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FOREWORD

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

In recent years, the AIIA has been active in extending its activities to younger members of the community. The AIIA has launched a variety of initiatives to engage young people including young professionals' networks, careers fairs, schools events, mentoring programs and the Young Diplomats Program.

As part of the AIIA's commitment to engage youth in international affairs, AIIA National Office launched an internship program in 2006. Since the commencement of the program, National Office has hosted more than 100 interns from Australia and overseas. A number of branches host internship programs, including very active programs at the AIIA's New South Wales and South Australian Branches. For more information, visit www.aiaa.asn.au.

Given the high quality of papers prepared, all of which have been subject to academic review, the AIIA is pleased to promote this work to a broader audience. The AIIA aims to produce an annual *Emerging Scholars* volume in order to publicise interns' research. Please note that the opinions contained in this volume are those of the authors alone and do not represent the views of the AIIA.

This volume of *Emerging Scholars* includes reports on a variety of challenging issues in international affairs.

At the close of the decade since September 11 2001, it is not surprising that chapters deal with the issues that this decade has raised such as the application of international humanitarian law both to terrorism and counterterrorism measures and the difficulties of distinguishing between combatants and civilians in asymmetrical warfare. Closer to home, a chapter examines the potential for a nexus between organised crime and terrorism in Papua New Guinea.

Some pieces deal with issues that have been much in the news, such as deterrent measures against asylum seekers in the Asia Pacific and Mediterranean and on the expanding role of digital information and communications technology in international human rights advocacy, including the impact of WikiLeaks. A chapter assesses the impact of China's and Australia's public diplomacy at the 2010 Shanghai Expo.

Other chapters deal with issues that should be perennial, such as morality and national interest within aid and development policies and the utility of a social development and human rights approach to crime prevention.

Looking ahead, a chapter examines the dynamics of the US-Australian relationship in a rapidly evolving strategic and geopolitical context while the final paper plans for the future of an Arctic region with reduced ice cover by looking at the need for a comprehensive agreement between the Arctic states.

We hope you enjoy your reading.

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 – 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 Gale Wilkinson, Olivia Boyd, Hallah Nilsen, Danielle Rajendram and Phanthanousone Khennavong 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 AIIA.

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

June 2011

ACRONYMS AND ABBREVIATIONS

ACMA	Australian Communications and Media Authority
AEPS	Arctic Environmental Protection Strategy
ANZUS	Australia, New Zealand, and United States Security Treaty
AP	Additional Protocol
APEC	Asia-Pacific Economic Cooperation
ASEAN	Association of South East Asian Nations
ATS	Antarctic Treaty System
AUSFTA	Australia-U.S. Free Trade Agreement
AUSMIN	Australia-U.S. Ministerial
CIDA	Canadian International Development Agency
CLCS	Commission on the Limits of the Continental Shelf
CPTED	Crime Prevention Through Environmental Design
CRA	Revealed Comparative Advantage
CTAP	Counter Terrorism Action Plan
DAC	Development Assistance Committee
DFAT	Department of Foreign Affairs and Trade
DPH	Direct Participation in Hostilities
EAS	East Asian Summit
ECP	Enhanced Cooperation Plan
EEZ	Exclusive Economic Zone
EP	Paiton Energy
ERIA	Economic Research Institute for ASEAN and East Asia
ETAP	Electoral Technical Assistance Program
EU	European Union
FARC	The Revolutionary Armed Forces of Colombia
FATF	Financial Action Task Force
GC	Geneva Convention
GFC	Global Financial Crisis
GWOT	Global War on Terror
ICAT	International Coalition Against Terrorism

ICJ	International Court of Justice
ICMPD	International Centre for Migration Policy Development
ICPC	International Centre for the Prevention of Crime
ICRC	International Committee of the Red Cross
ICT	Information Communications Technology
ICTY	International Criminal Tribunal for the Former Yugoslavia
IED	Improvised Explosive Device
IHL	International Humanitarian Law
IOM	International Organisation for Migration
IPA	Indonesian Petroleum Association
IPP	Independent Power Producing
ISP	Internet Service Provider
JBIC	Japanese Bank for International Cooperation
JETRO	Japan External Trade Organization
JICA	Japan International Cooperation Agency
JIEPA	Japanese Indonesian Economic Partnership Agreement
LTTE	Liberation Tigers of Tamil Eelam
MOU	Memorandums of Understanding
MTM	Mediterranean Transit Migration
NATO	North Atlantic Treaty Organisation
NGO	Non-Governmental Organisations
ODA	Official Development Assistance
OECD	Organisation for Economic Co-operation and Development
PNG	Papua New Guinea
POW	Prisoner of War
ROK	Republic of Korea (South Korea)
RPNGC	Royal Papua New Guinea Constabulary
RUF	Revolutionary United Front
RUSI	Royal United Services Institute
SLOC	Sea Lines of Communication
SME	Small and Medium Enterprises
TEMPCO	Tokyo Electrical Power Company

TPP	Trans-Pacific Partnership
UN	United Nations
UNCCP	United Nations Committee on Crime Prevention and Control
UNCLCS	United Nations Commission on the Limits of the Continental Shelf
UNCLS	United Nations Convention on the Law of the Sea
UNCTOC	United Nations Convention against Transnational Organised Crime
UNDP	United Nations Development Programme
UNHCR	United Nations High Commissioner for Refugees
UNODC	United Nations Office on Drugs and Crime
WHO	World Health Organisation
WMD	Weapons of Mass Destruction

Undermining the State: The ‘Crime-Terror Nexus’ and Papua New Guinea

Sean G L Jacobs*

The overlap between crime and terrorism is creating unprecedented security challenges for developing states. To sustain or further operations, terror groups have sought to extend collaboration with criminals and criminal networks. The Revolutionary Armed Forces of Colombia and the Taliban in Afghanistan are prominent examples of this convergence. Papua New Guinea, with high levels of crime, state weakness and corruption, provides an interesting sample of how developing states are attempting to prevent the emergence of a ‘crime-terror nexus’. Entering into international security agreements and strengthening the police force are two pragmatic ways to achieve this. This chapter thus examines the challenges faced by Papua New Guinea in applying the Asia Pacific Economic Cooperation (APEC) Counter Terrorism Action Plan. It also discusses the multitude of challenges faced by the Royal Papua New Guinea Constabulary in controlling crime and its possible convergence with terrorism.

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The state of Papua New Guinea (PNG) has been identified as both a possible haven and staging ground for terrorists. This fear has become particularly acute since the attacks of September 11, 2001 and subsequent concerns over weak states and state failure.¹ The increasing convergence of crime and terrorism has rejuvenated this anxiety, given PNG's high incidence of lawlessness, state corruption and weak national security institutions.

This chapter examines the convergence between crime and terrorism, and how this development is posing challenges for PNG's counter-terrorism apparatus. Although no terror groups are known to operate within PNG currently, increasing levels of crime, state weakness and corruption heighten the possibility of a crime-terror nexus. This is predicted to emerge in an attack on foreign nationals within PNG or materialise under a 'flag of convenience' arrangement where document fraud gives passage to terror groups or individuals. This creates two fundamental challenges for PNG's national security apparatus: (1) by limiting the enforcement of international security agreements such as the Asia Pacific Economic Cooperation group (APEC) Counter Terrorism Action Plan (CTAP) and, to some extent, the now-modified Australia-PNG Enhanced Cooperation Program; and (2) by threatening to overwhelm the state's principal counter-terrorism agency – the Royal Papua New Guinea Constabulary (RPNGC).

Crime and Terrorism

The links between crime and terrorism, also referred to as the 'crime-terror nexus', are well-documented. The mutual benefits accrued from cooperation allow terrorist groups and criminals to further their respective political and economic objectives. As commentators have noted, the distinct economic and political lines separating terrorists from criminals have, over time, "blurred rapidly".² A primary cause has been a decline in state-sponsored terrorism since September 11, 2001.³ This has prompted terror groups to seek alternative sources of funding.⁴ As a result, many terror groups now almost

¹ S. Patrick, 'Weak States and Global Threats: Assessing Evidence of "Spillovers",' Centre for Global Development (January 2006) available online: www.cgdev.org/files/5539_file_WP_73.pdf (accessed 20 October 2010).

² F.S. Perri, T.G. Lichtenwald and P.M. MacKenzie, 'Evil Twins: The Crime-Terror Nexus', *The Forensic Examiner* (2009) available online: <http://www.all-about-psychology.com/support-files/crime-terror-nexus.pdf> (accessed 20 October 2010).

³ E. Luttwak, 'A Truman for our times,' *Prospect* (31 August 2008) available online: <http://www.prospectmagazine.co.uk/2008/08/atrumanfourtimes/> (accessed 17 October 2010).

⁴ *Ibid.*

exclusively rely upon the narcotics trade to finance operations.⁵ The Revolutionary Armed Forces of Columbia (FARC), Hezbollah in Lebanon and the Taliban in Afghanistan are just a few examples of this direct crime-terror convergence.⁶

There are, however, limits to cooperation. Terror groups remain motivated by ideology and not economic profit. Although security planners point to the similarity of ‘method’ between terror groups and criminal organisations – also known as the “methods, not motives” approach – differing motives can still be observed.⁷ A competition with the state for legitimacy, a desire for exposure and a propensity for violence are three areas that continue to distinguish terrorist groups from criminal organisations.⁸

In both PNG and the Oceania region, these distinctions explain how terrorism is considered “not a current threat”⁹ while a growing level of transnational crime persists, for example illicit drug and people smuggling, money laundering and illegal logging.¹⁰ For regional and national policymakers, law enforcement agencies and regional analysts, it is the possibility of terrorism that heightens concerns over a crime-terror nexus in PNG.

Terrorism in PNG

Analysts and regional observers have underscored that terrorism does not, at present, take place within PNG. The University of Hawaii’s Jim Rolfe, for example, has noted that: “[c]onditions in parts of Papua New Guinea... are such that a description of terrorism could be applicable, but there seems to be

⁵ D.T. Johnson, ‘The Escalating Ties between Middle Eastern Terrorist Groups and Criminal Activity,’ Address to the Washington Institute for Near East Policy (19 January 2010) available online: <http://www.washingtoninstitute.org/html/pdf/johnson-remarks20100119.pdf> (accessed 17 October 2010), p. 1.

⁶ Ibid., p. 1.

⁷ L. Shelley and J. Picarelli, ‘Methods and Motives: Exploring the Links Between Transnational Organized Crime and International Terrorism,’ *Trends in Organized Crime*, vol. 9, no. 2 (2005), p. 53.

⁸ A. Schmid, ‘Links Between Terrorism and Drug Trafficking: A Case of “Narco-Terrorism”?’ International Summit on Democracy, Terrorism and Security (27 January 2005) available online: <http://english.safe-democracy.org/causes/links-between-terrorism-and-drug-trafficking-a-case-of-narcoterrorism.html> (accessed 20 October 2010).

⁹ J. Rolfe, ‘Oceania and Terrorism: Some Linkages with the Wider Region and the Necessary Responses’, Centre for Strategic Studies, New Zealand (2004) available online: http://www.victoria.ac.nz/css/docs/working_papers/WP19.pdf (accessed 14 October 2010), p. 3.

¹⁰ R. McCusker, ‘Transnational crime in the Pacific Islands: real or apparent danger?’, Australian Institute of Criminology (March 2006), available online: <http://www.aic.gov.au/publications/current%20series/tandi/301-320/tandi308/view%20paper.aspx> (accessed 14 October 2010).

no groups operating with terrorism as their prime tactic”.¹¹ There are three observations that support this analysis.

First, the level of state failure that typically allows terror groups to function – such as Somalia, regions of Afghanistan and Pakistan– does not exist in PNG. As political scientist Francis Fukuyama’s analysis of PNG revealed in 2007, “there are no warlords or regional centers of power strong enough to challenge the state itself”.¹² The absence of an armed insurgency within PNG limits the high intensity of terrorism that unstable states endure.¹³ Second, the US-State Department’s 2009 ‘Country Reports on Terrorism’ – arguably the world’s most comprehensive global terrorism report – only mentions PNG twice; both are brief references to training for state security officials and bilateral security cooperation.¹⁴ Third, there have been, since 2008, no Pacific states on the Financial Action Task Force blacklist.¹⁵

There are a number of ideological and demographic explanations for a failure of terrorism to manifest in PNG. Islam, for one, remains a minority religion within the state and is dwarfed by popular Christianity.¹⁶ The Muslim population is placed at only 4000 out of a total population of six million.¹⁷ One ABC news source reported that instances of Islamophobia are “quite

¹¹ J. Rolfe, op. cit. (2004), p. 6.

¹² F. Fukuyama, ‘Governance Reform in Papua New Guinea’, Johns Hopkins School of Advanced and International Studies (September 2007) available online: <http://www.sais-jhu.edu/faculty/fukuyama/publications.html> (accessed 17 October 2010).

¹³ The glaring exception to this was the Bougainville Crisis. From the late 1960s to 1990, between 15,000 and 20,000 people are estimated to have lost their lives. With increased autonomy and international assistance, however, the Province is now considered stable: see G. Dobell, ‘Report claims 20,000 people died during Bougainville crisis,’ *The World Today* (21 November 2001) available online: <http://www.abc.net.au/worldtoday/stories/s422294.htm> (accessed 30 November 2010).

¹⁴ United States Department of State, ‘Chapter 2: Country Reports: East Asia and Pacific Country Reports on Terrorism’ (2009) available online: <http://www.state.gov/s/ct/rls/crt/2009/140884.htm> (accessed 1 September 2010).

¹⁵ The Financial Action Task Force is, to quote its website, “an inter-governmental body whose purpose is the development and promotion of national and international policies to combat money laundering and terrorist financing” available online: http://www.fatf-gafi.org/pages/0,2987,en_32250379_32235720_1_1_1_1.00.html (accessed 21 October 2010); S. Windybank, ‘The Illegal Pacific, Part 1: Organised Crime’, Centre for Independent Studies (4 June 2008) available online: <http://www.cis.org.au/publications/policy-magazine/article/1782-feature-the-illegal-pacific-part-1-organised-crime> (accessed 21 October 2010), p. 37.

¹⁶ According to the US State Department’s 2007 International Religious Freedom Index Report, “96 percent of citizens identify themselves as members of a Christian church”: see US State Department Human Freedom Index Report, ‘Papua New Guinea’ (2007) available online: <http://www.state.gov/g/drl/rls/irf/2007/90150.htm> (accessed 3 November 2010).

¹⁷ ABC News, ‘Growing numbers convert to Islam in PNG’ (17 November 2008) available online: <http://www.abc.net.au/news/stories/2008/11/17/2422255.htm> (accessed 21 October 2010).

common.”¹⁸ Given the issues surrounding isolated Muslim populations, Muslim and non-Muslim social cohesion seems a likely area of concern for the government of PNG.

Despite these observations on the absence of ‘home-grown’ terrorism, there remains a consensus that a number of conditions – high levels of crime, state weakness and corruption – appear optimal for the possibility of PNG to serve as a host or staging ground for terrorism. In order to pinpoint the most likely crime-terror scenario, however, an examination of the nature of crime in PNG – particularly transnational crime – is required. This is best examined through the rubric of state weakness and corruption.

Crime, State Weakness and Corruption

Crime, state weakness and corruption are broad but interlinked areas. Each depends heavily upon the other for durability. It is therefore difficult to discuss crime, particularly transnational crime, without properly acknowledging these other elements. As Antonio Maria Costa, the Executive Director of the United Nations Office on Drugs and Crime points out, transnational crime, in any region, consistently flows along “the path of least resistance”.¹⁹ This phrase is important as it raises the issue of what constitutes ‘resistance’ and, in PNG’s case, what constitutes fundamental state weakness.

The absence of robust state presence can invite a ‘path of least resistance’ and invite transnational crime. This is most evident in regions of Africa where a weak state, in proximity to other weak states, has inevitably resulted in high incidences of transnational crime such as maritime piracy, drug trafficking, trafficking in persons and environmental crime.²⁰ Small island littoral regions, such as the Caribbean, have also been noted for their vulnerability to drug trafficking.²¹

¹⁸ Ibid.; Ben Scott’s extensive report on PNG also notes the establishment challenges that Islam faces: see B. Scott, ‘Re-imagining PNG: culture, democracy and Australia’s role’, Lowy Institute for International Policy (2005) available online:

<http://www.lowyinstitute.org/Publication.asp?pid=319> (accessed 21 October 2010).

¹⁹ A. Maria-Costa, ‘Transnational Organized Crime as a Threat to Peace and Security’, Council on Foreign Relations (17 June 2010) available online:

http://www.cfr.org/publication/22580/transnational_organized_crime_as_a_threat_to_peace_and_security.html (accessed 22 October 2010).

²⁰ Ibid.

²¹ McCusker, op. cit. (2006).

A useful comparison can be made to the Oceania and South-East Asian region, which has been termed an ‘arc of instability’.²² Within this region there have been multiple instances of state breakdown – such as violence in the Solomon Islands and East Timor – as well as enterprise-based transnational crime. Drug trafficking within the region is considered to be growing, according to a number of regional reports and substantial drug hauls in Fiji, Tahiti and Tonga.²³ Environmental crime – particularly illegal trade in timber – is also considered to be on the rise and escaping any serious prosecution.²⁴

The use of ‘flags of convenience’ is another criminal arrangement that has the ability to cause severe transnational disruption.²⁵ It can also directly aid terrorism. For example, in 2002:

“Croatian police in October seized a Tongan-registered vessel carrying explosives to Iraq; the previous month Italians intercepted another Tongan-registered vessel claiming it had landed 15 Pakistani *al Qaeda* members said to be planning strikes in Europe; and earlier in the year, Israeli authorities captured 50 tonnes of Iranian source weapons destined for the Palestinian Authority from a Tongan-registered ship in the Red Sea”.²⁶

The Tongan example is important for two reasons. First, it captures a region-specific convergence between crime and terrorism. Second, it underscores the overall level of state weakness in enabling this transaction to take place. Vessel registration, in any state, is a legal-administrative affair that requires a state’s maritime authority to approve registration. When paired with state corruption, this could extend beyond a maritime ‘flag of convenience’ to other forms of registration. ‘Breeder documents’, which provide the basis for common identification, could be issued by the state to terror groups or individuals. The Sudanese government, by issuing a number of passports to

²² G. Dobell, ‘The Pacific ‘arc of instability’,’ *ABC Correspondent’s Report* (20 August 2006) available online: <http://www.abc.net.au/correspondents/content/2006/s1719019.htm> (accessed 30 October 2010)

²³ McCusker, op. cit. (2006).

²⁴ A. Schloenhardt, ‘The illegal trade in timber products in the Asia-Pacific region’, Australian Institute of Criminology (2008) available online <http://www.illegal-logging.info/uploads/AusinsituteofcriminologyonILinAsiaPacific.pdf> (accessed 4 November 2010).

²⁵ ‘Flags of convenience’ refers to the practice of registering a merchant ship with a sovereign state different to that of the ship’s owners and flying the flag of the registration state on the ship. ‘Flags of convenience’ are often used when ship owners seek to avoid the regulations imposed by their home state.

²⁶ A. Renton-Green, ‘International Organised Crime, Piracy, and International Terrorism – an Asia-Pacific Convergence?’, Paris Institute of Criminology (22 November 2002) available online: <http://www.drmcc.org/spip.php?article77> (accessed 30 October 2010).

known terrorists throughout the 1990s, is a prominent example of this kind of criminal activity.²⁷

Where such state complicity in criminal activity appears, it becomes part of the ‘state-crime nexus’. According to Georgetown University Professors John Bailey and Roy Godson, this emanates in two broad forms: the first is where only “[s]ome state actors seek co-operation with criminals” while the second is where “all state structures are involved in criminal activities”.²⁸ PNG can be classified in the former category. As outlined, total state failure in PNG has not occurred. However, state-level corruption, particularly in law enforcement, is unfortunately widespread. As the former Police Minister for PNG, Bire Kimisopa, revealed in 2005: “Chinese mafia have bought off officials throughout the system... they are operating illegal businesses, they are siphoning money out, corrupting Government officials, colluding with police and making attempts to kill officials as well”.²⁹ As this shows, and as will be analysed further, state corruption is debilitating for agencies responsible for national security and counter-terrorism.

A Crime-Terror Nexus in PNG

As a result of this fragmented state-crime nexus, conditions in PNG thus appear conducive to a number of crime-terror nexus scenarios. PNG has a reservoir of opportunistic criminals, or what used to be termed ‘raskol’ gangs, with the potential to aid or assist a terror group aiming to strike within the state.³⁰ State weakness, paired with corruption, could also result in the creation of breeder documents or a ‘flag of convenience’ scenario as witnessed in Tonga.

Given these factors, Centre for Independent Studies researcher Susan Windybank and PNG economist Mike Manning isolated the two most predictable crime-terror nexus scenarios in PNG. First, they noted that “[t]errorists could pay criminal gangs to assist them with preparations for

²⁷ Luttwak, op. cit. (2008).

²⁸ J. Bailey and R. Godson as quoted in E. Marat, ‘The State-Crime Nexus in Central Asia: State Weakness, Organized Crime, and Corruption in Kyrgyzstan and Tajikistan,’ Central Asia-Caucasus Institute (October 2006) available online:

<http://www.silkroadstudies.org/new/docs/Silkroadpapers/0610EMarat.pdf> (accessed 24 October 2010) p. 22.

²⁹ ‘Chinese mafia and corrupt police cripple PNG – The Age, 2005’, available online:

<http://crimeandcorruptionpng.wordpress.com/2010/01/11/chinese-mafia-and-corrupt-police-cripple-png-the-age-2005/> (accessed 24 October 2010).

³⁰ H. Hughes and G. Sodhi, ‘The Bipolar Pacific,’ Centre for Independent Studies (21 August 2008) available online: <http://www.cis.org.au/publications/issue-analysis/article/800-the-bipolar-pacific> (accessed 30 November 2010), p. 16.

attacks on Australian soil or against Australian civilians and assets in PNG”.³¹ The 2002 Bali bombings are a clear example of an attack of this nature. Second, a “cash-strapped PNG government could resort to selling passports and visas to the highest bidder, or terrorists may use PNG as a flag of convenience to register ships that transport operatives and equipment”.³² Although no open source information alludes to direct cover being provided for terror groups or individuals, there have been multiple instances of state protection of foreign criminal enterprises. According to another study by Susan Windybank, Chinese gambling operators allegedly pay senior police “some \$6 million a year in protection money”.³³ There are also press reports of other highly questionable activities conducted by foreign businesses operating within PNG.³⁴ Given such state convergence with organised crime, it is not unlikely that government-issued protections in the form of passports or other false documents could, directly or indirectly, end up with terrorists.

This potential crime-terror nexus creates two key challenges for counter-terrorism agencies in PNG. First, the crime-terror nexus challenges PNG’s counter-terrorism agencies to properly enforce international security agreements such as the APEC Counter Terrorism Action Plan (CTAP) and the now-modified Australia-PNG Enhanced Cooperation Program (ECP). Second, the crime-terror convergence has the potential to overwhelm the state’s principal counter-terrorism agency, the Royal Papua New Guinea Constabulary (RPNGC). Before these two challenges can be considered, however, a brief discussion of the national security context within PNG is warranted.

PNG’s National Security Institutions

At the core of well developed national security institutions is a doctrine of strong oversight and co-ordination. Australia, for example, utilises a ‘four pillars’ approach to its national security institutions that includes diplomacy,

³¹ S. Windybank and M. Manning, ‘Papua New Guinea On the Brink,’ Centre for Independent Studies (12 March 2003) available online: <http://www.cis.org.au/publications/issue-analysis/article/871-papua-new-guinea-on-the-brink> (accessed 31 October 2010), p. 11.

³² Ibid.

³³ S. Windybank, op. cit. (2008), p. 36.

³⁴ Ibid. See also T. Kelola, ‘Call to stop alien influx,’ *PNG Post Courier* (20 September 2010), p. 4; ‘Prime Minister of Papua New Guinea Threatens to Kill Political Rival,’ *Daily Telegraph* (21 July 2010) available online: <http://www.telegraph.co.uk/news/worldnews/australiaandthepacific/papuanewguinea/7902418/Prime-minister-of-Papua-New-Guinea-threatens-to-kill-rival-politician.html> (accessed 1 December 2010).

defence, domestic security and intelligence.³⁵ Oversight and coordination within these pillars is well-planned, monitored and governed. It is clear that effective national security institutions rely upon strong state oversight.

PNG, by comparison, does not administer any equivalent level of direction or administration. This emanates from a fundamental state weakness. To revisit Fukuyama's earlier comment on the lack of "centers of power", many PNG observers have, in addition, persistently cited state weakness and limited collective action as core features of the PNG state.³⁶ This hampers not only the state's capacity for service delivery, but also its ability to maintain well-regulated borders, control crime and, in this case, mitigate a complicated crime-terror nexus.

Applying International Security Agreements

However, like any nation-state, PNG is obliged to rely upon its national security apparatus to counter the effects of a crime-terror convergence. In the absence of any comprehensive national security agencies, international security agreements can become a principal organising agent for counter-terrorism coordination. For instance, APEC calls for member states to submit and update a Counter Terrorism Action Plan (CTAP).³⁷

PNG's CTAP, last submitted in September 2009, provides a comprehensive overview of the various institutional arrangements that PNG relies upon to curb terrorism. It does this by listing government agencies and their "objectives", "expected outputs", "measures taken", "further measures" and "capacity building needs to be met".³⁸ The broad range of agencies include: PNG Customs, Department of Transport, Civil Aviation Authority, Immigration Services, the National Executive Council, the Central Bank of PNG, Department of Petroleum and Energy, and the RPNGC.³⁹ In the absence of a robust national intelligence department, much of the counter-terrorism effort in the CTAP becomes the responsibility of the RPNGC.

³⁵ C. Ungerer, 'Australia's national security institutions: Reform and renewal,' Australian Strategic Policy Institute (29 September 2010) available online http://www.aspi.org.au/publications/publication_details.aspx?ContentID=267 (accessed 31 October 2010).

³⁶ B. Reilly, "'Making Democracy Work" in Papua New Guinea: Social Capital and Provincial Development in an Ethnically Fragmented Society,' *Asian Survey*, vol. XLII, no. 6 (2002), p. 906.

³⁷ Asia Pacific Economic Cooperation (APEC), 'Counter Terrorism Action Plans', (2010) available online: http://www.apec.org/apec/apec_groups/som_committee_on_economic/som_special_task_groups/counter_terrorism/counter_terrorism_action_plans.html (accessed 31 October 2010).

³⁸ See *Ibid.*: 'Papua New Guinea'.

³⁹ *Ibid.*

The CTAP underlines the integrated nature of the state in countering a crime-terror nexus. Due to the complexity of modern security threats, states must engage government agencies without any specific expertise in counter-terrorism for national security.⁴⁰ In PNG's case, agencies such as the PNG Quarantine Service or the Department of Petroleum and Energy have, in effect, become part of the national counter-terrorism apparatus. Although not relied upon to undertake 'hard' counter-terrorism operations, mitigating the risk of terrorism relies upon these agencies to be functional in their respective capacities. The failure of PNG's maritime authority, for example, to properly administer vessel registration could result in illegal arms moving freely across borders, as seen in Tonga's case.

There is, however, some scepticism of whether such agencies are equipped to integrate, at any serious level, into a counter-terrorism plan. This scepticism is due to chronic state underperformance in nearly all arenas of government. According to Bill Standish, a long-time observer of PNG, "[in] much of the country the capacities of government institutions are over-stretched: most urban and rural people suffer from collapsing roads, and declining schools, health and other basic services".⁴¹ There are seemingly no government agencies, except perhaps the PNG Finance and Treasury Departments⁴², which are not reported as experiencing a high level of political or technical dysfunction.⁴³

The domestic application of Pacific-wide agreements is also worth considering here. At a regional level, many Pacific governments are known to persistently voice cooperation yet struggle to apply regional agreements domestically. The 2002 Nasonini Declaration – a regional touchstone on security cooperation – emphasised the point that "further urgent action was

⁴⁰ In Australia, for example, "there are over 30 commonwealth departments and agencies with an interest in national security; and the national security community now includes relevant state and territory agencies and the corporate sector": see M. Shoebridge, 'Australia's national security,' *United Service*, vol. 62, no. 1 (2011), p. 14.

⁴¹ B. Standish, 'The dynamics of Papua New Guinea's democracy: an essay,' *Pacific Economic Bulletin*, vol. 22, no. 1 (2007), p. 135.

⁴² Fukuyama's analysis noted the relatively competent performance of these agencies "granted the structural problems of their inability to monitor discretionary funds and other forms of spending": see F. Fukuyama, 'Observations of State-Building in the Western Pacific,' Johns Hopkins School for Advanced International Studies (2007) available online: <http://www.sais-jhu.edu/faculty/fukuyama/publications.html> (accessed 31 March 2010).

⁴³ The CTAP calling for "the association of disease surveillance networks" from the Quarantine Division is one such example of integrating security objectives with functional administrative tasks in the PNG context.

required of some member states”.⁴⁴ Ratification of any international agreement is, of course, a global problem and not just confined to the Pacific. However, slow security reform in Pacific states essentially amounts to a situation where, to quote Rolfe, “levels of rhetoric... are higher than the levels of action”.⁴⁵

The Police Response

The RPNGC is the institution that faces the primary challenge from PNG’s emerging crime-terror nexus. This has taken place in the absence of a national intelligence network or comprehensive terrorism or transnational crime legislation.⁴⁶ Without a well-devised national policy mechanism or legal framework most counter-terrorism coordination is thrust upon an overwhelmed RPNGC.

Dysfunction and Corruption

Multiple reports have noted the dysfunctional nature of the police in PNG. The most recent insight was delivered by a 2010 report from the United Nations Special Rapporteur on Torture.⁴⁷ According to Rapporteur Manfred Nowak, the police struggle to apply the rule of law “due to insufficient human and financial resources, high levels of corruption and a lack of political will”.⁴⁸ The Australian National University’s Hugh White mirrors these observations, adding that “PNG’s police are dysfunctional for many reasons... administrative systems that cannot do simple things such as paying phone bills and maintaining fuel supplies mean that police lack basic tools to do their job”.⁴⁹

Further compounding limited resources is the issue of police corruption. Internal reports have illustrated the high level of corruption within the police

⁴⁴ This point in the Nasonini Declaration actually emphasises the limited progress on the 1992 Honiara Declaration: see Pacific Islands Forum Secretariat, ‘The Nasonini Declaration’ (2002), available online: <http://www.forumsec.org.fj/resources/uploads/attachments/documents/Nasonini%20Declaration%20on%20Regional%20Security%202002.pdf> (accessed 14 December 2010).

⁴⁵ Rolfe, op. cit. (2004), p. 10.

⁴⁶ Ibid., p. 11.

⁴⁷ Associated Foreign Press (AFP), ‘United Nations report accuses Papua New Guinea police of beating prisoners,’ *news.com.au* (25 May 2010) available online: <http://www.news.com.au/breaking-news/united-nations-report-accuses-papua-new-guinea-police-of-beating-prisoners/story-e6frku0-1225871261315#ixzz12cXmjgKm> (accessed 17 October 2010).

⁴⁸ Ibid.

⁴⁹ H. White, ‘Let’s rebuild trust in our ties with PNG,’ *The Age* (18 May 2005) available online: <http://www.theage.com.au/news/Hugh-White/Lets-rebuild-trust-in-our-ties-with-PNG/2005/05/17/1116095958900.html> (accessed 14 October 2010).

force. A RPNGC probe in 2006, for example, identified 66 officers involved in corruption.⁵⁰ One of those implicated in the 2006 probe was the then-director of Fraud and Anti-Corruption who, although now demoted, still continues to serve within the RPNGC.⁵¹ Based on a number of recent discussions with PNG police officials, police corruption, although improving, lingers as an endemic problem.

A direct outcome of police corruption is the vast amount of small arms and light weapons that have escaped police inventory lists. In 2005 the Small Arms Survey, an independent project based at the Swiss-based Graduate Institute of International Studies, attempted to map firearm circulation in PNG's notoriously troubled Southern Highlands region. The study revealed the level of state failure in regulating the flow of firearms. It also suggested a high degree of state complicity. According to survey researcher Philip Alpers:

“[the] most destructive firearms used in crime and conflict in the Southern Highlands were supplied by police and soldiers within PNG. Virtually all the high-powered weapons we saw, or which were described to us, were firearms originally issued to the country's own military and law enforcement agencies. At all levels of discussion in PNG, it's no secret that politicians and civil servants are implicated in the domestic small arms trade”.⁵²

Corrupt state security officials can severely contribute to the emergence of a crime-terror nexus. The 2008 Mumbai terror attacks provide a relevant example. As noted by Prem Mahadevan of the Royal United Services Institute, the Pakistani terrorists responsible for the attack sought convergence – mostly for logistics – with a regional drug trafficking network that, in turn, was “bribing law enforcement officials”.⁵³ Corrupt security officials, particularly in this case, can act as a catalyst for the emergence of a crime-terror nexus.

⁵⁰ Radio New Zealand International, ‘PNG police probe finds 66 corrupt officers’ (27 February 2006) available online: <http://www.rnzi.com/pages/news.php?op=read&id=22505> (accessed 2 November 2010).

⁵¹ Published information on positions of high level personnel in the RPNGC is particularly difficult to obtain. Re-shuffling of personnel also takes place frequently, particularly at a line management and senior management level.

⁵² ‘Armed and Dangerous: The Crisis in Papua New Guinea,’ *Australian Financial Review* (2 April 2005).

⁵³ P. Mahadevan, ‘A Wilderness of Shifting Mirrors,’ *The RUSI Journal*, vol. 155, no. 5 (2010), p. 41.

Personnel and Bilateral Security Agreements

The RPNGC, similar to police forces in other developing states, must also contend with an extreme shortage of personnel. This is exemplified in the police to civilian ratio. The United Nations, given its technical experience in state-building, provides a recommendation on the number of police personnel to civilians to maintain an adequate level of law and order. This recommendation is 1 police officer to 400 civilians (1:400).⁵⁴ PNG's ratio, however, is 1:1200 – three times the UN threshold.⁵⁵ Although not confirmed in print, discussions with members of the PNG Law and Justice Sector suggest that the police force is roughly the same size as it was upon independence in 1975. Since 1975, however, PNG's population has more than doubled.⁵⁶

Bilateral security programs further expose the complexity of problems facing the police in PNG. The Australia-PNG Enhanced Cooperation Program (ECP), initiated in 2003 during peak concern over state failure, provides a relevant example. A defining characteristic of the Programme was the insertion of Australian police personnel within PNG police units. This type of 'in line' assistance, coupled with "increased cooperation in the areas of security, law enforcement, defence, customs, immigration and transport",⁵⁷ was aimed at directly strengthening the police and the state of PNG to control crime. Such 'in line' immersion, however, was eventually ruled unconstitutional by the PNG Supreme Court.

Following this ruling, Australian security expert Hugh White commented that, given the complexities of the problems faced by police, the ECP's goals were "trying to tackle problems at the wrong level".⁵⁸ A number of police building initiatives, particularly in other developing states, have expired in a similar fashion to the ECP.⁵⁹ Although 'in line' police assistance can be a vital security instrument, the ECP is an example of how the upper levels of

⁵⁴ S. Mbogo, 'Africa: police for peace,' Relief Web (14 August 2009) available online: <http://www.reliefweb.int/rw/rwb.nsf/db900sid/VVOS-7UWMSW?OpenDocument&RSS20&RSS20=FS> (accessed 1 December 2010).

⁵⁵ There are only 4800 members of the RPNGC: United States Department of State, 'Primer on Personal Security in Papua New Guinea,' available online: http://travel.state.gov/travel/cis_pa_tw/cis/cis_1757.html (accessed 1 December 2010).

⁵⁶ Hughes and Sodhi, *op. cit.* (2008), p. 4.

⁵⁷ Australian Agency for International Development, 'Australia Papua New Guinea Ministerial Forum 2003,' (12 December 2003) available online: http://www.aisaid.gov.au/hottopics/topic.cfm?ID=9936_7922_1525_9871_1026 (accessed 16 October 2010).

⁵⁸ H. White, *op. cit.* (2005).

⁵⁹ *Ibid.*

security policy must also be addressed. For developing states, simply “increasing expenditures”⁶⁰ is unlikely to acquit the complications of security, particularly a complicated multifaceted crime-terror nexus.

Conclusion

Terror groups are continually innovating. To sustain financial support, they have increased their convergence with criminals and criminal groups in a ‘crime-terror nexus’. This creates a fundamental challenge to states, particularly developing states such as PNG.

A crime-terror nexus is most likely to form within PNG under two scenarios. The first would be where a terror group enlists opportunistic criminals within PNG to carry out an attack on foreign nationals. The second would be where a ‘breeder document’ or ‘flag of convenience’ was used by terrorists to sustain, build or carry out terrorist operations.

These two crime-terror scenarios pose significant challenges for PNG’s already challenged national security apparatus. First, attempting to counter the emergence of a nexus has exposed the limitations of applying international counter-terrorism instruments such as the APEC CTAP. Second, counter-terrorism operations have entirely overwhelmed an already under-resourced and dysfunctional RPNGC. Attempts to directly build the police force, such as the Australia-PNG ECP, have further exposed the complexity of countering a crime-terror nexus.

It is by examining these challenges, however, that solutions to countering both crime and terrorism can be identified. Coordinating counter-terrorism efforts with other states through regional bodies such as APEC and building a strong police force unsusceptible to corruption represent the greatest opportunity of PNG improving its state security capacity and, in turn, countering an impending crime-terror nexus.

⁶⁰ Developed states also face these challenges: see R. Perl, ‘Combating Terrorism: The Challenge of Measuring Effectiveness,’ CRS Report for Congress (12 March 2007) available online <http://www.fas.org/sgp/crs/terror/RL33160.pdf> (accessed 17 October 2010), p. 6.

The 2010 Shanghai World Expo: An Exercise in Public Diplomacy?

Kara Muratore*

The 2008 Beijing Olympics positioned China firmly on the world stage. Two years later in 2010, the Shanghai World Expo once again placed China in the spotlight. But this time, the affair was not as one-sided with another 242 nations participating. When nations sell their messages in an international forum, then the currency they use can only be the phenomenon called public diplomacy, an important yet under-examined topic in international relations. This chapter investigated the use and effectiveness of public diplomacy at the 2010 Shanghai World Expo by carefully analysing both the Australian and Chinese efforts to promote international images for themselves.

This chapter finds that the nature of public diplomacy – dealing with the thoughts and perceptions of the masses – makes it hard to evaluate the effectiveness of public diplomacy measures. Yet, that does not mean that judgements as to the effectiveness of public diplomacy cannot or should not be attempted. This chapter assesses the Australian and Chinese public diplomacy at Expo 2010 by three criteria drawn from the academic debate surrounding this topic: the number of participants reached, whether the message projected was appropriate in its reflection of reality and, finally, if the act of public diplomacy was a

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part of a long-term project consistent with the nation's foreign policy objectives.

Although the long-term impact of China's and Australia's public diplomacy can not yet be measured in full, the initial assessment of a mixed result, with both countries performing well on some criteria but experiencing difficulties on others.

China is Australia's second largest trading partner, its largest source of international students and a growing source of international investment.¹ By 2010, Chinese was the second most commonly spoken language in Australia.² Yet, also in 2010, 46 per cent of Australians polled by the Lowy Institute believed that China would become a military threat in the next 20 years.³ This sentiment, on the rise since the previous poll in 2009, has not gone unnoticed in China with 48 per cent of Chinese people agreeing that Australia was "a country suspicious of China."⁴ The Shanghai World Expo in 2010, with its anticipated 70 million sightseers presented a not-to-be-missed opportunity for Australia and China to engage in a mutual dialogue of exchange and public diplomacy.

For Australia, more so than for China, this bilateral relationship is of considerable significance. In recent times, Australia struggled to overcome the clichéd image of being a sunbathed nation of beaches and deserts, with abundant natural resources and a wide variety of unusual and strange animals, such as kangaroos, standing on street corners.⁵ Yet, Australia is not the only country struggling against the prevailing stereotypes of their society. China also has issues, combating stereotypes that include the depiction of China as cold, backward and intolerant of dissent, neglectful of human rights.⁶ Such perceptions, although containing elements of truth – Australia does have many beaches –are not representative of the whole truth.

However, these stereotypes do not have to prevail as a nation's identifying features. As Canadian public diplomacy expert Daryl Copeland observes, today "a nation's brand has become its strategic equity, a key vector of influence, and a source of legitimacy" and so it is imperative for nations such as Australia and China, to find a

¹ Department of Foreign Affairs and Trade, *Trade in Services Australia 2008* (July 2009), p. 9, available online: <http://www.dfat.gov.au/publications/stats-pubs/tis-cy2008.pdf> (accessed 3 October 2010); see also M. Wesley, *Australia's Poisoned Alumni: International Education and the Costs to Australia* (Lowy Institute Policy Brief, August 2009), Annexure 2, available online: <http://www.lowyinstitute.org/Publication.asp?pid=1103> (accessed 20 September 2010).

² Shanghai World Expo 2010 Australian Pavilion, 'Australia-China Relationship,' available online: http://www.australianpavilion.com/en/australia_china_relationship.aspx (accessed 20 September 2010).

³ J. Broadbent et. al., *Australia's Diplomatic Deficit: Reinvesting in our Instruments of International Policy* (Lowy Institute for International Policy, 2009), p. 9, available online: <http://www.lowyinstitute.org/Publication.asp?pid=996> (accessed 1 August 2010).

⁴ F. Hanson and A. Shearer, *China and the World: Public Opinion and Foreign Policy* (Lowy Institute for International Policy and MacArthur Institute, 2009), p. 7, available online: <http://www.lowyinstitute.org/Publication.asp?pid=1193> (accessed 20 September 2010).

⁵ Senate Standing Committee on Foreign Affairs, Defence and Trade, *Australia's Public Diplomacy: Building our Image*, (Canberra: Parliament of Australia, August 2007), pp. 54-55, available online: http://www.aph.gov.au/Senate/committee/fadt_ctte/completed_inquiries/2004-07/public_diplomacy/report/report.pdf (accessed 1 August 2010); Personal Communications with L. Sachs, Commissioner General of the Australian Pavilion (18 September 2010).

⁶ A. Haupt, 'Bitter Stereotypes,' in *Intertext: A Student Publication of the Syracuse University Writing Program* (1999), available online: <http://wrt-intertext.syr.edu/VII/haupt.html> (accessed 8 September 2010).

solution that enables them to reconcile reality with their external image.⁷ The answer that has been identified – public diplomacy – is consequentially a hot topic of discussion.⁸

What is Public Diplomacy?

The term public diplomacy was coined in 1965 by Edmund Gullion to describe a phenomenon that was revolutionising the conduct of foreign relations employees.⁹ Old style, state-to-state diplomacy, with its associated traditions, methods and practices was being cast aside in response to the changing international political reality¹⁰ which included the spread of democracy, the unprecedented levels of media coverage and the rise of global non-governmental organisations (NGOs).¹¹ In response to this broadening of society, governments came to understand that the citizens of each country have some impact on shaping its government's policies and so public diplomacy was born. Public diplomacy is about strategic communication, through a variety of modes such as media and culture to develop a positive relationship with a mass audience.¹²

Former Australian Foreign Minister, Gareth Evans defined public diplomacy as “an exercise in persuasion and influence” which extends beyond the traditional governmental audience.¹³ Public diplomacy can often be confused with another term – ‘soft power’, conceived by Harvard Professor Joseph Nye in 2004 to describe the means by which a nation can gain influence without the use of force, or hard power.¹⁴ Public diplomacy may be a mechanism for the deployment of soft

⁷ D. Copeland, *Guerrilla Diplomacy: Rethinking International Relations* (Colorado: Lynne Rienner Publishers, 2009), p. 47.

⁸ J. Melissen, ‘Public Diplomacy: Between Theory and Practice,’ Presentation at the First Madrid Conference on Public Diplomacy (2006), p. 1, available online: http://www.clingendael.nl/publications/2006/20061200_cdsp_paper_melissen.pdf (accessed 16 August 2010)

⁹ K. Siddiqui and Q. Amal, *Diplomacy and Statecraft Cases and Readings*, Second Edition (Victoria: Tilde University Press, 2010), p. 47.

¹⁰ N. Cull, *Public Diplomacy: Lessons from the past* (Los Angeles: Figueroa Press, 2009), p. 13, available online: <http://uscpublicdiplomacy.org/publications/perspectives/CPDPerspectivesLessons.pdf> (accessed 16 August 2010); see also B. Hocking, ‘Rethinking the “New” Public Diplomacy’ in J. Melissen (ed.), *The New Public Diplomacy: Soft Power in International Relations* (Basingstoke and New York: Palgrave Macmillan, 2005), pp. 28-30.

¹¹ M. Leonard with C. Stead & C. Smewing, *Public Diplomacy* (London: The Foreign Policy Centre, 2002), pp. 2-3; see also M. Tehranian, *Global Communication and World Politics: Domination, Development and Discourse* (Boulder: Lynne Rienner Publishers, 1999), pp. 64-65.

¹² M. Leonard, ‘Diplomacy by Other Means,’ in *Foreign Policy* (September-October 2002), pp. 48-50.

¹³ G. Evans, ‘Australia and Asia: The Role of Public Diplomacy’ (1990) as quoted by J. Chey, ‘Cultural Diplomacy and Australia – China Cultural Relations,’ Public Speech at AIIA’s NSW Branch Charteris Lecture (Sydney: 20 July 2010).

¹⁴ J. Nye, *Soft Power: The Means to Success in World Politics* (Cambridge: Perseus Publishing, 2004) as quoted in I. d’Hooghe, *The Rise of China’s Public Diplomacy* (The Hague: Netherlands Institute of

power, but it is not the same thing. For example, it is possible for an international actor such as North Korea to engage in public diplomacy, and yet not have the ability to persuade other nations using its soft power.¹⁵ This is because soft power is something that a country must earn, including through mechanisms such as public diplomacy.

‘Nation-branding’ can be seen as a manifestation of public diplomacy where messages are coordinated towards an end: “nation branding involves telling a unique story with a clear shape and direction,” according to Daryl Copeland and “the resulting brand is a distillation of that story into a form that effectively conveys national values, policies and interests.”¹⁶ By contrast, public diplomacy should be contrasted with propaganda and its purely negative associations. Public diplomacy, even when in the form of nation-branding, involves dialogue and is at its core more complex than a simple didactic message.¹⁷

Gauging the Effectiveness of Public Diplomacy

While the aim of public diplomacy can be clearly identified, it can be executed in many ways. This is because much of what constitutes public diplomacy is both commonsense and opportunistic. Daryl Copeland highlights this aspect of public diplomacy when he argues that “public diplomacy does not need to be situated in a theoretical framework in order to be intelligible.”¹⁸ Accordingly, there is no one theoretical matrix which establishes a set of indicators against which public diplomacy may be judged.

Dr Nicholas Cull, professor of public diplomacy at the University of Southern California suggests that the clearest indicator of a successful public diplomacy campaign is adhering to what he calls “the Golden Rule of Public Diplomacy,” which is that what you are promoting abroad and what you are doing at home must align.¹⁹ University of Sydney Professor Jocelyn Chey suggests as one measure of effectiveness that any serious public diplomacy effort ought to be accompanied by thorough public opinion surveys.²⁰ Surveys, such as the yearly Lowy Institute polls

International Relations, 2007), p. 7, available online:

http://www.clingendael.nl/publications/2007/20070700_cdsp_paper_hooghe.pdf (accessed August 21st 2010).

¹⁵ Cull, op. cit. (2009), p. 15.

¹⁶ D. Copeland, op. cit. (2009), p. 171.

¹⁷ S. Mark, *Discussion Papers in Diplomacy: A Greater Role for Cultural Diplomacy*, (The Hague: Netherlands Institute of International Relations, 2009), pp. 21-22, available online:

http://www.clingendael.nl/publications/2009/20090616_cdsp_discussion_paper_114_mark.pdf (accessed 21 August 2010); see also J. Melissen, op. cit. (2006), pp. 3-4.

¹⁸ D. Copeland, op. cit. (2009), p. 165

¹⁹ Cull, op. cit. (2009), p. 27.

²⁰ Personal Communications with J. Chey, Academic, (6 September 2010).

have the benefit of being able to provide an account of changing perceptions over a period of time.

In November 2006, the Senate Standing Committee on Foreign Affairs, Defence and Trade was asked to prepare its first report on Australia's public diplomacy, in which one of the primary aims was to establish a framework for assessing the effectiveness of the then current public diplomacy programs.²¹ The resulting report, published in August 2007, dealt with the difficulties faced with the execution and evaluation of public diplomacy. The Committee recommended as a matter of priority that the Department of Foreign Affairs and Trade (DFAT), as the principal coordinator of Australia's public diplomacy effort develop a clear and specific set of performance indicators.²² In the January 2009 Government response to the report, 15 recommendations, including the one concerned with measuring the effectiveness of DFAT, were merely noted in what has been labelled by Alex Oliver of the Lowy Institute as an "inadequate and dismissive" 18 page reply.²³ That being said, ten specific performance indicators were identified in the response, which ranged from examining the amount of media coverage generated, to the number of participants and their levels of influence.

DFAT's list of indicators, though extensive, focused more what was being delivered and less about what was being conveyed, and how what was being conveyed was a part of the bigger picture of Australia's foreign policy aims. For this reason, this chapter will use the following criterion to assess the effectiveness of public diplomacy:

- The number of participants, both direct and indirect,
- The appropriateness of the message, and its reflection of reality,
- If the act of public diplomacy can be identified as having an impact, as a component of a sustained, long-term project.

This chapter investigated the effectiveness of the Australian and Chinese public diplomacy efforts at Expo 2010, as both nations sought to make the most of this opportunity. The information used in this chapter was gathered from a variety of sources including:

- Interviews with Ms Lyndall Sachs, Commissioner General of the Australian pavilion at Expo 2010; Professor Jocelyn Chey, a visitor to the Expo and

²¹ Senate Standing Committee on Foreign Affairs, Defence and Trade, op. cit. (2007), p. 2.

²² Ibid., p. 182.

²³ A. Oliver, 'Public Diplomacy Adrift,' *The Interpreter* (26 August 2009), available online: <http://www.lowyinterpreter.org/post/2009/08/26/Public-diplomacy-adrift.aspx> (accessed 29 September 2010)

- academic in the field of public diplomacy and Australia's relationship with China;; and a company that is a sponsor of the Australia pavilion in Shanghai
- Media reports from both Australian and Chinese sources
 - Online news media blogs
 - Official Expo 2010 related websites specific to the Australian and Chinese pavilions
 - Parliamentary reports and proceedings
 - Academic literature on public diplomacy.

Following a description of World Expo 2010, assessments will be made of both the Australian and Chinese activities including the budget, official aims of the pavilion organisers and the content of each pavilion. Finally, chapter identifies similarities and differences between the two countries' approaches and makes observations on the future of the Expo and of public diplomacy.

The 2010 Shanghai World Expo

The preparation and staging of any World Expo is huge. As advertised in the official World Expo Shanghai 2010 website, the scale of Expo 2010 was likened to being China's economic, scientific and technology Olympics.²⁴ Secretary-General of the Bureau International des Expositions Vicente Gonzalez Loscertales answers described Expo 2010 as "a work of herculean effort and a miracle of sorts."²⁵

Everything about the Expo, which opened on 1 May 2010 and continued for 184 days until 31 October 2010, was of ground-breaking proportions. The site of the Expo straddled both sides of the Huangpu River in Shanghai's centre and covered 13,000 acres, or nearly 53 square kilometres. To give more of a sense as to the sheer magnitude of the Expo, the location of Expo 2010 was 20 times larger than the 2008 International Expo held in Zaragoza, Spain and was twice the size of the micro-state of Monaco.²⁶ In this space, an unprecedented 192 participating nations and 50 NGOs and organisations designed and built their pavilions.²⁷ The Chinese pavilion, designed to resemble an ancient imperial crown, was the largest at 65m with a floor space of more than 26 soccer fields, which was approximately 30 times the size of the American pavilion. Over the duration of the event, organisers

²⁴ World Expo Shanghai 2010 Official Website, 'What is the World Expo?' (2010), available online: http://en.expo2010.cn/expo/expo_english/oe/awe/we/userobject1ai35594.html (accessed 20 August 2010).

²⁵ V. G. Loscertales, 'The greatest show on Earth: BIE Chief; Secretary-General says Expo will 'transform' Shanghai,' in *China Daily* (China: Holiday Edition, 1-2 May 2010), p. 1.

²⁶ C. Hogg, op. cit. (2010).

²⁷ Bureau International des Expositions, Expo 2010 Interviews, Interview with Mr W. Jinzhen (2010), available online: <http://www.bie-paris.org/site/en/library-a-publications/expo-2010-interviews/362-interview-with-mr-wang-jinzhen-commissioner-general-of-the-china-pavilion.html> (accessed 10 September 2010).

expected an estimated 70 million visitors or 400,000 daily.²⁸ Whilst it was thought that the majority of visitors to Expo 2010 would be Chinese, thanks to the wonders of technology, many others from around the globe were able to experience the Expo.²⁹ From 9:00am to midnight daily, visitors to the Expo site were bombarded with the frenetic pace of the schedule, which included more than 20,000 performances over the duration of the Expo.³⁰ The opening gala was choreographed by the artistic team behind the Vancouver Winter Olympics, and was a departure from the more low-key beginnings of the World Expos of yesteryear. Featuring an all-star cast, Hong Kong kung fu star Jackie Chan opened the event in song and was followed by Italy's tenor superstar Andrea Bocelli.³¹

Australia and the Shanghai World Expo

At each World Expo, participating nations and NGOs are allocated an allotment of land with which to create a small piece of home. This means that there is an element of competition with other countries involved: prior to the event, a 2007 Senate Committee Report noted, "significant effort [is] required to project and establish a positive image of Australia in a fiercely contested international space."³²

In Shanghai, Australia's presence was coordinated and headed by DFAT as the culmination of three years' work.³³ Australia was represented by what was essentially "the world's most expensive rusty shed" which looked like "a monolith of curved oxidised steel, ringed by raw Pilbara iron ore looking not unlike Kata Tjuta or Uluru."³⁴ The 20 metre high pavilion occupied a space of 4,800 square feet and was designed to host an average of 40,000 guests daily,³⁵ a figure which was exceeded with an average 46,000 visitors passing through the pavilion each day.³⁶

²⁸ 'You've Come a Long Way, Baby: Shanghai Finds its Big Feat,' *Sydney Morning Herald* (1 May 2010), available online: <http://www.smh.com.au/travel/news/youve-come-a-long-way-baby-shanghai-finds-its-big-feat-20100430-tzbt.html> (accessed 20 August 2010).

²⁹ 'Shanghai Kicks off World Expo with Lavish Show,' *ABC News* (1 May 2010), available online: <http://www.abc.net.au/news/stories/2010/05/01/2887639.htm> (accessed 20 August 2010).

³⁰ Expo Museum Online, 'World Fairs Podcast Three' (2010), available online: <http://www.worldsfairpodcast.com/mp3/WFP-003.mp3> (accessed 10 September 2010),

³¹ ABC News, *op. cit.* (2010).

³² Senate Standing Committee on Foreign Affairs, Defence and Trade, *op. cit.* (2007), p. 185.

³³ *Ibid.*, p. 33.

³⁴ J. Garnaut, 'Expo Extravaganza a Shed, but Not as Hu Knows It,' *Sydney Morning Herald* (30 January 2010), available online: <http://www.smh.com.au/world/expo-extravaganza-a-shed-but-not-as-hu-knows-it-20100129-n49l.html> (accessed 6 September 2010). For images, see A. Warr, 'The Australian Pavilion' (29 April 2010), available online: <http://www.indesignlive.com/articles/events/shanghai-expo-2010/the-australian-pavilion> (accessed 27 September 2010); P. Corlette, 'BlueScope Steel appoints Ikon' (17 July 2010) available online: <http://www.adnews.com.au/news/bluescope-steel-appoints-ikon> (accessed 27 September 2010); '2010: Shanghai Odyssey', *Foreign Policy* (30 April 2010), available online: http://www.foreignpolicy.com/articles/2010/04/30/2010_shanghai_odyssey%20?page=full (accessed 27 September 2010).

³⁵ Expo Museum Online, *op. cit.* (2010).

³⁶ *Sydney Morning Herald*, *op. cit.* (2010).

As a case in point, lamington sales proved to be double initial expectations, with as many as 1,000 being sold in the one day!³⁷ Closing day on 31 October, a projected 10 per cent or 7 million visitors in total to the 2010 Expo were to have experienced this snapshot of Australia.³⁸ The Australian pavilion designed to be a manifestation of what Australia represents, and a tribute to the history of the nation. As such, it is a carefully constructed façade, designed specifically with the aim of engaging with a mainly Chinese foreign public in an attempt to advance Australia's image.³⁹

Mr Tesch, Executive Director of the Shanghai World Expo, noted that Australia was fortunate to have received a large plot of land at 14,800 square metres, in comparison to its neighbours which were on plots of only 2,000 to 3,000 square metres.⁴⁰ The size of the plot was indicative of the amount of money and time invested into the project.⁴¹ In order to maximise the use of the space given and the comparative importance of Australia's relationship to China the Expo budget was increased from 2005⁴² and included A\$73 million from the Commonwealth Government and a further A\$10 million from the eight state and territory partners and additional eight corporate sponsors divided into levels – platinum, gold, silver and bronze.⁴³ The University of Sydney, a gold sponsor, contributed A\$1 million to the cause, while platinum sponsorship, such as that belonging to ANZ, BlueScope Steel and Rio Tinto, was valued at around A\$3 million.⁴⁴ The Australian pavilion and its programs combined to form the largest single public diplomacy project that the Australian government has ever engaged in.⁴⁵

With this much money in hand, the important question to consider is what the aims of the pavilion were, and how these were reflected in the content of the pavilion. Peter Sams, the Director of the Australian pavilion, summed up the aim for Australia as simply “to evangelise the gospel of Australia.”⁴⁶ The official DFAT objectives for participation in the Expo covered three broad objectives:

- Trade and investment
- The promotion of a modern and harmonious Australia which possesses great strengths in education and the arts

³⁷ Sydney Morning Herald, op. cit. (2010).

³⁸ Garnaut, op. cit. (30 January 2010).

³⁹ C. Wolf Jnr. and B. Rosen, *Public Diplomacy: How To Think About It and Improve It* (Pittsburgh and Santa Monica: RANT Corporation Occasional Paper, 2004), p. 4.

⁴⁰ Parliamentary Standing Committee on Public Works, op. cit., (2008), p. 10.

⁴¹ Senate Standing Committee on Foreign Affairs, Defence and Trade, op. cit. (2007), p. 185.

⁴² P. Sams in Expo Museum Online, op. cit. (2010).

⁴³ Personal Communications with L. Sachs, op. cit. (2010).

⁴⁴ L. Battersby, 'Corporate Diplomats' Elite Strategy,' *Sydney Morning Herald* (28 May 2010), p. 10, available online: http://www.usyd.edu.au/shanghai_expo/news/280510_Corporate_diplomats.pdf (accessed 27 September 2010).

⁴⁵ Personal Communications with L. Sachs, op. cit. (2010).

⁴⁶ P. Sams in Expo Museum Online, op. cit. (2010).

- The strengthening of cooperation and bilateral ties between China and Australia.⁴⁷

Lyndall Sachs, Commissioner General of the Australian pavilion, described the short-term aim of the pavilion as that visitors, whether public or VIP, left with a positive disposition towards Australia. This “emotional souvenir” would help facilitate the medium-term goal of the Australia pavilion, which was to get all manner of guests, both public and corporate, to want to find out further information about Australia.⁴⁸ Furthermore:

In the long term, it is hoped that Australia’s reputation as a good place to visit as a tourist, as a quality provider of education and a good place to do business will grow, and that all those who come to the pavilion remain positively disposed towards Australia, and that they spread word of their positive experience to family and friends. Particularly in China, with a culture that values long-term relationships which can often take considerable time before bearing fruit, this is a goal that may take decades to be fully actualised and is therefore extremely difficult to quantify.⁴⁹

By contrast, corporate sponsors were not targeting the general public.⁵⁰ According to David Morris, Director of Government Relations at the University of Sydney, “it is not mass consumer marketing, it’s about high-level relationships.”⁵¹ Sponsorship of the pavilion not only ensured business exposure, such as the 1,000 seater ANZ Theatre, but it will also provided a private venue for conducting exclusive invite only meetings. According to Jocelyn Chey, there are two separate programs, two entrances and two different experiences offered at the Australian pavilion for the general public and what she stated as the “more important” VIPs and targeted audiences.⁵² By the close of Expo on 31 October, it was estimated that 15,000 people would have attended the anticipated 220 invitation-only seminars, policy discussions, signings, cocktail receptions, lunches and dinners.⁵³ At times, cross promotion of business and nation aligned, such as when Rio Tinto’s promotion of pink diamonds from its Argyle Diamond Mine in Western Australia and its signing of a major deal with Chinese diamond jeweller Chow Tai Fook⁵⁴ led to Peng Peng,

⁴⁷ P. Tesch in Parliamentary Standing Committee on Public Works, op. cit. (2008), p. 3.

⁴⁸ Personal Communications with L. Sachs, op. cit. (2010).

⁴⁹ Ibid.

⁵⁰ L. Battersby, op. cit. (28 May 2010), p. 10.

⁵¹ Ibid.

⁵² Personal Communications with J. Chey, op. cit. (2010); see also J. Kurlantzick, ‘China’s Charm: Implications of Chinese Soft Power,’ Carnegie Endowment for International Peace, Publication Number 47 (June 2006), pp. 1-3, available online: http://www.carnegieendowment.org/files/PB_47_FINAL.pdf (accessed 21 August 2010).

⁵³ Personal Communications with L. Sachs, op. cit. (2010).

⁵⁴ M. Sainsbury, ‘Rio Tinto in Deal to Sell Diamonds to Rich Chinese,’ *The Australian* (27 September 2010) available online: <http://www.theaustralian.com.au/business/rio-tinto-in-deal-to-sell-diamonds-to-rich-chinese/story-e6frg8zx-1225929692900> (accessed 28 September 2010).

the Australian pavilion's kookaburra mascot, being encrusted in approximately 20,000 diamonds.⁵⁵

Having examined the various aims of the Australian pavilion, this chapter turns to examine the content which was designed to facilitate these aims. As former Prime Minister, Kevin Rudd stated in Mandarin in an online video for the Australian pavilion's official website, "visitors to the pavilion will be able to experience and enjoy all aspects of Australian life through cutting edge exhibits and performances by contemporary Australian artists."⁵⁶ As is common in Expos, cultural diplomacy – a subset of public diplomacy – is what is being utilised to sell the messages of the pavilions.⁵⁷ Lyndall Sachs reports that each day at least six hours of cultural activities take place within the pavilion.⁵⁸ The average public visitor spent approximately one hour queuing outside the pavilion, and a further one hour perusing the various historical dioramas, multimedia displays and art exhibitions inside the pavilion.⁵⁹ The "Better City, Better Life" theme resonated in the Australian pavilion, primarily in regards to the creators' attempt to dispel the myth that "Australia is an outback/beach shanty nation and that we actually have cities!"⁶⁰

Pete Ford of Think! OTS, the creative influence behind many exhibitions within the pavilion, identified three acts or stages that public visitors experienced as they progressed through the Australian pavilion: 'Journey', 'Discover' and 'Enjoy'.⁶¹ 'Journey' consisted of walk up an 158 metre elevated ramp as well as an internal journey as the exhibitions along the corridor transported the viewer to 'Australia'.⁶² These exhibits began with an indigenous Mimih Pole room, followed by a made-for-the-occasion documentary entitled Sisters which paid tribute to the 75 sister city relationships between China and also celebrated the contribution of women to

⁵⁵ Rio Tinto, 'Rio Tinto's Diamond Debut at the World Expo in Shanghai' (27 September 2010) available online at <http://www.diamonds.net/News/NewsItem.aspx?ArticleID=32669> (accessed 3 October 2010); Image available from Shanghai World Expo 2010 Australian Pavilion, 'Rio Tinto's Peng Peng' (27 September 2010) available online: <http://www.australianpavilion.com/asset/cms/frontpagebanners/adcd81eb-99c6-479d-80c8-ce7508496487.jpg> (accessed 3 October 2010).

⁵⁶ Shanghai World Expo 1010 Australian Pavilion, 'Message from the Former Australian Prime Minister in Mandarin' (2009, available online: http://www.australianpavilion.com/en/news_media/video.aspx (accessed 15 September 2010).

⁵⁷ Mark, op. cit. (2009), p. 39.

⁵⁸ Personal Communications with L. Sachs, op. cit. (18 September 2010).

⁵⁹ Battersby, op. cit. (2010), p. 10.

⁶⁰ P. Ford in Expo Museum Online, op. cit. (2010).

⁶¹ Ibid.

⁶² M. Boland, 'Culture Comes Down to a Cartoon,' *The Australian* (24 May 2010), available online: <http://www.theaustralian.com.au/news/arts/culture-comes-down-to-a-cartoon/story-e6frg8n6-1225870253759> (accessed 31 August 2010).

both Australia and China.⁶³ After this, the tunnel continued with a section of caricatures that showcased the nation, the land and the people of Australia.⁶⁴ At the end of the tunnel, visitors emerged into the 1,000-seater ANZ Theatre, the stage of ‘Discovery’ where they experienced a multi-screen 3D multimedia show.⁶⁵ Finally, visitors had the chance to ‘Enjoy’ what they discovered as they watched the Melbourne-based aerialist group Airborne perform in a three story atrium and shop in a retail space that provided merchandise as well as a wide variety of Australian cuisine and drinks.⁶⁶

Having now outlined its budget, aims and content, the Australian pavilion can now be assessed according to each of the three criteria proposed by this chapter.

First, how effective was the reach of the Australian pavilion at Expo 2010? The number of anticipated visitors to the pavilion was exceeded. However, staff at the Australian pavilion noted that “a high proportion of [pavilion] visitors has friends or relatives who were in Australia or had visited Australia.”⁶⁷ Whilst there is nothing inherently surprising about this, it is significant as it meant that the public diplomacy message is being received by those with some contact with Australia rather than reach a new audience. By contrast, there was considerable media coverage of Australia in Shanghai which reached a larger and less easy to quantify audience likely to have limited knowledge of Australia. There were some simple things that Australia did that helped to ensure media coverage, such as being the first nation to start building a pavilion, the first nation to start installing exhibitions and the first nation to begin local staff recruitment.⁶⁸ Because of Australia’s early preparation, when Chinese President Hu Jintao visited the Expo site he only went to the Australian and Chinese pavilions because they were the only two ready, causing considerable media coverage that benefitted the Australian message.⁶⁹ Lyndall Sachs refers to this as the “multiplier effect” and noted that as of September 2010 more than 7,000 articles had appeared in the Chinese press with over 70 per cent of these featuring positive opinions about the Australian pavilion as the lead story.⁷⁰

⁶³ C. Yang, ‘Australian Documentary “Sisters” Aims to Build Stronger People’s Bond with China,’ Embassy of the People’s Republic of China in Australia (6 June 2010), available online: <http://au.china-embassy.org/eng/zt/Shanghaiworldexpo/t707764.htm> (accessed 20 August 2010).

⁶⁴ Boland, op. cit. (2010).

⁶⁵ Bureau International des Expositions, ‘Australia – ImagiNation’ (2010) available online: <http://www.bie-paris.org/site/en/Shanghai%202010/pavilions/268-australia-qimaginationq.html> (accessed 6 September 2010).

⁶⁶ Ibid.

⁶⁷ Chey, op. cit. (20 July 2010).

⁶⁸ P. Sams in Expo Museum Online, op. cit. (2010).

⁶⁹ Garnaut, op. cit. (2010).

⁷⁰ Personal Communications with L. Sachs, op. cit. (18 September 2010).

Second, was the overall message and content of the Australian pavilion appropriate in its reflection of reality? The largest issue reported in the media, concerning the content of the pavilion was in regards to the caricatures section which one commentator suggested was a reduction of culture to what he termed a “cartoon strip”.⁷¹ Another commentator enthusiastically noted that the pavilion’s content was not only educational, but also kid-friendly.⁷² Peter Ford of Think! OTS responded to criticism by noting that disagreement over how to represent a nation is commonplace.⁷³ He identified the messages that the pavilion was trying to project was of Australia as a good place for education, tourism and business.⁷⁴

Third, was Australia’s participation designed to help impact a coherent, long-term goal? At one level, the answer was yes: the Shanghai Expo coincided with the 2010 Year of Australian Culture in China and the 2011 Year of Chinese Culture in Australia and was thus a part of a longer term project. At a broader level, this is more difficult to judge because it requires an assessment of Australia’s overall public diplomacy efforts. The 2007 Senate Committee Report was critical of Australia’s grasp of the bigger picture and likewise, the 2009 Lowy Institute “Diplomatic Deficit” report was concerned that Australia’s public diplomacy is generally underfunded, untargeted and poorly integrated into the bigger picture of Australia’s foreign policy goals.⁷⁵

As can be seen, despite the effort put into the creation and design of the Australian pavilion at Expo 2010, according to these criteria Australia’s public diplomacy effort receives a mixed report. Positives included audience size and the message being conveyed while the primary concern is that the benefits gained by Australia from Expo 2010 may be lost in the confusion of Australia’s overall public diplomacy plan.

China and the Shanghai World Expo

Having assessed the Australian public diplomacy effort at the Shanghai Expo, this chapter now turns to examine China’s efforts at the Expo. The Chinese pavilion, otherwise known as “The Crown of the East”, was the largest pavilion present at

⁷¹ Boland, *op. cit.* (24 May 2010); see also J. Clark, ‘Shanghai Expo 2010: It’s a Wonderful World Even Without Jetpacks and Hovercars’ (28 September 2010), available online: <http://www.nomadicnotes.com/> (accessed 3 October 2010).

⁷² K. Baoru, ‘Australian Pavilion: School of the Air, Green Technology’ (2010), available online: http://cnreviews.com/life/travel-tourism/australian-pavilion_20100703.html (accessed 27 September 2010).

⁷³ Ford, *op. cit.* (22 June 2010).

⁷⁴ Warr, *op. cit.* (29 April 2010).

⁷⁵ Broadbent et. al., *op. cit.* (2009), pp. 33-34.

Expo 2010.⁷⁶ The 63 metre high pavilion was shaped in the form of an ancient imperial crown with 56 columns representing the 56 ethnic nationalities of China.⁷⁷ After Beijing's handling of the 2008 Tibetan riots and the Olympic torch's world relay, Foreign Minister Jang Jiechi conceded in March 2010 that the Shanghai Expo represented another chance for China to "launch" its new public diplomacy program.⁷⁸ In 1978 Deng Xiao Ping's reforms opened up a post-Mao China to the world and after the 1989 Tiananmen Square massacre, China became aware of its increasingly negative world image.⁷⁹ Since this time, Chinese scholars and government officials have taken an active interest in public diplomacy as a means of better shaping perceptions of China as its international importance rises.

China and its leaders are using public diplomacy as a tool to seek to promote China's peaceful rise to prominence. According to President Hu Jintao in a 2006 Foreign Affairs meeting:

The increase in our nation's international status and influence will have to be demonstrated in hard power such as the economy, science and technology, and defence, as well as in soft power such as culture.⁸⁰

China's conscious effort to project a benign image has since been termed as China's 'Charm Offensive' or 'Smile Diplomacy.'⁸¹ Yet this public diplomacy attempt was not as effective as anticipated by its organisers. Another report produced by the Senate Standing Committee on Foreign Affairs, Defence and

⁷⁶ Expo 2010 Shanghai China, 'China Pavilion' (2010), available online: http://en.expo2010.cn/c/en_gj_tpl_85.htm (accessed 3 October 2010).

⁷⁷ World Architecture News, 'China Pavilion Completes Ahead of Shanghai's World Expo 2010' (9 February 2010), available online: http://www.worldarchitecturenews.com/index.php?fuseaction=wanappln.projectview&upload_id=13382 (accessed 3 October 2010). For images see: 'Chinese Pavilion of Shanghai World Expo Completed' (8 February 2010), available online: http://news.xinhuanet.com/english2010/photo/2010-02/08/c_13168107.htm (accessed 3 October 2010); Foreign Policy, op. cit. (2010); 'Take a Glance at Inside the China Pavilion,' *China Daily*, (27 April 2010), available online: http://www2.chinadaily.com.cn/china/2010expo/2010-04/27/content_9781097.htm (accessed 3 October 2010).

⁷⁸ A. Bezlova, 'World Expo a Launch Pad for 'New Public Diplomacy'', *IPS News* (29 April 2010) available online: <http://ipsnews.net/news.asp?idnews=51254> (accessed 6 September 2010).

⁷⁹ N. Cull, 'China's propaganda and Influence Operations, Its Intelligence Activities That Target The United States and Its Resulting Impacts on US National Security', Testimony before the US-China Economic and Security Review Commission Hearing (30 April 2009), p. 8, available online: http://www.uscc.gov/hearings/2009hearings/transcripts/09_04_30_trans/09_04_30_trans.pdf (accessed 30 September 2010).

⁸⁰ L. Mingjiang, 'China Debates Soft Power,' *Chinese Journal of International Politics*, Volume 2 (October 2008), p. 289.

⁸¹ S. Rahman, 'Slouching Tiger, Racing Dragon,' *India Today Online* (3 July 2010), available online: <http://indiatoday.intoday.in/site/Story/103941/slouching-tiger,-racing-dragon.html?complete=1> (accessed on 1 September 2010); see also 'From the Charm to the Offensive: China's Smile Diplomacy Shows its Teeth', *The Economist* (7 January 2010), available online: <http://www.economist.com/node/15211534> (accessed 23 August 2010).

Trade, entitled *China's Emergence: Implications for Australia*, noted that this was because China's rhetoric of peace and prosperity, when accompanied by a defence build-up, made China's smile seem more than a little insincere.⁸² China, with its one-party state, struggled to come to terms with an idea of public diplomacy which while it may be state-led, ought not to be state censored.⁸³ Commentators have noted that public diplomacy in China is more often known as "overseas propaganda" which is designed to sell China to the world.⁸⁴

The Chinese Government was reported to have invested an estimated US\$8.7 billion in the period of 2009-2010 to improve its image abroad.⁸⁵ Of this, Shanghai was believed to have received approximately US\$4.2 billion for the Expo, more than double the spending on the 2008 Olympics, as well as tens of billions of dollars more for an expensive makeover of the city's infrastructure and the iconic Bund foreshore.⁸⁶ The budget allocated towards the pavilion has been estimated at 1.5 billion Yuan or approximately US\$200-220 million.⁸⁷

The important question, both for the Chinese authorities and for the purposes of this chapter, is for what purpose did the organisers of the pavilion use this money? Commissioner General of the pavilion Wang Jinzhen noted that the overarching theme of the pavilion, in keeping with the Expo's theme of 'Better City, Better Life,' was "Chinese wisdom in Urban Development."⁸⁸ Organisers wished to communicate to the visitors of the Expo the following about the Chinese people:

- That they are hospitable and welcome people from the world
- That they are hardworking and eager to learn
- That they are peace loving people

⁸² Senate Standing Committee on Foreign Affairs, Defence and Trade, *China's Emergence: Implications for Australia*, (Canberra: Parliament of Australia, March 2006), pp. 18-21, available online: http://www.aph.gov.au/SENATE/committee/fadt_ctte/completed_inquiries/2004-07/china/report02/report.pdf (accessed 10 September 2010).

⁸³ d'Hooghe, op. cit. (2007), p. 7.

⁸⁴ P. Ford, 'On Eve of Shanghai Expo 2010, China Finds 'Soft Power' an Elusive Goal,' *The Christian Science Monitor* (29 April 2010), available online: <http://www.csmonitor.com/World/Asia-Pacific/2010/0429/On-eve-of-Shanghai-Expo-2010-China-finds-soft-power-an-elusive-goal> (accessed 27 September 2010).

⁸⁵ Rahman, op. cit. (2010).

⁸⁶ Bezlova, op. cit. (2010); see also 'Living the Dream: Something in Between a Fair Trade, A Funfair and a Template for Global Domination,' *The Economist* (29 April 2010) available online: http://www.economist.com/node/16009079?story_id=16009079 (accessed 23 August 2010)

⁸⁷ World Expo Shanghai 2010 Official Website, 'China Pavilion' (14 August 2010), available online: <http://expo2010shanghai.com/national-pavilions/china-pavilion/> (accessed 3 October 2010); see also Lørdag, 'Climbing the Everest of the Expo: China Pavilion!' (19 June 2010), available online: <http://exposingshanghai.blogspot.com/2010/06/climbing-everest-of-expo-china-pavilion.html> (accessed 3 October 2010).

⁸⁸ Bureau International des Expositions, op. cit. (2010).

- That they are open and would like to cooperate on a variety of matters such as economics, trade and science.⁸⁹

It is worth noting that, in addition to China's public diplomacy aims, the Chinese Government has internal political aims directed at the Chinese visitors to the pavilion. Many commentators observed that another aim of the Expo was to give the Chinese people belief in the system by which they are governed and impress upon them that their leaders, the Chinese Communist Party (CCP), are capable of ruling China in the 21st century.⁹⁰ The Chinese pavilion also offered a chance for the numerous visitors coming from all across China to know their country and to see what kind of lives their compatriots live, by visiting not only the Chinese pavilion, but also the other areas of the Expo which featured displays from each of China's provinces.⁹¹

The substance of the Chinese pavilion was in a familiar format to the Australian pavilion with content centred on three different stages. The first stage, 'Exploring Oriental Footprint,' consisted of a multimedia presentation exploring China's development since opening up in the past thirty years and the Chinese people's expectations for the future.⁹² Additionally, there was an animated version of Zhang Zeduan's famous 700 year old painting, *Along the River During the Qingming Festival* which contained exactly 1,069 moving figurines.⁹³ The following section, 'Land of Hope' featured a monorail ride through several rooms exhibiting various displays of life in the future and new hybrid varieties of rice, before opening up to a large hallway featuring the artworks of children from around the nation.⁹⁴ The final section, entitled 'Focus on Low-Carbon Future' highlighted Chinese technologies that will work towards a greener, more sustainable future.⁹⁵ For the tens of thousands of daily visitors who managed to get their hands on a rare special entrance pass to the Chinese pavilion, the displays focused not only on the future of China but also on its rich past. Precious national treasures, such as the Terracotta Warriors collection, the Qingling bronze chariots and various other national

⁸⁹ Ibid.

⁹⁰ *The Economist*, op. cit. (29 April 2010); see also *The Economist*, op. cit. (7 January 2010); Bezlova, op. cit. (2010); and also Cull, op. cit. (2009), pp. 10-15..

⁹¹ W. Yiyao, 'China Pavilion About More Than Just Pride,' *China Daily* (28 September 2010) available online: http://www.chinadaily.com.cn/china/2010expo/2010-09/28/content_11356663.htm (accessed 3 October 2010).

⁹² World Expo Shanghai 2010 Official Website, op. cit. (2010).

⁹³ Bureau International des Expositions, op. cit. (2010); see also W. Lee, 'The Centrepiece of the World Expo 2010 – China Pavilion Known as the Crown of the East' (2010), available online: <http://ezinearticles.com/?The-Centrepiece-of-the-World-Expo-2010---China-Pavilion-Known-As-the-Crown-of-the-East&id=4458937> (accessed 3 October 2010).

⁹⁴ PRLog, 'China Pavilion at Expo 2010 Shanghai' (16 July 2010), available online: <http://www.prlog.org/10800196-china-pavilion-at-expo-2010-shanghai.html> (accessed 10 September 2010).

⁹⁵ Lee, op. cit. (2010).

icons.⁹⁶ Additionally, for those who liked their Expo history, there was a display featuring 60 pieces of Huzhou Silk which featured and won a gold medal 159 years earlier at the original World Expo in London.⁹⁷

The question remaining to be answered is how effective was China's public diplomacy at the Expo? This chapter will now assess China's efforts at Expo 2010 against the same three criteria used to evaluate Australia's performance.

The first criterion looks at the number of participants, both direct and indirect. There is no doubt as to the numbers being reached by China's public diplomacy effort, as was embodied in their national pavilion and hosting of Expo 2010. As noted many times before, the Expo is anticipated to play host to 70 million visitors. Shanghai indisputably hosted the largest Expo ever held, with record numbers of physical visitors, although it is important to note that there is no information available by which to judge the number of international visitors to the Expo. In addition to this, China's message also reached an unquantifiable number of people indirectly, through online blogging and reports or, through media coverage of the Expo. So by this account, Expo 2010 was resounding success.

The second criterion examines the extent to which the message conveyed reflected reality, and whether or not it was appropriate to the situation at hand. One of China's biggest assets was the positive image of its culture, and for this reason China's rich history took pride of place within the national pavilion.⁹⁸ That being said, the Chinese pavilion, like many others, highlighted the positives whilst being dismissive of the negatives. This was, to some extent, to be expected in World Expos, but raises the potential problem of denial of reality. The Chinese Tibet and Xinjiang provincial pavilions at Expo 2010, painted a picture of "happy, peaceful, patriotic regions" that was very much at odds with the international image of these areas, including well-publicised riots.⁹⁹ Decisions like this may go unnoticed by Chinese citizens who have limited access to western media sources. However, for those who are aware of the incongruities, such actions only reinforced the negative stereotypes and led to doubt. These attempts to obscure reality seem a pity, as they tarnished the image of what was by many other accounts a standout World Expo.

⁹⁶ Ibid.

⁹⁷ Betty, 'Huzhou, China Pavilion, More than 60 'Silk Treasures' During the Welcome Expo' (8 June 2010) available online: http://www.articlealley.com/article_1591485_15.html (accessed 27 September 2010).

⁹⁸ d'Hooghe, op. cit. (2007), p. 17.

⁹⁹ N. Rosendorf, 'India Today Interview: Indian Versus Chinese Soft Power,' *Newswire – CPD Blog & Blogroll* (13 July 2010), available online: http://uscpublicdiplomacy.org/index.php/newswire/cpdblog_detail/india_today_interview_indian_versus_chinese_soft_power/ (accessed 1 September 2010).

Third, was China's participation and hosting of the 2010 Expo part of a larger, long-term public diplomacy impact plan? Once again the answer is affirmative. In recent years a great amount of time and effort went into exploring the potential, as well as putting it into practice, of public diplomacy for China.¹⁰⁰ In February 2007, public diplomacy and soft power were key subjects at both the annual conferences of the National People's Congress and the Chinese People's Political Consultative Conference, at which President Hu Jintao argued that China's key to success in the future relied on using the influence of China's culture.¹⁰¹ As can be seen, the message on the importance of public diplomacy flowed directly from the President and outwards to all the CCP's ideological apparatus'. This can be seen through monetary allocations towards various large scale cultural activities – such as the Expo – but also through years or months of cultural exchange, such as is upcoming between Australia and China meeting and has happened previously between China and Russia, France, America and Germany.¹⁰² In addition to this, in the past six years China has opened a total of 282 'Confucius Institutes' and 272 'Confucius Classrooms', modelled on France's 'Alliance Francaise', which promote Chinese language and culture to the world for a prolonged period of time.¹⁰³

Interestingly, having completed this examination of China's public diplomacy, according to these criteria China put on a rather successful Expo coming up with resounding positives in two of the three categories. However, as with the previous Australian assessment, there is one criterion that provided cause for concern: that China's message was not always consistent in its depiction of reality, and therefore, was damaging to China's public diplomacy effort as a whole. For China to engage in a truly successful public diplomacy campaign the audience needed to be able to trust, and not doubt the message that was being portrayed.

Conclusion

The 2010 Shanghai World Expo provided a great opportunity for public diplomacy but one which was difficult to utilise effectively. As this chapter has shown, both Australia and China experienced difficulties in their attempts to utilise public diplomacy effectively at Expo 2010.

In terms of the number of participants reached, both Australia and China performed well. Simply by virtue of participating in the World Expo, there was a ready-made audience of people given the continuing popularity of the Expo series. Most

¹⁰⁰ Mingjiang, op. cit. (2008), p. 306.

¹⁰¹ Xinhua, 'Hu Jintao stressed enhancing Soft Power of Chinese culture,' *People Daily* (15 October 2007), available online: <http://english.peopledaily.com.cn/90002/92169/92187/6283148.html> (accessed 27 September 2010).

¹⁰² Mingjiang, op. cit. (2008), p. 304.

¹⁰³ Rahman, op. cit. (2010).

visitors to Expo 2010 were Chinese, meshing well with the purpose of the Australian pavilion which sought to re-align the Chinese images of Australia but also fitting with China's domestic aims for the Expo. Additionally, China as the host nation had the added advantage of being able to showcase the best of Shanghai to participants and visitors alike, thus broadening its appeal.

Use of an appropriate message to reflect reality presented more of a difficulty for China. For Australia, the message was clear even if there was some criticism of the medium by which this was conveyed. China successfully drew on its history and culture as inspiration for its public diplomacy message but decided to depict provinces involved in well-publicised riots in an overly positive light. Unfortunately for China, this positive projection of peace and happiness in regions, which the media recently reported to be the contrary, cast doubt as to the truthfulness of China's other exhibits within its pavilion at Expo 2010.

Australia and China differed in the extent to which their participation in the Expo was a component part of their respective nation's public diplomacy plans. The strict one-party state control that inhibited the effectiveness of China's public diplomacy message proved to be its saving grace in this final indicator. From President Hu Jintao to the bottom of the CCP there had been an emphasis on discovering and utilising public diplomacy in the past ten years to help shape China's peaceful rise through the ranks of international importance. Because of this, China launched a comprehensive and thorough public diplomacy program that included the Beijing Olympics, the Shanghai Expo as well as the construction of many permanent Confucius Institutes around the world. While China is able to boast of a rich and varied public diplomacy campaign courtesy of an ever-increasing public diplomacy budget, DFAT's public diplomacy measures have been underfunded for years. It is to be hoped that this can be reversed so that public diplomacy is seen not merely as a technique but as an integral component of Australian policy.

A Global Alliance? US Interests in the US-Australia Alliance

Jade Cooper*

The recent statement by US Secretary of State Hillary Clinton that “the United States has no better friend than Australia”¹ recognises Australia’s reliability in supporting a full range of US efforts to its greatest capacity. The alliance has traditionally extended to both security and economic cooperation. In recent times, with a rise in non-traditional security threats, the US economy struggling to recover from the global financial crisis and the world experiencing a drastic power shift towards the Asia-Pacific region, America’s interests in such cooperation have grown exponentially. The US accepts that achieving global economic and security stability in such an environment requires collaboration. It is thus working on strengthening its existing alliances, building new alliances and fostering regional multilateral networks. Australia’s unique position - as a non-threatening ‘western’ state geographically positioned in Asia and with a strong alliance with the US - makes it an extremely useful partner for the US in its efforts to nurture these relationships. Analysis demonstrates the success of the US in fully exploiting its bilateral relationship with Australia, yet, this is contrasted by Australia’s ongoing struggle to maintain an independent position vis-à-vis the US, which poses the question; is this indeed a global alliance, or rather an alliance broad in scope but lacking symmetry and mutual respect?.

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¹ H.R. Clinton, Speech and Interview with Australian Broadcasting Company, Melbourne (07 November 2010) available online: <http://www.state.gov/secretary/rm/2010/11/150516.htm> (accessed 7 November 2010)

With Australia, our alliance is global in scope. From Iraq and Afghanistan to our historic FTA, we are working jointly to ensure security, prosperity, and expanding freedom.

National Security Strategy of the United States of America²

The US government recognises Australia as “a country that shares [its] founding commitments to liberty and to equality, and to [its] traditions of justice and tolerance.”³ Both Australian and US policy makers are constantly referring to the two countries’ common values in an attempt to emphasise the alliance’s strong foundation and resultant depth, breadth and continuity. It is argued that these shared values result in complementary national priorities and a common foreign policy agenda, ensuring that the alliance is of mutual benefit to both parties, regardless of the changing international environment.

There is no doubt that the US-Australia alliance is broad; this chapter will explore America’s interests in the alliance to determine whether or not the alliance can truly be described as ‘global’ and mutually beneficial. The chapter will begin by exploring the security alliance, where seventy years of cooperation in combat and in the development of technology and in intelligence has increased both countries’ capacity to counter traditional and non-traditional security threats. Next, this chapter will assess the significance of the economic benefits enjoyed by the US through the alliance, particularly since the signing of the Australia-US Free Trade Agreement (AUSFTA). Finally, the role of Australia in aiding the US in its efforts to join, stabilise and benefit economically from the Asia Pacific region will be examined. Understanding whether or not the alliance truly can be described as ‘global’ helps chart the likely future of the alliance.

Security Relationship

As a global leader, the US is motivated to maintain global stability and peace and prevent attacks against the US homeland and its forces deployed internationally. Both in US traditional war efforts, and in its current endeavours to suppress

² The National Security Strategy of the United States of America (March 2006), p.40: available online: http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf (accessed 20 October 2010)

³ D. Cheney, quoted in H. Cincotta, ‘Cheney Hails Security Alliances with Japan, Australia,’ Bureau of International Information Programs, US Department of State (24 February 2007) available online: <http://www.america.gov/st/washfile-english/2007/February/20070224171232attocnich0.300152.html> (accessed 20 August 2010)

terrorist movements and halt proliferation of nuclear weapons and weapons of mass destruction (WMD), Australia has been a consistently reliable ally.⁴

Military Alliance

Australia has sent troops to fight alongside the US in each of America's major 20th century war efforts: World War I, World War II and the Vietnam and Korean wars. The countries' military alliance is codified in the ANZUS security treaty which requires the parties to act to meet the common danger in the case of an armed attack in the Pacific.⁵ However, since Australia voluntarily invoked the treaty in response to the September 11 2001 attacks on the US, it could be argued that the treaty now demands cooperation in response to conflict in *any* region of the world. In recent years there has been much debate over whether the ANZUS treaty remains in US interests.⁶ Doug Bandow, former advisor to President Ronald Reagan, argues that rather than guaranteeing military presence, the US should act as an "offshore balancer" given that its allies in the region are now strong enough to respond to regional conflict independently and that the US is pre-engaged in other regions.⁷ While both governments currently recognise the agreement as binding, the US government's increasingly open concern over the unsustainable nature of its defence spending⁸ suggests that Australia would be wise to consider the possibility that support from the US in the case of a regional attack may not be as forthcoming or comprehensive as it would hope.

Australia and the US also maintain a strong counter-terrorism alliance. As victims of terrorist attacks, both countries broadly agree not only on the existence and magnitude of the global terrorist threat, but also its source and the best strategy to combat it. Such strategy involves balancing "kinetic" missions that physically restrain terrorists or insurgents with capacity-building missions which, by earning the trust of local populations, thereby separates them from regional antagonists.⁹

⁴ A. Scobell, 'The Alliance and the Asia-Pacific Region: An American Perspective,' in J.D. McCausland, D.T. Stuart, W.T. Tow and M. Wesley, (eds.) *The Other Special Relationship: The United States and Australia at the Start of the 21st Century* (US Government, February 2007).

⁵ Security Treaty between Australia, New Zealand and the United States of America (ANZUS). Signed San Francisco, 1 September 1951. Entry into force 29 April 1952. Australian Treaty Series 1952 No. 2.

⁶ J. Higley, 'The Relationship's Political Aspects: An American Perspective,' in McCausland et al, op. cit. (2007)

⁷ D. Bandow, quoted in E. Hall, 'Analyst Says US-Australia Alliance Outdated,' *The World Today*, Australian Broadcasting Corporation (17 August 2005) available online: <http://www.abc.net.au/worldtoday/content/2005/s1439959.htm> (accessed 25 September 2010).

⁸ R. Gates, quoted in 'US cannot afford another Afghanistan or Iraq, warns Defence Secretary,' *The Telegraph* (9 May 2010) available online: <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/7701718/US-cannot-afford-another-Afghanistan-or-Iraq-warns-Defence-Secretary.html> (accessed 4 December 2010).

⁹ J.A. Schear, 'The Future of the US-Australia Alliance: Adapting to new Challenges?' in

On 10 September 2001, then leaders Bush and Howard met in Washington DC to reaffirm the US-Australia- alliance. The events of the following day turned the leaders' promises into action. Despite no binding obligation to do so, Australia immediately invoked the ANZUS treaty. It also became the first country to commit to the International Coalition Against Terrorism.¹⁰

On the launch of Operation Enduring Freedom, Australia sent Defence Force troops to Kyrgyzstan, Diego Garcia and the Persian Gulf, followed by Army Special Forces to Afghanistan in December 2001.¹¹ Ever since, Australia has played an important role as "the largest non-NATO contributor of troops in Afghanistan and indeed, one of the largest contributors overall."¹² Australia's current efforts in Uruzgan province, in single-handedly training the Afghan force brigade, highlight the actual practice of Australian support of US efforts to rebuild a self-sustainable Afghanistan.¹³ Despite the Australian Green Party's fight for an early withdrawal of troops from Afghanistan, the Australian government has recently confirmed its intention to keep troops there until Afghan security forces are self-sustaining, and to support reconstruction efforts over the next decade.¹⁴ Prime Minister Gillard's official visit to Afghanistan early in her term as Prime Minister reinforced this commitment of continued support.¹⁵

Australia's support of US efforts in Iraq was similarly significant, sending approximately 20,000 Australian Defence Force personnel from 2003 to serve alongside Americans, as well as aircraft and supportive technologies.¹⁶ In July 2009, Australia made the decision to pull out its combat forces, due to both the improvement in Iraq's security and stability¹⁷ and an appreciation that such

McCausland et al, op. cit. (2007) p. 321.

¹⁰ B. Vaughn, 'Australia: Background and US relations,' Congressional Research Service Report for Congress, (8 August 2008) p. 10.

¹¹ D. Blumenthal, 'Strengthening the US-Australian Alliance: Progress and Pitfalls,' *Asian Outlook* (April–May 2005).

¹² A.F. Rasmussen, Secretary General of NATO, 'Transcript of Joint Press Conference, Brussels' (4 October 2010) available online: <http://www.pm.gov.au/node/6936> (accessed 20 October 2010).

¹³ H.R. Clinton, Australia-United States Ministerial (AUSMIN) joint press conference (8 November 2010) available online: http://foreignminister.gov.au/transcripts/2010/kr_tr_101108_press_conf.html (accessed 8 November 2010).

¹⁴ G. Robinson, 'Afghanistan: We're Staring at 10 More Years, Warns PM,' *Sydney Morning Herald* (19 October 2010) available online: <http://www.smh.com.au/national/afghanistan-were-staring-at-10-more-years-warns-pm-20101019-16rxg.html> (accessed 20 October 2010).

¹⁵ M. Kenny, 'Prime Minister Julia Gillard Makes Surprise Visit to Afghanistan,' *The Advertiser* (4 October 2010) available online: <http://www.adelaidenow.com.au/news/national/prime-minister-julia-gillard-makes-surprise-visit-to-afghanistan/story-e6frea8c-1225933383003> (20 accessed October 2010).

¹⁶ Vaughn, op.cit. (2008) p. 4.

¹⁷ Australian Labor Party, 'Julia Gillard and Labor: Let's Move Australia Forward', Labor's Plan for Defence Fact Sheet (2010).

contributions to the Iraq effort left Australia less equipped to address regional issues.¹⁸ However, ongoing support of reconstruction and stabilisation efforts demonstrated Australia's continuity in supporting US-led efforts.

Australia also promotes counter-terrorist measures throughout the Asia Pacific region. This is valued by a US which recognises that in order to counter terrorism globally it must mobilise its allies to undertake counter-terrorism activities within their own regions. Collaboration with partners that have local knowledge not only increases the effectiveness of US counter-terrorist efforts, but also lessens its strategic responsibility.¹⁹

Australia has been proactive in preventing the spread of terrorism in the Asia-Pacific region. Its most recognised efforts include convening a ministerial meeting on counter-terrorism, founding an Asia-Pacific counter-terrorism centre and cooperating with several Southeast Asian governments in enhancing both their counter-terrorist capacities and their border and maritime security. Also of significance is Australia's commitment to stabilising the politics of the 'arc of instability',²⁰ which has in turn lessened the likelihood of these states becoming terrorist destinations. Such efforts include the Regional Assistance Mission to the Solomon Islands, cooperating with the Papua New Guinea government to achieve good governance and professionalise its police force and sending forces to restore order to East Timor.²¹

Australia's immediate and continuing support of US counter-terrorism operations has demonstrated that the US can rely on Australia's support, particularly in comparison with other US allies.²² This has significantly strengthened the alliance. Beyond the global interest of promoting freedom from terrorism, the Howard government was also motivated by perceived national interests.²³ Through strengthening the military alliance, the government believed that it might assume a position from which it could exert more influence on the US, giving Australia a greater sense of security in the face of being a potential target of terrorism. Howard being invited to former US President George Bush's ranch in April 2003 to discuss the post-war administration of Iraq is a commonly cited example of this increased

¹⁸ Vaughn, op.cit. (2008) p. 11.

¹⁹ J.J.Przystup, 'The United States, Australia, and the Search for Order in East Asia and Beyond,' in McCausland et al, op. cit. (2007) p. 265.

²⁰ Term adopted by various commentators drawing on Zbigniew Brzezinski quoted in 'IRAN: The Crescent of Crisis,' *Time Magazine* (15 January 1979).

²¹ A.L. Smith, 'Still Great Mates: Australia and the United States,' *Asian Affairs*, vol. 30, no. 2, (2003) pp. 114-121. See also Przystup, McCausland et al, op. cit. (2007) p. 265.

²² Australia is 'one of only two reliable American allies' the other being the UK, according to former US Ambassador to Australia Tom Schieffer: see P. Dibb, 'Australia's Alliance with America,' *Melbourne Asia Policy Papers*, vol. 1, no. 1 (2003), p. 6.

²³ Blumenthal, op.cit (2005), p. 16.

influence.²⁴ While it is presumptuous to assume that Australia can greatly influence its super-power ally, the fact that Australia is being increasingly consulted for its views on and ideas for overcoming global and regional issues demonstrates America's respect for the contribution that Australia can make, which is encouraging for the future of the alliance.

Non-Proliferation Alliance

The next dimension of the US-Australia security alliance is cooperation in combating weapons of mass destruction (WMD) and nuclear proliferation. The strength of Australia's non-proliferation policy makes it a very supportive partner of US non-proliferation efforts globally.²⁵ Australia has been a member and strong supporter of the Nuclear Non-Proliferation Treaty (NPT) since its formation in 1973. Australia also supports the strengthening of safeguards on civilian nuclear activities by the International Atomic Energy Agency (IAEA) and was the first to sign the IAEA Additional Protocol to strengthen IAEA monitoring. Its membership of the Nuclear Suppliers Group export control coordination body and constant cooperation with the Proliferation Security Initiative since its launch in May 2003 similarly demonstrates Australia's commitment to non-proliferation efforts.

With the world's largest source of uranium, Australia's very strict self-imposed standards for nuclear trade strongly demonstrate its support for non-proliferation. In fact, Australia's standards are stricter than current global export control regime demands.²⁶ Recent debate in Australia over whether it should sell uranium to India highlighted the power afforded to Australia through its access to uranium.²⁷ Australia has also played an important role in international discussions over methods to encourage nuclear energy growth while containing the spread of sensitive nuclear technologies to avoid proliferation.

The US and Australia are also collaborating in their efforts to avoid proliferation.²⁸ The 2004 Memorandum of Understanding on Missile Defence Cooperation, followed by the 2005 Defence Update which contains the important clause, "Australia will continue to look for ways to support the United States in the Asia-Pacific region," demonstrates such bilateral cooperation. The countries also engage

²⁴ M. Wilkinson, 'PM invited to talk turkey, ranch style, over Iraq,' *Sydney Morning Herald* (15 April 2003) available online: <http://www.smh.com.au/articles/2003/04/15/1050172599158.html> (accessed 2 October 2010).

²⁵ M.B. Nikitin and B. Vaughn, 'US-Australia Civilian Nuclear Cooperation: Issues for Congress,' Congressional Research Service Report for Congress (1 December 2010); M.B. Nikitin, P.K. Kerr, and S.A. Hildreth, 'Proliferation Control Regimes: Background and Status,' Congressional Research Service Report for Congress (18 October 2010); Vaughn, op.cit. (2008).

²⁶ Nikitin, Kerr and Hildreth, op.cit. (2010).?

²⁷ Ibid.

²⁸ Scobell in McCausland et al, op.cit. (2007) p. 32.

in joint advanced missile defence technology research, for example to intercept missile strikes of the type that North Korea is suspected to be capable of launching. The Trilateral Strategic Dialogue between Australia, Japan and the United States which are ministerial level consultations directed at managing regional security also commonly have nuclear issues on the agenda.

The most recent cooperative effort is the recently signed Peaceful Uses of Nuclear Energy Agreement, which is to replace the current 1979 Agreement between Australia and the United States of America concerning the Peaceful Uses of Nuclear Energy. Once in force, this agreement will regulate the exportation of “information, material, equipment, and components for nuclear research and nuclear power production,”²⁹ and prohibit the transfer of sensitive nuclear technology. The most significant changes this proposed agreement will bring are the broadening of the scope of cooperation and the modernising of physical security requirements.

North Korea’s constant antagonism towards the international community and demonstrations of growing nuclear capacity is a major driving force for non-proliferation cooperation. The North Korean crisis has been described by US President Obama as a “grave threat” to global and regional security.³⁰ North Korea continues to act irresponsibly: failing to follow through on its obligations concerning the six-party talks and repeatedly violating UN Security Council resolutions in tests to display its military capacity. It is estimated that North Korea is in possession of over 800 ballistic missiles, some with a flight potential to threaten US security.³¹

Australia is concerned about North Korea proliferating because it poses a threat to its ally South Korea and increases the chance of weapons being supplied to terrorists in Australia’s neighbouring countries.³² Hence, it has consistently supported US statements and actions against North Korea’s nuclear and WMD capacity. Australia supported US attempts to impose UN sanctions on North Korea for its missile test of July 2006 and subsequent October 2006 nuclear test. More recently, Australia joined the US in claiming that North Korea’s 5 April 2009

²⁹ Nikitin and Vaughn, op.cit. (2010) p. 1.

³⁰ B. Obama, ‘Remarks by President Obama and President Lee Myung-Bak of The Republic of Korea in Joint Press Availability’ (16 June 2009) available online: http://www.whitehouse.gov/the_press_office/Remarks-by-President-Obama-and-President-Lee-of-the-Republic-of-Korea-in-Joint-Press-Availability/ (accessed 25 September 2010).

³¹ D.A. Pinkston, ‘The North Korean Ballistic Missile Program,’ Strategic Studies Institute Publication (February 2008); see also P. Crail, ‘Chronology of US-North Korean Nuclear and Missile Diplomacy,’ Arms Control Association (Updated 12 November 2010) available online: <http://www.armscontrol.org/factsheets> (accessed 2 December 2010).

³² J.D. McCausland, ‘Panel V (Security and Defense Aspects) Chairman’s Introduction,’ in McCausland et al, op.cit. (2007) pp. 248-251.

launch of a Taepodong-2 long-range rocket “was a threat to peace and security and a violation of United Nations Security Council Resolution 1718.”³³ Following the Australia-United States Ministerial Meeting (AUSMIN) in 2009, Australia and the US formally called on North Korea's leaders to comply with UNSC Resolution 1718 in abandoning the country's ballistic missile program and to commit to the denuclearisation of the Korean Peninsula through the Six-Party Process.³⁴

Strategic Alliance

In addition to military support, US defence efforts are aided by Australia's sharing of technologies, intelligence and military doctrine.³⁵ The Australia-US Defence Trade Cooperation Treaty, ratified by the US Senate on 29 September 2010, will enter into force once Australia has both consulted the defence industry on implementation of the treaty and introduced implementing legislation into Parliament. The treaty will work alongside the 2007 Enhanced Defence Cooperation Initiative in supporting existing sharing of defence technology. It is also expected to expedite and simplify the trade of classified and unclassified defence articles through its provision to establish an “Approved Community of government facilities and private companies” which will circumvent current export regulations.³⁶

Intelligence sharing in the Joint Defence Facilities is of great importance to US defence. Australia is an ideal partner for the Joint Defence Facilities program due to its geographic proximity to the Asia Pacific region, technical expertise, advanced economy and stable democratic political system.³⁷ The Pine Gap Joint Defence Facility situated near Alice Springs is one such location. This facility provides ballistic missile early warning, information-monitoring of neighbouring countries' compliance with disarmament and arms control agreements and general intelligence collection for both countries' benefit. Other joint exercises include both submarine and satellite-based communications systems, the latter of which is governed by the US-Australia Military Satellite Communications Partnership Statement of Principles of 2008.

³³ AUSMIN Consultations, ‘2009 Joint Communiqué, Washington D.C.’ (9 April 2009) available online: <http://www.state.gov/secretary/rm/2009a/04/121555.htm> (accessed 18 September 2010).

³⁴ Ibid.

³⁵ McCausland, in McCausland et al, op.cit. (2007) p. 245.

³⁶ S. Smith, K. Rudd and C. Emerson, ‘Australia Welcomes US Senate's Agreement to Ratify Australia-US Defence Trade Cooperation Treaty,’ Joint Media Release (1 October 2010) available online: http://www.foreignminister.gov.au/releases/2010/kr_mr_101001b.html (accessed 9 October 2010).

³⁷ ‘US Strategic Alliance’ in Department of Defence, *Defence White Paper 2009: Defending Australia in the Asia Pacific Century: Force 2030* (Canberra: Australian Government, 2009), pp. 93-5.

Another significant defence initiative of the alliance is its joint combined training capability, which falls under the 2007 Enhanced Defence Cooperation Initiative. Training US and Australian troops together is more cost-effective and results-driven than unilateral training.³⁸ The consequent presence of US forces in Australia, as well as the access they are granted to training and exercise ranges, also gives the US a platform from which to balance the region.³⁹

Most recently, 2010 AUSMIN consultations involved an agreement to establish a bilateral Force Posture Working Group with the mandate to explore options for enhanced defence cooperation on Australian soil. US-Australia cooperation in the fields of space and cyberspace security was another focus of the discussions, resulting in the signing of the Space Situational Awareness Partnership Statement of Principle for greater military cooperation in intelligence, surveillance and reconnaissance.⁴⁰

The lack of a multilateral alliance such as NATO supporting US military presence in the region handicaps its ability to maintain Asia-Pacific security.⁴¹ The significance of Australia's guarantee of US access to bases and safe shores in the region is highlighted by considering the tension between China and Taiwan and the potential for future conflict. The US is particularly conscious of the possibility that on taking Taiwan, China's shared prosperity in the region could lead to the US losing access to its existing bases, transit routes and markets.⁴² The US-Australia alliance in the outbreak of such violence would also be vital in terms of intelligence, since a signals installation in Western Australia receives information on Chinese satellite communications through its linkage with the Taiwan National Security Bureau's signal intelligence base.⁴³

Trade Alliance

Traditionally, trade between Australia and the US has been characterised by Australia's comparative advantage in the production of agricultural products and natural resources, countered by US barriers on key Australian exports including wool, sugar and dairy. These barriers, in the form of quotas, tariffs and government

³⁸ Ibid.

³⁹ W.T. Tow, 'The Deputy Sheriff? US-Australian Relations,' United States-Asia Relations Today: A New "New World Order"?, Centre for Education Research & Innovation Colloquium (2-4 December 2002).

⁴⁰ Clinton, op.cit. (November 2010).

⁴¹ E. Katahara, 'Major Foreign and Security Policy Challenges Facing the US, Japan and Australia,' The Fifth Japan-Australia Track 1.5 Dialogue, Tokyo (23-24 July 2009).

⁴² L. Rosenberger, 'United States and Australia: Competing Economic Perspectives,' in McCausland et al, op.cit. (2007) p. 199.

⁴³ Scobell in McCausland et al op.cit. (2007) p. 89.

subsidies of US exports, have been in place to protect US domestic industries, which has caused friction between the two nations.⁴⁴

While the US is Australia's largest trade and investment partner, Australia is only America's 14th largest export country and 8th largest foreign investor.⁴⁵ This is not to deny, however, the benefit that the US enjoys through the trade relationship.

It has been said that negotiation of an FTA "allows the United States to bring the full might of its negotiating position to bear on a single country."⁴⁶ Consistent with this, in the Australia-US Free Trade Agreement (AUSFTA) negotiations the US had considerable wins without any significant sacrifices. Since the agreement has been in place, the US has used its provisions to further its national interests to the extent that the catchphrase of the Office of the US Trade Representative has reportedly become: "Don't take it personally; we are only playing by the rules."⁴⁷

Three of these significant wins by the US were in the areas of copyright protection, pharmaceutical regulation and unilateral removal of agricultural trade barriers. The US negotiated a twenty year extension of Australian copyright protection which in practice leads to an increased net cost to Australia, as users of copyright-protected works will remain liable seventy years after the death of copyright owners.

In the pharmaceutical field, through ensuring that the Australian Therapeutic Goods administration enforces new patent claims over generic competitors, the US has made it easier for foreign pharmaceutical companies to hold monopolies over pharmaceutical products in Australia. This has not only led to increased profits for US pharmaceutical companies but has also given the US a successful model to work from in future attempts to secure similar provisions in regional FTAs.⁴⁸

Prior to the AUSFTA, Australian tariffs on particular dairy products were 30 per cent, and 4 to 5 per cent on fruits and vegetables, processed foods, some grains, oilseeds and other products. With the signing of the FTA however, all tariffs on US agricultural products were immediately removed. This means tariff-free entry of approximately US \$400 million worth of US agricultural exports to Australia annually.⁴⁹ The US however, negotiated to liberalise its barriers on products

⁴⁴ D. Russell, 'Economic and Business Aspects: An Australian Perspective,' in McCausland et al, op.cit. (2007) p. 217.

⁴⁵ Australian Government Austrade Department, 'USA Profile: Trade Relations and Statistics' (updated 10 June 2010) available online: <http://www.austrade.gov.au/USA-profile/default.aspx> (accessed 2 October 2010); see also Australian APEC Study Centre, *An Australia-USA Free Trade Agreement: Issues and Implications* (2001) p. 48.

⁴⁶ Russell in McCausland et al, op.cit. (2007) p. 223.

⁴⁷ Ibid., p. 226.

⁴⁸ Ibid., p. 225.

⁴⁹ Department of Agriculture- Foreign Agricultural Service, 'U.S.- Australia Free Trade Agreement

gradually over an extended transition period, which resulted in an immediate 60 per cent reduction in agricultural tariffs, followed by a further 9 per cent by 2008. Of particular detriment to Australia is America's success in retaining both volume and price-based safeguards on beef during and after the transition period respectively and quotas and tariffs on dairy products and sugar.⁵⁰

As a result of these US triumphs, the first year of the agreement brought an increase in US exports to Australia of 5.7 per cent while Australian exports to the US fell by 4.7 per cent.⁵¹ This trend has continued, with the bilateral trade gap in America's favour growing from \$US 6.4 billion to \$US 11.6 billion between 2004 and 2009.⁵² These results and the broad scope of the AUSFTA, demonstrate that despite Australia not being one of America's major trade partners, the trade relationship benefits the US considerably.

America's increasing demand for uranium is another factor encouraging the continuation of its friendly trade relations with Australia. "Over 60 per cent of [US] GDP now comes from industries and services that run on electricity, and over 85 per cent of the growth in US energy demand since 1980 has been supplied by electricity."⁵³ With both economic and environmental advantages, this electricity is increasingly being generated through nuclear technologies. The US Energy Information Administration predicts an 11.11 per cent increase in US electricity generation from nuclear power between 2007 and 2030.⁵⁴ This increased generation corresponds to an increased demand for uranium, which, due to limited domestic supply, must be sourced internationally. Australia's uranium reserves are the world's largest, constituting 31 per cent of the world's total uranium resources.⁵⁵ In 2009, 86 per cent of the uranium used to produce electricity in the US was imported.⁵⁶ While only 13 per cent of this was from Australia,⁵⁷ Australia has the potential to

Fact Sheet' (March 2006).

⁵⁰ Ibid.; see also Centre for International Economics, 'Economic Analysis of AUSFTA: Impact of the bilateral free trade agreement with the United States', Prepared for the Department of Foreign Affairs and Trade (April 2004) p. 14.

⁵¹ Rosenberger in McCausland et al, op.cit. (2007) p. 197.

⁵² R. Tiffen, 'Mind the Gap: Benefits From Free Trade Haven't Quite Gone the Distance,' Sydney Morning Herald (March 3 2010) available online: <http://www.smh.com.au/opinion/politics/mind-the-gap-benefits-from-free-trade-havent-quite-gone-the-distance-20100302-pg6p.html> (accessed 10 October 2010).

⁵³ P.W. Huber, 'The Million-Volt Answer to Oil,' *Energy Policy & the Environment Report*, Manhattan Institute for Policy Research (October 2008).

⁵⁴ Energy Information Administration, 'World net electricity generation from nuclear power by region, 2007-2030,' *International Energy Outlook 2010* (27 July 2010).

⁵⁵ World Nuclear Association, 'Australia's Uranium,' (October 2010) available online: <http://www.world-nuclear.org/info/inf48.html> (accessed 20 September 2010).

⁵⁶ US Energy Information Administration, Independent Statistics and Analysis (updated July 2010) available online: <http://www.eia.doe.gov/> (accessed 20 September 2010).

⁵⁷ Nikitin and Vaughn, op.cit. (2010).

increase its production rates drastically, as currently it has just three uranium mines open but more openings are scheduled.⁵⁸ With growing pressure on states to achieve energy security in this globally changing environment, America's alliance with Australia will be important to its success in leading by example in the transition to nuclear power.

Asia-Pacific Alliance

Everywhere we go, we will advance one overarching set of goals: to sustain and strengthen America's leadership in the Asia-Pacific region and to improve security, heighten prosperity, and promote our values.

Secretary of State Hillary R. Clinton⁵⁹

The United States, with "32 percent of the world's GDP, 43 percent of world military expenditures, half of world arms production, and at least 60 percent of world military research and development," is undoubtedly the current economic and military giant of the international arena.⁶⁰ However, this strength alone is not enough to stabilise the Asia-Pacific region. Rather, there must be collective engagement with countries within the region on important and emerging issues.⁶¹

In recognition of this reality, the Obama administration has developed an Asia strategy focused on "allies, institutions and new friends."⁶² This cooperative approach is particularly appropriate because of America's need to improve its international leadership credibility, which has been damaged through its acting without the permission of the international community, such as forming a 'coalition of the willing' to commence the invasion of Iraq without UN approval.⁶³ As expressed by a Canadian delegate in the 2nd Meeting of the Japan-Canada-US Conference Series on Trilateral Cooperation, while the US is clearly willing and capable of being a regional leader, it lacks the third requirement; acceptance.⁶⁴

⁵⁸ World Nuclear Association, op.cit. (2010).

⁵⁹ H.R. Clinton, 'America's Engagement in the Asia-Pacific,' address in Honolulu, Hawaii (28 October 2010) available online: <http://www.state.gov/secretary/rm/2010/10/150141.htm> (accessed 2 November 2010).

⁶⁰ P. Dibb, The Consequences for Australia of US Global Dominance, p. 2, unpublished paper, as quoted in McCausland et al, op.cit. (2007) p. 5.

⁶¹ Government-Department of Defense, *Quadrennial Defense Review Report* (February 2010).

⁶² G. Garrett, 'Strategic Choices: Australia, China and the US in Asia,' *The Asialink Essays*, vol. 2 no. 5 (2010) p.4; see also A. Scobell, in McCausland et al, op.cit. (2007) pp. 95-97.

⁶³ B. Hayden, 'Introduction,' in McCausland et al, op.cit. (2007). For a contrasting perspective see 'Anti-Americanism on the Wane?' in The National Intelligence Council, *Global Trends 2025: A Transformed World* (November 2008) pp. 95-6.

⁶⁴ The 2nd Meeting of the Japan-Canada-US Conference Series on Trilateral Cooperation, Tokyo, 30-31 August 2010 (personal record).

With a belief that US regional alliances “remain potent inducements for China to move toward responsible stakeholderhood,”⁶⁵ the US is intent on building on its existing bilateral partnerships to create strengthened multilateral cooperation.⁶⁶ “In a vast and diverse region, our bonds with our allies...remain the foundation for our strategic engagement”⁶⁷

America’s three broadest bilateral partnerships in the region are those with Japan, South Korea and Australia. As Japan is troubled by its ageing population, wavering economy and political uncertainty and South Korea by the instability of the Korean Peninsula, the alliance with Australia is appealing due to its simplicity and consequent stability.⁶⁸ The combination of Australia’s common approach to global and regional issues and its extensive involvement with Asian nations makes it a unique and ideal US ally in its attempts to build multilateral networks.

“Australia does have an important intermediary role between the...East Asian economic power and the western part of the world...Australia is deeply connected to both...and Australia is listened to...”⁶⁹

Since Australia is not perceived as a rival by any state within the region, it is in a unique position where it is seen as a non-threatening security partner and facilitator of multilateral partnerships, by both developing and developed states.⁷⁰ The sophistication of its relationships with Asian states, including trade relations with China and formal diplomatic ties with North Korea, gives Australia “a measure of diplomatic leverage as a middle power in an increasingly competitive Asian geopolitical environment that is disproportionate to its own modest (if highly proficient) defence capabilities.”⁷¹ An alliance with such a state is of value to the US, which accepts that super-powers are rarely best positioned to nurture collaborative arrangements between states.⁷²

⁶⁵ Przystup in McCausland et al, op.cit. (2007) p. 265.

⁶⁶ H.R. Clinton, ‘Remarks on Regional Architecture in Asia: Principles and Priorities,’ Honolulu, Hawaii (12 January 2010) available online: <http://www.state.gov/secretary/rm/2010/01/135090.htm> (accessed 25 September 2010).

⁶⁷ Clinton, op.cit. (October 2010).

⁶⁸ Garrett, ‘op.cit. (2010), p. 4.

⁶⁹ J. Fallows, ‘James Fallows on Obama's First Year, the US-China Relationship and the Media,’ Address to the United States Study Centre, University of Sydney (4 November 2009) available online: <http://ussc.edu.au/s/news-room/view/James-Fallows-on-Obamas-first-year-the-US-China-relationship-and-the-media> (accessed 15 September 2010).

⁷⁰ Schear in McCausland et al, op.cit. (2007) p. 323.

⁷¹ Hayden in McCausland et al, op.cit. (2007) p.80; for more information on Australia-China relations see E.S. Medeiros, K. Crane, E. Heginbotham, N.D. Levin, J.F. Lowell, A. Rabasa and S. Seong, ‘Pacific Currents; The responses of US Allies and Security Partners in East Asia to China’s Rise,’ RAND Corporation Project Air Force (2008).

⁷² A. MacIntyre, ‘Kevin Rudd, Australian Foreign Policy and Asia,’ *East Asia Forum Online* (12 October 2010) available online: <http://www.eastasiaforum.org/2010/10/12/kevin-rudd-australian->

The next component of the US approach to Asia is establishing partnerships with developing countries in the region that offer potential. One such partnership is that with Indonesia. The US acknowledges the necessity of monitoring and supporting the peaceful transition to democracy by the world's largest Muslim-majority state.⁷³ Recognising its regional leadership role, as the creator of the Bali Democracy Forum, host of the 2011 East Asia Summit (EAS) and chair of ASEAN in 2011, the US has formalised ties with Indonesia through the creation of a Comprehensive Partnership Agreement in November 2010.⁷⁴ The US is also exploring a partnership with Vietnam. Vietnam's act of extending an invitation to the US to participate at the 2010 EAS is a reflection of the increasing diplomatic, economic and now defence relations between the two countries.⁷⁵ The US is also increasing its engagement with India, the largest democracy in the world, most recently through a civilian nuclear technology agreement.⁷⁶

The biggest focus of the US, however, is undoubtedly on strengthening relations with China. Over the last three years Australia has simultaneously strengthened its economic relationship with China and its alliance with the US.⁷⁷ However, with the global financial crisis (GFC) both hindering the growth of the global economy and fast-tracking the evolution from the 20th "American Century"⁷⁸ to the 21st Asia-Pacific Century, China's economic gains on the US and US concerns over the message that China's increasingly close commercial relationship with Australia will send to other US allies in the region⁷⁹ have led to discussions over whether Australia will have to choose between its relationships with the two powers.

Due to the US and Australia's independent interests in a relationship with China, the two countries have responded differently to its rise to power. Australia, a middle power rich in raw materials, sees China as a commercial opportunity. Indeed China's steady importation of Australian raw materials was significant in maintaining Australia's economic security throughout the GFC.⁸⁰ In contrast, the US views China as a "serious commercial threat."⁸¹ With China's refusal to let its currency float upward against the dollar, as well as holding a quarter of America's

[foreign-policy-and-asia/](#) (accessed 20 October 2010); see also Russell in McCausland et al, op.cit. (2007).

⁷³ Garrett, op.cit. (2010) p. 5.

⁷⁴ Clinton, op.cit. (October 2010).

⁷⁵ Ibid.

⁷⁶ Garrett, op.cit. (2010), p. 5.

⁷⁷ G. Garrett, 'Chimerica and Australia,' *American Review*, vol. 1 (2009).

⁷⁸ Termed by H.R. Luce, 'The American Century,' reprinted in M.J. Hogan, ed., *The Ambiguous Legacy* (Cambridge, Cambridge University Press, 1999).

⁷⁹ Russell in McCausland et al, op.cit. (2007).

⁸⁰ Rosenberger in McCausland et al, op.cit. (2007) p.204; see also Garrett, op.cit. (2010).

⁸¹ Ibid. p. 204.

borrowing and constituting nearly half of its trade deficit, the China-US relationship has been described as “the biggest and most imbalanced economic relationship in human history.”⁸²

The Bush administration’s response to China’s rise to power has been characterised as “openly blam[ing] China and seek[ing] economic sanctions to protect against what it saw as unfair competition,” which is in stark contrast to Australia’s non-confrontational approach.⁸³ Under the Obama administration, however, the US has changed its policy, aiming to “engage and socialise China rather than isolate and chastise it.” Of course, securing China’s participation as a “responsible stakeholder”⁸⁴ in such an Asia-Pacific network will not be an easy task, but the fact that this change in policy is supported by Australia suggests that China’s rise has the potential to strengthen the U.S-Australia alliance, rather than be the catalyst to its dissolution.⁸⁵

In August 2004, then Australian Foreign Minister Downer (subsequently retracted) statement that ANZUS does not bind Australia to help the United States defend Taiwan in a China-Taiwan war led to doubt over Australia’s commitment to the US.⁸⁶ Such uncertainty highlights the sensitivity of the US-Australia alliance vis-à-vis China, because of Australia’s reluctance to act in a way which might compromise either its economic relationship with China, or its alliance with the US. The remaining uncertainty thus suggests the possibility of a time where Australia would have to make a decision that could entirely change the nature of its alliance with the US.

The third focus of the Obama administration in terms of its Asia-Pacific involvement is on utilising regional institutions to forward its defence, economic and diplomatic agenda. Increased engagement with regional institutions under the Obama administration demonstrates such a commitment. In an address to East Asian Nations in 2009, US President Obama declared that:

As an Asia-Pacific nation, the United States will be involved in the discussions that are shaping the future of the region, and will participate fully in regional multilateral organisations as they evolve with the changing challenges of the 21st century.⁸⁷

⁸² Garrett, *op.cit.* (2010) p. 3.

⁸³ Rosenberger in McCausland et al, *op.cit.* (2007) p. 204.

⁸⁴ See R.B. Zoellick, ‘Whither China: From Membership to Responsibility?’, Address to National Committee on U.S- China Relations, New York (21 September 2005) available online: http://www.ncuscr.org/files/2005Gala_RobertZoellick_Whither_China1.pdf (accessed 4 October 2010).

⁸⁵ Blumenthal, *op.cit.* (2005).

⁸⁶ *Ibid.*

⁸⁷ B. Obama, ‘United States Pursuing Renewed Engagement in Asia-Pacific,’ Major Address to East

The US encourages the restructure of existing institutions to respond to the evolving challenges of the Asia-Pacific region. It envisages APEC becoming more results-oriented and focused on sustainable economic process. It would also like to see the EAS become a forum where strategic and political issues are explored in depth.⁸⁸

Australia strongly supports such broadening of agenda and scope. With a belief that “the place of the United States in the Asian region is incontestable, indisputable and indispensable,”⁸⁹ Australia encourages US engagement in such regional architecture.⁹⁰ Aligned with a common agenda, Australia remains an important partner to the US in these efforts.⁹¹

Recent activities suggest that the regional architecture is evolving, attested to by the inaugural ASEAN Defence Ministers Meeting between ASEAN defence ministers and eight dialogue partners (Australia, China, India, Japan, New Zealand, Russia, South Korea and the United States) on 12 October 2010 and the expansion of the EAS membership to include the US and Russia.⁹² Following the AUSMIN consultations in November 2010 Hillary Clinton acknowledged the significance of Australia’s support in achieving this development.⁹³

The US is also largely motivated to be a member of the Asia-Pacific region by economic considerations. The rapidly expanding economic weight of the region, particularly in the wake of the GFC with China’s relative success in keeping its economy stable, has led to an increased US interest in engaging with regional markets in the promotion of free trade. “[D]eveloping Asia will account for close to

Asian Nations, Tokyo (14 November 2009) available online: <http://www.america.gov/st/peacesec-english/2009/November/20091113215718dmslahrellek0.4669415.html> (accessed 2 November 2010).

⁸⁸ Clinton, op.cit. (October 2010).

⁸⁹ K. Beazley, ‘Address to the 2010 Asia Society Texas Centre Tiger Ball’ (2 June 2010) available online: <http://www.usa.embassy.gov.au/files/whwh/AMBSpeechAsiaSocietyHouston.pdf> (accessed 18 October 2010).

⁹⁰ Scobell, in McCausland et al, op.cit. (2007); see also B. Obama quoted in S. Kaufman, ‘Obama Tells ASEAN Leaders U.S. Needs Partnership with Asia,’ Bureau of International Information Programs, Department of State (24 September 2010) available online: <http://www.america.gov/st/business-english/2010/September/20100924151605esnamfuak0.9327967.html> (accessed 25 September 2010).

⁹¹ Garrett, ‘Strategic Choices’ op.cit (2010); Schear, in McCausland et al, op.cit. (2007).

⁹² C.A. Thayer, ‘Southeast Asia: Patterns of Security Cooperation,’ *East Asia Forum Online* (29 October 2010) available online: <http://www.eastasiaforum.org/2010/10/29/southeast-asia-patterns-of-security-cooperation/> (accessed 30 October 2010).

⁹³ Clinton, op.cit. (November 2010).

two thirds of the world economy in 2030, almost doubling the current 34% share of the region in 2009.”⁹⁴

In recognising the limitations of existing market-liberalising mechanisms, the United States is collaborating with Australia to develop the Trans Pacific Partnership (TPP), which is to build on the existing agreement between New Zealand, Chile, Singapore and Brunei Darussalam.⁹⁵ As the only agreement of its kind, the TPP has the “potential to trigger a wholesale reconfiguration of Asian commercial alliances in a way that would meet important and long-held US goals.”⁹⁶ Such goals include doubling US exports in order to overcome US unemployment and monitoring China’s East Asian trade dominance.⁹⁷ With a similar interest in increasing its export rates within the region, Australia is investing heavily in negotiations to ensure the creation of an agreement which most benefits Australia and its allies. The pre-existing AUSFTA also acts as an important model in shaping a similarly US-biased TPP.

The Future of the Alliance

Australia’s loyalty to the US and the extent to which the US benefits from such loyalty is evident. What one is left pondering is the extent to which this loyalty is acknowledged and appreciated by the US, and to what degree it is contrary to Australia’s national interests, particularly in the Asia Pacific region.

As a global leader, the US is constantly balancing responses to a multitude of challenges. With such pressure, on top of domestic concerns, many have begun to question whether the Australian alliance remains a US priority.⁹⁸ Then Vice

⁹⁴ J.W. Lee and K. Hong, ‘Economic Growth in Asia: Determinants and Prospects,’ Asia Development Bank Economics Working Paper Series, no. 220 (September 2010) p. 7.

⁹⁵ The first of four negotiations to include the United States, Australia, Peru and Vietnam in the agreement began in Melbourne on 15 March 2010. The US and other participatory states predict the future involvement of its major economic partners, China, Japan and South Korea, and of ASEAN’s key member, Indonesia: Australian Fair Trade and Investment Network Ltd., ‘Trans-Pacific Partnership Agreement’ (updated 29 October 2010) available online: <http://aftinet.org.au/cms/trans-pacific-partnership-agreement/trans-pacific-partnership-agreement> (accessed 30 October 2010); G. Garrett, ‘Strategic Choices,’ op.cit. (2010); United States Trade Representative, ‘USTR begins TPP talks in Australia,’ USTR Press Release (March 2010) available online: <http://www.ustr.gov/about-us/press-office/press-releases/2010/march/ustr-begins-tpp-talks-australia> (accessed 2 September 2010).

⁹⁶ C. Barfield and P. Levy, ‘Tales of the South Pacific: President Obama, the Trans-Pacific Partnership and US leadership in Asia,’ International Economic Outlook, American Enterprise Institute for Public Policy Research, no. 2 (December 2009) .

⁹⁷ R. Kirk, ‘APEC and the USA: Looking to 2011 and Beyond Forum’, Address in Melbourne, Australia (15 March 2010) available online: <http://usrsaustralia.state.gov/us-oz/2010/03/15/ustr1.html> (accessed 20 September 2010); see also B. Obama, quoted in Kaufman, op.cit. (2010).

⁹⁸ R. Lyon, ‘Obama’s administration’s foreign and security policy and its implications for Australia

President Cheney's comment in 2007 that "[r]arely have the challenges been so numerous... and yet never before has our alliance been stronger,"⁹⁹ aptly captures the potential, however, for the alliance to be further strengthened through Australia's increased contributions to these global US efforts. The question is; does the US take these contributions for granted?

The frequency of visits to Australia by US officials has been a measure used historically by Australian Governments to highlight America's commitment to Australia. It is not surprising, therefore, that the postponement of President Obama's 2010 visit to Australia – twice – followed by the omission of Australia from his ten-day diplomatic mission to the Asia-Pacific region in November 2010, has intensified fears that Australia's importance to the US is declining.¹⁰⁰ The President upheld his resolution to embark on the Asia tour just three days after the Democrats' devastating losses in the mid-term elections,¹⁰¹ despite widespread criticism that in doing so the government would be running away from complaints about the failing US economy. He reiterated the US government's commitment to the region and belief that only through strengthening regional alliances will America's domestic economy recover.¹⁰² In light of this commitment to the region, the omission of Australia from his visiting schedule, while visits to India, Indonesia, South Korea and Japan were included, is particularly worrying for Australia.

One recent visit to Australia that was followed through on was that of US Secretary of State Hillary Clinton and Secretary Gates for the 25th annual AUSMIN consultation on 8 November 2010. Secretary Clinton is the highest-ranked US official to visit Australia since 2007, when then President Bush made the journey, not in recognition of America's special relationship with Australia but merely to participate in APEC discussions. Although Australian media thoroughly covered

and Japan,' in *The Fifth Japan-Australia Track 1.5 Dialogue*, op.cit. (2009); Katahara, *The Fifth Japan-Australia Track 1.5 Dialogue*, op.cit. (2009).

⁹⁹ D. Cheney, quoted in Cincotta, op.cit. (2007).

¹⁰⁰ G. Garrett, 'President with eye on the Pacific,' *The Australian* (9 June 2010)

<http://www.theaustralian.com.au/news/opinion/president-with-eye-on-the-pacific/story-e6frg6zo-1225877165509> (accessed 2 September 2010); B.K. Gordon, 'Obama's visit to Indonesia and Australia and the TPP,' *East Asia Forum* (30 May 2010) available online:

<http://www.eastasiaforum.org/2010/05/30/obamas-visit-to-indonesia-and-australia-and-the-tpp/>

(accessed 26 September 2010); B. Norington, 'Obama drops plans to visit Australia in Indonesia trip,' *The Australian* (24 September, 2010) available online:

<http://www.theaustralian.com.au/national-affairs/obama-drops-plans-to-visit-australia-in-indonesia-trip/story-fn59niix-1225928787136> (accessed 26 September 2010).

¹⁰¹ 'Obama Sets Out For 10-day Asia trip,' *World News Australia*, SBS Online (5 November 2010)

available online: <http://www.sbs.com.au/news/article/1403396/Obama-sets-out-for-10-day-Asia-trip> (accessed 4 October 2010).

¹⁰² G. Garrett, 'Midterm Referendum on Obama,' *ABC 24* (1 November 2010) available online:

<http://ussc.edu.au/news-room/Midterm-referendum-on-Obama> (accessed 4 November 2010).

the visit, highlighting the commitments made for further defence and climate change cooperation,¹⁰³ one might ask to what extent the visit was a self-serving engagement for the US. The comparative lack of US media attention surrounding Australian Foreign Minister Rudd's US visit in October 2010 further highlights the discrepancy between the level at which each country values the other.¹⁰⁴

Undoubtedly, Australia benefits from the alliance with the US. Most significantly, the guarantee of US support in the event that Australia were threatened by a conventional or nuclear attack in combination with the benefits of ongoing defence collaboration allows Australia to spend far less on its national defence infrastructure than would otherwise be necessary. The stability that US presence brings to the region is also of extreme importance to Australia. However, there is little doubt that its exceedingly close relationship with the US damages how Australia is viewed by its Asian neighbours, thus depriving it of opportunities in the region.¹⁰⁵ Australia's perceived incapacity to pursue its own agenda in spite of its super-power ally was made evident through the outcry by numerous Asian nations following then President Bush's reference to Australia as a 'deputy sheriff' of the Asia Pacific region in late 2003.¹⁰⁶

The Australia-US alliance is broad and multilayered. It is founded on common values and mutual interests in regional and global security, market liberalisation and multilateral cooperation. It is also an alliance that continues to expand and strengthen. While both countries benefit from the alliance, and both governments continue to publicise their belief in its promising future, it must not be taken for granted: "The US-Australia alliance can prosper only so long as both sides firmly believe that what they are getting out of the relationship equals or exceeds what they are putting into it."¹⁰⁷ Hence the matter-of-fact attitude with which the US accepts the overwhelming majority of benefits from the relationship is of concern to the future of the alliance.

¹⁰³ 'Australia-US in Solar Research Pact,' *World News Australia*, SBS Online (7 November 2010) available online: <http://www.sbs.com.au/news/article/1405272/Australia-US-in-solar-research-pact> (accessed 7 November 2010).

¹⁰⁴ H.R. Clinton, 'Remarks With Australian Foreign Minister Kevin Rudd After Their Meeting, Washington, DC' (17 September, 2010) available online: <http://www.state.gov/secretary/rm/2010/09/147303.htm> (accessed 30 September 2010).

¹⁰⁵ D. McDougall, 'Australia and Asia-Pacific Security Regionalism: From Hawke and Keating to Howard,' *Contemporary Southeast Asia* (April 2001).

¹⁰⁶ Malaysian Deputy Defense Minister Shafie Apdal, for example, referred to Australia as America's "puppet" in the region: 'Howard denies Australia has 'sheriff' role,' *Sydney Morning Herald* (17 October 2003) available online: <http://www.smh.com.au/articles/2003/10/17/1065917588513.html> (accessed 2 November 2010).

¹⁰⁷ Schear in McCausland et al, op.cit. (2007) p. 313.

As the international arena and countries' respective national interests continue to evolve, it will become increasingly important for Australia to assess its role as an independent international actor, and how this is both aided and hindered by its relationship with the United States of America.

Preventing Crime: An International Social Development and Human Rights Perspective

Rose Grantham*

Routinely, crime prevention is approached from a law and order perspective: an approach that is often reactive rather than proactive. To be effective, crime prevention must be placed in a much broader social context. A critical approach to crime prevention can lead to improved social development and better protection of human rights. Drawing upon United Nations' social development and human rights initiatives, this chapter investigates three areas of crime prevention. The first is crime prevention through good urban design and management; good urban design can not only reduce crime rates but can also lead to improved social and sustainable development. Second, this chapter investigates alcohol-related crime and violence and considers what measures could be taken to reduce it; it finds that the interests of the alcohol industry need to be balanced with effective regulation and education. Finally this chapter looks at how women and girls are often portrayed in advertising and pornography and finds that violent pornography and video games makes violence towards women and girls more socially acceptable, seriously undermining efforts toward achieving gender equality.

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The United Nations has set out a social development and human rights approach to crime prevention in various United Nations instruments. Crime prevention is not only a law and order issue. It is a much broader social issue that “depends above all on... improving social conditions and enhancing quality of life.”¹ This requires crime prevention initiatives that will result in social transformations that lead to improved human development. In an age where crime is becoming increasingly globalised, this approach is more needed than ever before. Critical analysis of crime prevention methodology is influenced by post-modernist and feminist theories. Such analysis requires that crime prevention is approached from within the current social and political context. Effective crime prevention is dependent on a broad-based approach that addresses the underlying causes of crime.

This chapter investigates three areas of crime prevention to which social development and human rights can be applied. The three areas are: crime prevention through urban design and management, alcohol-related crime and violence and sexual crime.

The United Nations highlights ‘effective urban planning, design and governance’ as a policy response to urban crime and violence.² ‘Crime Prevention Through Environmental Design’ principles are now widely utilised in urban design. The European Commission and particularly the United Kingdom have taken this concept even further, recognising that sustainable development relies on providing quality of place that is “fairer, safer, healthier and more prosperous.”³

The second area of investigation is alcohol-related crime and violence. According to crime statistics the incidence of public disorder and violent crime is increasing.⁴ To understand this increase, the underlying factors or causes need to be considered. Several reports are emerging outlining the social costs and the harm of alcohol, particularly given that there is evidence of an increase in binge drinking among younger people in Australia.⁵ This chapter considers the role of the alcohol

¹ R.S. Clark, ‘Human Rights and the U.N. Committee on Crime Prevention and Control’, *The ANNALS of the American Academy of Political and Social Science*, vol. 506, no. 68 (1989), pp. 75.

² United Nations Human Settlements Program, *Enhancing Urban Safety and Security: Global report on human settlements* (United Kingdom: UN Habitat, 2007).

³ HM Government, *World class places: The Government’s strategy for improving quality of place* (London: Communities and Local Government, 2009), p. 6.

⁴ ‘Crime statistics and the trouble with knives’ (12 October 2010) available online: <http://www.abc.net.au/rn/lawreport/stories/2010/3034723.htm#transcript> (accessed 15 October 2010).

⁵ A. Richardson and T. Budd, ‘Young Adults, alcohol, crime and disorder’, *Criminal Behaviour and Mental Health*, vol. 13, (2003), p.5-17.; P. Lloyd, ‘Report: Alcohol costs Australia \$36 billion/year,’ *Lateline* (23 August 2010) available online: <http://www.abc.net.au/lateline.content/2010/s2991299.html> (accessed 12 September 2010).

industry and of the government on issues of the availability, marketing and pricing of alcohol and the role of education in alcohol use.

The final area of investigation is sexual crime. In particular the industries of pornography and advertising are scrutinised to establish if the objectification of women and the sexualisation of children play a part in sexual crime. Despite some significant social transformations for women and girls, for example in the areas of employment and education, gender inequality remains deeply ingrained in most societies. There are some disturbing trends in both pornography and advertising that unequivocally represent the current social reality of gender inequality. Although it is difficult to conclusively link hard-core pornography, advertising and sexualised images of children to sexual crime, they nonetheless represent significant deficits in human development and in human rights.

A Social Development and Human Rights Approach to Crime Prevention

Enhancing social development and the protection of human rights are central to various United Nations instruments. Among these instruments is the United Nations Committee on Crime Prevention and Control (the UNCCPC). The first paragraph of the Sixth United Nations Congress' 1980 Caracas Declaration states that:

The success of criminal justice systems and strategies for crime prevention..... depend above all on the progress achieved throughout the world in improving social conditions and enhancing the quality of life; it is thus essential to review traditional crime prevention strategies based exclusively on legal criteria.⁶

Roger Clark of the UNCCPC alludes to the idea that strategies for crime prevention are necessarily issues of a social nature.⁷ In order to minimise crime, planned development needs to be equitable. To achieve this requires the “coordinated attention of various agencies and disciplines.”⁸ Effective crime prevention requires an approach that addresses social equity and human rights. It requires navigating current social and political frameworks to ensure greater social equity and the protection of human rights.

In contrast to the UN approach, the dominant policy framework results in what some have called a somewhat “contradictory” approach to crime prevention.⁹ On

⁶ Clark, op.cit. (1989) p. 75.

⁷ Ibid., p. 69.

⁸ Ibid., p. 78.

⁹ E. Carrabine as quoted in R.Watts, J. Bessant and R. Hill, *International Criminology: a critical introduction*, (Milton Park, Abingdon, Routledge, 2008), p. 154.

one hand there is a ‘get tough on crime and criminals’¹⁰ approach, together with a call for traditional family values and respect for law and order, especially through contemporary Christian movements. On the other hand, this approach also emphasises privatisation and free-market policies, with the effect that governments have shifted their role from that of provider to regulator. This means that the individual and the community have become increasingly responsible for solutions to social and economic problems.¹¹

Ulrich Beck of the London School of Economics argues that the “risk society” has replaced the “class society” of modern times.¹² Together with economic rationalism, this largely drives corporate and community responses to crime prevention. In this approach, criminal behaviour is explained as rational, calculated and as the product of individual’s choices. One of the leading texts on international criminology argues that criminology has largely retained this conventional approach to crime prevention, despite the prevalence of human rights agendas. The emphasis is on risk and protective factors, rather than tackling the underlying causes of crime. As a consequence, ‘at risk’ individuals are assessed using childhood, family, schooling and socio-economic factors. This approach results in remedial measures targeted at those who are judged as poor, anti-social and dysfunctional. It can also target certain ethnic groups, for example indigenous groups or Muslims. Targeting assumed ‘at risk’ individuals can be viewed as an effective way of preventing crime, however it is problematic on a number of fronts.

The approach is highly presumptive because it relies on profiling the kind of person who is likely to commit crime, thereby de-emphasising all other persons. It largely limits the task of crime prevention to dealing with “those who [often] have no voice in political and civil affairs.”¹³ It can be seen as a narrow view that is full of “moralistic prejudices devoid of real insight into the world of ‘normal’ virtues and the real conduct of ordinary people.”¹⁴ Crime prevention strategies based on these assumptions lack “critical and reflective analysis.”¹⁵ Structural causes such as class, wealth distribution and poverty are often ignored, and as a result strategies such as education, employment and poverty alleviation are overlooked. Effective crime prevention requires a coordinated and on-going effort with social equity and human rights at its core. This type of approach requires locating crime prevention within its social and political context, and can lead to taking steps to improved social transformation.¹⁶ In a world in which the gap between rich and poor is

¹⁰ Watts et al., op. cit. (2008) p. 154.

¹¹ Ibid., pp. 155-156.

¹² U. Beck as quoted in E. Carrabine, P. Iganski, M. Lee, K. Plummer and N. South, *Criminology: A sociological introduction* (London: Routledge, 2004), p. 104.

¹³ R. Hogg and D. Brown as quoted in Watts et al., op. cit. (2008) p. 165.

¹⁴ Watts et al., op. cit. (2008) p. 159.

¹⁵ Ibid.

¹⁶ Ibid., p. 164.

increasing, a traditional approach to crime prevention is regressive and results in more dangerous and polarised societies. There is evidence of this already occurring, especially in the context of the ‘global criminal economy’ that has emerged out of the current process of globalisation.¹⁷ As documented by the United Nations Office on Drugs and Crime (UNODC), in many of examples the flow of trade is from “the desperate poor to the needy rich.”¹⁸ The changing nature of crime highlights how politically and socially embedded it is and the need to adopt a more critical analysis. It requires analysing the structural causes of crime, challenging assumptions about who commits crime and working toward transformative solutions that respond to the types of crime which are actually occurring that pose the biggest threats. Such an approach has the ability to close the gap between the very rich and the very poor.

A conventional approach to crime prevention produces what has been called “disciplinary proprieties that centre on positivist assumptions and the lure of scientific absolutes.”¹⁹ It is overarchingly rationalist and objectivist as opposed to critical. Criminologists who take a more critical approach to crime prevention recognise the significance of the social changes that are taking place. Two such changes are often explained by feminist theory and post-modernist theory or critiques. Feminist theory argues that in patriarchal societies women are “exploited, oppressed and dominated”, meaning that until recently, women have largely been ignored in philosophical, historical and social science discourses.²⁰ As a result, the social reality is that of deep-gender-based inequality. This cannot be ignored if the prevention of crimes such as domestic violence, sexual abuse, prostitution and people trafficking is to be successful. The other highly influential critical theory is post-modernism. In many ways rebutting ‘enlightened’ and ‘rationalist’ theory, post-modernism recognises the fluid nature of society and recognises that there is not one answer to crime prevention hence the necessity of a broad-based approach.²¹ Post-modernist expression permeates many forms of culture, art and architecture, including urban design.

Crime Prevention Through Urban Design and Management

Social development and human rights underpin much of the work of the United Nations. The United Nations acknowledges that traditional approaches to crime have “increasingly been replaced by an approach that recognises the necessity for a broad-based response.”²² The UN identifies “enhancing urban safety and security

¹⁷ M. Castells as quoted in Watts et al., op. cit. (2008) p. 164.

¹⁸ N. Scheper-Hughes and L. Wacquant as quoted in Watts et al., op. cit. (2008) p. 165.

¹⁹ G. Pavich as quoted in Watts et al., op. cit. (2008) p. 230.

²⁰ Watts et al., op. cit. (2008) p. 86-7.

²¹ Carrabine et al. op. cit. (2004) p. 97-8.

²² United Nations Human Settlements Program, op. cit. (2007) p. 260.

through effective urban planning, design and governance” as the first of one of six policy responses to crime and violence in urban areas.²³ ‘Crime Prevention Through Environmental Design’, is now a recognised response to criminology’s opportunity theory, of which situational prevention is its practical application.²⁴ Several Crime Prevention Through Environmental Design associations now exist including the International Crime Prevention Through Environmental Design Association, the European Designing Out Crime Association and the British Designing Out Crime Association (DOCA). These associations are comprised of police officers, architects, planners, criminologists, security professionals and others.²⁵ These organisations recognise the “inter-relationship between the physical environment and human behaviour.”²⁶ According to the United Nations:

Available evidence shows that *crime prevention* through environmental design-based approaches to the processes of shaping new development have an important contribution to make to crime prevention.²⁷

The United Nations estimates that 10-15 per cent of crimes are impacted by environmental design and management components, amounting to millions of incidents of crime each year.²⁸ Research shows that some types of crime can be reduced by particular built environments without displacing crime.²⁹

Some developed nations, such as the United States, Canada and the United Kingdom have a relatively advanced approach to integrating crime prevention in urban planning and design. The European Commission has adopted a “safe cities” approach.³⁰ The United Kingdom is good case in point. Police Architectural Liaison Officers are appointed to provide advice to key players in the development process.³¹ The UK now has a range of advisory agents and documents setting new standards in urban planning. Safety is viewed as an integral part of sustainable development, the primary purpose of the UK planning system:

²³ Ibid., p. 239.

²⁴ ‘Planning and Urban Design and Management for Crime Prevention Handbook’, AGIS – Action SAFEPOLIS, European Commission funds as per Contract JLS/2006/AGIS/208 (2006-2007), p. 6.

²⁵ I. Colquhoun, *Design Out Crime: Creating Safe and Sustainable Communities*, (Oxford, Elsevier 2004), p. 56.

²⁶ E-DOCA ‘About Us’, available online:

<http://www.e-doca.net/files/uk/introduction.html> (accessed 20 October 2010).

²⁷ United Nations Human Settlements Program, op. cit., (2007) p. 97-8.

²⁸ Ibid., p. 69.

²⁹ E-DOCA, op. cit., (2010).

³⁰ *Planning Urban Design and Management for Crime Prevention Handbook*, op. cit. (2006-2007).

³¹ United Nations Human Settlements Program, op. cit., (2007) p. 97.

The built environment can be a source of everyday joy or misery. It is an important influence on crime, health, education, inclusion and well-being.³²

These principles are now incorporated into Australian urban design. In February 2010 the Government of South Australia's Department of Planning and Local Government released a document entitled "The 30 year Plan for Greater Adelaide". Although the document does not mention crime prevention specifically, it does highlight the importance of broad concepts such as mixed-use precincts, effective transport, housing choice, sustainability and inclusive communities.³³

The vision of "world class places" provides a framework for achieving quality of place that can improve human development of which crime prevention is a part. Good environmental design does not privilege or exclude any sectors of a community. It supports a diverse mix of uses and a broad socio-demographic providing "spontaneous surveillance".³⁴ It is an important way to ensure social equity and the protection of human rights. These principles can drive efforts to improve social capital, or "community assets", resulting in socially progressive transformation.³⁵ More broadly, it involves providing assistance to strengthen a community's economic prospects. This can be achieved by improving a community's education, employment, sporting and cultural activities. Strong and robust economies and social and sustainable development requires strong and resilient communities.

Alcohol-Related Crime and Violence

According to the United Nations, crime rates at global and regional levels have steadily increased in the 20 years to the year 2000 by 30 per cent, although rates vary among regions.³⁶ While there has been an overall decline in crime rates in Australia it is worth noting that public order offences have increased.³⁷ In the year 2008-09, acts intended to cause injury was the principal offence (21%), followed by public order offences (17%).³⁸ According to criminologist Julian Bondy, "over time, steadily but surely, [Australia is] becoming a more violent society."³⁹ There

³² HM Government, op. cit. (2009) p. 2.

³³ Department of Planning and Local Government, 'The 30 year Plan for Greater Adelaide' (Adelaide: Government of South Australia, February 2010).

³⁴ Planning Urban Design and Management for Crime Prevention Handbook, op. cit. (2006-2007) p. 9.

³⁵ United Nations Human Settlements Program, op. cit. (2007) p. 104.

³⁶ Ibid., p. 53.

³⁷ Australian Bureau of Statistics, *Recorded Crime – Offenders 4519.0* (2008-09), p. 11.

³⁸ Ibid., p. 10.

³⁹ Crime statistics and the trouble with knives, op. cit., (2010).

has been a 200% increase per capita in assaults to the 20 years to the year 2009.⁴⁰ Furthermore, according to the International Centre for the Prevention of Crime's International Report 2010, "the consumption of alcohol is a major factor associated with criminal violence and abuse."⁴¹ In Wollongong NSW, nearly half (48.5 per cent) the number of assaults involved alcohol in 2009.⁴² A Youth Lifestyle Survey conducted in the UK found that binge drinking, particularly by males between the ages of 18 to 24, was statistically related to offending behaviour, even after taking other relevant factors into account.⁴³ While higher crime rates may reflect the fact that more offenders are being prosecuted rather than an increase in offences per se, nevertheless the statistics are alarming and require consideration of measures to reduce alcohol-related violence and crime.

The excessive use of alcohol has long been considered a public health issue. Recently in Australia however, there has been a call to address alcohol misuse as a social issue, rather than just a health issue alone.⁴⁴ This is demonstrated by the way in which law enforcement agencies are responding to alcohol-related violence. For example, on a weekend in September of 2010 police in Australia and New Zealand conducted a crackdown on alcohol-fuelled violence, in which more than 1,000 arrests were made in Queensland and NSW alone.⁴⁵ The crackdown is part of an Australian and New Zealand police alliance, codenamed Operation Unite, to tackle "alcohol misuse, violence and anti-social behaviour."⁴⁶ According to a media release prior to the crackdown:

Operation Unite demonstrates the united resolve of police commissioners to change Australia and New Zealand's culture of binge drinking in public places and challenge the drinking public to take greater responsibility for their behaviour.⁴⁷

Relying on this effort to change peoples' drinking behaviour requires some evidence that this type of response is effective. Possible shortcomings of this response are that it could damage the relationship between law enforcement

⁴⁰ Ibid.

⁴¹ International Centre for the Prevention of Crime, *International Report on Crime Prevention and Community Safety: trends and perspectives* (Montreal: Canada, 2010), p. 66.

⁴² NSW Bureau of Crime Statistics and Research, *Local Government Area Crime Report, Wollongong* (Sydney: NSW Government, 2009), p. 39.

⁴³ Richardson and Budd, op. cit., (2003), p. 5.

⁴⁴ Lloyd, Peter, op. cit., (23 August 2010).

⁴⁵ 'Drunks targeted in nationwide crackdown', *ABC News* (12 September 2010) available online: <http://www.abc.net.au/news/stories/2010/09/12/3009418.html> (accessed 12 September 2010).

⁴⁶ Australia New Zealand Policing Advisory Agency, 'Operation Unite: Police United Stand On Drunken Violence' (8 September 2010) available online: <http://www.police.wa.gov.au/LinkClick.aspx?fileticket=jQAa0wc4fe4%3D&tabid=1488> (accessed 23 May 2011).

⁴⁷ Ibid.

agencies and young individuals, rendering the response counterproductive. In reality, solving the problem of excessive drinking, which may lead to violent or other anti-social behaviour, is beyond the scope of law enforcement agencies alone. Binge drinking and its effects are a wider social issue and require a broader response to analyse its causes. This is understood by law enforcement agencies:

Tackling this issue is not something the police can do alone. Police are looking for the community to take a stand and push for a change in our drinking culture and acceptable standards of behaviour.⁴⁸

The World Health Organisation (WHO) is working toward an international agreement on the sale and consumption of alcohol to reduce its harmful effects through a policy framework which squarely emphasises the role of the alcohol industry. The three components are the availability of alcohol, marketing of alcoholic beverages and pricing policies.⁴⁹

In developed countries there is regulation of the availability of alcohol, for example in terms of age and licensing restrictions and available hours, though these regulations have changed over time to reflect changes in lifestyles.

On marketing, the WHO is particularly concerned to protect young people from the dangers of alcohol. It is concerned that alcohol marketing and advertising can influence a young person's decision to drink. At a meeting convened by the WHO on Marketing and Promotion of Alcohol to Young People in Valencia in 2002, the following concerns were aired:

Marketing contributes to people overestimating the prevalence of heavy and frequent drinking among their peers presenting a very one-sided view of alcohol, linking it to fun, enjoyment, sexual and social success creating the impression that drinking alcohol is the norm in all societies.⁵⁰

Industries have recognised the marketing potential of new technologies such as the internet and advanced mobile phone technology which also are subject to minimal regulation.⁵¹ According to Leanne Riley, the WHO considers that “global and national regulation and education efforts are lagging or inadequate.”⁵² While the WHO's concerns are echoed by health experts, it should be noted that econometric

⁴⁸ Ibid.

⁴⁹ International Centre for the Prevention of Crime., op. cit., (2010), p. 73.

⁵⁰ L. Riley, ‘Drinking it in: Findings of the Valencia Meeting on Marketing and Promotion of Alcohol to Young People’, in M. Grant and J. O’Connor, (eds.) *Corporate Social Responsibility and Alcohol* (London: Routledge, 2005), p. 77.

⁵¹ Ibid.

⁵² Ibid.

studies point to there being “no clear evidence of an association between advertising and levels/patterns of drinking.”⁵³

The WHO also sees pricing policies as having a role in reducing the harmful effects of alcohol. Taxation and self-regulation have both been used as a way of influencing what and how much people drink, but both approaches suffer from major flaws, as they are currently implemented. In Australia there is currently no regulation of discounting of alcoholic products, unlike the United Kingdom where “a mandatory code to target irresponsible practices such as promotions for cheap drinks in clubs and pubs and cheap deals in supermarkets” is being introduced.⁵⁴

This leaves the alcohol industry subject to a number of self-regulating mechanisms.⁵⁵ The WHO’s position is that self-regulation does not work. Success in dealing with the problems of alcohol requires a partnership approach that appropriately balances public and private interests.

An influential study of corporate responsibility for alcohol companies asserts that “partnership is necessary because none of the individual players in the debate have the capacity to deliver a total solution to the problem of alcohol and society.”⁵⁶ A partnership approach, based on respect, trust, transparency and shared interests is better than one of competing interests and adversity.⁵⁷ It is necessary for the industry to accept social responsibility for its product. It is inappropriate to market and advertise a product in a way that deliberately targets immature or underage drinkers.

In order to balance the right of the alcohol industry to market and advertise its product, it is necessary for the government to adopt effective education campaigns. Psychologist Stanton Peele argues that a ‘basis should be laid for encouraging the emergence of regulated, pleasurable and sensible drinking.’⁵⁸ Good examples are the UK’s “When it comes to alcohol – know your limits’ campaign”⁵⁹ and in Australia, the “4 for men, 2 for women” campaign. Campaigns of this nature clearly inform consumers of safe alcohol levels in units. Slogans such as “Drink Responsibly”, currently adopted in Australia, lack meaningful information on which consumers are able to make informed choices. Informative campaigns

⁵³ S. J. Robinson and A. J. Kenyon, *Ethics in the Alcohol Industry* (London, Palgrave Macmillan, 2009), p. 51.

⁵⁴ *Ibid.*, p. 178.

⁵⁵ *Ibid.*, p. 54.

⁵⁶ J. Orley and D. Logan, ‘Perspectives on Partnership for Corporate Social Responsibility in the Beverage Alcohol Industry’, in Grant and O’Connor, op. cit. (2005), p. 51.

⁵⁷ *Ibid.*, p. 48.

⁵⁸ S. Peele, ‘Drinking Education: Minimizing Negatives or Optimizing Potential?’, in Grant and O’Connor, op. cit., (2005) p. 71.

⁵⁹ Robinson and Kenyon, op. cit., (2009) p. 73.

provide a non-value laden moral compass to consumers, particularly to younger consumers. These measures not only address health and law and order problems with alcohol, but are broad-based and enhance social development and human rights.

In addition, many countries invest in education, prevention and harm reduction programs on substance abuse. The European Commission's focus is on alcohol education.⁶⁰ The International Centre for the Prevention of Crime notes, however, that "while schools, the police, pupils and parents may all like the programs, they have no long-term impacts on attitudes to, or use of drugs."⁶¹ Similarly, the WHO notes: "The evidence base for harm-reduction approaches is not yet well established as that for regulating the availability and demand for alcohol beverages."⁶²

Sexual Crime

Sex offences account for around 10 per cent of violent crimes, with the majority of these sex crimes committed by men.⁶³ Statistics also show that sex crimes are severely underreported, and that even when they are reported, few result in a conviction.⁶⁴ The prevalence of sexual assault against women is higher in countries where the status of women is low.⁶⁵ While sex offences are increasing, so too is the level of sexual violence in material of a pornographic nature and in video games. This has led some to investigate if there is a link between sex offences and sexual violence simulated in pornography and video games. Additionally, concern has been expressed about the increasing incidence of the sexualisation of children. This chapter will now consider these concerns in the context of advertising, video games and pornography.

Some commentators express concern with the way in which women are objectified in advertising. In an image-saturated culture, images have largely replaced the spoken and written word as the major form of communication.⁶⁶ Wheelock College Professor Gail Dines claims that increasingly, advertisements feature sexualised

⁶⁰ Ibid., p. 41.

⁶¹ International Centre for the Prevention of Crime, op. cit., (2010) p. 69.

⁶² WHO as quoted in Ibid., p. 73.

⁶³ Carrabine et al., op. cit., (2004) p. 150.

⁶⁴ Ibid.

⁶⁵ C. L. Yodanis, 'Gender Inequality, Violence Against Women, and Fear: A Cross-National Test of the Feminist Theory of Violence Against Women', *Journal of Interpersonal Violence*, Vol. 19 No. 6 (June 2004), p. 655.

⁶⁶ G. Dines, 'Childified Women: How the Mainstream Porn Industry Sells Child Pornography to Men', in S. Olfman, (ed.), *The Sexualization of Childhood* (Westport: Praeger Publishers, 2009), p. 121.

young women in order to capture the attention of their viewers.⁶⁷ University of Melbourne academic Lauren Rosewarne undertook a study of billboards and found that, despite many years of struggle for greater equality, “women tend to be portrayed as young, thin, white and idle.”⁶⁸ It is the idleness of these images that Rosewarne found most disturbing. The placement of a woman in these images “purely because of her appearance renders her an object and reduces her status to a commodity.”⁶⁹ The setting of these advertisements is neutral, offering no occupation or identity of the woman. She is there merely to “draw attention, rather than lend authority to the product.”⁷⁰ The women are nondescript, and thus they become nonentities.⁷¹ Of further concern is the increasing instance of pornographic references in mainstream advertising. In the case of billboards in public places, Rosewarne asserts that this is a public policy concern. It amounts to sexual harassment as it makes some feel embarrassed, offended and excluded.⁷² Such material would be considered inappropriate in a workplace or school and yet it appears among the public landscape.⁷³ At the least, this type of advertising objectifies women, thereby de-valuing and lowering their status. It undermines efforts to achieving gender equality. At worst, because it presents women as not deserving of respect or dignity, it may make them more vulnerable to sexual assault.

The pornography industry has grown exponentially, with a proliferation of pornography now available and largely unregulated on the internet.⁷⁴ Pornography is now mainstreamed, having a well established presence in popular culture. This includes in advertisements, film, television, music videos, magazines, the internet and in video games. This in itself is not problematic, providing it does not represent gender inequality. However, the changing nature of pornography and its accessibility requires some attention. Gail Dines reports that internationally pornography is becoming:

more hard, more nasty and more relentless than ever before with mainstream internet porn depicting sex act after sex act that are devised to push the woman’s body to the limit of physical endurance [it] shows a

⁶⁷ Ibid., p. 122.

⁶⁸ L. Rosewarne, ‘Sex on the Street: Outdoor Advertising and the Sexual Harassment of Women’, in M. Tankard Reist, (ed.) *Getting Real: Challenging the Sexualisation of Girls* (North Melbourne, Spinifex Press Pty Ltd, 2009), p. 67.

⁶⁹ Ibid., p. 68.

⁷⁰ Ibid., p. 69.

⁷¹ Ibid.

⁷² Ibid., p. 72.

⁷³ Ibid., p. 73.

⁷⁴ B. McLellan, ‘Sexualised and Trivialised: Making Equality Impossible’, in Tankard Reist, op. cit. (2009) p. 151.

level of misogyny and cruelty that is breathtaking, even for the porn industry.⁷⁵

In order to distinguish itself from the mainstream, the pornography industry is becoming more hard-core. One producer of particularly violent pornography says that consumers are “becoming a lot more demanding about wanting to see the more extreme stuff.”⁷⁶ In 2002 the Free Speech Coalition won a court case in which the 1996 Child Porn Prevention Act was found to be too broad: the law was narrowed to restrict only those actually under the age of 18, as opposed to those that appear to be, in making pornography. The result has been “an explosion in the number of [web]sites that ‘childify’ women” known as pseudo child pornography sites.⁷⁷ For example, the sub-genre ‘teen porn’ has its very own portal, listing hundreds of sub sub-genres.⁷⁸ There has been an increase of 53 per cent in two years in searches of these sites.⁷⁹

In pornographic material women, despite being regularly brutalised, are always portrayed as enjoying the experience and wanting more. So, does this activity in any way translate to committing crime of a sexual nature? Through Gail Dines’ extensive analysis of pseudo child pornography, she concludes that users over time become desensitised and bored and the next obvious step is to turn to real child pornography.⁸⁰ Other evidence supports this view. Researchers have found that viewing pornography can have a desensitising effect, so that viewers then seek more “violent and bizarre porn genres,” often to the viewers’ own surprise.⁸¹ One sociologist found that there is no clear demarcation between paedophiles and non-paedophilic sexual deviants but rather it can be a continuum.⁸² Gail Dines’ and others work demonstrates that pseudo child pornography is clearly implicated in the production and the consumption of the highly illegal industry of child pornography.

It can also be argued that objectifying women and sexualising children is contrary to the broader human rights agenda in which women’s and children’s rights are “seen as a cornerstone in the promotion of human rights.”⁸³ In the early 1980s Catharine MacKinnon and Andrea Dworkin introduced anti-pornography legislation in Minnesota and Indiana on the grounds that it was a violation of civil

⁷⁵ Dines in Olfman, op. cit., (2009), p. 123.

⁷⁶ J. Jordan as quoted in Dines in Olfman, op. cit., (2009), p. 123.

⁷⁷ Ibid., p. 124

⁷⁸ Ibid., p. 126.

⁷⁹ Ibid., p. 124.

⁸⁰ D. Russell as quoted in Dines in Olfman, op. cit., (2009), p. 141.

⁸¹ Ibid. 140

⁸² Cited in *ibid.*

⁸³ United Nations Human Settlements Program, op. cit, (2007) p. 102.

rights because of its “graphic sexually explicit subordination of women.”⁸⁴ Despite some initial success, the legislation was vetoed in Minnesota and deemed unconstitutional in Indiana because it impinged on the right to freedom of speech.⁸⁵ MacKinnon and Dworkin represent a type of feminism known as “dominance feminism” which argues that concepts within liberalism operate to legitimate the status quo, rather than to increase women’s power.⁸⁶ Thirty years after this legislation was defeated, given the changing nature of pornography as already discussed, dominance feminism is more relevant than ever. Pornography, now an intricate part of popular culture, regularly depicts the domination of men over women, sexualises inequality and sexualises violence against women.⁸⁷ Research suggests that such material makes violence against women more acceptable.⁸⁸

Another issue potentially related to sexual crime is the sexualisation of children in advertising. Emma Rush of the Australia Institute and Charles Sturt University claims that the sexualisation of children may contribute to child sex abuse in two ways: firstly it may “contribute to creating teenage or adult sexual interest in children where none previously existed” and secondly, it may “lower an important barrier (strong sexual norms) to child sexual abuse.”⁸⁹ Although there is not yet any conclusive evidence, many experts agree there is a serious risk that the sexualisation of children contributes to child sex abuse.⁹⁰ To highlight the seriousness of the matter, in 2006, 12 national leaders in children’s health, welfare and media published an open letter in *The Australian* newspaper calling for action to stop the sexualisation of children by commercial interests, claiming it “make[s] them [children] more vulnerable by far, to sexual danger and harm.”⁹¹

There is also concern that the sexual education of young people is being substantially influenced by internet porn. Violent and hard-core porn can have negative consequences on young peoples’ attitudes to sex. Some report on the increasing incidence of boys perpetrating sexual crimes against women and girls.⁹² Matthew Ezzell of James Madison University documents his concerns about the effect that pornography and video games are having on boys’ attitudes toward women and sex, the endorsement of rape myths, aggression and concepts of

⁸⁴ B. J. Crawford, ‘Toward A Third-Wave Feminist Legal Theory: Young Women, Pornography And The Praxis Of Pleasure’, *Michigan Journal of Gender & Law*, Vol. 14, no. 99, (2007) p. 134.

⁸⁵ *Ibid.*, p. 135.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

⁸⁸ J. M. Stankiewicz, and F. Rosselli, ‘Women as Sex Objects and Victims in Print Advertisements’, *Sex Roles*, vol. 58, (2008), pp. 579-589.

⁸⁹ E. Rush, ‘What Are the Risks of Premature Sexualisation for Children?’, in Tankard Reist, *op. cit.* (2009) p.47.

⁹⁰ *Ibid.*, p. 49.

⁹¹ *Ibid.*

⁹² M. Ezzell, ‘Pornography, Lad Mags, Video Games, and Boys: Reviving the Canary in the Cultural Coal Mine’, in Olfman, *op. cit.* (2009) p. 28.

control. Most agree that it is difficult to draw definite conclusions between the consumption of pornography and sexual crime. Nonetheless, University of Texas Robert Jensen says of men's violence against women:

Pornography alone doesn't make men do it, but pornography is part of the world in which men do it, and therefore the production, content, and use of pornography are important to understand in the quest to eliminate sexual violence.⁹³

In Australia, despite criticism and debate around censorship, the Australian Government is set to introduce legislation requiring all internet service providers (ISPs) to filter out material on the Australian Communications and Media Authority's Refused Classification Content List.⁹⁴ ISP level filtering already takes place in other countries including the UK, Canada and several Scandinavian countries. Material blocked will include child sexual abuse imagery and sexual violence.⁹⁵

Conclusion

These three case studies of the effect of urban design, alcohol-related crime and violence and the portrayal of women and children in pornography and advertising show the value of the way the United Nations has redefined crime through a human rights framework to include its social causes. Crime prevention is dependent upon improving social conditions. A critical approach that considers crime within its social and political context will lead to better coordination of various agencies and disciplines to achieve a more broad-based effort towards crime prevention.

The prevention of crime is one social benefit among many of good urban design and maintenance. Environments that offer a diverse mix of uses and social capital provide a range of social benefits including reduced crime, better health, education, social inclusion, sense of belonging and greater well-being.

On alcohol-related crime, corporations and governments have a social responsibility to implement effective regulation and education to reduce this incidence. The excessive use of alcohol is implicated in a substantial amount of crime and violence. It is therefore necessary to focus attention on the alcohol industry and on governments to look at issues around availability, marketing, pricing and education.

⁹³ R. Jensen as quoted in Ezzell in Olfman, op. cit. (2009) p. 23.

⁹⁴ Department of Broadband, Communications and the Digital Economy, 'Internet Service Provider (ISP) filtering', available online: http://www.dbcde.gov.au/funding_and_programs/cybersafety_plan/internet_service_provider_isp_filtering (Accessed 1 November 2010).

⁹⁵ Ibid.

On pornography, anthropological and social analysis of pornography and advertising reveals that it persistently undermines gender equality. Increasingly, hard-core pornography and images of 'childified' women being sexually violated pervade the internet porn and video game industries. This suggests that controlling pornographic and sexualised images of women and children could be an important source of crime prevention. Governments could actively promote the right of individuals and groups to object to material they deem offensive or harmful.

These methods of crime prevention are consistent with United Nations initiatives that address social development and human rights at a global level.

The Emerging ‘Fifth Estate’: Human Rights and Advocacy in the Digital Age

Henry Lawton*

This chapter investigates how non-state actors are leveraging contemporary digital information and communications technologies to monitor and promote human rights. This forms part of a wider debate surrounding the utility of these tools to build community for social and political innovation and change. This chapter finds that rapidly evolving technologies and practices are empowering non-state actors by enabling them to disseminate information within and about even the most repressive states and societies on an unprecedented scale. This trend can be characterised as the emergence of a ‘Fifth Estate’ of political and social power. While these technologies can be exploited for purposes contrary to human rights, they are, on balance, a positive development. Arguing for collaborative approaches, this chapter demonstrates that human rights advocates are, on the one hand, in a unique position to leverage these technologies but, on the other, need to tread a very careful path between embracing the decentralised mentality of a networked environment and maintaining certain forms of centralised control to ensure professional integrity.

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The most recent trend in human rights advocacy has been the realisation of leading communication theorist Manuel Castells' argument that "power in the network society is communication power."¹ This has driven advocacy groups to embrace the newest digital information and communication technologies (ICTs), and thus allowed them to operate in the maelstrom of information that saturates our contemporary "Network Society."² Indeed, these technologies are "reconfiguring access"³ to people, information, and services by enhancing citizen's "communicative power."⁴ This accelerated technological shift to digital communication has achieved a critical mass in many societies⁵ and has created space for 'networked individuals'⁶ to become a new locus of power by moving across, undermining and going beyond the boundaries of existing institutions.⁷ This trend was labelled in 2009 by the Director of the Oxford Internet Institute, Professor William Dutton, as the emergence of a new "Fifth Estate" in addition to the 'Fourth Estate' of the news media.⁸ Dutton has argued that this new locus of power could challenge the influence of other more established bases of institutional authority by operating in the "space of flows", in contrast to a space of places.⁹ This characterisation is echoed by Princeton University's Professor Anne-Marie Slaughter, who argues that this emerging networked world of the twenty-first century exists "above the state, below the state and through the state."¹⁰ Thus, in today's ever more interconnected world, individuals and non-state actors have gained an unprecedented level of power in an international system still dominated by states.

In spite of this, human rights advocates can not claim victory. The response to ICTs by repressive governments, rigid societies and violent non-state actors present a great challenge to the human rights agenda, and shows that the technological shift towards digital communication is not inherently benign. These actors, which enforce their power with scant regard for human rights, are constantly observing and adapting to counter the successful methods of digital information

¹ M. Castells, *Communication Power* (Oxford: Oxford University Press, 2009) p. 53.

² M. Castells, *The Rise of The Network Society* (Oxford: Blackwell Publishers, 1996).

³ W. H. Dutton, 'The internet and social transformation', in W. H. Dutton, B. Kahin, R. O'Callaghan and A. W. Wyckoff (eds.), *Transforming Enterprise: The Economic and Social Implications of Information Technology* (Cambridge: MIT Press, 2005) pp. 375–98.

⁴ N. Garnham, 'Information Politics: The Study of Communicative Power', in W. H. Dutton, M. Peltu, M. Bruce (eds.), *Society On The Line: Information Politics in The Digital Age* (Oxford: Oxford University Press, Oxford, 1999).

⁵ W. H. Dutton, 'The Fifth Estate: Emerging through the Network of Networks', *Prometheus*, Vol. 27, No. 1, (2009) p.5.

⁶ Castells, op. cit. (1996).

⁷ Dutton, op. cit. (2009), p.2.

⁸ Ibid.

⁹ Citing Castells, op. cit. (1996), as quoted in Dutton, op. cit (2009) p.10.

¹⁰ A. Slaughter 'America's Edge: Power in the Networked Century', *Foreign Affairs*, Vol. 88, Issue 1 (Jan/Feb 2009), p. 95.

dissemination, which is increasingly being used to bear witness to human rights violations and hold abusive power to account. The sum of these changes, both the technological revolution and subsequent counter-revolution, has not only changed the relationship between citizens and states, but has “emerged to shape a new geopolitical information landscape.”¹¹

This chapter maps the prominent contours of this new information environment. It examines the usage and effects of digital ICTs on human rights monitoring and dissemination through case studies of the Kenyan elections in 2008, the Iranian elections in 2009 and the work of prominent non-government organisation WikiLeaks, in 2010. These three case studies highlight the evolution of these protean technologies and practices. This chapter seeks to provide human rights advocates with insights into these issues in order that they not only understand the information environment in which they must operate, but can learn to thrive in it. These case studies are not simple ‘good news’ stories, but rather a more nuanced appraisal of events that takes into account both the positive and the negative aspects of these uses of digital ICTs. They disprove the characterisation of these technologies of ‘mass self communication’¹² as an unalloyed good, and confirm Manuel Castells’ argument that “network technology and networking organisation are only means to enact the trends inscribed in the economic, political, and cultural factors... of globalisation.”¹³

Ushahidi in Kenya

Kenya provides a useful example of the utility of digital ICTs to monitor human rights during electoral violence. On 1 January 2008, rumours spread that the incumbent President, Mwai Kibaki, had rigged the recent Presidential election. Violence spread across the county as politically motivated attacks inflamed long simmering tribal and ethnic tensions. By 9 January, the violence centred on the Kibera slums in Nairobi and the towns of Kisumu, Kakamega, Eldoret and Naivasha in the Rift Valley.¹⁴ Underlying tension was exacerbated and amplified into violence in ways previously unavailable: using mostly SMS messages the

¹¹ R. Deibert and R. Rohozinski, ‘Beyond Denial: Introducing Next-Generation Information Access Controls’ in R. Deibert, J. Palfrey, R. Rohozinski and J. Zittrain, (eds.), *Access Controlled: The Shaping of Power, Rights, and Rule in Cyberspace* (Cambridge MA: MIT Press, 2010) p.6.

¹² Castells, op. cit. (2009) p.55.

¹³ Castells cites a number of scholarly works to support this point: Ibid. p.24.

¹⁴ J. Goldstein and J. Rotich, ‘Digitally Networked Technology in Kenya’s 2007–2008 Post-Election Crisis’ (2008), Internet & Democracy Case Study Series, Berkman Center Research Publication No. 2008-09, The Berkman Center for Internet and Society, Harvard University, available

online:http://cyber.law.harvard.edu/publications/2008/Digitally_Networked_Technology_Kenyas_Post-Election_Crisis (accessed 12 September 2010).

ethnic, tribal and political tension became what has been termed “viral hatred”.¹⁵ For example, one prominent anti-Kikuyu SMS message read:

Fellow Kenyans, the Kikuyu’s [sic] have stolen our children’s future...we must deal with them in a way they understand...violence.¹⁶

In reaction, Kikuyu messages read:

No more innocent Kikuyu blood will be shed. We will slaughter them right here in the capital city. For justice, compile a list of Luo’s [sic] you know...we will give you numbers to text this information.¹⁷

This exchange shows how such “mass self communication”¹⁸ through SMS proved extremely useful for empowering this type of explicit, systematic, and publicly organised campaign of what was essentially mob violence. In its March 2008 report, Human Rights Watch noted how such messages were “coaching the young people to go to war.”¹⁹

In response, a group of civic minded Kenyans, both in Nairobi and the diaspora, launched a website campaign called Ushahidi, which means ‘testimony’ in Swahili.²⁰ This online campaign drew local and global attention to the violence and proved to be “far and away the most prominent and successful digital civic campaign” at this time.²¹ The Ushahidi technology was quickly designed and launched at the height of the violence on 2 January by a team of Kenyan-linked technology experts led by David Kobia and Erik Hersman.

In the common vernacular of digital media, the Ushahidi application has been described as a ‘mashup’.²² It essentially blends two internet applications to relay information in a visually compelling way. It combined crisis information from citizen-generated reports and media with that of NGOs, and then ‘mashed up’ that data with geographical mapping tools. It combines Google Maps, which allows users to zoom in and view satellite images of Kenya, with a tool for users to report

¹⁵ Ibid.

¹⁶ Citing O. Quist-Arcton, ‘Text Messages Used To Incite Violence in Kenya,’ *NPR News*, www.npr.com, <http://www.npr.org/templates/story/story.php?storyId=19188853>. in Goldstein and Rotich, op. cit. (2008).

¹⁷ Ibid.

¹⁸ Castells, op. cit. (2009) p.55.

¹⁹ Human Rights Watch, ‘Ballots to Bullets: Organized Political Violence and Kenya’s Crisis of Government’ (2008) available online: <http://hrw.org/reports/2008/kenya0308/kenya0308web.pdf> (accessed 13 September 2010).

²⁰ Ushahidi, ‘About’, available: http://www.usshahidi.com/media/Ushahidi_1-Pager.pdf, (accessed 13 September 2010).

²¹ Goldstein and Rotich, op. cit. (2008).

²² Ibid.

incidents of violence on the map by adding photos, video and written content with their mobile phones and internet browsers. This initial deployment of Ushahidi had 45,000 users in Kenya.²³

From its roots in Kenya, Ushahidi became an organisation that refined its free and open source mapping and content management system which bears its name. The stated goal of the organisation is to “create a system that facilitates early warning systems and helps in data visualisation for response and recovery.”²⁴ A key component of Ushahidi that separates it from other digital dissemination tools is the ability to use mobile phones as a primary means of both sending crisis incidents and receiving updates. In parts of the world like Kenya, the internet can be difficult to access. Thus the platform was created with the mobile phone as its key element, making it a far more accessible and a truly grassroots initiative.

As Larry Diamond of Stanford University argues, the best way of interpreting the two-sided nature of this Kenyan case study is as opposite impulses on a continuum.²⁵ On one side is a ‘predatory society’ driven by cynical, opportunistic and often violent norms, while on the other is a ‘civil society,’ where behaviour is driven by the norms of toleration, accountability and equality.²⁶ This tension has, and will continue to define not only the use of digital ICTs into the foreseeable future, but it will define the effects of the internet itself.

Web 2.0 in Iran

Digital ICTs played a significant role in shaping global opinion during the political turmoil in Iran that followed the controversial victory of incumbent Mahmoud Ahmadinejad in the June 2009 Presidential elections. Digital ICTs became paramount because the Iranian regime was very successful in cracking down on more traditional news gathering and dissemination practices.²⁷ Journalists and human rights monitors both within and outside of Iran were left in an information vacuum where their only option for sourcing news was to turn to the digital technologies which had already been enthusiastically embraced by young Iranians. These included mobile phone video footage, internet forums and, most notably, Twitter and YouTube. Digitally networked citizens were able to communicate the brutality of the crackdown by state security forces in torrents of information both individually and as part of a broader movement.

²³ Ibid.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Ibid.

²⁷ They used such blunt methods such as arresting locals including 31-year-old Iranian-American journalist Roxana Saberi, who received an eight-year jail sentence for being a US ‘spy’. Foreign journalists were also expelled, most notably the BBC’s Jon Leyne.

These technologies played a crucial role in disseminating information about the events in Iran to the wider world, helping focus attention on human rights abuses and the Iranian people's fight for democracy. This ability of anti-government activists to use digital ICTs to maintain political pressure and momentum was famously demonstrated by the deadly attack on Iranian dissenter Neda Agha-Soltan. The graphic last moments of her life were captured digitally, using mobile phone video cameras to bear witness as she lay bleeding from the head on a Tehran street in the arms of friends. This footage 'went viral' when it was uploaded onto YouTube. This footage rapidly made her the symbol of the brutality of the regime and its disregard for human rights and served to galvanise and broaden the opposition movement. The use of digital ICTs created and sustained a surge of international moral solidarity unprecedented in the Iranian struggle for democracy and increased the power of advocacy for greater respect for human rights. While this struggle was being waged long before digital ICTs, the use of these technologies gave Iranian opposition movements the worldwide publicity that they desperately needed.

Accompanying these positive developments were a new set of inevitable challenges that go hand in hand with political organisation through new technologies. An over-reliance on Twitter and blogs developed as traditional communication methods were suffocated. This concentrated and intensified the usage of these new technologies to the point where their inherent shortcomings as 'crowd sourced' tools sometimes complicated the situation, and even undermined the opposition 'Green Movement' and human rights advocates. One example is that of 'martyr' Saeedeh Pouraghay. Many journalists and followers of the prominent Twitter feeds marked '#iranelection' were told she was raped, disfigured and murdered after being arrested for chanting 'Allah Akbar' on her rooftop.²⁸ This story spread with the lauded speed of digital media, and even inspired the 'head' of the opposition Green Movement, Mir-Hossien Mousavi, to attend a commemoration ceremony that was held for her in Tehran.²⁹

Yet this 'martyr' turned out to be an illusion, a mirage generated by the heat of intensifying ICT usage. Pouraghay later appeared on Iranian state television and said that on the night when she was supposedly arrested, she had escaped the violence by jumping off her balcony. In the intervening two months, she said was being treated at the home of the person who found her injured from the fall to the street below.³⁰ In an insight only realised in sober reflection some months later, a

²⁸ G. Esfandiari, 'The Twitter Devolution', *Foreign Policy* (7 June 2010) available online: http://www.foreignpolicy.com/articles/2010/06/07/the_twitter_revolution_that_wasnt, (accessed 25 September 2010).

²⁹ Ibid.

³⁰ Ibid.

Green Movement opposition website alleged that the Iranian regime had “planted the story in order to cast doubt on opposition claims about the rape of post-election detainees and pave the way for further arrests of opposition leaders.”³¹ Such a strategy would conform to Manuel Castells’ theory of creating power by shaping the public mind to fabricate, reveal, damage or block damaging information regarding one’s opponents.³²

The Iranian example vividly shows how the amplification of information provided by digital ICTs can prove to be problematic: in ‘turning up the volume’ quality can sometimes be drowned out. Radio Free Europe correspondent Golnaz Esfandiari goes further, arguing that digital ICTs “far from being a tool of revolution in Iran over the last year” have, “in many ways, just complicated the picture.”³³ He argues that the “Twitter Revolution” was an “irresistible meme during the post-election protests, a story that wrote itself.”³⁴ He notes, albeit in the clarity of hindsight, that human rights monitors and Western journalists who were starved of information simply scrolled through and used the English-language tweets posted with tag #iranelection. All the while “no one seemed to wonder why people trying to coordinate protests in Iran would be writing in any language other than Farsi.”³⁵ The Iranian diaspora spreading many of these tweets in English were not primary sources, meaning that already unsubstantiated and anonymous information was often further distorted by translation and interpretation. When mistakes were made, the reputation of human rights monitors suffered and they were forced into time-absorbing source-substantiation in the scramble for information.

The Regime Adapts

While digital ICTs were a source of empowerment for opposition groups, the Iranian government was also able to incorporate ICTs into its sophisticated security apparatus. During the period of brazen political dissent, the Iranian regime rapidly evolved its digital *modus operandi*. It co-opted many ICTs to spread disinformation, defame leading dissidents and provoke and splinter opposition groups.³⁶ One example was the use of mobile phone footage to post photographs of key dissidents online while pressuring the rest of population to identify them.³⁷

³¹ Esfandiari, op. cit. (2010)

³² Castells, op. cit. (2010) p. 286.

³³ Esfandiari, op. cit (2010).

³⁴ Ibid. A ‘meme’ is a unit of for carrying social information, cultural ideas, symbols or practices through social communication.

³⁵ Ibid.

³⁶ J. Lichtenstein, ‘Digital Diplomacy’ *The New York Times Magazine* (12 July 2010) available online: <http://www.nytimes.com/2010/07/18/magazine/18web2-0-t.html> (accessed 2 September 2010).

³⁷ E. Campbell, ‘The Rebellion Network’, *Foreign Correspondent* (7 July 2009) available online: <http://www.abc.net.au/foreign/content/2009/s2615882.htm> (accessed 13 September 2010).

A number of people who named themselves online were arrested, including those who believed they were posting anonymously. The regime was able to do this by using the digital tracking technology of 'deep packet inspection' software.³⁸ This software was supplied by some of the same Western companies who provide many of the digital technologies beneficial to political dissidents and advocates of human rights, and was used to track down users and censor the internet.³⁹ The Iranian regime also deliberately degraded the internet by slowing it down to severely hamper its usefulness as a conduit of information for opponents.⁴⁰ In subsequent attempts at digitally enhanced political dissent on national holidays, the regime has been able to exploit what is so often celebrated as a key strength of a digitally savvy opposition: a horizontal, decentralised structure. By jamming mobile phones, texting and internet services, flash-mob-style impromptu organising was prevented.⁴¹ The insight drawn by activist circles was that since the regime "has shown it is capable of learning, and the opposition has to do the same."⁴²

Cases of such adaptation by repressive regimes has driven digital sceptics like the author Malcolm Gladwell to argue that activist movements only work when there are 'strong' non-digital ties between the participants, and that the 'weak' ties formed with digital media do not, and inherently cannot meet this requirement.⁴³ He explains his dichotomy by arguing that digital social media are tools for building networks, prone to conflict and error. He sees their seeming lack of a centralised leadership structure without clear lines of authority as a yoke on their ability to be used by activists who need to think strategically. He argues digital networks are the opposite, in structure and character, of the organisational hierarchies he sees as absolutely necessary to drive serious political and social change.⁴⁴ Gladwell thus sees a danger in over-reliance on digital networks:

³⁸ Ibid.

³⁹ D. Calingaert 'Authoritarianism vs. the internet: The Race Between Freedom and Repression', *Policy Review*, No.160 (March 2010), Hoover Institution, Stanford University, available online: <http://www.hoover.org/publications/policy-review/article/5269> (accessed 13 September 2010).

⁴⁰ D. O'Brien as quoted in M. Glaser, 'The Importance of Free Speech Online in Iran, China, Kenya', *PBS MediaShift* (9 July 2009) available online: <http://www.pbs.org/mediashift/2009/07/the-importance-of-free-speech-online-in-iran-china-kenya190.html> (accessed 13 September 2010).

⁴¹ A. L. Butters, 'Iran's Opposition Searches for a New Strategy', *Time* (16 February 2010) available online: <http://www.time.com/time/world/article/0,8599,1964483,00.html> (accessed 14 September 2010).

⁴² Ibid.

⁴³ M. Gladwell, 'Small Change: Why The Revolution Will Not Be Tweeted', *The New Yorker* (4 October 2010) available online: http://www.newyorker.com/reporting/2010/10/04/101004fa_fact_gladwell (accessed 9 October 2010).

⁴⁴ Ibid.

It shifts our energies from organizations that promote strategic and disciplined activity and toward those which promote resilience and adaptability. It makes it easier for activists to express themselves, and harder for that expression to have any impact. The instruments of social media are well suited to making the existing social order more efficient. They are not a natural enemy of the status quo.⁴⁵

Evolving Practices

In response to the inherent problems of ‘crowd sourced’ information disseminated through digital ICTs, a number of conventions rapidly matured in Iran as they did in Kenya. A symbiotic relationship developed between this emerging ‘Fifth Estate’ and the more traditional Fourth Estate. For example, a wave of digital complaints about the lack of CNN and BBC coverage forced them to bring their resources and expertise to bear.⁴⁶ Key professional journalists became mediators where information was exchanged, evaluated and then fed into the stream of the more powerful mass media. Prominent examples of this were the ‘twitter hubs’⁴⁷ run by journalists like Nico Pitney, a senior editor of the influential *Huffington Post*. Pitney’s blogs show how a synthesis of professional reporting and reliable amateur material is evolving in which the news tips that journalists have always relied upon are now being aired in public after being corroborated via such ‘hubs’.⁴⁸ Pitney’s embrace of digital ICTs provided a direct link for the Iranian opposition to ask hard questions of powerful decision makers. Most notable was U.S. President Obama who, in a White House press conference, acknowledged the possibilities of this by asking for questions directly from Iranians via Nico Pitney.⁴⁹ This is an illustration of the transitional and constantly evolving nature of digital empowerment.

Another means of vetting information was to ‘triangulate the details.’⁵⁰ This was demonstrated by the problem of anonymous sources providing content. Initially the Iranian diaspora was able to quickly respond by acting as editors of content, providing much of the screening and verification of often anonymous sources that became so crucial in disseminating information to foreigners. These Farsi speakers learnt to listen intently to the sound from the protest videos, discerning the accents of Iranian cities and transcribing the chants and screams.⁵¹ Even anonymous

⁴⁵ Ibid.

⁴⁶ D. O’Brien as quoted in Glaser op. cit. (2009).

⁴⁷ Ibid.

⁴⁸ B. Stelter ‘Journalism Rules Are Bent in News Coverage From Iran,’ *The New York Times* (28 June 2009) available online:

http://www.nytimes.com/2009/06/29/business/media/29coverage.html?_r=1, (accessed 13 September 2010).

⁴⁹ Campbell, op. cit. (2009).

⁵⁰ L. King, executive in charge of CNN’s iReport service, as quoted in Stelter, op. cit. (2009).

⁵¹ Ibid.

internet users developed a reputation over time as trusted sources as they honed their skills by dating footage and filming street signs and landmarks.⁵² This direct link with the Iranian people helped break down tempting caricatures and preconceived notions of the political climate, giving the possibility of a new nuance and accuracy in reporting where traditional information gathering methods were restricted. Matthew Weaver, blogger for *The Guardian*, best summed up the result of these maturing conventions, “first the tweets come, then the pictures, then the YouTube videos, then the wires.”⁵³

The Iranian example highlights how digital ICTs are not inherently and absolutely positive for human rights advocates. They can also be made to serve a brutal regime like Iran’s. They have the most potential at the time – that transitory golden moment – where the digital capabilities of dissidents and human rights advocates exceed those of the state.

Long-Term Trends in Tehran

While the Iranian regime’s use of digital ICTs proved a significant thorn in the side of the opposition movement, it was not enough to stop a long-term trend of networks of citizens gathering and disseminating information about human rights. Iran’s population has a high information gathering and dissemination capacity with approximately sixty per cent of the population under the age of thirty and one of the highest rates of internet penetration in the Middle East.⁵⁴ This culture of ‘Web 2.0’ includes estimates that, despite strong legal and extralegal persecutions, there are around one hundred thousand regularly maintained blogs by Iranians in what has been termed ‘Weblogistan’.⁵⁵

One of the least-discussed aspects of the Iranian case study was the way that the opposition Green Movement and human rights monitors created a ‘political autoimmune disease’⁵⁶ in which the regime was forced to attack a significant portion of its own national infrastructure to shut down dissent. The regime could not sustain attacking this for more than a few weeks as this was extremely damaging to the economy, crippling massive swathes of its communications capacity. This illustrates one of the most significant advantages provided by contemporary digital

⁵² Ibid.

⁵³ Ibid.

⁵⁴ M. A. Dayem, ‘Attempting to silence Iran’s ‘Weblogistan,’ *Nieman Reports*, Vol.63 No.2 (Summer 2009), Nieman Foundation for Journalism, Harvard University, available online: <http://www.nieman.harvard.edu/reports/article/101480/Attempting-to-Silence-Irans-Weblogistan.aspx> (accessed 15 September 2010).

⁵⁵ Ibid.

⁵⁶ C. Shirky, as quoted in Campbell op. cit. (2009).

ICTs. As activist Mohsen Sazegara⁵⁷ notes, the costs of military-style suppression of digitally enhanced dissent are unsustainable, both because of the direct expense and because such suppression repels foreign investment and support. This means: “Time is on our side. We just have to survive. They have to run a country.”⁵⁸

This case study illustrates the way in which increasingly digitally savvy repressive states present a unique set of challenges to those seeking to disseminate information about human rights abuse. The lifeblood of human rights advocacy is access to timely and accurate information; however digital ICTs are distorting this finely balanced equation: with each new technology the sheer volume of information increases, yet there has not been a corresponding increase in quality. Digital ICTs are currently in a transitional phase away from an idealised conception to one where there is a greater premium on editing and professional practice, especially when traditional information gathering techniques are curtailed by an aggressive regime.

Digital ICTs are tools for enhanced communication that are increasingly melding the ‘online’ into ‘offline’ reality. When utilised effectively, they serve to amplify the political clout of savvy users. However they are not inherently benign despite the optimism of some ‘technological determinists’ nor do these technologies inevitably lead to a dystopian vision of a ‘surveillance society’.⁵⁹

Fletcher School Professor Daniel Drezner argues that it is not an ‘either/or’ choice; digital “social networks lower the transaction costs for creating both weak *and* strong ties, loose collaboration *and* more tightly integrated social movements.”⁶⁰ According to blogger Oliver Willis, as social media has matured, leaders have inevitably emerged who can exert a “semblance of command and control”.⁶¹ He argues that social networks magnify the translation of ‘influencers’ pushing the “influenced to do something,” but that network leaders “need to have leadership skills no matter the medium.”⁶²

⁵⁷ One of the founders of the Revolutionary Guard Corps and former aide to Ayatollah Khomeini, Mohsen Sazegara posted videos on YouTube from his home in suburban Virginia to give advice to the Green Movement: see Butters, op. cit. (2010).

⁵⁸ Ibid.

⁵⁹ Castells, op. cit. (1996).

⁶⁰ D. W. Drezner, ‘A mild defence of social networks,’ *Foreign Policy* (12 October 2010) available online: http://drezner.foreignpolicy.com/posts/2010/10/11/a_mild_defense_of_social_networks (accessed 13 October 2010).

⁶¹ O. Willis, as quoted in Drezner, *ibid.*

⁶² Ibid.

WikiLeaks and the Future of Digital Activism

The final case study looks at innovative and influential non-governmental organisation WikiLeaks.⁶³ This digital ICT is more than simply a ‘digital drop box.’ It is a truly 21st century ‘Pandora’s box’. It has acted as a lightning rod that takes digital dissemination to the extreme.

University of Massachusetts Professor Charli Carpenter makes a strong argument that the model pioneered by WikiLeaks adds real value to the international regime governing the behaviour of soldiers in wartime, promoting “precisely the sort of accountability that the Geneva Conventions require but military culture tends to discourage.”⁶⁴ If soldiers are to speak out without WikiLeaks, they must do so through the chain of command and justice and are likely to fear retribution from that same system. This was shown when Sgt. Joseph Darby saw former high school friends abusing prisoners at Abu Ghraib prison in Iraq in 2004, and fulfilled his duties under the Geneva Conventions by reporting the abuses to the U.S. Army’s Criminal Investigation Command. Although he asked to remain anonymous, then-Defense Secretary Donald Rumsfeld revealed his identity after which he received a flood of hate mail and death threats.⁶⁵

Carpenter argues that the WikiLeaks model could provide a solution as a reporting mechanism through which individual soldiers could report specific war crimes anonymously without fear of retribution. Already WikiLeaks has proved adept at this. On 5 April 2010 WikiLeaks released classified U.S. military footage from 12 July 2007 of an attack in Baghdad by a U.S. helicopter on what appeared to be wounded civilians as well as at least two Reuters news staff. Under intense international scrutiny, the WikiLeaks model protected the identity of its source. The alleged source, U.S. military intelligence officer P.F.C Bradley Manning, was only charged later due to the emergence of alleged self-incriminating internet conversations.⁶⁶ The video not only brought to light a specific event, but it also generated an investigation and broader debate about the rules of engagement when

⁶³ In June 2009, WikiLeaks and Julian Assange won Amnesty International’s UK Media Award for the 2008 publication of “Kenya: The Cry of Blood – Extra Judicial Killings and Disappearances”, a report by the Kenyan National Commission on Human Rights about police killings in Kenya: see J Scahill ‘WikiLeaks and War Crimes,’ *The Nation* (30 August 2010) available online:

<http://www.thenation.com/article/154000/WikiLeaks-and-war-crimes> (accessed 4 September 2010).

⁶⁴ C. Carpenter, ‘How WikiLeaks Could Use Its Power for Good,’ *Foreign Policy* (12 August 2010) available online:

http://www.foreignpolicy.com/articles/2010/08/12/how_WikiLeaks_could_use_its_power_for_good

⁶⁵ (accessed 13 August 2010).

⁶⁶ Ibid.

⁶⁶ ‘The Iraq Archive: The Strands of a War’, *The New York Times* (22 October 2010) available online:

<http://www.nytimes.com/2010/10/23/world/middleeast/23intro.html?scp=5&sq=WikiLeaks&st=cse> (accessed 23 October 2010).

combating insurgencies. In this, the video did exactly what reports of military abuses are supposed to do.

Afghan Discontent

In July 2010, WikiLeaks published some 91,000 classified documents on the NATO intervention in Afghanistan, many of them raw intelligence field reports that named Afghan collaborators. This alludes to the dangerous and ever-present possibility of a Pyrrhic victory for human rights advocates seduced by an uninhibited faith in digital ICTs. WikiLeaks saturated the public with far too much data to identify specific cases of wrongdoing easily, yet enough data to put individual civilians at risk by revealing their identities. This alludes to *Foreign Policy* writer Evgeny Morozov's criticism that often "the technologists are oblivious to the highly pernicious externalities of their own good intentions."⁶⁷ While delivering unprecedented insight into the operation of NATO and the U.S. government, such practices have undermined WikiLeaks' own legitimacy as a non-partisan investigative organisation.

Protean Practice

Such mistakes made by WikiLeaks have driven change in the model it pioneered. Its more recent major document 'dumps' have been enhanced by giving early access to some of the most credible international news outlets including *The New York Times* and *The Guardian*.⁶⁸ This strategy of working with 'press partners' allows traditional news outlets to extract the most newsworthy information while providing public access to the original source material. This leverages both the respectability and refined editing skills of these bastions of the Fourth Estate to provide an informed interpretation for the public. In the words of founding Editor Julian Assange, this evolved WikiLeaks model uses:

internet technologies in new ways to report the truth... WikiLeaks coined a new type of journalism: scientific journalism. We work with other media outlets to bring people the news, but also to prove it is true. Scientific journalism allows you to read a news story, then to click online to see the

⁶⁷ Another unintended consequence is when repressive regimes use such raw intelligence field reports as evidence of 'propaganda' plots to convict human rights advocates in show trials: see E. Morozov, 'The 20th century roots of 21st century statecraft,' *Foreign Policy* (7 September 2010) available online: http://neteffect.foreignpolicy.com/posts/2010/09/07/the_20th_century_roots_of_the_21st_century_statecraft (accessed 13 September 2010).

⁶⁸S. Jackson, 'WikiLeaks taps press partners to make sense of its document deluge,' *The Australian* (13 December 2010).

original document it is based on. That way you can judge for yourself: Is the story true? Did the journalist report it accurately?⁶⁹

This highlights that the emerging ‘Fifth Estate’ is most powerful when complemented by the Fourth Estate, who are also competing with, co-opting and imitating these new organisations. Using the established media to assist with highly specific, targeted and protected leaking of specific human rights abuses provides the model pioneered by WikiLeaks with far greater political and moral weight. This revision in practice can hopefully encourage governments to pursue and prosecute human rights abuses more vigorously, and start to set a precedent that might help deter such behaviour in the first place. A precursor to this was seen when U.S. Senator John Kerry, chair of the powerful Foreign Relations Committee, stated on the day the Afghan documents were released:

However illegally these documents came to light, they raise serious questions about the reality of America’s policy toward Pakistan and Afghanistan. Those policies are at a critical stage, and these documents may very well underscore the stakes and make the calibrations needed to get the policy right more urgent.⁷⁰

Conclusion

The case studies of Kenya, Iran and WikiLeaks explored in this chapter have demonstrated how digital ICTs are ‘reconfiguring access’⁷¹ to people, information, and services. However this emerging locus of power does not exist on its own; it is challenging and collaborating with the other Estates. The case studies showed how, by challenging government policies and Fourth Estate sources, the emerging ‘Fifth Estate’ is able to provide an “alternative source of authority to professional expertise by offering citizens, patients, students and others alternative sources of information, analysis and opinion.”⁷² Governments will continue to wrestle with the “tensions of the relentless drive to build new technologies and the unpredictable and often counterproductive consequences that flow from them for their power and authority.”⁷³

Of the case studies, the model pioneered by WikiLeaks demonstrates most vividly how digital ICTs provide the basis of an emerging ‘Fifth Estate’ that is able to penetrate, and then transcend geographic and political boundaries to meld the local into a global civil society. Each of the case studies demonstrated how the

⁶⁹ J. Assange, ‘Don’t shoot the messenger for revealing uncomfortable truths,’ *The Australian* (8 December 2010).

⁷⁰ Scahill, op. cit. (2010).

⁷¹ Dutton op. cit. (2005).

⁷² Dutton, op. cit. (2009) p.10.

⁷³ Deibert and Rohozinski, op. cit. (2010) p.3.

connectivity provided by digital ICTs and the internet have broadened the crossroads of politics so that citizens are increasingly able to challenge the knowledge and analytical rigour of governments, economic elites and public intellectuals. To date, these technologies have proven better at helping monitor and maintain vigilance on human rights rather than driving full scale political change, yet as WikiLeaks demonstrates, this is by no means set in stone. This chapter has demonstrated that while digital ICTs are often exploited for purposes contrary to the human rights agenda, they are, on balance, a positive development in enhancing ‘communicative power’⁷⁴ of predominantly non-state actors within even the most repressive states and societies.

⁷⁴ Garnham, *op. cit.* (1999).

A Comparative Study in International Criminal Prevention: Measures Used in the Asia-Pacific and Mediterranean to Deter Migrant Smuggling by Boat

Emily Thwaites-Tregilgas*

Due to poverty, violence, persecution, unemployment in their home countries, and restrictions on legal migration systems, thousands of people are now moving illegally into other countries with the assistance of migrant smugglers. Given the numbers of asylum seekers and the geographical positioning of countries in the Asia-Pacific and Mediterranean regions, illegal migration via sea has become a common concern for both regions. This study will compare the current methods used in both the Asia-Pacific and Mediterranean regions to deter migrant smuggling by boat, discussed at global, regional and national levels.

Findings show that prevention methods used to deter migrant smuggling in both the Asia-Pacific and the Mediterranean regions are not dissimilar in approach but the roles and effectiveness of global, regional and national initiatives in both regions have varied. In both regions the dominant approach is one of reactionary response where prevention is largely interpreted as the need for tighter management of migration movements rather than focusing on root causes of migrant smuggling.

This study finds that the management of migration flows can be achieved through strong border security, however there is evidence that this approach is unsustainable and does not truly prevent migrant smuggling. This chapter

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advocates a change in attitude by national governments toward global migration movements and makes recommends further research, greater cooperation and a heightened role for advantaged countries in each region.

Due to poverty, violence, persecution, unemployment and restrictions on legal migration systems, thousands of people are now moving illegally into other countries with the assistance of migrant smugglers.

This chapter uses the definition of migrant smuggling as laid out in the Protocol Against the Smuggling of Migrants by Land, Sea and Air Supplementing the United Nations Convention Against Transnational Organised Crime:

‘Smuggling of migrants’ shall mean procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.¹

At the heart of migrant smuggling is ‘procurement’, a concept that criminalises the facilitation of illegal migration as opposed to illegal migration itself. Migrant smuggling thus involves many different crimes including document forgery, money laundering, corruption and organised crime.²

Unlike other crimes related to illegal migration such as human trafficking, the victims of migrant smugglers have involved themselves voluntarily, although sometimes in circumstances of limited alternatives.³

Given the geographical positioning of countries in the Asia-Pacific and Mediterranean regions, sea crossings have become common pathways used by migrant smugglers in both regions.

Migrant Smuggling in the Asia-Pacific Region

Unauthorised boat arrivals are not a new problem for the Asia-Pacific region. The world’s largest exodus since World War II occurred in the Asia-Pacific after the fall of Vietnam in 1975. Today, inequalities, instability and underdevelopment in the region have meant the continuation of migratory movements in the region. Australia’s wealth, stability and multicultural society make it an attractive

¹ Article 3.(a): United Nations Office on Drugs and Crime (UNODC), *United Nations Convention Against Transnational Organised Crime and Protocols Thereto* (New York: United Nations, 2004), p. 54.

² B. Agnieszka and G. Agnieszka (eds.), *Europol Review: General Report on Europol Activities* (The Hague: European Police Office, 2009), p. 26.

³ A. Schloenhardt, *Migrant Smuggling: Illegal Migration and Organised Crime in Australia and the Asia Pacific Region* (Boston: Martinus Nijhoff Publishers, 2003), p. 18.

destination country. For these reasons it is generally understood there is a flow in the region towards Australia.⁴

At the end of 2009 the refugee population of the Asia-Pacific was estimated to be 3,856,000, the highest of all regions covered by the United Nations High Commissioner for Refugees (UNHCR). Between September 2008 and June 2009 140 suspected illegal entry vessels carrying 6,308 passengers of mostly Afghan, Iranian, Iraqi and Sri Lankan nationalities, plus 357 crew members who are likely to face charges for people smuggling, were intercepted in Australian waters.⁵ The Australian Customs and Border Protection Service reported a 44.46 per cent increase in illegal foreign vessels in Australia's northern waters in between 2008-09 to 2009-10 costing the civil maritime surveillance and response unit alone of Australian Customs and Border Protection \$292,871,00.⁶

The exact sea routes of illegal migrants in the Asia-Pacific region are not known, but they begin commonly in major source countries such as Iraq, Afghanistan and Iran towards transit countries such as Malaysia, Indonesia or Thailand and then finally to Australia. The most common routes known by Australia are those from Indonesia across the Timor Sea and Indian Ocean. One common route is from Kupang, Indonesia towards Christmas Island and the Ashmore and Cartier Islands.

Migrant Smuggling in the Mediterranean Region

Like the Asia-Pacific region, illegal migration is not a new phenomenon for the North African and European Mediterranean region (Mediterranean region). Europe experienced a large increase in migration towards their borders after the fall of the Soviet Union in 1991. More specifically a dramatic increase was noticed in migrants arriving on the sea borders of countries such as Italy, Spain and Greece during the early 1990s; consequently Italy was the first country to draw international attention to the problem of illegal migration via sea routes.

Flows of illegal migration in the region follow a similar pattern to the Asia-Pacific in that it often involves a journey from origin countries including countries of central, western and eastern Africa and the Middle East to North Africa and the finally to Europe via the Mediterranean sea or via the Atlantic Ocean towards Spain. The three main routes crossing the Mediterranean Sea and the North Atlantic Ocean are:

⁴ Ibid., p. 27.

⁵ Australian Federal Police, *Annual Report 09-10* (Canberra: Australian Federal Police, 2010), p. 39.

⁶ Australian Customs and Border Protection Service, *Annual Report 2009-10* (Canberra: Australian Customs and Border Protection Service, 2010), p. 39.

- The Western African Route; from the Maghreb countries especially from and via Morocco to the Spanish mainland and from sub-Saharan countries towards the Spanish Canary Islands
- The central Mediterranean; from Libyan and Tunisian ports towards the Italian islands of Lampedusa, Panelaria and Sicily and also towards Malta
- The eastern Mediterranean; from the Middle East via Turkey and Egyptian ports to Greece (including Crete) and Italy.⁷

At the end of 2009 the refugee population of North Africa (including the Middle East) was estimated to be 2,005,900.⁸ More than 300,000 irregular migrants attempted to cross the Mediterranean Sea in 2006, of whom the majority were from sub-Saharan Africa.⁹ Based on media and police reports, UNHCR estimates that more than 500 people died in 2007 attempting to make the crossing, while the Spanish authorities estimate that up to 1,000 died trying to reach the Canary Islands from Africa.¹⁰ UNHCR's most recent Global Review estimated that 87 per cent of migrants in sub-Saharan countries use migrant smugglers to make their journeys, with the smugglers earning around US\$300 million dollars each year.¹¹

Global Prevention

There are many global organisations involved in the prevention of migrant smuggling. These organisations support important mechanisms that uphold international law and international norms, as well as facilitating the implementation of conventions and protocols. The 1951 Convention Relation to the Status of Refugees (1951 Convention), the United Nations Convention against Transnational Organised Crime (UNTOC) and the Protocol Against the Smuggling of Migrants by Land, Sea and Air Supplementing the United Nations Convention Against Transnational Organised Crime (Migrant Smuggling Protocol) are important international agreements that create a framework for the prevention of migrant smuggling. For countries that have the resources to implement these frameworks, signing them is one of the most important steps towards prevention of migrant smuggling in their country.

⁷ B. Gerbrewald (ed.), *Africa and Fortress Europe: Threats and Opportunities* (Adlershott: Ashgate Publishing Limited, 2007), p. 136.

⁸ United Nations High Commissioner for Refugees (UNHCR), *2009 Global Trends: Refugees, Asylum-Seekers, Returnees, Internally Displaced and Stateless Persons* (Vienna: UNCHR, 2010), p. 7.

⁹ D. Bouteillet-Paquet, *Smuggling of Migrants: A Global Review and Annotated Bibliography of Recent Publications* (Geneva: UNODC, 2010), p. 30.

¹⁰ UNHCR, 'Irregular Migration by Sea' (2009) available online: <<http://www.unhcr.org/4a1e48f66.html>> (accessed 12 October 2010).

¹¹ Bouteillet-Paquet, op. cit. (2010) p. 30.

The 1951 Convention was created by the UNHCR to deal with the large numbers of refugees in the aftermath of World War II. The UNHCR continues to deal with international migration as an ongoing issue. Article 33 of the Convention provides for a right of non-return ('non-refoulement') to refugees with a well-founded fear of being persecuted because of specific characteristics such as race or region. The Convention's primary concern is thus the protection of the rights of refugees rather than tackling root causes. Instead, the Convention plays a primary role in providing long-lasting solutions to the migratory movements of people in need of asylum through human rights protection. By recognising the need for refugee rights under international law and providing legal avenues for migrants to seek refuge the 1951 Convention plays a fundamental role in the prevention of migrant smuggling.¹²

The most common criticism of the 1951 Convention has been that the overall scope of the instrument is too narrow to remain relevant to the 21st century characteristics of migratory movements. The Convention's definition of 'refugee' excludes people who do not fit this definition but are still in great need of asylum.¹³ For example, persons fleeing famine, severe environmental disasters and economic migrants do not qualify as refugees under the 1951 Convention. These groups of people without access to international protection are left to resort to alternative services like migrant smugglers for help.¹⁴ Furthermore, the power of the 1951 Convention to impose fair processing and granting of asylum is limited and depends on implementation by individual governments. Many countries in the Asia-Pacific, especially transit countries, are not signatories to the Convention and are not bound by its terms. Even countries which are signatories exercise some discretion in how they implement their obligations. This leaves some countries to ignore their part in burden-sharing and justify discriminatory asylum policies in an attempt to lower the numbers of asylum seekers entering the country. This is despite the fact that some nations in Africa, Asia and the Middle-East – states with far fewer economic resources than the major industrialised countries – sometimes host much larger numbers of refugees over longer periods.¹⁵

The United Nations Convention against Transnational Organised Crime (UNCTOC) is currently the major, most universal tool available to combat transnational criminal activities beyond the limitations of national legislation. It aims to counteract transnational criminal organisation through the universal criminalisation of organised crime, corruption and money laundering.

¹² UNHCR, *The 1951 Refugee Convention: Questions & Answers* (Geneva: UNHCR, 2007), p 10.

¹³ Schloenhardt, *op. cit.* (2003), p. 388.

¹⁴ *Ibid.*, p. 388.

¹⁵ *Ibid.*, p. 16.

UNCTOC has created law and law enforcement strategies at international and national levels and sets standards for domestic law reform as well as for regional cooperation. It can be used to facilitate bilateral and global cooperation and puts some pressure on non-cooperative nations. It also serves as a universal basis for joint investigations, mutual legal assistance and extradition of offenders.

The Migrant Smuggling Protocol is a supplement to UNCTOC and acts as a universally recognised tool to combat migrant smuggling:¹⁶

Article 2. Statement of purpose: The purpose of this protocol is to prevent and combat the smuggling of migrants, as well as to promote cooperation among states parties to that end, while protecting the rights of smuggled migrants.¹⁷

Article 6 requires all parties to criminalise the act and its surrounding activities such as producing, providing, procuring or possessing fraudulent travel or identity documents. Article 15, section 3 of the Protocol promotes the development of programs and cooperation at global, regional and national levels. It recognises the core causes of migrant smuggling in origin countries and calls on special attention to be placed on these states.

Furthermore, Articles 7-9 of the Migrant Smuggling Protocol describe special measures against migrant smuggling by sea. Article 7 is concerned with cooperation and states that ‘States Parties shall cooperate to the fullest extent possible to prevent and suppress the smuggling of migrants by sea, in accordance with the international law of the sea’¹⁸ while Article 8 contains provisions for the procedures to be taken once a vessel is found in foreign waters and promotes cooperation and information exchange between countries about measures to be taken against suspect vessels.¹⁹ Finally Article 9 contains safeguard clauses to ensure humane treatment and compliance with the international law of the sea.²⁰

Many countries have not signed the 1951 Convention, UNCTOC or its supplementing Migrant Smuggling Protocol (see figure 1). In most cases this is because the material and human resources needed for implementation and enforcement of these obligations is considered too high. Less than half of the countries studied in the Asia-Pacific region have signed the 1951 Convention and the Migrant Smuggling Protocol. Moreover, signing does not necessarily mean results. The North African region, in which all countries are signatories to the

¹⁶ Ibid., p. 361.

¹⁷ Ibid., p. 54.

¹⁸ Ibid., p. 56.

¹⁹ Ibid., p. 57.

²⁰ Ibid., p. 58.

Migrant Smuggling Protocol, continues to be a major origin and transit region for illegal migration.

Although criticised for the limitations on their impact, the above conventions play pivotal roles on the prevention of migrant smuggling and migration difficulties as a whole. Through creating international norms and frameworks they also provide the relevant global organisations with a mandate in which to work.

Bodies such as United Nations Office on Drugs and Crime (UNODC) and UNHCR act as help to implement related protocols and conventions by incorporating them into national legislation. One example is UNODC's Impact Programme which works directly with governments, international organisations, and other UN entities to assist states in implementing the Migrant Smuggling Protocol.

In comparison to the Mediterranean, the Asia-Pacific is not as heavily assisted by these organisations, as a large majority of states are non-signatories. The UNODC for example, has a presence in both regions but spends more than double what it spends in the Asia-Pacific region in North Africa.

Global bodies independent of the UN such as the International Organization for Migration (IOM) have been more present in the Asia-Pacific region. The IOM has a stronger focus on practical work at national levels and acts as a mediator between national governments and international bodies to find solutions rather than promoting formal international conventions. Although primarily a humanitarian organisation it also makes a very strong contribution to the prevention of migrant smuggling through addressing core issues in origin and source countries. The IOM has a strong presence in Indonesia, including a Labour Migration Policy Project that aims to build Indonesia's labour migration capacity and increase cooperation between Indonesia and four destination countries – Malaysia, Singapore, Bahrain and Kuwait – in order to facilitate labour migration and increase awareness of labour migration policies.²¹

Regional Prevention

Despite the diversity within each region, there are many regional organisations in both regions involved in promoting cooperation to prevent migrant smuggling and its prevention. However when comparing the prominent regional organisations of both regions it is clear that the European Union (EU) operates at a much more advanced level and enjoys a much higher level of cooperation between its members

²¹ International Organization for Migration (IOM), 'Indonesia', (2010) available online: <<http://www.iom.int/jahia/Jahia/activities/asia-and-oceania/indonesia>> (accessed 12 September 2010).

and international organisations than the Association of South-East Asian Nations (ASEAN).

Mediterranean Region

The EU involves its member states in high levels of internal cooperation including freedom of internal movement. Such cooperation allows the region to combat flows of illegal migration towards its borders to an extent far greater than that of ASEAN. The EU works in cooperation with regional organisations such as Frontex, International Centre for Migration Policy Development (ICMPD) and Europol. With the cooperation of concerned EU country members, this has managed to create very effective border control mechanisms.

Frontex is a specialised body of the EU tasked to coordinate the operational cooperation between member states and between regional organisations in the field of border security. It has been extremely successful in the management of Europe's Mediterranean and Atlantic Sea borders. Within the context of the unique Schengen free-movement, Frontex's role in protecting 42,672km of external sea borders is a high priority.²² Frontex activities are intelligence driven and operate in collaboration with national border management systems, other regional agencies such as Eurojust, European Satellite Centre and the Maritime Safety agency, European Police Office (Europol), and the European Police College as well as with global organisations like Interpol.²³

Since 2008 Frontex has carried out eight major operations with the aim to prevent unauthorised border crossings at the Mediterranean and North Atlantic (Canary Islands area).²⁴ A 75 per cent decrease in illegal sea border crossings has been recorded since the beginning of these operations. Sea detections have also dropped for the first time below those at land. Although extremely successful in deterring migrants attempting to cross by sea, Frontex data also shows a simultaneous rise in land border detections since their initiation as well a rise in detections in the second quarter of 2010. This suggests that if the core causes of migrant smuggling remain, any decline in illegal migration via patrolled routes are likely to rise again after policing of waters are reduced.²⁵

²² Frontex, 'Origin', available online: <http://www.frontex.europa.eu/origin_and_tasks/origin/> (accessed 12 October 2010).

²³ Frontex, 'Frontex', available online: <<http://www.frontex.europa.eu/>> (accessed 13 October 2010).

²⁴ Frontex, 'Examples of accomplished operations', available online: <http://www.frontex.europa.eu/examples_of_accomplished_operati/go:flt/> (accessed 13 Oct 2010).

²⁵ Frontex, *FRAN Quarterly*, Issue 2 (April-June 2010), p. 9.

The Mediterranean region also benefits greatly from the work of the International Centre for Migration Policy Development (ICMPD), a regional organisation operating independent of the EU. The ICMPD was created specifically to address the migration issues of the region through the promotion of innovative, comprehensive and sustainable migration policies and as a service exchange mechanism for governments and organisations. The ICMPD is running, among others, two important projects: the Mediterranean Transit Migration Dialogue and the Budapest Process.²⁶

The Mediterranean Transit Migration Dialogue was established to assist the development of informal and flexible consultative structures among migration officials in sending, transit and receiving states of the Mediterranean region with a view to preventing irregular migration. Dialogue participants include Algeria, Egypt, Libya, Tunisia and Morocco along with Europol, Frontex, the European Commission, Interpol, IOM, the League of Arab States, UNHCR, United Nations Economic and Social Commission for Western Asia and UNODC. One of the useful projects of this Dialogue is an interactive i-map that enables partner states to exchange information on the migratory situation in and surrounding the Mediterranean Sea and supporting the development and implementation of cooperation initiatives.²⁷

The Budapest Process serves as an inter-governmental dialogue involving governments and international organisations but operating outside the framework of the EU. International Centre for Migration Policy Development. It provides a framework for exchanging information and experiences on topics such as regular and irregular migration, asylum, visa, border management, trafficking in human beings and smuggling of migrants as well as return and readmission. Through dialogue, and follow-up, the Budapest Process promotes good governance in the field of migration and is supporting the transfer of good practices and the common understanding of migration concepts and policies.²⁸

²⁶ International Centre for Migration Policy Development (ICMPD), 'What is ICMPD?' available online: <<http://www.icmpd.org/whatisicmpd.html>> (accessed 12 September 2010).

²⁷ ICMPD, 'I-Map', available online: <[http://www.icmpd.org/906.html?&no_cache=1&tx_icmpd_pi1\[article\]=922&tx_icmpd_pi1\[page\]=1089](http://www.icmpd.org/906.html?&no_cache=1&tx_icmpd_pi1[article]=922&tx_icmpd_pi1[page]=1089)> (accessed 12 October 2010).

²⁸ ICMPD, 'Budapest Process' available online: <http://www.icmpd.org/fileadmin/ICMPD-Website/Budapest_Process/What_is_the_Budapest_Process_January_2010.pdf> (accessed 15 October 2010).

Asia-Pacific Region

ASEAN operates with a much lower level of international cooperation and coordination with regional organisations.

However ASEAN has developed Action Plans and Declarations that are a promising step towards greater cooperation of its member states on such matters as immigration and transnational crime legislation. For example, the ASEAN Plan of Action on Immigration Matters was established to forge and strengthen immigration cooperation with a view to establish an effective network to promote the modernisation of immigration facilities, systems and operations and upgrade human resources capabilities and capacities of immigration officials to support the economic aspirations of ASEAN.²⁹ Although it seems unlikely that a comprehensive harmonised asylum system for all ASEAN members will become a reality in the near future, the conclusion of Action plans demonstrates that the countries in a region as diverse as the Asia-Pacific can cooperate in finding practical solutions on politically, culturally and economically sensitive issues, such as migrant smuggling and refugee rights.

ASEAN does not cooperate with other regional organisations to the same extent as the EU and operates largely with intentional exclusion of other organisations and countries in the region, which limits its capabilities and resources in terms of preventing migrant smuggling. ASEAN has in the past been critical of other organisations, such as Interpol, for being too euro-centric, while Interpol has complained of a lack of support and intelligence by from the Asia-Pacific.³⁰ This means that potentially useful information-sharing interactions are not happening.

The countries of the Asia-Pacific region, although also engaged through forums independent of ASEAN lack an organisation involving all countries of the region devoted to migration policy development or a degree of cooperation between regional organisations that creates the same effect as shown through the example of the International Centre for Migration Policy Development and EU. Considering ASEAN's reluctance to cooperate with other organisations as well as countries of the region such as Australia, forums such as the Inter-governmental Asia-Pacific Consultations on refugees, displaced persons and migrants (APC), the Council for Security Cooperation in the Asia Pacific (CSCAP) and the Bali Process, which operate outside the framework of ASEAN, are of high importance. The APC has a

²⁹ Association of South East Asian Nations (ASEAN), 'ASEAN Plan of Action for Cooperation on Immigration Matters', available online:

<<http://www.aseansec.org/16572.htm>> (accessed 8 October 2010).

³⁰ Schloenhardt, op. cit. (2003), p. 307

focus, amongst other things, on prevention and migrant smuggling,³¹ and has been set up in partnership with UNHCR and IOM for countries of the Asia-Pacific region to discuss issues relating to population movement and explore opportunities for greater regional cooperation.³² Similarly to the Budapest process, the Bali Process brings its participants together to workshop practical measures to help combat people smuggling such as capacity building of operational level officials representing justice and law enforcement. The Bali Process is a collaborative effort involving the participation of almost all the countries of the Asia-Pacific (see figure 1) including international organisations such as the IOM and UNHCR.

National Measures

One would assume that a crime so fundamentally transnational in nature would be best dealt with through global or regional initiatives. However prevention initiatives and commitment by national governments are pivotal to the prevention of migrant smuggling and the effectiveness of existing international and regional initiatives.

The cultural, political and economic diversity of the Asia-Pacific region is reflected in the way individual countries of the region have responded to issues of illegal migration and border control. While they cooperate in several regional forums there is little harmony between their legal and border control systems. Some countries of the Asia-Pacific are signatories of international treaties and have implemented comprehensive legislation to address migrant smuggling, but many have not.

The European countries bordering the Mediterranean Sea, on the other hand, enjoy more harmonised border control systems with majority of countries of the region, including North African countries signatory to the relevant international conventions. However national immigration policy is still at the discretion of national governments and individual countries of both regions have responded to migrant smuggling largely as an issue of national security. The deterrence of illegal vessels at sea and tightening of immigration policies rather than prevention initiatives directed at problems in origin countries has been the common approach towards prevention methods by major destination countries in each region: Australia and Italy.

³¹ Inter-governmental Asia-Pacific Consultations on Refugees, Displaced Persons and Migrants (APC), 'About us' (2010) available online:

<<http://www.apcprocess.net/aboutus.htm>> (accessed 10 October 2010).

³² APC, 'Asia-Pacific Consultations of Refugees, Displaced Persons and Migrants' (2010) available online: <<http://www.apcprocess.net/index.html>> (accessed 10 October 2010).

Australia

Australia's attempts to lower the number of unauthorised arrivals who seek asylum in Australia, have been for almost two decades has focused on strengthening border security and tightening its immigration policies. The 2009-10 Australian Federal Budget allocated \$654 million to combat migrant smuggling. Most of which was given to Customs, the Australian Federal Police, the Commonwealth Director of Public Prosecutions and the Defence Department for coastal and maritime surveillance activities and people smuggling investigations and prosecutions. The remainder – a total of \$92.4 million – was spent on engagement with regional neighbours and international organisations. This includes engagement with Indonesia, which involves funding to the IOM for managing detention facilities in Indonesia and establishing temporary transit facilities to address irregular population flows in the region, including funding to develop a regional framework for the resolution of the status of asylum seekers in cooperation with the UNHCR and IOM.³³

Since 2002 Australia's immigration detention policy has been seen as “an essential component of strong border control”³⁴ in the attempt to deter the flow of illegal migrants towards its borders.³⁵ As of 4 February 2011, there were 6659 people in immigration detention,³⁶ 97 per cent of whom arrived unlawfully by boat³⁷ and 46.7 per cent had been detained for 6-12 months.³⁸ Figures contained in the Department of Immigration and Citizenship's brief to the incoming government show that \$471.18m has been allocated to offshore processing alone of illegal arrivals in the 2010-11 budget.³⁹ Considering the continued increase in illegal

³³ J. Philips, *Budget 2009-10: Immigration – Border Protection and Combating People Smuggling* (Canberra: Parliament of Australia, 2010) available online: <http://www.apf.gov.au/library/pubs/RP/BudgetReview2009-10/Immigration_BorderProtect.htm> (accessed 1 November 2010).

³⁴ Department of Immigration and Citizenship (DIAC), ‘Fact Sheet 82: Immigration Detention’ (2011) available online: <<http://www.immi.gov.au/media/fact-sheets/82detention.htm#a>> (accessed 20 March 2011).

³⁵ DIAC, ‘Background to Immigration Detention’ (2011) available online: <<http://www.immi.gov.au/managing-australias-borders/detention/about/background.htm>> (accessed 20 March 2011).

³⁶ Department of Immigration and Citizenship, ‘Immigration Detention Statistics Summary: Community and Detention Services Division’ (DIAC, 2011) available online: <<http://www.immi.gov.au/managing-australias-borders/detention/pdf/immigration-detention-statistics-20110204.pdf>> (accessed 20 March 2011), p. 1.

³⁷ *Ibid.*, p. 2.

³⁸ *Ibid.*, p. 4.

³⁹ ‘Offshore Option Five Times Dearer’, *The Australian* (8 January 2011) available online: <<http://www.theaustralian.com.au/news/nation/offshore-option-five-times-dearer/story-e6frg6nf-1225983879727>> (accessed 20 March 2011).

foreign vessels reported by the Australian Customs and Border Protection Service, the current methods used by Australia have been expensive and ineffective in preventing migrant smugglers from attempting to make their journeys towards Australia.

Australia has also developed specific laws targeting migrant smuggling. The majority of these offences can be found under division 12, subdivision A: “people smuggling related offences” of the *Migration Act 1958*.⁴⁰ The most recent addition to the legislative framework concerning people smuggling was the introduction of the *Anti-People Smuggling and Other Measures Bill 2010* which added new offences, enhanced investigative tools, and extended penalties.⁴¹ These changes were a result of national security reforms initiated by former Prime Minister Kevin Rudd in 2008 which emphasised the need for greater coordination among government agencies and cooperation between regional partners. However, the eventuating bill did not make any significant policy changes in terms regional cooperation or prevention:

...It is not as simple as pretending that one simplistic notion of a change in domestic policy is going to end people smuggling in the world. It is just not going to happen and it has not happened in the past... I think all countries in the world now understand that international cooperation and quite sophisticated policy responses are necessary to try and deal with this problem.⁴²

Italy

Italy was the first country to seek international criminalisation of illegal migration by sea. Italy, like Australia after the Vietnam War, experienced a huge influx of migrants after the fall of the Soviet Union. Italy’s reaction, not unlike Australia, was to tighten border security and toughen penalties on illegal migration.⁴³ In 2007 after a dramatic escalation of sea crossings of the Tyrrhenian Sea, Italy submitted a draft multilateral convention to combat illegal migration by sea to the IMO, which was later integrated into the Migrant Smuggling Protocol.⁴⁴

⁴⁰ Commonwealth of Australia, *Migration Act 1958* (Canberra: Office of Legislative Drafting and Publishing, 2010).

⁴¹ E. Karlsen, *Anti-People Smuggling and Other Measures Bill 2010*, 11 March, no. 131, 2009–10 (Canberra: Parliamentary Library, 2010), p. 3.

⁴² Senator C. Evans, as quoted in *ibid.* p. 21.

⁴³ Schloenhardt, *op. cit.* (2003), p. 347.

⁴⁴ International Council on Human Rights Policy, *Irregular Migration, Migrant Smuggling and Human Rights: Towards Coherence* (Geneva: ICHRP, 2010), p. 66.

The Government of Italy has continued its concentration on law enforcement efforts to prevent migrant smuggling but has since adopted controversial policies preventing the processing of migrants on Italy's mainland. In 2009, Italy initiated its 'Push-back Policy'. A bilateral migration agreement was concluded between Italy and Libya agreeing that illegal immigrants captured within Italian borders would be sent to detention centres in Libya for processing.⁴⁵ This is not unlike the former 'Pacific solution' adopted by Australia in 2001 for offshore processing with Nauru and Papua New Guinea. The bilateral agreement between Italy and Libya is fully funded by Italy⁴⁶ and allows them to skip procedures for filing potential asylum applications, which is instead carried out by humanitarian organisations in Libya.⁴⁷ In the first two months after the agreement came into force at least 900 people were sent to Libya without assessment.⁴⁸

The 'push-back' policy resulted in a significant drop in arrivals since it was launched in May 2009. In the first three months of 2010 there was a 96 per cent drop in arrivals compared to 2009.⁴⁹ This led Italian Interior Minister Roberto Maroni to comment: The Italian model of fighting illegal immigration has produced exceptional results and we think it should be copied by other European countries.⁵⁰

The policy has had real and great affect on surrounding European countries that border the Mediterranean Sea. For example Malta has noticed, following the 2009 introduction of joint patrols by Libya and Italy, the number of illegal immigrants reaching Malta has dropped significantly.

Statistics obtained from the Home Affairs Ministry show that the number of illegal immigrants reaching Malta in 2009 dropped by more than half over the previous year. While during 2008 a total of 84 boats with 2,775 illegal immigrants arrived from Libya, the number declined to 17 boats in 2009 and a total of 1,475 illegal immigrants. The statistics also show that the majority of illegal immigrants

⁴⁵ C. Simon, 'Greek and Italian Prime Ministers Cooperate Closely', *Clandestinenglish* (2009) available online: <<http://clandestinenglish.wordpress.com/2009/07/16/greek-and-italian-prime-ministers-cooperate-closely/>> (accessed 17 September 2010).

⁴⁶ M. Zyganov, 'Italy sees big drop in illegal migration after accord with Libya', *Ria Navosti* (2010) available online: <<http://en.rian.ru/world/20100417/158629466.html>> (accessed 13 September 2010).

⁴⁷ Euractiv, 'Italy's immigration deal with Libya sparks uproar', *Euractiv* (2009) available online: <<http://www.euractiv.com/en/justice/italy-immigration-deal-libya-sparks-uproar/article-183116>> (accessed 17 September 2010).

⁴⁸ UNHCR, 'UNHCR Interviews: Asylum Seekers Pushed Back to Libya' (2009) available online: <<http://www.unhcr.org/4a5c638b6.html>> (accessed 17 September 2010).

⁴⁹ Zyganov, op. cit. (2010).

⁵⁰ Italian Interior Minister Roberto Maroni, cited in *ibid.*

reaching the island in 2009 arrived in the first half of the year when the joint Italian-Libyan anti-migration patrols had not yet started. Since the introduction of the patrols, the flow of illegal immigrants to Malta and Lampedusa has almost stopped.⁵¹

Italy's bilateral agreement with Libya has proved to be very effective in deterring migrants from attempting to cross the Mediterranean and has extended to benefit other countries of the region. This could be an incentive for further cooperation between transit and destination countries. But despite its success, Italy's policy has been highly criticised by humanitarian and refugee organisations. Furthermore results will continue to be unstable, as root causes are not being addressed in Libya. Reports from Frontex of the second quarter of 2010 show an increase in detections at sea, suspected by Frontex to be due to the recent re-organisation of criminal groups in response to bilateral agreements in the area as well as the expulsion of the UNHCR by Libya in June. The UNHCR were protecting and processing 9,000 refugees and 4,000 asylum-seekers in Libya. These people are now expected to attempt illegal entry into the EU.⁵² This increase despite earlier success accentuates the importance of development initiatives to help combat migrant smuggling at its source rather than at sea.

These two examples show that a balance needs to be found between the desire for control over national security and realisation of the realities of migratory movements. Both Australia and Italy have continued to use methods of deterrence that have failed in preventing migrant smuggling. Although Italy has been successful in managing border control, these methods do not address core causes and are therefore likely to be unsustainable.

While every nation has a sovereign right over its immigration policies as well as a duty to maintain national security, individual governments need to understand that international migration is inevitable: "it can be managed by states but not controlled by them"⁵³ because it is a result of factors beyond the control of any individual national state. Long-term solutions would demand international development, economic and political cooperation at an unachievable scale. Therefore governments must therefore accept that migratory movements are unavoidable and that it is these factors pushing people to seek asylum combined

⁵¹ I. Camilleri, 'Frontex patrols stopped as Malta quits: Italy, Libya patrols proving to be very effective', Times of Malta (28 April 2010) available online: <<http://www.timesofmalta.com/articles/view/20100428/local/frontex-patrols-stopped-as-malta-quits>> (accessed 13 September 2010).

⁵² Frontex, op. cit. (2010), p. 9.

⁵³ J. Salt, 'The Business of International Migration', in M. Siddique and R. Appelyard, (eds.) *International Migration into the 21st Century, Essays in Honour of Reginald Appleyard* (Cheltenham UK: Edward Elgar, 2001), p. 86.

and with restrictions on legal migration systems that has given migrant smugglers an opportunity to operate.⁵⁴

Migrant smuggling in both regions has exposed the limitations of global systems to deal with today's migratory movements as well as the reluctance of western high-income countries in these regions to keep their immigration policies open and non-discriminatory. At a national level countries need to review their immigration policies with this reality in mind.⁵⁵ An alternative approach to the prevention of migrant smuggling could involve keeping legal pathways for asylum open in order to reduce the risk of people resorting to migrant smugglers. This could be argued to enhance national security and provide more economical results, with investment used to assist migrants into the workforce rather than be wasted on deterrence and detention.⁵⁶

Some western destination countries in other regions have tried to prevent abuse of their immigration systems without denying access to those in need of protection. Western European and Scandinavian nations, for example, have found that releasing asylum seekers into the community subject to reporting obligations is a less expensive response to the growing numbers of asylum seekers which is consistent with their human rights obligations.⁵⁷

Conclusion

This chapter has found that the prevention methods used to deter migrant smuggling in both the Asia-Pacific and Mediterranean regions are not dissimilar in approach, but the roles and effectiveness of global, regional and national initiatives in both regions do vary. In both regions the dominant approach is one of reactionary response where prevention is largely interpreted as the need for tighter management of migration movements rather than focusing on the root causes of migrant smuggling. This chapter has shown that the management of migration flows can be achieved through strong border security; however there is evidence that this approach may simply shift routes or methods rather than truly preventing migrant smuggling.

The Mediterranean Region has been very successful in lowering the numbers of illegal vessels carrying migrants crossing the Mediterranean and North Atlantic Seas through border security. However the unexpected spike in detections, as well as a simultaneous rise in the number of land detections suggests that border

⁵⁴ Schloenhardt, *op. cit.* (2003), p. 51.

⁵⁵ *Ibid.*, p. 387.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*, p. 398.

security does not necessarily prevent migrant smuggling but rather push the organisations to alter their operations. Furthermore, as the core causes of migrant smuggling are not addressed in the border security method, the current levels of border protection must be continued and possibly expanded over time for the effect to be sustained. Likewise, Australia has also tried deterrent methods such as increased border security and tightening of immigration policies without great success. The example of the Mediterranean region could prove to be a lesson for Australia as it continues to pursue stronger border security systems and maintains its immigration policy.

Given deterrence methods can help to manage illegal sea crossings but will not necessarily prevent migrant smuggling in the long-term, prevention methods must look more to core causes for solutions. Governments need to accept that migrant smuggling exists because of the deficiencies of current migration and asylum systems. Seeing migration movements are inescapable, this suggests that it is the systems in place that are allowing opportunities for migrant smugglers that should be reconsidered and better managed.

Prevention methods should be focused on broadening current immigration systems. A new international immigration regime encompassing greater freedom of movement for migrants would involve global movement driven by national initiative. As this is unlikely to happen in the near future, due to the current climate of anti-immigrant sentiment and heightened security concerns in most Western countries following the September 11th 2001 attacks, it is perhaps more practical to focus on the findings in this study that offer more achievable solutions.

For example, further research is needed on the specific characteristics of migrant smuggling in each region or the perspectives of origin countries. In particular root causes should be investigated in much more depth as this will point to the most sustainable methods of prevention.

The Asia-Pacific region should aim to achieve higher levels of cooperation between organisations at national, regional and global levels. For example Aseanapol could be encouraged to engage in information sharing with Interpol. Furthermore, the Asia-Pacific does not have a regional organisation dedicated to migration policy development and its implementations involving all the countries of the region as the International Centre for Migration Policy Development does in the Mediterranean region. The development of a new organisation or expansion of an existing initiative such as the Bali Process is recommended to help the prevention of migrant smuggling.

The role of more advantaged states in each region should be stronger in the prevention of migrant smuggling. As the Asia-Pacific is the region with the lowest

number of signatories to the principal international instruments that relate to the prevention of migrant smuggling, countries with higher capacities should help lesser-developed countries in the region to develop the capacity to for prevention frameworks and conform to international standards through the adoption of the 1951 Convention and UNCTOC and its supplementing Migrant Smuggling Protocol. In an effort to achieve this, current signatories should be reminded of Article 15 section 3 of the Migrant Smuggling Protocol which reminds signatories to pay “special attention to economically and socially depressed areas, in order to combat the root socio-economic causes of the smuggling of migrants, such as poverty and underdevelopment.”⁵⁸

⁵⁸ UNODC, *op. cit.* (2004), p. 62.

Figure1. Signatories to International Conventions and Memberships in International and Regional Organisations

Country	UN	UNC TOC	MSP	Inter pol	IOM	ASE AN	Bali	Buda pest	APC	CSC AP	ICM PD	EU	1951 Con
Asia-Pacific Region													
Australia	✓	✓	✓	✓	✓	-	✓	-	✓	✓	-	-	✓
Brunei	✓	✓	-	✓	-	✓	✓	-	-	✓	-	-	-
Burma	✓	✓	✓	✓	-	✓	✓	-	✓	-	-	-	-
Cambodia	✓	✓	✓	✓	✓	✓	✓	-	✓	✓	-	-	✓
PR China	✓	✓	-	✓	-	-	✓	-	✓	-	-	-	✓
Fiji	✓	-	-	✓	-	-	✓	-	-	✓	-	-	✓
Indonesia	✓	✓	✓	✓	-	✓	✓	-	✓	-	-	-	-
Lao PDR	✓	✓	✓	-	-	✓	✓	-	✓	✓	-	-	-
Malaysia	✓	✓	-	✓	-	✓	✓	-	✓	✓	-	-	-
Nauru	✓	✓	✓	✓	-	-	✓	-	-	-	-	-	-
New Zealand	✓	✓	✓	✓	✓	-	✓	-	-	✓	-	-	✓
Papua New Guinea	✓	-	-	✓	-	-	✓	-	-	✓	-	-	✓
Philippines	✓	✓	✓	✓	✓	✓	✓	-	✓	✓	-	-	✓
Singapore	✓	✓	-	✓	-	✓	✓	-	✓	✓	-	-	-
Solomon Islands	✓	-	-	-	-	-	✓	-	-	-	-	-	✓
Sri Lanka	✓	✓	✓	✓	✓	-	✓	-	-	-	-	-	-
Taiwan	-	-	-	-	-	-	-	-	-	-	-	-	-
Thailand	✓	✓	-	✓	✓	✓	✓	-	✓	✓	-	-	-
TimorLeste	✓	✓	✓	✓	-	-	✓	-	-	-	-	-	✓
Vanuatu	✓	✓	-	✓	-	-	-	-	-	✓	-	-	-
Vietnam	✓	✓	-	✓	✓	✓	✓	-	✓	-	-	-	-

Country	UN	UNC TOC	MSP	Inter pol	IOM	ASE AN	Bali	Buda pest	APC	CSC AP	ICM PD	EU	1951 Con
North African Region													
Algeria	✓	✓	✓	✓	✓	-	-	-	-	-	-	-	✓
Egypt	✓	✓	✓	✓	✓	-	-	-	-	-	-	-	✓
Libya	✓	✓	✓	✓	✓	-	-	-	-	-	-	-	-
Morocco	✓	✓	-	-	-	-	-	-	-	-	-	-	✓
Tunisia	✓	✓	✓	-	✓	-	-	-	-	-	-	-	-
European Mediterranean region													
Albania	✓	✓	✓	✓	✓	-	-	✓	-	-	-	-	✓
Bosnia and Herzegovina	✓	✓	✓	✓	✓	-	-	✓	-	-	-	-	✓
Croatia	✓	✓	✓	✓	✓	-	-	✓	-	-	✓	-	✓
Cyprus	✓	✓	✓	✓	✓	-	-	✓	-	-	-	✓	✓
France	✓	✓	✓	✓	✓	-	-	✓	-	-	-	✓	✓
Greece	✓	✓	✓	✓	✓	-	-	✓	-	-	-	✓	✓
Italy	✓	✓	✓	✓	✓	-	-	✓	-	-	-	✓	✓
Malta	✓	-	-	✓	✓	-	-	✓	-	-	-	✓	✓
Montenegro	✓	✓	-	✓	✓	-	-	✓	-	-	-	-	-
Portugal	✓	✓	✓	✓	✓	-	-	✓	-	-	✓	✓	✓
Slovenia	✓	✓	✓	✓	✓	-	-	✓	-	-	✓	✓	-
Spain	✓	✓	✓	✓	✓	-	-	✓	-	-	-	✓	✓
Turkey	✓	✓	✓	✓	✓	-	-	✓	-	-	-	-	✓

Key:

UN – Member States of the United Nations

UNCTOC – United Nations Convention on Transnational Organised Crime

MSP – Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the UCTOC

Interpol – International Police Organisation

IOM – International Organisation for Migration

ASEAN – Association of Southeast Asian Nations

Bali – Bali regional ministerial process on people smuggling, trafficking in persons and related transnational crime

Budapest – Budapest consultative forum aiming at developing comprehensive and sustainable systems for orderly migration

APC – Asia-Pacific Consultations

CSCAP – Council for Security Cooperation in the Asia Pacific

ICMPD – International Centre for Migration Policy Development

EU – European Union

1951 Con – United Nations 1951 Convention relating to the Status of Refugees

Aid, Development and Mutuality: the Case for ‘Moral’ Realism?

Jannika Brostrom*

It is customary for specialists in international relations to regard aid and development as arenas of foreign policy where realist theory has little or nothing to contribute. Yet it is a misconception to suggest that all aspects of realism are solely concerned with material dimensions of state power, and the mechanisms to exercise that power. This perception has fuelled a general caricature of realism that rational state action is exclusively guided by the pursuit of power and self-interest. This chapter explores how considerations of morality are increasingly being accommodated through the concept of mutuality in current ‘moral realist’ thought. This is demonstrated through an analysis of Canada’s and Japan’s policies relating to aid and development in Indonesia. This case identifies three factors demonstrating mutuality: economic development leading to stability and increased trade opportunities; long-term expectations of reciprocity; and clear convergence between national and broader ‘moral’ interest. Taken together, the cases show that mutuality is a significant feature of contemporary international relations.

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It is customary for specialists in international relations to regard aid and development as arenas of foreign policy where realist theory has little or nothing to contribute. Yet it is a misconception to suggest that all aspects of realism are solely concerned with material dimensions of state power, and the mechanisms to exercise it. It fuels a general caricature of realism: that blunt rational state interests guide foreign policies and that the current order of the international system resembles the state of nature described as a ‘war of every man against every man.’¹

This chapter will argue that many realists have adapted to changing international realities in which complex interdependencies form more than a zero-sum game that can be analysed through the prism of rational egoism. This chapter demonstrates this by focusing on aid and development as an aspect of foreign policy that is increasingly being accommodated through the concept of *mutuality* in realist thought. This examination shows that what has been termed ‘moral realism’ – on the surface a seemingly oxymoronic concept – accepts that norms (relating to human rights, development, and international customs, treaties and alliances) can be embedded between states, and they can thus affect calculations of national interests. This chapter identifies three factors – economic development leading to stability and increased trade opportunities; long-term expectations of reciprocity; and clear convergence between national and broader ‘moral’ interest – which show that mutuality is a significant feature of contemporary international relations.

A clear example of this can be found in Canada’s and Japan’s similar approach to fostering development in Indonesia. Both these states articulate explicitly normative development policy agendas that are justified in terms of the national interest. The common focus of both these actors shows that mutuality on development objectives affects the posture of states that are culturally unrelated, geographically distant, and which face very different domestic and external policy priorities.

Before doing this, however, it is useful to examine different strands of realist thought. This lends weight to the argument that realism is often conflated as a simplistic over-reliance on material power. Once this has been established I move on to examine mutuality in more detail, and then show in the crux of the paper that realism can indeed accommodate ethical propositions, as well as considering them key factors in formulating state objectives.

¹ T. Hobbes, *Leviathan* (Oxford: Oxford University Press, 1996).

The Re (Integration) of Norms in Contemporary Realism

Realists who subscribe to the philosophy of Thomas Hobbes² and Thucydides,³ as well as the strategic thought of Clausewitz⁴ have certainly reinforced a primordial view of international relations. They argue⁴ that the lack of a global authority – legitimate or otherwise – renders law or civil society unworkable within an anarchical international system.⁵ This perspective, supported by Kenneth Waltz, Stephen Krasner and Raymond Aron, maintains that even in conditions of formal legal equality⁶, states interact in a primitive word order exclusively through the mechanics of power politics.⁷ Competition for power is thus the most important

² T. Hobbes, *The Elements of Law, Natural and Political* (London: Cass, 1969), Part 1.

³ P. Woodruff, *On Justice, Power, and Human Nature: The Essence of Thucydides' History of the Peloponnesian War* (Indianapolis: Hackett, 1993).

⁴ C. Brooker and N. Stone (eds.), *Clausewitz: Philosopher of War* (London: Routledge & Kegan Paul, 1983).

⁵ Normative theorising is referred to in this paper as the body of work that discusses the moral and ethical dimensions of international relations and the wider interpretations generated by this discourse. See: C. Brown, *International Relations Theory: New Normative Approaches* (UK: Columbia University Press, 1992), p. 3-5. For more information on normative theorising in international relations see T. Nardin, *Law, Morality and the Relations of States* (Princeton: Princeton University Press, 1989); M. Frost, *Towards a Normative Theory of International Relations* (Cambridge: Cambridge University Press, 1986) and C. Beitz, *Political Theory and International Relations* (Princeton: Princeton University Press, 1979).

⁶ The principle that all states are equally sovereign under international law is evident in the UN Charter (Article 2.1). In international relations theory the meaning and definition of sovereignty varies, however, since the Peace of Westphalia sovereignty is generally recognised as the legal right of the state to exercise its supreme authority within its territory and conduct its affairs independently from external influence. For more information on sovereignty see J. E. Thompson, 'State Sovereignty in International Relations: Bridging the Gap between Theory and Empirical Research,' *International Studies Quarterly*, vol. 39 (1995), p.213-33; J. Bartelson, *A Genealogy of Sovereignty* (Cambridge, Cambridge University Press, 1995); M. R. Fowler and J. M. Bunck, *Law, Power, and the Sovereignty State* (University Park, PA: Penn State Press, 1995) and F. H. Hinsley *Sovereignty 2nd ed.* (Cambridge: Cambridge University Press, 1986).

⁷ K. Waltz, *Theory of International Politics* (Massachusetts: Addison Wesley, 1979); K. Waltz, 'Realist Thought and Neo-Realist Theory,' *Journal of International Affairs*, vol. 44 (1990), p. 21-37; K. Waltz, 'The Emerging Structure of International Politics,' *International Security*, vol.18 (1993), p. 44-79; S. D. Krasner, *Structural Conflict: The Third World Against Global Liberalism* (Berkeley: Berkeley University Press, 1985); S. D. Krasner, 'Fortune, Virtue, and Systemic Versus Scientific Inquiry,' in J. Kruzal and J. N. Rosenau (eds.) *Journeys Through World Politics* (Massachusetts: Lexington Books, 1989), p.426-440; S. D. Krasner, 'Structural Causes and Regime Consequences: Regimes as Intervening Variables,' *International Organization*, vol. 36 (1982), p. 1-21; S. D. Krasner., 'Realism, Imperialism and Democracy,' *Political Theory*, vol. 20 (1992), p.39-48; S. D. Krasner, 'Compromising Westphalia,' *International Security*, vol. 20 (1996/1997), p. 115-151; R. Aron, *Peace and War* (New York: Praeger, 1968) and R. Aron, 'What is a Theory of International Relations,' *Journal of International Affairs*, vol. 21 (1967), p. 185-206.

variable motivating states, defining the context of their interactions and serving as the foundation of (and the agent for) foreign policy.⁸

For many realists this means that any state behaviour motivated by ‘moral’ or ‘ethical’ factors is informed by abstract values that fall outside proper understandings of statecraft.⁹ Here, structural realists are keen to separate normative approaches from empirically-grounded theorising by claiming a theoretical dichotomy between morality as a subjective aspect of human consciousness and the objective rational materialism of politics. Hence Kenneth Waltz and John Mearsheimer argue that international stability is best preserved when states use their material means to balance against each other, and thereby subordinate any ethical or moral behaviour to the distribution of power.¹⁰ This general assumption has been used to separate international relations theory from foreign policy analysis, meaning the former cannot be used to examine and prescribe for the latter.

Yet such a characterisation is clearly at odds with recent developments in state behaviour, where human rights, humanitarian assistance and mutual alliances are increasingly visible as normative rather than just material factors. Even many realists agree that states are not the only agents capable of exerting influence on the international stage. Indeed, Non Governmental Organisations (NGOs), aid agencies, United Nations (UN) agencies, human rights organisations and private enterprises can all be viewed as having a considerable influence on world order.¹¹

The result is that some realists argue that the structure of the international system is shifting from a static condition of anarchy towards a system of complex interdependencies, meaning that states are now being influenced by a broader range of external and internal forces that require action outside the need to compete for power.¹² The absence of a relatively stable bipolar world structure has led scholars like William Wohlforth and Michael Desch to argue that states are now searching for alternative ways to cement their status in an uncertain international environment. Others, like Michael Wesley, go even further. They argue that

⁸J. Donnelly, ‘Realist Tradition,’ *Realism and International Relations* (Cambridge: Cambridge University Press, 2000), p.6-43.

⁹ C. Brown, ‘Ethics interests and Foreign Policy,’ in Karen E. Smith and Margot Light (eds.), *Ethics and Foreign Policy* (New York: Cambridge University Press, 2001), p. 15-33.

¹⁰ K. Waltz, ‘The Emerging Structure of International Politics,’ *International Security*, vol.18 (1993), p.44-79 and J. Mearsheimer, ‘Liberal Talk, Realist Thinking,’ *University of Chicago Magazine* (2002) available online: www.alumni.uchicago.edu/magazine/0202/features/index.htm. pp7-10 (accessed 15th November 2010).

¹¹ C. A. J. Coady, *Morality and Political Violence* (New York: Cambridge University Press, 2008), p. 43-68.

¹² R.O. Keohane and J. S. Nye, *Power and Independence* (3rd Ed) (New York: Longman, 2010), p. 20-32.

competition can be settled by mediation, arbitration and the establishment of common laws that have the ability develop a sense of reciprocity and trust in the international system.¹³ It is this sense of common laws that is at the heart of new these ‘moral realist’ approaches. These theorists suggest that factors such as economic interdependence, technical innovation, regime stability, security dilemmas and ideology are all evidence of normative aspects of state power that contribute towards making foreign policy.¹⁴

In this more nuanced realist view of the international environment, the use of ethics in foreign policy becomes a useful explanatory variable rather than just a reflection of power, giving rise to the idea of *mutuality*. What differentiates the new ‘moral’ realism from other perspectives is that it argues a state’s *raison d’ etre* (or its perspectives and beliefs about the distribution of power) can influence its foreign policy decisions.¹⁵ Norms and ethics are principled beliefs in state action that cement the state-centric order of the international system. This implies a sense of contingent rationality by decision-makers rather than the simple claim that all states comply with the forces of political reason at all times. The economic, political and social interactions involved in creating a relatively stable international system may signify important mutual interests, but the reciprocal benefits gained from participating in this process will only affect those who have the capacity to engage in it.¹⁶

¹³ W. C. Wohlforth, ‘Realism and the End of the Cold War,’ *International Security*, vol. 19 (1994), p. 91-129; M. C. Desch, ‘Culture Clash: Assessing the Importance of Ideas in Security Studies,’ *International Security*, vol. 23, no.1(1998), p. 141–70; K. A. Oye, (eds) *Cooperation Under Anarchy* (Princeton: Princeton University Press, 1986), p.1-24.

¹⁴ W. C. Wohlforth, ‘Realism and the End of the Cold War,’ *International Security*, vol. 19 (1994), p. 91-129 and M. C. Desch, ‘Culture Clash: Assessing the Importance of Ideas in Security Studies,’ *International Security*, vol. 23 (1998), p. 141–70. This perspective has been especially informed by the writings of Robert Gilpin and John Herz who argued that in the context of growing co-operation and inter-state relations structural theories of realism needed to include more ‘enlightened’ views of self-interest in foreign policy. Robert Gilpin was particularly concerned with the role of international economic forces and the marketplace in forming state foreign policy: R. Gilpin, *The Political Economy of International Relations* (Princeton: Princeton University Press, 1987). John Herz was concerned with the establishment of a ‘common interest’ between states identifying the ethics involved in what he posits as the ‘security dilemma’ of states: J. Herz ‘International Relations: Ideological aspect,’ *International Encyclopaedia of the Social Sciences* (London: Macmillan, 1968).

¹⁵ M. C. Desch, ‘It is Kind to be Cruel: The Humanity of American Realism,’ *Review of International Studies*, vol. 29 (2003), p. 415-426.

¹⁶ *Ibid.*.

The Convergence of Ethics and Interests: Moral Realism and Shared Mutuality

Proponents of moral realism accept the ambiguity between a state's national and international interest and seek ways to identify where the two converge. Its intellectual antecedent, 'classical realism', has sought to demonstrate why rational and self-interested individuals living in a political society adhere to formal and informal limits on their actions and conduct their affairs within a specific set of moral rules. The perspectives of Hans Morgenthau¹⁷, Hedley Bull¹⁸, David Hume,¹⁹ E.H. Carr²⁰ and John Vincent²¹ identify with the normative theorising involved in the creation of an 'international society'²² and argue that in the absence of a world government, the condition of anarchy is bounded by a system of moral codes and conventions. Although this system is open to manipulation, these conventions nevertheless can be analysed as moderating power competition.²³ Classical realism explores morality in international relations based on the tacit assumption that in an interdependent world, political actors will view each country's national interest in similar terms. If a political leader is expected to act responsibly about the state's national interest, it is possible to expect that these leaders would seek common interests with similarly minded individuals in other states.²⁴

Moral realism adapts from this the understanding that effective political action is best pursued within a common moral community. The political tradition of Carl Schmitt and Hans Morgenthau saw the mechanics of power politics through competition between such morally bounded actors, where social antagonism can create incentives for states and political decision-makers to develop rational modes

¹⁷ H. Morgenthau, *Politics Among Nations: The Struggle for Peace and Power* (5th Ed) (New York: Alfred a Knope, 1977).

¹⁸ H. Bull, *The Anarchical Society* (London: Macmillan Press, 1977).

¹⁹ D. Hume, *A Treatise of Human Nature Book III* (Clarendon Press: Oxford, 1978).

²⁰ E. H. Carr, *The Twenty Years' Crisis, 1919-1939* (2nd Ed) (London: Macmillan, 1946).

²¹ R. J. Vincent *Human Rights and International Relations*, (Cambridge University Press, 1989).

²² The concept of an 'international society' has featured heavily in both normative and English School theories of international relations. Its main proposition is that relations between states do not simply create an international system but a society, the basis being that there is a normative overly to these relationships centred on the possibility to identify the 'morality of states.' For more information see K. W. Thompson, *Morality and Foreign Policy* (USA: Louisiana State University Press, 1980), p. 2-28 and C. Brown, *International Relations Theory: New Normative Approaches* (New York: Columbia University Press, 1992), p. 11-59. For more on the concept of an International Society from an English School perspective see H. Bull, *The Anarchical Society* (London: Macmillan Press, 1977) and T. Dunne, *Inventing International Society: A History of the English School* (New York: St Martins Press, 1998).

²³ H. Morgenthau, 'Morality, 'Mores, and Law as Restraints on Power,' *Politics Among Nations: The Struggle for Peace and Power 5th ed* (New York: Alfred a Knope, 1977), p.225-262.

²⁴ D. O. Brink, *Moral Realism and the Foundation of Ethics* (New York: Cambridge University Press, 1989), p. 7-20.

of behaviour.²⁵ In international relations simple primordialism is thus replaced by more civilized methods of social, commercial and economic competition.

Contemporary moral realists like Michael Wesley and Anthony Coady thus argue that normative considerations are important intervening variables in the ruthless order of the international system that create an ethical framework where relations among states are shaped by mutual trust and obligation, confidence and similar perceptions of international problems.²⁶ However power creates limitations to this when putting policy into practice: sStates with limited domestic and economic resources are more logically disposed to exert their power and influence through peaceful means; by contrast, powerful states are not so similarly restrained and the continued benefit gained from past success can breed hubris and encourage decision-makers to make inflated estimates of their ability to advance their interests and influence world events.²⁷

A moral realist approach therefore recognises as folly state action that refuses to consider international perceptions. Status and influence can be successfully acquired through bribes and coerced through fear, but influence achieved in this manner is usually short-lived and attracts undesirable social and political attention.²⁸ Foreign policy that is seen to adhere to shared normative principles enables political actors to channel their power and influence into more productive (and less costly) means.²⁹ Self-restraint that promotes political prudence and acknowledges the principles of normative ordering cements and sustains a nation's status and makes efficient political influence possible acting as a building block towards an international reputation that reflects authority and importance.³⁰ A nation that seeks to achieve a reputation as a 'good international citizen' also provides an added guarantee that its rights and interests will not be easily encroached upon.³¹ A nation that is credited with meeting its obligations, respecting the rights of others and giving equal consideration to the legitimate interests of others can also, on occasion, have a role in international relationships disproportionate to its power.³²

²⁵ C. Schmitt, *Concept of the Political* (New Brunswick, NJ: Rutgers University Press, 1976).

²⁶ M. Wesley, 'Towards a Realist Ethics of Intervention,' *Ethics and International Affairs*, vol. 19, no. 2 (2005), pp. 60-71 and C. A. J. Coady, 'The Moral Reality in Realism,' *Journal of Applied Philosophy*, vol. 22, no. 2 (2005), p. 121-136.

²⁷ R. N. Lebow, *The Tragic Vision of Politics: Ethics, Interests and Orders* (Cambridge, UK: Cambridge University Press, 2003), p. 347-358.

²⁸ *Ibid.*, p.347-358.

²⁹ J. S. Nye, *Soft Power: The Means to Success in World Politics* (Washington, D.C.: Public Affairs, 2004).

³⁰ V. Van Dyke, *International Politics* (3rd Ed) (New Jersey: Prentice-Hall New Jersey, 1972), p.300-322.

³¹ *Ibid.*

³² B. Verbeek, *Instrumental Rationality and Moral Philosophy* (The Netherlands: Kluwer Academic Publishers, 2002), p. 53-60.

International mutuality thus forms a network of shared relationships that draws together nations of different customs and practices, making it possible to identify the foundation of a ‘settled body of norms’ in the international system.³³ Given the condition of mutuality it is possible to identify objective and valid moral characteristics in the shared actions of states as permanent agents of world affairs that are independent of the influence of personal/cultural beliefs about what is right and wrong.³⁴

This raises the important question of how to understand what constitutes international mutuality, and how to demonstrate its significance in states’ foreign policies. There are many potential areas of state action in which this can be explored, such as the international human rights regime, arms control agreements, various treaties and accords, supranational bodies and international legal networks – or even the notion of sovereignty itself. But one area stands out as ideal for this examination. If moral realists are correct to claim that an embedded ethics can be identified in foreign policy resting on shared mutuality, then aid and development policy represents the most obvious empirical example. Aid and development is an area where states participate in supporting the potential enhancement of power for other weaker states. The following case study will examine three factors that indicate mutuality matters in international politics: economic development leading to stability and increased trade opportunities; long-term expectations of reciprocity; and clear convergence between national and broader ‘moral’ interests. The aid policies of Canada and Japan towards Indonesia are evaluated with respect to the prominence of these factors.

Moral Realism in Practice: Development in Indonesia

The foreign policy approach of Canada and Japan towards Indonesia is a useful reflection of mutuality. Each nation has actively pursued a strategic and ethical interest in Indonesia’s social and economic development. For both states, the motivations guiding Canadian and Japanese foreign policy can be identified as moral factors based on informed policies of human development. The analysis clearly identifies that the strategic and economic benefits received by Japan and Canada also resulted in mutual outcomes for Indonesia’s own internal development. This indicates that when the normative considerations of states converge with traditional principles of ‘interests defined as power,’ and a moral realist perspective can explain aid and development policy agendas.

³³ C. M. Korsgaard, *Sources of Normativity* (Cambridge, UK: Cambridge University Press, 1996), p. 33-40.

³⁴ F. Rauscher, ‘Kant’s Moral Anti-Realism,’ *Journal of the History of Philosophy*, vol. 40, no.3 (2002), p. 477-99.

This is because it is rare for states to give to others without either anticipating some benefit in return, or at least for circumstances in the target of their aid to become agreeable. This has both strategic and economic motives. On the one hand, there is a clear moral imperative for wealthy states to engage in aid and development, but such policies tend to be pressed most keenly when they tie in neatly with the country's other priorities. For this reason, aid donors view their interactions with recipient nations as a 'two-way street,' that lie firmly within the established principles of the national interest. What is more significant is that the strategic dimension to this is recognised by both the donor and the recipient. Both Japan and Canada make it clear, for instance, that any aid should be reciprocated with trade, and with support for their attempts to create an advantageous economic environment. This means that mutuality implies not just reciprocation by aid recipients, but clear material gains for the donor. In this way, mutuality represents a convergence between pragmatic interests and moral priorities.

One broad indicator of this is through each nation's support for building Indonesia's institutional and political capacity. This includes programs like the Electoral Technical Assistance Program, where Japan contributed US\$34.45 million towards purchasing election equipment and advisers and Canada's establishment of an Indonesian Election Fund to foster greater participation in the electoral process.³⁵ Even though Indonesia has made significant economic progress following the 1997-1998 economic crisis and political transformation, the UNDP still classifies the nation as lagging behind in the delivery of key social services. Continued unrest and damage from natural disasters in agricultural communities have had a significant impact on programmes of human development, with 110 million individuals still living below the poverty line and an estimated 400 000 infected with HIV.³⁶

Canada: Development with an Expectation of Increased Trade Access

In Canada principles of morality and an empathy for human suffering have created a foreign policy based on a self-protective concern for a more stable world order. This is reflected in Canada's international development policies originally formed through participation in the Colombo Plan and the United Nations Development

³⁵ United Nations Development Programme (UNDP), 'Japan grants additional aid for Indonesian elections' (1999) available online: www.undp.or.id/press/view.asp?FileID=19990604-1&lang=en (accessed 23 November 2010) and Canadian International Development Assistance (CIDA), 'List of Bilateral Projects in Indonesia' (1999) available online: <http://www.indonesia-ottawa.org/economy/BILATERAL/BILATERALPROYEKRIKANANADA.html>

³⁶ UNDP, 'Country Programme for Indonesia (2006-2010)' (2010) available online: www.undp.or.id/pubs/docs/CPD%202006-2010.pdf (accessed 23 November 2010).

Programme (UNDP).³⁷ Specifically, Canada has created a Development Assistance Charter that explicitly focuses Canada's strategy on strengthening the human and institutional capacity of developing countries. This serves both the pragmatic interest of export expansion for Canadian industries and exports as well as the normative objective of creating a more harmonious international society.³⁸ Canada's methods of development assistance have been directed towards the provision of food aid and programmes of urbanisation, particularly in the areas of energy, transportation and agriculture.

More generally, Canada has endeavoured to create and maintain open and friendly relations with South East Asian nations and its policy with respect to Indonesia is part of this. The region has significant overseas market potential with revealed comparative advantage in key Canadian exports such as fertilisers, wood and electrical equipment.³⁹ Therefore, any attempt to build economic and political stability generates greater Canadian access to South East Asian markets. The Canadian International Development Agency (CIDA) does not have the economic resources to match the financial support provided by other nations such as Japan. Instead, CIDA prefers to focus on specific targeted policy areas as a means of ensuring that its aid is reaching its intended outcomes.

Thus Canada is a leading participant in the multilateral Jakarta Commitment on Aid for Development Effectiveness. The Government of Canada identified three guiding principles for its contribution to the initiative: strengthening local ownership, building more effective and inclusive partnerships and delivering and accounting for results. These factors were developed with the expectation that the training of civil servants and banking officials would ensure transparency in the use of public funds. Canada also focused on building the operational efficiency of small and medium enterprises as a means of promoting business opportunities in areas such as forest and water resource management in order to assist in the development of aquaculture. Projects include initiatives such as the Swash Project, which aims to strengthen the civil service in urban policy and thereby, improve access to clean water through more efficient sanitation, and the Canadian Manufacturers and Exporters Program which endeavours to improve the success of small and medium enterprises by decreasing the gender gap and encouraging women to gain skills in business. CIDA contributed up to \$12m for technical

³⁷ D. C. Thompson and R. F. Swanson, (eds.) *Developing Relations with the Third World* (Canada: McGraw Hill Ryerson, 1971), p.95-115.

³⁸ Government of Canada, 'Canadian International Development Assistance: To Benefit a Better World' (2005) available online: www.acdi-cida.gc.ca/index-e.htm (accessed 18 November 2010).

³⁹ Department of Foreign Affairs and International Trade (DFAIT), 'Canadian Competitiveness in Emerging Markets – Indonesia 2010' (2010) available online: www.international.gc.ca/economist-economiste/.../Indonesia_Deck-ENG.pdf (accessed 18 November 2010).

assistance, micro credit and peer-lending.⁴⁰ These projects have already had some success, with the creation of 220 direct jobs and 447 indirect jobs in the province of Sulawesi.

While it is tempting to view Canada's engagement as purely altruistic, in fact its specific geographic focus on the area of Sulawesi is also strategic. This is consistent with the idea that mutuality entails programmes of economic development being pursued as a means of ensuring regional security and increased trade opportunities. In 2009, the Canadian Ambassador to Indonesia, Mackenzie Clugston, stated that development assistance in Indonesia is guided by Canada's interests in the mineral- and resource-rich Sulawesi region.⁴¹ Long-standing trade interests have been a priority for Canadian development assistance, with Canadian nickel company Val INCO being established in Southern Sulawesi and the Canadian Embassy taking part in the Indonesian Petroleum Association (IPA) exhibition which promotes greater business opportunities and service capabilities.⁴² In 2007, Canada's investment in Indonesian oil, and gas, nickel mining, and garment producing sectors had reached US\$3 billion. By 2009, Canada had six companies represented in both the infrastructure and training sectors. In the telecommunications sector, Indonesia's largest data and corporate network communications provider selected the Canadian-based SR Telecom to supply ATM and channel services to areas in Java, Kalimantan and Sulawesi regions.⁴³

By July 2010, trade between the two countries reached over 2.5 billion, with mutual benefits being returned to Indonesia. Indonesian exports in food, beverages, and fishing products increased from \$16.1b in 2005 to \$19.5b in 2009. Indonesian Deputy Trade Minister, Mahendra Siregar identified that this increase was achieved through product promotion and the encouragement of small and medium enterprises. He went on to state, 'we have been using the trade mission to disseminate information about Indonesian trade policies and investment among Canadian business community members and facilitate match making between Indonesia and Canadian business people.'⁴⁴ This has allowed the level of

⁴⁰CIDA, 'Indonesian Projects' (2006) available online:

www.collectionscanada.gc.ca/webarchives/200602160 (accessed 18 November 2010).

⁴¹ 'Presentation of Credentials: New Canadian Ambassador to Indonesia, Mr Mackenzie Clugston (2009) available online: www.canadainternational.gc.ca/indonesia (accessed 18 November 2010).

⁴² DFIAT, 'The Canadian Trade Commission Service - Mining Sector Profile, Jakarta, Indonesia' (2007) available online: http://www.southernarcminerals.com/resources/fac_imsp.pdf (accessed 18 November 2010) and 'Canada to Participate in Indonesian Petroleum Exhibition 2009,' *Asia Pulse News* (5 May 2009)..

⁴³ Embassy of Indonesia Ottawa, 'Indonesian Investment and Trade Deals' (2005) available online: http://www.indonesia-ottawa.org/indo_canada/files/indo_trade_deals.pdf (accessed 18th November 2010).

⁴⁴ 'Indonesia's Trade Prospects with Canada Improves: Trade Ministry,' *Asia Pulse News* (1 July 2010).

Indonesian exports to rise from \$106m during the first quarter of 2009 to \$167.9m during the same period in 2010.

This long-term commitment by Canada to both trade and development assistance can be understood in terms of the second aspect of mutuality examined here: the expectation that Indonesia will reciprocate by supporting the Canadian agenda in key multilateral forums. In this regard, Canada has used its relationship with Indonesia as a strategic bridge towards greater economic engagement within the Asia-Pacific. At the 2010 G20 summit, the Canadian Finance Minister James Flaherty stated that Canada anticipated Indonesian cooperation in gaining acceptance from other South East Asian on the G20's economic framework.⁴⁵ Canada also expects Indonesia's support in implementing fiscal management training, the easing of state budgetary deficits and the stabilisation of debt-to-GDP ratios by continuing to reform the finance sectors of emerging nations. During bilateral talks between Agriculture Ministers Gerry Ritz and Susiwana at APEC in Japan, Canada sought assurances that its science-based approach to trade would be supported by Indonesia. This allows Canada to save on lengthy and expensive testing at Indonesian ports and increases the value of its wheat and potato exports.⁴⁶

The examination of Canada's approach to Indonesia suggests that its foreign policy is consistent with the moral realist principle of mutuality. The training of civil servants and increased efficiency of small and medium enterprises helps Indonesia work towards achieving economic stability by promoting the international competitiveness of Indonesian exports and Canadian business practices. Programmes of human development such as the Swash Project demonstrate clear moral concerns by improving community access to clean water. Canada's long-standing commitment to building Indonesia's economic capacity has also led to an expectation that Indonesia will support Canadian initiatives in key Asia-Pacific multilateral institutions. Taken together, these indicate a clear convergence between national and moral interests.

Japan: Aid and Trade as Interlinked Agendas

The norm of development is central to understanding Japan's foreign policy, which values the expression of cooperation and support for the security and order of international society as part of the international 'good'.⁴⁷ In Japan, the norm of

⁴⁵ R. A Witar, 'Canada Expects RI Support at Upcoming G20 Summit,' *The Jakarta Post* (11 November 2010).

⁴⁶ 'Minister Ritz Maximises First Agriculture APEC Meeting and Protects Canadian Wheat Access to Indonesian Market,' *Benzinga* (15 October 2010).

⁴⁷ This sentiment is reinforced in the preamble to the Japanese constitution where the national interest is viewed as striving for a 'place of honour in the comity of nations': The Ministry of Foreign Affairs of Japan (MOFA), 'Japanese Constitution' 'in *Diplomatic Bluebooks* (2004) available online: www.mofa.jp/policy/other/bluebook/index/html (accessed 20 November 2010).

development emerged from the historical struggle as a latecomer to the participation of international affairs. Capacity- building has thus been the major focus of Japan's political and economic prescriptions for South East Asian development, particularly with regard to strengthening governments and their core institutions.⁴⁸ This avoids potential criticism – of which Japan is acutely aware – that Japan seeks to undermine national governments by utilising the language of state failure and development.

Since its colonial expansion during the Pacific War, Japanese policy has been mindful of the crucial importance of South East Asia to the economic stability and security of Japan security, and it has endeavoured to promote integration and stability in the region.⁴⁹ Its main strategy to keep its influence in South East Asia has been through the provision of aid under various reparation agreements dating back to the 1952 San Francisco peace treaty. Japan is also a founding member of the Development Assistance Committee of the OECD and has become the largest aid donor in the East Asia region, concentrating specific attention on the development of Indonesia, which is its largest individual trading partner. Because of its economic importance, Japan has preferred to follow a more bilateral approach towards its relationship with Indonesia.

Japan was the first nation to sign a free trade agreement (FTA) with Indonesia: the Japanese Indonesian Partnership Agreement (JIEPA) in 2008. This follows a similar strategic pattern that has seen Japan form bilateral economic ties with other Southeast Asian states that trade on manufacturing and resource capacity.⁵⁰ This is in line with Japan's 'New National Energy Strategy', in which resource-rich nations are given priority for Japanese trading engagement. Indonesia is rich in natural resources and accounts for 70% of Japanese imports in minerals, metal and fuel. In comparison, Indonesian imports from Japan are mostly industrial, capital goods and machinery parts, meaning Japan benefits more from this partnership as its exports are demanded at a higher price than the primary commodities being shipped out of Indonesia. This said, in comparison to other economic agreements with Southeast Asian nations, the JIEPA does include a commitment to strengthen the capacity of Indonesia's supporting industries in textiles and automotive production.

For Japan, economic development in Indonesia is essential for increasing Japanese investment opportunities. The Japan External Trade Organization has sent experts

⁴⁸ R. Dore, *Japan's Internationalism and the UN* (Great Britain: Routledge, 1997), p. 97-114.

⁴⁹ *Ibid.*, p.184. This has been reflected in Japan's active engagement with the states of Vietnam, Cambodia, Laos, Burma and Indonesia as a means to promote economic development, economic interdependence and political security, all of which help to create a smoother transition from authoritarian rule towards a more transparent form of representational government.

⁵⁰ Japan has recently signed free trade agreements with Singapore, Malaysia, Philippines and Thailand.

in moulds and dies and human resources to train Indonesian workers in the auto parts industry.⁵¹ Along with tariff reduction, these commitments allow Indonesian textiles and auto-parts to gain a competitive advantage. Increased efficiency in these key areas can promote Indonesia's manufacturing ability and encourage local producers to target other markets, particularly in the Middle East and South East Asia. This emphasis on capacity building is not limited to the resource sector. The JIEPA is also the first bilateral agreement in which Japan took on an obligation to accept foreign workers. So far, 400 nurses and 600 caregivers have already been trained in Japan to acquire necessary skills for employment in the Indonesian health system.⁵² This indicates that economic and social development in Indonesia is important to Japan's economic stability and a steady flow of exports. Aid is the central foreign policy tool in securing this.

The Japanese aid budget is divided into three policy spheres: financial loans, grant aid and technical cooperation. This compartmentalisation allows Japan to pursue an economic and strategic driven development policy without being seen as imperialistic, while also maintaining a moral-based aid policy. Financial loans have an inherent strategic purpose as they are used as assurance that when Japan enters into economic agreements with developing nations, the gains achieved through tariff reduction and business exchange are not offset by the recipient's failure to maintain economic growth. For instance, as the largest supplier of primary commodities to Japan, Indonesia is also the largest recipient of Japanese financial loans, with US\$20.3 billion being guaranteed by the Japanese Bank for International Cooperation (JBIC). In 2010, the JBIC agreed to guarantee Indonesian Samurai Bonds into 2011 using a low interest rate that gave Indonesia the opportunity to repay the loans as they matured.⁵³

The remaining two spheres, technical cooperation and grant aid, are tailored towards human development projects with both economic and moral objectives. Japanese grants target issues food security and education through initiatives such as the Project for Safe School and Reconstruction in areas devastated by natural disasters and the Food Security Project for Underprivileged Farmers. The budget allocation for these two projects is \$US12 million with the objective of ensuring the resilience of disaster prone areas by reviving educational infrastructure and increasing food supply through the promotion of safe agricultural practices.⁵⁴ The Japan International Cooperation Agency (JICA) also pledged to support the

⁵¹ A. Amari and Y. Hayashi, 'The Significance of JIEPA for RI's Development,' *The Jakarta Post* (7 January 2008).

⁵² Asia Economic Institute, 'Japanese-Indonesian Economic Partnership Agreement,' (2008) available online: http://www.asiaecon.org/special_articles/read_sp/11573 (accessed 26 November 2010).

⁵³ 'JBIC to Guarantee RI Samuri Bonds,' *The Jakarta Post* (16 November 2010).

⁵⁴ MOFA, 'Exchange of notes for Japanese ODA Loan and Grant Aid for the Republic of Indonesia' (2010) available online: www.mofo.go.jp/announcement (accessed 23 November 2010).

financial recovery of small and medium enterprises in disaster-hit Yogyakarta and Central Java to ensure economic stability continues in the areas. According to the President of JICA Sadako Ogata, stated ‘the recovery is important not just to victims, but also to the economy. It is crucial to reinstate life, to mend ruined jobs and businesses in Yogya, such as the craft industry, which had been developing well using local sources.’⁵⁵

Development assistance is thus aimed at increasing Japanese investment opportunities where there is a possibility of mutual benefit through the transfer of production and management techniques. Programmes of technical cooperation are thus particularly important to Japan’s aid strategy. Jusuf Wanandi of the Centre for Strategic and International Studies has stated that Japan needs to do more in this area as a means of contributing to Indonesia’s economic development.⁵⁶ The policy of Japanese companies employing Indonesians to work in Japan to gain knowledge in Japanese business practices assists in creating a more receptive enterprising environment and adds weight to greater Japanese involvement in ASEAN, which despite such initiatives as the Economic Research Institute for ASEAN and East Asia, has been viewed as lagging behind.

In 2009, this concern was reflected at the Bali Democracy Forum II, which Japan and Indonesia co-chaired. During the joint press conference, President Yudhoyono and Prime Minister Hatoyama committed to strengthening their bilateral relationship with Prime Minister Hatoyama stating that ‘we agreed to cooperate on enhancing investment opportunities in Indonesia and in the promotion of investment in various economic sectors.’ As part of this ongoing assurance, he particularly emphasised Japanese interest in building Indonesia’s energy capacity: ‘We hope that advancing cooperation in the energy sector as well as others would result in mutual benefits.’⁵⁷ The Indonesian governments’ own National Electricity General Plan is projected to grow at an annual rate of 9% till 2027. This means that the development of energy infrastructure is an area where Japan can achieve international competitiveness while still ensuring mutual benefits for both countries. In line with this, President Yudhoyono identified renewable energy and transport infrastructure as key sectors where Indonesia hopes to attract foreign investment.

Like Canada, Japan’s emphasis on building a mutual relationship has led to the long-term expectation that Indonesia will play a reciprocal role by encouraging

⁵⁵ ‘Japan to Help Business Recovery Process in Yogya,’ *The Jakarta Post* (15 November 2010).

⁵⁶ J. Wanandi, ‘Japan-Indonesian Relations: A 50 year Journey,’ *The Jakarta Post* (24 March 2008).

⁵⁷ Prime Minister of Japan and his Cabinet, ‘Joint Press Conference by PM Yukio Hatoyama of Japan and President Susilo Bambang Yudhoyono of Indonesia on the occasion of the Bali Democracy Forum II in Bali, Indonesia,’ (2009) available online: www.Kantei.go.jp/foreign/hatoyama (accessed 20 November 2010).

Japanese investment. This strategy can be seen in the current increase of \$1.125m in funding by JBIC in partnership with Indonesian PT Paiton Energy to expand on the existing thermal power plant in East Java. Japanese companies Mitsui & Co and Tokyo Electrical Power Company have equity stakes in the deal and have agreed to provide political risk guarantees for the co-financed portion of the deal.⁵⁸ A similar agreement was also made between JBIC and Indonesian P.T. Cirebon Electrical Power to fund the Cirebon thermal power plant in West Java.⁵⁹ This level of cooperation extends across the energy sector. In 2006, the JBIC signed the Umbrella Note of Mutual Understanding for the promotion of Independent Power Producing projects, and in 2010 both nations agreed to work towards establishing business opportunities in geothermal power generation.

The Japanese strategy in Indonesia can be understood through the notion of mutuality. Japan's developmental policies have been guided by economic interest as Indonesia is the nation's primary supplier of natural resources. This has meant that programmes of human development that promote Indonesia's internal economic stability and encouraged greater foreign investment have been favoured over the promotion of human rights. In this way, Japan's emphasis on food security, education and capacity building represents a combination of material and moral objectives with mutual economic benefits being advanced for both Japan and Indonesia. The gains for Indonesia in labour relations, technical exchange and tariff-free access to Japan's domestic market have led to long-term expectations that Indonesia will support Japanese business practices, particularly in its growing energy industry. In the case of Japan as for Canada, this demonstrates a clear convergence between national and moral factors.

Conclusion

The two analyses above demonstrate that, despite having different foreign policy approaches constructed by a set of unique cultural backgrounds and political preferences, Canada and Japan have both viewed international development as a fundamental goal of statecraft. While separated in place, power and history, their approaches towards Indonesia's economic development can be understood through a moral realist lens as an example of international mutuality. This can be seen in the role of three factors in both nations' policies: economic development leading to stability and increased trade opportunities, long-term expectations of reciprocity and clear convergence between national and broader moral interests.

⁵⁸ 'Japan's JBIC to lend US\$1.215 for Indonesian Power Project,' *Asian Pulse News* (9 March 2010).

⁵⁹ Japanese Finance Corporation, 'JBIC Annual Report 2010' (2010) available online: <http://www.jbic.go.jp/en/about/business/year/2010/pdf/2010-00-full.pdf> (accessed 5 December 2010).

Even so, there are some differences between the approaches of the two states. For instance, Canada has preferred a multilateral focus as it helps Canada to achieve influence in Indonesia's economic development disproportionate to its wealth and geographic location. In comparison, Japan has pursued more direct bilateral mechanisms that focus on investing heavily in Indonesia's financial markets and institutional capacity. This has been driven by a distinct economic and strategic interest in ensuring that Indonesia continues to favour Japan as a destination for its primary exports.

The analysis of development from this perspective reveals that states will view morality as an important objective that contributes to calculations of the national interest. As Canada's and Japan's posture in relation to Indonesia shows, morality is an essential factor that affects how national interests are acted upon in policy practice.

International Humanitarian Law and Terrorism: The Problem is Not Lack of Rules, but Lack of Respect for Them

Luke Nasir*

Since the September 11 2001 terrorist attacks in New York and the consequent US-led 'War on Terror', there has been debate among experts on the application of international humanitarian law to terrorism including calls for the immediate need to amend the Geneva Conventions of 1949 and Additional Protocols of 1977 better to regulate terrorism during war time. Drawing from this debate, this chapter supports and explores the view that the existing legal frameworks of the Geneva Conventions 1949 and Additional Protocols 1977 do possess enough coverage to outlaw terrorism during armed conflict. This is achieved by matching the proscribed acts of war with the constituent elements and characteristics of acts of terrorism. This chapter concludes that any need for amendment to the laws of war are an outcome of a lack of respect for international humanitarian law in unconventional or asymmetric armed conflict, rather than a failure in the capacity of the laws of armed conflict to be applied to terrorism.

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In January 2003, a forum of experts met at Harvard University as part of an initiative launched by the Government of Switzerland. Including experts from the International Committee of the Red Cross (ICRC), the governments of several countries and noted international scholars, the agenda of the forum was to discuss and review the application of international humanitarian law (IHL) to armed conflict in the 21st century, especially in the aftermath of the September 11 2001 terrorist attacks on New York and Washington and the consequent US-led ‘War on Terror’ that followed. From this meeting came calls to amend the Geneva Conventions of 1949 and Additional Protocols of 1977 better to regulate terrorism.

On one side of the debate, the state of armed conflict in the 21st century suggests the need for a review of IHL given that it is not being respected in many areas. For example, there is no universally accepted legal definition of terrorism. IHL also failed to protect US terrorist detainees in the war on terror and IHL does not extend to acts of terrorism occurring in times of peace – a realm where the scope of the laws of war (*jus in bello*) cannot go and where terrorism has unfortunately proven to exist. IHL is uncertain on the position of terrorists and terrorist organisations as ‘high contracting parties’ subject to the protections and expectations of the Geneva Conventions and also fails to clearly place and classify the status of the ‘War on Terror’ within the legal thresholds of international and non-international armed conflicts.¹

Advocates of this view argued that just as the 1977 Additional Protocols² were created to ‘fill the gaps’ in the original drafting legislation of the four Geneva Conventions of 1949³ – which failed to

¹ M. Schmitt, ‘Rethinking the Geneva Conventions,’ Crimes of War Project (30 January 2003) available online: www.crimesofwar.org/expert/genevaConventions/gc-intro.html (accessed 19 May 2010).

² Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (AP.I), 8 June 1977, and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (AP.II), 8 June 1977.

³ Convention (GC.I) The Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949; Convention (GC.II) The Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea.

cover the anti-colonial and internal armed conflicts in the aftermath of World War II – it was argued that so, too, IHL could be reformed to compensate and regulate ‘unconventional’ armed conflict and terrorism for the 21st century.⁴

On the other hand, those on the opposing side in this debate declared that the constituent elements of terrorism – attacking civilians, disproportion and lack of distinction – were already currently prohibited under IHL.⁵ Any attempt to pursue amendments to the Geneva Conventions, because of a lack or failure of IHL to deal with terrorism, was not only an invalid interpretation of the law of armed conflict, but could also direct IHL into an area of regulation ‘where it did not belong.’⁶

This chapter explores the degree to which IHL deals with terrorism. It focuses on the legal application of IHL to terrorism rather than the “War ‘on’ Terror”⁷ more generally.

First, an outline is provided on what constitutes terrorism to help distinguish acts of terrorism. The current IHL regime is then examined to see whether it applies to acts of terrorism. It is concluded that the

Geneva, 12 August 1949; Convention (GC.III) Relative to the Treatment of Prisoners of War, Geneva, 12 August 1949; Convention (GC.IV) Relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949.

⁴A. Dworkin, ‘Rethinking The Geneva Conventions: Introduction,’ Crimes of War Project (30 January 2003) available online:

www.crimesofwar.org/expert/genevaConventions/gc-intro.html

⁵ International Committee of the Red Cross (ICRC), ‘International Humanitarian Law: Answers to Your Questions’, ICRC Document 0703/002 (2004), p.19: ‘What does Humanitarian Law Say About Terrorism?’.

⁶ R. Gabor, ‘Legal Frameworks to Combat Terrorism: An Abundant Inventory of Existing Tools,’ *Chicago Journal of International Law*, vol.5 (2004-2005), p. 500.

⁷ US engagement of war with Al-Qaeda, the Taliban and State policy decisions made since 9/11 have had an important impact on the application and implications of IHL to terrorism. Unfortunately, the limited scope of this paper rules out any substantial investigation into the ‘Global War on Terror’. Rather this paper’s major concern is the legal aspects of IHL, their application to acts of terrorism and lack of respect for IHL within asymmetric warfare. For full coverage of the intricate challenges of the ‘war on terror’ to the ‘laws of war’ see J.J. Paust, ‘War and Enemy Status After 9/11: Attacks on the Laws of War,’ *Yale Journal of International Law*, vol.28 (2003), p. 325-336 and D. Jinks, ‘The Application of the Geneva Conventions to the Global War on Terrorism,’ *Virginia Journal of International Law*, vol.46 (2005-6), p. 165-196. For insight into the legal applications of anti- and counter-terrorist campaigns to IHL see A. Roberts, ‘Counter-terrorism, Armed Force and the Laws of War,’ *Survival*, vol. 44, no.1 (2002), pp. 7-32.

scope of current legal frameworks possess enough coverage to outlaw terrorism during armed conflict. Reasons for the lack of respect for IHL in asymmetric warfare are then considered before concluding that any need for amendment to the laws of war are a result of a lack of respect for IHL in unconventional or asymmetric armed conflict rather than a failure in the capacity of the laws of armed conflict to apply to terrorism.

What is Terrorism?

An examination of the adequacy of IHL in dealing with terrorism requires an insight into what terrorism is. Although there are several definitions across both domestic legislation and at the international level there is currently no generally agreed international definition of the term.⁸ The only widely adopted text dates back to the Convention for the Prevention and Punishment of Terrorism adopted by the League of Nations in 1937. It defines acts of terrorism as “criminal acts directed against a State or intended to create a state of terror in the minds of a group of persons or the general public.”⁹

Attempts to create a binding definition of terrorism has been a source of much contention mainly due to disagreement on whether ‘freedom fighters’ engaged in national liberation movements could be classified as terrorists.¹⁰ Indeed, the recent United Nations draft Comprehensive Convention on International Terrorism has been stalled for several years because of this issue, among many others.¹¹ The ICRC believes that the

⁸ A. Cassese, *International Criminal Law* (2nd Edition) (New York: Oxford University Press, 2008) pp. 162-163; Definitions of terrorist acts include: Art:1(2) of the Arab Convention for the Suppression of Terrorism 1998: ‘Any act or threat of violence...seeking to sow panic...causing fear...’ available online: www.al-bab.com/arab/docs/league/terrorism98.html; Art:1(2) of the Convention of the Organization of the Islamic Conference on Combating International Terrorism 1999: “...any act...threatening to harm or imperil lives, honour, freedoms, security or rights...” available online: www.oic-un.org/26icfm/c.html; Art 1(3) of the Organization of African Union Convention on the Prevention and Combating of Terrorism 1999; various United Nations General Assembly Resolutions available at <http://www.un.org/terrorism/resolutions.shtml>.

⁹ H.P. Gasser, ‘IHL, The Prohibition of Terrorist Acts and the Fight Against Terrorism,’ *Year Book of International Law*, vol.4 (2001), p. 331.

¹⁰ Cassese, op.p. cit. (2008) p.p. 162.

¹¹ See GA L/3144 – Ad hoc Committee on Assembly Resolution 51/210 42nd Meeting (29 September 2009) on the Convention negotiation challenges. Available online: <http://www.un.org/News/Press/docs/2009/13144.doc.htm>. See also ICRC, ‘IHL and the

very term remains highly susceptible to subjective political interpretations and that giving it a legal definition is unlikely to reduce its emotive impact or use.¹²

The draft Convention has, however, produced a valuable contribution to a description of what constitutes ‘acts of terrorism,’ as have a number of other resolutions adopted by the United Nations in the last few decades.¹³ These acts include:

- not distinguishing between intended targets or bystanders;
- striking indiscriminately with a political cause that cannot be obtained through conventional or lawful methods;
- creating fear, intimidation and humiliation in order to establish conditions which further a cause; and
- directly targeting civilians.¹⁴

Regardless of the lack of a comprehensive definition at the international level, terrorist acts are crimes under domestic law and existing international and regional conventions on terrorism and they may, provided the requisite criteria are met, qualify as war crimes or as crimes against humanity. Acts of terrorism are also regulated through the applicable IHL as discussed below.

Applicability of IHL to Terrorism

While IHL does not provide a definition of terrorism, it explicitly prohibits acts committed against civilians and civilian objects that would commonly be considered ‘terrorist’ if committed during peacetime.¹⁵ That being said, the degree to which the Geneva

Challenges of Contemporary Armed Conflicts’ (2007), ICRC Document 30IC/07/8.4, p.5.

¹² ICRC, op. cit. (2007).

¹³ For example, see Article 2 of UNGA Resolution 51/210 December 1996: ‘Any person commits an offence within the meaning of this convention if that person causes...death or serious bodily injury,...damage to public or private property, when the purpose of the conduct, by its very nature or context, is to intimidate a population or to compel a government or an international organisation to do or abstain from doing any act...’ A comprehensive list of treaties on terrorism can be found at http://treaties.un.org/Pages/DB.aspx?path=DB/studies/page2_en.xml&menu=MTDSG

¹⁴ Gasser, op. cit. (2001) p. 333.

¹⁵ For comprehensive coverage of the legal definition of terrorism in peacetime see M. P. Scharf, ‘Defining Terrorism as the Peacetime Equivalent of War Crimes: Problems

Conventions 1949 apply to terrorism is limited by IHL only being applicable to active armed conflict.

During armed conflict, it is a basic principle of IHL that persons engaged must at all times distinguish between civilians and combatants and between civilian objects and military objectives. This principle of ‘distinction’ is a cornerstone of IHL. Derived from it are specific rules aimed at:

- protecting civilians;
- prohibiting deliberate, disproportionate or direct attacks against civilians and civilian objects;
- prohibiting the use of human shields, hostage taking of civilians or of persons no longer taking part in hostilities and;
- rules governing the conduct of hostilities that are aimed at sparing civilian life and civilian objects from the effects of hostilities.

Acts of terrorism, by their very nature, are contrary to the above rules. By this standard, acts of terrorism are banned in *jus in bello* and are therefore regulated by articles within the Geneva Conventions and Additional Protocols as examined below.

Both the Geneva Conventions and Additional Protocols specifically prohibit ‘terror’. For example, acts aimed at spreading ‘terror’ among the civilian population are proscribed in both Article 51(2)AP.I and Article 13(2)AP.II:

“The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence, the primary purpose of which is to spread terror among the civilian population, are prohibited.”

These Protocol rules prohibit disproportionate attacks deliberately designed to ‘terrorise’ civilians that cannot be justified by any military advantage.¹⁶

and Prospects,’ *Case Western Reserve Journal of International Law*, vol.36 (2004), p. 359-374 and M. P. Scharf, ‘Defining Terrorism as the Peacetime Equivalent of War Crimes: A Case of too much Convergence Between IHL and ICL?’, *ILSA Journal of International and Comparative Law*, vol.7 (2000-1), p. 391-398.

¹⁶ ICRC, op. cit. (2007) p. 6.

Similarly, Article 4(2d) AP.II specifically prohibits “acts of terrorism” against all persons who do not take a direct part, or who have ceased to take direct part in hostilities. This provision imposes individual criminal responsibility to protect individuals and the civilian population from collective measures that induce ‘terror.’¹⁷

Likewise, ‘measures of terrorism’ are prohibited in Article 33 GC.IV – “...collective penalties and likewise all measures of intimidation or of terrorism are prohibited.” Article 33 prevents the use and perpetration of terrorism by occupying powers, belligerents, civilians and organised groups.¹⁸ These provisions of Article 33 are applicable in any situation of terrorism resorted to in the territory of one of the belligerents, in a combat zone, or in an occupied territory.¹⁹

AP.I, which applies to international armed conflicts, and AP.II, which applies to non-international armed conflicts, both prohibit the constitutive elements of terrorism, without explicitly using the word ‘terrorism’:

- “attacks on civilians and civilian objects”(Art:51(2)AP.I & Art:13 AP.II);
- “attacks on places of worship”(Art:53 AP.I & Art:16 AP.II);
- “attacks on works and installations containing dangerous forces”(Art:56 AP.I & Art:15 AP.II);
- “the taking of hostages” – (Art:75 AP.I & Art: 4(2) AP.II)²⁰ and;
- “murder of persons not or no longer taking part in hostilities” (Art:75 AP.I & Art:4(2a) AP.II).

Similarly, Article 3²¹ common to all four Geneva Conventions prohibits acts of terrorism on protected persons by both states and non-state

¹⁷ Ibid.

¹⁸ ICRC, *Commentary, Fourth Geneva Convention* (Geneva: ICRC, 1958), pp. 225-6.

¹⁹ Cassese, op. cit. (2008) p. 171.

²⁰ Art: 4(2) AP.II ‘...the following acts...remain prohibited at any time and in any place whatsoever:

(a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment; (b) collective punishments;(c) taking of hostages;(d) acts of terrorism;(e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form or indecent assault;(f) slavery and the slave trade in all their forms;(g) pillage;(h) threats to commit any or the foregoing acts.’

armed groups (including terrorist groups)²² again, without explicitly using the word ‘terrorism’:

- violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- taking of hostages; and
- outrages upon personal dignity, in particular humiliating and degrading treatment.

Additional Protocol I applies further prohibitions to international armed conflicts including prohibitions of “indiscriminate attacks” in warfare – Art:51(4)AP.I. This provision covers military operations (or any act of violence) which are:

- not directed at a specific military objective;
- employ a method or means of combat which cannot be directed at a specific military objective;
- employ a method or means of combat the effects of which cannot be limited as required by the law;
- or, consequently, are of a nature to strike military objectives and civilians or civilian objects without distinction.

In other words, attacks or acts of violence are prohibited if, though intended to hit a military target, they disproportionately kill or wound civilians or destroy civilian objects, including civilian infrastructure. These rules ban terrorist activities which are indiscriminate acts.²³

²¹Common Art:3. ‘In the case of armed conflict not of an international character...each Party to the conflict shall be bound to apply... the following provisions: (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;(b) taking of hostages;(c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.’

²² For a detailed analysis of the applicability of common Article 3 see D. Jinks, ‘September 11 and the Laws of War: Part IV: Common Article 3 and September 11,’ *Yale Journal of International Law*, vol.28, no. 2 (2003), pp. 20-42.

²³ Gasser, op. cit. (2001) p. 333.

Additional Protocol I also prohibits direct terrorist attacks on legal combatants of opposing armed forces. Whilst IHL does allow soldiers to shoot and be shot at as they are active participants in, and simultaneously a legitimate target of, military operations,²⁴ Article 35(1) proscribes direct terrorist attacks as a legitimate and beneficial act of war if carried out against enemy personnel: “In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.”

Article 35(2) of Additional Protocol I further prohibits the employ of ‘weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering’ and the use of perfidy as a method for feigning civilian status to commit violence or benefit a terrorist attack on opposing armed forces is eliminated by Art:37(1c) AP.I:

“... It is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy. The following acts are examples of perfidy :...c) - the feigning of civilian, non-combatant status.”

The prohibition to kill, injure or capture an enemy combatant by resort to perfidy applies both in international and non-international armed conflicts and are the tactics used by terrorists to attack combatants..²⁵ Perfidy, along with the majority of prohibited acts of terrorism mentioned above, is a direct product of asymmetric warfare.

Asymmetric Warfare as Disrespectful Warfare

The current framework of IHL is best suited to armed conflicts between equally powerful adversaries. Difficulties arise with implementation, compliance and respect for IHL when the nature of the conflict is asymmetric – that is, between two unequal parties – where one or both sides resort to strategic, tactical and operational methods of warfare which are illegal and unconventional.

²⁴ Ibid., p. 336.

²⁵ M. Sassoli, ‘Terrorism and War,’ *Journal of International Criminal Justice*, vol.4 (2006), p. 969.

Asymmetric warfare is acting, organising and thinking differently than an opponent in order to maximise advantages, exploit an opponent's weaknesses, attain the initiative or gain greater freedom of action. It can be a political and/or military strategy entailing different methods, technologies, values and organisations, with both short and long-term intentions initiated either deliberately or by default. Asymmetry can also be discrete or pursued in combination with conventional symmetric warfare.²⁶

The nature then of asymmetric warfare shapes a belligerent's attitude towards IHL. When IHL serves a need, for instance by protecting soldiers and civilians with 'prisoner of war' and 'non-combatant' status, observance of IHL is high. On the other hand, when belligerents see themselves as disadvantaged by normative restraints, "those lawful boundaries of IHL may well be ignored".²⁷

By this characteristic, asymmetric warfare undermines the basic principles of reciprocity in IHL: the wish that one's enemy respect the rules and laws of war in order to receive the same respect by the opposing side. This can be seen where combatants treat captured enemy combatants humanely because they hope that they would also be treated humanely if captured.²⁸

Such motivation is lacking in asymmetric conflicts, especially in regards to acts of terrorism. Terrorist groups in asymmetric conflicts believe that their only chance to overcome an enemy which is much superior in equipment, technology and manpower is through terrorist acts. These deliberate acts of terrorism are illegitimate acts of war and show little respect to the convincing IHL doctrine that strict obedience to, and respect of, IHL can actually benefit military advantage and victory because it ensures that belligerents concentrate on what is decisive for victory; the military potential of the enemy.²⁹

²⁶ S. Metz and D.V. Johnson in M.N. Schmitt, 'Asymmetrical Warfare and International Humanitarian Law' *Air-Force Law Review*, vol.62, (2008), p. 4.

²⁷ E.A. Posner, 'Terrorism and the Laws of War,' *Chicago Journal of International Law*, vol.5 (2004), p. 432.

²⁸ M. Sassoli, 'The Implementation of IHL: Current and Inherent Challenges: Particular Difficulties in Obtaining Respect for IHL in Asymmetric Warfare,' *Yearbook of International Humanitarian Law* (2007), p. 58.

²⁹ Sassoli, op. cit. (2007) p. 57.

Such a motivation would receive little attention by terrorist groups as they are the weaker side in asymmetric conflicts. Many terrorist organisations lack the necessary structures of authority, hierarchy, communication between superiors and subordinates, and processes of accountability needed to enforce adherence to the applicable Geneva Conventions and Additional Protocols.³⁰ Many terrorist groups are made up of disaffected young men committing acts of terrorism against the country in which they reside. These groups do not constitute states, nor do they recognise themselves in regular armed forces under a commander able or willing to enforce IHL, or wear any recognisable uniform.³¹

Yet, possession of a military hierarchy of structure and accountability does not automatically lead the stronger sides to adhere strictly to IHL. Dealing with terrorism in asymmetric warfare, the stronger side to the conflict may waive its obligations to abide by IHL in armed conflicts.

Such was the case with the US in the ‘War on Terror’ since September 11 2001. The US was undoubtedly the stronger side due to technological superiority and military strength of armed forces. In response, the weaker organisation, Al Qaeda, resorted to asymmetric warfare – a common characteristic of non-international armed conflicts where those fighting against the government are inferior in power and have no chance to overcome governmental armed forces in a conventional open battle between clearly distinguished fighters. The US-led ‘War on Terror’ thus took place in a situation lacking the military distinction for which IHL is best suited where combatants are commanded by a person responsible for subordinates, wearing fixed distinctive signs, openly carrying their arms and complying with the laws and customs of war.³²

The nature of Al Qaeda’s terrorism blurred the distinction between the protection of civilians taking part in hostilities and lawful combatants. This posed a problem for the US in determining the status and treatment of terrorists who directly participated in the ‘War on Terror.’

³⁰ L.C. Green, *The Contemporary Law of Armed Conflict* (3rd Edition) (Manchester: Manchester University Press, 2008), p. 57.

³¹ *Ibid.*, p. 88.

³² Y. Arai-Takahashi, ‘Disentangling Legal Quagmires... The Question of POW Status,’ *Yearbook of International Humanitarian Law*, vol. 5 (2002), pp. 75-78.

Whilst the US claimed the ‘War on Terror’ was an international armed conflict,³³ thus covered by all Geneva Conventions and Additional Protocol I, it did not consider itself bound by them. The US argued that ‘terrorists’ that had fallen into US custody were ‘unlawful combatants’³⁴ – a title contained nowhere within the Geneva Conventions – and were therefore neither protected as prisoners of war nor as civilians.³⁵ Therefore, ‘terrorist’ groups acting on their own behalf and without the requisite link to a state or similar entity were excluded by the US from IHL protections.

Unlike the US, the ICRC declared ‘unlawful combatants’ to be fully protected by IHL and that it was incorrect for the US to suggest that these detainees had minimal or no rights.³⁶ The ICRC emphasised that

³³ In 2006, this US position changed when the Supreme Court's decision in *Hamdan v. Rumsfeld* altered U.S. policy regarding the law of armed conflict in the war on terror, finding that Common Article 3 is applicable to the conflict between the U.S. and al-Qaeda as a non-international armed conflict: see K. Petty, ‘Are you there Geneva? It’s Me Guantanamo,’ *Case Western Reserve Journal of International Law*, vol.42 (2009), p. 173.

³⁴ The Geneva Conventions contain no explicit reference to "unlawful combatants." This framing is shorthand for civilians who have directly participated in hostilities in an international armed conflict without being members of the armed forces as defined by IHL and who have fallen into enemy hands. Under the rules of IHL applicable to international armed conflicts, civilians enjoy immunity from attack “unless and for such time as they take a direct part in hostilities” : see ICRC, *op. cit.* (2007) p. 5-10.

³⁵ The main issue was the legal status to be given to various categories of detained persons, some of whom arguably were members of the Afghan armed forces (‘the Taliban’), while others were not (members of Al-Qaeda or other groups). The US government decided to consider none of these detainees as POWs: they were just ‘terrorists’. As they have allegedly resorted to violence, they are referred to as ‘unlawful combatants’ and are not entitled to any IHL protections: see Gasser, *op. cit.* (2001) p. 340-41.

³⁶ Regarding the status and rights of civilians who have directly participated in hostilities in an international armed conflict (Unlawful Combatants) and have fallen into enemy hands, there are essentially two schools of thought. According to the first, “unprivileged belligerents” are covered only by the rules contained in Article 3 common to the four Geneva Conventions and (possibly) in Article 75 of Additional Protocol I, applicable either as treaty law or as customary law. According to the other view, shared by the ICRC, civilians who have taken a direct part in hostilities, and who fulfil the nationality criteria set out in the Fourth Geneva Convention (Article 4), remain protected persons within the meaning of that Convention. Those who do not fulfil the nationality criteria are at a minimum protected by the provisions of Article 3 common to the Geneva Conventions and Article 75 of Additional Protocol I, applicable either as treaty law or as customary law. Thus, there is no category of persons affected by or involved in international armed conflict who fall outside the scope of any IHL protection: see ICRC, *op. cit.* (2007) p. 5-10.

no one, regardless of their legal status, can be subjected to acts prohibited by IHL, such as murder, violence to life and person, torture, cruel or inhuman treatment or outrages upon personal dignity or be denied the right to a fair trial. Prisoners of war under the Geneva Conventions must be treated humanely at all times, receive adequate mental care, be free from physical or mental torture, be entitled to adequate food, free practice of religion and have access to sanitary quarters as favourable as their captors.³⁷ Indeed, one of the purposes of the laws of war is to protect the life, health and dignity of all persons involved in or affected by armed conflict. The ICRC saw it then as:

“inconceivable that calling someone an ‘unlawful combatant’ (or anything else) should suffice to deprive him or her of rights guaranteed to every individual under the law.”³⁸

US treatment of terrorist detainees disregarded the obligations contained within the Geneva Conventions. According to a number of international reports from Human Rights groups such as Amnesty International and Human Rights Watch,³⁹ the US violated its obligations to the Geneva Conventions by placing detainees in tiny cells, neglecting to provide or upkeep adequate conditions to maintain human dignity, ‘disappearing’ prisoners in secret facilities for years without any legal process, sending them to be interrogated in countries in which torture is standard practice and subjecting them to inhumane interrogation.⁴⁰

The US treatment of terrorist detainees in this manner was another example of disrespect for IHL in asymmetric warfare. An official US commission of inquiry that investigated the US Department of Defence’s treatment of terrorist detainees in Guantanamo, Abu Graib and other defence detention facilities, concluded in its final report that the US could not defeat the ‘enemy’ if captured enemies had to be treated according to the Third Geneva Convention relative to the Treatment of Prisoners of War. The report claimed that necessary

³⁷ M. Mofidi, ‘Unlawful Combatants or POW: The Law and Politics of Labels,’ *Cornell International Law Journal*, vol 36 (2003), p. 88.

³⁸ ICRC, op. cit. (2007) p. 5-10.

³⁹ See www.hrw.org and www.amnesty.int for reports on the conditions that were inflicted on terrorist detainees in the ‘war on terror’ since 2001.

⁴⁰ T. Malinowski, ‘Extraordinary Rendition, Extraterritorial Detention and Treatment of Detainees’ Human Rights Watch (25 July 2007) available online: <http://www.hrw.org/en/news/2007/07/25/extraordinary-rendition-extraterritorial-detention-and-treatment-detainees> (accessed 15 May 2010).

intelligence information about terrorist networks could only be obtained by treating those withholding such information ‘inhumanely’.⁴¹

Conclusion

Developments in global armed conflict since the September 11 2001 attacks and the consequent US-led ‘War on Terror’ have created new challenges for IHL.

As debates surrounding IHL have since suggested,⁴² two major areas of IHL seem to be lacking in regards to regulations of IHL over terrorism:

First, states involved in the “War on Terror” have exploited the ‘legal black holes’⁴³ in IHL and treated terrorists as unlawful civilians and belligerents who exist outside the protection of rules for prisoners of war or combatants – not only inflicting inhumane treatment on these detainees, but denying them the utmost of any foundational legal liberties applied by any applicable legal process – *habeas corpus*.⁴⁴

Second, although acts of terrorism are acts outlawed in the Geneva Conventions, IHL is not well suited by the tendency of terrorists to behave in a manner that is undefinable, unthinkable and unconventional.⁴⁵ This is an outcome of asymmetric warfare and is likely to lead to non-compliance with IHL.⁴⁶

A number of solutions to these issues are possible. There have been calls for a new terrorism protocol – outlawing acts of terrorism,

⁴¹ J.R. Schlesinger, ‘Final Report of the Independent Panel to Review DoD Detention Operations’ (August 2004) available online <http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf> (accessed 18 May 2010) p. 85: ‘If we were to follow the ICRC’s interpretations (of the Geneva Conventions) interrogation operations would not be allowed. This would deprive the US of an indispensable source of intelligence in the war on terrorism.’

⁴² Crimes of War Project’ available at www.crimesofwar.org/expert/genevaConventions/gc-intro.html.

⁴³ S. Borelli, ‘Casting light on the Legal Black Hole: International Law and Detentions Abroad in the “War on Terror,”’ *International Review of the Red Cross*, vol. 87, no.8 57 (2005).

⁴⁴ *Ibid.*, p. 67.

⁴⁵ Sassoli, *op. cit.* (2006) p p. 52-55 .

⁴⁶ W.H. Taft, ‘The Law of Armed Conflict after 9/11: Some Salient features,’ *Yale Journal of International Law*, vol. 28 (2003), p. 323 and B. Saul, ‘Two Justifications for Terrorism: a Moral Legal Response,’ *Alternative Law Journal*, vol. 30, no.5 (2005) p. 219.

outlining the rights of a terrorist detainee and providing the standard of treatment that the detainer must display to the captive. However the prospects for a new protocol might be limited when the 1977 Additional Protocols are yet to be universally ratified.

Another option in gaining respect for IHL could be to usher in a new, more efficient, terrorism convention – rather than awaiting the current draft UN terrorism convention that has not progressed due to technicalities.⁴⁷ A further option is to apply more coherent and forceful jurisdiction over terrorism compliance by creating new customary IHL norms that precisely ban terrorism as a war crime within the mandate of ‘grave breaches’ of the International Criminal Court. Yet this too could lead to confusion between what does and does not constitute a legitimate target, a lawful killing and a legal combatant, and would likely motivate political bias and prosecutor indiscretion.⁴⁸

Indeed, any new development in IHL to deal better with the challenges of terrorism will first require agreement on a definition of terrorism. Even then, this will not prevent future terrorist attacks occurring and will not promote any more respect for IHL if accomplished.

The global body for IHL, the ICRC, describes its main role and focus as ‘gaining respect for the rule of law in armed conflict and protecting the victims of war.’⁴⁹ This chapter concludes that IHL does have the capacity to deal with terrorism and any amendment to the Geneva Conventions 1949 and Additional Protocols 1977 is less urgent than the immediate need to gain compliance and respect for IHL from those engaged in and fighting terrorism. The problem is therefore not a lack of rules, but a lack of respect for them.

⁴⁷M. Hmoud, ‘Countering Terrorism on a Global Scale: Negotiating the Draft Comprehensive Convention on International Terrorism: Major Bones of Contention,’ *Journal of International Criminal Justice*, vol.4 (2006).

⁴⁸ Sassoli op. cit. (2007) p. 59.

⁴⁹ ICRC, op. cit. (2007).

The 2009 ICRC Study on Direct Participation in Hostilities: Implications for International Humanitarian Law

Carna Kisa*

The concept of direct participation in hostilities underpins the overarching objective of international humanitarian law, which is to maintain the balance between military necessity and humanitarian concerns in international and non-international conflict. The significance of the concept is particularly notable in contemporary conflict, where there is no clear distinction between combatants and civilians but rather a grey area in which identifying groups has become one of the key challenges to complying with international humanitarian law. The objective of the 2009 study by the International Committee of the Red Cross is to clarify the meaning of the concept of direct participation in hostilities in order to encourage greater compliance with international humanitarian law. This chapter provides a critical analysis of the study in order to draw conclusions about the feasibility of the clarification and the extent to which it is applicable to current conditions of warfare. This chapter's reveals a lack of satisfactory interpretation of direct participation in hostilities and numerous inconsistencies with the overarching aim of international humanitarian law. While some elements of doubt have been removed, the application of many aspects of direct participation in hostilities to the current

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context of decision-making by combatants remains challenging and vague. Nevertheless, considering that international humanitarian law seeks to operate in a variety of contexts and impacts on actors with divergent interests, the effort to create effective norms is well-justified.

The inherent objective of international humanitarian law (IHL) is to humanise war, while taking into account the essential balance between military necessity and humanitarian concerns. Since the difficulty of distinguishing between civilians and combatants is one of the main barriers to the achievement of this balance, the International Committee of the Red Cross' (ICRC) interpretative guidance on direct participation in hostilities (DPH) aims to strengthen this principle and clarify its definition.¹

The ICRC study is imperative in light of contemporary armed conflict, in which there is an existing shift of hostilities towards the civilian population and urban locations, increased outsourcing of military posts to civilian personnel such as private contractors or government employees, and in which those participating in hostilities fail to satisfactorily distinguish themselves from civilians.² Contemporary conflict has exemplified these ambiguities in many ways; for example, with insurgents such as Hamas in Israel and the Liberation Tigers of Tamil Eelam in Sri Lanka blending into the civilian population to challenge conventional armed forces, or with the debate on how to deal with the use of human shields to protect military targets. Such circumstances alone attest to the difficulty of interpreting the concept of DPH, particularly as many IHL issues remain unresolved. They also demonstrate the horrific cost of weak implementation of IHL. With the objective of clarifying the understanding of DPH, the ICRC's interpretative guidance seeks to strengthen implementation of the principle of distinction between civilians and combatants, and strike a balance between humanitarian concerns and military necessity.

Although the notion of DPH is derived from Article 3(1) common to the Geneva Conventions³ and is inherent in numerous provisions of IHL, it

¹ International Committee of the Red Cross (ICRC), 'Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law' (2009) available online:

<http://www.icrc.org/web/eng/siteeng0.nsf/html/p0990?opendocument> (accessed 24 May 2010), p. 5.

² N. Melzer, 'The ICRC's Clarification Process on the Notion of Direct Participation in Hostilities under International Humanitarian Law' (2009) available online: http://www.oas.org/dil/esp/XXXVI_curso_The_ICRC_Clarification_Process_Nils_Melzer.pdf (accessed 24 May 2010).

³ ICRC, Convention III Relative to the Treatment of Prisoners of War (1949) available online: <http://www.icrc.org/ihl.nsf/FULL/375?OpenDocument> (accessed 5 June 2010) Art 3(1).

has, however never been defined.⁴ Due to its significant implications to the international law of armed conflict, the ICRC specifically answers three questions regarding DPH: who is considered a civilian, what conduct amounts to direct participation in hostilities and what modalities (such as the temporal factor) govern the loss of protection against direct attack.⁵ This chapter will analyse each of these questions in turn, as each uncovers key legal issues to be examined and leads to conclusions regarding the effectiveness of the ICRC's approach. The likelihood of success of the ICRC's interpretative guidance will be determined in light of recent evidence and the current nature of warfare.

The Concept of 'Civilian'

IHL protects individuals against direct attack "unless and for such time as they directly participate in hostilities".⁶ The definition of 'civilian' is a 'negative' or mutually exclusive approach: it defines civilians by what they are not, rather than what they are. In international armed conflict, they are "neither members of the armed forces of a party to a conflict nor participants in a levée en masse"⁷, while in non-international conflict, they are not a member of state armed forces or an organised armed group.⁸ The application of this definition by the ICRC's interpretive guidance reveals a simplified view of the term civilian, as it excludes the detailed depictions of the concept inherent in both Article 1 of the first section in the 1907 Convention IV of Hague Regulations⁹ and Article 4 of the Third Geneva Convention, which consider armies, militia and volunteer corps as significant groups relevant to the definition of the concept. The simplification of the definition, rather than a comprehensive approach targeting all areas of uncertainty is evident throughout the ICRC study. While clarity is its objective, the neglect of issues that have initially caused confusion draws criticism and unresolved ambiguity which will be evident in the following analysis.

⁴ ICRC, op. cit. (2009) p.12.

⁵ Ibid., p. 6.

⁶ ICRC, op. cit. (2009) p. 13.

⁷ Ibid., p. 26.

⁸ Ibid., p. 36.

⁹ The Hague Regulations Convention IV (1907) available online: <http://www.opcw.org/chemical-weapons-convention/related-international-agreements/chemical-warfare-and-chemical-weapons/hague-convention-of-1907/> (accessed 5 June 2010), Art. 1.

Armed Forces

The ICRC interpretative guidance defines armed forces as a group explicitly excluded from the positive definition of civilians; “All persons who are neither members of the armed forces of a party to the conflict nor participants in a levée en masse are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities.”¹⁰ ‘Armed forces’, which are, under Additional Protocol I targetable at all times, are also according to the ICRC study only targetable if the individuals in question are organised, armed and belonging to an armed group.¹¹ As long as all three criteria are fulfilled, they are targetable at all times. However, rules accompanying this definition weaken its clarity and give rise to questionable characteristics of the ICRC definition.

The strength of this approach to classifying armed forces lies in the requirements of the group to be ‘organised and armed’, as the group is subsequently treated as a regular armed force. This means that no greater protection from attack is assumed for an irregular force, thus the key objective of IHL to maintain the balance between military necessity and humanity remains undistorted.

However, the requirement to belong to an armed group serves to create imbalances between irregular and regular armed forces. According to the interpretive guidance, “organised armed groups operating within the broader context of an international armed conflict without belonging to a party to that conflict could still be regarded as parties to a separate non-international armed conflict”.¹² Firstly and most importantly, this constitutive element of the study excludes organised groups not belonging to a party in international armed conflict from the definition of ‘armed forces’, as they are treated according to the rules of law for non-international armed conflict. Consequently, this approach protects them from attack when they are not actively partaking in hostilities, as they are considered to be civilians under Additional Protocol I, the Hague Regulations, and the Geneva Conventions.¹³ However, this

¹⁰ ICRC, *op. cit.* (2009) p. 26.

¹¹ *Ibid.*, p. 22.

¹² *Ibid.*, p. 24.

¹³ K. Watkin, ‘Opportunity Lost: Organized Armed Groups and the ICRC ‘Direct Participation in Hostilities’ Interpretive Guidance’ (2010) available online: http://www.law.nyu.edu/ecm_dlv3/groups/public/@nyu_law_website_journals_jour

characteristic of a combatant has not specified the category into which liberation movements such as that of the Palestinian people belong to. While their battle with the Israelis constitutes an international armed conflict due to the occupied territory,¹⁴ without explicit consideration of such situations in IHL, Palestinian fighters have no linkage to a particular state and are hence not entitled to the status of prisoners of war upon capture.

This exposes the ambiguity in the interpretative guidance which contradicts its purpose to clarify the principle of direct participation in hostilities. It exposes a pragmatic failure wherein members of an organised armed group are protected from attack on the basis of international armed conflict, but exposed to attack on the basis of non-international armed conflict. Applying the resulting conclusions to the conflict in Iraq and the irregular forces fighting against the American-led alliance, it is evident that the Sunni jihads and the Shiite militia utilised the international nature of the conflict to become involved and fight the Coalition forces despite their lack of interest in the failure of the Iraqi government.¹⁵ Although it is certain that non-international and international conflict can exist simultaneously when a non-international conflict is already in progress or in other similar situations, cases such as Iraq pose a different context in which the definition of ‘armed forces’ as expressed in the ICRC study can benefit the irregular forces which get involved at a later stage, more so than regular forces.

By contrast the interpretative guidance successfully draws a distinction between regular and irregular armed forces. The crucial factor of difference is that irregular forces such as militias, volunteer corps and resistance movements belonging to a party to the conflict are not regulated by domestic law as regular forces are. As such, membership of irregular forces “can only be reliably determined on the basis of functional criteria, such as those applying to organised armed groups in non-international armed conflict”.¹⁶ Contrary to this, membership in regular armed forces is “generally regulated by domestic law and expressed through formal integration into permanent units

[nal_of_international_law_and_politics/documents/documents/ecm_pro_065932.pdf](#) (accessed 5 June 2010) p. 650.

¹⁴ S. Yarden, ‘IHL obligations in the struggle for self-determination’ (2009) available online: <http://www.diakonia.se/sa/node.asp?node=3145> (accessed 20 March 2011).

¹⁵ Schmitt, *op. cit.* (2010) p. 14.

¹⁶ ICRC, *op. cit.* (2009) p. 25.

distinguishable by uniforms, insignia, and equipment”,¹⁷ which excludes them from any characteristics of civilians, “regardless of their individual conduct or the function they assume within armed forces”.¹⁸

Although the strength of further clarification of the issue is affirmed by the distinction made, its implications remain unsatisfactory. Based on the above discrepancy between the two groups, the interpretative guidance implies that the basis on which the difference is established is the role of domestic law in establishing an international standard for armed force membership.¹⁹ Clearly, the opportunity for irregular forces to be treated more favourably than state armed forces remains unrestrained, as they do not present themselves as distinctively as regular forces do and may subsequently be considered to be civilians based on their appearance. This is particularly unsatisfactory in light of their potential to acquire the status of lawful combatants and gain the prisoner of war status according to the criteria set in the third Geneva Convention.²⁰

Although a minor point within the interpretive guidance, the role of ‘levée en masse’ is another aspect which reflects lack of clarity. The term specifically refers to a group of people living in a non-occupied territory who, ‘on the approach of the enemy, spontaneously take up arms to resist the invading forces without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war’.²¹ Not only is the levée en masse excluded from the civilian population, but it also lacks adequate organisation to be considered a part of armed forces. As much as the difficulty of explicitly specifying its role is understandable, the lack of functional criteria and an effective delineation of how the group should be treated and targeted provokes objection. While it is stated that “all other persons acting on a spontaneous, sporadic, or unorganized basis are considered to be civilians”,²² the line between the definition of the two is not specified and may be the cause of difficulty in determining whether an uprising constitutes a levée en masse, or another spontaneously formed group which is to be treated as a group of civilians. In this respect, the link between the study and empirical

¹⁷ Ibid., p. 25.

¹⁸ Ibid..

¹⁹ Watkin, op. cit. (2010) p. 652.

²⁰ Ibid., p. 652.

²¹ ICRC, op. cit. (2009) p. 25.

²² Ibid

possibilities requires greater clarification, as civilians may be incorrectly targeted.

With the objective of elucidating the distinction between civilians and combatants, the interpretive guidance proposes an additional criterion of “continuous combat function”²³ for membership of an organised group. The justification for introducing this criterion is its potential to reduce the risk of erroneous civilian deaths in situations of uncertainty. Article 50(1) of the Additional Protocol I provides that ‘[i]n case of doubt whether a person is a civilian, that person shall be considered to be a civilian’.²⁴ What this expectation of presumption does not take into account is the risk that the individual making a judgment takes when presuming that a potential attacker is a civilian. Accordingly, there has been much criticism of the provision’s exposure to exploitation, as well as demand for additional methods of distinguishing between civilians and non-civilians as a step preceding one of immediate presumption. In view of the increasing failures of organised armed groups to distinguish themselves from civilians, the introduction of the idea of ‘continuous combat function’ seems promising in its ability to “limit membership to individuals who were unambiguously members of the organised armed group by virtue of their involvement in combat action”.²⁵

Due to the function’s potentially positive impact both pragmatically and academically, the ICRC has applied the concept to members of organised armed groups in both international and non-international armed conflict, while using it concurrently with ‘direct participation’ to clarify that group members whose function is to undertake activities equivalent to direct participation are subject to attack.²⁶ Members with this function are similar to individuals from regular armed forces and are legitimate targets even when they are not engaged in activities equivalent to direct participation at the time of attack.

While the criterion has potential, for example to protect those who escape ICRC’s definition of direct participation in hostilities but still manage to remain closely and continuously involved in activities and

²³ Ibid., p. 27.

²⁴ ICRC, ‘Protocol I Additional to the Geneva Conventions’ (1977), available online: <http://deoxy.org/wc/wc-prot.htm> (accessed 6 June 2010) Article 50(1).

²⁵ Schmitt, op. cit. (2010).

²⁶ ICRC, op. cit. (2009) p. 52.

operations of the organised armed group,²⁷ the main issue is the implications once this definition is applied to an empirical situation. For example, individuals who are involved in functional planning for a group but do not partake in the development of specific tasks would not meet the criteria set by the ICRC as necessary for direct participation in hostilities.²⁸ This imposes a limit that excludes numerous individuals who fight for the group on a regular, rather than continuous basis; by contrast, such individuals would be legitimate targets if their function was the same in a state armed force.²⁹

It is a highly problematic implication that those who belong to an organised armed group and who have a continuous combat function are legitimate targets at any given time, while those who sporadically involve themselves in armed conflict may only be attacked at the time of their direct participation. Not only is it unfeasible to distinguish between the two in light of the contemporary nature of armed conflict, but it is also impossible to base such a determination on the recommended “information which is practically available and can reasonably be regarded as reliable in the prevailing circumstances”.³⁰ Taking into account the viable possibility that one establishes that an identified individual has previously engaged in hostilities, it is highly questionable how an attacker in a succeeding operation against the organised armed group is to discern whether the engagement was solely periodic or not. This is particularly true in asymmetric warfare and the 'War on Terror', where sporadic rather than continuous attacks are commonly practiced and distinguishing between fighters who satisfy this criteria and those who do not is extremely difficult.

The Concept of Direct Participation in Hostilities

The second area examined by the ICRC's interpretative guidance is ‘the criteria that determine whether and, if so, for how long a particular conduct amounts to direct participation in hostilities’.³¹ As such, it seeks

²⁷ D. Toorn, ‘Direct Participation in Hostilities’: A Legal and Practical Evaluation of the ICRC Guidance’ (2010) available online: http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=damien_van_der_toorn (accessed 6 June 2010) p. 7.

²⁸ Ibid., p. 28.

²⁹ Ibid., p. 29.

³⁰ ICRC, op. cit. (2009) p. 35.

³¹ Ibid., p. 41.

to evaluate the controversial issue of defining which specific acts of civilians will suspend their protection against direct attack.

The interpretive guidance establishes that sole participation in hostilities does not lead to a loss of protection from attack, but rather has to be defined as ‘direct’ participation. The guidance defines direct participation in hostilities as specific, hostile acts of individuals towards an enemy³² and justifies this approach by stating that:

“Any extension of the concept of direct participation in hostilities beyond specific acts would blur the distinction made in IHL between *temporary, activity-based loss of protection* (due to direct participation in hostilities), and *continuous, status or function-based loss of protection* (due to combatant status or continuous combat function).”³³

To avoid the evidentiary problems which are the inevitable result of excluding the delineation of specific acts, the guidance provides three cumulative constitutive elements of direct participation which the specific act must meet in order to qualify as direct participation in hostilities: a specific threshold of harm, direct causation and nexus with a belligerent in the conflict. Each element will be outlined and critically assessed in turn.

Threshold of Harm

The first constitutive element stipulates that the specific act carried out by an individual must be likely to “adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack”.³⁴ This element contributes much strength to the guidance’s aim of making the ambiguous concept of DPH clearer. It usefully transcends the narrow definition of the concept in the Commentary on Additional Protocol I, which states that ‘direct’ participation means “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”³⁵. In light of the ‘targeted killings’ case in which the

³² Ibid., p. 44.

³³ ICRC, op. cit. (2009) pp. 44-5.

³⁴ Ibid., p. 46.

³⁵ ICRC, ‘Commentary on the Additional Protocols of 8 June 1977 to the Geneva Convention of 12 August 1949’ (1949b) available online:

Israeli Supreme Court decided that this definition precludes acts such as suicide bombings which intended to cause damage to civilians,³⁶ this definition by the ICRC now makes explicit the role of the threshold of harm. For example, it successfully adapts its delineation of the element to contemporary conflict, as it determines that actions that qualify include clearing mines placed by enemy forces or undertaking a computer network attack to observe strategic enemy interactions.³⁷ It also suggests that actions which weaken the morale of civilians, as well as the refusal to engage in activities which may indirectly aid the enemy, do not qualify.³⁸

Evidently, traditional considerations of the definition of DPH have been transcended and improved by the element of the threshold of harm regarding protected persons and objects. Nevertheless, its limit to death, injury or destruction may draw criticism in light of prominent ethnic conflicts in which forceful expulsion of groups of civilians occurs. A more detailed criterion in this respect would contribute to a greater distinction between actions which directly relate to the armed conflict in question and those of a merely criminal nature.³⁹

Direct Causation

As the second element, direct causation requires a “direct causal link between a specific act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part”.⁴⁰ This element is the most stringent and narrow of the three, as it considers a harmful act brought in “one causal step” as a crucial aspect of direct participation.⁴¹ By contrast,

[i]ndividual conduct that merely builds up or maintains the capacity of a party to harm its adversary, or which otherwise

http://www.loc.gov/r/frd/Military_Law/pdf/Commentary_GC_Protocols.pdf

(accessed 6 June 2010) p. 619, paragraph 1944.

³⁶ Supreme Court of Israel, *Public Committee Against Torture in Israel v Government of Israel* (2005) HCJ 769/02, available online:

www.elyon1.court.gov.il/files_eng/02/690/007/a34/02007690.a34.pdf (accessed 10 June 2010) Paragraph 33.

³⁷ ICRC, op. cit. (2009) p. 48.

³⁸ Ibid., p. 49.

³⁹ Schmitt, op. cit. (2010).

⁴⁰ ICRC, op. cit. (2009) p. 51.

⁴¹ Ibid., p. 55.

only indirectly causes harm, is excluded from the concept of direct participation in hostilities.⁴²

Examples of conduct that only has an indirect impact includes imposing a regime of economic sanctions, providing its adversary with supplies and services, scientific research and design and recruitment and training of personnel.

The constricted scope within which this element operates is based on the focus on participation in hostilities, rather than conflict in general. The ICRC has made an explicit distinction between individual acts of participation in the conduct of hostilities, which have a direct causal link, and acts which generally sustain the war effort, which only assume an indirect causal link. The strength of this distinction lies in its utility in a situation in which much of the activity undertaken by a state in armed conflict may be dedicated to sustaining the war effort. To disobey the distinction inherent in the element of direct causation would be to allow for a regressive move of legitimising the targeting of anyone who is involved in the war sustaining effort.⁴³ Applying the distinction to the US/NATO killing and capturing of Afghan drug traffickers with links to Taliban,⁴⁴ it becomes evident that such an act is unlawful if based solely on the Afghani's position as the source of funds for the insurgency.⁴⁵ A similar conclusion was also drawn by the Israeli Supreme Court in its decision in *Public Committee Against Torture in Israel v Government of Israel* that providing monetary aid to belligerents does not constitute direct participation in hostilities.⁴⁶ In both cases, a greater number of characteristics indicating direct

⁴² Ibid., p. 52-3.

⁴³ D. Akande, 'Clearing the Fog of War? The ICRC's Interpretive Guidance on Direct Participation in Hostilities', *International Comparative Law Quarterly* vol.59 (2010), p. 180-192, available online:

http://www.law.nyu.edu/ecm_dlv3/groups/public/@nyu_law_website_journals_journal_of_international_law_and_politics/documents/documents/ecm_pro_065932.pdf (accessed 5 June 2010), p. 188.

⁴⁴ United States Senate, 'Afghanistan's Narco War: Breaking the Link Between Drug Traffickers and Insurgents, A Report to the Committee on Foreign Relations, One Hundred Eleventh Congress, First Session' (2009) available online: http://www.humansecuritygateway.com/documents/USGOV_AfghanistansNarcoWarBreakingLink_DrugTraffickersInsurgents.pdf (accessed 12 June 2010).

⁴⁵ D. Akande, 'US/NATO Targeting of Afghan Drug Traffickers: An Illegal and Dangerous Precedent?' (2009) available online: <http://www.ejiltalk.org/usnato-targeting-of-afghan-drug-traffickers-an-illegal-and-dangerous-precedent/> (accessed 12 June 2010).

⁴⁶ *Public Committee Against Torture in Israel v Government of Israel*, op. cit. (2005).

participation in hostilities based on the constitutive elements were necessary to make them legitimate targets.

The interpretive guidance also provides useful material on direct causation in collective operations. The ICRC states that “where a specific act does not on its own directly cause the required threshold of harm, the requirement of direct causation would still be fulfilled where the act constituted an integral part of a concrete and coordinated tactical operation that directly causes such harm.”⁴⁷ It provides an example relevant to contemporary conflict by referring to an attack by an unmanned aerial vehicle that involves activities performed by the pilot operating it, an individual managing the weapons, someone in charge of communications with the craft and a commander who is in overall control. As the study clarifies, in such a case or similar cases, all individuals involved are considered to be direct participants.⁴⁸ By providing such an example, the study offers greater understanding of the definition of ‘direct causation’ and makes the task of applying it to contemporary conflict more viable.

Despite the strength of the interpretative guidance in this area, it also has the capacity to weaken the balance between military necessity and humanitarian concerns. In particular, the view adopted by the ICRC in regards to human shields draws deserved criticism. While it is reasonable of the study to recognise civilians who are forced to act as human shields as indirect participants protected from attack,⁴⁹ it is debatable whether the same approach is suited to voluntary human shields.

The ICRC acknowledges that acting as a voluntary shield is undertaken with the purpose of “creating a physical obstacle to military operations of a party to the conflict” such as blocking the road used by military vehicles, which indicates that “they could directly cause the threshold of harm required for a qualification as direct participation in hostilities”⁵⁰. However, the study also advocates that voluntary human shields have insignificant impact on the capacity of the attacker to destroy the military target in cases in which weapons of precision such as artillery or air attacks are used.⁵¹ Implying that they qualify as indirect

⁴⁷ Ibid., p. 54-55

⁴⁸ Ibid., p. 54

⁴⁹ ICRC, op. cit. (2009) p. 56.

⁵⁰ Ibid.

⁵¹ Ibid., p. 57.

participants in hostilities, this characterisation of voluntary human shields encourages the activity as it minimises the risk of repercussions.⁵²

This establishes firm grounds for the imbalance between humanitarian concerns and military necessity. Considering military necessity, it must be noted that the attacker is deprived of military advantage due to the existence of the human shield. In turn, the existence of the human shield is based on the individuals' reliance on their protection from the attack, as well as reliance on the resulting propaganda value if the attacker proceeds with the attack and risks civilian lives. Such was the case in Iraq in 1997, as women, men and children were enticed into volunteering as human shields by being offered extra food rations.⁵³ As a result, eighty palaces and industrial facilities in central Iraq were protected by voluntary human shields during a time of crisis with the US.⁵⁴ Propaganda value was utilised by the Iraqi government when directing voluntary human shields to areas of military significance and those most likely to be the targets of enemy bombs.⁵⁵

Despite this, the guidance expresses that the causal relation between the conduct of voluntary human shields and the resulting harm remains indirect. However, the alternative consideration of the act as direct participation would avoid the above-mentioned exploitation of the law, as the human shields would not be legally substantiated. It must be noted that the aim of those who recommend that voluntary human shields be treated as direct participants is not to expose them to attack, but to rather exclude their potential death and injury as a result of the attacker's proportionality calculation.⁵⁶ As stated in the study itself, "the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the

⁵² Toorn, op. cit. (2010) p. 32.

⁵³ Central Intelligence Agency, 'Putting Noncombatants at Risk: Saddam's Use of 'Human Shields'' (2003) available online:

https://www.cia.gov/library/reports/general-reports-1/iraq_human_shields/index.html#09 (accessed 14 June 2010).

⁵⁴ Ibid.

⁵⁵ N. Al-Duaij, 'The Volunteer Human Shields in International Humanitarian Law' (2010) available online:

http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=eisa_al_enizy (accessed 14 June 2010), p. 17.

⁵⁶ Schmitt, op. cit. (2010)

prevailing circumstances.”⁵⁷ This military purpose may very easily outweigh the potential to harm those acting as voluntary human shields when weaponry of precision is taken into account, and be used as a justification based on proportionality. If otherwise considered in relation to the status of human shields, the balance between military necessity and humanitarian matters would be more sustained. Such consideration would also contribute to a more explicit separation of civilians from combatants, as it would be more likely that the willingness of civilians to risk their lives as direct participants would weaken.

Belligerent Nexus

This third and final element of the concept of DPH requires that the act is “specifically designed to directly cause the required threshold of harm *in support of a party to the conflict and to the detriment of another*.”⁵⁸ On the basis of this specific requirement, the interpretative guidance assumes the most commonly occurring zero-sum game that results from direct participation. Although this is indeed mostly the case, there are exceptions which have characterised some contemporary armed conflicts, whereby an armed group participates in operations against a party without benefiting the other. The ICRC study has given much attention to the exceptions in this case, stating that attacks against military personnel, civil disturbances for reasons irrelevant to the conflict and defending oneself or others from unlawful violence constitute acts that do not apply to the definition of belligerent nexus.⁵⁹ While this inclusion of exceptions repels any major criticism in terms of the rule’s application to contemporary conflict, it also attracts a recommendation to make the belligerent nexus requirement more straightforward. Considering that these exceptions are increasingly occurring, a sole description of the act being conducted ‘to the detriment of another’, rather than both ‘in support of a party to the conflict and to the detriment of another’ would further clarify the issue and avoid unnecessary confusion about what constitutes direct participation in hostilities.

⁵⁷ ICRC, op. cit. (2009) p. 77

⁵⁸ Ibid., p. 46

⁵⁹ ICRC, op. cit. (2009) p. 48.

Modalities Governing the Loss of Protection: the Temporal Factor

The interpretation of the temporal factor in the definition of DPH is one of the most significant aspects of the interpretive guidance. As found in both of the Additional Protocols to the Geneva Conventions, the temporal factor serves to provide civilians with the benefit of protection against direct attack “unless and for such time as they take a direct part in hostilities.”⁶⁰ Based on the inclusion of the concept of ‘for such time’ in the Commentary to the direct participation articles in both Additional Protocols,⁶¹ the interpretive guidance assumes the same approach and states that “measures preparatory to the execution of a specific act of direct participation in hostilities, as well as the deployment to and the return from the location of its execution, constitute an integral part of the act.”⁶² Considering the nature of the concept, the temporal scope is only considered in relation to individuals who are involved in hostilities on a spontaneous, sporadic or temporary basis. This definition and ensuing explanations of the temporal scope within the guidance seek to clarify specific aspects of the matter which have been subject to much controversy and objections in cases such as *Public Committee Against Torture in Israel v Government of Israel* in which the Israeli Court concluded that the matter of the concept ‘of such time’ is one of interpretation, which then impacts on any other intrinsic factor.

The Beginning and End of Direct Participation

The precise start and end of direct participation are of vital importance to DPH and the protection of civilians - as will be shown in the example of improvised explosive devices used by Iraqi and Afghan insurgents.⁶³ With the aim of clarifying its meaning, the guidance equates the beginning of hostilities to “military operations preparatory to an

⁶⁰ *Ibid.*, p. 70.

⁶¹ Protocol I suggests that a number of delegations to the Diplomatic Conference viewed direct participation as including “preparations for combat and return from combat” and that “once he ceases to participate, the civilian regains his right to the protection.” Protocol II states that a civilian loses protection “for as long as his participation lasts. Thereafter, as he no longer presents any danger for the adversary, he may not be attacked”: see Schmitt, *op. cit.* (2010).

⁶² ICRC, *op. cit.* (2009) p. 65.

⁶³ N. Kumagai, ‘The challenge of improvised explosive devices to International Humanitarian Law,’ IUJ Research Institute, International University of Japan (2010) available online: http://www.iuj.ac.jp/research/workingpapers/PIRS_2010_01.pdf (accessed 20 March 2011).

attack”,⁶⁴ which are “so closely linked to the subsequent execution of a specific hostile act that they already constitute an integral part of that act.”⁶⁵ Just as explicitly, the guidance specifies that actions “aiming to establish the general capacity to carry out unspecified hostile acts do not”⁶⁶ qualify as preparations for an attack. What the study also reinforces is the idea that an operation begins only once the “deploying individual undertakes a physical displacement with a view to carrying out a specific operation”, while “return from the execution of a specific hostile act ends once the individual in question has physically separated from the operation”.⁶⁷

The alternative view proposes that the temporal scope of direct participation should be inclusive of any causal connection in existence preceding and following the particular hostile action.⁶⁸ In particular, the need for consideration of such a view is encompassed in the example of the assembly of improvised explosive devices (IEDs), which the guidance excludes from DPH. The problem is that the preparation of the IED which includes acquiring materials to build it is excluded from the definition of direct participation until the point when the individual building it reaches the final stages necessary for its usage. The use of IEDs in attacks by Afghani insurgents in particular caused the deaths of 85% of the total civilians killed in 2008.⁶⁹ Reconsideration of such a limited approach by the ICRC would be beneficial in light of the greater opportunity to prevent harmful outcomes from occurring once both the construction and placement of the IED qualify as preparatory measures belonging to the period of direct participation.⁷⁰

The ‘Revolving Door’

The phrase; “military operations preparatory to an attack” creates an ambiguous meaning for the beginning of direct participation in

⁶⁴ Ibid., p. 65.

⁶⁵ Ibid.

⁶⁶ Ibid., p. 66.

⁶⁷ Ibid., p. 67.

⁶⁸ Schmitt, op. cit. (2010), in reference to proposals made by experts involved in the discussion regarding the Interpretive Guidance.

⁶⁹ Kumagai, op.cit. (2010) p. 1.

⁷⁰ B. Boothby, ‘‘And For Such Time As’’: The Time Dimension to Direct Participation in Hostilities’ (2010) available online:

http://www.law.nyu.edu/ecm_dlv2/groups/public/@nyu_law_website_journals_journal_of_international_law_and_politics/documents/documents/ecm_pro_065933.pdf

(accessed 15 June 2010) p. 749.

hostilities, as its usage in Additional Protocol I is in reference to the duty of combatants to distinguish themselves from the civilian population.⁷¹ The 'for such time' temporal element has, due to its controversial nature, been equated to a concept of the 'revolving door', which denotes the common reference to a situation where an individual is a farmer during the day and becomes a rebel fighter at night. Considering this common condition, it is extremely difficult for a combatant to discern when that individual is protected and when not, especially when their status is purposely changed without an explicit act of distinguishing themselves from the civilian population. This has been common in Israel, where Hamas fighters, when attacked, were recognised as civilians; in Afghanistan, where it was not possible to make a distinction between a Taliban fighter and an Afghan civilian; in Sri Lanka, where fighters of the LTTE blended into the civilian population; and in Iraq, where militias dressed as civilians protected themselves against attack.⁷²

While the interpretive guidance recognises the existence of the 'revolving door', it nevertheless undertakes a narrow approach to the issue by stating that it serves as an integral part rather than a malfunction of IHL, as it averts attacks on civilians who do not, at a particular time, represent a military threat.⁷³ Although the evident humanitarian approach is to be supported, the flaw in this interpretation of the concept is its assumption that the combatant, rather than the individual disrespecting the basic rules of IHL, should bear the responsibility associated with misunderstanding the status of the direct participant. This ultimately distorts the sought balance between military necessity and humanitarian concerns, as the 'civilian' status of such participants has the capacity to immunise a valid target from attack once the proportionality test is taken into consideration.⁷⁴ Not only so, but the level of threat presented by such members of armed groups is considerably disproportionate to the expectation that state military forces need to wait for a distinct sign of either attack or combatant

⁷¹ Article 44(3) of Additional Protocol I: 'Combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack.'

⁷² T. Pfanner, 'Editorial- IRRC December 2008 No 872,' *International Review of the Red Cross* (2008) available online:

<http://www.icrc.org/eng/resources/documents/article/review/review-872-p819.htm> (22 March 2011).

⁷³ ICRC, *op. cit.* (2009) p. 70.

⁷⁴ T. McCormack and A. McDonald, *Yearbook of International Humanitarian Law* (The Hague: TMC Asser Press, 2005), p.13.

status in order to react militarily. In relation to the matter of ‘lawful combatants’, this view was affirmed by the International Criminal Tribunal for the former Yugoslavia Appeals Chamber in *Prosecution v. Blaskic*, as it rejected the idea that an individual has to carry a weapon in order to be targeted.⁷⁵

The burden of recognition was inherent in Abkhazia and South Ossetia, where civilian behaviour exemplified explicit exploitation of the temporal concept.⁷⁶ Incidents involved included the use of IEDs,⁷⁷ which pose a challenge to the ICRC’s approach to the ‘revolving door’. Contrary to asymmetrical warfare, which involves surprise attacks, activities such as those including IEDs and land mines provide the insurgents with an opportunity to leave before the attack occurs. State combatants are faced with the rational decision to locate insurgents through human and technical intelligence while the insurgents are still nearby, as no opportunity of preparing for an attack exists. The interpretive guidance, however, does not provide the combatants with such a chance.

Acknowledging the difficulty of dealing effectively with such circumstances, the least that can be expected is to balance the military necessity with humanitarian matters by placing the risk of failure to distinguish oneself onto the person disrespecting IHL, rather than the state combatant, who is entitled to the use of force. Although this seems to contradict the notion of presumption of civilian status in cases of doubt, it is essentially a matter of the likelihood of reasonable mistakes in the fog of war, rather than an offence of wilful killing of civilians, as recognised by the Rome Statute of International Criminal Law.⁷⁸ The viability of the inclusion of such considerations would markedly improve the balance required between military necessity and humanitarian matters of concern.

⁷⁵ Ibid.

⁷⁶ D. Williams, ‘The Often-Vexed Question of Direct Participation in Hostilities: A Possible Solution to a Fraught Legal Position?’, *Journal of Politics and Law*, Vol. 2, No. 1 (2009) available online:

<http://www.ccsenet.org/journal/index.php/jpl/article/viewFile/377/336> (accessed 10 June 2010) p.4.

⁷⁷ United States Mission to the OSCE, ‘Statement on IED Incidents in Georgia’ (2009), available online: http://www.osce.org/documents/pc/2009/04/37114_en.pdf (accessed 15 June 2010).

⁷⁸ Rome Statute of International Criminal Court (1998) available online:

http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf (accessed 17 June 2010) Article 32.

Conclusion

The above analysis has drawn conclusions of both a positive and negative nature regarding the interpretation of DPH by the interpretive guidance. As indicated, while its interpretation of the concept of ‘civilian’, ‘armed forces’, ‘direct participation in hostilities and the inherent factor of the ‘revolving door’ clarifies some of the key distinctions and matters of ambiguity, many elements respective to each concept remain unresolved. Most important to note has been the guidance’s lack of consistency with the overarching aim of IHL, which is to strike a balance between military necessity and matters of humanitarian concern. Given the current state of conflicts in which civilians are at greater risk than ever, it is of fundamental importance that all aspects of direct participation in hostilities are clearly defined, so that they can be effectively applied and implemented in practice. However, given that IHL seeks to operate in a variety of contexts and that it impacts on actors with contrasting interests, it will be difficult to create effective norms. Bearing in mind the problematic nature of all the issues interpreted in the guidance, the attempt by the ICRC to appreciate the operational complexity of contemporary warfare deserves much praise, as well as suggestions for improvement.

Sovereignty in the Arctic: Can the United Nations Convention on the Law of the Sea Deal with Continental Shelf Claims?

Zeng Fei He*

The concept of state sovereignty is one of the central pillars of international law. However there are still parts of the globe where sovereignty is contested. Within recent years, international struggle for control of the Arctic's natural resources, navigational capacity and military opportunities has dramatically increased. The United Nations Convention on the Law of the Sea, the legal regime that should handle territorial disputes in the Arctic, is likely to be inadequate for determining sovereignty in the region, particularly in relation to disputes over the continental shelf. At this point Norway is the only Arctic nation that has agreed to binding resolution of such disputes. Canada, Russia, and Denmark have all opted out of binding resolution, and the United States is not a party to the Convention. This chapter suggests that the time has come for an Arctic Treaty.

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In August 2007, Russia received international attention when it sent two mini-submarines to plant a Russian flag in the deep seabed near the North Pole.¹ This mission, Russia's second attempt to claim the area, focused international attention on the Arctic Region.² In 2001, Russia made its first claim submission to the United Nations Commission on the Limits of the Continental Shelf (CLCS) to establish the outer limits of its continental shelf under Article 76 of the United Nations Convention on the Law of the Sea (UNCLOS),³ an international agreement that addresses all aspects of resources and uses of the world's oceans. Russia claimed two mountain ridges in the Arctic Ocean, the Lomonosov and Alpha-Mendeleyev, as a "natural prolongation of its land territory."⁴ Canada and Denmark are performing studies of the same ridge for potential Article 76 claims.⁵

Why are the Arctic coastal states rushing to claim sovereignty over Arctic territory? A United States Geological Survey estimated that the Arctic region holds 14%-25% of the world's oil and gas reserves; however, these resources have been inaccessible until recently, when climate change and global warming made exploration feasible.⁶ Of the five countries laying claim to the area, Denmark has perhaps been the most frank about its intentions: according to its Science and Technology Minister, Arctic sovereignty would "give us access to oil and gas."⁷

¹ 'Russia Plants Flag under North Pole,' *BBC News* (2 Aug 2007) available online: <<http://news.bbc.co.uk/2/hi/europe/6927395.stm>> (accessed 25 February 2010).

² 'Russia Plants Flag Staking Claim to Arctic Region,' *CBC News* (2 Aug 2007) available online: <<http://www.cbc.ca/world/story/2007/08/02/issia-arctic.html>> (accessed 3 March 2010).

³ United Nations Convention on the Law of the Sea (UNCLOS), opened for signature 10 December 1982, 1833 UNTS 3, art 76 (entered into force 16 November 1994).

⁴ United Nations Division for Ocean Affairs and the Law of the Sea, Commission on the Limits of the Continental Shelf (CLCS), Outer Limits of the Continental Shelf Beyond 200 Nautical Miles from the

Baselines: Submissions to the Commission: Submission by the Russian Federation available online: <<http://www.un.org/depts/los/clcs-newsubmissions-files/submissionus.htm>> (25 February 2010).

⁵ J. Coman, 'Denmark Causes - International Chill by Claiming North Pole,' *The Telegraph* (17 October 2004) available online:

<<http://www.telegraph.co.uk/news/worldnews/1474377/Denmark-causes-international-chill-by-claiming-north-pole.html>> (accessed 3 March 2010).

⁶ S. Hargreaves, 'The Arctic: Oil's Last Frontier,' *CNN Money* (25 October 2006) available online: <<http://money.cnn.com/2006/09/27/news/economy/arctic-drilling/index.htm>> (accessed 3 March 2010). Noting that while the 25% figure is widely referenced, it includes areas outside of the Arctic Circle and when not including those areas, the estimate is 14%. However, a 14% estimate may undervalue the Arctic reserves as it does not include many of the Arctic basins.

⁷ Coman, op. cit. (2004).

Despite the region's fragility, the Arctic is protected only by a collection of unrelated, non-binding national and international agreements and the Arctic Council, a voluntary organisation consisting of countries bordering the Arctic Ocean.⁸ The only form of 'hard law' amid a piecemeal collection of 'soft law' agreements is the 1973 Agreement on the Conservation of Polar Bears.⁹ Unfortunately, there is no unifying legal instrument protecting the Arctic Region as a whole.¹⁰ Existing mechanisms are insufficient to protect the Arctic from the adverse effects of increased oil and gas exploration and development.

This chapter will argue that the overlapping continental shelf claims in the Arctic can be best resolved by a multilateral agreement similar to the Antarctic Treaty System adopted in 1961.¹¹ However, resolution of the continental shelf disputes in the Arctic will largely depend on geology and the world may see polar nations advance creative arguments, old and new, to establish legitimacy to their individual sovereignty claims in the region. First, this chapter provides a brief overview of UNCLOS and the other arrangements that currently govern the Arctic Region and discusses why UNCLOS has failed to address territorial claims between Arctic countries. The arguments previously proposed by States and the limited precedent with respect to continental shelf disputes will be examined. Finally, this chapter will examine the key issues facing future development in the Arctic region and concludes that the best approach to avoid unnecessary disputes would be to facilitate a multilateral, Arctic-specific treaty with an effective, binding dispute settlement mechanism.

⁸ 'About Arctic Council,' *Arctic Council* (22 October 2007) available online: <<http://arctic-council.org/article/about>> (accessed 3 March 2010).

⁹ Agreement on Conservation of Polar Bears, opened for signature 15 November 1973, 27 UST 3918 (entered into force 1 November 1976).

¹⁰ B. Carpenter, 'Warm is the New Cold: Global Warming, Oil, UNCLOS Article 76, and How an Arctic Treaty Might Stop a New Cold War.' *Environmental Law*, vol. 39 (2009), p. 251.

¹¹ The Antarctic Treaty, opened for signature 1 December 1959, 402 UNTS 71 (entered into force 23 June 1961).

The Arctic and the Law of the Sea

The United Nations Convention on the Law of the Sea (UNCLOS), often referred to as the “constitution of the oceans,” is considered one of the most expansive international agreements in the world.¹² Ratified by more than 150 countries to date, UNCLOS governs nearly every aspect of maritime law, including sovereignty limits, navigation, seabed mining, and environmental protection of the world’s oceans. It also provides a legal framework for resolving ocean-related disputes.¹³ Of the five nations bordering the Arctic, four of them have ratified the UNCLOS Treaty. In 1996, Norway was the first Arctic nation to ratify the treaty, followed by Russia in 1997, Canada in 2003, and Denmark in 2004.¹⁴ The only country to not have ratified the Treaty is the United States. The treaty has been signed by the President but not ratified by the US Senate, meaning that UNCLOS is not legally binding on the US.¹⁵

Among the most important and relevant provisions of UNCLOS are those delineating the areas of the oceans in which coastal states may exercise sovereignty. First, UNCLOS defines a country’s “territorial sea” as the ocean space that extends twelve nautical miles from its coastal low-water mark.¹⁶ Under UNCLOS, the territorial sea functions as a continuation of the country’s land within the territorial sea; therefore, nations may exercise complete sovereignty over the water, seabed, and air space.¹⁷

Those areas of the Arctic Ocean beyond the limits of national jurisdiction are ‘high seas’, and they will remain as such even when outer continental shelf claims have been asserted. The high seas regime

¹² S. Holmes, ‘Breaking the Ice: Emerging Legal Issues in Arctic Sovereignty.’ *Chicago Journal of International Law*, vol. 9 (2008), p. 330.

¹³ UNCLOS Arts. 279-299.

¹⁴ Table Recapitulating the Status of the Convention and of the Related Agreements, *United Nations Division for Ocean Affairs and the Law of the Sea* (26 October 2007) available online: <<http://www.un.org/Depts/los/reference-files/status2007.pdf>> (accessed 3 March 2010).

¹⁵ No US president has technically signed the entire UNCLOS. President Ronald Reagan objected to the deep seabed mining provisions (Part VI), so he approved the entire Convention, save those troublesome provisions, by executive order. When Part VI was revised in 1994, President Bill Clinton signed the revised agreement. Thus, every part of UNCLOS has been signed by a president (albeit in two pieces), but the US Senate has never ratified any part of it.

¹⁶ UNCLOS Art. 3.

¹⁷ UNCLOS Art. 2.

emphasises the freedom of the high seas and thus extends to the freedoms of navigation, scientific research and fishing.¹⁸

The thorniest problem is resolution of each country's continental shelf. The UNCLOS Treaty defines a country's continental shelf as "the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin."¹⁹ This definition is significant because it provides for a delimitation of continental shelf boundaries, with signatories enjoying the right to a 200 nautical mile Exclusive Economic Zone (EEZ), in which they enjoy the exclusive right to resource exploration. Countries with continental shelves longer than 200 miles can petition the Commission on the Limits of the Continental Shelf (CLCS) to gain the rights to exploit their shelf beyond the limit of their EEZ, otherwise known as the outer continental shelf.²⁰ Here, then, is where much of the dispute around Arctic territorial claims lies: what is the limit of the claimant's continental shelf?²¹

The implications of the outer continental shelf regime for the Arctic are significant. Much of the Arctic Ocean remains beyond the limits of existing 200 nautical mile continental shelf claims, including the seabed at the North Pole. Therefore, in theory, a great deal of the Arctic Ocean is potentially susceptible to an outer continental shelf claim. However, the probability is that not all of the Arctic seabed falls within the relevant criteria set for an outer continental shelf claim under UNCLOS. Within the Arctic Ocean seabed, there are a number of submarine ridges which may form the basis for outer continental shelf claims. Some of these claims can extend the EEZ up to 350 nautical miles, 150 nautical miles beyond the normal 200 nautical mile EEZ granted by UNCLOS,²² of which the Lomonosov and Alpha-Mendeleyev Ridges are the most significant. A number of states fronting the Arctic could assert outer continental shelf claims, including Canada, Denmark, Norway, Russia and the United States. Russia was the first state to make an outer continental shelf claim when it submitted its claim to CLCS in 2001. In

¹⁸ UNCLOS Part VII.

¹⁹ UNCLOS Art. 76(1).

²⁰ UNCLOS Art. 76(8).

²¹ A. Charron, 'The Northwest Passage.' *International Journal*, vol. 60, no. 3 (2005), p. 835.

²² UNCLOS Art. 76(6).

2007, Norway submitted a claim, followed in 2009 by Denmark. Canada may not be far behind.²³

Over the next few years, it can be anticipated that the CLCS will have to review and decide on multiple claims to an Arctic outer continental shelf, a number of which will overlap. The CLCS has made clear that it will not become engaged in political or legal disputes. To date the CLCS has sought strictly to maintain its role as a scientific and technical body, notwithstanding that its recommendations can have enormous significance as to the legitimacy of the submitted outer continental shelf claims.²⁴

The greatest weakness of UNCLOS is its dispute settlement regime. Article 298 allows each nation to decline to accept any method of resolution for disputes, particularly those surrounding territorial claims. Arctic states can thus effectively avoid any binding dispute settlement mechanism for territorial and resource disputes.²⁵

The remedy provisions of UNCLOS indicate a strong preference for the peaceful resolution of disputes. Article 279 provides that parties should first try to settle disputes informally. If two countries are unable to settle a dispute on their own within a “reasonable period of time”, UNCLOS provides four methods of resolution: the International Tribunal for the Law of the Sea, the International Court of Justice or one of two arbitral tribunals.²⁶ When a country ratifies UNCLOS, it may choose a forum for settling its disputes under the Convention. If a dispute exists between two countries that have elected different forums – as has occurred for Arctic nations²⁷ – UNCLOS directs the parties to use arbitration, unless they agree otherwise. Article 298, however, allows each nation to decline to accept any method of resolution for various categories of disputes, including boundary disputes between countries with opposite or adjacent territorial seas, exclusive economic zones or continental shelves.²⁸ Canada, Denmark and Russia have all indicated

²³ Charron, op. cit. (2005) p. 836.

²⁴ D. Rothwell, ‘The Arctic in International Affairs: Time for a New Regime?’ *The Brown Journal of World Affairs*, vol. 15 (2008), p. 245.

²⁵ Kefferputz and Bochkarev, ‘Expanding the EU’s Institutional Capacities in the Arctic Region.’ Policy Briefing and Key Recommendations, *Heinrich Boll Stiftung*, December 2008.

²⁶ Holmes, op. cit. 14, p. 336.

²⁷ Ibid.

²⁸ UNCLOS Article 298 provides:

When signing, ratifying, or acceding to this Convention or at any time

that they do not accept any of the procedures for the resolution of disputes provided for under Article 298. As Norway is the only Arctic nation willing to participate in binding dispute resolution for overlapping continental shelf claims, UNCLOS will necessarily be incapable of resolving any disagreement involving these claims to the Arctic.

UNCLOS's implementation of the Common Heritage of Mankind principle²⁹ also appears inadequate to protect the Arctic since it was conceived strictly as a tool to promote equity in resource development, rather than to protect a specified geographical area. The Common Heritage of Mankind Principle has the authority to identify an area as being a 'global common,' meaning that it is not available for appropriation by a single State, but is available for peaceful purposes and economic development, such as resource extraction, that benefits the whole of mankind. It would likely be opposed by countries with territorial claims.

The other legal arrangements within the Arctic Region are a disparate collection of separate legal regimes – the majority of which do not have the support of all Arctic States – rather than one unified, comprehensive Arctic regime.³⁰ This severely weakens their effectiveness.³¹ The Arctic Environmental Protection Strategy³² and the Arctic Council³³ have

thereafter, a State may ... declare in writing that it does not accept any one or more of the procedures provided for in section 2 with respect to ... disputes concerning the interpretation or application of articles 15, 74 and 83.

UNCLOS, articles 15, 74, and 83 respectively address delimitations of the territorial sea, the exclusive economic zone and the continental shelf between states with opposite or adjacent coasts.

²⁹ UNCLOS Part XI. Discussing topics related to the Area, including principles governing the Area, development of resources of the Area, and the International Seabed Authority. It is a legal doctrine that applies to various global commons.

³⁰ Rothwell, op. cit. (2008), p. 250.

³¹ Ibid.

³² In 1991 the five countries which border the Arctic, along with Iceland, Finland and Sweden, established the Arctic Environmental Protection Strategy (AEPS), in order to provide a forum for discussion and co-operation as well as to identify the different environmental problems faced by these countries. It also includes several northern indigenous organisations as well as several working groups and task forces, adopted with the responsibility of conservation and maintaining sustainable development. 'Arctic Environmental Protection Strategy,' *Arctic Council* (June 1991) available online: <http://arctic-council.org/filearchive/artic_environment.pdf> (accessed 14 March 2010).

³³ A voluntary organization of countries that border the Arctic Ocean, established with the aim of responding to environmental emergencies such as oil spills and identifying

sought to address environmental issues, however, they lack the authority necessary to force States to take action nor do they have experience adjudicating boundary disputes. They focus largely on encouraging action by Arctic States within their own territories and cannot provide a dispute settlement mechanism for sovereignty issues.³⁴

Traditional Theories of the Continental Shelf

Given that UNCLOS does not provide a forum for resolving overlapping continental shelf disputes, countries have attempted to bolster their claims by scrutinising the limited precedent in relation to continental shelf disputes. The International Court of Justice has issued decisions on three overlapping continental shelf disputes since its inception in 1946, but none of these decisions applied UNCLOS as binding treaty law:³⁵ the *North Sea Continental Shelf Cases*³⁶ were decided in 1969 before UNCLOS was drafted while the ICJ applied UNCLOS as customary law in *Tunisia v Libya* and *Libya v Malta*.³⁷

As a matter of treaty interpretation, the plain language of UNCLOS does not provide a method for deciding overlapping continental shelf disputes. The language of Article 83(1) states that these disputes should be decided "by agreement on the basis of international law..., in order to achieve an equitable solution." As the ICJ discussed in *Libya v Malta*, UNCLOS provides an end-equitability, but no means of achieving it.³⁸ Traditional arguments that have been successful in past continental shelf disputes include geological circumstances, historical practice and the equidistant principle.³⁹ The ICJ has rejected arguments that landmass

environmental co-operation. Because the Arctic Council acts as a forum, it has no binding decision-making powers and members do not have to participate in programs or issues which are not in their interest. 'About Arctic Council,' *Arctic Council* (2007) available online: <http://arctic-council.org/article/about>> (accessed 14 March 2010).

³⁴ Holmes, op. cit. (2008), p. 349.

³⁵ *North Sea Cases* 1969 ICJ 3; *Case Concerning the Continental Shelf (Tunisia v Libya)* 1982 ICJ 18 (24 February 1982); *Case Concerning the Continental Shelf (Libya v Malta)* 1985 ICJ 13 (3 June 1985).

³⁶ *North Sea Cases* 1969 ICJ 3.

³⁷ The ICJ considered UNCLOS as customary law in *Tunisia v Libya* 1982 ICJ at 47-49 and in *Libya v Malta* 1985 ICJ at 29-33.

³⁸ *Libya v Malta* 1985 ICJ at 30 (UNCLOS sets a goal to be achieved, but is silent as to the method to be followed to achieve it.).

³⁹ Holmes, op. cit. (2008), p. 350.

proportionality or economic considerations should play a role in delimiting continental shelves.⁴⁰

Geology

Under UNCLOS Article 76, geology forms the basis of any nation's claim to extend recognition of its continental shelf beyond its exclusive economic zone. The language of Article 76 describes the continental shelf in geological terms and instructs coastal States to submit claims that include supporting geological data.⁴¹ Both Russia and Norway, two Arctic countries who have submitted claims to the Commission, relied on extensive geological data to support their claims.⁴²

While geology is an important element of any argument, it will not likely have an effect on settlement of Arctic claims.⁴³ Because Arctic nations are so close together and are likely to have connected continental shelves, geology will probably prove to be unhelpful in resolving continental shelf disputes. The ICJ recognised this in *Tunisia v Libya*⁴⁴ and suggested that it will be rare for geology to provide an easily-defined boundary line.

⁴⁰ Ibid

⁴¹ UNCLOS Art. 76. Defining a country's continental shelf as the "natural prolongation of its land territory to the outer edge of the continental margin," where the "continental margin" is defined as the "submerged prolongation of the land mass of the coastal state."

⁴² 'Continental Shelf Submission of Norway in respect of areas in the Arctic Ocean, the Barents Sea, and the Norwegian Sea: Executive Summary,' *United Nations: Oceans and Law of the Sea* (27 November 2006) available online: <http://www.un.org/Depts/los/clcs_new/submissions_files/nor06/nor_exec_sum.pdf> (accessed 3 March 2010). Discussing geological and geomorphical characteristics of the continental shelf. Russia and Norway have both complied with the formal UNCLOS process by submitting claims to the Commission on the Limits of the Continental Shelf. 'Reaction of States to the submission made by Norway to the Commission on the Limits of Continental Shelf: Russia,' *United Nations: Oceans and Law of the Sea* (21 February 2007) available online: <http://www.un.org/Depts/los/clcs_new/submissions_files/nor06/rus_07_00325.pdf> (accessed 3 March 2010).

⁴³ Holmes, op. cit. (2008), p. 343.

⁴⁴ *Tunisia v Libya* 1982 ICJ at 47 ("It would be a mistake to suppose that it will in all cases, or even in the majority of them, be possible or appropriate to establish that the natural prolongation of one State extends, in relation to the natural prolongation of another State, just so far and no farther, so that the two prolongations meet along an easily defined line").

Historical Practice

Countries may advance historical arguments in two ways. First, a country might argue that its historical use or occupation of an area of the Arctic proves that other countries have acquiesced to a boundary line. Alternatively, countries might attempt the type of symbolic behaviour demonstrated by Russia when it used a submarine to plant a national flag 4,000 metres under the North Pole in an effort to promote its sovereignty claims.⁴⁵ The second is unlikely to have any legal effect.

The ICJ rejected arguments from historical practice in the case of *Tunisia v Libya*⁴⁶ but acknowledged that history could be a factor in delimiting the overlapping continental shelf claims at least in some cases.⁴⁷

The counter-argument is that UNCLOS represents a move away from historical rationales; for example UNCLOS allows historical consideration in some disputes, but not for disputes regarding adjacent or opposite exclusive economic zones or continental shelves.⁴⁸ This suggests that UNCLOS was not intended to allow historical considerations to be a factor in the type of continental shelf disputes that will emerge in the Arctic.⁴⁹

More broadly, it could be argued that the use of history seeks to supplant treaty law with customary law in a case where UNCLOS provides a legal framework. While it could be argued that custom is available to fill gaps when international treaties or statutes are insufficient, regardless of the shortcomings of UNCLOS, the use of historical precedent would frustrate UNCLOS' apparent goal to use legal rules to decide disputes.⁵⁰

⁴⁵ BBC News, op. cit. (2007).

⁴⁶ *Tunisia v Libya* 1982 ICJ at 68 ("Rejecting Tunisia's claim that after using an area of the ocean for fishing, Libya had acquiesced to a boundary line").

⁴⁷ *Tunisia v Libya* 1982 ICJ at 73 ("The historic rights remain however to be considered in themselves. Historic tides must enjoy respect and be preserved as they have always been by long usage.").

⁴⁸ UNCLOS Art. 15. Allows "historic title or other special circumstances" to be used in delimiting the territorial sea between countries with opposite or adjacent coasts while Art. 74 and 83 lack reference to the use of historical title for delimiting the exclusive economic zones or continental shelves between countries with opposite or adjacent coasts.

⁴⁹ Holmes, op. cit. (2008), p. 343.

⁵⁰ *Ibid.*

Accepting historical practice arguments also has the potential to motivate Arctic countries to occupy and develop areas as quickly as possible. Unlike *Tunisia v Libya*, where Tunisia had an eighty-year historical practice of fishing in the contested area, the Arctic is much less settled and therefore, more susceptible to destruction and exploitation.

The Equidistant Principle

Before UNCLOS, the 1958 Geneva Convention on the Continental Shelf provided that continental shelf disputes for countries with opposite or adjacent coasts should be determined by drawing a median line between the two coasts, unless the countries came to another agreement or special circumstances required a different arrangement.⁵¹ This method of delimitation is called the 'equidistant' or 'equidistance' principle. This principle has been considered in all three ICJ decisions with respect to overlapping continental shelf disputes.⁵² The equidistant principle has the advantage of being convenient, inexpensive and easy to apply;⁵³ and is invariably advanced by the smaller country.⁵⁴

However, despite its benefits, the ICJ has consistently emphasised its willingness to depart from the equidistant principle.⁵⁵ In *Libya v Malta*, for example, the court determined the boundary by finding the equidistant median line between the two coasts and adjusting it to give Libya a larger share based on its longer coastline.⁵⁶ Countries may also

⁵¹ Convention on the Continental Shelf, opened for signature 29 April 1958, 15 UST 471 art 6, (entered in force 10 June 1964).

⁵² *Libya v Malta* 1985 ICJ at 37-38; *North Sea Cases* 1969 ICJ at 23-24; *Tunisia v Libya* 1982 ICJ at 78-80.

⁵³ *Libya v Malta* 1985 ICJ at 19, describing the equidistant principle: "[N]o other of delimitation has the same combination of practical convenience and certainty of application."

⁵⁴ *Libya v Malta* 1985 ICJ at 19, Malta advanced an equidistance argument. Similarly, in the *North Sea Cases* 1969 ICJ at 23, Denmark and the Netherlands argued for an equidistant boundary,

⁵⁵ *Libya v Malta* 1985 ICJ at 38, "equidistance is [not] the only appropriate method of delimitation, even between opposite or quasi-opposite coasts, nor even the only permissible point of departure." *North Sea Cases* 1969 ICJ at 23, "[the advantages of the equidistance principle] do not suffice of themselves to convert what is a method into a rule of law, making the acceptance of the result of using that method mandatory."

⁵⁶ *Libya v Malta* 1985 ICJ at 56.

object to the equidistant principle on the grounds that it is an artefact of an old treaty that was not incorporated by UNCLOS.⁵⁷

As shown above, unfortunately UNCLOS is unlikely to resolve territorial disputes between countries with interests in the Arctic region, both because UNCLOS does not provide for effective dispute resolution and uncertainty on the principles to be applied.⁵⁸ This suggests the need for a different approach.

Arctic Regime Options: Development of an Arctic Treaty

To deal with the thorny question of territorial disputes, there is nothing to prevent the Arctic states from looking towards the Antarctic for a model for the Arctic region. The Antarctic Treaty System (ATS) is a successful series of five treaties that protect that region's similarly fragile environment with legally binding agreements. In 1961, at the time of the ratification of the Antarctic Treaty, the world faced a predicament in Antarctica similar to the one that it faces in the Arctic today. Seven countries had made territorial claims in Antarctica, a region rich in mineral resources. The Antarctic Treaty resolved these territorial disputes with an 'agreement to disagree' which froze the question of sovereignty for the duration of the treaty, and allowed States to focus on the region's preservation. According to Article IV, nothing in the Treaty "shall be interpreted as a renunciation...of previously asserted rights of or claims to territorial sovereignty in Antarctica." At the same time, no new claim, or enlargement of an old claim, can be asserted while the Treaty is in force.

A similar "agreement to disagree" provision could be incorporated in any Arctic Treaty. Such a provision would freeze in time the Article 76 claims of Russia, Norway and Denmark, as well as the potential claims of Canada and the United States. Some may argue that the coastal States would never freeze their sovereignty claims over valuable oil and gas reserves; however, this is exactly what States did when they ratified the Antarctic Treaty. It can work well in a situation where each state does not wish to degrade the commons, but will do so in order to prevent another state from degrading it first.⁵⁹ Perhaps during an imposed 'cooling off' period, states might come to see the Arctic in the same

⁵⁷ Holmes, op. cit. (2008), p. 349.

⁵⁸ Vsevolod Gunitskiy, 'On Thin Ice: Water Rights and Resource Disputes in the Arctic Ocean' *Journal of International Affairs*, vol. 61, no. 3 (2008), p. 262.

⁵⁹ Ibid.

light as the countries whose claims were frozen by the ATS came to view Antarctica: as an aesthetic, scientific, and environmental treasure.⁶⁰

Such a resolution may be unlikely in the Arctic, however, if this is not possible, a useful provision of an Arctic Treaty might be to create a working group composed of member states devoted solely to negotiating territorial claims in the Arctic. This body would work in concert with the CLCS, allowing claims to be discussed before they are presented in open forum.⁶¹ To reassure states that their claims will not be threatened, one article of the treaty could explicitly state that participation in the working group will not equate to a renunciation of or halt to existing territorial claims or a validation of claims made by other states.⁶² To further substantiate the flexibility and durability of a proposed Arctic Treaty, another potential article could establish a deadline for the dissolution of the working group or amending the group's procedures if no progress can be made.⁶³

Any Arctic Treaty would need to be based upon respect for the existing international legal frameworks that apply to the region, such as UNCLOS, and would also inevitably need to respect existing sovereign rights. However, within such a guiding framework there exists the potential to develop innovative responses to some of the region's challenges. An Arctic treaty could take the form of a relatively short framework treaty addressing the fundamental sovereignty and dispute resolution mechanisms and a set of overarching regional management principles that would provide a sound foundation for the region.⁶⁴

An Arctic Treaty could also consider mandating the demilitarisation of the region in order to emphasise the spirit of economic cooperation and scientific investigation, with exceptions made for military personnel protecting scientists and engineers.⁶⁵ This could potentially alleviate tensions, as it did in Antarctica.⁶⁶ Unfortunately this would be unlikely to be adopted since it conflicts with the interest of national sovereignty.

⁶⁰ Holmes, *op. cit.* (2008), p. 350.

⁶¹ Gunitskiy, *op. cit.* (2008), p. 269.

⁶² *Ibid.*

⁶³ Gunitskiy, *op. cit.* (2008), p. 270.

⁶⁴ Rothwell, *op. cit.* (2008), p. 250.

⁶⁵ Gunitskiy, *op. cit.* (2008), p. 262.

⁶⁶ *Ibid.*, p. 269.

An Arctic Treaty could also incorporate a prohibition on natural resource extraction, similar to Article 7 of the Protocol on Environmental Protection to the Antarctic Treaty⁶⁷ which prohibits mining in Antarctica for fifty years. Any moratorium could be reassessed in fifty years as for Antarctica thus satisfying coastal states' desire to stake a claim in the region while preventing oil and gas development for fifty years. Whether this option is viable depends on several factors such as climate change, ice-free seas, and loss of wildlife. Climate change effects could very well strengthen the case for oil and gas development in the area. On the other hand, proponents of an Arctic Treaty claim that implementation of the treaty may assist to mitigate and reverse some of these global warming-induced effects.⁶⁸ In the meantime, the Arctic will be protected and, because safe and economically feasible oil and gas development may not be possible for this period anyway, the coastal States may not have lost anything.⁶⁹

Despite the advantages of applying an Antarctic Treaty structure to the Arctic region, there are several key differences that would make an Arctic Treaty strictly modelled after the Antarctic Treaty inappropriate. Most obviously, Antarctica is a continent (a land mass), while the Arctic is an ocean. Therefore, countries are interested in using the Arctic for navigation, fishing, mining and defence, while countries proposed to prevent these uses in the context of Antarctica.⁷⁰ For these reasons, the stringent protections afforded by the Antarctic Treaty System may be inappropriate or unrealistic for countries negotiating a treaty for the Arctic.

Another problem with relying too heavily on the Antarctic Treaty is that its provisions have the character of temporary fixes rather than permanent solutions. Instead of arguing about overlapping claims or mining, the countries decided to wait fifty years. This arrangement certainly made sense at the time, particularly in light of Cold War concerns and indifference to the mining resources in Antarctica, but the "wait-and-see" character of the Antarctic Treaty may be unsuitable for the Arctic, where countries already seem disposed to act quickly.⁷¹

⁶⁷ Protocol on Environmental Protection to the Antarctic Treaty, opened for signature 1 December 1959, 402 UNTS 71 (entered into force 23 June 1961).

⁶⁸ Holmes, *op. cit.* (2008), p. 349.

⁶⁹ Carpenter, *op. cit.* (2009), p. 251.

⁷⁰ The Antarctic Treaty, opened for signature 1 December 1959, 402 UNTS 71 (entered into force 23 June 1961).

⁷¹ Holmes, *op. cit.* (2008), p.348-349.

Rather than copy the content of the Antarctic Treaty, a better solution may be to emulate its structure. There are several advantages to creating a multilateral agreement specifically governing the Arctic, notably that a multilateral Arctic agreement would be controlled by the Arctic countries themselves.

At the very least, a new Arctic Treaty should provide a binding legal framework for resolving overlapping continental shelf disputes. Several possible solutions come to mind, including dividing overlapping claims down the middle, with respect to the equidistant principle, and agreeing to binding resolutions in an international court that has experience adjudicating boundary disputes.⁷² Finally, a new Arctic Treaty should also preserve the navigation, peaceful purpose and environmental provisions of UNCLOS.⁷³ These important and unambiguous provisions should not present an obstacle to resolving continental shelf disputes.

Conclusion

If Russia's flag-planting marks a potential return to the realpolitik of yesteryear, then conflict over the Arctic offers an important test case for international law and global conflict management. The future of Arctic sovereignty could, therefore, provide some important lessons for drafting durable international treaties and managing resource disputes in the modern age.⁷⁴

It is clear that none of the Arctic states can individually deal with the challenges the region is facing.⁷⁵ The Norwegian, Russian, and United States experience as founding members of the Antarctic Treaty should give them confidence that a new regime approached in the right spirit of cooperation has great potential. A framework with sufficient institutional authority so as to entrench cooperation between Arctic States with respect to climate change, environment and sustainable resource management.⁷⁶ The time has come for an Arctic Treaty.⁷⁷

⁷² Ibid., p. 349.

⁷³ UNCLOS Art. 17-19 (navigation); 34-45 (navigation); 88 (peaceful purpose); 192-237 (environmental protection).

⁷⁴ Gunitskiy, op. cit. (2008), p. 262.

⁷⁵ Rothwell, op. cit. (2008), p. 251.

⁷⁶ Kefferputz and Bochkarev, op. cit. (2008), p. 10.

⁷⁷ Rothwell, op. cit. (2008), p. 252.