

“OPEN FOR BUSINESS”: INTERNATIONAL FINANCIAL INSTITUTIONS, POST-CONFLICT ECONOMIC REFORM, AND THE RULE OF LAW

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What practices should international institutions adopt to promote economic development, peace, and stability in post-conflict zones? The United Nations, the World Bank, and the International Monetary Fund, among other such institutions,

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have a common answer: practices that promote marketization and the rule of law.

Today the concept of the rule of law provides a home and a livelihood for overlapping world visions of good governance, economic development, and international peace and stability. In 2003, Thomas Carothers said: “[I]t has become a new credo in the development field that if developing and post-communist countries wish to succeed economically they must develop the rule of law.”¹ The same can now be said of peacebuilding: The rule of law, operationalized through expansive legal and judicial reform programs, has become the new mantra of international organizations in the reconstruction and economic development of post-conflict zones.

The process of building peace and promoting economic growth through law has led to a number of innovations within the international legal order. It has required international organizations to interpret their own Articles of Agreement creatively and proactively so as to allow intervention in the domestic and often political affairs of failed and conflict-ridden states. In addition, it has led international organizations to take on the business of lawmaking directly through legal reform and technical assistance projects. Neither the United Nations (UN) nor, by extension, its specialized agencies were meant (or authorized) to be legislators.² Yet the breadth of contemporary rule of law programs demonstrates that this prohibition no longer holds in practice. International Financial Institutions (IFIs) such as the World Bank and the International Monetary Fund (IMF) are now serving as economic strategists and even as the principal drafters of key pieces of commercial legislation in post-conflict zones.³ In functioning

1. Thomas Carothers, *Promoting the Rule of Law Abroad: The Problem of Knowledge* 6 (Democracy and Rule of Law Project, Working Paper No. 34, 2003).

2. See Oscar Schachter, *United Nations Law*, 88 AM. J. INT'L L. 1, 1 (1994) (“Neither the United Nations nor any of its specialized agencies was conceived as a legislative body. Their charters and governing instruments contemplated that their objectives would be carried out mainly through recommendations aimed at coordinating (or ‘harmonizing’) the actions of their member states.”).

3. See *infra* notes 45-47, 59, 107 and accompanying text. The term “International Financial Institutions” properly includes a range of regional and international institutions including the Asian Development Bank, the European Bank for Reconstruction and Development, and the World Trade Or-

states, IFI powers are advisory and based on member consent.⁴ In post-conflict societies, the absence of representative and functioning governmental counterparts that can bargain over proposed policy and legislative changes and the typically poor repair of the pre-conflict legal systems means that IFI involvement can border on the legislative.

The purpose of this Article is to explore the legal basis of the expanding involvement of IFIs in multilaterally administered post-conflict zones and to examine the implications of their interest in using law in the process of economic reconstruction. This Article's focus on multilateral administrations is deliberate: In Afghanistan, East Timor, Iraq, and Kosovo, the conditions for IFI entry have been determined in part by Security Council resolutions, signaling an important and developing legal relationship between the IFIs and the UN. In addition, the World Bank and the IMF have exercised broad de facto legislative powers through policy and technical assistance programs that have pushed their de jure mandates into domestic matters normally reserved to sovereign states. These expanding post-conflict activities illustrate the increasing relevance of IFIs not only to domestic law and legal reform but more broadly to international peace and security.

It is on the basis of growing IFI rule of law activities in post-conflict zones that I make three claims: (i) The Security Council has become an institutional enabler for IFI post-conflict reconstruction through its issuance of Chapter VII resolutions that condone IFI involvement and economic development; (ii) post-conflict work has required both the IMF and the World Bank to undertake significant interpretive leaps with regard to their Articles of Agreement, revealing an important new expansion in their mandates; and (iii) IFI post-conflict work highlights the emergence of a *substantive* conception

ganization, amongst others. In this article, I address only the IMF and World Bank due to their involvement in multilateral peacebuilding operations, their position within the UN system, and their particular programmatic focus on the rule of law.

4. For example, article V, section 2(b) of the IMF's Articles of Agreement recognizes that the IMF provides technical assistance as a service to the membership and that this service does not impose any obligation on the member without its consent. *See* Articles of Agreement of the International Monetary Fund art. I, July 22, 1944, 60 Stat. 1401, 2 U.N.T.S. 39 (amended through June 28, 1990) [Hereinafter IMF Articles of Agreement].

of the rule of law based on the promotion of markets (or “marketization”) that indelibly influences the orientation of post-conflict states. This programmatic focus on the IMF and World Bank’s current rule of law activities raises the question of whether the IFIs have the political legitimacy and institutional accountability to engage in legal reform in post-conflict zones.

This analysis begins with a discussion of the rule of law and contemporary IFI practices and policies on post-conflict legal reform. Next, I use the case study of occupied Iraq in 2003-04 to illustrate my three claims. The occupation of Iraq is a unique but telling example of the salience of economic and legal reform to post-conflict reconstruction: unique due to the hyper-market approach instigated by the United States (as well as its status as an occupying power), but telling in that it portends the growing role of IFIs, marketization, and legal reform in Security Council-sponsored economic reconstruction. The second half of the article is dedicated to exploring the legal implications of my three claims. First, I address the convergence of IFI and Security Council mandates on economic reconstruction and international peace and security and the tensions inherent in this relationship. Next, I assess the constitutional doctrines—such as implied powers—that IFIs have employed to expand their involvement into post-conflict lawmaking. I conclude with a discussion of the legitimacy and accountability of IFI-sponsored legal reforms, and explore whether modified trusteeship duties should apply to IFI involvement in multilateral post-conflict economic reconstruction.

I. INTERNATIONAL ORGANIZATIONS AND THE RULE OF LAW

The rule of law is a vigorously debated concept, and there exist different and often divisive formulations of the procedural and substantive essence of the doctrine.⁵ While it is be-

5. See generally Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)?*, 21 *LAW & PHIL.* 137 (2002); Judith Shklar, *Political Theory and the Rule of Law*, in *THE RULE OF LAW, IDEAL OR IDEOLOGY I* (Allan Hutchinson & Patrick Monahan eds., 1987). For a discussion of the practical dimensions of these debates, see Rachel Klienfeld Belton, *Competing Definitions of the Rule of Law, Implications for Practitioners* (Democracy and Rule of Law Project, Working Paper No. 55, 2005).

yond the scope of the present article to evaluate the merits of the various positions, a working definition of the rule of law is useful in assessing the current interest in promulgating the rule of law internationally. In simple terms, the rule of law can be said to involve the application of clear and settled laws to those who govern so as to constrain their power. In its basic iteration, therefore, the rule of law is a procedural notion, the key principles and characteristics of which are clarity, prospective application (no retroactivity), stability, and generality.⁶

While international organizations have not engaged in conceptual debates about the nature of the rule of law, they have over the last decade frequently adopted the rule of law as an operational concept.⁷ For example, in his August 2004 Report on the Rule of Law, the Secretary General of the UN defined the rule of law in reference to four attributes: accountability, equal application, independent enforcement, and consistency with human rights. He wrote:

[The rule of law is] a principle of governance in which all persons, institutions and entities, public and private including the state itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated and which are consistent with international human rights norms and standards.⁸

6. See, e.g., LON FULLER, *THE MORALITY OF LAW* 39 (1964); JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 270 (1980).

7. Scholarship on the "international" rule of law is consequently deepening. See, e.g., David Dyzenhaus, *The Rule of (Administrative) Law in International Law*, 68 *LAW & CONTEMP. PROBS.* 127, 127 (Summer/Autumn 2005). See also Ernst-Ulrich Petersmann, *How to Promote the Rule of Law?*, 1 *J. INT'L ECON. L.* 25, (1998).

8. The Secretary-General, *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 6, delivered to the Security Council, U.N. Doc. S/2004/616 (Aug. 23, 2004). See also Wade Channell, *Lessons not Learned: Problems with Western Aid for Law Reform in Post Communist Countries* 3 (Democracy and Rule of Law Project, Working Paper No. 57, 2005) (emphasizing similar attributes (although without reference to human rights) in the context of international donor projects and noting that "[a] priority area for donor efforts has been the establishment of the rule of law, which donors commonly define as accountable, transparent government that equitably enforces laws and regulations through an independent judiciary to create a 'level playing field' for economic actors").

Although the World Bank has not offered a definition of the rule of law as such, it has highlighted what it considers to be its key elements: dignity, equality, and consistency with international standards.⁹ In discussing legal aspects of the World Bank's work on Human Rights, Robert Danino, Senior Vice President and General Counsel of the World Bank, stated: "The 'rule of law' with its inherent notions of fairness and social justice . . . includes access to justice, recognition before the law, proper public sector management and the independence of the judiciary; all of which are protected under international human rights law. However, the rule of law must also be supported by a number of other indispensable factors, such as public participation, a free press and a voice for civil society."¹⁰

The IMF advocates a rule of law based on economic rights and obligations, and norms to govern the behavior of market actors.¹¹ While the IMF does not go so far as to reference

9. World Bank, *Initiatives in Legal and Judicial Reform*, at 2 (2004), available at http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2004/03/01/000012009_20040301142827/Rendered/PDF/250820040Edition.pdf ("The rule of law prevails where (1) the government itself is bound by the law; (2) every person in society is treated equally under the law; (3) the human dignity of each individual is recognized and protected by law; and (4) justice is accessible to all. The rule of law requires transparent legislation, fair laws, predictable enforcement, and accountable governments to maintain order, promote private sector growth, fight poverty, and have legitimacy. Legal and judicial reform is a means to promote the rule of law.").

10. Robert Danino, *The Legal Aspects of the World Bank's Work on Human Rights: Some Preliminary Thoughts*, in HUMAN RIGHTS AND DEVELOPMENT: TOWARDS MUTUAL REINFORCEMENT 509, 522 (Philip Alston & Mary Robinson eds., 2005).

11. See, e.g., International Monetary Fund [IMF], *Code of Good Practices on Transparency in Monetary and Financial Policies: Declaration of Principles*, at 5 (Sept. 26, 1999), available at <http://www.imf.org/external/np/mae/mft/code/eng/code2e.pdf> [hereinafter *IMF Code*] ("[G]ood governance calls for central banks and financial agencies to be accountable, particularly where the monetary and financial authorities are granted a high degree of autonomy. In cases when conflicts might arise between or within government units (e.g., if the central bank or a financial agency acts as both owner and financial supervisor of a financial institution or if the responsibilities for monetary and foreign exchange policy are shared), transparency in the mandate and clear rules and procedures in the operations of the agencies can help in their resolution, strengthen governance, and facilitate policy consistency."). See also IMF, *International Standards and Fund Surveillance—Progress*

human rights in its operational documents,¹² it is engaged in promulgating substantive principles under the rule of law umbrella as discussed in more detail *infra*.

Because the rule of law has been linked to the free market and to economic prosperity since Adam Smith's *The Wealth of Nations*,¹³ the adoption of this concept by the IFIs is perhaps not surprising. Clear and settled laws have often been thought to promote economic development. In post-conflict situations, however, the state of law is often in disarray. In practical terms, direct IFI involvement in judicial projects and even legislative reform has been required to promote the rule of law. A central thesis of this article is that this engagement is novel. It signals a shift in the role of law in international peacebuilding and demonstrates the assumption of quasi-legislative functions by IFIs in post-conflict situations.

II. IFI ENGAGEMENT IN POST-CONFLICT SITUATIONS

Before the 1990s, the World Bank and the IMF were largely absent from post-conflict zones. As one commentator noted, they had generally "[taken] the first plane out" of war-torn areas.¹⁴ For example, when the civil war broke out in

and Issues, at 2 (Aug. 16, 1999), available at <http://www.imf.org/external/np/rosc/stand.htm> ("The development and adoption of standards in areas central to the effective operation of domestic and international financial systems holds the promise of better informed lending and investment decisions, increased accountability of policy makers and better policy making and, ultimately, improved economic performance.").

12. *But see* Jean-Pierre Chauffour, *Pro-Human Rights Growth Policies*, DEVELOPMENT OUTREACH, Oct. 2006, available at <http://www1.worldbank.org/devoutreach/october06/article.asp?id=381> (providing a perspective on how human rights are still relevant to the IMF's approach).

13. *See* ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 15 (Edwin Cannon ed., Univ. of Chicago Press 1976) (1776). *See generally* MAX WEBER, GENERAL ECONOMIC HISTORY 114-17 (Frank H. Knight trans., The Free Press 1950) (1927); FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM 44 (1944); William E. Scheuerman, *Globalization and the Fate of Law*, in RECRAFTING THE RULE OF LAW: THE LIMITS OF LEGAL ORDER 243 (David Dyzenhaus ed., 1999); David M. Trubek, *Toward a Social Theory of Law: An Essay on the Study of Law and Development*, 82 YALE L.J. 1, 6-7 (1972); BRUCE RUSSETT & JOHN R. ONEAL, TRIANGULATING PEACE: DEMOCRACY, INTERDEPENDENCE, AND INTERNATIONAL ORGANIZATIONS 14-27 (2001); ROLAND PARIS, AT WAR'S END: BUILDING PEACE AFTER CIVIL CONFLICT 41 (2004).

14. Press Release, DPO/NGO Annual Conference, Economic Recovery Called Primary Element in Peace-Building, As DPI/NGO Conference Con-

Cambodia in the 1970s (leading to the Khmer Rouge's ascent to power), the World Bank and the IMF fled and did not return until 1991.¹⁵ Their absence was not a foregone conclusion. After all, the World Bank Group (which today includes the International Bank for Reconstruction and Development (IBRD), the International Finance Corporation (IFC), the International Development Association (IDA), and the Multilateral Investment Guarantee Agency (MIGA)) and the IMF were created with a post-war mandate in mind. Born at the Bretton Woods conference in 1944, these institutions were intended to assist in the reconstruction of Europe after WWII.¹⁶ Both institutions were given powers to regulate the international economic system in an effort to prevent future financial chaos and political upheaval.¹⁷ The IMF's objective was to promote monetary cooperation, facilitate the growth of international trade, and promote exchange rate stability and short term liquidity so as to avoid disequilibrium in the international system.¹⁸ The World Bank, in contrast, was a public bank created to as-

tinues, U.N. Doc. NGO/479/PI/1442 (Oct. 9, 2002) (containing statement by Kazuhide Karoda of the World Bank's Conflict Prevention and Reconstruction Unit), available at <http://www.un.org/News/Press/docs/2002/NGO479.doc.htm>.

15. IMF, *Fund Involvement in Post-Conflict Countries (Memorandum to Members of the Executive Board)*, at 6, Doc. No. EBS/95/141 (Aug. 16, 1995). See also Press Release, DPO/NGO Annual Conference, *supra* note 14.

16. See International Bank for Reconstruction and Development Articles of Agreement art. 1, opened for signature Dec. 27, 1945, T.I.A.S. No. 1502, 2 U.N.T.S. 134, as amended Feb. 16, 1989, available at <http://siteresources.worldbank.org/EXTABOUTUS/Resources/ibrd-articlesofagreement.pdf> [hereinafter World Bank Articles of Agreement] (indicating that the key purpose of the World Bank is to "assist in bringing smooth transition from wartime to peacetime economies"). See also Maurizio Ragazzi, *The Role of the World Bank in Conflict-Afflicted Areas*, 95 AM. SOC'Y INT'L L. PROC. 240, 241-42 (2001) (noting that economic and social stability and human security are preconditions for development and that development is a key word in the World Bank's definition of its purposes); IMF Articles of Agreement, *supra* note 4.

17. For a reading of their mandates in light of contemporary conflicts, see Eric Dorkin, *Development, The IMF, and Institutional Investors: The Mexican Financial Crisis*, 9 TRANSNAT'L L. & CONTEMP. PROBS. 247, 248 (1999); NICOLE BALL & TAMMY HALEVY, MAKING PEACE WORK: THE ROLE OF THE INTERNATIONAL DEVELOPMENT COMMUNITY 104 (1996).

18. ANDREAS F. LOWENFELD, INTERNATIONAL ECONOMIC LAW 174-76 (2002). See also James M. Boughton, *IMF at 60: Reflections on Reform at the IMF and the Demands of a Changing World Economy*, 41 FIN. & DEV. 8 (Sept. 2004).

sist with reconstruction and development and to promote long-range balanced growth for countries not yet in the economic mainstream.¹⁹

There are several reasons IFIs were absent from conflict areas despite their post-war orientation. First, inspired by "functionalist" theories of international organizations, these agencies were intended to provide technical assistance in economic matters and to stay out of politics.²⁰ This apolitical design is demonstrated in an important carve-out in the World Bank's Articles of Agreement:²¹

The Bank and its officers *shall not interfere in the political affairs of any member*; nor shall they be influenced in their decisions by the political character of the member or members concerned. *Only economic considerations shall be relevant to their decisions*, and these considerations shall be weighted impartially in order to achieve the purposes stated in Art. 1.²²

19. LOWENFELD, *supra* note 18, at 175.

20. PHILLIPE SANDS & PIERRE KLEIN, *BOWETT'S LAW OF INTERNATIONAL INSTITUTIONS* § 3-003 (5th ed. 2001). For a discussion of functionalism generally in international organizations, see JOSÉ E. ALVAREZ, *INTERNATIONAL ORGANIZATIONS AS LAWMAKERS* 17-29 (2005).

21. The IMF's focus on exchange rates and monetary policy were perceived as less political than the Bank's, and consequently its Articles of Association did not contain this explicit restriction on political issues. Nonetheless, a comparable limit was placed on its surveillance activities: All members of the IMF must consent to surveillance, but the IMF in turn must "respect the domestic social and political policies of members" pursuant to Article IV Section 3(b). IMF Articles of Agreement, *supra* note 4, art. IV, § 3(b). It is important to note, however, that no such restriction applies to IMF conditional lending. See IMF, *IMF Conditionality Factsheet* (Sept. 1999), available at <http://www.imf.org/external/np/exr/facts/conditio.htm>. For a comparative discussion of the World Bank and the IMF's treatment of political issues, see IBRAHIM F.I. SHIHATA, *THE WORLD BANK IN A CHANGING WORLD* 65 (1991). See also WORLD BANK, *IMF AND HUMAN RIGHTS* 88 (Willem van Genugten et al. eds., 2003).

22. See World Bank Articles of Agreement, *supra* note 16, art. IV, § 10 (emphasis added); SHIHATA, *supra* note 21, at 65. Note also that article III, section 5(b) and article V, section 5(c) of the World Bank's Articles of Agreement contain similar prohibitions on involvement in political issues. The European Bank for Reconstruction and Development provides a useful point of comparison. Founded in 1991, its Articles of Agreement specify that it can only lend to countries with multiparty democracies and pluralism. See Agreement Establishing the European Bank for Reconstruction and Development, in *BASIC DOCUMENTS OF THE EUROPEAN BANK FOR RECONSTRUC-*

Because peace is an inherently political issue, reconciliation and peacemaking processes appeared to be beyond the competence of these IFIs despite their reconstruction objectives. In addition, certain threshold conditions in the World Bank's Articles of Agreement seemed to preclude it from operating in transitional states. For example, the World Bank's Articles of Agreement require membership as a prerequisite for Bank funding.²³ New states, states emerging from conflict, and territorial entities within partitioned states were not considered to be eligible for IMF or Bank membership. The instability of war created further pragmatic concerns regarding the competencies of the Bank and the Fund in post-conflict situations. Both institutions were fearful of the risks and potential setbacks in countries emerging from conflict: Projects might not be successful if hostilities were renewed, staff safety might be compromised, and the reputations of the IFIs might be tarnished through perceptions of bias or inequity in their programs.²⁴ Over the first fifty operational years of the United Nation's history, when competency to intervene in conflict situations was found (if at all) it was vested in the UN directly and not in specialized agencies like the IFIs.

A. *World Bank and IMF Policies on Post-Conflict Assistance*

A sea-change in the approach to conflict occurred in the mid-1990s, when both the IMF and the Bank developed new policies permitting targeted post-conflict engagement. For the World Bank, the process of returning to its original mission by helping nations to emerge from conflict began in 1994.²⁵ As the Bank has explained:

TION AND DEVELOPMENT 5 (2000), available at <http://www.ebrd.com/pubs/insti/basics.pdf>.

23. The World Bank's policy on membership is discussed *infra* at notes 204-06 and accompanying text.

24. World Bank, *Post Conflict Reconstruction: The Role of the World Bank*, at 57, Rep. No. 17752 (1998), available at http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/1998/04/01/000009265_3980624143531/Rendered/PDF/multi_page.pdf; Ake Lonnberg, *Restoring and Transforming Payment and Banking Systems in Postconflict Economies*, in 3 CURRENT DEV. IN MONETARY & FIN. L. 727 (2005).

25. Paul Blustein, *A Loan Amid the Ruins: World Bank Shifts Aid to Rebuilding War-Torn Countries*, WASH. POST, Feb. 13, 1996, at D1; see generally John Ciorciari, *A Prospective Enlargement of the Roles of the Bretton Woods Financial*

Two events in the mid-1990s brought about a major turning point in the Bank's approach to conflict. The first came in 1994 when the Bank was asked to administer the multi-donor Holst Fund for the West Bank and Gaza. The second came in 1995, when the Bank was asked to take the lead with the European Commission in planning and coordinating international assistance for post-conflict recovery in Bosnia and Herzegovina. A trust fund was established upstream of Bank lending, followed by emergency lending mobilized more rapidly and across a wider range of activities than previously undertaken. The Bosnia program in particular, broke the mold, and formed the basis for a new post-conflict framework which was to become within three years a Bank operational policy.²⁶

The impetus behind this reengagement came from the Clinton Administration, which recognized that the World Bank could be a source of money to finance reconstruction and that it could provide expertise in infrastructure, micro-finance, and "all the nuts and bolts of nation-building."²⁷

The World Bank has developed its post-conflict policies through an evolving set of internal initiatives and "Operational Policies."²⁸ First, the World Bank's Board of Executive Directors endorsed a policy paper on involvement in post-conflict reconstruction and formed a Post-Conflict Unit in 1997.²⁹

Institutions in International Peace Operations, 22 *FORDHAM INT'L L.J.* 292 (1998-1999).

26. CONFLICT PREVENTION AND RECONSTRUCTION UNIT, WORLD BANK, *THE ROLE OF THE WORLD BANK IN CONFLICT AND DEVELOPMENT* 4 (2004), available at <http://siteresources.worldbank.org/INTCPR/214578-1112884026494/20482669/ConflictAgenda2004.pdf> [hereinafter *ROLE OF THE WORLD BANK*].

27. Sebastian Mallaby, *It Pays for the U.S. to Go to the Bank*, *WASH. POST*, Sept. 26, 2004, at B3. In addition, IFI involvement prompted more sympathy than an American-led reconstruction effort, suggesting that World Bank involvement was becoming a prerequisite where the international community is asked to underwrite the peace. *Id.* at B4.

28. For a discussion of the legal effect of the World Bank's Operational Policies, see Benedict Kingsbury, *Operational Policies of International Institutions as Part of the Law-Making Process: The World Bank and Indigenous Peoples*, in *THE REALITY OF INTERNATIONAL LAW, ESSAYS IN HONOUR OF IAN BROWNLIE* 323, 323 (Goodwin-Gill et al. eds., 1999).

29. Ragazzi, *supra* note 16, at 242.

Next, the Bank adapted its Emergency Recovery Assistance policy to provide more streamlined approvals processes for post-conflict involvement and passed Operational Policy (OP) 2.30 on Development Cooperation and Conflict, which is read in conjunction with OP 8.50 on Emergency Assistance.³⁰ These policies set out the World Bank's principles of involvement for countries in transition from conflict. Most recently, the World Bank has launched an initiative for Low Income Countries Under Stress (LICUS)³¹ and has become a primary aid coordinator and administrator of emergency trust funds in post-conflict situations.³²

OP 2.30 recognizes that "violent conflict, within or between countries, results in loss of life and destruction of assets, contributes to social and economic disintegration, and reverses the gains of development, thereby adversely affecting the Bank's core mission of poverty reduction. Such conflict not only affects the country or countries of the combatants, but also may spill over to other countries and have regional

30. World Bank, *Operational Manual*, OP 8.50 (Aug. 1995), OP 2.30 (Jan. 2001), available at wbln0018.worldbank.org/institutional/manuals/opmanual.nsf.

31. In 2004-2005, LICUS focus countries were Burundi, Comoros, Cote d'Ivoire, Guinea Bissau, Liberia, Togo, and Zimbabwe. In 2003, LICUS focus countries (which continue to receive close support) were Angola, Central African Republic, Haiti, Papua New Guinea, Somalia, Sudan, and Tajikistan. See WORLD BANK, *ENGAGING WITH FRAGILE STATES: AN IEG REVIEW OF WORLD BANK SUPPORT TO LOW-INCOME COUNTRIES UNDER STRESS* app. G (2006), available at [http://lnweb18.worldbank.org/oed/oeddoelib.nsf/24cc3bb1f94ae11c85256808006a0046/a4d6461b0067e049852571f500551e1b/\\$FILE/licus.pdf](http://lnweb18.worldbank.org/oed/oeddoelib.nsf/24cc3bb1f94ae11c85256808006a0046/a4d6461b0067e049852571f500551e1b/$FILE/licus.pdf). For a discussion of the policy developments leading up to the creation of LICUS, see *ROLE OF THE WORLD BANK*, *supra* note 26, at 8.

32. The World Bank's Articles of Agreement do not mention trust funds specifically, but both the IBRD and the IDA have acted as trustees for a number of funds. In addition, the World Bank has established and administered other bilateral or multilateral trust funds that have provided resources to countries applying for Bank membership. See World Bank, *Operational Manual*, *supra* note 30, at OP 14.40 (Feb. 1997) (requiring adherence to various procedures, including preparation of briefs, applicable conditions and restrictions, and reporting and auditing requirements). For an example of the operation of trust funds in practice, see World Bank, *World Bank Group Response to Post Conflict Reconstruction in Kosovo: General Framework for an Emergency Assistance Strategy*, available at http://www.worldbank.org/html/extdr/kosovo/kosovo_st.htm.

implications.”³³ In this statement, the Bank links domestic economic development with internal conflict and *regional* peace and stability. The Bank’s post-conflict policies also shift its focus from infrastructure development to “support[ing] economic and social recovery and sustainable development through investment and development policy advice, with particular attention to the needs of war-affected groups who are especially vulnerable by reasons of gender, age or disability.”³⁴ Finally, the transitional support strategies in OP 2.30 are stated to be in close alignment with the implementation of peace accords, “potentially allowing for closer coordination between the economic and political dimensions of peacebuilding.”³⁵

The IMF formalized its policy for engagement in post-conflict situations in 1995 by expanding its existing program on emergency assistance for natural disasters. The policy now permits Fund intervention after a disruption and in situations where members might be unable to implement and prepare a comprehensive economic program.³⁶ The Board set out a number of conditions that countries must meet to be eligible for IMF emergency post conflict assistance:

disruption of institutional and administrative capacity as a result of conflict; sufficient capacity for planning and policy implementation; demonstrated commitment; urgent balance of payments need; catalytic role of IMF support; concerted international effort; and

33. World Bank, *Operational Manual*, *supra* note 30, at OP 2.30(1) (Jan. 2001).

34. *Id.* at OP 2.30(2c); *see also* Klaus Decker, World Bank Legal Vice-President, Presentation to the Justice Reform Practice Group (Aug. 11, 2006), *available at* <http://www.asil.org/documents/rol06061.ppt>.

35. James K. Boyce, *The International Financial Institutions: Postconflict Reconstruction and Peacebuilding Capacities* (Seminar on ‘Strengthening the UN’s Capacity on Civilian Crisis Management,’ Copenhagen, June 8-9, 2004), at 2, *available at* <http://www.cic.nyu.edu/archive/conflict/Boyce%20-%20IFIs%20&%20peacebuilding%20-%20June%202004.pdf>. *See* ROLE OF THE WORLD BANK, *supra* note 26, at 11 (“A TSS is typically closely aligned with the objectives and sequencing of priorities in peace accords and recovery plans.”).

36. *See* IMF, *Summing Up by the Chairman—Fund Involvement in Post-Conflict Countries*, Doc. No. EBM/95/82 (Sept. 6, 1995), *in* 30 SELECTED DECISIONS AND SELECTED DOCUMENTS OF THE INTERNATIONAL MONETARY FUND 291 (2003), *available at* <http://www.imf.org/external/pubs/ft/sd/index.asp?decision=EBM/95/82> [hereinafter IMF, *Summing Up*]; IMF, *Conversion of Emergency Assistance into a Special Policy*, Doc. No. 12341-(00/117) (Nov. 28, 2000), *in* 30 SELECTED DECISIONS AND SELECTED DOCUMENTS, *supra*, at 298.

intention by the member to move in a short time frame to an upper credit tranche stand-by or to an arrangement under the Enhanced Structural Adjustment Facility³⁷

The Fund's policy is therefore designed to restore macroeconomic stability and to catalyze balance of payments support for conflict-ridden countries.³⁸ It emphasizes early Fund involvement, urgency, and short-term engagement for the rebuilding of administrative and institutional capacities and prioritizes countries that have good implementation capacity and that can move into an upper credit tranche quickly.³⁹ Although the IMF has not introduced institutional changes comparable to those at the World Bank, it has made use of existing technical assistance programs to reestablish monetary, financial, and fiscal systems in post-conflict situations.⁴⁰

B. *IFI Post-Conflict Legal Reform*

Legal reform has become a first-order priority in the Bank and the IMF's post-conflict operations, though neither of their official policies specifically provides for post-conflict lawmaking. The IMF states that "creat[ing] a proper legal framework for fiscal policy" is the first step in a three-step response to conflict.⁴¹ The World Bank has stated that the rule of law is

37. As usefully summarized in the following press release: Press Release, Int'l Monetary Fund, IMF Approves Emergency Post Conflict Assistance to Sierra Leone, Press Release No. 98/55 (Nov. 9, 1998), available at <http://www.imf.org/external/np/sec/pr/1998/pr9855.htm> (outlining the Fund's provision of emergency assistance to Sierra Leone and detailing the above conditions).

38. See Ciorciari, *supra* note 25, at 337-39 (1999) (discussing this policy).

39. See Boyce, *supra* note 35, at 5.

40. See generally IMF, *Technical Assistance Factsheet* (Sept. 2005), available at <http://www.imf.org/external/np/exr/facts/tech.htm> ("About three-quarters of IMF technical assistance goes to low and lower-middle income countries, particularly in sub-Saharan Africa and Asia. *Post-conflict countries are also major beneficiaries*, with Timor-Leste, the Democratic Republic of Congo, Iraq and Afghanistan among the top recipients in recent years.") (emphasis added).

41. See Sanjeev Gupta et al., *Rebuilding Fiscal Institutions in Post-Conflict Countries*, at 7-8, IMF Occasional Paper No. 247 (2005), available at <http://www.imf.org/external/pubs/nft/op/247/op247.pdf>. See also World Bank, *Initiatives in Legal and Judicial Reform*, *supra* note 9, at 2-3; SHIHATA, *supra* note

now a *sine qua non* of development.⁴² In 1998, the World Bank elevated the establishment of the rule of law through legal and judicial reform projects to one of its programmatic pillars in the Comprehensive Framework for Development,⁴³ and today the Bank explicitly links the rule of law with post-conflict strategies.⁴⁴

21, at 225 (stating that law plays a "critical role" in "private sector development"). Shihata also lists the "rule of law" as a component of good governance which creates the basic elements of a good "business environment": "stability and predictability." *Id.* at 85.

42. Roberto Danino, Senior Vice Pres. and Gen. Counsel, World Bank, Speech Before the European Bank for Reconstruction and Development and the British Institute of International and Comparative Law: The Importance of the Rule of Law and Respect for Contractual Rights in Transition Countries (Dec. 5, 2003), *available at* <http://siteresources.worldbank.org/INTLAWJUSTICE/214576-1139604306966/20818761/RuleofLawEBRD120503.pdf>.

43. *See* James D. Wolfensohn, President, World Bank Group, Speech Before the World Bank Board of Governors: The Other Crisis 13 (Oct. 6, 1998), *available at* <http://www.worldbank.org/html/extdr/am98/jdw-sp/am98-en.pdf> (discussing the necessity for a comprehensive development framework that "would specify the regulatory and institutional fundamentals essential to a workable market economy—a legal and tax system that guards against caprice, secures property rights, and that ensures that contracts are enforced, that there is [sic] effective competition and orderly and efficient processes for resolving judicial disputes and bankruptcies, a financial system that is modern, transparent, and adequately supervised, with supervision free of favor, and with internationally recognized accountancy and auditing standards for the private sector"). *See also* James D. Wolfensohn, President, World Bank Group, *A Proposal for a Comprehensive Development Framework*, at 10-11 (Jan. 21, 1999), *available at* <http://siteresources.worldbank.org/CDF/Resources/cdf.pdf> ("Without the protection of human and property rights, and a comprehensive framework of laws, no equitable development is possible. A government must ensure that it has an effective system of property, contract, labor, bankruptcy, commercial codes, personal rights laws and other elements of a comprehensive legal system that is effectively, impartially and cleanly administered by a well-functioning, impartial and honest judicial and legal system."). For the history of this policy see WORLD BANK, SUB-SAHARAN AFRICA: FROM CRISIS TO SUSTAINABLE GROWTH 192 (1989) (stating that the rule of law needs to be established). *See also* SHIHATA, *supra* note 21, at 107.

44. James D. Wolfensohn, President, World Bank Group, Remarks on Post-Conflict Peace Building at the UN Security Council (May 26, 2005), *available at* <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:20590299~menuPK:34472~pagePK:34370~piPK:34424~theSitePK:4607,00.html>.

Both institutions execute legal reform through their technical assistance programs.⁴⁵ The IMF has drafted or provided advice on laws on central banking, currency, taxation, and other fiscal matters in a number of post-conflict zones pursuant to this policy.⁴⁶ The World Bank has been less involved in legislative reform, prioritizing project lending over technical assistance, but it has provided advice on draft legislation in areas as diverse as finance and banking, telecommunications, anti-monopoly, land titling, gender equity, and the environment. In post-conflict zones, the Bank has targeted the regulatory foundation for commercial activities.⁴⁷ In East Timor, for example, it assisted in reforming “laws governing land ownership, conflict resolution, investment, business transactions, and commercial arbitration as well as civil and criminal laws.”⁴⁸ Because the Bank only operates with member consent

45. The IMF provides drafting assistance and advice in order to “[contribute] to the development of the productive resources of member countries by enhancing the effectiveness of economic policy and financial management.” See IMF Articles of Agreement, *supra* note 4, art. 1. Technical assistance is specifically authorized under “Limitations on the Fund’s Operations and Transactions,” which emphasizes member consent: “If requested, the Fund may decide to perform financial and technical services . . . that are consistent with the purposes of the Fund. . . . Services under this subsection shall not impose any obligation on a member without its consent.” *Id.* art. V, § 2(b). The Bank, on the other hand, premises its involvement in legal reform on its mission to “promote economic growth and reduce poverty in its member states.” World Bank, *Legal and Judicial Reform: Strategic Directions*, at 1, Rep. No. 26916 (2003), available at http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2003/10/24/000160016_20031024092948/Rendered/PDF/269160Legal0101e0also0250780SCODE09.pdf.

The World Bank’s involvement in law reform (outside of conflict-specific contexts) has involved a mix of (i) law reform initiatives to develop hospitable legal environments for foreign investment, and, subsequently, (ii) judicial reform projects for dispute settlement (i.e., the China Economic Law Reform Project, the Venezuela Judicial Infrastructure Project, and a Judicial Reform Project in Bolivia). World Bank, *Initiatives in Legal and Judicial Reform*, *supra* note 9, at 3-5.

46. For an overview, see IMF, *MFD Technical Assistance to Recent Post-Conflict Countries*, at 10 (Dec. 13, 2004), available at <http://www.imf.org/external/np/ta/2005/eng/022805a.pdf> [hereinafter *MFD Technical Assistance*].

47. World Bank, *Initiatives in Legal and Judicial Reform*, *supra* note 9, at 8-10.

48. East Timor Joint Assessment Mission, *Building a Nation: A Framework for Reconstruction and Redevelopment*, at ¶ 25, Macro-Economics Background Paper (Nov. 1999), available at <http://pascal.iseg.utl.pt/~cesa/dtcjammacroecon.pdf>.

(pursuant to its policy on de facto governments)⁴⁹ or on the basis of requests from the international community, the IFIs use international requests (by, for example, the Security Council) as a proxy for member consent when those states are not members.

In broad terms, the World Bank and the IMF advocate programs of liberalization that combine minimal government regulation of the market with maximum incentives for private investors. Over the past two decades, both institutions have contributed to the creation of an increasingly "dense web of international regulation intended to promote free markets and protect the rights of entrepreneurs" through standard setting and best practices.⁵⁰ This strategy involves strengthening institutions and the judiciary through better legal frameworks, introducing modern regulations and supervisory agencies, removing trade restrictions, and establishing a coherent tax system and authority.⁵¹ Regulatory and financial reforms are intended to make resource allocation more efficient, remove obstacles such as tax discrimination and barriers to entry, clarify property rights and contract enforcement, and create an inter-

49. See generally World Bank, *Operation Manual*, *supra* note 30, at OP 7.30. Its application is illustrated by the World Bank's strategy in Iraq. See World Bank, *Interim Strategy Note of the World Bank Group for Iraq*, at 10, Rep. No. 27602 (Jan. 14, 2004), available at [http://lnweb18.worldbank.org/mna/mena.nsf/Attachments/Iraq+Interim+Strategy/\\$File/Iraq+Interim+Strategy.pdf](http://lnweb18.worldbank.org/mna/mena.nsf/Attachments/Iraq+Interim+Strategy/$File/Iraq+Interim+Strategy.pdf) [hereinafter *Iraq Interim Strategy*] (noting that "[i]n the absence of a de jure government and in considering whether to extend new loans or grants to a country with a de facto government, Bank policy (OP 7.30) allows a certain time to pass to weigh:

- (i) whether the new loan or grant would expose the Bank to additional legal or political risks associated with the country's financial obligations and obligations to carry out the project;
- (ii) whether the government is in effective control of the country and enjoys a reasonable degree of stability and public acceptance;
- (iii) whether the government generally recognizes the country's past international obligations, in particular any past obligations to the Bank;
- (iv) the number of countries (particularly neighboring) that have recognized the government or dealt with it as the government of the country; and
- (v) the position of other international organizations toward the government").

50. ALVAREZ, *supra* note 20, at 243.

51. See, e.g., Chauffour, *supra* note 12; IMF Code, *supra* note 11.

nal revenue basis through simplified tax administration.⁵² In addition, IFI policies seek to integrate post-conflict economies into the global financial architecture.⁵³

In some ways, IFI programs in post-conflict situations are simply an extension of their usual operations and illustrative of their expanding normative lawmaking functions.⁵⁴ The IMF, for example, has developed conditional lending programs that often require countries to reshape economic and social policies and enact new laws in order to receive assistance.⁵⁵ Indeed, conditionality has been described as the most dramatic way that the IMF has affected sovereign decisionmaking across the globe.⁵⁶ The IFIs have also promulgated standards and codes for a variety of different financial practices in an effort to harmonize and standardize the law.⁵⁷

IFI activities in post-conflict situations are nonetheless distinct from their endeavors elsewhere in a number of ways. First, IFIs benefit from extraordinary leverage in post-conflict situations. Post-conflict territories administered under multilateral mandates do not, by definition, have functioning na-

52. See Michael Trebilcock & Kevin Davis, *What Role Do Legal Institutions Play in Development?* 23 (IMF Conference on Second Generation Reforms, Nov. 8-9, 1999) (describing the relationship between law and economic development theories).

53. See IMF, *IMF Technical Assistance: Transferring Knowledge and Best Practice* (May 2003), available at <http://www.imf.org/External/pubs/ft/exrp/techass/techass.htm>. See also IMF, *Policy Statement on IMF Technical Assistance* (Apr. 1, 2001), available at <http://www.imf.org/external/pubs/ft/psta/index.htm>.

54. See ALVAREZ, *supra* note 20, at 235 (discussing how World Bank Guidelines represent potent forms of institutional law that are not based on any explicit provision in the Bank's Charter).

55. For example, legal reform was a critical aspect of the IMF's stabilization program in Korea in 1997. See IMF, *Stand-By Agreement with the Republic of Korea* (Dec. 5, 1997), available at <http://www.imf.org/external/np/oth/korea.htm>. For a critique of the IMF's policy, see Devesh Kapur, *The IMF: A Curse or Cure?*, 111 FOREIGN POL'Y 114, 123-26 (1998).

56. ALVAREZ, *supra* note 20, at 241.

57. For a discussion of IMF and World Bank involvement in the development of international standards and codes, see generally Herbert V. Morais, *The Quest for International Standards: Global Governance vs. Sovereignty*, 50 U. KAN. L. REV. 779 (2002). A summary of standards and codes relevant to IMF and World Bank work and the Reports on Observance of Standards and Codes is available in IMF & World Bank, *The Standards and Codes Initiative—Is It Effective? And How Can It Be Improved?* 9 (2005), available at <http://www.worldbank.org/ifa/ROSC%20review%202005.pdf>.

tional governments. Operationally, IFIs have had to work with transitional governments in Iraq, Kosovo, East Timor, and Afghanistan as though they were sovereign. Indeed, on the basis of Security Council Resolutions, the Bank and the Fund concluded agreements with the UN and its sister agencies *as states* in East Timor.⁵⁸ Furthermore, because the Security Council has identified economic reconstruction as an objective for transitional administrations but has little expertise itself, IFIs are starting to exercise "sovereign" powers in certain core areas of commercial and fiscal governance by their involvement in developing new legislation.⁵⁹ IFI involvement in multilateral operations is having a ripple effect on national policies and laws.

The templates for many of the laws proposed in post-conflict zones are derived from recommendations developed in response to the Latin American and Southeast Asian financial crises of the 1980s and 1990s and from the standards and codes mentioned above.⁶⁰ This is a worrisome heritage. The economic circumstances of pre- and post-conflict economies are very different from those that precipitated the global financial crises. The latter are typically thought to have arisen from current account deficits caused by overvalued exchange rates, excess foreign debt, and weak banking systems that led

58. Klaus Rohland & Sarah Cliffe, *The East Timor Reconstruction Program: Successes, Problems, and Tradeoffs* 2 (World Bank Conflict Prevention and Reconstruction Unit, Working Paper No. 2, 2002); Jarat Chopra, *The UN's Kingdom of East Timor*, 42 SURVIVAL 27, 30 (2000).

59. The significance of increasing references to economic reconstruction is discussed below in footnotes 147, 148, and the accompanying text. For commentary on the UN Transitional Administrations as governments, see Michael Matheson, *United Nations Governance in Postconflict Societies*, 95 AM. J. INT'L L. 76 (2001); Kristen Boon, *Legislative Reform in Post-conflict Zones: Jus Post Bellum and the Contemporary Occupant's Law-Making Powers*, 50 MCGILL L.J. 285 (2005). In Kosovo and East Timor, for example, the UN took on all legislative, executive, and judicial authority and exercised competence over domestic economic issues such as taxation, banking, currency, and the regulation of the private sector.

60. See, e.g., Martin Feldstein, *Economic and Financial Crises in Emerging Market Economies: Overview of Prevention and Management* 19 (Nat'l Bureau of Econ. Research, Working Paper No. 8837, 2002) (discussing how the IMF's basic approach was the same in Southeast Asia, Latin America and Eastern Europe). The continuity with post-conflict reconstruction programs is evident, in turn, from the similarity in scope, content, and sequencing of the proposed legal reforms. See *infra* note 237.

to bank runs by domestic and foreign creditors.⁶¹ The relevance of model laws developed in response to these circumstances is not always clear given the experience of post-conflict entities like Kosovo, Afghanistan, and East Timor—territories that had neither the banking, trade, and currency systems of Latin America and Southeast Asia nor the volume and sophistication of trade and investment that precipitated the financial crises. Many countries that accepted IMF reform packages found the social costs to be too high and attempted to pay off the loans and regain their autonomy as soon as possible.⁶²

The implementation of laws in vulnerable societies under occupation or international administration has been said to promote a “democracy deficit” at odds with UN-mandated peacebuilding programs.⁶³ For most countries, adherence to IFI codes of best practices is (at least in theory) voluntary. For example, the IMF’s model laws are not related to membership obligations. The only such obligation that IMF members assume is that, pursuant to article VIII of the IMF Articles of Agreement, they cannot place restrictions on current payments and transfers.⁶⁴ The IMF promulgates laws on banking, currency, and financial management simply as a means to promote its own purposes as set out in article I of its Articles of Agreement. In post-conflict situations, however, these standards are being implemented as a matter of right, underscoring the quasi-legislative role of IFIs in such circumstances.⁶⁵ In short, the IMF and to a lesser extent the Bank have become significant legal players in the economic reconstruction of post-conflict zones such as Iraq, Kosovo, East Timor, and Afghanistan.

61. Feldstein, *supra* note 60, at 19.

62. See Joseph Stiglitz, *Development Policies in a World of Globalization*, in *PUTTING DEVELOPMENT FIRST: THE IMPORTANCE OF POLICY SPACE IN THE WTO AND IFIs* 15, 16-18 (Kevin Gallagher ed., 2005).

63. See generally Katharina Pistor, *The Standardization of Law and Its Effect on Developing Economies*, 50 *AM. J. COMP. L.* 97 (2002) (on the hazards of standardization and convergence of IFI best practices). See also Morais, *supra* note 57, at 821.

64. IMF Articles of Agreement, *supra* note 4, art. VIII.

65. Morais, *supra* note 57, at 814. For a discussion of the “democracy-deficit” in the standards and codes movement, see Robert P. Delonis, *International Financial Standards and Codes: Mandatory Regulation Without Representation*, 36 *N.Y.U. J. INT’L L. & POL.* 563 (2004).

The case study on Iraq that follows illuminates how central legal reform and marketization have become to post-conflict reconstruction. Because Iraq was a member of both the IMF and the World Bank, it did not pose the problem of membership outlined later in this Article. Nonetheless, IFI involvement in Iraq is a useful means of illustrating (i) the relationship between the Security Council and IFIs, (ii) the technical expertise the Bank and the Fund offer in economic issues, and (iii) growing calls for coordination.⁶⁶ At a more general level, it raises the question of whether the role law in economic development is as important as is currently claimed. Some of the world's most successful economies have only a tangential relationship with the type of legal order promulgated by the IFIs.⁶⁷

III. ECONOMIC REFORM IN OCCUPIED IRAQ

A cornerstone of President Bush's foreign policy in the invasion of Iraq was to bring a market economy to Iraq and lasting prosperity to the Middle East. Almost before they arrived, U.S. troops and officials were declaring Iraq "Open for Business."⁶⁸ Although the invasion was officially justified on the grounds of self-defense and the need to end humanitarian violations by Saddam Hussein's regime, there is little doubt that Iraq's rich natural resources made it an attractive region

66. See World Bank, *Annual Report Post-Conflict Fund—Fiscal Year 2005*, at 1 (Oct. 2005), available at <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTSOCIALDEVELOPMENT/EXTCPR/0,,contentMDK:20698452~menuPK:1260916~pagePK:148956~piPK:216618~theSitePK:407740,00.html> [hereinafter *Annual Report Post-Conflict Fund*]. The Bank and the IMF are involved in various aspects of economic policy development, donor coordination, project lending, debt reduction, and technical assistance. For example, the Bank (and less directly the Fund) has participated in "Joint Assessment Missions" or JAMs with the UN at early stages of multilateral involvement. Since 1997, the Bank's Post Conflict Fund (PCF) has received an accumulated amount of \$65.5 million from the World Bank Development Grant Facility (DGF) and an additional \$6.7 million from bilateral and multilateral donors, and today conflict-lending accounts for about a quarter of Bank-financed projects. See World Bank, *Annual Report Post-Conflict Fund*, *supra*, at 1.

67. See, e.g., Franklin Allen, Jun Qian & Meijun Qian, *Law, Finance and Economic Growth in China*, 77 J. FIN. ECON. 57 (2005) (discussing the relationship of law to economic development in China).

68. Bathsheba Crocker, *Reconstructing Iraq's Economy*, WASH. Q., Autumn 2004, at 73, available at http://www.twq.com/04autumn/docs/04autumn_crocker.pdf.

over which to establish strategic influence.⁶⁹ Because the interim U.S. administration in Iraq instigated economic reforms in close cooperation with the IMF and the World Bank, and because Security Council Resolutions 1483, 1511, and 1536 specifically referred to IFIs in the reconstruction process, the free-market reforms implemented in occupied Iraq are a useful case study for examining the role of IFIs in post-conflict multilateral operations.

The Coalition Provisional Authority (CPA) acted as the temporary governing authority in Iraq from April 2003 until June 30, 2004, when power was turned over to an interim Iraqi government.⁷⁰ The CPA was primarily composed of U.S. and U.K. military representatives, with symbolic representation from other members of the "Coalition of the Willing."⁷¹ The United States vested the CPA with "all executive, legislative and judicial authority necessary to achieve its objectives."⁷² Its mission was "to restore conditions of security and stability, to create conditions in which the Iraqi people can freely determine their own political future, including by advancing efforts to restore and establish national and local institutions for representative governance and facilitating economic recovery and sustainable reconstruction and development."⁷³ The central role of the market economy in Iraq's rehabilitation was no secret. As the CPA's website proclaimed: "The ultimate goal for Iraq is a durable peace for a unified and stable, democratic Iraq that is underpinned by new and protected freedoms and a growing market economy. A key long range strategic objective is a secure environment for people and property that en-

69. See Sean D. Murphy, *Assessing the Legality of Invading Iraq*, 92 GEO. L. J. 173, 173-74 (2004).

70. For information on the dissolution of the CPA, see Iraqcoalition.org: Homepage of the New Iraq (last visited Feb. 16, 2007).

71. See Steve Schifferes, *US Names 'Coalition of the Willing'*, BBC NEWS ONLINE, March 18, 2003, available at <http://news.bbc.co.uk/2/hi/americas/2862343.stm> (last visited Feb. 16, 2007).

72. Coalition Provisional Authority [CPA], Reg. No. 1, § 1, ¶ 2, Doc. No. CPA/REG/16 May 2003/01 (May 16, 2003).

73. *Id.* § 1, ¶ 1. For a discussion of the ambiguities in the status and institutional authority of the CPA within the U.S. Government, see L. ELAINE HALCHIN, CONG. RESEARCH SERV. REP. FOR CONG., *THE COALITION PROVISIONAL AUTHORITY (CPA): ORIGIN, CHARACTERISTICS, AND INSTITUTIONAL AUTHORITIES* (2004), available at www.fas.org/sgp/crs/mideast/RL32370.pdf.

ables citizens to participate fully in political and economic life."⁷⁴

The CPA's operation in Iraq is distinct from the multilateral operations in Kosovo, East Timor, and Afghanistan in that it was subject to the laws of occupation.⁷⁵ The United States and the United Kingdom, as occupying powers, were bound by the Hague Regulations of 1907 and the Geneva Conventions of 1949.⁷⁶ These instruments require the occupying power to maintain the status quo in a number of important regards. First, prior laws of the sovereign remain in force unless certain exceptions are met. For example, pursuant to article 64 of the Fourth Geneva Convention, occupying powers can only change prior civil laws that "are essential to enable the Occupying Power to fulfill its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power."⁷⁷ Second, oc-

74. Press Release, CPA, An Historic Review of CPA Accomplishments 4 (June 28, 2004), available at http://www.cpa-iraq.org/pressreleases/20040628_historic_review_cpa.doc.

75. It should be noted, however, that the CPA did not immediately recognize its role as an occupying power. In their May 8, 2003 letter to the President of the Security Council, for example, Britain and the United States only acknowledged that they would "strictly abide by their obligations under international law, including those relating to the essential humanitarian needs of the people of Iraq." Letter from the Permanent Representatives of the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2003/538 (May 8, 2003) [hereinafter Letter from the Permanent Reps.]. See EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION ix (2d ed. 2004) [hereinafter BENVENISTI, OCCUPATION]; Boon, *supra* note 59, at 306-07. Nonetheless, Security Council Resolutions 1483, 1511, and 1546 recognized (but did not authorize) the CPA's occupation of Iraq. See S.C. Res. 1483, ¶ 4, U.N. Doc. S/RES/1483 (May 22, 2003); S.C. Res. 1511, ¶ 1, U.N. Doc. S/RES/1511 (Oct. 16, 2003); S.C. Res. 1546, ¶ 2, U.N. Doc. S/RES/1546 (June 8, 2004).

76. See generally BENVENISTI, OCCUPATION, *supra* note 75.

77. See Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War art. 64, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva IV]. For an interpretation of article 43 of the Hague Convention, which complements article 64 of Geneva IV, see Regulations Respecting the Laws and Customs of War on Land, Annex to the Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539 [hereinafter Hague Regulations]. For the negotiating history of article 64, see generally 2 FINAL RECORD OF DIPLOMATIC CONFERENCE OF GENEVA 671 (1949). For commentary on these provisions, see BENVENISTI, OCCUPATION, *supra* note 75, at 100-05.

cupants must respect certain existing institutions. Under article 54 of the Fourth Geneva Convention, occupying powers may not “alter the status of public officials or judges in the occupied territories . . . should they abstain from fulfilling their functions for reasons of conscience.”⁷⁸ In sum, an occupant is obliged to respect existing laws and institutions and maintain the status quo unless it is “absolutely prevented” from doing so.⁷⁹

The laws of war are notoriously silent on matters relating to the economy. They contain specific references to taxes and customs,⁸⁰ prohibit pillage,⁸¹ and provide some protections for property⁸² and natural resources.⁸³ But guidance on eco-

78. Geneva IV, *supra* note 77, art. 54

79. Gerhard von Glahn, *Taxation under Belligerent Occupation*, in *INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES* 341, 349 (Emma Playfair ed., 1992).

80. *See* Hague Regulations, *supra* note 77, art. 48 (“If, in the territory occupied, the occupant collects the taxes, dues, and tolls imposed for the benefit of the State, he shall do so, as far as is possible, in accordance with the rules of assessment and incidence in force, and shall in consequence be bound to defray the expenses of the administration of the occupied territory to the same extent as the legitimate Government was so bound.”). *See also* Geneva IV, *supra* note 77, arts. 23 & 61 (requiring the free passage of certain consignments related to religious worship, clothing, and medical supplies).

81. Geneva IV, *supra* note 77, art. 33.

82. Hague Regulations, *supra* note 77, art. 46 (private property protections). *See also* Geneva IV, *supra* note 77, art. 53 (“Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.”). In its commentaries on this provision, the International Committee of the Red Cross (ICRC) notes that the scope of this provision is not as broad as it may first appear. No general protection of property exists (only property in occupied territories is protected), and an important reservation applies: property is not protected where military necessity applies. Furthermore, “under international law the occupying authorities have a recognized right, under certain circumstances, to dispose of property within the occupied territory—namely the right to requisition private property, the right to confiscate any movable property belonging to the State which may be used for military operations and the right to administer and enjoy the use of real property belonging to the occupied State.” *INT’L COMM. OF THE RED CROSS, COMMENTARY: IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR* 301 (Oscar Uhlar et al. eds, Ronald Griffen & C.W. Dumbleton trans., 1958), available at <http://www.icrc.org/ihl.nsf/COM/380-600060?OpenDocument> [hereinafter ICRC COMMENTARY GENEVA IV].

conomic administration, banking, currency reform, and private industry is virtually non-existent.⁸⁴ This lacuna can be explained by pragmatic self interest:

The rules of conventional international law governing belligerent occupation contain very few references to the treatment of the banking and business structure of an occupied territory. One reason for this gap in the law . . . [was the] logical temptation to exploit, if not loot, enemy territory . . . [and] given this temptation, an invader or potential invader would be exceedingly loath to see the creation of hard and fast rules designed to restrict his freedom to exploit enemy territory and to control the latter's economic structure to his own fullest advantage.⁸⁵

Historically, occupants have used the law of occupation to control the economies of occupied territories.⁸⁶ The occupation of Iraq is indicative of a very different approach. The CPA used the gaps in the international legal framework to jump-start the Iraqi economy by creating a modern legal system oriented toward international trade and foreign direct in-

83. See Hague Regulations, *supra* note 77, art. 55 (providing that an occupant is entitled to utilize public resources provided such use benefits the lawful owner); BENVENISTI, OCCUPATION, *supra* note 75, at xi-xii.

84. GERHARD VON GLAHN, LAW AMONG NATIONS: AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW 690 (7th ed. 1996). See also Eyal Benvenisti, *The Security Council and the Law on Occupation: Resolution 1483 on Iraq in Historical Perspective* (2004), available at www.tau.ac.il/law/members/benvenisti/articals/amos.doc (explaining lack of directives on economic reconstruction as arising from the predominantly laissez-faire conception of the state during the development of the laws of war).

85. GERHARD VON GLAHN, THE OCCUPATION OF ENEMY TERRITORY 202 (1957). Note, however, that pillage is prohibited under article 47 of the Hague Regulations and article 33 of the Geneva Conventions. See Hague Regulations, *supra* note 77; Geneva IV, *supra* note 77; ICRC COMMENTARY GENEVA IV, *supra* note 82, at 226-27 ("The prohibition of pillage is applicable to the territory of a Party to the conflict as well as to occupied territories. It guarantees all types of property, whether they belong to private persons or to communities or the State. On the other hand, it leaves intact the right of requisition or seizure.").

86. See Hisham Awartani, *Israel's Economic Policies in the Occupied Territories: A Case for Supervision*, in INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES, *supra* note 79, at 399 (arguing that the Israeli government implemented policies designed to discourage the creation of an indigent economic base).

vestment. The CPA used Security Council Resolution 1483 as the principal instrument *authorizing* economic regulatory reform to fill the gaps in the laws of war.⁸⁷ Critical in this regard was paragraph 8(e) of Security Council Resolution 1483, which required the promotion of “*economic reconstruction and the conditions for sustainable development, including through coordination with national and regional organizations, as appropriate, civil society, donors, and the international financial institutions.*”⁸⁸

A. *Security Council Resolutions and IFI Involvement in Iraq*

In cooperation with the CPA and the UN Mission in Iraq (UNAMI), the IMF and the World Bank were extensively involved in economic reconstruction and debt relief from the early days of the occupation. In May 2003, an agreement was forged to address frozen Iraqi assets around the world, other ongoing UN economic sanctions, and the role of international financial institutions in the Iraqi reconstruction.⁸⁹ Prior to the

87. Interview with Derek Gilman, Deputy Gen. Counsel for Commercial Law Reform for the CPA (Feb. 25, 2005). *See also* CPA Reg. No. 1, *supra* note 72 (“The CPA shall exercise powers of government temporarily in order to provide for the effective administration of Iraq during the period of transitional administration, to restore conditions of security and stability, to create conditions in which the Iraqi people can freely determine their own political future, including by advancing efforts to restore and establish national and local institutions for representative governance and facilitating economic recovery and sustainable reconstruction and development.”).

88. S.C. Res. 1483, *supra* note 75, ¶ 8(e) (emphasis added). In addition, paragraph 8(f) called for international efforts to promote judicial reform. *Id.* ¶ 8(f). The Security Council also authorized reforms to the economy in its July 17, 2003 Report. *See* The Secretary-General, *Report of the Secretary-General pursuant to paragraph 24 of Security Council resolution 1483 (2003)*, ¶¶ 90-93, *delivered to the Security Council*, U.N. Doc. S/2003/715 (July 17, 2003) [hereinafter *Secretary General 1483 Report*].

89. *See* Larry Elliott, *Iraq on fast track for debt relief: British-brokered pact enables IMF and World Bank to lead recovery programme*, THE GUARDIAN MANCHESTER, Apr. 14, 2003, at 1.19 (“In a deal brokered by Britain, the International Monetary Fund and the World Bank will spearhead an emergency economic programme once Iraq has been made secure and the United Nations has passed a fresh resolution.”); Elizabeth Becker, *U.S. and Allies Seek U.N. Resolution to Promote Iraq Aid*, N.Y. TIMES, Apr. 13, 2003, at B7; Elizabeth Becker, *Help Is Tied to Approval by the U.N.*, N.Y. TIMES, Apr. 12, 2003, at B8. After the G7 meeting, a meeting of the “Iraq Core Group” took place at the UN in June, 2003. It was followed by a Donor’s conference in Madrid in October 2003. The Core Group consisted of the CPA, the Euro-

occupation of Iraq, IFIs generally had not been linked to reconstruction processes by the Security Council. Resolution 1483, in contrast, contains a multitude of references to the IFIs:

The Security Council, . . . [n]oting the statement of April 12, 2003 by the Ministers of Finance and Central Bank Governors of the Group of Seven Industrialized Nations in which the members recognized the need for a multilateral effort to help rebuild and develop Iraq and for *the need for assistance from the International Monetary Fund and the World Bank* in these efforts:

. . .

Calls upon the international financial institutions to assist the people of Iraq in the reconstruction and development of their economy and to facilitate assistance by the broader donor community, and welcomes the readiness of creditors, including those of the Paris Club, to seek a solution to Iraq's sovereign debt problems;

. . .

Calls upon Member States and international and regional organizations to contribute to the implementation of this resolution.⁹⁰

Subsequent Security Council Resolutions on Iraq repeated this emphasis on multilateral assistance and economic development, bringing the IFIs directly into the scope of the Security Council's Chapter VII mandate. Security Council Resolution 1511 of October 16, 2003, for example:

Resolves that the United Nations, acting through the Secretary-General, his Special Representative, and the United Nations Assistance Mission in Iraq, should strengthen its vital role in Iraq, including by providing humanitarian relief, promoting the economic reconstruction of and conditions for sustainable development in Iraq, and advancing efforts to restore and

pean Union, the IMF, Japan, the UAE, the UN, the U.S. and the World Bank. Spain joined the Core Group after the October 2003 meeting in Madrid. *See also* World Bank, *Iraq Interim Strategy*, *supra* note 49, at 11.

90. S.C. Res. 1483, *supra* note 75, at 1, ¶¶ 15, 26.

establish national and local institutions for representative government;

. . .

Appeals to Member States *and the international financial institutions* to strengthen their efforts to assist the people of Iraq in the reconstruction and development of their economy, *and urges those institutions to take immediate steps to provide their full range of loans and other financial assistance to Iraq*, working with the Governing Council and appropriate Iraqi ministries;

. . .

Calls upon Member States and concerned organizations to help meet the needs of the Iraqi people by providing resources necessary for the rehabilitation and reconstruction of Iraq's economic infrastructure.⁹¹

Press reports at the time indicated that this broad allocation of power to the IFIs was due to the Bush administration, which was "balking at mandates that would give the United Nations as big a part in running postwar Iraq as many European nations want."⁹²

A second feature of note on the Security Council Resolutions on Iraq was their *renouvellement* of the laws of occupation. The Resolutions condoned economic reconstruction and the establishment of the rule of law and created new duties and obligations for the myriad international actors called to assist in the reconstruction of Iraq. As David Scheffer writes, these Resolutions "invited the Authority to act beyond some of the barriers that occupation law otherwise would impose on occupying powers."⁹³ Several of these innovations implicated the

91. S.C. Res. 1511, *supra* note 75, ¶¶ 8, 20, 22. See The Secretary-General, *Report of the Secretary-General pursuant to paragraph 24 of resolution 1483 (2003) and paragraph 12 of resolution 1511 (2003)*, ¶ 100, delivered to the Security Council, U.N. Doc. S/2003/1149 (Dec. 5, 2003) (illustrating the Secretary General's interest in policy coordination with IFIs).

92. Paul Blustein, *G-7 Agrees that Iraq Needs Help with Debt; Important Roles seen for IMF, World Bank*, WASH. POST, Apr. 13, 2003, at A37. Note, however, that the Bush Administration brought the World Bank into the process much later than it should have, particularly as compared to the point of entry of the World Bank in Bosnia. See Mallaby, *supra* note 27, at B3.

93. David J. Scheffer, *Agora (Continued): Future Implications of the Iraq Conflict: Beyond Occupation Law*, 97 AM. J. INT'L L. 842, 845-46 (2003) (noting

IFIs. For example, under Security Council Resolution 1483, the IFIs were accorded monitoring roles for the International Advisory and Monitoring Board (IAMB)⁹⁴ tasked with auditing the Development Fund for Iraq (DFI).⁹⁵ This fund is financed by oil revenues, remaining proceeds of the Oil for Food Program, and assets of the former Hussein government.⁹⁶ In addition, the World Bank was appointed administrator of the Iraq Trust Fund, which finances emergency and technical assistance projects.⁹⁷ Most importantly, the World Bank and the IMF became critical players in the legal, economic, and institutional reconstruction process. The reform tasks to which the IFIs were directed were, as summarized by the Secretary General, in:

the areas of (a) currency reform, central bank, and payments system; (b) the commercial banking sector; (c) public expenditure management; (d) tax policy and the fiscal regime for the oil sector; (e) price lib-

that Security Council Resolution 1483 opened up the laws of war by overriding restrictive provisions and adding new responsibilities for occupying powers); see BENVENISTI, OCCUPATION, *supra* note 75, preface.

94. See generally IMF, *International Advisory and Monitoring Board Terms of Reference* (Oct. 21, 2003), available at <http://www.imf.org/external/country/irq/eng/2003/iamb/102103.htm>.

95. See CPA, Reg. No. 2, Doc. No. CPA/REG/10 June 2003/02 (June 18, 2004).

96. S.C. Res. 1483, *supra* note 75, ¶ 12 (noting "the establishment of a Development Fund for Iraq to be held by the Central Bank of Iraq and to be audited by independent public accountants approved by the International Advisory and Monitoring Board of the Development Fund for Iraq and look[ing] forward to the early meeting of that International Advisory and Monitoring Board, whose members shall include duly qualified representatives of the Secretary-General, of the Managing Director of the International Monetary Fund, of the Director-General of the Arab Fund for Social and Economic Development, and of the President of the World Bank").

97. The Iraq Trust Fund was created in January, 2004 as the World Bank arm of the Joint UN-World Bank International Reconstruction Fund Facility for Iraq. As of August 31, 2005, \$455.6 million had been pledged to the Fund. See generally World Bank, *Iraq Trust Fund Data Sheet* (2005), available at <http://siteresources.worldbank.org/IRFFI/64168382-1092419012421/20661561/DatasheetAugust31.pdf>. In 2004, the World Bank signed agreements with ministries in Iraq to disburse Trust funds for emergency projects on health, the water supply, sanitation, and school repair in addition to capacity-building projects on training and assistance. Fifty-five million dollars were committed to the financial and private sectors with a major focus on telecommunications. See *id.*

eralization, enterprise reform, and social protection; (f) an initial assessment of policies and actions to energize the private sector; and (g) economic statistics.⁹⁸

The Security Council's integration of IFIs into its Chapter VII mandate and the reconstruction of Iraq created a complex spectrum of duties and obligations because the legal frameworks and responsibilities applicable to the different entities involved in the reconstruction process varied greatly. The CPA and the Coalition forces were bound by the Geneva Conventions and the Hague Regulations as occupying powers.⁹⁹ However, the UN, the IMF, and the World Bank, as international organizations are neither signatories to international humanitarian law instruments nor have they voluntarily declared adherence to the conventions.¹⁰⁰ The UN is of course bound by its own Charter. As independent agencies in the UN System, the World Bank and the IMF are not, although some argue that they are at least bound by "general principles" of the Charter.¹⁰¹ Instead, the IFIs are governed according to their Articles of Agreement, their internal regulations, and by general principles of international law.¹⁰² In practice, the World Bank and the IMF are required to give "due regard" to Security Council resolutions pursuant to their Relationship Agreements (as discussed *infra*), but there is no overarching framework consistently applying international humanitarian

98. *Secretary General 1483 Report*, *supra* note 88, ¶ 93.

99. See Letter from the Permanent Reps., U.N. Doc. S/2003/538, *supra* note 75 (indicating acknowledgment by the U.S. and the U.K. of their responsibilities as occupying powers).

100. Some scholars, however, have argued that international humanitarian law should bind international organizations. See BENVENISTI, OCCUPATION, *supra* note 75, at xvi; Laurie Blank, *The Role of International Financial Institutions in International Humanitarian Law: Report from the International Humanitarian Law Working Group*, 42 PEACEWORKS (U.S. Inst. of Peace, Wash., D.C.), Jan. 2002, available at <http://www.usip.org/pubs/peaceworks/pwks42.pdf>; SIGRUN I. SKOGLY, HUMAN RIGHTS OBLIGATIONS OF THE WORLD BANK 192 (2001).

101. See SKOGLY, *supra* note 100, at 109.

102. See SHIHATA, *supra* note 21, at 65 (recognizing that treaty provisions of the Bank are subject to "customary rules" such as general rules of international law developed through state practice, judicial precedents, and scholarly works); Kingsbury, *supra* note 28, at 331 (on the legal effect of the Bank's operational policies).

law, human rights law, and specific provisions of the Charter despite the overarching Chapter VII mandate.

B. *Economic Development and Legal Reform*

Measures to reform the Iraqi economy had several objectives. They were intended to address the immediate economic consequences of war (including extensive looting),¹⁰³ improve the infrastructure and living standards that had declined over a decade of UN-imposed sanctions, and reform the autocratic institutions that had come to characterize Saddam Hussein's rule.¹⁰⁴ Legal reform was a key priority of the CPA in occupied Iraq and an area into which World Bank and IMF expertise and legitimacy were readily integrated. Derek Gilman, former Deputy General Counsel for Commercial Law Reform for the CPA, confirmed that the CPA interpreted Security Council Resolution 1483 as requiring consultation with both the World Bank and the IMF on matters relating to economic reconstruction.¹⁰⁵ As a formal matter, the CPA provided the World Bank and the IMF draft regulations for its comments and consideration.¹⁰⁶ In some instances, the IFIs acted as primary advisors

103. Interview with Derek Gilman, *supra* note 87. See, e.g., CPA, Mem. No. 8, Doc. No. CPA/MEM/25 January 2004/08 (Feb. 26, 2004). Note, however, that the inadequacies of the CPA's anti-looting measures have come under attack. See Anne Ellen Henderson, *The Coalition Provisional Authority's Experience with Economic Reconstruction in Iraq: Lessons Identified*, 138 SPECIAL REPORT (U.S. Inst. of Peace, Wash., D.C.), 2005, at 8.

104. IMF, *Iraq: Macroeconomic Assessment*, at 3 (Oct. 21, 2003), available at <http://www.imf.org/external/np/oth/102103.pdf>. Although the data are unreliable, GNP per capita was estimated to have dropped from \$3,600 in the early 1980s to \$200 in the 1990s before recovering to approximately \$770 - \$1,000 in 2001. See *id.* at 6.

105. Interview with Derek Gilman, *supra* note 87. See also Brett H. McGurk, *Revisiting the Law of Nation-Building: Iraq in Transition*, 45 VA. J. INT'L L. 451, 460 (2005) (noting that "[m]ost economic reform measures had to carefully track the coordination mechanism outlined in Resolution 1483, requiring feedback and approval from the IGC, the International Monetary Fund, the World Bank, and attorneys and interested agencies in London, Canberra, and Washington").

106. Derek Gilman identified the following steps in the CPA's legislative process: (i) identify need (e.g. private sector development, request from Iraqis); (ii) prioritize need (i.e. mission critical, very important, or important); (iii) identify relevant existing Iraqi law; (iv) assign counsel to review existing Iraqi law and identify relevant international standards; (v) coordinate with Iraqis (government officials, and where possible, the Iraqi public

on laws within their areas of expertise: The IMF, for example, was the principal drafter of the Financial Management Law and provided written standards and significant drafting assistance on the Banking Laws adopted by the CPA in Iraq.¹⁰⁷

Approximately thirty new laws related to the economy were passed during the CPA's fourteen months in power.¹⁰⁸ A company law was enacted that reduced state oversight of corporations and made it easier to obtain loans,¹⁰⁹ a salary schedule for government employees was set out,¹¹⁰ oil production was regulated,¹¹¹ a new tax strategy was enacted,¹¹² foreign levies were adjusted to five percent to support the reconstruc-

sector) and provide Arabic summaries or point papers (where possible); (vi) enlist international coordination: submit drafts of regulations and ensure approval of representatives of the United States, United Kingdom, Australia, IMF, and World Bank; (vii) revise draft based on comments; (viii) translate draft regulation into Arabic; (ix) present regulation to Ambassador L. Paul Bremer for approval; (x) present English and Arabic versions to IGC for approval; (xi) further revise drafts incorporating comments from IGC and advice from specialized agencies, in particular the International Financial Institutions and the Coalition Governments; (xii) obtain signature of Ambassador Bremer for entry into force; (xiii) publish regulation on website; (xiv) publish regulation in Iraq's official gazette. See Interview with Derek Gilman, *supra* note 87.

107. *Id.* See also IMF, *MFD Technical Assistance*, *supra* note 46, at 16-17 ("During the period 2003-04, MFD [Monetary and Technical Systems Dep't of the IMF] provided considerable TA [Technical Assistance] in the form of policy papers on a number of key issues, including central bank institutional reform, financial sector legislation, and currency reform to the Coalition Provisional Authority and the CBI [Central Bank of Iraq]. The first MFD mission, in July 2004, was largely of a diagnostic nature. . . . LEG [Legal Dep't of the IMF] and MFD prepared various versions of a new CBI Law, which was enacted in March 2004.").

108. See Greg Fox, *The Occupation of Iraq*, 36 GEO. J. INT'L L. 195, 215-22 (2005) (discussing reforms to Iraqi laws dealing with banking, taxation, foreign trade, private economic transactions, securities regulation, regulatory reforms, and state-owned enterprises).

109. CPA, Order No. 64, Doc. No. CPA/ORD/29 February 2004/64 (Mar. 5, 2004).

110. CPA, Order No. 30, Doc. No. CPA/ORD/8 September 2003/30 (Sept. 8, 2004).

111. CPA, Order No. 36, Doc. No. CPA/ORD/3 October 2003/36 (Oct. 3, 2003).

112. CPA, Order No. 37, Doc. No. CPA/ORD/19 September 2003/37 (Sept. 19, 2003); CPA, Order No. 49, Doc. No. CPA/ORD/19 February 2004/49 (Feb. 20, 2004). These strategies set the highest individual and corporate tax rates at 15% as of 2004.

tion of Iraq,¹¹³ a new currency—the Iraqi Dinar—was issued,¹¹⁴ permit schemes were reformed to open up Iraq to international trade,¹¹⁵ a securities law was passed,¹¹⁶ new bankruptcy laws were enacted,¹¹⁷ and a new public contracts law was put into place to provide for competitive bidding and negotiated contracts.¹¹⁸ To assist Iraq in its bid to join the WTO, intellectual property laws consistent with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and other international standards were put in place.¹¹⁹ In addition, under the IMF's guidance, the Central Bank was declared independent from the Finance Ministry and the Bank was given the central role of combating inflation.¹²⁰ New banking laws consistent with IMF standards were then put into place.¹²¹ These provisions allowed the Central Bank of Iraq to issue licenses to foreign banks to establish majority- or wholly-owned subsidiaries in Iraq, with the number of foreign banks granted licenses limited to six until December 31, 2008 and unlimited after this point. In addition, under the new banking laws, any number of foreign banks could own up to a fifty percent stake in Iraqi banks.¹²²

113. CPA, Order No. 38, Doc. No. CPA/ORD/9 September 2003/38; amended by CPA, Order No. 70 CPA/ORD/3 April 2004/70 (Apr. 4, 2004).

114. CPA, Order No. 43, Doc. No. CPA/ORD/14 October 2003/43 (Oct. 14, 2003).

115. CPA, Order No. 54, Doc. No. CPA/ORD/24 February 2004/54; amended by CPA, Order No. 70 CPA/ORD/3 April 2004/70 (Apr. 4, 2004).

116. CPA, Order No. 74, Doc. No. CPA/ORD/18 April 2004/74 (Apr. 19, 2004).

117. CPA, Order No. 95, Doc. No. CPA/ORD/2 June 2004/95 (June 4, 2004).

118. CPA, Order No. 87, Doc. No. CPA/ORD/14 May 2004/87 (May 16, 2004).

119. CPA, Order No. 81, Doc. No. CPA/ORD/26 April 2004/81 (Apr. 26, 2004); CPA, Order No. 83, Doc. No. CPA/ORD/29 April 2004/83 (May 1, 2004).

120. CPA, Order No. 18, Doc. No. CPA/ORD/07 July 2003/18 (July 7, 2003) (prohibiting the CBI from loaning funds to government ministries).

121. CPA, Order No. 40, Doc. No. CPA/ORD/19 September 2003/40 (Sept. 19, 2003); CPA, Order No. 94, Doc. No. CPA/ORD/6 June 2004/94 (June 7, 2004). See also IMF, *Iraq: Macroeconomic Assessment*, *supra* note 104, ¶ 53; Interview with Derek Gilman, *supra* note 87.

122. See CPA Order No. 40, *supra* note 121. The threat of violence has deterred investment in Iraq, however. None of the foreign banks granted licenses in 2003 had opened up shop as of August 2005 due to the security situation. See *Struggling To Pick Up The Pieces: The IMF's Assessment of Iraq*,

Perhaps the most controversial reform was CPA Order No. 39 on Foreign Investment, which laid the groundwork for the privatization of the Iraqi economy. Some of the salient features of this order included: (i) replacing all other laws in effect on foreign investment; (ii) putting foreign and national investors on equal footing and allowing 100% foreign ownership of business entities, including unrestricted profit remittances; (iii) opening up all economic sectors and regions of Iraq to foreign investment, with the exception of the primary extraction and initial processing of natural resources, banks and insurance; and (iv) allowing foreigners to lease land for up to forty years.¹²³ The preamble to this regulation was telling:

Recognizing the problems arising from Iraq's legal framework regulating commercial activity and the way in which it was implemented by the former regime,

Recognizing the CPA's obligation to provide for the effective administration of Iraq, to ensure the well being of the Iraqi people and to enable the social functions and normal transactions of every day life,

Acting in a manner consistent with the Report of the Secretary General to the Security Council of July 17,

ECONOMIST.COM, Aug. 17, 2005, http://www.economist.com/agenda/displayStory.cfm?story_id=4289059.

123. CPA, Order No. 39, Doc. No. CPA/ORD/19 September 2003/39; amended by CPA, Order No. 46, Doc. No. CPA/ORD/19 September 2003 (Dec. 20, 2003). This quick privatization "shock therapy" combined with rapid trade liberalization was widely criticized. See, e.g., Joseph Stiglitz, IRAQ'S NEXT SHOCK WILL BE SHOCK THERAPY, ZNET, Mar. 17 2004, <http://www.zmag.org/content/showarticle.cfm?SectionID=13&ItemID=5164>. See also Scheffer, *supra* note 93, at 851; Daphne Eviatar, *Free-Market Iraq? Not So Fast*, N.Y. TIMES, Jan. 10, 2004, at B9. Note, however, that the wave of anticipated privatizations did not take place. As the *Economist* reported in July, 2004: "The CPA was keen to start the process of privatising the 200 or so ageing and inefficient state-owned enterprises (SOEs), but, after discussions with the Governing Council, it was agreed that any such process could only be put in train by a sovereign (and probably elected) Iraqi government." *Iraq Country Briefing: Economic Structure*, ECONOMIST.COM, July 13, 2004. One reason for this delay was the fear of expropriation (or re-regulation) of privatized industries by subsequent Iraqi governments. Political risk insurance was very hard to come by, making "greenfield" market opportunities a bit of a chimera. See Naomi Klein, *Risky Business*, THE NATION, Jan. 5, 2004, at 11, available at <http://www.thenation.com/doc/20040105/klein>.

2003, concerning the need for the development of Iraq and its transition from a non-transparent centrally planned economy to a market economy characterized by sustainable economic growth through the establishment of a dynamic private sector, and the need to enact institutional and legal reforms to give it effect,

Having coordinated with the international financial institutions, as referenced in paragraph 8(e) of the U.N. Security Council Resolution 1483.¹²⁴

These reforms were both rapid and significant. As the IMF itself noted:

The potential reform agenda to move to a market economy, open the economy to trade and foreign investment and liberalize prices is very ambitious. In other transition economies, the implementation of these reforms has typically been difficult and time consuming, reflecting the need to build political support for reforms to ensure that they are durable, and that adequate institutional capacity exists to ensure effective implementation.¹²⁵

In theory, comprehensive legal reforms enacted by transitional authorities are reversible by subsequent sovereign governments.¹²⁶ In practice, however, there was considerable

124. CPA Order No. 39, *supra* note 123.

125. See IMF, *Iraq: Macroeconomic Assessment*, *supra* note 104. See also Lorenzo Perez, IMF Mission Chief for Iraq, Statement on the IMF's Macroeconomic Assessment of Iraq Delivered to the Int'l Donors' Conference for the Reconstruction of Iraq, ¶¶ 7-8 (Oct. 23, 2003), available at <http://www.imf.org/external/np/dm/2003/102303.htm> ("In IMF staff's view, policymaking in Iraq is rendered particularly challenging by the combination of problems associated with the emergence from a conflict situation and inherited features of a transition economy. In this context, an ambitious macroeconomic strategy is being developed to promote the establishment of an open, market-based economy to improve living standards and reintegrate Iraq into the world economy. It is expected that institutions would be created based on international best practices and that would meet internationally accepted standards of transparency and openness. Safety nets should be designed to protect the poor and vulnerable from negative impacts of the transition.").

126. For example, the Transitional Administrative Law (TAL) that came into effect when the CPA ceased to exist provided that the laws enacted by the CPA would remain in force until a sovereign government was put in

pressure to maintain the economic regulations passed by the CPA. A 2004 World Bank report makes this clear:

Crucial to investor confidence is the credibility of the transitional and new governments' approach to the existing legal framework and the predictability of their basic policies. Such sustainability will require achieving adequate consensus at various levels on an underlying economic strategy. For continuity, the sovereign Iraqi government will need to confirm its broad support for legislation issued by the Coalition Provisional Authority and clearly signal that pending administrative regulations critical to the implementation of fundamental legal provisions will be developed and implemented. Recent reforms often presuppose the existence of competent institutions. In practice, relevant institutions—public sector organizations and private sector bodies—should be established and/or strengthened to the point where they are capable of playing their appropriate roles.

Impeding the development of a modern market economy in Iraq are important weaknesses in dispute resolution and in enforcement of contracts and property rights. Independence of the judiciary needs to be assured, not only in writing but also in practice. Efficiency, predictability, and fairness of the judicial process demand a climate of security. Training programs for judges and other legal staff are needed, and the judicial infrastructure needs to be improved. Enforcement of judgments will depend critically on the empowerment of the Offices of Juristic Execution.¹²⁷

This emphasis on early legal reform has had a significant impact. There were few changes to the commercial laws enacted by the CPA after the occupation ended, although the poor security situation and political upheaval were certainly contributing factors to legislative inaction. Moreover, legal re-

place. See Transitional Administrative Law [TAL] [Constitution] arts. 3(c), 26(c), available at <http://www.iraqcoalition.org/government/TAL.html>.

127. World Bank, *Building a Sustainable Investment Climate in Iraq* ¶¶ 33-34 (Reconstructing Iraq, Working Paper No. 1, Sept. 27, 2004) (emphasis added).

form remained a top priority for the IFIs even after the occupation ended. In the 2006 Stand-by Agreement signed between the IMF and Iraq, for example, pension and petroleum law reform were identified as two of the most important goals.¹²⁸

C. *Implications of Evolving IFI Mandates for Dealing with De Facto Regimes*

In many ways, IFI involvement in Iraq was business as usual. IFIs have been involved in the reconstruction of numerous post-conflict and occupied zones, including Bosnia, Cambodia, Angola, Rwanda, Eritrea, Lebanon, the Palestinian West Bank and Gaza, Kosovo, East Timor, Liberia, and Afghanistan. As Ake Lonnberg, Senior Economist at the IMF, stated with regards to the IMF's role, "Iraq is only the most recent case of the IMF supporting local capacity building by restoring or transforming central banking functions and the payment and banking systems."¹²⁹

In other respects, however, the economic reform of Iraq signals a series of important developments:

- IFIs were crucial to the CPA's campaign for legitimacy in the economic reconstruction process in Iraq. As multilateral agencies, IFIs brought an aura of neutrality and perhaps even a stamp of legitimacy to the occupation of Iraq.
- Key Security Council Resolutions on Iraq demonstrated not only an interest in ensuring policy coordination among all international actors but also a desire to hand off economic and financial issues to the IFIs.
- IFIs were formally integrated into the legislative process—drafting, reviewing and commenting upon CPA regulations before they were enacted.

128. See IMF, *Iraq: First and Second Reviews Under the Stand-By Arrangement*, IMF COUNTRY REPORT 06/301 (2006).

129. The transformation of the banking system in Iraq was the culmination of similar efforts in other post-conflict zones such as Cambodia (1991–1995), Albania (1991–1994), Rwanda (1994–1999), Bosnia and Herzegovina (since 1996), Kosovo and Timor-Leste (since 1999), and Afghanistan (since 2001), among other places. See Interview with Ake Lonnberg, Senior IMF Economist, available at <http://www.imf.org/external/pubs/ft/survey/2003/110303.pdf>.

- The Bank and the Fund's official post-conflict policies were not publicly relied upon during their involvement in occupied Iraq. This suggests that either these policies were not invoked or that they were used in confidence. In either case, it is not clear the policies had a practical effect, nor did they make IFI involvement more transparent.
- Finally, the process of economic transformation illustrated the belief that the best foundation for economic reconstruction is a free market system supported by a modern legal framework. In this regard, the CPA's approach echoes earlier generations of the law and development movement in its emphasis on law as the fulcrum of change.¹³⁰

While many of the IFI lawyers who contributed to the reform process in Iraq had extensive prior experience directing transitions from planned to market economies and developing regulatory frameworks for fiscal and business environments in other situations,¹³¹ institutional involvement came with worrisome effects. There is a legitimacy gap when IFIs engage in quasi-legislative functions that have a public dimension and yet are not bound by general international legal constraints such as those contained in humanitarian and human rights law and the UN Charter.¹³² Furthermore, wide-ranging reform is not always consistent with self-determination, because it assumes

130. See generally David M. Trubek, *Toward a Social Theory of Law: An Essay on the Study of Law and Development*, 82 *YALE L.J.* 1 (1972). For later critiques, see David Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 *WIS. L. REV.* 1062 (1974); Brian Tamanaha, *The Lessons of Law-and-Development Studies*, 89 *AM. J. INT'L L.* 470 (1995).

131. See generally Henderson, *supra* note 103, at 10. Many of the lawyers providing technical assistance in post-conflict situations have been previously involved in legal reform in the former Soviet Union, South East Asia, and Latin America.

132. The World Bank and the IMF have traditionally maintained that they are not bound by human rights instruments or by international humanitarian law because they are international financial organizations, although the Bank's position is softening somewhat. See Robert Danino, Senior Vice-Pres. and Gen. Counsel, World Bank, Speech at NYU School of Law Conference: The Legal Aspects of the World Bank's Work on Human Rights: Some Preliminary Thoughts 14-15 (Mar. 1, 2004) (on file with N.Y.U. J. INT'L L. & POL.).

international organizations have better decisionmaking competence than local constituencies.¹³³ The CPA- and IFI-sponsored reforms emphasized the rapid establishment of a sophisticated fiscal environment and wholesale marketization and particularly the limited role of government, facilitation of capital investment, and clear property rights.¹³⁴ Reminiscent of the Washington Consensus, the underlying theory was a belief in the reduction of the role of the state and an enhanced role for markets.¹³⁵ However, these reforms came with high social costs, including unrest, unfulfilled promises regarding job creation and, ultimately, an inability to attract foreign investment.¹³⁶ Other competing principles, such as elevating the role of women¹³⁷ and protecting the environment,¹³⁸ were far less prominent.

133. See Ruth Gordon, *Some Legal Problems with Trusteeship*, 28 CORNELL INT'L L.J. 301, 320 (1995) (arguing that non-self-governing peoples are entitled to a right of self-determination).

134. World Bank, *Rebuilding Iraq, Economic Reform and Transition*, at 4 (Feb. 2006), available at siteresources.worldbank.org/IRFFI/Resources/IraqCEM-finalComplete.pdf (noting that private-sector job creation is driven primarily by investment and commenting that to improve the climate for investment, Iraq needs to strengthen institutional underpinnings such as laws and regulations together with their monitoring, implementation, and enforcement capabilities and develop a creative and targeted set of programs to focus investment on substantial job creation).

135. See generally John Williamson, *What Should the World Bank Think About the Washington Consensus?*, 15 WORLD BANK RESEARCH OBSERVER 251 (2000), available at [http://www.worldbank.org/research/journals/wbro/obsaug00/pdf/\(6\)Williamson.pdf](http://www.worldbank.org/research/journals/wbro/obsaug00/pdf/(6)Williamson.pdf) (clarifying the fundamentals of standard policy advice and discussing how the concept "Washington Consensus" has become associated with market fundamentalism).

136. Henderson, *supra* note 103, at 4.

137. See Chauffour, *supra* note 12 (discussing how social principles might be integrated into an economic development theory). Note also that there are concrete economic reasons to support these principles: women tend to be "high return" investments. See Isobel Coleman, *The Payoff from Women's Rights*, 83 FOREIGN AFF. 80, 92 (2004) (noting that the CPA compromised on women's issues in Iraq and Afghanistan). Furthermore, as Scott Carlson argues, "assuming any degree of altruistic motives among post-conflict elites is perilous and unwise. . . . Women's groups in particular tend to place rule of law at the forefront of their agendas. Thus supporting the activities of such groups and pursuing their full participation in legal and judicial reform should be a core concern of UN peacekeeping operations." Scott N. Carlson, UN Dep't of Peacekeeping Operations, *Legal and Judicial Rule of Law Work in Multi-dimensional Peacekeeping Operations: Lessons-Learned Study*, at 16-

Despite these tensions, calls for cooperation between the UN and IFIs are escalating. The UN Millennium Declaration of 2000 identified the need for “greater policy coherence and better cooperation between the United Nations, its agencies, the Bretton Woods Institutions and the World Trade Organization, as well as other multilateral bodies.”¹³⁹ The Brahimi Report of 2001 recommended that the World Bank take a lead in economic aspects of post-conflict peace operations.¹⁴⁰ These themes were reflected in subsequent UN reforms. In December 2004, the Report of the Secretary-General’s High Level Panel on Threats and Security recommended greater policy coherence between IFIs, states, and other international institutions.¹⁴¹ These proposals culminated in a Peacebuild-

17 (Mar. 2006), available at <http://pbpu.unlb.org/pbpu/library/ROL%20Lessons%20Learned%20Report%20%20March%202006%20FINAL.pdf>.

138. However, the World Bank implemented a review process to evaluate the social and environmental impact of bank-financed projects. See Faris Hadad-Zervos, *The World Bank in Iraq: Iraqi Ownership for Sustainability*, ¶ 108 (World Bank, Working Paper, June 2005), available at <http://siteresources.worldbank.org/IRFFI/Resources/WBPaperIraqFaris.pdf>.

139. See United Nations Millennium Declaration, G.A. Res. 55/2, ¶ 9, U.N. Doc. A/RES/55/2 (Sept. 18, 2000), available at <http://www.un.org/millennium/declaration/ares552e.htm> [hereinafter Millennium Declaration]. The January 2005 report of the Millennium Development Project “Investing in Development” similarly states that the World Bank and IMF are key to the poverty reduction strategies necessary to achieving the development goals: “Only by reducing poverty and improving environmental management over the coming decades can a rise in conflicts and state failures be averted.” UN MILLENNIUM PROJECT, INVESTING IN DEVELOPMENT: A PRACTICAL PLAN TO ACHIEVE THE MILLENNIUM DEVELOPMENT GOALS 263 (2005), available at <http://www.unmillenniumproject.org/reports/fullreport.htm> [hereinafter UN MILLENNIUM PROJECT, INVESTING IN DEVELOPMENT]. See also Millennium Declaration, *supra*, ¶ 6 (“Responsibility for managing worldwide economic and social development, as well as threats to international peace and security, must be shared among the nations of the world and should be exercised multilaterally. As the most universal and most representative organization in the world, the United Nations must play the central role.”). The Report also recommends strengthening the rule of law by ensuring property rights and contract enforcement, and by investment in public sector management. UN MILLENNIUM PROJECT, INVESTING IN DEVELOPMENT, *supra*, at 31, 115-16.

140. The Secretary-General, *Report of the Panel on United Nations Peace Keeping Operations*, ¶ 46, delivered to the Security Council and the General Assembly, U.N. Doc. A/55/305, S/2000/8009 (Aug. 21, 2000) [hereinafter Brahimi Report].

141. The Secretary-General, *A more secure world: our shared responsibility: Report of the High Level Panel on Threats, Challenges and Change*, ¶ 265, delivered to

ing Commission—a major platform in the UN Reform process—created in December 2005.¹⁴² The Commission is composed of thirty-one members acting on the basis of consensus, and its main purposes are to advise on and propose integrated strategies for post-conflict peacebuilding and recovery.¹⁴³ Representatives of the IMF and Bank are invited to participate, but will not have seats on the Commission, as originally suggested.¹⁴⁴

IV. THE EVOLVING RELATIONSHIP BETWEEN THE SECURITY COUNCIL AND THE IFIs

The United Nations has traditionally been preoccupied with the politics of peace, tending to dismiss the role of economics in conflict resolution. The World Bank, preoccupied with macro-economics, long ignored the political realm as beyond its mandate to eradicate poverty. But today there is new agreement about one basic point: the scourge of intrastate war will not be contained unless the vicious cycle of poverty, economic injury, and political grievance is broken.¹⁴⁵

IFI involvement in economic reconstruction in Iraq and elsewhere confirms the observation that the Security Council

the General Assembly, U.N. Doc. A/59/565 (Dec. 2, 2004), available at <http://www.un.org/secureworld/report.pdf> [hereinafter *Secure World*].

142. G.A. Res. 60/180, U.N. Doc. A/RES/60/180 (Dec. 30, 2005).

143. The selection process for members of the Commission was based on an allocation of places to members of the Security Council, the Economic and Social Council (ECOSOC), and top financial and troop contributors. The final spots were based on recommendations by the General Assembly. See G.A. Res. 60/180, *supra* note 142, ¶¶ 4-6.

144. The initial proposals envisioned direct participation of the Bank and the Fund, but the final scheme suggests their involvement will be discrete. See *Secure World*, *supra* note 141, ¶ 225; High-level Plenary Meeting of the General Assembly, *Revised Draft Outcome Document*, ¶ 66, U.N. Doc. A/59/HLPM/CRP.1/Rev.1 (Sept. 14-16, 2005), available at <http://www.globalpolicy.org/msummit/millenni/2005/0722draftoutcome.pdf> (“Representatives from the World Bank and the International Monetary Fund should be invited to participate in all meetings of the Peacebuilding Commission in a manner suitable to their governing arrangements, as well as a representative from the Secretary-General.”).

145. Allan Gerson, *Peace Building: The Private Sector's Role*, 95 AM. J. INT'L L. 102 (2001).

no longer maintains a monopoly over international peace and security. Instead, it increasingly relies on other organizations to execute its broadening mandate.¹⁴⁶ The shift toward economic reconstruction and more generally toward IFI-led economic development in contemporary peacebuilding strategies is readily apparent. Before the 1990s, the Security Council rarely addressed economic issues¹⁴⁷ or referred to international financial institutions in its resolutions, but today such topics are standard fare.¹⁴⁸

IFI post-conflict engagement illustrates how the institutional line between peace and economics, which is reflected in the division of powers of the Bretton Woods institutions and the UN, no longer corresponds to contemporary realities. The Security Council, created to manage interstate aggression, is today addressing state collapse and the reconstruction of

146. Shepard Forman & Andrew Grene, *Collaborating with Regional Organizations*, in *THE UN SECURITY COUNCIL: FROM THE COLD WAR TO THE 21ST CENTURY* 295, 295 (David Malone ed., 2005).

147. One exception is the UN Mission to the Congo (ONUC) from 1960-1964, where the UN gave policy and economic advice on foreign exchange control, central banking, and debt relief. See Edward Mortimer, *Under What Circumstances Should the UN Intervene Militarily in a "Domestic" Crisis?*, in *PEACEMAKING AND PEACEKEEPING FOR THE NEW CENTURY* 111, 127-28 (Olara A. Otunnu & Michael W. Doyle eds., 1998); JAMES DOBBINS ET AL., *THE UN'S ROLE IN NATION-BUILDING: FROM THE CONGO TO IRAQ* 23-24 (2005).

148. Prior to the late 1990s, international financial institutions were rarely, if ever, referred to by the Security Council. When they were, it was usually restricted to donor coordination. For example, some resolutions urged international financial institutions to assist in coordinating and disbursing donor funds. See, e.g., S.C. Res. 1576, U.N. Doc. S/RES/1576 (Nov. 29, 2004) (Haiti); S.C. Res. 1230, ¶ 16, U.N. Doc. S/RES/1230 (Feb. 26, 1999) (Central African Republic). Others urged IFIs to contribute to economic development. See, e.g., S.C. Res. 1545, ¶ 19, U.N. Doc. S/RES/1545 (May 21, 2004) (Burundi); S.C. Res. 1542, ¶ 13, U.N. Doc. S/RES/1542 (Apr. 30, 2004); S.C. Res. 1037, ¶ 18, U.N. Doc. S/RES/1037 (Jan. 15, 1996) (Eastern Slavonia, Baranja, and Western Sirmium); S.C. Res. 1063, ¶ 5, U.N. Doc. S/RES/1063 (June 28, 1996) (Haiti); S.C. Res. 1088, ¶ 12, U.N. Doc. S/RES/1088 (Dec. 12, 1996) (Bosnia & Herzegovina). The Security Council also requested assistance from the World Bank in establishing efficient and transparent control of exploitation of natural resources in the Democratic Republic of the Congo. See S.C. Res. 1565, ¶ 22, U.N. Doc. S/RES/1565 (Oct. 1, 2004); S.C. Res. 1457, U.N. Doc. S/RES/1457 (Jan. 24, 2003). See also S.C. Res. 1528, ¶ 6(f), U.N. Doc. S/RES/1528 (Feb. 27, 2004) (Côte d'Ivoire).

conflict zones as a matter of course.¹⁴⁹ IFIs, in the meantime, have taken on significant responsibilities in the economic and regulatory reform of post-conflict situations, where international peace and security are at the forefront. Despite their avowed intent to take the back seat to the UN in multilateral operations, IFI practices reflect considerable engagement.¹⁵⁰ In a recent press release on post-conflict involvement, for example, the IMF said:

Directors generally were of the opinion that the Fund is uniquely suited to take the *lead role* in designing an overall strategy for rebuilding fiscal and monetary institutions, and, together with the World Bank, the financial sector, in post-conflict countries owing to the Fund staff's extensive cross-country experience. Designing such a strategy at the very outset facilitates appropriate sequencing of technical assistance and coordination among different technical assistance providers, and allows the Fund to use its limited resources more effectively.¹⁵¹

149. See generally U.N. Charter art. 39 (empowering the Security Council to "determine the existence of any threat to the peace, breach of the peace, or act of aggression and . . . make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security"); U.N. Charter art. 2, para 7 (prohibiting intervention in the domestic affairs of states and reflecting two basic principles of the Organization: domestic jurisdiction and state sovereignty). Until the 1990s, this mandate to "maintain or restore international peace and security" was interpreted narrowly. For a discussion of the expansion of the Council's Chapter VII powers, see Cameron R. Hume, *The Security Council in the Twenty-First Century*, in THE UN SECURITY COUNCIL, *supra* note 146, at 609; PARIS, *supra* note 13, at 22; Neclă Tschirgi, *Post-Conflict Peacebuilding Revisited: Achievements, Limitations, Challenges* (Int'l Peace Academy, Peacebuilding Forum 2004), at 5.

150. The World Bank Operational Manual 2.30 states that the Bank is not a world government and that it does not engage in peacemaking or peacekeeping (or disarming combatants or providing humanitarian relief). World Bank, *Operational Manual*, *supra* note 30, at OP 2.30 (Jan. 2001). The IMF's policies demonstrate a similar intent: to maintain a secondary role in the reconstruction process. The Board of Directors emphasized the importance of policy coordination with other international organizations, regional development banks, bilateral donors, and creditors, and noted that in most situations the IMF would not be the lead institution. See IMF, *Summing Up*, *supra* note 36.

151. Press Release, Int'l Monetary Fund, IMF Executive Board Discusses Staff Papers on Rebuilding Fiscal Institutions in Post-Conflict Countries

The convergence in the mandates of the Security Council, the World Bank, and the IMF no doubt responds to economic realities: International peace and security are linked to economic stability, and¹⁵² research shows that peace brings about economic development.¹⁵³ Economic issues such as poverty, corruption, resource mismanagement, and poor living conditions or social exclusion can create transborder effects including conflict, refugee flows, and even terrorism (such as when failed states give safe haven to terrorist financing.). The implications of unsuccessful post-conflict transitions are confirmed by World Bank research: Post-conflict countries face a forty-

(Mar. 29, 2005), available at <http://www.imf.org/external/np/sec/pn/2005/pn0545.htm> (emphasis added). The World Bank's activities have also continued to expand; it now provides political risk insurance to certain enterprises operating in post-conflict zones. See World Bank, *Managing Political Risks with MIGA's Guarantees*, available at <http://www.miga.org/sitelevel2/level2.cfm?id=1058>. The Bank is also formally involved in clearing land mines in post-conflict areas. In one publication, it states: "It has become clear that Mine Action is not only a humanitarian imperative, but is also a precondition for sustainable development, ongoing efforts to ensure peace and security in many mine-affected countries, and, if not addressed, a serious obstacle to the achievement of the Millennium Development Goals (MDGs) for many post-conflict countries." *Landmine Contamination: A Development Imperative*, SOCIAL DEVELOPMENT NOTES (World Bank Conflict Prevention and Reconstruction Unit, Washington, D.C.), Oct. 2004, available at [Inweb18.worldbank.org/ESSD/sdvext.nsf/67ByDocName/LandmineContaminationADevelopmentImperative/\\$FILE/DN20_Web.pdf](http://Inweb18.worldbank.org/ESSD/sdvext.nsf/67ByDocName/LandmineContaminationADevelopmentImperative/$FILE/DN20_Web.pdf). Likewise, it is involved in a Multi-Country Demobilization & Reintegration Program in the Great Lakes region of Africa, and, although not billed as humanitarian relief, the central aims of the program—to demobilize and reintegrate ex-combatants—are not dissimilar. See generally <http://www.mdrp.org/> (last visited Feb. 19, 2007).

152. For example, richer states and states with higher levels of economic growth are less prone to large-scale internal violence. See Ibrahim Elbadawi & Nicholas Sambanis, *How Much War Will We See? Explaining the Prevalence of Civil War*, 46 J. CONFLICT RESOLUTION 307, 329 (2002) (high economic development effectively eliminates the risk of civil war regardless of ethnic diversity); MICHAEL W. DOYLE & NICHOLAS SAMBANIS, MAKING WAR AND BUILDING PEACE: UNITED NATIONS PEACE OPERATIONS 34 (2006).

153. See, e.g., Seth G. Jones & James Dobbins, *The UN's Record in Nation Building*, 6 CHI. J. INT'L. L. 703, 715-16 (2006) (assessing the link between the economy, peace and, democracy in UN nation building missions). Note, however, that a history of war has a severe impact on post-conflict countries because of economic distortions and macroeconomic imbalances. Graciana del Castillo, Organization for Economic Cooperation and Development [OECD], *Economic Reconstruction in Post-Conflict Transitions: Lessons for the Democratic Republic of Congo* 12 (OECD Working Paper No. 228, Nov. 2003).

four percent chance of reverting to conflict during the first five years after the onset of peace.¹⁵⁴

Economic realities do not resolve the departure from the institutional division of powers envisioned by the UN Charter. The "open texture" of the UN Charter and the Articles of Agreement of the IFIs highlight clashing principles that are coming to a head in the post-conflict context.¹⁵⁵ On the one hand, IFIs hold a considerable degree of independence and special expertise and are committed to policies of liberalization and marketization pursuant to their Articles of Agreement. On the other hand, the peacebuilding process which the Security Council manages under its Chapter VII powers is understood to be used for the purpose of creating democratic institutions, promoting power sharing, and laying the basis for a transition to self-government. Fast and far-reaching marketization may not promote these goals.¹⁵⁶

A. *Status of IFIs within the UN System*

IFIs are specialized agencies of the UN as defined by article 57 of the UN Charter.¹⁵⁷ These agencies form a decentral-

154. PAUL COLLIER ET AL., *BREAKING THE CONFLICT TRAP: CIVIL WAR AND DEVELOPMENT POLICY* 22 (2003). See also S. Brock Bloomberg and Gregory D. Hess, *The Temporal Links Between Conflict and Economic Activity*, 46 J. CONFLICT RESOLUTION 74, 74-75 (2002).

155. See ALVAREZ, *supra* note 20, at 85 (discussing Oscar Schachter, *Interpretation of the Charter in the Political Organs of the United Nations*, in *LAW, STATE AND INTERNATIONAL LEGAL ORDER: ESSAYS IN HONOR OF HANS Kelsen* 274 (Salo Engel ed., 1964)).

156. There is in fact considerable debate over whether the rapid marketization promulgated by the IMF in Bosnia and the former Soviet Union reduced social tensions and promoted peace. Some claim that efforts by IFIs to bring about economic liberalization contributed (paradoxically) to renewed hostilities. See e.g. PARIS, *supra* note 13, at 6; Anne Orford, *Locating the International: Military and Monetary Interventions After the Cold War*, 38 HARV. INT'L L.J. 443, 451 (1997) (discussing how IFI policies contributed to war in the former Yugoslavia).

157. See U.N. Charter art. 57, ¶ 1 ("The various specialized agencies, established by intergovernmental agreement and having wide international responsibilities, as defined in their basic instruments, in economic, social, cultural, educational, health, and related fields, shall be brought into relationship with the United Nations in accordance with the provisions of Article 63."); U.N. Charter art. 63, ¶¶ 1, 2 ("The Economic and Social Council may enter into agreements with any of the agencies referred to in Article 57, defining the terms on which the agency concerned shall be brought into

ized network of intergovernmental international agencies within the UN system. They have wide international responsibilities in economic, social, cultural, educational, health, and related fields, as is seen by examining the mandates of representative agencies, such as the ILO, UNESCO, and the WTO.¹⁵⁸

Specialized agencies of the UN are “brought into relationship” with the UN via separate relationship agreements.¹⁵⁹ Some of these agreements create a close relationship between the agency and the UN. The World Health Organization, for example, is dependent on the UN for its budget and is *required* to include items proposed by the UN on its agenda.¹⁶⁰ The IFIs, in contrast, have a much more independent arrangement. Article I of both the Agreement between the United Nations and the World Bank and the Agreement between the United Nations and the IMF provides that the Bank and Fund are “required to function as . . . independent international organization[s].”¹⁶¹ The Bank and the Fund are financially separate from the UN, being funded by direct member contributions, and they are only required to give UN items “due consideration” on their agendas.¹⁶² Many of their functional tasks are protected as well. For example, the World Bank controls its own loan decisions:

relationship with the United Nations. Such agreements shall be subject to approval by the General Assembly. It may co-ordinate the activities of the specialized agencies through consultation with and recommendations to such agencies and through recommendations to the General Assembly and to the Members of the United Nations.”).

158. See Werner Meng, *Article 57*, in *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 806-15 (Bruno Simma ed., 1994) [hereinafter *UN CHARTER COMMENTARY*].

159. See U.N. Charter art. 57, ¶ 2 (“Such agencies thus brought into relationship with the United Nations were hereinafter referred to as specialized agencies.”).

160. For a discussion of how the IMF and World Bank agreements differ from those with other agencies, see SKOGLY, *supra* note 100, at 103-05.

161. Agreement between the U.N. and the International Bank for Reconstruction and Development art. I, ¶ 2, Nov. 15, 1947, 16 U.N.T.S. 346 [hereinafter *World Bank Relationship Agreement*]; Agreement between the U.N. and the International Monetary Fund art. I, ¶ 2, Nov. 15, 1947, 16 U.N.T.S. 326 [hereinafter *IMF Relationship Agreement*]. The two Relationship Agreements are largely but not entirely identical in wording.

162. *World Bank Relationship Agreement*, *supra* note 161, art. III; *IMF Relationship Agreement*, *supra* note 161, art. III.

The United Nations recognizes that the action to be taken by the Bank of any loan is a matter to be determined by the independent exercise of the Bank's own judgment in accordance with the Bank's Articles of Agreement. *The United Nations recognizes therefore, that it would be sound policy to refrain from making recommendations to the Bank with respect to particular loans or with respect to terms or conditions of financing by the Bank.*¹⁶³

Among the specialized agencies, therefore, the IFIs enjoy a special independence.

Article VI of the Relationship Agreements addresses the IFI-Security Council relationship:

The Fund takes note of the obligation assumed, under paragraph 2 of Article 48 of the United Nations Charter, by such of its members as are also Members of the United Nations, to carry out the decisions of the Security Council through their action in the appropriate specialized agencies of which they are members, and will, in the conduct of its activities, have *due regard* for decisions of the Security Council under Articles 41 and 42 of the United Nations Charter.

The Fund agrees to assist the Security Council by furnishing to it information in accordance with the provisions of Art. V of this agreement.¹⁶⁴

163. World Bank Relationship Agreement, *supra* note 161, art. IV, ¶ 3 (emphasis added).

164. IMF Relationship Agreement, *supra* note 161, art. IV (emphasis added); *see also* World Bank Relationship Agreement, *supra* note 161, art. IV. For commentary see SANDS & KLEIN, *supra* note 20, at § 3-007. IFI relationships with other UN organs, such as the General Assembly, are less intimate than those with the Security Council. For example, under article II, the Fund is entitled to attend meetings of the General Assembly for the purposes of consultation, and to participate (but not vote) in meetings of the General Assembly, the Economic and Social Council, the Trusteeship Council, and their subsidiary organizations. *See* IMF Relationship Agreement, *supra* note 161, arts. II (2) & II (3). For a discussion of the scope of the World Bank's obligations in the face of General Assembly Resolutions, see the South Africa and Portugal loan controversies in SHIHATA, *supra* note 21, at 101-03.

The requirement that the Bank and the IMF give “due regard” to Chapter VII Security Council resolutions vividly illustrates the systemic tensions in the division of powers between the Security Council and the IFIs. “Due regard” does not indicate that Security Council resolutions are binding on the IFIs; on a plain reading, it suggests the IFIs are merely responsible for balancing their legal duties given their independent legal personality.¹⁶⁵

The IMF has held to this narrow interpretation of article VI of the Relationship Agreement, finding the obligation to give “due regard” renders the Security Council’s decisions only persuasive to the agency. Former IMF General Counsel Joseph Gold wrote: “[T]he IMF has steadfastly avoided any statement or action that might imply that the IMF is bound by decisions of the Security Council.”¹⁶⁶ The IMF maintains the inter-

165. Note, for example, that article XX of the General Agreement on Tariffs and Trade (GATT) creates several exceptions for contracting parties based on “due regard” provisions, which have been interpreted as requiring the balancing of legal duties. See General Agreement on Tariffs and Trade art. XX, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194. See Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, ¶ 4, WT/DS2/AB/R (May 20, 1996), available at [http://www.worldtradelaw.net/reports/wtoab/us-gasoline\(ab\).pdf](http://www.worldtradelaw.net/reports/wtoab/us-gasoline(ab).pdf). Note also that article XX of the Convention on the Rights of the Child requires States parties to give “due regard” to the desirability of continuity in a child’s upbringing and to the child’s ethnic, religious, cultural and linguistic background. See Convention on the Rights of the Child art. XX, Nov. 20, 1989, 1577 U.N.T.S. 3, 28 I.L.M. 1456. Some treaties use “due regard” to ensure equity. Art. IX of the Outer Space Treaty states: “In the exploration and use of outer space, including the moon and other celestial bodies, States Parties to the Treaty shall be guided by the principle of co-operation and mutual assistance and shall conduct all their activities in outer space, including the moon and other celestial bodies, with due regard to the corresponding interests of all other States Parties to the Treaty.” Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies art. IX, Jan. 27, 1967, 610 U.N.T.S. 205, available at <http://www.state.gov/t/ac/trt/5181.htm>.

166. See Evelyne LaGrange & Pierre Michel Eisemann, *Article 41*, in LA CHARTE DES NATIONS UNIES: COMMENTAIRE ARTICLE PAR ARTICLE 1195, 1211 (Jean-Pierre Cot & Alain Pellet ed., Economica 3rd ed. 2005). The IMF makes independent findings of statehood, for example, and while it might take into account the UN’s position, it considers it as evidence and not as a legally binding fact. See JOSEPH GOLD, MEMBERSHIP AND NONMEMBERSHIP IN THE INTERNATIONAL MONETARY FUND 56 (1974). See also THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 3-4 (1995) (discussing im-

pretation today that Chapter VII resolutions are non-binding.¹⁶⁷

Former General Counsel of the World Bank Ibrahim Shihata has taken a less "independentist" stance. He writes that the designation of the Bank as an "independent international organization" means that there are limits on the matters on which the UN can make recommendations.¹⁶⁸ This is probably true: The UN would not be able to make recommendations that would place IFIs in violation of their Articles of Agreement such as a recommendation that would interfere with the Bank's autonomous authority over loan decisions.¹⁶⁹ Nonetheless, the Bank recognizes that article 48 of the UN Charter, which requires members of the UN to carry out Security Council decisions "directly and through their action in the appropriate international agencies of which they are members," binds specialized agencies to Security Council resolutions through their members.¹⁷⁰

On a thin reading of the UN Charter, article 48 (and article 25 which similarly provides that "the Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter") places the primary burden of implementing Security Council decision on member states individually and through the international organizations in which they are members.¹⁷¹ As such,

plications of the IMF's 1992 determination that the Socialist Federal Republic of Yugoslavia had ceased to exist).

167. See Francois Gianviti, *Decision Making in the International Monetary Fund*, 1 CURRENT DEV. IN MONETARY & FIN. L. 32 (1999) ("'Due regard' means that the IMF is not itself bound by those [Security Council] decisions.").

168. See SHIHATA, *supra* note 21, at 82. But see MARC DARROW, *BETWEEN LIGHT AND SHADOW: THE WORLD BANK, THE INTERNATIONAL MONETARY FUND AND INTERNATIONAL HUMAN RIGHTS LAW* 125 (2003).

169. See World Bank Relationship Agreement, *supra* note 161, art. IV, ¶ 3.

170. SHIHATA, *supra* note 21, at 76; U.N. Charter art. 48.

171. See Elbadawi & Sambanis, *supra* note 152, at 315. As a general matter of competence, the Security Council may prohibit the acts of international organizations, and, of course, by virtue of article 103 the UN Charter trumps other treaty obligations. See U.N. Charter art. 103; Christian Tomuschat, *Article 2(3)*, in UN CHARTER COMMENTARY, *supra* note 158, at 103; SHIHATA, *supra* note 21, at 76, 102 (comparing and contrasting obligations towards Security Council and General Assembly resolutions); Waldemar Hummer & Michael Schweitzer, *Article 52*, in UN CHARTER COMMENTARY, *supra* note 158, at 714-15 (noting that the Security Council often "calls upon" regional and

the IMF and World Bank could not ask their members to undertake activities in violation of Chapter VII resolutions. Indeed, the Council's binding decisionmaking power was thought to be indispensable—"the core element" of the effective functioning of the UN, given its oversight of international peace and security.¹⁷² This is further shown by article 103 of the UN Charter, which states that the Charter takes precedence over other treaty obligations, vitiating any potential argument that the IMF or World Bank Articles of Agreement are of a higher authority.¹⁷³

It is the "thicker" reading of this obligation—that IFIs have some form of direct responsibility to implement and respect Chapter VII Security Council Resolutions—that has been resisted with vigor. While in practice the IFIs have respected the principal aspects of Security Council resolutions by, for example, refusing to lend to or cooperate with countries subject to Chapter VII sanctions,¹⁷⁴ the expansion of the Security

international organizations to act in accordance with its resolutions, but does not claim to create obligations for them); SANDS & KLEIN, *supra* note 20, at § 3-009.

172. See Bruno Simma & Stefan Brunner, *Article 27, in UN CHARTER COMMENTARY*, *supra* note 158, at 463.

173. U.N. Charter art. 103.

174. For example, the World Bank determined that Security Council Resolution 661 imposing sanctions on Iraq precluded the Bank from lending to Iraq. On IFI involvement in Iraq specifically, see Becker, *U.S. Seeks U.N. Resolution*, *supra* note 90. See also Francois Gianviti, *Current Legal Aspects of Monetary Sovereignty*, 4 CURRENT DEV. IN MONETARY & FIN. L. 3, 8 (2005). In a press conference given by the World Bank on April 11, 2003, Jean-Louis Sarbib, Vice President for the Middle East and North Africa Region, stated: "Well, Resolution 661, for those of you who don't know, is . . . the sanctions resolution—it was passed under Article VII of the United Nations Charter, and essentially, it . . . prevents any activity, any essentially economic activities, by any national or international organizations in the territories of Iraq. So that the General Counsel of the Bank a while back made the determination that the Bank would follow the UN Security Council resolutions under Article VII, and we are bound legally to follow this resolution. This resolution also, again, under its paragraph 4, says that 'All states shall not make available to the Government of Iraq or to any commercial, industrial, or public utility undertaking in Iraq or Kuwait any funds or any other financial or economic resources and shall prevent their nationals and any persons within their territories from removing from their territories or otherwise, etc.' You can construe this as saying we could not even go and pay for hotels in Iraq. So that is the situation, and it is not exactly clear today where the United Nations Security Council stands on this particular resolution. So 661 is one

Council's resolution on economic reconstruction will put their resolve to the test. Would the IFIs follow a Security Council resolution that required resource management or implemented an Economic Management Assistance Program with which they disagreed?¹⁷⁵ Or, conversely, how would the IMF view a Security Council resolution that asked the IMF to implement a financial bailout package for a failed state that might not meet the usual criteria? As the Security Council both expands its post-conflict activities and submits to limits on its own powers,¹⁷⁶ the grey areas in the international legal hierarchy are all the more palpable.

B. *Expansion of the Security Council's Mandate*

The convergence between peace and economics is worth exploring from the Security Council's vantage point as well. The only specific Charter reference to economic matters in the Security Council's tool kit is article 41, which lays the basis for sanctions.¹⁷⁷ This power is not equivalent to a general competence in the economic sphere, however, because article 41 only endows the Council with discretionary powers to en-

that is important for us to see clearly what we can do because of our determination to respect the resolutions of the UN Security Council under Article VII of the Charter." Press Conference on the Middle East and North Africa Region, World Bank (April 11, 2003), *available at* <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:20104897~menuPK:34476~pagePK:34370~piPK:34424~theSitePK:4607,00.html>. Commentary to the press by Bank officials, in fact, suggested that the Bank wanted new Security Council resolutions to explicitly reverse the sanctions regime. *See id.*

175. The Forest Reform Program and the Economic Management Assistance Program implemented by the Security Council in Liberia presents this potential scenario. *See* S.C. Res. 1689, U.N. Doc. S/RES/1689 (June 20, 2006) and S.C. Res. 1607, U.N. Doc. S/RES/1607 (June 21, 2005); *see generally* RENATA DAWN & LAURA BAILEY: LIBERIA'S GOVERNANCE AND ECONOMIC MANAGEMENT ASSISTANCE PROGRAM (2006), *available at* <http://siteresources.worldbank.org/INTLICUS/Resources/DPKOWBGEMAPFINAL.pd#search=%22economic%20management%20assistance%20program%22>.

176. *See* U.N. Charter arts. 1 & 2. For a discussion of the legislative limits applicable to the Security Council in post-conflict situations see Boon, *supra* note 59, at 316-18.

177. U.N. Charter art. 41. Although article 41 does not refer specifically to sanctions, it provides for "measures not involving the use of armed force" including "complete or partial interruption of economic relations," which has become the basis for economic sanctions.

force the peace through economic measures.¹⁷⁸ While the UN might be seen to have general jurisdiction over economic issues under article 1 of the Charter (which provides that one of the UN's purposes is to "achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character"¹⁷⁹), it was the Economic and Social Committee (ECOSOC) and not the Security Council which was intended to be the coordinating mechanism for economic issues within the UN.¹⁸⁰

Nonetheless, the advent of peacebuilding in the 1990s provided an opportunity for the Security Council to increase its engagement in issues of governance and economics at a rapid pace.¹⁸¹ Its initial involvement in election monitoring and assisting in the establishment of democratic governments in countries ranging from El Salvador to East Timor and from the Central African Republic to Mozambique¹⁸² has given way to the designation of economic reconstruction as a substantive objective in the Security Council's missions. For example, the

178. See Evelyne LaGrange & Pierre Michel Eisemann, *supra* note 166, at 1211.

179. U.N. Charter art. 1, para. 4.

180. See MARGARET P. KARNS & KAREN A. MINGST, *INTERNATIONAL ORGANIZATIONS: THE POLITICS AND PROCESSES OF GLOBAL GOVERNANCE* 374 (2004) (noting also that the General Assembly has executed economic policy and programming on occasion); Stephen Zamora, *Economic Relations and Development*, in *THE UNITED NATIONS AND INTERNATIONAL LAW* 232, 233-34 (Christopher Joyner ed., 2001). See also U.N. Charter art. 63, ¶¶ 1, 2 ("The Economic and Social Council may enter into agreements with any of the agencies referred to in Article 57, defining the terms on which the agency concerned shall be brought into relationship with the United Nations. Such agreements shall be subject to approval by the General Assembly. It may coordinate the activities of the specialized agencies through consultation with and recommendations to such agencies and through recommendations to the General Assembly and to the Members of the United Nations.").

181. For example, Boutros Boutros-Ghali's *An Agenda For Peace* stated: "Our aims must be . . . in the largest sense, to address the deepest causes of conflict: economic despair, social injustice and political oppression. It is possible to discern an increasingly common moral perception that spans the world's nations and peoples, and which is finding expression in international laws, many owing their genesis to the work of this Organization." The Secretary-General, *An Agenda For Peace*, ¶ 15, delivered to the General Assembly, U.N. Doc. A/47/277, S/24111 (Jan. 17, 1992).

182. Cameron R. Hume, *The Security Council in the Twenty-First Century*, in *THE UN SECURITY COUNCIL*, *supra* note 146, at 607, 609; PARIS, *supra* note 13, at 22.

Security Council underscored the importance of economic rehabilitation to the region of Eastern Slavonia in Resolution 1037.¹⁸³ Security Council Resolution 1244 establishing the UN Mission in Kosovo (UNMIK) required the international administration to "[support] the reconstruction of key infrastructure and other economic reconstruction."¹⁸⁴ Security Council Resolution 1272 similarly required the UN Transitional Administration in East Timor (UNTAET) "[t]o assist in the establishment of conditions for sustainable development."¹⁸⁵ And in Afghanistan, the Security Council called on member states to provide "long-term assistance for the social and economic reconstruction and rehabilitation of Afghanistan and [welcomed] initiatives towards this end."¹⁸⁶ The linkage has been affirmed by the Secretary General's 2005 Report, "In Larger Freedom":

Not only are development, security and human rights all imperative; they also reinforce each other. This relationship has only been strengthened in our era of rapid technological advances, increasing economic interdependence, globalization and dramatic geopolitical change. While poverty and denial of human rights may not be said to "cause" civil war, terrorism or organized crime, they all greatly increase the risk of instability and violence. Similarly, war and atrocities are far from the only reasons that countries are trapped in poverty, but they undoubtedly set back development.¹⁸⁷

Thus, despite the absence of explicit textual references to economic capacity, economic reconstruction (and economic governance generally) has made its way into the implied powers granted to the Security Council to maintain international peace and security.¹⁸⁸

183. S.C. Res. 1047, ¶ 11(f), U.N. Doc. S/RES/1037 (Jan. 15, 1996).

184. S.C. Res. 1244, ¶ 11(g), U.N. Doc. S/RES/1244 (June 10, 1999).

185. S.C. Res. 1272, ¶ 2(f), U.N. Doc. S/RES/1272 (Oct. 25, 1999).

186. S.C. Res. 1378, ¶ 4, U.N. Doc. S/RES/1378 (Nov. 14, 2001). This call was repeated in Security Council Resolution 1419. See S.C. Res. 1419, ¶ 10, U.N. Doc. S/RES/1419 (June 26, 2002).

187. The Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, ¶ 16, U.N. Doc. A/59/2005 (Mar. 21, 2005).

188. Economic reconstruction is not the only economic issue appearing under the Security Council's umbrella. The Security Council has also ad-

It is important to establish that the Security Council's cooperation with IFIs on peacekeeping matters is not on its face problematic. Because the Security Council often cannot implement Chapter VII measures by its own means, it has made use of other implementing agencies on a regular basis.¹⁸⁹ For example, the Security Council has delegated its peacekeeping powers to regional and multinational forces in Liberia, Bosnia, and Sierra Leone under article 53 of the UN Charter.¹⁹⁰ Furthermore, in the *Certain Expenses* case, the International Court of Justice (ICJ) determined that the Security Council had primary but not exclusive responsibility for peacekeeping.¹⁹¹ It would therefore be incorrect to view the Security Council as delegating its powers to IFIs.¹⁹² The Security Council's relationship with IFIs is, however, distinguishable from its relationship with regional organizations and agencies, because IFIs

ressed good economic governance and corporate and financial crimes that are transborder in nature. In response to September 11, the Security Council used Resolution 1373 to enact measures on terrorist financing and money laundering. This resolution requires Member States to deny all forms of financial support for terrorist groups and to suppress the provision of safe havens for terrorists. S.C. Res. 1373, ¶ 2(a), (c), U.N. Doc. S/RES/1419 (June 26, 2002); see also S.C. Res. 1607, U.N. Doc. S/RES/1607 (June 21, 2005). For commentary, see Ilias Bantekas: *Current Development: The International Law of Terrorist Financing*, 97 AM. J. INT'L L. 315 (2003). Furthermore, in its 2005 resolutions extending the embargo against Liberia, the Security Council has ventured into the domains of economic governance by underscoring the importance of transparency in accounting, the responsible use of public funds, and national legal reform. S.C. Res. 1617, U.N. Doc. S/RES/1617 (July 29, 2005). The Security Council is currently being lobbied to include the Economic Governance Action Plan (EGAP) developed by the UN, ECOWAS, the European Union, and the United States in the next UN National Transitional Government of Liberia (UNMIL) mandate. The EGAP covers "revenue, expenditure, procurement, corruption and new contracts and concessions, for immediate implementation by the NTGL and subsequent adherence by any future Government of Liberia." Liberia Economic Governance Plan of Action, available at <http://www.ulaaliberia.org/LEGAP.htm>.

189. Hummer & Schweitzer, *supra* note 171, at 712.

190. See Forman & Grene, *supra* note 146, at 295; DANESH SAROOSHI, *THE UNITED NATIONS AND THE DEVELOPMENT OF COLLECTIVE SECURITY* 248 (1999).

191. *Certain Expenses of the United Nations (Article 17, ¶ 2, of the Charter)*, Advisory Opinion, 1962 I.C.J. 151 (July 1962); Gerson, *supra* note 145, at 104.

192. For an account of the delegation of Security Council powers see SAROOSHI, *supra* note 190, at 250.

can engage in post-conflict reconstruction under their own mandates.

More problematic is the fact that because economic and regulatory reforms are intended to contribute to a sustainable peace, IFIs have become entwined with a range of political issues that go beyond governance.¹⁹³ A recent Bank report bears out these complicated objectives: "[I]n many countries, post-conflict reconstruction has meant not only a transition from conflict to peace, but also a transition from a planned to a market-based economy, with a critical role for government as an enabler of social and economic progress."¹⁹⁴ This has required IFIs to decide which institutions should be privileged: local constituencies or the market.¹⁹⁵ This strategy has propelled IFIs into fundamentally political issues. For example, privatization, a key step in the transition from a planned to a market economy, requires important policy decisions about the allocation of ownership rights within societies, including the determination of whether limits on certain industries or profit remittances should be placed on foreign investors.¹⁹⁶

193. Cf. Gunther Handl, *The Legal Mandates of Multilateral Development Banks as Agents for Change Towards Sustainable Development*, 92 AM. J. INT'L L. 642, 645 (1998) (discussing the legal mandate of multilateral development banks with regards to sustainable development).

194. Hadad-Zervos, *supra* note 138, ¶ 4.

195. See, e.g., Chukwuma Obidegwu, *Post-Conflict Peace Building in Africa: The Challenges of Socio-Economic Recovery and Development* (World Bank, Africa Region Working Paper Series No. 73, Oct. 2004), available at <http://www.worldbank.org/afr/wps/wp73.pdf>. ("There is a strong case for the market-based approach for dealing with the complex combination of economic and governance issues that are at the roots of poor economic performance and conflict. The alternative to a market-based approach is a government led and controlled economic approach. This would be too risky since, in most cases, it was poor governance and socio-economic mismanagement by the government that plunged the country into conflict in the first place. Besides, it would be impractical in post-war situations, as the poor institutional and human capacity and the severe financial constraints would limit the scope for and effectiveness of public sector interventions in productive activities.").

196. See, e.g., HAL S. SCOTT, INTERNATIONAL FINANCE 676 (2005). For a discussion of the policy choices underlying privatizations, see William L. Megginson & Jeffrey M. Netter, *From State to Market: A Survey of Empirical Studies on Privatization*, 39 J. ECON. LIT. 321 (2001). On privatization in Russia in particular, and the endemic corruption and self-dealing that accompanied it, see Bernard Black, Reinier Kraakman & Anna Tarassova, *Russian Privatiza-*

Political development and self-determination is affected by the privileging of free-market policies in post-conflict zones.¹⁹⁷

V. CONSTITUTIONAL IMPLICATIONS OF IFI POST-CONFLICT ENGAGEMENT

IFI post-conflict policies represent a significant constitutional shift within these organizations. Post-conflict engagement is not based on any explicit textual provisions. Instead, authority is derived from an 'implied powers' reading of the Articles of Agreement. As international organizations with independent legal personalities, the IMF and World Bank's Articles of Agreement function as constitutions.¹⁹⁸ While formal amendments must be approved by the Board of Governors,¹⁹⁹ in practice many significant changes have taken place as a re-

tion and Corporate Governance: What Went Wrong?, 52 STAN. L. REV. 1731 (2000).

197. A recent report critiquing the Afghan government's policies states in this regard that "participation in markets is not open to all; benefits are not spread equitably between participants; and the way markets currently operate is having a negative effect on political governance and 'state-building.'" Sarah Lister & Adam Pain, *Trading in Power: The Politics of "Free Markets" in Afghanistan 1* (Afg. Research Eval. Unit, Briefing Paper, June 2004), available at http://www.areu.org.af/?option=com_docman&Itemid=&task=doc_download&gid=367.

198. The IMF and the Bank's Articles do not explicitly establish their independent legal personality, but it is implicit in the method of their creation. See, e.g., *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. Rep. 174, 179 (Apr. 11) (finding that despite the fact that the Charter did not explicitly establish the UN as an international person, such status could be inferred through necessity, member intent, and the practice of the Organization). Likewise, the Bank's powers to interpret its Articles of Agreement as a constitution inhere in its status as an independent international organization. As Broches explains, "the Bank's powers are not limited to those that are granted in express terms. The fact that an operation or transaction is not expressly authorized or contemplated by a specific provision of the Articles, does not mean that the Bank has no power to undertake it." ARON BROCHES, *SELECTED ESSAYS: WORLD BANK, ICSID, AND OTHER SUBJECTS OF PUBLIC AND PRIVATE INTERNATIONAL LAW* 28 (1995).

199. SHIHATA, *supra* note 21, at 3. See also IMF Articles of Agreement, *supra* note 4, art. XXVIII; World Bank Articles of Agreement, *supra* note 16, art. VIII.

sult of the teleological interpretation of organizational powers adopted by these institutions.²⁰⁰

Such an expansion occurred in both institutions in the 1980s. The Bank determined that its mandate permitted it to consider political issues that had economic *effects*.²⁰¹ The IMF's Guidance Note on governance activities makes a similar point: When making decisions, the IMF may consider political issues but must focus on the economic aspects of governance and not be influenced by the type of political regime in place in a given state.²⁰² Post-conflict policies and practices are a more recent example of the IFIs' expansion of their mandates through reinterpretation of their constitutive documents.²⁰³

The Bank's approach to membership provides a concrete example of this interpretive process. As noted above, one of

200. JOSEPH GOLD, INTERPRETATION: THE IMF AND INTERNATIONAL LAW 45 (1996) ("[I]nterpretation can be described loosely as the search for meaning of the text and implied powers as the discovery of authority not expressed in the text. Both approaches can be regarded as dedicated to a policy of promoting the effectiveness of the organization's purposes.")

201. See generally SHIHATA, *supra* note 21, at 168. See also Gunther Handl, *supra* note 193, at 643. As is well documented elsewhere, after the demise of the fixed-rate currency system and the oil crisis of the 1970s, the IMF transformed its focus from macroeconomic policies of industrialized states to microeconomic policies of developing countries. Around the same time, the World Bank moved from long term project lending to macroeconomic policy (which had traditionally been the IMF's domain) because it recognized that severe macroeconomic imbalances were detrimental to growth prospects. These shifts signaled changing institutional roles and a rejection of the exclusion of domestic and political issues from the IFIs jurisdictions. See Anne Krueger, *Whither the World Bank and the IMF?*, 36 J. ECON. LIT. 1983, 1989 (1998); Richard E. Feinberg, *The Changing Relationship Between the World Bank and the International Monetary Fund*, 42 INT'L ORG. 545 (1988); Robert Hockett, *From Macro to Micro to "Mission Creep": Defending the IMF's Emerging Concern with the Infrastructure Prerequisites to Global Financial Stability*, 41 COLUM. J. TRANSNAT'L L. 153 (2002).

202. The Guidance Note therefore limits the IMF's involvement in governance issues to those with a significant macroeconomic impact and identifies good governance in terms of "improving the management of public resources and supporting the development and maintenance of a transparent and stable economic and regulatory environment conducive to efficient private sector activities." See IMF, *The Role of the Fund in Governance Issues*, Guidance Note EBS/97/125 (July 27, 1997), in 30 SELECTED DECISIONS AND SELECTED DOCUMENTS, *supra* note 36; Joseph Gold, *Political Considerations Are Prohibited by Articles of Agreement when the Fund Considers Requests for the Use of Resources*, IMF SURV, May 23, 1983, at 146, 148.

203. See Gold, *supra* note 202, at 150-54.

the original reasons the Bank perceived post-conflict reconstruction as outside of its mandate is that states in conflict (and the successor entities emerging from civil war) do not meet threshold conditions for membership. The Bank's Articles of Agreement state that the purpose of the IBRD is to "assist in the reconstruction and development of territories of *members*"; and they further specify that "the resources and the facilities of the Bank shall be used *exclusively for the benefit of members*."²⁰⁴ The Bank's ability to admit new members and even to navigate around the basic requirement for membership is very limited: Not only must Bank members be states, but those states must first be members of the IMF.²⁰⁵ The Bank, therefore, appeared to be prohibited from intervening in many post-conflict zones without a settled legal status or government.²⁰⁶

This precise scenario arose with regards to Gaza. The World Bank had not financed projects in Gaza due to the unresolved legal status of the territory.²⁰⁷ In 1992, however, the Bank's Executive Directors determined that the improvement in the economic conditions of the Territories, the impact on

204. See World Bank Articles of Agreement, *supra* note 16, art. I, art. III, § 1(a) (discussing conditions for membership in the World Bank) (emphasis added). See also *id.*, art. III, § 4(i) (discussing other relevant provisions on membership). For a discussion of the admission of new members that were not original IMF members, see Elizabeth Lin, *The Federal Republic of Yugoslavia and the World Bank*, in 1 WORLD BANK LEGAL REVIEW: LAW AND JUSTICE FOR DEVELOPMENT 379 (Rudolf V. Van Puymbroeck ed., 2003).

205. World Bank Articles of Agreement, *supra* note 16, art. II, § 1 ("(a) The original members of the Bank shall be those members of the International Monetary Fund which accept membership in the Bank before the date specified in Article XI, Section 2 (e). (b) Membership shall be open to other members of the Fund, at such times and in accordance with such terms as may be prescribed by the Bank.").

206. Membership has been less problematic for the IMF because the IMF does not bar relationships with non-members. While it does not *lend* to non-members, it does provide technical assistance and policy advice to countries seeking membership (including post-conflict countries). The IMF's Articles of Agreement provide that members of the Fund are those that were present at the United Nations Monetary and Financial Conference in 1944 or that subsequently became members of the Fund by fulfilling the terms and conditions set out by the Board of Governors. For a discussion on the process of admitting new members, see JOSEPH GOLD, *THE FUND AND NON-MEMBER STATES: SOME LEGAL EFFECTS* 3 (1966).

207. Ibrahim F.I. Shihata, I. Hadi Abushakra & Hans-Jürgen Gruss, *Legal Aspects of the World Bank's Assistance to the West Bank and the Gaza Strip*, VII PALESTINE Y.B. INT'L L. 19, 25 (1992/1994).

regional economic cooperation and growth, and the benefits for peace and prosperity would be such that a Bank-supported Trust Fund would be "for the benefit of its members" pursuant to article III(1)(a) of the Articles of Agreement despite the fact that Gaza had neither applied for membership nor could qualify as a Bank member.²⁰⁸

This interpretation of the phrase "for the benefit of its members" was later applied to Kosovo and East Timor in 1999, when interim administrations were created by the UN. In a legal memorandum, the World Bank stated:

World Bank assistance to non-member countries, or territories with a *special status*, has been provided to the (then) Soviet Union, West Bank and Gaza, and Bosnia and Herzegovina, and is proposed for Kosovo. In all cases, the overriding consideration that ultimately led to the extension of Bank assistance was that the latter was to benefit the Bank's members, and in each case the benefits were identified and explained to the Executive Directors before the assistance was provided.²⁰⁹

Although it has not yet done so, the Bank could also use its Articles of Agreement as the basis for even more expansive jurisdiction over non-member states. Article IV (10) of the Bank's Articles of Agreement acts as a safeguard for the sovereignty of the Bank's member states.²¹⁰ That is, it restricts the Bank from intervening in the political affairs of *member* countries. This safeguard does not apply to *non-members*. Based on the wording of OP 2.30 of the *Operational Manual*, the Bank

208. *Id.* at 37; World Bank Articles of Agreement, *supra* note 16, art. III.

209. World Bank, *Memorandum of the Pres. of the Int'l Dev. Ass'n to the Ex'e Eds. on a Transitional Support Strategy of the World Bank Group for East Timor*, at Annex A, Rep. No. 21184-TP (Nov. 3, 2000), available at <http://sitere-sources.worldbank.org/INTTIMORLESTE/Resources/AllAnnex.pdf> (emphasis added). Kosovo was an internationally administered territory within the Former Yugoslavia under the UNMIK and therefore not eligible for membership. Similarly, UNTAET governed East Timor for three years until Timor-Leste became independent in May 2002. During this period, East Timor was no longer within the jurisdiction of Indonesia, nor was it a sovereign state capable of independent membership.

210. See World Bank Articles of Agreement, *supra* note 16, art. IV, § 10 ("The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned.").

would not be prohibited from engaging in wide-ranging intervention in non-member states, because the safeguards applicable to members have not been extended to non-members.²¹¹ The consequences of this lapse are significant: The limits that would normally apply to Bank programs in sovereign states are lifted in post-conflict situations. Any applicable framework is presumably derived instead from the IFI programs and perhaps from applicable Security Council resolutions.²¹²

IFIs may never be able to satisfy their critics. While some argue that their recent mandate expansions are illegitimate and contrary to the intentions of the founders,²¹³ others contend that it is high time the IFIs became effective in places where they are really needed, such as post-conflict situations. Indeed, Boyce suggests a series of recommendations which would further extend IFI mandates in post-conflict settings.²¹⁴ These apparently intractable positions might be resolved by a closer look at the accountability structures, which I examine next.

VI. TRUSTEESHIP & ACCOUNTABILITY

IFI economic and regulatory reforms in post-conflict zones illustrate a significant shift towards involvement in domestic issues. Although it might be a myth that economic policy is a matter of domestic control (as Lance Taylor notes, half the people and two-thirds of the countries in the world lack

211. See World Bank, *Operational Manual*, *supra* note 30, at OP 2.30 (Jan. 2001).

212. Cf. ALVAREZ, *supra* note 20, at 94 (discussing domestic jurisdiction and safeguard clauses amongst other international economic organizations).

213. See generally ALLAN H. MELTZER, REPORT OF THE INTERNATIONAL FINANCIAL INSTITUTION ADVISORY COMMISSION (March 2000), available at <http://www.house.gov/jec/imf/meltzer.pdf>. For a discussion of limitations on IFI powers, see Daniel D. Bradlow, Lecture to the 94th Annual Meeting of the Am. Soc'y of Int'l Law: Rapidly Changing Functions and Slowly Evolving Structures: The Troubling Case of the IMF (April 2000), in 94 AM. SOC'Y INT'L L. PROC. 152, 157 (2000) ("[T]he IMF has failed to define what the outer limits of its mandate are or to stipulate a principled basis on which it determines what issues it is willing to address and which issues are outside its mandate."); Antony Anghie, *Time Present and Time Past: Globalization, International Financial Institutions, and the Third World*, 32 N.Y.U. J. INT'L L. & POL. 243, 270 (2000).

214. See Boyce, *supra* note 35, at 5.

full control over their economic policy),²¹⁵ IFIs have emerged not only as internal norm-generators²¹⁶ but also as external rule-makers promulgating new laws in non-member and internationally administered territories. While all international organizations can enact internal regulations, it is very rare for specialized agencies to issue external secondary laws which are binding upon states.²¹⁷ IFI rule of law activities in internationally administered territories therefore reveal the fault lines of a more general set of IFI practices.

These broadening powers have led to calls for greater accountability and transparency within the organizations.²¹⁸ Because IFIs enjoy a broad range of privileges and immunities and are rarely subject to domestic suit, internal accountability mechanisms have been a good strategy for establishing checks and balances on their powers. The growing public roles of IFIs in post-conflict reconstruction place a finer point on this issue: Given that IFI actions are increasingly seen as legitimate only when there is corresponding accountability,²¹⁹ what duties do IFIs owe the inhabitants of occupied or internationally

215. Lance Taylor, Editorial, *The Revival of the Liberal Creed – the IMF and the World Bank in a Globalized Economy*, 25 *WORLD DEV.* 145, 145 (1997).

216. For a discussion of the “internal” (or norm-creating) lawmaking exercises of international organizations, see generally ALVAREZ, *supra* note 20.

217. Rauschnig, *supra* note 158, at 949.

218. See Ngaire Woods & Amrita Narlikar, *Governance and the Limits of Accountability: The WTO, the IMF, and the World Bank*, 53 *INT’L SOC. SCI. J.* 569, 569 (2001) (“[D]ecisions and policies taken [by international economic institutions] at the international level are increasingly affecting groups and people within states.”). For more general criticisms of these institutions, see, e.g., Joseph E. Stiglitz, *Democratizing the International Monetary Fund and the World Bank: Governance and Accountability*, 16 *GOVERNANCE: AN INT’L J. ON POL’Y, ADMIN. & INSTITUTIONS* 111 (2003); Jeffrey D. Sachs, *URGENT: How to Run the International Monetary Fund*, *FOREIGN POLICY*, July-Aug 2004, at 60; Ngaire Woods, *Holding Intergovernmental Institutions to Account*, 17 *ETHICS INT’L AFF.* 69 (2003); Jed Rubenfeld, *The Two World Orders*, *WILSON Q.*, Autumn 2003, at 22. The World Bank has now established an Inspections Panel that will hear complaints where Bank practices violate internal policies. See Daniel Bradlow, *International Organizations and Private Complainants: The Case of the World Bank Inspection Panel*, 34 *VA. J. INT’L L.* 553 (1994).

219. Cf. Larry Cata Backer, *Multinational Corporations, Transnational Law: The United Nations’ Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law*, 37 *COLUM. HUM. RTS. L. REV.* 287 (2005) (making a similar argument with regards to multinational corporations and the Corporate Social Responsibility movement).

administered territories when they operate under Security Council resolutions.²²⁰

It might be contended that post-conflict legal reform creates a fundamental conflict of interest for the IFIs, in that the interests of inhabitants of post-conflict zones are irreconcilable with their major stakeholders. After all, IFIs have a duty to promote liberalization and protect the interests of their stakeholders (i.e., their member states and particularly the United States, which provides the lion's share of the budget).²²¹ IFIs might consider that they have no option but to insist upon structural reforms and tight monetary policies that will protect the United States and other major industrialized countries, even if this brings about severe consequences in the recipient countries.²²² On the other hand, if the objective of multilateral economic reconstruction is to create a basis for sustainable self-government, IFI objectives must be altered to correspond to the overarching Chapter VII mandates.²²³

The medical field provides a useful analogy. Research physicians are confronted with similar dilemmas: Is the primary obligation of research physicians to their research and to the integrity of their data, or do they have a duty of care to patients who enroll in clinical trials even when they are not the

220. Note that the Security Council has also been widely criticized for operating in an unaccountable fashion in post-conflict situations. See, e.g., John Cerone, *Minding the Gap: Outlining KFOR Accountability in Post-Conflict Kosovo*, 12 EUR. J. INT'L L. 469 (2003); Amnesty Int'l, *Iraq: On Whose Behalf? Human Rights and the Economic Reconstruction Process in Iraq*, AI Index MDE 14/128/2003, June 20, 2003, available at [http://web.amnesty.org/library/pdf/MDE141282003ENGLISH/\\$File/MDE1412803.pdf](http://web.amnesty.org/library/pdf/MDE141282003ENGLISH/$File/MDE1412803.pdf).

221. See LOWENFELD, *supra* note 18, at 503 ("The Managing Director of the Fund and the staff owe their duty entirely to the Fund and to no other authority (Art. XII(4)(c)).").

222. Fund resources are derived from member quotas, and Bank resources derive from member subscriptions. Both quotas and subscriptions are determined according to the size of the member's economy, and these ratios translate into overall voting power within the organization. As a result, the United States, the country with the largest quota and subscription, has the highest total voting power at both the IMF and the Bank (16.73% in the IMF and 17.1% in the World Bank).

223. See Handl, *supra* note 193, at 645 (noting that in the context of sustainable development generally, IFIs must promote normative concepts that bear directly on sustainable development); Kingsbury, *supra* note 28, at 325 (making this point with regards to operational policies and indigenous peoples).

treating physicians?²²⁴ Perhaps they have a modified duty to both, and the law should seek to protect subjects from excessive deviations from their medical interests without requiring researchers to provide the same level of therapeutic attentiveness that they would in ordinary clinical care.²²⁵ By the same reasoning, it can be argued that IFIs have a special duty of care to act in the best interests of the inhabitants of internationally administered territories when they take on specific activities such as regulatory reform. This fiduciary-like duty to the inhabitants would limit their obligations to other constituencies such as stakeholders and markets and require a relaxation of the IFIs' "self-interested vigilance" in favor of the inhabitants' protection.²²⁶

I have argued elsewhere that the concept of trusteeship informs the scope of power and the type of accountability required of the UN when it administers post-conflict zones.²²⁷ Trusteeship was central to the UN mandate system, and the relationships of dependency that exist in contemporary post-conflict occupations (whether under the Geneva Conventions or under Security Council Resolutions) are akin to stewardship.²²⁸ Because IFIs act under Security Council mandates when they pursue economic reconstruction in post-conflict zones, they should similarly assume trustee-like responsibilities.²²⁹ IFIs are not blind to the unusual scope of their author-

224. See, e.g., Carl H. Coleman, *Duties to Subjects in Clinical Research*, 58 VAND. L. REV. 387, 389-95 (2005).

225. *Id.* at 440.

226. See Kingsbury, *supra* note 28, at 327 (noting that some courts are sympathetic to claims of breach of fiduciary liability by the Bank). In the domestic context, fiduciary duties normally involve a "duty of care" requiring fiduciaries to exercise diligence in making decisions on behalf of the beneficiary and a "duty of loyalty" obligating the fiduciary to promote the best interests of the beneficiary as opposed to the fiduciary's own interests or those of another person or entity. *Id.* See also Coleman, *supra* note 224, at 425.

227. Boon, *supra* note 59, at 316-18. Note that the concept of trusteeship also informs the duties imposed on belligerent occupants by the Hague Regulations and the Geneva Conventions, although the scope is narrower. For example, the laws of occupation require that occupying powers provide food and medicine to inhabitants. See Hague Regulations, *supra* note 77, at § III; Geneva IV, *supra* note 77, at art. 4.

228. See, e.g., RICHARD CAPLAN, *A NEW TRUSTEESHIP?: THE INTERNATIONAL ADMINISTRATION OF WAR-TORN TERRITORIES* (2002).

229. Cf. Handl, *supra* note 193, at 645 (discussing MDB involvement in sustainable development, and arguing that, as important participants in the

ity. The World Bank's post-conflict policies note the "special status" of post-conflict zones,²³⁰ and the Bank characterized its role in East Timor as one of "unusual cooperation" between the East Timorese people, UNTAET, and donor countries and institutions:

The World Bank, like many other institutions, *took on an unaccustomed role*. The Bank was involved particularly early, in planning for reconstruction prior to the 1999 ballot, and has supported a wide range of activities through its trusteeship of the Trust Fund for East Timor, its economic monitoring activities and its responsibility for co-chairing donor meetings.²³¹

Trusteeship requires that an administering authority manage the affairs of dependent parties in their best interests while refraining from self-dealing.²³² Particularly important in this regard is recognition of the vulnerability of the dependent party due to the high potential for exploitation. Article 73 of the UN Charter confirms this obligation: UN members who administer territories whose peoples have not achieved a full degree of self government must recognize that "the interests of the inhabitants of these territories is paramount."²³³

international legal process, they have a responsibility to use loan criteria and standards that might not be of relevance from a narrow economic development point of view).

230. See *Iraq Interim Strategy*, *supra* note 49, at 15.

231. Rohland & Cliffe, *supra* note 58, at 1 (emphasis added).

232. See generally CHRISTOPHER WEERAMANTRY, NAURU: ENVIRONMENTAL DAMAGE UNDER INTERNATIONAL TRUSTEESHIP 227-30 (1992) (discussing the basic requirements of a fiduciary in international law). For an analogy under Canadian law, see *K.L.B. v. British Columbia*, [2003] 2 S.C.R. 403, ¶ 49 (defining a fiduciary duty as a trust-like duty involving duties of loyalty and an obligation to act in a disinterested manner that puts the recipient's interest ahead of all other interests).

233. U.N. Charter art. 73. See also *International Status of South-West Africa*, Advisory Opinion, 1950 I.C.J. 128 (July 11); *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 I.C.J. 16, 28 (June 21) (discussing the sacred trust and the well-being of inhabitants). Similar reasoning is apparent in contemporary jurisprudence in countries such as Canada with regards to the rights of Aborigines. Under section 35 of the 1982 Canadian Constitution Act, the Canadian government has a fiduciary obligation towards Aboriginal peoples to act in their best interests. See *Constitution Act 1982*, being *Schedule B to the Canada Act 1982*, R.S.C., No. 5 (Appendix II 1985), § 35.

In practice, trusteeship affects the process and the substance of legal reforms. With regards to process, recent post-conflict legal reforms have been characterized by rapid and sweeping changes based on a common blueprint.²³⁴ IFIs have tended to sequence and implement a standard set of market-oriented laws.²³⁵ While experiences elsewhere are not irrelevant, the one-size-fits-all approach cannot respond to local contingencies, particularly where nuanced political objectives such as a sustainable peace, equitable development, and democratic consolidation are sought. For example, Security Council Resolution 1244 establishing the UN Mission in Kosovo set forth specific objectives to be implemented "*with the assistance of relevant international organizations*" in order to "[facilitate] a political process designed to determine Kosovo's future status, . . . [oversee] the transfer of authority from Kosovo's provisional institutions to institutions established under a political settlement; [support] the reconstruction of key infrastructure and other economic reconstruction; . . . and [protect and promote] human rights." The Security Council also welcomed:

[T]he work in hand in the European Union and other international organizations to develop a comprehensive approach to the economic development and stabilization of the region affected by the Kosovo crisis, including the implementation of a Stability Pact for South Eastern Europe with broad international participation in order to further the promotion of democracy, economic prosperity, stability and regional cooperation.²³⁶

The core substantive obligations of trusteeship in post-conflict legal reform involve objective criteria for managing post-conflict affairs. In the post-conflict context, potential abuses may be most effectively curtailed by delineating specific areas of IFI competence, requiring consultation where national interests will be affected by regulation, and modifying

234. See generally Boon, *supra* note 59, at 322 (discussing the commonality in the substance of legal reforms in East Timor, Kosovo, and Iraq).

235. For example, compare the similarity of banking laws in Iraq and East Timor. Compare CPA Order No. 94, *supra* note 121, arts. 5, 13, 26 & 29, with UNTAET Reg. No. 2008, U.N. Doc. UNTAET/REG/2000/8, arts. 5, 9, 23, 26 (Feb. 25, 2000).

236. S.C. Res. 1244, *supra* note 184, ¶¶ 10, 11, 17 (emphasis added).

aggressive free-market transitions to incorporate a more gradual approach to institutionalization and equitable economic development. Rather than generally deferring to IFI recommendations on economic reconstruction the Security Council should limit IFI involvement to specific areas.

The Security Council could also curb the discretionary powers of IFIs involved in post-conflict reconstruction by requiring the organizations to consult with and provide standardized reports to the populations affected by their activities.²³⁷ A consultative obligation has, for example, been recognized in Canada as within the Crown's fiduciary obligation towards Aboriginals. The duty to consult has been extended by statute to private companies in the petroleum industry.²³⁸ By analogy, IFIs could be required by the Security Council to consult with local communities about proposed regulatory changes.

Limiting the subject matter competence of IFIs and mandating consultations with the local population would help ensure that, when IFI interests (or the interests of IFI stakeholders or the markets) do not coincide with the long-term economic interests of the inhabitants of occupied territories, alternatives can be explored. For example, legal reforms that involve significant policy choices on issues like privatization should be delayed until representative governments are in place or should be implemented in such a way as to ensure that some national control is retained.²³⁹ Not only will this limit potential conflicts of interest between administrators and inhabitants but there are good business reasons for this approach: Unpopular changes may be rejected by subsequent

237. At present, the IFIs have no reporting obligations to inhabitants. The UN Missions in Kosovo and East Timor created the office of "Ombudsperson" as a post-hoc accountability mechanism.

238. Cf. Sandra Gogal, Richard Riegert & Joann Jamieson, *Aboriginal Impact and Benefit Agreements: Practical Considerations*, 43 ALBERTA L. REV. 129 (2005) (discussing the duty on the petroleum industry to consult with Aboriginals where their rights are affected, and noting that the duty to consult increases with the potential impact on Aboriginal rights). See also Kingsbury, *supra* note 28, at 325 (discussing the World Bank's operational policy on consultation with indigenous peoples).

239. Stiglitz, *supra* note 62, at 18 (commenting on the hazards of privatization).

sovereign governments, leading to instability and potentially significant profit losses.²⁴⁰

VII. CONCLUSION

In domestic parlance, the rule of law is primarily a procedural notion whereby laws provide settled rules to guide future action. I have suggested that, through their rule of law programs and post-conflict engagement generally, international organizations such as the UN, the World Bank and the IMF have given the rule of law a substantive dimension by promoting marketization. IFIs have started to take a position on what laws are good laws rather than simply advocating the consistent promulgation and enforcement of laws irrespective of their content. Moreover, the IFIs have become advisors, and, in some instances, primary lawmakers in the occupation of Iraq and in UN-administered peacebuilding operations.

The concept of the rule of law has been captured by economists, lawyers, and international organizations who use the term for various and sometimes conflicting ends.²⁴¹ In other words, despite the procedural nature of the rule of law, the model laws implemented in post-conflict situations are not value-neutral. Many contain important policy choices about ownership rights and the allocation of wealth in societies. IFI regulatory reform in post-conflict situations provides a particularly good example of how these policy choices are being translated into law and more generally of how the rule of law and the *role* of law in peacebuilding has shifted from limited programs to establish civil or criminal accountability for past atrocities (often under the rubric of "transitional justice") to a broad-based attempt to rebuild national legal systems and lay the basis for a market economy.²⁴²

Marketization and the maintenance of international peace and security have therefore emerged as the second and

240. See Klein, *supra* note 123, at 11 (discussing political risk insurance in Iraq).

241. Thomas Carothers, *The Rule of Law Revival*, FOREIGN AFF. (March/April 1998), at 95; Carothers, *supra* note 1, at 7; Kleinfeld Belton, *supra* note 5, at 5-6.

242. This shift is made apparent by gaps in programming and literature. Neil Kritz's book on Transitional Justice, for example, does not mention economic reform. See 1 TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES 50 (Neil J. Kritz ed., 1995).

third conceptual pillars behind contemporary rule of law programs in post-conflict zones, signaling the convergence of economic globalization and reconstruction. Contemporary peacebuilding strategies therefore place a modern veneer on the longstanding linkage between commerce, stability, and the rule of law. Two examples bear this out: The Afghan Constitution enshrines a market economy as a constitutional principle,²⁴³ and the Dayton Accords for Bosnia state that the parties desire to “promote the general welfare and economic growth through the protection of private property and the promotion of a market economy.”²⁴⁴ Economic development and the free market have rather startlingly made their way into the founding documents of these newly constituted post-conflict societies.

Despite this enthusiastic “legal” embrace of the free market, recent attempts at legal reform have not been considered a success. The prognosis for Iraq is a case in point. Despite the CPA’s efforts to significantly reform the legal system, general instability has stunted economic development and broad regulatory reforms have had little effect. Because new laws are not necessarily the answer to old problems and the incentives for repetition (through standard term model laws) sometimes outweigh the real needs of societies, a healthy skepticism should inform aggressive technical assistance programs in vulnerable states.²⁴⁵

Increased IFI involvement in legal reform also brings into relief the longstanding hesitancy with which IFIs have regarded economic and social rights.²⁴⁶ I have argued that IFI legal reform has taken on quasi-legislative dimensions. Principled restraints on the exercise of those powers should become all the more pressing. An important decision handed down by

243. AFGHAN CONST. (2004) art. 10 (“The state shall encourage, protect as well as ensure the safety of capital investment and private enterprises in accordance with the provisions of the law and market economy.”). For an account of the state of the law in Afghanistan versus the incentives for private investors, see Michael Luongo, *Time to Open the Kabul Branch?*, N.Y. TIMES, Nov. 8, 2005, at C11.

244. General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Peace Agreement), Bosn.-Herz., Annex 4 preamble, Dec. 14, 1995, 35 I.L.M. 89, 118.

245. Channell, *supra* note 8, at 8-9.

246. See Gordon, *supra* note 133.

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the Bosnia Human Rights Chamber creates a precedent, whereby the Office of the High Representative was subjected to international norms due to its governance functions.²⁴⁷ This is the time for the IFIs to adopt the rule of law as an operational concept inside as well as outside their organizations.

²⁴⁷ See discussion in Ralphe Wilde, *From Danzig to East Timor and Beyond: The Role of International Territorial Administration*, 95 AM. J. INT'L L. 583 (2005).

