

2004

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### Recommended Citation

Olivera Medenica, *The World Bank, The IMF and the Global Prevention of Terrorism: A Role for Conditionalties*, 29 Brook. J. Int'l L. (2004).

Available at: <https://brooklynworks.brooklaw.edu/bjil/vol29/iss2/3>

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# THE WORLD BANK, THE IMF AND THE GLOBAL PREVENTION OF TERRORISM: A ROLE FOR CONDITIONALITIES

*Olivera Medenica\**

## I. INTRODUCTION

The Twin Towers, an architectural symbol of Western power, came crashing down on a beautiful and hopelessly tragic September morning. The incredible scale of the attack left us horrified, bewildered, and wounded as a nation. With ghastly images in our memory, the U.S. turned towards the bleak prospect of fighting an elusive enemy. Like any true economic and military superpower, our response was strong and immediate. But was our response efficient, and most importantly, are we safer now than before?

In an interview granted shortly after September 11, 2001, James Wolfhenson, the president of the World Bank, described the collapse of the Twin Towers as not only a terrorist attack of the grandest scale, but also as the image “of the South landing hard on the cradle of the North.”<sup>1</sup> This statement is insightful because it is powerfully descriptive and suggests that a collective response is needed to address the issue. Although poverty may not be the sole cause of terrorism, it does play a role in its spread.<sup>2</sup> If that is the case, ignoring such a connection is not only negligent, but as has been proven, deadly.

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<sup>1</sup> Maurizio Molinari, *Wolfensohn: La Guerra al Terrorismo Si Vince Eliminando la Povertà “L’11 Settembre È Come Se L’afghanistan Fosse Sbarcato A Wall Street Da Allora Non Possiamo Più Ignorare I Problemi Del Sud Del Mondo”* [The War Against Terrorism Will Be Won By Eliminating Poverty – “September 11 is as if Afghanistan Landed on Wall Street; Since Then, We Can No Longer Ignore the Problem of the South”], LA STAMPA, Dec. 12, 2001, at 5, available at <http://digilander.libero.it/liceorodolico/guerra/Wolfensohn.htm>.

<sup>2</sup> Powell: *Poverty Aids Terrorism*, CNN MONEY, Feb. 1, 2002, available at [http://money.cnn.com/2002/02/01/news/davos\\_powell/index/htm](http://money.cnn.com/2002/02/01/news/davos_powell/index/htm).

This Article argues that the World Bank and the International Monetary Fund ("IMF"), collectively the International Financial Institutions ("IFIs"), could play a central role in the war on terrorism. As international institutions with unrivaled resources at their disposal, both the World Bank and the IMF could begin incorporating broad anti-terrorism conditions within their financial assistance programs.<sup>3</sup> The IFIs could expand beyond their respective mandates and impose conditions that would require states seeking financial assistance to implement an anti-terrorism framework designed to criminalize terrorist offenses, prevent potential terrorists and terrorist groups from using such states' territory to further terrorist purposes, and allow for the exchange of information with the necessary international authorities concerning the activities and crimes of terrorists and terrorist groups. In return, the funds provided by the IFIs could assist these states in strengthening their economies and ameliorating prevalent levels of poverty.

Part II of this Article analyzes different definitions of terrorism and examines the leading factors contributing to its rise. Part III.A provides an historical and technical outline of the IFIs' respective mandates and activities from their inception at the Bretton Woods conference to their current activities. Part III.B posits a new role for the IFIs and concludes that these institutions should expand their respective mandates by providing financial assistance to address the leading factors contributing to the spread of terrorism and conditioning such assistance on the fulfillment of the objectives contained within United Nations ("UN") Resolution 1373.<sup>4</sup>

## II. TERRORISM

Terrorism, as an act of political violence, has existed for as long as political ideologies have been promoted.<sup>5</sup> In the wake of September 11<sup>th</sup>, the subject of terrorism has become a common

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3. Although the IFIs have begun to address the issue of terrorism, the institutions' work has not been included as a condition for financial assistance and it has been limited to financing of terrorism and anti-money laundering issues.

4. S.C. Res. 1373, U.N. SCOR, 4385th Mtg., Supp. 1, U.N. Doc. S/RES/1373 (2001).

5. See BRUCE HOFFMAN, *INSIDE TERRORISM* 14–15 (1998).

staple of our daily news intake. But aside from religious fanaticism, scant attention has been paid to economic and social factors underlying the proliferation of this dreadful phenomenon. To fully understand terrorism, attention must shift from the criminal nature of the act to a perception of terrorism as a symptom of our social pathology. The following section will therefore explore the root causes of terrorism: first, through an examination of the various definitions of the term, and second, through an analysis of the key factors leading to or facilitating the development of this sociopolitical disease.

#### A. *Definitions of Terrorism*

Although the word “terrorist” has become a part of our everyday vocabulary, no single definition of the term has gained universal acceptance within the international community.<sup>6</sup> This lack of consensus stems from the inherently pejorative nature of the term.<sup>7</sup> It is a word loaded with negative connotations that are generally only applicable to one’s adversaries.<sup>8</sup> As Brian Jenkins writes “[w]hat is called terrorism...seems to depend on one’s point of view. Use of the term implies a moral judgment; and if one party can successfully attach the label terrorist to its opponent, then it has indirectly persuaded others to adopt its moral viewpoint.”<sup>9</sup> This proclivity for subjective judgment has spawned a great variety of definitions, each reflecting the political slant of the particular interest group.<sup>10</sup> Title 22 of the U.S. Code, Section 2656f(d) defines terrorism as “premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents.”<sup>11</sup>

The U.S. Federal Bureau of Investigation (“FBI”) defines terrorism as “the unlawful use of force or violence against persons or property to intimidate or coerce a Government, the civilian population, or any segment thereof, in furtherance of political or

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6. HOFFMAN, *supra* note 5, at 37; *see also* ALEX P. SCHMID, POLITICAL TERRORISM: A RESEARCH GUIDE TO CONCEPTS, THEORIES, DATA BASES AND LITERATURE 6 (1983).

7. HOFFMAN, *supra* note 5, at 31.

8. *Id.*

9. *Id.*

10. *See id.* at 38.

11. *See* 22 U.S.C. § 2656f(d) (2000).

social objectives.”<sup>12</sup> The U.S. Department of Defense defines it as “the unlawful use of — or threatened use of — force or violence against individuals or property to coerce or intimidate governments or societies, often to achieve political, religious, or ideological objectives.”<sup>13</sup>

Each one of these examples partially defines terrorism. The first leaves out spontaneous acts of political violence along with the psychological dimension of terrorism.<sup>14</sup> The second offers no insight as to what political or ideological aims might entail, and the third, although most complete, omits the social dimension of terrorism.<sup>15</sup>

As explained by Bruce Hoffman, perhaps the best explanation of the term lies in its distinction from other types of violence.<sup>16</sup> When contrasted with guerrilla warfare, ordinary criminals and the lunatic assassin, terrorism can be understood as:

- Ineluctably political in aims and motives;
- Violent — or, equally important, threaten[ed] violence;
- Designed to have far-reaching psychological repercussions beyond the immediate victim or target;
- Conducted by an organization with an identifiable chain of command or conspiratorial cell structure (whose members wear no uniform or identifying insignia); and
- Perpetrated by a subnational group or non-state entity.<sup>17</sup>

Taking these elements into account, and for purposes of this Article, terrorism will be defined “as the deliberate creation and exploitation of fear through violence or the threat of violence in the pursuit of political change.”<sup>18</sup>

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12. See 28 C.F.R. § 0.85 (West 2004); see also FEDERAL BUREAU OF INVESTIGATION, U.S. DEPT. OF JUSTICE, TERRORISM IN THE UNITED STATES: COUNTERTERRORISM THREAT ASSESSMENT AND WARNING UNIT, NATIONAL SECURITY DIVISION i (1998), available at <http://www.fbi.gov/publications/terror/terror98.pdf>.

13. Military Operations in Low Intensity Conflict, Chapter 3, Department of the Army FM 100-20/APF3-20 (Dec. 5, 1990), available at [http://www.maoism.org/misc/lic/fm100-20/10020ch3.htm#s\\_25](http://www.maoism.org/misc/lic/fm100-20/10020ch3.htm#s_25).

14. See HOFFMAN, *supra* note 5, at 38–39.

15. *Id.*

16. *Id.* at 40.

17. *Id.* at 43.

18. *Id.*

### B. State Failure

The argument is often made that poverty causes terrorism.<sup>19</sup> Drawing such an equation merely provides an adumbrated explanation of the problem. It is well-known that Osama bin Laden, the alleged mastermind of worldwide Islamic terrorism, originates from great Saudi wealth.<sup>20</sup> It is also fairly well known that most if not all of the September 11<sup>th</sup> hijackers were highly educated and received money from their families.<sup>21</sup> But even if there is no direct correlation between poverty and terrorism, there is some validity in recognizing the connection.<sup>22</sup> Pov-

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19. See Alan Friedman, *UN Leader To Warn of Dangers in Wealth Gap*, INT'L HERALD TRIB., Feb. 4, 2002, at 1; Charles Lambroschini, *Guerre Contre le Terrorisme – Dans Un Entretien Au “Figaro”, Le Secrétaire Général des Nations Unies Souligne Que La Démocratie Est Une Valeur Universelle*; Kofi Annan: “Il Faut S’attaquer Aux Racines Du Terrorisme, La Pauvreté Et L’ignorance” [War Against Terrorism: In an Interview with “Figaro” the Secretary General of the UN Stresses That Democracy Is a Universal Value: Kofi Annan: “We Must Address The Roots of Terrorism, Poverty and Ignorance”], LE FIGARO, Nov. 5, 2001 at 4; Swami Agnivesh & Rev Valson Thampu, *Poverty and Terrorism: Shared Roots* (Jan. 12, 2002), available at <http://www.tehelka.com/channels/cometary/2002/jan/12/com011202poverty.htm>; Andrew Demaria, *Arroyo Links Terrorism to Poverty*, CNN.com at <http://www.cnn.com/2001/WORLD/asiapcf/southeast/10/29/phili.arroyo> (last visited Oct. 30, 2003); Jim Lobe, *US Report Links Terrorism with Rights, Poverty*, ASIA TIMES, Mar. 6, 2002 available at <http://www.atimes.com/c-asia/DC06Ag03.html>; Kuldip Nayar, *Terrorism: Rooted in Poverty*, BUS. LINE, Sept. 14, 2001, available at <http://www.blonnet.com/businessline/2001/09/14/stories/04148503.htm>; Powell: *Poverty Aids Terrorism*, CNN MONEY, Feb. 1, 2002 at [http://money.cnn.com/2002/02/01/news/davos\\_powell/index.htm](http://money.cnn.com/2002/02/01/news/davos_powell/index.htm).

20. George A. Lyden, *The International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001: Congress Wears a Blindfold While Giving Money Laundering Legislation a Facelift*, 8 FORDHAM J. CORP. & FIN. L. 201, 238–39 (2003) (“Bin Laden’s personal fortune has been estimated to be as high as \$300 million.”); Juliette Bennett, *Public Private Partnerships: The Role of the Private Sector in Preventing Funding Conflict*, 35 VAND. J. TRANSNAT’L L. 711, 711–12 (2002) (“Bin Laden’s reportedly vast inherited wealth comes from his father’s hugely successful international construction company.”).

21. Ilias Bantekas, *The International Law of Terrorist Financing*, 97 AM. J. INT’L L. 315, 321 (2003); Peter Finn, *Hijackers Depicted as Elite Group: European Officials See Greater Sophistication*, WASH. POST, Nov. 5, 2001, at A01.

22. Friedman, *supra* note 19 (quoting both U.S. Secretary of State Colin Powell’s and Secretary General of the UN Kofi Annan’s recognition that terrorism flourishes in impoverished countries); Demaria, *supra* note 19 (quoting Philippine President Gloria Macapagal-Arroyo as stating, “[i]t is evil that

erty may not be the cause of terrorism, but terrorists can manipulate poverty to their advantage.

As Robert Rotberg notes, an alternative and more probable explanation to the poverty-terrorism synergy lies in the phenomena of failed states.<sup>23</sup> According to Rotberg, “[b]ecause failed states are hospitable to and harbor nonstate actors — warlords and terrorists — understanding the dynamics of nation-state failure is central to the war against terrorism.”<sup>24</sup> How best to prevent state failure and strengthen weak states therefore becomes a critical component of any meaningful policy debate about terrorism prevention.

So what is state failure, and how does a state become a failing or failed state? As Rotberg states, “[n]ation-states fail because they are convulsed by internal violence and can no longer deliver positive political goods to their people.”<sup>25</sup> He distinguishes between several incremental stages of nation-state failure: general weakness or apparent distress, failure, and collapse.<sup>26</sup> The extent to which a state performs well on the success-failure spectrum hinges on its capacity to deliver political goods to its citizens.<sup>27</sup> These political goods “encompass expectations, conceivably obligations, inform the local political culture, and together give content to the social contract between ruler and ruled that is at the core of regime/government and citizenry interactions.”<sup>28</sup>

Although each political good carries great weight, there is a hierarchy of political goods.<sup>29</sup> None is as crucial as a state’s ob-

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causes terrorism but the evil needs to spread its ideology as a mass base and the best breeding ground is poverty”).

23. See generally STATE FAILURE AND STATE WEAKNESS IN A TIME OF TERROR (Robert I. Rotberg ed., 2003) [hereinafter ROTBERG, IN A TIME OF TERROR]; Robert I. Rotberg, *The New Nature of Nation-State Failure*, 25 WASH. Q. 85, 2002 [hereinafter Rotberg, *The New Nature of Nation-State Failure*]; Robert I. Rotberg, *Failed States in a World of Terror*, 81 FOREIGN AFF. July-Aug. 2002 [hereinafter Rotberg, *Failed States*].

24. Rotberg, *The New Nature of Nation-State Failure*, supra note 23, at 85.

25. Robert I. Rotberg, *Failed States, Collapsed States, Weak States: Causes and Indicators* in STATE FAILURE AND STATE WEAKNESS IN A TIME OF TERROR 1 (Robert I. Rotberg ed., 2003) [hereinafter Rotberg, *Causes and Indicators*].

26. *Id.*

27. See *id.* at 1–2.

28. *Id.* at 3.

29. *Id.*

ligation to provide security to its citizenry; a state must be able to control its borders within and without.<sup>30</sup> It must not only have the capacity to prevent cross-border invasions, but it must also provide its citizens the opportunity to resolve disputes without recourse to arms.<sup>31</sup> Once security has been sustained, the delivery of other political goods becomes possible.<sup>32</sup>

A state must also provide a predictable and recognizable system of adjudicating disputes.<sup>33</sup> It must regulate and protect the rights of its citizens by establishing codes and procedures, as well as a judicial system that effectively symbolizes and validates the local principles of justice and fair play.<sup>34</sup>

Another important political good is the right of citizens to liberally participate and contribute to the political process. This includes: “the right to compete for office; respect and support for national and regional political institutions, like legislatures and courts; tolerance of dissent and difference; and fundamental civil and human rights.”<sup>35</sup>

Other remaining goods that similarly play an essential role in the development of a healthy, or successful, state include:

[M]edical and health care (at varying levels and costs); schools and educational instruction (of various kinds and levels) — the knowledge good; roads, railways, harbors, and other physical infrastructures — the arteries of commerce; communications infrastructures; a money and banking system, usually presided over by a central bank and lubricated by a national currency; a beneficent fiscal and institutional context within which citizens can pursue personal entrepreneurial goals and potentially prosper; the promotion of civil society; and methods of regulating the sharing of the environmental commons.<sup>36</sup>

Whether a state is categorized as weak, strong, or failed will not depend on its success or failure to deliver a particular good, but rather on its overall performance in the hierarchy of political goods.<sup>37</sup> Strong states will undoubtedly perform well in all of

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30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 3–4.

37. *Id.* at 4.



the categories.<sup>38</sup> Weak states, however, will provide a sporadic and inconsistent performance, fulfilling some or few of the political good categories.<sup>39</sup> The fewer categories a state is capable of fulfilling, the more it tends to edge towards the brink of failure.<sup>40</sup>

In contrast, failed states deliver limited quantities, if any, of essential political goods.<sup>41</sup> They are deeply conflicted, divided by civil wars or disobedience, and are generally typified by weak institutions and a corrupt leadership.<sup>42</sup> According to Rotberg, failed states share the following characteristics:

[A] rise in criminal and political violence; a loss of control over their borders; rising ethnic, religious, linguistic, and cultural hostilities; civil war; the use of terror against their own citizens; weak institutions; a deteriorated or insufficient infrastructure; an inability to collect taxes without undue coercion; high levels of corruption; a collapsed health system; rising levels of infant mortality and declining life expectancy; the end of regular schooling opportunities; declining levels of GDP per capita; escalating inflation; a widespread preference for non-national currencies; and basic food shortages, leading to starvation.<sup>43</sup>

Because failed states are unable or unwilling to deliver key political goods, they are vulnerable to attacks upon their fundamental legitimacy.<sup>44</sup> When a self-serving ruling elite is perceived as working for itself and not the state, citizens begin to seek alternative sectional and community loyalties.<sup>45</sup> Group leaders or communal warlords, some deriving support from outside sources, answer this demand for support and security.<sup>46</sup> It is at this stage that terror is likely to breed.<sup>47</sup>

In the final stages of failure, a state becomes truly collapsed.<sup>48</sup> Although a rare and extreme case, the collapsed state is typified

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38. *Id.*

39. *Id.* at 4.

40. *Id.*

41. *Id.* at 6.

42. *See id.* at 5–6, 8.

43. Rotberg, *Failed States supra* note 23, at 132.

44. *See id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 133.

by a clear power vacuum.<sup>49</sup> The state becomes a geographic expression of meaningless borders.<sup>50</sup> In this state of deconstruction, warlords or local group leaders take over and install their version of statehood by setting up local security, markets and trading arrangements.<sup>51</sup>

The relative successes and failures of states operate on a broad continuum, and no particular stage is terminal or permanent. The international community's ability to recognize a state's slide into failure is crucial in light of a failed state's vulnerability as a breeding ground for terrorism. But mere recognition of these warning signs, although a feat by itself, is insufficient to produce positive change. The international community must be ready to react, and to this end, it must be ready to commit time, energy and most importantly, resources to help prevent a state's slide into failure.

### III. A NEW ROLE FOR THE IFIS

Although few may disagree that terrorism must be addressed on a global scale, questions remain as to how the international community should achieve such an objective.<sup>52</sup> A meaningful response must be three dimensional. It must address the root causes of the problem, provide a regulatory framework to prevent future infractions and ensure compliance through an effective enforcement mechanism. The following section will examine a possible role for the IMF and the World Bank, first through a brief overview of the IFIs' respective fields of operation and the extent to which these institutions' policies and lending facilities have evolved over time; and second, through an analysis of loan conditions and their potential meaning in the war against terrorism.

#### A. *The IMF and World Bank*

The IMF and the World Bank were created out of coordinated efforts by the major Allied governments to revive international

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49. *See id.*

50. *See id.*

51. *See id.* at 133–34.

52. *See discussion, infra*, at Part II.A. *See* Jennifer Trahan, *Terrorism Conventions: Existing Gaps and Different Approaches*, 8 NEW ENG. INT'L & COMP. L. ANN. 215, 220–21 (2002).

trade in the post-World War II era.<sup>53</sup> The sharp economic downturn of the Great Depression and the military investment, both human and economic, of World War II had left the global economy in severe need of a panacea for its fiscal ailments.<sup>54</sup>

In 1944, representatives of 45 governments met at the UN Monetary and Financial Conference at Bretton Woods, New Hampshire, in order to finance the rebuilding of a war-torn Europe and to prevent future economic depressions.<sup>55</sup> The consensus was to emphasize transnational commerce by building a system supported by cooperation and interdependence in the fields of trade and monetary policy.<sup>56</sup> Out of this agreement emerged the IMF and the World Bank.<sup>57</sup>

### 1. The Institutional Organization of the IMF

The IMF was created as a specialized agency of the UN designed to promote the stability of the international monetary system.<sup>58</sup> Its central objective is to prevent economic crises from occurring by advising member states on the soundness of their economic policies and to provide temporary financing for member states experiencing balance of payments problems.<sup>59</sup>

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53. Rajesh Swaminathan, *Regulating Development: Structural Adjustment and the Case for National Enforcement of Economic and Social Rights*, 37 COLUM. J. TRANSNAT'L L. 161, 164 (1998).

54. See Swaminathan, *supra* note 53, at 164. See generally International Monetary Fund, *What is the International Monetary Fund*, at <http://www.imf.org/external/pubs/ft/exrp/what.htm> (last visited Oct. 30, 2003) [hereinafter *What is the IMF?*].

55. See JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* 11 (2002). See also *What is the IMF?*, *supra* note 54.

56. Swaminathan, *supra* note 53, at 164.

57. *Id.*; see also STIGLITZ, *supra* note 55, at 11.

58. *What is the IMF?*, *supra* note 54.

59. See *id.* Benefiting from an almost global membership of 183 states, the IMF reports to the ministries of finance and the central banks of governments of its member states. See *id.*; STIGLITZ, *supra* note 55, at 12. A Board of Governors, representing all member states, is the highest authority within the institution and meets once a year to decide on major policy issues. See *What is the IMF?*, *supra* note 54. Day-to-day operations are left to the Executive Board which meets several times per week at the IMF's headquarters in Washington, D.C. See *id.* The Executive Board consists of a total of 24 Executive Directors with the United States, Japan, Germany, France, United Kingdom, China, Russia, and Saudi Arabia, having their own seats on the Board, and the remaining directors elected on a rotating two-year basis. See *id.* Decisions are made based on a weighted voting system with the state with the

The IMF's statutory purposes are embodied in its Articles of Agreement.<sup>60</sup> Its purposes include the promotion of balanced world trade expansion, exchange rate stability, the establishment of a multilateral system of payments, and temporary financial assistance to member states experiencing balance of payment problems.<sup>61</sup> To further its goals, the IMF examines the

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larger "quota" having more votes. *See id.* These quotas are essentially capital subscriptions that members pay upon joining the institution and are intended to reflect each member's relative size in the global economy. *See id.* As quotas are determined by the economic size of a country, it is the major developed countries that benefit from greater voting powers. STIGLITZ, *supra* note 55, at 12. As a result of this, the United States benefits from an actual veto power. *Id.*

60. Articles of Agreement of the International Monetary Fund, *opened for signature* Dec. 27, 1945, 160 Stat. 1401, *as amended* April 1, 1978, 29 U.S.T. 2203, 2 U.N.T.S. 39, *available at* <http://www.imf.org/external/pubs/ft/aa/index.htm> (last visited Feb. 18, 2004) [hereinafter IMF Articles of Agreement].

61. Article I of the Articles of Agreement of the International Monetary Fund provides:

The purposes of the International Monetary Fund are:

- (i) To promote international monetary cooperation through a permanent institution which provides the machinery for consultation and collaboration on international monetary problems.
- (ii) To facilitate the expansion and balanced growth of international trade, and to contribute thereby to the promotion and maintenance of high levels of employment and real income and to the development of the productive resources of all members as primary objectives of economic policy.
- (iii) To promote exchange stability, to maintain orderly exchange arrangements among members, and to avoid competitive exchange depreciation.
- (iv) To assist in the establishment of a multilateral system of payments in respect of current transactions between members and in the elimination of foreign exchange restrictions which hamper the growth of world trade.
- (v) To give confidence to members by making the general resources of the Fund temporarily available to them under adequate safeguards, thus providing them with opportunity to correct maladjustments in their balance of payments without resorting to measures destructive of national or international prosperity.

performance of each member's economy as a whole, focusing mainly on its macroeconomic policies — policies on exchange rates, the management of money, and the member state's government budget — and financial sector policies.<sup>62</sup> The IMF also places due consideration on a member state's structural policies, such as labor market policies, that could potentially affect macroeconomic performance.<sup>63</sup> Additionally, the institution advises its members on the best course of action in re-evaluating national policies so they more effectively pursue objectives such as high employment, low inflation, and sustainable economic growth.<sup>64</sup> This technical assistance is further supplemented with training programs for government and central bank officials of member states.<sup>65</sup>

An important aspect of the institution's organization is its ability to provide loans to member states experiencing balance of payment problems. Maintaining a healthy balance is a central precondition to the IMF's founding purpose of promoting global economic stability.<sup>66</sup> Should a member state find itself unable to comply with this condition, Article I of the IMF's Articles of Agreement provides that it is required to make funds "temporarily available to [member states] under adequate safeguards...to correct maladjustments in their balance-of-payments without resorting to measures destructive of national or international prosperity."<sup>67</sup>

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(vi) In accordance with the above, to shorten the duration and lessen the degree of disequilibrium in the international balances of payments of members.

The IMF shall be guided in all its policies and decisions by the purposes set forth in this Article. IMF Articles of Agreement, *supra* note 60, at art. 1, 29 U.S.T. at 2205, 2 U.N.T.S. at 40, *available at* <http://www.imf.org/external/pubs/ft/aa/index.htm> (last visited Feb. 18, 2004).

62. *What is the IMF?*, *supra* note 54; IMF Articles of Agreement, *supra* note 60, art. I, para. v, 29 U.S.T. at 2203, 2 U.N.T.S. at 40, *available at* <http://www.imf.org/external/pubs/ft/aa/index.htm> (last visited Feb. 18, 2004).

63. *What is the IMF?*, *supra* note 54.

64. *Id.*

65. *Id.*

66. IMF Articles of Agreement, *supra* note 60, art. I, para. v, 29 U.S.T. at 2203, 2 U.N.T.S. at 40, *available at* <http://www.imf.org/external/pubs/ft/aa/index.htm> (last visited Feb. 18, 2004).

67. *Id.*

The institution's lending, however, is conditional on the borrowing state's adoption of IMF policies designed to correct its balance of payments problems.<sup>68</sup> Article V(3)(a) of the IMF's Articles of Agreement provides that

[t]he Fund shall adopt policies on the use of its general resources... and may adopt special policies for special balance of payments problems, that will assist members to solve their balance of payments problems in a manner consistent with the provisions of this Agreement and that will establish adequate safeguards for the temporary use of the general resources of the Fund.<sup>69</sup>

These performance-based conditionalities enable the IMF to "independently...examine [the] country's need for balance of payments assistance and to require the adoption of corrective policies before funds are disbursed."<sup>70</sup> Conditions may include trade liberalization measures, depreciation of the exchange rate, decreasing the fiscal deficit, and restrictions on the credit provided by domestic banks.<sup>71</sup> According to the IMF, "[t]he conditionality associated with IMF lending helps to ensure that by borrowing from the IMF, a country does not just postpone hard choices and accumulate more debt, but is able to strengthen its economy and repay the loan."<sup>72</sup>

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68. *What is the IMF?*, *supra* note 54.

69. IMF Articles of Agreement, *supra* note 60, art. V sec. 3(a), 29 U.S.T. at 2211, available at <http://www.imf.org/external/pubs/ft/aa/index.htm> (last visited Feb. 18, 2004).

70. Swaminathan, *supra* note 53, at 166; see also International Monetary Fund, *Regulation of International Finance: Guidelines on Conditionality, Executive Board Decision No. 6056-(79/88)*, 1 B.D.I.E.L. 391 (Mar. 2, 1979).

71. Mary C. Tsai, *Globalization and Conditionality: Two Sides of the Sovereignty Coin*, 31 LAW & POL'Y INT'L BUS. 1317, 1321 (2000).

72. *What is the IMF?*, *supra* note 54. The IMF provides for various preventative and protective measures to ensure that the borrowing member state has fulfilled the loan's conditionalities. Compliance is established where the borrowing state has satisfied certain criteria "designed to measure the impact of fiscal and monetary policy on external viability." Swaminathan, *supra* note 53, at 166. The institution's standards for determining the borrowing member state's compliance "will normally be confined to (i) macroeconomic variables, and (ii) those [criteria] necessary to implement specific provisions of the Articles or policies adopted under them. Performance criteria may relate to other variables only in exceptional cases...." International Monetary Fund, *Executive Board Decision No. 6056-(79/38)*, 1 B.D.I.E.L. 393 (Mar. 2, 1979), reprinted in JOSEPH GOLD, *CONDITIONALITY* 30 (International Monetary Fund,

## 2. The Institutional Organization of the World Bank

The World Bank is a multilateral institution that enables member states to assist in the collective “promotion, world-wide, of sustainable economic development and poverty reduction.”<sup>73</sup> These objectives are pursued through lending, the production of research and economic analysis and the provision of policy advice and technical assistance.<sup>74</sup>

A product of World War II, the World Bank was initially envisioned to address the financial needs of a post-war reconstruction.<sup>75</sup> Harry Dexter White, a U.S. Treasury official and one of the original drafters of the plan for the World Bank, stated that the primary objectives of the World Bank were to “provide or otherwise stimulate long-term, low-interest-rate loans for reconstruction and for the development of capital-poor areas.”<sup>76</sup> Reconstruction was, nevertheless, the World Bank’s dominating objective during the initial decade and a half of its life.<sup>77</sup> By the early 1960s, however, the political topography of the world had been drastically altered.<sup>78</sup> Adapting to this changing political reality led the World Bank to shift its priorities “from reconstruction to development and from Europe to the developing world.”<sup>79</sup>

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Pamphlet Series No. 31, 1979). If the IMF deems that the borrowing member state has failed to comply with these conditionalities, it can refuse to release the next disbursement. Tsai, *supra* note 71, at 1322.

73. THE WORLD BANK: STRUCTURE AND POLICIES 10 (Christopher L. Gilbert & David Vines eds., 2000) [hereinafter THE WORLD BANK: STRUCTURE AND POLICIES]. The World Bank was also created as a specialized agency of the United Nations. The World Bank, *What is the World Bank*, at <http://web.worldbank.org> (last visited Nov. 5, 2003).

74. THE WORLD BANK: STRUCTURE AND POLICIES, *supra* note 73, at 10.

75. *Id.* at 14.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* Commonly perceived as a single lending institution specializing in development strategies, the World Bank is actually a large organization comprising an amalgam of four smaller units operating under the title of ‘World Bank Group.’ *Id.* at 12. The original and central member of the World Bank Group is the International Bank for Reconstruction and Development (“IBRD”). *Id.* Its principal objective is “to borrow funds and lend these on to qualifying member governments or to public sector institutions for agreed projects.” *Id.* The second unit of the World Bank is the International Development Agency which functions as an aid agency, mainly confining its activi-

Although the membership of the World Bank is coextensive with the membership of the IMF, the working objectives of the World Bank differ markedly from those of the IMF, most noticeably in that the World Bank functions first and foremost in its banking capacity as a financial intermediary.<sup>80</sup> It raises money by selling bonds on the international capital market and subsequently lends these funds to member states at a small mark-up over the World Bank's AAA<sup>81</sup> borrowing rate.<sup>82</sup> It

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ties to 60 "IDA countries" that have a low GDP per capita. *Id.* Although the IBRD and the IDA are almost entirely coextensive, differences basically center on the duration of the loan, its interest rates and the source of the loaned funds. *Id.* at 12–13. In essence, "[t]he Bank, as IDA, provides both development assistance and development aid while, as the IBRD, it provides assistance and enhanced access to capital." *Id.* at 13. The third unit of the World Bank is the International Finance Corporation ("IFC"), which was founded in 1956. *Id.* at 12. This institution's main objective is to strengthen domestic industries by lending to private sector institutions and taking equity shares in private sector enterprises. *Id.* The fourth and last unit is the Multinational Investment Guarantee Agency ("MIGA"), which was created in 1988. *Id.* Its objective is to guarantee "private sector investors against expropriation and repatriation risks in developing countries." *Id.*

80. See THE WORLD BANK: STRUCTURE AND POLICIES, *supra* note 73, at 17. As provided in its Articles of Agreement, the membership of the World Bank is limited to sovereign states who are already members of the IMF. Swaminathan, *supra* note 53, at 168. Similarities between the two institutions also extend to the World Bank's organizational and voting structures. The Board of Governors, representing all member states, has all of the World Bank's powers vested in it, while the Executive Directors conduct the institution's daily operations. See Articles of Agreement of the International Bank for Reconstruction and Development, *opened for signature* Dec. 27, 1945, art. V, sec. 2, 60 Stat. 1440, *as amended* Dec. 16, 1965, 16 U.S.T. 1942, 2 U.N.T.S. 134 [hereinafter World Bank Articles of Agreement]. As in the IMF, there is a total of 24 Executive Directors with the United States, Japan, Germany, France, United Kingdom, China, Russia, and Saudi Arabia, having their own seats on the Board, and the remaining directors elected on a rotating two-year basis. See World Bank, IBRD/IFC/IDA Executive Directors and Alternates, at <http://siteresources.worldbank.org/BODINT/Resources/b-eds.pdf> (last visited Oct. 28, 2003). Decisions are also based on a weighted voting system based on capital subscriptions and on each member state's economic strength. World Bank Articles of Agreement, arts. II para. 3 and V para. 3, 60 Stat. 1441–54, 2 U.N.T.S. 136–72; see also World Bank, IBRD: Votes and Subscriptions, at <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/BODEXT/0,,contentMDK:20124831~menuPK:64020035~pagePK:64020054~piPK:64020408~theSitePK:278036,00.html> (last visited Oct. 28, 2003).

81. An AAA-rating is the highest possible rating issued by rating agencies such as Moody's and Standard & Poor's. An AAA rating signifies a guarantee that anyone who purchases AAA-rated bonds will be sure to get their money



lends either “directly to a member government or [requires that its loans be] guaranteed by the member government in whose territory the project [or program] is located.”<sup>83</sup> In addition, the World Bank restricts the use of such loans “for the foreign exchange component of specific [programs or] projects.”<sup>84</sup>

Disbursement of aid is, however, conditional on the borrowing state’s adoption of specified conditionalities. Article III(4) of the World Bank’s Articles of Agreement provides that the World Bank may provide loans “to any member or any political subdivision thereof and any business, industrial, and agricultural enterprise in the territories of a member,” subject to the condition that the member state fully guarantee the repayment of the principal and interest.<sup>85</sup> The World Bank is further obligated to “pay due regard to the prospect that the borrower... will be in [the] position to meet its obligations under the loan...”<sup>86</sup> The World Bank’s conditionalities are comprehensive, and generally include policy and structural reforms in the borrowing state including improved governance, the elimination of corruption and gender equality, among many others.<sup>87</sup>

### 3. The Changing Nature of the World Bank and the IMF

Since their inception in 1944, the World Bank and the IMF have changed significantly in their respective scope of operations. Lending facilities have expanded from short-term remedial measures based on specific projects, to extensive policy-

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back, with the agreed interest, when the bonds mature. See John Burgess, *Groups Plan Boycott of World Bank Bonds*, WASH. POST, Apr. 11, 2000 at E03, available at <http://www.globalpolicy.org/socecon/bwi-wto/wbank/bonds.htm>; see also The World Bank’s Bonds Are Getting Looser, at <http://www.wbberope.org/tool-kit-article3.php> (last visited Feb. 8, 2004).

82. Swaminathan, *supra* note 53, at 168; THE WORLD BANK: STRUCTURE AND POLICIES, *supra* note 73, at 12.

83. Kim Reisman, *The World Bank and the IMF: At the Forefront of World Transformation*, 60 FORDHAM L. REV. S349, 353 (1992)(citations omitted).

84. *Id.*

85. World Bank Article of Agreement, *supra* note 80, art. III, sec. 4., 60 Stat. at 1443, 2 U.N.T.S. at 144.

86. *Id.* World Bank Articles of Agreement, *supra* note 80, art. III, sec. 4, para. 5, 16 U.S.T. at 1443–44, 2 U.N.T.S. at 144.

87. See Herbert V. Morais, *The Globalization of Human Rights Law and The Role of International Financial Institutions in Promoting Human Rights*, 33 GEO. WASH. INT’L L. REV. 71, 94–95 (2000).

oriented programmatic interventions, often encompassing important regulatory and structural changes in developing member states. These institutions' ranges of activities have also become increasingly intertwined, most distinctively during the last two decades.

The 1980s trumpeted the benefits of free market ideology, and the IMF and the World Bank became the "new missionary institutions" emblematic of this change.<sup>88</sup> From this prevalent political climate emerged a new "Washington Consensus," a doctrine based upon the consensus of the IMF, the World Bank, and the U.S. Treasury.<sup>89</sup> The Washington Consensus was dedicated to: "(i) deregulation and opening domestic markets to foreign goods and services; (ii) freeing trade and (iii) opening domestic capital markets to the free flow of international capital."<sup>90</sup> The Bretton Woods institutions were to promote these objectives by: "(i) facilitating the rapid liberalization of the goods markets and removing or reducing barriers to trade (ii) encouraging Governments to tighten fiscal and monetary policies (iii) promoting stable exchange rates and (iv) liberalizing capital markets."<sup>91</sup> Although the IMF and the World Bank's respective missions remained and continue to remain separate and distinct, it is during this time period that their activities became increasingly co-dependant and intertwined.<sup>92</sup> A brief retrospective of these institutions' lending facilities and respective activities provides a revealing illustration of this structural shift towards a Washington Consensus policy-based orientation.

#### a. World Bank Lending Facilities

The World Bank's founders intended primarily to provide assistance by guaranteeing private loans.<sup>93</sup> In the 1950s, however, the World Bank's original scope was expanded to provide direct loans to developing states experiencing a scarcity of private ex-

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88. STIGLITZ, *supra* note 55, at 13.

89. G. Sivalingam, *The Impact of Globalization on the Malaysian Economy* 2, at <http://www.insead.edu/events/eamsa/papers/sivalingam.pdf> (last visited Oct. 28, 2003).

90. *Id.*

91. *Id.*

92. STIGLITZ, *supra* note 55, at 13.

93. EDWARD S. MASON & ROBERT E. ASHER, *THE WORLD BANK SINCE BRETTON WOODS* 26 (1973).

ternal sources of finance.<sup>94</sup> These loans were provided for through Structural Adjustment Programs (“SAP”) whereby financing could serve as a “[vehicle] for the design and implementation of projects, particularly in the infrastructure sector.”<sup>95</sup> In the late 1970s, the World Bank further expanded its scope of operations to focus on inappropriate public policies in developing countries that were burdened with “large fiscal deficits...unsustainable balance-of-payments deficit[s] and...open or repressed inflation.”<sup>96</sup> Local governments often further exacerbated the rampant financial hardship of these countries by pursuing “expansionary demand policies.”<sup>97</sup>

Conscious of the difficulties that such unstable macroeconomic environments presented, the World Bank cast aside the use of project-oriented initiatives and started resorting to Structural Adjustment Lending (“SAL”).<sup>98</sup> This lending facility was geared for “quick-disbursing balance-of-payments support to assist [developing] member countries in implementing a less costly adjustment to external shocks.”<sup>99</sup> These loans, however, imposed significant conditions upon the disbursement of financial assistance. Member states were expected to “achieve both *long-term macroeconomic stabilization and structural transformation* of [their economies] by addressing the fundamental causes of [their] economic crises.”<sup>100</sup> More specifically, they were required to “bring...the level of demand and its composition ([the proportion of] tradable relative to non-tradable goods), into line with the level of output and external financing.”<sup>101</sup> These objectives were to be accomplished through the implementation of policies and legislation designed to achieve the necessary

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94. *Sisters in the Wood: Distant Relations*, ECONOMIST, Oct. 12, 1991, at 9 [hereinafter *Distant Relations*].

95. Swaminathan, *supra* note 53, at 169.

96. Vittorio Corbo & Stanley Fischer, *Adjustment Programs and Bank Support: Rationale and Main Results*, in ADJUSTMENT LENDING REVISITED: POLICIES TO RESTORE GROWTH 7 (Vittorio Corbo et al. eds., 1992) [hereinafter Corbo & Fischer, *Adjustments Programs*].

97. *Id.*

98. See ADJUSTMENT LENDING REVISITED: POLICIES TO RESTORE GROWTH 1 (Vittorio Corbo et al. eds., 1992).

99. *Id.*

100. Corbo & Fischer, *Adjustments Programs*, *supra* note 96, at 7 (emphasis in original).

101. *Id.*

macroeconomic corrections.<sup>102</sup> The recurrent use of this facility throughout the 1980s resulted in SALs accounting for a quarter of World Bank lending by the end of the decade.<sup>103</sup>

In order to ensure the success rates of SALs, however, the World Bank limited the availability of this lending facility to member states already benefiting from an IMF sponsored stabilization program.<sup>104</sup> In this way, the World Bank essentially came to condition its loans upon explicit approval from the IMF. Although this arrangement did improve the probabilities for high success rates, this “no Fund programme, no SAL” rule eventually proved a nuisance.<sup>105</sup> The World Bank therefore introduced the Sector Adjustment Loan (“SECAL”), which was directed at states lacking an IMF program.<sup>106</sup> These loans “support[] policy changes and institutional reforms in a specific sector” and “focus on major sectoral issues such as the incentive and regulatory frameworks for private sector development, institutional capability, and sector expenditure programs.”<sup>107</sup>

The most noteworthy characteristic of the SALs and SECALs, however, is their heavy emphasis on policy-based objectives.<sup>108</sup> Whereas the World Bank was initially focused on small, project-based facilities, it eventually expanded to address the general macroeconomic stability and balance of payments problems of developing member states.

#### b. IMF Lending Facilities

The IMF similarly shifted from small scale lending facilities to comprehensive initiatives heavily slanted towards policy-

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102. See Jonathan Cahn, *Challenging the New Imperial Authority: The World Bank and the Democratization of Development*, 6 HARV. HUM. RTS. J. 159, 160 (1993) (arguing the World Bank uses its leverage to “legislate entire legal regimes...and often rewrite[s] a country’s trade policies, [and] fiscal policies”). *Id.* at 160.

103. See *id.* at 175–76.

104. *Sisters in the Wood; Until Debt Us Do Part*, ECONOMIST, Oct. 12, 1991, at 14 [hereinafter *Until Debt Us Do Part*].

105. See *id.*

106. *Id.*

107. WORLD BANK, WORLD BANK LENDING INSTRUMENTS: RESOURCES FOR DEVELOPMENT IMPACT, at 17, at <http://www.worldbank.org/poverty/wbactivities/lend.pdf> (last visited Feb. 5, 2003).

108. See Cahn, *supra* note 102, at 174–75; see also *Distant Relations*, *supra* note 94; see also *Until Debt Us Do Part*, *supra* note 104.

oriented objectives.<sup>109</sup> The IMF was created to offer member states temporary facilities in order to maintain the stability of the international monetary system.<sup>110</sup> To achieve this objective, the IMF provided, and continues to provide, for diverse means of access to available funds, the amount of which is directly related to each member state's quota.<sup>111</sup>

At its inception, funds were divided into a "reserve tranche" and four equivalent "credit tranches."<sup>112</sup> The reserve tranche was part of a member's own reserves kept on deposit with the IMF and access to it was virtually unimpeded.<sup>113</sup> Each of the credit tranches, however, represented 25% of the member's quota and a member's access to any of them was conditioned on the IMF's authorization.<sup>114</sup> While the first tranche was fairly easy to obtain, access to the remaining three credit tranches was subject to much closer scrutiny and "almost always require[d] a stand-by or similar arrangement"<sup>115</sup> between the IMF and the borrowing member state.

These stand-by arrangements were essentially agreements between the IMF and member states providing for the latter's borrowing of hard currencies, should the need arise.<sup>116</sup> As they were intended to "provide short-term balance-of-payments assistance for deficits of a temporary or cyclical nature,"<sup>117</sup> they had to be repaid within three years and "were assessed near market interest rates."<sup>118</sup> Moreover, stand-bys were only disbursed in installments and included "rigid performance [based] conditionalities."<sup>119</sup> The structure of these arrangements illus-

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109. See *Distant Relations*, *supra* note 94.

110. *What is the IMF?*, *supra* note 54; see also *Sisters in the Wood; A Fund by Design*, *ECONOMIST*, Oct. 12, 1991, at 14 [hereinafter *A Fund by Design*].

111. *A Fund by Design*, *supra* note 110, at 7. A "quota" is each IMF member state's proportion of contribution of gold to the IMF and their concomitant ability to draw from the IMF. See *The IMF and the World Bank – The Origins of the IFIs*, at <http://www.globalization101.org/issue/imfworldbank/2.asp> (last visited Feb. 8, 2004).

112. See *id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. Swaminathan, *supra* note 53, at 171.

119. *Id.*

trates that these lending facilities were not meant to address any issues of a “structural or socioeconomic nature” within the borrowing member state, but rather solely focused on the IMF’s primary objective of economic stabilization.<sup>120</sup>

The IMF, however, began expanding its facilities by the early 1980s as it experienced difficulties in addressing balance of payments problems through its customary lending facilities.<sup>121</sup> To address the complexities of an increasingly unstable monetary environment, the IMF introduced the Extended Fund Facility (“EFF”).<sup>122</sup> This facility was designed to allow member states to borrow up to 140 percent of their quota with a repayment period of four to ten years instead of three to five years.<sup>123</sup> Still an insufficient tool to address the pervasive debt obligations of the poorest states, the institution further expanded its facilities in 1986 by establishing the Structural Adjustment Facility (“SAF”), which charged an interest rate of only one-half percent.<sup>124</sup> SAF loans included a repayment period of five to ten years, and “were financed by sovereign repayments to the IMF during the 1970’s and disbursed to finance three-year stabilization programs.”<sup>125</sup>

As the SAF resources neared depletion, the IMF introduced yet another type of loan, the Enhanced Structural Adjustment Facility (“ESAF”).<sup>126</sup> The funds were raised through contributions of major developed member governments, and borrowing states could receive double the amount obtainable under the

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120. *See id.*

121. *Id.*

122. *Id.*; *see also* International Monetary Fund, Executive Board Decision No. 4377-(74/114), Sept. 13, 1974, art. I(iv), *in* SELECTED DECISIONS OF THE INTERNATIONAL MONETARY FUND AND SELECTED DOCUMENTS 33 (1987).

123. Swaminathan, *supra* note 53, at 171; *see also* International Monetary Fund, Executive Board Decision No. 6339-(79/179), Dec. 3, 1979, *in* SELECTED DECISIONS OF THE INTERNATIONAL MONETARY FUND AND SELECTED DOCUMENTS 50, 50–54 (1976); International Monetary Fund, Executive Board Decision No. 6830-(81/65), Apr. 22, 1981, *in* SELECTED DECISIONS AND SELECTED DOCUMENTS OF THE INTERNATIONAL MONETARY FUND 515, 515–16 (June 30, 1997).

124. Swaminathan, *supra* note 53, at 172; *see also* INTERNATIONAL MONETARY FUND, STRUCTURAL ADJUSTMENT: CONCESSIONAL FACILITIES RESIST LOW-INCOME COUNTRIES, IMF SURVEY: SUPPLEMENT ON THE IMF 1, 21 (1993).

125. Swaminathan, *supra* note 53, at 172; *see also* *Until Debt Us Do Part*, *supra* note 104.

126. Swaminathan, *supra* note 53, at 172.

SAF.<sup>127</sup> The major difference, however, was that the conditionalities and the scrutiny attached to these loans was much stricter.<sup>128</sup> In addition, "ESAF funds were disbursed in smaller installments than under the SAF, and subjected to frequent performance-based tests."<sup>129</sup> The IMF's satisfaction with the performance of its new lending facilities at the close of the decade resulted in its establishment of about 30 SAF and ESAF facilities in Africa, and the virtual disappearance of EFFs and standbys from the continent.<sup>130</sup>

The IMF's use of the SAF and ESAF lending facilities marked a change in the institution's method of addressing balance of payments inequities. Whereas loans were initially short-term and typically focused on redressing balance of payments problems, they gradually evolved into policy-based instruments requiring the implementation of important structural and policy changes within the borrowing government.<sup>131</sup> Furthermore, as the majority of these stabilizing facilities were disbursed to the developing world, the IMF's activities increasingly became developmental in nature.<sup>132</sup>

This overlap of activities between the IMF's progressive policy-based facilities and the World Bank's original developmental mandate was eventually formally reinforced in an official agreement between the two Bretton Woods institutions.<sup>133</sup> In March of 1989, the World Bank and the IMF entered into a "concordat" whereby the two institutions formalized their already established practice that World Bank structural adjustment loans would exclude member states lacking an IMF stabilization program.<sup>134</sup> They further agreed that "the IMF would have 'primary responsibility' over short-term stabilization and exchange rates, and the Bank would be in the lead on medium and longer-term structural reform."<sup>135</sup> In this way, the World Bank and IMF operations became officially and permanently

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127. *Id.*; see also *Until Debt Us Do Part*, *supra* note 104.

128. Swaminathan, *supra* note 53, at 172.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 172-73.

133. *Id.* at 173.

134. *Id.*; see also *Until Debt Us Do Part*, *supra* note 104.

135. *Until Debt Us Do Part*, *supra* note 104.

interconnected and their combined policies of stabilization and structural adjustment developed into a standard feature of World Bank and IMF interventions.

#### 4. Conditionality

A central and controversial aspect of World Bank and IMF activities is reflected in the institutions' use of conditions for their lending facilities.<sup>136</sup> As with many exchanging partners, the IFIs require debtor states to provide credible commitments to increase certainty of repayment and ensure cooperation in the implementation of the loans. These commitments, or conditions, essentially provide an infrastructure which the IFIs believe will allow the debtor state to stabilize, grow, and pay off the debt.<sup>137</sup> Although the IFIs have been severely criticized for the inclusion of conditions reflecting policy-oriented objectives, conditionalities remain an integral component of the institutions' lending facilities and have grown to include matters previously considered outside of the institutions' scope of activities.<sup>138</sup>

##### a. Conditions Defined

The conditions that the various borrowing states submit to are quasi-contractual in nature, as is underscored by the definition of "conditionality."<sup>139</sup> Tony Killick defines aid conditionality as "a mutual arrangement by which a government takes, or promises to take, certain policy actions, in support of which an IFI...or other agency will provide specified amounts of financial assistance."<sup>140</sup> Others define it as "the linking of the disbursement of a loan to understandings concerning the economic policy which the government of the borrower country intends to

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136. See generally MICHEL CHOSSUDOVSKY, *THE GLOBALIZATION OF POVERTY: IMPACTS OF IMF AND WORLD BANK REFORMS* 45–75 (1997); See generally STIGLITZ, *supra* note 55, at 43–52.

137. CHOSSUDOVSKY, *supra* note 136, at 45; STIGLITZ, *supra* note 55, at 44.

138. STIGLITZ, *supra* note 55, at 44–45; see also discussion, *infra* at Part II.A.3.a.

139. The definitions included in this section are equally applicable to the IMF's and World Bank's practices.

140. TONY KILLICK ET AL., *AID AND THE POLITICAL ECONOMY OF POLICY CHANGE* 6 (1998).



pursue.”<sup>141</sup> These conditions enable the IMF and the World Bank “independently to examine the country’s need for balance of payments assistance and to require the adoption of corrective policies before funds are disbursed.”<sup>142</sup>

“Although the failure of a member state to meet these conditions is not *a fortiori* a breach of contract or a violation of international law,” there are three important repercussions for non-compliance.<sup>143</sup> First, the institutions may limit, or restrict, the noncompliant nation’s credit.<sup>144</sup> In order to ensure compliance, the IMF and the World Bank condition the release of credit upon the borrowing state’s fulfillment of performance criteria previously stipulated in a credit agreement.<sup>145</sup> A borrowing state must therefore fulfill these performance criteria in order to be deemed compliant with the conditions.<sup>146</sup> Second, the institutions can suspend the next disbursement if they determine that the borrowing state has failed to comply with these conditions.<sup>147</sup> Finally, because private creditors consider the institutions’ approval of a member state’s economy a “seal of approval,” the institutions’ determination that a particular state has been noncompliant can result in the practical elimination of the debtor state’s private funding.<sup>148</sup> As these repercussions can have disastrous financial consequences, a debtor state has every incentive to comply with the loan agreement’s terms and conditions.<sup>149</sup>

While loan agreements and conditions are of a mandatory nature, they are meant to result from an ongoing dialogue be-

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141. Paul Mosley, *A Theory of Conditionality*, in DEVELOPMENT FINANCE AND POLICY REFORM: ESSAYS IN THE THEORY AND PRACTICE OF CONDITIONALITY IN LESS DEVELOPED COUNTRIES 129 (Paul Mosley ed., 1992).

142. Swaminathan, *supra* note 53, at 166.

143. Tsai, *supra* note 71, at 1322.

144. *Id.*

145. *Id.*; see also John W. Head, *Global Implications of the Asian Financial Crisis: Banking, Economic Integration, and Crisis Management in the New Century*, 25 WM. MITCHELL L. REV. 939, 945 (1999).

146. Tsai, *supra* note 71, at 1322.

147. *Id.* at 1322; see also Head, *supra* note 145, at 945.

148. Tsai, *supra* note 71, at 1322; see also Anthony Galano III, *International Monetary Fund Response to the Brazilian Debt Crisis: Whether the Effects of Conditionality Have Undermined Brazil’s National Sovereignty?*, 6 PACE INT’L L. REV. 323, 339 (1994); See AGE F.P. BAKKER, INTERNATIONAL FINANCIAL INSTITUTIONS 51 (1996).

149. See Tsai, *supra* note 71, at 1322.

tween the debtor state and the IFI in question.<sup>150</sup> For instance, a government seeking IMF assistance must provide evidence that it is “seriously committed to economic reform.”<sup>151</sup> This will usually take the form of a “letter of intent” outlining “the government’s major orientations in macro-economic policy and debt management.”<sup>152</sup> The typical loan agreement will therefore include the debtor state’s proposed policy reforms concerning various sectors of the economy and government, while the arrangement itself, will contain additional policy proposals, review schedules, and binding conditions.<sup>153</sup> Similarly, in the case of many indebted states, the borrowing government “is obliged under its agreement with the [financial institutions] to outline its priorities in a...‘Policy Framework Paper.’”<sup>154</sup> These government-generated documents, although heavily influenced by the institutions’ input, eventually form the basis for the final loan agreement and its appurtenant conditions.

#### b. Conditions as a Policy Tool

As a general matter, conditionalities are a reflection of policies endorsed by the IFIs.<sup>155</sup> The inherent nature of loan agreements enables the institutions to prescribe a set of policy actions, which the debtor state must accept in order to receive the necessary funding.<sup>156</sup> Although the institutions’ economic prescriptions have remained consistent since the 1980s, an examination into their policy objectives reveals that conditionalities have gradually expanded in scope to include not only economic but political considerations as well.<sup>157</sup>

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150. See CHOSSUDOVSKY, *supra* note 136, at 53–54.

151. *Id.* at 53.

152. *Id.*

153. Erica R. Gould, *The Changing Activities of International Organizations: The Case of the International Monetary Fund* 8 (unpublished paper initially prepared for delivery at the 2000 Annual Meetings of the American Political Science Association, Aug. 31 – Sept. 3, 2000 (cited with permission of the author)), available at [http://spe.cgu.edu/econ/conferences/2000\\_peifc/papers/gould\\_changing\\_activities.pdf](http://spe.cgu.edu/econ/conferences/2000_peifc/papers/gould_changing_activities.pdf).

154. CHOSSUDOVSKY, *supra* note 136, at 54.

155. *Id.* at 52.

156. *Id.*

157. Carlos Santiso, *World Bank and Good Governance: Good Governance and Aid Effectiveness: The World Bank and Conditionality*, 7 GEO. PUB. POL’Y REV. 1, 2 (2001).

The Washington Consensus emerged in the 1980s as an economic orthodoxy that has permeated the institutions' lending facilities since its inception.<sup>158</sup> A by-product of free market ideologies, "[t]he consensus' policy prescriptions include opening trade, fiscal restraint, prudent macroeconomic management, deregulation and privatization."<sup>159</sup> The consensus evolved from the Latin American financial crisis of the 1980s where "[l]oose monetary policy led to inflation running out of control."<sup>160</sup> Based largely on the political climate at the time, the prescriptions utilized in dealing with the crisis (i.e., fiscal austerity, privatization, and market liberalization), were permanently adopted by the IFIs as the models for future financial assistance packages.<sup>161</sup>

These policies translated into comprehensive programs of macro-economic stabilization and structural economic reform. As explained by Professor Chossudovsky, "[s]tructural adjustment is viewed by the IFIs as consisting of two distinct phases: 'Short-term' macro-economic stabilization (implying devaluation, price liberalization and budgetary austerity) to be followed by the implementation of a number of more fundamental... structural reforms."<sup>162</sup> Conditions under the Washington Consensus may therefore require the debtor state to implement reforms including currency devaluation;<sup>163</sup> "liberalization of the labor market,"<sup>164</sup> reduction of the budget deficit,<sup>165</sup> "ceilings" on state expenditures;<sup>166</sup> price liberalization;<sup>167</sup> trade liberalization;<sup>168</sup> privatization of state enterprises;<sup>169</sup> tax reforms;<sup>170</sup> priva-

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158. See Sivalingam, *supra* note 89, at 2.

159. Santiso, *supra* note 157, at 13–14 (citations omitted).

160. STIGLITZ, *supra* note 55, at 53.

161. See *id.* at 16–17.

162. CHOSSUDOVSKY, *supra* note 136, at 55.

163. *Id.* at 56 ("including the unification of the exchange rate and the elimination of exchange controls").

164. *Id.* at 56–57.

165. *Id.* at 59.

166. *Id.* at 60.

167. *Id.* at 61 ("elimination of all subsidies and price controls").

168. *Id.* at 63 ("elimination of import quotas and the reduction and unification of tariffs").

169. *Id.*

170. *Id.* at 64 ("[T]he introduction of a value-added or sales tax and changes in the structure of direct taxation.").

tization of agricultural land;<sup>171</sup> deregulation of the banking system;<sup>172</sup> liberalization of capital movements;<sup>173</sup> and poverty reduction through targeted social programs.<sup>174</sup>

Beginning in the early 1990s, the World Bank and IMF fundamentally shifted their policies and strategies by introducing the concept of “good governance” both as an objective and a condition for financial assistance.<sup>175</sup> This shift in policy reflected an increasing recognition by the IFIs “that the reasons for underdevelopment and mismanaged government are ‘sometimes attributable to weak institutions, lack of an adequate legal framework, damaging discretionary interventions, uncertain and variable policy frameworks and a closed decision-making process which increases risks of corruption and waste.’”<sup>176</sup> This change also resulted from growing pressure by donor governments to address the prevalent corruption, economic mismanagement and bureaucratic ineptness preventing the repayment of their financial investments.<sup>177</sup>

The World Bank defines governance as encompassing “the form of political regime; the process by which authority is exercised in the management of a country’s economic and social resources for development; and the capacity of governments to design, formulate and implement policies and discharge functions.”<sup>178</sup> The World Bank has distinguished “six main dimensions of *good* governance: [v]oice and accountability, which includes civil liberties and political stability; [g]overnment effectiveness, which includes the quality of policymaking and public service delivery; [t]he lack of regulatory burden; [t]he rule of law, which includes protection of property rights;

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171. *Id.*

172. *Id.* at 64–65.

173. *Id.* at 65–66 (“[T]he IMF insists on the transparency and free movement of foreign exchange in and out of the country.”).

174. *Id.* at 66–67.

175. Santiso, *supra* note 157, at 1–2.

176. *Id.* at 5 (citations omitted). Although the author is specifically referring to the World Bank, these principles are equally applicable to the IMF. *See id.*

177. Santiso, *supra* note 157, at 4.

178. *Id.* at 4. Although the World Bank recognizes the importance of the political dimension of governance, it interprets the concept restrictively by arguing that the focus is solely placed on the economic dimensions of good governance. *Id.*

[i]ndependence of the judiciary; and [c]ontrol of corruption.”<sup>179</sup>

The IMF broadly defines governance as encompassing “all aspects of the way a country, corporation, or other entity is governed.”<sup>180</sup> According to the IMF, “[i]t includes the economic-policy interactions that fall within the mandate and expertise of the IMF,” as well as “their effectiveness; their transparency, and thus the accountability of policy makers; and the extent to which they meet internationally accepted standards and good practices.”<sup>181</sup> The IMF has recognized two spheres in which it considers itself best placed to contribute to good governance, namely:

- *Improving the management of public resources* through reforms covering public sector institutions (e.g., the treasury, central bank, public enterprises, civil service, and the official statistics function), including administrative procedures (e.g., expenditure control, budget management, and revenue collection); and
- *Supporting the development and maintenance of a transparent and stable economic and regulatory environment conducive to efficient private sector activities* (e.g., price systems, exchange and trade regimes, and banking systems and their related regulations).<sup>182</sup>

The introduction of good governance adds a normative concept to the economic orthodoxy of the Washington Consensus, giving rise to what some analysts have described as a “post-Washington Consensus.”<sup>183</sup> This newly defined consensus brings three important dimensions to the IFIs’ lending facilities. First, the concept of governance recognizes the importance of politics and its influence over development matters within the debtor state.<sup>184</sup> It underscores the need to reform “not only the policies but also the institutional framework in which policies are formulated.”<sup>185</sup> The IFIs have given increasing recognition to the

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179. Santiso, *supra* note 157, at 4 (emphasis added).

180. INTERNATIONAL MONETARY FUND, THE IMF’S APPROACH TO PROMOTING GOOD GOVERNANCE AND COMBATING CORRUPTION – A GUIDE, at <http://www.imf.org/external/np/gov/guide/eng/index.htm> (last modified Dec. 9, 2002).

181. *Id.*

182. *Id.* (emphasis in original).

183. Santiso, *supra* note 157, at 14.

184. *Id.*

185. *Id.*

fact that macroeconomic policy changes must be complemented with effective democratic institutions that are able to support the social consequences of structural adjustment programs.<sup>186</sup> The IFIs' post-Washington Consensus therefore requires "strengthening the institutions of governance, enhancing the rule of law and enhancing accountability and transparency."<sup>187</sup>

A second dimension of the new consensus concerns the state. During the 1980s and 1990s, the IFIs were essentially focused on "balancing public finances and reducing the size of the bureaucracy."<sup>188</sup> The role of the state was relegated to second place as the institutions placed an emphasis on "strengthening non-state actors and promoting decentralization and local governance."<sup>189</sup> The reforms sought by the IFIs, however, necessitate a strong and effective state governed by the rule of law. The institutions' lending facilities have included the dual focus of stabilizing and liberalizing the economy while simultaneously "reforming the state and strengthening governing institutions."<sup>190</sup> These latter adjustments entail "improving the efficiency and effectiveness of governing institutions (in particular the judiciary and parliaments), developing sound financial markets with appropriate regulations and supervision, enhancing legal and regulatory environments, improving the quality of the public sector and building social capital and cohesion."<sup>191</sup> While the state is expected to become leaner, the transition necessitates strong political institutions and a responsive bureaucracy. The IFIs have therefore also begun to acknowledge the crucial role of the state and the importance of good governance in providing an appropriate legal and regulatory framework to support the institutions' reforms.<sup>192</sup>

Finally, the post-Washington Consensus recognizes the need to strengthen public institutions. Public institutions are defined as "formal and informal rules and their enforcement

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186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.* at 15.

190. *Id.* at 14; see also Moises Naim, *Washington Consensus or Washington Confusion?*, FOREIGN POL'Y, Apr. 1, 2000, at 87-103, available at 2000 WL 18912666.

191. Santiso, *supra* note 157, at 14.

192. See *id.* at 14.

mechanisms that shape the behavior of individuals and organizations in *society*.”<sup>193</sup> As the Washington Consensus often ignored issues of institutional reform, the post-Washington Consensus places an emphasis on addressing fundamental institutional weaknesses, inappropriate public policies and un-enforced legal frameworks.<sup>194</sup>

While the post-Washington Consensus adds another dimension to the IFIs' lending facilities, it neither supplants nor limits the policies initially espoused by the Washington Consensus. The institutions continue to view sound macroeconomic policies as an indispensable basis of financial assistance. Remaining steady in its financial prescriptions, the IFIs' post Washington Consensus has merely broadened the reform agenda to include the complex realm of national politics.<sup>195</sup>

### *B. Conditions to Address Terrorism*

As international institutions with unmatched resources at their disposal, the World Bank and the IMF are uniquely positioned to address state failure and the prevention of terrorism. To this end, the IFIs could restructure their loan agreements to take into account the distinguishing characteristics of a state's slide into failure (i.e., its political goods deficit) in the context of terrorism prevention. While loan funds could help a state deliver key political goods, conditions on such loans could serve as a vehicle for the implementation of an anti-terrorism regulatory framework.<sup>196</sup> Incorporating these principles within the IFIs'

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193. SHAHID JAVED BURKI & GUILLERMO E. PERRY ET. AL, BEYOND THE WASHINGTON CONSENSUS: INSTITUTIONS MATTER 11 (1998) (emphasis in original).

194. Santiso, *supra* note 157, at 15.

195. *Id.* at 16.

196. Both the IMF and the World Bank have done some limited work in terms of including anti-terrorism considerations within their policies. However, these considerations are currently at a preliminary stage and are limited to the issues of anti-money laundering and the financing of terrorism. Moreover, it is not clear whether these considerations will be included as a conditionality in the IFIs' financial assistance programs. See MONETARY AND EXCHANGE AFFAIRS AND LEGAL DEPARTMENTS, INTERNATIONAL MONETARY FUND & THE FINANCIAL SECTOR, WORLD BANK, TWELVE-MONTH PILOT PROGRAM OF ANTI-MONEY LAUNDERING AND COMBATING THE FINANCING OF TERRORISM (AML/CFT) ASSESSMENTS AND DELIVERY OF AML/CFT TECHNICAL ASSISTANCE: JOINT INTERIM PROGRESS REPORT OF THE WORK OF THE IMF AND THE WORLD

loan conditions presents two important issues. First, can the IFIs condition their loans on antiterrorism prevention where their respective charters prohibit them from addressing questions of political and civil rights? Second, how could such loan conditions be structured when the international community has not yet agreed upon a comprehensive terrorism convention? The following sections will address these two questions.

### 1. Moving Beyond Antiquated Mandates

In examining a possible role for the IFIs in the war against terrorism, it is essential to fully appreciate their founding purposes. In this regard, attention must turn to the IFIs' constitutional mandates and the significance of their respective scopes of operations over fifty years after the Bretton Woods conference.

The World Bank was primarily founded with the objective of assisting in the economic development of developing member states and to promote private foreign investment.<sup>197</sup> By contrast, the IMF's purpose is to promote the stability of the international monetary system.<sup>198</sup> An important aspect of the IFIs' financial assistance programs is their categorical refusal to address questions of political and civil rights within the borrowing member state. According to the World Bank's Articles of Agreement:

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 weighed impartially in order to achieve the purposes stated in Article I.<sup>199</sup>

The World Bank's Articles further provide that it is to "make arrangements to ensure that the proceeds of any loan are used only for the purposes for which the loan was granted...without

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BANK (2003), available at <http://www.imf.org/external/np/mae/aml/2003/eng/033103.htm>.

197. See discussion *supra* at Part III.A.2.

198. See discussion *supra* at Part III.A.1.

199. World Bank Articles of Agreement, *supra* note 80, art. IV, sec. 10., 60 Stat. at 1449, 2 U.N.T.S. at 158.



regard to political or other non-economic influences or considerations.”<sup>200</sup>

Although the IMF's Articles of Agreement do not have a similar provision, their general stipulation requiring it to “be guided in all its policies and decisions by the purposes set forth”<sup>201</sup> has been interpreted as having a similar effect.<sup>202</sup> Moreover, Article IV provides that in exercising surveillance over the exchange rate policies of its member states, the IMF shall adopt principles for the guidance of its members and that “[t]hese principles shall respect the domestic, social and political policies of members.”<sup>203</sup>

The IFIs' apolitical stance has generated considerable debate in recent years.<sup>204</sup> It is often argued that the IFIs' Articles of Agreement place a legal constraint on the IFIs' lending practices and that financial assistance should therefore not be withheld on the basis of non-economic reasons.<sup>205</sup> This argument is based on the belief that IFI loans should be non-discriminatory and that in supporting economic, social and cultural rights for all, the IFIs have paved the way for greater political freedoms while remaining politically neutral.<sup>206</sup> According to these “strict interpretation” advocates, “[n]o reasonable interpretation...can transform prohibition into permission.”<sup>207</sup>

Although literally correct, this argument has been undermined by the IFIs' actual practice, particularly within the past ten years.<sup>208</sup> Both the World Bank and the IMF have signifi-

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200. *Id.* at art. III, sec. 5, para. b, 60 Stat. at 1443–44, 2 U.N.T.S. at 146.

201. IMF Articles of Agreement, *supra* note 60, art. I, 29 U.S.T. at 2205, 2 U.N.T.S. at 42.

202. Joseph Gold, *Political Considerations Are Prohibited by Articles of Agreement When the Fund Considers Requests for Use of Resources*, 1983 IMF SUR. 145, 146 (1983). Sir Joseph Gold was General Counsel to the IMF from 1960-79. *Id.* at 148.

203. IMF Articles of Agreement, *supra* note 60, art. IV, sec. 3, para. b, 29 U.S.T. at 2209.

204. Morais, *supra* note 87, at 88.

205. For an outline of these arguments see Morais, *supra* note 87, at 88.

206. Morais, *supra* note 87, at 88–89.

207. *Id.* at 89.

208. See Santiso, *supra* note 157, at 2 (“During the 1980s and 1990s, the scope of [the IFIs'] conditionalities both widened and deepened as IFIs attempted governmental and social re-engineering.”); see also Morais, *supra* note 87, at 90–94 (“the record clearly shows that the IFIs are actually doing

cantly expanded their respective scopes of operation since the institutions' inception at the close of World War II.<sup>209</sup> Initially structured as short-term remedial measures, the IFIs' lending facilities have developed into extensive policy-oriented programmatic interventions, often encompassing substantial regulatory and structural changes within the borrowing member state.<sup>210</sup> Most notably, however, the IFIs' introduction of "good governance" as both an objective and condition for financial assistance has further blurred the distinction between "politics" and "economics."<sup>211</sup> This "post-Washington Consensus" has not only legitimized the IFIs' promotion of measures to fight corruption and improve transparency and accountability of institutions and officials, but has also led to the IFIs' active involvement in the promotion of legal and judicial reforms.<sup>212</sup> In this regard, the IFIs have recommended and assisted member states in "drafting new laws, amending existing laws, reforming court systems and training judges."<sup>213</sup> These legal reforms have touched upon politically sensitive areas such as "corruption among public officials (both politicians and civil servants), local government reform, civil service reform, reform of the court system, tax reform, strengthening regulatory and supervisory institutions, enhancing women's rights, social security or pension reforms, and promoting public participation."<sup>214</sup>

Aside from empirical evidence of the IFIs' increasingly political endeavors, it remains debatable whether a legal analysis of the IFIs' articles of agreement leads to the conclusion that these

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much more than they have ever done to promote human rights in a comprehensive and meaningful way"). *Id.* at 90.

209. See discussion *supra* Part III.A.3.

210. See Morais, *supra* note 87, at 89 (listing the additional areas the IFIs have financed such as "reform of civil service, reform of public sector enterprises, legal and judicial reform, reform of local governments...rights of indigenous peoples," to name but a few). *Id.* at 89.

211. See Santiso, *supra* note 157, at 1; see also Morais, *supra* note 87, at 90.

212. See Santiso, *supra* note 157, at 14 ("An important dimension of the post-Washington consensus is the recognition that politics matters for development. It suggests that sustaining development requires reforming not only the policies but also the institutional framework in which policies are formulated.") *Id.*; see also Morais, *supra* note 87, at 94 ("IFIs have become very active in promoting legal and judicial reforms in their member countries."). *Id.*

213. Morais, *supra* note 87, at 94.

214. *Id.* at 95.

institutions are strictly prohibited from delving into the political realm.<sup>215</sup> Both the IMF and the World Bank were formed as specialized agencies of the UN.<sup>216</sup> As such, one might argue that the UN Charter is hierarchically superior to the IFIs' own articles of agreement. Article 55 of the UN Charter provides that "the United Nations shall promote...universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."<sup>217</sup> Although the UN Charter also contains a provision prohibiting interference in internal political affairs,<sup>218</sup> the UN has repeatedly interpreted this provision as inapplicable to human rights because such matters are not considered to be the prerogative of a sovereign state.<sup>219</sup> If that is the case, why should the IFIs be considered exempt from fulfilling the fundamental objectives of a hierarchically superior institution?

Legal analysis aside, it is clear that the IFIs' apolitical stance has become outdated and that the international donor community has given growing recognition to the political barometer of borrowing member states.<sup>220</sup> To this end, the IFIs should begin applying financial and technical assistance in the context of anti-terrorism prevention. Terrorism is not only a politically motivated act,<sup>221</sup> but it is also an act that has been widely recognized as a violation of human rights.<sup>222</sup> As such, and considering

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215. *See id.* at 90–94.

216. *Id.* at 84.

217. U.N. CHARTER art. 55.

218. *Id.* art. 2, para. 7.

219. *See* Olivera Medenica, *Protocol I and Operation Allied Force: Did NATO Abide by Principles of Proportionality?*, 23 LOY. L.A. INT'L & COMP. L. REV. 329, 347–60 (2001).

220. *See generally* Morais, *supra* note 87.

221. *See* discussion *supra* Part I.A.

222. *See* Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) at 149 (1977) (stating that terrorist activities or individuals or groups are in clear disregard of human rights); U.N. Comm. H.R., Res. 2000/30, U.N. ESCOR, 56th Sess., U.N. Doc. E/CN.4/2000/167 (2000); U.N. Comm. H.R. Res. 1998/47, U.N. ESCOR, 54th Sess., Supp. No. 3, at 158, U.N. Doc. E/CN.4/1998/47 (1998); U.N. Comm. H.R. Res. 1997/42, U.N. ESCOR, 53rd Sess., Supp. No. 3, at 139, U.N. Doc. E/CN.4/1997/42 (1997); U.N. Comm. H.R. Res. 1999/27, U.N. ESCOR, 55th Sess., Supp. No. 3, at 113, U.N. Doc. E/CN.4/1999/27 (1999); U.N. Comm. H.R. Res. 1998/73, U.N. ESCOR, 54th Sess., Supp. No. 3, at 234, U.N. Doc. E/CN.4/1998/73 (1998) (hostage-taking is aimed at the destruction of human rights); G.A. Res. 46/51, U.N. GAOR, 46th Sess., Supp. No. 49, at

the IFIs' current practice, it falls squarely within their respective scopes of operation.

## 2. Framework

The next question necessarily becomes: how are anti-terrorist conditions to be formulated? A significant response must not only combine prevention with prosecution, but must also successfully address the idiosyncrasies of state failure and the domestic prevention of terrorism. Perhaps most importantly, such conditions must be aligned with an anti-terrorism standard accepted by the international community (i.e., the international donor community).

### a. International Conventions and Protocols

Although there are a host of multilateral conventions addressing terrorist acts, there is no comprehensive multilateral convention governing terrorism alone. Specifically, the existing ten conventions and two protocols cover: airports and airplane hijacking;<sup>223</sup> attacks upon "internationally protected persons;"<sup>224</sup>

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283, U.N. Doc. A/RES/46/51 (1991); G.A. Res. 3034 (XXVII), U.N. GAOR, 27th Sess., Supp. No. 29, at 119, U.N. Doc. A/RES/3034 (XXVII) (1972); Organization of African Unity, Declaration and Plan of Action 12, CONF/HRA/DECL(I) (1999), at <http://ncb.intnet.mu/mfa/oau/decpl.htm> (last visited Oct. 27, 2003) (condemnation of terrorism as a violation of human rights); Siracuse, Italy: Conference on Terrorism and Political Crimes, Final Document: Conclusions and Recommendations, pt. I 1-2, reprinted in M. CHERIF, INTERNATIONAL TERRORISM AND POLITICAL CRIMES xi (1975); Michael J. Bazylar, *Capturing Terrorists in the "Wild Blue Yonder": International Law and the Achille Lauro and Libyan Aircraft Incidents*, 8 WHITTIER L. REV. 685, 688 (1986); Robert A. Friedlander, *Terrorism and International Law: What is Being Done?*, 8 RUTGERS-CAM. L.J. 383, 387-88 (1977); Jordan J. Paust, *The Link Between Human Rights and Terrorism and Its Implications for the Law of State Responsibility*, 11 HASTINGS INT'L & COMP. L. REV. 41 (1987); S.C. Res. 579, U.N. SCOR, U.N. Doc. S/RES/579 (1985), reprinted in 25 I.L.M. 243 (1986) (taking of hostages and abductions have severe consequences for the rights of victims and are manifestations of terrorism); G.A. Res. 40/61, U.N. GAOR, 40th Sess., Supp. No. 53, at 301, U.N. Doc. A/RES/40/61 (1985) (terrorism violates human dignity and loss of innocent lives, and mindful of relevant human rights instruments, all acts of terrorism, "by whomever committed," are unequivocally condemned).

223. See Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Sabotage), Sept. 23, 1971, 24 U.S.T. 565, 10 I.L.M. 1151 [hereinafter Montreal Convention]; Convention for the Suppression of

thefts of nuclear materials;<sup>225</sup> the taking of hostages;<sup>226</sup> unlawful acts against maritime navigation and fixed platforms on the continental shelf;<sup>227</sup> terrorist bombing;<sup>228</sup> the financing of terrorism;<sup>229</sup> and the making of plastic explosives.<sup>230</sup> Most of these instruments place legal obligations upon contracting states to: criminalize the acts covered and establish appropriate penalties for crimes committed; provide jurisdiction for certain offenses; provide custody and make a preliminary factual inquiry of the alleged offenders; give notification to interested states of the actions taken; prosecute the alleged offender if the state does not grant extradition; consider the offense to be an "extraditable offence" for purposes of an extradition treaty; and provide assistance in connection with criminal proceedings regarding the offences covered.<sup>231</sup>

While these conventions and protocols are of tremendous importance, they are inadequate in addressing state failure and the domestic prevention of terrorism. As Jennifer Trahan

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Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105 [hereinafter Hague Convention]; Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219 [hereinafter Tokyo Convention].

224. See Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1977, 1035 U.N.T.S. 167 [hereinafter Protected Persons Convention].

225. See Convention on the Physical Protection of Nuclear Material, Oct. 26, 1979, T.I.A.S. No. 11080, 1456 U.N.T.S. 124.

226. See Convention Against the Taking of Hostages, Dec. 17, 1979, T.I.A.S. No. 11081, 1316 U.N.T.S. 205 [hereinafter Hostage Convention].

227. See Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, S. TREATY DOC. NO. 101-1, 1678 U.N.T.S. 222 [hereinafter Maritime Convention]; Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, Mar. 10, 1988, S. TREATY DOC. NO. 101-1, 1678 U.N.T.S. 304.

228. See International Convention for the Suppression of Terrorist Bombings, G.A. Res. 164, U.N. GAOR 52nd Sess., Supp. No. 49, U.N. Doc. A/RES/52/164 (1997) [hereinafter Terrorist Bombings Convention].

229. See International Convention for the Suppression of the Financing of Terrorism, G.A. Res. 109, U.N. GAOR, 54th Sess., Supp. No. 49, U.N. Doc. A/RES/54/109 (1999) [hereinafter Financing of Terrorism Convention].

230. See Convention on the Marking of Plastic Explosives for the Purpose of Detection, Mar. 1, 1991, SEN. TREATY DOC. NO. 103-8, 2122 U.N.T.S. 359 [hereinafter Plastic Explosives Convention].

231. See Trahan, *supra* note 52, at 220.

notes, they are filled with gaps and inconsistencies and only highlight the need for a comprehensive multilateral convention.<sup>232</sup> First, these instruments have little, if any, preventative focus.<sup>233</sup> If prevention is addressed, it is usually formulated in broad language and limited to a single article.<sup>234</sup> The Montreal Convention, for instance, states that “Contracting States shall, in accordance with international and national law, endeavour to take all practicable measures for the purpose of preventing the offences” covered by the convention.<sup>235</sup> The Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons also provides for state cooperation by “exchanging information and co-ordinating the taking of administrative and other measures as appropriate to prevent the commission of those crimes.”<sup>236</sup> This open-ended language not only lacks specificity but may also result in states taking little or no action at all.<sup>237</sup>

Second, some of these conventions and protocols are inapplicable if the acts covered by these instruments occur solely in one state.<sup>238</sup> For instance, if a terrorist act is committed within

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232. Trahan, *supra* note 52, at 220–21.

233. *Id.* at 222.

234. *Id.*

235. Montreal Convention, *supra* note 223, art. 10, para. 1, 24 U.S.T. at 571.

236. Protected Persons Convention, *supra* note 224, art. 4, para. b, 28 U.S.T. at 170, 1035 U.N.T.S. at 170; *see also* Maritime Convention, *supra* note 227, art. 13, 1678 U.N.T.S. at 230, 231.

237. Although some conventions include a preventative focus, encumbering conditions diminish the benefits of such language. For instance, certain conventions require that information be “accurate and verified” before sharing it with other interested states. *See* Financing of Terrorism Convention, *supra* note 229, art. 18, para. 3, G.A. Res. 109 at 412; Terrorist Bombings Convention, *supra* note 228, art. 15, para. b, G.A. Res. 164 at 393. Where terrorist attacks are in question, this may simply take too much time. Other conventions provide detailed steps for the prevention of terrorism but include a lengthy phase-in process for their implementation. *See* Plastic Explosives Convention, *supra* note 230, art. 4, para. 2–3., SEN. TREATY DOC. NO. 103-8, 2122 U.N.T.S. at 375. Perhaps the best example of a convention including detailed steps for the prevention of terrorism is the Financing of Terrorism Convention. *See* Financing of Terrorism Convention, *supra* note 229.

238. Trahan, *supra* note 52, at 225; *See also* Financing of Terrorism Convention, *supra* note 229, art. 3, G.A. Res. 109 at 405; Terrorist Bombings Convention, *supra* note 228, art. 3, G.A. Res. 164 at 390; Hostage Convention, *supra* note 226, art. 13, T.I.A.S. 11081 at 11, 1316 U.N.T.S. at 210; Montreal Convention, *supra* note 223, art. 4, para. 2–3, 24 U.S.T. at 569.

a particular state, and the alleged offender and victims are nationals of that state, then these conventions do not apply.<sup>239</sup> Accordingly, should such a situation arise, officials from that state are under no international obligation to share information about such an offense even if it may be politically related to a potentially larger international crime.<sup>240</sup> Similarly, other states are under no obligation to provide assistance in possible criminal proceedings within that state.<sup>241</sup> Although such provisions were meant to safeguard the sovereignty of each contracting state, it may prove counterproductive in an era of increasingly global terrorism.

Third, and perhaps most importantly, because these conventions and protocols include little if any language addressing the prevention of terrorism and do not address acts committed within a single state, they impose no real obligation to combat domestic terrorists that are active within a particular state but have not yet committed a terrorist act.<sup>242</sup> Thus, a condition requiring debtor states to sign on to these conventions before receiving aid from IFIs would be helpful, but would not necessarily be adequate to address the root causes of the problem.

#### b. UN Resolution 1373

Perhaps one of the best examples of the international community's commitment to the fight against terrorism is UN Reso-

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239. See Financing of Terrorism Convention, *supra* note 229, art. 3 G.A. Res. 109. at 405; Terrorist Bombings Convention, *supra* note 228, art. 3, G.A. Res. 164 at 390; Hostage Convention, *supra* note 226, art. 13, T.I.A.S. 11081 at 11, 1316 U.N.T.S. at 210; Montreal Convention, *supra* note 223, art. 4, para. 2-3, 24 U.S.T. at 569.

240. See Financing of Terrorism Convention, *supra* note 229, art. 3, G.A. Res. 109 at 405; Terrorist Bombings Convention, *supra* note 228, art. 3, G.A. Res. 164 at 390; Hostage Convention, *supra* note 226, art. 13, T.I.A.S. 11081 at 11, 1316 U.N.T.S. at 210; Montreal Convention, *supra* note 223, art. 4, para. 2-3, 24 U.S.T. at 569.

241. See Financing of Terrorism Convention, *supra* note 229, art. 3, G.A. Res. 109 at 405; Terrorist Bombings Convention, *supra* note 228, art. 3, G.A. Res. 164 at 390 ; Hostage Convention, *supra* note 226, art. 13, T.I.A.S. 11081 at 11, 1316 U.N.T.S. at 210; Montreal Convention, *supra* note 223, art. 4, para. 2-3, 24 U.S.T. at 569.

242. See Trahan, *supra* note 52, at 228.

lution 1373.<sup>243</sup> Adopted on September 28, 2001, Resolution 1373 forms the foundation of the UN's counterterrorism efforts. This resolution declares international terrorism a threat to "international peace and security" and imposes binding obligations on all UN member states.<sup>244</sup> It also establishes a Counterterrorism Committee ("CTC") consisting of all members of the Security Council to monitor the implementation of the resolution.<sup>245</sup>

In Resolution 1373, the Security Council mandates that states:

- Refrain from providing any form of support to terrorist groups;
- Take the necessary steps to prevent the commission of terrorist acts;
- Deny safe haven to those who finance, plan, support, or commit terrorist acts;
- Prevent those who finance, plan, facilitate or commit terrorist acts to use their territories to further terrorist purposes against other states;
- Ensure that any person financing, planning, or perpetrating terrorist acts is brought to justice and that such acts are established as criminal offences in each state's domestic laws;
- Afford one another assistance in connection with criminal proceedings relating to the financing or support of terrorist acts;
- Prevent the movement of terrorist(s) through effective border controls.<sup>246</sup>

Resolution 1373 also addresses the financing of terrorism, requiring states to prevent and suppress the financing of terrorist acts, criminalize the funding of terrorist groups by their nationals, freeze the financial assets of terrorists, and prohibit their nationals from providing financial assets to terrorists.<sup>247</sup> In addition, states are called upon to increase the exchange of infor-

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243. S.C. Res. 1373, U.N. SCOR, 4385th mtg., Supp. 1, U.N. Doc. S/RES/1373 (2001).

244. *Id.*

245. *Id.* at 3.

246. *Id.* para. 2.

247. *Id.* para. 1.



mation regarding terrorists and to become parties to the various international conventions and protocols covering terrorism.<sup>248</sup>

In essence, Resolution 1373 “requires all member states to review their domestic laws and practices to ensure that terrorists cannot finance themselves or find safe havens for their adherents or their operations on these states’ territory.”<sup>249</sup> To this end, the CTC is charged with the review of reports submitted by member states of the UN detailing the steps undertaken to fulfill the objectives of Resolution 1373.<sup>250</sup> Through this on-going dialogue, the CTC is to focus on technical capacity building and to “work with each state to implement the resolution at its fastest capable speed.”<sup>251</sup> The reports that have been submitted to the CTC thus far have therefore “varied in both quality and length, largely reflecting the different levels of capacity among states to implement Resolution 1373 and different levels of resources states have to prepare a report under Resolution 1373.”<sup>252</sup>

Although the non-threatening, capacity-building language of Resolution 1373 contributed to its widespread support, it is also one of its major weaknesses. There is simply no end-date as to the resolution’s implementation, nor is there a timeframe as to how long this process could potentially take.<sup>253</sup> The CTC also has no intention of declaring states to be in compliance with the requirements of resolution 1373.<sup>254</sup> In fact, as of April 2003, the CTC declared that it will not operate as a sanctions committee and therefore “will not report to the Security Council those states it has determined are not in compliance with the obligations imposed by Resolution 1373.”<sup>255</sup> There is therefore no ultimate requirement, other than diplomacy, to comply with the resolution’s objectives.

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248. *Id.* para. 3.

249. Eric Rosand, *Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight Against Terrorism*, 97 AM. J. INT’L L. 333, 334 (2003).

250. *Id.*

251. *Id.* at 335.

252. *Id.*

253. *Id.*

254. *Id.* at 336.

255. *Id.*

Another problem with Resolution 1373 is that some states simply lack the technical and financial resources to implement all of the concerns contained in the resolution. Pursuant to Resolution 1373, the CTC has sought to address this issue by identifying each state's specific needs and matching them with donors capable of providing the necessary assistance.<sup>256</sup> To date, over fifty member states have expressed an interest in receiving assistance to enable them to adequately implement Resolution 1373.<sup>257</sup> Unfortunately, the CTC does not have the resources to provide such assistance. The successful implementation of Resolution 1373 is therefore largely dependant upon outside donors that are capable and willing to provide the necessary assistance, whether financial or technical.

Finally, it is questionable whether the submission of written reports by member states is sufficient to fulfill the resolution's objectives beyond its preliminary stages.<sup>258</sup> Once states have reported back to the CTC on their progress with regards to Resolution 1373, written submissions may not be sufficient to adequately monitor the newly enacted legislation and assess the quality of its application.<sup>259</sup> Perhaps effective implementation will require on-site monitoring by the CTC; an authority that is neither explicitly, nor arguably implicitly, granted by Resolution 1373.

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256. Security Council Resolution 1377 invites the CTC "to explore ways in which states can be assisted, and in particular to explore with international, regional and subregional organizations: [t]he promotion of best-practice in the areas covered by Resolution 1373 (2001)...[t]he availability of existing technical, financial, regulatory, legislative or other assistance programmes which might facilitate the implementation of Resolution 1373 (2001)...[and] [t]he promotion of possible synergies between these assistance programmes." S.C. Res. 1377, U.N. SCOR, 4413th mtg., Supp. 1, at 295, U.N. Doc. S/RES/1377 (2001).

257. Rosand, *supra* note 249, at 339.

258. The CTC divided its work into three stages: Stage A would require states to implement the necessary legislation; Stage B would require an executive machinery capable of handling these legislative changes; and Stage C would require its proper implementation. See Rosand, *supra* note 249, at 335–36.

259. Rosand, *supra* note 249, at 339.

## c. A potential role for the IFIs

The IFIs could, however, play a vital role in addressing these issues and fulfilling the objectives of Resolution 1373. Both the IMF and the World Bank could begin incorporating Resolution 1373 into their lending facilities by imposing conditions on their loans requiring the implementation of Resolution 1373 within a specified timeframe. Each disbursement of funds would therefore become contingent on a state's actual incorporation of certain counterterrorism measures within its national laws. Consideration should also be given to make funds available on a grant basis to those states most in need of assistance in implementing Resolution 1373. These grants should be used exclusively for the purposes of Resolution 1373 and could impose the same conditions and timeframes as the IFIs' lending facilities.

Most importantly, however, the subject areas covered by these conditions could be expanded beyond the IFIs' traditional mandates to include areas typically considered outside their respective fields of operation. In addressing the root causes of terrorism and the strengthening of weak states, the IFIs' conditions could emphasize such important areas as prevention, suppression and the exchange of information. For instance, a state could incorporate into its national laws preventative measures such as the following:<sup>260</sup>

- Preventing the use of its territory as a base for planning, organizing, executing, attempting or taking part in terrorist crime in any manner whatsoever. This includes the prevention of terrorist infiltration into, or residence in its territory either as individuals or groups, receiving or giving refuge to, training, arming, financing, or providing any facilitation to terrorists;
- Developing and strengthening systems for the detection of the movement, importation, exportation, stockpiling and use of weapons, munitions and explosives and of other means of

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260. These suggested measures are largely based on select language from the Arab Convention for the Suppression of Terrorism. See Arab Convention for the Suppression of Terrorism, Apr. 22, 1998, *reprinted in* INTERNATIONAL INSTRUMENTS RELATED TO THE PREVENTION AND SUPPRESSION OF INTERNATIONAL TERRORISM 152, 155–56, U.N. Sales No. E.01.V.3 (2001) [hereinafter Arab Convention for the Suppression of Terrorism].

aggression, murder and destruction as well as procedures for monitoring their passage through customs and across borders;

- Developing and strengthening systems concerned with surveillance procedures and the securing of borders and points of entry overland and by air in order to prevent illicit entry;
- Strengthening mechanisms for the security and protection of eminent persons, vital installations and means of public transportation.

As for suppressive measures, they could include:<sup>261</sup>

- Arresting the perpetrators of terrorist offences and prosecuting them in accordance with national law or extraditing them in accordance with relevant provisions of any applicable treaties;
- Providing effective protection for those working in the criminal justice field;
- Providing effective protection for sources of information concerning terrorist offences and for witnesses of such offences;
- Extending the necessary assistance to victims of terrorism.

Furthermore, technical assistance could be provided through collaboration between the IFIs, the CTC, and the states receiving financial assistance. In order to maintain the integrity of a genuine dialogue, the states in question could appoint a committee of three experts in the subject of terrorism.<sup>262</sup> These experts would have the responsibility of communicating with CTC experts appointed by the UN for the specific purpose of engaging in a discourse with states sponsored by the IFIs. Not only would such a structure provide a forum for the exchange of expertise, but it would also provide a conduit for the exchange of information.

In this regard, once this collaboration is established, states receiving financial assistance could enact measures facilitating the exchange of information between these states and the CTC

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261. *Id.* at 157.

262. These experts could be drawn from a variety of different fields such as academia, the government or private practice.

with regards to potential activities and crimes of terrorists and terrorist groups. For instance, these measures could include.<sup>263</sup>

- Promoting the exchange of information with the CTC concerning:
  - a) The activities and crimes of terrorist groups and of their leaders and members; their headquarters and training; the means and sources by which they are funded and armed; the types of weapons, munitions and explosives used by them; and other means of aggression, murder and destruction;
  - b) The means of communication and propaganda used by terrorist groups, their *modus operandi*; the movements of their leaders and members; and the travel documents that they use.
- Notifying the CTC in an expeditious manner of the information it has concerning any terrorist offence that takes place in its territory and is intended to harm the interests of that state or of its nationals and to include in such notification statements concerning the circumstances surrounding the offence, those who committed it, its victims, the losses occasioned by it and the devices and methods used in its perpetration;
- Cooperating with the CTC in the exchange of information for the suppression of terrorist offences and promptly notifying the CTC of all the information or data in its possession that may prevent the occurrence of terrorist offences in foreign territory, against such foreign state's nationals or residents or against their interests.<sup>264</sup>

Although such conditions would go a long way in the fight against terrorism, it is important to note that these measures are not meant to modify or supplant the IFIs' emphasis on the concept of "good governance." The success of these measures is almost entirely based on a state's ability and willingness to adequately implement them. Accordingly, while loan funds provided by the IFIs should serve to address a state's delivery of key political goods in the context of state failure, it is important for the IFIs to consider the strength of such a state's good gov-

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263. See Arab Convention for the Suppression of Terrorism, *supra* note 260, at 158.

264. See *id.*

ernance policies. Similarly, although a state's grant eligibility should largely be based on its capacity to deliver political goods, the international donor community must be provided with some level of protection and assurance that these funds will be used to fulfill the IFIs' intended purposes. Good governance must therefore remain an essential component of the IFIs' financial policies.

#### IV. CONCLUSION

Restructuring the IFIs' conditions to address terrorism raises two important legal questions. First, whether such restructuring falls outside of the IFIs' respective mandates and, second, whether the IFIs can adequately address the issue when the international community has not yet agreed upon a comprehensive multilateral convention.

Both questions can be answered in the affirmative. But the most important question remains whether we can achieve the necessary political consensus to support these changes. Although this Article does not purport to provide the ultimate solution to the eradication of terrorism, it does provide a method through which the international community can help in preventing future attacks. As we have seen, the importance of setting such a regulatory framework cannot be underestimated. The international donor community must therefore be committed to a long-term investment in the war on terrorism without the expectation of immediate results.

As Abraham Lincoln once stated "you cannot escape the responsibility of tomorrow by evading it today."<sup>265</sup> Accordingly, if nothing is done today to prevent tomorrow's terrorist attacks, we must be ready to accept collectively our responsibility for failure to prevent such attacks from occurring.

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265. *Quoteland.com: All the Right Words*, at [http://www.quoteland.com/author.asp?AUTHOR\\_ID=1042](http://www.quoteland.com/author.asp?AUTHOR_ID=1042) (last visited Nov. 6, 2003).