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Research Articles

Editor's Note:

Scholars of international relations (IR), divided as they are over the contours of the discipline, bear moral responsibility to, among other things, objectively and fairly present the unfolding nature of international affairs, the types and potency of actual and potential challenges, and the means available to confront such challenges. While analyses and policy prescriptions are portrayed using a variety of theoretical tools, *all* international relations scholars ought to share a desire to further understand the nuances of international political life, convey the dynamics of change, and offer decision-makers, and the interested public, constructive approaches for dealing with the multitude of international actors (state, non-state/non-governmental, supranational and intergovernmental), contrasting interests, resource competition (between allies and adversaries), in addition to geopolitical conditions and emerging causes of discord.

Currently however, the public domain of information is largely determined by the nature of available tools (re: the internet), and the role of scholarship in depicting international affairs is being subordinated to popular media outlets (including Facebook, blogs and Twitter) and political punditry; and 'communication' has become, in many ways, synonymous with 'education.' In a way, the monopolisation of international political analyses by IR theorists has been shattered as scholars continue to produce intricate and thoughtful explorations while public interest in such work dwindles.

The downward trend in relying on scholarship is logical given the speed of change to international relations coupled with the fact that many now have, at their fingertips, the ability to convey their opinion of international events as they occur. Similar to Bill Gates' notion of *business at the speed of thought*, international scholarship cannot keep pace with *reportage at the speed of occurrence*. In other words, IR scholars can do little more than present historical-political renditions of events using theoretical frameworks to explain causes and effects. This implies a substantial time-gap between an internationally significant event and an adequate scholarly response. With policy-makers and publics demanding swiftness and coherence in foreign policy, it is no wonder that IR scholars are increasingly finding themselves out-of-the-loop in decision-making cycles, while local 'people on the ground' are given increased importance in foreign policy-making.

Of course, IR scholars have devoted their lives to scientifically and theoretically exploring international issues, and their assessments cannot, in content, be compared to unsubstantiated and unresearched opinions. However, it is important that IR scholars reassert themselves and attempt to fulfil the important and admirable role of objectively informing decision-makers and publics so policies reflect the best known options and governments (at least democratic ones) are restrained in their actions by a sizable community of scholars able to reach, and help form, public opinion.

If political personalities here in the Czech Republic would, for example, heed scholarly, rather than public exclamation, their concern over the US's decision to

abandon its missile defence (MD) components may have reflected the gravity of the decision itself. Indeed, the Czech Republic (and Poland) laboured to secure US military investments in order to deepen their security provisions through the enlistment of an off-shore ally without a history of colonial expansion and occupation (at least within Europe), dictatorship or unprovoked belligerence. The US, for its part, used MD in the Czech Republic (and Poland) to achieve three of its own ambitions: increase its influence on EU decision-making by favouring two key 'new' EU members; carve-out forward geopolitical positions vis-à-vis Russia; and launch new socio-economic inroads into Central and Eastern Europe. So, the abandonment of MD in the Czech Republic indicates that: 1) the US, under Obama, has not prioritised relations with 'new' EU members; 2) the US has allowed Russia to penetrate its decision-making cycles and caves into Russian belligerence even if it appears that the US 'traded' MD for Russian acquiescence to sanctions against Iran; and 3) the Czech Republic was, for (at least) the third time in the past century, abandoned by its closest ally.

It is likely that Obama's midnight telephone call – announcing the abandonment of MD – to Czech Prime Minister Jan Fischer was deliberate in its absurd timing; ensuring that Fischer was unable to adequately reply or present counter-veiling argumentation. In his malicious approach to the Czech Republic, Obama revealed what many IR scholars already knew: that he was elected to advance US interests and that the US continues to assert itself as a unilateral power while attempting to give the impression of multilateralism. This idea contrasts sharply with European public opinion of Obama, which embraced him and his 'yes we can' attitude. It is shameful that Obama's rhetoric has done more to formulate European approaches to the US – as policy, in this case, reflects public opinion – than his actual policies have.

The above is but one example and shows some dangers which require rectification. Scholars need to re-enter decision making processes and help their political community make the right, not necessarily the most popular choices, while continuing to further educate the general public, otherwise democratic values will be eroded under new waves of populism.

It is on this point that I would like to welcome you to CEJISS 3:2, since CEJISS has prioritised providing in-depth analyses of central issues in IR – free of charge – to as wide a public as possible. This issue introduces and examines many important themes in IR that, when read together, illustrates some key characteristics of the nature of international political life. I sincerely hope you enjoy this issue and I look forward to your comments, criticisms and concerns.

Mitchell A. Belfer

Editor in Chief
CEJISS

Understanding Suicide Terrorism: Problem-Solving Approach to Suicide Terrorism

Tanya Narozhna and W. Andy Knight[1]

Introduction

Over the past few years, the problem of suicide terrorism has garnered significant scholarly interest.[2] Recent literature on suicide terrorism eschews earlier claims about the profound irrationality or psychopathology of attackers and focuses instead on the strategic dimension of this phenomenon, introducing rational choice cost-benefit analysis of the strategic calculations on the part of sponsoring organisations. Such analysis is often supplemented by the discussion of individual motives and the role of society in moulding the attackers. Amidst this literature one finds remarkably little serious reflection on the ways in which the rejection of earlier claims about the irrationality of suicide terrorism contributes to the reframing of the problem in line with the logic of rationality; how rationalist approaches advance our knowledge of suicide terrorism; and whether interpretive perspectives can offer any fresh insights into the nature of this phenomenon. Ironically, the narrow limits of rationalist literature on suicide terrorism have often been self-imposed by a commitment (implicit or explicit) to produce policy relevant research that offers governments practical recommendations for countering terrorism. This instrumental problem-solving approach is no doubt important, in that it certainly provides a practical 'tool-box' guide for policy-makers. But the problem-solving approach is limited in perspective in terms of the problem and its solutions. At the same

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[2]   A number of scholarly publications including, but not limited to, Mohammed Hafez's *Manufacturing Human Bombs: The Making of Palestinian Suicide Bombers* (2006), Robert Pape's *Dying to Win: The Strategic Logic of Suicide Terrorism* (2005), Diego Gambetta's *Making Sense of Suicide Missions* (2005), Mia Bloom's *Dying to Kill: The Allure of Suicide Terror* (2005), Ami Pedahzur's *Suicide Terrorism* (2005), Christoph Reuter's *My Life is a Weapon: A Modern History of Suicide Bombing* (2004) indicate increased attention to suicide terrorism among social scientists.

time, the dominance of rationalist explanations of this phenomenon leaves little room for reflectivist approaches to the study of suicide terrorism within the field of international relations (IR).

This article draws on Robert Cox's distinction between problem-solving and critical theories (Cox, 1996:85–123) to demonstrate that academic engagement with the problem of suicide terrorism has thus far been overly determined by an instrumentalist problem-solving approach. While acknowledging the relative merits of both critical and problem-solving perspectives, we put forth the argument that rationalist problem-solving analysis of suicide terrorism is inherently limited in that it is inextricably linked to the political agendas of dominant states. As such, it validates a very limited spectrum of opinions within the confines of mainstream IR. Critical theory, with its explicit normative agenda, calls into question global ideational and material structures, within which suicide terrorism originates. Therefore, a critical theoretical perspective offers an important insight into the phenomenon of suicide terrorism. Our argument proceeds through the following steps. First, we outline the difference between problem-solving and critical theories, highlighting their respective strengths and weaknesses. Second, we demonstrate where the problem-solving analysis falls short and how the critical theoretical approach can provide a different explanation of suicide terrorism as a problem of the socio-political complex as a whole.

Mapping the Theoretical Terrain: Two Kinds of Theories

Robert Cox (1996:87) reminds us that 'theory is always for someone and for some purpose.' The purpose of theory, according to Cox, is either to provide a guide for solving specific problems within a particular history-bound perspective, or to reflect upon its initial perspective and attempt to transcend the institutional and relational parameters within which a particular theory originates. Accordingly, theories can be categorised as 'problem-solving' or 'critical'. Problem-solving theories are predicated on an implicit assumption of fixity with regard to the socio-political order. The objective of problem-solving analysis and praxis is to maintain the existing institutional and power-relational *status quo* by confronting any destabilising pressures within the international system. Since the general form and practice of existing institutional and power relations is not questioned, specific problems tend to be compartmentalised within specialised spheres. Other spheres of social reality are implicitly considered unproblematic and unaffected by the problems outside their limits. Reducing a problem to a manageable set of parameters allows for a fairly quick and precise examination of the problem. This, in turn, makes it possible to produce parsimonious explanations and circumscribed recommendations for immediate policy measures. However, without questioning their own normative

assumptions, problem-solving theorists can offer only short-term managerial solutions to the particular problems. They are unable to offer comprehensive long-term solutions.

Unlike problem-solving scholarship, critical theories are concerned with the larger picture of the socio-political order and historical change. Many observers have noted that the multiplicity of critical theories makes it difficult to group them within a single category. However, for the purpose of our analysis, we refer to critical theory as a broad category that is defined by 'four common intellectual orientations' – questioning of the positivist epistemology, rejection of scientific methods, challenging of the rationalist ontology, and normative condemnation of value neutral theorizing (Price and Reus-Smit, 1998:261). While embracing a historically conditioned perspective as their point of departure, critical theorists attempt to transcend their initial perspective by engaging in in-depth reflections on the normative framework within which problems originate. They give serious consideration to alternative perspectives and entertain scenarios of potential transformations of the prevailing socio-political order. Whereas problem-solving theorists end up objectifying their initial perspective, critical theorists are concerned with becoming 'clearly aware of the perspective which gives rise to theorizing, and its relation to other perspectives' (Cox, 1996:88).

Within the IR discipline, critical and problem-solving theories have been widely perceived as inevitably irreconcilable, given the difference in their levels of abstraction; their normative, epistemological, ontological, and methodological orientation; and their programmatic agendas. Such dichotomy resulted from a particular appropriation of Cox's initial categorisation by mainstream academe in its attempt to set limits on the acceptable approaches to knowledge. Implicit in this dichotomous framing is the idea that some theories are more focused on real world issues and therefore more 'useful', while other theories offer critique for the sake of criticism alone (Duvall and Varadarajan, 2003:81). Such disconnect between problem-solving, and critical IR theories, is grossly overdrawn. For instance, the 'problem-solving/critical theory' binary is rightly criticised for imposing dubious categorisation and simplifying all research into either being policy relevant or having no bearing on policy-making. However, as Duvall and Varadarajan (2003:81) point out, '[all] theory is political and [all] political action is theory-laden.' Therefore, at the most basic level, all theoretical research bears implications for practical political action in distinct ways for different actors. Secondly, a different level of theory in these two approaches makes them complementary, rather than opposites. What distinguishes problem-solving and critical theoretical perspectives is not so much their level of analysis and practical relevance, but rather the nature of their relationship to the exercise of power and social practices through which power is projected (Duvall and Varadarajan, 2003:81). Problem-solving IR theorists (realists, liberalists, and mainstream constructivists) share a common

commitment to a positivist ontology and methodology, which determines the way they view existing institutions and power structures and makes them ideal for reinforcing the status quo. The practical relevance of problem-solving theories to those in positions of power is self-evident. In contrast, critical IR theories, from modernist and post-structural forms, consider problems as potential indicators of the need for structural change. Critical theories focus on 'inequalities engendered by the existing structures, practices, and/or discourses of power; they challenge the naturalness (and, by extension, the desirability) of the existing order. These theories speak, therefore, not to those in positions of power, but to those who seek to resist and challenge them' (Duvall and Varadarajan, 2003:81).

The Problem-Solving Approach to Suicide Terrorism

A considerable portion of the recent literature on suicide terrorism is a by-product of the problem-solving perspective.[3] In an attempt to understand specific patterns of the attacks, their spatial and temporal embeddedness, and the role of organisations behind them, problem-solving scholarship develops explanatory models that focus on multiple causal paths to suicide terrorism across individual, organisational, and societal levels. A number of major common threads can be detected in the recent problem-solving literature on suicide terrorism. First, problem-solvers generally shun psychological and grievance-based explanations of relative deprivation, frustration, alienation, etc.[4] Instead, they emphasise the crucial importance of group context and dynamics and portray individual acts of suicide bombings as the final link in a long organisational chain and/or as the result of strategic interactions among insurgent groups. Robert Pape (2005:232–249 at 233) argues, for example, that the 'vast majority of suicide terrorist attacks are not isolated or random acts by individual fanatics but, rather, occur in clusters as part of a larger campaign by an organized group to achieve a specific political goal.' Bloom (2005:78), too, elaborates on the process of strategic outbidding between multiple insurgent groups and contends that when violence is perceived positively and even demanded by the local population, suicide terrorism gives a sponsoring organisation an upper hand

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[3] The most illustrative works on the strategic nature of suicide terrorism include, but are not limited to Mia Bloom, *Dying to Kill: The Allure of Suicide Terror* (New York, *NY: Columbia University Press, 2005*); Robert Pape, *Dying to Win: The Strategic Logic of Suicide Terrorism* (Random House, 2005); Diego Gambetta, ed., *Making Sense of Suicide Missions* (Oxford University Press, 2005); and Ami Pedahzur, *Suicide Terrorism* (Cambridge: Polity Press, 2005)

[4] Ami Pedahzur, while embracing rationalist approach, nevertheless argues that local organisations sponsor suicide missions to create outlets for expressing community-wide feelings of injustice, frustration, desperation. See, Ami Pedahzur, *Suicide Terrorism* (Cambridge: Polity Press, 2005).

vis-à-vis its rivals in local power struggle. Her argument also implies an *a priori* propensity toward violence within society. However, Ami Pedahzur (2005:159) believes that such demand for radical violent tactics is 'a highly cultivated top-down phenomenon,' fostered by local organisations in the context of prolonged conflicts. Generally, reliance on radical tactics, including suicide bombings, is said to be driven by the desire on the part of sponsoring organisations to distinguish themselves from and outbid local political opponents, as well as garner greater popular support. Bloom, Pape and Gambetta agree that the latter is crucial for the success of suicide terror strategy.

Second, there appears to be an emerging consensus in the recent problem-solving literature on suicide terrorism that this phenomenon is a strategy employed mostly by non-state organisations that represent a weaker side in an asymmetric warfare. Suicide terrorism, in other words, is the weapon of the weak, an extreme form of 'the rationality of irrationality' (Pape, 2005b), in which the weaker side becomes stronger through 'irrational' individual acts of self-sacrifice in pursuit of a 'rational' coercive strategy designed to achieve specific political objectives. Presumably, insurgent organisations reap a number of benefits on different levels given tactical and coercive efficiency of these attacks, difficulties in deterring them, their symbolic value, as well as popular and financial support generated by suicide bombings framed as martyrdom. Suicide bombings work more effectively when insurgent groups (whether they are the occupied, the state or the occupier) represent different ethnic, linguistic and religious groups. Pape (2005a), in particular, suggests that religious differences between the occupier and the occupied can inflame local nationalism and facilitate the legitimisation of suicide terrorism. In such circumstances, the ideas of otherness are exploited to dehumanise those on the 'other' side and treat them as a legitimate target (Bloom, 2005:79). Most problem-solving scholars agree that religion blended with nationalism, foreign occupation, and excessively violent counter-terror measures may affect participation and support, but generally reject the idea that religion per se is a sufficient cause for suicide terrorism. Consistent with rationalist logic, religion and culture are reduced either to the level of 'incentives,'(Bloom, 2005:85) or a recruiting and indoctrinating tool for achieving a 'secular and strategic goal' (Pape, 2005a:22), such as national liberation.

Third, there is also a general recognition by problem-solving scholars of the limited utility of profiling suicide terrorists. The broad range of backgrounds and lifestyles that characterise modern suicide perpetrators, as well as the complexity of context-dependent personal motivations driving individuals to commit acts of suicide terrorism makes it exceedingly difficult to identify who these individuals are in advance. This kind of behaviour is rendered exceptional in view of the relatively small number of suicide bombers and low frequency of attacks.

The Critical Theoretical Perspective on Suicide Terrorism

From a critical theoretical perspective, there are three key issues with the recent problem-solving research on suicide terrorism: 1) the rationalization of suicide terrorism; 2) the tendency to conceal the politics and power of naming; and 3) the reductionist treatment of suicide terrorism as a state security issue. First, the problem-solving approach operates on the assumption that suicide terrorism is a problem conducive to rational choice analysis, which implies the possibility of developing an objective definition of this phenomenon. Scholars embracing the critical theoretical perspective, however, have questioned this assumption, arguing instead for the need to recognise the multiplicity of more 'contextualised' and culturally specific kinds of suicide terrorism (Euben, 2007:129–133). Their position seems to be validated by the fact that to this point problem-solvers have failed to develop a comprehensive, generally accepted definition of suicide terrorism or even to agree on the use of this term. While Bloom, Pape and Pedahzur refer explicitly to 'suicide terrorism,' other authors avoid the use of the term 'terrorism' or both 'suicide' and 'terrorism', replacing them instead with 'suicide missions' (Gambetta, 2005), 'suicide bombings' (Reuter, 2004), or 'martyrdom' (Victor, 2003; Davis, 2003). Still others propose a definition as a matter of formality, without meaningfully engaging in serious conceptual explorations. In this context, Christopher Ankersen's (2007:2) conclusion that 'there is no one understanding of terrorism, but rather a plethora of differentiated meanings … [that] vary across the spectrum of terrorist perpetrators, victims of terrorist violence, decision-makers aiming to respond to terrorism, and the "rest of us"' certainly applies to suicide terrorism.

From the problem-solving perspective, a failure to develop a general definition of suicide terrorism can be attributed, in part, to the fact that the subject of suicide terrorism has attracted serious scholarly attention relatively recently. However, despite the significant history of scholarly explorations, the study of terrorism in general has resulted in only two major attempts at developing a comprehensive consensus definition of the term – one undertaken by Alex Schmid (Alex Schmid, Albert Jongman et.al., 1988) in the 1980s, and the other in a more recent collaborative work by Leonard Weinberg, Ami Pedahzur and Sivan Hirsch-Hoefler (2004). Both attempts yielded a number of 'definitional elements', but confirmed that terrorism is an 'essentially contested concept,' subject to endless interpretations and dispute, but no consensus (Weinberg, et.al., 2004:778). Existing definitions of terrorism, while containing certain common threads, such as the centrality of coercive nature, intentional generation of massive fear, and political goals, tend to focus overwhelmingly on motivational issues. The need to weave motivational aspects into the definition of terrorism is necessitated by the fact that terrorism's coercive nature makes it strikingly similar to the corrective and deterrent functions vested in

the state. The latter, as Pape suggests, applies to suicide terrorism as well. In Pape's words (2005b:237), 'the heart of the strategy of suicide terrorism is the same as the coercive logic used by states when they employ air power or economic sanctions to punish an adversary.' Herein, however, lies a dilemma. If terrorism comprises all acts of deliberate targeting of civilians, regardless of whether those acts are committed by state or non-state actors, then in its destruction and ruthlessness state sponsored coercion far exceeds other acts of terrorism, including suicide terrorism committed by (semi)-clandestine groups and individuals.[5] While considerable debate revolves around the question of the right to coerce and which actors can legitimately exercise it, the motivational factors enable some problem-solving researchers to draw a line between coercion that is state-sanctioned and 'legitimate' and terrorism. However, at the conceptual level, inclusion of motives into the definition of terrorism makes it an inherently value-laden term, open to subjective interpretations. It makes the concept devoid of any significant consistency and defies the rationalist precept of objectivity. This explains why recent problem-solving scholarship on suicide terrorism generally eschews explanations focused on personal grievances and motives and focuses instead on the strategic nature of this phenomenon.

From the perspective of critical theory, however, this new focus of the problem-solving literature remains problematic. Critical theorists can certainly appreciate the arguments about strategic behaviour of suicide bombers and those who recruit, train and deploy them. Nevertheless, from the critical theoretical perspective, problem-solvers' analyses of the strategic dimension of suicide terrorism are inherently limited in that they 'derive meaning from function' without recognising that 'the particular significance of such tactics, the standards by which success is measured, and the contexts relevant to determining the particular function they perform actually depends upon the kind of interpretive frame operative at particular moments in particular places' (Euben, 2007:130). The logic and language of instrumental rationality render deeply held religious beliefs, cultural norms and moral commitments either marginally relevant or too complex to quantify (Euben, 2007). This is not to reinstate a simplistic Orientalist notion that Islam leads to suicide terror, but rather to argue that contextual exploration of the discourses of contemporary jihadism could provide important insights into our understanding of the rise of the culture of martyrdom in some parts of the world. This explains why critical theorists challenge the reductionist treatment of cultural, religious, and moral norms as 'incentives' in the problem-solving literature on suicide terrorism. From a critical theoretical perspective, religion, culture, and morality are complex 'interlocking system[s] of meanings' that define identities, provide interpretive frameworks, create collective memory, determine the limits of

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[5]   See also Rudolph Rummel, *Death by Government* (New Brunswick, NJ: Transaction Publishers, 1994).

acceptable practices (Euben, 2007:129–133), and render the very assumption of the possibility of developing an objective general definition of suicide terrorism incongruous. We need to explore the reasons why and the ways in which Islam has been linked to the recent culture and practice of martyrdom. And, considering that Islam prohibits both 'suicide' and 'terrorism', such exploration should, according to critical theorists, start with the shift in terminology.

This brings us to the second key issue with the problem-solving approach to suicide terrorism, namely its tendency to conceal the politics of naming certain acts, groups, and individuals as terrorist, as well as the epistemological consequences of essentialising an adversary as terrorist. At its core, suicide terrorism, according to problem-solvers, is a naked struggle for power by individuals and organisations with a clear political agenda. This struggle manifests itself not only in physical violence, but also in discursive battles over establishing and controlling dominant interpretive frames, over the ability to disempower dissent by rendering certain world-views illegitimate, and over the power of naming and names (Duvall and Varadarajan, 2003; Bhatia, 2005:5-22). The conflict over names and naming between insurgent groups and states became exceedingly pronounced with the launching of the 'Global War on Terror' that 'forced many to verbally negotiate and assert who they are, who they are allied with, and who they are against' (Bhatia, 2005:7). The power of established names is such that it commands the monopoly on truth, obscures the disputes through which the names were selected in the first place, and dictates inclusions and exclusions. Identifying a 'terrorist' is, therefore, a political matter contingent on a particular political context, which adds considerable confusion in both legal and political realms.

Despite an unresolved controversy around the highly politicised issue of designating terrorist groups and individuals, problem-solving theorists insist on the possibility of objective identification. An implicitly rationalist ontology that informs problem-solving analysis of suicide terrorism denies the formative function of its narrative in categorising and labelling this phenomenon. Problem-solving scholars consider language and terms as objective representations of reality, in effect naturalising and normalising the vocabulary they employ and downplaying the epistemological implications of their theorising. Such implications include rationalisation of state-endorsed violence, mobilisation of support for state policies, and communication to the opponents that they will be treated similarly to other groups designated with the same term (Harb and Leenders, 2005:174). Critical theoretical works that examine and challenge the name-giving authority of the problem-solving approach are either accused of justifying suicide terrorism or are openly ridiculed, as demonstrated by Crenshaw's (2005:88) reaction to a 2005 special issue of *Third World Quarterly* on the politics of naming. 'The terrorist label may impede American understanding of Hezbollah,' she wrote, 'but it is unclear how much that understanding would improve if the term were not applied.'

By silencing non-mainstream discourses in academic and political circles, and by ostensibly serving particular interests in today's global power relations, the problem-solving approach produces a series of binary juxtapositions, inscribing 'others' with a series of negative characteristics and motives, assigning the brutality of 'their' acts to the fundamentally evil character of the actors, and contrasting 'them' with 'us'. For problem-solvers, a suicide terrorist is always 'the other,' who directs violence against 'us.' The 'us versus them' dichotomy is subtly woven into an intricate net of other oppositions, such as 'innocent-vicious', 'stability-chaos', 'friends-enemies', 'progressive/superior/civilised-backward/savage'. Problem-solving scholarship on suicide terrorism is therefore a particular way of attaching meanings, stereotypes, moral connotations and labels to acts, groups, individuals, and societies using a highly politicised process of name-giving. The hidden structure of knowledge produced by problem-solving analysts combined with the focus on practical relevance of their analyses serve as a self-reinforcing foundation for the preservation of the global power-relational status quo. Critical theoretical perspective reveals the ideological bias of the 'objective' problem-solving scholarship on suicide terrorism and calls for a need to carefully examine 'the verbal tools and strategies of both governments and non-state movements as they compete for legitimacy' (Bhatia, 2005:19).

Finally, the third difficulty with the recent problem-solving literature on suicide terrorism is that it compartmentalises our knowledge of this phenomenon, sets fixed parameters on how the problem is analysed, and reduces it to a limited number of variables, i.e. violence, fear, threat, coercion, strategy, tactic, etc. Suicide terrorism is confined to the realm of state security. It is often overlooked, however, that the framing of terrorism as a state security issue is only a matter of convention. Such convention emerged during the Cold War period, which was characterised by a seemingly immutable fixity in global institutional and power relations – an assumption that privileged problem-solving approaches (Cox, 1996:90). Since the bipolar power dynamics appeared to persist indefinitely, much of the problem-solving theorising at the time focused on how to manage pressures within the existing world order (terrorism being one of them) without seeking to understand the opportunities for the feasible transformation(s) of the Cold War order. Dominated by the security-as-state-survival logic, problem-solving theorists viewed terrorism as an existential threat – a sufficient condition to elevate terrorism into the realm of state security, or to securitise the issue.[6] A far more significant

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[6] Securitisation model is closely associated with the Copenhagen School, represented most prominently by Buzan, Waever, and de Wilde. This model offers the possibility for a systematic analysis of the processes by which certain issues become elevated to the status of 'security problems' (securitised) and shifted out of the security sphere (desecuritised). According to this model, the success of securitisation is dependent on the persuasiveness of discourse employed by the securitising actors, be they the government, military, elite or

attempt at the securitisation of terrorism took place more recently, following the 2001 Al-Qaeda attacks on the United States (Buzan, 2006:1101–1118). One aspect of the post-9/11 securitisation of terrorism, which is particularly important in the context of this discussion, has been an attempt to securitise development by drawing a link, albeit indirect, between terrorism and poverty. Evident in the 2002 US National Security Strategy (NSS), which replaced the concept of deterrence with a pre-emptive strategy, this move indicated deliberate depreciation of traditional military threats of the past and asserted that addressing global poverty was important to US national security, as 'poverty, weak institutions, and corruption make weak states vulnerable to terrorist networks…'(NSS, 2002). Sustainable development was deemed both a 'compelling moral and humanitarian issue,' as well as a 'security imperative' (Powell, 2002).

Despite being met with significant criticism in academic circles,[7] the tenuous connection between poverty and terrorism received recognition and support from several top political figures, including the President of the World Bank (IBRD) and the head of the World Trade Organisation (WTO). The practical outcome of such consensus was the undisputed subordination of development to the singular purpose of fighting terrorism (Cosgrave, 2007). Such repackaging of 'development' through the identification of poverty as one of the root causes of terrorism posed a serious dilemma in that it framed poverty as a 'security threat.' The entanglement of poverty and terrorism was a clear attempt to securitise poverty as one of the components of the securitisation of terrorism, rather than evidence of the desecuritisation of terrorism. The latter would require recognition that terrorism is more than strictly a state security problem, and that at the very least it is also a socio-economic problem. However, 'relocating' terrorism from the realm of state security to the socio-economic one would logically imply the need for a set of socio-economic,

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civil society groups, as well as the acceptance of a threat constructed through 'speech act' by a relevant audience. For more, see Barry Buzan, Waever O., De Wilde J., *Security: A New Framework for Analysis* (Boulder, CO: Lynne Rienner, 1998).

[7] For example, M.I. Lichbach's comprehensive evaluation of the literature on economic inequality and political violence found support for and against such relationship. M.I. Lichbach, 'An Evaluation of "Does Inequality Breed Political Conflict?" Studies,' *World Politics* 41(July 1989), pp. 431–470. Also, Jeffrey Ross and Helga Tawil Souri both recognise the link between terrorism and poverty (see, Jeffrey Ross 'Structural Causes of Oppositional Political Terrorism: Towards a Causal Model,' *Journal of Peace Research* 30:3(1993), pp.317–329. Helga Tawil Souri, 'Marginalizing Palestinian Development: Lessons Against Peace,' Development 49:2 (2006), pp. 75–80). Yet, contrary to their argument, recent study by James Piazza on the relationship between terrorism and any of the measures of economic development discovered no significant link between the two. Rather, demographic conditions, ethno-religious diversity, increased state repression, and the structure of party politics have been found to correlate significantly with terrorism. See, James Piazza, 'Rooted in Poverty?: Terrorism, Poor Economic Development, and Social Cleavages,' *Terrorism and Political Violence* 18:1 (2006), pp. 159–177.

rather than police and military measures to address this problem. For Western democracies it is much easier to fight terrorism with military force, than introducing complex economic measures, such as an equitable redistributive mechanism in the global market.

Post-9/11 securitisation of terrorism left its imprint on the recent problem-solving works on suicide terrorism, which is reflected in a generally limited engagement of this literature with the issue of structural violence, particularly foreign occupation and political oppression, and its role in shaping popular support for the culture of martyrdom. Pape (2005a), for instance, finds no correlation between foreign occupation and repressive policies of the occupier and suicide terrorism. However, other scholars and studies have found a direct link between occupation and the rise of radicalism.[8] Even some problem-solvers have been more receptive of the idea that collective experience of structural violence is directly linked to the rise of suicide terrorism. Kalyvas and Sanchez-Cuenca (2005:228), for instance, maintain that 'what matters is not that the individual personally experiences political repression or economic deprivation but, rather, that the living conditions of the community are so grim and hopeless as to move people to extreme acts.' What also matters is the fact that problem-solvers' reliance on rational choice theories makes them ill-equipped to account for the sociology and social psychology of structural violence. Rational choice theories operate relatively well at the individual level, which makes them a good source for explaining strategic calculations behind individual decisions to deploy (or not) suicide bombers. However, the rational choice literature is less helpful when it comes to explaining the group dimension of collective resistance. The rationalist approach is inherently limited in its ability to account for group solidarity and other complex dynamics of collective support for martyrdom and sends us instead 'in search of selective incentives to get individuals to contribute to the provision of collective goods' (Shapiro, 2007:136). The treatment of general conditions as 'selective incentives' by recent works on suicide terrorism, while problematic from critical theoretical perspective, allows problem-solvers to view socio-economic, demographic, political and other conditions as secondary in comparison with the strategic side of this phenomenon, and enables them to frame suicide terrorism, explicitly or implicitly, as a state security problem.

To reiterate an earlier point, framing suicide terrorism strictly as a state security problem is largely a result of convention. But we ought not to forget

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[8]   In particular, Rasler refers to Sean Yom and Basel Saleh's study of Palestinian suicide bombers, as well as Robert White's research on IRA. See, Robert White, 'From Peaceful Protest to Guerrilla War: Micromobilization of the Provisional Irish Republican Army,' *American Journal of Sociology* 94:6 (1989), pp. 1277–1302; Sean Yom, and Basel Saleh, 'Palestinian Violence and the Second. Intifada: Explaining Suicide Attacks,' Presented at the 19th Middle East History and Theory Conference (2004), University of Chicago, Chicago. Both in Rasler, Review Symposium (2007).

that 'a conventional cutting up of reality is at best just a convenience of the mind' (Cox, 1996:85). In time, as the organisation and practice of human affairs change, conventional understandings and classifications become increasingly arbitrary as the pressures of an evolving social reality necessitate the adjustment or even rejection of old concepts (Cox, 1996:87). Such adjustment can be seen in the attempts of some critical security scholars to reorient the focus of security studies from the state to the individual and community through the notion of human security. While not a monolithic idea, human security has evolved into an umbrella concept unifying all those who believe in the necessity of replacing the state with the individual – and people collectively – as the referent object of security.

For its advocates, human security is not simply an updated version of the anachronistic state-centered security framework. Rather, supporters of human security regard this concept as signalling a paradigmatic shift in the theory and practice of security towards protecting and empowering the individual and community (MacLean, Black and Shaw, 2006). By reorienting the focus, proponents of human security reinforce the agency of the individual and community vis-à-vis the state. This contributes to 'a rebalancing of the liberal paradigm of governance towards more individual [and community] rights, agency, and freedom, and away from the notion that individuals [are] merely subjects of regimes of constraint and regulation in which they often [have] little say' (Richmond, 2007:467). In this sense, human security poses an emancipatory challenge to the traditional state security framework. And, as Thomas (2002:114-5) notes, human security as a norm goes even further than merely securing the individual, it 'describes a condition of existence in which basic material needs are met, and in which human dignity, including meaningful participation in the life of the community can be realized… Such human security is indivisible; it cannot be pursued by or for one group at the expense of another.'

Human security has drawn new normative lines of inquiry regarding the degree of its theoretical 'revisionism'; the nature of state sovereignty and the relationship between people and the state; and the structure-agency binary, especially as it relates to the potential of human agency to challenge structural factors and the distribution of power (Newman, 2004:358-9). These issues inflamed highly controversial debates that raised old concerns about redressing the structural inequalities of the global economic infrastructure, creating a level political playing field, reconciling market mechanisms with social considerations, to name just a few. The only consensus appears to be that while normatively attractive, human security is analytically weak (Thomas, 2002). The concept eschews a precise, scientific, workable definition and is criticised as extraordinarily ambiguous and too 'slippery by design' to be of practical significance either for academic research or policy-making.

However, from a critical theoretical perspective, the lack of the universal definition of human security, as well as its inclusiveness, holism, open-endedness, broad sweep and elasticity, rather than being viewed as the reasons for disqualifying the concept as 'unworkable', should be treated as strengths. These characteristics of human security allow one to contextualise sources of insecurity. In this sense, different, and at times competing, concepts of human security reflect different security concerns specific to each sociological/cultural context (Newman, 2001:239–51). Therefore human security may provide important context-specific insights into the collective experience that leads people to support suicide terrorism. Analytically, this makes human security more sensitive toward specific people and places. Considering that this concept is oriented more to human needs than state security, examining suicide terrorism through the lens of human security allows one to engage meaningfully with sociological and social psychological factors at the heart of suicide terrorism. In other words, the concept of human security can expand our understanding of suicide terrorism by enabling us to account for culture, religion, economy, gender and other 'low politics' issues in the analysis of this phenomenon.

Furthermore, the fact that human security does not yield a universal definition means that the concept cannot be pinned down as either status-quo-oriented or transformative. As a result, critical definitions of human security that pose a fundamental challenge to political and economic institutions and values are not discursively discarded. For example, Thomas and Wilkin (1999:3) understand human security not as 'some inevitable occurrence, but as a direct result of existing structures of power that determine who enjoys the entitlement to security and who does not.' This means that the 'emancipation from oppressive power structures – be they global, national, or local in origin and scope – is necessary for human security.' Therefore, examining the problem of suicide terrorism through the prism of critical definitions of human security offers a broader explanatory frame that focuses on the links between the existing global order, on the one hand, and local actors (suicide terrorists, organisations employing them, and societies supporting them), on the other. This enables critical theorists to view suicide terrorism as a problem of the social and political complex as a whole.

By the same token, the rise of suicide terrorism is an indicator of pressures within the existing world order to change the power relational status quo. Embracing a critical theoretical perspective on suicide terrorism thus requires that we call into question existing institutional and social power relations and examine whether and how they are changing. We need to reveal the developments that triggered recent exponential growth in the number and worldwide impact of suicide terror attacks. This means that we ought to examine the dynamics within the present world order or, to use a Coxian term, within the current 'historical structure of world order' (Cox, 1996:97).

Suicide Terrorism: A Historical Structure Lens

Each historical structure, according to Cox, is represented by a configuration of three categories of forces: material conditions, ideas, and institutions. With regard to suicide terrorism, critical theory urges us to explore how the interplay of material conditions with dominant ideas and institutions facilitates the radicalisation of Muslims in some societies and the spread of martyrdom through suicide. In all likelihood, the recent upsurge of suicide terrorism has as much to do with the weakening of fixity in global power relations and the doctrinal vacuum in the aftermath of the Soviet collapse,[9] as with the structural violence blamed on the West, its global institutions, and (neo)liberal ideologies. Homer-Dixon (2001) notes that grievances exploited by terrorists are, in fact, compounded by 'an international political and economic system that's more concerned about Realpolitik, oil supply, and the interests of global finance than about the well-being of the region's human beings.' His argument reflects the idea that violence in the form of suicide terrorism can emanate from the interplay of material, institutional and ideational dimensions of the existing world order. Therefore, it makes sense to take a closer look at the recent changes in each of these dimensions.

In the last two decades, the politico-military dimension of historical structure has been characterised by two strong moves on the part of the US from Cold War limited hegemony to post-Cold War expanded hegemonic multilateralism to post-9/11 (neo)-imperial unipolarity. During the Cold War, the US - a limited hegemon –exercised a relatively high degree of soft power within its sphere of influence, spreading American values, social norms, and lifestyle beyond its borders. The evolving Cold War conflict played a significant role in moulding and reinforcing limited American hegemony. Much of the acquiescence to US leadership was sustained by the provision of benefits to loyal and subordinate states in the form of aid, security guarantees against Soviet threat and participation in the liberal economic order. While violent conflict was controlled in the relations between collaborative adherents to US hegemony, recourse to force helped establish and/or maintain American presence in the periphery. However, it was the periphery that became severely disadvantaged by liberal economic institutional arrangements, 'through which the asymmetries of exchange relations …[worked to the] benefit [of] the hegemonic power' (Harvey, 2003:181). Therefore, the periphery displayed little consent to US leadership. It is also in the periphery

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[9] See, for example, Cornelia Beyer, *Violent Globalisms: Conflict in Response to Empire* (Ashgate 2008); Adrian Guelke, *Terrorism and Global Disorder: Political Violence in the Contemporary World* (I.B.Tauris, 2006). Of relevance here is also Gambetta's argument that suicide terrorism needs to be understood in terms of both its historical continuity and its diffusion across insurgencies. We argue that the collapse of Cold War bipolarity contributed to the spread of suicide terrorism.

that the US efforts at establishing control through the use of force clashed with Soviet attempts, backed by the coercive power of its military machine and competing communist ideology. Faced with the paucity of acquiescence and a serious contestant, the United States had no choice but to rely on a combination of benign hegemonic and coercive dictatorial forms of power to retain control over the periphery.

Following the demise of a communism Eastern Bloc, the United States faced a unique opportunity (a unipolar moment) to internationally expand its hegemony. But the growing resort to aggressive unilateral action in the aftermath of 9/11 contributed to increased tensions with the periphery, especially among so-called 'rogue states.' The challenge to increasingly dictatorial American domination came in different forms – suicide terrorism being one of them. To terrorists, US hegemony with its institutional and ideational underpinnings is both implicated in attempts at, and through the outcome of, exclusive control over trade, finance, production, and services (Chaturvedi and Painter, 2007:386). Harvey (2003:181) argues that American hegemony represents 'accumulation by dispossession [of which the] …primary vehicle … has been the forcing open of markets throughout the world by institutional pressures exercised through the IMF and the WTO, backed by the power of the United States (and to a lesser extent Europe) to deny access to its own vast market to those countries that refuse to dismantle their protections.' Against this backdrop, it is worth mentioning that Cox himself ascribed considerable importance to institutions, which he saw as crucial for the stability of any particular world order. Institutions, at least initially, perpetuate the status quo by promoting normative underpinnings for the power configuration existing at the time of their origin (Cox, 1996:99). Hegemonic institutions ensure domination of the strong by legitimising prevailing power relations; they offer 'softer' means of power for resolving conflicts, such as persuasion, manipulation, and bribery. By doing so, they ensure the distinctiveness of hegemonic domination from dictatorial domination (the latter relying primarily on the 'hard' power of the strong).

As mentioned above, both Cold War and post-Cold War orders reflected consistent efforts on the part of the US to expand its political, military and economic power through the process of institution-building and creating a relatively stable liberal institutionalised order. Even in the aftermath of the 2001 terror attacks, the US – a major architect of multilateral institutionalism – did not abandon the broader goal of promoting liberal political and economic institutions globally, even though in some cases some of these institutions became seriously weakened. (Sorensen, 2006:353) The dominant position of Western capitalist democracies within most of the global multilateral institutions, especially the international financial institutions, remained firmly in place. This can explain why Western efforts to promote liberal institutions and values often ignite resistance, including from radical Islamist elements. Githens-Mazer

(2008:19–26) contends that individual and collective interactions with state and international institutions, along with ideological commitments and individual experiences, account for support and participation in radical violent Islamism.

Indeed, much of the terrorist discourse is directed against global liberal institutions. These institutions are seen from the global south as embodiments of American dominance. Created in 1944, these institutions underwent significant transformation from a system of 'embedded liberal compromise' (Ruggie, 1982:379–415) to one that advocated economic neoliberalism. Despite this transformation, the Bretton Woods institutions are reflective largely of the collective images prevalent in the West. They provide little room for non-Western ideas, thus hampering the development of truly inter-cultural universal values. It is no surprise, then, that terrorists often incorporate into their discourse fierce critiques of the complicity of US-dominated economic institutional arrangements in generating and sustaining structural conditions of poverty, social inequality, exclusion, dispossession, and poor distribution on a global scale. Mousseau (2002:5-6) refers to terrorism as 'the deeply embedded anti-market rage brought on by the forces of globalization.' This rage is directed not only against institutions that typify Western 'accumulation by dispossession,' but also against (neo)liberal ideology in general.

From a critical theoretical perspective, suicide terrorism is a way of expressing divergent collective views on the nature and legitimacy of current power relations, distinct meanings of justice, as well as opposing values held by those on the periphery of the current historical structure. The dynamics of globalisation brought modern and traditional value systems into contact and, at times, into conflict, generating fear among marginalised groups of US or western cultural domination (Newman, 2006). Modernity with its emphasis on secularism and rationality brought not only freedom, democracy, and diversity, but also devastating social and economic disruption, profound nihilism, and materialism – all of which are tightly connected with the structure and nature of US power, and therefore strongly detested by terrorists and their supporters. Such contestation of rival collective images of social order is evidence of the existence of alternative collective views on the nature of world order. In this respect, critical theory provides the possibility of exploring the heterogeneity of the present historical structure by recognising the forces, sources and patterns of contestation and resistance by the excluded, marginalised and silenced. A critical theoretical perspective requires that we understand suicide terrorism within a *longue durée* dynamic framework and treat it as a problem of the socio-political complex as a whole. This is not to suggest that critical theoretical scholarship is 'better' than the problem-solving approach, but to demonstrate that its distinctive relationship to the structures and practices of power enables critical theoretical perspective to reveal deeply problematic and contentious conceptual issues generally masked by the problem-solving research. Unable to address these issues effectively, problem-solving scholarship is trapped in

objectifying suicide terrorism, in concealing both the theory-laden and contentious essence of the very basic terms it employs and implicit political commitments of its theorising, and in reducing the phenomenon of suicide terrorism to the sphere of state security. In the face of these unresolved conceptual issues, problem-solving analysis relies on a string of assumptions that frame a latent normative project, which reinforces the prevailing global status quo.

Conclusion

The above discussion highlighted the tendency of recent problem-solving literature on suicide terrorism to focus on the strategic nature of this phenomenon. Problem-solving scholarship provides important insights into the issue of suicide terrorism by reorienting the discussion from the earlier emphasis on irrationality of suicide bombers to a more sophisticated theoretical engagement with rational calculations made by organisations and leaders employing this tactic. However, the entanglement of the rationalist works on suicide terrorism with the political agendas of dominant states circumscribes the scope of problem-solving analysis and carries hegemonic implications. Critical theoretical approach reveals some deeply problematic, unresolved conceptual issues, confronting problem-solving literature (the rationalisation and securitisation of suicide terrorism, as well as the politics of naming). Some may charge that the distinction between the two approaches is not as sharp as first proposed, considering that even problem-solving approach suggests measures, such as poverty eradication, narrowing of the gap between the haves and have-nots, fostering of the intercultural dialogue, and supplementing military security with human security. However, critical theoretical and problem-solving perspectives on suicide terrorism operate at the different levels of abstraction, and embrace distinct epistemological, ontological and methodological orientations and programmatic agendas. For instance, critical theorists replace the rationalist explanatory framework with an interpretive one, thus emphasising the need to contextualise suicide terrorism, that is, to account for the complex web of political, material and discursive factors at play within each specific context. Most importantly, what really separates these two approaches is the orientation. Problem-solving approaches are status-quo in orientation and view suicide terrorism as a problem to be managed within the context of securitized agenda, whereas critical theory contextualizes suicide terrorism and tries to understand the deeper societal sources of this problem. This has implications for policy making. While they do not offer a simple way of explaining and addressing the issue, critical scholars view suicide terrorism as a problem of the socio-political complex as a whole, rather than a self-contained security issue. Such a broader view of the problem allows critical theorists to engage with the considerations of how existing discourses, practices and structures of power are implicated in the exponential rise of suicide terrorism and to suggest that

effective counter-terror strategies require a shift away from problem-solving status quo management of the problem to recognising the need for major social, economic, and political changes to the existing world order.

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Talking about Unlawful Combatants?
A Short and Concise Assessment of a
Long and Multifaceted Debate[1]

Veronika Bílková[2]

In the memorandum of February 7, 2002, (former) US president George W. Bush qualified the members of the Taliban movement arrested in Afghanistan and detained at the US military base of Guantánamo Bay as "unlawful combatants".[3] In the following months, the scope of this term was broadened to include, at first, detained members of the Al Qaeda terrorist organization, and, later, all the "other international terrorists around the world, and those who support such terrorists."[4] Simultaneously, the US declared that unlawful combatants did not enjoy combatant privileges, which grants combatants the right to participate in hostilities without undergoing the risk of prosecution for such participation.[5] Moreover, once detained, they were, in the administration's view, not entitled to either the status of prisoners-of-war (POW) (protected by the 1949 Geneva Convention III), or of civilians (protected by the 1949 Geneva Convention IV). They constitute an autonomous category of persons, who are excluded from international protection or covered by some minimal humanitarian standard.

This approach has been heavily criticized by other countries, international organizations, NGOs, and legal experts, who have questioned the appropriateness

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[3] "Based on the facts supplied by the Department of Defense and the recommendation of the Department of Justice, I determine that the Taliban detainees are unlawful combatants /.../." G. W. Bush, Memorandum *Humane Treatment of Taliban and al Qaeda Detainees,* 7 February 2002, par. 2 d).

[4] Dworkin, A. 2006. *Excerpts from Interview with Charles Allen, Deputy General Counsel for International Affairs, US Department of Defense.* www.crimesofwar.org/onnews/news-pentagon-trans.html (accessed on August 28, 2006).

[5] Combatant privilege does not cover the commission of war crimes and other violations of international humanitarian law, for which combatants may be held resposible.

of the term, the purposes lying behind its use, as well as the legal uncertainties surrounding the status of, and the legal regime applicable to, detainees in the so-called 'war on terror.' Discord over these issues has given rise to an interesting and multifaceted debate, whose outcomes – and, in fact, whose very course – will certainly mark, and to a certain extent even determine, the future development of international humanitarian law (IHL). IHL is a branch of public international law specifically designed to protect victims of armed conflicts and to regulate the means and methods of warfare.[6] It is based on several fundamental principles, one of them being the principle of distinguishing between combatants and civilians. The concept of unlawful combatants challenges this distinction, and seeks to add yet another category of persons into the IHL regime and, consequently, jeopardizes the balance this regime has been traditionally based on.

Over the past years, the concept of unlawful combatants has been the focus of numerous articles, policy papers and books.[7] Most of these texts have primarily focused on the legal status of persons described as unlawful combatants, and on the rights and privileges such persons enjoy under current IHL. While not completely omitting discussion on these issues, this paper adopts a somewhat different, more original position. In addition to dealing with the concept of unlawful combatants as such, this work draws attention to the multifaceted debate that has recently (and in the past) accompanied its use. In doing so, it aims at advancing two main arguments: firstly, the debate, despite its alleged focus on one, central issue, is characterized by immense confusions, which manifest themselves in

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[6] IHL applies, with some minor exceptions, solely in armed conflict, which has been recently defined as "a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State". ICTY, *Prosecutor v. Duško Tadić,* Case No. IT-94-1-AR72, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, par. 70.

[7] See, for instance, Aggelen, J. Van. 2005. A Response to John C. Yoo, "The Status of Soldiers and Terrorists under the Geneva Conventions". *Chinese Journal of International Law* 4(1): 167–181; Aldrich, G. H. 2002. "The Taliban, Al Qaeda, and the Determination of Illegal Combatants." *American Journal of International Law* 96: 891–898; Azubuike, L. 2003. "Status of Taliban and Al Qaeda Soldiers: Another Viewpoint." *Connecticut Journal of International Law* 19(1): 127–154; Callen, J. 2003–2004. "Unlawful Combatants and the Geneva Conventions." *Virginia Journal of International Law* 44: 1025–1072; Elsea, J. 2006. "Treatment of ´Battlefield Detainees´ in the War on Terrorism." *CRS Report for Congress*, p. 57; Goldman, R. K. and Tittemore, B. D. 2002. "Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law", *ASIL Task Force Paper*, p. 60; Jinks, D. 2006. "The Applicability of the Geneva Conventions to the ´Global War on Terrorism´". *Virginia Journal of International Law* 46(1): 165–195; Kinsella, H. M. 2005. "Discourses of Difference. Civilians, Combatants, and Compliance with the Laws of War." *Review of International Studies* 31: 163–185; MacDonald, A. 2002. "Defining the War on Terror and the Status of Detainees: comments on the Presentation of Judge George Aldrich." *Humanitäres Völkerrecht* 15(4): 206–209; Sassoli, M. 2004. "The Status of Persons Held in Guntánamo Under International Humanitarian Law." *Journal of International Criminal Justice* 2(1): 96–106; Yoo, J. C. and Ho, J. C. 2003. The Status of Terrorists. *Virginia Journal of International Law* 44(1): 207–228.

three spheres: a terminological, a conceptual, and a legal. These confusions turn the debate into a cacophonic chorus of mutually incompatible positions that often do not meet each other at the discursive or epistemological level. Secondly, these confusions – far from unwanted – play an integral role in contributing to becloud the true purpose of the recent use of the term. Never denoting an autonomous legal concept, the notion of unlawful combatants has, in the period after September 11, 2001, ceased to serve as the useful descriptive expression it used to be. Instead, it has become a political device, designed primarily to discredit political enemies and justify the lowering of legal guarantees granted to them. These arguments are further developed in the body of the text (below).

Three Confusions Characterizing the Debate on Unlawful Combatants

As noted above, three main confusions currently characterize the debate on unlawful combatants these are: terminological, conceptual, and legal confusions.

Terminological Confusion

The first confusion is of a terminological nature. It relates to the plurality of terms that are frequently used to label those persons (also) known as unlawful combatants. The circle of such terms includes, without being limited to, irregular combatants, enemy combatants, illegal belligerents, unlawful belligerents, irregular belligerents, unprivileged combatants, or the more traditional notions of francs-tireurs and maraudeurs.[8] The relationship between these various terms is far from clear. Some authors believe that these are largely identical in scope and content. For instance, Bialke claims that "an unlawful combatant is also referred to with identical meaning as an illegal combatant, unprivileged combatant, franc-tireur meaning 'free-shooter', unprivileged belligerent, dishonorable belligerent or unlawful belligerent".[9] Yet, this opinion is not uniformly accepted and there are other authors, for whom important differences exist between various terms and no conflation is possible here.[10]

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[8]   *"The uncertain status of these 'illegitimate' warriors is evidenced by the variety of terms used to describe them such as unlawful combatants, unprivileged belligerents, enemy combatants, terrorists or insurgents. Often these participants in conflict are referred to simply as criminals."* Watkin, Kenneth. 2005. *Warriors Without Rights? Combatants, Unprivileged Belligerents, and the Struggle Over Legitimacy.* Program on Humanitarian Policy and Conflict Research, Harvard University, Occasional Paper Series 2: 5.

[9]   Bialke, J. P. 2004. "Al-Qaeda and Taliban Unlawful Combatant Detainees, Unlawful Belligerency, and the International Laws of Armed Conflict." *Air Force Law Review*, available at: www.findarticles.com/p/articles/ mi_m6007/is_55/ai_n8585592/print (accessed on August, 24, 2006).

[10] Hoffman, M. H. 2002. Terrorists are Unlawful Belligerents, not Unlawful Combatants: A Distinction with Implications for the Future of International Humanitarian Law, *Case Western Reserve Journal of International Law* 34(2): 227–230.

The practice of the US in the so-called 'war on terror' presents an interesting example of this terminological uncertainty as well as of some implications, such uncertainty may bear.[11] Whereas, in the aftermath of the terrorist attacks on September 11, 2001, US officials referred almost exclusively to unlawful combatants,[12] later, the use of the terms enemy combatants or unprivileged combatants became more common.[13] The shift in terminology caused practical problems: for instance, the US was prevented from prosecuting, in its military commissions, as 'unlawful combatants,' those persons who had previously been qualified as 'enemy combatants' by the Combatant Status Review Tribunal, established at the Guantánamo Bay prison facility in 2004.[14]

Conceptual Confusion

The second confusion draws attention to the fact that neither the term unlawful combatants, nor any of the other notions used in the same context, are uniformly defined and, clearly, they *all* can, and in various contexts do, refer to three very different categories of persons.

The first category encompasses combatants using secret and/or deceiving operational methods of warfare in order to be indistinguishable from a civilian population. Such persons lose their combatant status and, if detained, do not become POWs and may be prosecuted for participation in hostilities. This category primarily deals with spies and military saboteurs. It is, at times, broadened to cover combatants deliberately disguising themselves in civilian clothes, irrespective of the purpose of doing so. This broadening risk blurring the line between unprivileged participation in hostilities and perfidy as an unlawful act committed by a privileged participant in hostilities.[15] In view of the above, it is not uniformly supported by the doctrine.

The first meaning of the term is the oldest or, more precisely, the original one. It is within this context that that the term was first introduced into legal vocabulary by the US Supreme Court in its 1942 decision in the *Ex Parte*

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[11] See also Sweeney, M. J. 2003. Detention at Guantanamo Bay, A Linguistic Challenge to Law. *Human Rights:* 15–17.

[12] *"They will be handled mot as POWs, because they are not, but as 'unlawful combatants'."* Rumsfeld, D. H. 11 January 2002, cit. in D. Eberhard, *Rumsfeld Stands Pat On 'Unlawful Combatants'*, News Max, 28 January 2002.

[13] Deputy Secretary of Defense, *Order Establishing Combatant Status Review Tribunal*, 7 July 2004.

[14] For more information, see *Combatant Status Review Tribunals, Factsheet,* available at http://www.defenselink.mil/ news/Oct2006/d20061017CSRT.pdf (accessed on 12 September 2008).

[15] Acts of perfidy are defined by IHL as *"acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy. The following acts are examples of perfidy: /.../ (c) the feigning of civilian, non-combatant status /..../"*. Article 37 par. 1 of 1977 Additional Protocol to the four Geneva Conventions of 1949.

Quirin case. The case concerned a group of eight German agents who, disguised in civilian clothes, penetrated the territory of the US in a submarine, with the purpose of commiting acts of espionage and sabotage there. Arrested before committing any hostile act, the agents were brought to a military commission specifically constructed for this purpose by (then) President Franklin D. Roosevelt, and were sentenced to the death penalty. In its decision on the appeal, relating mainly the to the issue of jurisdiction, the US Supreme Court stated that

> "by universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants."[16]

The Court added that while the former "are subject to capture and detention as prisoners of war by opposing military forces," the latter, including spies and saboteurs, are "likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful."[17]

The second category of persons described as unlawful combatants includes individuals who take a direct part in hostilities without being entitled to do so. Unlike spies and saboteurs, these individuals do not necessarily have to use secret and/or deceiving operational methods of warfare. They may even distinguish themselves from the civilian population. Yet, lacking the legal entitlement to participate in hostilities is sufficient to turn them into unlawful combatants. As in the previous case, those persons are not protected against attacks and, if detained, they do not have POW status, and may be prosecuted for participation in hostilities. This category comprises some elements of the civilian population (so-called civilians by day, fighters by night); mercenaries; and members of militias or guerrilla groups who do not fulfill all the four conditions of regular combatancy, namely: being part of a military hierarchy; wearing uniforms or other distinctive signs visible at a distance; carrying arms openly; and conducting military operations in accordance with the laws and customs of war.[18]

The second meaning of the term is also the most typical. It was introduced into the discourse in the post-WWII context and has remained there until now

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[16]   US Supreme Court, *Ex Parte Quirin,* 317 US 1 (1942), par. 30–31.

[17]   Ibid. The Court also specified the groups of people covered by the term by saying that *"the spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals".* Ibid.

[18]   Article 4 par. A al. 2 of the Geneva Convention III Relative to the Treatment of Prisoners of War.

despite that neither the Geneva Conventions (1949), nor their two Additional Protocols (1977), contain any references to it.[19] Some even consider that this silence is deliberate, motivated by the desire "not to provide even negligible legitimacy to the existence of such elements of war" and by the fear that "the creation of an intermediate status would blur the basic dichotomy distinguishing civilians from combatants."[20]

During the Cold War however, two other notions were more commonly used to label unlawful combatants according to this second meaning, namely 'unprivileged belligerents' and 'irregular combatants.' The former term, promoted by Baxter, covered persons taking direct part in hostilities without being entitled to do so, as well as spies and saboteurs, thus creating a larger category.[21] The latter term, which became popular in the decolonisation period (1960s and 1970s), served to describe members of national liberation movements. In the 1980s and 1990s, the notion of unlawful combatants became more popular again but, since the problematic was not the center of attention, no process of conceptual clarification occurred.

The third category of persons labeled as unlawful combatants includes all those who participate in the perpetration of terrorist offences as well as those lending them any form of support. This is the meaning in which the term has been used since September 11, 2001, not only by the US, but also by several other states, and an increasing number of experts.

Among states, the case of Israel is especially interesting, as it is the only country which has directly incorporated the term into its legal order. The Israeli *Incarceration of Unlawful Combatants Law*, adopted in 2003, and intent to "regulate the incarceration of unlawful combatants /.../ in a manner conforming with the obligations of the State of Israel under the provisions of international humanitarian law"[22] defines an unlawful combatant as

> a person who has participated either directly or indirectly in hostile acts against the State of Israel or is a member of a force perpetrating hostile acts against the State of Israel, where the conditions prescribed in Article 4 of the Third Geneva Convention of 12th August 1949 with respect to prisoners-of-war and granting prisoner-of-war status in international humanitarian law, do not apply to him.[23]

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[19] See, for instance, the Nuremberg Tribunal, *The Hostages Case, Trials of War Criminals*, Washington: Government Printing Office 1950, where the term was used to characterise members of resistence movements.

[20] Zachary, S. 2005. Between the Geneva Conventions: Where Does the Unlawful Combatant Belong. *Israel Law Review* 38(1-2): 378–417.

[21] Baxter, R. R. 1951. So-Called ‚Unprivileged Bellegerency': Spies, Guerillas, and Saboteurs. *British Yearbook of International Law* 28: 323–345.

[22] *Incarceration of Unlawful Combatants Law*, S. H. 192, 2003 (Israel), par. 1.

[23] Ibid., par. 2 al. 2.

While this provision still sticks to the classical IHL vocabulary, invoking the Geneva Convention and the POW status, it clearly illustrates the trend of using the term 'unlawful combatants' to describe, *en bloc*, practically all enemies of a particular state.

If compared, the three meanings alotted to the term 'unlawful combatants' reveal striking differences. Those differences contrast the first two meanings (unlawful combatants as non-distinguished combatants and as armed non-combatants) from the third one (unlawful combatants as all enemies in the 'war on terror'). This occurs in two main areas. The first area has to do with underlying principles allegedly jeopardized by unlawful combatancy, while the two former concepts refer to the principle of distinction, the third focuses on the legitimacy of the fight itself. Thus, there is a true conceptual shift from the IHL regulation of *ius in bello* (law in war) to the just war regulation of *ius ad bellum* (law to wage war).

The second area relates to context and circumstances. The first two meanings given to the notion of unlawful combatants invokes the realities of classical armed conflicts. The third is connected with the so-called 'war on terror' declared after September 11, 2001. Yet, examining classical armed conflicts and the 'war on terror' shows disparity. For instance, there are no clear time and spacial limitations in the latter. Since terrorism is a global phenomenon that has accompanied history since records began, the fight against it is more similar to a cosmic struggle against an absolute and ineradicable evil rather than a 'normal' armed clash between states. Such a struggle is unfolding around the world and may persist until "the point at which there is no reasonable prospect of the resumption of hostilities,"[24] which may mean forever. Moreover, while classical armed conflicts confront (relatively) easily identifiable and distinguishable parties, the 'war on terror' is fought against an enemy that is largely invisible.

It is therefore possible to argue that there is a deep conceptual and contextual difference between the three interpretations given to the term unlawful combatants. The first and second interpretations (unlawful combatants as non-distinguished combatants and as armed non-combatants) belong to the traditional normative framework of IHL; the third one (unlawful combatants as all the enemies in the war on terror), on the contrary, breaks away from this framework, referring instead to a new *a-normative* reality that shares very few elements with the environment of classical armed conflicts. Reasons for the term's transfer to such a different environment will be explored in the second part of this work.

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[24] Dworkin 2006, op. cit.

Legal Confusion

The third confusion characterizing the debate on unlawful combatants is linked to the legal status of those labeled by the term, whichever of the three possible meanings is attributed to it. Several problems arise in this context. First, there is no agreement on whether unlawful combatants constitute an independent category *de iure,* or only a category *de facto* having a descriptive value at best. The first position is , for instance, supported by (former) Canadian Minister J. R. Wright who claimed that "detainees may have a variety of statuses under international law, including those of prisoners of war, unlawful combatants or civilians."[25] The second position is reflected, among others, in an article by Zachary, who pretends that "the unlawful combatant /.../ is merely a descriptive phrase, not a legal one," and "there is therefore no room for analogy between the POW and the unlawful combatant, for these terms do not exist in the same legal space."[26]

Secondly, there is a dispute over the legal regime to be applied to unlawful combatants, provided they constitute an independent legal category. For some, Article 3 common to the four Geneva Conventions (1949) and/or Article 75 of Additional Protocol I (1977) are the most relevant provisions.[27] Both endow protected persons with only basic humanitarian guarantees, such as protection against murder, torture or hostage taking. The US Supreme Court in its 2006 *Hamdan v. Rumsfeld* decision embraced this approach, declaring that the detainees at the Guantánamo Bay Prison were covered by common Article 3.[28] Other institutions and authors are less specific in their views, referring vaguely to some general principles of the Geneva Convention, minimal standards of humane treatment or other ambiguous terms. This approach is well illustrated by Taft, who claims that only "certain minimal standards apply to the detention of the unprivileged belligerents."[29] Finally, others consider that unlawful combatants are, from the standpoint of IHL, mere outlaws, deprived of any international protection and left to the discretion of the detaining power. Thus, in Dinstein´s words, "unlawful combatant /.../ is deprived of the protection of

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[25] Cit. in Abbott, K. 2004. *Terrorists: Criminals, Combatants or ... ?: the Questions of Combatancy.* In *The Measure of International Law: Effectiveness, Fairness and Validity: Proceedings of the 31st Annual Conference of the Canadian Council on International Law, Ottawa, October 24–26, 2002.* Kluwer Law International, The Hague, p. 379.

[26] Zachary 2005, op. cit., p. 385.

[27] See, for instance, Fitzpatrick, J. 2003. Rendition and transfer in the war against terrorism: Guantánamo and beyond. *Loyola of Los Angeles International & Comparative Law Review* 25(3): 457–492.

[28] US Supreme Court, *Salim Ahmed Hamdan v. Donald H. Rumsfeld*, 29 June 2006.

[29] Taft, W. H. 2003. The Law of Armed Conflict After 9/11: Some Salient Features. *Yale Journal of International Law* 28: 319–323, p. 321.

international law /.../ and is left to be dealt with in accordance with enemy's domestic legal system."[30]

Third and finally, it is unsettled among experts whether the fact of being an unlawful combatant is, in itself, an illegal act for which the respective person may be prosecuted and punished, or whether illegality stems only from concrete acts of illegal warfare (eg. killing, or injuring enemy combatants or civilians) that such a person commits while taking a direct part in hostilities.[31] The former opinion finds support in the *Ex Parte Quirin* decision (1942), according to which "unlawful combatants are /.../ subject /.../ to the prosecution /.../ for acts that make their belligerence unlawful."[32] The latter opinion is defended by Baxter, who denies that "unprivileged belligerence is a violation of international law."[33]

The three confusions discussed above are closely related. The debate, in which different actors speak of varying categories of persons using different terms and having different legal concepts in mind, is confused. The following sections explains reasons for, and consequences of, this state of affairs and demonstrates that such confusions play an important role in obscuring the purpose the term 'unlawful combatants' has recently been used on the international level.

Unlawful Combatants: The Purpose of the Terms' Usage

The term 'unlawful combatant' is not an independent legal concept. In the framework of classical IHL, it has served as a relatively useful descriptive expression, characterizing one of the factual phenomena frequently encountered in the course of armed conflicts, namely the lack of a clear distinction between combatants and civilians. Yet, its recent usage in the context of the so-called 'war on terror' has decreased its descriptive value, turning the term into a political device primarily serving to stigmatize and dehumanize certain groups of people in order to justify why a special legal regime must be applied to them. These concepts are further elaborated in the subsequent sections of this work.

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[30] Dinstein, Y. 1989. *The Distinction Between Unlawful Combatants and War Criminals.* In Dinstein, Y. (ed.). *International Law in Time of Perplexity, Essays in Honour of Shabtai Rosenne.* Martinus Nijhoff Publishers, Dordrecht/Boston/London, p. 105.

[31] See Kinsella, H. M. 2005. Discourses of Difference. Civilians, Combatants, and Compliance with the Laws of War. *Review of International Studies* 31: 163–185.

[32] *Ex Parte Quirin,* op. cit., pp. 31–32.

[33] Baxter 1951, op. cit., p. 344.

Unlawful Combatants: A Legal Concept?

No source of IHL or public international law contains explicit references to unlawful combatants (or any equivalent term). The absence of the expression however, does not necessarily imply the absence of the concept, which may be present without a special denomination. In order to uncover the situation, an analysis of current sources of IHL must be undertaken. In this analysis, attention is paid to both IHL conventions and to customary rules of IHL collected, to a high degree, in the study on 'Customary International Humanitarian Law,' (2005) by the *International Committee of the Red Cross* (ICRC).[34] Moreover, since issues of unlawful combatancy pervades both the Hague and Geneva systems of IHL, the two must be presented here so that the legal picture they represent are distingueshed.

The Hague system of IHL is aimed at limiting the means and methods of lawful warfare and at regulating the situation on the battlefield level in general. Those present on a battlefield have traditionally been divided into two broad groups: combatants and civilians. The questions that natuarally arise here are: whether these two legal categories are the only ones, or is there another category? (re: of unlawful combatants); and, whether such catagories actually account for *all* people present on a battlefield, or are there some persons excluded from the IHL regulation that could be labeled as unlawful combatants?

Answers provided to the above questions vary considerably. Some, including the ICRC (and part of the doctrine), responds to them negatively, upholding the principles of dichotomy (reinforcing the existence of only two legal categories) and integrality (everyone is covered).[35] Others, including some judicial decisions (and another part of the doctrine), agree to the principle of integrality but have doubts about the dichotomy of the legal regulation.[36] Finally, others (among them several experts), approve of the principle of dichotomy but question that of integrality, claiming that some persons are simply left out of the regulation.[37]

Analysis of relevant sources of IHL reveals that, throughout history, the legal situation on the battlefield level has not been static but rather has undergone gradual changes. Some milestones in this evolution were; the adoption of the

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[34] Henckaerts, J.-M., Doswald-Beck, L. (Eds.). 2005. *Customary International Humanitarian Law*, *Volume I: Rules, Volume II: Practice.* ICRC/Cambridge University Press, Cambridge.

[35] Dörmann, K. 2003. The legal situation of "unlawful/unprivileged combatants". *International Review of the Red Cross* 85(849): 45–74.

[36] Hoffman, M. H. 2002/1. Quelling Unlawful Belligerency: The Juridical Status and Treatment of Terrorists Under the Laws of War. *Israel Yearbook on Human Rights* 31: 161–181.

[37] *"Unlawful combatants /.../ enjoy no protection under international law."* Detter, I. 2000. *The Law of War,* 2nd Edition. Cambridge University Press, Cambridge, cit. in Rozenberg, J. *Opinion divided over status of 'unlawful combatants',* Telegraph, 17 January 2002.

first legal instruments regulating the conduct of warfare (*Lieber Code* of 1863, *Hague Regulation* of 1907 etc); the adoption of the four Geneva Conventions (1949) (mainly Geneva Convention III, indirectly defining the term combatant, and Geneva Convention IV, extending protection to civilians); and the adoption of Additional Protocol I (1977). While older sources left the questions of integrality and dichotomy partly unresolved, the more recent ones deal with them comprehensively.

In part IV – ensuring general protection of a civilian population against the effects of hostilities – of Additional Protocol I (1977), defines a civilian as "any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol" (Article 50 par. 1). The negative formulation of this definition, as well as its complex and comprehensive cover, reflected in the reference to 'any person,' show that the Protocol opts for an integral and dichotomist solution to the problem. Anyone present on a battlefield therefore must have a legal status, which means that the IHL legal regulation is based on the principle of integrality, displaying no gaps and leaving nobody outside of its normative framework. At the same time, everyone has to be either a member of armed forces, or a civilian, since the definition is clear that "apart from members of the armed forces, everybody physically present in a territory is a civilian."[38]

Members of armed forces, with the exception of medical personnel and chaplains, are considered combatants with the right to participate in hostilities.[39] More specifically, this category includes: a) members of regular armed forces of a party to the conflict, including members of militias or volunteer corps forming part of such armed forces, regardless of whether the government or authority they profess allegiance to is recognized by the other party to the conflict; b) members of other militias and volunteer corps, including those of organized resistance movements, which belong to a party to the conflict, operate in or outside of their own territory, and fulfill the four conditions of regular combatancy; and c) participants in a levée en masse, i.e. "inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had

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[38] Sandoz, Y., Swinarski, Ch., Zimmermann, B. B. (Eds.). 1987. *Commentary on the Protocol Additional to the Geneva Conventions of 12 August 1949, and relationg to the Protection of Victims of International Armed Conflicts (Protocol I).* ICRC/Martinus Nijhoff Publishers, Geneva, p. 611, par. 1917.

[39] *"Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities."* Article 43 par. 2 of Protocol I. The armed forces consist of *"all organized armed forces, groups and units which are under a command responsible to that Party for the conduct or its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party"* (Article 43 par. 1 of Protocol I).

time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war" (Article 4 par. A al. 6 of the Geneva Convention III). Additional Protocol I, Article 4 par. 3, specifies that combatants do not lose their status, if they individually fail to distinguish themselves from civilians, when the nature of hostilities does not allow them to do so; provided they carry arms openly during each military engagement and any preparation thereto.

All other persons present on a battlefield, who do not fall into one of the groups described above and thus are not combatants (or medical personnel and chaplains), are civilians. Consequently, they enjoy civilian immunity and "shall not be the object of attack" (Additional Protocol I, Article 51 par. 3). This immunity however, applies only as long as they behave in accordance with their civilian status and do not take direct part in hostilities. In case they fail to observe that requirement, they lose, for the duration of their direct participation in hostilities, civilian immunity and may face deliberate attack. Yet, even then they maintain their civilian status; they can never be deprived of it (unless they become regular combatants or medical personnel and chaplains). It is necessary to add that while Additional Protocol I has not been ratified by nearly one fifth of existing states, including the US and Israel, the relevant provisions containing the definitions of civilians and members of armed forces are presently considered as part of customary IHL and, as such, are binding on the international community as a whole.[40]

Analysis has revealed that the Hague system of IHL has been, at least since the adoption of Additional Protocol I (1977), based on the principles of integrality, covering all persons present on a battlefield, and of moderated dichotomy, distinguishing two main legal statuses; of combatants and civilians, and adding the special group of medical personnel and chaplains to the former to compose a broader category of members of armed forces. The Hague system, thus, does not leave anyone present at the battlefield out of its legal regulation, nor does it provide space for the creation of another, half-civilian half-combatant status of unlawful combatant.

The Geneva system of IHL aims at protecting persons who do not, or no longer, take part in hostilities, namely: wounded, sick, shipwrecked, POWs and civilians, if those fall into the hands of the enemy. Protected persons are, again, divided into two expansive groups with distinct legal statuses: POWs and civilians. As in the previous case, questions arise as to whether, first, the two statuses are the only sets of persons detained by an enemy may have (or is there a third category of unlawful combatants) and, second, whether the regulation covers everyone falling into enemy hands (or are there some persons excluded from the regulation that could be labeled as unlawful combatants). The legal regulation of Geneva law being somewhat different from that of Hague law,

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[40] See rules 1-6 of the ICRC Study on Customary International Humanitarian Law.

and answers given to these questions do not necessarily have to be identical to those that are valid for the latter.

There is no consensus on such issues at the international level. Some actors, including the ICRC, part of the doctrine and military manuals of some countries, answer both of them in an affirmative way, claiming that "every person in enemy hands must have some status under international law: s/he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. There is no intermediate status; nobody in enemy hands can be outside the law."[41] Others refute either the di(tri)chotomy of the regulation, or its integrality. The analysis of the relevant sources, encompassing the four Geneva Conventions (1949), Additional Protocol I (1977), and customary rules of IHL, shows that the legal regulation has undergone a long evolution and has changed its extent and content several times.

The four Geneva Conventions (1949) distinguish two categories of persons falling into the hands of the enemy, party to the conflict or the occupying power, namely POWs, protected by Geneva Convention III, and civilians, protected by Geneva Convention IV. POWs are regular combatants and some other persons accompanying armed forces, "who have fallen into the power of the enemy" (Geneva Convention III, Article 3 par. A); they enjoy immunity from prosecution for participation in hostilities, and are granted various privileges of Geneva Convention III. Civilians are primarily "those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals" (Geneva Convention IV, Article 4 al. 1).[42]

Since the two categories are not defined in a complementary manner some groups of detained persons may remain outside the scope of both. Such persons either have yet another specific status (medical personnel and chaplains, Geneva Convention I), are subject to a certain legal regime without having the respective status (persons treated as POWs without formally having that status, Geneva Convention III, Article 4 par. B), or had both their status and the legal regime applied to them undefined (civilians having the nationality of

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[41] Pictet, J. S. (Ed.). 1994. *Commentary on the Geneva Conventions of 12 August 1949, Volume III.* ICRC, Geneva, p. 51. Compare: *"If a person is determined /.../ not to fall within any of the categories listed in Article 4, GPW, he is not entitled to be treated as a prisoner of war. He is, however, a 'protected person' within the meaning of Article 4, GC /.../."* US Military Manual FM 27–10, *The Law of Land Warfare,* 1956, p. 41, par. 73.

[42] Some parts of Geneva Convention IV have a wider scope of application and cover *"the whole of the populations of the countries in conflict"* (Article 13 of Geneva Convention IV). These parts, however, contain only basic standards of humanitarian treatment and do not deal with specific questions, such as the detention regime.

those detaining them). The four Geneva Conventions are neiher based on full integrality, nor on strict di(tri)chotomy.

The 1949 regulation has been substantively modified by Additional Protocol I (1977). The Protocol, firstly, contains a clearer definition – and partly redefinition – of the key notions of POWs and civilians. The former term is extended to include detained combatants who failed to distinguish themselves from civilians but carried arms openly (Article 44 par. 3), the second is enlarged by the abolishment of the nationality criterion.

Secondly, the Protocol confirmed the existence of persons who are neither entitled to POW status, nor benefit from more favorable treatment in accordance with Geneva Convention IV either because their protection has been limited (Geneva Convention IV, Article 5), or because they do not fall into the scope of Geneva Convention IV at all. These persons are newly granted, at the minimum, fundamental guarantees of human treatment anchored in Article 75 of the Protocol. The application of this provision to all detained persons not benefiting from more favorable treatment is confirmed by par. 7 al. b of Article 75, which claims that even "persons accused of war crimes or crimes against humanity /…/ shall be accorded the treatment provided by this Article, whether or not the crimes of which they are accused constitute grave breaches of the Conventions or of this Protocol."

The Additional Protocol I therefore, brought the regulation of Geneva law to its integrality, filling gaps that had existed previously. At the same time the regulation has not become strictly di(tri)chotomist. It still classifies persons falling into the hands of the enemy into more than just two or three legal categories (persons having POW status, persons treated as POWs, persons having civilian status, medical personnel etc). Yet, again, none of those categories may be said to consist of 'unlawful combatants,' since those labeled by the term continue to have different legal statuses and legal regimes applied to them. Thus, the analysis has revealed that the Geneva system of IHL does not know an independent, autonomous category of 'unlawful combatants' either.

It is important to add that the so-called 'war on terror' has not changed this legal framework in any significant way. It could not have done so, at least so far, because of two main factors. The first consists of the plurality of meanings with which the term 'unlawful combatants' has been used over the past years. Even the two principal states promoting the term, the US and Israel, do not share the same understanding of who an unlawful combatant is. Since any rule of customary law needs to be based on uniform practice, the lack of uniform definition is a clear sign of the absence of any new rule. This claim is furthermore supported by the second factor, which has to do with the preponderant behavior of international actors. As mentioned, the existence of a legal category of unlawful combatants has officially been accepted by only a few states, while at the same time, being denied by many entities including most states, the ICRC,

NGOs, and experts. Since the creation of any new customary rule requires the representativeness of the practice and the accordant legal opinion (*opinio iuris*) of a substantive part of the international community, the absence of both of these elements shows that any new rule of international law on 'unlawful combatants' has not yet been established and it is highly disputable whether such a norm is emerging at all.

It is possible to conclude that current international humanitarian law (or more generally current international law) does not recognize unlawful combatants as an independent legal category, and the term thus does not denote any existing legal concept. The following section inquires into why, if this is the legal situation, the term is used on the international level at all?

'Unlawful Combatant':
A Descriptive Expression or Political Device?

Without denoting any autonomous legal concept under IHL, the term 'unlawful combatants' has traditionally served as a relatively useful descriptive expression, drawing attention to one of the factual phenomena encountered in the context of modern armed conflict. It has been used to characterize all those who, by either failing to distinguish themselves from the civilian population (re: being combatants), or by taking direct part in hostilities without being entitled to do so (re: being civilians), contribute to the blurring of the line between combatants and civilians, thus jeopardizing one of the main principles of IHL, the principle of distinction. While the two groups of unlawful combatants, including spies, saboteurs, other undistinguished combatants, or fighting civilians, do not have the same legal status – neither in the Hague nor in the Geneva systems of IHL –, their appearance on a battlefield gives rise to similar (or identical) practical problems, justifying the use of one common descriptive (extra-legal) notion for them all. This use however, makes sense only within the framework of classical IHL and only in respect of the first two categories of persons designed as unlawful combatants.

Yet, the recent utilization of the term in the context of the so-called 'war on terror' is still problematic. Having no legal meaning, the notion seems to be deprived of any descriptive value here as well. It does not refer to any uniform reality. As mentioned, even the approaches adopted by its two main proponents, the US and Israel, differ considerably: while the first uses the term to label anyone who presents a security threat to its interests, the second still refers to the traditional IHL framework, speaking about those having participated in hostilities and not being granted POW status. Furthermore, inconsistencies exist not only between the two countries´ utilizations of the notion, but also within them. For instance, US sources relating to terrorists do not describe any homogenous category of persons, the notion of terrorism being largely undefined, and those labeled by it have very little factual, and still less legal, features in common.

In fact, the only element that seems to be truly shared by unlawful combatants in the third, most recent meaning, is that some states view them as hostile persons, acting against their interests and, at the same time, lacking legitimacy to do so. Thus, the term becomes a synonym of a political actor who is deemed illegitimate and dangerous. Moreover, since it has negative connotations, its utilization, bringing about the stigmatization of the persons denoted by it, is aimed at justifying why special treatment, not corresponding to normal standards of humanity, must be accorded here. Consequently, the term serves as a political device, used by states for utilitarian purposes; to free their hands from legal constraints and enable them to treat their real or alleged enemies in a manner that seems appropriate under particular security circumstances.[43]

Conclusion

The term 'unlawful combatants,' and its usage gives rise to many complicated legal, and factual, questions, which is one of the main reasons why it has stirred up such an interesting and multifaceted debate. This debate however, manifests serious confusions of terminological, conceptual, and juridical natures. As a result, different actors speak about different categories of persons using different notions and have different legal concepts in mind. These confusions obscure the fact that the term 'unlawful combatants' does not denote any autonomous legal concept, and while it has traditionally served as a relatively useful descriptive expression in the system of IHL, its recent utilization in the 'war on terror' has turned it into a political device aimed at justifying sub-standard treatment of allegedly illegitimate political enemies.

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[43] See Steyn, J. 2004. Guantanamo Bay: the legal black hole. *The International And Comparative Law Quarterly* 53(1): 1–15.

Medvedev's Initiative: A Trap for Europe?[1]

Yury Fedorov[2]

Introduction

The informal meeting of OSCE foreign ministers (Corfu, June 27–28, 2009) launched the so-called 'Corfu Process'. Greek Foreign Minister, Theodora Bakoyannis, summarizing the meeting's discussions noted that the process should be an

> open, sustained, wide-ranging and inclusive dialogue on security [with a view] to solve the security challenges [Europe is facing], guided by the spirit of comprehensive, cooperative and indivisible security.[3]

The Corfu Process was initiated, at least partly, by Russia's assertive efforts to develop a legally binding pan-European security treaty which will develop 'new security architecture in Europe.' This implies reshaping existing, and creating new institutions and norms regulating security relations in Europe and in a wider geopolitical space stretching *east* 'from Vancouver to Vladivostok.' It is also known as the 'Medvedev Initiative,' since the initial proposal was advanced by Russian President Dmitry Medvedev (June 2008).

Moscow's idea of developing 'new security architecture in Europe' was not generally supported by other participants in the Corfu meeting.[4] Most Europeans are skeptical about developing new, and modifying existing, security institutions,

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[3] Corfu Informal Meeting of OSCE Foreign Ministers on the Future of European Security Chair's Concluding Statement to the Press. See: http://www.osce.org/documents/cio/2009/06/38505_en.pdf.

[4] For example, French Foreign Minister, Bernard Kouchner said after the meeting 'We don't need a new structure. We have many at our disposal – U.N., EU, OSCE, Council of Europe. We have the principles; we have the structures, let's strengthen them.' See: 'OSCE Sceptical on Security Proposal', *The Moscow Times*, Tuesday, June 30, 2009 at: http://www.themoscowtimes.com /article/1010/42/379101.htm.

seeing such approaches as attempts to enfeeble NATO, the OSCE, the EU and other European bodies. When it comes to Russia, most prefer dialogue on a number of concrete security issues, ranging from the future of the Conventional Forces Europe Treaty (CFE) to energy security, democracy, and human rights (etc).

One should not expect, however, that as a result of Corfu, Moscow retreats from its approach of translating some general political formulas, related to European security, into a legally binding framework. Speaking after the meeting of the NATO-Russia Council (also held in Corfu, June 27, 2009), Russian Foreign Minister Sergey Lavrov noted that Russian considerations of

> the initiative of Russian President Medvedev to craft a new European Security Treaty, were heard. A number of delegations reiterated the interest in engaging in their substantive consideration also in the RNC (Russia-NATO Council) format along with the discussions that have already begun in the OSCE, in our relations with the EU and in the political science community.[5]

This implies that Moscow will continue, and most probably intensify, its efforts to establish 'new security architecture in Europe' instead of working to maintain the current system based on NATO and, in a wider context, on transatlantic cooperation.

For their part, a number of leading EU figures hoped that debates on European security would deepen trust between Russia and the West and thereby prod Moscow to a more cooperative relationship.[6] On the Western side of the Atlantic, a number of influential US political analysts close to the current administration support the Russian idea, seeing it as an element of a wider *reset* of Russia-US relations even if it comes at the expense of 'subsuming NATO into a larger structure.'[7]

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[5] For a transcript of the Opening Statement and Response to Media Questions by Sergey Lavrov at following the informal Russia-NATO Council Meeting see: http://www.mid.ru/brp_4.nsf/e78 a48070f128a7b43256999005bcbb3/15051d4e4e095e92c32575e40045431b?OpenDocument.

[6] In February 2009, Javier Solana mentioned that Medvedev's proposals 'deserve to be taken seriously. And engagement in a debate is in itself a road to build trust'. See: Javier Solana Madariaga, EU High Representative for Common Foreign and Security Policy, Speech at the 45th Munich Security Conference, February 7, 2009 at: http://www.securityconference.de/konferenzen/rede.php? menu_2009=&menu_konferenzen=&sprache=en&id=235.

[7] Thomas Graham, Senior Director at Kissinger Associates, previously a Special Assistant to the President and Senior Director for Russia at the National Security Council, wrote in April 2009 that "(t)he administration should give preliminary approval to participating in a conference on European security architecture, as proposed by President Medvedev ... The challenge is to build a security architecture based on three pillars: the United States, the European Union, and Russia. If this ultimately leads to the subsuming of NATO into a larger structure over the long term, we should be prepared to accept that. America's essential goal is not securing NATO's long-term future as the central element of our engagement with Europe, no matter how valuable an instrument of U.S. policy in Europe NATO has been in the past; the goal is ensuring security in Europe, now and in the future". See: Thomas Graham "Resurgent Russia and U.S. Purposes. A Century Foundation Report". *The Century Foundation*. 2009. p. 24.

This raises an important question: what are the genuine driving forces and goals of Medvedev's Initiative, and how does it relate to the strategic interests of other European states? To answer this it is necessary to uncover what Russia's ambitions are vis-à-vis a pan-European security treaty.

Medvedev's Initiative and the Development of Russia's Approach

Medvedev's initial proposal to conclude 'a regional pact based … on the principles of the UN Charter and clearly defining the role of force as a factor in relations within the Euro-Atlantic community' occurred during a speech in Berlin (June 5, 2008) where he insisted that it should be a legally binding treaty 'in which the organisations currently working in the Euro-Atlantic area could become parties.' Talks for that treaty, Medvedev announced, should begin at a pan-European summit.[8] The arguments Medvedev deployed in support of his proposals revealed an important goal: to marginalize NATO, substitute existing transatlantic security and defence links by a general regional collective security system. Regarding the OSCE, it frustrates Moscow by monitoring elections in Russia, among other newly independent post-Soviet states. Medvedev cynically informed his German audience that

> Atlanticism as a sole historical principle has already had its day … [NATO has] failed so far to give new purpose to its existence. It is trying to find this purpose today by globalising its missions, including to the detriment of the UN's prerogatives, and by bringing in new members … an organisation such as the OSCE … prevented from becoming a full-fledged general regional organisation [because of] the obstruction created by other groups intent on continuing the old line of bloc politics.[9]

Medvedev reiterated the idea of a pan-European security treaty on a number of occasions including at the EU-Russia summit in Khanty-Mansiysk (June 2008) and again at a meeting with Russian ambassadors (July 15, 2008). The idea was met with scepticism. It is difficult to gain the trust of other European states by proposing an encompassing political initiative substantiated by rhetoric about Atlanticism that has 'had its days' and NATO that has lost its *raison d'être*.

The Concept of Russia's Foreign Policy, a doctrinal document developed within the Foreign Ministry, and approved by Medvedev (July 12, 2008), denoted new European security architecture in a single paragraph:

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[8]   Dmitry Medvedev, Meeting with German Political, Parliamentary and Civic Leaders, June 5, 2008, Berlin, available at: http://www.president.kremlin.ru/eng/speeches/2008/06/05/2203_type82912 type82914type84779_202153.shtml.

[9]   Ibid.

The main objective of the Russian foreign policy on the European track is to create a truly open, democratic system of regional collective security and cooperation ensuring the unity of the Euro-Atlantic region, from Vancouver to Vladivostok, in such a way as not to allow its new fragmentation and reproduction of bloc-based approaches which still persist in the European architecture that took shape during the Cold War period. This is precisely the essence of the initiative aimed at concluding a European security treaty, the elaboration of which could be launched at a pan-European summit.[10]

The language deployed in this document was misleading, and notions of 'truly open,' or 'democratic regional security system' were elusive. The former, for instance, may imply that this security system should not be limited by geographic boundaries, or that any political actor or state may participate. The only clear message was that Medvedev's Initiative was aimed at marginalizing NATO. That was the real essence of the passage that a new security system in Europe would not "allow … [the] reproduction of bloc-based approaches."

Most probably the paragraph noted above was a last minute insertion into an existing text on the concept of Russia's foreign policy. Although the establishment of 'a truly open, democratic system of regional collective security and cooperation' has been characterized as a key goal of Russia's policy in Europe, this idea was not further elaborated in this document, and the bulk of the European section of the Concept was subordinated to more traditional diplomatic topics such as Russia's relations with the EU, Council of Europe, NATO and NATO-Russia Council, and specific bilateral issues.

Until August 2008 Medvedev's Initiative looked amateurish; a demonstration that the newly elected president was capable of producing and articulating new and impressive political ideas. At the same time, it was a naïve attempt to bolster Russia's influence on security developments in Europe while cutting into the influence into Western institutions such as NATO. It was likely advanced by a few senior members of Medvedev's Administration, perhaps in cooperation with a group of so-called 'political analysts' who were either unable or unwilling to develop a more meticulous exposé of this plan, including the content and subject of the proposed treaty, parties to it, its correlation to existing security arrangements among other important details, and sufficient argumentation supporting the idea which could be accepted in European decision-making circles.

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[10]   The Foreign Policy Concept of the Russian Federation. Approved by President of the Russian Federation, July 12, 2008, available at: http://www.president.kremlin.ru/eng/text/docs/2008/07/204750. shtml.

In August 2008 Medvedev's Initiative had all but disappeared from the foreign policy agendas of both Russia and EU states, due to Russia's aggression against Georgia. However, in September 2008 it began to play a much more central role in Russian foreign policy than before. Russian diplomacy enhanced its efforts in promoting it. On one hand, due to the invasion of Georgia, some EU states, (France, Germany, Italy and Belgium), warmed to the Russian initiative, which they believed might constrain Russian aggressiveness.[11] On the other hand, the deterioration of Russia's international reputation fuelled Moscow's search for new approaches and tools to mitigate the negative reaction of Russia's behaviour in the Caucasus, as well as strengthen its ability to influence developments in Europe. For this reason, the establishment of a 'new European security architecture' was included in the list of priorities of Russian policy in Europe and the Russian Foreign Ministry intensified political and information campaigns promoting Medvedev's Initiative.

Addressing the World Policy Conference in (Evian), France, on October 8, 2008, Medvedev expressed a few general details of the Russian vision of a proposed treaty. He emphasized that it should concentrate on 'hard' security issues only and announced that

a) The basic principles of security and cooperation in the Euro-Atlantic area must be affirmed,

b) All participating states should guarantee neither to use force against one another, nor to threaten the use of force,

c) The treaty must guarantee equal security for all. No state or international organization can have the exclusive rights to protect peace and stability in Europe,

d) The treaty should establish basic parameters for arms control and new cooperation mechanisms for combating proliferation of weapons of mass destruction, international terrorism, and drug trafficking.

Simultaneously, Medvedev accused NATO (and the US) of pursuing policies hostile to Russia. Aggressively, Medvedev indicated the, *de facto*, revival of deterrence – as a legitimate policy – and listed Moscow's standard

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[11] Russian experts from the Institute of World Economy and International Relations wrote that "(t)he conflict in the Caucasus has led primary European countries (France and Germany above all) to a recognition of a necessity to restructure European and global security systems… Many in Russia hope that in a new global situation, which is characterized by the easing of American leadership and strengthening of new centres of power (including Russia) the leading EU states will support proactive interaction with Russia in managing a whole spectrum of global problems: from financial and economic issues up to security problems". See: V. G. Baranovsky, I. D. Zvyagelskaya, I.Ya. Kobrinskaya, V. A. Kremenyuk, V. V. Mikheev, The report "Rossiya i mir: 2009" (Russia and the world: 2009), Part II, "Foreign policy", IMEMO RAS, Russian Trade-Industrial Chamber and Foundation of prospective studies and initiatives, p. 30, available at: http://www.globalaffairs.ru/docs/imemo_prognosis.pdf.

set of accusations against the West. Despite Medvedev's provocative tone, his declarations were received by some positive responses from some EU states. French President Nikolas Sarkozy emphasized the importance of Euro-Atlantic solidarity, though also expressed his belief that Russia *is* a privileged partner of the EU in the security area, supported Medvedev's critique of the US, and suggested holding the OSCE summit in 2009 to discuss Medvedev's idea of a new system of European security.[12]

A month later, speaking at the EU-Russia summit in Nice (November 2008) Medvedev added two important points to his proposal: Russia agreed with the EU's and NATO's participation together with the CIS and the CSTO, in future negotiations for a 'new European security architecture,' and suggested that until a new treaty is concluded participants of the negotiations must avoid undertaking 'unilateral actions.' Medvedev suggested that

> the main thing is that we be prepared to … discuss these issues under the aegis of the OSCE and with the participation of all European institutions, including NATO, the European Union, the CSTO (Collective Security Treaty Organisation) and the CIS. … I fully agree that until we sign a special global agreement on ensuring European security, we should all refrain from taking any unilateral steps that would affect security.[13]

Consenting to the participation of the EU and NATO in future negotiations was a concession. A number of EU states made it clear that any new security arrangements should include NATO and the OSCE. At the same time the participation of the CSTO in those talks would allow Moscow to portray this amorphous and loose military bloc as a sound international actor, fully legitimate and recognized in Europe, and thus able to consolidate it. Importantly, Russia suggested general refrain from any 'unilateral actions' until a new agreement was concluded, which may take a very long time. This suggests that any measures taken by NATO, the EU or individual European states, unwelcome by Moscow, may be interpreted as a 'unilateral action' and thus be restrained.

A few additional points of details have helped clarify Moscow's position vis-à-vis Medvedev's Initiative since the Nice speech. Lukov (Russian Ambassador to Belgium), noted that the treaty may include urgent consultations with the state which believes that its security is threatened.[14] In December 2008 Lavrov (Russian Foreign Minister) announced that an identification of the basic principles for the development of arms control regimes, confidence

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[12] Arkady Dubnov, 'Nashli vremya i mesto' (They found the time and place), *Vremya novostei*, October 9, 2008.

[13] Joint Press Conference (together with French President Sarkozy and European Commission President, Barroso), November 14, 2008; available at: http://www.president.kremlin.ru/appears/2008/11/14/2100_type63377type63380type82634_209203. shtml.

[14] Address of the Russian Ambassador to Belgium, Lukov, November 26, 2008, available at: http://www.belgium. mid.ru/press/posol_r_034.html.

building measures, and restraint in military developments should be established and developed by the proposed treaty. Yet his deputy, Alexander Grushko, speaking at the joint meeting of the OSCE Forum for security and cooperation, and the Permanent Council (18 February 2009), proclaimed that the new treaty is not intended to replace the CFE Treaty, the Treaty on Open Skies, or the Vienna Document (1999). Grushko said that the restoration of the CFE regime now 'requires not only the ratification of the Agreement on Adaptation of the Treaty but also the adoption of other far-reaching measures needed to ensure its viability given the new conditions.' He also said that the OSCE is not 'the one and only forum for the elaboration of the treaty.' A wide variety of multilateral formats could prove useful (the Russia-EU dialogue and, over the longer term, the NATO-Russia Council).[15]

It looked as though the intense promotion of Medvedev's Initiatives' focus on developing new security architecture in Europe came while a sense of confusion prevented Russia's diplomatic mechanisms from fully advancing such a comprehensive security concept. However, Moscow was steadfast on a particular point. Russian senior officials did not conceal that the final aim of restructuring 'European security architecture' is meant to diminish NATO's role in the European security landscape. They insisted that 'systemic defects' of existing European security institutions and practices resulted from so called 'NATO-centrism'. The latter 'by definition negates the creation of a truly universal collective security system in the Euro-Atlantic area, and artificially impedes honest discussions on the problems which the Caucasus crisis has laid bare', Lavrov wrote at the end of December 2008.[16] Moreover, Russian officials claim that the wars in (former) Yugoslavia, the recognition of Kosovo, the war in Georgia (August 2008), the crisis of the CFE Treaty among other negative developments in Europe, resulted from the 'centrality of NATO.'

Such arguments act as examples of political hypocrisy. NATO deployed force in (former) Yugoslavia with the aim of ending the policy of ethnic cleansing implemented by Milosevic's regime (which was supported by Russia). It was Russia – not NATO – which fuelled hyper-nationalism in Serbia. Also, the war in the Caucasus was, in fact, Russian aggression against Georgia.[17] Lastly, the collapse of the CFE Treaty resulted from Russia's

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[15] Statement by Russian Deputy Minister of Foreign Affairs, Alexandre Grushko, at the OSCE Forum for Security and Cooperation and the Permanent Council, 18 February 2009.

[16] Sergey Lavrov "Russian Foreign Policy and a New Quality of the Geopolitical Situation", Diplomatic Yearbook 2008. This document is available at: http://www.mid.ru/brp_4.nsf / e78a48070f128a7b43256999005 bcbb3/19e7b14202191e4ac3257525003e5de7?OpenDocument.

[17] In 2004/5, Russia sent dozens of military instructors to Abkhazia and South Ossetia, and most senior military and security-related ministries' positions were filled by Russian Officers. In May 2004, Russia began to construct its first military base in Java, South Ossetia. On April 30, 2008 the first illegal Russian paratroopers from the Novorossiysk airborne division went into Abkhazia in clear violation of peacekeeping operations. On May 26, 2008 Russian railway

stubborn refusal to withdraw its forces from Moldova and decommission the Gudauta military base in Abkhazia. Now, the restoration of the CFE Treaty regime is being blocked by Russia's occupation of Abkhazia and South Ossetia, and by the construction of several Russian military facilities on those territories.

Lavrov's Address: Same Wine, New Bottle

The latest version of Medvedev's Initiative was articulated by Lavrov in his address at the OSCE Annual Security Review Conference in Vienna (June 23, 2009). This address attempted to pour the same anti-NATO wine into a new bottle. The Kremlin decided to base its interest of marginalizing NATO on a concept of 'indivisibility of security.' Lavrov portrayed the latter as a fundamental principle of international politics and interpreted it as a 'commitment to not secure oneself at other's expense,' and demanded to translate it into a compulsory codified rule of international law. He announced that the

> chief systemic drawback consists in that over the 20 years we've been unable to devise guarantees of the observance of the principle of indivisible security. Today we're witnessing the infringement of a basic principle of relations between states that was laid down in the 1999 Charter for European Security and in the documents of the Russia-NATO Council – the commitment to not secure oneself at others' expense.[18]

The existence of NATO, Lavrov continued, contradicts the principle of 'indivisibility of security' because it results in the formation of two zones of *different* security, a 'NATO area' and a non-NATO area; fragmenting the so-called pan-European space. 'The collision between pan-European and intra-bloc approaches leads to a fragmentation of the pan-European space occurring in practice.'[19] The next, and the most important, element of Lavrov's argument was that, in order to improve security in Europe (or rather within the

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troops illegally crossed over into Abkhazia. On July 9, four Russian jets violated Georgian airspace (later admitted by Moscow). On August 3, 2008, general mobilization the North Caucasus was announced and the arrival of the first 300 mercenaries into South Ossetia was confirmed. On August 4, 2008 medical and communication units of the 58th Army arrived in South Ossetia. On August 6, a regular regiment of Russian Border Guards occupied the first piece of Georgian territory; the southern gate of the Roki Tunnel. See: Andrei Illarionov, Senior Fellow, Cato Institute and President, Institute of Economic Analysis, 'Another Look at the August War,' Center for Eurasian Policy, Hudson Institute, December 9, 2008, available at: http://www.hudson.org/files/ documents/AndreiIllarionov speech.pdf.

[18] Address by Lavrov to the OSCE Annual Security Review Conference, Vienna, June 23, 2009. See: http://www.mid.ru/brp_4.nsf/e78a48070f128a7b43256999005bcbb3/9eb56f1ecaad3ab 5c32575df00362cc9?OpenDocument.

[19] Ibid.

OSCE area) either NATO should be dismantled, or it should be subordinated to larger a pan-European institution, which, in his view, could be the OCSE, if it is turned into a 'full-fledged' organization able to assure the 'hard security' of all its members. He declared that the

> problem could have been easily solved and not necessarily through the liquidation of NATO [sic] following the dissolution of the Warsaw Treaty Organization. It would have been enough to consecutively institutionalize and transform the OSCE into a full-fledged regional organization within the meaning of Chapter VII of the UN Charter. That is the OSCE would be dealing with the full spectrum of Euro-Atlantic issues and, above all, ensuring in the region – based on legal commitments – an open collective security system.[20]

Politically, this would an attempt to marginalize NATO by placing it under the control of a more robust OSCE. This attempt is naïve, as one could hardly expect NATO to voluntarily agree to subordinate itself to any other international body. Also, if the OSCE is turned into a regional organization 'within the meaning of Chapter VII of the UN Charter', it would be even less effective in maintaining peace than the UN because decisions would have to be taken by all 56 members of the OSCE, not the five permentant representatives of the UNSC. In addition, there is a basic difference between NATO and the OSCE: the former is a defence alliance designed to defend its members against exogenous aggression; while the latter aims to prevent and resolve conflicts between its members. Finally, zones of different security in Europe exists not because of NATO, but due to insecurity in areas beyond NATO's zone of responsibility. In part, such insecurity is the result of Russia's attempts to impose its political will through intrigues, the use of gas exports as a political weapon, and the deploment of raw military force. For instance, Latvia's security is more comprehensive than Georgia's due to Latvia's membership in NATO while Georgia is not protected against Russian aggression.

How Moscow Hopes to Undermine NATO

Lavrov's address confirmed Russia's goal of undermining NATO by establishing new international institutions, rules and frameworks to constrain NATO's activities.[21] Additionally, Lavrov outlined the content of a Pan-European security treaty, which reveals how Moscow plans to achieve this goal.

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[20] Ibid.

[21] On May 16, 2009 2009, Medvedev made it clear that Russia aimed to undermine NATO. "As a military and political bloc NATO is becoming larger and security is becoming more fragmented and more piecemeal. I think that this is bad for everyone concerned, no matter what our negotiating partners say. So we need new approaches… if we can create a new

According to Lavrov, the proposed treaty should consist of four main parts. The first should confirm, in a legally binding form, the basic principles for intergovernmental relations in the Euro-Atlantic area. This includes a commitment to fulfil, in good faith, obligations under international law; respect for sovereignty; the inadmissibility of the use or threat of force against both the territorial integrity and the political independence of states, non-interference in internal affairs, equality and the right of peoples to dispose of their destiny, and respect for all other principles set out in the UN Charter.

This is nothing but a list of basic principles in the opening chapter of the Helsinki Final Act (1975). It is indicative, however, that Russia does not include itself in a project for a pan-European security treaty such as: respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion and belief; equal rights; and self-determination of peoples. A reproduction of those principles, as legally biding provisions, would be insufficient for providing a security foundation in Europe, as it is in any other part of the world.[22]

Yet, the cornerstone of this part of the proposed treaty is the demand to guarantee, in a legally binding form, 'equal security.' The latter is interpreted as: a) not ensuring one's own security at the expense of others; b) not allowing acts (by military alliances or coalitions) that weaken the unity of the common security space, 'particularly to prevent the use of their territory to the detriment of other states' security, to the detriment of peace and stability in the Euro-Atlantic area'; and c) no development of military alliances that would threaten the security of other parties to the proposed treaty. Lastly, Moscow wants to confirm that no state or international organization may bear exclusive rights to maintain peace and stability in the Euro-Atlantic region.[23]

Such principles look attractive at first glance. However, their implementation will trap the EU. Some of these principles were mentioned in the Charter

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matrix of relationships, I think it will be effective. In any case, this is obviously better than advancing NATO in every direction. At any rate we are not happy with that idea and we are going to respond to it". See: Medvedev, Interview with Sergei Brilyov, Vesti V Subbotu [News on Saturday], Rossiya Television, May 16, 2009. See: http://www.president.kremlin. ru /eng/speeches /2009/05/16/1134 _type84779_216376.shtml.

[22] German analyst Margarete Klein concluded: "This is a reasonable proposal, but is not sufficient on its own to ensure that the principles are enforced. After all, they have already been enshrined in many documents and nevertheless been violated; including by Russia itself. For example, Moscow decried the recognition of Kosovo as an independent state by Western countries as "immoral and illegitimate", but itself violated the principle of territorial integrity when it extended unilateral recognition to Abkhazia and South Ossetia; what is more, it did so following the use of military force". See: Margarete Klein, "Russia's Plan for a New Pan-European Security Regime: A Serious Proposal or an Attempt at Division?", *Russian Analytical Digest*, 55, February 18, 2009. p. 7.

[23] Lavrov, OSCE Annual Security Review Conference, Vienna, June 23, 2009.

for European Security, approved at the OSCE Istanbul Summit (1999) and, as such, are already internationally accepted. But, if turned into legally binding clauses of an international treaty, such abstract political formulas may be used as a powerful legal tool able to limit the ability of a state to enhance its defence and security mechanisms.[24] In particular, Moscow would acquire a legitimate right to prevent any action of the US, NATO, the EU or individual European states on the pretext that it either ensures their own security at the expense of Russia's, or undermines the 'unity of the common security space.' As for the clause that no state 'can have any preeminent responsibility for maintaining peace and stability in the OSCE area' mentioned in the Charter for European Security, the latter does not specify what, exactly, 'preeminent responsibility' (or 'exclusive rights') means. This clause may be interpreted in a way that NATO is not permitted to undertake operations beyond the zone of its traditional responsibility, or even within this zone, without the consent of Russia or the CSTO.

In a wider context, the trap for the EU results from the fact that if a political formula turns into a clause of a legally binding arrangement it automatically necessitates the establishment of an international institution capable of monitoring the implementation of such a clause. In other words, if the EU agrees with Russia's idea to forbid 'ensuring someone's security at the expense of the others,' then it would be necessary to establish a body authorized to assess and conclude whether a particular action 'ensures someone's security at the expense of the others,' or 'undermines the unity of the common security space', or not, and make binding decisions about such actions. Lavrov suggested that Moscow plans to establish institutions of this kind able to control the West's activities in defence and security related areas. He announced that 'it will also be necessary to agree on the mechanisms to ensure the universal application of this and other previously agreed principles.'[25] Lavrov's Vienna speech made clear that Russia sees a reformed OSCE as such an institution. If implemented, this scheme restricts the ability of NATO and the EU to advance their members' security as they see fit.

The implementation of Lavrov's proposals also could result in the establishment of a Euro-Atlantic security institution that parallels NATO. For instance, a reformed or enforced OSCE, which would assume partial responsibilities

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[24] Russian analyst, Dmitry Trenin, deciphered this principle accurately as, four no's: 'no NATO in the CIS countries; no US bases in the CIS countries; no support for anti-Russian regimes in the CIS countries; and no ABM deployment near Russia's borders' because Moscow views such actions as attempts to ensure NATO's security at the expense of Russia's. See: http://www.svobodanews.ru /Article/2008/11 /28 /20081128185141033.html.

[25] Sergey Lavrov, "How to Bring the Cold War to a Conclusive End?", *Mezhdunarodnaya Zhizn*, May 21, 2009, available at: http://www.mid.ru/ brp_4.nsf/e78a48070f128a7b43256999005bcbb3/3dad89fa866b2502c32575be003b7eff?OpenDocument.

for peace-making and peace-building, would also create difficulties for NATO and the EU. Therefore, if discussions about 'new European security architecture' are based on Russia's proposals, the West would engage in debates about mechanisms for marginalizing NATO, restricting its activities as well as those of individual European states, and the US, in security and defense areas, and providing Russia with additional institutional capabilities to influence security related decisions in Europe.

The second part of the treaty proposed by Moscow focuses on basic principles for the development of arms control regimes, and the reinforcement of confidence, restraint and reasonable sufficiency in military building. This includes the principles of non-offensive defence and the renunciation of any additional permanent stationing of substantial combat forces outside of national territory.[26]

Instead of negotiating particular arms controls among other 'hard' security issues, that are important for Europe, such as the restoration of the CFE Treaty regime, or control over tactical nuclear weapons, Moscow wants to revise the earlier basic principles and mechanisms of arms control agreements, the CFE Treaty and confidence building measures. It confirms that Russia's military is looking for new international legal instruments aimed at a substantial reduction of military potentials of NATO in Europe and proximate areas. In addition, Moscow aims to force the West to recognize and accept Russian military presence in South Ossetia and Abkhazia, occupied, *de facto*, by Russian soldiers.

The third part of the proposed treaty is based on principles of conflict settlement (including the inadmissibility of the use of force); respect for negotiations and peacekeeping formulas; confidence-building measures; and fostering dialogue between parties (etc). Issues related to the use of force, peacekeeping, and conflict resolution are regulated by the UN Charter, the Helsinki Final Act, among other international documents. It is unclear what Moscow intends to add.

The fourth part is dedicated to countering new threats and challenges, including the spread of weapons of mass destruction (WMD), international terrorism, and illicit drug trafficking and other types of transnational crime (TOC). Cooperation between Russia and Western countries on these matters should be welcome. Yet, to be seen as committed to cooperation, Russia should also support Western efforts to prevent Iran's nuclear weapons program and end its supply of modern weaponry to Iran, and stop blocking the development of practical measures to prevent the spread of biological weapons, which is of growing importance.

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[26] Lavrov, OSCE Annual Security Review Conference, Vienna, June 23, 2009.

International Reactions to Medvedev's Initiative

The international reaction to Medvedev's Initiative is mixed and largely incoherent. Disparity results from acute differences of approaches found amond various European actors. Georgia, the Baltic States (Latvia, Lithuania and Estonia), and most Central and East European states are suspicious of this Initiative.[27] They reason that it may undermine NATO while it is still capable of defending them from Russian military aggression and pressure. Their decision-makers and (in some countries), sizable segments of the public are irritated by Moscow's hypocrisy, and are concerned with the reluctance of Western states to explicitly declare the defence of new NATO members in case of possible Russian aggression.[28]

For their part, the leaders of France, Germany, Greece, Cyprus, Italy, Spain, Belgium (among others) believe that it would be expedient to benefit from the Russian offer and negotiate with Russia on European security issues. They believe that the EU, NATO, and the OCSE should be maintained and strengthened as principal building blocks of any European security architecture. At the same time they hope that negotiations may improve mutual trust, and, as a result, encourage Russia to deepen its ties to the EU so that a new network structure could emerge to assist in reducing Moscow's belligerence. They are also persuaded that there are a number of international security threats (WMD proliferation, terrorism, drug-trafficking, etc) that cannot be solved without Russian cooperation.[29] The UK has altered its previously negative stance towards Medvedev's

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[27] In February 2009, (current) Estonian President, Toomas Ilves noted that '(a)fter the dust from the guns of August has settled, we are left with one fundamental change: minimally the collapse of the post-1991 settlement, and more broadly the principles of the CSCE Helsinki Final Act of 1975: no use of force to change national borders … The collapse of this order represents a paradigm shift in European security equivalent to the end of the Cold War in 1989–91. No longer can we assume that international aggression (as opposed to the civil wars of the Balkans) is excluded as a possibility in Europe ... Russia, for its part, has moved beyond the paradigm, not only by changing it but also by proposing a new security architecture to replace the OSCE and other structures because the "old one clearly does not work". The argument in brief is that the Georgian-Russian War shows that the existing arrangements failed'. See: Toomas Ilves, Speech at the 45th Munnich Security Conference, February 7, 2009, available at: http://www.security conference.de/konferenzen/rede.php?menu_2009=&menu_konferen zen=&sprache=en&id=241&.

[28] According to public opinion polls (carried out by Harris Interactive on behalf of the Financial Times) conducted in the US, UK, France, Germany, Italy and Spain, fifty percent of polled Germans and two-fifths of polled Italians and Spaniards, would oppose their state sending troops to stop Russia from militarily engaging the Baltic states (Latvia, Lituania and Estonia). In contrast, two-fifths of polled French, and just over a third of polled Americans and Britons, would support their states involvement. See: http://www.harrisinteractive.com /news/ FTHarrisPoll/HI_FinancialTimes _HarrisPoll_September2008.pdf.

[29] For instance, on February 3, 2009 French President Sarkozy and German Chancellor Angela Merkel published a joint article in Le Monde in which they expressed readiness to debate Medvedev's proposal but made it clear that existing international security agreements and structures should not be undermined. French and German leaders reiterated their confidence

Initiative and David Miliband (UK Foreign Secretary), said that future talks with Russia should result in the consolidation of the Western approaches to European security, including human rights, economic security, and other dimensions of security.[30]

Of critical importance is the position of the US: the very idea of pan-European arrangements on security in the European and Euro-Atlantic spaces is moot unless Washington agrees to participate. At the same time, if the US supports this idea, it may – and most probably will – encourage a number of European countries which have not taken a definite position on the issue, to agree to such arrangements. The Obama administration, unlike Bush's, is not as reluctant in accepting Medvedev's Initiative, yet (to date) Washington preserves its position on practical multilateral debates for 'new security architecture in Europe.' The Joint Statement published after the meeting of Medvedev and Obama (April 1, 2009) in London notes that

> We discussed our interest in exploring a comprehensive dialogue on strengthening Euro-Atlantic and European security, including existing commitments and President Medvedev's June 2008 proposals on these issues. The OSCE is one of the key multilateral venues for this dialogue, as is the NATO-Russia Council.[31]

It seems that Obama views 'new security architecture in Europe' as an element of a wider strategic deal with Russia commonly known as a 'reset' of Russia-US relations, which was under discussion in Washington and Moscow in Spring 2009. Washington will probably make substantial concessions to Russia, including its consent to begin official discussions on Medvedev's Initiative,

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and commitment to the EU, NATO and OSCE, and 'to the well-tried and tested European standards underpinning our security, to the arms control and disarmament regimes, and to trans-Atlantic cooperation'. See: Angela Merkel and Nicolas Sarkozy, "La sêcuritê, notre mission Commune," Le Monde, February 3, 2009.

[30] Speaking at the Munich Security Conference (February 2009), David Miliband said: 'We welcome President Medvedev's call for a debate about the future of European Security. In taking this debate forward we should be pursuing our mutual interest in resolving and preventing conflict in Europe, tackling WMD proliferation, combating organised crime and addressing the threat from extremism ... Though we must also be clear; this does not undermine our commitment to leave the door to NATO membership open for those who desire it. Its starting point needs to be an acceptance of the fundamental principles of territorial integrity, democratic governance and international law, and recognition that, in the 21st century, breaking these principles will have serious consequences. It needs to embrace a wide definition of security: not just military security and state sovereignty, but economic, energy and climate security, human security and human rights'. See: Miliband, See: David Miliband, Speech at the 45th Munich Security Conference, February 7, 2009, available at: http://www.securityconference.de/konferenzen/rede.php?menu_2009= &menu_ konferenzen=&sprache=en&id=243.

[31] Joint Statement by Medvedev and Obama, April 1, 2009, see: http://www.president. kremlin. ru/eng/text/docs/2009/04/214839.shtml.

if Russia effectively supports US efforts of ending Iran's nuclear program, and supports NATO's stabilization mission in Afghanistan. It is not at all clear that Russia will, at this point, accept such a formula, however, Medvedev is a pragmatic leader and Russia may alter its position if it perceives greater benefits from doing so.

In this complicated political context, the Western approach to Medvedev's Initiative includes two basic elements: firstly, existing security institutions should not be undermined and may participate in security negotiations. At the same time, the West is ready to discuss unfolding security issues with Russia. For instance, at the meeting of NATO Foreign Ministers (Brussels, December 2-3, 2008) NATO underscored that the existing structures, based on NATO, the EU, the OSCE and the Council of Europe, share common values, and provide opportunities for states to engage substantively on Euro-Atlantic security within a broad legal framework, that includes: respect for human rights, territorial integrity, the indivisibility of state sovereignty of all states, and the requirement to fulfill international commitments and agreements. They concluded that

> (w)ithin this framework, Allies are open to dialogue within the OSCE on security perceptions and how to respond to new threats, and seek the widest possible cooperation among participating states to promote a common Euro-Atlantic space of security and stability. The common aim should be to improve the implementation of existing commitments and to continue to improve existing institutions and instruments so as to effectively promote our values and Euro-Atlantic security.[32]

The EU position was presented by the Czech Republic's delegation in Vienna at the Joint Session of the Forum for Security Co-operation and Permanent Council (February 18, 2009). According to the statement, the EU believes that the OSCE is a 'natural' forum from which to debate wide European security issues, and that such a debate within the OSCE should focus on restoring confidence, allowing all participants to address their security concerns. The EU declared that

> (i)t is equally important that work continues to revitalise the CFE regime bringing it back into full operation. We should strive for full implementation of the Vienna Document 1999 and the Open Skies Treaty. The EU calls upon all parties concerned to preserve and fully implement the existing acquis of arms control agreements and CSBMs, as well as to explore options for its further strengthening ... The comprehensive security architecture as developed over years based on existing organisations, shared commitments and principles should not be undermined. The EU remains open to considering ways and means to strengthen them … The security of the

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[32] Final Communique: Meeting of the North Atlantic Council at the Foreign Minister level, December 3, 2008, see: http://www.nato.int/docu/pr/2008/p08–153e.html.

European continent is inextricably linked with that of North America and the discussion among the 56 OSCE participating States is one of its abiding strengths. The promotion of a common space of security and stability from Vancouver to Vladivostok requires our combined and continuous efforts in order to respond effectively to present and emerging security challenges.[33]

In Corfu, most participants emphasized that existing security institutions function well, and additional institutions are unnecessary.[34] However, Bakoyannis' concluding remarks left the most important issues, a pan-European security treaty, and the transformation of the OSCE, open. Bakoyannis noted that

the Ministers concurred that it is also time to consider that much work remains to be done, and that the vision of a united continent, built on universal principles and indivisible security remains a target rather than a reality. It is high time to "Reconfirm our acquis, Review the state of play of European Security and renovate our mechanisms to deal with traditional and new challenges."[35]

Additionally, Bakoyannis listed some traditional and emerging threats which remain unresolved. This list includes:

- Protracted conflicts, ethnic tensions and unresolved border disputes;
- Europe's fundamental arms control regime, the CFE Treaty;
- Democracy, the rule of law and respect for fundamental human rights;
- A deepening economic crisis;
- Energy security, illegal migration, human trafficking, terrorism and fundamentalism, cybercrime and rising instability in regions adjacent to the OSCE area (…).[36]

This list mostly refers to Western visions of security challenges facing present-day Europe. Yet the thesis about a 'renovation' of mechanisms to deal with security may also reflect, albeit indirectly, Russia's approach. Indeed, Bakoyannis reasserted the mantra of 'the indivisibility of security from Vancouver to Vladivostok,' used by Russia to substantiate a marginalization of NATO. It indicates that future debates on security issues in Europe may focus either on

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[33] EU Statement in response to the address by the Deputy Minister of Foreign Affairs of the Russian Federation Alexander Grushko. Joint Session of the Forum for Security Cooperation and Permanent Council no. 38. Vienna 18 February 2009, Document FSC-PC.DEL/8/09.

[34] Following the Corfu meeting, Finnish Foreign Minister, Alexander Stubb (referring to NATO, the EU and the OSCE) noted that: "noone wants anything brand new ... almost everyone thinks the existing security organizations in Europe are working quite well'. See: Nicholas Paphitis 'Greek OSCE chairmanship urges European countries to build single voice on security', *The Daily Star* , June 29, 2009.

[35] Corfu Informal Meeting of OSCE Foreign Ministers on the Future of European Security Chair's Concluding Statement to the Press. Op cited.

[36] Ibid.

a number of the most important issues, like the restoration of the CFE Treaty regime and the restitution of the territorial integrity of Georgia, or on Russia's proposals aimed at undermining European and transatlantic security and defence capabilities.

A further trajectory of the Corfu process depends on answering crucial questions: whether it is possible to conclude a 'fair deal' with Moscow on strategic issues, acceptable to the West (as a whole), or to a few 'leading' Western countries? Or, does Russian aggressiveness result from systemic characteristics of Russian society and governance, and any deal with the West would be seen in Moscow as a sign of Western weakness, thus fuelling further Russian belligerence?

This question is especially important because there are some circles in Europe (and the US) which advocate engagement with Russia despite its aggression against an independent country.[37] They emphasize that Russia's international behaviour stems from deep traumas in the collective Russian psyche caused by the crash of the Russian and Soviet Empires, crises related to transition, and nostalgia inevitable when such a heterogeneous society goes through fundamental changes. The principal mistakes made by the West – advocates of this approach insist – was in ignoring Russia's concerns about NATO's enlargement (including potential Ukrainian and Georgian membership); Western support for the so-called 'colour revolutions' in the post-Soviet space; and the inability to restrain Georgia from aggression against South Ossetia, which instigated the Russo-Georgian conflict (2008). In order to assess whether this approach is correct or not an outline of the strategic implications of Medvedev's Initiative, and how it correlates with basic trends in Russia's policy towards Europe, needs to be undertaken.

Medvedev's Initiative, Russia's 'Grand Strategy'

Multilateral debates, with Russia, on European security are often substantiated by the point that ultimately such discussions may engage Moscow in a

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[37] For instance, a group of influential American analysts and political figures from the Commission on US policy to Russia stated that 'the potential collapse of the post-Cold War security architecture in Europe – established by the Conventional Forces in Europe (CFE) Treaty, the Intermediate Nuclear Forces (INF) Treaty, and the NATO-Russia Council, among other agreements and institutions – is also a serious threat to European security. Here, the fundamental problem is Russian dissatisfaction with a security system established at the time of Moscow's greatest weakness, during the 1990s. Russia does have legitimate interests in Europe, though it sometimes pursues them through unacceptable means. … Russia's President Dmitry Medvedev has called for dialogue on new security architecture and this provides an important opportunity for the United States, NATO, and the European Union to make specific proposals'. See: 'The Right direction for US policy towards Russia', A Report from the Commission on U.S. Policy toward Russia, March 2009, Washington, D. C. p. 10.

constructive relationship to NATO and Western states on the basis of shared interests. A group of US (former) high-ranking officials and analysts close to Obama expressed such a vision clearly, suggesting that

> (p)rotecting and advancing America's national interests in the decades ahead requires a strategic reassessment of the United States' relationship with Russia with an emphasis on exploring common interests. A constructive relationship with Russia will directly influence the United States' ability to advance effectively vital national-security interests in non-proliferation, counterterrorism, and energy security, and to deal with many specific challenges such as Iran or European security.[38]

Similar views are found among some European politicians and academics who perceive that cooperation with Russia is of vital importance to neutralize new challenges, and assure both hard and soft European security, including the stability of energy supplies. They assert that Medvedev's Initiative provides an opportunity to reduce Russia's inherent distrust towards Europe, and the West more generally, and improve Russian-Western relations.

Neither the US nor EU has an interest of political or strategic opposition to Russia. In fact, the West is genuinely interested in cooperation with Moscow on a number of security issues. However, 'it takes two to tango' and the principal question is whether Russia is truly as interested as the EU and US are? To answer this, it is required to examine Russia's 'grand strategy' (towards Europe), and assess how particular segments of, and personalities in, Russia's policy-making community see Russia's interests, including how Medvedev's Initiative correlates with such views.

Various groups and personalities in Russia differ on how common interests and goals should be pursued, although most factions of the Russian elite share a basic set of ideas, interests, perceptions and illusions about foreign policy. Russian 'grand strategy' results from a mentality, typical not only of a major part of Russian elites, but also of a major part of Russian society, inherited from both its Soviet and Imperial past. Its principal goal is the restoration of Russia's superpower status through the recreation of its 'sphere of influence' in Eurasia and Central/East Europe. Dmitry Rogozin, (present) Russian Ambassador to NATO, recently said that current tensions in Europe, result from the

> destruction of the whole Yalta-Potsdam security system, the system of modern international security architecture, … in which we've lived all those decades and saved the world from major wars … Destruction of this system is fraught with escalation of conflicts all over the world.[39]

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[38] Ibid. p. 1.

[39] Record of the press-conference of Dmitry Rogozin, Russia's Permanent Representative to NATO, on 'Changes in Russia-NATO relationship after Kosovo independence', February 2, 2008, available at: http://www.rian.ru/pressclub/20080222/99667207.html.

In this, Rogozin revealed a concept Moscow loathes to publicize; that the restoration of the Yalta-Potsdam system, a pillar of which was Soviet domination over Central/Eastern Europe, is a precondition for a stable international environment and is Russia's ultimate objective.

Russian elites also believe that since Russia is the world's second most influential nuclear power, and has enormous energy resources at its disposal, the international community should recognize its superpower position in Eurasia. Moscow hopes that a 'window of opportunity' has opened due to the West's perceived deteriorated global position – owing to fractures leading-up to Operation Iraqi Freedom (2003), the failures in Iraq, the unfolding crisis in Afghanistan, Pakistan, Iran, and, since the end of 2007, the economic crisis – and that Russia could seize the opportunity to emerge as a superpower again. Of course, Russian ruling elites have understood that the current economic crisis has damaged Russia's economy too; however it has not yet resulted in any major alterations to its foreign policy. Russia expects that its large financial reserves, accumulated during periods of high oil and gas prices, allows Russia to maintain its posture until the next spike in hydrocarbon prices, and that the West's ability to resist Russia's pressure will decrease because of the crisis.

Moscow's strategic ambitions are not fully supported by its true weight in international relations. Although Ruissia possesses a massive military and the second largest nuclear arsenal in the world, it failed to prevent NATO enlargement into its traditional sphere of influence. EU dependence on Russian oil and gas may provide Moscow with *some* tools for lumping political pressure on a few European states, however, it is stuck in a quagmire since it cannot radically reduce its energy exports to the EU, as the sale of hydrocarbons is *the* main source of state revenues needed for Russia's 'petro-state type' economy. Also, divergence of strategic interests between the US and EU is regarded by many Russian policy makers as considerably more profound and serious than reality reflects.

The gap between Moscow's ambitions and capacities results in international debacles. Unable to recognize strategic blunders, Russia's ruling elites blame failure on external forces, notably the US and NATO, accusing them of preventing its rise to superpower status. To counter such external meddling, the subordination of the West is one of Russia's most fundamental foreign policy objectives. With such an objective, Russia seeks to interrupt transatlantic links, and enfeeble NATO. Russia also attempts to divide the so-called 'new' and 'old' Europe, and re-establish effective control over the post-Soviet states.[40]

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[40] Medvedev's foreign policy doctrine presumes both the former Soviet republics and the former Soviet block states are within Russia's 'privileged interests.' Medvedev defined those regions as areas where Russia shares 'special historic relations,' to which it is 'bound together as friends and good neighbors,' and to which it will 'build friendly ties.' See: Interview with Dmitry Medvedev, available at: http://www.president.kremlin.ru/eng/text/speeches/2008/08/31 /1850_type82912type82916_206003.shtml.

Russia uses a variety of tools to achieve its objectives including: attempts to establish international institutions, regimes and/or systems of semi-formal consultations that disrupt transatlantic links and structures, and provide Russia with some levers of influence on European security policy.[41] The aforementioned institutions and regimes were – and are – often veiled as 'non-confrontational, non-discriminatory and open' pan-European security systems without 'dividing lines,' thus differing from a defence alliance (NATO), which is regarded as 'closed' and 'discriminatory.' Such attempts are rooted in the Soviet period, beginning with the Soviet idea of an all-European process aimed at legitimizing Soviet domination over the former Warsaw Pact states. The latter was regarded as cementing 'the geopolitical results of the second World War.' Other examples include: Gorbachev's 'Common European House;' Yeltsin's 'pan-European security order;' the idea of a Russia-Germany-France 'triangle' advanced in the lead-up to Operation Iraqi Freedom (2003); and the current proposal of a US-EU-Russia 'triangle.'[42] Medvedev's Initiative is the most recent and most far-reaching enterprise of this kind. Setting hopes on engaging Russia in a constructive relationship with NATO, and the Western states, by discussing 'new European security architecture' is largely impractical especially if such a pan-European approach is not universally accepted among Russia's decision-making elites.

Medvedev's Initiative and Russian Elites

Russian political and military elites differ over Medvedev's Initiative for Russia's foreign policy and the tactics to realize it. A number of ana-lysts and political pundits (Fyodor Lukyanov, Timofei Bordachev, Nadya

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[41] The arsenal of methods Moscow uses to attain those goals includes: usage of Europe's dependence on Russian oil and gas, including the establishment of "privileged energy relationships" with a number of European countries; attempts to control gas-flows to a number of European states with a view to obtain a tool of political influence upon them; usage of NATO's dependence on Russian transit routes to the ISAF; demonstration of military force ("patrol flights" of Russian strategic bombers near the air-space of some European countries, Russian-Byelorussian military exercises) and military pressure on Europe (destruction of the CFE-Treaty regime that is of substantial importance for Europe; threats to withdraw from the INF Treaty and to station new Iskander missile in Kaliningrad that may lead to a new missile crisis in Europe); exploitation of anti-American feelings spread across some parts of European societies and elites especially during the George W. Bush presidency.

[42] (Former) Polish Foreign Minister, Adam Daniel Rotfeld, argued that 'Russian proposals (Medvedev's Initiative) are hardly new. Suffice it to recall Mikhail Gorbachev's initiative of the end of 1980s, to build, as part of the perestroika policy, a united democratic Europe – "our common European home". Public statements of Russian leaders – Vladimir Putin, Dimitri Medvedev and Sergei Lavrov – have been more a manifestation of continuity of a Russian political way of thinking than an answer to the change which occurred in Europe in the past twenty years'. See: Adam Daniel Rotfeld, 'Does Europe Need a New Security Architecture?' Paper presentation at the Finnish Institute of International Affairs and Ministry of Foreign Affairs, Helsinki, March 26-27, 2009. p. 13.

Alexandrova-Arbatova, among others), centred around Sergey Karaganov, confidant to Sergey Prihod'ko, (chief of the international staff of the Presidential Administration), use 'soft' arguments to support Medvedev's Initiative. For instance, Lukyanov, (Editor-in-Chief of Karaganov's journal, *Russia in Global Affairs*), suggests that Medvedev's Initiative is in-sync with a more general 'natural mutual gravitation' of Russia and Europe to each other, and an growing gap between Europe and the US. He characterizes this initiative as a 'novel intellectual approach' needed for the emergence of a 'Greater Europe' able to counterweight the US and China.[43] Neither Lukyanov, nor other analysts of Karaganov's circle, were able to develop such sophisticated arguments themselves. Instead, they imitate the theory of an emerging 'Eurosphere' or a new 'European empire' embracing the former Soviet Union, Africa and the Middle East developed in the early 2000s by a few European political thinkers.

For her part, Alexandrova-Arbatova argues that Medvedev's Initiative is a signal to the West that Medvedev is looking for substantial changes to Russian foreign policy, and wishes to refrain from the confrontational rhetoric typical of Putin, and make Russia more cooperative with the West.[44] Such points are a type of 'carrot,' some Russian analysts propose to Europe. However, they develop a 'stick' too. In an article published in April 2009, Karaganov outlined a few basic points of the concept, typical of this part of the Russian political and bureaucratic elite:

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[43] Lukyanov wrote recently: 'Europe may quite soon discover that it is losing its position as the US's main partner, while Asia replaces it. It will be an unpleasant realization, undermining the traditional horizon of European politics. At the same time, possible US attempts to gain European aid in strengthening American dominance over all the world (which in Washington's eyes is what the new era of trans-Atlantic solidarity should mean), may make Europe resilient on its own … During the next few decades, Russia and the European Union are destined to closely interact with each other if they want to play important roles in the 21st century. However, the creation of a model for such interaction requires and the renunciation of numerous stereotypes inherited from the past century. The construction of a new "Greater Europe" on the basis of Russia and the EU is a task comparable in scale to that which the architects of European integration set themselves after World War II'. See: Fyodor Lukyanov, 'Europe Needs a New Security Architecture'*,* Russian analytical digest, N 55, February 18, 2009. p. 5.

[44] Alexandrova-Arbatova wrote: 'From the very beginning, President Medvedev's foreign policy agenda differed from that of his predecessor ... Medvedev is focused on cooperation with the West, rather than confrontation. While in Berlin in June 2008, during his first trip as the newly elected president, he proposed a universally binding international security agreement using the template of the Helsinki accords. This proposal has been criticised as a new Gorbachev-like initiative – "say something glamorous first, and worry about implementation later". But in its substance, it was a message to the West, first and foremost NATO, to identify a new agenda for transatlantic cooperation, to readjust it to the post-bipolar security challenges and to reduce the gap in security between Russia and the West – surely not an unworthy objective'. See: Nadia Alexandrova-Arbatova, 'Russia after the Presidential Elections: Foreign Policy Orientations'. In: 'Russian Foreign Policy. The EU-Russia Centre Review', Issue 8, October 2008. p. 11.

- Europe (and the West as a whole) face a strategic dilemma: either accept Russia's proposal or be threatened by the prospect of a renewal of Cold War conditions;

- De-facto freeze of NATO enlargement and mutual recognition of Kosovo, Abkhazia and South Ossetia are integral elements of a future European security treaty. 'If attempts to enlarge NATO continue there is a threat of Russia's transformation from a revisionist state, which changes disadvantageous rules of a game imposed upon it during the 1990s, into a revanchist state;

- The OSCE should be transformed into an OCSCE – an Organization of Collective Security and Cooperation in Europe, which has military-political functions. (It actually means that this OCSCE will absorb NATO and/or some of its functions);

- The suggested treaty should be supplemented with a treaty on Union of Europe, which will be a unification of Russia and the EU on the basis of common economic, energy, and human spaces. This entity should be supplemented by a constructive 'triangle cooperation' with the US and China.[45]

The notion of a 'strategic dilemma' facing Europe is a clear example of blackmailing tactics inherent in Russia's foreign policy. For its part, the idea of a European-Russian 'strategic partnership' or even unification able to counterbalance the US and thus improve Europe's international posture may attract some Europeans. Yet, despite looking attractive, this approach is fundamentally flawed. It ignores the fact that Russia has already turned into a revanchist state, as well as the existence of a deep 'value gap' between Russia and the EU, principal differences between the political nature of these two entities and, even more importantly, the essence of Russia's 'grand strategy' is not aimed at the formation of a kind of strategic alliance with the EU but at capitalizing on differences within the transatlantic community.

Finally, Medvedev's foreign policy is more militant and anti-Western than Putin's was. After all, Medvedev ordered Russian troops into Georgia, proclaimed the doctrine of Russian zones of 'privileged interests,' decided to station Iskander missiles in Kaliningrad, – in response to US MD in Poland and the Czech Republic – and used extremely anti-Western rhetoric.

The activities of Karaganov's group (together with some other groups that gravitate to the Kremlin rather than to the Foreign Ministry or military) reveal some intentions, and methods, of the Presidential Administration. The latter strives to demonstrate it is able to achieve its strategic goals through 'soft methods' rather than overt pressure. It cultivates some 'special relationships' with academic and political circles in Western countries who naively believe

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[45] Sergey Karaganov, 'Magiya tzifr – 2009' (The magic of figures – 2009), *Russia in Global Affairs*, 2, March-April 2009, available at: http://www.globalaffairs.ru/numbers/37/11573. html.

that it would be possible to establish a cooperative relationship with Russia through being conscientious of Russian political and strategic sensitivities.

Activities of the Presidential Administration often result from bureaucratic rivalry with the Foreign Ministry. This approach also reflects the interests of fractions within Russia's top circles; mainly business and bureaucratic groups engaged in economic relations with the West. Such circles share the basic attitudes of Russia's 'grand strategy' though are keen to avoid a new Cold War as it may upset their business, political and in some cases personal interests in Europe.

While the Presidential Administration is inclined to use 'soft' approaches to support Medvedev's Initiative, Lavrov, and his high-ranking lieutenants, make no secret that this initiative is aimed at the marginalization of NATO and the OSCE. The main argument they use is that 'NATO-centrism' of the existing European security architecture is outdated, and a source of insecurity on the continent. This may have two explanations: high officials from the Foreign Ministry may underestimate Europe's ability to resist Russian pressure and overestimate European dependence on Russian energy and communications with the ISAF and over-state rifts between Europe and the US. Also, Lavrov may wrongly conclude that current debates in NATO about the future of the Alliance, implies the beginning of its end. In addition, this approach may result from the 'soft' European reaction to Russia's invasion of Georgia. Whatever the reasons for such a policy are, its content is clear: Russia should exert pressure on Europe, and the US, to gain as much as possible from perceived Western political weakness and its inability to shape a coherent policy towards Russia.

At the same time, the approach to Medvedev's Initiative characteristic of Russia's Foreign Ministry may signal that its highest circles are in latent opposition to this idea, as Russia's military command seems to be. Russian diplomats are knowledgeable enough to realize that debates about NATO's future attempts to marginalize it are hardly acceptable for the vast majority of Europeans. Despite differences in attitudes towards the US, all European members of NATO are interested in NATO's continued existence. In this light, anti-NATO argumentation supporting the Initiative is likely to prompt Europe's rejection of it. On one hand, this provides additional arguments to Russia's more hawkish circles to intensify opposition to the West; and on the other hand it allows Russia to avoid making concessions such circles deem unacceptable.

There is much evidence that Russia's military does not support Medvedev's Initiative. Almost no Russian military officers or experts close to the armed forces have participated in the development of this Initiative. Unlike the mass-media which regularly publishes articles supporting Medvedev's Initiative, neither Krasnaya zvezda, (official newspaper of the Defence Ministry), nor Voenno-promyshlennii kurier, (the influential, unofficial mouthpiece of Russian military and defence industries), have published anything substantial in support

of the proposed 'new security architecture in Europe.' It is also indicative that Sergey Ivanov, (First Vice-Premier responsible for the defence industry, and one of the key figures in Russia's security sector), when speaking at the Munich Security Conference (February 2009), outlined Russia's approaches to a wide set of arms control and security issues, did not even mention 'new security architecture in Europe' or Medvedev's Initiative. Given the Byzantine nature of Russian politics, it was a clear signal that he, and probably the circles he belongs to, disapprove of the Initiative.

This may stem from two basic reasons: Russia's military command suspects that involvement in negotiations – and being interested in their successful results – the Kremlin, and Medvedev himself, may make concessions to the West which would be incompatible with the interests of the Russian military. In particular, Russia's military command may be concerned by the prospect of restrictions on the deployment of Russian forces and military activities on Russian territory. It is not a secret that the main reason Russia withdrew from the CFE Treaty was the so-called 'flank limits,' as Russia's generals were strongly concerned by the restrictions on armaments in those zones.

Also, Russia's military command is not interested in 'new security architecture in Europe,' even if it were advantageous for Russia. Firstly, it would mean a strengthening the Foreign Ministry's role in the formation of Russian foreign and security policy, thus reducing the role of the military in the shaping of the country's international behaviour. Even more importantly, the successful implementation of Medvedev's Initiative could prevent the deployment of new Russian Iskander missiles to Kaliningrad. Meanwhile, given the deterioration of Russia's *general purpose* (conventional) forces, and the mounting difficulties maintaining its strategic nuclear arsenal, Russia's military is increasingly interested in the production and deployment of new Iskander missiles to the Western part of the country.[46] They consider these missiles as the only weapon able to counterbalance a hypothetical deployment of US high-precision platforms; sea and air-based long range cruise missiles, to areas near Russia's western borders.

Ultimately, Russia's military, especially the Command of Land Forces, are not interested in the US's abandonment of the MD shield deployment to the

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[46] Russian media made it known that Russia planned to station, in Kaliningrad, up to five missile brigades (60 launchers) equipped with Iskander missiles. There are three modifications of Iskander missile:

- Iskander-E, also known as SS-26 Stone, is a ballistic missile of battle range of about 280 kilometres;
- Iskander-M, a ballistic missile of the battle range up to 500 kilometres or more;
- Iskander-K, cruise missile also known as R-500. In 2007 Russian military have tested it with a range of about 400 kilometres. However, information appeared that this missile could be of battle range up to 2 000 kilometres, as it is a modified upgrade of Soviet land-based cruise missile RK-55, also known as CSS-X-4 Slingshot.

Czech Republic and Poland, as it undermines the justification for stationing Iskanders. It is also disinterested in the mutual rejection of 'unilateral actions' until negotiations result in a European security treaty. It is thus to be expected that Russia's Ministry of Defence, and the Command of Land Forces – which will be directly involved in the formulation of Russia's position during any negotiations – will be reluctant to accept any compromise solutions, and prefer the absence or failure of negotiations rather than their success based on mutually accepted concessions.

Conclusion

Since the Corfu process began, and can hardly be negated unless Russia initiates new aggression against one of its neighbours, the West should develop a coherent strategy including the formulation of the objectives it hopes to achieve in negotiations with Russia. This strategy could focus on a few more important security issues facing Europe, but not a pan-European security treaty whatever shape it may assume. It should be remembered that the Helsinki Final Act (1975), portrayed as the peak of 'détente' between East and West, did not prevent numerous political and strategic crises in the 1970 and 1980s – some of the most dangerous episodes of the Cold War – and relations with Russia need to be conducted with an air of caution no matter the pitch of its overture.

Rethinking EU-Russian Relations: 'Modern' Cooperation or 'Post-Modern' Strategic Partnership?

Scott Nicholas Romaniuk[1]

Introduction

The geopolitics of both the European Union (EU) and the Russian Federation (Russia), following the collapse of the Soviet Union (USSR), has largely been defined by a search to carve out their own niches within a new geopolitical context. Several ideological, psychological, cultural, and historical factors contributed to closer cooperation between Russia and its more prosperous EU neighbours. In addition, Russia's geographical position and proximity to Europe necessitates the development of cooperation between Russia and the EU as leading voices on the continent.

The traditional logic of neo-realist and neo-liberal theories as mainstream approaches to understanding international relations has become dominant in explaining the dynamics of EU-Russian relations.[2] However, the logic of such mainstream approaches is insufficient for reflecting on complex processes of change in EU-Russian rapprochement. Alternatively, constructivist theoretical frameworks present different maps of the international arena drawn with a different focus and on a different scale.[3] The new map offers an alternative to mainstream logic and a different perspective on questions in EU-Russian cooperation such as: why the EU-Russian relationship is important for the EU; and what hinders these partners from further rapprochement?

This work presents two main arguments: first, geographic proximity, historical tiers and energy interdependence are important but not entirely sufficient

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[2]   S. Smith, "Positivism and Beyond." in *International Theory: Positivism and Beyond*, eds. Steve Smith, Ken Booth and Marysia Zaliwski, (Cambridge, UK: Cambridge University Press, 1996), 11.
[3]   N. Woods, "The Uses of Theory in the Study of International Relations." in Woods, N. ed., *Explaining IR since 1945*, (Oxford, UK: Oxford University Press), 1996, 13.

for explaining the necessity of EU-Russian cooperation for the EU. This work argues that, for the EU, cooperation with Russia is about demonstrating the EU's 'presence' and deploying different types of cooperative models in order to change the existing political realities, to confirm the EU's status of a trans-formative power, and Westernise Russia.[4]

Secondly, it is not conflicting interests, but rather norms-based tensions that paradoxically arise in EU-Russian cooperation. These tensions emerge as a result of the different nature of the partners – Russia as a self-interested modern state, and the EU as a post-modern actor – which may prevent partners from further rapprochement. EU-Russian cooperation is understood in this work as the process of international socialisation, which brings changes, constructs new realities, builds new practices and often triggers tensions between the partners.

The first section of this work focuses on how constructivist theory and methodological findings present an alternative to conventional approaches in understanding EU-Russian cooperation. The second section discusses the im-portance, uniqueness and necessity of EU-Russian cooperation for the EU. The final section demonstrates why there are difficulties with further rapprochement with negotiations over a new Partnership and Cooperation Agreement between the EU and Russia in the context of the simmering Russo-Georgia conflict. With respect to the methodological aspects of this work, ideas and norms play an independent causal role for constructivism, and the task is to try to establish correlation between ideas, norms and their impact on actors.

Alternative Approaches to Understanding EU-Russian Rapprochement

In less than two decades the relationship between the EU and Russia has transformed from exclusively bilateral relations between some of the European Community's members and the USSR, to a partnership between the EU and Russia. These actors now cooperate and establish new realities that were incon-ceivable during the Cold War. Russia has been the subject of many fundamental policy documents, policy implementation instruments and internal discussions over the past ten years, and the density and frequency of bilateral dialogue between Russia and the EU is remarkable.

Partners wilfully interact in different spheres, which assist the EU in build-ing new models of cooperation. These models are subsequently applied to numerous Soviet-successor states, particularly Ukraine, Belarus, and Moldova.[5] Moreover, as Trenin contends, the EU's interests towards Russia lies in the sphere of deep transformation, Westernisation and cooperation with Russia,

4   C. Bretherton, and J. Vogler, *The European Union as a Global Actor*, (London, UK and New York, NY: Routledge, 2006), 24.

5   Kashkin, S. *Pravo Evropeiskogo Sojuza*, (Moscow: Jurist, 2002), 889.

and not as a potential member of the EU as was the case with the former Warsaw Pact states (the Czech Republic, Hungary, Poland, Slovakia).[6] Therefore, Russia – along with other emerging global players, such as China, India and Brazil – creates a basis for the EU's exercise of an effective multilateral international approach to cooperation with an important actor not aspiring to join EU institutions.[7]

EU-Russian relations remain contradictory and difficult. Such accounts include legacies of the Cold War, which saw distrust, ambiguity over common strategic goals that continue to surface in the contemporary period, as well as asymmetry in levels of economic development.[8] These accounts create favourable conditions for the abundance of predominantly neo-realist and neo-liberal approaches to understanding EU-Russian relations in both Western and Russian academic literature. Accounts from both schools negatively interpret the current situation and future perspectives of cooperation, and underestimate achievements as a result.

Such views of EU-Russian relations are often exclusively based on disparities and focused on the realist notion of 'balance of power' and of Russia's opposition to any "institutional arrangements on the continent which accord [Russia] only a marginal role."[9] Moreover, as liberal institutionalists observe, institutions in Europe are mostly defined as "Western in political origin and focus."[10] This verity creates additional tensions with Russia whose modes of governance are out-of-sync with EU standards.

Other conflicting interests are illustrated in the EU-Russian energy dialogue, in particular the ratification of the so-called *Energy Charter*.[11] Ratification of the *Charter* would help the EU diversify its energy imports and enhance the sustainability of energy supplies.[12] However, Russia is attempting to defend its position as a key energy supplier to the European market,[13] which conflicts with

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[6] Trenin, D. *Integratsiia i identichnost': Rossiia kak 'Novĭ Zapad'*, (Moscow, 2006), Chapter 4.

[7] Grevi, G. and Vasconcelos, A. "Partnerships for effective multilateralism: EU relations with Brazil, China, India and Russia," *EUISS: Chaillot Paper* #109, 2008, 9.

[8] Н. Арбатова, (N. Arbatova), *The Black Sea Regional Cooperation in the Context of the EU-Russia Relations*, (Berlin: International Conference, May 2007), 1 and 2; T. Aleseeva, "Rossiia v prostranstve globalnogo vospriiatiia," *Mezhdunarodnye Protsessy*, Vol. 5, No. 2/14, (2007) available at: <http://www.intertrends.ru/fourteen/005.htm>; J. Borko, and A. Butorina, Evropeiskii Sojuz v XXI veke: vibiraja strategiju razvitija, (Moscow, 2001), 41.

[9] Webber, M. "Introduction: Russia and Europe—Conflict or cooperation?" in M. Webber, ed., *Russia and Europe: Conflict or Cooperation*, (Houndmills, Basingstoke, Hampshire: Macmillan Press, 2000), 7.

[10] Ibid, 15.

[11] D. Johnson, "EU-Russiann Energy Links: A Marriage of Convenience?" *Government and Opposition*, Vol. 40, No. 2, (2004), 256–258.

[12] Voloshin, V. EU-Russian Energy Dialogue. RECEP, 2004, 31. <http://www.recep.ru/ru/group-eurf-docs>.

[13] R. Seidelmann, "Decision-making in EU's CFSP: Deficits and Perspectives," in *A Focus on EU-Russian Relations*, ed. K.Westphal. (Frankfurt am Main: Peter Lang, 2005), 59.

the interests of EU-based companies to access Russian resources and modernise Russia's energy infrastructure.[14]

Population mobility and security on the EU's borders is increasingly becoming a key issue, especially since the EU's Eastern Enlargement (2004, 2007), which considerably expanded the common EU-Russian border.[15] Personified power and autocratic features of the Russian political environment and so-called 'imitative democracy' of a "Russian system" and its mechanisms of governance also present a major component to discourses on competing and irreconcilable interests in EU-Russian cooperation.[16]

Nonetheless, EU-Russian cooperation is not *only* based on deriving economic benefits, striking a 'balance of power,' decreasing transaction costs (within the framework of energy dialogue), promoting reliability and security on the EU's eastern borders, or drafting formalised agreements. Undoubtedly, the EU's recognition of Russia as a partner is of great importance for the latter, which altered its constitutional status and embarked upon a new course of democratic transformations.

Of no less significance is that the EU has become "the main tool for Russia's modernisation."[17] Technical Aid to the Commonwealth of Independent States (CIS), (TACIS), trans-border cooperation through INTERREG (Community initiative that aims to stimulate interregional cooperation in the EU) mechanisms, the Northern Dimension initiative and cooperation through the Council of the Baltic Sea States demonstrate some of EU's modernisation tools.[18] Therefore, as section two below demonstrates, EU cooperation with Russia concerns demonstrating the EU's *presence*,[19] and "international personality" of a transformative power and co-ordinating its actions as well as further unifying its position when it comes to cooperation and partnership models.[20]

Traditional, more mainstream approaches note that tensions and conflict in cooperation are based on a clash of diverse, and what appears to be, irreconcilable interests that prevent partners from reaching further rapprochement. Such

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[14] V. Voloshin, "EU-Russian Energy Dialogue." RECEP, 2004, 31.<http://www.recep.ru/ru/group-eurf-docs>.

[15] H. Grabbe, "The Sharp Edges of Europe: Extending Schengen Eastwards." *International Affairs*, Vol. 76, No. 3, (2000), 528.

[16] L. Shevtsova, "Political leadership in Russia's transformation." in A. J. Motyl, B. A. Ruble and L. Shevtsova. eds., *Russia's Engagement with the West: Transformation and Integration in the Twenty-First Century*, (Armonk, NY: M. E. Sharpe, 2005), 111–113.

[17] "The Russian Federation Middle Term Strategy towards The European Union," October 1999. <http://www.delrus.cec.eu.int/en/p_242.htm>.

[18] The European Commission's Delegation Official Site. TACIS, INTERREG, "Northern Dimension, Council of the Baltic Sea States," <http://www.delrus.ec.europa.eu>.

[19] C. Bretherton, and J. Vogler, *The European Union as a Global Actor*, (London, UK and New York, NY: Routledge, 2006), 24.

[20] D. Long, "Transatlantic Relations and Canadian Foreign Policy," *International Journal*, Vol. 58, No. 4, (2003). 1.

a wide explanation of existing tensions between the EU and Russia has gained explanatory power as a result of the concentration on unchangeable, exogenous interests widespread in neoliberal and neorealist accounts.[21]

Following more traditional explanations for tensions, it is essential to recognise that there are numerous common interests that *should* bring both partners closer together. For example, as Arbatova emphasizes, partners have common interests regarding threats to European and international security, stability in a wider Europe, and especially, CIS space.[22] Coordinating their actions, both partners could pursue a common goal of developing regional multilateral mechanisms and achieve their own project of constructing a rational world order, independent of the US.[23] As a result of possessing both over-lapping and conflicting interests, it is possible to bargain in areas where transaction costs are low, and elaborate common institutional mechanisms to make these agreements work; thus compromising on diverse interests.[24]

Concentrating on areas of mutual interest and "manage controversial high-stakes issues delicately" is indeed possible.[25] Such a solution may support integration and rapprochement but only if the partners decide to integrate wherever possible and necessary.[26] Energy cooperation without well-defined shared strategic goals may, for instance, lead to more acute disagreements which could prevent the partners from formulating precise strategic priorities and long-term plans.[27] The example of the Common European Economic Space (CEES) further demonstrates how issues with energy dialogue can be avoided or even potentially ameliorated.

The CEES is not a single market, although the removal of obstacles for the free flow of goods, services, capital and labour are all mentioned in the document except for the customs union which is one of the main features of a single market approach. The CEES has characteristics of a free-trade zone with cross-border trading of goods and services though it is not fully integrated and lacks a common currency, monetary policy and supranational bodies to

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[21] A. Wendt, "Anarchy is what States make of it: The Social Construction of Power Politics," *International Organization*, Vol. 46, No. 2, (1992), 392–394. Wendt suggests that both neo-liberals and neo-realists built their arguments on an assumption that it is behaviour, not interests that can change.

[22] Н. Арбатова, (N. Arbatova), "Obshchee prostranstvo bezopasnosti mezhdu Rossieĭ i ES: imperativy I pripiatstviia," *Indeks Bezopasnosti*, Vol. 3, No. 86/14, (2008), 64.

[23] Н. Арбатова, Н, (N. Arbatova), "Obshchee prostranstvo bezopasnosti mezhdu Rossieĭ i ES: imperativy I pripiatstviia," *Indeks Bezopasnosti*, Vol. 3, No. 86/14, (2008), 64.

[24] A. Moravcsik, "A New Statecraft? Supranational Entrepreneurs and International Cooperation," *International Organization*, No. 53, (1999), 270.

[25] A. Moravcsik, "Striking a New Transatlantic Bargain," *Foreign Affairs*, Vol. 82, No. 4, (2003), 75.

[26] T. Bordachev, "Na puti k strategicheskomy soĭuzu," *Russia in Global Affairs*, No. 1, (2006). <http://globalaffairs.ru>.

[27] Н. Арбатова, (N. Arbatova), "Obshchee prostranstvo bezopasnosti mezhdu Rossieĭ i ES: imperativy I pripiatstviia," *Indeks Bezopasnosti*, Vol. 3, No. 86/14, (2008), 64 and 69.

govern common economic activities.[28] Energy related problems could block developments within the CEES project however, its flexible approach allows for the improvement of cooperation in certain areas where core interests are not at stake, and to selectively integrate. As a result of this selective, flexible model of cooperation, EU-Russian trade in the first seven months of 2008 grew by some €36.5 billion to €165.3.[29]

Constructivists would argue that interests are changeable, flexible and dependant[30] on dialectical agent-structure relations.[31] As the discussion on the process of tracing historical developments of cooperation demonstrates below, cooperation becomes a self-evident practice and a social fact based on 'human agreement' that is perceived as objective so long as the agreement exists.[32] Partners prescribe more meaning to this cooperation constituting new realities and constructing new structural and institutional conditions, which in response, constrain partners' egoistic interests or enable their behaviour.

It is doubtful that interests are the main cause for tensions in EU-Russian cooperation. Despite efforts to legally formalize, institutionalize, and prescribe meaning to cooperation over a relatively long period of time, conflicts and contention endure. This contributes to instability in rapprochement between the EU and Russia. The paradox recalls the need for constructivists to provide theoretical tools and explain the reasons for reoccurring conflicts beyond what mainstream approaches provide. In this, section three (below) explores a relatively neglected area of conflict and demonstrates that the issues with norms continuously occupy an important place in EU-Russian relations.[33]

Although constructivism questions the exogenous character of interests and the claimed 'objectivism' of analytical blocks found in more mainstream approaches, it does not completely reject the material ontology of mainstream approaches by combining analysis of material structures with the study of ideational factors, so-called 'social ontology,' "shared understandings"[34] and

28 "Road Maps of Four EU-Russian Common Spaces," May 2007: <http://ec.europa.eu/comm/external_relations/russia/russia_docs/road_map_ces.pdf>.

29 P. Runner, (11 November 2008), "Lithuania complicates French rapprochement with Russia," <http://euobserver.com>.

30 A. Wendt, "Anarchy is what States make of it: The Social Construction of Power Politics," *International Organization*, Vol. 46, No. 2, (1992), 394.

31 C. Bretherton, and J. Vogler, *The European Union as a Global Actor*, (London, UK and New York, NY: Routledge, 2006), 22.

32 M. Barnett, "Social Constructivism," in J. Baylis and S. Smith eds., *The Globalization of World Politics: An Introduction to International Relations*, 3rd ed (Oxford, UK: Oxford University Press, 2005), 259.

33 F. Splidsboel-Hansen, "Russia's Relations with the European Union: A Constructivist Cut," *International Politics*, No. 39, (2002), 414.

34 K. M. Fierke, "Constructivism," in T. Dunne, M. Kurki, and S. Smith eds., *International Relations Theories: Discipline and Diversity*, (Oxford, UK and New York, NY: Oxford University Press, 2006), 170.

inter-subjective meanings.[35] Therefore, EU-Russian relations are "in a way, socially constructed" for the chosen theoretical approach.[36]

In practice, it is difficult to demonstrate the causal power of ideas and norms established in agreements. Moreover, interaction between the EU and Russia is evolving inasmuch as it is still in the process of 'becoming' and has not achieved its ends. The ongoing process of EU-Russian relations makes it difficult to form judgments about the partnership exclusively in terms of success or failure. A partial solution to these concerns in EU-Russian cooperation, process tracing of cooperation, textual analysis of fundamental official documents together with examination of an academic discourse is deployed as instruments of interpretive methodology. Textual analysis and academic discourse provides means for understanding the impact that cooperation has on the EU, and the factors that subsequently induce conflict between the partners.

Since EU-Russian relations are examined through the process of international socialisation, it is necessary to apply 'historicisation' – constructivists' methodological tools – to historically contextualise findings.[37] Tracing the historical evolution of meanings is also a necessary step since these are prescribed by actors to the importance of cooperation and which have made further development of cooperation possible.[38] Such methodological solutions provide an analytically operational alternative to traditional mainstream approaches in the EU studies, which rests on both the material and the ideational worlds.

The Necessity of EU Cooperation with Russia

Within the context of changing realities presented by a globalising world, a web of economic, social, political and cultural networks de-border existing local and national systems of governance.[39] As a result, new regional and global terrains have emerged. On one hand – and applicable to EU-Russian cooperation – it is not immediately apparent whether the EU is inevitably a global actor and a leading voice for Europe, or not. On the other hand, where Russia fits – in terms of its internal transformations and external foreign policy choices – is equally ambiguous. In other words it is unclear how strong an actor Russia will be in the future. However, even today both the EU and Russia may be considered as having an international 'actorness' about them since both

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[35] M. Barnett, "Social Constructivism," in J. Baylis and S. Smith (eds), *The Globalization of WorldPolitics: An Introduction to International Relations*, 3rd ed, (Oxford, UK: Oxford University Press, 2005), 253.

[36] A. Wendt, "Anarchy is what States make of it: The Social Construction of Power Politics," *International Organization*, Vol. 46, No. 2, (1992), 394.

[37] V. Pouliot, "'Sobjectivism': Toward a Constructivist Methodology," *International Studies Quarterly*, Vol. 51, No. 2, (2007), 360.

[38] Ibid, 360.

[39] J. Habermas, "Toward a Cosmopolitan Europe," *Journal of Democracy*, Vol. 14, No. 4, (2003), 88.

have sufficient internal capabilities such as available resources, political will, and the degree of autonomy to cooperate meet external demands placed on them, such as the ability to construct multilateral institutions and respond to common threats.[40]

The importance, uniqueness, and necessity of EU-Russian cooperation for the EU as an international actor are the focus of this section. The second part of this work traces the main stages of cooperation through the process of the adoption of fundamental documents as the final outputs in EU-Russian cooperation, and examines some implications these documents have for the EU or changes, if any, they bring to EU-Russian cooperation.

The analysis predominately concentrates on the EU; Russia's participation in cooperation needs exceeds the scope of this work. However, some reference to Russian processes is necessary for the overall arguments presented here. It is important to look at EU-Russian agreements because they not only provide a formal context, but also influence the environmental sector, create new structural conditions, alter perceptions of the main actors, and bring changes to EU-Russian relations. This is achieved by reproducing institutional practices that are informed by, and promote, certain ideas.[41] Moreover, agreements themselves reflect the internal negotiations and basic discourse that are considered to be viable, desirable and necessary.[42]

During the Cold War the USSR, as a mature power, generally ignored the existence of the European Communities (EC). Instead, the USSR maintained bilateral relations with EC members. The EC-USSR dimension was not recognised during the Cold War, since the Soviet government considered the newly established organization an attempt to strengthen political and economic order inculcated by an ideological enemy, NATO.[43] The first 'thaw' came in 1989 when the first *Agreement on Trade and Cooperation* between the EC and USSR was adopted. The terms of this agreement were not fully implemented due to the collapse of the USSR (1991), and the transformation of the country. However, Russia received recognition from the EC as an assign of the collapsed USSR.[44]

The establishment of the EU with considerable economic clout, wide international responsibilities, and burgeoning political weight, made the establish-

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[40] C. Bretherton, and J. Vogler, *The European Union as a Global Actor*, (London, UK and New York, NY: Routledge, 2006), 24.

[41] Margheritis A., and Maldonado, M. "Regional Integration and (Hauled) Migration Policy: What Does the European Experience Teach Us? *Journal of European Public Policy*, Vol. 14, No. 1, (2007), 156.

[42] L. Hansen, *Security and Practice: Discourse analysis and the Bosnian War*, (London, UK and New York, NY: Routledge, 2006), 51 and 52.

[43] I. Leshukov, "Russia and the European Union: A strategy of interaction." in D. Trenin, ed., *Russia and European Security Institutions: Entering the 21st Century*, (Moscow: Carnegie Endowment for International Peace, 2000), 29.

[44] S. Kashkin, *Pravo Evropeiskogo Sojuza*, (Moscow: Jurist, 2002), 886.

ment of a coherent policy framework and institutionalised cooperation with the EU logical and necessary for Russia. Subsequently, the *Partnership and Cooperation Agreement* (PCA) was signed in 1994 and entered into force in 1997 (Agreement on Partnership and Cooperation (PCA), 1997). Thus, the idea of institutionalised cooperation as a necessary requirement for further relations with the EU led to the establishment of a basic document in EU-Russian relations.

Partnership between Russia and the EU not only provided a favourable ground in trade dialogue and economic cooperation, it also demonstrated the potential to constitute new realities between two partners by introducing more areas of cooperation and ascribed new and important merits to the partnership (PCA, Article V). In other words, even if the EU and Russia were so diverse and could hardly understand each other, it was critical for the EU to include Russia in its 'space' of influence. It was also necessary for the EU to try and build relations in which both actors would create new meaning for their relations and potentially effective outcomes.

As Leshukov noted, the text of the Agreement is replete with articles based on 'principal-agent' relations, whereby the EU acts as a 'principal' that spreads its democratic and liberal economic rules on the territory of Russia.[45] Russia, on the other hand, plays the role of 'agent' and follows the directions of EU institutions.[46] Articles within the Agreement confirm that, in the case of Russia, EU institutions sought to dominate rather than foster cooperation on an equal basis. Nonetheless, the document laid a legal basis for the future development of EU-Russian cooperation, and it appears to be the most detailed agreement adopted by partners that paved the way to establishing structural conditions for cooperation such as, for instance, the Euro-Atlantic Partnership Council, or the Permanent Partnership Council (PPC), and the Parliamentary Cooperation Committee (PCC, 1997).

Realism would argue that such developments did not necessarily serve as evidence of a trend; arguing instead that the efforts to build a cooperative relationship between the EU and Russia is dependent on a particular situation (where both actors believe that they gain more than their partner – relative gains theory), temporary, and thus unlikely to endure. However, in 1999 a second fundamental document in the EU-Russian relationship – the *Common Strategy of the European Union on Russia* (the Common Strategy) – was adopted. The Common Strategy was quite a general document of the policy already implemented within the framework of the PCA, which explains numerous generalizations in the document but does not explain why the EU sought this document

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[45] I. Leshukov, "Russia and the European Union: A strategy of Interaction," in D. Trenin, ed., *Russia and European Security Institutions: Entering the 21ˢᵗ Century*, (Moscow: Carnegie Endowment for International Peace, 2000), 40.

[46] Ibid, 40.

in the first place.[47] Presumably, for the EU, such a document was perceived as a means to increase the effectiveness of its relatively new Common Foreign and Security Policy (CFSP) as the second pillar in the EU's architecture and its prescribed tool – Common Strategy (Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Related Acts, 1997, Article XIII).

The idea of the Common Strategy has made the EU unique and more of an independent global actor which expresses a common political stance towards other international actors. The Common Strategy has a single voice in foreign affairs, and demonstrates its international presence. Moreover, the fact that the first EU Common Strategy focused on Russia confirms the significance of EU-Russian relations for the EU. Most importantly however, the Strategy proclaimed "(t)he integration of Russia into a common European economic and social space" and established the EU's determination to launch an EU-Russian dialogue with regard to creating CEES (Common Strategy of the European Union, Part II). Such a declaration is representative of the EU's intentions to continue an incremental process of cooperation with its eastern neighbour while simultaneously confirming the importance of EU relations with Russia.

Consequently, the adoption of the Russian Federation's *Middle Term Strategy* towards the European Union (2000–2010) affirms the careful attention Russia pays towards developing a cooperative relationship to the EU and in recognition of the EU's status as an international player.[48] It appears as though Russia's Strategy was the required response to the actions of the EU, and therefore, vague.[49] Nonetheless, the Western direction of Russia's foreign policy at the beginning of the 21st century is fairly reflected in this document: "(t)he Russian foreign policy is subjected to the global task of the economic modernisation of the country and achievement of competitiveness on the world market."[50]

Russia's Strategy clearly defines future relations with Europe as "a strategic partnership not aimed at Russia's incorporation into European institutions."[51] Therefore, it symbolizes the first attempt to frame a Russian policy towards the EU as a strategic partner and international actor. However, Russia's understanding of the word 'strategic' denotes a defensive interpretation of Russia that

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[47] J. Borko, and A. Butorina, *Evropeiskii Sojuz v XXI veke: vibiraja strategiju razvitija*, (Moscow, 2001), 58.

[48] "The Russian Federation Middle Term Strategy towards the European Union," October 1999. <http://www.delrus.cec.eu.int/en/p_242.htm>.

[49] T. Bordachev, "Strategy and Strategies," in A. Moshes (ed), *Rethinking the respective strategies of Russia and the European Union*, (Moscow: Carnegie Endowment for International Peace, 2003), 42.

[50] "Obrashenije Presidenta k Federalnomy Sobraniju RF," (2002), <http//www.president.kremlin.ru/text/appears/2002/04/10691.shtml>.

[51] "The Russian Federation Middle Term Strategy towards the European Union," October 1999, <http://www.delrus.cec.eu.int/en/p_242.htm>.

seeks to become a powerful actor without any constraints on its sovereignty and be equal to the EU. Such a position reveals the nature of Russia as a 'modern' state, which places primary importance on its sovereignty and secondary importance on mutually beneficial cooperation. For the EU cooperation was largely seen as promotion by a 'post-sovereign' international institution of one-sided transformation, harmonization and gradual integration with the EU's norms and values, but not with its institutions.[52] This course fanned tensions and limitations to EU-Russian relations.

The subsequent stage of EU-Russian cooperation is found in the EU's Neighbourhood policy (2004). The adoption of this document is closely connected with the EU's fifth enlargement and the changes the EU experienced in honing its economic and geopolitical influence. This stage may be interpreted as an example of a new 'post-modern' thinking of 'transformative power;' attempting to place all its neighbours, including the Russian Federation, under a single umbrella and develop a new 'post-modern,' but coherent, policy to them.

Russia reacted as a 'modern' actor; defending its sovereignty – proclaimed in the *Mid-Term Strategy* – and considered the EU's step as an attempt to increase asymmetry between the actors and decrease the special status of Russia as a strategic partner.[53] Such reaction demonstrates the exacerbation of tensions between the partners based on differences in their nature.

Despite these problems, the EU has confirmed its obligations in the creation of four common spaces (EU-Russian Summit, Saint-Petersburg, 2003), and proved to be consistent in its common foreign policy priorities and capable of adopting a common decision on Russia either with 15 or 25 of its members. "Road Maps of Four EU-Russian Common Spaces" signed in May 2005 (Road Maps of Four EU-Russian Common Spaces, 2005) was the result of this decision. Integration occurs in the sphere of the common economic space, common space of security and justice, as well as external security, education and culture. The Common European Space project is not only a form with no meaning – the critique, quite often expressed towards the EU's common foreign policy and its cooperation with third countries. It is a subsequent change which has occurred despite tensions in EU-Russian relations bringing about positive shared understandings of each other "expressed in the desire to drive the four roads of cooperation together."[54]

If not for the aforementioned 'human agreements' of the 1990s, which led to an increasing perception of cooperation as an objectively real social fact, such a result would be impossible even considering energy dependence between

[52] H. Haukkala, "The Relevance of Norms and Values in the EU's Russia Policy," (Working Papers 52, 2005), 11. <http://www.upi-fiia.fi>.

[53] K. Westphal, *The EU-Russian Relationship and the Energy Factor: A European View*, (Frankfurt am Main: Peter Lang, 2005), 32.

[54] F. Splidsboel-Hansen, "Russia's Relations with the European Union: A Constructivist Cut," *International Politics*, No. 39, (2002), 402.

the partners.[55] Moreover, the change influenced political practices between the partners at the international level.[56] Fourteen dialogues established under the Four Road Maps, and several sectoral agreements, may serve as a prime example.[57] Action plans were also adopted and implemented in such areas as Energy, Materials and Nanotechnologies, Space, to name a few.[58]

Cooperation with Russia assists the EU in confirming its external image as an internationally important transformative power, and even more so as a tool for modernisation that can truly makes a difference and brings about changes to international exchanges. Despite a long-term history of exclusively bilateral relations between Russia and particular EU members, the EU is increasingly perceived by Russia as a cohesive actor, and a leading voice for Europe. Provided that the adopted 'road maps' are operational and incorporated into the text of a new PCA[59] thereby filling a 'legal vacuum' in the partnership, they may assist the EU in constructing a Common European Space predominantly based on the EU's ideas of what this space is to resemble, what norms, and that principles it should be based on.[60] In other words, the EU-Russian relationship may be seen as a post-sovereign international institution that promotes one-sided transformation, harmonization and gradual integration with the EU's norms and values, but not with its institutions.[61]

Ultimately, both partners demonstrated the will and ability to include and cooperate and not to implement a strategy of exclusion or opposition. Indeed, changes occurred in addition to the development of a new culture of cooperation between the partners should be recognised. However, changes do not always lead to positive results and heightened understanding; they may produce paradoxes, such as future ruptures in cooperation, or subsequent conflicts of strategic interests at home and abroad. The final section of this work introduces a constructivist explanation of the factors impeding partners from further rapprochement and delays the whole project of post-modern cooperation.

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[55] M. Barnett, "Social Constructivism," in J. Baylis and S. Smith (eds), *The Globalization of WorldPolitics: An Introduction to International Relations*, 3rd ed, (Oxford, UK: Oxford University Press, 2005), 259.

[56] F. Splidsboel-Hansen, "Russia's Relations with the European Union: A Constructivist Cut," *International Politics*, No. 39, (2002), 404.

[57] *Report from the European Commission* (May 2007), "EU-Russian Relations," <http://ue.eu.int/>.

[58] D. Isajev, "The Main Theories of Harmonization of Legislation in the Process of Creating the EU-Russian Common Spaces," (RECEP 19, March 2005), <http://www.recep.ru/ru/group-eurf-docs>.

[59] The 1997 PCA expired in 2007 and a new version of the Agreement is currently under negotiation.

[60] Н. Арбатова, (N. Arbatova), "Russia-EU Quandary 2007," *Russia in Global Affairs*, Vol. 2, (April–June 2006). <http://eng.globalaffairs.ru/numbers/15/>.

[61] H. Haukkala, "The Relevance of Norms and Values in the EU's Russia Policy," *Working Papers 52*, 2005, 11. <http://www.upi-fiia.fi>.

The Politics of New Partnership and Cooperation Agreements

EU-Russian cooperation was developed as an asymmetrical donor-recipient relationship, in which the donor, in this case the EU, would attempt to impose its norms and views of a post-modern polity whereas Russia, as the recipient, would try to accept these donor's investments.[62] In contrast to East/Central Europe, Russia is more interested in the modernisation process than in the result of full-fledged membership. One should consider the Russian point of view, that full admittance to EU institutions is, perhaps, possible only in theory. Russia does not necessarily have to become part of the EU, but rather learning from European experiences is indispensable for a Russia that aspires to modernise and gain recognition by the West.[63]

Motivation for convergence is driven by the desire for acceptance, symbolic legitimacy, and status.[64] This helps explain why Russia continuously seeks to achieve economic, social, and political convergence with the EU. Despite this however, the donor-recipient formula causes tensions and conflicts in EU-Russian relations. Such tensions are due to the fact that Russia has been undergoing the stage of adoption and internalisation of a normative concept as a modern state inasmuch as it is simply not on the 'same page' as the EU – as a post-modern polity – when it comes to the notion of what is 'appropriate' and what is not.[65] This does not preclude that cooperation has no impact on Russia; it only indicates that the EU plays the role of a dominant group for Russia, which explains the EU's 'superior' attitude towards its recipient. Additionally, Russia is undergoing the process of socialisation in EU-Russian rapprochement which is sometimes 'painful' and replete with resistance.[66]

Negotiations for a new Partnership and Cooperation Agreement between the EU and Russia in the context of the Russo-Georgia conflict is interesting to examine in terms of the nature of partners and the presence of conflict. Sampling is 'purposeful' and the Russo-Georgia conflict is selected as a case-study because it offers a useful manifestation of the phenomenon of interest, and it

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[62] Ibid.

[63] F. Splidsboel-Hansen, "Russia's Relations with the European Union: A Constructivist Cut," *International Politics*, No. 39, (2002), 399.

[64] M. Barnett, "Social Constructivism." in J. Baylis and S. Smith (eds), *The Globalization of World Politics: An Introduction to International Relations*, 3rd ed, (Oxford, UK: Oxford University Press, 2005), 264.

[65] M. Finnemore, and K. Sikkink, "International Norm Dynamics and Political Change," *International Organization*, Vol. 52, No. 4, (1998), 891 and 892.

[66] M. Barnett, "Social Constructivism." in J. Baylis and S. Smith (eds), *The Globalization of World Politics: An Introduction to International Relations*, 3rd ed. (Oxford, UK: Oxford University Press, 2005), 268.

is information rich.[67] Moreover, it plays a confirmatory role of a theory-based qualitative inquiry previously discussed in this work.[68]

Firstly, both the EU and Russia prescribe certain normative meanings to the notion of sovereignty, legitimacy, 'good governance,' the rule-of-law, and freedoms and rights. These values are most firmly associated with the nature of the partners. Russia's actions are determined by a more modern understanding of sovereignty: it has adopted, though with delays, the modern concept of sovereignty and it is currently accepting the basic elements of the concept through a socialisation process at both institutional and societal levels. For its part, the EU no longer supports the concept of sovereignty and is in the midst of developing a new way of thinking based on a post-modern set of values and beliefs. For this reason EU cooperation with Russia is replete with resentment and mutual irritation.

The Russo-Georgia conflict provoked political rifts within the EU; for instance, a joint statement was issued by the three Baltic States (Latvia, Lithuania and Estonia), together with Poland, condemning Russia's actions.[69] However, other countries expressed more moderate positions on the conflict. Such divisions could have been explained by Smith as a lack of socialisation effects on new EU members and the increasing alignment of positions among the older members due to the same socialisation effects imposed by the EU.[70] Nonetheless, the actions of Sweden and the UK, which were highly critical of Russia, are not in-sync with this explanation. Apparently, the EU, in the Russo-Georgia conflict, forced Russia to act in accordance with *its* (the EU's) normative standards. For Russia, the primary, stated (though disputed) goal was to defend the rights of its citizens (the overwhelming majority of South Ossetians retain Russian citizenship), and to interfere because its regional interests were being undermined. Such a position led to tensions with the EU which considered Russian behaviour 'inappropriate' and took measures to enforce compliance with *its* norms by issuing a declaration and suspending all talks on PCA and exacerbating the problem with the aforementioned 'legal vacuum'.[71] As an EU members' foreign minister claimed "(w)hen we see them violating rules, we should be very clear in our language."[72] As a result, it was the EU which sponsored peace talks between Russia, Georgia and South Ossetia, and defines the level of appropriateness of such talks.[73]

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[67] Patton, M. *Qualitative Research and Evaluation Methods*, 3d ed. (London, UK and New Delhi: Sage Publications, 2002), 40.

[68] Ibid, 194.

[69] "Finding a Voice," Baltic Times, 13 August 2008, <http://www.baltictimes.com/news/articles/21104/>.

[70] K. Smith, "Speaking With One Voice" *Journal of Common Market Studies*, Vol. 44, No. 1, (2006), 134.

[71] "Europe Quietly Caves in to Agree to New Partnership Talks with Russia." The Economist, *November 2008.*

[72] Ibid.

[73] Euronews. (20 November 2008), <http://www.euronews.net/en/article/20/11/2008/russia-and-georgia-hold-productive-talks-on-the-caucasus/>.

These interpretations confirm that the EU is using its status of partnership to exert pressure on Russia and attempt to force it to conform to the EU's system of norms. It seems that the effect of mutual constitution takes place in cooperation, and the EU is also changing, under pressure, to cooperate or even rethink the role of Russia as an international player. Indeed, a strong critique from Sweden, the Baltic States, the UK, and the Czech Republic was followed by "two heavyweight policy recommendations [warnings] from the office of EU top diplomat Javier Solana and the European Commission."[74] Solana's paper noted that the EU needs Russian support on all major foreign policy problems,[75] and the question of whether "to cooperate or not to cooperate" can be addressed well by using the words of an EU diplomat: "(i)f you look at [Georgia's] issue, legally there is no reason to re-launch the talks [on PCA.] But political reality dictates that we need to communicate with Russia."[76] Therefore, Leonard and Popescu were correct in stating that "the EU may not have completely succeeded in changing Russia, but Russia is certainly changing the EU."[77] Obviously, both the EU and Russia mutually construct and constrain each other in their partnership and therefore reproduce cooperation as a political reality.

The EU stumbles with deep-rooted and, therefore, more resistant clashes of norms in EU-Russian cooperation based on the difference in nature of the actors. Russia simultaneously undergoes two socialisation processes: 1) internal – characterized by inclusion of modern concepts of sovereignty into political and social realities; and 2) external – linked to cooperation with the EU, which also imposes pressures to change. Such an explanation adds to a better understanding of EU-Russian relations, its dynamics and may underscore some reasons for increased tensions.

Conclusions

External challenges and opportunities pushed both the EU and Russia to carve out their own international niches. The same challenges also compelled both actors to trial new roles: the EU as an active global actor and Russia as a former great power which attempts to become something it never was: a democratic country and the EU's partner in a multi-polar world. Russia seems to perceive the EU as a 'modernisation' power critical for building new dimensions of political interaction and new roads for cooperation. This may balance the assertion that the EU is exploiting external opportunities in order to cooperate and exercise its transformative power, create conditions for 'effective

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74   P. Runner, (11 November 2008), "Lithuania complicates French rapprochement with Russia," <http://euobserver.com>.

75   Ibid.

76   Ibid.

77   M. Leonard, and N. Popescu, "A Power Audit of EU-Russian Relations," *ECFR*, (February 2007), 17.

multilateralism,' forge new practices, and even constrain an international environment by making it more suitable and favourable to the EU's requirements and preferences.

The EU has achieved some important results in claiming the status of a transformative post-modern power. Therefore, the necessity of EU-Russian cooperation for the EU should not be underestimated. Furthermore, EU-Russian cooperation may be seen as a 'post-sovereign' partnership that exemplifies Russia's gradual integration of EU's norms without EU membership. In this respect, as the process tracing shows, there is potential for a new strategic level in EU-Russian cooperation, and both sides experience constitutive effects of this cooperation. However, as the case of the Russo-Georgia conflict confirms, there is a norms-based conflict in EU-Russian relations based on differences between the Russia's modern concept of the sovereign state and the EU's post-modern approach to building a Europe without states. Such a conclusion demonstrates that constructivist explanations permit the recognition of tensions and contributes to a better understanding of dynamics in EU-Russian cooperation.

Governing Internal Security in the European Union

Artur Gruszczak[1]

Introduction

The Maastricht treaty on the European Union (EU) erected a three-pillar edifice of European integration whose third pillar comprised various forms of cooperation in justice and home affairs. Many practices had existed much before 1992 and their inclusion into the new organization was a kind of cosmetic surgery. That face-lifting of cooperation in justice and home affairs had obvious consequences for the nature of the third pillar and the overall balance of EU policies. The third pillar was a strictly intergovernmental area where the EU members kept their sovereign right to decide upon their home affairs and judicial cooperation, as well as regulate migration flows and safeguard their national borders. EC institutions did not have much say on those matters, and any progress of cooperation depended on consensus between the members.

The Maastricht treaty established legal/formal and institutional grounds for EU cooperation in managing internal security through intergovernmental consultations regarding the movement of persons in the EU, and concomitant flanking measures in the fields of police and judicial cooperation. EU politics of internal security was formally strengthened in the Amsterdam Treaty, and practically through incorporation of acquis Schengen into the legal framework of the Union. The gradual widening of the Schengen area, the abolition of controls at internal borders and the reinforcement of flanking measures, especially at external borders, allowed the EU to set up a comprehensive and relatively efficient system of internal security.

Although the Amsterdam treaty, reforming the EU, intended to improve the fluctuation of numerous policy fields, its provisions concerning justice and home affairs were controversial. Firstly, a relatively simple and

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transparent structure of third-pillar cooperation was replaced by a multi-level asymmetrical and entangled cross-pillar construction in an "area of freedom, security and justice." Provisions relating to immigration, visas, asylum and other policies related to free movement of persons were transferred to the Community pillar. The third pillar was reduced to police and criminal justice cooperation. The Schengen acquis was inserted into the framework of the EU although its provisions were granted a special autonomy.

Discussions about the reform of the EU have dominated a general political and theoretical discourse on European integration at the threshold of the 21st century. A host of supranational institutions and intergovernmental bodies along with politicians and government officials from the EU members have perseveringly deliberated upon the most suitable and desirable shape of a future EU. The 2007 Lisbon treaty ended the long and tortuous trip to a new arrangement for European integration although its fate is still undecided. Moreover, the formal abolition of the pillar structure was partially undermined by special provisions concerning, first of all, internal security matters, especially police cooperation and criminal justice.[2]

The process of constitutionalisation of the EU came amidst a great global security debate. The symbolic and political impact of the 9/11 terrorist attacks on the US, when Western civilization lost the feeling of stability and entered a new stage: a 'war on terror,' brought about new challenges for the EU in the area of security. Transnational processes, in which the EU and its Communities have, for decades, assumed a leading and creative role, changed the traditional perception and understanding of security.

One of the objectives of European integration has been to make inhabitants of the continent feel safer and more confident in the institutions of public life. The challenge of transnational threats such as terrorism, cross-border organized crime, large-scale migrations, asymmetrical conflicts or WMD proliferation had also to be met by the European states. Confronted for decades with such disquieting events and phenomena, the Europeans managed to work out, within the framework of European integration processes, certain arrangements allowing for more effective and long-term cooperation in preventing and combating the major threats to European security.

This paper is intended to reflect upon the problems and challenges to the EU's internal security governance from three different angles: theoretical, political and virtual.

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[2]   See Jörg Monar, "Justice and Home Affairs in the EU Constitutional Treaty. What Added Value for the 'Area of Freedom, Security and Justice'?" *European Constitutional Law Review*, 2005, 1 (2): 226.

Governance as an Analytical Framework for EU Internal Security

Cooperation in the area of the EU's internal security covers a vast terrain where multiple actors on transnational, national and sub-national levels enter in complex interactions mapping out, or bringing about diverse models of security and agendas for public order. Polycentric and differentiated structures of EU security governance predetermines a variety of approaches to efficient and legitimate policy-making, and allows for identifying several modes of governance in the area of internal security of the EU.

Governance is a multifaceted concept which, being in vogue over the past decade, poses numerous cognitive, analytical and definitional problems and difficulties. Regardless of the enormous scholarship in this field[3], one should keep in mind three basic presumptions:

- the EU is a special kind of (epistemic / security / organizational / regulatory) community "cursed" by her hybrid nature "contaminating" the structures of power, authority, accountability, territoriality;
- security governance should be taken as a policy issue where public institutions predominate societal self-organization;
- governance should be seen in an organizational/procedural perspective rather than in participatory/distributive one.

The EU's internal security policy was predetermined by some hybrid features of the Union and thus sought to interlink activities undertaken by its members on the basis of prerogatives in the areas of law enforcement, public security and public order, with cross-border cooperation within and outside the EU's normative and institutional framework, as well as activities of EU

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[3] James N. Rosenau, "Governance, Order and Change in World Politics" in *Governance Without Government: Order and Change in World Politics,* ed. by J.N. Rosenau, E.-O. Czempiel (Cambridge: Cambridge University Press, 1992); *Modern Governance: New Government-Society Interactions*, ed. by Jan Kooiman (London - Thousand Oaks – New Delhi: Sage Publications, 1993; James G. March and Johan P. Olsen, *Democratic Governance* (New York: The Free Press, 1995); R.A.W. Rhodes, *Understanding Governance: Policy Networks, Governance, Reflexivity and Accountability* (Buckingham: Open University Press, 1997); *Debating Governance. Authority, Steering, and Democracy*, ed. by Jon Pierre (Oxford-New York: Oxford University Press, 2000); Artur Gruszczak, "Democratic Governability in East-Central Europe – A Comparative Performance Account" in *Perspectives on Democratic Consolidation in Central and Eastern Europe*, ed. by Dirk Berg-Schlosser and Raivo Vetik (Boulder: East European Monographs, 2001); Kees van Kersbergen and Frans van Waarden, "Governance" as a bridge between disciplines: cross-disciplinary inspiration regarding shifts in governance and problems of governability, accountability and legitimacy," *European Journal of Political Research* 2004, 43 (2): 143–71; Renate Mayntz, "From government to governance: Political steering in modern societies" in *Governance of Integrated Product Policy,* ed. by D. Scheer and F. Rubik (Sheffield: Greenleaf Publishing, 2006); Oliver Treib, Holger Bähr and Gerda Falkner, "Modes of governance: towards a conceptual clarification," *Journal of European Public Policy* 2007, 14 (1): 1–20.

agencies and bodies in the area of freedom, security and justice (e.g. Europol, Eurojust, Frontex), inserting all that in an overall security strategy of the Union.

EU security governance is a complex set of political activities undertaken by the members, assisted by EU institutions, bodies and agencies, to secure a high level of safety for EU citizens, and legal aliens, as well as to respect civil liberties and fundamental rights. Security governance embodies active public and private involvement in creating conditions necessary for the government to fulfill its functions with legitimacy, efficacy and stability. The EU's identity is built on a common perception of threats and risks. Moreover, EU security governance is being realized in a single territorial entity consisting of complex, multitiered, geographically overlapping structures embedded into multilayered security regimes. In this context, EU security governance has been strongly influenced by "schengenization" of normative framework for internal security cooperation.

EU security as a political issue involving rational decision-making, enforcement, and follow-up, has to be taken at the same time as a societal phenomenon allowing for greater human mobility, large-scale cross-border flows and high-tech tools of interpersonal communication. Free movement of people, empowerment of EU citizens and legal residents to move and reside freely within the territory of the EU members (under certain conditions), gave rise to a growing need for safeguarding those achievements and at the same time enhancing efficiency and viability of law enforcement institutions. Balancing freedom with security in a common area became an entangled and challenging issue politically and practically. Securitization over the freedom to move, reside and communicate in the EU turned out to be a functional requirement and condition of further development of the EU as an area of freedom, security and justice.

Given the aforementioned remarks, one can distinguish the following modes of governance of EU internal security[4]:

Liberal externalization – security policy is still a domain of governmental actions and undertakings and, as such, is intrinsically inserted into diplomacy and international agreements. Local indigenous factors of instability and insecurity are closely interlinked with external sources of risks and threats originating in religious, cultural or ethnic dissent. State institutions in their responsibilities for safeguarding state sovereignty, territorial integrity but also public order and safety for the inhabitants, take security as a "dual-use" issue, both internal and external, combining thus domestic efforts with activities abroad. The basic assumption of security policy is that in the global context of political, economic, social and cultural processes the state has to reinforce the capacities to deliver basic values and norms underpinning national identity,

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[4]   For more details see Artur Gruszczak, "Governance of EU Internal Security: Does a Multitude of Methods Make a Method?" in *The Modes and Methods of European Union Activity*, ed. by Leszek Jesień (Kraków: Tischner European University, 2008), 156–65.

legitimacy and authority. Stepping up to the level of EU cooperation, security seems to be a matter of intergovernmental bargain and collective choices resulting from a common perception of fears.

Intensive transgovernmentalism – EU members are committed to advanced forms of extensive cooperation and engagement but consider the EU legal and institutional framework insufficient, inadequate or unacceptable.[5] Bifurcating paths of securitization of the EU led to multiple policy venues where security is a major objective. The complex EU legal and institutional framework is still insufficient to pledge solid support to efforts undertaken by the members individually or in a coalition. While the development of security cooperation within the EU could be evaluated positively in terms of strategies, action plans, green papers, and evidently, legal instruments, the members still keep quite a wide area of exclusive competences and resist further "unionization" of internal security policy.

Open coordination (strategy maps) – Open coordination as an EU policy tool was established by the 2000 Lisbon European Council to improve governance and decision-making in "soft areas" of the Union's competence. As Radaelli writes, "open coordination enables policy-makers to deal with new tasks in policy areas that are either politically sensitive or in any case not amenable to the classic Community method."[6] Application of the open method of coordination in the area of freedom, security and justice means combining instruments of open coordination within weakly constitutionalised areas of Community competence (immigration and asylum, border control) and intergovernmental third-pillar patterns of cooperation (threat reduction and assessment, intelligence-led policing, information sharing). Tools of open coordination used in the third-pillar cooperation included strategic guidelines elaborated and adopted by the European Council or the Council, regular policy evaluation and the use of scoreboards, sharing best practices (fundamental for EU cooperation in the fight against terrorism, organized crime, illegal migration).

Multi-level governance – heterogeneity of justice and home affairs in the EU requires an extensive use of multidimensional methods and policy-oriented agenda-settings.[7] Even some government-centric fields of JHA, like police cooperation, could not work properly when reduced exclusively to the state level. Within the area of internal security, there are various ventures undertaken in different dimensions by different political actors with overlapping competencies. Representatives of national law enforcement bodies constitute only

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[5]   Helen Wallace, "The Institutional Setting" in *Policy-Making in the European Union* ed. by Helen Wallace and William Wallace (Oxford: Oxford University Press, 2000), 33.

[6]   Claudio M. Radaelli, *The Open Method of Coordination: A New Governance Architecture for the European Union?* (Stockholm: Swedish Institute for European Policy Studies, 2003), 7.

[7]   Jörg Monar, "Specific factors, typology and development trends of modes of governance in the EU Justice and Home Affairs domain", available at http://www.eu-newgov.org/database/ DELIV/D01D17_Emergence_NMG_in_JHA.pdf, accessed on 12 September 2007.

one set among a variety of participants in EU politics.[8] The movement from the intergovernmental to supranational realm in terms of security integration is not a result of non-purposeful spill-over, but of the strong role played by particular epistemic communities in the EU. Multi-level governance appears to be a method of integration through bargain between strategy-oriented transnational epistemic communities and EU Members dedicated to pursue their own goals. Multi-level governance in internal security area is a vertically-oriented set of patterns of decision-making and enforcement embedded in interlocked structures permeating heterarchical architecture of horizontal layers wherein competencies and jurisdictions are diffused and locally-oriented actors focus on individual properties.[9] Diffusion of responsibilities for EU internal security and overlapping competencies and jurisdictions on national and EU levels increase a chance for successful implementation of multi-level governance as the predominant mode of internal security governance.

Networked governance – Policy networks imply a cooperative mode of governance based on stable patterns of exchange and reciprocity. Multiple actors with overlapping competencies engage in cooperation and equivalent exchange. Internal security governance networks constitute both loose institutional arrangements[10] and non-hierarchical structures of information exchange. Emergence of various networks was largely facilitated by technological breakdown and revolution in global communication. Technology and modernization contributed to a new perspective on the interaction between human existence and transformation of state politics. As Castells wrote, "the European member states have been forced to innovate, producing, at national, regional, and local levels, new forms and institutions of governance, including the Union itself as a 'new form of state', i.e., 'the network state'."[11] Information networking is probably the most spectacular form of EU internal security governance. Collection, storage, analysis and exchange of information is the dominant mode of activities of EU bodies like Europol, Eurojust, European Justice Network (in criminal and in civil matters as well), Eurodac. Network systems, like the Schengen Information System and a would-be Visa Information System are the basis and crucial element of EU policy in the area of movement of persons. EU security policies prove that the dense network of interconnected entities bound by nodal links could function not only as a useful tool to maintain top-down

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8 Monica den Boer, "9/11 and the Europeanisation of Anti-Terrorism Policy: A Critical Assessment", Groupement d'Études et de Recherches 'Notre Europe', Policy Papers N°6, September 2003, 23.

9 Magnus Ekengren, "New Security Challenges and the Need for New Forms of EU Cooperation: The Solidarity Declaration against Terrorism and the Open Method of Coordination," *European Security* 2006, 15 (1): 91.

10 Monica den Boer, "From Networks to Institutions ... or Vice Versa? Opportunities for "Good Governance" in EU Police Cooperation," *Collegium* 2001, 22: 36–43.

11 Manuel Castells, *End of Millenium*, Vol. III, *The Information Age: Economy, Society and Culture* (Oxford and Malden: Blackwell, 2001), 362–63.

securitization of the public arena but also as a pattern of politics focusing on cross-border organizational undertakings and operations bringing about practical results in terms of security strategy.

A conceptual approach to governance of EU internal security is based on a flexible architecture of cooperation and mutual support, horizontal intertwining of cooperation fields and policy dimensions, multiple roles and diverse tasks for policy actors involved in security governance. Such a configuration, however, is dyadic in its essence. In the legal-institutional context, it is centered on EC institutions and third-pillar agencies (Europol and Eurojust). But there are still many policy areas where supranational institutions and bodies are excluded or simply ineffective in their activities. This is the reason why members were so keen on launching and reinforcing various forms of transgovernmental cooperation. While Europol has been lacking operational competences and it works as an information clearinghouse, many cross-border police cooperation agreements between EU members were concluded (e.g. the Mondorf agreement between Germany and France of 1997 or the Benelux treaty on cross-border police interventions of 2004) providing for advanced common operational activities in the fight against serious crime. For the Council of the EU was grappling with the free-riding syndrome and lack of consensus indispensable to adopt new legal measures in the third-pillar cooperation, a group of EU members launched such extra-EU initiatives as the G6 group[12] or the Prüm Treaty of 2005.[13]

That apparently fragmented structure of security cooperation shows nevertheless clear evidences of interlocking capacities and multifunctional design. It is interesting to see that some cooperation forms with centrifugal effect (like the Prüm cooperation) were quite quickly, though only partially, transformed into centripetal action (Council decision of June 2007 integrating major parts of the Treaty into EU law). This example shows that intensive transgovernmentalism is still a viable and relatively efficient mode of cooperation in such entangled and complex structure of EU internal security cooperation.

The Politics of EU Internal Security

EU security governance, in its "classic" meaning of the 1990s, was a complex set of political activities undertaken by the members, assisted by EU

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[12] An informal group of intergovernmental cooperation on security matters (chiefly terrorism, illegal migration, transnational organized crime) established in 2003 on French initiative, comprising France, Germany, the United Kingdom, Italy, Spain and – from 2006 – Poland.

[13] "Convention between the Kingdom of Belgium, the Federal Republic of Germany, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands and the Republic of Austria on the stepping up of cross-border cooperation, particularly in combating terrorism, cross-border crime and illegal migration", signed in the German village of Prüm on 27 May 2005. See Prüm Convention, Council of the European Union, doc. 10900/05, Brussels, 7 July 2005.

institutions, bodies and agencies, to secure high level of safety to EU citizens and legal aliens as well as to respect civil liberties and fundamental rights. Security governance embodied active public and private involvement in creating conditions necessary for the government to fulfil its functions with legitimacy, efficacy and stability. Moreover, EU security governance was being realized in a single territorial entity consisting of complex, multitiered, geographically overlapping structures embedded into multilayered security regimes. In this context, EU internal security governance was strongly influenced by "schengenization" of normative framework for internal security cooperation.[14]

Such an approach is close to Kirchner who perceived EU security policy as a combination of institutional roles and policy fields in a wide area of the European integration. Kirchner focused his analysis on how the EU "has coordinated, managed and regulated key security functions as conflict prevention, peace-enforcement/peace-keeping and peace-building".[15] Such a wide approach to the issue of security of the EU entails drawing a multi-level, pluri-conceptual study area interlinking various elements and dimensions of security of the EU. In a similar vein, Rhinard, Ekengren and Boin perceive the issue of EU security through various lenses of EU activities in the field of security. They point out that the Union moved recently towards an active role as an external security provider – as Kirchner wrote – but extended this role to internal security matters in the context of protection and a "safer Europe". They use the term "protection space" for description of a new security area built up by sets of actors, rules and practices seeking to protect citizens against direct and indirect threats.[16]

Given that observation, one can notice a significant and important in terms of security policy shift from consequent criminal justice to proactive law enforcement. This was due to the fact that implementation of the most relevant legal instruments adopted on the level of EC institutions, especially the 2002 framework decisions on the European Arrest Warrant and Joint Investigation Teams, were at the beginning sluggishly and in some cases reluctantly transposed into national legal orders, regardless of consequences of 9/11. Further instruments, like European Evidence Warrant or framework decision 2006/960/JHA on simplifying the exchange of information and intelligence between law enforcement authorities of the Members of the EU either await complete implementation in all Members or are subject to numerous limitations. For example, on the grounds of evidence warrant, competent authorities of EU Members could only exchange already existing and clearly available objects,

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[14] Artur Gruszczak, "Networked Security Governance: Reflections on the E.U.'s Counterterrorism Approach," *Journal of Global Change and Governance* 2008, 1 (3): 4–5.

[15] Emil J. Kirchner, "The Challenge of European Union Security Governance," *Journal of Common Market Studies* 2006, 44 (5): 948.

[16] Mark Rhinard, Magnus Ekengren and Arjen Boin, "The European Union's Emerging Protection Space: Next Steps for Research and Practice," European Integration 2006, 28 (5): 514–17.

documents or data obtained under production, seizure orders, including criminal records. Only judges, investigating magistrates and public prosecutors are entitled to issue evidence warrants. If the framework decision on evidence warrant is restrictive as to national authorities involved in cooperation, decision on exchange of information and intelligence seems to be little specific on national users. Defining them as "a national police, customs or other authority", it opens room for multitude of actors being involved in sensitive arrangements. Exchange of intelligence, a critical element in attempts at establishing an EU intelligence-led police cooperation, also hardly passes the proportionality test. Availability of police data and intelligence, notwithstanding such a principle proclaimed in the 2004 Hague Programme, is subject to numerous regulations, rules and working arrangements established on EU level as well as within national legal and political frameworks. Given constant deficit of trust among law enforcement agencies and EU bodies, like Europol and Eurojust, rapid, straightforward, full and efficient transfer of information and intelligence data is hardly possible exclusively on the grounds of the Council framework decision, rather it would follow intergovernmental channels and arrangements, both formal and informal.

The need to establish stronger and more politically-oriented bases for internal security policies as well as the pressure to set them into motion as quick as possible contributed to the employment of strategic thinking into conceptual works and policy-making. In the aftermaths of the 2004 Madrid terrorist attack, unlike post-9/11 developments, the need for concerted action was evident on the level of the EU. Moreover, given political and operational reasons as well as domestic circumstances in certain Members, EU cooperation had to take into account common actions and strategies worked out by the institutions and bodies of the Union in its legal and institutional framework. In the European Security Strategy a scenario for joint action on the EU level was clear: "Europe is both a target and a base for such terrorism: European countries are targets and have been attacked […]. No single country is able to tackle today's complex problems on its own […]. Concerted European action is indispensable".[17]

The whole package of interlocking strategies of internal security management was based on the principles of diminishing threats (both internal and external) and reducing vulnerability. Some of those strategies have been outlined in general terms (the 2003 European Security Strategy); others were designed specifically to tackle the challenges of cooperation in the area of freedom, security and justice (the 2005 Strategy for the External Dimension of Justice and Home Affairs; the 2004 EU Drugs Strategy 2005–2012; the 2005 strategy for combating radicalization and recruitment into terrorism); still others kept a horizontal position (the 2005 Counter-Terrorism Strategy).

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[17] A Secure Europe in a Better World, 1 and 3.

An evident feature of EU security policy after 2004 is the stress on prevention, an early warning activity relying on a proper identification of root causes of delegitimisation of public order in the EU.[18] The EU Counter-Terrorism Strategy approved by the Council on 1 December 2005 set out a strategic commitment to "protective security" and was founded on four types of activities: prevention, protection, pursuance and response.[19] The Counter-Terrorism Strategy puts emphasis on countering radicalization and terrorist recruitment. This aim was made clearer in the strategy for combating radicalization and recruitment into terrorism adopted by the Council in 2005.[20]

Nearly all of the above-mentioned strategies stemmed from an optimistic supposition that societal sphere of the EU is sufficiently strong to neutralize and absorb dysfunctional undertakings planned or committed by enemies of freedom and democracy through mechanisms of inclusiveness inherent in EU politics, deep-rooted in democratic and liberal tradition of an EU supranational community.[21] However, it is often stressed that indigenous factors of instability and jeopardy are closely interlinked with external sources of threats and menaces, often strongly motivated by religious or cultural reasons. This is particularly important in the present era of asymmetric threats and conflicts where danger may come suddenly and provoke an immediate outburst of panic and destabilization. In such circumstances one of the arguments in the European Security Strategy should be taken for granted: "With the new threats, the first line of defence will often be abroad".

The 2005 Strategy for the External Dimension of Justice and Home Affairs stemmed from a thesis that the emergence and reinforcement of an area of freedom, security and justice in the EU can by successful only when the external political and social environment, particularly in adjacent and neighbouring areas and regions, will offer favourable conditions in terms of partnership, cooperation and threat reduction. This would mean that the EU should launch an intensive multi-level conceptual and organizational labour driving at re-shaping the outer world into an area of freedom, prosperity, rule of law and accountability. In terms of security needs, the strategy makes it pretty clear: "it is no longer useful to distinguish between the security of citizens inside the EU and those outside".[22]

Since, after 9/11, EU internal security became evidently a cross-pillar issue, involving a series of divergent Community and Union legal measures,

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[18] See Marieke de Goede, "The Politics of Preemption and the War on Terror in Europe" *European Journal of International Relations* 2008, 14 (1): 161–85.

[19] Council of the European Union, doc. 14469/05 LIMITE, Brussels, 15 November 2005.

[20] Council of the European Union, doc. 14781/1/05 REV 1 LIMITE, Brussels, 24 November 2005.

[21] See Cornelia Beyer, "The European Union as a Security Policy Actor: The Case of Counterterrorism," *European Foreign Affairs Review* 2008, 13 (3): 302–03.

[22] Council of the European Union, doc. 14366/05 LIMITE, Brussels, 11 November 2005, 3.

common actions, joint endeavours and practical instruments, efforts at improving effectiveness of EU legal and institutional framework, particularly through abolishing the pillar structure of the Union and replacing them with a single "communautarized" framework, were culminated in 2007 when the Lisbon treaty was signed. The reform treaty, however, in a sense is a step back since it acknowledges numerous sovereign competencies that the Members retain in their internal security policies and gives them a wider room for manoeuvre in the field of internal security outside the legal and institutional framework of the EU. CEPS experts Carrera and Geyer pose a slightly rhetoric question: "did we scrap the pillars only to construct a 'mosaic' (a 'patchwork') in the Areas of Freedoms, Securities and Justices?"[23]. Monica den Boer, referring herself yet to the constitutional treaty, considered it the "proof of the lack of vision about the long-term objectives."[24]

Indeed, the complex and entangled EU area of freedom, security and justice as erected in Amsterdam, would after the present reform of the treaties still be as complicated as before, with new provisions having in some cases a retrogressive effect. For instance, widened parliamentary scrutiny may discourage Members from sensitive undertakings in the field of internal security, border management and migration. Introduction of a specific 'emergency brake' in some areas of judicial cooperation in criminal matters makes any progress in this area hostage of Members.

Another evidence of the lack of progress in the third pillar area, or even false meaning of advancement in this field, is the arrangement of prerogatives and power of Europol and Eurojust. The role of both major EU bodies involved in internal security cooperation, was kept limited to being an information clearinghouse and a coordinator of national activities in a support capacity. The question of assignment of operational powers to Europol indicates unsurmountable barriers to a qualitative advancement in EU internal security cooperation. A commitment to endow Europol with operational powers was already present in the Amsterdam treaty. The reform treaty does nothing else than repeating this promise. Instead, national parliaments were tasked with the political monitoring of activities of Europol. Although some experts see this proposal as an example of exception clauses advocated by the proponents of intergovernmentalism, we would rather consider it another brake restraining in the name of national sovereign interests further practical collaboration unfolding on transnational level.[25]

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[23] Sergio Carrera, Florian Geyer, "The Reform Treaty & Justice and Home Affairs: Implications for the Common Area of Freedom, Security & Justice" *CEPS Policy Brief*, no. 141, August 2007, 2.

[24] Monica den Boer, "Crime and Constitution: a Brief Chronology of Choices and Circumventions," *Maastricht Journal of European and Comparative Law* 2004, 11 (2): 143.

[25] Wolfgang Wagner, "Guarding the guards. The European Convention and the communitization of police co-operation," *Journal of European Public Policy* 2006, 13 (8): 1230–1246.

Hence the logic of the reform in the area of freedom, security and justice is quite perverse. It seems that it could reinforce the tendency to develop novel forms of justice and home affairs cooperation outside the EU. The reform treaty explicitly acknowledges the opportunity to launch and develop certain forms of cooperation outside the Union. "It shall be open to Member States to organise between themselves and under their responsibility such forms of cooperation and coordination as they deem appropriate between the competent departments of their administrations responsible for safeguarding national security."[26] Variable geometry of internal security cooperation between the EU Members is thereby sanctioned. The gap between intergovernmentalism and communitarism cannot be closed overnight.

Virtual Security Governance

Governance of EU security stems from the growing need of establishing intrinsic linkages between modern security governance and post-modern forms of securitization. Strong belief in modern technologies of surveillance and control motivates proliferation of high-tech security tools at the Union level. The Members, convinced of efficiency and rationality of those new generation instruments, make binding agreements, through community measures or EU law, on application of high-tech security tools to cooperation in the area of freedom, security and justice. The Union therefore seeks to attain classical objectives by the use of post-modern means and instruments whose substance is information. That is why EU agencies and bodies in charge of securing stability and safety in the whole Union focus their activities on information gathering, processing and storage yet scarcely on operational activities. The collection, storage, analysis and exchange of information (Europol), technical support and expertise, risk analyses and research (Frontex) comparison and storage of data (SIS, Eurodac, VIS) are forms of activities predominant in the context of EU internal security governance. That is why the Union and its members put so much emphasis on the principle of availability, i.e. the right of equal access by an appropriate authority in a member state to information held by authorities in other member state. That is the reason – along with the post-modern perception of territoriality and sovereignty – why cooperation in justice and home affairs among the EU members has been recently following bifurcating paths. A relatively new context of cooperation should be referring to various projects drawn up by the members outside the EU's formal structures bringing about fragmentation or multi-levelling of EU internal security governance. The Prüm treaty (2005) as well as the Council decision implementing main provisions of that treaty into the EU law evidence strong emphasis put on establishment and availability of national DNA analysis files, fingerprint data bases, automated searching and

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[26] Article 73, "Treaty on the functioning of the European Union, Consolidated Version", *Official Journal of the European Union* C 115, 9.05.2008, 74.

comparison of biometric data as well as supply of other sensitive personal data. Adding some of the recent proposals from the European Commission (like entry/exit system at the external borders, EU PNR or body scanners at border crossing points) the stress on virtual security measures should be seen as unprecedented and comparable only to some tentative proposals put forward by certain members.

Faith in high-tech sophisticated methods and tools results from a specific "Copernican turn" in thinking about public security and personal safety in the Western cultural area. Advances in technology, innovation and modernization contributed to a new perspective on the interaction between human existence and transformation of state politics. Reflection on security had to be reoriented toward post-modern new technological paradigm centred on sophisticated means of microelectronic information and communication technologies, widespread global networking, virtual reality processes in cyberspace, "stealth" surveillance and management of identity of individuals. A move of security agencies beyond their national territories and the progress in European policing made internal security subject to a special spill-over where decisions and moves facilitating transnational cooperation, economic integration and free movement prompted the emergence of new policies and measures seeking to strengthen liberties and reduce threats. In Badie's words, identity-based commitments and transnational involvements challenged the state's capacity to use its ultimate power and thus to display sovereignty.[27] As a result, the fading away of sovereignty, or reduction of sovereignty to a spacial practice, brought about the blurring of classical distinctions and the emergence of new identities.[28] Modern attributes of sovereignty and order, like self-sustainable nation-state, boundary-closed territory; sovereign, internally legitimate state authority; macro-political strategies of national development, primacy of public law in international arena, seemed more and more obsolete.

Structural transformation undergoing rapidly in the realms of technology, communication and culture contributed to a new perspective on governance highlighting the interaction between human existence and reconstruction of state. Zwahr and Finger saw it in the following way: "System we call State is more *virtual* than *physically* existent. There is no tangible object we can identify to be the 'State', rather it is the system of functions, mechanisms and objects as a whole. That is why we call the system 'State' a *virtual governance architecture*."[29]

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[27] Bertrand Badie, "Realism under Praise, or a Requiem? The Paradigmatic Debate in International Relations," *International Political Science Review* 2001, 22 (3): 255.

[28] R. B. J. Walker, "Europe is not where it is supposed to be," in *International Relations Theory and the Politics of European Integration*, ed. by Morten Kelstrup and Michael Charles Williams (London – New York: Routledge, 2000), 21.

[29] Thomas Zwahr and Matthias Finger, "Towards Virtual Governance Architecture – A Perspective on Information Technology as a Transformer of Public Institutions and Governments" available at http://infoscience.epfl.ch/record/55884 accessed on 11 September 2007.

What has been interesting and significant in the development of EU justice and home affairs cooperation, especially in the aftermath of 9/11, was the emergence of new forms of EU internal security governance contributing to a progressing shift towards virtual governance.[30] Obviously enough, "virtual" should not be identified with a computer-generated "space" which is viewed through "goggles" and is responding to stimuli sent from the participant.[31] The virtual should be conceived as a developing form of existence that is fully real, that has its own ontological status, but has not yet been fully actualized.[32] The Deleuzian approach to differentiation and divergence makes an interesting contribution to the meaning of virtuality in the structural context of technological shifts and their impact on the tense relationship between security and liberty.[33] Difference may be taken as a regulatory norm enabling individual and collective identification, which is a key method for the early detection of threats to public order. Security then is an issue of managing difference and this feature may be best revealed when appropriate means and tools are applied.[34] This explains why the politics of security experienced post-modern turn to a new technological paradigm centred on sophisticated means of microelectronic information and communication technologies, widespread global networking, virtual reality processes in cyberspace, surveillance and management of identity of individuals.

Networking, digitalization and information governance in EU security area did not mean breaking with the classic meaning of 'territorial sovereignty' but rather shifting towards a qualitatively new dimension of cooperation without encroaching sovereignty. Therefore, post-classic approaches focusing on sovereign rights and territorial boundaries should also be taken into account although not in a "pure" form but "virtualized" by massive information flows, technologies of managing difference and digital identification. Sharing intelligence and transferring sensitive data, including personal data and biometric identifiers, have been postulated since the trauma of 9/11. Virtual governance of EU internal security took shape of a multidimensional networked structure consisting of communication channels and nodes of data bases and analytical centres.

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[30] Kirchner, "The Challenge of European Union Security Governance", 948.

[31] Mark Poster, *The Second Media Age* (London: Blackwell, 1995), 12.

[32] Barbara Hooper, "Ontologizing the borders of Europe" in *Cross-Border Governance in the European Union*, ed. by Olivier Kramsch and Barbara Hooper (London and New York: Routledge, 2004), 211.

[33] Gilles Deleuze, *Difference and Repetition* (New York: Columbia University Press, 1994).

[34] Didier Bigo and Sergio Carrera, "From New York to Madrid: Technology as the Ultra-Solution to the Permanent State of Fear and Emergency in the EU", CEPS, Brussels, April 2004, available at http://www.ceps.be/Article.php?article_id=314, accessed on 4 September 2004.

EU projects that have been unfolding recently (SIS II, VIS, Eurodac, entry/exit) are based on highly advanced communication and control technologies and resolutely introduced biometrics. This relatively new technique of personal identification and authentication is particularly important in the context of security management, allowing for advanced personalization of administrative measures concerning both EU citizens (ID cards, passports, mobile telephony) and aliens (visa, asylum application, border control). This is an effective tool against illegal migration (like Eurodac fingerprint data system), but also an instrument facilitating certain procedures related to freedom of movement (like IRIS system of control on selected British airports).[35] This is, at the same time, a powerful tool allowing for construction of a sophisticated system of individual control and surveillance in order to prevent and counter major threats to internal security like terrorism or WMD proliferation. Hitherto projects carried out by EU countries are concentrated on external border security measures, involving a specific "bio-political technology"[36] (biometric or machine-readable passports, biometric visas, fingerprint and body scanners) as well as high-tech means of border control (satellite surveillance, infrared monitoring, electronic fences and even spy planes[37]).

Evidently, virtualization of EU security policy is a nonlinear process reinforcing thereby multi-levelling of internal security governance. In terms of politics it may even breed frustration since some leading members, supported by the European Commission, are eager to proceed with further digitalization and technological securitization of the Union while the majority of middle and small nations, backed by the European Parliament, are afraid of economic, political and societal consequences of that process. Rapidly growing technological gap between means of policing, surveillance and data exchange applied by the most advanced EU Members, like Germany, France, the UK or the Netherlands and traditional methods and techniques employed by law enforcement agencies in the "new Europe" (former Communist states) hinders prospects for establishing an Union-wide virtual security community.

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[35] See Iris Recognition Immigration System, http://www.iris.org.uk and e-Borders Programme, http://www.homeoffice.gov.uk.

[36] Jef Huysmans, "A Foucaultian View on Spill-Over: Freedom and Security in the EU," *Journal of International Relations and Development* 2004, 7 (3): 308.

[37] According to a report published by Transnational Institute and Statewatch (Ben Hayes, *Arming Big Brother. The EU's security research programme*, Amsterdam, April 2006), a research programme financed by the European Commission seeks to establish a system of border surveillance by Unmanned Aerial Vehicles (UAVs). British Independent on Sunday (4 June 2006) informed: "Fleets of unmanned drone aircraft fitted with powerful cameras are to be used to patrol Europe's borders in a dramatic move to combat people-smuggling, illegal immigration and terrorism", available at http://news.independent.co.uk/europe/article624667.ece, accessed on 4 June 2006.

Conclusions

Internal security governance and – in a wider perspective – the governance of the areas of freedom, security and justice appear as a complex multi-level differentiated set of organizational, institutional and normative patterns and modes of "arranging things". The modes mentioned in the text are, in a sense, intermingled and generally formatted by the legal and institutional architecture of the EU. They never work alone, they have to be interlocked and stimulated by others. Horizontal and vertical dimensions of governance shift actors' preferences toward predictable outcomes and strategic blueprints. This is legitimate in case of "classical" modes as externalization and intensive transgovernmentalism, and even in some aspects of multi-level governing. However, post-modern methods and instruments of securitization make them more and more obsolete. In the post-9/11 world information became the major instrument of cooperation between EU members in their efforts to improve governance of internal security but its utility depends much on citizens.[38] Civic response to government policies is decisive for a successful and effective implementation of information-led model of network governance. The application of new technologies, means, methods and techniques to information gathering, processing and transferring has to be verified because it is the average citizen who is impacted from these advanced tools, and methods, of securitization. Governments and public agencies must seek a balanced approach to a subtle relationship between security and liberty. Information governance and public networking seem to be suitable means of legitimization of EU security policy. However, they would not minimize the side effects of large-scale information processing and circulation among security agencies on both the EU level, and within the transatlantic security community.

Freedom, security and justice are really laudable goals and all the efforts undertaken by the EU institutions and members towards the construction of a genuine security policy arena are the bright side of justice and home affairs cooperation. Unfortunately, it turns out more and more frequently that the measures leading to that objective cause harmful effects on liberty, transparency and senses of freedom among EU citizens. More accountability means greater influence of European Community institutions, like the European Parliament and Court of Justice, but at the same time this could slow decision making, subjecting it to political and legal debates, not only on the member level, but also, or mainly, on the EU level.

If the members want to energetically push their cooperation forward, they must work out a common approach regardless of various local, national, political, ideological, societal, cultural determinants. Yet Monar stresses that

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[38] Juliet Lodge, "EU Homeland Security: Citizens or Suspects?" *Journal of European Integration*, 2004, 26 (3): 253–79.

the "least common denominator, however, has in most cases meant 'negative' action in the sense of restrictive measures".[39] Therefore, progress achieved in reaching a single uniform approach may be illusionary and have negative outcomes over the long run.

Last, but not least, one should be fully aware that "the penalty for delay in building the area of freedom, security and justice could be an increase in crime, a lessening of confidence in the courts and an increase in insecurity on the part of European citizens".[40] The EU must reinvent internal security governance inasmuch as the reform treaty seems to be the lowest common denominator worked out in the long, dramatic and tortuous process of negotiations. Variable geometry of modes of EU internal security governance is the best available way out of the labyrinth of the EU's justice and home affairs.

European security is spilling over the external frontiers of the Union. In the era of the "war on terror", the challenge of global threats such as terrorism, transnational organized crime, large-scale migrations, cybercrime or money laundering cannot be met by the EU alone. Transnational processes, in which the EU has played for decades a leading and creative role, changed traditional perception and understanding of security. The breaking of nations allowed for not only circulation of ideas, international economic exchange, human mobility and development of interpersonal relations in the global scale, but also made room for proliferation of trans-border threats, pathologies and various forms of criminal activities.[41] The globalization of the structure of the international system is a dual process: positive stimulation of cooperation, exchange and mutually profitable economic and technological advancement was accompanied by emergence of new channels and opportunities for individuals, groups and organizations involved in illegal and criminal activities harmful and dysfunctional in the context of global stability and openness. As a result of these transnational processes, the move of security agencies beyond their national territories and the progress in international cooperation, at least in Europe, internal security became subject to a special kind of spill-over where decisions and moves facilitating transnational cooperation, economic integration and free movement prompted the emergence of new policies and measures seeking to strengthen liberties and reduce threats. In a wider Europe, there is a room for further measures and initiatives, and new members should perform a more active role in securing Europe against transnational threats.

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[39] Monar, "Specific factors, typology and development trends of modes of governance in the EU Justice and Home Affairs domain," 5.

[40] Adam Townsend, "Can the EU achieve an area of freedom, security and justice?", Centre for European Reform, London, October 2003, 9, available at http://www.cer.org.uk, accessed on 6 June 2004.

[41] See Robert Cooper, *The Breaking of Nations: Order and Chaos in the Twenty-First Century* (London: Atlantic Books, 2003).

The politics of the EU is full of dichotomies. The hybrid nature of the EU seems to justify that feature of the European integration. Nonetheless, it does not absolutely mean that one should comprehend that complicated process through paradoxes and contradictions. The transnational aspect of the EU politics requires clear explanations to various queries and doubts concerning ways and means the EU adopts in its everyday activities. Perhaps the EU cooperation in justice and home affairs is an area where ambivalent approach is a must in order to grasp mentally all the peculiarities of the EU's overall governance of internal security matters.

Missing Development Opportunities on the EU's Southern Border

José María López-Bueno[1]

Introduction

According to Kennan's long telegram, permanent peaceful coexistence between the democratic 'West' and the communist 'East,' (led by the Soviet Union), was next to impossible (Kennan, 1946). However, similar to Soviet 'official statements,' Kennan's assumptions were thinly veiled propaganda, meant for domestic consumption. In hindsight it is clear that despite the multitude of crises, socio-political and economic shocks and disturbances, the relationship between the 'West' and 'East' was unlikely to have degenerated into an open and direct confrontation. The end of the Cold War did not bring about universal peace, but rather witnessed the emergence of another fault-line, one based more on political identities than geopolitics, but still pointing to a supposedly inevitable conflict. This time the line of impossible coexistence runs along the border of the Islamic world and a new, expanded 'West' which includes the 'traditional West' (the US, Canada, West European states, NATO), former Warsaw Pact countries (re: Czech Republic, Slovakia, Poland, Hungary, Romania, Bulgaria) and some post-Soviet states (Latvia, Lithuania, Estonia). As Huntington indicated as far back as 1990, we can expect a clash between Islam and the West.

But is this true? For many, especially following the September 11th 2001 terrorist attacks, the answer is an obvious 'yes.' When Huntington spoke of a 'clash of civilizations,' this clash was meant to begin along the 'bloody borders' demarcating – awkwardly – the dominant Judeo-Christian West from the Islamic world (Huntington, 1993). However, New York, London, Bali and Madrid are located a significant distance from Huntington's border zones. These cities may be considered symbols of the West for Islamists, certainly, but they do not form, or remain part of, a geographical boundary butting against the Islamic world.

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Huntington supposed that the actual borders between Europe and the Islamic world, those which run through the Balkans (Bosnia, Kosovo) and between Greece and Turkey, would be the main confrontational line. While this was relatively accurate for more than a decade of armed violence in and among former Yugoslavian peoples, or even on the Caucasian border of Russia (e.g. Chechnya), Turkey's status as an active NATO member and EU candidate stands directly opposed to Huntington's proposition. But the European borders separating the West from the Islamic world are not only to be found in the wider Balkan region: at the western end of the Mediterranean Sea, the EU has two additional physical contact points to Islam, the Spanish (and hence EU) cities of Melilla and Ceuta which are located on continental Africa, surrounded on three sides by Moroccan territory and one side by the sea. While these Spanish cities have historically bore witnessed to occasional incidents of organised political violence, and despite the continued differences (socio-economic, political and cultural) between Spain and Morocco, they are important generation stations for regional employment and development. Melilla and Ceuta, unlike New York, Madrid or London, comprise part of a physical land border between the West (as represented by the EU) and the Islamic world.

The Maghreb-Europe Neighbourhood

The EU's southernmost border is not the Mediterranean Sea: since the 15th century (CE), Spain populated two cities in North Africa – Melilla and Ceuta – just across the Strait of Gibraltar. The borders produced by these cities are nevertheless questioned as Morocco claims both as its territory, and they have been a source of numerous political disputes (internal, bilateral and multilateral) since Morocco's independence (1956). Being part of the internationally recognised and sovereign territory of Spain, and having been fully integrated within Spain's administrative and political structures, both cities entered the (former) EEC with Spain (1986). Therefore, all EU policies are applied to both cities (with exception to the Customs Union and the Common Agricultural Policy).

In 2004, the EU expanded from 15 to 25 members. This enlargement brought obvious changes to the EU map, with new frontiers in the East and South, and encouraged the launch of the EU's European Neighbourhood Policy (ENP) which would form the backbone of the EU's foreign relations to the bordering states and regions. Importantly, the ENP's objective is:

> (…) to share the benefits of enlargement with neighbouring countries in strengthening stability, security and well-being for all. By drawing countries into an increasingly close relationship with the EU, it can create a 'ring of friends' and prevent emergence of new dividing lines (European Commission, 2004; 2).

Moreover, the ENP literally ascribed the European Security Strategy (ESS) goal of promoting of 'a ring of well governed countries to the East of the European Union and on the borders of the Mediterranean with whom we can enjoy close and cooperative relations' (European Council, 2003; 9).

The ENP, however, cannot be easily applied to the EU-North African border since Morocco denies any official recognition of Melilla and Ceuta, and restricts their ability to promote EU projects. As a result, not a single project from the EU's allotted €12,000 million budget for ENP activities has gone to the areas of Melilla and Ceuta and the adjacent Moroccan towns and cities. This blockade could be interpreted as the result of bilateral tensions, between an EU member and its Mediterranean neighbour, over the final status of the latter's post-colonial territory. Alternatively, something else may be driving this blockade since this border conceals the largest income-per-person difference between neighbouring countries in the world; other than the difference between North and South Korea. Paradoxically, this border is one of the areas where ENP objectives could be achieved since, contrary to acts political showmanship which highlight differences and problematics, relations between Melilla, Ceuta and their Moroccan neighbours are fluid, and a multitude of peaceful, mutually beneficial, daily exchanges occur.

Rich Neighbour, Poor Neighbour

The GDP gap between the Mexico and the US is averaged at a ratio of 1:15 and in Europe the difference between Bulgaria and Greece is 1:9. Between Morocco and Spain this difference is 1:19.50. Even if measured in terms of Gross Income per capita or Purchasing Power Parity per capita (PPP), the difference between Spain and Morocco exceeds the other cases (Table 1).

Table 1

	1. GDP (US $ millions)	A/B	2. Gross Income per Cápita (US $ millions)	A/B	3. Purchasing Power Parity (PPP US$)	A/B
Spain	1,429,226		29,450		30,820	
Morocco	73,275	19.50	2,250	13.09	3,990	7.72
USA	13,811,200		46,040		45,850	
Mexico	893,364	15.46	8,340	5.52	12,580	3.64
Greece	360,031		29,630		32,330	
Bulgaria	39,549	9.10	4,590	6.46	11,180	2.89

Source: World Bank. 2007
http://siteresources.worldbank.org/DATASTATISTICS/Resources/GDP.pdf
http://siteresources.worldbank.org/DATASTATISTICS/Resources/GNIPC.pdf

Outside of Europe we can see similar differences to those observed between Spain and Morocco; at Israel's border with Jordan (1:10.22); and Syria (1:4.25) (Table 2). Even when compared to these cases however, the Spanish-Moroccan difference remains larger.

Table 2

	1. GDP (US $ millions)	A/B	2. Gross Income per Cápita (US $ millions)	A/B	3. Purchasing Power Parity (PPP US$)	A/B
Spain	1,429,226		29,450		30,820	
Morocco	73,275	19.50	2,250	13.09	3,990	7.72
Israel	161,822		21,900		25,930	
Jordan	15,832	10.22	2,850	7.68	5,160	5.03
Israel	161,822		21,900		25,930	
Syria	38,081	4.25	1,760	12.44	4,370	5.93

Source: World Bank. 2007
http://siteresources.worldbank.org/DATASTATISTICS/Resources/GDP.pdf
http://siteresources.worldbank.org/DATASTATISTICS/Resources/GNIPC.pdf

Such economic differences on the border of two states with different historical and cultural backgrounds (one Western and the other Islamic) may seem to many, like Huntington, to form a 'West'-Islam hot spot similar to present-day Israel; yet it is not, at least for the time-being. Indeed, quite the opposite seems to be taking root.

Cross-Border Development

Melilla has, despite the ENP funds blockade, become a pole for development, which radiates wealth to surrounding Morocco. The border between Melilla and Morocco has many of the requirements that theories of regional economic development established over the last 50 years such as those of cluster and spatial agglomeration; concentrated population; legal and administrative synergies; availability of capital and financial instruments; high concentration of transport infrastructures; and finally, fluid and informal social relations (Mocanyo Jiménez in Toral Arto, 2001; 32. Espínola Salazar, 1999. Krugman, 1991; 483–499).

As Chart 1 (below) indicates, the high crossing rates of this frontier is an indication that it provides benefits for the citizens that cross it; if it did not, they of course would not cross it, considering the official political differences between these countries. Indeed, thousands of Spaniards and Moroccans cross

the Melilla-Nador border on a daily basis. Since there is no official support for these exchanges, the reason for such high rates may be found in personal benefits that Moroccan and Spanish citizens glean. Nevertheless, since its independence, Morocco has maintained a political demand to obtain sovereignty over Ceuta, Melilla and a few small islands off its Mediterranean coast. This enduring dispute – a constant companion to the state of Hispano-Moroccan relations – has never been heard at any international court, (i.e. the International Court of Justice), and is classified by some authors as a dialectic tradition between these two countries (Ballesteros, 2004).

Chart 1: Number of People Crossing the Spanish-Moroccan Border in Melilla (in thousands)
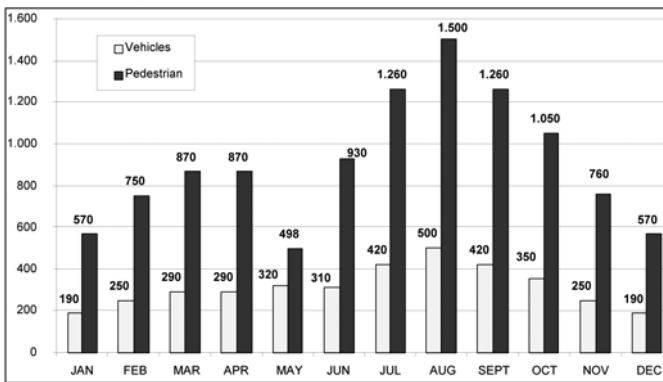
Source: Fhimades, 2009.

At times, these conflicting claims have resulted in bilateral crises between Spain and Morocco. For instance, in 2001/2 after several months of mutual accusations and provocative behaviour – including the occupation of the small uninhabited island (*Isla de Perejil*), first by Moroccan troops and a week later by Spanish commandos – the intervention of (then) US Secretary of State Collin Powell was needed to restore the pre-crisis status quo.

Political differences and sovereignty issues have not precluded the development of a healthy relationship – including a multitude of exchanges – along the border with Melilla. These relationships directly challenge Morocco's official discourse about the negative influence of Melilla on its Moroccan surroundings.

Recent scholarship on the socio-economic impact of these border relationships conducted by the *Universidad Francisco de Vitoria* (Madrid) for the *Fundación para el Desarrollo Socioeconómico Hispano-Marroquí* (Foundation for Socio-economic Development Hispano-Moroccan, FHIMADES) clearly states that 'there are clear indicators of economic dependencies, among others, of trade relations, labour and services at this border that demonstrate the

positive effects resulting from the flows of goods between two neighbouring regions' (FHIMADES, 2008; 64). Although the study was limited by its lack of many key official statistics, it points out numerous relationships that support the above statement, as the influence of imports to Melilla and its positive effect on Morocco's GDP; 'if the rate of imports in Melilla increases 1%, Morocco's GDP growth rate increases approximately 0.20%; therefore; international commerce in Melilla promotes economic growth in Morocco.' The impact of Melilla's imports on Morocco's GDP is manifest through trade with Melilla, much of which takes place through informal channels. These relations – questioned by Moroccan officials and certainly in need of serious improvements in many ways – are set to undergo a profound restructuring after 2012, when the Free Trade Agreement between Morocco and the EU will take full effect.

The findings of this research do not only refer to trade. There are many other interactions along this border that produced wealth and individual benefits for the citizens involved. For example:

(l)eaving aside the peculiarities of the informal or atypical trade, there is empirical evidence, provided in this report, and arguments provided by economic theory to demonstrate the positive effects resulting from the flows of goods between two bordering geographical areas ... The gap between the two economic areas is a driving factor in this particular trade that promotes socio-economic relations in general. The benefits are mutual, Melilla is a market that favours the expansion of its business and trade has made Nador an economic engine, with multiplier effects on the rest of Morocco's economy. This is demonstrated, among other facts, by the rapid population growth in Nador, the progression of port traffic, the development of its financial system, the role of indirect tax revenue, among others (FHIMADES, 2008; 77).

These findings are consistent with previous Moroccan studies and publications that expressly stated that 'due to certain economic development projects in the 1970s, and taking advantage of its proximity to Melilla, Nador has increased its momentum and has become a pole of regional development' (Abbou et al. 2003; 33). In fact, Moroccan authorities recognize the importance of maintaining a relationship to Melilla for Nador's social and economic structure and have clearly noted that it is not possible to speak of 'trading structures in the province of Nador without mentioning Melilla and its impact on the regional economy' that '... supports, directly and indirectly, approximately 25 % of the population of the province of Nador' (Ministère de l'Intérieur, 1989).

Other parameters analysed, such as the progression of Nador maritime traffic, the development of its financial system or tax revenues (75% of Morocco's *Region Oriental* tax revenues came from the province of Nador), are examples of these relations and point to further positive effects; stemming from Nador, to other regions of Morocco.

Urban Agglomeration and Regional Development

There are many theoretical models which are designed to explain reasons driving the development of a given region or country. To avoid a review of more than two centuries of fundamental concepts and theoretical models (accumulation of capital, competency models, etc) Krugman's theory is deployed as an adequate model which largely consolidates previous models, from both economic theory and economic geography. For Krugman (among others) trade, specialization, and competition, tend to form patterns of agglomeration feed with external economies and innovation. This process is complemented by the distribution of economic activity and the relations established in a given spatial agglomeration, with almost self-feeding returns (Martin and Rogers, 1994; 34). Complementing this approach with other models that include the public sector as provider of infrastructure, enhanced cost reduction processes and improved productivity derived from these close exchanges, we can reason that the formation of clusters is, if not unavoidable, at least very close to economic development. As demonstrated below, around the cities of Melilla and Nador, in addition several relationships, beyond the economic realm, further contribute to reinforcing the agglomeration phenomenon.

Employment and Healthcare

Because of their geographical proximity, Nador and Melilla are 'natural partners' (Krugman, 1993; 110). There is a series of conditioned relations mainly due to their geographical proximity (15 km) and the distance to their respective capitals (more than 500 kilometres) which promote neighbourly relations. Beyond economic indicators, these relations are manifest because they represent clear personal opportunities for this border neighbourhood. Nearly thirty thousand Moroccans cross the border into Melilla each day for the purpose of searching for employment opportunities, healthcare, education and services that they either cannot find in Morocco or are simply found in greater abundance and condition in Melilla.

According to Melilla's *Oficina de Extranjeros* (Non-citizens and Immigrants Office) in July 2008 there were 2,344 cross-border workers, a sum that could be enlarged by at least 25% owing to illegal workers.[2] 95% of Moroccan workers in Melilla are employees who benefit from a Work Permit for specific cross-border employment. Given the location of the city, this status – an exception within the EU and Spanish visa and work permits regulations – gives employees several rights, such as free health care, in Melilla; as will be further explored below.[3]

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[2]   According to research conducted for the *Consejería de Economía, Empleo y Turismo* (Economic, Employment and Tourism Counsellor), illegal or 'hidden' employment is around 25% in Melilla. This figure is represented predominately by Moroccan cross border people working in construction and services.
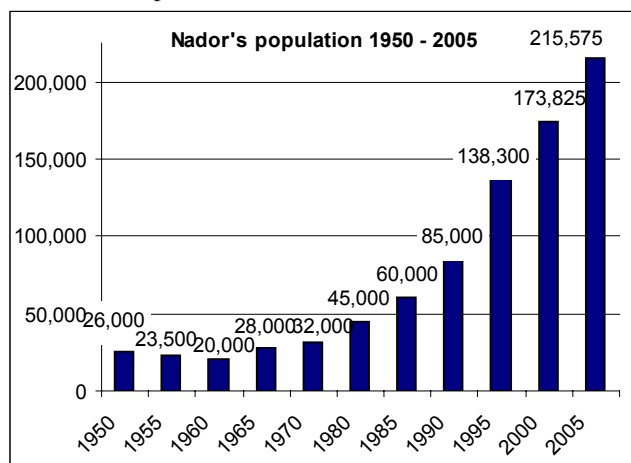
[3]   These exceptions are embodied in the Spanish legal body after the enactment of *Real Decreto* (Royal Order) nª 2393 (December, 30th 2004).

With a population of nearly 70,000, the number of cross-border workers alone would not explain the unusual high statistics of sanitary assistance provided by Melilla's Hospital. However, it illustrates some benefits that extend beyond this EU city. At Melilla's Hospital, 15% of emergencies, 25% of dialyses and more than 45% of deliveries are made to 'non-resident foreign patients', a bureaucratic term to refer to Moroccan citizens. According to some sources, statistics at the Melilla's Hospital would be equivalent to a centre serving a population between 300,000–350,000 people (*Diario de Valencia*, 2005). As discussed below, many of these figures can easily be explained by the Moroccan population concentration proximate to Melilla in the province of Nador.

Melilla is also a point of attraction for Moroccan citizens searching for higher education such as the University of Granada and the *Escuela Hispano Marroquí de Negocios* (Spanish-Moroccan Business School). In the latter institution, Moroccan students represent nearly 50% of total graduates since 2004.

There is an even more graphic data set that shows the weight of Melilla as a central regional developmental pole. Nador; situated more than 500 kms from its economic and political capitals of Rabat and Casablanca, poorly connected by road and, until July 2009, with no railroad connection to the rest of the country, has seen its population multiply 10-fold over the past 50 years. As Chart 2 indicates, over the same period, Morocco's total population has only increased by three-fold.

Chart 2: *Nador's Population 1950–2005*

Nador belongs to the so-called *Region Oriental* (Eastern Region), which produces Morocco's greatest number of émigrés. With insignificant economic

structures, its proximity to Melilla and the exchanges at the border may help explain such an agglomeration and subsequent population growth.

Population, Growth and Agglomeration

Nador was founded by Spain in 1909 to serve as a military camp for the defence of Melilla. In contrast to older Moroccan cities such as Tangier, Fez or Oujda, Nador has a short history linked directly to Melilla. However, in only a century, Nador has grown at rates three times Morocco's national average, and has generated a circle of satellite towns with an outstanding aggregated population nearing 300,000 inhabitants in a 25 km radius (Table 3).

Table 3: Nador's Main Suburban Villages

Seghanghan	20,181
Ihddaden	25,480
Bni Chikar	4,188
Taouima	6,909
Farkhana	10,994
Selouane	9,211
Kariat Arekman	5,266
Beni Enzar	31,800
Arouit	36,021
Nador	126,207
	276,257

Source: Chambre de Commerce d'Industrie et des Services de Nador. Nador, 2007. Recensement Général de la Population et de l'Habitat de septembre 2004. <http://www.statoids.com/yma.htm>.

This conurbation has also registered outstanding growth rates over the last decade with an average population growth of over 25% between 1999–2004 (see Table 4).

Table 4: Population Increases 1994–2004

	1994	2004	%
Nador	112,450	126,207	12.23%
Arouit	27,047	36,021	33.18%
Beni Enzar	23,897	31,800	33.07%
	163,394	**194,028**	**26.16%**

Source: Chambre de Commerce d'Industrie et des Services de Nador. Nador, 2007. Recensement Général de la Population et de l'Habitat de septembre 2004. <http://www.statoids.com/yma.htm>.

This however, pales compared with the previous decade growth rates as Morocco's Administration recalls. Between 1982 and 1994 Nador's growth was nearly twice the average growth of similar cities in Morocco (see Chart 3). During this period, the population grew from 62,000 to more than 112,000 inhabitants, revealing a growth of 81%. The majority (74.4%) of these, estimated at more than 50,000 people, is based on internal migration (*Haut Commissariat*, 229; 15).

Chart 3: Population Growth 1982–1994
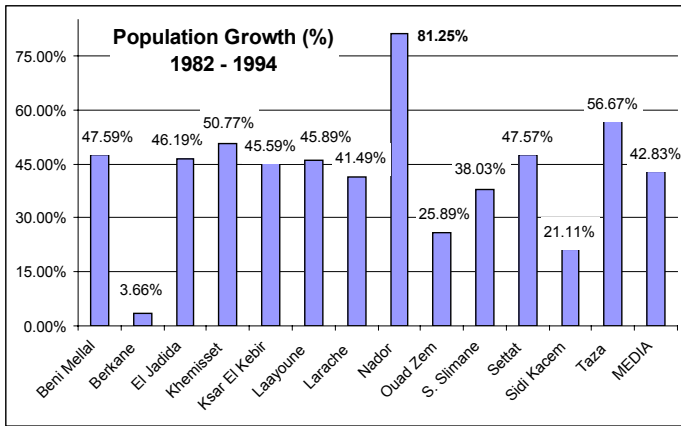
Source: Haut Commissariat au Plan Recensement Général de la Population et de l'Habitat.

As noted, 'taking advantage of its proximity to Melilla, Nador has increased its momentum and has become a pole of regional development'. But, is there really something noteworthy? Is not this just another example of the opportunities created across borders and that, among other reasons, are based on the confluence of different price levels, regulatory frameworks, which complement, among other things, financial systems, networks and infrastructure concurrency? Is it not the case, for example, between US and Mexico on the San Diego-Tijuana border? The answer is yes, though there is an important difference: the Spanish border with Morocco (in Melilla) forms a border between Western Europe and the Muslim Maghreb. Therefore, further exploration of this border will help identify crucial issues for EU policies and approaches.

The EU-Maghreb Border Neighbourhood

This border between the West and the Muslim world is unique for several reasons. Since Morocco's independence (1956), neighbourly relations have only been politically disrupted, for reasons often far removed from the people in Nador and Melilla, such as: the 1973 cholera epidemic, attempted *coups d'état* in Morocco in the early 1970s, political discussions between Madrid and Rabat over fishing rights and/or trade agreements, and more recently by the swelling of sub-Saharan African immigrants attempting to enter EU territory. Not until the last quarter of 2008, have there been incidents at Beni-Enzar, the main border control-post, which was caused by local Moroccan carriers of merchandise; although these incidents occasionally disrupted the usual flow of goods and people through the post, they have not yet affected the relationships between the citizens living in the region.

More than 50 years of neighbourly relations between the people of Nador and Melilla may act as an example; to demonstrate is that at least one border between the 'West' and Islam is not, as Huntington claimed, necessarily bloody. While there can be no denying that this border area was the scene of politically motivated violence in the first quarter of the 20th century, it is noteworthy that Europe itself was in the throws of political upheaval and it would be unfair to examine this particular border through the lenses of political or cultural tensions while ignoring the global situation. As the situation in Europe was resolved – post-1945 – the border between Melilla and Nador also settled into a period of 'normalisation.' Additionally, this neighbourhood may be guided by the peaceful coexistence of a multitude of religious and cultural groups in the city of Melilla itself. Catholics, Muslims and Jews, among other religions, have lived in this city of (approximately) 75,000 inhabitant for decades and a quick view at Melilla's school calendar confirms this coexistence well as it observes the main religious holidays of each denomination.[4]

Although currently, there are similar examples of such coexistence in many European cities such as, London, Paris, Brussels and Berlin – mostly following the decolonisation processes of the mid-20th century – in the case of continental Spain, this is quite a recent phenomenon. The image of children of different religious denominations sharing classrooms and desks is a phenomenon that, in mainland Spain, has been visible for barely a decade. In Melilla this occurred much earlier. A small, but still important example is the case of the selected catholic *La Salle-El Carmen* school where, in the mid 1970s – with Franco's dictatorship still holding the reigns of power – the current 2nd Vice-President of the Regional Government of Melilla, Abdelmalik el-Barkani was elected the

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[4]   Melilla has 9 churches, 6 synagogues, a Hindu temple and 14 mosques, the first of these was built by the City Council in 1945.

students' delegate for his class; a class comprised of a majority of Catholics and many Jews and Muslims.

Coexistence within Melilla, influenced by the reality of its geographical location and its demographic composition, is largely regarded as normal, and has only been altered for political reasons such as with the introduction of Spain's new Non-Citizens Act in the 1980s. At that time, many residents of Moroccan origin in Melilla lacked Spanish nationality, and the initial uncertainties of legal procedures and opportunities for acquiring nationality were manipulated by some local politicians for electoral reasons. Once the issue was remedied, all attempts to mobilize Melilla's Islamic population based on their ethnicity or religion has, until the present, seen very limited success. Over the past twenty five years, aside the short periods of local coalitions, the Melilla Regional Assembly has been ruled by the two main Spanish political parties: *Partido Popular* (PP, Popular Party) from 1991 to 1997 and again since 2000 to the present; and *Partido Socialista Obrero Español*, (PSOE, Labour and Socialist Spanish Party) from 1981 until 1991. Since Melilla's Muslims make up nearly a third of the total population, if they were politically motivated solely on the basis of their religious affinity, their weight in the Assembly would be higher than the 22% that *Coalición por Melilla* (lead by Mustafa Aberchan) obtained in the 2007 regional elections.

Remote Neighbours

Peaceful coexistence – among citizens of different religions in Melilla and between the city of Melilla and its Moroccan neighbours – has been heavily influenced by the geographical remoteness of Melilla from continental Spain (and Madrid), and the distance of Nador from Rabat and Casablanca. Nador is located in the so-called Rif, the northern region of Morocco that early in the 20th century rose up in arms against Spain and, led by the legendary Abdelkrim, briefly formed the Republic of the Rif. Even after Morocco's independence, the Rif rose again but this time against Morocco. This rebellion provoked a harsh military crackdown commanded by (then) Prince Hassan, who later became King Hassan II. Hassan, offended by the rebellion, economically abandoned the Rif during his reign and thereby reduced its chances of proper development. Given this background, and the 600 kilometres of poor road-works between Nador and Rabat and Casablanca, relations with Melilla, just 15 kms away, seemed natural. In addition to proximity, services, employment, trade and related opportunities, the purchasing power of a European city (almost 8 times higher than Morocco's) is a significant magnet capable of overcoming both cultural barriers and official policies. On the other hand, Melilla, more than 90 nautical miles away from the nearest port of continental Spain and with a small aerodrome in operation only since 1969, was virtually forced to foster good relations with its neighbours, or retard its development

through isolation. These relations were initially limited to agricultural trade, among other basic products, have gradually expanded, overcoming cultural and religious barriers through their familiarity, providing immediate benefits. The neighbourhood between Melilla and Nador is quite different from official bilateral relations between Madrid and Rabat (Spain and Morocco). Although there is still much to improve on, this neighbourhood better resembles a fluid peaceful region rather than a conflictual one, and the evolution of these neighbourly relations, as private citizens' initiatives, although affected by the official rules of international borders, are not directed by any Foreign Affairs Ministry. On this West-Islam frontier, coexistence is peaceful, even though it has been generated without official support. In this post-September 11th world, this neighbourhood is a wonderful exception that one would expect to receive some official support.

EU Official Soft Power and Reality

In 2004, after its enlargement to 25 members, the EU established the European Neighbourhood Policy (ENP), which inherited the spirit of the Euro-Mediterranean Partnership, which was launched in Barcelona (1995). The ENP's introduction stated that

In order to avoid the creation of new dividing lines, it is particularly important to remove obstacles to effective cross-border cooperation along the external borders of the European Union. Cross-border cooperation should contribute to integrated and sustainable regional development between neighbouring border regions and harmonious territorial integration across the Community and with neighbouring countries (European Commission, 2006; 2).

With the ENP, the EU fully endorsed the European Security Strategy (ESS) objective to 'contribute to stability and good governance in our immediate neighbours and promoting a ring of well governed countries to the east of the EU and on the shores of the Mediterranean with whom we enjoy close relations of cooperation' Accordingly, one of the ENP's objectives explicitly addresses the 'promotion of political, economic and social reforms across the neighbourhood is an important objective of Community assistance' (European Commission, 2006; 1).

The ENP has a remarkable feature: the ENP 2007–2013 budget is €11,181 million, more than double the previous MENA funds available between 1995–2004.

Given the goals of ENP would it not be logical to stress its application to the region that comprises European Melilla and Moroccan Nador? Should this not be a privileged destination that could be an example of cooperation between Europe and the Maghreb? Furthermore, it would not be an *ad hoc*

test; quite the opposite. It would be a real case that, as demonstrated, has been in motion for the past decades. Some measures envisaged by the EU seem simply designed to be implemented along this border. It is logical, and would certainly be an exemplary place to demystify negative stereotypes. The reality is, however, different.

Cross-Border Cooperation

Three years after the publication of the ENP financial instrument regulation, Spain and Morocco have not yet managed to agree on a Joint Action Plan; the mandatory first step to develop ENP funded projects. From the 15 ENP programs covering all EU external borders, only two of them, those affecting Spain and Morocco, remain blocked. If this situation is not resolved by June 2010, the European Commission will reallocate some €190 million initially assigned to Morocco-Spain cross border programmes, to other EU external borders. If this occurs the loss would greater than financial; it would be a lost opportunity and ensure that this EU external border does not receive extra financial support in the future.

The main reason for deadlock is Morocco's refusal to recognise Melilla and Ceuta as sovewriegn parts of Spain. Morocco rejects that a Joint Action Plan with Spain include these cities as eligible zones for ENP programmes. Privately, Moroccan officials acknowledge the positive impact of Melilla on its immediate surroundings however the official line forces them to publicly deny it.

The importance of territorial claims in Morocco's political discourse is also visible if we look at the 30 year old dispute over Western Sahara. In fact, in an attempt to soften Morocco's attitude, Spain has all but recognized Moroccan claims to areas which actually belong to Western Sahara. This caused Spain to suffer from other EU member's protests, and forced Spain to include a footnote in the current Joint Plan draft:

> According to the consultation from the Legal Service, the Commission considers that the regions concerned can benefit from cooperation since it is written that this does not mean any recognition by the Union of Morocco's claims on the territory of Western Sahara and that the projects must benefit the people of the region concerned. Furthermore, these considerations should be accepted by the Moroccan counterpart (*Ministerio de Economía y Hacienda*, 2009; 8).

Contrarily, Morocco denies, as eligible areas, two cities that, unlike the Western Sahara, were not subject to any process of decolonisation in the UN, but are covered by both the Spanish Constitution of 1978 and the 1986 accession of Spain to the European Communities. There might be very powerful reasons in Morocco's internal politics for taking such a stance. However, it is

hard to understand why Morocco would reject €190 million for development from the EU while, at the same time, sign an agreement to gain Privileged Status with the Union.

Missed Opportunities?

EU foreign affairs, despite the Common Foreign Security Policy (CFSP), is more a target to achieve than a set of actual directives. So far, the only formula that really works is based on coordinating the specific foreign policies of EU members, though each has it own relative influence, and focus, and therefore EU foreign affairs remain diffused. Based on this assumption it becomes clear how Morocco has managed to reject a beneficial EU policy; it views the EU initiative through the lens of bilateral, Spanish-Moroccan, relations.

Without considering the international influence of Spain, or the support that Morocco may enjoy from other EU members, it is clear that – despite the suitability of ENP for Nador and Melilla – larger political forces prevent its implementation. This may be a consequence of a *political game* played on the citizens; in this case it could result in more dramatic conclusions.

Melilla and Ceuta are the only two land frontiers the EU shares with the Maghreb. For centuries, Europe and South Mediterranean states witnessed fluctuation and episodes of confrontation until the 20th century when conflict gave way to tolerant coexistence, and eventually to relationships of mutual benefit. If the ENP cannot be implemented along this border it will not only deny the workable application of an EU policy but moreover, it will question the EU's ability to exercise influence in its neighbourhood. The goal of promoting an area of common 'peace, stability and shared prosperity' will likely be questioned well beyond Melilla and Nador. The possible non-implementation of the ENP along these borders will condemn their inhabitants, especially the most disadvantaged ones, the Moroccans, to seek out a living whether informal or illegal. If cross border cooperation is not possible, given the difference in income and wealth, drug trafficking and immigration will remain the main alternatives for the population, 31% of which is under 15 years of age.

Although there is no agreed upon link between radical Islamic movements and levels of economic development, it is likely that an environment of scarcity which lacks suitable opportunities will be prone to destabilisation and may result in the adoption of extremist ideologies. For this reason it is worth remembering that Melilla and Ceuta have been specifically threatened by al Qaeda on eight separate occasions over the past fifteen years. These threats, stepped up after the formation of Al Qaeda in the Islamic Maghreb, features well in a critical speech directed at the current Moroccan regime:

The issue of Ceuta and Melilla in jihad's propaganda, it also has a prominent component of reproach to the current rulers of the Muslim world. Tolerate this 'injustice' and not adopt a more aggressive and hostile towards Spain in both cities has been used as an argument to delegitimize regimes classified as 'apostates'. (Cembrero, 2007)

For Islamists, Morocco's ruling class 'is more concerned with the Western Sahara than releasing Ceuta and Melilla and cleaning the impurity of Spain.' (Torres Soriano, 2009; 7–9)

Under such circumstances it does not seem prudent to dismiss additional opportunities for development and stability. Especially when, from the late summer of 2008, there have been numerous border incidents in Melilla, including the death of a Moroccan citizen by crushing, the wounding of several Spanish policemen from stone throwing, and stab wounds and intermittent cuts of border traffic.

Although the Spanish authorities' official version maintains that these incidents are 'infrequent, isolated and unusual', they are on the rise and since the independence of Morocco there has not been such a spike in incidents on this border, and much less with members of the Moroccan police threatening or even directly attacking Spanish policemen. Until recently, Moroccan policemen have been largely inhibited or acted peacefully; they had never actively participated in such actions. However unlikely, these incidents may be viewed as unintended outcomes of certain behaviour and undoubtedly, they can be restrained. The Melilla-Nador border, despite the difficulties, thus far exemplifies a unique confluence between the 'West' and the Muslim world that does not necessarily have to be bloody, and instead can act as a point of mutual benefit.

In the bloody summer which followed 'Operation Iraqi Freedom,' an EU diplomat in Morocco noted that 'the United States would give anything to have an example like Melilla to teach in the Middle East'. Unfortunately, the EU itself, while knowledgeable of Melilla's geographic location, is at a loss for figuring out how to use Melilla to increase the EU's goodwill in the region, heighten its influence and demonstrate that the EU's neighbourhood can rise in prosperity and opportunity and share a secure future together with the EU.

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Continuity and Change in the US Foreign and Security Policy with the Accession of President Obama

Nik Hynek[1]

Introduction

The question of continuity and change in the US Foreign/Security Policy (henceforth USFSP) after the accession of President Obama can be constructively studied from two complementary perspectives: the thematic perspective and the procedural perspective. This method determines the structure of this analysis. In the beginning, key issues of the USFSP in the context of the change of the American administration are examined. A part of the discussion of the transition from the Republican administration of George W. Bush to the Democratic administration of Barack Obama will be an attempt to follow *the continuity and change in the key issues of the USFSP and the change in the prioritization of issues*. For a comparison of the approaches of Bush and Obama, one needs to approach the topic indirectly due to the fact that Obama's presidency is still in its early stages, which means that we still cannot completely evaluate the USFSP under the current American president. It is precisely the fact that it is impossible to compare eight years of the government of George W. Bush with approximately seven months of the Obama government that is the cause of the indirect approach of this evaluation. It will be based on a combination of extrapolation from existing but still scattered early signals and defining what can be regarded a success when considering the goals of the primary issues of the USFSP on the basis of Obama's publically known positions. Subsequently, an evaluation of *the preferred procedural means of reaching the set goals* in the framework of the central issues of the USFSP will tie into the perspective related to changes in thematic priorities. The main finding of the first part will be that even though Obama is seen as the president who put an end to several trends that were introduced by Bush, such a conclusion must necessarily be

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rejected as reductive or even misleading. In contrast to this, in the second part, the analysis will point out several shifts associated with the change of the administration.

Continuity and Change in USFSP on the Thematic Level

The presented analysis considers the following issues of the USFSP to be central: the stabilization campaign in Iraq (i), the stabilization project in Afghanistan (ii), the issue of relations with Russia in the context of missile defense and the efforts to reduce the number of ballistic missiles and nuclear warheads (iii), the issue of rogue states, in the frame of which there is a breaking away from Bush's discourse on the so-called Axis of Evil and the insulation of Iran (iv), and North Korea (v), which are now newly treated as separate cases. Before we move on to the analysis of the changes and continuities in the issues introduced above, it is necessary to emphasize that thus far, there did not emerge any new and unexpected issue that would really test Obama in his role as the Commander in Chief. In this respect, the case of the liberation of Richard Phillips, the captain of the cargo ship Maersk Alabama, who was detained by Somali pirates, surely cannot be considered to be a real test. As for the preparations for the process of transition from Bush to Obama before the inauguration ceremony, they were carried out well above the level of the usual standards of comparison – like the transition itself.

Iraq

The accession of Obama to the Presidential Office was closely connected to the necessity to quickly assume a position in regard to the two most prominent foreign-security challenges of today: the stabilization campaigns in Iraq and Afghanistan respectively. In regard to Iraq, Obama – who was still a presidential candidate at the time – assumed a minority centre-left liberal position toward the war, and his critical attitude was evident in fragmentary votes. His presidential decision, which he announced at Camp Lejeune in North Carolina on 27 February 2009, was marked by a pragmatic shift in regard to the issue. Instead of the original tempo that Obama adumbrated during his presidential campaign, that is, his promise to pull one or two brigades engaged in combat every month (during a period of 16 months), as president, Obama opted for a compromise plan. According to this new plan, the American soldiers directly engaged in combat in Iraq will be pulled from Iraq before August 2010. The remainder – 35,000 to 50,000 soldiers that will remain in Iraq as a "transition component" – will then complete various tasks in the country (especially training Iraqi security components, battling terrorist cells, and protecting military and civilian persons) until December 2011.

To this day, Obama has not accepted Bush's simplified interpretation of the success of the military strategy of selectively increasing the number of troops (the surge strategy), which was especially successful in the Iraqi province of Anbar (Obama explains that the success was related to the combination of the surge strategy with the so-called Sunni Awakening in the province and its subsequent geographical expansion). The key influence on this change towards pragmatism in Obama's ideological position came especially from the American Minister of Defense Robert Gates, who served in both of the administrations, and General David Petraeus, who was originally the Commanding General of MNF-Iraq and is now newly the commander of US Central Command. In regard to this issue, we can evaluate the change in the administration in the following way: **general change** – the priority of Iraq decreased in the context of the American government redirecting its attention, troops and finances in the direction of Afghanistan; **partial change** – a decrease in the rigidity of the plan and the speed of pulling troops out of Iraq, and the partial possibility of revising the plan on the basis of the security situation; **continuity** – continuity on the tactical and operational levels, as well as the acceptance of responsibility for the political development of the situation in Iraq. The operation in Iraq will be considered to be successful if at least minimal democracy is upheld, the territorial integrity of the country is maintained, and the systematic order of ethnic and religious conflicts as well as terrorist attacks is weakened.

Afghanistan

Already during his presidential campaign, Obama criticized (then) president Bush for his relative absolution of political responsibility for the development of the situation in Afghanistan, the corresponding problematic change in the original strategic priorities of the US, i.e. defeating the Taliban and al-Qaeda and stabilizing Afghanistan, the invasion of Iraq, and the subsequent steps taken in the attempts to stabilize it. The overturning of this situation in favour of the original strategic priority and the declaration of the intention to defeat the Taliban represent the biggest planned foreign-security commitment for President Obama to date, and it will probably continue to be so for the next several years. However Obama returned to the original political commitment to assume responsibility for the developments in Afghanistan, his new security strategy is different from that of Bush in several aspects. Obama's biggest break with the Bush administration may be the abandonment of friendly and unconditional negotiations with Pakistan as an allied country in the framework of the discursive abandonment of the so-called war against terrorism. This course of action was replaced by a new strategic conception that sees Pakistan as an important part of Afghanistan's lack of security, but not through a prism of viewing, *a priori*, friendliness as a functional solution (e.g. Bush-Musharaf). Thus, a strategic battlefield now newly connects Afghanistan and Pakistan (the so-called Af-Pak strategy). In the new American conception, it is evident that the improvement

of the situation in Afghanistan is directly dependent on the improvement of the situation in Pakistan, especially in the Federally Administered Tribal Areas (FATA) and neighbouring regions (e.g. Swat).

The most significant evidence of an increase in the American efforts to stabilize the situation in Afghanistan, and namely of Obama substantially increasing the United States' assumption of political responsibility for developments in the country in comparison to Bush, is the import of the surge strategy, which involves 17,000 troops, from Iraq. This step is very risky, not only in terms of the question of the appropriateness of the American strategy in the context of the Afghan asymmetrical conflict, as even General Petraeus was originally sceptical of the strategy's applicability (due to the unique geographic determinants and specific historical-political factors), but also in terms of the allied commitment. The top priority of the issue in the current USFSP is translated into political pressure on the allies, (NATO ISAF, and in the case of some allies, also their participation in the so-called Coalition of Willing within the framework of the Operation Enduring Freedom), especially pressure to follow the American surge strategy and provide security instructors. These instructors are to raise the standards of the Afghan police, which, in contrast to the Afghan National Army, are in a catastrophic state.

Even though many countries promised to increase the number of personnel in their contingents, many consider pulling their contingents out of Afghanistan after the recent presidential elections on the condition that a dramatic worsening of the security situation will not take place. This situation will present one of the key tests of Obama's ability to push through his Afghan strategy at the multilateral level. The new American conception will also influence the reformulation of the character of the allied commitment. In the framework of NATO, there already began the American pressure to increase the harmonization of the cooperation of the Provincial Reconstruction Teams (PRT) in the framework of the mandate of NATO ISAF. There is now also American pressure on EU specialists in terms of the plan to utilize the expertise of the EU in the training of the Afghan police and in civilian and military crisis management. Currently, they are more like an aggregate of national contributions rather than one coordinated multilateral contribution. This is one of the reasons for why a plan to build a multilateral coordination agency for the PRTs in Kabul is being considered. A partial advancement away from autonomous PRTs can be seen in the emphasis on multilevel strategy, as well as on the participation of neighbouring countries.

Generally, we can evaluate the change in the administration in regard to this issue in the following way: **general change** – a significant increase in the priority of Afghanistan, which is Obama's strongest current political commitment, which is evident in the surge strategy; **partial change** – the regional interlacing of the security situations in Afghanistan and Pakistan; the effort to involve Iran in the solution (which is rather formal); **continuity** – the constant pressure

from the US on the allied commitment, even if Obama's reasons for it are the opposite of Bush's (the US freeing its hands for Iraq vs. the US as a role model in the framework of the surge strategy); in the framework of NATO, Obama still prefers the dimension of the "solidarity" of the commitment to NATO over an approach that would reflect real needs (e.g. changes in the command structure and a plan for the stabilization campaign). The operation in Afghanistan will be considered successful if at least minimal democracy is upheld; a viable national army is established; the state of the Afghan police is improved; the Taliban are pushed back in terms of territory and their influence is limited (liquidating the leaders of al-Qaeda would be a big plus); the number of terrorist attacks is reduced; if there is a possibility of realizing at least a part of the originally planned civilian reconstruction projects, and, last but not least; if there is an allied presence in the country at least in the framework of the current numbers.

Russia, Efforts towards Nuclear Arms Control and Missile Defense

The issue of American-Russian relations is pulled here into the context of the control of nuclear arms control/disarmament and missile defense. The context of missile defense directly affects the Czech Republic in relation to the signed (but still unratified) agreement on the placement of American X-band radar on the territory of the Czech Republic in the framework of the so-called third pillar of the American National Missile Defense System. The third pillar was proposed by the former president Bush, and the project is the exact reason for why Bush unilaterally backed out of the ABM agreement (1972), which strongly limited the number and range of anti-ballistic missile defense systems. Obama's position on this matter remained unknown for a long time during his presidential campaign. Shortly before the elections, under pressure from the media, Obama finally expressed his views on the matter. He stated that he would support the construction of the radar under two conditions: 1) the Iranian threat will remain and grow; and 2) the system's financial *and* functional effectiveness will be proven. As the Government Accountability Office (GAO) repeatedly proved, the system falls short of the plan of the American Missile Defense Agency (MDA) in terms of several technological aspects and meeting deadlines.

On 06 July 2009, President Obama, and his Russian counterpart Medvedev, tentatively came to the agreement that the process of strategic nuclear weapons reduction would continue, with the goal of lowering the number of nuclear warheads to 1,500-1,675 and the number of carriers to 500-1,000 before the year 2012. This involves an extension of the nuclear regime after the START 1 agreement from 1991 expires. START 1 limited the number of warheads to 6,000 and the number of carriers to 1,600, and it will expire in December 2009. That what is involved is a long and gradual bilateral process is apparent from

the signing of the so-called Moscow agreement (SORT), which in 2002 decided that every side would have 1,700-2,200 warheads in an operational state until 2012. The current tentative agreement can be evaluated as a completely routine step in both the procedural and substantive contexts of this issue area. Obama is merely continuing in the commitment that was put into practice by the former president Bush during his meeting with the then Russian president Putin in Sochi in the spring of 2008.

What definitely does not show the characteristics of mere routine, though, is the context of the agreement, in which three other issues play key roles: 1) Obama's efforts towards full nuclear disarmament in the future, which has supporters across the entire political spectrum in the US (e.g. Kissinger, Schultz, Perry, or Nunn); 2) the third pillar of the American missile defense; and 3) the efforts of the US and the West in general to put an end to clandestine military nuclear program and ballistic-missile program in Iran. In the case of efforts towards future nuclear disarmament, Obama presented his radical vision during his Prague speech on April 5, 2009. At its core was an emphasis on the moral responsibility of the US for a world without nuclear weapons, in the framework of which the legal following up on the START-1 and SORT agreements, as well as the hastened American ratification of the Comprehensive Test Ban Treaty (CTBT), is only the first albeit important step.

An awareness that Obama will try to keep lowering the numbers of nuclear warheads and carriers in the future because of his vision is a part of the current Russian attitude. As was shown by the announcements of Russian President Medvedev and the country's Minister of Foreign Affairs Lavrov after Obama's visit to Moscow, Russia conditioned – even if vaguely – its signing of the tentatively agreed upon agreement on the US cancelling its plans to install components of the national missile defense in the Czech Republic and Poland. Obama's position in regard to the system remains pragmatic, as already pointed out. It is evident that the Russian demand cannot be taken seriously when considering the numbers of warheads and ballistic missiles mentioned above. However, when it comes to the political dimension of the demand, this statement no longer applies.

In addition, for Obama, the missile defense project is not a narrow geostrategic issue, as it was for Bush, but a political issue. This can be clearly seen in Obama's private letter to President Medvedev from the beginning of February 2009. Parts of the letter which (probably intentionally) got into the hands of the media indicate Obama's readiness to exchange the third pillar plan for a more significant decrease in the current nuclear arsenals and likewise for the beginning of pressure from Russia on Iran in the question of putting an end to the nuclear program and ballistic-missile program. Even though Obama's efforts towards being accommodating to Russia and verbally "resetting" the US's previous relationship with Russia are appropriate and understandable, the actual carrying out of Obama's intentions and the political-strategic

implications are now much more problematic. For one thing, the quality of the personal relations of the presidents of the US and Russia has a much smaller effect on the political results than is usually assumed. In addition to this, Obama can hardly expect particularly strong political support from Russia in the direction of Iran due to Russia's economic interests in this country. This is the case in spite of the fact that Russia temporarily stopped some of its sales of military supplies to Iran, including its selling of a super-advanced anti-aircraft defense system S-300 (partially also because of earlier pressure from Israel). The earlier Russian sceptical reaction to Obama's letter and the current Russian condition for continuing in the reduction of the nuclear arsenals of both of the countries (the cancellation of the installation of missile-defense components in the Czech Republic and Poland) are given by the understand-able efforts of Russia to avoid looking like a subordinate country that would try to diplomatically have an effect on Iran on the basis of American rules. Thus, the situation is still in the middle of "the prelude" - or playing for time. The problem is that Russia and the US have different expectations about the sequence of the steps: the US wants to see Russia successfully putting pres-sure on Iran and, at the same time, the Russian signature on a legally binding document that would limit the nuclear arsenals of the US and Russia. The US is then also willing to freeze or even cancel the plan for the Central European components of missile defense (Obama is taking 2–3 months to revise the project). On the contrary, Russia wants a guarantee that the last step in the American plan will come first, and then it also hopes that instead of having to put pressure on Iran, it will be enough to make more cuts in the numbers of nuclear warheads and carriers in order to uphold at least its basic functional relations with the US.

Obama's efforts to establish a bilateral line as a basic diplomatic strategy in regard to Russia are already alarming for several reasons. Obama, in his letter to Medvedev, completely reframed the third pillar from a security matter into a political bargaining chip for negotiations about the nuclear disarma-ment and/or coordinated advance in regard to Iran. Likewise, Obama did not consult this step with the Czech or Polish executives, which was confirmed in the harsh statements of the government officials of both countries in the media. The reactions to Obama's approach also confirmed that the Czech and Polish governments always recognized the third pillar as an issue that is important for its geopolitical dimension and that would allow the two countries to increase their international-political capital (Poland also saw it as an op-portunity to increase its economic capital). So far, what has been surprising was the absence of any relevant statements on the part of Obama in regard to the commitment on the level of NATO to interconnecting the American and alliance anti-rocket systems in the future, as has been stipulated by the Bucharest Declaration. Thus, so far, the US managed to completely bypass NATO in regard to this issue.

What is probably the most disconcerting – as was shown by the previous points – is that Obama is not only continuing in the established tendency of the US and Russia to solve significant security questions bilaterally (that is, he is continuing in the tendency to try to establish the so-called strategic condominium), but he is also trying to deepen this tendency. This deepening will be discussed in the next part, which analyses the components of the USFSP. On the other hand, Obama is limberly continuing on in regard to the question of the installation of the third pillar. The author's interviews with a prominent consultative source for Obama in these questions show the correctness of the argument that Obama is moving towards a residual strategy in the question of missile defense. By this is meant the plan that if Obama does not succeed in convincing Russia to take up a desirable course of action in regard to Iran and, at the same time, the Iranian threat does not decrease, Obama can return to the third pillar plan - and this time with a stronger international legitimacy on the basis of practically showing the limits of diplomacy in regard to this issue. Such a course of action can be especially important in regard to maintaining the unity of the alliance at the level of the Bucharest Declaration, especially after the critical statements about the third pillar from the French President Sarkozy and the German Chancellor Merkel.

In all, we can evaluate the change of the administration in regard to this issue as follows: **general change** – a temporary (but not necessarily definitive) suppression of the third pillar and reframing it from a security issue to a political bargaining chip in negotiations, and replacing the original meaning of the previous issue with a radical vision of nuclear disarmament; **partial change** – a strong discourse on resetting relations with Russia in the context of a rather naive faith in the possibility of a lasting change in the Russian position in regard to the US and the West in general; **continuity** – efforts to extend arms-control regime of strategic nuclear weapons (efforts towards a new agreement in regard to another reduction (but not elimination) of nuclear warheads and ballistic missiles were started already by Bush during his meeting with Putin in Sochi in spring 2008); the endurance and even deepening of the strategic condominium, and only a nominal utilization of NATO in related questions (the NATO-Russia Council, the Bucharest commitment). Relations with Russia could be considered to be successful if complementary diplomatic interactions with Russia are set up bilaterally (nuclear-weapons arms-control) and multilaterally (NATO – missile defense, Georgia), if the plan to continue the regime of the control of nuclear armament is drawn up and ratified, and if Russia's ambitions in the area of Kavkaz and Eastern Europe (and partially also Central Europe) are counterbalanced. A direct and mediated (UN Security Council) synergetic pressure on Iran and North Korea from the side of the US and Russia, as well as advancement in the direction of almost complete nuclear disarmament (there are many reasons not to believe in the possibility of complete nuclear disarmament), would be a large but hardly attainable bonus.

Iran

Iran is one of the two most discursively accentuated issues of the current US-FSP (Afghanistan being the other). Obama made two significant changes to the American policy towards Iran: 1) right after his accession, Obama successfully cancelled the Bush-created and (as a result) utterly counterproductive discourse on the so-called 'Axis of Evil' with the practical result being that the US can now separately work with Iran and North Korea. This course of action reflects the reality that Iran is the more politically complex country with a much bigger direct influence on the region; and 2) it is precisely on the basis of cancelling the discourse on the so-called Axis of Evil that Obama started to approach Iran with a broad-minded diplomatic attitude, compared with Bush's diplomatic boycott of Iran from 2002 until the end of 2008. The broad-mindedness of Obama's current attitude lies in him focusing on the US's entire relationship with Iran instead of beginning the relationship with a discussion of problematic points. More specifically, Obama abandoned Bush's demand for Iran to stop enriching any uranium as a condition for any negotiations between the two countries. The zenith of Obama's approach was his televised speech to "the Iranian government and people" and his later speech at Cairo University. So far, in this respect, Obama's approach to Iran is rigorously balanced out. He is trying to recognize Iran as a regional power (e.g. the US's successful invitation for Iran to take part in trying to solve the problem of Afghanistan in the Hague at the end of March 2009). In this respect, he surpassed all of the previous US administrations since the deposition of the Shah and the establishment of theocracy in 1979. An indirect result of this can now be seen even on the Iranian political scene, where, during the presidential elections, there appeared an unprecedentedly harsh and open campaign, and usually hidden conflicts in the framework of the theo-political elite were revealed. These conflicts went beyond the level of reactions to Obama's approach, as they were also related to the question of whether the regime itself will survive. Regardless of the results of the elections (the current president officially won), the ruling political apparatus was subjected to harsh domestic criticism. The violent break-up of the pre-election demonstrations of Iranians unhappy with the high likelihood that the presidential elections had been rigged, brought the conflict to a new level.

At the same time, we cannot forget the fact that the core of the confrontation cannot be reduced to the popular but inaccurate axis of conservatives vs. reformists. Obama accurately calibrated the reaction to the continuing development in the country, by which he made difficult (but did not stop) the possibility of the Iranian spiritual leader Khamenei and President Ahmadinejad discrediting the domestic opposition by connecting it to the US government. The post-election situation shows that there is now a break-up of the previous domestic consensus, which was formed in an alliance against the non-conceptual and short-sighted politics of Bush. The broadmindedness of the diplomatic approach that can now be designated as Obama's biggest device in his relations with Iran can, of

course, change into the biggest weakness of the USFSP both in respect of this issue and generally. Such a development could arise very quickly. It could arise when Obama, under domestic and/or international pressure (including regional pressure from the side of Morocco, Egypt, Bahrain, etc.), would have to narrow the current breadth of his diplomatic approach to focus on the problematic issues of Iran's nuclear and missile programs or react to Iranian provocation or a sudden problematic political situation (e.g. an increase in the testing of mid-range missiles, getting the know-how that is necessary for long-range ballistic missiles, any escalation in the dyadic relationship with Israel, Iran's ruling theo-political elite refusing Obama's approach and continuing in its confronta-tions, Iran rejecting or abandoning the planned diplomatic negotiations, or any serious escalation in the socio-political conflict).

It is precisely a movement towards a narrower framework for the American-Iranian interaction for at least one of the reasons mentioned above, which will happen sooner or later, that will lead to a very surprising conclusion. In spite of all the differences between Bush and Obama that were sketched out above in terms of a wider dialogue (although so far, it has been more like a monologue), Obama's USFSP will be defined by a very obvious continuity with the Bush era. If the US does not accept the idea of a nuclear Iran, which cannot be expected due to Israeli pressure, domestic American pressure, and misgivings about the regional security dilemma (although when considering the risk of proliferation, the case would unequivocally be less problematic than that of North Korea), Obama's basic structure of interaction will be the same as Bush's. In such a case, the utilized strategy of rewards and punishments (the carrot and stick strategy) would change only in terms of its scope. We can expect Obama's re-wards to be greater (in accord with his general approach), but correspondingly, we can expect his punishments to be greater as well. Plus, considering the fact that the US invested a significant amount of political capital into stopping the nuclearization of Iran, the US's inability to stop this process would reduce the international-political influence and position of the US - not just absolutely but also in the US's relations with Russia and China, especially considering their obstructive blocking tactics in the UN Security Council.

In general, we can evaluate the changes in the administration in regard to this issue as follows: **general change** – a broadminded commencement of diplomatic interactions with Iran in contrast to Bush ignoring the country, and removing the preliminary conditions for establishing a dialogue; **partial change** – efforts to carry out the main diplomatic activity at the bilateral level; **continuity** – the carrot and stick strategy (Obama still has not used this strat-egy because he did not have to narrow down the framework of diplomatic interaction to problematic issues). The US efforts in regard to this issue can be considered to be successful if Iran eventually commits to placing its nuclear program under the monitoring and verification of the IAEA and its peaceful use (nuclear material would apparently be provided by Russia, and nuclear

waste would be sent back to Russia); the cooperation with North Korea is diffused in the areas of developing and especially testing ballistic missiles (Iran almost exclusively tests mid-range ballistic missiles for North Korea in exchange for North Korean know-how concerning the missiles); the regional security dilemma is overcome and a regional balance emerges, which involves, among other things, the suppression of the political ambitions of the Lebanese Hezbollah by Iran.

North Korea

The developments in North Korea of the last few months present *the first direct threat* to Obama's administration. Just a couple of hours before Obama's April speech in Prague, Kim Chong-il managed to cloud over the main point of Obama's speech (the question of nuclear disarmament) by testing long-range ballistic missiles. The North Korean test was announced in advance, although the timing was surprising. In the framework of the test, the three-stage intercontinental ballistic missile Taepodong 2 flew almost 4,000 km, which is twice the distance of the Taepodong 1 when it was tested in 1998 (the previous test of the Taepodong 2 ended with a fiasco, but not even the last test was a complete success when the third stage of the missile was not jettisoned as planned). Although Obama tried to utilize this adverse act in his speech at the last minute in order to strengthen his claims of his support for nuclear disarmament, the timing of the test deepened the existing scepticism of international community towards this vision. In addition to this, the timing also drew attention to the most problematic part of the vision: the efforts towards nuclear disarmament in the context of rogue regimes that own and develop nuclear weapons and that operate outside of a related legal regime (the Nuclear Non-Proliferation Treaty or NPT). Obama had to react to this by confirming the significance of the deterrence strategy even for the future. Here, we can follow a distinct political (but not strategic) change from the policies of Bush, who would almost certainly argue by claiming that what is necessary in this situation is an effective missile defense system, and not the deterrence strategy. The crisis was subsequently deepened by the North Korean underground nuclear test of May 25, 2009, which, in contrast to the previous test, was successful. The strength of the nuclear charge was between 10 and 20 kilotons. In the further escalation, North Korea fired three surface-to-air missiles, and current news reports point to the possibility of preparations for another test of a nuclear charge, which would now be the third one.

Obama's reaction to the last test was precisely in his Prague speech, in which the president described the test of the Taepodong 2 as a provocation and promised to be hard in holding North Korea responsible for going against the UN Resolution 1718, which forbids North Korea from carrying out any activities related to developing and testing ballistic missiles. The new resolution of the UN Security Council from 12 June 2009 made sanctions tougher in

several ways, especially in the area of transportation of fissionable materials into North Korea and that of closing financial agreements with this country. As for the analysis of the current North Korean behaviour, the usually mentioned external reason (i.e. that North Korea wants to attract Obama's attention and increase the reward for a return to six-party negotiations - but according to Kim Chong-il, the country will allegedly never return to six-sided negotiations), which is now a part of North Korea's usual extortion strategy, can actually be seen as a secondary reason in this context. The main reason can be seen in the urgent need to stabilize the domestic political position of Kim Chong-il after his stroke and especially his current biggest goal: to choose a successor (the C.I.A. confirmed, on the basis of information captured by tapping devices and documents from 12 June 2009, that the successor will probably be his youngest son Kim Chong-un) and to get a military elite to support him. This is one of the reasons for why Kim Chong-il's continuing aggression is not only related to the area of nuclear and missile technologies, but also to the escalation of the tensions at sea (South Korea and Japan) and on the border between North and South Korea. It is evident from the rise in tensions that this is not a case of tactical rational calculation like the previous instances of tension, but of an existential matter related to the survival and reproduction of the regime.

It is precisely in this light that we can perceive the emptiness of Obama's strong discursive threats and the problematic nature of their possible realization. The first problem is general: Obama, with his emphasis on the diplomatic possibility of solving the North Korean question, created unrealistic expectations in both the US and the world. By combining this problem with the more specific problem (i.e. the existentially motivated behaviour of Kim Chong-il), Obama got into the absolutely least advantageous situation for solving this question in the span of several years. The hardest part for Obama is the realization that the possibility of overcoming the two problems of the situation is given by the development in North Korea and its activities and stances, and not by the actions of the US The case of North Korea shares one common characteristic with the case of Iran, but in the case of North Korea, it is more prominent: the fact that Obama does not currently dispose of any worked out strategy in regard to these countries. What is more, Obama's own political capital and the American political capital in general are dependent on the steps taken by the ruling elite in both of the countries. North Korea, which has a rich history of political extortion and breaking its commitments and the reputation of a state that cannot be forced to uphold the basic principles of existing norms of international law through sanctions or military force (the geostrategic reasons), thus sets the most distinct limits to Obama's wide diplomatic approach, which was also discussed in relation to Iran. The issue of North Korea will also be the main test of Obama's multilateral abilities, especially his ability to create synergic pressure together with Russia and China. Conceding to bilateral negotiations with North Korea would be a cardinal error for the US.

Generally, we can evaluate the change in the administration in regard to this issue as follows: **general change** – the absence of any comprehensive strategy on the part of Obama in regard to North Korea can be evaluated as negatively as the sharp change in Bush's approach to this issue (diplomatically ignoring the country and creating the so-called Axis of Evil → diplomatic negotiations on ending the nuclear program); **partial change** – Obama called forth unrealistic expectations in regard to the possibility of a diplomatic solution (including the use of coercive diplomacy and the functionality of selective sanction instruments); **continuity** – a basic carrot and stick strategy, but now Obama has the chance to show a punishment not just discursively, but also practically. The US efforts in regard to this issue can be considered to be successful if, in the context of a short time horizon, the UN Security Council carries out a synchronized implementation of new and harder sanctions against North Korea; if, in the context of a medium time horizon, North Korea is brought back to six-party negotiations, including confirming the previous concluded commitments, deepening them (especially by introducing monitoring and verification mechanisms) and preventing trade in nuclear and missile technologies; and if, in the context of a long time horizon, North Korea is denuclearized, which is an absolutely essential condition for at least growing close to Obama's vision of future nuclear disarmament.

	General Change	Partial Change	Continuity
Iraq	Lowering the issue priority	Reducing the rigidity of the plan concerning the troops withdrawal	Tactical and operational levels, acceptance of political responsibility by Obama
Afghanistan	Significant increase in the priority of the issue and in the political responsibility	Regional solution – the Af-Pak Strategy	Steady pressure in the Allies, preference of the intra-NATO solidarity over really effective solution on the ground
Russia	Suppression of the third pillar and the use of the issue for arms-control negotiations and for concerted pressure on Iran	Significant discourse on resetting the bilateral relationship	Attempts to renew arms-control regime; the existence of the strategic condominium
Iran	Genuine efforts to establish diplomatic interactions; removing the conditions for the dialogue	Emphasis on bilateral ties, efforts to produce balanced commentaries concerning the domestic development in Iran	Basic strategy of rewards and punishments (as yet unused, still too early)
North Korea	The absence of a coherent strategy	The creation of unrealistic expectations about the applicability of a diplomatic solution	Basic strategy of rewards and punishments (as yet unused, though it could have been used already)

Procedural Changes to USFSP

At the level of political and diplomatic resources and instruments, which are used by the Obama administration in the USFSP, we can see at least a partial change in every procedural aspect. The most profound change comes out of the differing world views of Bush and Obama. Although Bush was usually described as a realist and Obama as an idealist, this kind of categorization is misleading. Instead, we could designate Bush as a *rigid realist* and Obama as a *pragmatic realist*. In Bush's world view, one could see several uncompromising opinions, but these opinions paradoxically arose out of idealistic operational codes, which are based on simplified representations of international-political reality. This kind of Manichean vision was the basis of the entire War on Terror and the now classic phrase: "Either you are with us or against us." The result of such a position in regard to individual issues was analyzed in the previous part of the policy paper. In contrast to this, Obama is a pragmatic realist whose idealism is more discursively based but is not converted into practical activity (unlike that of Bush). Slogans like "Yes, we can" or frequently used humanistic images coexist in the case of Obama with hawk-like positions that in many cases surpass those of the Republicans (for example, the intensification of the use of unmanned Predator aircraft to attack the leaders of al-Qaeda and the Taliban in spite of significant "collateral" losses in civilian lives). The same applies to the area of terrorism. Although Obama does plan to close the prison at the Guantanamo Bay Naval Base, as he promised to do this during his election campaign, we cannot expect any radical change in the status of many (although not all) imprisoned extremists, as was indicated by Obama's introduction of a new legal framework on 21 May 2009. Probably the most surprising evidence of Obama's pragmatic realism was the fact that he put human rights on the back burner while propagating democratic values in the USFSP. As two details which are important in this context and which establish a general tendency, we can mention Obama's friendly handshake with Hugo Chávez, the authoritarian president of Venezuela, and Minister of Foreign Affairs Hillary Clinton's surprising remark during her visit to China that human rights would not be discussed because the US already knows China's position on the matter.

The change in the USFSP can plainly be seen in the symbolic politics of Obama's administration and Obama himself. Obama managed to compensate for his lack of both a coherent strategy and a harmonization of interests and goals until the present through a series of gestures, apologies, and efforts towards reconciliation. Although this course of action is not difficult to understand after Bush's government, it does not mean that it should become the symbolic centre of the USFSP or especially that it could stay in this position. There are three basic problems with this course of action: 1) the risk of creating a meta-narrative of the US as a weak and timid country that is

not able to push toward achieving its long term goals; 2) Obama's apologies and reconciliations were almost never balanced out with an analysis of the character and intentions of the American opponents (of the Russian, Iranian, Afghan, North Korean and Latin American political elites); and 3) Obama managed to raise the difference between discourse/style and actions/substance in the framework of the USFSP to an unprecedented height. In regard to analysing the instruments of the USFSP, it is necessary to reject the utterly unproductive, but often made, distinction between Bush as a proponent of hard power and Obama as a supporter of soft power. The reason for this is the combination of the two types of power in Obama. It is thus more appropriate to focus on Obama's ability to utilize the new types of soft power, as these were unavailable to Bush because of his rigid positions and his lack of international popularity. Obama is especially dependent upon direct and indirect public diplomacy, which is proven by Obama's video speeches that are strategically placed on the web portal YouTube or his ability to make speeches directly to the inhabitants of foreign states, thus mobilizing their support. Obama is the first American president since John F. Kennedy in whom the character of so-called *celebrity diplomacy* appeared and became deeper. Celebrity diplomacy is usually studied mainly in the cases of untraditional diplomatic actors (Bono from U2, Bob Geldof, etc.), but usually not in the case of a president of a superpower. Another change in diplomatic activities in connection with the change in the administration is Obama's prioritizing of special, uncommon, and non-routine diplomatic channels. The weight of ambassadors in key nations is reduced by the engagement of special delegates who have this work as their full time occupation and specialize in one concrete problem and in one country or region (Holbrooke for Af-Pak, Mitchell for the Middle East, Bosworth for North Korea, and Gration for Sudan; the only exception is Hill for Iraq, since he is an ambassador).

The last, most important and least expected finding is related to the question of the *preferred format* for the USFSP on the background of Obama's idea of *the desirable character of international order*. The intuitive assertion that Obama prefers multilateralism while Bush preferred unilateralism was already refuted as wrong in the first part of this analysis. American multilateralism could be categorized as nominal. Thus, it is not a deeply rooted normative preference. The cases of the allied interaction in regard to the issues of Afghanistan and Russia were already used as examples. Obama's preferred diplomatic format is *bilateralism*, and its crux lies in interactions with great powers, regardless of whether they are emergent (China) or once and future (Russia). The radical break can be found at the deepest level, that is, in the transformation of American preferences in regard to the matter of the character of the international order. At this level, in respect of all of the discussed issues, Bush was dependent on creating predominantly *informal and thematically specific coalitions of willing* both in places where NATO was not present (Iraq) and places where it

was present (Afghanistan). In many cases, the coalitions of willing were wholly informal (as in the War on Terror).

With the changing of the Minister of Defense (Rumsfeld → Gates), the first transformations in preferences in regard to this issue took place. With Obama's accession and keeping Gates and the central document, the National Defense Strategy (May 2008), in force, the original prioritization of the coalitions of willing was abandoned, and instead of this, Obama established a preference that had not been seen since the 19th century: that of *efforts towards a concert of great powers*. In contrast to the preference of a great power concert of the 19th century, Obama's efforts towards a great power concert are not multilaterally based, but instead they involve a *series of bilateral relations* (bilateral parallelism). The crux is the US's relationship with Russia and the efforts towards the creation of a new strategic regime that would be mutually linked with China in the realm of security. In the case of the relations with Russia, this bilateralism has the concrete form of the already analysed strategic condominium. In the case of China, manifestations of this bilateralism exist only in areas outside of security (the economy, or the focal point of the Copenhagen summit on global warming in the G2 interactions of the US and China). It is precisely this analysis that can explain an apparent paradox: at the thematic level, this analysis showed that the USFSP exhibits a large amount of continuity. At the same time, the conception of great thematic changes is taking place in the USFSP. The Czech Republic (as well as Poland) serves as a very appropriate example for showing how an originally overrepresented country in terms of influence in an American coalition of willing (in the case of the Czech Republic, missile defense; in the case of Poland, missile defense and Iraq) can lose its relative position and influence with the shift to the American efforts towards a bilateral great power concert (in the case of relations with Russia, the great power concert would be based on a strategic condominium as suggested in Obama's letter to Medvedev). That which at first sight looks like a change at the thematic level is actually a procedural change that took place while there has been a significant continuity in the thematic area.

Conclusion

It was shown that the continuity and change of the US Foreign and Security Policy (USFSP) after the accession of President Obama can be studied at the procedural and thematic levels. The presented analysis argued that the change of the presidential administration in the US has been accompanied by many changes in thematic priorities. Analysed topics in this regard were Iraq, Afghanistan, Russia in the context of the control of nuclear armament and missile defense, Iran, and North Korea. The effect on NATO was seen especially in the area of the stabilization of Afghanistan and in the relationship between the US and Russia (missile defense), and it demonstrated Obama's scepticism in

regard to the strategic role of NATO. An analysis of key issues showed that in spite of the common belief that the USFSP has been completely changing, the transition from George W. Bush to Barack Obama actually embodied a high amount of continuity between them. Contrary to this, however, an analysis of the means of the USFSP demonstrated a large variety of changes, including the most fundamental one: the change in the conception of the character of the international system and the practical politics connected with it (the ad hoc Coalition of Willing → a new great power concert in the form of parallel bilateralisms).

State Failure and Security in a Post-Westphalia Era[1]

Natalia Piskunova[2]

Introduction

A current trend in International Relations (IR) suggests that challenges to the international system are of a post-Westphalia character. These *new* challenges are caused by the gradual decline of the state as the *only* authoritative player on the international relations and security chessboard. A shift in focus is evident since the classic domain of state prevalence – security – is now likely to fall into the hands of new actors. As a result, several states and regions dotting the international community are defined by, de-facto, cases of weak and failing polities owing to eroding institutions of governance. Examples of failed states demonstrate that the failure of the State, as a key player in contemporary IR, to fulfil its duties in political processes, in most cases, leads to humanitarian crises. Thus, in order to prevent related tragedies, there is a pressing need to scrutinize the links between state failure and security, if we are to assume that it is the State which is vested with the responsibility to safeguard its citizens. Moreover, the examination of the prism that distorts state rule is necessary to account for the new possible global threats that state failure\collapse may bring. This can demonstrate how poor governance – on a local level – and, eventually, state failure are transferred to a higher level of threat hierarchy.[3] For the purpose of exploring this issue it is important to address the question: how state failure influences security in a post-Westphalian international environment?

A preliminary hypothesis is that the modern security configuration in an underdeveloped region poses challenges to governance. In its turn, poor governance tends to generate sustained internal conflict(s) within the states of the

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[3] See R. Rotberg, *When States Fail: Causes and Consequences*, (Princeton University Press), 2004; S. Eizenstat, J. E. Porter and J. M. Weinstein, "Rebuilding Weak States," *Foreign Affairs* 84, 2005; and C. Clapham, *Africa and the International System: The Politics of State Survival*, (Cambridge University Press), 1996.

region. This provokes a spiral of internal violence, which may be viewed as a threat to the existence of sustained states in diverse and changing security environments and could, through the process of contagion, spread to other regions.

In this regard, an important issue raised in this research is based on providing a correlation between governance inefficacy and the low sustainability of state(s), from which practical implications to the assessment of the states' capacities in the post-Westphalia era may be derived. The analyzed case of Somalia reflects a growing need for realist assessments to adequately view patterns of governance in underdeveloped countries in underdeveloped regions.

State Failure in Post-Westphalia Conditions

The concept of state failure has attracted the attention of IR scholars since, at least, the early 1990s with the dissolution of the USSR and the end of the Cold War. In nearly two decades since those series of acute changes to the nature of IR, the issue of failed states remains unresolved. This poses a new challenge to scholars, given that the new system of international relations – a post-Westphalia system – is yet to fully emerge and be properly assessed.

In fact, the issue of state failure has been viewed as a local phenomenon with little significance to the wider global political environment. However, an almost 20-year period of unsuccessful attempts to resolve, or to create a viable theoretical (and practical) framework to address this issue, necessitates a review of the occurrence of state failure, the impacts of such failures and identify some of the more prevailing trends.

Previously, state failure was circumscribed to a more history-laden approach where chronologies of failure were demonstrated and analysed according to historical narratives. Various policy-implications were offered to address this problem, however none was properly implemented.[4] Currently, several new scholarly approaches to understanding state failure are being developing.

Examples of the emerging scholarship may be found in the indexes of the Mo Ibrahim Foundation and the World Peace Foundation. The Ibrahim Index of African Governance offers empirical data on trends in, as the title suggests, African governance from 2000–2008, and presents a cumulative set of indexes of governments' performance in Africa, by, for instance compiling a hierarchy of failed states on the African continent and highlighting areas of state failure. According to the authors of the index, it

> uniquely defines "good governance" as the delivery of key political goods, which we specify in terms of five categories, fifteen sub-categories, and

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[4]   See A. Yannis, "State Collapse and its Implications for Peace-Building and Reconstruction," *Development and Change* 33:5. pp. 817–835.

fifty-eight sub-sub-categories … this definition is comprehensive and common to all countries. Good government means the supply of those core political goods, whatever the culture and whatever else the government might undertake. The delivery of those core political goods can be measured with basic figures and statistics on poverty, infrastructure, the free and fairness of elections, the absence of war, and so on.[5]

As the authors of the Ibrahim Index of African Governance explain, the index "assesses national governance against 57 criteria. The criteria capture the quality of services provided to citizens by governments."[6] The outcome of the calculations performed by the authors of the index is presented in the form of a ranking chart for all African countries. The governance assessment criteria are "divided into five over-arching categories which together form the cornerstone of a government's obligations to its citizens namely: 1) Safety and Security; 2) Rule of Law, Transparency and Corruption; 3) Participation and Human Rights; 4) Sustainable Economic Opportunity; 5) Human Development."[7] The authors stress that the "(i)ndex of African Governance is unique … in a number of key ways. First, it is one of the few to measure 'governance' broadly defined. Most other work focuses on *components* of good governance—peace and security, the rule of law, corruption, political participation, human rights, sustainable development, etc."[8]

In a complimentary vein, the Fund for Peace Organisation (est. 1957), offers an annual Failed States Index, which covers governance performance in all countries of the world from 2005. This index provides a mathematically-based approach to assessing state failure, based on a number of formulas, which allows for calculating and visualizing the existing situation in terms of state failure, the prospect of failure among various countries, and to contrast these with cases of countries with low potential for state failure. The calculation of this index is based on assessing social, political and economic indicators:

Social Indicators (I-1); Mounting Demographic Pressures (I-2); Massive Movement of Refugees or Internally Displaced Persons creating complex Humanitarian Emergencies (I-3); Legacy of Vengeance-Seeking Group Grievance or Group Paranoia (I-4); Chronic and Sustained Human Flight; Economic Indicators (I-5); Uneven Economic Development along Group Lines (I-6); Sharp and/or Severe Economic Decline, Political Indicators (I-7); Criminalization and/or Delegitimization of the State (I-8); Progressive Deterioration of Public Services (I-9); Suspension or Arbitrary Application of the Rule of Law and Widespread Violation of Human Rights (I-10);

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5   "Special Paper 1," *Ibrahim Index of African Governance*.
6   "Background Briefing," *The Mo Ibrahim Foundation* available at: http://www. moibrahimfoundation.org/index-2008/pdf/english_briefing_note.pdf, p. 1.
7   Ibid.
8   "Special Paper 1," *Ibrahim Index of African Governance*.

Security Apparatus Operates as a "State Within a State" (I-11); Rise of Factionalized Elites (I-12); Intervention of Other States or External Political Actors (I-13).[9]

To contextualise this index, in 2008 the highest ranking of state failure was accredited to Somalia, which had total of 114.2 points, and the lowest ranking was Norway with a total of 16.8 points. This ranking allows scholars to visualize the so-called *red zone* countries; those with the highest prospects for state failure (currently 35 countries) and make comparisons between them on the series of indicators noted above.

There are however certain drawbacks to this emerging index-based approach. A prime shortcoming seems to be the impossibility to use these indexes for making an overview of failed states from a dynamic and\or regional perspective. The problem is that the number of analyzed country-cases in these indexes varies over time, and thus the position and rating of a given country may differ each year. For example, the Failed State Index includes data from 2005–2008 while the Index of African Governance contains data from 2000 to 2008, with reports and rankings for 2000, 2002, 2005, 2006, 2007 and 2008 available. This carries a potential of misjudgement, partially acknowledged by the authors of the indexes who stress that: "(s)cores for each country cannot be compared meaningfully year to year, but may unfortunately be interpreted in that way by those who do not fully understand the Index methodology."[10] Given these drawbacks, the indexes, however consistent, are not flexible enough to allow an assessment of state failure as a regional phenomenon.

Another approach to state failure may be derived from International Law. In international legal terms, paradoxically, the term 'failed state' is not officially recognized. However, there is a growing debate over whether it is possible to recognize *any* political or territorial unit as a state if it does not correspond with the basic UN provisions for the declaration of an independent state. In the UN's tradition, a self-governing territory was recognized as an independent state if it adhered to certain criteria such as: proven possession of a defined territory, retaining a permanent population and effective government capable of entering into relations with other states, independence, and sovereignty.[11] Moreover, international legal practice has a long-established, though not always consistent, tradition of recognizing seceding entities as newly-created states.[12]

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[9]   For example see: www.fundforpeace.org.
[10] "Ibrahim Index of African Governance: Measurement, Methods, and More," *The Moe Ibrahim Foundation* available at: http://www.moibrahimfoundation.org/index-2008/papers/.
[11] Y. Crawford, *The Concept of Statehood in International Law*. pp. 37–89.
[12] *Modes of the Creation of States in International Law*, Chapter 9. pp. 375–421.

From the perspective of recent international law, failed states pose a challenge to the established system of recognition of states as system units. Moreover, the international legal system is unable to cope with this phenomena as there is no mechanism for withdrawing of the status of the state from a given unit even if it later, after gaining recognition, fails to meet the agreed upon criterion of states. This problematic was acknowledged by Herbst (1996) who suggested applying a mechanism of 'decertification' to de-facto failed states. Herbst argued that

> (d)ecertification would be a strong signal that something has gone wrong in an African country, and that parts of the international community are no longer willing to continue the myth that every state is always exercising sovereign authority.[13]

This procedure could enhance a multidisciplinary approach, allowing scholars to consider structural factors, which have long been ignored in analyzing state failure. Herbst notes that

> (u)nfortunately, the international community, in its response to state failure in Africa, has refused to acknowledge the structural factors at work, despite mounting evidence that the loss of sovereign control is becoming a pattern in at least parts of Africa.[14]

Additionally, there is a line of reasoning which views state failure as a process, inherent in the global political system that also contributes to state formation. Along these lines Doornboos suggests that

> (d)epending on one's understanding of 'collapse' and the political dynamics that give rise to it, it is indeed conceivable to regard collapse as part of processes of state reconfiguration and formation.[15]

This understanding begs the question of applicability. For example, can this reasoning be applied to actual cases of failed states such as post-collapse Somalia? The question is whether it is possible to regard the emerging self-proclaimed entities on the territory of former Somalia as states, and therefore legitimate actors, within the international system with effective internal governing structures as "the right to be a state is dependent at least in the first instance upon the exercise of full governmental powers with respect to some area of territory."[16]

In cases of failed states, a tension between two fundamental principles of international law is present. On one hand, the principle of international recogni-

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[13] J. Herbst, "Responding to State Failure in Africa," *International Security*, 21:3, 1996/7. pp. 120–144.

[14] Ibid. pp.120–144

[15] M. Doornboos, "State Collapse and Fresh Starts: Some Critical Reflections," *Development and Change* 33:5. p. 798.

[16] *The Concept of Statehood in International Law*. p. 46.

tion – and the corresponding right of self-determination – provides an official opportunity for a territorial and political unit to proclaim its independence, and seek international recognition. In case of failing or failed states, where certain territorial units seek secession from a failing entity (or 'dissolving' state), in legal terms,

> the secession of a self-determination unit, where self-determination is forcibly prevented … will normally be reinforced by the principle of self-determination, so that the degree of effectiveness required as a precondition of recognition will be much less extensive than in the case of secession.[17]

This presents another potential threat to regional security, as in conditions of state collapse there is a strong tendency for fragmentation, which tends to lead to localised spirals of violence.

On the other hand, international law protects the principle of territorial integrity of the state "at least so far as external use of force and intervention are concerned – though not to the point of providing a guarantee."[18] Possessing formal ownership of territory does not support declarations of self-proclaimed entities to simply be regarded as states, as the effectiveness of governance is regarded as a key criterion of a state. In other words

> (t)erritorial sovereignty is not ownership of but governing power with respect to territory … (t)he right to be a State is dependent at least in the first instance upon the exercise of full governmental powers with respect to some area of territory … (t)he requirement that a putative State have an effective government might be regarded as central to its claim to statehood. 'Governance' or 'effective government' is evidently a basis for the other central criterion of independence.[19]

As an outcome of such international legal tensions there is no clear understanding of the norms that are applicable to cases of failed states and "there is no longer one single test for secessionist independence."[20]

In cases of countries facing ensuing civil strife the notion of *belligerent recognition* may be applicable. This is relevant

> (w)here a secessionist movement had achieved a certain degree of governmental and military organisation, issues of responsibility … impelled a certain de facto recognition of the situation even though the conflict was continuing … By virtue of recognition of belligerency third States were entitled to maintain strict neutrality between the parties to the conflict and the insurgents achieved a separate though temporary status.[21]

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[17] *Modes of the Creation of States in International Law*. p. 383.
[18] Ibid. p. 384.
[19] *The Concept of Statehood in International Law*. pp. 46, 55–56.
[20] *Modes of the Creation of States in International Law*. p. 384.
[21] Ibid. p. 380.

In this sense, state failure opens a certain window of opportunity for providing security at local levels: if *belligerent recognition* is granted to a warring local entity that processes a sustainable level of governing capabilities it may produce a degree of political stabilisation on the ground. This may be seen as a step to ending political violence and bringing about a negotiated settlement between the different parties involved.

There is an additional point related to legality and state failure which needs to be presented to provide deeper understanding of the phenomenon namely:

> It is necessary to distinguish unilateral secession of part of a State and the outright dissolution of the predecessor State as a whole. In the latter case there is, by definition, no predecessor State continuing in existence whose consent to any new arrangements can be sought … The dissolution of a State may be initially triggered by the secession or attempted secession of one part of that State. If the process goes beyond that and involves a general withdrawal of all or most of the territories concerned, and no substantial central or federal component remains behind, it may be evident that the predecessor state as a whole has ceased to exist.[22]

In the case of Somalia (as a failed state), a number of self-proclaimed but diplomatically unrecognized political units are present; some of which have been exercising, *de facto*, political control over their self-defined territories for several decades. The cases of Somaliland and Puntland, and to a lesser extent, Maakhir and Galmudug, serve as valid examples. To date, none of these have been internationally recognised (*de jure*). The exercise of power over such territories and, as a consequence, the construction of relative (if local) security, is largely dependent on the establishment of new sub-state actors within the general configuration of a failed state. These sub-state actors in Somali are represented by ethnic clans and networks, which may be considered patronage-based local elites. Prior to presenting an in-depth analysis of Somalia (as a failed state) it is useful to examine the distinction between several state and non-state actors as a precursor to investigating the particulars of Somalia's state failure and how its populace copes.

State and Non-State Actors

Patronage-Based Elites

Currently, socio-political and economic elites conduct activity in a new global configuration, defined by an emerging post-Westphalian international system. The present state of international affairs suggests changes and challenges

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22 Ibid. p. 390–391.

posed by the gradual decline of states as actors monopolising international exchanges.

The (supposed) post-Westphalian era has created new frameworks for elite-based actions and there is now greater fluidity in the global economy and less state mechanisms to centralise and control international trade. In developed economies, this new configuration has contributed to the expansion of the role of political and economic elites, while in underdeveloped economies, the situation is not as obvious since the structure of industries and markets are still largely dependant on the state as a regulator of economic transactions. Markets in the latter are more traditional and personal interactions tend to be more important than arbitrary rules. Evidently, the type of economic and political elite largely depends on the regime type in place and the regime's preferred form of governance – including the main actors allowed to participate – which heavily influences the economic life of the state.

In underdeveloped economies, major economic subjects – elites – conduct their economic activity under strong influence of the system of interactions, which is typical for traditional societies. In these economies, patronage-based elites play the role of key economic and political actors on both the economic market and the political arena.

Globalisation increases elites' competition and widens the prospects of modernization in these economies. Governments are induced to "maintain the 'opening' of these societies, develop the economy and thus limit the regulating capacity in a country."[23] However, this entails a potential fragmentation of a weak state because, as Doornboos noted in many post-colonial African states "their survival as independent states would have come to a halt had it not been for the international recognition of their sovereignty."[24]

Africa is associated with particular political and economic development mechanisms. One of the key differences between Western and oriental economies is visualized in the tradition of recruiting the ruling elite through political parties' competition. Political parties in Asian and African societies are often formed on the basis of a 'patron-client' relationship, which excludes the consideration of parties' political platforms and manifestos. The political relations between parties are substituted by a system of personal and often family, or relative-based relationships between leaders and party members.

The internal security configuration of underdeveloped states remains under strong influences from clientelism, which may be defined as a dissemination of ethnic, religious, clan-based, family-based and other liaisons into the political sphere. Clientelism remains one of the basic principles of the recruitment of

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[23] K. Kaiser, "Globalisation as democracy problem" *Internationale Politik*, 4, 1998.

[24] See: M. Doornboos, "State Collapse and Fresh Starts: Some Critical Reflections," *Development and Change* 33:5, 2002. p.809; and R. Jackson, *'Quasi-States' Sovereignty, International Relations and the Third World*, Cambridge University Press, 1990.

elites in underdeveloped countries (such as Somalia). Political and economic tradition still plays a key role in these societies. In countries of Africa in general the process of state-building has never been accomplished according to Western standards. As a result, it is these countries where all mistakes and miscalculations of governance are most visible as organisational structures in such societies are often based on authoritarian principles where key political leaders create a ruling 'presidency clan' – an informal network of professional politicians and businessmen who hold key posts in a government.[25]

Internal security provisions in such states are often haunted by problems of power distribution and lack the institutional frameworks for arbitrarily regulating the rights and responsibilities of different organs of governance and citizenry as a means of constructing a secure, internally stable polity able to effectively grow economically to the benefit of all segments of society. While it should be noted that the early post-colonial period witnessed the creation of the 'bureaucratic' state (in newly independent, post-colonial states); some institutions were indeed formed in a bid to enter the international economic system and make structural adjustments to internal political and economic hierarchies. However, political elites largely failed to adequately address issues of power sharing, and power transference, which are crucial additives for constructing reflective and sustainable states. Indeed, throughout much of the developing world, inept political elites were substituted according to 'presidential' whims and, in a climate of political survival, ruling cliques sought to enhance their governing positions and encouraged patronage-based elites – on the basis of personal, clan relationships – were loyalty superseded all other commitments.[26] Clans represent a type of patronage-based elite and it is clear that political parties – in many failing states – are formed on a *patron-client* relationship, where political platforms are secondary to the sentiment of the 'in' group and political parties represent and are manifestations of certain clans. Political relations *between* parties are thus defined by inter-personal and often family- or relative-based relationships between leaders and party members.

In this ostensibly post-Westphalian system, patronage-based elites may act as alternatives to more market-based and their influence on a states' economic development may be both positive and negative though is closely connected with political transformation. In failed states, patronage-based elites may act as alternative elites, or alternative market players using power vacuums, and the

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[25] See: W. Zartman (ed), *Collapsed States: The Disintegration and Restoration of Legitimate Authority*, (Lynne Rienner), 1995.

[26] Coyne defines Somali clans as being 'determined by patrilineal descent and membership can be as large as several hundred thousand members. Within the larger clan structure, smaller groups, known as diya (paying) groups, also exist. See: C. Coyne, "Reconstructing Weak and Failed States: Foreign Intervention and the Nirvana Fallacy," *Foreign Policy Analysis*, 2, 2006. p. 347.

lack of state-imposed regulations, to establish new conditions for the economic and political environment.

Non-State Actors in a Failed State Case: a Local Example

Before turning to the case of Somalia, it is important to present another set of actors operating within a state, particularly a failed state. These are non-state actors, which in contrast to patronage-based elites noted above; tend to shy away from assuming direct political control over a state and seek to control certain key elements of the former state.

The emerging post-Westphalian system may be characterised by the ambiguous role of some non-state actors whose impact have rarely been assessed as they function within failed states and it is important to examine their behaviour, aims and ambitions, to reveal reasons for their emergence and their actual and potential impact on the internal dynamics of failed states.

In the Horn of Africa, since the 1990s, various radical organisations have spread and intensified the scope of their activities. Historically, countries proximate to the Horn maintain relationships to the Islamic Middle East and since the 1990s the influence of radical organisations has widened as a result of a regional power vacuum following the collapse of the USSR (including the subsequent end of the Soviet-Afghanistan conflict), the stalemate in the Iran-Iraq war, détente and peace negotiations in the Arab-Israeli conflict and the US-led 'liberation' of Kuwait. Since those events, business groups from Saudi Arabia, Iran, Turkey and Malaysia have increased their investments to the Horn in the areas of mining, and food-stuffs. Along with heightened investments, a massive project based on the construction of mosques was undertaken, helping to consolidate Islam's influence in traditionally non-religious regions. After the Ethiopia-Eritrea war (1998–2000), both countries were financially exhausted and required international reconstruction assistance. This inspired diplomatic offensives – directed at the Islamic world – for loans and direct investment. As a consequence, Ethiopia had to adopt a confessional policy and several Muslim organisations were revived or created. These included the "Supreme Council on Muslim Affairs" and the "Regional Association of Muslim Scholars," among others. At present, these organisations operate as a network of non-state actors on sub-state levels, and aim to widen the presence of Islamist organisations in all regions of the country. For instance, in the Afaria region of Ethiopia (close to the Ethiopian-Somali and Ethiopian-Kenyan borders) a prolonged stand-off, between Tigrai-Amhara organisations (Tigrai Liberation National Front and Afar Liberation Front), continues to simmer.

Other significant radical organisations include Al-Ittihad al-Islamiyya, Islamic Front for Oromo Liberation, National Front for Liberation of Ogaden, Oromo Liberation Front and the Muslim Brothers. These organisations aim to create an Islamic Republic of Oromia in the border region of Ethiopia, Kenya

and Somalia. The government of Ethiopia has taken political, economic and military measures to weaken the activities of the Oromo Liberation Front however; the government fails to adequately limit the radical activities of other 'Fronts,' as these organisations have exhibited attempts to unite their efforts.

The impact of radical Islamic organisations in the Horn of Africa may be seen through several faucets:

1. The consistent geographic expansion of 'Islamized' regions,
2. Providing financial support to local radical Islamic organisations,
3. The fast-track transformation of Muslim communities into extremist organisations,
4. The incorporation of Sharia-based law in Muslim communities to the detriment of state-imposed law,
5. The increased lobbying of Islamist activists in government.

These organisations aim to provoke local Ethiopian (radical) Muslim communities to open, violent confrontations with other communities. The activities of such radical organisations are often well-coordinated: for example, in early 2002 (January) the followers of the Oromo Liberation Front staged localised clashes in the towns of Harar, Nazret and Addis-Ababa. As a result, 3 people were reported dead and 100 wounded only in Harar.

An internationally-active radical organisation, Al-Ittihad al-Islamiyya, has a history of involvement in the African Horn. This organisation, which acts as an independent non-state actor in the region, coordinates its activities with local radical organisations (including fronts, supporting the activity of Oromo, Afar and Tigrai political groups) and with Somali military and political groupings. Along with Al-Ittihad al-Islamiyya there are other non-state radical organisations, which promote extremism from their bases in Somalia, such as Al-Majmaa al-Islam, Al-Sunna ba al-Djamaa and Ansar al-Sunna.

The activities of such organisations demonstrate the potential challenges faced by neighbouring states. It is reasonable to expect that in conditions of continuing civil war and political instability in Somalia, the potential role and impact of radicalized organisations will gradually increase. The contagion and deployment of non-state actors – re: violent radicalized organisations – may contribute to worsening the conditions in Somalia and other African Horn states, thus enhancing the prospect of a regional failure.

The Case of Somalia: 1990–2009

As noted, in war-torn Somalia, the substitution of elites by clans in both economic and political spheres reveals acute economic and political challenges. In fact, this substitution has contributed to the process of state failure by creating a parochial mechanism of resource distribution:

In the Somali case, it was the inability to accommodate conflicting interests, often articulated on a clan basis, and the instrumental use to which the state apparatus was put in the pursuit of this inter-clan violence, that caused the disintegration of the fragile system. For all its repressive qualities, the Somali state had a relatively weak presence within the society, which meant that it could all the more easily collapse and be thrown off when inter-clan conflict and repression came to a head.[27]

In Somalia, in 1991–1999, patronage-based elites had applied for international financial and humanitarian aid on behalf of the state of Somalia. International funds and agencies provided the requested aid to these recipients; however, there was no outcome in terms of development of the country. As the United Nations Development Programme does not assess the Human Development Index for Somalia, it is difficult to consider exact data of aid inflow and redistribution of foreign aid between the leading clans in former Somalia.

Between 1991 and 1993, recipients of international aid distributed these resources between different clans according to the clan hierarchy. The extensive scale of this 'distribution' is obvious, since the whole Somalian society is based on a hierarchy of ethnic clans. Practically the entire amount of international aid went to clans, which formed the patronage-based elites in Somalia. These elites used the power vacuum, which was created in conditions of state failure, to establish a scheme of acquiring international financial aid without providing any warrants.[28] As credits and loans to Somalian agencies have thus been abstracted from state guarantees, the investment climate in the country has deteriorated. Major international investors abandoned the country, and eventually the majority of international assets were withdrawn. This led to the decrease of social spending and, as a result, the level of poverty soared.

The political configuration of state failure is largely triggered by the creation and development of independent proto-state units, which claimed authority over several territories of Somalia. This was partly endowed by the government of former Somali Republic in 1960, when "political affiliations quickly developed along clan-based lines (…) (t)he majoritarian parliament created a set of incentives that led to constant struggles where clans would attempt

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[27] M. Doornboos, State Collapse and Fresh Starts: Some Critical Reflections. Development and Change 33(5) 797–815 (2002), Blackwell Publishers, USA, p.801; see also M. Doornboos, J. Markakis, 1994, "Society and State in Crisis: What went wrong in Somalia?", in M. A. Salih, L. Wohlgemuth (eds) "Crisis Management and the Politics of Reconciliation in Somalia", pp.12–18, Uppsala: Nordiska Afrikainstitutet.

[28] N. Piskunova. State Failure: Local Phenomenon or Global Trend? On Crisis on Somalia 1990-2008," *Cosmopolis Political Studies Journal.* №3 (22) 2008, pp.79–87, Moscow, Russia/pdf and summary available online at www.cosmopolis.mgimo.ru.

to form coalitions and then create disputes among other clans in order to control a majority."[29] In 1991, Somalia's northern territories (former British Somaliland) claimed independence. In the north-eastern parts of Somalia, the Majeerteen ethnic clan claimed independence for the autonomy of Puntland. In 2002, south-western Somalia also declared autonomy (these territories included Bay, Bakuul, Jubbada Dexe, Gedo, Shabeelaha Hoose, and Jubbada Hoose), and in 2006, the creation of an independent Jubaland was declared.[30] All these independent units were created by clans, or patronage-based elites, which also established limited markets for the exchange of goods and services on these territories. Some of these attempts were rather successful, and they were noted in the Report of the Secretary-General of the UN as prerequisites for 'calm conditions' amid the 'chaos and anarchy' found in the rest of former Somalia.[31] One of these successful attempts was Somaliland, which "while not recognized by any foreign government as a legitimate state, (…) has remained stable with the creation of a constitution."[32]

An ensuing standoff between Somaliland and Puntland, fostered by competition for power and resources between patronage-based elites, results in the status-quo of non-recognition of either of these units (as states) on the international level. A territorial dispute, spawned by struggles for power, is actually developing into a full-scale war with new political entities emerging.[33] This creates an additional security threat to the region, as what is seen in these circumstances is in fact a "process of state-building which appears consistently to exacerbate instability and armed conflict."[34]

Both sides claim the provinces of Sanaag and Sool as part of their respective territory. The conflict commenced in 2003 when Puntland took control of Sool's provincial capital, Las Anod. In April that year, both sides engaged in

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[29] C. Coyne. Reconstructing weak and failed states: foreign intervention and the nirvana fallacy, Foreign Policy Analysis (2006), 2, p. 348.

[30] These acts were made public by the representatives of corresponding entities, and received media coverage.See reports on announcing of independence of these units on web-resources www.somalilandforum.com: http://www.waltainfo.com; http://www.irinnews.org/IRIN-Africa.aspx; www.somaliwatch.com, www.alertnet.org,www.panapress.com, www.hmbasha.net, www.hmbasha.net, www.geeskaafrika.com, www.bbc.co.uk/worldservice/africa/features/focus_magazine/index.shtml, www.geeskaafrika.com/igad2020_9dec05.html, www.channelafrica.org/portal/site/channelafrica/, www.channelafrica.org/portal/site/channelafrica/.

[31] See Reports of the Secretary-General of the UN S/2001/1211, December 19, 2000, paragraph 34, and S/2001/1201, October 25 2002, paragraph 55, Special Report of the Secretary-General no.4/2000, (2000) OJ C 113/1, Paragraphs 82–83. These reports are available at resource www.un.org.

[32] C. Coyne. Reconstructing weak and failed states: foreign intervention and the nirvana fallacy, Foreign Policy Analysis (2006), 2, 349.

[33] See CONFLICT BAROMETER 2007, p. 31, Heidelberg Institute for International Conflict Research, 2008.

[34] K. Menkhaus. State collapse and the threat of terrorism, London: International Institute of Strategic Studies, p. 18.

skirmishes in the province of Sanaag, which later declared its independence from Puntland as well as its allegiance to the Transitional Federal Government of Somalia, forming the autonomous entity of Maakhir.

However, the territory of south-eastern and southern Somalia, where the majority of the population is concentrated, remains in political and economic chaos, sustained by competition between patronage-based elites. In structural terms, this territory is a 'vacuum of power,' with no elements of sustained governance even in local communities. In this way, patronage-based elites, which control local communities, prevent investments in these territories and restrict normal business and political interactions with the wider international community.

The activisation of non-state actors, such as clans (patronage-based elites) and radicalized religious organisations in newly created proto-state units has contributed to the absence of a unified central government in Somalia for the past 10 years. The interim (Transitional) government tries to control parts of southern Somalia from its capital in Baidoa, however, it is not deemed legitimate by the majority of Somalians. In this situation, the future of security configuration in Somalia remains an open question. However, at this stage it is evident that new developments, demonstrated by Somalia, shows the rise of new actors and trends, which may have an influence on the process of state-building in these territories. It is visible that the current condition of state failure remains a threat to the system of regional inter-state system, given the conditions of the emerging post-Westphalia order.

Conclusions

Despite a growing need to address the current trends of political and territorial development in situation of state failure, there is a lack of a multidisciplinary approach that would merge existing views on state-building under conditions of negative security. As demonstrated with the case of Somalia; self-proclaimed territorial and political entities may exhibit a potential for advancing to self-governance. However, these attempts are hindered by negative security, largely an outcome of ensuing civil strife.

The supposed post-Westphalian period imposes new challenges to the process of state-building under negative security configuration. The role of non-state actors, both internal and external, is intensified by instability caused by inter-clan warfare. On the internal (sub-state) level, patronage-based elites attempt to substitute the authority of the state (in managing security). On the external level, the rise of radicalized non-governmental organisations provokes additional violence and thus contributes to the chaotic situation.

These trends carry both positive and negative consequences not only for the failed state, but to the region in general. A positive consequence may be

the development of new forms of statehood with patronage-based elites being the pioneers of the process. A negative consequence may be the intensification of activities of radicalized organisations, which may hinder the process of stabilization of political situation in this region.

Finally, a situation of the complicated process of initial state building in situation of a negative security environment of a failed state may be viewed as first and unique attempt to create states in post-Westphalia era as a result of state failure. This calls for a response by scholars of IR, which could offer a theoretical understanding of these real-time practical developments.

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Multilateral Development Bank Accountability Mechanisms: Developments and Challenges[1]

Richard E. Bissell and Suresh Nanwani[2]

I. Introduction

Prior to 1993, the multilateral development banks[3] (MDBs) could be held to account for their actions only by their shareholders – governments in all cases that provided working capital for the banks for their lending and development purposes. It was thus a fundamental change in the system of international governance for citizens adversely affected by poorly-designed and/or implemented projects supported by these banks to be able to file claims through a formal accountability mechanism or forum to redress their grievances. The term "accountability mechanism" in this article means an avenue for private individuals and groups to file claims against the institution for redress of their grievances on poorly-designed and/or implemented projects. Clearly the MDBs had always been "accountable" to their shareholders; the term is introduced here in the sense that public institutions have become increasingly directly accountable to publics in recent decades, and part of that trend has been the inclusion of international financial institutions (IFIs) with a development mandate.

This article focuses on six MDB accountability mechanisms, that is, the World Bank Inspection Panel (WBIP), Inter-American Development Bank (IDB) Independent Investigation Mechanism (IIM), Asian Development Bank's (ADB) Accountability Mechanism of 2003 which replaced its Inspection Function of 1995, the Compliance Advisor/Ombudsman (CAO) Office of International Financial Corporation (IFC) and Multilateral Investment Guarantee Agency (MIGA), European Bank for Reconstruction and Development's (EBRD) Independent Recourse Mechanism (IRM) and African Development Bank's (AfDB) Independent Review Mechanism (IRM). Outside MDBs, accountability mechanisms at several national financial institutions with international activities have also been set up such as Japan Bank for International Corporation (JBIC), Nippon Export and Investment Insurance, Japan (NEXI), Japan International Cooperation Agency (JICA), and Overseas Private Investment Corporation, USA (OPIC).[4] Over the past 15 years, there has been a proliferation of MDB accountability mechanisms, each having its own unique system in attempting to fix problem projects. Grievance claims filed with accountability mechanisms have been increasing over the years, and citizens are still clamoring for MDBs to adopt new approaches or ways to hear their voices and handle their grievances.

This article was originally based on the outreach presentations by ADB's Compliance Review Panel[5] on the ADB Accountability Mechanism and on trends and challenges of MDB accountability mechanisms in Australia, England, Japan, and the Philippines from 2005 to 2007 and the inputs received from the participants including suggestions on better accountability procedures and redress of grievances. Participants were ADB staff, government officials, nongovernmental organizations (NGOs), civil society members, academic staff, undergraduate and postgraduate students, practicing lawyers, private sector officers, and the diplomatic community. The purpose of this article is to stimulate debate and discussion on the challenges faced by MDBs and their accountability mechanisms and to identify possible approaches that can be taken to meet these challenges.

Section II describes the establishment and raison d'être of MDB accountability mechanisms. Section III gives a brief overview of these mechanisms and is followed by an analysis on the emerging trends and directions of these mechanisms in Section IV. The article concludes in Section V with a discussion

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[4] In 2003, JBIC introduced its "Summary of Procedures to Submit Objections Concerning JBIC Guidelines for Confirmation of Environmental and Social Considerations" and NEXI established its "Procedures for Submitting Objections on Guidelines of Environmental and Social Considerations in Trade Insurance". In 2004, JICA enacted its "Modus Operandi of the Objection System regarding compliance with JICA Guidelines for Environmental and Social Considerations" and OPIC established its Accountability and Advisory Mechanism. These mechanisms are not specifically discussed here as they would be the subject of another article.

[5] See the ADB Compliance Review Panel (CRP)'s outreach activities at http://www.compliance.adb.org/dir0035p.nsf/alldocs/ELLN-6NC4CT?OpenDocument (accessed October 1, 2008).

of the challenges that lie ahead for MDBs and their accountability mechanisms and makes suggestions on how these banks and their mechanisms can meet the challenges.

II. Establishment and Raison D'être of MDB Accountability Mechanisms

The charters or constituent documents of the seven MDBs are clear on the mandates of these institutions, namely, to promote and finance the economic development of the developing or borrowing countries. The charter of the first MDB – International Bank for Reconstruction and Development (IBRD) – was drafted in 1944 to address the need for economic reconstruction and development worldwide with the aftermath of the Second World War. Regional development banks, namely, IDB, AfDB, ADB, and EBRD, were later established to focus on development in countries in their respective regions. IFC and MIGA were created (in 1956 and 1985, respectively) to supplement the activities of IBRD and IDA by covering private sector operations.

Although IBRD was established in 1946 and other MDBs were established thereafter (IDB was established in 1959, AfDB and ADB were set up in the following decade, and EBRD was created in 1991), the role of civil society organizations (CSOs) as a stakeholder was not given prominence in the earlier years of the banks' business processes. Until the late 1980s, people adversely affected by projects, CSOs, and the application of environmental and social policies (such as environment, involuntary resettlement, and disclosure of information) had little impact on MDBs which were otherwise free to design and approve projects in coordination with their borrowing countries for public sector operations and their project sponsors for private sector operations. The MDBs relied on borrowing governments to deal with issues arising from communities and CSOs in the project area.

In the 1980s, the emergence and growth of advocacy NGOs in the United States, operating in Washington D.C. where the World Bank is headquartered, and in Europe, and their working with local communities, citizen groups, or fledgling Southern NGOs in borrowing countries that were affected by World Bank projects in Brazil, Indonesia, and India,[6] set the tone for the World Bank to devise an accountability mechanism to give affected people a voice to present claims. The traditional view that an MDB is formally accountable only to its member governments was getting eroded with increasing public accountability to, and participation from, civil society in both donor and developing countries. Concomitantly, there was a shift in development models towards sustainable

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[6]   These are the Polonoroeste road and resettlement project in Brazil, the Sardar Sarovar (Narmada) Dam and Power Projects in India, and the Kedung Ombo Multipurpose Dam and Irrigation Project in Indonesia.

development and with the right to development formally recognized at the 1992 United Nations Conference on Environment and Development, MDBs, such as the World Bank (followed by other institutions such as ADB and IDB) began to develop environmental and social policies to improve their development effectiveness by emphasizing the interests of affected communities through policies on involuntary resettlement, environment, and indigenous peoples.[7]

The WBIP and ADB Accountability Mechanism will be discussed in this section; the former is the first, and remains the most experienced, example of an MDB accountability mechanism, and the latter replaced the original Inspection Function with an innovative system which has both problem-solving and investigation phases. The WBIP was created in 1993 through a combination of external and internal pressures, primarily external. The external pressure stemmed from concerns by NGOs in America and Europe with support from NGOs in developing countries, which were disgruntled at poorly-designed and/ or environmentally-damaging projects, including the Sardar Sarovar Projects in India and the Yacyretá Hydroelectric Project in Argentina and Paraguay. Also, there was pressure from donor countries in IDA's 10th replenishment negotiation process in 1992. The internal pressure came from the Board of Directors, triggered by the publication of the Morse Commission's report[8] in June 1992, and the Wapenhans Report[9] in November 1992. The World Bank created the Morse Commission, an independent commission headed by Bradford Morse to undertake an independent review of the Sardar Sarovar Projects in India. The World Bank also established a portfolio management task force on its lending operations that produced the Wapenhans Report, which documented the low "success rate" of World Bank-financed projects. These two reports reinforced NGO proposals for an independent citizen-driven grievance mechanism. The World Bank, in response to the Wapenhans Report's recommendations, concluded in its action plan that "the interest of the Bank would be better served by the establishment of an independent Inspection Panel" with a view to augmenting the Bank's existing supervision, audit, and evaluation functions.[10] Civil

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[7] Günther Handl, "The Legal Mandate of Multilateral Development Banks as Agents for Change Toward Sustainable Development", 92 *American Journal of International Law* 642 (1998).

[8] See Bradford Morse and Thomas Berger, *Sardar Sarovar: Report of the Independent Review* (Ottawa: Resources Future, Inc., 1992). The authors were of the view that the Projects were flawed, the resettlement and rehabilitation of all those displaced by the Projects was not possible under prevailing circumstances, and that the environmental and social impacts of the Projects were not properly considered or adequately addressed.

[9] World Bank, *Effective Implementation: Key to Development Impact, R192-125* (November 3, 1992). The Wapenhans Report noted that it deemed 37.5 percent of the World Bank's projects completed in 1991 as failure, up from 15 percent in 1981 and 30.5 percent in 1989, and that there was a declining trend in project performance because of the presence of an approval culture (where priority was on lending targets rather than on project quality).

[10] World Bank, Portfolio Management: Next Step: A Program of Actions (July 22, 1993), para. 60.

society played a catalytic role in the establishment of the WBIP, which in turn resulted in the adoption of similar mechanisms in other MDBs.[11]

The ADB's experience in setting up its accountability mechanisms – the Inspection Function in 1995 and the Accountability Mechanism in 2003 – is instructive in understanding how external and internal factors affected their establishment and reform.[12] The external factors were the measures taken by the World Bank and IDB in promoting transparency and accountability in their operations, as well as enhancing efficiency and development effectiveness through the establishment of their accountability mechanisms in 1993 and 1994 and the bank's commitments in relation to the general capital increase for its ordinary operations and in relation to its Asian Development Fund (ADF)[13] VII negotiations. Markedly absent was the civil society pressure that was the sin qua non in the creation of the WBIP. The three internal factors were the bank's response to its task force established in 1994 to review its operations to enhance portfolio quality;[14] giving effect to the bank's policy on confidentiality and information disclosure adopted in 1994; and the aim to "increase transparency and accountability, and also complement the Bank's existing supervision, audit and evaluation systems".[15]

In contrast to the short-lived Inspection Function, the ADB Accountability Mechanism heralded a new dimension of accountability mechanism as it overhauled the previous system of inspection (investigation) to encompass both problem-solving and compliance review. The review of the Inspection Function examined the policy to consider the application of private sector operations as they were not covered under the policy. There were significant external pressures from civil society, primarily advocacy NGOs, who were not satisfied with the handling and outcome of the investigation of the Samut Prakarn Wastewater

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[11] Maartje van Putten, 'Policing the World', *Accountability Mechanisms for Multilateral Financial Institutions and Private Financial Institutions* (The Netherlands: Tilburg University and Canada: McGill University, 2006), 79. There is considerable literature on the events shaping the development of accountability mechanisms at the World Bank and ADB and other institutions as well as on the impacts in MDB lending operations. See, for example, Dana Clark, Jonathan Fox, and Kay Treakle, eds., *Demanding Accountability: Civil-Society Claims and the World Bank Inspection Panel* (Rowman and Littlefield, 2003); Eisuke Suzuki and Suresh Nanwani, "Responsibility of International Organizations: The Accountability Mechanisms of Multilateral Development Banks", *Michigan Journal of International Law* 27(1) (2005): 181; and David B. Hunter, "Civil Society Networks and the Development of Environmental Standards at International Financial Institutions", 8 *Chicago Journal of International Law* (2008): 437.

[12] ADB, Review of the Inspection Function: Establishment of a New ADB Accountability Mechanism (Manila: ADB, May 2003). ADB, Establishment of an Inspection Function (Manila: ADB, December 1995).

[13] The Asian Development Fund is the bank's special operations window providing concessional funds to borrowing countries, similar to IDA replenishments.

[14] ADB, Report of the Task Force on Improving Project Quality (Manila: ADB, January 28, 1994).

[15] ADB, *Establishment of an Inspection Function* (Manila: ADB, December 1995), para. 2.

Management Project in Thailand, the first case under this policy which caused "concerns about independence, credibility, transparency and information dissemination, and effectiveness of the Inspection Function".[16] External pressure was also exerted by donor countries in the ADF VIII replenishment, where they "recommended a strengthened and more independent Inspection Function, and the Function should have oversight of private sector projects"[17] and by the G-7 countries in 2001 which announced that MDBs "should further improve and strengthen accountability and transparency, including through the establishment or the reinforcement of central control mechanisms to ensure compliance with agreed policies and safeguards".[18]

The Inspection Function review process took a year and a half from October 2001, with the establishment of a steering committee and a working group to carry out the review, to the approval of the policy by the bank's Board of Directors in May 2003. The review process included consultations and online comments within and outside the bank with the Board of Directors, Management,[19] staff, government, civil society, and private sector on several drafts of the policy paper in 10 cities across ADB member countries. This was in stark contrast to the previous decision process where no external consultation had taken place.

A similar but less intense external consultation process of getting public comments on a draft paper was also used in the setting up of the EBRD accountability mechanism and in IDB's proposed enhancements to its IIM in 2005. The AfDB had a proposal on an inspection panel in 1994 but this did not get approval by the bank's Board of Directors as the institution went through major reorganization, and in 2003, the bank instead hired a consultant to prepare a study on a proposed accountability mechanism. It sought online comments from the public on the report prior to the adoption of the mechanism by the Board. The CAO Office at IFC and MIGA was created in 1999 in response to a request filed with the WBIP on a private sector operation supported by IFC in the Pangue Hydroelectric Dam Project in Chile in 1995 and civil society lobbying for an accountability mechanism at IFC and MIGA as the activities of these two institutions are not covered by the WBIP.

The purpose of project affectees and CSOs in bringing or supporting claims to the MDBs, initially the World Bank, was to demand that the banks

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[16] ADB, Review of the Inspection Function: Establishment of a New ADB Accountability Mechanism, para. 4.

[17] ADB, *ADF VIII Donors' Report: Fighting Poverty in Asia* (November 2000), para. 129, http://www.adb.org/Documents/Reports/ADF/VIII/ADFVIII_Donors_Report.pdf (accessed October 1, 2008).

[18] *Statement of G-7 Finance Ministers and Central Bank Governors* at Palermo, Italy (February 17, 2001), para. 12, http://www.g8.utoronto.ca/finance/fm20010217.htm (accessed October 1, 2008).

[19] At ADB, "Management" refers to the President and the Vice Presidents. This term in other MDBs typically refer to the chief executive officer and the vice presidents.

be transparent and comply with their policies in their operations, in the light of the Rio Earth Summit of 1992 and the protests over projects, especially the Sardar Sarovar Projects in India, where more than 100,000 people would be subject to involuntary resettlement from the construction of the dam. They were using the World Bank as a fulcrum because of its reputed clout and influence over policymaking in the developing countries where civil society was finding it difficult to get political traction.[20] At the same time, the purpose of these mechanisms is to address the absence of access to effective remedies by individuals negatively impacted by bank projects due to an MDB's immunity from local jurisdiction.[21] MDB immunity "has remained absolute, barring exceptions allowed under specific provisions mandated by the nature of the organization or of the dispute in question."[22] Recourse to national courts is not available unless MDBs waive their immunities or organize some form of dispute settlement by agreement. Notwithstanding the progressive development as citizen-driven grievance mechanisms, these mechanisms were primarily intended to serve as internal governance tools as non-judicial bodies and to enhance the institutional development effectiveness, in line with the mandates of their institutions.[23] At the minimum, the MDB accountability mechanisms provide for the first time under international law a window of access for individuals to file claims with these institutions on their complaints with MDB projects and with the opportunity to influence decision making processes at these institutions.

III. Overview of MDB Accountability Mechanisms and Emerging Trends and Directions

In this section, a brief overview of each MDB accountability mechanism is given followed by an analysis on the emerging trends and directions in structure, functions and operations. The establishment of the WBIP resulted in a cascading effect which began at IDB in 1994 (IDB's Independent Investigation

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20 Richard E. Bissell. 2005. Learning Processes in International Accountability Mechanisms. *The Innovation Journal: The Public Sector Innovation Journal*. Volume 10 (1). p. 2.

21 Eisuke Suzuki and Suresh Nanwani, "Responsibility of International Organizations: The Accountability Mechanisms of Multilateral Development Banks", *Michigan Journal of International Law* 27(1) (2005): 206.

22 Emmanuel Gaillard and Isabelle Pingel-Lenuzza, "International Organizations and Immunity from Jurisdiction: To Restrict or to Bypass", *International and Comparative Law Quarterly* Vol. 51 (January 2002). See, for example, ADB's charter in Article 50.1 which prescribes that its immunity does not extend to "the exercise of its powers to borrow money, to guarantee obligations, or to buy and sell or underwrite the sale of securities." The World Bank has similar immunities which are stated in IBRD's Articles of Agreement, Chapter VII, Section 3 and in IDA's Articles of Agreement, Chapter VIII, Section 3. AfDB, EBRD, IFC, and MIGA charters have similar provisions.

23 Suresh Nanwani, "Accountability mechanisms of multilateral development banks: powers, complications, enhancements» in Amanda Perry-Kessaris, editor, «Law in the Pursuit of Development: Principles into Practice?», (Routledge, Taylor & Francis Group, forthcoming)

Mechanism), followed by ADB in 1995 (Inspection Function) and in 2003 (ADB Accountability Mechanism), by IFC and MIGA in 1999 (Compliance Advisor/Ombudsman [CAO] Office), by EBRD in 2003 (its Independent Recourse Mechanism commenced functioning in July 2004), and by AfDB in 2004 (its Independent Review Mechanism was effective in early 2006). The overview focuses on salient aspects, highlighting similarities, differences and unique features, and is not intended to contain detailed information which is available from other studies and from the websites of the MDB accountability mechanisms.[24]

World Bank Inspection Panel

The precursor of the MDB accountability mechanism is the WBIP which was created by a resolution.[25] The Panel has three members of different nationalities from World Bank member countries and it reports directly to the Board of Directors of IBRD and IDA. One Panel member is a full-time chair who is elected by the members themselves. The Panel members are appointed by the Board for a 5-year nonrenewable term, and after serving on the Panel, cannot be employed by the World Bank Group. The Panel investigates complaints filed by at least two or more persons with common interests or concerns and who are living in the country where the target project is located. An individual is not allowed to file a claim and this common feature runs through all other MDB accountability mechanisms except for IFC/MIGA's CAO Office. The Panel investigation is focused on fact-finding and its report is sent to the Board on whether there is violation of the World Bank's operational policies and procedures without making any recommendations for remedies as it is not allowed to do so. The Panel is supported by a secretariat. The Panel does not carry out monitoring of the action plans prepared by Management in response to the Panel's fact-finding investigation unless the Board, on an exceptional basis, requests the Panel to do so, or if a new request based on new information is filed by the affected group.

There have been two Board-level reviews of the Panel's structure and functions, one in 1996 which was required under the resolution creating the Panel

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[24] See the World Bank Inspection Panel at http://www.worldbank.org/inspectionpanel; ADB's Accountability Mechanism at http://www.adb.org/Accountability-Mechanism/default.asp; AfDB's Independent Review Mechanism at http://www.afdb.org/portal/page?_pageid=473,5848220&_dad=portal&_schema=PORTAL; IDB's IIM at http://www.iadb.org/aboutus/iii/independent_invest/independent_invest.cfm; EBRD's Independent Recourse Mechanism at http://www.ebrd.com/about/integrity/irm/index.htm; and IFC/MIGA's Compliance Advisor/Ombudsman (CAO) Office at http://www.cao-ombudsman.org/ (accessed October 1, 2008).

[25] *The World Bank Inspection Panel, Resolution No. IBRD 93-10 and Resolution No. IDA 93-6* (International Bank for Reconstruction and Development and International Development Association, September 22, 1993).

after 2 years from the date of the appointment of the first Panel members, and the other in 1999. The 1996 Clarifications[26] focused on four main areas: preliminary assessment by the Panel, eligibility and access, outreach and the role of the Board of Directors. The 1999 Conclusions[27] clarified the application of the resolution in four main areas: preliminary assessment, Board authorization of an investigation, material adverse effect, and action plans. Both reviews involved some input from civil society, but the ultimate decision was entirely the Board's. From 2000 to 2002, the Panel was in the process of revising its Operating Procedures to reflect the 1996 Clarifications and 1999 Conclusions but there has been no revision made thereafter.[28] As of October 1, 2008, 52 claims have been filed with the Panel.

IDB's Independent Investigation Mechanism

The IDB's IIM is similar to the WBIP in its operation with two main differences. First, there is no permanent panel but instead a roster of investigators of 15 members from the bank's member countries approved by the Board of Directors (the original figure of 10 members was increased to 15 when the IIM was amended with Board approval in 2000). A panel of investigators from the roster, not fewer than three, is appointed ad hoc by the Board of Directors to investigate a claim as required. The panel can make recommendations to the Board of Directors in relation to its findings. Members of the roster cannot be employed by the bank for a period of 2 years following the termination of their appointment. Second, the IIM also applies to private sector operations except for equity operations as it applies to IDB-supported operations to cover loan, technical cooperation and guarantee operations only.[29] In addition to increasing the number of investigators on its roster, the IIM's amendment in 2000 also included the establishment of a Coordinator function to oversee IIM administration as there was no permanent support or administrative staff to support the IIM. The Coordinator was tasked to provide support functions including processing all requests for investigations including whether the requests meet the requirements under the policy for the roster member to review the request because under the original mechanism, the President made a determination

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[26] 1996 Clarifications of Certain Aspects of the Resolution (October 17, 1996).

[27] 1999 Conclusions of the Board's Second Review of the Inspection Panel (April 20, 1999). The 1999 Conclusions of the Board's Second Review of the Inspection Panel is also sometimes referred to as the 1999 Clarifications of the Board's Second Review of the Inspection Panel; see the Inspection Panel's Annual Report (August 1, 2000 to July 31, 2001) where both titles are used at pp. 43 and 44.

[28] World Bank Inspection Panel Annual Report from August 1, 1999 to July 31, 2000, 49. See also the World Bank Inspection Annual Report from August 1, 2000 to July 31, 2001, 47 and the World Bank Inspection Annual Report from August 1, 2001 to June 30, 2002, 59.

[29] IDB Independent Investigation Mechanism (June 30, 2000) at http://www.iadb.org/cont/poli/mecanism.pdf para. 1.2 (accessed October 1, 2008).

on eligibility and recommended to the Board whether an investigation panel should be convened.

An IIM review process began in 2005 with a Proposal for Enhancements to the IIM: Draft Consultation and Compliance Review Policy of February 2005[30] and public consultations were held in three cities as well as comments sought from the public with all comments to the draft policy made available in July 2005.[31] The latest IIM annual report states that the matter of "design of any enhancements to the Bank's IIM will need to reflect the Bank's new organizational model and strategic focus, raising technical issues regarding the most effective organization and structure of the IIM function within the realigned Bank. These questions will need to be considered during 2008."[32] There is no full-time person appointed to provide secretariat support though this changed when a full-time Coordinator was appointed in January 2008 to support the IIM review process and to coordinate IIM matters. As of October 1, 2008, five claims have been registered with the IIM.

ADB Accountability Mechanism

The ADB Accountability Mechanism of 2003 replaced the Inspection Function policy of 1995 which was modeled after IDB's IIM with its roster of experts with nuanced differences such as the establishment of a standing Board committee – the Board Inspection Committee (BIC) – which selected a panel of experts to carry out an investigation of a claim authorized by the Board of Directors. The ADB Accountability Mechanism is the first MDB system which went beyond the incipient MDB approach to have a pure investigation or inspection function approach by having a dual approach of both problem-solving and compliance review externally driven by claimants.[33] Under this mechanism, the issues of problem-solving (consultation) handled by the Special Project Facilitator (SPF) and investigation (compliance review) handled by the Compliance Review Panel (CRP) are clearly demarcated as separate matters as consultation does not focus on fault of any party while compliance review focuses on the institutional conduct. Separate secretariat support is provided for the consultation phase and compliance review phases to emphasize the

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[30] http://enet.iadb.org/idbdocswebservices/idbdocsInternet/IADBPublicDoc. aspx?docnum=474362 (accessed October 1, 2008).

[31] http://enet.iadb.org/idbdocswebservices/idbdocsInternet/IADBPublicDoc. aspx?docnum=559818 (accessed October 1, 2008).

[32] IDB. Independent Investigation Mechanism: 2007 Annual Report for January 1, 2007 - December 31, 2007 (Inter-American Development Bank: Washington, D.C.) (March 13, 2008), p. 4.

[33] The ADB accountability mechanism has been described by Maartje van Putten as a "vanguard amongst the accountability mechanisms". See van Putten, Maartje. 2006. 'Policing the World', Accountability Mechanisms for Multilateral Financial Institutions and Private Financial Institutions, Tilburg University, the Netherlands and McGill University, Canada, p. 129.

distinctive features of each phase. Claimants are required to go through the consultation phase first before they can file a request for compliance review. They can file a request for compliance review if the claim is found ineligible by the SPF, or if they find the consultation process not purposeful, or if they have reached an advanced stage of the consultation process and have serious concerns on compliance issues.

The SPF, appointed by the President to handle problem-solving, is seen as an internal function, that is, to strengthen the internal processes of operations departments which are responsible for formulating, processing, or implementing any ADB-assisted project. The SPF's term is 3 years and is renewable. The Panel members handling the investigation are appointed by the Board of Directors in its oversight of transparency and accountability for Management's operations. The Board approves the appointment of the Panel members upon the President's recommendation. With the exception of the initial Panel members who were appointed on a staggered basis of 3, 4, and 5 years, the Panel members are appointed for a 5-year nonrenewable term, and after serving on the Panel, they cannot be employed by the bank in any capacity. The Panel has three members, two of whom must be from the bank's regional countries with at least one from a developing member country. The Panel reports to the Board of Directors on all activities except for clearance of the Panel's terms of reference in conducting a compliance review and for review of its draft monitoring reports where it reports to the Board Compliance Review Committee (BCRC) which is tasked with this oversight role. The Panel's task in investigating claims is not restricted to fact-finding, as in the case of WBIP, but also to making recommendations to ensure project compliance for the Board of Directors to then decide on the remedial actions that Management has to take. Both SPF and CRP are empowered with monitoring mandates, that is, to follow up regularly on agreements reached after the consultation process is successfully concluded (for the SPF) and on the bank's implementation of remedial actions approved by the Board (for the CRP).

The policy provides for a review to be carried out after 3 years from December 2003, when the mechanism was made effective. No review has been carried out yet and as expressed by the Chair, CRP in 2006, the review would be best postponed until at least two more cases have been dealt with by the mechanism under both phases, but not later than 2009.[34] This is due to the limited experience of the mechanism as so far, only one complaint has gone through the full process of the consultation phase and one request has gone through the full process of the compliance review phase. As of October 1, 2008, 12 claims have been registered with the ADB Accountability Mechanism (there were eight claims filed under the previous policy, but only two proceeded with an investigation).

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[34] Meeting by Chair, CRP with NGOs in Tokyo, Japan in October 2006 at http://www.compliance.adb.org/dir0035p.nsf/attachments/Mtg-JpnNGOs-19Oct06.pdf/$FILE/Mtg-JpnNGOs-19Oct06.pdf (accessed October 1, 2008).

IFC and MIGA's Compliance Advisor/Ombudsman Office

The CAO Office at IFC and MIGA handles the private sector operations of these institutions. It was set up in 1999 in response to the lack of jurisdictional mandate by the WBIP over the request filed on an IFC-financed project in the Pangue Ralco Complex of Hydroelectric Dams in Chile. The primary factors for the establishment of this mechanism were the following: civil society pressure for an accountability mechanism at these institutions; the outcome of the independent investigation commissioned by the World Bank's President over the Pangue project claim; and pressure from IFC's Board of Directors. The Office has three roles: compliance (auditing both institutions' environmental and social performance on sensitive projects to ensure compliance with policies and procedures); advisory (to advise the President and Management of both institutions in dealing with particular projects and on broader environmental and social policies); and ombudsman (responding to complaints by project affectees and attempting to resolve issues through problem-solving). The ombudsman function is unique among all MDB accountability mechanisms in that it allows any individual, in addition to groups of people, affected or likely to be affected by social and/or environmental impacts of an IFC or MIGA project to file a complaint. It has been constructed similar to the ombudsman function at the national level in many countries where individual citizens can seek redress to check on improper government activity against them. All other MDB accountability mechanisms do not allow individual claims as these can only be filed by two or more people with common interests or concerns or by their authorized representatives. The CAO Ombudsman will monitor the implementation of its recommendations and agreements reached by the parties.

The CAO Office commissioned in 2003 an independent 3-person external review team to assess the effectiveness of its Office which identified the ombudsman function as having the "greatest importance" of all three functions.[35] The CAO Office has over the years been reviewing its operational guidelines to manage its roles better and clearly. In April 2007, it issued its Operational Guidelines on its three roles, replacing its previous Operational Guidelines after a review which included a 90-day public comment period to provide greater predictability on CAO processes for resolving complaints. The problem-solving role is externally triggered in that it is initiated by complainants while the compliance role is triggered by a request from senior management of IFC and MIGA or the President of the World Bank Group, a complaint transferred from the CAO Ombudsman where no resolution was possible, and at the discretion of the CAO. The claimants are still required to go through

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[35] *Beyond Compliance?* An External Review Team Report on the Compliance Advisor/Ombudsman Office of IFC and MIGA by Ben Dysart, Tim Murphy, and Antonia Chaves, External Review Team (July 24, 2003), p. 38.

the ombudsman function first and "cannot file their cases directly with CAO Compliance".[36]

The CAO is appointed by, and reports to, the President of the World Bank Group rather than the Boards of Directors of IFC and MIGA and makes periodic reports to them on its activities. The appointment is for a period of 3 to 5 years, renewable by mutual consent and the present CAO has had her initial appointment from 1999 extended to 2010. The appointment of the CAO was the outcome of an independent 6-member external search committee from civil society and industry representatives, including NGOs. All senior staff come from outside the World Bank Group and they are appointed by, and report to, the CAO. Although there is no express provision on a permanent employment bar for the CAO after the assignment, the assumption is made by many NGOs that the CAO is not able to work permanently at IFC or MIGA at the end of the assignment. The CAO also has a group of strategic advisors with expertise on issues of process, accountability, and dispute system design to assist its activities. The CAO Office has been carrying out largely a problem-solving role, followed by its advisory role and the emerging role of the compliance function (only one compliance audit was triggered in the first 4 years of its operations and eight more were triggered in the next 5 years). A reference group of stakeholders established by the CAO Office with representatives from the private sector, the NGO community, academia, and other institutions meets annually to give advice and guide its evolution and growth. As of October 1, 2008, about 70 claims have been registered with the CAO Ombudsman.[37]

EBRD's Independent Recourse Mechanism

EBRD's accountability mechanism went through a public consultation process prior to its adoption by the Board of directors in 2003. It also provides for both problem-solving and compliance review functions, and like AfDB's accountability mechanism, houses them in one unit for administration – the Office of the Chief Compliance Officer (CCO). The CCO is a staff member appointed by the President and administers the bank's IRM as the "Co-ordinator", in addition to its other responsibilities such as monitoring compliance with the requirements imposed on banking teams to complete integrity and anti-money laundering red flag checklists prior to consideration of investment decisions, investigating allegations of corruption or fraud in EBRD's activities, dealing with staff misconduct, and administering EBRD's codes of conduct for its employees.

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[36] CAO Response to the public comments on CAO's draft Operational Guidelines of November 2006, p. 43.

[37] See *CAO Annual Report 2006-2007*, pp. 34-36 and the CAO website http://www.cao-ombudsman.org/ (accessed October 1, 2008).

The CCO is assisted by a roster of up to 10 experts in compliance review. There are currently 3 experts appointed to the roster. Except for the first 3 experts, who are appointed over a staggered period, the experts are appointed by the Board of directors on the recommendation of the President for a term of 3 years which can be renewed for a period of up to 3 years. When a complaint is registered, the CCO and one expert will work jointly as assessors to conduct an assessment on whether the complaint is eligible for compliance review, which will be carried out by one of the experts. Any eligibility and compliance review assessment report or compliance review investigation report prepared is sent to the President or the Board of Directors depending on the nature of the bank operation (to the President if the bank operation does not require Board approval or has not been approved by the Board, and to the Board if the bank operation has been approved by the Board at the time of submission). The expert can make recommendations in carrying out the investigation and these may include recommendations on "any remedial changes to systems or procedures within the EBRD to avoid a recurrence of such or similar violations".[38]

The CCO is tasked to monitor the implementation of the recommendations approved by the President or the Board unless the approving authority decides that monitoring be carried out by the expert whose recommendation was approved or another expert from the roster. The CCO can also in the course of carrying out the eligibility and compliance review assessment of the compliant consider whether "problem-solving techniques might be usefully employed to resolve the issues".[39] Accordingly, in assessing a complaint, there may be a recommendation for a compliance review or a problem-solving initiative, or both or neither.[40] The CCO conducts the problem-solving initiative alone or with the help of a problem-solving facilitator and the reporting line is to the President. The CCO is tasked to carry out monitoring of activities under a problem-solving initiative or can delegate the task to another person.

EBRD's IRM policy provides for a review after 2 years of its operations. The CCO proposed in her latest annual report that "a comprehensive review of the IRM be carried out in 2008"[41] which will include problems adhering to current time lines and the limited scope for problem-solving initiatives. The review commenced in March 2008 and provides for public consultations in seven cities as well as written submissions through a dedicated email address. It is expected to result in the bank's approval of revised IRM Guidelines and

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[38] EBRD. Independent Recourse Mechanism Rules of Procedure (April 6, 2004), para. 34.c.i.

[39] *Ibid.*, para. 27.

[40] EBRD. Independent Recourse Mechanism. Annual Report for 2007. Report of the Chief Compliance Officer, p, 1.

[41] Ibid., p. 6.

Rules of Procedure by June 2009.[42] As of October 1, 2008, five claims have been registered with EBRD's accountability mechanism.

AfDB's Independent Review Mechanism

The AfDB's Independent Review Mechanism (IRM) was established after a study was carried out in November 2003 by an individual consultant. The study report went through public and informal consultation processes. The study report recommended an option which was a dual approach of problem-solving and compliance review (like ADB's Accountability Mechanism) which was adopted by the Board of Directors. This option is similar to EBRD's accountability mechanism, with two differences: (1) the proposed director of the Compliance Review and Mediation Unit (CRMU) would only work on compliance and problem-solving matters, unlike the equivalent officer at EBRD who worked on other matters such as monitoring integrity of investment decisions and administering the code of conduct for bank personnel; and (2) its mandate of operational policies and procedures was beyond the limited policies reviewable at EBRD's mechanism (environmental policy and public communications policy).[43] The mechanism is pivoted on a centralized office, the CRMU, with the head (director, CRMU) playing a leading role in the mechanism and a roster of experts of three individuals who must be nationals of member states of the bank or state participants in the African Development Fund. With the exception of the initial experts who were appointed on a staggered basis of 3, 4, and 5 years, the experts are appointed by the Board for a nonrenewable term of 5 years and they can work for the AfDB Group 2 years after serving on the IRM. There is, however, no permanent post-employment bar as is provided in WBIP and ADB's Accountability Mechanism.

The director, CRMU is appointed by the President in consultation with the Board of Directors of the AfDB Group, and is tasked to perform both problem-solving and compliance review functions. The director is appointed for a 5-year term, renewable for another 5-year period. The director plays a central role in determining whether the request filed "should be registered for problem-solving exercise or, alternatively, for a compliance review".[44] The director oversees the problem-solving exercise and with the assistance of two experts from the roster forms a three-member panel to conduct the compliance review. The director can at the end of a problem-solving exercise, whether it is successful or otherwise, determine that a compliance review is warranted.[45]

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[42] The stakeholder consultation and disclosure plan on the IRM review process is at http://www.ebrd.com/about/integrity/irm/scdp.pdf (accessed October 1, 2008).

[43] Daniel D. Bradlow, Study on an Inspection Function for the African Development Bank Group (November 24, 2003), p. 59.

[44] African Development Bank Group. Compliance Review and Mediation Unit of the Independent Review Mechanism. Operating Rules and Procedures (July 27, 2006), para. 20.

[45] *Ibid.*, para. 43.

Compliance review is not externally triggered by the claimants. The director also wields significant power in the investigation as he or she participates in all aspects of the compliance review, including exercising a vote in the event of a deadlock in the panel's deliberations.[46] The director is barred from employment at the AfDB Group after serving his or her appointment.

The panel is empowered to make recommendations to bring the project back into compliance and also make recommendations on "any remedial changes to systems or procedures within the Bank Group to avoid a recurrence of such or similar violations".[47] The AfDB's accountability mechanism refers to the following in the case of projects financed by any AfDB group entity: for a sovereign guaranteed project, the bank's "operational policies and procedures in respect of the design, appraisal and/or implementation of such project",[48] and in the case of private sector or non-sovereign guaranteed projects, "social and environmental policies and safeguards".[49]

The mechanism also has monitoring tasks to carry out the implementation of the problem-solving and compliance review outcomes. A review is required after 3 years of operation from the appointment of the head (in June 2006) and a review is scheduled in mid-2009. As of October 1, 2008, one claim has been registered with this mechanism and the investigation is ongoing with compliance review being carried out together with an investigation by the WBIP on the Bujagali Hydropower Project in Uganda supported by both institutions. The AfDB's IRM issued its compliance review report for this project in June 2008 and provided it to the claimants at the same time it provided the report to the Board for consideration and decision.[50]

Summary of Main Features of MDB Accountability Mechanisms

In sum, all the MDB accountability mechanisms are focused on at least one aspect of addressing citizen complaints – investigation or problem-solving. Each MDB accountability mechanism has been shaped by its particular resolution approved by the institution's Board of Directors on the principal function, implementers, cut-off point for filing claims, and the reporting lines to the institution (President or Board of Directors). A table of the MDB accountability mechanisms with main features of function, structure and operations is given below illustrating similarities and differences in these mechanisms.

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[46] *Ibid.*, para. 51.

[47] *Ibid.,* para. 52.

[48] AfDB. Independent Review Mechanism. Resolutions B/BD/2004/9 and F/BD/2004/7 (June 30, 2004), para. 11 (i).

[49] Ibid., para. 11 (ii).

[50] AfDB Group. Compliance Review and Mediation Unit of the Independent Review Mechanism. Operating Rules and Procedures (approved in July 2006), para. 56.

Table 1: On MDB accountability mechanisms with main features of function, structure and operations

Item	WB Inspection Panel	IDB Independent Investigation Mechanism	ADB Accountability Mechanism	IFC/MIGA CAO Office	EBRD Independent Recourse Mechanism	AfDB Independent Review Mechanism
Function	Investigation	Investigation	Problem-solving and investigation	Problem-solving as the principal function, followed by compliance audit and advisory.	Problem-solving and investigation	Problem-solving and investigation
Implementer and reports	Inspection Panel supported by a secretariat. Panel issues annual reports.	Coordinator with assistance from investigators from a roster. Coordinator issues annual reports.	For problem-solving, Special Project Facilitator supported by staff. SPF issues annual reports. For compliance review, Compliance Review Panel supported by a secretariat, and Board Compliance Review Committee with oversight role on CRP's activities. CRP and BCRC issue annual reports.	CAO supported by staff. CAO issues annual reports.	Chief Compliance Officer (CCO) handles problem-solving. CCO is assisted by experts from a roster for compliance review. CCO is supported by staff. CCO issues annual reports.	Director, Compliance Review and Mediation Unit handles problem-solving. Director is assisted by experts from a roster for compliance review. Director issues annual reports.
Reporting line	Panel members report to the Board.	Investigators report to the Board.	SPF reports to the President. CRP members report to the Board (and to BCRC when it exercises its oversight role).	CAO reports to the President of the World Bank Group.	CCO reports to the President for problem-solving. For compliance review, the expert from the roster reports to the President for projects not yet approved by the Board, and to the Board for approved projects.	For problem-solving, the Director reports to the President for projects not yet approved by the Board, and to the Board for approved projects. For compliance review, the Panel involving the Director and 2 experts from the roster report to the President for projects not yet approved by the Board, and to the Board for approved projects.

Cut-off point for filing claims	Loan not closed or 95 percent of loan has been disbursed.	95 percent of loan has been disbursed.	Issuance of the project completion report (usually 2 years after physical completion of project).	For problem-solving, up to repayment of loan or divestment of operation.	12 months after physical completion of the project or 12 months after final disbursement or cancellation of the undisbursed amount.	12 months after physical completion of the project or 12 months after final disbursement or cancellation of the undisbursed amount.
Monitoring activities	None	None	Yes	Yes for ombudsman and compliance audit.	Yes	Yes
Nature of investigation	Strictly fact-finding, no recommendation.	Fact-finding and can make recommendations.	Fact-finding and can make recommendations.	Fact-finding and can make recommendations.	Fact-finding and can make recommendations.	Fact-finding and can make recommendations.
Scope of policies and procedures covered	Broad spectrum - World Bank's operational policies and procedures (WBIP covers IBRD/IDA projects, public sector operations only).	Broad spectrum - IDB's operational policies and procedures (for both public and private sector operations).	Broad spectrum - ADB's operational policies and procedures (for both public and private sector operations).	For problem-solving, where people are affected by social and environmental impacts of IFC/MIGA projects (IFC and MIGA operations are private sector). For compliance audits, on projects that have substantial concerns regarding social and environmental outcomes.	So far, bank's 2008 environmental and social policy and the public information policy are covered (EBRD covers both private and public sector operations).	For public sector operations, broad spectrum – AfDB's operational policies and procedures. For private sector operations, only the social and environmental policies and safeguards.
Years of operation	15	14	5	9	4	2
Number of claims filed or registered (as of October 1, 2008)	52	5	12 (8 under the inspection policy).	70 (for ombudsman function). On compliance audits, CAO carried out 9 audits.	5	1

Review of mechanism	Two reviews resulting in 1996 Clarifications and 1999 Conclusions. No scheduled date for another policy review.	Review in 2000, resulting in an amendment. Review ongoing of the draft revised policy issued in 2005.	Inspection Function policy of 1995 replaced by the ADB Accountability Mechanism after an extensive review in 2002 and 2003. No scheduled date for policy review.	Review carried out in 2003. Analysis of CAO's experience carried out in 2006. CAO's Operational Guidelines reviewed; revised in 2007.	Review ongoing; expected to be completed by June 2009.	Review scheduled in mid-2009.
Special features or developments	First MDB accountability mechanism and has considerable experience in handling of claims.		First MDB accountability mechanism with two-pronged approach of problem-solving and compliance review, separately demarcated and with different offices. Claimants given right (together with Management) to comment on Panel's draft investigation report before it is finalized.	First MDB accountability mechanism providing for problem-solving. Individual claims are allowed (other MDB mechanisms require a community of persons of at least two persons).	CCO has other functions e.g. investigating fraud and corruption where reporting line is to the President. Mandatory annual training for experts of at least 5 days in EBRD matters.	Claimants given the Panel's final report when it is submitted to the President or Board for decision. Mandatory annual training for experts of at least 5 days in AfDB matters.

Source: Information from the websites and annual reports of MDB Accountability Mechanisms.

As illustrated in the table, there has been a shift from investigation to other methods such as problem-solving in addressing citizen claims. IFC/MIGA's CAO Office is unique among all MDB accountability mechanisms where individual claims are allowed.[51] At the other accountability mechanisms, claims have to be filed by a community of persons such as an organization, association, society or other grouping of individuals and the affected party must consist of any two or more persons, and the claimants must be in the territory of the borrowing country.[52] ADB's Accountability Mechanism stands out as the only mechanism which provides the claimants the opportunity to comment (together with Management) on the Panel's draft investigation report before it is finalized and issued to the Board.

The term "operational policies and procedures" is used at the World Bank, IDB, ADB, and AfDB in their accountability mechanisms and at EBRD, the term "Relevant EBRD Policy"[53] is used. Depending on the institution, these compliance reviewable policies range from a limited scope (in the case of EBRD, environmental, social and public information matters) to a broader spectrum (in the case of ADB, the Operations Manual which cover environmental and social safeguards, and the Project Administration Instructions which outline the policies and procedures to be followed by staff in the administration of bank-financed projects). The permanent body of the WBIP is emulated in ADB's Accountability Mechanism which has included a distinctive reporting line to a Board committee to exercise an oversight role to clear the CRP's proposed terms of reference in conducting an investigation and to review the CRP's draft monitoring reports. The absence of monitoring activities in earlier mechanisms was expressly provided in IFC/MIGA's CAO Office in 1999, and used in ADB's Accountability Mechanism, EBRD's IRM and AfDB's IRM. All the mechanisms have gone through reviews either as required under their policies or for assessing the effectiveness of the mechanism (as in the case of the CAO Office).

Some MDB accountability mechanisms have the same features. Both EBRD and AfDB accountability mechanisms can make recommendations to bring the project back into compliance and also include recommendations on any remedial changes to systems or procedures within the institution to avoid a recurrence of violations. EBRD and AfDB have the same provision on mandatory training for experts in the institution's operational matters for at least 5 days each year.

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[51] Compliance Advisor/Ombudsman (CAO), *CAO Operational Guidelines* (April 2007), para. 2.2.2., http://www.cao-ombudsman.org/about/whoweare/documents/EnglishCAOGuidelines06.08.07Web.pdf (accessed October 1, 2008).

[52] See for example, *The World Bank Inspection Panel*, *Resolution No. IBRD 93-10 and Resolution No. IDA 93-6* (International Bank for Reconstruction and Development and International Development Association, September 22, 1993), para. 12; *1999 Conclusions of the Board's Second Review of the Inspection Panel*, para. 9.a; and ADB, *Review of the Inspection Function: Establishment of a New ADB Accountability Mechanism* (Manila: ADB, May 2003), para. 68. Under the ADB accountability mechanism, provision is also made allowing the claimant to be in an ADB member country adjacent to the borrowing country.

[53] EBRD. Independent Recourse Mechanism Rules of Procedure (April 6, 2004), para. 1.aa.

IV. Emerging Trends and Directions

Each MDB has similar classes of shareholders, with the World Bank, IFC and MIGA, having a far wider coverage of shareholders compared to the regional development banks, and with the same donor countries championing accountability mechanisms, namely, the United States and several European countries including the United Kingdom, Switzerland, Netherlands, and Germany. Yet each institution has adopted a different approach in enhancing the institution's commitment to accountability and enhancement of its development effectiveness. In practice, each approach reflects the institution's uniqueness in its own way of doing business, and the region's financial and political contexts, even though the institutional development mandate is the same. Despite the different approaches taken by MDBs in fashioning their accountability mechanisms, there are emerging trends and directions.

Addressing Concerns by Both Problem-Solving and Investigation

The variety of different MDB accountability mechanisms across the institutions illustrates the evolution of the mandates of different accountability mechanisms in responding to addressing citizen concerns. First, there have been three approaches so far. The "first wave approach" of an inspection or investigation approach to bringing problem projects into compliance with bank policies was expanded in 1999 with the creation of a "second wave approach" with the addition of a problem-solving function at the CAO Office, with its other two roles (compliance and advisory).[54] The present "third wave approach",[55] that is, provision of a problem-solving function in addition to an investigation function was provided with nuances in the combined approaches in the citizen grievance systems by MDBs and other financial institutions – at ADB (in the current accountability mechanism), EBRD, AfDB, JBIC, NEXI, JICA, and OPIC. This is a departure from the earlier approaches as it was realized that it was equally important for the institution to address the problem of affected communities on the ground through problem-solving, as much as the need for compliance with institutional policies.

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[54] The problem-solving function at CAO is externally-driven (by individuals or groups of individuals or organizations) while the compliance and advisory functions are internally-driven (by CAO, IFC/MIGA, or the President or Board of Directors of the World Bank Group).

[55] See Suresh Nanwani, "Holding Multilateral Development Banks to Account: Gateways and Barriers", *International Community Law Review* (2008), 207. Ms. van Putten, formerly a World Bank Inspection Panel member and presently a panel member in AfDB's accountability mechanism is of the view that the introduction of a consultation phase has "in its nature a much more 'human face'". See van Putten, 'Policing the World', *Accountability Mechanisms for Multilateral Financial Institutions and Private Financial Institutions*, 129.

Secondly, the focus on investigation has grown from that of being a mere fact-finder with regard to compliance without the right to make any recommendation (at the WBIP) to that of empowering the Mechanism in question, after completing the investigation, to make recommendations with regard to compliance and remedy of problems in the project. Increasingly, other MDB accountability mechanisms are being given that latter authority.

Establishing Permanent Panels
Instead of Roster of Experts

There is an emerging trend to set up a permanent panel to carry out investigations instead of drawing on a roster of experts, as in the case of IDB's accountability mechanism and the ADB Inspection Function. The number of experts selected in an ad hoc panel has been generally three in IDB's IIM and in the ADB Inspection Function, with four persons selected in the claim under the Chashma Right Bank Irrigation (Stage III) Project in Pakistan under the ADB Inspection Function. The EBRD accountability mechanism is a hybrid in practice, since the policy allows for a roster of up to 10 experts but only three have been appointed for the reason that this "helps to ensure that the experts become familiar with the Bank and its policies and procedures",[56] and thus giving the roster the character of a permanent panel. The AfDB accountability mechanism has a roster of three experts to assist the director, CRMU in carrying out investigation in a compliance review, but it also is so small as to create the atmosphere of a panel. IDB's proposal for enhancements to its IIM also takes a fresh approach by providing a panel of three members from different countries of the bank.[57] The experience of having a roster of experts at IDB's IIM and ADB's Inspection Function has shown that roster members will often not be available as needed. Also, members of a large roster have little incentive to become well-versed with the operations of the bank, and are less likely than panel members to understand the bank's context, and would carry little knowledge from claim to claim, although the use of a roster may appear to cost less in the short-term than having a permanent panel.

Making Mechanisms More Friendly
and Easily Accessible to Users

Over the years, MDB accountability mechanisms have taken steps or made provisions to ensure friendly and easier accessibility of the mechanisms to users. As a first step in implementing the legalese of the WBIP Resolution,

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[56] EBRD. Independent Recourse Mechanism. Roster of Experts. http://www.ebrd.com/about/integrity/irm/experts.htm (accessed October 1, 2008).

[57] IDB. Proposal for Enhancements to the Independent Investigation Mechanism: Draft Consultation and Compliance Review Policy (February 3, 2005), para. 16.

the Panel condensed the requirements for filing a request for inspection into a half-page set of questions, subsequently translated into multiple languages. Nevertheless, in some MDB accountability mechanisms, there were prescriptions that the complaint had to be in certain languages (English in the case of the ADB Inspection Function as it is the bank's working language, or in any of the bank's four official languages in the case of IDB's IIM). Complaints by email and facsimile are also not allowed in the case of IDB's IIM and the ADB Inspection Function. These prescriptions have in the course of the establishment of new or revised mechanisms been removed to reduce barriers in filing a claim. The ADB Accountability Mechanism, EBRD's IRM and AfDB's IRM allow claims to be filed in local languages in addition to the banks' official or working languages and also allow claims to be filed by email or facsimile. The IDB's proposal for enhancements to its IIM still disallows claims to be filed by email or facsimile.[58] The complaint forms of MDB accountability mechanisms have through brochures and operating procedures also been made more simple and friendly for people to use in filing claims, especially at the CAO Office, WBIP and ADB Accountability Mechanism, including obviating the need to specifically cite violations of policy in claims for compliance review. Provisions on allowing confidentiality of claims which were either disallowed or not expressly provided in IDB's IIM and ADB's Inspection Function are now allowed in the accountability mechanisms at World Bank, ADB, AfDB, IFC/MIGA, and EBRD, and have also been expressly provided for in IDB's proposal for enhancements to its IIM.[59] Allowing confidentiality of claims gives claimants a measure of comfort to file claims for fear that they may be subject to reprisals if their identities are required to be made publicly available.

Extending the Period of Time for Filing Claims

The standard for the period of time allowed for filing claims was first set by the WBIP, the "95 percent disbursement rule", which is that claims cannot be filed after the loan is substantially disbursed. This gauge used at the WBIP was replicated in earlier accountability mechanisms (IDB's IIM and ADB's Inspection Function). This benchmark is arbitrary, is susceptible to manipulation in the case of cancellation of a portion of the undisbursed loan, and is extremely difficult for the claimants to ascertain without having access to bank data. In the drafting of the resolution on the WBIP, there were various proposals on the filing of claim period, ranging from 2 years from the loan closing date to 75 percent of the loan disbursed, and the final agreement on the 95 percent disbursement rule was reached and reflected in the resolution. Indeed, the arbitrariness of the

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[58] Proposal for Enhancements to the IIM: Draft Consultation and Compliance Review Policy of February 2005, para. 48 at http://enet.iadb.org/idbdocswebservices/idbdocsInternet/IADBPublicDoc.aspx?docnum=474362 (accessed October 1, 2008).

[59] *Ibid.*, para. 46.

rule was acknowledged by the World Bank General Counsel early in the life of the WBIP, in agreeing that the bank policies apply to any project where the loan has not yet been repaid.[60] On this basis, claims could technically be filed many years beyond project completion, but the Board claimed that the bank would not have leverage on the borrower once the project was substantially completed, and thus set the 95 percent disbursement rule. There was also concern that a much longer period would invite limitless requests for inspection. In fact, there was no basis for the concern that there would be an inundation of claims; as of October 1, 2008, only 153 claims over 15 years have been filed or registered with the MDB accountability mechanisms discussed above. The CAO Office allows claims to be filed with the Ombudsman function up to repayment of the loan or divestment of operation, which provides the widest time period for filing claims and is consistent with the contractual approach that the terms and conditions of the loan agreement apply until the loan is fully repaid. The comfort level reached by several MDB accountability mechanisms – ADB, EBRD and AfDB – is at least 1 year (2 years in the case of ADB's) after physical completion of the project, which takes into account that physical impacts of the project can still affect local communities after the loan is fully disbursed.

Provisions on Description of Claimants

The identification of claimants who can use the mechanisms has not changed since the establishment of the WBIP and has been applied for all other MDB accountability mechanisms, except for IFC/MIGA's CAO Office. The claimants have been identified as a community of persons such as an organization or other grouping of individuals which includes any two or more persons who share common interests, or by the local representative of such party, or by a non-local representative in exceptional cases when local representation is not available. The last option has been rarely used, the most notable exception being the WBIP in the case of the China Western Poverty Reduction Project. The CAO Office is the only MDB mechanism that has a unique provision allowing individual claims and the fear of inundation of frivolous claims seems to be unfounded as there are only about 11 individual claims, as of October 1, 2008, filed with the Ombudsman function over the past 9 years.

Providing Monitoring of Outcomes from Problem-Solving and Investigation

Monitoring of outcomes was not addressed in the WBIP and other MDB mechanisms emulating it did not have any monitoring provisions, such as

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[60] Richard E. Bissell, "The Arun III Hydroelectric Project, Nepal" in Dana Clark, Jonathan Fox, and Kay Treakle, eds., *Demanding Accountability: Civil-Society Claims and the World Bank Inspection Panel,* (Rowman and Littlefield, 2003) 41.

IDB's IIM and the ADB Inspection Function. IFC/MIGA's CAO Office had clear provisions on monitoring of outcomes in terms of settlement agreements reached during problem-solving and its other functions, and this monitoring function has provided the stimulus for other MDB mechanisms to have clear provisions on monitoring of outcomes from problem-solving and investigation at ADB, EBRD and AfDB. The need for involvement of claimants and the public is highlighted in the monitoring activities to check on the progress in the implementation of the outcomes. In the case of the WBIP, the Board has expressly requested the Panel to return to several projects (such as the Yacyretá Hydroelectric Project in Argentina and Paraguay) after implementation of Management's action plan to determine the impact of remedial measures.

Ensuring Claimants' Participation in the Accountability Procedures

The earliest standard set for claimants' participation in the WBIP did not allow claimants to actively participate in the accountability procedures once the investigation phase had begun. From the date of filing and being informed that their claims are eligible, the claimants are not involved in the accountability procedures except at specific points when the panel meets them in the field until the outcome of the decision by the Board on the panel's investigation. Civil society has raised the issue of due process for the claimants and their right to be heard and participate in the accountability procedures. There is a growing trend to involve the claimants more in the accountability procedures such as during panel visits to the project area and in its interactions with the claimants during the investigation but these concrete actions are still few and far between. In an unusual departure, the ADB Accountability Mechanism allows the claimants (at the same time as Management) to comment on the Panel's draft investigation report, and the responses of both claimants and Management are posted on the Panel's website when the Board decision is made. AfDB's IRM allows the claimant to be provided with the compliance review panel's investigation report at the same time that the panel provides this report to the Board for consideration and decision, subject "to the provisions of the [AfDB] Group's Disclosure of Information Policy (in particular those relating to the disclosure of confidential information and/or documents)."[61] The AfDB IRM's investigation report of June 2008 for the Bujagali Hydropower Project and

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[61] AfDB Group. Compliance Review and Mediation Unit of the Independent Review Mechanism. Operating Rules and Procedures (approved in July 2006), para. 56. A similar provision is provided in the EBRD's accountability. See EBRD. Independent Recourse Mechanism Rules of Procedure (April 6, 2004), para. 38. However, the compliance review report by EBRD's IRM relating to the Vlore Thermal Power Generation Project (dated April 17, 2008) was not issued to the claimants till May 9, 2008 after the Board's decision on May 8, 2008. See the Register for this project at http://www.ebrd.com/about/integrity/irm/200701.pdf (accessed October 1, 2008).

Bujagali Interconnection Project was provided to the claimant the same day it was sent to the Board for consideration and decision which took place 3 weeks later on July 14, 2008. While it would be more participatory for the claimant to have a draft investigation report so that it can then give the panel its comments, together with Management, for the panel to deliberate before finalizing the report, this step at least gives the claimant some measure of involvement and participation. However, the full impact of this measure has yet to be tested as the claimant's comments arrived too late for the panel to consider the claimant's views in its already finalized report.

Mandatory Training of Experts

There is a growing direction to provide for mandatory training for compliance review panel experts although early MDB accountability mechanisms had no formal provisions on training of experts and the practice varied in terms of providing them with briefings on bank's operational matters (in the case of the World Bank Inspection Panel) or orientation programs that were organized for new members and staff (in the case of the ADB Accountability Mechanism). Two MDB accountability mechanisms – EBRD followed by AfDB – have clearly stated that training of at least 5 days a calendar year will be provided to the compliance review panel experts on the bank's operational matters. This measure is clearly beneficial in that the panel members who are unlikely to be highly knowledgeable and up-to-date about the institution's operations and their policies and procedures are given the opportunity to familiarize themselves with the institutions (together with the Board, Management and staff) and have a better understanding of the institution's business processes.

Lessons Learnt From Emerging Directions and Trends

When an accountability mechanism is being established (such as OPIC's Office of Accountability mechanism) or under review (such as IDB's proposal to enhance its IIM), improvements made by other mechanisms are cited for adoption. In OPIC's accountability mechanism, an individual consultant who carried out a study prior to the approval of the mechanism by OPIC's Board of Directors, had been earlier involved in ADB's review of its Inspection Function. OPIC's mechanism contained similar operational principles found in ADB's Accountability Mechanism[62] and emulated its two-phase approach (problem-solving and compliance review). In the case of IDB's proposal to enhance its

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[62] Such as the mechanism should enhance the institutional effectiveness mandate; be transparent and fair to all stakeholders; be accessible and responsive to concerns of local communities; and be cost-effective. Accountability and Advisory Mechanism for the Overseas Private Investment Corporation. General Policy and Guidelines approved on September 20, 2004, para. 2.

IIM, the comments from the public have been wide-ranging and some of these include the extension of the threshold bar from the "95 percent disbursement rule" to 2 years after physical completion of the project, reducing barriers such as the prohibition of email and facsimile in filing claims, and the inclusion of monitoring of outcomes of problem-solving and compliance review.

The European Investment Bank's (EIB) complaints mechanism policy approved in June 2008 expressly notes that it takes into account the concerns expressed by CSOs and suggestions of internationally-reputed consultancies specialized in the field of accountability thereby incorporating "appropriate inputs".[63] The EIB organized workshops featuring experts with experience in other mechanisms before adopting its policy. This policy allows any person or group of person "with an interest in the environmental, developmental or social impacts of the EIB Group's activities" to file a complaint by email in any official European Union (EU) language. The EIB Complaints Office's focus is on fact-finding with emphasis given to problem-solving. A memorandum of understanding between EIB and the European Ombudsman (EO) has been entered to strengthen EIB's complaints mechanism policy to allow complaints filed by non-EU citizens or residents as EIB has to overcome its institutional problem due to the mechanism policy being internal (as opposed to the EU which is external) and allowing the EIB Complaints Office to address complaints from citizens/residents in an EU state or entities not having a registered office in an EU state.

Further, MDB mechanisms such as IDB's IIM and ADB's Inspection Function did not go through a public consultation process but the trend now is to have public consultation either in the establishment of a new mechanism (as in AfDB's IRM) or in any review (in the ongoing IDB's proposal for enhancements to its IIM and the ongoing EBRD's IRM review). Public consultation is crucial as it gives credibility and legitimacy to an MDB's accountability mechanism. This is further demonstrated in EIB's endeavors to periodically review its complaints mechanism policy and EIB has stated it will launch a public consultation on its policy in 2009.[64]

V. Challenges for MDBs and Their Accountability Mechanisms and Suggestions to Meet These Challenges

In this final section, we will consider the challenges that lie ahead for MDBs and their accountability mechanisms and make suggestions on meeting these challenges.

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[63] EIB's Complaints Mechanism Policy (June 24, 2008) at para. 3.2 at http://www.eib.org/attachments/strategies/complaints _mechanism_policy_en.pdf (accessed October 1, 2008).

[64] *Ibid*., para. 3.3.

Introduction of Accountability Mechanisms and Improvement of Accountability Mechanisms or Other Systems at MDBs

MDBs have taken the lead over other international organizations (as well as national organizations, commercial banks, and CSOs) in setting up accountability mechanisms to address citizen grievances on internationally-funded development projects. The pressure is now on other financial institutions that do not have accountability mechanisms, when they should as their activities influence or have a direct impact on communities.[65] One example of the tensions in this movement was drawn out by the IMF's Independent Evaluation Office, which completed, in April 2008, an evaluation of the institution's corporate governance highlighting that accountability "is probably the weakest aspect of IMF governance" and "is particularly crucial in regard to the Fund, whose actions can have a major impact".[66] The IMF's Executive Board and the IMF Managing Director issued a joint statement in May 2008 stating that the issues raised by the report would take time to address and the "discussion will require the engagement of all parties at many different levels – involving not only the Executive Board and Management, but also the Fund's membership and other stakeholders more broadly."[67] Civil society is closely monitoring IMF's process of reform and monitoring and have stressed that the institution give consideration to the vital areas of accountability and transparency. CSOs have complained of being shut out of the process of reform as the institution does not have an explicit consultation framework to engage external stakeholders.[68]

Having opened the doors of accountability at some institutions, it is not surprising that civil society's demands will necessarily increase in expecting an equal if not higher standard from financial institutions with inadequately functioning accountability mechanisms by highlighting good practices at some MDB accountability mechanisms. These practices include providing monitoring of outcomes, advancing the time frame for filing complaints beyond the 95 percent disbursement rule, and allowing requesters (together with Management) to comment on the Panel's draft investigation report. Where reviews of accountability mechanism are delayed, such as the ongoing IDB's 2004 proposal for enhancements to its IIM, renewed pressure has been applied by

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[65] One World Trust. Global Accountability Report 2006, para. 49.

[66] International Monetary Fund. Independent Evaluation Office. Governance of the IMF: an evaluation. (2008), at http://imf-ieo.org/eval/complete/pdf/05212008/CG_main.pdf (accessed October 1, 2008) para. 20.

[67] Joint Statement by the Executive Board and the IMF Managing Director, Press Release No. 08/121, (May 27, 2008) at http://www.imf.org/external/np/sec/pr/2008/pr08121.htm (accessed October 1, 2008).

[68] Letter from BIC, USA and 16 other NGOs to the IMF Managing Director dated March 25, 2008. The letter is provided in BIC, USA's update dated March 25, 2008 at http://www.bicusa.org/en/Article.3722.aspx (accessed October 1, 2008).

CSOs. The Center for International Environmental Law (CIEL), for instance, gave its comments on the proposal for improvements to its current system "incorporating comments from civil society and the best practices of other IFI accountability mechanisms".[69]

In replenishment exercises of concessional funds for MDBs, such as the World Bank, testimonies provided by civil society before national authorities on how institutional development effectiveness can best be achieved through the WBIP include suggestions on reforms of accountability mechanisms. In June 2008, Lori Udall testified and provided a statement on behalf of seven NGOs, including BIC, USA and CIEL, before the U.S. House of Representatives Committee on Financial Services in its hearing on the 15th Replenishment of IDA, that although the NGOs did not recommend opening the resolution creating the WBIP at this time given the current political climate among the Board and Management, they would recommend reforms and updates to make the Panel process more accessible and user-friendly to affected people. In the 15 years of WBIP operations, the NGOs found that "overall, the Panel process has been positive, producing project level reform and/or creating political space for affected people in developing countries."[70] Some of the recommended reforms included the following: giving claimants access to the Panel's final report before or as it is sent to the Board, to Management's response to the report, and to action plans; empowerment by the Board with more flexibility to follow up and monitor implementation of remedial measures to bring the project back into compliance with bank policies and procedures; and development of a Panel selection process that is open, transparent, and participatory.[71]

MDBs such as the World Bank, ADB and EBRD have separate systems handled by its other offices to address specific matters such as fraud and corruption and procurement irregularities of the institution's civil works contracts, goods and services, including consulting services, in carrying out bank projects. These other systems provide windows of access for individuals to file complaints with MDBs as a check to ensure that the bank's funds are properly used for the purposes of the project, and that there is integrity maintained without any fraud or corrupt practices in project execution and staff behavior. While there are annual integrity reports issued by the integrity offices of MDBs at the World Bank, ADB and EBRD on how they deal with complaints addressed to them, there are no annual reports filed by MDBs on how they deal with procurement

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[69] Center for International Environmental Law. The Inter-American Development Bank's (Un) Accountability Mechanism (April 4, 2008), at http://www.ciel.org/Ifi/IDB_4Apr08.html (accessed October 1, 2008).

[70] Statement of Lori Udall regarding the World Bank Inspection Panel – Update and Recommendations for Reform in the Context of the Fifteenth Replenishment of the International Development Association before the Committee on Financial Services, U.S. House of Representatives (June 18, 2008) at http://financialservices.house.gov/hearing110/udall061808.pdf (accessed October 1, 2008), p. 5.

[71] *Ibid.*, pp. 13-14.

irregularities and complaints filed by civil society. MDB Management practices on handling corruption in particular have undergone increasing scrutiny from MDB member countries on their inquiries on MDB development financing[72] and the enhancement of development effectiveness in the United Kingdom and the United States, through its Senate Foreign Relations Committee and House Committee on Financial Services, and testimonies given by civil society members on the handling of corruption in MDB projects.[73] It is a positive development that donors generally are paying close attention to the corruption issue, and the process of harmonizing practices on this issue among bilateral and multilateral donors is likely to be driven in fora such as the Organization of Economic Co-operation and Development.[74]

Movement Beyond Accountability to Demonstrating Responsibility

Civil society is increasingly pursuing the next logical step of "responsibility", that is, if the MDB is held accountable for violating its policies and procedures in the bank's project and people have been adversely harmed, it can, and should, be made financially responsible for the damage caused by violating its polices and procedures. Such financial obligations can take on two dimensions: (1) that the bank should provide additional grant financing to the borrower to cover costs to the project resulting from the bank's conduct, or (2) that the bank should compensate individual project affectees for damage that results directly from its non-compliance with its own policies. The bank's accountability in the establishment of these accountability mechanisms is to be distinguished from the separate concepts of legal liability and international responsibility. The obligation to make full reparation is the general principle behind the consequences of an internationally wrongful act as laid down by the Permanent Court of International Justice in the Factory at Chorzów case.[75]

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[72] See the Opening Statement for Hearing on the Review of the Anti-Corruption Strategies of the Regional Development Banks by US Senate Committee on Foreign Relations Chairman Richard G. Lugar (April 21, 2005), http://foreign.senate.gov/testimony/2005/LugarStatement050421.pdf (accessed October 1, 2008).

[73] These are given in the hearing of a review of the anti-corruption strategies of the AfDB, ADB and EBRD by the US Senate Committee on Foreign Relations in April 2005 at http://foreign.senate.gov/hearings/2005/hrg050421a.html (accessed October 1, 2008) and at the hearing on the role and effectiveness of the World Bank in combating global poverty by the House Committee on Financial Services in May 2007 at http://www.house.gov/apps/list/hearing/financialsvcs_dem/ht052207.shtml (accessed October 1, 2008).

[74] http://www.oecd.org/topic/0,3373,en_2649_37447_1_1_1_1_37447,00.html (accessed October 1, 2008).

[75] Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17, p. 47. The Court stated that the "essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, so far as possible, wipe out all the

International organizations are generally immune from national jurisdictions in which individuals might otherwise bring claims against them. On the international level, claims by individuals must be endorsed and represented by the state of the individual claimant's nationality, which is normally not available.

Affected people who get some measure of satisfaction when the investigating panel hears their voices still want further empowerment though they are not parties to the legal agreements signed by the MDBs with the borrowing countries. Problem-solving is a positive step taken by MDBs in its formal inclusion in their accountability mechanisms, but there is no guarantee that the problem will be solved according to the claimants' wishes as problem-solving is consensual for all the parties and a resolution in favor of the affected people cannot be guaranteed. Compliance is treated as an internal governance tool focusing on what the institution considers its own accountability and taking remedial action to ensure project compliance, which does not necessarily match with the affected peoples' expectations.

The translation from "accountability" into "responsibility" is a particular challenge for MDBs. MDB accountability mechanisms do not provide legal remedies by way of damages or injunctions as they are not judicial bodies. On the other hand, civil society has been clamoring for responsibility in various ways through debates on MDB's "legal and moral obligation"[76] that these banks have such an obligation to ensure that their contract terms are respected, and that the rights of local affected people are respected, consistent with the requirements of the banks' policies, in the case of the cancellation of illegitimate debts owing to MDBs which do not benefit the populations of developing countries.[77]

It is suggested that creative solutions will have to be found for citizen claims to be settled through arbitration as there is general immunity of MDBs before national courts and no recourse to national courts will be available unless they waive their immunity or organize some form of dispute settlement mechanism by agreement. One view is that MDBs can devise an appropriate passage for private parties' claims from an MDB's compliance review phase to its administrative tribunal (which handles employment-related disputes between staff and

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consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law."

[76] See, for example, letter from International Accountability Project to Executive Director Carole Brookins dated 23 June 2003 at http://www.narmada.org/resources/DanaWBLetter. pdf (accessed October 1, 2008), p. 3. The letter referred to the World Bank's legal and moral obligation under its contracts which would equally apply to the other MDBs' legal and moral obligations on their contracts.

[77] Joint NGO Report (February 2007) Eurodad and other NGOs. *Skeletons in the Cupboard Illegitimate Debt Claims of the G7.*

the employer and can award damages and other relief) which could be metamorphosed as a special tribunal established at the request and consent of the parties.[78] A second view is that a problem-solving unit be also established within the MDB (in this case, the World Bank), by the establishment of a problem-solving unit called the Development Effectiveness Remedial Team which would report directly to the Board of Directors and be tasked with "remedying the social and environmental policy violations identified by the Inspection Panel and helping to ensure that displaced and aggrieved communities are adequately compensated and assisted to improve their standards of living."[79] Problem-solving has been adopted by other MDB accountability mechanisms together with compliance review with nuanced approaches. This suggestion is to improve the current system at the World Bank. The authors hold the opinion that problem-solving would be better served before a compliance review is undertaken as it is more urgent to address the claimants' needs in a timely way than to focus on an investigation which is in the interest of the institution in ensuring institutional compliance and improvement of its overall project quality in the long run.

A third view has been provided that the MDB establish an Office of Claims Resolution (OCR) without the need for the present accountability mechanisms.[80] Under this proposal, there would be a two-stage process where claimants would file a request for claim resolution with the OCR and the director of this office would appoint an independent intermediator to attempt to solve the problem created by the bank's alleged noncompliance with its policies and procedures. If the intermediator failed to resolve the claim or if the bank agreed to corrective measures but failed to comply with them, the claimants would have the option to institute arbitration proceedings against the bank conducted on a modified version of the Optional Rules for Arbitration between International Organizations and Private Parties produced by the Permanent Court of Arbitration. This tribunal would have the power to award damages to the claimants. This proposal is premised on the MDB's "willingness to waive its immunity"[81] which would be difficult to achieve easily as this would require consent of its members to amend its charter.

A fourth view espouses "a radical rethink of the law of jurisdictional immunities of international organizations".[82] By this approach, affected people

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[78] Eisuke Suzuki and Suresh Nanwani, "Responsibility of International Organizations: The Accountability Mechanisms of Multilateral Development Banks", *Michigan Journal of International Law* 27(1) (2005), 224.

[79] Dana Clark, "The World Bank and Human Rights: The Need for Greater Accountability", 15 Harvard Human Rights Journal (2002), 224.

[80] Enrique R. Carrasco and Alison K. Guernsey, "The World Bank's Inspection Panel: Promoting True Accountability through Arbitration" 41 Cornell International Law Journal (2008).

[81] Ibid., p. 629.

[82] Gerhard Thallinger, "Piercing jurisdictional immunity: The possible role of domestic courts in enhancing World Bank accountability" Vienna Online Journal on International Constitutional Law (Vol. 1, 2008), p. 30.

should proceed to sue the MDB in the domestic courts after unsuccessfully exhausting the process under the accountability mechanism, and the "domestic courts should deny immunity and exercise jurisdiction over international organizations as long as these lack adequate instruments guaranteeing the right to a court for individuals adversely affected by an organization's actions or omissions".[83] This proposal is admittedly radical in its approach to domestic courts' handling of the jurisdictional immunities of MDBs which is generally absolute unless the MDBs agree to waive their immunities and has yet to be tested. The jury is still out on this debate on the movement from accountability to demonstrating responsibility.

There is ongoing discussion on the issue of responsibility of international organizations by academics, judicial pronouncements, and the International Law Commission (ILC)'s current work on this area, which would provide sources of evidence as general principles of international law. The ILC's work since 2002, when the ILC added this topic to its agenda, is ongoing. However, the issuance of ILC's Fifth Report in May 2007 noted that while 30 draft articles on "Responsibility of international organizations" have already been provisionally adopted, decisions on some of the questions raised on these draft articles relating to the internationally wrongful act of an international organization would be postponed to the time when the ILC would have the opportunity to reconsider certain issues dealt with in the additional 14 draft articles provisionally adopted in the session covered by the report. This reconsideration would benefit from "elements of practice that States and international organizations could supply in the meantime. … A wider knowledge of practice would clearly allow a better apprehension of questions relating to the international responsibility of international organizations. Moreover, the Commission would then be more consistently able to illustrate its draft articles with examples drawn from practice."[84] The report also noted the frequently made remarks by both states and international organizations that the ILC's current draft takes "insufficiently into account the great variety of international organizations".[85] In February 2008, the European Commission in providing its comments, expressed concerns as to the feasibility of subsuming all international organizations under one draft when there is a highly diverse nature of international organizations (including the EC itself).[86]

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[83] Ibid., p. 35.

[84] International Law Commission. Fifth report on responsibility of international organizations by Giorgio Gaja, Special Rapporteur (May 2, 2007) at http://untreaty.un.org/ilc/documentation/english/a_cn4_583.pdf, para. 5. (accessed October 1, 2008).

[85] *Ibid.,* para. 7.

[86] International Law Commission. Responsibility of international organizations. Comments and observations received from international organizations. (March 31, 2008) at http://untreaty.un.org/ilc/documentation/english/a_cn4_593.pdf, p. 4. (accessed October 1, 2008).

The International Court of Justice (ICJ) has opined that international organizations may be responsible for their own conduct under international law.[87] In its advisory opinion on the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, the ICJ stated "that the question of immunity from legal process is distinct from the issue of compensation for any damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity. The United Nations may be required to bear responsibility for the damage arising from such acts."[88] Professor Crawford has remarked that when international organizations were merely forums of state activity, responsible for preparing agendas but not implementing them, the issue of accountability was largely ignored but with the position changed over the past 50 years since the creation of the United Nations and the proliferation of international organizations with diversified members and functions, the "problem [of international responsibility for international organizations] is not going to go away by categorical denials."[89]

In addressing accountability of their operations, MDBs are in an invidious position on how best to position themselves in relation to the spectrum and different needs of various stakeholders, including borrowers, project affectees and civil society groups, in fixing problem projects. Most MDBs have responded to the presence of accountability mechanisms by transferring more responsibility for remedies to the borrowers. The accountability towards project-affected people has also become sidelined in keeping with the mandate of enhancing institutional development effectiveness or still remains to be effectively addressed when the affected people want staff sanctions imposed on staff responsible for violating the bank's policies, project suspension, and award of damages arising from problem-solving and panel investigation, as these are outside the remit of the mechanisms.

MDBs are confronted with two reality checks – one is that of political will where the "ultimate decision to raise and effectively implement accountability will always remain a political one"[90] and the other is the limited remedies available under the accountability mechanism as it is an internal governance tool (albeit externally-launched) focusing on the bank's accountability which does not match with civil society's expectations of legal and moral responsibility. The International Law Association (ILA) has deliberated on the accountability of international organizations to their members and third parties over 8 years

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[87] Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, 1999 I.C.J. 62.

[88] *Ibid.*, pp. 88-89.

[89] Crawford, James. March 2007. Fifth Steinkraus-Cohen International Law Lecture: Holding International Organizations and Their Members to Account. para. 34 at http://www.unawestminster.org.uk/pdf/crawford_lecture.pdf (accessed October 1, 2008).

[90] International Law Association Report of the Sixty-Eighth Conference, Taipei, May 24–30, 1998, *Report of the International Law Association Committee on Accountability of International Organizations*, p. 603.

through 4 biennial conferences from 1998 to 2004. The ILA found that the balance between the autonomy which international organizations including MDBs require in their decision-making and operational processes and the requirements of an accountability regime functioning well and leaving no loopholes is a "delicate one".[91]

Maintaining Key Features of an MDB Accountability Mechanism

There is considerable literature on the key features of an MDB accountability mechanism. Bradlow has categorized the following seven principles that should guide the design of an international organization's inspection mechanism: clarity of purpose; user friendliness; independence; powers of investigation; impartiality, competence and fairness; efficiency and cost-effectiveness; and effective management of issues presented.[92] Bridgeman and Hunter have indicated six principles on which a new accountability mechanism should be based and judged against: independence; transparency; fairness and objectivity; professionalism; accessibility; and effectiveness.[93] The accountability mechanisms of MDBs and other institutions have proposed a framework against which the accountability mechanisms of these institutions should be tested: accessibility, credibility, efficiency, and effectiveness (ACEE).[94] While there is no mechanical formula to determine the establishment of an ideal accountability mechanism, the authors propose that the main characteristics of an accountability mechanism should be, based on good practice and their experiences with MDB accountability mechanisms, the following: credibility; effectiveness; independence; objectivity; professionalism; and accessibility.

There is no hierarchical order of importance in the characteristics and all are equally important. Credibility, effectiveness and independence are probably the most difficult to measure because they are finally determined by the users of the mechanism – whether the communities find the mechanism credible in conducting the problem-solving and/or compliance review, as well as monitoring the outcomes; whether they find the mechanism independent in that they believe they have been heard by a few good persons who are untainted and have

[91] International Law Association Report of the Seventy-First Conference, Berlin, August 16–21, 2004 *Final Report of the International Law Association Committee on Accountability of International Organizations*, p. 230.

[92] Daniel D. Bradlow, Private Complainants and International Organizations: A Comparative Study of The Independent Inspection Mechanisms in International Financial Institutions, *Georgetown Journal of International Law* (2005) Vol. 36 403.

[93] Natalie L. Bridgeman and David B. Hunter, Narrowing the Accountability Gap: Toward a New Foreign Investor Accountability Mechanism 20 *Georgetown International Environmental Law Review* (2008) 187.

[94] Fourth Meeting of Principals of Independent Accountability Mechanisms in International Financial Institutions held in June 2007 in EBRD, London.

nothing to lose in expressing their views; and whether they find the mechanism effective in delivering the results that they would like to have, which in turn is impacted by the restrictions of the mandate such as the inability to award damages and restitution. If the claimants find the mechanism and its key personnel (that is, problem-solver, investigating panelists and secretariat) not credible, independent and effective, they would have no faith in the mechanism, quite apart from the reputational risk and damage suffered by the institutions in empowering citizens to bring claims in pursuit of their aims in being accountable for their operations.

Independence is the ability to avoid influences from outside the mechanism such as Management, member governments, executing agencies, claimants, together with defined entry and exit points that exhibit no connection with the institution (covering the length of period worked with the institution prior to the assignment, a complete employment bar after the assignment, and recusals from a particular activity in the event of a conflict of interest). Objectivity is the ability to carry out the work through a fair and impartial hearing of all sides. Professionalism is the delivery of outputs that will ensure the best standards are employed through the problem-solver and the investigating panelists and their secretariat staff and consultants. Accessibility is the process of making the mechanism easier for use by the claimants, lessening barriers by issuing simple claim forms in local languages, and having outreach with communities through using network NGOs as agents of the mechanism.

Despite the self-styled use of "independent" in the mechanisms at AfDB (Independent Review Mechanism), IDB (Independent Investigation Mechanism) and EBRD (Independent Recourse Mechanism), the mere use of this term does not guarantee that independence is necessarily ensured or maintained. The term "independent" as used in these three accountability mechanisms would mean independence of key personnel from operations departments or Management as the case may be but that would not necessarily satisfy the perceptions of the ultimate users of the mechanism. At IDB's IIM, the roster members cannot be employed by the bank for a period of 2 years following the termination of appointment and at AfDB's IRM, the experts can work for the AfDB Group 2 years after serving on the mechanism. Even if in practice these roster members do not resume any employment at the institution, the perception of independence will be compromised in the eyes of the claimants. The independence of an accountability mechanism is also manifested in the staff within the office where the staff are recruited by the principal officer heading the mechanism and have restrictions on their employment in working for the organization after their engagement at the mechanism. For example, all senior staff in the CAO Office come from outside the World Bank Group and they are appointed by, and report to, the CAO which effectively gives her more independence in running her office. The CAO ensures that its professional staff contracts restrict the professional staff members from obtaining employment with IFC or

MIGA for a period of 2 years after they end their engagement with the CAO.[95] At the WBIP, the executive secretary of the WBIP is assigned by the World Bank President after consultation with the Board and the executive secretary, in consultation with the chairperson of WBIP, selects the staff members.

By Wahi's definition, all the MDB accountability mechanisms are "semi-independent" as they function within the structure of their respective institutions and their powers are strictly limited by the terms of their mandates.[96] Bissell has opined that the WBIP's independence is "partial at best, with the Board often divided in supporting the statutory independence of the Panel from Management"[97] with the ground reality that both the "Board and Management, in their own ways and from different perspectives, are uncomfortable with the Panel being independent."[98] The EBRD's mechanism and AfDB's mechanism can be considered to be not independent due to the lack of clear distinction between problem-solving and compliance review. EBRD's mechanism has been viewed as failing the test of independence as it "is an internal mechanism, managed by the President."[99] The consultation phase at the ADB Accountability Mechanism has also been criticized as this function reports to the President, and is "potentially compromising the structural independence"[100] of the mechanism. In addition, there is no imposition of a permanent employment bar on the after serving the assignment as SPF. The view has also been expressed that the consultation phase proposed under IDB's enhancements to its IIM should be conducted by someone selected and reporting to the Board as it would maintain independence from Management.[101]

The functioning of both problem-solving and compliance review functions within EBRD's accountability mechanism could be strengthened by making them separate and not housed under one administrator (Co-ordinator) who in assessing a complaint, may recommend a compliance review or a problem-solving initiative, or both or neither. CEE Bankwatch Network has commented that the EBRD's mechanism should have "a clear distinction between the problem-solving and compliance review functions. … These windows should

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[95] CAO Operational Guidelines (April 2007), para. 1.3.

[96] Namita Wahi, Human Rights Accountability of the IMF and the World Bank: A Critique of Existing Mechanisms and Articulation of a Theory of Horizontal Accountability 12 U. C. Davis Journal International Law and Policy (2005-2006) 331, 356.

[97] Richard E. Bissell, "Institutional and Procedural Aspects of the Inspection Panel" in G. Alfredsson and R. Ring, eds., *The Inspection Panel of the World Bank: A Different Complaints Procedure* (Kluwer Law International, 2001) p. 124.

[98] Ibid, p. 125.

[99] Letter from Richard E. Bissell and Jim MacNeill to the EBRD President dated January 15, 2003 at http://bankwatch.org/documents/ebrd_irm_wbcomments.pdf (accessed October 1, 2008).

[100] Letter to IDB on its proposal for enhancements to the Independent Investigation Mechanism by David Hunter and five NGOs dated May 4, 2005 at http://enet.iadb.org/idbdocswebservices/ idbdocsInternet/IADBPublicDoc.aspx?docnum= 559818, p. 5. (accessed October 1, 2008)

[101] *Ibid*., p. 9.

operate independently of one another."[102] The AfDB's mechanism likewise has a similar problem of having two windows which are not operating independently of one another as the director, CRMU in administering the mechanism oversees the problem-solving exercise and conducts the compliance review with assistance of two experts from the roster. Van Putten views the involvement of the director, CRMU in these two functions as "rather complicated" because in carrying out these tasks, the director bears the risk of a conflict of interest.[103] Problem-solving is focused on fostering amicable settlement without apportionment of blame on any party while compliance review is focused on the bank's conduct on the possible violation of policies.

Ensuring the Buy-in of Civil Society in Selection Process of Key Personnel in the Accountability Mechanism

There are no express provisions in the resolutions or policy papers on the MDB accountability mechanisms on the selection process of key personnel of these mechanisms. The absence of such provisions or operating procedures is of concern to civil society as they cannot be assured that these key personnel will remain independent from Management. The selection process for the WBIP members was not transparent in the 1990s.[104] In 2003, a committee was appointed to select a new Panel member which includes the chairperson of the Committee on Development Effectiveness (CODE), the Dean or co-Dean of the Board, a Managing Director or Regional Vice President, and the General Counsel.[105] The selection procedures for WBIP members are also made publicly available which specify how the selection committee members prepare a shortlist of candidates and after interviewing the shortlisted candidates, with the most senior member of the Inspection Panel, the committee would then recommend the best two or three candidates to the President for further consideration for him to put forward his nomination to the Board for its decision.[106] The

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[102] CEE Bankwatch Network's Comments on the Existing IRM. The EBRD Independent Recourse Mechanism Review (June 2008) at http://bankwatch.org/documents/bwn_comments_IRM_06_08_FINAL.pdf (accessed October 1, 2008) at p. 14.

[103] Maartje van Putten, 'Policing the World', *Accountability Mechanisms for Multilateral Financial Institutions and Private Financial Institutions* (The Netherlands: Tilburg University and Canada: McGill University, 2006), 144.

[104] Lori Udall, *The World Bank Inspection Panel: A Three Year Review* (Washington, D.C.: The Bank Information Center, 1977), p. 82.

[105] World Bank. Appointment of Committee to Select a New Member of the Inspection Panel at http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/Appointment_of_Committee_to_Select.pdf?resourceurlname=Appointment_of_Committee_to_Select.pdf (accessed October 1, 2008).

[106] Selection Procedures for Members of the Inspection Panel (IR2002-0004) Excerpts at http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/Selection_Procedures_Members_Inspection_Panel.pdf?resourceurlname=Selection_Procedures_Members_Inspection_Panel.pdf (accessed October 1, 2008).

ADB also provided information on its website on how its first CRP members were selected – though a selection committee consisting of the head of its personnel department, the bank's Secretary, the General Counsel, and the head of its Operations Evaluation Department, together with a Board member who is also the chair of the bank's Board Inspection Committee (the forerunner of the current Board Compliance Review Committee).[107]

NGOs have voiced their concerns with the U.S. House of Representatives on the selection process for selecting WBIP members over recent years, noting that the process has "become increasingly more internal to the Bank and less transparent."[108] A letter from CIEL and BIC, USA together with 11 other NGOs to the World Bank president in April 2008 expressed concerns on the existing procedures for selecting the WBIP members and in particular on the Selection Committee which they believed would "potentially threaten the Panel's independence."[109] To these NGOs, the inclusion of a Regional Vice President whose region includes projects that are the subject of Panel claims was a conflict of interest. They requested that civil society, as the Panel's primary stakeholders, be provided a means to participate in the selection of new members and that the selection committee be constituted to exclude representatives of Management and consist of the Chair of the Panel, the Dean of the Board, the Chair of CODE, and one civil society representative.

The World Bank's response was to remove the Regional Vice President from the selection committee as projects in her region are the subject of Panel complaints. It rejected the argument that having any bank staff on the selection committee represented a conflict of interest, and claimed that involving civil society would present "practical difficulties of selecting them".[110] The CAO has the unique distinction among all key personnel in the MDB accountability mechanisms to have civil society buy-in in her selection process as her appointment resulted from the creation of a working group of six people from civil society and the private sector, all from outside IFC/MIGA, and the working group's top choice was appointed by the President of the World Bank Group. The CAO Office of all MDB accountability mechanisms comes closest to how

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[107] ADB Accountability Mechanism Extension of Effective Date and Declaration of Effectiveness (November 27, 2003) at http://www.adb.org/Documents/Others/ADBAM-Bd_paper-effectiveness.pdf (accessed October 1, 2008).

[108] Statement of Lori Udall regarding the World Bank Inspection Panel – Update and Recommendations for Reform in the Context of the Fifteenth Replenishment of the International Development Association before the Committee on Financial Services, U.S. House of Representatives (June 18, 2008) at http://financialservices.house.gov/hearing110/udall061808.pdf (accessed October 1, 2008), p. 11.

[109] Letter from CIEL and BIC, USA, together with other NGOs, to the World Bank President on Inspection Panel Selection Committee and Process (April 17, 2008) at http://www.ciel.org/Publications/Zoellick_InspectionPanel_17Apr08.pdf (accessed October 1, 2008).

[110] See Bretton Woods Project, Inspection Panel Conflicts, Update 61 (June 17, 2008) at http://www.brettonwoodsproject.org/art-561839 (accessed October 1, 2008).

a multi-stakeholder group can effectively be involved in the selection process. The involvement of civil society in the selection process of key personnel in accountability mechanisms continues to be a challenge for the other MDBs.

Facilitating Citizen Access by Lowering Threshold Levels

MDBs can lower the threshold levels of their respective accountability mechanisms in order that citizens will have easier access to these mechanisms. Among all MDB accountability mechanisms, the CAO Office has the lowest threshold level in that it accepts complaints from individuals or groups of people or organizations that believe they are, or may be, affected by the social and environmental impacts of IFC/MIGA projects, while the others have raised bars to disallow individual claims and require elements of "adversely affected" or "material harm" to be proven by the claimants. Similarly, the expansion of policies such as the limited policies (currently two) at EBRD – its 2008 environmental and social policy (replacing the 2003 environmental policy) and the public information policy[111] – would provide a broader oversight of policy which would be consistent with the mandate of an institutional accountability mechanism.

The annual meetings of accountability mechanisms of MDBs and other financial institutions held since 2004 provide an opportunity for these mechanisms to, apart from sharing their experiences and views, also discuss harmonization of activities, such as use of simple and user-friendly claim forms, conducting joint outreach, and agreed understandings in carrying out their activities in the event of joint referrals by claimants on cofinanced projects for efficiency and cost-effective purposes, in accordance with the Paris Declaration on Aid Effectiveness. There is no perfect MDB accountability mechanism as the systems are evolving and there is no comfort zone reached by the parties – the institutions, governments, and citizens – on what would give citizens the optimal redress.

Lessons Learnt and the Way Ahead

For the MDBs, the challenges that lie ahead in the strengthening of accountability mechanisms are how to demonstrate accountability and responsibility for harm caused to project affectees, to generate lessons learnt to improve the institution's development effectiveness, to avoid or mitigate politicization of process, and to harmonize accountability mechanisms to rationalize donor activities to make them more cost-effective under the Paris Declaration on Aid Effectiveness. MDBs may consider allowing the filing of individual claims in accountability mechanisms which is already done at IFC/MIGA's CAO Office

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[111] EBRD. *About the IRM,* http://www.ebrd.com/about/integrity/irm/about/index.htm (accessed October 1, 2008).

and has not posed a problem in the Office's operations, and allowing claimants to respond to the Panel's draft investigation report, thereby giving people due process in ensuring that their voices are heard during the accountability procedures. Fears of allowing individual claims in other MDB accountability mechanisms that they would result in a floodgate of frivolous claims have apparently proved to be unfounded as overall, there has been no disruption of operations in the CAO Office. These fears also seem misplaced based on the figures from CAO's ombudsman (problem-solving) function as it has received over the past 9 years about 70 complaints[112] out of which about 11 are filed by individuals, and seven have arisen from one project (the Baku-Tbilisi-Ceyhan Main Export Pipeline Project).[113]

MDB accountability mechanisms are sailing in relatively unchartered waters when it comes to monitoring the outcomes of their activities. The WBIP does not have a mandate to monitor the Management's action plan presented to the Board when the Panel issues its findings to the Board, even though the Board has occasionally availed itself of the Panel's expertise to carry out a monitoring function. Newer accountability mechanisms have incorporated a monitoring function to cover the outcomes reached after problem-solving and/or investigation but the ambit of monitoring is still unclear. The CAO Office's experience, based on its review of its effectiveness in 2006, shows how its monitoring function has been developed to be useful internally, as a tool for designing improvements to its procedures, and externally, to improve its ability to report on its achievements.[114]

Monitoring can be made easy if the recommendations made from the Panel's findings are appropriate and clear, but the monitoring takes on new perspectives. Claimants still have standing but the focus changes in monitoring in that the mechanisms now consider the implementation of the outcomes which involves checking primarily on Management and their actions. Also, if the mechanisms find that the implementation of the outcomes is not carried out, can they issue recommendations that will have "teeth" upon approval by the Board as the Board's decision will be binding on Management? In the Bujagali project claim at the AfDB's IRM, the Panel recommended that the Board approve general measures such as the bank streamlining and systematizing its policies and procedures so that they become easily accessible to staff and the public in line with the bank's policy on information disclosure instead of project-specific recommendations notwithstanding violations of several policies including gender, involuntary resettlement, poverty reduction, and environment, and that the

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[112] See *CAO Annual Report 2006-2007*, pp. 50-52 and the CAO website, http://www.cao-ombudsman.org (accessed October 1, 2008).

[113] See Summary of BTC Pipeline complaints from 2003 to March 2008 at http://www.cao-ombudsman.org/html-english/documents/CurrentBTCComplaintTracker_updatedMarch08.pdf (accessed October 1, 2008).

[114] CAO Annual Report 2006–2007, p. 15.

Board appoint an IRM expert and the director, CRMU to "conduct the annual reviews of the implementation"[115] of the Board's decision based on its report. The Board accepted the Panel's findings and recommendations and instructed Management to prepare two action plans, one responding to the Panel's recommendations on the bank's policies and procedures (that is, on general measures) and the other for "actionable project-specific findings on non-compliance and areas of concern."[116] The Board approved the Panel's recommendation that the IRM "monitor the implementation of the project-specific action plan" which would mean that the IRM would not monitor Management's action plan responding to the Panel's recommendations on general measures. The lack of clarity in marking out the Panel's terms of monitoring will be an issue for the Panel and for the claimants who expect the mechanism to have a monitoring mandate.

Citizen voices on the future of MDBs, in particular, the World Bank, are increasing through public hearings such as the Independent People's Tribunal on the World Bank Group in India on the World Bank and its policies and procedures in September 2007[117] and the World Bank Campaign Europe in its public hearing on the World Bank under the auspices of the Permanent Peoples' Tribunal in October 2007.[118] The preliminary findings of the jury in the Independent People's Tribunal have called for "India and the international community to join to hold the World Bank accountable for policies and projects that in practice directly contradict its mandate of alleviating poverty for the poorest and potential alternatives."[119]

The participation by CSOs in the Third High-Level Forum on Aid Effectiveness in Accra in September 2008 to review the Paris Declaration of 2005 stemmed from the formation of an Advisory Group in January 2007 to a growing interest on the part of CSOs to engage with donors and country governments on issues of aid effectiveness as they are largely excluded from the Paris Declaration framework and its implementation.[120] This participation is another instance of civil society's demonstration of its engagement in the international

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[115] AfDB. Independent Review Panel. Compliance Review Report on the Bujagali Hydropower and Interconnection Projects. (June 20, 2008) at http://www.afdb.org/fileadmin/uploads/afdb/Documents/Compliance-Review/30740990-EN-BUJAGALI-FINAL-REPORT-17-06-08.PDF?bcsi_scan_B90AE85AF6AB15C6=0&bcsi_scan_filename=30740990-EN-BUJAGALI-FINAL-REPORT-17-06-08.PDF, p. 16. (accessed October 1, 2008).

[116] AfDB's Boards of Directors decision (July 9, 2008) at http://www.afdb.org/fileadmin/uploads/afdb/Documents/Generic-Documents/30740992-EN-BOARDS-DECISION-BUJAGLI-REPORT.PDF (accessed October 1, 2008).

[117] At http://www.worldbanktribunal.org/about_the.html (accessed October 1, 2008).

[118] At http://www.worldbankcampaigneurope.org/spip.php?article68 (accessed October 1, 2008).

[119] At http://www.worldbanktribunal.org/pdf/initial-findings.pdf (accessed October 1, 2008).

[120] See Turning the Tables. Aid and accountability under the Paris framework. A civil society report by Eurodad. (April 2008) at http://www.eurodad.org/uploadedFiles/Whats_New/Reports/Turning_the_Tables.pdf (accessed October 1, 2008). p. 13.

aid effectiveness debate and the important role it can play and voice on aid effectiveness issues at the same forum with governments and donors. The "foot in the door" of the decision-making process approach has now been transformed into "a seat at the table" approach, as vocally articulated by NGOs calling upon governments to open up the G8 summit in Hokkaido to participants of civil society[121] and by calls from CSOs that "civil society groups *should always be offered a seat at the table* and policy dialogues need to feed into political processes" (emphasis added) at discussions between donors and governments including the high-level forums following the Paris Declaration.[122] Eurodad's engagement with the World Bank in April 2008 on odious debt, illegitimate debt, and responsible lending illustrates the concerns of civil society that these issues should be further debated at the international level even though there are disagreements on workable definitions of odious and illegitimate debts, and on operational issues on the framework for responsible financing.[123]

Concomitant with calls for accountability, civil society groups are themselves conscious that as they demand accountability from MDBs as well as new targets of national institutions such as export credit agencies which are bilateral export promotion agencies and do not necessarily have development mandates,[124] they in turn must be accountable to their stakeholders. Examples of accountability measures taken include introspections by a large NGO network on how it can improve accountability of its own NGO members,[125] the establishment of complaint and response mechanisms by several NGOs[126] and the

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[121] See the recommendations by 2008 Japan G8 Summit NGO on "Calling for the G8 summit to be open to civil society" at http://g8ngoforum.org/forum/uploads/holdingg8.pdf (accessed October 1, 2008).

[122] See Turning the Tables. Aid and accountability under the Paris framework. A civil society report by Eurodad. (April 2008) at http://www.eurodad.org/uploadedFiles/Whats_New/Reports/Turning_the_Tables.pdf (accessed October 1, 2008). p. 6.

[123] See Meeting Notes drafted by Eurodad and World Bank staff on Round Table on Conceptual and Operational Issues of Lender Responsibility for Sovereign Debt (April 14, 2008) at http://www.eurodad.org/uploadedFiles/Whats_New/Reports/Odious_Debt_Roundtable_Report_FINAL_July_17_08.pdf (accessed July 27, 2008). See also Gail Hurley, Eurodad Charter on Responsible Financing. (January 2008) at http://www.eurodad.org/uploadedFiles/Whats_New/Reports/Responsible_Financing_Charter_report.pdf (accessed October 1, 2008).

[124] See, for example, Briefing paper for the revision of the Common Approaches – August 2006 prepared by Friends of the Earth France for ECA Watch at pp. 14-16 available at http://www.eca-watch.org/problems/fora/oecd/Common_Approaches_Review/ECAW_CA_Monitoring_Paper_25Aug2006.pdf (accessed October 1, 2008).

[125] In 2006, BOND (British Overseas NGOs for Development), the United Kingdom's broadest network of voluntary NGOs working in international development, commissioned a report "A BOND Approach to Quality Standards in Non-Governmental Organizations: Putting Beneficiaries First" after researching its members' approaches and views on quality and accountability. With the issuance of the report, BOND continues to support its members on issues of quality, effectiveness and accountability in development work.

[126] See for example Oxfam's establishment in 2005 of a complaints and response mechanism in its field program in the tsunami-affected area in Aceh and Nias, Indonesia to allow beneficiaries save access to raise their concerns over housing and livelihood support projects. See:

adoption of an International Nongovernmental Organization (INGO) Accountability Charter in June 2006 by 11 INGOs including Oxfam International and ActionAid International. This charter is open to INGOs to become signatories, and it establishes and implements a system that not only sets common standards of conduct for INGOs but also creates mechanisms to report, monitor and evaluate compliance as well as provide redress.[127]

There are relentless calls for MDB accountability based on the democratic space sought by CSOs in their quests for stronger accountability mechanisms and variations thereof in redressing grievances by project affectees. The debate will carry on in present and future policy reviews of any MDB accountability mechanism and there is no categorical answer on what is the "right" approach. The approach taken by any MDB will necessarily be suited to that institution's context and the political will of its members as the Board of Directors is the approving authority. If civil society has little or no comfort with an MDB's accountability mechanism, it will reiterate its demands to reform the mechanism.

Humanitarian Accountability Partnership – International Newsletter Issue No. 6 (November 2005) at http://www.hapinternational.org/pool/files/617-Newsletter%20Issue%20no%20 6%20PDF.pdf (accessed October 1, 2008).

[127] See http://www.ingoaccountabilitycharter.org/about-the-charter.php (accessed October 1, 2008).

Book Reviews

Democracy Under Construction: Patterns From Four Continents

by Ursula J. van Beek (ed)

Reviewer: Charles A. Robinson
(Metropolitan University Prague)

The various paths of democratisation have taken many and varied forms over the history of the implementation and improvement of democratic procedures and institutions. For those of us lucky enough to have lived under the established democracies of North America and much of Europe, problems of democratic renewal are very much on the contemporary agenda. For example, Britain is currently undertaking a dialogue concerning a legitimacy and trust deficit that has opened up in the wake of parliamentary scandals over expenses, a dialogue made all the more pressing in the context of a declining interest in parliamentary politics over the last twenty or so years.

However, a whole set of problems face countries characterised as undergoing, as Samuel Huntington has put it, a "Third Wave" of democratisation. Beginning, according to this volume's editor, Ursula van Beek, in 1974 and gathering momentum after 1989, the various authors of this interesting and engaging volume argue that the countries undergoing this Third Wave share certain commonalities, even if the differences are often striking.

The authors focus their attentions on five specific Third Wave countries, namely South Africa, Poland, (East) Germany, South Korea, and Chile, and offer a comparative analysis that in many ways can be read as a series of regional comparisons. The authors are well aware of the potential difficulties associated with such an analysis, and, as such, devote an early chapter to the theoretical and methodological challenges posed by such an undertaking. The focus here is on the attitudes and behaviour of normal citizens engaged in the democratic process itself, rather than merely on the functioning of formal

institutions. The authors are aware that democratic institutions can only become an important part of the political landscape if they have a positive effect on people's norms and values.

In analysing processes of democratisation across such a diverse range of regions and specific countries, the authors focus on four distinct but interrelated areas: political society, economic society, civil society, and, interestingly, historical memory. These four aspects come together to offer an analysis that will be of interest not only to political scientists, but also to theoreticians concerned with recent developments in democratic theory and, more specifically, the relationship between the democratic norms and values of citizens - at the level of political and civil society - and the prospects for new democracies to deepen and widen their democratic institutions. For example, readers of Jürgen Habermas will be familiar with the idea that new democratic institutions must be met half-way by an already liberal – or at least conducive – political society, as reflected in the attitudes and beliefs of the citizens who are to become the subjects and authors of the outcomes of the democratic process. As such, civil society must be ready to absorb the burdens that democratic enfranchisement entails for normal citizens.

In this way, historical memory takes on an important role. What, many of the contributors ask, is the historical experience of citizens who, until recently, have been familiar with varying degrees of authoritarianism, and how do these historical memories factor into processes of democratisation and the consolidation of democratic institutions?

Nevertheless, the authors remain cautiously optimistic that solutions can be found, perhaps in the drafting of constitutions and "founding documents" that emphasise the democratic spirit and hopefulness that characterise these relatively new democracies. Jorge Heine, in his chapter, focuses on the issue of constitutional design and implementation, he argues that, despite the attendant risks of such projects, undertaken in Poland and South Africa, but not in Chile, there is a risk worth taking. The example of Germany here is instructive. In an attempt to break with the past, with the historical memory of Nazism, Germany attempted, through its constitution, to emphasise the values of freedom, equality, and democracy as a bulwark against potential relapses. Of course, the extent to which an entity can overcome its own inglorious past is moot, and a subject for empirical analysis. In part, this is a question of the attitudes of citizens towards the previous autocratic regime or regimes, which can often be positive. How then can democratic institutions take root in such seemingly infertile soil? This subject is tackled in the chapter by Hans-Dieter Klingemann. He asserts that the longer democracy exists in any particular country, the better the chances are that citizens will eventually accept the terms set out by post- and anti-autocratic parties and groups. Markowski, in his contribution, argues that the ideal of democracy can take root, even if it leads to a certain degree of dissatisfaction with the actual or perceived functioning

of democratic institutions as they fail to live up to the standards codified in some ideal procedural account.

In terms of arguments concerning the relationship between economic restructuring and the legal institutionalization of democracy, Philip Mohr argues, against more conventional theories such as those of Lipset, that economic development is not the crucial factor in helping democracy take root, and also that the success of democratic development does not require (or is not necessarily accompanied by) standard models of economic restructuring. Each of the countries under consideration takes its own economic path, depending on the previous economic structures that have been inherited by the new democratic political society and elites. Also, as Habermas has noted time and again, democracy also functions to restrict the excesses of the state and the market. Democratic institutions monitor and hold in check the former by preventing incursions into market-driven sectors of the economy and by making sure that there is public knowledge and discussion of government policies, and the latter by guaranteeing that the instrumental logic of the free market does not invade spheres to which that logic is inappropriate or inapplicable. Here, Mohr concentrates more on democracy's role in restricting the actions of the state.

This places a heavy burden on civil society, for if, as noted above, civil society is not at least conducive to the introduction and consolidation of democratic institutions, the task for democrats can be more difficult. Kotze and du Toit argue that, following Bourdieu and others, social capital remains an important explanatory tool, and especially the related notions of trust and tolerance, which underpin societal interactions between citizens. Again, old habits die hard, and, as Rüsen points out, past experiences will always dictate to some degree the path that democratisation will take. Reminiscent of the German philosopher Hans-Georg Gadamer, Rüsen emphasises the power of tradition, although it is also pointed out that we can overcome and work through bitter memories of authoritarianism, and that the process itself is cathartic and offers hope for renewal and that an end can be brought to old hostilities in the attempt to forge a new future that avoids old mistakes.

In conclusion, the various contributors to this volume offer different accounts of a number of different countries in terms of a number of criteria. Yet the underlying threads, both empirical and philosophical, tie things together well. Especially, the emphasis on historical memory is considered and interesting, and will be of interest to scholars from different disciplines. Students of the empirical study of democracy in countries dealing with difficult pasts will find it of importance in their studies, and will be able to apply the ideas and theoretical frameworks on offer in their own research.

'Nonviolent action is a means of combat, as is war.'

A Critical Review of Gene Sharp's The Politics of Nonviolent Action

Publisher: **Porter Sargent Publishers, 1973**
ISBN Number: 978-0-8755–8070-8.

Reviewer: Richard Lappin
(University of Leuven)

'You mean you don't want to fight the occupation of your country?' She would have liked to tell them that behind Communism, Fascism, behind all occupations and invasions lurks a more basic, pervasive evil and that the image of evil was a parade of people marching by with raised fists and shouting identical syllables in unison.

Sabina in 'The Unbearable Lightness of Being'
Milan Kundera, 1984

Gene Sharp published his seminal trilogy, *The Politics of Nonviolent Action*, in 1973. The methods, theories and advice that he espoused over thirty-five years ago have continually received praise as a means to resist the inhumanity often found in society, yet, the extent of their usefulness to peacebuilding is less assured. This retrospective review of *The Politics of Nonviolent Action* acknowledges the significant contribution that the book has made in the service of peacebuilding, however, it also proposes several counter-arguments to the otherwise customary and unquestioning tributes to Sharp's work.

In April 2008, Sharp was presented with the Courage of Conscience award by the Peace Abbey of Sherborn in Massachusetts, USA; an honour given 'to promote the causes of peace and justice, non-violence and love.'[1] Joan B. Kroc of Notre Dame's Institute for International Peace Studies has stated that Sharp is 'the world's leading scholar on non-violent action… his reputation is so commanding, and his work is so established, that you can't even begin to work in this field without acknowledging and working

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[1]   The Peace Abbey, *The Courage of Conscience Award* (2009 [cited April 8 2009]); available at: http://www.peaceabbey.org/awards/cocrecipientlist.html.

from his foundation.'[2] Indeed, Sharp's works have been widely read and his methods actively embraced by the likes of Otpor, the Serbian student group which brought down the Slobodan Milošević regime in 2000, and Pora, the Ukrainian opposition movement so prominent during the 2004 Orange Revolution. In fact, one opposition activist in Ukraine went so far as to describe Sharp's work as the 'bible' of Pora.[3] Sharp has also previously consulted with leaders from Estonia, Latvia and Lithuania during their secession from the Soviet Union, visited Tiananmen Square during the anti-government protests of 1989, and consulted with opposition leaders on the Myanmar border in 1996. Perhaps Sharp's biggest accolade though is his capacity to irk dictators. In recent years, both Hugo Chávez of Venezuela and the military junta of Myanmar have publicly accused Sharp of directly trying to topple them from power.

These plaudits are a reflection on a career that has demonstrated an unwavering support of non-violent action and the defence of freedom and comprises several other important works such as the shorter and more accessible *From Dictatorship to Democracy: A Conceptual Framework for Liberation*, and his most recent book *Waging Nonviolent Struggle: 20th Century Practice and 21st Century Potential*. However, it is *The Politics of Nonviolent Action*, which remains the cornerstone of his approach and one of the most oft cited texts in peacebuilding literature, as well as in the broader field of international relations.

The foundation of Sharp's work lies in his understanding of the nature of power. One of the initial misconceptions that Sharp seeks to correct is that power is not a monolithic structure with control concentrated in the hands of a few individuals at the top of a metaphorical pyramid. Sharp explains that such a model assumes that political power is 'a "given", a strong, independent, durable (if not indestructible), self-reinforcing, and self-perpetuating force.'[4] Moreover, as Sharp notes, it is often commonly believed that the only method to oppose such a structure is through overwhelming force, for example, by means of a violent revolution. However, Sharp offers a contrasting view of power, and defines it as something which is diffused throughout society, and which by consequence makes power dependent on the consent and obedience granted to it by the larger citizenry. In other words, without the obedience of citizens, the power of a ruler simply disintegrates. In essence, it is like the fable of 'The Emperor's New Clothes', the notion of an omnipotent ruler is an illusion that will only exist if people continue to *believe* that it exists.

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[2]   The Peace Abbey, *The Courage of Conscience Award* (2009 [cited April 8 2009]); available from http://www.peaceabbey.org/awards/cocrecipientlist.html.

[3]   Oleh Kyriyenko, quoted in: Margreet Strijbosch, *Ukraine: The Resistance Will Not Stop* (Radio Netherlands, November 25 2004 [cited 2009 April 8]); available from http://www. radionetherlands.nl/currentaffairs/region/easterneurope/ukr041125.

[4]   Gene Sharp, *The Politics of Nonviolent Action: Part One: Power and Struggle* (Boston: Porter Sargent Publishers, 1973). p. 9.

This definition is crucial because it forms the foundation for all of the 198 different kinds of non-violent action that Sharp proposes. Without going into excessive detail, these methods can be broken down into three broad categories; protest and persuasion; social, economic and political non-cooperation, and; non-violent intervention. Each of the methods are carefully explained and the book undoubtedly provides an excellent resource for people who feel they are being suppressed in a conflict (either latent or manifest). Moreover, the emphasis on non-violence, the mobilizing of stakeholders and the recognition that power is something consensual and changeable are themes embraced by all respected peacebuilding initiatives. It would therefore be easy to add Sharp's methods to the canon of peacebuilding tools without further discussion. However, it is this author's contention that the relationship between non-violent action and peace is not always a harmonious one, and the remainder of this review will be dedicated to highlighting potential flaws with non-violent action and demonstrating how, at times, the approach can be counter-productive to the ethos of peacebuilding.

First, it must be acknowledged that Sharp never explicitly addresses peacebuilding, his concern is solely the politics of non-violent action. The fact that these can, at times, be adversarial is readily accepted by Sharp, who contends that 'nonviolent action is a means of combat, as is war.'[5] He also openly states that non-violent techniques 'differ from milder peaceful responses to conflict, such as conciliation, verbal appeals to the opponent, compromise and negotiation.'[6] In essence, therefore, non-violence should not be automatically (if ever) equated with peacebuilding. Indeed, it often offers a win-lose confrontational approach that does little to provide for reconciling with the past or envisioning a future which are essential elements in fostering a sustainable peace. From this perspective, and in the tradition of Johan Galtung, peacebuilding is conceived as not only the 'negative' task of preventing a relapse into violence, but also encompassing the 'positive' tasks of aiding the sustainable recovery of the state and removing the underlying causes of violent conflict.[7] It is easy to dismiss the positive aspects of peacebuilding as wishful thinking, fuzzy, or utopian, but a reconsideration of recent events in Georgia reminds us that a movement towards peace that does not address the root causes of the conflict – no matter how non-violent that transition may be – will only represent a pause in an otherwise enduring, and ultimately violent, conflict.

Second, what happens when the suppressed are on the wrong side of the win-lose dichotomy? One only has to remember the events of Tiananmen Square in 1989 to understand that non-violent protests in the face of overwhelming military power may not only prove futile, but can also have a negative impact on a

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[5] Ibid. p. 67.
[6] Ibid. p. 67.
[7] Johan Galtung, "Cultural Violence," *Journal of Peace Research* 27, no. 3 (1990).

fledgling peace process by 'frightening' people into accepting the status quo. A similar situation has recently developed in Uzbekistan, where anti-government opposition has been effectively silenced following a bloody crackdown by the government on non-violent demonstrations in Andijan in 2005 which left several hundred dead. Ultimately, it is human instinct to protect your life rather than risk it for some higher goal, however noble that objective may be.

Third, even if the use of non-violent methods forces the demise of an authoritarian government, there is no guarantee of what will fill the subsequent vacuum. There is no caveat provided that ensures repressive regimes will be replaced swiftly and seamlessly by inclusive democratic regimes. Even if democratisation is initiated, a poorly managed transition and premature elections can often lead to a return to violence by polarising the society on the very issues that led to discord and violence.[8] Moreover, several studies indicate that the typical outcome of such a transition is usually only a pseudo-democracy; a regime that allows periodic multiparty elections, but otherwise restricts the exercise of democratic freedoms.[9] Luc Reychler has observed that 'the devil is in the transition' and Sharp's methods do not provide for dealing with the devil.

Fourth, non-violent techniques may be effective means, but they do not always have justifiable ends. As Sharp writes 'there is nothing in nonviolent action to prevent it from being used for both "good" and "bad" causes.'[10] For instance, Milošević effectively used 'human shields' – a method advocated by Sharp[11] – to protect key infrastructure during the 1999 NATO bombardment of Serbia. Similarly, radical right-wing and neo-Nazi groups in Western Europe are increasingly positioning themselves as non-violent organizations that adhere to the rules of peaceful democratic processes.[12] Interestingly, during an interview in 2003, Sharp was specifically asked what his response would be if neo-Nazis asked for advice on non-violent action, his response was telling: 'I would say, "Here is a list of publications on non-violent struggle... I would prefer that you change your outlook on the world and on other people. If you continue to be Anti-Semites, then it is better for you do this than to slaughter people".'[13] This answer typifies the relationship between *The Politics of Nonviolent Action* and peacebuilding. Non-violent action is a virtue, but it is not the only one. The assumption that there is a 'unity of goodness' between non-violent action and peacebuilding is a naïve one. Non-violent methods are undeniably preferable to violent ones, but they

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8   Luc Reychler, *Democratic Peace-Building & Conflict Prevention: The Devil Is in the Transition* (Leuven: Leuven University Press, 1999).

9   See, for example: Roland Paris, *At War's End: Building Peace after Civil Conflict* (New York: Cambridge University Press, 2004).

10   Sharp, *The Politics of Nonviolent Action: Part One: Power and Struggle*. p. 71.

11   Ibid. p. 388.

12   See, for example: Forthcoming in R. Eatwell and M.J. Goodwin, *The New Extremism in 21st Century Britain* (London and New York: Routledge, 2010).

13   Metta Spencer, *Gene Sharp 101* (July-September) (Peace Magazine, 2003 [cited April 8 2009]); available at: http://archive.peacemagazine.org/v19n3p16.htm.

do not necessarily guarantee the positive aspects of a sustainable peace, such as inclusive governance, reconciliation, or a secure environment.

Finally, and to return to Kundera's quote at the beginning of this review, the image of any unified popular movement can be both simplistic and unsettling. The rallying of the masses around a new symbol – be it Otpor's clenched, raised fist, or Pora's orange flags – masks the complexities of peacebuilding and suggests a one-voice-no-debate approach. The reasons why people took to the streets in Georgia, Ukraine and Serbia were myriad and although they may have been united in their opposition to an unpalatable regime, they are unlikely to maintain that harmony in agreeing a new future for the country. Dislodging a dictator is one thing, fostering inclusive democratic governance is another.

(The clenched, 'raised fist' of the non-violent Serbian opposition group, Otpor)

Admittedly Sharp never offers any pretence that these concerns will be addressed in his work, however, this only serves to reaffirm that his methods should therefore be approached by peacebuilders with trepidation. Indeed, non-violent action can be considered to offer only one part of an equation. Yes, non-violent methods are preferable to violent ones, but without efforts to promote inclusive governments that can effectively address the underlying tensions, these methods alone will never be enough to ensure a positive and sustainable peace, and, at times, they may even frustrate efforts. Therefore, despite mainstream thought indicating otherwise, at its best non-violent action can only be considered as a complement to peacebuilding, but at its worst it can be its very antithesis.

Better Safe than Sorry: The Ironies of Living with the Bomb

by Michael Krepon

Stanford University Press, 2009.
ISBN: 0804760632

Reviewer: Brian Karmazin
(Concordia University, Montreal)

Better Safe than Sorry is a historical narrative of nuclear weapons, their conception, use and relevance to the geopolitics of the Cold War and beyond. Importantly, in the words of the author, the book serves as a "reminder of what happened in August 1945 – and what must not happen again"[1] Krepon acknowledges the Non-Proliferation Treaty (NPT) which constitutes the legal framework for current approaches to dealing with the nuclear question. He recognises the need for the permanent members of the United Nations Security Council (UNSC) to strengthen their cooperation in the area of non-proliferation. Krepon is critical of the United States' hypocritical approach developed during the Bush administrations, noting that the "rules and norms were good, except where norms constrained US freedom of action or the actions of US friends and allies."[2] Krepon also assumes that the US has a responsibility to act in a leadership role to prevent the further development and potential usage of nuclear weapons. The break-up of the Soviet Union breeds confidence in the face of emerging threats from Iran, North Korea and Pakistan, which Krepon believes are far less dangerous than the threat of mutually assured destruction during the Cold War. He nevertheless urges statesmen to err on the side of caution as they try to reduce "the risk of having the most deadly weapons fall into the most dangerous hands."[3]

The Cold War, referred to as the first nuclear age, was characterised by unparalleled bipolar nuclear tensions and proxy warfare between the US and the USSR.[4] During that period "*the Bomb* was the central problem – not a particular state that had the Bomb or wanted to get it."[5] A fundamental debate over deterrence and reassurance, nuclear non-proliferation and arms control shaped

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[1] Michael Krepon, *Better Safe than Sorry: The Ironies of Living with the Bomb* (Stanford: Stanford UP, 2009). p. xi.
[2] Ibid. p. 6.
[3] Ibid. p. 28.
[4] Ibid. p. 33.
[5] Ibid. p. 45.

international relations from the 1950s onwards. Krepon traces the evolution of this debate from an American perspective and describes key developments in the nuclear policies of the Eisenhower, Kennedy and Johnson administrations; developments which made possible the ground-breaking NPT. As tension decreased, the multi-lateral treaty – signed in 1968 in Helsinki – would bind several members of the international community to prevent new states from acquiring nuclear weapons and prevent states which already possesses them, from selling nuclear weapons or the ingredients and technology so they may produce their own. In the 1970s, Nixon's official visit to Moscow opened the way for talks aimed at Strategic Arms Limitation (SALT I and SALT II) and paved the way for the Strategic Arms Reduction Treaty (START). The US and the USSR would remain in détente under the Ford and Carter administrations. In the 1980s, despite the commencement of the so-called Second Cold War (following the USSR's invasion of Afghanistan, 1979) US President Ronald Reagan and Soviet leader Mikhail Gorbachev overcame major differences and took coordinated actions to halt an escalating arms race. Still on a positive note, "no achievement during the first nuclear age was more central to reducing dangers than the record of not using nuclear weapons in warfare, even when doing so might have conferred short-term gains."[6]

The second nuclear age began with the dissolution of the USSR and the presumption of Iraq's – under Saddam Hussein – advanced nuclear weapons programme.[7] Even though the collapse of the USSR was viewed positively, "a new set of nuclear dangers accompanied this welcome event, dangers that have not gone away and that could erupt at any time."[8] Among the many dangers of this new chapter in international relations, Krepon identifies asymmetric warfare and nuclear terrorism: the fear that rogue states and non-state actors, such as terrorist organisations or guerrilla movements, may seek to acquire nuclear weapons to challenge the international *status quo*. Krepon revisits the Cold War trilateral relationship between the US, China and the USSR, pointing out that today, while China and Russia are bound by a strategic alliance, the Chinese government maintains even stronger ties with Pakistan. Alongside Iran and North Korea, Pakistan is often cited as a major nuclear threat to global peace. Krepon recalls that throughout the 1990s, "two individuals personified the new dangers of the second nuclear age, where nuclear terrorism, 'loose nukes', and viral, horizontal proliferation have become paramount anxieties . . . A.Q. Khan and Osama Bin Laden."[9] Both names are linked to Pakistan: while Khan is known as the father of the Pakistani nuclear programme, Bin Laden's ties to the Taliban movement in the region are well documented. While massive, life-threatening, nuclear standoffs have not occurred in the current

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[6]   Ibid. p. 92.
[7]   Ibid. p. 94.
[8]   Ibid. p. 131.
[9]   Ibid. p. 113.

nuclear age with the same regularity of the Cold War, Krepon sees a high probability that future events, in the area of nuclear weapons, may be detrimental to global peace. Krepon justifies his fears by highlighting possible repercussions to the Bush administration's mismanagement and irresponsible behaviour in the carrying-out of the 2003 invasion of Iraq.

Further, Krepon describes current nuclear trends within the international community as he identifies nine main challenges he believes will shape the future. These are: 1) the increasing risk of nuclear arms being used in state-to-state conflicts; 2) the Iranian and North Korean nuclear programmes; 3) the impact of the political turmoil in Pakistan; 4) the proliferation of nuclear weapons to new states; 5) nuclear terrorism; 6) radical, extremist groups obtaining nuclear weapons; 7) monitoring failures by the International Atomic and Energy Agency (IAEA); 8) global increase in nuclear testing and the growth of various uranium; and 9) plutonium enrichment programmes worldwide.[10] He then draws a list of likely outcomes to the nuclear question, most notably: the abolition of nuclear weapons; nuclear anarchy; proliferation; arms control and dominance. According to Krepon, "the alternative nuclear future of abolition is the most suitable end state for U.S. nuclear policy, but it remains a long-term vision, many steps away."[11]

Krepon attributes US successes in the nuclear realm, to a combination of five fundamental elements: deterrence, military strength, containment, diplomatic engagement, and arms control. However, "when national leaders appeared to be relying too heavily on any one of these key elements, public anxieties dictated reorientation."[12] In fact, when applied individually these aspects of a safe nuclear strategy have often led to unwanted results; while heavy reliance on military strength during the Nixon era led to the Vietnam War, diplomatic engagement with the USSR resulted in dangerous encounters between President Kennedy and Khrushchev in Vienna in the 1960s and between Reagan and Gorbachev in the 1980s, and an overwhelming focus on military strength led to over-spending as seen in Eisenhower's military industrial complex.[13]

Krepon produces an insightful, in-depth analysis of the five main elements that allowed the US and USSR to avoid a nuclear conflict between them and prevent others from engaging in one. He also alludes to the issue of missile defense systems and the relevance of the US-proposed NATO complex expected to be deployed in Poland and the Czech Republic. This project, he argues, is the result of the Bush administration's unilateralism, as prior discussions with US Congress, NATO, and Russia – still an important member of the international community – were minimal at best. Krepon notes that "(s)afe passage

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[10] Ibid. p. 137–8.
[11] Ibid. p. 173.
[12] Ibid. p. 175.
[13] Ibid. p. 176.

during the first nuclear age required steadfastness, good fortune, learning from mistakes, and above all, wisdom. Safe passage during the second nuclear age will require more of the same."[14]

While acting as an excellent testimony of Krepon's extensive knowledge, *Better Safe than Sorry* is intended for advanced students or experts of the subject at hand as the author is often overly theoretical, at times irritatingly, on technical aspects of nuclear weapons, such as his depiction of Multiple Independently Targetable Re-entry Vehicles (MIRVs), SCUD-type missiles and Intermediate-Range Nuclear Forces (IRNFs) which fall out of the reach of the novice reader. On the positive side, the clear and straightforward sub-headings help structure an otherwise dense work. With respect to content, not only does Krepon underestimate the nuclear threats that are found in current Iran, North Korea and Pakistan, but the international system he describes is unipolar and US-centric, thus, inconsistent with reality. Furthermore, the optimism he initially expresses by the end translates to political idealism.[15] Students of international relations interested in the nuclear question must seek refuge elsewhere. Still, there is hope that the US, in partnership with other key international actors such as the EU and Russia, will find a way to secure a safe future for themselves and the wider international community. In fact, during the EU-US Summit in Prague, US President Barack Obama asserted his nation's devotion to a world free of nuclear weapons.[16] A few hours later he visited Moscow where his words materialised into action as he signed a crucial arms reduction agreement with his Russian counterpart, Dmitry Medvedev.

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[14] Ibid. p. 212.
[15] Ibid. p. xvi.
[16] The White House: Office of the Press Secretary, "Remarks by President Barack Obama: Hrad-cany Square, Prague, Czech Republic", April 5, 2009; available at: http://www.whitehouse.gov/the_press_office/Remarks-By-President-Barack-Obama-In-Prague-As-Delivered.

Responsibility to Protect: The Global Effort to End Mass Atrocities

by Alex J. Bellamy

Polity Press, Cambridge, 2009

Reviewer: Kristyna Syslova
(Metropolitan University Prague)

The so-called Responsibility to Protect [R2P] has, recently, emerged as a widely discussed and hotly debated issue. Even though the idea is not entirely new or at all revolutionary, there is yet to be a general acceptance of its boundaries and implications and thus it continues to be meticulously examined and its logic questioned. Some of the more common questions related to R2P include: where does the R2P originates from, what does it means and what does it involve?; Does a responsibility to protect truly exist?; Does R2P clash with the concept of state sovereignty, if so why and what is to be done to reconcile these principles?; and, who is responsible for protecting who? Such questions are found in both academic and public queries and have inspired a whole generation of authors to solve such problematics, examine the nuances and provide reasonable assumptions as to the nature of R2P and its wider implications. One such author is Alex J. Bellamy, who compelling book: *Responsibility to Protect: The Global Effort to End Mass Atrocities* certainly makes an adequate contribution to the emerging literature base. This review is meant to highlight some of the more meaningful arguments presented by Bellamy.

In the first chapter, Bellamy's focus rests on a presentation of the origins of R2P as a concept. In this quasi-historic approach, Bellamy commences by reviewing the 'grass-roots' of R2P: from the sovereignty as/and responsibility debate. He demonstrated that the 'traditional sovereignty' (self-determination) and 'sovereignty as responsibility' (protection of fundamental human rights) have a lot in common, particularly that every sovereign has responsibilities to its citizens and the international community (pp. 15–27). Although, as Bellamy states, there is disagreement over the nature of responsibility and on the roles of international society, what is undoubtedly common to both is the acceptance of the UN Security Council's authority as a policing arm to sovereign affairs (pp. 30–33). Arguing in favour of the similarities between both 'sovereignty' concepts provides a base for establishing a common consensus towards the R2P.

After working with the conceptual side of the R2P debate, Bellamy analyses the International Commission on Intervention and State Sovereignty

(ICISS) – establishment by the Canadian government – and its role in developing a novel approach to the R2P. This second chapter thus opens with the argument that the international community should be prevented from idly watching as a state's political authority fails to protect its citizens from genocide, ethnic cleansing or other large-scale atrocities. In viewing the Commission, Bellamy selects its most important function, to: "set out the case for the R2P and identified its three main components: to prevent, to react and to rebuild." While these are dealt with in more details in subsequent chapters, it is noteworthy that these feature so prevalently in his work as they form the practical side of the R2P concept and Bellamy seems eager to endorse a physical body – such as the ICISS – capable of fulfilling a R2P mandate.

Among the most important arguments raised in this chapter concerns the notion that no states are, or should be exempt from fulfilling the goals the R2P promises. In other words, all states and governments share responsibility (pp. 51–59). According to the ICISS report, the main purpose of R2P is to reduce the deliberative choice between standing aside or taking action, which world leaders faced, and continue to face today. The Commission adopted an effective approach, making prevention – of genocide and other mass atrocities – the key to the R2P. Bellamy goes on to provide an examination of the R2P's development problematic, for instance its association with 'humanitarian intervention', stating that this relationship actually complicates international support. Nevertheless, the R2P gradually transformed from a concept into a principle or norm, when "all states pledge to adhere (to R2P) ... both in their relations with their own citizens and in their behaviour as members of international society" (p. 5).

As the author notes in chapter three, the R2P – promoted and supported by (then UN General Secretary) Kofi Annan, while undergoing some important changes – was, in 2005, at the UN World Summit, finally transformed from a proposed concept into an international principle which ought to be endorsed by the entire UN membership (p. 95). World leaders agreed, for the first time, that states have a primary responsibility to protect their own people from crimes against humanity, genocide, ethnic cleansing, sexual violence as well as other war crimes and the international community has a responsibility to act when governments fail to protect a citizenry because they are unable or unwilling to do so.

It is common to assume that governments actually bear responsibility for providing safety and security for their citizens however; state sovereignty often serves as the legal blanket needed to commit violent acts against a citizenry. Throughout his work, Bellamy highlights the fact that – sad as it is – genocide, violations of human rights and other atrocities remain "an all too frequently recurring phenomenon" (p. 1), and tries to explain why such atrocities have not ceased despite a climate in international relations conducive to accepting the norm of R2P.

Invariably, Bellamy relies on case-work to properly underscore the moral arguments this work is founded on. In this, the perilous situation in the Democratic Republic of Congo (DRC) is earmarked by Bellamy as a humanitarian black-hole which demands the international community's assistance as more than 5.4 million people have died there as others, particularly the US and EU, merely watch one set of atrocities after another befall the hapless civilian population.

Officially, the conflict in DRC is over, yet the continuation of suffering is relentless: major human rights abuses and other atrocities have not ended, starvation and malnutrition are the norm, preventable diseases are rampant and sexual violence is wide-spread. Additionally, the number of refugees and displaced people is enormous adding extra pressure points to an already strained region. While it is clear that segments of the international community are concerned about the situation in DRC, and in the wider Great Lakes Region, and consequently, a number of observation and peacekeeping missions have been sent by the EU, and the UN has been present there since 1960, the situation remains poor and, in fact worsens rather than improves as time goes on. Bellamy expresses surprise at the ineptitude of the international community when it comes to demonstrating the R2P as a functioning norm by noting that the international response to atrocities in DRC are "slow, timid and disjointed" (p. 1).

Instead of making concerted efforts to stem violence and help those most vulnerable and in need of external support, often those able offer protection and sustainable living act as spectators rather than intervene. Self-interests typically win out over morality. Indeed, it is common that states are weary to get involved into another's domestic political scene and often even the fact about the nature of an ensuing conflict – including its potential contagion – is, not enough to mobilise the international community to act. Bellamy argues that currently it is the combination of all the above which ensures that interventions are slow, incoherent, under-equipped and lacking coherence in their mandate (p. 2).

Bellamy provides a clear, in-depth and analytical overview of the theoretical and practical dimensions of the R2P concept and norm in international relations and is geared towards seeking a solution to seemingly intractable conflicts to prevent the continuation of human history being defined by genocide and other horrible atrocities. In short, Bellamy's research is more than providing a historic or thematic account of the R2P, it is an attempt to demonstrate an alternative avenue for human history to venture and his aim – successfully achieved – was to demonstrate that perpetual cycles of violence can in fact be brought to an end, though such progress requires the active participation of the whole of the international community and not through continued procrastination. Finally, Bellamy presents approaches to transforming the R2P into an applicable programme of action which would

secure the protection of civilians and therefore launch a new chapter in history. For those interested in human rights protection, international affairs or recent ongoing and development in international relations, this book comes highly recommended.

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