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Loyola University Chicago School of Law provides an environment where a global perspective is respected and encouraged. International and Comparative Law are not studied only in theoretical, abstract terms but primarily in the context of values-based professional practice. In addition to purely international classes, courses in other disciplines – health law, child and family law, advocacy, business and tax, antitrust, intellectual property – have strong international and comparative components.

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- A two-week summer program at Loyola's campus at the Beijing Center in Beijing, China focusing on international and comparative law, including a semester long course in the spring to educate students on the Chinese legal system.

#### *International Field Study*

- A ten-day, between-semester course in London on comparative advocacy, where students observe trials at Old Bailey, then meet with judges and barristers to discuss the substantive and procedural aspects of the British trial system. Students also visit the Inns of the Court and the Law Society, as well as have the opportunity to visit the offices of barristers and solicitors.
- A comparative law seminar on *Legal Systems of the Americas*, which offers students the opportunity to travel to Chile over spring break for on-site study and research. In Santiago, participants meet with faculty and students at the Law Faculty of Universidad Alberto Hurtado.
- A one-week site visit experience in San Juan, Puerto Rico, students have the opportunity to research the island-wide health program for indigents as well as focus on Puerto Rico's managed care and regulation.
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Mr. Wing-Tat Lee, a businessman from Hong Kong, established a lecture series with a grant to the School of Law. The lectures focus on an aspect of international or comparative law.

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# TRUMP'S FOREIGN POLICY: REALIST ECONOMIC NATIONALISM

Eric Engle\*

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## Abstract

This article presents newly-elected President Trump's proposed foreign policies, contextualizing them in the greater picture of U.S. global strategy. It argues that Trump's proposed foreign policies are largely a salutary reaction against repeated neoconservative errors, perpetrated by both Republicans and Democrats. However, like the younger President Bush, Trump pursues a unilateral approach to international relations. Trump's unilateralism risks repeating some of the unilateralist errors of the younger Bush. Moreover, Trump's policies to restrict immigration, raise wages, introduce tariffs, and pursue protectionist policies, if in fact implemented, will prove economically disastrous and will fail to deliver the promised prosperity for ordinary Americans which Trump seeks. The potential errors and probable successes are outlined in this article within the broader context of the formation of the international rule of law through globalization.

## I. Introduction

U.S. foreign policy in the first two decades of this century was marked and marred by a number of errors.<sup>1</sup> Those errors cost the Republic dearly, both in terms of lost lives and wasted wealth. As a result, many of those who voted for Trump did so partly in protest against the consequences of foreign policy errors committed by the Republicans and Democrats alike.

Ordinarily, foreign policy does not play a major role in federal elections, even presidential elections. This is partly because the issues of foreign policy are largely outside of the interest of the average voter or of the average voter's ability to understand or influence, due to a lack of individuals' expertise in foreign languages, geography, and history. The inability of the average voter to understand or influence foreign policy results not in an indifferent electorate but in one which takes a reactive view to foreign affairs. That is, voters generally only react, and then only in a rough and unarticulated way, to foreign policy issues. This explains why simplistic, erroneous policies – isolationism, tariff barriers, and literal border walls - appeal to the majority of uninformed voters. They appear as simple solutions to complex problems, but because the problems are complex those ideas are not solutions at all.

Voter reaction against the foreign policy failures of republicans and democrats alike, whether in Iraq, Libya, or Syria, partly explains how a candidate with an ideology of economic nationalism could become the head of a party which had been committed to internationalist market-liberalism through free-trade under multilateral institutions.

Ordinary people lack expertise in foreign language, macroeconomics, international law, and history. Understanding and forming effective foreign policies requires knowledge of all those issues. This explains why countries have a pro-

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<sup>1</sup> See generally WALID PHARES, *THE LOST SPRING: U.S. POLICY IN THE MIDDLE EAST AND CATASTROPHES TO AVOID* (2014); See also, Joseph E. Stiglitz & Linda J. Bilmes, *The \$3 Trillion War*, VANITY FAIR (Apr. 2008), <http://www.vanityfair.com/politics/features/2008/04/stiglitz200804>; See also Rupert Cornwell, *Iraq War Set to be More Expensive than Vietnam*, INDEPENDENT (Apr. 28, 2006), <http://www.independent.co.uk/news/world/americas/iraq-war-set-to-be-more-expensive-than-vietnam-6102587.html>.

## Trump's Foreign Policy: Realist Economic Nationalism

fessional corps of foreign policy experts: Ministries of Foreign Affairs, Departments of State, and Intelligence Agencies, etc. Although ordinary people lack all that expertise, ordinary people can nonetheless grasp the broad outlines of foreign policy and national strategy. The details of developing and implementing foreign policy are complex and require specialists with knowledge typically outside the competence, interests, and experiences of the average voter. This is why foreign policy, though vital to all, rarely decides federal elections, and then only in reaction to grave foreign policy failures, the case in 2016: War after war in Afghanistan, Iraq, Libya, Syria, Somalia, and Yemen have certainly weighed heavily on the minds of specific demographics of voters. Although foreign policy is not generally the driver of federal elections, exceptionally, for example in the face of repeated grave foreign policy errors, foreign policy influences federal elections, particularly presidential elections.

The need for professional foreign policy expertise explains why all countries have a professional diplomatic corps, a foreign policy community. The various professionals in the foreign policy community bring their particular expertise in one or more facets of foreign relations like languages, geography, computer science, economics, or cultural affairs to help form and implement national strategy. Their collective expertise exceeds that of the average voter, any individual expert, or even of the President. Such expert elites are necessary in order to effectively form and administer foreign policy: they are indispensable to form and implement coherent effective foreign policy.

The fact that foreign policy formation and implementation requires experts explains in part why Trump must attract at least acquiescence from foreign policy elites. These elites do not form a conspiratorial deep state: they do however form and administer a bipartisan foreign policy which exhibits remarkable inter-administration continuity and serves the national interest. This capacity to speak with one voice abroad is a unique strength of the United States, due to its presidential, not ministerial governance model. Trump will obviously try to tap these foreign policy experts. Indeed, he must do so in order to govern effectively. To what extent Trump will succeed in attracting foreign policy elites' support or assistance is still an open question.<sup>2</sup> Trump will in any case need such experts to advise him and implement his policies. However, Trump's brash populist leadership style may well repel elites, particularly given Trump's neo-isolationism and protectionist policies, which run contrary to the multilateral market liberalism which were consensus views held by both major political parties in the United States.

Even though forming and implementing effective foreign policy requires experts, most voters can understand national strategy, at least in the Big Picture

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<sup>2</sup> See, e.g., Eric Bradner, *McCain Steps Up Trump Criticism*, CNN (Feb. 21, 2017), <http://www.cnn.com/2017/02/21/politics/john-mccain-trump-criticism/index.html>. (Illustrating, long-time Senator McCain already opposes Trump, and will become more opposed to Trump as time passes); See also Julian Zelizer, *Flynn's departure: The second big blow to Trump in a week*, CNN (Feb. 14, 2017), <http://www.cnn.com/2017/02/14/opinions/flynn-resignation-trump-troubles-zelizer/index.html>. (Meanwhile, Lt. General Flynn, nominated by the President for a prominent national security post has already been ousted from the Executive Branch).

## Trump's Foreign Policy: Realist Economic Nationalism

sense. Voters in the 2016 election knew something was very wrong with U.S. foreign policy: endless expensive wars. They also knew that foreign policy failures resulted in unfortunate domestic consequences: unemployment in 2008 and low wage growth since then, as well as various terrorist and criminal attacks, lost lives, wasted wealth. They voted accordingly — for a candidate who would decisively end a series of wars the US *chose* to enter in the Middle East: Mythology to the contrary, Saddam Hussein had nothing to do with 9/11.<sup>3</sup> Nor, so far as can be reasoned, did Bashar Assad or Muammar Gaddafi.<sup>4</sup>

The voters rejected the endless avoidable wars and voted for a candidate whose foreign policy would pursue only the national interest<sup>5</sup> instead of vague human rights claims<sup>6</sup> that in practice were only excuses for ill-considered, expensive, over-ambitious, unnecessary interventions in Iraq, Syria, Libya and elsewhere. They voted for a candidate who promised to end the wars and to improve the economy: Trump. They voted against the candidate who had a voting and administrative record supporting war after war in Iraq, Libya, and Syria: Clinton. They so voted not because of pacifism or isolationism but because of the costly domestic consequences of avoidable foreign wars, which were obvious even to ordinary voters.

To understand the causes and extent of mistakes in U.S. foreign policy prior to Trump, we must understand neoconservative ideas about people, state-power, and the international system because neoconservative ideas have dominated U.S. foreign policy for the last two decades. Unfortunately, the neoconservatives' ideas are generally incorrect, which explains most of the mistakes in US foreign policy in the first two decades of this century. Neoconservative policies were implemented by the Republicans and by the Democrats, which explain why an anti-establishment candidate was able to usurp a political party and then seize the Presidency. Trump's master-stroke was to attract the industrial Midwest, traditionally Democratic-leaning due to its labor union base, to the Republican Party. That, coupled with his statist-interventionist approach to the economy, is a political pole-shift as great as that worked by Reagan or even Franklin D. Roosevelt.

How the Democrats lost labor is an interesting question and will be discussed at length over the next four years, but is beyond the scope of this article. Presi-

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<sup>3</sup> Suzanne Goldenberg, *Bush: Saddam Was Not Responsible For 9/11*, THE GUARDIAN (Sept. 11, 2006), <https://www.theguardian.com/world/2006/sep/12/september11.usa2>.

<sup>4</sup> Neil Macfarquhar, *An Erratic Leader, Brutal and Defiant to the End*, N.Y. TIMES (Oct. 20, 2011), <http://www.nytimes.com/2011/10/21/world/africa/qaddafi-killed-as-hometown-falls-to-libyan-rebels.html>. (“Tripoli truly began to emerge from the cold after the September 2001 attacks against the United States. Colonel Qaddafi condemned them and shared Libya’s intelligence on Al Qaeda with Washington. Libya had been the first country to demand an international arrest warrant for Osama bin Laden.”).

<sup>5</sup> Donald J. Trump, Remarks on Foreign Policy at the Center for the National Interest in *Trump on Foreign Policy*, NAT’L INTEREST (Apr. 27, 2016), <http://www.nationalinterest.org/feature/trump-foreign-policy-15960> [hereinafter Trump Remarks on Foreign Policy].

<sup>6</sup> Donald Trump, Transcript: Donald Trump’s Foreign Policy Speech, N.Y. TIMES (Apr. 27, 2016), [www.nytimes.com/2016/04/28/us/politics/transcript-trump-foreign-policy.html?\\_r=0](http://www.nytimes.com/2016/04/28/us/politics/transcript-trump-foreign-policy.html?_r=0) (“Finally, I will work with our allies to reinvigorate Western values and institutions. Instead of trying to spread universal values that not everybody shares or wants, we should understand that strengthening and promoting Western civilization and its accomplishments will do more to inspire positive reforms around the world than military interventions.”) [hereinafter Trump Foreign Policy Speech on Apr. 26, 2016].

## Trump's Foreign Policy: Realist Economic Nationalism

dent Trump is the first Republican since Nixon to accord the federal government a strong role in the economy as arbiter and indeed manager of labor-capital conflicts between workers and management. This, too, is a radical political shift: both major parties had taken up non-interventionist economic policies. Whether he knows it or not, Trump's economic strategies are corporatist.<sup>7</sup> His proposed foreign policy amounts to economic nationalism, a variant on international relations realism.

This article exposes Trump's foreign policy as a popular reaction against foolish neoconservative excesses. It is structured as follows:

Part I exposes the neoconservatives' failed policies and then their underlying, faulty ideas which led to those failed policies. Their wrong-headed policies have dominated U.S. foreign policy for two decades with disastrous consequences.

Part II then describes a liberal neo-realist theory, which is more accurate than neo-conservatism and which coheres with Trump's economic nationalism. Since neo-realism is more accurate than neo-conservatism it enables better foreign policy to meet the various challenges facing the United States. This theory has and will inform Trump's nationalist foreign policy of "America first."<sup>8</sup>

The imminent destruction of the so-called Islamic State will finally end the ill-conceived, expensive, and inapt "global war on terror." Part III of this article thus considers the new challenges facing U.S. foreign policy. Those challenges will increasingly be Chinese and Russian rather than Jihadi and may well end in a new cold war.

Thus, U.S. foreign policy and economic policy is about to undertake a radical course correction. Trump's rejection of neo-conservatism<sup>9</sup> is salutary: The U.S.A. will no longer enter into endless wars with unrealistic objectives in pursuit of policies which are naive or hypocritical. Trump will prosecute fewer wars but more viciously<sup>10</sup> and will finally end the expensive supposedly interminable so-called global war on terror, which will free up resources for production, resources which otherwise would have been wasted on war after war. The imminent end of the so-called global war on terror will, however, see new and more serious challenges: economic nationalism, populism, and the risk of a new cold war.

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<sup>7</sup> Robert Tracinski, *Donald Trump Is America's Berlusconi*, FEDERALIST (Feb. 15, 2016), <http://thefederalist.com/2016/02/15/donald-trump-is-americas-berlusconi-whose-rhetoric-won-his-country-nothing/>.

<sup>8</sup> Donald J. Trump, Presidential Election Victory Speech (Nov. 9, 2016), in Federal News Services, *Transcript: Donald Trump's Victory Speech*, N.Y. TIMES (Nov. 9, 2016), <http://www.nytimes.com/2016/11/10/us/politics/trump-speech-transcript.html> ("I want to tell the world community that while we will always put America's interests first, we will deal fairly with everyone, with everyone — all people and all other nations. We will seek common ground, not hostility; partnership, not conflict.") [hereinafter Trump Victory Speech].

<sup>9</sup> Matthew Duss, *How Donald Trump Is Beating the Neoconservatives at Their Own Game*, NATION (Mar. 25, 2016), <https://www.thenation.com/article/how-donald-trump-is-beating-the-neoconservatives-at-their-own-game/>.

<sup>10</sup> Trump Remarks on Foreign Policy, *supra* note 5 ("I will never send our finest into battle unless necessary, and I mean absolutely necessary, and will only do so if we have a plan for victory with a capital V. I will not hesitate to deploy military force when there is no alternative. But if America fights, it must only fight to win.").

## Trump's Foreign Policy: Realist Economic Nationalism

President Trump's economic nationalism will not stop globalization or liberalism. Economic facts on the ground, institutional inertia, and a market orientation will constrain,<sup>11</sup> compel, and ultimately commit Trump to abandon or ignore protectionist promises<sup>12</sup> and practice instead Hayekian free trade<sup>13</sup> under the rubric of national unity.<sup>14</sup> In other words: Trump will try, and fail, to impose tariff walls<sup>15</sup> and bans on immigration<sup>16</sup> and will likely resort to nationalist exhortations to placate and motivate his base in the face of the institutional constraints he faces. Economic reality will compel the President to embrace immigration and free trade, though his free trade agreements may be bi-lateral rather than multi-lateral and his immigration policies will be more selective than his predecessors.

If I am wrong and Trump achieves protectionist policies such as tariffs or punitive taxation the result will be foreign counter-measures leading to market collapse and poverty,<sup>17</sup> and ultimately to more wars to soak up the unemployed and distract from domestic failure. However, the economic errors Trump is trying to make – inflationary wage hikes, immigration restrictions to shrink the labor supply and increase wages, and tariff walls to limit foreign competition – will likely prove impossible to implement due to the same economic constraints which compelled his election in the first place and foreign backlash. Whether Trump knows these policies would ruin the economy does not matter: because they would ruin the economy they will never be implemented. Even his vaunted immigration policies will likely be constrained by courts and congress.<sup>18</sup>

The rise of populist leaders shows that globalization is built out from nationalism, not on top of it nor to replace it. Globalization will increasingly manifest as the integration of various conflicting vectors of populist leaders such as Trump, Putin, Duterte, Abe, Erdogan, etc. These “national champions” will ultimately claim ideas and portions of globalization and liberalism such as trade and toler-

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<sup>11</sup> Louis A. Delvoie, *Trump's power constrained*, THE WHIG (Feb.17, 2017), <http://www.thewhig.com/2017/02/17/trumps-power-constrained>.

<sup>12</sup> E.g., Ben White, *Investors turned off by Trump's protectionist talk*, POLITICO (Jan. 20, 2017), <http://www.politico.com/story/2017/01/2017-trump-inauguration-investors-react-233919>.

<sup>13</sup> E.g., Interview with Donald Trump, Coverage of 2016 Presidential Hopefuls, Fox News Sunday (Oct. 18, 2015) (Trump has made statements which, with simple qualifications can be used to “walk back” on his statements on free trade. “I am all for free trade, but it's got to be fair.”).

<sup>14</sup> Trump Victory Speech, *supra* note 8 (“Now it's time for America to bind the wounds of division; have to get together. To all Republicans and Democrats and independents across this nation, I say it is time for us to come together as one united people.”).

<sup>15</sup> Matthew Rozsa, *A Tariff is Still a Tax: President Trump's Wall Will Be Paid for By Americans Paying Taxes on Imported Goods*, SALON (Jan. 27, 2017), <http://www.salon.com/2017/01/27/a-tariff-is-still-a-tax-president-trumps-wall-will-be-paid-for-by-americans-paying-taxes-on-imported-goods/>.

<sup>16</sup> Cf. Douglas Massey, *Donald Trump's Mexican Border Wall Is a Moronic Idea*, FOREIGN POLICY (Aug. 18, 2015), <http://foreignpolicy.com/2015/08/18/donald-trump-immigration-border/> (an example of the institutional opposition Trump's policies evince).

<sup>17</sup> Andrew Soergel, *Trump's Rumored Tariff 'Going to Be Perceived as a Trade War'*, US NEWS AND WORLD REPORT (Dec. 22, 2016), <https://www.usnews.com/news/articles/2016-12-22/trumps-floated-tariff-going-to-be-perceived-as-a-trade-war>.

<sup>18</sup> *Congress and the Courts Will Poke Holes in the President's Deportation Plans*, THE ECONOMIST (Feb. 23, 2017), <http://www.economist.com/news/united-states/21717387-barack-obamas-administration-deported-hundreds-thousands-people-every-year-donald>.

ance, diversity and deterrence, in order to maximize their own power by overtly arbitrating the various inevitable conflicts in the international system. Darkly however, that world-order is less likely to foster freedom and instead will tend to encourage authoritarianism, even – exceptionally - discrimination. However, as he himself is populist, Trump is much likelier to master rather than be mastered by the other populist leaders mentioned above given his much larger power base. As the United States is a global microcosm, a diverse immigrant empire, globalization and liberalism will inevitably continue, pushed forward, ironically, by white nationalists, either implicitly or provocatively.

Trump's election thus not only inaugurates a long overdue foreign policy course correction and a domestic political pole shift; it also signals new foreign policy issues facing the United States, namely: bilateralism in trade, immigration, even defense as well as increased state-to-state interactions rather than non-state actor or multilateral interactions, in the greater context of populist pugilism in the shadow of a new cold war. Trump may, but likely will not, avert a new cold war with Russia and/or China.

Prior to examining these oncoming challenges, we must first consider the source of the failed U.S. foreign policy of the last two decades, “neo-conservatism”, against which Trump is a reaction.

## II. Neo-conservatism

The neocons,<sup>19</sup> many of whom are Jewish,<sup>20</sup> and almost all of whom are pro-Israeli, started as leftist Trotskyites. Later in their careers however, the neocons rejected Communism and Socialism, becoming co-opted back into the system which they had earlier opposed. The neocons are not crypto-Trotskyite infiltrators seeking to worm their way into government to “change the system from within.”<sup>21</sup> Rather, they simply saw from experience that they were naive in their youth and wrong to have believed in Marxism-Leninism: live and learn. The neocons' foreign policy is however consistent with their Trotskyite<sup>22</sup> roots. Neocons believed that rapid regional revolution<sup>23</sup> could sweep throughout the entire Middle East. Neo-liberal revolutions would supposedly replace dictatorial regimes with stable, productive democracies. The neocons predicted<sup>24</sup> the results

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<sup>19</sup> WHY DID THE UNITED STATES INVADE IRAQ? (Jane K. Cramer & A. Trevor Thrall eds., 2012).

<sup>20</sup> Murray Friedman, *THE NEOCONSERVATIVE REVOLUTION: JEWISH INTELLECTUALS AND THE SHAPING OF PUBLIC POLICY* (Cambridge University Press 2005); *See also* Benjamin Balint, *RUNNING COMMENTARY: THE CONTENTIOUS MAGAZINE THAT TRANSFORMED THE JEWISH LEFT INTO THE NEOCONSERVATIVE RIGHT* (PublicAffairs 2010); *See also* Alexander Bloom, *PRODIGAL SONS: THE NEW YORK INTELLECTUALS AND THEIR WORLD* 372 (Oxford University Press 1986).

<sup>21</sup> *See* Robert Sullivan, *Fabianism*, [http://library.brown.edu/cds/mjp/render.php?view=mjp\\_object&id=mjp.2005.00.082](http://library.brown.edu/cds/mjp/render.php?view=mjp_object&id=mjp.2005.00.082) (arguing that the “change the system from within” trope even pre-dates Trotsky, tracing it to Fabianism).

<sup>22</sup> Amir Butler, *When the Rattlesnakes Bite Back*, *ASIA TIMES* (Dec. 10, 2003), [http://www.atimes.com/atimes/Middle\\_East/EL10Ak04.html](http://www.atimes.com/atimes/Middle_East/EL10Ak04.html).

<sup>23</sup> Fred Barbash, *Bush: Iraq Part of 'Global Democratic Revolution'*, *WASH. POST* (Nov. 6, 2003), <http://www.washingtonpost.com/wp-dyn/articles/A7991-2003Nov6.html>.

<sup>24</sup> JUSTIN VAISSE, *NEOCONSERVATISM: THE BIOGRAPHY OF A MOVEMENT* 16 (Arthur Goldhammer trans., 2010).

of their regime change policy would be the attainment of human rights, the rule of law, and unleashing productive potential in the Middle East. Unfortunately, their optimistic predictions proved false. Neoconservative foreign policy has proved disastrous for the United States. The neoconservative's overly-optimistic theories were probably shaped by the successful revolutions which swept through Eastern Europe in 1989. Starting in the Baltic states, and followed by the rest of Eastern Europe, a series of mostly peaceful revolutions did indeed sweep away dictatorships, leading to improved human rights protections and greater productivity. The neocons were likely trying to replicate the results of the peaceful Eastern European "singing revolutions," which replaced communist dictatorships with fledgling democracies.<sup>25</sup> However, if the Eastern European revolutions of 1989 were their chosen model for the Middle East<sup>26</sup> then someone should have pointed out that there were no U.S. military interventions anywhere in the collapsing Soviet Union, and that Middle Eastern countries are both poorer<sup>27</sup> and more violent than Eastern European ones.<sup>28</sup> It is one thing to support a revolution, e.g. in Ukraine in 2014, but quite another to impose one by military intervention, e.g. Libya, 2013. Although the U.S. did intervene in ex-Yugoslavia in the mid-1990s, the intervention there was limited to instituting a cease-fire and peace among already conflicting parties. U.S. intervention in ex-Yugoslavia was not an intervention to remove one regime (e.g., Milosovic) and replace it with another.

Neoconservatives argued that regime change<sup>29</sup> in the Middle East would be low cost<sup>30</sup> both in monetary and human terms. After all, that had been the experience in 1989. Paul Wolfowitz famously said "the oil revenues of that country [Iraq] could bring between \$50 and \$100 billion over the course of the next two or three years. . . We're dealing with a country that can really finance its own reconstruction, and relatively soon."<sup>31</sup> Wolfowitz also said "predictions. . . that it will take several hundred thousand U.S. troops to provide stability in post-Saddam Iraq, are wildly off the mark."<sup>32</sup> Unfortunately, he was quite wrong on both

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<sup>25</sup> See Jacob Heilbrunn, *Neocons and the Revolution: How the Arab revolt is rocking the neoconservative world*, FOREIGN POLICY (Feb. 23, 2011), <http://foreignpolicy.com/2011/02/23/neocons-and-the-revolution-2/> (providing insight into the machinations within the neoconservative movement on revolution and human rights).

<sup>26</sup> Neil Davidson, *Is Social Revolution Still Possible in the Twenty-First Century?*, 23 J. CONTEMP. CENT. & E. EUR. 105, 107 (2015).

<sup>27</sup> See Ricard Torne Codina, *Economic Snapshot for the Middle East & North Africa*, FOCUS ECONOMICS (Feb. 8, 2017), <http://www.focus-economics.com/regions/middle-east-and-north-africa> (providing an overview of the economic well-being (or lack thereof) in the various countries in the Middle East).

<sup>28</sup> See Geo. Mason U., *Economies in Transition* (2017) <http://chnm.gmu.edu/1989/exhibits/economies-in-transition/introduction> (providing insight into the economic factors of the 1989 revolutions).

<sup>29</sup> See generally William Kristol & Robert Kagan, Opinion, *Bombing Iraq Isn't Enough*, N.Y. TIMES (Jan. 30, 1998), <http://www.nytimes.com/1998/01/30/opinion/bombing-iraq-isn-t-enough.html>.

<sup>30</sup> JEFFREY RECORD, WANTING WAR: WHY THE BUSH ADMINISTRATION INVADED IRAQ 93 (2010).

<sup>31</sup> Lou Dobbs, Opinion, *Dobbs: Our Leaders Are Ducking Reality on Iraq*, CNN (Dec. 6, 2006), <http://www.cnn.com/2006/US/12/05/Dobbs.Dec6/index.html>.

<sup>32</sup> Joshua Fryer, *Five Years Ago, Wolfowitz and Rumsfeld Were 'Off The Mark' On Troop Levels*, THINKPROGRESS (Feb. 27, 2008), <https://thinkprogress.org/flashback-five-years-ago-wolfowitz-and-rumsfeld-were-off-the-mark-on-troop-levels-28c0cec1b6cf#.2dc9bcaze>.

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counts. None of the neocons' rosy predictions about the costs or consequences of regime change proved true.<sup>33</sup> Rather than seeing stable productive democracies governed by the rule of law, the Middle East is now marked by civil wars in Libya (beginning in either 2011 or 2014) and Syria (ongoing since 2011), resurgent authoritarianism in Egypt, and various jihadi factions, both militant and non-militant, scattered throughout the region. Two decades since the "Project for a New American Century"<sup>34</sup> outlined the neoconservative agenda for regime change in the Middle East in *Rebuilding America's Defenses*.<sup>35</sup>

It is evident that the neoconservatives made these errors:

- 1) The neocons over-estimated U.S. power and the capacity of the use of force to work political change;<sup>36</sup>
- 2) The neocons under-estimated the costs, both human and monetary, of regime change as a national strategy;<sup>37</sup>
- 3) The neocons over-stated the beneficial results that regime change would bring.<sup>38</sup>

These errors are detailed below in that order.

### 1. Overestimating U.S. Power: Unilateralism

Neoconservatives argued that the United States was powerful enough to do it alone. Former President Bush famously said: "You are either with us or with the terrorists."<sup>39</sup> In the plain language of idioms: my way or the highway. Arrogant unilateralism repelled allies and did nothing to convert enemies into neutrals or neutrals into friends.<sup>40</sup> Turning neutrals into allies and neutralizing enemies are key actions in war-fighting and peace-winning. It is human nature to push back when one is told what to do, which is why unilateralism and arrogance are repulsive. That partly explains why Trump's nationalist campaign message and subsequent executive agenda, in itself sensible, offends many. President Trump's unilateralism risks repeating some of the errors of the younger Bush's adminis-

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<sup>33</sup> C. Bradley Thompson, *Neoconservatism Unmasked*, CATO UNBOUND (Mar. 7, 2011), <https://www.cato-unbound.org/2011/03/07/c-bradley-thompson/neoconservatism-unmasked>.

<sup>34</sup> See generally PROJECTS FOR THE NEW AMERICAN CENTURY, <<https://web.archive.org/web/20130609155225/http://www.newamericancentury.org/globalissues.htm> (last visited Feb. 18, 2017).

<sup>35</sup> See generally THOMAS DONNELLY, *REBUILDING AMERICA'S DEFENSES: STRATEGY, FORCES AND RESOURCES FOR A NEW CENTURY* (2000).

<sup>36</sup> *THE BRITISH APPROACH TO COUNTERINSURGENCY: FROM MALAYA AND NORTHERN IRELAND TO IRAQ AND AFGHANISTAN* 2234 (Paul Dixon ed., 2012).

<sup>37</sup> *THE BUSH LEADERSHIP, THE POWER OF IDEAS, AND THE WAR ON TERROR* 47 (David B. MacDonald et al. eds., 2012).

<sup>38</sup> THEODORE H. COHN, *GLOBAL POLITICAL ECONOMY: THEORY AND PRACTICE* 66 (7th ed. 2016) ("However, the results of the Iraq War show that neoconservatives overestimated the U.S. ability to replace coercive regimes in complex developing societies with Western-style governments.").

<sup>39</sup> *Bush: 'You Are Either With Us, Or With the Terrorists'*, VOICE OF AMERICA NEWS (Oct. 27, 2009), <http://www.voanews.com/a/a-13-a-2001-09-21-14-bush-66411197/549664.html>.

<sup>40</sup> Strobe Talbott, *Opinion Unilateralism: Anatomy of a Foreign Policy Disaster*, BROOKINGS INST. (Feb. 21, 2007), <https://www.brookings.edu/opinions/unilateralism-anatomy-of-a-foreign-policy-disaster/>.

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tration, e.g. torture.<sup>41</sup> Unilateral policies pursued by Fomer-President George W. Bush during his presidency proved quite expensive. The elder Former-President George H.W. Bush, thanks to multi-lateralism, obtained significant financial and military support from U.S. allies: The First Gulf War was funded entirely by U.S. allies,<sup>42</sup> because they were persuaded that opposing Hussein was in their own interests. In contrast, in the Second Gulf War, the younger President George W. Bush, pursued a unilateral strategy and consequently obtained almost no foreign support, military or financial.<sup>43</sup> President Trump, like the younger Bush, is a unilateralist. However, he has previously stated that he is not an interventionist.<sup>44</sup> Thus, he is less likely to get trapped in avoidable, expensive wars than the younger Bush was.<sup>45</sup>

### 2. Under-Estimating the Cost of Regime Change

The neocons vastly underestimated the costs of imposing new governments on foreign states. The neocons' proposed wave of inexpensive instant bloodless revolutions proved to be quite costly and very violent. Thousands of maimed and killed U.S. veterans and trillions of wasted dollars are the results of ill-considered U.S. interventions in Iraq, Libya, Egypt, Syria, and elsewhere.<sup>46</sup> Fortunately, the neocon regime-change policies which failed, whether implemented by Republicans in Iraq or Democrats in Libya and Syria, play no part in Trump's proposed foreign policy.

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<sup>41</sup> Interview by Arthur Sulzberger, Jr. with Donald Trump, *in* N.Y. TIMES (Nov. 23, 2016), <https://www.nytimes.com/2016/11/23/us/politics/trump-new-york-times-interview-transcript.html> [hereinafter Sulzberger Interview] ("General Mattis is a strong, highly dignified man. I met with him at length and I asked him that question. I said, what do you think of waterboarding? He said — I was surprised — he said, 'I've never found it to be useful.' He said, 'I've always found, give me a pack of cigarettes and a couple of beers and I do better with that than I do with torture.' And I was very impressed by that answer. I was surprised, because he's known as being like the toughest guy. And when he said that, I'm not saying it changed my mind. Look, we have people that are chopping off heads and drowning people in steel cages and we're not allowed to waterboard. But I'll tell you what, I was impressed by that answer. It certainly does not — it's not going to make the kind of a difference that maybe a lot of people think. If it's so important to the American people, I would go for it. I would be guided by that. But General Mattis found it to be very less important, much less important than I thought he would say. I thought he would say — you know he's known as Mad Dog Mattis, right? Mad Dog for a reason.").

<sup>42</sup> See, e.g., ERROL ANTHONY HENDERSON, *DEMOCRACY AND WAR: THE END OF AN ILLUSION?* 150 (2002) (noting that the First Gulf War, orchestrated by the senior President Bush in the early 1990s, was largely self-funding due to the coalition of dozens of active allies.).

<sup>43</sup> See, e.g., BRUCE JONES, CARLOS PASCUAL & STEPHEN JOHN STEDMAN, *POWER AND RESPONSIBILITY: BUILDING INTERNATIONAL ORDER IN AN ERA OF TRANSNATIONAL THREATS* 8 (2009).

<sup>44</sup> Trump Remarks on Foreign Policy, *supra* note 5 ("I will work with our allies to reinvigorate Western values and institutions. Instead of trying to spread universal values that not everybody shares or wants, we should understand that strengthening and promoting Western civilization and its accomplishments will do more to inspire positive reforms around the world than military interventions.").

<sup>45</sup> Sulzberger Interview, *supra* note 41 ("I don't think we should be a nation builder. I think we've tried that. I happen to think that going into Iraq was perhaps . . . I mean you could say maybe we could have settled the civil war, O.K.? I think going into Iraq was one of the great mistakes in the history of our country. I think getting out of it — I think we got out of it wrong, then lots of bad things happened, including the formation of ISIS. We could have gotten out of it differently.").

<sup>46</sup> Stiglitz & Bilmes, *supra* note 1; See also Rupert Cornwell, *Iraq War Set to be More Expensive than Vietnam*, INDEPENDENT (Apr. 28, 2006), <http://www.independent.co.uk/news/world/americas/iraq-war-set-to-be-more-expensive-than-vietnam-6102587.html>.

### 3. Over-Stating the Benefits of Regime Change

The neocons predicted regime change would result in democratic self-governance, the rule of law, improved protection of human rights, and increased productivity in the targeted states: incorrect once again. Whether in Iraq and Afghanistan under the Republicans or in Syria<sup>47</sup> and Libya<sup>48</sup> under the Democrats, regime change did not lead to the rule of law, improve protection of human rights, or increase productivity. In fact, violence and chaotic disorder are all that the regime change attained in the Middle East, placing the United States on a permanent war footing. We may rightly wonder if any of those failed interventions were necessary, or even useful in deterring and/or destroying terrorists and their training areas. These countries certainly failed to attain improved human rights, democracy, or greater productivity, since their conflicts began than they experienced before the intervention.

Why were the neocons so blithe, so careless with the lives of others? Divide and rule<sup>49</sup> was the possibility neoconservatives offered as the fallback to their over-optimistic regime change policies. If the grand ambition to transform the entire Middle East fails wholesale — so what? The consequence would be disorder and division among enemies, actual or potential: divide and rule.

We can better understand neoconservative strategy if we consider British and Israeli history. From the Spanish Armada to Hitler, Britain sought to prevent the emergence of a dominant continental European power<sup>50</sup> by playing the European powers against each other in what became known as the balance of power. Britain sought to prevent the emergence of a dominant continental power, for such a power would unite Europe by conquest and then threaten Britain. To prevent that threat, British foreign policy sought to maintain a precarious balance of power

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<sup>47</sup> U.S. Department of State, “Clinton Email” UNCLASSIFIED U.S. Department of State Case No. F-2014-20439 Doc No. C05794498 Date: 11/30/2015 <https://foia.state.gov/searchapp/DOCUMENTS/...0C05794498/C05794498.pdf> (“The best way to help Israel deal with Iran’s growing nuclear capability is to help the people of Syria overthrow the regime of Bashar Assad.”).

<sup>48</sup> Micah Zenko, *The Big Lie About the Libyan War*, FOREIGN POL’Y (Mar. 22, 2016), <http://foreignpolicy.com/2016/03/22/libya-and-the-myth-of-humanitarian-intervention/>.

<sup>49</sup> Kevin MacDonald, *Iraq Nightmare*, OCCIDENTAL OBSERVER (June 13, 2014), <http://www.theoccidentalobserver.net/2014/06/iraq-nightmare/>. (While the *stated* purpose of the neoconservatives, who are known Machiavellians, is to generate revolutions in the Arab world—mass uprisings—to create democratic rule of law states, their *real* purpose is to create *permanent* disorder: divide and rule. They appear to be trying to follow Rome and Britain with *diviso et impero*— divide and rule. Britain struggled for centuries to prevent the emergence of a dominant continental power, fighting *three global wars* in the process (for the war against Napoleon was indeed global). Ultimately, Britain’s policies proved unsustainable and the greatest empire in world history was bankrupted. On British policy of divide and rule, to prevent the emergence of a dominant power on the European continent, see J. Pirenne, *The Tides of History Vol. II: From the Expansion of Islam to the Treaties of Westphalia* 429 (EP Dutton 1963). The *real* purpose of the neoconservatives is similar, divide and rule. The neoconservatives seek to prevent the emergence of a dominant leading Arab power to prevent the emergence of a unified Arab world, which neoconservatives presuppose would oppose U.S. and Israel. The 2008 financial crash again shows that *diviso et impero* is financially unsustainable. A sustainable foreign policy elaborates a vision of rules and rulership in which the governed consent to being governed because they see such consent as in their self-interest).

<sup>50</sup> 2 JACQUES PIRENNE, *THE TIDES OF HISTORY: FROM THE EXPANSION OF ISLAM TO THE TREATIES OF WESTPHALIA* 429 (1963).

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among the competing alliances on the European continent to preserve Britain's independence and power to prevent the emergence of any dominant power on the European continent. Palmerston famously said thereto: Britain has no permanent friends, no permanent enemies, only permanent interests.<sup>51</sup> First Spain, then Holland, then France, then Germany were all prevented from uniting Europe and conquering Britain by the balance of power policy. Ultimately however, Britain's continental policy of divide and rule through a balance of power failed and ended in the bankruptcy of Britain and the unification of the European continent into the European Union, using free-trade as the key to prosperity and leading to interdependence and fostering peace.<sup>52</sup> The EU and NATO together have kept the European peace for over 75 years and proven more effective at maintaining peace and building prosperity than the balance of power policy. This is why Trump's willingness to call into question the U.S. commitment to NATO and free trade is seen, rightly, as dangerous and destabilizing, so much so that both General Mattis and Secretary of State Tillerson<sup>53</sup> have already been compelled to reiterate U.S. commitment to the EU and NATO despite statements intimating the contrary by the President.<sup>54</sup>

Although the balance of power policy ultimately failed Britain, it is nonetheless likely that the Israeli government pursues a similar policy in the Middle East to prevent the emergence of a united Arab world.<sup>55</sup> The Israeli government wishes to prevent the emergence of a united Pan-Arab state because that would likely mean the extinction of the Israeli state, and perhaps also the expulsion or even extermination of the Jewish people living in Israel. A new balance of power, if indeed covertly advocated by the Israeli government, likely pits Iran, Saudi Arabia, Egypt, and Turkey against each other to prevent the emergence of any of them as the unifying force of a new Ottoman Empire or new Islamic Caliphate. However, as British history shows, a balance of power policy is by definition unstable and ultimately unsustainable because it offers no hope for an improved future and is a policy of permanent conflict. Balance of power theory and policies are just as much a failure as neo-conservatism, having caused two

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<sup>51</sup> *Travel Through History in the UK: Lord Palmerston*, INFOBRITAIN [www.infobritain.co.uk/Palmerston.htm](http://www.infobritain.co.uk/Palmerston.htm) (last visited Feb. 16, 2017) ("We have no eternal allies, and we have no perpetual enemies. Our interests are eternal and perpetual, and those interests it is our duty to follow.").

<sup>52</sup> See Eugene Kontorovich, *The Arab League Boycott And WTO Accession: Can Foreign Policy Excuse Discriminatory Sanctions?* 4 Chi. J. Int'l L. 283, 286 (2003); See also Eric Allen Engle, *A Social-Market Economy for Rapid Sustainable Development*, 2 J.L. Dev. & Pol. 42, 43 (2009) ("[T]he free trade system was designed to promote not just prosperity but peaceful and amicable relations between Member States.").

<sup>53</sup> Travis J. Tritten, *Tillerson Stands Firm on Nato, Backs Russia Dialogue*, STARS AND STRIPES (Jan. 11, 2017), <https://www.stripes.com/news/tillerson-stands-firm-on-nato-backs-russia-dialogue-1.448397> ("The Article 5 [NATO] commitment is inviolable and the U.S. is going to stand behind that commitment").

<sup>54</sup> Elizabeth McLaughlin, *Analysis: What we learned from Defense Secretary James Mattis' 2nd trip overseas*, ABC NEWS (Feb 20, 2017), <http://abcnews.go.com/International/analysis-learned-defense-secretary-james-mattis-trip-overseas/story?id=45614506> (Mattis stated: "The alliance remains a fundamental bedrock for the United States," and "As President Trump has stated, he has strong support for NATO.").

<sup>55</sup> MOSHÉ MACHOVER, ISRAELIS AND PALESTINIANS: CONFLICT AND RESOLUTION 293 (2012).

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World Wars. Few people truly understand the logic of the balance of power idea and thus they wrongly equate it with international relations realism. The balance of power system characterized the decline and fall of the British Empire: it is nothing the U.S., or Israel for that matter, should seek to emulate. Fortunately, Trump does not appear to have taken up balance of power policies or rhetoric.

Having examined neoconservatism and its impact on U.S. foreign policy, we now turn to the neocons' flawed assumptions to understand the source of their flawed policies.

### III. The Neocons' Assumptions

#### 1. Human Nature

The more fascist strain of neo-conservatism regards people as fundamentally horrible creatures, lazy and most motivated by hate, fear, and greed.<sup>56</sup> Carl Schmitt stated: “[B]ecause man is by nature evil, he therefore needs dominion. But dominion can be established, that is, men can be unified only in a unity against – against other men. Every association of men is necessarily a separation from other men. . . the political thus understood is not the constitutive principle of the state, of order, but a condition of the state.”<sup>57</sup> Despite this pessimistic flawed view, neocons do believe people capable of excellence. However, neocons believe we require what is now called Foucauldian disciplining<sup>58</sup> to attain excellence because they believe us to be so horrible.

#### 2. Dishonesty and Duplicity

Given that neocons as a principle believe people are rather horrible it may be less than surprising that neocons are economical with the truth.<sup>59</sup> Neoconservatives practice a policy of calculated deceptions, inherent dishonesty. Leo Strauss believed that deception is inevitable in the world, and must be placed in the service of state power using “noble lies.”<sup>60</sup> In *Persecution and the Art of Writing* (1952), Strauss wrote that there must be both exoteric (overt) and esoteric (secret) aspects in philosophical writing because of the bad character of people: “Strauss believed that the essential truths about human society and history should be held by an elite, and [h]e held that philosophy is dangerous because it brings

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<sup>56</sup> C. BRADLEY THOMPSON & YARON BROOK, *NEOCONSERVATISM: AN OBITUARY FOR AN IDEA* 240 (2015).

<sup>57</sup> DAVID LIVINGSTONE, *BLACK TERROR WHITE SOLDIERS: ISLAM, FASCISM & THE NEW AGE* 315 (2013).

<sup>58</sup> See generally MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (Alan Sheridan trans., 1977).

<sup>59</sup> Jim Lobe, *Leo Strauss' Philosophy of Deception*, ALTERNET (May 18, 2003), [http://www.alternet.org/story/15935/leo\\_strauss%27\\_philosophy\\_of\\_deception](http://www.alternet.org/story/15935/leo_strauss%27_philosophy_of_deception).

<sup>60</sup> Seymour M. Hersh, *Selective Intelligence*, THE NEW YORKER (May 12, 2003), <http://www.newyorker.com/magazine/2003/05/12/selective-intelligence>.

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into question the conventions on which civil order and the morality of society depend.”<sup>61</sup> Irving Kristol agrees with this policy of deception, stating:

There are different kinds of truths for different kinds of people. There are truths appropriate for children; truths that are appropriate for students; truths that are appropriate for educated adults; and truths that are appropriate for highly educated adults, and the notion that there should be one set of truths available to everyone is a modern democratic fallacy. It doesn't work.<sup>62</sup>

Those dark views are simply wrong. In the real world honesty is the best policy for practical reasons. To be an effective liar one must first engage in self-deception. Consequently, muddled thinking, delusion, confusion, neuroses, and paranoia are the usual fate of “clever” liars. Furthermore, in the end the truth comes out anyway — and then what? Lack of forethought marks most liars. Loss of credibility and thus of support are the natural final consequences of a policy of deception. No one likes being lied to, so few people put up with liars. You only have one reputation to ruin, and once it is ruined good luck restoring it. Not only does Trump's election signal the defeat of neoconservative policy, the neoconservative policy pundits now are in a position with an extremely threatened future, whether surviving only as discredited Trotskyites or as discredited liberal interventionists.

### 3. Permanent War

Whether because of their Fascist roots (Schmitt) or the Zionist outgrowth therefrom (Strauss), neocons believe that war is inherent to the human condition, necessary for the survival of the fittest<sup>63</sup> and at times even desirable. Given their policy of hidden agendas<sup>64</sup> and duplicity it should not be surprising that for all their talk of human rights, neocons are not opposed to permanent war,<sup>65</sup> 1984-style,<sup>66</sup> complete with newspeak. The “PATRIOT Act,”<sup>67</sup> which came 30 days after September 11, 2001, granted sweeping powers to the federal government to trespass on civil rights, and licensed the U.S. government to wage permanent war.<sup>68</sup> David Abraham compared this sweeping grant of power, while not nearly as all-encompassing, to Germany's *Ermaechtigungsgesetz*, which followed the

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<sup>61</sup> R. Alta Charo, *Passing on the Right: Conservative Bioethics Is Closer than It Appears*, 32 J.L. MED. & ETHICS 307, 311 (2004).

<sup>62</sup> Ronald Bailey, *Origin of the Specious: Why do neoconservatives doubt Darwin?* (July 1997), <http://www.reason.com/news/show/30329.html>.

<sup>63</sup> IRVING KRISTOL, *NEOCONSERVATISM: THE AUTOBIOGRAPHY OF AN IDEA* 293 (1999).

<sup>64</sup> PHILIPP SARASIN, *ANTHRAX: BIOTERROR AS FACT AND FANTASY* 67-68 (Giselle Weiss trans., 2006).

<sup>65</sup> David Abraham, *The Bush Regime from Elections to Detentions: A Moral Economy of Carl Schmitt and Human Rights*, 62 U. MIAMI L. REV. 249, 262 (2008).

<sup>66</sup> GEORGE ORWELL, 1984 (1949).

<sup>67</sup> See generally USA PATRIOT ACT, Pub. L. 107-56, Page 115 Stat. 272 (2001).

<sup>68</sup> Abraham, *supra* note 65.

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*Reichstag* arson.<sup>69</sup> Torture in the USA is now called “enhanced interrogation,” just like Nazi Germany.<sup>70</sup> The U.S.A. even has its very own Blackshirts: Blackwater, which has since renamed itself Xe, Academi, etc. to avoid responsibility for crimes of its employees.<sup>71</sup> When the government follows in the footsteps<sup>72</sup> of unrepentant Nazi ideologues like Carl Schmitt,<sup>73</sup> no matter how many Zionists<sup>74</sup> filter<sup>75</sup> them, do not be surprised when you wind up with Nazi policies.<sup>76</sup> In “Political Theology” Schmitt defines the sovereign as he who decides whether to invoke a state of emergency.<sup>77</sup> Schmitt’s ideal political form features an all-power executive, with broad-ranging emergency powers, such as those seen in the German Enabling Act or the USA Patriot Act and still sparks debate in US legal policy circles.<sup>78</sup>

Whether despite or because of the Nazi experience, unrepentant fascists<sup>79</sup> like Carl Schmitt and their hapless Zionist victims like Leo Strauss saw the world as fundamentally conflicted, even agonistically so. In turn, the neoconservatives believe that violent conflict is inevitable to the human condition, even desirable to discipline their underlings, and anyone who thinks otherwise is hopelessly naive. Neocons thus embrace a sort of Darwinism which sees war as heroic and necessary to maintain domestic order and the strength of the species. This is one of the reasons conservatives, who regularly balk at the idea of a social-welfare state, clamor to fund the military industrial complex, even its social-welfare aspects. Hitler called that National Socialism.<sup>80</sup> Believing war to be inevitable

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<sup>69</sup> Abraham, *supra* note 65, at 258.

<sup>70</sup> ALFRED HIRSCH, RECHT AUF GEWALT?: SPUREN PHILOSOPHISCHER GEWALTRECHTFERTIGUNG NACH HOBBS 191 (2004).

<sup>71</sup> Matt Apuzzo, *Blackwater Guards Found Guilty in 2007 Iraq Killings*, N.Y. TIMES (Oct. 22, 2014), [https://www.nytimes.com/2014/10/23/us/blackwater-verdict.html?\\_r=1](https://www.nytimes.com/2014/10/23/us/blackwater-verdict.html?_r=1).

<sup>72</sup> Abraham, *supra* note 65.

<sup>73</sup> Michael Lind, *Carl Schmitt's War on Liberalism*, NAT'L INTEREST (Apr. 23, 2015), <http://nationalinterest.org/feature/carl-schmitt%E2%80%99s-war-liberalism-12704>.

<sup>74</sup> WILLIAM H. F. ALTMAN, THE GERMAN STRANGER: LEO STRAUSS AND NATIONAL SOCIALISM xi (2010).

<sup>75</sup> Laurent Guyénot, *The Machiavelian Threefold Game of the Neoconservatives*, VOLTAIRE NETWORK (May 27, 2013), <http://www.voltairenet.org/article178638.html>.

<sup>76</sup> Arthur Versluis, *How Carl Schmitt Spawned Fascist America*, COUNTERPUNCH (Aug. 10, 2006), <http://www.counterpunch.org/2006/08/10/how-carl-schmitt-spawned-fascist-america-nbsp/>.

<sup>77</sup> Carl Schmitt, *Politische Theologie* 11 (Duncker & Humblot 2004) (“Souverän ist, wer über den Ausnahmezustand entscheidet.” [trans. “Sovereign is who decides on the exceptional state”]).

<sup>78</sup> See, e.g., Ahmad Chehab, *The Unitary Executive and the Jurisprudence of Carl Schmitt: Theoretical Implications for the ‘War on Terrorism* (Jan. 7, 2007) (unpublished research paper, Wayne State University Law School) <https://ssrn.com/abstract=1746966>.

<sup>79</sup> Lars Vinx, *Carl Schmitt*, STAN. ENCYCLOPEDIA PHIL., <http://plato.stanford.edu/entries/schmitt/> (last updated Oct. 1, 2014).

<sup>80</sup> See Adolf Hitler, Volume Two: *The National Socialist Movement*, in MEIN KAMPF (1923), [http://www.hitler.org/writings/Mein\\_Kampf/mkv2ch04.html](http://www.hitler.org/writings/Mein_Kampf/mkv2ch04.html), (Hitler describes his idea of nationalist socialism throughout Mein Kampf (“My Battle”). “The People’s State must assure the welfare of its citizens by recognizing the importance of personal values under all circumstances and by preparing the way for the maximum of productive efficiency in all the various branches of economic life, thus securing to the individual the highest possible share in the general output.”).

creates an expensive<sup>81</sup> self-fulfilling prophecy of war after war.<sup>82</sup> Permanent war plays right into the hands of the enemies of the United States, whose objective is to bankrupt the United States,<sup>83</sup> because war is very expensive. Neocons' pessimistic cynical ideas, superficially appealing if taken at face-value, when fully exposed and understood are repulsive and cannot attract long-term compliance, replication, or supporters and thus are doomed to fail as can be seen from the fascist experiences with state power from 1930-1950 and the neocons' repeated failures in Afghanistan, Iraq, Libya, Syria, and elsewhere. Perpetual warfare manifests through at least two current ideas: the "clash of civilizations" and "the long war."

a. *Clash of Civilizations*

Samuel P. Huntington argued that in the post-cold war world a "clash of civilizations"<sup>84</sup> was likely, if not inevitable,<sup>85</sup> due to resource pressure and cultural difference. Echoing the neocons, Huntington notes: "There can be no true friends without true enemies."<sup>86</sup> Huntington's idea that future conflicts are likely and likely along ethnic lines meshes well with the neoconservatives' belief that war is inherent to the human condition and their practice of permanent war. The problem with such fatalism is it denies the power of human will to shape our social and material environment and tends to become a self-fulfilling prophecy. If you believe war is inevitable and that civilizations are by nature essentially different and in conflict, then you should not be surprised to see yourself trapped in war after self-destructive war. If you believe something is impossible or inevitable it is — for you. That is, limiting beliefs blind people to possibilities, to reality, and lead to surprised when objective facts overtake subjective error. Likewise, believing things impossible means you will think yourself or others incapable of things which they could in fact do.

Although I think President Trump is mistaken about the possibilities of cooperation with Putin, he does have the vision that cooperation rather than conflict is desirable, preferable, and possible: and politics is the art of the possible. However, after MH-17, Crimea, Donetsk, Lugansk it is evident to me that Trump is to present Putin's useful idiot.<sup>87</sup> At some point Trump will figure out that cooperation with Russia really is not possible: and then what? Likely, the U.S. will

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<sup>81</sup> Stiglitz & Bilmes, *supra* note 1.

<sup>82</sup> Glenn Greenwald, *Wes Clark and the Neocon Dream*, SALON (Nov. 26, 2011), [http://www.salon.com/2011/11/26/wes\\_clark\\_and\\_the\\_neocon\\_dream/](http://www.salon.com/2011/11/26/wes_clark_and_the_neocon_dream/).

<sup>83</sup> *Bin Laden: Goal is to Bankrupt U.S.*, CNN (Nov. 1, 2004), <http://www.cnn.com/2004/WORLD/meast/11/01/binladen.tape/>.

<sup>84</sup> Samuel P. Huntington, *The Clash of Civilizations?*, 72 FOREIGN AFF. 22, 22 (1993).

<sup>85</sup> Mohammed Haruna, Opinion, *September 11 and Huntington's Prophecy*, DAILY TRUST (Sept. 26, 2001), <http://allafrica.com/stories/200109270278.html>

<sup>86</sup> SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER*, 20 (1997) <https://books.google.com/books?id=Iq75qmi3Og8C&pg=PA20&lpg=PA20>.

<sup>87</sup> Brent Griffiths, *Albright: Trump fits the mold of Russia's 'useful idiot'*, POLITICO (Oct. 24, 2016), <http://www.politico.com/story/2016/10/trump-russia-useful-idiot-madeleine-albright-230238>.

return to and even intensify its current campaign to isolate Russia and undermine Putin's government.

b. *The Long War*

The neocon practice of permanent warfare is also expressed through the idea that the United States is somehow trapped in "a long war." How or why that is the case escapes me. For neoconservatives, war is not only inevitable, war is inevitably long. That is exactly the recipe to lose a war with because conflict is costly, agonistic, and unpredictable. The idea that we are trapped in a "long war" arose after the terrorist attacks against New York and Washington and is seen in the writings, for example, of James C. Boisselle<sup>88</sup> and Sharon L. Leary.<sup>89</sup> So at least some people think they know why the United States is trapped in a "long war" with a few easily isolated maniacs.<sup>90</sup> However, their reasoning is unimaginative and simplistic, because it does not imagine or propose alternatives to war-after-war for a very long time, nor consider alternatives to war. Constructing the struggle against terrorism as war is inapt.<sup>91</sup> That treats terrorists, who are in fact cowardly criminals, as honorable warriors, making them martyrs, and confuses police work in preventing terrorism and capturing terrorists with armed conflict on open battlefields. The idea of a long war plays right into the hands of Bin Laden and his ilk: the longer the war the likelier it is to bleed out the American treasury and bankrupt the republic. The idea of an inevitable long war is strategically blind and tactically inapt, a recipe for defeat. Permanent war does however enable social control through the centralization of power, and the suppression of dissent: The idea of permanent war as a governance tool to distract the masses was central to the Trotskyite George Orwell's view of state power in his book "1984."<sup>92</sup>

Autocrats and dictators such as Hitler or Galtieri use foreign wars and threats of foreign wars to unite the people and justify authoritarianism while distracting from economic failure and corruption. The rise of a surveillance state, permanent war, and newspeak (e.g. "enhanced interrogation" instead of torture, "targeted killing" instead of assassination), predicted by Orwell in 1984, coheres with recent U.S. history. In any case, a few terrorist attacks by a tiny minority of religious maniacs do not necessitate a permanent state of war; nor is there a good

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<sup>88</sup> Col. James C. Boisselle, *Strategic Adaptation in the Long War* (Apr. 3, 2007) (unpublished student thesis, U.S. Army War College), <http://www.dtic.mil/dtic/tr/fulltext/u2/a494081.pdf>.

<sup>89</sup> Col. Sharon L. Leary, *Sustaining the Long War*, (Mar. 26, 2007) (unpublished student thesis, U.S. Army War College), <http://www.dtic.mil/cgi-bin/GetTRDoc?Location=U2&doc=GetTRDoc.pdf&AD=ADA469589>.

<sup>90</sup> Aaron David Miller, Opinion, *Fighting ISIS Will Be a Long War*, CNN (Nov. 19, 2015), <http://www.cnn.com/2015/11/19/opinions/miller-isis-the-long-war/index.html>.

<sup>91</sup> See generally ERIC ENGLE, *IDEAS IN CONFLICT: INTERNATIONAL LAW AND THE GLOBAL WAR ON TERROR* (2013) ("[W]ar is the wrong metaphor for the broader struggle, since wars are fought at full intensity and have clear beginnings and endings. Meeting the jihadist challenge is more of a 'long, twilight struggle' [quoting John F. Kennedy's inaugural address] whose core is not a military campaign but a political contest for the hearts and minds of ordinary Muslims around the world.").

<sup>92</sup> See generally ORWELL, *supra* note 66.

argument to regard the U.S. as trapped in an inevitable endless war. The neocons' nightmare of permawar is more strategic blindness — or duplicity, consistent with the neocons policy of conscious deception.

The election of Donald Trump to the presidency signals the end of these neoconservative policies. He has already indicated he views the world through a realist lens of the national interest, which will put an end to the past fifteen years of endless expensive avoidable crusades.

*c. On War*

The neocons believe, enucleate, that war is inevitable and inevitably long, yet also a *deus ex machina*, a magical unicorn. They are incorrect, and wars are won by whomever makes the fewest mistakes.<sup>93</sup> Advocates of open-ended military commitments such as the neocons make any or all of these mistakes:

1. They over-estimate the capacity of military force to effect political change
2. They under-estimate the possibility of political solutions
3. They underestimate the costs of war.
4. They fail to elaborate a war termination strategy.<sup>94</sup>

Miscalculating the costs and capacities of war and the failure to elaborate a war-termination strategy are mistakes, evidence of a lack of forethought. Mistakes are harbingers of defeat.

War is extremely costly, unpredictable, and a limited tool of political influence. War is costly and unpredictable because people will do anything to win, which in turn makes the course of war unpredictable. Consequently, war is agonistic: a fight to the death. Furthermore, war's agonistic nature means no warring party can compromise because each party to a war becomes trapped into escalation of commitment<sup>95</sup> due to the sunk-costs fallacy.<sup>96</sup> Those few "traitors" who advocate "cowardly compromise" are easily scapegoated as "defeatists" who are "unpatriotic."<sup>97</sup> Thus, compromise in war is impossible. Consequently, though

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<sup>93</sup> SUN TZU, *THE ART OF WAR* (Lional Giles trans., Luzac & Co. 1910) (c. 500 B.C.E.).

<sup>94</sup> David C. Gompert, Hans Binnendijk & Bonny Lin, *The Iraq War: Bush's Biggest Blunder*, NEWSWEEK (Dec. 25, 2014), <http://www.newsweek.com/iraq-war-bushs-biggest-blunder-294411>. (Illustrating that when the U.S. invaded Iraq again in the Second Gulf War there was an unfounded expectation that all resistance would collapse and the speedy peaceful reconstruction of Iraq would occur: "The post-invasion model in the minds of those who decided to invade was that Iraqis freed from Saddam's despotism would work through a peaceful political process to create a unified, democratic and productive state that would serve as a model for others in the Arab world. The implication was that the demand for American occupation—troops, money, administration, and mediation—would be modest and brief." In fact, sectarian conflicts suppressed and mollified by Saddam Hussein reemerged, fueled by radicalism and the break-down of order. Effective military planning considers and plans for all contingencies, not merely the best-case or hoped-for scenarios, but also the worst case scenarios.)

<sup>95</sup> Theresa F. Kelly & Katherine L. Milkman, *Escalation of Commitment* (Oct. 23, 2011) (research paper, The Wharton School) (on file with the University of Pennsylvania), [http://opim.wharton.upenn.edu/%7Ekmlkman/2011\\_10\\_23\\_escalation\\_FINAL.pdf](http://opim.wharton.upenn.edu/%7Ekmlkman/2011_10_23_escalation_FINAL.pdf).

<sup>96</sup> Definition of Sunk Cost Trap, INVESTOPEDIA, <http://www.investopedia.com/terms/s/sunk-cost-trap.asp> (last visited Feb. 16, 2017).

<sup>97</sup> See, e.g., WILLIAM L. SHIRER, *THE RISE AND FALL OF THE THIRD REICH* 31 (1960). (The most famous example is the "backstab myth"; in Germany, after World War I, certain people tried to explain the defeat of the German army as a result of domestic treachery by variants of a Jewish-Bankers-Marxist

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wars are easy to start they are very difficult to end, which also makes their course unpredictable. Since no one can compromise, wars drag on with false hopes of miracle weapons or diplomatic breakthroughs offered to keep the people, basically ignorant about foreign affairs, happy to send their sons to die heroically as martyrs in wars that are already lost. War is not the continuation of politics by other means: it is the bankruptcy of politics, for the political is marked by constant compromise whereas war is a field where any compromise, no matter how slight, is impossible. Since war is costly, unpredictable, and difficult to end, supreme excellence in the art of war is to subdue the enemy without fighting,<sup>98</sup> for then you make your enemies' soldiers and supplies your own, whereas fighting necessarily destroys your own resources and any spoils. That too shows why war is not the continuation of politics by other means and instead is evidence of political failure. For these reasons well-led states avoid war when possible. When well-led states do wage war they do so rapidly and decisively, using overwhelming force to quickly crush the enemy combatants and conclude the conflict with as little destruction as possible. Colin Powell<sup>99</sup> is the best recent example of seeing the limits and risks inherent in the use of force. From correct premises he reaches the right conclusion: force, if used at all, must be applied as rapidly and decisively as possible. When war is waged it must be short, sharp, and have popular support with clear objectives. Otherwise, war should not be waged at all because long wars eventually become unpopular and are immediately expensive. Open-ended commitments to violence tend to be ill-considered and unrealistic. For all these reasons military force should be avoided when possible, but when used must be deployed with crushing decisive rapidity. That is exactly President Trump's formula for America's future wars.

### 4. Weimer on Washington

Neoconservative regime change policies, whether implemented by Democrats (Libya,<sup>100</sup> Syria<sup>101</sup>) or Republicans (Iraq,<sup>102</sup> Afghanistan<sup>103</sup>), attained only dismal results. Yet no one has fundamentally questioned the neoconservative prem-

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conspiracy.). *See generally*, VICTOR CHERKASHIN & GREGORY FEIFER, *SPY HANDLER: MEMOIR OF A KGB OFFICER – THE TRUE STORY OF THE MAN WHO RECRUITED ROBERT HANSEN AND ALDRICH AMES* (2005); JOHN BARRON, *BREAKING THE RING: THE BIZARRE CASE OF THE WALKER FAMILY SPY RING*, (1987). (Likewise, though fortunately with less harsh consequences, some tried to blame the U.S. defeat in Vietnam on domestic treachery – of which there was some, just not on the part of bankers or Jewish people: Agee, Walker, Ames, Hanson, the depressing deadly list of traitors goes on.).

<sup>98</sup> SUN TZU, *supra* note 93.

<sup>99</sup> Colin L. Powell, *U.S. Forces: Challenges Ahead*, FOREIGN AFF. (1992), <http://www.cfr.org/world/us-forces-challenges-ahead/p7508>.

<sup>100</sup> Mark Mardell, *US Confirms its Libya Ambassador Killed in Benghazi*, BBC NEWS (Sept. 12, 2012), <http://www.bbc.co.uk/news/world-africa-19570254>; *See also* Greg Miller, *CIA rushed to save diplomats as Libya attack was underway*, WASH. POST (Nov. 1, 2012), [https://www.washingtonpost.com/world/national-security/cia-rushed-to-save-diplomats-as-libya-attack-was-underway/2012/11/01/c93a4f96-246d-11e2-ac85-e669876c6a24\\_story.html](https://www.washingtonpost.com/world/national-security/cia-rushed-to-save-diplomats-as-libya-attack-was-underway/2012/11/01/c93a4f96-246d-11e2-ac85-e669876c6a24_story.html). (Although U.S. casualties in Libya have been few among the dead figured notably the U.S. Ambassador to Libya Christopher Stevens and contracted employees of the Central Intelligence Agency Glen Doherty and Tyrone Woods as well as diplomat Sean Smith.).

<sup>101</sup> Jeffrey Sachs, *Hillary Clinton and the Syrian Bloodbath*, HUFF. POST (Feb 14, 2017), [http://www.huffingtonpost.com/jeffrey-sachs/hillary-clinton-and-the-s\\_b\\_9231190.html](http://www.huffingtonpost.com/jeffrey-sachs/hillary-clinton-and-the-s_b_9231190.html).

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ises or prescriptions, let alone proposed alternatives. This explains a certain paralysis and incapacity of current U.S. foreign policy. Contemporary U.S. foreign policy incompetence can be broadly but roughly characterized as power without purpose: a reflection, perhaps, of domestic congressional gridlock, the Weimarization of American politics.<sup>104</sup> Namely, America, like Weimar Germany in 1930, is factionalized into paralytic zero-sum dynastic factions: “gridlock.” *Federalist Number 10*<sup>105</sup> warned us of the dangers of faction: so did Benjamin Franklin.<sup>106</sup> *Federalist 10* explains that the key problem facing democracy is the rise of self-aggrandizing factions, coherent organized groups, which will try to expropriate property from other disorganized or political isolated groups: political paralysis might prevent factious expropriation but it also prevents effective governance and so is no solution to the problem of political polarization. *Federalist 10* prescribes sensible remedies to faction: the conscious inculcation of patriotism which places the national interest above faction coupled with the creation of legitimate channels for the naturally acquisitive tendencies of people: commerce. This separation of commerce and the state implies in turn a limited form of government.

Current U.S. politics, like those of Weimar era Germany in the 1920s and 30s, are marked by gridlock and political paralysis. Recent obvious examples of factious political paralysis can be seen in the budget sequester and also in the nomination and appointment of federal judges, especially Supreme Court justices. Despite this factional paralysis there is hope. The United States in the 2000s, unlike Germany in 1933, is not a bankrupt, broken nation. The United States in 2016 is still more akin to “House of Cards”, than “Game of Thrones.” Nevertheless, U.S. foreign policy is remarkably ineffective despite being terribly expensive thanks to the combination of erroneous ideas about foreign policy and domestic political paralysis. Part of the rise of populists like Trump<sup>107</sup> is a reaction against dishonest self-serving elites and gridlocked paralysis. Unfortunately however, most egotists are not deep thinkers. Consequently, even though Trump partially identifies the problem - factious dynasties, the epitome of a political class of professional politicians permanently seated in Gerrymandered districts - his solution, term limits, is only partial, and he may be unable to implement it. In the words of a Weimar era poem:

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<sup>102</sup> U.S. Department of Defense, *U.S. Casualty Status*, (Apr. 25, 2017) <http://www.defense.gov/casualty.pdf> (Over four thousand U.S. military personnel have died and over 30,000 have been wounded in fighting in Iraq since 2003. Moreover, over a hundred thousand Iraqis have died, with estimates of Iraqi war dead ranging as high as one million.).

<sup>103</sup> *Id.*

<sup>104</sup> The White House, *What You Need to Know about the Sequester*, (2013) <http://www.whitehouse.gov/issues/sequester>.

<sup>105</sup> THE FEDERALIST NO. 10 (James Madison).

<sup>106</sup> Joseph Lieberman, *A Republic, If We Can Keep It*, 282 ATLANTIC MONTHLY 14, 14-17 (1998).

<sup>107</sup> David Lewis, *Carl Schmitt: Nazi-Era Philosopher Who Wrote Blueprint for New Authoritarianism*, CONVERSATION (May 25, 2016), <http://theconversation.com/carl-schmitt-nazi-era-philosopher-who-wrote-blueprint-for-new-authoritarianism-59835>.

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*"The best lack all conviction, while the worst  
Are full of passionate intensity."*<sup>108</sup>

In sum, the neocons profoundly misapprehend the nature and limits of war and state-power. The foreign policy errors of the United States in the first two decades of this century were largely the result of their incorrect ideas. Merely recognizing that force has limited use and that unilateralism is ineffective leadership are steps in the right direction: "don't do stupid shit."<sup>109</sup> Understanding that state interactions are not inevitably or fundamentally violent, that war can be limited or even better avoided altogether, are further steps in the right direction. However, ultimately, the United States must develop foreign policies which reject neo-conservatism. A transformative approach to U.S. foreign policy based on some of the presumptions of international relations ("IR") realism will be more effective and is outlined below and is much closer to Trump's stated foreign policy outlook than the neoconservative folly he rightly rejects.

### IV. A Realist Alternative to Neoconservative Mistakes

#### 1. State Power

States, bands of like-minded similar individuals, are fundamentally self-interested and act coherently in pursuit of their perceived self-interest. People are not angels nor devils: we are however self-interested but do have free-will. Aristotle in *Politics* puts it best:

man, when perfected, is the best of animals, but, when separated from law and justice, he is the worst of all; since armed injustice is the more dangerous, and he is equipped at birth with the arms of intelligence and with moral qualities which he may use for the worst ends. Wherefore, if he has no virtue, he is the most unholy and the most savage of animals, and the most full of lust and gluttony. But justice is the bond of men in states, and the administration of justice, which is the determination of what is just, is the principle of order in political society.<sup>110</sup>

Aristotle recognizes that humans are capable of the worst misdeeds, yet desire the best. This understanding of our desire for the good and our capacity to do both good and evil is the basis of international relations realism. International relations realism is the idea that states, though abstractions from material reality, are reflections of that reality. States, like individuals, are rational and pursue their self-interest as best they can. Albeit, because people are self-interested, whether as individuals or aggregated into states, "the strong do what they can; the weak suffer what they must."<sup>111</sup> International law has limits and is not perfect in

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<sup>108</sup> W.B. YEATS, *THE SECOND COMING* (1919).

<sup>109</sup> Jefferey Goldberg, *The Obama Doctrine*, ATLANTIC, (Apr. 2016), <http://www.theatlantic.com/magazine/archive/2016/04/the-obama-doctrine/471525/>.

<sup>110</sup> ARISTOTLE, *POLITICS* (Benjamin Jowett trans., Clarendon Press ed. 1885) (c. 350 B.C.E.).

<sup>111</sup> THUCYDIDES, *THE PELOPONNESIAN WAR* (Martin Hammond trans., Oxford World's Classics 2009) (c. 400 B.C.E.).

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part because people are imperfect. That is the world as it is. It may not be the world we desire, but we must start with understanding the world as it is in order to attain the world we desire. The realistic “facts of life” must be our starting point. The world needs correct ideas if we are to propose something better than the mendacious, unrealistic, and self-destructive policies of the neoconservatives, who have squandered trillions<sup>112</sup> of dollars and hundreds of thousands of lives in ill-considered pursuit of opportunistic cynicism.

### 2. International Relations Realism

States are formalized<sup>113</sup> abstract aggregates of individuals, which are more powerful than the sum of their constituents because of productive synergies<sup>114</sup> resulting from specialization and improved communication. IR realism argues that States are rational power-maximizers.<sup>115</sup> That description is largely but not completely accurate. Roughly speaking, States do seek to maximize their power. States generally do act rationally in pursuit of power. There are however exceptions. Some actors, e.g. Hippies, the Amish, and slackers, do not try to contend for state-power at all and are not power-maximizers. Furthermore, some actors who seek to maximize their power do so irrationally: Hitler and Bin Laden come to mind as examples of irrational power-maximizers. Nonetheless, States and their constituents generally try to maximize their own power and tend to do so rationally. Those States which either do not seek to maximize their power and/or do not do so rationally are usually marginalized by other actors which are more coherent in the pursuit of power and so can generally be ignored when modeling state-power.

President Trump is a foreign policy realist. The main presumptions of IR realism are largely correct: States are generally rational actors and seek to maximize their power. However, there are other presumptions of realism which are less accurate. These errors of classical realism are sufficiently important and complex to require detailed analysis to understand why we should reject them and what we might better think instead.

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<sup>112</sup> *Iraq War 'Costlier Than Vietnam'*, BBC NEWS (Aug. 31, 2005), <http://news.bbc.co.uk/2/hi/america/4201812.stm>.

<sup>113</sup> CHRIS CROWTHER-DOWEY, *AN INTRODUCTION TO CRIMINOLOGY AND CRIMINAL JUSTICE* 310 (2007).

<sup>114</sup> ARISTOTLE, *POLITICS* (Benjamin Jowett, trans.), <http://classics.mit.edu/Aristotle/politics.mb.txt> (“the complete community, formed from several villages, is a city-state, which at once attains the limit of self-sufficiency, roughly speaking. It comes to be for the sake of life, and exists for the sake of the good life”).

<sup>115</sup> BRUCE EDMONDS, & RUTH MEYER, *SIMULATING SOCIAL COMPLEXITY: A HANDBOOK* 675 (2013); See also Bruce Bordner, *Rethinking Neorealist Theory: Order Within Anarchy*, (1997), <http://brucebordner.com/Neorealism.html> (Summarizing Kenneth Waltz's *Man The State and War* as arguing that states are rational maximizers not of power but of their own survival).

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### *a. IR Realists tend, wrongly, to see the international system in Westphalian terms*

Classical IR Realists see the international system as state-centered and exclusively constituted by States. That simplification, though useful for rough modeling, is obviously inaccurate in the world today. The international system is no longer centered exclusively on states. Numerous non-state actors now play parts on the world stage: international organizations, corporations, NGOs, and terrorist groups are some of the examples of non-state actors in the international arena. Although States are still the primary international actor, States now interact as one actor in a complex matrix of international organizations, multinational corporations, non-governmental organizations, national liberation movements, and terrorists before the backdrop of a global culture. Global culture transcends States and is manifested not only in Hollywood and capitalist ideology but also in Bollywood and Putin's alter-mondialism. Inasmuch as classical realism sees the international system as constituted exclusively by States, or as best modeled exclusively through the lens of States, it is inaccurate. The current post-Westphalian international system just described briefly is no longer exclusively constituted by States.<sup>116</sup>

### *b. Classical IR Realists tend to see states as essentially isolated from each other, and even as autarchic and interacting somewhat like billiard balls or atoms, bouncing off of each other but ever independent*

In 1684, at the dawn of the Westphalian system and the industrial revolution, States were in fact largely isolated from each other. Today however, States are no longer isolated nor self-sufficient. We have lived in a post-Westphalian hegemonic globalized world since at least 1990, if not 1945. Greatly improved technology and new ideas of governance have created a world which is intensively networked via instant global communications and interdependent due to a massive increase in global trade thanks to improvements in transit technology. In 1684 transatlantic travel took weeks, even months. Today it takes but hours to cross the Atlantic Ocean. Communication is now instant and nearly cost-free. Thus, the world today is intensively networked, contrary to the presumptions of classical IR realism.

Although historically States were isolated and thus necessarily self-sufficient, that description is no longer even roughly accurate. States today are not only intensively networked they are also interdependent, not autarchic, because trade fosters prosperity and peace.

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<sup>116</sup> See, e.g. Antonio Cassese, *Human Rights, in A Changing World* 22 (Polity Press) (1990); See generally Engle, *supra* note 91 (In the post-Westphalian world states still remain the primary constituent of international law and the primary international actor. However, they have been supplemented by non-state actors such as international organizations and corporations in the formation of international norms ("soft-law"); rather than a principle of isolation into nation-states. Unlike the Westphalian system, the post-Westphalian world features intense economic and even political integration through global trade and communication, operating under principles of universal human rights).

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*c. Classical IR realism correctly casts states into the role of rational power-maximizers, but wrongly tends to see states as interacting exclusively in zero-sum power relations*

State interactions are no longer exclusively or even usually zero-sum or negative-sum. Positive sum economic interactions have become more important than military interactions in the post-Westphalian world<sup>117</sup> due to the prosperity and peace that economic interdependence generates:<sup>118</sup> in the post-war world trade vastly increased and instant global communication<sup>119</sup> became reality because of jet aircraft and then computers. States today as a general rule relate to each other primarily commercially. Military interactions between States have become exceptional. That was not always the case. The rise of a positive-sum international economy contradicts the presumptions of classical IR realism, which saw state interactions as generally zero sum.<sup>120</sup>

Classical IR realism posits that States can really only maximize their own power at the expense of other States. In reality, however, most State interactions today are positive sum and economic, not zero sum and military (inter-war rivalry) let alone negative sum (war). Furthermore, constantly improving technology increases the absolute capacity of almost all states, even those which are “weaker” in comparisons of relative-power. Power, in the sense of capability, is increasing for all States in absolute terms thanks to technological progress and economic growth.

In the contemporary post-Westphalian world we see, more-or-less, a dominant global ideology positing the free movement of goods, capital, ideas, and even persons as normal. Trump at times wishes to oppose some or all of that, but in the end he too will be washed under by the wave of instant global communication and rapid inexpensive global travel and trade which drive globalization forward, whether we like it or not. These are technological facts which cannot be ignored.

A global liberal ideology was never a defining characteristic of the Westphalian State system or of IR realism. Today however, even States such as Russia and China that currently challenge U.S. global hegemony do so largely within

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<sup>117</sup> William C. Plouffe, *Sovereignty In The “New World Order”: The Once And Future Position Of The United States, A Merlinesque Task Of Quasi-Legal Definition*, 4 TUL. J. INT'L & COMP. L. 49, 85 (1996).

<sup>118</sup> In the post-war world international trade organizations proliferated: the General Agreement on Trade and Tariffs evolved into the World Trade Organization. As well as a global free-trade organization regional free trade associations such as the European Economic Communities, the North American Free Trade Area, the Association of South-East Asian Nations, and MercoSur / Andean Pact arose.

<sup>119</sup> Alfred C. Aman, *The Globalizing State: A Future-Oriented Perspective On The Public/Private Distinction, Federalism, And Democracy*, 31 VAND. J. TRANSNAT'L L. 769, 780-81 (1998) (showing that technology and capital mobility equate to the rise of private actors and the decline of state actors); See also Stephen Kobrin, *Back to the Future: Neomedievalism and the Postmodern Digital World Economy*, J. OF INT'L AFF. 361 (1998), <http://www-management.wharton.upenn.edu/kobrin/Research/hartrev2.pdf> (arguing that national markets are too small to serve as economic units and that technology, especially information and telecommunication technology, has driven economic integration and deterritorialized commerce).

<sup>120</sup> See Luzius Wildhaber, *Sovereignty and International Law*, in THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY DOCTRINE AND THEORY 661, 668 (R. St. J. Macdonald et al. eds., 1986).

and using the terms of liberalism. Authoritarians no longer dare use the terms of fascism or even of Marxist class-struggle because those ideas are proven failures and rather obviously wrong and inadequate for effective governance, especially global governance. Even corrupt authoritarian States are compelled to use the ideas and goals of liberalism to maintain domestic legitimacy and to negotiate with the wealthy strong states,<sup>121</sup> all of which just-so-happen to be liberal democracies. Francis Fukuyama was to that extent correct in declaring the triumph of global liberalism.<sup>122</sup> At the same time however, Fukuyama was mistaken about the ideological triumph of liberalism as the “end” of history in the sense of conclusion: conflict continues in the world after the cold war, notably in the Middle-East. However, violent conflict is now exceptional rather than the general rule.<sup>123</sup> Fukuyama did believe that history ended, and was wrong; history is neither the liberal line of progress, which might end, nor the ancient Greek wheel of time, endless with no real progress. Marxists rightly argue that history is an upward spiral<sup>124</sup> of inevitable long-term progress, with inevitable temporary set-backs: “two steps forward, one step back.” Thus, though history has not and cannot truly end, it has reached a level of development in which war has become the exception, not the rule, of interstate interaction. Although there have been numerous wars in the past two decades they have been confined almost exclusively to Africa and the Middle East, the poorest parts of the world. Fukuyama rightly saw Aristotelian liberalism as the telos, the natural path and goal, of human history.<sup>125</sup> However, liberalism will not be the end of the existence of state power because of the ever-present capacity of humans for conflict. Since people are by nature able to do terrible things to each other there will always be state-power, if only to restrain the evil and deluded ones, and history will never truly conclude, despite hopeful but unrealistic proclamations to the contrary, whether by Marxists, Libertarians, or liberals like Fukuyama.<sup>126</sup> The fact that people are inherently capable of violence explains why history will never end, why the State will never completely wither away. Technological progress will however continue to increase wealth, push globalization, and increasingly make violence a thing of the past, making state-power less and less relevant in ordinary life, increasingly replacing the state with civil society. However, the potential for violence will always be there: State power will always be necessary to restrain violent extrem-

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<sup>121</sup> *E.g.* Constitution of the People's Republic of China [Constitution] Dec. 4, 1982, art. 35 (The Chinese constitution proclaims the rights of individual liberties: “Freedom of speech, of the press, of assembly, of association, of procession and of demonstration. . . .Citizens of the People's Republic of China enjoy freedom of religious belief.”).

<sup>122</sup> *See generally* Francis Fukuyama, *The End of History?*, NAT'L INTEREST (1989), <https://ps321.community.uaf.edu/files/2012/10/Fukuyama-End-of-history-article.pdf>.

<sup>123</sup> John Baylis, James J. Wirtz, & Colin S. Gray, *Strategy in the Contemporary World: An Introduction to Strategic Studies*, 102 (2007).

<sup>124</sup> Vladimir Ilyich Lenin, *On the Question of Dialectics* (1915) in *LENIN'S COLLECTED WORKS* at 357-61 (4th ed.1976).

<sup>125</sup> *See generally* Francis Fukuyama, *The End of History and the Last Man* 55-56 (1992) (addressing Aristotle's view on historical cyclicity).

<sup>126</sup> KARL MARX & FRIEDRICH ENGELS, *THE MANIFESTO OF THE COMMUNIST PARTY* (Samuel Moore trans., 1888) (1848).

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ists. Libertarians and Marxists, even if well meaning, are simply in error about human nature and the possibility of ending state-power.

Trump's election triumph also represents the rejection of libertarianism, for Trump is clearly a statist, and accords the State a pivotal role in the economy. Violence is a basic possibility of the human condition. Yet people desire a good life and are inherently social: We naturally tend to band together.<sup>127</sup> This dynamic of fear and desire explains the formation and evolution of state power:

*"The state comes into existence, originating in the bare needs of life, and continuing in existence for the sake of a good life."<sup>128</sup>*

Aristotle goes on from there to define man as the rational talking animal,<sup>129</sup> inherently social, inherently curious, who seeks the good life. Thus, the State is doubly inevitable<sup>130</sup> and desirable. We band together in States not merely out of *fear* of nature or each other as Hobbes thinks.<sup>131</sup> We also band together in *hope and desire* to attain the good life and for the productive benefits of living in society.<sup>132</sup> We band together in part because of productive synergies: people live better and are more productive in groups than when isolated from each other. Babies, to make the obvious example, are in no way self-sufficient and could not survive, let alone prosper, unaided. Adults, while capable to survive, can only truly prosper in communities since people are naturally social and specialization increases productive power.<sup>133</sup> These facts are the bases of legitimate state-power and are why the Libertarians and Marxists<sup>134</sup> are both mistaken about the

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<sup>127</sup> See generally, Aristotle, *supra* note 110.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 1253a1-18.

<sup>130</sup> *Id.* at 1252b30-1253a1, 1253a1-18.

<sup>131</sup> "by art is created that great LEVIATHAN called a COMMONWEALTH, or STATE (in Latin, CIVITAS), which is but an artificial man, though of greater stature and strength than the natural, *for whose protection and defence* it was intended" Thomas Hobbes, *Leviathan*, "Introduction," P 1 (1651) (emphasis added), <http://www.uoregon.edu/~rbear/hobbes/leviathan.html> ; "[W]hatsoever therefore is consequent to a time of Warre, where every man is Enemy to every man; the same consequent to the time, wherein men live without other security, than what their own strength, and their own invention shall furnish them withall. In such condition, there is no place for Industry; because the fruit thereof is uncertain: and consequently no Culture of the Earth; no Navigation, nor use of the commodities that may be imported by sea; no commodious Building; no Instruments of moving, and removing such things as require much force; no Knowledge of the face of the Earth; no account of Time; no Arts; no Letters; no Society; and which is worst of all, continual fear, and danger of violent death; And the life of man, solitary, poor, nasty, brutish, and short." Thomas Hobbes, *Leviathan* 84, (A. R. Waller ed., 1904).

<sup>132</sup> Aristotle, *POLITICS*, Book I, Chapter 1 (I.2.1252b27–30) (ca. 350 B.C.) ("originating in the bare needs of life, and continuing in existence for the sake of a good life.").

<sup>133</sup> See, e.g. Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* bk. 1, at 3 (Edward Cannan ed., 5th ed. London: Methuen & Co., Ltd. 1904), <http://www.econlib.org/library/Smith/smWNI.html>. (recalling Adam Smith's famous pin factory where each worker alone could only fashion, perhaps, one pin a day, but where even but ten poor workers specializing could produce two pounds of pins per day).

<sup>134</sup> See GERARD CASEY, *LIBERTARIAN ANARCHY: AGAINST THE STATE* (Bloomsbury Academic, 2016) (illustrating a libertarian anarchist view); See also, FRIEDRICH ENGELS, *Anti-Dühring* Part III, Chapter 2 (1878), [http://www.mlwerke.de/me/me20/me20\\_239.htm#Kap\\_II](http://www.mlwerke.de/me/me20/me20_239.htm#Kap_II) ("The interference of the state power in social relations becomes superfluous in one sphere after another, and then ceases of itself. The govern-

possibility to end the State and the nature of State power, though for different reasons.

### 3. Understanding the Possibilities and Limits of U.S. Power

The most logical argument is for a neorealist theory which sees the State as a rational actor, the primary actor, but no longer the only actor in the international system. The State seeks to maximize power, if only to survive, but does so more often through positive-sum economic interactions rather than zero-sum political or negative-sum military interactions. The argument has also been made herein to reject neo-conservatism as unrealistic, a proven failure, just as the impossibility of Marxist or Libertarian anti-state views has also been pointed out here.

Neorealist theory is largely consistent with President Trump's foreign policy statements. Following, I will further expose this neorealist theory in terms of contemporary challenges to U.S. foreign policy.

#### *a. Universalism instead of Unilateralism*

The U.S.A. is a global hegemon, leading a network of allies from all over the globe. Trump questioned alliance and trade networks before his election and during the start of his presidency, but in the end will be compelled to them because they are so useful. Unilateralist interventionism is a very foolish idea that fails<sup>135</sup> as can be seen from the Second Gulf War: that should not however inspire the opposite vice, vacillation.<sup>136</sup> Unfortunately, President Trump embraces unilateralism, but is not an interventionist. His unilateralism is nevertheless foolish because it calls into question the alliance and trading networks which the U.S. created and through which the U.S. exercises global hegemony such as the North Atlantic Treaty Organization (NATO), the United Nations, the World Trade Organization, and the North American Free Trade Agreement (NAFTA). Whether Trump will continue to attack institutions of U.S. global governance is an interesting question, but if he does he will surely lose support from the foreign policy elites, which he requires in order to form and implement U.S. foreign policy.

The U.S. commitment to its allies is key to its global hegemony. Cicero saw it first: "Our Roman republic, by defending its allies, has got possession of the world."<sup>137</sup> The fact that U.S. alliance commitments are credible explains U.S. global power: as a matter of fact, wars are likelier won by countries with many allies and few enemies, for there is strength in numbers, especially when well-coordinated. Additionally, not only the U.S. commitment to allies but also a real

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ment of persons is replaced by the administration of things and the direction of the processes of production. The state is not 'abolished', it dies out").

<sup>135</sup> Richard Falk, *Why Foreign Military Intervention Usually Fails in the 21st Century*, FOREIGN POL'Y J. (Nov 3, 2014), <http://www.foreignpolicyjournal.com/2014/11/03/why-foreign-military-intervention-usually-fails-in-the-21st-century>.

<sup>136</sup> Joseph Bosco, *About Time the U.S. Made a Stand in South China Sea*, REAL CLEAR WORLD (Nov.2, 2015), [http://www.realclearworld.com/articles/2015/11/02/about\\_time\\_the\\_us\\_made\\_a\\_stand\\_in\\_south\\_china\\_sea\\_111537.html](http://www.realclearworld.com/articles/2015/11/02/about_time_the_us_made_a_stand_in_south_china_sea_111537.html).

<sup>137</sup> FRANCIS BARHAM, 1 THE POLITICAL WORKS OF MARCUS TULLIUS CICERO: COMPRISING HIS TREATISE ON THE COMMONWEALTH; AND HIS TREATISE ON THE LAWS (1841).

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vision of the future of peaceful productivity explains U.S. global hegemony. The United States is committed to a new world order, *novus ordo saeculorum*. The U.S.-led new world order is based on democracy, freedom, and the rule of law. This new world order replaces authoritarianism, monarchy and dictatorship, constraint and command. In a world of dictatorships, genocide, and slavery it is the last best hope of earth.<sup>138</sup>

President Trump, so far as I have seen, has not addressed the idea of the U.S.A. as leader of a new world order, a new order of the ages. He has however addressed the idea of American exceptionalism, rejecting that idea as undiplomatic.<sup>139</sup>

A proper self-understanding of the United States sees the United States as a universal force for freedom: The United States is the leader of a phalanx of nations all of which are committed to democracy and the rule of law. This concert of nations embraces and advances universal values, the good.<sup>140</sup> States which reject democratic self-government and the rule of law, i.e. the champions of authoritarianism, dictatorship, corruption, and lawless violence, are ever-fewer, because technological and social progress exposes these self-evident truths: fear, hypocrisy, violence, and corruption are terribly ineffective governance tools. There are fewer tyrannies, yet some still exist and must be resolutely opposed.

### b. *American Exceptionalism*

American exceptionalism is the idea that the United States, a secular republic, is exceptional in its origin as espousing a limited form of democratic government under the rule of law with universal applicability. In fact, America is at once exceptional and ordinary. America is exceptional as the first secular state<sup>141</sup> committed to the idea of self-governance under law, a literally revolutionary idea. Yet, America is also as ordinary as the tens of millions of impoverished refugees who have emigrated to the U.S.A. and now constitute its core populace. America is exceptional because this cross-section of the entire world is a *vox populi mundi*: a global voice of a globalizing world. Yet America is also ordinary because these people really are “just like everyone else.”<sup>142</sup> Ordinary people doing extraordinary things explain why America is the most advanced State in the global process of liberalization. The United States of America is the larg-

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<sup>138</sup> President Abraham Lincoln, Annual Address to the U.S. Congress, (Dec. 1, 1862) (“we shall nobly save, or meanly lose, the last best hope of earth”).

<sup>139</sup> David Corn, *Donald Trump Says He Doesn't Believe in "American Exceptionalism"*, MOTHER JONES (June 7, 2016), <http://www.motherjones.com/politics/2016/06/donald-trump-american-exceptionalism> (emphasizing President Donald Trump's distaste for the term American exceptionalism).

<sup>140</sup> See Aristotle, *supra* note 110 (explaining the importance of political science in determining the scope and application of the other sciences to attain the end of the good for the individual and the state).

<sup>141</sup> JOSEPH J. ELLIS, *AMERICAN CREATION: TRIUMPHS AND TRAGEDIES AT THE FOUNDING OF THE REPUBLIC* (2008).

<sup>142</sup> Emma Lazarus, “The New Colossus,” inscribed on the Statue of Liberty National Monument (“Give me your tired, your poor, Your huddled masses yearning to breathe free, The wretched refuse of your teeming shore. Send these, the homeless, tempest-tost to me, I lift my lamp beside the golden door!”).

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est country on earth which is also a reflection, even a microcosm, of the entire planet<sup>143</sup> because it is constituted of immigrants from the entire world.<sup>144</sup> This partly explains U.S. global hegemony. Because the USA is a global microcosm, a refugee center for the entire world, it is easy for non-citizens to identify with the USA. America is also exceptional because the United States was the first federal democracy on earth.<sup>145</sup> Although some ancient Greek city-states had a limited form of self-government, the vote was limited to the aristocratic class and they were not federated. Ancient Greek democracies were not based on universal suffrage. Furthermore, the ancient Greek city-states were small and never united. Often at war with each other, ancient Greek governance never went beyond mere military alliances of independent city-states to anything like regional let alone continental governance. Finally, The Greek city states never claimed to be secular. Thus, America is exceptional, the first modern federal mass-democracy.<sup>146</sup>

Yet, America is also unexceptional. America is “merely” the spearhead of a global liberation movement of like-minded peoples and states.<sup>147</sup> American exceptionalism is really better expressed as universalism: “all men are created equal.”<sup>148</sup> The United States is also unexceptional in that it is the logical outgrowth of ancient Greek and modern British liberal ideas expressed by Aristotle, Locke,<sup>149</sup> and in Magna Charta<sup>150</sup> and the English Bill of Rights.<sup>151</sup> The liberal world, now numbering billions, the planet's majority, is much larger in space and numbers than some 50 states on one continent comprising just a few hundred

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<sup>143</sup> Patrick J. Buchanan, *America Is a Microcosm of a World on Fire*, THE AMERICAN CONSERVATIVE (July 18, 2014), <http://www.theamericanconservative.com/2014/07/18/america-is-a-microcosm-of-a-world-on-fire/> (arguing that America is a global microcosm, but that this means America is violently conflicted).

<sup>144</sup> Dara Lind, *37 Maps That Explain How American is a Nation of Immigrants*, VOX (Feb. 7, 2017), <http://www.vox.com/2015/1/12/7474897/immigration-america-maps>.

<sup>145</sup> ARTICLES OF CONFEDERATION of 1777, <http://www.usconstitution.net/articles.html> (the U.S. confederation was not the world's first confederation, however, it became the first federation featuring separation of powers with the ratification of the U.S. Constitution); See also THE FEDERALIST NO. 10 (James Madison), <https://www.congress.gov/resources/display/content/The+Federalist+Papers> (explaining how the federation is intended to check factionalism, which is of course the source of current congressional gridlock); See also ERIC ENGLE, *Haudenosaunee Great Law of Peace*, in U.S. CONSTITUTIONAL LAW FOR GERMAN JURISTS, 21 (2012) (on aboriginal origins of federal idea. The separation of powers idea is also evident in the Haudenosaunee's Great Law of Peace, though it is more evidence in Montesquieu's Spirit of the Laws (1750); See generally Eric Engle, *Theseus's Ship of State: Confederated Europa between the Scylla of Mere Alliance and the Charybdis of Unitary Federalism*, 8 FLA. COASTAL L. REV. 27, 27 (2006) (for further information on confederation and federation in current law).

<sup>146</sup> PAUL BARRY CLARKE & JOE FOWERAKER, ENCYCLOPEDIA OF DEMOCRATIC THOUGHT, 438 (2001); See also Thomas Jefferson, *quoted in* MERRILL D. PETERSON, THE JEFFERSON IMAGE IN THE AMERICAN MIND 378 (1998) (“I have sworn upon the altar of God eternal hostility against every form of tyranny over the mind of man”).

<sup>147</sup> Harvey J. Kaye, THOMAS PAINE AND THE PROMISE OF AMERICA 220 (2007).

<sup>148</sup> THE DECLARATION OF INDEPENDENCE, para. 2 (U.S. 1776).

<sup>149</sup> See generally JOHN LOCKE, TWO TREATISES ON GOVERNMENT (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

<sup>150</sup> See generally MAGNA CARTA (1215).

<sup>151</sup> See generally ENGLISH BILL OF RIGHTS (1689).

million people. Although America was first, soon France<sup>152</sup> and then every Republic in the American continents replicated the basic ideas of the founding fathers. The great experiment<sup>153</sup> went global. States which claim to be theocracies, absolute monarchies, and dictatorships, once the world majority, are now the shrinking minority. The few remaining autocratic bastions, the remnants of the failed deluded communist experiment and vestigial dictatorships, will ultimately also embrace democracy, the rule of law, and human rights because that is in the self-interest of their own people and of the world. Democratic self-governance under the rule of law is the most effective governing system,<sup>154</sup> as history and technological progress show. So, ironically, the neoconservatives were right in their stated teleology, their stated goals of people-power leading to regime change. However, the neoconservatives were incorrect in their means to those ends, being far too Machiavellian and impatient for such lofty goals.<sup>155</sup> Unilateralist armed intervention and cynical deceits cannot be the tactic of a global liberation movement. Furthermore, the neocons relied too much on the stick of pure power without the carrot's suasion or diplomacy. Finally, the unstated goals of the neocons' poisoned their project,<sup>156</sup> with fatal consequences for far too many, including many Americans, as well as disastrous economic consequences.<sup>157</sup>

*c. The Tactics of Global Liberation: How to Free Slaves and Influence People*

The U.S. strategy of global development through freedom for enlightened self-interest, as reflected in the defense of the rule of law, democratic self-governance, and other human rights, is clear. That vision has successfully guided the United States since at least 1775 and will continue to guide it through all of the advances in life and affronts to its security. However, the appropriate tactics to attain the goal of global peace-through-prosperity and interdependence — global free trade and economic integration with equal justice under law — are less clear and will depend on factors outside of U.S. borders.

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<sup>152</sup> See generally National Assembly of France, *Declaration of the Rights of Man and the Citizen*, (Aug. 26, 1789), [http://avalon.law.yale.edu/18th\\_century/rightsof.asp](http://avalon.law.yale.edu/18th_century/rightsof.asp).

<sup>153</sup> Letter from George Washington to Catharine Macaulay Graham, (1790) (“the establishment of our new government seemed to be the last great experiment for promoting human happiness by a reasonable compact in civil society”).

<sup>154</sup> PUSHESH PANT, *INTERNATIONAL RELATIONS IN 21ST CENTURY*, 182 (2011) (claiming incorrectly that “After the [Second World] war, the Spanish civil war put an end to republicanism” [sic]. In fact, Spanish fascism extinguished the coalition of Marxists and Socialists (“republicans” i.e. not monarchists) prior to the start of the Second World War).

<sup>155</sup> LEO STRAUSS, *THOUGHTS ON MACHIAVELLI* (1958).

<sup>156</sup> See, e.g. *Two Views of the Iraq War*, DAILY KOS (Nov. 17, 2008), <http://www.dailykos.com/story/2008/11/17/662269/>.

<sup>157</sup> See Kimberly Amadeo, *Cost of Iraq War: Timeline, Economic Impact*, THE BALANCE (Jan. 17, 2017), <https://www.thebalance.com/cost-of-iraq-war-timeline-economic-impact-3306301> (estimating that the costs of the various wars the U.S. has engaged in since 2001 run to nearly 2 trillion dollars).

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For the first hundred years of the Republic it was possible, necessary, and desirable for the United States to follow George Washington's advice<sup>158</sup> and avoid foreign entanglements.<sup>159</sup> The United States, the world's sole secular republic was a *usurper* in a world of monarchies,<sup>160</sup> an implicit threat to every monarchy and theocracy on earth. The U.S. governed a diverse mix<sup>161</sup> of peoples: religious refugees, proto-capitalists, African slaves, natives, penal colonists, smugglers, and tax evaders. The Republic was large in area, yet far from the only foothold in the region, was sparsely populated, and could have easily been ripped apart by internal factionalism combined with foreign intervention, a real and frightening possibility.<sup>162</sup> Indeed, the greatest threat in the history of the Republic was the Civil War, a war in which President Lincoln, through careful diplomacy, was able to prevent French or British military intervention.<sup>163</sup> However, as the natural moat of the ocean shrank due to technology, as the populace and land area of the republic grew and grew, as more and more states became democracies, neutrality and non-interventionism, once wise policies<sup>164</sup> was no longer necessary and in fact became impossible and dangerous. U.S. isolationism further destabilized the already inherently unstable balance of power in Europe because: in the event of a general European war, the U.S. could in principle remain neutral or intervene, and could do so either for or against Britain. The neutrality of the United States prior to the First World War made it impossible for the various European powers to calculate the consequences of a general European war,<sup>165</sup> with tragic consequences in the form of two world wars, caused in part by American neutrality.<sup>166</sup> After the terrible world wars, the new Republic grew into a global power with allies throughout the world, then a superpower, and now is global hegemon.

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<sup>158</sup> Daniel L. Davis, *What Hillary and Trump Should Learn from Ike and George Washington*, NAT'L INTEREST (Aug. 15, 2016), <http://nationalinterest.org/blog/the-skeptics/washington-eisenhower-2016-warrior-presidents-who-shunned-17359?page=2>.

<sup>159</sup> President George Washington, Farewell Address (Sept. 19, 1796).

<sup>160</sup> ELLIS, *supra* note 141.

<sup>161</sup> VINCENT N. PARRILLO, *DIVERSITY IN AMERICA* (3rd ed. 2008).

<sup>162</sup> Richard J. Maybury, *The Founding Fathers: Smugglers, Tax Evaders And Traitors*, FREE MARKET 1 (July 1, 1987), [https://mises.org/system/tdf/fm787\\_0.pdf?file=1&type=document](https://mises.org/system/tdf/fm787_0.pdf?file=1&type=document).

<sup>163</sup> Michael Burlingame, *Abraham Lincoln*, MILLER CENTER OF PUBLIC AFFAIRS AT UNIVERSITY OF VIRGINIA, <http://millercenter.org/president/biography/lincoln-foreign-affairs> (last visited Feb. 24, 2017) (providing a brief overview of this fascinating piece of American diplomatic history).

<sup>164</sup> Thomas Jefferson, First Inaugural Address (Mar. 4, 1801) (“[e]qual and exact justice to all men, of whatever state or persuasion, religious or political; peace, commerce, and honest friendship with all nations, entangling alliances with none”); *See also* JOHN N. PETRIE, *American Neutrality in the 20th Century: The Impossible Dream*, in *THE MCNAIR PAPERS* (1995).

<sup>165</sup> JOHN WHITECLAY CHAMBERS, *THE OXFORD COMPANION TO AMERICAN MILITARY HISTORY* 495 (2d ed., 1999).

<sup>166</sup> *See generally From Neutrality to War: The United States and Europe, 1921 – 1941*, National Endowment for the Humanities, <https://edsitement.neh.gov/curriculum-unit/neutrality-war-united-states-and-europe-1921-1941> (for an accessible and comprehensible canonical layman's guide to the failure of neutrality).

## V. The Enemies of Liberalism

We now turn our attention to present or imminent challenges facing U.S. global hegemony. These are, roughly speaking, medieval Mohammedan maniacs, Russia, and China, addressed here in that order.

### 1. Medieval Mohammedan Maniacs

The Islamic religion was perverted by suicidal maniacs claiming to represent “pure” Islam.<sup>167</sup> In reality, the Mohammedan maniac’s ideology is not Islam, it is totalitarian fascism.<sup>168</sup> Like other<sup>169</sup> fascists they claim the state has absolute power and must be at the fore in every aspect of life and wish to return to a supposedly superior medieval way of life,<sup>170</sup> when disease was rampant and literacy rare. Terrorists are un-Islamic because they ignore the Koranic law of war, which expressly prohibits killing innocent women and children.<sup>171</sup> I call them Mohammedan, not Islamic, because they elevate man above God and do not seek peace.

The maniacal Mohammedans struck at the Republic because it is secular and liberal. Osama Bin Laden, leading a minority of maniacs, sought to isolate the United States from allies, to polarize conflicts between Islam against Liberalism and Christianity, and to bankrupt the United States.<sup>172</sup> Unilateralism, like permanent war, plays into the hands of the enemy because it needlessly isolates the United States alienating allies and encouraging neutrals to consider the enemy’s

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<sup>167</sup> See Osama Bin Laden, *Messages to the World: The Statements of Osama Bin Laden*, 167 (James Howarth trans., Bruce Lawrence ed. 2005); See also 15 *Dabiq* (former journal of ISIS) 4, 21 (2016), [www.clarionproject.org/factsheets-files/islamic-state-magazine-dabiq-fifteen-breaking-the-cross.pdf](http://www.clarionproject.org/factsheets-files/islamic-state-magazine-dabiq-fifteen-breaking-the-cross.pdf).

<sup>168</sup> ALBERT SPEER, *INSIDE THE THIRD REICH: MEMOIRS*, 115 (1970) (“You see, it’s been our misfortune to have the wrong religion. Why didn’t we have the religion of the Japanese, who regard sacrifice for the Fatherland as the highest good? The Mohammedan religion too would have been more compatible to us than Christianity. Why did it have to be Christianity with its meekness and flabbiness?”); See also HEINRICH HIMMLER, *ON THE FORMATION OF THE SS HANDSCHAR (MUSLIM) DIVISION*, (Aug 6, 1943) (“I hold all commanders and other SS officers, responsible for the most scrupulous and loyal respect for this privilege especially granted to the Moslems. They have answered the call of the Moslem chiefs and have come to us out of hatred for the common Jewish-Anglo-Bolshevik enemy and through respect and fidelity for he who they respect above all, the Führer, Adolf Hitler. There will no longer be the least discussion about the special rights afforded to the Moslems in these circles.”).

<sup>169</sup> *New Feudalism. Hitler’s World Order*, SYDNEY MORNING HERALD 9 (Jan. 15, 1941) <https://news.google.com/newspapers?nid=1301&dat=19410115&id=B-djAAAIAIBAJ&sjid=BZUDAAAIAIBAJ&pg=5817,1553585>; See also Heather Pringle, *Heinrich Himmler: The Nazi Leader’s Master Plan*, HISTORYNET (July 17, 2007), <http://www.historynet.com/heinrich-himmler-the-nazi-leaders-master-plan.htm>.

<sup>170</sup> David Carr, *With Videos of Killings, ISIS Sends Medieval Message by Modern Method*, N.Y. TIMES (Sept. 7, 2014), <https://www.nytimes.com/2014/09/08/business/media/with-videos-of-killings-isis-hones-social-media-as-a-weapon.html>; See also Michael Shammas, *ISIS’s Backwards ‘Caliphate’ Evokes Crusaders Over Caliphs*, HUFF. POST (Dec. 29, 2015), [http://www.huffingtonpost.com/mike-shammas/isiss-backwards-caliphate\\_b\\_8881636.html](http://www.huffingtonpost.com/mike-shammas/isiss-backwards-caliphate_b_8881636.html).

<sup>171</sup> QUR’AN 6:151 (“and do not kill a soul that God has made sacrosanct, save lawfully.”); See also QUR’AN 5:53 (“whoso kills a soul, unless it be for murder or for wreaking corruption in the land, it shall be as if he had killed all mankind; and he who saves a life, it shall be as if he had given life to all mankind.”).

<sup>172</sup> Osama Bin Laden, *Full Transcript of Bin Ladin’s Speech* (Nov. 1, 2004), AL JAZEERA <http://www.aljazeera.com/archive/2004/11/200849163336457223.html>.

line. Bin Laden's objective was to bankrupt<sup>173</sup> the United States and destroy U.S. hegemony in a foolish effort to ultimately<sup>174</sup> return the Arab world to a medieval myth: a pan-Islamic Caliphate<sup>175</sup> where slavery would be legal and gender roles strictly defined. The would-be Caliphate would supposedly conquer the infidels and dominate the planet creating a world united by Islam — whether it likes it or not, ignoring the Koranic statement that “there is no compulsion in religion.”<sup>176</sup> Supposedly fundamentalists, Bin Laden and his allies ignored the literal text of the Koran, which requires tolerance of monotheists,<sup>177</sup> equal rights for women,<sup>178</sup> and respect for the law of war.<sup>179</sup> Bin Laden's medieval fascism ignored the realities of scientific progress, social diversity, and the Koran itself. Consequently, his ideas and those of like-minded maniacs could never attract supporters among even moderate Moslems,<sup>180</sup> let alone authoritarian atheist gov-

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<sup>173</sup> *Bin Laden: Goal Is to Bankrupt U.S.*, CNN (Nov. 1, 2004), <http://www.cnn.com/2004/WORLD/meast/11/01/binladen.tape/>.

<sup>174</sup> Nancy A. Youssef, *Osama bin Laden Warned an Islamic State Would Fail*, DAILY BEAST (Mar. 1, 2016), <http://www.thedailybeast.com/articles/2016/03/01/osama-bin-laden-warned-an-islamic-state-would-fail.html>.

<sup>175</sup> Cassandra Vinograd, *Islamic State Declares Caliphate, Seizes Osama Bin Laden's Dream*, NBC NEWS (Aug. 26, 2015), <http://www.nbcnews.com/storyline/isis-uncovered/islamic-state-declares-caliphate-seizes-osama-bin-ladens-dream-n144221>.

<sup>176</sup> Sheikh Sâmi al-Mâjid, *Let There Be No Compulsion In Religion*, ISLAM TODAY, (Jan. 10, 2007), <http://en.islamtoday.net/artshow-262-3441.htm>.

<sup>177</sup> Z. Haq & A. Zahoor, *O People of the Book!, Verses From The Glorious Qur'an*, (1998), <http://www.cyberistan.org/islamic/peopleq.htm>.

<sup>178</sup> Abdur Rahman I. Doi, *Women in the Quran and the Sunnah*, ISLAM'S WOMEN, [http://www.islam-swomen.com/articles/women\\_in\\_quran\\_and\\_sunnah.php](http://www.islam-swomen.com/articles/women_in_quran_and_sunnah.php) (last visited Feb. 16, 2017); See also Carla Power, *What the Koran Really Says About Women*, TELEGRAPH (Nov. 6, 2015), <http://s.telegraph.co.uk/graphics/projects/koran-carla-power/>.

<sup>179</sup> See e.g., “ABOUL-ENEIN, H. YOUSUF AND ZUHUR, SHERIFA, ISLAMIC RULINGS ON WARFARE 22, (Diane Publishing Co., 2004). (“If they withdraw from you but fight you not, and [instead] send you [guarantees of] peace, then God hath opened no way for you [to war against them]” (Koran, 4:90); “But if they [the enemy] incline towards peace, do thou [also] incline towards peace, and trust in God: for He is the One that heareth and knoweth [all things]” (Koran, 8:61); “Stop, O people, that I may give you ten rules for your guidance in the battlefield. Do not commit treachery or deviate from the right path. You must not mutilate dead bodies. Neither kill a child, nor a woman, nor an aged man. Bring no harm to the trees, nor burn them with fire, especially those which are fruitful. Slay not any of the enemy's flock, save for your food. You are likely to pass by people who have devoted their lives to monastic services; leave them alone); See also Heba Aly, *Islamic Law and the Rules of War: More Than a Millennium Before the Codification of the Geneva Conventions, Most of the Fundamental Categories of Protection Could be Found in Islamic Teachings, Middle East Eye*, (Apr. 29, 2014) archived at <http://perma.cc/L6PQ-WTRW> (stating the Koran prohibits targeting civilians unless under “supreme emergency” to prevent the destruction of Islam); See also 10 Islamic Rules of War, 1000 Good Deeds, (Nov. 20, 2012), <http://1000gooddeeds.com/2012/11/20/10-islamic-rules-of-war/>.

<sup>180</sup> Scott MacLeod, *Curtains for Bin Laden's Freak Show*, HUFF. POST [http://www.huffingtonpost.com/scott-macleod/osama-bin-laden-freak-show\\_b\\_856512.html](http://www.huffingtonpost.com/scott-macleod/osama-bin-laden-freak-show_b_856512.html) (last visited Apr. 1, 2017) (“his fellow Muslims rejected his radical ideology and terrorist methods. He was unable to find or lead a mass following anywhere, including his native Saudi Arabia. He had already lost his last foothold in the Arab world a few months after I met him when the Sudanese government — Islamist allies — betrayed him and bin Laden skulked out of Khartoum in the dead of night. Fifteen years later, he was a fugitive on the run, holed up in a villa without Internet in northern Pakistan. He had become a man without adequate protection from bodyguards, much less a commander of a glorious Muslim army marching on Jerusalem. Bin Laden has no glory to show for his deeds, mainly just blood on his hands.”).

ernments such as China<sup>181</sup> or North Korea.<sup>182</sup> One of the major U.S. mistakes in the past twenty years has been the failure to split the moderate Moslem majority from the tiny minority of maniacal Mohammedans.<sup>183</sup> Trump<sup>184</sup> is just the most obvious recent example of this form of blindness, which fails to distinguish enemies from friends. Bin Laden, killed in Pakistan, failed in part because he did not consider the resilience of U.S. political and financial institutions, the strength of the American people, and the attractive power of democratic freedom.<sup>185</sup> Bin Ladenism is unsustainable because it is literally suicidal, repulsive, and thus is self-defeating. Consequently, the threat of the so-called "Islamic" state — really, Mohammedan fascism — is being slowly extinguished. The so-called "Islamic State" was premature,<sup>186</sup> maniacally ruthless, and is being squeezed to the point where it will be crushed.<sup>187</sup> Of course, some individuals, isolated and scattered, will escape from the cauldron of the "Caliphate." Many of those isolated maniacs will not learn and will still try to engage in disorganized sporadic suicidal terrorism. However, as they literally die out, literally get older, and find fewer and fewer resources for support, the scattered survivors of Mohammedan fascism will watch their would-be murder spree fail to attain any of its goals. The Mohammed-

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<sup>181</sup> Jennine Liu, *China's ISIS Woes: With its Rising Overseas Presence, Can China Sustain its Policy of Non-interference?*, THE DIPLOMAT (Feb. 26, 2016), <http://thediplomat.com/2016/02/chinas-isis-woes/> ("On November 18, 2015, the Islamic State, also known as the Islamic State of Iraq and al-Sham (ISIS) executed a Chinese hostage known as Fan Jinhui. A self-professed wanderer, the Islamic State kidnapped him in Syria and offered him up for sale initially before executing him. Fan is the first Chinese hostage to be killed by the Islamic State, although in 2014, ISIS executed three Chinese militants for attempted desertion."); See also Neelabh Chaturvedi, *Islamic State Recognizes Taiwan in New Propaganda Video*, CNBC (Nov. 25, 2015), <http://www.cnbc.com/2015/11/25/islamic-state-riles-china-by-recognizing-taiwan-in-new-propaganda-video.html>. (ISIS claims to have recognized Taiwan as an independent country, almost certainly incurring the ire of the People's Republic of China thereby.)

<sup>182</sup> *North Korea Sends 'Message of Sympathy' for Brussels Attacks*, THE KOREA TIMES (Mar. 23, 2016), <http://www.koreatimesus.com/n-korea-sends-message-of-sympathy-for-brussels-attacks/>.

<sup>183</sup> James Kurth, *Splitting Islam*, THE AMERICAN CONSERVATIVE (Sept. 26, 2005), <http://www.theamericanconservative.com/articles/splitting-islam/>. ("The history of the Cold War shows that, when dealing with an opposing political ideology, a strategy of separating its moderate adherents from its extremist adherents can sometimes be successful. In Europe in particular, the United States was very successful in separating moderate Marxists—socialists and social democrats—from extremist Marxists—communists—during the 1950s, and this division largely persisted for the rest of the Cold War. This splitting strategy was not very effective in the Third World, however. There, moderate Marxists—the 'Third Way'—rarely existed or, if they did, they were soon marginalized by the extremist Marxists or repressed by the authoritarian, anticommunist regimes that were the allies of the United States. Today's counterpart would be separating moderate Muslims from extremist Islamists.")

<sup>184</sup> Paul R. Pillar, *The Foreign Consequences of Trump's Racism*, NAT'L INTEREST (June 15, 2016), <http://nationalinterest.org/blog/pillar/the-foreign-consequences-trumps-racism-16597>.

<sup>185</sup> Nikki Knewstubb, *Bush Rejects Taliban Offer to Hand Bin Laden Over*, THE GUARDIAN (Oct. 13 2001), <https://www.theguardian.com/world/2001/oct/14/afghanistan.terrorism>; See also Brian Daks, *Osama Truce Offer Rejected*, CBS NEWS (Apr. 15, 2004), <http://www.cbsnews.com/news/osama-truce-offer-rejected>. ("I am offering a truce to European countries," the taped message said as the stations showed an old, still picture of bin Laden. "Its core is our commitment to cease operations against any country which does not carry out an onslaught against Muslims or interfere in their affairs.")

<sup>186</sup> Murad Batal al-Shishani, *The Islamic State's Strategic and Tactical Plan for Iraq*, TERRORISM MONITOR (Aug. 8, 2014), <https://jamestown.org/program/the-islamic-states-strategic-and-tactical-plan-for-iraq/>.

<sup>187</sup> Mohammed Nuruzzaman, *Is the ISIS Caliphate Collapsing?*, NAT'L INTEREST (Aug. 13, 2016), <http://nationalinterest.org/feature/the-isis-caliphate-collapsing-17338>.

dan maniacs' challenge, already fading, will finally disappear. Their back has already been broken.<sup>188</sup>

## 2. Russia

The defeat of maniacal Mohammedan fascism is no guarantor of the triumph of liberalism: there are other more serious challengers. Though he finally failed, Bin Laden's tactics were successful enough, mostly because of U.S. strategic errors, to encourage authoritarians in China and autocrats in Russia to mount challenges to liberal democracy. Russian and Chinese challenges to liberalism, enabled by the Mohammedan maniacs, will persist after the defeat of the so-called "Islamic state."

Unfortunately, efforts to help Russia reform its domestic law and society to grow Russia into the rule of law, free-trade, prosperity, and peace have largely failed.<sup>189</sup> Russian foreign policy has emerged as consistently and constantly deceptive and hostile, enabled by the fading and failing jihad, which as we see in Chechnya is also an enemy of Russia.<sup>190</sup> The bellicose actions of the Russian federation constitute an attempt by Russia to make itself important again by starting a new cold war<sup>191</sup> to create a multi-polar world.<sup>192</sup> However, history shows that multi-polarity leads to large great-power wars, whereas unipolarity is associated with great peace,<sup>193</sup> e.g. the Pax Romana,<sup>194</sup> the Haudenosaunee (Iroquois) Great Law of Peace,<sup>195</sup> the Qin pax sinica,<sup>196</sup> pax Britannica,<sup>197</sup> Pax Ameri-

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<sup>188</sup> Jean Marc Mojon & Tony Gamal-Gabriel, 2016, *The Year the IS 'Caliphate' Buckled*, AGENCE FR. PRESSE (Dec. 16, 2016), <https://www.yahoo.com/news/2016-caliphate-buckled-064441981.html>.

<sup>189</sup> See, e.g. RUSSIA, THE EUROPEAN UNION AND THE CIS (Eric Engle ed., 2012).

<sup>190</sup> See, e.g., Mansur Mirovalev, *Chechnya, Russia and 20 Years of Conflict*, ALJAZEERA (Dec. 11, 2014), <http://www.aljazeera.com/indepth/features/2014/12/chechnya-russia-20-years-conflict-2014121161310580523.html>.

<sup>191</sup> See generally Eric Engle, *A New Cold War? Cold Peace. Russia, Ukraine, and NATO*, 59 ST. LOUIS U. L.J. 97 (2014).

<sup>192</sup> *Shift to Multipolar World: Lavrov Says Russia Working to Adjust Foreign Policy to New Reality*, RT NEWS (Apr. 10, 2016), <https://www.rt.com/news/339082-russia-new-foreign-policy-multipolar/>; See also Molly K. McKew, *Putin's Real Long Game: The World Order We Know is Already Over, and Russia is Moving Fast to Grab the Advantage. Can Trump Figure Out the New War in Time to Win it?*, POLITICO (Jan. 1, 2017), <http://www.politico.com/magazine/story/2017/01/putins-real-long-game-214589>; See also Michael Crowley, *Putin's Revenge: Humiliated by the 1990s, Russia's strongman is determined to win Cold War 2.0. He may be succeeding*, POLITICO (Dec. 16, 2016), <http://www.politico.com/magazine/story/2016/12/russia-putin-hack-dnc-clinton-election-2016-cold-war-214532>.

<sup>193</sup> See generally William C. Wohlforth, *Unipolarity, Status Competition, and Great Power War*, 61 WORLD POL. 28 (2009).

<sup>194</sup> See, e.g., ADRIAN GOLDSWORTHY, *PAX ROMANA: WAR, PEACE AND CONQUEST IN THE ROMAN WORLD* (2016).

<sup>195</sup> See, e.g., BRUCE ELLIOTT JOHANSEN & BARBARA ALICE MANN, *ENCYCLOPEDIA OF THE HAUDENOSAUNEE (IROQUOIS CONFEDERACY)* (2000).

<sup>196</sup> 2 ELIZABETH POLLARD, *WORLDS TOGETHER WORLDS APART* 242 (W.W. Norton & Company 2015).

<sup>197</sup> See, e.g., BARRY GOUGH, *PAX BRITANNICA: RULING THE WAVES AND KEEPING THE PEACE BEFORE ARMAGEDDON* (2014).

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cana.<sup>198</sup> Hobbes tells us why: “during the time men live without a common power to keep them all in awe, they are in that condition which is called war, and such a war as is of every man against every man.”<sup>199</sup> A hegemon provides that common power to keep them all in awe. Since a multipolar world would be even more dangerous, it is fortunate that the geopolitical facts on the ground — population and poverty — as well as lack of a coherent ideology mean Russia was easily isolated and is unable to marshal allies to mount more than a regional challenge to liberalism. Despite Trump's desire to improve U.S.-Russian relations, he will likely be unable to do so. This is because Russian foreign policy tends to be duplicitous, intransigent, and one sided, and none of that will change just because Trump is in office.<sup>200</sup> The fact is, the United States and Russia have little in common neither in terms of interests or values.<sup>201</sup> Russian efforts to dominate immediate neighbors by force and fraud will ultimately fail due to Russian bankruptcy,<sup>202</sup> both metaphoric and real. No one likes a bully. Russia is not a large state in terms of population nor is it technically advanced or particularly productive.<sup>203</sup> Russia lacks a coherent ideology around which to raise a serious challenge to liberalism.<sup>204</sup> So any Russian challenge to liberalism will be at most regional. One tragedy of the early 2000s was the inability of Russia to grow westwards or the West to include Russia, but the fault of this tragedy ultimately is found in Moscow, not Washington, London, Paris, or Berlin.

Russian governance can be characterized as corrupt, deceptive, lawless, yet realist.<sup>205</sup> The Russian state seeks to maximize Russian power through cunning policies of force and fraud.<sup>206</sup> On the one hand, isolating a thoroughly corrupt dishonest bellicose regime with no unique ideology would appear to be easy: Great Russian orthodox Christian authoritarianism by nature lacks global appeal. On the other hand, Russian violent lawlessness presents a negative role model to the other great state challenge to U.S. global hegemony, China. Obviously, if there are no consequences when Putin occupies invades and annexes neighbors like Moldova, Georgia, and Ukraine, then we should expect China and many other states to do likewise, say, in the South China Sea. This explains why stopping Putin fast and hard is vital to the U.S. led rules-based world order. China must note the consequences of Russian corruption and illegality, which are pov-

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<sup>198</sup> See generally, JAMES MACDONALD, *WHEN GLOBALIZATION FAILS: THE RISE AND FALL OF PAX AMERICANA* (2016).

<sup>199</sup> Thomas Hobbes, *Of Man, Being the First Part of Leviathan*, 34 HARV. CLASSICS, pt. 5, § 13, at ¶ 8 (Charles W. Eliot ed., 2001) (1651).

<sup>200</sup> See generally, Engle, *supra* note 191 (analyzing the Russian challenge and correct U.S. responses).

<sup>201</sup> See, e.g., Eric Engle, *Gay Rights in Russia? Russia's Ban on Gay Pride Parades and the General Principle of Proportionality in International Law*, 6/2 J. OF EURASIAN L. 22 (2013).

<sup>202</sup> See, e.g., Eric Engle, *It Would Be Funny, If It Weren't So Sad: Putin and Hitler*, ST. LOUIS U. L. J. (2015) <http://www.slu.edu/colleges/law/journal/it-would-be-funny-if-it-weren-t-so-sad-putin-and-hitler/>.

<sup>203</sup> Eric Engle, *A New Cold War? Cold Peace. Russia, Ukraine, and NATO*, 59 ST. LOUIS U. L. J. 97-174 (2015) (providing an extensive analysis of the Russian challenge and correct U.S. responses to it).

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

erty and isolation. The consequence for illegal annexation must be severe, otherwise we would return to the deadly poor prewar world of constant border wars.

### 3. The Chinese Challenge

Dictatorial Chinese-atheist Marxism and theocratic-jihadi fascism have little in common beyond authoritarianism. Unlike Mohammedan fascism, the current system of government in China is not totalitarian. The People's Republic of China, unlike the so-called Islamic state, is not totalizing and omnipresent and does not intrude into all social spheres of life, unlike fascist theocracy. Chinese and Russian political ambitions are organized around state power, not random murder stunts. Organized state-power constrains violent tendencies but also channels and focuses them. Although Russian and Chinese adventurism may be foolish, China and Russia are not maniacal or even necessarily irrational. Consequently, Russia and China raise greater strategic and long-term challenges to global liberalism, yet less immediate tactical challenges than Mohammedan fascism.<sup>207</sup> The Russian and Chinese challenges to liberalism must be met unequivocally and resolutely, yet flexibly, relying on persuasive bargaining and negotiating as much as on sanctions, deterrence, and global embarrassment.

Russian invasions and annexations are a direct challenge to a rules based world-order. However, China poses a greater and more difficult potential challenge because it has a much larger and more productive population and is led by the Communist party and the elites who wield the entirety of its power.<sup>208</sup> Fortunately, to present, the Chinese challenge is largely potential rather than actual.<sup>209</sup> That may be in part because China must cope with the fact of newfound prosperity and the domestic consequences thereof. One major challenge is pollution: China is very badly polluted.<sup>210</sup> Simply cleaning up China's own environment will greatly improve the quality of life for Chinese people and is an important task of the Chinese government, if only to secure its own legitimacy in the eyes of the Chinese people, who will increasingly want a comfortable western lifestyle.<sup>211</sup> Moreover, the Chinese people, now enriched due to working within a market economy, will also increasingly desire the same liberal advantages as their western counterparts, whether in the form of freedom of political, artistic, or sexual expression; those troublesome liberties dictatorships cannot control and

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<sup>207</sup> Dave Majumdar, *America Reveals 'Great Power' Plans Against Russia and China*, NAT'L INTEREST (Feb. 3, 2016), <http://nationalinterest.org/blog/the-buzz/america-reveals-great-power-plan-against-russia-china-15103>.

<sup>208</sup> Nike M. Kamrany & Frank Jiang, *China's Rise to Global Economic Superpower*, HUFF. POST [http://www.huffingtonpost.com/nike-m-kamrany/chinas-rise-to-global-eco\\_b\\_6544924.html](http://www.huffingtonpost.com/nike-m-kamrany/chinas-rise-to-global-eco_b_6544924.html) (last visited Apr. 25, 2017).

<sup>209</sup> Xie Tao, *Assessing the China Challenge for Trump's Presidency*, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE (Jan. 18, 2017), <http://carnegieendowment.org/2017/01/18/assessing-china-challenge-for-trump-s-presidency-pub-67690>.

<sup>210</sup> Jonathan Kaiman, *China's toxic Air Pollution*, THE GUARDIAN (Feb. 25, 2014), <https://www.theguardian.com/world/2014/feb/25/china-toxic-air-pollution-nuclear-winter-scientists>.

<sup>211</sup> *Why China's Youth Find Western Culture Attractive*, PBS (Feb. 12, 2013) [http://www.pbs.org/newshour/bb/world-jan-june12-china\\_02-13/](http://www.pbs.org/newshour/bb/world-jan-june12-china_02-13/).

thus distrust and usually suppress. China faces related governance problems.<sup>212</sup> For example: How much freedom of expression for religion is permitted in an atheist government where Party membership and religious affiliation are incompatible?<sup>213</sup> How to manage party political local elections?<sup>214</sup> Could a federal China better govern regions like Tibet, Hong Kong, Taiwan? Most importantly, the Chinese government faces the immense task of creating a rule of law state and rooting-out corruption.<sup>215</sup> The single party “people’s dictatorship”<sup>216</sup> cannot maintain effective power without a rule of law state which is free of corruption. These stresses constrain and compel Chinese foreign policy, but will not disappear even if China’s adventuresome foreign policies prevail.

So, China faces serious domestic challenges. Perhaps surprisingly, those very challenges in part explain China’s adventurous foreign policy. The Chinese regime seeks to maximize its foreign policy influence to unite and impress its own people and distract<sup>217</sup> them from domestic problems.<sup>218</sup> Chinese foreign policy initiatives include the creation of a parallel banking system with, shall we say, “lax” compliance requirements in comparison to those now typical in western banks.<sup>219</sup> The Asian Infrastructure and Investment Bank in the best case will take money laundering business away from HSBC and in the worst case, which is likely, will end up being a bank for dictatorships.<sup>220</sup>

Meanwhile, China makes exorbitant claims to land and waters in the East China and South China Seas. China has claimed shoals and islands, reclaiming land from the adjoining sea to expand said shoals and islands to build military

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<sup>212</sup> Eric Fish, *Why’s Beijing So Worried About Western Values Infecting China’s Youth?*, CHINA FILE (Feb. 4, 2017), <https://www.chinafile.com/features/whys-beijing-so-worried-about-western-values-infecting-chinas-youth>.

<sup>213</sup> Eleanor Albert, *Religion in China*, COUNCIL ON FOREIGN RELATIONS (June 10, 2015), <http://www.cfr.org/china/religion-china/p16272>.

<sup>214</sup> *Vote As I Say: Independent Candidates For Elections Appear To Be a Spontaneous Step Too Far For The Communist Party*, THE ECONOMIST (Jun. 16, 2011), <http://www.economist.com/node/18836744>.

<sup>215</sup> Macabe Keliher & Hsinchao Wu, *How To Discipline 90 Million People: Can China’s President Reform The World’s Largest One-Party State By Reforming Its Officials?*, THE ATLANTIC (Apr. 7 2015), <https://www.theatlantic.com/international/archive/2015/04/xi-jinping-china-corruption-political-culture/389787/>.

<sup>216</sup> XIANFA art. 10, §5 (1982) (China) (“The People’s Republic of China is a socialist state under the people’s democratic dictatorship led by the working class and based on the alliance of workers and peasants.”).

<sup>217</sup> Zheng Wang, *How Foreign Analysis of China’s Military Parade Missed the Point*, THE DIPLOMAT (Sept. 10, 2015), <http://thediplomat.com/2015/09/how-foreign-analysis-of-chinas-military-parade-missed-the-point/> (“Many reports about the September 3 military parade claim that Beijing wanted to use the parade to distract people’s attention from the stock market and China’s economic problems.”).

<sup>218</sup> Ted Galen Carpenter, *Could China’s Economic Troubles Spark a War?*, NAT’L INTEREST (Sept. 6, 2015), <http://nationalinterest.org/feature/could-chinas-economic-troubles-spark-war-13784>.

<sup>219</sup> See, e.g., Fan Yu, *Follow the Money: Chinese Banks On Course For Global Expansion*, EPOCH TIMES (Oct. 9, 2016), <http://www.theepochtimes.com/n3/2169046-follow-the-money-chinese-banks-on-course-for-global-expansion/>. (“The U.S. Federal Reserve last month ordered the New York branch of the Agricultural Bank of China to improve its anti-money-laundering (AML) infrastructure after examiners found ‘significant deficiencies’ in its AML controls.”).

<sup>220</sup> David McLaughlin & Greg Farrell, *HSBC Money-Laundering Controls Aren’t Sufficient, U.S. Says*, BLOOMBERG (Apr. 1, 2016), <https://www.bloomberg.com/news/articles/2016-04-01/hsbc-hasn-t-adhered-to-terms-of-u-s-prosecution-agreement-imhzdm5q>.

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bases. States are in fact free to reclaim land from the sea, accreting thereby their sovereign territory, including by construction of artificial islands.<sup>221</sup> However, though occupied by China and thus de facto Chinese, the de jure sovereignty over at least some those islands and shoals is disputed.<sup>222</sup> More troubling, China also claims extensive exclusive fishing and mineral rights over the adjoining waters and seabed.<sup>223</sup> Those claims to exclusive economic rights are clearly contrary to international law.<sup>224</sup>

The Chinese policies of “merritorial”<sup>225</sup> expansion are examples of rational power maximization. China undertakes expansionism in part to deflect domestic challenges mentioned earlier: China's government seeks to unite the Chinese people around foreign fears and distract the Chinese people from domestic problems through its adventurist foreign policy in order to obtain populist legitimacy. Hopefully, China's policies will prove less extreme and end better than when Galtieri tried a similar insular foreign policy over the Falklands to distract domestic discontent in Argentina.<sup>226</sup> How else may China manifest its foreign policy ambitions? China might try to split the U.S., Taiwan, Korea, Japan, Philippines, and Vietnam from each other. However, that policy, if attempted, would likely only drive those States into closer relations with the United States. China might even try to defeat some or all of these countries in regional wars, proceeding from the weakest to the strongest just like Russia did against Moldova, then Georgia, and most recently Ukraine.

China may also try to lure the U.S. into expensive over-commitment. Although the U.S. should help China's neighbors defend themselves, for example, by arming and upgrading the submarine forces of these countries, the U.S. should also do so frugally. However, Chinese claims to territorial waters and exclusive economic zones in areas where such rights clearly do not accrue under current

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<sup>221</sup> United Nations Convention on the Law of the Sea, art. 56(1)(b)(i), Dec. 10, 1982, 1833 U.N.T.S. 397; *See also* art. 60(1)(a).

<sup>222</sup> Richard Javad Heydarian, *A Dangerous Showdown in the South China Sea*, NAT'L INTEREST (June 28, 2014), <http://nationalinterest.org/feature/dangerous-showdown-the-south-china-sea-10775>.

<sup>223</sup> Daniel Livingstone, *The Spratly Islands: A Regional Perspective*, 1 J. OF THE WASHINGTON INST. OF CHINA STUDIES, 149, 149 (Fall 2006).

<sup>224</sup> *See generally* Ronald O'Rourke, CONG. RESEARCH SERV., R42784, MARITIME TERRITORIAL AND EXCLUSIVE ECONOMIC ZONE (EEZ) DISPUTES INVOLVING CHINA: ISSUES FOR CONGRESS (2015); *See also* United Nations Convention on the Law of the Sea, art. 60(8), Dec. 10, 1982, 1833 U.N.T.S. 397 (“Artificial islands, installations and structures do not possess the status of islands. They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea, the exclusive economic zone or the continental shelf. Natural reefs in contrast may be used as a measure of the territorial sea”); *See also* United Nations Convention on the Law of the Sea, art. 6, Dec. 10, 1982, 1833 U.N.T.S. 397 (“Reefs in the case of islands situated on atolls or of islands having fringing reefs, the baseline for measuring the breadth of the territorial sea is the seaward low-water line of the reef, as shown by the appropriate symbol on charts officially recognized by the coastal State.”).

<sup>225</sup> This is a neologism the author coined. *Mare* is of course Latin for the sea. China seeks not only to claim and reclaim islands, rocks, and shoals, but also (and illegally) to claim subjacent mineral and fishing rights in the adjoining seas.

<sup>226</sup> Edward Schumacher, *Galtieri Bars Peace If Britain Restores It's 'Colonial Rule'*, N.Y. TIMES (June 16, 1982), <http://www.nytimes.com/1982/06/16/world/galtieri-bars-peace-if-britain-restores-its-colonial-rule.html>.

international law must be opposed. Those territorial claims which are dubious<sup>227</sup> must also be contested. The reason even friends of China must contest these claims is because under international law if one country makes a legal claim, and that claim goes uncontested by other countries then after sufficient time the claim becomes legal as a matter of international customary law.<sup>228</sup> Consequently, the United States and U.S. regional allies must consistently vigorously oppose Chinese over-reach and aggrandizement, even while acknowledging those Chinese claims which are in fact legitimate. The United States ought to support China's neighbors, not to oppose China but rather to help China avoid the path that Russia has taken. Given the risk of war or a series of wars between China and its neighbors, it is very important to the United States to make a clear example of what happens to countries such as Russia which decide to wage wars of conquest and to signal that the consequences of regional war would be bad, even disastrous, for China. Clear deterrent signaling is crucial. Russia is an example for China and should be made an example of for that reason. That too is basic deterrence. Although China challenges the rules-based world order, it does so in part as a reaction to its own internal problems, problems which frankly threaten any single party ruling class due to a lack of domestic rule of law. Aristotle already warned that dictatorships are unstable because of the concentration of power in the hands of the tyrant, consequent lawlessness, and the inevitable instability upon the succession of the tyrant.<sup>229</sup> That explains why liberalization is in the Chinese government's self-interest. The Chinese government thus faces constraints and if rational a balanced policy of "carrots" and "sticks" — trade and development if China acts responsibly, alliances arms and sanctions if China acts foolishly — should be effective at persuading China to pursue its self-interest rationally by building the rule of law in its domestic and foreign legal relations as opposed to undertaking foolish risky international adventures. The facts of environmental, demographic, and economic challenges explain why the networked interdependent global liberal core can help China grow into that core rather than further out into the poor periphery which the Russian state is currently riding headlong into — if the Chinese government so chooses. Russia is the negative example for China, the harbinger of the fate of corrupt lawless authoritarian regimes.

China both faces and poses challenges, challenges that can be resolved. However, resolving the challenges of China may not be easy. If — and only if — one

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<sup>227</sup> See *How Uninhabited islands soured China-Japan ties*, BBC (Nov. 10, 2014), <http://www.bbc.com/news/world-asia-pacific-11341139> (China's claim to the uninhabited Senkaku islands is one example of a dubious Chinese claim; those islands were discovered by China, but ceded to Japan by treaty over a hundred years ago. While mere discovery does give de jure executory title, this title was ceded and was never perfected by the fact of Chinese settlement into vested sovereign territory).

<sup>228</sup> *Customary International Law*, WEX LEGAL DICTIONARY, [https://www.law.cornell.edu/wex/customary\\_international\\_law](https://www.law.cornell.edu/wex/customary_international_law) (last visited Feb. 16, 2017).

<sup>229</sup> Aristotle, *supra* note 110 ("Tyranny has all the vices both of democracy and oligarchy"; "There are two chief motives which induce men to attack tyrannies- hatred and contempt. Hatred of tyrants is inevitable, and contempt is also a frequent cause of their destruction.").

proceeds from correct assumptions can we avoid “Thucydides Trap.”<sup>230</sup> Professor Graham Allison, at Harvard University, noted the tendency of status quo hegemony to fail to adequately contain or foster rising powers, noting that rising powers tend to go to war with the dominant hegemon. Allison regards this as a real risk and the greatest challenge to U.S. foreign policy in this century. Given the risks we face, we must better understand the neoconservative errors of the first decade of this century in order to avoid further errors and meet current challenges.

Failure to understand the nature and limits of war and the incapacity to conceive of a rapid solution to an isolated problem explains how the United States crippled its own foreign policy sufficiently that authoritarian kleptocracies,<sup>231</sup> most notably Russia, literally bankrupted in a cold war, now try to flout international law. However, the kleptocrats and authoritarians, like the maniacal Mohammedans, are incapable of forming a successful alternative ideology to global liberalism. Corruption fosters poverty making kleptocracy a poor contender for global or even regional dominance. Corruption and poverty, rather than “realistic” or “purifying” expressions of “national will” or “the spirit of the times” are in fact repulsive failures as governance tools. Such structures draw even fewer allies than cynicism, unilateralism, or one-dimensional militarism. Does anyone really expect technologically-backward impoverished nations to dominate the planet? Why? How? Placing one's faith in the uneducated, impoverished, desperate, deluded, and deceived global proletariat led by a conspiratorial, dictatorial, vanguard party of intellectuals is only slightly less unrealistic than placing one's faith in the hands of those who wish to return to medieval slavery, as history has shown.

## VI. Conclusion

The United States champions a universal liberal ideology. The United States is also a global “refugee center”, a multicultural melting pot, literally populated by people from the entire planet. These are two pillars of American power that President Trump can and should stand on. Due to America's universal ideology and population base it can successfully appeal to liberal elements within authoritarian and developing countries throughout the world to attract allies and transform corrupt impoverished authoritarian regimes into productive participants in a new world order based on the rule of law, not men.

U.S. global hegemony is not merely based on military power or economic productivity. U.S. hegemony is also culturally attractive throughout the world, and not merely because of Hollywood or propaganda. However, to turn global support into aid and to export the ideas of democratic self-government under the

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<sup>230</sup> Allison Graham, *The Thucydides Trap: Are the U.S. and China Headed for War?*, THE ATLANTIC (Sept. 24, 2015), <http://www.theatlantic.com/international/archive/2015/09/united-states-china-war-thucydides-trap/406756/>.

<sup>231</sup> See KAREN DAWISHA, PUTIN'S KLEPTOCRACY: WHO OWNS RUSSIA? 313 (2015), <https://books.google.com/books?isbn=1476795207> (defining kleptocracy as a particular form of authoritarian or autocratic regime in which the governing class systematically strips wealth from the nation and appropriates it to itself. North Korea and Russia are two of the more obvious examples of kleptocracies).

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rule of law the United States requires a much more optimistic and disciplined vision of the world than the dismally depressing and utterly unrealistic neoconservative nonsense that crippled U.S. foreign policy for at least the first decade of this century. President Trump's economic nationalism can and should broaden its horizons and ambition to make America the undisputed global leader again by standing on these pillars of American power.

Additionally, President Trump rightly recognizes that to "make America great again" the United States must choose its battles wisely and fight only battles it will win. Rather than seeking to impose "a new American century"<sup>232</sup> on the basis of lawless cynical unilateral violence, we must call for partnerships among nations based on mutual respect, tolerance, and the rule of law to lift the developing world out of lawless corruption, poverty, and self-destructive belligerency into the developed world, enjoying the free movement of goods, persons, capital, and ideas. Populists must be criticized when intolerant or unilateral and encouraged to adapt their thinking toward liberal internationalism as that is the most effective base for trade in a tightly networked interdependent world.

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<sup>232</sup> See generally Felicity Arbuthnot, THE NEOCONS' PROJECT FOR THE NEW AMERICAN CENTURY, GLOBALRESEARCH (Sept. 20, 2012) <http://www.globalresearch.ca/the-neocons-project-for-the-new-american-century-american-world-leadership-syria-next-to-pay-the-price/5305447>.

TRANSNATIONAL SUPPORT AND LEGAL EDUCATION REFORM IN  
DEVELOPING COUNTRIES: FINDINGS AND LESSONS  
FROM BURMA/MYANMAR

Jonathan Liljeblad\*

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**Abstract**

Myanmar's current transition involves a concerted international effort to promote the rule of law. Legal education is integral to promoting the rule of law, and so calls for development aid that works to improve a country's legal education system. The nature of development aid, however, calls for some analysis of its efficacy. This paper contributes to this call by taking as a case study the state of transnational aid efforts to improve legal education in Burma/Myanmar, and finds issues that threaten the efficacy of international aid efforts to reform legal education in developing countries. The analysis concludes with recommendations to mitigate such issues.

**I. Introduction**

Myanmar's current transition involves a concerted international effort to promote the rule of law. This follows development philosophies that see the rule of law as a necessary condition to facilitate and support a legal system sufficient to sustain the flow of information, goods, and services that constitute political, eco-

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conomic, and socio-cultural development.<sup>1</sup> As a result, development aid requires some dedication of energy to ensuring the rule of law.

Legal education is integral to promoting the rule of law,<sup>2</sup> and so calls for development aid that works to improve a country's legal education system. For a country like Myanmar, which is criticized for suffering from a weak rule of law,<sup>3</sup> this makes it imperative that foreign aid providers devote attention to the condition of law schools and their progress in the country's ongoing transition. Specifically, this calls for legal education development aid that expands the capacities and skills of law school faculty, staff, and students to contribute to the concurrent efforts to advance the rule of law.

The nature of development aid, however, calls for some analysis of its efficacy. While development aid has been effective in producing some improvements in education within regions like Southeast Asia,<sup>4</sup> the history of development aid is rife with criticisms that it engenders complications harmful to its recipients, results in complex policies that are inefficient, fosters corruption by enabling actors with no accountability, and frustrates endemic reform efforts within the societies it is intended to help.<sup>5</sup> Above all, it is charged with a failure to achieve its intended goals of easing underdevelopment.<sup>6</sup> As a result, it is necessary to study aid to ensure its effectiveness.<sup>7</sup>

This paper contributes to this call by taking as a case study the state of transnational aid efforts to improve legal education in Burma/Myanmar. The objective is to provide analysis drawing upon perspectives of aid beneficiaries in a manner that informs potential aid providers. Particularly, this paper draws upon commentaries from Myanmar law schools regarding their experiences with Western

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<sup>1</sup> See LAW IN THE PURSUIT OF DEVELOPMENT: PRINCIPLES INTO PRACTICE?, at 5-6 (Amanda Perry-Kessaris ed., 2010).

<sup>2</sup> Ronald Brand, *The Export of Legal Education: Its Promise and Impact in Transition Economies*, in THE EXPORT OF LEGAL EDUCATION: ITS PROMISE AND IMPACT IN TRANSITION SOCIETIES, at 2 (Ronald Brand and D. Wes Rist, eds., 2009).

<sup>3</sup> INT'L BAR ASS'N HUMAN RIGHTS INST., THE RULE OF LAW IN MYANMAR: CHALLENGES AND PROSPECTS 16, 116 (2012).

<sup>4</sup> Tun Lin Moe, *An Empirical Investigation of Relationships Between Official Development Assistance (ODA) and Human and Educational Development*, 35 INT'L J. OF SOC. ECON 202, 221 (2008) (providing examples of improvements development aid has assisted Southeast Asia).

<sup>5</sup> See Alberto Alesina and David Dollar, *Who Gives Foreign Aid to Whom and Why?*, 5 J. OF ECON. GROWTH 33, 33-34 (2000) (providing a summary of the discovered patterns that occur during the allocation of foreign aid); see also DEBORAH BRAUTIGAM, EXPERT GRP. ON DEV. ISSUES, AID DEPENDENCE AND GOVERNANCE 33-34 (2000) (discussing aid intensity and factors that contribute to its dependence); see also David Chapman, *Assessing Directions for Educational Development Assistance*, 47 INT'L REV. OF EDUC. 459, 468-470 (2001) (discussing organizations and the ways they affect a country's development after they have provided a country with aid); see also Leif Wenar, *Accountability in International Development*, 20 ETHICS AND INT'L AFF. 1, 15 (2006) (explaining how providing a country with monetary aid actually hurts more than it helps).

<sup>6</sup> Tomi Ovaska, *The Failure of Development Aid*, 5 CATO J. 175, 186 (2003) (explaining why institutions like the World Bank fail their intended goals); see also Ashok Kumar Pankaj, *Revisiting Foreign Aid Theories*, 42 INT'L STUD. 103, 114 (2005) (discussing historical evidence of countries which have made significant progress without foreign aid and discusses why they prevailed).

<sup>7</sup> Tim Buthe et al., *Humanitarian Principles, Economic Development Objectives, and Organizational Interests in NGO Private Aid Allocation*, 66 INT'L ORG. 571, 575 (2012) (highlighting why studying aid is critical).

development aid directed at assisting legal education reform. The analysis begins with a review of the research methodology used in this study. The discussion then offers a brief background section that describes the context of underdevelopment, political transition, and government treatment of universities that set the challenges for legal education reform in Myanmar. After this, the analysis organizes the commentaries of respondents to this study into a list of identifiable complaints that reveal deeper issues regarding the delivery of education development aid to Myanmar's law schools. A subsequent section uses such observations to generate potential solutions. The paper concludes with an admonition that the purpose of the analysis is to inform efforts to aid the reform of Myanmar law schools during this period in the country's transition, with an understanding provided by an academic perspective that is relevant for all parties—foreign or domestic—involved in the work of bringing Myanmar's legal education system to standards reflective of institutions serving a public interest in the rule of law.

To facilitate discussion, this study treats the terms “development assistance” and “development aid” as synonymous terms that refer to international efforts to provide training and resources to recipients, with the origins of training and resources usually coming from more developed countries and the recipients being located in less developed countries. “Development” is an expansive term encompassing a wide range of phenomenon such as political development in the form of democratization and elections, legal development in terms of statutory reforms and rule of law project, economic development expressed as infrastructure and business investments, or social-cultural development pursued via health services and school construction. However, “development” in this paper is focused primarily on “educational development aid” directed at providing training and resources to Myanmar law schools. Such training and resources constitutes “capacity building” or “capacity development” that develops “abilities to perform functions, solve problems, and set and achieve objectives”<sup>8</sup> using skills acquired through “technical aid” or “technical assistance” that conveys “information and expertise.”<sup>9</sup> “Aid providers” can be any entity, including non-governmental organizations (“NGOs”), universities, or governments outside of Myanmar, delivering training and resources intended to help Myanmar law schools in their process of reform.

## II. Methodology

The bulk of this analysis involves an ethnographic study using participant-observer methods applied towards a capacity-building technical aid workshop conducted by Bridges Across Borders Southeast Asia Community Legal Education (“BABSEACLE”), an NGO operating under a United Nations Development

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<sup>8</sup> United Nations, *Definition of Basic Concepts and Terminologies in Governance and Public Administration*, U.N. Doc. E/C.16/2006/4 (Jan. 2006), <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan022332.pdf>.

<sup>9</sup> *What is Technical Assistance?*, UNESCO, <http://www.unesco.org/new/en/culture/themes/cultural-diversity/cultural-expressions/programmes/technical-assistance/what-is-technical-assistance/> (last visited Feb. 17, 2017).

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Programme (“UNDP”) mandate. The workshop, one of an ongoing series extending over several years, was held over five days in May 2015 at Taungoo University and involved approximately 75 participants sent from 18 of Myanmar’s law schools, with each school providing a delegation of four faculty representatives of varying seniority. The workshop encompassed the experiences of campuses that ranged in geographic location, faculty and student size, community composition, and national academic ranking. While ostensibly focused on the implementation of community or clinical legal education programs, the workshop sought to maximize its outcomes by orienting its activities in recognition of the endemic contextual issues facing each law school. To accomplish this, during the course of the five-day program the workshop encouraged attendees to articulate and share their experiences with legal education development aid. This produced an aggregate commentary of Myanmar law school experiences with foreign aid.

The observations from such feedback are supplemented with work conducted in Myanmar under a United States Fulbright Scholar grant from 2014-2015 which involved placement as a lecturer at the University of Yangon with duties that included teaching, administrative assistance, curriculum review, and participation in several national conferences regarding university reform. This allowed direct, immersive, and sustained exposure to the challenges and issues faced by Myanmar university faculty in the country’s current transition.

This study does not claim to offer a comprehensive overview of education development aid for Myanmar’s law schools. Instead, this study endeavours to be an analysis of feedback from Myanmar law schools about their experiences with legal educational development aid, in hopes of identifying issues relevant to improving the outcomes of Western aid directed at helping reform Myanmar’s legal education system. In doing so, the discussion engages reflective study that follows the calls from scholars like Deborah Eade and Michael Edwards, who argue for greater self-awareness, self-criticism, and openness about the motivations, activities, and consequences of development aid.<sup>10</sup>

In drawing upon the experiences of Myanmar law school faculty, this analysis represents an attempt to highlight the issues that preoccupy aid recipients when they exercise the opportunity to express their perspectives. Such an approach is motivated by Franziska Dubgen’s observation that many of the failures of development aid result from a development literature dominated by the Global North that overlooks the views of the Global South.<sup>11</sup> The hope is that by presenting the issues that concern Myanmar’s law school faculty, staff, and students, it will be possible to better understand their perceptions and hence their subjective interpretation of the development aid being directed to them. This will help deter-

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<sup>10</sup> Deborah Eade, *Capacity Building: Who Builds Whose Capacity?*, 17 DEV. IN PRAC. 630, 633-37 (2007) (explaining why various forms of aid need to be more conscious of their actions); see also Michael Edwards, *International Development NGOs: Agents of Foreign Aid or Vehicles for International Cooperation?*, 28 NONPROFIT AND VOLUNTARY SECTION Q. 25, 37 (1999) (discussing factors NGOs should examine to determine what areas they can improve upon).

<sup>11</sup> Franziska Dubgen, *Africa Humiliated? Misrecognition in Development Aid*, 18 RES. PUB. 65, 70 (2012) (discussing the effects of the Global North and the Global South).

mine strategies that allow such aid to fulfil the expectations of those most affected by its outcomes—and those who it presumably was meant to help.

In keeping with the principles of legal anthropology regarding ethnographic research methods, readers are advised of the subjectivity bias endemic to participant-observer methods wherein observations are interpreted and understood through the researcher's worldview.<sup>12</sup> Mindful of this, it should be noted that the author was a participant-observer engaged in aid directed at reforming Myanmar's legal education system to meet standards supported by the UNDP and law schools in the United States, Australia, and Singapore. The author balances this with a bicultural background as an academic born in Myanmar but raised in Sweden and the United States, which provides sensitivity to the differences in worldviews and associated socio-cultural, economic, political, and historical contexts between Myanmar and the West. In addition, to further mitigate subjectivity bias the fieldwork sought the perspectives of respondents by engaging and recording their impressions, observations, and critical comments of their experiences with foreign assistance. This involved unstructured conversations that occurred while the author was performing duties as a teacher and workshop instructor, supplemented with primary and secondary source materials collated from government documents, public statements of government officials, and broadcast or print interviews with government officials. Due to the sensitive status of the legal system and universities in Myanmar's history, which involved repeated shutdowns of higher education institutions that in some cases were lifted only as recently as 2012, a paramount concern is to protect the identities of respondents involved in this study. This means the omission of any information that might be attributed to specific individuals, law schools, or even universities.

It should also be noted that Myanmar continues to be a developing country in transition from an authoritarian to a democratic political system. This complicates the study of Myanmar's education system due to a number of factors. First, the country's transition involves a broad scope of political, economic, and social reforms that accelerated following the restoration of relations with the West in 2012 and which brought with it foreign technical assistance, foreign investment, foreign trade, and renewed diplomatic relations.<sup>13</sup> For example, there are an array of new laws being passed or drafted across a range of areas, particularly in infrastructure, human development, energy, foreign investment, and education; a continuing peace process to end domestic conflicts with various ethnic groups; a reform process to promote rule of law, human rights, and independence of the legal and judicial professions; a growing number of infrastructure and human

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<sup>12</sup> H. RUSSELL BERNARD, *RESEARCH METHODS IN ANTHROPOLOGY: QUALITATIVE AND QUANTITATIVE APPROACHES* at 22 (4th ed. 2006); see also Carlos Palacios, *Volunteer Tourism, Development, and Education in a Postcolonial World: Conceiving Global Connections Beyond Aid*, 18 *J. OF SUSTAINABLE TOURISM* 861, 865-66 (2010) (explaining subjectivity bias).

<sup>13</sup> Mary Callahan, *The Opening in Burma: The Generals Loosen Their Grip*, 23 *THE J. OF DEMOCRACY* 120, 131 (2012); see Neil Englehart, *Two Cheers for Burma's Rigged Election*, 52 *ASIAN SURV.* 666, 666-86 (2012) (discussing Burmese election); see also Christina Fink, *How Real Are Myanmar's Reforms?*, 2014 *CURRENT HIST.* 224, 230 (2014) (discussing the reforms in Myanmar); see also N. Ganesan, *Interpreting Recent Developments in Myanmar as an Attempt to Establish Political Legitimacy*, 1 *ASIAN J. OF PEACEBUILDING* 253, 269-70 (2013) (discussing Burmese politics and the recent election).

development projects; and efforts to promote improved governance, with technical aid to bolster capacity and reduce corruption.<sup>14</sup> Attendant with all of this is a continuing process of democratization, with efforts to move the country in a direction free of military involvement in government.<sup>15</sup> The sum of all these changes is a dynamic environment with fluid conditions that makes it difficult for analyses to stay current and thus relevant to understanding Myanmar. As a result, this paper is written with a caveat that the analysis herein is subject to the transient nature of Myanmar's ongoing transition, and so focuses on a state of reform in Myanmar's university system in general and its legal education system in particular during the period of time 2014-2015 that hosted field research.

### III. Myanmar's Context

Some context is useful in discussing development aid in Myanmar. It helps to understand the need and role for aid, as well as to identify a basis for investigating the nature of aid and its consequences for the people it is presumably meant to help. With respect to Myanmar, this requires an understanding of the extent of underdevelopment, the dynamic and complex nature of the country's transition, and the resulting effect on Myanmar's legal education system.

#### A. Low HDI

Under British rule, Myanmar was among the wealthiest countries in Southeast Asia.<sup>16</sup> Since that time, however, the country has descended to become one of the poorest countries in Asia. While the UN and World Bank provide promising data that show Myanmar's gross domestic product ("GDP") in 2012 as being approximately \$59 billion with an annual growth rate of approximately 8.5%,<sup>17</sup> the UN also report an annual GDP per capita of US\$1,126<sup>18</sup> and a Human Development Index rank of 150th out of 187 measured countries.<sup>19</sup> Indicating that Myanmar is the poorest country in the Association of Southeast Asian Nations ("ASEAN").<sup>20</sup> Much of this is driven by the country's allocation of spending, with the government reporting a 2014-2015 fiscal year budget with only 6% spent on education and 3% on healthcare, which respectively represent the lowest

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<sup>14</sup> See Fink *supra* note 13; see Ganesan *supra* note 13; see also Kyaw Yin Hlaing, *Understanding Recent Political Changes in Myanmar*, 34 CONTEMP. SE. ASIA 197, 198, 203 (2012) (discussing various democratic changes occurring in Myanmar).

<sup>15</sup> Hlaing, *supra* note 14, at 208-212.

<sup>16</sup> DAVID STEINBERG, *Myanmar: The Roots of Economic Malaise*, in *Beyond Politics to Societal Imperatives* 86 (Kyaw Yin Hlaing et al. eds., 2005).

<sup>17</sup> Myanmar, U.N. DATA (2015), <http://data.un.org/CountryProfile.aspx?crName=MYANMAR> [hereinafter Myanmar U.N. Data]; see also *World Bank Open Data*, THE WORLD BANK, <http://data.worldbank.org> (last visited Feb. 17, 2017).

<sup>18</sup> *Id.*

<sup>19</sup> Human Development Report 2015, UNITED NATIONS DEV. PROGRAM, [http://hdr.undp.org/sites/all/themes/hdr\\_theme/country-notes/MMR.pdf](http://hdr.undp.org/sites/all/themes/hdr_theme/country-notes/MMR.pdf) (last visited Feb. 17, 2017).

<sup>20</sup> Peter Chalk, *On the Path of Change: Political, Economic and Social Challenges for Myanmar*, AUSTRAL. STRATEGIC POL'Y INST. (Dec. 2013), [https://www.aspi.org.au/publications/on-the-path-of-change-political-economic-and-social-challenges-for-myanmar/SR62\\_Myanmar.pdf](https://www.aspi.org.au/publications/on-the-path-of-change-political-economic-and-social-challenges-for-myanmar/SR62_Myanmar.pdf).

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education budget and the third lowest healthcare budget in ASEAN.<sup>21</sup> This contrasts with the Center for Strategic and International Studies extrapolations of data from the Stockholm International Peace Research Institute, which finds Myanmar devoting 13% of its government spending to the military<sup>22</sup> compared to an ASEAN average of 9%.<sup>23</sup> Various governance indicators match such dubious rankings. For example, Transparency International's Corruptions Perceptions Index lists Myanmar 156th out of 175 countries in 2014.<sup>24</sup> In its Rule of Law Index, the World Justice Project factored in variables including constraints on government powers, absence of corruption, security, observance of rights, and enforcement, and found Myanmar ranked 92 out of 102 countries under study.<sup>25</sup> Working to address these challenges is a government that has been consistently recognized as lacking capacity in all areas and at all levels, with weak institutions, opaque leadership, dysfunctional civil service, poor infrastructure, inadequate resources, and insufficient skills.<sup>26</sup> While development and technical aid from the international community increased in the wake of the country's 2011 elections and initiation of political reforms, it continues to struggle against the scale of development issues.<sup>27</sup>

### B. Democratic Transition

Myanmar's path to democracy is what scholars like Larry Diamond and Francis Fukuyama describe as a negotiated transition to transfer power to civilian control in a way acceptable to incumbent military elites.<sup>28</sup> Brian Joseph finds that this is the preferred strategy among various factions within Myanmar's political system when they are given a choice between negotiated transition, regression to military rule, "Singapore" style economic reform at the expense of

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<sup>21</sup> Ei Ei Toe Lwin, *Military Spending Still Dwarfs Education and Health*, MYANMAR TIMES (Mar. 30, 2014) <http://www.mmtimes.com/index.php/national-news/10000-military-spending-still-dwarfs-education-and-health.html>.

<sup>22</sup> *Id.*

<sup>23</sup> CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES, *Analyzing Southeast Asia's Military Expenditures*, COGITASIA (2015), <https://www.cogitasia.com/analyzing-southeast-asias-military-expenditures/>.

<sup>24</sup> Corruption Perception Index 2016, Myanmar, TRANSPARENCY INT'L (2014), <https://www.transparency.org/country/MMR> (last visited Feb. 17, 2017).

<sup>25</sup> WJP Rule of Law Index 2016, WORLD JUSTICE PROJECT, <http://worldjusticeproject.org/rule-of-law-index> (last visited Feb. 17, 2017).

<sup>26</sup> See Chalk, *supra* note 20; see also MYANMAR'S TRANSITION: OPENINGS, OBSTACLES AND OPPORTUNITIES at 16-19 (Nick Cheesman et al. eds., 2012); see also LAW, SOCIETY, AND TRANSITION IN MYANMAR at 377-379 (Melissa Crouch & Tim Lindsey eds., 2014).

<sup>27</sup> See Chalk, *supra* note 20; See Cheesman et al, *supra* note 26; see Crouch & Lindsey, *supra* note 26.

<sup>28</sup> GRETCHEN CASPER & MICHELLE TAYLOR, NEGOTIATING DEMOCRACY: TRANSITIONS FROM AUTHORITARIAN RULE at 225-244 (1996); see also Francis Fukuyama et al., *Reconsidering the Transition Paradigm*, 25 J. OF DEMOCRACY 86, 100 (2014); see also Larry Diamond et al., *The Need for a Political Pact*, 23 J. OF DEMOCRACY 86, 100 (2012) [hereinafter *Need for a Political Pact*]; see also Fink, *supra* note 13; see also Brian Joseph, *Political Transition in Burma: Four Scenarios in the Run-up to the 2015 Elections*, 32 SAIS REVIEW 137, 149 (2012).

authoritarian government, or fragmentation into polarized conflicts.<sup>29</sup> Diamond and Fukuyama, however, observe that a negotiated transition may be effective in bringing civilian government in a gradual, deliberate manner but it comes with the risk of incurring a bargained exchange of conditions in which power is transferred to civilian authority in return for an enshrinement of corruption and dysfunction that benefits the departing military elite.<sup>30</sup> If such an outcome were to occur, it would increase the vulnerability of Myanmar's democracy to the fate of other governments that have experienced a "democratic regression" wherein democratic regimes slid into dysfunction and increased limitations on freedom as a result of continued, ingrained corruption within their political systems.<sup>31</sup> Compounding this is a political landscape which extends beyond a simple dichotomy of military versus civilian voices to encompass a spectrum of multiple factions with distinct interests which at various times converge or diverge along the various fissures in the transition discourse that Larry Diamond characterizes as involving questions about the path "from authoritarianism to democracy, from military to civilian rule, from a closed and monopolistic to an open and competitive economy, and from an ethnically fractured and fissiparous state to a more viable and coherent union."<sup>32</sup> Within such an environment, international efforts have to navigate ways that explore "third views" which do not antagonize either military or pro-democracy extremes.<sup>33</sup>

### C. Universities & Law Schools in Myanmar

Myanmar's legal education system reflects a Myanmar history of government restrictions on both universities and the legal profession, with both universities and legal professionals being treated by the government as centers of discontent fomenting public resistance to the state.<sup>34</sup> The legal system and legal education deteriorated in professional standards and public stature as a result of government reforms and military actions to suppress their perceived threats to state authority.<sup>35</sup> The law schools, in particular, were subjected to significant changes that resulted in a modern system that is widely recognized as suffering substantial

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<sup>29</sup> Joseph, *supra* note 28, at 139-140.

<sup>30</sup> Fukuyama, *supra* note 28, at 91-92; *see also* *Need for a Political Pact*, *supra* note 28, at 140-145.

<sup>31</sup> Larry Diamond, *Democracy's Third Wave*, 110 CURRENT HIST. 299, 307 (2011) [hereinafter *Democracy's Third Wave*].

<sup>32</sup> Callahan, *supra* note 13, at 113-115; Renaud Egreteau, *Legislators in Myanmar's First "Post-Junta" National Parliament (2010-2015): A Sociological Analysis*, 33 J. OF SE. ASIAN AFF. 91, 124 (2014); Joseph, *supra* note 28, at 149.

<sup>33</sup> Hans-Bernd Zollner, *After an Election and a Symbolic Re-election in Myanmar – What Next?*, 42 INT'L Q. FOR ASIAN STUD. 47, 72 (2011).

<sup>34</sup> Nick Cheesman & Kyaw Min San, *Not Just Defending; Advocating for Law in Myanmar*, 31 WIS. INT'L L. J. 702, 733 (2014); *see also* Melissa Crouch, *Rediscovering "Law" in Myanmar: A Review of Scholarship on the Legal System of Myanmar*, 23 PAC. RIM L. & POL'Y J. 543, 577 (2014); *see also* Myint Zan, *Legal Education in Burma Since the Mid-1960s*, 12 J. OF BURMA STUD. 63, 107 (2008).

<sup>35</sup> Cheesman & San, *supra* note 34, at 702-708; *see also* Crouch, *supra* note 34, at 549 & 572-573; *see also* Thomas Fuller, *Myanmar's Opening Up Hasn't Loosened Graft in Courts*, N.Y. TIMES (Oct. 24, 2014) [https://www.nytimes.com/2014/10/25/world/asia/myanmars-opening-up-hasnt-loosened-graft-in-courts.html?smid=pl-share&\\_r=0](https://www.nytimes.com/2014/10/25/world/asia/myanmars-opening-up-hasnt-loosened-graft-in-courts.html?smid=pl-share&_r=0); *see also* Zan, *supra* note 34, at 50-52.

deficiencies in research and teaching.<sup>36</sup> Myint Zan, in his study of Myanmar's legal education system, described a curriculum driven by ideology and which was rife with inaccuracies and distortions, lacking in subjects considered standard in most Common Law jurisdictions, afflicted by low admissions and matriculation requirements, and populated by poorly-trained teachers and students.<sup>37</sup> He detailed multiple-choice exams for which questions and answers were provided to students prior to exam dates, graduates who could not answer basic questions about Common Law legal principles, and the use of limited, often outdated textbooks or scholarly journals.<sup>38</sup> Zan warned that the scale of work necessary to restore the quality of Myanmar's law schools was extensive and should not be underestimated.<sup>39</sup>

While not specifically directed in response to Zan's warning, the Myanmar government has been making efforts since the lifting of economic sanctions and diplomatic isolation in 2012 to reform Myanmar's universities, including the legal education system. Dr. Daw Yin Yin Nwe, an advisor to President Thein Sein, made a series of presentations in the early months of 2015 supporting the country's Education Law that detailed the government's commitment to increasing the education budget, increasing the number of teachers, and investing in university infrastructure and resources.<sup>40</sup> Attendant with this has been the introduction of foreign aid coming from a spectrum of entities representing a range of sectors and levels of international actors including governments, international institutions, non-governmental organizations (NGOs), and academic bodies. For example, participants in this study described examples of foreign government aid efforts such as the Australian Volunteers in International Development ("AVID") or the United States Fulbright Scholars program. Research participants also observed education development efforts sponsored by international institutions such as the United Nations Development Programme ("UNDP") and United Nations Education, Scientific, and Cultural Organization ("UNESCO"), both of which provided technical assistance and coordinated NGO activities for Myanmar's schools and Ministry of Education. In addition, they noted the efforts of NGOs like BABSEACLE and the Lericci Fondazione, which brought foreign experts to provide skills-training and education materials to Myanmar faculty and staff. Attendant with these other actors, they observed the activities of foreign universities like Australian National University ("ANU"), Deakin University, Oxford University, the National University of Singapore, Chung-An University, and Tokyo University, who supplied their own faculty, staff, and resources in partnerships with Myanmar schools.

The form of educational development assistance provided by this range of actors encompasses a range of services. Myanmar universities often receive di-

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<sup>36</sup> Zan, *supra* note 34, at 4-32.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> Yin Yin Nwe, Presentation at the Higher Education Leadership Programme II, The New Education Law: Implications (2015).

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rect support, with foreign aid workers performing university functions such as teaching classes, engaging in collaborative research with Myanmar counterparts, designing courses or curricula, and providing classroom materials. Foreign aid also involves infrastructure projects to construct or renovate university campuses to provide offices, classrooms, laboratories, libraries, or event venues. In addition, foreign assistance sometimes involves conferences meant to promote networking and collaboration between Myanmar faculty and staff with colleagues from the international community.

While important to the Myanmar respondents in this study, such forms of aid did not preoccupy their concerns. Rather, their attention seemed to focus primarily on their experiences with capacity-building and technical aid programs. Specifically, the issues they raised dealt with the strategies employed by aid providers. From the descriptions provided, it seems that the development aid receiving the greatest concern involved either capacity-building to improve academic resources, such as the renovation of classrooms or provisioning of internet access to web-based scholarly databases, or technical aid to increase skills, such as training programs for faculty and staff in research, teaching, or curriculum and course design. These forms of aid were both *in situ* in terms of involving foreign personnel traveling to locations within Myanmar, usually on individual university campuses, or *ex situ* in terms of involving Myanmar personnel traveling to foreign locales. In both cases, the strategies to deliver aid are of limited duration, occurring within trips lasting as briefly as a few days or as long as several weeks. Much of the content that the respondents describe dealt with topics such as critical analysis teaching methods, particularly in terms of departing from the predominant Myanmar use of rote memorization classroom lessons; research skills, including the use of scholarly citations, critical analysis, and university-level writing; or curriculum development with respect to subject requirements for undergraduate and postgraduate degrees and their associated syllabi and course materials.

Underlying these aid efforts is an apparent philosophy to endow Myanmar faculty, staff, and students with skills and resources commensurate with law schools in other countries. A common observation made by respondents was that foreign aid programs tend to claim a goal of providing concepts, perspectives, and methods employed by the legal education systems in the aid providers' respective countries of origin—usually the West—and that these are presented as reflecting global standards of professionalism. This exemplifies the phenomena Alan Watson, Melissa Crouch, and William Ewald refer to as “legal transplants,” or legal ideas that are borrowed from one country and applied in another,<sup>41</sup> and which have been criticized for trending towards cultural imperialism.<sup>42</sup> Respon-

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<sup>41</sup> Melissa Crouch, *Asian Legal Transplants and Rule of Law Reform: National Human Rights Commission in Myanmar and Indonesia*, HAGUE J. ON THE RULE OF L. 146, 146-77 (2013); see also William Ewald, *Comparative Jurisprudence (II): The Logic of Legal Transplants*, 43 AM. J. OF COMP. L. 489, 495(1995); see also ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* at 20-65 (1993).

<sup>42</sup> Pierre Legrand, *The Impossibility of Legal Transplants*, 4 MAASTRICHT J. OF EUR. AND COMP. L. 111, 123 (1997); see also Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying*

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dents, however, noted that much of the foreign aid seemed to reflect a sincere desire to avoid such a risk, with foreign trainers stressing a strategy of “training the trainers” oriented towards teaching locals who would then presumably reflect, engage, interpret, and contextualize what they had learned in ways more appropriate to their needs and more readily shared with other locals, effectively generating a cascading propagation of increased capacities and technical skills.

Such an approach follows what David Ellerman refers to as a principle of “development-as-autonomy” that “respects, fosters, and sustains” the autonomy of aid recipients, particularly in their capacities to contribute to the development of their own societies.<sup>43</sup> For Ellerman, autonomy involves control over ideas, and it is important that control over the substance of aid is ultimately held by the locals since it respects the dignity of aid recipients by fostering their self-motivation and independence.<sup>44</sup> A strategy of “training the trainers” calls upon locals to take control, in that it looks to aid recipients to take power and responsibility for the local propagation of foreign aid. The apparent theme is one of empowerment of aid recipients, and so suggests a sincere desire to avoid Deborah Eade’s general criticism of the development industry as suffering from a tendency “. . .to ignore, misinterpret, displace, supplant, or undermine the capacities that people already have.”<sup>45</sup>

### IV. Aid Issues Raised by Myanmar Law School

In general, the workshop participants were appreciative of the educational development assistance given to Myanmar universities. They indicated that Myanmar’s post-independence history under military rule had incurred a decline in the quality of Myanmar’s schools—not just for law schools or universities, but for the education system as a whole, with almost universal acceptance that the country was in need of foreign assistance to redress the consequences of the past. As a result, the overall sentiment from the faculty, staff, and students was of deep appreciation for whatever contributions, foreign or otherwise, that served to improve the country’s education system.

Despite this, they also expressed a consensus regarding issues in educational development assistance, with Myanmar faculty, staff, and students expressing concerns about the manner in which aid was being provided. In particular, with respect to aid to Myanmar’s law schools, it was clear that aid recipients have experienced a range of issues that impair the apparent goals of foreign aid to empower Myanmar locals and thereby improve Myanmar’s law schools. While echoing the problems tied with what Deborah Eade labels as the Development

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*Law Ends Up in New Divergences*, 61 *MOD. L. REV.* 11, 32 (1998); see also David Nelken, *Transplants and Beyond: Of Disciplines and Metaphors*, in *COMPARATIVE LAW IN THE 21ST CENTURY* at 19-34 (Andrew Harding & Esin Öricü eds. 2002).

<sup>43</sup> DAVID ELLERMAN, *HELPING PEOPLE HELP THEMSELVES: FROM THE WORLD BANK TO AN ALTERNATIVE PHILOSOPHY OF DEVELOPMENT ASSISTANCE* 6-7 (2006).

<sup>44</sup> David Ellerman, *Autonomy in Education and Development*, 7 *J. OF INT. COOPERATION IN ED.* 3, 4-9 (2004).

<sup>45</sup> Eade, *supra* note 10, at 633.

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Industry,<sup>46</sup> the complaints conveyed by respondents reveal deeper features about the foreign aid directed at Myanmar's legal education system. As such, while they may not be indicative of development aid in general or even development efforts within Myanmar in particular, they do constitute an insight into challenges that impede the work of education development aid from achieving an apparent goal of assisting Myanmar's legal education system—a system seen as integral to the promotion of human rights, democracy, and the rule of law in a country struggling to transition to those ideals.

### A. Asymmetry

The first issue can be described as asymmetry in the distribution of aid. Deborah Eade, in a commentary on her experiences in the development aid industry, describes the phenomenon of asymmetric partnerships between aid providers and recipients in which aid providers retain control over financial and technical resources and treat aid recipients as marketing tools to recruit further contributions from international donors.<sup>47</sup> Eade criticizes these relationships for conducting uni-directional transfers of assistance, with aid entities dictating the content and distribution of aid and intended beneficiaries having little or no influence in what they receive.<sup>48</sup> Furthermore, Eade sees this as problematic because it does little to build local capacity in terms of independence among aid beneficiaries and tends to erode self-criticism among aid providers.<sup>49</sup> Eade's sentiments are shared by Ellerman, who sees aid programs that are controlled by aid providers as denying the dignity of locals as autonomous human beings and fostering relationships of dependency wherein locals are marginalized to foreign interests.<sup>50</sup>

A symptom of this became apparent among the complaints of Myanmar law faculty, with respondents frequently citing inequalities in the outreach efforts of foreign entities among Myanmar universities. In particular, with respect to law schools, respondents observed that the majority of aid from foreign universities was directed at Yangon University and Mandalay University. These represent the two most prestigious universities in Myanmar, but overlooks the other law schools in the country, particularly those located in remote locations such as Myitkyina, Sittwe, or Magwe. Respondents noted that this inequality is reflected by the distribution in Memorandums of Understanding ("MOUs"), which set the terms of institutional relationships between universities in terms of technical aid, resource sharing, student and faculty exchange, and research collaboration.<sup>51</sup> For example, at the time of this writing, respondents stated that Yangon University was contemplating more than 30 MOUs with foreign universities while other

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<sup>46</sup> Eade, *supra* note 10, at 633.

<sup>47</sup> *Id.*

<sup>48</sup> Eade, *supra* note 10, at 635.

<sup>49</sup> *Id.*

<sup>50</sup> Ellerman, *supra* note 44.

<sup>51</sup> Personal Interviews, Respondents 1-75.

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universities like Taungoo University or Sittwe University were offered little or no MOUs.<sup>52</sup>

There are potential explanations for this disparity: some respondents indicated that the historically centralized education system continues to allow the Ministry of Education to direct foreign aid to select campuses; others indicated that the choices seemed to be made by foreign aid providers themselves. Either way, the decisions overlooked the wishes of the ensemble of Myanmar universities. Both explanations corroborated the experience of BABSEACLE, which finds that the vast majority of Myanmar universities express welcome for foreign assistance whenever it is offered. This suggests that the inequities in distribution are not a function of Myanmar recipients, but rather a result of decision-making power over aid distribution that is exercised without reciprocal discretion on the part of aid recipients. This is problematic in that it suggests a power imbalance skewed towards actors responsible for producing and distributing aid, and so raises a justice issue over the marginalization of universities within the development aid system—universities that ostensibly represent the population such a system is supposed to serve.

### B. Abbreviation

Another apparent issue is the abbreviated nature of educational aid programs given to Myanmar law schools. David Chapman, in his studies of educational development assistance, finds that a recurring issue “was that project-level evaluations did not pay sufficient attention to whether the intended outcomes were actually achieved.”<sup>53</sup> He sees this as an extensive problem, noting that even though the question of long-term sustainability of aid was recognized as an important criterion it receives little attention in practice.<sup>54</sup> The value of ongoing relations is not minor, with scholars like Bruce Joyce, Beverly Showers, and Jan Berkvens noting that a transfer of skills in professional development programs—such as that provided by legal education training sessions—is hampered without provision of opportunities to practice or follow-up support to facilitate such practice.<sup>55</sup> This defeats the purpose of aid programs to empower aid recipients, and sustains conditions of dependency that leave locals reliant upon the presence of foreign workers to implement the lessons of aid programs.

Such a complaint was registered by respondents, with a substantial number expressing dissatisfaction with respect to the aftermath of educational aid programs. Specifically, respondents indicate that a frequent, if not prevalent, issue is that upon their completion the lessons and resources provided by such programs do not propagate further through the universities. Respondents referred to cases

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<sup>52</sup> Personal Interviews, Respondents 1-75.

<sup>53</sup> David Chapman, *A Meta-Look at Meta-Studies of the Effectiveness of Development Assistance to Education*, 56 INT'L REV. OF EDUC. 547, 555 (2010).

<sup>54</sup> *Id.* at 558.

<sup>55</sup> BRUCE JOYCE & BEVERLY SHOWERS, *STUDENT ACHIEVEMENT THROUGH STAFF DEVELOPMENT* (3rd ed. 2002); see also Jan Berkvens, *What International Aid Organizations Can Learn from International Adult Learning: Experiences from Cambodia*, 18 J. OF AGRIC. EDUC. AND EXTENSION 347, 351 (2012).

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in which representatives of their respective departments were chosen to receive training, either via *in situ* on Myanmar university campuses or *ex situ* in foreign locales, but then never proceeded to relay what they had learned to their colleagues, superiors, or students. To a degree, respondents cited this was due to the challenges of adapting new practices within the existing burdens of their work environments, but they also noted that such challenges were exacerbated by lack of opportunities for additional communication and assistance from aid providers to help implement the lessons of training into practice. The frequent result was that trainees would return to previous, more familiar modes of behavior, thereby defeating the original purpose behind the training. These types of outcomes are problematic because they run contrary to the aid philosophy of “training the trainers” that relies on trainees to carry their lessons to others in their place of origin.

Additional monitoring and support can prevent such issues, but the persistence of these problems indicates insufficient, if not absent, efforts to follow aid programs with ongoing evaluation and assistance to ensure that the goals of propagating education reform are achieved. Respondents affirmed this, with observations that for both *in situ* and *ex situ* programs the interactions with foreign aid workers last for fixed durations with little or no opportunities for further communication or instruction once the training is completed.

### C. Reductionism

An additional problem is the reductionist nature of aid that ignores the endemic challenges posed by local conditions. Scholars like Jan Berkvens and Melissa Crouch observe problems in efforts to prescribe globally accepted reform solutions to Asian contexts.<sup>56</sup> Berkvens, in his study of adult learning education programs in Cambodia finds significant risks to aid objectives resulting from a lack of awareness regarding contextual issues.<sup>57</sup> Similarly, while Crouch studied the transplant of human rights institutions into Indonesia and Myanmar, she also notes that the introduction of legal concepts requires a need for more consideration of local context.<sup>58</sup> Specifically, Crouch finds that while the transplant of foreign solutions may be done out of a desire to emulate model strategies that were successful elsewhere they require a recognition of what is being transplanted, the origins from whence it came in comparison to the destination it is being applied, the consequences of such a transplant, and the motivations for such activities.<sup>59</sup> Both Berkvens and Crouch echo the sentiments of scholars like Pierre LeGrand, Gunther Teubner, and David Nelken, who see a risk in following positivist approaches that assume ideas and concepts are removed from social

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<sup>56</sup> Berkvens, *supra* note 55, at 353; Crouch, *supra* note 41, 146-77.

<sup>57</sup> Berkvens, *supra* note 55, at 353-54.

<sup>58</sup> Crouch, *supra* note 41, 146-77.

<sup>59</sup> *Id.* at 148-52.

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context and instead call for the exercise of contextual approaches that are more culturally situated so as to be more relevant.<sup>60</sup>

These observations are corroborated by the complaints of respondents, who observe that when they receive development aid it does not always seem applicable to Myanmar universities. One particular illustration was their experiences with the provisioning of access to on-line scholarly databases.<sup>61</sup> A program lauded in the media and promoted by database companies and the Myanmar government, it was launched in 2014 with the intention of providing Myanmar students and faculty with access to a global body of scholarship while bypassing the comparatively greater costs associated with the physical acquisition of books or investment in infrastructure like libraries.<sup>62</sup> Respondents, however, complained that: 1) there was little training given to students or faculty in how to use such databases, with insufficient time, explanation, and practice provided to trainees, especially for those coming from backgrounds with little previous exposure to internet resources; 2) what training was given to a limited selection of students and faculty, who were then overwhelmed with the demands of conveying newly-acquired and still-unfamiliar concepts and skills to their compatriots; 3) there was little continuing assistance for students or faculty in the skills associated with using on-line databases; 4) the databases were predominately driven in English and there was little English language support for Myanmar faculty and staff; and 5) internet access was a persistent problem at many Myanmar universities, with respondents frequently citing that internet bandwidth was limited or frequently inoperative, to a degree that database access was unavailable.<sup>63</sup> The sum result was that while there was internet access and on-line database access, such access was not functional in terms of being available for integration into academic practice.

Another notable example offered by respondents involved the apparent philosophy of some development aid programs to train a successive series of cohorts from faculty and staff in select university departments on the reasoning that it would allow those departments to incrementally build their expertise over time. However, this overlooks the existence of a faculty “transfer” system employed by Myanmar’s education system. In Myanmar, faculty members are subject to transfers to different universities twice per year for the ostensible purpose of allowing promotions or requests for relocation. The notice of reassignments can be as short as two days and at most two weeks, and frequently involve faculty being removed in the midst of teaching during a semester. For development aid programs, this poses a regular risk of aid recipients being relocated, effectively undermining aspirations of building department capacity. This phenomenon is

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<sup>60</sup> LeGrand, *supra* note 42, at 116-117; *see also* Teubner, *supra* note 42, at 17-18; *see also* Nelken, *supra* note 42, at 19-34.

<sup>61</sup> Personal Interviews, Respondents 1-7.

<sup>62</sup> Yen Saning, *Rangoon, Mandalay Universities Get Information Age Boost*, THE IRRAWADDY (July 24, 2015), <http://www.irrawaddy.org/burma/rangoon-mandalay-universities-get-information-age-boost.html>.

<sup>63</sup> Personal Interviews, Respondents 1-7.

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known and understood to Myanmar faculty and staff, but was identified as a regular discovery to foreign entities working with Myanmar universities.

These kinds of problems illustrate the presence of assumptions held by development aid regarding the conditions within Myanmar's universities, and reveal a lack of sensitivity regarding the context of Myanmar society and its education system. It also reveals a more fundamental issue in terms of a lack of consideration regarding the existence of such assumptions and a lack of diligence about the need for such sensitivity. The consequence is that issues like internet access to scholarly databases and faculty recruitment and retention are essentialized as being identical to universities in other countries, and thus lead to formulaic solutions that are reductionist in their approach to endemic problems. This means that they risk being irrelevant to the people they are meant to aid.

### D. Politicization

A further issue is one identified by scholars like Yash Tandon, who argues that development aid tends to be incorrectly treated as politically neutral or something that can be depoliticized.<sup>64</sup> Yash sees this as incorrect since it overlooks the effects of historical power relations that continue to operate in recipient locations.<sup>65</sup> Scholars like Jan Berkvens and Deborah Eade, who assert that aid programs frequently fail to recognize the relationships within which people of target aid groups are embedded, share Yash's concerns.<sup>66</sup> This is problematic, since it overlooks the impact of forces that may redirect or deny aid to the marginalized people it was meant to reach.

The imperative for contextual awareness was emphasized by the respondents, who described cases where Myanmar faculty and staff were chosen for development assistance based on processes that were not communicated or clearly explained. The lack of transparency raised concerns that selection was not based on past merit or future potential to implement development aid programs, but instead on personal preferences of university leadership. As a result, respondents indicated a tendency for faculty and staff to see grants of development aid—whether in terms of resources, access to *in situ* programs, or invitations to *ex situ* training—as awards made by their superiors in recognition of their good behavior. Ideally this would embody meritocratic principles, but the endemic cultural context of Myanmar creates of risk that such forms of aid are not based on merit but rather on ulterior motivations. Myanmar's society is based on a history of patron-client relations, wherein subordinates follow leaders not based on rank but rather on patronage, such that subordinates are embedded in dependent relationships comprising entourages that rely upon the whims of their leaders to dispense assets to their followers.<sup>67</sup> Inherent in such power structure is a constant impera-

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<sup>64</sup> Yash Tandon, *Aid Without Dependence: An Alternative Conceptual Model for Development Cooperation*, 52 DEV. 356, 356-62 (2009).

<sup>65</sup> *Id.*

<sup>66</sup> Eade, *supra* note 10, at 623-33; *see also* Berkvens, *supra* note 55, at 350.

<sup>67</sup> Ashley South, *Governance and Legitimacy in Karen State*, in RULING MYANMAR: FROM CYCLONE NARGIS TO NATIONAL ELECTIONS 63-89 (Nick Cheesman et al., 2010); *see also* DAVID STEINBERG,

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tive for leaders to retain power and hence to discourage any threats to their authority, meaning that assets—such as invitations to travel to foreign countries for training programs—are invariably awarded based not on potential for future innovation or intrepid behavior but instead on proven records of past loyalty and compliance to power. In essence, aid distribution becomes less about recognizing talent or skill but instead more about rewarding adherence to a status quo. This is problematic for development aid that is directed at changing the status quo. This becomes even more problematic in cases where foreign aid providers rely upon local leadership to select candidates for aid programs, since this actually serves to reinforce endemic patron-client power relations and thereby strengthens the status quo.

### E. Division

In her study of the role of development aid in Rwanda, Regine Andersen argues that aid programs sometimes serve to foster division within target populations.<sup>68</sup> This can arise as a result of a lack of coordination between different aid programs driven by what Deborah Eade observes as a desire by aid entities to accumulate and maintain power that displaces alternative motives to assist their partners.<sup>69</sup> Such dysfunction leads to waste, coverage gaps, and conflict between aid policies.<sup>70</sup>

A symptom of this arose from respondents from universities receiving development assistance from multiple aid providers. One of their complaints is that there is a persistent lack of coordination among foreign partners, with little communication or effort to organize disparate aid efforts into a cohesive whole. Respondents cite this as being a cause of confusion, in that they find themselves interacting with multiple foreign entities utilizing different vocabularies, concepts, methodologies, objectives, and strategies with little reference to each other. This suggests that while the existence of different aid providers would seem to offer the promise of choice, such choice is not meaningful for aid recipients who lack a pre-existing understanding to distinguish the differences. Respondents noted that a frequent outcome of such scenarios is that faculty within universities eventually align themselves according to their loyalties to particular aid providers. This outcome is consistent with Myanmar's patron-client culture, which suggests that faculty in Myanmar's law schools tend not see the presence of conflicting aid entities not as a marketplace in which they as customers can choose from competing aid producers, but instead see them as situations of choice regarding potential patrons. The implication of this difference is that in the former there is some equality between consumers and producers that pressures aid providers to compete in providing services to aid recipients, and so

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BURMA: THE STATE OF MYANMAR 38 (2001); *see also* ROBERT TAYLOR, THE STATE IN MYANMAR 8 & 26-28 (2009).

<sup>68</sup> Regine Andersen, *How Multilateral Development Assistance Triggered the Conflict in Rwanda*, 21 *THIRD WORLD Q.* 441, 442-55 (2000).

<sup>69</sup> Eade, *supra* note 10, at 635-637.

<sup>70</sup> Wenar, *supra* note 5, at 4-5.

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empowers Myanmar faculty with agency in finding value in aid, while in the latter there is a hierarchy of authority wherein aid recipients look to join entourage maintaining loyalty, and so fosters a structure of dependency by Myanmar faculty upon foreign patrons. To the extent that the ulterior purpose of educational development aid is empowerment of Myanmar's law school faculty, the risk of dependency contradicts the ostensible mission of aid providers.

### F. Neo-Colonialism

In his study of volun-tourism education programs, Carlos Palacios identifies a constant threat of neo-colonialism.<sup>71</sup> He sees this occurring whenever aid workers assume positions of privilege with respect to the people in beneficiary schools, in that this replicates colonial patterns of foreigners holding hegemonic positions over locals.<sup>72</sup> This was readily apparent in Myanmar, with respondents describing *in situ* aid programs that place aid workers in expatriate accommodations and dominant positions within recipient universities. In developing countries like Myanmar, expatriate accommodations usually cater to Western sensibilities and foster isolated social networks of foreigners interacting in relationships removed from the faculty, staff, students, and communities meant to be the beneficiaries of development aid. Such divisions continue to the working environment, with aid workers accorded privileged positions as advisors or consultants holding responsibilities to direct the transformation of professional practices and policies in Myanmar universities. Respondents described foreign aid workers as guests deserving of attention and respect, echoing Myanmar colonial history in which the local populations of British Burma were taught that Myanmar (then Burmese) culture was inferior to Western civilization.<sup>73</sup> To a degree this is consistent with any measure of hospitality, but in a patron-client culture it risks scenarios in which foreign aid providers supplant local leaders without any attendant alteration of existing societal power relations. Such scenarios are problematic, since they allow foreign aid workers to assume de facto decision-making powers over university policies and thereby replicate neo-colonial patterns of behavior that do little to further goals of promoting practices of leadership, autonomy, and critical approaches in Myanmar's education system.

### V. Potential Solutions

A cursory glance would suggest that the solutions for the problems presented in the preceding analysis can be rectified ad hoc. That is, asymmetric relations could be resolved by focusing more on engaging Myanmar law schools in equitable relationships. Similarly, abbreviated aid could be mitigated by sustaining development assistance over long periods. In addition, reductionism could be avoided by more inculcating greater diligence within aid workers and programs

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<sup>71</sup> Palacios, *supra* note 12.

<sup>72</sup> *Id.*

<sup>73</sup> MICHAEL AUNG-THWIN & MAITRII AUNG-THWIN, A HISTORY OF BURMA SINCE ANCIENT TIMES: TRADITIONS AND TRANSFORMATIONS 210 (2013).

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regarding context. Further, politicization could be mitigated by more reflection on the consequences of foreign aid as it encounters endemic power relations. Moreover, division could be addressed by promoting more effective coordination and communication among the various foreign and local stakeholders tied to aid programs. Last, neo-colonialism could be ameliorated by bolstering efforts to prevent segregation and privilege in aid relationships.

These kinds of solutions, however, fail to address the underlying issues driving the above problems. Ad hoc approaches that follow self-prescribing solutions may offer some superficial alleviation of an apparent problem, but they are unlikely to ensure long-term, sustained improvement for locals unless they recognize and respond to the deeper causes driving aid problems. If the purpose of development aid is to bring lasting reforms to legal education, then aid programs need to pursue transformational change in terms of driving change in the contextual forces responsible for the conditions in Myanmar law schools.

The nature of these forces are made more clear by recognizing the situation of Myanmar's legal education reforms as involving a structure-agency dynamic, with Myanmar's law schools—and by extension their attendant universities, including faculty, staff, and students—constituting actors attempting to exercise agency within a structure of forces that determine their capacities for choice. These forces are historic, in the sense that there is a history of Myanmar's authoritarian government constraining the activities of universities to suppress a perceived threat of unrest. The forces are economic, with Myanmar's low levels of economic performance depriving the country of capital available for investments in its education system. The forces are political, with an ongoing political transition dictated by a military that continues to limit a fractious discourse with disparate, competing political voices. The forces are also socio-cultural, with a patron-client system that interprets reform efforts within a framework of hierarchical relationships, vertical power structures, centralized top-down decision-making, limited transparency, and uni-directional flows of information and resources.

Lasting reforms require a transformation of these structural forces. It is possible for actors to participate in the transformation of the structure around them,<sup>74</sup> but this requires the enabling of agency that allows faculty, staff, and students to respond in ways that alter their status. This means that educational development aid programs are more appropriate if they serve to facilitate the capacities of aid recipients to function as autonomous actors with the ability to find or develop, possess and understand, implement or exercise decisions and actions affecting their welfare. Others echo this sentiment in the development industry. For example, Deborah Eade observes that the core of capacity-building is to “support the capacity of local people to determine their own values and priorities, to organise themselves to act upon and sustain these for the common good, and to shape the moral and physical universe that we all share.”<sup>75</sup> Tim Buthe, Solomon

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<sup>74</sup> ANTHONY GIDDENS, *THE CONSTITUTION OF SOCIETY: OUTLINE OF THE THEORY OF STRUCTURATION* 4 (1984).

<sup>75</sup> Eade, *supra* note 10, at 632.

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Major, and Andre de Mello e Souza assert that aid providers serve as trustees with aid recipients, and so must behave in a principled manner according to norms that are reinforced on an ongoing basis.<sup>76</sup>

As a result, admonitions for more equitable relationships are better understood as calls for arrangements that allow more involvement by Myanmar's law schools in decisions regarding the content and allocation of aid. Audrey Ottier gives an example of this with respect to program evaluation, arguing that evaluation requires participation in selection of evaluation tools, planning, and data analysis in addition to data gathering.<sup>77</sup> Expectations to maintain development assistance means sustaining relations sufficient to allow shared experiences and understandings not just with aid programs but also their consequences. This sentiment is expressed by Deborah Eade, who argues that development aid should involve both shared responsibilities and shared risks with mutual accountability indicative of committed partnerships.<sup>78</sup> The length and depth of such relations are reflected are commensurate with the complexities of reform, as Tanya Narozhna indicates in stating that:

“. . .development is a complex process comprised of multiple (often conflicting) interests, cultural perceptions, and inter-subjective understandings and beliefs, and that aid is ideational in nature, as it inevitably implies a transfer of symbolical resources. . .if Western assistance practices in developing countries are to be improved, the discursive form of aid has to be endowed with meaning that resonates with adequate understanding within the recipient culture.”<sup>79</sup>

Narozhna's concerns also speak to the expectations for more diligence regarding context, with her recognition of the importance of meaning and understanding justifying culturally sensitive approaches cognizant of the contextual origins of change and mindful of her warning that, “construction of a new social reality is possible, but only from within the cultural framework of what has already been created.”<sup>80</sup>

Addressing the presence of power relations is a more delicate issue, since a desire for contextual awareness implies a cultural sensitivity towards Asian proclivities for the hierarchical nature of patron-client relationships. However, scholars like Maurianne Adams and Jan Berkvens offer ways to redress the politicization of aid that arises in patron-client societies while still maintaining

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<sup>76</sup> Tim Buthe et al., *The Politics of Private Foreign Aid: Humanitarian Principles, Economic Development Objectives, and Organizational Interests in NGO Private Aid Allocation*, 66 INT'L ORG. 571, 601 (2012).

<sup>77</sup> Audrey Ottier, *Participatory Evaluation in the Context of CBPD: Theory and Practice in International Development*, 20 THE CANADIAN J. OF EVALUATION 1, 123-48 (2005).

<sup>78</sup> Eade, *supra* note 10, at 636.

<sup>79</sup> Tanya Narozhna, *The Role of Culture in International Development Aid: Implications for Theory and Practice*, 11 CANADIAN FOREIGN POL'Y 3, 81 & 85-86 (2004).

<sup>80</sup> *Id.* at 85.

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cultural sensitivity.<sup>81</sup> Cognizant that Western models of aid pursue liberal ideals of individualism and autonomy that are not always relevant to group-oriented Asian societies<sup>82</sup>, Adams and Berkvens suggest culturally relevant strategies of collaborative learning and dialogue that treat aid as a form of co-authorship producing a shared conceptual framework that enables mutual understanding.<sup>83</sup> Mel Gray sees this as particularly relevant to intercultural understanding in multi-cultural environments<sup>84</sup>, making strategies of collaborative co-authorship useful for countries like Myanmar where there are an array of international and domestic entities engaged in ongoing development projects. Gray observes that such strategies are flexible enough to accommodate dynamic conditions where a country's current transition is driving changes in cultural sensibilities across a range of political, legal, social, and economic concerns—conditions that describe the context of Myanmar's political transition.<sup>85</sup>

This extends the call for coordination and communication, albeit beyond the interactions of multiple aid providers to encompass aid recipients. This is not easy in Southeast Asian societies, where people exhibit a reluctance to engage in conversations involving unclear or unpredictable outcomes with others deemed as superior.<sup>86</sup> This requires investing in relationships that build social capital in the form of trust sufficient to provide a sense of a safe learning environment, translation that phrases foreign concepts in local modes of understanding, and familiarity that foster understanding of cultural cues in communication.<sup>87</sup> This ties in with the mitigation of segregation and privilege, in that such levels of social capital require a frequency and depth of interaction tied to an immediate presence not afforded by conditions that remove or distance aid providers from their beneficiaries.

It is understood that reforms brought by development aid constitute their own structure, but the question is not whether there is a structure but rather what kind of relationship exists between structure and agency. Specifically, does the structure enable the agency of aid recipients in their own aid? Strategies that utilize

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<sup>81</sup> MAURIANNE ADAMS, PROMOTING DIVERSITY IN COLLEGE CLASSROOMS (1992); *see also* Berkvens, *supra* note 55, at 354-358.

<sup>82</sup> TALMADGE C. GUY, CULTURE AS A CONTEXT FOR ADULT EDUCATION: THE NEED FOR CULTURALLY RELEVANT ADULT EDUCATION, 5-18 (1999); *see also* Sharan B. Merriam & Gabo Ntseane, *Transformational Learning in Botswana: How Culture Shapes the Process*, ADULT ED. Q. 183-197 (2008).

<sup>83</sup> Adams, *supra* note 81; *see also* Berkvens, *supra* note 55; *see generally*, Munir Fasheh, *Rethinking Our Perceptions, Conceptions, and Values Concerning Learning, Education, and Development, Lecture at the Salzburg Seminar, Global Issues: The Roles and Responsibilities of Adult Education, Salzburg, Austria*, in GLOBAL ISSUES IN ADULT EDUCATION: PERSPECTIVES FROM LATIN AMERICA, SOUTHERN AFRICA, AND THE UNITED STATES (Courtney B. Merriam & R. Cervero eds., 2006).

<sup>84</sup> Mel Gray, *Dilemmas of International Social Work: Paradoxical Processes in Indigenisation, Universalism, and Imperialism*, 14 INT'L J. OF SOC. WELFARE 231, 231-38 (2005).

<sup>85</sup> *Id.*

<sup>86</sup> Berkvens, *supra* note 55.

<sup>87</sup> COLIN BEARD & JOHN P. WILSON, THE POWER OF EXPERIENTIAL LEARNING: A HANDBOOK FOR TRAINERS AND EDUCATORS 48-50 (2nd ed. 2002); *see also* Peter Malvicini, *Popular Education and Lifelong Learning: An Integrative Approach to Poverty, Development, and Change*, in GLOBAL ISSUES IN ADULT EDUCATION: PERSPECTIVES FROM LATIN AMERICA, SOUTHERN AFRICA, AND THE UNITED STATES 350 (2006).

the above principles to address this requirement include direct, immersive, sustained programs that place foreign aid providers alongside Myanmar faculty and staff doing the same tasks of research and teaching in the law schools. Exemplars are programs like the Australian Volunteers in International Development (“AVID”) or the United States Fulbright Program, which provide the potential for foreign educators to work with Myanmar counterparts in extended partnership arrangements lasting as long as twelve months that facilitate shared experiences over legal education problems and which thereby build social capital fostering collaboration towards mutually acceptable solutions. While the processes and outcomes of such relationships may be dependent on the commitment, preferences, and flexibility of the individuals involved, they at minimum function to set conditions that encourage understanding that can better mitigate the issues raised by the respondents in this paper.

## VI. Conclusion

The motivation for this paper was to improve educational development aid using self-reflective analysis tied to the experiences of Myanmar law school faculty with the delivery of such aid. The analysis referenced educational development aid literature to organize these experiences in ways that highlighted the concerns of Myanmar aid recipients to identify issues in the provision of aid to Myanmar law schools. While focused on addressing the situation of Myanmar’s legal education system, the analysis provides insights for more general educational development aid by illustrating the need for more contextual awareness and more sustained, egalitarian, sensitive relationships with aid recipients. Doing so enables greater agency for aid recipients not just in terms of working within the structure of choices offered by aid providers but in terms of going further to participate in the construction of such aid structure. This, however, requires a commitment to what Deborah Eade sees as the requisite preconditions for effective development assistance: self-awareness, self-criticism, and modesty about the complexities of development assistance among all parties involved.<sup>88</sup> These requirements are reciprocal, as Michael Edwards asserts:

“. . . it is possible to help others effectively, but only if we realise that in doing so they help us to grow to a fuller, more independent knowledge of ourselves. . . if our own practice is autocratic, closed, and chauvinist, it is unlikely that we will be able to encourage others to be democratic, open, and egalitarian.”<sup>89</sup>

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<sup>88</sup> Eade, *supra* note 10, at 635.

<sup>89</sup> Edwards, *supra* note 10, at 615.

# EXTRAJUDICIAL PUNISHMENTS TO COMBAT THE PHILIPPINE DRUG WAR: PROBLEM OR SOLUTION?

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## I. Introduction

Extrajudicial punishments arose as a prevalent issue worldwide during the early 20th century.<sup>1</sup> Consisting of executions, forced disappearances, and arbitrary arrests and detentions, extrajudicial punishments are viewed as highly unethical by many human rights organizations because they divert from the sanction of any legal or judicial proceeding, thereby bypassing the due process of law.<sup>2</sup> Its use is becoming increasingly commonplace as a government solution for eradicating unwanted citizens acting against the governmental agenda, with more apparent use in Third-World countries that often suffer from dictator-like

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<sup>1</sup> Beverly Rose Lobo, *Question of Human Rights Violations Under Extrajudicial Punishments*, DHIRUBHAI AMBANI INTERNATIONAL MODEL UNITED NATIONS (Oct. 17, 2014).

<sup>2</sup> Frederico Andreu-Guzmán, *Enforced Disappearance and Extrajudicial Execution: Investigation and Sanction: Practitioners Guide No. 9*, INT'L COMM'N OF JURISTS, 1, 87 (2015), <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2015/12/Universal-Enforced-Disappearance-and-Extrajudicial-Execution-PGNo9-Publications-Practitioners-guide-series-2015-ENG.pdf>.

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governments or political turmoil.<sup>3</sup> With the rise of new technology, extrajudicial killings have further transformed.<sup>4</sup> Issues have come to light regarding the use of extrajudicial killings through unmanned aerial vehicles that target specific individuals, such as the drone strike in Yemen that killed Anwar al-Awlaki, a U.S. citizen turned Al-Qaeda operative, in 2011.<sup>5</sup> Other countries have also turned to the use of extrajudicial punishments for a quick fix to their problems, guising them as “acts of war,” with a flagrant disregard for the consequences that are guaranteed to ensue.<sup>6</sup>

Recently, the Philippines has come under scrutiny for the widely-known authorization of extrajudicial punishments by its current president, Rodrigo Duterte, and the prevalence of such tactics being used to kill alleged criminals and innocent bystanders.<sup>7</sup> Between July 1, 2016 and December 12, 2016, more than 5,900 suspected drug dealers and users were killed at President Rodrigo Duterte’s command.<sup>8</sup> Duterte is well-known for condoning, and oftentimes outright encouraging, the use of extrajudicial executions to ending the country’s current “Drug War,” an alleged war which confronts the nation’s drug trade through extreme and violent measures.<sup>9</sup> His no-nonsense approach to eradicating the drug trade and drug use has not only led to the over-population of already overcrowded prisons, but also the deaths of many innocent bystanders.<sup>10</sup> Due to Duterte’s lawless tactics, various governments and global human rights organizations have condemned the heavy use of extrajudicial punishments in the Philippines.<sup>11</sup>

This article will specifically focus on President Duterte’s regulation of the Drug War in which he explicitly promotes extrajudicial punishments to combat the prevalent illicit drug trade. This article will then discuss the factors that con-

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<sup>3</sup> See generally, Amanda Taub, *How Countries Like the Philippines Fall Into Vigilante Violence*, N.Y. TIMES (Sept. 11, 2016), <http://www.nytimes.com/2016/09/12/world/asia/the-philippines-rodrigo-duterte-vigilante-violence.html>.

<sup>4</sup> Rebecca Gordon, *How the US Military Came to Embrace Extrajudicial Killings*, THE NATION (July 18, 2015), <https://www.thenation.com/article/how-the-us-military-came-to-embrace-extrajudicial-killings/>.

<sup>5</sup> Mark Mazzetti, Charlie Savage & Scott Shane, *How a U.S. Citizen Came to Be in America’s Cross Hairs*, N.Y. TIMES (Mar. 9, 2013), <http://www.nytimes.com/2013/03/10/world/middleeast/anwar-al-awlaki-a-us-citizen-in-americas-cross-hairs.html>.

<sup>6</sup> GABRIELLA BLUM & PHILIP HEYMANN, *LAW AND POLICY OF TARGETED KILLING, LAWS OUTLAWS, AND TERRORISTS: LESSONS FROM THE WAR ON TERRORISM* 167 (MIT Press, Vol. 1 2010).

<sup>7</sup> Nick Robins-Early, *Duterte’s Brutal Drug War Skyrockets Killings in the Philippines*, THE HUFFINGTON POST (Aug. 15, 2016), [http://www.huffingtonpost.com/entry/rodrigo-duterte-philippines-drugs-vigilante-killings\\_us\\_57aa0e8ae4b0ba7ed23d9fef](http://www.huffingtonpost.com/entry/rodrigo-duterte-philippines-drugs-vigilante-killings_us_57aa0e8ae4b0ba7ed23d9fef).

<sup>8</sup> Sherwin Alfaro & Elizabeth Roberts, *Philippines: More Than 5,900 Deaths in ‘War on Drugs’ Since July*, CNN WORLD (Dec. 13, 2016), <http://www.cnn.com/2016/12/12/asia/philippines-death-toll-drug-war/index.html>.

<sup>9</sup> See Robins-Early, *supra* note 7.

<sup>10</sup> Oliver Holmes, *Duterte says children killed in Philippines drug war are ‘collateral damage’*, THE GUARDIAN (Oct. 17, 2016), <https://www.theguardian.com/world/2016/oct/17/duterte-says-children-killed-in-philippines-drug-war-are-collateral-damage>; See also Andrew R.C. Marshall, *Philippines drug war turns a teeming jail into a haven*, REUTERS (Nov. 8, 2016), <http://www.reuters.com/article/us-philippines-drugs-prison-idUSKBN13320W>.

<sup>11</sup> See Robins-Early, *supra* note 7.

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tribute to the Drug War, followed by an analysis of the impact of extrajudicial punishments in different countries. Finally, the article will offer a proposal to President Duterte, addressing the ongoing Drug War in the nation today and providing his administration with alternatives on how to repair the harm that has been caused by the onslaught of killings that have occurred outside of the Philippine judicial system.

### II. Background

Traditionally, extrajudicial killings have been difficult to control because they are not criminalized under international law as broadly as other acts of harm or death, such as torture.<sup>12</sup> Further, the term “extrajudicial punishment” is far from clear cut with an ambiguous definition, therefore increasing the level of difficulty with which authorities can prosecute and hold participants in extrajudicial punishments accountable.<sup>13</sup> Furthermore, third-world countries struggle with the prevalence of extrajudicial punishments due to their severe lack of resources available to allocate to its prevention and regulation.<sup>14</sup>

#### A. Philippine Demographics

An island located off the coast of east Asia, the Philippines is a poverty-ridden country with a history of political turmoil.<sup>15</sup> United States influences remain in the country today, with several U.S. army and naval stations in operation throughout the many Philippine islands.<sup>16</sup> In a study conducted by the Philippine Statistics Authority, one in five Filipinos was classified as “poor,” or living below the poverty threshold.<sup>17</sup> In 2014, the Asian Development Bank estimated 25.2% of the Filipino population to be living below the national poverty line; countries such as Indonesia, Thailand, Vietnam, and Malaysia only had less than 12% of their populations living below their respective national poverty lines.<sup>18</sup>

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<sup>12</sup> Erin Creegan, *Criminalizing Extrajudicial Killings*, 41 DENV. J. INT’L L. & POL’Y, 185, 189 (2012).

<sup>13</sup> PJ Ruben T. Reyes and J. Mariano C. Del Castillo, *Thoughts on Extrajudicial Killings and Unexplained Disappearances*, COURT OF APPEALS MANILA STATION, PHILIPPINES (2016), [http://ca.judiciary.gov.ph/index.php?action=mnuactual\\_contents&ap=j5050](http://ca.judiciary.gov.ph/index.php?action=mnuactual_contents&ap=j5050); See generally, Christian D. Pangilinan, *The Dispute over Extrajudicial Killings: The Need to Define Extrajudicial Killings as State-Sponsored Acts*, 86 PHIL. L. J. 811, 812 (2012).

<sup>14</sup> See generally, Robins-Early, *supra* note 7.

<sup>15</sup> Pauline Eadie, *The Philippines, Environmental Politics and the Challenges Ahead*, BALLOTS & BULLETS, SCH. OF POL. & INT’L REL., U OF NOTTINGHAM (Apr. 18, 2016), <http://nottspolitics.org/2016/04/18/the-philippines-environmental-politics-and-the-challenges-ahead/>.

<sup>16</sup> Manuel Mogato, *Philippines Offers Eight Bases to U.S. Under New Military Deal*, REUTERS (Jan. 13, 2016), <http://www.reuters.com/article/us-philippines-usa-bases-idUSKCN0UR17K20160113>.

<sup>17</sup> Press Release, Philippine Statistics Authority, Poverty Incidence Among Filipinos Registered at 21.5% in 2015 (Oct. 27, 2016), <https://psa.gov.ph/poverty-press-releases> (stating that a Filipino, on average, needed at least PHP 1,813 (roughly \$40 USD) each month to meet both food and non-food needs).

<sup>18</sup> Basic Statistics 2016, *Poverty in the Philippines*, ASIAN DEV. BANK, (Apr. 2016), <https://www.adb.org/countries/philippines/poverty>.

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Akin to other East Asian countries with similar demographics, the Philippines has grappled with the long-standing issue of extrajudicial punishments.<sup>19</sup>

Stemming back to the 1970s under the tumultuous Marcos administration, the Philippine government has periodically utilized extrajudicial punishments to eradicate political opposition or unfavorable citizens.<sup>20</sup> During then-President Ferdinand Marcos' twenty-year regime as a dictator, he not only declared martial law across the nation but also suspended the writ of habeas corpus, utilizing the electric chair as his primary choice of extrajudicial punishment until 1976, when it switched to death by firing squad.<sup>21</sup> Under the Marcos regime, drug trafficking and other criminal acts were punishable by death, and in many cases, broadcasted on national television.<sup>22</sup> Of note, the extrajudicial punishment figures from the Marcos regime were significantly less than the numbers gathered from Duterte's regime; additionally, the numbers from the Marcos regime represent a span of several decades, whereas Duterte's numbers are derived from the six short months he has been in office.<sup>23</sup> Similar to Duterte, President Marcos also had a favorable rating amongst the Filipino population despite the fact that those who opposed him were either publically killed or mysteriously vanished.<sup>24</sup> The troubled policies of the Marcos regime only came to an end after he was accused of embezzling millions of pesos from the Filipinos, subsequently resulting in a military coup and his exile to the United States.<sup>25</sup>

### B. President Duterte's History of Violence

Prior to President Duterte assuming office, then-president Gloria Macapagal-Arroyo also faced similar challenges with controlling the use of extrajudicial punishments.<sup>26</sup> However, under her presidency, terrorist groups in the provinces committed the extrajudicial punishments, not the Philippine police force or vigilantes living in the main cities.<sup>27</sup> To combat the use of extrajudicial executions, she established "Task Force 211," a team of government employees who investi-

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<sup>19</sup> See Pangilinan, *supra* note 13.

<sup>20</sup> See Pangilinan, *supra* note 13.

<sup>21</sup> Joel Ruiz Butuyan, *Extrajudicial killings as crime against humanity*, INQUIRER.NET (Aug. 15, 2016), <http://opinion.inquirer.net/96518/extrajudicial-killings-crime-humanity>.

<sup>22</sup> Maggie dela Riva, REVOLVY.COM (Mar. 10, 2017), <https://www.revolvy.com/topic/Maggie%20dela%20Riva&uid=1575>.

<sup>23</sup> Rishi Iyengar, *The Killing Time: Inside Philippine President Rodrigo Duterte's War on Drugs*, TIME (Aug. 25, 2016), <http://time.com/4462352/rodrigo-duterte-drug-war-drugs-philippines-killing/>.

<sup>24</sup> *Id.*

<sup>25</sup> Mark Hanrahan, *Philippine President Duterte Threatens to Impose Martial Law*, NBC NEWS (Jan. 15, 2017), <http://www.nbcnews.com/news/world/philippine-president-duterte-threatens-impose-martial-law-n707066>.

<sup>26</sup> ATTY. AL A. PARRENO, REPORT ON THE PHILIPPINE EXTRAJUDICIAL KILLINGS 13 (The Asia Foundation 2011), <http://www.asiafoundation.org/resources/pdfs/ReportonPhilippineEJK20012010.pdf>.

<sup>27</sup> *Extrajudicial Killings in the Philippines: Strategies to End the Violence: Hearing on S. Hrg. 110-290 Before the Subcommittee on East Asian and Pacific Affairs of the S. Comm. On Foreign Relations, 110th Cong.* (2007), <https://www.gpo.gov/fdsys/pkg/CHRG-110shrg40811/html/CHRG-110shrg40811.htm>.

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gated and filed charges against the participants of these lawless killings.<sup>28</sup> Her administration also established the Melo Commission, a group headed by now-retired Philippine Supreme Court Justice Jose Melo, which prosecuted those responsible for the deaths of many political figures and the forced disappearances of others.<sup>29</sup>

Between 2001 and 2010, an estimated 390 individuals were killed in extrajudicial executions, with only 161 of those cases being filed with the Philippine prosecutor; most of these deaths can be attributed to Philippine terrorist groups.<sup>30</sup> Conversely, under Duterte's presidency, these terrorist groups are but one of the contributing factors to the high number of deaths stemming from extrajudicial executions.<sup>31</sup> In the last six months, as many as 6,000 individuals have been killed, with a large majority of their deaths being traced to vigilantes, government officials, the Philippine armed forces, and even the Philippine National Police.<sup>32</sup> Alarming, over 3,500 unsolved homicide cases are linked to Duterte, be it to his explicit approval of extrajudicial killings by vigilantes or government-controlled forces.<sup>33</sup> As such, the mere fact that these deaths are occurring has exposed the lawlessness of the Philippine government, various government entities, the unchecked powers of national and local clans, and the deep-rooted government ties to such organizations.<sup>34</sup>

President Duterte's loud promotion of extrajudicial punishment is not a new concept.<sup>35</sup> Prior to winning the presidency, President Duterte was mayor of Davao City for over twenty years.<sup>36</sup> During his time as mayor, he was quite vocal about his disdain for those who contributed to the drug industry, earning him the nickname "The Punisher" for his takedown of criminals and alleged criminals.<sup>37</sup>

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<sup>28</sup> See Parreno, *supra* note 26, at 58.

<sup>29</sup> See *Hearing on S. Hrg. 110-290*, *supra* note 27.

<sup>30</sup> See Parreno, *supra* note 26, at 4 & 17.

<sup>31</sup> See generally, Kristine Guerra, *Philippine President Duterte warns terrorists he can be '10 times' more brutal than ISIS*, WASH. POST (Aug. 16, 2016), [https://www.washingtonpost.com/news/worldviews/wp/2016/08/16/philippine-president-duterte-warns-terrorists-he-can-be-10-times-more-brutal-than-isis/?utm\\_term=.57fb44370fcf](https://www.washingtonpost.com/news/worldviews/wp/2016/08/16/philippine-president-duterte-warns-terrorists-he-can-be-10-times-more-brutal-than-isis/?utm_term=.57fb44370fcf).

<sup>32</sup> THOMAS LUM, CONG. RESEARCH SERV., RL 33233, THE REPUBLIC OF THE PHILIPPINES AND U.S. INTERESTS 5 (2012).

<sup>33</sup> See generally Daniel Berehulak, *'They Are Slaughtering Us Like Animals'*, N.Y. TIMES (Dec. 7, 2016), <http://www.nytimes.com/interactive/2016/12/07/world/asia/rodrigo-duterte-philippines-drugs-killings.html>.

<sup>34</sup> International Business Publications, *Strategic Information and Development*, Philippines Foreign Policy and Government Guide Vol. 1 1, 98 (2013).

<sup>35</sup> Emily Rauhala, *Before Duterte was the Philippines' president, he was 'the Death Squad mayor'*, WASH. POST (Sept. 28, 2016), [https://www.washingtonpost.com/world/asia\\_pacific/before-duterte-was-the-philippines-president-he-was-the-death-squad-mayor/2016/09/28/f1d1ccc4-800b-11e6-ad0e-ab0d12c779b1\\_story.html?utm\\_term=.11e8dfad63cb](https://www.washingtonpost.com/world/asia_pacific/before-duterte-was-the-philippines-president-he-was-the-death-squad-mayor/2016/09/28/f1d1ccc4-800b-11e6-ad0e-ab0d12c779b1_story.html?utm_term=.11e8dfad63cb).

<sup>36</sup> Michael Sullivan, *Why Philippine President Rodrigo Duterte Distrusts the US*, NPR (Oct. 11, 2015), <http://www.npr.org/sections/parallels/2016/10/11/497487363/why-philippine-president-rodrigo-duterte-distrusts-the-u-s>.

<sup>37</sup> See Rauhala, *supra* note 35; See also Ian Bremmer, *These 5 Facts Explain Rodrigo Duterte's Victory in the Philippines*, TIME (May 13, 2016), <http://time.com/4328326/rodrigo-duertes-philippines-five-facts/>.

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In fact, Duterte was known for being the ringleader of the “Davao Death Squad,” a militia group that executed his bidding through the use of extrajudicial punishments, specifically causing political opponents and alleged criminals to “disappear.”<sup>38</sup> These former Davao Death Squad militiamen later testified in trials that Duterte was involved in the deaths of more than a thousand individuals.<sup>39</sup>

Often, those caught in the crosshairs are not habitual drug users; they are merely human mules being used to shuttle around paraphernalia, or occasional users in the wrong place at the wrong time.<sup>40</sup> President Duterte has also openly admitted his involvement in the deaths of children and innocent people, referring to them as ‘collateral damage,’ eliciting responses from various human rights organizations, the Catholic Church, and many member states of the UN.<sup>41</sup> However, Duterte has ignored the plights of these organizations, commenting, ‘I do not care what the human rights guys say. I have a duty to preserve the generation. If it involves human rights, I don’t give a shit. I have to strike fear.’<sup>42</sup> He has even gone as far as to threaten the Philippines’ departure from the UN.<sup>43</sup>

### III. Discussion

The day after his inauguration, President Duterte publicly vowed to protect those who killed drug lords, pushers, and users: even if they killed as many as a thousand people.<sup>44</sup> He also pledged to make the fish in the Manila Bay ‘fat from all the bodies’ of the drug users he was aiming to dump into its waters.<sup>45</sup> In his first month as president, President Duterte was responsible for the deaths of approximately 1,200 people, be it his explicit instruction to the Philippine Armed Forces, Philippine Police Force, or his express granting of protection from criminal sanctions to vigilantes.<sup>46</sup> Over 600,000 drug users turned themselves in to government offices and police stations the following month to register their

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<sup>38</sup> See generally, Carlos H. Conde, *Philippine death squads extend their reach*, N.Y. TIMES (Mar. 23, 2015), <http://www.nytimes.com/2005/03/23/world/asia/philippine-death-squads-extend-their-reach.html>.

<sup>39</sup> Chieu Luu, Tiffany Ap & Kathy Quiano, *Philippines President ‘Ordered Death Squad Hits While Mayor,’ Alleged Hitman Claims*, CNN (Sept. 16, 2016), <http://www.cnn.com/2016/09/15/asia/philippines-duterte-senate-hearing/>.

<sup>40</sup> Mikas Matsuzawa & Patricia Viray, *Casualties of Rody’s War*, PHILIPPINE STAR GLOBAL (Sept. 19, 2016), <http://newslab.philstar.com/war-on-drugs/poverty>.

<sup>41</sup> See Holmes, *supra* note 10; See also Camila Domonoske, *Under New Philippines President, Nearly 1800 Have Died in Extrajudicial Killings*, NPR (Aug. 22, 2016) <http://www.npr.org/sections/thetwo-way/2016/08/22/490944191/under-new-philippine-president-nearly-1-800-have-died-in-extrajudicial-killings>; See also Robert Muggah, *Duterte’s Drug War in the Philippines is Out of Control, He Needs to be Stopped*, THE GUARDIAN (Jan. 5, 2017), <https://www.theguardian.com/global-development-professionals-network/2017/jan/05/rodrigo-dutertes-drug-war-in-the-philippines-is-out-of-control-he-needs-to-be-stopped>.

<sup>42</sup> See Holmes, *supra* note 10.

<sup>43</sup> Euan McKirdy, *Philippines President Rodrigo Duterte Insults UN, Threatens to Leave Over Criticism*, CNN (Aug. 21, 2016), <http://www.cnn.com/2016/08/21/asia/philippines-duterte-threatens-to-leave-un/>.

<sup>44</sup> See Iyengar, *supra* note 23.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

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names, primarily out of fear that they would be next on Duterte's hit list.<sup>47</sup> Coupled with the fact that the current term for Philippine presidents lasts six years, the ratio at which individuals are dying under Duterte's administration translates to an unprecedented number of deaths in the upcoming years should both the drug war and Duterte's sanction of extrajudicial killing continue.<sup>48</sup>

Out of those 6,000 deaths that have occurred since Duterte assumed office, 2,086 were allegedly killed in police operations, with the remaining 3,841 were killed under other circumstances, including by vigilantes.<sup>49</sup> Unstopped, Duterte is only moments away from suspending the writ of habeas corpus in an attempt to bolster his campaign against illicit drugs, which will ultimately lead to a higher Philippine death toll.<sup>50</sup> Under the Philippine Constitution, the President may suspend the writ or proclaim martial law, in cases of invasion, rebellion, or when the public safety requires it.<sup>51</sup> Due to President Marcos' abuse of habeas corpus suspension along with his unchecked proclamation of martial law in the 70's, the Philippine Constitution now has a provision that limits any suspension of the writ or declaration of martial law to sixty days.<sup>52</sup> However, if the president submits a report to the congress within 48 hours after any suspension or proclamation of either doctrine, Congress has the opportunity to vote on the matter, and can choose to revoke or extend the proclamation or suspension.<sup>53</sup> With an approval rating of 83% as of December 11, 2016 and only single-digit disapproval and distrust ratings in regard to his performance and trustworthiness, the likelihood of the Philippine Congress sanctioning Duterte's actions and extending the suspension of the writ should he ask for their support seems extremely likely, increasing the likelihood that his suspension of the writ may actually occur.<sup>54</sup>

When comparing the rate of drug use in the Philippines to the drug use of other countries, the illicit drug trade does not appear as precarious as President Duterte suggests, particularly when compared to the rate at which alleged perpetrators of the Drug War are being punished or executed.<sup>55</sup> According to the United Nations Office on Drugs and Crime, the highest recorded figure of am-

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<sup>47</sup> Aurora Almendral, *When Half a Million Drug Users Surrendered in the Philippines, Authorities Sent Some of Them to Zumba*, PRI (Oct. 12, 2016), <http://www.pri.org/stories/2016-10-12/when-half-million-drug-users-surrendered-philippines-authorities-sent-some-them>.

<sup>48</sup> See generally, Reuters, *Philippines' Duterte Says He May Not 'Be Around' Till End of Term*, CNBC (Dec. 13, 2016), <http://www.cnbc.com/2016/12/13/philippines-duterte-says-he-may-not-be-around-till-end-of-term.html>.

<sup>49</sup> *Id.*

<sup>50</sup> *UN expert rejects Philippines conditions for fact-finding mission on drugs war*, U.N. Office of the High Commissioner (Dec. 16, 2016), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21045&LangID=E>.

<sup>51</sup> Const. (1987), art. III, § 15 (Phil.).

<sup>52</sup> *Id.* art. VII, §18.

<sup>53</sup> *Id.*

<sup>54</sup> Helen Flores, *Rody approval rating at 83%*, PHILIPPINE STAR GLOBAL (Jan. 7, 2017), <http://www.philstar.com/headlines/2017/01/07/1660424/rody-approval-rating-83>.

<sup>55</sup> VJ Bacungan, *Duterte warns of suspension of writ of habeas corpus*, CNN PHILIPPINES (Nov. 13, 2016), <http://cnnphilippines.com/incoming/2016/11/13/rodrigo-duterte-warns-of-suspension-of-writ-of-habeas-corpus.html>.

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phetamine use amongst the Philippine population is 2.35%, which is worse than the US rate of 2.20%.<sup>56</sup> Comparatively, however, the population differences between the two countries differ by over 220 million individuals, resulting in a larger population of drug users in the US when compared to the Philippines.<sup>57</sup> However, cocaine use in the Philippines is limited to .03% of the population, comparable to the UK's rate of 2.40% and the US' rate of 2.10%.<sup>58</sup> According to statistics released by the Philippine Dangerous Drugs Board, roughly 1.8 million Filipinos are addicted to illegal drugs, with 11,321 *barangays*, the Filipino term for "district," housing residents who use illicit drugs on a daily basis.<sup>59</sup> The most commonly used drug is *shabu*, or meth.<sup>60</sup> Due to the majority of its ingredients being readily available in household products or over the counter medications, *shabu* is produced quickly and efficiently at low costs, making it the drug of choice for sellers.<sup>61</sup> Moreover, users experience an instantaneous high despite only ingesting small quantities, making it the ideal choice for users as well; the drug retention rate for *shabu* is 28%.<sup>62</sup>

Although Duterte's extrajudicial punishment policies have yielded results, these results are merely temporary.<sup>63</sup> For each individual he kills, another will take his place, since illicit drug use is a health issue that requires targeted, non-criminal, interventions that start with the individual.<sup>64</sup> With an estimated 1.8 million drug users out of a general population of 100 million people, more blood will be shed using this quick fix unless the root cause of the Drug War is eradicated.<sup>65</sup>

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<sup>56</sup> See Iyengar, *supra* note 23.

<sup>57</sup> See generally, Central Intelligence Agency, *East & Southeast Asia: Philippines*, The World Factbook, (Jan. 12, 2017), <https://www.cia.gov/library/publications/the-world-factbook/geos/rp.html>, (provides estimated population total in United States as of July 2016); Central Intelligence Agency, *North America: United States*, The World Factbook, (Jan. 12, 2017), <https://www.cia.gov/library/publications/the-world-factbook/geos/us.html>, (provides estimated population total in Philippines as of July 2016).

<sup>58</sup> See Iyengar, *supra* note 23.

<sup>59</sup> Babe Romualdez, *How Serious Is Our Drug Problem?*, PHILIPPINE STAR GLOBAL (Aug. 28, 2016), <http://www.mapinc.org/newscfdp/v16/n591/a03.html>.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*; See also Jeffrey Hays, *Amphetamines (Speed, Ice, Methamphetamines, Shabu Shabu, Hirropin) in Japan*, FACTS AND DETAILS, <http://factsanddetails.com/japan/cat19/sub125/item663.html> (last updated Jan. 2013).

<sup>62</sup> Jodesz Gavilan, *DDB: Philippines Has 1.8 million Current Drug Users*, RAPPLER (Oct. 11, 2016), <http://www.rappler.com/nation/146654-drug-use-survey-results-dangerous-drugs-board-philippines-2015>.

<sup>63</sup> Camille Diola, *How Duterte's drug war can fail*, PHILIPPINE STAR GLOBAL (Sept. 19, 2016), <http://newslab.philstar.com/war-on-drugs/policy>.

<sup>64</sup> Aries Arugay & Janjira Sombatpoonsiri, *Duterte's War on Drugs: Bitter Lessons from Thailand's Failed Campaign*, THE CONVERSATION (Sept. 29, 2016), <http://theconversation.com/dutertes-war-on-drugs-bitter-lessons-from-thailands-failed-campaign-66096>.

<sup>65</sup> See Diola, *supra* note 63.

#### IV. Analysis

##### A. Contributing Factors to the Drug War

###### a. Poverty

One of the more pressing, contributing factors to the Drug War is the fact that the Philippines is an inherently poor country, in comparison to the other countries of the world.<sup>66</sup> As such, it is often cheaper to buy drugs than it is to put food on the table.<sup>67</sup> Thus, many individuals turn to drugs to escape the harsh realities of poverty, hopelessness, and powerlessness.<sup>68</sup> Unless the government or private industry generates enough jobs for those making, peddling, and using drugs, the drug problem will persist.<sup>69</sup> Moreover, because such a strong correlation exists between the use of drugs and unemployment, the creation of more jobs would assist in not only decreasing the percentage of drug users but also decrease the population of unemployed individuals, in addition to bolstering the economy.<sup>70</sup> According to a spokesperson for iDefend, an organization that assists in providing rehabilitative services to drug users, “it all boils down to a war against the poor. We can be sure that even with a high kill rate, we will still have a massive drug problem after six years.”<sup>71</sup>

###### b. Children

Young children often wind up on the street for a variety of reasons, whether it is to help their family make ends meet, or because they are being abused at home.<sup>72</sup> These children often live and survive on the street with little or no contact with their families, or live at home but spend a significant amount of time out on the street, begging or vending.<sup>73</sup> In a study conducted on the correlation

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<sup>66</sup> United Nations, *Country Classification*, World Economic Situation and Prospects 2014, [http://www.un.org/en/development/desa/policy/wesp/wesp\\_current/wesp2014.pdf](http://www.un.org/en/development/desa/policy/wesp/wesp_current/wesp2014.pdf). (The United Nations classifies the Philippines as a “developing nation.”)

<sup>67</sup> See generally, *End the Drug War: Philippines President Duterte Says Kill All Drug Dealers*, DRUG POLICY ALLIANCE (July 11, 2016), <http://www.drugpolicy.org/blog/end-drug-war-philippines-president-duterte-says-kill-all-drug-dealers> (explaining how many turn to drugs in order to cope with their lives and escape reality, such as the difficulties of living in poverty and providing for one’s family).

<sup>68</sup> Jovic Yee, ‘Don’t make war on drugs war on human rights’, INQUIRER (Aug. 13, 2016), <http://newsinfo.inquirer.net/805816/dont-make-war-on-drugs-war-on-human-rights>.

<sup>69</sup> *Id.*

<sup>70</sup> Rogier van den Brink, *Philippines: Creating More and Better Jobs: We Can Work It Out*, THE WORLD BANK (Feb. 26, 2014), <http://www.worldbank.org/en/news/speech/2014/02/26/philippines-creating-more-and-better-jobs-we-can-work-it-out>.

<sup>71</sup> *Id.*

<sup>72</sup> UNICEF, *Under pressure: children on the streets*, [https://www.unicef.org/philippines/real-lives\\_11786.html](https://www.unicef.org/philippines/real-lives_11786.html) (last visited Feb. 18, 2017).

<sup>73</sup> Levi Njord, Ray M. Merrill, Rebecca Njord, Ryan Lindsay & Jeanette D.R. Pachano, *Drug Use Among Street Children and Non-Street Children in the Philippines*, ASIA-PACIFIC J. PUB. HEALTH 22(2), 203, 211; See also Schools Online, *Street Children*, BRITISH COUNCIL, <https://schoolsonline.britishcouncil.org/street-children> (last visited Mar. 10, 2017) (Street children are minors who live and/or work on the streets. UNICEF has classified into three categories: street living children, who have run away from their families and live alone on the streets; street working children, who spend most of their time on the

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between drug use among street children and non-street children, street children were significantly more likely to have been given or sold a drug in the past month than non-street children, and in turn, drug use is more prevalent amongst street children.<sup>74</sup> This can be attributed to the fact that street children have greater access to drugs than non-street children.<sup>75</sup>

Furthermore, in a 2008 study published in the *Asia-Pacific Journal of Public Health*, it was found that drug abuse by Filipino youths began between the ages of ten and eleven years.<sup>76</sup> Often consisting of toluene-based solvents (such as shoe glue), the relatively low cost and ease at which children can obtain such products makes solvent-based type drugs a common choice.<sup>77</sup> With Filipino children lacking the option to seek treatment for any drug addiction they may develop due to poverty levels or lack of knowledge regarding resources, their drug addiction grows from tobacco, alcohol and inhalants to more severe drugs.<sup>78</sup> Early experimentation with these substances is known to be associated with both immediate and lasting problems, including abuse and dependence, which can result in profound, long-term health and social consequences.<sup>79</sup>

### c. Government

The Philippine government has already created organizations to help combat the drug trade, which include: the Dangerous Drugs Board and the Philippine Drug Enforcement Agency, both created in 2002 to prevent and control the prevalent use of drugs amongst the Philippine population.<sup>80</sup> Collectively, these agencies are placed in charge of tasks such as shutting down drug bodegas and arresting individuals found in possession of drugs.<sup>81</sup> Specifically, the Dangerous Drugs Board has recently been placed in charge of establishing the needed drug abuse treatment and rehabilitation centers to provide drug dependents who have

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streets but return home on a regular basis; and children from street families, or children who live on the streets with their families.)

<sup>74</sup> See L. Njord, Merrill, R. Njord, Lindsay & Pachano, *supra* note 73 at 207.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 208.

<sup>77</sup> *Id.* at 204.

<sup>78</sup> *Id.*

<sup>79</sup> R.J. E. Gruber, M.M. Anderson & M. Lodico, *Early Drinking Onset and its Association with Alcohol Use and Problem Behavior in Late Adolescence*, 25 *PREVENTIVE MED.* 293, 300 (1996); See also *Drugs, Brains, and Behavior: The Science of Addiction*, NIDA, <https://www.drugabuse.gov/publications/drugs-brains-behavior-science-addiction> (last visited Mar. 9, 2017).

<sup>80</sup> Exec. Ord. No. 218, *Strengthening The Support Mechanism For The Philippine Drug Enforcement Agency*, Republic of the Philippines, Office of the President, Philippine Drug Enforcement Agency; see also Congress of the Philippines, Twelfth Congress, First Regular Session, Republic Act No. 9165, (June 7, 2002).

<sup>81</sup> Bureau of International Narcotics and Law Enforcement Affairs, *2016 International Narcotics Control Strategy Report*, U.S. DEP'T OF STATE, <https://www.state.gov/j/inl/rls/nrcrpt/2016/vol1/253301.htm>; See also Philippine Drug Enforcement Agency 2015 Annual Report, 15, <http://pdea.gov.ph/images/AnnualReport/2015AR/AR2015page1to37.pdf>.

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voluntarily surrendered with the appropriate treatment and services they need.<sup>82</sup> However, when over 600,000 admitted drug users turned themselves in during the first weeks of Duterte's presidency out of fear of being killed, both these entities and local entities were unprepared.<sup>83</sup> In an attempt to rehabilitate some of the drug users who willingly turned themselves in, local governments sent meth addicts to compulsory Zumba classes.<sup>84</sup> Meanwhile, others were sent to community rehabilitation programs where they learned trades like hairdressing or soapmaking, in addition to being subject to weekly "value formation" sessions that served as a barometer of their sincerity in changing their lifestyle.<sup>85</sup> These wildly ineffective rehabilitation tactics not only showcase how woefully unprepared and overwhelmed local and governments and organizations were, but also further highlight the dire need for proper resources to assist the Filipino population that is truly willing to participate in effective rehabilitation.<sup>86</sup>

Another problem contributing to the Drug War is the fact that the Filipino government has a longstanding history of corruption.<sup>87</sup> In a corruption study conducted by Transparency International in 2016, the Philippines ranked 101 out of 176 countries and territories, indicating that it was plagued by untrustworthy and badly functioning public institutions.<sup>88</sup> As such, some of the top government officials in recent years have been found guilty of bribery, and participating in political coups, among other corrupt acts.<sup>89</sup> Recently, President Duterte has launched a purge of the ranks of politicians, judiciary, and the armed forces by publicly announcing names of over 150 people he accused, albeit many of these accusations being unfounded, of being involved in illegal drug-related corruption and allowing them 24 hours to turn themselves in for investigation, or risk becoming targets of a 'hunt.'<sup>90</sup> However, unlike the ordinary citizens being subject to extrajudicial executions, these government officials were promised to receive the due process of law if any of the accused were charged in court.<sup>91</sup>

Aside from this, corruption also exists amongst the very people designated to protect and serve the Filipinos: the Philippine National Police. Oftentimes, police participating in extrajudicial punishments fabricate their official reports, al-

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<sup>82</sup> *President Duterte Issues EO to Establish, Support Rehab Centers*, REPUBLIC OF THE PHIL., OFFICE OF THE PRESIDENT: DANGEROUS DRUGS ABROAD (Oct. 17, 2016), <http://www.ddb.gov.ph/newsroom/292-president-duterte-issues-eo-to-establish-support-rehab-centers>.

<sup>83</sup> See Almendral, *supra* note 47.

<sup>84</sup> See Iyengar, *supra* note 23.

<sup>85</sup> *Id.*

<sup>86</sup> Iyengar, *supra* note 23.

<sup>87</sup> See generally TRANSPARENCY INT'L, *More Than 6 Billion People Live In Countries With a Serious Corruption Problem*, <https://www.transparency.org/cpi2015/> (last visited Feb. 18, 2017).

<sup>88</sup> TRANSPARENCY INT'L, *Corruption Perceptions Index 2016*, (Jan. 25, 2017), [http://www.transparency.org/news/feature/corruption\\_perceptions\\_index\\_2016](http://www.transparency.org/news/feature/corruption_perceptions_index_2016).

<sup>89</sup> See Philippines- Government & Business Contacts Handbook, International Business Publications 6 (5th ed. 2008).

<sup>90</sup> Himanshu Goenka, *Philippine Drug War: President Duterte Launches Corruption Purge*, IBT (Aug. 8, 2016), <http://www.ibtimes.com/philippine-drug-war-president-duterte-launches-corruption-purge-2398555>.

<sup>91</sup> *Id.*

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leging that they acted in self-defense, and routinely plant guns, spent ammunition, or even drug packets next to victims' bodies.<sup>92</sup> Some officers are even paid \$160 to \$300 extra in cash, albeit secretly at their headquarters, for each extrajudicial execution disguised as a legitimate operation.<sup>93</sup> Occasionally, officers even go as far as to set up arrangements with funeral homes where they can receive a commission for sending corpses their way.<sup>94</sup>

### B. The Use of Extrajudicial Punishments in Other Countries

#### a. Thailand

Earlier this century, then Thai Prime Minister Thaksin Shinawatra also 'launched a war on drugs', leading to at least 2,800 deaths through extrajudicial punishment methods.<sup>95</sup> During an investigation occurring five years after Prime Minister Thaksin's declaration, it was discovered that more than half of the individuals killed had no connection to drugs whatsoever.<sup>96</sup> Another several thousand people were coerced into anti-drug treatment and rehabilitation.<sup>97</sup>

Similar to the Philippines, Thailand's Drug War stemmed from the prevalent use of methamphetamines amongst its citizens.<sup>98</sup> Ethnic Burmese rebels produced most of the methamphetamines on the Thailand-Myanmar border to finance their armed struggles against the Thai government.<sup>99</sup> Because of its affordable price, methamphetamines were largely consumed by the rural working class.<sup>100</sup>

In an attempt to eradicate the trade of methamphetamines, the Thai government compiled "blacklists" of those involved in the trade, and collaborated with local governors and police officers to arrest, and often kill, those on the lists.<sup>101</sup> The war ultimately ended with Prime Minister Thaksin being overthrown in a

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<sup>92</sup> 'License to Kill: Philippine Police Killings in Duterte's 'War on Drugs'', HUMAN RIGHTS WATCH, <https://www.hrw.org/report/2017/03/01/license-kill/philippine-police-killings-dutertes-war-drugs> (last visited Mar. 10, 2017).

<sup>93</sup> Steve Mollman, *Murder by Numbers: Duterte's War on Drugs Has Created 'An Economy of Murder' in the Philippines*, says Amnesty International, QUARTZ (Feb. 01, 2017), <https://qz.com/900039/dutertes-war-on-drugs-has-created-an-economy-of-murder-in-the-philippines-says-amnesty-international/>.

<sup>94</sup> *Id.*

<sup>95</sup> *Thailand's 'war on drugs': International Harm Reduction Association and Human Rights Watch briefing paper*, HUMAN RIGHTS WATCH, <https://www.hrw.org/news/2008/03/12/thailands-war-drugs> (last visited Mar. 12, 2008).

<sup>96</sup> *Id.*

<sup>97</sup> HUMAN RIGHTS WATCH, NOT ENOUGH GRAVES: THE WAR ON DRUGS, HIV/AIDS, AND VIOLATIONS OF HUMAN RIGHTS 3 (Vol. 16, No. 8, 2004), <https://www.hrw.org/reports/2004/thailand0704/thailand0704.pdf>.

<sup>98</sup> See Arugay & Sombatpoonsiri, *supra* note 64.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

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coup in 2006.<sup>102</sup> He now lives in Dubai, under a self-imposed exile, and the Thai government to this day continues its battle against the use of illicit drugs in the country.<sup>103</sup>

### b. Brazil

Although Brazil's history of extrajudicial killings is not as severe as some of its neighboring South American countries like Colombia or Guatemala, Brazil faces its own significant extrajudicial punishment problems.<sup>104</sup> The Brazilian police force has killed more than 8,000 people unlawfully in the past decade, with many killings resulting from extrajudicial executions.<sup>105</sup> Many officers involved in these executions said they did not report the crimes of their colleagues for fear that they would also be killed.<sup>106</sup> Furthermore, officers involved in unlawful killings routinely seek to cover up their criminal behavior by threatening witnesses, planting guns or drugs on their victims, and tampering with crime scenes, such as removing corpses from the scene and delivering them to hospitals.<sup>107</sup> Such a chain of unlawful events ultimately 'turns communities against the police and undermine[s] security for all,' poisoning relationships with local communities and endangering the lives of all.<sup>108</sup>

With inadequate resources to dedicate to the investigation of police officers involved in extrajudicial executions, 'officers will continue to commit extrajudicial executions, in turn making the job of policing Rio more difficult and dangerous for all the rest.'<sup>109</sup> To rectify this, Brazilian authorities have recently attempted to improve how police extrajudicial punishments are handled by creating a special prosecutorial unit that focuses on police abuse, called the GAESP.<sup>110</sup>

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<sup>102</sup> See generally, Amy Sawitta Lefevre, *Thai Army Gets Down to Work on Economy, Stifles Dissent*, REUTERS (May 26, 2014), <http://www.reuters.com/article/us-thailand-politics-idUSBREA4P00M20140527>; (Prime Minister Thaksin's overthrowing largely resulted from a schism between poor, rural populists and the largely urban middle class. The deadlock between pro-Thaksin and anti-Thaksin groups ultimately led to the Thai armed forces seizing government control while Thaksin was out of the country.); Catherine E. Shoichet, *Thailand coup: A Cheat Sheet to Get You Up to Speed*, CNN, (May 23, 2014), <http://www.cnn.com/2014/05/21/world/asia/thailand-crisis-up-to-speed/>.

<sup>103</sup> *Police: Thaksin Still in UAE*, BANGKOK POST, (May 21, 2009), <http://www.bangkokpost.com/archive/police-thaksin-still-in-uae/143938>.

<sup>104</sup> HUMAN RIGHTS WATCH, *Brazil: Extrajudicial Executions Undercut Rio Security*, (July 7, 2016), <https://www.hrw.org/news/2016/07/07/brazil-extrajudicial-executions-undercut-rio-security>.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> "Good Cops Are Afraid," *The Toll of Unchecked Police Violence in Rio de Janeiro*, HUMAN RIGHTS WATCH (July 7, 2016), <https://www.hrw.org/report/2016/07/07/good-cops-are-afraid/toll-unchecked-police-violence-rio-de-janeiro>.

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### c. Kenya

Kenya is just one of the many countries in Africa that has a police force that utilizes extrajudicial punishment as a solution to its problems.<sup>111</sup> With the recent election of a new president, the extrajudicial executions carried out by police death squads were primarily related to the election.<sup>112</sup> The transformation of the police force from a security institution into a bastion of insecurity is the outcome of several factors, including the fact that policemen are underpaid and ill-equipped to do their job.<sup>113</sup> The Kenyan executive branch has also proven to be problematic when it comes to extrajudicial punishments. When confronted by a new security situation, the executive's default response has been to set up a "special police unit" to address the situation.<sup>114</sup> These types of units often operated under minimum oversight and maximum impunity, further distorting the power that these units had due to the systemic lack of accountability and an entrenched culture of pervasive impunity.<sup>115</sup>

## V. Proposal

### A. Public Health Approach

Without a public health approach, drugs, addiction, and crime will continue to be prevalent forces in the Philippines.<sup>116</sup> Rather than turning to extrajudicial punishments, President Duterte should focus on correcting behavior and rehabilitating these citizens. Increased funding should be channeled into programs that assist drug users in quitting these habits and rehabilitating them to become functional members of society. As it stands, there are only fourteen small, public rehab centers, and a handful of private centers scattered throughout the entire country, together totaling over sixty rehabilitation centers, bearing only a total of 3,216 available beds to drug dependents willing to undergo rehabilitation.<sup>117</sup> With the existing ratio of government treatment slots to drug addicts, there are 778 would-be patients competing for each bed.<sup>118</sup> Many of the existing rehabilitation centers are overcapacity; the DOH-TRC Bicutan Rehabilitation Center, the largest of rehabilitation facility in the country, has an approved capacity of 550

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<sup>111</sup> Abdullahi Boru Halakhe, *The Trap of Insecurity: Extrajudicial Killings in Kenya*, ALJAZEERA (Dec. 8, 2014), <http://www.aljazeera.com/indepth/opinion/2014/12/trap-insecurity-extrajudicial-ki-20141288552608186.html>.

<sup>112</sup> Esmaguel Paterno II, *Duterte to Suspend Writ of Habeas Corpus if 'Forced'*, RAPPLER (Nov. 13, 2016), <http://www.rappler.com/nation/152167-duterte-suspend-writ-habeas-corpus-warning>.

<sup>113</sup> Paterno II, *supra* note 112.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> See Diola, *supra* note 63.

<sup>117</sup> *Costs and Fees of Alcohol and Drug Rehab Centers in the Philippines*, ALCOHOL AND DRUG REHAB CENTER IN THE PHILIPPINES, <http://alcoholdrugrehabphilippines.blogspot.com/2014/01/costs-and-fees-of-alcohol-and-drug.html> (last visited Mar. 26, 2014) [hereinafter *Costs and Fees of Rehab Centers*]; See also Jefferson Antiporda, *200 Years for Rehab of 1.3M Addicts*, THE MANILA TIMES (Aug. 9, 2016), <http://www.manilatimes.net/200-years-for-rehab-of-1-3m-addicts/278883/>.

<sup>118</sup> See Antiporda, *supra* note 117.

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individuals and currently houses 1,557 individuals.<sup>119</sup> With over 7,000 Philippine Islands comprising the entire nation, it is clear why only fourteen public rehabilitation centers in a country marred by drug addiction is exceedingly problematic.<sup>120</sup> The establishment of more government-funded rehabilitation centers would not only significantly reduce the cost for treatment seekers from 10,000–100,000 Philippine pesos per month to 5,000–10,000 Philippine pesos per month, but most government-run rehabilitation centers would also offer free programs for those who truly cannot afford to finance it on their own.<sup>121</sup> By allocating more resources to rehabilitation facilities, individuals controlled by their drug addictions can seek help, resume their place in society, and contribute to the Philippine economy.<sup>122</sup>

However, President Duterte has recently stated that the government currently lacks the funds to rehabilitate drug addicts, thus he would rather have them killed ‘in the meantime.’<sup>123</sup> In his national budget proposal for 2017, President Duterte pledged to allocate 110.4 billion pesos to the Philippine National Police: an amount 24.6% higher than the allocated budget in 2016.<sup>124</sup> As an additional matter, he stated his intention to increase the Armed Forces’ budget by 15%, and the Judiciary’s budget by 21.5%: all organizations of the government which have not demonstrated the need for larger budgets.<sup>125</sup> Collectively, President Duterte aimed to give these organizations a combined total of 53.74 billion pesos, translating to 10 billion US dollars.<sup>126</sup> Rather than promising this monstrous amount to branches of government that have not demonstrated an active need for it, Duterte should allocate these resources to the rehabilitation of the thousands of drug abusers who turned themselves in to the government. As the Philippine Department of Health budget of 635 million PHP for 2016 was based on the projected normal volume of patients in prior years, that figure should change to accommodate the influx of thousands of drug dependents who turned themselves in out of fear of Duterte’s heavy-handed use of extrajudicial punishments as an enforcement mechanism.<sup>127</sup>

If the Philippines truly lacks the resources to increase funding to rehabilitation facilities, perhaps the best route for the administration to take would be to follow the lead of the likes of the Netherlands, Portugal, and Ecuador and decriminalize

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<sup>119</sup> See McKirdy, *supra* note 43.

<sup>120</sup> CNN Philippines Staff, *More islands, more fun in PH*, CNN PHILIPPINES, (Feb. 20, 2016), <http://cnnphilippines.com/videos/2016/02/20/More-islands-more-fun-in-PH.html>.

<sup>121</sup> *Costs and Fees of Rehab Centers*, *supra* note 117.

<sup>122</sup> *Id.*

<sup>123</sup> See Almendral, *supra* note 47.

<sup>124</sup> Rodrigo Roa Duterte, *Message of President Rodrigo Roa Duterte to the Seventeenth Congress of the Philippines on the National Budget for Fiscal Year 2017*, Republic of the Philippines, Dep’t of Budget and Mgmt. (Aug. 15, 2016), [http://www.dbm.gov.ph/?page\\_id=16375](http://www.dbm.gov.ph/?page_id=16375).

<sup>125</sup> *Id.*

<sup>126</sup> *Historical Rates for the USD/PHP currency conversion on 19 November 2016*, POUNDSTERLING LIVE, <https://www.poundsterlinglive.com/best-exchange-rates/us-dollar-to-philippine-peso-exchange-rate-on-2016-11-19> (last visited Mar. 23, 2017).

<sup>127</sup> See Antiporda, *supra* note 117.

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the use of drugs.<sup>128</sup> Although most of the countries that have opted to take this route still have fines that are imposed on those who sell drugs, the possession of small amounts is permissible.<sup>129</sup> Conversely, harsher financial penalties and criminal sanctions on the makers of these drugs, or even the opportunity to expunge their criminal records if they find a more honest way of living would assist in deterring more units from entering the market. The resources that were then previously allocated to pursuing drug users were, in turn, freed up to deal with major drug trafficking, rehabilitation, harm reduction, and treatment of drug abuse.<sup>130</sup>

### B. Preventing Drug Use and Abuse in Philippine Youth

Because “prevention” is an easier solution than the problem of “curing” addicts and users, the Philippine government has continued its campaign to introduce Drug Abuse and Resistance Education (DARE), a program initially utilized amongst American youth.<sup>131</sup> Introduced in the Philippines in 1993, this program aims to provide children and youth with knowledge to help them make informed, health decisions.<sup>132</sup> As the use of methamphetamines and other drugs are prevalent among Filipino youth, such intervention programs are needed.<sup>133</sup> Although this is a step in the right direction, more funding should be channeled towards drug prevention for the Filipino youth. By promoting programs that prevent this specific population from engaging in drug consumption and abuse, the government will help youths avoid such a costly, major health problem, thereby helping them make safe and healthy choices early on in their lives.<sup>134</sup>

### C. Establishing an Independent Investigation

Rather than encourage the use of extrajudicial punishments as a solution, President Duterte should shift away from outright executions and instead utilize the due process system that has been put into place by the Philippine Constitution.<sup>135</sup> This would not only create more jobs as additional prisons and employees will be necessary, but also silence the cries of human rights organizations and activists who condemn the use of extrajudicial punishments. By utilizing and relying on

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<sup>128</sup> *10 Countries That Ended Their War on Drugs*, INSPIRE MALIBU, <http://www.inspiremalibu.com/blog/drug-addiction/10-countries-that-ended-their-war-on-drugs/> (last visited Feb. 18, 2017).

<sup>129</sup> *Id.*

<sup>130</sup> *10 Countries That Ended Their War on Drugs*, *supra* note 128.

<sup>131</sup> Jose Rodol Clapano, *School-based Anti-Drug Education Program Proposed*, PHILIPPINE STAR GLOBAL (Aug. 18, 2016), <http://www.philstar.com/campus/education/2016/08/18/1614588/school-based-anti-drug-education-program-proposed>.

<sup>132</sup> Clapano, *supra* note 131.

<sup>133</sup> Leonardo Estacio Jr., *Assessing Methamphetamine Use Among Drug-Using Filipino Youth*, NAT'L INST. ON DRUG ABUSE, (2010) <https://www.drugabuse.gov/international/abstracts/assessing-methamphetamine-use-among-drug-using-filipino-youth>.

<sup>134</sup> DEP'T OF HEALTH, *OH-NCR empowers youth against illegal drugs and substances*, OFFICIAL GAZETTE (Sept. 5, 2013) <http://www.gov.ph/2013/09/05/doh-ncr-empowers-youth-against-illegal-drugs-and-substances/>.

<sup>135</sup> See Const. (1987), art. III, §1 (Phil.).

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the prison system, President Duterte could stimulate the economy and provide additional jobs to those in need in the impoverished nation, while making the conditions in the prisons more humane.<sup>136</sup>

However, because President Duterte has already set in motion the idea that bypassing the judicial system and therefore due process is permissible, it will be difficult to reign in the vigilantes who actively seek out these drug law offenders.<sup>137</sup> Thus, an independent monitoring system, along with the implementation of legislation to impose larger fines and harsher punishments on those violating the anti-extrajudicial punishment laws, should be created and enforced.<sup>138</sup> By hiring investigators and providing them with the resources necessary for investigation and active prevention of extrajudicial punishments, the commission's effectiveness will be extremely effective.<sup>139</sup> Further, a more assertive form of government should be encouraged, but assertive in the sense that it will inspire more individuals to *report* the crimes, rather than the extrajudicial strategies currently serving as the norm.

Additionally, a separate institution should be established to ensure that no additional extrajudicial punishments occur.<sup>140</sup> In 2006, the Melo Commission was established by then-President Arroyo to pinpoint the perpetrators of extrajudicial punishments and prevent additional lawless deaths from occurring.<sup>141</sup> However, the Melo Commission was not successful during then-president Gloria Macapagal-Arroyo's administration, primarily due to the fact that they lacked credibility and power to conduct investigations.<sup>142</sup> As an additional matter, between February 2007 and October 2008, the Melo Commission produced a single preliminary report to publish its findings; this solitary report was only published after much pressure by the public.<sup>143</sup> By utilizing a similar commission to fit Duterte's administration but altering it so that this newfound commission will be granted

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<sup>136</sup> See generally, *Philippines to Build More Prisons*, THE STRAITS TIMES (Aug. 10, 2016), <http://www.straitstimes.com/asia/se-asia/philippines-to-build-more-prisons>. (discussing the overcrowding of prisons due to President Duterte's Drug War).

<sup>137</sup> See generally, Teddy Casino, *Confronting Extrajudicial Killings Under Duterte*, RAPPLER (Sept. 29, 2016), <http://www.rappler.com/thought-leaders/146642-confronting-extrajudicial-killings-duterte>. (discussing the difficulty the Philippines has had in the past reining in the use of extrajudicial punishments).

<sup>138</sup> See generally, Philip Alston, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, Eleventh session, Agenda Item 3, (Apr. 29, 2009); <http://www.refworld.org/docid/5404442a0.html>.

<sup>139</sup> *Id.* at 16.

<sup>140</sup> *Id.*

<sup>141</sup> Lawyers for Lawyers, *Report of the International Verification and Fact Finding Mission on Attacks Against Lawyers and Judges in the Philippines*, 1, 14 (Nov. 4-12, 2008), [http://www.advocatenvooradvocaten.nl/wp-content/uploads/Report\\_of\\_the\\_IVFFM\\_2008.pdf](http://www.advocatenvooradvocaten.nl/wp-content/uploads/Report_of_the_IVFFM_2008.pdf).

<sup>142</sup> *Id.* at 70; See also Communication on the Views of the Human Rights Committee under Art. 5, paragraph 4, of the Optional Protocol to the Int'l. Covenant on Civil and Political Rights, Concerning Communication No. 1560/2007, Marcellana and Gumanoy v. Philippines, Rep. of the Human Rights Committee on its Ninety-Fourth Session Vol. II, U.N. Doc. A/64/40, at 394 (2009).

<sup>143</sup> UNITED NATIONS, International Covenant on Civil and Political Rights, Human Rights Committee, Ninety-fourth session, 1, 8, (Oct 13-31, 2008), <http://hrlibrary.umn.edu/research/Philippines/Marcellana%20and%20Gumanoy%20v%20The%20Philippines,%20%20Case%20No.%201560-2007.pdf>.

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more power to punish those it finds in violation of the law and made more transparent so the Filipino citizens can see that the government is taking steps to actively combat lawless killing, this organization will be able to furnish more pleasing results than the Arroyo administration organizations.

### D. Role of International Organizations

Another significant problem is the inability or indifference of international organizations to define extrajudicial punishments concretely and impose sanctions on countries that violate such laws.<sup>144</sup> Although human rights advocates have attempted to define what constituted an extrajudicial killing or forced disappearance, they often tend to narrow the scope of the definition by failing to include specific acts, or fixate on defining characteristic such as the element of State involvement and the political motivation of the violations.<sup>145</sup> Under international law, extrajudicial punishments are not criminalized as broadly as torture, despite death of a human being more severe than torture.<sup>146</sup> Such broad definitions not only allow for the pursuit and criminalization of offenders who slip through the cracks of their particular state's law, but also assists states in making changes or improvements to these definitions in order to better tailor them to their state's needs.<sup>147</sup> Although international law paradigms exist to prevent enforced disappearances and war crimes, extrajudicial punishments, specifically extrajudicial executions, fall neither here nor there.<sup>148</sup> Additionally, international tribunals are reluctant to regulate extrajudicial punishments, particularly when these punishments occur within the borders of a specific country, as there generally is no jurisdictional tie to international concerns, other than the disturbing idea that such acts are occurring against humans in another country.<sup>149</sup> By concretely defining what constitutes extrajudicial punishments, more perpetrators can be held accountable because such acts will be easier to identify and prosecute, and perhaps the international community would be more comfortable to regulate events when extrajudicial punishment occur.<sup>150</sup>

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<sup>144</sup> See Creegan, *supra* note 12, at 189.

<sup>145</sup> See Pangilinan, *supra* note 13, at 829.

<sup>146</sup> *Id.*; See also UNITED NATIONS, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, General Assembly (Dec. 10, 1984) (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 for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.").

<sup>147</sup> See generally, Antonio Marchesi, *Implementing the UN Convention Definition of Torture in National Criminal Law (with Reference to the Special Case of Italy)*, 6 J. OF INT'L CRIM. JUST., 195, 214 (2008).

<sup>148</sup> Marchesi, *supra* note 147, at 192.

<sup>149</sup> *Id.* at 194.

<sup>150</sup> *Id.*

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With that being said, President Duterte must also adopt a better attitude towards such organizations willing to lend a hand.<sup>151</sup> With trade and tourism being the top stimulators of the Philippine economy, childish threats to leave the United Nations or even the insulting of heads of states of other countries compromises the economy of the Philippines.<sup>152</sup>

### E. Transparency in Government

Furthermore, President Duterte must promote transparency, in general, within his government.<sup>153</sup> As it stands, the Philippines continues to be one of the most corrupt governments in Asia, with nepotism abounding in government appointments, a bevy of bribes accepted under the table, and an apparent lack of accountability when government officials have violated the law.<sup>154</sup> Passing a law that allows any person to request information from a government office and requiring all public offices to keep records promotes accountability within a government previously dubbed as corrupt (similar to the Freedom of Information Act (FOIA)) in the United States.<sup>155</sup> With regards to the Drug War, government officials should also be subject to drug tests to ensure that the illicit drug problem is not contributed to by high-capacity officials, yet these individuals must be protected from extrajudicial punishment at the same time.<sup>156</sup>

Transparency in government should also start from the ground up.<sup>157</sup> Involving *barangay* leaders in the implementation of anti-illegal drugs facilitates the government agenda to decrease the pervasive drug issue, as *barangay* leaders know the extent of the problem within their district and can address it more readily than a government official not as familiar with the locale.<sup>158</sup>

Implementing a cohesive plan that encompasses the aforementioned suggestions would significantly impact the Drug War, as these ideas working harmoniously would attack the root of the problem. The Philippine administration needs to understand that drug addiction is a mental health issue and in turn, provide both individuals and community leaders with some kind of public health solution to curb drug use; this strategy will leave the Filipinos in much better shape than they are in currently. Further, implementing stronger drug prevention programs

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<sup>151</sup> See generally, Stephen Collinson, *Duterte's Tongue the Least of Obama's Philippine Problem*, CNN (Sept. 7, 2016), <http://www.cnn.com/2016/09/06/politics/rodrigo-duterte-obama-laos-meeting/>.

<sup>152</sup> *Id.*

<sup>153</sup> See generally, Tarra Quismundo, *Poe Calls for Transparency Amid Gov't Deal with Chinese Firms*, INQUIRER (Oct. 26, 2016), <https://globalnation.inquirer.net/148060/poe-calls-for-transparency-amid-govt-deal-with-chinese-firms>.

<sup>154</sup> See Njord, Ray M. Merrill, Njord, Lindsay & Pachano *supra* note 73.

<sup>155</sup> See generally, Ineke Deserno, *The Nexus Between Transparency and Records Management: Quality of Multinationals' Environmental, Social and Governance (ESG) Reporting*, ARMA INT'L EDUC. FOUND. (Feb. 26, 2008).

<sup>156</sup> *Mandatory Drug Testing for Government Personnel Could Regain Lost Public Trust, Says Palace Official*, O.G. (July 9, 2016), <http://www.gov.ph/2016/07/09/mandatory-drug-testing-for-government-personnel-could-regain-lost-public-trust-says-palace-official/>.

<sup>157</sup> See Gavilan, *supra* note 62.

<sup>158</sup> *Id.*

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amongst the youth, holding perpetrators of extrajudicial punishments accountable, and encouraging other entities to act for the benefit of the country will not only facilitate orderliness in the country, but also promote the spirits of the Filipino people when they see that their well-being is finally a top priority, particularly after the recent onslaught of lawless killings that have indicated otherwise.

### **VI. Conclusion**

Shifting the focus from instantaneous punishment to a more peaceful approach with focus on rehabilitating those currently addicted to drugs will result in a much more effective outcome of the Drug War. Unless the source is stopped at the root, the use of extrajudicial killings will continue to be a temporary solution to a permanent problem, as more and more Filipinos will continue to turn to drugs without the proper knowledge and resources to mitigate their use or prevent them from dabbling in illicit drugs. An allocation of resources towards drug rehabilitation facilities, prevention programs, or even the decriminalization of illicit drugs in general will ultimately help the Filipinos by providing them the resources they need to become contributing members of society, in turn boosting the country's economy and helping the Filipino population as a whole.

EXPANDING PAST GENOCIDE, CRIMES AGAINST HUMANITY,  
AND WAR CRIMES: CAN AN ICC POLICY PAPER EXPAND  
THE COURT’S MANDATE TO PROSECUTING  
ENVIRONMENTAL CRIMES?

Payal Patel\*

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Destroying rainforest for economic gain is like burning a Renaissance painting to cook a meal.

-Edward O. Wilson

**I. Introduction**

In September 2015, Michelle Campos, her father, and grandfather were executed during an attack that displaced 3,000 indigenous people in the resource-rich Mindanao region of the Philippines from their homes, in order to gain easy access to the region’s coal, nickel, and gold reserves.<sup>1</sup> The Campos family was killed by paramilitaries who were protecting mining companies involved; the government did nothing to help.<sup>2</sup> Environmental crimes and land grabbing like what the Campos family experienced have become an acceptable business practice across the globe. Companies and governments are forcing their business

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<sup>1</sup> *On Dangerous Ground*, GLOBAL WITNESS (June 20, 2016), <https://www.globalwitness.org/en/reports/dangerous-ground/>.

<sup>2</sup> *Id.*

agendas on innocent individuals, destroying peoples' homes, spiritual lands and ways of life. Recently, there has been a global call to take more action against those who commit environmental crimes, by prosecuting environmental wrongdoers in international forums and making clear that the commission of crimes against the environment will not be tolerated. Subsequently, on September 15, 2016, the Office of the Prosecutor for the International Criminal Court ("ICC" or "the Court") published a Policy Paper on Case Selection and Prioritization ("Policy Paper"), outlining a list of new priorities that would be investigated by the Office of the Prosecutor to be brought before the Court, including environmental crimes and land grabbing.

While the Policy Paper is an ambitious step in the right direction for environmental justice, it may not be enough. A crucial caveat in criminalizing the destruction of the environment, illegal exploitation of resources, and land-grabbing is the complexity in proving fault, which makes prosecution in the ICC ill-suited for the black and white stigmatization that the international criminal justice system requires.<sup>3</sup> The ICC is a punitive retributive justice court that could symbolically punish environmental criminals but cannot effectively promote environmental security.<sup>4</sup> This leads to the question: is the expanded scope of the ICC to include environmental crimes just an empty gesture?

This article explores the feasibility of the ICC as a forum to prosecute environmental crimes. The article will first establish the background of the ICC, its limited ability to prosecute environmental crimes or land grabbing and the call for international jurisprudence to punish those who harm the environment. The second section will discuss the Policy Paper and the addition of priorities for upcoming sessions. The third section will analyze the infrastructural limitations of the ICC that restrict the ICC's ability to prosecute environmental crimes and how environmental crimes could fit into the three core crimes of the ICC: genocide, crimes against humanity, and war crimes. Finally, the last section will discuss alternatives to prosecuting environmental crimes in the Court.

Overall, this article will show that while the Policy Paper is an ambitious step in the right direction for international environmental justice, the ICC is not the appropriate forum for the prosecution of environmental crimes. The restrictions upon the Court render it unsuitable for punishing ecological wrongdoers and land grabbers for the environmental harms they commit. The Policy Paper will likely not be able to live up to the hype.

## II. Background

The ICC was established to prosecute individuals from developing and unstable countries that lack the mechanisms and jurisprudence necessary to internally

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<sup>3</sup> Frederic Megret, *The Problem of an International Criminal Law of the Environment*, 36 COLUM. J. ENVTL. L. 195, 218 (2011) (discussing the problems with the ICC as an institution to prosecute environmental crimes).

<sup>4</sup> Mark A. Drumbl, *International Law Weekend Proceedings: International Human Rights, International Humanitarian Law, and Environmental Security: Can the International Criminal Court Bridge the Gaps?*, 6 ILSA J. INT'L & COMP. L. 305, 331 (2000).

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bring these perpetrators to justice.<sup>5</sup> The Court's primary purpose is to sanction the most serious of international crimes.<sup>6</sup> The ICC codifies the belief that certain international wrongdoings must be criminalized and stigmatized.<sup>7</sup> As such, the ICC helps hold accountable those who disturb efforts to establish long-term peace, stability, and equitable development.<sup>8</sup>

The Court follows a complementarity principle by first deferring to national judicial institutions, military commissions, court martial proceedings and other domestic courts before prosecuting an action.<sup>9</sup> The belief is that state forums should first attempt to deal with internal issues before the ICC takes action. Due to complementarity, only twenty-three cases have been brought before the Court.<sup>10</sup> In general, the ICC has jurisdiction to take action if a crime occurs in a country that has ratified the Rome Statute or if the perpetrator who committed the crime originates from a ratifying country.<sup>11</sup> Additionally, the ICC can investigate cases referred to it by the United Nations ("U.N.") Security Council.<sup>12</sup> Due to its dependence on the cooperation of individual states and the U.N. Security Council, the ICC has been criticized for its inability to independently bring cases to trial.<sup>13</sup> The court has also been said to lack teeth because many countries with powerful international corporations are not under its jurisdiction.<sup>14</sup> Furthermore, the ICC has been criticized for being unable to prosecute crimes that occur during peacetime since its prosecutorial focus has been on war crimes, crimes against humanity, and genocide.<sup>15</sup>

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<sup>5</sup> *CEOs Can Now Be Prosecuted Like War Criminals at The Hague*, TELESUR (Sept. 16, 2016), <http://www.telesur.com/english/news/CEOs-Can-Now-Be-Prosecuted-Like-War-Criminals-at-the-Hague-20160916-0013.html> [hereinafter TELESUR]. See also Peter Sharp, *Prospects for Environmental Liability in the International Criminal Court*, 18 VA. ENVTL. L.J. 217, 243 (1999), for more information on the development of the ICC and the Rome Statute.

<sup>6</sup> Symposium, *The International Response to the Environmental Impacts of War: Afternoon Panel – Accountability and Liability: Legal Tools Available to the International Community*, 17 GEO. INT'L ENVTL. L. REV. 616, 624 (2005) [hereinafter Geo. Int'l Symposium]. See also United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Rome Statute of the International Criminal Court*, Preamble, U.N. Doc. A/CONF.183/9 (July 17, 1998) [hereinafter *Rome Statute*].

<sup>7</sup> Geo. Int'l Symposium, *supra* note 6; *Rome Statute*, *supra* note 6.

<sup>8</sup> About Page, INT'L CRIM. CT., <https://www.icc-cpi.int/about> (last visited Feb. 17, 2017) [hereinafter ICC About Page].

<sup>9</sup> Geo. Int'l Symposium, *supra* note 6; *Rome Statute*, *supra* note 6, art. 1.

<sup>10</sup> ICC About Page, *supra* note 8.

<sup>11</sup> John Vidal & Owen Bowcott, *ICC Widens Remit to Include Environmental Destruction Cases*, THE GUARDIAN (Sept. 15, 2016), <https://www.theguardian.com/global/2016/sep/15/hague-court-widens-remit-to-include-environmental-destruction-cases> (discussing the expansion of the ICC to permit it to remit cases concerning environmental destruction. Currently, the ICC has jurisdiction over 124 countries). See also *Rome Statute*, *supra* note 6, art. 12.

<sup>12</sup> Vidal & Bowcott, *supra* note 11; See also *Rome Statute*, *supra* note 6, art. 13(b).

<sup>13</sup> TELESUR, *supra* note 5.

<sup>14</sup> TELESUR, *supra* note 5 (for example, China, India, Russia, Cuba and Indonesia have neither signed nor ratified the Rome Statute. Additionally, the United States, Israel and Sudan have stated their intention to not become of the court).

<sup>15</sup> Geo. Int'l Symposium, *supra* note 6; See also Press Release, Global Witness, Company Executives Could Now be Tried for Land Grabs and Environmental Destruction, (Sept. 15, 2016), <https://www.globalwitness.org/en/press-releases/company-executives-could-now-be-tried-land-grabbing-and-environ>

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In recent years, there has been a push from international non-governmental organizations, environmental groups, and civil activities for the Court to shift focus to environmental wrongdoings. Actions that harm the environment are traditionally considered regulatory or statutory violations of administrative laws; they are not yet considered separate crimes under various state or supranational criminal statutes.<sup>16</sup> Instead, environmental harms are considered consequences to other crimes, such as those that occur during wartime. For example, Protocol I of the Geneva Convention prohibits “methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.”<sup>17</sup> However, this provision, as is often the case with many environmental crimes, was meant to regulate war crimes and not environmental crimes; therefore, it comes as no surprise that the provision has not resulted in any criminal convictions.<sup>18</sup>

The ICC’s jurisdiction to prosecute environmental crimes is limited to crimes occurring after the Prospects for Environmental Liability in the International Criminal Court was adopted in 1998.<sup>19</sup> Article 8(2)(b)(iv) is the only instance where the Rome Statute addresses environmental wrongdoings.<sup>20</sup> An environmental war crime under Article 8(2)(b)(iv) could be prosecuted if the crime satisfies three elements.<sup>21</sup> First, the *actus reus* must be widespread, severe and cause long-term environmental damage.<sup>22</sup> Second, the *actus reus* cannot have been committed as part of a concrete or direct military advantage.<sup>23</sup> Finally, the *mens rea* of act must be intentional.<sup>24</sup>

There are many limitations to prosecuting environmental war crimes under this provision of the Rome Statute.<sup>25</sup> The provision only applies to international armed conflict or non-international conflicts where there is protracted armed conflict between the government and armed groups.<sup>26</sup> Additionally, ICC jurisdiction is only restricted to war crimes occurring within current ICC member states that are “committed as a part of a plan or policy or as part of a large-scale commis-

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mental-destruction-historic-move-international-criminal-court-prosecutor/ [hereinafter Global Witness Press Release].

<sup>16</sup> Megret, *supra* note 3, at 200 (discussing the different types of treaties and how they criminalize certain types of behavior that disadvantage the environment).

<sup>17</sup> *Id.* at 197. *See also* Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 35(3), June 8, 1977, 1125 U.N.T.S. 3.

<sup>18</sup> Megret, *supra* note 3, at 197-99.

<sup>19</sup> Vidal & Bowcott, *supra* note 11; *see also* Geo. Int’l Symposium, *supra* note 6.

<sup>20</sup> Ryan Gilman, *Expanding Environmental Justice After War: The Need for Universal Jurisdiction Over Environmental War Crimes*, 22 *COLO. J. INT’L ENVTL. L. & POL’Y* 447, 453 (2011); *Rome Statute*, *supra* note 6, art. 8(2)(b)(iv).

<sup>21</sup> Geo. Int’l Symposium, *supra* note 6, at 625; *Rome Statute*, *supra* note 6, art. 8(2)(b)(iv).

<sup>22</sup> Geo. Int’l Symposium, *supra* note 6, at 625; *Rome Statute*, *supra* note 6, art. 8(2)(b)(iv); *see also* Gilman, *supra* note 20.

<sup>23</sup> Geo. Int’l Symposium, *supra* note 6, at 625.

<sup>24</sup> *Id.*

<sup>25</sup> Geo. Int’l Symposium, *supra* note 6, at 626.

<sup>26</sup> *Id.* at 627; *see also* Gilman, *supra* note 20, at 455; *see also Rome Statute*, *supra* note 6, art. 8(2)(f).

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sion of such crimes.”<sup>27</sup> Furthermore, the environmental crime often must take place during armed conflict, and not follow the armed conflict separately and distinctly.<sup>28</sup> Article 8(2)(b)(iv) can only impose criminal sanctions on the most invidious of perpetrators because the perpetrator must know that his actions will cause environmental damage.<sup>29</sup> A perpetrator against whom an environmental war crime action is brought need only show that she did not know that her actions would cause “widespread, long-term and severe” damage to absolve herself from criminal responsibility.<sup>30</sup> Effectively, this eliminates land grabbing as falling within ICC jurisdiction as a war crime, since land rights are not universal and fall distinctly within the scope of domestic and local laws. Therefore, no charges have been successfully filed under the Article.<sup>31</sup>

In reality, most environmentally harmful acts do not occur during times of war but rather times of peace. Land grabbing is becoming increasingly common during peacetime. With the help of governments, private corporations are taking control of vast areas of land to uncover and exploit natural resources.<sup>32</sup> “Chasing communities off their land and trashing the environment has become an accepted way of doing business in many resource-rich yet cash-poor countries.”<sup>33</sup> More importantly, these crimes are being committed under the justification that they are essential to “community development.”<sup>34</sup> In the name of development, conflicts over natural resources are turning deadly.<sup>35</sup> In 2015, at least three people were killed per week while defending their land, forests, and rivers from government and business entities with interests in big agriculture, mining, drilling, and toxic dumping.<sup>36</sup> Over the last ten years, corporations and governments have taken away tens of millions of hectares of land from their rightful owners.<sup>37</sup> Land grabbing disproportionately affects minority populations, who lose their natural homes, traditional practices and places of spiritual significance, subse-

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<sup>27</sup> Geo. Int’l Symposium, *supra* note 6, at 627; *see also* Gilman, *supra* note 20, at 455; *see also* Mark A. Drumbl, *Waging War Against the World: The Need to Move from War Crimes to Environmental Crimes*, 22 *FORDHAM INT’L L.J.* 122, 125 (1998) [hereinafter *Waging War*].

<sup>28</sup> Geo. Int’l Symposium, *supra* note 6, at 627.

<sup>29</sup> *Waging War*, *supra* note 27, at 130.

<sup>30</sup> Gilman, *supra* note 20, at 455-56.

<sup>31</sup> *Id.* at 453.

<sup>32</sup> TELESUR, *supra* note 5.

<sup>33</sup> *Id.* (describing the crime of land grabbing through Gillian Caldwell, the executive director at Global Witness).

<sup>34</sup> *Land Grabbers May End Up In The Hague: Global Diligence Welcomes The ICC Prosecutor’s New Case Selection Policy*, GLOBAL DILIGENCE (Sept. 15, 2016), <http://www.globaldiligence.com/2016/09/15/land-grabbers-may-end-up-in-the-hague-global-diligence-welcomes-the-icc-prosecutors-new-case-selection-policy/> [hereinafter GLOBAL DILIGENCE].

<sup>35</sup> Global Witness Press Release, *supra* note 15.

<sup>36</sup> Global Witness Press Release, *supra* note 15; *see also* *On Dangerous Ground*, *supra* note 1; *see also* *International Criminal Court Turns Attention To Environmental Destruction, Protecting Indigenous People From Land-Grabs*, SUSTAINABLEBUSINESS.COM (Sept. 16, 2016), <http://www.sustainablebusiness.com/international-criminal-court-turns-attention-environmental-destruction-protecting-indigenous-people-land-grabs/> [hereinafter *ICC Turns Attention to Environmental Destruction*].

<sup>37</sup> *ICC Turns Attention to Environmental Destruction*, *supra* note 36.

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quently causing the destruction of their cultural identities.<sup>38</sup> Consumer practices do little to protect landowners. Traders and investors are often not required to confirm that the products they buy, such as palm oil, rubber or gold, are legally or ethically sourced.<sup>39</sup> In rural communities in Africa, Asia, and Latin America, land rights are lacking, even though traditionally, families have held this land for generations.<sup>40</sup> Some businesses even rely on corrupt politicians to gain land concessions or unethical security forces to illegally displace residents off the land for which they are attempting to take claim.<sup>41</sup> Businesses can do this without fear of prosecution because no international body has stopped them. Due to this blind spot in international criminal justice, violence and theft related to land rights are common.

Many international organizations have been campaigning for years to have the ICC investigate and prosecute environmental crimes committed by both the companies that perpetrate them and the governments that grant them permission.<sup>42</sup> More specifically, these organizations have focused on stopping land grabbers and natural resource extractors from evicting millions in whatever illegal and violent ways necessary.<sup>43</sup> Resorting to bullying and violence is now an acceptable way to do business in countries rich with natural resources but poor in judicial protections land ownership rights.<sup>44</sup> Organizations are urging the international community to end these practices by holding the wrongdoers accountable.

Recognizing the many limitations to the ICC's ability to prosecute non-war crimes, the Office of the Prosecutor announced, in the Policy Paper of 15 September 2016 that it will begin to prioritize crimes that occur during peacetime.<sup>45</sup> These crimes include illegal dispossession of land, illegal exploitation of natural resources and environmental destruction.<sup>46</sup> The Prosecutor made specific reference to land grabbing.<sup>47</sup>

### III. Discussion

The announcement by the Prosecutor to expand the scope of its investigations is said to be a revolutionary step in international justice.<sup>48</sup> Specifically, there is a belief that the shift in focus will reshape how international business is done since company executives, politicians and individuals can now be prosecuted under

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<sup>38</sup> GLOBAL DILIGENCE, *supra* note 34.

<sup>39</sup> Global Witness Press Release, *supra* note 15.

<sup>40</sup> *Id.*

<sup>41</sup> GLOBAL DILIGENCE, *supra* note 34.

<sup>42</sup> Global Witness Press Release, *supra* note 15.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> Vidal & Bowcott, *supra* note 11.

<sup>48</sup> Global Witness Press Release, *supra* note 15.

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international law for environmental crimes they commit in the name of business development.<sup>49</sup> It is believed that those that seize land, destroy forests, and poison water will soon be tried alongside war criminals.<sup>50</sup>

Although the Policy Paper references land grabbing and environmental destruction, the Court is not extending its formal jurisdiction to include these offenses as official crimes.<sup>51</sup> The Court, in fact, is not recognizing any new crimes as part of this increased policy.<sup>52</sup> Investigations must somehow fall within existing offenses sanctioned by the Court, but with a new wider lens.<sup>53</sup> Reinhold Gallmetzer, one of the ICC working group members who drafted the Policy Paper, stated that the purpose of the expansion was to exercise jurisdiction in a broader context. The ICC can now investigate environmental crimes that reach the necessary threshold to constitute genocide, war crimes, or crimes against humanity.<sup>54</sup> For example, forcible transfers of a population can be considered a crime against humanity and if the forcible transfer is committed as a result of or as a precursor to land grabbing, the land grabbing can also be considered a crime against humanity on its own for which the individual responsible can be charged.<sup>55</sup>

The Court's attempt to prosecute environmental crimes is not novel. In 2009 and 2010, then current-ICC Prosecutor Luis Moreno Ocampo obtained arrest warrants against Sudanese president, Omar Al-Bashir.<sup>56</sup> Bashir was charged with acts of genocide, war crimes, and crimes against humanity based on his involvement with or in the water pump and well contamination in Darfur as a method to target and kill certain groups in the region.<sup>57</sup> However, the focus of Bashir's crimes was on their effects on the civilian population and not on the environmental damage caused. The environmental ramifications of his actions, as will likely be the case with any future prosecutions by the ICC, were overshadowed by the impacts of his crimes on humans.

Although the Office of the Prosecutor is ambitiously trying to include environmental crimes as part of its repertoire, its ability to succeed in prosecuting ecological crimes will be limited for the various reasons described below. The following discussion will highlight how the ICC is not the best forum to prose-

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<sup>49</sup> Global Witness Press Release, *supra* note 15.

<sup>50</sup> *Id.*

<sup>51</sup> Vidal & Bowcott, *supra* note 11.

<sup>52</sup> *ICC Turns Attention to Environmental Destruction*, *supra* note 36.

<sup>53</sup> Vidal & Bowcott, *supra* note 11.

<sup>54</sup> Aonghus Heatley, *Environmental Crimes by Companies Will Now be Prosecuted at the International Criminal Court*, E2 L. BLOG (Oct. 3, 2016), <http://www.gtlaw-environmentalandenergy.com/2016/10/articles/international/environmental-crimes-by-companies-will-now-be-prosecuted-at-the-international-criminal-court/>.

<sup>55</sup> Vidal & Bowcott, *supra* note 11.

<sup>56</sup> Tara Smith, *The International Criminal Court Will Start Prosecuting People Who Commit Crimes Against the Environment*, BUS. INSIDER (Sept. 23, 2016), <http://www.businessinsider.com/international-criminal-court-prosecution-crimes-against-environment-2016-9>.

<sup>57</sup> *Id.* (while Bashir continues to evade arrest, the step towards his prosecution was a positive one for the Court).

cute environmental crimes and if they are pursued, how, in light of the status of the core crimes, the Court will be unable to put the environment first.

#### IV. Analysis

The ICC is ill-equipped to prosecute environmental crimes for multiple reasons. First, the Court will likely not give as much attention to environmental crimes as compared to other ICC core crimes.<sup>58</sup> Second, ICC Judges and Prosecutors do not have the environmental expertise or the funds to effectively prosecute and judge environmental crimes.<sup>59</sup> Third, ICC sanctions and punishments are not well suited to correct environmental harms.<sup>60</sup> Finally, the Rome Statute itself does not integrate environmental crimes into its scope to successfully achieve justice.<sup>61</sup>

A. Environmental crimes are not given as much importance as other core crimes.

The Policy Paper may not end up having as profound an effect on environmental justice as has been suggested because it may not actually become a priority for the Office of the Prosecutor. Without the creation of a new core crime specific to the environment, the Prosecutor will have to pursue environmental crimes in furtherance of other crimes currently within the scope of the Rome Statute. As discussed below, environmental crimes will only be a secondary priority when compared to crimes that affect human life, such as crimes against humanity, genocide, and war crimes. To look at ecological crimes this way is anthropocentric; it deemphasizes the impacts of environmental attacks that do not immediately adversely affect the human population.<sup>62</sup> By requiring that crimes meet additional criteria to be prosecuted by the Court, the importance of the environmental crime itself is decreased. Furthermore, the ICC is at the mercy of the states that fund its activities and therefore, priority will be placed where funders so chose. The ICC must pay international salaries to prosecutors and judges, which funding countries may find too steep to prosecute environmental crimes.<sup>63</sup> The environmental crime will not be prosecuted as a primary action, but rather as a byproduct of another crime that the perpetrators have committed.

Additionally, the Policy Paper's seventh clause suggests that the ICC may simply be attempting to induce national judiciaries to prosecute environmental

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<sup>58</sup> Drumbl, *supra* note 4, at 326.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 326-27.

<sup>61</sup> *Id.* at 326.

<sup>62</sup> Megret, *supra* note 3, at 210.

<sup>63</sup> David J. Sheffer, Dir., Ctr. for Int'l Human Rights, Nw. Univ. Sch. of Law, Remarks at the Loyola University Chicago School of Law International Law Review Symposium: War Wounds: The Role of International Criminal Justice in Rebuilding the Rule of Law (Feb. 3, 2017).

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crimes internally.<sup>64</sup> The Policy Paper mentions that the Office is not required to investigate all alleged criminal acts that are brought before it.<sup>65</sup> In following the ICC's policy of complementarity, the Policy Paper may be a push for national judicial systems to attempt prosecuting environmental crimes within their borders first, before the ICC contemplates investigation.<sup>66</sup> While it explicitly mentions environmental crimes and land grabbing, the Policy Paper also reiterates that it is unable to pursue all deserving cases and that it will work with States to prosecute crimes of international importance. A careful reading of the Policy Paper may suggest that the increased priority list is nothing more than wishful thinking and a push for others to do what it cannot.

Another problem with the glamorization of the Policy Paper is that, based on the structure of the ICC as an institution, there is a real possibility that no environmental charges will be brought. After a crime occurs, the Office of the Prosecutor must look to see if there is sufficient evidence to bring an investigation, by reviewing the gravity of the offense and whether the Court can serve justice to the victims.<sup>67</sup> In reality, cases often do not make it past this preliminary examination stage.<sup>68</sup> Since the ICC's inception, only a few dozen cases have ever made it to the next stage, at which point the case is left idle until a full-fledged investigation commences.<sup>69</sup> It is not until the investigation stage that the full arsenal of the ICC's resources and legal power are used.<sup>70</sup> While there are many crimes that deserve attention from the ICC, the decision to investigate is partly based on the gravity of the crime, which the Policy Paper states is assessed based on the number of direct and indirect victims, the extent of the damage caused, and the bodily or psychological harm that occurs.<sup>71</sup> Specific facts are taken into account to determine the gravity of a crime including killings, rapes, other gender-based crimes, crimes against children, persecution and the imposition of conditions of life on a group.<sup>72</sup> In assessing the gravity of crimes, there is no mention of environmental harm as a criterion used in the assessment. Therefore, while environmental crimes are listed as a priority, it is likely these crimes will struggle to keep the Prosecutor's attention. Crimes affecting human populations

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<sup>64</sup> Phoebe Braithwaite, *Environmental Crimes Court Warrant International Criminal Court Prosecution*, INTER PRESS SERV. NEWS AGENCY (Oct. 1, 2016), <http://www.ipsnews.net/2016/10/environmental-crimes-could-warrant-international-criminal-court-prosecutions/>.

<sup>65</sup> Office of the Prosecutor, *Policy Paper on Case Selection and Prioritisation*, Int'l Crim. Ct. (Sept. 15, 2016), [https://www.icc-cpi.int/itemsDocuments/20160915\\_OTP-Policy\\_Case-Selection\\_Eng.pdf](https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf) [hereinafter *OTP Policy Paper*].

<sup>66</sup> *Id.*

<sup>67</sup> *How the Court Works*, INT'L CRIM. CT., <https://www.icc-cpi.int/about/how-the-court-works> (last visited Feb. 17, 2017).

<sup>68</sup> Chandara Yang et al., *Kem Ley Murder May Become Part of ICC Case Against Cambodian's 'Ruling Elite'*, RADIO FREE ASIA (Sept. 6, 2016), <http://www.rfa.org/english/news/cambodia/kem-ley-murder-may-become-09062016145507.html>.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *OTP Policy Paper*, *supra* note 65.

<sup>72</sup> *Id.*

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will still be considered more deserving of international attention when compared to man-made environmental deterioration.

There is also a serious question as to whether the Office of the Prosecutor even has the single-handed authority to expand the scope of the ICC's mandate to review environmental crimes at all.<sup>73</sup> This Policy Paper is not the first time the Office of the Prosecutor claimed it was increasing its priorities but did not follow through. In 2003, the Office made a similar mention about selecting cases based on economic factors; however, no charges were subsequently filed under the increased policy.<sup>74</sup> The September 15, 2016, Policy Paper, therefore, may similarly only be symbolic.

B. The ICC does not have the knowledge or resources to prosecute environmental crimes.

ICC Judges and Prosecutor are not experts on the environment. Amongst other factors, judges are elected based on their moral character and experience in either criminal law or international law.<sup>75</sup> Prosecutors are elected based on factors such as competence and managerial experience.<sup>76</sup> Neither group has the requisite scientific expertise to have a live and fruitful discussion about environmental crimes in a way that would allow Judges to make an educated and informed decision as to the culpability of a perpetrator in committing an ecological wrongdoing.<sup>77</sup> ICC judges deal with the prosecution of mass killers and rapists, perpetrators of genocide and torturers but they are not equipped to deal with environmental harms.<sup>78</sup> For fair access to justice, these parties would need to develop knowledge in scientific issues, which would cost the Court significant time and money. Therefore, as ICC judges and prosecutors are not well educated in environmental issues, the ability of the ICC to seek justice for these crimes is limited. In contrast, if environmental crimes were litigated in a specialized forum, prosecutorial costs would be reduced and there would be a greater guarantee of due process.<sup>79</sup>

Another forum, similar to that of the Council of Europe's Convention on the Protection of the Environment Through Criminal Law, would be better able to prosecute these crimes. This forum is specialized in the environment and its divisions have the requisite environmental knowledge to effectively prosecute

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<sup>73</sup> Eva Vogelyang, Assoc., Knoops' Advocate, Remarks at the Loyola University Chicago School of Law International Law Review Symposium: War Wounds: The Role of International Criminal Justice in Rebuilding the Rule of Law (Feb. 3, 2017).

<sup>74</sup> Cristina Maza, *ICC Move Fuels Debate on Cambodian Case*, THE PHNOM PENH POST (Sept. 19, 2016), <http://www.phnompenhpost.com/national/icc-move-fuels-debate-cambodian-case>.

<sup>75</sup> *The Judges of the Court*, INT'L CRIM. CT., <https://www.icc-cpi.int/iccdocs/PIDS/publications/JudgesEng.pdf> (last visited Feb. 17, 2017).

<sup>76</sup> *ICC: Q&A on the International Criminal Court Prosecutor Election Process*, HUM. RTS. WATCH (Aug. 12, 2011), <https://www.hrw.org/news/2011/08/12/icc-qa-international-criminal-court-prosecutor-election-process>.

<sup>77</sup> Geo. Int'l Symposium, *supra* note 6, at 628.

<sup>78</sup> *Id.*

<sup>79</sup> Drumbl, *supra* note 4, at 327.

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environmental crimes.<sup>80</sup> Additionally, the Council has jurisdiction over corporate offenders and natural persons; it can also require perpetrators to reinstate the environment.<sup>81</sup> Other approaches to litigating environmental issues are discussed in Section V. Without the restorative or injunctive remedies that can only be understood and developed through proper education on environmental issues, the ICC will be limited in its ability to effectively prosecute crimes and deter future perpetrators from land grabbing or causing environmental deterioration.

### C. The ICC's jurisdiction and sanctions are not well suited for environmental crimes.

The ICC's jurisdiction is limited to individuals and as such, no state liability can be imposed.<sup>82</sup> States are complacent in land grabbing and other environmental crimes, allowing and sometimes even helping private corporations displace populations or make living conditions unbearable.<sup>83</sup> It is difficult to prosecute environmental crimes committed by governments because of the limitations of public international law; states can invoke sovereignty to avoid international interference in natural resources management or state regulation.<sup>84</sup>

The ICC relies on member states to prosecute international crimes. The Office of the Prosecutor is subject to political support and therefore can only serve effectively where there is political will.<sup>85</sup> The Prosecutor will, therefore, look for cases where it has a high chance of success and can have a profound impact, in essence only going after individuals who are the most responsible.<sup>86</sup> Therefore, timing is everything.<sup>87</sup> The U.N. Security Council referral system limits the ICC's ability to prosecute because permanent members of the Security Council have the ability to veto the referral.<sup>88</sup> Since the United States, Russia and China have not ratified the Rome Statute, there is a higher chance that one of these permanent members will veto referrals to the ICC because the referral may adversely impact their interests in the country of the responsible individual.<sup>89</sup>

The problems with states controlling the ability of the ICC to prosecute international environmental crimes can be analogized to the tragedy of the commons.<sup>90</sup> States are interested in protecting the environment and punishing those

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<sup>80</sup> Drumbl, *supra* note 4, at 327.

<sup>81</sup> *Id.* at 327-28.

<sup>82</sup> Geo. Int'l Symposium, *supra* note 6, at 628.

<sup>83</sup> Megret, *supra* note 3, at 213.

<sup>84</sup> *Id.* at 204-05.

<sup>85</sup> Alex Whiting, Professor of Practice, Harvard Law Sch., Remarks at the Loyola University Chicago School of Law International Law Review Symposium: War Wounds: The Role of International Criminal Justice in Rebuilding the Rule of Law (Feb. 3, 2017).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> Braithwaite, *supra* note 64.

<sup>89</sup> *Id.*

<sup>90</sup> Megret, *supra* note 3, at 214. See Garrett Hardin, *The Tragedy of the Commons*, 162 AM. ASS'N FOR THE ADVANCEMENT SCI. 1243 (1968), for more information on the tragedy of the commons.

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culpable for damage only to the extent that they are no more burdened than any other states in this plight.<sup>91</sup> Each individual state would prefer that another state carry the burden of sanctioning perpetrators so as to not disadvantage its own development or make it less attractive for corporate investment or other activities in its interests.<sup>92</sup> In these cases, certain states unequally bear the burden and so nothing gets done.<sup>93</sup> Therefore, international sanctions punishing environmental crimes should not operate similarly to how domestic laws, which relies on governments to bring a complaint, punish behavior.<sup>94</sup> There should be an independent body that dictates whether and how ecological crimes are going to be prosecuted. Because the ICC does not currently have the ability to act entirely independently from state governments, the Court is limited in how successful it will actually be in prosecuting perpetrators of ecological deterioration.<sup>95</sup>

For example, if a land grabbing Corporation A is working with the Government of State X to acquire land in State X, it will be difficult to prosecute Government X or Corporation A because Government X has an interest in protecting itself and the Corporation. Further difficulty ensues if other states have a relationship with Government X that they may not want to jeopardize for the sake of protecting the victims of Corporation A's land grabbing scheme. This hypothetical lines up with the later discussed Cambodian case, which hopes to receive ICC consideration after private and government actors failed to protect Cambodian landowners from land grabbing by Cambodia's ruling elite. In prosecuting environmental crimes, there could be an accountability problem that the structure of the ICC cannot overcome.

Furthermore, environmental crimes are not always inter-state or political.<sup>96</sup> As described above, there are often private and economic dimensions to environmental crimes and with the involvement of multinational corporations, assigning responsibility in a way that the Court can prosecute can be difficult.<sup>97</sup> Multiple actors involved in the commission of the environmental crime can be problematic in terms of territorial jurisdiction, coordination, and localization.<sup>98</sup> States may offer their territory for illegal environmental activities or may be involved in other corruption schemes that make prosecuting environmental crimes within that particular state ineffective.<sup>99</sup> Therefore, having jurisdiction over a multinational corporation that has the support of a state can render the Court unable to prosecute the perpetrators of environmental crimes.

One major criticism of the new policy is that even if the Court prosecutes land grabbers, it will still not be enough to rehabilitate the damage and restore justice.

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<sup>91</sup> Megret, *supra* note 3, at 214.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 215.

<sup>94</sup> *Id.* at 205.

<sup>95</sup> *Rome Statute*, *supra* note 6, art. 12.

<sup>96</sup> Megret, *supra* note 3, at 212.

<sup>97</sup> *Id.* at 212-13.

<sup>98</sup> *Id.* at 213.

<sup>99</sup> *Id.*

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Prosecuting those responsible for causing environmental damage may make the victims whole, or repair the destruction because the ICC is limited in the sentences and sanctions it can apply.<sup>100</sup> Additionally, a Fiduciary Fund foreseen in the Rome Statute may not be effective in repairing damage because even though the funds can be used to repair the environment, it is more likely that funds will be allocated to compensate human victims.<sup>101</sup> The ICC's mandate runs in contradistinction to other mechanisms that extend liability to perpetrators, since the ICC specifically prosecutes international crimes.<sup>102</sup> Other forms of extending liability, such as the tort-based liability or compensation commissions discussed below, would be more effective since they would provide a damage award in response to the individual perpetrator's impact to the environment, funds which can be used in rehabilitation efforts.<sup>103</sup> The Policy Paper references truth-seeking mechanisms, reparation programs, institutional reform and other justice institutions as playing an important role in the adjudication of these serious crimes, all of which may be more successful forums for punishing and sanctioning environmental crimes.<sup>104</sup>

Other methods of punishment, such as compensation-based awards, may be more effective in restoring justice and acting as a deterrent to future perpetrators.<sup>105</sup> For example, after the 1991 Gulf War, the UN Security Council created a Compensation Commission (UNCC) funded by the sale of Iraqi oil to compensate victims and finance environmental reparations.<sup>106</sup> The UNCC adopted mass tort litigation approaches to settle claims associated with the war to compensate for the damage done to the Kuwaiti environment and public health.<sup>107</sup> A compensation-based sanction would ensure that the damages paid by perpetrators were used to restore the environment affected by the harm. It would introduce a much-needed flexibility for punishing environmental perpetrators by promoting remedies that were individually tailored to the effects of the specific crime. However, the ICC may not have the infrastructure necessary to follow through with this method.

D. The Rome Statute does not well integrate environmental crimes into its scope.

With the exception of Article 8(2)(b)(iv), the Rome Statute does not directly reference the environment.<sup>108</sup> The principles outlined in the Rome Statute cannot

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<sup>100</sup> Smith, *supra* note 56.

<sup>101</sup> Marcos A. Orellana, *Criminal Punishment for Environmental Damage: Individual and State Responsibility at a Crossroad*, 17 *Geo. Int'l Env'tl. L. Rev.* 673, 695 (2005).

<sup>102</sup> Geo. Int'l Symposium, *supra* note 6, at 623.

<sup>103</sup> *Id.* at 624.

<sup>104</sup> *OTP Policy Paper*, *supra* note 65.

<sup>105</sup> Smith, *supra* note 56.

<sup>106</sup> *Id.*

<sup>107</sup> Drumbl, *supra* note 4, at 308.

<sup>108</sup> Sharp, *supra* note 5, at 218.

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be easily interpreted to include the environment.<sup>109</sup> First, the Statute does not allow for analogous interpretations of the law and all ambiguities are construed in favor of the accused; meaning that environmental crimes must fit within the current criteria or they are not pursuable.<sup>110</sup> Most crimes also require a knowledge intent, or *mens rea*, and would not necessarily encompass wanton or reckless acts that cause environmental damage. This is directly in contradiction with the precautionary principle of environmental responsibility, which requires preventative steps to avoid damage even when there is uncertainty over the consequences of environmental acts.<sup>111</sup> The Rome Statute is not meant to prosecute ecological crimes.

The Policy Paper did not create new crimes specific to the environment. Recently, there has been mention of a new crime such as “ecocide” or “geocide” which could develop a criminal sanction for environmental cleansing.<sup>112</sup> Ecocide could criminalize a current act on behalf of future generations.<sup>113</sup> Under “geocide” or “ecocide,” harming the natural environment is a breach of the duty to care and a breach of tortious and delictual conduct that when done willfully, recklessly or negligently, constitutes a crime.<sup>114</sup> States can commit ecocide through their activities or policies, by failing to regulate activities under their control or by causing or permitting environmental damage to be caused, either directly by a governmental body or indirectly by an individual or entity acting under state control.<sup>115</sup> Individuals and organizations can also commit ecocide.<sup>116</sup>

The Rome Statute implicitly gives the Court the authority to develop new core crimes beyond those originally outlined in the Statute, and therefore the Court could have instituted new environmental crimes.<sup>117</sup> This, however, would have presented international governance problems with non-member states and states for which these new core crimes are unacceptable.<sup>118</sup> There must be international consensus for the addition of new core crimes. Since there is no international consensus on the creation of a universal environmental crime, a new crime is unlikely to ever develop.<sup>119</sup> Without punishing environmental manipulation and misuse, the Policy Paper will be limited.<sup>120</sup>

The way environmental harms are compared to other types of criminal acts is problematic.<sup>121</sup> While there is no way to suggest that there was a benefit to the

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<sup>109</sup> Orellana, *supra* note 101, at 691.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> Geo. Int'l Symposium, *supra* note 6, at 627.

<sup>113</sup> Megret, *supra* note 3, at 203.

<sup>114</sup> Drumbl, *supra* note 4, at 324-25.

<sup>115</sup> Mark Allan Gray, *The International Crime of Ecocide*, 26 CAL. W. INT'L L.J. 215, 219 (1996).

<sup>116</sup> Drumbl, *supra* note 4, at 221.

<sup>117</sup> Sharp, *supra* note 5, at 227.

<sup>118</sup> *Id.*

<sup>119</sup> Geo. Int'l Symposium, *supra* note 6, at 628.

<sup>120</sup> *Id.* at 627.

<sup>121</sup> Megret, *supra* note 3, at 221.

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commission of a traditional ICC core crime a defendant may be able to conjure up some defense of communal benefit.<sup>122</sup> There is no benefit to society from the commission of mass murder but a corporation's executive may be able to argue that the taking over some land for mining or agribusiness increased food supply or jobs.<sup>123</sup> If perpetrators are able to communicate to the ICC that they committed these crimes in furtherance of a benefit to society, it will become increasingly difficult to view environmental crimes in the same light as ICC core crimes.

The way the Policy Paper is written suggests that environmental crimes are meant to fit within the preexisting core crimes within the ICC's jurisdiction.<sup>124</sup> The three main crimes that the ICC prosecutes are genocide, crimes against humanity, and war crimes. Fitting environmental crimes into these three existing crimes is possible but difficult. No matter how successful, it is likely that the environmental aspects of the crime will be a secondary consideration when compared to the other acts that are under investigation.

### 1. *Genocide*

To prove genocide under the Rome Statute, one must show that acts were committed with the intent to destroy a national, ethnic, racial or religious group.<sup>125</sup> The greatest challenge to include environmental degradation in genocide prosecution is the intent or knowledge element of the crime.<sup>126</sup> It is not enough to show that the executive of a transnational corporation knowingly engaged in an environmentally harmful act in a way that may displace or injure an indigenous population - to convict based on genocide, there must be a specific intent to destroy the population as well.<sup>127</sup> This is even more difficult to prove, as the Rio Declaration recognizes a right to sustainable development, which allows acceptable levels of environmental degradation in the name of progress.<sup>128</sup> Therefore, a country or corporation that, by its actions, causes fatal environmental harm in the name of development has a defense to say their actions were justified for the benefit of society.<sup>129</sup>

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<sup>122</sup> Megret, *supra* note 3, at 221.

<sup>123</sup> *Id.*

<sup>124</sup> *OTP Policy Paper*, *supra* note 65.

<sup>125</sup> See *Rome Statute*, *supra* note 6, art. 6 (genocide is defined in the Rome Statute as "any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious mental or bodily harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.").

<sup>126</sup> Sharp, *supra* note 5, at 234.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* (the Rio Declaration is an international document outlining 27 principles intended to guide sustainable development). See U.N. Secretary General, *Rio Declaration on Environment and Development: Application and Implementation*, ¶2, U.N. Doc. E/CN.17/1997/8 (Feb. 10, 1997), for more information.

<sup>129</sup> Sharp, *supra* note 5, at 234.

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The goal of prosecuting genocide is generally to punish those who take away life, but cultural integrity also receives protection as a juridical value.<sup>130</sup> The Court may be able to prosecute acts of genocide that threaten the existence of certain groups by environmental degradation.<sup>131</sup> For example, subjecting a group of peoples to conditions that destroy their vital living space can be considered genocide, as would be the case with an indigenous community that is materially or spiritually tied to its habitat.<sup>132</sup> However, environmental degradation may not physically destroy a population but instead destroy its cultural identity, as would be the case if an indigenous community had to resettle off their sacred land or integrate and assimilate with a new civilization.<sup>133</sup> Therefore, the ecological harm may not rise to the level necessary to prosecute the perpetrator as committing an act of genocide. Additionally, the Rome Statute requires a *mens rea* for a criminal conviction and proving a direct intent or motive to commit genocide will not include convictions for environmental destruction that comes as part of progress or development or for when environmental destruction is only a byproduct.<sup>134</sup>

This problem can be illustrated through the extinction of the Ache indigenous group in Paraguay in the 1970s, when the Paraguayan Government used transactional corporations to promote oil exploration on the Ache's ancestral land, causing the cultural group to slowly die out.<sup>135</sup> While the Government and transnational corporation's actions met the definition of genocide, there was no evidence that proved "intent to destroy."<sup>136</sup> Therefore, the environmental destruction these groups clearly committed could not be prosecuted as genocide. If a perpetrator were to knowingly pollute a water source, poison fields or destroy a habitat in order to remove a group and take over their land, the Rome Statute's definition of genocide would be met and there may be some level of environmental protection.<sup>137</sup> The fatal problem lies in waiting until the level of environmental degradation reaches those that mimic genocide in order to prosecute the crime; this is too high a threshold and limits the efficacy of deterrence efforts.<sup>138</sup> Without a specific intent to destroy and without waiting until the damage is irreversible, prosecuting environmental crimes as genocide can prove to be difficult.

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<sup>130</sup> Orellana, *supra* note 101, at 691.

<sup>131</sup> *Id.* at 692.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> Orellana, *supra* note 101, at 692.

<sup>135</sup> Sharp, *supra* note 5, at 234.

<sup>136</sup> *Id.* at 234-35.

<sup>137</sup> *Id.* at 235.

<sup>138</sup> Megret, *supra* note 3, at 210.

## 2. *Crimes Against Humanity*

Crimes against humanity are acts knowingly committed against a civilian population.<sup>139</sup> There is more flexibility to include environmental crimes under the definition of crimes against humanity than exists within the definition of genocide since the scienter element of a specific intent to destroy is not required.<sup>140</sup> Of the various types of crimes against humanity, there are two that could best be used to prosecute environmental crimes: extermination and deportation or forcible transfer of population. Extermination is “the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population.”<sup>141</sup> For example, in the 1990s, Saddam Hussein, in hopes of destroying the Marsh Arab community in southern Iraq, diverted the Tigris and Euphrates rivers to drain the marshes in Mesopotamia in retaliation of an uprising in the area.<sup>142</sup> Deportation or forcible transfer of population is the “forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.”<sup>143</sup> To knowingly destroy a human habitat can be considered a forceful displacement of a group of persons “from an area in which they are lawfully present.”<sup>144</sup> Finally, if these acts do not fit under the two preceding crimes against humanity, they can also be considered crimes against humanity as “inhumane acts of a similar character intentionally causing great suffering or serious injury to body or mental or physical health.”<sup>145</sup>

Crimes against humanity are meant to protect the civilian population.<sup>146</sup> These crimes are only connected to the environment by implication or indirectly.<sup>147</sup> While the intent behind an environmentally harmful act may not be to destroy a people, a culture or a habitat, if a continuous and foreseeable result from the harm is that a people, a culture or a habitat will be destroyed, the result can make the act criminal.<sup>148</sup> Any potential economic justification for the exer-

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<sup>139</sup> *Rome Statute*, *supra* note 6, art. 7 (crimes against humanity are defined as “any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity. . . ; (i) enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”). *See also* Sharp, *supra* note 5, at 237.

<sup>140</sup> Sharp, *supra* note 5, at 237.

<sup>141</sup> *Id.*

<sup>142</sup> Smith, *supra* note 56 (this crime could not be prosecuted by the ICC because it took place before 2002); *see generally* Tara Weinstein, *Prosecuting Attacks that Destroy the Environment: Environmental Crimes or Humanitarian Atrocities?*, 17 *GEO. INT’L ENVTL. L. REV.* 697 (2005).

<sup>143</sup> Sharp, *supra* note 5, at 237; *see also* Orellana, *supra* note 101, at 693.

<sup>144</sup> Sharp, *supra* note 5, at 239.

<sup>145</sup> *Id.*

<sup>146</sup> Orellana, *supra* note 101, at 693.

<sup>147</sup> *Id.*

<sup>148</sup> Sharp, *supra* note 5, at 239.

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cise of the right to development does not mitigate a callous disregard for natural life or integrity.<sup>149</sup> For example, in the Cambodian case discussed below, any defense suggested that the land grabbing was in pursuit of economic development would likely not justify the displacement of approximately 350,000 persons.

Despite the fact that many different acts can constitute crimes against humanity, environmental crimes can be difficult to fit into its realm.<sup>150</sup> Crimes against humanity must “shock the conscience of mankind,” a requirement that is generally meant for actions whose results are grave to humankind and not the natural environment.<sup>151</sup> The problem is that harm to the environment may be too remote, widespread or difficult to prove and therefore will not fit within these generally accepted principles.<sup>152</sup> Nevertheless, of the three core crimes that the ICC prosecutes, crimes against humanity may be the best suited for the prosecution of environmental crimes, even though it may still be difficult to do without a direct correlation between the environmental harm and the result on a human population.

### 3. War Crimes

The ICC’s jurisdiction extends over all war crimes specified by the Rome Statute and in particular to those “committed as part of a plan or policy as a part of a large-scale commission of such crimes.”<sup>153</sup> While there are many definitions of war crimes in the Rome Statute, only one addresses environmental damage specifically. Article 8(2)(b)(iv) defines a war crime as “intentionally launching an attack in the knowledge that such attack will cause. . . long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.”<sup>154</sup> There are multiple readings of this definition. The first reading criminalizes “widespread, long-term and severe damage to the natural environment.”<sup>155</sup> A more strict reading would require “widespread, long-term and severe damage to the natural environment which is not justified by military necessity.”<sup>156</sup> Yet another reading would require the knowledge to be excessive in relation to the anticipated advantage and thus would require the employment of a balancing test.<sup>157</sup> The problem is that there is no guidance on exactly when actions taken that adversely affect the environment become criminal.<sup>158</sup>

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<sup>149</sup> Sharp, *supra* note 5, at 239.

<sup>150</sup> Megret, *supra* note 3, at 208.

<sup>151</sup> *Id.* at 209.

<sup>152</sup> *Id.*

<sup>153</sup> Sharp, *supra* note 5, at 240.

<sup>154</sup> *Id.* at 240-41.

<sup>155</sup> *Id.* at 241.

<sup>156</sup> Sharp, *supra* note 5, at 241.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

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The Rome Statute's preparatory works on the inclusion of environmental war crimes show that the integrity of the environment is a secondary matter to military considerations.<sup>159</sup> Environmental harms being committed, as a byproduct of war, are not unusual. Between 1962 and 1971, twelve million gallons of Agent Orange was sprayed over almost ten percent of present-day South Vietnam, destroying between fourteen and thirty-three percent of Vietnamese forests and exposing civilians and soldiers to defoliants that caused physical and mental disability in future generations of children.<sup>160</sup> During the 1991 Gulf War, Iraq ignited Kuwait's oil wells causing the dumping of oil into the Persian Gulf, subsequently leading to the contamination of Kuwait's water supply.<sup>161</sup> NATO aerial bombardments of the Federal Republic of Yugoslavia under Operation Allied Force caused the destruction of a petrochemical, fertilizer and refinery complex that discharged oil, gasoline, and dichloride in the Danube river, emitting toxic gasses and pollution downstream into the Black Sea.<sup>162</sup> None of these actions were prosecuted as environmental war crimes.

Moreover, there is no jurisdiction to sanction armed forces that cause environmental insecurity by testing weapons, mobilizing forces or supervising the disarmament process.<sup>163</sup> If individuals do not inform themselves that their actions are destructive to the environment, they can use their ignorance as a defense against war crimes.<sup>164</sup> The Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD), Geneva Conventions and Protocol I of the Hague Convention have all been insufficient to establish individual or state liability for the environmental harms they commit because these conventions only protect the environment when the environmental harm is indirectly or implicitly accompanied by military action.<sup>165</sup> Even though environmental war crimes are explicitly mentioned in international law, there have been little to no successful prosecutions of the same.

### V. Proposal

Based on the above analysis, prosecuting environmental crimes under the Rome Statute may not be as successful as supporters of the Policy Paper believe it to be. Companies who invest in certain countries without understanding the environmental impacts of their actions will now risk being complicit in the commission of ICC core crimes, but only if their actions reach the level that is required by the Statute.<sup>166</sup> Associated activities from land grabbing, such as deforestation, can potentially be prosecuted, but only if they destroy a popula-

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<sup>159</sup> Orellana, *supra* note 101, at 694.

<sup>160</sup> Drumbl, *supra* note 4, at 308.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 309.

<sup>163</sup> Drumbl, *supra* note 4, at 314.

<sup>164</sup> *Id.* at 323.

<sup>165</sup> Orellana, *supra* note 101, at 683.

<sup>166</sup> Vidal & Bowcott, *supra* note 11.

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tion.<sup>167</sup> The only real impact that the Policy Paper has on international justice is that the ICC is showing company executives and investors that, steps are being taken to show that no one will be able to hide behind a corporate veil and commit atrocities during peacetime in the name of progress or development.<sup>168</sup> Whether criminal action will be taken or the Policy Paper is just a symbolic gesture, it is one of the first steps towards creating an accountability mechanism for ecological wrongdoers.

It can be quite complicated to bring an action against a corporation or government for an environmental crime because the prosecution must prove a definitive relationship between the entity and the specific environmental damage it caused.<sup>169</sup> The ICC is planning on assessing the impact of the crimes, *inter alia*, through the victim's increased vulnerability, the terror instilled because of the crime and the social, economic and environmental damage inflicted because of a defendant's actions.<sup>170</sup> The commission of these crimes will be assessed through:

the means employed to execute the crime, the extent to which the crimes were systematic or resulted from a plan or organized policy or otherwise resulted from the abuse of power or official capacity, the existence of elements of particular cruelty, including the vulnerability of the victims, any motives involving discrimination held by the direct perpetrators of the crimes, the use of rape or other sexual or gender-based violence or crimes committed by means of, or resulting in, the destruction of the environment or of protected objects.<sup>171</sup>

But, in order for this to work, the ICC must send a case to the investigation stage.

An initial first case under the expanded ICC focus comes from Cambodia. The Policy Paper does not necessarily make land grabbing a crime *per se* but allows mass forcible evictions from the land grabbing to be perceived as a crime against humanity during peacetime.<sup>172</sup> The timing of the Policy Paper coincides with the filing of a case of mass human rights violations related to land seizures in Cambodia.<sup>173</sup> Business leaders in the country, working with the kleptocratic Cambodian government, have been systematically stealing land.<sup>174</sup> Based on the

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<sup>167</sup> Vidal & Bowcott, *supra* note 11.

<sup>168</sup> Smith, *supra* note 56.

<sup>169</sup> Farron Cousins, *Could the International Criminal Court Start Prosecuting Climate Crimes?*, DESMOG (Oct. 1, 2016), <https://www.desmogblog.com/2016/10/01/could-international-criminal-court-prosecute-climate-crimes> (for example, to obtain a verdict in a lawsuit, a plaintiff or prosecutor would have to show that Company X created Product Y, which was directly and solely responsible for the damage alleged. If there are any other influences, which are extremely common and likely, the entire suit can be negated).

<sup>170</sup> Cousins, *supra* note 169.

<sup>171</sup> *Id.*

<sup>172</sup> Vidal & Bowcott, *supra* note 11.

<sup>173</sup> Global Witness Press Release, *supra* note 15.

<sup>174</sup> *Id.*

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logic of the Policy Paper, Richard Rogers, a partner of the international criminal law firm Global Diligence, filed a case with the ICC on behalf of 10 Cambodians.<sup>175</sup> The case alleges that since 2002, the Cambodian ruling elite – spanning from government officials to the military – have committed mass human rights violations in order to gather wealth and power by forcibly evicting almost 350,000 from their land.<sup>176</sup> The ICC Prosecutor is said to be taking two to three environmental cases seriously, for which decisions as to whether the Office will bring charges will be made by the end of this current year.<sup>177</sup> This case was unprosecuted in Cambodia because the government found the allegations to be politically motivated and based on fake statistics.<sup>178</sup> It is thought that because of the lack of action taken in Cambodia, this is one of the few environmental cases under consideration by the Court.

However, the ICC may not be the proper place to enforce environmental crimes. Because many crimes that take place are not inter-state or international, perhaps the ICC should follow its traditional rationale and defer to individual states to punish environmental crimes. Many countries currently include environmental rights within their legislation. The African Charter on Human and People's Rights states, "all peoples shall have the right to a general satisfactory environment favorable to their development."<sup>179</sup> The Brazilian Constitution recognizes that "everyone is entitled to an ecologically balanced environment which is an asset of everyday use to the common man and essential to the healthy qualify of life; this imposes a duty on the government and the community to protect and preserve it for the present and future generations."<sup>180</sup> The Namibian Constitution imposes an active responsibility on the State to maintain ecosystems, ecological processes and biological diversity in the country and also ensure national resources are used in a sustainable way that benefits present and future citizens.<sup>181</sup> The problem, which is beyond the scope of this article, is that many states do not prosecute violations of these rights.<sup>182</sup> If the ICC and the international community continue to lead by example, domestic or other transnational forums may be better suited to deal with the environmental harm that multinational corporations cause.

Certain environmental disasters within the ICC's jurisdiction come to mind as potentially chargeable events. For example, the ICC can investigate environmental crimes committed as part of the Lebanon Jiyeh Power Station bombing in 2006, which caused one of the largest oil spills in the Mediterranean Sea or the release of toxic materials during the 2008-2009 conflict in Gaza, that led to mass

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<sup>175</sup> Vidal & Bowcott, *supra* note 11.

<sup>176</sup> *Id.*

<sup>177</sup> Yang et al., *supra* note 68.

<sup>178</sup> Christ Arsenault, *International Court to Prosecute Environmental Crimes in Major Shift*, REUTERS (Sept. 15, 2016), <http://www.reuters.com/article/us-global-landrights-icc-idUSKCN11L2F9>.

<sup>179</sup> Sharp, *supra* note 5, at 231.

<sup>180</sup> *Id.* at 231-32.

<sup>181</sup> *Id.* at 232.

<sup>182</sup> *Id.* at 233.

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soil and water contamination.<sup>183</sup> The ICC may be able to look at the *Deepwater Horizon* explosion in the Gulf of Mexico, of which BP, TransOcean, and Halliburton may have been criminally responsible.<sup>184</sup> Current and former Exxon officials may be prosecuted for covering up the company's contribution to climate change, caused by its CO2 emissions after the company knowingly and willfully hid these dangers from the public despite its own scientific findings that put liability and responsibility on Exxon.<sup>185</sup>

Despite the number of cases that could theoretically be prosecuted, prosecuting environmental crimes is easier said than done. In February 2016, a BP rig supervisor was found not guilty of violating the Clean Water Act after the *Deepwater Horizon* spill.<sup>186</sup> Additionally, a Hungarian court acquitted over a dozen Mal Corp employees in January 2016 for their part in a toxic red sludge spill from a 2010 reservoir burst that killed ten people.<sup>187</sup>

However, there is still a possibility that domestic courts are the best venue to prosecute environmental crimes. In June 2015, a Dutch court returned a verdict ruling that the Netherlands had a legal duty to lower CO2 emissions for the current and future generations.<sup>188</sup> The judge's decision set precedent; it was the first to establish a duty of care to future generations as a method of establishing climate justice.<sup>189</sup> If ecocide was made an international crime against peace in more countries, additional progress could be made.<sup>190</sup>

The international community can also learn a lesson from Guatemala and the efforts made in the country to protect the environment. In July 2016, the country became the first in the world to dedicate a court responsible for adjudicating crimes against nature, or ecocide.<sup>191</sup> The Environmental Crimes Court has gathered momentum and has already ruled against palm oil corporation Empresa Reforestadora de Palma de Petén SA (REPSA) after the company was charged with ecocide.<sup>192</sup> In this case, REPSA's negligent practices of polluting the La Pasión River, by dumping the pesticide Malathion into it, caused the deaths of millions of fish and other wildlife.<sup>193</sup> A coalition of grassroots groups operating

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<sup>183</sup> Smith, *supra* note 56 (asserting that the ICC would not be able to prosecute the crimes since these states have not ratified the Rome Statute).

<sup>184</sup> Cousins, *supra* note 169.

<sup>185</sup> *Id.*

<sup>186</sup> Brittany Felder, *ICC to Focus on Environmental Crimes*, JURIST (Sept. 16, 2016), <http://www.jurist.org/paperchase/2016/09/icc-to-focus-on-environmental-crimes.php>; see also *United States of America v. Robert Kaluza*, No. 2:12-CR-00265 (E.D. La.), AUSA Jennifer Saulino.

<sup>187</sup> Felder, *supra* note 186.

<sup>188</sup> Femke Wijdekop, *Stopping the Sixth Extinction: Ecocide Law*, SALT (Sept. 29, 2015), <http://www.wearesalt.org/stopping-the-sixth-extinction-ecocide-law/>.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *On Dangerous Ground*, *supra* note 1.

<sup>192</sup> *Guatemala's Environmental Crimes Court Hears First Case*, SUSTAINABLEBUSINESS.COM (Jan. 19, 2016), <http://www.sustainablebusiness.com/guatemala39s-environmental-crimes-court-hears-first-case-55448/>.

<sup>193</sup> *Id.* (La Pasión river runs for approximately 300 miles in Guatemala's northern regions, and is the home various bird, mammal and fish species. It also supports tens of thousands of individuals who live

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as the Commission for the Defense of Life and Nature filed the action on behalf of the environment and the decision against REPSA was upheld at the appellate level.<sup>194</sup> The coalition's success was only possible because Guatemala recognized the crime of ecocide.<sup>195</sup> Similarly, without recognizing such a crime, there is no international recourse mechanism to establish justice for the environmental damage done.

### VI. Conclusion

The Policy Paper is of symbolic and precedential value; it suggests that environmental crimes are going to be taken seriously in the future. It is a step in the right direction. However, with the prohibitive *mens rea* requirements necessary to prosecute environmental crimes, it will be difficult to prosecute anything other than "intentional inflictions of environmental harm," resulting in largely unprosecuted negligent and reckless damage.<sup>196</sup> Ecological crimes still must fit within the definitions of genocide, crimes against humanity and war crimes and this can be limiting. The legal infrastructure that protects land rights is lacking. A stronger architecture to protect land ownership rights is necessary to ensure corporations are held accountable for their global trade practices. The hope with the expanded scope of the ICC is to consider traditionally under-prosecuted crimes.<sup>197</sup> However, the ICC is likely not going to be the right forum to adjudicate these crimes. Limitations in structure and accessibility mean that environmental crimes will always be a secondary priority to other crimes that are committed in conjunction and as a result, more practical and accessible solutions are needed. While the Policy Paper may be a warning to company executives and investors that their bullying on the environmental playground will no longer be tolerated, the reality is that the existing infrastructure is not enough.

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along the banks. The Guatemala National Council for Protected Areas estimates that REPSA's toxins affected 23 fish species and 21 bird, reptile and mammal species).

<sup>194</sup> *Guatemala's Environmental Crimes Court Hears First Case*, *supra* note 192.

<sup>195</sup> *Id.*

<sup>196</sup> Drumbl, *supra* note 4, at 332.

<sup>197</sup> Vidal & Bowcott, *supra* note 11.





