Australian Institute of International Affairs

EMERGING SCHOLARS
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Edited by Melissa H. Conley Tyler
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CONTENTS

FOREWORD

The Australian Institute of International Affairs (AIIA) was established over 75 years ago to promote public understanding and interest in international affairs.

In recent years, the AIIA has been increasingly active in promoting its activities to younger members of the community. The AIIA has launched a variety of initiatives to involve young people including Young Professional Networks, careers fairs, schools events and the Young Diplomat Program. This has helped the AIIA reach its present strength of more than 1600 members across seven State and Territory Branches.

As part of our commitment to engage youth in international affairs, the AIIA National Office launched an internship program in 2006. Since the commencement of the program in 2007, the National Office has hosted more than 80 interns from Australia and overseas. A number of branches host internship programs, including a very active program at NSW Branch.

Given the high quality of papers prepared by interns, the AIIA wanted to promote this work to a broader audience. It was thus decided to produce an annual *Emerging Scholars* series in order to publicise their work. The opinions contained in this volume are those of the authors alone and do not represent the views of the AIIA.

This third volume in this series includes reports on a variety of challenging issues in international affairs, including the ICC's role in post-conflict accountability, what role civil society plays in Thai politics, the subtle influence of government on media freedoms in Korea, the development of international linkages can improve social welfare, how states work together internationally to combat terrorism, what opportunities and challenges 'normalisation' provides Japan, where private military and security corporations fit into international law, how new types of state action can be governed by the rules on force, and the difference between strategic success and victory.

The *Emerging Scholars* series provides a unique opportunity for young researchers to influence debate in the community on a number of important issues. For the authors, it is a valuable opportunity to publish, often for the first time, and to reach an audience of their peers and elders, many of whom are experts in their fields. We congratulate the authors on their work and hope that this further stimulates their interest in careers in international affairs.

I would like to thank the reviewers for this volume – National Vice-President Geoff Miller AO, Honorary Secretary to the Research Committee Dr Chad Mitcham and Dr Sue Thompson – for the significant work they have put into ensuring the quality of this publication. I would also like to recognise Matt Smith, Tim Cook, Anna Jamieson-Williams, and Michael Gibbs for assisting in the editing process. I thank Professor Robert Campbell and Cheryl Wilson of the Australian National Internship Program for placing so many excellent interns with the Institute. We wish the authors well in their future endeavours and commend their research to you.

Melissa H. Conley Tyler
National Executive Director
Australian Institute of International Affairs

ACRONYMS AND ABBREVIATIONS

AAC	Anti-Anarchist Conference
ABM	Anti-Ballistic Missile
ABS	Asian Barometer Surveys
AQI	Al-Qaeda in Iraq
BMD	Ballistic Missile Defence
CAR	Central African Republic
COIN	Counterinsurgency
CPA	Coalition Provisional Authority
CSO	Civil Society Organisation
DRC	Democratic Republic of the Congo
DPJ	Democratic Party of Japan
DPRK	Democratic People's Republic of Korea (North Korea)
EEZ	Exclusive Economic Zone
FTA	Free Trade Agreement
FM 3-24	COIN Field Manual (US Army)
GCS	Global Civil Service
GWOT	Global War on Terror
ICBM	Inter-Continental Ballistic Missile
ICC	International Criminal Court
ICJ	International Court of Justice
ICPC	International Criminal Police Commission
IHL	International Humanitarian Law
ILC	International Law Commission
JASDF	Japan Air Self-Defence Force
JGSDF	Japan Ground Self-Defence Force
JMSDF	Japan Maritime Self-Defence Force
JSDF	Japanese Self-Defence Forces
JSS	Joint Security Stations
LDP	Liberal Democratic Party of Japan
LRA	Lord's Resistance Army
MAD	Mutually Assured Destruction
NATO	North Atlantic Treaty Organisation
NGO	Non-Governmental Organisation
PAC-3	Patriot Advanced Capability - 3
PAD	People's Alliance for Democracy
PKO	Peace Keeping Operations
PLA	Chinese People's Liberation Army
PM	Prime Minister
PMCs	Private Military Corporations
PMSCs	Private Military and Security Corporations
PSCs	Private Security Corporations
PPP	People's Power Party
ROC	Republic of China (Taiwan)
ROK	Republic of Korea (South Korea)
RUF	Revolutionary United Front
SLOC	Sea Lines of Communication

SM-3	Standard Missile 3
TRT	Thai Rack Thai (“Thais Love Thais”) party
WMD	Weapons of Mass Destruction
UDD	United front for Democracy against Dictatorship
UNSC	United Nations Security Council
US	United States of America
UPC	Union of Congolese Patriots

Conflict Resolution in Africa: A Role for the International Criminal Court?

Amy Grant

Since decolonisation Africa has spiralled into a seemingly unbreakable pattern of civil conflict. This article explores the ability of new legal mechanisms to provide a response to these conflicts in the hope that they may prove innovative in bringing a swift cessation to violent conflict. The article focuses on the International Criminal Court (ICC) as it is considered to be the legal mechanism with the greatest scope, and therefore the greatest potential, to address the nature of African civil conflicts. Building from a belief in the value of international justice, this article finds that within the complexity of African civil conflict there is a role for the ICC due to its ability to prosecute individuals, and thus assign accountability, for grave violations of international law. The ICC is likely to be most effective in conflict resolution initiatives in Africa through its sociological impact on warring parties in conflict situations where the threat of prosecution serves as an incentive to motivate them to seriously engage in peace negotiations. However, new legal mechanisms do not provide a comprehensive solution to African civil conflict as they lack the ability to secure successful peace agreements by addressing the root causes of conflict. Rather, the value of the ICC is most effective when utilised as one of a number of accountability mechanisms in an eclectic and flexible approach to conflict resolution.

Amy Grant obtained a Masters in International Relations at the University of New South Wales; this chapter is derived from her dissertation.

Introduction

The African continent has been plagued by interstate conflict since decolonisation. In the popular view of the global community, it is a region fraught with economic catastrophe, endemic corruption and civil violence. However, a recent report by the Human Security Report Project takes a more positive position. It describes an 'extraordinary' change in the African security landscape and provides evidence of a reduction by almost 50% in the number of conflicts being waged throughout the continent between 1999 and 2006.[1] In real terms, this has translated into the actual cessation of conflict in areas in which some of the worst violence has occurred, such as Sierra Leone, Liberia, and the Central African Republic (CAR).[2]

The data from the Human Security Project coupled with recent advances in conflict resolution creates the prospect that the cessation of conflict may not be a transient phenomenon.[3] Many of the new developments in conflict resolution have centred around international law and advancements in international humanitarian law. There is now a belief that international law has a role to play in conflict resolution due to the ability of new legal mechanisms to prosecute the most serious violators of international humanitarian law. The ICC has been heralded as the mechanism which has the greatest scope, and therefore, potential, to influence the cessation of violent conflict and thus form an effective part of conflict resolution initiatives.

African States actively supported the creation of the ICC. This speaks to the overall willingness throughout the continent to eradicate impunity for serious violations of international law and to find a solution to the civil conflicts which have plagued countries in the region.[4] However, Africa's commitment to the ICC has weakened and criticism has grown as the ICC has taken its first steps in Africa and failed to produce

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[1] Human Security Report Project, "Human Security Brief" (2007), available online: www.humansecuritybrief.info/index.html (accessed 5 June, 2008).

[2] G. Evans, 'Conflict and Mass Violence in Africa: Is There an End in Sight?' (2007), available online: www.crisisgroup.org/home/index.cfm?id=4820&l=1 (accessed 5 June, 2008).

[3] ibid.

[4] N. Waddell and P. Clark, 'Introduction', in N. Waddell and P. Clark, (eds.) *Peace, Justice and the ICC in Africa Meeting Series Report* (London: Royal African Society, 2008), p.10.

concrete results.[5] The ICC's engagement with Africa has raised questions concerning its impact on the ground in conflict situations.

The ICC's efficacy as a mechanism for the resolution of conflict has been sharply drawn into focus following the issuing of an arrest warrant for Sudanese President Omar al-Bashir. For this action the ICC has been heavily criticised as having obstructed peace and of being a Western instrument of regime change. Some of the loudest advocates of these views come from within Africa itself, most notably the African Union (AU) whose failure to support the ICC threatens to undermine all of its current and future investigations.

This chapter firstly will explore the nature of African civil conflicts and seek to identify aspects of these conflicts which are judiciable. It will then outline the hopes and expectations for the ICC following the realisation of the Rome Statute.[6] This will be done to establish the context within which the debate over the efficacy of the ICC in relation to conflict resolution in Africa takes place. The chapter will then turn to evaluate what role new legal mechanisms can play in conflict resolution initiatives. This will be assessed by exploring the debate surrounding the methods of the ICC and which of these may make the most valuable contribution to conflict resolution initiatives. This will be achieved with an empirical analysis of the ICC investigation in Uganda. From this basis an assessment will then be offered on the efficacy of new legal mechanisms to provide a response to future African civil conflicts.

The Nature of African Conflict: The Relevance of the ICC

The ICC has jurisdiction over crimes of genocide, crimes against humanity and war crimes. A definition of each of these can be found in the Rome Statute.[7] In order to assess the extent to which new legal mechanisms such as the ICC can play an effective role in the resolution of African civil conflicts, it is necessary to examine the extent to

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[5] S. Hanson, 'In Uganda, Peace Versus Justice' (2006), available online: www.cfr.org/publication/12049/in_uganda_peace_versus_justice.html?breadcrumb=%2Findex (accessed 30 May, 2008).

[6] For the text of the Rome Statute see 37 ILM 999 (1998). Also see Scott S. V. (ed.), *International Law and Politics Key Documents* (Colorado: Lynne Rienner Publishers, Inc, 2006) pp. 248-314.

[7] The Rome Statute of the International Criminal Court, articles 6, 7, 8.

which the crimes committed in African civil conflicts fall under the jurisdiction of the ICC.

Genocide, crimes against humanity and war crimes include crimes of savagery, the recruitment and employment of child soldiers, widespread systematic killing and rape. Thus the Rome Statute provides the ICC with the legal basis to prosecute those responsible for committing such atrocities in Africa. It is this jurisdiction which gives the ICC scope to operate in African conflicts and enables it to prosecute violators of these aspects of international law. Due to the ICC's ability to provide a legal redress against the instigators of violence and conflict, a number of African States have supported it as a response to the atrocious crimes parts of the region have witnessed since decolonisation. [8]

The abuse of children by forcing them to be child soldiers has come to symbolise conflict in Africa. While the existence and use of child soldiers is not limited to Africa, it is in Africa where the issue is most apparent. It is estimated that there are between 200,000 and 500,000 child soldiers in Africa. Most are drawn from the poorest and most marginalised parts of society.[9]

It is also an aspect of conflict which is considered to be judiciable. For example, since 2003 the Democratic Republic of Congo (DRC) has undertaken extensive domestic legislative reform prohibiting the recruitment of children under the age of 18.[10] A United Nations report in 2005 found an overall reduction in child soldier recruitment in the DRC and while this can be attributed largely to a reduction in active fighting it also indicates the potential impact of legislation.[11] The first referrals to the ICC have involved allegations of conscription or enlisting child soldiers; Thomas Lubanga, leader of the Union of Congolese Patriots (UPC), is currently on trial facing three charges relating to the conscription and use of child soldiers in the DRC and Joseph Kony,

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[8] L. Moreno-Ocampo, Peace, Justice and the International Criminal Court in Africa, in N. Waddell and P. Clark (ed.) *Peace, Justice and the ICC in Africa Meeting Series Report*, London, Royal African Society, 2008, p. 8.

[9] V. Druba, "The Problem of Child Soldiers", *International Review of Education,* vol. 48, no.3/4 (2002), p.271.

[10] Coalition to Stop the Use of Child Soldiers, "Child Soldiers Global Report 2008" (2008), available online: www.childsoldiersglobalreport.org/content/congo-democratic-republic (accessed 20 May 2008).

[11] ibid.

leader of the Lord's Resistance Army (LRA), has been indicted on two counts of enlisting children constituting war crimes in Uganda.

The emergence of a new form of 'Chinese style' warlordism is another feature of African conflict. As parts of postcolonial Africa have descended into a pattern of political instability and violence, warlordism has materialised indue to failing state structures weakened by the power vacuum which accompanied independence. In the African context it is characterised by the practice of organised looting. This has created a shadow state in some African nations whereby rebel leaders, or warlords, are able to use failing state structures to challenge formal power structures.[12] This allows access to the control of valuable resources and commodities which provide an incentive for war. In Sierra Leone, warlords and their forces control most of the country outside of Freetown.[13] A similar situation occurred in the Sudanese second civil war.[14] The activities that these warlords conduct in the pursuit of control over resources and commodities may potentially expose them to prosecution by the ICC. Since they can be individually prosecuted for crimes, it is hoped that this threat will influence the way they choose to conduct conflict.

A pattern of systematic violence within many conflicts in Africa is also evident. The continent has become synonymous with extreme, irrational and senseless brutality.[15] Civilians are often the target of this violence, which can lead to the brutal destruction of entire communities. In Rwanda, this became genocide. There is evidence that "ethnic cleansing" has occurred in Darfur.[16] In Sierra Leone, seemingly random acts of

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[12] C. Newbury, 'States at War: Confronting Conflict in Africa,' *African Studies Review,* vol.45, no.1(2002), p. 8.

[13] International Crisis Group, 'Conflict History: Sierra Leone'(2007), available online: www.crisisgroup.org/home/index.cfm?action=conflict_search&l=1&t=1&c_country=96 (accessed 1 April, 2008).

[14] S. E, Hutchinson, 'A Curse from God? Religious and Political Dimensions of the Post 1991 rise of Ethnic Violence in South Sudan,' *The Journal of Modern African Studies,* vol. 39, no. 2 (2001), pp. 307-331.

[15] Newbury, op. cit., (2002) p. 8.

[16] International Crisis Group, 'The Darfur Genocide' (2005), available online: www.crisisgroup.org/home/index.cfm?id=3338&l=1 (accessed 1 April, 2008).

slaughter and amputation became a persistent practice.[17] These acts are covered by the Rome Statute and accordingly are aspects of conflict that can be prosecuted by the ICC. The ICC has begun exercising its jurisdiction in Africa. As mentioned above, the ICC is currently prosecuting Thomas Lubanga for the enlistment of child soldiers in the DRC. In November 2009 the ICC began two new trials against Congolese Leaders Germain Katanga and Mathieu Ngudjolo Chui**,** both of whom have been charged with a number of war crimes and crimes against humanity. In the CAR, the ICC has opened an investigation based on allegations of widespread rape of civilians.**[18]** In its investigation in Sudan the ICC issued arrest warrants in 2007 for Sudanese Minister Ahmad Harun and rebel leader Ali Kushayb and more recently in 2009 for rebel leader Abu Garda and President al-Bashir. All have been charged with crimes against humanity and war crimes. Mostly recently, in November 2009, the ICC opened an investigation into the post election violence in Kenya in 2007 and 2008.

The ICC and Conflict Resolution: Hopes and Limitations

The realisation of the ICC represents the latest innovation in responding to atrocities committed against humanity. It marks the beginning of an era of accountability for international crimes.[19] In recognition of the occurrence of "unimaginable atrocities that deeply shock the conscience of humanity" and that the "most serious crimes of concern to the international community as a whole must not go unpunished," the ICC aims to put an end to impunity and to contribute to the prevention of the most serious international crimes. [20]

The Rome Statute entered into force on 1 July 2002 less than four years after the adoption of its text on 17 July 1998. All but eight of the 50 African States have either signed or ratified the treaty. [21] Its rapid acceptance represents the will of the international community, including African states, to strengthen the international system

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[17] International Crisis Group, op. cit., (2007).

[18] International Criminal Court, 'Prosecutor Opens Investigation in the Central African Republic'(2007), available online: www.icc-cpi.int/press/pressreleases/248.html (accessed 20 May, 2008).

[19] P. Kirsch, 'ICC Marks Five Years Since Entry Into Force of Rome Statute' (2007), available online: www.icc-cpi.int/library/about/newletter/16/en_01.html (accessed 16 November, 2007).

[20] The Rome Statute of the International Criminal Court, Preamble.

[21] O. Bekon and S. Shah, 'Realising the Potential of the International Criminal Court: The African Experience,' *Human Rights Law Review,* vol. 6, no. 3(2006), p. 3.

of justice against violent acts committed with impunity.[22] It is considered a landmark achievement for international justice and has created high expectations that it will be able to deliver justice and deter future crimes.

The ICC is distinctive from other legal mechanisms partly because it is based on a multilateral treaty. It is the only international court which has broad jurisdiction over genocide, crimes against humanity and war crimes. Further, it has jurisdiction to investigate crimes committed on the territory of state parties and/or by a national of a state party. Accordingly, the ICC has an ability to circumvent issues of sovereignty which so often complicate international attempts to intervene in what are often considered the affairs of states. Its mandate is to prosecute, but to do so while complementing national criminal justice systems, commencing an investigation only when a state is unwilling or unable to initiate proceedings.

However, as much as the mandate and jurisdiction of the ICC offer hope that it can provide a response to large-scale violent crime, its limitations can be found in the challenges it faces. The primary challenge of the ICC is the necessity of conducting investigations amid on-going conflict. The court only has jurisdiction over crimes committed since it entered into force. This forces it to confront the inherent challenges involved in pursuing justice and peace simultaneously. The ICC does not have the luxury of waiting for a peace settlement before launching an investigation.

A further challenge the ICC faces is that it has no enforcement mechanism. It is thus dependent on the cooperation of the state in which the violations occur to assist in the arrest of the accused. The constraining effects of this challenge are evident in the current investigation in Sudan with both Khartoum and the African Union refusing to assist with the capture of serving President al-Bashir.

The ICC's ability to overcome its limitations will need to be decisive if it is to achieve its mandate and fulfil the hope and expectations the international community has vested in it. The ICC has now reached a crucial point. To date, tangible successes are hard to see. The commencement of the Lubanga, Katanga and Ngudjolo Chui trials has provided the ICC with some momentum but its effectiveness in bringing al-Bashir to

[22] United Nations Information Service, 'Rapid Entry into Force of International Criminal Court' (2002) available online: www.unis.unvienna.org/unis/pressrels/2002/sgsm8201.html (accessed 22 May, 2008).

trial will define the ICC and, in turn, determine its deterrent power and ability to establish international law as an effective means of resolving conflict.

The ICC and Conflict Resolution: Examining the Possibilities

There is growing acceptance that ensuring justice through formal legal channels is fundamental to build lasting peace and justice[23] and to minimise the cycle of conflict.[24] Prosecution plays a central role as it has the ability to assign accountability for crimes, *w*ithout which political philosopher Michael Walzer argues there can be no justice.[25] The power of accountability lies in its deterrent effect.[26] The more the international community holds firm in apprehending and punishing those who commit international crimes, the more potential violators will be forced to consider the consequences and will be dissuaded from launching criminal campaigns.[27]

However, the view that justice is only achievable through prosecution is a narrow one. It ignores the fact that "efforts to prosecute those most responsible for international crimes confront compelling reasons for indemnifying warring factions in order to cement peace processes." [28] When applied on the ground amongst the reality of peacekeeping such an unwavering belief in the need for prosecution often proves misleading and unhelpful.[29] It is a debate which the ICC has been confronted with in the first of its investigations. It has received considerable criticism for complicating the peace process in Uganda and Sudan with its unfaltering insistence on prosecution.[30]

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[23] D. Pankhurst, 'Issues of Justice and Reconciliation in Complex Political Emergencies: Conceptualising Reconciliation, Justice and Peace,' *Third World Quarterly,* vol. 20, no. 1(1999),p. 239.

[24]B. Broomhall, '(Post-) Conflict States and the International Criminal Court' (2003) available online: www.justiceinitiative.org/db/resource2/fs/?file_id=14240 (accessed 21 November 2007).

[25] M Walzer, Just and Unjust Wars (New York: Basic Books, 2000), p.20.

[26] B. Orend, 'Justice After War,' *Ethics and International Affairs,* vol. 16, no. 2(2002), p. 53.

[27] D. Robinson, 'Serving the Interests of Justice: Amnesties, Truth Commissions and then International Criminal Court,' *European Journal of International Law,* vol. 14, no. 3(2003), p, 489.

[28] G. Simpson, 'One Among Many: The ICC as a Tool of Justice during Transition', in N, Waddell and P. Clark (eds.), *Courting Conflict? Justice, Peace and the ICC in Africa,* London, The Royal African Society, 2008, p.74.

[29] N. Grono and A. O'Brien, 'Justice in Conflict? The ICC and Peace Processes', in N. Waddell and P. Clark (eds.), *op. cit., (2008) p. 13.*

[30] B. Afako comments in N. Waddell and P. Clark (ed.), *Peace, Justice and the ICC in Africa Meeting Series Report,* London, Royal African Society, 2008, p. 11.

Both conflicts illustrate the difficulty of reconciling peace and justice[31] and demonstrate that framing the debate as one between peace and justice is too simplistic. These conflicts reveal that the two can work in tandem under certain circumstances and in opposition in others. [32]

Opponents of the ICC argue that international justice as a whole is ineffective as it will inevitably be impeded by local politics.[33] Political scientist Phil Clark draws upon the Juba peace talks as an example of where the ICC has to date failed to understand the complex political dynamics surrounding the negotiations and its investigation has thus been hindered. Director of the Royal African Society Richard Dowden argues that the idea of punitive justice is misguided and that the ICC cannot "hand out justice in Sudan as if it were Surrey." [34] This view holds that for justice to be effective it must be locally grounded and not imposed by an international decree that reflects Western-inspired, universalist notions of justice. [35]

This line of argument finds support in the resolution of civil conflicts in Mozambique, Angola and South Africa all of which were resolved without the assistance of prosecution. It also raises the question: justice for whom? How do Western notions of justice translate to African populations? For Dowden these questions highlight that within the complexity of Africa's civil conflicts the ICC fails to understand the local context,[36] and is accordingly unable to address the root causes of conflict.[37] Prosecution may act as a deterrent in some instances but it does not remove the impetus for disgruntled groups to resort to conflict, treating instead only the symptoms of conflict.

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[31]N. Grono, 'What Comes First, Peace or Justice?' (2007), available online: www.crisisgroup.org/home/index.cfm?id=4707&1=2 (accessed 21 November 2007).

[32] P. Clark, 'Dilemmas of Justice' (2007), available online: www.prospect-magazine.co.uk/article_details.php?id=9524 (accessed 30 May 2008).

[33] Clark, op. cit.,(2007).

[34] R. Dowden, 'ICC in the Dock' (2007), available online: www.prospect-magazine.co.uk/article_details.php?id=9269 (accessed 30 May 2008).

[35] T. Allen, Ritual '(Ab)use? Problems with Traditional Justice in Northern Uganda,' in N. Waddell and P. Clark (eds.), *op. cit., (2008) p. 47.*

[36] Dowden, op. cit.,(2008).

[37] Franciscans International, 'Quest for Peace, Challenge of Justice: The ICC and Northern Uganda' (2006) available online: www.franciscansinternational.org/news/article.php?id=1230 (accessed 30 May 2008).

In contrast, defenders of the ICC reject the notion that a 'Western' court has no role to play in the African context.[38] Instead they contend that it can make a significant contribution to conflict resolution initiatives and that its impact to date underscores its potential.[39] In this view the ICC is heralded with being instrumental in bringing the peace talks in Juba close to a settlement, rather than an impediment to the process.[40] There is support amongst African populations for punitive justice[41]. This suggests that prosecution has a positive role to play in reaching a resolution of conflict[42] as there is a desire to ensure that accountability is central in any peace agreement negotiations.[43]
From these arguments emerge two dominant schools of thought on how best the ICC can influence the cessation of conflict. The first is a "judiciable approach" where prosecution directly influences the cessation of conflict. The second is a "sociological" or indirect approach where the ICC becomes an institution which motivates warring parties to negotiate.

The judiciable approach maintains that the ICC will have a direct impact on the cessation of conflict through the prosecution of those responsible for the most serious of crimes. Through the institutionalisation of prosecution the ICC convicts those guilty of atrocities and this in turn facilitates peace by creating the feeling amongst victims that justice has been done. In this view it is the assigning of accountability, and the subsequent removal of the primary perpetrators, which brings an end to hostilities and facilitates the realisation of resolution and peace.

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[38] P. Kambale and A. Rotman, 'The International Criminal Court and Congo: Examining the Possibilities' (2004), available online: www.crimesofwar.org/africa-mag/afr_05_kambal_html (accessed 18 March 2008).

[39] G. Mattiolli and A. van Woudenberg , 'Global Catalyst for National Prosecutions? The ICC in the Democratic Republic of Congo', in N. Waddell and P. Clark (eds.), *op. cit., (2008) p. 59*.

[40] A. Perkins, 'Justice for War Criminals – or Peace for Northern Uganda?' (2008), available online: http://blogs.guardian.co.uk/katine/2008/03/justice_for_war_criminals_or_p.html (accessed 30 May 2008).

[41] Africa Focus, 'Uganda: Calls for Peace, Justice' (2005) available online: www.africafocus.org/docs05/ugan0510.php (accessed 30 May 2008).

[42] Grono and O'Brien, op. cit., (2008) p. 14.

[43] M. Otim and M. Wierda, 'Justice at Juba: International Obligations and Local Demands in Northern Uganda', in N. Waddell and P. Clark (eds.), *op. cit., (2008) p. 23*.

In the sociological approach, the ICC becomes an instrument which enables all actors to negotiate and this enables conflict settlement. Here potential ICC prosecution provides an incentive of "sufficient credibility" to influence the actions and calculations of warring parties.[44] In this view, it is the threat of prosecution which motivates warring parties to the negotiating table. This incentive has been lacking in previous efforts to resolve conflict through negotiation and thus presents a new avenue through which the ICC can contribute to conflict resolution.

There is an inherent tension between these two approaches. Firstly, the second is reliant upon the first to establish "sufficient credibility." Yet the second approach is open to offering amnesty as a last resort in exchange for perpetrators putting down their weapons to sign a peace agreement. This directly undermines the aims of the first approach. Secondly, the tension between these two approaches echoes that between attaining justice and peace. It highlights the difficulty of reconciling justice and peace illustrating in 'real terms' the implications of each.

On the basis of the existing literature this article finds the critics of the ICC to have some valid arguments in relation to the challenges facing the ICC. However, there is value in international law and it is important that the ICC is given an opportunity to work. The ICC does have a role to play in the resolution of African civil conflicts as prosecution can influence the cessation of conflict. To what extent and how the ICC can achieve this most effectively will now be considered through an exploration of the debate outlined above.

The African Context: The ICC Investigation in Northern Uganda

The ICC's application and potential role in conflict resolution efforts are complicated in the African context.[45] This is highlighted in the ICC investigation in Northern Uganda where there has been considerable debate over the ICC's impact on the Juba peace process. Northern Uganda should have been an easy first case for the ICC.[46] The LRA was a relatively small military movement and its crimes were indisputable and the

[44] Grono and O'Brien, 'Justice in Conflict? The International Criminal Court and Peace Process in Africa' (2007) available online: www.crisisgroup.org/home/index.cfm?id=5120&1=1 (accessed 18 March 2008).

[45] Waddell and Clark, op.cit. (2008) p. 11.

[46] Otim and Wierda, op. cit. (2008) p. 22.

government cooperative.[47] However, rather than decisively showing its ability to bring a resolution to the conflict, the ICC's investigation created controversy.

The ICC arrest warrants issued in the Northern Ugandan investigation have changed the dynamics of the peace talks.[48] Following a year long investigation the ICC issued warrants for LRA leader Joseph Kony and four of his top commanders. Kony has been charged with 33 counts of war crimes and crimes against humanity.[49] The warrants were supported by the Ugandan government and were kept sealed for several months in order to give parties to the ongoing peace talks an opportunity to reach agreement.[50] Once the warrants were unsealed they had two effects. Initially they served as a catalyst which motivated the LRA to the negotiation table.[51] Then, once negotiations were underway, the LRA used the warrants to stall negotiations demanding that the charges be dropped before they would sign an agreement.

Despite the controversy there does remain considerable support for the ICC's involvement in Northern Uganda. The complexity of the situation allows for the exploration of the debate concerning how the ICC can most effectively contribute to the resolution of conflict.

Looking at the judicial approach, which stipulates that it is through prosecution that the ICC will have the greatest impact on the resolution of conflict, concrete evidence to support the judicial approach is difficult to ascertain due to the lack of prosecutions to date. For this reason, arguments of this nature are based upon epistemological reasoning that ending impunity and assigning accountability will eventuate into an agreement from which sustainable peace can be built. There is however some empirical support for this view in the Ugandan conflict. A significant reduction in the scope of the conflict was reported following the issuing of ICC arrest warrants. This is likely attributed to the LRA leadership wanting to avoid increasing the charges against them as their arrest seemed more likely.[52] While it is difficult to judge what crimes have been prevented,

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[47] Otim and Wierda, op. cit. (2008) p. 22.

[48] Africa Focus, op. cit. (2005).

[49] E. Harsch, 'Seeking Peace with Justice in Uganda,' *Africa Renewal,* vol. 19, no. 4 (2006), p.23.

[50] ibid., p, 24.

[51] Otim and Wierda, op. cit. (2008) p. 22.

[52] G. Evans, 'Justice, Peace and the International Criminal Court' (2006) available online: www.crisisgroup.org/home.index.cfm?id=4431&1=1 (accessed 21 November 2007).

promoters of this view believe that there is enough circumstantial evidence to suggest that the scope of the conflict has changed.[53] But as the peace process stalled and the Ugandan government sought to recall the ICC arrest warrants there were reports that the LRA had launched another violent campaign in neighbouring countries.[54] This was followed by the announcement of the failure of the Juba peace talks.[55] These developments highlight the strength and weakness of this approach. On the one hand it demonstrates the importance of prosecution by highlighting the consequences of a failure to do so. In 2008 the ICC suspended its efforts to capture Kony in light of a meeting where it was expected that a peace agreement would be signed.[56] It now appears that this achieved little other than to allow the LRA to regroup. The collapse of the negotiations altogether demonstrates that even with amnesty peace is not assured. It also shows the difficulty of achieving actual prosecution when perpetrators remain elusive, and supports arguments that peace without justice is unsustainable and will inevitability lead to a renewal of violence.[57]

Looking at the sociological approach, which views the ICC as capable of influencing the calculations of warring parties, sufficient evidence from the Ugandan conflict is available to support the validity of this approach. The war raged for twenty years throughout which time the LRA refused to engage with any external organisation. It was only once the ICC investigation had commenced and brought with it the threat of accountability that the LRA changed its approach and became willing to seriously explore a peace agreement.[58] In this instance it can be seen that the ICC has been successful when other attempts have failed to bring the LRA to the negotiating table.[59]

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[53] R. Goldstone's comments in C. McGreal, "African Search for Peace Throws Court into Crisis" (2007), available online: www.guardian.co.uk/world/2007/jan/09/uganda.topstories3 (accessed 30 May 2008).

[54] J. Narimatsu, "ICC Chief Prosecutor Urges Arrest for LRA Leader, Joseph Kony" (2008), available online: www.impunitywatch.com/impunity_watch_africa/2008/04/icc-chief-prose.html (accessed 19 May 2008).

[55] Al Jazeera, "Uganda Talks with LRA 'Fail'" (2008), available online: http://english.aljazeera.net/NR/exeres/F485DF1D-C50E-4F77-A70C-D349E2B3DA67.htm (accessed 6 June 2008).

[56] Narimatsu, op. cit., (2008).

[57] Broomhall, op. cit., (2003).

[58] S. Baldo's comments in A. Merril, 'Conflict Resolution: Seeking Justice in Africa-An interview with Suliman Baldo' (2007) available online: www.ictj.org/en/news/features/1253.html (18 March 2008).

[59] Grono and O'Brien, op. cit., (2007).

The strength of this argument is that prosecution provides an incentive which can be utilised in conflict resolution initiatives. This has previously been lacking.[60] Its value is derived from its ability to alter the calculations of warring parties so as to make them more willing to participate in peace negotiations. By creating the environment in which warring parties can conduct serious negotiations the ICC is contributing effectively to conflict resolution. However, this is unlikely to be the sole reason that a peace agreement is reached. As was evident in Northern Uganda while the threat of prosecution motivated the LRA to the negotiating table it also served as a reason to refuse to sign a final agreement.

Both approaches appear to be having an impact on the conflicts under investigation. The first by reducing the severity of the violence once the prosecution process has been initiated against the core perpetrators; the second by compelling perpetrators to participate in peace negotiations as their only avenue to escape persecution.

While both rely on the effect of prosecution to bring about a resolution to conflict, based upon empirical evidence from the Northern Uganda conflict this article finds the sociological impact of the ICC to be most likely to bring about a cessation of conflict. However, its ability to do so is heavily reliant upon the impact and the likelihood of judicial ramifications. The threat of prosecution will only prove to be an effective motivator for warring parties to put down their weapons if prosecution is seen to be a real possibility that is regularly and consistently carried out. The two approaches can therefore be seen to be intrinsically linked.

The sociological effects of the threat of prosecution in Northern Uganda demonstrated that the ICC does have a role to play in resolving African civil conflicts. It can be more effective than the judicial approach because it is less likely to be hindered by external factors. The judicial approach is susceptible to the tension which exists between peace and justice when trying to pursue them simultaneously. As long as the ICC is forced to intervene in on-going conflicts, this approach will continue to be compromised as the pressure to deprioritize justice in favour of peace may prove unavoidable. Regardless of the belief in the importance of justice, the desire to end human suffering in the short term will triumph over the fight for justice if it cannot bring an immediate cessation of conflict.

[60] Grono, op. cit., (2007).

Prosecution however, still maintains a central role. Without it the sociological approach fails, as it loses its incentive and leverage. There is also a definite need for prosecution in conflict situations as justice is essential for the sustainability of peace.[61]

The Future of the ICC in Africa

Many of the issues encapsulated in the Ugandan investigation have been forced under the global microscope since March 2009 when the ICC issued an arrest warrant for Sudanese President al-Bashir, thus catapulting the court into the centre of the world's attention. Reaction within the African and global community has been mixed, with some critics painting the ICC as an obstacle to peace. The most damaging critic has been the AU who, in denouncing the indictment and announcing that they will not cooperate with the ICC to secure President al-Bashir's arrest,[62] have directly undermined the role of prosecution in the peace process. In so doing, the AU has jeopardised the ICC's legitimacy in Africa, drawing into question whether the ICC can play an effective role in African conflict resolution.

In taking such a decisive stand, which has wide-reaching ramifications, the AU has given legitimacy to al-Bashir and the National Congress Party (NCP) who have shown no genuine interest in a substantial and sustainable peace agreement. The NCP's strong opposition to an effective peacekeeping force in Darfur, which a substantial peace agreement would bring, predates the 2005 United Nations Security Council (UNSC) referral to the ICC.[63] Further, the government is not interested in a deal that would see it share power and wealth with rebel groups and in effect reduce its control.[64] Finally, the condition of bringing perpetrators of grave crimes to justice was dropped from previous Sudanese peace agreement negotiations, such as the Comprehensive Peace Agreement (CPA), and this failed to bring sustainable peace to the country.

What the ICC does next will be of vital importance for its future involvement in Africa. Its first priority must be to secure a speedy conclusion to the trial of Thomas Lubanga,

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[61] Broomhall, op. cit. (2003).

[62] Al Jazeera, 'AU Nations Will Not Arrest Bashir' (2009) available online: http://english.aljazeera.net/news/africa/2009/07/200973195375587.html (accessed 1 February 2010).

[63] N. Grono and D. Mozersky, 'Sudan and the ICC: A Question of Accountability' (2007) available online: www.crisisgroup.org/home/index.cfm?id=4640 (accessed 1 February 2010).

[64] ibid.

whose trial to date has lasted 13 months. This must be followed by a timely resolution in the trial of Germain Katanga and Ngudjolo Chui. The ICC's success in these trials will be critical. If it is able to secure convictions, it will demonstrate that prosecution is a credible threat to warring warlords and that it does indeed have a role to play in conflict resolution.

Conclusion

Some aspects of the ICC's current investigations appear to support its critics who feel that it has a limited role to play in conflict resolution initiatives. The ICC's investigation in Northern Uganda, for example, does little to sway the debate over the value and effectiveness of international justice decisively in its favour. The ICC's absolute belief that punitive justice provides a comprehensive answer to African conflicts appears misguided, as the circumstances of these civil conflicts are acutely different to that of developed Western society and therefore cannot be applied in the same fashion with the same results. When contrasted with successful conflict resolution initiatives in Africa that were achieved without prosecution, such as the truth and reconciliation tribunals in South Africa, this view appears even more convincing.

This chapter, however, finds this argument to be too critical of an institution in its infancy assigned the task of irradicating impunity for grave violations of international law without its own policy force and among the politics of international state relations. Further, the critics of the ICC ignore the value of international law and the potential for ICC prosecutions to develop a jurisprudence of international criminal law.[65] This could elevate other novel legal issues which relate to conflict, such as prosecution of individuals within the multinationals who have benefited economically from the looting of Africa's natural resources, to be adjudicated on an international level.[66] This may strengthen the response of new legal mechanisms such as the ICC to civil conflicts either through deterrence or an ability to address a wider range of aspects of the nature of African conflicts.

Despite the challenges confronting it, the ICC does have a role to play in conflict resolution in Africa. However it is not the only answer to the civil conflicts in Africa. The absolute resolve of the ICC to pursue prosecution renders it inflexible and leaves it incapable of adapting to the complexity of African civil conflicts. The main value of the

[65] Kambale and Rotman, op. cit., (2004).

[66] ibid.

ICC lies in its ability to influence the calculations of warring parties, motivating them to engage in peace negotiations. The ICC should thus be viewed as one of a number of accountability mechanisms utilised in conflict resolution initiatives. It can act as a valuable deterrent while still offering a mechanism through which prosecution can occur when it is deemed appropriate. It cannot, however, be the sole source of accountability and, by extension justice, employed and relied upon in initiatives seeking a cessation or resolution of conflict.

The debate over the efficacy of the ICC in relation to conflict resolution is therefore too simplistic for the conflicts it has been called upon, and will continue to be called upon, to investigate. In some instances the ICC will be effective and will be able to make a valuable contribution to the resolution of conflict, while in others it will be less effective or ineffective. The ICC does have a role to play in conflict resolution initiatives but it cannot provide the miraculous answer to African civil conflict somehad hoped for.

This hope and the excessively high expectations attached to the ICC may have been naive. The fight over political control of scarce economic resources continues in many African nations which grapple constantly with a fragile peace. New legal mechanisms such as the ICC are really only addressing the symptoms of conflict and not the core issues which relate to the causes of African civil conflicts. So while the ICC can provide incentives for the cessation of conflict and form part of a framework which assigns accountability, it does not–and cannot--treat the root problems. In order to respond to the underlying causes of African civil conflicts, a political process is required and this is outside the scope of the ICC.

This view is not argued with an intention to undermine the efforts of the ICC. Rather, it demonstrates that a flexible, comprehensive and eclectic approach is required if conflict resolution initiatives are to match the depth and complexity of African civil conflicts. The ICC can serve as a foundation for such an approach and should continue to be heavily involved in African civil conflicts. It cannot however achieve this on its own. Only when this approach is developed will conflict resolution efforts have a decisive impact on the civil conflicts which plague the African continent.

Civil Society and Democracy: What Future Awaits Thailand?

Ilaria Finucci

The social and political unrest that has characterised Thailand since 2006 has attracted the attention of scholars and analysts. Mass protests paved the way for the coup d'état that ousted Prime Minister Thaksin on 19 September 2006, abruptly putting to an end to 15 years of continuous democratic government. Since then, two other PMs have been ousted due to pressure by popular movements. Thai civil society has thus returned to the forefront of national politics as it was in the 1970s and 1990s, when it dared to challenge elites' dominance over politics and society. This time, however, its role does not appear to be beneficial to Thailand's democratic development as it has thus far lacked cohesiveness and has not made democracy its sole focus, hence losing direction. To have a deeper understanding of the current political situation of the country, the peculiar cultural and social background of Thailand needs to be taken into consideration. In fact, many of the challenges faced by democracy in the country are closely related to the divide between urban and rural populations, as well as to the traditional principles regulating people's mutual relationships and attitudes towards authority. Analysis shows that democratic prospects for Thailand do not appear particularly bright at the moment as many deep changes are needed within civil society and traditional elites, requiring much effort on the part of Thai society as a whole.

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Introduction

Since 2006 Thai politics has been characterised by an escalating level of violence. In September 2006, mass protests led to a coup d'état that ousted then Prime Minister Thaksin Shinawatra. Two years later, unrest spread again and PM Samak Sundaravej was dismissed by an allegedly biased Constitutional Court. Renewed rallies in November 2008 forced PM Somchai Wongsawat from power after only two months from his appointment. In December 2008, Mr Abhisit Vejjajiva was appointed Prime Minister, the third in barely three months. Many Thais, however, oppose him and Bangkok has seen once again violent clashes among pro- and anti-government groups. More recently, between April-May 2010, the Thai capital saw renewed street fighting that led it close to the brink of civil war. In Bangkok's main shopping district, barricades made of bamboo sticks, metal wire and tyres were erected by the protesters, while some areas of the city were declared "live-fire zones" by the military.

Thailand, traditionally known as the "land of smile," has now lost its serene atmosphere and has been shaken by the fierceness of both the protesters and the military sent to the field to re-establish order. The fact that demonstrators have become increasingly violent suggests that exasperation with the status quo is spreading at least among some sectors of the population. It seems almost impossible that communication and understanding could be achieved between the two opposing factions. Both have rampaged Bangkok streets in the last four years advancing claims for "true" democracy.

The purpose of this chapter is to examine the factors that led to the 2006 putsch and the role played by Thai civil society. To this end, Thaksin's rise to power will be presented along with the establishment's reaction and counter strategies. Then the focus will move to the changes that civil society has undergone in Thailand, especially its progressive politicisation. The potential and limits of Thailand's evolving civil society are discussed in light of events since 1996 in order to gain a deeper understanding of Thai civil society organisations (CSOs) in the current political environment and their impact on the country's democratic development.

Background to the 2006 Coup d'Etat

The history of democracy in Thailand has always been quite troubled. Since the end of absolute monarchy in 1932 the country has not experienced progressive development of its democratic institutions. On the contrary, 18 coups d'état have been staged since then and popular uprisings have occurred which have usually been violently suppressed by the military. This unsteady political situation seemed to have come to an end under the

premiership of Thaksin Shinawatra who first won election in 2001 as leader of the Thai Rak Thai: "Thais Love Thais" Party (TRT). Four years later he was confirmed Prime Minister for a second term with a landslide victory over the opposition.[67] The main reason behind his unprecedented success was the great care he put into formulating policies since the inception of TRT in 1998. In 2001 he elaborated an agenda that won the hearts of the Thai electorate through meetings held with various social groups. Thaksin won the 2001 general elections on the basis of his political proposals and not merely on his charisma, as usually happens in the Thai context.

Thaksin pursued a "dual-track" policy,[68] which tried to respond to the necessities both of the rural masses and of entrepreneurs, acknowledging and trying to mitigate the cleavages between metropolitan and hinterland residents. His aim was to re-establish social peace after the general unrest and hardship caused by the 1997-1998 Asian economic crisis. Fulfilling his electoral promises, Thaksin on the one hand launched several local projects to win the loyalty of the rural masses;[69] on the other hand, to ensure business support, he fostered "neo-liberal" policies such as privatisation and Free Trade Agreements (FTAs).[70]

However, his government was far from blameless. Human rights violations and the brutal suppression of Muslim insurgency in the South triggered mass protests on the part of people's movements. Planned FTAs and privatisation policies were met with the same reception, as they were considered harmful for the general population. However, these rallies did not greatly affect Thaksin's popularity or cause any political change. The PM maintained his high standing, dominating the Thai Left and Right. The former was not credible or strong enough to constitute a real opposition to the incumbent

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[67] M.H. Nelson, 'Thaksin Overthrown: Thailand's "Well-Intentioned" Coup', in Thang D. Nguyen, (ed.) *The Thai Challenge: Unity, Stability and Democracy in Times of Uncertainty* (New York: Nova Science Publisher, 2008), p. 11.

[68] G.J. Ungpakorn, *A Coup fot the Rich. Thailand's Political Crisis* (Bangkok, Workers Democracy Publishing, 2007), p. 16.

[69] Among those projects were the well-known 30 Baht health care scheme and the "One Tambon One Product" (OTOP). The latter – based on the "One Village One Product" movement started in Japan – aimed at promoting local industry through the production of specialty goods attractive on the international market. See http://www.thai-otop-city.com/background.asp (accessed 19 June 2010).

[70] Ungpakorn, op. cit., (2007) p. 16.

government; the latter could not win the support of the masses because of its conservative orientation.[71]

As for the Thai establishment's reaction to the Thaksin government, the first signs that he was not held in high esteem appeared only a few months after his election. The royalist Anand Panyarachun publicly declared that:

> dictatorship no longer comes from the military or those in khaki uniforms. Rather, it depends on a person's mind […]. Danger caused by people with dictatorial inclinations has not disappeared from Thailand, although there is less intensity perhaps, or the means have changed. Meanwhile, there are new means of suppressing democracy – deceiving means that lull people into satisfaction, that make them slumber for a while, having happiness.[72]

Panyarachun was warning Thais against the risk of having political figures with authoritarian tendencies who could earn popular support by apparently satisfying the people's needs, while actually destroying democracy. In a nutshell, these words contain all the future criticism against Thaksin and his policies: the traditional elites' campaign against popular democracy had already started.[73]

Still, in 2005, criticism of Thaksin's populist agenda was voiced mainly by conservatives and royalists. In July the President of the King's Privy Council General Prem Tinsulanonda hinted at the PM's double standards and cronyism, going as far as to voice a thinly veiled threat that if measures against rampant corruption were not adopted soon, Thaksin would be ousted.[74] The PM reacted claiming that he would not allow any change contrary to democratic process. In a very emphatic tone he even declared himself ready to protect democracy with his own life.[75] A verbal "war" had started between Thai elites and Thaksin, each of them trying to impose their particular vision of democracy and good governance.

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[71] Ibid., p. 19.

[72] Nelson, op. cit., (2008) p. 15.

[73] Later in 2001 even the King expressed his pessimistic assessment of the government performance in an unprecedented speech on the occasion of his birthday: Ungpakom, op. cit., (2007) p. 15.

[74] Ibid., p. 15.

[75] Ibid., p. 16.

On 6 February 2005 Thaksin was re-elected Prime Minister for an additional term. His landslide victory generated a protest movement that one year later formalised its status under the sobriquet of the Peoples' Alliance for Democracy (PAD).[76] Led by Sondhi Limthongkul – a media tycoon like Thaksin –PAD was comprised of 23 organisations as well as independent individuals, including:

> farmers, teachers, state-enterprise officials, senators, academics, students and businessmen […], the Campaign for Popular Democracy, the Campaign for Popular Media Reform, the labor union of EGAT […] the broader anti-privatization network, the Network of Artists for Democracy, the Assembly of the Poor, and the Student Federation of Thailand.[77]

These various individuals and organisations shared two common and interrelated goals: in the short term, to oust Thaksin; in the long term, to reform the Thai political system. The latter objective depended on the former, as they believed that no change could be effected for as long as the PM was in power.

The emergence of PAD gave many the hope that Thais' interest in politics had been aroused and that they were keen on playing an active role. There certainly was some truth in this, as from that moment onwards civil society organisations' (CSOs) activities have increasingly dominated news and the national political arena. However, commentators missed an important point regarding the orientation that Thai civil society was taking: near to the conservative elites and far from the grassroots.

Thai Civil Society and Democracy

The role that civil society can play in democratic transition and consolidation is debated in the existing literature on the topic. Some scholars[78] argue that civil society is not a prerequisite to political change; on the contrary it emerges or strengthens after the

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[76] Nelson, op. cit., (2008) p. 12.

[77] Phoojadkarn Daily, 'Pressure Tells: Thaksin calls for polls', *Asia Times Online* (25 February 2006) available online: http://www.atimes.com/atimes/Southeast_Asia/HB25Ae06.html (accessed 19 June 2010).

[78] G. O'Donnell and P.C. Schmitter, *Tentative Conclusions about Uncertain Democracies* (Baltimore: The Johns Hopkins University Press, 1986); G.L. Curtis, 'A "Recipe" for Democratic Development', in L. Diamond & M.F. Plattner, (eds.) *Democracy in East Asia* (Baltimore and London: The John Hopkins University Press, 1998), pp. 217-223.

establishment of democratic institutions. Other factors they would identify as generating transition or consolidation include internally, divisions within authoritarian regimes, leadership, economic growth and resource distribution; and externally, the international context as it determines the overall atmosphere in which changes occur and the reception to them by the population. National history must also be considered because it moulds peoples' mindsets, opinions and behaviours.

These theories, certainly appropriate for some of the transitions which have occurred in South America and Europe, greatly value the role of incumbent leadership in effecting political change. Applying them to Asia, however, would not be very profitable because they do not acknowledge the impact of people's movements which often have been the primary, if not leading, force behind the establishment of many of the third-wave democracies in the region.

This research follows the mainstream trend of literature on democratisation (such as Diamond[79] and Alagappa[80]) in ascribing a crucial role and multiple functions to CSOs in effecting democratic transition and consolidation. More specifically, membership in CSOs can help build and develop democratic values and virtues in citizens by instilling habits of compromise, making them more open to different views and fostering mutual trust and respect. Group affiliation can also help people develop political awareness and activism. As more information is often made available by groups and members are usually required to contribute concretely to the planning and implementation of programs, affiliates tend to abandon apathy and become more socially and often more politically active.

Thailand has experienced a growth in CSO density during the past 20-30 years. This was not a continuous process, however, because on more than one occasion the military reasserted its authority, drastically reducing the space available for citizens' activism.[81] From Asian Barometer Surveys it also emerges that only a minority of the Thai

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[79] L. Diamond, *Developing Democracy*. *Toward Democratic Consolidation* (Baltimore: The John Hopkins University Press, 1999), p. 249.

[80] M. Alagappa, *Civil Society and Political Change in Asia*: *Expanding and Contracting Democratic Space* (Stanford: Stanford University Press 2004), p. 480.

[81] This was the case in the 1970s, when the 1973 student demonstrations led to a military take-over three years later and the government imposed a strict control over any kind of association.

population is involved in people's movements;[82] thus, even if CSOs may have positive effects on political awareness and democratic behaviour, only a limited number of people directly benefit from this.

Turning to the typology of the people involved in CSOs, the Asian Barometer Surveys show that the hinterland-metropolitan divide that afflicts Thailand is evident in the level of citizens' participation. In 2001 ABS researchers divided respondents according to their geographical location. The highest associational membership levels were always registered in the rural areas, with the share declining progressively in more urban settings. [83] This is perhaps imputable to a more socially conducive environment in rural areas than in urban ones, where individuals tend to be more isolated from one another.

The 2005 ABS show that Thai CSOs have not been very successful in their role as arenas for promoting and establishing democratic values, behaviours and norms among their members. If, on the one hand, CSOs have contributed to promoting interest in politics and the importance of voting, on the other hand they have not played a major role in furthering perhaps the two most typical activities of people's movements: campaigning and, especially, protest activities. Considering also the overall low level of participation in CSOs in Thailand, ABS researchers suggest that civil society may have fallen in the hands of "elite-led, if not state-led, leadership"[84] and thus is losing its confrontational character, being "absorbed" into the mainstream of politics.

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[82] C.M. Park and J. Lee, 'Are Associations the Schools of Democracy across Asia?', *Asian Barometer* (Taipei: Asian Barometer Project Office, National Taiwan University and Academia Sinica, 2007) available online: http://www.asianbarometer.org/newenglish/publications/workingpapers/no.38.pdf (accessed 19 June 2010), p. 7. The nations surveyed are South Korea, Taiwan, Mongolia, Indonesia, Philippines, Singapore and Thailand

[83] Respondents were divided into four categories on the basis of their place of residence: rural areas, provincial capitals, city suburbs and Bangkok. Involvement in just one CSO registered 29.6% in rural areas and only 22.2% in the capital: see R.B. Albritton and T. Bureekul, 'Civil Society and the Consolidation of Democracy in Thailand,' *Asian Barometer* (Taipei: Asian Barometer Project Office, National Taiwan University and Academia Sinica, 2007) available online: http://www.asianbarometer.org/newenglish/publications/workingpapers/no.4.pdf (accessed 19 June 2010), p. 14.

[84] Ibid., p. 21.

The Yellows and the Coup d'État

Thaksin's second electoral victory in 2005 generated anti-government protests and, later, the creation of PAD. According to PAD, Thaksin was a corrupt politician who widely favoured cronyism and, even worse, was challenging the royal institution itself. Therefore, to distance themselves from the PM, give more credibility to their movement and win the support of a larger share of Thais, PAD members widely publicised their sincere loyalty to the revered Monarch. As a tangible sign of their orientation they also wore yellow shirts during their ever more frequent rallies in Bangkok.

By the end of 2005, a hundred thousand PAD members and other "Yellow-shirts"– as they soon became known – were roaming the streets of the capital, asking for Thaksin's resignation and the instalment of a royally appointed PM. The latter claim was shared by the PAD members, but not by all Yellows. Those in disagreement soon defected from the movement.[85]

Due to the growing political unrest, PM Thaksin dissolved Parliament in February 2006 and called new elections to be held in two months. The opposition, perhaps conscious of the risk that the PM would again carry the majority, decided not to face him directly but to boycott the elections. This strategy proved effective as notwithstanding the amount of votes casted for Thaksin, he could not make the House convene.[86] Therefore the decision about the validity of the elections passed into the hands of the Constitution Court, which very quickly (after barely one month) declared the elections null. Later the King promulgated a decree according to which new elections would be held in October.

Unfortunately, the course of events was twisted and forced into a new and totally different direction by Thai elites. Since Thaksin had proved extremely successful in three different electoral races, the military, royalists and the urban middle- and upper-classes were probably aware that five months would not be enough to turn the results of the coming elections in their favour. This induced traditional elites to find other ways to ensure their success and to re-establish their control over society. Since the democratic means of elections had not proven fruitful, then the decision fell on a practice widely used in Thailand that had usually brought about the expected outcome: a coup d'état.

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[85] G.J. Ungpakorn, op. cit., (2007) pp. 38-39.

[86] Both in the first and second rounds several seats remained vacant because TRT candidates did not have any competitor and could not reach the required 20% of eligible voters' support. See Nelson, op. cit., (2007) pp. 12-13

The unrest created by the conservative PAD was crucial in paving the way to the putsch that took place on 19 September 2006 as it provided the military with a plausible excuse for their intervention: namely, restoring order and peace. After surrounding Government House and occupying other key sites in Bangkok, at 11:00pm a message appeared on all TV channels informing the population that the "Council for the Reform of the Democratic System of Government with the King as Head of State" had seized power.[87] At 11:50pm another message appeared giving the following reasons for the putsch:

> As it has become clearly apparent that the administration of the present caretaker government has led to severe rifts and disunity among the Thai people unprecedented before in Thai history, [...] the majority of the people are suspicious and untrusting of the government's administration which shows signs of rampant corruption, malfeasance, political interference in government agencies and independent organization affecting their ability to perform their duties [...]. The Council wished to reaffirm that it does not intend to administer the country itself and will restore the democratic governmental system with a monarch as head of state to the Thai people as soon as possible so as to maintain peace and order within the Kingdom.[88]

Three elements of this communiqué are worth noticing. In the first place, the name that the military junta gave itself: namely "Council for the Reform of the Democratic System of Government with the King as Head of State". That appellative contains two elements aiming at ensuring broad popular support: "democratic" and "monarchy". In other words, the junta wanted to give the public an image of itself as working and acting for the democratisation of Thailand, while always remaining loyal to the sacred royal institution.

Second, the reference to the alleged suspicion and distrust towards the Thaksin government among the Thai population was an utter distortion of reality. An Asian Barometer Survey poll a few months before the coup in 2006 showed that there was a

[87] Ibid., p. 18.

[88] Ibid., p. 19.

widespread sense of satisfaction (93%)[89] with the incumbent government and that the perception of corruption was low, even among urban residents.[90]

Lastly, the communiqué reaffirmed the role of the military as peace-keeper of the kingdom and as closely linked and deeply loyal to the monarchy. This was used to support the right of the military to intervene in politics and to remain in power as long as required. This view echoes the old *sakdhina* system, with the trinity of king, military and religion informing all aspects of Thai life.[91]

Paving the way to the putsch by creating continuous political tension was the, albeit probably involuntary, undemocratic influence of PAD on Thai politics, confirming the theory that civil society is not necessarily an agent for democratisation. In fact the

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[89] R.B. Albritton and T. Bureekul, 'Developing Democracy Under a New Constitution in Thailand', in Yun-han Chu, L. Diamond, A.J. Nathan and Doh Chull Sin, (eds.) *How East Asians View Democracy* (New York: Columbia University Press, 2008), p. 133.

[90] R.B. Albritton and T. Bureekul, 'The State of Democracy in Thailand,' Asian Barometer Conference on the State of Democratic Governance in Asia (2008), available online: http://asiapacific.anu.edu.au/newmandala/wp-content/uploads/2008/09/state-of-democracy.pdf (accessed 19 June 2010) table 4, p. 8.

[91] The term *sakdhina* traditionally refers to the system of land allocation on the part of the king to his subjects based on the prestige accorded to them. Well-known Thai intellectual M.R. Kukrit revitalised this concept through a new interpretation: *sakdhina* in the 1950s came to mean honour resulting from one's personal status, synthesised by the expression: "Know thy place". In other words, people should accept and be contented with the status in which they were born and act accordingly. Behaving according to the *sakdhina* system resulted in an orderly society. Hence, M.R. Kukrit advocated that "Thainess" was supportive of a hierarchical social structure as it would lead to order, stability, peace and prosperity. There are three main pillars of the *sakdhina* system: 1) the king is totally moral and always right – because of his sincere adherence to Buddhist values – and since he reigns with paternal affection towards his subjects, democratic institutions meant to create a system of check-and-balance within the government are utterly superfluous; 2) politics is harmful as it disrupts order within society; 3) no one is to be allowed to disrupt order and the Thai-style ruler – who is the nation's leader and guardian of its stability – is entitled to use any means to re-establish order and peace. Linked to this concept is that of the military – together with the bureaucracy – as supporter and bulwark of the Thai nation, as it helps the ruler to perform his functions. See Saichol Sattayanurak, 'The Construction of Mainstream Thought on "Thainess" and the "Truth" Constructed by Thainess' (2005) available online: http://www.fringer.org/wp-content/writings/thainess-eng.pdf (accessed 19 June 2010), p. 25.

Yellow-shirt uprisings not only led to the seizure of power on the part of the military, but later did not complain much about this undemocratic act. The reason is very simple: the forces behind the coup d'état were basically the same as those constituting the PAD ranks. Hence, no conflict of interest existed: both shared the same desire to have Thaksin out of the political scene to put an end to his populist agenda and reassert their own status.

After the coup d'état, the movement grew quiet, as it had achieved its aim. However, when after a year of military rule elections were held on 23 December 2007, tensions spread again. Though a long time had passed since Thaksin's ouster and his TRT party had even been banned from politics, the electoral race was won by the pro-Thaksin People's Power Party (PPP). The new PM Samak Sundaravej followed his predecessor's steps, implementing pro-poor policies while protecting some vested interests. Therefore Thailand was in the same situation as in 2006 before the putsch. This was utterly unacceptable for the Yellow-shirts, as it meant that all they had done to put commoners back in their place had been unsuccessful. Therefore in spring 2008 they resumed mass protests. In the meantime, Thaksin was accused of corruption and, instead of facing a court trial, he fled to Britain, beginning his exile.

By September 2008, PAD protesters had long been roaming the streets of Bangkok and occupying key government sites while calling for PM Samak's resignation. The establishment – in this case in the form of the Constitutional Court – answered their requests indirectly by charging the incumbent PM of violating the conflict of interest law and forcing him from office. The populist-dominated parliament then chose Somchai Wongsawat as new PM, but this did not have any effect on street protests by the PAD as their aim was still to topple the populist government in power. Tension escalated and the Yellow-shirts went as far as to impose a blockade on Bangkok international airport, leaving thousands of foreign tourists stranded and severely damaging Thailand's image and economy. Once again the Constitutional Court intervened, this time accusing PPP of electoral fraud and ousting PM Somchai in December 2008. The will of the Thai elites as incarnated by PAD prevailed also on this occasion, steering the course of Thai politics and history.

The overthrow of the two PPP Prime Ministers can be considered a further occasion in which sectors of Thai civil society did not act as democratisation agents. On the contrary, they subverted the rule of law and rejected the will of the majority by opposing the results of the general elections. It can be said that between 2006 and 2008

even formal democracy was overthrown in Thailand: the basic elements of democratic governance (such as voting government representatives) no longer applied in the country. Even if PAD cannot be blamed as soley responsible for such a degradation of the Thai democratic political system, nonetheless it certainly favoured this course of events with its carelessness for the country's overall and welfare in terms of political development by not sufficiently evaluating the consequences of its actions. The reason behind all this is that PAD's only concern was reasserting the privileges and higher status of the elites that dominated its ranks, as well as Thai society.

The Reds and the Yellows: Conflicting Mantras

The ouster of PM Thaksin, the 15 months of military rule and the overthrow of PM Samak and PM Somchai triggered growing resentment among large sectors of the Thai population. They were mainly composed of those citizens who had cast their votes for those three figures and who had seen their choices rejected each time. It was in this atmosphere that a pro-Thaksin movement emerged and flourished: the United Front for Democracy against Dictatorship (UDD).

Compared to PAD, this movement – also known as the Red-shirts – had a strong rural base as it was in the hinterland that Thaksin had earned much of his popularity, thanks to his pro-poor projects. Rural residents had experienced a notable improvement in their daily life thanks to TRT and then PPP policies. For once, they felt that the central government actually cared for their welfare and had kept its electoral promises. Perhaps this image of Thaksin as the "hero of the poor" was not totally true, as malfeasance was certainly present in his cabinet and cronyism seems to have been a prominent feature of his government. Nonetheless, he was widely viewed as having done something for the benefit of the poorer sectors of Thai society.

The Red-shirts were accused by the PAD of ignorance and of allowing TRT (and, later, PPP) canvassers to buy their votes in the name of an immediate return such as new infrastructure or healthcare improvement. These accusations were perceived as an unacceptable insult on the part of poorer Thais and could be seen a sign of the close-mindedness of the PAD and Thai elites as a whole. They were missing the point. that the real question was not vote-buying, but rather the deep divide between rural and urban residents. In other words, the needs and, therefore, demands of provincial citizens differed from those of urban citizens as they lived in a different economic, environmental and social milieu.

Thais living in the hinterland demand a popular, grassroots democracy, i.e. a political system in which each and every person counts simply for being a citizen. In this political system the majority rules and politicians work for the wellbeing of their electorate. In other words, rural Thais ask for "a government of the people, by the people and for the people," that is democracy as envisioned also by Abraham Lincoln.

On the opposite side are the Thai urban middle class and entrepreneurs, who ask for a democracy in which their freedom is limited neither by an excessively intruding state, nor by one guided by a populist agenda. Urban residents are aware that to conduct their businesses freely democracy is perhaps the most suitable form of government, as there is no autocratic leader unchecked by their voices. However, they despise and fear any government that allows common people's needs to prevail and guide the state agenda. In other words, the Bangkok middle class favours what is commonly referred to as "elite-guided" democracy, in which the frame of a democratic government is maintained, while guiding principles and values are based on elites' necessities and preferences. Whenever they feel their privileged position is threatened by populist politicians, they opt for the military to intervene or even for the installation of one strong leader.[92] Therefore, urban Thais' commitment to democracy could be seen as only on condition that their dominance – be it economic, social or political dominance – remains unaltered.

The UDD had an additional reason to protest, namely the overthrow of democratically elected representatives. They perceived this as having been robbed, as their votes did not have any value either to the military group that staged the coup or to the royalist/conservative PAD that so greatly contributed to the ouster of two PPP Prime Ministers in 2008.[93] If the putsch was widely seen as an authoritarian way to force Thaksin from office, the Constitutional Court sentences against Samak and Somchai were not perceived as a democratic means either. The judges, all coming from Thai

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[92] R.B. Albritton and T. Bureekul, 'Thailand Country Report: Public Opinion and Political Power in Thailand' (Taipei: Asian Barometer Project Office, National Taiwan University and Academia Sinica, 2007) available online: http://www.asianbarometer.org/newenglish/publications/workingpapers/no.34.pdf (accessed 19 June 2010) , table 9, p. 19.

[93] J. Head, 'No Winners in Thailand's Crisis', *BBC News* (14 April 2009) available online: http://news.bbc.co.uk/2/hi/asia-pacific/7998243.stm (accessed 19 June 2010).

upper-classes, did not enjoy the trust of poorer Thais and their decisions were portrayed as "politically biased"[94] and the trials themselves were viewed as "highly politicized."[95]

During their rallies in Bangkok, the Red-shirts voiced their dislike for the military, as the latter had proved to have double standards towards protesters on the basis of their "colour." While not much had been done in 2006-2008 to prevent the Yellow-shirts from damaging Thailand's economy and international image, the military in 2009 was willing to roll tanks into the capital and use tear gas to disperse the Red-shirts.[96] The harsh criticism voiced by the UDD against the military is an indication that at least some sectors of Thai society are growing tired of traditional elites' control over the country. If this sentiment spreads among the population, real democratisation in Thailand would be more likely as the military would be forced once and for all to go back to the barracks and only civilians would steer the "political wheel" of the country.

However, the events of April 2009 contain some worrying elements as well. The gravest of all is the fact that military repression received indirect support from "hundreds of pro-government vigilantes armed with machetes and clubs."[97] Political tensions have not just escalated in Thailand; they risk degenerating into civil war. Red- and Yellow-shirts, in fact, are not simply voicing opposing political views, but have started using violence against one another. If chaos and unrest become uncontrollable, the military might be provided once again with an excuse to get involved and seize power. Therefore Thai civil society – whether wearing yellow or red shirts – must be very careful and ponder the consequences of any course of action it may undertake. This is to say that even if PAD members favourably consider military intervention to put an end to UDD unrest, the military might not be willing to relinquish power next time, leading

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[94] S. Kelley, 'Colour-coded Contest for Thailand's North', *Asia Times Online* (July 31 2009), available online: http://www.atimes.com/atimes/Southeast_Asia/KG31Ae02.html (accessed 19 June 2010).

[95] As reported by an international newspaper, on 13 April 2009 soldiers faced protesters with assault rifles and in the clashes two people were killed and 113 wounded: T. Fuller, 'As Protesters Pause in Thailand, Their Grievances against Elite Simmer', *International Herald Tribune* (14 April 2009), available online: http://www.nytimes.com/2009/04/15/world/asia/15thai.html?_r=1 (accessed 19 June 2010).

[96] S. Mydans and T. Fuller, 'Thai Leader Urges Calm Amid Widening Protests,' *International Herald Tribune* (13 April 2009) available online: http://www.nytimes.com/2009/04/14/world/asia/14thai.html (accessed 19 June 2010).

[97] Ibid.

to the country being led indefinitely by a junta, with dubious benefits for all sectors of Thai society.

It is worth noting that not all UDD members support Thaksin or want him back to premiership.[98] Many recognise that his government had major flaws such as corruption, human rights abuse and nepotism. However, they agree with pro-Thaksin members that he was unjustly removed from office, just like former PMs Samak and Somchai. They also share the feeling that injustice is widespread and the military treats them unfairly. These various reasons impel people from different walks of life and political leanings to join in creating such a strong popular movement as UDD.

The events leading to and following the 2006 coup d'état have proved that Thailand is still a "tale of two democracies".[99] During their rallies, both the Yellow-shirts and the Red-shirts have been asking for democracy to be re-established. But they are not referring to the same kind of democracy, otherwise they would have been able to unite and more effectively further the democratic development of Thailand, putting an end to decades of elites' domination and "military's political resurgence."[100]

The democracy the UDD wants to realise is "grassroots" democracy, in which power is truly in the hand of Thai citizens.[101] They want citizens to participate in electoral campaigns, express their opinions through voting and for the winning candidate to have the right to be in power for a full term. No military putsch or elitist protest should be able to ouster a democratically elected PM. Commoners' votes should count as much as upper-classes' votes in Thailand as in any other democracy. Thai elites (i.e. the military, the judiciary and other unelected officials), with their continuous interference, are seem as undermining democracy.[102]

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[98] J. Head, op. cit., (2009).

[99] A. Laothamatas, 'A Tale of Two Democracies: Conflicting Perceptions of Elections and Democracy in Thailand', in R.H. Taylor (ed.), *The Politics of Elections in Southeast Asia* (New York: Cambridge University Press, 1995), pp. 201-223.

[100] S. Kelly, op. cit., (2009).

[101] J. Head, op. cit., (2009).

[102] L. Ash, 'Seeing Red in Rural Thailand, *BBC News* (April 23 2009), available online: http://news.bbc.co.uk/2/hi/asia-pacific/8012145.stm (accessed 19 June 2010).

On the other hand, the Yellow-shirts interpret "true democracy" as fighting against corrupt politicians who win elections by buying votes from uneducated people.[103] Thailand should be left in the hands of those who, having a better education, know what democracy is all about and what the country really needs. In other words, they want to establish an elite-guided democracy.

These two conflicting visions of democracy can be interpreted as an indication that real democracy– that is, a form of government in which both formal and substantial elements of democracy can be found - has not been established yet in Thailand. The reason, however, is not, for example, "Asian values" or that "the population is not ready for it"; rather, the reason why democracy is languishing is that socio-economic divides between rural and urban areas are still strong and mirrored also in civil society. Hence, divisions persist and compromise is hard and unlikely to be reached as long as short-term perspectives continue to prevail.

Conclusion

Civil society is generally considered by scholars as an important contributor to democratic development, although to fulfil this role it needs to be built on and pursue democratic ideals. Has this been the case in Thailand since 2006? Has civil society contributed to the country's democratisation? The answer cannot be a simple "yes" or "no" because it needs to take into consideration the complexity of the social and political environment in Thailand.

The question can be answered affirmatively if the focus is on CSOs' reactivation and vigour since 2006. Thais seem to have abandoned their former apathy towards politics and are willing to play an active role in it. Instead of simply accepting whatever those in power decide, they wish to voice their opinions and have them heard. As shown by the Asian Barometer Survey, Thais have a quite clear idea of what democracy is in terms of freedom and basic liberties, as well as of political rights and procedures.[104] Since a democratic culture exists in Thailand, Civil society should in principle be able to contribute to the democratisation of the country. However, this is not exactly what is happening.

[103] J. Head, op. cit. (2009)

[104] Albritton and Bureekul, op. cit., (2008a) p. 119.

There are three main reasons why the question posed above can be answered in the negative. First of all, the sectors of civil society acting under or aligned with the PAD are not proponents of true democracy. What they are calling for is a limited version of democracy, close to "oligarchy." In their opinion, pre-eminence in society and in politics must be given to those with higher status, while the masses should just bow and follow. The underlying principle is that proposed by the "*sakdhina* system": "Know thy place". In other words, commoners should not have much say in politics as they are not educated enough and can be easily fooled by cunning politicians such as Thaksin and his allies. They are sufficiently alarmed by popular democracy that they are ready to give up some of their liberties in order to preserve the status quo.[105]

Second, Thai civil society has become polarised as a result of the deep divide existing between metropolitan and rural residents. The uneven economic development of the country has led to the emergence of very different needs and political expectations. While urban Thais want the state to interfere as little as possible in their affairs and permit them their independence, rural residents deem state intervention necessary to improve their daily life by implementing local projects and providing adequate services.

Third, civil society in Thailand cannot be an agent for democratisation because in the last few years it has been progressively losing one of its fundamental traits: independence. Many believe that to be really effective, CSOs need to be independent from government and political parties. This suggests that CSOs should "not organize themselves on a partisan basis to aggregate interests and formally compete for state office."[106] This latter statement depicts exactly what PAD has recently done by turning into a formal, registered political party: the New Politics Party. As for the UDD, it can be argued that it has not contributed much to Thailand' democratisation either. It is true that during these last three years of social unrest the movement has been a strong proponent of grassroots democracy. However, the UDD has made Thaksin the main (if not the only) focus of its struggle and tends to envision democracy as possible only if he comes back to power. This is a major flaw in the UDD program because it subordinates Thailand's desperate need for democracy to the destiny of a prominent political figure.

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[105] Asian Barometer Survey evidence shows that metropolitan Thais are more open than others to military intervention in politics: Albritton and Bureekul, op. cit., (2007b), table 9, p. 19.

[106] Alagappa, op. cit., (2004) p. 38.

The Red-shirts have begun showing an increasing awareness of this issue since the break-through of UDD protesters during an ASEAN Summit meeting held in Thailand in April 2009.[107] The degree of violence reached on that occasion and the following days in Bangkok has seriously damaged the image of the movement, inducing protest leaders to reconsider their strategies. They produced a declaration in which it is stated that their ultimate objective is establishing a "true democracy that places the king as the head of the kingdom, whereby political power belongs entirely to the people"[108] along with "real rule of law...whereby equal justice for all Thais must have no double standards".[109] All these would be reached through peaceful means. The UDD seems to have learned from its own mistake of relying too much on personality cult, a positive development. However, the Red-shirts have still much to learn on how to conduct their protests. The events of April-May 2010 – when fortified encampments were created in central Bangkok and street fighting included rocks, gunfire and even Molotov cocktails – have proven that UDD strategies are degenerating towards civil war instead of progressing towards civil society peaceful means.

In conclusion, the prospects for democracy in Thailand are not bright, at least in the short term. Deep changes are needed within Thai civil society if it really wants to be a democratisation agent for the country. It should ponder its strategies and means, learn from the example of civil struggles in other countries and also from its own past mistakes.

Deep changes are also needed in many other sectors of Thailand's current political scene. The traditional elites – represented by wealthy urban residents, the military, the bureaucracy and the royalists – should become aware of the benefits that democracy can bring about. Even if in the short term the establishment of true democracy would mean losing their privileged status, in the long-term it would ensure a more stable social and economic environment for all. As for Thai political parties, they need to develop realistic and effective political agendas having in mind the nation's welfare. In this way the electorate would have something concrete to evaluate the candidates upon and

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[107] T. Fuller, 'Thailand Cancels Summit after Protests', *International Herald Tribune* (12 April 2009) available online: http://www.nytimes.com/2009/04/12/world/asia/12thai.html?fta=y (accessed 19 June 2010).

[108] S.W. Crispin, 'A Desperate Plea for Amnesty', *Asia Times Online* (19 August 2009) available online: http://www.atimes.com/atimes/Southeast_Asia/KH19Ae01.html (accessed 19 June 2010).

[109] Ibid.

perhaps would less likely be led astray by personality cults. Finally, the judiciary should be truly independent so as to become a pillar of a new, democratic, accountable political system. Evolution may also be necessary in the "*sakdhina* system" which can be seen to hinder people from challenging traditional elites, from truly adhering to the democratic ideals they seem and profess to know, so as to become, feel and act as citizens and not as subjects.

In these transformations needed within Thailand, CSOs can and should play a major role. If it is rooted on democratic principles and has as its sole objective the establishment of democracy, then civil society can effectively help steer Thailand towards a better future.

Development and Freedom of Mass Media in North Korea and South Korea

Kristian Hollins

A fundamental concept of democratic practice is free speech, and a free media. This article explores the link between government and mass media by drawing on and comparing aspects of political ideology and media freedom in both the Democratic People's Republic of Korea (North Korea) and the Republic of Korea (South Korea). This is achieved through an assessment of the historical, political, economic and cultural impacts on the development of the mass media, showing a correlation between the political ideology of each state over the period since the division, and the corresponding freedom of the media. This is then assessed against the dated, but fundamental normative theories of journalism and a contemporary adaptation of these theories. The piece concludes that there is a tangible link between political ideology and media freedom, as well as making predictions about the role of the media in any potential future Korean unification.

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Since the dawn of democratic political theory in ancient Greece, it has been necessary to keep the people informed through a public forum to ensure the accountability of the government. With the concurrent rise of the mechanised printing press and modern democracy in the 18th century, this role was undertaken by journalists and newspapers. It is now commonly considered that journalism has a fundamental role within a functioning democracy[110]. However, not all peoples enjoy the same access to free media, even in states that are relatively developed. In 1956, Siebert, Petersen and Schramm asserted that "to see the differences between press systems in full perspective, one must look at the social system in which the press functions…to see the social systems and their true relationship to the press, one has to look at certain basic beliefs and assumptions which the society hold"[111]. The Democratic People's Republic of Korea and the Republic of Korea, more commonly referred to as North Korea and South Korea respectively, provide an interesting case study of this journalistic philosophy in practice.

North Korea and South Korea once had historical and cultural similarities and, if the 1953 conflict had not occurred, it could be argued that similar media cultures might have developed. However, it seems the differences in politics and economics since 1953 have been substantial enough to develop the separate and entirely different forms of media outlet we now see in the two states.

The following piece will investigate the historical, cultural, political and economic issues that have led to these differences in media culture and freedoms between the two states, and will reinforce the important role and function of journalism in a democratic state. This discussion will also utilise and adapt the normative theories of journalism to determine the relevant theories or aspects of the theory found in North Korea and South Korea and determine whether a link can be drawn between active journalistic theory and journalistic practice in these states.

Until relatively recently, both states shared a common culture and history. In fact, until the period directly following the Second World War, Korea existed as a wholly unified state. Following the surrender of the occupying Japanese force, Korea was divided

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[110] S. Coronel, 'Corruption and the Watchdog Role of the News Media', in P. Norris, (ed.) *The Roles of the News Media* (Washington DC: The World Bank, 2009).

[111] F. Siebert, T. Peterson and W. Schramm, *Four Theories of the Press* (North Stratford, NH: Ayer Company Publishers, 1956) p. 2.

along the 38th Parallel by the United Nations, under the administration of the Soviet Union in the North, and the United States of America in the South[112], reflecting the Cold War politics of the day. In June 1950, North Korea invaded the South. The conflict lasted until July 1953 and ended with a brokered armistice.

It was during this period of conflict that fundamental divisions emerged between the states. The historical, political, economic and cultural differences have led to different contemporary media environments. This article will discuss these differences as well as the issues that produced them.

In order to assess and compare the relationship between government and mass media in North Korea and South Korea, it is first essential to have some knowledge of this relationship prior to the division. Korea was annexed by Japan in 1910, placing the state under Japanese rule for the next 35 years. Under this rulership, the media was both a colonial collaborator, helping to establish Japanese propaganda among the population[113], and a voice for the nationalist resistance, actively seeking Korean independence[114]. This left the Korean media in the unenviable position of both struggling for the Korean people and collaborating with the Japanese authorities[115].

Following the surrender of Japan during World War Two and the Korean Conflict from 1950 to 1953, North Korea moved towards a closer union with the Union of Soviet Socialist Republics and the People's Republic of China[116], and employed a comprehensive political system based on the example of the Marxist-Leninist model, essentially becoming a 'one-party' state with the media as a propagandist. Similarly, the

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[112] A. Nahm, *Introduction to Korean History and Culture*, *5th Ed* (New Jersey: Hollym, 1998), p. 216-217.

[113] M. Kim, *A study on the lag of development of modern newspapers in East Asia* (Seoul: Nanam Publishing, 1999).

[114] K, Kim, *Press and propaganda policy under Japanese colonial rule* (Seoul: Yee-U, 1978).

[115] M. Kang, 'The struggle for press freedom and emergence of "unelected" media power in South Korea', in S.K., Chua and J.N. Erni, (eds.) *Asian Media Studies* (Oxford: Blackwell Publishing, 2005) p.77.

[116] Nahm, op. cit., (1998) p. 257

mass media of North Korea developed into a singular entity, with all outlets reporting the same news, regardless of notions of ideology or locality[117].

However, by the mid-1950s, North Korean leader Kim Il-Sung was criticising the drive of post-Stalin USSR towards reform[118]. It was at this time that Kim Il-Sung developed and implemented the idea of *juche* which translates roughly as the theory of 'self-reliance,'[119] amongst the greater social democratic ideology. The theory called for the independence of the North Korean state in matters of domestic politics and international relations, economics, and self-defence and the military[120]. This position resulted in North Korea's self-imposed isolationism and aggressive military stance toward neighbours in Asia, the highly centralised economy, and the large proportion of the population serving in the People's Army.

A coincident effect of this ideology is the authoritarian control held by the government, more specifically current leader Kim Jong-Il, over the affairs of the state, including journalism. One example of this far-reaching control, as outlined by Romano[121], describes the situation whereby citizens are not permitted to lock their doors at night, so security forces may check their activities at any time. While journalism itself is not banned, independent sources of media and particular rights are withheld from the public, essentially eliminating non-state operated media outlets[122]. For example, freedoms of association, speech and the imparting of knowledge are almost non-existent, thereby cutting off the fundamental tools of comprehensive journalism.

The mass media of North Korea is specifically under the direct control of Kim Jong-Il, and all forms of mass communication reinforce his cult of personality.[123]. The state-controlled media of North Korea is highly-propagandist, being given tasks of strengthening political unity and ideological conformity, and state-employed journalists

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[117] S.A. Gunarnte and S.D. Kim, 'North Korea', in S.A. Gunarnte, (ed.) *Handbook of the Media in Asia* (New Delhi: Sage Publications, 2000) p. 589.

[118] J. Portal, *Art Under Control in North Korea* (London: Reaktion Books, 2005) p. 58.

[119] A. Buzo, *The Making of Modern Korea* (London: Routledge, 2002) p.93; and

[120] ibid., p. 3

[121] A. Romano, 'Asia', in Pippa Norris, (ed.) *The Roles of the News Media* (Washington DC: The World Bank, 2009).

[122] ibid

[123] Buzo, op. cit.. (2002) p.92.

publicly praise the North Korean socialist model over that of other states. However, it is interesting to note that to the North Korean understanding this system of information control is not undemocratic, as it would be considered in the West. Rather, North Korea considers the system to be democratic based on the fulfilment of the role assigned to it by the administration[124]. Rather than considering the media to be autonomous, North Korea considers it as one of the many organically interrelated subsystems that make functional governance possible.

Many academics and practitioners in the field of development journalism reject the belief that the media is an integral and indeed organic part of the government. For example, during the reign of Soeharto in Indonesia and the corresponding nation-building program which sought to induce cooperation between the media and the bureaucracy in order to "develop the great family of the nation"[125], it was found that many journalists rejected the 'press-as-government-partner' viewpoint[126], as well as the argument that government should remain unchallenged by journalists to ensure the drive towards development.

Following the Stalinist model, North Korea produces different publications for the 'inner' and 'outer' circles of society and government[127]. Government leaders receive the most information, including news from foreign correspondents, while low-ranking officials and institutions such as the military receive less comprehensive and highly edited information[128]. The general population is only permitted to receive access to state-operated media institutions. However, this access is limited by poor distribution for print and widespread electricity shortages for radio and television broadcasts[129]. In addition to the state control of print, radio and television broadcasts, Internet access is very limited by both lack of capacity, due to a strategic lack of government investment, and the same energy concerns and high costs that affect audio-visual mediums.[130].

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[124] Gunarnte and Kim, op. cit. (2000) p. 588.

[125] A. Romano, 'Normative theories of development journalism: state versus practitioner perspectives in Indonesia' *Australian Journalism Review*, vol. 20, no. 2 (1998), p. 81.

[126] Romano, op. cit. (1998), p. 65.

[127] McNair, B., *Glasnost, Perestroika and the Soviet Media* (London: Routledge, 1991), p. 41; and

[128] Gunarnte and Kim, op.cit. (2000), p. 596.

[129]J. Hoare and S. Pares, *North Korea in the 21st Century* (Kent: Global Oriental, 2005) p. 51.

[130] ibid., p. 54.

Furthermore, accessing international media sources and publications is a severely punishable offense[131]

Journalists are guided by an official book, *The Great Teacher of Journalists*, which espouses the importance of Kim Jong Il's management of the media, as well as the responsibility of outlets "to write and compile excellent articles that arouse the sentiment of the masses in keeping with the Party's intentions"[132].

Equally as difficult as getting foreign information into North Korea is getting accurate and comprehensive local information from the inside, out. Most information is gained from the rare returned foreign aid workers or political visits by foreign governments, or from official policy[133]. Foreign journalists are viewed with great suspicion, as exemplified by the recent jailing of two US journalists[134] who were sentenced to twelve years in a hard labour camp for allegedly "committing hostilities against the Korean nation" and crossing into North Korea illegally – anything that can be construed as 'counterrevolutionary' by a Marxist-Leninist standard. This distrust is further exacerbated by the opinion in North Korea that all foreign journalists are spies.So held because many if not all North Korean journalists working overseas are linked with their own national intelligence service[135]. Consequently, there are no correspondents working in the state.

Reporters Sans Frontiéres publishes a yearly 'World Press Freedom Index' that ranks states according to the status of its 'free media'. North Korea was listed as last on this list until 2007, where it moved to second last after Eritrea[136].

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[131] Amnesty International, "More Information on North Korea", (2009) available online: http://www.amnestyusa.org/all-countries/north-korea/more-information-on-north-korea/page.do?id=1011313 (accessed: 9 June 2009); and

[132] Darewitz, op. cit. (2000), p. 139.

[133] Buzo, op. cit. (2002), p.176.

[134] Sang-Hun, C., 'N. Korea Sentences 2 U.S. Journalists to 12 Years of Hard Labor,' *New York Times* (8 June 2009).

[135] Darewitz, op. cit. (2000), p. 145.

[136] Reporters Sans Frontiéres, 'World Press Freedom Index, 2008'. (2008) available online: http://www.rsf.org/en-classement794-2008.html (accessed: 6 June 2009).

Following the Korean Conflict, South Korea, under influence of its ally in the United States, began moving towards a Western-style of government, albeit in an indirect, zigzag fashion. The political form of government changed over the course of the next four decades from autocratic to military administration in 1961 and back again by 1972, before political assassination and protests for reform in 1979 and finally to true democratic elections in 1987[137]. Any changes to the media before democratisation are commonly considered to have been made in a political context and owing to a political agenda, being the reinforcement of the military's political power[138], rather than reporting in the public interest. Since this time of troubles, South Korea has maintained a peaceful, democratic system of government in the form of a presidential republic, following a Western-style separation of powers into: executive, judicial and legislative branches However, it is still attempting to shake off the authoritarian employment of democratic power[139].

The relationship in South Korea is still in transition from before the democratisation of the late 1980s and early 1990s: from traditional authoritarian rulership of the media to a true independent liberal press. It is currently stuck somewhere in-between – a critical media operating in an adversarial political environment and a democratically elected government with authoritarian tendencies, often simply termed an "authoritarian democracy"[140].

A number of 'stand offs' have occurred, mostly instigated by the government, taking the shape of legal battles or more specifically, taxation audits[141], marring the post-democratisation relationship between the government and the media. While most have been resolved, there was never a clear winner in these shows of power. The clear loser was the potential transition towards a more independent media.

The predominate factor differentiating South Korea from North Korea has been its rapid economic development since the end of the conflict in 1953. During this period, South

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[137] Nahm, op. cit. (1998).

[138] K. Kwak, 'Democratization and changing state-media relations in South Korea,' in Romano, A. and M. Bromley, (eds.) *Journalism and democracy in Asia* (London: Routledge, 2005) p. 123.

[139] Ibid., p. 133.

[140] C.G. Christians, T.L. Glasser, D McQuail, K. Nordenstreng, and R.A. White, *Normative theories of the media: Journalism in democratic societies* (Chicago: University of Illinois Press, 2009) p. 202.

[141] Kwak, op. cit. (2005), p. 125-128; and

Korea experienced high levels of industrialisation, which in turn led to outward-looking economic strategies and engagement in international trade. This rose from a lack of natural resources and a small domestic market for goods and services. To counter these factors, South Korea engaged in the capitalist politico-economic strategy of export-oriented industrialisation whereby the state gains access to foreign markets in exchange for opening the domestic economy to foreign investment[142]. This strategy had the effect of boosting economic growth by exploiting export markets in which the state had a comparative advantage[143].

In the 1980s, South Korea's economy began to stabilise, due to policy intervention by the government, which continued into the 1990s. The Asian Financial Crisis of the late-1990s reversed some of the rapid growth of the previous two decades, but the South Korean economy bounced back and returned to normal growth during the early 2000s[144], buoyed by large multinational corporations, such as the *Chaebol* conglomerates[145]. During the 2008/2009 Global Financial Crisis, South Korea's economy suffered again, with the Won losing approximately thirty-percent of its value[146].

The media environment in South Korea followed a course that reflected the political environment of the day. During the autocratic, military and authoritarian governments, censorship of the media, outlet closure and arrests of journalists was rife, and more generally, all administrations attempted some form of control over the media[147], even going as far as utilising state-owned media sources to repress true freedom of speech[148]. With the democratisation and political reform of the late 1980s, came increases in press freedom and the development of a free and independent media. The high levels of foreign investment in South Korea, due to a political environment aimed towards economic progression and growth, contributed to the development of independent

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[142] J. Ravenhill, *Global Political Economy* (Oxford: Oxford University Press, 2005) p. 421.

[143]ibid., p. 420.

[144] Buzo, op. cit. (2002), p.187.

[145] Du Mars, op. cit. (2000), p. 203.

[146] Market Data Centre, *Wall Street Journal*, 2009, available online: http://online.wsj.com/mdc/public/npage/2_3051.html?mod=2_3002&sid=123946&page=intl (accessed 4 June 2009).

[147] Buzo, op. cit. (2002), p.121; and

[148] Buzo, op. cit. (2002), p.106.

media organisations through more independent and diverse forms of funding. Prior to this increase in funding, three family-run newspapers, collectively known as the *Chojoongdong*, and with long-established links to the government, accounted for a 70 percent share of the media newspaper market[149]. This freedom increased both the capacity of the South Korean press to operate as the 'fourth estate' and the potential of the media to provide some aspect of independent critique of the government and its policies[150].

Unlike North Korea, South Korea does not suffer from physical limitations on power generation or funding, and the television, radio and most recently, internet outlets, have blossomed under the liberalised media laws. This has given rise to the development of citizen journalism and of the 'prosumers' – regular people who are the fundamental producers of news media as well as being its primary consumers[151]. Perhaps the best example of this is the Ohmynews.com website, which provides a majority of content from South Korean citizens. In fact, the same economic growth that lead to the rise of independent media sources in South Korea has also fuelled the rise of online, internet-based outlets, due to the wide- and far-reaching nature of the national broadband network[152]. Consequently, internet news sources have taken the place of other mediums as not only the most prolific but also the most trusted source of news in the state[153]. This move away from traditional media sources, such as the *Chojoongdong*, towards new media reflects a certain attitude of the South Korean people – that government requires an independent and critical media to function properly, both in ethical and in practical terms[154].

In the Reporters Sans Frontiéres, 'Press Freedom index', South Korea ranked 47th in the world[155] while a 2004 report by the same organisation noted that although South

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[149] D. Kim and T. J. Johnson, "A shift in media credibility: Comparing internet and traditional media sources in South Korea". *International Communication Gazette*, vol. 71, no. 4 (2009), p. 287.

[150] Coronel, op. cit. (2009); and

[151] Sun Phil Kwon, 'South Korea,' in M. Rao, (ed.) *News media and new media* (Singapore: Eastern University Press, 2003), p. 328.

[152] D. Kim and T. J. Johnson, op. cit. (2009), p. 284.

[153] ibid., p. 296.

[154] Kwon, op. cit. (2003), p. 329.

[155] Reporters Sans Frontiéres, 'World Press Freedom Index,' (2008) Available online at: http://www.rsf.org/en-classement794-2008.html (accessed 6 June 2009).

Korea exhibits the traits of a free media, "opposition media in not always tolerated"[156], specifically referring to any pro-North or pro-Communist outlets or content.

As can be seen from these analyses of North Korea and South Korea, the different historical, political, ideological and cultural norms and experiences of the two states since the 1950s has resulted in different media environments for each state. The most fundamental differences between the states are in political and economic forms, which can be traced to differing historical experiences in recent decades. The split between the two states was the North-USSR and South-USA alliances shaped following the Second World War. They continue to play a role in the international relations of the North East Asian region. These alliances resulted in differing political experiences for both states that resulted in exceptionally different and extremely distinct economic ideologies. These economic ideologies have fundamentally affected the international relations and global interactions of the two states in the contemporary environment.

It was a combination of these differences that led to the evolution of key differences in the social and cultural characteristics of North Korea and South Korea, and in the different media environments that are visible today.

In their 1956 work, Siebert, Peterson and Schramm developed four normative theories of the press in order to represent the way in which journalism should function and the roles the press should undertake: authoritarian, libertarian, communist and social responsibility[157]. They are based on the idea that there is an inherent link between the operation of the mass media and the government of any given state[158]. This link is a means of determining the freedoms and restrictions placed on the function and operation of the media by the government of the state. A state can be placed on a scale within or between these theories, by drawing parallels between similar traits of the government-media link in theory and in practice. For example, the media in the United States of America is considered by many to be broadly libertarian, due to fundamental entitlements such as freedom of speech, freedom of association and freedom of information. However, it also draws characteristics from social responsibility theory,

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[156] Reporters Sans Frontiéres, 'East Asia and Middle East Have Worst Press Freedom Records' (2004). Available online: http://www.rsf.org/en-classement450-2004.html (accessed 6 June 2009).

[157] ibid., p. 3.

[158] Siebert, Peterson and Schramm, op cit. (1956), p. 2.

which includes limitations on these freedoms in cases of national security or other concerns, for example, slander or attacks on the individual[159].

The weakness of Siebert, Petersen and Schramm's theory is its inability to describe and account for unusual situations seen today, such as that found in North Korea. Romano argues "no normative press model perfectly represents any society, since there is always inconsistency, diversity and change within social value systems"[160]. However, while the four theories of the press may struggle to describe certain states, it is possible to apply the fundamental concept that underlies the theory – that it is possible to find an inherent link between the political and media systems – in order to describe the situation found in North Korea.

North Korea, or at least the North Korean administration, has often dismissed the idea of free speech, along with other 'Western' ideas of individual freedom, as "bourgeois"[161] ideas, but their constitution does account for freedom of speech, freedom of the press, and freedom of association[162] - as long as these freedoms reinforce the people's participation in socialism. This stance shows at a micro-level the link between political ideology and media freedom. It is difficult to argue however, that the system of information control in North Korea has been developed with the 'public good' or national interest as its goal. Rather, the system of information control is utilised to maintain the 'cult of the leader' and godlike aura surrounding Kim Jong-Il and the military machine.
Broadly following the normative theories of the press, North Korea follows a middle path between the authoritarian and communist theories of the press, but demonstrates a model with a distinct aspect of government control. In North Korea there is a prohibition of criticism relating to the government and party and a belief that censorship is considered well within the public interest. Further, media is used as an instrument of government policy promotion, and the idea that the good of society is more important than individual freedoms is promoted[163]. Western libertarian ideals are dismissed as "bourgeois notions"[164] and counterrevolutionary. Glorification of the 'revolution' and

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[159] ibid., p. 78.

[160] Romano, op. cit. (1998), p. 81.

[161] Buzo, op. cit. (2002), p.100.

[162] Gunarnte and Kim, op. cit. (2000), p. 591.

[163] Siebert, Peterson and Schramm, op cit. (1956), p. 10.

[164] Buzo, (2002), p.100.

development are often bedfellows in post Marx-Leninist political thought, a concept often regarded as a "rationale to take control of mass media to promote state policies, often as part of larger campaigns of repression"[165]. This combination of theories has been the predominant model for North Korea since the division, and seems unlikely to change in the near future.

Perhaps the most effective means of determining the link between the government and media is the adaptation of the normative theories into an empirical "control" theory of the press, more equipped to explain and address the unique situation in North Korea. Romano argues that "to define press models, one must first observe social values and behaviours in all their complexity and then decipher how journalism fits within the existing structure"[166]. If it can be assumed with some certainty that North Korea views the mass media as innately part of the government, rather than as an autonomous entity, then the role of the media, as with any government department, is the communication of and adherence to Kim Jong-Il's policies as well as maintaining politico-ideological unity between the people, and between citizens and the government. The media's fundamental role is the reinforcement of socialist ideas and ideals amongst society. Under this empirical theory, the North Korean government-media relationship can be broadly defined as 'collaboration as compliance'[167] because of the coercion of mass media, journalism's apathy to overt control and the traditional, customary cooperation of the press as exemplified throughout the state's history.

In contrast, South Korea has demonstrated a number of the normative theories of the press, since the division as well as in the contemporary period. From the period of the division, through until the democratisation in the late 1980s, South Korea displayed traits predominately from the authoritarian theory of the press, including the promotion of government policy, licensing and censorship of media outlets, and bans on private media ownership. With the democratisation, came a 'freer' media. This illustrates key traits of the libertarian theory of the press. These include arguably the most important role of the media in any democratic state: acting as the fourth estate - the watchdog of the government[168]- and informing the people of the actions and inaction of the state administration. However, South Korea also demonstrates one common fundamental

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[165] Christians, Glasser, McQuail, Nordenstreng, and White, op. cit. (2009), p. 201.

[166] Romano, op. cit. (1998), p. 81.

[167] Christians, Glasser, McQuail, Nordenstreng, and White, op. cit. (2009), p. 199.

[168] Coronel, op. cit. (2009), p. 3.

aspect of the communist and authoritarian theories. It prohibits pro-North and pro-communist material and thereby censors freedom of speech which may be contrary to the government's objectives[169].

The greater question is of the role the mass media has to play in the state, and the inherent link between mass media and government. The relationship between the mass media and the state has been explored with the conclusion that there is an inherent link between the government and the media due to the social and societal aspects[170]. However, less study has been undertaken into the link between access to free and independent media and democratic governance. As can be seen from the above case study of North Korea and South Korea, key aspects of a democratic state, such as freedom of speech and freedom of information that are not found in North Korea but are found, for the most part, in South Korea, are fundamental for the existence of a free media. True democracy requires the unencumbered flow of information and ideas because citizens require access to independent information and investigation to ensure the correct and uncorrupted function of government. They have a "moral duty" to be informed[171] in order to maintain accountability.

The future for journalism in both states seems to hold even more change for mass media and government. Perhaps the greatest issue facing both states is the opportunity for reunification and the end to the Cold War-style hostilities. Putting aside the complex mechanisms and substantial difficulties of unification, the media must understand the role it could play in what would be a momentous achievement. Just as government, and changes in government, have been able to affect the media environment, so too can active measures taken by the mass media, effect political transformation. While the media in North Korea may not be in a position to effect such change, the media in South Korea is well placed to aid in the pursuit of social and cultural integration between the two states, perhaps more so than any other social institution[172], including the South Korean government. This is due to the less official nature of social media and therefore its capacity to operate both at and around government levels. The difficulty for the South Korean media would be to put aside its criticism of the North Korean government

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[169] Siebert, Peterson and Schramm, op. cit. (1956), p. 36.

[170] ibid., p. 2.

[171] ibid., p. 101.

[172] W. Non, 'Republic of Korea,' in A. Goonasekera and D. Holaday, (eds.) *Asian Communication Handbook* (Singapore: AMIC/SCS, 1998) p. 148.

and focus on reunification itself. There is also the potential for 'new media' to permeate into North Korean society from the South, although this capacity is limited due to overt government control over not only media sources but life itself.

Although diametrically opposed on a scale of political ideology and therefore also on the scale of press freedom, the governments of both states, as well as any potential singular, unified government, need to understand that policy without criticism, authority without question, and power without scrutiny, is undemocratic, regardless of ideology.

The recent political, economic and cultural divergence along historically similar pathway has led to the development of completely differing media environments between the two states. These media environments reflect the core values of the commonly accepted normative theories of journalism, that is, the authoritarian, libertarian, communist and social responsibility theories or, in the contemporary era, adaptations of the theory to allow for alternative or hybrid political ideologies. Key aspects of these theories can be found in the media models visible in North Korea and South Korea, with North Korea exhibiting adaptations and variations of both authoritarian and communist theories, while the South exhibited predominately libertarian and social responsibility theories. The fundamental concept of this theory is the inherent link between government and mass media.

The North Korean and South Korean case studies, in conjunction with the normative theories of journalism, help answer the question of whether an intrinsic link exists between the status of a free media and the status of true democracy in a state. This piece has illustrated the inherent link between the overarching ideology of the state, that is, democratic or undemocratic, and the status of free speech and information within that state. States that exhibit traits of undemocratic ideology, such as the one-party system found in North Korea, will ultimately also have restrictions on media, in terms of public access, capacity and censorship in order to protect and maintain power within that state.

How Can Global Civil Society Help Achieve Distributive Justice?

Masaki Kataoka

The aim of this chapter is to explore the possibilities of global civil society's role for global distributive justice. The arguments of this chapter are based upon social constructivism, which contests that culture, identity and society itself are important factors in defining a state's policy. Distributive justice is the idea that rich, Western countries are morally obliged to distribute their wealth to poorer countries. The chapter argues that distributive justice is morally desirable, but practically unrealistic. With this assumption in mind, the chapter explores civil society's role in achieving global distributive justice. Civil society's role in international relations has become more powerful with the onset of globalisation. Globalisation has reduced the difference between 'national' and 'international', helping people to promote distributive justice by affecting governmental decision-making. This chapter concludes that globalisation's ability to facilitate the dissemination of ideas and ideals in a democratic way could be helpful for poor societies to overcome their living difficulties.

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Introduction

The aim of this chapter is to explore the potential power of global civil society to achieve global distributive justice. It is common knowledge that much of the world's population does not have the financial capabilities to effectively sustain itself, resulting in malnutrition, hunger and preventable diseases. According to the World Food Programme, approximately 1.02 billion people are undernourished worldwide (one in six of the total human population)[173]. Distributive justice is a method to distribute wealth from the rich to the poor and thus reduce this inequality.

The next section will explain one of the main theories of international relations: social constructivism, which is the theoretical basis for this chapter. Then, a theoretical review of distributive justice will follow. The next section will clarify the importance and significance of civil society, especially in a globalised world. Some critics of global civil society will also be introduced. The final section will try to rebut the critics and seek a role for global civil society in achieving distributive justice.

Theoretical Review

Constructivism

Emerging in the 1990s, social constructivism has become an influential theory in international relations. This theory illuminates factors and issues to explain state behaviour in a way that more traditional, dominant theories cannot.

The defining feature of social constructivism is that it focuses on the significance of identity and culture. According to social constructivists, state behaviour is the product of social and historical factors, rather than human nature or other more traditional explanations. The world system is therefore constructed by such issues and is the result of the interactions between states, whose behaviour is determined by them. For example, Max Weber argued that social constructivism is an attempt to clarify "how culture shaped the meanings and significance that actors gave to their actions."[174] This means that culture is of great significance in shaping states' behaviour. This idea is very different from more traditional theories. The two most established theories, liberalism and realism, explain a state's behaviour based on its fixed interests, such as the

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[173] World Food Programme, "Hunger," (2010) available online: http://www.wfp.org/hunger (accessed 21 June 2010).

[174] M. Weber, cited in B. Michael, 'Social Constructivism,' in J. Baylis and S. Smith,(eds.) *The Globalization of World Politics* (Oxford: Oxford University Press, 2001), p. 257.

maintenance of national security and the maximisation of its power. Social constructivists, however, posit a notion that a state's interests are not static, but dependent largely on its society and the cumulative activities of its population.

Although there are a variety of arguments within social constructivism, this chapter will adopt one of the most influential and coherent explanations of the theory: Wendt's understanding of constructivism. He used so-called structuration theory, arguing that "the capacities and even existence of human agents are in some way necessarily related to a social structural context – that they are inseparable from human sociality."[175] Mere individual work is not enough; creating social structures requires the collective work of many individuals, their practices and identity, as well as the factors that are catalysts for their activities, including religion, custom and traditions. Culture, identity and social events can be a mechanism for individuals to coalesce into a unified social group; thus, "the nature and configuration of the internal relations that comprise a social structure… define a set of possible transformations of combinations of its elements."[176] Therefore, social structure is not a natural construct, but a human-made one. As Wendt insisted, "social structures are the result of the intended and unintended consequences of human action, just as those actions presuppose or are mediated by an irreducible structural context."[177]

The question arises; how can people construct social structures which are the basis for collective activities in a society? It is individuals who possesses or perceive the meaning of an event, culture and identity. How do people gather hundreds of beliefs in one place? Wendt argued that "socially shared knowledge" is the knowledge that helps individuals link together within a society[178]. As Copeland, Associate Professor at the University of Virginia, interpreted, constructivists pay more attention to the culture that shapes states' behaviour and recognise that the "intersubjective shared knowledge" may both constrain and shape behaviour. In the international arena, state interests are not as static as realists or liberalists argue, but rather, they can be altered or reproduced through state interactions and behaviours - behaviours that are shaped through socially

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[175] A. E. Wendt, 'The Agent-Problem in International Relations Theory,' *International Organization*, vol. 41, no. 3 (1987), p. 355.

[176] ibid., p. 357.

[177] ibid., p. 360.

[178] ibid., p. 360.

shared knowledge.[179] Shared knowledge can be accumulated in a society through mediums such as historical text books, traditional festivals, customs and general 'way of life'. In other words, these elements produce a people's identity. Professor Zehfuss of the University of Manchester called such variables "intersubjective" identity, which gives meaning to our acts and fuels our interests[180].

Thus, according to social constructivism, international relations and politics do not abide by fixed principles. According to social constructivism, these principles are the products of the construction of socially and collectively shared ideas such as knowledge, culture, rules and symbols, which are subjective and therefore fluid. Identities and interests can be interpreted as a result of the socially constructed nature of the actors. Individuals are inevitably influenced by their own perceptions of their society, therefore shaping "how individuals construct and interpret their world." Indeed, it is only through society and social activities that individuals give the "meaning to reality."[181] In summary, social constructivists explain that world politics is constructed through interactions of states' behaviour and that this behaviour is socially constructed through their social activities based on culture and identity.

Distributive Justice

The current world market has produced a huge economic disparity between the rich West and the poor, mainly non-Western countries. Globalisation allows states and companies to act beyond their own borders. In this situation, the dominant Western states become richer by exploiting the economic system with their already hegemonic strength and the poor become poorer due to their respective economic weakness. Some people argue that this situation is not fair to the poor, because the system is not of their devising and thus, nor is their poverty. As the Universal Declaration of Human Rights states, all humans have a right to live healthily, but as a result of economic domination by developed countries, they are inevitably stuck in less than healthy living conditions. Therefore, cosmopolitans argue that the wealth must be fairly distributed to the poor,

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[179] D. C. Copeland, 'The Constructivist Challenge to Structural Realism: A Review Essay,' in S. Guzzini and A. Leander, (eds.) *Constructivism and International Relations* (Oxford: Routledge, 2006), p. 3.

[180] M. Zehfuss, 'Constructivism and Identity: A Dangerous Liaison,' in S. Guzzini and A. Leander, ibid., p. 95.

[181] Barnett, in Baylis and Smith, op. cit, (2001) p. 259.

because the rich have enough money, food and medicines to provide them to people who need them the most.

Australian philosopher Peter Singer employs a very powerful metaphor to advocate the moral obligation the West has to global distributive justice[182]. In the case that a child is drowning in a shallow pond, you have a moral obligation to save the child at the expense of your clothes. Most people would agree that human life is worth significantly more than clothes. Therefore, in this scenario one would have a moral obligation to save the child. Singer insisted that if people are starving to death then one has a moral obligation to provide them with your surplus food. Therefore, the distribution of wealth from developed countries to developing countries can be seen as a moral obligation that all developed countries bear.

Some argue, however, that while it is undoubtedly good to save a child, it does not constitute an obligation. In a domestic context, the relationship between citizens and their state is one of co-operation. Joining a community such as a state or religious group is a way to fulfil one's goals. Instead of providing opportunity to realise one's goals, communities require people to maintain a special obligation to other group members. In the case of the relationship between people and the state, the state provides people with security, certain standards of living and so forth. In return, people have an obligation to obey laws, pay taxes and other such duties. Such reciprocity is possible only when individuals and the state share common needs and interests. We need institutions to achieve social aims and in order to facilitate such objectives, institutions must be a collective body of people's will. In short, communities are bound by a common understanding of needs and interests; therefore, people accept their special obligation to the community and its members. In this sense, one does not have so many common interests and needs with people living outside one's own country. Thus, there is little obligation to fulfil global distributive justice.

This argument seems plausible. It is undeniable that psychologically people feel an affinity to those who share a similar understanding, identity and culture. However, this is not to say there is no room to distribute justice to other nations, but rather that people tend to focus more on assisting fellow citizens. The priority attributed to international distributive justice is lower than in comparison with domestic distributive justice.

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[182] P. Singer, 'Famine, Affluence, and Morality,' in W. Aiken and H. LaFollette, *World Hunger and Morality* (New Jersey: Prentice-Hall Inc., 1996).

However, if one has the ability to save people, the moral duty to do so increases, while if you do not have such ability, the moral duty diminishes.

Therefore, "the strength of the obligation depends upon the circumstances, but it never disappears."[183] If you have an ability to distribute justice you have a moral obligation to help those who are suffering. In this regard, people who are living in developed countries have a moral duty to distribute justice to the poor, although the obligation is weaker than the one within their nation. Therefore, distributive justice to the world, regardless of demarcations between territories, is morally desirable.

This argument has, however, is practically problematic. Professor Thomas Nagel of the New York University introduced Hobbs' account of justice in his article "The Problem of Global Justice"[184], citing that "actually justice cannot be achieved except within a sovereign state." British political theorist David Miller asserts that people accept special obligations to their fellow citizens, because only such people share their interests and needs.[185] Institutions serve to collect and represent the interests, demands and needs of the citizenry as individuals cannot effectively do this for themselves outside the bounds of regulation and law. People accept such special obligations through legal, social and economic institutions. Such obligations and the benefits they create can be distributed only within groups that shares common interests and needs. Thus, "the requirements of justice themselves do not… apply to the world as a whole, unless and until… the world comes to be governed by a unified sovereign power."[186]

As we have seen in this theoretical analysis of social constructivism, shared identity, culture and ideas connect individuals to a society and are the driving forces behind its direction. In lacking any shared culture and identity, we cannot create any institutions collecting people's will in order to distribute justice to those outside. Therefore, distributive justice is morally desirable, but practically impossible due to lack of common interest, identity and moral concern between states in the current demarcated, state-centric international system. This chapter will investigate a way of breaking this

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[183] B. Barry, *Liberty and Justice* (Oxford: Oxford University Press, 1991), p. 192.

[184] T. Nagel, 'The Problem of Global Justice,' *Philosophy & Public Affairs*, vol. 3, no. 2 (2005), p. 114.

[185] D. Miller, *On Nationality* (Oxford: Oxford University Press, 1995).

[186] Nagel, op. cit., (2005) p. 121.

stalemate, by establishing a new actor who may be able to play an alternative role in realising morally desirable distributive justice. The new actor is global civil society.

Global Civil Society

Civil Society

The traditional international relations theories of realism and liberalism assert that the main actors in international relations are states and that interactions between states create the structure for international relations.

However, since the advent of globalisation this situation has changed. According to Willets, there are five distinct categories of actor in international relations; 1) about 200 governments, 2) 64,000 transnational companies, 3) 9,000 single-country non-governmental organisations, 4) 240 intergovernmental organisations and 5) 6,600 international non-governmental organisations.[187] The data indicate that the international structure is not merely the result of interactions among states, but also the result of interactions among other actors. They all play different roles in realising their own goals, sometimes cooperating with each other and sometimes not; their roles depend largely on a set of goals formulated in accordance with their interests. For example, if governments' interest is to maintain security, they spend a large amount of revenue to build up highly equipped military forces. Or if international inter-governmental organisation's interest is to prevent war, they may mediate between two states and resolve issues peacefully based on negotiation. Therefore, although it is true that states are still significant actors, they are no longer solitary actors in international relations; thus a variety of sectors act for what governments cannot do. Therefore, "we must assume that governments and NGOs interact with each other, along with companies and international organizations."[188]

One defining feature of civil society is its dual capacity to collect peoples' interests and pursue them in conjunction with people from all over the world. The first function is commonly enabled by states, but the second function is beyond states' power. States gather collective will only within their boundaries, but civil society focuses not on jurisdictions or territorial boundaries, but on boundaries of interest, such as the environment, human rights protection and gender equality. Based on its interests, civil

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[187] P. Willetts, 'Transnational Actors and International Organizations in Global Politics,' in J. Baylis and S. Smith, op. cit., (2001) pp. 426-427.

[188] ibid., p. 427.

society theoretically acts both domestically and internationally. In addition, civil society is a collective body with the power to change a bad situation for the better, through processes such as democratisation, fair trade or legislation securing the rights of indigenous people. For example, "companies usually initiate economic change and NGOs are usually the source of new ideas for political action." Likewise, "democracy and human rights have been extended by women's group, ethic minorities and dissident groups."[189] These examples highlight how such new actors facilitate civil society in achieving change.

Globalisation

The significance of civil society and its influence on the international system has been more salient owing to the parallel development of globalisation. The rapid development of technology and invention of the internet has allowed civil society to act internationally and disseminate beliefs to the world. Some decades ago, civil society's influence was mainly confined to its immediate neighbours. However, the rapid growth of "human power" gave it time and space to pursue its goals more broadly.[190] People now have the ability to receive news and world events instantaneously. Under these circumstances, people may find they share more common interests with people living outside their countries than with those who live in their own community.[191]

In this regard, "one effect of the globalisation of communication is to make it physically and financially feasible for small groups of people to establish and to maintain cooperation, even though they may be based thousands of miles apart from each other."[192] In the early to mid twentieth century, people shared a common identity and culture with others at local or national level. However as a result of the development of information technology, it has been possible for people to understand the culture and identity of other societies through interactions with those people. As a consequence, civil society is better equipped to disseminate ideas to the world by effectively using the internet, grassroots activities and advertisements.

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[189] ibid., p. 443.

[190] J. Keane, *Global Civil Society*(Cambridge: Cambridge University Press, 2003), p. 206.

[191] D. Chandler, 'Building Global Civil Society "from below",' *Millennium: Journal of International Studies*, vol. 33, no. 2) (2004), p. 329.

[192] Willetts, op. cit., (2001) p. 438.

The development of transportation technology and communication networks has helped different groups to cooperate with each other more readily. The combination of different groups and actors that operate beyond state borders exercise a massive influence on the world's societies. For example, some non-government organisations (NGOs) aggressively pursue governmental policy change and create networks with other NGOs to strengthen their advocacy, opinions and ideas in governmental policy-making process and sometimes they acquire a right to participate in inter-governmental meetings.[193] Amoore and Langley state:

> …what we can observe in the 1990s is the emergence of a supranational sphere of social and political participation. Not only is this sphere distinct from the practices of governance and economy, but they depict it as existing above and beyond national, regional, or local societies… GCS (Global Civil Society) as a field of action that provides an alternative ideological and political space to that currently occupied by market-orientated and statist outlooks.[194]

Therefore, it is fair to say that "in recent decades, the growth of cross-border publics has led to a rising awareness of the factual growth of global civil society."[195]

Critics of Global Civil Society

As we have seen in the previous section, the growing significance of global civil society is a salient issue. There is much that global civil society can do for global justice, which states cannot achieve. However, there is also much scepticism over what global civil society can achieve.

For example, there is an argument that "global civil society is not a principle that has universal validity."[196] Activities undertaken by global civil society are mainly directed from the West to the rest and under these circumstances, poor societies, which are the prime recipients of global distributive justice, have only two possible choices: to receive Western-oriented actions based on Western norms, or not. They do not have the capabilities to achieve, for example, human rights or the development as formed by

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[193] ibid., p. 439.

[194] L. Amoore and P. Langley, 'Ambiguities of Global Civil Society,' *Review of International Studies*, vol. 30, no. 1) (2004), p. 92.

[195] Keane, op. cit., (2003) p. 175.

[196] M. Kaldor, *Global Civil Society: An Answer to War?* (Cambridge: Polity Press, 2003), p. 38.

their own culture and socially constructed identity. Professor and Director of the Centre for the Study of Global Governance at London School of Economics and Political Science Mary Kaldor states:

> This is a view that even today pervades the thinking of Western donors – the idea that through support for NGOs, the West can help the rest of the world 'catch up'. This conception of civil society has, not surprisingly, given rise to the charge that civil society is a Eurocentric concept, that is to say, a concept born out of the particular cultural context of north-west Europe, not easily transposable to other contexts.[197]

This critique suggests that due to its one-way direction, global distributive justice conducted by actors of global civil society, such as NGOs, does not work. This is because notions of human rights and development as understood by western society cannot be transplanted to recipients, to whom such concepts are alien; doing so can in fact be negative or damaging. Through the lenses of cultural imperialism, because the process of globalisation generates the basis of global culture through institutions of western design, global culture is not universal, but is in fact westernised. The nature of civil society can be assessed the following way:

> …the empowerment of civil society associations is pursued through the disempowerment of others, and the identity of collective body is secured through the production of insecurity for others.[198]

Consider the following case. There are people who desperately want to build a dam to secure clean water. Their society is poor and hundreds of people die due to lack of clean water every year. Consequently, building a dam is their hope to elevate their standard of living. However, one environmental NGO opposes this project, arguing that building the dam will damage the local eco-system. The NGO thus conducts lobbying activities to the bank which is supposed to invest millions of dollars in building the dam. The NGO also conducts a campaign criticising the bank's planned investment. Thousands of people join the campaign. Finally, the bank decides not to invest in the project. As a consequence, the dam project is cancelled, leaving thousands of people without clean water.

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[197] ibid., p. 38.

[198] Amoore and Langley, op. cit., (2004) p. 107.

This example suggests how arbitrary global civil society may be in discriminating between interests. Therefore, critics argue that as long as the flow of distributive justice remains Western in source, it inevitably becomes a new form of domination, westernising non-western countries, which is not only morally unacceptable but also practically impossible, because local communities may reject such imperialistic activities.

Discussion

Cultural Diversity

However, some scholars insist that globalisation will not lead to a western cultural domination of non-western societies. In contrast, cultural diversity theorists argue that globalisation in fact creates a new form of unique local culture by bonding local and global cultures.[199] The created culture is fluid and the process of globalisation incorporates many cultures. As pluralists argue, people can accept other cultures and in turn those cultures affect and are affected by other cultures involved in the process. Therefore, culture is never purely local in nature, but created through interactions with many other cultures. What we call culture, according to cultural pluralists, is merely the final stage of interaction between multiple cultures, which in turn are produced by the same process.[200] The multidirectional nature of this process has not produced homogeneity, but hybridity and local uniqueness.[201] National identity is created by interrelations with others who have very different identities. Such interactions construct, change or alter national identity.

This explanation of forming local culture and identity suggests that people do not necessarily abide by traditional thinking or follow a way of life and culture preserved from the influence of others. Society is the product of inter-cultural relations and, through these interactions, society creates a new form of culture. Therefore, cultural changes under globalisation do not necessarily constitute Americanisation or Westernisation, but is a combination of several cultures, including local, national, regional and Western.

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[199] J. A. Sholte, *Globalization: A Critical Introduction* (Hampshire: Palgrave Macmillan, 2005).

[200] J. Tomlinson, *Cultural Imperialism: A Critical Introduction* (Maryland: The Johns Hopkins University Press, 1991), pp. 90-94.

[201] D. Massey and P. Jess, 'Places and Cultures in an Uneven World,' in D. Massey and P. Jess, *A Place in the World?: Places, Cultures and Globalization* (Oxford: Oxford University Press, 1995), pp. 216-217.

This so-called cultural hybridity theory shows that people can adjust their lifestyle, identity and custom as suitable for their society. Therefore, penetration of Western ideas does not lead to cultural homogenisation with a Western bias, because society constructed through culture and identity has always been a by-product of many others.

The point here is that to create better living conditions, a society needs to interact with other cultures in order to alter itself. If a society is marginalised or isolated from others, then that society is prevented from developing through the adoption and integration of other cultures' positive attributes. Thanks to globalisation, civil society has had a capacity and ability, although limited, to convey its own ideals that individuals and organisations believe worth pursuing. Global civil society's role under globalisation is, therefore, not to exploit or dominate local cultures or peoples, but to introduce new values to the societies. This, of course, might include values unacceptable to a society or other values which they are happy to accept. If cultural diversity theory is right, acceptance or rejection of a value is a matter of self-determination. Global civil society can provide a chance for societies, especially those that lack access to information, to choose appropriate values and ideas for them. To put it simply, informing marginalised societies that there are many possible choices for them to overcome social difficulties is one of the crucial roles of global civil society.

The precondition of civil society is, therefore, respect for diversity. A multitude of different views, opinions and values could and has produced competition and conflict between them.[202] Therefore:

> … global civil society is a universal ethical ideal. But it is a universal principle with a difference. It is the universal precondition of the open acceptance of difference. In the absence of its institutional structures, different individuals, groups, movements and organisations cannot otherwise co-exist peacefully.[203]

Likewise:

[202] Keane, op. cit., (2003) p. 196.

[203] ibid., p. 203.

> It is as if global civil society requires each of its participants or potential members to sign a contract: to acknowledge and to respect the principle of global civil society as a universal ethical principle that guarantees respect for their moral differences.[204]

Thus, global civil society creates a "democratic global polity."[205] Consequently, an environment is created where "the key task for the agent of global civil society is about increasing the responsiveness of political institutions…the need to influence and put pressure on global institutions in order to reclaim control over local political space."[206]

Via globalisation, civil society has attained an access to governments and an ability to change governmental policies by, for example, advocacy by NGOs or research by think tanks. Because of this democratic nature, civil society is of crucial importance under globalisation. As David Chandler, senior lecturer at the Centre for the Study of Democracy, University of Westminster, notes:

> A new political space is designed beyond the traditional distinction between state and civil society: an intermediate public space, whose function is not to institutionalise the movements or to transform them into parties, but to make society hear their messages… while the movements maintain their autonomy. This ambiguity is the key to the bottom-up ethics of global civil society, understood as a space whereby political movements can make their claims but also maintain their difference and specificity.[207]

Distributive Justice by Global Civil Society

Finally, this chapter will try to apply this logic to a model of distributive justice. Globalisation helps raise awareness of current international issues such as poverty and climate change in countries other than one's own. When people read that millions of children are starving to death, they may feel obligated to help. Such sentiment could not be so easily cultivated in previous eras. As a result of technological advancement in the field of communications, people are more aware of situations and events happening around the globe.

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[204] ibid., p. 202.

[205] Amoore and Langley, op. cit., (2004) p. 98.

[206] ibid., p. 98.

[207] Chandler, op. cit., (2004) p. 322.

Thus, the world has shrunk. Globalisation allows a bilateral flow of information; on one hand, developing countries realise and learn ways to better their situation, whilst the developed world learns that others less fortunate require assistance.

In terms of distributive justice, however, the most striking problem is that our domestic moral duties and burdens continue to be significantly more important to people than regional or international moral duties and burdens[208]. Princeton Professor Charles R. Beitz points out that whilst the world has shrunk, individuals still maintain a state-centric perspective, even though the global community is on the precipice of evolving beyond traditional nationalism.[209]

This paradox informs us that while distributive justice is morally desirable, it may be practically unrealistic. However, even though people proportionally feel more affinity to their fellow nationals, this is just a matter of priorities. For instance, if we examine the example of raising a child: most people's first priority is to raise their own child, not a child of another family. However, it does not mean that they do not care about children of other families. Merely, they feel a closer affinity to their own child.

What global civil society must aim to achieve is a narrowing of the perceived gap between national and international. In principle, if the affinity felt for fellow nationals was of similar scale to that for non-nationals, individuals would be willing to distribute wealth in an international environment, as occurs in the domestic environment. NGOs aggressively conduct campaigns and grassroots activities to inform people of the situation in developing countries. Universities hold public seminars to discuss how people can act to reduce poverty. Some companies promote ecological products to prevent global warming. These types of actions help to reduce the gap between national and international. The current state-centric nature of international relations means that the relationships that are significant to actors are generally "prudential ones, not moral ones"; therefore, states tend to focus on inter-state affairs.[210]

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[208] T. W. Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (Cambridge: Polity Press, 2002), pp. 95-96.

[209] C. Beitz, *Political Theory and International Relations* (New Jersey: Princeton University Press, 1979).

[210] S. Hoffmann, *Duties beyond Borders* (New York: Syracuse University Press, 1981), p. 149.

Global civil society has relative flexibility to act across borders compared to state governments. Hundreds of foreign NGOs operate in developing countries in an attempt to alleviate poverty, address specific illnesses and disease and provide infrastructure. Similarly, numerous NGOs from different countries sometimes cooperate with each other beyond both borders and sectors to achieve their aims. These activities impact on both domestic and international systems. If more people are aware of the devastating situation in some developing countries and feel an affinity to the local population thanks to, for example, NGOs' grassroots activities, the concentric layer between national and international would become narrower. Theoretically, if society changed its perspective of external affairs and focused as much on international affairs as domestic issues, a government might also change its foreign policy. This bottom-up process of policy-making posits a new possibility to reduce poverty, originating from global civil society and infiltrating governments via a change in the public's interests. Global civil society could "bypass the state through appealing to transnational networks, international institutions and foreign governments."[211]

Conclusion

This chapter tried to clarify the role of global civil society in achieving distributive justice in the situation that globalisation is intensifying. Using the principles of social constructivism suggests that while distributive justice is morally desirable, it may be practically unrealistic. One cannot deny the desirability of securing distributive justice in developing countries where a lot of people are suffering from marginalised social status, protracted conflict, poverty, poor living condition and political instability. However, with the focus of most individuals being fixed in a national mindset that prioritises fellow nationals over foreigners, distributive justice beyond state borders appears presently unachievable.

This chapter then examined the possibility that global civil society can do something for global distributive justice. Civil society, especially under globalisation, has been more influential on international relations in recent years. As a result of technological innovation, particularly in the field of information and communications, civil society has been able to act effectively beyond state borders. Some critics argue that global civil society is morally unacceptable because it exhibits a neo-imperialistic influence over other cultures. They argue that as the flow of influence between civil society and the

[211] Chandler, op.cit., (2004) p. 332.

cultures it affects is always one-way, from the West to the non-West, it may deform or destroy local identity, desire and culture.

To prevent such an occurrence, the precondition of global civil society is based on a theory of cultural diversity, respect for diversity and consensus-based activities. If necessary, a new framework and set of rules could be established that dictate how global civil society should act in different countries. This may be the role of governments and international organisations. To establish such a framework is important in order to avoid the neo-imperialistic influences that engender such opposition. Consequently, all actors should respect diversity. The creation of such a framework may be the next step for global civil society.

This chapter finally argues that global civil society has the potential to make the distance between the concentric layers of the international community, between national and international narrower, and this is what states cannot do under the current state-centric international system. However, states also perform duties that global civil society cannot, such as engineer the framework to ensure the principle of respect for diversity that is a prerequisite for global civil society to function effectively. What is required is to allocate tasks to the most appropriate actors in international relations.

Different Centuries, Similar Strategies? Opposing Terrorism in 1898 and 1998

Julia Jansson

This chapter discusses international police co-operation to combat anarchy in 1898 and terrorism in 1998. It argues that both the Anti-Anarchist Conference of Rome in 1898 and Interpol in 1998 depoliticised anarchism and terrorism by breaking each down into their constituent parts, that were inevitably criminal. Interpol still uses this tactic which has enabled joint international action against terrorism.

This chapter provides a comparative historical analysis of the ways in which the International Anti-Anarchist Conference in 1898 and the International Criminal Police organisation (Interpol in 1998 depoliticised terrorism.

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The President of the United States declared "[This ideology] is a crime against the whole human race and all mankind should band against [it]." The President urged that the speeches, writings and meetings of the supporters of the ideology should be treated as seditious and that their activities should be constrained. He drew a parallel between this doctrine and piracy. Like piracy, he said, it should be covered by international law.[212]

The president in question was not George W. Bush at the beginning of the twenty-first century. The missing word is not terrorism. Instead, it was Theodore Roosevelt in 1901 and he spoke about anarchism - the greatest threat to security and order in the late nineteenth and early twentieth century Europe. It is a good example of the parallels between two phenomena: anarchism in the 1890s and terrorism in the 1990s.

Terrorism and the international fight against it is something that one comes across in the news every day. The Global War on Terror led by the United States has more or less been in the headlines since September 2001. Less attention has been paid to the more low profile police-work done to prevent terrorist attacks or to catch terrorists.

International police co-operation has existed from the period when terrorism as we know it today emerged. Over a hundred years ago international terrorism was perceived as a threat to security in Europe. Anarchists had assassinated heads of state, and representatives of the police offices of European nations gathered in Rome at the International Anti-Anarchist Conference in 1898 to discuss ways to confront this threat. This co-operation focused on the field of international police co-operation and led to the creation of the International Criminal Police Commission in 1923,[213] later known as Interpol.[214]

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[212]Theodore Roosevelt cited in B. Tuchman, *The Proud Tower. A portrait of the world before the war 1890-1914* (Hong Kong: The Macmillan Publishers Limited, 1980), p. 107.

[213]R. B. Jensen, 'The International Anti-Anarchist Conference of 1898 and the Origins of Interpol.' *Journal of Contemporary History*, Vol. 16, No. 2 (April 1981), pp. 323-347.

[214] The abbreviation Interpol was only invented in the early 1950s – see M. Anderson, *Policing the World. Interpol and the Politics of International Police Co-operation* (Oxford: Clarendon Press, 1989), p. 53 and P. Andreas and E. Nadelmann, *Policing the Globe. Criminalization and Crime Control in International Relations* (Oxford: Oxford University Press, 2006), p. 285) - but is used in this study about both organisations: the International Criminal Police Commission and the current international criminal police organisation – INTERPOL.

Both the Conference and Interpol reacted to terrorism in a similar way. They depoliticised it by breaking terrorist acts down to their constituent, criminal parts. Depoliticisation is defined in this paper as the act of removing the political aspect from anarchism and terrorism, which I have equated with criminalising these acts.

This chapter will provide a comparative historical analysis of the ways in which the International Anti-Anarchist Conference of 1898 and Interpol in 1998 depoliticised terrorism. It will do this by examining the propositions regarding anarchism made at the Conference and the resolutions regarding terrorism made by Interpol between 1951 and 1998.[215]

The International Anti-Anarchist Conference of Rome 1898

> "We might search in vain perhaps for a better definition of anarchism than that just given by a little girl twelve years old. Asked by a person who did not know the facts, what her father was doing abroad, the little girl replied: 'He's working for Anarchy.' 'But do you know, little one what Anarchy means?' 'O yes, it means hating God, the Government and the rich!'." [216]

The International Conference of Rome for the Social Defence Against Anarchists (Conference) was held secretly in 1898.[217] It gathered decision-makers and authorities to discuss the anarchist peril in colloquies that were organised from the 24 November until 21 December 1898.[218] It was attended by the representatives of twenty-one European countries. The Conference's secrecy was so comprehensive that some historians almost a century later have even claimed that it was never organised.[219] The Conference was held in a context of political turmoil created by anarchist activities in Europe. Its aim was to create and facilitate international police co-operation among

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[215] The resolutions considered in this chapter are listed on the Interpol homepage: http://www.interpol.int/Public/Terrorism/resolutions.asp (accessed 28 June 2010).

[216] G.M. Fiamingo, *Early Writings on Terrorism, vol. 1-3* (Edited by R. Kinna) (London and New York: Routledge, 2006), vol. 2, p. 99.

[217] Tamburini, F 'La Conferenza internazionale di Roma per la difesa sociale contro gli anarchici (24 novembre-21 dicembre 1898),' *Clio: rivista trimestrale di studi storici, Edizioni Scientifiche Italiane*, n. 2 (1997), p. 227.

[218] Jensen, op. cit., (1981)

[219] Tamburini, op. cit., (1997) p. 228; Jensen, op. cit., (1981) p. 323.

participating states and to devise and to put into practice a common defence system against anarchist acts and against the propagation of anarchist theories.

The Conference, along withits successor conference of St. Petersburg in 1904, created a more formal ground for practical police co-operation that had existed throughout the nineteenth century. The conference was a break-through in some areas of international co-operation and was the first organised international event of its kind although an international network of law enforcement offices had already existed before 1898.[220]

Even though all participants saw the Conference as a significant event, the political aspects related to the fight against anarchism were sensitive. Invitations to the Conference were carefully made to emphasise the practical side of police actions against anarchism, and explicitly stated that "technical and administrative staff" were invited.[221] This concentration on the lower levels of anti-anarchist operations led to the partial success of the anti-anarchist treaties of Rome and St. Petersburg. Police officials met separately from the government representatives in informal meetings, and discussed the practical side of information exchange.[222]

The formal depoliticisation of anarchism led to comprehensive participation and promises of amendments to legislation, but only a small number of countries involved took action based on the propositions of the Conference.[223] The treaty that was prepared had to be ratified at national level. Only then did the international and national interests collide in a critical manner. As Professor Richard Bach Jensen from the University of

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[220]M. Deflem, *Policing World Society. Historical Foundations of International Police Cooperation* (Oxford and New York: Oxford University Press, 2002), pp. 70-77; M. Deflem, *'Wild Beasts Without Nationality': The Uncertain Origins of Interpol*, 1898-1910in P Reichel, (ed.) *The Handbook of Transnational Crime and Justice* (Thousand Oaks, CA: Sage Publications, 2005) pp. 275-285; Tamburini, op. cit., (1997) p. 243. There had even been a previous call for an international conference against nihilism by Russia after the assassination of the Tsar in 1881: P. Di Paola, 'The Spies Who Came in from the Heat: The International Surveillance of the Anarchists in London,' *European History Quarterly*, Vol. 37, No. 2 (April 2007), pp. 189-215.

[221] L. Hsi-Huey, *The Rise of Modern Police and the European State System from Metternich to the Second World War* (Cambridge: Cambridge University Press, 1992), p. 162.

[222] Deflem, M., op. cit. (2005)

[223] Deflem, ibid. and Tamburini, op. cit, (1997) p. 253.

Louisiana, states: "national self-interests and rivalries edged out international concerns."[224]

The Conference was criticised by its contemporaries. Socialists feared that strict measures would be taken against their ideology.[225] Anarchists wanted attention to be paid to the social conditions in Italy which caused the rise of anarchism.[226]

The Conference resulted in a protocol that was signed by all attendees except for the representatives of the British Government.[227] The protocol included a definition of anarchism and guidance to the participating countries on, for example, required amendments to legislation and measures for securing more effective surveillance of anarchists.

The final propositions of the Conference consist of three pages containing the following topics:

1. The political nature of anarchism.
2. The definition of anarchism.
3. The objectives of the conference on administrative reforms.
4. The objectives of the conference on extradition processes.
5. The objectives of the conference on legislative reforms.

The aims of the Conference were to define the elements that characterise an anarchist act; to suggest the most efficient means to control anarchist propaganda and actions, respecting the legislation of each participant state; to specify whether an anarchist act should be a case where the treaties on the expulsion of fugitives should be applied; to examine the means of keeping anarchists under police surveillance and, in necessary cases, to implement expulsion or extradition; and to assess the means of preventing or hindering the press from distributing anarchist propaganda. These aims were made deliberately broad to enable a wide range of discussion and evaluation. The autonomy of participant states was emphasised to render it possible for a wide range of states to

[224] Jensen, op. cit., (1981)

[225] Tamburini, op. cit., (1997) p. 234.

[226] Ibid., p. 235.

[227] Deflem, op. cit., (2005) and the final propositions of the AAC of Rome 1898.

attend the Conference.[228] The countries that participated had different political notions, and the disagreements emerged at the conference.[229] Even Italy, which had called the meeting, did not accept all the propositions.

The first paragraph of the propositions is the following:

> The Conference is of the opinion that anarchism does not have anything in common with politics and it should in no case be considered a political doctrine. [230]

This paragraph contradicts most common definitions of anarchism which view anarchism as a political doctrine. By separating anarchism from politics, the conference depoliticised the ideology and thus criminalised it.

The most cited part of the propositions is the following:

> II. It is considered as an anarchist act, in the context of the resolutions of the Conference, every act having as its aim the destruction through violent means, of all social organisation. The one committing an anarchist act as presented above is considered an anarchist.[231]

The definition of anarchism was the first big topic the conference had to deal with. This had not previously been done by any European parliament or court. The trouble of defining who could be considered an anarchist was in fact avoided with this definition: an anarchist was someone who acted like one. In this case an anarchist was perceived as a person who used violent means to destroy social institutions.[232] The notion of destruction of all social organisation gave anarchism a serious and sinister tone. It left it

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[228] Tamburini, op. cit., (1997) p. 240.

[229] Di Paola, op. cit., (2007) p. 210.

[230] "I. La Conférence estime que l'anarchisme n'a rien de commun avec la politique et qu'il ne saurait, en aucun cas, être considéré comme une doctrine politique." The final propositions of the AAC of Rome, 1898. Author's translation.

[231] "II. Est considéré comme acte anarchique, au point de vue des resolutions de la Conférence, tout acte ayant pour but la destruction, par des moyens violents, de toute organisation sociale. Est repute anarchiste celui qui commet un acte anarchique au sens indiqué ci-dessus." The final propositions of the AAC of Rome, 1898. Author's translation.

[232] Jensen, op. cit., (1981) p. 327.

for the participating countries to decide how a person could be proved to be an anarchist.

The English delegation at the Conference criticised the notion of an anarchist act as a violent act aimed against social institutions. According to delegates, the same definition could be applied to socialism and to any revolution that replaced the parliament with a king or vice versa.[233] As any ideological reasons for the action were excluded, this is of course true. This raises the question of the use of the term "anti-anarchist" in the name of the Conference. Why not convene an anti-violence or anti-criminal conference?

The third part of the Conference's propositions regarded administrative measures. Participating states were directed towards more efficient monitoring of anarchists. For this purpose, a central police authority was to be established. The founding of a central authority aimed also at facilitating communication among the participant states. The directions also included guidelines for expulsions of anarchists from nations. The adoption of a new identification system, the "portrait parlé," was confirmed.

The fourth proposition contained suggestions on the extradition of anarchists and included a reminder for the states not to treat anarchists as political criminals. This may have been directed at the United Kingdom, since this country had previously offered asylum for anarchists.[234] The final part of the propositions was the most extensive. It provided for the actions that would be covered by criminal law in each country. These included preparation for an anarchist act and anarchist propaganda.

The most discussed subjects were the difficult topics of surveillance and the suppression of freedom of expression and freedom of movement. The Conference took as a goal not only the apprehension of anarchists after they had committed terrorist acts, but also the prevention of these acts from materialising.

The fifth part of the propositions of the Conference gave detailed advice on national legislation. It was recommended that participant countries include in their legislation the criminalisation of, for instance, the preparation of an anarchist act, the membership or founding of an association that aimed for the perpetration of an anarchist act, and providing assistance to anarchists. Complicity in an anarchist act was also to be

[233] Tamburini, op. cit., (1997) p. 242.

[234] Jensen, op. cit., (1981), pp. 326-327.

punished. These propositions are of course applicable to many criminals and supporters of the anarchist ideology itself. Being a supporter of the ideology was not considered criminal in itself, but the question of what could be considered promoting or assisting anarchist acts was left open.

Paragraph 5(D) and (E) contain suggestions for tighter censorship and advocate the limitation of press reports on anarchism. Each participating country could decide what texts to censor.

The propositions also advised all countries to reinstate the death sentence for the commission of anarchist acts against heads of state and emphasised that executions of anarchists should not be public. This guideline illustrates on the one hand the fear authorities had toward anarchist thought and on the other the awareness of the best tool the anarchists had in spreading their ideology: publicity.

The last paragraph of the propositions concluded that anarchist crimes should always be treated as anarchist, irrespective of their motivation. From this proposition, a paradox emerges: can an anarchist act be committed without political motivation? Why is such an act not simply a criminal act? Why does it need to be dealt with at a conference especially aimed at fighting anarchism?

The contents of these propositions illustrate how difficult it was not to cross the line between banning anarchist ideology, and preventing anarchists' violent acts from occurring. Criminalisation was possibly seen as an answer to the need for balance between demands for more civil liberties, such as freedom of speech, and the fight against anarchism.

Anarchism was criminalised and depoliticised but at the same time the actual measures against it were political, as they included measures such as preventive censorship.

Interpol and Depoliticisation

> "As I learned about Interpol, some puzzling aspects surfaced. It is a police organisation without police powers; it is an international governmental organisation without a founding treaty or convention to establish its legitimacy formally. But then again, the organisation is marked by a surprising spirit of voluntary co-operation and harmony among a dissimilar and divergent group of races, religions,

creeds, political persuasions, and cultural levels."[235]

Criminal activities do not stop at national borders, so why should police organisations? Both international crime and international law enforcement expanded during the decades prior to the First World War.[236] The International Criminal Police Commission nowadays known as Interpol [237] was founded in Vienna in 1923. This makes it a quarter century older than the United Nations. It is a relatively little known intergovernmental organisation despite its status as the world's oldest still-active organ of international co-operation. Its objective was and has been to prevent and stop international crime. Interpol is an international organisation[238], working with issues that cross multiple countries. In addition to being subordinate to national legislation by its constitution, Interpol is working "in the spirit of the 'Universal Declaration of Human Rights.' "[239]

The relationship of Interpol with terrorism has been problematic from its beginnings. Article 3 of Interpol's constitution states: "It is strictly forbidden for the organisation to undertake any intervention or activities of a political, military, religious or racial character."[240] This was added to the constitution in 1946 (and reworded in 1956) when Interpol was re-organised after Second World War.[241] Article 3 ruled the conduct of Interpol for the following decades.

"One man's terrorist is another man's freedom fighter" is a well-known proverb. This has been the stumbling block for Interpol's action against terrorism. However, an act of

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[235] M. Fooner, *Interpol. Issues in World Crime and International Criminal Justice* (New York: Plenum Press, 1989), p. 12.

[236] Andreas and Nadelmann, op. cit., (2006), p. 79.

[237] See http://www.interpol.int/Public/icpo/governance/sg/history.asp

[238] The United Nations recognised it as an intergovernmental organisation in 1971; until that point it had the status of an non-governmental organisation: http://www.interpol.int/Public/icpo/governance/sg/history.asp (accessed 29 June 2010); see also Fooner, op. cit., (1989) pp. 51-53.

[239] Interpol's Constitution, Article 2, available online: http://www.interpol.int/Public/ICPO/LegalMaterials/constitution/constitutionGenReg/constitution.asp (accessed 28 June 2010).

[240] Ibid.

[241] Fooner, op. cit., (1989) pp. 49-50.

terrorism comprises a series of criminal offences,[242] and this has provided Interpol with common ground for agreement among its member states.

Definitions of terrorism vary from country to country. This has created a problem for Interpol, since national laws reflect different points of view. This makes law enforcement at an international level difficult. Even the United Nations has been unable to agree on a definition of terrorism, even though it has been using the word "terrorism" in its General Assembly Resolutions since 1972.[243] Its only instrument of enforcement is the restricted International Convention for the Suppression of Terrorist Bombings from 1997.[244]

As a result of the principle that interventions on issues that are political are not allowed, one would expect Interpol would be have been unable to fight terrorism at all. This is what happened in the 1950s and 1970s.[245] Interpol was later accused of being hypocritical in not taking a stand against crimes that were clearly within its mandate.[246] The resolutions of the period did not provide concrete advice on preventing and suppressing terrorism, but mostly empty phrases on enhancing co-operation between member states and condemning violence.

Eventually, the organisation had to recognise that terrorism involves crimes that are indisputably within its mandate. These include, for instance, murder, kidnapping, extortion, robbery and arson. Members agreed that it was hypocritical not to deal with terrorism when it clearly was an international crime.[247] At that time not all governments

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[242]A. Conte and B. Ganor, *Legal and Policy Issues in Establishing an International Framework for Human Rights Compliance When Countering Terrorism,* available online: http://www.ictconference.org/var/119/20471-Ganor_Conte_Human%20Rights.pdf (accessed 2008).

[243]UN General Assembly resolutions 3034 (1972), A/RES/31/102 (1976), A/RES/32/147 (1977), A/RES/34/145 (1979), A/RES/63/109 (1981), and A/RES/38/130 (1983).

[244]As cited in M. Deflem, M. and L. Maybin,. *Interpol and the Policing of International Terrorism: Developments and Dynamics since September 11,* in L. Snowden and B. Whitsel, (eds.) *Terrorism: Research, Readings, & Realities,* (Upper Saddle River, NJ: Pearson Prentice Hall, 2005), pp. 175-191. Available online: http://untreaty.un.org/English/Terrorism.asp (accessed 28 June 2010).

[245] Fooner, op. cit., (1989).

[246] Ibid., p 10.

[247] "TVI Interview: Commander Raymond Kendall" cited in Fooner op. cit., (1989) p. 10.

were against of all kinds of terrorism. Criminologist Michael Fooner writes: "In effect, governments were, in different ways, only opposing terrorists' activity selectively."[248]

Today, fighting terrorism has become a key part of the work of Interpol.[249] This has especially been the case since the terrorist attacks in the United States in 2001. After the attacks Interpol concentrated on fighting terrorism. At the same time national police organisations have increased their efforts in counter-terrorism.

Associate Professor Mathieu Deflem of the University of South Carolina indicates two ways that Interpol resolutions depoliticise and criminalise terrorism.[250] First, where an ideologically motivated act contains criminal elements, these are considered to prevail when discussing the totality of the act and the possible countermeasures. This attitude was adopted by Interpol in 1998. Second, terrorism is generally defined in a vague manner. In fact, Interpol has not given a definition at all:

> Thus, while ideological sentiments, political responses, and formal laws on terrorism can be very diverse in the world, the target of terrorism at the level of police bureaucracy is defined in a language that can be shared among police institutions across the world.[251]

From the police perspective, terrorism is thus a crime and it can be treated as such.[252]

Interpol has made a number of resolutions on terrorism from 1951 to 1998. These are prepared at General Assembly sessions held each year. Only resolutions considering terrorism and listed by Interpol are used in this study. The listing includes a few resolutions that do not use the term "terrorism", because from 1951 until 1983 it was not used by the organisation. At least two reasons for this exist. First, the term was not as commonly used then as it is today. Second and more importantly, the organisation

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[248] Fooner, ibid., p. 10.

[249] See: http://www.interpol.int/Public/FusionTaskForce/default.asp: available online. (Accessed 28 June 2010)

[250] M. Deflem, 'Social Control and the Policing of Terrorism: Foundations for a Sociology of Counter-terrorism,' *The American Sociologist*, vol. 35, no. 2 (2004), pp. 75-92.

[251] Ibid.

[252] Ibid.

avoided the concept in order to secure its political neutrality. Altogether, Interpol has written eighteen resolutions that concern terrorism.

From 1951 until 1983, political neutrality was considered of prime importance to Interpol, and Article 3 of its constitution ("It is strictly forbidden for the organisation to undertake any intervention or activities of a political, military, religious or racial character") is highlighted repeatedly in the resolutions of the General Assembly.

In its 1951 resolution "Requests for International Enquiries"[253], it was made clear that Interpol would not intervene in crimes "of a predominant political, racial or religious character," even if they constituted breaches of the legislation of member states. The issue of terrorism versus the fight for freedom caused difficulties for Interpol and other international organisations. In 1972, after 11 Israeli athletes were taken as hostages and later killed at the Munich Olympics, both Interpol and the UN had difficulty in determining what position to take. The Interpol resolution "Hostages and Blackmail[254]," that was formulated directly after the attacks had obvious references to this event, even though it was not explicitly mentioned:

> CONSIDERING that certain aspects of modern international criminality, such as the holding of hostages with the intention of perpetrating blackmail or other forms of extortion, have developed to the extent of constituting a severe menace to the life and safety of persons as well as the security of property[255]

The resolution proposed that in order to prevent future tragedies of this kind, member countries should do everything they could within the limits of Articles 2 and 3 of Interpol's Constitution. These limits indicate how delicate the question of political neutrality was.

In 1979 the first changes in the anti-terrorist policy of Interpol emerged. The resolution of 1979 "Acts of Violence Committed by Organised Groups"[256] stated that only some

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[253] AGN/20/RES/14, Lisbon, 1951.

[254] AGN/41/RES/7 Frankfurt, 1972.

[255] Available online:
http://www.interpol.int/Public/ICPO/GeneralAssembly/AGN41/Resolutions/AGN41RES7.asp (Accessed 28 June 2010)

[256] AGN/48/RES/8 Nairobi, 1979.

groups could claim to have an ideological motivation for their criminal activities. Previously, Interpol had considered any group that claimed to be ideologically motivated, to be so motivated. This was the first time that the motivation for an act and the act itself were separated.

The 1980s was a period of change in the policies and dynamics of Interpol. The French had had a leading role in post-war Interpol, but new leading members emerged in the 1980s with the U.S.A., West Germany, Britain, Canada and Japan becoming important players within Interpol during this decade.

A new stance on terrorism was gradually formed between the years 1982 and 1985. A resolution from 1983 was the first to refer to terrorism, but it still emphasised the importance of Article 3. [257] The United States unexpectedly changed the attitude that it had formed in the 1950s and stated that Interpol had an obligation to address terrorism. By 1984, the U.S. had acquired strong representation in the organisation and by 1985 a new policy toward terrorism was accepted widely and member countries could deal with terrorism from a law-enforcement perspective.[258] According to University of Edinburgh Professor Malcolm Anderson, this re-interpretation of Article 3 was the result of "a combination of American pressure, sensitivity to sections of western public opinion alarmed by terrorism, and fear that the organisation could be marginalised."[259]

Alex Conte and Boaz Ganor of the International Institute for Counter-Terrorism ask why terrorism even needed to be discussed:

> An act of "terrorism", after all, will comprise a series of acts that, in and of themselves, constitute various criminal offences. To take an example, a bombing of an Embassy will likely involve the unlawful possession of explosives, the wilful destruction of property and the wilful injury to or killing of persons. Each element is a criminal offence in most jurisdictions and, as such, is capable of being dealt with by the relevant municipal jurisdiction.[260]

This is a view that Interpol gradually adopted during the 1980s and 1990s.

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[257] AGN/52/RES/9 Cannes, 1983.

[258] Fooner, op. cit., (1989), p. 43.

[259] Quoted in Deflem, op. cit., (2005).

[260] Conte and Ganor, op. cit., (2005)

During the 1990s, there were "certain highly publicised terrorist incidents", such as the World Trade Center bombing on February 26, 1993.[261] In 1998 Interpol confirmed its commitment to combat international terrorism. Its new strategy was to depoliticise and criminalise terrorism so that opposing it could be included in the field of action of the organisation.

The Cairo Declaration against Terrorism of 1998 was the first resolution to refer to countermeasures. This reveals a more pragmatic approach to terrorism. The impact of the terrorist attacks against U.S. embassies in Tanzania and Kenya to this resolution is worth noting. The attacks happened on 7 August, 1998, as the General Assembly meeting in Cairo took place two months later, from the 22 until the 27 October. The most important issue for the General Assembly was to set up an international action plan to make co-ordination among the member states of Interpol more efficient. The fields in which joint action was declared were:

> […] the extradition of fugitive terrorists, the sharing of information essential to criminal investigations and to terrorism prevention measures, the detection of all types of traffic in weapons, explosives or other items directly or indirectly connected with the activities of organised terrorist groups, and the adoption of specific criminal charges relating to the use of new technologies for terrorist purposes.[262]

These were basically the same fields of action in which Interpol had sought intensive co-operation for the majority of its existence. Now they were especially related to terrorism. Terrorism could no longer be separated from other types of international crime, since terrorism always constitutes of crimes such as murder or arson, which are considered crimes globally.

In 1999, the fight against terrorism was declared as one of the main aims of Interpol: [263] The resolution stated that to provoke a state of terror could not be justified under any circumstances "irrespective of considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them."

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[261] Deflem, op. cit., (2006)

[262]Interpol resolution: AGN/67/RES/12 Cairo Declaration against Terrorism, 1998.

[263] Interpol resolution AGN/68/RES/2 The Financing of Terrorism, 1999.

The terrorist attacks in the United States in 2001 were regarded as an international issue by Interpol. Soon after 9/11, Interpol Secretary General, Ronald Noble, stated that, while the terrorist attacks took place on U.S. soil, "they constituted attacks against the entire world and its citizens.[264] The resolution on the terrorist attacks conformed to the new policy of Interpol.[265] The possibility of the attacks being of political nature was not mentioned in the resolution – Article 3 was no longer central.

The terrorist attacks in the United States on September 11, 2001 and the attacks in Madrid in 2004 and London 2005 clearly had an impact on security concerns all over the world. At the same time, the number of Interpol resolutions on terrorism grew substantially.[266] There was also a clear shift in the wording of the resolutions. One possible reason for this could be the growth of U.S. interest and influence over the organisation around the early 1990s, and especially after the terrorist attacks in 1998 and 2001.

The adoption of an anti-terrorist stance in the agenda of Interpol both promoted the issue of international police co-operation on the political agenda internationally and brought Interpol to the core of international security.

Depoliticisation of Anarchism and Terrorism

Common definitions of anarchism and terrorism include the notion that they are inherently political. But the 1898 Anti-Anarchist Conference of Rome and Interpol have coped with anarchism and terrorism by depoliticisation them.

The political motivation for terrorism had prevented international police co-operation from acting against it. Interpol was not, until the change in 1998, allowed to take action against politically or religiously motivated crimes. The strategy of depoliticising terrorism from 1998 onward gave Interpol the ability to act against terrorism, as the motivations for the criminal acts were separated from the acts themselves.

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[264] Deflem, op. cit., (2006).

[265] AG-2001-RES-05, Terrorist attack of 11 September 2001 (Budapest, 2001).

[266] Of the 18 resolutions Interpol has made on terrorism during the years 1951-2006, eight have been written during the last 10 years.

However, it can be argued that terrorism is something that can never be depoliticised, even when it is claimed to be a crime and nothing but a crime. As RAND Corporation Senior Adviser Brian Jenkins noted:

> What is called terrorism thus seems to depend on one's point of view. Use of the term implies a moral judgement; and if one party can successfully attach the label *terrorist* to its opponent, then it has indirectly persuades others to adopt its moral viewpoint.[267]

Terrorist is always a pejorative term and one that is only applied against one's opponents.[268]

The criminalisation of terrorist acts links the coping strategies employed by the Rome Conference and Interpol. Why was the Conference called "anti-anarchist" and not "anti-violence"? Most likely it was because anarchism had been labelled as the biggest threat of the time. Maybe also because dealing with anarchism by breaking it into its constituent criminal parts could help obfuscate any recognition of the social conditions that had fuelled the phenomenon. Perhaps it is still the same with terrorism. Terrorists have been named an absolute evil and thus the reasons for the anger toward the Western world can be forgotten:

> Terrorism cannot be "defeated," because it is a tactic and not an enemy. It will continue as long as people view it as an effective way of achieving their political goals, particularly if they believe that they cannot do so in any other way.[269]

The Conference and Interpol had similar coping strategies for similar threats. As in the late nineteenth century, international police co-operation to fight counter-terrorism might bring the level of co-operation to a whole new level.[270] It is also possible that politically motivated terrorism may again be depoliticised. Historical examples show that the pattern has been both evolutionary and cyclical. What is now new is the transatlantic interconnectedness of security issues and the evolution of a transatlantic

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[267] Cited in B. Hoffman, , *Inside Terrorism* (London: Victor Gollancz, 1998) p. 31.

[268] Ibid.

[269] N. Bensahel, 'A Coalition of Coalitions: International Cooperation Against Terrorism,'' *Studies in Conflict & Terrorism,* vol. 29 (2006), pp. 35–49.

[270] Andreas and Nadelmann, op. cit., (2006) p. 190.

security community "based more on policing alliances against non-state actors than traditional security alliances against state-based military threats,"[271] something that clearly existed in European-wide context in the last years of the nineteenth century.

The two experiences show that the basis for international anti-terrorist co-operation has been and will consist of two imperatives: the depoliticisation of the phenomenon and the non-binding nature of resolutions. As long as state sovereignty exists, terrorism cannot be defined internationally.

This chapter has sought to provide a view on the depoliticisation of anarchism and terrorism in 1898 and 1998. Both the Conference in Rome and Interpol faced similar threats and reacted to those threats by reframing the perpetrators of terrorist acts as criminals rather than political agents with a politically inspired claim.

[271] Ibid.

Contemporary Japanese Defence Policy and the Notion of Normalcy

William H.M Hobart

The perennial debates concerning Japan's defence policy have recently been marked by rhetoric and Japan attempting to become a "normal nation." However, to date there has been no clear articulation of what Japan must achieve in order to attain the status of "normal." For Japanese policy makers to define or attach criteria to the process of normalisation would ultimately diminish its usefulness as a vague, catch-all expression which can be used to appease their own pacifist constitution, population, observers within the region and the international community as a whole. This process has manifested itself in the form of increased involvement in international affairs and peace keeping and new laws that herald an increased capability for the Japanese Self-Defence Force both constitutionally and materially. This chapter seeks to separate the rhetoric of normalisation from the reality of this process, and ultimately asserts that the pursuit of becoming a normal nation is merely a legitimising tool that is opportunistically deployed in order to repress the controversy of constitutional change. By analysing the relationships that Japan maintains with the United States of America, the People's Republic of China and the Democratic People's Republic of Korea one can identify the opportunities and threats to Japan's normalisation. Furthermore, this report identifies how such factors legitimise and encourage the process.

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Introduction

The security landscape in Asia is by no means static. China has recently celebrated its 60th year of Chinese Communist Party rule by parading new fighter jets, ballistic and cruise missiles. The Democratic People's Republic of Korea (DPRK) has continued to develop its nuclear capacity and delivery systems; meanwhile, Iran has defied the world by hiding a secret nuclear facility.[272] More than ever, potential flashpoints such as the Senkaku islands, the Korean Peninsula, and the Taiwan Strait are monitored as security concerns in Asia. Meanwhile, the international community is increasingly concentrating on state-based security concerns and militaries are becoming increasingly orientated towards peacekeeping, counter-terrorism and humanitarian missions.

In the midst of this widespread change, Japanese policy makers have the task of managing their immediate security environment along with the expectations of allies and the international community to participate in the maintenance of international security. The expansion of the Japanese Self-Defence Force's (JSDF) capacity to participate in global security while taking into account the legal obstacles posed by Article 9[273] of the Japanese Constitution and the potential risk of starting a regional arms race is problematic domestically, regionally and globally.

Since the early 1990s, policy makers and party leaders (especially influential politician Ichiro Ozawa) have called for Japan to become a "normal" country.[274] The desire to normalise is understandable, especially in the realm of international affairs since "normal" implies that one is accepted, recognised and respected. But what is 'normal' for Japan and how can we accurately define 'normal'? Therein lays the value of this

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[272] I. Traynor and J. Borger, "Iran Admits Secret Uranium Enrichment Plant," *The Guardian* (September 25, 2009), available from: http://www.guardian.co.uk/world/2009/sep/25/iran-admits-uranium-plant (accessed 26 September, 2009).

[273] Article 9 of the Constitution of Japan reads as follows: Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes. In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.

[274] Ozawa, I., *Blueprint for a New Japan: The Rethinking of a Nation.* (New York: Kodansha International, 1993). p.5.

normalisation rhetoric. The concept's ambiguous yet desirable status lends itself to instant approval without requiring definition and is thus a particularly useful tool in justifying certain policies. Japanese policy makers have realised the potential of "normalisation" as a policy device and have used it to frame a variety of attempts to change the nature of the JSDF. These changes attempt to address a number of intertwined issues in Japanese foreign, domestic, security and defence policy.

The rhetoric of normalisation aims to legitimise these moves by softening the image of the JSDF while maximising its capacity. This is not a new strategy in Japan. However, since the early 1990s, an unprecedented amount of change has occurred in Japan's security posture; change that it is vital to understand as the East Asian security landscape becomes increasingly volatile. Thus, the purpose of this chapter is to contextualise the rhetorical concept of normalisation with the existing threats and opportunities presented by Japan's neighbours and allies.

This chapter will illustrate the nature of the relationship Japan has with the United States of America (US) which represents the cornerstone of its security and defence policy. In addition, the relationships Japan shares with its regional neighbours will be examined, specifically how these relationships interact and how the policies championed by normalisation discourse are likely to affect the security landscape of the region. Current defence white papers, defence budgets and existing security literature illustrate the contemporary and projected nature of the armed forces of the US, Japan and its regional neighbours. Therefore, by analysing the context of the global and regional security landscape, it is possible to develop a greater understanding of the strategic inputs to the normalisation discourse.

In addition, this chapter highlights the current threats perceived by Japanese policy makers and civilians, which serve to add legitimacy to the policies pursued under the banner of "normalisation". Four strategic catalysts have driven the normalisation discourse: the crisis on the Korean Peninsula, the end of the Cold War, the 1990 Gulf War and the dispute over Taiwanese independence. These four events have shaped perceptions of what Japanese defence and foreign policy need to address more than any shift in military balance. Furthermore, these events have only served to highlight what is seen as the "emptiness" of the alliance with the US. This emptiness is a description of the lack of reciprocity within the alliance.

Japanese defence policy in the past has typically been reactionary as opposed to pre-emptive. Insufficient consideration has been given to the future of Japan's strategic bargain with the US. This chapter will look at Japan's relationships separately; however, each section will serve to highlight how much these relationships affect each other. The ability to interpret Japan's international relationships as *both* potential threats (even the US) and as opportunities is critical for policy makers and security analysts, considering that the normalisation discourse depends highly on the credibility - and marketability - of these threats.

The United States

Any discussion on Japanese security and defence policy is invariably also a discussion of US policy regarding Japan. As Japanese leaders continue to affirm, the US has been the cornerstone of Japanese defence policy in the post-war era. Article 9 of the Japanese constitution and American bases in Japan remain the primary points of debate when discussing defence policy reform and the Japan-US alliance. Northeast Asia is a troubling place for Japanese security analysts. Japan is surrounded by hostile or potentially hostile states and non-state actors. With the Japan-US alliance having served as effective deterrence for so long, it is not surprising that Japanese policy makers seek to strengthen this commitment. Yet, simultaneously, there is concern regarding the stability of the alliance. Normalisation is a policy banner that has come to legitimise domestically, appease regionally and affirm globally that Japan is capable of responding to threats without remilitarising, yet permitting Japan to assume responsibilities commensurate with its economic power and obligations.

The normalisation discourse is intrinsically linked to the pressure the United States has placed on Japan since the Gulf War to increase its contribution to the alliance. Public criticism of Japan's involvement surfaced in US Ambassador Michael Armacost's 1991 communiqué to Washington:

> A large gap was revealed between Japan's desire for recognition as a great power and its willingness and ability to assume these risks and responsibilities … For all its economic prowess, Japan is not in the great power league … Opportunities for dramatic initiatives were lost to caution … [and] Japan's crisis

> management system proved totally inadequate [in response to Japan's Gulf War commitment].[275]

And again in the Secretary of Defence, William Sebastian Cohen's 1998 "Report on Allied Contributions to the Common Defence":

> Japan's share of the contributions [to the common defence] remains substantially below its share of ability to contribute... [in the view of] the complex legacy of WWII [Japan's] responsibility sharing has focussed more on assuming a substantial share of US stationing costs and less on other aspects, such as active participation in shared regional and global military roles and missions.[276]

The US has had difficulty with the issue of reciprocity, despite the alliance being predicated on an exchange of US security for generous base lending provisions. As such, Japan is not the only party having difficulty with Article 9. In the absence of a Soviet threat, over time the US has come to view the original containment strategy of the peace constitution as a free ride on US defence. It seems neither the US nor Japan can have it both ways. US defence comes at the cost of obligation and pressure for Japan to participate globally. This only engenders the need for US commitment to the defence of Japan when regional neighbours interpret greater Japanese participation as force maximisation and projection. Japan has drastically elevated its capacity and involvement in international security with "special measures" and "peace co-operation" laws enacted in 1992, 2001 and 2003. Furthermore, the decision to deploy ships to the coast of Somalia in [year] saw the first international deployment of the naval arm of the JSDF to protect Japanese interests. Whether these interests were genuine or not, it is worth noting that Japan was placed under extreme pressure by the US to engage in anti-piracy off the coast of Somalia. Japan's interest could thus be indirect; that is, showing the US that it is willing to be a responsible and dependable ally.

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[275] M. Armacost, 'The Gulf War: Impact on US – Japan Relations,' George Washington University Archives (1991), available online: http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB175/japan2-13.pdf (accessed 21 April 2009).

[276] W. S. Cohen, 'Report on Allied Contributions to the Common Defence: A Report to the United States Congress by the Secretary of Defense' (March 1998) available online: http://www.defense.gov/pubs/allied_contrib98/index.html (accessed 1 March 2010).

Reaffirming or strengthening commitment to the alliance is not a new trend in Japanese policy statements. However, the normalisation discourse has emerged as a factor in depoliticising the alliance. US requests to put "boots on the ground" or to "show the flag" have occured as part of alliance obligations.[277] Normalisation contextualises these requests as an invitation to participate in the larger effort to "prevent and eradicate terrorism", which is an issue that legitimises security and force projection.[278] Furthermore, by attaching US foreign and defence policy to immediate threats to Japanese security, the alliance is not only seen as important but "more important than ever".[279] Therefore, it is a relationship to preserve and, if anything, strengthen. Security concerns have been broadened to include human security, non-state actors, disease and terrorism. As a result, defence policy is becoming an output of public good in conjunction with threat response. These non-political issues have given Japan and the US a greater range of opportunities where co-operation is not subject to as much domestic debate and regional scepticism, which in turn promotes greater alliance rapport.

Threats and Opportunities

The United States has generally not been considered a threat to Japan in the post-war era.[280] However, the threat of possible entanglement in US security issues or abandonment of Japan by US foreign and defence policy has been perceived since its post-war occupation. Ensuring against abandonment has taken the form of increased capacity to respond to a conventional attack in lieu of US protection. Although abandonment is unlikely, it does serve as an opportunity to take precautionary measures. For example, PAC-3 and Aegis missile defences have been cited as important domestic assets to the JSDF in protecting Japanese territory, despite existing precautions using the same weapons systems by the US forces in Japan.[281] The potential to be seen as a proxy target of America or entanglement in US security missions with no immediate relevance to Japanese security was mitigated by Article 9 of the post-war

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[277] G. McCormack, *Client State: Japan in the American Embrace* (New York: Verso, 2007)

[278] R. J. Samuels, "Securing Japan: The Current Discourse," *Journal of Japanese Studies* 33, no. 1 (2007), Kitaoka Shin'ichi, "Goodbye Tanaka - Style Politics, Hello New Center.," *Japan Echo* 36, no. 4 (2009).

[279] R. J. Samuels, *Securing Japan - Tokyo's Grand Strategy and the Future of East Asia* (New York: Cornell University Press, 2007), p.158

[280] Ibid.

[281] Japanese Ministry of Defence, "Japan's B.M.D, 2009", Japanese Ministry of Defence (2009), available online: http://www.mod.go.jp/e/index.html (accessed 1 March, 2010).

constitution. For the most part, Article 9 has served Japan well in preventing combat involvement. The threat of becoming a proxy target during the Cold War has been replaced by the threat of international terrorism which has targeted the U.S and its allies. Although there has been no attack on Japan, nor any attack linked to Japan's alliance with the US by terrorists or other non-state actors, the threat has been regarded as ever-present and unpredictable, particularly since the September 11, 2001 attacks. The nebulous threat of terrorism has affected a large number of defence policies issued by states around the world, especially those who are allied with the US, usually resulting in an increasein domestic security and the projection of force, whether regionally or globally. Japan is no different; justifications for increased force projection have come primarily from the opinion of analysts and policy makers that Japan must affirm its relationship with the US by participating in the Global War on Terror (GWOT), which has seen emergency laws passed and deployments to Afghanistan.[282] Forces were also deployed to Iraq in conjunction with the threat of Weapons of Mass Destruction (WMD). Without engaging in the debate surrounding the legality or legitimacy of the Iraq War, the war itself was part of the Global War on Terror and thus received the same legitimising precedent set by the war in Afghanistan.[283] Although no combat troops were deployed in either theatre by Japan, it shows that Japanese policy makers took this as an opportunity to engage in global security missions, "normalise" Japanese involvement in such missions and most importantly appear as a dependable ally to the United States. [284]

The alliance with the US should be viewed in the wider-context of the ever changing global security landscape. Media outlets and scholars have misinterpreted alliance

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[282] McCormack, *op. cit., (2007);* J. Samuels, 'Japan's Goldilocks Strategy,' *The Washington Quarterly* 29, no. 4 (2006); Y Soeya, 'Japanese Security Policy in Transition: The Rise of International and Human Security,' *Asia- Pacific Review* vol. 12, no. 1 (2005); Y Takao, *Is Japan Really Remilitarising? - The Politics of Norm Formation and Change* (Melbourne: Monash University Press, 2009); Wilkins, "'Analytical Eclecticism" In Theorizing Japanese Security Policy: A Review Essay ' *Asian Security* vol. 4, no. 3 (2008).

[284] See 'Law Concerning Special Measures for Humanitarian and Reconstruction Assistance in Iraq' (2003) available online:

transition as alliance fragility.[285] This transition is evidenced by the equipment Japan acquired in response to the Soviet threat and in more recent acquisitions. Japan developed its own military hardware such as the Type 90 main battle tank whilst the Japanese Air Self Defence Force (JASDF) acquired E-2C Hawkeye early warning aircraft and F-15 Eagle air superiority fighters to combat the Soviet Tu-22M Backfire. Similarly the Japanese Maritime Self Defence Force (JMSDF) acquired a large number of destroyers, minesweepers, and P-3C aircraft to assist in anti-submarine warfare to provide a defensive shield for the US Navy operating out of Japan. Furthermore, with the collapse of the Soviet Union, Japan had to modify the JSDF's capabilities to address the changing security landscape and alliance expectations. These modifications have come in the form of increased ballistic missile defence, refuelling capabilities in the Indian Ocean, the *Hyūga* class amphibious assault ship and a greater focus on Special Forces. Furthermore, the defence budget affords the new hardware required to meet regional threats, yet reflects a dramatic decrease in overall spending in order to remain under the 1% ceiling permitted for defence purchases.[286]

The relationship with the US is complicated by increasing expectations of reciprocity within the alliance. Washington has continually applied significant pressure to Japan to revise Article 9 or to increase its contribution to US led missions and international security. However, it would be counterproductive for Washington to perceive Japanese responses to such overtures as an indication of Japanese commitment to the alliance. Japan's contribution to the alliance is a domestic issue as it affects the balance between the possibilities of entanglement or abandonment. It is up to Japanese policy makers to devise creative contributions to Afghanistan and elsewhere on non-traditional security issues.

The Status of Forces Agreement (SOFA) between the US and Japan provides the legal parameters for US forces in Japan and continues to be an issue that has created some friction between alliance obligations and domestic support.[287] However, it is important to note that the US has over 100 SOFAs all over the world. While revising the SOFA may appear to be a bilateral and domestic issue to Japan, it has multilateral implications

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[285] M. Elliot, 'Viewpoint: Yes, Japan Does Want a New Relationship with the US' *Time* (7 September, 2009) available online: http://www.time.com/time/world/article/0,8599,1920886,00.html (accessed 1 March, 2010).

[286] Takao, op. cit.,(2009), p.36.

[287]op. cit., (2009), p.9

for the US. If the Japan seeks SOFA revision, for example, to include an environmental clause, it should take a gradual and multilateral approach, possibly involving fellow host countries such as the Republic of Korea and Germany.

The alliance with the US remains the cornerstone of Japanese security and foreign policy. Although there have been concerns over the solidarity of the alliance after the embarrassment of the Gulf War allegations concerning "cheque-book diplomacy," Japan has shown through its strategic acquisitions, rhetoric, new special measures laws and subsequent deployments that it wishes to remain a staunch ally of the US. Domestically, there is a need for Japan to insure against the possibility of entanglement or abandonment. Although the US poses no direct threat, the potential indirect threats of entanglement and abandonment present the same opportunities of a conventional, state based threat by legitimising military reform and modernisation. From a realist perspective of the security landscape in Asia, modernisation and reform could easily be misinterpreted as force projection and so a zero sum game emerges in the region. The "normalisation banner" is designed to clarify Japan's benevolent security policy. However, policy must be predicated on necessity. Thus, China and the DPRK remain possible sources of conflict in the region that must be addressed.

The People's Republic of China

Perhaps the best illustration of the perceived security zero sum game in East Asia is China's recent military modernisation. Similar to normalisation, China has titled its military modernisation and economic growth as a "peaceful rise."[288] However, the term "rise" has found popular opposition in China, with many preferring to perceive China as being a regional hegemon (and the 'middle kingdom') and titling the policy "resurgence".[289] Both cases are euphemisms to describe an increase in security maximisation while assuring regional neighbours and global observers that all intentions are benign. Policy makers in both China and Japan are very much aware of the security landscape in the region and the banners of "normalisation" and "peaceful rise" are designed to prevent a destabilising arms race which could provoke the US, given its concerns over losing its strategic grip on the region. In particular, China's navy

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[288] M. Wan, 'Tensions in Recent Sino-Japanese Relations: The May 2002 Shentang Incident' *Asian Survey*, vol. 43, no. 5 (2003),

[289] Office of the Secretary of Defence USA, 'Military Power of the People's Republic of China:, Department of Defence, Annual Report to Congress (2008)', available online: http://www.cfr.org.publication/18943 (accessed 1 March 2010).

has been subject to a significant modernisation program, acquiring 30 submarines and 22 surface ships in the past decade in addition to a substantial increase of maritime aviation assets and naval missilery.[290] Chinese diplomats have thus felt the need to reassure regional powers and global observers that the modernisation program is the natural result of economic growth and a response to changing security concerns involving maritime piracy, counter-terrorism and humanitarian interventions. For example, China's most recent naval acquisition, *Hospital Ship 866*, at 100,000 tonnes is the largest hospital ship ever built.[291] Following the example set by the *USNS Mercy, Hospital Ship 866* could become a major diplomatic tool for China if deployed to humanitarian and peacekeeping operations (PKO). Similarly, the Chinese Navy has also escorted a number of Japanese, Taiwanese and UN World Food Program ships off the coast of Somalia to protect them from piracy.[292] These strategies are clearly mirrored by Japan's increasing role in counterterrorism, anti piracy and PKOs, demonstrating the countries' shared strategy of showing regional powers and the world that they are not remilitarising; rather, they are expanding their capacity for benevolence to assist in *world* security issues.

The Senkaku Islands are a contested region for China and Japan where deployed forces include "research ships" and PC-3 maritime surveillance aircraft respectively. These deployments are clear signals to each other that they are still very much engaged in the area. As such, one can view Japan's relationship with China as a delicate stage performance where each must present the best show of face and choreograph their security moves delicately and precisely so as to not create a security dilemma.

There is a great deal of potential for Japan to increase its diplomatic rapport with China. For instance, since visits to the Yasukuni shrine ceased with the departure of Junichiro Koizumi as Prime Minister, there has been an upswing in bilateral dialogue between China and Japan and Korea and Japan.[293] However, it will take more than symbolic gestures to establish trust with Japan's neighbours, who vividly remember the atrocities carried out by the Japanese during the Second World War. The invasion of China by the Japanese Imperial Forces in 1939 still casts suspicion on Japan's normalisation, whereas

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[290] Ibid.

[291] Shin'ichi, op. cit., (2004)

[292] Samuels, op. cit. *Securing Japan - Tokyo's Grand Strategy and the Future of East Asia* (2007), p.167.

[293] L. E. Easley, 'Defence Ownership or Nationalist Security: Autonomy and Reputation in South Korean and Japanese Security Policies' *SAIS Review*, vol. 27, no. 2 (2007), p.12

China's peaceful rise does not carry the same historical baggage. In addition, Japanese policy makers must balance the relationships with China and the US against one another and appease domestic pacifist sentiment, yet effectively respond to fears of DPRK missile attacks and terrorism.

Threats and Opportunities

There is perhaps more evidence to suggest that Japan and China face lucrative opportunities with each other, rather than threats. Each country depends on the other for its economy: Japan provides China with capital and technology, while China provides Japan with cheap labour and an export platform. Each country wishes to maintain peace on its own sea Lines of communication (SLOC), so that energy can be imported and commodities and wares exported. The Six Party Talks regarding DPRK denuclearisation provide a further opportunity for political interaction.[294] Chinese delegates even voted in the UN Security Council (2006 and 2009) to reprimand the DPRK on its belligerent missile tests on two occasions. With so much opportunity for cultural, political and economic collaboration, one would imagine that strategic rapprochement is only a matter of time. So why is China considered an equal if not greater threat than the DPRK by Japan?

East Asia does not enjoy the same détente that Europe has enjoyed since the collapse of the Cold War and states are still developing and asserting themselves in the region. Japanese diplomats and politicians have often voiced that they feel Japan does not receive the respect it should. Energy security, piracy in the SLOCs and territorial disputes are all prevalent issues in the Sea of Japan, East China Sea and Yellow Sea regions.

China and Japan depend on the SLOCs for the importation of energy, 80% of which passes through the Malacca straits, whose waters are notorious for pirate activity. Both China and Japan therefore benefit from secure SLOCs. However, as economic and cultural relationships develop, political and military suspicions follow. The Taiwan Strait remains a potential flashpoint that could involve the US, Japan and China in conventional or nuclear conflict and thus risks making these SLOCs conflict zones. Here mutual dependence presents opportunity for cooperation while also presenting risk. Because both Japan and China depend on these sea lands, any shift in the balance

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[294] Samuels, op. cit. *Securing Japan - Tokyo's Grand Strategy and the Future of East Asia* (2007), pp.136-8.

of power can be interpreted as a move to challenge the neutrality of these waters. This is shown by the dispute regarding the sovereignty of the Senkaku Islands and natural resources in adjacent sea beds.

The Senkaku Islands and Taiwan Strait disputes in combination with memories of the Second World War constitute the biggest obstacles to Chinese and Japanese rapprochement. Thus, China presents a potential threat in the event of annexation of the Senkaku Islands or a more immediate threat should China annex the Republic of China (ROC) (Taiwan).[295] The latter concern is particularly complex as the United States has vested interests in keeping the ROC democratic. Despite the vast array of issues that China and Japan can co-operate on, territorial disputes, political and military scepticism stemming from war memory and ties with the Unites States only serve to reinforce China's realist perspective on the security landscape of the region. As a result, China has modernised its armed forces significantly.

China's Military Modernisation

It is not necessarily the quantity of modern armed forces China has at its disposal that worries Japanese security analysts. The concern is the rate in which China has been able to transform its war fighting capacity. China's ability to modernise and acquire modern material in a short period of time is far greater than Japan's, which has a 1% ceiling on defence spending and thus cannot afford to acquire the same tonnage of material as China. Consequently, Japan is not capable of maintaining its position in a regional arms race. Yet the Japanese should remain aware that China is still very much behind in military modernisation and fields a numerically superior but technologically inferior conventional force.[296] The vast majority of the People's Liberation Army Air Force aircraft date from the Cold War era and are easily outmatched by U.S or Japanese 4th and 5th generation aircraft. Similarly, the People's Liberation Army Ground Force is large but poorly equipped.[297] Chinese forces do not have the capacity to defeat even a moderately sized adversary possessing the same equipment as Japan or the U.S, though this will change in the future. However, of more immediate concern is China's nuclear

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[295] Natural resources found surrounding the Senkaku Islands have become attractive to Chinese policy makers who realise China's growing energy security concerns.

[296] Japanese Ministry of Defence, 'Japan's B.M.D, 2009', Japanese Ministry of Defence (2008) available online: http://www.mod.go.jp/e/publ/w_paper/2008.html (accessed 1 March 2010).

[297] Ibid.

arsenal and the viable means of delivery that China possesses.[298] As a result, the normalisation discourse in Japan gains greater significance in light of the threat that China poses.

As previously discussed China and Japan are in a sense playing the same game. Each country has deployed strategic euphemisms to soften an otherwise substantive military transformation. Furthermore, each has used the other as a potential threat to legitimize these transformations in conjunction with a variety of other factors, such as the changing nature of warfare, growth of international terrorism, destabilization caused by the DPRK and piracy issues. This process has resulted in a situation where each country recognises the strategy used by the other and is thus sceptical of what are regarded as benign developments. Furthermore, the concerns over potential flashpoints such as the Senkaku Islands or the Taiwan Strait existed even *before* China began to ""rise"" or Japan decided to become "normal". Thus rhetorical devices such as normalisation and peaceful rise have a limited capacity to diminish concerns.

Japan's relationship with China is a major factor when analysing Japan"s "normalisation," because it is one of the primary legitimising tools used to convince the pacifist Japanese public that normalisation is vital for national security. The 2008 U.S Department of Defence Report on the Military Power of the People's Republic of China noted: "China has achieved a remarkable strengthening of virtually all the key elements that we traditionally associate with comprehensive national power... and has achieved real military options in the region."[299] Such processes have stripped Japan's "normalisation" and China's "peaceful rise" of their non-threatening pretence, to expose them for what they really are: an attempt to achieve military power commensurate with economic power. The fact that China is not limited to the same constitutional restrictions as Japan only serves to engender concern that China may embark upon unchecked military modernisation.

Japan has plenty of opportunity for co-operation with China, as discussed. Yet territorial issues and Chinese resentment over the Second World War are proving major obstacles to rapprochement. In addition, Japanese policy makers must be ever mindful of their relationship with the US when devising policies on China. If China makes an attempt to annex Taiwan and Japan fails to support the US it would surely gravely damage the

[298] This includes operational cruise and ballistic missiles.

[299] Office of the Secretary of Defence USA, op. cit., (2008)

alliance. Therefore, Japanese strategists have no desire to provoke China into brinkmanship. Fortunately, Japan and China are serving each others' interests at present by legitimising their respective policies as "normalisation" and "peaceful rise." Of greater immediate concern is the DPRK and itsnuclear testing and delivery platforms which are becoming an unpredictable and worrying threat to Japan and the region.

Democratic People's Republic of Korea

The DPRK has very little opportunity for rapprochement with Japan and few countries could mutually distrust each other more. The recent missile threat from the DPRK has pushed security and strategic issues to the front of the agenda for Japanese policy makers while serving to dampen domestic pacifism. The DPRK abducted Japanese nationals during the 1970s and 1980s and their current military belligerence and nuclear testing has ostracised them from the global community, making them particularly repugnant neighbours to the Japanese. Meanwhile from Pyongyang's perspective, the Japanese alliance with the United States is seen as the harbouring of a mortal enemy, whilst the atrocities that occurred during the Japanese occupation of the Korean Peninsula are vividly remembered in anti-Japanese propaganda.[300] There have been efforts to normalise relations and engage in discussions which have primarily focused on the abduction issue. However, thus far all glimmers of progress have invariably disappeared in light of other disagreements. Japan's main concern is the DRPK's growing capability to attack Japan. This nuclear threat has generally been regarded by civilians and the government alike as Japan's most pressing security threat.

Although the DPRK's willingness to use ballistic or cruise missiles against Japan is unclear, the uncertainty only serves to exacerbate concern. The DRPK missile threat has done more to assist the normalisation rhetoric than any other threat; the unpredictability, brazenness, abductions and personality cult surrounding Kim Jong Il and Kim Il Sung makes the DPRK a sensational and frightening enemy.

Threats and Opportunities

The DPRK poses a viable threat in its ability to strike Japan with either conventional or nuclear weapons. The DPRK has a large Special Forces detachment within the military and its army itself is the fifth largest in the world.[301] Despite the size of the Korean

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[300] Ibid

[301] Samuels, op. cit. *Securing Japan - Tokyo's Grand Strategy and the Future of East Asia* (2007), pp.148-9.

People's Army its forces are poorly trained and equipped. Its arms are antiquated and forward supply lines would be hard to maintain given the lack of logistical infrastructure.[302] Furthermore, Japan does not have the same economic stakes in the DPRK as it does in China. Domestically, the business sector in Japan is an important voice against adopting a hardline on China; this is not the case for the DPRK, to which Japan's business sector is largely indifferent. With the business sector as concerned as the rest of society, it is easy for the Japanese government to use the DPRK threat as a legitimising tool to support increased JSDF modernisation, strengthening of the alliance with the US and overall "normalisation." Furthermore the DPRK missile threat provides an opportunity to maximise security vis-à-vis China. Japan has thus equipped its Maritime Forces with Aegis ABM defences to complement the existing PAC-3 Ballistic Missile Defence (BMD) ground shield. Japan's Special Forces have been trained to respond to an insurgent attack on important facilities such as Japan's nuclear reactors. These are all threats that Japan is fast becoming equipped to deal with while maintaining the broad support of its citizenry.

Strengthening the alliance with the US is one thing; putting the alliance to the test is another. Thus Japanese security policy relies on deterrence. Normalisation softens the image of developing capabilities commensurate with the economy, which in turn creates a viable deterrence threat to China and North Korea while appearing committed to Washington.

While the relationship with the DPRK is more of an immediate strategic concern, it involves the relationships Japan has with China and the US. The US has increasingly applied diplomatic pressure to China to do much of the work to denuclearise the DPRK.[303] Furthermore, it is in China's interests to see the Korean Peninsula without conflict, which would otherwise result in a wave of displaced North Koreans entering the North-East of China. US policy towards the DRPK and the Taiwan Strait has potentially destabilising consequences for the region and has affected the relationship Japan has with its neighbours. With this strategic security landscape in mind, it is possible to understand the policies and acquisitions that have been pursued under the banner of normalisation as a means to meeting these threats and opportunities, while balancing the relationships Japan has with its allies and neighbours.

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[302] Hughes, op. cit. (2006), pp. 42-3.

[303] Hughes, op. cit. *Japan's Security Agenda - Military, Economic & Environmental Dimensions* (2004), p.35.

Conclusion

The "normalisation" process and the policies and acquisitions that have been carried out under it have been legitimised by the emerging threats that have shaped the security landscape of East Asia. Normalisation has thus served a multi-purpose role in line with Japan's grand strategy.[304] The alliance with the US has been strengthened by Japan's increased capacity to deploy overseas and by Japan's BMD systems, which have broadened the alliance's overall BMD shield. As a result, Japan has moved closer to having military power commensurate with its economic power. In addition, the banner of normalisation has served to soften the image of this increased capacity in a region that is governed by a zero sum game, especially regarding China. Thus the ambiguity of what is "normal" has helped erode traditional doctrines which sacrificed independent security and diplomacy capabilities in favour of economic recovery. This policy change has legitimised Japan's current security strategy to much of the pacifist domestic population and regional observers. The changing security landscape illustrated in this report must be credited with predicating this transformation, as policy is ideally a reflection of necessity. Real threats such as the DPRK have been used as an excuse to justify a number of proxy developments that meet the broader goals of Japanese grand strategy, such as strengthening the US alliance and fortifying the JSDF.

[304] Samuels, op. cit. (2006).

International Humanitarian Law and Private Military and Security Corporations: Time for a New Legal Regime?

Lucia Cipullo

The post-Cold War era has seen a dramatic decline in the number of military personnel at a time when deployments of military forces are greatly increasing. This decline has driven governments to privatise and outsource both traditional and non-traditional military tasks to Private Military and Security Corporations (PMSCs). The ever-increasing use of PMSCs in situations of armed conflict has resulted in controversy regarding their legal status and how they can be categorised in international law, and their proliferation entails a negative perception due to the legal gaps surrounding their use and the "legal vacuum" in which these "modern-day mercenaries" operate. In particular, the traditional laws of war have come under fire for their apparent inapplicability to the actions of PMSCs. This chapter provides an overview of the current debate surrounding the apparent inadequacy of International Humanitarian Law (IHL) in regulating the conduct of PMSCs, and examines the challenges regarding the categorisation of PMSCs in international law and the potential for a new legal regime to govern their activities.

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Introduction

In the wake of the 2003 War in Iraq, an unprecedented amount of attention was given to the use of Private Military and Security Corporations (PMSCs) in military activities and conflict situations. While the participation in armed conflicts of persons who are not officially members of the regular armed forces is not an entirely new phenomenon,[305] discussion and controversy surrounding the use of private corporations in military activities has proliferated in recent years. Much of the debate regarding PMSCs has centred on the apparent inadequacy of International Humanitarian Law (IHL) in governing their activities in situations of armed conflict, as well as the lack of a clear definition of their status under IHL. The absence of a clear and definite classification of PMSCs and the status of their personnel under IHL has led to their being associated with mercenarism, and the labelling of their personnel as "modern-day mercenaries".

The on-going significance of PMSCs calls for a re-examination of their role and regulation in armed conflict.[306] IHL has been criticised for its apparent inadequacy in addressing the legal issues pertaining to PMSCs, with the conclusion often being reached that a new legal regime to regulate their activities and define their status is required. A plethora of commentary exists regarding the status of PMSCs under IHL, how they can be categorised, and how they ought to be regulated under International Law. While PMSCs do not necessarily operate in a 'legal vacuum', their status remains ambiguous and reliant on many variables. A broad consensus also exists for the need to place greater emphasis on state responsibility for the actions of PMSCs.

This chapter seeks to address certain key issues regarding PMSCs and IHL, namely by discussing the scope of the current rules of IHL which potentially apply to PMSCs, and how (and if) they can be classified under this body of law. This chapter will also consider whether the current IHL framework is adequate, or if there is a need for the development of a new legal regime to govern the activities of PMSCs. While it is beyond the scope of this discussion to examine in detail the status of PMSCs as far as protections afforded and the rights and duties implicated to them, this paper is designed to provide an overview of the situation, in light of the potentially

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[305] L. Doswald-Beck, 'Private Military Companies under International Humanitarian Law', in S. Chesterman and C. Lehnardt, (eds.) *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* (Oxford: Oxford University Press, 2007) p.115.

[306] K. Fallah, 'Corporate Actors: The Legal Status of Mercenaries in Armed Conflict,' *International Review of the Red Cross,* vol.88, no.863 (2006), p.600.

applicable/inapplicable rules of IHL, in order to demonstrate the challenges regarding their status and regulation and the potential for a new legal regime.

Background: PMSCs on the Rise

In the past, PMSCs have generally been described as either "Private Military Corporations" (PMCs) or "Private Security Corporations" (PSCs) depending on the specific services they provide and the activities they undertake. PMCs traditionally supply services ordinarily provided by regular armed forces in order to support an army and enhance the efficacy of military operations; PSCs on the other hand typically provide services aimed at providing security and protecting property.[307] More recent discussions of this topic have merged the two groups into one broader conception, that of "Private Military and Security Corporations" (PMSCs). PMSC will be the term of use in this paper.

PMSCs provide services to a wide array of clients, including governments in the developed and developing worlds, non-governmental organisations, international corporations and international organisations like the United Nations, and have become a ubiquitous part of modern armed conflict and post-conflict reconstruction.[308] Though difficult to generalise, the activities of PMSCs can include support of military activities, security services, advice and training for states' armed forces and active participation in combat operations.[309]

As previously stated, the phenomenon of private persons or contractors carrying out duties for the armed forces is not new, and Article 4(4) of the *Geneva Convention (III) Relative to the Treatment of Prisoners of War* explicitly refers to 'persons who accompany the armed forces without being members thereof, such as….supply contractors, members of labour units or of services responsible for the welfare of the

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[307] A. Faite, "Involvement of Private Contractors in Armed Conflict: Implications under International Humanitarian Law,' *Defence Studies,* vol.4, no.2 (2004), p.168.

[308] B. Perrin, 'Promoting Compliance of Private Security and Military Companies with International Humanitarian Law,' *International Review of the Red Cross,* vol.88 (2006), pp.613-614.

[309] K. Weigelt and F. Marker, 'Who is Responsible? The Use of PMCs in Armed Conflict and International Law' in T. Jager and G. Kummel, (eds.) *Private Military and Security Companies. Chances, Problems, Pitfalls, and Prospects* (Wiesbaden: Verlag für Sozialwissenschaften, 2007), p.381.

armed forces'.[310] However, the post-Cold War era saw a dramatic reduction in numbers of military personnel at a time when deployments of military forces were greatly increasing, particularly in the context of peace-keeping operations, thereby driving governments to outsource and privatise tasks that were traditionally performed by soldiers.[311]

PMSCs have gained significant attention and their use has proliferated since their large-scale employment by the United States (US) in the 2003 War in Iraq. This "boom" in military and security outsourcing in Iraq resulted in unprecedented attention given to the status and regulation of PMSCs under international law,[312] particularly given the level of outsourcing taking place, as well as the nature of the activities contracted out to private corporations.[313] The scope of conflict-related activities which civilians perform today is immense: in Iraq, for example, the number of private contractor personnel active on the ground has at times been upward of 20,000 individuals.[314]

For budgetary reasons, many states are increasingly outsourcing their military activities,[315] and the use of civilians or private contractors in support roles has proved particularly appealing as it has freed up military personnel to perform combat operations.[316] In the case of Iraq, with US forces also deployed to Afghanistan and the Balkans, there were a limited number of troops available for combat, occupation, and transition duties, which provided a compelling reason to employ private contractors.[317]

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[310] *Geneva Convention (III) Relative to the Treatment of Prisoners of War,* opened for signature 12 August 1949, 75 U.N.T.S 135, art 4(4) (entered into force 21 October 1950), ("Third Geneva Convention").

[311] C. Schaller, 'Private Security and Military Companies under the International Law of Armed Conflict' in T. Jager and G. Kummel, (eds.) *Private Military and Security Companies. Chances, Problems, Pitfalls, and Prospects* (Wiesbaden: Verlag für Sozialwissenschaften, 2007), p.347.

[312] E.L. Gaston, "Mercenarism 2.0? The Rise of the Modern Private Security Industry and Its Implications for International Humanitarian Law Enforcement", *Harvard International Law Journal,* vol.49, no.1 (2008), p.221.

[313] Faite, op. cit., (2004) p.167.

[314] M. N. Schmitt, 'Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees,' *Chicago Journal of International Law,* vol. 5, (2004-2005), p.512.

[315] Faite, op. cit., (2004) p.178.

[316] Schmitt, op. cit (2004-2005), p.517.

[317] ibid., p.518.

The use of PMSCs often entails a negative perception due to the large number of legal "gaps" surrounding their use,[318] and the apparent "legal void" in which they operate.[319] The controversy that has emerged regarding the activities of PMSCs is due in large part to reports of human rights abuses and the potential for unpunished criminal misconduct,[320] thereby demonstrating the urgency with which this issue must be addressed. This has also led to an association between PMSCs and traditional mercenaries, and has raised the question as to whether or not the personnel of PMSCs can be considered mercenaries under international law.[321] The next section of this paper will consider this claim, and to what extent PMSCs fall under this category.

PMSCs as Modern-Day Mercenaries?

During the 1960s and 70s, the hiring of private or foreign personnel was often associated with covert, mercenary activity.[322] The activities of PMSCs has led to debate regarding their potential status as mercenaries, with some arguing that the activities of PMSCs are closely related to mercenary activities and should therefore be banned; and those who argue that conventional definitions of mercenarism are too narrow to encompass PMSCs.

Mercenaries have historically been associated with misconduct, abuse, and motivation driven by profit.[323] While the negative reputation of PMSCs has led to their association with mercenaries and to suggestions that they should be banned, the more corporate form of PMSCs and their advanced capabilities tends to distinguish them from traditional mercenaries.[324] Apart from providing additional personnel, PMSCs can provide sustained and complex operations, logistical and operational support, and training and advisory services; capabilities beyond those of traditional mercenaries.[325]

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[318] Weigelt and Marker, op. cit., (2007) p.377.

[319] P. W. Singer, 'War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law,' *Columbia Journal of Transnational Law,* vol.42, (2004), p.548.

[320] Gaston, op. cit., (2008) p.229.

[321] Faite, op. cit., (2004) p.168.

[322] ibid., 166.

[323] Gaston, op. cit., (2008) p.230.

[324] ibid., p.228.

[325] ibid., p.234.

Two key definitions of mercenaries can be found in a) Article 47 of the *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (1977),*[326] and b) Article 1 of the *International Convention against the Recruitment, Use, Financing and Training of Mercenaries (1989).*[327] The definition found in the Mercenaries Convention is essentially a repetition or an extension of the definition found in Additional Protocol I. For the purposes of determining the status of PMSCs under IHL, Article 47 of Additional Protocol I is the most relevant legal provision relating to mercenaries.[328]

Article 47 proposes six conditions which must be cumulatively fulfilled in order for a person to be classified as a mercenary:[329] for example, that such a person must take a direct part in hostilities,[330] and is not a member of the armed forces of a party to the conflict.[331] This provision has often been deemed unworkable[332] and seldom applicable to PMSCs.[333] Attempts to apply this provision to PMSCs are problematic[334] because it is rare that all six conditions would ever be cumulatively filled in a single case. Issues as to whether or not a person participates directly in hostilities and whether they constitute part of a state's armed forces are difficult provisions to generalise about, and must be

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[326] *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International armed Conflicts (Protocol I),* opened for signature 8 June 1977, 1125 U.N.T.S 3, art 47 (entered into force 7December 1978) ("Additional Protocol I").

[327] *International Convention against the Recruitment, Use, Financing and Training of Mercenaries*, opened for signature 4 December 1989, 2163 U.N.T.S 75, art 1 (entered into force Oct 20, 2001) ("Mercenaries Convention").

[328] M.D. Voyame, 'The Notion of 'Direct Participation in Hostilities' and Its Implications on the Use of Private Contractors under International Humanitarian Law', in T. Jager and G. Kummel, (eds.) *Private Military and Security Companies: Chances, Problems, Pitfalls, and Prospects* (Wiesbaden: Verlag für Sozialwissenschaften, 2007), p.368.

[329] It must be noted here that for reasons of space and word limit, it is beyond the scope of this paper to present an individual analysis for each condition, and they will therefore be discussed more generally.

[330] *Additional Protocol I*, art 47(2)(b) .

[331] *Additional Protocol I*, art 47(2)(e) .

[332] Voyame, op. cit., (2007) p.368.

[333] Faite, op. cit., (2004) p.169.

[334] K. O'Brien, 'What Should and What Should Not be Regulated?' in S. Chesterman and C. Lehnardt, (eds.) *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* (Oxford: Oxford University Press, 2007) p.31.

examined on a case by case basis. It must also be noted that Additional Protocol I only applies to international armed conflicts, and that no provision regarding the category of mercenaries is found in the *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)(1977).*[335]

From a legal perspective, individuals employed by PMSCs will generally fall outside the definition of a mercenary found in international instruments like Additional Protocol I and the Mercenaries Convention,[336] which have been described as "narrow" and "ineffective" in ascertaining the status of PMSCs in IHL.[337] While Additional Protocol I does not establish mercenary activity as a crime, it is strictly prohibited under the Mercenaries Convention.

However, considering that this Convention provides that the same six requirements be fulfilled as outlined in Additional Protocol I, and given that this is unlikely to occur, it becomes easier for those states who wish to continue using PMSCs to circumvent the international ban provided for in the Convention.[338] Moreover, the traditional abolitionist response to mercenarism which has stemmed significantly from the post-colonial experience of mercenaries in Africa bears little relevance to the more recent experience of PMSCs.[339] The extent and frequency of PMSC activities shows no sign of abating, and therefore a prohibitionist approach, such as that taken towards mercenarism, can be considered impractical. This, together with the fact that the use of PMSCs is so widespread, serves to highlight the fact that a specific status relating to PMSCs ought to be developed.

While it is clear that attempting to classify PMSCs under the heading of "mercenary" remains problematic and somewhat unhelpful in terms of improving their regulation,

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[335] *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II),* open for signature 8 June 1977, 1125 U.N.T.S 609 (entered into force 7 December 1978) ("Additional Protocol II").

[336] Faite, op. cit., (2004) p.170.

[337] Schaller, op. cit., (2007) p.359.

[338] Gaston, op. cit., (2008) p.222.

[339] S. Chesterman, and C. Lehnardt, 'Introduction' in S. Chesterman and C. Lehnardt, (eds.) *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* (Oxford: Oxford University Press, 2007), p.1.

consideration must be given to the two fundamental categories by which persons are classified under IHL: civilians and combatants. The following section will discuss which category of persons is most appropriate to apply to PMSC personnel, and whether or not these categories are adequate in encompassing these new actors.

Classifying PMSCs under International Humanitarian Law: Combatants or Civilians?

The increasing number of PMSCs involved in both international and non-international armed conflicts calls for an accurate determination of their status under IHL.[340] Once their status is understood and accepted, it is only then that they can be regulated effectively.[341] The rules of IHL are different from the vast majority of international legal norms, in that they are specifically designed to regulate the behaviour of state parties *and* individuals, and provide certain rights and obligations to them both.[342] IHL does not provide a single set of rights and duties pertaining to its subjects; rather the legal status to which persons are subject varies among different categories.[343] This in turn creates the problem of not being able to generalise in the case of PMSCs, as the services they provide and the activities they undertake differ broadly.

There exists a plethora of variables to consider when examining the status of PMSCs under IHL. For example, whether they are operating in an international or non-international armed conflict or whether their activities are considered "direct participation" in hostilities. As far as non-international armed conflicts are concerned, the status of combatant does not exist, therefore the distinction and protection afforded to individuals relies on whether or not a person takes a 'direct part' in the conflict or not.[344] This gives rise to a multitude of determining factors as to what constitutes "direct participation" in a conflict, a notion which itself remains complex and problematic.[345]

Moreover, in situations of international armed conflicts, one of the fundamental distinctions enshrined in these norms is the distinction between combatants and civilians

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[340] Schaller, op. cit., (2007) p.345.

[341] L. Cameron, "Private Military Companies: Their Status under International Humanitarian Law and its Impact on their Regulation", *International Review of the Red Cross,* vol. 88, no. 863 (2006), p.575.

[342] Schaller, op. cit., (2007) p.356.

[343] Voyame, op. cit., (2007) p.361.

[344] Faite, op. cit., (2004) p.172.

[345] Cameron, op. cit., (2006) p.597.

(non-combatants).[346] However, this distinction has begun to blur in recent years due to the more active role civilian contractors play in military forces.[347] While existing norms of IHL found in the Geneva Conventions and their Additional Protocols (which are also enshrined in customary international law) provide an appropriate foundation for ascertaining the status of PMSCs operating in situations of armed conflict, whether or not this foundation is sufficient is debatable.

Combatants

Article 43 of Additional Protocol I is a key point for determining the status of persons involved in an international armed conflict. The distinction between combatants and civilians is a negative one, and anyone who does not fall under the conditions in Article 43 can be considered a civilian.[348] In situations where Additional Protocol I applies, PMSC personnel could be considered combatants according to Article 43 if they belong to an organised group or unit which is commanded by a party to the conflict who is responsible for its subordinates, and who is subject to an internal disciplinary system which enforces compliance with the rules of IHL.[349] PMSCs could also potentially qualify for combatant status under Article 4 of the Third Geneva Convention[350] depending on the nature of their activities. However it can be argued that this is unlikely given the fact that this provision was not designed to address such roles which did not exist at the time the Geneva Conventions were negotiated.[351]

As previously mentioned, combatant status does not exist in the case of non-international armed conflicts. In a civil war, for example, the status of non-state actors is essentially a matter of domestic law, and the provisions of IHL applicable to a non-international armed conflict do not provide a definition of a combatant; the distinction in IHL rests mainly on those who take a direct part in hostilities and those who do

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[346] Schaller, op. cit., (2007) p.346.

[347] D.R. Rothwell, 'Legal Opinion on the Status of Non-Combatants and Contractors under International Humanitarian Law and Australian Law,' Australian Strategic Policy Institute (2004), available online: http://www.aspi.org.au/pdf/ASPIlegalopinion_contractors.pdf (accessed 31 May, 2009).

[348] Voyame, op. cit., (2007) p.367.

[349] Faite, op. cit., (2004) p.171.

[350] *Third Geneva Convention,* opened for signature 12 August 1949, 75 U.N.T.S 135, art 4 (entered into force 21 October 1950).

[351] Schmitt, op. cit., (2004-2005) p.531.

not.[352] However, as previously mentioned, the notion of what exactly constitutes direct participation in hostilities remains unclear, and even discussions on the subject such as the commentary provided by the ICRC[353] are ambiguous.

Civilians

As stated previously, anyone who does not fall within the scope of Article 43 of Additional Protocol I can potentially be classified as a civilian. Article 4(A)(4) of the Third Geneva Convention encompasses all persons accompanying the armed forces who are not actually members thereof, such as civilian members of military aircraft crews, war correspondents, and supply contractors.[354] Contrary to arguments like Schmitt's, which suggest that the Geneva Conventions were not designed to encompass PMSCs,[355] it has also been argued that this article serves as an anticipation of the existence of entities like PMSCs by establishing the term 'civilians accompanying the armed forces'.[356] However, this provision was designed to cover those persons accompanying the armed forces who would not take a direct part in hostilities, a fact which can be deduced from the stipulation that persons falling under Article 4(A)(4) enjoy prisoner of war status.[357] With many private contractors armed and working closely on the ground with other military personnel, this line becomes significantly blurred.

In situations of international armed conflicts, persons who are *not* categorized as members of the armed forces of a party to a conflict are civilians according to Article 50 of Additional Protocol I, which provides that "a civilian is any person who does not belong to one of the categories of persons referred to in Article 4A(1), (2), (3) and (6) of

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[352] Faite, op. cit., (2004) p.172.

[353] The ICRC commentary on Additional Protocol I describes the concept of direct participation as 'acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces' (see Section 1944, p618). See also Schmitt, op. cit., (2004-2005) p.531, who argues that the meaning of 'direct participation' is 'highly ambiguous' and that Articles 4(A4) and 5 of the Third Geneva Convention constitute the only delineating authority on activities barred as direct participation.

[354] Third Geneva Convention, art 4(A)(4)

[355] Schmitt, op. cit., (2004-2005) p.531.

[356] Voyame, op. cit., (2007) p.375.

[357] ibid., p.375.

the Third Geneva Convention and in Article 43 of this Protocol."[358] This includes categories such as members of the armed forces, members of other militias or volunteer corps who carry arms openly or wear a "fixed distinctive sign".[359] However, if PMSCs who fall under this category of civilians take direct participation in hostilities they will no longer be protected under IHL for the duration of their participation.[360]

This stems back to the issue of what exactly constitutes an act of "direct participation". While an in-depth discussion of this topic is beyond the scope of this paper, in order to gain a brief understanding it can be said that most logistics and support functions would not constitute direct participation in hostilities, while activities such as strategic planning or transportation of weapons may do so.[361] The notion of direct participation in hostilities remains somewhat of a grey area, and it is difficult to determine the status of civilian contractors who work alongside military personnel.[362] Nevertheless, writers such as Schmitt argue that "it is difficult to imagine a situation in which individual government civilian or contractor employees might qualify as formal members of the armed forces regardless of the duties they perform".[363]

It can be seen from the preceding discussion that there is scope for PMSCs to fall under the key categories of combatant or civilian provided for in IHL, and that potentially applicable rules do exist. While there is no *specific* reference to PMSCs in IHL conventions, it is inaccurate to suggest that there is no law applicable to them at all.[364] Rather, it is the extent of this applicability that is called into question. In any event, their classification is so dependent on a plethora of variables regarding the context of their involvement (whether in international or non-international armed conflict), the nature of their activities (whether they constitute direct or indirect participation), and the wide-ranging activities and services PMSCs undertake, which makes it difficult to establish any broad or clear status for them under IHL.

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[358] *Additional Protocol I*, art 50(1)

[359] For full details of the provision see art 4, Third Geneva Convention

[360] Faite, op. cit., (2004) p.173.

[361] ibid., p.173.

[362] Schaller, op. cit., (2007) p.352.

[363] Schmitt, op. cit., (2004-2005) p.524.

[364] Doswald-Beck, op. cit., (2007) p.115.

As a result of this, such matters must be determined on a case-by-case basis. This creates uncertainty as to whether or not the rules of IHL are adequate in determining the status of PMSCs under IHL and how effective they are in regulating their activities. The next section of this chapter will examine the notion of a new legal regime, or at least a new principle of IHL to address the status and regulation of PMSCs directly.

Regulating PMSCs under International Humanitarian Law: Time for a New Legal Regime?

Given the debate surrounding the status of PMSCs under IHL, and the consequent ambiguity regarding which rules should govern their activities, it may be necessary to determine a new classification for PMSCs and a means by which they can be effectively regulated, not only at a national level but at an international level as well. Most importantly, a common solution to the problem on an international level needs to be established, and regulation concerning PMSCs should hold the state which contracted the PMSC responsible for its actions.[365] Many discussions of this issue have reached the same conclusion; that of the need for a higher level of state responsibility and regulation, and a clear classification of PMSCs under international law.

It has been argued that because of their independence from states' armed forces and militaries, PMSCs are therefore beyond the reach of IHL regulations as far as state responsibility is concerned.[366] This section addresses the potential for a new legal regime regulating PMSCs in times of war. Areas which will be examined include issues of state responsibility and a collective approach, proposals for a new principle of IHL and the recent Swiss Initiative regarding PMSC activity.

State Responsibility: A Coordinated Approach

Given that the outsourcing of certain elements of logistics, training, security, and technical support for military operations is a key part of modern military strategy,[367] it can be argued that there is a need to recognise the outsourcing of these activities to PMSCs for what it has become: a strategic tactic of modern warfare requiring an

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[365] I. Drews, 'Private Military Companies: The New Mercenaries? – An International Law Analysis' in T. Jager and G. Kummel, (eds.) *Private Military and Security Companies. Chances, Problems, Pitfalls, and Prospects* (Wiesbaden: Verlag für Sozialwissenschaften, 2007), p.343.

[366] Gaston, op. cit., (2008) p.236.

[367] Gaston, op. cit., (2008) p.243.

increase in state responsibility and the development of sufficient, appropriate accountability and control mechanisms.[368] As far as current levels of state responsibility are concerned, the most authoritative source in determining which actions can be attributed to the state can be found in the International Law Commission's (ILC) *Draft Articles on Responsibility of States for Internationally Wrongful Acts.*[369]

The customary law represented in the ILC's Draft Articles arguably gives sufficient grounds to ensure state accountability if a state employs a PMSC in a situation of armed conflict.[370] In particular, Article 5 outlines that states are responsible for acts committed by entities which they have authorised to act on their behalf, or in a capacity invested in them.[371] Therefore, the outsourcing of tasks typically undertaken by PMSCs may imply responsibility for the state that delegated those tasks.[372] However, this would only be the case if those private entities were exercising acts which would ordinarily be undertaken by state organs, and is determinant on whether or not those entities can be deemed *de facto* organs of the state. Once again, the reoccurring issue of the absence of a blanket approach is encountered, along with the need to address individual situations on a case by case basis.

Those who argue that the status and activities of PMSCs in both international and non-international armed conflicts is fully covered by the existing rules of IHL, often suggest that the real issue lies not in the problem of state responsibility, but as a result of insufficient international enforcement mechanisms pertaining to these laws. The Geneva Conventions do not provide for an international enforcement mechanism, therefore enforcement and responsibility presently lies with each individual state and its relevant domestic laws.[373] However, there is a fundamental provision contained in Article 1 common to the four Geneva Conventions requiring that all state parties must "ensure

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[368] ibid., p.240.

[369] *Draft Articles on the Responsibility of States for Internationally Wrongful Acts* as contained in the Report of the International Law Commission on the Work of its Fifty-third Session, UN Document A/56/10 (2001). ("Draft Articles"). See also Faite, op. cit., (2004) p.176.

[370] Weigelt and Marker, op. cit., (2007) p.393.

[371] Draft Articles, art 5, (2001).

[372] Faite, op. cit., (2004) p.176.

[373] Schaller, op. cit., (2007) p. 359.

respect" of IHL "in all circumstances".[374] This means that states cannot simply avoid their IHL responsibilities by outsourcing them to PMSCs.

Moreover, there is arguably no need to make reference to Common Article 1 because obligations under IHL treaties are considered obligations of result.[375] This means that if a violation were to occur by a state-hired PMSC, and that particular state did not provide adequate training or information regarding the rules of IHL, then it would be held responsible for its omission or failure to "ensure respect" of IHL .[376]

Nevertheless, the domestic regulation of PMSCs by states has often been deemed insufficient, ineffective and inconsistent,[377] and military training in IHL remains questionable. State practice tends to run contrary to Common Article 1 in that states do not consider themselves under an obligation to ensure all persons are instructed in the rules of IHL, the responsibility of which is often left to other actors such as Red Cross societies.[378] Hence, the need continues for strong and centralised international legal principles and for adequate enforcement and regulation mechanisms.

Since PMSCs are transnational actors and the nature of their business is transnational as well, it is difficult to impose domestic regulations on them, particularly in the absence

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[374] See Article 1 in each of the following: *Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field,* opened for signature 12 August 1949, 75 U.N.T.S 31 (entered into force 21 October 1950); *Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea,* opened for signature 12 August 1949, 75 U.N.T.S 85 (entered into force 21 October 1950); *Geneva Convention (III) Relative to the Treatment of Prisoners of War,* opened for signature 12 August 1949, 75 U.N.T.S 135 (entered into force 21 October 1950); *Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War,* opened for signature 12 August 1949, 75 U.N.T.S 287 (entered into force 21 October 1950).

[375] Doswald-Beck, op. cit., (2007) p. 133.

[376] Doswald-Beck, op. cit., (2007) p.133, and Cameron, op. cit., (2006) p.597.

[377] See A. Schneiker, 'National Regulatory Regimes for PMSCs and their Activities: Benefits and Shortcomings' in T. Jager and G. Kummel, (eds.) *Private Military and Security Companies. Chances, Problems, Pitfalls, and Prospects* (Wiesbaden: Verlag für Sozialwissenschaften, 2007) p.408, who also argues that despite the apparent inefficacy of domestic laws regarding PMSCs, they are however more easily enforced.

[378] Doswald-Beck, op. cit., (2007) p.132.

of a general classification of status.[379] These issues give rise to further questions regarding the efficacy of states' individual domestic laws in dealing with the regulation of PMSCs which are beyond the scope of this chapter. While the most effective mechanisms to control and regulate PMSC activity would likely be established through a coordinated approach on an international level, this could take years to implement and the varying proposals would undoubtedly be wide-ranging.[380]

States need to be aware that in most situations, at least for the time being, they will be held responsible for the actions of the PMSCs they hire under the doctrine of state responsibility. In cases where states do not directly control PMSCs, state responsibility could also be generated from a lack of 'due diligence' or effective oversight on the part of the host or hiring state, in which states effectively give a "quiet nod" or "turn a blind eye" to risk-prone or abusive conduct of PMSCs.[381]

Recognizing PMSCs as a Strategic Method of Modern Warfare: A New Principle of IHL?

E.L. Gaston proposes that many of the legal issues regarding PMSCs could be addressed by developing a new principle of IHL that recognises state use of PMSCs as a new means of warfare, combined with a stronger state responsibility link established between PMSCs and the states that hire them.[382] He argues that the outsourcing of government security or military functions in support of any combat or humanitarian operations that would otherwise trigger IHL requires relevant internal oversight, accountability, and liability mechanisms in order to ensure that these companies and their personnel comply with international and domestic legal norms and regulations.[383]

However, a significant limitation of this theory is that it only addresses the issue of state use of PMSCs, without consideration of other international actors that use PMSCs, such as international organisations like the United Nations or, inevitably, the European

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[379] Gaston, op. cit., (2008) p.241.

[380] Schneiker, op. cit., (2007) p.417-418.

[381] C. Lehnardt, 'Private Military Companies and State Responsibility' in S. Chesterman and C. Lehnardt, (eds.) *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* (Oxford: Oxford University Press, 2007) p.155.

[382] Gaston, op. cit., (2008) p.223.

[383] Gaston, op. cit., (2008) p.223.

Union.[384] This presents a whole other issue of institutional responsibility (without even delving into the issue of individual responsibility) which is beyond the scope of this chapter.

The increase in outsourcing and the significant role of PMSCs in modern conflict and peacekeeping operations certainly warrants an effective coordinated approach, and perhaps the development of a new IHL principle (or rather, the codification of an already emerging state approach[385]) establishing oversight and control mechanisms could also eliminate inconsistencies among states' domestic approaches.[386] However this is unlikely given that domestic implementation of such rules would undoubtedly differ among states, thereby potentially leaving domestic implementation and enforcement mechanisms weak.

It is also possible that PMSCs could continue to evade IHL and other restrictions at an international level, as current rules and restrictions are often predominantly state-centred. In any event, the need exists to develop a principle creating obligations not only for states, but also for corporations and their personnel.[387] Again, this is not without limitations. Difficulties could emerge in relation to regulating PMSCs, as the contracting state would need to ensure that the PMSCs to which they outsource are aware of, and comply with, relevant international and domestic regulations.

The Montreux Document: A Step Towards Regulation

The Montreux Document[388] came about as a result of a joint initiative by Switzerland and the International Committee of the Red Cross (ICRC) in 2006, as an attempt to reconcile the issues and controversy surrounding the use of PMSCs. The document serves to remind states, PMSCs and PMSC personnel of their existing obligations under

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[384] For more information on issues regarding institutional responsibility, see the article by N.D. White and S. MacLeod, 'EU Operations and Private Military Contractors: Issues of Corporate and Institutional Responsibility,' *European Journal of International Law,* vol. 19 (2008) p.965-988.

[385] Gaston, op. cit., (2008) p.244.

[386] ibid., p.243.

[387] ibid., p.243.

[388] Swiss Federal Department of Foreign Affairs, 'Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to operations of Private Military and Security Companies During Armed Conflict' (2008), available online: http://www.dv.admin.ch/psc (accessed at 23 May 2009).

IHL and contains a set of over 70 "good practices" designed to assist states in complying with their obligations under international law.[389] It draws together already existing IHL principles relevant to PMSCs in an attempt to demonstrate that relevant laws already exist, and that states cannot use PMSCs as way of outsourcing their responsibilities or to exempt them from the reach of IHL

The document does not serve to legitimise or de-legitimise the use of PMSCs; rather it encourages states to uphold their existing legal obligations, including the states where PMSCs operate, the states that contract them, and their home states.[390] This document was developed in the hope of taking a step towards the regulation of PMSCs, and to encourage PMSCs to "self-regulate" in line with the Montreux Document's "good practices".[391]

While the development and production of such a document is hopeful in that it demonstrates a growing awareness of the urgency in addressing international legal issues pertaining to PMSCs, it is not without its limitations. Only 20 states participated in the negotiation process, and in the end it was only adopted as a non-binding agreement by 17 of those states. However, negotiating a binding treaty is an extremely lengthy and problematic process, often resulting in ratification and enforcement issues.[392] Although the document is non-binding and not widely ratified, it does recognise that the regulation of PMSCs is an international issue of concern, and outlines relevant applicable laws. It also serves as an authoritative statement on the issue of PMSCs and a positive step in the direction of international regulation.

Conclusion

There is no doubt that there are a multitude of issues regarding the status and regulation of PMSCs in international law. Their proliferation has seen an unprecedented level of discussion and debate among writers, lawyers, analysts and the like, regarding this "grey area" of both international and domestic law.[393] At the centre of this issue is the

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[389] Swiss Federal Department of Foreign Affairs, "Informal Summary of the Montreux Document by Switzerland" (2008), available online: http://www.dv.admin.ch/psc (accessed at 23 May, 2009).

[390] See Swiss Federal Department of Foreign Affairs, ibid.

[391] ibid.

[392] Drews, op. cit., (2007) p.343.

[393] F. Francioni, 'Private Military Contractors and International Law: An Introduction,' *The European Journal of International Law,* vol. 19, no.5 (2008), p.962.

notion that the means and methods of warfare, and the actors that go with them, are not static. They are constantly changing and evolving and sometimes new rules are required to keep up with this process. The laws of war outlined in the Geneva Conventions and their Additional Protocols were not designed specifically to deal with PMSCs, as such actors were not as prolific on the world stage as they are today. Rather, they are a product of the moment in history when which they were drafted.[394]

The main issues pertaining to classification and regulation as discussed in this paper lay not only with the existing rules of IHL, but also with a lack of enforcement and regulation methods. Because PMSC use is rapidly increasing, agreement must be reached on the rules governing their activities and regulation through a cooperative approach. Initiatives like the Montreux Document are trying to promote and achieve this through recognising that while a range of possible legal regimes at a national and international level are applicable, there is still a need to address the many gaps.

Arguing that PMSCs constitute nothing more than modern-day mercenaries is as unhelpful as trying to classify them under the relevant provisions found in Additional Protocol I and the Mercenaries Convention, as only a limited number of personnel would satisfy the conventional requirements. The growing presence of PMSCs cannot be countered simply by banning them through a prohibition like the Mercenaries Convention. The reasons which led to the rise of PMSCs in the first place still persist; namely cuts in defence budgets, high-tech weapons systems, and deficits in the training of regular armed forces, and as a result many states have come to rely on their services.[395]

Moreover, trying to classify PMSCs under the various pre-existing categories of IHL has proved to be problematic, as differences still remain regarding their status as combatants or civilians, and whether or not any of these categories accurately describe the variety of roles PMSCs undertake in military operations and the international system more generally.

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[394] P.A. Fernandez-Sanchez, 'The Legal Situation of Foreigners in Armed Conflicts' in P.A. Fernandez-Sanchez, (ed.) *The New Challenges of Humanitarian Law in Armed Conflicts – In Honour of Professor Juan Antonio Carillo-Salcedo* (Leiden: Martinus Nijhoff, 2005), p.124.

[395] Drews, op. cit., (2007) p.342.

While the laws of IHL provide a foundation for classifying PMSCs, they are neither irrelevant nor exhaustive. The lack of a clear status and the issue of regulation of PMSCs are inextricably linked in that one cannot be fully effective without the other: regulation can only be effective if the status and responsibility of these players is widely understood and accepted.[396] Though potentially applicable rules of IHL exist, they have to be applied on a case by case basis and, while providing a foundation, they do not adequately encompass this new means of warfare. In a sense, it can be argued that IHL fails to capture the significance of non-state actors such as PMSCs and that neither the implementation of nor the debate surrounding regulatory mechanisms has kept pace with the development of these corporations, and as a consequence, no adequate international legislation exists.[397] Nevertheless, this writer recognises the potential for reform as well as the fact that implementing a new legal regime or incorporating a new principle of IHL under the existing regime will be neither an easy nor straightforward task.

[396] Cameron, op. cit., (2006) p.598.

[397] Schneiker, op. cit., (2007) p.407.

The Prohibition on the Use of Force: New Forms of intervention

Hannah Richardson

The nature of modern warfare is evolving: scenarios from the past few years indicate the increasing potential for the use of cyber warfare and environmental destruction in war. Governments, too, seem alive to this with many having policies to combat these forces. Yet, the question becomes whether international law reflects this, or whether, the definition of force within the United Nations Charter remains frozen in the 1940s. This paper, having discussed the definition of force, goes on to argue that some forms of cyber warfare and environmental damage are, and ought to be, caught by the prohibition on the use of force.

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Current principles

A. *Introduction*

Writing in 1764, the German philosopher Christian Wolff declared that 'a state has an absolute right not to allow any other nation to interfere in any way in its own government.'[398] Wolff was part of a long tradition denouncing intervention in, and in particular the use of force against, states that had its birth in Greco-Roman thought. In its modern incarnation, Article 2(4) of the Charter of the United Nations ('Charter' or 'UN Charter') prohibits the use of force, unless in self-defence, or when authorised by the United Nations ('UN') Security Council ('Security Council'). Few principles of international law enjoy the status of being so widely accepted as the prohibition on the use of force. As Judge Sette-Camara, in the case before the International Court of Justice ('ICJ') of *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (the '*Nicaragua Case'*), famously declared, 'the non-use of force as well as non-intervention…are not only cardinal principles of international law but could in addition be recognised as peremptory rules of customary international law'. [399] Yet, '[a]mbiguities and complexities …lurk behind the misleadingly simple rule in Article 2(4)'.[400] Indeed, governments face tectonic shifts in geopolitical and technological landscapes; one scholar recently posed the question of how to address 'attacks against computer networks (cyber attacks), [and] the release of hazardous materials'. [401] This paper will assess whether these new hazards are caught by the prohibition on the use of force. Part I attempts to formulate a definition of the use of force. Parts II and III take the principle in Part I and apply it to two scenarios of possible force: cyber warfare and environmental intervention. Part V then goes on to pose the normative question: should these new threats be considered the use of force, or is this inappropriate.

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[398] Christian Wolff, *Jus Gentium Methodo Scientifica Pertractatum,* in Ann Van Wynen Thomas, *Non-Intervention The Law and its Import in the Americas*, Dallas, Southern Methodist University Press, 1956, p. 5.

[399] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits) (Separate Opinion Sette-Camara)* [1986] ICJ Rep 14, p 199.

[400] Tom Franck, Who killed Article 2(4)?: Or Changing Norms Governing the Use of Force by States, *American Journal of International Law* 64(4): 1970: p. 809.

[401] Karl-Heinz Kamp, 'Towards a New Strategy for NATO' (2009) 51 *Survival Global Politics and Strategy* 21, 24

B. *The prohibition on the use of force*

The question of whether it is 'just' to use of force has long occupied philosophers and lawyers. The Charter provides the most recent enunciation of the prohibition against the use of force; Article 2(4) prohibits

> *the threat or use of force against the territorial integrity or political independence of any state or in any other manner inconsistent with the Purposes of the United Nations.*[402]

The prohibition is now considered a 'common fundamental principle' in treaty and customary law.[403] This norm has been further developed by the *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States*[404] (the '*Declaration on Friendly Relations*') and the General Assembly definition of aggression.[405] The core exception allowed by the Charter, and customary international law, is that of self-defence.[406] Similarly, there is an exception for action mandated by the UN.[407] There have also been claims that humanitarian disasters and mass atrocities provide a justification for intervention, however this remains contentious.[408]

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[402] *Charter of the United Nations*, adopted 26 June 1945, 892 UNTS 119 (entered into force 24 October 1945), art 51 and art 2(4).

[403] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICL Rep 14, para 181.

[404] *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,* GA Res 2625, UN GAOR 25th sess, 1883rd plen mtg, supp no 28, UN Doc A/Res/25/2625 (1970).

[405] *Resolution on the Definition of Aggression,* GA Res 3314, UN GAOR, 34th sess, 2319th plen mtg, UN Doc A/Res/3314 (1974).

[406] See *Charter of the United Nations*, adopted 26 June 1945, 892 UNTS 119 (entered into force 24 October 1945), art 51. See also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICL Rep 14.

[407] Ian Brownlie, *International Law and the Use of Force by States*, Oxford, Oxford University Press, 1963, Chapter XVII.

[408] See, for example, Gareth Evans and Mohamed Sahnoun, 'Intervention and State Sovereignty: Breaking New Ground' (2001) 7(2) *Global Governance* 119.

Despite the prohibition being one of the fundamental aims of the international legal system, 'the scope of the fundamental notion of "force" is not undisputed.'[409] This is not merely academic squabbling; as scholar Christine Gray points out 'General Assembly resolutions could not settle the controversies … as to the meaning of "force"'.[410] The paradigmatic use of force – overt military aggression – is universally accepted as within the prohibition.[411] Yet, scholarship[412] and case-law[413] suggest that 'the concept in practice and principle has a wider significance',[414] some arguing that the prohibition is not confined to 'physical or kinetic force applied by conventional weaponry'.[415] Despite this, as Ian Brownlie QC points out, the term 'use of force' has 'not been the subject of detailed consideration.'[416] This appears true even as regards the International Court of Justice;[417] it seems to have addressed the definition of force on a case-by-case basis rather than putting forward an overarching principle. Thus, the initial question is whether, when case-law and customary law is examined, a coherent principle coalesces.

C. *Consequences v instrument approach*

Scholars and commentators generally fall into two categories regarding the definition of force: the 'instrument-based'[418] or instrumentality approach, focusing on the method of

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[409] *The Charter of the United Nations, A Commentary, Oxford, Oxford University Press, edited by Bruno Simma, 2002, p.* 117.

[410] Christine Gray, *International Law and the Use of Force*, Oxford, Oxford University Press, 2000, p. 6.

[411] Brownlie, 361.

[412] *Ibid.*

[413] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (Judgment)* [2005] ICGJ 31; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICL Rep 14; *Corfu Channel Case (United Kingdom v Albania) (Merits)* [1949] ICJ Rep 4.

[414] Brownlie, 361

[415] Michael N Schmitt, Computer Network Attack and the Use of Force in International Law: Thoughts on a Normative Framework, *Columbia Journal of Transnational Law* 37: 1999 p. 908, (special issue to honor Telford Taylor), reprinted as Institute for Information Technology Applications (USAF Academy) Publication # 1, July 1999.

[416] Brownlie, p. 361.

[417] For maximum clarity, this paper has cited paragraph numbers preceded by 'para'. Where cases are not given paragraph numbers, page numbers have been cited preceded by 'p'.

[418] Schmitt.

intervention, and the consequentiality approach,[419] focusing on the consequences of an intervention (the 'consequences' and 'instrument' approaches). The relevant factor, for the instrument school, 'is the nature of the assault, not its ramifications.'[420] Thus, force is limited to armed force[421] or 'military activity'[422] or the use 'of some kind of weapon of violence.'[423] By contrast, advocates of the consequences approach, of which Michael Schmitt is the key protagonist,[424] argue that any force that 'produce[s] the effects of an armed attack'[425] should be within the prohibition, and as a result, the prohibition captures 'force other than armed force'.[426] The question becomes: which approach is the better approach?

D. *Preferable approach*

1) Instrument approach

Initially, the instrument approach appears attractive. The Vienna Convention on the Law of Treaties outlines the principles guiding treaty interpretation. In particular, it provides that treaties should be given their 'ordinary meaning';[427] Article 2(4) prohibits force without ever mentioning the consequences thereof. Yet, there is equally no mention of 'armed' or 'military' force in the Article. The Vienna Convention also points to a treaty's context, object and scope,[428] including the preamble, drafting history

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[419] Duncan B Hollis, Why States Need an International Law for Information Operations, *Lewis & Clark Law Review* 11(no issue number): 2007: p.1041.

[420] Sean P Kanuk, Information Warfare: New Challenges for Public International Law, *Harvard International Law Journal,* 37(1): Winter. 1996, p. 289.

[421] Simma, p. 117. See also J N Singh, *Use of Force under International Law*, New Delhi, Harnam Publications, 1984, p. 212.

[422] Hague Academy, *Recueil des cours*, Vol. 230 (1991-V), p. 313-31, cited by Ian Brownlie, Kosovo Crisis Inquiry: Memorandum on the International Law Aspects, *The International and Comparative Law Quarterly* 49(4): Oct. 2000 p. 894.

[423] Singh, p. 213.

[424] Schmitt, p. 912.

[425] Walter Gray Sharp Sr, *CyberSpace and the Use of Force*, Falls Church, Virginia, Aegis Research Corp, 1999, p. 101.

[426] Brownlie, p. 362.

[427] *Vienna Convention on the Law of Treaties*, open for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 31(1).

[428] *Vienna Convention on the Law of Treaties*, open for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 31(1).

and general aims. Advocates of the instrument approach, such as Bruno Simma, argue that the mention of 'armed force' in the preamble suggest that the relevant force in article 2(4) is armed force. Yet, this reference could, in fact, militate against a finding that the relevant force is armed;[429] one could argue that the framers knew that they had the option to use the terms 'armed force' or 'armed attack', as they did in the Preamble and Article 51, but intentionally omitted those qualifiers in Article 2(4), and therefore, 'force' is not limited to armed force.

The instrument approach enjoys an appealing simplicity; even Schmitt acknowledges that '[it] eases the evaluative process by simply asking whether force has been used'.[430] But, by focusing on the method of intervention, it essentially focuses on the form rather than substance. The logical conclusion of this position is that a state that intervenes in another state without using a military, but nonetheless cases destruction, may escape the prohibition. This seems absurd, and it is doubtful whether it would be accepted by the international community; the US Department of Defense's policy is that if an intervention 'causes widespread civilian deaths and property damage, it may well be that no one would challenge the victim nation if it concluded that it was a victim of an armed attack'. [431] Even proponents of the instruments approach acknowledge the limitation of focusing on form over substance. Simma notes: '[e]xceptions to this might arise where, in extreme situations, the use of physical non-military force may produce the effects of an armed attack'.[432] Advocates of the consequences approach might see this as the rule, rather than the exception.

2) Consequences approach

The consequences approach takes a more holistic approach to interpreting Article 2(4), arguing that the Charter's main aim is to prevent the effects of war,[433] but that for ease of definition the framers used 'force' as 'a relatively reliable instrument-based surrogate for a ban on deleterious consequences.'[434] This seems convincing: of course the framers of the Charter sought to prevent 'deleterious consequences'.

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[429] Malcolm N Shaw, *International Law*, Cambridge, Cambridge University Press, 2008, p. 1124.

[430] Schmitt, p. 911.

[431] Office of the General Counsel, Department of Defense, *An Assessment of Legal Issues in Information Operations* (2nd ed, 1999).

[432] Simma, p. 119.

[433] Schmitt, p. 910.

[434] *Ibid.,* p. 911.

Yet, this is not entirely consistent with state practice, case-law and scholarship; military interventions that cause no deleterious consequences are nonetheless the use of force. Consider, for example, an incident in 1950 when an unarmed US aircraft violated Soviet Union airspace, prompting the Soviet government to send a squadron of planes after the B29, first demanding it to land, and then firing at it in the belief that the Soviet Union was under an armed attack justifying self-defence. After the incident, the Soviet Union, referring to the prohibition on the use of force, 'declare[d] its resolute protest' for 'this gross violation of the Soviet frontier…which at the same time constitutes an unheard of violation of the elementary rules of international law.'[435] A similar incident occurred in 1962; building on state practice.[436] As Brownlie notes, the Soviet government characterized military intelligence flights over Soviet territory and territorial waters as 'acts of aggression'.[437]

International law is not only the product of charters and conventions; rather state practice, such as the acts and statements ('opinio juris') of the Soviet Union in this case, contribute to international norms. The *opinio juris* of the Soviet Union to the effect that such violations of airspace by military aircraft are force is supported both by the ICJ, and scholarship from eminent practitioners.[438] In the *Corfu Channel Case,*[439] two British destroyers were hit by mines during innocent passage of the Channel. Albania declined to give the UK permission to sweep for mines. Despite this, the British military went ahead with the sweep. The sweeping of the channel caused no 'deleterious consequences', yet was held to be a 'policy of force' by the ICJ.[440] Thus, any principle on the use of force must acknowledge that, whilst the UN Charter generally aims to prohibit deleterious consequences, it is settled law that incursions that do not result in such consequences may also be prohibited where there is at least the potential for such consequences.

Indeed, anyone claiming that consequences are central to the question of force, must face the inevitable question: which consequences does the article prohibit? Some might

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[435] 'US Aircraft's "Violation" Of Soviet Territory' *The Times* (London) 12 April 1950, 6.

[436] 'Moscow Protest Over U2 Violation In Far East' *The Times* (London) 5 September 1962, 10.

[437] Brownlie, p. 363.

[438] *Ibid.*, p. 363-4.

[439] *Corfu Channel Case (United Kingdom v Albania) (Merits)* [1949] ICJ Rep 4.

[440] *Corfu Channel Case (United Kingdom v Albania) (Merits)* [1949] ICJ Rep 4, p. 35.

argue that economic coercion causes deleterious consequences. Yet, the suggestion by Brazi that economic coercion should be included in the prohibition was explicitly rejected by a vote of 26 to 2.[441] Further, during the drafting of the *Declaration on Friendly Relations*, there was debate as to the meaning of 'force' and whether it should extend to 'all forms of pressure, including those of a political or economic character, which have the effect of threatening the territorial integrity or political independence of any State'. This, too, was rejected.[442] Not all negative consequences, therefore, are caught within the prohibition. The consequences approach is not without response to this: Schmitt posits no less than six 'consequence commonalities' that distinguish force captured by Article 2(4) from other types of force such as economic coercion. This is certainly not as elegant as the instrument-based approach. Nor does Schmitt base these criteria in case-law or *opinio juris*. However, these criteria are not entirely without merit.

i. *Severity*

The first criterion, according to Schmitt, is 'severity': there must be some threat of 'injury or destruction of property'. Schmitt is not the first scholar to suggest that severity should be a requirement.[443] However, this requirement does not stand up to case-law. As discussed above, incursions have often been seen as contraventions of the prohibition without severe consequences. However, one possible reason for the *Corfu Case* being the use of force is that the intervention clearly entailed potential violence. Schmitt's severity requirement should be modified to make clear that the requirement is of destruction – not necessarily severe – or potential destruction.

ii. Immediacy & directness

Immediacy and directness of harm are two criteria posited by advocates of the consequences approach, as indicating where an intervention is the use of force.[444] This is not only sound, but arguably finds some favour in case-law. In the *Nicaragua Case,*

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[441] Schmitt, p. 905; see also Simma, p.118.

[442] *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,* GA Res 2625, UN GAOR 25th sess, 1883rd plen mtg, supp no 28, UN Doc A/Res/25/2625 (1970). See also, *Report of the Special Committee on Friendly Relations,* UN GAOR, 24th Sess, Sup No 19 at 12, UN Doc A/7619 (1969).

[443] P L Zanardi, Indirect Military Aggression in A Cassese, *The Current Legal Regulation of the Use of Force*, Dordrecht, Kluwer Academic Publishers, 1986, p. 112.

[444] Schmitt, p. 914.

the US supported Contra rebels in their armed opposition to the Nicaraguan government. The US was therefore directly responsible for the Contras' actions, even though the US itself had not engaged in any armed activity. However, in finding this link, the Court noted that not all forms of support would be sufficient; the mere supply of funds to the Contras would be too remote.[445] This position is supported by the general consensus on economic coercion.[446] One reason for rejecting economic coercion as a form of force is that harm is not a direct and immediate result of the coercion.

iii. *Invasiveness*

Schmitt posits 'invasiveness' as a defining feature of force, and in particular the 'cross[ing] into the target state'. This is an elegant way of distinguishing economic harm, and seems natural as most attacks on a state would cross its borders. Yet, it is not without limitations. Article 2(4) already requires the use of force be directed at a state, thus barring 'any kind of forcible trespassing.'[447] Perhaps a better way of phrasing this requirement is not to concentrate on the act of crossing borders, but to require that the destruction, or potential destruction be of a physical nature. This would distinguish economic coercion – the consequences of which are normally financial – and would avoid reiterating the requirement of being directed at a state.

iv. Measurability

'Measurability' is Schmitt's fifth 'consequence commonality'. What measurability means, however, remains unclear. He argues that the consequences should be measurable, and that those that are 'harder to measure' are not captured by the prohibition.[448] This requirement does not stand up: economic coercion has very measurable financial consequences, perhaps even more capable of accurate measurement than physical harm. Again, a better requirement is that the destruction or potential destruction be of a physical nature rather than other types of harm, such as financial. This is perhaps what he means: in explaining 'measurability' Schmitt notes that 'the consequences of armed coercion are usually easy to ascertain (eg a certain level of destruction)'. Both the economic force and military force that he refers to involve 'a certain level of destruction'; the distinguishing factor is that military force involves

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[445] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICL Rep 14, para 228

[446] Simma, p. 118.

[447] *Ibid.,* p. 123.

[448] Schmitt, p. 915.

physical destruction whilst economic coercion entails (at least initially) financial destruction.

v. Presumptive legitimacy

Schmitt's final requirement is that 'the consequences of armed coercion are presumptively impermissible, whereas those of other coercive acts are not'.[449] This is neither necessary nor accurate. The requirement of presumptive legitimacy is not necessary if one requires, as suggested above, that the relevant destruction or potential destruction be of a physical nature. Perhaps the reason that there is a presumption that armed intervention is illegitimate is because of the physical destruction of force. More importantly, however, the assertion that other forms of coercion carry a presumption of legitimacy is simply wrong: the UN system is based on sovereignty; economic intervention is a violation of this. The *Declaration on Friendly Relations*, which revised the Charter, clearly prohibits all forms of intervention.[450] Similarly, the ICJ, in the *Nicaragua Case,* held that 'the mere supply of funds to the contras,' was 'undoubtedly an act of intervention in the internal affairs of Nicaragua' and was thus prohibited.[451] As Judge Sette-Camara declared in the *Nicaragua Case,* both the prohibition on the use of force and the principle of non-intervention are 'peremptory rules of customary international law'.[452] Intervention, therefore, including economic intervention, does not enjoy the presumption of legitimacy that Schmitt suggests.

E. *Hostile intent*

One issue not covered by the consequences and instrument approach is the role, if any, of hostile intent. Judge Rosalyn Higgins,[453] and scholar Walter Sharp,[454] suggest that hostile intent may play a role in defining force. However, a lack of hostile intent appears insufficient to convince the ICJ that merely a contravention of sovereignty has occurred

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[449] *Ibid.*

[450] *Declaration on Principles of International Law concerning Friendly Relations and CO-operation among States in accordance with the Charter of the United Nations,* GA Res 2625, UN GAOR 25th sess, 1883rd plen mtg, supp no 28, UN Doc A/Res/25/2625 (1970).

[451] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICL Rep 14, para 228.

[452] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits) (Separate Opinion Sette-Camara)* [1986] ICJ Rep 14, p 199.

[453] Hague Academy, *Recueil des cours*, Vol 230 (1991-V), 313-31, cited by Brownlie.

[454] Sharp, p. 132.

rather than the use of force. In the *Corfu Channel Case* the Court accepted that the reason for the presence of the United Kingdom in the strait was entirely for the purposes of sweeping it, and the United Kingdom did not engage in any acts of violence.[455] Yet, the Court found that the UK had engaged in 'a policy of force'.[456] This suggests that hostile intent is not a defining feature of force.[457] Indeed, any principle requiring hostile intent fails to address the issue of a mistaken use of force – it seems unlikely that mistaken force would not be considered force. Similarly, self-defence necessarily implies a lack of hostile intention, but is nonetheless force.[458] Finally, humanitarian intervention involves a justifiably use of force. It seems, therefore, that the role for hostile intention seems extremely limited.

F. *Directed at a state*

The UN Charter prohibits the use of force 'against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations'. There is debate as to whether these words should be interpreted restrictively[459] however, Shaw QC points out that 'the weight of opinion' is that they 'reinfoc[e] the primary prohibition'.[460] Simma's commentary on the Charter thus notes that this requirement captures 'any possible kind of transfrontier use of armed force'.[461] Tellingly, no case on the use of force has turned on whether the force was sufficiently directed against the victim state. Yet, despite its wide import, the requirement is not so wide as to be meaningless. There clearly has to be some form of 'trespass' into another state's territory. Thus, as Simma's commentary accurately notes, attempts by warships to use force to stop and seize pirate or slavery ships would not be contravening Article 2(4).[462] It is perhaps at this point that Judge Higgins' suggested hostile intention might come into play. The word 'directed' suggests that an attack is aimed at, or intended for a

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[455] *Corfu Channel Case (United Kingdom v Albania) (Merits)* [1949] ICJ Rep 4, p 33-4.

[456] *Corfu Channel Case (United Kingdom v Albania) (Merits)* [1949] ICJ Rep 4, p 35.

[457] See also, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICL Rep 14, para 202.

[458] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (Judgment)* [2005] ICGJ 31, para 148.

[459] See Shaw, p. 1127, see also Brownlie, p. 885.

[460] Shaw, p. 1127. See also Simma, p. 123.

[461] Simma, p. 123.

[462] *Ibid.,* 124.

particular end, it indicates an intention and agency, unlike more passive words that could have been used such as 'on' or 'at' (an attack at another state).

G. *Proposed Test*

While the prohibition on the use of force is a core principle of international law, there is disagreement on the extent of the prohibition outside the paradigm case of military attack. There are limitations to both the instrument and consequences approaches, although on balance the consequences approach is the better one because it focuses on the substance of an intervention. This does not mean that Schmitt's articulation of it is without limitations. Rather, it ought to be amended to define force simply as destruction or potential destruction, of a physical nature that is a direct and immediate result of an intervention. This paper adopts this method and applies this test to the 'new hazards' discussed in Part III below.

I. Cyber Intervention

Scenario 1

In 2007, Chinese hackers allegedly attacked the US nuclear weapons laboratory at Oak Ridge, Tennessee, in a series of sophisticated cyber infiltrations. Similarly, in 2007 hackers infiltrated the logistic systems of over 20 US Air Force bases. The hackers 'achieved systems administrator status' allowing them control over the systems.[463] *Every year, the US is subject to an estimated 12,986 direct assaults on federal agencies, and 80,000 attempted attacks on Department of Defence computer network systems. This affects the US military's operational capabilities.*[464]

Technology is a long-standing accomplice of war, and, indeed, a key vulnerability.[465] Governments are not blind to this: the United States government has invested significant resources in building its technology capability, and defending against cyber attacks with its Computer Network Attack sub-group of its Joint Task Force on

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[463] Richard Clarke, Keynote Address: Threats to US National Security: Proposed Partnership Initiatives Toward Preventing Cyber Terrorist Attacks, *DePaul Business Law Journal* 12(1): Fall/Spring. 1999: p. 36.

[464] Gary Waters, Desmond Ball and Ian Dudgeon, *Australia and Cyber-warfare,* Australian National University Press, 2008, p. 42.

[465] Eric Talbot Jensen, Computer Attacks on Critical National Infrastructure: A Use of Force invoking the Right of Self-Defense, *Stanford Journal of International Law*, 38(1): Winter. 2002, p. 212.

Computer Network Operations.[466] Similarly, the Australian government's recent White Paper notes that '[c]yber warfare has emerged as a serious threat to critical infrastructure'[467] and dedicates a chapter to it. A Cyber Security Operations Centre is planned. The question becomes whether the international legal framework mirrors the position of governments, or whether it lags behind.

A. *Is there intervention?*

Cyber attacks are not physical in the same way that military attacks are; some might deny that an intervention has occurred at all. Indeed, as internet sites could be hosted in separate states, some might argue that it is the host state not the victim state that has been subject to intervention. The simple response to this is to look to the consequences of the intervention: if Australian telecommunications infrastructure is hosted in another state but the consequences of its infiltration are felt in Australia, Australia is a victim of intervention. Lawrence Lessig in his definitive work on cyber law discusses overlapping jurisdiction, concluding that people in cyberspace occupy multiple spaces, but this does not allow them to escape one jurisdiction.[468] Similarly, whilst an infiltration may involve multiple jurisdictions, this should not allow an attacker to escape the prohibition on the use of force because the signals it sends passes through multiple jurisdictions.

B. *Physical destruction*

Not all cyber interventions will be the use of force; some may merely be intervention, and others, such as spam, may not even be that. Some types of cyber intervention, however, have chilling potential for destructive violence. Examples include the use of wireless application protocols and firewall-penetrating software to hijack aircraft avionics resulting in control over the aircraft allowing hijackers to direct it to crash. Or the use of high power lasers and radio frequency weapons to burn out the avionics in aircraft.[469] Similar attacks could be launched at air traffic control or ships' radars with the potential for catastrophic results. Satellite communications links could 'be in the adversary's hands,' following the 'hijacking' of all the transponders on communications

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[466] M McGuire, *Hypercrime: The New Geometry of Harm*, Abingdon, Routledge-Cavendish, 2007.

[467] Australian Department of Defence, *Defence White Paper* (2009) Australian Department of Defence <http://www.defence.gov.au/whitepaper/> at 7 September 2009, p. 9.

[468] Lawrence Lessig, *Code and Other Laws of Cyberspace*, New York, Basic Books, 1999, p. 190.

[469] Waters et al, p. 41.

satellites,[470] whilst missile launching technology could be hijacked and missiles launched.[471]

Many of the scholars who have addressed cyber attacks focus on the potential for destructive consequences of a cyber attack.[472] Governments seem alert to this: according to General James N Mattis commander of the US Joint Forces Command, '[a] well-timed and executed cyber attack may prove just as severe and destructive as a conventional attack.'[473] The consequences of the examples cited in the preceding paragraph certainly do seem analogous to those in settled cases, such as the destruction caused in the *Oil Platforms Case*. Indeed, infiltration into aviation systems and even civilian infrastructure would seem to entail far more destruction than the peaceful sweeping of mines in the *Corfu Channel Case.* The potential destruction of cyber attacks seems to even be more severe than what the United States was guilty of in *Nicaragua.* In that case, the United States was responsible for a range of acts the Contras engaged in. However, these were not always severe as measured by the extent of destruction. The CIA even warned that 'the guerrillas should be careful not to become an explicit terror' but rather should engage in limited attacks on the government.[474] Yet, the US was still guilty of having used force. As cyber interventions have the possibility for devastation similar to military attacks, it would seem they make a strong case for inclusion in the prohibition on the use of force.

C. *Direct & immediate destruction*

Whilst some cyber interventions have the potential for physical harm, such harm may not always be sufficiently direct and immediate to be titled the use of force. Waters et al describe potential cyber attacks on civilian infrastructure such as electricity grids, gas and oil infrastructure, water supply systems, traffic, emergency rescue services, public administration, telecommunications, transport, banking and finance.[475] The destruction of this 'critical infrastructure', according to Waters et al, 'would have a debilitating

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[470] *Ibid.*

[471] *Ibid.*

[472] Hollis, p.1032.

[473] James N Mattis, *Statement of General James N Mattis* (2009) The House Armed Services Committee <http://armedservices.house.gov/hearing_information-jan-may2009.shtml> at 29 September 2009.

[474] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICL Rep 14, para 118.

[475] Waters et al, p. 50.

impact on the national security and the economic and social welfare of a nation'. [476] Yet, an infiltration in, for example, the gas grid may not result in physical harm for days, perhaps weeks. Similarly, the example at the beginning of this part of infiltration impairing the military's response capacity might not involve immediate destruction but rather limit a state's ability to respond to other destruction. Even somewhat more direct examples, such as transport accidents as a result of traffic lights being disrupted, would be spatially and temporally removed from the intervention. This may be more analogous to the mere sponsoring of rebels by the United States in *Nicaragua* – an act of intervention that was held to be too remote from the destructive consequences the Contras caused.

D. *Directed at a state*

Any cyber intervention must clearly be directed at the territorial integrity or political independence of a state in order to be the use of force. Not all cyber interventions will satisfy this: intervention into the banking sector or telecommunications may be considered an attack on private enterprise rather than territorial integrity. Other examples, such as attacks on electricity grids or public administration, however, seem to involve infrastructure at the core of a State's territorial integrity. Whilst the requirement of being directed at a state has generally been read widely – thus allowing the mere sweeping of mines in the *Corfu Case* to be considered the use of force – such a broad interpretation of territorial integrity may not be appropriate in the virtual world. Unlike incursions with military vehicles – such as in the *Corfu Case* – it would seem that 'merely penetrating a nation's cyberspace… is not a use of force.'[477] As a passive cyber intervention does not imply the potential destruction that non-violent military incursions do, it is unlikely to be considered as force directed at a state. Where a cyber intervention causes immediate and direct physical destruction within a state, however, it would be difficult to argue that the force was not directed at that state.

E. *Concluding remarks*

That cyber attacks could entail direct and immediate physical destruction suggests that they ought to be the use of force. Some, however, might point to Article 41 of the UN Charter and argue that the framers intended that cyber attacks not be included in the prohibition. Article 41 gives the Security Council the power to decide on measures 'not involving the use of armed force' to be employed to give effect to its decisions,

[476] *Ibid.*

[477] Jensen, p. 223.

including interruption of 'telegraphic, radio, and other means of communication'. These, some might argue, are either related to cyber intervention (radio, telegraphic) or are analogous to them. Yet, this position ignores a key fact in Article 41: it specifies measures not involving 'armed force'. Cyber interventions are clearly not 'armed', in the sense of involving conventional arms and weapons. Yet, they still may contravene Article 2(4) for which the standard is not 'armed' force, but rather simply, 'force'.

Cyber attacks involving immediate and direct physical destruction merit categorisation as the use of force within Article 2(4). Indeed, with time, they could also be seen as a contravention of the customary legal principle prohibiting force. Customary law is based on state practice; there is currently insufficient state practice to establish whether cyber attacks would be a contravention of the customary law of the non-use of force. Whilst there have been a few cyber interventions, these have not involved widespread destruction. In the episode between Russia and Estonia, Russia allegedly interfered with Estonian bank, government, newspaper and broadcasters' websites.[478] Estonia certainly claimed that it was 'under attack', although other states were slow to support this.[479] If cyber attacks increase in frequency and intensity, and states begin to declare that this is force, a customary international norm may coalesce.

II. Environmental Intervention

Scenario 2

'The Imjin River's level suddenly doubled Sunday [6 September 2009], sweeping away six South Koreans camping and fishing near the border dividing the two Koreas. South Korean officials quickly suspected the estimated 40 million tons of water came from a new North Korean dam — one that some in the South had warned the North could use as a weapon'.[480]

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[478] Waters et al, p. 49.

[479] Duncan Hollis, *E-War Rules of Engagement* (2007) Los Angeles Times, <http://www.latimes.com/news/printedition/asection/la-oe-hollis8oct08,0,7896901.story> at 27 August 2009.

[480] Hyung-Jin Kim, *North Korea admits causing flood deaths* (2009) The Independent, <http://www.independent.co.uk/news/world/asia/north-korea-admits-causing-flood-deaths-1783410.html> at 8 September 2009.

The environment has long been implicated in, and manipulated as a tool of, war.[481] As environmental and geo-political landscapes change, this tool has the potential to be increasingly potent. Historical examples of this include the destruction by the Chinese of the Huayankow dike on the Yellow River, resulting in the drowning of several thousand advancing Japanese soldiers, as well as vast destruction to Chinese civilians.[482] Similarly, during WWII the British destroyed two dams in the Ruhr Valley causing 1294 German deaths, and significant destruction.[483] During the Korean War, the United States destroyed several dams in North Korea with resulting destruction to life and property.[484] Other potential hazards include the release of poison,[485] or the intentional use of fire.[486] Environmental warfare is already an issue of concern to the international community: Protocol I of the 1977 Additions to the Geneva Conventions of 1949 prohibits attacks against the environment, with criminal sanctions a possibility for the war crime of severe environmental damage under the *Rome Statute* of the International Criminal Court.[487] Most relevant is the *Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques*.[488] There remains, however, significant dispute about whether, and in what circumstances, environmental damages could constitute a use of force. Brownlie suggests that physical or environmental intervention could be captured by the prohibition.[489] Others, however, such as Bruno Simma dismiss the idea, or accept it 'only within narrow limits'.[490]

A. *Is there intervention?*

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[481] See, Arthur H Westing, Environmental Warfare, *Environmental Law,* 15(4): Summer. 1985: p.646.

[482] *Ibid.*, 651.

[483] *Ibid.*, 652. See also *ibid.*, 634.

[484] *Ibid.*

[485] Michael F Martin, *Vietnamese Victims of Agent Orange and U.S.-Vietnam Relations* (2009) Congressional Research Service <http://ftp.fas.org> at 1 October 2009.

[486] See generally, Rex J Zedalis, Burning of the Kuwaiti Oilfields and the Laws of War, *Vanderbilt Journal of Transnational l Law* 24(4): 1991: p. 711.

[487] *The Rome Statute of the International Criminal Court,* open for signature 17 July 1998, 2187 UNTS 3, (entered into force 1 July 2002) ('*Rome Statute*'), Art 8(2)(b)(iv).

[488] *Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques*, open for signature 18 May 1977, 1108 UNTS 151, art 1 (entered into force 5 October 1978).

[489] See Brownlie, p. 376, in relation to flooding.

[490] Simma, p. 118.

A fire or flood could clearly cross borders. Yet, some might argue that such events are natural and cannot be an intervention. Whilst this seems intuitively attractive it fails to stand up to close inspection. If the relevant factor were that these things are natural, then the launching of large boulders would similarly be beyond the prohibition, boulders too are naturally occurring. In fact, the very claim that these things are 'natural' seems limited: an intentionally lit fire is not natural, nor is a man-made dam. A further objection is that the flow of water or fire is not physical in the same way that weaponry or troops are. This argument is similarly flawed: if there is a requirement that the intervention be 'physical' then biological warfare would be excluded. Both intuitively, based on their destructive potential, and according to scholarship,[491] biological warfare would contravene the prohibition on the use of force. Indeed, the *Nicaragua Case* provides some evidence that the ICJ does not apply the requirement of actual physical intervention strictly: the US was held to have used force via the actions of the Contras even though it did not itself physically intervene in Nicaragua. Thus it seems difficult to mount an objection to the argument that intentional use of the environment may be intervention.

B. *Direct & immediate physical destruction*

It seems uncontroversial that a physical or environmental attack – including the scenario at the beginning of this part – could entail significant physical destruction. The examples of the usage of flooding in warfare, such as the flooding of the Yellow River, illustrate its great destructive potential. Those arguing for criminalisation of environmental harms note that the 'devastation' that can be caused by rivers 'is enormous.' [492] Similarly, the US federal agency managing dams notes 'the potential violence' that dams entail.[493] Indeed, even sceptics, such as Simma, acknowledge that 'physical force can affect a State just as severely as the use of military force.'[494] Further, the harm caused by flooding or fire is direct, immediate, and unleashes harm resembling military attacks, such as in the *Armed Activities Case.* However, not all environmental interventions enjoy such immediacy – poisoning of a river, as with Agent Orange, might not injure people for years, or even generations. Despite this, most uses of environmental intervention involve not only the potential of significant physical destruction, but destruction that is direct and immediate. The evidence of the use of

[491] Brownlie, p. 362.

[492] Schofield, p. 635.

[493] *Ibid.*

[494] Simma, p. 119.

environmental intervention as a tool of war throughout history makes it a strong case for its categorisation as the use of force.

C. *Directed at a state*

Any attack must be directed at the territorial integrity or political independence of a state, to be force. This may pose a problem for a state claiming that an environmental intervention is the use of force; the attacking state may have other explanations for the intervention, and thus argue that there was no intention that it be 'directed' against another state. Yet, it can also be difficult in the case of conventional weaponry. The United States targeted the Chinese embassy in Belgrade in 1999; it was unclear whether it was a mistake. The only way of proving is to look to the context to see whether an intention was manifest. The most that can be concluded is that there is a presumption that the launching of conventional weaponry is done intentionally, whilst physical or environmental incursions may carry the opposing presumption. Admittedly, intention is difficult to prove, however, as the *Corfu Channel Case* illustrates, hostile intent is not a necessary condition. Whilst the intentional aspect of the requirement that force be directed at a state may provide some evidential issues, this requirement is not a fatal obstacle to including physical intervention in the prohibition on the use of force.

D. *Concluding remarks*

The environment presents an imposing threat to human life and property. Its destructive potential, and its use in previous wars, warrant its inclusion within the prohibition on the use of force. Yet, any state making the claim that environmental or physical force has been used faces the Herculean – perhaps Sisyphean – task of proving that the relevant harm was direct and immediate and that the force was purposefully directed. These may prove fatal in some instances, especially in the case of the flooding of rivers such as the one quoted at the beginning of this paper, however there may be some cases where it can be shown. There are limited examples of environmental intervention outside already established wars. It is thus uncertain whether there is state practice – which is the basis for the development of customary law – suggesting that environmental intervention is the use of force.

III. Implications

Given the finding above that some of these new threats may be the use of force, the question becomes what the implications of this are.

A. *Self-defence*

The use of force in self-defence sends a strong message to the attacking state, with the possibility of ending hostility. Cyber attacks, some warn, could 'be a serious and destabilizing force unless states are given the right to protect themselves'.[495] Restraining a nation's ability to respond to a cyber attacks could encourage 'rogue nations' to commit increasingly severe attacks.[496] By contrast, others warn against categorising non-military force as the use of force, because, as scholar Bert Roling puts it, it 'is too dangerous'[497] and 'would lead to abuse of the rule [of self-defence].'[498] Yet, would one of the above hazards trigger the right to self-defence?

Article 51 of the UN Charter outlines the right of self-defence, which also exists in customary international law[499] and may include the right to anticipatory self-defence.[500] This right is only triggered by an armed attack,[501] being 'the most grave form of the use of force' as opposed to 'less grave' uses of force.[502] Some guidance as to what constitutes grave and less grave force is provided by General Assembly declaration on the definition of aggression that the ICJ cited in *Nicaragua* as an example of an armed attack.[503] That declaration defines aggression as including invasion, bombardment, blockade, attack by armed forces, and the sending of armed bands, amongst other acts.[504] The grave/less grave test seems to concentrate on consequences, however, the

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[495] Jensen, p. 240.

[496] *Ibid.,* 228.

[497] Bert VA Roling, The Ban on the Use of Force and the UN Charter in Antonio Cassese, *The Current Legal Regulation of the Use of Force*, Dordrecht, Martinus Nijhoff Publishers, 1986, p. 3.

[498] *Ibid.*

[499] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICL Rep 14, para 176.

[500] Timothy L H McCormack, Anticipatory Self-Defence in The Legislative History of the United Nations Charter, *Israel Law Review,* 25 (1): Winter 1991, p.1.

[501] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICL Rep 14, para 195.

[502] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICL Rep 14*,* para 191.

[503] *Resolution on the Definition of Aggression,* GA Res 3314, UN GAOR, 34th sess, 2319th plen mtg, UN Doc A/Res/3314 (1974). See also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICL Rep 14, para 195.

[504] *Resolution on the Definition of Aggression,* GA Res 3314, UN GAOR, 34th sess, 2319th plen mtg, UN Doc A/Res/3314 (1974), Article 3.

presence of the term 'armed' in Article 51 and the consistent presence of military and armed forces in the examples in the Definition of Aggression, implies that it applies only to conventional military warfare.[505] Such warfare is notably absent in the discussed examples of new hazards; it is unlikely that they would be considered 'armed attacks'. Brownlie QC certainly thinks that the use of flood is not an armed attack.[506] Fears that the inclusion of these new hazards in the prohibition could result in states using self-defence, and thus escalating violence, could be misplaced.

Even if the new hazards discussed do amount to an armed attack, any use of force in response to them must be necessary and proportionate.[507] The ICJ seems to have set a high standard for necessity and proportionality. The Court rejected United States' claim that its attacks of Iranian platforms were 'necessary to protect its essential security interests'.[508] The principles guiding self-defence, therefore, provide a limit to the lawful actions of a state victim to any of the hazards discussed above. It is unlikely that any of these hazards would be considered armed attacks. This is probably a net positive; unlike military attacks, the hazards discussed above could probably be defended against using other methods that do not require the use of force in self-defence. Such methods include peaceful countermeasures, such as the US suspending commercial air flights to Paris in response to France's violation of international law.[509]

B. *Broader implications*

Any discussion of these new hazards being the use of force must take account of the broader consequences for international law and politics. The first is the potential discord between various states regarding the categorisation of these threats. The prohibition on the use of force enjoys a rare consensus in the international community; broadening the prohibition to include these new hazards risks creating divisions where unity is so badly required. Yet in contrast to this, if some of the above attacks – notably cyber attacks – remain beyond the prohibition, there would appear to be a discord between the

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[505] See also, Simma p. 796.

[506] Brownlie, p. 376.

[507] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICL Rep 14, para 194. *Nuclear Weapons Advisory,* (ICJ Reports 1996 (1), p. 245, para. 41)

[508] *Oil Platforms Case (Islamic Republic of Iran v United States of America) (Judgment)* [2003] ICJ Rep 161, para 73.

[509] *Air Services Case (France v United States)* (1978) 18 RIAA 416.

military's definition of force and that of international law. Governments such as the United States and Australia seem to consider cyber attacks the use of force. It will become increasingly difficult to respond to the criticism that international is irrelevant if this schism persists.

C. *Alternatives to force*

Whilst the above hazards may not be force, they may still contravene the prohibition on intervention. The principle of non-intervention commands significant respect as a peremptory norm of international law.[510] A contravention of the prohibition on non-intervention would certainly give a victim state legal rights, including to reparations.[511] Indeed, in accordance with Article 41, it is available to the Security Council to impose sanctions in response to an intervention, thus symbolically condemning the intervention, and also practically punishing it. However, the victim state would clearly not have the right to self-defence,[512] nor does intervention carry with it the same normative weight as the use of force.

D. *Conclusion*

The current definition of force is skeletal, if not unclear. The instruments-based approach is myopic; focusing on form over substance. Whilst the consequences approach offers a more complex solution, the version posited by Schmitt is unwieldy and limited. The new threats discussed in this paper – examples of which have occurred recently – demand consideration by the international community. At least some examples of them could very well be the use of force; others are less clear. Yet, no analysis of whether these threats constitute force can be done in a vacuum; rather, legal and practical considerations must be taken into account – including the issue of self-defence. That these hazards could be the use of force, and yet not trigger the right to self-defence, illustrates an inherent tension in the international legal system between the need to deter attacks through the possibility of retaliatory self-defence, and yet to rein in states too eager to use self-defence in the face of minor incursions. This paper has focussed on the narrow question of the use of force in the UN Charter and customary

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[510] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICL Rep 14, para 202.

[511] See, for example, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICL Rep 14.

[512] See *Charter of the United Nations*, adopted 26 June 1945, 892 UNTS 119 (entered into force 24 October 1945), art 51.

international law. Yet, this leaves unanswered the question of whether these new hazards should be equally controlled by the laws of war. While this author has argued that many examples of these new threats ought to be considered the use of force, this hasn't been without noting the difficulty of establishing this. As the possibility of these new threats increases, the question is posed whether the UN Charter system is the appropriate forum for dealing with these threats. Perhaps new multi-lateral treaties should be devised to deal with these threats. One thing is clear: the international community should address these issues before one of these emerging threats becomes a catastrophic reality.

Operational Success, Strategic Ambiguity: Assessing the United States Counterinsurgency Mission in Iraq and the Concept of Victory

Cameron Hawker

The paper assesses the concept of victory in the context of the United States Counterinsurgency mission in Iraq. Events in Iraq demonstrate that victory is a contested concept which can be interpreted in either absolute or relative terms. Furthermore, the political objective of war can change in the course of a campaign; this directly alters the criteria by which victory must be assessed. In the case of Iraq, the Americans can rightly claim an operational success as a result of adoption of counterinsurgency warfare. However, there has not yet been the kind of political breakthrough necessary for strategic victory to be declared. While sustainable strategic success in Iraq remains possible, the term 'victory' is itself unsuitable to the changed nature of the mission. Instead success will come only through enfranchising the Iraqi people.

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Mission Accomplished?

By late 2006, the American mission in Iraq was on the brink of failure. Large sections of the country, including Baghdad were close to anarchy as sectarian violence escalated to shocking levels. In many parts of Iraq the Sunni insurgency raged out of control. At the same time, Shi'a militias with links to the central government terrorised the Sunni population. Washington, which had been slow to comprehend the nature and magnitude of the situation, was faced with a decision to escalate its commitment or find a way to withdraw. Washington chose to escalate. That escalation, known as 'the surge', deployed an additional 20,000-25,000 American soldiers and marines into Iraq and was accompanied by a fundamental shift in operational conception and execution.[513] By adopting a Counterinsurgency (COIN) strategy, US forces moved from an enemy centric to a population centric approach. Washington hoped that prioritising the protection of the civilian population would isolate it from the insurgency, thus removing the insurgent's core support base and causing it to wither and die.

The establishment of Joint Security Stations (JSS) at key locations around Baghdad and the Sunni Triangle was central to this approach.[514] These JSS formed part of a broader strategy that required close cooperation between Iraqi and US forces. The objective of this strategy was to improve the security situation to a point where reconstruction could begin. Since the implementation of the surge in early 2007, the US has dramatically improved the security situation in Iraq; the number of American casualties and the rate of sectarian attacks have fallen sharply. In the summer of 2007 security incidents averaged around 1500 a week. By the middle of 2009 that number had fallen to about 150 a week including incidents attributed to criminal rather than political motivations.[515] The Sunni insurgency has been severely weakened. Simultaneously, the Shi'a dominated government has shown some signs of reaching across the sectarian divide. Furthermore, this progress has been sustained for several years. Consequently, Iraqi society has begun to show real signs of renewal. Markets, schools and coffee

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[513]T. E. Ricks, *Fiasco: The American Military Adventure in Iraq* (*New* York, Penguin Press, 2006) p. 9.

[514]P. R. Mansoor, *Baghdad at Sunrise: A Brigade Commanders War in Iraq* (New Haven, Yale University Press, 2008) p. 117.

[515]Petraus, D., Statement to the Senate Armed Services Committee (April 1st 2009), (available online) http://armed-services.senate.gov/statemnt/2009/April/Petraeus%2004-01-09.pdf (accessed 6 February, 2010).

houses have reopened in areas that were long considered to be no go zones, and there appears to be a consensus that a modicum of normalcy has returned to the country.[516]

These developments make it tempting to conclude that the mission in Iraq is nearing completion and that the US is now in a position to claim victory. This paper argues against that assumption. The US has achieved a remarkable operational success in Iraq when one considers how far the situation had deteriorated. However, it has not yet obtained the kind of political result needed to claim a strategic victory. Iraq remains extremely fragile; while many of the improvements made are real, it is unclear whether or not they will be sustainable. Therefore it is too early to judge the ultimate success of the US mission in Iraq. The success of the mission is dependant on a variety of American and Iraqi factors which will be examined in the course of this paper. This paper argues that American strategic success remains possible and that a completion of COIN operations remains the surest way to secure that success. However, this will require the deep and continuing commitment of American military, economic and political resources. Although strategic success is attainable it is unlikely that such success would be called a victory if it does come to pass – at least not in the traditional sense. This is due to a variety of factors including the unconventional style of warfare fought there, the protracted length and toll of the campaign, the fact that the metrics of success have changed significantly since the initial invasion, as well as lingering doubts over the legitimacy of the entire venture.

The concept of victory carries unfortunate associations in the Iraqi context. President George W. Bush prematurely declared victory in May 2003 aboard the Air Craft Carrier *USS Abraham Lincoln*. The theatrics of that occasion was indicative of the *hubris* that lead to many mistakes in the execution of the war once Saddam had been toppled. Iraq provides us with an example of how the criteria for victory can change in the course of a campaign, how political objectives can be recast to reflect realties in the theatre and how war remains fluid, unpredictable, easy to instigate but difficult to end on favourable terms.

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[516]BBC News, "Baghdad Voices: Improved Security", *BBC News* (November 15, 2007) available online: http://news.bbc.co.uk/2/hi/talking_point/7094285.stm (accessed 12 March, 2010)' http://armed-services.senate.gov/statemnt/2009/April/Petraeus%2004-01-09.pdf.

Insurgency and Counterinsurgency

Although COIN is sometimes portrayed as being a new approach to warfare, it is a strategy firmly rooted in military history and it is from these historic case studies that contemporary COIN strategists draw their lessons. Insurgents and insurgencies are arguably as old as war itself. For example, we know that the ancient Britons led by Queen Boudicca waged an insurgency against their Roman occupiers in the first century AD.[517] The term *Guerrilla*, literally meaning 'small war', is derived from the Peninsular War during the Napoleonic era during which the Spanish actively resisted the imposition of French Imperial rule.[518] The twentieth century offers the strategic scholar a myriad of insurgencies to study. Many of these latter conflicts emerged as reactions to European colonial rule. The twentieth century also offers the scholar a range of literature written from the perspectives of both the insurgent and counterinsurgent. Mao Tse Tung's *On Guerrilla Warfare* is arguably the definitive text on the tactics of *Guerrilla* war and demonstrated how the successful use of those tactics could be parlayed into strategic victory.[519]

Prominent theorists and practitioners of COIN include the British army officers Sir Frank Kitson and Sir Robert Thompson, both of whom served in the Malayan Emergency; and David Galula, a French officer who served in the Algeria War. Insurgent warfare is often referred to as asymmetric; this is a misnomer in the sense that all warfare is fought between parties of different size and composition. In the case of insurgent warfare, these differences are greatly magnified. Insurgent forces tend to utilise tactics that maximise mobility and stealth in order to maximise their efficiency against their opponents. Such tactics often take the form of hit and run attacks using small numbers of combatants. The insurgent is inevitably at a numerical and technological disadvantage so must use tactics that compensate for this weakness. The objectives of insurgent groups vary. In some cases a group will seek to assume outright control of the state which they agitate against; in other cases the goal will be to attain control or autonomy over a particular region. The difference between COIN and other forms of warfare is often overstated. While it is true that COIN places an emphasis on political as well as military solutions, it is also true that all forms of warfare contain a political dimension and ultimately require political solutions. COIN prioritises the

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[517]V. Davies Hanson, 'The Roman Way of War' in G. Parker, (eds.), *The Cambridge History of Warfare,* (Cambridge: Cambridge University Press, 2005), p. 48.

[518] J. A. Lynn, 'Nations at Arms' in G. Parker, (eds.), *The Cambridge History of Warfare,* p. 192.

[519]M. T. Tung, *On Guerilla Warfare* Samuel B Griffith (tran) (New York: Dover Publications, 2005)

protection of the civilian population over the destruction of the enemy. While the military defeat of the insurgent is desirable, it is not essential to the strategy. Instead COIN seeks to isolate the insurgent from the populace, thus denying it its support base. COIN draws on civil, political and economic instruments of the state in order to achieve its objectives. The approach is sometimes described as 'full spectrum operations' or 'hybrid warfare' and while the objective of 'winning hearts and minds' is central to the strategy, it is wrong to assume that COIN does not involve organised violence like any other form of warfare.[520]

According to David Galula, COIN must be prosecuted in accordance with four laws.[521] The population must be the objective or centre of gravity; as both the sustainability of the insurgency and the legitimacy of the government is vested with the people. The support of the population is not unconditional; this applies to both the insurgent and counterinsurgent. Every insurgency consists of three groups; an active minority for the insurgency, an active minority against the insurgency and a passive uncommitted majority – success is determined by those who can gain the support of the majority. Finally, military force superiority is never enough to ensure success in COIN. Beyond that, the successful counterinsurgent must embed its forces within the populace in order to protect it and to assist in the provision of services from schools and hospitals through to more substantive infrastructure, police forces, independent courts and ultimately a government that is able to provide law and order.

The Concept of Victory

If war is the use of military engagements to fulfil a political purpose, then logic suggests that victory represents the successful end point of this exercise. The American General, Douglas MacArthur claimed that "in war there is no substitute for victory".[522] MacArthur conceived victory in its absolute sense, which was in keeping with the traditional view of the concept. This interpretation was probably best articulated by the 19th century German strategic theorist, Carl von Clausewitz. Clausewitz argued that victory requires "the destruction of his (the enemy's) force, whether by death, injury or any other means - either completely or enough to make him stop fighting".[523] History

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[520]C. H. Kahl, "COIN of the realm", *Foreign Affairs,* vol. 80, no. 6 (2007), *p.* 172.

[521]D. Galula, *Counterinsurgency Warfare: Theory and Practice* (London: Pall Mall Press, 1964), p. 63.

[522] D. Macarthur quoted in W. Manchester, *American Ceaser: Douglas Macarthur 1880-1964,* New York, Little Brown Company, 1978, p. 217.

[523]C. von Clausewitz, *On War,* trans. M. Howard and P. Paret (New York: Alfred A. Knopf, 1993), p. 227

demonstrates, however, that different political purposes call for different kinds of victories. For example, at the end of the Third Punic War in 146 BC, the Romans imposed a peace upon the Carthaginians that was so brutal that little of that civilization survived. Having long been menaced by Carthage, the Romans believed that their political purpose required nothing less than the outright removal of the Carthaginians.

Wars of annihilation, such as the Roman war against the Carthaginians, are relatively simple in that the only requirement for victory is the complete destruction of the enemy. Today the world's nuclear powers have the ability to inflict the kind of destruction far beyond the ability of Rome. The ability to inflict such destruction, however, does not necessarily equate to victory for two reasons; the deterrent value of nuclear weapons has lead to an impasse by which no state can use its weapons against a fellow nuclear power without the risk of incurring retaliation or against a non nuclear power for fear of incurring the wrath of the international community.

For Washington, Iraq was of choice rather than one of necessity. As such, successive administrations have never been willing to consider the kind of measures imposed during a war of necessity, knowing that the public would not tolerate them. For example, during the Second World War the American public endured conscription, rationing and increased taxation not to mention massive casualties. There was no question of any of this to support operations in Iraq. However, the fact that US public was not willing to make the kind of sacrifices made in the Second World War did not mean that it did not expect the kind of decisive victory achieved in that conflict. There is an expectation that victory ought to be the final word. This is expectation is particularly strong amongst the public but can be found among members of the strategic policy community too. However, a reading of history shows that inconclusive wars are not new and that victory has seldom turned out to be what it first seemed to the victors. Victory may breed *hubris* which in turn begets *nemesis* and has for this reason has been described as only slightly less dangerous than defeat.

Clausewitz's concept of victory is notable for its lack of a moral component; indeed Clausewitz dismissed what he saw as misguided sentimentality. Today it is widely accepted, however, that for political purposes victory requires not only military advantage brought about through force of arms, but also political legitimacy. Commentators such as Robert Mandel refer to the need to achieve victory while

inflicting the minimum possible damage to civilians and infrastructure [524]. This obviously has a special relevance to American COIN operations in Iraq.

Varying categories of victory must also be taken into account. These include tactical, operational and strategic victories. Tactical victory involves success in individual military engagements, while operational victory requires theatre wide success. Strategic victory, however, entails a political as well as a military dimension. Tactical and operational success may be parlayed into strategic victory but they do not do not guarantee it. Colin Gray notes that it is possible for an army to achieve operational victory without the state achieving strategic success.[525] This arguably happened in Vietnam, where the US was defeated without ever being beaten decisively in the field.

There is a debate within the academy on how decisive victory is as a strategic determinant. Colin Gray argues that military victory itself can be decisive and that matters can be settled on the battlefield.[526] However, Michael Howard argues that "few wars, in fact are any longer decided on the battlefield (if indeed they ever were). They are decided at the peace table".[527] As this analysis reveals, victory achieved on the battlefield presents an opportunity to achieve stability through politics and diplomacy, but it is an opportunity that has sometimes been squandered. Iraq represents an intriguing case study because although the opportunity to achieve stability was very nearly lost, Washington's decision to switch strategies and to modify the balance of its objectives from justice to order offers it a real opportunity to reach a favourable outcome.

Former US Secretary of State Henry Kissinger argues that "the success of war is victory; the success of peace is stability". [528] The traditional interpretation of victory sits uneasily with experiences in Iraq. Indeed, the term 'victory', with its triumphal overtones is somewhat inappropriate in a counterinsurgency campaign. Iraq has shown

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[524] R. Mandel *The Meaning of Military Victory* (Lynee Reiner, New York 2006) p.48

[525]C. Gray, *Defining and Achieving Decisive Victory* (Carlisle: Strategic Studies Institute, United States Army War College, 2002), p. 18.

[526]Ibid.

[527]M. Howard, "When are wars decisive?", *Survival: Global Politics and Strategy,* vol. 41, no. 1 (1999),*:* p. 126.

[528]H.Kissinger cited in C. W. Freeman Jr., *The Diplomats Dictionary* (Washington: ISIP Press, 2001), p. 109.

us that victory can be a relative rather than an absolute concept. It also reminds us that political objectives can alter during the course of a war; therefore, the criteria for victory will change too. This fact is demonstrated throughout history. Stability plays an important part in the concept of relative victory since stability becomes the substitute for victory.

In order to appreciate the state of the American mission in Iraq today, it is necessary to study its early mistakes and the origins of its latter successes.

Iraq: Wrestling Defeat from the Jaws of Victory

Chief military correspondent for the New York Times, Michael R. Gordon and NBC military analyst, General Bernard E. Trainor have criticised American war planning in Iraq for focusing on the relatively easy task of removing Saddam and his weak conventional forces whilst neglecting the more difficult task of securing and rebuilding Iraq.[529] Both the White House and the Pentagon correctly anticipated a speedy conventional campaign. Colin H. Kahl has argues that this approach revealed a "blitzkrieg bias".[530] This bias was evident in the kind of training provided to American forces; training that was focused on conventional war fighting and paid little attention to the need to secure the population, provide administration or engage in reconstruction. Washington's over-confidence in the utility of its technological superiority can also be attributed to this bias. The result of this mode of thinking was that the US prepared itself not for the kind of war it was about to fight, but for the war it believed it was best suited to fight. In doing so American strategists ignored the writings of Clausewitz, who stated the importance of understanding the nature of the conflict upon which one was embarking and warned against "mistaking it (war) for, nor trying to turn it into something alien to its nature".[531] The US prepared to fight a short, high tech and high intensity war in Iraq, but found that they were soon bogged down in a low tech and low intensity insurgency.

Washington's failure to anticipate the insurgency was followed by a prolonged failure to recognise the insurgency for what it was, or to adapt to developments on the ground in a timely fashion. The first stirrings of the Iraqi insurgency were felt in the wake of the invasion. Within weeks of President Bush's declaration of victory, attacks on

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[529]M. R. Gordon and B. E. Trainor, *Cobra II: The Inside Story of the Invasion and Occupation of Iraq* (New York: Pantheon Books, 2006) p. 498.

[530]Kahl, op.cit. p.175

[531]Von Clausewitz, op. cit., p.732.

American forces stationed within the Sunni Triangle were steadily rising.[532] These attacks were dismissed by Washington as the work of disaffected elements of the former regime - which in many cases they were - and as something which would soon naturally fade away - which they did not. The insurgency began to demonstrate its own momentum. Insurgents found American convoys and motorised patrols to be easy targets for improvised or light weaponry. Insurgent groups often exploited the propaganda value of these attacks by posting footage of them on the internet.[533]

The Iraqi insurgency has never been monolithic. It has never comprised a single group or operated under a common leadership. Nor has the insurgency been motivated by a single ideology; rather it has consisted of various groups acting on varying grievances. This disparity in motivation and organisation was a key weakness that the US would eventually use to its own advantage. Unfortunately, initial American policy and practice actually contributed to the problem. The insurgency found sustenance in the power vacuum created by the invasion and in Washington's inability to form a narrative that was consistent with realties in the theatre of war. This vacuum can be attributed to a failure to provide the population with security or restore basic infrastructure. The two most counter-productive pieces of policy to emerge from the Coalition Provisional Authority (CPA) were the decisions to disband the Iraqi Army and preclude any member of the Ba'ath party from public life. These decisions essentially disenfranchised the Sunnis, leading to their disengagement from the emerging political process and inflaming tensions with the Shi'a.[534] It also directly contributed to the growing insurgency by leaving tens of thousands of young men idle. This mismanagement was compounded by a singular failure to understand the nature and dynamics of Iraqi culture. A society based on the interrelated ideals of honour and revenge must be handled with extreme sensitivity. This sensitivity was not widely evident until much later in the campaign.

The American response to the insurgency from spring 2003 until the end of 2006 was both confused and confusing. While some individual commanders implemented a population-centric approach at a local level, there was no overreaching COIN strategy. Despite rhetoric on the need to win 'hearts and minds' the focus of operations in the

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[532]C. Malkasian, "Counterinsurgency in Iraq" in D. Marston and C.Malkasian, (eds.) *Counterinsurgency in Modern Warfare* (Oxford: Osprey Publishing, 2008), p. 242.

[533]Ricks, *Fiasco* op. cit. (2006), p. 1.

[534]Ricks, *Fiasco* op. cit. (2006), p. 77.

theatre remained enemy-centric. The US Commander, General George Casey, emphasised transitioning responsibility to Iraqi forces. This approach was undermined by the slow progress of the training of those forces and in some cases their infiltration by Shi'a militias.[535] Under Casey, American forces began to withdraw to large bases which isolated them from the population.[536] Stationing troops in major population centres and conducting regular foot patrols was avoided as it was believed that these methods would result in a higher rate of casualties. Washington based commentators such as Bob Woodward have noted that the White House grew increasingly casualty adverse, aware of the impact mass casualties could have on the public's perception of an already unpopular war.[537] In Iraq, efforts to protect the population were ad hoc. Occasional sweeps through towns and villages did little to engage the locals, who knew that the insurgents would soon return to punish anyone who may be seen as a collaborator. US search and destroy missions often achieved little besides disrupting and enraging the locals. American operations actually became counterproductive in many parts of the country as groups such as al-Qaeda in Iraq (AIQ) grew stronger.[538]

There were some early tactical successes achieved through the use of COIN methods. These, however, tended to be "sporadic and short lived" according to at least one commander.[539] Arguably, the most notable success was achieved by the 101st Airborne Division, based in Ninawa Province under the command of (then) Major-General David Petraeus. Petraeus' approach deviated from the norm and achieved a positive result by doing so. The 101st based itself in the region's largest city – Mosul – and maintained a continuous presence on the streets. This enabled them to forge ties with the locals and gather intelligence. General Petraeus also made some progress in engaging with the local Sunni leadership and involving them in the political process. As a result of this approach, a degree of stability was achieved in Ninawa that set it apart from the rest of Iraq. Much of this progress, however, was undone after the 101st withdrew in 2004 and was replaced by a far smaller unit.[540]

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[535]Ricks*, Fiasco* op. cit. (2006), *p.* 127.

[536]B. Woodward, *State of Denial: Bush at War Part III* (New York: Simon & Shuster, 2009), p. 97.

[537]Ibid.

[538]Kahl, op. cit., p. 173.

[539]J. R. Crider, "A view from inside the surge", *Military Review,* vol. 89, no. 2 (2009), *p.* 82.

[540]Ibid.

Return from the brink: Implementing the 'surge'

Many months elapsed between the point where the US lost the strategic initiative and the point where it elected to implement a comprehensive COIN strategy. Reform was slow and predominantly driven from the bottom up, by junior officers who had experienced local success using COIN methods.[541] In Washington, the Democratic victory in the 2006 mid term elections was seen as a judgment on the progress of the war. Although the Iraq Study Group, which was commissioned by the White House, advised a phased withdrawal, President Bush opted for a different strategy.

The drafting of the COIN Field Manual (FM 3-24) drew on the knowledge of over two hundred military professionals and academics. It provided a common guideline for both the US Army and Marine Corps and its adoption signalled a theoretical and practical change of course. In January 2007 President Bush appointed General Petraeus as Commander of US forces in Iraq and the accompanying surge deployed an additional five army brigades and two marine infantry battalions. While public attention focused on the significant number of extra troops involved, the crux of the strategy was the way those troops were to be deployed. The decision to move units out of large operational bases and into towns and small forward outposts was central to securing the population. This objective now permeated every aspect of the mission.[542] Much of FM 3-24 was drawn from historic case studies such as the Malayan Emergency and the Algerian insurgency against the French. The work of David Galula and his theories on population groups was especially influential. Accounts of US battalion commanders reveal how the direct application of Galula's thesis impacted on the situation on the ground. For example, Lieutenant-Colonel James R. Crider claims that his decision to task two platoons with 24 hour foot patrols in Baghdad was taken directly from Galula's writings and that it yielded rapid, positive results.[543]

General Petraeus combined lessons drawn from COIN case studies with knowledge gained through US Army and Marine Corps successes in Iraq to lay out a uniform strategy. Under Petraeus, the tone of American operations in Iraq changed. Those operations were now scrutinised under a cost-benefit analysis which asked whether the operation would "take more bad guys off the street than it creates by the way it is

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[541]T. E. Ricks, *The Gamble: General Petraeus and the Untold story of the American Surge in Iraq 2006-2008* (New York: Penguin Press, 2009) p. 33.

[543]Crider, op. cit., p. 84.

conducted".[544] A new cultural awareness which had already been evident in some units began to permeate US forces across Iraq. Under the mantra 'clear, hold, build' US forces re-entered suburbs and towns that had long been written off and remained there. Soldiers and Marines were now required not only to fight but to protect, teach, and rebuild infrastructure and even to intercede in community disputes. Training of Iraqi security forces continued to be a priority but was now integrated into a broader strategy. This approach has been described as 'full spectrum operations' and although it is a departure from conventional warfare it is not a new concept. Its key tenets are derived from classic COIN practitioners.

By the end of 2006, there were clear signs of a split emerging between the foreign dominated AQI movement concentrated in the Sunni Triangle in and around Baghdad and their Iraqi hosts.[545] Through a combination of careful negotiation, the building of good will, and arguably, luck; coalition forces were able to exploit this split. In al-Ambar, a province declared "lost" in October 2006, the US Marine Corps succeeded not only in isolating the populance from the insurgency but recruiting locals into the fight against it.[546] The adoption of FM 3-24 demonstrates that the US can conduct effective large scale COIN operations. General Jack Keane described the improvement in the security situation in Iraq during 2007 as "unprecedented in the annals of COIN practice".[547] While attacks on US forces and sectarian violence had decreased by the end of 2007, political progress moved at a slower pace, with the Maliki government slow to meet the benchmarks set for it by Washington. Lt Colonel Peter Mansoor, who was then General Petraus' Chief of Staff, argues that the chief success gained from the surge is that it has earned "time and space for the competition of power and resources in Iraq to play out in the political realm with words instead of bombs".[548] This suggests that the American mission remains unfulfilled and that its successful completion requires a sustained commitment.

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[544]Malkasian, op. cit., p.245.

[545]A. Phillips, "How al Qaeda lost Iraq", *The Australian Journal of International Affairs*, vol. 63, no. 1 (2009), p. 64.

[546]T.E. Ricks, "Situation Called Dire in West Iraq: Anbar is Lost Political Analyst Says", *The Washington Post* (11 November, 2006, Online. Available HTTP: <http://www.washingtonpost.com/wp-dyn/content/article/2006/09/10/AR2006091001204.html> (accessed 7 February 2010)

[547]J. Keane cited in B. Woodward, *The War Within: A Secret White House History 2006-2008*, (New York: Simon & Schuster), p. 433.

[548]Mansoor, op. cit., p.345.

Evaluating the Mission

Judging the success of the US mission in Iraq requires an understanding of the mission's initial objectives and the broader political purpose behind these objectives. Within the Bush administration it was widely believed that Iraq was ripe for democratisation. This opinion was not derived from any specialised knowledge of Iraq, but from an ideological belief that democracy is a natural default preference for any population liberated from oppression.[549] The administration expected that this transformation would happen rapidly.[550] The evidence suggests that the administration believed that Iraq's democratisation would require little long term support from the US. Carter Malkasion argues that "the two pillars of US strategy: democratisation and the building of a national and integrated Iraqi Army, did not match the sectarian realties of Iraq".[551] The Bush administration conceived that the new Iraq would be secular, united and would eventually take its place as an ally in the Global War on Terrorism (GWOT).[552] It was anticipated that such an Iraq would become a useful counterweight to the growing influence of Iran.[553] Arguably, the most striking assumption was that the democratisation of Iraq would spark a chain reaction of reform across the Middle East. The scale of the administration's ambitions for Iraq was out of proportion with the political, military and economic resources at its disposal, not to mention the will of the American people.

If one were to judge the success of the American mission in Iraq purely against the objectives specified in March 2003, one would have to conclude that the mission had failed. However, this assessment would ignore the changing nature of the mission and the emergence of new objectives and expectations. The definition of what might qualify as strategic success has clearly changed between 2003 and 2010. Stephen Biddle contends that success may come in a form that many Americans find difficult to recognise. According to Biddle, the best case scenario is an Iraq that is stable, united, at peace with its neighbours and is not a haven for al-Qaeda.[554] Biddle's description

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[549]M. M. Zais, "Iraq: The way ahead", *Military Review*, vol. 88, no. 1 (2009), p.112.

[550]Zais, op. cit., p.113.

[551]Malkasian , op. cit., p. 248.

[552]Woodward, *State of Denial* op. cit (2009)., p.109.

[553]Ricks *The Gamble*, op. cit., (2009) p. 318.

[554]S. Biddle, "Patient stabilised: Iraq may be emerging from intensive care", *National Interest,* no. 94 (2008), p. 37.

includes no explicit mention of democracy or of human rights. A reading of the relevant literature suggests that this thinking is fairly representative of those who have served and worked in the theatre, but lacks wide support in Washington.[555]

The March Parliamentary elections were a clear success in terms of participation. In contrast to earlier polls, all sections of Iraqi society voted in strength. Therefore the results can be said to better reflect the will of the people. However, the people did not express that will with clarity. Almost three months after the elections votes were still being counted. This delay and the resulting uncertainty over the governance of the country risk strategic drift. In early June 2010 the Iraqi Supreme Court took a major step to breaking that deadlock by ratifying the results and announcing that Iraqiya alliance led by Ayad Allawi which is backed by much of the Sunni community[556]. However, it remains likely that Allawi will need to seek the support of al-Maliki and negotiations are ongoing.

The elections generated controversy before they were even held. In January 2010, the Iraqi Election Commission banned almost 500, mainly Sunni, candidates. These bans prompted US Ambassador Christopher Hill to state publicly that the credibility o the elections was threatened. Although levels of sectarian violence in the lead up to the 2010 elections was far less than previous polls, the number of attacks did rise sharply in late 2009 and early 2010. This rise comes off a low base thanks to the success of the surge. Nevertheless, these attacks remind us that the insurgency continues. Opinion is divided as to whether these attacks represent a new and growing threat or the death throes of the insurgency.[557] Nor is it clear if these attacks are primarily the work AIQ and their associates or the remnants of the old Baathist regime.[558] The US claims that AIQ is now struggling to recruit new members. It is thought that US and Iraqi forces have captured or killed over 400 hundred AIQ operatives since January 2010[559].

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[555]See Ricks, *Fiasco* op. cit., (2006), Woodward, *The War Within* and Mansoor, op. cit., (2008).

[556] S. Salaheddin 'Iraq's Supreme Court ratifies election results Associated Press (available online) http://www.google.com/hostednews/ap/article/ALeqM5hwK_CSpBxsNuVUEaDuOwmSSCiqGwD9G2G4EO0 (accessed 16/6/2010)

[557]Stratfor Global Intelligence, "Iraq a Shift in the Insurgency", (January 20, 2010), (available online) www.stratfor.com/iraq, (accessed 7 February 2010).

[558]Ibid.

[559] AFP 'Al-Qaeda struggling to find recruits in Iraq: US general Ralph Baker' *The Australian* 26/4/2010

While it is clear that the situation has dramatically improved since the carnage of the summer of 2006, it is unclear how sustainable these gains really are. At that point Iraq stood on the brink of civil war. In retrospect it appears that the full horror of such a war was avoided not only because of the efforts of Coalition forces but because the Iraqi people recoiled from the view from the precipice. However, it may be that a full scale sectarian conflict is inevitable in the long term. The carnage of 2006 leaves no doubt about how bitter and bloody a full scale Iraqi Civil War would be. The US had its own Civil War that settled some grievances, sparked others but ultimately forged a stronger Union. An Iraqi Civil War could conceivably do the same. However, it could mortally wound the Iraqi nation state. If that were to happen the conflict may spread to draw in both Iraq's Sunni and Shi'a neighbours and the consequences of that scenario are sobering indeed.

Critics of the surge argue that it has made only cosmetic changes without addressing the core problems faced by Iraqi society. Reidav Visser has called the reconstruction project a "colossus with feet of clay". [560] Visser argues that neither the Sadarists nor the Sunnis have been fully integrated into the political process and that doing so will ultimately require both groups participation. He sees a long term trend towards authoritarianism.[561]

An authoritarian Iraq is not necessarily a bad strategic outcome from Washington's point of view. The prospect, however, of a Shi'a *coup de etat* followed by an alliance with Iran would be a nightmare scenario for Washington and Iraq's large Sunni population. It is likely that American strategic success in Iraq will require a fundamental shift in the way Iraqis conduct their politics. Such a shift will probably require a degree of sectarian reconciliation that may simply be unachievable. The Iraqi Army remains a predominantly Shi'a institution, although its progress and conduct is thought to have improved considerably since the 'charge of the knights' in 2008.[562] The fact that Prime Minister Nouri al-Maliki has taken action against Shi'a militias is significant. It is clear, however, that al-Maliki's instincts remain sectarian. There is speculation that al-Maliki's government is host to Iranian clients.[563] Iran is in a strong position and it is likely that its influence will grow. It may be that Tehran has calculated that all it need

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[560]R.Visser, "The Sadarists of Basra and the far south of Iraq"*, Norwegian Institute of International Affairs*, NUPI Working Paper 734, May 2008, p. 9.

[561]Visser, op. cit., p. 12.

[562]Ricks, *The Gamble* op. cit., (2009) p. 323.

[563]Ibid., p.325.

do is to wait for a Shi'a takeover in Baghdad. The probability of this chain of events unfolding will increase as US influence in Iraq decreases. It may be that limiting Iranian influence in Iraq will compel the US to align with Moqtada Al Sadr, the least pro-Iranian of the Shi'a leaders. This would obviously be challenging for Washington on several levels. However, wars can create strange bedfellows.

The primary source of US influence in Iraq is the approximately 92,000 American troops stationed there. According to the current US-Iraq Status of Forces Agreement (SOFA), that number will decline to 50,000 by August 2010 and by the end of 2011 all American combat forces are due to leave Iraq.[564] Both President Barak Obama and Defence Secretary Robert Gates have indicated, however, that a substantial residual force may stay on. It may be that those troops who stay on do so as 'military advisors'. There is concern that the arrangements imposed by the US on Iraqi sects and factions will not hold once the American withdrawal begins. John McCreary argues that the power sharing arrangements have produced something that looks like peace but is unsustainable once the imposing power withdraws.[565]

The US may struggle to maintain security on the ground once it commences its withdrawal from Iraq. If the security situation were to deteriorate significantly at that point, it is unlikely that the American people would support a renewed surge. Emma Sky argues that the US must "reframe the issue for the American people" in order to buy time to complete the mission.[566] This raises a classic COIN dilemma. The successful counterinsurgent must not only win the support of the population in the theatre of operations, but they must also rally the support of their population at home. The British experienced this dynamic during the Boer War and again in Ireland. The Americans experienced it in Vietnam. Peter R. Mansoor claims that "the generational nature of these types of conflicts cuts against the grain of American strategic culture which favours short, decisive wars with definite beginnings and ends".[567] COIN is laboured intensive and prolonged. David Kilcullen claims that there has never been a

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[564]The White House, "US-Iraq Status of Forces Agreement", (November 17, 2008), (available online) http://georgewbush-whitehouse.archives.gov/infocus/iraq/SE_SOFA.pdf (accessed March 15, 2009).

[565]J. McCreary cited in Ricks, op. cit., p. 328.

[566]E.Skye cited in Ricks, op.cit. p. 334.

[567]Mansoor, op. cit., p. 348.

successful COIN campaign that lasted less than ten years.[568] That may well mean retaining a sizeable US presence in Iraq until at least 2017. Given the unpopularity of the war and the deteriorating situation in Afghanistan, it will be difficult for any administration to convince the American public of the need to complete the mission in Iraq. Arguably, the only way to do so effectively is to remind the public of the consequences of leaving an Iraq that is unstable and a threat to the region and ultimately, to the US itself.

Washington can credit the surge as an operational success. This success is remarkable when one considers the low ebb reached prior to its implementation. However, this success does not constitute victory in the traditional sense. Indeed the triumphal connotations of the word make it unsuitable for the American mission in Iraq, even if it were correct. A victory of sorts remains possible if strategic success can be achieved. However, strategic success will require a deep and sustained commitment, rather than a temporary surge of forces. COIN remains the optimal strategic approach because it offers the best probability of setting and achieving military objectives that fulfil Washington's political purpose. The nature of that political purpose has changed since 2003 and while justice has not been entirely sacrificed to order, it is clear that Washington's goals are geared more towards pragmatism than idealism. Washington's political purpose now requires a stable Iraq rather than a secular, democratic nation. If the US is to achieve strategic success in Iraq it will be after the passing of many more years and regrettably, the loss of more lives. If such a success does occur it will be seen as an Iraqi success rather than an American one. This may seem unjust to the US in light of the massive American sacrifice in blood and treasure, but it will ultimately be the only true measure of success. Whether that success is to be considered worthwhile, having resulted from so many failures and errors of judgment and requiring so much sacrifice is a question for the American people.

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[568]D.Kilcullen, "Countering global insurgency", *Small Wars Journal,* (2004), available online: http://smallwarsjournal.com/documents/kilcullen.pdf (accessed 27 April 2009).

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