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Prologue

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Issue 24.1 of the *Florida Journal of International Law* heralds a thought-provoking set of articles, ranging across the areas of international business law in relation to developing countries' struggle to become more financially stable; international laws of war in relation to procedural safeguards in the U.S. war against terrorism; law and economics applied to Alexander Sack's concept of the "Odious Debt Problem" suffered by developing nations; evolving women's constitutional rights in Iraq and Afghanistan; and the labor rights of U.S. domestic women, many of whom are poor immigrants. *FJIL* is proud to showcase these diverse articles written by prominent as well as rising scholars. First, Thomas Andrew Kelley III's[1] *Corruption as Institution Among Small Business in Africa* combines painstaking ethnographic work with a critical legal analysis of business institutions and practices in Africa. The larger context of Kelley's article is this: U.S.-based international development programs, including those targeted for Africa, are influenced by New Institutional Economics (NIE)—an American school of economic thought that focuses on the role institutions play in "healthy economic development." Specifically, anchored by NIE principles, the United States has cultivated several development programs across Africa, typically described as "business

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1. Thomas Andrew Kelley III is a Professor of Law and Director of Clinical Programs at the University of North Carolina at Chapel Hill Law. Professor Kelley was Co-Director of the UNC-Chapel Hill Externship Program from 1999-2002 and the Director of Community Programs at the Duke University Center for Documentary Studies from 1994-1999.

formalization" programs, which aim to generate and maintain efficient, "business-facilitative" institutions such as chambers of commerce as well as "one-stop shops," where business owners can take care of all the legal and regulatory requirements that affect their enterprises. In keeping with neoclassical economics, aid organizations hope that the new orderly institutions will induce business owners to leave the informal sector, where most of them now operate, and move into the formal sector, where, theoretically, the new progressive structures will enable them to grow more rapidly, pay taxes and obey health and safety regulations. Against such a rosy backdrop, Professor Kelley's article arrives at sobering conclusions. Kelly's article, whose findings are grounded in a month of painstaking fieldwork among the owners of small businesses in the West African Republic of Niger, argues that business formalization programs are failing to gain traction and entice business owners into the formal sector because the business sector is already ruled by a well established, widely understood institution: corruption.[2] For the United States and other Western aid workers, the widely entrenched and widespread institutionalization of corruption signals new challenges not foreseen by the NIE business model. Kelley concludes by proposing that instead of cultivating rational, business-facilitative institutions in developing countries, and then hoping that business owners will be drawn to them, aid workers should first dismantle a pervasive system of corruption.

Second, Carla Crandall's[3] *Ready . . . Fire . . . Aim!: A Case for Applying American Due Process Principles Before Engaging in Drone Strikes* also employs an autoethnographic genesis based upon her employment, prior to entering law school, at the National Geospatial-Intelligence Agency (NGA). While Ms. Crandall worked at NGA, she was deployed with military forces in Yemen and Iraq and consequently, became fascinated with the procedural protections necessary to ensure the legitimacy of U.S. operations during the war on terror. In her article, Crandall ambitiously aims to offer a groundbreaking approach to the

2. Phillip Segal, *Coming Clean on Dirty Dealing: Time for a Fact-Based Evaluation of the Foreign Corrupt Practices Act*, 18 FLA. J. INT'L L. 169, 190 (2006) (Author employs examples of case law to demonstrate corruption (*i.e.*, *United States v. Napco International, Inc. & Venturian Corp.* involved an "[a]gency agreement through which bribes were funneled to officials of the government of Niger. The agreement used a code name for the agent, which was part of the given name of a Niger official's live-in girlfriend."). 835 F. Supp. 493 (D. Minn. 1989).

3. Law Clerk to the Honorable Laura Denvir Stith, Supreme Court of Missouri. The author wishes to thank Professors David Moore and Ronnell Andersen Jones for their helpful comments on previous drafts of this Article.

otherwise intractable issue of how drone strikes conducted by the United States as part of the war on terror can be legitimized.[4] Crandall claims that thus far, existing scholarship has principally focused on either International Human Rights law or International Humanitarian law to justify or condemn drone attacks. Furthermore, in contrast to the approach she adopts, Crandall claims that the few who have analyzed the applicability of American due process principles have limited their focus to the need for *post*-deprivation review. Crandall makes a bold claim: she purports to explain why none of these approaches offer adequate guidance to govern the behavior of the United States as related to drone attacks. After underscoring why it is so critical that this relatively unexplored area be examined, Crandall interprets *Hamdi v. Rumsfeld* (542 U.S. 507 (2004)) and *Boumediene v. Bush* (128 S. Ct. 2229 (2008)) as potentially pointing out that pre-strike procedural protections may in fact be in place in order to legitimize drone attacks. Ultimately, Crandall inquires into what those procedural protections could be. Specifically, extrapolating from her analysis of *Hamdi* and *Boumediene*, she suggests that Combatant Status Review Tribunals may serve as a useful framework for discerning the procedural protections required by American due process before the United States engages on drone assaults.

Third, Robert Bejesky's[5] *Currency Cooperation and Sovereign Financial Obligations* is as bold and ambitious in scope as the two prior articles. Mr. Bejesky draws from his conceptual tool box of international law principles, contract law doctrines, and observations from the history of international economic cooperation, in order to

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4. *See generally* Paul A. Walker, *Traditional Military Activities in Cyberspace: Preparing for "Netwar,"* 22 FLA. J. INT'L L. 333, 339 (2010) ("[I]t is widely reported that the CIA is operating Predator drones carrying out airstrikes against al Qaeda leadership in Pakistan."); *see also* Thomas J. Bogar, *Unlawful Combatant or Innocent Civilian? A Call to Change the Current Means for Determining Status of Prisoners in the Global War on Terror*, 21 FLA. J. INT'L L. 29, 43 (2009) ("The distinction [between 'direct participation in hostilities' and 'participation in the war effort'] becomes blurred when civilian contractors operate drones engaged in combat . . . ."). International Committee of the Red Cross, *Commentary on the Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977*, at 619.

5. Robert Bejesky has an M.A, in Political Science (Michigan), an M.A. in Applied Economics (Michigan), and an LL.M. in International Law (Georgetown). The author has taught courses in International Law at Cooley Law School and for the Department of Political Science at the University of Michigan, courses in American Government and Constitutional Law at Alma College, and courses in Business Law at Central Michigan University and the University of Miami.

dissect an issue involving principal/agent relations and public choice. Bejesky begins by acknowledging that a potential conflict in fiduciary relations can flow from two fundamental principles: (1) private sector and diplomatic interactions with foreign leaders that solidify economic agreements at the international level, and (2) self-determination and informed public choice over fiscal decision-making at the domestic level. Bejesky argues that a transnational agreement that contravenes the latter fundamental of legitimate governance may have imposed a continuous international obligation on the state and its people even when voluntary, informed, and/or rational assent to the obligation were lacking or there were irregularities in the original agreement or its execution. In simple terms, private contracts and international treaties can, even as an unintended consequence, impose hegemonic conditions on a country causing immense suffering among its citizens, such as a crippling inheritance of debt—a condition the local population has not chosen.

Bejesky thus seeks to unearth variables relevant to the continuing generation of unsustainable debt that has plagued developing countries, fiscal questions that could be relevant to current issues in Ireland and Greece, and the significant attention recently focused on Alexander Sack's formulation of the Odious Debt Doctrine. With the Iraq upheaval being in the international spotlight, and the prominence of Sack's description of the mounting debt problem, both organizations and prominent individuals have advocated that populations be relieved of debt obligations when political leaders have breached fiduciary commitments to the populace. Like Kelley, Bejesky points to numerous instances of corruption that violate the principle of rational, public choice: "Some examples of government agents contravening [the] populace include accepting foreign loans and pilfering the value, financing human rights abuses, or spending not for the benefit of the state or its people." Despite powerful advocacy, Bejesky sadly observes that creditor-state legislative initiatives have not emerged. He outlines some of the major obstacles to effective change, such as the difficulties of identifying and defining lost economic value amid interacting economic variables and connecting adverse financial ramifications to the distant breach in fiduciary relations. In closing, Bejesky proposes a three-element test that assesses practical detail of lost economic value and advances a contemporary definition of breach. For Bejesky, it is imperative that such an alternative framework should use macro-level generalities found in the developing world debt crisis, currency cooperation, and globalization, and support the chosen language of the espoused elements with doctrines found in the common law of contract,

equity, and international law.

Fourth, Carolyn Dubay's[6] *Beyond Critical Mass: A Comparative Perspective on Judicial Design and Gender Inequality in Iraq and Afghanistan* begins with the observation that "crisis" can signal both an emergency, as well as an opportunity for change and growth. With the rash of revolutions and democratic protests spreading like wildfire through the Middle East and North Africa, there is once again a striking opportunity for constitutional reform and engagement in Islamic societies, especially in relation to women's rights. Dubay thinks that future efforts at incorporating women's voices into the development of the law must be informed by the recent constitutional reform efforts in Iraq and Afghanistan." Dubay offers a carefully nuanced critique. She notes that although the new constitutions in these post-conflict states contained specific provisions to guarantee women's political participation in their national legislatures, the design of these so-called "fast track" remedies to gender discrimination have failed to address the historical role of judicial institutions in enforcing discriminatory norms affecting women. Hence, even if gender quotas in Afghanistan and Iraq seem to signal "an immediate and tactical success for women's groups," she cautions that failing to adopt a more holistic, "multi-dimensional approach to ensure long-term entrenchment of women's equality in the context of the Islamic state" was a strategic error in the constitutional drafting process.

Dubay argues that, as the larger pattern of history shows, constitutions may provide many rights. Nevertheless, securing the rule of law depends on effective enforcement-side mechanisms that shape, albeit slowly, how society values and respects constitutional guarantees. She eventually arrives at similar conclusions as does Kelley regarding the entrenchment of corrupt practices in longstanding cultural structures, this time, obstructing not only political and economic development, but also specifically the development of women's rights. While the *sine qua non* for successful implementation of these quotas depends on improved security and education, as well as an electoral processes free from intimidation and fraud, structural weaknesses in the judicial framework created under the new constitutions in Afghanistan

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6. Carolyn Dubay is a Visiting Scholar, Faculty of Law at the University of Leuven, Belgium. The author wishes to thank Alex Braunstein, David Byron, Kendall Obreza, Adriana Paris, Joshua Root, Adam Suess, and Laura Thayer for their excellent editorial work, and a special thanks to Jennifer Allen and Marta Bakas for their dedication and painstaking attention to detail.

and Iraq, combined with existing deficiencies in judicial capacity, remain "a barrier to effective empowerment of women through the law." Thus, Dubay ardently concludes that an integrated strategy in the constitutional drafting process should have therefore promoted the participation of women not just in the legislative process, but in the formal and informal judicial processes at the national and local levels.

Fifth and finally, Adriana Paris'[7] *Women Meet the State: Protection for Domestic Workers in the United States* is the Winner of FJIL's 2011-2012 Best Note Competition. Like Dubay, Paris' focus is on women's rights but Paris adjusts her analytic lens on the situation of U.S. domestic workers, many of whom are poor immigrant women. Paris characterizes the term "domestic worker" as referencing mostly immigrant women who provide in-home services, such as cleaning and general home maintenance for individuals and families.[8] Paris observes that U.S. labor laws, such as the Fair Labor Standards Act and the National Labor Relations Act, do not offer full protection for domestic workers. Unfortunately, she also notes that the William Wilberforce Trafficking Victims Protection Reauthorization Act, a source of possible supplementary legal protection, has proven similarly ineffective.

Thus, Paris argues that in order for domestic workers to have minimum wage, maximum working hours and better working conditions, states and localities must act. As examples of proactive strategies, she points out that states such as New York and Illinois, and localities such as Montgomery County, Maryland, have been successful in addressing their constituent domestic workers' specific needs. Thus, Paris suggests that the preferred avenue for achieving domestic worker protection is state and local law rather than federal law. However, it is difficult to segregate the local from the national and the international. Because domestic workers mainly immigrate from other countries, this

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7. Adriana Paris graduated with a B.A. with honors in the major in May 2009 from the University of Central Florida; she expects to complete her J.D. in May 2012 at University of Florida Levin College of Law. The author extends special thanks to Liridona Sinani and Merise Jalali, Articles Editors, for going above and beyond the call of duty in vetting this paper for the final edited version.

8. *E.g.*, Jose Miguel Flores, *The South-North Exchange on Theory, Culture and Law: Law, Culture, and Indigenous People: Comparative and Critical Perspectives: Essays: Humans and Rights: Colonialism, Commerce, and Globalization: Globalization and Urban Opportunities in the Immigrant Cityscape*, 17 FLA. J. INT'L L. 719, 722-23 (2005) ("From their ethnic neighborhoods in Jackson Heights in New York and Boyle Heights in Los Angeles . . . . immigrant populations leave home each day to occupy many of the janitorial, hotel and leisure industry jobs . . . and other service sector, often low wage jobs. . . .").

issue requires an international focus as well. Therefore, Paris notes that some improvement in the working conditions in the sending countries or some international regulation of labor migration is necessary so that domestic workers do not have to migrate internationally for jobs.