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ARTICLES

**Cover Image**: Fernando Botero: Abu Ghraib 60, 2005: oil on canvas; 51-5/8 x 62-1/4 in.; University of California, Berkeley Art Museum and Pacific Film Archive, Gift of the artist. 2009.12.35

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# Let's Talk about the Boteros: Law, Memory, and the Torture Memos at Berkeley Law

Laurel E. Fletcher*

*What parts of their uncomfortable associations should universities remember, and how? Berkeley Law is revisiting an ongoing question about its link to the War on Terror: how should the school should address its relationship to the Torture Memos of the Bush Administration in light of its employment of one of the Memos' principal authors, Professor John Yoo? The dean of Berkeley Law is considering whether to remove paintings by the world-famous artist Fernando Botero. The paintings, currently on prominent display inside Berkeley Law, depict US soldiers torturing prisoners at the Abu Ghraib prison. These artworks rebuke the US government and its decision to rewrite the foundational norms of the rule of law in the pursuit of national security after 9/11. The potential removal of these paintings raises questions of memory heuristics: why are the paintings there at all, what do they communicate about the past, and is this past worthy of commemoration? This Article examines the paintings as works of public memory and uses this lens to explore what the Boteros have come to mean to the Berkeley*

* Clinical Professor of Law, University of California, Berkeley, School of Law. I am very grateful to many colleagues at Berkeley and beyond for their help and guidance. While this Article benefited from their engagement, I am solely responsible its contents. In particular, I would like to thank Christopher Edley, Jr. and Erwin Chemerinksy for their institutional insights. Many individuals shared their knowledge of relevant events or offered valuable comments including, Kathryn R. Abrams, Muneer Ahmad, Roxanna Altholz, Carolyn Patty Blum, Juliet Brodie, Seth Davis, Pablo de Greiff, Sandy Fredman, Eliza Garnsey, Amber Ginsburg, Sara Kendall, Alexa Koenig, Christopher Kutz, Emma Stone Mackinnon, Saira Mohamed, Melissa Murray, Sarah Nouwen, Nomfundo Ramalekana, Nikki Reisch, Bertrall Ross, Meg Satterthwaite, Jane Schacter, Jeff Selbin, Jonathan Simon, Eric Stover, Surabhi Ranganathan, Ruti Teitel, Kathleen Vanden Heuvel, Hedi Viterbo, Harvey M. Weinstein, and Mike Wishnie. This Article profited from feedback I gained presenting at the following institutions: Cardozo School of Law; Columbia Law School; The Dickson Poon School of Law, King's College London; SOAS, University of London; University of California, Irvine; University of Cambridge; University of Kent; University of Oxford; Ulster University; and Yale Law School. Thanks to Shaika Ahmed, Antonia David, Amanda (AJ) Jaramillo, Lauren Kelly-Jones, and Sanaz Payandeh for their excellent research assistance, the outstanding staff at the Berkeley Law Library for their expert support, and Olivia Layug Balbarin for preparing the manuscript. I also wish to thank the editors at BJIL for their helpful feedback and edits. I shared a draft of the manuscript with John Yoo, who declined to provide comments.

*Law community. Understanding the Boteros as memory works enables us to see their representational economy in greater complexity and invests the deliberation about their future as a site for shaping institutional identity and values. By grounding discussion of how the law school should reconcile with this divisive past in memory theory, this Article provides insights into broader debates about how universities should reckon with their unsettling histories.*

## INTRODUCTION

Berkeley Law is now revisiting a question about its institutional values and identity: how should the school address its relationship to the so-called Torture Memos of the Bush Administration in light of its employment of one of the Memos' principal authors, Professor John Yoo? Since 2004, when the first photographs of US soldiers torturing Iraqi prisoners at Abu Ghraib became public, and journalists obtained the Department of Justice legal memorandum authorizing so-called "Enhanced Interrogation Techniques," the document and the torture scandal have been indelibly linked in the public's imagination.[1] The memorandum, written by Professor Yoo while he served as a high-level government attorney, was one of several legal opinions that interpreted domestic and international law as justifying a State policy of unprecedented coercive interrogation techniques.[2] These memoranda authorized US personnel to torture suspected terrorists and allowed the Bush Administration to defend the legality of its detention and interrogation policies.[3]

Later, President Obama acknowledged that the United States had committed torture, disavowed the policy, and reestablished US compliance with international standards.[4] However, President Obama stopped short of holding anyone accountable for justifying or implementing a policy of torture. Consequently, questions linger about the legality and morality of the country's interrogation and detention policies. The Torture Memos remain a subject of controversy because we as a country have not fully repudiated them.

The controversy over the Torture Memos put a spotlight on Professor Yoo, and public criticism also took aim at the university that employed him. There were public demands for the university to censure the controversial professor.[5] How could a key architect of the legal scaffolding for a State policy of torture be allowed to educate the next generation of lawyers? Could or should the university censure a faculty member for conduct that fell outside his academic duties? What did Professor Yoo's position on the law faculty signal about the values of the leading public law school in the State of California? Professor Yoo's presence on the faculty raised narrow questions about permissible regulation of faculty

1. *See infra* notes 57–58.

2. *See infra* notes 42–43, 45.

3. *See infra* text accompanying notes 44–45.

4. President Barack Obama, Press Conference by the President (Aug. 1, 2014), https://obamawhitehouse.archives.gov/the-press-office/2014/08/01/press-conference-president [hereinafter Press Conference by President Obama].

5. *See, e.g.*, Martin Lasden, *Mad About Yoo*, DAILY J. (Sept. 2, 2007), https://www.dailyjournal.com/articles/303420-mad-about-yoo; *see also infra* notes 93–94 and accompanying text.

conduct, as well as broad questions about legal education. These are sensitive and lingering questions, which have circulated, largely unresolved, in the public sphere, in legal academia, and at Berkeley Law for years.

University officials responded to demands for action by reference to law, invoking the academic rules that governed Professor Yoo's conduct solely as determinative of what the university could do.[6] In so doing, administrators deflected more searching criticism of the institution. Dean Edley responded to pressure to sanction Professor Yoo by citing to the academic regulation on unacceptable faculty conduct, which provides for dismissal of faculty members who are convicted of a criminal offense that "clearly demonstrates unfitness" to serve as a faculty member.[7] Because Professor Yoo was never convicted of an offense, the university considered the matter closed.[8] By narrowing its focus to the question of illegality, Berkeley Law effectively absolved itself from recognizing the institutional and cultural challenges that the controversy over Professor Yoo provoked. If the university administration had understood the relevant policy was insufficient, it could have taken steps to change it.[9]

Furthermore, Berkeley Law could have taken nonlegal measures that would have explicitly affirmed the school's values in relation to the Torture Memos and the rule of law. The school could have publicly engaged with the broader questions that the controversy provoked about the role of lawyers in safeguarding liberal values and human rights in a democracy and about the mission of law schools in this regard. The school could have issued statements, revised the curriculum, or initiated research on these topics. Such communicative practices would have represented an *institutional* response to the crisis. Instead, the burden fell to faculty and students who acted in their individual capacities to raise important questions.[10]

Berkeley Law's single visible response to the Torture Memos was the decision by the Dean of the law school, Christopher Edley, Jr., to install four

6. Brad DeLong, *The Torture Memo and Academic Freedom*, THE TORTURE MEMO (May 8, 2008), https://delong.typepad.com/the_torture_memo/2008/05/the-torture-mem.html (response from William Drummond, Chair, Academic Senate, to UC Berkeley Economics Professor J. Bradford DeLong's May 6, 2008 letter).

7. PROVOST & EXEC. VICE PRESIDENT OF ACAD. AFFAIRS, UNIV. OF CAL., *General University Policy Regarding Academic Appointees: The Faculty Code of Conduct (Rev. 7/1/17)*, *in* ACADEMIC PERSONNEL MANUAL, at sec. I, APM-015, at 9 (Acad. Pers. & Programs Office, Univ. of Cal. ed., 2020) (ebook), [hereinafter UC Faculty Code of Conduct], https://www.ucop.edu/academic-personnel-programs/_files/apm/apm-015.pdf.

8. Riya Bhattacharjee, *Dept. of Justice Clears UC Berkeley Professor John Yoo of Misconduct*, BERKELEY DAILY PLANET (Feb. 25, 2010), http://www.berkeleydailyplanet.com/issue/2010-02-25/article/34705.

9. *See infra* Section III.D.

10. In the years following the Abu Ghraib scandal, faculty members and student groups organized conferences and presentations at the law school, but the administration did not mount an institutional initiative explicitly to respond to the challenges that the controversy surrounding the Torture Memos posed to legal education. *See infra* Section IV.B.

Fernando Botero[11] paintings that dominate a main corridor of the law school, just outside the Dean's offices. The paintings, which follow Botero's iconic style of voluminous, bulky human forms, depict detainees being tortured at the Abu Ghraib prison in Iraq. Botero created the works as a "permanent accusation"[12] of the violations committed by the United States.

Botero's paintings memorialize the United States' radical breach of its own human rights commitments. These are provocative paintings of political art; their exhibition at the law school is freighted with meaning. When the paintings were installed in the law school, then-Dean Edley introduced the exhibition as constructing a narrative condemning the breach of the rule of law that led to torture.[13] Although none of the printed materials about the paintings that hang alongside them mention this link, their display in the law school at which Professor Yoo works forms part of the context for viewing the canvasses. The art exhibit thus has mnemonic significance above and beyond its relationship to abstracted rule of law values, since it serves as the *only* continuous visible sign or communicative practice acknowledging the link between the law school and State-sanctioned torture.

In October 2019, the current dean at Berkeley Law, Erwin Chemerinsky, initiated a review of the law school's exhibit of the Botero paintings ("the Boteros"). Prompted by a flood of complaints about the paintings from alumni, faculty, staff, and students, upon his arrival in the summer of 2017, Dean Chemerinsky appointed a committee to consider the fate of the paintings.[14] The Dean told the author in January 2018 that, in his short time at the school, the topic on which he received the received most negative comments was the Boteros. According to Dean Chemerinsky, stakeholders offered several reasons for requesting removal: the paintings are disturbing to viewers, unfitting to a law school setting, and an unfair reprimand to Professor Yoo. At the time of this writing, the committee has not concluded its work and the dean has not yet made a decision about what will happen to the canvasses. This ongoing deliberation of the Boteros offers an opportunity to revisit the question of how the school should address its relationship to the Torture Memos.

The Boteros' potential removal rekindles both immediate questions (why are the Boteros there at all?) and larger questions about institutional responsibility to

11. Fernando Botero is a Colombian painter and sculptor known for his "volumetric stylization of figures and objects." His subject matter often includes social critiques. Botero's "works are presently held in the collections of The Museum of Modern Art in New York, the Art Institute of Chicago, and the Museo Botero in Bogotá which is dedicated to the artist and his oeuvre." *Fernando Botero*, ARTNET, http://www.artnet.com/artists/fernando-botero/ (last visited Sept. 17, 2019).

12. Louis Freedberg, *California Cultures: The Art of Abu Ghraib*, S.F. CHRON. (Jan. 22, 2007), https://www.sfgate.com/bayarea/article/CALIFORNIA-CULTURES-The-art-of-Abu-Ghraib-2622260.php.

13. E-mail from Christopher Edley, Jr. Dean, Univ. of Cal., Berkeley, Sch. of Law, to Berkeley Law Community (Aug. 13, 2012 12:01 PM PST) (on file with author).

14. In fall 2019, the dean formed the committee, named the Visual Art Display Committee, and appointed the author as a member.

respond to the school's association with the Torture Memos. This Article makes two contributions to this discussion. First, it provides a fuller record of the context of the exhibition. It reconstructs the history of the paintings and how they came to Berkeley Law, as well as the public controversy surrounding the Torture Memos, Professor Yoo, and the university's response to calls for action. This larger context is critical to understanding the complex meanings that the Boteros convey.

Second, this Article employs an analytical framework of public memory to unpack some of the meanings of the Boteros. Understanding the Boteros as imbued with various meanings or memories enables us to appreciate their rich, communicative value. While a memory analysis supports keeping the paintings, its greatest contribution is to change the terms of how the question is debated. Rather than decide simply whether the paintings should stay or go, the question suggested by public memory is *how* Berkeley Law should respond to its unique relationship to the breach of law that the paintings represent.

This Article does not advance a single interpretation of the Boteros. Rather it sketches several interpretative frames, each of which is progressively narrower in scope. The first interpretative frame explores the relationship between the paintings and the public-facing identity of Berkeley Law. Dean Edley intended the exhibition to communicate a reminder of the dark entanglement of law in the State use of torture during the War on Terror. This is the most general narrative frame that the exhibit communicates to the broadest audience. A second interpretive frame understands the exhibition as the result of the exclusively legal response that the university took to the controversy regarding Professor Yoo. This approach produced a false binary between imposing a legal sanction and doing nothing. Dean Edley pursued an alternate path: he acted on his own initiative to install the exhibition, which opened, through art, a further and continuous communication on the topic. The final interpretative frame examines the relationship between public memory and institutional identity, and the role of the faculty in shaping how Berkeley Law communicated its response. Faculty engagement on this topic is an important site of study to appreciate the economy of institutional identity and its production through public memory.

Berkeley Law has the opportunity to consider, through a reassessment of the Boteros, its institutional responsibility to produce and curate the school's public memory. The law school's association with the Torture Memos creates a moral demand to clarify the school's position on torture and on the role of legal educators. Contemporaneous with the protests against Professor Yoo, Berkeley Law could have expressed its views about the morality and optics of employing, as a senior member of the international law faculty, one of the lawyers who approved techniques that led to torture and immunized State agents from criminal prosecution. However, the university ducked its institutional responsibility by protecting the right of faculty to participate in public life and enjoy their employment rights as predominant values over all others. Against this backdrop, Dean Edley's decision to display the Boteros broadened the university's range of

communicative practices. Art can be a moral intervention that conveys institutional values.

There will likely be a range of views offered regarding whether the Botero exhibit is an appropriate way to express institutional values. Some will argue that the Boteros should be kept because of their representational power depicting the abuse of power and law. The paintings have become symbols that denounce torture and the complicity of law in its practice. This reason alone might justify keeping the Boteros at the law school. However, those who believe that Professor Yoo provided exemplary public service, or who think that the school should not take a normative position about government service rendered by a faculty member, may see the paintings as an unwarranted rebuke of an accomplished professor.

Temporality is a challenge for how Berkeley Law considers its public memory of the Torture Memos. The continuous presence of Professor Yoo on the faculty makes it impossible to disaggregate the institution's communication of a substantive value judgment about his government work from the broader questions about what values the law school seeks to project. This temporality is what makes the topic especially sensitive and difficult to address, and what makes it imperative for Berkeley Law to do so.

In reconsidering the paintings, we also should ask whether these works should serve as the only mnemonic devices for these issues that the school cultivates. The school should consider various ways to promote engagement with the legal and moral questions provoked by the Torture Memos, in addition to art. Removal of the paintings without further institutional engagement with these issues reasonably will be interpreted as silencing deliberation on the matter.

This Article analyzes the memory work performed by the Boteros at Berkeley Law and considers how discussing the exhibit as public memory shapes community deliberation about the paintings in the context of the institutional identity of the school. Section I provides the conceptual and legal background for an analysis of the controversy surrounding the Abu Ghraib prisoner abuse and its link to Professor Yoo. It offers an overview of memory studies and identifies the key concepts and dynamics applicable to analyzing the Boteros. It then outlines the legal development of the US detention and interrogation program after 9/11 and Professor Yoo's role in it. Section II offers a brief history of how the Boteros came to Berkeley Law and what the artist and university intended by bringing the canvases to the school. Section III examines the public controversy surrounding Professor Yoo upon his return to the faculty, which coincided with the eruption of the Abu Ghraib scandal. In this Section, I review the public demands for Professor Yoo's censure and Dean Edley's defense of Professor Yoo as a member of the faculty. Section IV analyzes the paintings as memory works. This Section examines the school's public-facing communication about the works; how the institution used the paintings to balance competing institutional values of upholding a faculty member's due process rights while also signaling its rebuke of the legal advice he offered as a government lawyer; and how faculty norms of

collegiality shaped the public memory Dean Edley constructed. It then considers the institutional responsibility for memory. In particular, this Section revisits the mnemonics of the Boteros and considers what is at stake in their continued presence, removal, or replacement with other communicative devices.

## I.
## CONCEPTUAL AND LEGAL BACKGROUND

### *A. Memory Studies: Conceptual and Interpretive Tools*

The field of memory studies offers several concepts and techniques for studying the Boteros as sites of meaning making about the Torture Memos and Berkeley Law's moral relationship to the memos and to the War on Terror. Broadly concerned with how the past is engaged and the consequences of this engagement, memory studies is an area of multidisciplinary work that includes the humanities and social and cognitive sciences.[15] The field considers questions of how material objects and communicative practices transmit meaning across time; the role of social interactions, institutions, and political contestations in shaping discourse about the past; and the mental and cognitive processes involved in individual memory. The objects of study are varied. They may be tangible materials (texts, paintings, cultural artifacts, etc.); non-tangible objects (rituals, holidays, cultural practices and traditions, etc.); or intentionally created markers that remind us of past events (memorials and commemorations).[16] The unit of analysis may be the individual, family, community, nation, and relationship or interrelationship of one unit of analysis to another unit(s).[17] These approaches share a common understanding that memory is an inherently dynamic process that mediates between who is remembering and what is remembered.

In the context of memorials, museums, and other curated objects of public memory, institutional decision makers are instrumental in determining what is remembered, how, and for whom. Dean Edley's decision to bring the Boteros to Berkeley Law put them into a dynamic and immediate relationship with the Berkeley Law community, fundamentally changing the interpretative context for the works from that of an art museum.

Insights from scholars concerned with remembrance at the collective (rather than individual) level, as well as those interested in how public institutions create

15. *See generally* CULTURAL MEMORY STUDIES: AN INTERNATIONAL AND INTERDISCIPLINARY HANDBOOK (Astrid Erll, Ansgar Nünning & Sara Young eds., 2008); THE COLLECTIVE MEMORY READER (Jeffrey K. Olick ed., 2011); IWONA IRWIN-ZARECKA, FRAMES OF REMEMBRANCE: THE DYNAMICS OF COLLECTIVE MEMORY (1994).

16. *See, e.g.*, CULTURAL MEMORY STUDIES, *supra* note 15; THE COLLECTIVE MEMORY READER, *supra* note 15; IRWIN-ZARECKA, *supra* note 15.

17. *See, e.g.*, Jean-Christophe Marcel & Laurent Mucchielli, *Maurice Halbwachs's Mémoire Collective*, *in* CULTURAL MEMORY STUDIES, *supra* note 15, at 141–49; Jan Assmann, *Communicative and Cultural Memory*, *in* CULTURAL MEMORY STUDIES, *supra* note 15, at 109–18.

or use cultural artifacts that interpret and generate meaning about the past, are most pertinent to this analysis. Their work, like mine, investigates the "interplay of present and past in socio-cultural contexts."[18] Therefore, I apply several pertinent insights from these areas to situate my examination of the Boteros. These cluster around three dimensions of memory work: the contingent nature of memory, the relationship of memory to identity, and questions of perspectivity and the dynamics of how viewers experience mnemonic objects.

### *1. Memory Heuristics*

Perhaps the defining feature of memory studies is its understanding of memory as socially constructed. What we remember of the past and how we interpret it is shaped by context: what materials are used to trigger recollections, how those are presented, for whom, for what purpose, and so on. The intellectual roots of memory studies date to the 1920s, when French sociologist Maurice Halbwachs developed the concept of collective memory to explain the transmission of ideas and values ("memory") across generations.[19] Halbwachs theorized that individual memories do not exist in a vacuum but are instead the product of social construction and exchange.[20] The concept of collective memory helped explain shared understandings and meanings that persist over generations and distinguish groups from one another.[21] Scholars from various disciplines have expanded on Halbwachs' insights into the ways that the construction of memory (also referred to as works of memory, or memory works) reflects important shared values and shapes identity.[22] Often related to the stories that groups tell about their histories, construction of shared memory refers to processes that communities engage in to "transmit narratives about themselves and others across time."[23]

One strand of memory studies focuses on tangible objects, such as monuments, to examine the relationship between memory and identity. Often referred to as "memory sites" or "sites of memory," these are locations, objects, or figures that "provide a placeholder for the exchange and transfer of memories

18. Astrid Erll, *Cultural Memory Studies: An Introduction*, *in* CULTURAL MEMORY STUDIES, *supra* note 15, at 2.

19. *See* MAURICE HALBWACHS, ON COLLECTIVE MEMORY (1992).

20. *Id*. at 53 ("We can understand each memory as it occurs in individual thought only if we locate each within the thought of the corresponding group.").

21. Halbwachs excluded from collective memory the sphere of culture, and scholars have extended the field to explicitly consider the sociocultural context—i.e. institutions, rituals, and practices—that plays a role in memory. *See* Assmann, *supra* note 17, at 110 (distinguishing Halbwachs's social memory from cultural memory); ALEIDA ASSMANN, CULTURAL MEMORY AND WESTERN CIVILIZATION: FUNCTIONS, MEDIA, ARCHIVE (2011); IRWIN-ZARECKA, *supra* note 15; *see also* Erll, *supra* note 18, at 3–4.

22. For elaboration on the development of the field, *see* Erll, *supra* note 18, at 1.

23. Kris Brown, *Commemoration as Symbolic Reparation: New Narratives or Spaces of Conflict?*, 14 HUM. RTS. REV. 273, 275 (2013).

among contemporaries and across generations."[24] In particular, the creation of monuments and memorials is one way in which nations and communities construct the past and regulate how it is remembered in the present.[25] There is a rich literature on monuments and memorials that focuses on these objects as processes of forming national identity and social memory,[26] their social evolution over time,[27] and their function as sites of meaning generation.[28] Sites of memory therefore reflect what those who create them want to convey about the past.

Public memory is constructed and maintained by institutions.[29] Moreover, the specific meanings that viewers may take from sites of memory are not stable or monolithic but are the product of interchange between the viewer and the social context in which the object is displayed. Institutional actors, like museum curators, librarians, and public officials, select the artifacts (including works of art, texts, and public memorials) available to the public, thereby making available or withdrawing mnemonic objects.[30] These decisions may be deeply contested initially or may become so at particular moments in time. At the same time, the experience of viewers is shaped by their individual perspectives: their sense of self and the social and political context in which they approach the memory site. The dynamic interaction between viewer and object is mediated by the context in which the viewing takes place and changes over time.[31] In fact, one of the ironies of memory sites is that they need active intervention to maintain their power to evoke the past and not to fade into the landscape.[32] Public memory is best understood as a dynamic process, which helps explain why the Boteros generate controversy at particular moments and why current Berkeley Law students may

24. Ann Rigney, *The Dynamics of Remembrance: Texts Between Monumentality and Morphing*, *in* CULTURAL MEMORY STUDIES, *supra* note 15, at 345, 346; *see also* JAY WINTER, SITES OF MEMORY, SITES OF MOURNING: THE GREAT WAR IN EUROPEAN CULTURAL HISTORY (1995); Eleanor Heartney, *An Iconography of Torture*, ART IN AM., Jan. 2007, at 128.

25. ALBERT BOIME, THE UNVEILING OF THE NATIONAL ICONS: A PLEA FOR PATRIOTIC ICONOCLASM IN A NATIONALIST ERA 11 (1998); *see also* Duncan Light & Craig Young, *Public Memory, Commemoration, and Transitional Justice: Reconfiguring the Past in Public Space*, *in* LESSONS FROM TWENTY-FIVE YEARS OF EXPERIENCE (Lavinia Stan & Nadya Nedelsky eds., 2015) (examining how public space under communist and postcommunist regimes particularly demonstrate the remaking of public memory, since public spaces were first molded to fit the narrative of the communist regime and later "cleansed" with the fall of the regime through the removal, renaming, rededication, and reuse of communist symbols).

26. *See* JAMES E. YOUNG, THE TEXTURE OF MEMORY: HOLOCAUST MEMORIALS AND MEANING (1993).

27. *See generally* WINTER, *supra* note 24; FRANÇOISE CHOAY, THE INVENTION OF HISTORY MONUMENT (2001).

28. *See* HALBWACHS, *supra* note 19; YOUNG, *supra* note 26; WINTER, *supra* note 24; Andrew M. Shanken, *Research on Memorial and Monuments*, 84 ANALES DEL INSTITUTO DE INVESTIGACIONES ESTÉTICAS 163 (2004); Brown, *supra* note 23.

29. *See* ASSMANN, *supra* note 21.

30. *See* Aleida Assmann, *Canon and Archive*, *in* CULTURAL MEMORY STUDIES, *supra* note 15, at 97; *see also* ASSMANN, *supra* note 21.

31. Rigney, *supra* note 24, at 345.

32. *See* Shanken, *supra* note 28, at 167–68.

not understand the reason for the paintings' continued presence. As one scholar observed, collective memory is "like a swimmer, [who] has to keep moving even just to stay afloat."[33]

*2. Why the Boteros Are Memory Works*

Objects take on particular meanings, in part, as a result of the interpretive frame in which they are presented. As James Young observed in the context of memorialization of the Holocaust, individuals and communities can use all manner of objects and media—from family mementos to film—as "sites of memory."[34] Because of their links to or interpretations of past events, material objects communicate and trigger particular meanings. Works of art can also serve to commemorate and narrate past events through representation. Pablo Picasso's *Guernica* painting of the massacre of civilians in the Spanish Civil War is one of the most famous examples of modern art memorializing the horrors of war.[35]

Like the attack on the village of Guernica, the 9/11 attacks on civilians by Al Qaeda hijackers came from the sky and ushered in a new era of warfare: the "War on Terror." Botero painted the horrors of this new war, depicting the torture of Iraqi prisoners by US soldiers in a series of paintings. The paintings symbolize how the Bush Administration abandoned the American commitment to human rights. The four paintings that hang at Berkeley Law feature naked detainees bound, blindfolded, and forced into degrading positions; one depicts prisoners stacked in a human pyramid, another shows a single prisoner doubled over on the floor with the boot of a guard pressing into his back. In a third, a menacing dog stands triumphant on the bloody back of a prostrate, caged inmate. The fourth canvass has two male figures. One is lying on his side wearing nothing but a woman's bra, and a second prisoner is sitting on his back arms raised to ward off the incoming kick from a guard; a stream of urine is hitting them both. The paintings capture the sadism and brutality of State violence. Emotionally powerful, the paintings elicit the viewer's revulsion. The message is an unequivocal denunciation of torture. Botero invoked Picasso to explain his own intention to yoke his art to memory as a moral and political intervention, stating "[p]eople would forget about Guernica were it not for Picasso's masterpiece. Art is a permanent accusation."[36]

33. Rigney, *supra* note 24, at 345.

34. *See* YOUNG, *supra* note 26, at viii.

35. "Painted as a passionate protest against senseless violence," *Guernica* has been "elevated . . . to the status of moral exemplar" and "universal icon warning that unless we studied its lessons, history was doomed to repeat itself." GIJS VAN HENSBERGEN, GUERNICA: THE BIOGRAPHY OF A TWENTIETH-CENTURY ICON 1 (2004). While Picasso's painting marked the atrocities of modern war, Francisco Goya, the eighteenth- and nineteenth-century Spanish painter, is credited as the first to represent the horrors of war, breaking with the tradition of representing battle scenes as sites of heroism and glory. *See* Julian Freeman, *War Art*, *in* THE OXFORD COMPANION TO MILITARY HISTORY (2004).

36. *See* Freedberg, *supra* note 12; Sonia Fleury, *Abu Ghraib Art, Shunned Elsewhere, Debuts*

Memory works evolve as the meaning of an object changes with its sociocultural context. The setting in which the Botero paintings are displayed creates meaning. Viewed in a museum, the paintings would offer an interpretation of events at Abu Ghraib that accuses the United States of violating its commitments to the rule of law. But as they are now displayed inside Berkeley Law, the paintings stand in a new relationship to their surroundings. Here, the paintings invite critical assessment of the role of law and lawyers in deploying State power. The unspoken but widely understood association of Berkeley Law with Professor Yoo also colors the paintings' meaning in this context.

As James Young writes, interpreting the meaning of a memorial requires investigating a series of relationships between "time to place, place to memory, memory to time."[37] Taking the Boteros out of a museum and displaying them in Berkeley Law altered these relationships. The paintings in the central hallway speak directly to new generations of law students and to the faculty who train them, continually renewing the message of the Boteros. The placement of the paintings complicates temporality in other ways, as the institution communicates meaning to new law students about a past rupture of law involving a current faculty member. The paintings' relationship of place to memory brings the memory of the abuses committed in the War on Terror into a law school, linking law to the horrors of this new war.

In short, the paintings communicate new and multilayered meaning in the law school. The artist intended that his Abu Ghraib series would stand as a "permanent accusation."[38] Its display at a law school supplies one target for censure: law itself. By virtue of their location, viewers are asked to consider how law is linked to the violence depicted in the canvasses and to the torture perpetrated by the United States in the War on Terror. And because the exhibit is displayed in a law school, the paintings stand as an accusation to students and their educators: what is the role of lawyers in projecting or restraining State violence? How will you discharge your duties to your clients? What kind of lawyers will the institution turn out? As a memory work, the exhibition cannot be interpreted in isolation from the controversy at Berkeley Law over Professor Yoo and the Torture Memos. Interpreted against this background, the Boteros communicate an institutional response, one which simultaneously conveys respect for the rule of law and acknowledges law's insufficiency to attend to the episode. The university reasonably found that Professor Yoo's work on the interrogation memos did not violate its faculty conduct policy, and this result left unaddressed the challenge to the school's institutional values to which the Boteros speak. These various meanings—and how they are shaped and interpreted—make the Boteros memory works.

*at UC-Berkeley Library*, DAILY CALIFORNIAN (Jan. 30, 2007) ("Botero cited painters like Diego Rivera and Pablo Picasso as inspirations for the works, which he hopes will remain part of the collective consciousness long after the events themselves have been forgotten.").

37. *See* YOUNG, *supra* note 26, at 15.

38. *See* Freedberg, *supra* note 12.

Memories fade, and in university settings, the constant turnover of students causes memory to fade that much faster. When the Boteros were first brought to the Berkeley campus in 2007, the Abu Ghraib scandal, the US interrogation program, and the ongoing protests against Professor Yoo remained active topics of conversation at the law school and around the country.[39] Today, however, the interrogation program has been dismantled, and despite the lack of accountability, these conversations no longer command the same attention. The very fact that Dean Chemerinsky must now respond to complaints that the Boteros do not belong inside the law school (because the images are upsetting or unfairly critical of Professor Yoo) suggests that the sociocultural context has changed substantially. Perhaps the Boteros have lost some of their original power.

As the school considers what to do with the paintings, now is an opportune time to revisit what Dean Edley intended by displaying the Boteros in the first place. Now is also a time to assess what the paintings have come to represent and to consider whether and how Berkeley Law should continue to foster its relationship to a morally uncomfortable past. To provide a foundation for this analysis, the following Part offers a brief overview of the law and policy applicable to the US detention and interrogation program after 9/11. Subsequently, I introduce the controversy surrounding Professor Yoo's role in developing the legal justification for the program and its spillover effects on his status as a faculty member at Berkeley Law.

### *B. Legalizing Torture: US Interrogation Policy*

In the wake of the September 11, 2001 Al Qaeda attacks, President Bush declared a "War on Terror." Law played a defining role in this new conflict. High-ranking officials, including Vice President Dick Cheney, made the case that the laws of war did not adequately meet the threat posed by a transnational non-State group capable of attacking the United States,[40] and that this threat required the United States to operate on "the dark side."[41] These officials advocated for updated legal rules that would authorize new methods for gathering human intelligence. The March 2002 CIA capture of Abu Zubaydah, a high-ranking Al Qaeda suspect, brought questions about what interrogation techniques would be allowed. The agency turned to the Office of Legal Counsel (OLC) at the Department of Justice (DOJ) for guidance.

39. *See infra* Section III.A.

40. *See* Memorandum from Jay S. Bybee, Assistant Attorney Gen., Dep't of Justice Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, Gen. Counsel, Dep't of Def. 1 (Jan. 22, 2002), https://www.justice.gov/sites/default/files/olc/legacy/2009/08/24/memo-laws-taliban-detainees.pdf (Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees).

41. *Meet the Press* (NBC television broadcast Sept. 16, 2011), https://georgewbush-whitehouse.archives.gov/vicepresident/news-speeches/speeches/vp20010916.html (Meet the Press Tim Russert interviews United States Vice President Dick Chaney).

Assistant Attorney General Jay Bybee and Deputy Assistant Attorney General John Yoo prepared memoranda that interpreted the federal anti-torture statute and established the legal standard that would govern both interrogations outside the United States[42] and the specific interrogation plan utilized in questioning Abu Zubaydah.[43] The CIA sought legal clarification before interrogating Abu Zubaydah to ensure that interrogators could not be prosecuted for using "aggressive methods" of questioning that would "otherwise be prohibited by the torture statute."[44] The August 2002 memorandum regarding applicable standards of conduct became explosively controversial when it was leaked almost two years later, and the document is now commonly referred to as the "Torture Memo."[45] It came to define post-9/11 debates about what is or is not torture, whether torture can ever be justified, and what is the appropriate role of lawyers in validating the use of questionable techniques on detainees. The assumptions driving Bybee and Yoo's legal advice rejected key elements of

42. *See* Memorandum from Jay S. Bybee, Assistant Attorney Gen., Dep't of Justice Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President 1 (Aug. 1, 2002) [hereinafter Torture Memo], https://www.justice.gov/olc/file/886061/download (Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A).

43. *See* Memorandum from Jay S. Bybee, Assistant Attorney Gen., Dep't of Justice Office of Legal Counsel, to John Rizzo, Acting Gen. Counsel of the Cent. Intelligence Agency 1 (Aug. 1, 2002), https://www.justice.gov/sites/default/files/olc/legacy/2010/08/05/memo-bybee2002.pdf (Interrogation of al Qaeda Operative).

44. *See* SELECT COMM. ON INTELLIGENCE, COMMITTEE STUDY OF THE CENTRAL INTELLIGENCE AGENCY'S DETENTION AND INTERROGATION PROGRAM, S. REP. NO. 113-288, at 33–38 (2014) [hereinafter SENATE SELECT COMMITTEE REPORT], https://www.intelligence.senate.gov/sites/default/files/documents/CRPT-113srpt288.pdf; *see also* JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 9 (2007) (explaining that the OLC opinion constituted a "get out of jail free" card for CIA officials involved).

45. The term "Torture Memos" has been used to refer to all legal memoranda authorizing harsh interrogation techniques written by government officials during the Bush Administration. THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB (Karen J. Greenberg & Joshua L. Dratel eds., 2005). "Torture Memos" also refers to the narrower category of six primary memoranda written by OLC attorneys authorizing interrogation techniques to be used on CIA "high value" detainees. David Cole, *Introductory Commentary: Torture Law*, *in* THE TORTURE MEMOS: RATIONALIZING THE UNTHINKABLE, at 3 (David Cole, ed. 2009) [hereinafter THE TORTURE MEMOS]. The first two of these memoranda were written on August 1, 2002, and John Yoo was a principal author, although the memoranda are signed by his superior, Jay Bybee. OFFICE OF PROF'L RESPONSIBILITY, DEP'T OF JUST, INVESTIGATION INTO THE OFFICE OF LEGAL COUNSEL'S MEMORANDA CONCERNING ISSUES RELATED TO THE CENTRAL INTELLIGENCE AGENCY'S USE OF "ENHANCED INTERROGATION TECHNIQUES" ON SUSPECTED TERRORISTS 1 (July 29, 2009) [hereinafter DOJ OFFICE OF PROF'L RESPONSIBILITY REPORT], https://www.hsdl.org/?view&did=28555; SENATE SELECT COMMITTEE REPORT, *supra* note 44, at 34 (noting that Yoo advised that proposed CIA techniques would not violate US law in a July 2002 meeting with CIA and OLC representatives to discuss the proposed interrogation plan for Abu Zubaydah). The memorandum to Alberto Gonzales, which defined the severity of pain that must be reached to meet the definition of torture as being akin to death or organ failure, is generally understood as the central memorandum that contravened international law and legalized torture. Torture Memo, *supra* note 42. This Article will refer to the narrower group of six memoranda collectively as the "Torture Memos" and the August 1 memorandum to Gonzales as the "Torture Memo."

decades of US global leadership promoting the international prohibition against torture.[46]

The United States prides itself on being a world champion of human rights. Its long-standing legal and policy position was that the United States did not practice or condone torture.[47] The Convention Against Torture (CAT), the second international human rights convention the United States ratified,[48] codifies an absolute prohibition against torture and requires States that ratify the treaty to criminalize this conduct.[49] At the time of ratification, US officials made numerous statements reiterating that torture is anathema to US values and policy.[50] Yet 9/11 and the Bush Administration's response to the attacks severely tested that commitment. As Professor Yoo later explained, OLC intended to respect the legal prohibition against torture, not to authorize torture, and the memos were needed to clarify ambiguous legal terms and detail how, or if, the statute applied during the War on Terror.[51] Acts that intentionally inflicted "severe" pain or suffering were prohibited by the statute.[52] But what was "severe"? Given that these interrogations took place in a state of "war," could the President order torture

46. *See* FREDERICK A.O. SCHWARZ JR. & AZIZ Z. HUQ, UNCHECKED AND UNBALANCED: PRESIDENTIAL POWER IN A TIME OF TORTURE 67–72 (2007).

47. *See* Comm. Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, Addendum, United States of America, ¶ 6, U.N. Doc. CAT/C/28/Add.5 (2000), https://2001-2009.state.gov/documents/organization/100296.pdf (The US report—submitted to the United Nations Committee Against Torture in 1999, as required by the CAT—clarified that torture is "categorically denounced as a matter of policy and as a tool of state authority" in the United States); Press Release, Off. of Press Sec'y, The White House, Statement by the President, United Nations International Day of Victims of Torture (June 26, 2003), https://georgewbush-whitehouse.archives.gov/news/releases/2003/06/20030626-3.html ("The United States is committed to the world-wide elimination of torture and we are leading this fight by example.").

48. The United States ratified the International Covenant on Civil and Political Rights in 1992, the Convention Against Torture in 1994, and the Convention on the Elimination of All Forms of Racial Discrimination in 1994. OFF. OF TREATY AFF., DEP'T OF STATE, MULTILATERAL TREATIES AND OTHER AGREEMENTS 520 (2019), https://www.state.gov/wp-content/uploads/2019/07/2019-TIF-Multilaterals-7-31-2019-1.pdf.

49. *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 2, Dec. 10, 1984, 1465 U.N.T.S. 85.

50. *See Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Treaty Doc. 100-20 Hearing Before the S. Comm. on Foreign Relations*, 101st Cong. 1-4, 16 (1990) (statement of Sen. Jesse Helms); *see also id.* at 1–2 ("Nobody favors torture under any circumstance . . . this country just does not torture anyone, by law or in fact."); *see also id.* at 15 (statement of Mark Richard, Deputy Assistant Att'y Gen., Criminal Div., Dep't. of Justice) ("I note with some pride that torture, as understood by most persons, does not often occur within this country and when, if it does, the Department of Justice is committed to seeing that appropriate prosecutions are instituted. As a people we have established constitutional safeguards to protect our inhabitants against wanton and willful violence by public officials.").

51. JOHN YOO, WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR 165–203 (2006).

52. 18 U.S.C. § 2340 (West 2004) (defining "torture" as an act intended to inflict "severe mental or physical pain or suffering"); *see also* 18 U.S.C. § 2340A (West 2004) (prohibiting "torture").

within his powers of commander-in-chief? Finally, if interrogation techniques were found to violate criminal law, could there be legal defenses to torture?

The advice from OLC on these points was sweeping and unprecedented. The memorandum interpreted the anti-torture statute to maximize the "coercive" methods interrogators could apply: it interpreted the severity threshold to be so high that only techniques that inflicted pain equivalent in intensity to the pain "accompanying organ failure . . . or even death" were prohibited.[53] It reasoned that the President's authority to prosecute war was nearly absolute and allowed him to override federal statute and international law to order the torture of detainees. Furthermore, OLC opined that criminal defenses could immunize interrogators from criminal prosecution if a court concluded that the domestic anti-torture statute applied.[54]

The memorandum provoked widespread criticism from scholars, policy makers, and the press.[55] Broadly speaking, the criticism focused on faulty legal

53. Torture Memo, *supra* note 42, at 1, 6.

54. *See id.* at 33–35, 39–46.

55. *See, e.g.*, Statement of Harold Hongju Koh Dean and Gerard C. and Bernice Latrobe Smith Professor of International Law Yale Law School before the Senate Judiciary Committee regarding The Nomination of the Honorable Alberto R. Gonzales as Attorney General of the United States January 7, 2005, at 5. https://law.yale.edu/sites/default/files/documents/pdf/KohTestimony.pdf

("A legal opinion that is so lacking in historical context, that offers a definition of torture so narrow that it would have exculpated Saddam Hussein, that reads the Commander-in-Chief power so as to remove Congress as a check against torture, that turns Nuremberg on its head, and that gives government officials a license for cruelty can only be described—as my predecessor Eugene Rostow described the Japanese internment cases—as a disaster."); Memorandum from William H. Taft, IV, Legal Adviser, US Dep't of State, to John Yoo, Deputy Assistant Attorney Gen., Dep't of Justice Office of the Legal Counsel 1–2 (Jan. 11, 2002) (regarding Your Draft Memorandum of January 9) (asserting that John Yoo's arguments were both legally and procedurally flawed); GOLDSMITH, *supra* note 44, at 148 (criticizing the OLC legal memoranda on interrogations for "the unusual lack of care and sobriety in their legal analysis."); Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1687 (2005); ("That views and proposals like these should be voiced by scholars who have devoted their lives to the law, to the study of the rule of law, and to the education of future generations of lawyers is a matter of dishonor."); Kathleen Clark & Julie Mertus, *Torturing the Law: The Justice Department's Legal Contortions on Interrogation,* WASH. POST (June 20, 2004), http://www.washingtonpost.com/wp-dyn/articles/A54025-2004Jun19.html; Dan Eggen & Josh White, *Memo: Laws Didn't Apply to Interrogators: Justice Dept. Official in 2003 Said President's Wartime Authority Trumped Many Statutes*, WASH. POST (Apr. 2, 2008), https://www.washingtonpost.com/wp-dyn/content/article/2008/04/01/AR2008040102213_pf.html (quoting Thomas J. Romig, the Army's former judge advocate general) ("[The memorandum is] downright offensive . . . ."); Jeffrey R. Smith, *Slim Legal Grounds for Torture Memos; Most Scholars Reject Broad View of Executive's Power*, WASH. POST (July 4, 2004), http://www.washingtonpost.com/wp-dyn/articles/A26431-2004Jul3_2.html (quoting Abraham D. Sofaer, a State Department legal adviser from 1985–90) ("We in the Reagan and Bush administrations intended that deliberate violations of the Convention [Against Torture] should lead to the criminal prosecution."); Ruth Wedgwood & R. James Woolsey, *Law and Torture*, WALL ST. J. (June 8, 2004), https://www.wsj.com/articles/SB108838039091548750 ("This diminished definition of the crime of torture will be quoted back at the United States for the next several decades. It could be misused by al Qaeda defendants in the military commission trials and by Saddam's henchmen. It does not serve America's interest in a world in which dictators so commonly abuse their people and quash their political opponents."); *cf.* Adam Liptak, *The Reach of War: Penal Law; Legal Scholars Criticize*

reasoning and conclusions of law that the memorandum reached on three issues: (1) the standard of severity for torture and the failure of the memorandum to consider contrary relevant and extensive international and domestic jurisprudence on what conduct constitutes torture; (2) separation of powers doctrine and disregard for domestic case law restraining the Commander-in-Chief powers to violate a statute; and (3) the misapplication of criminal defenses to preemptively immunize interrogators from prosecution as a matter of policy.[56]

The public was mostly unaware of this sweeping new legal authority until April 2004, when shocking photos of US soldiers abusing Iraqi prisoners at the Abu Ghraib facility in Iraq became public.[57] On the heels of this disclosure, the *Washington Post* published a leaked copy of the OLC August 2002 memorandum on interrogation standards of conduct.[58] While the Abu Ghraib prisoners were abused outside of interrogation and were not subjected to the methods outlined in OLC memoranda, critics inside and outside of government nevertheless attributed the abuse in the facility to the environment that the Torture Memos, with their loosened standards of treatment, had created.[59] International law is unequivocal

*Memos on Torture*, N.Y. TIMES (June 25, 2004), https://www.nytimes.com/2004/06/25/world/the-reach-of-war-penal-law-legal-scholars-criticize-memos-on-torture.html ("Charles Fried, a law professor at Harvard and the solicitor general in the Reagan administration, said it was important to analyze legal questions fully and dispassionately. 'There's nothing wrong with exploring any topic to find out what the legal requirements are,' he said."); Eric Posner & Adrian Vermeule, *A 'Torture' Memo and Its Tortuous Critics*, WALL ST. J. (July 6, 2004), https://www.wsj.com/articles/SB108906730725255526.

56. *Compare* Waldron, *supra* note 55, at 1682 (arguing that any attempt to loosen the torture standard would deal a traumatic blow to our legal system and affect our ability to sustain the law's commitment to human dignity); Scott Horton, *The Woes of a Torture Lawyer*, HARPER'S MAG. (Mar. 21, 2009), https://harpers.org/blog/2009/03/the-woes-of-a-torture-lawyer/ (asserting that "aside from the ethics and criminal law problems, Yoo's work is troubling just from the perspective of professional competence."); David Luban, *David Margolis Is Wrong: The Justice Department's Ethics Investigation Shouldn't Leave John Yoo and Jay Bybee Home Free*, SLATE (Feb. 22, 2010), https://slate.com/news-and-politics/2010/02/john-yoo-and-jay-bybee-shouldn-t-be-home-free.html; Jordan J. Paust, *Waterboarding is Decidedly and Manifestly Torture*, JURIST (Apr. 23, 2016), https://www.jurist.org/commentary/2016/04/jordan-paust-waterboarding-torture/ ("[A]dequate research during the erroneous 2002 memos would have easily demonstrated that several tactics authorized and abetted in violation of human rights law, the customary and treaty-based laws of war and the Convention Against Torture were torture."); JOSEPH MARGULIES, GUANTÁNAMO AND THE ABUSE OF PRESIDENTIAL POWER 29 (2006); *with* YOO, *supra* note 51, at 181–82, 184–88.

57. *See* Rebecca Leung, *Abuse of Iraqi POWs by GIS Probed*, 60 MINUTES II (Apr. 27, 2004), https://www.cbsnews.com/news/abuse-of-iraqi-pows-by-gis-probed/; Seymour M. Hersh, *Torture at Abu Ghraib: American Soldiers Brutalized Iraqis. How Far up Does the Responsibility Go?*, NEW YORKER (May 10, 2004), https://www.newyorker.com/magazine/2004/05/10/torture-at-abu-ghraib.

58. Dana Priest, *Justice Dept. Memo Says Torture 'May Be Justified'*, WASH. POST (June 13, 2004), http://www.washingtonpost.com/wp-dyn/articles/A38894-2004Jun13.html.

59. Military police guarding the detainees at the prison had been instructed by interrogators to "set physical and mental conditions favorable to interrogation. . . ." MG Antonio M. Taguba, *Findings and Recommendations*, *in* ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE 18 ¶ 10 (May 2004) [hereinafter *Taguba Report*], https://fas.org/irp/agency/dod/taguba.pdf. The interrogation techniques permitted at the facility mirrored those in the August 2002 OLC memo to Gonzales, as in March 2003, OLC provided the Department of Defense with the same interpretation

that torture can never be justified, and UN experts agreed that the abuse at Abu Ghraib crossed the line.[60] In the public's imagination, Abu Ghraib and the Torture Memos were inextricably linked.[61] The Abu Ghraib photographs have become the visual public record of what it looks like when the US government operates on "the dark side."[62]

Initially, the rules of the detention and interrogation program applied to a small number of captured terrorist suspects in CIA custody.[63] Over time, the application of these rules—and the abuses of detainees—spread to military operations in Afghanistan, Guantánamo, and Iraq.[64] Moreover, although the Bush

of the federal torture statute that it had provided to the CIA. Memorandum from John C. Yoo, Deputy Assistant Attorney Gen., Dep't of Justice Office of Legal Counsel, to William J. Haynes II, Gen. Counsel, Dep't of Defense (Mar. 14, 2003) [hereinafter March 2003 OLC Memo], https://fas.org/irp/agency/doj/olc-interrogation.pdf (Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States). When the March 2003 OLC memo became public in 2008, Democratic members of Congress reportedly attributed the abuses at Abu Ghraib to the permissible legal standards governing interrogations of security detainees at the facility. David Johnston & Scott Shane, *Memo Sheds New Light on Torture Issue*, N.Y. TIMES (Apr. 3, 2008), https://www.nytimes.com/2008/04/03/washington/03intel.html.

60. *See UN Seeks to Access Prisoners of US Forces,* SYDNEY MORNING HERALD (June 26, 2004), https://www.smh.com.au/world/un-seeks-access-to-prisoners-of-us-forces-20040626-gdj7qb.html (quoting Theo Van Boven, then-UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, on the subject of Abu Ghraib) ("The whole picture being drawn up is a matter of great concern . . . [t]he prohibition of torture and inhuman and degrading treatment is an absolute one. It may not be derogated from in any circumstances."); Warren Hoge, *U.N. Says Abu Ghraib Abuse Could Constitute War Crime*, N.Y. TIMES (June 4, 2004), https://www.nytimes.com/2004/06/04/international/middleeast/un-says-abu-ghraib-abuse-could-constitute-war-crime.html (quoting Bertrand Ramcharan, then-High Commissioner for Human Rights) ("willful killing, torture and inhuman treatment . . . might be designated as war crimes by a competent tribunal."). In addition, without specifically mentioning Abu Ghraib, the Committee Against Torture expressed concern about the US creation of secret detention facilities, depriving detainees of legal safeguards, and allegations of torture or cruel, inhuman or degrading treatment. Comm. Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, Conclusions and recommendations of the Committee Against Torture, United States of America, ¶ 17, U.N. Doc. CAT/C/USA/CO/2 (2006), https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fUSA%2fCO%2f2&Lang=en.

61. *See* YOO, *supra* note 51, at 182; *see generally* PHILIPPE SANDS, TORTURE TEAM: RUMSFELD'S MEMO AND THE BETRAYAL OF AMERICAN VALUES (2008).

62. *Meet the Press*, *supra* note 41.

63. Torture Memo, *supra* note 42.

64. OFFICE OF THE INSPECTOR GEN. OF THE DEF. DEP'T, 06-INTL-10, REVIEW OF DOD-DIRECTED INVESTIGATIONS OF DETAINEE ABUSE (2006), https://fas.org/irp/agency/dod/abuse.pdf; CIA OFFICE OF INSPECTOR GEN., SPECIAL REVIEW – COUNTERTERRORISM DETENTION AND INTERROGATION ACTIVITIES (2004), https://fas.org/irp/cia/product/ig-interrog.pdf; STAFF OF S. COMM. ON ARMED SERVICES, 110TH CONG., INQUIRY INTO THE TREATMENT OF DETAINEES IN U.S. CUSTODY (Comm. Print 2008) [hereinafter S. COMM. INQUIRY INTO THE TREATMENT OF DETAINEES IN U.S. CUSTODY], https://www.armed-services.senate.gov/imo/media/doc/Detainee-Report-Final_April-22-2009.pdf; ADMIRAL ALBERT T. CHURCH III, *Executive Summary*, *in* REVIEW OF DEPARTMENT OF DEFENSE DETENTION OPERATIONS AND DETAINEE INTERROGATION TECHNIQUES (Mar. 11, 2005), http://hrlibrary.umn.edu/OathBetrayed/Church%20Report.pdf (reviewing detention operations and detainee interrogation techniques in Guantánamo, Afghanistan, and Iraq); JAMES R.

Administration rescinded the leaked August 2002 memorandum in December 2004, the subsequent legal standards for interrogations did not fundamentally change.[65] The interrogation techniques approved in August 2002 remained valid until 2009, when President Obama rescinded all the relevant legal memoranda and executive orders on interrogation adopted by the Bush Administration.[66]

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SCHLESINGER ET AL., FINAL REPORT OF THE INDEPENDENT PANEL TO REVIEW DOD DETENTION OPERATIONS (2004), http://www.dtic.mil/dtic/tr/fulltext/u2/a428743.pdf (reviewing detention operations in Guantánamo, Afghanistan, and Iraq); Memorandum from David Margolis, Assoc. Deputy Att'y Gen., Dep't of Justice, to Eric Holder, Att'y Gen. 75 (Jan. 5, 2010), https://fas.org/irp/agency/doj/opr-margolis.pdf

(Subject: Objections to the Findings of Professional Misconduct in the Office of Professional Responsibility's Report of Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists) [hereinafter Margolis Report]; JANE MAYER, THE DARK SIDE 248 (2008); *see also* SANDS, *supra* note 61.

65. OLC lawyers determined that, under the new interpretation of the federal torture statute, all of the previously approved techniques were permissible. *See* Definition of Torture Under 18 U.S.C. §§ 2340–2340A, 28 Op. O.L.C. 297 (2004), https://www.justice.gov/file/18791/download [hereinafter Opinion on the Definition of Torture]. The new standard also survived subsequent review by OLC, which considered whether it violated international obligations or whether the interrogation techniques violated domestic law if they were applied in combination. Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Dep't of Justice Office of Legal Counsel, to John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency (May 10, 2005), https://fas.org/irp/agency/doj/olc/techniques.pdf (Re: Application of 18 U.S.C. §§ 2340–2340A to Certain Techniques That May Be Used in the Interrogation of a High Value al Qaeda Detainee) [hereinafter Memorandum on Certain Techniques that May Be Used in Interrogation of a High Value al Qaeda Detainee]; Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Dep't of Justice Office of Legal Counsel, to John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency (May 10, 2005), https://fas.org/irp/agency/doj/olc/combined.pdf (Re: Application of 18 U.S.C. §§ 2340–2340A to the Combined Use of Certain Techniques That May Be Used in the Interrogation of High Value al Qaeda Detainees) [hereinafter Memorandum on Combined Use of Certain Techniques That May Be Used in the Interrogation of High Value al Qaeda Detainees]; Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney Gen., Dep't of Justice Office of Legal Counsel, to John A. Rizzo, Senior Deputy Gen. Counsel, Cent. Intelligence Agency (May 30, 2005), https://fas.org/irp/agency/doj/olc/article16.pdf (Re: Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques That May Be Used in the Interrogation of High Value al Qaeda Detainees) [hereinafter Memorandum on the Application of U.S. Obligations Under CAT Article 16 to Techniques that May Be Used in the Interrogation of High Value al Qaeda Detainees].

66. Press Release, Off. of the Press Sec'y, The White House, Statement of President Barack Obama on Release of OLC Memos (Apr. 16, 2009), https://obamawhitehouse.archives.gov/the-press-office/statement-president-barack-obama-release-olc-memos ("In one of my very first acts as President, I prohibited the use of these interrogation techniques by the United States . . . through an Executive Order."). Of the five memoranda released, only one had been in the public domain: the leaked August 2002 memo to Gonzales. The four new memoranda included a second memorandum dated August 1, 2002 to Acting General Counsel for the CIA, John Rizzo, approving the interrogation techniques for Abu Zubaydah and three memoranda from May 2005. The May 2005 memoranda resulted from the changing legal landscape after the Abu Ghraib scandal. In December 2004, OLC rescinded the 2002 memorandum to Gonzales and replaced it with a memorandum that reaffirmed that the applicable standard for torture in the US criminal statute conformed to the definition of torture in the international torture convention, subject to US understandings. However, the memorandum did not specifically define prohibited conduct. Opinion on the Definition of Torture, *supra* note 65. OLC issued three more memoranda in 2005, which evaluated the approved interrogation techniques for

We now know that the United States held more than a hundred detainees as part of the CIA detention and interrogation program.[67] The CIA subjected thirty-nine detainees to "enhanced interrogation techniques" and abused or used unapproved techniques on others.[68] What is in the public record is shocking. Abu Zubaydah was the first subject of the new "coercive" interrogation techniques.[69] His treatment included "walling, attention grasps, slapping, facial hold, stress positions, cramped confinement, white noise and sleep deprivation," which continued in "varying combinations, [twenty-four] hours a day" for seventeen straight days.[70] When left alone during this period, Abu Zubaydah was placed in a stress position, left on the waterboard with a cloth over his face, or locked in one of two confinement boxes.[71] According to the cables, Abu Zubaydah was also subjected to the waterboard "2–4 times a day . . . with multiple iterations of the watering cycle during each application."[72]

Scores of other CIA detainees experienced similar treatment, and one detainee died in custody after being subjected to coercive interrogation methods.[73] The Senate investigation confirmed the CIA waterboarded three detainees.[74] The agency subjected at least five detainees in its custody to rectal rehydration without documented medical necessity,[75] which one interrogator explained as an effective method of inducing cooperation.[76] The CIA subjected detainees to sleep deprivation, a practice that the United Nations has condemned as torture.[77] Sleep deprivation, as practiced by the United States, "involved

high-value detainees under the standard for torture set out in the December 2004 memorandum and considered whether the approved techniques violated a separate international prohibition against cruel, inhuman or degrading treatment or punishment when the techniques were used singly or in combination. Memorandum on Certain Techniques that May Be Used in Interrogation of a High Value al Qaeda Detainee, *supra* note 65; Memorandum on Combined Use of Certain Techniques That May Be Used in the Interrogation of High Value al Qaeda Detainees, *supra* note 65; Memorandum on the Application of U.S. Obligations Under CAT Article 16 to Techniques that May Be Used in the Interrogation of High Value al Qaeda Detainees, *supra* note 65 .

67. *See* SENATE SELECT COMMITTEE REPORT, *supra* note 44, at xxi, 96, 101–08.

68. *See id.* (finding that, of at least 119 CIA detainees at CIA Detention Facilities, thirty-nine were subject to the CIA's enhanced interrogation techniques).

69. *See supra* notes 43-45, and accompanying text.

70. SENATE SELECT COMMITTEE REPORT, *supra* note 44, at 42.

71. *Id.*

72. *Id.* at 40–42, 67.

73. *Id.* at 54 (detailing the death of Gul Rahman in November 2002 at a CIA facility after being subjected to interrogation that included "48 hours of sleep deprivation, auditory overload, total darkness, isolation, a cold shower, and rough treatment." CIA personnel found Rahman dead in his cell, having spent the night sitting bare-skinned on a concrete floor and shackled to the wall, and determined that the likely cause of death was hypothermia.).

74. *Id.* at 389. Khalid Sheikh Mohammed received 183 applications of waterboarding. *Id.* at 85–96. Abu Zubaydah received at least eighty-three applications of waterboarding. *Id.* at 118 n.698.

75. *Id.* at xiii, 100.

76. *Id.* at 83 (internal citations omitted).

77. *See* Juan E. Méndez (Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), *Interim Rep. of the Special Rapporteur on Torture and Other*

keeping detainees awake for up to 180 hours, usually standing or in stress positions, at times with their hands shackled above their heads."[78] Reportedly, at least five detainees in CIA custody experienced hallucinations during prolonged sleep deprivation and, "in at least two of those cases, the CIA nonetheless continued the sleep deprivation."[79] The chief of interrogations at the CIA's lead facility favorably compared the environment they had created—keeping detainees in total darkness, shackled to the walls, with a bucket for their human waste[80]—to dungeons as a means to control captives and extract information.[81] CIA officials relied on legal approval of enhanced interrogation techniques to develop a program designed to break detainees through physical and psychological torment. That is the essence of torture.

It is now widely acknowledged that the approved interrogation techniques throughout this period permitted torture and violated international law.[82] Early in

*Cruel, Inhuman, or Degrading Treatment or Punishment*, ¶ 31, U.N. Doc. A/69/387 (Sept. 23, 2014) ("[M]any torture methods are becoming increasingly sophisticated and designed to be as painful as possible without leaving physical marks. These methods comprise, inter alia, asphyxiation; electric shocks; *sleep deprivation*. . ." (emphasis added)); Manfred Nowak (Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), *Study on the Phenomena of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in the World, Including an Assessment of Conditions of Detention*, ¶ 55, U.N. Doc A/HRC/13/39/Add.5 (Feb. 5, 2010) ("The establishment of psychological torture methods is a particular challenge [and]. . . sleep deprivation. . . [is] equally destructive as physical torture methods.").

78. SENATE SELECT COMMITTEE REPORT, *supra* note 44, at xii.

79. *Id.*

80. MAYER, *supra* note 64, at 276 (explaining that the detention facility had perfected the "art of interrogation" due to its comprehensive environment); SENATE SELECT COMMITTEE REPORT, *supra* note 44, at 49 (internal citations omitted).

81. SENATE SELECT COMMITTEE REPORT, *supra* note 44, at 50 n.240.

82. Senator Diane Feinstein, chair of the Senate Select Committee on Intelligence which conducted a five-year review of the CIA interrogation and detention program, wrote in her forward to the report that it was her "personal conclusion" that CIA detainees were tortured. *See id.* at vii; Comm. Against Torture, Concluding Observations on the Third to Fifth Periodic Reports of the United States of America, ¶ 11, U.N. Doc. CAT/C/USA/CO/3–5 (Nov. 20, 2014) ("The Committee expresses its grave concern over the extraordinary rendition, secret detention and interrogation programme operated by the [CIA] between 2001 and 2008, which involved numerous human rights violations, including torture, ill-treatment and enforced disappearance. . ."); Comm'n on Human Rights, Situation of Detainees at Guantánamo Bay, ¶¶ 51–52, U.N. Doc. E/CN/4/2006/120 (Feb. 15, 2006), http://undocs.org/E/CN.4/2006/120; EUR. PARL. ASS., *Lawfulness of Detentions by the United States in Guantánamo Bay*, 10th Sess., Res. 1433 (2005), http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17318 (concluding that many Guantánamo detainees had been subjected to ill treatment amounting to torture, which occurred systematically and with the knowledge and complicity of the United States government); Neil A. Lewis, *Red Cross Finds Detainee Abuse in Guantánamo*, N.Y. TIMES (Nov. 30, 2004), https://www.nytimes.com/2004/11/30/politics/red-cross-finds-detainee-abuse-in-guantanamo.html (describing a confidential report by the ICRC, which concluded that US treatment of detainees at Guantánamo rose to torture). *See also* SANDS, *supra* note 61, at 175–77; Smith, *supra* note 55; Jon Wiener, *Prosecute John Yoo, Says Law School Dean Erwin Chemerinsky*, THE NATION (Dec. 12, 2014), https://www.thenation.com/article/prosecute-john-yoo-says-law-school-dean-erwin-chemerinsky/ (reporting that Erwin Chemerinsky, then Dean of the Law School at the University of California, Irvine, stated that John Yoo's memorandum directly led to the torture policy and called for Yoo's criminal prosecution).

his tenure, President Obama strongly repudiated the CIA interrogation program[83] and limited questioning techniques by all US officials to those established by the Army Field Manual.[84] Yet the new President rejected calls for criminal prosecutions and announced in 2009 that those who had relied on legal advice from the DOJ would not be prosecuted for their actions.[85] Nonetheless, the legislative branch initiated its own examination as the Senate Select Committee undertook an extensive review of the CIA detention and interrogation program. Its 2014 report, only the executive summary of which has been released, cast new light on those initial decisions.[86] The report suggests that the CIA misled Congress, the public, and members of the executive branch about the factual

83. President Obama's acknowledgement that "we tortured some folks" was particularly noteworthy in this regard. Press Conference by President Obama, *supra* note 4.

84. Exec. Order No. 13491, 74 Fed. Reg. 4893 (Jan. 22, 2009). The standards for interrogation by the US military are contained in the Army Field Manual and prohibit torture. US DEP'T OF THE ARMY, *Human Intelligence Collection Operations*, *in* FIELD MANUAL, FM 2-22.3 (FM 34–52) (Army Publ'g Directorate ed., 2006), https://fas.org/irp/doddir/army/fm2-22-3.pdf. In 2006, Appendix M was added to the manual, which permits physical and sensory separation of detainees (use of blindfolds) in certain circumstances to prevent collusion among detainees. However, critics charge that Appendix M creates a loophole that may be exploited and could be used to subject detainees to torture or ill treatment. *See* Beth Van Schaack, *Torture Convention and Appendix M of the Army Field Manual on Interrogations*, JUST SECURITY (Dec. 5, 2014), https://www.justsecurity.org/18043/torture-convention-appendix-army-field-manual-interrogations/.

85. President Obama reasoned that policymakers had made hard decisions, but to pursue legal action against decisionmakers would be a "witch hunt" that would further divide the country. In April 2009, Obama stated that now is "a time for reflection, not retribution," that "nothing will be gained by spending our time and energy laying blame for the past," and that we must, instead, "move forward with confidence." Press Release, *supra* note 66. Even during his campaign, Obama stated he wanted to avoid "a partisan witch hunt," despite stating that he would want an immediate review of officials involved in torture or other potential crimes as "nobody is above the law." Will Bunch, *Obama Would Ask His AG to 'Immediately Review' Potential Crimes in Bush White House*, THE PHILA. INQUIRER (Apr. 14, 2008), https://www.inquirer.com/philly/blogs/attytood/Barack_on_torture.html?arc404=true.

86. The 480-page Executive Summary and twenty Findings and Conclusions of the Senate Select Committee Report have been released. The full 6200-page report and six million pages of material collected from the CIA, the Department of State, the Department of Justice, and the Department of Defense related to the interrogation program remain classified. Press Release, Sen. Dianne Feinstein, Intelligence Committee Votes to Declassify Portions of CIA Study (Apr. 3, 2014), https://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=de39366b-d66d-4f3e-8948-b6f8ec4bab24/. In August 2009, Attorney General Eric Holder initiated an investigation into more than one hundred instances of severe abuse of detainees in CIA custody. By June 2011, Holder announced that further investigation in the vast majority of those cases was not warranted, but that he would continue to investigate the brutal deaths of two detainees held in CIA custody in Afghanistan and Iraq in 2002 and 2003. However, on August 20, 2012, Holder announced the closing of these two final cases without any charges being brought, effectively foreclosing the possibility of any criminal charges against those involved in the torture programs. Press Release, Dep't of Just., Statement of Att'y Gen. Eric Holder on Closure of Investigation into the Interrogation of Certain Detainees (Aug. 30, 2012), https://www.justice.gov/opa/pr/statement-attorney-general-eric-holder-closure-investigation-interrogation-certain-detainees; Ken Dilanian, *Most CIA Interrogation Cases Won't Be Pursued*, L.A. TIMES (June 30, 2011), http://articles.latimes.com/2011/jun/30/nation/la-na-cia-interrogations-20110701. The Senate Select Committee Report remains the most searching review into the CIA's detention and interrogation program in Afghanistan and Iraq.

predicate for the program, its operation, and its efficacy.[87] There was some internal review of the government lawyers involved, which shed light on the shaky legal foundations of the program. The initial internal ethics review completed by the Department of Justice in 2009 found that the Torture Memos of August 2002 were not the product of good faith legal reasoning, but rather were written to justify a predetermined policy outcome: legalized torture.[88] Nevertheless, the Obama Administration did not file criminal charges, and there is no reasonable possibility that the Trump Administration will undertake any further effort to examine abuses that occurred during this period.

### *C. The Role of Professor Yoo*

Perhaps no Department of Justice attorney involved in the CIA interrogation program has garnered as much attention as former Deputy Assistant Attorney General John Yoo, the primary author of the August 2002 memorandum.[89] Before working at the Office of Legal Counsel, Yoo was a tenured professor at Berkeley Law. He resumed his post at the law school in 2004, just before the Abu Ghraib scandal broke. A former Supreme Court clerk and scholar writing on executive powers, he worked on several of the memoranda that defined not just new legal standards for interrogation, but controversial interpretations of applicable international law to the conflict.[90] Professor Yoo is a high-profile and prolific

87. SENATE SELECT COMMITTEE REPORT, *supra* note 44, at xi–xviii.

88. DOJ OFFICE OF PROF'L RESPONSIBILITY REPORT, *supra* note 45 (concluding that the memoranda were "drafted to provide . . . a legal justification for an interrogation program that included the use of certain" enhanced interrogation techniques). However, the Department of Justice did not adopt the report's findings of misconduct. Margolis Report, *supra* note 64. For further assessment of the legal validity of August 2002 memo, see SENATE SELECT COMMITTEE REPORT, *supra* note 44, at xiii–xiv, 33–34 (stating that, at a July 12, 2002 meeting that included CIA general counsel and OLC attorneys, Yoo advised "that the criminal prohibitions on torture would not prohibit the methods proposed by the interrogation team" even though, at that time, he did not know the CIA's specific proposed interrogation techniques and would not provide the full legal analysis regarding those proposed interrogation techniques until August 1). *See also* Jordan J. Paust, *The Absolute Prohibition of Torture and Necessary and Appropriate Sanctions*, 43 VAL. U. L. REV 1535, 1566 (2009) ("[I]t is obvious that the memo was not written for independent professional legal advice, but to provide possible cover for tactics already approved and to facilitate their use in the future."); Jose A. Alvarez, *Torturing the Law*, 37 CASE W. RES. J. INT'L L. 175 (2006); *see* Statement of Harold Hongju Koh *supra* note 55 at 5. ("The August 1 OLC memorandum cannot be justified as a case of lawyers doing their job and setting out options for their client. If a client asks a lawyer how to break the law and escape liability, the lawyer's ethical duty is to say no. A lawyer has no obligation to aid, support, or justify the commission of an illegal act."); Luban, *supra* note 56 ("Yoo cited legal authorities (often with dubious interpretations) to support his conclusions. . .[y]et somehow he managed to omit all the authorities on the other side—dissenting judicial opinions, later opinions by the same courts he did cite, and even Supreme Court decisions.").

89. *See supra* note 55 and accompanying text.

90. In addition to the memoranda on interrogation, John Yoo authored several other legal opinions on questions of the scope of presidential powers as well as the application of international law to the War on Terror. *See* The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them, 25 Opin. O.L.C. 188 (2001), https://www.justice.gov/sites/default/files/olc/opinions/2001/09/31/op-olc-v025-p0188_0.pdf;

academic and public figure. He has written a book about his role in the Bush Administration and has authored scores of op-eds on the War on Terror and the detention and interrogation program.[91] His outspoken defense of his work in the Bush Administration made him a lightning rod for critics of the government's interrogation and detention program, and his position on the Berkeley Law faculty brought protests to the law school.[92]

Berkeley Law has defended Professor Yoo's presence on the faculty on the grounds of academic freedom and due process. Regardless of one's feelings about Professor Yoo's role in drafting the Torture Memos, he offered legal advice in his role as a government lawyer and did not violate the university's faculty conduct policy. In the university's view, Professor Yoo's conduct as Deputy Assistant Attorney General has no bearing on his employment status at Berkeley Law. Critics decry this defense as a political feint and an act of moral cowardice on the part of the university.[93] These critics argue in effect that the law school should not allow an unindicted war criminal to teach the next generation of legal professionals.[94] At the same time that Berkeley Law stood behind Professor Yoo,

Memorandum from John C. Yoo, Deputy Assistant Attorney Gen., Dep't of Justice Office of Legal Counsel, and Patrick F. Philbin, Deputy Assistant Attorney Gen., Dep't of Justice Office of Legal Counsel, to William J. Haynes, II, Gen. Counsel, Dep't of Def. (Dec. 28, 2001), https://nsarchive2.gwu.edu/torturingdemocracy/documents/20011228.pdf (Re: Possible Habeas Jurisdiction over Aliens Held in Guantanamo Bay, Cuba); Memorandum from John C. Yoo, Deputy Assistant Attorney Gen., Dep't of Justice Office of Legal Counsel, and Robert J. Delahunty, Special Counsel, Dep't of Justice Office of Legal Counsel, to William J. Haynes, II, Gen. Counsel, Dep't of Def. (Jan. 9. 2002), http://hrlibrary.umn.edu/OathBetrayed/Yoo-Delahunty%201-9-02.pdf (Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees).

91. Professor Yoo worked to maintain his public visibility, even as this added to his notoriety in some circles. Unlike many of his former colleagues in the Bush Administration, Professor Yoo vigorously and publicly defended his legal work, authoring eight books, over sixty-four academic articles, and over 176 op-eds, as well as appearing at over 362 talks and presentations since returning to Berkeley Law in August 2004. John Yoo, BERKELEY LAW, https://www.law.berkeley.edu/our-faculty/faculty-profiles/john-yoo/ (last visited Sept. 3, 2018).

92. *See infra* Section III.

93. *See* Opinion, *Torture and Academic Freedom*, N.Y. TIMES (Aug. 20, 2009) https://roomfordebate.blogs.nytimes.com/2009/08/20/torture-and-academic-freedom/ ("To protect [Yoo's] work in the Justice Department under the guise of "academic freedom" is to protect the yelling of "fire" in a crowded theater."). *See also* Phillip Carter, *Blame Berkeley*, SLATE (Apr. 14, 2008), https://slate.com/news-and-politics/2008/04/blame-berkeley.html; Robert Gammon, *The Torture Professor*, E. BAY EXPRESS (May 14, 2008), https://www.eastbayexpress.com/oakland/the-torture-professor/Content?oid=1089823 ("[I]f UC Berkeley fails to investigate and fire Yoo, it will send an unmistakable — and perverse — message. If you're a professor, and you cross the line with a coed, it will cost you your job. On the other hand, you can violate moral, ethical, and legal standards. You can hurt the reputation of your university and your country. You can bring shame upon the nation and harm its standing in the world. You can put our soldiers at risk unnecessarily. You can enable people to be humiliated, tortured, and possibly even killed. And, apparently, you can do it all in the name of "academic freedom."); Robert Gammon, *John Yoo, War Criminal?*, E. BAY EXPRESS (Jan. 28, 2009), https://www.eastbayexpress.com/oakland/john-yoo-war-criminal/Content?oid=1176349 ("Any assertion that academic freedom justifies his authorization of war crimes is ethically bankrupt.").

94. For example, Berkeley's City Council passed a measure in December 2008 calling on the federal government to prosecute Professor Yoo for war crimes and, in the event of conviction, calling

its formal response could not adequately address the moral crisis that his presence provoked. The school not only had to confront protestors outside the institution but also had to grapple with challenges to its institutional identity and values.

The opportunity to display the Boteros was the result of a fortuitous set of circumstances, and the paintings work on multiple symbolic levels to externalize the school's struggle with its relationship to Professor Yoo and his role in the War on Terror. The Boteros serve to acknowledge that the university's application of the rule of law to Professor Yoo was only a partial response to his presence on the faculty. The art communicates a fuller acknowledgment that adherence to rule of law values requires the school to denounce torture as the perversion of these central principles. The following Section tells the story of Fernando Botero's work to create the series and how the paintings came to Berkeley Law.

## II.
## THE BOTEROS

### *A. The Abu Ghraib Series*

The artist Fernando Botero became riveted by the US torture scandal that followed the publication of the Abu Ghraib photos. He was particularly moved by Seymour Hersh's *New Yorker* article detailing the abuse as documented by US Major General Antonio M. Taguba.[95] Known as the Taguba Report, the general's investigation revealed the devastating extent of the "sadistic, blatant, and wanton criminal abuses" at the prison in Abu Ghraib.[96] General Taguba found that guards had, among other crimes: beaten prisoners, used dogs to "intimidate and frighten" detainees, and sodomized a detainee with a foreign object.[97] Soldiers stripped prisoners naked, forced them to wear women's underwear, hooded them, and posed them in humiliating positions to be photographed. Guards heightened the degrading treatment by exploiting the cultural opprobrium of public nudity and homosexuality: they forced naked inmates to masturbate and then photographed them in poses that made it appear as if the detainees were performing fellatio.[98] The Taguba Report and the Abu Ghraib photos revealed a bacchanal of horror perpetrated by US soldiers, and together they deeply undermined Bush

on UC Berkeley to dismiss him from the faculty. Carolyn Jones, *Berkeley Council Urges War Crimes Prosecution*, S.F. CHRON. (Dec. 10, 2008), https://www.sfgate.com/bayarea/article/Berkeley-Council-urges-war-crimes-prosecution-3181171.php.

95. *Fernando Botero: The Abu Ghraib Series, September 23, 2009 – February 7, 2010*, BAMPFA, http://archive.bampfa.berkeley.edu/exhibition/botero_2009.

96. Hersh, *supra* note 57.

97. *Taguba Report, supra* note 59, ¶¶ 6, 7, at 16-17.

98. KRISTIAN WILLIAMS, AMERICAN METHODS: TORTURE AND THE LOGIC OF DOMINATION 7 (2006); *Taguba Report, supra* note 59, ¶ 6(f), at 16 .

Administration claims that it was conducting the War on Terror consistent with American values and the rule of law.[99]

Botero channeled his anger at the revelations through his art: "[F]or months I felt this desire to say something because I thought it was an enormous violation of human rights. . . . [T]he United States has been a model of compassion and human rights. That this could happen in a prison administered by the Americans was a shock."[100]

Over fourteen months, Botero created over eighty paintings and sketches,[101] each titled "Abu Ghraib" and numbered sequentially,[102] based on photographs and reports of the abuse.

Botero's art interpreted the experience of the victims. His Abu Ghraib series contains dozens of large paintings capturing the prisoners in moments of terror and degradation.[103] Several paintings in the series show naked prisoners stacked on the floor and posed into human pyramids, or being urinated on by guards as they lie bound and helpless.[104] The faces of the perpetrators are rarely seen, and instead soldiers' boots or a latex-gloved hand holding a leash of a menacing guard dog appear on the periphery.[105] Botero's prisoners are captured in all their excruciating vulnerability—their injuries are vivid, their mouths distorted by pain and agonizing humiliation.

Despite the gruesome scenes, the paintings convey a certain reverence for the victims in ways that the actual photographs cannot. Botero's interpretation of the torture through his iconic, voluminous style[106] converts the inmates from the pornographic objects of the photos to victims of US criminal violence perpetrated

99. George W. Bush, President of the United States, On U.S. and Canada Relations and the War on Terrorism (Dec. 1 2004), https://americanrhetoric.com/speeches/gwbushhalifax.htm (asserting that the United States has "accepted important global duties . . . for the good of mankind" in the War on Terror, which include advancing human rights and the rule of law); SENATE SELECT COMMITTEE REPORT, *supra* note 44, at 115–16.

100. *Botero at Berkeley: A Conversation with the Artist*, BERKELEY REV. LATIN AM. STUD., Spring 2007, at 2, [hereinafter *A Conversation with Botero*], https://clas.berkeley.edu/research/botero-berkeley-conversation-artist. Speaking by phone from Mexico City, Botero said "he wasn't intending to 'shock people or accuse anyone' with his Abu Ghraib depictions. He didn't do them for commercial reasons (they're not for sale). 'You do it because it is in your gut, you are upset, you are furious, you have to get it out of your system.'" Freedberg, *supra* note 12.

101. *Id.*

102. *Boalt Helps Bring Dramatic Abu Ghraib Exhibit by Fernando Botero to Berkeley*, BERKELEY L. NEWS (Jan. 10. 2007) [hereinafter *Berkeley Law Helps Bring Abu Ghraib Exhibit to Berkeley*], https://www.law.berkeley.edu/article/boalt-helps-bring-dramatic-abu-ghraib-exhibit-by-fernando-botero-to-berkeley/.

103. Few of the pieces in the series are directly based on the photographs. DAVID EBONY, BOTERO ABU GHRAIB 15 (2006). As the artist explained: "[T]here was no point in just taking a photograph and making a copy in oil like they did during the hyperrealist movement in America in the sixties . . . .[I]n this case it didn't make any sense." *A Conversation with Botero*, *supra* note 100.

104. EBONY, *supra* note 103, at 31, 32, 77, 78.

105. *Id.* at 24, 25, 91.

106. *Id.* at 9.

in the name of national security. The artist sought to portray the emotional state of the prisoner and embed these emotions into a moral narrative.[107] He wanted to "visualize the atmosphere described in the articles, *to make visible what was invisible*."[108] While the actual victims did not have the heft that Botero gave to their reimagined forms, the painted figures "suggest a psychological and moral weightiness that commands, if it does not overwhelm, their confined spaces."[109] The artist explained that, struck by the "nobility" of some of the victims in the photographs, he sought to paint some of them as "prophets, to show that these people in their poverty had a tremendous dignity and were treated in a terrible way."[110] Art critic Roberta Smith observed that the paintings "restore the prisoners' dignity and humanity without diminishing their agony or the injustice of their situation."[111]

The giant scale of the paintings is particularly attuned to the unique characteristics of torture. A universally condemned practice, State torture is conducted out of public view and denied when accusations are launched. The public is not supposed to know of the State's violence. The Abu Ghraib photographs were trophy snapshots taken by soldiers to record their exploits and only came into the public domain because of a whistleblower in the unit.[112] Not only did their publication expose hidden violence, but the clandestine origins of the photos paradoxically evidenced the invisibility of torture.[113] The series pulls back the veil of secrecy surrounding the violent methods that the United States used to conduct this new war; it makes the invisible foundations of State torture visible.[114] It also places the Abu Ghraib scandal into a larger frame, which invites examination of the cultural and legal context that produced the abuses. In so

107. Botero explained: "Because the artist doesn't have to be there; he can imagine the scene and create something that has this power, as if it were actually an immediate vision of the thing. The concentration of energy and emotion that goes into a painting says more than the click of a photo." *A Conversation with Botero*, *supra* note 100.

108. *Id.*

109. EBONY, *supra* note 103, at 10.

110. *A Conversation with Botero*, *supra* note 100.

111. Jesse Hamlin, *Abu Ghraib Paintings Find Welcome at Cal*, S.F. CHRON. (Aug. 28, 2007), https://www.pressreader.com/usa/san-francisco-chronicle/20070828/281517926733548 (citing Roberta Smith, *Botero Restores the Dignity of Prisoners at Abu Ghraib*, N.Y. TIMES (Nov. 15, 2006), https://www.nytimes.com/2006/11/15/arts/design/15chan.html).

112. A reservist serving as a member of the military police at Abu Ghraib prison, Specialist Joseph Darby, gave a statement to the Army criminal investigative unit about the photographs. Another MP who participated in the photo sessions gave Darby a CD containing the images. Some of these were shown on the 60 Minutes broadcast. *See* Hersh, *supra* note 57. On April 28, 2004, CBS News published investigation details, and some of the photographs, in a 60 Minutes II broadcast. *See* MAYER, *supra* note 64, at 258–59.

113. Hedi Viterbo, *Seeing Torture Anew: A Transnational Reconceptualization of State Torture and Visual Evidence*, 50 STAN. J. INT'L L. 281, 317 (2014).

114. *See* Press Release, *supra* note 4.

doing, Botero opens up possibilities for reclamation by creating an accusation of injustice that demands response. [115]

### *B. Bringing the Abu Ghraib Series to the University of California, Berkeley*

The immediate audience for Botero's accusation was limited. Upon completion, only two museums (in Germany and Italy) exhibited the series in 2005 and 2006. Then, in fall 2006, the Marlborough Gallery in New York mounted a show to critical acclaim.[116] UC Berkeley professor and Chair of the Center for Latin American Studies Harley Shaiken read a review of the New York exhibition and, disappointed to learn that there were no further opportunities to see the paintings in the United States, reached out to Botero to bring the series to Berkeley.[117] Reportedly, museums in the United States did not want to show political art so unabashedly confrontational to US foreign policy.[118] Shaiken anticipated that similar criticism would be leveled at UC Berkeley, and he deliberately financed the show exclusively with private funds.[119] The Dean of Berkeley Law, Christopher Edley, made it a point to associate the law school with the show and contributed financially to the exhibit.[120]

Because the UC Berkeley Art Museum did not have exhibit space for the series available for the next two years, Shaiken and his colleagues worked quickly to identify an alternative location on campus. They secured Doe Library, the university's central library in the heart of the campus.[121] A large thoroughfare in the main library was converted into a gallery to display forty-seven paintings in

115. *See* Freedberg, *supra* note 12; Fleury, *supra* note 36 ("Botero cited painters like Diego Rivera and Pablo Picasso as inspirations for the works, which he hopes will remain part of the collective consciousness long after the events themselves have been forgotten.").

116. *See* Heartney, *supra* note 24; Smith, *supra* note 111.

117. Hamlin, *supra* note 111 (citing Smith, *supra* note 111).

118. *See* Freedberg, *supra* note 12 ("Some museums may have rejected the Abu Ghraib series for artistic reasons (even though Botero's less serious works are in the permanent exhibitions of many US museums) . . . . Botero's paintings got the cold shoulder here despite favorable reviews in a range of respected publications."); Heartney, *supra* note 24. (Botero explained that he offered the exhibit to US museums through a booking service, Arts Service International (ASI), and was informed that ASI had not received any requests for the show.). Daniel Coronell, *Botero at Berkeley: Figures in Light and Shadow*, BERKELEY REV. LATIN AM. STUD., Spring 2007, at 38, https://clas.berkeley.edu/research/botero-berkeley-figures-light-and-shadow.

119. Hamlin, *supra* note 111 (reporting that the $120,000 cost for the show came entirely from private donations).

120. *See Berkeley Law Helps Bring Abu Ghraib Exhibit to Berkeley, supra* note 102.

121. Hamlin, *supra* note 111.

the collection.[122] The exhibit ran for almost two months and drew fifteen thousand viewers.[123]

### *C. Bringing the Boteros to Berkeley Law*

During a 2007 interview, Botero expressed that he saw UC Berkeley as a fitting site to display his Abu Ghraib series because of the campus's history in the free speech movement and its "intellectual reputation" associated with civil rights.[124] Earlier, the artist had made clear that the paintings were not for sale and reportedly stated that he wanted the paintings to be on view in either Baghdad or the United States.[125] Less than six months after the show closed, Botero donated the entire Abu Ghraib collection, valued at $10–15 million, to UC Berkeley.[126]

With the terms of the gift ironed out and any internal misgivings overcome,[127] the university art museum mounted a four-month exhibition of the Boteros from September 2009 until early February 2010.[128] Once the show closed, the question arose regarding what pieces from the series would be on permanent display. According to Dean Edley, who was involved in the discussions, the museum initially took the position that the answer was "none."[129] Concerned that the works would disappear from public view, Edley proposed that selected pieces in the collection be displayed in buildings across campus and

122. Jean Spencer, *Botero at Berkeley: Bringing Botero to Berkeley*, BERKELEY REV. LATIN AM. STUD., Spring 2007, at 24, https://clas.berkeley.edu/research/botero-berkeley-bringing-botero-berkeley; Judith Scherr, *UC Berkeley Displays Botero Images of Abu Ghraib Brutality*, THE BERKELEY DAILY PLANET (Jan. 26, 2007), http://www.berkeleydailyplanet.com/issue/2007-01-26/article/26178?headline=UC-Berkeley-Displays-Botero-Images-of-Abu-Ghraib-Brutality—By-Judith-Scherr.

123. Kathleen Maclay, *Botero's Abu Ghraib Exhibit Closes After 15,000 Visitors View His Images of Torture and Humiliation*, UC BERKELEY NEWS (Mar. 27, 2007), https://www.berkeley.edu/news/media/releases/2007/03/27_botero.shtml.

124. Coronell, *supra* note 118.

125. Hamlin, *supra* note 111 (Botero turned down an offer from a German museum to build a wing to house the canvasses.).

126. *Botero Gives Abu Ghraib Art to Berkeley*, N.Y. TIMES (Aug. 30, 2007), https://www.nytimes.com/2007/08/30/arts/design/30arts-BOTEROGIVESA_BRF.html. Chancellor Birgeneau sought opinions from people on and off campus before accepting the gift. Hamlin, *supra* note 111.

127. Reportedly, Kevin Consey, the director of the university art museum, was not in favor of accepting the gift. However, former Museum Director and UC Art History Professor Peter Selz wrote the chancellor urging him to decide otherwise: "These are major, meaningful works of art . . . I feel it's very important for future generations to see these paintings chronicling the cruelty in our time." *Hamlin, supra* note 111. *See also* Associated Press, *Artist Offers Abu Ghraib Works to Berkeley*, CHI. TRIB. (Sept. 17, 2007).

128. Kathleen Maclay, *Fernando Botero Exhibit Exploring Abu Ghraib Abuses Opens at Berkeley Art Museum*, UC BERKELEY NEWS (Sept. 17, 2009), https://www.berkeley.edu/news/media/releases/2009/09/17_botero2009.shtml.

129. Interview with Christopher Edley, Jr., Former Dean, Univ. of Cal., Berkeley, Sch. of Law, in Berkeley, Cal. (Apr. 3, 2018) [hereinafter Interview with Christopher Edley, Jr.].

volunteered the law school to accept a few.[130] However, it proved difficult to find a location inside the law school which met the museum's requirements for security and public accessibility.[131] Subsequent renovations to the law school library offered a new space that fit the bill: it happened to be located in the hallway immediately outside the dean's offices.[132] Four paintings were installed just ahead of the 2012–13 academic year and remain there today.

## III.
## THE JOHN YOO CONTROVERSY AT BERKELEY LAW

Dean Edley's statement that accompanies the paintings introduces the Boteros as a form of important social commentary on law and the War on Terror.[133] This statement does not mention the years of controversy that

130. Email from Christopher Edley, Jr., *supra* note 13 (a revised version of this statement is posted as a wall plaque adjacent to the display at Berkeley Law, *see infra* note 133 for full text); Interview with Christopher Edley, Jr., *supra* note 129.

131. For example, the law school's reading room, while centrally located, did not have walls that were strong enough to hold the paintings and the Plexiglas cases needed to protect them. Other large hallways did not provide enough security to permit installing the works there. Interview with Kathleen Vanden Heuvel, Adjunct Professor of Law, Dir., Law Library, Univ. of Cal., Berkeley, Sch. of Law, in Berkeley, Cal. (Apr. 13, 2018).

132. Email from Christopher Edley, Jr., *supra* note 13 (*see infra* note 133 for full text). The museum and the law school ultimately agreed to hang four paintings there, chosen by museum staff. The Berkeley Art Museum had agreed to loan out most of the paintings to exhibits starting in spring 2012. The museum staff selected the four paintings now displayed at the law school because those paintings were not committed to international loans and so were available to install at the law school in summer 2012. Email from Kathleen Vanden Heuvel, Adjunct Professor of Law, Dir., Law Library, UC Berkeley, Sch. of Law to author (Apr. 13, 2018) (on file with author).

133. The statement from Dean Edley posted adjacent to the paintings reads in full:

> To the Berkeley Law Community:
>
> I was honored to support the first UC Berkeley Exhibition of artist Fernando Botero's Abu Ghraib series at the Doe Library in 2007. A few years after that remarkable show, the Berkeley Art Museum (BAM) exhibited all of the Abu Ghraib paintings that Botero donated to the university. However, BAM can display only a fraction of its holding at any one time. While some of its most important works are on loan to other institutions, many remain in storage for extended periods. For works as central to the ongoing debate about war and the rule of law, relegating the Abu Ghraib series to storage seemed unfortunate.
>
> I decided that our recent renovation projects presented an opportunity to address this problem—by using our expanded wall space to create a venue for art lovers on campus and an enriching experience for our own legal community. I approached BAM with a proposal to exhibit a select few of Botero's paintings at the law school, and the museum agreed.
>
> The Abu Ghraib paintings are a compelling choice for us because Botero's images raise powerful, universal, and timeless questions about the interrelationships of human nature, war, and the law. When I first saw these images, I thought, here is law that has failed. It has failed to protect, and it has failed to teach the basic morality that underlies human rights. To me, as a lawyer, the images show what happens in the moral

surrounded Berkeley Law regarding Professor Yoo's presence on the faculty and which included public calls for his dismissal.[134] The university's response sounded in the legal register and looked to the application of faculty conduct rules to address a situation for which they were ill-suited. This narrowed the debate and sidestepped larger questions about the law and morality which the Boteros addressed.[135] Without this critical background, the display of the Boteros can be interpreted as little more than the result of a fortuitous opportunity to bring legally themed art to the school. To appreciate the relationships that texture public memory is to see the paintings in relation to place and time.

To do so, this Section begins by outlining how the Abu Ghraib scandal became associated with the Torture Memos and Professor Yoo, and how this controversy, in turn, played out within Berkeley Law. The Boteros are in dialogue with this discussion, but it is a mistake to interpret their meaning solely in this light. In Section IV, this Article addresses how the law school exhibit speaks to the broader questions about institutional responsibility in preparing the next generation of legal practitioners. In other words, the paintings speak on multiple levels. The memory work of the Boteros negotiates with both the narrower questions regarding Professor Yoo as well as the broader sociolegal questions of institutional responsibility.

### *A. The Abu Ghraib Scandal and Professor Yoo's Legal Memoranda*

The 2004 Abu Ghraib scandal coincided with Professor Yoo's return to the law school after his time serving in the Bush Administration, and preceded the arrival of Christopher Edley as the new dean at Berkeley Law.[136] School was in session in late April 2004 when CBS aired the *60 Minutes* program on torture at Abu Ghraib, and public commentary appeared linking the August 2002 Torture Memo to the Iraqi prisoner abuse.[137] At commencement that year, students wore

void created when we have no law.

The Botero paintings displayed in the law school lobby will be rotated over time. In the months ahead, I hope this project will stretch beyond Botero to include a wide range of art that can be exhibited in our second-floor corridor as well. Among other ideas, I plan to invite alumni who have distinguished art collections to consider making short-term loans to the law school.

Christopher Edley, Jr.

Dean and Orrick Professor of Law

"Art has the capacity to make us remember a situation for a long time. When the newspapers stop talking, and the people stop talking, the art is there." Artist, Fernando Botero

134. *See infra* Section III.A and note 171.

135. *See infra* Section IV.B.

136. The prisoner abuse at Abu Ghraib was made public in late spring 2004, after Edley had accepted the Berkeley Law deanship, but before he arrived on campus. Interview with Christopher Edley, Jr., *supra* note 129.

137. *See supra* Sections I.B and I.C for discussion of Abu Ghraib and the Torture Memos. For

"Guantánamo" armbands to protest Professor Yoo's presence on the faculty and called on him to resign.[138] That summer, as Dean Edley moved into his new job, over one hundred law professors around the country and leaders of the legal profession signed an open letter to President Bush condemning the legal memorandum.[139] Thus began a public debate that persisted for the better part of the next decade about the legal justifications for and the implementation of the Bush Administration's detention and interrogation program. Because the Department of Justice continued to affirm the legality of the interrogation techniques authorized by Yoo's initial memoranda, Professor Yoo remained a relevant public figure in the torture controversy and attracted criticism of the law school. Critics of the Torture Memos framed Professor Yoo's presence on the faculty as Berkeley Law's approval of his role.[140] Others defended Professor Yoo, his legal opinion, and his continued position on the faculty.[141] In short, debates within the law school community mirrored debates outside of it.

The War on Terror was a watershed event for the nation and for the international Community. During the Bush Administration, public attention on the legal aspects of the War on Terror was a constant, but the context for Berkeley Law's engagement with the topic was defined by the controversy surrounding Professor Yoo. Abu Ghraib was a defining moment in the national debate on the interrogation and treatment of captives in US custody; photographic evidence had a powerful influence. The impact of the photos was wide-reaching: the judicial and legislative branches weighed in and established new legal parameters on the executive's power to detain, interrogate, and prosecute suspected Al Qaeda members.[142] The debates over the detention and interrogation program were part

further discussion regarding how the interrogation techniques initially approved for use by the CIA spread to Guantánamo, then to Afghanistan, and finally to Iraq, see S. COMM. INQUIRY INTO THE TREATMENT OF DETAINEES IN U.S. CUSTODY, *supra* note 64, at xx–xxii.

138. Lasden, *supra* note 5. I remember flyers in the law school appearing just before graduation that adapted the popular 1990s California milk producer *Got Milk?* ad campaign: the flyers had Professor Yoo's picture with a milk mustache superimposed on his upper lip and the words *Got Rights?*.

139. *Id.*

140. *See* Christopher Edley, Jr., *The Torture Memos and Academic Freedom*, BERKELEY LAW NEWS (Apr. 10, 2008), https://www.law.berkeley.edu/article/the-torture-memos-and-academic-freedom/ [hereinafter Edley April 2008 Statement].

141. *See* Lasden, *supra* note 5. Professor Yoo states he feels "very much at home at [Berkeley Law], where he counts as friends a number of colleagues." *Id.* However, he has also faced strong criticism from the student body and his colleagues.

142. The first Supreme Court rulings curbing the Bush Administration's detention policy came down weeks after the Abu Ghraib photos became public. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 510 (2004) (holding that US citizen detainees have due process rights, including the ability to challenge their enemy combatant status before an impartial tribunal); Rasul v. Bush, 542 U.S. 466, 485 (2004) (holding that foreign national detainees have the right to have their habeas corpus petitions heard in federal courts). Further judicial and legislative limitations soon followed. *See, e.g.*, Hamdan v. Rumsfeld, 548 U.S. 557, 567 (2006) (holding that detainees are entitled to due process protections, including judicial proceedings in regularly constituted courts); Boumediene v. Bush, 553 U.S. 723, 732–33 (2008) (holding that foreign national detainees have a constitutional right of habeas corpus);

of a more general and active legal debate about the appropriate balance between protecting domestic civil liberties and safeguarding national security after 9/11.[143] Law schools around the country were steeped in these discussions, regularly hosting academic conferences, debates, policy makers, and legal advocates to inform, educate, and stimulate thinking about the role (and rule) of law in response to terror in general, and in the interrogation and detention of War on Terror detainees in particular.[144]

Public criticism of the Bush Administration's detention and interrogation program targeted Professor Yoo and implicated Berkeley Law. Professor Yoo was named in lawsuits alleging his responsibility for the torture of individuals subject to interrogation under the standards he drafted;[145] he was subjected to a Department of Justice ethics investigation;[146] and he was widely criticized for his legal advice immunizing torture.[147] It is hard to imagine a law student in the United States during this period who was not exposed to the topic, or a Berkeley Law student who did not know that one of their professors was a leading figure in these legal debates. The public controversy surrounding Professor Yoo also led to

Detainee Treatment Act of 2005, 42 U.S.C. §§ 2000dd (2005) (establishing provisions related to the treatment of DOD and Guantánamo detainees); Military Commissions Act of 2009, 10 U.S.C. § 948 (2009) (addressing the Supreme Court's concerns in *Boumediene v. Bush* and amending a 2006 act that had unconstitutionally suspended the right of habeas corpus for detainees).

143. *See, e.g.*, Philip B. Heymann, *Civil Liberties and Human Rights in the Aftermath of September 11*, 25 HARV. J.L. & PUB. POL'Y 441 (2002); Kelly R. Cusick, *Thwarting Ideological Terrorism: Are We Brave Enough to Maintain Civil Liberties in the Face of Terrorist Induced Trauma?*, 35 CASE W. RES. J. INT'L L. 55 (2003); Geoffrey R. Stone, *National Security v. Civil Liberties*, 95 CALIF. L. REV. 2203 (2007); Erwin Chemerinsky, *Civil Liberties and the War Terror: Seven Years after 9/11 History Repeating: Due Process, Torture and Privacy during the War on Terror*, 62 SMU L. REV. 3 (2009).

144. *See e.g.*, Neil Katsuyama, *Panel Explores Nuances of Fighting Terrorism*, YALE DAILY NEWS (Jan. 30, 2004), https://yaledailynews.com/blog/2004/01/30/panel-explores-nuances-of-fighting-terrorism/; Jonathan P. Abel, *Conservative Panel Defends War on Terror,* THE HARV. CRIMSON (Sept. 17, 2003), https://www.thecrimson.com/article/2003/9/17/conservative-panel-defends-war-on-terror/; Ana Diaz-Hernandez, *Olshansky Says Rights Subverted*, THE STAN. DAILY ARCHIVES (Nov. 26, 2007).

145. Padilla v. Yoo, 678 F.3d 748, 750, 753–55 (9th Cir. 2012) (alleging that, as one of the principal authors of the torture memos, Yoo formulated unlawful policies that caused plaintiff's unlawful military detention and interrogation; the judge held that Yoo was entitled to qualified immunity as a DOJ attorney and dismissed the case). There was an unsuccessful attempt by former detainees to bring a criminal case in Germany against Yoo and other US officials for torture. Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 14, 2006, Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] [Decisions of the Federal Court of Justice of Civil Matters] (Ger.). *See also Criminal Complaint Against Donald Rumsfeld et. al.,* Federal Supreme Court Karlsruhe, Case No. 3 ARP 156/06-2 (Apr. 5, 2007), https://ccrjustice.org/sites/default/files/assets/ProsecutorsDecision.pdf (reasoning that, though the statute allowed for universal jurisdiction, other jurisdictional requirements were not met; the prosecutor declined to initiate proceedings in April of 2007, and again on appeal in April of 2009).

146. Margolis Report, *supra* note 64; DOJ OFFICE OF PROF'L RESPONSIBILITY REPORT, *supra* note 45.

147. *See supra* note 55; THE TORTURE MEMOS, *supra* note 45, at 5, 37–38.

calls to fire him—from both students and the public.[148] I remember several informal conversations with Dean Edley and members of his staff in which they conveyed the many calls and emails the dean's office received from alumni and members of the public. Reportedly, opinions were divided. Many agreed with critics of the Bush Administration, but many also supported Professor Yoo. My memory is that those who supported Professor Yoo defended him on any of several grounds, arguing that: his legal opinion was correct; he provided critical public service during an unprecedented national security crisis; and he was being unfairly targeted for legal advice when criticism, if any, should be directed toward the elected officials. These competing demands for action fell on Berkeley Law.

Given Professor Yoo's high profile,[149] it may strike some as surprising that Berkeley Law had relatively little to say about his work in the Bush Administration or whether that work impacted his ability to teach at the law school. The dean framed the issue primarily as a matter of due process addressed by faculty regulations, elevating a legal response over other forms of institutional or cultural action.[150] Asserting a normative position in other spheres would have required Berkeley Law to take a side in the substantive debate about the memos, which, in turn, would have raised a host of uncomfortable questions.[151]

The most comprehensive public record of the law school's views on the matter comes from two statements issued by Dean Edley, which serve as the background against which the Botero exhibit is understood. Dean Edley issued these statements in response to public controversy aimed at the school prompted by new revelations about the Torture Memos: the first was in 2008, four years after Professor Yoo returned to the faculty, and the second was in 2009. There was no public faculty or community discussion of either statement.

### *B. Dean Edley's April 2008 Statement*

In April 2008, the US government released another OLC memorandum, signed by John Yoo and dated March 14, 2003.[152] This memorandum considered whether federal criminal statutes applied to the actions of military officers who detained or interrogated terrorism suspects in military custody outside the United States.[153] Consistent with the 2002 memorandum on interrogation techniques

148. *See supra* note 5, *infra* notes 150, 171.

149. *See supra* note 91 and accompanying text.

150. *See* Edley April 2008 Statement, *supra* note 140; *see also* Christopher Edley, Jr., *The Torture Memos, Professor Yoo, and Academic Freedom*, BERKELEY LAW NEWS (Aug. 20, 2009), https://www.law.berkeley.edu/article/the-torture-memos-professor-yoo-and-academic-freedom/ [hereinafter Edley August 2009 Statement].

151. *See infra* Section IV.A.1.(c).

152. Eggen & White, *supra* note 55.

153. March 2003 OLC Memo, *supra* note 59, at 1. *See also Memos Provide Blueprint for Police State*, MARJORIE COHEN (Mar. 4, 2009), http://marjoriecohn.com/memos-provide-blueprint-for-police-state/.

approved for use by the CIA, John Yoo reached the same legal conclusions regarding interrogations by the military.[154] But by the time this legal memo became public, the climate had shifted.[155] Public disclosure of the legal justifications authorizing the US to administer "enhanced interrogation techniques"—now widely denounced as torture—led to renewed calls to hold the lawyers who provided this advice accountable.[156] Citing public criticism of Berkeley Law for retaining Professor Yoo on its faculty, Dean Edley issued a public statement that criticized Professor Yoo's government legal work, but defended his continued employment.[157]

In this statement, Dean Edley framed Professor Yoo's presence on the faculty in the context of the university's educational mission to foster a culture of debate and to have students argue about difficult problems with the "intensity and discipline these crucial issues deserve."[158] At the same time, Dean Edley clarified that Berkeley Law did not recruit Professor Yoo because of his service as a political appointee in the DOJ. Rather, Professor Yoo was a "prolific (though often controversial) scholar" who had earned tenure at Berkeley Law before serving in the Bush Administration.[159] While acknowledging his own and many of the faculty's disagreement with Professor Yoo's legal advice, Dean Edley posited that academic freedom and due process rights constrained what the school could and should do in response. In Dean Edley's view, faculty disagreement with the legal judgment of a colleague could not be the basis for firing or sanctioning. Otherwise, "academic freedom would be meaningless."[160]

154. March 2003 OLC Memo, *supra* note 59, at 14–19.

155. Johnston & Shane, *supra* note 59 ("Congressional Democrats used the 2003 memorandum on Wednesday to renew their criticism of the administration for policies that Senator Patrick J. Leahy of Vermont, chairman of the Judiciary Committee, said threatened 'our country's status as a beacon of human rights.'"). As one commentator noted, public attention focused on the fact that the administration had rescinded the August 2002 OLC memorandum, but largely overlooked the fact that the superseding OLC memorandum held that the prior techniques were, and remained, valid, and thus in the eyes of DOJ authorities continued to immunize interrogators from criminal sanction. THE TORTURE MEMOS, *supra* note 45, at 4, 17–18.

156. *See*, *e.g.*, Editorial, *There Were Orders to Follow*, N.Y. TIMES (Apr. 4, 2008), https://www.nytimes.com/2008/04/04/opinion/04fri1.html (criticizing the memorandum and its author, John Yoo, "who inexplicably, teaches law at the University of California, Berkeley"); *National Lawyers Guild Calls on Boalt Hall to Dismiss Law Professor John Yoo, Whose Torture Memos Led to Commission of War Crimes*, MARJORIE COHN (Apr. 9, 2008), http://marjoriecohn.com/national-lawyers-guild-calls-on-boalt-hall-to-dismiss-law-professor-john-yoo-whose-torture-memos-led-to-commission-of-war-crimes/; Jennifer Van Bergen, *The High Crimes of John Yoo*, COUNTERPUNCH (Apr. 24, 2008), https://www.counterpunch.org/2008/04/24/the-high-crimes-of-john-yoo/; Carlos Villarreal, *Professor John Yoo Should Be Dismissed from Boalt Law School—And Prosecuted*, COUNTERPUNCH (Apr. 22, 2008), https://www.counterpunch.org/2008/04/22/professor-john-yoo-should-be-dismissed-from-boalt-law-school-and-prosecuted/; Jones, *supra* note 94; *see also* SANDS, *supra* note 61, at 224–32.

157. *See* Edley April 2008 Statement, *supra* note 140.

158. *Id.*

159. *Id.*

160. *Id.*; *see also* Richard B. McKenzie, *In Defense of Academic Tenure*, 152 J. INSTITUTIONAL

Dean Edley pulled no punches when it came to criticizing how Professor Yoo exercised his role as a government lawyer. Dean Edley chastised Professor Yoo for rendering legal opinions that "reduce[d] the Rule of Law to the Reign of Politics."[161] Rather than providing a check on the abuse of government power, Dean Edley argued, Professor Yoo gave legal cover to political operatives to implement their anti-terrorism agenda. At the same time, Dean Edley insisted that Professor Yoo was not among the individuals who were most culpable for the torture program, stating that "no argument . . . makes [Professor Yoo's] conduct morally equivalent" to that of Secretary Rumsfeld or "comparable to the conduct of interrogators."[162] Nevertheless, Dean Edley addressed whether Professor Yoo's conduct as a government lawyer breached a duty that made him eligible for sanction by Berkeley Law. Citing the university rules governing faculty conduct, Dean Edley stated that Berkeley Law could only initiate removal if Professor Yoo were convicted of a crime which "clearly demonstrates unfitness to continue as a member of the faculty."[163] At the same time, Dean Edley expressed his personal view that the appropriate standard was not whether Professor Yoo's conduct was strictly criminal, but whether it breached a "comparable statute" or ethical rules for government attorneys.[164] Dean Edley concluded that there was no substantial evidence that even this more relaxed standard had been met.[165]

### *C. Dean Edley's August 2009 Statement*

The dean's statement did not prevent public protest at graduation that year.[166] However, the election of Barack Obama renewed hope among critics of the Bush presidency that the new administration would take decisive action against those responsible for the torture program.[167] After all, President Obama campaigned on a promise to close Guantánamo and repair the United States' reputation as a champion of human rights.[168] In the early months of his

& THEORETICAL ECON. 325, 335 (1996) (tenure protects independence and minimally shields academics from the effects of internal infighting with their colleagues).

161. Edley April 2008 Statement, *supra* note 140.

162. *Id.*

163. *Id.* Edley later reiterated the university's "unfitness" standard in his second public statement. *See* Edley, August 2009 Statement, *supra* note 153; *UC Faculty Code of Conduct*, *supra* note 7, at 9.

164. Edley April 2008 Statement, *supra* note 140; *UC Faculty Code of Conduct*, *supra* note 7, at 9.

165. Edley April 2008 Statement, *supra* note 140.

166. Asaf Shalev, *Protesters at Boalt Commencement Call for Yoo's Removal*, DAILY CALIFORNIAN (May 19, 2008), https://archive.dailycal.org/article.php?id=101711 (reporting that about fifty protesters dressed in orange jumpsuits assembled outside the law school's commencement ceremony to "demand that UC Berkeley fire controversial professor John Yoo").

167. The Berkeley City Council passed a measure calling for the federal government to prosecute Professor Yoo for war crimes and to demand that UC Berkeley dismiss him if he were convicted. Jones, *supra* note 94.

168. Transcript, *The Democratic Debate,* N.Y. TIMES (Nov. 15, 2007),

administration, the new President reversed his predecessor's interrogation policy, withdrew the OLC memoranda authorizing "enhanced interrogation techniques," and published four previously unreleased OLC legal memoranda that had governed the torture program.[169] In his statement accompanying the release of the OLC memoranda, President Obama made clear that officials who relied on this legal advice in good faith while carrying out their duties would not be prosecuted, but he made no representation about the fate of those who had drafted the legal memoranda.[170]

Official disclosure of the legal underpinnings of the Bush Administration's detention and interrogation program again revived attention on Professor Yoo and Berkeley Law. High-profile figures inside and outside the university called for action against Professor Yoo,[171] and demonstrators staged protests in front of his

https://www.nytimes.com/2007/11/15/us/politics/15debate-transcript.html (Then-Senator Obama stated: "I am going to want to go before the entire world and say, America's back, we are ready to lead . . . . We're going to lead by shutting down Guantanamo and restoring habeas corpus in this country so that we offer them an example.").

169. *See supra* note 45 for a discussion of the released memoranda. The announcement referred to six OLC memoranda, but two of these, the August 2002 memorandum to Alberto Gonzales and the December 2004 memorandum rescinding that earlier opinion, were already in the public domain.

170. Press Release, *supra* note 66.

171. Terence Chea, *Authors of 'Torture' Memos Face Backlash*, NBC NEWS (May 6, 2009), http://www.nbcnews.com/id/30609351/ns/politics-white_house/t/authors-torture-memos-face-backlash/#.XEEHIlxKhnJ ("California Attorney General Jerry Brown, a likely Democratic candidate for governor, said the memos raised questions about whether Yoo should be allowed to teach law at UC Berkeley and called for a full accounting."). UC Professor J. Bradford DeLong requested that the Chair of the Academic Senate on the Berkeley campus investigate whether Professor Yoo violated legal ethics, principles of scholarly integrity, or criminal statutes in his work at the Department of Justice. DeLong, *supra* note 6 (letter dated May 6, 2008, from UC Berkeley Economics Professor J. Bradford DeLong, to Chair of the UC Academic Senate William Drummond). The Chair of the Academic Senate declined to do so, stating that it would be up to university administrators, not the Academic Senate, to initiate such proceedings. *Id.* (response from William Drummond, Chair, Academic Senate, to UC Berkeley Economics Professor J. Bradford DeLong). *See also* David Glenn, *'Torture Memos' vs. Academic Freedom*, CHRON. HIGHER EDU. (Mar. 20, 2009), https://www.chronicle.com/article/Torture-Memos-vs-Academic/3236. The UC Berkeley faculty senate received requests to sanction Professor Yoo. Martin Syjuco, *Some at UC Berkeley Are Scrutinizing Yoo's Tenured Position*, THE PANTHER (Mar. 29, 2009), http://www.thepantheronline.com/news/some-at-uc-berkeley-are-scrutinizing-yoos-tenured-position. Many others also called for the university to investigate Professor Yoo. *See*, *e.g.*, Bhattacharjee, *supra* note 8 (stating that a Berkeley Law student group against torture was "sending petitions to the Justice Department, the Pennsylvania Bar Association, and the University of California Faculty Senate, urging investigations of Yoo and Bybee."); Riya Battacharjee, *District Attorney Drops Charges Against John Yoo Protesters*, BERKELEY DAILY PLANET (Sept. 28, 2009), http://berkeleydailyplanet.com/issue/2009-09-24/article/33826?headline=District-Attorney-Drops-Charges-Against-John-Yoo-Protesters- ("The group of 60 or so activists, community members, current and former law school students voiced their desire for a comprehensive criminal investigation into Yoo's role in the writing of interrogation memos while he was serving as legal counsel for the US Department of Justice from 2001 to 2003."). *See also* Brett Miller, *Chancellor's Choice of Fellows Draws Criticism*, NEW U., UC IRVINE (Jan. 17, 2005), https://www.newuniversity.org/2005/01/17/chancellors_choice_of_fellows101/; Scott Jaschik, *Protest During Poli-Sci Meeting*, INSIDE HIGHER ED (Sept. 1, 2017), https://www.insidehighered.com/news/2017/09/01/critics-berkeley-professor-stage-protest-during-

home.[172] Protestors entered Professor Yoo's classrooms, interfering with his ability to teach and prompting Dean Edley to issue a new statement.[173]

This statement, released on August 20, 2009, reiterated the arguments Dean Edley made in his earlier open communication, including the standard for academic sanction or dismissal.[174] Dean Edley promised to review the forthcoming DOJ ethics report on Professor Yoo's performance while at the OLC for findings that might trigger university action under the academic conduct standards.[175] Dean Edley was more forceful about the possibility of criminal sanctions, given the changed political circumstances. As a board member of the Obama Presidential Transition, Edley had argued in favor of criminal investigations of Bush Administration officials, on the grounds that only judicial proceedings could provide authoritative and conclusive determinations of law's boundaries. "We need to know where the boundaries of lawful conduct are in combating national security threats. We need to know when legal advice and advocacy become criminal," Edley wrote of the opinions he voiced when assisting in the Obama transition.[176] As a nation, we are still waiting for answers to those questions.

### *D. Legal Accountability and the Berkeley Faculty Conduct Rules*

In retrospect, the early days of the Obama Administration appear to have been the high-water mark for reckoning with the Bush Administration's detention and interrogation program. The DOJ released its final report on Professor Yoo in January 2010.[177] The determination of the investigation by the DOJ Office of Professional Responsibility (OPR) was that as a Deputy Attorney General, Yoo had committed "intentional professional misconduct" in rendering legal opinions in connection with the detention and interrogation program.[178] A designated career attorney at DOJ, David Margolis, reviewed the negative findings along with Professor Yoo's response; he found that Professor Yoo had not breached duties as a DOJ lawyer that would warrant referral to the state bar for disciplinary proceedings.[179] Margolis offered a somewhat equivocal assessment of the findings of the OPR. He prefaced his evaluation by referencing the narrow scope

his-talk-political-science-meeting.

172. Diana Newby, *Guess We're Not The Only Ones Who Find Yoo Puns Hoomorous*, DAILY CLOG (June 30, 2009), http://clog.dailycal.org/2009/06/30/guess-were-not-the-only-ones-who-find-yoo-puns-hoomorous/#more-11660.

173. Edley, August 2009 Statement, *supra* note 153.

174. *Id.*

175. *Id.*

176. *Id.*

177. Margolis Report, *supra* note 64.

178. DOJ OFFICE OF PROF'L RESPONSIBILITY REPORT, *supra* note 45, at 1.

179. Margolis Report, *supra* 64, at 67–69.

of his review, which constrained his analysis.[180] Margolis noted that this "decision should not be viewed as an endorsement of the legal work that underlies those memoranda."[181] Nevertheless, he concluded that Professor Yoo did not commit misconduct while working on the interrogation memoranda of August 2002.[182]

Dean Edley embraced the DOJ decision as putting an end to any further questions about whether the university could sanction Professor Yoo. The university's rules specify that unacceptable conduct meriting sanction includes crimes that "clearly demonstrate[] unfitness" to continue as a faculty member.[183] Although "unacceptable conduct" may include activities beyond criminal conviction,[184] university officials considered a determination by DOJ that Professor Yoo had committed a serious ethical violation as a necessary prerequisite for action.[185] When the DOJ cleared Professor Yoo of a sanctionable breach of government rules of ethics, Dean Edley issued a statement making clear that the matter of university sanction against Professor Yoo was closed:

> DOJ's conclusion underscores why it was important that the university not rush to judgment . . . I hope these new developments will end the arguments about faculty sanctions, but we should and will continue to argue about what is right or wrong, legal or illegal in combating terrorism. That's why we are here.[186]

Efforts to secure legal accountability for the DOJ lawyers and political appointees similarly failed. President Obama rejected the pursuit of legal accountability as a "witch hunt."[187] The DOJ did not initiate criminal proceedings against anyone involved in the interrogation program; civil suits against the individuals involved were dismissed.[188] Consequently, there was no criminal conviction or comparable violation that would trigger application of the university rules of sanction. Those looking to federal review to enable university action against Professor Yoo were disappointed. Perhaps ironically, the release of

180. *Id.* Margolis reviewed the OPR misconduct findings against Jay Bybee and John Yoo for their preparation of legal memoranda on interrogation of suspected terrorists and did not consider legal work outside of this context. *Id.* at 2. Margolis concluded that to find misconduct, OPR had to identify the existence of a "known, unambiguous obligation or standard" that had been violated. *Id.* at 2, 68–69. Margolis found that OPR had failed to identify such a standard in this case. *Id.* However, he did make a finding of "poor judgment," a finding of lesser seriousness that did not warrant referral to state bars for disciplinary action. *Id.*

181. *Id*. at 2.

182. *Id*.

183. *UC Faculty Code of Conduct*, *supra* note 7.

184. *Id*. at 2 ("The examples of types of unacceptable faculty conduct set forth below are not exhaustive. It is expected that case adjudication, the lessons of experience and evolving standards of the profession will promote reasoned adaptation and change of this Code.").

185. *Id*.

186. Bhattacharjee, *supra* note 8.

187. Bunch, *supra* note 85.

188. Press Release, *supra* note 66 (President "assur[ing] those who carried out their duties relying in good faith upon legal advice from the Department of Justice that they will not be subject to prosecution."); *supra* note 145.

Margolis' report coincided with the ending of the Berkeley Art Museum's Botero exhibition.

The conclusion of the DOJ investigation did not settle questions about the detention and interrogation program or the role of government lawyers, and the legalistic approach of Berkeley Law and the broader university created a moral gap rather than a resolution. First, by framing Professor Yoo's ongoing employment as an issue covered by the faculty conduct code, university officials artificially narrowed public concerns and made law *the only* realm through which the institution would address the challenges to its institutional identity.[189] Yet the faculty conduct code was not designed to address a challenge like the one Professor Yoo's employment posed. The regulations were written to *protect* faculty members' ability to participate in public life, not to adjudicate the substance or value of their activities.[190] Treating the code as the universe of possible action meant ignoring potential nonlegal responses. For example, Berkeley Law could have issued a statement about the ideals of moral fitness appropriate in professional schools in general, and how these ideals are discharged in the sphere of public service in particular. The university read the faculty conduct code as requiring *external* regulators to make a finding of serious misconduct. Because Professor Yoo did not violate the faculty conduct code, a gap emerged between what the university thought that it *could* do and lingering questions about what it *should do.*

Unable to rely on the conduct code to take action, Berkeley Law concluded that *no action* could be taken. Essentially, Dean Edley's decision made clear that when faculty provide legal advice that justifies illegal or unethical conduct, so long as they avoid prosecution, then no wrong has been done to the law school. Alternatively, Berkeley Law could have used the conclusion of the OPR investigation as an occasion to debate reform of the faculty conduct code, which would have opened up a discussion about whether public service by faculty needed to meet any substantive standards to avoid conflict with the university's mission and values. Although any change to the faculty conduct code likely would not have applied retroactively, taking up this issue would have signaled that regulations on faculty conduct could be used to reevaluate the university's role in thinking about how its faculty members served political power.

Finally, Dean Edley's narrative equivocated on the ultimate question: whether Professor Yoo's work at the DOJ was blameworthy *with respect to his fitness to serve in the academy*. The moral challenges that Professor Yoo posed to Berkeley Law could not be adequately captured by the binary determination of whether he had committed a legal offense and violated the faculty conduct rules.

189. In 2008, UC Berkeley Vice Provost for Academic Affairs and Faculty Welfare Sheldon Zedeck asked Vice-Chair of the Faculty Senate and law faculty member Professor Christopher Kutz to analyze whether the faculty conduct policy applied to Professor Yoo's professional service at DOJ. Interview with Christopher Kutz, Professor, Univ. of Cal., Univ. of Cal., Berkeley, Sch. of Law, in Berkeley, Cal. (Oct. 9, 2019) [hereinafter Interview with Christopher Kutz].

190. *See generally UC Faculty Code of Conduct*, *supra* note 7.

Such arguments about moral fitness raise broader concerns than strict legality: they provoke consideration about what ends law schools serve by educating students and whether faculty should emulate a particular vision of public service.

Stepping outside of the legalistic possibilities for individual sanction would have required the university to acknowledge that other values and judgments were at stake. Instead of accepting that the faculty rules of conduct extinguished all university action, Dean Edley could have used this moment to observe that the only issue settled by the DOJ ethics report was that law provided an inadequate solution. Berkeley Law could have considered other means of confronting the narrow question of how to treat an individual faculty member—whether via informal administrative measures regarding what courses Professor Yoo taught and what committees he served on, or a broader discussion about how the school teaches legal ethics,[191] or how to project Berkeley Law's institutional identity and rule of law values. Any of these actions would have signaled an institutional assessment of the legitimacy of the OLC memoranda.

Dean Edley seemingly closed the debate about Professor Yoo, but these larger issues continued to circulate. Dean Edley believed that the community would continue to debate right and wrong —but through what means and to what end? Law does not provide the vocabulary for ongoing community deliberation. The installation of the Boteros two years later offered one potential answer.

## IV.
## THE BOTERO EXHIBIT AT BERKELEY LAW AS MEMORY WORK

In exercising his decanal authority to install the Boteros, Dean Edley opened a dialogue about Berkeley Law's relationship to the Bush Administration's detention and interrogation program. This includes, but is larger than, the controversy over Professor Yoo. However, the minimal explanatory materials currently posted alongside the paintings make no reference to the controversy over Professor Yoo, and therefore hinder the communicative value of the paintings.

The first part of this Section articulates the public memory of the Boteros and the socio-institutional communicative practices that shaped this memory by analyzing three levels of meaning that the installation conveys. Dean Edley intended the exhibition to communicate a reminder of the dark entanglement of law in the State use of torture in the War on Terror. The painting's mnemonic link to Berkeley Law's association with John Yoo is not obvious and requires understanding how the law school and its faculty addressed the controversy. Thus, the memory work of the Boteros is multilayered. The publicly posted materials communicate a universal message about the value of the rule of law, while the

191. For example, the law school might have considered adopting a pervasive approach to teaching ethics, which would mean integrating ethical instruction across courses rather than condensed into a single-subject class. *See* Thomas L. Shaffer, *Using the Pervasive Method of Teaching Legal Ethics in a Property Course*, 46 ST. LOUIS U. L.J. 655, 656 (2002); David T. Link, *The Pervasive Method of Teaching Ethics*, 39 J. LEGAL EDUC. 485, 487 (1989).

paintings' location at Berkeley Law—for those observers who are aware of the recent history—serves to acknowledge the institution's moral relationship to the Torture Memos.

Next, this Section examines the memory work of the Boteros in light of the school's reconsideration of their display. Dean Edley, and not the university or faculty, made the initial decision to exhibit the paintings. Until now, the institution has not created a mechanism for community deliberation about Berkeley Law's relationship to the Torture Memos.

Dean Chemerinsky's decision to initiate discussion about the paintings opens up new possibilities for dialogue on this question. The Berkeley Law community should reconsider the exhibit and its meanings to make a deliberate decision about the continued display of the Boteros—or any other response to the Torture Memos that the community might deem appropriate. The interplay between the current audience for these communicative materials and their intended narrative is context-specific, dynamic (changes over time), and operates in multiple registers (individual and collective). I consider the value of continuing to display the paintings to acknowledge law's role in the War on Terror and to offer alternative cultural responses to mark the law's imbrication in war and torture.

### *A. Three Dimensions of the Berkeley Boteros as Memory Works*

I develop three dimensions for analysis, or interpretative frames, to explore the meaning of the Boteros. These interpretations are not exclusive of other understandings: this analysis accepts and acknowledges that individuals exposed to the paintings will draw their own unique meanings. But this analysis develops plausible interpretations and explores their implications to illustrate the payoff of memory analytics.

The first interpretative frame explores the relationship between the paintings and the public-facing identity of Berkeley Law. Here, the Boteros operate at the broadest level of public memory, constructing a moral narrative about the need to acknowledge the human destruction of torture and the role of lawyers in enabling its practice. A second interpretative frame understands the exhibition as the external representation of the constricted institutional response to the controversy regarding Professor Yoo. It considers the university's legalistic approach to demands to censure Professor Yoo and argues that Dean Edley's decision to install the exhibition created a cultural, as opposed to a legal, response to the Torture Memos. The final dimension examines the role of the faculty in the production of public memory and institutional identity. This dimension of public memory considers the interplay between internal norms of communication and the public memory the law school communicated. It alerts us to the often-complicated dynamics of internal discourse within institutions surrounding public controversy and public memory.

*1. The Law School Boteros as Public Memory*

Public framings of communicative materials, like works of art, are important in mediating between those materials' intended narrative and viewers' private experience. Viewers negotiate their interpretation of the paintings individually but rely on interpretive texts and social context to inform their experience.[192] Public frames, in other words, cannot dictate private understandings, but rather seek to "establish the likely range of meanings."[193] Thus, Dean Edley's statements are instructive as to the message the law school wanted the Boteros to convey.

*a. The Message Dean Edley Intended the Boteros To Convey*

Dean Edley constructed the Boteros as public memory of the breakdown of the rule of law in the War on Terror. There are two temporal aspects to Dean Edley's framing: one that looks to the past and sees torture as the breakdown of the rule of law, and a second that speaks to the present and prompts reflection on the extent to which injustice has been rectified. Each of these narratives asks questions about what justice requires. The absence of a definitive account of the detention and interrogation program, including the lack of legal accountability, casts the exhibit as a distinct provocation; the exhibit thereby entangles the law school in political debates, but with the critical distance that representational art provides. Thus, the deployment of the Boteros as a strategic intervention enabled Dean Edley to frame the exhibit as consistent with the school's educational mission—as a moral heuristic rather than as a legal or political judgment.

Dean Edley's public statements about why he brought the Boteros to the law school expressly linked the prisoner torture at Abu Ghraib to the human horror that comes from abandoning the rule of law in wartime.[194] Dean Edley wrote that the paintings depict "law that has failed. It has failed to protect, and it has failed to teach the basic morality that underlies human rights."[195] This framing posits the Boteros as vivid heuristics that aid viewers' understanding of law as a moral force.

By August 2012, when the paintings were installed, the images could also be interpreted as a tribute to the failure of law to address its past errors. Dean Edley linked the Botero exhibit to his disappointment with the decision of President Obama's top advisors to forego a searching investigation into the Bush Administration's detention and interrogation program.[196] A careful examination

192. *See generally* YOUNG, *supra* note 26.

193. IRWIN-ZARECKA, *supra* note 15, at 4.

194. Dean Edley acknowledged the exceptional nature of his intervention with the Boteros and suggested that it was, in part, the role of government lawyers in providing "legal cover" for political judgments to authorize torture that pushed him to act. Edley April 2008 Statement, *supra* note 140; Edley August 2009 Statement, *supra* note 150.

195. Email from Christopher Edley, Jr., *supra* note 13 (see *supra* note 133 for full text).

196. Christopher Edley, *Art and Law in a Time of Torture*, BERKELEY REV. LATIN AM. STUD., Fall 2012, at 38, https://clas.berkeley.edu/sites/default/files/shared/docs/tertiary/BRLAS-Fall2012-

of this program would have enabled the nation to debate the morality of the decisions made in light of a full record, and so to learn from the past.[197] In the absence of accountability, Dean Edley argued that art could provoke the necessary social deliberation about the meaning of torture and the breach of the rule of law that the detention and interrogation program constituted:

> Because we have not applied the rule of law to the full extent, I believe, we should have. Therefore, how can we be sure that we will remember? How can we be sure that we will continue to debate what is right and what is wrong? I believe that the answer lies in part in art. That is what Señor Botero has done for us . . . . And I will be eternally grateful.[198]

Dean Edley thus framed the Boteros as pedagogical tools.[199] This softened the impact of his judgment about the wrongfulness of the detention and interrogation program and broadened the conversation to consider the limits of law to prevent evil.

The exhibition stands out as a cultural intervention designed to raise questions about accountability in light of President Obama's decision not to pursue prosecutions. In a speech in Chile at an exhibition of Botero's Abu Ghraib paintings, Dean Edley posed a series of questions to illustrate the difference between the role of law in establishing rules of treatment and the role of morality in guiding our values. In response to the statement that "torture is illegal," Dean Edley asked: "Are all forms of abuse torture? Are there gradations of torture and circumstances in which some forms of torture may be permissible?"[200] These were questions that had circulated in legal circles and the popular press for years, and the paintings offered answers to these questions.[201] Thus, Dean Edley framed the paintings as a provocation to consider the relationship of law to torture, and the agency of lawyers in directing the ends to which law is deployed.

### *b. The Alternative Public Memory Communications of the Boteros*

There are additional interpretations of the memory work that the paintings advance in the context of their display at Berkeley Law. These interpretations do not rely on Dean Edley's statements but come from the larger political context in which the paintings were installed. Rather than a representation of law that has failed, the paintings can also be interpreted as representing law that worked as

Edley.pdf.

197. *Id. See* SENATE SELECT COMMITTEE REPORT, *supra* notes 44 and 86 and the accompanying text for the DOJ investigation into the CIA detention and interrogation program.

198. Edley, *Art and Law in a Time of Torture*, *supra* note 196.

199. *Id.* Dean Edley moderated the sting of his critique by qualifying his views as being those of "a lawyer" rather than those of a representative of the law school: "To me, as a lawyer, the images show what happens in the moral void created when we have no law." *Id.* But by addressing the audience as a lawyer, rather than as a dean, he muddles the communicative force of the exhibit. *See* Nancy Illman Meyers, *Painting the Law*, 14 CARDOZO ARTS & ENT. L.J. 397, 398 (1996).

200. Edley, *Art and Law in a Time of Torture*, *supra* note 196.

201. *Id.*

violently as intended.[202] Thus, the paintings are a form of transgressive truth telling. They are an amplified representation of what the US government had intended to remain invisible: the practice and effects of torture.[203]

Botero's *Abu Ghraib* series centers on representations of victims of torture. Torture victims are marginalized and demonized in anti-terrorism rhetoric, compounding their injuries and often stymying their quests for accountability. The paintings thus remind us of the unanswered calls for justice that victims require of a nation committed to the rule of law. States not only hide acts of torture, they hide law's complicity in its practice.[204] Indeed the Torture Memos point to the considerable effort of the Bush Administration to define so-called "enhanced interrogation" techniques as distinct from torture.[205] Furthermore, States perform torture out of the public eye and tightly control evidence of its occurrence. The Abu Ghraib photographs were not official records and were never supposed to have been published. Botero's paintings, based on the photographs, unmask legal rationalizations and narrate the experiential truth of a system of legalized torture. The "accusation" of the Boteros is that the State's claim to legality of its treatment of detainees was based on the manipulation and perversion of law. In this interpretation, law did not fail, as Dean Edley suggested: lawyers and politicians did.

### *c. The Politics of the Boteros as Public Memory*

In light of the alternative interpretation described above, Dean Edley's statement deserves closer scrutiny. Although his characterization of law's relationship to torture elided law's complicity, Dean Edley assumed an unequivocal moral stance in his rejection of the torture to which the images of prisoner abuse bear witness. In so doing, he took a side on the central issue in the debate about the detention and interrogation program: its claim to legality. The Torture Memos have been forcefully condemned on the grounds that government lawyers provided legal cover for a State policy to torture.[206] Pushback against this

202. Viterbo, *supra* note 113, at 301–02, 304.

203. Lisa Hajjar, *Wikileaking the Truth about American Unaccountability for Torture*, 7 SOCIETIES WITHOUT BORDERS 192, 197–98 (2012) ("Classification and secrecy have functioned in tandem as a shield to block public knowledge about prosecutable offenses in the 'war on terror'. . . . The war on whistleblowers, to which the harsh treatment of [Chelsea] Manning is an extreme example, is one means of preventing such information from getting out by deterring would-be leakers.").

204. Hedi Viterbo pointed out that the United States sought to use law to withhold information and images of torture by asserting the state secrets privilege, prosecuting individuals who allegedly leaked information, and defending suits seeking legal accountability for the CIA rendition program. Viterbo, *supra* note 113, at 302.

205. Padilla v. Yoo, 678 F.3d 748, 768 (9th Cir. 2012) (holding that Yoo was entitled to qualified immunity because, while Padilla's treatment may have risen to the level of torture, "we cannot say that any reasonable official in 2001–03 would have known that the specific interrogation techniques allegedly employed against Padilla, however appalling, necessarily amounted to torture.").

206. *See, e.g.*, Margolis Report, *supra* note 64; THE TORTURE MEMOS, *supra* note 45, at 5, 37–38.

accusation persists; as recently as 2014, former Vice President Dick Cheney continued to defend the program, discrediting the Senate investigation as "full of crap."[207] Cheney defiantly asserted that OLC lawyers' opinions settled the legality of interrogation techniques, that the authorized techniques worked, and that he would "do it again in a minute."[208]

Dean Edley's installation of the exhibit instantiates a powerful counter to such defenses of the program. Obama-era policy rejected the legal interpretations of the Torture Memos,[209] and the Trump Administration has not reversed these corrections. But the comments of Cheney and other defenders of the program, along with the continued secrecy around it, suggest that as a country we have not come to a common understanding of the justness or injustice of our methods. The past remains unsettled. Therefore, it remains important to harness the past to remind lawyers of their power to project or restrain violence. The Boteros are a reminder.

Dean Edley curated the exhibit to symbolize Berkeley Law's affirmance of the ideal of law as capable of facilitating and cultivating humanity's highest aspirations and virtues.[210] How we get there requires lawyers to wrestle with the complexity of drawing boundaries and interpreting principles in the face of competing demands. Law schools train students to engage in this process of reasoning and argumentation to reach just results. But Dean Edley argued that law alone cannot achieve the moral ends toward which we should strive, commenting that "we make a serious mistake if we expect too much of law."[211] He compared this misguided faith that law will prevent torture to the false belief that traffic laws will prevent car accidents.[212] Dean Edley's framing suggests that lawyers must be morally awake and must ensure that they deploy their legal skills in a way that steers society toward fulfilling its moral ambitions. The Boteros are a cautionary tale about what happens when we forget this lesson, and practicing this type of instruction is necessary to help lawyers fulfill their social role of safeguarding the rule of law in a democracy.

Abu Ghraib, and the breach of our nation's values brought on by the detention and interrogation program, resulted from human action by government lawyers and officials.[213] Botero's works make this breach visible and provoke remembrance of its legal foundation and evolution. Displayed in Berkeley Law,

207. Maya Rhodan, *Dick Cheney Says Senate Torture Report Is 'Full of Crap'*, TIME (Dec. 10, 2014), http://time.com/3629383/dick-cheney-cia-senate-torture-report/.

208. Zeke J. Miller, *Dick Cheney on CIA Interrogation Orders: "I'd Do It Again in a Minute,"* TIME (Dec. 14, 2014), http://time.com/3632875/dick-cheney-cia-interrogations-senate-report/.

209. Exec. Ord. No. 13491, 74 Fed. Reg. 4893 (Jan. 22, 2009).

210. "[L]aws can stand as instruction" which means that laws inculcate "higher values, higher social aspirations." Edley, *Art and Law in a Time of Torture*, *supra* note 196.

211. *Id.*

212. *Id.*

213. SENATE SELECT COMMITTEE REPORT, *supra* note 44; s*ee generally,* MAYER, *supra* note 64; SANDS, *supra* note 61.

the paintings prompt viewers to yoke their efforts as law students, faculty, and administrators to the service of justice. Thus, the paintings can be understood as a narrative intervention—one which represents the horrors of torture and abuse, but still offers the possibility that lawyers can redeem this past failure by refuting these depredations of humanity through their work.[214] Art works in ways that law cannot.

Dean Edley's argument for sponsoring the installation rests on two key and implicit assumptions. The first is that the law school should engage in moral instruction even when this touches on divisive, politically partisan debates. This assumption stands in tension with another common assumption of law schools and universities: institutions of higher education should value ideological diversity and encourage debate on issues of the day.[215] To adhere to the latter premise, universities generally stand apart from partisan politics. Even as Dean Edley framed the moral instruction of the paintings in rule of law values, the arguments about the detention and interrogation program were inextricably bound up in debates about the political judgments that led to the choice to torture prisoners. These judgments, by their nature, are politically contingent and therefore raise questions about whether the law school should, even implicitly, take a position on what had been a crucial national security policy.[216]

The second assumption is that the public record regarding Professor Yoo's role in the detention and interrogation program justified the school's instigation of a cultural intervention that communicated public rebuke of a faculty member. The absence of a definitive moral or legal judgment about the detention and interrogation program implied that the law school was taking sides in this debate and remonstrating Professor Yoo for his role. These assumptions are contested and form the gravamen of some of the complaints about the exhibit. I will revisit these assumptions and their implications in Section IV.B. The subsequent Sections provide additional context for Dean Edley's decision to use the Boteros as public memory by shedding light on the internal and external pressures on Berkeley Law.

### *2. Institutional Values and the Production of Public Memory*

A second dimension of memory work focuses on institutional values. Berkeley Law's response to the Torture Memos exposed the school to criticism

214. RUTI G. TEITEL, TRANSITIONAL JUSTICE 116 (2000).

215. *Principles of Community*, UC BERKELEY DIVISION OF EQUITY & INCLUSION, https://diversity.berkeley.edu/principles-community (last visited Sept. 18, 2019). Such formal neutrality may explain, in part, why law schools boast about high-profile, powerful alumni even if they are politically controversial. Links to powerful institutions and actors signal prestige and access that can benefit the school, its students, and its alumni.

216. Indeed, Dean Edley gave a nod to this norm by justifying the need to issue statements about Professor Yoo with reference to Yoo's conduct as a *legal* professional, implying that otherwise opining on faculty's moral conduct would be improper. Edley April 2008 Statement, *supra* note 140; Edley August 2009 Statement, *supra* note 150.

that it had compromised its moral principles. Because the law school treated law as its exclusive option for action, any university-level response became contingent on a judicial sanction against Professor Yoo. Such sanctions were always unlikely and were foreclosed entirely by the conclusion of the DOJ investigation and the Obama Administration's decision not to pursue legal accountability. Perhaps predictably, Berkeley Law's reliance on legal positivism did not satisfy critics who argued that the principal author of the Torture Memos should not be teaching at the law school. The university administration failed to acknowledge that if law was unsuited to address the challenge that Professor Yoo's continued appointment posed, the institution still had other options. In this light, Dean Edley's decision to act on his own authority and install the Abu Ghraib paintings was morally courageous. While none of his statements about the Botero exhibit mentioned Professor Yoo by name, the timing of the installation made its association with the controversy a reasonable conclusion.

The symbolic significance of the Botero exhibition should not be underestimated: it implicitly rebukes a faculty member. In fact, it is this message of opprobrium which contributes to the controversy over whether the canvasses are appropriate for the law school to display. At the same time, the paintings symbolically perform the law school's public commitment to the rule of law as applied to Professor Yoo. Berkeley Law rightly defended the employment rights of Professor Yoo. University faculty conduct policy protects the rights of professors to participate in public life regardless of their political views.[217] But the policy, as written, applied awkwardly because Professor Yoo had not acted in a private capacity: the controversy involved allegations that he failed to uphold his ethical duties as a *government lawyer*.[218]

Nevertheless many—and likely most—Berkeley Law faculty supported the university's interpretation of the rule and its application in the case of Professor Yoo.[219] In many informal conversations with faculty over the years, I remember very few faculty members who disagreed with this content-neutral rule of protection. And I do not remember anyone, myself included, who advocated that these protections should not apply to Professor Yoo. A few colleagues cautioned against pushing the university administration to make an institutional judgment about the moral boundaries of extramural activism in the case of Professor Yoo, lest officials take aim at faculty critical of the war or the use of torture. In fact, at

217. "Faculty members have the same rights and obligations as all citizens. They are as free as other citizens to express their views and to participate in the political processes of the community." *UC Faculty Code of Conduct*, *supra* note 7, at 9.

218. Interview with Christopher Kutz, *supra* note 189.

219. Glenn, *supra* note 171 (Professor Yoo's defenders raised the specter of McCarthy era censorship and the danger of ignoring the bright line rule which requires criminal conviction before a professor can be disciplined for outside work.). However, one UC Berkeley professor argued that Professor Yoo's memoranda were not only immoral, but amounted to professional misconduct. *Id.* (Academic freedom should not protect "those whose work is not the grueling labor of the scholar and the scientist but instead hackwork that is crafted to be convenient and pleasing to their political master of the day.").

least one faculty member reminded me that intervention by the regents of the university could have unintended consequences. During the Free Speech Movement on campus, the regents interfered with Berkeley faculty's teaching on politically charged topics.[220]

The university's policy on faculty conduct reflects principles of legal liberalism and protects the freedom to pursue political engagement outside of academic duties without regard to the content of that activism. Dean Edley refused to yield to critics on this point.[221] Nor did he challenge the faculty rules of conduct. Dean Edley's adherence to and inaction on this policy illustrate the way legal logic leads to predictable contradictions of values. This instance also highlights the contradictions inherent in Dean Edley's attempts to defend Berkeley Law's values that support human rights values while simultaneously adhering to his duty to follow university regulations.

Dean Edley went out of his way to defend Professor Yoo's presence on the faculty. In his final community statement on the issue, Dean Edley maintained that despite "thousands" of messages criticizing Professor Yoo's employment at Berkeley Law, Professor Yoo's legal advice was protected by academic freedom.[222] To illustrate this principle, Dean Edley drew an analogy between Professor Yoo's actions and the actions of a pro-choice professor teaching at a conservative college.[223] Despite the negative public attention a pro-choice professor might garner by speaking at "weekend rallies," that professor would be protected from adverse action by the college.[224]

In making this argument, however, Dean Edley elided the distinction between academic freedom and extramural faculty conduct.[225] Academic freedom applies to activities undertaken as a faculty member, while the faculty conduct provision at issue regulated faculty behavior undertaken outside of academic duties.[226] By analogizing Professor Yoo's government service to academic freedom, Dean Edley cast this as an issue about the neutral application of rules to protect civil liberties. After all, academic freedom protects socially progressive as well as conservative views. Critics of Professor Yoo argued that he should be removed from the faculty not because of his views as a scholar or

220. The UC Board of Regents sent a formal letter of censure to Jan Dizard, an untenured Berkeley professor, for co-teaching an off-campus course in the 1968–69 academic year that featured Black Panther leader Eldridge Cleaver. Interview with Jan Dizard, Professor, Univ. of Cal., Berkeley, in Berkeley, Cal. (Nov. 12, 2018). *See* CHARLES P. HENRY, BLACK STUDIES AND THE DEMOCRATIZATION OF EDUCATION 63–65 (2017).

221. Edley April 2008 Statement, *supra* note 140; Edley, August 2009 Statement, *supra* note 150.

222. *Id.*

223. *Id.; UC Faculty Code of Conduct*, *supra* note 7, at 9.

224. Edley, August 2009 Statement, *supra* note 150.

225. *UC Faculty Code of Conduct*, *supra* note 7, at 3–4, 9 (Part I: Professional Rights of Faculty, Part II.E: The Community).

226. *Id.*

private citizen, but because his service in the Bush Administration.[227] In the end, the distinction made no difference as the faculty conduct policy did not cover morally objectionable or professionally questionable government service.[228]

Dean Edley's support of Professor Yoo's rights as a faculty member signaled that Berkeley Law would not entertain efforts to interfere with Professor Yoo's tenure, regardless of the optics. For example, Dean Edley fought to treat Professor Yoo just like any other faculty member of his rank. At Berkeley Law, it is the custom to award the academic distinction of a named chair to tenured faculty on the basis of academic rank and seniority.[229] The dean confers with current faculty chair holders annually on eligible candidates. According to several chair holders at the time, Dean Edley urged chair holders to support honoring Professor Yoo based on his university record, despite opposition within the group. Dean Edley argued that Professor Yoo had earned the distinction and that his work as a government lawyer should have no bearing on the question. According to faculty involved in these discussions, there were sharp but respectful disagreements about the equities and optics of awarding Professor Yoo a chair, which might imply institutional approval of his government service. In 2014, Dean Edley unilaterally recommended that Professor Yoo be approved for a chair.[230] When the announcement of new chairs came out, I remember individual faculty members expressing their frustration over the matter. Several expressed concern that in its defense of due process and academic freedom, Berkeley Law appeared tone deaf or indifferent to how this move would be interpreted by the public.

Thus, when Dean Edley announced the display of a few of the Boteros at the law school as his own initiative, the paintings communicated a strong and public counter-torture response.[231] This interpretation is confirmed by the many remarks I have heard from community members who approve of the exhibit in part because it communicates the law school's condemnation of torture.

The paintings were a form of cultural and institutional intervention. I have also heard from faculty, staff, and students that they or others saw the paintings only as a condemnation of Professor Yoo—a sanction by art. That is too simple. The university's failure to formally sanction Professor Yoo did not extinguish the university's ability to respond to the challenge that Professor Yoo's continued employment presented to the institution's values. Dean Edley undertook this

227. *Id.* at 9–10, *see supra* note 171.

228. *UC Faculty Code of Conduct*, *supra* note 7, at 9; *see also* Interview with Christopher Kutz, *supra* note 189.

229. This description of the procedure for naming chairs is drawn from accounts of several chair holders at the time of these discussions and in the years following.

230. According to some participants, the debate among chair holders echoed the public debate over the propriety of Professor Yoo's law school affiliation. Apparently, the chairs had not reached an agreement on the matter before Dean Edley, in the final days of his deanship, advanced Professor Yoo's name to the outgoing UC Berkeley's chancellor, who then approved the appointment.

231. Email from Christopher Edley, Jr., *supra* note 13.

institutional work on his own, by opening up what Rudi Teitel calls a "poetics" of justice through art.[232]

As Dean Edley explained, law and morality differ.[233] With its unique rules of argumentation and evidence, law cannot address all the problems that society confronts.[234] Hosting the Boteros allowed the art to speak as a rebuke not just of torture, but of the fiction that the university's response to the controversy fully occupied the field of institutional possibilities. Art speaks in a different register than law and enables the school to communicate in a different but powerful medium. The Boteros conveyed a more forceful institutional denunciation of torture than the university's legalistic approach.

*3. Silence and the Parameters of Deliberation*

The final level of interpretation is internal to Berkeley Law, and it speaks to the representational economy of public memory. The fact that the Botero exhibit is the symbol of the school's association with, and response to, the Torture Memos speaks to the interplay between internal, ad hoc conversations among faculty and the public memory that Dean Edley promoted. Law schools, like the legal profession,[235] place a high value on civil, collegial discourse.[236] This interpretation highlights the role of academic norms of collegiality and how these powerfully shaped Berkeley Law's public-facing communications.

Collectively, the faculty observed norms on collegiality and behaved consistently with Dean Edley's public response to criticism of Professor Yoo's continued employment. These norms, which incorporate particular ideas about fairness, moral opprobrium, and political judgments, promote respectful discourse among professors.[237] While this prevented potentially divisive debate within the faculty and maintained respectable faculty politics, it also meant that Dean Edley

232. TEITEL, *supra* note 214, at 175.

233. Edley, *Art and Law in a Time of Torture*, *supra* note 196.

234. *Id.*

235. Jayne R. Reardon, *Civility as the Core of Professionalism*, ABA (Sept. 19, 2018), https://www.americanbar.org/groups/business_law/publications/blt/2014/09/02_reardon/ ("[C]ivility is central to the ethical and public-service bedrock of the American legal profession."); CAL. R. CT. 9.7, http://www.courts.ca.gov/cms/rules/index.cfm?title=nine&linkid=rule9_7 (The California Supreme Court "Civility" oath requires lawyers to pledge they "will strive to conduct [themselves] at all times with dignity, courtesy, and integrity.").

236. *See, e.g.*, Raymond M. Ripple, *Learning Outside the Fire: The Need for Civility Instruction in Law School*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 359, 359–60 (2001). At the University of California, Irvine, School of Law, for example, incoming law students have been asked to take a "Civility Oath." *UCI Law Class of 2015 takes Civility Oath*, YOUTUBE (Sept. 19, 2012), https://www.youtube.com/watch?v=B89wX173Rrc&t=2s. *See also* Sandra Day O'Connor, Professionalism, 76 WASH. U. L.Q. 5, 8 (1998) ("More civility and greater professionalism can only enhance the pleasure lawyers find in practice, increase the effectiveness of our system of justice, and improve the public's perception of lawyers.").

237. *See generally* Michael L. Seigel & Kathi Miner-Rubino, *Measuring the Value of Collegiality Among Law Professors*, 1 FAULKNER L. REV. 257 (2009).

spoke for the entire faculty, without incurring the burden or benefit of formal faculty deliberation and input. As a result, faculty silence shaped Berkeley Law's institutional identity in response to the moral challenge Professor Yoo's presence provoked. This allowed Dean Edley, unencumbered by formal faculty input, to unilaterally forge public memory using the Boteros. The installation of the paintings leaves unspoken, if not unresolved, how the faculty, as a collective, views this sensitive issue. Dean Chemerinsky's plan to reconsider the placement of the paintings will invite organized faculty deliberation about the meaning of the exhibit for the first time.

Because Dean Edley framed Berkeley Law's relationship to Professor Yoo in purely legalistic terms, he constrained acceptable faculty discourse on the topic. Dean Edley effectively postponed the relevance of faculty views on the legal or moral consequences of Professor Yoo's work at OLC until external authorities had issued a legal determination on the consequences. Until such time, faculty members voicing opinions on the matter were not commenting on authoritative judgments; but they would be offering their own views on the conduct of another faculty member outside of that member's academic duties. Such commentary would come uncomfortably close to crossing a line of collegiality. Even in his statements to the community on Professor Yoo and the Torture Memos, Dean Edley tempered his condemnation of the memos by emphasizing that he was speaking only for himself.[238] In effect, Dean Edley's frame collapsed moral questions into legal ones, which the law school faculty was in no position to adjudicate and upon which it was in no position to opine.

Many faculty members were shocked and disagreed with Professor Yoo's legal analysis.[239] Nevertheless, faculty members did not issue any collective public statements, either defending or condemning Professor Yoo, in response to various calls for his censure.[240] Disagreeing, even vigorously, with the scholarly views of a fellow faculty member is acceptable. Ad hominem attacks are not. Individual faculty members could exercise their academic prerogative to associate the school with alternative views of the detention and interrogation program, or the War on Terror more generally. Many wrote articles, issued reports, organized conferences, and gave speeches that challenged the legal reasoning of the Torture Memos and their impacts.[241] Thus, the norms of faculty collegiality channeled

238. Edley, April 2008 Statement, *supra* note 140 (stating that UC Berkeley's "restrictive standard" regarding unacceptable conduct warranting dismissal of a faculty member "is binding on me as dean, but I will put aside that shield and state my independent and personal view of the matter"); *see* Edley, August 2009 Statement, *supra* note 150.

239. *See id.*

240. The deliberations of chair holders about Professor Yoo's candidacy may have been the closest the faculty came to a collective discussion, but this gathering was restricted in membership and its discussion cannot be shared with the larger faculty.

241. One-time academic initiatives like workshops and presentations hosted at Berkeley Law also communicate institutional values. However, unlike the Botero paintings, these events do not have a continuous mnemonic presence in the physical space of the school.

faculty dissent into traditional and individualized academic outlets lest they transgress the unspoken, cultural expectations of the institution.

Self-censorship is a property of collegiality, and it operated to prevent faculty from criticizing Professor Yoo directly and from debating whether Professor Yoo's association with Berkeley Law called for alternative action.[242] This left the faculty outside any process to consider what, if anything, the institution should communicate about the apparent contradiction between the Berkeley Law's values pertaining to the rule of law and its association with the perversion of those values. An institutional response could have taken the form of a statement denouncing torture, calling for the university to reconsider the moral fitness rules governing faculty, offering a legal assessment of the OLC memoranda, or revisiting the legal ethics curriculum—to name just a few possibilities. Faculty likely held a range of views on this topic, and it is not possible to know what the outcome of such a deliberation would have been, whether any consensus could have been reached, or how formal debate would have impacted faculty morale. But without a formal process of consultation, Dean Edley was left to construct the school's response to these critiques alone.

In summary, this Section deconstructs the broader social and institutional context in which Dean Edley installed the four Botero paintings at Berkeley Law. The dean's action communicated a meaning beyond what was inscribed on the wall plaques. Individuals looking for the school to offer a moral condemnation of the Torture Memos could interpret the installation as the acknowledgment they had hoped to hear: Berkeley Law rejected torture and decried law's complicity in its practice. But the implicit message of the paintings also left room for ambiguity. This ambiguity allowed Dean Edley to speak symbolically for Berkeley Law and to rebuke the role of government lawyers in the detention and interrogation program, while still channeling faculty discourse into traditional academic outlets. This strategy dampened vocal criticism of the school and of Professor Yoo within the law school, but it meant that the institution did not create explicit mechanisms for the community to address these issues collectively. Perhaps now the Berkeley Law community has an opportunity to consider a wider range of communicative practices as it revisits the public memory of the Boteros.

### *B. Institutional Responsibility for Public Memory*

The material consequences of loosening the prohibition against torture came blaring through the photos of detainee abuse in Iraq and the subsequent investigations. This linked Berkeley Law with the international controversy over the nation's policies in its War on Terror. Now that Dean Chemerinsky has opened

242. I remember one private conversation in which a faculty member and self-described friend of Professor Yoo opined that while it was "obviously right" that Professor Yoo should not be removed or censured by the university, gonzo student civil disobedience and protests of his presence should be tolerated. I remember this person remarking, "I don't understand why students aren't splattering his office door with pig's blood."

up space to reconsider the placement of the Boteros, that conversation should address Berkeley Law's institutional responsibility to curate the school's public memory.

Before considering what institutional responsibility for public memory entails, it is important to revisit briefly the institutional identity and values that are at stake. Berkeley Law is a civil society institution with a distinct role to play in stimulating discussion on important issues affecting the community. Berkeley Law's association with the Torture Memos creates a moral demand to clarify the law school's position not just on torture, but on the role of legal educators and the values of legal education. To prospective students, academics, and the general public, Berkeley Law's defense of Professor Yoo's position on the faculty made little sense.[243] Berkeley Law was home to one of the legal architects of the detention and interrogation program, which led the United States to offer an unprecedented rebuke of international law, contributed to horrific acts of torture, and damaged US credibility as a champion of democratic values—yet the law school had nothing to say about what Professor Yoo's presence meant for its identity as California's leading public law school.

The disaggregation of Professor Yoo's work as a DOJ lawyer—which contributed to a policy of torture—and his role as a law professor indirectly signaled that students were free to emulate Professor Yoo's lawyering. How did this square with Dean Edley's condemnation of the Torture Memos as the distortion of law to serve political ends? The message seemed to be that there was no price to pay for pursuit of legal prestige and power so long as one avoided prosecution; the legal academy was indifferent to the moral ends to which one put a legal degree.

Even if the university had no grounds for removing Professor Yoo, Berkeley Law could have expressed its views on the topic. I offer this observation as a description of possible actions the institution could have taken, and not as a prescription of what it should have done. For example, Berkeley Law could have issued a statement about the morality and optics of having the lead lawyer who approved techniques that led to torture and immunized State agents from criminal prosecution as a senior member of the faculty. Dean Edley's statement sent an important signal in this regard, but the dean emphasized that he offered his views in his personal capacity only,[244] thereby disavowing any institutional responsibility. The chancellor of the university could have issued a statement about the professional values that lawyers should embody and uphold or convened a committee to issue a collective legal opinion on the Torture Memo.

But issuing any such statement posed institutional and political risks. Defenders of the Bush Administration's interrogation policies might well have accused the university of scapegoating a government attorney for carrying out his

243. Editorial, *supra* note 156.

244. Edley, April 2008 Statement, *supra* note 140.

job.[245] Within the law school community, the university faculty might have objected that the chancellor was illegitimately sidestepping the faculty conduct policy and making legitimate, though controversial, extramural activities relevant to fitness to serve as a faculty member.[246]

The university's failure to respond to the moral crisis of its association with the Torture Memos stands in contrast to its response to a subsequent sexual harassment scandal involving then-Dean Sujit Choudhry.[247] Unlike Professor Yoo, Dean Choudhry engaged in violative conduct while in his role as a university employee. Faculty rapidly voiced strong disapproval of Dean Choudhry's actions. I attended the faculty meeting that the law school convened within hours of the community learning that Dean Choudhry had violated the university's sexual harassment policy. The university chancellor and vice chancellor addressed the faculty and listened to our concerns. Law school administrators quickly issued a public statement repudiating Dean Choudhry's conduct and affirming that his behavior was antithetical to the core values of the school.[248] Because Dean Choudhry's misconduct occurred while carrying out his decanal responsibilities, swift, public condemnation by the faculty seemed uncontroversial, if not necessary.

In the case of Professor Yoo, the university ducked its institutional responsibility by elevating faculty's right to participate in public life and to enjoy their employment rights above all other values, including the right not to be tortured. The university gave no weight to factors such as the harm caused by a

245. *See, e.g.*, Josh Gerstein, *Obama's Lawyers Set to Defend John Yoo*, POLITICO (Jan. 28, 2009). https://www.politico.com/story/2009/01/obama-lawyers-set-to-defend-yoo-018063 (Referring to DOJ lawyers under the Obama Administration who argued in favor of dismissing cases brought against the authors of the Torture Memos, the author opines that the lawyers "have to stand by a prior administration's legal work — whether they agree with it or not — merely in the interest of protecting U.S. government prerogatives.").

246. Edley, April 2008 Statement, *supra* note 140; Edley, August 2009 Statement, *supra* note 153.

247. *See generally*, Chantelle Lee, Jessica Lynn & Pressly Pratt, *UC Board of Regents Reaches Settlements with Sujit Choudhry, Tyann Sorrell*, DAILY CALIFORNIAN (last updated April 18, 2017), https://www.dailycal.org/2017/04/14/tyann-sorrell-settles-lawsuit-against-sujit-choudhry-uc-regents/.

248. *See Message from the Associate Deans and Senior Administrators of Berkeley Law*, BERKELEY LAW (Mar. 11, 2016), https://www.law.berkeley.edu/article/message-associate-deans-senior-administrators-berkeley-law/ ("We are looking forward, as a community, to confronting and addressing the concerns raised by this conduct . . . Berkeley Law has been through other crises in its 100-plus years as a public law school. As before, we know that our students, faculty, staff, and alumni will hew to our strong core values of community and justice and demonstrate the resilience and strength that will allow us to emerge stronger than before."). *See also* Susan Svrluga, *Berkeley Law School Dean Resigns After Sexual Harassment Complaint*, WASH. POST (Mar. 10, 2018), https://www.washingtonpost.com/news/grade-point/wp/2016/03/10/berkeley-law-school-dean-resigns-after-sexual-harassment-complaint/?utm_term=.4785dc30cf55 (quoting a further message from Berkeley Law faculty to the law school community) ("We learned today about allegations that have been made against Dean Choudhry and University administrators involving both sexual harassment and the institution's response. We take these disturbing allegations extremely seriously. We emphatically condemn the type of conduct alleged in the complaint.").

State policy of torture, its mixed messages about the appropriate roles of lawyers and law professors, and the value of teaching justice. Neither the university nor the law school invited exploration of other institutional measures in response to demands for moral, as opposed to legal, action—with the sole exception of the Boteros.

The contrast between the university's attitude toward Professor Yoo and its studied consideration of abandoning the name "Boalt Hall" is likewise instructive. Universities are developing sophisticated communication practices to work through challenges to their values provoked by symbols and other associations with figures who are long gone, and whose ideas, like racism, are unquestionably antithetical to the mission of educational institutions.[249] For example, Berkeley Law itself, after a lengthy consultative process, recently abandoned the historic name "Boalt Hall" in response to the revelation that the school's colloquial namesake, John Boalt, held racist views and supported the Chinese exclusion policy.[250] However, Berkeley and other universities are not similarly skilled in articulating and responding to challenges that can arise from public engagement by the faculty.[251] It is beyond the scope of this article to determine the cause of this variance, but it is worth considering whether lack of accountability for the detention and interrogation program, the persistence of anti-terrorism discourse, and the political climate that stokes it means that we have not reached social consensus condemning the Torture Memos.[252]

Berkeley Law should keep in mind the meaning and purpose of public memory as it reconsiders the display of the paintings. Public memory is constructed and nurtured by institutional actors, and its meanings may change over time. Berkeley Law must ask what values the Boteros serve now. It has been nearly two decades since the 9/11 attacks, over sixteen years since the Abu Ghraib photos became public, and more than seven years since the Botero paintings came to Berkeley Law.

249. Report of the Comm. on the Use of the Boalt Name, to Erwin Chemerinsky, Dean, Univ. of Cal., Berkeley, Sch. of Law (revised Oct. 10, 2018), https://chancellor.berkeley.edu/sites/default/files/boalt_hall_building_name_review_committee_proposal.pdf; Letter from the Comm. to Establish Principles on Renaming, to Peter Salovey, President, Yale Univ. (Nov. 21, 2016), https://president.yale.edu/sites/default/files/files/CEPR_FINAL_12-2-16.pdf.

250. Report of the Comm. on the Use of the Boalt Name, *supra* note 249, at 4–5 (discussing the terms of Elizabeth Boalt's, John Boalt's wife, substantial gift honoring her husband and the extent to which the law school or a building that housed it was to be named for John Boalt).

251. *See* Julia Jacobs, *Elizabeth Lederer, Prosecutor of Central Park Five, Resigns From Columbia Law*, N.Y. TIMES (June 12, 2019), https://www.nytimes.com/2019/06/12/arts/elizabeth-lederer-central-park-five.html; *see also* Kate Taylor, *Harvard's First Black Faculty Deans Let Go Amid Uproar Over Harvey Weinstein Defense*, N.Y. TIMES (May 11, 2019), https://www.nytimes.com/2019/05/11/us/ronald-sullivan-harvard.html (relating a similar faculty controversy).

252. *See supra* notes 89-94, Section III.D, Section IV.B.

Faculty, staff, and alumni who object to the Boteros may think that this is an opportune moment to press their case. Berkeley Law has a new dean. Like his predecessor, Dean Chemerinsky has had a distinguished career championing progressive causes.[253] Dean Edley's defense of Professor Yoo may have surprised some of his left-leaning supporters, but it provided him with a measure of political cover when he decided to install the paintings. Given that Dean Chemerinsky publicly called for Professor Yoo's prosecution before becoming Dean of Berkeley Law,[254] those who oppose the law school's display of the Boteros may believe that Dean Chemerinsky should remove the paintings to show that he is not biased against Professor Yoo.

Reactivating discussion about the Boteros as public memory will prompt reevaluation of Berkeley Law's relationship to government abuses in the War on Terror. Deliberations will likely include arguments by people who interpret the paintings as unjustly condemning a faculty member and people who believe the school has a moral duty to condemn Professor Yoo. Some will undoubtedly object to the aesthetics of the images, while others may feel that the paintings' scale is appropriate to the representational challenges of torture. But this moment creates the opportunity for all of us to consider what responsibility Berkeley Law has to address this uncomfortable association and what values the school wants to signal. Discussing the Boteros as public memory enables us to consider them in a broader and more nuanced context. This approach suggests a different process for deliberation.

### *1. What Memories Are Valued?*

Does Dean Edley's public frame of interpretation still resonate with the law school community and the public at large? Should Berkeley Law continue to cultivate and nurture the mnemonics of the failure of law to protect core values of human dignity in the War on Terror? Is the installation's implicit rebuke of Professor Yoo's work on the Torture Memos an argument to keep the paintings or to take them down?

Dean Edley intended the Boteros to remind lawyers of the breakdown of the rule of law in times of crisis. This is a timeless message, and one worthy of holding in our consciousness as legal academics and professionals. To date, the United States has not conducted the searching investigation required to fully excavate how this country came to endorse a policy of torture, apportion responsibility for that debacle, and adopt the measures needed to ensure that these atrocities are not repeated. The United States' response to the 9/11 attacks has reverberated across the legal and geopolitical landscape and indelibly has defined our era. The use of torture in the War on Terror goes to the heart of what it means to be a nation of

253. *See Erwin Chemerinsky*, BERKELEY LAW, https://www.law.berkeley.edu/our-faculty/faculty-profiles/erwin-chemerinsky/ (last visited Nov. 21, 2019).

254. Wiener, *supra* note 82.

laws. It is hard to argue that the relevance of the communicative message of the Boteros has faded. The paintings also remind viewers of the victims of torture; the size and scale of their representation render the victims hypervisible and emphasizes the urgency of their message. Art is a moral intervention that communicates institutional values. Art cannot, on its own, prevent law's failure in the future or take action to remedy law's failure in the past. It does, however, have the power to remind the audience of the importance of the rule of law to inspire action. This mnemonic power alone justifies keeping the Boteros hanging at the law school.

However, the paintings also highlight the continued absence of an independent accounting of this episode in America's and in Berkeley's history. In so doing, the exhibit speaks to the possibility that human action can and will correct these past failures. Despite reforms instituted under the Obama Administration and more recent disclosures primarily focused on the CIA interrogation and detention program,[255] the country still has not, as Dean Edley wrote, "applied the rule of law to the full extent" in reviewing the country's detention and interrogation program.[256] We have been deprived of a full accounting and debate about the legality and morality of the methods the United States employed in the War on Terror. Democracy demands this much. Nothing that has happened since the Torture Memo became public has diminished the value of memorializing this failure of law to achieve its higher purposes. And there is much to be learned about the complicity of law and lawyers in facilitating this breach. The Boteros symbolically erase the gap between the past and present, reminding the audience of the unfinished account we are due.[257]

### *2. The Contemporary Relevance of the Boteros: Temporality and Professor Yoo*

The Boteros symbolize a conflict in values that has persisted at Berkeley Law for sixteen years: how to reconcile the law school's mission "to create a more just society"[258] with the continued presence of Professor Yoo on the faculty. It seems impossible to disaggregate substantive value judgments about Professor Yoo's government work from broader questions about what values the law school seek to represent and instill in its students. Such judgments are what make the topic especially sensitive and difficult to address. It also creates an imperative for the school to do so. It is hard to envision a public discussion about the Boteros that

255. *See*, *e.g.*, SENATE SELECT COMMITTEE REPORT, *supra* note 44.

256. Edley, *Art and Law in a Time of Torture*, *supra* note 196.

257. Moreover, in the present political climate, the current administration is dismantling legal protections for many vulnerable populations—including immigrants, LGBT communities, and the poor—and there is an argument for the premier public law school in the State of California to remember the human rights consequences of such rule of law failures.

258. *Mission and Learning Outcomes*, BERKELEY LAW, https://www.law.berkeley.edu/about-us/mission-learning-outcomes/ (last visited Nov. 21, 2019).

does not mention Professor Yoo. Thus far, the faculty norm of maintaining collegiality has contained and channeled disagreement and avoided open conflict. From an institutional standpoint, this has facilitated smooth administration of the school, but this norm silences debate on an important topic. Dean Chemerinsky's decision to open up the question of the continued exhibition of the Boteros to the law school community will potentially change this practice. Are we resilient enough to talk about our differences on this issue without igniting painful divisions?[259]

Temporality should be a pressing concern when we discuss the Boteros. First, the time horizon for Berkeley Law students is much shorter than for faculty, staff, or alumni. Students cycle through the school every three years, and in that limited period of time, the Boteros provide one powerful tool of symbolic public memory to expose students to the issue of torture. The Berkeley Law faculty, the curriculum, and even the artworks must continually communicate to students the values of the institution, its rich history, and its mission. Second, the practice of State torture is rooted in institutional structures and cultures. Like practices of discrimination and violence, continual education about and attention to the structural dimensions of these practices are part of working to prevent the harm.[260] Thus, even if there were a definitive legal determination about individual responsibility for the detention and interrogation program, the need for prevention would remain. Art and other cultural symbols uniquely acknowledge injustice and challenge us not to repeat the past.

The Boteros are a *continual* communication—a permanent accusation—that conveys the importance of countering the illegal State violence of the War on Terror. Currently, the paintings provide the only institutional narrative scaffolding for the law school community to discuss this topic. Employing public memory as a framework to debate the Boteros shifts the focus of the deliberation from seeing the paintings as a narrow normative judgment of Professor Yoo to acknowledging that the controversy surrounding his role raises broader questions of institutional identity. Through the Botero exhibit, Dean Edley performatively joined the liberal contradictions between the law school's simultaneous embrace of Professor Yoo

259. During the years when the US torture policy was actively debated, referring to the OLC legal memoranda as the "Torture Memos" was itself a normative and political act. This nomenclature seems less controversial today. Acknowledging that Professor Yoo's work authorized torture after a sitting President expressed this view does not cross the discursive boundaries which restrained faculty members from commenting on Professor Yoo's legal work during the Bush Administration. *See* Press Release, *supra* note 66 ("We have been through a dark and painful chapter in our history . . . . That is why we have released these memos, and that is why we have taken steps to ensure that the actions described within them never take place again."); Press Conference by President Obama, *supra* note 4 ("[W]e tortured some folks."). Nevertheless, acknowledging Professor Yoo's role runs up against the value of maintaining faculty harmony.

260. *See* Susan Marks, *Apologising for Torture,* 73 NORDIC J. INT'L L. 365, 380 (2004) (noting that international human rights' general tendency to decontextualize violations contributes to viewing the Abu Ghraib photos as exceptional, horrific images, rather than focusing on the underlying policies and factors that led to their production).

as a *faculty* member and its moral repudiation of the harms to which his legal advice as a *government lawyer* contributed. This is a complex acknowledgment, as required by a complex moral challenge.

*3. Removal of the Boteros*

The Boteros continue to perform important memory work for the Berkeley Law community and the general public. On this basis alone, the continued presence of the canvasses is justified. As exemplified by the debate over whether Berkeley Law should discontinue using the "Boalt" name,[261] the decision to discontinue a practice once it has begun takes on a different meaning than a decision to initiate a practice in the first place. In the context of the Boteros' contribution to public memory, what would it mean to take them down?

I have heard several arguments in favor of removal over the years. One argument is that the torture debate in the War on Terror is no longer a pressing issue. There are many urgent social justice issues involving Berkeley Law, including its aforementioned association with John Boalt, so why should the school continue to prioritize this one?

While there will always be questions about the relevance and significance of any subject matter displayed, the removal of the Boteros must be considered not in light of what else the school could display, but in light of whether marking the school's association with the Torture Memos remains important. To the extent that it does remain important, there may be a need for more education and outreach around the intended purpose behind the paintings. For example, the very small, explanatory wall plaques could be updated to include greater context that would acknowledge the controversy over the Torture Memos, and Dean Chemerinsky could circulate a new statement about why they are displayed and their importance for the community.

In addition, community dialogue with the works could be deepened by providing an opportunity for viewers to share their reactions to and interpretations of the paintings.[262] A record of these differing reactions could be cataloged to form a living archive. The paintings are visual spectacles, and if they are to continue serving as public memory, they require interpretation.[263] Encouraging

261. *See supra* notes 249 and 250.

262. For example, Georgetown University has established an initiative "to engage the historical role of . . . [the] University in the institution of slavery and its legacies in our nation." GEO. U. SLAVERY MEMORY & RECONCILIATION, http://slavery.georgetown.edu/ (last visited Feb. 14, 2020). The project includes an expanding archive on slavery and solicits information from descendants of "people owned and sold" by the Jesuits of Maryland Providence to include and share with the public. THE GEO. SLAVERY ARCHIVE, http://slaveryarchive.georgetown.edu/about (last visited Feb. 14, 2020).

263. *See* Shanken, *supra* note 28, at 169 ("Many memorials become as common as curbs, fences, traffic lights, and commercial storefronts . . . . In this way, memorials, which were meant to be exceptional, to stand outside of ordinary time and space, have too often become seamless parts of that space. One wonders if this neglect is not tantamount to a form of passive iconoclasm, or if it is the

the law school community to participate actively in this interpretation would strengthen the pedagogic aims of public memory.

A second argument in favor of removing the paintings is that some viewers reportedly find the images upsetting.[264] Those who wish to see the Abu Ghraib series exhibited in a museum can choose to do so, but students have to enter the building and the school should take care not to display images that cause students pain. This concern requires further investigation to determine the nature of such objections and to seek accommodation if possible. The location of the paintings already minimizes involuntary viewing—they are not hung in or adjacent to any classroom or within the library but are seen by those passing by the dean's administrative offices. For some, adding context for the canvasses may ameliorate the visual shock. Berkeley Law could also commission a bespoke installation that engages with law and the detention and interrogation program but employs nonrepresentational forms to do so. Berkeley Law is not the only law school to find itself engulfed in controversy over its choice of political art,[265] and the school may profit by looking to examples of public memory at other universities.[266]

natural order of things: forgetting.").

264. Representational art of human rights abuses has powerful significance for victims. Artists often pursue abstract representations in creating memorials as both works of remembrance and public art, yet survivors may demand a more literal interpretation: "We weren't tortured and our families weren't murdered in the abstract . . . it was real." YOUNG, *supra* note 26, at 9 (quoting a Holocaust survivor commenting on the Warsaw Ghetto Memorial).

265. In 2004, the dean of the law faculty at the University of Pretoria, South Africa hung an exhibit of etchings, "Disasters of Peace" by South African artist Diane Victor, in the school's new building. The works included sketches graphically depicting many social problems afflicting post-apartheid South Africa: child abuse, sexual violence, and the indifference of law and public institutions to these plights. The exhibit stirred controversy within the school over whether it was appropriate for the law school to use art intended to "horrify" the audience in an effort to endorse substantive human rights values at a time of societal transformation. Two faculty members debated these questions in a published volume. DISASTERS OF PEACE: AN EXCHANGE - PULP FICTIONS NO. 1 (Christof Heyns, & Karin van Marle eds., 2005), http://www.pulp.up.ac.za/pulp-fictions/disasters-of-peace-an-exchange-pulp-fictions-no-1. In response to protest, the dean removed two etchings in the series from their original display to his office, leaving blank space on the walls to mark their absence. Elizabeth Rankin, *Human Rights and Human Wrongs: Public Perceptions of Diane Victor's* Disasters of Peace, 2 S. AFR. J. ART HIST. 85, 87, n.7 (2011), https://repository.up.ac.za/bitstream/handle/2263/20052/Rankin_Human(2011).pdf?sequence=1.

266. In December 2013, a group calling itself "Wissen im Widerstand" (Knowledge in Resistance) "kidnapped" the portrait of Adolf Butenandt, a former teacher at Humboldt University in Berlin and winner of the Nobel Prize for chemistry in 1939, that had been exhibited in a university gallery. Luisa Hommerich, *Studierende Entführen Forscher-Portrait* [*Students Kidnap Researcher Portrait*], DER TAGESSPIEGEL [The Daily Mirror] (Dec. 6, 2013), https://www.tagesspiegel.de/berlin/protestguerilla-aktion-an-der-hu-studierende-entfuehren-forscher-portrait/9183710.html. The group demanded that the university stop honoring people related to Nazism, colonialism, and racism as well as engage in dismantling various relationships and institutions that continue to contribute to racism and oppression. *Nazi und Kolonialverbrecher in HU Berlin entführt* [*Nazi and Colonial Criminal was Kidnapped in HU Berlin*], ANTIFA-BERLIN (Dec. 6, 2013), https://www.antifa-berlin.info/news/429-nazi-und-kolonialverbrecher-in-hu-berlin-entfhrt. In November 2014, approximately one year after the "kidnapping," the university held a panel discussion on Butenandt's Nazi ties as well as the university's image and relations to its Nazi past. Harald Olkus, *Butenandt und die Folgen: Podiumsiddskussion aus Anlass der "Entführung" des Poträts von Adolf*

A final set of objections contends that it is inappropriate for Berkeley Law to convey public memory on this issue. However, the paintings are the only ongoing acknowledgment of Berkeley Law's unique and complex connection to the Torture Memos. To remove the paintings in this context would signal a deprioritization or silencing of this history. While critics of the paintings may see this as a way to put this past behind the institution, the importance and unresolved nature of the questions surrounding the Torture Memos and the detention and interrogation program make it unlikely that this controversy will simply fade away. Recent examples of other schools responding to students' demands for corrective action due to the legal work undertaken by faculty[267] provide an additional reason to think that Berkeley Law will continue to be asked what Professor Yoo's employment means for the law school.

In reconsidering the paintings, we should also ask whether these works should serve as the only mnemonic devices for these issues that the school cultivates. Dean Edley acted on his own to maintain a public memory of the values at stake in the school's association with the detention and interrogation program, but the parameters of communicating public memory lie beyond the Botero installation.

Berkeley Law could also consider various ways to promote engagement with the legal and moral complexity of the Torture Memos in addition to art. A thorough treatment of alternatives is beyond the scope of this Article, but I introduce a few ideas to illustrate the range of options. For example, the work of government attorneys to deploy law to authorize torture techniques raises questions about what law schools are doing to prevent this scenario from recurring. Berkeley Law has not changed its substantive curriculum in response to the Torture Memos. It could incorporate systemic discussion of the memoranda through curriculum in required legal ethics courses. In addition, Berkeley Law could include international law as a graduation requirement, on the theory that greater exposure to international law is an important check on weakening of human rights protections in general and of the absolute prohibition against torture

*Butenandt aus der Nobelpreisträgergalerie* [*Butenandt and the Consequences: Panel Discussion on the Occasion of the "Kidnapping" of the Portrait of Adolf Butenandt from the Nobel Laureate Gallery*], HUMBOLDT, Dec. 2014, at 8, https://www.hu-berlin.de/de/pr/medien/publikationen/humboldt/2015/201412/humboldt_201412.pdf. Panelists considered various forms of remembrance that the university could facilitate, including exhibiting portraits of individuals who were part of the resistance from 1933–45 or who provided innovative scientific advancements without receiving Nobel Prizes during the same period; a rotating exhibit was discussed. *Id.* Following the panel discussion, the President of the university agreed that the Butenandt portrait would not be re-installed. *Id.* As a temporary solution, the portrait would be replaced by an empty frame accompanied by a plaque titled "Eine Leerstelle schaft Raum für Kritik" (a gap creates space for criticism), with German and English explanations contextualizing the empty frame as a space for critique of the university's relationship with its past. Haushaltsantrag 2017, Historische Kommission der Verfassten Studierendenschaft in Berlin [Budget Proposal of the Student Body Historical Commission 2017].

267. *See id.*

in particular.[268] Outside of curricular reform, Berkeley Law could sponsor targeted programming to raise community awareness about the relationship of law to torture. This could be specific to the impact of the US detention and interrogation program. For example, Berkeley Law might organize an annual lecture or event to commemorate the victims of torture in the War on Terror each January 11, the day that the US detention center at Guantánamo Bay opened.

Public memory may assume a variety of forms. Law was not the exclusive province for the university and law school to act on demands for action in response to revelations about Professor Yoo and the Torture Memos. But the institution behaved as if it were. This belief deflected criticism and controlled institutional discourse, but questions persist about the institutional response to Professor Yoo's role in the detention and interrogation program and what this means for the school. Sensitivities around public discussion of the extramural work of this faculty member continue to inhibit institutional collective consideration. Now Berkeley Law has a new opportunity to supply a structure for discourse. In so doing, it can assume institutional responsibility for acknowledging and addressing the law school's complex association with the War on Terror. Whether the Boteros remain or are removed, we have to contend with what meaning they provoke for the law school. This is unfinished business to which we must attend.

## CONCLUSION

Dean Chemerinsky has invited deliberation about whether Berkeley Law should continue to exhibit paintings from Fernando Botero's Abu Ghraib series. The canvasses are important works of political art about the breach of the rule of law committed by the United States in the War on Terror. In addition, their installation in the law school conveys other meanings in light of Professor John Yoo's ongoing presence on the faculty. The paintings symbolically express moral opprobrium of the Torture Memos and distance the institution from Professor Yoo's legal work in preparing those memos. Balancing the school's internal commitments to academic freedom and collegial relations on the one hand, and public demands to take a moral stand on torture on the other, has been fraught. Former Dean Edley took the initiative to install the Boteros without a formal process for community input. The Boteros have served, symbolically, as the only permanent acknowledgment of the school's link to the Torture Memos, and thus

268. Some law schools, including Harvard, UC Irvine, and Michigan, already include international or comparative law as a required course. *See International and Comparative Law*, HARV. L. SCH., https://hls.harvard.edu/dept/academics/programs-of-study/international-and-comparative-law/ (last visited Feb. 14, 2020); *see also International and Comparative Law*, UCI L., https://www.law.uci.edu/academics/curriculum/international-law.html (last visited Feb. 14, 2020) (providing an overview of UCI Law's International Law curriculum requirements); Degree Requirements & the Degree Audit Report, MICH. LAW (Jan. 31, 2020), https://www.law.umich.edu/currentstudents/registration/Documents/Degree%20Requirements.pdf (Michigan Law's degree requirement overview including the International or Comparative Law requirement).

mark the absence of a collective consideration of what Berkeley Law's relationship to this past should be. It remains to be seen how this conversation will unfold. However, given the past controversy over the Torture Memos and Professor Yoo, it is reasonable to expect that there will be strong views on both sides. Divisions will likely be exacerbated if the central question is framed as whether or not to remove the Boteros.

An alternative framing is to ask whether and how the institution should acknowledge its unique relationship to the Torture Memos. This framing normalizes a historically fraught topic for discussion. Employing the analytic tools of public memory captures the collective social meanings of Berkeley Law's relationship to the Torture Memos that have circulated within the law school. This framework provides a context in which the Berkeley Law community can acknowledge that the paintings commemorate more than just the breakdown of the rule of law. It provides a vocabulary to discuss what the Boteros mean to the community, what values they symbolize, and how best to preserve these memories. Whether the Boteros stay or go, the questions their presence raise about our past and how we relate to it deserve collective reflection.

# Sustaining Multilateralism from the Bench

Sivan Shlomo Agon*

*The surge in regional trade agreements (RTAs) in recent decades has generated growing friction between regionalism and multilateralism in international economic governance, resulting in serious institutional and legal challenges to the World Trade Organization (WTO). In this state of play and with the WTO's negotiating arm trapped in a persistent stalemate, several questions arise: (1) What role, if any, has the WTO dispute settlement system (DSS) played in responding to the challenges posed to the WTO multilateral trade regime by RTA proliferation? (2) How have these systemic challenges affected WTO jurisprudence? And (3) in which ways have these challenges shaped the judicial choices made by the WTO DSS in cases implicating substantive and jurisdictional questions located at the WTO-RTA interface? Based on a close analysis of WTO cases involving RTA-related issues and empirical evidence generated through interviews with WTO practitioners having firsthand knowledge of the DSS's work, this Article shows that the DSS has not remained indifferent to the challenges presented to WTO rules and institutions by increasing economic regionalization. Rather, in the series of RTA-related cases reaching its docket, the DSS has engaged in a determined and enduring quest for sustaining the multilateral trading system from the bench. This quest has evolved along two parallel and mutually reinforcing trajectories: the substantive and the jurisdictional. When woven together, these trajectories demonstrate how a steady body of DSS jurisprudence has emerged. This jurisprudence is animated by a judicial philosophy of seclusion from and ascendency over regionalism and aimed at preserving the multilateral legal order in the face of the unabated surge in RTAs. This judicial philosophy, the Article concludes, nevertheless carries certain challenges of its own for the WTO and international economic law.*



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## INTRODUCTION

Since the 1990s, the world has experienced a significant and persistent surge in regional trade agreements (RTAs).[1] Not only has the number of RTAs "increased exponentially," but their scope and content have also evolved.[2] These agreements "have become an indelible feature of the international trading landscape"[3] and a key element of trade policy for all Members of the World Trade

1. Simon Lester, Bryan Mercurio & Lornad Bartels, *Introduction, in* 1 BILATERAL AND REGIONAL TRADE AGREEMENTS: COMMENTARY AND ANALYSIS 1, 3-4 (Simon Lester, Bryan Mercurio & Lornad Bartels eds., 2nd ed. 2016).

2. *Id.* at 5; Claude Chase et al., *Mapping of Dispute Settlement Mechanisms in Regional Trade Agreements – Innovative or Variations on a Theme?, in* REGIONAL TRADE AGREEMENTS AND THE MULTILATERAL TRADING SYSTEM 608 (Rohini Acharya ed., 2016).

3. Chase et al., *supra* note 2, at 608; Richard Baldwin, *The World Trade Organization and the Future of Multilateralism*, 30 J. ECON. PERSP. 95 (2016).

Organization (WTO),[4] developments stimulated in part by Members' "frustration" over the lack of progress in multilateral negotiations and the inability to bring the WTO Doha Round of trade talks to a successful conclusion.[5] As a result of these events, a complex web of RTAs has emerged, which has consequently generated growing friction between regional trade arrangements and the multilateral trading system centered in the WTO.

The mounting tension between regionalism and multilateralism in international trade has, in turn, engendered serious concerns about the fragmentation of international economic law. This tension has also presented acute challenges to the WTO as an institution and a legal system at a time when its negotiating function has become ensnared in a long-standing stalemate.[6] In particular, the expanding network of RTAs that overlap with WTO trade disciplines and provide for their own dispute settlement mechanisms has presented risks to the credibility of WTO rules and the centrality of WTO governance in the international economic order.[7] The expansion of RTAs has likewise posed threats to the authority of the WTO dispute settlement system (DSS),[8] the adjudicative body designed to enforce WTO rules and to help achieve the multilateral objectives that those rules embody.[9]

Against this backdrop and the failed attempts of the WTO's negotiating arm to overcome its impasse, several questions arise:

1. What role, if any, has the WTO DSS played in responding to the challenges RTA proliferation poses to the multilateral trade regime?
2. What effect have these systemic challenges had on WTO jurisprudence? And
3. How have these challenges shaped the DSS's judicial and interpretative choices in cases implicating questions located at the intersection between the WTO and RTAs?

An in-depth, interview-based analysis of WTO cases involving RTA-related issues suggests that the DSS has not remained indifferent to the challenges posed to WTO rules and institutions by economic regionalization. Instead, in a series of RTA-related cases reaching its docket, the DSS, under the guidance of the WTO's Appellate Body (AB), has engaged in a long and persistent quest to sustain the multilateral trading system from the bench. As this Article shows, that quest has evolved along two parallel, interrelated, and mutually reinforcing trajectories. The first is the substantive legal trajectory, which revolves around conflicts of

4. Rohini Acharya, *Regional Trade Agreements: Recent Developments, in* REGIONAL TRADE AGREEMENTS AND THE MULTILATERAL TRADING SYSTEM 1 (Rohini Acharya ed., 2016).

5. *Id.* at 8; Lester et al., *supra* note 1, at 3.

6. *See infra* Part II.

7. *See infra* Part II.

8. *See infra* Part II.

9. Sivan Shlomo Agon, *Is Compliance the Name of the Effectiveness Game? Goal-Shifting and the Dynamics of Judicial Effectiveness at the WTO*, 15 WORLD TRADE REV. 671, 677–681 (2016).

obligations under the multilateral and regional trade systems. Along this trajectory, the DSS has continually worked to entrench the autonomy and preeminence of the WTO legal edifice while limiting the ability of Member States to derogate from their substantive WTO obligations through the formation of RTAs. Along the second, complementary jurisdictional trajectory, the DSS has steadily operated to uphold its own authority vis-à-vis regional dispute settlement fora, a step meant to preserve the DSS as an international adjudicative institution as well as to ensure its power to enforce compliance with the WTO's substantive legal rules.

These two trajectories followed by the DSS in RTA-related disputes, this Article argues, demonstrate an evolving judicial philosophy of seclusion from and ascendency over regionalism,[10] a philosophy that results, as one WTO practitioner put it, in giving "greater strength to the multilateral system as opposed to regional . . . trade arrangements."[11] In other words, the WTO case law developed at the WTO-RTA nexus reflects a judicial philosophy of commitment to maintaining the multilateral trade regime and its underlying norms in a reality where the WTO's role as a vehicle for international trade regulation has been called into question while trade deals in regional fora multiply at an ever-increasing pace.

As this Article will show, this judicial philosophy, which lies at the heart of the DSS's quest to sustain multilateralism, is not asserted outright in RTA-related disputes but is, instead, often concealed behind a veil of textualism, thus appearing to adhere to the language of the WTO treaty. However, this thinly concealed judicial philosophy has driven a process of institutional evolution, adaptation, and struggle aimed at providing a measure of systemic and normative stability to the WTO regime in times of turbulence and change. Furthermore, this judicial philosophy, along its substantive and jurisdictional trajectories, has affected the legal and institutional interaction between the WTO and RTAs, thereby shaping the course of fragmentation in the international economic domain. Understanding this judicial philosophy, together with its ramifications for the WTO and the broader field of international economic law, is thus of great significance. This is particularly important because the friction between multilateralism and regionalism in international trade is not expected to disappear anytime soon. If anything, that friction will only grow as the surge in RTAs continues.[12]

With a view toward developing a fuller, more complex understanding of the DSS's quest in RTA-related disputes, the judicial philosophy steering it, and the interpretative strategies harnessed to its realization, this Article weaves together

10. *See* Robert Howse, *The World Trade Organization 20 Years On: Global Governance by Judiciary*, 27 EUR. J. INT'L L. 9, 75 (2016) (suggesting that the AB has implemented a judicial policy of "clinical isolation" from regionalism).

11. Interview with private attorney, in Geneva (Apr. 23, 2012); *see infra* note 13 (explaining the anonymous interview process utilized).

12. *See* Acharya, *supra* note 4, at 5 (discussing the proliferation of RTAs).

legal and institutional analysis with unique empirical data generated through in-depth, semi-structured interviews with WTO practitioners who have firsthand knowledge of DSS's work and the disputes examined.[13] The interviewees included diverse actors in the world of WTO dispute settlement, such as WTO adjudicators, senior and midlevel staff members of the WTO Secretariat, WTO ambassadors, legal counsel in trade delegations, and lawyers at private law firms.

In order to glean multiple perspectives and develop a holistic account of the issues involved, I attempted to interview informants with different positions and opposing interests in the RTA-related cases investigated. Through these interviews, I sought to gain a more complete picture of the DSS's operation and decision-making in RTA-related disputes, as well as to obtain relevant information that is excluded from DSS rulings and other public records. In particular, the interviews with WTO insiders served as a valuable tool for eliciting participants' perceptions of the challenges faced by the DSS in RTA-related disputes, tracing the ways in which these challenges influenced the DSS's judicial choices, and exposing the underlying rationale and policy preferences these choices represent. While the analysis presented in this Article is a product of a continuous dialogue between the interviews, WTO rulings, the literature, and other pertinent sources, the interviews revealed otherwise unavailable information and perceptions and provided knowledge about WTO dispute settlement in action, as it is experienced in the real world.

Following this Introduction, the Article proceeds in five parts. Part I provides a short overview of the WTO and its dispute settlement system. Part II situates the discussion of RTA-related disputes in the broader context of the regionalizing international economic landscape. To this end, Part II begins with a review of the current state of RTA proliferation, the increasing friction it engenders between multilateralism and regionalism in international economic governance, and the systemic threats it poses to the multilateral trade regime centered around the WTO. Part II then recounts the main legal and institutional challenges raised before the WTO DSS when confronted with RTA-related disputes, while pointing to the DSS's ardent quest to sustain multilateralism that these challenges seem to have prompted. Parts III and IV proceed with an in-depth, interview-based analysis of this judicial quest as it unfolded in a series of RTA-related cases implicating substantive and jurisdictional questions located at the WTO-RTA

13. These interviews form part of a broad series of interviews conducted by the author, primarily in Geneva, between March 2012 and April 2013. The present Article draws on nineteen of these interviews. Each interview lasted between one and one and a half hours. All participants but one permitted recording of the conversation. The interviews were conducted according to a semi-structured interview guide composed of open-ended questions that addressed the specific case(s) the interviewees were involved in and their experience with the work of the WTO DSS more generally. The semi-structured nature of the interviews permitted informants to convey their own narratives of the cases investigated and to share their knowledge of the DSS at length. At the same time, this format gave both the interviewees and the author the leeway needed to take the conversation down unexpected paths. For reasons of anonymity, the interviewees are cited throughout this work with generic titles such as "senior WTO official" or "EU official."

interface. Finally, Part V concludes with a discussion of the findings emerging from the study and an appraisal of their implications with a look to the future. Taking a broader perspective, this Part weaves together the substantive and jurisdictional threads of jurisprudence developed by the DSS in RTA-related disputes and discusses the fundamental judicial philosophy these threads reveal. On this basis, Part V assesses the systemic role played by the DSS in responding to the challenge of RTA proliferation. It further considers the ramifications of this role for the WTO and the future relationship of the multilateral and regional trade regimes in a rapidly changing global economic order.

## I.
## THE WTO AND ITS DISPUTE SETTLEMENT SYSTEM: A SHORT OVERVIEW

The WTO is a multilateral organization set up to supervise and liberalize international trade.[14] It was established in 1995 against the backdrop of the multilateral trading system as it had evolved during the fifty-year existence of the WTO's predecessor, the General Agreement on Tariffs and Trade (GATT).[15] The GATT provided the principal legal framework for the regulation of trade between nations from 1948 until the advent of the WTO,[16] operating for almost five decades as "the *de facto* international organization" for trade.[17] Under the GATT's auspices, the multilateral trading system "has been credited with considerable success in removing barriers to trade in goods" and with significantly promoting trade liberalization by sponsoring eight rounds of trade negotiations.[18]

The eighth and final round of multilateral trade negotiations under the GATT, known as the Uruguay Round, lasted from 1986 to 1994 and marked a pivotal turning point for the multilateral trading system.[19] It led to the creation of a formal institutional framework, in the form of the WTO, to oversee the multilateral trade regime, while also expanding the substantive scope of the regime by incorporating new areas within its regulatory reach.[20] Thus, whereas the GATT mainly dealt with trade in goods, the WTO and its agreements provide

14. *Who We Are*, WTO, https://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm (last visited Dec. 19, 2019).

15. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

16. For an excellent account of the origins and evolution of the GATT system, *see* ANDREAS F. LOWENFELD, INTERNATIONAL ECONOMIC LAW 23-71 (2nd ed. 2008).

17. PETER VAN DEN BOSSCHE & WERNER ZDOUC, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: LAW, TEXT, CASES AND MATERIALS 76 (3rd ed. 2013).

18. JOOST PAUWELYN, ANDREW T. GUZMAN & JENNIFER A. HILLMAN, INTERNATIONAL TRADE 75 (3rd ed. 2016).

19. For an overview of the Uruguay Round, *see* LOWENFELD, *supra* note 16, 64–71.

20. Gilbert R. Winham, *The Evolution of the World Trading System – The Legal and Institutional Context, in* THE OXFORD HANDBOOK OF INTERNATIONAL TRADE LAW 31, 37-38 (Daniel Bethlehem et al. eds., 2009).

for an extended set of rules dealing with trade in goods and services, as well as the protection of intellectual property rights.[21]

Pursuant to the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement),[22] the WTO is entrusted with a broad mandate.[23] In line with this mandate, one of the organization's pivotal functions is to provide the WTO's 164 Members with a forum for negotiations over new trade rules and additional trade liberalization.[24] Another central function assigned to the WTO is to facilitate the implementation, administration, and operation of the WTO agreements,[25] which together form a rich and complex body of treaty text.

And so, at the heart of the WTO are the WTO agreements, negotiated and signed by the bulk of the world's trading nations. These agreements, commonly referred to as the "covered agreements,"[26] provide the legal ground rules for international trade. Alongside the GATT, which became an integral part of the covered agreements upon formation of the WTO,[27] other key components include the General Agreement on Trade in Services (GATS),[28] the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS),[29] the Agreement on Technical Barriers to Trade (TBT),[30] and the Agreement on Subsidies and Countervailing Measures (SCM).[31]

Importantly, while the numerous agreements comprising WTO law are "lengthy and complex," several "fundamental principles run throughout all of these documents."[32] Perhaps most prominent among these principles are the two basic rules of nondiscrimination lying at the core of WTO law: (1) the most favored-nation (MFN) rule; and (2) the national treatment rule.[33] The MFN rule,

21. PAUWELYN et al., *supra* note 18, at 85.

22. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter WTO Agreement].

23. For a thorough presentation of the WTO's mandate and the various functions entrusted to the organization, *see* VAN DEN BOSSCHE & ZDOUC, *supra* note 17, at 82–104.

24. *See* WTO Agreement, *supra* note 22, at art. II:2.

25. *See Id.* at art. III:1.

26. David Palmeter & Petros C. Mavroidis, *The WTO Legal System: Sources of Law*, 92 AM. J. INT'L L. 398, 398 (1998).

27. General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187 [hereinafter GATT].

28. General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183 [hereinafter GATS].

29. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299.

30. Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S 120.

31. Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14.

32. *Principles of the Trading System*, WTO, https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (last visited Nov. 21, 2019).

33. *Id.*

considered "a cornerstone of the multilateral trading system,"[34] prohibits a WTO Member from discriminating *between* its various WTO trading partners.[35] It follows from this rule that a WTO Member granting some form of favorable treatment to any given country is required to grant the same favorable treatment to all other WTO Members.[36] The national treatment obligation, for its part, prohibits a WTO Member from discriminating *against* foreigners; that is, it requires each WTO Member to treat foreign products and services no less favorably than it treats "like" products and services of domestic origin.[37]

The language of the various WTO agreements, however—even with respect to the basic nondiscrimination rules—often lacks a fixed meaning and details regarding what exactly amounts to a violation of WTO law.[38] This is also the case with respect to many other WTO provisions, including the policy exceptions enshrined in GATT Article XX and GATS Article XIV, which, subject to certain conditions, allow Members to derogate from WTO trade obligations for health, environmental, and other regulatory purposes.[39] And, as seen later in this Article, the same holds true for the exceptions regarding RTAs stipulated in WTO law, which are likewise formulated in a rather broad and open-ended manner.[40] These broadly drafted WTO norms and commitments, in turn, require WTO adjudicators to delineate the exact scope of WTO legal obligations and to articulate the specific requirements those obligations impose on WTO Members whenever a dispute arises.[41]

Central to the WTO regime, therefore, is its DSS, which has been explicitly assigned the goal of clarifying WTO rules in its constitutive instrument—the Dispute Settlement Understanding (DSU).[42] In addition, DSS's objectives include: promoting the prompt and positive settlement of disputes, securing compliance with WTO rules, providing security and predictability to the multilateral trading system, maintaining the negotiated balance of rights and obligations between WTO Members, preventing unilateralism in Members' trade relations, and sustaining the operation and legitimacy of the WTO regime.[43] In order to fulfil these objectives, the DSS was established as a two-tier adjudicating

34. *Basic Purpose and Concepts*, WTO, https://www.wto.org/english/tratop_e/serv_e/cbt_course_e/c1s6p1_e.htm (last visited Nov. 21, 2019).

35. VAN DEN BOSSCHE & ZDOUC, *supra* note 17, at 36.

36. *Id.*

37. *Id.*

38. Sivan Shlomo Agon & Eyal Benvenisti, *The Law of Strangers: The Form and Substance of Other-Regarding International Adjudication*, 68 U. TORONTO L.J. 598, 606 (2018).

39. *Id.*

40. *See infra* Part II.

41. Shlomo Agon & Benvenisti, *supra* note 38.

42. *See* art. 3.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 15 Apr. 1994, 1869 U.N.T.S. 401 [hereinafter DSU].

43. For a discussion of these DSS goals, *see* Shlomo Agon, *supra* note 9, at 677–81.

system, composed of ad-hoc panels and a permanent Appellate Body. Both tiers of adjudicators hold compulsory and exclusive jurisdiction over all disputes between Member States under the WTO agreements, and the reports they issue become binding quasi-automatically—that is, unless rejected by a consensus of all WTO Members.[44]

The WTO DSS, currently under considerable pressure,[45] "has attracted a large volume of business over the years," steadily gaining prominence among international courts and tribunals.[46] Since its establishment in 1995, almost six hundred complaints have reached the DSS's docket, covering a long list of subjects under the WTO agreements.[47] Hence, in contrast with the WTO's negotiating function, which has exhibited little progress in producing new trade rules due to the failure to overcome the impasse in the Doha Round,[48] the WTO's judicial function has managed to develop a rich body of jurisprudence in the numerous disputes that have come before it. These disputes, in turn, share many commonalities: "[A]ll involve competing trade-related interests, all are political in some sense (fought between states), and all have been addressed under the DSU, with reference to the WTO agreements."[49] However, the various disputes filed with the DSS should not be viewed as a monolithic unit; these disputes often exhibit different features, which, consequently, present the system with "distinct legal, political, economic, and institutional challenges."[50]

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44. For a thorough presentation of the WTO DSS, *see* VAN DEN BOSSCHE & ZDOUC, *supra* note 17, at 156–311.

45. At the time of completing this Article, the DSS has become subject to substantial pressure resulting from the increasing number and complexity of cases filed with the system, and especially from the US's continued blocking of new appointments to the AB. As a result of the US's blockade on appointments, lasting from July 2017, as of December 2019, the AB has only one member, down from the full complement of seven members called for by the DSU. With only one member left in office, the AB can no longer meet the 3-member quorum required to hear new appeals, a development that threatens the future effectiveness and viability of the WTO DSS as a whole. *See, e.g.*, Jennifer Anne Hillman, *A Reset of the World Trade Organization's Appellate Body*, Council on Foreign Relations (2020), https://www.cfr.org/report/reset-world-trade-organizations-appellate-body (last visited Feb. 22, 2020); Markus Wagner*, The Impending Demise of the WTO Appellate Body: From Centrepiece to Historical Relic?, in* THE APPELLATE BODY OF THE WTO AND ITS REFORM 67 (Chang-fa Lo, Junji Nakagawa & Tsai-Fang Chen eds., 2020); Rachel Brewster, *The Trump Administration and the Future of the WTO*, 44 YALE J. INT'L L. 6, 8 (2018); Gregory Shaffer, *A Tragedy in the Making? The Decline of Law and the Return of Power in International Trade Relations*, 44 YALE J. INT'L L. 37, 40-41 (2018).

46. Richard Stewart & Michelle Sanchez Badin, *The World Trade Organization: Multiple Dimensions of Global Administrative Law*, 9 INT'L J. CONST. L. 556, 562 (2011).

47. *See Chronological List of Disputes Cases*, WTO, https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (last visited Feb. 21, 2020).

48. Baldwin, *supra* note 3, at 95, 106.

49. Shlomo Agon, *supra* note 9, at 681.

50. *Id.* at 681–82.

Thus, within the DSS's docket we find, among others, a growing number of cases known as "trade-and" disputes.[51] These disputes involve trade-restrictive national policies in areas such as health and environmental protection and incite the persistent friction between the WTO's trade liberalization mission and "non-trade" societal values.[52] The DSS's docket further includes several high-stakes, perennial conflicts between major economic powers that carry systemic implications for the disputants' economic relations and, more generally, for the stability of the cooperative WTO regime.[53] In a similar vein, the North-South divide has also entered the WTO dispute settlement arena, "placing the [WTO] judiciary in the uneasy position of having to apply law and technicalities to a tremendously charged social-political relationship, as it has in the other fields of tensions."[54]

Finally, Members have also called upon the DSS to adjudicate several cases involving the intricate tension between the multilateral and regional trading systems. This tension has intensified dramatically with the surge in RTAs over the last two decades.[55] As indicated in the Introduction, the latter category of cases, referred to here as "RTA-related" disputes, stands at the center of this Article. In what follows, I situate the discussion of RTA-related disputes and the systemic challenges such disputes pose to the DSS in a broader historical, institutional, and legal context. In so doing, I set the scene for an analysis of the quest to sustain multilateralism carried out by the DSS in this class of cases.

## II.
## MULTILATERAL ADJUDICATION IN A REGIONALIZING INTERNATIONAL ECONOMIC ORDER: CONTEXT, CHALLENGES, AND CONTENT

The proliferation of RTAs[56] is a salient feature of today's international economic landscape. However, such agreements are by no means a new phenomenon,[57] nor is their friction with the WTO, which has "dogged" the multilateral trading system "since its inception in the General Agreement on Tariffs and Trade (GATT) in 1947 and through its institutional transformation

51. *Id.* at 681.

52. *Id.*

53. *Id.* at 681–82.

54. TOMER BROUDE, INTERNATIONAL GOVERNANCE IN THE WTO: JUDICIAL BOUNDARIES AND POLITICAL CAPITULATION 28 (2004).

55. Shlomo Agon, *supra* note 9, at 681.

56. For the sake of clarity and consistency, I use the term Regional Trade Agreements (RTAs) in this Article to refer to both Free Trade Agreements (FTAs) and Customs Unions under GATT Article XXIV, as well as economic integration agreements under GATS Article V. Furthermore, the term "regional" as used herein does not carry any geographical connotations and includes agreements between parties that are geographically remote from one another.

57. *See* Lester et al., *supra* note 1, at 3.

into the WTO in 1995."[58] At the core of this tension, as Lockhart and Mitchell have argued, is the fact that RTAs "entrench the very discrimination" that the multilateral trade rules "seek to eliminate."[59] Thus, while RTAs vary widely in terms of geographic scope, number of State parties, and the trade-related issues subject to regulation, they all reduce trade barriers between the State parties, which seek closer economic integration beyond that of the multilateral trading system, and simultaneously maintain barriers with States outside the agreement.[60] Nonetheless, although such RTAs violate the fundamental tenet of nondiscrimination underlying the multilateral trading system as captured in the basic MFN rule, the WTO, like the GATT, has always allowed space for Members to grant one another more favorable treatment through RTAs—most notably, in Article XXIV of the GATT, subject to certain substantive and procedural conditions.[61]

Over the last two decades, however, the world has witnessed a sharp rise in the number of RTAs, unparalleled to that envisaged earlier.[62] Thus, "compared to the GATT years, when on average three RTAs were notified per year, since 1995, twenty-five RTAs, on average, have been notified per year."[63] Accordingly, while the GATT saw a total of 124 notifications of RTAs between 1948 and 1994, more than three hundred RTAs were in force between WTO Members as of September 2019,[64] with dozens of other agreements notified to the WTO but not yet in force or currently under negotiation. At present, all WTO Members have reported participation in at least one RTA, and some are party to multiple agreements.[65]

In addition to the sharp increase in the number of RTAs, their regulatory coverage has also broadened over time, "moving from the reduction of tariffs to behind-the-border issues such as harmonization of standards, and further, to so-called 'WTO-extra' . . . issues such as competition and investment."[66] Moreover, most, if not all, RTAs now contain provisions establishing dispute settlement

58. Robert Howse & Joanna Langille, *Spheres of Commerce: The WTO Legal System and Regional Trading Blocs – A Reconsideration*, 46 GA. J. INT'L & COMP. L. 649, 650 (2018).

59. Andrew D. Mitchel & Nicolas J.S. Lockhart, *Legal Requirements for PTAs Under the WTO, in* 1 BILATERAL AND REGIONAL TRADE AGREEMENTS: COMMENTARY AND ANALYSIS 81 (Simon Lester, Bryan Mercurio & Lornad Bartels eds., 2nd ed. 2016).

60. VAN DEN BOSSCHE & ZDOUC, *supra* note 17, at 651.

61. A corresponding provision is embedded in Article V of the GATS. Also of relevance is the "Enabling Clause," which relaxed the requirements for customs unions and FTAs for developing countries in order to facilitate economic development. *See Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries* (Nov. 28, 1979), GATT B.I.S.D. (26th Supp. 1980) at 203.

62. Acharya, *supra* note 4, at 5.

63. *Id.*

64. *Regional Trade Agreements: Facts and Figures*, WTO, https://www.wto.org/english/tratop_e/region_e/regfac_e.htm (last visited April 8, 2020).

65. *Id.*

66. Chase et al., *supra* note 2, at 608.

procedures, which have likewise "increasingly shifted from politically-oriented procedures to more sophisticated, legalistic forms of dispute settlement."[67]

The resulting "spaghetti bowl" of multilateral trade rules and regional trade arrangements,[68] each with its own dispute settlement mechanism, has inspired extensive debates over the fragmentation of international economic law and the challenges engendered by regime overlap. For example, there have been debates on conflicts of obligations under the WTO and RTA systems, jurisdictional competition between their dispute settlement fora, and forum shopping.[69] Most notably, the expansion of regionalism, which gained momentum with the failure to break the deadlock in the WTO Doha Round of trade negotiations,[70] has been accompanied by vigorous debate about the systemic effects of RTAs on the multilateral trade regime and, particularly, on the latter's role in regulating international trade, an element that has become a major source of unease for the WTO.[71] As former WTO Director General Supachai Panitchpakdi noted in 2008, "the role of the WTO" in global economic governance is "being tested by the abundance of regional trade agreements" that continue to spread around the globe, resulting in international trade being increasingly governed by preferential arrangements among select groups of members instead of "under MFN conditions governed by the WTO."[72] A decade later, in the face of the continuing regionalization of trade governance and the rise of so-called mega-regionals—RTAs of vast economic size and wide geographical spread[73]—Alan Winters went still further to warn that "absent a major and conscious change in the value placed

67. *Id.* at 608–09.

68. The term was first used by Jagdish Bhagwati, *US Trade Policy: The Infatuation with Free Trade Agreements*, *in* THE DANGEROUS DRIFT TO PREFERENTIAL TRADE AGREEMENTS 1 (Jagdish Bhagwati & Anne O. Kruger eds., 1995).

69. *See, e.g.*, Marc L. Busch, *Overlapping Institutions, Forum Shopping, and Dispute Settlement in International Trade*, 61 INT'L ORG. 735 (2007); Karen Alter & Sophie Meunier, *The Politics of International Regime Complexity*, 7 PERSP. ON POL. 13 (2009).

70. Lester et al., *supra* note 1, at 3; Chad P. Bown, *Mega-Regional Trade Agreements and the Future of the WTO*, 8 GLOBAL POL'Y 107 (2017).

71. *See, e.g.*, Todd Allee & Manfred Elsig, *The Presence of the World Trade Organization Within Preferential Trade Agreements, in* ASSESSING THE WORLD TRADE ORGANIZATION: FIT FOR PURPOSE? 321 (Manfred Elsig, Bernard Hoekman & Joost Pauwelyn eds., 2017); Bown, *supra* note 70; WTO, *World Trade Report 2011—The WTO and Preferential Trade Agreements: From Co-Existence to Coherence* (2011) [hereinafter World Trade Report 2011], https://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report11_e.pdf.

72. Supachai Panitchpakdi, *The WTO, Global Governance and Development, in* THE WTO AND GLOBAL GOVERNANCE: FUTURE DIRECTIONS 195-96 (Gary P. Sampson ed., 2008). A WTO legal officer similarly stated that because of the proliferation of RTAs the "basic" principle underlying "the multilateral system, which is the most favored nation principle, starts becoming the exception rather than the rule." Interview with WTO legal officer, in Geneva (Mar. 16, 2012).

73. These mega-regional trade agreements include, for example, the EU-Canada Comprehensive Economic and Trade Agreement (CETA) and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) Agreement. For an overview, *see* Bown, *supra* note 70; Shuiro Urata, *Mega-FTAs and the WTO: Competing or Complementary?*, 30 INT'L ECON. J. 231 (2016).

by . . . countries on multilateralism, we are unlikely to bequeath an effective multilateral trade system to the next generation."[74]

As the preceding discussion implies, the shift away from multilateralism in trade negotiations and the continuing surge in regional agreements that accord preferential treatment to some trading partners while excluding others pose threats to the attainment of those WTO objectives built on nondiscrimination. Moreover, the enduring proliferation in RTAs threatens the viability of the multilateral trading system and the WTO's centrality in the international economic order.[75] In addition, the expanding network of increasingly complex RTAs—which overlap with WTO trade disciplines and often include their own dispute settlement mechanisms—risks undermining the legal coherence and predictability of the multilateral trade rules.[76] This convoluted web of RTAs likewise constitutes a source of normative and jurisdictional conflicts with the WTO legal system,[77] as seen in several disputes that have come before the DSS.[78] As RTAs multiply and mature, more of these disputes are expected to reach the DSS's docket.

Such RTA-related disputes demand, in turn, that the WTO DSS address delicate questions that lie at the heart of the tense relationship between the multilateral and regional trade regimes. These questions pertain to the interaction between these separate but closely related normative international frameworks, the legal effects of RTA rules on WTO undertakings, and the competing jurisdictions of the judicial bodies established to enforce the distinct sets of international trade commitments. As a result, RTA-related disputes impinge in meaningful ways on the integrity of WTO rules, the realization of the multilateral

74. Alan L. Winters, *The WTO and Regional Trading Agreements: Is it All Over for Multilateralism?*, *in* ASSESSING THE WORLD TRADE ORGANIZATION: FIT FOR PURPOSE? 344, 346 (Manfred Elsig, Bernard Hoekman & Joost Pauwelyn eds., 2017).

75. *See, e.g.*, Bown, *supra* note 70, at 107; Winters, *supra* note 74; Marc D. Froese, *Mapping the Scope of Dispute Settlement in Regional Trade Agreements: Implications for the Multilateral Governance of Trade*, 15 WORLD TRADE REV. 563, 564 (2016); Rafael Leal-Arcas, *Proliferation of Regional Trade Agreements: Complementing or Supplanting Multilateralism?*, 11 CHI. J. INT'L L. 597 (2011); Henry Gao & C. L. Lim, *Saving the WTO from the Risk of Irrelevance: The WTO Dispute Settlement Mechanism as a "Common Good" for RTA Disputes*, 11 J. INT'L ECON. L. 899, 900 (2008).

76. *See, e.g.*, WTO, *World Trade Report 2003—Trade and Development* (2003), https://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report_2003_e.pdf (noting that the growing number of overlapping RTAs "risks undermining the transparency of trading rules" and that "ubiquitous and highly varied regional arrangements may. . . undermine the integrity and clarity of the multilateral trading system").

77. *See, e.g.*, Pamela Apaza Lanyi & Armin Steinbach, *Limiting Jurisdictional Fragmentation in International Trade Disputes*, 5 J. INT'L DISP. SETTLEMENT 372 (2014); Gabrielle Marceau & Julian Wyatt, *Dispute Settlement Regimes Intermingled: Regional Trade Agreements and the WTO*, 1 J. INT'L DISP. SETTLEMENT 67 (2010).

78. For an overview of the various WTO disputes in which the existence of an RTA has been pleaded or argued in one way or another, *see* Armand C. M. de Mestral, *Dispute Settlement Under the WTO and RTAs: An Uneasy Relationship*, 16 J. INT'L ECON. L. 777 (2013); *see also* Michelle Q. Zang, *When the Multilateral Meets the Regionals: Regional Trade Agreements at WTO Dispute Settlement*, 18 WORLD TRADE REV. 33 (2019).

trade liberalization objectives embodied in those rules, and the stature of the WTO as a vehicle for international trade regulation at a time when RTAs flourish against the backdrop of enduring stalemate in the WTO's legislative arm. Furthermore, as RTA-related cases often have a direct bearing on the very jurisdiction of the WTO DSS and its position vis-à-vis other international dispute settlement institutions, these disputes entail critical implications for the authority of the DSS itself and its ability to attain the goals set forth for it by WTO Members.

As demonstrated in the remainder of the Article, the DSS's awareness of the systemic consequences for WTO rules and institutions embedded in RTA-related disputes has, from the outset, guided this adjudicative mechanism in attuning its interpretative efforts and judicial arsenal accordingly. Thus, when called upon to decide cases that arise at the WTO-RTA nexus, the DSS, within its strategic judicial space, has deliberately and consistently opted for interpretive choices that may foster the multilateral trade system's security and predictability, entrench the primacy of the WTO and its norms, and sustain the DSS's own authority as a forum for the adjudication of international trade disputes. As one WTO official observed with respect to the line of jurisprudence developed by the DSS in RTA-related cases: "[I]f one were to read all of these cases, the overall assessment is that . . . [t]he case law would seem . . . to preserve the supremacy of . . . WTO law over other rules."[79] Going further, the same official added: "[O]ne of the values . . . [,] the normative value, that informs the case law of the Appellate Body and of panelists [in RTA-related cases] is preserving the WTO dispute settlement system and the WTO [regime] and its supremacy over regional trade agreements."[80]

As one may assume, however, this judicial philosophy, which lies at the core of the DSS's quest to sustain the multilateral trading system, is not asserted outright in RTA-related disputes. Instead, it is often shrouded in a veil of textualism, thus appearing to remain faithful to State consent. Yet this judicial policy, as I show below, is effectively captured not only in the evidence provided by WTO practitioners involved in the operation of the DSS and the RTA-related cases examined. It is also encapsulated in the specific judicial choices made and the legal interpretations developed in these cases, whereby WTO adjudicators have steadily worked along two parallel and mutually reinforcing trajectories to limit the ability of WTO Members to: (1) derogate from their substantive WTO obligations through the formation and operation of RTAs; and (2) contract out from the DSU through RTAs in a manner that would compromise the DSS's jurisdiction and thus its power to scrutinize RTA-related deviations from the WTO's substantive legal commitments.[81]

79. Interview with WTO legal officer, in Geneva (July 11, 2012).

80. *Id.*

81. de Mestral, *supra* note 78; Joanna Langille, *Neither Constitution nor Contract: Understanding the WTO by Examining the Legal Limits on Contracting Out Through Regional Trade Agreements*, 86 N.Y.U. L. REV. 1482 (2011).

Hence, irrespective of the many pleas made over the years that the DSS would "consider the problems posed by the troubled relationships of RTAs and the WTO from a broad perspective of the unity of international trade law," meaning that it would advance a more open policy toward RTA law and dispute settlement,[82] the DSS under the AB's leadership has consciously approached the legal and institutional challenges emerging at the intersection of the WTO and RTAs through a narrow, WTO-centered prism. Contrary to its own declaration in its very first case that WTO agreements are "not to be read in clinical isolation from public international law,"[83] the AB has effectively embraced an "implicit judicial policy of 'clinical isolation' from regionalism"[84] in its quest to sustain the multilateral trading system from the bench.

In what follows, this Article addresses the key jurisprudential milestones established in this quest, while exploring the interpretative efforts they marked as the DSS exercised its role as a multilateral adjudicator in an increasingly regionalizing international economic order. In carrying out this investigation, I first consider the case law developed by the DSS at the WTO-RTA substantive legal nexus (Part III), where conflicts of obligations between the two legal frameworks arose and a range of legal defenses were invoked as parties sought to shield the otherwise WTO-inconsistent measures adopted within the context of their regional agreements. Thereafter, I proceed with a complementary analysis of the DSS jurisprudence that emerged at the jurisdictional WTO-RTA juncture (Part IV), where questions concerning the interaction between the DSS and the overlapping regional dispute settlement fora presented themselves. These questions implicate, among others, the very capacity of the DSS as an adjudicative institution to pronounce on international trade law and enforce compliance with the substantive legal norms underlying the multilateral trading system.

## III.
## SUSTAINING MULTILATERALISM AT THE WTO-RTA SUBSTANTIVE LEGAL NEXUS

### *A. Embarking on the RTA Challenge:* Turkey-Textiles *and the (Narrow) Reading of the Regional Trade Exception in GATT Article XXIV*

From the very beginning, the positioning of the WTO DSS as a multilateral dispute settlement mechanism in the evolving reality of RTA proliferation has

82. de Mestral, *supra* note 78, at 784*; see also* Julia Ya Qin, *Managing Conflicts Between Rulings of the World Trade Organization and Regional Trade Tribunals: Reflections on the Brazil-Tyres Case*, *in* MAKING TRANSNATIONAL LAW WORK IN THE GLOBAL ECONOMY: ESSAYS IN HONOUR OF DETLEV VAGTS 601 (Pieter H. F. Bekker, Rudolf Dozler & Michael Waible eds., 2010); Lanyi & Steinbach, *supra* note 77.

83. Appellate Body Report, *United States–Standards for Reformulated and Conventional Gasoline*, 17, WT/DS2/AB/R (adopted May 20, 1996) [hereinafter *U.S.-Gasoline*].

84. Howse, *supra* note 10, at 75.

presented panels and the AB with some of the most delicate legal and institutional issues surrounding the intersection of trade multilateralism and regionalism. This includes several questions related to the substantive legal interaction between WTO agreements and RTA law, particularly the question of conflicting obligations under the parallel normative frameworks and the legal defenses available to justify the WTO-inconsistent measures taken by Members within the framework of their regional trade arrangements. As this discussion will show, the AB, "[t]rue to its mission to bring greater order" to WTO law and the multilateral trading system, "took on the challenge posed by RTAs as soon as it was offered."[85] This opportunity came in the early *Turkey-Textile*s case,[86] where the AB made its first "systematic effort" to address the legal relationship between RTAs and the WTO under the provision of GATT Article XXIV.[87]

As indicated previously, although RTAs deviate from the WTO's fundamental MFN rule, WTO law permits Members to enter into RTAs if certain requirements are met.[88] These requirements are contained in Article XXIV of the GATT, Article V of the GATS, and the Enabling Clause, which are known as the "regional trade exceptions."[89] Most prominent and debated among these regional trade exceptions is GATT Article XXIV,[90] which allows WTO Members to form RTAs—both free trade agreements (FTAs) and customs unions—under two main conditions stipulated in paragraphs (5) and (8). These conditions include: (1) the liberalization of substantially all trade between the parties to the RTA, and (2) the avoidance of greater trade restrictiveness against WTO Members who are not a party to the agreement.[91] In other words, the first condition under Article XXIV establishes a standard for the *internal trade* between the RTA's constituent parties, requiring that they take significant steps to remove all barriers to trade between them. On the other hand, the second condition establishes a standard for the *external trade* of the RTA's constituent parties with *third countries*, allowing the former to enter into an RTA so long as they do not impose higher barriers to trade on other WTO Members.[92] Ultimately, consistency with these conditions is what "allows WTO Members to deviate from the most-favored nation obligation that is a cornerstone of the multilateral trading system and to treat other parties to preferential agreements better than non-party WTO Members."[93]

85. de Mestral, *supra* note 78, at 790.

86. Appellate Body Report, *Turkey–Restriction on Imports of Textile and Clothing Products*, WT/DS34/AB/R (adopted Nov. 19, 1999) [hereinafter *Turkey-Textiles*].

87. Howse & Langille, *supra* note 58, at 661.

88. VAN DEN BOSSCHE & ZDOUC, *supra* note 17, at 651.

89. *Id.* at 648-649.

90. *See* Howse & Langille, *supra* note 58, at 665.

91. Howse, *supra* note 10, at 35.

92. For a thorough discussion of these conditions, *see* VAN DEN BOSSCHE & ZDOUC, *supra* note 17, at 656–662.

93. Howse, *supra* note 10, at 35.

Alongside these substantive conditions, Article XXIV of the GATT also contains a procedural component stipulated in paragraph 7(a).[94] In line with this procedural element, parties that create an RTA must notify the GATT/WTO of the agreement established between them, with a view to allowing a multilateral review of the agreement and an evaluation of its fidelity to the substantive conditions articulated in Article XXIV.[95] As Mavroidis has noted when addressing this procedural requirement, the original intent of the GATT's drafters was to ensure that no RTA could "be consummated absent multilateral clearance."[96] To this end, during the GATT era, notified RTAs would be reviewed by an ad hoc working party, composed of State delegates, to determine whether the agreements complied with the substantive conditions set out in Article XXIV.[97] After the WTO's creation, in an attempt to bring greater discipline to the review of RTAs, the ad hoc working party system was replaced with a permanent political organ, the Committee on Regional Trade Agreements (CRTA),[98] which was entrusted with the power to examine RTAs and assess their consistency with the multilateral trade system's law and policy.[99]

Despite this mandate, since being formed in 1996, the CRTA has not provided a disciplined review process for the many RTAs subsequently notified to the WTO.[100] Continuing disagreements between Members over ambiguities in the language of GATT Article XXIV, together with the insufficient information submitted by RTA parties and the fact that determinations of WTO consistency were to be made by all WTO Members, including those whose RTAs were under examination,[101] quickly came to plague the CRTA, resulting in its failure to provide a meaningful ex ante review of RTAs.[102] At the same time, given that the CRTA was explicitly tasked with reviewing individual regional agreements notified to the WTO, doubts arose as to whether WTO adjudicative bodies could examine the compatibility of such agreements with the substantive requirements of GATT Article XXIV.[103] The AB clarified these doubts as well as other fundamental questions concerning the application of the regional exception embedded in Article XXIV in the *Turkey-Textiles* case.

In *Turkey-Textiles*, India brought a complaint regarding Turkish quotas imposed on imports of Indian textile and clothing products. India argued that these

94. Langille, *supra* note 81, at 1503.

95. *Id.*

96. 1 PETROS MAVROIDIS, THE REGULATION OF INTERNATIONAL TRADE 292 (2016).

97. Langille, *supra* note 81, at 1503.

98. de Mestral, *supra* note 78, at 783.

99. World Trade Organization, Committee on Regional Trade Agreements, WT/L/127 (adopted Feb. 7, 1996).

100. de Mestral, *supra* note 78, at 783; *see also* World Trade Report 2011, *supra* note 71, at 185.

101. World Trade Report 2011, *supra* note 71, at 185.

102. Gao & Lim, *supra* note 75, at 899; Howse, *supra* note 10, at 35.

103. Gao & Lim, *supra* note 75, at 904.

import quotas were inconsistent with Turkey's obligations under WTO law, especially GATT Article XI concerning the prohibition on quantitative restrictions and GATT Article XIII regarding the nondiscriminatory administration of quantitative restrictions.[104] In response, Turkey asserted that the contested quantitative restrictions were introduced upon the formation of a customs union with the European Union (EU) and thus were justified under the exception for RTAs embodied in GATT Article XXIV.[105] According to Turkey, GATT Article XXIV "confers on WTO Members a right to enter into a customs union, and to derogate, under certain conditions, from their GATT obligations."[106]

As noted by Robert Howse, when the case arrived at the DSS, "[i]t was not especially controversial as a matter of judicial competence that the [WTO] dispute settlement organs could review the particular" trade restrictions introduced by Turkey and their link to the customs union with the EU.[107] However, the AB seized this early opportunity to clarify that the judicial competence of WTO adjudicators actually extends beyond examination of the appropriateness of the specific trade-restrictive measures at issue and includes "reviewing the overall consistency . . . of the customs union with the conditions in GATT Article XXIV."[108] Moreover, the AB not only made it clear in its ruling that all aspects of Article XXIV were justiciable, so that WTO panels could examine whether the substantive requirements for an RTA had been fulfilled, it essentially went further, suggesting that panels are "expected" to examine the overall compatibility of an RTA with the requirements of Article XXIV before considering a legal defense contending that a measure related to the formation of an RTA is justified under this provision.[109]

This AB ruling, which suggested that WTO judicial organs "might have the competence and even the responsibility in certain cases to determine" the consistency of an RTA with Article XXIV[110] while "overturning . . . the panel of first instance as well as the prior GATT practice" on this issue,[111] was criticized

104. *Turkey-Textiles*, *supra* note 86, ¶ 3.

105. *Id.* ¶¶ 6–20.

106. *Id.* ¶ 10.

107. Howse, *supra* note 10, at 35.

108. *Id.*; Gao & Lim, *supra* note 75, at 904.

109. *Turkey-Textiles*, *supra* note 86, ¶¶ 59-60 (stating that "[w]e would expect a panel, when examining such a measure, to require a party to establish [*inter alia*, whether the customs union fully meets the relevant requirements of Article XXIV.]").

110. Howse & Langille, *supra* note 58, at 667.

111. Howse, *supra* note 10, at 35. Note that the first instance panel in *Turkey-Textiles* was uncertain about whether it could assess the compatibility of the RTA between Turkey and the EU with Article XXIV. Exercising judicial economy, the panel thus proceeded in its analysis, assuming *arguendo* that the EU-Turkey RTA is compatible with the requirements of Article XXIV while limiting its "examination to the question of whether Turkey was permitted to introduce the quantitative restrictions at issue." *See Turkey-Textiles*, *supra* note 86, ¶ 60.

for upsetting the institutional balance between the WTO's political and judicial organs.[112] Nonetheless, no "major revolt" erupted against this declaration of expansive judicial authority and the legal clarification provided by the AB on the application of GATT Article XXIV.[113] As several commentators have noted, while the AB's decision in *Turkey-Textiles* may have intruded upon the authority of the WTO's political organs and the (ineffective) CRTA specifically,[114] it did so with the aim of reinforcing the multilateral trade disciplines and strengthening WTO oversight of the proliferating regional trade arrangements.[115] Thus, it was "consistent with the underlying substantive values" and objectives of the WTO community.[116]

However, the AB in *Turkey-Textiles* did not only take a "narrow view of the [regional] exception" in Article XXIV by "holding that it should be subject to strict judicial scrutiny, not merely diplomatic oversight, in the relevant WTO committee,"[117] the AB also interpreted the language of Article XXIV in a way that significantly limited Members' ability to use this clause as a shield for WTO-incompatible measures taken within the framework of RTAs. Thus, while the AB in *Turkey-Textiles* acknowledged that GATT Article XXIV may "justify the adoption" of an RTA-related measure "which is inconsistent with . . . GATT provisions, and may be invoked as a . . . 'defence' to a finding of inconsistency,"[118] the AB severely restricted the availability of this defense by introducing a condition that for such a measure to be justified, it must be *necessary* for the formation of the RTA.[119] Hence, according to the AB, a Member claiming the benefit of an Article XXIV defense must comply with two cumulative criteria. First, it must demonstrate that the measure at issue was introduced upon the formation of an RTA that fully meets the conditions of paragraphs (5) and (8) of Article XXIV. Second, it "must demonstrate that the formation" of the RTA "would be prevented if it were not allowed to introduce the measure at issue."[120] In reading this latter criterion into the language of Article XXIV, the AB

112. Gao & Lim, *supra* note 75, at 904. Forceful criticism was voiced in this respect by Frieder Roesler, a former director of the GATT legal secretariat. *See* Frieder Roessler, *The Institutional Balance between the Judicial and Political Organs of the WTO*, *in* NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW 325 (Marco Bronckers & Reinhard Quick eds., 2000).

113. Howse, *supra* note 10, at 36.

114. For subsequent developments in the WTO concerning the process of review of RTAs in light of the problems identified with the CRTA, including the adoption of the Transparency Mechanism for Regional Trade Agreements in 2006, see de Mestral, *supra* note 78, at 783–84; World Trade Report 2011, *supra* note 71, at 185.

115. Howse, *supra* note 10, at 36; Gao & Lim, *supra* note 75, at 904.

116. Howse, *supra* note 10, at 36.

117. *Id.* at 73.

118. *Turkey-Textiles*, *supra* note 86, ¶¶ 45, 58.

119. de Mestral, *supra* note 78, at 791 (noting that "the AB read into Article XXIV a condition that to be justified any measure must be 'necessary' for the formation" of the RTA); Langille, *supra* note 81, at 1508-1509.

120. *Turkey-Textiles*, *supra* note 86, ¶ 58.

effectively imposed a severe burden of justification on WTO Members in the form of the necessity test,[121] thus constraining their ability to derogate from WTO obligations through an RTA.[122]

It is important to highlight at this point that the strict and narrow interpretation of the regional trade exception followed by the AB in *Turkey-Textiles* differs quite significantly from the interpretative approach taken in other WTO disputes, most notably in "trade-and" disputes involving competing trade and nontrade interests. In the latter category of cases, the AB broadly and flexibly construed the policy exceptions enshrined in GATT Article XX (the "general exceptions clause"), in order to better accommodate values "external" to the WTO regime, such as health or environmental protection.[123] The message sent by the AB in the RTA-related case of *Turkey-Textiles* is therefore evident, as are its efforts to sustain the integrity of WTO rules and objectives and establish "the supremacy of the WTO over . . . regional bodies."[124] In Langille's words, the exception for RTAs in GATT Article XXIV "can only be employed in limited circumstances" according to the AB, whereas "WTO obligations can only be varied if a measure is necessary for an RTA to be formed." Stated differently, "[c]reating a preferential arrangement cannot trump the goals of the WTO."[125]

### *B. Fending off Regionalism Under the General Exceptions in GATT Article XX: The Cases of* Mexico-Soft Drinks *and* Brazil-Tyres

Cases where Members tried to justify WTO-inconsistent measures adopted in connection with RTAs under the general exceptions provided in GATT Article XX reflect a similar approach to *Turkey-Textiles*, as well as a conscious attempt of WTO adjudicators to limit Members' ability to derogate from their WTO obligations for RTA-related purposes. The first case that illustrates this approach is that of *Mexico-Soft Drinks*.[126]

#### *1. Mexico-Soft Drinks*

The *Mexico-Soft Drinks* case grew out of a broader dispute between the United States and Mexico concerning the market of sweeteners within the framework of the North American Free Trade Agreement (NAFTA).[127]

121. MICHAEL TREBILCOCK, ROBERT HOWSE & ANTONIA ELIASON, THE REGULATION OF INTERNATIONAL TRADE 117 (4th ed. 2012).

122. Langille, *supra* note 81, at 1509.

123. Shlomo Agon & Benvenisti, *supra* note 38, at 635–37, 642.

124. Interview with WTO legal officer, in Geneva (July 7, 2012).

125. Langille, *supra* note 81, at 1509.

126. Appellate Body Report, *Mexico–Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R (adopted Mar. 24, 2006) [hereinafter *Mexico-Soft Drinks* AB Report].

127. *Id.* ¶ 10. On November 30, 2018, the NAFTA contracting parties—the United States,

According to Mexico, quantitative restrictions imposed by the United States on imports of cane sugar from Mexico contradicted a sugar-specific NAFTA annex in which the United States had committed to granting market access to Mexican sugar.[128] When seeking resolution of this dispute, Mexico initially invoked the NAFTA dispute settlement procedures, but the United States prevented the establishment of a NAFTA panel by blocking the selection of panelists.[129] In an attempt to induce the United States to comply with its NAFTA obligations and agree to the composition of a NAFTA panel, Mexico decided to retaliate against the United States by imposing an extra 20 percent tax on soft drinks using sweeteners other than cane sugar, an act favoring Mexico's domestic cane sugar producers.[130] In response, the United States launched dispute settlement proceedings at the WTO rather than under the NAFTA, arguing that Mexico's discriminatory tax measures were inconsistent with the national treatment obligation stipulated in GATT Article III.[131]

During the WTO proceedings, Mexico claimed that notwithstanding the violation of GATT Article III, its soft drinks tax could be justified under the exception in GATT Article XX(d), which permits WTO Members to impose measures that are "necessary to secure compliance with laws and regulations which are not inconsistent with the provisions of [GATT]."[132] According to Mexico, its tax measures were "necessary to secure [the United States'] compliance" with its NAFTA commitments, "an international agreement that is a law not inconsistent with the provisions of the GATT 1994."[133]

Both the panel and the AB rejected Mexico's defense under GATT Article XX(d) and the proposed reading of the terms "laws and regulations" on which it was predicated.[134] While Mexico contended that these terms were "broad enough" to include "international agreements such as the NAFTA,"[135] the AB, like the panel, held that the terms "laws and regulations" in Article XX(d) narrowly "refer to the rules that form part of the domestic legal order of the WTO Member invoking the provision and do not include the international obligations

Canada, and Mexico—signed a new trade deal, known as the United States-Mexico-Canada Agreement (USMCA). The agreement, which seeks to modernize and replace the 25-year-old NAFTA, will enter into force once ratified by its three signatories. Until then, NAFTA will remain in force. *See* Office of the United States Trade Representative, United States-Mexico-Canada Agreement (signed Nov. 30, 2018), available at https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement.

128. Marceau & Wyatt, *supra* note 77, at 73.

129. Howse, *supra* note 10, at 74.

130. Marceau & Wyatt, *supra* note 77, at 73.

131. *Mexico-Soft Drinks* AB Report, *supra* note 126, ¶ 2.

132. *Id.* ¶¶ 58–59, 66.

133. Panel Report, *Mexico–Tax Measures on Soft Drinks and Other Beverages*, ¶ 8.162, WT/DS308/R (adopted Mar. 24, 2006) [hereinafter *Mexico-Soft Drinks* Panel Report].

134. *Id.* ¶¶ 8.198, 8.204; *Mexico-Soft Drinks* AB Report, *supra* note 126, ¶¶ 68–80.

135. *Mexico-Soft Drinks* AB Report, *supra* note 126, ¶ 64.

of *another* WTO Member," in this case, US commitments under NAFTA.[136] Hence, the AB concluded that Article XX(d) was not available as a justification for WTO-inconsistent measures seeking to secure compliance with a WTO Member's obligations under an international agreement, such as the RTA under discussion.[137]

Notably, while the AB provided several reasons why "laws and regulations" in Article XX(d) refer to rules that form part of a domestic legal system and acknowledged that international obligations could be incorporated into domestic law and in some national legal systems with automaticity,[138] the AB "never explained why the terms [laws and regulations] themselves could not also encompass international obligations."[139] In addition, although the AB provided some contextual and policy arguments in support of its decision to exclude international agreements from the purview of Article XX(d), the persuasiveness of those arguments has been doubted.[140]

For instance, one argument that the AB raised to support its narrow reading of Article XX(d) can be summarized as follows: if Article XX(d) were to cover international agreements, a WTO Member could invoke Article XX(d) to justify measures taken *unilaterally* to secure compliance with another Member's obligations under the WTO agreements, in contradiction to the rules on countermeasures and unilateral actions detailed in Articles 22 and 23 of the DSU.[141] When elaborating on this argument, a WTO official involved in the case began his remarks by alluding to the United States' past practice of "aggressive unilateralism" and the great attention consequently dedicated to the issue of unilateral measures during the drafting of the DSU in the Uruguay Round, which ultimately resulted in a prohibition on unilateral determinations and retaliatory measures in instances of alleged violations of WTO law.[142] This official went on to note that "a lot of what was in the . . . mind" of WTO adjudicators in *Mexico-Soft Drinks* was the threat of such "unilateral actions" and their potentially negative effect on the stability of the multilateral system and its dispute settlement mechanism.[143] The panel and the AB were both concerned that if they were to "decide[] differently, people could have read" Article XX(d) as suggesting that

136. *Id.* ¶ 75 (emphasis original); *Mexico-Soft Drinks* Panel Report, *supra* note 133, ¶¶ 8.191–8.197.

137. *Mexico-Soft Drinks* AB Report, *supra* note 126, ¶ 79.

138. *Id.* ¶¶ 69, 79, n. 148.

139. William J. Davey & André Sapir, *The Soft Drinks Case: The WTO and Regional Agreements*, 8 WORLD TRADE REV. 5, 10 (2009).

140. *Id.* at 9-11.

141. *Mexico-Soft Drinks* AB Report, *supra* note 126, ¶ 77. Article 22 of the DSU regulates the application of countermeasures in cases of non-compliance within the WTO framework, whereas Article 23 prohibits unilateral actions, stating that WTO Members shall not make determinations of violations of WTO agreements except by recourse to the WTO DSS, in accordance with DSU rules.

142. Interview with WTO legal officer, in Geneva (Mar. 16, 2012).

143. *Id.*

States "affected by a [WTO] violation of another country, even if they have not . . . obtain[ed] a [DSS] finding [of violation], . . . still have the authority to impose . . . their own countermeasures" unilaterally.[144]

While this argument summarizes WTO adjudicators' desire to secure the stability and predictability of the multilateral trading system by sending "a signal that . . . [Members] cannot take these unilateral measures,"[145] this justification is not entirely convincing. This is particularly so given the fact that the principle of effective treaty interpretation could preclude a Member's attempt to use GATT Article XX(d) to circumvent its obligations under DSU Articles 22 and 23, which forbid unilateral trade measures and regulate the application of countermeasures within the WTO framework.[146]

Another argument the AB invoked when rejecting the reading of Article XX(d) as covering measures necessary to secure compliance with international agreements was that acceptance of Mexico's position would imply that in order to resolve the case, WTO adjudicators would have to assess whether NAFTA, the regional agreement at issue, had been violated.[147] This, the AB contended, would make WTO panels and the AB "adjudicators of non-WTO disputes," a function extraneous to their mandate under the DSU.[148] As Davey and Sapir have rightly noted, however, "this argument is not really accurate, as the WTO system would only be taking a view on the other agreement to the extent it was necessary to determine WTO rights and obligations; its view would not constitute adjudication of the dispute under the other agreement."[149] The cogency of the AB's argument is further undermined by the fact that, in other instances, the AB held that "it could make determinations about the legal requirements of other legal systems and whether they are met, where needed, in order to apply a WTO legal rule."[150] This was the case, for example, with the Lomé Convention in *EC-Bananas*.[151] On the basis of this earlier case law, Howse has suggested that the AB in *Mexico-Soft Drinks* could have simply concluded that "the operative provision being applied was Article XX(d) of the GATT" and that a finding with respect to a NAFTA violation "was merely ancillary to determining" whether the Mexican measures were required to secure US compliance, thus making these measures consistent with the WTO covered agreements.[152]

144. *Id.*

145. *Id.*

146. Davey & Sapir, *supra* note 139, at 10.

147. *Mexico-Soft Drinks* AB Report, *supra* note 126, ¶ 78.

148. *Id.*

149. Davey & Sapir, *supra* note 139, at 10.

150. Howse, *supra* note 10, at 74.

151. Appellate Body Report, *European Communities–Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (adopted Sept. 25, 1997).

152. Howse, *supra* note 10, at 74.

The AB, like the panel, consciously chose not to pursue this route but to strictly construe GATT Article XX(d) as excluding international agreements, including RTAs, from its scope. This interpretative choice aptly discloses WTO judicial bodies' "implicit judicial policy of 'clinical isolation' from regionalism."[153] It also marks the adjudicators' deliberate attempt to control the negative impacts that RTA proliferation could have on the WTO legal system. Two messages were therefore made clear in the judicial endeavor undertaken by WTO adjudicators to sustain multilateralism in *Mexico-Soft Drinks*.

First, Article XX(d) was to be interpreted narrowly, meaning that WTO Members may not resort to this exception in order to justify WTO-inconsistent measures aimed at enforcing compliance with the international obligations adopted under the umbrella of regional trade arrangements. Clearly, this narrow interpretative approach is consistent with the strict mode of interpretation employed in *Turkey-Textiles* toward the regional trade exception embedded in GATT Article XXIV. At the same time, the narrow approach followed in *Mexico-Soft Drinks* with respect to the exception enshrined in Article XX(d) differs significantly from the broad interpretive stance taken by WTO adjudicators in "trade-and" disputes toward the exceptions found in Article XX(a), (b) and (g). In such "trade-and" cases, as I have described in detail elsewhere, WTO adjudicators exhibited much greater deference to the protected interests at stake (among them, health and environmental protection), as well as to the non-WTO international law sources of relevance to those interests.[154] When alluding to the noncoincidental variation between the judicial approach taken toward Article XX exceptions in "trade-and" disputes and the position taken in the RTA-related case of *Mexico-Soft Drinks*, a WTO official working on the case made a highly revealing comment:

> [In *Mexico-Soft Drinks*,] Mexico was saying that . . . it could invoke [Article] XX(d) to enforce the NAFTA [i.e., a regional trade agreement] . . . . [B]ut if someone were to suggest that they were applying a WTO-inconsistent measure to enforce an international environmental agreement, will they receive more deference than here? Maybe.[155]

This testimony tacitly demonstrates how the interpretative and judicial policy choices made by WTO adjudicators in *Mexico-Soft Drinks* were shaped by and harnessed to the DSS's efforts to uphold the WTO regime and bolster the stability and unity of its rules in the face of the threats posed by the expanding regional trading blocs. Indeed, a WTO panelist sitting on the bench in *Mexico-Soft Drinks* suggested as much when he explained the nondeferential approach WTO adjudicators took toward RTAs in this case:

> One thing is to show deference [to other international agreements], but . . . I see it . . . the other way around. There are so many . . . free trade agreements that it is

153. *Id.* at 75

154. Shlomo Agon & Benvenisti, *supra* note 38, at 635-637; Sivan Shlomo Agon, *Clearing the Smoke: The Legitimation of Judicial Power at the WTO*, 49 J. WORLD TRADE 539, 555–558 (2015).

155. Interview with WTO legal officer, in Geneva (Apr. 18, 2012).

> very risky to take that road. . . .It is very dangerous [to show deference to these agreements]. . . .[I]t was [therefore] clear to the panel . . . that we had . . . to establish the limits very clearly.[156]

The second message conveyed by the *Mexico-Soft Drinks* ruling on GATT Article XX(d), particularly by WTO adjudicators' refusal to look into the relevant legal norms under NAFTA and their assertion that such an act would amount to adjudication of a "non-WTO dispute," is that "the WTO dispute settlement system was not available" for Members "to address gaps and ineffectiveness" in regional trade arrangements and their dispute settlement fora.[157] With respect to this position, a WTO legal officer participating in the case stated:

> The truth is, at the end of the day, that Mexico had a valid complaint that the US is blocking [the operation of the] NAFTA [dispute settlement mechanism]. The question is, should . . . it be for the WTO, doomed for being in those situations, to fix their problem or should the WTO stay on the sidelines, like it did?[158]

This same interviewee added that the AB's ruling on GATT Article XX(d) reflected its "reluctance to get involved in what was a very messy regional dispute. . . . Not just the [dispute about trade in] sugar, but also this issue about . . . the blocking of the [selection] of panelists" by the United States, which prevented the establishment of a NAFTA panel to hear Mexico's claims and resulted in the latter's application of countermeasures.[159] There was some "concern" among WTO adjudicators at the time "that the WTO system would be put in a situation in which it would have to resolve regional controversies," a scenario that might undermine its own credibility.[160] The AB, determined to secure the autonomy, stability, and reliability of the WTO legal system, including its dispute settlement apparatus, sought to avoid any such occurrences.

### *2. Brazil-Tyres*

The AB exhibited a similar attitude in *Brazil-Tyres*, another RTA-related dispute. In that case, the AB essentially held that Brazil had acted inconsistently with WTO rules by following a ruling handed down by a tribunal established in the framework of the Mercado Común del Sur (MERCOSUR), the RTA created

156. Interview with WTO panelist, in Geneva (July 24, 2012).

157. Howse, *supra* note 10, at 74.

158. Interview with WTO legal officer, in Geneva (Apr. 18, 2012). A state delegate drew a similar picture when alluding to the AB's decision to reject Mexico's claims in *Mexico-Soft Drinks* and to distance itself from the U.S.-Mexico skirmish under the NAFTA: "It was clear that it was an unfair situation, but. . . the WTO [DSS] can really just say nothing other than 'we never said the world is fair and we have our job to reinforce this [WTO Agreement], and we are sorry about what's happening [between the US and Mexico at the regional level].'" Interview with EU official, in Brussels (July 20, 2012).

159. Interview with WTO legal officer, in Geneva (Apr. 18, 2012).

160. *Id.*

between Brazil and several South American countries.[161] At issue in *Brazil-Tyres* was an import ban on retreaded tires, originally adopted by Brazil in 2000.[162] According to Brazil, the ban was introduced as part of its efforts to reduce the risks to human, animal, and plant life and health associated with waste tires, the accumulation of which increases the exposure to toxic emissions caused by tire combustion and facilitates the transmission of diseases by the mosquitos using tires as breeding grounds.[163] Brazil's 2000 ban had initially been challenged by Uruguay before a MERCOSUR arbitral tribunal in 2001.[164] Siding with Uruguay, the tribunal found that Brazil's import prohibition was a new restriction of commerce in violation of MERCOSUR law, which prohibited MERCOSUR member States from introducing new trade barriers of any kind between one another.[165] Following this ruling, Brazil adopted a revised regulation in 2004 that instituted an exemption to the import ban for retreaded tires originating in MERCOSUR member States ("the MERCOSUR exemption").[166]

This sequence of events led the EU—the primary exporter of retreaded tires to Brazil prior to the ban—to initiate legal proceedings against Brazil at the WTO.[167] The EU claimed that Brazil's import ban violated the prohibition on quantitative restrictions in GATT Article XI and that the MERCOSUR exemption was inconsistent with Brazil's nondiscrimination obligations under GATT Articles I (MFN) and XIII (nondiscriminatory administration of quantitative restrictions).[168] Brazil defended its position by invoking, *inter alia*, the exception in GATT Article XX(b), which offers immunity for trade-restrictive measures "necessary to protect human, animal or plant life or health."[169]

In addressing this defense, the AB, as in other environment and health-related cases, took a rather broad and deferential view of Brazil's regulatory measure at the first stage of the analysis of Article XX, where the AB examined whether the measure came under one of the exceptions listed in paragraphs (a) to (j) (in this case, the exception in paragraph (b)).[170] At this stage, and although retreaded tires "contribute[d] only indirectly to the health risks associated with the

161. Appellate Body Report, *Brazil–Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R (adopted Dec. 3, 2007) [hereinafter *Brazil-Tyres* AB Report].

162. *Id.* ¶ 122.

163. *Id.* ¶ 134.

164. Panel Report, *Brazil–Measures Affecting Imports of Retreaded Tyres*, ¶ 2.13, WT/DS332/R (adopted Dec. 3, 2007) [hereinafter *Brazil-Tyres* Panel Report].

165. *Id.*

166. *Id.* ¶¶ 2.14-2.15.

167. Qin, *supra* note 82, at 604–05.

168. *Brazil-Tyres* AB Report, *supra* note 161, ¶ 2.

169. *Id.* ¶ 3.

170. Interview with AB member, in Jerusalem (June 6, 2012) (noting that the AB "has given a rather broad interpretation of. . . Article XX" and "in admitting an environmental exception" in this case).

accumulation of waste tyres,"[171] the AB ruled that Brazil's ban on imports of retreaded tires was "necessary" to protect "human, animal and plant life and health," thus upholding the panel's finding that the ban was provisionally justified under Article XX(b).[172] However, the AB took a different course when it turned to the second stage of the analysis under the Article XX chapeau, focusing on the manner in which Brazil's ban was applied. At this later stage, the AB parted company with the panel and reversed the latter's (relatively RTA-friendly) decision on the MERCOSUR exemption.

And so, in a different spirit from that displayed by WTO judicial bodies in previous RTA-related disputes, the first-instance panel in *Brazil-Tyres* took a rather accommodating posture toward MERCOSUR, the RTA at issue, when examining the Brazilian import ban under the chapeau of Article XX. The chapeau requires WTO adjudicators to ensure that trade-restrictive measures found provisionally justified under one of the exceptions in paragraphs (a)-(j) of Article XX "are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade."[173] In *Brazil-Tyres,* the panel found that although the MERCOSUR exemption had resulted in discrimination in the application of the import ban against non-MERCOSUR countries, such discrimination was not "arbitrary" or "unjustifiable" within the meaning of the chapeau.[174] First, according to the panel, the discrimination was not "arbitrary" since the adoption of the MERCOSUR exemption was not "motivated by capricious or unpredictable reasons" but by Brazil's legal obligation to comply with the MERCOSUR tribunal's ruling.[175] In addition, the ruling was delivered in the context of a trade liberalizing agreement among MERCOSUR member countries, with such agreements expressly recognized in GATT Article XXIV.[176] Second, the panel held that the discrimination resulting from the MERCOSUR exemption was not "unjustifiable" because the volume of retreaded tires imported from MERCOSUR countries, at the time of the panel's examination, had not been significant enough to undermine the import ban's ability to fulfill its intended objectives.[177] As a result, the panel did not find a violation of the Article XX chapeau in this respect.[178]

171. Qin, *supra* note 82, at 622.

172. *Brazil-Tyres* AB Report, *supra* note 161, ¶ 212; *Brazil-Tyres* Panel Report, *supra* note 164, ¶ 7.215.

173. Qin, *supra* note 82, at 606.

174. *Brazil-Tyres* Panel Report, *supra* note 164, ¶ 7.289.

175. *Id.* ¶¶ 7.272, 7.281.

176. *Id.* ¶¶ 7.273–7.274.

177. *Id.* ¶¶ 7.285–7.288.

178. Note, however, that at the end of the day the panel did find the Brazilian import ban to be applied in a manner that failed to meet the requirements of the chapeau of Article XX. This is due to the fact that despite the existence of the import ban, imports of used tires to Brazil were in effect

When asked to shed light on the rationale underlying the panel's uncommonly deferential approach toward MERCOSUR and the regional tribunal's ruling that prompted the adoption of the MERCOSUR exemption, one of the WTO panelists sitting on the bench in *Brazil-Tyres* made the following remarks. He noted that in this case, the panel was well aware of the fact that if the MERCOSUR exemption were to be found WTO-inconsistent, Brazil might find itself in a legal bind where it would not be able to comply with its obligations under the WTO without violating its obligations under MERCOSUR, pursuant to which the exemption had been adopted.[179] Consequently, the panel's view was that WTO adjudicators should not "interpret the WTO agreements . . . in a way that would put Members in conflict with their obligations under a regional trade agreement . . . if there is an alternative way of" interpreting the WTO agreements.[180] This panelist further stated that in cases where an alternative interpretation is not available and "a clear conflict" exists between WTO law and a Member's obligation under the respective RTA, then "all a WTO panel can do . . . is to apply WTO law."[181] Nevertheless, if the issues involved remain cloudy, that is,

> [i]f the conflict [between the RTA and WTO law] is not clear, then there ought to be some recognition given to . . . the regional trade agreement . . . recognizing that . . . WTO law includes, in fact, regional trade agreements, as Article XXIV says, [and] that they are legitimate parts of the international trading system.[182]

Another WTO official involved in the *Brazil-Tyres* panel proceedings went on to explain that the panel's guiding "rationale" in the interpretative exercise followed in this case was to ensure that its decision would not impede Brazil's ability to comply with the decisions of both the WTO DSS and the MERCOSUR tribunal:[183]

> [W]hat comes out of the panel report is really that they wanted to make sure that there would not be [a] contradiction [between the rulings of the two forums] . . . [thereby] putting Brazil in the situation that they don't know what to do . . . [and] are basically [forced to act] illegal[ly] . . . [with respect to the ruling of] one court . . . . or the other.[184]

allowed through court injunctions and in quite large quantities, what significantly undermined the ban's objectives. For this reason, the panel ultimately concluded that Brazil's ban was applied in a manner that constitutes unjustifiable discrimination and a disguised restriction to trade, and thus could not be justified under GATT Article XX. *Id.* ¶¶ 7.356–7.357.

179. Interview with WTO panelist, in Jerusalem (June 6, 2012).

180. *Id.* A WTO legal officer involved in the *Brazil-Tyres* proceedings followed suit, stating: "The panel's decision implies. . . that Brazil, as a member of MERCOSUR, has legal obligations, that it has to obey these obligations, and that the panel recognizes this state of events, and that it is allowed to take that into account." Interview with WTO legal officer, in Geneva (Mar. 19, 2012).

181. Interview with WTO panelist, in Jerusalem (June 6, 2012).

182. *Id.*

183. Interview with WTO official, in Geneva (Apr. 5, 2012).

184. *Id.*

However, this same official continued, the AB "did not seem to worry about" the potential conflict between Brazil's obligations under MERCOSUR and the WTO.[185] Whereas "the panel was ready to be more flexible on the interpretation of the rules," the AB was more concerned with "the legality of the [panel's] findings"[186] that, as Brink has noted, "would have allowed WTO Members to circumvent the Article XX chapeau and discriminate in the application of their health and environment policies . . . simply on the grounds that they were doing so pursuant to an obligation in *another* international agreement."[187]

Hence, unlike the panel, whose interpretation of the chapeau indicated a predisposition to avoid any head-on conflict with MERCOSUR's legal prescriptions, the AB interpreted the chapeau "in a way that it knew would require Brazil to breach its treaty obligation under MERCOSUR."[188] Thus, in rejecting the panel's interpretation, the AB first noted that the "assessment whether discrimination is arbitrary or unjustifiable" within the meaning of the chapeau "should be made in the light of the objective of the measure" in question.[189] In this case, the AB stressed, the "discrimination between MERCOSUR countries and other WTO Members in the application of the Import Ban was introduced as a consequence of a ruling by a MERCOSUR tribunal."[190] This ruling, according to the AB, "was not an acceptable rationale" for the resulting discrimination because it bore no relationship to the legitimate environmental and health-related objectives pursued by the import ban; it even went against these objectives.[191] Accordingly, the AB concluded, the MERCOSUR exemption resulted in Brazil's import ban being applied in a manner that constitutes arbitrary or unjustifiable discrimination,[192] in contrast to the requirements indicated in the Article XX chapeau. As a result, the ban could not be justified under Article XX as a whole.[193]

The AB's decision, determining that the MERCOSUR tribunal's ruling could not overcome the discipline of the Article XX chapeau and justify the discriminatory application of the import ban, "left Brazil in a legal quandary."[194] "Brazil could not honor its treaty obligation under the WTO without breaching its obligation under MERCOSUR—and vice versa—unless it agreed to lift the import ban altogether, which was not an option given its declared environmental

185. *Id.*

186. *Id.*

187. Tegan Brink, *Which WTO Rules Can a PTA Lawfully Breach? Completing the Analysis in Brazil-Tyres*, 44 J. WORLD TRADE 813, 816 (2010).

188. Qin, *supra* note 82, at 626.

189. *Brazil-Tyres* AB Report, *supra* note 161, ¶ 227.

190. *Id.* ¶ 228.

191. *Id.*

192. *Id.*

193. *Id.* ¶ 252.

194. Qin, *supra* note 82, at 609.

objective."[195] The AB, for its part, was well aware of the complex legal situation Brazil would face in the wake of the ruling. As one AB member then sitting on the bench stated: "The fact that there . . . [was] a [MERCOSUR] decision out there . . . meant that the [defending] country . . . [was] subject to two contradictory injunctions from two different treaties."[196] In justifying the AB's interpretative exercise, which contributed to this state of conflicting legal obligations at the regional and multilateral levels, that same AB member argued that:

> [W]e had to apply our law. . . . The judge has . . . to exercise his jurisdiction according to the statute and the applicable law before him. He should, of course, not be half-blinkered, he should look right and left, but he cannot go against the law that governments [have agreed upon], [or go against] his [delegated] functions, simply because of something which is outside his jurisdiction.[197]

Others, however, have argued that the conflict between multilateral and regional obligations that Brazil faced following the AB's ruling was "neither inherent nor inevitable."[198] According to Qin, this conflict arose purely as a result of the interpretation under the Article XX chapeau adopted by the AB,[199] which "showed no interest in facilitating Brazil's compliance with both sets of obligations and with the maintenance of the domestic regulatory scheme" that had already been found provisionally justifiable under Article XX(b).[200] Howse has further added in this regard:

> Had the Appellate Body taken a positive view of the co-existence of regional fora with the WTO dispute settlement system, it could easily have found that Brazil's discrimination in favour of MERCOSUR members was not unjustifiable—there is no definition of "unjustifiable" in Article XX and no textual basis for confining acceptable justifications to those that pertain to the main purpose of the general regulatory scheme itself.[201]

As seen above, the panel's interpretation of the term "unjustifiable" in Article XX differed indeed from the AB's interpretation.[202] Other interpretations of Article XX were also available, as Qin has demonstrated.[203] Nevertheless, the AB, despite its reputation for developing new and evolutionary interpretations and for integrating WTO agreements with other areas of international law,[204]

195. *Id.* A panelist involved in *Brazil-Tyres* similarly stressed that the AB's ruling "effectively put Brazil in a position where it could not comply with the WTO obligations and its MERCOSUR obligations at the same time." Interview with WTO panelist, in Jerusalem (June 6, 2012).

196. Interview with AB member, in Geneva (Apr. 19, 2012).

197. *Id.*

198. Qin, *supra* note 82, at 609.

199. *Id.* at 609–612.

200. Howse, *supra* note 10, at 74.

201. *Id.*

202. The alternative interpretation developed by the panel was discussed and rejected by the AB. *See Brazil-Tyres* AB Report, *supra* note 161, ¶ 229.

203. Qin, *supra* note 82, at 613–618.

204. *Id.* at 618.

consciously chose to reverse the panel's finding on the MERCOSUR exemption and refused to explore any interpretation that would avoid a conflict with the legal prescriptions under MERCOSUR. When alluding to this choice, a WTO official involved in *Brazil-Tyres* interestingly distinguished the AB's approach to RTAs from its attitude toward other international agreements:

> [T]he AB has been consistently trying . . . to build a case law of its own. So . . . there is always a little bit of reluctance to look too much for what's going on elsewhere, especially when what's going on elsewhere is very similar to what is going on in the WTO . . . when it is related to trade. It's a different matter when they are looking at other [international] agreements, for instance, CITES [the Convention on International Trade in Endangered Species] [as examined] in the [*U.S.*-]*Shrimp* case, where . . . they were looking [for] . . . an authority on environmental protection. There, I think, they are quite fine to do that . . . . [The AB's ruling in *Brazil-Tyres*, however,] was meant to . . . send a [different] message, that the law, the case law . . . to be considered is the case law here, [of the WTO,] and not the trade case law developed by another institution.[205]

Notably, this message did not come as a surprise to WTO practitioners, and neither did the AB's dismissal of the MERCOSUR tribunal's ruling. Rather, this attitude seemed a natural continuation of the AB's rulings in previous RTA-related cases. As a senior Brazilian official involved in *Brazil-Tyres* commented, "when the Appellate Body reversed [the panel's decision on the MERCOSUR exemption] . . . 'it was not a surprise." In fact, this official admitted, he "was surprised that the panel accepted [Brazil's] arguments," which relied on the MERCOSUR tribunal's decision.[206]

The picture emerging from this incident, in which the AB found that although Brazil was acting pursuant to its MERCOSUR obligations, Brazil was still required to meet the requirements of the GATT and, in particular, the chapeau of Article XX,[207] suggests that, in *Brazil-Tyres*, the AB followed the same judicial efforts marking its previous RTA-related jurisprudence. That is, the AB was working to preserve the autonomy of the WTO regime and to espouse the supremacy of WTO principles and rules over those of RTAs.[208] For this purpose, the AB further limited in its ruling the ability of Members' to contract out of their WTO obligations and discriminate against other WTO Members by means of an RTA.[209] As one WTO practitioner involved in the case stated, a comparison of the AB's ruling in *Brazil-Tyres* with its rulings in cases like *Mexico-Soft Drinks* strongly implies that "what . . . [the AB] is doing, intentionally or unintentionally,

205. Interview with WTO official, in Geneva (Apr. 5, 2012).

206. Interview with senior Brazilian official, in Geneva (July 5, 2012).

207. Jennifer Hillman, *Conflicts Between Dispute Settlement Mechanisms in Regional Trade Agreements and the WTO—What Should the WTO Do?*, 42 CORNELL INT'L L. J. 193, 194–195 (2009).

208. Nikolaos Lavranos, *The Brazilian Tyres Case: Trade Supersedes Health*, TRADE L. & DEV. 230, 253 (2009); Qin, *supra* note 82, at 622.

209. Langille, *supra* note 81, at 1510.

is setting the supremacy of WTO law" vis-à-vis RTA law,[210] despite the lack of hierarchical relationships between the WTO and RTAs under international law.[211]

In responding to the criticism ultimately levelled at the AB's ruling in *Brazil-Tyres*,[212] which urged WTO adjudicators "to get in dialogue between . . . courts" so as to avoid such incidents of conflicting obligations, one AB member went on to explain the regime maintenance rationale underlying this ruling in these words: "[I]f the WTO system were to take into account the MERCOSUR, the ASEAN, the African community" or the various other RTAs operating alongside the WTO, "the [WTO] system then . . . would be too easy to evade."[213] Similarly, an EU official made the following comment as he situated the *Brazil-Tyres* ruling in the broader context of increasing regionalism and the threats it poses to the multilateral system of international trade:

> [W]hat happened [in this case] is that the Appellate Body realized that in the future, there will be more regional integration . . . organizations, and that . . . you cannot . . . put in danger the WTO system just because . . . [those] regional integration organizations [are out there]. . . . [I]t is WTO litigation, so in principle, the WTO Appellate Body should give preference to the GATT [Agreement].[214]

In concluding his observations, this same EU official stressed that "if a WTO decision can ignore or put aside a domestic measure, why . . . [is it] not entitled to do the same thing with a regional measure or a regional decision?"[215] As discussed below, this spirit of isolation from and ascendancy over regionalism, aimed at strengthening the multilateral trade system, remained prominent in the more recent dispute that arose at the WTO-RTA substantive legal interface: *Peru-Agricultural Products*.[216]

### *C. The Quest to Sustain Multilateralism Continues:* Peru-Agricultural Products *and the Interpretation or Modification of WTO Law by Means of an RTA*

In *Peru-Agricultural Products,* Guatemala filed a complaint against Peru's Price Range System (PRS), a tariff regime that triggers additional duties on imports of selected agricultural products if their prices fall below a certain

210. Interview with WTO panelist, in Jerusalem (June 6, 2012)*; see also* interview with EU official, in Brussels (July 20, 2012).

211. Qin, *supra* note 82, at 623.

212. For relevant criticism, *see*, *e.g.*, Lavranos, *supra* note 208; Qin, *supra* note 82.

213. Interview with former AB member, in Jerusalem (June 6, 2012).

214. Interview with EU official, in Brussels (July 20, 2012).

215. *Id.*

216. Appellate Body Report, *Peru–Additional Duty on Imports of Certain Agricultural Products*, WT/DS457/AB/R (adopted July 31, 2015) [hereinafter *Peru-Agricultural Products* AB Report].

floor.[217] According to Guatemala, the PRS constituted a "variable import levy" incompatible with Article 4.2 of the WTO Agreement on Agriculture and "other duties or charges" in contradiction to Peru's commitment under Article II of the GATT.[218] However, in an RTA signed by Peru and Guatemala in 2011, the two States agreed that "Peru may maintain its Price Range System"[219] (so that the PRS, claimed to be in violation of WTO law, was allegedly permissible under the RTA). In the RTA, the countries also agreed that "in the event of any inconsistency" between WTO agreements and the RTA, the latter "shall prevail."[220] These RTA provisions were later invoked by Peru when defending the WTO violations associated with the PRS before the WTO DSS, thus raising fundamental questions concerning the substantive legal interaction between WTO and RTA rules, most notably the question of whether an RTA concluded between a subset of WTO Members can "influence or change the interpretation or application of WTO treaty provisions" as they apply between those specific Members.[221]

When deciding the case in 2015, the AB could have avoided delving into these intricate questions by simply following the panel's finding that the RTA between Guatemala and Peru (ratified by Guatemala only) had not yet entered into force; hence, its provisions were not legally binding on the parties.[222] The AB, however, took a considerably different approach. After confirming the panel's finding that Peru violated Article 4.2 of the Agreement on Agriculture and Article II of the GATT,[223] the AB began to tackle head on the issue of the relationship between the respective WTO provisions and the RTA, irrespective of the RTA's status. In so doing, as explained in the proceeding paragraphs, the AB refused to absolve the Peruvian PRS of the WTO violations identified based on any of the RTA-related defenses raised by Peru in a judicial exercise that significantly restricted the possible impact RTA rules could have on WTO obligations by means of either interpretation or modification.

The first defense Peru raised when attempting to exonerate itself of the WTO inconsistencies associated with its PRS was that, under customary rules of interpretation, the WTO provisions at issue should be interpreted in light of the provisions of the RTA between Peru and Guatemala.[224] More specifically, Peru

217. *Id.* ¶ 1.2.

218. *Id.* ¶ 1.4.

219. *Id.* n.92, n.105.

220. *Id.* ¶ 5.109, n.105.

221. Joost Pauwelyn, *Interplay Between the WTO Treaty and Other International Legal Instruments and Tribunals: Evolution After 20 Years of WTO Jurisprudence*, 17 (2016), available at https://ssrn.com/abstract=2731144.

222. Panel Report, *Peru–Additional Duty on Imports of Certain Agricultural Products*, ¶¶ 7.526–7.528, 8.1.f, WT/DS457/AB/R (adopted July 31, 2015) [hereinafter *Peru-Agricultural Products* Panel Report].

223. *Peru-Agricultural Products* AB Report, *supra* note 216, ¶¶ 5.61, 5.108.

224. *Id.* ¶ 5.91.

argued that the RTA concluded with Guatemala—which stipulated in paragraph 9 of Annex 2.3 that Peru may maintain the PRS—was pertinent to the interpretation of the WTO provisions applicable to the case as a "subsequent agreement between the parties," and as other "relevant rules of international law applicable in the relations between the parties" within the meaning of Article 31(3) of the Vienna Convention on the Law of Treaties[225] (VCLT).[226]

The AB dismissed this defense.[227] First, the AB determined that any interpretation of WTO provisions in light of an RTA, either as a "subsequent agreement" or as other "relevant rules" applicable between the parties under VCLT Article 31(3), could not go against the explicit text of the WTO treaty, as was the case here, with WTO rules, as previously interpreted by the AB, explicitly prohibiting Peru's PRS.[228] Second, the AB stated that according to its understanding of VCLT Article 31(1), the WTO treaty, as a multilateral treaty, was to be interpreted "as a whole," in a manner establishing the "common intentions" of all WTO Members and "not just the intentions of some of the parties" such as Peru and Guatemala.[229] To find otherwise "would suggest that WTO provisions can be interpreted differently depending on the Members to which they apply and on the their rights and obligations under an FTA to which they are parties."[230] Finally, the AB placed further limits on the interpretation of WTO provisions with reference to an RTA's rules by stressing that in order to inform the WTO interpretative process, such "other rules" must be "*relevant*," that is, "bearing specifically upon the interpretation" of the WTO provisions at issue.[231] Hence, rather than examining whether the RTA provisions were "rules applicable in the relations between the parties," the AB chose to focus its examination on whether the provisions could be considered "relevant" to the interpretation of the WTO articles under discussion.[232] In this respect, the AB found that by stating that Peru "'may maintain' its PRS," the RTA between Peru and Guatemala provided no "'relevant' interpretative guidance" to the construction of Article 4.2 of the Agreement on Agriculture or to the interpretation of GATT Article II.[233]

Following this line of reasoning, the AB rejected Peru's first RTA-based defense. In so doing, the AB significantly raised the bar for an RTA to be available

225. *Id.* ¶¶ 5.91, 5.98.

226. Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT or Vienna Convention].

227. *Peru-Agricultural Products* AB Report, *supra* note 216, ¶ 5.118.

228. *Id.* ¶¶ 5.93–5.94.

229. *Id.* ¶ 5.95.

230. *Id.* ¶ 5.106.

231. *Id.* ¶ 5.101.

232. James Mathis, *WTO Appellate Body, Peru–Additional Duty on Imports of Certain Agricultural Products, WT/DS457/AB/R, 20 July 2015*, 43 LEGAL ISSUES ECON. INTEGRATION 97, 100 (2016).

233. *Peru-Agricultural Products* AB Report, *supra* note 216, ¶ 5.103 (citation omitted).

for the purpose of interpreting WTO provisions[234] in what appears to be a clear attempt by the AB, in its heightened role as the guardian of the WTO legal system, to protect the coherence of the multilateral trade rules and prevent the fragmented application of those rules in times of RTA proliferation.

The AB exhibited a similarly exclusionary approach toward RTAs when it turned to address the second defense implicit in Peru's arguments, according to which the provisions of the RTA permitting it to maintain the WTO-inconsistent PRS modified the WTO provisions at issue *inter se*, that is, within the bilateral relations of Peru and Guatemala, in accordance with VCLT Article 41 on *inter se* treaty modifications.[235] Importantly, prior to addressing this defense, the AB concluded, based on its reading of several RTA provisions, that there was an "ambiguity" as to whether the RTA at all allowed Peru to maintain the WTO-inconsistent PRS.[236] This conclusion, in turn, could end the entire discussion. Nevertheless, the AB chose to continue its analysis, "assuming *arguendo*" that the RTA provisions allowed Peru to maintain the PRS.[237] In following this path, the AB seized the opportunity to declare that Peru could not modify its WTO commitments through the RTA and, more generally, that WTO Members' ability to contract out of their WTO obligations via RTAs was not governed by the general provisions of the VCLT, such as Article 41, but by the terms of WTO law itself.

And so, in rejecting Peru's second defense, the AB found that VCLT Article 41, which allows a subset of members to a multilateral treaty to modify the treaty *inter se* through a subsequent agreement, could not serve as a basis for two WTO Members to modify WTO rules via an RTA and to permit an otherwise WTO-inconsistent measure to hold between themselves. In the words of the AB, the WTO contains its own provisions for amendments, waivers, or exceptions for RTAs, "which prevail over the general provisions of the Vienna Convention."[238] As a result, the AB determined that "the proper routes" for assessing the lawfulness of RTA provisions departing from certain WTO rules "are the WTO provisions that permit the formation of regional trade agreements"—in this case, GATT Article XXIV, which Peru did not invoke.[239]

234. Mathis, *supra* note 232, at 101; Pauwelyn, *supra* note 221, at 20–21, 26.

235. Note that this defense was explicitly raised by Peru before the panel (*see Peru-Agricultural Products* AB Report, *supra* note 216, ¶ 5.111). However, Peru focused its defense before the AB on the "interpretation" of WTO provisions, as discussed above. Yet, as the AB rightly observed, on appeal as well Peru implicitly argued that the RTA concluded with Guatemala had "modified" its obligations toward Guatemala (*Id.* ¶¶ 5.96-5.97). This defense as well was consequently addressed in the AB's ruling.

236. *Peru-Agricultural Products* AB Report, *supra* note 216, ¶¶ 5.109–5.110.

237. *Id.* ¶ 5.111.

238. *Id.* ¶ 5.112.

239. *Id.* ¶ 5.113.

At this juncture, and although Peru did not raise Article XXIV as a defense for its WTO-inconsistent PRS,[240] the AB went further to reaffirm the strict two-prong test developed in *Turkey-Textiles,* according to which Article XXIV could justify a WTO-inconsistent measure provided that: (1) the measure at issue was introduced upon the formation of an RTA that fully meets the requirements of Article XXIV and (2) the formation of the RTA would be prevented if the introduction of the measure was not allowed.[241] In recounting this test, however, the AB did not address the different contexts of the two cases, namely, the fact that in *Turkey-Textiles*, "the test was applied to set the conditions for validating a measure that violated a *third party's* right in the WTO," whereas in *Peru-Agricultural Products*, the test was applied to a measure that violated WTO law "only between the *regional members* themselves."[242] Instead, what the AB did on this occasion, when faced with a measure that was not only WTO-inconsistent but which raised hurdles to regional trade and placed the party to the RTA in a less favorable position as compared with other WTO Members, was to reinforce its strict reading of GATT Article XXIV. This the AB did by stressing that Article XXIV is aimed at "facilitating trade and closer integration" among RTA parties, and thus cannot be interpreted "as a broad defence" for measures in RTAs "that roll back on Members' rights and obligations under the WTO covered agreements."[243]

The above judicial move taken by the AB in *Peru-Agricultural Products* is remarkable. In effect, the AB suggested with this interpretative act that "WTO Members had contracted out of Article 41 of the Vienna Convention through the WTO's own rules on amendments and exceptions,"[244] and "that, *even* where trade with *other* WTO Members is *unaffected*, any attempt by two or more Members to modify WTO obligations among themselves must pass through the relevant WTO legal architecture."[245] As Howse and Langille have stated when pointing to the systemic goals lurking behind this judicial course of action:

> This arguably goes beyond the obvious purpose of ensuring that . . . [RTAs] do not lead to more restrictive trade with third countries, or to ensuring that they in general result in freer trade, *to assuring the unity and integrity of the WTO as a legal system* . . . Here, the Appellate Body adopts an approach to *preserve the relative autonomy and universality of a multilateral regime under pressure from "spaghetti- bowl" fragmentation*.[246]

240. *Id.* ¶ 5.114.

241. *Id.* ¶ 5.115.

242. Mathis, *supra* note 232, at 103-04 (emphasis original).

243. *Peru-Agricultural Products* AB Report, *supra* note 216, ¶ 5.116.

244. Gregory Shaffer & Alan L. Winters, *FTA Law in WTO Dispute Settlement: Peru-Additional Duty and the Fragmentation of Trade Law*, 16 WORLD TRADE REV. 303, 320 (2017).

245. Howse & Langille, *supra* note 58, at 678*; see also* Zang, *supra* note 78, at 53.

246. Howse & Langille, *supra* note 58, at 678 (emphasis added).

Along similar lines, the AB's controversial interpretative exercise,[247] as delineated above, was referred to by Pauwelyn as the AB's "defensive attempt to shelter the WTO treaty from outside (FTA) attack."[248] Arguably, since the WTO legal text does not explicitly prohibit *inter se* modifications, the AB could have opted for other interpretations that recognize Members' contractual freedom under the general provisions of the VCLT to amend and update the trade rules applying in their bilateral relations.[249] The AB in *Peru-Agricultural Products*, however, "did not leave any room" for the application of those provisions "in the WTO legal space with respect to RTAs."[250] Instead, the AB made it very clear that while the WTO legal order forms part of international law, it would be "misplaced to . . . interpret the question of derogability … of WTO law through the lens of the general rules" of the VCLT and to assume, in consequence, that WTO commitments "can seamlessly be amended bilaterally between two WTO members" via an RTA.[251] As Tietje and Lang have noted, any other interpretative approach would have gone "against the normative duty of the Appellate Body to protect the integrity and coherence of the WTO's legal system."[252]

Thus, *Peru-Agricultural Products* and the judicial efforts it encompasses fit perfectly with the RTA-related cases reviewed earlier, all which addressed questions that emerge at the substantive legal interface between WTO law and RTAs. Common to these and other RTA-related disputes (involving safeguard measures, among others)[253] is the DSS's attempt to reinforce the stature of the WTO vis-à-vis RTAs, to uphold its objectives and principles (most notably nondiscrimination), and to augment the stability of the multilateral trade rules at a time when regional agreements and negotiations thrive and the WTO politico-diplomatic process struggles to overcome its stagnation. In so doing, the DSS, led by the AB, has consistently worked to secure compliance with WTO obligations and to make deviations from those obligations more difficult—not least by limiting the scope of legal exceptions and defenses that may offer shelter to the WTO-inconsistent measures adopted by Members in the context of their RTA-related activities. The DSS has likewise displayed "no interest in treaty interpretations that could accommodate or facilitate harmonious co-existence with

247. For a critique of this interpretative move and its legal consequences, see Pauwelyn, *supra* note 221, at 21–24; Shaffer & Winters, *supra* note 244, at 320-21; Zang, *supra* note 78, at 52–55.

248. Pauwelyn, *supra* note 221, at 22.

249. Shaffer & Winters, *supra* note 244, at 322; Sherzod Shadikhodjaev, *The "Regionalism vs. Multilateralism" Issue in International Trade Law: Revisiting the Peru-Agricultural Products Case*, 16 CHINESE J. INT'L L. 109, 120 (2017).

250. Shadikhodjaev, *supra* note 249, at 120.

251. Christian Tietje & Andrej Lang, *Community Interests in World Trade Law, in* COMMUNITY INTERESTS ACROSS INTERNATIONAL LAW 191, 207 (Eyal Benvenisti & Georg Nolte eds., 2018).

252. *Id.*

253. For a discussion of those cases, *see* de Mestral, *supra* note 78, at 791–94; Langille, *supra* note 81, at 1509–10.

regional regimes."[254] Instead, it has maintained a strict separation between the multilateral and regional trading systems, despite the fact that the latter are explicitly recognized in WTO agreements.

Similar judicial efforts to those envisioned at the WTO-RTA substantive legal nexus, as we will now see, have been introduced at the complementary WTO-RTA jurisdictional intersection. At this intersection, panels, together with the AB, have sought to uphold the WTO DSS's judicial authority and, thereby, the system's ability to enforce WTO substantive legal commitments. With a view toward achieving these ends, panels and the AB have not only refused to either defer to or refer to RTA jurisprudence and proceedings; they have also significantly constrained the extent to which Members may contract out of the DSU via RTAs in ways that compromise the DSS's jurisdiction and Members' right to WTO adjudication.

## IV.
## SUSTAINING MULTILATERALISM AT THE WTO-RTA JURISDICTIONAL NEXUS

Woven into the jurisprudence generated at the WTO-RTA substantive legal nexus is an interrelated strand of jurisprudence, dealing with the jurisdictional friction between the WTO and RTAs and the effects of regional dispute settlement mechanisms on the multilateral dispute settlement apparatus, the WTO DSS. At this jurisdictional juncture, the coexistence of the WTO DSS alongside multiple RTA dispute settlement fora raises various conundrums. Most prominent among them, perhaps, is the possibility that a dispute will be brought under both the WTO and RTA adjudicative mechanisms.[255] Since considerable overlap exists between the WTO agreements and RTAs—with the latter often referring to the WTO explicitly or incorporating substantial portions of WTO treaty language[256]—it follows that "a legally and/or factually identical dispute," or some of its aspects, could be brought before either or both the multilateral and the regional dispute settlement venues.[257] The overlapping and competing jurisdictions of these adjudicative mechanisms may, in turn, lead to forum shopping, waste of resources, legal uncertainty, and conflicting decisions, which might ultimately intensify the fragmentation of international trade law.[258]

254. Howse, *supra* note 10, at 75.

255. *World Trade Report 2011*, *supra* note 71, at 173; Howse & Langille, *supra* note 58, at 679.

256. For an overview, see Todd Allee, Manfred Elsig & Andrew Lugg, *The Ties Between the World Trade Organization and Preferential Trade Agreements: A Textual Analysis*, 20 J. INT'L ECON. L. 333 (2017).

257. Howse & Langille, *supra* note 58, at 679; *see also World Trade Report 2011*, *supra* note 71, at 173.

258. Lanyi & Steinbach, *supra* note 77.

Awareness of this jurisdictional overlap and the possibility of parallel proceedings at the multilateral and regional levels has prompted State parties to incorporate into RTAs a number of approaches as to how these agreements regulate the relationship and potential jurisdictional conflicts between their own dispute settlement mechanism and that of the WTO.[259] The most common of these approaches takes the form of a forum exclusion clause (also known as a "fork-in-the-road" clause), which allows the party initiating the dispute to choose between the multilateral or the RTA forum; however, once that party has initiated the dispute in one forum, the other forum is no longer available to it.[260]

In the WTO, on the other hand, Article 23 of the DSU, entitled "Strengthening of the Multilateral System," mandates that WTO Members shall have recourse to the rules and procedures of the DSU when seeking redress for a violation of the WTO covered agreements.[261] The AB elaborated that this provision "lays down a fundamental obligation of WTO Members" to settle disputes under the covered agreements in accordance with the DSU and "establishes the WTO dispute settlement system as the exclusive forum for the resolution of such disputes."[262] While DSU Article 23 does not explicitly state that the WTO DSS is hierarchically superior to RTA dispute settlement mechanisms,[263] neither Article 23 nor any other DSU provision sets out rules on how to resolve cases of jurisdictional overlap between the WTO and RTAs. Likewise, there are no rules as to whether the WTO DSS should relinquish its jurisdiction on certain occasions in order to overcome the emerging fragmentation issues between the multilateral and regional dispute settlement systems.[264] As one AB member described:

> There is nothing . . . in the DSU which tells us that you have to take [regional dispute settlement fora] into consideration . . . . Not only that, but you have a clause of exclusiveness, that any dispute that falls within the [WTO] agreements should be exclusively decided within the system. That is not what States do, [however,] because all these cases of NAFTA—Softwood Lumber, Soft Drinks, etc. . . . are played like games of ping-pong between . . . NAFTA and [the WTO] . . . . So, in a way, that is the great danger of the free trade areas . . . . [T]hey are taking out the substance of the general system. And [in] the general system, we . . . have a rule of

259. *World Trade Report 2011*, *supra* note 71, at 173.

260. *Id.*

261. *See* art. 23 of the DSU.

262. Appellate Body Report, *United States–Continued Suspension of Obligations in the EC–Hormones Dispute*, ¶ 371, WT/DS320/AB/R (adopted Nov. 14, 2008) [hereinafter *U.S.-Continued Suspension*].

263. Howse & Langille, *supra* note 58, at 679.

264. Songling Yang, *The Solution for Jurisdictional Conflicts Between the WTO and RTAs: The Forum Choice Clause*, 23 MICH. ST. INT'L L. REV. 107, 110 (2014); *see also* Songling Yang, *The Key Role of the WTO in Settling its Jurisdictional Conflicts with RTAs*, 11 CHINESE J. INT'L L. 281, 285-287 (2012).

exclusiveness.[265]

In this state of affairs, and despite the negative effects associated with the possible misuse of the overlapping dispute settlement mechanisms, in cases featuring aspects that "spill over" between a regional forum and the DSS, WTO adjudicators have shifted much of their efforts to asserting the autonomy, "if not a certain kind of supremacy. . . of the WTO dispute settlement system."[266] Thus, seeking to avert potential interference with the integrity of WTO adjudication and rule enforcement against the spread of regional trade arrangements and dispute settlement fora, WTO panels, like the AB, have consistently manifested an unwillingness to engage in discourse with RTA adjudicative systems, defer to their judgments, or suspend proceedings pending the outcome of a related dispute.[267] Rather than pursuing such routes or otherwise applying comity toward international fora with overlapping jurisdictions on trade matters, WTO adjudicators, in all relevant RTA-related cases thus far, have chosen to give precedence to their own jurisdiction—that is, to their own power to look into claims, undertake legal analysis, and deliver a WTO judgment.[268] In so doing, they have established a distinctively high bar for RTA parties to reach before they can waive their right to WTO adjudication.

As one private attorney and former State delegate put it, the unequivocal "message" emerging from the WTO cases exhibiting jurisdictional linkage between the WTO and RTAs is that "[i]f there is concurrent jurisdiction, you [should] come here [to the WTO] . . . . Even though you may litigate [your case] . . . in a regional tribunal, you are welcome here anytime you want." In fact, this informant added, WTO panels and the AB have sent an even stronger message: "Whenever the coin falls on our table, we're gonna [sic] take it. And only in very extreme situations, we're gonna [sic] drop the coin to a regional tribunal."[269]

### *A. Taking Up the WTO-RTA Jurisdictional Challenge:* Argentina-Poultry *and the Ensuing Cases*

The first dispute to raise the jurisdictional tension between the WTO and RTAs was *Argentina-Poultry*,[270] where the problem of sequential proceedings

265. Interview with AB member, in Geneva (Apr. 19, 2012). This point was also stressed by other interviewees. *See, e.g.*, interview with EU official, in Brussels (July 20, 2012).

266. Howse, *supra* note 10, at 73, 75.

267. *Id.* at 73-74; Caroline Henckels, *Overcoming Jurisdictional Isolationism at the WTO-FTA Nexus: A Potential Approach for the WTO*, 19 EUR. J. INT'L L. 571, 576–579 (2008).

268. On this conceptualization of "jurisdiction," *see* Andrew D. Mitchell, *The Legal Basis for Using Principles in WTO Disputes*, 10 J. INT'L ECON. L. 795, 821 (2007) (referring to jurisdiction as the power of WTO panels and the AB "to hear claims and proceedings, examine and determine the facts, interpret and apply the law, . . . and declare judgments" (citation omitted)).

269. Interview with former Mexican official, in Geneva (July 12, 2012).

270. Panel Report, *Argentina–Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R (adopted May 19, 2003) [hereinafter *Argentina-Poultry*].

(and, consequently, conflicting decisions) with respect to the same measure at the regional and multilateral fora presented itself. In this case, Brazil brought a WTO complaint against certain Argentine antidumping duties that it had previously—and unsuccessfully—challenged before a MERCOSUR tribunal.[271] In light of the prior MERCOSUR proceedings, Argentina raised a preliminary objection asking the WTO panel to refrain from ruling on Brazil's claim. Argentina argued that Brazil had breached its obligation to act in "good faith" by initiating WTO dispute settlement proceedings against the same antidumping measure after losing the case at the regional level.[272] Argentina also invoked the principle of estoppel, arguing that Brazil, given its actions in MERCOSUR, should be precluded from challenging the same measure before the WTO DSS.[273] In response, Brazil argued that even if the measure challenged in both cases was the same, the dispute before the MERCOSUR tribunal was grounded on a different legal basis from the dispute before the WTO panel, and that in bringing the case to the WTO, Brazil was simply exercising its rights under the DSU.[274]

Siding with Brazil, the panel dismissed Argentina's preliminary objection in its entirety. As to good faith, the panel observed, citing previous AB jurisprudence, that two conditions must be satisfied to support a finding that a Member failed to act in good faith: first, there must be a violation of a substantive provision of the WTO agreements, and second, there must be something "more than [a] mere violation,"[275] (e.g., an "egregious breach").[276] However, because Argentina did not allege a violation of any substantive WTO obligation, there was no basis for concluding that Brazil violated the principle of good faith in initiating the present proceedings.[277]

Similarly, the panel denied Argentina's estoppel plea, noting that there was "no evidence on the record that Brazil made an express statement that it would not bring WTO dispute settlement proceedings in respect of measures previously challenged through MERCOSUR."[278] In this respect, the panel pointed, *inter alia*, to the fact that the MERCOSUR choice-of-forum provision to which Argentina referred in its arguments (noting that bringing the dispute to the RTA exhausted WTO options, and vice versa) was not yet in force.[279] The panel further reasoned that Brazil's choice not to pursue WTO proceedings after previous MERCOSUR

271. *Id.* ¶ 7.17.

272. *Id.* ¶¶ 7.17–7.18, 7.34.

273. *Id.* ¶¶ 7.18, 7.37.

274. *Id.* ¶¶ 7.22–7.24. Note that the dispute before the WTO DSS offered an assessment of Argentina's anti-dumping duties in light of rules under the WTO Agreement on Anti-Dumping that do not exist under MERCOSUR.

275. *Id.* ¶¶ 7.35-7.36.

276. Howse & Langille, *supra* note 58, at 681.

277. *Argentina-Poultry*, *supra* note 270, ¶ 7.36.

278. *Id.* ¶ 7.38.

279. *Id.*

rulings did not mean that Brazil implicitly waived its right to a judgment under the DSU in the present case.[280]

Hence, despite the binding effect of the MERCOSUR ruling on the parties, the WTO panel's "default reaction," as a former WTO official described it, was that "unless there . . . [was] a very clear legal basis, . . . [it] w[ould] not decline jurisdiction."[281] Having insisted on its jurisdiction, the panel then addressed Argentina's alternative argument in this case. Argentina contended that if Brazil were entitled to bring the case to the WTO, the panel should be "bound" by the earlier MERCOSUR tribunal's ruling on the measure at issue.[282] According to Argentina, the MERCOSUR ruling formed part of the normative framework to be applied by the panel pursuant to VCLT Article 31(3), which requires that other "relevant rules of international law applicable in the relations between the parties" be taken into account for the purpose of treaty interpretation.[283] The panel rejected this argument as well, explaining that in raising its claim, Argentina was not asking the panel to "interpret specific provisions of the WTO agreements in a particular way" but to actually "rule in a particular way"—something the panel believed it was not authorized to do.[284] Furthermore, in a rather critical tone, the panel concluded by stating that WTO panels "are not even bound to follow rulings contained in adopted WTO panel reports, so we see no reason at all why we should be bound by the rulings of non-WTO dispute settlement bodies."[285]

As Langille has noted, "[h]ere the panel asserted the hierarchy of WTO dispute settlement proceedings."[286] In its effort to entrench the authority of the WTO DSS vis-à-vis regional adjudicative mechanisms, the panel in *Argentina-Poultry* expressed disinterest in mutual accommodation of DSU and RTA proceedings and made it eminently clear that "if any rule was violated by refusal to take a decision of a MERCOSUR tribunal into account" in WTO proceedings, "it was that of MERCOSUR" and not the DSU.[287]

The panel ruling in *Argentina-Poultry* resonates with the decision rendered in the later *U.S.-Softwood Lumber* dispute between Canada and the United States.[288] In the latter case, the WTO panel again showed "no sense of . . . 'judicial comity'" to earlier Canada-United States binational panels under Chapter 19 of NAFTA, which dealt with essentially the same issues related to antidumping

280. *Id.*

281. Interview with former WTO legal officer, in Geneva (July 16, 2012).

282. *Argentina-Poultry*, *supra* note 270, ¶¶ 7.17, 7.40.

283. *Id.* ¶¶ 7.18, 7.40.

284. *Id.* ¶ 7.41.

285. *Id.*

286. Langille, *supra* note 81, at 1512.

287. de Mestral, *supra* note 78, at 811.

288. Panel Report, *United States–Investigation of the International Trade Commission in Softwood Lumber from Canada, Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/RW (adopted May 9, 2006) [*U.S.-Softwood Lumber* Panel Report].

and countervailing duties that the United States imposed on Canadian lumber.[289] While Canada sought to use the decisions of the NAFTA panels to support its WTO complaint, the WTO panel did "not make a single reference to the concurrent NAFTA Chapter 19 proceedings,"[290] and only agreed to include them in a footnote, in which the panel explained that Canada's references to these decisions were inappropriate.[291]

The panel's decision in *Argentina-Poultry* likewise closely corresponds to the spirit of the AB's ruling in *Brazil-Tyres.* In this case, as shown earlier in the Article, the AB was unwilling to consider the MERCOSUR tribunal's ruling in its interpretation of the GATT Article XX chapeau or to allow Brazil to premise its actions on this non-WTO legal decision. Rather than apply judicial comity toward the MERCOSUR tribunal, the AB chose to uphold its own authority to interpret and pass judgment on the relevant trade rules.[292] Alluding to the AB's choice and its underlying goals, while situating *Brazil-Tyres* in the broader reality of RTA proliferation, a WTO practitioner involved in the case stated:

> [D]eal[ing] with regional trade arrangements . . . is a fundamental issue facing the [WTO dispute settlement] system. And the reason that it hasn't become more of an issue is that we don't have a vibrant dispute settlement process operating under the . . . [regional trade] systems, but as soon as we have a vibrant [regional] dispute settlement process [the problem facing the WTO DSS will intensify] . . . . [So] the Appellate Body [in *Brazil-Tyres*] is looking ahead and . . . is setting the primacy [of the WTO DSS] so that they never have to deal with it when it happens.[293]

Elaborating further, this same interviewee stressed that the growing friction between RTAs and the WTO is "an unresolved issue that States . . . are not prepared to address . . . in the WTO."[294] The AB, however, "does have to address" this friction whenever a dispute arises in the WTO-RTA context, and then it does so "in a hierarchic[al] way . . . [suggesting that] 'the Appellate Body . . . is the boss.'"[295] Drawing a comparison between the AB and the International Court of Justice (ICJ), this interviewee added: "Look at the International Court of Justice when other dispute settlement systems were developing, the presidents started to cry out . . . '[W]e're the premier, we're the prior one'. . . . I think it's the nature of a tribunal to assert its jurisdiction."[296]

This position was all the more evident in the *Mexico-Soft Drinks* dispute, where both the panel and the AB affirmed their authority to decide a case even

289. Joost Pauwelyn, *Adding Sweeteners to Softwood Lumber: The WTO-NAFTA "Spaghetti Bowl" is Cooking*, 9 J. INT'L ECON. L. 197, 202 (2006); *see also* de Mestral, *supra* note 78, at 798.

290. Pauwelyn, *supra* note 289, at 202.

291. *U.S.-Softwood Lumber* Panel Report, *supra* note 288, n.12.

292. Langille, *supra* note 81, at 1511.

293. Interview with WTO panelist, in Jerusalem (June 6, 2012).

294. *Id.*

295. *Id.*

296. *Id.*

after an RTA's dispute settlement procedures had been invoked.[297] In this case, discussed earlier in the context of Mexico's GATT Article XX(d) defense, Mexico argued, as a preliminary matter, that the WTO panel should decline to exercise its jurisdiction to hear the present dispute. Mexico reasoned that the case was "inextricably linked to a broader dispute" over trade in sugar between the parties under NAFTA, where Mexico had already requested a panel, and which constituted the appropriate forum for resolving the larger United States-Mexico "sugar war."[298] Importantly, although NAFTA includes a fork-in-the-road provision stating that once dispute settlement procedures are initiated under the NAFTA or the WTO, that forum is to be used to the exclusion of the other, Mexico did not place this provision before the WTO panel, nor did it suggest that there were any other jurisdictional impediments to the panel hearing the case.[299] Instead, it accepted that the panel "had the authority to rule on the merits" of the United States' claims, but argued that the panel, as an international adjudicative body, possessed the "implied jurisdictional powers" to refrain from ruling in the circumstances of the present case.[300]

In a preliminary ruling, the panel rejected Mexico's request.[301] One of the panelists sitting on the bench elaborated on this rejection, while shedding light on the panel's resolve to exercise jurisdiction in this RTA-related dispute:

> [W]e had to respond [to Mexico's request that the panel refrain from exercising jurisdiction] and we had to respond in a clear and sound way. But there was no hesitation . . . in the panel as to whether we had jurisdiction or not in this case. [The Mexicans] . . . were in breach of a WTO obligation. And . . . that is what we were examining. What was behind that is something that we've always tried to separate.[302]

Following this logic, and based on its reading of several DSU provisions, the panel ultimately found that "under the DSU, it had no discretion to decide whether or not to exercise its jurisdiction in a case properly before it."[303] The AB, in turn, upheld the panel's finding and the thrust of its legal reasoning. While recognizing that panels do have certain implied powers that are inherent in their adjudicative function, such as the power to determine whether they have jurisdiction in a given case and the scope of that jurisdiction,[304] the AB held that despite these powers, the text of the DSU *requires* panels to make a ruling on the merits of a dispute once jurisdiction has been validly established.[305] Hence, reluctant to use the inherent discretionary power of WTO adjudicators and cooperate with the

297. Langille, *supra* note 81, at 1512.

298. *Mexico-Soft Drinks* AB Report, *supra* note 126, ¶¶ 40, 42, 54.

299. *Id.* ¶¶ 44, 54.

300. *Id.* ¶ 44.

301. *Id.* ¶ 4.

302. Interview with WTO panelist, in Geneva (July 24, 2012).

303. *Mexico-Soft Drinks* Panel Report, *supra* note 133, ¶ 7.1.

304. *Mexico-Soft Drinks* AB Report, *supra* note 126, ¶ 45.

305. *Id.* ¶¶ 48-53.

regional dispute settlement forum, the AB in *Mexico Soft-Drinks* chose to follow a "strict textual" interpretation of the DSU.[306]

The AB's textual reading of the treaty took the following path. First, the AB reasoned that a panel's refusal to exercise jurisdiction in a case properly before it would breach its obligation under DSU Article 11 to "make an objective assessment of the matter before it."[307] Turning to DSU Article 23, the AB then argued for the "entitlement" of Members to a WTO ruling, derived from WTO Members' obligation to resort to the DSS when seeking to resolve a dispute under the WTO covered agreements.[308] According to the AB, as paraphrased by a private attorney, "[n]ot only do you [as a WTO Member] have an obligation to use the [WTO dispute settlement] system, but you are entitled to resolution under this system . . . . [Y]ou are entitled to that resolution as much as you are obliged to bring the problem to us."[309] In light of this reading, the AB found that if a panel were to decline jurisdiction over a particular dispute, it would effectively "diminish the rights" of a WTO Member under the DSU,[310] an act explicitly prohibited in Articles 3.2 and 19.2 of the DSU.[311] As a result, the AB concluded by reiterating the panel's statement that "a WTO panel 'would seem . . . not to be in a position to choose freely whether or not to exercise its jurisdiction'" in a case properly before it.[312]

Notably, this strict textual interpretation of the DSU differs significantly from the flexible and expansive interpretative approach to the DSU taken by the AB in other WTO disputes. For example, in *U.S.-Shrimp*, it was the AB that heavily criticized the panel's interpretation of DSU Article 13 as "too literal" and "unnecessarily technical and formal,"[313] and which ultimately went beyond the DSU treaty text to allow *amicus curiae* submissions in WTO proceedings.[314] Likewise, in *U.S.-Continued Suspension*, the AB did not hesitate to broadly construe Article 21.5 of the DSU as allowing complainants *and defendants* to initiate WTO compliance proceedings, in contrast to the long-standing

306. Henckels, *supra* note 267, at 578.

307. *Mexico-Soft Drinks* AB Report, *supra* note 126, ¶¶ 50-51; *see also Mexico-Soft Drinks* Panel Report, *supra* note 133, ¶¶ 7.6-7.8.

308. *Mexico-Soft Drinks* AB Report, *supra* note 126, ¶ 52; *see also Mexico-Soft Drinks* Panel Report, *supra* note 133, ¶ 7.9.

309. Interview with private attorney, in Geneva (Apr. 23, 2012); *see also* interview with US official, in Geneva (July 17, 2012) (stating that according to the AB, "if somebody brings. . . [a dispute] to the WTO, they have the right to have it resolve here").

310. *Mexico-Soft Drinks* AB Report, *supra* note 126, ¶ 53; *see also Mexico-Soft Drinks* Panel Report, *supra* note 133, ¶ 7.9.

311. Both Article 3.2 and Article 19.2 of the DSU mandate that panel and AB rulings "cannot add to or diminish the rights and obligations provided in the covered agreements."

312. *Mexico-Soft Drinks* AB Report, *supra* note 126, ¶ 53.

313. Appellate Body Report, *United States–Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 107, WT/DS58/AB/R (adopted Nov. 6, 1998).

314. *Id.* ¶ 110.

understanding among WTO Members that only complainants may initiate such proceedings.[315]

Moreover, the interpretive methodology the AB followed in *Mexico-Soft Drinks*, which involved "rigidly sticking" to the text and "emphasizing what it perceived to be imperatives in the DSU," contradicts the AB's flexibility in other cases involving non-WTO law, institutions, and values, where the AB proved willing to consider linkages between the WTO and other parts of the international legal system, resort to teleological interpretations, and engage in complex normative trade-offs.[316] Thus, in "trade-and" cases such as *U.S.-Shrimp* and *U.S.-Clove Cigarettes*, which involved nontrade social values of environmental protection and public health, the AB went out of its way to interpret the relevant WTO provisions in light of the broad "object and purpose" of the WTO treaty, while introducing a balancing test into the analysis of the competing norms and values at stake.[317] In the RTA-related dispute of *Mexico-Soft Drinks*, however, the AB chose not to "test its interpretation of the text against an overall inquiry into the object and purpose of the DSU or the broader *telos* of state-state dispute settlement."[318] Nor did the AB explicitly examine or weigh "the competing norms at issue: textualism and its role in maintaining the integrity of the WTO's adjudicative [system] . . . *vis-à-vis* the desirability of flexible accommodation of unanticipated and exceptional circumstances as a means of maintaining the effective administration of justice."[319] In *Mexico-Soft Drinks*, the AB, like the panel, simply prioritized the former interest over the latter.

But as one WTO official involved in the appellate proceedings in *Mexico-Soft Drinks* admitted when discussing the textual approach taken by WTO adjudicators: "Of course . . . you are never 100 percent textual, there will always be some of your policy preferences creeping in."[320] Indeed, as I argue here, the textual approach followed in *Mexico-Soft Drinks* and the interpretative outcomes it yielded clearly attest to the policy preferences and objectives the panel and the AB pursued in this case—most notably, sustaining the operation, credibility, and authority of the WTO and its DSS as the central forum for resolving trade disputes between Member States.[321] Along these lines, another WTO official participating in the *Mexico-Soft Drinks* appellate proceedings openly stated that the main goal underlying the finding that a WTO panel does not have discretion to decline to rule in a case properly before it was:

315. *U.S.-Continued Suspension*, *supra* note 262, ¶ 368.

316. Henckels, *supra* note 267, at 591.

317. Shlomo Agon, *supra* note 9, at 687-688.

318. Henckels, *supra* note 267, at 591.

319. *Id.*

320. Interview with former WTO official, in Geneva (July 16, 2012).

321. *See, e.g.*, interview with former Mexican official, in Geneva (July 12, 2012) (alluding to the will of WTO adjudicators in *Mexico-Soft Drinks* "to keep [the WTO] working" and to maintain the DSS as "the main tribunal for addressing state versus state disputes").

> [To] maintain[] the effectiveness of the [WTO dispute settlement] system, sort of protecting the integrity of this system, because otherwise . . . if panels were to decline jurisdiction, then . . . any type of messy controversy . . . at the regional level would certainly paralyze this system. And . . . [there was] recognition that one of the reasons why this [dispute settlement] system [in the WTO] gets good reviews, generally, is that it works. It eventually . . . delivers a result and doesn't get paralyzed.[322]

Going further in elaborating on the issue of the integrity and credibility of the DSS, the same official stated:

> [A]ny decision in which a panel says, "We can't decide this case because of x, y, or z" . . . may lead to a loss of credibility . . . . [O]f course, there may be cases in which . . . a panel intervenes where it shouldn't intervene, and so there's a loss of credibility for a reason. But there's the risk on the other side as well. If a panel were quick to say, "Well . . . something is happening over there [at the regional level] and maybe we should wait" . . . that might hurt the credibility of the [WTO dispute settlement] system because . . . the system would not be doing what it was asked to do, which is to resolve disputes.[323]

Against this backdrop, this official concluded that the jurisdictional ruling in *Mexico-Soft Drinks* "was the safe result"; "the opposite result would have been potentially . . . more problematic, because you . . . open a door and you don't know what would . . . happen[]."[324]

Continuing along this path, another WTO legal officer who worked on the *Mexico-Soft Drinks* case commented that if the DSS were to find that a panel with validly established jurisdiction can nevertheless exercise "discretion" as to whether to take jurisdiction over a complaint of WTO violation, "this kind of [discretionary] power would be[come] so open-ended that it would be unpredictable when a panel would . . . actually exercise jurisdiction," which is contrary to the DSS's explicit aim of "providing security and predictability to the multilateral trading system."[325] The same official went on to emphasize that "any

322. Interview with WTO official, in Geneva (Apr. 18, 2012). Echoing a similar view, a former Mexican state delegate involved in *Mexico-Soft Drinks* noted the following when alluding to the goal guiding the AB's and the panel's insistence on the WTO DSS's jurisdiction in this case: "[If you] think about the politics of the WTO, you have three areas—administration of treaties, negotiation, and dispute settlement. Which one is working? Dispute settlement. Which one is having some problems? Negotiations…. So certainly, you don't want to erode the one [area in the WTO] that is working properly." Interview with former Mexican official, in Geneva (July 12, 2012).

323. Interview with WTO official, in Geneva (Apr. 18, 2012). A Brussels-based state official similarly noted that "[t]hrowing a case out is a pretty big thing to do for the Appellate Body" as it may adversely affect its integrity. "For the Appellate Body. . . it is a very big thing because you have a sovereign state who comes there with an international dispute,. . . and you are basically sending it home with nothing." Interview with EU official, in Brussels (July 20, 2012).

324. Interview with WTO official, in Geneva (Apr. 18, 2012).

325. Interview with former WTO legal officer, in Geneva (July 16, 2012). Note that China, a third party in *Mexico-Soft Drinks*, had raised a similar argument to which the AB referred twice in its decision. According to China: "[A] WTO panel does not have an implied power to refrain from performing its 'statutory function'…. [I]f a panel that is 'empowered and obligated' to assist the DSB in the settlement of a dispute declines to exercise jurisdiction, such a decision would create legal

tribunal . . . faced with a trade-off like . . . [the one faced by the DSS in *Mexico-Soft Drinks*] would probably assert jurisdiction . . . . [T]hat is the nature of international tribunals, of any tribunal, you don't give up jurisdiction easily."[326] Offering an additional, related insight, a different WTO legal officer stressed: "If countries continue to bring disputes to this forum, that is what keeps this system going. The system lives only as long as States bring conflicts . . . . If States . . . [took] their trade disputes to competing adjudicating fora, that would affect the relevance of this system."[327]

These observations aptly reveal the judicial policy informing the interpretative stance of WTO adjudicators in *Mexico-Soft Drinks*. This judicial policy admits the risks posed to the DSS and its overarching WTO regime by RTA proliferation and recognizes that if the WTO is to remain a dominant actor in the international economic landscape, "it must provide the central means" of settling trade disputes between States.[328] With the surge in the number of RTAs notified to the WTO and the growing pace of negotiation of even larger regional agreements at a time when the WTO struggles to break its negotiation deadlock, the approach followed by the panel and the AB in *Mexico-Soft Drinks* appears geared toward maintaining the essential integrity of the WTO as an institution, as a body of trade rules, and as a core platform for settling international trade conflicts that all States can rely on.[329]

With a view toward achieving these ends, the result of the judicial endeavor carried out in *Mexico-Soft Drinks*, much like the result of the previous RTA-related disputes reviewed, is therefore "greater strength to the multilateral system as opposed to regional . . . trade arrangements" in a reality of economic regionalization.[330] That said, it should be noted here that "the panel and Appellate Body were . . . well aware of how big the . . . issues [in *Mexico-Soft Drinks*] were and took a fairly cautious approach in addressing them."[331] While the AB made clear that it did not accept Mexico's jurisdictional claim in this case, the AB, like the panel, concluded its discussion of the matter by stating that it was expressing "no view as to whether there may be other circumstances in which legal impediments could exist that would preclude a panel from ruling on the merits of the claims that are before it."[332]

uncertainty and be contrary to the aim of providing security and predictability to the multilateral trading system as well as the prompt settlement of disputes as provided for in Article 3.3 of the DSU." *See Mexico-Soft Drinks* AB Report, *supra* note 126, ¶¶ 34, 43.

326. Interview with former WTO legal officer, in Geneva (July 16, 2012).

327. Interview with WTO legal officer, in Geneva (Mar. 19, 2012).

328. de Mestral, *supra* note 78, at 807.

329. *Id.*

330. Interview with private attorney, in Geneva (Apr. 23, 2012).

331. Interview with WTO legal officer, in Geneva (July 11, 2012).

332. *Mexico-Soft Drinks* AB Report, *supra* note 126, ¶ 54; *see also Mexico-Soft Drinks* Panel Report, *supra* note 133, ¶ 7.10.

After making this statement, the AB briefly clarified that no such legal impediments existed in the present case, which was distinct from the case pursued by Mexico under NAFTA for several reasons. First, there was no overlap between the "subject matter and the respective positions of the parties" in the two cases. Second, no panel ruling had been rendered in the "broader" NAFTA dispute to which Mexico alluded. Third, there was no waiver of jurisdiction, which might ensue from the NAFTA's forum exclusion clause (not "exercised" by Mexico in this case).[333] Having said that, the AB reiterated that it was not expressing "any view on whether a legal impediment to the exercise of a panel's jurisdiction would exist in the event that features such as those mentioned above were present."[334] The AB thus left open the question of whether, for example, a prior RTA ruling deciding the issues raised in the WTO case or, more interestingly, an RTA's fork-in-the-road clause (such as the one not exercised by Mexico) or some other type of RTA provision conceived as a waiver of the right to initiate WTO proceedings, could constitute such a "legal impediment."[335]

Although speaking informally, a former WTO legal officer involved in *Mexico-Soft Drinks* compensated for the AB's silence by making several interesting observations in reference to the possibility that WTO adjudicators would actually relinquish jurisdiction based on a waiver or understanding agreed upon by Members within the framework of an RTA. Drawing a parallel to the *EC-Bananas* case,[336] where the AB found that a WTO Member may relinquish its right to have recourse to WTO dispute settlement by virtue of a mutually agreed upon solution in a specific dispute,[337] this interviewee stated that "the only situation in which the Appellate Body so far has accepted that jurisdiction would be forgone is . . . when a Member [explicitly] says, in the WTO, under a mutually agreed solution, 'I'm giving up on my right to bring a case.'"[338] Yet, he stressed, "that is not the same situation you have under an RTA." The one distinction identified as separating "the *Bananas* scenario" and an "RTA-type fork-in-the-road" scenario is grounded in the fact that

> the [announcement] . . . of Members that they are giving up WTO jurisdiction" in the *Bananas* scenario [is confined] . . . to *a specific dispute*. . . . It is [a waiver of the right to resort to the DSU] in a particular case, where you know the complainant, you know the defendant, you know . . . the subject matter . . . and you renounce [your DSU rights] because you have settled [the case] . . . . It is different if you have a fork-in-the-road provision which was negotiated . . . fifteen years ago

333. *Mexico-Soft Drinks* AB Report, *supra* note 126, ¶ 54 (citation omitted).

334. *Id.* (citation omitted).

335. Davey & Sapir, *supra* note 139, at 13; *see also* Howse & Langille, *supra* note 58, at 687.

336. Appellate Body Report, *European Communities–Regime for the Importation, Sale and Distribution of Bananas, Second Recourse to Article 21.5 of the DSU by Ecuador/Recourse to Article 21.5 of the DSU by the United States*, WT/DS27/RW2/ECU, WT/DS27/AB/RW/USA (adopted Dec. 22, 2008).

337. *Id.* ¶¶ 212, 217.

338. Interview with former WTO legal officer, in Geneva (July 16, 2012).

> on generic terms in an RTA and now you have a dispute. I think it [would be] . . . harder for . . . the panel or the Appellate Body to say, "well, they renounced [their right] . . . fifteen years ago."[339]

In light of this comparison, the same interviewee assessed that "it would have to be an extremely clear-cut situation where you, as the WTO panel, would be willing to renounce jurisdiction."[340] As described below, this prognosis, including the legal analogy on which it was predicated, turned out to be quite close to the route ultimately taken by the AB in the later *Peru-Agricultural Products* case, where one of the questions left open in *Mexico-Soft Drinks* presented itself: "Can WTO Members relinquish their DSU right to WTO dispute settlement proceedings through a waiver or understanding concluded outside the context of a specific WTO dispute, namely, in the framework of an RTA?"[341]

### *B. The Jurisdictional Quest's Culmination:* Peru-Agricultural Products *and the High Threshold for Relinquishing DSU Rights via an RTA*

In *Peru-Agricultural Products*, discussed earlier, Peru raised a preliminary objection, arguing that by agreeing in the RTA to the maintenance of the Peruvian PRS, Guatemala had waived its right to challenge this measure within the framework of WTO dispute settlement.[342] For this reason, according to Peru, Guatemala "acted contrary to its good faith obligations under [DSU] Articles 3.7 and 3.10 when it initiated the present [WTO] proceedings."[343] Peru thus requested that the WTO panel refrain from assessing Guatemala's claims.[344] The panel, in response, avoided delving into the fundamental question of whether Guatemala had actually relinquished its right to bring a WTO complaint in the RTA. Instead, basing its analysis on the "technical" grounds that the respective RTA had not entered into force, the panel found no evidence for claiming that Guatemala had initiated the WTO proceedings in a manner contrary to its good faith obligations.[345]

339. *Id.* (emphasis added).

340. *Id.* The same view was shared by other interviewees. *See, e.g.*, interview with WTO ambassador, in Geneva (July 5, 2012); interview with EU official, in Brussels (July 20, 2012); interview with private attorney, in Geneva (Apr. 24, 2012).

341. Pauwelyn, *supra* note 221, at 17.

342. *Peru-Agricultural Products* AB Report, *supra* note 216, ¶ 5.5.

343. *Id.* DSU Article 3.7, in the relevant section, states that "[b]efore bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful." DSU Article 3.10 provides that "[i]t is understood that requests for conciliation and the use of the dispute settlement procedures should not be intended or considered as contentious acts and that, if a dispute arises, all Members will engage in these procedures in good faith in an effort to resolve the dispute."

344. *Peru-Agricultural Products* Panel Report, *supra* note 222, ¶ 7.50.

345. *Id.* ¶¶ 7.88, 7.96, 8.1.a. *See also Peru-Agricultural Products* AB Report, *supra* note 216, ¶ 5.20.

While the AB upheld the panel's ultimate finding,[346] it took a different judicial course, demonstrating a greater willingness to consider the substance of Peru's jurisdictional claim "under the guise of a potential mutually agreed solution,"[347] encapsulated in the RTA provision in relation to the PRS.[348] In so doing, the AB, while paying little heed to the fact that the RTA was not actually in effect, seized the occasion to reaffirm the fundamental right of Members to initiate WTO legal proceedings and to stipulate the stringent conditions Members must meet in order to waive this right via an RTA.

The AB began its jurisdictional analysis in *Peru-Agricultural Products* by recalling its ruling in *EC-Bananas*, where the AB determined that a mutually agreed solution to a WTO dispute may contain a waiver by the parties of their right to have recourse to the DSU.[349] Restating its position in the *Bananas* case, the AB stressed that "the relinquishment of rights granted by the DSU cannot be lightly assumed" and that the parties "must clearly reveal" that they indeed "intended to relinquish their rights."[350] Following a substantive examination of the RTA between Peru and Guatemala, the AB concluded that Guatemala had "not clearly waived its right to have recourse" to WTO dispute settlement[351] and, in consequence, had not acted contrary to its good faith obligations under DSU Articles 3.7 and 3.10 when initiating these WTO proceedings.[352] To support this conclusion, the AB found that the RTA did not contain a clear statement relinquishing Guatemala's right to bring a case to the WTO DSS, but in fact provided in Article 15.3 that "[i]n the event of any dispute that may arise under this Treaty . . . or the *WTO Agreement*, the complaining Party may choose the forum for settling the dispute."[353] The AB also found support in one of its findings, mentioned earlier, that there was "ambiguity as to whether even the . . . [RTA] itself, regardless of its legal status," allowed Peru to maintain its PRS.[354] Finally, the AB reasoned that the RTA in question could not constitute a mutually agreed solution because it had been negotiated before the initiation of the present

346. *Peru-Agricultural Products* AB Report, *supra* note 216, ¶ 5.28.

347. Stephanie Hartmann, *Recognizing the Limitations of WTO Dispute Settlement—The Peru-Price Band Dispute and Sources of Authority for Applying Non-WTO Law in WTO Disputes*, 48 GEO. WASH. INT'L L. REV. 617, 646 (2016).

348. Referring in a footnote to Peru's appellant's submission, the AB indicated that: "Peru contends that the parties to the FTA had already reached a 'positive solution' within the meaning of Article 3.7 of the DSU when they agreed in the FTA that Peru may maintain its PRS." *See Peru-Agricultural Products* AB Report, *supra* note 216, n.103.

349. *Id.* ¶ 5.25.

350. *Id.*

351. *Id.* n. 109 and ¶ 5.28, where the AB stated: "Based on the foregoing discussion, we do not consider that a clear stipulation of a relinquishment of Guatemala's right to have recourse to the WTO dispute settlement system exists in this case."

352. *Id.* ¶ 5.28

353. *Id.* ¶ 5.27 (emphasis original).

354. *Id.* ¶ 5.26.

WTO dispute and, as noted earlier, was inconsistent with the WTO covered agreements.[355]

Of crucial importance for future RTA-related disputes,[356] however, is the AB's principled statement in *Peru-Agricultural Products* that it did "not exclude the possibility of articulating the relinquishment of the right to initiate WTO dispute settlement proceedings in a form *other than a waiver embodied in a mutually agreed solution*."[357] The AB nonetheless enumerated several conditions that need to be met for it to recognize such a waiver.[358] First, "any such relinquishment must be made *clearly*."[359] Second, the said relinquishment "should be ascertained . . . *in relation to, or within the context of, the rules and procedures of the DSU*."[360] Third, such relinquishment of DSU rights may not go "beyond the settlement of *specific disputes*."[361] It follows from the above that while WTO Members may waive their right to WTO adjudication in actions other than a mutually agreed solution under the DSU, parties to an RTA wishing to close the door to WTO dispute settlement on certain issues must strictly abide by the AB's explicit stipulations,[362] which, as Gregory Shaffer and Alan Winters note, "appear to go beyond the WTO textual requirements."[363]

These stipulations, in turn, require further clarification. However, it is rather clear that they significantly narrow the circumstances under which an RTA-based understanding to relinquish DSU rights can be effective in de facto thwarting a WTO panel's jurisdiction.[364] To begin with, these conditions seem to establish a high burden of proof, requiring demonstration of a Member's "clear" intent to waive its right to resort to the DSU.[365] In fact, Mathis has argued, the AB's interpretation is so strict that an RTA provision providing for a waiver of the right to invoke WTO dispute settlement must be "absolutely explicit, not subject to any reasonable argument over its interpretation," whereas any resulting contextual ambiguity will be resolved in favor of the complainant and the admission of the case.[366] Additionally, for the waiver of the right to initiate WTO legal proceedings to be valid, it must not only meet the textual clarity and explicitness

355. *Id.*

356. Pauwelyn, *supra* note 221, at 19; Shaffer & Winters, *supra* note 244, at 318.

357. *Peru-Agricultural Products* AB Report, *supra* note 216, ¶ 5.25 (emphasis added).

358. Shaffer & Winters, *supra* note 244, at 318.

359. *Peru-Agricultural Products* AB Report, *supra* note 216, ¶ 5.25 (emphasis added).

360. *Id.* (emphasis added).

361. *Id.* n.106 (emphasis added). The AB noted that it did not "consider that Members may relinquish their rights and obligations under the DSU beyond the settlement of specific disputes."

362. Pauwelyn, *supra* note 221, at 20.

363. Shaffer & Winters, *supra* note 244, at 318.

364. *See* Howse & Langille, *supra* note 58, at 684; Hartmann, *supra* note 347, at 648; Gabrielle Marceau, *The Primacy of the WTO Dispute Settlement System*, 25 QUESTIONS INT'L L. 3, 7, 13 (2015).

365. Hartmann, *supra* note 347, at 648.

366. Mathis, *supra* note 232, at 104.

test, it must also apply to "specific disputes."[367] While it is unclear what exactly the AB meant by "specific disputes," this term could be understood as broadly referring to all those disputes falling under both the RTA and the WTO.[368] However, it could also refer to a specific subject or measure regulated in the RTA and subsequently litigated under the DSU.[369] Still, the term "specific disputes" could be read even more narrowly as referring to a particular WTO complaint;[370] that is, to a dispute "that has already arisen, thereby excluding undetermined future disputes."[371] Should the latter be the case, this might suggest, for example, that even a clearly-stipulated, ex ante provision establishing the RTA dispute settlement procedures as the exclusive forum for the resolution of certain or all matters regulated under the RTA would not constitute a sufficient basis for a good faith claim to defeat a WTO panel's jurisdiction. To this, one should add the near impossibility of rebutting the assumption that WTO Members engage in dispute settlement in good faith,[372] and, in the words of the AB, the "'largely self-regulating' nature of a Member's decision to bring" a dispute to the WTO[373]—factors further lowering the odds of a responding Member successfully arguing that an RTA provision contracting out of the DSU constitutes evidence of bad faith, and thus the basis for a panel to decline jurisdiction.[374]

It should be noted at this point that on other occasions, however, when WTO Members have contracted out of the DSU *within* the WTO framework, the AB has exhibited a much more relaxed stance.[375] For example, in *U.S.-Continued Suspension*, the AB did not hesitate to allow the United States and the EU to open the hearings before it to the public through a bilateral agreement reached "inside the WTO,"[376] even though this agreement effectively contracted out of DSU Article 17.10, which prescribes confidential AB proceedings.[377] In contrast, in *Peru-Agricultural Products*, the AB expressed "major reservations about Peru and Guatemala bilaterally agreeing 'outside the WTO' (in an FTA) to 'contract out' of the DSU right to a panel;"[378] in fact, the AB seized this moment to place considerable limits on Members' ability to reach such agreements in the future.

367. Shaffer & Winters, *supra* note 244, at 318.

368. Pauwelyn, *supra* note 221, n.68.

369. Shaffer & Winters, *supra* note 244, n.30.

370. *Id.*

371. Pauwelyn, *supra* note 221, n. 68.

372. Marceau, *supra* note 364, at 12; Hartmann, *supra* note 347, at 648.

373. *See Peru-Agricultural Products* AB Report, *supra* note 216, ¶ 5.18.

374. Marceau, *supra* note 364, at 13 (arguing that following the AB' ruling in *Peru-Agricultural Products*, "[i]t seems difficult to conceive whether and how an RTA can possibly foreclose the use of the WTO DSM for the violation of WTO provisions, unless WTO Members decide to do so in the context of the DSU"); *see also* Hartmann, *supra* note 347, at 648.

375. Pauwelyn, *supra* note 221, at 29.

376. *U.S.-Continued Suspension*, *supra* note 262, Annex IV.

377. Pauwelyn, *supra* note 221, at 29.

378. *Id.*

In conclusion, the AB's latest ruling in *Peru-Agricultural Products* constitutes a direct continuation of the jurisdictional analysis employed by WTO judicial organs in previous RTA-related cases. This analysis seems to be driven by the goal of reinforcing the status of the DSS as the supreme judicial organ in the field of international trade,[379] yet with a view toward not only sustaining the DSS's authority as an international court, but also more systemically ensuring the functioning of the multilateral trade regime against the abundance of regional trade deals. The lesson emerging from *Peru-Agricultural Products* echoes and amplifies the lesson emerging from past cases along the WTO-RTA jurisdictional nexus. One WTO legal officer phrased this lesson quite succinctly:

> [W]hat we can take from these past cases, is that panels . . . [will not] lightly reach the conclusion that because there is an RTA . . . that relates to the same subject matter, that would . . . , in and of itself, raise the question [of whether] . . . the WTO [jurisdiction is] applicable. No, there has to be the right set of facts and it is clearly. . . a very high standard that must be met. And in no case to date has that standard been met.[380]

## V.
## DISCUSSION AND CONCLUSIONS

A long-standing and increasing tension exists between regionalism and multilateralism in international economic governance, with systemic implications for the WTO as an institution and a legal system. The analysis throughout this Article demonstrates how the WTO DSS, in a series of RTA-related cases reaching its docket, has adjusted its judicial efforts so as to face the challenges and threats posed to WTO law and institutions by the ever-intensifying regionalization of international trade relations. In this line of cases, the DSS, "as guarantor of WTO law"[381] and following the AB's lead, has engaged in a determined quest for securing the integrity and functionality of the WTO legal order, espousing the supremacy of WTO rules and the multilateral trade objectives they embody, as well as fortifying the authority of the DSS itself.

This quest for sustaining multilateralism at the WTO-RTA nexus has unfolded along two parallel and mutually reinforcing trajectories: the substantive and the jurisdictional. The substantive legal trajectory revolves around conflicts of obligations under the multilateral and regional systems and the effects of RTAs on the substance of WTO rules. Along this trajectory, the DSS, under the AB's guidance, has continually operated to entrench the autonomy and preeminence of the WTO legal edifice, from which deviations through RTAs may be allowed only in limited circumstances and based on the conditions detailed in the WTO's own rules. Thus, in cases like *Turkey-Textiles* and *Peru-Agricultural Products*, the AB meaningfully narrowed the operative scope of the regional trade exception

379. Howse & Langille, *supra* note 58, at 684-85.

380. Interview with WTO legal officer, in Geneva (July 11, 2012).

381. de Mestral, *supra* note 78, at 815.

enshrined in GATT Article XXIV, whereas in *Mexico-Soft Drinks* and *Brazil-Tyres*, it further constrained Members' ability to justify WTO-inconsistent measures adopted within the framework of RTAs under the general exceptions stipulated in GATT Article XX.

By doing so, the AB has worked to validate and strengthen WTO norms and their nondiscrimination underpinnings, with an eye toward preventing Members from undermining the WTO's multilateral trade liberalization project through the conclusion of RTAs. Moreover, in pursuing this agenda, the AB has not only limited the availability of WTO exceptions to serve as a shield for WTO-incompatible measures introduced in the context of regional arrangements; it has also restricted the possible impact RTA rules might have on the interpretation or application of WTO treaty provisions. Perhaps most significantly, the AB has refused to recognize Members' contractual freedom to modify, by means of an RTA, their WTO obligations as applied between themselves, while clarifying that any attempt by two or more Members to modify WTO rules is governed by the terms of WTO law itself, and not by the general provisions of the Vienna Convention, such as Article 41 on *inter se* treaty modification.

Hence, when operating along the substantive legal trajectory in RTA-related disputes, WTO adjudicators have repeatedly chosen not to facilitate greater coherence between WTO agreements and RTAs, in an effort to avoid further fragmentation of international economic law. Instead, they have often focused their efforts on deflecting RTAs' destabilizing effects on the WTO and its underlying norms, while maintaining a strict separation between the multilateral system and its neighboring regional trade regimes.

Along the complementary jurisdictional trajectory, in turn, the DSS has steadily worked to uphold its own authority vis-à-vis regional dispute settlement fora and to consolidate its power to review the WTO-compatibility of RTAs, elements vital for preserving the DSS as an adjudicative institution as well as for ensuring meaningful enforcement of WTO substantive legal norms. With a view toward achieving these ends, the DSS has not only asserted the authority to evaluate the conformity of RTAs to the requirements of GATT Article XXIV, but has also established a high bar in WTO jurisprudence before Members can waive their DSU rights and opt out of the DSS's jurisdiction by means of an RTA. Similarly, in their efforts to forestall potential interference with the integrity of WTO adjudication, WTO adjudicators, when exercising their judicial powers along the jurisdictional trajectory in RTA-related disputes, have repeatedly demonstrated their unwillingness to participate in a dialogue with RTA adjudicative systems, defer to their rulings, suspend proceedings pending the outcome of a related dispute, or otherwise apply comity toward international fora with overlapping jurisdictions on trade matters. In so doing, as one State official put it, WTO adjudicators have sent a clear message, according to which the WTO

DSS forms "the main tribunal for addressing State versus State disputes" in the field of international trade.[382]

As demonstrated throughout this Article, the quest to uphold multilateralism established along the substantive and jurisdictional trajectories delineated above, is reflected in the views and experience of WTO insiders. That same quest is also mirrored in the specific judicial choices and interpretative approaches followed by WTO adjudicators in the RTA-related cases examined. Together, these factors expose how, in the shadow of textualism, a steady body of jurisprudence has emerged, infused with a judicial philosophy of seclusion from and ascendency over regionalism and aimed at fortifying the multilateral trade rules and institutions in the face of the unabated surge in RTAs. As the Article showed, at any juncture along the RTA-related cases reviewed, WTO judicial organs could have made other judicial choices. Still, choices have been made that reveal particular policy preferences, choices that significantly differ from the choices made by WTO adjudicators in other types of disputes.

Most notably, the strict, textual, and exclusionary stance taken by the WTO DSS toward RTAs, maintaining "'clinical isolation' from these other trade fora" and their respective dispute settlement systems,[383] seems to digress significantly from the integrationist and flexible approach taken by the AB toward general international law in "trade-and" disputes, which involve sensitive non-trade interests such as environmental protection or public health. As indicated early in this Article, in *U.S.-Gasoline*, the very first case to reach the AB's docket, where a trade-restrictive regulation aimed at reducing air pollution was challenged, the AB openly stated that WTO rules should not be read "in clinical isolation from public international law."[384] In later such "trade-and" cases, the DSS embraced a similarly accommodating stance by integrating into its jurisprudence "public international law concerns over the environment and public health through its interpretation of the open-ended language" of the WTO agreements.[385] Yet, while the DSS under the AB's guidance has often looked to the outside in cases involving nontrade values, agreements, and stakeholders, which demonstrates the DSS's interpretative flexibility and willingness to consider linkages between the WTO and other parts of the international legal system, it has shown little if any consideration and regard to the various RTAs operating alongside the WTO.[386]

This variation in the interpretative approaches taken in "trade-and" disputes as opposed to RTA-related cases, I argue, largely stems from the different challenges confronted and goals pursued by the DSS in the two types of cases. In disputes involving the delicate tension between trade and nontrade concerns, "the core force pushing the AB to embrace other international law was to legitimize

382. Interview with Mexican official, in Geneva (July 12, 2012).

383. Howse, *supra* note 10, at 73.

384. *U.S.-Gasoline*, *supra* note 83, at 17.

385. Shaffer & Winters, *supra* note 244, at 324.

386. Shlomo Agon & Benvenisti, *supra* note 38, at 643.

itself"[387] and the overarching WTO regime among expanding circles of national and global stakeholders.[388] In contrast, in RTA-related cases, the main force motivating WTO adjudicators to adopt a policy of judicial seclusion from and resistance to other international law was the "threat . . . to WTO multilateralism" represented by the "outside rules" set by RTAs. In other words, the DSS was motivated by "the fear" that RTA provisions would disturb the "uniformity of WTO rules" or that dispute settlement under RTAs would undermine WTO adjudication.[389]

The distinctive, non-accommodating judicial policy taken by the DSS toward RTAs therefore reveals the WTO adjudicators' awareness of the systemic threats and challenges posed to the multilateral trade regime by RTA proliferation. Moreover, this judicial philosophy—as becomes clearer once its substantive and jurisdictional threads are woven together—exposes the adjudicators' recognition of the role and responsibility of the DSS in sustaining WTO governance in the face of economic regionalization and an enduring stalemate in the multilateral negotiating process. In this sense, the two threads of jurisprudence developed by the DSS in RTA-related disputes narrate a tale of institutional struggle, evolution, and change, recasting the DSS as a guardian of the multilateral trade regime rather than a mere instrument for resolving episodic bilateral disputes at a time when the role and stature of the WTO in global economic governance has been seriously called into question.

However, the inward-looking, WTO-centered judicial philosophy followed by the DSS in RTA-related cases during the last two decades may nevertheless entail some challenges and risks of its own for the WTO and international economic law more broadly. As Shaffer and Winters have noted, given the difficulty of reaching a consensus among over 160 WTO Members, demonstrated most forcefully in the collapse of the Doha Round of multilateral trade negotiations, the odds that any political solution to the growing friction between trade multilateralism and regionalism will materialize through the WTO's negotiating function are rather low.[390] In consequence, as regional trade deals proliferate and extend to mega-regionals such as CETA and CPTPP, the complex question of "how to address the sprawling world" of RTAs in WTO jurisprudence is expected to keep challenging the DSS, with the pressure on WTO adjudicators "to interpret WTO rules for today's changed landscape" likely to increase.[391]

In this state of play, it has been argued that for the WTO and its DSS to stay relevant, the latter may have to fine tune its current approach along the WTO-RTA substantive legal nexus. More specifically, rather than fending off the application of RTA rules, the DSS may have to find ways to facilitate greater

387. Pauwelyn, *supra* note 221, at 31; *see also* Shlomo Agon, *supra* note 154.

388. Shlomo Agon, *supra* note 9, at 686-89.

389. Pauwelyn, *supra* note 221, at 31–32

390. Shaffer & Winters, *supra* note 244, at 324.

391. *Id.*

coherence between WTO and RTA rules and contribute to the systemic integration of the closely related normative systems.[392] With a view to achieving these ends, Shaffer and Winters have suggested that one possible route for the DSS would be "to reverse course" and acknowledge parties' contractual freedom to update, via an RTA, the trade rules that apply between themselves—that is, to allow room for *inter se* modifications of WTO rules in line with Article 41 of the Vienna Convention.[393] Against the continuing regionalization trends, Pauwelyn has gone further to stress that the opposite route taken by the AB in *Peru-Agricultural Products*, namely, that of "preventing *inter se* updates to the WTO treaty agreed to by sovereign states . . . not only risks being paternalistic . . . . It also risks putting the WTO 'on ice' and undermining (rather than strengthening) the centrality and relevance of the WTO in a rapidly changing world trade system."[394]

In a similar vein, Pauwelyn has argued that adjustments to the DSS's judicial approach should also be introduced along the WTO-RTA jurisdictional nexus. There, rather than "imposing a WTO supremacy from above or centralizing all disputes at the WTO" (considering that WTO judicial organs are already overburdened), "it may be wiser to let countries choose and have WTO and FTA dispute settlement supplement each other or at least 'compete' by persuasion, not by a priori hierarchies."[395]

Here it should be noted that throughout the 25 years of the WTO's existence, WTO Members have repeatedly chosen the WTO DSS as the forum in which to resolve disagreements with their RTA partners,[396] while bringing "very few disputes" to the parallel regional dispute settlement fora.[397] Accordingly, disputes between RTA partners represent 19 percent of all WTO disputes.[398] This also holds for disputes between trading partners to relatively older RTAs, such as NAFTA. As a former Mexican official remarked in this regard: "[A]ll the disputes between Mexico, the United States, and Canada . . . are brought here [to the WTO]. [E]veryone has to fly . . . thousands of kilometers to litigate the dispute here in Geneva rather than going to the Western Hemisphere."[399]

This reality, as it has evolved over the past two decades or so, testifies in turn to the "continued attractiveness" of the WTO DSS over regional dispute settlement fora.[400] This attractiveness benefits, *inter alia*, from the support of the well-structured WTO Secretariat, the emergence of an extensive body of WTO

392. *Id.* at 321, 324. For a similar argument see Pauwelyn, *supra* note 221, at 32.

393. Shaffer & Winters, *supra* note 244, at 322; Pauwelyn, *supra* note 221, at 32.

394. Pauwelyn, *supra* note 221, at 32 (citation omitted).

395. *Id.*

396. Chase et al., *supra* note 2, at 682.

397. Pauwelyn, *supra* note 221, at 32.

398. Chase et al., *supra* note 2, at 683.

399. Interview with former Mexican official, in Geneva (July 12, 2012).

400. Pauwelyn, *supra* note 221, at 32.

jurisprudence, and the establishment of the AB,[401] which has orchestrated the development of this extensive body of case law. Ironically, however, it is the AB, the judicial organ that has played a pivotal role in transforming the DSS into a leading actor among international courts[402] and whose jurisprudence has provided normative and institutional stability to the WTO at a time when its negotiating function has been stalled,[403] which now faces grave trials that threaten its future functioning and the effectiveness of the WTO DSS as a whole. Thus, while the DSS is currently in high demand, with cases continuing to reach its docket,[404] at the time of finalizing this Article, this adjudicative system is subject to unprecedented pressures. These pressures result not only from the increasing number and complexity of cases filed but especially from the United States' backlash against the DSS, observed in the continued blocking of new appointments to the AB, which the United States accuses of judicial "overreach."[405] As a result of the United States' prolonged blockade on appointment to the AB, as of December 2019, the AB no longer has the quorum necessary to hear new appeals,[406] a development that endangers the future functioning of the WTO DSS and the multilateral rules-based trading system.[407]

It is still unclear if and how the AB crisis will be resolved and what future course the WTO DSS will take in the wake of this predicament.[408] It nevertheless seems reasonable to conclude that whatever solution is found to this stalemate and the way the WTO DSS navigates this crisis will have systemic implications for

401. *Id.*

402. Stewart & Badin, *supra* note 46, at 562.

403. Howse, *supra* note 10, at 76; Andrew Lang, *The Judicial Sensibility of the WTO Appellate Body*, 27 EUR. J. INT'L L. 1095, 1103 (2016).

404. *See Chronological List of Disputes Cases*, *supra* note 47.

405. Shaffer, *supra* note 45, at 40-44, 47 (citation omitted); Hillman, *supra* note 45.

406. The AB is composed of seven members who decide cases in panels of three. As of October 1, 2018, only three AB members remained in office. On December 10, 2019, the terms of two of the three remaining AB members expired. As a result, as of December 11, 2019, the AB no longer has the minimum three members needed to hear new appeals. *See Members Urge Continued Engagement on Resolving Appellate Body Issues*, WTO, https://www.wto.org/english/news_e/news19_e/dsb_18dec19_e.htm (last visited Feb. 21, 2020).

407. *See* Hillman, *supra* note 45; Wagner, *supra* note 45; Matteo Fiorini et al., *WTO Dispute Settlement and the Appellate Body Crisis: Insider Perceptions and Members' Revealed Preferences*, EUI Working Paper 2019/95, at http://diana-n.iue.it:8080/handle/1814/65244 (last visited Feb. 21, 2020).

408. For a discussion of the various initiatives, interim solutions, and reform proposals raised with a view to overcoming the current AB crisis, see, e.g., Hillman, *supra* note 45; Joost Pauwelyn, *WTO Dispute Settlement Post 2019: What to Expect?*, 22 J. INT'L ECON. L. 297 (2019); Geraldo Vigidal, *Living Without the Appellate Body: Multilateral, Bilateral and Plurilateral Solutions to WTO Dispute Settlement Crisis*, 20 J. WORLD INV. & TRADE 862 (2019); Bernard Hoekman & Petros Mavroidis, *Party Like It's 1995: Necessary But Not Sufficient to Resolve WTO Appellate Body Crisis* (2019), at https://voxeu.org/article/party-it-s-1995-resolving-wto-appellate-body-crisis (last visited Feb. 21, 2020); Laura von Daniels, Susanne Dröge & Alexandra Bögner, *Ways Out of the WTO's December Crisis: How to Prevent the Open Global Trade Order from Unravelling* (2019), at https://www.swp-berlin.org/10.18449/2019C46/ (last visited Feb. 21, 2020).

the multilateral trade regime as well as for the future interaction of the WTO and RTAs at the substantive and jurisdictional nexus.

# *Kenyatta* and the Government Shield: Leveraging Article 87(7) as a Tool for Cooperation at the International Criminal Court

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*This Note addresses the problem of noncompliance at the International Criminal Court (ICC) by analyzing the case against Uhuru Kenyatta. It begins by discussing the history of the ICC: its purpose, structure, and historic approach to managing noncooperation issues. The next Section analyzes the procedural history of the Kenyatta case, emphasizing the Court's struggle to obtain cooperation from Kenya. The Note then analyzes Article 87(7) of the Rome Statute in the context of the Kenyatta case and other cases. Ultimately, the Note concludes that the Court has taken an inconsistent approach in applying Article 87(7) and suggests that the Court utilize Article 87(7) more aggressively as a tool for cooperation moving forward.*



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## INTRODUCTION

> With any other court, if you're accused of murdering five people, say, you don't get bail . . . With the [International Criminal Court (ICC or Court)] you get to go home and mobilize your community. Powerful people have powerful ways of keeping themselves out of court.[1]

Such was the sentiment of Maina Kiai, United Nations Special Rapporteur on the rights to freedom of peaceful assembly and association, as he reported on the effectiveness of Uhuru Kenyatta's anti-ICC rhetoric in the days leading up to Kenyatta's 2013 election as Kenya's fourth President.[2] Almost immediately after his victory, Kenyatta faced fierce backlash from Kenyan citizens who questioned the legitimacy of the election, in part because it was the first election in Kenya's history to utilize biometric voting technology.[3] Public backlash was not the only threat that Kenyatta faced as the country's President-elect: at the time of his victory, Kenyatta was also facing charges for crimes against humanity before the ICC.

Three-and-a-half years earlier, on November 26, 2009, ICC Prosecutor Luis Moreno-Ocampo requested authorization from the ICC Pre-Trial Chamber to investigate the atrocities that followed the 2007 presidential election in Kenya.[4] After collecting evidence linking Kenyatta to the violence, the Prosecutor formally presented his findings to the Pre-Trial Chamber and charged Kenyatta

1. Michela Wrong, Opinion, *Indictee for President!*, N.Y. TIMES (Mar. 11, 2013), https://latitude.blogs.nytimes.com/2013/03/11/being-prosecuted-by-the-i-c-c-helped-uhuru-kenyattas-chances-in-kenyas-election/.

2. *Id.* According to Wrong, Uhuru Kenyatta capitalized on deep-seated anti-Western, anti-British sentiment as part of his campaign platform. *Id.* Kenyatta is the son of Jomo Kenyatta, Kenya's founding President, whom British authorities tried and detained. During the pending ICC trial, Uhuru Kenyatta's campaign spoke of "reclaiming sovereignty" from the "foreign powers" of the ICC to invoke familiar images of prior colonial rule. *Id.*

3. *See* Miriam Azu, *Lessons from Ghana and Kenya on Why Presidential Election Petitions Usually Fail*, 15 AFR. HUM. RTS. L.J. 150, 152 (2015). Issack Hassan, the Chairperson of Kenya's Electoral Management Body (EMB), declared Kenyatta the winner of the presidential race on March 9, 2013. *Id.* This was the first election for which biometric voting technology was used, and according to Hassan, Kenyatta received 50.07 percent of all votes cast. *Id.* His closest competitor, Raila Odinga, received 43.31 percent of votes. *Id.* Hassan declared Kenyatta the President and his running mate, William Ruto, the Deputy President-elect. *Id.* Kenyans contested the counting method and Kenyatta's victory in court, but the Supreme Court of Kenya upheld the election and the final tally, holding that although the counting methodology failed in some respects, "no injustice resulted from the fact that the EMB did not use the electronic system exclusively throughout the elections." *Id.* at 152–53.

4. Prosecutor v. Muthaura, ICC-01/09-02/11-382, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ¶ 1 (Jan. 23, 2012); *see also* Christopher Totten, Hina Asghar & Ayomipo Ojutalayo, *The ICC Kenya Case: Implications and Impact for Propio Motu and Complementarity*, 13 WASH. U. GLOBAL STUD. L. REV. 699, 715–16 (2014).

with crimes against humanity in 2011.[5] Initially, the Pre-Trial Chamber found "sufficient evidence to establish substantial grounds to believe" that Kenyatta had committed the alleged crimes.[6] Vast evidence from journalists, the United Nations, and human rights organizations linked Kenyatta to mass atrocities that led to hundreds of civilian deaths, sexual and gender-based violence, and thousands of deportations.[7] Nonetheless, the Prosecutor could not secure the Kenyan government's cooperation to collect enough evidence to prove at trial that Kenyatta orchestrated the violence.[8] Ultimately, after failing to obtain sufficient evidence for a prosecution, the Prosecutor was left with no choice but to withdraw the charges in late 2014.[9]

This Note analyzes Rome Statute Article 87(7) and its potential as an existing structural mechanism to compel signatories to the Rome Statute ("State Parties") to comply with ICC investigations. The ICC's failure to secure a conviction against Kenyatta provides a constructive framework for analyzing how Article 87(7) offers one method of achieving compliance yet has not been sufficiently utilized in previous ICC cases. The analysis begins with a brief history of the ICC and its structure, as well as the Court's historic treatment of noncooperation by State Parties. The Note then discusses the political and historical context of the events that occurred in Kenya after the 2007 presidential election. It then turns to the procedural history of the *Kenyatta* case and, in particular, to the Court's treatment of the noncooperation issues that arose prior to the withdrawal of the charges. Finally, the Note evaluates the effectiveness of the Court in securing the cooperation of other nations through its use of Article 87(7) and proposes that the Court more aggressively utilize Article 87(7) moving forward.

## II.
## A HISTORY OF IMPUNITY AND NONCOOPERATION WITH THE COURT

This Section outlines the history and purpose of the ICC, as well as some of the criticisms it has faced since its inception. In particular, the ICC has faced widespread criticism surrounding its perceived bias against African nations. Because the ICC has historically generated a substantial amount of its support from Africa, these criticisms—along with the ICC's struggle to secure cooperation from countries whose leaders have been subject to ICC investigations and prosecution—have threatened the Court's legitimacy and have even prompted some nations to formally withdraw their support from the Rome Statute. In Kenya,

5. Prosecutor v. Muthaura, ICC-01/09-02/11-382 ¶ 428

6. *Id.* In light of its evidentiary findings, the Pre-Trial Chamber held that Kenyatta "must be committed to a Trial Chamber for trial on the charges as confirmed." *Id.* ¶ 429.

7. *See infra* notes 81-90 and accompanying text.

8. *See ICC Drops Uhuru Kenyatta Charges for Kenya Ethnic Violence*, BBC (Dec. 5, 2014), https://www.bbc.com/news/world-africa-30347019.

9. Prosecutor v. Kenyatta, ICC-01/09-02/11-1005, Decision on the Withdrawal of Charges Against Mr. Kenyatta (Mar. 13, 2015).

anti-ICC sentiments soared after an arrest warrant was issued for Kenyatta while he was still a sitting Head of State, setting the stage for the ICC's struggle to obtain Kenya's cooperation in prosecuting Kenyatta.

### *A. The Purpose and Structure of the ICC*

The ICC was created in July of 1998 and is the world's first treaty-based, permanent international criminal court.[10] The Rome Statute, signed by over 120 countries, created the Court and its rules of procedure.[11] The Statute also defines four broad categories of international crimes: crimes against humanity, the crime of aggression, war crimes, and genocide.[12]

The Preamble to the Rome Statute states that the ICC is meant to "be complementary to national criminal jurisdictions" and that it remains "the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes."[13] This principle, embodied in Article 17 and known as the "complementarity principle," provides that a case is inadmissible at the ICC if it is being investigated or prosecuted by the State with jurisdiction over it, unless that State is "unwilling or unable genuinely to carry out the investigation or prosecution."[14] Functionally, the Article permits a State to challenge the admissibility of a case when that State claims to have exclusive jurisdiction because of its own investigation into the matter.[15] Similarly, Articles 19(2) and 19(5) explicitly permit a State to challenge the admissibility of a case that it claims to have jurisdiction over because of its own investigation.[16]

In addition to defining crimes and procedures for prosecuting them, the Rome Statute enumerates State Parties' obligations to cooperate in investigations.[17] For example, Article 89 states that if the Court issues any arrest warrants for people or parties under investigation, "States Parties shall . . . comply

10. INTERNATIONAL CRIMINAL COURT, UNDERSTANDING THE INTERNATIONAL CRIMINAL COURT 3, https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf.

11. *Id.*

12. Rome Statute of the International Criminal Court art. 5, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]; *See also State Parties to the Rome Statute: Kenya*, INT'L CRIM. CT., https://asp.icc-cpi.int/en_menus/asp/states%20parties/african%20states/Pages/kenya.aspx (last visited Nov. 2, 2019).

13. Rome Statute, *supra* note 12, Preamble; *See also* In the Cases of Prosecutor v. Ruto and Prosecutor v. Muthaura, Case Nos. ICC-01/09-01/11 and ICC-01/09-02/11, Application on Behalf of the Government of the Republic of Kenya Pursuant to Article 19 of the Statute, ¶¶ 23–25 (Mar. 31, 2011).

14. *See* Totten et al., *supra* note 4, at 700 n.3, 713; *see also* Rome Statute, *supra* note 12, art. 17(1).

15. *See generally* Rome Statute, *supra* note 12, arts. 17, 19.

16. *Id.* arts. 19(2), 19(5).

17. The general cooperation provision states: "States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court." *Id.* art. 86.

with requests for arrest and surrender."[18] Article 93 lists other requirements for State cooperation, including, among others, helping the Court identify the locations of people and items, producing evidence, serving judicial documents, examining places or sights, protecting victims and witnesses, and preserving evidence.[19] In addition, Article 87 authorizes the Court to make requests to State Parties for their cooperation.[20] Recognizing the importance of State cooperation and the potential difficulties in securing it, Article 87(7) also grants the Court the authority to make a formal finding of noncompliance against a State.[21] When making this finding, the provision allows the Court to refer a noncooperating State to one of two international bodies: the Assembly of States Parties ("Assembly") or the UN Security Council ("Security Council").[22]

The Assembly is the management oversight and legislative body of the ICC, codified in Part XI, Article 112 of the Rome Statute.[23] Among other things, the Rome Statute tasks the Assembly with managing oversight of the Presidency and the Prosecutor; considering and deciding the Court's budget; and "[c]onsider[ing] pursuant to article 87, paragraphs 5 and 7, any question relating to noncooperation."[24] Although it is somewhat unclear what a referral under Article 87(7) requires from the Assembly, the Assembly issued a resolution outlining its general approach for noncooperation procedures in 2018.[25] The Assembly stated that in referred cases, the referral "requires a formal response, including some public elements . . . Depending on the specifics of the case, there may be merit in pursuing an informal and urgent response."[26] In the same resolution, the Assembly stated that its noncooperation procedures must be carried out "in full respect for the authority and independence of the Court and its proceedings," and that those procedures are "aimed at enhancing the implementation of the Court's

18. *Id.* art. 89(1).

19. *Id.* art. 93(1).

20. *Id.* art. 87(7)(a) ("The Court shall have the authority to make requests to States Parties for cooperation. The requests shall be transmitted through the diplomatic channel or any other appropriate channel as may be designated by each State Party upon ratification, acceptance, approval or accession.").

21. *Id.* art. 87(7) ("Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.").

22. *Id.*

23. *See id.*, art. 112 ("An Assembly of States Parties to this Statute is hereby established. Each State Party shall have one representative in the Assembly who may be accompanied by alternates and advisors. Other States which have signed this Statute or the Final Act may be observers in the Assembly.").

24. *Id*. art. 112(2)(f).

25. *See generally* ICC Res. ICC-ASP/17/Res.5: Strengthening the International Criminal Court and the Assembly of States Parties, Annex II (Dec. 12, 2018), https://asp.icc-cpi.int/iccdocs/asp_docs/ASP17/RES-5-ENG.pdf#page=24.

26. *Id.* Annex II(C)(10).

decisions."[27] The Assembly also outlined various suggestions for how to respond to a referral from the ICC, including writing an open letter to the State reminding it of its obligations to cooperate, drafting a resolution at the next Assembly meeting that contains "concrete recommendations about the matter," and holding an emergency meeting to "decide on what further action would be required."[28]

The Security Council has been more explicit in outlining the sanctions it may impose, and has imposed, to "maintain or restore international peace and security."[29] The United Nations derives its authority to impose sanctions on State Parties from its Charter,[30] and the ICC has entered into an agreement with the United Nations recognizing that the two bodies will cooperate to mutually enforce the provisions of both the Charter and the Rome Statute.[31] In the past, the Security Council has imposed a variety of sanctions on nations to restore peace, including economic and trade sanctions, arms embargoes, and travel bans.[32] The Security Council has emphasized that its sanctions are not meant to be punitive, but rather are "intended to support governments and regions working towards peaceful transition."[33]

The original cohort of States that adopted the Rome Statute creating the ICC did so, in part, to combat the impunity of governmental leaders committing mass atrocities against civilians.[34] Kenya officially became a State Party on March 15, 2005, and is one of several African nations to become a signatory to the Statute.[35] Commentators have often observed that the Rome Statute derives much of its support from Africa, with African nations comprising 33 out of 122 State Parties.[36] In addition to their historic support of the ICC, a number of African

27. *Id.*

28. *Id.* Annex II(D)(1)*(b)*(a), (D)(15).

29. *See* United Nations Security Council, *Sanctions*, https://www.un.org/securitycouncil/sanctions/information (last visited Nov. 6, 2019).

30. U.N. Charter art. 43, ¶ 1.

31. *See generally* Relationship Agreement Between the United Nations and the International Criminal Court, U.N.-I.C.C., Oct. 4, 2004, 2283 U.N.T.S. 195.

32. *Sanctions*, *supra* note 29.

33. *Id.* ("Sanctions do not operate, succeed or fail in a vacuum. The measures are most effective at maintaining or restoring international peace and security when applied as part of a comprehensive strategy encompassing peacekeeping, peacebuilding and peacemaking. Contrary to the assumption that sanctions are punitive, many regimes are designed to support governments and regions working towards peaceful transition.").

34. *See* Rome Statute, *supra* note 12, Preamble ("The States Parties to the Statute . . . [d]etermined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes . . ."). The charges were also brought against William Ruto and Arap Sang, discussed more fully below, and were also dropped because of insufficient evidence in April 2016. *See* Press Release, ICC, Ruto and Sang Case: ICC Trial Chamber V(A) terminates the case without prejudice to re-prosecution in future (Apr. 5, 2016), https://www.icc-cpi.int/pages/item.aspx?name=pr1205.

35. *State Parties to the Rome Statute: Kenya*, *supra* note 12. There are currently 122 countries that are party to the Statute. *Id.*

36. *See, e.g.*, *id.*; *see also* Bartram S. Brown, *The International Criminal Court in Africa:*

nations have taken additional measures to fight governmental impunity through measures like the formation of the African Union ("AU").[37] The history of political impunity in Africa is long, complex, and uniquely intertwined with some of the challenges that continue to confront the ICC.[38]

### *B. The Situation in Darfur, Sudan*

Despite African countries' initial support for the ICC, commentators have observed increasing skepticism toward the ICC from African governments since the ICC brought charges against two sitting Heads of State.[39] In addition to Kenyatta, who was elected as the President of Kenya in 2013, the ICC issued arrest warrants for Omar Hassan Al-Bashir, the President of Sudan, in 2009 and 2010.[40] The Al-Bashir warrants generated strong opposition from the AU and frustrated African support for the ICC, in part because Sudan never ratified the Rome Statute.[41] Therefore, the ICC could only assert its jurisdiction over Sudan because the matter was referred to the Court by the Security Council, as permitted by Article 13(b) of the Statute.[42] After the Court issued and disseminated warrants

*Impartiality, Politics, Complementarity and Brexit*, 31 TEMP. INT'L & COMP. L.J. 145, 164 (2017) ("At the end of the 1998 Rome Diplomatic Conference, African States overwhelmingly endorsed the Rome Statute, and to this day there are more ICC States Parties from African than from any other single region.").

37. The African Union (AU) was established by the Constitutive Act of the African Union on July 11, 2000. *See* Constitutive Act of the African Union, *opened for signature* July 1, 2000, 2158 U.N.T.S. 3 (entered into force May 26, 2001), https://au.int/sites/default/files/pages/34873-file-constitutiveact_en.pdf. The AU was established for the purpose of achieving multiple objectives across the Continent, including "promot[ing] peace, security and stability on the continent," "promot[ing] democratic principles and institutions, popular participation and good governance," and "[p]romot[ing] and protect[ing] human and people's rights in accordance with the African Charter on Human and People's Rights and other relevant human rights instruments." *Id.* art. 3. The Act also codified the establishment of a Court of Justice of the Union. *Id.* art. 18.

38. For a detailed discussion of the history of political instability in Africa and global efforts to fight impunity, see John Mukum Mbaku, *International Law and the Struggle Against Government Impunity in Africa*, 42 HASTINGS INT'L & COMP. L. REV. 73 (2019).

39. *Id.* at 146–47.

40. *See* Alexandre Skander Galand, *A Global Public Goods Perspective on the Legitimacy of the International Criminal Court*, 41 LOY. L.A. INT'L COMP. L. REV. 125, 129 (2018). The ICC charged Al-Bashir with war crimes and crimes against humanity in 2009, and for genocide in 2010. *Id.* Al-Bashir was the first sitting President to be charged by the ICC.

41. *Id.* at 147.

42. *Id.* Rome Statute Article 13(b) states that the Court may exercise its jurisdiction in "[a] situation in which one or more of such crimes [outlined in the Statute] appears to have been committed [and] is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations." Rome Statute, *supra* note 12, art. 13(b). In these situations, the entire legal framework of the Rome Statute applies. *See, e.g.*, Prosecutor v. Al-Bashir, ICC-02-/05-01/09-302, Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir, ¶ 85 (July 6, 2017) ("The Chamber finds, in line with previous decisions of other Chambers of the Court that the effect of a Security Council resolution triggering the Court's jurisdiction under article 13(b) of the Statute is that the legal framework of the Statute applies, in its entirety, with respect to the situation referred."). Interestingly,

for Al-Bashir's arrest to Sudanese authorities and all State Parties, the Sudanese government publicly declared that it had no intention of cooperating with the proceedings against the President.[43]

Even though the Rome Statute required Sudan and all State Parties to comply with the arrest warrants the ICC issued, Al-Bashir continued to evade arrest.[44] In fact, the ICC Office of the Prosecutor reported that Al-Bashir crossed international borders at least 131 times between 2009 and 2016; on fourteen occasions, he entered the territory of a State Party to the Statute.[45] Significantly, unlike in the case against Kenyatta, the Pre-Trial Chamber II actually referred Malawi, Chad, the Democratic Republic of Congo, Djibouti, and Uganda to the Security Council for failing to comply with the arrest warrants for Al-Bashir and for allowing him to travel freely within their borders.[46] Later, when the ICC brought additional charges against Abdallah Banda, the leader of a Sudanese opposition group, for war crimes committed in Sudan during an AU Mission, Sudan again refused to cooperate and bring Banda to the ICC for prosecution.[47] The ICC responded by issuing a formal finding that Sudan had failed to comply with its obligations under the Statute, and referred Sudan to the Security Council.[48] Despite the referral, the Security Council failed to take any further action.[49]

### *C. The Situation in Libya*

While not a situation in which a sitting Head of State was implicated, the prosecution of Saif Al-Islam Gaddafi, son of former Libyan leader Muammar Gaddafi, also posed cooperation challenges for the ICC. Like Sudan, Libya is not

despite the United Nations Security Council's ability to refer cases, many early supporters of the Rome Statute wanted the Court to be independent of the United Nations. *See* BENJAMIN N. SCHIFF, BUILDING THE INTERNATIONAL CRIMINAL COURT 70–72 (2008).

43. Galand, *supra* note 40, at 130–31.

44. *Id.* at 130.

45. *Id.*

46. *Id.* at 130–31, n.32.

47. *Id.* at 132–33.

48. *Id.* at 133.

49. *Id* at 133–34. In fact, the ICC actually refused to make a finding of noncompliance against South Africa because of the Security Council's unwillingness to take any meaningful follow-up action. *Id.*; *see also* Prosecutor v. Al-Bashir, ICC-02-/05-01/09-302, Decision Under Article 87(7) of the Rome Statute on the Non-compliance by South Africa with the Request by the Court for the Arrest and Surrender of Omar Al-Bashir (July 6, 2017). The Chamber held that Article 27(2) of the Statute, which denies jurisdictional immunities to official Heads of State, means that Al-Bashir was subject to arrest by Sudan and by parties to the Statute, which included South Africa. *Id.* ¶¶ 92–97. Because South Africa failed to arrest Al-Bashir while he was in its territory, South Africa failed to comply with the Court's request for arrest and surrender. *Id.* ¶ 123. The Chamber referenced the *Kenyatta* case and the Prosecutor's motion for a finding of noncompliance, reiterating that the Chamber has discretion to consider all relevant factors before determining whether a referral is necessary. *Id.* ¶ 125. The Chamber concluded that a referral was not proper, in part, because previous referrals to the Security Council had not resulted in any measures against State Parties that failed to cooperate with the Court. *Id.* ¶ 138.

a State Party to the Rome Statute.[50] The ICC therefore asserted jurisdiction over Libya only after the Security Council referred the situation to the ICC in February 2011.[51] In June 2011, the Pre-Trial Chamber issued arrest warrants against three alleged perpetrators of crimes committed in Libya, including Muammar Gaddafi, Saif Al-Islam Gaddafi, and Abdullah Al-Senussi.[52] As of December 2014, the same month that the ICC withdrew the charges against Kenyatta, Libya had still failed to surrender Saif Al-Islam Gaddafi to the Court.[53] Libya had also failed to return documents belonging to Al-Islam Gaddafi's former defense counsel, which Libyan officials had seized.[54] Noting that "both outstanding obligations are of paramount importance for the Court's exercise of its functions and powers in the [Libya] case," the Chamber held that a finding of noncompliance was appropriate.[55] In making that finding, the Chamber emphasized that a finding of noncompliance under Article 87(7) of the Statute is "value-neutral" and is not designed to sanction or criticize the State, but rather "makes available to the Court an additional tool so that it may seek assistance to eliminate impediments to cooperation."[56] To foster such cooperation, the Chamber decided to refer the case to the Security Council.[57]

### *D. Declining Support from African Nations*

When the ICC eventually brought charges against Kenyatta, Kenya began advocating for a mass withdrawal of AU states from the ICC.[58] In September 2013, Kenya's parliament proposed a motion to withdraw from the ICC, "setting the stage to redeem the image of the Republic of Kenya" in the face of the ICC's investigation into President Kenyatta. Minister of Higher Education William Ruto

50. *The States Parties to the Rome Statute*, INT'L CRIM. CT., https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (last visited Feb. 23, 2020).

51. Galand, *supra* note 40, at 134; *see also Situation in Libya*, INT'L CRIM. CT., https://www.icc-cpi.int/libya (last visited Mar. 24, 2019). The situation arose out of alleged crimes against humanity and war crimes against Libyan citizens, including the repression of peaceful demonstrators, systematic attacks on civilians, the plight of refugees as a result of the violence, and more, arising in part out of an armed conflict that was ongoing throughout the country. *Id.*

52. Prosecutor v. Gaddafi, ICC-01/11-01/11-577, Decision on the Non-compliance by Libya with Requests for Cooperation by the Court and Referring the Matter to the United Nations Security Council, ¶¶ 1, 2 (Dec. 10, 2014).

53. *Id.* ¶ 4.

54. *Id.* In June 2012, four Court staff members traveled to Libya to discuss the proceedings. *Id.* ¶ 13. During that visit, Libyan authorities arrested Court members and seized various documents belonging to Gaddafi's former counsel. *Id.*

55. *Id.* ¶ 26.

56. *Id.* ¶ 33.

57. *Id.* ¶ 35.

58. Galand, *supra* note 40, at 142; *see also African states must reject calls to withdraw from the ICC*, AMNESTY INT'L (Oct. 10, 2013), https://www.amnesty.org/en/latest/news/2013/10/african-states-must-reject-calls-withdraw-icc/ (explaining the movement of a group of African states, including Kenya, leading a campaign against the ICC).

and radio journalist Arap Sang, both of whom were also believed to have played a role in the post-election violence of 2007.[59] To the relief of many, a mass exodus of African countries from the Rome Statute, which was contemplated at an AU summit later that same year, did not materialize.[60] Nevertheless, Kenyatta reignited his crusade against the ICC in February 2016at the twenty-sixth ordinary summit of the AU Assembly.[61] There, Kenyatta asked the Open-Ended Committee of African Ministers to consider a mandate requiring that the ICC develop a procedure for withdrawing from the Rome Statute "as necessary."[62] During his speech to the Committee, Kenyatta emphasized that withdrawal should only occur if the ICC failed to meet AU demands.[63] The AU demands included a call for certain ICC "reforms," such as withdrawing the charges against Ruto and Sang; not applying Article 68 of the Statute, which was amended in 2013 to allow the use of prior recorded testimony in the cases against Ruto and Sang;[64] and amending Article 27 of the Statute to give immunity to sitting Heads of State.[65] At the time of the summit, the charges against Ruto and Sang were still pending at the ICC. Only three months later, the ICC dropped the charges against both defendants due to lack of evidence.[66]

59. *Kenya parliament votes to withdraw from ICC*, AL JAZEERA (Sept. 5, 2013), https://www.aljazeera.com/news/africa/2013/09/201395151027359326.html. Ruto and Sang were both believed to have played a role in the post-election violence in 2007, and the ICC brought charges against them as well. Notably, even if Kenya withdrew its ratification of the Statute, the ICC would still have jurisdiction to prosecute Kenyatta, Ruto, and the remaining defendants. *Id.* Although some members of Kenya's parliament did make the call to withdraw, other members opposed the motion, arguing that the country would "be seen as a pariah state . . . as people who are reactionary and who want to have their way." *Id.* (quoting Francis Nyenze, an opponent of the motion). In addition, at least one journalist reported surveys showing that Kenyans opposed withdrawing from the Statute. *Id.*

60. Solomon Ayele Dersso, *The AU's Extraordinary Summit decisions on Africa-ICC Relationship*, EJIL: *TALK!* (Oct. 28, 2013), https://www.ejiltalk.org/the-aus-extraordinary-summit-decisions-on-africa-icc-relationship/. Despite a call by the AU to suspend the trials against Kenyatta and Ruto, and of any future Heads of State of any parties to the AU, until their elected terms of office were complete, not a single Member State declared its withdrawal from the ICC at the summit in October of 2013. *Id.* As Dersso points out, Article 27 of the Rome Statute requires parties that have accepted the jurisdiction of the ICC to prosecute Heads of State, and this outcome can only be prevented by amending the Rome Statute. *Id.* Therefore, the AU's declaration lacks an enforcement mechanism for parties that continue to submit to the jurisdiction of the ICC. *Id.*

61. Peter Fabricius, *Follow me, I'm right behind you, says Kenyatta*, POLITICSWEB (Feb. 4, 2016), http://www.politicsweb.co.za/opinion/icc-follow-me-im-right-behind-you-says-kenyatta.

62. *Id.*

63. *Id.*

64. *Id.* This amended rule allowed five prior testimonies from witnesses in the Ruto and Sang cases to be presented in court, since four of the witnesses later recanted their testimony and the fifth disappeared. *Id.*

65. *Id.*

66. *See* Marlise Simons & Jeffrey Gettleman, *International Criminal Court Drops Case Against Kenya's William Ruto*, N.Y. TIMES (Apr. 5, 2016), https://www.nytimes.com/2016/04/06/world/africa/william-ruto-kenya-icc.html.

Fear about African withdrawal from the Statute continued to loom in light of widespread criticism that the Court is biased against Africa.[67] As of 2017, every case brought before the ICC arose out of situations in Africa.[68] As candidates emphasized in Kenya's 2007 presidential election, the ICC's repeated assertions of jurisdiction in Africa raise the specter of colonialism because of the Court's rooting in Western policies and power.[69] Some commentators have challenged this perceived bias of the Court, noting, for example, that of the seven cases the ICC has brought in Africa, four of them were self-referrals.[70] These commentators have further argued that self-referrals provide evidence of African support for the Court, rather than indicating the Court's disproportionate interest in Africa.[71] Nevertheless, in 2016, three States—Burundi, The Gambia, and South Africa—threatened to withdraw from the Rome Statute because of perceptions that the Court was being "'hijacked by powerful western countries'" and "'acting as a proxy' for foreign-led government change."[72] In 2017, Burundi made good on its promise, becoming the first country in the world to withdraw from the Rome Statute.[73]

## III.
## THE CASE AGAINST KENYATTA

Despite detailed eyewitness reports of systemic and targeted violence emerging from Kenya after the 2007 election, the ICC struggled to obtain the evidence needed to ultimately secure a conviction against those believed to be

67. Several commentators have written about the Court's perceived bias against Africa. For a viewpoint challenging this criticism, see Shamiso Mbizvo, *The ICC in Africa: The Fight against Impunity*, *in* AFRICA AND THE ICC: PERCEPTIONS OF JUSTICE 41–45 (Kamari M. Clarke, Abel S. Knottnerus, and Eefje de Volder eds., 2016). Mbizvo argues that the Court's persistence in prosecuting mass atrocities evinces support for Africa and acknowledges that African nations comprised some of the most ardent supporters of the Statute.

68. Brown, *supra* note 36, at 145.

69. *Id.* at 146. Some of the criticism comes directly from the leaders of African nations, such as Rwandan president Paul Kagame's comments that the ICC is a "court to try Africans, not people from across the world." *Rwanda's Paul Kagame accuses ICC of bias against Africa*, AL JAZEERA (Apr. 29, 2018), https://www.aljazeera.com/news/2018/04/rwanda-kagame-accuses-icc-bias-africa-180429050656022.html.

70. Brown, *supra* note 36, at 146.

71. *Id.*

72. Jina Moore, *Burundi Quits International Criminal Court*, N.Y. TIMES (Oct. 27, 2017), https://www.nytimes.com/2017/10/27/world/africa/burundi-international-criminal-court.html.

73. *Id.* It should be noted that the Court was conducting a preliminary examination into Burundi at the time of the State's withdrawal. *Id.* Specifically, the Court was investigating alleged crimes against humanity occurring in the wake of the election of Pierre Nkurunziza. Agence France-Presse, *Burundi becomes first nation to leave international criminal court*, THE GUARDIAN (Oct. 27, 2017), https://www.theguardian.com/law/2017/oct/28/burundi-becomes-first-nation-to-leave-international-criminal-court. The election was met with the killing, imprisonment, torture, rape, and forced disappearances of Burundi citizens, causing an estimated five hundred to two thousand deaths and displacing over four hundred thousand other citizens. *Id.*

responsible. This Section analyzes the ICC's case against Kenyatta. In particular, it explores the Court's reluctance to seek assistance from the Security Council and the Assembly of States Parties in securing Kenya's cooperation in building and prosecuting the case against Kenyatta.

### *A. The 2007 Presidential Election and Subsequent Violence*

Rumblings of potential election-related violence circulated prior to the 2007 Kenyan presidential election and have been attributed, in part, to the country's history of deep-seated ethnic rivalries. The Maasai and Kikuyu ethnic groups have long disputed the allocation of land since Kenya gained independence from colonial rule.[74] Historically, Kenyan elected officials have harnessed ethnic divisions as a campaign tool, dividing the political allegiances of the country's citizens along ethnic lines.[75] In 2007, the presidential race was primarily between Mwai Kibaki, the incumbent President and a member of the Party of National Unity (PNU), and Raila Odinga, then-Prime Minister and a member of the Orange Democratic Movement party (ODM).[76] The PNU was primarily comprised of citizens of Kikuyu ethnicity, while the ODM received its support from citizens of Luo, Luhya, Kalenjin, and Maasai ethnicities.[77]

Opposition leader Odinga led the popular vote by over one million votes up until the final hours of the tallying process, when votes for the incumbent Kibaki soared, swiftly and inexplicably giving him the victory.[78] Kibaki's victory was especially suspect in light of ODM's majority representation in parliament; ODM won ninety-nine seats compared to PNU's forty-three.[79] After five electoral commissioners publicly denounced the seemingly fraudulent results, the head of

74. Totten et al., *supra* note 4, at 703; *see also* U.N. High Commissioner for Human Rights, *Rep. from OHCHR Fact-finding Mission to Kenya,* at 5–6 (Feb. 6–28, 2008), https://www.ohchr.org/documents/press/ohchrkenyareport.pdf. For example, the Government Lands Act regulates former colonial land and gives the sitting President of Kenya the power to appoint a Commissioner of Lands, who can then lease land for 99-999 years. *Id.* at 6. As a result, land has often been used by political figures as a means of rewarding loyalty. *Id.* at 5-6.

75. Totten et al., *supra* note 4, at 703. In addition, according to some reports, prior to the 2007 election, affiliates of leading candidates circulated leaflets and transmitted text messages containing hate speech about the opposing candidates, inflaming hostilities that later erupted into mass violence. *Id.* at 704. In fact, the Kenya National Commission on Human Rights reported at least seventy deaths from pre-election-related violence in Kenya during campaign rallies. In addition, the Commission reported that over two thousand families had fled their homes in one region, and over twenty thousand registered voters risked being disenfranchised because of the violence. *See* KENYA NAT'L COMM'N ON HUM. RIGHTS, STILL BEHAVING BADLY: SECOND PERIODIC REP. OF THE ELECTION MONITORING PROJECT 6 (Dec. 2007), https://www.rwi.lu.se/NHRIDB/Africa/Kenya/Kenya_KNCHR_Election_Report_2007.pdf.

76. Totten et al., *supra* note 4, at 703 n.15.

77. *Id.*

78. HUM. RIGHTS WATCH, BALLOTS TO BULLETS: ORGANIZED POLITICAL VIOLENCE AND KENYA'S CRISIS OF GOVERNANCE 22 (Mar. 2008), https://www.hrw.org/sites/default/files/reports/kenya0308web.pdf.

79. *Id.*

the Electoral Commission announced that even he could not determine which candidate actually won.[80] Almost immediately after the Electoral Commission announced the final tally at the Kenyatta International Conference Centre in Nairobi on December 30, 2007, journalists were instructed to leave.[81] The Kenyan government ordered broadcasters to cease live broadcasting,[82] and violence and chaos quickly engulfed the country.[83]

Reporters detailed how thousands of men burst into a small town waving sticks, destroying shacks, throwing stones, and fighting soldiers.[84] Witnesses reported that in small towns throughout the country, gangs invaded homes, dragged their inhabitants into the street, and clubbed them to death.[85] Gangs of young men invaded cities, burning homes, killing civilians, and looting businesses.[86] In one instance, a mob set fire to a church filled with citizens fleeing the violence, burning them alive.[87] Human rights experts and health centers reported numerous incidents of gang rape and other sexual violence, which was

80. *Id.* The co-chairwoman of the Kenya Election Domestic Observation Forum, who witnessed the presentment of tally sheets to the election commission, reported that some tally sheets were missing signatures, others were missing stamps, and in some areas, more people voted than the number of registered voters. *See* Jeffrey Gettleman, *Disputed Vote Plunges Kenya Into Bloodshed*, N.Y. TIMES (Dec. 31, 2007), https://www.nytimes.com/2007/12/31/world/africa/31kenya.html.

81. BALLOTS TO BULLETS, *supra* note 78, at 22–23.

82. *Id.* In addition, Kibaki was quickly sworn in to beat the onslaught of public outrage, which would have potentially compromised his victory. Totten et al., *supra* note 4, at 704. Nevertheless, the violence raged on, with gunshots heard in the distance as Kibaki was being sworn in. Gettleman, *supra* note 66.

83. According to the United Nations, large scale violence against Kikuyu families started as early as thirty minutes after the announcement of Kibaki's victory. *See OHCHR Fact-finding Mission to Kenya*, *supra* note 74, at 9. Some of the violence began with confrontations between law enforcement and crowds, and some cases involved youth vigilantes believed to have received money from ODM supporters to target PNU supporters or the Kikuyu community. *Id.* at 8. In one instance, 1320 houses belonging to Kikuyu families were attacked simultaneously, further suggesting that perpetrators were targeting individuals along ethnic lines. *Id.*

84. Gettleman, *supra* note 66.

85. *Id.*

86. Xan Rice, *Death toll nears 800 as post-election violence spirals out of control in Kenya*, THE GUARDIAN (Jan. 28, 2008), https://www.theguardian.com/world/2008/jan/28/kenya.international. In one incident in Naivasha, nineteen people were burned in their homes or hacked to death by rival tribal gangs. *Id.* The violence was perpetrated along ethnic lines, with gangs of Kikuyus burning the homes and cars of Luos and destroying the businesses of non-Kikuyu citizens. *Id.* In one town, almost two-thirds of the buildings, including a school, were burned in the middle of the night. *Id.* One prominent Kikuyu criminal gang, the Mungiki, was believed to be leading revenge attacks on communities supporting the opposition. *Id.*

87. *Kenya's Post-Election Violence Kills Hundreds*, NPR (Jan. 2, 2008), https://www.npr.org/templates/story/story.php?storyId=17774507. At least one human rights expert, when reporting on the violence, expressed "profound[] alarm[] [at] the reports of incitement to racial hatred and the growing frictions between the different ethnic groups," and called on authorities and ethnic and religious leaders to stop "what may become the dynamics of inter-ethnic killings . . . in the light of historical precedents in the region." *Id.*

reported by many to be based along ethnic lines.[88] After two months of brutality, Human Rights Watch reported that more than one thousand Kenyans had been killed and up to five hundred thousand people had been internally displaced.[89] In its fact finding report, the United Nations noted that although post-election violence along ethnic lines had occurred in the past, the systematic burning of property in the Rift Valley after the 2007 election suggested that this time, the intention was to permanently displace certain ethnic groups.[90]

### *B. The Charges Against Kenyatta*

Nearly two years after the post-election violence erupted, ICC Prosecutor Luis Moreno-Ocampo asked the Pre-Trial Chamber to authorize an investigation into the parties responsible for the violence in Kenya.[91] The Pre-Trial Chamber granted the requisite authorization on March 31, 2010, and the Prosecutor began his investigation into alleged crimes against humanity that occurred in Kenya between June 1, 2005 and November 26, 2009, including the post-election period.[92] During his investigation, the Prosecutor found evidence[93] linking Kenyatta and five other government officials and public figures to the violence: William Samoei Ruto, Minister of Higher Education, Science and Technology; Henry Kiprono Kosgey, a member of parliament; Joshua Arap Sang, the Head of Operations of the radio station Kass FM; Francis Kirimi Muthaura, Head of Public Service and Secretary to the Cabinet; and Mohammed Hussein Ali, Chief Executive and Head of the National Postal Corporation and former Police

88. *See 250,000 Kenyans displaced by post-electoral violence, UN estimates*, UN NEWS (Jan. 4, 2008), https://news.un.org/en/story/2008/01/244932-250000-kenyans-displaced-post-electoral-violence-un-estimates. Reports from specialized health centers serving female survivors of sexual assault and sexual violence after the election suggested that gangs of men were targeting women and children of particular ethnic groups, and that sexual violence accompanied other physical brutality toward these victims. Nairobi Women's Hospital and the Coast General Hospital in Mombasa reported double to triple the number of women seeking treatment for sexual assault in the months following the beginning of the violence. Humanitarians and physicians were especially concerned about sexual violence because of the high prevalence of HIV throughout the country. *See Sexual Violence Threatens Women and Girls in Kenya's Post-Election Crisis*, UNITED NATIONS POPULATION FUND (Mar. 5, 2008), https://www.unfpa.org/news/sexual-violence-threatens-women-and-girls-kenyas-post-election-crisis.

89. BALLOTS TO BULLETS, *supra* note 78, at 2.

90. *OHCHR Fact-finding Mission*, *supra* note 74, at 10 ("Of particular note . . . is that contrary to previous incidents of electoral violence, which had led to the temporary displacement of Kikuyu families, this time property was systematically burned and razed and some villages renamed under Kalenjin appellation, leaving little doubt as to the intent to evict any perceived 'outsiders' for good.").

91. Prosecutor v. Muthaura, ICC-01/09-02/11-382, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ¶ 1 (Jan. 23, 2012).

92. *Id.*

93. *Id.* The evidence consisted primarily of eyewitness reports, including reports from members of the Mungiki organization that was widely believed to be responsible for the organized attacks. *Id.* ¶ 119. Some of the witnesses reported that the attacks were planned and alleged that Kenyatta's associates were responsible. *Id.* ¶ 147. The Prosecutor also relied on reports from other organizations that investigated the violence and the surrounding circumstances. *Id.* ¶¶ 121–22.

Commissioner.[94] In December 2010, the Prosecutor requested that the Pre-Trial Chamber find reasonable grounds to believe that Kenyatta and the others committed various crimes within the ICC's jurisdiction and issue a summons for all of them to appear before the tribunal.[95] The Pre-Trial Chamber granted the motion, and Muthaura, Kenyatta, and Ali voluntarily appeared before the tribunal on April 8, 2011.[96]

The Prosecutor charged Kenyatta and the other defendants with multiple crimes against humanity in violation of the Rome Statute, including murder, deportation, or forcible transfer of population; rape and other forms of sexual violence; other inhumane acts; and persecution.[97] In particular, the Prosecutor alleged that Kenyatta helped conspire to organize attacks against ODM supporters by soliciting the aid of the Mungiki criminal organization and the local police force.[98]

Kenyatta's defense team initially challenged the ICC's jurisdiction, arguing that Kenyatta had not attacked any civilian population pursuant to a State or "organizational" policy within the meaning of Article 7(2)(a)[99] of the Statute.[100] The defense argued that any "organization" within the meaning of the Rome Statute must take on the characteristics of the State government. Because none of the ICC's evidence linked any of Kenyatta's crimes to any State-sponsored "organizational" policy, the defense argued that the allegations against him did

94. Ocampo bifurcated the situation in Kenya into two separate cases. In the first case, Ocampo charged defendants Ruto, Kosgey, and Sang, whose radio station was allegedly affiliated with one of the two political camps. *See* Galand, *supra* note 40, at 141; *see also* Totten et al., *supra* note 4, at 744. Kenyatta was implicated separately, along with Muthaura and Ali. Galand, *supra* note 40, at 141; Totten et al., *supra* note 4, at 744.

95. Situation in the Republic of Kenya, ICC-01/09-31-Red, Prosecutor's Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali (Public Redacted Version) (Dec. 15, 2010).

96. Decision on the Confirmation of Charges, ICC-01/09-02/11-382 ¶ 4. Prior to the confirmation of charges, the Chamber received a number of filings and issued a number of decisions dealing with pre-trial issues. *Id.* ¶ 5. In total, the Chamber received over 280 fillings and issued 90 decisions between the suspects' initial appearance on April 8, 2011 and the issuance of the Pre-Trial Chamber's decision concerning the Confirmation of Charges on January 23, 2012. *Id.* This Note does not address all of these filings and instead limits its discussion to the most salient decisions and filings pertaining to Kenya's cooperation in the investigative and adjudicative process.

97. *Id.* ¶ 21. The Pre-Trial Chamber charged Muthaura with the same crimes and included him in the same counts, and it charged Ali with the same crimes in separate counts. *Id.* The elements of the charged crimes can be found in the Rome Statute, *supra* note 12, at Article 7.

98. *Id.* ¶¶ 287-90.

99. Article 7 of the Statute defines "crimes against humanity" as "any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population." Rome Statute, *supra* note 12, art. 7(1). After enumerating the various acts constituting a crime against humanity, the Statute defines the term "attack directed against any civilian population" in Article 7(2)(a) as "a course of conduct involving multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack." *Id.* art. 7(2)(a).

100. Decision on the Confirmation of Charges, ICC-01/09-02/11-382 ¶ 27.

not fall within the purview of Article 7(2)(a).[101] The Pre-Trial Chamber dismissed these challenges and held that the defense was functionally attacking the merits of the Prosecutor's case rather than challenging the threshold jurisdictional question.[102] As an additional threshold matter, the Pre-Trial Chamber determined that the case rose to the level of gravity required to justify further action by the Court.[103]

The Pre-Trial Chamber then evaluated the sufficiency of the Prosecutor's evidence to determine whether it demonstrated "substantial grounds" to believe that Kenyatta committed the charged crimes, as required by Article 61(7) of the Statute.[104] Drawing upon its evidentiary standard in the case against Jean-Pierre Bemba Gombo, the Pre-Trial Chamber noted that the Article 61(7) evidentiary threshold required the Prosecutor to offer "concrete and tangible proof demonstrating a clear line of reasoning underpinning [his] specific allegations."[105] The Pre-Trial Chamber also stated that it independently assesses each piece of evidence, including an evaluation of relevance and probative value, to determine whether there are substantial grounds to believe that the suspects committed the charged crimes.[106] After analyzing the evidence presented, the Pre-Trial Chamber found substantial grounds to believe that Kenyatta was criminally responsible as a coconspirator of crimes against humanity.[107] These evidentiary grounds included: witness statements from members of the Mungiki organization,[108] reports from various humanitarian and international aid organizations,[109] eyewitness accounts of Kenyatta's meeting with high-ranking

101. *Id.*

102. *Id.* ¶¶ 30, 35.

103. *Id.* ¶¶ 39–40. Ali challenged the admissibility of the case under Article 17(1)(d), arguing that the case against him did not rise to the level of gravity required by the Statute. *Id.* ¶ 40. The Pre-Trial Chamber again rejected this argument, holding that his case met the sufficient gravity requirement and was therefore admissible. *Id.* ¶ 50.

104. *Id.* ¶ 51. The relevant portion of the Statute states that "[t]he Pre-Trial Chamber shall, on the basis of the hearing, determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged." Rome Statute, *supra* note 12, art. 61(7).

105. Decision on the Confirmation of Charges, ICC-01/09-02/11-382 ¶ 52 (quoting Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/04-01/07-717, ¶ 65).

106. *Id.* ¶ 75.

107. *Id.* ¶ 428. The Pre-Trial Chamber did not find that there was sufficient evidence to charge Ali, however. *Id.* ¶ 429. Judge Hans-Peter Kaul issued a separate dissenting opinion, arguing that the crimes alleged were not committed in furtherance of a policy of an organization within the meaning of Article 7(2)(a) of the Rome Statute. Prosecutor v. Muthaura, ICC-01/09-02/11-382-Red, Dissenting Opinion by Judge Hans-Peter Kaul (Jan. 29, 2012).

108. Decision on the Confirmation of Charges, ICC-01/09-02/11-382 ¶ 119.

109. *Id.* ¶¶ 121–22.

Mungiki officials before the crimes,[110] and eyewitness accounts of Kenyatta giving money to those officials in exchange for the attacks.[111]

### *C. Kenya's Noncooperation and the Withdrawal of Charges*

Prior to making an initial appearance before the Pre-Trial Chamber, the Kenyan defendants again filed an application challenging the ICC's jurisdiction, this time basing their objections on the complementarity principle.[112] In essence, the Kenyan defendants argued that Kenya had undertaken a number of constitutional and judicial reform measures, and took some steps to investigate lower-level perpetrators of the violence in the wake of the 2007 election.[113] The Pre-Trial Chamber ultimately concluded that Kenya had taken no "concrete steps" against the defendants and that it had no plans to do so.[114] It also scrutinized Kenya's assertions that the country had taken affirmative steps to investigate and prosecute those responsible for the post-election atrocities.[115] In its motion challenging the Court's jurisdiction, Kenya condemned the Prosecutor's allegations that the Kenyan government's failure to provide access to witnesses and documents in the prosecution of Muthaura constituted only limited assistance.[116] Kenya also responded to the Prosecutor's allegations of noncompliance, expressing its concerns about the consequences of the ICC's portrayal of Kenya's efforts. Specifically, Kenya argued: "It cannot be right that

110. *Id.* ¶ 307.

111. *Id.* ¶¶ 334–35.

112. In the cases of Prosecutor v. Ruto and Prosecutor v. Muthaura, Case Nos. ICC-01/09-01/11 and 01/09-02/11, Application on Behalf of the Government of the Republic of Kenya Pursuant to Article 19 of the ICC Statute (Mar. 31, 2011).

113. *Id.* ¶¶ 2, 6. In particular, Kenya argued that in the wake of the violence, it adopted a new constitution incorporating a bill of rights that strengthened fair trial rights and procedural guarantees, and strengthened the ability of national courts to hear cases relating to the post-election violence. *Id.* ¶ 2. Kenya also outlined a timeline of steps it intended to take in order to investigate and prosecute those responsible for the violence. *Id.* ¶¶ 14–20. In addition, Kenya outlined the investigative steps it took after the election and after the Pre-Trial Chamber authorized an investigation into Kenya, including the establishment of the Commission of Inquiry into Post-Election Violence (CIPEV), the Truth, Justice and Reconciliation Commission, and the Independent Review Commission on the General Elections. *Id.* ¶¶ 34–37; *see also* Totten et al, *supra* note 4, at 736–37.

114. *Id.* ¶ 60.

115. *See* Prosecutor v. Kenyatta, ICC-01/09-02/11-713, Government of Kenya's Submissions on the Status of Cooperation with the International Criminal Court, or, in the Alternative, Application for Leave to File Observations Pursuant to Rule 103(1) of the Rules of Procedure and Evidence (Apr. 8, 2013); *see also* Prosecutor v. Muthaura, ICC-01/09-02-11-673, Public Redacted Version of the Additional Prosecution Observations on the Defence's Article 64 Applications, Filed in Accordance with Order Number, ¶ 24 (Mar. 8, 2013) ("[T]he Prosecutor took the following investigative steps . . . [including] multiple steps to interview senior members of the Kenya Police – interviews that were blocked by a preliminary injunction, supported by the Government of Kenya ("GoK"), that remains in place two years later, despite the Prosecution's repeated requests to the GoK to ask the Court to designate judges to hear the case on the merits . . . ").

116. Government of Kenya's Submissions on the Status of Cooperation, ICC-01/09-02/11-713 ¶ 3.

a State's internal security is suborned by an outside agency's ill-supported allegations of non-cooperation which has the potential to erode national regard for the institutions of Government and their compliance with the rule of law."[117] Kenya again cited several of its actions in the wake of the 2007 post-election violence as evidence of its cooperation, including: the government's affirmative decision not to withdraw from the Rome Statute after the ICC launched an investigation;[118] the establishment of various commissions and task forces to investigate the post-election violence;[119] and the senior government officials' testimony before the Pre-Trial Chamber, which, according to the Kenyan government, constituted "a remarkable degree of engagement and cooperation."[120]

Despite Kenya's protestations, the Prosecutor filed a motion for a finding of noncompliance under Article 87(7) of the Rome Statute.[121] The party seeking an Article 87(7) finding bears the burden of demonstrating that the State did not make a good faith effort to cooperate.[122] The Prosecutor argued that for nineteen months, she attempted to secure financial records pertaining to Kenyatta's conduct that were critical to determining his guilt. In particular, the Prosecutor argued that information pertaining to Kenyatta's finances was crucial for proving that Kenyatta helped fund the post-election violence in 2007.[123] The Prosecutor initially reached out to the Kenyan government in 2012 seeking these records and asking the government to freeze all of the defendants' assets.[124] The Kenyan government initially responded to the requests by asking for more details about what specific information the Prosecutor sought, and after nearly five months, the government still had not produced the requested information.[125] The Prosecutor even traveled to Kenya and spoke to then-President Kibaki, specifying the

117. *Id.* ¶ 15.

118. *Id.* ¶ 25.

119. *Id.* ¶ 27.

120. *Id.* ¶ 34. The government went on to remind the Chamber that under the Statute, it only has a duty to cooperate, so "whether or not [the evidence it provides] is viewed as helpful or unhelpful to the prosecutor is irrelevant." *Id.* In sum, Kenya argued that the Prosecutor was attempting to attribute the Prosecutor's own failure to obtain enough evidence to Kenya's inaction. *Id.*

121. *See* Prosecutor v. Kenyatta, ICC-01/09-02/11-866, Prosecution Application for a Finding of Non-compliance Pursuant to Article 87(7) Against the Government of Kenya (Dec. 2, 2013).

122. Prosecutor v. Kenyatta, ICC-01/09-02/11-982, Decision on Prosecution's Application for a Finding of Non-compliance Under Article 87(7) of the Statute, ¶ 42 (Dec. 3, 2014). "[T]he Chamber's assessment is based not on whether all of the materials sought in the Revised Request have been supplied, but rather on whether the Kenyan Government has taken reasonable steps to execute the request." *Id*. ¶ 74.

123. Prosecutor Application for a Finding of Non-compliance, ICC-01/09-02/11-866 ¶ 30; *see also* Decision on the Confirmation of Charges, ICC-01/09-02/11-382 ¶ 384 ("[T]he evidence placed before the Chamber shows that [Kenyatta] was in charge of the provision of financial and logistical support to the direct perpetrators of the crimes . . . .").

124. Prosecutor Application for a Finding of Non-compliance, ICC-01/09-02/11-866 ¶ 6.

125. *Id.* ¶¶ 8–10.

information needed and emphasizing the urgency of the request, yet the Kenyan government continued to refuse to provide the necessary information.[126]

All of those attempts, according to the Prosecutor, failed because of Kenya's "obfuscation and intransigence."[127] With only two months remaining before trial, the Kenyan government still had not complied with the Prosecutor's attempts to secure the records, hindering the Prosecutor's ability to investigate the facts of the case and the Trial Chamber's ability to exercise its truth-seeking function.[128] The Prosecutor asked the Chamber to make a formal finding of Kenya's noncompliance in the investigation against Kenyatta, emphasizing Kenya's lack of meaningful attempts to comply with records requests and its failure to identify any specific legal impediments that would justify its inability to satisfy those requests.[129] In sum, the Prosecutor alleged that Kenya's repeated, lengthy delays and ineffective responses evinced a deliberate disregard of its obligation to cooperate and that the Chamber should make a finding of noncompliance and refer the matter to the Assembly of States Parties.[130]

Although the Trial Chamber concluded that Kenya met the threshold for a finding of noncompliance, it nonetheless rejected the Prosecutor's Article 87(7) application.[131] In its decision, the Chamber first noted its broad discretion under Article 87(7) of the Statute, and explained that a finding of noncompliance is not appropriate in every instance where a State fails to adhere to the Court's request.[132] The Chamber asserted that cooperation between *both* parties is key: "[B]oth the requesting entity and the requested State should make genuine efforts to resolve any difficulties in order to facilitate the execution of a request."[133] After evaluating both the Prosecutor's and Kenya's attempts to cooperate in the fact finding process, the Chamber concluded that Kenya failed to provide sufficient

126. *Id.* ¶¶ 11–14.

127. *Id.* ¶¶ 1–2. In its revised request, the Prosecutor sought to obtain various documents pertaining to Kenyatta. These documents included: records of companies, businesses or partnerships in which Kenyatta maintained an ownership interest; records relating to Kenyatta's real property; records identifying Kenyatta's income tax and value added tax returns; records relating to Kenyatta's vehicles; records relating to Kenyatta's financial accounts, including savings and other accounts; records relating to financial transactions at foreign exchange institutions; telephone numbers used by Kenyatta; and any records of information contained by Kenyan security and intelligence services concerning Kenyatta's activities. *See* Decision on Prosecution's Application for a Finding of Non-compliance, ICC-01/09-02/11-982.

128. Prosecution Application for a Finding of Non-compliance, ICC-01/09-02/11-866 ¶ 2. "Information regarding to the Accused's finances is directly relevant to the Prosecution's allegation that he helped fund the violence following the election in Kenya in 2007, and therefore is likely to assist the Chamber in adjudicating the charges against him. In the absence of this material, the Chamber's ability to determine the truth is severely curtailed." *Id.* ¶ 30.

129. *Id.* ¶¶ 25, 28.

130. *Id.* ¶¶ 25, 31.

131. Decision on Prosecution's Application for a Finding of Non-compliance, ICC-01/09-02/11-982 ¶ 88.

132. *Id.* ¶ 40.

133. *Id.*

explanations for its inability to produce certain documents, failed to consider alternative approaches to obtaining the necessary information, and took no meaningful steps to comply with the Prosecutor's requests.[134] Thus, according to the Chamber, Kenya satisfied the threshold for noncompliance under Article 87(7).[135]

The Trial Chamber next considered whether or not Kenya's noncompliance affected the Court's ability to exercise its powers and functions under the Rome Statute.[136] Despite concluding that Kenya's actions had this effect,[137] the Trial Chamber rejected the Prosecutor's request to make a formal finding of noncompliance under Article 87(7). The Trial Chamber reasoned that referring the case to the Assembly of States Parties might prolong the proceedings, especially in light of the Prosecutor's own admissions that the evidence sought might not be sufficient to secure a conviction.[138] In addition, the Trial Chamber expressed dissatisfaction at the Prosecutor's "complaisant approach" throughout the investigation, suggesting that the Prosecutor should have challenged Kenya's refusals to submit evidence at an earlier stage in the proceedings.[139] Despite concerns about Kenya's lack of cooperation, the Chamber was "not persuaded that the circumstances warrant[ed] referral on the basis of exhaustion of judicial measures at this stage."[140]

Only two days after the Trial Chamber issued its decision on noncompliance, the Prosecutor withdrew the charges of crimes against humanity against Kenyatta, citing a lack of evidence proving Kenyatta's criminal responsibility beyond a reasonable doubt.[141] Prosecutor Fatou Bensouda, who replaced Ocampo during the Kenya investigation, issued a public statement calling the withdrawal of charges "a dark day for international criminal justice."[142] Bensouda criticized Kenya for its lack of cooperation in the investigation, noting that several witnesses

134. *Id.* ¶¶ 74–78.

135. *Id.* ¶ 78. It should be noted that the Chamber also identified several alternative methods of investigation and evidence collection that the Prosecutor could have taken. *Id.* ¶¶ 49–50.

136. *Id.* ¶ 79.

137. *Id.* ("[T]he Kenyan Government's non-compliance has not only compromised the Prosecution's ability to thoroughly investigate the charges, but has ultimately impinged upon the Chamber's ability to fulfill its mandate under Article 64, and in particular, its truth-seeking function in accordance with Article 69(3) of the Statute.").

138. *Id.* ¶ 82.

139. *Id.* ¶ 88. "[T]he approach adopted by the Prosecution to the cooperation was, in some respects, not reflective of a prosecutorial and investigative body effectively seeking to obtain the requested materials. If the primary objective of pursuing the cooperation request at this time was to actually obtain the requested materials, the Chamber would have expected to see a greater degree of diligence, persistence and, where necessary, flexibility on the part of the Prosecution." *Id.*

140. *Id.* ¶ 89.

141. Prosecutor v. Kenyatta, ICC-01/09-02/11-983, Notice of Withdrawal of the Charges Against Uhuru Muigai Kenyatta (Dec. 5, 2014).

142. *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the Withdrawal of Charges Against Mr. Uhuru Muigai Kenyatta*, INT'L CRIM. CT. (Dec. 5, 2014), https://www.icc-cpi.int/Pages/item.aspx?name=otp-statement-05-12-2014-2&ln=en.

had died or recanted their statements while other witnesses refused to testify out of fear, and that the Kenyan government refused to surrender documents critical to proving the elements of the crimes charged.[143] The Prosecutor clarified, however, that she withdrew the charges without prejudice, leaving the door open for a potential prosecution if new evidence became available in the future.[144] On March 13, 2015, the Trial Chamber confirmed the withdrawal and terminated the proceedings against Kenyatta.[145]

## IV.
## A NEW PATH TO COOPERATION: ARTICLE 87(7)

The perception that the ICC is targeting Africa and the lingering fear of African countries' withdrawal from the Statute are not the only threats to the Court's legitimacy. The lack of cooperation the ICC has tolerated in its investigations and prosecutions up to this point, which is permitted by the discretionary nature of Article 87(7) of the Statute, has also endangered the Court's legitimacy. As one scholar noted, compliance at the ICC is "associated with social legitimacy[,] as the former signals whether the State believes that the institution has the right to rule."[146] Part IX, Articles 86–102 of the Rome Statute explicitly address the issue of State compliance. However, only Article 87 expressly dictates the consequences that State Parties to the Statute will face if they refuse to comply with investigations pending at the Court. Specifically, Article 87(7) authorizes the ICC to refer matters of State noncompliance to the Security Council or to the Assembly of States Parties, even though the Statute does not further outline the purpose or consequence of such a referral.[147]

143. *Id.*

144. *Id.*

145. Prosecutor v. Kenyatta, ICC-01/09-02/11-1005, Decision on the withdrawal of charges against Mr Kenyatta (Mar. 13, 2015). The Prosecutor had dismissed the charges against Muthaura in March of 2013, nearly two years before dismissing charges in the *Kenyatta* case. In that case, too, the Prosecutor cited insufficient evidence due to "investigative challenges, including a limited pool of potential witnesses, several of whom have been killed or died since the 2007-2008 post-election violence in Kenya, and others who are unwilling to testify or provide evidence to the Prosecution." Prosecutor v. Muthaura, ICC-01/09-02/11-687, Prosecution Notification of Withdrawal of the Charges against Francis Kirimi Muthaura (Mar. 11, 2013). Further, the Prosecutor noted that "[d]espite assurances of its willingness to cooperate with the Court, the Government of Kenya has in fact provided only limited cooperation to the Prosecution, and has failed to assist it in uncovering evidence that would have been crucial, or at the very least, may have been useful in the case against Mr. Muthaura." *Id.*

146. Galand, *supra* note 40, at 145. For a compelling sociological discussion of various sources of legitimacy and the current adequacy of the ICC in ensuring legitimacy, see generally *id*.

147. Rome Statute, *supra* note 12, art. 87(7) ("Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.").

Despite Article 87(7)'s delegation of power to the ICC to make a finding of noncompliance and to refer such matters to other international political bodies like the Security Council, the Court has not consistently or sufficiently applied this provision to significant instances of State noncompliance. The contrast between the Court's application of the provision in the *Kenyatta* and *Gaddafi* cases, which were decided within a week of one another, offers an illustrative example.

In the *Kenyatta Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute*,[148] the Trial Chamber acknowledged that *Kenyatta* was the Court's first opportunity to adjudicate the issue of a State failing to comply in the investigation phase of a case.[149] The Chamber divided its noncompliance analysis into two parts. First, the Chamber considered whether the State failed to comply because of "unjustified inaction or delay, or a clear failure to have in place appropriate procedures for effecting the cooperation."[150] If so, the Chamber could exercise its discretionary power to determine "whether making a finding pursuant to Article 87(7) of the Statute is appropriate in the circumstances."[151] The Chamber further noted that a State's compelling justifications for failures to comply may be a valid consideration under both prongs of the analysis.[152] After analyzing eight categories of evidence that Kenya failed to turn over to the Prosecutor, the Chamber held that Kenya did not provide a sufficient justification for its failures and took no meaningful steps to comply with evidentiary requests. Thus, the Chamber found that the first prong of the noncompliance analysis was satisfied.[153]

In evaluating the second part of the analysis, the Trial Chamber considered whether a formal finding of noncompliance would "promote the functions of the Court and assist a fair trial."[154] It emphasized that a finding of noncompliance would ultimately leave the remedial question to the Assembly of States Parties or the Security Council.[155] The Trial Chamber also noted that the Prosecutor bore the burden of demonstrating that Kenya's conduct warranted such a finding.[156] With these considerations in mind, the Trial Chamber concluded that a finding of noncompliance was inappropriate in Kenyatta's case, despite Kenya's

148. Prosecutor v. Kenyatta, ICC-01/09-02/11-982, Decision on Prosecution's Application for a Finding of Non-compliance Under Article 87(7) of the Statute (Dec. 3, 2014).

149. *Id.* ¶ 38. Article 98 of the Rome Statute requires States to comply in any and all investigations and lists various forms of assistance that State Parties are required to provide. The Chamber contrasted this request with previous requests for noncompliance findings under Articles 89(1) and 91 of the Statute for State failures to cooperate by failing to arrest and surrender subjects under investigation. *Id.*

150. *Id.* ¶ 42.

151. *Id.* ¶ 39.

152. *Id.*

153. *Id.* ¶¶ 74–78.

154. *Id.* ¶ 80.

155. *Id.* ¶ 81.

156. *Id.* ¶ 80.

noncooperation. The Chamber reasoned that a referral might result in further uncertainty and delay in the proceedings; that the Prosecutor had conceded that the evidence fell below the standard required for trial, even if the records requests were to be fully executed; and that a referral would not facilitate a fair trial or be in the interest of justice.[157]

Critically, the Trial Chamber left open the possibility of referring a case to the Assembly of States Parties under Article 87(7) in cases where such an action would promote future cooperation, or when the noncooperation at issue "is of a serious nature."[158] The Trial Chamber also seemingly suggested, however, that the impetus is on the Prosecutor to issue cooperation requests under Article 98(1) of the Statute and to follow up on its requests "expeditiously, thoroughly and meaningfully."[159] Interestingly, the plain text of Article 93 does not include any prosecutorial "diligence" requirement. Rather, Article 93 places the burden of cooperating in all aspects of the investigation squarely on the State.[160] Nevertheless, in *Kenyatta*, the Chamber criticized the Prosecutor for failing to demonstrate sufficient efforts in obtaining the requested information, which the Chamber ultimately determined to be fatal to a finding of noncompliance under Article 87(7).[161]

Critically, the Trial Chamber's implication that the Prosecutor has the burden of continually seeking evidence States deliberately and persistently refuse to provide seems to undercut the applicability of Article 87(7) altogether.[162] Further, in its decision, the Chamber gives no guidance about how far this burden extends, and at what point the Prosecutor's obligation to continue attempting to obtain information ends and the Court's obligation to make a referral to the Assembly of

157. *Id.* ¶ 82. The Chamber also noted that, in a decision issued on the same day, it had denied the Prosecutor's request to delay the trial until its evidentiary basis for pursuing charges improved. *Id.* ¶ 83.

158. *Id.* ¶ 84.

159. *Id.* ¶ 85.

160. *See* Rome Statute, *supra* note 12, art. 93 ("State Parties shall, in accordance with the provisions of this Part and under procedures of national law, comply with requests by the Court to provide the following assistance in relation to investigations or prosecutions."). At least one scholar has acknowledged that the investigation stage highlights the differences between international and national justice systems. *See* WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 104 (William A. Schabas, 1st ed. 2001). Schabas stated: "Under a national justice system, the prosecuting authority has more or less unfettered access to witnesses and material evidence, subject to judicial authorization where search or seizure are involved. The matter is not nearly as simple for an international court, because the prosecutor must conduct investigations on the territory of sovereign States. The investigation depends on the receptivity of the domestic legal system to initiatives from the Prosecutor's office. This will be especially difficult in the case of States that are not parties to the Statute or States that find themselves threatened by such an investigation, both of them rather probable scenarios." *Id.* at 104.

161. Decision on Prosecution's Application for a Finding of Non-compliance, ICC-01/09-02/11-982 ¶¶ 85–87.

162. This clearly contradicts the Court's own characterization of Article 87(7) as a "tool . . . to eliminate impediments to cooperation." *See supra* note 52 and accompanying text.

States Parties or the Security Council begins.[163] Despite the Chamber's insistence on the discretionary nature of its decision to refer the matter to the Security Council or the Assembly of States Parties, *Kenyatta* demonstrates that Article 87(7) cannot operate with any functional utility if the Chamber's discretion is limitless.

In the *Gaddafi* case, however, the Pre-Trial Chamber took a different approach in its noncompliance analysis. When Libya failed to surrender a defendant to the Court and to return defense counsel documents that Libyan officials had seized, the Pre-Trial Chamber again faced the issue of whether or not to make a formal finding of noncompliance.[164] The Pre-Trial Chamber first acknowledged that Libya had a duty to "cooperate fully with and provide any necessary assistance to the Court and the Prosecutor."[165] However, the Pre-Trial Chamber noted that "a finding of non-compliance under [A]rticle 87(7) of the Statute only requires an objective failure to comply, regardless of the State's underlying motives."[166] It then concluded that because Libya objectively failed to surrender Gaddafi to the authorities and return the missing documents, a noncompliance finding under Article 87(7) was appropriate, as was a referral to the Security Council.[167] Significantly, despite its declaration that this finding was based solely on Libya's failure to comply with its obligations to the Court, the Pre-Trial Chamber seemed to consider other factors in its analysis. For example, the Pre-Trial Chamber noted that "both outstanding obligations" to surrender the defendant and the documents were of "paramount importance for the Court's exercise of its functions and powers in the present case."[168] Furthermore, the Pre-Trial Chamber emphasized that Gaddafi's continued detention in Libya deprived

163. Decision on Prosecution's application for a finding of non-compliance, ICC-01/09-02/11-982 ¶ 88 ("If the primary objective of pursuing the cooperation request [under Article 98] at this time was to actually obtain the requested materials, the Chamber would have expected to see a greater degree of diligence, persistence and, where necessary, flexibility on the part of the Prosecution. The Chamber does not accept that the Prosecution has no independent means of taking such an approach. It ought to be pursued both throughout the course of the cooperation and when ultimately seeking to persuade the Chamber that a finding under Article 87(7) of the Statute is warranted.").

164. Prosecutor v. Gaddafi, ICC-01/11-01/11-577, Decision on the Non-compliance by Libya with Requests for Cooperation by the Court and Referring the Matter to the United Nations Security Council, ¶ 4 (Dec. 10, 2014).

165. *Id.* ¶ 21. The Pre-Trial Chamber did not reference Article 93, however, which explicitly requires parties subject to the Court's jurisdiction to comply with requests for cooperation issued by the Prosecutor.

166. *Id.* ¶ 33.

167. *Id.* ¶¶ 34–35.

168. *Id.* ¶ 26. The Chamber went on to state that "the initial appearance of Saif Al-Islam Gaddafi before the Chamber upon his surrender to the Court is a necessary precondition under the Statute for the proceedings in the present case to unfold and move forward to the stage of the Chamber's consideration on whether the available evidence is sufficient to commit Saif Al-Islam Gaddafi to trial." *Id.* ¶ 27.

him of his right to participate in his defense before the ICC[169] and deprived the victims of his crimes of their rights to justice.[170]

Although the *Kenyatta* and *Gaddafi* Article 87(7) decisions were issued within a single week of each other, both the Pre-Trial and Trial Chambers' conclusions and analyses in these cases remain at odds with one another. As a preliminary matter, it is unclear why the Pre-Trial Chamber utilized an "objective" test to determine whether or not it should make a finding of noncompliance in *Gaddafi*, but the Trial Chamber did not do the same in *Kenyatta*. This difference seems particularly anomalous given that the Pre-Trial Chamber expressly acknowledged that Libya had shown a commitment to the Court and had made efforts to cooperate, but the Trial Chamber expressly reached the opposite conclusion in *Kenyatta*.[171] Another particularly significant disparity in the two cases is the weight given to victims' rights in the noncompliance analysis. While the Pre-Trial Chamber considered victims' rights in *Gaddafi*, the Trial Chamber inexplicably made no mention of them in *Kenyatta*.

Furthermore, the Trial Chamber's decision in *Kenyatta* implied that a referral under Article 87(7) and the attendant noncompliance finding should be reserved for cases in which noncooperation is of a "serious nature."[172] However, it is unclear why one State's deliberate, unjustifiable refusal to produce critical evidence does not rise to the level of seriousness contemplated by the Trial Chamber.[173] The *Gaddafi* case illustrated noncooperation of a "serious nature."[174] In that case, the Pre-Trial Chamber correctly identified the Court's obvious inability to administer justice when a State fails to surrender a charged suspect.[175] However, the contrasting results in *Kenyatta* and *Gaddafi* concerning the appropriateness of noncompliance cannot be justified simply because one State failed to produce a charged suspect and the other failed to produce critical evidence. Of course, it is axiomatic that a prosecution is simply not possible if the subject at issue fails to ever appear before the Court. However, as the *Kenyatta* case demonstrated to both the ICC and the rest of the world, prosecution is likewise impossible if States refuse to meaningfully participate in an investigation.[176]

169. *Id.* ¶ 28.

170. *Id.* ¶ 29.

171. *Id.* ¶ 31.

172. Prosecutor v. Kenyatta, ICC-01/09-02/11-982, Decision on Prosecution's Application for a Finding of Non-compliance Under Article 87(7) of the Statute, ¶ 84 (Dec. 3, 2014).

173. *Id.*

174. *Id.*

175. *See* Prosecutor v. Gaddafi, ICC-01/11-01/11-577, Decision on the Non-compliance by Libya with Requests for Cooperation by the Court and Referring the Matter to the United Nations Security Council, ¶ 32 (Dec. 10, 2014) ("[T]he Chamber cannot ignore its own responsibilities in the proceedings and its duty to deploy all efforts to protect the rights of the parties and the interests of victims.").

176. For a discussion on the implications of the Statute's limitations on investigation, see

The *Kenyatta* case posed significant challenges for the ICC. The Court faced the scrutiny and backlash of an entire continent because of its pursuit of an investigation into atrocities committed against civilians for political gain. The Court struggled to secure Kenya's cooperation from the start, in large part because Kenyatta, like many other defendants the ICC has attempted to prosecute, was in a position of power to influence Kenya's cooperation with the Court.[177] In pursuing the investigation, the Court was forced to confront a fundamental question about how to operate effectively on a global scale: How does an international body adequately prosecute crimes when the individuals most able to facilitate the investigation are the very individuals subject to investigation?

The answer may lie in Article 87(7), but that provision is not self-executing. Although Article 87(7) authorizes a referral to two different international bodies with the power to impose sanctions, it does not *require* sanctions, nor does it require the Court to take any action at all. Notwithstanding the provision's shortcomings and the historical unwillingness of the Assembly of States Parties or the Security Council to take meaningful action when a referral is made, the ICC erred by declining to make a formal finding of noncompliance in *Kenyatta*. By failing to do so, the ICC implicitly ratified certain kinds of noncompliance that are just as detrimental to the successful prosecution of defendants as a State's failure to surrender defendants to the Court. By showing parties to the Rome Statute that there are no consequences for thwarting the Court's efforts to investigate, failing to make a finding of noncompliance under Article 87(7) may help States obtain the very result that they seek by their noncooperation: a dismissal of the charges against them.

In light of the ICC's failure to make a finding of noncompliance, the ICC eliminated the possibility of sanctions or any remedial action that the Assembly of States Parties or the Security Council had the authority to make.[178] Although

Christian M. De Vos, *The International Criminal Court: Between law and politics*, *in* INT'L CRIM. L. IN CONTEXT (Philipp Kastner ed., 2nd ed. 2018). De Vos argued: "More directly, such methods [of limited investigation] have also imperiled the ICC's credibility; indeed, while the withdrawal of charges against Kenyatta and other Kenyan accused was undoubtedly the most damaging for [the Office of the Prosecutor], to date nearly one-third of those individuals brought before the Court have had the charges against them dismissed by the pre-trial chamber or later withdrawn." *Id.* at 250.

177. Kenyatta was the President of Kenya throughout the duration of his prosecution at the ICC, and during that time, several witnesses mysteriously disappeared or recanted their statements. Emmanuel Igunza, *Kenya ICC witness killing haunts Eldoret family*, BBC (Jan. 9, 2015), https://www.bbc.com/news/world-africa-30716696. Igunza asks, "So why is it that unlike any other case at the ICC, it is witnesses in the Kenyan prosecutions that have been so vulnerable to intimidation? The answer may be that they were all high-profile figures with wide networks of supporters." *Id.* Another case of witness tampering occurred in the trial of former Congolese opposition leader Jean-Pierre Bemba Gombo. After Bemba was found guilty at the ICC of war crimes and crimes against humanity, the ICC began its prosecution of Bemba and four associates—including a member of the Congolese Parliament—for bribing witnesses to give false testimony in Bemba's trial. Jennifer Easterday, *Witness Tampering Case Opens at the ICC*, INT'L JUSTICE MONITOR (Sept. 29, 2015), https://www.ijmonitor.org/2015/09/witness-tampering-case-opens-at-the-icc/.

178. To fully capitalize on the utility of Article 87(7), it is imperative that the International Criminal Court work with the Assembly of States Parties and the Security Council to ensure that all

it is unclear whether or not the Assembly or the Security Council would have taken any action had a referral been made, the Prosecutor's decision to withdraw charges for lack of sufficient evidence was inevitable without any assistance from either the Court or outside political bodies to obtain the evidence and testimony that Kenya so adamantly tried to suppress. Consequently, the *Kenyatta* case resulted in the ICC's failure to secure the conviction—or even the trial—of a leader charged with organizing brutal attacks on the same citizens he was later re-elected to govern.[179]

## CONCLUSION

The ICC's failure to make a formal finding of noncompliance against Kenya has contributed to the erosion of support for the ICC, and has raised questions about the Court's willingness and ability to hold those who commit crimes against humanity accountable.[180] More importantly, the Court's failure to make a formal finding of noncompliance took any chance of seeing justice away from the victims of the government-orchestrated crimes. Some of Kenya's citizens sang and celebrated in the streets of the capital at news that their President would return to Kenya after the ICC dropped the charges against him. Nearly twenty thousand others confronted a harsh reality: in addition to their pain and suffering in the wake of the 2007 election, they would continue to be governed by the same man who orchestrated unspeakable violence and destruction against them and their loved ones.[181]

three bodies exercise their commitments and obligations to international criminal justice. This would require the Assembly of States Parties and the Security Council to begin imposing the sanctions that they are authorized to impose, or to more seriously consider the imposition of sanctions or other remedial measures that the Rome Statute expressly leaves to their discretion. This Note does not address the specific actions that the Assembly of States Parties or the Security Council should take, but the author acknowledges that a different approach by both bodies is necessary for Article 87(7) to fully serve its intended purpose of securing State compliance.

179. *See Kenya Election: Kenyatta Re-elected in Disputed Poll*, BBC (Oct. 30, 2017), https://www.bbc.com/news/world-africa-41807317. Kenyatta was re-elected in October of 2017 after initially being declared the general election winner in August. *Id.* However, the Kenyan Supreme Court annulled the August vote due to "irregularities" that, according to the court, were not attributable to Kenyatta or his campaign. *Id.* At least one news outlet reported that about fifty people died in post-election violence after the August election. *Id.* As of the date of the publication of this Note, Kenyatta still serves as Kenya's President.

180. For another perspective offering insight into the potential for the legitimacy of the Court, see generally MICHAEL J. STRUETT, THE POLITICS OF CONSTRUCTING THE INTERNATIONAL CRIMINAL COURT: NGOS, DISCOURSE, AND AGENCY 153 (2008). Struett argues that "[s]ince the ICC is a permanent court, it can avoid many of the criticisms of ad hoc war crimes tribunals. Because of its permanence, it can build on its successes over time. This permanence strengthens the ICC's pretensions to enforce universal norms, and as such it is logically in a position to command greater legitimacy." *Id*. In addition, in a survey by Gallup International and the Worldwide Independent Network of Market Research, approximately sixty percent of survey respondents said that they support the existence of an international court that is not under the authority of their own State. JAMES MEERNIK, INTERNATIONAL TRIBUNALS AND HUMAN SECURITY 145 (2016).

181. *See* Marlise Simons & Jeffrey Gettleman, *International Court Ends Case Against Kenyan*

A more aggressive application of Article 87(7) is one way for the ICC to show countries under investigation, victims, and the rest of the world that the Court will not be complicit in State Parties' noncooperation. Although Article 87(7) is supposed to foster the pursuit of justice by giving the Court a mechanism to sanction noncompliance, the Court's unwillingness to utilize Article 87(7) permits the very impunity the Court was created to combat. The need for a more liberal application of Article 87(7) is particularly relevant because, as of the time of writing, the ICC is investigating ten States and has launched preliminary examinations against eleven others.[182] History indicates that the Court will likely continue to face evidentiary struggles moving forward.[183] Evidentiary issues are especially likely considering that many of these cases implicate high-ranking government officials who, like Kenyatta, are in a position to harass, intimidate, or kill witnesses; destroy evidence; or otherwise evade the Court's power to prosecute.[184]

*President in Election Unrest*, N.Y. TIMES (Dec. 5, 2014), https://www.nytimes.com/2014/12/06/world/africa/uhuru-kenyatta-kenya-international-criminal-court-withdraws-charges-of-crimes-against-humanity.html. After the decision was announced, hundreds of celebrating citizens blocked the main highway in one town. *Id.* The chairman of a displaced persons camp, Peter Kariuki, stated: "We are thankful to God, as our president is now free." *Id.* Meanwhile, Fergal Gaynor, a lawyer representing some of the victims of the post-election violence, told the BBC that there was a "widespread feeling of disappointment" when the charges were dropped and that victims had been "robbed" of justice. *ICC Drops Uhuru Kenyatta Charges for Kenya Ethnic Violence*, BBC (Dec. 5, 2014), https://www.bbc.com/news/world-africa-30347019. In addition to the victims of the post-election violence, victims of violence stemming from their involvement in the criminal investigation were also left without justice. In one instance, a woman's husband was found murdered in a small town where several families reported the "mysterious disappearance" of relatives who were connected with the ICC during the investigation against Kenyatta. *See* Igunza, *supra* note 177.

182. *See* INTERNATIONAL CRIMINAL COURT, https://www.icc-cpi.int/# (last visited Apr. 26, 2019). As of the time this Note was written, the following States are under preliminary examination: Afghanistan, Bangladesh/Myanmar, Colombia, Guinea, Iraq/UK, Nigeria, Palestine, The Philippines, Ukraine, and Venezuela. *Id.* The following states are under investigation: Democratic Republic of the Congo, Uganda, Sudan, Central African Republic, Kenya, Libya, Côte d'Ivoire, Mali, Georgia and Burundi. *Id.*

183. For an interesting perspective about how Luis Moreno Ocampo, the original Prosecutor in the *Kenyatta* case, overcame some of the investigative difficulties of prosecuting international crime, see Luis Moreno Ocampo, *The International Criminal Court, in* THE FOUNDERS: FOUR PIONEERING INDIVIDUALS WHO LAUNCHED THE FIRST MODERN-ERA INTERNATIONAL CRIMINAL TRIBUNALS (David M. Crane, Leila N. Sadat & Michael P. Scharf eds., 2018). Ocampo stated, "The ICC prosecution may also be required to act where such national forces are themselves committing the crimes. In both scenarios, the classic investigations methods used by functioning national states could not be available for the ICC investigations." *Id.* at 96.

184. For example, the situation in the Philippines arises out of alleged extra-judicial killings of individuals involved in illegal drug use or drug dealing. *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening Preliminary Examinations into the situations in the Philippines and in Venezuela*, INT'L CRIM. CT. (Feb. 8, 2018), https://www.icc-cpi.int/Pages/item.aspx?name=180208-otp-stat. It is also alleged that these crimes occurred, in part, through the use of the police force. *Id.* Similarly, in Venezuela, the preliminary investigation arises out of alleged excessive force and abuse used by State security forces to silence protestors. *Id.* Both of these situations raise the specter of high-ranking official involvement, much like in the *Kenyatta*

To regain legitimacy, and to more faithfully execute its function as a justice-administering body, the International Criminal Court must begin aggressively utilizing its power under Article 87(7) at all stages of State investigations and criminal proceedings, combatting impunity by refusing to excuse it.

case, that could lead to potential evidentiary problems similar to those faced in prosecuting Kenyatta.