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Contents

Foreword	1
About the Editors	2
Eleanor Walsh <i>India: The New Coloniser in Africa?</i>	3
Lachlan Neville <i>Addressing Chinese Cyber Espionage Against Australia</i>	17
Lara Miles <i>An Effective Approach to People Smuggling in the Australian Context</i>	35
Gale Wilkinson <i>A Human Rights-Based Approach to Development: From Policy to Practice</i>	53
Patrick Hill <i>Japan's Retreat From Pacifism: Causes and Consequences</i>	67
Mary Szumylo <i>Dogs of War: The Regulation of Private Security Companies in the International Sphere</i>	79
Thomas Wooden <i>Balkan Enlightenment: The Role of Religion in the Break-Up of the Former Yugoslavia</i>	97
Callum Cross <i>The Diplomatic Beauty Pageant: Examining Australia's Campaign for a Non-Permanent Seat on the United Nations Security Council</i>	113
Hale Yildiz <i>Capital Goes Where Capital Grows: The Political Economy of Investment, Resource and Development in Central Africa</i>	129
Flavia Belleini Zimmermann <i>Strategic Considerations of the North West Shelf Venture and Its Impact on Australia–China Relations</i>	143
Rachelle Saad <i>An Experiment in Peacekeeping: United Nations in Somalia 1992–1995</i>	157
Katie Groot <i>Sharia Punishments and the International Criminal Court</i>	169

Foreword

The Australian Institute of International Affairs (AIIA) was established in 1924 to promote public understanding and interest in international affairs. The AIIA works actively to engage younger people in its work by coordinating events such as careers fairs, school events, mentoring, internships and a Young Diplomats Program.

As part of the AIIA's commitment to engage young people, AIIA National Office launched an internship program in 2006 that has hosted more than 300 interns to date. Internship opportunities also exist in all AIIA state and territory offices. Anyone who has served as an intern at the AIIA is eligible to submit a paper for publication in Emerging Scholars.

This year the AIIA received a high standard of submissions. The papers in this volume were selected after rigorous academic review and cover a range of topics in international affairs.

I would like to commend all of the authors for their work; their articles deserve a wide audience. Please note that the opinions contained in this volume are those of the authors alone.

My sincere thanks go to editors Craig Beyerinck, Rachelle Saad and Gale Wilkinson for their efforts in editing and coordinating this volume. They were a pleasure to work with and I look forward to watching them continue in impressive careers. We warmly thank all the reviewers and Sophie Qin for their support.

We hope this volume stimulates greater interest in international affairs.

Melissa H. Conley Tyler

National Executive Director, Australian Institute of International Affairs

About the Editors

The editors would like to thank the following people for generously contributing their time to the production of this volume: Kevin Boreham, Andrew Carr, Jocelyn Chey, David Envall, Matt McDonald, Chad Mitcham, Amy Nethery, Frank Smith, Andrew Stoler, Sue Thompson, Melissa Conley Tyler, Ali Watson, Vicki Waye and Andrew Williams.

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Gale Wilkinson graduated from the University of New South Wales with a Bachelor of Arts majoring in Politics, International Relations and Development Studies. She interned at AIIA National Office in 2011 before moving to the United Kingdom to complete her Masters Degree. She now holds an LLM Master of International Law. Her research interests focus on the implementation of human rights and their relationship with the development sphere. She is currently living in London and working for PricewaterhouseCoopers.

India: The New Coloniser in Africa?

Eleanor Walsh*

India and Africa have a centuries-long history with the modern-day relationship rooted in the shared experience of European colonialism. However, over the last 15 years Indian engagement has deepened and broadened and now encompasses the realms of economics, politics and security. During this time, Africa has served a dual purpose for New Delhi. First, India has continued to publically affirm its adherence to the principles of South–South cooperation (and its position as the leader of the developing world) and sees its activities in Africa as being a model of cooperation between countries of the Global South. Second, as a market for its goods and a source of energy, raw materials and political support, Sub-Saharan Africa represents a key component in enabling India to achieve its much-desired goal, major world power status. The truth that lies behind India’s rhetoric and diplomatic grandstanding is a stark choice between the material and the moral. While it has vociferously defended its actions as being wholly different from those of other powers, in reality it is the material that guides New Delhi’s African agenda. More worrying for the Subcontinent is that even after this choice, India’s march towards superpower status is not a smooth one.

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Introduction

All the major western powers have a long and sometimes troubled history of engagement in Africa.¹ However, in the last two decades a new crop of countries, including Russia, Iran and Turkey, have refocused their attention on the continent. Of course, in terms of Asian involvement in Africa, it has been China that has been at the centre of intense speculation, and sometimes even concern.² Nonetheless, since the end of the twentieth century scholars and politicians have begun to turn the spotlight on India's role in the continent.

With the widening and deepening of its engagement with Africa, India has acknowledged the 'emerging shifts in global economic and diplomatic centres of gravity' and has aimed to position itself at the heart of the challenges and opportunities provided.³ Equally the various demands of a growing economy and population, combined with maintaining New Delhi's long-standing rhetoric of being both an emerging superpower and the leader of the developing world, have led to an upsurge of interest directed across the Indian Ocean.

It is these last two points that will form the main focus of this article. There are two issues at stake: one, whether India's (re)engagement with the countries of Sub-Saharan Africa (SSA) has bolstered New Delhi's claim to be an advocate for the Global South; and two, the extent to which India has been able to utilise its dealings with the African continent in order to secure its position as a world power. First, however, these foreign policy principles that have guided successive Indian regimes require a little examination.

South–South cooperation

Mahatma Gandhi, the father of independent India, stated that Indian interaction with Africa is based on 'ideas and services, not of manufactured goods against raw materials after the fashion of Western exploiters'.⁴ Contemporary relations are spelled out in the government's 2008 India–Africa Framework for Cooperation Forum and the Delhi Declaration, both of which stress that the relationship must be founded on the concepts of South–South cooperation and mutual interest.⁵

While the widespread use of the word 'South' to describe developing nations has been in operation since the 1970s, the United Nations (UN) formally adopted the term South–South solidarity in 2003.⁶ Permeating the economic, social and political sectors, the

¹ For the purposes of this article, the term 'Africa' will be used to describe the countries of Sub-Saharan Africa only.

² See C. Alden, *China in Africa* (London: Zed, 2007); D. Brautigam, *The dragon's gift: the real story of China in Africa* (New York: Oxford University Press, 2009); and I. Taylor and Y. Xiao, 'A Case of Mistaken Identity: "China Inc." and Its "Imperialism" in Sub-Saharan Africa', *Asian Politics and Policy*, vol. 1, no. 4 (2009), pp. 709–725 *inter alia*.

³ E. Mawdsley and G. McCann, 'The Elephant in the Corner? Reviewing India-Africa Relations in the New Millennium', *Geography Compass*, vol. 4, no. 2 (2010), pp. 81–93.

⁴ M. Ghandi, as quoted in A. Vines, 'India's Africa engagement: prospects for the 2011 India–Africa Forum', *Programme Paper*, no. 2010/01, (London: Chatham House, 2010), p. 15.

⁵ See I. Taylor, 'India's rise in Africa', *International Affairs*, vol. 88, no. 4 (2012), pp. 783–784

⁶ UNDP (United Nations Development Programme) Forging a Global South: United Nations Day for South-South Cooperation Available (2004), available online: from <http://www.ctc-health.org.cn/file/2012060807.pdf> (accessed 12 January 2015).

UN's Industrial Development Organization (UNIDO) has declared that even before its official recognition, South–South cooperation represented ‘a broad framework for collaboration and the exchange of resources, technology, skills and knowledge between countries of the Global South’.⁷

To measure India's engagement with SSA, it is helpful to make use of development studies professor Fahimul Quadir's definition of South–South solidarity.⁸ Relying on ‘horizontal cooperation’, it requires that ‘any relationship be grounded in the principles of equality, partnership and mutual benefit’.⁹

This adherence to the doctrine of South–South cooperation is also inline with New Delhi's rhetoric of being the champion of Third Worldism, the foundations of which include non-alignment and challenging the global order. In the past, India has been aggressive in its desire to see more equity in international trade, for example at the Doha Development Round of the WTO. This is, of course, a critical issue for the farmers and business people of SSA. In showing that it is a leader of the Global South, India would also be able to strengthen its claim to being a world power (with the requisite influence and respect that this position would demand).

The importance of appearance

The second prism that this article will deploy is how India and Africa's relationship serves to lend credence to the Subcontinent's ambition of being viewed as a major global power, the ultimate expression of which would be the acquisition of a permanent seat on the UN Security Council. Indeed, India's place in the world was clearly spelled out even before independence by its soon-to-be first Prime Minister, Jawaharlal Nehru; ‘India could not be a mere hanger-on of any country or group of nations’.¹⁰ This question of where India sees itself in relation to the rest of the world is key to understanding its relationship with Africa. Former Foreign Minister Nirupama Rao repeatedly linked India's growing global role and profile with its activities in SSA.¹¹ For a country desirous of greater political influence, improved access to markets for its goods and secure sources of food and oil, Africa represents an area of real interest.

Therefore, in order to understand the true nature of Indo–African interactions it is necessary to focus on the key issues of trade, food and energy security, aid and diplomacy.

India–Africa: the ties that bind

Before being able to analyse whether the Subcontinent represents a new force in Africa or whether it is simply repeating colonial-style patterns of imbalance and dependency, it

⁷ C. Arthur, *Making It: Industry for Development*, 12 November, 4th Quarter (2012), p.3.

⁸ The terms South–South solidarity and South–South cooperation are used interchangeably throughout this paper.

⁹ F. Quadir, F, ‘Rising Donors and the New Narrative of ‘South–South’ Cooperation: what prospects for changing the landscape of development assistance programmes?’ *Third World Quarterly*, vol. 34, no. 2 (2012), p. 324.

¹⁰ S. Ganguly and M Pardesi, ‘Explaining Sixty Years of India's Foreign Policy’, *India Review*, vol. 8, no. 1 (Jan–Mar 2009), p. 11.

¹¹ K. Smith, ‘India's Identity and its Global Aspirations’, *Global Society*, vol. 26, no. 3 (Jul 2012)), p. 383.

is worth noting some details that have inspired authors such as Harry Broadman, Economic Adviser for the Africa Region at the World Bank, to state that ‘economic activity between Africa and Asia is booming like never before’.¹²

Historical linkages

To put India and Africa’s relationship into a historical context, it could be argued that the recognition of India as a major player in Africa is merely a more visible extension of previous patterns of trade and diplomacy. Records show that Indian merchants were plying their wares along the East African coast well before Portuguese explorers arrived in the sixteenth century.¹³ During colonial times this trade morphed into the movement of people as well as goods, and today over two million Africans can claim Indian origin.¹⁴

While there is undoubtedly a historical foundation to the Indo–African relationship, formal relations were only established against the backdrop of colonialism. At the time of India’s independence, only four African nations were sovereign states and the non-violent nature of Ghandi’s civil disobedience campaign was a source of inspiration to a new generation of African leaders. These included Kenneth Kaunda of Zambia, Ghana’s Kwame Nkrumah, Obafemi Awolowo of Nigeria and Tanzanian Julius Nyerere.¹⁵ Indian diplomatic staff in Africa were eager to stoke the fires of independence; colonial authorities demanded that the Subcontinent’s first commissioner in British East Africa be recalled to New Delhi after he vociferously gave his support to the nationalist movement.¹⁶

This support paid dividends in that India became a trusted ally for the newly independent states. New Delhi became one of the first diplomatic pit stops for the new leaders of SSA nations and while Ghana was establishing its foreign ministry, it requested that India represent Accra throughout the Middle East.¹⁷ For India’s first Prime Minister, the idea of a non-aligned and independent Africa was a powerful one; it not only played an important role in his attempts to mitigate the effects of the Cold War, but also had a significant part in his ‘vision of creating a just international order’.¹⁸ Nehru went so far as to label Africa as India’s ‘sister continent’.¹⁹

Although it is clear that the shared experience of colonialism provided India and SSA with a certain common ground, one should not be overly enthusiastic about this relationship. In the decades after independence, India was focused on internal and regional matters: the violence of partition and the Indian army’s intervention in East Pakistan (now Bangladesh). Furthermore, the economic and political energy that Indian

¹² H. Broadman, ‘China and India go to Africa: new deals in the developing world’, *Foreign Affairs*, vol. 87, no. 2 (2008), p.97.

¹³ D. McCormick, ‘China & India as Africa’s New Donors: The Impact of Aid on Development’, *Review of African Political Economy*, vol. 35, no. 155 (2008), p. 82.

¹⁴ *Ibid.*

¹⁵ J.P. Pham, ‘India’s expanding relations with Africa and their implications for US interests’, *American Foreign Policy Interests*, vol. 29, no. 5 (2007), p. 342

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ See S. Naidu, (2008) ‘India’s Growing African Strategy’, *Review of African Political Economy*, vol. 35, no. 115 (Mar 2008), p. 116.

¹⁹ J. Nehru, as quoted in Vines, op. cit. (2010), p. 3.

governments had to expend in managing the dynamics of the Cold War meant that New Delhi had little time or interest in engaging with Africa in a more concrete fashion. Moreover, the lack of support exhibited by the nations of Sub-Saharan Africa, after India's border dispute with China in 1962, was a grave disappointment to New Delhi and prompted India to be more introspective. Proof that Africa did not feature greatly in the minds of a series of Indian administrations lies in the fact that, as a cost-saving measure, diplomatic missions in Africa were being closed down right up until the 1990s. It should be noted, however, that India was well placed to renew its ties with the continent as it continued to emphasise its aforementioned commitment to South–South solidarity and its constant support for African nationalist movements.

Re-engagement with SSA came in tandem with the economic liberalisation of the early 1990s that saw the Subcontinent's policy-makers begin to align the country's foreign policy agenda with its growing economic ambitions.

Afro–Indian trade and investment: equal exchange?

Although numerous authors have noted New Delhi's desire to be seen to reject the Chinese model of engagement, it has certainly borrowed elements of this relationship.²⁰ In modelling themselves after the successful Forum on China–Africa Cooperation, the Africa–India Summits have the explicit aim 'to change the world's perception of India... in order to boost its global political standing'.²¹ The 2014 summit was postponed until the following year, due to fears surrounding the Ebola outbreak in West Africa.

One direct consequence of these summits has been the huge increases in Indo–African business; while trade generated US\$967 million in 1991, this had climbed to US\$25 billion by 2006.²² The latest figures from the Export-Import Bank of India (Exim) have trade between the two valued at US\$38 billion for the months of April 2011 to January 2012 alone.²³ Through its position in IBSA (India, Brazil, South Africa) Dialogue Forum and BRICS (Brazil, Russia, India, China, South Africa), India has also been able to cement its increasingly lucrative relationship with South Africa culminating in state visits by Jacob Zuma in 2010 and 2012, which included 230-plus delegations of businesspeople.²⁴

The positive impacts of Indo–African business

In terms of trade, it is primary goods that dominate Indian imports from Africa. However, there is evidence that even this narrow focus can have positive impacts on Africa's long-term development.²⁵ As noted by Ian Taylor, Professor in International Relations and African Politics at St Andrews University, increased competition for

²⁰ The 'Chinese model' is seen as bring rife with corruption and the willingness to do business with any regime, regardless of human rights abuses, environmental concerns etc. See I. Taylor, op. cit. (2012), p. 792; Mawdsley and McCann, op. cit. (2010), p. 89; and A. Narlikar, 'India's Rise to Power: Where Does East Africa Fit In?', *Review of African Political Economy*, vol. 37, no. 126 (2010), p. 456.

²¹ P. Kragelund, 'Back to BASICS? The Rejuvenation of Non-traditional Donors' Development Cooperation with Africa', *Development and Change*, vol. 42, no. 2 (2011), p. 596.

²² Naidu, op. cit. (2008), p. 119.

²³ Exim, *Export-Import Bank of India Annual Report 2011-2012*, (New Delhi: Export-Import Bank of India, 2012), p.25

²⁴ Vines, op. cit. (2010), p. 6.

²⁵ Naidu, op. cit. (2008), p. 121.

resources will inevitably reduce costs and thus improve the continent's 'capacity to gain access to goods and services at more acceptable prices'.²⁶ Moreover, with the immense purchasing power of India's growing middle class, consumer products are increasingly in demand. Meeting this voracious appetite for products has been credited with boosting the competitiveness of the African manufacturing sector and supporting industrialisation in general.²⁷

New Delhi has also moved to facilitate Indo–African trade through mechanisms such the preferential market access status conferred on exports emanating from all Least Developed Countries (LDC), 34 of which are in Africa.²⁸ With its adoption of the Duty Free Quota Free (DFQF) scheme endorsed by the World Trade Organisation in 2005, India became the first non-developed country to extend this facility to all LDCs in Africa.²⁹ While the agreement did not require developing nations to provide market access, it provided a unique opportunity for Afro–Indian commerce. Coming into effect in 2008, 85 percent of goods that were previously subject to tariffs could now enter the Indian market duty free; New Delhi has also accorded preferential market access to a further nine percent of products.³⁰ Most notable for an African context is that 92.5 percent of LDC global exports are now granted preferential market access.³¹ Economists for the UN Conference on Trade and Development (UNCTAD) and the Australian National University, David Vanzetti and Ralf Peters, have concluded that the additional exports from African LDCs are worth over \$4.2 billion.³² Thus, the Indian scheme has had a direct impact on the revenue now available to African governments and businesses.

It is also important to note the ways in which state-owned and private companies have been implicated in India–African relations, especially as New Delhi provides considerable and overt support to the Indian private sector.³³ These investments range from large-scale construction projects to acquisitions in the telecom industry. Indian companies have been noted, in opposition to their Chinese counterparts, for their high levels of integration into, and engagement with, the local socioeconomic environment.³⁴

With India's foreign direct investment (FDI) patterns growing by over 800 percent since the beginning of the twenty-first century, it is interesting to note which sectors of the African economy have been targeted.³⁵ The vast majority of FDI has been funnelled into

²⁶ Taylor, op. cit. (2012), p. 796.

²⁷ Broadman, op. cit. (2008), p.98; and Taylor, op. cit. (2012), p. 796.

²⁸ Vines, op. cit. (2010), p. 12.

²⁹ Government of India, 'Duty Free Tariff Preference (DFTPI-LDC) Scheme announced by India for Least Developed Countries (LDCs)' (2012), available online: http://commerce.nic.in/trade/international_tpp_DFTP.pdf (accessed 12 January 2012).

³⁰ Ibid.

³¹ D. Vanzetti and R. Peters, 'Nothing to Declare: Duty-free access to imports from LDCs' (2012) *Australian National University and UNCTAD Contributed Paper*, available online: <http://ageconsearch.umn.edu/bitstream/47646/2/> Vanzetti.Peters.pdf (accessed 12 January 2015), p. 1.

³² Ibid., p. 2.

³³ Mawdsley and McCann, op. cit. (2010), p. 84.

³⁴ F. Cheru and C. (eds.), *The rise of China and India in Africa : challenges, opportunities and critical interventions* (London : Zed, 2010). p.21; and M. Schoeman, 'Of BRICs and mortar: the growing relations between Africa and the global south', *The International Spectator*, (2011), pp. 37-38.

³⁵ J. P Pradhan, 'Indian Direct Investment in Developing Countries: Emerging Trends and Development Impacts', *UNCTAD Programme on South-South FDI and Developing Country TNCs Working Paper*, no. 2008/08 (New Delhi: Institute for Studies in Industrial Development 2008).

the manufacturing and service sectors, while only 18 percent has gone to the primary sector.³⁶ This therefore enables African countries to go beyond their traditional reliance on raw materials and gives them the opportunity to improve on their current position at the lowest rungs of the global production chain.³⁷

Thus, Indian involvement in SSA provides African governments with new opportunities as well as significant sources of income, which has traditionally come from development assistance. Both elites and ordinary Africans are afforded more options for trade and investment, consequently reducing their dependence on both their traditional trading partners in the West and on newer actors, namely China.

There are, however, some thorns to this rosy tale of economic cooperation and partnership.

Business as usual

India's commitment to have a 'moral basis' to its relations with Africa becomes increasingly untenable as its concentration on capital-intensive investments has so far created few jobs and thus appears to mirror developed nations' interactions with the continent.³⁸ Furthermore, as a large proportion of its interest in Africa is focused on commodities, there is a real risk that without proper management, New Delhi's trade relationship with SAA will continue to force Africa to the margins of the global economy. Such action would surely reproduce and reify what Professor Maxi Schoemen, Head of the Department of Political Sciences at the University of Pretoria, labels 'a pattern reminiscent of colonial and post-colonial' power relations.³⁹

Furthermore, while African import tariffs have seen significant reductions, New Delhi has in place numerous escalating tariff-rate structures making value-added imports from SSA more expensive.⁴⁰ This imbalance has enabled Indian goods and services to swamp local markets and has the potential to become another impediment to Africa's efforts to integrate into the global economy.⁴¹ Moreover, trade relations are notably unequal in terms of geography; South Africa makes up 68 percent of Sub-Saharan exports.⁴²

Throughout SAA New Delhi (and Indian private companies) has demonstrated the ability to 'fly under the radar' and to elicit a lot less anxiety and condemnation than their Chinese counterparts. However, with closer examination there appears to be increasing tensions between the reality of doing business in Africa and the official rhetoric of South-South cooperation.⁴³ Indian companies have been accused of being amongst the worst offenders for bribe paying. These undemocratic means of securing business deals are sure to escalate as investments spread throughout the continent.⁴⁴ With the

³⁶ Cheru and Obi, op. cit. (2010), p.90.

³⁷ Broadman, op. cit. (2008), p.105.

³⁸ Ibid., p. 100.

³⁹ Schoeman, op. cit. (2011), p. 38.

⁴⁰ Broadman, op. cit. (2008), p.102.

⁴¹ Jobelius, op. cit. (2007), p. 5.

⁴² Mawdsley and McCann, op. cit. (2010), p. 86; and Vines, op. cit. (2010), p.6.

⁴³ Vines, op. cit. (2010), p. 2.

⁴⁴ M. Jobelius, 'New powers for global change? Challenges for the international development cooperation: the case of India', *Dialogue on Globalization Briefing Papers*, no. 5 (New Delhi: Friedrich Ebert Stiftung, 2007); and op. cit. (2010), p. 88.

government's long history of acting as an enabler and fixer for the private sector, the allegations of corruption surrounding Indian companies, coupled with labour disputes in Kenya, Nigeria and elsewhere, are likely to cause the Indian state more public relations problems.⁴⁵ They also seriously undermine any public commitment on the concepts of fairness and partnership that underpin the ideal of South–South cooperation.

Thus, it would appear that when given the choice between an uninterrupted march towards great power status and maintaining its position of solidarity with the poorest citizens of the world, the Indian government chooses the former.⁴⁶ Indeed, even the former Prime Minister Manmohan Singh has stated that when it comes to safeguarding India's future, 'identification with the South is no longer possible nor desirable'.⁴⁷

To secure this future for India, and achieve its goal of being a major world power, there are two key areas that New Delhi sees as essential: food security and energy security.

Feeding India's growing hunger

Food security

Although the Subcontinent comprises only 3 percent of the world's landmass, it feeds 17 percent of the world's population and is plagued by small farms that are wholly inappropriate for large-scale commercial farming.⁴⁸ Given that the UN predicts that its population will reach over 1.7 billion by 2060, the issue of feeding the masses is obviously a pressing one.⁴⁹ As a result, the government has encouraged Indian companies to look further afield for options rather than purchasing food on the international market.⁵⁰ As 60 percent of the world's currently unfarmed arable land is located in Africa, that India's eye has fallen on the continent is unsurprising.⁵¹ An example of the government's approach to solving its impending food emergency can be seen in its relationship with Ethiopia, where through a 'Duty-Free Tariff Preference Scheme', imports from Ethiopia are more competitive in the Indian market due to lower import tariffs.⁵² While this obviously encourages Ethiopian production, its true objective is to increase exports to India.

While this may appear to be a true example of mutual benefit, accusations of 'land grabs' have surfaced. A different side of India's South–South relationship was exposed in 2013 when Ethiopian activists visited New Delhi to highlight the plight of Ethiopians being forcibly removed from their land by government forces to make way for Indian

⁴⁵ G. Price, 'For the global good: India's developing international role', *Chatham House Report*, London: Chatham House, 2011), p. 9.

⁴⁶ Smith, op. cit. (2007), p. 380.

⁴⁷ Ibid., p. 377.

⁴⁸ Price, op. cit. (2011), p. 5.

⁴⁹ I. Taylor, *The International Relations of Sub-Saharan Africa* (New York; London: Continuum, 2010), p.10; R. Shrinivasan, 'India's population will peak at 1.7bn in 2060: UN study', *Times of India* (5 May 2011), available online: http://articles.timesofindia.indiatimes.com/2011-05-05/india/29512357_1_population-projections-billionth-person-peak (accessed 12 January 2015).

⁵⁰ I. Taylor, op. cit. (2010), p.95.

⁵¹ Schoeman, op. cit. (2011), p. 39

⁵² I. Taylor, op. cit. (2010).

investors.⁵³ The fact that reports suggest that these expulsions are accompanied by the intimidation, detention and rape of objectors certainly sours any Indian assertion of South–South solidarity.⁵⁴ Indian claims that these large-scale land deals represent a win-win situation by supporting the introduction of modern agricultural and technological practices and by increasing employment opportunities are loudly disputed by NGOs.⁵⁵ Added to this is the sticky issue of the world’s largest recipient of food aid setting aside huge tracts of fertile land (more than 600,000 hectares or 1.5 million acres) to sell to Indian food companies.⁵⁶ The India described by its diplomats and government officials as offering a ‘model of engagement with the continent based on equality, mutual respect and benefits’ is beginning to look decidedly implausible.⁵⁷

Energy security

Satisfying India’s rapacious demand for energy influences much of its dealings with the African continent. Current projections have coal, the Subcontinent’s primary source of energy, running out within 40 years.⁵⁸ Furthermore, Vibhuti Haté, Research Associate at the Centre for International and Strategic Studies, predicts that demand for energy will double by 2025, by which time 90 percent of India’s petroleum will have to be imported.⁵⁹ This undoubtedly makes energy a critical factor in Afro–Indian relations. It is necessary to note that the Middle East currently accounts for most of India’s oil imports.⁶⁰ However, given the instability of that region and the fact that 60 percent of the top global oil and gas discoveries of 2013 were made in Africa, it is in India’s best interests to look for alternative supplies of energy.⁶¹

It should be emphasised that, in regards to its oil and gas engagements in Africa, New Delhi is willing, and able, to intervene to stop oil deals that it considers perilous.⁶² For example, in 2005 the state oil and gas company ONGC Videsh Ltd (OVL) was set to buy a 45 percent (\$2 billion) stake in Nigeria’s Akpo Field from South Atlantic Petroleum Ltd., a company controlled by former Nigerian Defence Minister General Theophilus Danjuma. However, the Indian Cabinet’s Committee on Economic Affairs vetoed the purchase due to political concerns over corruption, as well as a lack of due process. India’s loss was China’s gain as Beijing displayed no such qualms.⁶³

There have also been examples of positive consequences for local communities when Indian firms have invested in Africa. These include a variety of corporate social

⁵³ J. Vidal, ‘Indian investors are forcing Ethiopians off their land Thursday’, *The Guardian* (7 February 2013) available online: <http://www.theguardian.com/global-development/2013/feb/07/india-investors-forcing-ethiopians-off-land> (accessed 12 January 2015).

⁵⁴ Ibid.

⁵⁵ A. Mittal, ‘Indian land grabs in Ethiopia show dark side of south-south co-operation’, *The Guardian* (25 February 2013) available online: <http://www.theguardian.com/global-development/poverty-matters/2013/feb/25/indian-land-grabs-ethiopia> (accessed 12 January 2015).

⁵⁶ Ibid.

⁵⁷ Cheru and Obi, op. cit. (2010), p. 23.

⁵⁸ Naidu, ‘India’s Growing African Strategy’, (2008), p. 118

⁵⁹ V. Haté, (2006) ‘India’s Energy Dilemma’, *South Asian Monitor*, no. 98 (2006), p. 1.

⁶⁰ Naidu, op. cit. (2008), p. 118

⁶¹ A. Vines, ‘Africa’s oil and gas potential: Boom or hype?’ *CNN* (18 September 2014), available online: <http://edition.cnn.com/2014/09/18/business/africa-oil-gas-potential-boom-hype/> (accessed 15 January 2015).

⁶² See Vines, op. cit. (2010), pp. 1-19.

⁶³ Ibid.

responsibility projects.⁶⁴ However, any ethical considerations that were at play in this case were curiously absent in dealings with Sudan. While many oil companies were shying away from dealing with Khartoum due to concerns over the regime's human rights record, OVL concluded a deal which was the recipient of 'some timely diplomatic backing from the [Indian] Ministry of External Affairs'.⁶⁵ It seems that while in the past India has not been scrutinised to the same degree as other actors, such as China, it would be prudent for New Delhi to address increasing concerns from within Africa and from abroad. As Taylor baldly states, it is in the oil sector that 'Indian investment perhaps poses the greatest risk for ordinary Africans'.⁶⁶ Africa experts Cheru and Obi are equally stark in their assessment of New Delhi's oil dealings: India runs the risk that 'the red carpet rolled out to welcome it to the continent... [will be] quickly... rolled up and taken away'.⁶⁷ And with it any hopes of utilising a relationship with Africa to support its global ambitions.

To ease relations with African governments, India, like many other nations, relies heavily on the key mechanism of development assistance.

Indian development cooperation: unique and successful?

While the symbolism of India making the transition from aid receiver to aid donor feeds into its desire to be seen as a major world power, it could be argued that New Delhi's role as a defender of the developing world is reaffirmed by the fact that, despite the existence of a clear self-interested economic element to India's provision of aid, its development cooperation is available to both resource-rich and resource-poor nations.⁶⁸

The positive side of Indian aid

In a paper on the challenges of international development cooperation, German researcher Matthias Joblius found that as New Delhi 'explicitly emphasises that the goal of its development work is to further Indian interests abroad and to promote its own economic situation', there appears a certain honesty that pervades its relations with Africa.⁶⁹ Given that Exim's stated mission is to 'enhance exports and integrate India's international trade and investment with its economic growth', the fact that New Delhi is ultimately concerned with not only securing access to new markets, but also guaranteeing its energy and food security should not come as any surprise.⁷⁰

An important component of New Delhi's development assistance is Exim, which functions as India's main agent for distributing aid to Africa. Through its program of concessional loans, or lines of credit (LOC), India has sought to support a number development projects which could go a long way in overcoming one of the continent's biggest barriers to development: its crushing infrastructure problems. For example, in 2012 a US\$15 million LOC of was extended to the Government of Benin in order to promote transport linkages with neighbouring countries.⁷¹

⁶⁴ See Taylor, op. cit. (2012), p. 792.

⁶⁵ R. Beri, 'Africa's energy potential: prospects for India', *Strategic Analysis*, vol. 29, no. 3 (2005), p. 382.

⁶⁶ Taylor, op. cit. (2012), p. 791.

⁶⁷ Cheru and Obi, op. cit. (2010), p. 26.

⁶⁸ Schoeman, op. cit. (2011), p. 40.

⁶⁹ Jobelius, op. cit. (2007), p. 4.

⁷⁰ Exim, op. cit. (2012), p.13.

⁷¹ Exim, op. cit. (2012), p.17.

It is interesting to note that India is rather unique in focusing as it does on less corruption-inducing projects rather than monetary donations.⁷² Areas of note have included academic scholarships and IT support. The Indian Technical and Economic Cooperation Program (ITEC) delivers US\$1 billion worth of assistance and the Indian-funded African e-Network provides essential tele-medicine and tele-education to the poorest and most remote parts of the continent.⁷³ There have also been welcome moves to use India's comparative advantage in cheap pharmaceuticals to aid in the fight against the HIV/AIDS epidemic.

Unlike its Western rivals, Indian development assistance is marked by a lack of political conditionalities. India's experience in how to operate in a post-colonial world is arguably more relevant to African states than any policy advice coming from Europe or the United States (US); the lack of rhetoric on human rights and democracy promotion is completely in line with the model of non-interference and respect for sovereignty that has been long been at the heart of Indian foreign policy. Although, given that Indian aid emanates from the largest democracy in the world, perhaps it subtly encourages all the positive attributes of a democratic state.

The exact nature of Indian assistance is somewhat difficult to estimate due to the inclusion of aid types that do not fit the definitions of development assistance laid down by the OECD's Development Assistance Committee. There are, however, numerous identifiable shortcomings to India's aid efforts in Africa that could result in harming both recipient and donor.

Indian development assistance: pragmatism vs. South–South solidarity

New Delhi's development program has suffered from a lack of a unified approach. It was presumed that the Indian International Development Cooperation Agency would coordinate efforts thus ensuring maximum efficiency in the delivery of development assistance. However, 'turf wars' between various ministries have thus far stymied any form of progress. This has resulted in a distinct dearth of information about the exact nature of aid programs as well as questions over whether the benefits provided are real or simply hypothetical.

Obviously it would be naïve to think that New Delhi's aid policies were wholly altruistic. However the importance of development assistance being used as a complementary foreign policy tool cannot be overstated. India's aid largesse has also been linked to support from individual countries such as Malawi and Tanzania, as well as the African Union, in regards to its bid to secure a permanent seat on the Security Council.⁷⁴ There is an acknowledgement from senior figures in the Indian government that the LOCs can sometimes be seen 'as nothing more than an export subsidy scheme for surplus goods'.⁷⁵ It is interesting to note that India's policy of tying aid to the

⁷² S. Agrawal, 'Emerging Donors in International Development Assistance: The India Case', *IDRC Report - Partnership and Business Development Division* (Ottawa: IDRC, 2007).

⁷³ Naidu, op. cit. (2008), pp.125-126; and Vines, op. cit. (2010), p. 16

⁷⁴ P. Clottey, P, African Union to Bolster Ties with India, *VOA* (24 May 2011), available online: <http://www.voanews.com/content/african-union-to-bolster-ties-with-india--122612019/158184.html> (accessed 12 January 2015).

⁷⁵ Agrawal, op. cit. (2007), p.8.

purchase of Indian goods and services is something that New Delhi has, in the past, refused to accept from others. Thus, it would appear that India is running the risk of engaging in practices that it has often derided when carried out by its former donors. The success of India's attempts to establish itself as an inherently different actor in Africa is looking decidedly dubious.

There is obviously a growing discrepancy between India's stated aims and the actions it perceives as necessary to secure its future economic needs. Perhaps it's best left to the continent's former Prime Minister to explain. In a speech to new members of the Indian diplomatic corps, Manmohan Singh clearly spelled out his view that a foreign policy approach underpinned by the Nehruvian principle of equality and cooperation for mutual benefit is out-dated and unwanted: '[t]he world is not a morality play'.⁷⁶

Security and diplomacy

In order to keep its relationship with Africa on an even keel, New Delhi has pursued a number of different avenues including a total of 42 'Indian Missions Abroad' located in Africa.⁷⁷ Furthermore, India's military links with an ever-growing list of African nations are a component of its policies towards the continent that span the economic, diplomatic and development spheres. With piracy in the Indian Ocean a continuing threat to the huge volume of trade that comes by sea, India has taken a leading role in coordinating maritime security operations. Having established a surveillance post in Madagascar in 2007, India has also signed a raft of defence agreements with numerous African nations including Kenya, Mozambique and Tanzania.⁷⁸ Not only has India conducted joint coastal patrols for various summits as well as naval exercises with its IBSA allies, but the Indian military has also conducted a variety of training program through ITEC.⁷⁹ Although this involvement is small, it is only a matter of time before India begins to reap more benefits from its position as a regional military power with an undeniably important geostrategic location.

It is the area of peacekeeping that affords us a different perspective on Indo–African relations. New Delhi has taken part in all UN peacekeeping missions in Africa, contributing large numbers of soldiers and earning it enormous goodwill, especially in West Africa. These efforts, coupled with support for regional institutions such as the African Union and the Economic Community of West African States (ECOWAS), should allow New Delhi to acquire what India Cheru and Obi determine as 'crucial allies' thus strengthening India's 'hope to be recognised as a major emerging player in international relations both by the global South and the developed North' – everything the Subcontinent has always wanted and believed it deserves.⁸⁰

Nevertheless, there is arguably a gulf between what India wants to do, says it is going to do and what it actually does. For example, despite efforts by the Ministry of External Affairs to increase its diplomatic presence on the continent, the number of officials remains comparatively small; 'India's 1.2 billion people are represented by about the

⁷⁶ Smith, *op. cit.* (2007), p. 375.

⁷⁷ Ministry of External Affairs, 'Indian Missions Abroad', Government of India, available online: <http://www.mea.gov.in/indian-missions-abroad.htm> (accessed 5 December 2014).

⁷⁸ Cheru and Obi, *op. cit.* (2010), p. 72.

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*, p. 68.

same number of diplomats as Singapore's 5m'.⁸¹ Many diplomats lack the necessary language skills to work effectively in non-English speaking African nations and there exists general lack of knowledge and interest in media and academic circles. Overall, this has resulted in bureaucratic, financial and even public interest hurdles that limit any large-scale engagement with the continent.

Thus, it could be dangerous to overestimate the place of Africa for the Indian state. Trade with its Asian neighbours spectacularly overshadows its current commitments to the African continent and it must be remembered that many percentage increases in trade between the two look impressive mainly due to the low starting point. New Delhi's aid budget must also be put into context. In the fiscal year 2009–2010, while India's official development assistance to the whole of Africa was calculated at Rs.20.53 billion, Afghanistan received Rs.400 billion.⁸² Even Africa's share of the much-touted LOCs amounted to just over half of the overall spend.⁸³

Conclusion

With increased involvement between the Subcontinent and Africa come increased opportunities as well as challenges. As Indo–African engagement deepens and expands, it is becoming increasingly obvious that India's interest in South–South cooperation and solidarity is playing a definite second fiddle to its economic goals. New Delhi's public adherence to the rhetoric only seems to make an appearance when it serves to emphasise India's influence and reach throughout the developing world. It is therefore the material rather than the moral that is paramount for today's leaders and perhaps India's Africa policies are in danger of following the well-trodden path of their shared former colonial masters. India's vision of itself as a global power at the vanguard of a new world order is marred by the fact that the Subcontinent has increasingly embraced the very fundamentals of contemporary international affairs. In former Prime Minister Singh's words, '[t]he world's political and economic system is a power play and those who have greater power use it to their advantage'.⁸⁴

In regards to India's desire to be seen, and treated, as a world power, New Delhi has been able to gain allies, energy and food sources as well markets amongst the nations of SSA; this 'Africa bloc' could represent a crucial element in strengthening India's voice in international fora. However, whether India actually has this muscle to flex is still in dispute. Domestic and regional politics are still foremost in the minds of most Indian politicians and citizens and a few diplomatic overtures and security pacts with African countries will not change this. Domestically, the levels of poverty and inequality in the Subcontinent remain another hurdle to overcome. In short, it would appear that Indian political scientists Ganguly and Pardesi's conclusion is sound; despite all its efforts, 'any jubilation about India's imminent emergence as the next Asian great power is somewhat premature'.⁸⁵

⁸¹ Economist, 'Can India become a great power', *The Economist* (30 March 2010), available online: <http://www.economist.com/news/leaders/21574511-indias-lack-strategic-culture-hobbles-its-ambition-be-force-world-can-india> (accessed 12 January 2015).

⁸² Cheru and Obi, op. cit. (2010), pp. 17-18.

⁸³ Exim, op. cit. (2012), p.47

⁸⁴ Smith, op. cit. (2007), p. 375.

⁸⁵ Ganguly and Pardesi, op. cit. (2007), p. 17.

However, when discussing India's, or any other actor's, policies towards Africa, it is easy to ignore the factor of African agency. It is in the hands of Africa's political and economic leaders that the success of Indian engagement in SSA lies. If leadership from these groups is lacking, and if Indian investment, trade and development assistance is not properly managed, we could witness a sort of neo-colonialism by invitation, the consequences of which would be devastating. The image of India as the new coloniser would rock the very foundations upon which the Indian state is built and New Delhi would be implicated in writing the latest chapter in the story of the hardship and suffering of the African people.

Addressing Chinese Cyber Espionage Against Australia

Lachlan Neville*

Australia continues to face an increasing cyber threat from foreign sources, with a disproportionate number of attacks originating from within China; Australia's number one trading partner. Australia's Cyber Security Operations Centre has reported an increasing number of attacks on Australian businesses and Government targets each year. Although the cost to the Australian economy has been difficult to calculate, the theft of intellectual property has mounted to billions of dollars. Chinese involvement in these incidents has become a primary focus for Australia and its allies, due to reports by private cyber security firms and US Government departments directly accusing the Chinese People's Liberation Army of funding and perpetrating these attacks. Despite mounting evidence of this, however, the Australian Government has yet to take an official position on these accusations. This paper analyses several approaches that the Australian Government could pursue in dealing with this issue including: Australia's current cyber security strategy and cooperation with its allies; learning from US attempts to engage with China bilaterally; and the efficacy of international efforts to establish cooperation on this global issue.

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Introduction

The ongoing cyber-thefts from the networks of public and private organizations, including Fortune 500 companies, represent the greatest transfer of wealth in human history—General Alexander, Commander of US Cyber Command, National Security Agency Director¹

The integration of cyber technologies in networking industry and government has expanded rapidly over the past decade, coinciding with a sharp increase in the use of the same technologies for industrial espionage. The massive growth of cyber espionage in recent years has had a profound economic impact on the industry of national economies such as the United States (US). A 2014 McAfee report into the global cost of cyber attacks placed global financial losses to national incomes as high as US\$575 billion in 2014 alone.² However, this dollar figure is likely a significant underestimate due to the underreporting of incidents by major companies and a lack of effort by states to investigate losses.

Harder to calculate, and perhaps more devastating to national economies in the long term, has been the theft of intellectual property (IP). This form of cyber industrial espionage is particularly harmful to hi-tech industries in developed nations, as they rely on IP to maintain market competitiveness and to support the future growth of domestic industry. Furthermore, evidence of cyber espionage against militaries, such as the US Department of Defense, threatens national security owing to the loss of invaluable military technology and strategic intelligence.

As a result of the sophistication of these types of cyber attacks and their targets, increased global cyber espionage has been attributed primarily to state and state-affiliated groups—accused of over 87 percent of incidents in 2013 alone.³ While the main target countries are classified as within the G-20, so too are the main offenders which include the US, China and Russia. China, however, is increasingly accused as being the most virulent offender, targeting foreign industry and governments in order to rapidly modernise its own domestic industry.

Reports by cyber security firms, including McAfee and Mandiant, have provided detailed analysis and evidence of cyber attacks originating from within China; specifically attributing these to the People's Liberation Army (PLA).⁴ Lending support to these claims, the US has publicly accused China of such attacks since 2006,⁵ culminating in the indictment of five PLA officers on charges of economic espionage and computer hacking by the US Department of Justice.⁶ Evidence of cyber attacks by

¹ K. Alexander, 'An Introduction by General Alexander', *The Next Wave*, vol. 19, no. 4, (2012).

² McAfee, 'Estimating the Global Cost of Cybercrime', *Centre for Strategic and International Studies*, Santa Clara (2014), p. 6.

³ Verizon, '2014 Data Breach Investigations Report' (2014), available online: http://www.verizonenterprise.com/DBIR/2014/reports/rp_dbir-2014-executive-summary_en_xg.pdf (accessed 25 September 2014), p. 39.

⁴ Mandiant, 'APT1: Exposing One of China's Cyber Espionage Units' (2013), available online: http://intelreport.mandiant.com/Mandiant_APT1_Report.pdf (accessed 20 September 2014).

⁵ W.C. Hannas, J. Mulvenon and A.B. Puglisi, 'Chinese Cyber Espionage', in *Chinese Industrial Espionage* (Routledge, Milton Park, Abingdon, Oxon, 2013), p. 216.

⁶ United States Department of Justice, 'U.S. Charges Five Chinese Military Hackers for Cyber Espionage Against U.S. Corporations and a Labor Organization for Commercial Advantage', *media release*,

Chinese sources suggests not only an increase in the number of cyber-attacks, but also in the number of targets. Most of these targets are governments and businesses from English-speaking countries,⁷ namely the US, UK and, increasingly, Australia.

In May 2013, the ABC's Four Corners program revealed several Australian Government departments and businesses had been the victims of numerous cyber attacks, which had emerged from within China.⁸ The report named Adelaide-based electronics firm Codan as one of the victims, claiming Chinese spies engaging in cyber espionage had stolen blueprints and later disseminated these to domestic electronic firms within China. Despite the financial losses attributed to the alleged cyber theft, Codan refused to confirm the claims, joining the chorus of silence within government regarding alleged Chinese cyber hacking. Then-Prime Minister Julia Gillard instead offered a swift rebuttal stating that the report contained 'a number of unsubstantiated allegations',⁹ mirroring the Chinese foreign ministry's own comments of 'groundless accusations'. In addition to Codan, Four Corners also claimed several Federal Government departments had also been breached by Chinese cyber hackers, including the Department of Foreign Affairs and Trade (DFAT), Defence, and Australian Security Intelligence Organisation (ASIO).

Although Australian officials have recognised the growing threat to Australia from foreign cyber activity, officials have yet to directly confront China or engage in diplomatic discussion over the issue. The Australian Government's only official statement thus far has been in response to the Four Corners report, stating that 'Australia discusses cyber issues with a range of countries, including China', and that in April 2013 Prime Minister Julia Gillard had 'raised a number of issues with Premier Li, including cyber security'. No additional statement or information regarding Australia's engagement with China over this issue has since been provided. In addition to this, Australia's national Cyber Security Strategy has not been updated since 2009 and has little mention of foreign state-based cyber espionage.

The continued silence by Australian authorities over Chinese involvement—in contrast to the US Government—may in part reflect the difficult position Australia faces. Since China became Australia's largest trading partner in 2007, the Australian Government has focused on building a warmer relationship with China particularly with regard to establishing a free trade agreement.¹⁰ As such, confronting the Chinese government over the issue of cyber espionage could prove damaging and risky for present and future two-way trade. Nevertheless, the cost of not taking stronger action could prove far more detrimental to the Australian economy and national interest in the long term.

Washington (19 May 2014), available online: <http://www.justice.gov/opa/pr/us-charges-five-chinese-military-hackers-cyber-espionage-against-us-corporations-and-labor> (accessed 10 October 2014).

⁷ Mandiant, p. 4.

⁸ K. O'Brien, 'Hacked', *Four Corners* (27 May 2013), available online: <http://www.abc.net.au/4corners/stories/2013/05/27/3766576.htm> (accessed 18 August 2014).

⁹ E. Griffiths and S. McDonell, 'ASIO hack: Julia Gillard defends intelligence funding for spy agency while China rejects link', *ABC News* (28 May 2013), available online: <http://www.abc.net.au/news/2013-05-28/gillard-defends-intelligence-funding-in-wake-of-asio-hack/4718166> (accessed 26 September 2014).

¹⁰ Australian Government Australian Government Department of Foreign Affairs and Trade, 'People's Republic of China Country Brief' (2014), available online: http://www.dfat.gov.au/geo/china/china_brief.html (accessed 9 September 2014).

This report, therefore, intends to provide an informed contribution to the discussion of cyber security policy within Australia by examining the extent of Chinese cyber espionage, the Australian Government's current approach to cyber security in contrast to the US and, finally, the diplomatic options Australian authorities should pursue in taking action on this growing issue.

Terminology

Although cyber espionage is the focus of this report, some important clarifications regarding terminology are required in reference to cyber espionage and cyber crime. Cyber espionage in the context of this report is understood as a form of signals intelligence operations conducted by state intelligence agencies as an extension of traditional intelligence collections methods. As such, this is generally considered an acceptable modern application of espionage activity in the international system. Cyber crime however, may refer to any method of cyber attack that is used 'to engage in criminal activities by an actor for a profit'.¹¹

The issue with these two definitions emerges from the increasing use of cyber espionage by state intelligence agencies to engage in cyber crime against another state, which blurs the distinction between accepted forms of state intelligence operations and theft. Furthermore, the targeting of IP and critical national infrastructure has begun to transform the international debate over this issue from regulating transnational cyber crime to concerns over cyber warfare. Further elaboration on this issue is contained within a latter section of this paper that discusses the multilateral approaches Australia may take in dealing with Chinese cyber espionage.

Chinese cyber espionage on Australia

The increasing number of attacks on Australia

Following the revelation by ABC's Four Corners program in 2013 that several Australian businesses and government departments had been hacked, it has come to public attention that cyber espionage has become a national security issue for Australia. Worldwide, the numbers of incidents recorded has seen 'consistent, significant growth',¹² as threats continue to become increasingly sophisticated.¹³ Australia's Cyber Security Operations Centre reported in 2013 that the number of incidents detected in Australia had risen from 1,259 in 2011, to 1,790 in 2012, with a further 789 by mid-2013 alone.¹⁴

The economic damage of these attacks on the Australian economy remains difficult to calculate due to the underreporting of incidents by business,¹⁵ however, a 2014 McAfee report estimated that these attacks were already costing Australia up to 0.08 percent of

¹¹ J. Karlsrud, 'Peacekeeping 4.0: Harnessing the Potential of Big Data, Social Media, and Cyber Technologies', in J.F. Kremer and B. Müller (eds.), *Cyberspace and International Relations: Theories, Prospects and Challenges* (Springer: Heidelberg, New York, Dordrecht, London, 2014), p. 141.

¹² Verizon Enterprise, p. 38.

¹³ Australian Security Intelligence Organisation, 'ASIO Report to Parliament 2012-2013', Canberra (2013), p. 5.

¹⁴ Australian Signals Directorate, 'The Cyber SITREP', presented at the 3rd Annual Australian Defence Magazine Cyber Security Summit, Canberra (12 July 2013).

¹⁵ McAfee, p. 6.

its GDP every year.¹⁶ Adding to cost of these attacks is the theft of IP from Australian industry, which some estimating the cost to the economy as high as \$15 billion annually.¹⁷ This is significant when considering the contribution of intellectual property industries in Australia providing \$93.2 billion to the economy and employing 8 percent of the national workforce.¹⁸ As such, protecting intellectual property from cyber espionage is not only vital to individual businesses, but to Australia's economic security.

In addition to the economic cost, cyber espionage also threatens national security as attackers target governments as well as businesses. In recent years, reports have emerged detailing breaches within ASIO, the Department of Defence, DFAT, and the Australian Parliamentary Network.¹⁹

Suspected Chinese involvement

Although Australia faces the threat of cyber espionage from a variety of sources, China is frequently cited as the main offender in attacks on Australia and other developed nations.²⁰ Actual evidence of Chinese cyber espionage in Australia remains sparse, however allegations of Chinese involvement are frequent.²¹ Academics from Australian universities have suggested that Australia is just as much a target of Chinese cyber espionage operations as the US or other countries'.²² In 2013, then-opposition defence spokesman David Johnson spoke out accusing the Chinese PLA of hacking into the computer systems of Australian mining companies and federal parliament, following a briefing by the Australian Signals Directorate.²³

Further abroad, China has also been the focus of allegations by several US officials and government reports. In 2011, the Office of the National Counterintelligence Executive report to US congress labelled China a 'persistent collector' of economic intelligence and the world's most active perpetrator of economic espionage.²⁴ The report further stated that 'other advanced industrial countries principally blame China'.²⁵ In May 2013, a report conducted by the Commission on the Theft of American Intellectual Property also accused the Chinese government of sponsoring between 50 percent and 80 percent

¹⁶ Ibid., p. 21.

¹⁷ F. Foo, 'IP theft costs Australia \$15bn', *The Australian* (15 November 2013), available online: <http://www.theaustralian.com.au/technology/ip-theft-costs-australia-15bn/story-e6frgakx-1226761311674> (accessed 8 October 2014).

¹⁸ PricewaterhouseCoopers, 'The Economic Contribution of Australia's Copyright Industries', *Australian Copyright Council* (2012), p. 4.

¹⁹ Four Corners, 'Hacked'; M. Siegel, 'Chinese spies read Australian MPs' emails for a year: report', *Reuters* (27 April 2014), available online: <http://www.reuters.com/article/2014/04/28/us-australia-chinahacking-idUSBREA3R00420140428> (accessed 16 October 2014).

²⁰ Hannas, et al., pp. 216-217.

²¹ T. Feakin, 'Enter the Cyber Dragon: Understanding Chinese Intelligences Agencies' Cyber Capabilities', *Australian Strategic Policy Institute*, no. 50 (2013), p. 1.

²² B.M. Thompson, 'Chinese Cyber Hacking: Australia-China FTA Talks Under Threat', *QUT News* (6 June 2014), available online: <http://www.qutnews.com/2014/06/06/chinese-cyber-hacking-australia-china-fta-talks-under-threat/#.VFQkj4cxFsM> (accessed 20 October 2014).

²³ B. Nicholson, 'Coalition says Chinese cyber espionage must be stopped', *The Australian* (30 August 2014), available online: <http://www.theaustralian.com.au/national-affairs/election-2013/coalition-says-chinese-cyber-espionage-must-be-stopped/story-fn9qr68y-1226706983699> (accessed 20 October 2014).

²⁴ Office of the National Counterintelligence Executive (NCIX), 'Foreign Spies Stealing US Economic Secrets in Cyberspace' (2011), p. i.

²⁵ Ibid., p. B-1.

of international IP theft, describing these activities as encouraged by ‘national industry policy goals’.²⁶

Thus far the Australian Government has not advanced a public position on these claims,²⁷ however, concerns over the security of Chinese state-owned enterprises (SOEs) operating in Australia led to a ban in 2012 of telecommunications provider, Huawei, from involvement in the construction of the National Broadband Network (NBN). The ban was a result of advice given by ASIO that was ‘based solely on security matters’, following a similar ban by the US in which the National Security Agency (NSA) described Huawei as a spy for the Chinese government.²⁸

A 2013 report, by US cyber security firm Mandiant, detailed evidence of Chinese involvement in cyber espionage. The report, *APT1: Exposing One of China’s Cyber Espionage Units*, exposed in detail the structure, capabilities and targets of Chinese hackers. Most importantly, the report directly demonstrated the Chinese PLA was a primary source of cyber attacks on Western countries, including Australia.²⁹

Chinese cyber capabilities, targets, and objectives

The PLA recognises the importance of cyberspace to both its military fighting capacity and use in information warfare.³⁰ The asymmetric nature of cyber-attacks—that are able to reduce the technological advantage of powerful states such as the US—have thus been a primary focus for China’s military.³¹ A secondary application of this development has been its use in conducting espionage for the purpose of acquiring foreign military technology.

As the PLA’s offensive cyber capabilities have developed, its cyber espionage program has expanded from strategic targets to economic targets.³² As such, the core of China’s cyber espionage program is conducted within the PLA. The department tasked with cyber operations is the third Department of the General Staff, the most senior of the PLA. Situated within this department is Unit 61398, which directly reports to the Central Military Commission and is well resourced and well funded. Mandiant estimates that Unit 61398 is large enough to be ‘staffed by hundreds, and perhaps thousands of people’.³³ Furthermore, Unit 61398 is directly supported by China Telecom, which

²⁶ The National Bureau of Asian Research, ‘The IP Commission Report’, *The Commission on the Theft of American Intellectual Property* (2013), p. 3.

²⁷ Feakin, p. 1.

²⁸ R. Peake, ‘Chinese firm’s NBN ban not political: ASIO’, *Canberra Times* (18 October 2012), available online: <http://www.canberratimes.com.au/national/chinese-firms-nbn-ban-not-politicalasio-20121017-27rxv.html> (accessed 23 November 2014); C. Joye and P. Smith, ‘NSA Spy Praises Huawei Ban’, *Australian Financial Review* (8 May 2014), available online: http://www.afr.com/p/technology/nsa_spy_praises_huawei_ban_v4IilOKDavNyMNyR1P3Q2L (accessed 15 November 2014).

²⁹ Mandiant, 2013; C. Joye, ‘China Ramps Up Spying on Australian Business’, *Australian Financial Review* (14 October 2014), available online: http://www.afr.com/p/special_reports/opportunityasia/china_ramps_up_spying_on_australian_RAWFIGZ4USnF8RHWSbnA8K (accessed 15 November 2014).

³⁰ United States Department of Defense, ‘Military and Security Developments Involving the People’s Republic of China 2014’, Washington (2014), p. 35.

³¹ R. Prakash, ‘China and Cyberspace’, *ORF Issue Brief*, no. 52 (2013), p. 2.

³² *Ibid.*, p. 3.

³³ Mandiant, p. 3.

provides the fibre optic telecommunications infrastructure necessary to carry out its operations.³⁴ In addition to Unit 61398's extensive physical infrastructure and operation within China, they also control 'thousands of systems in support of their computer intrusion activities' around the world.³⁵

Due to the extent of China's cyber capabilities, Unit 61398 has been able to target an extensive number and range of industries in many countries. Targets include both the public and private sector, with particular focus on industries that match those 'China has identified as strategic to their growth'.³⁶ In their report Mandiant identified IT, aerospace, public administration, telecommunications, and scientific research as the top five industry targets.³⁷

These industries are primarily targeted for their intensive innovation in the production of new technologies. China's dire need to rapidly modernise its domestic industry has seen its cyber espionage program pursue an industrial focus. Despite continued economic growth—which is predicted to make the Chinese economy the largest in the world—the Chinese Government is acutely aware of the need to move its economy beyond low-tech manufacturing, fearing stagnation of economic development.³⁸ China's ability to do this, however, is constrained by its existing economic system, which discourages indigenous innovation due to 'anti-competitive practices in favour of SOEs'.³⁹

Australia's current approach

In the 2013 ABC Four Corners program, presenter Kerry O'Brien interviewed then-Attorney-General Mark Dreyfus on the issue of alleged Chinese cyber hacking on Australian businesses and government departments. Attorney General Dreyfus, in line with official government policy, refused to comment on the claims, which prompted O'Brien to proclaim a 'deafening silence surrounds this issue'.⁴⁰ Despite this dramatisation, the Australian Government has maintained a policy of 'not comment[ing] on specific cyber-related incidents, investigations or operations'.⁴¹ Unlike Australia's allies who have also been victims of Chinese cyber espionage—most prominently the US—the Australian Government has not provided a public position on any allegations despite mounting evidence, and has yet to engage with China bilaterally over this issue.⁴² Diplomatically it appears that the federal government is unwilling to confront China directly, which is likely due to certain constraining factors within Australian foreign policy and how it is conducted.

³⁴ Ibid.

³⁵ Ibid., p. 4.

³⁶ Ibid.

³⁷ Ibid., p. 24.

³⁸ Z. Zhao and K.H. Zhang, 'China's Industrial Competitiveness in the World', *The Chinese Economy*, vol. 40, no. 6 (2007), pp. 6-23.

³⁹ J. Lee, 'Cyber Kleptomaniacs: Why China Steals our Secrets', *World Affairs*, vol. 176, no. 3 (2013), p. 78.

⁴⁰ Four Corners, 'Hacked'.

⁴¹ Australian Government Australian Government Department of Foreign Affairs and Trade, 'Australia - Cyber: Reports of Chinese Cyber Attacks', *internal communication*, Canberra (2013), p. 1.

⁴² Feakin, p. 8; A. Levin, P. Goodrick and D. Ilkina, 'Securing Cyberspace: A Comparative Review of Strategies Worldwide', *Privacy and Cybercrime Institute*, Toronto (2013), p. 13.

Constraints

Firstly, the issue of cyber espionage, while damaging to the Australian economy, may not be great enough to warrant strong and potentially costly action. In the 2014 report, *Net Losses: Estimating the Global Cost of Cybercrime*, McAfee suggested states that suffer losses of less than two percent of national income are likely to 'tolerate malicious activity as long as it stays at acceptable levels'.⁴³ As the economic cost of cyber espionage in Australia is for the moment relatively small, the Australian Government is unlikely to be under anywhere near the same pressure to confront China as states such as the US.

In addition to the limited pressure exerted by cost, inaction may be further influenced by the nature of Australian foreign policy, which historically has approached international issues in a manner representative of Australia's middle power status. Australia's style of middle power diplomacy refers to a consistent approach successive governments have taken towards international relations, which reflect a 'practical realism' in dealing with great powers such as China.⁴⁴ Due to the size and power of China, Sino–Australian relations have always been asymmetric.⁴⁵ As the Chinese economy continues to grow and Beijing seeks to assert more power on the international stage, Australia will likely lack the 'clout' necessary to apply diplomatic pressure over claims of cyber espionage.⁴⁶

While part of this asymmetry in power relations is due to certain geopolitical factors including the size of the Chinese economy and military, Australia's trade dependence on China also places Australia in an awkward position if a diplomatic dispute were to occur. In 2007 China has overtaken Japan as Australia's largest trading partner in total number of exports and imports.⁴⁷ This size of bilateral trade has continued to grow each year as Chinese demand for Australian minerals has made China Australia's main export destination, comprising 36.1 percent of total exports.⁴⁸ Given that Australia is highly dependent on two-way trade with China, if the Australian Government were to confront China over the issue of cyber espionage, such action could potentially pose too greater a risk to trade relations.

While it is not possible to predict how the Chinese Government might react if Australia were to confront China, current heated tensions with the US on this issue suggest that bilateral engagement carries risk. Supporting this notion is the decision by China to reinstate tariffs on the import of Australian coal—a sign of China's ability to place trade restrictions on Australia, while absorbing the cost.⁴⁹ As free trade agreement

⁴³ McAfee, p. 11.

⁴⁴ C. Ungerer, 'The "Middle Power" Concept in Australian Foreign Policy', *Australian Journal of Politics and History*, vol. 53, no. 4 (2007), p. 538-551

⁴⁵ J. Manicom and A. O'Neil, 'China's rise and middle power democracies: Canada and Australia compared', *International Relations of the Asia Pacific*, vol. 12, no. 2 (2012), pp. 199-228.

⁴⁶ Ungerer, p. 540.

⁴⁷ Australian Broadcasting Corporation, 'China Unseats Japan as Australia's Largest Trade Partner', *ABC News* (31 August 2007), available online: <http://www.abc.net.au/news/2007-08-31/china-unseats-japan-as-australias-largest-trade/656322> (accessed 13 November 2014).

⁴⁸ Australian Government Australian Government Department of Foreign Affairs and Trade, 'Australia' (2014), available online: <https://www.dfat.gov.au/geo/fs/aust.pdf> (accessed 13 November 2014).

⁴⁹ J. Smyth, 'Australia Hit by China Coal Tariff Move', *The Financial Times* (10 October 2014), available online: <http://www.ft.com/intl/cms/s/0/ab37ff64-502d-11e4-a0a4-00144feab7de.html#axzz3J8NCs7dk> (accessed 13 November 2014).

negotiations between Australia and China continue, it is unlikely the Australian Government will risk the value of two-way trade over the economic cost attributed to cyber espionage.

In addition to these constraints, Australian Governments may have so far refrained from engaging China directly due to its own espionage activities. During the fifth Strategic and Economic Dialogue (S&ED), in 2013, China accused the US of hypocrisy after US officials formally voiced concerns over China's cyber espionage program.⁵⁰ The Chinese government-run news agency Xinhua later suggested that leaks by Edward Snowden over the NSA spying program had 'smashed the image of the US as a cyber liberty advocate'.⁵¹

China's response to the US highlights the fact that cyber espionage is not an issue confined to China, but is also an activity undertaken by the US and its allies in their own espionage programs, including Australia.⁵² Australia's participation in the 'five eyes' surveillance community, involves monitoring states within South and East Asia.⁵³ Although other states such as China may be aware of these activities, they need only to condemn the culprit if the espionage is made public. This was demonstrated in 2013 when the Australian intelligence agency Australian Signals Directorate (ASD), formerly Defence Signals Directorate, was caught spying on Indonesia's President.⁵⁴ Confronting China over their cyber espionage program may therefore, only lead to embarrassing counter accusations against Australia. As such, Australia's current approach to dealing with cyber espionage appears to be focused on national cyber security policy rather than assertive diplomatic engagement.

National cyber security initiatives

Although the Australian Government has yet to take a public position on claims of Chinese involvement, cyber espionage is recognised as a national security issue, referred to by the ASIO as 'an enduring and first order-threat'.⁵⁵ However, due to the relatively recent adoption of information communications technology (ICT) by government and business in the last couple of decades, the Australian Government's response to malicious cyber activity only began in earnest following the release of the 2000 Defence White Paper, which was the first official policy to recognise cyber security as a national

⁵⁰ Glaser and Vitello, p. 6.

⁵¹ L. Dan and B. Mingxin, 'Surveillance Programs Reveal U.S. Hypocrisy', *Xinhua News Agency* (14 June 2013), available online: http://news.xinhuanet.com/english/indepth/2013-06/14/c_132454804.htm (accessed 14 November 2014).

⁵² H. Porteous, 'Cybersecurity and Intelligence: The US Approach', *Parliamentary Information and Research Service*, Ottawa (2010), pp. 9-10.

⁵³ Cox, p. 6.

⁵⁴ P. Dorling, 'Bug Thy Neighbour', *The Sydney Morning Herald* (19 November 2013), available online: http://newsstore.fairfax.com.au/apps/viewDocument.ac?sessionId=D34E7603B95A04FAB29AC9833D6C1B68?sy=afr&pb=all_ffx&dt=selectRange&dr=1month&so=relevance&sf=text&sf=headline&rc=10&rm=200&sp=brs&cls=1032&clsPage=1&docID=SMH131119FD4D17M5TBC (accessed 14 November 2014).

⁵⁵ D. Irvine, 'Director-General Speech: Address to the Security in Government Conference 2011 Senior Executive Service Breakfast – The Rapidly Growing Threat of Cyber Espionage and ASIO's Response to this Threat', *presented at Security in Government Conference*, Canberra (5 July 2011), available online: <http://www.asio.gov.au/Publications/Speeches-and-Statements/Speeches-and-Statements/5-July-2011-Security-in-Government-Conference.html> (accessed 28 October 2014); Australian Security Intelligence Organisation, 'ASIO Report to Parliament 2011-2012', Canberra (2012), p. VIII.

security issue.⁵⁶ Since then, the Australian Government has continued to recognise the growing threat to Australia's 'National Information Infrastructure', a term used to refer to various information systems that support transport, utilities, finance and 'critical government services'.⁵⁷

In 2009, the Attorney-General's Department developed Australia's first Cyber Security Strategy, which intended to provide 'a government-led coherent, integrated approach' to cyber security policy.⁵⁸ As a result, mechanisms have since been setup to allow for the coordination of civilian intelligence, military intelligence, and policing agencies, as well as mechanisms that facilitate the exchange of information between businesses and government agencies over threats and responses.

The three main agencies that direct these efforts are: the Cyber Security Operations Centre, which coordinates the resources of ASD, ASIO, Australian Federal Police and the AG's Department in assessing and responding to cyber threats; CERT Australia, which provides advice to the private sector on cyber security practice and information on known threats; and the Business Liaison Unit within ASIO, which performs a similar function to CERT but with a focus on Australia's critical infrastructure.⁵⁹

Although these mechanisms and agencies have helped sophisticate Australia's approach to cyber security, the 2009 Cyber Security Strategy has not been updated since.⁶⁰ A 'Cyber White Paper' that was intended to replace the 2009 strategy was announced in 2011, however, the White Paper was later transferred across departments, "'broadened" away from cyber security', and released as a statement in 2012 that only updated the 'national digital economy strategy'.⁶¹ In November 2014 a review of Australia's cyber security policy and strategy was announced; as of August 2015 this review is yet to be released.⁶²

International cyber security cooperation

In addition to improving cyber security at the national level, the Australian Government has also made clear the importance of engaging with international partners and

⁵⁶ Australian Government, Australian Government Department of Defence, 'Defence 2000: Our Future Defence Force', *White Paper*, Canberra (2000), p. 13.

⁵⁷ D. Williams, 'E-security Initiative: Protecting the National Information Infrastructure', *Budget 2001-2002*, Canberra (22 May 2001), available online: <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2FIM446%22> (accessed: 24 October 2014).

⁵⁸ Australian Government, Australian Government Attorney General's Department, 'Cyber Security Strategy', Canberra (2009), p. v.

⁵⁹ Irvine, 'Director-General Speech'.

⁶⁰ Feakin, p. 8.

⁶¹ T. Feakin and P. Jennings, 'Towards a Cyber White Paper', *The Strategist – The Strategic Policy Institute Blog* (2013), available online: <http://www.aspistrategist.org.au/towards-a-cyber-white-paper/> (accessed 8 November 2014).

⁶² Department of Prime Minister and Cabinet, 'The Cyber Security Review: Keynote speech by Dr Margot McCarthy' (2015), available online: <http://www.dpmc.gov.au/pmc/media/2015/keynote-speech-australian-cyber-security-centre-conference> (accessed 30 August 2015); Prime Minister of Australia, 'Cyber Security Review' (2014), available online: <https://www.pm.gov.au/media/2014-11-27/cyber-security-review-0>; and B. Thomas-Noone, 'Australian Needs a Cyber White Paper', *The Interpreter* (17 April 2014), available online: <http://www.lowyinterpreter.org/post/2014/04/17/Australia-needs-a-cyber-white-paper.aspx?COLLCC=2434678744&> (accessed 8 November 2014).

multilateral cyber security frameworks. The 2009 Cyber Security Strategy states that international engagement is one of the Australian Government's strategic priorities, which 'requires an increased effort in multilateral forums to improve the security of interoperable networks'.⁶³

The Australian Government has thus far pursued this path through a focus on Australia's existing alliances and intelligence sharing networks. The most crucial to these networks has been Australia's participation in the UKUSA Agreement, also referred to as 'five eyes', which facilitates intelligence cooperation between the US, UK, Canada and New Zealand.⁶⁴ As early as 2002, a memorandum of understanding between the members of the 'five eyes' intelligence community established the International Computer Network Defence Coordination Working Group (ICCWG).⁶⁵ The ICCWG brought together representatives from the 'five eyes' community to facilitate mutually protected 'national defense information networks'.⁶⁶

Although Australia's main focus of international cooperation is within the Anglo-sphere, the Australian Government has also taken part in broader US-led cyber security exercises. The Cyber Storm biennial exercise series includes participants from the International Watch and Warning Network that holds simulations on responses to cyber-attacks.⁶⁷ In addition to cyber security cooperation, Australia's engagement with key alliance partners also extends into mutual defence. In 2011, following the 60th anniversary of the signing of ANZUS, the Australian and the US Governments affirmed that the ANZUS treaty commitments also encompassed cyber-attacks.⁶⁸

Australia's approach to the issue of cyber espionage appears to be currently focused primarily on defensive cyber security measures, rather than bilateral engagement with China. This approach however, contrasts with the approach taken by the US Government, which has already engaged in discussion with the Chinese government over this issue.

Case study: the US approach

As the world's largest economy, the United States experiences the same cyber security threats as Australia, but on a much larger scale. As one of Australia's closest allies, Australia has also cooperated extensively with the US on issues of cyber security. As such, Australian Governments have typically followed US precedent in cyber security policy. This was evident in the decision to ban Huawei from involvement with the NBN,

⁶³ *Cyber Security Strategy*, p. 22.

⁶⁴ J. Cox, 'Canada and the Five Eyes Intelligence Community', *Strategic Studies Working Group Papers* (2012), p. 5.

⁶⁵ 'Information Assurance for Allied Communications and Information Systems', *Combined Communications-Electronics Board* (December 2008), available online: <http://jcs.dtic.mil/j6/cceb/acps/acp122/ACP122F.pdf> (accessed 10 November 2014).

⁶⁶ Chairman of the Joint Chiefs of Staff Instruction, 'Multinational Interoperability Council' (14 January 2013), available online: http://www.dtic.mil/cjcs_directives/cdata/unlimit/3165_01.pdf (accessed 10 November 2014), p. GL-2.

⁶⁷ Department of Homeland Security, 'Cyber Storm: Securing Cyber Space' (2014), available online: <http://www.dhs.gov/cyber-storm-securing-cyber-space> (accessed 10 October 2014).

⁶⁸ K. Rudd, S. Smith, H.R. Clinton and L. Panetta, 'Joint Statement on Cyberspace', *media release*, Washington DC (15 September 2011), available online: http://foreignminister.gov.au/releases/Pages/2011/kr_mr_110916a.aspx?ministerid=2 (accessed 10 November 2014).

following a US decision to do the same. Unlike Australia however, the US has taken a much more concerted approach to cyber security, concurrent with its role as a world leader. This has involved domestic measures such as increasing the cyber security budget of the Department of Defense to US\$4.7 billion in 2013, and international engagement, such as the promotion of the Budapest Convention on Cybercrime.⁶⁹ Examining the US approach in dealing with cyber espionage will therefore provide an example of a clearer path that Australia could take in engaging with China on this problem.

Confronting China

In contrast to Australia, the US Government has been less restrained in publicly accusing China of cyber espionage. Since 2006, US Government departments and officials have increasingly asserted the involvement of the Chinese government in cyber attacks originating from within their territory.⁷⁰ In 2006, a US Air Force officer made public the hacking of an unclassified US military network by Chinese sources.⁷¹ A year later in 2007, in a report to Congress, the US–China Economic and Security Review Commission accused the Chinese government of an ‘aggressive and large-scale industrial espionage campaign’.⁷² The Office of National Counterintelligence Executive in its report to Congress also reasserted this claim in 2011.⁷³ In response to US accusations however, the Chinese government has also accused the US of large-scale cyber-attacks against the PLA and Chinese Defence Ministry.⁷⁴

In response to these mutual accusations, in 2013 the US Government finally decided to approach China formally over this issue in order to reach a diplomatic solution. During a visit to China by Secretary of State John Kerry in April, both sides agreed to establish a Cyber Working Group (CWG) to enable civilian and military representatives from both governments to engage in discussion over ‘transparency and international rules for operating in cyberspace’.⁷⁵

Bilateral cyber working group

The first meeting of the bilateral CWG took place two days before the fifth annual S&ED, and the second S&ED in July 2013. During this high-level event, US President Obama raised concerns over cyber espionage with Chinese President Xi Jinping,

⁶⁹ A. Sullivan, ‘Obama Budget Makes Cybersecurity a Growing U.S. Priority’, *Reuters* (10 April 2014), available online: <http://www.reuters.com/article/2013/04/11/us-usa-fiscal-cybersecurity-idUSBRE93913S20130411> (accessed 8 November 2014).

⁷⁰ Hannas, et al., p. 216.

⁷¹ J.A. Lewis, ‘Significant Cyber Incidents Since 2006’ (2014), available online: http://csis.org/files/publication/140310_Significant_Cyber_Incidents_Since_2006.pdf (accessed 10 November 2014).

⁷² U.S.-China Economic and Security Review Commission, ‘2007 Report to Congress of the U.S.-China Economic and Security Review Commission’, *One Hundred Tenth Congress First Session* (2007), available online: http://origin.www.uscc.gov/sites/default/files/annual_reports/6.2007-Report-to-Congress.pdf (accessed 25 September 2014), p. 8.

⁷³ NCIX, p. 5.

⁷⁴ C. Albanesius, ‘China Accuses U.S. of Hacking Government Sites’, *PC Magazine* (28 February 2013), available online: <http://www.pcmag.com/article2/0,2817,2416056,00.asp> (accessed 10 November 2014).

⁷⁵ T.Y. Jones, ‘U.S., China Agree to Work Together on Cyber Security’, *Reuters* (13 April 2013), available online: <http://www.reuters.com/article/2013/04/13/us-china-us-cyber-idUSBRE93C05T20130413> (accessed 10 November 2014).

highlighting substantial evidence pointing to Chinese involvement in cyber attacks on American businesses. Despite tense discussions over this issue, the CWG was successful in its two-day meeting with both sides making proposals to increase transparency on the issue.⁷⁶ The positive outcome was further underscored by the recognition of progress by both sides who ‘pledged support’ for future continuation of the CWG.⁷⁷

Despite the apparent diplomatic breakthrough with the Chinese leadership, optimism over future cooperation on cyber security was short lived. In May 2014, a grand jury from the US Department of Justice indicted five PLA officials on charges of cyber espionage and ‘trade secret theft’. The indictment alleged that Chinese military officials had hacked six American companies in the ‘nuclear power, metals and solar products industry’ for the purpose of providing information to competing Chinese SOEs.⁷⁸ Immediately following the indictment, China’s Foreign Ministry Spokesperson Qin Gang stated the Chinese government had formally lodged a protest against the charges, which ‘grossly violate[d] the basic norms governing international relations’. Gang strongly reiterated that no Chinese government or military official had ever engaged in the cyber theft of trade secrets, unlike the US, which regularly targeted China.

China’s reaction to the indictment was also followed up by the immediate suspension of the CWG, citing a ‘lack of sincerity on the part of the US’ in cyber security cooperation.⁷⁹ Following this setback, the US Government attempted to resuscitate cyber security talks in June by requesting China to restart the CWG prior to the sixth S&ED, however, Chinese officials refused.⁸⁰

Although the US approach to dealing with Chinese cyber espionage has so far been difficult for US–China relations, confronting China bilaterally over these issues has demonstrated that the Chinese government is at least willing to engage on issues of cyber security diplomatically. Due to Australia’s asymmetric relations with China, the Australian Government is certainly less able to engage China in such strong terms as the US have, however, Australia may at least be able to engage China on softer terms.

⁷⁶ Ibid., p. 7.

⁷⁷ W.J. Burns, J. Lew, Y. Jiechi and W. Yang, ‘The U.S.–China Closing Statements for U.S.–China Strategic and Economic Dialogue’, *The Fifth U.S.–China Strategic and Economic Dialogue*, Washington (2013), available online: <http://www.state.gov/s/d/2013/211850.htm> (accessed 10 October 2014).

⁷⁸ United States Department of Justice, ‘U.S. Charges Five Chinese Military Hackers for Cyber Espionage Against U.S. Corporations and a Labor Organization for Commercial Advantage’, *media release*, Washington (19 May 2014), available online: <http://www.justice.gov/opa/pr/us-charges-five-chinese-military-hackers-cyber-espionage-against-us-corporations-and-labor> (accessed 10 October 2014).

⁷⁹ Ministry of Foreign Affairs of the People’s Republic of China, ‘China Reacts Strongly to US Announcement of Indictment Against Chinese Personnel’, *media release*, Beijing (20 May 2014), available online: http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2535_665405/t1157520.shtml (accessed 20 October 2014).

⁸⁰ M. Pennington, ‘US to Ask China to Restart Cyber Working Group’, *Associated Press* (30 June 2014), available online: [http://www.memphisdailynews.com/news/2014/jun/30/us-to-ask-china-to-restart-cyber-working-group/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+memphisdailynews%2Fbbde+\(The+Memphis+Daily+News\)](http://www.memphisdailynews.com/news/2014/jun/30/us-to-ask-china-to-restart-cyber-working-group/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+memphisdailynews%2Fbbde+(The+Memphis+Daily+News)) (accessed 20 October 2014); United States Department of State, ‘Senior State Department Officials on the U.S.–China Strategic and Economic Dialogue’, Beijing (2014), available online: <http://www.state.gov/r/pa/prs/ps/2014/07/228948.htm> (available online 20 October 2014).

Multilateralism

Australia and the US are far from the only nations dealing with increased cyber attacks from foreign sources; with most of Europe, Asia, South America, and Africa also experiencing increased cyber crime and cyber espionage.⁸¹ China, in addition to being regularly accused of cyber espionage against other states, is also the second largest victim of cyber attacks, costing the Chinese economy up to 0.63 percent of GDP, just shy of the US, which lost 0.64 percent in 2014.⁸² As such, cyber espionage and cyber crime is a global problem, which affects all major economies.

Complicating a solution to this global issue, however, is the transnational and easily concealable nature of attackers, which often act with impunity as no global multilateral treaty or system of governance to prevent cyber attacks currently exists; other than attempts through institutions such as Internet Corporation for Assigned Names and Numbers and the International Telecommunications Union.

International cyberspace governance

One way for Australia to address Chinese cyber espionage is to push for the adoption of a global system of cyberspace regulation, as a system of rules may help form norms around the acceptable use of ICT technologies in state-based espionage activities. So far, however, no global resolution to the issue has been reached. Instead, two separate international approaches have developed in competition with one another, reflecting existing geopolitical divides in international politics and their differences in viewing the issue conceptually.

Post-Communist states, such as China and Russia, believe that despite the de-territorialised space of the Internet, control and regulation of information should remain within the 'jurisdiction of the nation-state'. As such, China advocates for an international approach based on territorial sovereignty and equality between states in regulating cyberspace.

Liberal democracies in the West such as Australia, the US and Europe, however, seek a de-nationalised approach that emphasises the role of the private sector.⁸³ These two international blocs, and their attempts to create a multilateral regulation of cyberspace, are referred to as the Budapest approach and the United Nations approach.

Budapest approach

The Budapest approach refers to the name of the Council of Europe's Convention on Cybercrime, a regional agreement signed in 2001 by most member states of the Council of Europe (COE). Since 2001, all but two COE states—with the notable exception of Russia—have signed, as well as eight other non-COE states including the US and

⁸¹ McAfee, p. 9.

⁸² P. Goodrick and A. Levin, 'From Cybercrime to Cyberwar? The International Policy Shift and its Implications for Canada?', *Canadian Foreign Policy Journal*, vol. 19, no. 2 (2013), pp. 127-143.

⁸³ M.L. Mueller, 'China and Global Internet Governance: A Tiger by the Tail', in R. Deibert, J. Palfrey, R. Rohozinski and J. Zittrain (eds.), *Access Contested: Security, Identity, and Resistance in Asian Cyberspace*, (The MIT Press: Cambridge, London, 2012), p. 177.

Australia.⁸⁴ As such, the Budapest approach was the first serious attempt to create a multilateral framework aimed at combating cybercrime and regulating cyberspace.

Although cybercrime remains the focus of the convention, cooperation within such a framework could act as a basis for the creation of norms on cyber espionage between states,⁸⁵ particularly if parties to the treaty can ‘achieve greater unity among its members’ on ‘common criminal policy’.⁸⁶

Unfortunately, the adoption of the Convention has remained largely confined to Europe and other Western states, as the Convention is perceived to be out-dated and inadequate.⁸⁷ This is due to the fact that certain articles within the Convention have created contention among Russia, China, and various states in the developing world. Specifically, Russia and China have taken exception to Article 10, which places obligation on each party to criminalise copyright infringement and the theft of IP when ‘committed wilfully, on a commercial scale’.⁸⁸ Russia and China believe this will serve only to protect Western corporate interests in Europe and North America.⁸⁹ In addition to this, both Russia and China have also taken great exception to Article 32(b), which allows law enforcement authorities from one state to access information from another state without their consent or knowledge. Russia and China view this as a ‘violation of sovereignty’ and incompatible with domestic legislation.⁹⁰ China’s biggest criticism is that the Convention does not provide adequate state controls over the flow of information. This form of liberalised Internet governance is at odds with China’s highly centralised authoritarian political system, which views unrestricted information as threatening to political stability.⁹¹

UN approach

In contrast to the Convention on Cybercrime, the United Nations (UN) approach advocates a state-centric regime of regulation over the Internet. China and other proponents of this approach suggest that the creation of a comprehensive international treaty under the authority of the UN should replace the role of non-state actors—such as the Internet Corporation for Assigned Names and Numbers—claiming this would democratise the regulation of cyberspace between states.⁹² Democratisation in this sense however, refers to a system of equal *state-based* representation, rather than representation of individuals or non-state groups.⁹³

⁸⁴ Council of Europe Treaty Office, ‘Convention on Cybercrime CETS No: 185’ (2014), available online: <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=185&CL=ENG> (accessed 10 October 2014).

⁸⁵ J.M Spade, ‘China’s Cyber Power and America’s National Security’, *U.S. Army War College* (2011), p. 48.

⁸⁶ Council of Europe, ‘ETS 185 – Convention on Cybercrime’ (2001), p. 2.

⁸⁷ P. Goodrick and A Levin, p. 137.

⁸⁸ Council of Europe, 2001, p. 7.

⁸⁹ P. Goodrick and A Levin, p. 137.

⁹⁰ Centre for Strategic and International Studies, ‘Bilateral Discussions on Cooperation in Cybersecurity China Institute of Contemporary International Relations (CICIR) - Center for Strategic and International Studies (CSIS)’, *Sino-U.S. Cybersecurity Dialogue*, Beijing (2012), available online: http://csis.org/files/attachments/120615_JointStatement_CICIR.pdf (accessed 10 October 2014), p. 3.

⁹¹ Mueller, p. 182.

⁹² *Ibid.*

⁹³ *Ibid.*, p. 181.

Although various attempts have been made to shift regulation towards the UN, one such attempt was proposed in 2010 by China, Russia, Tajikistan, and Uzbekistan. The proposed ‘International Code of Conduct for Information Security’, was an attempt to create an alternative to the Convention on Cybercrime, through emphasising the role of states in regulating cyberspace and ‘respect for the sovereignty, territorial integrity and political independence of all States’.⁹⁴ Unlike the Convention on Cybercrime, however, the proposed Code of Conduct was not focused on facilitating transnational law enforcement or cyber security. Rather, the intention was to ensure states such as China and Russia could maintain control over the flow of information within their borders that could have potential security consequences for state control.

The fear driving this need has heightened since the 2010 Arab Spring, which resulted in revolutions, civil war, and widespread civil unrest within authoritarian states across the Middle East and North Africa. The success of the revolutions in Tunisia and Egypt was attributed partly to the use of social media, which highlighted the potentially destabilising nature of the Internet on authoritarian regimes and the possibility of a ‘Jasmine Revolution’ occurring in China.⁹⁵

The likelihood of reaching an international agreement that restricts cyberspace in this manner seems low at present, as Western states have rejected the *International Code of Conduct*, and any attempts at establishing UN-level governance. However, in 2014 a unanimous agreement was reached between members of an intergovernmental group of experts, which stated that international law does ‘fully apply to state behaviour in cyberspace’.⁹⁶ The group consisted of representatives from all permanent (P5) Security Council members, as well as experts from ten other states, including Australia. This small step towards establishing norms on cyber espionage is particularly encouraging and suggests that, despite conflicting views on cyberspace governance, an international resolution to issues in this area is possible.

Conclusion

Australia faces a growing threat from cyber espionage by the Chinese military, which regularly uses cyber hacking as a means of engaging in industrial espionage against Australian businesses. The economic cost and long-term loss of IP threatens Australian businesses and the integrity of Australia’s largest trade partnership.

In response to this national security issue, the Australian Government has undertaken internal measures to protect Australia from threats in cyberspace through a national cyber security strategy and cooperation with key alliance partners.

⁹⁴ L. Baodong, V. Churkin, S. Aslov and M. Askarov, ‘Developments in the Field of Information and Telecommunications in the Context of International Security’, *United Nations General Assembly* (2011), available online: http://www.un.org/disarmament/HomePage/ODAPublications/DisarmamentStudySeries/PDF/DSS_33.pdf (accessed 10 October 2014), p. 4.

⁹⁵ Karlsrud, p. 106; Office of the Secretary of Defense, ‘Military and Security Developments Involving the People’s Republic of China 2013’, *Annual Report to Congress*, Washington (2013), p. 18.

⁹⁶ D. Wolter, ‘The UN Takes a Big Step Forward on Cybersecurity’, *Arms Control Association* (September 2013), available online: http://www.armscontrol.org/act/2013_09/The-UN-Takes-a-Big-Step-Forward-on-Cybersecurity (accessed 8 October 2014).

In contrast to the US, the Australian Government has not yet given a public position or confronted China over claims of cyber espionage. Constraints within foreign policy—including Australia’s middle power status and asymmetric relations with China—have so far prevented Australia from following the same path as US.

Multilaterally, the international debate over the global issue of cyber espionage and cyber crime remains in a deadlock between Western states—which advocate for freedom of access to the Internet—and post-Communist states—that seek state control.

An effective approach to addressing Chinese cyber espionage would see more active diplomacy both with China bilaterally, and with the international community on establishing international norms on cyberspace.

Cyber espionage is a growing issue for Australia, one that is damaging the Australian economy. It is paramount the Australian Government develop an assertive position on this issue and engage diplomatically with China, breaking the existing chorus of silence.

An Effective Approach to People Smuggling in the Australian Context

Lara Miles*

People smuggling has become an increasingly pressing issue in the Australian national consciousness in recent years. This issue threatens Australia's sovereignty and control of its borders; however, the Australian Government has struggled to maintain a consistent approach to addressing irregular migration, with tensions between its nationalistic defensive barriers and the international humanitarian agenda. The most effective response lies in a holistic approach that acknowledges the complex origins of people smuggling both domestically and internationally. In order to address the push and pull factors that drive individuals to seek out people smugglers and perpetuate the so-called people smuggling business model, policy must consist of a combination of deterrence, containment and regional cooperation. Strategic and targeted deterrence efforts combined with sustained international assistance, increased legal avenues for migration and cooperation with relevant international actors would see Australia make a positive move towards sustainably and effectively combating people smuggling. While the Australian Government cannot control migration flows, a comprehensive approach that aims to undermine the demand for smuggling services and increase regional deterrence efforts will allow the Australian Government to manage the issue.

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People smuggling is a highly politicised issue in Australia. The topic has a disproportionate impact on the national consciousness, with significant amounts of media, political and public attention dedicated to the issue. Despite the current government's claimed success in its goal of 'stopping the boats' through Operation Sovereign Borders, this hasn't eliminated attempted sea voyages by asylum seekers. The reality is that there are still significant push factors for irregular human movement in the immediate Asia-Pacific region and beyond, and it is likely that people smugglers will continue to capitalise on these new market opportunities.¹

Flows of voluntary human movement have increased in recent years due to massive relative population expansion in volatile developing countries accompanied with a trend for reductions in legal opportunities for migration in destination countries. Consequently, this has seen an increase in the use of people smugglers, as the desire to migrate for economic and humanitarian reasons has proved stronger than the legal restrictions and deterrents in place.²

An increase in people smuggling is a significant concern for Australia. The Australian Federal Police (AFP) identifies people smuggling as a national threat: citing serious security and criminal concerns, quarantine and health risks, significant logistical problems and costs accrued in processing, as well as infringements on sovereignty and control over borders associated with unauthorised arrivals.³ Of equal concern are the considerable risks to the individuals enlisting smuggling services; the desperation of these individuals leaves them vulnerable to exploitation by their smuggler, and smuggling voyages are associated with high levels of injury and death. In one incident, the sinking of the unknown Suspected Illegal Entry Vessel—or SIEV X—a fishing boat en route from Sumatra to Christmas Island on 19 October 2001, resulted in the death of 353 people.⁴

Thus, this report will recommend addressing people smuggling from within a holistic migration system that balances national security interests with international obligations, whilst also addressing push factors for migration through both domestic measures and regional cooperation. While current policy has acknowledged the importance of a comprehensive approach, there is a gap between rhetoric and practice. This report will recommend an expansion of current containment and regional cooperation measures, as well as a lexicon shift in the treatment of people smuggling within policy, as a punitive policing effort alone will not be enough to sustainably address the issue.

¹ C. Renshaw, 'Australia ups its Syrian refugee intake – but what about its own backyard?', *The Conversation* (9 September 2015), available online: <http://theconversation.com/australia-ups-its-syrian-refugee-intake-but-what-about-its-own-backyard-47160> (accessed 8 October 2015); 'Operation Sovereign Borders: Asylum seekers still trying to reach Australia, says Lieutenant General Angus Campbell', *ABC News* (28 January 2015), available online: <http://www.abc.net.au/news/2015-01-28/operation-sovereign-borders-boat-turnbacks/6053244> (accessed 8 October 2015).

² Ibid.

³ Commonwealth of Australia, *People Smuggling* (Australian Federal Police, Canberra, ACT, 2014), available online: <http://www.afp.gov.au/policing/people-smuggling.aspx> (accessed 25 August 2014).

⁴ M. Crock and D. Ghezelbash, 'Do Loose Lips Bring Ships? The Rise of Policy, Politics and Human Rights in Managing Unauthorised Boat Arrivals', *Griffith Law Review*, vol. 19, no. 2 (2010), pp. 238-287.

The approach thus far

People smuggling in the Australian context

Following an explosion on SIEV 36, a fishing boat carrying 49 Afghani passengers near Ashmore Reef on 16 April 2009, then-Prime Minister Kevin Rudd labelled people smugglers the ‘scum of the earth’. Rudd asserted that smugglers represented the ‘vilest form of human life’, and that ‘they trade on the tragedy of others and that’s why they should rot in jail and in my own view, rot in hell’.⁵ Evidently, the irregular arrival of migrants is a contentious issue in Australia. Despite being a country founded on migration, its particular historical context has produced an ‘invasion anxiety’ amongst its predominantly Anglo-Saxon population.⁶ Australia has a long history of selective and exclusionary migration policy, stemming back to the white Australia policies enacted at Federation.⁷ More recently, border security measures have tightened following the *Tampa* Affair in August 2001 and the terror threats of September 11,⁸ and focus has shifted from those arriving by boat to those facilitating and profiting from their journey.⁹ Australia has adopted a whole-of-government approach to people smuggling, which encompasses several government departments and agencies focusing on prosecution, disruption, and capacity building.¹⁰

Accompanying this securitisation of policy has been a public condemnation of ‘boat people’, a perception driven largely by jingoistic media reporting of asylum seekers as exploitative and threatening to the Australian way of life, with people smugglers as the driver of this action.¹¹ Antje Missbach and Frieda Sinanu argue this media and political hysteria has seen irregular migration issues be securitised rather than treated as a humanitarian problem.¹² Australia has adopted a reactionary response, primarily founded on policies of deterrence—an intersection of crime and immigration control within policy termed by Michael Welch as ‘crimmigration’. Punitive measures such as mandatory detention and the expansion of federal police powers have been brought against the asylum seeker in an attempt to curb migration flows and break the ‘people smuggler’s business model’.¹³ Thus, the Australian context makes it unlikely that open

⁵ E. Rodgers, ‘Rudd Wants People Smugglers to ‘Rot in Hell’’, *ABC News* (17 April 2009), available online: <http://www.abc.net.au/news/2009-04-17/rudd-wants-people-smugglers-to-rot-in-hell/1653814> (accessed 3 October 2014).

⁶ In the 2011 census, 36.1 percent of respondents identified their ancestry as English. Including responses of Scottish, Irish and Welsh, 56 percent of respondents identified their ancestry as from the British Isles. P. Madden, ‘How Anglo is Australia?’, presented at NSW Community Relations Commission, Parramatta, (18 April 2013), available online: <https://www.gov.uk/government/speeches/how-anglo-is-australia> (accessed 3 October 2014); Welch, op. cit., p. 4.

⁷ *Ibid.*, p. 3.

⁸ Crock and Ghezelbash, op. cit., p. 240.

⁹ C. Barker, *The People Smugglers’ Business Model*, Research Paper, no. 2 (2013), Foreign Affairs, Defence and Security Section, Canberra, 2013.

¹⁰ Commonwealth of Australia, *People Smuggling – Australia’s Response*, Attorney-General’s Department, Canberra, ACT (2014), available online: <http://www.ag.gov.au/CrimeAndCorruption/Peoplesmuggling/Pages/Peoplesmuggling-Australiasresponse.aspx> (accessed 3 October 2014).

¹¹ F. McKay, S. Thomas and R Warwick Blood, ‘Any One of these Boat People Could be a Terrorist for all we Know! Media Representations and Public Perceptions of “Boat People” Arrivals in Australia’, *Journalism*, vol. 12, no. 5 (2011), pp. 608–624.

¹² Missbach and Sinanu, op. cit., p. 62.

¹³ Welch, op. cit., pp. 1–21.

border polices as found in other parts of the world will ever be possible, desired or accepted by its population.¹⁴

An insufficient migration system

As a transnational problem, people smuggling requires a transnational response. Punitive policies which aim to disrupt pull factors attribute behaviour solely to the responsibility of the individual, maintaining that smuggled refugees are undeserving of support and protection because it was their *choice* to migrate illegally. However, it is important not to adopt reductive rationalist theory when explaining complex social phenomenon. In reality, migration functions within a complex network structure of historical and international relations and human and institutional factors.¹⁵ Migration is driven by push factors—those factors that force or motivate emigration—and pull factors—those factors that determine a country to be a desirable destination. Refugees are pushed by a negative force from the source country and pulled by a positive force to the destination country. The source of these forces can be political, demographic, socioeconomic or environmental.¹⁶ Thus, while refugees do have a level of agency in enlisting smuggling services and bypassing regular migration pathways, they are generally driven by migratory push factors beyond their individual control.¹⁷

Andreas Schloenhardt explains the decision to migrate as reached through a rational evaluation of the costs and benefits of relocation. Thus, an individual will decide to migrate when the perceived benefits of migration outweigh the financial and non-financial costs associated with movement: often risks, sanctions and penalties¹⁸. While there are a number of socio-cultural motivations,¹⁹ empirical research suggests that most often the decision to migrate is precipitated by an immediate catalyst in the form of a threat or event—which is useful in explaining the five waves of irregular boats arrivals to Australia coinciding with events including the end of the Vietnamese War in 1975 and the Tiananmen Square Massacre in 1989.²⁰

Paradoxically, growing migration pressures and subsequent increased migration flows have caused destination countries to restrict legal avenues of migration and criminalise irregular and clandestine migration, and these restrictions have in turn incentivised alternative, often illegal, means of migration.²¹ Legal channels for migration in source countries are often unavailable and resettlement policies in transit countries insufficient and consequently there is a demand amongst refugees for smuggling services.²² It has been observed that among the clientele for smugglers are legitimate asylum seekers who have attempted to use legal channels, but have become frustrated with the system after

¹⁴ Crock and Ghezelbash, op. cit., p. 242.

¹⁵ A. Schloenhardt, 'Trafficking in Migrants: Illegal Migration and Organized Crime in Australia and the Asia Pacific Region', *International Journal of the Sociology of Law*, vol. 29 (2001), pp. 331-378.

¹⁶ A. Schloenhardt, 'Migrant Smuggling: Illegal Migration and Organised Crime in Australia and the Asia Pacific Region', *Brill Academic Publishers* (2003), p. 28–29.

¹⁷ *Irregular Migration, Migrant Smuggling and Human Rights*, International Council on Human Rights Policy, Geneva, Switzerland, 2010. p. 11.

¹⁸ Schloenhardt, op. cit., p. 335.

¹⁹ Ibid.

²⁰ Crock and Ghezelbash, op. cit., p. 249.

²¹ Schloenhardt, op. cit., p. 339.

²² Missbach and Sinanu, op. cit., p. 68.

years of waiting in limbo for resettlement.²³ Thus, while refugees are waiting in transit countries such as Indonesia and Malaysia, their demands for services are met by the local population, who are motivated by considerable economic incentives.²⁴ From this it can be reasonably deduced that people smuggling is a case of supply and demand and is, in a sense, a by-product of a pre-existing problem: an insufficient migration system both domestically in Australia and regionally in the Asia-Pacific.

Deterrence

The logic underpinning deterrence as a method for countering people smuggling is to 'break the people smugglers' business model' by essentially deterring the smugglers' market.²⁵ It attempts to counter migration pull factors through the interception and disruption of smuggling efforts. In Australian policy, deterrence has taken form in the strengthening of border control and security and legislation frameworks.

Border protection and security

The 2014–15 federal budget committed \$711 million over six years to enhance Australia's border management, with a focus on the new Operation Sovereign Borders—a military-led border security operation—and Australian Border Force—a single frontline operational border agency proposed to come into effect from 1 July 2015.²⁶ This includes additional funding towards maintaining the Australian Customs and Border Protection Services' maritime surveillance and interception operations in Australia's northern waters, with a commitment of \$81.2 million over four years for extending leases, increasing patrols and replacing vessels.²⁷

Australia's commitment to border security has seen the expansion of federal policing powers, particularly in cooperation with regional authorities. The AFP asserts its objective as 'contributing effectively to Australia's border management and security, particularly preventing Australia from people smuggling, including by prevention, deterrence and disruption'.²⁸ This is achieved in part through the People Smuggling

²³ Asylum seekers seeking resettlement face long waits in transit country immigration detention centres or UNHCR and IOM housing and shelters. 'Asylum Seekers Stuck in Indonesia Limbo', *The Jakarta Globe*, (11 April 2014) available online: <http://thejakartaglobe.beritasatu.com/news/asylum-seekers-stuck-indonesia-limbo/> (accessed 3 October 2014); Missbach and Sinanu, op. cit., p. 75.

²⁴ Ibid., p. 79.

²⁵ J. Glenday, 'Breaking the 'Business Model' of People Smuggling', *ABC News* (13 May 2013), available online: <http://www.abc.net.au/news/2013-05-13/breaking-the-business-model-of-people-smuggling/4685330> (accessed 3 October 2014).

²⁶ Commonwealth of Australia, *Restoring Border Integrity*, Australian Government Australian Government Budget 2014–15, Canberra, ACT (2014), available online: http://www.budget.gov.au/2014-15/content/overview/html/overview_28.htm (accessed 12 August 2014).

²⁷ C. Barker, *Counter-people Smuggling Measures: Budget Review 2014–15 Index*, Parliament of Australia, Canberra, ACT (2014), available online: http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/BudgetReview201415/PeopleSmuggling (accessed 9 August 2014).

²⁸ Commonwealth of Australia, *Australian Federal Police Annual Report 2012–13*, Australian Federal Police, Canberra, ACT (2013), p. 22, available online: <http://www.afp.gov.au/~media/afp/pdf/a/afp-annual-report-2012-2013.ashx> (accessed 5 August 2014).

Strike Team, which provides ‘a centrally directed, highly mobile investigative capability against organised people-smuggling syndicates operating in Australia and overseas’.²⁹

However, a 2011 report by the United Nations Office on Drugs and Crime found that while border control policies are undoubtedly a legitimate and necessary pursuit for a sovereign nation, the effectiveness of deterrence in combating migration flows is questionable, and has been shown to have potentially damaging consequences. These consequences include: prompting dangerous changes to smuggling routes and methods; encouraging the evolution of more professional and sophisticated smuggling networks; and further limiting opportunities for migration, consequently increasing the demands for and costs of smuggling services.³⁰

Indeed, Stephen Castles notes that efforts by the US Government to strengthen border security with ‘Operation Gatekeeper’ under the Clinton Administration in 1994—measures which included doubling the number of agents patrolling the border and tripling the US Immigration and Naturalisation Service budget over the period of six years—failed to curb the illegal entry of refugees through the assistance of smugglers, and it is likely that similar attempts in other states would be met with similar results.³¹ This is in part because reductive understandings of the people smuggling concept—such as the ‘people smuggler’s business model’—fail to acknowledge the diverse and complex nature of the issue, and consequently attempt to address it homogenously rather than developing targeted responses to individual cases.³² Furthermore, evaluations which link irregular arrivals to weakened border controls retain a purely internal view of migration and neglect to acknowledge the considerable influence of external factors,³³ thus ‘state migration control efforts still follow a national logic, while many of the forces driving migration follow transnational logic’.³⁴

With regards to the Australian context, Sharon Pickering expresses concern over the AFP’s apparent militarisation of irregular migration. Pickering details how AFP rhetoric has shaped people smuggling as an issue of national security, subsequently expanding police territory and removing the boundaries between immigration and criminal law. In the 1996–97 AFP Annual Report, people smuggling was mentioned only briefly and in relatively innocuous terms, in contrast, by the 2000–01 Annual Report, the terminology used included ‘organised people-smuggling’ and ‘unlawful noncitizens’: vocabulary which assumes criminality and excludes claims of asylum.³⁵ Thus, this lexicon shift symbolically reconstructed the issue as a matter of organised crime and propelled the AFP into the de-territorialised realm of the transversal people smuggler, a shift which,

²⁹ *People Smuggling*, Australian Federal Police, Canberra, ACT (2014), available online: <http://www.afp.gov.au/policing/people-smuggling.aspx> (accessed 5 August 2014).

³⁰ *Smuggling of Migrants: A Global Review and Annotated Bibliography of Recent Publications*, United Nations Office on Drugs and Crime, Vienna (2011), pp. 86-88, available online: http://www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Smuggling_of_Migrants_A_Global_Review.pdf (accessed 20 August 2014).

³¹ S. Castles, ‘Why Migration Policies Fail’, *Ethnic and Racial Studies*, vol. 27, no. 2, 2004, p. 205-227.

³² Barker, op. cit., p. 41.

³³ Crock and Ghezelbash, op. cit., p. 240.

³⁴ Castles, op. cit., p. 212.

³⁵ S. Pickering, ‘The Production of Sovereignty and the Rise of Transversal Policing: People-smuggling and Federal Policing’, *The Australian and New Zealand Journal of Criminology*, vol. 37, no. 3 (2004), pp. 362-379.

Pickering argues, has concerning ramifications for jurisdictional restraint and unchecked powers.³⁶

These concerns highlight the need for deterrence efforts that go beyond indiscriminate border policing, instead pursuing a targeted approach that sets clear expectations and boundaries for practice.

Judicial measures: legislative framework

The second effort to deter people smuggling has been through the domestic criminalisation of most aspects of irregular migration and organised crime.³⁷ Australia's legislative framework criminalising people smuggling is set out under the *Migration Act 1958* and the *Criminal Code Act 1995*, which was amended by the *Anti-People Smuggling and Other Measures Act 2010* and came into force on 1 June 2010. According to the Attorney General's department, this legislative framework 'makes it an offence for a person (the first person) to organise or facilitate the bringing or coming to Australia, or the entry or proposed entry into Australia, of another person (the second person), where that second person is a noncitizen of Australia, and where the second person had, or has, no lawful right to come to Australia'.³⁸

In addition, under this legislation it is an offence to conceal or harbour a noncitizen, to provide false documents or misleading information relating to a noncitizen or to support the offence of people smuggling through material support or resource aids. Also, there are a number of aggravated people smuggling offences which carry a greater maximum sentence and carry a minimum sentence; these include ventures which involve the danger of death or serious harm, the smuggling of five or more persons, repeat offending or providing false documents or misleading information relating to five or more noncitizens.³⁹

An important aspect of enforcing this legislation and preventing unauthorised maritime ventures is regional intelligence cooperation. Under the People Smuggling Strike Team specialist personnel are deployed from the AFP to Indonesia, Malaysia, and Sri Lanka to conduct joint operations and intelligence gathering activities to identify and disrupt smuggling operations through disruption, investigation, prosecution and information exchange and coordination.⁴⁰

Upon evaluation, Schloenhardt concludes that Australian criminal law comprehensively penalises people smuggling activities including supply, service, distribution and finance. The weakness, however, lies in a lack of complimentary legislation abroad.⁴¹ The criminalisation of people smuggling is appealing, as in principle it only affects the criminals, it acts as a deterrent for criminal activity and it is a comparatively inexpensive

³⁶ S. Pickering, 'Border Terror: Policing, Forced Migration and Terrorism', *Global Change, Peace & Security*, vol. 16, no. 3 (2004), pp. 211-226.

³⁷ Schloenhardt, op. cit., p. 368.

³⁸ Commonwealth of Australia, *People smuggling legislation*, Attorney-General's Department, Canberra, ACT (2014), available online: <http://www.ag.gov.au/CrimeAndCorruption/Peoplesmuggling/Pages/Peoplesmugglinglegislation.aspx> (accessed 3 October 2014).

³⁹ Ibid.

⁴⁰ The Coalition's Policy for a Regional Deterrence Framework (2013), p. 10.

⁴¹ Schloenhardt, op. cit., pp. 362-3.

method of combating smuggling. However, it is unlikely to be a deterrence against significant push factors, and should only form one aspect of an approach, as it alone cannot address the fundamental causes of smuggling.⁴² As a transnational issue, the effectiveness of Australia's judicial efforts is dependent on assistance, cooperation and harmonisation with regional law enforcement and criminal law.⁴³

Kingpins or fishermen?

Despite a comprehensive legislative framework and cooperation efforts, the AFP reported an overall conviction rate of 91 percent among all Crime Program cases reaching court in the 2012–13 period—a figure marginally lower than previous years—and this decline was attributed to the ‘complexity of a number of people-smuggling cases that have not led to a conviction’.⁴⁴ The AFP reported 32 persons arrested for people smuggling offences in this period, 6 were smuggling organisers and the remaining 26 were crewmembers.⁴⁵

These figures are concerning as they appear to undermine the government's claim of targeting transnational criminal networks.⁴⁶ Jonathon Hunyor claims that the majority of prosecuted crew members are from poor fishing communities, have little actual involvement beyond manning the vessels and are in fact often victims of the smuggling process as much as the refugees themselves.⁴⁷ Thus, there needs to be a clear hierarchical distinction between the ‘kingpins’ of smuggling ventures and the ‘people movers’ who operate at a very basic level.⁴⁸

This incites debate on the actual form and structure of people smuggling ventures. An Iraqi refugee convicted in Australia on two counts of smuggling, Ali Al Jenabi, argues that smuggling follows the horizontal network model, which undermines arguments for the so-called ‘smuggling business model’:

‘I laugh out loud when I hear it. Do they think there are men in suits sitting around the boardroom tables somewhere devising strategies? Has no one told them people smuggling is an amorphous rag-tag network run by word of mouth and mobile phones? ... If you want to stop people smugglers you have to do something about what causes people to flee their own countries in the first place’.⁴⁹

Deterrence efforts often overlook the close relationship between smugglers and asylum seekers, and forget that smuggling is just one aspect within a larger migration issue. While legislative focus should be directed towards smuggling organisers, it is both unreasonable and contrary to international obligations for Australia's criminal law to counter smuggling by restricting access to asylum and denying the fair assessment of claims.⁵⁰

⁴² Ibid., p. 369.

⁴³ Ibid., p. 370.

⁴⁴ AFP Annual Report, 2013–14.

⁴⁵ Ibid.

⁴⁶ M. Grewcock, ‘Australia's ongoing border wars’, *Race Class*, vol. 54, no. 10 (2013), pp. 10-32.

⁴⁷ J. Hunyor, ‘Don't jail the ferryman – the sentencing of Indonesia's ‘people movers’’, *Alternative Law Journal*, vol 26, no. 5 (2001), pp. 223-228.

⁴⁸ Ibid.

⁴⁹ M. Grewcock, ‘Robin de Crespigny, The People Smuggler’, *Australian & New Zealand Journal of Criminology*, vol. 45, no. 443 (2012), pp. 443-446.

⁵⁰ Schloenhardt, op. cit., p. 371.

A targeted objective

While Australia's sovereignty gives its authorities the right to control movement across its borders, the effectiveness of a deterrence-focused approach is constrained by the transnational reality of people smuggling. Successful deterrence would require an acknowledgement of the externalities of irregular migration, which in practice would translate into greater levels of cooperation and harmonisation in the region and an acceptance of the limitations of domestic deterrence efforts.

In addition, deterrence cannot come at the expense of Australia's international obligations to human rights, and security operations and legislation must not unfairly target and prosecute legitimate asylum seekers or 'people movers'. Rather, there should be an expansion in intelligence sharing with regional partners to identify the smuggling organisers and develop legislation that will effectively prosecute them.

Containment

The containment of people smuggling is dependent on addressing the root causes of migratory movement, countering push factors and preventing individuals from engaging smuggling services. Containment is pursued through alliances with regional actors, and thus works on the principle of shared burden and responsibility for migration management.⁵¹ Australia has pursued containment through capacity building, development assistance and increased legal avenues for migration.

Capacity building

Capacity building in source countries—enhancing institutional and service delivery capacity—promises to reduce the need for irregular migration by providing the necessary protection and solutions for refugees in their source countries, and thus is an effective migration management technique.⁵²

The value of capacity building is well recorded and championed within Australian policy, and efforts have been made to translate this rhetoric into practice; evidenced by the Department of Immigration and Citizenship's 2013–14 commitment of \$1.9 million 'to build capacity and capabilities in the Gulf and Middle East region with the aim of reducing irregular onward movement to Australia'.⁵³

However, an evaluation of the Australian Government's spending on irregular maritime arrivals and counter-people smuggling activities as of September 2013 noted that any effort to counter people smuggling activities through capacity building and related

⁵¹ B. S. Chimni, 'Aid, Relief, and Containment: The First Asylum Country and Beyond', *International Migration*, vol. 40, no. 5 (2002), pp. 75-94.

⁵² G. Loescher and J. Milner, 'The Missing Link: The Need For Comprehensive Engagement in Regions of Refugee Origin', *International Affairs*, vol. 79, no. 3 (2003), pp. 595-617.

⁵³ H. Spinks, C. Barker and D. Watt, *Australian Government Australian Government spending on irregular maritime arrivals and counter-people smuggling activity*, Department of Parliamentary Services, Canberra, ACT (2013), p. 25, available online: http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/1277010/upload_binary/1277010.pdf;fileType=application/pdf#search=%22background%20note%20%28parliamentary%20library,%20australia%29%22 (accessed 3 October 2014).

activities prove minor when compared to the costs associated with deterrence activities.⁵⁴

Furthermore, Gil Loescher and James Milner argue that capacity building should be extended beyond states to include regional and local NGOs, as a severe constraint on the security of refugees in source and transit countries is a lack of supportive civil society. NGOs also offer services as checks on government policy and migration process, ensuring accountability.⁵⁵

Official development assistance

Under the current government, Australia's foreign aid department, AUSAid, was absorbed into Department of Foreign Affairs and Trade (DFAT). Australia's official development assistance (ODA) objective is now cited as 'promot[ing] Australia's national interests through contributing to economic growth and poverty reduction'.⁵⁶ Despite the significant criticism this decision received,⁵⁷ cuts to ODA made up 21 percent of the major budget savings for the 2014–15 federal budget.⁵⁸

However, given the well-documented understandings of the migration-development nexus and the positive impact ODA can have on stabilising source countries,⁵⁹ it is logical to attempt to address the political, demographic, socioeconomic, and environmental push factors of migration through development assistance, and thus it may even be in the national interest to expand ODA to attempt to manage migration.⁶⁰

A continued focus on conflict resolution and an increase in reconstruction aid to post-conflict societies is paramount to ease migration pressures⁶¹. Currently, Australia is supporting and participating in an international effort to stymie Islamic State of Iraq and

⁵⁴ See the previously mentioned expansion in federal funding for Australia's border management: C Barker, *Counter-people Smuggling Measures*, Parliament of Australia, Canberra, ACT (2014), available online: http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/BudgetReview201415/PeopleSmuggling (accessed 3 October 2014); Spinks, Barker and Watt, op. cit. (2013), p. 27.

⁵⁵ Loescher and Milner, op. cit., p. 608.

⁵⁶ *About Australia's aid program*, Australian Government Australian Government Department of Foreign Affairs and Trade, Canberra, ACT (2014) available online: <http://aid.dfat.gov.au/makediff/Pages/default.aspx> (accessed 25 September 2014).

⁵⁷ 'Independent AusAID program officially ends today', *International News*, radio program, ABC Radio, Melbourne (1 November 2013), available online: <http://www.radioaustralia.net.au/international/radio/program/pacific-beat/independent-ausaid-program-officially-ends-today/1213192> (accessed 20 September 2014).

⁵⁸ 'Foreign aid cuts make up one fifth of budget savings', *ABC News* (22 May 2014), available online: <http://www.abc.net.au/news/2014-05-20/tim-costell-correct-on-budget-foreign-aid-cuts/5452698> (accessed 20 September 2014).

⁵⁹ N. N. Sørensen, N. V. Hear and P. Engberg-Pedersen, 'Migration, Development and Conflict: State-of-the-Art Overview', in N. V. Hear and N. N. Sørensen (eds.) *The Migration-Development Nexus*, United Nations & The International Organization for Migration, Geneva (2003), pp. 5-50.

⁶⁰ M. J. Gibney, *Outside the Protection of the Law: The Situation of Irregular Migrants in Europe*, vol. 6, Refugee Studies Centre, (Oxford: 2000), p. 23.

⁶¹ S. Castles, 'The Factors That Make and Unmake Migration Policies', *International Migration Review*, vol. 38, no. 3, (2004), pp. 852-884.

the Levant advances in Iraq and Syria.⁶² While the long-term impact of this conflict on refugee flows to Australia is yet to be seen, there is already evidence of massive refugee flows into the region, particularly into Turkey, this highlights the need for pre-emptive measures to manage migration.⁶³

In addition, there needs to be a greater focus on relief and development aid to source and transit countries, in part through comprehensive programs aiming to safeguard human rights, improve economic opportunity, and implement good governance practices and more equitable trading arrangements.⁶⁴ However, Bhupinder Singh Chimni warns that a long-term objective to address underlying migration push factors will require patience, as a consequent ‘migration hump’ is expected in the short-term—a temporary increase in migration as economic development increases the mobility of the receiving population.⁶⁵

Increased legal avenues

The International Council on Human Rights Policy argues that stringent border controls imposed by destination countries have not reduced the flow of refugees, but have weakened their access to human rights protection and triggered an increase in irregular migration and the services that facilitate it.⁶⁶ Beyond the impact restriction policies have had on refugees, it has influenced public opinion within destination countries, where it is felt ‘governments have lost control over their borders and simultaneously relinquished their humanitarian obligations’.⁶⁷ In fact, Welch remarks that following the Keating Government’s approval of large scale refugee intakes and initiatives to stem the flow of Vietnamese ‘boat people’ in the late 1970s, ‘Australians seemed to be more comfortable with a large refugee program under government control than the spontaneous arrival of a small number of boats’.⁶⁸ This suggests that an increase in legal avenues for migration—particularly an increase in the humanitarian intake for asylum seekers and larger resettlement quotas—would not only help manage migration more effectively and counter demand for smuggling services, but would also help to alleviate ‘boat people’ fears in the Australian population.

In fact, the Australian Government has acknowledged the benefits of its Humanitarian Program to national security, as one of the stated aims of the program is to ‘reduce the prospect of irregular movement from source countries and countries of first asylum’.⁶⁹ Between 2012–13 a total of 50,444 visa applications were lodged to Australia under the offshore program component, and in the same period 20,019 visas were granted under the Humanitarian Program—a considerable increase from the 13,759 visas granted

⁶² Australian Associated Press, ‘Tony Abbott will throw Australia’s support behind US plan to curb ISIS’, *The Guardian* (22 September 2014), available online: <http://www.theguardian.com/world/2014/sep/22/tony-abbott-will-throw-australias-support-behind-us-plan-to-curb-isis> (accessed 30 September 2014).

⁶³ ‘New clashes erupt at Syrian-Turkish border as 130k refugees flee’, *RT News* (22 September 2014), available online: <http://rt.com/news/189564-syrian-refugees-turkey-isis/> (accessed 30 September 2014).

⁶⁴ *Ibid.*

⁶⁵ Chimni, *op. cit.*, p. 76.

⁶⁶ *Irregular Migration, Migrant Smuggling and Human Rights*, p. 2.

⁶⁷ *Ibid.*

⁶⁸ Welch, *op. cit.*, p. 4.

⁶⁹ Commonwealth of Australia, *Humanitarian Program Information Paper 2014–15*, Department of Immigration and Border Protection, Canberra, ACT (2014), available online: <http://www.immi.gov.au/media/publications/refugee/ref-hum-issues/pdf/humanitarian-program-information-paper-14-15.pdf> (accessed 20 October 2014).

between 2011–12.⁷⁰ However, the 2013–14 program has been reduced back to 13,750 places, including a minimum of 11,000 places to be granted offshore.⁷¹

Recent public discourse has called for an increase in Australia’s humanitarian intake, particularly in response to conflicts in Syria, the Democratic Republic of the Congo, Mali, and the border between Sudan and South Sudan.⁷² Under the annual consultation process on the Humanitarian Program, the Refugee Council of Australia urged the Australian Government to return its quota to a 20,000 annual intake, a recommendation which received overwhelming support from other consultation participants.⁷³

A continued commitment

If people smuggling isn’t addressed at the source, push factors will continue to ‘bottleneck’ refugees in transit countries, perpetuating the demand for smuggling services. Migration pressures can be alleviated by strengthening protection and service delivery in source countries, administrating carefully targeted ODA programs, and increasing legal opportunities for migration—particularly through humanitarian intake.

While the benefits of containment policies have been acknowledged and undertaken by government policy to an extent, this commitment needs to be expanded. Effort should be made to empower relevant local and regional NGOs, and translate the acknowledgment of ODA’s effectiveness into practical application.

Regional cooperation

Measures enacted on a domestic level to combat people smuggling without complimentary measures and harmonisation in the region will simply displace the issue.⁷⁴ Australia has engaged with the Asia-Pacific region to address irregular migration issues through bilateralism, cooperation with partner organisations and the Bali Process.

Bilateralism

Australia has established a number of bilateral agreements and working groups on irregular migration related issues with key countries in the region; most notably Indonesia, Malaysia, Cambodia, Papua New Guinea, Pakistan, Sri Lanka, India, Afghanistan and Iraq.

Cooperation focuses on deterrence and containment, including border management, legal cooperation, maritime surveillance and interdiction, law enforcement, intelligence sharing, and technical assistance, as well as discussions on a range of irregular migration

⁷⁰ Commonwealth of Australia, *Fact Sheet 60 – Australia’s Refugee and Humanitarian Program*, Department of Immigration and Border Protection, Canberra, ACT (2014), available online: <https://www.immi.gov.au/media/fact-sheets/60refugee.htm> (accessed 15 September 2014).

⁷¹ *Humanitarian Program Information Paper 2014–15*.

⁷² *Australia’s refugee and humanitarian program 2014–15*, Australian Refugee Council (2014), available online: http://www.refugeecouncil.org.au/r/isub/2014-15_Intake%20sub.pdf (accessed 20 October 2014), p. 3.

⁷³ *Ibid.*, p. 8.

⁷⁴ A. A. Aronowitz, ‘Smuggling and Trafficking in Human Beings: The Phenomenon, the Markets that Drive it and the Organisations that Promote it’, *European Journal on Criminal Policy and Research*, vol. 9, no. 2 (2001), pp. 163-195.

issues.⁷⁵ Australia's bilateral relations are strongest with Indonesia and Malaysia, although efforts to expand cooperation with other states are currently underway.⁷⁶

Partner organisations

Irregular migration is governed primarily through regional initiatives, not through an international normative or institutional framework.⁷⁷ As such, there is a lack of binding agreements in international law on issues of international migration.⁷⁸ There are, however, international organisations whose work on irregular migration aims to fill this void. The two main actors are the International Organization for Migration (IOM) and the United Nations High Commissioner for Refugees (UNHCR).⁷⁹

The IOM is an inter-governmental organisation that 'works closely with governments, inter-government and civil society partners to help ensure the orderly and humane management of migration'.⁸⁰ The IOM is sustained through both ODA eligible and non-ODA eligible funding, and Australia has been a major contributor in recent years having committed \$37.1 million in ODA-eligible non-core funding in 2010–11 alone.⁸¹

The IOM provides a range of protection and assistance services to refugees and states, and for Australia this includes capacity building projects and population stabilisation in the region, research and policy discussion, facilitated travel for humanitarian visa recipients, and the delivery of assisted voluntary return packages.⁸² In particular, the IOM works closely with Australian authorities in Indonesia to help implement a Regional Cooperation Arrangement—which regulates the movement of irregular migrants through Indonesia and provides care and assistance to those intercepted—and the Reinforcing Management of Irregular Migration project—which seeks to detect and monitor irregular migration flows, provide training to law enforcement, and raise awareness of irregular migration through information campaigns.⁸³

The UNHCR is mandated by the UN to 'lead and co-ordinate international action to protect refugees and resolve refugee problems worldwide',⁸⁴ and the Australian

⁷⁵ Houston, op. cit., p. 114.

⁷⁶ Department of the Prime Minister and Cabinet, *Joint Statement on the State Visit of Prime Minister of Australia to India*, media release, New Delh (5 September 2014), available online: <https://www.pm.gov.au/media/2014-09-05/joint-statement-prime-minister-modi-new-delhi-india> (accessed 6 October 2014); Department of Foreign Affairs and Trade, *Joint Communiqué Of The Eighth Singapore-Australia Joint Ministerial Committee (SAJMC)*, media release (22 August 2014), available online: http://foreignminister.gov.au/releases/Pages/2014/jb_mr_140822a.aspx (accessed 10 October 2014); Department of Foreign Affairs and Trade, *Australia-Sri Lanka talks: Four-point Plan to Fight People Smuggling*, media release (17 December 2012), available online: http://foreignminister.gov.au/releases/2012/bc_mr_121217.html (accessed 10 October 2014).

⁷⁷ A. Betts, *Global Migration Governance*, Oxford University Press, Oxford (2011), p. 79.

⁷⁸ J. Douglas and A. Schloenhardt, *Combating Migrant Smuggling with Regional Diplomacy: An Examination of the Bali Process*, Migrant Smuggling Working Group, The University of Queensland, Brisbane (2012), p. 23.

⁷⁹ Betts, op. cit., p. 91.

⁸⁰ Commonwealth of Australia, *Australian Multilateral Assessment: International Organisation for Migration (IOM)*, AusAID, Canberra, ACT (2012).

⁸¹ Ibid.

⁸² Houston, op. cit., p. 114.

⁸³ Ibid., op. cit., pp. 113–14.

⁸⁴ *About Us*, United Nations High Commissioner for Refugees, Geneva, Switzerland, available online: <http://www.unhcr.org/pages/49c3646c2.html> (accessed 10 October 2014).

Government is strongly committed to assisting in this effort. On 21 September 2012 the Australian Government and the UNHCR signed a four-year Partnership Framework to strengthen their cooperation and delivery of programs with a commitment of \$105 million from the Australian Government between 2013–16.⁸⁵ Commitments such as these signal Australia’s recognition of the UNHCR as a key multilateral partner.⁸⁶

Bali Process

Australia’s most significant regional cooperation effort has been in its dominant role and participation in the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime (Bali Process)—an international forum which raises awareness of people smuggling, trafficking in persons and related transnational crimes, and develops and implements strategies and practical cooperation in response. It currently includes more than 45 members, including the UNHCR, the IOM and the UNODC— in addition to a number of observer countries and international agencies.⁸⁷

Regional consultative process

The Bali Process is an example of a Regional Consultative Process (RCP), whereby ‘a group of states—which may not necessarily be part of the same geographical region—engag[e] in regular, informal, behind-closed-doors dialogue on migration’.⁸⁸ The RCP model is praised as an effective mechanism of international diplomacy, and has been considered preferable to more formal multilateral models offered by the UN and other global international organisations.⁸⁹

Australia has committed substantial funding to the forum, as evidenced by the 2014–15 federal budget which allocated DFAT \$6.4 million over two years ‘to continue existing counter-people smuggling measures, specifically a dedicated position in Sri Lanka, the Ambassador for People Smuggling Issues and Bali Process meetings’.⁹⁰

Successful outcomes

Perhaps the most significant outcome of the Bali Process thus far has been in soft power. It has opened discussion on the subject of irregular migration and fostered a sense of cooperation and solidarity on the issue, despite the significant barrier of a diverse geopolitical region.⁹¹

The Regional Cooperation Framework (RCF)—a non-binding set of common understandings for dealing with irregular movement and asylum seekers established in

⁸⁵ *AusAID – UNHCR Partnership Framework 2013–16*, Commonwealth of Australia, Canberra, ACT (2013).

⁸⁶ Houston, *op. cit.*, p. 113.

⁸⁷ *About the Bali Process*, Bali Process, available online: <http://www.baliprocess.net/> (accessed 20 August 2014).

⁸⁸ Betts, *op. cit.*, p. 18.

⁸⁹ Douglas and Schloenhardt, *op. cit.*, pp. 9–10.

⁹⁰ Barker, ‘*Counter-people smuggling measures*’, 2014.

⁹¹ Douglas and Schloenhardt, *op. cit.*, p.13.

March 2011⁹²—was established with the objective of ‘provid[ing] a more effective way for interested parties to cooperate to reduce irregular movement through the region’.⁹³ It focuses on improving asylum seeker access to assessment processes, improving protection arrangements, and encouraging border security arrangements, law enforcement activities and a disincentive scheme to target people smuggling enterprises.⁹⁴

In addition, as of February 2012, 18 Member States had adopted the *Model Law to Combat People Smuggling*—a legislative framework modelled on the UN’s *Protocol against the Smuggling of Migrants by Land, Sea and Air*, targeted towards countries that had no, or rudimentary, laws relating to people smuggling—supplementing the 19 other Member States with existing equivalent laws.⁹⁵ This achievement partially addresses Schloenhardt’s call for complimentary foreign legislation,⁹⁶ as uniformity in legislation encourages greater levels of legal assistance between states and bilateral and multilateral law enforcement and judicial cooperation.⁹⁷

Regional bureaucracy

Practical outcomes beyond the RCF and model laws, however, have been less impressive. A Sydney Morning Herald article reporting the Fifth Regional Ministerial Conference in April 2013 labelled the forum a ‘hot-air fest’ that only involved declarations and rhetoric, without any actual tangible translation into action.⁹⁸

A 2012 examination of the Bali Process since its inception argued the forum is founded on too narrower a focus; the objectives have focused on legislative frameworks and border security strategies and have neglected issues of human rights, root causes of irregular migration, and the assistance offered to refugees.⁹⁹ In addition, the agenda has been driven by state interest, primarily Australia’s, which undermines claims of equality amongst Member states.¹⁰⁰

Indeed, the fundamental shortcoming lies in its reality as a consultative regional forum, as a diplomatic forum can only have a limited impact on irregular migration, and thus the capabilities of the Bali Process should not be overestimated.¹⁰¹

⁹² S. Taylor, ‘Regional Cooperation and the Malaysia Solution’, *Inside Story* (9 May 2011) available online: <http://insidestory.org.au/regional-cooperation-and-the-malaysian-solution/> (accessed 22 August 2014).

⁹³ ‘Co-Chairs’ Statement’, in *Fourth Bali Regional Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime*, (Bali: 2011), available online: http://www.unodc.org/documents/southeastasiaandpacific/2011/04/som-indonesia/110330_FINAL_Ministerial_Co-chairs_statement_BRMC_IV.pdf (accessed 15 October 2014), p. 2.

⁹⁴ *Regional Cooperation Framework*, Bali Process, available online: <http://www.baliprocess.net/regional-cooperation-framework> (accessed 20 August 2014).

⁹⁵ Douglas and Schloenhardt, op. cit., pp. 13–14.

⁹⁶ Schloenhardt, op. cit., p. 363.

⁹⁷ Douglas and Schloenhardt, op. cit. p. 14.

⁹⁸ M. Bachelard, ‘Bali Process grinds on with no sign of results’, *The Sydney Morning Herald* (4 April 2013), available online: <http://www.smh.com.au/federal-politics/political-opinion/bali-process-grinds-on-with-no-sign-of-results-20130404-2h7yz.html> (accessed 25 August 2014).

⁹⁹ Douglas and Schloenhardt, op. cit., pp. 17–18.

¹⁰⁰ *Ibid.*, p. 19.

¹⁰¹ *Ibid.*, p. 22.

An expanded approach

The Australian Government has framed itself as a regional leader in its cooperation efforts on people smuggling. The Attorney General's 2012–13 annual report acknowledges international cooperation as one of the most effective ways to address people smuggling, and states that 'the Australian Government engages with regional partners both bilaterally and as a participant in multilateral forums and a range of conferences, workshops and working groups on irregular migration and border security issues'.¹⁰² In fact, in an address to the Putrajaya forum—a gathering of defence and intelligence officials in Kuala Lumpur in April 2014—Morrison argued that the success of Operation Sovereign Borders is evidence that Australia could take a regional leadership role in combating people smuggling.¹⁰³

However, in actuality, regional cooperation in the Asia-Pacific region is still in its early stages, and the success of the Bali Process will depend on its ability to produce practical outcomes beyond diplomatic discussion. Regional migration governance and bilateral cooperation is currently driven by a security agenda, and must be expanded to include a focus on refugee protection and human rights. Additionally, Australia has developed strong relationships with key regional partners, but it is paramount that these relations not be compromised by the reshaped role of Australia's ODA.

Conclusion

Migration is a natural social process, and it must be accepted that international migration is inevitable. Sasika Sassen maintains that, 'if we can accept that migration is not simply an aggregation of individual decisions, but a process patterned and shaped by existing politico-economic systems, then the question of control and regulation becomes more manageable'.¹⁰⁴

Thus, while governments cannot control migration flows, they may manage them with appropriate policies. Individuals resort to irregular migration due to a lack of alternatives, and thus satisfying asylum seekers' needs—both through domestic policy reforms and capacity building and assistance to source and transit countries regionally—will undermine the demand for people smuggling services. An effectively managed migration system would see a reduction of irregular migration flows to Australia, consequently satisfying its obligations to international human rights and to national security.

¹⁰² *Attorney Generals Department Annual Report 2012–13*, Commonwealth of Australia, Canberra, ACT, (2013).

¹⁰³ L. Bourke, 'Australia could take 'regional leadership role' on tackling people smuggling, says Minister Scott Morrison', *ABC News* (15 April 2014), available online: <http://www.abc.net.au/news/2014-04-15/scott-morrison-on-australia-leadership-role-people-smuggling/5391082> (accessed 7 August 2014).

¹⁰⁴ Sassen, cited in S. Pickering, 'The Production of Sovereignty and the Rise of Transversal Policing: People-smuggling and Federal Policing', *The Australian and New Zealand Journal of Criminology*, vol. 37, no. 3 (2004), pp. 362-379.

People smuggling does not exist in isolation, and similarly the solution to combating it must also exist within a multidimensional system encompassing deterrent and preventative measures, as well as regional harmonisation. Australian policy has acknowledged the importance of a comprehensive approach to combating irregular migration, but this rhetoric has not translated into assertive practice—rather, current efforts are driven by a national security agenda. There must be a shift in policy beyond a hollow commitment towards the recognition that this offers the most beneficial approach, both for the interests of the refugee and for Australia.

People smuggling is not an isolated issue, but exists within a broader insufficient migration system. Thus, it is the system that needs to be reformed and developed, as a security-driven war on people smuggling will not prove to be an effective and sustainable approach.

A Human Rights-Based Approach to Development: From Policy to Practice

Gale Wilkinson*

Since the 1990s there has been a growing consensus on the link between human rights and development and the need to incorporate human rights norms into poverty reduction strategies. In recent years this has culminated in the establishment of a human rights-based approach (HRBA) to development. A HRBA to development programming is one that systematically applies the values, principles and standards contained in international and national human rights law to all aspects, both substantive and procedural, of the development process. In this way, it has the potential to address, and provide resilience to, the structural vulnerabilities and insecurities felt globally by the most poor and marginalised. This paper describes and analyses the HRBA in practical terms and to examine what integrating human rights with development translates to in practice by focussing on the right to education. Concentrating on the realisation of the right to education through the use of a HRBA enables a clearer exploration of the practical implications and added value of this approach, as well as its potential limitations.

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Despite significant recent progress in poverty reduction, the United Nations Development Programme (UNDP) determined that in 2014 more than 2.2 billion people were still living near to, or in, multi-dimensional poverty—denied the vital human rights to adequate food, water, shelter, education and healthcare.¹ In most cases the poor along with women, immigrants, indigenous groups and older people, are structurally vulnerable. Their insecurity has evolved and persisted over long periods of time to create divisions that are not easily overcome: in gender, ethnicity, race, job type and social status.² It is these structural vulnerabilities and insecurities that pose the greatest challenge to implementing development policies successfully. This paper will examine and critically analyse the prevailing human rights-based approach (HRBA) to development that has gained significant popularity over the past two decades for its potential ability to address, as well as provide resilience to, the structural vulnerabilities and insecurities that sustain this multi-dimensional poverty. An HRBA to development is normatively based on internationally agreed human rights standards and endeavours to promote and protect universal human rights. It seeks to identify and address the inequalities that lie at the heart of development problems and redress the discriminatory practices and unjust distributions of power that hinder development progress. Attention to the rights of the most vulnerable and marginalised individuals and communities is a non-negotiable component of the human rights construction. Therefore, adopting an HRBA directs the attention of policy-makers and development planners to the potential ‘losers’ in development processes. An HRBA helps to promote the sustainability of development work; empowering people themselves, especially the most marginalised, to participate in policy formulation; and hold accountable those who have a duty to act.³

Through an analysis of the existing literature on HRBAs to development, this paper will argue that the HRBA is currently the most sufficient and holistic policy to tackle the problems of development in today’s world. It will further be argued that an approach with a solid theory is not enough. The approach must be translated into policy and, most importantly, into practice. In this regard, the paper seeks to describe the HRBA in practical terms- to examine what integrating human rights with development translates to in practice, by focusing on the right to education. Concentrating on the realisation of the right to education through the use of an HRBA enables a clearer exploration of the practical implications and added value of this approach, as well as its potential limitations.

The paper will begin by describing and analysing the HRBA and allow for the comparison of an HRBA to previous traditional development approaches in order to highlight that an HRBA is the most sufficient and holistic policy to tackle development issues in today’s world. Having established the strengths of the theory, the next section seeks to use the implementation of the right to education as an illustration of moving an HRBA from policy into practice. Finally, the paper will look towards the future. In light of the current global discussion on the post 2015 development goals, this paper will argue that an HRBA needs to feature highly in future goals that are decided.

¹ United Nations Development Programme, ‘Human Development Report 2014’ (2014), available online: <http://hdr.undp.org/sites/default/files/hdr14-report-en-1.pdf> (accessed 30 July 2014).

² Ibid.

³ Office of the High Commissioner of Human Rights, ‘Frequently Asked Questions on a Human Rights-Based Approach to Development Cooperation’ (2006), available online: <http://www.ohchr.org/Documents/Publications/FAQen.pdf> (accessed 31 August 2014).

An HRBA Defined

An HRBA underlines the multi-dimensional nature of poverty by targeting the root causes of deprivation and expanding the range of responses. In this way, it redefines the nature of the development problem. Unlike the simple ‘basic needs’ structure of traditional development—one that focuses on securing additional resources for delivery of services to particular group in the form of charity or aid—the HRBA goes further, calling for the equal sharing of existing resources and assisting poor and marginalised people in asserting their rights to those resources.⁴ Grounded in the norms of international and national human rights legislation, the approach recognises the inherent dignity of every human being without distinction; it recognises and promotes equality between women and men; promotes equal opportunities and choices for all; and promotes mutual respect between people to encourage peace and justice.⁵ According to Hausermann, ‘it creates an approach that utilises human rights principles and legal norms as a coherent framework for concrete action to eliminate poverty and achieve sustainable improvement in the quality of life of the poor and socially isolated’.⁶ Furthermore, by lending the practices of development the support of internationally agreed legislation, the label of being ‘human rights-based’ can in itself serve as a means of legitimising a more progressive and powerful approach to development.⁷

HRBA Core Values

At its core, the HRBA has the principles of accountability, empowerment, participation, equality and non-discrimination. It is from these principles that the approach’s value and benefits to development stem.

Accountability

The international human rights framework consists of a spectrum of treaties and conventions that establish rights and obligations for individuals, groups and governments. This in turn has created the concepts of rights-holders and duty bearers that have claims to human rights and obligations to respect, protect, promote and fulfil human rights, respectively.⁸ An HRBA identifies these two groups, and works towards strengthening the capacities of rights-holders to make their claims, and duty bearers to meet their obligations.⁹ By framing development in the normative framework of human rights, the approach creates obligations that have the legal power to render all actors within the development process (governments, bilateral or multilateral donors, NGOs

⁴ A. Cornwall and C. Nyamu-Musembi, ‘Putting the ‘rights based approach’ to development into perspective’, *Third World Quarterly* vol. 25, no.8 (2004), p. 1417.

⁵ J. Hausermann, *A Human Rights Approach to Development* (printed by The KPC Group for Rights and Humanity, 1998), p. 32.

⁶ *Ibid.*

⁷ Cornwall and Nyamu, *op. cit.* (2004), p. 1418.

⁸ L. T. Munro, ‘The “Human Rights-Based Approach to Programming”: A Contradiction in Terms?’ in S. Hickey and D. Mitlin (eds), *Rights-Based Approaches to Development: Exploring the potential and pitfalls* (Kumarian Press, 2009), p. 190

⁹ The UN Common Understanding on Human Rights Based Approach to Development Programming, available online: <http://hrbaportal.org/the-human-rights-based-approach-to-development-cooperation-towards-a-common-understanding-among-un-agencies> (accessed 31 August 2014).

and private contractors) to higher levels of accountability.¹⁰ It is argued that this greater accountability is the key to improved effectiveness and transparency of development programs by facilitating the monitoring of programs and inducing duty bearers to act.¹¹ Establishing ways to operationalise and evaluate institutions and mechanisms for accountability in development programming is a defining challenge for an HRBA.¹² One of the biggest components of this challenge is the reality that most poor have little access to the institutions that may enforce their rights.¹³ The approach places accountability primarily on the state; however, it is a characteristic of most marginalised communities that they look towards their own communities for support instead of the state.¹⁴ Therefore, to overcome this challenge in an HRBA, governments will need to find ways to reach and serve communities, potentially by building alliances with organisations that have a long-term presence in these marginalised communities, such as religious organisations or community groups.¹⁵ Here, NGOs have an important role to play, as they have a greater ability to grow trust and create partnerships within communities.¹⁶

Empowerment

One of the fundamental benefits of the HRBA is that it empowers people and communities affected by poverty to claim their rightful entitlements.¹⁷ The principle of empowerment also stems from the fact that the approach is framed in human rights terms and subsequently in legal entitlements. In this way, an HRBA has the ability to change the way people perceive themselves, in regards to the government and other actors. As such, the rationale for development no longer derives merely from the point that people living in poverty have needs but also from the fact that they have rights and entitlements.¹⁸ In the same regard, what was once understood as under traditional development programs as ‘charity’ becomes ‘justice’ from the corresponding duty-bearer and this shift in emphasis is critical for the self-esteem of the poor.¹⁹ An HRBA can strengthen the capacity of local civil society groups to understand their human rights, analyse these issues through a human rights framework, develop advocacy and awareness strategies and realise their human rights.²⁰ In South Africa, CARE International is aiming to change the power relations within society by encouraging civil society to see themselves as responsible rights-holders with the power to change how they are viewed and treated by others as well as to hold duty bearers responsible.

¹⁰ C. Dias, ‘Understanding the UN Common Understanding on a Human Rights-Based Approach to Development Programming’ in C. Raj Kumar and D.K. Srivastava (eds), *Human Rights and Development: Law, Policy and Governance* (LexisNexis, 2006), p.316.

¹¹ E. Filmer-Wilson, ‘The Human Rights-Based Approach to Development: The Right to Water’, *Netherlands Quarterly of Human Rights*, vol. 23, no.2, (2005), p.218.

¹² M. Robinson, ‘What Rights Can Add to Good Development Practice’ in P. Alston and M. Robinson (eds), *Human Rights and Development: Towards Mutual Reinforcement* (Oxford University Press, 2005), p. 39.

¹³ Cornwall and Nyamu-Musembi, op. cit. (2004), p.1418.

¹⁴ Robinson, op. cit. (2005), p. 36.

¹⁵ Ibid., p. 37.

¹⁶ Ibid.

¹⁷ Filmer-Wilson, op. cit. (2005), p. 217.

¹⁸ OHCHR, ‘Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies’ (2012), available online: <http://www.ohchr.org/Documents/Publications/PovertyStrategiesen.pdf> (accessed 31 August 2014), p. 4.

¹⁹ Filmer-Wilson, op. cit. (2005), p. 217.

²⁰ Dias, op. cit. (2006), p.316.

Through workshops, including both civil society organisations and government, CARE has been changing the mind-sets of communities and civil society; enabling them to effectively defend and exercise their rights and work to improve the capacity of government to fulfil their obligations.²¹

Participation

Unlike traditional approaches to development, an HRBA attaches as much importance on the processes that enable developmental goals to be achieved as the goals themselves.²² In human rights law the principle of participation insists that humans are entitled to have a role, a voice, in decisions that affect them and their communities.²³ Translated into an HRBA this means ensuring the active and informed participation of the poor and marginalised in the formulation, implementation and monitoring of development strategies.²⁴ This is contrasted with the traditional development approach within which participation was considered to mean consulting with the recipients of development programs on already fully planned and designed projects.²⁵

This shift essentially changes the direction of development policy from top-down to bottom up, decentralising programming from the headquarters to the local level.²⁶ Participation along with accountability implies that those affected by a development project must have a measure of control and power; this leads to a sense of ownership in the development process, guaranteeing greater sustainability of projects.²⁷ The principle of participation also provides challenges for the approach in cases where a state has weak democratic structures or no democracy at all. Participation therefore also requires the duty of those responsible to supply the conditions for this participation, namely by strengthening democratic institutions and civil society organisations by, for example, promoting free and fair electoral systems.²⁸ The case of ActionAid's work in Nepal highlights the use of participatory frameworks that changed the way a program was implemented. When ActionAid Nepal started work in one rural area, staff envisioned a project that would address poverty by helping tenant farmers increase production, suggesting that irrigation would be a good investment. However, after engaging with farmers and considering their opposition to the scheme, staff realised that irrigation could be counterproductive to the tenant farmers who had no enforceable right to the land they farmed. With improved irrigation and productivity land value would increase. As a result, landowners might find it more worthwhile to evict tenants and farm themselves. The irrigation project was discarded and instead work began on organising education and advocacy for the defence of tenant rights. ActionAid also supported efforts to build strong local organisations, influence policy and increase farmers' critical

²¹ Filmer-Wilson, op. cit. (2005), p. 223.

²² OHCHR, op. cit. (2012), p.5.

²³ Munro, op. cit. (2009), p. 191.

²⁴ OHCHR, op. cit. (2012), p. 5.

²⁵ B. I. Hamm, 'A Human Rights Approach to Development', *Human Rights Quarterly*, vol 23, (2001), p.1019.

²⁶ Ibid.

²⁷ Filmer-Wilson, op. cit. (2005), p. 219.

²⁸ Hamm, op. cit. (2001), p. 1019.

analysis and leadership skills, thereby contributing to the growth of a wider social movement of tenant farmers and peasants.²⁹

Equality and non-discrimination

Equality and non-discrimination are two other dimensions of an HRBA that focus on the process of how a development program is achieved. Non-discrimination and equality are two basic principles of human rights and a precondition of peace and development.³⁰ For an HRBA, integrating these principles requires identifying those groups that are the most marginalised in a society and ensuring that their rights and well-being are safeguarded in development policies.³¹ The approach then goes on to identify and address why these groups are marginalised, giving extra concern to the political, legal and social framework of the country.³² As Filmer-Wilson highlights, in many cases this will require training for development practitioners to ensure that they fully understand these issues and why certain groups are at risk; for example, UNICEF in Sudan runs a consortium that offers training courses on Sudanese culture for all those working in humanitarian aid.³³ The principles of non-discrimination and equality also add a unique dimension to the HRBA by providing that these principles also permeate the actors and donors of development projects, not just programs themselves.³⁴ As Uvin puts it ‘the promotion of human rights begins with oneself’.³⁵ Organisations seeking to promote human rights should also ensure that their internal personnel management and decision making procedures are non-discriminatory, non-exclusionary, transparent and accountable.³⁶

The above advocates that an HRBA encompasses the most comprehensive system to approach today’s development problems as its potential is grounded in its ability to address the underlying issues that sustain poverty by focusing on the principles of accountability, empowerment, participation, equality and non-discrimination. The following section provides an illustration of applying an HRBA from policy into practice.

Realising the right to education through the adoption of a HRBA

Education has been formally recognised as a human right in Article 26 of the Universal Declaration of Human Rights; it is further protected in the International Covenant on Economic, Social and Cultural Rights (ICESCR) Article 13 and again in Article 28 of the Convention on the Rights of the Child (CRC). The latter two internationally legally binding documents have near universal ratification, the ICESCR with 162 parties and the CRC with 194 (the United States and Somalia being the only two States that have signed but not yet ratified the Convention). Furthermore, the right to education is

²⁹ Jennifer Chapman, ‘Rights-Based Development: The Challenge of Change and Power for Development NGOs’ in S. Hickey and D. Mitlin (eds), *Rights-Based Approaches to Development: Exploring the potential and pitfalls* (Kumarian Press, 2009), p.170.

³⁰ Hamm, op. cit. (2001), p.1017.

³¹ Filmer-Wilson, op. cit. (2005), p. 221.

³² Ibid., p. 222.

³³ Ibid.

³⁴ Peter Uvin, ‘From the right to development to the rights-based approach: how ‘human rights’ entered development’, *Development in Practice* vol. 17, no. 4-5, (2007) p. 604.

³⁵ Ibid., p.604.

³⁶ Ibid., p. 622.

exemplified in many international goals, strategies and targets that have been set over the last 25 years; it is the subject of the second Millennium Development Goal to achieve universal access to free, quality and compulsory primary education by 2015 and the Education for All goals that were established in 1990 and reaffirmed at the 2000 World Education Forum. These various strategies and commitments have had a notable effect. In 1948, when education was recognised as a human right, only a minority of the world's children had access to any formal education whereas today, a majority of them go to school.³⁷ Increasing the quantity of education was the major target for right to education goals. Although more children are attending school than ever before, 57 million children of primary school age remain out of school, the majority of whom are girls.³⁸

Most international attention has been focused on helping children get into school, however, the current education crisis is not simply the rates at which children attend school.³⁹ The crisis is multidimensional: not only must children have access to school, they need to be taught a quality curriculum and complete all years of schooling, and most importantly all children must have equal access to education. Unsurprisingly, of the 57 million children not in school, 54 percent of them are girls, with the proportion rising to 60 percent in Arab states: a share that has remained steady since 1999.⁴⁰ Of lower-income countries, only 20 percent have achieved gender parity in education.⁴¹ The trend continues into adulthood whereby 493 million women are illiterate, accounting for almost two thirds of the world's 774 million illiterate adults.⁴² Inequality in access is also swayed towards those belonging to economically and socially marginalised and vulnerable groups, such as linguistic and ethnic minorities, immigrants, the handicapped, indigenous peoples, child victims of conflict and street children.⁴³

Enrolment is only half the measure of achieving universal primary education and success needs to be judged on completion rates as well. Progress in this regard is even more disappointing. In 2010, around 75 percent of those who started primary school reached the last grade and it is estimated that by 2015 only 13 out of 90 countries will have achieved universal primary school completion.⁴⁴ The final indicator that needs to be taken into account is the quality of the education received, as poor quality education inhibits learning, even for those who make it to school.⁴⁵ The pupil-to-teacher ratio has been a key measure for assessing progress. Globally these ratios have hardly changed between 1999 and 2011, from 26:1 in 1999 to 24:1 in 2011.⁴⁶ Furthermore, less than 75 percent of primary school teachers are trained according to national standards in approximately one third of the countries with data.⁴⁷ None of these statistics are

³⁷ UNESCO and UNICEF, 'A Human Rights Based Approach to Education For All' (2007), available online: <http://unesdoc.unesco.org/images/0015/001548/154861e.pdf> (accessed on 30 August 2014).

³⁸ UNICEF, Education For All, 'Global Monitoring Report 2013/4; Teaching and Learning – Achieving quality for all' (2014), available online: <http://unesdoc.unesco.org/images/0022/002256/225660e.pdf> (accessed on 31 August 2014).

³⁹ UNESCO and UNICEF, op. cit. (2007) p.52.

⁴⁰ Ibid.

⁴¹ Ibid

⁴² Ibid.

⁴³ K. Singh, 'Foreword' in B. Blue Swadener, L. Lundy, J. Habashi and N. Blanchet-Cohen (eds), *Children's Rights and Education* (Peter Lang Publishing Inc, 2013), xi.

⁴⁴ UNESCO and UNICEF, op. cit. (2007), p. 52

⁴⁵ UNDP, op. cit. (2014).

⁴⁶ UNICEF, op. cit. (2014), p. 85.

⁴⁷ Ibid.

particularly positive and a lot more needs to be done now and in the future. Access to, completion and quality of education needs to be achieved in a non-discriminative atmosphere for the right to education to be successfully implemented and fully realised. As will be seen in the following section, a HRBA contains the elements to address each of these features as it focuses not only on the quantity of education but also the quality—dealing with obstacles beyond and within education, adding a qualitative dimension to the existing global focus on quantitative targets and moving beyond the simple indicator of access to education.

The value of a HRBA to implementing the right to education

Under the traditional development approach education was implemented and measured by school enrolments, with an increase from 30 percent to 40 percent considered a success.⁴⁸ However, from a human rights perspective, this increase signifies the continual denial of the right to education to 60 percent of the population.⁴⁹ The status of education as a human right adds weight to achieving education for all. Development actors are provided with a valuable advocacy tool for bringing the world's attention to this sphere and for holding local or national governments accountable to their commitments.⁵⁰ It furthermore builds capacity by focusing on empowerment, harnessing and developing the capacities of governments to fulfil their obligations and of students to claim their rights and entitlements.⁵¹

A foundation in human rights promotes democracy and social progress and, for education, this equates to the development of a school environment in which children know their views are valued. An environment where there is a focus on respect for families and the values of the society within which they live; and where understanding of cultural diversity is promoted, serving to strengthen social cohesion.⁵² An HRBA is founded on principles of peace and non-violent conflict resolution, in this way schools and communities must create learning environments that eliminate all forms of physical, sexual or humiliating punishment by teachers, and challenge all forms of bullying and aggression among students—the lessons children learn from school-based experiences in this regard can have far reaching consequences for wider society.⁵³ The approach also produces better outcomes for economic development. By promoting universal access to education and overcoming discrimination against girls, children with disabilities, working children, children in rural areas, and minority and indigenous children, the economic base of society can be widened, thus strengthening a country's economic capability.⁵⁴

One of the biggest contributions an HRBA makes in implementing the right to education is by targeting the underlying root causes of barriers to the right to education, moving beyond access to target rights *in* and *through* education. Here, a look at gender equality in education provides the best example of the approach addressing rights *to*, *in* and *through* education.

⁴⁸ K. Tomasevski, *Education Denied* (first published by Zed Books, 2003), p. 3.

⁴⁹ *Ibid.*

⁵⁰ Filmer-Wilson, *op. cit.* (2005), p. 230.

⁵¹ UNICEF and UNESCO, *op. cit.* (2007), p. 12.

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ *Ibid.*

Previous development policies that attempted to remedy the unequal enrolments of girls have focused on barriers to access and included increases in the availability of schools and access to them, and inducements to parents to send their daughters to school.⁵⁵ This involved requiring schools to enrol a certain number of girls, establishing special schools for girls and recruiting and training female teachers.⁵⁶ These policies have made a large contribution to providing girls access to school and overcoming some of the exclusion.

However, human rights research has demonstrated that the biggest obstacles to girls' education lie beyond the education sector in circumstances including early marriage, pregnancy and unpaid household work.⁵⁷ Through marriage and pregnancy, girls of primary school age are not only precluded from school, but also lose their rights as a child.⁵⁸ Both the CRC and Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) contain rights that urge governments to prohibit and eliminate child marriage. Moreover, the Committee on the Rights of the Child has formulated the view that suspending pregnant school children from school is discriminatory against girls and also a violation of the right to education.⁵⁹

Therefore, applying an HRBA to education in situations where these rights violations takes place would alter the practice and design of education policies and seek to tackle illegal practices of child marriage and discriminatory actions that stop pregnant girls attending school or returning when they are able. In instances where girls are being deprived access to school through a necessity that they are required to work in the household, instead of simply requiring girls to attend school an HRBA would allow for the adaption of the school schedule to the seasonal and daily rhythm of life. Since poor families often depend on the work of each family member for their survival, combining school and work often proves necessary: an HRBA provides the flexibility to understand and support this necessity.⁶⁰ The approach also looks towards rights *in* and *through* education. These components look toward adaption of the school curriculum to suit girls as well as boys. Improving access to education for increased numbers of girls and women does not necessarily have a positive impact on equality if, when in school, these girls learn from curricula and textbooks that perpetuate the stereotypes that impede gender equality.⁶¹ In a survey of women in primary school, textbooks in Croatia revealed that sons were the subject of 42 percent of the material on family life, and daughters only 17 percent.⁶² Whereas a traditional development approach would simply look to get girls into school, a HRBA has the ability to identify this issue and address it. Human rights provide helpful guidance, requiring examination of the entire legal status of girls and women in society, as well as the sources of law which determine it and a

⁵⁵ Tomasevski, op. cit. (2003), p. 158.

⁵⁶ Ibid.

⁵⁷ K. Tomasevski, 'Girls' education through a human rights lens: What can be done differently, what can be made better?' in T. O'Neil (ed) *Human Rights and Poverty Reduction: Realities, Controversies and Strategies. An ODI Meeting Series* (Overseas Development Institute, 2006) p.16

⁵⁸ Ibid., p. 17.

⁵⁹ Ibid., p. 18.

⁶⁰ Tomasevski, op. cit. (2003), p. 163.

⁶¹ Tomasevski, op. cit. (2006), p. 17.

⁶² Ibid., p. 16.

HRBA necessitates that the purpose and content of education be designed and practised to the equal rights of girls and women.⁶³

The practical implications of an HRBA

An HRBA to realising education requires a framework that addresses the right of access to education, the right to quality education and respect for human rights in education.⁶⁴ The practice of integrating the legal rights to education into the approach can be most comprehensively examined by using the four-schema approach—developed by the previous UN Special Rapporteur to Education, Katarina Tomasevski—that separates the legal obligations derived from the right to education into the categories of making education available, accessible, acceptable and adaptable.

Making education available

International human rights law asserts governments' responsibility for ensuring free and compulsory primary education.⁶⁵ In an HRBA the first step in accomplishing this right is identifying the financial obstacles to free universal education, the law cannot force parents or governments to ensure education if it is beyond their means, and therefore international cooperation is generally necessary.⁶⁶ For the same cause, an HRBA to education has the potential to direct political choices that might otherwise under-emphasise education and furthermore recognises that as children generally lack a political voice, they need coordinated efforts on their behalf to secure quality education through the political system.⁶⁷

Making education accessible

The principles of non-discrimination and equality are highlighted under the category of making the right to education accessible. There is a legal obligation of all governments to ensure, individually and collectively, education for all children, and especially to eliminate exclusion and discrimination.⁶⁸ Therefore an HRBA must take account of the need of the poor and the most disadvantaged, including working children, remote rural dwellers and nomads, and ethnic and linguistic minorities, children, young people and adults affected by conflict, HIV/AIDS, hunger and poor health; and those with special learning needs.⁶⁹ An HRBA must seek to eliminate barriers within the community and within schools to achieve equality in access to education.

Making education acceptable

This criterion revolves around the quality of education. International treaties do not go as far as to define what quality education is, but instead define what functions education

⁶³ Ibid., p. 19.

⁶⁴ UNESCO and UNICEF, op. cit. (2007) p.27.

⁶⁵ For example: Universal Declaration of Human Rights, Convention on the Rights of the Child, International Covenant on Economic, Social and Cultural Rights.

⁶⁶ K. Tomasevski 'Manual on Rights Based Education', available online: <http://unesdoc.unesco.org/images/0013/001351/135168e.pdf> (accessed 31 August 2014).

⁶⁷ Ibid., p. 13.

⁶⁸ The Dakar Framework for Action, available online: <http://unesdoc.unesco.org/images/0012/001211/121147e.pdf> (accessed 31 August 2014).

⁶⁹ Ibid.

should fulfil (such as developing a child's personality, promote respect for human rights and non-discrimination).⁷⁰ Here, an HRBA promotes the need for fully-equipped schools that are safe and employ trained teachers that can help children reach their full potential. It also contains a feature that looks at whether graduate unemployment exists, and what measures can be taken towards aligning education with employment-creating measures. The use of minority languages for teaching is also an important component of this approach.

Making education adaptable

In seeking to make education adaptable an HRBA promotes an education system that is able to adapt to children in a variety of ways, rather than forcing children to adapt to the nature of schooling on offer.⁷¹ In this way an HRBA looks at the human rights principles of non-discrimination and equality. It seeks to make the school environment one that is beneficial to all children; whether this be through targeted learning programs for disabled children, or making sure textbooks reflect gender equality.

To summarise, an HRBA to education seeks to comprehensively identify all possible problems and barriers and uses targeted programs to analyse and address them. This differs most significantly from traditional approaches that simply sought to get kids into school. If the coverage and effectiveness of education can be widened, it could provide not only a more just and fair world but also one that is more secure. The right to education is an empowerment right: it helps to lift economically and socially marginalised people, both adults and children, out of poverty and gives them the ability to participate fully in their communities.⁷² It is crucial for helping people to achieve their full potential by imparting the knowledge and skills necessary for a better life.⁷³

The HRBA and the post-2015 development agenda

The focus on the post-2015 development agenda correlates with the conclusion of the Millennium Development Goals (MDGs), which served as the framework for global action and cooperation on development since 2000. The eight goals sought to halve global income poverty and hunger; achieve universal primary education and eliminate gender disparity within it; reduce child mortality and improve maternal health; combat HIV/AIDS, malaria and other diseases; ensure environmental sustainability and develop a global partnership for development.⁷⁴ As the world approached 2015, the overall target date for achieving the MDGs, the debate on how to advance the global development agenda beyond 2015 began.

The nature of poverty and how we understand it has changed considerably in the last 15 years. As such, there is a need to create a framework for the future that focuses on the current nature and understanding of poverty. During the period of the MDGs (particularly the early years) poverty was characterised as poor people living in rural areas in low-income countries, with the answer to this problem being the international

⁷⁰ Tomasevski, op. cit. p. 28.

⁷¹ Ibid., p. 39.

⁷² Committee on Economic, Social and Cultural Rights, 'General Comment 13' (1999) E/C.12/1999/10

⁷³ UNICEF, op. cit. (2014), p. i.

⁷⁴ The Millennium Development Goals.

transfer of resources via aid, leading to economic growth and poverty reduction.⁷⁵ Today, poverty is defined as a much more multi-dimensional concept. It includes not only a lack of income, but also a range of factors such as poor health, lack of education, inadequate living standard, disempowerment, poor quality of work and threat from violence.⁷⁶ Therefore, the new framework to be established needs to be flexible in order to adapt to these changing contextual circumstances. It also needs to be flexible at a national level to recognise the differences in conditions of individual countries. It was recognised that the only way for the MDGs to be achieved was for them to be internalised by developing countries and their development partners.⁷⁷ This proved a challenge for the MDGs as low-income countries struggled to articulate the set global goals into domestic policy.⁷⁸ It has also been argued that we need to move beyond the material and minimal outcomes of the MDGs, at the least by adding qualitative dimensions to the quantitative targets.⁷⁹ The future framework must go beyond the MDGs which, by setting broad based targets, didn't focus enough on the most poorest, vulnerable and excluded in the global community.⁸⁰ As such, the High-Level Panel of Eminent Persons on the Post-2015 Development Agenda has specified five transformative shifts to give new life to the MDGs into the future: leave no one behind; put sustainable development at the core; transform economies for jobs and inclusive growth; build peace and effective, open accountable institutions for all; and forge a new global partnership.⁸¹

From the five transformative shifts mentioned above, it is not hard to see the correlation between them and the language of human rights: inclusive, accountable, equality and non-discrimination. There has been a global appeal from institutions and people around the world calling for human rights to be the focus of the development agenda post-2015.⁸² Human rights and an HRBA have the potential to be adaptable and flexible to the changing context of the nature of deprivation and vulnerability. The international human rights framework is exhaustive and has the ability to adjust to new problems and

⁷⁵ A. Summer and M. Tiwari, 'What Issues Will (Re)define the Post-2015 Debate?' in M. Langford, A. Summer and A. Ely Yamin (eds), *The Millennium Development Goals and Human Rights* (Cambridge University Press, 2013), p. 363.

⁷⁶ According to the Oxford Poverty and Human Development Index, available online: <http://www.ophi.org.uk/policy/multidimensional-poverty-index/> (accessed 31 August 2014).

⁷⁷ C. Gore, 'Beyond the Romantic Violence of the MDGs', in M. Langford, A. Summer and A. Ely Yamin (eds), *The Millennium Development Goals and Human Rights* (Cambridge University Press, 2013), p.388.

⁷⁸ *Ibid.*, p. 388-389.

⁷⁹ D. Nayyar, 'The MDGs after 2015: Some reflections on the possibilities' (2012) Background Paper for the UN System Task Team on the Post-2015 UN Development Agenda, available online: http://www.un.org/millenniumgoals/pdf/deepak_nayyar_Aug.pdf (accessed 31 August 2014), p.10.

⁸⁰ UN, 'A New Global Partnership: Eradicate Poverty and Transform Economies Through Sustainable Development' The Report of the High-Level Panel of Eminent Persons on the Post-2015 Development Agenda (2013), available online: http://www.post2015hlp.org/wp-content/uploads/2013/09/HLP-Report_English-Access-PDF.pdf (accessed 31 August 2014).

⁸¹ *Ibid.*

⁸² See for example; N. Pillay, High Commissioner for Human Rights, 'Open Letter On Human Rights in the Post-2015 Agenda' (2013), available online: <http://www.ohchr.org/Documents/Issues/MDGs/HCOpenLetterPost2015.pdf> (accessed 31 August 2014); Human Rights Watch, 'Rights Should Be Central To Post-2015 Development Agenda' (2013), available online: https://www.hrw.org/sites/default/files/related_material/2013post2015dev-goals.pdf (accessed 31 August 2014); Beyond 2015, 'A Holistic and Human Rights-Based Approach for Addressing Inequalities in the Post-2015 Development Agenda' (2012), available online: <http://www.beyond2015.org/sites/default/files/Beyond%202015%20-%20Addressing%20Inequalities.pdf> (accessed 31 August 2014).

present new legal securities for the problems that arise. An HRBA also contains the important element of accountability which was considerably lacking in the MDGs.⁸³ Seymour highlights that it is well known that the world does not lack the resources to end poverty, and as such if those with power were held more accountable for their actions at a national, regional and global level, it would lead to more enlightened decisions that have the potential to adjust the structures of power better to serve those without it.⁸⁴ If the future development agenda was grounded in human rights and a HRBA, the principle of ‘leave no one behind’ would be comprehensively protected. Human rights are indivisible. They are applicable to everyone based on the inherent dignity of being human. No one, regardless of ethnicity, gender, geography, disability, race or other status will be forgotten. Moreover, an HRBA with its focus on participation would also make the process of deciding, implementing and monitoring the goals a participatory process. This offers the prospect of a framework with greater legitimacy that is informed by a much greater range of perspectives and is more responsive to country-level realities.⁸⁵

Conclusion

The simple premise of an HRBA is that if the human rights of every person were fully implemented without discrimination, the primary goals of human development would be met. Obviously, this has an element of being quite idealistic but nonetheless presents a solid framework and goal to achieve.

This paper has sought to add to the existing literature on an HRBA by critically analysing the theory of the approach and examining its practical values and potential pitfalls through its use in realising the right to education. A lot of the existing literature has focused on the theory of the approach presenting its great potential, but it is only by examining the approach in practice, and in this case through the right to education, that the full potential of the approach can be gauged.

The HRBA signifies a true redefinition of development approaches. It underlines the multi-dimensional nature of poverty and seeks to target the root causes of the poor’s deprivation. It is grounded in the norms of international human rights legislation and therefore has, at its core, the principles of accountability, empowerment, participation, equality and non-discrimination. These principles are what make it different from traditional approaches to development that mainly focused on economic targets and increasing income. These approaches fail to take into account those who were excluded or marginalised, or the equal distribution of progress they made. By focusing on accountability, the approach has the ability to hold to account those who have the duty to act and positively influence the livelihoods of the poor. The principle of empowerment has a driving force in an HRBA by providing those affected by poverty to reach out and claim their rights and entitlements. Participation as a key value of an HRBA means giving everyone, regardless of their age, sex, status, race or religion a voice and role in decisions that affect them. Instead of taking a fully planned development project from headquarters out into the field as in traditional development, an HRBA starts at the grassroots level and seeks to find what the people involved believe are the underlying

⁸³ D. Seymour, ‘Integrating Human Rights and Equality’, in M. Langford, A. Summer and A. Ely Yamin (eds), *The Millennium Development Goals and Human Rights* (Cambridge University Press, 2013), p. 414.

⁸⁴ Ibid.

⁸⁵ Ibid.

issues, and works cooperatively to find solutions. Finally, non-discrimination and equality are two of the greatest guiding principles of human rights and are translated directly into the entire approach, through identification of the issue, designing the program and policy, implementing and monitoring.

By examining an HRBA to realising the right to education the added values and potential pitfalls of the approach were fully established. It was shown that the lack of a right to education in many situations goes well beyond the simple need to increase access to education that traditional development approaches sought to do. Instead, it was highlighted that there are considerable barriers not only to education, but within it and through it as well. It was then shown how through a HRBA an approach could be taken that would address the underlying vulnerability and root causes of a lack of the right to education.

Upon determining that an HRBA is the most comprehensive approach to helping facilitating progress towards full human development, it is only right that we advocate for human rights and an HRBA to take a primary role in the development goals set for the future in order to address the underlying structural vulnerabilities and inequalities faced by today's poor in a hope of improving the lives of over thirty percent of the world's people who are faced with the harsh realities of multidimensional poverty.

Japan's Retreat from Pacifism: Causes and Consequences

Patrick Hill*

Japan is in retreat from a literalist interpretation of its post-World War II (WWII) constitution. Japan has been incrementally retreating from such a position by reinterpreting Article Nine of its constitution in order to fit the political need of the day and to allow for specific security and defence policy outcomes. The latest interpretation will allow Japan to come to the aid of allies, via collective self-defence, opening up increased opportunities for Japanese military involvement in the region. Reasons for Japan's retreat from its pacifist tendencies include: an uncertain security environment caused by the rise of China and the USA's rebalance to Asia, a desire to be considered a normal nation under international law, growing security policy independence and domestic electoral reform. The consequences of Japan's reinterpretation are significant for the regional balance of power and relations within the region. A preservation of the status quo in the region underwritten by US security will be more resilient with an outward-looking Japanese defence policy. It also represents increased opportunities for smaller countries to take advantage of Japan's reengagement with the region with increased aid benefits as Japan seeks to counter the increased influence of China. A more powerful Japan has emerged that will, on balance, increase stability and further entrench US leadership in the region.

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Japan's constitution is unique for its pacifist and, in particular, anti-military nature. Despite being the third largest economy in the world, and for a majority of the post-war period the second largest economy, it has been conspicuously absent from security affairs, only ever playing a background role in global security issues due to its pacifist constitution. The election of Japanese Prime Minister Shinzo Abe represents a break from the past. Abe has campaigned and argued for a greater role for Japan in the region and the world in the security context. As part of his platform, constitutional change was a necessity. On 1 July 2014 the Japanese cabinet passed a decision that effectively reinterpreted its constitution to allow for collective self-defence. Furthermore, in September 2015 the Japanese Government passed legislation formalising its reinterpretation and allowing for Japanese deployment overseas in certain circumstances. Examining the evolution of Japan's constitutional reinterpretation and the likely consequences it creates are important for the entire region. Japan is a significant power and, in pure realist terms, the only regional country capable of countering China.

Japan's most recent interpretation of its constitution will permit collective self-defence. This paper will demonstrate that this is a continuation of the Japanese tradition not to directly change the text of the constitution but to interpret it in a way that allows for specific security, foreign policy or defence policy outcomes. It will be illustrated that the latest interpretation, whilst the most far-reaching to date, is a natural progression from previous interpretations and comes about due to a variety of internal and external factors. These internal factors include: Japan's legislative reform, growing nationalism and a desire to be considered a 'normal' nation under international law. External factors include: China's rise and US pressure for greater alliance contributions. The consequences of the interpretation to allow for collective self-defence will have both positive and negative effects. It will be explained that the consequences of Japan's retreat from pacifism will be: greater US enmeshment in the region; a heightened anxiety on the part of South Korea and China regarding Japanese militarisation; a larger role for Japan in regional matters; and, above all, a more powerful Japan. This paper asserts that this will be advantageous for the region by increasing stability and providing a counter-weight to Chinese influence.

Causes

Alignment with international law

Japan has been left out of the community of nations because it has been restricted in contributing towards international peace and security.¹ The disparity between international law and Japan's constitution is that the former allows for collective self-defence whilst the latter does not. Japan's constitution was designed to inhibit its ability to procure military forces or 'other war potential'.² Article 9 (dubbed the 'peace clause')

¹ C. Hughes, 'Why Japan Could Revise Its Constitution and What It Would Mean for Japanese Security Policy' *Foreign Policy Research Institute*, vol. 50 (2006), p. 725.

² D. Gibbs, 'Future Relations Between the United States and Japan: Article 9 and the Remilitarization of Japan' *Houston Journal of International Affairs* vol. 33 (October 2012), p. 141; W. Shuichi 'Article 9 of the Japanese Constitution and security policy: realism versus idealism in Japan since the Second World War' *Japan Forum*, vol. 22 (December 2010), p. 406.

prohibits Japan from maintaining 'land, sea and air forces'.³ When the Japanese constitution was written, a US State Department memo noted the clause may not 'stand the test of time and the stress of relations between nations'.⁴

The interpretation to allow for collective self-defence is the latest attempt to rectify Japan's standing as an ordinary nation under international law. This is a natural extension of previous instances where the constitution has been reinterpreted in order to achieve policies that are allowed under international law but not the domestic constitution. There has been political and military thinking in Japan on the need to revise Article 9 of its constitution as far back as the very early 1950s.⁵ During that time, the anti-militarist aspect of Japan's constitution was problematic because Japan was considered an essential bulwark against Soviet expansion into Asia, much as it is today considered a force multiplier of US power against China.⁶ In 1954, Japan determined that the right to collective self-defence permitted under the United Nations (UN) charter was unconstitutional because it exceeded 'the minimum necessary force for the purposes of self-defence'.⁷ This made Japan an oddity in international relations as it was one of the region's most powerful states yet could not exercise that right for the benefit of peace.⁸ Over the course of decades, this situation of total non-military involvement slowly began to change. Subsequent agreements and reinterpretations of Article 9 allowed for US bases to be established on Japanese territory and for Japan to start building its own self-defence forces. In 1978 a Japan-US agreement gave Japan the right to 'de facto acts of collective self-defence' where Japan had the ability to protect sea lines of communication up to 1000 miles from shore.⁹ In addition, Japan allowed US nuclear submarines to cross through its territory and breached its one percent limit on defence spending in 1986.¹⁰ These are concrete examples where Japan, in response to circumstances of the day, adjusted the interpretation of its constitution, passed legislation if needed, and secured the security outcome that it desired. Consequently, the disparity between international law for collective self-defence and Japan's security policy narrowed over time.

International pressure

A further catalyst for the revision of Japan's traditional pacifist tendencies was the Gulf War in 1991. Japan failed to pass legislation through parliament and its forces did not take part in the operation, yet it did provide 13 billion dollars to fund the campaign. This was internationally ridiculed as 'cheque book' diplomacy, which Japan found offensive.¹¹ The international pressure, mainly from the USA, for Japan to actually

³ Prime Minister of Japan and Cabinet, 'The Constitution of Japan', available online: http://japan.kantei.go.jp/constitution_and_government_of_japan/constitution_e.html (accessed 18 September 2014).

⁴ J. Moses, T. Iwami, 'From pacifism to militarisation: liberal-democratic discourse and Japan's global role' *Global Change, Peace & Security*, vol 21 (March 2009), p. 72.

⁵ *Ibid.*, p. 73.

⁶ *Ibid.*, p. 74.

⁷ C. Hughes, *op. cit.* (2006), p. 728.

⁸ A. Oros, 'Japan's Strategic Culture: Security Identity in a Fourth Modern Incarnation' *Contemporary Security Policy*, vol. 35 (June 2014), p. 227

⁹ C. Hughes, *op. cit.* (2006), p 729

¹⁰ *Ibid.*, p. 731.

¹¹ *Ibid.*, p. 729, 731.

contribute forces was immense.¹² It kick-started a debate about the role of Japan in the world and questioned the applicability of the Yoshida Doctrine (as will be detailed later). At this stage, the limits the constitution placed on its use of force confined Japan; however, it was still present on the international scene, financially contributing to many international organisations but it was always a bystander in security affairs. The ridicule that followed the first Gulf War in 1991, and the inadequacy of the Japanese contribution to world security affairs, was reinforced by an US report in 2000 that found ‘Japan’s prohibition against collective self-defence is a constraint on alliance cooperation’, spurred the cause for reform.¹³ After the 2001 terrorist attacks on the US, Japan could not invoke the right of collective self-defence to support the US as many other countries did. Instead it had to pass a special measure, the ‘Antiterrorism Special Measures Law’, which allowed for patrols into the Indian Ocean (a non-combat role) in support of the US.¹⁴ Utilising similar methodology the ‘Iraqi Reconstruction Law’ was passed in 2003 to again allow Japan to make a non-combat contribution force to the Iraq war.¹⁵ Japan, like any democracy, has had to ensure such legislation is constitutionally effective, lest it be declared invalid. To do this, an emphasis has been placed on the preamble of the constitution, which stresses cooperation with the international community.¹⁶ The international pressure, particularly from the US for contributions to the ‘War on Terror’ and the Iraqi campaign (the former being authorised under a UN mandate) was substantial.¹⁷

The international pressure on Japan, an advanced democratic country, to make an active contribution to military affairs in response to international events is substantial. However, what its constitution allowed for and the expectation of the international community could only be bridged if the constitution was reinterpreted. Japan’s contribution to military events, although small, demonstrates that the Japanese Government has been willing to reinterpret its constitution in order to achieve specific military policy outcomes. It exhibits that Japan has a history of reinterpreting its constitution that has continued, and is likely to continue into the future.

Independence, nationalism and an internal debate

After WWII, Japan made a decision to outsource its security to the US. Japan’s foreign policy was essentially made up of five principles (called the Yoshida Doctrine named after Shigeru Yoshida, Japan’s post-war Prime Minister): expand overseas markets; only have minimal defence spending; steer clear of international political disputes; avoid the use of force if involved in disputes; and reduce actual or potential international tensions through diplomatic means.¹⁸ This was on the condition that the US provided for and guaranteed Japanese security.¹⁹ At the time, it was never in doubt that the US had the ability and willingness to provide such a service, whereas the ability of the US at present—with multiple theatres of war in different global settings and the uncertain

¹² B. Taylor, ‘Asia’s century and the problem of Japan’s centrality’ *International Affairs*, vol. 87 (2011), p. 872.

¹³ C. Hughes, op. cit. (2006), p. 735.

¹⁴ Ibid., p. 732.

¹⁵ M. Heazle, ‘Japan post-9/11: security policy, executive power and political change in an ‘un-normal’ country’ *Australian Journal of International Affairs*, vol. 63 (December 2009), p. 474.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ W. Shuichi, op. cit. (2010), p. 409.

¹⁹ Ibid.

effectiveness of the rebalance to Asia—is questionable. Furthermore, the applicableness of the Yoshida Doctrine in today’s Japan has been thrown into doubt by growing nationalism. The prominence of US forces stationed on Japanese territory has served as both a physical reminder of US security and an antagonism for greater Japanese nationalism. On the people-to-people level, the fact US troops remain beyond the reach of Japanese law and, at the government-to-government level, the feeling that the US treats Japan as a subservient outstation and not as an equal partner has led to this growing nationalism. Since the failure of Japan to contribute to the 1991 Gulf War, so called ‘*Normal Nation-alists*’, as described by Samuels, have gained traction within the Liberal Democratic Party (LDP) party, the political party of Japan that has ruled for a vast majority of the post war period.²⁰ Many of the various debates within Japanese security policy centre on whether to keep, modify or reject the US-Japan alliance.²¹

Growing nationalism has contributed to Japan’s retreat from its post-WWII constitution. As Japan was reliant upon the provision of US security after WWII it gave rise to a feeling of an unequal partnership or inferiority where Japan is subservient to the US.²² Such resentment played a part in the election of the Democratic Party (DPJ) in 2009, which had a plan for a more independent security policy that involved removing US military bases from Japanese soil. However, this was not achieved due to the difficulties involved, including, most notably, political opposition demanding that security would be compromised, which, given the rise of China, was quite damaging for the government.²³ Sentiment for a more independent security stance has built-up over time. For instance, when the US shifted its policy position on China during President Nixon’s administration, the USA, in breach of prior agreements, did not discuss the policy with Japan.²⁴ A consequence of such actions was an ‘underlying desire’ from the perspective of Japan for the US to treat it as an ‘equal partner’.²⁵ This reflects the argument advanced by some scholars, that the US alliance deprives Japan of its independence.²⁶ While the Japanese public were supportive of the alliance, this did not necessarily mean they liked foreign troops on their soil.²⁷ It was reflected by outgoing DPJ leader, Prime Minister Yukio Hatoyama, who said that it was not beneficial for ‘Japan to depend on the United States for her security over the next 50 or 100 years’.²⁸ North Korea’s military threats and the ‘real possibility of conflict’ with China over the Senkaku Islands are reasons for Japan wanting a more independent security policy from the US but the underlying reason has been ‘neo-nationalism’.²⁹ Such an attitude reflects the complexity of Japanese politics and intellectual debate. Whilst the DPJ utilised nationalism in a failed attempt to distance itself from US military bases on Japan, the LDP has utilised that same nationalism and directed it, not against the US, but for the purpose of a greater

²⁰ R. Samuels ‘Securing Japan: The Current Discourse’ *The Journal of Japanese Studies*, vol. 33 (Winter 2007), p. 127..

²¹ *Ibid.*

²² T. Sunohara, ‘The Anatomy of Japan’s Shifting Security Orientation’, *The Washington Quarterly*, vol. 33 (October 2010), p. 43.

²³ J. Dreyer, ‘China Up, Japan Down? Implications for the United States’, *Orbis*, vol. 57 (Winter 2013), p. 96.

²⁴ *Ibid.*, p. 85.

²⁵ T. Sunohara, *op. cit.* (2010), p. 42.

²⁶ R. Samuels, *op. cit.* (2007), p. 127.

²⁷ D. Gibbs, *op. cit.* (2012), p. 170; T. Sunohara, *op. cit.* (2010), p. 42.

²⁸ *Ibid.*, p. 39.

²⁹ A. Oros, *op. cit.* (2014), p. 242; T. Sunohara, *op. cit.* (2010), p. 43.

military role in the region.³⁰ Since the election of the LDP government the US-Japan alliance has not been under threat, but by having the right of collective self-defence Japan can pursue a more independent foreign policy in accordance with international missions or regional alliances.

On the political front, the emergence of Prime Minister Abe cannot be underestimated. Japan's Prime Minister Abe is seen as a nationalist leader who is committed to strengthening security in Japan and its alliance network. He has increased the defence budget, pursued a constitutional reinterpretation and is actively pursuing greater cooperation with major powers in the region—Australia, India and the US—to form 'Asia's democratic security diamond'.³¹ The purpose of his strategy is (on face value) to guarantee freedom of navigation through the South China Sea to prevent it from becoming 'Lake China'. It is a continuation of Abe's first term initiative (2006–2007), the Quadrilateral Security Dialogue, which failed, but its re-invention exposes the determination Abe has in gaining some type of democracy-led security arrangement.³² To some degree this idea is progressing. At the G20 summit in Brisbane in 2014, Japan, the US and Australia committed to boost 'maritime security capacity building' under the trilateral banner.³³

China's rise

Japan and China have traditionally sought to promote 'economic gains at the expense of their nationalist credentials'.³⁴ Since 2010 when China limited the export of rare-earth minerals via an unofficial ban, as well as tolerated anti-Japanese riots in 2012, there has been a willingness (on both sides) to forsake economics for nationalist gain.³⁵ Underlying these tensions is the belief that China is a revisionist power as it is seeking to overturn the status quo in its immediate region, settling, by coercive means, maritime disputes.³⁶ There is particular concern in Japan about the ability of China to occupy the Senkaku (known as Diaoyu by China) Islands. Japan's Prime Minister, Shinzo Abe, has reflected this sentiment in his justifications for increasing military spending and accusations that China is being aggressive.³⁷ This contest for control over the islands is

³⁰ R. Samuels, op. cit. (2007), p. 127.

³¹ S. Abe, 'Asia's Democratic Security Diamond' *Live Mint*, (December 2012) available online: <http://www.livemint.com/Opinion/viqg2XC8fhRfjTUIcctOM/Asias-democratic-security-diamond.html> (accessed 1 January 2015).

³² 'Beyond Abenomics: Japan's grand strategy' *Strategic Comments*, vol. 19 (August 2014), p. 1.

³³ A. Panda 'US, Japan, Australia Boost Maritime Cooperation' *The Diplomat*, (November 2014) available online: <http://thediplomat.com/2014/11/us-japan-australia-boost-maritime-cooperation/> (accessed 1 January 2015).

³⁴ M. Koo, 'The Senkaku/Diaoyu dispute and Sino-Japanese political-economic relations: cold politics and hot economics?' *The Pacific Review*, Vol. 22 (May 2009), p. 211.

³⁵ S. Nagy, 'Nationalism, Domestic Politics, and the Japan Economic Rejuvenation' *East Asia*, vol. 31 (March 2014), p. 9.

³⁶ J. Mearsheimer, 'The Gathering Storm: China's Challenge to US Power in Asia' *The Chinese Journal of International Politics*, Vol. 3 (2010), p. 382.

³⁷ S. Abe 'Japan Is Back, A Conversation with Shinzo Abe' *Council on Foreign Affairs*, (August 2013) available online: <http://www.foreignaffairs.com/discussions/interviews/japan-is-back> (accessed 18 September 2014); A. Dupont and C. Baker, 'East Asia's Maritime Disputes: Fishing in Troubled Waters' *The Washington Quarterly*, vol. 37 (2014), p. 84.

not new: in 1978, more than 100 Chinese fishing trawlers swamped the island area with 12 entering the 12 nautical mile exclusion zone.³⁸

The strategy China is deploying has been used to acquire other islands in areas of contested maritime space in the South China Sea. The strategy depends on the use of non-military personnel, often fisherman, to first establish contact with a particular area, which is then supported by China's various paramilitary marine agencies.³⁹ A key feature of China's strategy is the lead role its non-military maritime enforcement agencies take.⁴⁰ The response of countries to this strategy has been either to confront the incursion, or ignore it. The outcome has been the same for China: it gains the contested area. When Vietnam confronted China over the Parcel Islands in 1974, which was precipitated by numerous Chinese fishing vessels entering the area, it was comprehensively defeated and the islets have since been in the possession of China.⁴¹ The same approach has been taken with the Senkaku Islands as exemplified in 2012 when a Chinese fisherman rammed the Japan Coast Guard vessels.⁴² Into this context China announced its Air Defence Identification Zone providing pretext for China to enforce its law over the contested area. This directly threatens Japan, with the Prime Minister stating 'the Senkaku Islands are an integral part of Japanese territory, based on both history and international law'.⁴³ China's latest effort to exert control over its various claims in the South China Sea has seen a large sea dredger deployed to create islands capable of supporting buildings and small airstrips, incrementally changing the status quo.⁴⁴ The protagonist approach China has in maritime disputes, in both the South China Sea and the East China Sea, does not bode well for regional stability.

The basic premise is that China cannot rise peacefully.⁴⁵ Japan, by reinterpreting its constitution to allow for collective self-defence, has hedged against whether or not the US is committed to Asia. At its most extreme, it raises the question of whether the US could win a war against China or whether it would be prepared to fight one on behalf of Japan.⁴⁶ This is particularly prevalent for the Senkaku Islands although the US has clarified that its treaty obligations cover the islands. The China threat is one reason why Japan wants to expand its capability and presence in the region. The interpretation to allow for collective defence assists Japan in this regard. However, some authors have proposed that China's or even North Korea's threats have had nothing to do with Japan's shift to focusing on national security.⁴⁷

³⁸ M. Koo, op. cit. (2009), p. 217.

³⁹ A. Dupont and C. Baker, op. cit. (2014), p. 83.

⁴⁰ Ibid., p. 79.

⁴¹ Ibid., p. 84.

⁴² M. Swaine, 'Chinese Views Regarding the Senkaku/Diaoyu Islands Dispute' *China Leadership Monitor*, Vol 41, available online: <http://carnegieendowment.org/2013/06/04/chinese-views-regarding-senkaku-diaoyu-islands-dispute> (accessed 1 August 2014).

⁴³ S. Abe, 'Japan Is Back, A Conversation with Shinzo Abe' *Council on Foreign Affairs* (August 2013) available online: <http://www.foreignaffairs.com/discussions/interviews/japan-is-back> (accessed 18 September 2014).

⁴⁴ L. Lewis, 'Dredger shores up Chinese claims to disputed islands' *The Times* (September 2014), available online:

<http://www.thetimes.co.uk/tto/news/world/asia/article4204033.ece?shareToken=47ce5fd9736f87e6111ac4520a4c37af> (accessed 18 September 2014).

⁴⁵ J. Mearsheimer, op. cit. (2010), p 382

⁴⁶ R. Samuels, op. cit. (2007), p. 138.

⁴⁷ 'Beyond Abenomics: Japan's grand strategy' *Strategic Comments*, vol. 19 (August 2014), p. 2.

Electoral reform

A 1994 change to the election laws for the House of Representatives dictated that it would be more beneficial for Japanese politicians to campaign on national issues.⁴⁸ Prior to this, there were multiple candidates from the same party running in electorates forcing them into a system where one had to ‘outbid’ the other, whereas the post-1994 system mandated one candidate from one party in each electorate, eliminating the bidding (at least between members of the same party).⁴⁹ The results show that prior to 1994, candidate’s manifestos had two-thirds ‘pork’—policies that focused on local issues which generally involved large benefits that were not rationally justified—whereas at the 1996 election, and thereafter, this reversed to around two-thirds of manifestos being devoted to national issues.⁵⁰ The new electoral system allowed candidates to incorporate national policies into their campaign and, accordingly, national issues received more political support. The political system was geared towards politicians providing monetary benefits to their specific electorate to the exclusion of issues of national importance. It was found that whilst interest in national security was always of concern to the public, politicians started to pay more attention to such issues after 1994.⁵¹ For example, the abduction of Japanese civilians by North Korea was very prevalent before 1994 and a significant security concern, yet it only started to prominently feature in political manifestos after 1994.⁵² This was because of the political dividend it could provide. A difference in political leaders also matters.

Exploiting nationalism to achieve reforms is a common practice amongst politicians from various countries.⁵³ It can be argued that the current Japanese Prime Minister, Shinzo Abe, is exploiting nationalism to achieve political aims such as constitutional reform and confronting Chinese aggression whereas some of his predecessors utilised nationalism primarily for economic reform.⁵⁴ In many ways, this complements previous arguments that the electoral reforms of the early 1990s gave national leaders the opportunity to channel the pre-existing nationalism within the populace to achieve reforms in their particular areas: economic or, in this case, constitutional reform. Electoral reform, combined with the political aim of Japan’s current Prime Minister, did contribute, in part, to Japan’s retreat from its post-WWII constitution.

The connection between Japanese political reform and Japan’s recent constitutional reinterpretation is not clear-cut. It has not been as important as other factors such as the rise of China, the growing pressure from outside allies or the internal nationalistic pressure for a greater Japanese military presence. However, it has served as a platform that has allowed Japanese politicians to debate and pass the current interpretation of the constitution. Principally, China’s rise has allowed politicians to gain electorally, where

⁴⁸ A. Catalinac, ‘Not made in China: Japan’s home-grown national security obsession’ *East Asia Forum*, (March 2013) available online: <http://www.eastasiaforum.org/2013/03/06/not-made-in-china-japans-home-grown-national-security-obsession/> (accessed 18 September 2014).

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ A. Catalinac, ‘Pork to Policy: The Rise of National Security in Elections in Japan’ *Harvard*, available online: <http://scholar.harvard.edu/amycatalinac/publications/pork-policy-rise-national-security-elections-japan> p. 6, 8, 27 (accessed 18 September 2014).

⁵² A. Difilippo, ‘How Tokyo’s Security Policies Discount Japanese Public Opinion: Toward an Alternative Security Agenda’ *Pacifica Review*, vol. 14 (February 2002), p. 31.

⁵³ S. Nagy, *op. cit.* (2014), p. 5.

⁵⁴ *Ibid.*, p. 5.

they may not have had such an opportunity before the electoral reforms. China was not as much of a threat in 1996, but is now at the forefront of many debates. The consequences of Japan's actions in the geostrategic sphere are numerous but depend on what perspective the changes are viewed from.

Consequences

A more powerful Japan

Through the terms of collective self-defence Japan has the capability and intent to (at the very least) affect the regional balance of power towards a continuation of the status quo. As envisaged by its current Prime Minister, Shinzo Abe, Japan will not be as restricted in involving itself in regional military affairs. The culmination of Japan's retreat from its pacifist constitution has been its interpretation of Article 9 to allow for collective self-defence. Australia and the US have welcomed Japan's new interpretation.⁵⁵ On face value, the reinterpretation of Japan's constitution brings it into line with international law, specifically Article 51 of the UN Charter. One of the primary consequences of Japan explicitly endorsing collective self-defence is the ability of it to come to the aid of its security partners, principally the US, and to participate in UN security operations. Although Japan has participated in previous UN operations, it has always only been within in the non-security sphere, which has limited its impact and usefulness.⁵⁶ Collective self-defence would, for example, allow Japan to assist with operations against the Islamic State. A reason given for Japanese constitutional reinterpretation was so that it could, through the UN, 'contribute to international peace and security' – an important part of other areas of its constitution such as its preamble.⁵⁷ Whilst the consequences of Japan's retreat from its pacifist constitution makes its contribution to UN missions possible, it is unlikely to happen because the Japanese public still retain a highly pacifist orientation in its strategic outlook.⁵⁸ Prime Minister Abe cited that only 30 percent of people supported the concept of collective self-defence and when presented with a specific example, such as a rocket attack by North Korea on US bases, still only 60 percent of the Japanese public supported collective self-defence.⁵⁹ These are very low numbers. This indicates that whilst Japan's constitution is now consistent with international law, it is unlikely that the Japanese public will be supporting overseas deployments anytime soon.

Preserving the status-quo

Bolstering the US rebalance to Asia, and maintaining the balance of power in Asia overall, is another outcome of Japan's reinterpretation of its post-WWII constitution. Japan will be able to more ably contribute to the US-Japan alliance under the banner of collective self-defence. The US, in particular, could make the allegation that Japan (amongst other nations) has been freeloading off the alliance and it is about time it

⁵⁵ Department of Foreign Affairs and Trade, 'Japanese Prime Minister Abe's announcement on Japanese security policies', 2 July 2014, available online: <http://dfat.gov.au/news/media-releases/Pages/japanese-primeminister-abes-announcement-on-japanese-security-policies.aspx> (accessed 1 February 2015); J. Psaki, U.S Department of State, 30 June 2015, available online: <http://www.state.gov/r/pa/prs/dpb/2014/06/228570.htm#JAPAN> (accessed 1 February 2015).

⁵⁶ A. Difilippo, op. cit. (2002), p. 46.

⁵⁷ Ibid., p. 23.

⁵⁸ A. Oros, op. cit. (2014), p. 246.

⁵⁹ S. Abe, op. cit. (2013).

pulled its weight. This is not quite the case as Japan significantly assists, and incorporates, defence policies such as the defensive missile shield, with the defence bilateral treaty already.⁶⁰ Furthermore, financial support by Japan of US troops on Japan's soil has also been expensive; Japan pays roughly \$120,000 per American soldier stationed in Japan, compared with Germany, which contributes approximately \$10,000 per US military person stationed there.⁶¹ Whilst Japanese support for the alliance has remained strong, albeit with interruptions, it has never recognised that it would come to the aid of US forces if they were attacked in Asia. The reinterpretation clarifies that Japan would have the legal ability to come to the defence of US interests in Asia if they were attacked.⁶²

Whilst in theory a Japan that acts as a major force multiplier in the region would be of beneficial weight to the US in its rebalance to Asia, there are significant questions pertaining to Japan's capability, in light of its economic performance, to even act as a credible force multiplier.⁶³ Much like Britain has been to America in Europe, Japan has been a reliable ally in Asia. However, the lost decades that Japan has suffered with stagflation and China overtaking it as the world's second largest economy means that Japan is not as powerful as it once was. In essence, it will 'increasingly lack the requisite weight' that the US needs in order to balance China's rise.⁶⁴ Such an analysis underestimates the need for the US to have local partners in the region in order to fulfil its involvement in the area. Japan anchors the US via the defence treaty; it is one (perhaps the only) regional power that can curb excess Chinese power whilst encouraging regional security as a way to socialise Chinese behaviour.⁶⁵ Japan has currently proposed a defence budget of \$53 billion US dollars.⁶⁶ This is in no way an insignificant amount that will include funding for additional capabilities that may be controversial. For instance, equipment such as a helicopter carrier, which can be turned into an aircraft carrier, 'has offensive capability'.⁶⁷ If the US rebalance to Asia is to be as effective as intended, the US needs Japan as much as Japan needs the US.

Japan remilitarised?

From one perspective Japan's retreat from its pacifist constitution increases stability and a rules-based order in Asia. From another perspective, in particular South Korea's and China's, it increases the risk of conflict and heightens fears of 'encirclement' or 'containment', by a militarised Japan.⁶⁸ It is impossible to reconcile these views as they both contradict one another and very much depend on the perspective the issue is approached from.⁶⁹

⁶⁰ C. Hughes, op. cit. (2006), p. 735.

⁶¹ A. Mulgan, 'Why Japan Still Matters' *Asia-Pacific Review*, vol. 12, 2005, p. 114.

⁶² S. Abe, op. cit. (2013); C. Hughes, op. cit. (2006), p. 735, 743.

⁶³ B. Taylor, op. cit. (2011), p. 873.

⁶⁴ Ibid., p. 877.

⁶⁵ E. Goh, 'How Japan Matters in the Evolving East Asian Security Order' *International Affairs*, vol. 87 (2011), p. 888.

⁶⁶ Banyan, 'Japan's Military Spending Tooling Up' in *The Economist* (1 September 2014), available online: <http://www.economist.com/blogs/banyan/2014/09/japans-military-spending> (accessed 18 September 2014).

⁶⁷ D. Gibbs, op. cit. (2012), p. 164.

⁶⁸ Y. Yi, 'Int'l community criticizes Abe's attempt to lift ban' *Xinhuanet News*, (May 2014), available online: http://news.xinhuanet.com/english/video/2014-05/18/c_133342448.htm (accessed 18 September 2014).

⁶⁹ A. Oros, op. cit. (2014), p. 230.

South Korea and China have made vocal protests of Japanese Members of Parliament visiting the Yasukuni Shrine with concerns that Japanese politicians are condoning the actions of war criminals, who are remembered at the shrine, during WWII.⁷⁰ The Yasukuni Shrine issue neatly symbolises (from South Korea's and China's perspective) Japanese historical amnesia, whilst its changing defence posture, via the constitutional reinterpretation, represents the concrete steps it is taking to reassert itself as a military power.⁷¹ Japan does not help its case by revisiting past apologies for the 'comfort women' issue of forced prostitution of South Korean women.⁷² In addition, Japan has purchased (or nationalised) the Senkaku Islands, changing the status quo in the island dispute with China. This does not mean Japan is automatically an aggressive state, as the purchase of the Senkaku Islands by the central government was an attempt to inhibit extreme nationalists from purchasing the island themselves and putting structures on it.⁷³ This intention, however, was lost on China. Japan's retreat from its pacifist constitution means, from the Chinese point of view, that it will contribute to the US strategy of containing China.⁷⁴ The Japanese retreat from pacifism and strengthening of the US-Japan alliance could heighten regional tensions, and, in any respect, this is not in the national interest of China.⁷⁵ A Japan inhibited by as many legal constraints as possible to the deployment of forces bodes well for China. However, it is contradictory that China argues its own increase in military spending and assertiveness is normal for a rising power when it would logically follow that it is normal for a country, of Japan's status no less, to be allowed the right of collective self-defence in accordance with international law. Although there is a genuine concern on the part of China regarding overall US hegemony in Asia and the part Japan is playing in maintaining that hegemony, it is hyperbolic of China and South Korea to conclude that Japan is on a path to remilitarisation. Its retreat from the pacifist constitution drawn up by foreign powers has given it the rights of a normal nation, exactly the same as South Korea and China. Despite this, there is an almost certainty that South Korea, China and possibly some other South-East Asian states will be apprehensive of Japan's growing role in the region.

Part of Japan becoming a 'normal nation' is that it has the right to export military equipment abroad. Japan has recently come into the export market, for example, by signing agreements and expressing interest in selling military technology such as its invitation to tender for Australia's new submarines.⁷⁶ It has also given patrol boats to the Philippines who have maritime disputes with China.⁷⁷ In addition, Japan has been

⁷⁰ B. Blanchard, 'China protests after Japanese minister visits shrine for war dead', *Reuters*, (January 2014), available online: <http://www.reuters.com/article/2014/04/12/us-china-japan-idUSBREA3B07020140412> (accessed 18 September 2014).

⁷¹ R. Samuels, op. cit. (2007), p. 131

⁷² S. Harold, 'How Can Japan Improve Relations with South Korea' *Asia-Pacific Review*, vol. 22 (2015), p. 124 and 129.

⁷³ J. Dreyer, op. cit. (2013), p. 96.

⁷⁴ T. Mito, 'Japan's Constitutional Revision Debate under Prime Minister Abe Shinzō and its Implications for Japan's Foreign Relations' *Japanese Studies*, vol. 28 (May 2008), p. 68.

⁷⁵ A. Difilippo, op. cit. (2002), p. 23.

⁷⁶ 'Abe, Abbott to talk trade and defence' *Sky News*, (July 2014) available online: <http://www.skynews.com.au/news/politics/national/2014/07/07/abe--abbott-to-talk-trade-and-defence.html> (accessed 18 September 2014).

⁷⁷ 'Patrol boats from Japan to start arriving in 2015' *Philippine Daily Inquirer*, (March 2014), available online: <http://newsinfo.inquirer.net/590453/patrol-boats-from-japan-to-start-arriving-in-2015> (accessed 18 September 2014).

building ties with India and Vietnam.⁷⁸ Strategic hedging by Japan is a signal that, whatever the major outcomes of Japan's retreat from its pacifist constitution, it will be a more powerful force in the geostrategic environment because of it.⁷⁹ The underlying factor for this is to balance the push China has made, particularly in Southeast Asia.⁸⁰ It is a far more likely consequence that Asia will be better off because Japan is becoming more engaged. This includes being able to contribute to international efforts and, most significantly, support the US in its operations. This acts as a major force multiplier for the US in the region.

Conclusion

Japan has been in retreat from its pacifist constitution for many decades, which has been beneficial for Japan and the region. It has gradually moved towards becoming a normal nation afforded the same rights as other states in accordance with international law, culminating in the recent reinterpretation of Article 9 of its constitution to allow for collective self-defence. This move has a number of causes. A desire for an alignment with international law was initiated in earnest after the Gulf War in 1991 where Japan was ridiculed for its lack of contribution and US pressure for greater quid-pro-quo commitment in its alliance treaty. A greater desire for independence and the utilisation of nationalism by motivated politicians who had a political system designed to capitalise on such forces, along with the threat of China, have contributed to Japan's retreat from its pacifist constitution. A consequence is that Japan will involve itself more deeply in regional matters in order to counter the influence of China and contribute to the continuation of the balance of power in favour of the USA through increased military cooperation. An unfounded fear will exist, and be utilised by China and South Korea, that Japan is re-militarising in a repeat of its early twentieth century actions. There is no rational reason to oppose Japan's decision to allow for collective self-defence as it is allowed by the United Nations and is an inherent right of all nations. It is a positive that reflects Japan's standing as a major economic and diplomatic nation in the world.

⁷⁸ J. Paul, 'India Japan Security Cooperation: A New Era of Partnership in Asia' *Journal of the National Maritime Foundation of India*, vol. 8 (2012), p. 31; J. Hornung, 'Japan's Growing Hard Hedge Against China', *Asian Security*, vol. 10 (2014), p. 108.

⁷⁹ J. Hornung, *op. cit.* (2014), p. 108.

⁸⁰ J. Paul, *op. cit.* (2012), p. 33.

Dogs of War: The Regulation of Private Security Companies in the International Sphere

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Private Security Companies (PSCs) have transformed how war is conducted in our modern world. Far from the traditional notion of the 'soldier for hire' mercenary, PSCs are sophisticated, complex entities that provide privatised military services to an extensive clientele base, most notably state governments during the coalition involvement in Iraq. However, despite their increased use in the global conflict landscape, their actions have managed to escape any kind of substantial legal or regulatory measures such as those imposed on their military counterparts. PSCs currently operate in an undefined legal grey-area in which abuses and misconduct go unpunished. International and regional legal instruments enacted with the traditional mercenary in mind are inapplicable and the present international scheme, the Montreux Document, has proven to be ineffective in enforcing legal obligations and a code of conduct. After exploring the history and proliferation of PSCs, this paper will discuss the current legal accountability of PSCs and how they have thrived in a low regulation environment with regard to a number of factors including: the mercenary-security distinction, the inadequacies of international law and definition restructuring.

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Private Security Companies (PSCs) have dramatically changed the way war and conflicts are conducted today. A rapid rise since decolonisation and the end of the cold war has seen them become integral to the international security landscape—this is particularly evident by their use in Iraq. Despite their increasing use in global conflicts, they have managed to escape any substantial regulatory measures such as those imposed on their military counterparts. The legal grey-area in which they operate has proven valuable and has made them indispensable to Western interests in modern warfare.

In response to the international community's unwillingness to address the problem of rampant mercenaries in 1960–70s Africa, the affected states banded together and took regulation action themselves to stay the havoc.¹ PSCs have a far more complex and evolved role in warfare than these past mercenaries ever did and this role appears to be ever increasing. However, a similar international response to PSCs as seen with mercenaries in the 1970s has not occurred.

This paper will establish the current legal accountability of PSCs and explore how and why they have thrived in a low regulation environment and why more stringent regulation has yet to occur. This question is complex and a number of contributing factors will be explored, including the proliferation of PSCs, the mercenary/security company distinction, definition restructuring in international law and the current inadequacies of international law.

To mercenaries...and beyond

Mercenaries and the privatisation of war is almost as old as war itself. Indeed, the 'private provision of violence was a routine aspect of international relations' prior to the Treaty of Westphalia, and the idea of war being fought only by state forces is an idealisation.² The etymological roots of the word 'mercenary' suggests it derives from the latin *mercenarius* meaning 'hireling', which itself is derived directly from *merces*—'reward'.³ Illustrated historically, hired, expertly trained freelance soldiers made up the entirety of Hannibal's undefeated army⁴ and the ancient Chinese, Romans and Greeks were known for employing large numbers of mercenaries to fill out their respective forces.⁵ The United Kingdom bolstered its armed forces during the American War of Independence by hiring 30,000 Hessian soldiers,⁶ whilst Italian city-states in the Renaissance were known for maintaining their own private military protection detail, known as the *condotierri*.⁷ Italy was a hub of private military actors; *condota* (contracts) were used to raise personnel, and this was formalised with the *condotterri* (contractor) who supplied and commanded the company.⁸ Far from freelance, transient mercenaries,

¹ T.S. Milliard, 'Overcoming Post-Colonial Myopia: A Call to Recognize and Regulate Private Military Companies', *Military Law Review* 176 (2003), 4-5.

² P.W. Singer, *Corporate Warriors; The Rise of the Privatized Military Industry* (New York: Cornell University Press, 2003), p. 19.

³ H.Y. Liu, 'Mercenaries in Libya: Ramifications of the Treatment of 'Armed Mercenary Personnel under the Arms Embargo for Private Military Company Contractors', *Journal of Conflict & Security Law* vol. 16, no. 2 (2011), 303.

⁴ Singer, *Corporate Warriors*, p. 19.

⁵ D. Shearer, 'Outsourcing War', *Foreign Policy*, no. 112 (1998), p. 69.

⁶ Shearer, *op. cit.* (1998), p. 69.

⁷ M. Fulloon, 'Private Military Companies: The New Condottieri', *Social Alternatives*, vol. 32, no. 1 (2013), p. 50.

⁸ *Ibid.*, p. 50.

the *condottieri* were ‘more permanent and disciplined organisations [...] hired out for particular military campaigns over set periods of time’.⁹ Evidently, the notion of the ‘soldier for hire’ has been found in some form or another across history,¹⁰ highlighting its important place in the conflict landscape.

This role began to decrease in the nineteenth century with the rise of nationalism and nation building giving prominence and value to the idea of it being honourable to fight ‘for one’s country rather than for commercial interests’.¹¹ Subsequently, the popularity of mercenaries decreased significantly by the early twentieth century, with the establishment of state legitimate use of violence. The concept of the state and sovereignty spread across the globe, and with it, national armies and fighting for a greater good became the norm in the international system; this was illustrated particularly through the strong patriotism of both World Wars.¹² The private military market was delegitimised, resulting in a shift toward the nation-state holding the monopoly on the legitimate use of force.¹³

The popularised ‘soldier of fortune’ experienced a renaissance in 1960–1970, fuelling a brief, and brutal, mercenary era in post-colonial Africa. Colonial powers and companies who wanted to protect their interests and remain influential in these fragile states hired mercenaries to do so.¹⁴ Their involvement was most notable, and infamous, in the Congo war from 1960–1964.¹⁵ Infamously dubbed ‘Les Affreux’ (‘The Terrible Ones’) by locals, they included the notorious ‘Mad’ Mike Hoare who led both 4 Commando for Katanga, and 5 Commando ANC for Prime Minister Tshombe.¹⁶ The group was known for widespread unsanctioned killing, torture, looting and mass rapes and even Hoare himself described his men as ‘appalling thugs’.¹⁷ Frenchman Bob Dernard gained notoriety in the Congo in the same vein as Hoare, in addition to an infamous series of ‘violent coups’ in the 1970s in the Comoros Islands and the Seychelles.¹⁸ The chaos and destruction wreaked by these mercenaries across newly independent African states fostered and solidified the violent, ‘ruthless and brutish’¹⁹ image with which they are associated today.

During this time, the international community was unable to reach a consensus on how to deal with the problem, leading to an African solution. The states most affected by the ruthless actions of these men banded together to condemn them, resulting in the Organisation for African Unity (OAU) Convention for the Elimination of Mercenarism

⁹ Ibid.

¹⁰ Fulloon, op. cit. (2013), p. 50.

¹¹ Shearer, op. cit. (1998), p. 70.

¹² Ibid.

¹³ Liu, op. cit. (2011), p. 305.

¹⁴ Singer, op. cit. (2003), p. 37.

¹⁵ S. J. G. Clarke, *The Congo Mercenary: A History and Analysis*, (Johannesburg: The South African Institute of International Affairs, 1968), p. 4.

¹⁶ Singer, op. cit. (2003), p. 37.

¹⁷ P. Gleijeses, “‘Flee! The White Giants Are Coming!’: The United States, the Mercenaries, and the Congo”, *Diplomatic History*, vol. 18, no. 2 (1994), p. 79.

¹⁸ Singer, op. cit. (2003), p. 37.

¹⁹ Fergal Keane, ‘There will be work for mercenaries in Africa until democracy replaces dictatorships’, *The Independent*, (20 March 2004), available online: <http://www.independent.co.uk/voices/commentators/there-will-be-work-for-mercenaries-in-africa-until-democracy-replaces-dictatorships-6172334.html>, (accessed 12 October 2014).

in 1977.²⁰ It introduced the idea of collective accountability that mercenaries are a collective problem for Africa and African unity, not just the individual states they operate in.²¹ The United Nations Mercenary Convention eventually followed, outlawing recruitment, training, use and financing of mercenarism, although years after it was needed during the African crisis.²²

Global state security priorities changed considerably after the collapse of the Soviet Union.²³ Without the need to maintain NATO to confront communist Eastern Europe, highly sophisticated armies designed to fight the complex large-scale conflicts Cold War strategists had envisioned²⁴ were no longer necessary. In a chain reaction, professional armies were dramatically downsized worldwide—by an estimated more than six million personnel in the 1990s²⁵—leaving a huge number of individuals with a specialised skill set now unceremoniously unemployed. Essentially, the ‘result [was] a sharp increase in military expertise available to the private sector’.²⁶ With the shift of focus away from super power conflict, developing regions ceased to be part of the national interests of the great powers, who were no longer willing to intervene in minor conflicts.²⁷ Subsequently, without superpower rivalry providing a sense of order and stability, smaller-scale levels of conflict experienced a massive increase in these regions.²⁸ This combination of withdrawal and failure of governance created a security vacuum inevitably filled by out of work soldiers struggling to assimilate into civilian society.²⁹ These men also had access to the considerable arms stocks that became available on the open market.³⁰ These conditions fostered an environment where privatised war could once again prosper, leading to the establishment of the first modern PSC: Executive Outcomes (EO).

Founded by Apartheid-era South African Defence Force Personnel and incorporated in Britain in 1993,³¹ EO seized the security realm’s attention with a major contract in Angola in May 1993. The government had failed to recapture the northern Soyo oil fields taken by the rebels earlier in March and enlisted EO’s services.³² Using a group of only 50 men (mostly former officers), EO orchestrated an attack with the Angolan Armed Forces and quickly recaptured the compound.³³ With only three wounded, minimally damaged equipment and the swiftness of the operation, it was deemed a resounding success.³⁴ This was quickly followed by a contract in September 1993 to

²⁰ H. Tonkin, *State Control over Private Military and Security Companies in Armed Conflict* (United Kingdom: Cambridge University Press, 2011), p. 184.

²¹ Milliard, op. cit. (2003), pp. 4-5.

²² Ibid., p. 5.

²³ P. Singer, ‘Corporate Warriors: The Rise of the Privatized Military Industry and Its Ramifications for International Security’, *International Security*, vol. 26, no. 3, (2001-2002), p. 192.

²⁴ Shearer, op. cit. (1998), p. 70.

²⁵ Singer, op. cit. (2001-2002), p. 193.

²⁶ Singer, op. cit. (2003), p. 53.

²⁷ Singer, op. cit. (2001-2002), p. 194.

²⁸ Singer, op. cit. (2003), p. 50.

²⁹ D. Bergner, ‘The Other Army’, *The New York Times Magazine* 14 August 2005: 29(L).

³⁰ Singer, op. cit. (2003), p. 54.

³¹ S. Brayton, ‘Outsourcing War: Mercenaries and the Privatization of Peacekeeping’, *Journal of International Affairs*, vol. 55, no. 2, (2002), p. 312.

³² Shearer, op. cit. (1998), p. 73.

³³ Brayton, op. cit. (2002), p. 312.

³⁴ Ibid., p. 312.

protect a diamond mine in Cafunfo considered crucial for victory.³⁵ For an estimated \$40 million a year, the Angolan government hired more than 500 EO personnel to train nearly 5,000 of their own soldiers whilst also protecting the mine.³⁶ This is often credited with reversing the tide of the conflict in the government's favour and was the first demonstration of the power, effectiveness and profitability of this new form of privatised military.³⁷ Whilst assisting in Angola, things 'began to completely fall apart for the government of Sierra Leone'³⁸ and it is here that the true value of the firm emerged. The state quickly enlisted EO's expertise in March 1995 to assist with the rebel Revolutionary United Front (RUF) forces who had besieged the Kono diamond mines: a valuable source of income for the country. EO needed only 11 days to drive the rebels from the capital and recapture the mines.³⁹ A second major contract with the Sierra Leonean government was quick to follow in May: 22 months at a cost of \$35 million.⁴⁰ Working with local militias, EO restructured their style and strategy of warfare, advocating; 'constant pursuit and punishment of the rebel force', rather than roadside ambush and quick withdrawal tactics, and utilised air and artillery to beat the RUF into submission.⁴¹ EO had again turned the tide of civil war and brought stability to a chronically unstable region. They had also successfully brought the rebels to the negotiating table for a peace agreement, for approximately a third of Sierra Leone's defence budget.⁴² Comparatively, a UN force deployed for eight months after the peace agreement was signed cost \$47 million.⁴³

Whilst instability returned to Sierra Leone once the company left, and EO was abruptly shut down in 1999 due to South African anti-mercenary laws,⁴⁴ its impact had been significant. EO had also operated in Uganda, Kenya, South Africa, Indonesia and the Congo post Sierra Leone.⁴⁵ However, these initial engagements in Angola and Sierra Leone illustrated the effectiveness, innovation and vast lucrative potential of this business, providing the blueprint for the modern PSC.⁴⁶

Corporate warriors: the modern private security company

Post-EO PSCs had little resemblance to the brutal mercenaries of 1960s Africa. From a historical standpoint, PSCs most resemble the Italian *Condottieri* of the Renaissance period. These fourteenth century warrior groups functioned essentially like companies, and much like PSCs today.

The PSC is a complex entity. A general definition states PSCs are 'private business entities that provide military and/or security services'.⁴⁷ These services include: 'combat

³⁵ Ibid., p. 313.

³⁶ Shearer, op. cit. (2001-2002), p. 73.

³⁷ Singer, op. cit. (2003), pp. 108-109.

³⁸ Ibid., p. 110.

³⁹ Brayton, op. cit. (2002), p. 313.

⁴⁰ Shearer, op. cit. (2001-2002), p. 73.

⁴¹ Singer, op. cit. (2003), p. 113.

⁴² Ibid., pp. 113-114.

⁴³ Brayton, op. cit. (2002), p. 313.

⁴⁴ Ibid., pp. 313-314.

⁴⁵ Singer, op. cit. (2003), p. 115.

⁴⁶ Ibid., pp. 115-116.

⁴⁷ International Committee of the Red Cross (ICRC), *The Montreux Document: on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict* ('The Montreux Document') (Montreux: 2008), para 9.

operations, strategic planning, intelligence, risk assessment, operational support, training and technical skills',⁴⁸ guarding and protection.⁴⁹ Due to the vast range of military skills potentially offered, within this general definition different types of PSCs have come to the fore. These classifications rest largely on the kind of services the company chooses to offer.

The first type is the military provider firm concerned with the battle space. These firms are the most controversial as they directly engage in conflict, taking part in actual hostilities or being in direct command and control of units.⁵⁰ Alternatively, they may also be hired in the capacity of 'force multipliers': supplementing their client's existing forces to 'multiply' their attack capabilities.⁵¹ EO is a classic example: a firm engaged in active combat operations hired to confront an 'immediate, high threat' situation.⁵²

The second type is the military consulting firm. These firms provide advisory and training services to clients, offering 'strategic, operational, and organisational analysis [...] integral to the function or restructuring of armed forces'.⁵³ Providing tactical and strategic advice on combat, they do not take part on the battlefield itself; it is the 'client who bears the final risks'.⁵⁴ Although they do not provide manpower, this does not in any way diminish the value of their contribution. Largely staffed by former military officers, including four star generals and ex-special forces, their knowledge, training and expertise is just as, if not more, valuable than firepower⁵⁵ as it can have an 'immense strategic impact' on conflict.⁵⁶

The last type of PSC is the military support firm. These companies provide 'rear-echelon and supplementary services', filling functional needs rather than the planning and execution of combat.⁵⁷ Such services are wide in scope, but deemed critical for operations and include 'logistics, technical support and transportation'.⁵⁸ These are closest to traditional multinational corporations and their functions are increasingly the most outsourced as they have little to do with combat.⁵⁹ According to a Western diplomat, behind each US or British soldier in conflict are 10 to 12 individuals to support them and because of this, states progressively outsource these duties.⁶⁰

Whilst these categories are very distinct from one another it would be difficult to find a firm classified under just one. Even EO, a classic military provider firm, also supplied advisory services to Sierra Leonean soldiers.⁶¹ Modern PSCs provide a huge range of services to present themselves as versatile and thus, more employable. There is much overlap between services, making it difficult to break a firm into separate constituents.

⁴⁸ Fulloon, op. cit. (2013), p. 49.

⁴⁹ ICRC, *The Montreux Document*, para 9.

⁵⁰ Ibid., p. 201.

⁵¹ Singer, op. cit. (2003), p. 94.

⁵² Ibid., p. 93.

⁵³ Singer, op. cit. (2001-2002), p. 201.

⁵⁴ Singer, op. cit. (2003), p. 95.

⁵⁵ Ibid., pp. 95-96.

⁵⁶ Tonkin, op. cit. (2011), p. 45.

⁵⁷ Singer, op. cit. (2001-2002), p. 202.

⁵⁸ Ibid., 202.

⁵⁹ Singer, op. cit. (2003), p. 98.

⁶⁰ Tonkin, op. cit. (2003), p. 51.

⁶¹ Ibid., pp. 42-43.

For instance, US firm Triple Canopy advertises itself as being able to provide “mission support, security, training and advisory services”⁶² a possible mix of all three PSC categories.

PSCs are structured and organised like other regular commercial firms. They are registered corporate bodies formally incorporated in stock exchanges⁶³ and have ‘legal personalities, hierarchical structures, websites and public relations officials’.⁶⁴ They can be standalone companies or subsidiaries of larger multi-national conglomerates⁶⁵ such as military support firm Kellogg, Brown & Root, formerly a subsidiary of larger oil field services corporation, Halliburton.⁶⁶ Due to the nature of work and the necessary flexibility for adapting to client needs, PSCs utilise ‘databases of qualified personnel and specialized sub-contractors’ rather than maintain permanent employees.⁶⁷ Personnel are primarily ex-military and security industry, hired on a contract-by-contract basis. The highest-paid and sought-after are ex-special forces; Delta Force, Rangers and SEALs in the US, Special Air Service in the UK and Australia’s Special Air Services Regiment (SASR).⁶⁸ Similarly, Triple Canopy was set up by ex-Delta Force soldiers Matt Mann and Tom Katis and subsequently keenly seeks, and often has its pick of, fresh former Delta personnel.⁶⁹ As Mann humbly stated, ‘rock stars like to work with rock stars’.⁷⁰ The remaining numbers come from non-special forces regiments in western armies, or from countries such as Chile, Fiji, Ukraine, and veterans of apartheid-era South Africa.⁷¹ PSCs maintain a diverse clientele including: state governments, corporations, international organisations and NGOs.⁷² Multinational corporations are one of the principal contractors and are predominantly mineral extraction and natural resources companies.⁷³ Many of the places where these valuable resources are found are in the throes of deep civil conflict and subsequently the dangers of conducting operations in such zones are significant.⁷⁴ Consequently, these companies are reliant on hiring their own security, as they are unable to ‘rely on foreign governments to protect them’.⁷⁵ The most profitable contracts, however, come from state employers to supplement their national military forces and range from Western states like the US and the UK, to others such as Sierra Leone. The biggest contractor of PSCs is the US, with highly lucrative contracts worth billions of dollars over a number of years.⁷⁶ The US Department of Defence has increasingly turned to PSCs to privatise non-combat military capabilities,

⁶² Triple Canopy, ‘Careers: Secure Your Future’, *Triple Canopy*, available online:

<http://www.triplecanopy.com/careers/> (accessed November 14, 2014).

⁶³ Fulloon, op. cit. (2003), p. 51.

⁶⁴ Tonkin, op. cit. (2011), pp. 35-36.

⁶⁵ *Ibid.*, p. 36.

⁶⁶ J. Risen, ‘Controversial Contractor’s Iraq Work Is Split Up’, *The New York Times*, May 24, 2008, <http://www.nytimes.com/2008/05/24/world/middleeast/24contract.html?pagewanted=all>.

⁶⁷ Singer, op. cit. (2003), p. 75.

⁶⁸ Tonkin, op. cit. (2011), p. 36.

⁶⁹ Bergner, op. cit. (2005).

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² Tonkin, op. cit. (2011), p. 37.

⁷³ Singer, op. cit. (2003), p. 81.

⁷⁴ *Ibid.*, 81.

⁷⁵ *Ibid.*, 81.

⁷⁶ M. O’Hanlon and P.W. Singer, ‘The Humanitarian Transformation: Expanding Global Intervention Capacity’, *Survival*, vol. 46, no. 1, (2004), p. 91.

arguing the resources of the overstretched military need to be channelled into combat operations.⁷⁷

The PSC industry has become a juggernaut in the business of war. From modest beginnings in the early 1990s, the industry has ballooned into one with estimated annual revenue in excess of \$100 billion,⁷⁸ and hundreds, if not thousands, of PSCs now operate in more than 110 countries on every continent.

The post 9/11 era

The September 11 2001 attacks were crucial to accelerating the proliferation of the industry into a multi-billion dollar powerhouse: demand increased exponentially virtually overnight, ‘altering the entire dynamic of global security’.⁷⁹ The US economy slumped significantly in the months following the attack,⁸⁰ however, the economic outlook improved considerably for PSCs: one of few industries where this was the case.⁸¹ In the three months following, September 11 cost New York City 143,000 jobs a month and an estimated \$2.8 billion in wages;⁸² this was a stark contrast to the prices of PSCs listed on the stock exchange, which surged approximately 50 percent, some even doubling in value.⁸³ The attacks ‘created a heightened sensitivity to security [and] increased demand for [...] military-style protection’,⁸⁴ which cultivated an environment that allowed new firms to be established and existing firms to diversify and restructure.⁸⁵ Triple Canopy—now one of the biggest global firms—was started in the wake of 9/11, specifically to address the new threat of terrorism,⁸⁶ whilst US firm Blackwater expanded from ‘training services’ into a fully-fledged security detail with Blackwater Security Consulting.⁸⁷ When US forces under then-President George W. Bush invaded Afghanistan on 7 October 2001 to capture the leader of Al-Qaeda, Osama bin Laden,⁸⁸ and later Iraq on 20 March 2003, to disarm Iraq’s weapons of mass destruction⁸⁹; the impact of PSCs could be seen.

⁷⁷ D. Brooks, ‘Messiahs or Mercenaries? The future of international private military services’, *International Peacekeeping*, vol. 7, no. 4, (2000), p. 137.

⁷⁸ J. Scahill, *Blackwater: The Rise of the World’s Most Powerful Mercenary Army* (New York: Nation Books, 2007), p. 41.

⁷⁹ Singer, op. cit. (2003), p. 231.

⁸⁰ Lydia Polgreen, ‘Study Confirms 9/11 Impact on New York City Economy’, *The New York Times*, 30 June 2004, available online: <http://www.nytimes.com/2004/06/30/nyregion/study-confirms-9-11-impact-on-new-york-city-economy.html> (accessed 29 September 2014).

⁸¹ Singer, op. cit. (2003), p. 232.

⁸² Polgreen, op. cit. (2004).

⁸³ Singer, op. cit. (2003), p. 232.

⁸⁴ *Ibid.*, p. 232.

⁸⁵ Paul Harris, ‘How private firms have cashed in on the climate of fear since 9/11’, *The Guardian*, 6 September 2011, available online: <http://www.theguardian.com/world/2011/sep/05/private-firms-fear-9-11> (accessed 29 September 2014).

⁸⁶ Bergner, op. cit. (2005).

⁸⁷ Scahill, op. cit. (2007), p. 42.

⁸⁸ Office of the Press Secretary, ‘Remarks by the President in Address to the Nation on the Way Forward in Afghanistan and Pakistan’, *The White House*, 1 December 2009, available online: <https://www.whitehouse.gov/the-press-office/remarks-president-address-nation-way-forward-afghanistan-and-pakistan> (accessed 10 August 2015).

⁸⁹ Office of the Press Secretary, ‘President Discusses Beginning of Operation Iraqi Freedom’, *The White House*, 22 March 2003, available online: <http://georgewbush-whitehouse.archives.gov/news/releases/2003/03/20030322.html> (accessed 10 August 2015).

The profitability was palpable: within months of incorporating Blackwater Security Consulting in 2002, the company was pocketing hundreds of thousands of dollars a month in revenue courtesy of a CIA contract in US-occupied Afghanistan.⁹⁰ When US forces converged upon Baghdad in March 2003, ‘the opportunity of a lifetime’ presented itself to the industry.⁹¹ Modern mercenaries began pouring into Iraq from firms such as ‘Control Risks Group, DynCorp, Erinys, Aegis, ArmorGroup, Hart, Kroll [...] Halliburton [and] KBR’.⁹² It is reported that US agencies issued well over \$85 billion in private contracts from 2003–2007.⁹³ British military company revenue also skyrocketed courtesy of the occupation from \$320 million beforehand to more than \$1.6 billion in early 2004.⁹⁴ Business thrived; contractors built, operated and guarded coalition complexes, maintained and loaded weapons systems, supplied troops and maintained protection details amongst other tasks.⁹⁵ For specifics: a \$13 billion contract was awarded to KBR to provide troop supplies and maintain equipment;⁹⁶ Triple Canopy was awarded a series of government contracts to guard Coalition Provisional Authority (CPA) quarters valued at \$250 million annually;⁹⁷ and Australian firm Unity Resources Group provided security for the Australian embassy in Baghdad in a \$9 million contract.⁹⁸ Most famously, Blackwater was singularly awarded a no-bid \$27.7 million contract in August 2003 to provide the personal security protection detail for Paul Bremer.⁹⁹ Paul Bremer was ‘Bush’s man’, sent to direct the occupation of Iraq from Baghdad, essentially the single most important—and by extension, at risk—US official in Iraq.¹⁰⁰ In successfully keeping him alive, Blackwater was launched to the status of being *the* preeminent contractor working in Iraq, a stark contrast when juxtaposed with their humble ‘training services’ beginnings.¹⁰¹ Undeniably, ‘Osama bin Laden turned Blackwater into what it is today’.¹⁰²

The extent of contractor involvement was largely hidden from the public eye until four Blackwater personnel were killed, burned, dragged through the streets and hung from a bridge in Fallujah.¹⁰³ The ensuing public outcry and news headlines such as ‘US Civilians Mutilated in Iraq Attack’¹⁰⁴ meant that the role contractors were playing in the war became much more scrutinised. Soon, details of just how many contractors were operating in Iraq and in what capacity began to surface. It was estimated that over 25,000 private contractors (excluding a projected unarmed 50,000) were operating in Iraq alongside coalition forces,¹⁰⁵ the number potentially rising to well over 100,000

⁹⁰ Scahill, op. cit. (2007), p. 43.

⁹¹ Ibid., p. 47.

⁹² Ibid., p. 76.

⁹³ Tonkin, op. cit. (2011), p. 36.

⁹⁴ Scahill, op. cit. (2007), p. 77.

⁹⁵ Singer, op. cit. (2001-2002), pp. 122-123.

⁹⁶ Ibid., p. 123.

⁹⁷ Bergner, op. cit. (2005).

⁹⁸ J. Mendes and S. Mitchell, ‘Who is Unity Resources Group?’, *ABC News*, 15 September 2010, available online: <http://www.abc.net.au/news/2010-09-15/who-is-unity-resources-group/2261606>, (accessed 8 October 2014).

⁹⁹ Scahill, op. cit. (2007), p. 69.

¹⁰⁰ Ibid., p. 60.

¹⁰¹ Ibid., p. 80.

¹⁰² Ibid., p. 41.

¹⁰³ Ibid., pp. 103-104.

¹⁰⁴ Ibid., p. 108.

¹⁰⁵ Bergner, op. cit. (2005).

toward the end of the occupation.¹⁰⁶ These considerable numbers were striking. During the Gulf War of 1990–1991, the ratio of soldiers to contractors was estimated 50 to 1 in largely military support roles.¹⁰⁷ Comparatively, figures suggest this ratio was at one to one for Iraq and Afghanistan,¹⁰⁸ and it is speculated that by the summer of 2007, the number of contractors had ‘exceeded the number of troops’.¹⁰⁹ Reliance upon private security contractors rendered them indispensable to both the world’s most dominant and sophisticated army¹¹⁰ and its coalition counterparts. PSCs had been hired to fill gaping deficiencies in the states capacity to conduct warfare left by swift post-Cold War downsizing. The perception that the private sector could mobilise quicker allowed government agencies to off-load projects and PSCs to take on traditional state functions.¹¹¹ Further, the number of troops deployed to Iraq proved woefully inadequate for the scale of the mission. A retired US general stated the US force was ‘too small [...] the military just hadn’t provided the numbers’ and this subsequently left PSCs to ‘[perform] a military role’.¹¹² Contractors had proven so invaluable to the Iraq mission that some argue ‘the US military cannot operate at peak efficiency without [their] expertise’.¹¹³

However, what these masses of contractors did in Iraq, ‘how many people they killed, how many of them died or were wounded’, remains largely unknown.¹¹⁴ No one oversaw their activities which resulted in scandals being leaked via the media, which reported that ‘Iraq had become [...] a “Wild West” with no sheriff’.¹¹⁵ The most infamous scandal was the 2007 fatal shooting of 17 Iraqi civilians and the wounding of 20 others in Nisour Square by a Blackwater convoy.¹¹⁶ With existing public backlash against the PSC, this further outrage proved to be the company’s undoing; all its contracts were immediately lost and it was ‘renamed, sold and renamed again’.¹¹⁷ Another infamous scandal was the alleged torture of detainees at the Abu Ghraib prison by members of DynCorp and Titan, who the CIA hired for interrogation.¹¹⁸ The serious claims involved Iraqi prisoners being beaten, starved and dehydrated, threatened with dogs and sexually abused.¹¹⁹ Finally, Australia’s Unity Resources Group obtained grave notoriety in an incident where a convoy unleashed a ‘barrage of gunfire’ into a vehicle,

¹⁰⁶ L. A. Dickinson, *Outsourcing War & Peace: Preserving Public Values in a World of Privatized Foreign Affairs* (New Haven: Yale University Press, 2011), p. 37.

¹⁰⁷ A. Stanger and M. E. Williams, ‘Private Military Corporations: Benefits and Costs of Outsourcing Security’, *Yale Journal of International Affairs* vol. 2, no. 1 (2006), p. 4.

¹⁰⁸ J. Joachim and A. Schneiker, ‘New Humanitarians? Frame Appropriation through Private Military and Security Companies’, *Millenium: Journal of International Studies*, vol. 40, no. 2, (2012), p. 366.

¹⁰⁹ Dickinson, op. cit. (2011), p. 37.

¹¹⁰ Singer, op. cit. (2001-2002), p. 121.

¹¹¹ Dickinson, op. cit. (2001), p. 37.

¹¹² Bergner, op. cit. (2005).

¹¹³ D. Mayer, ‘Peaceful Warriors: Private military Security Companies and the Quest for Stable Societies’, *Journal of Business Ethics*, vol. 89, no. 4, (2010), p. 389.

¹¹⁴ Scahill, op. cit. (2007), p. 77.

¹¹⁵ Ibid., pp. 76-77.

¹¹⁶ M. Chulov, ‘Iraqis react to Blackwater Verdict: ‘I’m surprised they were convicted at all’, *The Guardian*, 24 October 2014, available online: <http://www.theguardian.com/world/2014/oct/23/iraq-blackwater-guards-conviction-guilty-verdict-baghdad> (accessed 7 November 2014).

¹¹⁷ M. Apuzzo, ‘Blackwater Guards Found Guilty in 2007 Iraq Killings’, *The New York Times*, 22 October 2014, available online: <http://www.nytimes.com/2014/10/23/us/blackwater-verdict.html> (accessed 7 November 2014).

¹¹⁸ Mayer, op. cit. (2010), p. 390.

¹¹⁹ Ibid., p. 392.

killing two Iraqi women.¹²⁰ Despite this, perhaps the biggest scandal to arise from Iraq is Paul Bremer and the CPA that sent US contractors into Iraq with immunity from prosecution under Iraqi law.¹²¹ According to the terms of Iraq's 2004 Transitional Administrative Law, CPA decrees remain in force unless made obsolete by new legislation. CPA Order 17 states: 'contractors shall be immune from Iraqi legal process with respect to acts performed by them pursuant to the terms and conditions of a Contract'.¹²² Not only were contractors committing these atrocities, they were also unable to be prosecuted for them. This served as a point of immense controversy amongst the public and international community, with 'increasing calls for further clarification [...] and mounting pressure to develop a regulative framework'.¹²³

The current legal and regulatory framework

PSCs have been able to evade substantial accountability for two main reasons. First, there is a distinct lack of effective legal accountability, leaving considerable room for impunity. Outsourcing traditionally government military functions "creates a class of corporate actors [...] [above] military justice, domestic law, or international law."¹²⁴ PSCs typically operate in failed states lacking the ability and mechanisms to prosecute crimes, whilst the hiring states are unwilling. Arguably, the failure in this system in Iraq could be attributed to the immunity decree and the fact contractors are not subject to the Uniform Code of Military Justice.¹²⁵ However, cases involving criminal misconduct by contractors in Iraq have been notoriously difficult to prosecute in the US. Several suspected criminal misconduct cases referred to the Department of Justice resulted in only one being filed,¹²⁶ while others were dismissed under the 'state secrets doctrine' and 'political question doctrine'.¹²⁷ In the Abu Ghraib prison scandal, despite being involved in 36 percent of incidents, not one private contractor was subject to the same prosecution as was the case with the US Army soldiers.¹²⁸ The Nisour Square case was dismissed twice before once again being reopened.¹²⁹ This third attempt resulted in a guilty verdict in late October 2014, with convictions of murder, manslaughter and weapons charges.¹³⁰ This is unique for being the only prosecution of alleged contractor misconduct, seven years after the event, and implies that states are only willing to prosecute when the incident is deemed to be egregious. The verdict was deemed a 'legal and diplomatic victory for the United States government' and vital to repair things with deeply frustrated Iraqis,¹³¹ a convenient additional outcome. These events raise the

¹²⁰ A. E. Kramer and J. Glanz, 'U.S. Guards Kill 2 Iraqi Women in New Shooting', *The New York Times*, 10 October 2007, available online: <http://www.nytimes.com/2007/10/10/world/middleeast/10iraq.html?pagewanted=print> (accessed 29 October 2014).

¹²¹ B. Bennett, 'America's Other Army', *TIME* 170 (2007).

¹²² Mayer, op. cit. (2010), p. 391.

¹²³ M. L. Tougas, 'Some Comments and Observations on the Montreux Document', *Yearbook of International Humanitarian Law*, vol. 12 (2009), p. 322.

¹²⁴ Mayer, op. cit. (2010), p. 390.

¹²⁵ Ibid., p. 390.

¹²⁶ W. C. Peters, 'Laws, Wars and Mercenaries: The Case for Courts-Martial Jurisdiction over Civilian Contractor Misconduct in Iraq', *Brigham Young University Law Review*, vol. 367, no. 2, (2006), p. 373.

¹²⁷ Mayer, op. cit. (2010), p. 390.

¹²⁸ Singer, op. cit. (2001-2002), pp. 127-128.

¹²⁹ J. Pattinson, 'Outsourcing the Responsibility to protect: Humanitarian Intervention and Private Military and Security Companies', *International Theory*, vol. 2, no. 1, (2010), p. 16.

¹³⁰ Apuzzo, op. cit. (2014).

¹³¹ Ibid.

question of whether more rigorous prosecution should be expected and demanded of governments.

Secondly, the grey legal area PSCs operate in allows the accountability of contracting states to be diminished—something providing a myriad of benefits. Because of their company structure, PSCs do not have the hierarchy seen in the military; they are accountable only to the contract they sign, as opposed to a chain of command.¹³² Further, PSCs are unburdened by public opinion, political constraints and military legality; governments can ‘conduct “foreign policy by proxy”’.¹³³ States therefore deliberately write ambiguous contracts in terms and oversight mechanisms to allow for the pursuit of foreign policy goals ‘safe in the knowledge that should the situation deteriorate, official participation can be fudged’.¹³⁴ This infers that the inherent impunity serves the national interest of the contracting state. When scandals occur, the contractors’ ultimate accountability to their employer, not the state, absolves the state of responsibility and eludes an international public relations disaster. Further, states are able ‘to do “dirty work” without repercussions [...] [and] political exposure’.¹³⁵ This explains the unwillingness of states to create a comprehensive regulatory scheme. Essentially, it is not within their interests to trap PSCs in legal accountability; they provide the opportunity to carry out strategic actions that ‘would not gain legislative or public approval’ through conventional means.¹³⁶ Indeed, trying to impose accountability upon PSCs ‘is like sand going through your fingers [...] they are like amoeba, they come and go’.¹³⁷

The current legal and regulatory framework governing PSCs is minimal at best when considered in conjunction with the breadth and gravity of work they perform. There are only three active instruments potentially applying to PSCs: Article 47 of Protocol I to the Geneva Conventions,¹³⁸ the UN Mercenary Convention¹³⁹ and the OAU Convention for the Elimination of Mercenarism in Africa.¹⁴⁰

Article 47 does not outlaw mercenaries entirely, but was the first document in international law to properly conceptualise what a mercenary is.¹⁴¹ It provides a definition of mercenaries by separating the concept into six characteristics, and seeks to punish them by denying them both combatant and prisoner of war status.¹⁴² However, this will not be discussed in detail, as the Geneva Convention is designed to ensure protection of victims of international armed conflict rather than outlaw mercenarism.¹⁴³

¹³² Pattison, op. cit. (2010), p. 14.

¹³³ Walker, op. cit. (2005), p. 661.

¹³⁴ Shearer, op. cit. (1998), p. 74.

¹³⁵ Walker, op. cit. (2005), p. 668.

¹³⁶ Singer, op. cit. (1998), p. 125.

¹³⁷ Walker, op. cit. (2005), p. 688.

¹³⁸ First Additional Protocol to the Geneva Conventions of 12 August 1949, and relative to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 UNTS 3.

¹³⁹ International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, 4 December 1989, 29 ILM 91, UN Doc. A/Res/44/34.

¹⁴⁰ Convention of the Organization of African Unity for the Elimination of Mercenarism in Africa, 3 July 1977, OAU Doc. CM/433/Rev.L. Annex 1.

¹⁴¹ E. Krahnemann, ‘From ‘Mercenaries’ to ‘Private Security Contractors’: The (Re)Construction of Armed Security Providers in International Legal Discourses’, *Millennium: Journal of International Studies*, vol. 40, no. 2, (2012), p. 348.

¹⁴² Dickinson, op. cit. (2011), pp. 41-42.

¹⁴³ Krahnemann, op. cit. (2012), p. 349.

As the title suggests, the UN Convention targets those who use mercenaries, in addition to mercenaries themselves. The definition of mercenary in this convention is derived from Article 47.¹⁴⁴ Article 1 states:

1. A mercenary is any person who;
 - (a) is specially recruited locally or abroad in order to fight in an armed conflict;
 - (b) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces of that party;
 - (c) is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;
 - (d) is not a member of the armed forces of a party to the conflict; and
 - (e) has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.¹⁴⁵

A person must satisfy all criteria to classify as a mercenary and commit an offence for the purposes of the Convention. The Convention also widens this definition in Article 2, adding:

2. A mercenary is also any person who, in any other situation:
 - (a) is specially recruited locally or abroad for the purpose of participating in a concerted act of violence [...]
 - (b) is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation.¹⁴⁶

The OAU Convention also adopts a similar definition which, however, is notably more aggressive by including state parties and ‘juridical persons’ for alleged breaches under the Convention.¹⁴⁷ Article 1(2) prohibits individuals, groups, associations, states or representatives of states from using or supporting mercenaries ‘with the aim of [...] opposing a process of self-determination stability or the territorial integrity of another state’.¹⁴⁸

These instruments are comprehensive, yet ultimately ineffective and fail to regulate PSCs. As discussed earlier, the Conventions were created in response to the rampaging mercenaries of post-colonial Africa. From this stems the primary problem; they were written with the kind of mercenary of the time in mind, which are virtually non-existent today.¹⁴⁹ This is particularly evident in the OAU Convention where Article 2 clearly refers to mercenaries working against national liberation movements that had swept across the continent.¹⁵⁰ The definition of ‘mercenary’ in these conventions is restrictive to the point of being unworkable, once poignantly stated: ‘[a] mercenary who cannot

¹⁴⁴ H. L. Liu, ‘Leashing the Corporate Dogs of War: The Legal Implications of the modern Private Military Company’, *Journal of Conflict & Security Law*, vol. 15, no. 1, (2010), p. 146.

¹⁴⁵ International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, 4 December 1989, 29 ILM 91, UN Doc. A/Res/44/34.

¹⁴⁶ Mercenary Convention.

¹⁴⁷ Liu, op. cit. (2010), p. 146.

¹⁴⁸ Convention of the Organization of African Unity for the Elimination of Mercenarism in Africa, 3 July 1977, OAU Doc. CM/433/Rev.L. Annex 1.

¹⁴⁹ Krahnmann, op. cit. (2012), p. 351.

¹⁵⁰ Tonkin, op. cit. (2011), p. 185.

exclude himself from this definition deserves to be shot—and his lawyer with him’.¹⁵¹ The first issue resides in the requirement of being ‘specially recruited’. Modern contractors today are employees contracted to a specific company, thus they cannot be said to be ‘specially recruited’.¹⁵² Further, the profit motivation is notoriously difficult to satisfy, deemed ‘impossible to prove in a court of law’.¹⁵³ Monetary gain is only one of many possible factors motivating an individual to take part in conflict, other reasons potentially being politically or ideologically driven.¹⁵⁴ This is the most problematic of the definition criterion, as it is near impossible to isolate an individual’s ‘central’ motivation, yet it is also ‘the “crux” of mercenarism, without which the definition would be meaningless’.¹⁵⁵ The ineffectiveness of these instruments is further demonstrated in the utter lack of support. The legitimacy of the OAU Convention is undermined by the fact some ratifying states are the biggest PSC employers,¹⁵⁶ whilst only 30 states have ratified the UN Convention, none of whom is a major power.¹⁵⁷

PSCs have also made conscious efforts over the years to distance themselves from the ‘mercenary’ tag, to eliminate the term from international discourse and render these international instruments inapplicable. Indeed, an industry representative angrily asserted: ‘We are private security companies! Private security! [...] the work is defensive. We protect’.¹⁵⁸ This image and linguistic restructuring can be traced through the UN mercenary discourse. In 1987, the UN appointed Enrique Ballesteros as the UN Special Rapporteur on the use of mercenaries and tasked him with writing annual reports detailing the UN mercenary discourse. As late as 1993—the EO era—his reports indicate that the criminal status of mercenaries, regardless of the role played in conflict, continued to be affirmed.¹⁵⁹ Ballesteros’ 1994 report went so far as to explicitly mention EO and categorise them as mercenaries within the bounds of the UN Convention, much to EO’s displeasure.¹⁶⁰ However, in the late 1990s, a change in the attitudes of UN member states toward PSCs had been noted. Ballesteros lamented the ‘gaps and loopholes’ preventing PSC activities from being captured within the UN mercenary definition, and made note that the alternate perception of PSCs as ‘lawful companies’ was gaining ground in international circles.¹⁶¹ For him, this was particularly problematic as personnel, despite their military backgrounds and high salaries could not be considered as ‘coming within the legal scope of mercenary status’.¹⁶²

¹⁵¹ Liu, op. cit. (2010), p. 144.

¹⁵² C. Walker and D. Whyte, ‘Contracting Out War?: Private Military Companies, Law and Regulation in the United Kingdom’, *International and Comparative Law Quarterly*, vol. 54, no. 3, (2005), p. 679.

¹⁵³ P. Jackson, ‘War is much too serious a thing to be left to military men’: Private military companies, combat and regulation’, *Civil Wars*, vol. 5, no. 4, (2002), p. 40.

¹⁵⁴ Walker, op. cit. (2005), p. 679.

¹⁵⁵ Tonkin, op. cit. (2011), p. 181.

¹⁵⁶ Jackson, op. cit. (2002), p. 40.

¹⁵⁷ Ibid., p. 40.

¹⁵⁸ Bergner, op. cit. (2005).

¹⁵⁹ Krahmann, op. cit. (2012), p. 356.

¹⁶⁰ Ibid., p. 357.

¹⁶¹ UN Commission on Human Rights, ‘Report on the Question of the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination, Submitted by Mr. Enrique Bernales Ballesteros, Special Rapporteur, Pursuant to Commission Resolution 1995/5 and Commission Decision 1996/113’, E/CN.4/1997/24, 20 February 1997, para.92.

¹⁶² Shearer, op. cit. (1998), p. 69.

The term ‘Private Security Company’ first appeared in Ballesteros’ 1998 Report and was used to describe firms such as EO and its counterpart Sandline International:¹⁶³ an abrupt departure from the mercenary assertion of only four years earlier. It signified the distinction companies had longed for a separation of PSCs from the dreaded mercenary tag within international discourse.¹⁶⁴ It was in the early 2000s when Ballesteros’ own discourse changed sharply—his report deemed PSCs as legal entities to which not only did the UN Convention not apply,¹⁶⁵ but also had significant potential for making a positive contribution to security.¹⁶⁶ Shaista Shameen replaced Ballesteros in 2004 and also significantly furthered the positive framing of PSCs. She stated in 2005 the term ‘mercenary’ was ‘derogatory [...] completely unacceptable and too often used to describe fully legal and legitimate companies’,¹⁶⁷ far stronger language than her predecessor. Her replacement, the Working Group on Mercenaries, continued this change by redefining and reframing traditional mercenary activities in a positive light. They established a formal definition deeming PSC activities as ‘services that are traditionally and characteristically [...] core functions and competencies of the state’¹⁶⁸ which rendered the mercenary definition inapplicable. The Working Group also published a Draft Convention in 2010, which excluded PSCs from existing mercenary conventions and eliminated the term ‘mercenary’ altogether.¹⁶⁹ This solidified the discursive, linguistic and perceptive changes occurring over the previous two decades. PSCs were now a corporate entity providing a service, neutralising the negative connotations of war profiteering.

There is one active international scheme with specific regard to PSCs: the Montreux Document.¹⁷⁰ The document is the product of almost three years of consultation with the International Committee of the Red Cross (ICRC), industry representatives, NGOs and contracting states such as the US, UK, China, France and Afghanistan.¹⁷¹ The document consists of two parts; the first reiterates existing international legal obligations relating to PSCs and the second outlines 73 ‘good practices’ to be followed.¹⁷² Such a public reaffirmation of the applicability of international humanitarian law (IHL) and human rights to contemporary conflict has been deemed a ‘significant achievement of historic importance’ given the uncertainty of this position between 2003 and 2008.¹⁷³ It is hoped the document will ‘lay the foundation for further practical regulation’.¹⁷⁴

¹⁶³ Krahmman, op. cit. (2012), pp. 357-358.

¹⁶⁴ Ibid., 357-358.

¹⁶⁵ UN Economic and Social Council, ‘Report on the Question of the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination, Submitted by Mr. Enrique Bernales Ballesteros, Special Rapporteur, Pursuant to Commission Resolution 1999/3’, E/CN.4/2000/14, 9 March 2000, paras.68-9.

¹⁶⁶ UN report, para. 71.

¹⁶⁷ Krahmman, op. cit. (2012), p. 359.

¹⁶⁸ Ibid., p. 360.

¹⁶⁹ N. D. White, ‘The Privatisation of Military and Security Functions and Human Rights: Comments on the UN Working Group’s Draft Convention’, *Human Rights Law Review*, vol. 11, no. 1, (2011), p. 136.

¹⁷⁰ International Committee of the Red Cross (ICRC), *The Montreux Document: on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict* (*The Montreux Document*) (Montreux: 2008).

¹⁷¹ J. Cockayne, ‘Regulating Private Military and Security Companies: The Content, Negotiation, Weaknesses and Promise of the Montreux Document’, *Journal of Conflict & Security Law*, vol. 13, no.3, (2009), pp. 401-402.

¹⁷² Tougas, op. cit. (2009), p. 324.

¹⁷³ Cockayne, op. cit. (2009), p. 403.

¹⁷⁴ Ibid., p. 404.

From the outset, it seems like a success; 17 states endorsed it on 17 September 2008, and this number is now more than 35.¹⁷⁵ However, for all its promise, it is not without issues. The most significant of these is that the Preface explicitly states it is ‘not a legally binding instrument and does not affect existing obligations of States under customary international law or under international agreements’.¹⁷⁶ It is, in essence ‘a bible with no enforcement capacity’¹⁷⁷—whilst ‘persuasive in law [...] it [falls] to states to make it binding in law’.¹⁷⁸ The fact states may endorse the document without the pressure of implementation makes such support insignificant. The second prominent weakness is the document makes little effort to regulate the PSC industry itself, the responsibility in both parts instead falling almost entirely on states. Essentially, the document expresses the state has the responsibility to ensure the respect of IHL and human rights, not outsource inherent state functions, take measures to investigate and rectify violations by the PSC and scrutinise the PSC they are contracting.¹⁷⁹ The obligations placed on PSCs are largely to comply with and respect domestic and international law,¹⁸⁰ but it is arguably the corporation, not the state, that needs more stringent regulation. Thus, whilst a ‘welcome first step’ the Montreux Document lacks the ‘implementation [and] enforcement arrangements to give it teeth’.¹⁸¹

A comprehensive report reviewing the Montreux Document five years on revealed that implementation in the US and UK leaves much to be desired.¹⁸² The US, whilst undertaking some efforts, has done little to revise its current licensing system and monitoring procedures to better reflect Montreux requirements and ensure compliance with IHL and Human rights laws.¹⁸³ Comparatively, the UK needs significantly more clarification in licensing and monitoring to meet its Montreux commitments.¹⁸⁴ Notably, the law and regulations to hold PSCs and personnel criminally liable for violations are limited to the point of inapplicability, and in the UK’s case, criminal jurisdiction does not extend to misconduct committed abroad.¹⁸⁵ Evidently, Montreux has provided PSCs with a polite and effective umbrella to legitimise their existence without managing their behaviour, allowing for the myriad of abuses and scandals that have occurred. Given the diversity of the industry, it could be said the best way to regulate PSCs is to put pressure on contracting states to enter into more responsible contracts. This is a valid point. However, years of debate and pressure from the UN special rapporteur and within the international community ultimately had no impact. No state has pushed for the kind of regulation the debate envisioned, *except* for the Montreux Document, which notably allows states to continue as they are now. While the biggest contractors like the US ignore the document requirements and continue to enter into minimally regulated contracts, it is highly unlikely others would take the first step. Evidently, putting such pressure on states has proven to be ineffective.

¹⁷⁵ White, ‘The Privatisation of Military and Security Functions and Human Rights’, 134.

¹⁷⁶ ICRC, *The Montreux Document*.

¹⁷⁷ Cockayne, op. cit. (2011), p. 426

¹⁷⁸ Ibid., p. 427.

¹⁷⁹ Tougas, op. cit. (2009), pp. 330-341.

¹⁸⁰ Ibid., pp. 336-338.

¹⁸¹ Cockayne, op. cit. (2009), p. 428.

¹⁸² R. DeWinter-Schmitt (Ed), ‘Montreux Five Years On: An Analysis of State Efforts to Implement Montreux Document Legal Obligations and Good Practices’, *Washington College of Law* (2003), pp. 8-9.

¹⁸³ Ibid., p. 8.

¹⁸⁴ Ibid., p. 9.

¹⁸⁵ Ibid., pp. 8-9.

Conclusion

For all the victims of injustice perpetrated by PSCs across the world since the incorporation of EO, regulation of PSCs has proven to be woefully inadequate and borderline non-existent. PSCs have proven too valuable to states to be subject to outright prohibition or a strict scheme; despite Blackwater's abysmal behaviour resulting in being sold and renamed *twice*, the US Government is still willing to offer it and other PSCs contracts because it serves the national purpose and desire for discrete deniability. Whilst Montreux is a valuable step forward, more stringent regulation is certainly needed to ensure that PSC personnel no longer thrive above the law, but are held accountable for their actions.

Balkan Enlightenment: The Role of Religion in the Break-Up of the Former Yugoslavia

Thomas Wooden*

There is a distinct lack of literature concerning the role of religion in the break-up of the former Yugoslavia. Academics have predominantly framed their inquiries into the former federation's disintegration in terms of catalysts for war without considering indicia that influence them. This restrictive focus has left out one of the most influential actors in the former federation—the religious institution. In order to address the lack of consideration, this paper will analyse and consolidate prominent works concerning religion's role in the break-up of the former Yugoslavia in the English language. The religions of concern in this paper consist of the Croatian Catholic Church, Serbian Orthodox Church and the Bosnian Islamic Community. This paper will address, inter alia, the relationship between nationalism and religious institutions, attempts at ecumenical dialogue and symbolism on the battlefield, which will demonstrate religion's widespread influence. This paper will reveal that religion's influence is extensive and inflamed tensions in the lead up to, and during, the conflict. By addressing the break-up of the former Yugoslavia through a lens focused solely on religion's influence, this paper serves as a significant consolidation and analysis of existing literature.

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The break-up of the former Yugoslavia in the 1990s constituted the final genocide in Europe for the twentieth Century.¹ It has been claimed that the conflict was the ‘most catastrophic event in Europe since the Holocaust’.² This conflict has produced a profusion of scholarly attention from varying disciplines. The cause of conflict in the Balkans is highly contentious. Most authors, in their analysis of the conflict through both religious and secular lenses identify that the discord was not brought about solely, or significantly, because of religion. While some authors dismiss religion as a significant cause for war, most recognise the importance religion played in the lead up to the crises and during the conflict. It is evident that the catalysts for war in the Balkans were numerous, including, *inter alia*, cultural, political, economic and ideological factors, with a specific focus on ethnic nationalist movements aimed at establishing ethnically homogenous states.³ It is unlikely that religion can be cited as a cause for war in the Balkans and neither is it the author’s purpose to prove this. It is evident, however, that although not a classical religious war based on theology, it was a conflict within which religion was ‘deeply involved and consciously engaged’.⁴

The former Yugoslavia was a federation predominantly comprised of six ethnicities: Serbs, Croats, Slovenes, Macedonians, Montenegrins and Muslims.⁵ Uniquely, Muslims within Bosnia were officially designated the title of Muslim for both nationality and religious identification.⁶ Under the communist regime that ruled the former Yugoslavia until its disintegration, each republic was considered equal, regardless of population size.⁷ Accordingly, no one in the former Yugoslavia was considered a minority.⁸ The country also had a diverse range of religions. In determining the role of religion, this paper will examine the three prominent religious institutions that existed within the former Yugoslavia: the Croatian Catholic Church, the Serbian Orthodox Church and the Bosnian Islamic Community.⁹ These religious institutions have been implicated in the crises to varying degrees.

Whilst acknowledging religion was not the vehicle for war in the Yugoslav conflict, Vrcan noted that the inquiry into the role of religion ‘involves the earlier and wider question of the role of religion in deepening social divisions and cleavages until they reach the point of fracture and in exacerbating social conflicts until they reach maximum incandescence’.¹⁰ Vrcan has captured the importance of the role of religion in this conflict without ignoring other indicia for war in the former Yugoslavia. What is interesting about the role of the main religions under inquiry is the understanding that

¹ P. Mojzes, *Balkan Genocides: Holocaust and Ethnic Cleansing in the Twentieth Century* (Plymouth: Rowman & Littlefield Publishers, Inc 2011), p. 131.

² J. Ridgeway and J. Udovički, ‘Introduction’, in *Yugoslavia’s Ethnic Nightmare: The Inside Story of Europe’s Ongoing Ordeal* (New York: Lawrence Hill Books 1995), p 3.

³ G. F. Powers, ‘Religion, Conflict and Prospects for Reconciliation in Bosnia, Croatia and Yugoslavia’, *Journal of International Affairs*, Vol. 50, No. 1 (Summer 1996), pp. 222-223; V. Perica, *Balkan Idols: Religion and Nationalism in Yugoslav States* (New York: Oxford University Press 2002), p. 165.

⁴ S. Vrcan, ‘The War in Former Yugoslavia and Religion’, *Religion, State and Society*, Vol. 22, No. 4 (1994), p. 377.

⁵ G. Stokes, ‘From Nation to Minority: Serbs in Croatia and Bosnia at the Outbreak of the Yugoslav Wars’, *Problems of Post-Communism*, Vol. 52, No. 6 (November/December 2005), pp. 3-4.

⁶ Powers, *op. cit.* (1996), p. 236.

⁷ Stokes, *op. cit.* (2005), pp. 3-4.

⁸ *Ibid.*, p. 4.

⁹ Vrcan, *op. cit.* (1994), p. 367.

¹⁰ *Ibid.*

they were not ‘extremist fanatical sects, but well-established and respectable world religions’.¹¹

In Perica’s 2002 seminal book, *Balkan Idols*, it was recorded that scholarship on the former Yugoslavia did not extensively address the role of religious institutions, despite their ‘active history-making forces’.¹² In other works, it is apparent that theologians and sociologists have adopted the inquiry into religion’s role, whereas political scientists’ focus is directed towards other indicia for war. Despite the lack of extensive cross-disciplinary scholarship, this paper intends to present a consolidation of the information available in the English language and serve as a significant analysis of the role of religion in the former Yugoslavia. Religion’s role will be identified as an important factor in the inflammation of tensions before and during the crises that resulted in the disintegration of what is now known as the former Yugoslavia.

A contextual understanding of the former Yugoslavia

Before analysing the role religion played in the break-up of the former Yugoslavia, it is vital to understand the disagreement amongst authors of the former nation’s multiculturalism and the strength of national identity. Understanding former Yugoslavian society is fundamental to understanding the ability for religion to inflame tensions and play an influential role in the respective republics. There existed a stark juxtaposition between how the former Yugoslavia was perceived by the world and by its inhabitants. Whilst acknowledging a lack of universal satisfaction and acceptance by Yugoslavs of their nation, Paul Mojzes, in his book *Balkan Genocides: Holocaust and Ethnic Cleansing in the Twentieth Century*, detailed that the former Yugoslavia’s inhabitants maintained cordial relations amongst its various nationalities; Yugoslavia became the communist country to which individuals from developing or other communist countries fled.¹³ This description of former Yugoslavian society is complemented by Doder’s description of Yugoslavia as a ‘vague country’ with a confusing ‘landscape of Gothic spires, Islamic mosques and Byzantine domes’.¹⁴ Furthermore, upon the outbreak of war, Oberschall cited a Muslim woman recalling the cordiality amongst its citizens: ‘In Prijedor there were no conflicts between nationalities. We didn’t make distinctions. My colleague at work was an Orthodox Serb, we worked together [...] I don’t understand’.¹⁵ Moreover, it has been claimed that the Yugoslav identity was important and its failure as a multicultural, multiethnic and multi-religious society became a substantial source of conflict.¹⁶ This understanding of identity in the former Yugoslavia has, however, been met with divergent views. For example, Michael Ignatieff, in his book *Blood and Belonging* recalls his tennis coach always calling himself Slovenian rather than Yugoslavian.¹⁷ Additionally, Meg Coulson cited the 1984 ‘magnificence of Sarajevo’s appearance in the year it hosted the Winter Olympics’ as

¹¹ Ibid., p. 370.

¹² Perica, op. cit. (2002), p. VIII.

¹³ Mojzes, op. cit. (2011), p. 133.

¹⁴ D. Doder, *The Yugoslavs* (New York: Random House 1978), pp. 18-9.

¹⁵ A. Oberschall, ‘The Manipulation of Ethnicity: From Ethnic Cooperation to Violence and War in Yugoslavia’, *Ethnic and Racial Studies*, Vol. 23, No. 6 (2000), pp. 984-5.

¹⁶ M. Coulson, ‘Looking Behind the Violent Break-Up of Yugoslavia’, *Feminist Review*, No. 45 (Autumn 1993), p. 95.

¹⁷ M. Ignatieff, *Blood and Belonging: Journeys into the New Nationalism* (New York: Farrar, Straus and Giroux 1995), p. 21.

misleading.¹⁸ These authors demonstrate differences in both personal and academic opinion of the existence of multiculturalism and importance of national identity. Although not speaking directly to the role of religion, they have emphasised the importance of identity.

The ‘ancient hatreds’ thesis

There exists a thesis that the outbreak of war in the Balkans can be attributed to ‘ancient hatreds’.¹⁹ This hypothesis contends that the ‘Yugoslav conflict is merely the most recent in a long history of conflicts between three major cultures, which are distinguished primarily by religion’.²⁰ Henry Kissinger went as far as to conclude that ‘the conflict is about religion, not ethnicity, since all the groups are of the same ethnic stock’.²¹ Similarly, Samuel Huntington posited that the crisis in the former Yugoslavia was representative of the eastern boundary of Western Christianity of the 1500s, which divided Catholicism from Orthodoxy and Islam and subsequently labelled it as the ‘Velvet Curtain of culture’ which ‘replaced the Iron Curtain of ideology’.²² Although likely to contain some truth, the analysis is questionable; such contentions cannot be measured nor recognised due to the innumerable forces that contributed to the outbreak of war. These authors have, however, highlighted the possibility that the influence of historical religious differences led to the outbreak of war. Regardless of the extent to which the ‘ancient hatreds’ thesis has significance, the historical relations and conflicts between religious institutions are clearly a factor to consider when addressing the success or failure of ecumenical dialogue, which will now be considered.

Nationalism and religion

The role of nationalism and its attribution as a cause for war in the former Yugoslavia has received widespread academic attention. What has been significantly absent from this body of scholarship is whether religion served to inflame nationalist sentiment and tensions amongst the republics of the former Yugoslavia. The following discussion will highlight that the Croatian Catholic Church and Serbian Orthodox Church were entwined with nationalistic sentiment in their respective states, whereas the Bosnian Islamic Community engaged in a comparably moderate approach to nationalism.

Defining nationalism

There exists manifold interpretations of ‘nationalism’. Ignatieff defined nationalism as ‘a political doctrine’, where ‘nationalism is the belief that the world’s peoples are divided into nations, and that each of these nations has the right to self-determination, either as self-governing units within existing nation-states or as nation-states of their own’.²³ Morgan expands upon this definition by stating that ethnic nationalism involves ‘the desire for one’s race to be pure and to exclude others from one’s claimed territory’.²⁴ It is Morgan’s conclusion that, by distinguishing oneself from others and

¹⁸ Coulson, op. cit. (1993), p. 87.

¹⁹ Powers, op. cit. (1996), p. 224.

²⁰ Ibid.

²¹ H. Kissinger, ‘Bosnia: Reasons for Care’, *Washington Post* (10 December 1995), p. C9.

²² S. P. Huntington, ‘If Not Civilization, What?’, *Foreign Affairs*, Vol. 72 No. 3 (Summer 1993) pp 30-1.

²³ Ignatieff, op. cit. (1995), p. 5.

²⁴ P. Morgan, ‘The Dangers of Ethnic Nationalism’, *Quadrant*, Vol. 52, No. 6 (June 2008), p. 54.

creating an ‘antagonistic view of identity’, extreme cases of nationalism can lead to ethnic cleansing, as became evident in the former Yugoslavia.²⁵

The role of religion in forming national identity can be questioned. There exists a contemporary assumption that as modernity progresses, religious influence wanes; this hypothesis is compounded by a claim that ‘modern nationalism is replacing traditional religious identity’.²⁶ The crises in the former Yugoslavia challenged this proposition, as the three prominent religions and xenophobia became imbued in a unique form of nationalism.²⁷

Religion and nationalism amalgamated: ethno-religious nationalism

To explain the amalgamation of religion and nationalism, Vrcan contrasted the former Yugoslavia with Northern Ireland by citing Bradford, where he stated:

“Scratch a partisan of the Home Rule and in nine cases in ten, you will find a Catholic: scratch his adversary and you will find a Protestant,” which means that if one scratches a Croatian nationalist, in nine out of ten cases one will find a Catholic and if one does the same with a Serbian nationalist, one will find an Orthodox, or something similar with a Muslim’.²⁸

Furthermore, Mojzes, in his discussion of the break-up of the former Yugoslavia, coined a term that specifically referred to the aforementioned phenomenon, namely that of ‘ethnoreligiosity’.²⁹ Mojzes stated that this term provided for a ‘specific symbiotic merger of one’s ethnic and religious heritage as a means of providing a sense of personal and collective identity’.³⁰ These statements reveal that religion was imbued within nationalist rhetoric, and therefore identity, amongst the republics of the former Yugoslavia.

Ethno-religious nationalism and ultranationalists

Gerard Powers ruminated heavily upon the practical effects of ethno-religious nationalism that potentially inflamed tensions in the former Yugoslavia. Powers claimed that ultranationalists of the respective nationalities in the former Yugoslavia engaged in and promoted activities that would disrupt the process of self-determination in the republics and non-violent negotiations.³¹ It was the actions of the clergy of the respective churches that unconsciously encouraged ethno-religious nationalism; by encouraging the defence of their community’s rights when faced with persecution, the clergy undermined their ability to counter the ultranationalist’s ‘project of religious and national chauvinism’.³² Through the sanctification of the wars for self-determination,

²⁵ Ibid.

²⁶ I. Iveković, ‘Nationalism and the Political Use and Abuse of Religion: The Politicization of Orthodoxy, Catholicism and Islam in Yugoslav Successor States’, *Social Compass*, Vol. 49, No. 4 (2002), p. 523.

²⁷ Ibid., pp. 523, 534.

²⁸ S. Vrcan, ‘Transition, War and Religion’, *Archives de Sciences Sociales des Religions*, Vol. 43, No. 103 (1998), p. 162, citing Roy Bradford, ‘Religion et politique en Irlande du Nord’ in Torelli Maurice (ed), *Religions et Guerres*, Nice Mame, 1992, p. 172.

²⁹ Mojzes, op. cit. (2011), pp. 146-7.

³⁰ Ibid.

³¹ Powers, op. cit. (1996), p. 223.

³² Ibid., p. 224.

religion served to exacerbate the tensions and conflict between the nationalities in the republics of the former Yugoslavia.³³ It is difficult to conclude that the churches, in this respect, acted specifically to fortify the tensions and conflict in the former Yugoslavia. Powers concludes, however, that public declarations made in favour of defending the rights of the community exposed the churches to the manipulation of ultranationalists.³⁴ It is clear that religion played a leading role in identity construction within the respective republics of the former Yugoslavia, creating what has been termed 'ethnoreligiosity'. Religion was, therefore, tied to the respective objectives of nationalist independence and/or expansion.

The Christian churches utilising ethno-religious nationalism

The removal of nationalist sentiment in the former Yugoslavia was never completely successful, despite the promise of the Partisan movement after the conclusion of the Second World War.³⁵ This failure was particularly evident within Serbia and the Serbian Orthodox Church. The combination of nationalism and religion, whilst evident in Croatia and on a smaller scale in Bosnia, was most prominent in Serbia due to its promulgation by the Serbian Orthodox Church. Citing others, Vrcan illustrates this relationship by stating that the 'Serbian nation has grown out of Orthodoxy, and that the Serbian nationality cannot exist without Orthodoxy'.³⁶ This is echoed by Shenk, Steele and Ferris where it is stated that there is an understanding that to be Serb, one must be Orthodox, and that all Orthodox Serbs should live in the same state.³⁷ It has been claimed that since the 1800s, the Serbian Orthodox Church used ethnic nationalism as part of religion and fused *pravoslavlje* (the Orthodox faith) and ideology of the 'restored nationhood'.³⁸ An example of this is evident in Perica's citation of Serbian Orthodox's Saint Nikolaj Velimirović's work, where he stated 'the healthy nationalism of the Gospel is the only right path'.³⁹

Did the Serbian Orthodox Church derive significant authority from this identity construction, or was it merely tokenistic? Evidence would suggest the former. It has been claimed the Serbian Orthodox Church not only played the role of 'rearguard' of Serbian nationalism during its vanguard in the early 1980s, but also played a key symbolic role where it carried the earthly remnants of 'emperor' Lazar who was 'killed by the Turks at the battle of Kosovo' in 1389 across presumed Serb lands in accordance with the call for a Greater Serbia.⁴⁰ This represents not only support given by the Serbian Orthodox Church for nationalist sentiment but also practical efforts to outwork the geographical expansion of Serbia at the cost of its neighbouring republics. The militancy of the Serbian Orthodox Church in relation to nationalist sentiment has been further exemplified through the use of the term 'clerical nationalism' whereby the religious identity of Serbs was politicised to combat the challenge of the claim of

³³ Ibid., p. 228.

³⁴ Ibid., pp. 229-30.

³⁵ Stokes, op. cit. (2005), p. 3.

³⁶ S. Vrcan, 'A Christian Confession Possessed by Nationalistic Paroxysm: The Case of Serbian Orthodoxy', *Religion*, Vol. 25, No. 4 (1995), p. 162, citing M. Radovanović, 'O potrebi moralne i duhovne obnove /On the Need of Moral and Spiritual Renewal/', *Glad Crkve* (1991), p. 1.

³⁷ G. Shenk, D. Steele and E. Ferris, *God with Us? The Roles of Religion in Conflicts in the Former Yugoslavia* (Uppsala: Life and Peace Institute 1993), pp. 37-8.

³⁸ Perica, op. cit. (2002), p. 8.

³⁹ Ibid., p. 8, citing Ranković, Bigović and Milovanović, p. 217.

⁴⁰ Iveković, op. cit. (2002), p. 524; Stokes, op. cit. (2005), p. 369.

independence of the other republics and to pursue the goal of a Greater Serbia.⁴¹ Unapologetic statements have been made of the connection between the Serbian Orthodox Church and Serbian identity, described as ‘obsessed [...] by the tragic fate of the Serbian people in history’, and which understood itself as ‘the ultimate protector of Serbian national identity’.⁴² The institution of the Serbian Orthodox Church within its nation’s identity may explain its actions as a legitimising force for the actions against Croatia, where it feared its population was threatened with ethnic unrest.⁴³

While not as extreme, ethno-religious nationalism was also present in Croatia. During the war in Croatia, a foreign observer commented that Croatia was:

‘gripped by something approaching hysteria, numerous demonstrations were held, during which rosaries were held along flags, and prayers and nationalist slogans, hymns and nationalist songs were mingled together. To the observer the connection between Catholic Church and nationalism in Croatia was open on display’.⁴⁴

Despite this connection between the Catholic Church in Croatia and national identity, the church attempted to reject itself as a tool of politics.⁴⁵

From this evidence, it is possible to conclude that the Serbian Orthodox Church not only formed part of national identity for Serbians, but the church itself utilised ethno-religious nationalism to encourage the expansion of a Greater Serbia. Contrastingly, Croatia also displayed similar, though less extreme, forms of ethno-religious nationalism. It is, therefore, evident that the religious institutions played a role in nationalist identity construction and utilised its power to influence their respective societies.

Ecumenical dialogue

The importance of ecumenical dialogue cannot be underestimated nor sufficiently emphasised. The success of ecumenical dialogue had the potential to markedly change how the three religious institutions engaged within their republics and whether they encouraged or tempered the tensions that led to the outbreak of war. Vjekoslav Perica and his influential 2001 article and 2002 book concerning the role of religion before, and during, the break-up of the former Yugoslavia, serves as the foundation for this discussion of ecumenical dialogue.⁴⁶ Perica’s works are based upon interviews with religious and political leaders, in addition to religious proclamations, speeches and works of other intellectuals, among other significant sources. Where some authors briefly describe the existence of ‘ancient hatreds’ as a cause for tension between

⁴¹ Ž. Djurić, ‘The Orthodox Religion in Yugoslavia and Modern Neo-Liberal Economic Politics’, *International Review of Sociology: Revue Internationale de Sociologie*, Vol. 8, No. 2 (1998), p. 272.

⁴² G. Van Dartel, ‘The Nations and the Churches in Yugoslavia’, *Religion, State and Society*, Vol. 20, No. 3-4 (1992), p. 279.

⁴³ Ibid.

⁴⁴ P. Palmer, ‘Religions and Nationalism in Yugoslavia: A Tentative Comparison between the Catholic Church and the other Communities’, in Mient Jan Faber (ed.) *The Balkans: A Religious Backyard of Europe* (Ravenna: Longo 1996), p. 151.

⁴⁵ Van Dartel, op. cit. (1992), p. 279.

⁴⁶ Perica, op. cit. (2002); V. Perica, ‘Interfaith Dialogue Versus Recent Hatred: Serbian Orthodoxy and Croatian Catholicism from the Second Vatican Council to the Yugoslav War, 1965-1992’, *Religion, State and Society*, Vol. 29, No. 1 (2001), pp. 39-66.

ethnicities and religions, Perica engages in a comprehensive analysis and narrative of ecumenical dialogue between the Serbian Orthodox Church and the Croatian Catholic Church, revealing varying levels of success and cooperation. An examination of the attempts for sustained ecumenical dialogue will reveal substantial obstruction by the Serbian Orthodox Church in contrast to the Catholic Church's initial enthusiasm. This barrier will be linked to the retreat of each religion into their respective republics in which each subsequently encouraged varying levels of nationalism.

The failure or success of ecumenical dialogue is most important when juxtaposed with the actions (or omissions) each religious community took in regards to the expansion of nationalism. Ecumenical dialogue, as a precursor to war, had the potential to strengthen multiculturalism; instead, it led to further division between the churches and subsequently the nationalities with which they were connected. The binding together of the two churches for pacifism and against nationalism could have altered the course of history for the former Yugoslavia.

Recognising that religion did play a role in the break-up of the former Yugoslavia, it is imperative to recognise the attempts made to build respect and understanding between the two faiths and consequently the two nationalities. It was in Rome that the Catholic Vatican Council decided that ecumenical dialogue must be extended by the Catholic Church in Croatia to the Serbian Orthodox Church to 'work together towards reunification through renewal of spiritual culture, theological dialogue, common prayer and other forms of cooperation'.⁴⁷ This resulted in the establishment of annual inter-faith prayers and vigils known as the 'Octave of Prayer for Christian Units' in January 1966.⁴⁸ Additionally, the Council encouraged dialogue with Muslims and non-Christians in the document *Nostra aetate*.⁴⁹ The main focus, however, was to establish positive dialogue with the Serbian Orthodox Church. It was, therefore, the Vatican that first recognised the need for cooperation and acted to implement cooperative initiatives through the Croatian Catholic Church.

Subsequent to these attempts, in 1960 the Catholic Theological Faculty in Zagreb hosted symposiums which invited theologians of all denominations, with ecumenical expert Kolarić stating that the events were '[f]ree of hierarchical rigidity, [where] theologians could effectively advance ecumenical ideas'.⁵⁰ Further, the first expression of Catholic-Orthodox inter-faith prayer was a local and informal event between Croatian Catholic bishop Frane Franić of Split-Makarska and Serbian Orthodox Archpriest Marko Plavša; this event is worthy of mention, for it is claimed to be the first to occur between the two in a thousand years.⁵¹ The landmark event was received with widespread sympathy and was a stimulus for future interfaith activities.⁵² Subsequent to this momentous event, grass-roots ecumenism expanded into academia and was accepted by the lower clergy, demonstrating the potential for the church to become an actor focused upon cooperation and diplomacy. The initial cooperation represented an apprehensive yet hopeful reversal of historical animosities and 'ancient hatreds'. The weakened communist system that choked religious freedoms in Yugoslav society presented an opportunity for the two

⁴⁷ Perica, op. cit. (2001), p. 59.

⁴⁸ Ibid., p. 41.

⁴⁹ Ibid., p. 40.

⁵⁰ Ibid., p. 44, citing Juraj Kolarić, *Pravoslavni* (Veritas, Zagreb 1985), p. 18.

⁵¹ Perica, op. cit. (2002), pp. 31-2.

⁵² Perica, op. cit. (2001), p. 42, citing Juraj Kolarić, *Pravoslavni* (Veritas, Zagreb 1985), p. 187.

churches to ally themselves against a common enemy. Their actions in reality, however, were analogous to those of states, where the two churches 'behave[d] like states in a balance of power system rather than two religious institutions sharing common traditions, beliefs, values and practices, and the same God'.⁵³ These actions reflect the difficulty of shedding historical animosities.

The collapse of ecumenical dialogue

Sustained ecumenical dialogue was unsuccessful due to frustrations of the Serbian Orthodox Church. A then-confidential report by the Yugoslav Federal Executive Council concerning religious affairs concluded in as early as 1969 that 'mistrust and intolerance between churches is so deeply rooted that ecumenical cooperation and religious leaders' effort aimed at building an ideological alliance against organized socialist political forces, are not likely to succeed'.⁵⁴ The Council's conclusion was correct. The attempted cooperation by the Catholic Church through ecumenical initiatives was identified by the Serbian Orthodox Church as an effort to undermine and threaten the church and the identity of its people.⁵⁵ Consequently, anti-ecumenical sentiments expanded within the Serbian Orthodox Church and in 1978 it boycotted a conference designed to promote theological discourse between the Catholic and Orthodox churches.⁵⁶

Although it is not within the scope of this paper to record all ecumenical activities, it must be recognised that Serbian Orthodox prelate Ljubodrag Petrovic, in addition to Belgrade Jesuits, Muslim clerics and leaders of various Jewish communities, published a document in 1989 that called for 'greater religious liberty, advancement of religious culture and the formation of inter-faith advocacy groups'.⁵⁷ The Serbian Orthodox Church, although not entirely to blame for the failure of ecumenical dialogue as evidenced by this inter-faith alliance, appeared to have actively obstructed dialogue for national interest. The two Christian churches, therefore, failed to sustain ecumenical dialogue and a peaceful coexistence, thus perpetuating its role as supporter of tensions within the former Yugoslavia.

The Christian churches and legitimacy

The discussion of religion, identity and nationalism revealed the importance of religious conviction to the Croatian and Serbian people. Whether the two Christian churches, through act or omission, utilised their role in identity-construction to legitimise the actions of their respective leaders and military pursuits in their objectives for independence and/or expansion will be analysed. It has been claimed that, while the churches cannot be blamed for the onset of war, they may be responsible, to a degree, for the legitimisation or failure to resist nationalist political developments within their states.⁵⁸

⁵³ Ibid., p. 60, citing Sabrina P. Ramet, *Nationalism and Federalism in Yugoslavia, 1962-1991*, 2nd Edition (Bloomington: Indiana University Press 1992).

⁵⁴ Ibid., p. 48, citing *An Information on Some Aspects of the Status and Activity of Religious Communities in Yugoslavia* (Federal Commission for Religious Affairs, Belgrade, 1969), p. 12.

⁵⁵ Van Dartel, op. cit. (1992), p. 277.

⁵⁶ Perica, op. cit. (2001), p. 49.

⁵⁷ Perica, op. cit. (2002), p. 138.

⁵⁸ Van Dartel, op. cit. (1992), p. 278.

The Croatian Catholic Church's involvement in legitimisation was varied. Catholic Cardinal Kuharić's admonition, published in the Catholic Press Agency during the conflict in 1996, stated that: 'If the opponent burns my house, I will guard his. If he demolishes my church, I will protect his. And if he kills my father, I will safeguard the life of his father'.⁵⁹ Despite this public declaration, it has been argued that the Catholic Church was slow to condemn Croatian crimes due to preoccupation with their people's suffering.⁶⁰ The failure by the Catholic Church to condemn crimes and militancy was revealed by Mojzes in an earlier 1992/1993 interview with Cardinal Kuharić, in which he failed to denounce a friar who engaged in battle and label it impermissible.⁶¹ This illustrates a lack of uniformity by the Catholic Church's religious leaders in combating ethno-religious nationalism and the politicisation of religion.

In contrast, the Serbian Orthodox Church engaged in public legitimisation in alignment with the nationalist cause. The Serbian Orthodox Church's role in legitimisation was put most aptly by Powers: 'the church has contributed to the war, therefore, not in creating aggressive and chauvinistic Serb nationalism but in validating its claims of national rights and myths of victimization, and giving it theological and religious legitimacy'.⁶² This statement acknowledges that the Orthodox Church did not construct aggressive, Serb nationalism, but served to enhance and legitimise it theologically, complementing the previous finding of the church's influence through ethno-religiosity. Analogously to the Catholic Church, however, the Orthodox Church called for the Serbians to defend their nation whilst remaining silent on the crimes being committed in Serbia's name. The Serbian Orthodox Assembly announced:

'With full responsibility before God and before our People and human history, we call the entire Serbian Nation to stand up in defense of their centuries long rights and liberties, of their vital interests, necessary for physical and spiritual survival and right to remain in the land of their father and grandfathers'.⁶³

This declaration was compounded by the public blessing by Serbian Orthodox priests of known Serbian war criminals and justification for the destruction of mosques and Catholic churches.⁶⁴ Moreover, the perpetuation of the victim mentality in Serbia was affirmed by Serbian Bishop Lukijan in his 'eye for an eye' statement in which he called for the Serbs to retaliate for the historical crimes of the Ustaša.⁶⁵ There are a plethora of examples of the Serbian Orthodox Church's public endorsement of expansionism, retaliation and the conflict that may be required to fulfil these goals. These examples demonstrate the Serbian Orthodox Church's widespread public legitimisation of nationalist forces.

⁵⁹ A. J. Bellamy, *The Formation of Croatian National Identity: A Centuries-old Dream*, (Manchester: Manchester University Press 2003) p. 163, citing Cardinal Franjo Kuharić in *Glas Concila*, Catholic Press Agency, Zagreb, 3 January 1996.

⁶⁰ Powers, op. cit. (1996), p. 236.

⁶¹ P. Mojzes, 'The Roman Catholic Church in Croatia and Its Contribution to Nationalist Sentiment', *Religion, State and Society*, Vol. 21, No. 3-4 (1993), p. 391.

⁶² Powers, op. cit. (1996), p. 244.

⁶³ Ibid., pp. 243-244, citing Serbian Orthodox Assembly, 5 July 1994.

⁶⁴ Iveković, op. cit. (2002), p. 525.

⁶⁵ Perica, op. cit. (2002), p. 162, citing Bishop Lukijan, *Vijesnik*, 6 March 1991.

So great was the influence and role of the Serbian Orthodox Church in Serbian society that secular political leaders utilised it for legitimisation. Radovan Karadžić, nationalist leader of the Bosnian Serbs, was reported in a 1990 interview to have said that the church was ‘not merely a religious organisation [...] [but] a cultural institution and part of national leadership; the Church is highly important for all Serbs, and it is irrelevant whether one believes in God or not’.⁶⁶ This creates a paradigm where irreligious people fought a war imbued with religion. In recognising the importance of religious identification for survival purposes surrounding ethnic cleansing of whether one was an Orthodox or Orthodox atheist, Powers states that religion lost its meaning and was reduced to ‘an artefact, another way of describing cultural, ethnic or national differences’.⁶⁷ Mojzes even claimed the Yugoslav conflict was largely fought by irreligious people that wore religion as a distinguishing symbol but did not understand what the symbols represented.⁶⁸ Regardless of the true beliefs of individual Serbs, it is evident that the church played a significant legitimising role both through conduits such as the church and political leaders.

Religious symbols and symbolism

Subsequent to the question of religious legitimacy is the inquiry into whether religion and religious symbols were instrumentalised by nationalistic political leaders or religious leaders. Velikonja argues that both the political and religious leaders exploited nationalist euphoria to achieve their goals.⁶⁹ To demonstrate this exploitation, it has been claimed that the three prominent religions of concern engaged in varying displays of religious identification on the battlefield, including religious insignia, prayers before battle, religious salutes and clergy in uniform.⁷⁰ So apparent were the displays of religious iconography during war that combatants in conflict could identify their enemy by their religious symbols.⁷¹ Religion, therefore, was used not only to provoke ethno-religious tensions, but was publicly portrayed in battle, signifying a noteworthy role in the conflict. Additionally, demonisation of the enemy was utilised by each of the three religions.⁷² It has been claimed that in order to destroy the enemy, they were to become symbolically dehumanised, satanised and sufficiently cursed by God.⁷³ For example, religion was employed by Serbian extremists to label the Bosnians as jihad fighters, janissaries and mujahidins whose objective it was to construct a fundamentalist Islamic state.⁷⁴ Concurrently, some in the Islamic Bosnian circles labelled the Christian states’ attacks as a contemporary version of the crusades.⁷⁵ These examples exhibit the use of religious symbolism to both satanise the enemy and legitimise military conflict and to strengthen religious identity with the respective cause.

⁶⁶ Ibid., p. 162, citing an interview with Radovan Karadžić in the weekly newspaper, *Nedjelja*, 2 September 1990.

⁶⁷ Powers, op. cit. (1996), p. 227.

⁶⁸ P. Mojzes, *Yugoslavian Inferno: Ethnoreligious Warfare in the Balkans* (New York: Continuum Publishing Co., 1994), p. 130.

⁶⁹ M. Velikonja, ‘*In Hoc Signo Vincens: Religious Symbolism in the Balkan Wars 1991-1995*’, *International Journal of Politics, Culture, and Society*, Vol. 17, No. 1 (2003), p. 3.

⁷⁰ Perica, op. cit. (2002), p. 166.

⁷¹ Vrcan, op. cit. (1994), p. 369.

⁷² Velikonja, op. cit. (2003), p. 9.

⁷³ Ibid.

⁷⁴ Ibid., p. 10.

⁷⁵ Ibid.

The destruction of religious sites

In the lead-up to and during the Yugoslav crises, the intentional destruction of churches and mosques can be identified as a cause of ethno-religious tensions.⁷⁶ Arguably, those who are truly religious and of Orthodox, Catholic or Islamic faith, would understand that the destruction of foreign religions' places of worship was not in accordance with their religious beliefs.⁷⁷ Consequently, it is contended that those who committed such acts, although done on behalf of their religion, knew little about their religion's teachings.⁷⁸ This argument echoes prior statements concerning the assertion that the Yugoslav conflict involved irreligious people fighting a war imbued with religion. Whether the destruction of religious sites stemmed from true religious conviction or not, religion was employed as a symbol and excuse for the destruction of places of worship. It is clear, therefore, that through the use of religious symbols in combat and the specific destruction of places of worship, religion played a significant role in the crises of the former Yugoslavia.

The Bosnian Islamic community and ethno-religious nationalism

Unlike the ethno-religiosity driven in Croatia and Serbia, religion played a markedly different role in Bosnia both before and during the break-up of the former Yugoslavia. Although Bosnia encouraged a multicultural society and therefore myriad religions, Islam was the dominant faith. Where the Orthodox and Catholic churches exposed themselves to manipulation by ultranationalists, the Islamic Community in Bosnia committed itself to Yugoslav patriotism, due chiefly to State oversight. The Islamic leaders maintained loyalty to the Communist Yugoslav regime and its project to replace nationalism with a unique form of patriotism entitled 'brotherhood and unity'.⁷⁹ Consequently, Muslims in Bosnia earned the trust of the regime and were granted more religious liberty than was experienced in other republics. A theme evident in an analysis of Bosnian Muslims throughout the conflict in the former Yugoslavia was a stricter patriotism to the Yugoslav State and its Communist regime. The commitment to the Yugoslav State by Bosnian Muslims exhibits a stark contrast to the role Christian churches took whilst linked with their respective ethnic communities. Whilst ethno-religious nationalist movements were encouraged in the last decade of the six-republic federation, the Islamic *reis-ul-ulema*, Naim Jadziabdic spoke in Sarajevo, Bosnia at the Supreme Assembly of the Islamic Community, evidencing its commitment to the Communist regime:

'We have gathered today to discuss questions and problems of the Islamic Community. But let me first remind all of you, that we mark this year two great jubilees. The first is the 40th anniversary of the victory over fascism and liberation of our country. Along with Victory Day, we are commemorating the fifth anniversary of the death of our dear president Tito, who is not physically with us; nonetheless we remain loyal to him, and we shall proceed to march down the Tito's path of brotherhood and unity for the benefit of all of us, for our own happiness. [...] Only united as brothers will we be able to march forward and defend our

⁷⁶ Powers, op. cit. (1996), p. 222.

⁷⁷ D. Sokolovic, 'How to Conceptualize the Tragedy of Bosnia: Civil, Ethnic, Religious War or...?', *War Crimes, Genocide & Crimes Against Humanity*, Vol. 1, No. 1 (January 2005), p. 122.

⁷⁸ Ibid.

⁷⁹ Perica, op. cit. (2002), p. 78.

freedom and self-management. Religious officials in our mosques will have special responsibility to preserve these ideals and achievements'.⁸⁰

This statement affirmed the Islamic Community's commitment to the Yugoslav State. Although nationalism was encouraged by various parts of the Islamic Community in Bosnia, due to the overall commitment by the Islamic Community to Yugoslav patriotism, ethno-religious nationalism failed to create an early stronghold in Bosnia. The Bosnian Islamic Community, in this regard, therefore played an initially peaceful role in the break-up of the former Yugoslavia.

Izetbegović, Islam and Bosnian Serbs

Islam in Bosnia and its Muslim President, Alija Izetbegović, though less controversial than the Christian churches, played a significant role in shaping Bosnia's path for the beginning of the Balkan conflict. Then-President Izetbegović is of specific interest due to his immersion in the Islamic Community as a devout Muslim and his literature concerning Islam. This section will contrast those before it, illustrating that the fear of Islam and Izetbegović's identification as a Muslim was utilised as a cause for fear by the minority Serb population living in Bosnia and as a justification for Serbian invasion. This discussion will distinguish itself from previous arguments as Islam did not initially encourage ethno-religious nationalism, but rather Serbia utilised Islam as a cause for war.

It is claimed that one of the chief causes for discontent amongst Bosnian Serbs was Izetbegović's *Declaration* that circulated in 1970—a programmatic statement concerning the regeneration of Islam due to his perceived failure of Islamic education and stagnation throughout the greater Islamic world.⁸¹ Izetbegović, although a publicly devout Muslim, was reportedly a modernist who believed in protection of minorities, higher education standards and was critical of authoritarian regimes.⁸² As established, Bosnia's Islamic Community was not originally a fount of ethno-religious nationalism. This is reflected in Izetbegović's leadership, where, although he sought a contemporary change in Islam, he did not believe in nationalism and praised cooperative institutions such as the European Economic Community (EEC).⁸³ Izetbegović labelled the EEC 'the most constructive event in the twentieth century European history. And the establishment of this supranational structure was the first real victory of the European peoples over nationalism'.⁸⁴ Bosnian Serbs perpetuated the argument of Izetbegović's religious fundamentalism by comparing his *Declaration* with Adolf Hitler's *Mein Kampf*.⁸⁵ Not only were Izetbegović's actions in direct contrast with creating an Islamic State, he publicly stated that 'to be quite clear, I don't want an Islamic Republic, but I want Islam to survive in this part of the world [...] Just maybe it is our mission to show Islam in a new an genuine light. [...] No one will be persecuted for their religion, nationality or political conviction. That will be our fundamental law'.⁸⁶ Although not a

⁸⁰ Ibid., p. 81.

⁸¹ Stokes, op. cit. (2005), p. 8.

⁸² Ibid., p. 6.

⁸³ Ibid., p. 7.

⁸⁴ Ibid., p. 7, citing Alija Izetbegović, *Islamic Declaration*.

⁸⁵ Ibid., p. 8.

⁸⁶ Ibid., p. 8, citing Alija Izetbegović, *Izetbegović: Odabrani govori, pisma, izjave, intervjui* (Alija Izetbegović: Selected Speeches, Letter, Statements, and Interviews) (Zagreb: Prvo Muslimansko Diončko Društvo Zagreb 1995) pp. 170, 39, 89.

religious leader of the Islamic faith in Bosnia, as Head of State and devout Muslim who had widespread influence in Bosnian society, Izetbegović's statements, complemented by the lack of ethno-religious nationalism, are a helpful reflection upon the role religion played in Bosnia. This analysis reveals the Islamic Community in Bosnia played a comparatively passive role when contrasted with the Serbian Orthodox and Croatian Catholic churches.

Conclusion

This paper's consolidation and analysis concerning the role of religion has uncovered various conclusions regarding religion's role in the break-up of the former Yugoslavia. These conclusions are of special interest, as they concern three religions that are universally accepted and respected. Moreover, this paper is distinct from existing academic work that typically analyses nationalist and religious influences independently.

This paper's discussion of nationalism and religion exposed the unique term 'ethno-religious nationalism', wherein ethnic nationalism and religion were intertwined, revealing a distinct contrast to the contemporary theory that as modernity progresses, religious influence wanes. The Croatian Catholic and Serbian Orthodox churches, through various means, perpetuated ethno-religious nationalism and effectively rendered themselves obsolete against ultranationalists. By supporting Serbian nationalist exploits, the Serbian Orthodox Church exacerbated ethno-religious sentiment. Contrastingly, ethno-religious nationalism was perpetuated to a moderate extent, despite the Croatian Catholic Church's attempts to reject itself as a tool of political exploits. Both institutions, to varying extents, exacerbated ethno-religious sentiment.

The 'ancient hatreds' thesis provides understanding of the underlying historical tensions existed between the three prominent religions. One of the obstacles to the success of ecumenical dialogue was the historical tension between the Croatian Catholic and Serbian Orthodox churches. Despite frustrations by the opposing religious institution, it was the Croatian Catholic Church that sought to pursue ecumenical dialogue with the Serbian Orthodox Church. Ecumenical dialogue, although foreseeably destined for failure, could have markedly altered the mode in which the two churches engaged with ethno-nationalism.

So pervasive was religion's role in the conflict that religious iconography could be perceived on the battlefield. Moreover, regardless of individual religious conviction, the destruction of religious sites occurred. Through ethno-religious nationalism, individuals utilised religion as a cause for destruction.

It is evident that the Bosnian Islamic Community played a significantly more passive role in contrast to the Christian churches. With adherence to the communist patriotism of 'brotherhood and unity', the Bosnian Islamic Community avoided initial conflict with other religions within Bosnia. Furthermore, Izetbegović as head of state, devout Muslim and member of the Bosnian Islamic Community did not encourage the expansion of an Islamic Republic nor consequently ethno-religious nationalism. Religion in Bosnia, therefore, played a comparatively peaceful role in the initial crises of the former Yugoslavia.

Religion was not the cause for war in the former Yugoslavia. This paper consolidated and analysed some of the most respected English works concerning the role of religion in the break-up of the former Yugoslavia. It can be concluded that religion played a significant, though not cataclysmic, role in the disintegration of the former Yugoslavia.

The Diplomatic Beauty Pageant: Examining Australia's Campaign for a Non-Permanent Seat on the United Nations Security Council

Callum Cross*

This report examines Australia's recent diplomatic campaign for a non-permanent seat on the United Nations Security Council. It discusses Australia's campaign strategies and tactics alongside the theory of soft power, before discussing the local and international opposition encountered during Australia's bid. This report will also examine the events after Australia's successful election to the UNSC as a non-permanent member for a two-year term, particularly international issues such as the MH17 disaster. By drawing on key lessons from Australia's most recent bid, this report offers several recommendations on the strategies that can be used for Australia's next UNSC non-permanent member election campaign, as well as Australia's bid for a UN Human Rights Council seat. Overall, this report aims holistically to examine a recent and important era of Australian foreign policy and diplomacy at work.

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Vowing to restore Australia's place as a 'creative middle power', in March of 2008, then Prime Minister Kevin Rudd announced Australia's decision to seek a non-permanent seat on the United Nations Security Council (UNSC) for a two-year term.

Spearheaded by Rudd and the Department of Foreign Affairs and Trade (DFAT) Australia's four-year campaign culminated on 18 October 2013 when Australia was successfully elected.¹ Campaigning for a seat is regarded as the diplomatic equivalent of bidding to host the Olympic Games, and has further been referred to as a 'diplomatic beauty pageant', as the UNSC is the international community's most eminent committee.² The UNSC has the political, legal and military authority to impose sanctions, authorise the use of force, suspend economic and diplomatic relations between countries and implement the policies it deems necessary to maintain international peace and security.³

The central purpose of this article is to analyse how the Australian Government secured a seat on the UNSC. The article is centred on the events leading up to and following Australia's successful campaign. From the launch of the campaign in 2008 to the recent confirmation of another bid by incumbent Minister for Foreign Affairs Julie Bishop, this report will establish and examine the key strategies and tactics of Australia's successful campaign and Australia's work on the council. It will also provide recommendations regarding how Australia can once again become a non-permanent member of the UNSC and the United Nations Human Rights Council (UNHRC).

This article is divided into three parts. First, it will examine the campaign strategies and key points over the four-year period. It will utilise the international relations theory of soft power developed by Joseph Nye to analyse the campaign. Second, this article will briefly discuss the opposition to Australia's bid, the immediate aftermath of the election and what Australia accomplished during its tenure. Finally, key tactics and strategies that were successfully used by Australia for the 2013-2014 term will be examined in order to show how they can be harnessed for Australia's next potential bid, as well as in Australia's current campaign for a seat on the UNHRC. Overall, this paper attempts to highlight a recent and vitally important section of recent Australian foreign policy and what lessons can be learnt for any other successive bids.

'The diplomatic beauty pageant': Australia's campaign

This article will first examine and analyse Australia's campaign for a non-permanent seat on the UNSC. It will detail the key strategies Australia utilised to safely win a seat in the first-round of voting.

The motivation behind the UNSC campaign is linked to former Prime Minister Kevin Rudd's more expansionistic, proactive and ambitious foreign policy goals. Rudd regarded the UN and other international institutions as an important element of

¹P. Coorey, 'Rudd targets UN council seat', *Sydney Morning Herald* (31 March 2008), available online: <http://www.smh.com.au/news/national/rudd-targets-un-council-seat/2008/03/30/1206850709159.html> (accessed 20 October 2013).

²J. Langmore, 'Australia's campaign for security council membership', *Australian Journal of Political Science*, vol. 48, no. 1 (2013), pp. 101-111.

³A. Dreher, M. Gould, M. Rablen, and J. Vreeland, 'The determinants of election to the United Nations Security', *Public Choice*, vol. 158, no. 1-2 (2014), pp. 51-83.

Australia's foreign policy, and something that Australia can utilise to make a difference globally⁴. Rudd argued that the UNSC is 'now more relevant, active and interventionist on global and regional security challenges than at any previous time'.⁵ This was the central rationale for Australia. Rudd clearly believed in liberal institutionalism, as demonstrated in his attempt to build the Asia-Pacific Community. In this case however, the gap between Rudd's ambition and delivery was considerable.⁶ Rudd was criticised for being too optimistic and sometimes arrogant, yet this article would argue that this criticism fell away as soon as Australia was successful in gaining a seat on the UNSC. Australia failed to secure a seat in 1997, with a campaign that began under the Keating Labor Government, and ended in failure during the Howard Government's first term.⁷ According to Thakur, 'Australia has a large and direct stake in the rules-based global order',⁸ yet it has been more than 25 years since Australia last previously served on the UNSC during the 1985–86 terms.⁹

With Rudd overseeing the campaign as something personal, the government placed high priority on winning the bid. According to reports, a 'small but dedicated team was convened in the Department of Foreign Affairs and Trade' tasked to win the seat.¹⁰ Fullilove acknowledges that Australia used election strategies such as, but not limited to: 'cultivating bilateral relationships, lobbying governments, attending meetings, carrying out our various UN reporting obligations, and so on'.¹¹ Australia started late in the race, but proved to be a well-received candidate overall. As this article will demonstrate later, Australia had formidable competition from its two rivals in the race: Luxembourg and Finland.

The central proposition used in Australia's campaign was that Australia can make 'a difference for the small and medium countries of the world', linked to Rudd's foreign policy ambitions.¹² Moreover, Australia emphasised 'we do what we say' as a slogan for the campaign.¹³ This slogan was used extensively throughout the campaign with many of the strategies outlined herein reflecting this statement. Malone argues that

⁴ M. Beeson, 'Rudd's foreign policy legacy', *The Conversation*, (15 November 2013), available online: <https://theconversation.com/rudds-foreign-policy-legacy-20375> (accessed 22 September 2015).

⁵ K. Rudd, 'Australia's Bid for a Seat on the UN Security Council', *Speech to the National Press Club*, Canberra (1 June 2011), available online: <http://www.unaa.org.au/pdfs/Foreign%20Minister%20-%20National%20Press%20Club%20Address.pdf> (accessed 10 October 2013).

⁶ G. Dobell, 'The Rudd foreign policy legacy', *The Interpreter*, (24 June 2010), available online: <http://www.lowyinterpreter.org/post/2010/06/24/The-Rudd-foreign-policy-legacy.aspx> (accessed 22 September 2015).

⁷ M. Fullilove, *The case for Australia's UN Security Council bid*, Lowy Institute for International Policy, Sydney, 2009.

⁸ R. Thakur, *Australia and the United Nations*, the Australian Institute for International Affairs, Canberra, 2012a.

⁹ R. Thakur, 'Sitting on top of the world', *Sydney Morning Herald* (3 December 2012b), available online: <http://www.smh.com.au/federal-politics/sitting-on-top-of-the-world-20121202-2aosa.html> (accessed 2 November 2013); and M. Dinnen, 'Australia's bid for a seat at the UN Security Council', in A. Cullen, and S. Murray (eds.), *The globalization of world politics: Case studies from Australia, New Zealand and the Asia-Pacific* South Melbourne: Oxford University Press, (2011), pp. 62-64.

¹⁰ T. Woodroffe, 'How Australian can wield power at the UN head table', *The Drum* (18 October 2012a), available online: <http://www.abc.net.au/unleashed/4321704.html> (accessed 2 November 2013).

¹¹ *Ibid.*, p. 2.

¹² Commonwealth of Australia, 'Australia: Candidate for the United Nations Security Council 2013-14' (2012), available online: <https://australia-unsc.gov.au/> (accessed 10 October 2013).

¹³ *Ibid.*, p. 3.

‘convincing themes can help a campaign’.¹⁴ These statements were developed quickly, and subsequently ‘hammered’ away throughout the campaign. Australia’s slogan was a key to emphasising past missions and work it conducted with the UN, and is a vital strand of soft power.¹⁵

This report considers the context of Australia’s campaign as a ‘charm offensive’, coupled with the use of hard and soft power resources. One of the key strategies that Australia pursued was placing significant emphasis on Australia’s historical role within the UN and its wider agencies since the UN’s establishment. It was hoped that this ‘charm offensive’ would bring votes for Australia and, thereby, elect Australia to the UNSC. As a founding member of the UN and having chaired the first-ever session of the Security Council, Australia was keen to display its important contribution to the UN.

Thakur contends that Australia has a solid and established record of involvement in the UN.¹⁶ One of the most important campaign offensives was the emphasis that Australia has widely contributed more than 65,000 peacekeepers in 50 different operations.¹⁷ In addition, Australia has supported missions into East Timor, Afghanistan, Cambodia and to the Regional Assistance Mission to the Solomon Islands (RAMSI). This was viewed as a key foundation of the bid and why Australia should be elected.

An emphasis on past events is seen as a soft power resource. Nye asserts that: ‘Soft power rests heavily on three basic resources: its culture in places where it is attractive to others; its political values when it lives up to them at home and abroad; and its foreign policies (legitimate and moral authority)’.¹⁸ Throughout the campaign Australia successfully displayed its national culture, political values and foreign policy. Although some authors argue that ‘national reputation is a poor guide to the likely success of Security Council candidates,’ Australia’s political values as a democratic nation, its support for indigenous peoples around the world, religious and inter-faith dialogue and Australia’s leading role in international conflicts were seen as a substantial share of the campaign strategies’ power.

In an attempt to promote Australia as a ‘middle-power’ and increase Australia’s overall chances with states in Africa, the Australian Government, under DFAT, opened several new embassies and consulates around the world. Australia’s diplomatic engagement and development assistance with Africa was not historically widespread, especially in contrast to the Asia-Pacific region.¹⁹ This however, changed when Australia sought membership of the UNSC. Australia opened new diplomatic missions in Addis Ababa and Senegal. Increased Australian engagement with Africa ‘was driven, in large part, by its goal of achieving a seat on the UNSC’.²⁰

Australia increased dialogue and representation with many states in Latin America such as Brazil, Mexico, Colombia and Argentina, amongst others.²¹ Australia also re-opened

¹⁴ D. Malone, ‘Eyes on the prize: The quest for non-permanent seats on the UN security council, *Global Governance*, vol. 6, no. 1 (2000), pp. 3-23

¹⁵ *Ibid.*, p. 3.

¹⁶ Thakur, *op. cit.* (2012a), p. 24

¹⁷ Thakur, *op. cit.* (2012a), p. 24-25

¹⁸ J. Nye, *The Future of Power* New York: Public Affairs, (2011).

¹⁹ *Ibid.*, p. 205.

²⁰ *Ibid.*, p. 205.

²¹ Rudd, *op. cit.* (2011), p. 1.

a mission to Peru to increase its chances. Malone attests that ‘diplomatic reach is important’ for the international status of a campaign, in general.²² Malone further suggests that Australia has in the past ‘traditionally pursued a more targeted approach to diplomatic representation, concentrating on countries meaningful to its national interests’.²³ This was significant during the 1996 bid for a UNSC seat launched under the Keating Labor Government. Increased diplomatic representation by Australia played a significant part in Australia’s campaign strategy. This is a prime example of soft power and diplomatic manoeuvring in order for Australia to assert its dominance globally over its competitors.

Embassies and consulates globally are key actors in soft power projection. Nye attests that soft power is ‘the ability to get what you want through attraction rather than coercion or payments’.²⁴ Whilst Australia did encourage voting in its favour via increased foreign aid to Africa and other states, the increased diplomatic representation in Africa and Latin America is seen as a core soft power platform that Australia used to source votes.

‘Soft power rests on the ability to shape the preferences of others’ and Australia was successful at this.²⁵ The ultimate goal of Australia’s UNSC campaign was to seek votes in its favour over its competitors Luxembourg and Finland. In order to accomplish this, Australia went on a ‘charm offensive’. Australia attempted to court votes from other countries that may not have otherwise voted in its favour. ‘A country may obtain the outcome it wants in world politics because other countries—admiring its values, emulating its example, aspiring to its level of prosperity and openness—want to follow it’.²⁶ This is a trademark form of soft power. Throughout the campaign, Australia attempted to display and emphasise its good international citizenship.

Through its efforts to showcase Australia as leader in maintaining and supporting international peace and security—the Millennium Development Goals (MDGs), a ‘strong record of global action on climate change’ and Australia’s commitment to UN reform—Australia represented values and history that many may find attractive, and thus, would award Australia with a position on the UNSC’.²⁷ This is a key example of Nye’s soft power theory.

Australia also used soft power tactics to secure votes through the influence of Australian dignitary visits to overseas countries. In this regard, Australia’s then Permanent Representative to the UN, Gary Quinlan, helped secure Australia a seat on the UNSC. Langmore observes that Ambassador Quinlan was immensely involved through numerous UN forums, meetings and high-level engagements.²⁸ Personal relationships are a key measure of soft power, and Quinlan invited other UN Ambassadors to numerous concerts and events featuring Australian artists. Ambassador Quinlan ‘built excellent working relationships with many of his peers’ and a ‘popular, energetic

²² Malone, op. cit. (2000), p.12.

²³ Ibid., p.12.

²⁴ J. Nye, *Soft Power: The means to success in world politics*, New York: Public Affairs, (2004).

²⁵ Nye, op. cit. (2004), p. 6.

²⁶ Nye, op. cit. (2004), p. 6.

²⁷ Commonwealth of Australia, op. cit. (2012), p. II.

²⁸ J. Langmore, ‘Australian shouldn’t give up on a UN Security Council seat’, *The Conversation* (26 April 2012), available online: <http://theconversation.com/australia-shouldnt-give-up-on-a-un-security-council-seat-6338> (accessed 1 November 2013).

permanent representative' makes significant difference to a campaign given that voting is essentially conducted by other permanent representatives.²⁹ The work conducted by diplomats and officials is important to the success of a campaign. On Election day within the UN General Assembly, as a last minute campaign boost Australia gave delegates Cadbury Caramello Koalas.³⁰ These miniature chocolate koala bears are seen as a testament to Australia's culture, and culture is an important soft power resource.³¹ Moreover, diplomats spent most of their time confirming potential votes and working to ensure a bid is successful.³²

Kevin Rudd, as Minister for Foreign Affairs, visited countries around the world to promote Australia's case and secure votes, and is widely seen as having significant role in the success of Australia's campaign.³³ Person-to-person contacts were crucial to ensuring Australia would be heard and voted for. In addition, his successor Bob Carr and former Prime Minister Julia Gillard also played major roles in ensuring support for Australia. Both Carr and Gillard attended the UN General Assembly meeting in October 2012 and met with numerous world leaders in an attempt to lobby them.³⁴ Carr reportedly met with 30 of his peers over four days in the lead-up to the vote. Byrne acknowledges that 'political leaders can play a central and direct advocacy role in either cultivating or undermining a state's reputation and image'.³⁵ In addition, high-level official and ministerial visits to states in Africa by Kevin Rudd, the Governor-General Quentin Bryce, Stephen Smith, Simon Crean and Joel Fitzgibbon were designed to ensure support for Australia from Africa.³⁶ Julia Gillard also announced the appointment of Special Envoys to Africa.³⁷ Overall, Australia received favourable support from African nations.³⁸ This is a testament to soft power resources used by Australia. This was necessary as Australia does not represent nor lie within a geographic 'bloc' of nations, unlike Finland and Luxembourg.³⁹ Hence, Australia had to look elsewhere.

Australia's and Finland's campaign was 'propelled by the visible and aspirational campaign leadership'.⁴⁰ Like Rudd, Finnish Prime Minister Tarja Halonen's activist foreign policy spurred Finland's campaign. In relation to soft power, Nye asserts that politicians and leaders within democracies must rely more on the important combination

²⁹ Ibid., p. 1; and Malone, op. cit. (2000), p. 14.

³⁰ E. Curran, and R. Pannett, 'Australia's secret weapons in U.N. bid: Koala candy', *The Wall Street Journal* (18 October 2012), available online: <http://blogs.wsj.com/dispatch/2012/10/18/australias-secret-weapon-in-un-bid-koala-candy> (accessed 1 November 2013).

³¹ Nye, op. cit. (2011), p. 84.

³² C. Byrne, *Campaigning for a seat on the United Nations Security Council: A middle power reflection on the role of public diplomacy*, USC Centre on Public Diplomacy, University of South California and Figueroa Press, Los Angeles, 2011.

³³ Langmore, op. cit. (2012), p. 1.

³⁴ Coorey, op. cit. (2012), p. 1.

³⁵ Byrne, op. cit. (2011), p. 25.

³⁶ Lyons, op. cit. (2012), p. 204-205.

³⁷ Lyons, op. cit. (2012), p. 205.

³⁸ D. Flitton, 'Pacific leaders' back Australian bid', *Sydney Morning Herald* (29 August 2012a), available online: <http://www.smh.com.au/federal-politics/political-news/pacific-leaders-back-australian-bid-20120829-250wz.html> (accessed 25 September 2013).

³⁹ P. Corey, "'We don't entertain the thought of losing" UN vote', *Sydney Morning Herald*, (29 September 2012), available online: <http://www.smh.com.au/federal-politics/political-news/we-dont-entertain-the-thought-of-losing-un-vote-20120928-26qi1.html> (accessed 1 November 2013).

⁴⁰ Ibid., p. 25.

of both inducements *and* attraction, in order to achieve a desired outcome.⁴¹ The campaign was successful for a number of reasons, but the role played by individuals is regarded as a soft power resource, and this ultimately played favourably towards Australia. Byrne stresses that ‘successful election turns upon notions of international reputation and image, the very currencies of soft power, and as such is connected to the influences, interests and expectations of a wider international public’.⁴²

Financial inducements and incentives were also heavily and strategically utilised throughout the campaign. Australia provided approximately two percent of the total contribution to the core UN budget between 2013 and 2015, in addition to other funds given directly to multiple UN agencies.⁴³ This claim here is to display Australia’s financial goodwill and status as a creative middle-power. The use of foreign aid was a highly successful strategy in Australia’s bid to become a non-permanent member. This report observes numerous instances where this was overtly apparent. Although the use of financial incentives does not meet Nye’s criteria of soft power, it is more of a raw power resource and it is important to consider how the use of foreign aid to increase Australia’s chances for a seat on the UNSC was used. Soft power does not unequivocally rule out foreign aid, and it can be asserted that Australia was attempting to attract states through hard power resources, which may not have been considered important to Australia’s national interest but nonetheless important for victory. In the lead up to October 2012, Australia dramatically increased aid to countries that could often not be deemed in Australia’s direct national interest.

Kuziemeko and Werker, in a central analysis of money and UNSC campaigns, have found that political and strategic goals predominantly explain the flow of aid to other countries.⁴⁴ This was a simple act of vote buying.⁴⁵ Latin America and the Caribbean region benefited greatly from the rise in foreign aid expenditure during the campaign. During 2006–2007, under the Howard Government, aid to the Caribbean was around \$170,000. Following Hurricane Ivan in Grenada, this sum spiked to around \$2 million.⁴⁶ In 2009–2010, foreign aid to the Caribbean rose dramatically to \$24.7 million, through the now defunct Australian Agency for International Development (AusAID). This article determines that irrespective of a traditional foreign aid concentration towards the Asia-Pacific, increased aid to the Caribbean was a direct result of the campaign for a UNSC seat. Smaller states such as Belize, Saint Lucia, Saint Vincent, Guyana and Jamaica were also the recipients of an increased flow of aid.⁴⁷ Cave argues that the rise in foreign aid directed to gaining votes ‘side-tracked’ traditional foreign aid objectives.⁴⁸ Lyons reported that \$7.7 Million in ‘technical assistance’ was donated to Kenya,

⁴¹ Nye, *op. cit.* (2004), p. 6.

⁴² Byrne, *op. cit.* (2011), p. 8.

⁴³ United Nations General Assembly Resolution 238; Fullilove, *op. cit.* (2009), p. 4

⁴⁴ I. Kuziemeko and E. Werker, ‘How much is a seat on the Security Council worth? Foreign aid and bribery at the United Nations’, *Journal of Political Economy*, vol. 114, no. 5, (2006).

⁴⁵ *Ibid.*, p. 209.

⁴⁶ E. Higgins, ‘Collapse in calypso aid now our UN seat is secured’, *The Australia* (17 May 2013), available online: <http://www.theaustralian.com.au/national-affairs/collapse-in-calypso-aid-now-our-un-seat-is-secured/story-fnhi8df6-1226644858353> (accessed 31 October 2013).

⁴⁷ *Ibid.*, p. 1.

⁴⁸ D. Cave, ‘Why Australia’s Security Council bid was a mistake’, *Crikey* (28 September 2012), available online: <http://www.crikey.com.au/2012/09/28/why-australias-security-council-bid-was-a-mistake/> (accessed 31 October 2013).

Namibia, Botswana and Tanzania for flood-relief.⁴⁹ Foreign aid administered by AusAID was ‘driven by the self-interested objective of achieving a UNSC seat’, and was a successful method used to secure votes.⁵⁰

‘Distorting foreign policy’: obstacles and opposition

Competing for a seat on the international community’s most prestigious body was an arduous task and Australia’s campaign faced numerous obstacles and opposition, both at home and abroad. In the first instance, Australia was competing directly against Luxembourg and Finland for one of two seats available in the Western European and Others Group (WEOG).

Luxembourg was Australia’s most formidable competitor having launched its campaign much earlier in 2001.⁵¹ Bob Carr, at the time, stated that our ‘European rivals have a clear advantage’.⁵² Luxembourg has never held a seat on the UNSC and was widely known for its commitment to many wider UN organisations.⁵³ Luxembourg is a significant actor in the field of security, human rights and international development. We can observe comparison between Australia and Luxembourg, as both states have deployed tens of thousands of peacekeepers to various conflict zones around the world.⁵⁴ However, Luxembourg’s position as a tax-haven hindered its campaign.⁵⁵ Finland invested approximately \$2.5 million on its campaign, compared to Australia’s \$23.6 million.⁵⁶ Finland also believed that it had ‘locked up’ votes even before Australia had declared its intention to run.⁵⁷ Moreover, Finland had twice been a member of the UNSC and thereby has a considerable advantage over Australia and Luxembourg, as incumbency is always looked favourably upon.⁵⁸ Finland had contributed around 50,000 peacekeepers in its time as a member of the UN since 1955. Langmore asserts that Finland’s campaign exhibited its commitment to sustainable and peaceful resolutions of conflict throughout the campaign; this is the primary task of the UNSC. However, public comments by the Finnish ambassador before the ballot suggested that he was overconfident. ‘Finland assumed it had earned its seat and that major campaigning was unnecessary’.⁵⁹ Despite the well-run and longer campaigns of Luxembourg and Finland, Australia and Luxembourg were ultimately elected as non-permanent members for the

⁴⁹ T. Lyons, ‘Australian foreign policy towards Africa’, in J. Cotton, and J. Ravenhill (eds.), *Middle Power Dreaming: Australia in world affairs 2006-2012* South Melbourne, Oxford University Press (2012), p. 206.

⁵⁰ *Ibid.*, p. 206.

⁵¹ Langmore, op. cit. (2013), p. 107.

⁵² A. Park, ‘Why does Australia want a UNSC seat?’, *SBS News Online* (18 October 2012), available online: <http://www.sbs.com.au/news/article/2012/10/18/why-does-australia-want-uns-> accessed (1 November 2013).

⁵³ Langmore, op. cit. (2013), p. 107-108.

⁵⁴ *Ibid.*, p. 107.

⁵⁵ *Ibid.*, p. 107.

⁵⁶ S. Cullen and L. Millar, ‘Security Council bid failure would be “disastrous”’, *ABC News* (18 October 2012), available online: <http://www.abc.net.au/news/2012-10-18/abbott-on-un-security-council-bid/4320110> (accessed 3 November 2013); Langmore, op. cit. (2013), p. 107.

⁵⁷ *Ibid.*, p. 1.

⁵⁸ Langmore, op. cit. (2013), p. 107.

⁵⁹ Langmore, op. cit. (2013), p. 107-109.

2013–2014 terms in the WEOG.⁶⁰ Opinion commentary after the win stated that Australia’s victory was ‘an absolute stunner’ despite it being ‘far shorter, cheaper and more values-based campaign’ than Australia’s two competitors.⁶¹

Unsurprisingly, criticism at home was abundant throughout the entire campaign, much of which stemmed from the conservative side of Australian politics. Fullilove has noted that ‘the bid has also attracted many exaggerated and inconsistent criticisms’.⁶² One of the most central complaints of Australia’s campaign was that the campaign was distorting Australia’s other foreign policy interests and objectives.

Cave asserts that the Pacific Islands must be at the ‘core of Australian foreign policy’ and cited the UNSC campaign as having ‘distracted, confused and increasingly distorted’ Australia’s relationship with the Pacific Island states.⁶³ This is incorrect. Australia’s central election platform was for the representation of small and medium countries, as well as developing states.⁶⁴ The election of Australia to the UNSC would support the interests of Pacific Island states. The leaders of the Marshall Islands, Tonga and Samoa, amongst others publically supported Australia’s candidacy.⁶⁵ In addition, the support and backing of 12 Pacific Island states was a crucial component of Australia’s campaign for success.⁶⁶ The Prime Minister of Singapore, in late 2012, overtly backed Australia’s campaign asserting that the election of Australia to the UNSC to be in the interest and benefit of the Asia-Pacific region.⁶⁷ Brazil also pledged its support to Australia, demonstrating that Australia’s increased diplomatic representation in Latin America had worked.⁶⁸ Claims to the contrary by conservative critics were therefore immediately rendered inaccurate.

Media reports suggested that then Opposition Leader Tony Abbott labelled any failure in the bid as ‘absolutely disastrous’.⁶⁹ Much of the criticism of the campaign stemmed from Mr Abbott, who pledged to discontinue the campaign and redirect the attention of DFAT to other priorities and areas concerning Australian foreign policy should he be elected. Mr Abbott also expressed grave concerns about the financial cost of the campaign.⁷⁰ In contrast, Langmore asserted strongly that ‘any country that failed to stand for election to the Council would be announcing to the world that it was opting out of the global community’.⁷¹

⁶⁰ T. Eastley and L. Millar, ‘Australia wins seat on UN Security Council’, *ABC News* (19 October 2012), available online: <http://www.abc.net.au/news/2012-10-19/australia-wins-seat-on-un-security-council/4321946> (accessed 3 November 2013).

⁶¹ Woodroffe, op. cit. (2012a), p. 1.

⁶² Fullilove, op. cit. (2011), p. 1.

⁶³ Cave, op. cit. (2012), p. 1.

⁶⁴ Commonwealth of Australia, op. cit. (2012), p. II.

⁶⁵ Flitton, op. cit. (2012a), p. 1.

⁶⁶ Ibid., p. 1.

⁶⁷ The Australian, ‘Singapore PM says OZ UN bid good for Asia’, *The Australian* (11 October 2012), available online: <http://www.theaustralian.com.au/news/breaking-news/singapore-pm-arrives-at-parliament-house/story-fn3dxiwe-1226493447169> (accessed 2 November 2013).

⁶⁸ The Australian, ‘Australia, Brazil sign partner agreement’, *The Australian* (22 June 2012), available online: <http://www.theaustralian.com.au/news/breaking-news/australia-brazil-sign-partner-agreement/story-fn3dxity-1226405307770> (accessed 2 November 2013).

⁶⁹ Millar and Cullen, op. cit. (2012), p. 1.

⁷⁰ Park, op. cit. (2013), p. 1.

⁷¹ Langmore, op. cit. (2012), p. 1.

Former Minister for Foreign Affairs Alexander Downer attests that a ‘well-handled presidency can enhance a country’s reputation’, yet was critical of the campaign.⁷² During this time, the Coalition Spokesperson on Foreign Affairs, Julie Bishop, noted that the Coalition ‘in principle’ supported Australia. However, Ms Bishop disagreed with the way that the campaign was being pursued.⁷³ In addition, notable Coalition Ministers such as Christopher Pyne and Malcolm Turnbull were also believed to have supported the bid, contrary to Mr Abbott’s position.⁷⁴

Other criticism cited by Cave asserts that ‘misguided’ foreign aid towards countries in Africa and Latin America has ‘side-tracked’ foreign policy.⁷⁵ This does not fit the national interest of Australia and the actual financial support Australia provides does not have ‘the same competitive advantage or expertise’.⁷⁶ Foreign aid was an important method for securing votes and hence proved effective for Australia; as a result, Australia received strong positive support from ‘14 Caribbean nations, the Seychelles and the Solomon Islands’.⁷⁷ Moreover, UN Secretary-General Ban Ki-moon reportedly indicated his support for Australia.⁷⁸ Fullilove also acknowledges that those opposed to Australia’s bid views the UNSC as ‘unimportant or even demeaning’ as a result of the veto power afforded to permanent five (P-5) members of the UNSC.⁷⁹ Resolutions before the UNSC must be approved by nine members to be successful, therefore, it is not only the P-5 group that can extinguish proposed resolutions.⁸⁰ The opposition towards the campaign was unique and unprecedented.

Most countries tend to support their governments bid and are happy or proud to see their country elected to the UNSC as a non-permanent member.⁸¹ ‘No other country has ever been subject to the level of domestic debate and ridicule’.⁸² Criticism swiftly ended once Australia was successful in its bid. The problems associated with Australia’s campaign ultimately did not affect Australia’s chances overall.

‘A big, juicy, decisive win’: after the election

Australia was elected to the council with 140 votes, well above the required 129.⁸³ Luxembourg was also elected as the second member in the WEOG and Argentina,

⁷² A. Downer, ‘Australia fumbles its chance at the United Nations’, *The Advertiser* (1 September 2013), available online: <http://www.adelaidenow.com.au/news/opinion/alexander-downer-australia-fumbles-its-chance-at-the-united-nations/story-fni6unxq-1226708587650> (accessed 2 November 2013).

⁷³ L. Taylor, ‘Another gotcha moment for gunslinger Abbott’, *The Sydney Morning Herald* (29 September 2012), available online: <http://www.smh.com.au/federal-politics/political-opinion/another-gotcha-moment-for-gunslinger-abbott-20120924-26hi3.html> (accessed 3 November 2013).

⁷⁴ T. Woodroffe, ‘Stop bagging Australia’s Security Council bid’, *The Drum* (5 July 2012), available online: www.abc.net.au/unleashed/4109506.html (accessed 2 November 2013).

⁷⁵ Cave, op. cit. (2012), p. 1.

⁷⁶ Ibid., p. 1.

⁷⁷ A. Drummond, ‘UN Security Council race continues’, *The Australian* (28 September 2012), available online: <http://www.theaustralian.com.au/news/breaking-news/un-security-council-race-continues/story-fn3dxix6-1226483253420> (accessed 2 November 2013).

⁷⁸ Ibid., p. 1.

⁷⁹ Ibid., p. 10.

⁸⁰ Ibid., p. 6.

⁸¹ Woodroffe, op. cit. (2012c), p. 1.

⁸² Ibid., p.1

⁸³ Eastley and Millar, op. cit. (2012), p. 1.

Rwanda and South Korea were elected in their respective groups.⁸⁴ Australia would be serving its tenure alongside other small and regional powers such as Pakistan, Morocco, Togo, Guatemala and Azerbaijan.⁸⁵ Foreign Minister Bob Carr labelled the victory as ‘a big, juicy, decisive win’ and further noted that the near \$25 million invested in the campaign would not have been wasted if Australia lost.⁸⁶ Carr further remarked the success of the campaign stemmed from support from African, Pacific as well as Caribbean nations.⁸⁷ Australia would have needed to understand the ‘dynamics, personalities and priorities of this diverse and eclectic group’ and hence, this would ‘be essential to Australia maximising the utility of its time on the Security Council’.⁸⁸

In September 2013, Australia held the Presidency of the UNSC and the powerful role to shape issues and push agendas and matters vital to Australia’s national interest. A concern raised within media and opinion circles was that the 2013 federal election could have interfered with Australia’s tenure as president, especially coinciding with the United Nations Leaders’ Week.⁸⁹ According to reports, the federal election ‘could throw Australia’s diplomatic plans into disarray’, because scheduling the federal election at the same as Australia’s campaign would complicate efforts.⁹⁰ Australia’s diplomatic mission to the UN in New York could have been seen as non-credible or illegitimate, given that the government in Australia was in ‘pre-election caretaker mode’ and thereby could have ‘fewer opportunities to deliver key diplomatic objectives’.⁹¹ The federal election would ‘leave Australia’s diplomatic mission in New York without necessary government back-up to drive its message’.⁹² This was particularly concerning Australia’s ‘pen-holder’ status on chairing committees on the Taliban, matters vis-à-vis Afghanistan, Al Qaeda and Iran.⁹³ However, the concerns did not become true, as election did not affect any of these urgent matters and issues. We can observe that in September 2013, everything ran smoothly in New York.⁹⁴

Another significant noteworthy issue occurring in the months preceding Australia’s election to the UNSC was the reduction of foreign aid to Africa and the Caribbean. As aforementioned, this report found that foreign aid was used as a highly successful and important campaign strategy. After the election, large amounts of foreign aid that flowed to parts of the developing world were significantly reduced. Higgins reported in *The Australian* that AusAID funding to the Caribbean increased to \$25 million in 2009–2010 and 2010–2011 financial years in order to secure votes from the Caribbean voting bloc.⁹⁵ However, just two months after Australia’s campaign was successful, the aid budget to

⁸⁴ Ibid., p. 1.

⁸⁵ Woodroffe, op. cit. (2012a), p. 1.

⁸⁶ Eastley and Millar, op. cit. (2012), p. 1.

⁸⁷ Ibid., p. 1.

⁸⁸ Ibid., p. 1.

⁸⁹ C. McGrath, ‘Election uncertainty casts cloud over Australia’s UN Security Council plans’, *ABC News* (31 July 2013), available online: <http://www.abc.net.au/news/2013-07-31/election-uncertainty-has-impact-on-un-security-council-bid/4855568> (accessed 5 November 2013).

⁹⁰ J. Farrall and M.E. Louise, ‘This Saturday, Australians will finally elect a president’, *The Conversation*, (1 September 2013), available online: <http://theconversation.com/this-saturday-australians-will-finally-elect-a-president-17491> (accessed 12 November 2013).

⁹¹ McGrath, op. cit. (2013), p. 1.

⁹² Ibid., p. 1.

⁹³ Ibid., p. 1.

⁹⁴ Farrall and Louise, op. cit. 2013), p. 1; and McGrath, op. cit. (2013), p. 1.

⁹⁵ Higgins, op. cit. (2013), p. 1.

the Caribbean dramatically dropped to \$13.3 million in the 2011–2012 financial years,⁹⁶ with the bulk of Australian aid flows being sent back to the Asia-Pacific region. Funding to aid projects in Zimbabwe, South Sudan and Somalia have also been cut.⁹⁷ Australia touted its reputation as a nation that gives generously through foreign aid. However, Australia reduced its foreign aid budget by 70 percent in order to help fund ‘essential infrastructure’ in Australia.⁹⁸ A further \$3.7 billion was cut from the 2015 Budget,⁹⁹ which will impact those who are beneficiaries of Australia’s aid program and will reflect negatively on Australia’s reputation globally.

Post-tenure: where to from here?

Australia ended a two-year term on the UNSC with several key issues and events dominating Australia’s work on the council. The leadership Australia showed during the MH17 disaster was exceptional and considered to be a defining, albeit challenging, moment. Much praise was heaped upon Australia’s efforts regarding the UNSC Resolution 2166. Following the downing of Malaysian Airlines flight MH17 in separatist-held Ukraine, Australia co-sponsored a bill to grant access to the site immediately to conduct investigations and to retrieve the bodies of the 298 victims.¹⁰⁰ Australia worked alongside the Netherlands on the resolution, which was unanimously passed. Both Minister for Foreign Affairs Bishop and Australian diplomatic efforts at the UN in the aftermath was praised, as Australia had secured some reprieve for the victims’ families.¹⁰¹ Again, reports observe that soft power and Australia’s reputation within the UN system played a crucial role in Australia’s diplomatic efforts.

Further, the stalemate in Syria also became a major priority for Australia. There is also correlation between Australia wanting to take part in the resolution of international conflicts, such as those in the Solomon Islands, East Timor and Cambodia and now again in Syria. Although with a non-interventionist platform, the Australian Government reaffirmed its support to see a resolution to the conflict in Syria through the implementation of UNSC Resolution 2118.

On 27 September 2013, Australia was a part of a unanimous decision to pass UNSC Resolution 2118, which called for the removal of chemical weapons in Syria, following the confirmation of an attack on 21 August. Resolution 2118 prohibited ‘Syria from

⁹⁶ Ibid., p. 1.

⁹⁷ Ibid., p. 1.

⁹⁸ M. Baker, ‘The shame that is Abbott’s foreign aid policy’, *The Sydney Morning Herald* (23 November 2013), available online: <http://www.smh.com.au/comment/the-shame-that-is-abbotts-foreign-aid-policy-20131101-2wrxt.html#ixzz2kxLMdQM> (accessed 5 November 2013).

⁹⁹ J. Nicholson, ‘Foreign aid to Africa cut by 70pc; contributions to Indonesia nearly halved’, *ABC News* (26 May 2015), available online: <http://www.abc.net.au/news/2015-05-13/foreign-aid-cuts-under-new-budget-africa-indonesia/6465264> (accessed 22 September 2015).

¹⁰⁰ J. Bishop and T. Abbott, ‘Media release: UN Security Council resolution on the downing of flight MH17’ (22 July 2014), available online: http://foreignminister.gov.au/releases/Pages/2014/jb_mr_140722.aspx?ministerid=4 (accessed 2 July 2015).

¹⁰¹ J. Kehoe, ‘Australia thanked for UN resolution on MH17’, *The Australian Financial Review* (22 July 2014), available online: <http://www.afr.com/news/world/europe/australia-thanked-for-un-resolution-on-mh17-probe-20140722-jjjed> (accessed 2 July 2015); and N. O’Malley, ‘UN resolution on MH17: How Australia achieved what other nations could not’, *Sydney Morning Herald* (22 July 2014), available online: <http://www.smh.com.au/world/un-resolution-on-mh17-how-australia-achieved-what-other-nations-could-not-20140722-zvnli.html> (accessed 2 July 2015);

using, developing, producing, otherwise acquiring, stockpiling or retaining chemical weapons'.¹⁰² The work on Syria, MH17 and other causes heightened Australia's credibility internationally and added to Australia's soft power war chest. With these two successes in mind, how can Australia use its position and reputation gained from its seat into the future? Already, we have seen a bid for Australia to gain a seat on the UNHCR, and most recently, Julie Bishop announced that canvassing for another term on the UNSC had begun. This article will briefly consider each in turn and the lessons that can be learnt.

Australia is currently seeking a three-year term on the UNHRC beginning in 2018, with voting in 2017. Australia is competing for one of two seats amongst 47 others. This would be the first time Australia would hold a position on the Council.¹⁰³ The cost of the campaign is unknown and will be absorbed by current funds¹⁰⁴. Australia's bid for a seat on the UNHRC is problematic. In order to win a seat Australia 'must demonstrate the highest standards in the promotion and protection of human rights and receive the support of the majority vote of the General Assembly'.¹⁰⁵ However, throughout recent Australian political history, especially with the advent of the Coalition government's harsh border protection policies, Australia has been widely criticised for its human rights breaches, particularly in regards to its treatment of asylum seekers¹⁰⁶. This represents a deep contradiction by Australia and impacts the use of soft power resources.

However, countries with abhorrent and questionable human rights records have previously been successfully elected to the council, such as China, Saudi Arabia and Cuba.¹⁰⁷ Despite this serious criticism, Australia is still campaigning for a seat. However, how can Australia appeal to other nations to secure a seat? Simply campaigning on Australia's record as being a good international citizen who upholds human rights will not be enough. Australia has been widely 'lectured' by the UN and many international human rights groups regarding its treatment of asylum seekers, the handling of issues concerning Indigenous Australians, those with a disability, and recent attempts to restrict media reporting.¹⁰⁸

¹⁰² United Nations Security Council Resolution 2118.

¹⁰³ M. Knott and S. Whyte, 'Australia presses for Human Rights Council seat despite UN criticism', *Sydney Morning Herald* (12 October 2014), available online: <http://www.smh.com.au/federal-politics/political-news/australia-presses-for-human-rights-council-seat-despite-un-criticism-20141011-114rmo.html> accessed 6 July 2015); and M. Grattan, 'Australia gets bollocking from UN Human Rights Commissioner – but we want a seat at their table', *The Conversation* (8 September 2014), available online: <https://theconversation.com/australia-gets-bollocking-from-un-human-rights-commissioner-but-we-want-a-seat-at-their-table-31421> accessed (6 July 2015).

¹⁰⁴ M. Knott and S. Whyte, op. cit. (2014), p. 1.

¹⁰⁵ United Nations Association of Australia, 'Australia's role in the UN', Canberra (2015), available online: <http://www.unaa.org.au/australias-role-in-the-un.html> (accessed 7 July 2015).

¹⁰⁶ M. Gordon, 'New UN human rights chief attacks Australia over asylum seeker rights 'violations'', *Sydney Morning Herald* (7 September 2014), available online: <http://www.smh.com.au/federal-politics/political-news/new-un-human-rights-chief-attacks-australia-over-asylum-seeker-rights-violations-20140907-10dlkx.html> accessed (6 July 2015); J. Méndez, 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment', *United Nations Human Rights Council* (6 March 2015), available online: www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session28/Documents/A_HRC_28_68_Add.1_AV.doc (accessed 6 July 2015).

¹⁰⁷ M. Knott and S. Whyte, op. cit. (2014), p. 1.

¹⁰⁸ Human Rights Watch, 'World Report 2014: Australia – Events of 2013' (2015), available online: <https://www.hrw.org/world-report/2014/country-chapters/australia> accessed (6 July 2015).

These issues cast Australia in a negative light, and diminish its ability to use soft power resources to project power overseas. However, given its lacklustre military and defence spending compared to other nations, soft power is an important resource that needs to be utilised by Australia. Culture and past experiences however are not the only criteria of soft power. Technology, innovation and science, as well as education and trade are kinds of soft power assets lying at the centre of Australia's role as a global power.

Australia can again rely on foreign aid in order to secure votes, despite Australia's foreign aid budget being dramatically decreased. Further, increasing monetary obligations to various UN agencies would highlight Australia's commitment to the multilateral institution overall. Drawing on Australia's recent work during the MH17 crash, in regards to Syria, as well as other work concerning the successful attempt to place North Korea's abhorrent and heinous human rights record and situation 'on the record'.¹⁰⁹ As a result of Australia's efforts on North Korea, such a matter will become a permanent feature in the official work of the UNSC.¹¹⁰ If Australia were to follow its strategy outlined above regarding its UNSC campaign, Australia may be able to gain a seat on the UNHRC. The lingering criticism over Australia's human rights abuses will become a factor of contention, as the leadership of the UNHRC has repeatedly criticised Australia.¹¹¹ If Australia won a seat on the UNHRC, this would significantly increase its chances for another seat on the UNSC.

In a recent media conference in New York, Minister for Foreign Affairs Julie Bishop announced that Australia is bidding for another seat on the UNSC for the 2029–2030 term.¹¹² This is despite the Coalition offering limited support for the previous bid under Labor.¹¹³ It has been argued that this will allow the greatest amount of time effectively to lobby for a seat and reduce costs in the long run.¹¹⁴ Little detail aside from the timing of the bid has been released, and it remains to be seen if this bid will continue. The timing of the bid has been labelled 'unambitious'.¹¹⁵ Some armchair analysts have concluded that a bid every 15 years or so is a reasonable objective.¹¹⁶ However, this report would assert that if Australia was a serious candidate for the UNSC and was confident of its chances, it ought to then bid for a seat during an earlier term. Whilst this would put it in direct competition with other states such as Germany, Israel and Belgium (2019–2020) or Denmark and Greece (2025–2026), if Australia truly believed in itself it should bid earlier and not throw out a challenge towards the end of the next decade.¹¹⁷

¹⁰⁹ L. Millar, 'UN Security Council: Australia's time at the top table comes to an end after two-year term', *ABC News*, (1 January 2015), available online: <http://www.abc.net.au/news/2015-01-01/australias-time-on-un-security-council-comes-to-an-end/5994380> (accessed 9 August 2015).

¹¹⁰ *Ibid.*, p.1.

¹¹¹ M. Gordon, *op. cit.* (2014), p. 1.

¹¹² N. O'Malley, 'Julie Bishop looks to 'Prime Minister Wyatt Roy' in 2029 UN Security Council bid', *The Sydney Morning Herald*, (30 September 2015), available online: <http://www.smh.com.au/federal-politics/political-news/australia-takes-another-tilt-at-united-nations-security-council-seat-20150929-gjxokl.html> (accessed 2 October 2015).

¹¹³ D. Conifer and S. Anderson, 'Timeframe for UN Security bid 'unambitious', Tanya Plibersek says', *ABC News*, (30 September 2015), available online: <http://www.abc.net.au/news/2015-09-30/australia-seeks-seat-on-un-security-council/6815060> (accessed 2 October 2015).

¹¹⁴ N. O'Malley, *op. cit.* (2015), p. 1.

¹¹⁵ D. Conifer and S. Anderson, *op. cit.* (2015), p. 1.

¹¹⁶ P. Nadin, 'UN Security Council bid: How Australia should sell itself', *The Interpreter*, (1 October 2015), available online: <http://www.lowyinterpreter.org/post/2015/10/01/UN-Security-Council-bid-How-Australia-should-sell-itself.aspx> (accessed 2 October 2015).

¹¹⁷ *Ibid.*, p. 1.

The only other declared candidate at this time is Finland once again. Given Australia's success in the previous tenure, it ought to run as a candidate a lot earlier than 2029 and use the recent tenure to demonstrate what it can accomplish.

If Australia can win a seat on the UNHRC this would translate into a comfortable victory in the UNSC. Australia can demonstrate a commitment to a variety of issues and causes, as well as a commitment to the UN overall. It is interesting to note that Australia's success in its last tenure should translate into a main foundation for the next campaign. Australia's use of soft and hard power resources is important here. Soft power resources are crucial again. Playing on Australia's success regarding Resolution 2166 as a remarkable achievement and the readiness of Australia to respond quickly to major global events would stand as a point of difference. As Australia worked alongside the Netherlands to secure the resolution, this article would argue that a potential joint bid between the Netherlands and Australia would be a strategic move, as both states are in the WEOG. With shared values and a similar level of international political engagement, a joint bid should be canvassed.

However, if the two nations both declare their intention to run for the normally two seats up for contention, both countries would be elected easily without serious competition from elsewhere. Australia should rectify its diminishing human rights record and restore its aid budget; this would add weight to any new campaign. The use of financial inducements, should be a foremost strategy, without it Australia risks losing. Australia must take a proactive approach. It should seek to play a greater role outside the Asia-Pacific region, by expanding its foreign policy network to states Australia has not traditionally had business with. Finally, the UN is full of numerous sub-organisations. Australia could work in a niche area of foreign policy with smaller issues that could ultimately yield fast results. This is not to advocate a smaller strategy of foreign policy, as Australia should continue to work on major global issues. Australia's lacklustre response to the Ebola epidemic highlights where Australia can and ought to do more. This will reflect positively upon Australia and for Australia's next bid.

This article has examined Australia's quest to secure a seat on the UNSC. With Australia's tenure over, it is essential to observe the importance of diplomacy through international institutions and the changes it can make. It demonstrates how success in the international arena can be derived from soft power resources, rather than conventional military forces. This article concludes by asserting that the diplomatic beauty pageant ultimately proved indispensable and advantageous to Australia's national interest and reputation globally. Australia should seek another term as soon as possible, and several more into the future.

Capital Goes Where Capital Grows: The Political Economy of Investment, Resource and Development in Central Africa

Hale Yildiz*

From the rise of neoliberalism and the global money market, Foreign Direct Investment (FDI) has been regarded as an effective tool for economic growth and development, as well as a facilitator for market integration for developing nations. In relation to Sub-Saharan Africa, orthodox economic studies emphasize the need to build up market-friendly and transparent institutions—and consequently become attractive to FDI—in order to reach a desired level of development. However, among many studies exploring this FDI-growth-development nexus, a recent line of literature introduces the ‘African variable’ of Resource Curse Theory (RCT) in an attempt to explain existing negative correlations that arise in circumstances where foreign capital inflow has negligible or negative effects on economic growth or development levels of the host country. In addressing this negative relation, RCT focuses on Africa’s inherent incapacity to efficiently manage its own resources in failing to uphold a business-conducive institutional foundation and transparent political institutions. This tendency is also applied to the phenomenon of the coltan trade that has long been associated with conflicts in the Democratic Republic of Congo (DRC), where extractive FDI to this region has continued, or even increased, despite ongoing violence, insecurity, weak state institutions, ambiguous property rights and endemic corruption. However, in analysing the dynamics of FDI-growth-development nexus, both mainstream FDI and RCT literature lack a comprehensive explanation for the existing trends in the region outside of limited sector-specific exploration and structural-institutionalist perspectives that reverberate market fundamentalism. What is needed, in this respect, is a more critical political economic approach that positions the nature and role of international capital under critical scrutiny, incorporating it into political economic dynamics of the global market.

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It is abundantly clear [...] that foreign investors are cold-hearted capitalists motivated by profit and the desire to maximize the value of their firms. They have developed a global mindset that views the world as a single economic space. To them, economic geography is borderless, stateless, and with few, if any, insurmountable cultural limitations.¹

From the rise of neoliberalism and the global money markets, Foreign Direct Investment (FDI) has been regarded as an effective tool for economic growth and development, as well as a facilitator of market integration for developing nations. Especially in the post-Washington Consensus neoliberal world order and extensive financial deregulation, mainstream economic theory reviewing the benefits and advantages of FDI takes for granted its growth-inducing and welfare-promoting prospects.

In recent years, largely as a result of the rising amount of FDI flowing predominantly to the primary sector in the region as a whole, the link between FDI and development has been repeatedly analysed in an African context.² Given the resource-abundant nature of Sub-Saharan Africa (SSA), the African-centred literature has primarily focused on the extractive industries, which consists of the extraction of raw materials, and resource-seeking FDI in relation to economic growth theories. This orientation underpins the Resource Curse Theory (RCT).³

With regards to both FDI theory and RCT, respectively, there are two general assumptions, which this study questions:

1. FDI to the sub-continent as a whole is a necessary step in integrating SSA into the global financial system and it is a leading propagator of growth and development in the continent. By its nature, FDI flows into areas with strong governance mechanisms, transparent institutions and stable political environments and is deterred by the presence of conflict, instability and violence.
2. The numerous cases where FDI to the extractive sector in SSA has had a negative impact on economic growth and development in the region may be, for the most part, attributed to the preeminent 'resource curse' that is experienced in the region. As such, any such negative impact of capital flow into the region is due to the lack of capacity in SSA countries in managing their natural resources efficiently and effectively.

However, in analysing the dynamics of FDI-growth-development nexus in SSA, both mainstream FDI and RCT literature lack a comprehensive explanation for the existing trends in the region outside of limited sector-specific exploration and structural-institutionalist perspectives that reverberate market fundamentalism. Doing so, both lines of literature tend to exonerate capital away from negativities that arise from natural resource abundance and seek to explain this negative correlation between FDI and economic growth with a more systemic factor lying in the epitome of indoctrinations of

¹ K. Yelapaala, 'Rethinking the Foreign Direct Investment Process and Incentives in Post-Conflict Transition Countries', *Northwestern Journal of International Law & Business*, 30, 1, (2010), p. 22.

² G. Gohou, and I. Soumare, Does Foreign Direct Investment Reduce Poverty in Africa and are There Regional Differences? . *World Development* , 40, 1 (2011), pp. 75-95.

³ E. Akinlo, Foreign Direct Investment and Growth in Nigeria: An Empirical Investigation. *Journal of Policy Modeling* , 26 (2004), pp. 627-639.

SSA: referring to an ‘African-ness’ of inherent weakness and backwardness. Thus, existing literature remains insufficient in accounting for the effects that arise from the nature of foreign capital inflows

In order to provide an alternative approach to the assumptions above, this study will look into the coltan trade in Central Africa, with specific focus on the DRC, in order to analyse the inflow and direction of foreign capital in the region. By documenting the nature of FDI flow to the coltan industry in the DRC—a recognised failed state⁴ with weak institutions and rule of law experiencing ongoing conflict and violence—and putting foreign capital under a critical lens, this paper aims to shed an alternative, political light on the theoretical components of FDI and RCT. From a political economy perspective, a critical scrutiny of the behaviour and impact of FDI firms and investment to the coltan industry in the DRC, where capital is incorporated into the analysis as an actor that contributes to the generation or continuation of conflict and underdevelopment in the region, will introduce a refined focus on capital flow and corporate behaviour against the backdrop of international markets. With greater critical implications for the theoretic boundaries of both FDI and RCT, this paper seeks to open up a broader and alternative debate on the political economy of natural resource management and the role of international capital and global market cycles in development.

By doing so, this study holds the assumption that money flows where there is profit and withdraws where there is loss, without an inherent tendency to facilitate economic growth or development in the path through which it travels.

FDI behaviour and impact in the primary sector: the case of SSA

First of all, in an attempt to differentiate FDI from other capital flows, it is important to offer an accepted definition. UNCTAD⁵ defines FDI as an ‘*investment involving a long-term relationship and reflecting a lasting interest of a resident entity in one economy (direct investor) in an entity in an economy other than that of the investor*’. For the sake of analysis, this paper will focus on resource-seeking FDI, which is directed to the pursuit of natural resources or human capital.

Positioned in a global context, in the face of financial deregulation and the diffusion of the global commodity market, there has so far been a general increase of FDI levels and inflows in the world.⁶ Seen as a positive development by organisations representative of the stance of international community (such as World Bank, IMF, UN and NEPAD), FDI flows to Africa have increased on absolute terms. In studying the existing theoretical and economic literature on FDI flows and its effects, related works in this area have been divided into two contexts: mainstream FDI theory and critical approaches to FDI. This differentiation rests in contrasting approaches to both the drivers of FDI such as political stability, large market size, strong institutional environment or strong legal and regulatory frameworks as prerequisites, as well as its

⁴ FFP, *Failed States Index 2013* (The Fund for Peace, Washington D.C: 2013).

⁵ UNCTAD, *World investment Report 2004* (United Nations Conference on Trade and Development, Geneva: United Nations, 2004).

⁶ E. Bannerman, *Foreign Direct Investment and the Natural Resource Curse; what is the relationship to Economic Development, Income Inequality and Poverty? Do institutions and Good Governance matter?* (University of San Francisco, San Francisco: Munich Personal RePEc Archive, 2007).

effects on the growth and development prospects of SSA countries; where mainstream literature draws a positive correlation that its critical counterpart questions and disputes. Given this distinction, general theoretical and practical tendency in the field has predominantly assumed the path of mainstream FDI theory while, to a large extent, neglecting significant contributions of alternative approaches to the field.

African-centred literature on the impact of FDI and economic growth exploring this nexus, such as that of Asiedu⁷, Buthe & Milner⁸, Basu & Srinivasan⁹ and Akinlo¹⁰, have drawn a positive correlation between foreign capital, growth and development. Some works in this field, such as that of Asiedu and Basu & Srinivasan, also point to the need to attract more FDI and suggest policy frameworks. However, in its totality, the literature remains largely categorical and weak in terms of providing an in-depth analysis. As such, mainstream literature, retaining more of a quantitative methodology of research, fails to explain FDI inflows into a war-torn, weakly governed SSA country in the first place. With regards to stable or increasing levels of FDI to countries such as DRC, Angola, Sierra Leone, Liberia, Nigeria etc, mainstream literature fails to provide an in-depth analysis of FDI trends and behaviour in what are regarded as weak or failed states and conflict-affected countries. Similarly, mainstream research also fails to account for numerous cases where FDI inflows continued despite wide-scale political instability, violence or civil war as well as for cases where conflict erupted simultaneously with relatively undisrupted channels of FDI. These existing cases not only refute the assumption of the institutionalising, disciplining impact and character of FDI, but also contest the mainstream conceptualisations of investment and international firm behaviour when positioned within a conflict-affected context.¹¹

In this sense, critical FDI literature—more specifically RCT—contributes to the debate by demonstrating that, contrary to the conventional wisdom behind the factors that attract FDI in natural resource-rich SSA countries, FDI has continued to flow regardless of their destitute post-conflict economic situation, burdened by market failure, small market size, severe economic constraints and weak institutional base.¹² This theme is outlined especially in the works of Yelapaala¹³, Kuwimb¹⁴, Auty¹⁵ and Ross¹⁶. However, RCT lacks the theoretical rigour necessary to provide an in-depth critical account of this negative correlation through its narrow market-biased focus that points the proverbial finger at institutional, systemic and actor-specific factors. As such, the literature represents little more than a repeated emphasis on the lack of FDI-friendly legal and

⁷ E. Asiedu, 'Foreign Direct Investment in Africa: The Role of Natural Resources, Market Size, Government Policy, Institutions and Political Instability' *United Nations University* (2006), pp. 63-77.

⁸ T. Buthe and H. V. Milner, 'The Politics of Foreign Direct Investment into Developing Countries: Increasing FDI through International Trade Agreements?' *American Journal of Political Science*, 52, 4 (2008).

⁹ A. Basu and K. Srinivasan, *Foreign Direct Investment in Africa- Some Case Studies*, African and International Capital Markets Departments, International Monetary Fund (2002).

¹⁰ Akinlo, op. cit. (2004).

¹¹ J. Bray, 'Practice Note 3: Foreign Direct Investment in Conflict-Affected Contexts', *Strengthening the Economic Dimensions of Peacebuilding* (March 2010), pp. 1-18.

¹² Yelapaala, op. cit. (2010).

¹³ Ibid.

¹⁴ M. Kuwimb, *A Critical Study of the Resource Curse Thesis and the Experience of Papua New Guinea*. James Cook University, Faculty of Law, Business and Creative Arts. JCU (2010).

¹⁵ R. M. Auty, *Sustaining Development in Mineral Economies: The Resource Curse Thesis* (London: Routledge, 1993).

¹⁶ M. L. Ross, 'The Political Economy of the Resource Curse', *World Politics*, 51 (1999), pp. 297-322.

regulatory frameworks, the Dutch disease and structural economic consequences, and ‘African Big Man’ analyses of corrupt leaders and the actions of warlords and rebels. Doing so, RCT fails to provide a critical political economy analysis exploring the nature and behaviour of international capital flow as an independent variable within the extractive FDI-growth-development nexus, and one that integrates FDI into the political dynamics of the conflict-ridden region.

In this sense, a significant contributor to this research are the results of studies examining the link between FDI and conflict that bear important implications for the nature of political economy oriented research; namely those of Multilateral Investment Guarantee Agency (MIGA)¹⁷, Honke¹⁸, Li¹⁹ and Kim²⁰. By analysing the nature of extractive FDI behaviour where business opportunities tend to outweigh risks and potential losses are limited, this research reveals irregularities in the conventional assumptions behind factors for investment and the role of FDI in countries that have weak state mechanisms and rule of law, lacking or weak market institutions and ongoing violence and conflict. Furthermore, the extractive FDI-conflict nexus initiates a critical investigation on the nature of international capital in which an analysis of MNE behaviour in CAF countries positions this type of FDI in the genesis or prolongation of conflicts. As such, in cases where the amount of FDI becomes positively related to the occurrence of conflict, these findings suggest an alternative picture of international markets, capital flow and development. In this sense, it is through these studies that a more critical approach to foreign capital and FDI behaviour may be constructed.

The next section will build upon the theoretical contributions of these analyses in order to conduct an in-depth exploration of the coltan trade in the DRC within the framework of political economy, questioning the role of international capital in development.

Case study: the coltan chain in central Africa and what the DRC can reveal about the global market on commodities

Coltan: a resource profile

Coltan is the common name for the mixture of columbite and tantalite²¹ (two mineral ores); and tantalum is the specific metal extracted from ore comprising of tantalite, of which coltan is one. The significance of this mineral stems from its unique metallurgical properties—such as its high melting point, high conduction of electricity, and strong resilience to corrosion—that make it vital to high-tech industries like mobile communications devices.²² As such, tantalum is also fundamental for use in the

¹⁷ MIGA, *Investment and Political Risk in Conflict-Affected and Fragile Economies*, Multilateral Investment Guarantee Agency, WIPR. MIGA (2010).

¹⁸ J. Honke, ‘Business for Peace? The Ambiguous Role of ‘Ethical’ Mining Companies’, *Peacebuilding*, 2, 2 (2014), pp. 172-187.

¹⁹ Q. Li, ‘Political Violence and Foreign Direct Investment’, *Global Strategic Management*, 12 (2006b), pp. 225-249.

²⁰ H. Kim, ‘Political Stability and Foreign Direct Investment’, *International Journal of Economics and Finance*, 2, 3 (2010), pp. 59-71.

²¹ The term ‘coltan’ is generally used in SSA to refer to the metal ore Columbite-Tantalite as it is more commonly known outside of the continent. This study adopts this colloquialism.

²² Ernst & Young, *Conflict Minerals: What you need to know about the new disclosure and reporting requirements and how Ernst & Young can help* (Ernst & Young, EYGM Limited: 2012).

production of consumer electronics ranging from hearing aids and GPS systems to laptops, mobile phones, camera parts and video game consoles. Moreover, it is a vital material in a range of other industries from aerospace to automotive, energy and medical devices. Given its wide scale application, the continued growth of the mobile phone sector in Africa and Asia, topped with growing demand in developments in ICT, machinery, aircrafts, energy production turbines and energy storage are likely to sustain high global demand for tantalum, in par with its trajectory in the last decade.²³

Its place in the global commodity market: price volatility

As Nest²⁴ suggests, regardless of whether a country possesses tantalite deposits, the decision to extract it on a commercial basis is an economic one to be made by the entities that have the mining rights (generally MNCs), which follows an analysis of supply and demand and other relevant costs associated with mine development and operations. The most important economic factor that provides the greatest incentive for mining operations is the global price of ore in the market, which is the price that the mining company can obtain from the ore depending on global demand for tantalum-based products.

In this light, two notable price spikes of tantalum have been documented: one occurring in 1980, and the other in 2000. While the spike in 1980 came about during a mineral boom, where it initiated further exploration to discover new deposits and incentivised new avenues for recycling, the 2000 price spike is the most critical one, which shifts the debate to a more African context.

While it is generally believed that the immediate price increase of tantalum in 2000 was a result of supply shortage, the spike was actually due to speculation about growing future demand of tantalum for use in capacitors in new innovative mobile phones, gaming platforms and light laptops.²⁵ In this period, the two major tantalum producers, Cabot and H.C. Starck placed large orders with producers via the use of long-term contracts, which locked in a considerable amount of the mineral's production. This caused a sudden scarcity of tantalite due to the supplies becoming locked in to certain processors long term in advance. As the market for tantalite became constrained, prices continued to soar and traders and investors began to seek new channels of tantalite supply outside the constraints of long-term contracts. Conveniently facilitated by the economic networks that penetrated in the DRC during the first years of the Congo War, traders, processors and investors rushed to funnel the mineral out of the country and onto the global market, causing the price of tantalite to plummet shortly after. This new interest in coltan in the DRC also led to a rapid outburst of deposit exploration, extraction and commercialising activities across the eastern part of the DRC.

After this period, coltan was predominantly mined in conditions of armed conflict and human rights violations where armed groups who seized control of mining operations garnered inordinate revenues from the resource, exploiting its high prices on the international market. In 2009, estimates suggest that rebel groups in the DRC, the main

²³ R. Bleischwitz, M. Dittrich and C. Pierdicca, *Coltan from Central Africa, International Trade and Implications for Any Certification*, Department of European Economic Studies, (Bruges: College d'Europe 2012).

²⁴ M. Nest, *Coltan* (Cambridge, UK: Polity Press, 2011).

²⁵ Ibid.

hub of illicit trade in coltan, made an excess of approximately one billion US dollars (USD) through conflict mineral trade.²⁶

To a large extent due to its unregulated mining and extraction environment and its primary importance of global use in consumer electronics, coltan has become a major resource of conflict and tension in the world; coined as a ‘conflict mineral’ along with gold, tin and tungsten. Per se, given the intermediary status of coltan as a component of an end-product, the upstream and downstream supply and production chains of coltan are much more complex and are entirely globalised, facilitating the perpetuation of illegitimate trade and production during all the stages of its supply chain. Also, stemming from this factor is the fact that many companies and consumers are still unaware of its existence as a component in their daily electronic products, making it increasingly difficult to control rising global demand. In addition to this, the security situation in coltan’s supply chain is highly sensitive and fragile, making issues such as transparency and traceability even more complex and difficult.

Coltan in Central Africa: the DRC and beyond

Carbonite-sourced deposits of coltan reside mainly in Central Africa—currently the largest supplier of coltan on the world market—in the Kibaran Belt running through Burundi, Rwanda, Uganda and DRC where it is extracted and processed conventionally by labour-intensive and largely unregulated Artisanal and Small-Scale Mining (ASM).²⁷ Existing limited data on tantalum’s primary production in 2008 shows that the African continent produced around 37 percent of the world’s tantalum and held around sixteen percent of its world reserves, most of them originating out of the DRC.²⁸ More specifically, statistical data pertaining to 2007 shows that the majority of tantalite in Africa—around 52 percent—was produced by the DRC, around 22 percent by Ethiopia, fifteen percent by Rwanda, seven percent by Mozambique, and around three percent by Nigeria²⁹. Further data suggests that in 2009, the DRC exports totalled up to a minimum of 275 tonnes with an estimated value of around 4 million USD, potentially exceeding combined production levels of both Brazil and Australia.³⁰

These estimates are important in the sense that, as opposed to official numbers, critical data analysis attributes more of the share of global tantalite production—estimated at around 60 percent—to DRC production in 2007. Given that this is a high possibility, these findings position the DRC as the second largest source of global tantalum in the 2000s. This not only indicates the significance of Congolese production in the global market but also points to its potentially destabilising impact on the global economic chain of coltan due to its price volatility and nature of mining operations.

²⁶ Bleischwitz, Dittrich, and Pierdicca, op. cit. (2012).

²⁷ Ibid.

²⁸ E. Sutherland, *Coltan, the Congo and your Cell Phone: The connection between your mobile phone and human rights abuses in Africa* (11 April 2011), available online: <http://ssrn.com/abstract=1752822> (accessed 23 August 2013).

²⁹ Tantalite production in the region also demonstrates notable periodic peaks in coltan production in DRC in 2000 and 2002-onwards, Mozambique in 2003 and Ethiopia throughout the mid-2000s.

³⁰ Bleischwitz, Dittrich, and Pierdicca, op. cit. (2012).

Coltan mining in the DRC

Most coltan extraction occurs mainly in the Kivu provinces of Eastern DRC in a manner that is peculiar and unrepresentative of the system in which tantalite is produced and traded in other parts of the world.

In terms of the organisation of mining operations, the general rhetoric echoing in the literature tends to refer back to the volatility of coltan mining in the DRC. As compared to other SSA nations that engage in artisanal and small-scale tantalite mining, such as Nigeria, Ethiopia and Rwanda, coltan mining in the DRC is characterised by weak rule of law leading to an ambiguous practice of mining rights, violence and arbitrary relations of exchange. The nature of mining and its relation to ground-level dynamics, such as state strength, property rights, etc. create an environment of regulatory vacuum; thus making it more conducive to illicit mining practices and conflict scenarios.

Tracing the path of coltan

The most distinguishing feature of the coltan production and supply chain in the DRC is its artisanal method of extraction and frequent exchange before its exposure to the global markets in Europe, Asia and North America. As such, due to the sheer size of the deposits and the frequent risk of extortion and looting, a network of small traders—referred to as *négociants* by the Congolese—along with multiple porters are involved in the trade of large consignments of ore.³¹ Nest reports that the use of multiple ports and actors serves a dual function that both reduces the risk of losing entire consignments to incidents of theft or looting and creates new risks arising out of the large number of gatekeepers and handlers in relation to uncertainties around the quality and quantity of the ore and its origins.³² This repeated exchange also creates a number of opportunities for smuggling, illicit commerce and taxation by armed groups. Indeed, numerous cases of erupting violence, loss of equipment and investment capital during the movement of coltan have become serious setbacks for firms doing business in the DRC.

Generally, the nature of mining activity in the DRC takes place using low-skilled local workers, basic machinery, small-scale land transport and occasional air transport. There are several levels to the production and supply chain of coltan in the country, starting from its extraction to its commercial sale.

After being dug out by *creuseurs*—or miners—coltan is placed into small plastic bags weighing around 15 to 50 kg and is carried out of the mines via porters who carry the ore through treacherous terrains to the villages or residences where *négociants*, or traders, conduct business. At this point, some coltan occasionally gets smuggled from the hands of miners and porters by armed groups, terrorists or militias. Once the supply is handed over to a *négociant*, similar to miners, the porters are usually paid in coltan by the *négociants* themselves. It is here in the chain that the mineral starts its frequent exchanges, changing hands between *négociants* until its purchase by a locally based

³¹ This specific system of handling consignments in the DRC via intermediary traders known as *négociants* and *comptoirs*, is mainly due to the reluctance of MNCs and trading companies that are involved in the trade of coltan to engage in direct business links in the DRC.

³² Nest, op. cit. (2011).

comptoir (trading firm). Nest states that these firms operate from physical spaces usually set up in eastern DRC in Goma, Bukavu and Bunia and are relatively powerful in controlling export volumes as they hold the decision-making power as to how much ore to export and other commercial decisions related to the consignments.

The second step in the supply chain is the exchange between comptoirs and international minerals trading firms from which coltan makes its official entrance into the global market. It is generally the case that, in the exchange between comptoirs and tantalite processing firms, major companies manipulate international tantalite prices via negotiations with producers.³³ This is also another point in which coltan trade in and from the DRC differs significantly from its trade conducted elsewhere. In mines in Ethiopia, Australia and Egypt, tantalite, along with other minerals and natural resources such as oil, coal and iron ore, are sold via forward contracts that take place between a producer (supplier) and a buyer firm agreeing on a certain quantity of the commodity at an agreed price for a set period of time into the future. The use of forward contracts, in this regard, makes prices and supplies more predictable in terms of making future projections, planning and cost management; thus stabilising commodity prices. However, all coltan from the DRC is sold on the 'spot market' with no contractual agreements between producers, traders or commercial users where the commodity is traded in cash and delivered immediately.³⁴ Moreover, due to the absence of a central marketplace where all coltan is traded, some sales go unreported and some facts and figures may typically be lost, creating a lack of information on price and supplies. Also, due to the lack of infrastructure and physical distance between mines and the commercial trading environments of comptoirs and international firms based in big towns, creuseurs and negociants are generally unaware of the current spot market prices of coltan.

The third stage of the supply chain is international processing where the coltan sold at the international spot market is transported to processing plants in Asia, Europe and North America to be combined with tantalite originating from other countries and transformed into tantalum metal for commercial use. This is the stage where coltan and tantalum supply chains converge to produce intermediary products such as foils, plates, wires and powders that will eventually become final-end products such as laptops or mobile phones. This is also the stage where information as to the origins of the ores are either passed on or lost. In this sense, the tantalite processing firms may choose not to include coltan from the DRC in their consignments to be shipped to manufacturers, or they may choose not to disclose information about a mixed consignment to a downstream manufacturer.

The fourth stage in the supply chain comprises the manufacturing of components and final products containing tantalum. In this sense, in order to manufacture an electronic device, tantalum products are first sent to companies that make capacitors, then sent to those that manufacture circuit boards, and finally to companies that produce the end product such as mobile phones or laptops. In the final end stage of the chain, the tantalum is sent to some of the world's biggest brand name corporations such as Apple

³³ Nest also mentions three major companies that process tantalite into tantalum in the global market and that consume around 70 to 80 percent of the world's supply of tantalite: H. C. Starck in Germany, Cabot in the United States and Ningxia Orient Tantalum Industry in China.

³⁴ Most of the coltan trade on the spot market occurs virtually via the interchange between sellers and buyers using telephones or the Internet.

Inc., Acer, Dell, Ericsson, Motorola, Toshiba, etc.^{35 36} By this stage, it is generally debated whether the origins of the minerals, especially that of tantalum, is known by these international companies.

This type of trading, in the form of decentralised and non-contractual spot trading has two implications: high price fluctuations due to changing demand and manipulations from major firms, therefore contributing to high price volatility in the extractive sector of the DRC; large information asymmetry between producers and middleman traders as the victimised, vulnerable group; and comptoirs and international buyers with access to international price information set by the global market. In both cases, the absence of long-term or forward contracts is both indicative of and a contributor to the unpredictability of the mineral industry in the DRC. This instability in the production and supply of coltan becomes a major impediment in the development of a strong and sustainable extractive sector in a country already riddled by violence, instability, weak state and infrastructure, and unregulated extraction methods.

The FDI dimension

Critical to this study and to its greater implications to conventional FDI theory and the RCT in the context of Africa, is the presence of MNCs actively investing in coltan as active players in the coltan trade in the DRC despite its evident non-conduciveness to trade and investment. Especially with the onset of the financial crises engulfing the twenty-first century, big corporations have faced falling profit margins and losses on stock markets, thus giving them further incentive to engage in profit-making activities such as investing in the lucrative coltan industry in the DRC. Further fuelling investment in DRC's coltan industry is the growing international demand for cell phones and computer chips, along with other electronics that assume a vital role in the lives of a large number of people.

In this sense, the UN identifies numerous cases of international firm engagement in the trade of coltan in the height of the Congo War that actively imported coltan from the DRC using Rwanda as a middle ground from which consignments were shipped to countries like Malaysia, Germany, Switzerland, India and Pakistan to be processed or further exported.³⁷ In this regard, the UN also recommended the financial sanctioning of 29 international firms originating from Uganda, Rwanda, Britain, US, Germany, Belgium, Switzerland, Malaysia, St. Kitts & Nevis and Hong Kong, that were documented to be involved in the illicit coltan trade. Notably, the UN identified several major Western corporations such as Anglo American, Barclays Bank, Bayer AG, Cabot, De Beers, H.C. Starck and Standard Chartered Bank as being directly involved with coltan in the DRC.

³⁵ To further illustrate the supply chain, the African Research Bulletin (cited in Sutherland, 2011, p. 8) describes the process in which the middlemen transport and exchange the coltan from the mines to sell at depots and warehouses where casual labourers are paid less than 1 USD per day to remove iron impurities from the ore using magnets. The remaining ore consignment is then taken to Kigali to be shipped to metal refineries and processing plants. The Bulletin also notes that these middlemen were being paid around 1.59 USD per one pound (lb.) of ore in 2007, when the price set in the international spot market was around 8 to 18 USD and the processed capacitor grade tantalum powder was being sold at around 350 to 400 USD per lb.

³⁶ Ibid., p. 87.

³⁷ Ibid., p. 119.

Similarly, a 2002 report by the International Peace Information Service (IPIS)³⁸ lists numerous European trading companies that have invested in the DRC during the Congo War. In this sense, IPIS reveals that the Belgian companies of Cogecom Sprl and Sogem—a subsidiary for Umicore, in cooperation with its local partner Mudekereza-Defays-Minérais (MDM)—along with the German corporation Masingiro GmbH, enjoyed direct relationships with the Rwandan-backed RCD located in Goma, where these companies became key business partners investing into the supply chain of coltan in the South Kivu region of the DRC.³⁹ In this context, the UN Panel of Experts⁴⁰ has accused Masingiro of rushing for profit and being ‘*ready to do business regardless of elements of unlawfulness and irregularities*’. It is further noted that these companies operate mainly from Rwanda and Rwandan controlled territories in eastern DRC, as well as through local subsidiaries.⁴¹ The IPIS report also reveals some joint initiatives of European businesses with Rwandan military and political actors, most notably the Rwandan Patriotic Army (RPA), in a type of ‘military commercialism’, mentioning some Swiss offshore companies such as Finmining, Finconcord and Raremet, and a Dutch-US joint venture called Eagle Wings Resources.⁴² This is described in the 2002 IPIS report as a system where ‘military officers create corporate-military businesses in order to generate income for themselves and their politico-military (state) apparatus’.⁴³

In response to the data, the UN Panel of Experts has stated that ‘*the role of the private sector in the exploitation of natural resources and the continuation of the war has been vital*’.⁴⁴ Indeed, the involvement of foreign companies in the coltan trade, deemed largely illegal by the UN due to the illegal occupation and control of mining lands and activities by armed groups, has recently captured the interest of many NGOs and human rights organisations calling for the regulation of the coltan trade and questioning the role of foreign companies and FDI. It is partly due to this global grassroots-level backlash, that the FDI dimension of the fragile mineral sector in the DRC has been exposed to critical overview. According to a UN report,⁴⁵ ‘*corporations from around the world have sought to profit from exploiting the DRC’s natural resources on the cheap – particularly coltan, a mineral used to produce cell phones, laptops and video game consoles*’. The same report also exposes the involvement of longstanding major international companies in the region that have joined the ‘coltan rush’ in order to profit from the revenues of the coltan trade in the DRC.

More interesting is the research conducted between 1999 and 2000; period corresponding to coltan’s price spike as well as the heights of the Congo War. As such, research reveals that this was also the period in which international company involvement in the DRC, specifically in the trade of coltan, was also at its peak. Data indicates that 80 percent of all coltan in this period was processed in H.C. Starck in

³⁸ J. Cuvelier and T. Raeymeakers, *Supporting the War Economy in the DRC: European Companies and the Coltan Trade*, International Peace Information Service (Brussels: IPIS, 2002).

³⁹ Ibid.

⁴⁰ UN, *Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo*, United Nations, UN Expert Panel Report, (United Nations, 2001), p. 186.

⁴¹ Cuvelier and Raeymeakers, op. cit. (2002).

⁴² Ibid., p. 8.

⁴³ Ibid., p. 20.

⁴⁴ Ibid., p. 8.

⁴⁵ UN, op. cit. (2001), p. 4.

Germany.⁴⁶ In this sense, this firm had enjoyed direct links with armed groups in the supply chain during the early 2000s, suggesting that neither ongoing violence nor weak property laws, rule of law, infrastructure or state capacity were sufficient reasons to halt or reject investment in DRC's extractive sector. The report also notes that Rwanda Metals—a company involved in coltan trading in partnership with the Rwandan Patriotic Army (RPA)—was using its ties with the Rwandan army in order to export at least 100 tons per month, pointing to an existing vicious cycle in the conflict-mineral-investment nexus of the DRC coltan industry. In this sense, it is noted that coltan enabled the Rwandan army to continue its activities in the DRC by providing protection and security to the companies involved in its extraction where, in turn, those companies enabled the continuous exploitation of the mineral.⁴⁷ Along similar lines, figures released from the 2011 UNCTAD report suggest that FDI to the DRC in 2007 was recorded as being the highest in the history of UN's records on trade and investment in regards to the country.⁴⁸ Indeed, it is noted here that international companies and MNCs continue to engage in the coltan trade in the DRC, despite its documented links in funding armed groups such as the RCD, FDLR and PARECO; thus contributing to the perpetuation of violence and conflict on the ground.

Finally, it is a case in point to relate to an ongoing regional shift in the coltan trade patterns in the region. In this sense, while Western countries were the lead investors in the coltan sector in the DRC during the 1990s and early 2000s as the dominant importers of coltan, recent years have seen a shift towards China which has been increasing its investment volume in the region, as well as other developing countries and African countries increasingly engaging in regional trade and investment in other resource-rich African nations. Global Witness⁴⁹ notes that the coltan imported by China averaged to around 60 percent of the total production of North and South Kivu in 2010, most of which was imported by the three main Chinese companies: Fogng Jiata Metals, Star 2000 Services and Unilink Trading Hong Kong. The amount of investment into coltan, consequently the DRC's extractive sector, is projected to increase further in the near future. Changing figures indicate that future FDI into the coltan sector of the DRC may be shifting under the control of the developing nations of the twenty-first century.

Conclusions

From an in-depth exploration of the DRC and its coltan industry, it is possible to relate to several features that define both the national and domestic dynamics of the country as well as identifying the peculiar aspects and elements intrinsic to its coltan industry. For the sake of comparative analysis, these elements provide a frame of reference in which it becomes possible to compare the elements of conventional wisdom of FDI and the realities and the nature of FDI taking place in the DRC. The generally held assumption is that, money flows where there is profit, without an intrinsic propensity for enabling economic growth and development.

⁴⁶ Nest, op. cit. (2011), p. 117.

⁴⁷ UN, op. cit. (2001).

⁴⁸ UNCTAD, *Foreign Direct Investment in LDCs: Lessons Learned from the Decade 2001-2010 and the Way Forward*, United Nations Conference on Trade and Development, (New York: United Nations, 2011).

⁴⁹ Global Witness, 'The Hill Belongs to Them', *Global Witness* (December 2010).

In short, coltan production and supply chain in the DRC is ridden by unregulated, small-scale extraction, weak property rights, unwritten or ambiguous contracts and trade agreements, multiple traders and middlemen, ethnically divided mining operations governed by tension and conflict, extortion and smuggling caused by the easy infiltration of different armed groups to the supply chain and ongoing violence. These factors constitute the general features of the mineral sector in the DRC and hold important implications for the nature of extractive FDI in this region.

As such, this study has attempted to underline several features of the DRC—in the centre of the international coltan trade—as a country that, despite receiving relatively high levels of FDI as compared to the rest of SSA, remains a hostile environment for investment; decrepit by a war-torn unstable economy, informal economic networks based around armed groups and ethnic divisions, and weakened state structure lacking regulatory oversight in enforcing strong property laws and rule of law. In effect, this case study traces the behaviour of international capital and positions it within a web of informal actors and conflict that bears important implications for the theoretical assumptions of mainstream FDI theory and RCT, with broader contributions to the FDI-growth-development nexus.

Implications for FDI theory

According to the findings of this study, the coltan trade network in Central Africa that comprises of the nature of the mineral, its supply chain and the DRC, possesses little of what neo-classical, orthodox economic theory deems as necessary prerequisites for receiving FDI. By relating to the volatility of coltan and its highly unstable and volatile pricing on the international market—its unregulated and ambiguous network of extraction administered by informal agreements, corruption and conflict; and a country run down by armed groups, ethnic conflict, rampant instability, weak infrastructure, and low levels of human capital as the hub of international coltan trade—this research reveals the discrepancies between the main assumptions of mainstream FDI theory on the determinants and function of FDI in growth and development, and the realities of international mineral trade and global commodity market. In this sense, it is emphasised here that FDI theory has generally failed to explain the large amounts of FDI flowing into the region and the vast network of informal groups, international firms and ongoing conflict that has riddled the conventional paradigm of FDI-growth-development nexus.

Implications for resource curse theory

This research also attempted to expose the theoretical dearth of RCT in providing a wholesome and effective explanation for the negative correlation between FDI and growth and development in the context of the coltan and Central Africa. Indeed, it is shown here that, in order to understand the dynamics and realities that lie within the case of the coltan trade in the DRC, it is necessary to go beyond a narrow market-fundamentalist, structuralist approach that solely focuses on the institutional weakness of the DRC state in failing to institute market-friendly and liberal macroeconomic reforms and the corrupt tendencies of rent-seeking armed groups and other African actors. In this way, RCT—similar to FDI theory—takes granted the determinants and function of capital and isolates it from critical political analyses. While such a focus is not necessarily irrelevant, it merely scratches the surface for understanding the role and nature of international capital in the DRC.

As such, without an in-depth analysis of international capital, reviewing its behaviour and impact through a lens of critical political economy, an RCT-based analysis of this case study remains superficial with inaccurate or insufficient remedies and policies for facilitating growth and development in the SSA.

Strategic Considerations of the North West Shelf Venture and its Impact on Australia–China Relations

Flavia Bellieni Zimmermann*

The Australian North West Shelf venture is the largest resource sector development in the country's history. The strategic implications of this project for Australia's gas production industry are immense. Gas, particularly liquid natural gas as a cleaner source of energy, has crucial strategic importance in international politics and energy security across the region. Being a key exporter of gas in the Asia-Pacific would be in Australia's national interest. It would give the country greater bargaining power in the region, especially in Australia–China relations and for the issue of balance of power in Asia. China's need for reliable and cleaner sources of energy should be a driving force behind a closer Australia–China relationship in years to come. Nevertheless, by having a closer relationship with China, Australia may face new challenges to its historic defence partnership with the United States. Furthermore, there is an increased need to protect a critical infrastructure site such as the North West Shelf against a terrorist launch. This article endeavours to explain the strategic impact that the North West Shelf venture project has for the Australian economy and its strategic implications for Australia's relations in the Asia-Pacific region, particularly with China.

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To begin with, it is important to contextualise the origins of the extraction and commercialisation of natural gas in Australia. It is claimed that the Western Australian North West Shelf (NWS) gas project is one of the most significant resource developments in the country's history.¹ This project was initiated in the 1960s, with substantial mineral reserves being discovered by the 1970s.² It is believed that both natural and condensed gas reserves in the North Rankin and Goodwyn region would reach around 300,000 million to 56.1 million cubic metres respectively.³ Due to its strategic importance for energy markets, both domestically and internationally, in 1979 state and federal governments provided environmental approval for gas commercialisation across the region.⁴ In 1980, the Japanese built North Rankin platform initiated the extraction of natural and condensed gas in the nation.⁵ In 1984 natural gas started to be manufactured to the State Energy Commission of Western Australia (SECWA).⁶ Furthermore, in 1985 a twenty-year contract for the sale of liquefied natural gas (LNG) was sealed with Japan.⁷ It is crucial to mention that LNG is a reliable and cleaner source of energy that can be used for household and industrial consumption in nations across the world.⁸ With this agreement, Japan was given the right to build two LNG processing trains, storage tanks, a loading jetty and seven gas carriers.⁹ In 1989, the construction of the Goodwyn platform was announced, with the first shipment reaching Japanese shores in August of the same year.¹⁰ Since 2003 LNG has increased in its economic significance as a major source of revenue for the Australian Commonwealth.¹¹ Western Australia is currently the greatest exporter and producer of LNG in the country, exporting 80 percent of national gas production during the 2013–2014 period alone.¹² Japan has been the major destination of Australian gas exports over the last decade, however other major LNG consumers in Asia notably include China, the Republic of Korea and Taiwan.¹³

In a world where there is a growing need for energy, the strategic implications of this project for Australia both domestically and regionally are immense.¹⁴ A growing Asian population, and increasing challenges regarding climate change, increases the demand for cleaner energy in the Asia-Pacific. The natural gas industry may hold the key to the balance of power in the region. Neighbouring nations have the challenge of providing alternative energy sources to meet the demands of their growing population, whilst

¹ P. J. Higgs and Alan A. Powell, 'Australia's North-West Shelf Gas Project: A general equilibrium analysis of its impact on the Australian economy', *Resources Policy* (September 1992), p.179.

² Ibid.

³ Ibid.

⁴ Ibid.

⁵ Woodside Petroleum Ltd, 'Beyond the Flame: The Story of Australia's North West Shelf Natural Gas Project', *Woodside*, (Perth: 1989), p.132.

⁶ Ibid.

⁷ Ibid.

⁸ Liquefied Natural Gas (LNG), *LNG ConocoPhillips*, available online: <http://www.conocophillips.com.au/our-business-activities/how-we-deliver-energy/Pages/liquefied-natural-gas.aspx>, (accessed on 8 July 2015).

⁹ Ibid.

¹⁰ Ibid.

¹¹ Australia's Liquefied Natural Gas (LNG) exports, 2003-04 to 2013-14 and beyond, *Australian Government Australian Government Department of Foreign Affairs and Trade*, available at: <http://dfat.gov.au/about-us/publications/Documents/australias-lng-exports-2003-04-to-2013-14.pdf> (accessed on 8 July 2015).

¹² Ibid.

¹³ Ibid.

¹⁴ Ibid.

diminishing their carbon footprint in the near future. By assuming a position as a major regional provider of natural and condensed gas to neighbouring countries might elevate Australia's regional status from a medium to a significant political player in the Asia-Pacific. It is in Australia's economic interest to produce more gas and to export some of its production to the Asia-Pacific region, particularly to Chinese markets. Nevertheless, the NWS and the Australian gas industry have increased significantly the Australia–China economic interdependence, which may produce an impact in the historic Australia–US defence alliance.¹⁵ Another growing problem associated with energy security and reliable sources of energy in the Asia-Pacific are the disputed areas of the East and South China Sea, which are rich in natural resources, particularly in natural gas.¹⁶ Also, the increasing threat of international terrorism across East and South Asia may increase risks of a future terrorist launch against a strategic flashpoint such as the NWS, compromising energy security not only for Australia but also for countries across the region. This article endeavours to explain the importance of the NWS venture project for the Australian economy, the strategic importance of this venture to the gas industry in the Asia-Pacific, particularly to Chinese markets, and its impact to Australia–China relations.

The importance of the of the NWS venture for the Australian economy

Western Australia has become a major player in the resources industry across the globe, particularly in the Asia-Pacific. The Australian northwest can be regarded as one of the most economically promising areas in the country. Some experts in the development sector claim that the Pilbara region in Western Australia is 'the engine room of the Australian economy'.¹⁷ The NWS venture produced a major impact in the economic and social development of this region.¹⁸ The vast expansion and production of iron ore in Western Australia currently accounts for one-fifth of the total value of national exports.¹⁹

At the present moment, it holds 21 percent of the international share in iron ore, 15 percent in alumina, 12 percent in nickel, 9 percent in natural gas, 8 percent in diamonds, 7 percent in gold as well as 15 percent of minerals such as tantalum, 12 percent zircon, 10 percent limonite and 8 percent rutile.²⁰ It is believed that the Pilbara region alone fomented a 0.2 growth of the national population. Resource sector projects that are carried out on an onshore and offshore capacity, such as Gorgon, Wheatstone and Pluto, continue to drive capital investment and an influx of people to the region.²¹ Since 2001 exports on the resources sector have increased from 55.6 billion US dollars to over 185

¹⁵ G. Sherindan, *The partnership: the inside story of the US-Australian alliance under Bush and Howard* (Sydney: University of New South Wales Press, 2006), p.20.

¹⁶ B. Hayton, *The South China Sea: The struggle for power in Asia* (Yale: Yale University Press, 2014), p.122.

¹⁷ Regional Development Australia, Preliminary Pilbara Regional Plan (August 2010), p. 30.

¹⁸ Ibid.

¹⁹ Box A: The Effects of Changes in Iron Ore prices, *Statement on Monetary Policy*, February 2015, available at: <http://www.rba.gov.au/publications/smp/2015/feb/html/box-a.html> (accessed on 13 July 2015).

²⁰ Western Australian Government/Australian Government 'Submission to the Australian Defence Force Posture Review' (2009).

²¹ G. Briggs, 'Strategic Risk and North West Australia's Critical Infrastructure', *Future Directions International; Independent Strategic Analysis of the Australia's Global Interests* (2010) p.1.

billion US dollars.²² Western Australia currently exports approximately 60 percent of these figures to Chinese markets. Moreover, another important strategic aspect of the Northwest for energy security across the region would be its proximity to Asian markets.

The most ambitious project in the Australian northwest is the North West Shelf (NWS) venture. The venture includes a massive amount of hydrocarbon reserves within the Carnarvon Basin, and most of its liquid gas reserves remain unused. Approximately 29.5 billion US dollars have been invested in the project since the 1980s. The Australian NWS venture, managed by the Woodside-operated North West Shelf, currently embodies more than one-third of Australia's gas production. This major project commenced back in the 1980's and is a pivotal project for Australia's gas production to the Asia-Pacific region.²³

Furthermore, the NWS project consists of a venture between six significant resource sector multinational companies, BHP Billiton, BP, Chevron, Japan Australia LNG (MIMI), Shell and the Australian Woodside Energy. It is important to mention that this venture is the world's largest liquefied natural gas (LNG) supplier.²⁴ Australia has abundant LNG reserves that are located throughout on shore and off shores sites in northern and northwest Australia.²⁵ Over the last 29 years, the NWS venture has become the major domestic producer of gas, and it is of vital importance to gas supply and production in Australia. The NWS is of crucial strategic importance not only to Australian domestic consumption, but also as one of the greater exporters of gas to its neighbouring countries in Asia. The NWS venture has positioned Australia as a major liquefied gas exporter to the Asia-Pacific, particularly to China.²⁶

The importance of the NWS venture LNG production for Asia-Pacific markets

International Energy Agency statistical data indicates that at present Australia is the third largest LNG producer in the world, behind Qatar and Malaysia.²⁷ The agency reports that the country is operating at a production base of 24.4 million LNG tonnes per year. On the other hand, no other nation in the world has more plants under construction than Australia. By the time such projects come to completion, the country's northwest will be producing approximately 85.8 million tonnes per year.²⁸ If this prediction is accurate, Australia would then replace both Qatar and Malaysia as the leading LNG exporter in the world. This being so, Australia has the potential to become the leading

²² Northern Defence Posture: Securing our Natural Resources.

²³ R. Murray, *From the Edge of a Timeless Land: A History of the North West Shelf Gas Project* (Sydney: Allen and Unwin, 1991), p. 188.

²⁴ Woodside Australia Energy, 'First LNG Cargo for China Loading at Australia's North West Shelf', ASX Announcement, (May 2006), available on line: <http://www.woodside.com.au/Investors-Media-old/Announcements/Documents/17.05.06%20First%20LNG%20cargo%20for%20China%20loading%20at%20Australia's%20North%20West%20Shelf%20for%20China.pdf#search=new%20joint%20venture%20for%20LNG%20supply%20in%20china> (accessed 2 February 2015).

²⁵ G. Briggs, 'The Global Energy Demand for Australian Sourced LNG', *Future Directions International: Independent Strategic Analysis of the Australia's Global Interests*, (2010).

²⁶ E. Greenblat, 'Chinese Join Shelf Partners', *The Age* (August 26, 2002), available on line: <http://www.theage.com.au/articles/2002/08/25/1030053010047.html> (accessed 2 February 2015).

²⁷ 'Can Australia become the world's leading LNG exporter?', *ABC News* (21 October 2013), available online: <http://www.abc.net.au/news/2013-10-14/macfarlane-lng-exports/5014018> (accessed 27 January 2015).

²⁸ *Ibid.*

gas producer and exporter in the Asia-Pacific region, and particularly to Chinese markets. Due to steady population growth and the need for reliable, cleaner sources of energy, Australia should become an important political player across the region. Thus, energy security concerns could raise Australian regional significance from a medium to a major regional player while dealing with its Asian counterparts.

There are concerns, however, that the strategic importance of the NWS venture in the Asia-Pacific could be compromised due to a slowing Chinese economy. According to recent reports on gas investments and exploration, the Western Australian resources sector, previously a booming industry, has already ‘past its peak and is firmly on the wane’.²⁹ Investments peaked in the later quarter of 2013, with most LNG projects now coming closer to completion. Spending and exploration are still at historic highs, however new project investment is on a downward trend.³⁰ Nevertheless, the introduction of the latest technology and infrastructure in the Northwest of Australia is still driving the expansion of national gas production. According to latest reports, LNG production should, in the short term, become the most significant source of Commonwealth revenue.³¹ Also, easy access deposits will trigger high production levels for several decades to come. The Carnarvon and Browse basin reserves will meet an increase in global demand for natural gas.³² It is believed that the gas boom is set to take place throughout 2015 and 2016, with LNG exports shooting up to 70 percent and then stabilising at 48 percent a year.³³ According to these predictions, gas exports will be placed in the limelight of Australian’s economy.³⁴

Furthermore, the NWS Chevron project has recently sealed a commercial agreement with the South Korean industrial conglomerate SK Group. This binding agreement states that, from 2017, Chevron will supply South Korea with no less than 4.5 million tonnes of LNG for a five years period.³⁵ A slowing Chinese economy has produced an impact on the resources industry and iron ore prices, but gas exports to both China and the Asia-Pacific region are still growing strong.³⁶ This being so, LNG exports will continue to be on high demand and a liability in the region. This will secure Australian influence and relevance in the international gas industry for many years to come.

²⁹ A. Macdonald-Smith, ‘Oil, gas investment boom over, exploration at historic highs’, *The Australian Financial Review* (28 August 2014), available on line:

http://www.afr.com/p/business/companies/oil_gas_investment_boom_over_exploration_aN81emmxJhvWq13XvuBy2O (accessed 27 January 2015).

³⁰ Ibid.

³¹ Ibid.

³² Australian Defence Force, ‘Defence Force Posture Review: Initial Assessments Against the Review’s terms of Reference’.

³³ ‘Australia is expected to become the world’s largest exporter of liquefied natural gas (LNG) within four years’, *The Australian Business Review* (31 October 2014), available on line:

<http://www.theaustralian.com.au/business/mining-energy/australia-to-be-worlds-largest-lng-exporter-hsbc/story-e6frg9df-1227108582779> (accessed 28 January 2015).

³⁴ Ibid.

³⁵ Chevron signs sales and purchase agreement with SK Group for over a 4 million tonnes of LNG, *Oil Earth* (21 January 2015), available on line:

http://www.oilearth.com/n/Chevron_sign_sales_and_purchase_agreement_with_SK_Group_for_over_4_million_tons_of_LNG/4774535e5a80.aspx (accessed 28 January 2015).

³⁶ K. Diss, ‘LNG hailed as Australia’s next big revenue raiser’, *ABC News* (7 December 2014), available online: <http://www.abc.net.au/news/2014-12-07/lng-hailed-as-australias-next-big-revenue-raiser/5949654> (accessed 27 January 2015).

The strategic importance of Australian LNG as a source of cleaner energy for Chinese markets

The Chinese economic miracle has created a political environment where there is a pressing need for reliable sources of energy to sustain steady national economic growth. However, since the country's commercial opening to international markets, the levels of pollution have increased considerably.³⁷ It is a pressing issue for Chinese domestic politics to secure reliable, and yet, cleaner sources of energy.³⁸ It has been claimed by the Intergovernmental Panel on Climate Change (IPCC) that the effects of such carbon emissions in China, if left unchecked, will considerably increase the likelihood of irreversible damage to their ecosystem.³⁹ According to this report, the temperature in China would have a significant impact on its seawaters.⁴⁰ The rise in seawaters would affect the fishing industry and make the entire South and East Asian region more prone to natural disasters.⁴¹ A high carbon footprint would produce a significant impact on the Chinese quality of life, affecting generations to come.⁴² As a result, the Chinese government has recently stated that it will be promoting lower carbon emissions and energy efficiency policies in the country.⁴³

The Australian LNG market became particularly attractive to China as a cleaner source of energy for their booming economy.⁴⁴ It is believed that by 2020 China may be importing approximately 50 million tonnes of LNG, a seventh of the world demand.⁴⁵ Accordingly, Chinese demand for LNG would surpass Korean consumption by no later than 2017.⁴⁶ China's rapidly growing demand for reliable and cleaner energy inflates its dependency on Australian resources thus elevating Australian strategic importance for energy security across the region⁴⁷.

The geostrategic impact of NWS in Australia–China relations

By becoming one of the greatest exporters of gas with its neighbouring countries, Australia has significantly increased its geopolitical and strategic power across Asia.⁴⁸ With the

³⁷ F. Zhou, 'China's Energy Conservation Strategy', in Elspeth Thompson, 'Conservation in East Asia', *World Scientific Publishing*, vol.7, 2010, p.144.

³⁸ *Ibid.*, p.145.

³⁹ J. Gupta, 'How Climate Change will impact China – latest IPCC report', 3 October 2014, available online: <https://www.chinadialogue.net/blog/7458-How-climate-change-will-impact-China-latest-IPCC-report/en> (accessed on 9 July 2015).

⁴⁰ Intergovernmental Panel on Climate Change (IPCC), *Climate Change 2014: Mitigation of Climate Change*, available online: <https://www.ipcc.ch/report/ar5/wg3/> (accessed on 9 July 2015).

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ F. Jotzo, 'China makes its formal climate change pledge', *The Interpreter*, 1 July 2015, available online: <http://www.lowyinterpreter.org/post/2015/07/01/China-makes-formal-climate-change-pledge.aspx>, (accessed on 9 July 2015).

⁴⁴ A. Macdonald-Smith, 'China's clean air quest to drive LNG investment: Santos', *Sydney Morning Herald* (May 26 2014), available at: <http://www.smh.com.au/business/chinas-clean-air-quest-to-drive-lng-investment-santos-20140526-38zss.html> (accessed on 8 July 2015).

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ G. Raby, 2010. 'The Rise and Rise and Rise of China: implications for Australia', *Keynote Address to the Future Summit, Grand Hyatt, Melbourne* (24 May 2010), available online: <http://www.china.embassy.gov.au/bjng/spch24may.html> (accessed 2 February 2015).

⁴⁸ C. Sen Yu and J. Xiong, 'The dilemma of interdependence: current features and trends in Sino-Australian relations', *Australian Journal of International Affairs*, (5) 66, p 579-591 (2012), p.579.

growing demand for reliable, cleaner sources of energy, the NWS venture has the potential to change Australia from having a ‘middle power’ status to that of a major political and geostrategic regional player.⁴⁹ This could have a major impact on the way in which diplomatic relations take place between Australia, countries in the Asia-Pacific, and particularly with China. The NWS venture has placed China in ‘heavy reliance on Australia’s mineral, and increasingly, energy resources’, enhancing Australia’s bargaining power with China, by giving it a level of influence well beyond its size in terms of population or geostrategic importance.⁵⁰

The NWS venture and natural resources agreements substantially increase Australian bargaining power with China. However, it is important to state that trade relations between the two countries are becoming more interdependent. Since 2000 the total trade between China and Australia intensified and it continues to increase significantly. In 2002 alone bilateral trade reached 10 billion US dollars, reaching 29 billion US dollars in 2004. The recent free trade agreement sealed with China will unlock significant benefits to Australia and increase the interdependence between the two nations.⁵¹ The new trade agreement will produce major implications for the economies of both countries, having broad repercussions on national agriculture, the resources sector, general trade, financial services and investment.⁵²

It is important to note that the Chinese dream of a ‘new silk road’ could be yet another example of the growing interdependence between the Australian and the Chinese economies.⁵³ Australian iron ore resources are of crucial importance to build such roads, thus helping China to pursue its economic ambitions with other neighbouring countries.⁵⁴ On the other hand, Australia also needs Chinese investment and the capital coming from the iron ore industry.⁵⁵ A decrease in Chinese demand for iron has already caused a significant impact on the Australian economy and its national revenue.⁵⁶ If the current trend continues, softer iron ore prices will compromise future prosperity and economic growth in the country. Be that as it may, the advent of the free trade agreement and intensified Australia–China relations will impact the regional balance of power, particularly the historical Australian defence alliance with the United States.

⁴⁹ Ibid.

⁵⁰ G. Raby, 2010, ‘The Rise and Rise and Rise of China: implications for Australia’, *Keynote Address to the Future Summit, Grand Hyatt, Melbourne* (24 May 2010), available on line: <http://www.china.embassy.gov.au/bjng/spch24may.html> (accessed 2 February 2015).

⁵¹ The Hon T. Abbott PM, ‘Landmark China-Australia Free Trade Agreement’, *media release* (17 November 2014), available on line: <http://www.smh.com.au/business/the-economy/who-wins-in-australiachina-free-trade-agreement-20141117-11ojvd.html> (accessed on 30 January 2015).

⁵² M. Mason, ‘Who wins in the Australia-China free trade agreement’, *Sydney Morning Herald Business Day* (17 November 2014), available online: <http://www.smh.com.au/business/the-economy/who-wins-in-australiachina-free-trade-agreement-20141117-11ojvd.html> (accessed on 30 January 2015).

⁵³ The Chinese project of a Silk Road economic belt would connect countries across Eurasia, branching out across Southeast Asia. This would create a maritime component that would extend from the Indian Ocean to the Persian Gulf and the Mediterranean, *in* Nadele Rolland, ‘China’s New Silk Road’, available at: <http://www.nbr.org/research/activity.aspx?id=531>, (accessed on 11 July 2015).

⁵⁴ Ibid.

⁵⁵ M. Stanley, ‘Can China’s silk road save iron ore?’ *Houses and Holes in Commodities*, 9 June 2015, available at: <http://www.macrobusiness.com.au/2015/06/can-chinas-silk-road-save-iron-ore/> (accessed on 13 July 2015).

⁵⁶ Ibid.

Australia–China interdependence and its impact on the Australian–US defence alliance

The growing interdependence of Australia in its trade relations with China could have major implications on the historic defence alliance with the United States (US).⁵⁷ Australia–China relations are on the rise, however, they are not symmetrical and may at times be conflicting. On the one hand the Australia–China relationship seems to be growing stronger in trade and particularly with the gas industry, on the other however there are security and geopolitical concerns.⁵⁸ Australia is currently in a situation where it must honour its duties as a US ally, but it also must place itself in the international arena in such a way that will not provoke China’s sensitivities.

Some strategic thinkers claim that, due to previous political patterns of behaviour and the history behind both the US and China, a conflict between these two nations may take place in the near future.⁵⁹ China’s rise as a world power and particularly US advocacy of International Human Rights may be seen by China as a threat to its domestic structure. The US, on its turn, has major concerns that China may replace its role as a leading economic and military power in the world.⁶⁰ This could also pose a threat to US security and strategic alliances and cooperation partnerships across the globe. In this regard, there are claims that China could be determined, as was the Soviet Union during the Cold War years, to expand its sphere of influence throughout the surrounding regions with the aim of achieving political hegemony in the international arena.⁶¹

With the end of the so called ‘Pax Americana’ and US decline as the world’s leading economic and military power, a new world order is developing and with it a new balance of power between the nations is unfolding. This new world order will produce major implications for the future of defence cooperation alliances across the globe. US economic decline, and the nation’s dethronement as the world’s political and military hegemon, is already producing considerable change in the international political landscape.⁶² There are claims that the current domestic political situation in the US is ‘dysfunctional’, which may lead it to an inexorable road towards further political weakening and decay.⁶³ Arguably, these could be regarded as exaggerated doomsday claims. However, the fact is that the international economic and military order is going through a new era and the US hegemony and indisputable supremacy of the past seem to be no more. A new balance of power is emerging in the world where US unilateralism will no longer be dominant, but rather several new emerging powers. The new world order has morphed from American hegemony and unilateralism into

⁵⁷ G. Sherindan, *The partnership: the inside story of the US-Australian alliance under Bush and Howard* (Sydney: University of New South Wales Press, 2006), p.20.

⁵⁸ C. Sen Yu and J. Xiong, ‘The dilemma of interdependence: current features and trends in Sino-Australian relations’, *Australian Journal of International Affairs*, vol 66, no5 (2012) pp. 579-591, p580.

⁵⁹ H. Kissinger, *World Order: Reflections on the Character of Nations and the Course of History* (New York: Penguin books, 2014), p.228.

⁶⁰ *Ibid.*, p. 230.

⁶¹ *Ibid.*

⁶² G. Rose and J. Tepperman. ‘Dysfunction Junction: Trouble on the Home Front’, *Foreign Affairs*, vol. 93, no.5 (2014), p.2,

⁶³ F. Fukuyama, ‘America in Decay: The Sources of Political Dysfunction’, *Foreign Affairs*, vol. 93, no.5 (2014), p.5.

multilateralism, where various new power blocs are developing in the international scenario.⁶⁴

The rise of China, energy security and the South China Sea dispute

As US power seems to be weakening, China's rising economic might and its growing geostrategic importance in the international arena, particularly in the Asia-Pacific, raises concerns about future Imperialistic ambitions.⁶⁵ With a booming Chinese economy and its quest for reliable sources of energy, the disputed areas in the East and South China Sea are raised once again to political prominence.⁶⁶ Since the 1990s China has been concerned with reliable sources of energy to ensure its steady growth and prosperity. During the late 1980s Chinese scientists found that parts of the South China Sea, such as in the region of Zengmu (James) Shoal, off the coast of Borneo, was particularly rich in oil and natural gas.⁶⁷ It is claimed that this region has approximately 91 billion barrels of oil. Additionally, it is believed that in the Spratly Islands alone there are approximately 25 billion cubic metres of natural gas and 105 billion barrels of oil.⁶⁸

China's modernised military capabilities and its push towards a stronger military presence in the region has been a matter of growing concerns to the international community. In 2013 China declared an Air Defence Identification Zone (ADIZ) over parts of the East China Sea.⁶⁹ Japan, Korea and Taiwan have declared their respective ADIZs in the past, and the current Chinese military posture and assertiveness is increasing tensions across the region.⁷⁰ It is claimed that new Chinese ADIZ includes the disputed Senkaku Islands.⁷¹ These islands are strategically crucial for Chinese naval strategy since they provide a gateway between Japan and Taiwan, thus allowing free access to Pacific waters.⁷²

On a final note, another problem associated with a greater Chinese military presence in the region may be due to the disputed area of Taiwan.⁷³ In a political scenario where an invasion of Taiwan would be imminent, the likelihood of the US stepping into the conflict is rather significant.⁷⁴ It is claimed that the dispute between China and Japan for

⁶⁴ J. Timmos Roberts, 'Multipolarity and the new world (dis)order: US hegemonic decline and the fragmentation of the global climate regime'. *Global Environment Change*, vol.21, no 3 (2011), pp. 776-784, p781.

⁶⁵ C. Tubilewicz, 'The 2009 Defence White Paper and the Rudd Government's Response to China's Rise', *Australian Journal of Political Science*, vol.45, no 1 (2010), pp. 149-157, p151.

⁶⁶ R. Haddick, *Fire on the Water: China, America and the Future of the Pacific* (USA: Library of Congress Cataloguing in Publication Data, 2014), p.9.

⁶⁷ B. Hayton, *The South China Sea: The struggle for power in Asia* (Yale: Yale University Press, 2014), p.122.

⁶⁸ Ibid.

⁶⁹ J. Perlez, 'Calls Grow in China to Press Claim for Okinawa', *New York Times*, 13 June 2013, available at: http://www.nytimes.com/2013/06/14/world/asia/sentiment-builds-in-china-to-press-claim-for-okinawa.html?_r=0 (accessed on 9 July 2015).

⁷⁰ R. Haddick, *Fire on the Water: China, America and the Future of the Pacific* (USA: Library of Congress Cataloguing in Publication Data, 2014), p.16.

⁷¹ Ibid.

⁷² J. Perlez, 'Calls Grow in China to Press Claim for Okinawa', *New York Times*, 13 June 2013, available at: http://www.nytimes.com/2013/06/14/world/asia/sentiment-builds-in-china-to-press-claim-for-okinawa.html?_r=0 (accessed on 9 July 2015).

⁷³ Ibid.

⁷⁴ R. Patrick, 'Australia's Future Submarines at War Against China?', *Sea Pacific Defence Reporter Journal*, (2013), p.28.

Taiwan, and disputed borders in areas near the East and South China Sea, could trigger a multilateral conflict in the region.⁷⁵ At the present moment, China is still reluctant to disclose any of its medium to long-term military strategic plans. A strong strategic focus on coastal defence is a well-known Chinese tradition, yet its new maritime strategic posture is raising concerns among regional nations, Australia included.⁷⁶ The China–US relationship is crucial to strategic stability in the Asia-Pacific. Nevertheless, it cannot be ruled out that China’s quest for reliable sources of energy, and ideological and regional strategic divergences with the US, could bring both super powers to clash in the near future.⁷⁷ It is therefore fundamental to promote a defence partnership between these two countries so that both the Chinese and US vision for the Asia-Pacific is taken into consideration. Thus, Australia as a regional power will also need to rethink its defence alliance with the US in the light of China’s rising power. A greater Australia–China defence dialogue could potentially water down suspicion towards any military strategic manoeuvres across the region.

The importance of China–US–Australia security cooperation for the future stability of the Asia-Pacific

It is crucial that security cooperation between Australia, China and the US be promoted in the Asia-Pacific. The best pathway for Australian diplomatic relations with China, it seems, would be to positively encourage a ‘steady and constructive China–US–Australia triangular relationship’.⁷⁸ Indeed, China’s booming and rising economy has been seen by many analysts as the greatest challenge to the Australian, New Zealand and US defence alliance.⁷⁹ As paradoxically as it seems, in order to successfully achieve a balance of power in Asia it is paramount to develop a China–US defence partnership.⁸⁰ The promotion of international policies that will bring about a combination of balance of military strategy with partnership diplomacy between these two nations is vital for political stability in the Asia-Pacific.⁸¹ A purely military balance of power could bring about hostility between China and the US, and an approach based solely on mutual cooperation will prove to be insufficient. This carefully-crafted diplomatic balance may not alleviate all divergences between both China and US, but it will most likely mitigate their antagonisms.⁸² Thus, by encouraging a partnership between these two nations, not only a strategic clash between China and the US could be avoided, but also political instability and the spreading of Islamic terrorism in South East Asia.⁸³ It is important to encourage a China–US–Australia defence partnership to promote Australian national interests, security and stability in the region. Australia’s increasing role as a major energy producer and exporter to booming economies in the

⁷⁵ Ibid.

⁷⁶ M. Farrer, ‘Reorientation of Chinese Naval Focus and the Expansion of South Sea Fleet’, Asia Pacific Defence Reporter, 2012,

⁷⁷ Defence White Paper, Australian Government/Australian Government Department of Defence (2009), available online: <http://www.defence.gov.au/whitepaper/2009/> (accessed 2 February 2015).

⁷⁸ C. Sen Yu and J. Xiong, ‘The dilemma of interdependence: current features and trends in Sino-Australian relations’, *Australian Journal of International Affairs*, vol. 66, no 5 (2012), pp. 579-591, p585.

⁷⁹ W. Tow and L. Hay, 2001, ‘Australia, the United States and a “China growing strong”’: managing conflict avoidance’, *Australian Journal of International Affairs*, vol. 55, no 1 (2001), pp37-54, p40.

⁸⁰ H. Kissinger, *World Order: Reflections on the Character of Nations and the Course of History* (New York: Penguin books, 2014), p. 301.

⁸¹ Ibid.

⁸² Ibid.

⁸³ P. J. Smith, ‘China’s Economic and Political Rise: Implications for Global Terrorism and US-China Cooperation’. *Studies in Conflict & Terrorism*, vol.32,(2009), pp.627–645, p630.

Asia-Pacific increases its bargaining power in the region. Therefore, Australia could operate as a moderating power between US and China in the Asia-Pacific, thus promoting stability and defence cooperation across the region.

It is important to mention that there are already some positive efforts towards China–US–Australia defence cooperation in the Asia-Pacific. There are recent reports stating that these nations have recently carried out joint training operations in the region.⁸⁴ This might be an indicator of a brighter future where defence cooperation between two world powers and Australia will bring about stability and security to the Asia-Pacific. Another important aspect of China–US–Australia defence cooperation would be border protection issues and the fight against Islamic extremism and terrorist organisations in Asia.⁸⁵ Thus, this development may promote a ‘third way’ to geopolitics and strategy in Asia, where China–US–Australia defence cooperation would steadily increase. However, the complexity of the Asia-Pacific also urges Australia to develop its own defence imprint in the region. A closer trade partnership with China and Australia’s growing strategic gas industry might increase the likelihood of a greater defence dialogue with China and other Asia-Pacific nations.

Another important issue regarding Australia–China relations would be the NWS venture permanent agreement with the state-owned China National Offshore Oil Corporation (CNOOC).⁸⁶ Under this agreement, CNOOC acquired a 5.3 percent interest in the venture for \$348 million, and the venture agreed to supply China with more than 3.3 million tons of LNG for 25 years. Australia signed a definitive agreement with CNOOC on 21 October 2013, which potentially weakens the country’s bargaining power with China.⁸⁷ Furthermore, this permanent agreement with Chinese investment on natural resources in Australia could create a scenario in which China is able to secure natural resources supplies.⁸⁸

This agreement could be a political indicator that China aims at expanding its sphere of influence in the region and that its growing military might could result in imperialistic advances in the near future.⁸⁹ The political dynamics in the Asia-Pacific are very complex. It cannot be disregarded that China’s permanent agreement with the NWS venture could be a political move to neutralise Australia’s strategic importance in the region. In a multipolar world order where new power blocks are emerging and a new balance of power is developing, both China and Australia could become major political players in the region. It is crucial for the promotion of peace and stability in the Asia-Pacific to encourage greater China–US–Australia cooperation. Furthermore, Australia’s role as a key gas provider significantly increases the country’s bargaining power with its Asian counterparts. Australia must take advantage of the existing political momentum to

⁸⁴ Australian Government Australian Government Department of Defence Annual Report (2013-2014), vol. 1, part 2.

⁸⁵ P. J. Smith, ‘China’s Economic and Political Rise: Implications for Global Terrorism and US-China Cooperation’, *Studies in Conflict & Terrorism*, vol.32, (2009), pp.627–645, p.630.

⁸⁶ CNOOC Ltd, ‘CNOOC Ltd Signs a Definitive Agreement to Acquire Interest in Australian LNG JV’, *press release*, (21 October 2013), available online: http://www.cnooc.com/art/2013/10/21/art_8461_1131021.html (accessed 2 February 2015).

⁸⁷ *Ibid.*

⁸⁸ T. H. Moran, *China’s Strategy to Secure Natural Resources: Risks, Dangers and Opportunities* (Washington : Peterson Institute for International Economics, 2010),p.6

⁸⁹ Defence White Paper, Australian Government Australian Government Department of Defence (2009), available online: <http://www.defence.gov.au/whitepaper/2009/> (accessed 2 February 2015).

move from being a ‘middle power’ and become a major political player in the Asia-Pacific.

The Australian northwest, the NWS and international terrorism

Energy security, defence and economic policies are matters that are deeply intertwined and tend to be carefully analysed by policy makers. Currently it is a matter of concern to prevent any future terrorist threats or launches against the NWS, a site of growing strategic significance and magnitude. The level of defence is still considered insufficient if compared to the economic relevance of the region.⁹⁰ It would be in Australia’s national interest to have a stronger naval facility closer to the site to respond to uncertainties in the Indian Ocean rim and Southeast Asia.⁹¹ A larger military footprint in the Australian northwest would assist with sea-lanes protection, secure the industry supply lines and increase consumer confidence in the region.⁹²

It is crucial for Australia to establish the relationship between securing energy resources and sites such as the NWS and economic and national security. As mentioned, the NWS is of major importance to the national economy, both for domestic consumption and also as a vital source of budget revenue. Furthermore, Australian LNG is a cleaner source of energy for the country and for the Asia-Pacific, which may assist with carbon emissions reduction targets across the region.⁹³ The NWS is a critical infrastructure location that must be kept secure from possible terrorist activity.⁹⁴ In a federal state, it is the Commonwealth States and Territories’ main responsibility to prevent the advent of a terrorist launch against critical infrastructure sites.⁹⁵ Nevertheless, it is important to acknowledge that the NWS gas pipelines and facilities consist of on shore and off shore critical infrastructure. Consequently, off shore gas ducts and critical infrastructure would lie beyond Australia’s domestic jurisdiction.⁹⁶ Thus, it is crucial for national energy security that the Australian Defence Force starts playing a more decisive role in the Northwest of the country.⁹⁷

Nonetheless, it is valid to mention that there is a coordinated approach to critical infrastructure protection in the country. It involves the sharing of information and logistics between the National Counter-Terrorism Committee and the National

⁹⁰ Northern Defence Posture: Securing Our Natural Resources, available online:

https://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB8QFjAA&url=http%3A%2F%2Fwww.aph.gov.au%2Fparliamentary_business%2Fcommittees%2Fhouse_of_representative_s_committees%3Furl%3Djscna%2Fsubs%2Fsub0147%2520attach%2520e.pdf&ei=PurOVJ-IJaXamgWLuIKYc&usq=AFQjCNG4dNudATyTK88nWDusgve8_nwGZA&sig2=tgRtzLcaL7tKKy1fGusw2w (accessed 15 January 2015).

⁹¹ Ibid.

⁹² Ibid.

⁹³ A. Macdonald-Smith, ‘China’s clean air quest to drive LNG investment: Santos’, Sydney Morning Herald, May 26 2014, available at: <http://www.smh.com.au/business/chinas-clean-air-quest-to-drive-lng-investment-santos-20140526-38zss.html>, (accessed on 8 July 2015).

⁹⁴ Department of Attorney General, ‘Critical Infrastructure Protection’, *Commonwealth of Australia* (Canberra: 2008).

⁹⁵ Western Australian Government/Australian Government, ‘Submission to the Australian Defence Force Posture Review’, available online: <http://www.defence.gov.au/Publications/Reviews/ADFPPosture/Submissions/WA%20Government%20Submission.pdf> (accessed 2 February 2015).

⁹⁶ Ibid.

⁹⁷ Ibid.

Intelligence Coordination Committee, and guidelines established by the National Guidelines for the Protection of Critical Infrastructure.⁹⁸ By adopting this multifaceted approach to the sharing of information, the Australian Government aims at ‘taking all necessary and practical action to protect Australia and Australians from terrorism home and abroad’.⁹⁹

Since the recent terror incidents in Western nations such the attack against the independent satirical magazine Charlie Hebdo in France, and incidents such as the Martin Place siege in Sydney, Australia’s National Terrorism Public Alert System has been raised to ‘high’.¹⁰⁰ The growing strategic and economic relevance of the NWS deserves greater attention from Australian defence experts. With home-grown terrorism and international terrorism on the rise, there are pressing security challenges to Australia.¹⁰¹ The time is ripe for the Australian Defence Force and national security strategists to think of ways and means to increase military presence in the northwest of the country.

Conclusion

In conclusion, the NWS venture is the most significant resources project in Australian history. It has become the major domestic producer of gas and one of the most important LNG producers in the Asia-Pacific. This venture strengthens the Australian economy and increases the country’s geostrategic significance in the region, particularly with China due to its ‘heavy reliance’ on Australian minerals and energy resources. The project has the potential to change Australia’s ‘middle power’ status to that of a key political player in Asia, because it enhances its bargaining power with China and other countries in the region. However, it is important to state that there is a rising interdependence between Australian and Chinese markets, particularly with the free trade agreement recently ratified by these two nations. In this regard, the growing interdependence between the Australian and Chinese economies may produce an impact in the historic military and defence alliance between Australia and the US.

The Australia–China relationship seems to be intensifying, due to the NWS venture’s importance in the resources industry, particularly with the production of LNG, a reliable and cleaner source of energy. Nonetheless, there are growing concerns for future strategic and defence alliances in the Asia-Pacific. With the US economy on decline, unilateralism comes to an end as multilateralism in the international arena rises. In this new world order, several new power blocks are emerging and a new balance of power is unfolding. This will produce major geopolitical implications in Asia. The role that China aims to play in the Asia-Pacific and its strategic planning is still not clear for most analysts. Many international experts fear that the motivation behind China’s expansion of its naval and military capabilities will have future implications for disputed areas such as Taiwan and the South China Sea. Also, the sealing of a

⁹⁸ Trusted Information Sharing Network for Critical Infrastructure Protection, available online: <http://www.tisn.gov.au/Pages/default.aspx> (accessed 2 February 2015).

⁹⁹ Ibid.

¹⁰⁰ D. Wroe, ‘Terror alert level lifted for Australian police amid attack fears’, Sydney Morning Herald (20 January 2015), online <http://www.smh.com.au/federal-politics/political-news/terror-alert-level-lifted-for-australian-police-amid-attack-fears-20150120-12tyfn.html> (accessed on 29 January 2015).

¹⁰¹ P. Jennings ‘From lone wolves to trained militia, recruits to jihadism share many similarities in their pre-terror lives’, *Inquirer, The Weekend Australian*, January 10-11 (2015), p15.

permanent agreement with the NWS venture could be regarded as a Chinese political move to 'buy out' Australian resources. This could compromise Australia's strength when negotiating with its Chinese counterparts. Another matter of increasing concern for the future of the resources industry would be a Chinese economy that is growing at a much slower pace.

It is predicted that Australia's gas boom will 'take off' during the 2015–2016 period, due to the introduction of new infrastructure and latest technology. Moreover, booming economies in the Asia-Pacific, notably China, have a growing need for reliable and cleaner sources of energy. Australian LNG plays a fundamental role in cutting back carbon emission across the region, therefore mitigating problems associated with climate change. Consequently, gas and LNG production will, as a matter of fact, expand over the next years. Additionally, Australia's recent trade agreement with Korea and the growing importance of LNG exports in Asia place the country in the limelight of strategic planning and energy security in the region. The fact that NWS increases Australia's status as a significant political player seems to be indisputable. Nevertheless, in order to mitigate possible geopolitical confrontations in the Asia-Pacific, particularly between China and the US, a constructive triangular China–US–Australia defence relationship should be promoted. This triangular relationship could also assist with border protection policies and the fight against radical Islamic groups in the region.

Finally, Australia faces many challenges to national security and to control the spreading of home-grown and international terrorism within its borders and in surrounding Asian nations. With the current terror alert on 'high', it is a crucial to develop policies that will keep a critical infrastructure site such as the NWS secure. An attack to the NWS site would produce significant damage to the Australian economy and compromise energy security not only in Australia, but also across the Asia-Pacific. It is beyond doubt that an area of the strategic magnitude of the Australian northwest demands greater attention from public authorities and policy makers.

An Experiment in Peacekeeping: United Nations in Somalia 1992–1995

Rachelle Saad*

In the 1990s the United Nations embarked on a mission far-beyond its experiences developed over the previous forty years of peacekeeping—a mission that ultimately prompted the world’s temporary disengagement with peace operations. Since their beginning, UN peacekeeping missions have drastically evolved in their complexity and purpose. This has presented numerous challenges that have significantly impacted the organisation’s institutional capacity and ability to fulfil its mandate. The UN experience in Somalia witnessed a unique shift from a humanitarian ‘traditional’ peacekeeping operation—a mission that sought to maintain a pre-existing ceasefire—to a volatile experiment in peace enforcement designed to establish peace in a drastically difficult security environment. Underprepared and overwhelmed, the UN (and the United States) faced a situation that provoked a modification of the rules of peacekeeping, amplified confusion of objectives and methods of intervention and inevitably resulted in a failure to fulfil the mission’s mandate.

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The nature of United Nations (UN) peacekeeping operations has evolved rapidly over the years. Although the established principles and practices of peacekeeping have responded flexibly to new demands, the basic conditions for success remain unchanged:¹⁰² a clear and practicable mandate; the cooperation of the parties in implementing that mandate; effective and unified command in the field; the adequate provision of financial and logistic support; and the readiness of member states to contribute the required military, police and civilian personnel and specialists are all necessary for the successful implementation of a peacekeeping operation.

Despite the turmoil that ensued following the overthrow of President Siad Barre in 1991, the United Nations continued its peacekeeping and humanitarian efforts in Somalia. ‘Thrust into a situation of virtual anarchy’, however, the lightly-armed UN force swiftly became ‘hostages not peacekeepers’.¹⁰³ Prior to the end of operations in 1995, the UN’s role in Somalia was already perceived by many as a tragic one—a tragedy ‘of opportunities missed and strategic and operational blunders not justified by situational realities’.¹⁰⁴

The challenges and tensions of UN operations in Somalia manifested themselves in the various phases of the mission. The ‘UN Operation in Somalia I’ (UNOSOM I), deployed in April of 1992, sought to reconcile tensions between warring parties and secure passage for relief operations. Underprepared and ill-equipped, UNOSOM I failed to restore the basic security required for external relief operations. In December 1992, UNOSOM I was replaced by the ‘Unified Task Force’ (UNITAF). Led by the United States (US), UNITAF found successes in providing secure passage for humanitarian activities and enabling the peace process in Somalia. In May 1993, the ‘UN Operation in Somalia II’ (UNISOM II) took charge, the first peacekeeping mission to be given the mandate to use force in its operations, as it moved into an overarching nation-building phase. Strategic confusion, the steady collapse of political will and recurrent conflict resulted in a collective failure to fulfil mission objectives and the ultimate termination of the UN peacekeeping operation in Somalia. The Somalia ‘failure’ however was arguably less a failure of UN peacekeeping than a failure to apply and implement it effectively.

Uncovering the complexities of UN peacekeeping missions is no easy task and it is often easier to focus on ‘what’ happened or what ‘should’ have happened than to address questions of ‘how’ or ‘why’. The purpose of this article is to examine UN activity in Somalia between 1992 and 1995. It will cover UN peacekeeping and peace enforcement operations following the Somali civil war ceasefire in 1992 until the official discontinuation of UN intervention in 1995. In doing so this article seeks to explore some of the key challenges faced by the UN in Somalia; specifically looking at the gaps and relationships between mandates, political will, resources, capacity and realities in the field. Questions on the neutrality and impartiality of the UN in this context will also be addressed. Furthermore, this article will attempt to delve into the relationship between the UN and other actors in the maintenance of international peace and security,

¹⁰² B. Boutros-Ghali, *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-keeping* (New York: United Nations, 1992).

¹⁰³ J.T. O’Neill, and N. Rees, *United Nations Peacekeeping in the Post-Cold War Era* (London: Routledge, 2005), p. 112.

¹⁰⁴ J. Clark, ‘Debacle in Somalia: Failure of the Collective Response’, in Lori Damrosch (ed.), *Enforcing Restraint: Collective Intervention in Internal Conflicts* (New York: Council of Foreign Relations, 1993), p. 207.

namely the role of the United States and its implications on UN credibility and effectiveness in Somalia. This article will conclude by reflecting on (in reference to the case of Somalia) how UN peacekeeping and peace enforcement operations could be, or could have been, improved in order for the UN to continue to actively pursue its ultimate goal of attaining peace and justice.

Understanding the context

Before a peacekeeping operation is undertaken, it is important to obtain extensive information on political, social and economic circumstances.¹⁰⁵ To this end, it is important to note that before the UN ‘intervened’ in 1992, civil war and famine had devastated Somalia and the enduring local power struggles essentially rendered UN peacekeeping activities impossible.

A cursory look at the history of Somalia reveals the fractured nature of a country long moulded by political decentralisation¹⁰⁶—a country long embedded in the politics of a complex and rigid clan system. In an effort to maintain control and power, Somali warlords and elites systematically exploited the clan system of political patronage and provoked traditional clan rivalries. Favouritism, the exclusivity of resource provision, alienation and the arming of loyal factions perpetually encouraged clan violence and protracted an already dire humanitarian crisis. It is important to note that exploitation of the clan system was done both internally and externally. Proxy wars fought by states such as Egypt, Libya, Ethiopia and Eritrea (in order to serve their own national interest) further fuelled Somalia’s turmoil through the pervasive arming of various factions formed along clan lines.

Despite the defeat of President General Siad Barre and his dictatorship in 1991, Somalia’s conflict raged on as two clan leaders, General Mohamed Farah Aidid and Ali Mahdi Mohamed, fought for power. ‘Divide and rule’ tactics prevailed and violence ensued. A ceasefire was eventually agreed between the two warring factions in 1992. Somalia, however, was deemed a ‘failed state’—with no functioning government, the country was in a state of ‘anarchy’. Clan-divided, warlord-ruled and without a central authority able to enforce law (and essentially govern its people), the Somali people instinctively attempted to ensure their own survival by taking up arms. This is particularly significant with regards to UN operations in Somalia given that the UN eventually deemed disarmament as necessary to enable mission ‘success’. Security dilemmas are inevitable in a failed state; demobilisation is a risk few would take without certainty that a central authority could provide security. This cyclical and deteriorating security situation, coupled with political chaos and widespread banditry, impeded humanitarian efforts and peace initiatives in Somalia. A lasting solution to the crisis had to go ‘beyond the provision of emergency relief and address the daunting tasks of national reconciliation and the resuscitation of governance in Somalia’.¹⁰⁷

¹⁰⁵ J.S. Sutterlin, *The United Nations and the Maintenance of International Security: A Challenge to Be Met* (Westport, Connecticut: Praeger Publishers, 2003), p. 42.

¹⁰⁶ Clark, ‘Debaele in Somalia’, p. 207.

¹⁰⁷ K. Menkhaus, ‘International Peacebuilding and the Dynamics of Local and National Reconciliation in Somalia’, in Walter M. Clarke and Jeffrey M. Herbst (eds.), *Learning from Somalia: The Lessons of Armed Humanitarian Intervention* (Boulder, CO: Westview Press, 1997), p. 42.

Between November 1991 and March 1992, the war claimed approximately 30,000 lives and by June 1992, 5,000 Somalis were dying each day, one and a half million were on the brink of death and four and a half million were nearing starvation.¹⁰⁸ Famine engulfed vast regions of Somalia including the capital Mogadishu as starvation continued to claim in excess of 1,000 victims a day. By November 1992, approximately 80 percent of relief commodities were being seized.¹⁰⁹ This intensive looting was taking place by in large due to the fact that ‘food was serving as the currency of the land’—‘food equalled money and power’.¹¹⁰ Confronted by a society dominated by nomadic politics and warring clans, the UN went into Somalia only to encounter challenges far beyond the scope of the organisation’s experiences and capacity.

UNOSOM I: ‘traditional’ peacekeeping

In January 1992, Resolution 733 was adopted in response to the Somalian UN representative’s formal request for assistance. The UN Security Council Resolution, in addition to calling for a ceasefire between the warring factions, imposed an arms embargo, called for the Secretary-General to deploy ‘a fact-finding mission’ on the ground and requested increased levels of humanitarian assistance.¹¹¹ Humanitarian efforts, however, remained virtually impossible to implement due to the ongoing violence and criminality. The persistent raiding and looting of aid trucks impeded UN and allied supply efforts. On 24 April 1992 the ‘UN Operation in Somalia I’ (UNOSOM I) was established as a peacekeeping force under Resolution 751 with the primary objective being the protection of humanitarian operations.¹¹²

UNOSOM I was a ‘traditional’ peacekeeping mission operating within the context of a ceasefire agreement¹¹³ and it was initially deployed with the consent of Somalia’s de-facto political leaders. ‘Traditional’ peacekeeping is strictly bound by the principle of consent. The consent of the main parties involved in a conflict provides a UN peacekeeping operation with the ‘necessary freedom of action, both political and physical, to carry out its mandated tasks’.¹¹⁴ In the absence of such consent, a peacekeeping operation ‘risks becoming a party to the conflict; and being drawn towards enforcement action, and away from its intrinsic role of keeping the peace’.¹¹⁵

The situation in Somalia quickly proved to be far beyond the experience of any UN peacekeeping mission that had been previously deployed.¹¹⁶ UNOSOM I proved unable to meet the challenge it faced. The continuing violence and persistent attempts by various militias to steal humanitarian relief supplies simply rendered the small force

¹⁰⁸ O’Neill and Rees, *United Nations Peacekeeping*, p. 108.

¹⁰⁹ Clark, ‘Debacle in Somalia’, p. 213.

¹¹⁰ Ibid.

¹¹¹ A.J. Bellamy and P.D. Williams, *Understanding Peacekeeping* (Cambridge: Polity Press, 2010), pp. 223-224.

¹¹² See United Nations Security Council, *Resolution 751 (1992) Adopted by the Security Council at its 3069th meeting, on 24 April 1992, 24 April 1992, S/RES/751 (1992)*, available online: [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/751\(1992\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/751(1992))

¹¹³ O’Neill and Rees, *United Nations Peacekeeping*, p. 110.

¹¹⁴ United Nations, *United Nations Peacekeeping Operations: Principles and Guidelines* (New York: United Nations, 2008), p. 31.

¹¹⁵ Ibid.

¹¹⁶ L. Lewis and J. Mayall, ‘Somalia’, in M. Berdal and S. Economides (eds.), *United Nations Interventionism, 1991-2004* (New York: Cambridge University Press, 2007), p. 122.

unable to operate effectively.¹¹⁷ General Aidid did not approve the deployment of extra UNOSOM troops, further complicating fulfilment of the mandate. Practicality demanded that a decision be made: appease those with the power on the ground, or oppose them by force.¹¹⁸ The Security Council and Secretary-General agreed that the situation had become ‘intolerable’ and that resorting to force, as allowed under Chapter VII of the UN Charter, to deliver humanitarian assistance should be considered.¹¹⁹

UNITAF: the US takes the lead

By November 1992, the two principal problems, as identified by the UN, were famine and weapons.¹²⁰ In December 1992, the Security Council authorised a large US-led military-humanitarian intervention to secure ports and airfields, protect workers and shipments and assist in humanitarian efforts.¹²¹ The Unified Task Force (UNITAF), known to the American public as Operation Restore Hope, operated under Resolution 794 (passed December 1992) which authorised the use of ‘all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia’.¹²²

The US was regarded as the ‘only’ nation in a position to maintain neutrality and the only nation with the ability to launch the necessary large-scale aid operation.¹²³ The US-led charge was, for the most part, accepted by Aidid and Ali Mahdi (who had grown wary of UN peace efforts). Despite initial successes in protecting aid deliveries, success did not endure.

The UN Secretary-General wanted UNITAF to impose a ceasefire and disarm military factions but US leaders were reluctant to add to the mission objectives and complicate the relations among participants.¹²⁴ UNITAF’s problems began in earnest when its commanders and the UN Secretary-General differed over the definition of what constituted ‘a secure environment’ for the delivery of humanitarian assistance.¹²⁵ Moreover, Somali sentiments towards the American presence changed as the US administration changed. The Bush administration—fearing a ‘mission creep’ and the burdens of intervention—limited involvement whereas the Clinton administration was more receptive to the UN. Aidid lost confidence when he perceived that the US was cooperating with the UN and eventually turned against the US. With this, ‘the opportunity for disarmament by agreement was lost’.¹²⁶

¹¹⁷ Bellamy and Williams, *Understanding Peacekeeping*, p. 224.

¹¹⁸ Lewis and Mayall, ‘Somalia’, p. 122.

¹¹⁹ O’Neill and Rees, *United Nations Peacekeeping*, p. 112. See also United Nations, *Charter of the United Nations and Statute of the International Court of Justice* (New York: United Nations, 1945), available online: <http://www.un.org/en/documents/charter/>

¹²⁰ Ibid.

¹²¹ K.A. Mingst and M.P. Karns, *The United Nations in the 21st Century* (Boulder: Westview Press, 2007), p. 100.

¹²² United Nations Security Council, *Resolution 794 (1992) Adopted by the Security Council at its 3145th meeting, on 3 December 1992*, 3 December 1992, S/RES/794 (1992), available online: [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/794\(1992\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/794(1992))

¹²³ O’Neill and Rees, *United Nations Peacekeeping*, p. 112.

¹²⁴ D. Wolter, *A United Nations for the 21st Century: From Reaction to Prevention: Towards an Effective and Efficient International Regime for Conflict Prevention and Peacebuilding* (Baden-Baden, Germany: Nomos, 2007), p. 190.

¹²⁵ Bellamy and Williams, *Understanding Peacekeeping*, p. 224.

¹²⁶ O’Neill and Rees, *United Nations Peacekeeping*, p. 114.

UNOSOM II: mandating the use of force

Resolution 814 was passed on 26 March 1993. The Resolution arguably made Somalia ‘a testing ground for new peacekeeping ideas’.¹²⁷ ‘UNOSOM II was the first peacekeeping operation in UN history to be given a mandate to use force, not merely in self-defence but in pursuit of its mission’.¹²⁸ Authorised to act with or without the consent of the de facto parties, the use of force was mandated to protect humanitarian aid and to disarm Somali militias. Contingents were ordered to operate in a ‘traditional’ peacekeeping fashion when the use of force was not required, but were also authorised to act as peace enforcement units when force was required to carry out the mission.¹²⁹ This ‘incoherent mixture’ of peacekeeping and peace enforcement¹³⁰ significantly undermined UN efforts in Somalia.

UNOSOM II assumed responsibility for the maintenance of a secure environment throughout Somalia. Although the US handed official command back to the UN, the US remained ‘central to the enforcement measures concerned’.¹³¹ The US and the Secretary-General did not, however, share the same opinion on the objective of the use of force.¹³² ‘Both parties had widely divergent views on the purpose and nature of the operation and on who would provide the “muscle”’.¹³³

UNOSOM II encountered severe security problems that threatened the safety of mission personnel.¹³⁴ On 5 June 1993, an attempt to disarm militia loyal to Aidid resulted in the deaths of twenty-three Pakistani soldiers. All pretences of impartiality vanished thereafter. In addition to consent, a UN peacekeeping mission must not undertake activities that would compromise its image of impartiality. A UN peace operation requires a sound mission plan that is understood, communicated and effectively and impartially implemented at every level.¹³⁵ With the passing of Resolution 837, which authorised ‘the arrest and prosecution of those responsible for the attack’, UN peacekeepers entered in to a state of war with Aidid’s militia.¹³⁶ The UN became one of the players in the conflict.¹³⁷ With consent of all warring parties already disregarded (as it was virtually impossible to obtain), the UN mission in Somalia essentially self-destructed when impartiality was lost.

Following the ‘Black Hawk Down’ incident (3–4 October 1993), which resulted in the deaths of eighteen US soldiers, the US decided to withdraw from Somalia. Resolution

¹²⁷ Ibid., p. 115.

¹²⁸ Ibid.

¹²⁹ Ibid.

¹³⁰ Ibid., p. 107.

¹³¹ Bellamy and Williams, *Understanding Peacekeeping*, p. 229.

¹³² O’Neill and Rees, *United Nations Peacekeeping*, p. 115.

¹³³ Ibid., p. 116.

¹³⁴ Wolter, *A United Nations for the 21st Century*, p. 190.

¹³⁵ United Nations, *United Nations Peacekeeping Operations*, p. 38.

¹³⁶ Bellamy and Williams, *Understanding Peacekeeping*, p. 226. See also United Nations Security Council, *Resolution 837 (1993) Adopted by the Security Council at its 3229th meeting, on 6 June 1993*, 6 June 1993, S/RES/837 (1993), available online:

[http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/837\(1993\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/837(1993))

¹³⁷ Wolter, *A United Nations for the 21st Century*, p. 190.

897 (4 February 1994) ended all peace enforcement action. UNOSOM II was officially terminated on 31 March 1995.

The mandate versus ‘reality’

Somalia was a ‘multidimensional problem’ that required a clear mission strategy and plan of action that integrated all relevant dimensions: humanitarian, political and security.¹³⁸ Arguably, the ‘inadequate assessment’ of the situation led to a ‘total underestimation’ of the task facing UN efforts.¹³⁹ The UN adopted objectives that were difficult to measure, such as disarmament, restoration of the Somali state, political reconciliation and the formation of a coalition government.¹⁴⁰ Abstract guidelines, coupled with an arguably naïve notion of external force neutrality failed to respond to situational realities and further eroded UN peace efforts. The mandates (including resources, capacities, and practicable objectives) essentially could not meet the realities in the field and failed to adapt accordingly.

Resources provided for UNOSOM I could not meet the operational needs of the mission. Unrealistic expectations of what the resources and contingents provided could achieve, coupled with an incoherent mandate, immensely complicated UN efforts. Despite some success in creating safe passages for humanitarian relief and UNITAF’s powerful force presence (that caused a retreat and dispersion of local factions), confusion over the mandate and the restrictive use of powers inevitably led to the renewal of the factional offensive.¹⁴¹

The UNOSOM II mandate, in terms of strategy, was clearer than UNOSOM I and UNITAF. However, the mandate was ‘too ambitious in relation to the instruments and the will to implement it’.¹⁴² UNOSOM II’s broader mandate incorporated state-building and disarmament in addition to securing safe passages for humanitarian relief. This being said, ‘for such a broad objective the mission lacked means, equipment, expertise and personnel as well as the necessary integrated approach’.¹⁴³

As UN and US commanders made attempts to slide from peacekeeping into enforcement and back again,¹⁴⁴ tension with Aidid and Somali locals amplified and increased hostilities, endangering the mission’s personnel and objectives. Moreover, the mandate, and in particular the euphemism ‘all necessary means,’ could not establish clear-cut criteria for success and fuelled debates surrounding interpretation. Furthermore, by ‘dropping’ its impartiality (with Resolution 837), UNOSOM II’s challenges grew and exacerbated its inability to operate effectively without the necessary resources (including highly trained troops to match all contingencies) and a unity of purpose (particularly with regards to involuntary disarmament and its nation-building objectives). ‘UNOSOM I, UNITAF and UNOSOM II all failed to fulfil their mandate’, demonstrating that a

¹³⁸ O’Neill and Rees, *United Nations Peacekeeping*, p. 121.

¹³⁹ *Ibid.*

¹⁴⁰ A. S. Natsios, ‘Humanitarian Relief Intervention in Somalia: The Economics of Chaos’, in Walter M. Clarke and Jeffrey M. Herbst (eds.), *Learning from Somalia: The Lessons of Armed Humanitarian Intervention* (Boulder, CO: Westview Press, 1997), p. 77.

¹⁴¹ *Ibid.*, p. 132.

¹⁴² *Ibid.*

¹⁴³ Wolter, *A United Nations for the 21st Century*, p. 190.

¹⁴⁴ M. Pugh, ‘Peace Enforcement’, in T.G. Weiss and S. Daws (eds.), *The Oxford Handbook on The United Nations* (New York: Oxford University Press, 2007), p. 374.

successful operation requires ‘not only a clear mandate but the means to implement it’.¹⁴⁵

The UN–US relationship

‘Of all the relationships between member countries and the organisations they create, the one between the United States and the UN is perhaps the most unique, complex, and important’.¹⁴⁶ The UN’s ability to act in any situation depends on the compliance of member states and their provision of the resources necessary to successfully accomplish a mission.¹⁴⁷ The operation in Somalia in particular demonstrated ‘both the need for and the risk of co-operative coexistence’ between the US and the UN.¹⁴⁸ The UN mission was heavily dependent on US capabilities and participation. The intricacy of the UN–US relationship illustrates not only the vitality of the relationship, but also the limitations and challenges that emerge with the type of multinational force that was deployed in Somalia.

The US, although invested in the mission and a crucial provider of military support, sought to limit the duration of their military involvement. Following UNITAF, the US was willing to rapidly hand command over to UN peacekeeping forces, but UNOSOM II remained strongly American orientated. The US continued to dominate the operation’s command and control structure. It is argued that at ‘the heart’ of UNOSOM II’s command problems was the attitude and role of the US.¹⁴⁹ US military units remained independent, reported to headquarters in the US and launched raids outside UNOSOM’s mandated tasks (without communicating intentions to UN commanders). The lack of a unity of command soon proved disastrous.

The US Ranger operation that led to the Black Hawk Down incident and the Battle of Mogadishu was not communicated to the UN. After the incident, Jonathan Howe (head of UNOSOM), confessed that the UN should ‘never again’ allow two different military commands to operate independently in the same area.¹⁵⁰ Consequently, the US could not bear any further costs to its citizens. The incident led to US withdrawal from Somalia and a re-evaluation of future US participation in peacekeeping operations. ‘The UN was left to go it alone’ but the challenges were overwhelming and beyond the organisation’s capability.¹⁵¹ The UN was thus forced to follow suit.

The UN’s members lack a common military doctrine.¹⁵² Nations want ‘to dictate where their contingents will serve and what duties they will perform’.¹⁵³ UNOSOM II was not

¹⁴⁵ O’Neill and Rees, *United Nations Peacekeeping*, p. 132.

¹⁴⁶ J. T. Howe, ‘Relations Between the United States and United Nations in Dealing with Somalia’, in Walter M. Clarke and Jeffrey M. Herbst (eds.), *Learning from Somalia: The Lessons of Armed Humanitarian Intervention* (Boulder, CO: Westview Press, 1997), p. 77.

¹⁴⁷ *Ibid.*, p. 192.

¹⁴⁸ R. Thakur, ‘From Peacekeeping to Peace Enforcement: The UN Operation in Somalia’, *The Journal of Modern African Studies*, vol. 32 (1994), p. 387.

¹⁴⁹ O’Neill and Rees, *United Nations Peacekeeping*, p. 127.

¹⁵⁰ R. Barton, *The Weapons Detective: The Inside Story of Australia’s Top Weapons Inspector* (Melbourne: Schwartz Publishing, 2006), p. 103.

¹⁵¹ G.F. Oliver, ‘The Other Side of Peacekeeping: Peace Enforcement and Who Should Do It’, *International Peacekeeping: The Yearbook of International Peace Operations*, vol. 8 (2004), p. 105.

¹⁵² Bellamy and Williams, *Understanding Peacekeeping*, p. 228.

¹⁵³ J.T. Howe, ‘The United States and United Nations in Somalia: the limits of involvement’, *The Washington Quarterly*, vol. 18, no. 3 (1995), p. 49.

operating on the ground alone. There were several forces from UN member states operating in Somalia that were not officially part of the UN mission. Several national contingents within UNOSOM II persisted in taking their orders from their national capitals.¹⁵⁴ US soldiers operating under General Garrison significantly impacted the UN mission, most notably their eventual orders to capture Aidid or his senior officials whenever the opportunity arose. The US component of UNOSOM II ‘distanced itself from UN elements, creating a situation where information was not shared and common operating procedures and rules of engagement were not established’.¹⁵⁵

Unifying command and control could have allowed for effective responses to the quickly evolving situation in Somalia. The Commission of Inquiry created by the Security Council in February 1994 (to investigate the attacks on UNOSOM II personnel) noted that the mission in Somalia failed because of a lack of communication and coordination.¹⁵⁶ Some have argued that many lessons were learned from Somalia, but the most important one was that command and control of combat forces (particularly in peace enforcement operations) must be clear and unambiguous,¹⁵⁷ much like their mandates.

Lessons from Somalia

Despite some successes in stabilising the security environment, the inexplicit (and arguably ambitious) mandates, combined with challenges to command and control of missions, rendered UN peacekeeping and peace enforcement in Somalia a failure. The last UN troops left Somalia in March 1995, leaving behind ‘a situation not too dissimilar from the one they had initially encountered in 1992’.¹⁵⁸

The ‘experience in Somalia marked the beginning of the world’s (temporary) disengagement with peace operations’.¹⁵⁹ Following Operation Desert Storm (Iraq, 1991), major state donors established collective expectations for involvement in Somalia.¹⁶⁰ The collective response to the situation in Iraq, however, stands in stark contrast to that in Somalia. The debacle in Somalia destroyed the international community’s initial post-Cold War enthusiasm for peacekeeping. UNOSOM’s difficulties led to reluctance, especially on the part of the United States, to undertake such activities in the future and had major implications for the handling of future conflicts (most notably the 1994 Rwandan Genocide).¹⁶¹ Somalia ‘forced a radical rethinking of when and where the UN should get involved’¹⁶² with US President Bill Clinton insisting that the UN General Assembly needed to learn to say ‘no’.¹⁶³ It has often been argued that a ‘lack of resolve is not so surprising when the motivation of

¹⁵⁴ Bellamy and Williams, *Understanding Peacekeeping*, p. 226.

¹⁵⁵ *Ibid.*, p. 111.

¹⁵⁶ *Ibid.*

¹⁵⁷ Oliver, ‘The Other Side of Peacekeeping’, p. 105.

¹⁵⁸ Bellamy and Williams, *Understanding Peacekeeping*, p. 226.

¹⁵⁹ *Ibid.*, p. 106.

¹⁶⁰ Clark, ‘Debacle in Somalia’, p. 216.

¹⁶¹ Mingst and Karns, *The United Nations in the 21st Century*, p. 100.

¹⁶² Michael W. Doyle and Nicholas Sambanis, ‘Peacekeeping Operations’, in *The Oxford Handbook on The United Nations*, edited by Thomas G. Weiss and Sam Daws (New York: Oxford University Press, 2007), p. 334.

¹⁶³ M.W. Doyle and N. Sambanis, ‘Peacekeeping Operations’, in T.G. Weiss and S. Daws (eds.), *The Oxford Handbook on The United Nations* (New York: Oxford University Press, 2007), p. 334.

participating nations is primarily humanitarian'.¹⁶⁴ In actuality, serving the UN's goals does not appear high on the foreign policy priority of most countries.¹⁶⁵ Be that as it may, the political will, or commitment, of member states is 'an increasingly critical factor in determining whether or not sufficient action is taken and sufficient resources are made available'.¹⁶⁶

Commitment of the international community to a peace operation is the key to its success. 'Half-hearted' peacekeeping undermines its goal of maintaining peace and its broader goal of securing the conditions required for the building of sustainable peace. Sustainable peace is, after all, the 'best measure of successful peacekeeping'.¹⁶⁷ The loss of confidence and lack of resolve following the UN and US experience in Somalia diminished the international community's willingness to conduct future peacekeeping operations. Disengagement, however, had grave consequences. Following the 1994 Rwandan Genocide, peace operations were once again put on the forefront of the UN's agenda. The 1990s ultimately gathered force behind the drive to reform UN peace operations and seek ways for the international community to prevent a repeat of tragic events like those witnessed in Bosnia, Rwanda and Somalia during the 1990s.¹⁶⁸ The 2005 World Summit, for example, saw the unanimous endorsement of the Responsibility to Protect (R2P) norm. The increasing acceptance of the responsibility to prevent and stop genocide, crimes against humanity, ethnic cleansing and war crimes has had a substantial impact on contemporary peacekeeping.

Complex and dangerous peacekeeping missions like the one conducted in Somalia 'demand discipline' and 'well-trained personnel equipped with modern communications capability'.¹⁶⁹ The 2000 Brahimi Report on Peacekeeping highlighted many of the logistical, operational and technical challenges facing UN peace operations. The report also placed great emphasis on reform and more specifically the need for a rapid deployment capacity.¹⁷⁰ Nonetheless, as Somalia has illustrated, alleviating the UN's challenges does not rely solely on a permanent or easily deployable UN peacekeeping force. A clear and feasible mandate can eliminate many of the challenges that impede the UN's ability to effectively fulfil mandated objectives. Vague mandates with wording such as the 'use of all necessary means' (or a 'secure environment'), without defining what such terms imply, often leads to competing interpretations which can prove disastrous on the ground, diminishing the credibility of a given mission. The presence of many diverse contingents in any peace operation increases the implications of incoherence. As demonstrated by the US and UN in Somalia, conflicting interpretations can erode co-operation and diminish motivations for participation (particularly since participating member states often find it difficult to commit to missions in which the casualties and risks involved are seemingly unjustifiable). The credibility of a peacekeeping operation is a direct reflection of the international community's belief in the mission's ability to achieve its mandate (the mission's capability, effectiveness and

¹⁶⁴ Howe, 'The United States and United Nations in Somalia', p. 49.

¹⁶⁵ Thakur. 'From Peacekeeping to Peace Enforcement', p. 357.

¹⁶⁶ Mingst and Karns, *The United Nations in the 21st Century*, p. 79.

¹⁶⁷ Doyle and Sambanis, 'Peacekeeping Operations', p. 323.

¹⁶⁸ J.M Hanhimäki, *The United Nations: A Very Short Introduction* (New York: Oxford University Press, 2008), p. 139.

¹⁶⁹ Sutterlin, *The United Nations and the Maintenance of International Security*, p. 50.

¹⁷⁰ See United Nations, *Report of the Panel on United Nations Peace Operations*. The Brahimi Report, A/55/395; S/2000/809. (New York: United Nations, 2000).

ability to manage and meet expectations).¹⁷¹ Simply put, to achieve and maintain credibility, a peacekeeping mission requires a clear and deliverable mandate with the resources and capabilities to match.¹⁷²

Conclusion

Peacekeeping is one of the most ‘visible’ roles the UN plays on the world stage.¹⁷³ Despite the term’s official inception after the creation of the UN Charter, the concept of ‘peacekeeping’ has undoubtedly become a central part of the UN’s agenda.

In hindsight, the effectiveness of the operation in Somalia could have been improved. Improving mandate precision (helping alleviate interpretation clashes); refining coordination and command of military and peacekeeping personnel; ensuring the efficient means, resources and capabilities required; and attaining a better understanding of the risks and potential costs in order to alleviate (or better yet, eliminate) the ‘lack of resolve’ of member states involved in such operations can ultimately increase the UN’s ability to fulfil its mandate and its broader goal of attaining peace with justice.

In addition to insights regarding the improvement of the logistical, operational and technical levels of peace operations, Somalia has demonstrated the power of UN member states and the equally important political factor. For one thing, Somalia has shown that the relationship between the UN and the US in the maintenance of international peace and security is complex but vital. The role of the US can impact UN credibility and effectiveness and many have come to conclude that UN operations in Somalia (or elsewhere for that matter) could not have been conducted without active US endorsement and participation. Ultimately the UN cannot act alone. Its member states can strengthen or weaken the organisation; can present it with opportunities or challenges; and are, in essence, crucial players in the UN’s goal of achieving peace with justice.

Despite the challenges, ‘international peacekeeping has proved to be remarkably resilient’.¹⁷⁴ The demands on the UN for peacekeeping operations will, in the coming years, continue to challenge the capacity, as well as the political and financial will of the UN and its member states.¹⁷⁵ Peace operations remain a vital tool in the quest of attaining peace with justice. Unsurprisingly however, the international community’s commitment to such operations—and commitment to enabling sustainable peace—is equally necessary. As late Secretary-General Dag Hammarskjöld proclaimed, ‘the United Nations was not created to bring us to heaven, but in order to save us from hell’.¹⁷⁶ This quest to combine vision with pragmatism can endure provided that the world community continues to learn from the ‘failures’ and ‘successes’—be they operational, political or otherwise—that aspire to bring all of humanity closer to freedom from fear, freedom from want and freedom to live in dignity.

¹⁷¹ United Nations, *United Nations Peacekeeping Operations*, p. 38.

¹⁷² *Ibid.*, p. 38.

¹⁷³ Hanhimäki, *The United Nations*, p. 71.

¹⁷⁴ Thakur, ‘From Peacekeeping to Peace Enforcement’, p. 409.

¹⁷⁵ Boutros-Ghali, *An Agenda for Peace*.

¹⁷⁶ Thakur, ‘From Peacekeeping to Peace Enforcement’, p. 369.

Sharia Punishments and the International Criminal Court

Katie Groot*

The investigation by the International Criminal Court (ICC) into the situation in Mali presents the ICC with the opportunity to evaluate the lawfulness of severe Sharia punishments (namely, stonings, floggings and amputations) under the Rome Statute. While such punishments violate international human rights law prohibitions on torture and cruel, inhuman and degrading treatment, they can also constitute two distinct violations of the Rome Statute: war crimes and crimes against humanity. Accordingly, the state-sanctioned implementation of stonings, floggings and amputations are liable to trial before the ICC as international crimes. This paper will focus on the capacity in which the ICC could determine that stonings, floggings and amputations employed according to Sharia law violate the Rome Statute, and the potential consequences of such a finding. In doing so, a particular focus is taken on the capacity for the ICC to be used as a de facto human rights tribunal to increase accountability for human rights violations arising from the use of strict Sharia laws.

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Since its genesis, questions have been raised regarding the compatibility of the *Rome Statute of the International Criminal Court* ('*Rome Statute*') and Sharia law.¹ The current International Criminal Court (ICC) investigation into the situation in Mali however, directly confronts the ICC with this issue. In particular, the investigation by the ICC Prosecutor into the operation of rebel-instituted Sharia trials in northern Mali poses questions for the ICC regarding the lawfulness of Sharia sanctions enforced by rebel authorities. However, a finding that the Sharia punishments administered by rebel authorities are unlawful under the *Rome Statute* will have broader implications, politically and culturally, particularly for states which employ similar punishments as part of their penal laws. This paper explores the possible bases on which some of the more severe Sharia punishments (specifically, stonings, floggings and amputations) violate the *Rome Statute*. As the paper will demonstrate, under the *Rome Statute*, such punishments are capable of constituting war crimes (if administered during an armed conflict) or crimes against humanity. The ramifications of an ICC decision that these punishments constitute international crimes are thus subsequently considered, both for authorities using these Sharia punishments and for the ICC itself. In this context, the paper recognises the ICC's theoretical capacity to be more broadly used as a *de facto* human rights court to try Sharia-based human rights violations. By trying extreme Sharia punishments as war crimes or crimes against humanity, the ICC is an avenue by which to increase the human rights accountability for states using Sharia punishments that amount to torture or cruel, inhuman or degrading treatment. Those interested in adopting such an approach should, however, firstly consider the related issues elaborated upon in this paper.

Sharia punishments in Mali and the ICC

The investigation by the ICC Prosecutor into the situation in Mali will present the ICC with the opportunity to consider the lawfulness of stonings, floggings and amputations administered according to Sharia law under the *Rome Statute*.² The investigation was launched after the Malian government referred the situation in Mali to the ICC in July 2012, following the outbreak of a civil war in January 2012.³ One area of investigation is the operation of trials conducted by rebel groups according to a strict interpretation of Sharia law in northern Mali. The Sharia trials were initiated in furtherance of the mutual desire of Islamist groups, such as Ansar Dine, Al Qaeda in the Islamic Maghreb and the

¹ For example, see M. J. Kelly, 'Islam and International Criminal Law: A Brief (In) Compatibility Study', *Pace International Law Review*, vol. 1, no.8 (2010); A. Maged, 'Arab and Islamic Shari'a Perspectives on the Current System of International Criminal Justice', *International Criminal Law Review*, vol. 8 (2008); M. E. Badar, 'Islamic Law (Shari'a) and the Jurisdiction of the International Criminal Court', *Leiden Journal of International Law*, vol. 24 (2011); and S. C. Roach, 'Arab States and the Role of Islam in the International Criminal Court', *Political Studies*, vol. 53 (2005).

² The author acknowledges that not all interpretations of Sharia law consider punishments such as stonings, floggings and amputations to accord with Sharia; however this paper endeavours to focus on the use of such punishments by authorities (state and non-state) that claim to be acting pursuant to Sharia law. For more on punishments under Sharia law, see Bassouni, M. C., *The Islamic Criminal Justice System* (Oceana Publications, 1982); Peters, R., *Crime and Punishment In Islamic Law: Theory and Practice From the Sixteenth to the Twenty-first Century* (Cambridge University Press, 2005); and Hakeem, F. B., Haberfield, M. R., and Verma, A., *Policing Muslim Communities: Comparative International Context* (Springer New York, 2012).

³ International Criminal Court Office of the Prosecutor, 'Situation in Mali: Article 53(1) Report', ICC-01-12, (2013), available online: http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/icc0112/Documents/SASMaliArticle53_1PublicReportENG16Jan2013.pdf (accessed 12 January 2015).

Movement for Oneness and Jihad in West Africa (MUJAO), to enforce strict Sharia law throughout Mali.⁴ Alleged infractions of the fundamentalist interpretation of Sharia in northern Mali have attracted heavy penalties, administered by rebel authorities pursuant to their interpretation of Sharia law. Amputations have been a particularly common form of punishment in cases of theft or robbery and often occur with little or no pain relief administered prior.⁵ Not all amputees receive hospital care and some have reportedly died within a few days, likely from infection or blood loss.⁶ Locals also describe witnessing floggings of individuals caught consuming alcohol or smoking cigarettes and the beating of women for failing to adhere to strict dress codes.⁷ Residents in Gao have even reported Ansar Dine officials cutting off a woman's ear after she was seen wearing a skirt that was considered too short.⁸ There is little distinction on the part of the authorities as to whom the punishments shall apply: frail and elderly citizens have collapsed and publicly urinated on themselves while being publicly flogged for smoking, whilst children as young as eight years old have been beaten for swimming in the river and others recruited into rebel groups such as MUJAO have had a hand amputated as punishment for stealing weapons to sell.⁹ Given their severity, when assessing these trials, the ICC thus needs to consider, among other things, whether or not the Sharia-based punishments administered by rebel authorities violate the *Rome Statute*.

What is significant about this question, however, is that the imposition of the types of severe Sharia sanctions described above is not limited to rebel groups in northern Mali. Sharia law informs many legal systems, including penal codes, throughout the world. In the Arab region, Sharia forms the primary source of law for the majority of states.¹⁰ Indeed, countries such as Iran have gone so far as to embed Sharia in their constitution, identifying the Qur'an as the source of all legislation.¹¹ Furthermore, the prevalence of Sharia-based legal systems is spreading. Nigeria is home to a dual legal system, with its northern states reinstating Sharia legal codes in the place of formerly Western codes.¹²

⁴ Amnesty International, 'Mali: Five Months of Crisis. Armed Rebellion and Military Coup' (2012), available online: <http://www.amnesty.org/en/library/asset/AFR37/001/2012/en/f93ab197-dd94-45b5-8e42-a3375c7747c4/afr370012012en.pdf> (accessed 12 January 2015), pp.17-19; and Human Rights Watch, 'Mali: Islamist Armed Groups Spread Fear in the North' (2012), available online: <http://www.hrw.org/news/2012/09/25/mali-islamist-armed-groups-spread-fear-north> (accessed 12 January 2015).

⁵ C. Freeman, 'Under the Mali militants' reign of terror: refugees tell of life under Islamist rule', *The Telegraph* (19 January 2013), available online: <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/mali/9813538/Under-the-Mali-militants-reign-of-terror-refugees-tell-of-life-under-Islamist-rule.html> (accessed 12 January 2015).

⁶ P.H. Mben, 'A Trip Through Hell: Daily Life In Islamist Northern Mali', *Spiegel Online* (29 October 2012), available online: <http://defence.pk/threads/a-trip-through-hell-daily-life-in-islamist-northern-mali.216342/#ixzz3CUopfK1u> (accessed 12 January 2015).

⁷ Human Rights Watch, 'Mali: War Crimes by Northern Rebels' (2012), available online: <http://www.hrw.org/news/2012/04/30/mali-war-crimes-northern-rebels> (accessed 12 January 2015).

⁸ *Ibid.*

⁹ 'Mali: Islamist Armed Groups Spread Fear in the North', *op. cit.* (2012); and BBC News Africa, 'Mali crisis: Gao protests 'stop hand amputation'', *BBC* (6 August 2012), available online <http://www.bbc.co.uk/news/world-africa-19155616> (accessed 12 January 2015).

¹⁰ Badar, *op. cit.* (2011), p. 413.

¹¹ See Article 4 of the *Constitution of the Islamic Republic of Iran*: Kelly, *op. cit.* (2010), pp. 11-12; and H. Abtahi, 'The Islamic Republic of Iran and the ICC', *Journal of International Criminal Justice*, vol. 3, no. 3, (2005), pp. 637-638.

¹² Kelly, *op. cit.* (2010), pp. 20, 28; and Badar, *op. cit.* (2011), p. 414.

Only last year, Brunei became the first East Asian country to institute Sharia law.¹³ The degree to which Sharia informs the legal code varies amongst states. In most countries that use Sharia law, the state decides which parts of Sharia law are to be enforced.¹⁴ Some states, such as Pakistan, are more selective in their use of Sharia, while others, such as Saudi Arabia, exclusively use Sharia.¹⁵ Under a strict interpretation of Sharia law, adopted in countries such as Saudi Arabia and Sudan, the Qur'an specifies what many may view as severe and disproportionate punishments for certain categories of offences.¹⁶ For example, the Qur'an prescribes the penalty of an amputated hand for theft.¹⁷ Drinking alcohol can warrant flogging under Islamic law.¹⁸ Extramarital sex is a significant violation and carries the heavy penalty of death by stoning for married adulterers.¹⁹ These are amongst the most extreme forms of Sharia-based punishments and many countries that use Sharia law today do not apply them.²⁰ Yet their continued use in a number of countries means that the possibility that these punishments may violate the *Rome Statute* has a broader impact than simply on the rebel authorities who use such sanctions. The specific impact of this will be explored later in this paper.

Sharia punishments and the *Rome Statute*: war crimes?

There are two avenues by which Sharia punishments such as stonings, floggings and amputations can be said to violate the *Rome Statute*; as war crimes or crimes against humanity. The possibility that Sharia punishments may constitute war crimes will likely arise for direct consideration by the ICC in the Mali trials. In particular, the severity of punishments administered on those convicted by Mali's Sharia courts invokes the question of whether there are implied limits on the types of sentences that can be lawfully passed in a non-international armed conflict (NIAC) under the *Rome Statute*. Article 8(2)(c) of the *Rome Statute* identifies serious violations of Common Article 3 of the *1949 Geneva Conventions* as war crimes triable before the ICC.²¹ Of particular relevance, Article 8(2)(c)(iv) of the *Rome Statute* prohibits '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 recognised as indispensable by civilised peoples' in the context of a NIAC.²²

Aside from mentioning executions, Article 8(2)(c)(iv) is silent on the question of whether there are limitations on the types of sentences that may be lawfully passed in a

¹³ Sydney Morning Herald, 'Brunei introduces Islamic sharia penalties, including death by stoning for adultery' (2 May 2014), available online: <http://www.smh.com.au/world/brunei-introduces-islamic-sharia-penalties-including-death-by-stoning-for-adultery-20140501-zr2y1.html> (accessed 12 January 2015).

¹⁴ R. Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-first Century* (Cambridge University Press, 2005) 148.

¹⁵ Kelly, op. cit. (2010), pp.18-19.

¹⁶ T. Johnson and M. A. Sergie, 'Islam: Governing Under Sharia', *Council for Foreign Relations*, 25 July 2014, available online: <http://www.cfr.org/religion/islam-governing-under-sharia/p8034> (viewed 21 July 2015).

¹⁷ Qur'an, Surat al-Ma'eda, 5:38; and M. C. Bassiouni, 'Crimes and the Criminal Process', *Arab Law Quarterly*, vol. 12, no. 3 (1997), pp. 279.

¹⁸ Ibid., pp. 282.

¹⁹ Ibid., pp. 280.

²⁰ H. R. Dammer and R. S. Albanese, *Comparative Criminal Justice Systems* (5th ed., Wadsworth, 2014) 195-196; and Johnson and Sergie, op. cit. (2014).

²¹ *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) art 8(2)(c) (hereafter referred to as '*Rome Statute*').

²² Ibid., art 8(2)(c)(iv).

NIAC. However, some insights can be gained from the surrounding provisions. Preceding subsections in Article 8(2)(c) contain absolute prohibitions on violence to life and persons, including murder of all kinds, mutilation, cruel treatment and torture, and outrages upon personal dignity, particularly humiliating and degrading treatment. These prohibitions are also included in the *Rome Statute* as serious violations of the *Geneva Conventions*, and thus war crimes, in an international armed conflict (IAC).²³ To interpret Article 8(2)(c)(iv) as excusing otherwise serious violations of the laws of war, so long as they are carried out following a fair trial and judgment by a regularly constituted court, would create a significant inconsistency in the *Rome Statute*. Further, it would remove some of the protections afforded to non-combatants in a NIAC by Article 8(2)(c). The ICC ought to be reticent to adopt such an interpretation, especially in the absence of any express intention to do so reflected in Article 8(2)(c). In contrast, executions are expressly contemplated under Article 8(2)(c)(iv) where there has been a fair trial by a regularly constituted court. In effect, this provides an express exception to the broader prohibition against violence to life in Article 8(2)(c).²⁴ As such, in the absence of any further express exceptions in Article 8(2)(c)(iv), the absolute nature of the preceding prohibitions in Article 8(2)(c) ought to be interpreted as impliedly limiting the lawful sentences that may be passed in an armed conflict.

Under this interpretation, there is a strong case that many of the more severe Sharia punishments violate these restrictions on the treatment of non-combatants in an armed conflict under the *Rome Statute*. In generating a permanent disfigurement, the carrying out of amputations *prima facie* violates the prohibition on violence in the form of mutilations under Article 8(2)(c)(i).²⁵ Given that amputations as a form of Sharia punishment constitute the infliction of severe physical pain for the purpose of punishment, there is furthermore potential scope for this conduct to be considered as a war crime of torture under the *Rome Statute*.²⁶ Beatings and floggings causing severe physical or mental pain or suffering are also within the scope of the prohibition on ‘cruel treatment’ against non-combatants and thus impermissible under the *Rome Statute*.²⁷ Floggings and beatings that take place publicly—especially those against elderly citizens which cause them to collapse and/or involuntarily urinate—can also constitute a form of humiliating and degrading treatment.²⁸ Finally, insofar as stonings are concerned, it is

²³ *Ibid.*, art 5.

²⁴ *Ibid.*, art 8(2)(c)(iv).

²⁵ See *Elements of Crime of the International Criminal Court*, U.N. Doc. PCNICC/2000/1/Add.2 (adopted 09 September 2002) art 8(2)(c)(i)-2 (hereafter referred to as ‘*Rome Statute Elements of Crime*’).

²⁶ *Ibid.*, art 8(2)(c)(i)-4; and Burgers, J H and Danelius, H, *The United Nations Convention Against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1st ed, Martinus Nijhoff Publishers, 1988) 473. There is no threshold defined in the *Rome Statute* or the *Elements of Crime* for what constitutes ‘severe’ physical pain; however the Pre-Trial Chamber has held that ‘an important degree of pain and suffering has to be reached in order for a criminal act to amount to an act of torture’: see *Prosecutor v. Jean-Pierre Bemba Gombo* (ICC-01/05-01/08), Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, 193.

²⁷ *Rome Statute*, op. cit. (1998), art 8(2)(c)(i); *Rome Statute Elements of Crime*, op. cit. (2000), art 8(2)(c)(i)-3; and Burgers and Danelius, *ibid.*

²⁸ E.g. based on definitions of ‘degrading treatment’ propounded by the European Commission of Human Rights such as ‘treatment or punishment that “grossly humiliates the victim before others or drives the detainee to act against his/her will or conscience”’: see J. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules* (Cambridge: Cambridge University Press, 2005) 319; and *ibid.*, art 8(2)(c)(ii). See also *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* (ICC-01/04-01/07), Decision on the Confirmation of Charges, 30 September 2008, 371; and *Prosecutor v. Kvočka et al.* (IT-98-30/1-T), Trial Judgement, 2 November 2001, 173.

worth recalling that executions are expressly contemplated under Article 8(2)(c)(iv), provided they are only imposed after a fair trial by a regularly constituted court. This would possibly render stonings an exception to the general prohibition on violence to life in Article 8(2)(c)(i). However, given that stonings are a particularly protracted and painful method of execution and would otherwise come within prohibitions on (at least) cruel, inhuman and degrading treatment, it is possible that there are restrictions on the permissible methods of executions undertaken in armed conflicts.²⁹ Ultimately, it is difficult to view any of these forms of punishments as compatible with the protections preserved under the *Rome Statute* for non-combatants in armed conflicts. Instead, there is a sound basis on which the ICC could conclude that the imposition of such sentences in northern Mali amounts to war crimes under Article 8(2)(c) of the *Rome Statute*.

Should the ICC turn to consider the lawfulness of Sharia punishments in northern Mali, however, any conclusions reached by the Court will not only have immediate ramifications for those involved in the conflict in Mali but will also generate greater implications regarding the scope of permissible conduct in other current and future NIACs. This is primarily because a NIAC can manifest in two ways: an armed conflict between state and non-state actors, or an armed conflict purely between non-state actors. Significantly, the laws regulating NIACs bind both parties to the conflict equally.³⁰ That is to say, the restrictions contained in Article 8(2)(c) of the *Rome Statute* apply to limit the conduct of both state and non-state actors that may be involved in the conflict. Insofar as international armed conflicts (IAC), which only involve state actors, are concerned, murder, mutilation, cruel treatment, torture and humiliating and degrading treatment are also all liable to classification as war crimes under the *Rome Statute*. Accordingly, states that impose Sharia punishments, such as stonings, floggings and amputations, according to their regular penal codes during an armed conflict are actually committing war crimes under the *Rome Statute*. While not a prerequisite for the Court to exercise its jurisdiction over war crimes, Article 8(1) of the *Rome Statute* indicates that the ICC will have jurisdiction over war crimes ‘in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes’.³¹ The implementation of punishments that constitute war crimes as part of a state’s penal policy during an armed conflict would meet these terms in most, if not all, cases. As a result, such conduct committed as part of a state’s penal law is liable to prosecution at the ICC.

²⁹ For a discussion of other instances in which executions may constitute cruel treatment, see the decision of the European Court of Human Rights in *Soering v United Kingdom*, Ser. A, No. 161.

³⁰ It is generally accepted that provisions regulating NIACs bind both state and non-state parties to NIACs, provided those non-state groups are of sufficient organisation to qualify as parties to the conflict. See: Common Article 3 to: *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); *Geneva Convention relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950); and *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950). See also J. K. Kleffner, ‘The applicability of international humanitarian law to organized armed groups’, *International Review of the Red Cross*, vol. 93 (2011), pp. 443-444. The ICC has recently accepted the applicability of international humanitarian law to non-state parties: see Situation in the Democratic Republic of the Congo, in the case of the *Prosecutor v. Thomas Lubanga Dyilo (Judgment)* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 14 March 2012).

³¹ *Rome Statute*, op. cit. (1998), art 8(1); and *Bemba*, op. cit. (2009), 211.

Sharia punishments and the *Rome Statute*: crimes against humanity?

The possibility that Sharia punishments may be considered war crimes if administered in the context of an armed conflict is not the only avenue by which they may be considered unlawful under the *Rome Statute*. While the war crimes provisions require a nexus to an armed conflict and thus are limited in application to those circumstances, the provisions governing crimes against humanity under Article 7 of the *Rome Statute* cast a wider net in respect to Sharia punishments. For a crime against humanity to be committed, there is no requirement the alleged act be committed in the context of, or incidental to, an armed conflict. Instead, the act must form part of ‘a widespread or systematic attack directed against any civilian population’.³² For the purposes of Article 7, an attack involves ‘a course of conduct involving the commission of acts of violence’.³³ The term systematic requires ‘an organised plan in furtherance of a common policy, which follows a regular pattern and results in a continuous commission of acts’ or the ‘non-accidental repetition of similar criminal conduct on a regular basis’.³⁴ What is notable in the context of this paper is that an ‘attack directed against any civilian population’ is broad enough to encompass the repeated commission of the alleged act ‘pursuant to or in furtherance of a State or organisational policy’.³⁵

Of the specified acts that may constitute a crime against humanity under the *Rome Statute*, two have particular relevance to Sharia punishments. Article 7(1)(f) identifies torture amongst the prohibited acts and Article 7(1)(k) forms somewhat of a catch-all provision, prohibiting ‘other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or to mental or physical health’. Insofar as torture is concerned, the definition is directly imported from the *Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment* to cover ‘the intentional infliction of severe pain or suffering whether physical or mental’.³⁶ Similar to its use in Article 8, the phrase ‘severe pain’ has generally been used in relation to prohibitions on torture to highlight that only acts reaching a certain threshold of gravity should be considered to constitute torture.³⁷ *Prima facie*, punishments such as stonings, floggings and amputations reach such a threshold.³⁸ It is worth noting that the definition of torture under the *Rome Statute* includes a proviso excluding ‘pain or suffering arising only from, inherent in or incidental to, lawful sanctions’.³⁹ However, the preferred view is that the term ‘lawful’ refers to international law, or national laws only insofar as they are consistent with international law.⁴⁰ Consequently, criminal responsibility for torture

³² *Rome Statute*, op. cit. (1998), art 7(1).

³³ *Naletilic and Martinovic* (IT-98-34-T), Judgment, 31 March 2003, para 233; *Limaj* (IT-03-66-7), Judgment, 30 November 2005, 182.

³⁴ *Katanga*, op. cit. (2008), 127

³⁵ *Ibid.*, art 7(2)(a).

³⁶ *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) art 1; and *ibid.*, art 7(2)(e).

³⁷ Burgers and Danelius, op. cit. (1988), 473.

³⁸ *Ibid.*

³⁹ *Rome Statute*, op. cit. (1998), art 7(2)(e).

⁴⁰ R. Cryer, H. Friman, D. Robinson and E. Wilmshurst, *An Introduction to International Criminal Law and Procedure* (3rd ed, Cambridge University Press, 2014) 251; H. von Hebel and D. Robinson, ‘Crimes within the jurisdiction of the Court’, in Roy S. K. Lee, *The International Criminal Court: the making of the Rome Statute* (1st ed, Kluwer Law International, 1999) 99; A. Smagadi, *Sourcebook of International Human Rights Materials* (1st ed, British Institute of International and Comparative Law, 2008) 108; M.

under the *Rome Statute* will not be absolved because the conduct is sanctioned under state penal laws.⁴¹

The broader ‘other inhumane acts’ provision provides an alternative basis upon which to class Sharia punishments administered by the state as crimes against humanity. The purpose of this provision of the *Rome Statute* is to cover serious violations of international customary law and basic international human rights which are similar in nature and gravity to the other acts referred to in Article 7(1).⁴² Adopting a lower threshold than torture, this provision requires the intentional infliction of ‘great suffering, or serious injury to body or to mental or physical health’.⁴³ Given that Sharia punishments such as stonings, floggings and amputations generate extreme suffering and injuries in the form of mutilation and permanent disfigurement, the requisite suffering threshold would undoubtedly be met. Thus the classification of Sharia punishments as a crime against humanity, at least by virtue of Article 7(1)(k), is an obvious fit.

When administered by the state against civilians pursuant to state penal laws, it is likely that floggings, stonings and amputations fall within the ambit of Article 7. The imposition of these punishments involves the commission of acts of violence, and therefore fall within the definition of ‘attack’ under Article 7. By intentionally carrying out these acts to punish wrongdoers, state officials are repeating this conduct on a regular basis pursuant to a state policy to perform such punishments. Administering floggings, stonings and amputations as punishments pursuant to state penal policy therefore falls within the class of conduct prohibited by Article 7. As such, the text of the *Rome Statute* leaves open the possibility that severe Sharia punishments imposed by the state could be considered war crimes or crimes against humanity by the ICC.

The ramifications of finding Sharia sanctions to be international crimes

A finding by the ICC that stonings, floggings and amputations could constitute crimes against humanity or war crimes under the *Rome Statute* would clearly have profound ramifications for states that employ severe Sharia sanctions as part of their legal system. Consequently, even if there is a theoretical basis for the use of severe Sharia punishments to be tried at the ICC, the ramifications of doing so warrants consideration. In particular, the possibility that the ICC could act as a *de facto* human rights court is worth exploring in light of the capacity for severe Sharia punishments, at least theoretically, to fall within the purview of the *Rome Statute*. Indeed, many of these punishments are also not easily reconcilable with international human rights laws (IHL). For example, prohibitions on torture and cruel, inhuman and degrading

Boot, *Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court: Genocide, Crimes Against Humanity and War Crimes* (1st ed, Intersentia, 2002) 508; and C. K. Hall, ‘Torture’, in Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* (2nd ed, C. H. Beck, Hart and Nomos, 2008) 253. It should be noted that this is not the only interpretation of ‘lawful’, and the drafting history reveals that the phrase may have been intended as a reference only to lawfulness under domestic laws: see W. A. Schabas, *The International Criminal Court – A Commentary on the Rome Statute* (Oxford University Press, 2010) 166-166; and T. L. H. McCormack, ‘Crimes Against Humanity’, in Dominic McGoldrick, Peter Rowe and Eric Donnelly (eds.), *The permanent International Criminal Court – Legal and Policy Issues* (Hart Publishing, 2004) 193.

⁴¹ Hall, *ibid.*

⁴² *Katanga*, above n 28, 150.

⁴³ *Ibid.*, art 7(1)(k).

treatment are included in numerous human rights documents, such as the *International Covenant on Civil and Political Rights*, the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment*, the *Convention for the Protection of Human Rights and Fundamental Freedoms*, the *Arab Charter on Human Rights*, the *African Charter on Human and People's Rights* and the *Inter-American Convention on Human Rights*.⁴⁴ Nonetheless, a number of countries implement such punishments under state penal systems despite being party to treaties prohibiting torture and cruel, inhuman and degrading punishment.⁴⁵ The process by which such alleged violations of IHRL could be tried and punished, however, is not at all obvious. Regulatory bodies, such as the United Nations Human Rights Committee (UNHRC) and the Committee Against Torture, exist to monitor compliance with international human rights law conventions prohibiting such conduct; yet there is no mechanism for the trial and punishment of those suspected of violating these conventions with capacity equal to the ICC. Indeed, even bodies like the UNHRC are only equipped with the authority to issue 'concluding observations' regarding the status of a country's compliance.⁴⁶ Beyond that, it largely falls to international pressure to reform the practice of countries found to be violating IHRL. Consequently, the capacity for countries that sign on to human rights treaties and nonetheless regularly violate them via extreme Sharia punishments to be held to account by the ICC would represent a significant step forward for human rights. With the lack of effective enforcement mechanisms representing a sizeable deficiency in the current international human rights framework, the only current feasible means by which to compensate may be via the ICC. The possibility that the implementation of brutal punishments by the state against civilians could be tried via the ICC may accordingly generate a glimmer of hope for human rights advocates seeking greater enforcement of international human rights obligations.

Yet while this may be promising in theory, the reality of the situation is that there are sizeable hurdles to overcome before the ICC may fill the major deficiency in human rights accountability. First and foremost, there is the significant issue of jurisdiction. No state that employs Sharia law as the primary source of its legal system is currently a state party to the ICC.⁴⁷ In fact, Jordan is the only Arab state that has signed on to the *Rome Statute* and Nigeria is the only state party that partially employs Sharia law.⁴⁸ Consequently, some of the biggest and most populated Islamic states, such as Indonesia and Iran, are not party to the ICC.⁴⁹

⁴⁴ *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 7; *Convention Against Torture*, above n 28; *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 1 November 1950, CETS 5 (entered into force 3 September 1953) art 3; *Arab Charter on Human Rights*, opened for signature 22 May 2004, *reprinted in* 12 Int'l Hum. Rts. Rep. 893 (2005) (entered into force 15 March 2008) art 8; *African Charter on Human and People's Rights*, opened 27 June 1981, 21 ILM 58 (entered into force 21 October 1986) art 5; and *Inter-American Convention on Human Rights*, opened for signature 21 November 1969, 1144 UNTS 123 (entered into force 18 July 1978) art 5.

⁴⁵ By way of example, Saudi Arabia, Libya and Sudan are all signatories to the *Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment*.

⁴⁶ Human Rights Committee, 'Working Methods', (2014), available online: <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/WorkingMethods.aspx> (accessed 12 January 2015).

⁴⁷ Kelly, *op. cit.* (2010), p.28.

⁴⁸ M. Mark, 'Boko Haram vows to fight until Nigeria establishes sharia law', *The Guardian* (28 January 2012), available online: <http://www.theguardian.com/world/2012/jan/27/boko-haram-nigeria-sharia-law> (accessed 13 January 2015).

⁴⁹ The term 'Islamic states' is used in this paper to denote those states that are members of the Organisation of the Islamic Conference (OIC). M. Frick and A. Muller, *Islam and International Law*:

These circumstances render most, if not all, states that could be said to employ the most severe Sharia punishments effectively out of reach of the ICC. The jurisdiction of the ICC is largely limited to those crimes which have been perpetrated by a national, or in the territory, of a state party.⁵⁰ Unless a state accepts the jurisdiction of the ICC on an *ad hoc* basis,⁵¹ the only other avenue by which a non-state party using harsh Sharia law could be prosecuted for possible war crimes or crimes against humanity would be following the referral of the matter to the ICC Prosecutor by the United Nations Security Council.⁵² However, the chances of such a referral by the Security Council are low. In the 13 years since the ICC commenced operation, the Security Council has only exercised its referral powers under Article 13(b) of the *Rome Statute* twice. The highly political nature of Security Council referrals will likely remain an impediment on an otherwise significant mechanism by which to extend the reach of the ICC. Ultimately, as the potential crimes under consideration in this instance would occur by nationals (e.g. government officials) within the territory of a non-state party, and the chances of an *ad hoc* self-referral or Security Council referral are slim, therefore, the likelihood that the ICC could try significant human rights violations arising from the use of Sharia law is very low.

The lack of ICC jurisdiction over the perpetrators of extreme Sharia punishments currently presents an insurmountable challenge to any such cases coming before the ICC in the foreseeable future. Even if, for the purposes of this paper, the significant jurisdictional hurdle is put to one side, the complex issue of whether the ICC *should* try such matters will persist. The possibility that those states that are violating their human rights obligations through the implementation of Sharia punishments could be brought to account will no doubt invigorate the tension between politics and the law that often permeates international criminal tribunals. On the one hand, the ICC was intended to represent an independent and impartial institution, free of political influence. Pursuing significant and widespread violations of fundamental human rights, such as state sanctioned inhumane and torturous punishments, would furthermore be consistent with the founding mandate of the ICC to strengthen accountability for serious human rights abuses and serious international crimes.⁵³ The fact that torture, and cruel, inhuman and degrading treatment have been included as components of two separate international crimes over which the ICC has jurisdiction is telling of the seriousness by which the international community views the conduct. The manifestation of torture and cruel, inhuman and degrading treatment in the form of Sharia punishments thus ought to warrant classification as a serious international crime.

However, when the politics of the matter is considered, the issue of whether the ICC is the appropriate forum to try possible Sharia-based human rights violations becomes substantially more complex. With an already low level of engagement by Islamic states with the ICC, claims that their national penal codes may subject them to allegations of

Engaging Self-Centrism from a Plurality of Perspectives (The Netherlands: Martinus Nijhoff, 2013), p. 369.

⁵⁰ *Rome Statute*, op. cit. (1998), art 12(2).

⁵¹ *Ibid.*, art 12(3). This *ad hoc* referral of jurisdiction has occurred on three occasions, regarding matters in Cote d'Ivoire, Palestine and Ukraine.

⁵² *Ibid.*, art 13(b).

⁵³ *Rome Statute*, op. cit. (1998), preamble; and International Criminal Court, 'Understanding the International Criminal Court', available online: www.icc-cpi.int/iccdocs/pids/publications/uicceng.pdf (accessed 22 July 2015).

war crimes or crimes against humanity would significantly damage the reputation of the ICC amongst those states. Some Arab states, such as Iran, have already indicated trepidation over the possibility of their officials being subjected to prosecution for crimes against humanity at the ICC, given their poor human rights records.⁵⁴ Specifically, Iranian officials have acknowledged that floggings, stonings and amputations are considered to be torturous and inhumane acts by some in the international community, and that the ‘mono-cultural view of these definitions’ could result in their classification as crimes against humanity by the ICC.⁵⁵ In fact, Professor M. Cherif Bassiouni, who occupied a pivotal role in establishing the ICC, has suggested that fear of being prosecuted at the ICC has been one of the primary reasons why many Arab states have not joined the ICC.⁵⁶ With a continuing proliferation of Sharia law in state legal codes, the result may consequently be to further alienate states favouring Islamic law from the ICC.

In addition, using the ICC to punish Sharia-based human rights violations would not only alienate those states presently using Sharia punishments. Instead, any state that subscribes to a set of legal norms that differs to those enshrined in the *Rome Statute* would likely be displeased, as it would indicate that there is little room for cultural divergence from the *Rome Statute*. Using the ICC as a *de facto* human rights court in such circumstances may therefore further damage the ICC’s aspirations of universal justice and instead generate cries of cultural imperialism. For some, however, prosecuting the worst violations of international human rights standards, such as torture and inhumane treatment, regardless of how they manifest, would only be to further the ICC’s claim to universal justice. This is particularly so given that those standards purport to be universal in nature themselves. Yet, in the eyes of others, it would undoubtedly highlight the cultural differences and differing concepts of justice that continue to undermine the universality of the Court.

As the sovereignty of states has evolved, there has emerged a general consensus in the international community that states are entitled to retain some cultural differences. Generally, the types of laws a state chooses to institute and the severity of the punishments it administers is a matter within the sovereignty of the nation-state, and beyond the interference of the international community. To an extent, there are adaptations of this argument already contained in other sections of the *Rome Statute*. For example, Article 80 contains the statement that provisions of the *Rome Statute* regulating the penalties that the ICC may impose are of no prejudice to the penalties prescribed by the domestic laws of a state.⁵⁷ This provision was largely inserted to reflect the sovereign rights of states regarding the death penalty.⁵⁸ Furthermore, the

⁵⁴ D. Wippman, ‘The International Criminal Court’, in C. Reus-Smit (ed.), *The Politics of International Law* (Cambridge: Cambridge University Press, 2004), p. 162; M. C. Bassiouni, ‘The Arab States and the ICC: Twelve Years Since Rome’, *The Monitor*, vol. 40 (2010), p.17; and Abtahi, op. cit. (2005), pp. 644-645.

⁵⁵ E. Alehabib, as cited in Abtahi, op.cit. (2005), pp. 644-645.

⁵⁶ Professor Bassiouni was Vice-Chairman of the General Assembly’s Ad Hoc Committee on the Establishment of an International Criminal Court in 1995, Vice-Chair of the General Assembly’s Preparatory Committee on the Establishment of an International Criminal Court in 1996-98, and Chairman of the Drafting Committee of the 1998 Diplomatic Conference on the Establishment of an International Criminal Court. Bassiouni, op. cit. (2010), p.17.

⁵⁷ *Rome Statute*, op. cit. (1998), art 80.

⁵⁸ Human Rights Watch, ‘Summary of the Key Provisions of the ICC Statute’ (1998), available online: <http://www.hrw.org/news/1998/12/01/summary-key-provisions-icc-statute> (accessed 12 January 2015).

inclusion of forced pregnancy as a constitutive act of a crime against humanity is accompanied by a caveat that it shall not affect national laws relating to pregnancy, so as to respect the sovereign right of states to legislate freely on abortion.⁵⁹ In fact, the interplay between the sovereignty of states and the authority of the ICC largely informs the operation of the Court in its entirety. The ICC was established as a court of last resort and as such the principle of complementarity in Article 17 of the *Rome Statute* preserves respect for the primacy of the state in addressing transgressions.⁶⁰ Challenging laws deeply embedded in not only a state's legal system but also, in some cases, the state's religion and culture could undermine the present delicate harmony between the ICC and state sovereignty.

Nevertheless, appeals to sovereignty can only go so far. This is particularly so for states that have voluntarily endorsed and signed on to international human rights treaties prohibiting torture and cruel, inhuman and degrading treatment. For example, Saudi Arabia regularly administers Sharia punishments such as stonings, floggings and amputations, all the while being a signatory to the *Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment*. States that sign on to treaties imposing human rights obligations exercise their sovereignty by doing so; yet the absence of effective mechanisms by which to enforce IHRL enables states such as Saudi Arabia to act entirely inconsistently with their treaty obligations. The argument presented in this paper does not favour the ICC being used as a tool by which to impose a particular set of cultural ideals onto otherwise unwilling states, or to further cultural imperialism in contradiction of sovereign rights. Instead, what is advocated in this paper is a potential for the ICC to be used as a mechanism to enforce the human rights obligations of states that sign on to treaties such as the *Convention Against Torture* and yet simultaneously violate them through the administration of harsh Sharia punishments. In these circumstances, the extent to which the ICC could be accused of cultural imperialism is limited, as the states in question would have themselves already endorsed the standards set out in the human rights instrument by signing on to it. As such, if issues of jurisdiction were overcome, using the ICC as a *de facto* human rights court to increase accountability for significant violations of human rights obligations, such as those contained in the *Torture Convention*, would be a triumph for the Court and international human rights.

Conclusion

Through the advent of the ICC, it is possible that perpetrators of Sharia punishments that amount to torture or cruel, inhuman or degrading treatment could be tried by an international tribunal for crimes against humanity or war crimes. However, beyond severe Sharia punishments, the impending consideration by the ICC of the use of Sharia law by rebel groups in northern Mali could ultimately provide a gateway to exploring a broader use for the ICC. If the ICC were to be used as a *de facto* human rights court in the manner this paper has suggested, it would be a significant advance in our current system of international human rights. For human rights violations that are found to also breach the *Rome Statute*, the ICC has recourse to a far broader range of penalties than merely offering 'concluding observations'. The availability of an enforcement mechanism that can generate weightier and more personal consequences for those

⁵⁹ *Rome Statute*, op. cit. (1998), arts 7(1)(g) and 7(2)(f); and Cryer, Friman, Robinson, and Wilmhurst, op. cit. (2014), pp. 257.

⁶⁰ *Ibid.*, art 17.

deemed most responsible for human rights abuses would be a notably more persuasive deterrent than current IHRL enforcement tools. Practically speaking however, the ICC is already presented with a substantial workload.

As such, should the ICC be used as a *de facto* human rights court to try broader human rights violations than those immediately before it, it ought to be considered as a supplementary rather than primary enforcement mechanism in the IHRL framework. Future exploration of the relationship between provisions of the *Rome Statute* and other IHRL documents would be prudent, as it would likely reveal numerous other instances of overlap. In turn, this would present further opportunities to consider the scope of the *Rome Statute* and the ways in which the ICC may be used to respond to significant human rights violations. With the ICC established to ensure greater respect for human rights globally, its broader utility in increasing accountability for significant violations of IHRL obligations could make a substantial difference in the human rights standards of a number of countries.