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Dear Reader:

Welcome to the fourth issue of the *Yale Review of International Studies*. It is hard to believe that it has been nearly two years since a small but ambitious core of undergraduates founded a new publication with a broad mandate: to create a space for original scholarship and insightful commentary that reflected the vibrant discussion of international issues already taking place all over the University—whether in heated seminar debates or midterm study groups, over late-night Falafels or fourth cups of coffee.

True to original form, this issue reflects all of the intimidating thickness of the Yale Bluebook, the originality the undergraduate scholarship in its courses, and the methodological rigor across its majors. In this issue alone, Zoe Egelman considers the short history and evolving definitions of EU citizenship; Anne Bloomdahl reexamines military secrecy two decades after Daniel Ellsberg leaked the Pentagon Papers; Deirdre Dlugoleski uncovers an 18th century journal that sheds new light on the origins of British foreign policy in the Palestinian territories. And that is just a sample.

We hope you enjoy reading these outstanding pieces as much as we have, whether flipping through or line-by-line. They were carefully selected from an increasingly tall pile of submissions, the quality of which has propelled standards unimaginably higher with each new semester.

We should also mention that our sleek new design makes YRIS more than a pleasure to read; it is now also a treat to hold, save, and shelve for safe keeping. For this we owe sincere thanks to our indefatigable new designers, Martha Kang McGill and Grace Robinson-Leo. They have refocused our journal on readability and substance, but have also given us a smart companion that we are proud to carry conspicuously on strolls across campus. What more could we ask for?

Well, there is one more thing: Please consider submitting your work. We are always looking for brilliant student essays on inter-

national trends and issues broadly understood, and the journal's strength relies on submissions from readers like you.

We truly look forward to reading (and publishing) more of your work in the year ahead.

Best Regards,

The Editors

Lakhdar Brahimi's credentials are impeccable, fruit of the Algerian statesman's long career, and he's as able a candidate as any to serve as United Nations special envoy to Syria as the nation's increasingly bloody civil war grinds on. His CV counts postings and honors that would be the envy of any diplomat, starting with his representation of Algeria's long-ruling Front de Libération National (FLN) in Jakarta at the tender age of 22.¹ He enjoys membership in the Elders, a diplomatic and humanitarian A-list that includes Desmond Tutu, Nelson Mandela, and Kofi Annan, Brahimi's predecessor as envoy to Syria.²

He even looks a little bit like Henry Kissinger.

And yet, with all of that experience under his belt, Brahimi's appointment still ought to give us at least a moment's pause. Why? Because Algeria didn't enjoy the liberalizing benefits of an Arab Spring, and because that atypical calm can't be credited to a sterling democratic and human rights record for the party — or the military chiefs that support it — to which Brahimi has dedicated much of his life's diplomatic service.

Now, the obvious objection here is that it's unfair to blame Brahimi for the failures of the broader Algerian political apparatus, and it would be, especially since he isn't acting for it in an official capacity. That being said, he's no outsider to the FLN — his ties to the party run very deep — and a series of very public roles have found him frequently condemning the abridgment of rights that are far from held sacred by his home government.

When Algeria held parliamentary elections this summer in an attempt to let off popular steam, the United States and others were quick to rubber-stamp them as a democratic success; a closer look shows that wishing does not make it so.³ Though the FLN held firmly to power with 48% of total seats, they did so winning just 17% of votes cast — and enjoyed the support of only 6% of eligible voters. Allegations of fraud were widespread, and many citizens either didn't vote or cast blank ballots in despairing protest of anticipated corruption.⁴

In her capacity as Secretary of State, Hillary Clinton singled out for particular praise the number of women elected in Algeria — nearly a third of all seats (or, in other words, better women’s representation than in either the United States Senate or House of Representatives). As the Carnegie Endowment for International Peace pointed out soon after the elections though, this was FLN gamesmanship: Their electoral law, of very recent vintage, requires that 20–50% of party candidates be female.⁵ Given Algeria’s otherwise not particularly strong record on women’s rights, it’s hard to imagine this wasn’t a provision cynically put in place to curry favor with the West.

Still, to compare Algeria’s anti-democratic tendencies — even implicitly — to those Brahimis is confronting in Syria should probably seem grossly exaggerated; the FLN may have been heavy handed in dealing with Arab Spring protests, but at least they are not going through a civil war.

And they are not, in large part because they already had one during their last flirtation with democracy in the 1990s. It was not so long ago, certainly not long enough for the Algerian people to forget, that the FLN and military’s choice to cancel elections in the face of an impending Islamist popular victory prompted one of the bloodier eras of the nation’s history. Call it a prototype Arab Spring, and one without a happy ending.

The memory of what’s called in French “la décennie noire” (the Black Decade) and its 150,000 casualties loom large among the reasons that Arab Spring protests in Algeria were so small, despite significant popular grievances.⁶ Neither the Algerian government nor the Algerian people seem to have the stomach for more strife. Lack of armed conflict notwithstanding though, the Algerian regime remains characterized by deeply undemocratic tendencies; the fight has just largely gone out those concerned.

If the Syrian situation is a conflagration, then the Algerian one is wet powder. That Brahimis hasn’t used the remarkable podium — any of the remarkable podiums — afforded to him by his international stature to push for real change in his home country ought to be disappointing as a result. The problems there are quieter, clearly, but not unserious for it.

The United States would do well to learn from the tension in Brahimis’s position. The hastiness with which the U.S. and Europe have been willing to sanction the conduct of the FLN and its military backers before turning their attention elsewhere lends weight to charges that U.S. foreign policy suffers from either deep

cynicism (Algeria is an important partner in combatting terrorism and a major energy supplier in the region; therefore, it goes un-criticized) or equally profound naïveté (falling for government-spun pro-democracy rhetoric that one Algerian activist group called “[a] ruse aimed at fooling international opinion at a time when Arab regimes are under pressure.”)⁷ Neither perception does the United States any good as it struggles to manage its interests and values in the wake of the Arab Spring.

In the end, and in deference to political realities, progress is better than no progress and undemocratic is preferable to deeply undemocratic; in that regard, Algeria isn’t the pressing priority that some other Arab nations are at the moment vis-à-vis Western interests. Brahimi, though, and the West too, would benefit from calling a spade a spade in the Algerian case. A little tough talk — and a little of the credibility that comes with consistent messaging — could go a long way.

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Putin and USAID: The Makings of a Grip Too Tight on Power
Samuel Oblatz & Nicholas Alers

In September 2012, the Russian government, headed by President Vladimir Putin, mandated that the U.S. Agency for International Development (USAID) cease operations, as their services were no longer needed. USAID began working in Russia in 1992 shortly after the fall of the Soviet Union, and since then USAID-Russia has approved over \$2.5 billion in expenditures. Given that the organization has operated in Russia for more than twenty years, its expulsion begs the question: why now? The political motive behind Putin's action soon became apparent, with the Foreign Ministry shortly thereafter accusing USAID of attempting "to influence political processes, civil society institutions, and elections at various levels, through distribution of grants."¹ Thus, Putin's dismissal of USAID is consistent with the Kremlin's recent tactics of marginalizing NGOs with links to his opposition and to foreign sources of financing. Moreover, the USAID episode fits within a broader framework of Putin's contempt for democracy, civil society, "ordinary" Russians, and due process.² While intended to help consolidate the President's power, these tactics also ultimately hold the potential to undermine it.

Under Putin, Russia has long practiced a genre of governance labeled "managed democracy" or "competitive authoritarianism," characterized by questionable electoral processes and minimal accountability. Freedom House currently classifies Russia as "not free"; on a scale from one to seven — with seven being least free — Russia is rated at five and a half.³ Among its Central and Eastern European (CEE) neighbors, Russia is one of only a handful of nations currently trending *away* from civil liberties and democracy since the fall of the Berlin Wall. However, the movement away from democratic norms has not been without its opposition. This year especially, President Putin finds himself in an increasingly hostile domestic landscape. Recent protests — directed against election fraud and corruption and calling for an end to the Putin regime — have drawn international attention.

Putin's response has been to mount a campaign that portrays the discontent as externally generated and to attack the civil

society organizations that pose a threat to his political authority. While the Kremlin claims that Russian civil society is “fully mature” and in no need of “external direction,”⁴ the non-governmental sector tends to disagree.⁵ In July 2012, Putin signed legislation that required NGOs to register as “foreign agents” if a portion of their funding originated from abroad. As a result, these organizations are subjected to government audits that place an undue burden on them. Since funding for prominent democracy and human rights groups such as NGO Memorial, Transparency International, and Golos — an election-monitoring organization which brought to light voting violations and election fraud in December 2011, spurring mass street protests — accounts for about half of USAID’s \$50 million budget in Russia, it makes for an easy target.⁶ Though Putin’s strategy of starving civil society organizations from external funding in order to solidify his hold on power is arguably shortsighted, the Russian President is right to be wary of the potentially subversive effects of aid to these civil society organizations. Putin is wrong, however, to use the blunt instrument of terminating USAID’s efforts as a means to stifle such subversion, since doing so eliminates a key funding source for other NGOs that provide important social services like health care and humanitarian assistance. In other words, Putin emphasizes USAID’s assistance to political and democratic actors, but fails to properly acknowledge USAID’s support of health, environmental, and economic organizations.

Russia’s tumultuous past has led many Russians to prioritize stability, sometimes over democracy and individual liberty.⁷ This explains, in part, why Putin has managed to hold onto power for so long despite his corrupt and anti-democratic tendencies. Since the end of the Cold War, NGOs have filled an important gap left by a government plagued with the economic and social shortcomings characteristic of autocracy. The purpose of USAID-Russia was to assist Russia’s post-Cold War political and economic transition by helping “the Russian people improve public health and combat infectious diseases, protect the environment, develop a stronger civil society, and modernize their economy.”⁸ USAID’s efforts are not entirely motivated by altruism and likely do exhibit the biases of politicized aid; at the same time, the good they have done in Russia cannot be discounted.

In the face of political strife, economic disarray, and social disillusionment, many of the organizations funded in part by USAID have strengthened Russia’s social fabric and provided support to

a large number of Russians living in difficult conditions. For example, USAID funded programs dedicated to the eradication of polio and tuberculosis, and information campaigns on HIV/AIDS. Moreover, the organization has provided welfare assistance to over 80,000 children and helped to restructure the electricity sector. Finally, the World Bank and the Russian government enacted considerable judicial reforms based on USAID best practices.⁹ Writ large, NGOs, which rely greatly on external funding from USAID, have become key actors in promoting social stability in Russia. The difficulty of disentangling the altruistic and political thrusts of USAID's Russian initiatives means that Putin's outright rejection of USAID could have the unintended consequence of making Russians more acutely aware of the costs associated with his quasi-authoritarian rule.

The forced exit of USAID could signal two perilous trends. First, it could signal an attempt by Putin to rally the Russian people against an outside enemy — the resurgence of a confrontational diplomatic strategy. Second, as this article argues, it could reveal that the Putin Administration is running out of options; he is taking steps to reduce democratic mechanisms in order to consolidate and assure his political longevity by attacking foreign-funded civil society organizations. The Kremlin aptly symbolizes this dilemma of all Russian leaders: “it is a fortress behind which the administration protects itself from the wrath of the people it pretends to govern.”¹⁰ The post-election crackdown on political dissent, characterized by the assault on USAID, recent laws censoring the Internet and restricting freedom of assembly, and the harsh response to the Pussy Riot protests, demonstrates Putin's willingness to bolster his “fortress.” However, as a consequence of Putin's strategy, much of Russia's non-governmental sector has suffered a “body-blow.”¹¹ Putin's intent may be to target his opposition, but by antagonizing the United States and ostracizing key NGOs, he may be further unraveling an already-fragile social framework and inflaming “the wrath of the people.” How long can Vladimir Putin remain in office as he continues to burn the candle at both ends: persecuting democracy and undermining social stability?

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Stories from South Tel Aviv:
The Plight of African Asylum Seekers in Israel
Anna Meixler

In 1948, the newly established Jewish and democratic State of Israel asserted in its Declaration of Independence that:

The State of Israel will be open for Jewish immigration and for the Ingathering of the Exiles; it will foster the development of the country for the benefit of all its inhabitants; it will be based on freedom, justice, and peace as envisioned by the prophets of Israel; it will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex; it will guarantee freedom of religion, conscience, language, education and culture...¹

However, since the first African asylum seekers entered Israel in 2005, the state has failed to properly process refugee status requests and provide social services for 60,000 Darfuris, South Sudanese, and Eritreans, engendering social and political inequality across racial and religious lines.² Given the Palestinian-Israeli conflict, looming tensions with Iran, and strain in relations with the United States dominating the attention of the Israeli public, it is perhaps unsurprising that there should be little outcry against the state's mistreatment of asylum seekers, even though such treatment violates international law as set forth in the 1951 Convention Relating to the Status of Refugees. Even more unfortunate than the current condition of tens of thousands of impoverished, neglected asylum seekers is the missed opportunity for a positive model that Israel could set internationally by instituting sound, comprehensive refugee policy. Given the timing, scale, and concentration of African immigration to Israel, Israel could be one of the world's leaders in refugee assimilation, but its government and citizens have not taken action. Unfortunately, as explained by Noa Ben Ya'acov, Senior Protection Agent of the UNHCR in Israel, world bodies like the UNHCR are equally ineffective.³

According to the 1951 Convention Relating to the Status of Refugees, a refugee is someone who

owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality, and is unable to, or owing to such fear, is unwilling to avail himself of the protection of that country.⁴

Significant numbers of Africans seek asylum in Israel from South Sudan, an area that has suffered decades of bloody civil war. It is still engulfed in conflict and poverty despite its newfound independence, achieved in July 2011. Asylum seekers come also from Darfur, a region that has lost millions to genocide, and, most numerous, from Eritrea, a country controlled by a totalitarian military regime well known for its gross violations of human rights. Refugees from these three regions seek asylum in Israel because of its geographic proximity and the relatively low smuggling price charged by intermediary Bedouins. Israel is also perceived as less racist and offering more abundant educational and economic opportunity than nearby Egypt.⁵

Rosy prospects aside, asylum seekers undergo a rude awakening once they reach Israel, should they survive the dangerous journey through the Sinai and then across the Egyptian-Israeli border. A minority of asylum seekers (600 people) was inexplicably pushed back into Egypt by the Israeli Defense Force, and was not given the chance to apply for refugee status — or even cross the border.⁶ Having endured great trauma in their countries of origin, these asylum seekers underwent the arduous journey to Israel by foot, car, and plane, all the while being exploited, beaten, robbed, and raped by Bedouin smugglers.⁷ Having at last reached the Israeli-Egyptian border and avoided the Egyptian soldiers, who open fire at them, these asylum seekers were denied entry to Israel. This unofficial IDF practice has reportedly stopped in recent months, and was heavily criticized by human rights organizations such as The Hotline for Migrant Workers for its illegality (the 1951 UNHCR Convention deemed it legal to deport asylum seekers only after their requests for refugee status were rejected, allowing all who seek asylum to enter the country and appeal for proper status.)⁸

Once in Israel, asylum seekers are held arbitrarily and indefinitely in prison-like detention centers in the Negev. This practice is illegal under the conditions of the 1951 Convention Relating to the Status of Refugees, which forbids countries from detaining asylum seekers whose applications for refugee status have not

already been reviewed and rejected. Asylum seekers are released only as new waves of immigrants arrive, and are given bus tickets, typically to Tel Aviv.⁹ They are then left to fend for themselves.¹⁰

Though clearly there are major problems in Israel's reception of refugees, its greatest failing is its lack of infrastructure to legalize and integrate the asylum seekers who arrive. Since July 2009, the Interior Ministry has been responsible for determining refugee status; prior to this date the UNHCR reviewed asylum requests with the intention of handing over the task to the Israeli government. However, only a handful of the tens of thousands of applicants have been granted refugee status in Israel, while 99% of Eritrean asylum seekers in Canada, 66% in the United Kingdom, and 97% in the United States were recognized as refugees in 2009.¹¹ Asylum seekers in Israel are granted protection against deportation in the form of temporary visas, which state that they can live in Israel until conditions in their countries of origin change. They are not, however, granted access to public Israeli social, medical and welfare services. The Israeli government has also failed to institute refugee-specific aid programs, as other democratic countries have. For example, both Australia and the United States have established refugee family reunification programs.¹² The Israeli government, meanwhile, issues visas requiring frequent renewal, and the confusing legal statuses of refugees make them vulnerable to employer abuse and render them constantly fearful of deportation.¹³ In December 2010 the government started printing "this is not a work permit" on 2A5 visas. Though it is not illegal for refugees to work, the marking renders them unemployable as employers often misunderstand the qualifying statement.¹⁴

The asylum seeker community lives in poverty, enduring homelessness and hunger with little hope for future generations given the lack of educational opportunities for asylum seeker youth. Though asylum seeker children are allowed to attend municipal schools, scholarships for higher education are non-existent, save for twelve scholarships awarded by an NGO, Israel at Heart, in 2011.¹⁵ Depression and other psychological disorders abound, and many asylum seekers are too fearful of deportation or consumed with job-hunting to seek aid from NGOs or appeal to the Israeli government, according to African asylum seekers Adam Bashar and Oscar Olivier, both of whom live in South Tel Aviv.¹⁶ In fact, the government-funded programs for asylum seekers largely restrict their ability to find safe haven in Israel. As opposed to

funding social programs, the government spends millions of dollars annually in the upkeep and expansion of detention centers in the Negev, and also funds voluntary repatriation flights to the asylum seekers' tumultuous countries of origin.¹⁷

The government criminalizes refugee status in the minds of Israelis: Minister of Interior Affairs Rabbi Eli Yoshai claims that African refugees threaten Israel's Jewish majority, as reported by *Israel National News* in August 2012.¹⁸ Knesset member Danny Dannon, in a May 2012 *Ha'aretz* interview, called for their deportation.¹⁹ Prime Minister Benjamin Netanyahu referred to this community as a threat to Israeli safety at the December 4, 2011 Israeli Ministry of Foreign Affairs meeting, as recorded by the Cabinet Secretariat.²⁰ The media also propagate anti-refugee sentiments, which have led to increasing public hostility directed towards asylum seekers, with many Israelis refusing to hire or rent apartments to them.²¹ This past spring and summer, there were violent attacks in asylum seeker neighborhoods perpetrated by Israeli citizens. In May, several crude firebombs hit homes and a kindergarten in Shapira, an African neighborhood,²² followed by protests against Africans in Tel Aviv in response to recent crimes against Israelis linked to the asylum seeker community. Protestors beat African passersby, or looted and shattered the windows of African businesses.²³ Israeli minors have been arrested in South Tel Aviv for attacking asylum seekers with clubs and pepper spray. Attacks continued through the summer, with arsonists setting fire to asylum seeker homes, injuring residents and bringing the violence to Jerusalem for the first time.²⁴

Given the poor social and political climate in which African asylum seekers live, typically amidst extreme poverty, they lead bleak, unproductive lives. In Israel, over 60,000 people are treated in a fashion that is not only illegal (under international law set forth by the UNHCR and signed by Israel) and inadequate but also unnecessary. Should Israel expand its Refugee Status Determination bureau, and should the UNHCR expand its efforts in Israel, real progress could be made. The millions of dollars funneled into detention centers and flights back to Africa could allow asylum seekers access to vital resources and services, ultimately fostering a strong African community that contributes to Israeli culture and the nation's economic vitality. Though the problems these asylum seekers face are vast, they have appeared only in recent years and in concentrated, accessible cities. Walking around South Tel Aviv, one sees that the need for

proper refugee status, employment, and social services for these demographics is obvious and immediate. Solutions are clear, but will require a major redirection of funds, and a substantial shift in public, governmental, and media attitudes. Israel could be a symbol of hope for refugees, and a model for the just treatment of the downtrodden for other nations. But such progress also requires the outcry of the masses; change will only come when the people, and not only those whose voices are fettered by trauma and poverty, demand it.

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The Northern Distribution Network and Withdrawal from Afghanistan

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The United States has committed to withdrawing from Afghanistan by 2014. Given the sheer amount of equipment and number of personnel currently on the ground, the logistics of this departure promise to be challenging. Though aircraft are an option for withdrawing the 120,000 containers worth of supplies on site from remote areas, ground-based transportation remains most cost-effective. Thus the military will seek to use a land route to transport at least a significant percentage of this equipment.¹ In planning the evacuation, the same political calculus that plagued past planners' mapping of a potential supply route will remain essential. The exodus will likely follow an ill-defined path crossing Central Asia and known informally as the Northern Distribution Network (NDN). The NDN winds through some of the most politically volatile countries in the world — and American dependence on it may indirectly harm relations with Russia and prop up authoritarian regimes.

During the early stages of the war, the US primarily brought in supplies through western Pakistan. However, in 2009, Pentagon strategists drew an alternate network of routes, including the NDN, which includes Latvia, Russia and much of Central Asia. Its main artery ends in Uzbekistan (because of its central location and advanced railway system) before crossing the border into Afghanistan at Termez. Though the route has some natural advantages, it is made all the more attractive in that it avoids the turbulent western border provinces of Pakistan.²

By the end of 2011, over 50% of non-lethal goods destined for NATO troops were passing through the NDN, and if relations with Pakistan remain strained, an even higher percentage will presumably follow the route as they leave in 2014.³ Obviously, the monetary and political advantages of participation for any country hosting a portion of the NDN are huge, and as a result several Central Asian countries have jockeyed for a greater role in the network.

So far, the United States has stood by Uzbekistan's efforts to maintain its central position. Assistant Secretary of State Robert

Blake's August 12 – 18 visit to Uzbekistan underscores the country's current strategic importance to American withdrawal. To facilitate Uzbek cooperation, American criticism of human rights abuses committed by President Islam Karimov's administration has declined precipitously since the NDN opened.

But besides this relief from criticism, what does Karimov want for his support of the NDN? Perhaps, on a basic level, the actual American equipment. Many American planners have suggested that some of the non-lethal supplies could be sold cheaply to the countries that this equipment would otherwise be passing through. Additionally, the payment accrued through transit fees, as well as the revenues from shipping contracts and subcontracts are not insubstantial. The cost of shipping one container through the NDN is 2.5 times as high as shipping through Pakistan because of increased distance, more difficult conditions, and tariffs levied by Central Asian governments.⁴ Most broadly, welcoming American business and cultivating US government support allows Karimov to balance against Russia's overbearing influence within Uzbekistan.

Every Central Asian country plays this delicate diplomatic game, but the obvious importance of the NDN to American strategy seems to have emboldened participating countries in their interactions with Moscow. Uzbekistan's recent withdrawal from the Collective Security Treaty Organization (CSTO), for example, seems to have been due largely to President Karimov's desire to position Uzbekistan as a leading independent player in the logistics of the NDN. Similarly, Tajik President Emomali Rahmonov has delayed agreeing to host Russian military bases, which some analysts claim results from his desire to profit from the NDN transit deal.⁵

This ongoing tug-of-war between Russian and US spheres of influence explains the tolerance the US has recently shown for the NDN's inefficiencies. It seems almost incredible, for instance, that America accepted (on November 17, 2011) both greatly increased shipping rates and more layers of dysfunctional bureaucracy in negotiations with Uzbekistan instead of searching for a new route. The federal government has explicitly recognized this unique inefficiency, notifying outside contractors earlier this year that any consequences of shipping through Uzbekistan would be their own fault.⁶

Thus, expected inefficiency within Uzbekistan and other Central Asian states will be tolerated because American engage-

ment there serves both to get materials home and to challenge an increasingly influential Russia. However, even though Central Asian states occasionally get up to diplomatic mischief, the Kremlin is still far closer than the White House, and still has many tools to make disobedient leaders regret their pivot toward the US. Further, the obvious American need to withdraw a large amount of supplies on a set timeline will allow Russia to use its own continued cooperation on the NDN as a bargaining chip in future negotiation. Regionally, Tajikistan and Uzbekistan will both hold elections in 2013 and 2015, respectively, and these countries' leaders will certainly use their special rapport with the US to advance their own political ends. The NDN, then, may expose America to increased criticism of its support of human rights offenders.

In exploring other options for withdrawal, a route through Turkey, and another through Siberia have been suggested. However, the all-important railway connection through Uzbekistan and Central Asia will not be easy to pass up, despite the political complications implicit in using the NDN.

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- 1 Akhmedov, Karimjan and Evgeniya Usmanova. "Afghanistan Withdrawal: The Pros and Cons of Using the Northern Distribution Network." 12 Sep 2012. <www.eurasianet.org/node/65904>.
- 2 Kuchins, Andrew C. and Thomas Sanderson. "Central Asia's Northern Exposure." New York Times. 4 Aug 2009. <www.nytimes.com/2009/08/05/opinion/05iht-edkuchins.html>.
- 3 Trilling, David. "Northern Distribution Nightmare." Foreign Policy Magazine. 6 Dec 2011. <www.foreignpolicy.com/articles/2011/12/06/afghanistan_resupply_nato_ndn>.
- 4 Ibid.
- 5 Akhmedov, Karimjan and Evgeniya Usmanova. "Afghanistan Withdrawal: The Pros and Cons of Using the Northern Distribution Network." 12 Sep 2012. <www.eurasianet.org/node/65904>.
- 6 Tynan, Deirdre. "Uzbekistan: Tashkent Shakedown Practices Hold Up NDN Traffic — Contractors." 27 Feb 2012. <www.eurasianet.org/node/65056>.

Today, we live in a world of networked global communities, drawn together by the recent technological boom. This unprecedented degree of interconnectivity has affected every size and kind of social organization, from the American government to a camera-armed protester on the streets. Technology has particularly changed the fabric of the Islamic world, a community torn between rejecting innovation and embracing modernity. The mass social movements that rocked the Middle East during the Arab Spring only highlight how important connective devices have become for the strategic calculi of Islamic social movements. Islamic groups now use Internet platforms like Facebook and YouTube to reach a greater audience, challenge opponents, and spread their ideologies.

Twitter, the social media platform *du jour*, offers unique advantages to users. Its short but sweet sound bite format and easy transmission abilities can captivate an audience accustomed to constant and condensed media bombardment. It allows movements to easily reach a global audience and challenge opponents. Twitter also acts as an ideological microphone, facilitating framing and belief dissemination. Given these benefits, it is unsurprising that many Islamic social movements now consider Twitter to be a valuable asset. In this essay, I will provide a comprehensive analysis of how Harakat al-Shabaab al-Mujahideen (HSM or Al-Shabaab for short), a militant al-Qaeda ally operating in Somalia, employs a Twitter account as a framing tool and method of contention. I examine Al-Shabaab's tweets, photos and followers from three lenses: intended functions of the Twitter account, target audience, and thematic messages. Essentially, I analyze *why*, *whom* and *how*: *why* Al-Shabaab uses Twitter, *whom* it is trying to reach, and *how* it is attempting to establish that connection. By understanding what Al-Shabaab seeks to change and whom it seeks to attract, we can further grasp its inner ideological gears.

The HSM Press Office is the press branch of Al-Shabaab (HSM), which formed six years ago after the Islamic Courts Union splintered into multiple militant groups. Al-Shabaab aims to establish an independent Muslim state by "waging jihad" against perceived domestic and foreign enemies. The group uses kidnappings, piracy, and other terrorist activities to intimidate its enemies and control large swathes of Somali territory. Al-Shabaab launched its Twitter account on December 7, 2011 under the name "HSM Press Office," sparking a legal and media firestorm as counterterrorism experts in the West battled to eliminate the webpage. As of October 7, 2012, @HSMPress had 16,630 followers and 917 tweets.

Intended Functions of the HSM Twitter Account

- 1 HSMPress, 4 Apr 2012.
- 2 HSMPress, 20 Mar 2012.
- 3 HSMPress, 28 Mar 2012.
- 4 HSMPress, 15 Dec 2012.
- 5 HSMPress, 28 Mar 2012.
- 6 HSMPress, 9 Dec 2012.
- 7 HSMPress, 10 Apr 2012.

The HSM Press Office employs Twitter as both a method of contention and framing device. Al-Shabaab has three primary Twitter usage objectives: intramovement coordination, information creation and verification, and ideological engagement.

On the tactical level, Al-Shabaab uses Twitter to coordinate members' knowledge and maintain movement coherency. Updates occur almost daily and give detailed descriptions of the nature, size, execution, and result of an engagement. For example, @HSMPress was incredibly active on April 4 during the bombing of a movie theater in the capital Mogadishu: "Large explosion brings the show to an end at the #Mogadishu Theatre, leaving scores of MP's, #TFG officials & intelligence personnel dead."¹ Earlier, on March 20, @HSMPress tweeted: "Mujahideen seized 3 AA mounted military vehicles, 2 buses, a cache of weapons and a large amount of ammunitions in a store #JihadDispatches."² These instances demonstrate that the "tactical tweets" can range from broad announcements, like the Mogadishu theatre bombing headline, to incredibly detailed reports of assets — such as weapons, combatants, and territory — that have been won or lost. For Al-Shabaab, Twitter serves as an organizational tool. When all members operate on the same set of information, mobilization friction is reduced and movement coherency increases.

Al-Shabaab also uses Twitter to employ a larger information creation and verification strategy. In the networked world, there are information creators, which produce and distribute knowledge, and information processors, which consume that knowledge. An information creator can shape public opinion by controlling which stories are released and how they are framed; an organization is only an effective information creator, however, if the number of people who consider it a trustworthy source is sufficiently large to shift the ideological climate. The publicity wing of Al-Shabaab pursues information creator status by imitating a press organization, as evidenced by a March 28 tweet noting that the HSM Press Office is "easily reachable through most journalists."³

In its quest to become an information creator, the HSM Press Office discounts opposition media sources and frames itself as a legitimate source of knowledge. The movement frequently attacks journalists that it feels are subjective and manipulative.⁴ "Most journalists," asserted @HSMPress, "tend to have a myopic view of the events in Somalia but some tend to exceed others in dishonesty and lack of professionalism."⁵ The HSM Press Office charges journalists "to verify and double-check their sources instead of regurgitating unreliable accounts often from subjective media."⁶ @HSMPress even encourages its followers not to expect impartial reports from the "Kafir media" about the Mujahideen.⁷ By framing opposition media as subjective and manipulative, the HSM Press Office further portrays itself as a legitimate "information creator."

- 8 HSMPress, 29 Dec 2011.
9 HSMPress, 28 Dec 2011.
10 HSMPress, 9 Dec 2011.

Al-Shabaab employs a two-pronged approach to achieving information creator status. The first aspect is generating and circulating information. As an aspiring information creator, HSM publishes its own press releases and provides live coverage of events via Twitter.⁸ These activities help the HSM Press Office gain a following among information processors. The second aspect of the strategy is fact checking. Since trustworthy reputation is critical to success as an “information creator,” HSM portrays itself as upholding journalistic integrity by condemning media subjectivity and discounting allegedly false or malicious reports. For example, on December 28 @HSMPress wrote: “The truth can’t be eclipsed by vindictive tales concocted by professional amateurs whose judgment is clouded by emotion” and included a link to a *New York Times* article critical of the movement.⁹ This “whistleblower” frame further indicates that the HSM Press Office desires to be viewed as a dependable “information creator.”

With information creator status comes increased legitimacy, a necessary precursor for the final function that Twitter serves for Al-Shabaab — voicing grievances and directly sparring with ideological opponents. Twitter’s response function enables the HSM Press Office to practice “dynamic propaganda,” which I define as an engagement that serves the dual purposes of challenging a critic and broadcasting a certain belief. An @HSMPress conversation with Twitter follower @DianaNTaylor provides a good example of this phenomenon: “@DianaNTaylor what’s beyond abhorrence is the collective Western Crusade against Islam of which you seem quite blasé about if not supportive.”¹⁰ In this interaction, @HSMPress simultaneously questions the critic @DianaNTaylor’s credibility and exposes other followers to the argument that the West is at war with Islam. As Twitter gains momentum, “dynamic propaganda” becomes an increasingly effective method of contention in the online world.

Target Audience

- 11 “Somalia,” 2012.

Online communities are increasingly becoming all-encompassing due to increased global interconnectivity. Al-Shabaab capitalizes on this trend by writing almost every tweet in English. I determined that the decision to use English is a strategic choice by analyzing the demographics of Al-Shabbab’s potential audiences. Only 106,000 Somalis, or 1% of the population, use the Internet.¹¹ If Al-Shabaab had intended to appeal primarily to the Somali people, the organization would likely (1) write in Arabic, and (2) rely less on electronic means of communication. A global audience, on the other hand, is much more amenable to information distributed in English on the Internet. We can therefore conclude that the HSM Twitter account aims to resonate with individuals sympathetic to the broader Islamic cause, regardless of physical location.

Based on the number of people who follow @HSMPress (12,518 users in five months), this transnational strategy seems to be work-

ing. Subscribers to the feed include self-described “political junkies,” students, Muslims, journalists, and nongovernmental organizations. Most followers live outside of Somalia. This flourishing global audience indicates that the organization has both regional and international goals that resonate with diverse individuals. Although Al-Shabaab’s primary objective is to establish sharia rule in Somalia, it also aims to motivate and shape the worldwide debate on jihadism and Islam.

Thematic Messages

12 HSMPress, 1 Jan 2012.

13 HSMPress, 19 Jan 2012.

14 Ibid.

Technology’s evolution has made “winning hearts and minds” a priority for social movements around the globe, the Islamic world included. In order to achieve just that, a movement must frame itself in a way that appeals to “the people.” Al-Shabaab recognizes the importance of favorable public opinion and seeks it out by using Twitter to circulate its preferred frames. On January 1, @HSMPress tweeted that those with “shallow understanding” do not realize that territory can be won or lost; victory comes through ideological pervasiveness.¹² The HSM Press Office employs frames that it believes are most likely to resonate with the greatest number of people and that will give it the ideological upper hand in the Somali conflict. These thematic messages are crucial to understanding the movement; they explain how Al-Shabaab would like to be viewed and highlight what issues Al-Shabaab believes are most important to its audience. To maximize appeal, the organization advances messages that address both ideological and practical issues.

Central to Al-Shabaab’s ideology is the “clash paradigm” dictating that the West is not battling isolated military threats in the Middle East but is rather at war with Islam as an ideology and as a culture. The “clash” frame portrays Islam as endangered and encourages Muslims to defend their religion against perceived extinction. For the HSM Press Office, this framing strategy portrays the West as immoral while simultaneously emphasizing Islam’s triumphs. The depiction of the West as deviant strengthens the idea that Islam is a righteous cause, a concept that resonates with many Muslims. The HSM Press Office condemns Western decadence, writing “The Kuffar have proudly nurtured a godless society of moral degenerates and are not known for having too savory a reputation.”¹³ HSM also emphasizes perceived Western hypocrisy by highlighting that the West preaches morality while simultaneously imprisoning Muslims in horrific conditions.¹⁴ In HSM’s portrayal, the West’s mere existence threatens the ideals of Islam. This frame encourages Muslims to subvert the West for their religion’s sake by joining an organization like Al-Shabaab.

The HSM Press Office is heavily focused on attacking any Western presence in the Muslim world. It frequently blames foreigners, ranging from nearby Kenyans to the Western world, for creating Somalia’s problems. For many Muslims, frustrations regarding foreign occupation and cultural imperialism are easy to sympa-

- 15 HSMPress 13 Feb 2012
- 16 HSMPress, 23 Feb 2012.
- 17 HSMPress, 25 Feb 2012.
- 18 HSMPress, 13 Dec 2011.
- 19 HSMPress, 18 Jan 2012.
- 20 HSMPress, 10 Dec 2011.
- 21 Ibid.
- 22 HSMPress, 30 Jan 2012.

thize. Such individuals are sensitive to HSM reports that the West is acting deceptively or subversively toward Islam. The HSM Press Office aims to harness these fears by framing the West on its Twitter page as immoral, barbaric, and illegitimate.

The HSM Press Office also appeals to long-standing Muslim anger regarding Western colonialism and exploitation. @HSMPress accused the British government on February 13 of trying to “colonize Somalia” and of “meddling in Islam affairs in the hope of reviving a hopeless dream of a British Empire.”¹⁵ HSM further emphasized perceived Western oppression in writing that foreign involvement is used as a tool to suppress Muslims in Somalia.¹⁶ For many regional inhabitants, frustration arises specifically from Western extraction of resources that residents believe belong to them. On February 25, @HSMPress accused the West of abusing Somalia’s natural resources and rendered continued usage illegitimate: “Western companies must be fully aware that all exploration rights & drilling contracts in N.Eastern #Somalia are now permanently nullified.”¹⁷ By framing the West as an exploitative and oppressive force, @HSMPress encourages Muslims to take responsibility for their own nations: “you must carve the destiny of your nation - not the invaders,” it wrote.¹⁸ The HSM Press Office highlights foreign exploitation to strengthen Al-Shabaab’s case for resistance in Somalia.

In an effort to subvert support for foreign involvement in Somalia, the HSM Press Office demonizes foreigners, who are portrayed as interventionist and belligerent. @HSMPress rejected the decision of some East African nations to invade Somalia, calling it a victory for “Western imperialism.”¹⁹ The HSM Press Office also tries to highlight the perceived futility of Western involvement. @HSMPress provided a link to an *Independent* article with the caption “Decades of interference — and not a single success... Foreign interventions have never succeeded in Somalia.”²⁰ This tweet implies that the West cannot achieve victory because the people of Somalia are too strong to be broken and empowers Somalis to believe that they can successfully resist foreign interference. HSM Press Office makes a further case via Twitter for why that resistance should be violent. In a response to one follower, @HSMPress denounced diplomatic negotiations with the explanation that “you can’t negotiate under the muzzle of aggressor’s gun; Invasion nullifies every peace attempt.”²¹ This statement depicts nonviolent dialogue as unfeasible due to foreigners’ actions. By eliminating a peaceful option, this frame intends to justify HSM’s violent methods of contention.

Foreigners are also portrayed as physically and ideologically deceptive. For instance, @HSMPress provided extensive coverage and photos of an International Committee of the Red Cross (ICRC) scandal in Somalia earlier this year. The report identified that 70% of the food provided during a shortage by ICRC, a Western organization, was expired and likely to make consumers ill.²² By releasing and promoting this story, Al-Shabaab highlighted perceived West-

- 23 HSMPress, 14 Dec 2011.
- 24 HSMPress, 14 Dec 2011.
- 25 HSMPress, 19 Mar 2012.
- 26 HSMPress, 14 Apr 2012.
- 27 HSMPress, 24 Jan 2012.
- 28 HSMPress, 19 Mar 2012.

ern disregard for the Muslim world. The HSM Press Office also accuses the West of waging a misleading ideological battle against Islam. In a response to a follower, @HSMPress wrote on December 14, “Western Media has spent years inculcating derogatory anti-Islam views into ur minds.”²³ These frames are designed to agitate suspicion of Western actions in the hopes that sympathizers will in turn view Al-Shabaab as trustworthy and join the movement.

In support of the clash paradigm, the HSM Press Office contrasts Western immorality with Islamic values. Al-Shabaab uses religious metaphors and symbols as framing tools. Muslims concur on the validity of some of Al-Shabaab’s principles, like Muslim responsibility and unity (although definitions of these values differ); the Al-Shabaab doctrine regarding martyrdom, however, is contested within the Muslim community. The HSM Press Office uses both allusions and direct appeals to religious authorities to frame Al-Shabaab’s actions as consistent with Islamic values.

In response to a follower’s comment, @HSMPress touted Islam’s advances in physics, math, astronomy, architecture, and other disciplines while Europe was still languishing in the dark ages.²⁴ In this frame, Islam’s rise to the forefront of a cultural revolution is portrayed as inevitable. A sheikh affiliated with Al-Shabaab asserted, “While the crusaders continue to weaken politically, economically & militarily, clear signs of Islam’s triumph are becoming apparent.”²⁵ Every movement wants to appear victorious to its followers; Al-Shabaab strives to achieve this by framing Islam as slowly, but surely, victorious in the culture clash with the West.

The HSM Press Office appeals to a sense of Muslim responsibility, asserting that Muslims both within and outside of Somalia are compelled to challenge the West by supporting Al-Shabaab. @HSMPress consistently encourages Muslims around the world to wage jihad against unjust and illegitimate governments.²⁶ Wrote @HSMPress on January 24, “To propound, propagate and promote the forgotten obligation of Jihad among the Muslims around the globe is the essence of #JihadPhilosophy.”²⁷ The movement also legitimizes its “obligatory jihad” frame by quoting religious authorities: “Sheikh; Jihad is an individual obligation; so all Muslims, and Somalis in particular, must march forth for Jihad against the enemy of Allah.”²⁸ By labeling its actions as jihad and therefore mandatory for every Muslim, HSM seeks to gain greater validity and support among the Islamic community.

Al-Shabaab also asserts the importance of international unity in resisting the West. Nationalism has historically limited Muslim unity because regional objectives have often been prioritized over transnational ones. While Al-Shabaab’s true objectives may be regionally focused, the movement recognizes the value of international Muslim support. To attract a worldwide audience, the HSM Press Office emphasizes global Muslim solidarity; the HSM Press Office thus frames its regional goals as general Islamic ones that Muslims around the world can relate to, regardless of nationality. HSM portrays the transnational Muslim community as coherent

- 29 HSMPress, 19 Mar 2012.
30 HSMPress, 10 Apr 2012.
31 CNN Wire Staff, 2012.
32 HSMPress, 19 Mar 2012.
33 HSMPress, 12 Feb 2012.
34 HSMPress, 24 Jan 2012.
35 HSMPress, 21 Jan 2012.
36 HSMPress, 10 Mar 2012.

and strong to draw support from outside Somalia. Al-Shabaab's affiliated sheikh emphasized, "Despite still being a distance apart, the bond of unity of the Mujahideen cannot be severed on the basis of nationality and ethnicity."²⁹ In response to a "bogus" news story, @HSMPress also encouraged Muslims to be suspicious of reports "that intend to sow sedition and disunity among the Mujahideen and the wider Muslim Ummah."³⁰ In this frame, Muslims are encouraged to maintain solidarity despite physical separation and Western sabotage.

Al-Shabaab particularly emphasizes transnational unity by depicting its alliance with Al-Qaeda as a model of Muslim solidarity.³¹ In a quote from the Al-Shabaab-affiliated sheikh, @HSMPress emphasized "the unity of the Mujahideen & their mutual objective in fighting a common enemy."³² The HSM Press Office scoffed at "Western outrage at the merger," implying that the West felt threatened by Muslim cohesion.³³ Al-Shabaab's alignment with an organization that addresses global Muslim grievances is designed to bring legitimacy and attention to its regional goals.

Finally we come to martyrdom, a controversial topic in the Islamic community. Many Muslims reject the use of violence, including suicide bombings, to achieve political, territorial, or ideological objectives. To counter this dissatisfaction, the HSM Press Office attempts to legitimize its violent methods of contention by asserting that they are sanctioned under jihad and considered martyrdom in the name of Islam. Those who die fighting for the Al-Shabaab cause are glorified on Twitter and become part of the "Martyrdom Brigade."³⁴ The dead militants receive prayers via tweets that Allah will accept their sacrifice and have mercy on their souls.³⁵ In the HSM Press Office's frame, death in the name of Islam is a reward that all Muslims should aspire to achieve.³⁶ This strategy aims to validate fatal violence despite widespread criticism within the Muslim community, and attract soldiers by portraying death in battle as a glorified reward.

The clash paradigm clearly plays a central role in Al-Shabaab's thematic messages. Many potential followers, however, are more concerned about their day-to-day quality of life than an abstract, and often distant, ideological battle. To appeal to those individuals who are focused on practicality, Al-Shabaab asserts that it is more adept than the West is at offering stability and social services. Studies have shown that populations in the midst of conflict often support the side that delivers consistent day-to-day security. Al-Shabaab capitalizes on this trend by undermining its opponents' efforts to stabilize society while simultaneously providing safety for the population. The HSM Press Office aims to frame Al-Shabaab as more successful than its opponents at protecting the populace, while depicting the West as actively eroding Somali stability. A series of tweets on January 25 continuously criticizing a UN established political office in Somalia (UNPOS) is one example of this frame. The HSM Press Office cited its Office for Supervising the Affairs of Foreign Agencies in calling UNPOS an "impediment

- 37 HSMPress, 25 Feb 2012.
38 HSMPress, 28 Dec 2011.
39 HSMPress, 10 Jan 2012.
40 HSMPress, 2 Jan 2012.
41 Ibid.
42 Ibid.
43 "Somalia," 2012.

to attainment of peace and stability in Somalia" and an attempt "to fragment the homogeneous Somali society and revive old hostilities."³⁷

On the other hand, the HSM Press Office highlights Al-Shabaab's successes at establishing security. It reported that 3,000 families fled opposition areas for the safety of Mujahideen-controlled camps.³⁸ In response to a follower's comment, @HSMPress boasted that "the one thing residents of HSM-administered regions do fully enjoy, unlike the other regions of Somalia," is safety.³⁹ Al-Shabaab also claimed to have enacted a reconciliation strategy that "doused the flames of enmity between warring tribes" in Somalia.⁴⁰ @HSMPress encourages followers to believe that Al-Shabaab can provide better protection from violence and suffering than the West — or the Somali government — can.

The provision of social services is another common strategy employed by Al-Shabaab to establish roots within communities and win supporters by alleviating public grievances. This approach highlights the inability of incumbent governments to provide basic amenities for their citizens. Al-Shabaab's chosen social service is education. @HSMPress reported that a schooling system was non-existent before the Mujahideen gained control.⁴¹ According to the Twitter account, Al-Shabaab has since established three universities, 550 madrassas and 150 primary and secondary schools.⁴² With 50% of Somalia's population under 18 years of age (and eligible for schooling), this strategy is likely to resonate among the young men and women who view education as a means to a better life.⁴³ Providing educational resources gives Al-Shabaab an opportunity to demonstrate its competency in light of existing socioeconomic policy disappointments; by spreading the news of the movement's educational successes on Twitter, Al-Shabaab portrays itself as an organization working to create positive and substantive change for society wherever the government falls short.

Conclusion

Al-Shabaab's Twitter account offers revelations that are central to understanding the movement. The microblogging platform is used by the HSM Press Office to accomplish three primary objectives: coordinate information within the movement, become an "information creator," and engage in "dynamic propaganda" as a method of contention. Recognizing the benefits of global recognition and support, the HSM Press Office tweets with a global audience in mind.

Al-Shabaab's projected identity and perception of the relative importance of particular issues are then well reflected in @HSMPress' tweets, which provide valuable insight into the nature of that identity. HSM self-identifies as a righteous savior of Islam in the face of Western manipulation, intervention, and subversion, justifying Al-Shabaab's controversial actions through a religious framework with allusions to Islamic values and appeals to Islamic

authorities. In other rhetoric, Al-Shabaab recognizes that many Somalis are frustrated with the government's inability to provide social services and stability; the movement therefore focuses on constructing schools and securing locations as a way of expanding its appeal. Above all, the movement seeks through its self-presentation on Twitter to gain both religious and secular legitimacy. In all these efforts, Al-Shabaab recognizes the strategic value of a global vision and forms its rhetoric and its alliances accordingly.

Al-Shabaab is just one of the many movements engaged in a struggle to amass the most devotees. Because population is finite, the global audience is a limited resource. Every supporter attracted by one movement means that a rival organization has lost a potential follower. In such a heated competition, the worth of Twitter and other social media platforms cannot be ignored. Such an invaluable tool can make or break a social movement in today's interconnected world.

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Amidst the Iraq War and the promulgation of a unilateral foreign policy under the Bush administration, global public opinion of the United States plummeted. One might imagine this precipitous decline to be of importance in global politics; however, realism, the dominant theory of world politics does not recognize attitudes and perceptions as salient factors in describing international state behavior. Nevertheless, in recent years, the ideas of soft power and soft balancing, as articulated by Joseph Nye and Robert Pape, respectively, have introduced these factors to modern global affairs, as influences substantially affecting states' capacities to achieve foreign policy objectives. Within this paradigm, attraction and persuasion, in addition to coercion and threats, are significant means to foreign policy ends. In essence, global political opinion matters.

In this paper I ask whether a decline in global public opinion towards the United States led to soft balancing against the United States in the context of international institutions. Specifically, I will look at the dynamics in transatlantic relations within NATO in the midst of the Iraq War crisis of the early and mid 2000s. I find evidence of soft balancing in tandem with significant declines in European public opinion toward US international policies in both institutional settings. Fluctuations in global public opinion are indeed causally related to the level of soft balancing in international institutions. This provides evidence that perceived intentions and international institutions matter in international relations. Therefore, this paper provides an argument that undermines the traditional neorealist literature and provides support to both balance of threat theory and liberal institutionalism. The overall significance of the findings in this paper will be interpreted within the context of the liberal international order proposed by John Ikenberry in *After Victory*.

Literature Review

Balance of power theory is a central tenet of neorealism, accounting for the behavior of states (or at least great powers) in any given distribution of power where there is no global hegemon. This theory, which posits that states continually seek to achieve parity of power in the international system, was popularized by Kenneth Waltz in his renowned book *Theory of International Politics*, published in 1979. The structural constraints of the international system as described by John Mearsheimer, in both his article "The False Promise of International Institutions" and his book *The*

- 1 John Mearsheimer, "The False Promise of International Institutions." *International Security*, 19 (1995), 10–12.
- 2 Robert Pape, "Soft Balancing against the United States." *International Security*, 30 (2008), 10.

Tragedy of Great Power Politics, provide the underlying reasoning behind balance of power politics. Assuming a natural state of anarchy, the inherent offensive capability of states, uncertainty of intentions, primary concern with survival, and rationality, state behavior is motivated and characterized by fear, distrust, and competition for relative power in a self-help game.¹ In this 'tragedy' states will seek to counter superior power in order to preserve the balance of power and avoid exploitation. They may do this by passing the buck to the most capable state or they may cooperate, if only temporarily, when there is no single state willing to or capable of balancing the potential hegemon alone. Regardless of the methods they use, the distribution of hard (military or relevant-to-military) power in the international system is taken to be the most important factor in determining its shape.

However, since the end of the Cold War, no overt balancing—particularly among European states—against the hegemon of the world system (the United States) has occurred. To explain this, Robert Pape, T.V. Paul, and others argue that a milder, conditional form of balancing is instead taking place due to the unique characteristics of the United States as the lone superpower. Of particular note, Pape argues for the importance of intentions, such that secondary states engage in soft balancing depending on whether they perceive US intentions to be benign. Because hard (traditional) balancing is too costly and risky, "soft" balancing (measures that "do not directly challenge US military preponderance but that use nonmilitary tools to delay, frustrate, and undermine aggressive unilateral US military policies") can occur.² Soft balancing is particularly likely to occur through international institutions because these structures help states overcome the prisoner's dilemma associated with engaging in balancing. Because the best scenario for a state is that the superior power be balanced without absorbing any of the costs of doing so itself, it will seek to free-ride (defect) instead of cooperating with other states to successfully balance against the hegemon. However, as argued by Robert Keohane in *After Hegemony*, international institutions can facilitate cooperation among states because they reduce uncertainty by providing information, monitoring state behavior, codifying state behavior, and conferring legitimacy. Thus, it might seem appropriate to look for evidence of soft balancing in international institutions because institutions help overcome the prisoner's dilemma which typically stifles cooperation. Still, this argument may only apply to hard balancing and not to soft balancing; it is far from clear that the costs of engaging in soft balancing are sufficient to incentivize buck-passing, and it is beyond the scope of this paper to fully engage and resolve this issue.

The better argument for why one should look within international institutions to find evidence of soft balancing derives from Ikenberry's theoretical explanation for institutionalizing power when a state becomes the leading power in the aftermath of a major war. Ikenberry argues that, after achieving victory in World

- 3 John Ikenberry, *After Victory*. (Princeton: Princeton University Press, 2001), 51.
- 4 *Ibid.*, 54.
- 5 Nye, Joseph, "The Decline of American Soft Power." *Foreign Affairs*, 83 (2004), Preface.
- 6 German Marshall Fund of the United States. *Transatlantic Trends: Topline Data, 2002–2011*. Accessed at trends.gmfus.org/transatlantic-trends/

War II and persuasively becoming the leading state in the international system, the United States engaged in a revolutionary process of institutionalizing its power and values within the Bretton Woods institutions, the UN, NATO, etc. While a hegemon would normally want to bind other states to rules and institutions while remaining free itself, Ikenberry explains that in current conditions, "to get the willing participation and compliance of other states, the leading state must offer to limit its own autonomy and ability to exercise power arbitrarily" within institutions.³ The other or secondary states have a strong interest in complying and participating because they fear domination by unbridled hegemonic power; international institutions reduce this threat. On the other side of the equation, a leading state like the United States has a strong interest in constraining itself within the institutions and rules it establishes in order to obtain the compliance and participation of secondary states because doing so conserves American power. Ikenberry argues, "the creation of basic ordering institutions is a form of hegemonic investment in the future. If the right types of rules and institutions become entrenched, they can continue to work in favor of the leading state even as its relative material capabilities decline."⁴ However, secondary states are particularly likely to soft balance against the US within international institutions because such institutions artificially increase their power relative to that of the United States. For example, NATO requires consensus among member states for significant strategic decisions, meaning that relatively weaker states like Belgium and Luxembourg are greatly empowered. By voluntarily constraining itself within international institutions, the United States empowered secondary states to counter or constrain (i.e. soft balance) US initiatives.

The key to understanding soft balancing as presented in this paper is to consider the role of soft power. In his book, *Soft Power*, and elsewhere, Joseph Nye argues that soft power, or "the ability to get what you want through attraction rather than coercion or payments," is a critical component of America's power in the world system.⁵ To be more precise, Nye distinguishes between three sources of soft power: culture, political values, and foreign policies. Neither culture nor political values vary significantly over short time scales in America, but foreign policies certainly do. Therefore, Nye argues that a decline in American soft power due to aggressive unilateral foreign policies significantly dampens its ability to achieve its foreign policy aims. In other words, the extent to which states perceive a threat from a superior power, and thus seek to soft balance against it, depends on that superior power's use of soft power.

From the *Transatlantic Trends* data, in addition to other reputable public opinion data sources, it is clear that public opinion of the United States in Europe declined significantly after the onset of American unilateral behavior under the Bush Administration.⁶ However, in order to make the claim that increased anti-Americanism in Europe caused soft balancing in NATO, the relationship

- 7 Monti Narayan Datta, "The Decline of American Soft Power in the United Nations." *International Studies Perspectives*, 10 (2009), 271.
- 8 Robert D Putnam, "Diplomacy and Domestic Politics: The Logic of Two-Level Games." *International Organization*, 42 (1988), 434.
- 9 Ibid.
- 10 Bruce Bueno de Mesquite, James Morrow, Randolph Siverson, and Alastair Smith. "An Institutional Explanation of the Democratic Peace." *American Political Science Review*, 93 (1999), 793.

between public opinion in a state and that state's international behavior must be clearly established. Monti Datta, in his article "The Decline of American Soft Power in the United Nations," observes, but does not explain, that "when the public in a given country feels antipathy toward the United States, that country's government has an incentive to distance itself from the United States within international political institutions."⁷ The logic of Robert Putnam's two-level games for international negotiations, presented in his paper "Diplomacy and Domestic Politics: the Logic of Two-Level Games," demonstrates the effect of domestic pressure on state behavior in the international system. As Putnam states, "at the national level, domestic groups pursue their interests by pressuring the government to adopt favorable policies, and politicians seek power by constructing coalitions among those groups."⁸ At the level of inter-state relations, "national governments seek to maximize their own ability to satisfy domestic pressures, while minimizing the adverse consequences of foreign developments."⁹ Because any inter-state agreement being negotiated by diplomats or politicians must fall within the 'win-sets' or limits of acceptability provided by their domestic pressure groups (or else risk rejection and potential loss of power), there exists a clear and direct connection between public opinion and a given state's (particularly a democracy's) international behavior.

Even more explicit in its link between public opinion to state behavior is Bruce Bueno De Mesquita's 'selectorate' model. In any regime, the leaders must satisfy a sufficiently large subset of the selectorate, the portion of the population that participates in selecting political leadership. The members of this "winning coalition are those people whose support is required to keep the incumbent in office."¹⁰ Because NATO members are democracies with universal suffrage, the leaders must satisfy their publics, not simply the political elite. This means that state leaders, at least in democracies, are beholden to public opinion, perhaps an obvious point but one that nonetheless calls for a theoretical explanation. We should therefore expect significant shifts in public opinion to be linked with shifts in state behavior.

Changes in European Public Opinion

From 2002 to 2011, the *Transatlantic Trends* survey sponsored by The German Marshall Fund of the United States documented significant fluctuations in European public opinion towards the United States. Because data for the full 9-year period is only available for selected European countries (UK, France, Germany, the Netherlands, Italy, Poland and Portugal), I use public opinion in these seven as a proxy for all of Europe. From 2002 to 2003, the percentage of Europeans who desired strong US leadership in world affairs decreased from 64% to 45%. By 2008, this proportion had dropped further to 38%. Then, suddenly, in tandem with the election of Barack Obama, the percentage of Europeans desiring strong

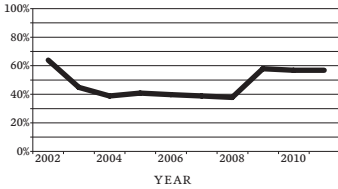
US leadership jumped to 57% and has remained stable since. The implication that the switch between two different presidents caused these shifts in European public opinion is confirmed in two other questions asked by the *Transatlantic Trends* surveyors. From 2002 to 2009 they asked Europeans to rate their feelings toward the United States, “with 100 meaning a very warm, favourable feeling, 0 meaning a very cold, unfavourable feeling, and 50 meaning not particularly warm or cold.”¹¹ In 2002, the average rating was 64 before it dropped to 57 in 2003 and then 54 in 2004. From 2008 to 2009, Europeans’ average rating of the United States increased from 53 to 60. This implies that the election of Barack Obama had a significant effect on Europeans’ perspective of the United States. While there are clear ratings changes associated with the Iraq War crisis and the election of Obama, the variations in rating are not large and in each year Europeans had, on average, a warmer feeling toward the United States.

The subtle shifts in responses to this question stand in stark contrast to the larger swings in European public opinion when asked whether they approve or disapprove of the way the president of the United States is handling international policies. In 2002, 38% of those polled approved of President Bush’s international policies, a generally low approval rating. This number then crashed to 23% in 2004, rose gently to 26% in 2005, and then fell to 19% for the subsequent three years. Astonishingly, 2009 saw a 66 percentage point swing. After the election of Obama, approval of the US president’s handling of international policies skyrocketed to 85% in 2009 from 19% in 2008. Since then, the president’s European approval rating fell to 79% in 2010 and then 77% in 2011. These larger shifts in response to the question about the president’s policies imply that the general shifts in European public opinion towards the United States in the last decade were driven by perceptions of the American president and his foreign policies. In short, significant shifts in European public opinion toward the US, particularly its president, follow closely the onset and subsequent drawback of a more unilateral American approach to foreign policy as exemplified by the Iraq War and the election of Barack Obama respectively.

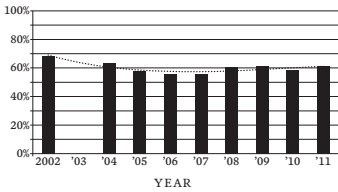
Quantitative Evidence of Soft Balancing: UNGA Voting Patterns

In order to delineate a correlation between the documented shifts in European public opinion and some quantifiable measure of soft balancing against the United States in international institutions, a basic linear regression analysis was conducted. After gathering the percentage of UN General Assembly voting coincidence with the United States for all EU member states between 2000 and 2010, this data was regressed on the three different measures of European public opinion discussed above. The measure of opinion of the US based on the president’s handling of international affairs was the only significant result. An increase of 1% in European approval of the president’s handling of international policies is associated

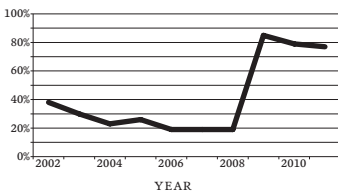
Percentage of EU7 Europeans That Desire Strong US Leadership in World Affairs



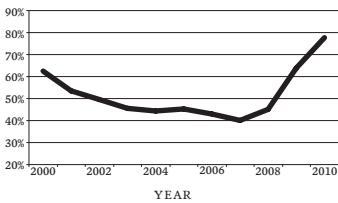
Percentage of EU7 Europeans Who Think That NATO is Still Essential to Their Country's Security



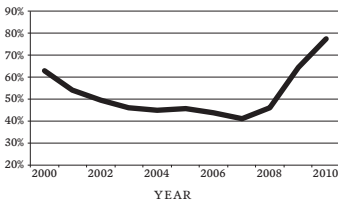
Percentage of EU7 Europeans Who Approve of the US President's International Policies



UNGA Voting Coincidence with the US for the EU



UNGA Voting Coincidence with the US for NATO



with a 0.317% increase in EU voting coincidence with the US in the UNGA. This result is statistically significant at the 95% confidence level (t -value = 6.84). The results of an otherwise identical regression for NATO members voting coincidence with the US in the UNGA almost exactly mirror those for the EU.

A potential pitfall for this statistical approach to establishing correlation lies in the content of the UN General Assembly (UNGA) resolutions voted on from year to year. If the topics considered and voted on varied significantly from year to year during the time frame considered, it would be impossible to claim, based on the regression analysis completed for this paper, that the variation in European public opinion towards the American president is in any way related to variation in UN General Assembly voting coincidence with the United States by European countries. It could simply be that European countries' interests are more aligned with the United States in certain topical areas than others and so we should expect significant variation in the topics of UNGA resolutions to result in differing levels of voting coincidence with the United States. In order to overcome this statistical challenge, an analysis of UNGA resolution topics from the 55th to the 65th UNGA session (2000–2011) was conducted. After reviewing the topics of each resolution for each session, each resolution was given a code (1–9) signifying a relatively broad topic. The criteria for coding were based on overviews of the resolution topics provided by the United Nations General Assembly webpage. In some cases, codes applied to many resolutions; in others, codes applied to one resolution that recurs annually (for example, the yearly resolution denouncing America's embargo of Cuba). The nine topics coded were human rights, Israel/Palestine issues, nuclear weapons, conventional armaments, development/developing countries, democracy promotion, law of the oceans, decolonization, and America's embargo of Cuba, respectively. Together, resolutions within these topics amounted to between 80.46% and 88.89% of all resolutions in a given session, with an average of 84.6%. Basic linear regression analysis conducted for each topic shows that for all but two topics the proportion of annual UNGA resolutions made up by each topic does not significantly change at the 95% confidence level; their confidence intervals cross zero (see Appendix: Regression Analysis). For the two topic areas where there was statistically significant change over the time period considered, nuclear weapons and democracy promotion, a closer look is instructive. Resolutions related to nuclear weapons made up between 20.34% and 25.4% of all resolutions coded during the Bush Administration, and then roughly 26.7% of all resolutions coded during the Obama Administration (2009–2011). Though statistically significant, the shift from accounting for between one fourth and one fifth of the resolutions to a little more than one fourth is not substantial enough to warrant throwing out this paper's earlier findings. Furthermore, resolutions related to democracy promotion, while showing a statistically significant change over the time period according to regression

analysis, only fluctuate between accounting for 3.57% and 1.43% of resolutions coded. The fact that that fluctuation has been even smaller since the 60th UNGA session (2005–2006), from 1.43% to 1.79%, cements the fact that while statistically significant according to linear regression analysis, the change is not at all substantial. Overall, it is clear that the topics voted on in the UNGA remain largely the same and make up similar proportions of all resolutions from year to year.

The quantitative method used here is rather simplistic and contains subjective assumptions (particularly in relation to the author's discretion in coding resolutions), but it nevertheless holds worth. The simple correlation delineated and backed up by establishing the insignificance of changes in resolution topics from year to year in the UNGA implies a relationship that is in need of fleshing out. That European countries voting coincidence with the US in the UNGA varied in tandem European public opinion throughout the previous ten years suggests a potential causal relationship that is worth investigating. The following sections incorporate case studies within NATO in order to do precisely this.

Qualitative Evidence of Soft Balancing: NATO

- 12 Andrew Dorman and Joyce Kaufman, *The Future of Transatlantic Relations: Perceptions, Policy and Practice*. (Stanford: Stanford Security Studies, 2011), 3.
- 13 Ibid., 62.
- 14 Geir Lundestad, *The Atlantic Alliance Under Stress: US-European Relations After Iraq*. ed. David Andrews, (Cambridge: Cambridge University Press, 2005), 9.
- 15 Ibid.

Immediately following the tragic events of September 11, 2001, there was an outpouring of support for the United States in Europe. In cities throughout Europe people held candlelight vigils and proclaimed their support for a wounded ally and friend. This sentiment was echoed in NATO members' enthusiastic response to the invocation of NATO's collective security statute (Article 5). However, warm transatlantic feelings would not last long. After the United States "chose not to work within the NATO framework for its response," and instead opted to "move forward with a 'coalition of the willing,'" Europeans quickly became wary of American unilateralism.¹² The National Security Strategy of 2002 and President Bush's 'Axis of Evil' speech in January of that year intensified this wariness, as both confirmed European fears of a supremely unilateral US foreign policy.

However, it was the 2003 decision to go to war with Iraq that devastated the transatlantic relationship. Notably, "Germany and France, often joined by Belgium and Luxembourg, were vocal in their opposition to the US policy decision surrounding the invasion of Iraq."¹³ As Geir Lundestad argues in *The Atlantic Alliance Under Stress: US-European Relations after Iraq*, the "war in Iraq suggests a fundamental break with the practice of the preceding fifty years" within the transatlantic relationship.¹⁴ For example, unlike in previous conflicts where France ended up on the side of Washington, "in 2003, Paris became the champion of opposition to the United States in a crisis that the administration in Washington considered to be of supreme importance."¹⁵ Furthermore, whereas Germany had been "the most loyal of US partners in Europe...in this instance, Berlin sided firmly with the French; in fact, it took an

- 16 Ibid.
- 17 Elizabeth Pond *The Atlantic Alliance Under Stress: US-European Relations After Iraq*, 45.
- 18 Dorman and Kaufman, *The Future of Transatlantic Relations*, 62.
- 19 Pond, *The Atlantic Alliance Under Stress: US-European Relations After Iraq*, 46.
- 20 Ibid.
- 21 Ibid.

even more anti-American position than did the French.”¹⁶ What is of particular significance is that France and Germany, among others, were not only vocal, but also acted within NATO to frustrate and slow what they perceived to be aggressive, unilateral behavior by the United States.

In early 2003, a “showdown within NATO,” as Elizabeth Pond terms it, took place between Germany, France, and Belgium on the one hand and the United States on the other. At issue was the endorsement by NATO of advance military planning to aid Turkey in case military conflict spread more widely in the region. As Pond explains, “the United States wanted to maximize the pressure on Iraq by recruiting the fledgling new Islamic government in Ankara to the cause of war in Iraq.”¹⁷ However, armed with large domestic majorities opposing the Iraq war (71% in Germany), Germany, France and Belgium opposed the Bush administration’s “request under Article 4 of the NATO treaty to prepare for the defense of Turkey.”¹⁸ “Germany, France, and Belgium refused to go along with the required unanimous vote in the NATO Council” because they understood it as a “thinly disguised effort to get NATO sanction for the impending war itself.”¹⁹ These countries thus sought to constrain the United States by using NATO’s institutional network. They did not budge easily. Only after threats from the US “that the Alliance would be dead” and a “month of wrangling language acceptable to Berlin about ‘defensive’ was assistance for Turkey was found.”²⁰ The United States’ motion was then passed after the vote was moved to NATO’s Defense Planning Committee, a body to which France, at that time only a political and not military member of the alliance, did not belong.²¹ Though this intense confrontation among allies within a NATO setting was eventually resolved, it demonstrated the extent to which US unilateralism had strained the transatlantic relationship. NATO members sought to frustrate and constrain US behavior within the NATO institutional network, an occurrence that clearly falls in line with Pape’s definition of soft balancing. The confrontation over ‘defensive’ aid to Turkey was a textbook case of entangling diplomacy, and it clearly took place because the imminent Iraq war was so unpopular among European publics.

Providing an example of how US policies led to soft balancing against the US in the midst of the Iraq war crisis is only half of the equation. In order to argue effectively that variation in European public opinion towards the United States leads to varying levels of cooperation, it must also be demonstrated that such soft balancing eroded in the wake of greatly improved European public opinion towards the United States. To confirm this paper’s analysis levels of cooperation or soft balancing must vary in accordance with shifts in public opinion.

After the inauguration of President Obama, the evidence suggests that the meteoric rise in European public approval of US international policies was indeed matched by increased cooperation and the absence of instances of soft balancing such as the one

- 22 Treacher, *The Future of Transatlantic Relations*, III.
- 23 *Transatlantic Trends: Topline Data*, 2011.
- 24 Mattox, *The Future of Transatlantic Relations*, 125.
- 25 Ibid.
- 26 Steven Hildreth and Carl Ek. *Missile Defense and NATO's Lisbon Summit*. Congressional Research Service (2011), 1.

discussed above. The reason for this is that opposition to the Bush administration specifically (and not to America in general) characterized European perceptions of the United States from 2001 through 2008. Therefore, in the three years since Obama became the president of the United States, countries like France and Germany, that had led the opposition to the United States in NATO and the EU during the Iraq war crisis, changed tacks and began cooperating with the United States.

In the case of France, Adrian Treacher makes it clear that “the French approach was anti-Bush, not anti-American” during the Bush tenure. We should thus expect improved cooperation between the United States and France after Obama’s election. Since then, within the NATO alliance, we see that “French and American forces have been cooperating in both Kosovo and Afghanistan...not to mention France’s reintegration into NATO’s integrated military structures” which was announced in April of 2009.²² One could claim that France’s reintegration into the military structures of NATO after the inauguration of Obama and the resulting change in public opinion towards the United States in France is simply a coincidence, but selectorate theory offers a reason to believe a relationship exists. France certainly had a shift in strategic thinking, but the elected French leadership is also beholden to public opinion. From 2003–2008, between 82% and 86% of the French public disapproved of the Bush administration’s international policies. By contrast, from 2009–2011, between 79% and 88% of the French public approved of the Obama administration’s international policies.²³ The election of Obama marks a massive shift from majority disapproval to majority approval of the American president’s international policies. Therefore, whereas French reintegration into NATO would have been politically infeasible during the Bush administration, due to the US’s unpopularity in France, the subsequent shift to large majority French approval of Obama’s international policies sanctioned French reintegration. Notwithstanding essential strategic considerations, this example provides evidence of a clear link between positive changes in public opinion towards the US and increased cooperation in NATO.

In the case of Germany, with the election of Obama, “the groundwork for more cooperation...was laid” according to Gale Mattox.²⁴ Mattox highlights the example of the NATO missile defense discussions; after initial hesitancy to accept the value of missile defense in relation to the threat of Iran, Germany accepted the decision to move forward with the missile system after consultations within NATO.²⁵ Both the Bush and Obama administrations sought to develop a missile defense system in Europe. The Bush administration’s approach was largely bilateral, involving primarily direct negotiations with Poland and the Czech Republic, but the administration had also sought NATO endorsement and the adoption of the system as an alliance capability.²⁶ In fact, “some observers have suggested that the Bush administration chose not to work primarily through NATO because consensus agreement on

- 27 Ibid., 18.
- 28 Steven Hildreth and Carl Ek, *Long-Range Ballistic Missile Defense*. Congressional Research Service (2009), 16–17.
- 29 Hildreth and Ek. *Missile Defense and NATO's Lisbon Summit*, 5.
- 30 *Transatlantic Trends: Topline Data*, 2011.

the system was unlikely.”²⁷ In their 2009 Congressional Research Service report on the missile defense plan, Hildreth and Ek suggest that European countries, particularly Germany, France, and Luxembourg, opposed the Bush missile defense plan because they viewed it as another instance of assertive American unilateralism and believed that it could provoke unnecessary tension with Russia.²⁸ This was of particular concern to Germany, as Germany has historically been wary of transatlantic security initiatives that may damage relations with Russia (for example, German opposition to offering a NATO Membership Action Plan to Ukraine in 2008). After Obama became president, he cancelled the Bush Administration plan and initiated his own European missile defense system plan. European NATO members soon adopted the new plan at the November 2010 summit in Lisbon.²⁹ The changes in the plan are surely causally related to the change in reaction from Germany and other NATO members, but the drastic shifts in public opinion towards the United States were instrumental to its approval. The selectorate model again informs us that this should be the case. Beholden to public opinion as democratically elected leaders, the German leadership very likely shifted their position on American-led European missile defense as a result of the massive swing in German public opinion towards the United States. From 2003–2008, between 81% and 87% of the German public disapproved of the Bush administration’s international policies. By contrast, from 2009–2011, between 81% and 92% of the German public approved of the Obama administration’s international policies.³⁰ Thus, whereas cooperating on missile defense during the Bush administration was politically infeasible due to the large majorities of the German public disapproving of US policies, cooperating with the US within NATO was subsequently politically authorized due to the huge reversal in German public opinion after the election of Obama.

From these examples, one can conclude that low approval ratings of US policies generated soft balancing while high ratings led to improved cooperation within NATO. It is not insignificant that France and Germany, after leading the opposition to the Iraq War in NATO and elsewhere while domestic anti-Bush feelings were high, cooperated with the United States within NATO in important ways when domestic pro-Obama feelings were high. It is difficult to characterize entire periods of the transatlantic relationship using only a few case studies, but because the cases discussed here reflect broader shifts in state behavior as demonstrated by the quantitative analysis of UNGA voting coincidence, the argument levied within this paper remains sound.

Conclusion

Because the evidence suggests that negative European public opinion results in soft balancing against the United States in NATO and the EU, important conclusions for policy and theory may be drawn.

For policy, it must be concluded that the United States should steer clear of aggressive unilateral policies and seek to invest itself further in the multilateral forums of international institutions, or risk generating counter-productive opposition from European allies. As discussed above, the liberal international order established by the United States after World War II institutionalized, and thus conserves, American power. By constraining itself within international institutions, the US was able to obtain the compliance and participation of other states. However, to the extent that the United States bucks international institutions and seeks to assert itself unilaterally, secondary states will use the existing institutional structures to constrain the US as much as possible. If this is not successful in discouraging American unilateral behavior, the institutional network established by the United States will increasingly fail to conserve American power and influence into the future.

In terms of international relations theory, the validation of this hypothesis provides support for second-image explanations of international relations that give weight to public opinion. Further, it validates the importance and relevance of international institutions. If states do in fact soft balance against the United States via international institutions, it is because they view international institutions as effective measures of soft balancing in the international system. Furthermore, the validation of this paper's hypothesis supports theories of soft balancing, demonstrating that in the absence of 'hard' balancing, less obvious forms of balancing may occur. This is hardly a confirmation of realism. In fact, the salience of public opinion in determining when soft balancing occurs is in direct contrast to central tenets of neo-realism that dismiss second-image explanations.

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Editor's note: Regression analyses were excluded from this publication due to space constraints.

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“Kosovo is the love child of an international affair. We don’t know who we are. We don’t know what parent to look up to. We are a bastard child.”

Shkelzen Maliqi, Kosovan Intellectual

Introduction

- 1 Fisnik Korenica and Dren Doli. “Constitutional Rigidity in Kosovo: Significance, Outcomes, and Rationale,” *International Law Review Online Companion* (Pace University School of Law: January 1, 2011), vol. II, no. 6.
- 2 The Comprehensive Proposal for the Kosovo Status Settlement is also known as the Ahtisaari Plan, more commonly.
- 3 As of October 11, 2012, 91 countries have recognized Kosovo. www.kosovothanksyou.com.
- 4 John Tunheim, “Rule of Law and the Kosovo Constitution,” *Minnesota Journal of International Law* (2009), vol. XVIII, no. 2, 372.

On February 17, 2008, Kosovo declared independence from Serbia, nine years after the outbreak of an ethnically driven conflict between Kosovan Albanians and Kosovan Serbs, a massive humanitarian intervention, and two of the largest United Nations and European Union missions seen to date. Following the declaration of independence, Kosovo produced a constitution that was ratified on April 9, 2008 and put into effect on June 15, 2008. The constitution had an internationally-supervised drafting process and, arguably, was predominantly a product of the Comprehensive Proposal for the Kosovo Status Settlement,¹ dated March 26, 2007 and written in large part by U.N. Special Envoy, Marti Ahtisaari.²

Championed by internationals and many Albanian Kosovars alike as incredibly “modern,” Kosovo’s constitution provides a consociational government structure that guarantees minority representation and rights, bearing in mind the conflict-ridden past but with a keen eye to a multi-cultural democracy in the future. Often, Kosovo is championed as a success of international intervention: Kosovo is on its way to becoming a country recognized by the United Nations;³ it has not seen heavy casualties since the initial intervention in 1998; and it has been admitted to organizations like the International Monetary Fund and the World Bank.

Despite such successes four years after independence, Kosovo still retains significant ethnic divisions, particularly in the Kosovan Serbian stronghold of North Mitrovica near the border with Serbia. Such divisions manifest in unofficial self-segregation by ethnicity, antagonism between ethnicities, lack of minority participation in civil society and partisan politics, and, most dishearteningly, violence. In contrast, Kosovo’s constitution — informed as it is by the international community’s “heightened consensus” and “passion for insuring [that] all people” share in the benefits provided in the Universal Declaration of Human Rights,⁴ promises a system based on the cooperation and equal rights of different ethnicities between Serbs, Albanians, and other minorities. On the ground, however, Kosovo’s community remains divided by contentious ethnic enmity.

- 5 "NATO Sends More Troops to Kosovo After Border Unrest," *BBC News*, August 1, 2011, <www.bbc.co.uk/news/world-europe-14376424>.
- 6 Bojana Barlovac, "Northern Serbs Vote 'No' to Kosovo," *Balkan Insight*, February 16, 2012.
- 7 James L. Gibson, *Overcoming Apartheid: Can Truth Reconcile a Divided Nation?* (Russell Sage Foundation, 2004), 4–5.
- 8 Arend Lijphart, *Democracy in Plural Societies*, (New Haven, CT: Yale University Press, 1977), 25.

The most recent example of the ethnic discord in Kosovo includes the violent outbreaks on the border with Serbia in Mitrovica in August 2011 when Kosovan officials tried to gain control of the border checkpoints. NATO sent 700 extra troops to the already 6,000 strong Kosovo NATO Force (KFOR).⁵ In addition to this show of force, there was a recent referendum run by Kosovan Serbs in the breakaway region of North Mitrovica, in which 99 percent of Serbs who voted (constituting 75 percent of all Serbs living there) voted "No" to the question "Do you accept the institutions of the so-called Republic of Kosovo."⁶ As can be seen, Kosovan Serbs are resistant to recognizing not only the institutions and provisions laid out for them in the Constitution, but all forms of authority and enforcement both international and Kosovan. Considering the ethnic discord in the country, one must question if there are problems of political and governmental structure in the constitution, in addition to problems with the values that are presented in the constitution.

In this paper, I use the experience of Kosovars and their constitution as a case study to question whether a constitution can be a source of reconciliation when it is largely adopted from the international presence in zones of ethnic conflict. "Reconciliation" is used herein as James L. Gibson defines it: "groups getting along together," support for human rights, legal universalism, and "eschew[ing] racism and embrac[ing] tolerance."⁷ I argue that in order for reconciliation or peaceful coexistence to develop in the statebuilding project following ethnic conflict there must be three key factors in the making and execution of constitutions that have been influenced by international peacekeeping, summed up by 1) *structure*, 2) *legitimation* and 3) an *enforcer/incentivizer*.

Firstly, constitutions require a governance *structure* that reflects the obvious social divisions by giving groups autonomy, but encourages and incentivizes them to work as a whole. This kind of structure theoretically can be provided in a consociational arrangement, where predetermined ethnic or social groups are guaranteed a minimum amount of representation, protection, and power. Consociational democracies are defined in four terms. Usually there is a government with a grand coalition of political leaders from the significant sect of society, a mutual veto to protect vital minority interests, proportionality of representation, and a high degree of autonomy for each group to run its own affairs, so as to avoid feeling oppression from other groups.⁸

Next, constitutions require a *legitimation* element that binds people to the law and encourages voluntary compliance with it. I believe that the ethnic nationalism, so divisive in Kosovo, can be superseded by a different legitimating element, such as the Universal Declaration of Human Rights, that unites people in an identity that is attached to a strong belief in the power of equality and universal values embedded in procedural and legal norms. Theoretically, this seems like an attractive alternative for peacekeepers to promote as a legitimating factor.

- 9 James D. Fearon and David D. Laitin, "Neotrusteeship and the Problem of Weak States," *International Security*, vol. XXIX, no. 4, pp. 5–43, 7.

Yet, there are two problems with developing consociationalism and doctrines of universal human rights without guidance, security, and to some degree, force. Consociationalism can potentially exacerbate ethnic tensions by dividing and codifying government along ethnic lines. I also recognize that accepting values such as universal human rights is a challenge to develop amongst warring groups without a force to prevent conflict. To mitigate the challenges of having previously warring groups create laws and peacefully coexist together, I propose a tall but necessary element, that of an "enforcer" or "incentivizer." James D. Fearon and David D. Laitin describe something similar to this concept as being a "Neotrustee" who participates in overseeing the "complicated mixes of international and domestic governance structures"⁹ of a post-conflict society. The international community or some other neutral force is required to be present in order to guarantee peaceful coexistence of ethnic groups, allowing them the space to begin dialogue, develop procedures, and adopt a constitution that is recognized, respected and enforced. This can either be through the presence of policing, auditors, or other incentives for participation, such as membership to multinational organizations or monetary gain. Without such an enforcer, the peaceful, cooperative multi-ethnic society provided for in consociational structures and human rights dogma simply would not exist. Society would devolve back into ethnic conflict.

Bearing these three theoretical points in mind, I explore the optimistic possibility of creating the appropriate political and social ecosystem in the Constitutional drafting and peacemaking processes. I suggest that if balanced appropriately, ethnic cleavages can be mitigated in many instances through the right structure, legitimating values, incentives and enforcement. However, I also explore where this theory is lacking, particularly with the case of North Mitrovica and Serbian separatist movements within Kosovo. In these instances, I propose that the *enforcer* must act as a diplomat as well by working with surrounding countries or opposition (in this case, Serbia), by giving incentives to cooperate in a certain manner, but also by conceding land (in the case of North Mitrovica) or some control when absolutely necessary to maintain the peace. Ultimately, the internal ecosystem of a country, no matter how well planned in a statebuilding or Constitutional drafting process, must be understood as part of a regional ecosystem that requires great oversight by *enforcer*.

Background of Kosovar Conflict and the Road to Independence

Slobodan Milosevic rose to power in Yugoslavia in the late 1980s, largely through inciting Serbian fears and paranoia. Milosevic garnered the support of Serbs throughout the former Yugoslavia by uniting them in victimhood, pointing out the threat of the growing number of Kosovar Albanians within the "Serbian homeland" of Kosovo—known in the Serbian nationalist narrative as the seat

- 10 Henry Perritt, *The Kosovo Liberation Army: The Inside Story of an Insurgency*, (Chicago, IL: University of Illinois Press, 2008), 24–25.
- 11 Thaci later went on to become the current Prime Minister of Kosovo.
- 12 Roland Gjoni, “Building a New State and Society through Constitutional Design: Is the External State Building Working in Kosovo?” delivered at Political Studies Association of U.K., April 19–21, 2011, London, 3.
- 13 This included a National Assembly, Prime Minister, Ministries, President and Supreme Court.

of Serbian nationalism, folklore, and the Serbian Orthodox Patriarchate. His fueling of ethnic hatreds won him the support of Serbs throughout Yugoslavia, giving him control of the Serbian Community Party in 1987 and ultimately the presidency in 1989. Upon gaining the presidency, Milosevic revoked Kosovo’s political autonomy and began a series of actions that marginalized Albanians, excluded them from any participation in government, and denied them any right to express their culture or language.¹⁰

Quickly, a government in exile for the predominantly Albanian population grew under the leadership of Dr. Ibrahim Rugova, an Albanian intellectual who had spent many years developing a government in exile for Kosovo, mostly out of Switzerland. Rugova participated in many international non-violent resistance conferences and intellectual circles, trying to learn ways to peacefully resist the Serbian aggression. At the same time that Rugova was working on peaceful resistance, an armed insurgency known as the Kosovo Liberation Army (K.L.A.) developed under Adem Jashari and Hashem Thaci—in many ways as a response to the failure of international intervention in Kosovo at Dayton.¹¹ The K.L.A. was more or less a guerilla army, informally trained and decentralized in command. Both Rugova’s peaceful resistance and the K.L.A., despite different means and ideologies, had the same goal—an independent and Albanian nation of Kosovo. As K.L.A. guerrilla fighting and Serbian aggression increased, it caught the attention of the international community, particularly with the Massacre at Račak, during which Serbian Special Police killed 45 civilians. As fighting carried on in 1999, the E.U. and U.S. convened at the Rambouillet Peace Talks to propose an agreement for the short-term secession of Kosovo; Serbia rejected it.

The West was beginning to find reasons for intervention. Perhaps the West did not want another genocide on their watch, as had happened in Bosnia. It could be that they wanted to curb Milosevic’s aggression once and for all. Perhaps because the nascent European Union was taking shape and trying to integrate Europe under universal European values, an ethnic conflict in the Balkan backyard would be contradictory to the E.U.’s foundational values. A greater fear might have been the flows of refugees into Europe. With all of these reasons piling up, on March 24, 1999, NATO launched air strikes without a U.N. Security Council (U.N.S.C.) resolution.¹² By June 1999, the Yugoslav Army surrendered and withdrew. The U.N.S.C. adopted Resolution 1244 recognizing Kosovo as an integral part of the Federal Republic of Yugoslavia, calling for the safe and unimpeded return of refugees and displaced peoples, and authorizing an international mission to establish a provisional self-government pending status.

By May 2001, The United Nations Mission in Kosovo (UNMIK) created central government institutions for Kosovo known as the Provisional Institutions of Self-Government,¹³ an effort to promote “Standards before Status”—designed to make Kosovo a multi-ethnic society. The mission faced the “Albanians’ impatience with the

14 Ibid., 3.

15 UN Security Council, Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo (June 12, 2008) S/2008./54, <daccess-dds-ny.un.org/doc/UNDOC/GEN/No8/377/90/PDF/No837790.pdf?OpenElement>.

status uncertainty and Serbs' rejection of any initiative that would promote Kosovo as a self-governing entity."¹⁴ The March 2004 riots that resulted were a reminder that the conflict was not dead and still quite contentious.

Realizing that Kosovo had to begin towards some kind of status settlement, U.N.S.G. Kofi Annan in October 2005 appointed Martti Ahtisaari to lead the U.N. Office of the Special Envoy for Kosovo. Ahtisaari suggested in March 2007 that Kosovo be granted independence, but the plan was rejected by Serbia, which subsequently urged Kosovo Serbs to leave Kosovo government institutions. Ahtisaari developed a document called "The Comprehensive Proposal for the Kosovo Status Settlement" that was not accepted by the Security Council, namely because it implied Kosovo's independence, which upset Russia, Serbia's ally. Other bodies, such as the European Union, the U.S., U.K., and France encouraged its usage and much of it was adopted by the Provisional government. The plan laid out constitutional provisions for consociational government which guaranteed minority representation and rights. It also described a process of government decentralization for minority municipalities. Ultimately, Kosovo unilaterally declared independence on February 17, 2008 and adopted the Constitution of the Republic of Kosovo (largely inspired by the Ahtisaari Plan) on April 9, 2008. The U.N.S.G. acknowledged that declaration of independence, and the coming into effect of the Constitution had created a new reality in Kosovo.¹⁵

Despite the fact that not all of its member countries recognize Kosovo, the European Union has set up a special mission there to oversee the development of rule of law processes. The European Union Rule of Law Mission to Kosovo (EULEX) was deployed in the absence of an amended Security Council resolution "six-point plan." EULEX "monitors, mentors and advises" Kosovo while "retaining limited executive powers." The European Union had in mind the creation of a multiethnic, European project, with or without the recognition by all member states of Kosovo's independence. This is where the narrative of the story of Kosovo's constitutional project in creating a multi-ethnic, civil democracy begins.

The third section of this essay has been omitted from this excerpt.

The Ahtisaari Plan and Kosovo's Constitution

Can constitutions influenced or written by the international community provide *legitimation*, *incentives*, *enforcement* mechanisms and *structure* to allow multiethnic peoples in post-conflict zones to live peacefully together? Recall in the introduction that the successful statebuilding project, especially when overseen by internationals, must balance and be aware of these three elements during a constitution's drafting, ratification, and execution. As a means to answer this question, this section investigates the factors that led up to Kosovo's independence and the international facilitation of the creation of Kosovo's Constitution. The story of Kosovo's con-

- 16 Marko, Joseph. "The New Kosovo Constitution in a Regional Comparative Perspective." *Review of Central and East European Law* (2008), vol. XXXIII, pp. 437–450, 439.
- 17 Marko *op. cit.*, 440. Marc Weller, "The Kosovo Constitution and Provisions for the Minorities in Kosovo" *European Yearbook of Minority Issues* (2006/2007), vol. 6.

stitution goes back primarily to the Comprehensive Proposal for the Kosovo Status Settlement dated 26 March 2007.

Kosovo's constitution, while largely influenced by the Ahtisaari Plan, has a complex legislative history. In 1991, as Milosevic began to heavily enforce policies of ethnic discrimination against Albanians in Kosovo, the "Kacanik Constitution" was drafted by Kosovan Albanians activists, which both declared Kosovo independent and set up a parallel government structure for the new "Albanian nation state." This constitution was largely written by Ibrahim Rugova and his government in exile.¹⁶ Rugova was quite an international figure, advocating for the independence of an Albanian Kosovo and participating in many international seminars on non-violent resistance movements. In many respects, he was a product of the international system and tried to play by its rules. Despite this, the Kacanik Constitution was taken seriously by neither the international community nor the Serbian (then Yugoslav) government, who at the time were dealing with conflicts in Croatia and Bosnia. Even later, during the conflict between the Serb military and KLA on the ground, Albanian political parties had "draft constitutions in their desk drawers in the event of conflict settlement and finally gaining political independence."¹⁷ Though perhaps an exaggeration, the idea remained that Kosovars were waiting in the wings for a chance at independence in the international spotlight.

Before the Ahtisaari Plan, Kosovo's Constitution was influenced by other administrative mandates and documents. The establishment of the U.N. Interim Administration Mission in Kosovo (UNMIK) based off of the U.N. Security Council Resolution 1244 was primarily intended to preserve the territorial integrity of Kosovo and grant it "substantial autonomy" until a final status could be met. Albanian Kosovars viewed this mandate as a step towards an independent and sovereign Kosovo. In a secret meeting in Prizren in 2000, headed by the Special Representative of the UN Secretary-General (S.R.S.G.), Bernard Kouchner, there was an attempt to see if the 1999 Rambouillet Peace Accords document could be used as a model for constitution drafting, but this document essentially gave Serbia power to establish territorial and institutional "parallel structures" of government in Kosovo and also block decision-making processes in the central government in Kosovo. Kouchner realized that Rambouillet could not be the document that would establish a sustainable government scheme for Kosovo and Serbia, though the idea of using the peace accords as a foundation for the constitution would be an inspiration for the Ahtisaari Plan.

Serbia's unwillingness to recognize Kosovo and the general lack of consensus in the international community as to whether Kosovo should be independent left Kosovo in a state of limbo after 1999, during its administration under UNMIK. To mitigate the economic and social problems that come from what was essentially a client state like Kosovo, the U.N. Security Council issued the Comprehensive Proposal for the Kosovo Status Settlement, otherwise known as the Ahtisaari Plan. Marti Ahtisaari of Finland, who

18 In 2008, Ahtisaari was awarded the Nobel Prize for his work in Kosovo, and with his Crisis Management Initiative in Iraq, Northern Ireland, the Horn of Africa, and Central Asia.

had been heavily involved with the Bosnia-Herzegovina Working Group of the International Conference on the former Yugoslavia and had facilitated crisis management around the world, was Special Envoy for the Kosovo Status Process.¹⁸

The document Ahtisaari produced laid out general principles, constitutional provisions, rights of communities, the justice system, debt, security, international representation, and military guidelines for the future of Kosovo. Constitutional provisions here would later be adopted into Kosovo's constitution in 2008, almost word for word. Many of the values underpinning the new Kosovo constitution would be drawn from the doctrines of international human rights, multiculturalism, and consociationalism — ideas that had been circulating in a number of ongoing and growing European Union intellectual circles, notably in the work of Jürgen Habermas.

Article One of the Ahtisaari Plan lays out the general principles of the proposal, which exemplify the ideals of universal human rights, equality, and multi-culturalism — the *legitimation* factor touched upon earlier that would make the values underpinning Kosovo universally acceptable to all ethnicities. Article 1.1 states: “Kosovo shall be a multi-ethnic society, which shall govern itself democratically, and with full respect for the rule of law, through its legislative, executive, and judicial institutions.” This first proclamation immediately underscores two key points: 1) Kosovo will be multi-ethnic and 2) it will be democratic. In reality, Kosovo had been neither truly multi-ethnic nor democratic. Kosovo, throughout the 1990s, had been multi-ethnic in demographic terms, but Milosevic's systematic marginalization of Albanians from the political and economic systems had ultimately made Kosovo part of the Serbian nationalist project, with a parallel Albanian system. These new values radically broke from the historically ethnically based and ethnically organized paradigm in Kosovo.

These universal legitimizing factors in Article 1 of the Ahtisaari Plan are reiterated in Article 7 of the Constitution. The article is titled, simply, “Values.” It states:

The constitutional order of the Republic of Kosovo is based on the peace, democracy, equality, respect for human rights and freedoms and the rule of law, non-discrimination, the right to property, the protection of environment, social justice, pluralism, separation of state powers, and a market economy.

These values are derived directly from Articles 1.1 through 1.6 of the “General Principles” of the Ahtisaari Plan, and appear additionally in other articles throughout the plan that further explicate them. These principles, at least in the formal language of human rights doctrine, are foreign to the Kosovar government's rhetoric, entrenched as they were after years under Communist and nationalistic dictatorship. That this article is entitled “Values” says something about the presumed, underlying legitimizing element to the constitution: respect for the constitution, rule of law, and legalism

- 19 Marko, Joseph. "The New Kosovo Constitution in a Regional Comparative Perspective." *Review of Central and East European Law* (2008), vol. XXIX 33, pp. 437–450, 442.
- 20 Ibid.

itself. Kosovo's constitution does make a very obvious attempt at trying to provide and explain the values that make the constitution legitimate and savory to all peoples in Kosovo. This universalism is also reinforced by the inclusion and guarantee of the Declaration of Human Rights. Additionally, other articles pronounce critical new changes to Kosovo's experience. Article 1.2 states that Kosovo "shall be based on the equality of all citizens." Article 1.3 states that "Kosovo shall adopt a Constitution" of the "highest democratic standards." Article 1.4 states Kosovo "shall have an open market economy."

Chapter II of the Constitution details the "Fundamental Rights and Freedoms," many of which are directly copied from the Ahtisaari Plan and other international agreements on human rights. Article 22 on the "Direct Applicability of International Agreements and Instruments" lists and guarantees international agreements as applicable to Kosovo, and "in the case of conflict, have priority over provisions of laws and other acts of public institutions." The list includes the Universal Declaration of Human Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms and its protocols, the International Covenant on Civil and Political Rights, the Council of Europe Framework Convention for the Protection of National Minorities, and four others, all of which were directly lifted from Annex I—Constitutional Provisions, Article 2.1 of the Ahtisaari Plan. In many ways, Kosovo here adopts other agreements that have "priority" over other Kosovan acts or provisions in case of conflict. In this article, Kosovo positions itself as an obedient client to an international schema of "neotrusteeship" and human rights doctrine, in a language and form of understanding that is exogenous both in documents and ideology. It was, in short, a radically new break from the past of ethnic nationalism and kinship ties that had held together the Albanians of Kosovo and had separated Yugoslavia. It was proposing a new way of finding reasons to live together under universal values, with the help and guidance of the international community.

Indeed, much of Kosovo's Constitution was drawn from the Ahtisaari Plan with the oversight of the international community acting as *incentivizers*, *enforcers*, and also mentors. As the plan did make provisions for a "Constitutional Working Group," after the declaration of independence, the "Constitutional Commission of Kosovo" was created. The Ahtisaari Plan envisioned a group of twenty-one experts combined with political representatives who would be the drafters. U.S.A.I.D. exercised a very strong influence on this process, providing many of the experts involved.¹⁹ The work on the constitutional draft was divided into ten different working groups: on the preamble, founding principles, Kosovo institutions, fundamental rights and freedoms, security and order, community rights, judicial power, economic relations, local self-government, and independent agencies and ombudsperson. A draft was put out for public discussion from February 19 to March 4, 2008.²⁰ However, the draft was not voted on democratically in a referendum; there

- 21 Gjoni, Roland. "Building a New State and Society through Constitutional Design: Is the External State Building Working in Kosovo?" delivered at Political Studies Association of UK, 19–21 April 2011, London, 3.
- 22 James D. Fearon and David D. Laitin, "Neotrusteeship and the Problem of Weak States," *International Security*, vol. XXIX, no. 4, pp. 5–43, 7.

were fears that many Albanians and Serbs would have boycotted the process or rejected the draft, because it was not designed to promote an Albanian nation state nor was it going to rejoin Kosovo to Serbia.²¹ To this end, the Kosovan Serbian participation in the drafting process, compared to the level of participation by the international community, was quite minimal. Moreover, and perhaps most telling, the levels of representation is very much reflected in the Ahtisaari Plan and the Constitution.

Article 1.11 of the Ahtisaari Plan mandates the involvement of the international community in Kosovo's future, calling to mind the official placement of an *enforcer* or *incentivizer* in the state-building project. The Article states: "The international community shall supervise, monitor and have all necessary powers to ensure effective and efficient implementation of this Settlement, as set forth in Annexes IX, X, and XI. Kosovo shall also issue an invitation to the international community to assist Kosovo in successfully fulfilling its obligations to this end." The international community is both inviting and demanding its presence in the future of Kosovo. The Ahtisaari Plan outlines a constitution and future for Kosovo with the idea that the international community will play an integral part in the future of Kosovo. The constitution of Kosovo reflects this involvement, as much of the constitution is directly — almost word for word — copied from the Ahtisaari Plan.

In areas of ethnic conflict where there has been some exogenous international peacekeeping presence, such as the U.N. or NATO, this external "trustee" of the peace enforces the rule of law or gives some incentive for peace (abiding by certain international standards in exchange for membership to organizations like the IMF, the World Bank, or in Kosovo's case, the E.U.). Aside from forcing these countries or giving them incentives to participate, the internationals as "trustees" to this peace often have interests in seeing these new or weak states such as Kosovo succeed. James D. Fearon and David D. Laitin lay this concept out in their article, "Neotrusteeship and the Problem of Weak States." The article coins the term "neotrusteeship" to describe a form of "postmodern imperialism" that describes the "complicated mixes of international and domestic governance structures"²² that evolved in places like Kosovo, Bosnia, East Timor, Sierra Leone, Afghanistan, and Iraq in order to ensure regional security and fulfill international interests, but with hopes for an exit strategy. Undoubtedly, geopolitics get involved in determining where such peacekeeping operations occur, yet the point remains that the reasons, resources, and interests of international powers differentiate this form of trusteeship from imperialism.

Both the Ahtisaari Plan and the Constitution mandate that the international community play a very active and significant role in the administration and rule of law in Kosovo, signifying the paternalistic role internationals will play as the "neotrustees" and enforcers of a new order. The Ahtisaari Plan in Article 12.3 makes provisions for an International Civilian Representative (I.C.R.)

from an International Steering Group (I.S.G.) who would have “overall responsibility for the supervision” and “final authority in Kosovo regarding the interpretation of this settlement.” Annex IX goes into greater detail about the competencies of the I.C.R., some of which include “taking corrective measures to remedy, as necessary, any actions taken by Kosovo authorities” that are a breach (IX. 2.1) and his/her consent for appointment of the Auditor-General, international judges and prosecutors, Director of Customs, and Director of Tax Administration (IX.2.2). Additionally the I.C.R. would coordinate all international efforts including the European Security and Defense Policy Mission (ESDP). The I.C.R.’s mandate would not expire upon Kosovo’s independence, but rather upon completion of the fulfillment of the Ahtisaari Plan, thus creating a partially international government.

Kosovo’s Constitution does not deny the role of its international overseers. Kosovans are fully aware of their role as a client state and welcome internationals in the implementation of their constitution and their government structures. Chapter XIII, Article 143.1 specifically notes “All authorities in the Republic of Kosovo shall abide by all of the Republic of Kosovo’s obligations under the Comprehensive Proposal for the Kosovo Status Settlement.” Article 143.2 goes on to state that “the provisions of the Comprehensive Proposal for the Kosovo Status Settlement dated 26 March 2007 shall take precedence over all other legal provisions in Kosovo.” To this end, there will still be a larger or higher authority in Kosovo until the provisions in the Ahtisaari Plan are fulfilled; the end is not defined.

One cannot deny the provisions for a transition towards autonomy. Kosovo’s constitution does recognize in Article 151, Temporary Composition of Kosovo Judicial Council, and Article 152, Temporary Composition of the Constitutional Court, that many of the international actors and judges will eventually be replaced by Kosovars, but only towards the end of the fulfillment of the Ahtisaari Plan — an end which was not fully defined. While there are attempts made to show the phasing out of certain internationals, some are left at loose ends, particularly concerning the I.C.R. Many other figures, such as the Governor of the Central Bank of Kosovo, or the Auditor-General, are appointed by or appointed through consent of the I.C.R., according to Articles 157 and 158. The role or duration of the I.C.R.’s mandate is not clarified in the Constitution.

As mentioned before, the Constitution marks that it is a responsibility of the state to “promote a spirit of tolerance, dialogue and support reconciliation among communities and respect the standards set forth in the Council of Europe Framework Convention for the Protection of National Minorities and the European Charter for Regional or Minority Languages.” (58.2) This dedication to reconciliation and protection of minorities, not to mention the exact wording of the article, also finds its origins in the Ahtisaari Plan in Annex II, Article 2.2. The spirit of reconciliation lives in paper by positive declarations and in systemically giving automatic representation to Serbs and other minority members in government

- 23 Donald L. Horowitz, *Ethnic Groups in Conflict*, (Berkeley, CA: University of California Press, 1985), 306.
- 24 *Ibid.*, 334.
- 25 *Ibid.*, 348.
- 26 Arend Lijphart, *Democracy in Plural Societies*, (New Haven, CT: Yale University Press, 1977), 5.
- 27 *Ibid.*, 9.

by way of a *structural* element in this statebuilding process, one that is very aware of the divisions in the population and does not try to ignore the obvious factions, despite its universalist language.

In societies with militarized ethnic groups, it should be no curiosity that politics and government structure will also be defined by ethnicity; these divisions cannot be ignored in the constitutional drafting process and must be recognized to a degree in the *structure* of the government laid out. Donald L. Horowitz describes this ethnically divided society as rather infectious: “once one party organizes along ethnic lines, others are inclined to follow suit.”²³ These ethnic parties “preempt the organizational field” and tend to “crowd out parties founded on other bases.”²⁴ Thus, the political landscape is defined solely by ethnicity and then by variations within those ethnicities. There is little crosscutting and participation across ethnic lines politically. Horowitz summarizes this political organization as having “stable parties” but “unstable politics.”²⁵ Ethnic cleavages are written into the social landscape.

Consociationalism can theoretically provide a framework of government in a constitution that can mitigate ethnic tensions and even encourage reconciliation through power sharing arrangements along ethnic lines. Arend Lijphart has written extensively on the concept of consociational democracy. He describes it as “segmented pluralism”²⁶ which considers not only formal separations of powers (legislative, executive, judicial) but also informal political substructures (parties — along ethnic lines in Kosovo’s case, interest groups).²⁷ The informal substructures are formalized into some kind of guaranteed power sharing arrangement. Examples of consociational democracies exist in Belgium, the Netherlands, Austria, Bosnia and Herzegovina, and Switzerland to varying degrees of political stability. The power sharing dynamics and theoretical and practical possibility for ethnic cooperation make consociationalism very attractive for international arbiters. This is evidenced by their application of the Ahtisaari Plan to Kosovo’s government structure and constitution, which guarantees representation to each minority group, as well as general autonomy and powers of decision making in certain minority municipalities. Kosovo’s constitution as outlined by the Ahtisaari Plan is set up with many of the major features of consociationalism

Thus, as the third *structural* component outlined earlier as being necessary to a successful Constitution and statebuilding exercise, the Ahtisaari Plan makes constitutional provisions to set up a consociational government system that guarantees the representation of minorities in the legislative bodies and courts, as well as a system of decentralized local government that has some autonomy on most matters of education, healthcare, and, to a degree, economics. According to the Ahtisaari Plan, this decentralization was put in place to “address legitimate concerns of the Kosovo Serb” community (Annex III — Decentralization).

The government structure under the Kosovo Constitution is truly set up along consociational lines first laid out in the Ahtisaari

Plan's Annex on Constitutional Provisions. In the Ahtisaari Plan, Annex I, Article 3.2 guarantees in the Assembly of Kosovo "twenty (20) seats reserved for the representation of Communities that are not in the majority in Kosovo" with ten for Serbs, and ten for other minority community members such as Ashkali, Egyptians, Roma, Bosniak, Turks, and Gorani. More seats can be won if the electoral process so dictates, but all minority groups will have the guarantee of this minimum level of representation, according to Article 3.3. Without much surprise, this Assembly structure, typical of most consociational governments, is repeated in Article 64 of Kosovo's Constitution.

The Ahtisaari Plan is incredibly aware of the need to protect minorities. In Annex III: Decentralization, as mentioned before, minorities are guaranteed general self-autonomy in a special system of decentralization. In this scheme, new municipalities are created (usually along ethnic lines) and receive the rights to control pensions and educate children in Serbian language, among others. As an additional level of protection, the Committee on the Rights and Interests of Communities stays in place under both the Ahtisaari Plan and in the Constitution under Article 78. The Committee has powers to oversee that communities are having their rights fulfilled, with a guarantee that 1/3 of the members be Kosovan Serbs. They are also guaranteed restitution under the Ahtisaari Plan's Annex VII, Property and Archives, in Article 6.I. However, perhaps the most unique is Article 10 of Annex III of the Ahtisaari Plan: minorities, particularly Serbs, are able to communicate and cooperate "within the areas of their own competencies" with other municipalities, agencies, and even "government agencies, in the Republic of Serbia." Because Article 148 of Kosovo's constitution protects the enforcement and principles of the Ahtisaari Plan, it must guarantee these rights, competencies, and the fulfillment of all provisions in the Ahtisaari Plan.

To summarize, both the Constitution and the Ahtisaari Plan uphold elements like consociationalism to provide a structure for a deeply divided community to find a balance between the experience of living together while apart and the use of universal human values as a source of legitimacy. Both documents also place emphasis on the ongoing involvement of internationals. The Constitution's Article 143 places the legal provisions laid out in the Ahtisaari Plan above any conflicting laws made in Kosovo proper. Additionally, it includes the ongoing presence of international auditors and judges in certain posts. Both documents are aware of the ethnic cleavages and try to mitigate them through recognition in a consociational structure. The documents also try to surmount ethnic differences through universal human rights doctrine and legalism as legitimizing elements. However, these documents require the ongoing presence (and sometimes explicit force of) the international community to create an environment peaceful enough for the experience and institutions of peaceful coexistence and reconciliation to take root. Despite attempts to provide the trifecta of a

proper ecosystem comprising a *legitimation* element, *enforcement* and *incentives*, and of course the proper *structural* components of government that bear in mind inherent divisions while still offering universal equality and representation, some Kosovan Serbs are still exhibiting violent resistance to Kosovo's institutions. That violence calls into question how long and how forceful the "neo-trustee" must stay in order for ethnic cleavages to close.

Theory in Inaction: The Failures of an Exogenously Influenced Constitution and State-Building Process in the Case of North Mitrovica

28 "Referendum in north: 99.74% say 'No' to Priština," B92, February 16, 2012, <www.b92.net/eng/news/politics-article.p?yyyy=2012&mm=02&dd=16&nav_id=78814>.

Despite the attempts of the international community to set up a sustainable governing system through the Constitution for Kosovo to live in peace, internal ethnic cleavages exist which destroy the balance of the system in theory and in practice. This imbalance may be seen from Kosovan Serbs' simple lack of recognition and participation in the government. As noted in the Ahtisaari Plan as well as in the Constitution, minorities should theoretically be ensured representation, rights, and even special protections in the new state of Kosovo. However, despite these promises, many members of the Kosovar Serbian community still resist even the recognition of Kosovo and its rule of law. Moreover, they even participate in a Serbian state-sponsored parallel system. The most salient example of the systematic rejection of Kosovo as a multicultural state is found in the activities of North Mitrovica and its recent referendum asking, "Do you accept the institutions of the so-called Republic of Kosovo?" The vote proved to be 99.7% "No," totaling about 75.28% of the 35,000 eligible voters.²⁸

The significance of the complete rejection of Kosovo and the corresponding attempt to have North Mitrovica join Serbia is illustrative of the failure of governance, participation, and constitutional culture to take hold in the country, showing that ethnic loyalties can run deeper than loyalty to a government that promises representation, rule of law, special protection, and more.

Mitrovica is a municipality 40 km north of Prishtina. The municipality today is divided north and south, with the Ibar River flowing in between the two halves. Mitrovica may appear to be a special case in light of other, significantly smaller Serbian communities in Kosovo. However, its recent violence in the summer of 2011 and the unanimity of the 2012 referendum are signs that promises of universal human rights only run skin deep in Kosovo and that, when left to their own devices, Serbs (and perhaps Albanians) would resort to ethnic and cultural bonds as the cement for social solidarity.

The power and influence of the Republic of Serbia is evident in many parts of Kosovo, but nowhere more so than in Mitrovica, frequently manifesting itself in support for teachers, healthcare, policing, a parallel government system, and more. Considering Serbia gives around 300–500 million Euros per year in aid to Kosovan Serbs, the loyalty that that support produces seems possibly dangerous, even contradictory to the ultimate goals of the Ahtisaari Plan,

- 29 Gjoni, Roland. "Building a New State and Society through Constitutional Design: Is the External State Building Working in Kosovo?" delivered at Political Studies Association of UK, 19–21 April 2011, London, 5.
- 30 OSCE, "Kosovo Serbs," *Community Profile*, 2010, <www.osce.org/kosovo/75450>, 3.
- 31 *Ibid.*, 4.
- 32 UNDP, "Mitrovica Public Opinion Survey" March 2011, <www.kosovo.undp.org/repository/docs/Final-ENG-Mitrovica-Opinion-Poll.pdf>, 13.
- 33 Poll July 2010, *Ibid.*, 16.
- 34 Poll November 2010, *Ibid.*, 47.
- 35 Policy Brief, the Economy of Mitrovica 2009, in UNDP, "Mitrovica Public Opinion Survey" March 2011, <www.kosovo.undp.org/repository/docs/Final-ENG-Mitrovica-Opinion-Poll.pdf>, 12.
- 36 UNDP, "Mitrovica Public Opinion Survey" March 2011, <www.kosovo.undp.org/repository/docs/Final-ENG-Mitrovica-Opinion-Poll.pdf>, 13.
- 37 OSCE, "The Mitrovica Justice System: Status Update and Continuing Human Rights Concerns," January 2011, Issue 1, <www.osce.org/kosovo/75526>, 3.
- 38 For security purposes, trials in North Mitrovica proper rarely take place.
- 39 *Ibid.*, 3.

despite provisions permitting the accepting of gifts and coordination with outside institutions and governments in Article 10 of Annex III of the Ahtisaari Plan.²⁹ Given the higher salaries, pensions, and social assistance offered by Serbian state institutions in places like Mitrovica, Serbia is likely to remain a significant influence in Kosovo so long as these parallel structures are permitted to exist.³⁰

As more municipalities are created along ethnic lines by the government in Prishtina, many Serbs find themselves even more consolidated in exclusive communities as they move to be with fellow Serbs. Before 1999, about 4,000–4,500 Serbs lived in Southern Mitrovica, but today there are almost none.³¹ Indeed, as minorities are treated as a specific class of people, rather than as a part of the general populace, they tend to isolate themselves from interaction with other ethnic community members. For instance, about 67.4% of Serbs living in North Mitrovica today did not live there before the war.³² This is not perceived as a problem either; 0.0% of Serbian Kosovar respondents said the "Divided City" was a problem when asked.³³ Indeed, when asked if they had any contact with other ethnic groups, 73.6% of Kosovan Albanians said "No." In contrast, 41.9% of Kosovan Serbs — who might interact with other minorities in the North — responded "No" to the same question.³⁴ That lack of interaction and sense of division creates a problem when Kosovar ethnicities try to participate in Kosovo's multicultural government structures, despite the ongoing process of decentralization.

Economic opportunities in Mitrovica are a particular problem, posing the potential for fiery conflict. Demographically, the region has incredibly low employment rates, with young people finding access to employment or education near impossible. The Trepca mining complex has activities of only a fraction of what they once were; in 1988 it employed 23,000 workers and today it employs just 2,525 workers, 1,355 of whom are Albanian (54%) and 1,170 (46%) of whom are Serbian.³⁵ The poverty rate is about 69.7% per headcount, or with a poverty distribution of about 22.6%.³⁶ Unsurprisingly, an O.S.C.E. report in 2010 notes a "deterioration in the security situation since mid-2009 in northern Mitrovica." The community profile report cites Kosovar Albanians attacking a Serbian couple and Albanian school children stoning a bus with Serbians on it. These levels of poverty, unemployment, and ethnic tension does not bode well for reconciliation or recognition.

Additionally, access, recognition, and participation in Mitrovica are a problem, particularly with respect to the rule of law. The court system in Mitrovica is nearly at a standstill because of issues of both security and capacity, and the lack of capacity has bred even greater perceptions of injustice. According to a 2011 O.S.C.E. report on "The Mitrovica Justice System: Status Update and Continuing Human Rights Concerns," the Mitrovica municipal court functions in a minimal capacity, and typically out of the neighboring Vushtrri Municipal court in Kosovo.^{37,38} In addition, there is a huge issue of resources: over 31,715 cases were submitted between February 2008 and October 2010.³⁹ Despite the deployment of

- 40 European Commission, *Commission Staff Working Document: Kosovo Under UNSCR 1244/99 2009 Progress Report*, SEC (2009) 1340, <ec.europa.eu/enlargement/pdf/key_documents/2009/ks_rapport_2009_en.pdf>.
- 41 *Ibid.*, 6.
- 42 “Kosovo Serbs defy NATO demands over blockade,” *BBC News*, October 18, 2011, <www.bbc.co.uk/news/world-europe-15355955>.
- 43 “Kosovo tense after deadly clash on Serbian border,” *BBC News*, July 26, 2011, <www.bbc.co.uk/news/world-europe-14303165>.
- 44 Associated Press, “NATO starts clearing roadblocks in Kosovo,” *Fox News.com*, August 1, 2011, <www.foxnews.com/world/2011/08/01/nato-starts-clearing-roadblocks-in-kosovo/>.
- 45 Muhamet Brajshori, “KFOR request reinforcements, precautions,” *Southeast European Times*, August 3, 2011, <www.setimes.com/cocoon/setimes/xhtml/en_GB/features/setimes/features/2011/08/03/feature-02>.
- 46 T.J., “Serbia and Kosovo: On the border of conflict.” *The Economist*, November 21, 2011, <www.economist.com/blogs/easternapproaches/2011/11/serbia-and-kosovo>.

EULEX judges in Mitrovica, the number of cases continues to grow and the little respect that Serbs from North Mitrovica attempted to show in their submission of cases continues to wane. Access to justice in areas inhabited by non-majority communities and especially in northern Kosovo is not guaranteed, and is seriously limited by the absence of a functioning judiciary. There is, for instance, no Kosovo Serb representative in the district legal aid office based in South Mitrovica.⁴⁰ The same OSCE report describes a growing “sense of impunity” amongst youngsters and other Kosovar Serbs.⁴¹

On July 26 2011, North Mitrovica saw a surge in violence, Serbian nationalism, and NATO-KFOR activity in response to the Kosovo Serb blockade that lasted until near the end of 2011. There were huge political provocations involved. A week before the violence, Kosovo responded to a Serbian ban on Kosovar goods by banning Serbian goods into Kosovo. Prime Minister Hashem Thaci also unilaterally ordered the Kosovar Police to take control of border crossings between Kosovo and Serbia in North Mitrovica—without consultation with EULEX or KFOR.⁴² The clash between the Kosovo Police and Kosovan Serb locals on July 26 resulted in the death of a Kosovo police officer, Enver Zymberi, which subsequently fueled Albanian nationalism around the country.⁴³ By July 27 the Jarinje border crossing was burned down by locals with hand flares and Molotov cocktails. Kosovan Serbs continued to blockade roads to the north until NATO removed roughly three out of eight roadblocks by August 1.⁴⁴ By August 3, KFOR had requested another 700 troops to handle the escalating violence.⁴⁵ September 16 saw yet more conflict as KFOR airlifted troops to take control of the border. The clashes continued well into October, as more injuries were incurred from riots, pipe bombs, and rubber bullets on both Serbs and KFOR as the latter tried to dismantle remaining roadblocks. This incident was a clear example of Kosovo Serbs showing strong loyalty to Serbia rather than to their “European” or “multicultural state.”

Notably, Kosovar Serbs’ loyalty to and trust in Serbia is waning just as their interest in joining the European community is also deteriorating. Some mentioned that if Serbia accepts customs officials from Kosovo on the border, it would mean that Serbia “has started to kill us.” At the same time, they indicate ambivalence towards joining the EU, stating, “When do you think Greece will go bust? What about Italy? If the EU is in such a state, why should we be trying to join it?”⁴⁶ Clearly, the foundation of ethnic loyalty is shaken as Serbia continues to be tempted by EU integration, which would require ceding Mitrovica to Kosovo. At the same time, EU loyalty is shaken simply by the economic and social problems it now faces.

This recalls the question of the role of the “enforcer” and “incentivizer.” As Serbia moves towards greater cooperation with the EU in hopes of integration, it means abandoning their parallel structures in Mitrovica and Kosovo at large. The role of the “incentivizer” can also work for the enemies of Kosovo, and be part of the solution

- 47 "Referendum in north: 99.74% say 'No' to Priština," *B92*, February 16, 2012, <www.b92.net/eng/news/politics-article.php?yy=2012&mm=02&dd=16&na=78814>.
- 48 Fatmir Aliu, "Kosovo government condemns Serb referendum," *Balkan Insight*, February 15, 2012, <www.balkaninsight.com/en/article/kosovo-serbia-s-referendum-a-territorial-claim>.
- 49 Bojana Barlovac, "Kosovo Serbs urge Belgrade to prepare elections," *BalkanInsight*, March 21, 2012, <www.balkaninsight.com/en/article/kosovo-serbs-we-want-elections>.

to creating an environment of peaceful coexistence. If Serbia were to abandon these institutions, it could potentially mean greater prospects for the fulfillment of the Kosovo constitution's aspirations, but also even more violence and disgruntled Kosovan Serbs.

Despite the possibility that Serbia could abandon them, Kosovo Serbs in Mitrovica are not giving into acceptance or recognition of Kosovo's institutions in the meantime. As mentioned previously, during this past winter, Kosovo Serbs in North Mitrovica held a referendum in February 2012 asking, "Do you accept the institutions of the so-called Republic of Kosovo?" The vote proved to be 99.7% "No", comprising about 75.28% of the 35,000 eligible voters.⁴⁷ Neither Belgrade nor Prishtina was thrilled. Serbian President Boris Tadic released a statement that the referendum was harmful to Serbia's EU integration ambitions. Tadic explained, "This move by leaders of the municipalities in northern Kosovo can only reduce the possibilities of the state, and is not in the interests of Serbs in the province."⁴⁸ Similarly, Prishtina found the referendum illegal and harmful to the state capacities promised by the Constitution.

Despite these reactions from both Prishtina and Belgrade, Kosovo Serbs continue to demand that Belgrade run municipal elections in Mitrovica just as they are doing throughout Serbia. Seventy-nine delegates and mayors of the four Serb municipalities wanted to launch their election preparations for May 6 just as they have started to do in Serbia. This is an effort to show their "absolute commitment to the Serbian state."⁴⁹ Yet, because Brussels claims that limiting these parallel structures in Kosovo is essential to Serbia's EU bid, Serbia itself now faces a worrisome problem.

The above examples demonstrate the unwillingness of the Kosovar Serbs to recognize, participate in, or buy into European values, the Republic of Kosovo, and the rights promised to them by the Constitution. Their loyalties and cultural priorities are first and foremost grounded in Serbia. Even with the presence of KFOR to enforce the peace and EU membership as an incentive to participate, this ethnic division is too wide to bridge at the moment. If the Ahtisaari Plan, the Constitution, and the internationals cannot integrate Mitrovica into Kosovo's institutions, how will the consociational system effectively function? How will the spirit of universal human rights ever grow to replace the ethnic loyalties that could ignite at any moment, as seen in the past year? Indeed, this is where theory, policy, and reality meet in a critical moment.

"What to do?": The Perennial Balkan Question with Some Concluding Remarks

Despite the problems in North Mitrovica, Kosovo has seen substantial development from warzone to developing country in just ten years. The country has made strides in having a modern multi-cultural government, in having a populous that is slowly overcoming painful memories of ethnic war and warming up to cooperation, and in having a continuous military presence that has scaled

back over the years. With respect to the framework for a legitimation element, a balanced structure, and enforcement mechanism, Kosovo could even be considered *the* success of international intervention to date. That said, it is still a long way from perfect. Kosovo's question of status and stability depends on a Serbian change of heart, geopolitical will, and the outcome of what happens in North Mitrovica — which at the end of the day does not fall on the structure of a constitution, but on the incentives and wills of the international community.

The ongoing instability emanating from the lack of recognition by Serbs in Mitrovica and the violence that comes with it are huge factors in preventing the rest of Kosovo from enjoying peace. Despite the structure, legitimacy, and enforcement elements in place, something is not working to appease Kosovan Serbs in Mitrovica. A consociational agreement that provides so many rights and protections to minorities is not enough, as there is neither desire nor necessity to participate in an independent Kosovo. As a result of the lack of participation, there is a perception that the state is failing. Thus, it is hard for many minorities and even some Albanians to have faith in the power or efficacy of their state (beyond Albanian ethnic loyalties and patriotism for an independent “Kosova”). There is little faith in the state's power to carry out a constitution that seemed to promise so much. Even with the enforcement of the rule of law provided by KFOR's presence and other internationals, some divisions, like that in Mitrovica, are just not meant to be forced together. Sometimes, secession is just as important to stability as a good government, a faithful people, and a powerful enforcement mechanism.

Thus, the Balkan question of “What to do?” arises. Mitrovica is a powder keg in the region. On the one hand, it seems appropriate for North Mitrovica to secede to Serbia, but then the experiment of a multicultural Kosovo would be dubbed a failure by the international community, and the billions spent by European and American taxpayers to try to glue Kosovo together would be for naught.

Additionally, there is the problem of creating a challenging legal precedent and disrupting certain balances in the geopolitics of the “neotrustees” of Kosovo. Currently the principle of *uti posseditis* has dominated the conversation on creating territorial boundaries after regime change. Originating in Roman times, *uti posseditis*, property as designated by the previous territorial boundary remains with the possessor or victor after conflict, but the territorial boundaries go unchanged. This principle also influenced the international community at the Badinter Arbitration Committee at the beginning of the breakup of Yugoslavia. It assumed that *uti posseditis* would stand as an effective way of territorially dividing the new independent republics, so no boundary changes would occur. If Mitrovica were to break away from Kosovo then, it would set an even more dangerous legal precedent for ethnic minorities to secede — a precedent already thought to be applicable to Kosovo if Kosovo's secession were not considered *sui generis*.

50 “EU leaders grant Serbia candidate status,” *BBC News*, March 1, 2012, <www.bbc.co.uk/news/world-europe-17225415>.

51 Toby Vogel, “Tadic excludes Serb controlled parts of Kosovo from elections,” *European Voice.com*, March 15, 2012, <www.europeanvoice.com/article/imported/tadic-excludes-serb-controlled-parts-of-kosovo-from-elections/73856.aspx>.

The secession of Kosovo was problematic enough for great powers like China and Russia to stomach, let alone another instance of boundary changes like Mitrovica. The U.S. and the E.U. cannot afford to create more imbalances in such geopolitical and legal dynamics by letting North Mitrovica secede to Serbia. To this end, the geopolitical interests of the “neotrustee” seem to be getting in the way of what potentially could be a very viable move towards creating a more peaceful environment in Kosovo by excising a destabilizing community that does not want to be there in the first place. Other Serb communities would not be incensed (most other Serbian communities are just too far away from Serbia geographically to secede, and are already starting to integrate into Kosovo’s social fabric more easily without the proximity to their mother country). Simply put, while the secession of Mitrovica might be one of the most obvious moves to create peace, it will not be permitted by the very “neotrustees” who are spending so much to find a solution for peace.

The other option for letting Kosovo move forward towards a stronger state and culture of self-governance would be for Serbia to recognize Kosovo. This seems like a common suggestion at the end of most political papers on the region. Serbia has been refusing this recognition, but this excludes them from joining the European Union. Recent economic and political hardships have in many ways changed Serbian political priorities to make EU membership more valuable and more of an incentive than keeping Kosovo, which becomes less of a reality every day. On March 1, 2012, Serbia was granted candidate status by the European Union after agreeing to more talks and concessions surrounding Kosovo, but full membership is still contingent on recognizing Kosovo.⁵⁰ Serbia itself has been slowly cutting ties with parallel government structures in North Mitrovica, and the president of Serbia has recently excluded Kosovo Serbs from voting in national Serbian elections.⁵¹ If Serbia were to recognize Kosovo, Mitrovica would potentially stop trying to rejoin Serbia, as it would be too much of a political liability for Serbia’s EU integration to accept North Mitrovica into their country. If Mitrovica is permitted to secede or Serbia recognizes Kosovo, the associated political and ethnic cleavages might relax. Kosovan Serbs who live in geographic enclaves in the heart of Albanian Kosovo would see that boundaries are being drawn more firmly and Serbia is not going to take back Kosovo; they would have to participate in Kosovan government structures to be successful or live in a bygone dream that only hinders their personal development. This potentially might make an actively participatory consociationalism more of a reality, at least in theory, because the cleavages would not be so great.

To a certain degree, the cards lay in the hands of Serbia to make a move; the *enforcer* in this case also has to be a diplomat and make sure that countries surrounding the new state recognize the validity of that state, and make adjustments when necessary — such as border negotiations and territorial exchanges in this instance. The

52 James D. Fearon and David D. Laitin, "Neotrusteeship and the Problem of Weak States," *International Security*, vol. XXIX, no. 4, pp. 5–43, 43.

53 Shkelzen Maliqi, Interview, July 29, 2011, conducted by Danielle Tomson, Prishtina, Kosovo.

international community must take active steps as a "neotrustee" to ensure the welfare and execution of Kosovo and its constitution.

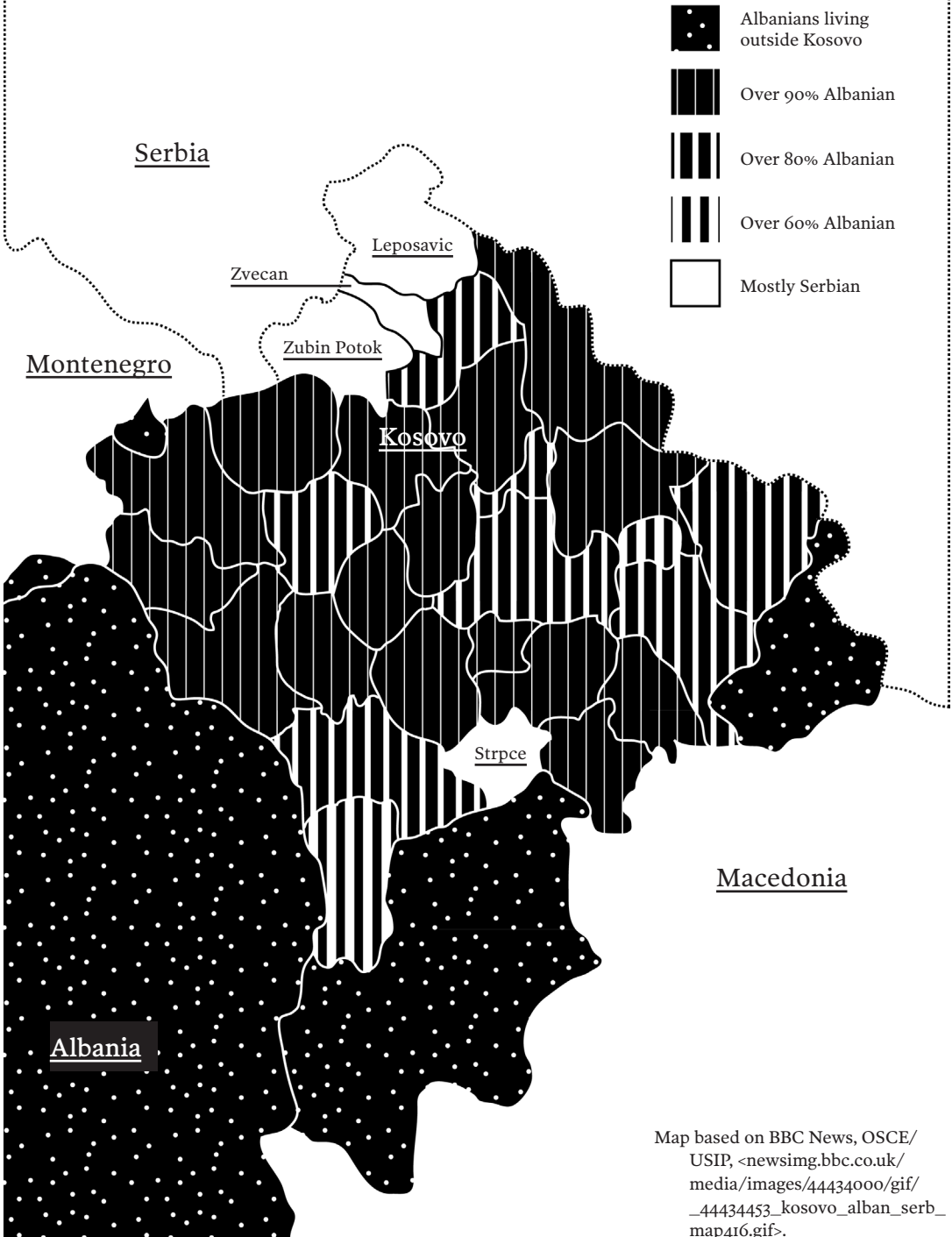
If the "neotrustees" of Kosovo remain and can give the time and resources to making sure the structures and values they transplanted take root, there is the potential for Kosovo to be self-governing, and peaceful—perhaps even reconciled thanks to the structure and legitimacy provided by the constitution. However, this may take *decades* of political evolution. Laitin and Fearon have faith that this can happen. They agree that "it makes sense [...] to construct new institutions and operating procedures that will be effective and fair in dealing with the challenges posed by collapsed states" but it will require long-term commitments and resources that go in the "direction of neotrusteeship."⁵² However, this requires a lot of international aid, incentives, and ongoing force not only in Kosovo, but also directed at Serbia to recognize Kosovo.

This tall order may have too short of a mandate and too few resources in order to be fulfilled. It requires the international community to pick and choose their "neotrusteeships" carefully—they are expensive and have great potential to go terribly wrong, never resolving the core conflict if not given the time and resources. Large interests must be at stake in order to carry out a mission like this—interests which may even sabotage potential and necessary options that could create more peace, such as secession in this case. Transplanting values and political systems without assuring their growth and adherence can backfire, as it might have in Bosnia. The initial peacekeeping mission cut short can make things worse for both the people in the conflict zone and the international community, as it might have in Iraq. That said, the identity of Kosovans in the long run might just be recognized and remembered as being a client state to international aspirations for a more multicultural and peaceful world order. It was an early experiment in what looks to be an ongoing trend in international intervention; hopefully we can learn from it.

With the right arrangement and proper balance of constitutional structuring, legitimating mechanisms, and a more neutral international presence, a country can see success come from a properly written and executed constitution that draws on exogenous resources and inspirations. This admittedly tedious balancing act can also risk great success or great failure if those involved, including those in the international community, are not flexible. As Kosovan public intellectual Shkelzen Maliqi said, "Kosovo is a child of an international love affair."⁵³ While all children must grow up, it is not without significant growing pains, educational loans, identity crises, and the potential for great danger and violence that they do so; nonetheless, there remains the potential for success and peace.

Danielle L. Tomson ('12) is an alumna of Saybrook College. This is an adaptation from her senior essay in Political Science.

Map of Kosovo,
Showing Distribution of Ethnicity by Municipality



Map based on BBC News, OSCE/
USIP, <[newsimg.bbc.co.uk/
media/images/44434000/gif/
_44434453_kosovo_alban_serb_
map416.gif](http://newsimg.bbc.co.uk/media/images/44434000/gif/_44434453_kosovo_alban_serb_map416.gif)>.

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Conversion and Settlement in Pre-Mandate British Foreign Policy

Deirdre Dlugoleski

I will not cease from Mental Fight,
Nor shall my Sword sleep in my hand:
Till we have built Jerusalem,
In England's green & pleasant Land¹

- 1 William Blake, "And did those feet in ancient time," 1808.
- 2 Commonly known as the London Jews Society (LJS).
- 3 Manasseh Ben Israel, *The Hope of Israel*, Amsterdam 1651, Yale Internet Resource.
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With these words, William Blake captures the missionary zeal that drove the 19th century movement for the conversion of the Jews and their restoration to Palestine. Both millenarian and imperialist, the evangelical Anglicans of the London Society for the Promotion of Christianity, or London Jews' Society (LJS) sought to establish among the Jews a messianic age under English rule; the Society was convinced that Jewish recognition of the Messiah and their return to the Holy Land would speed the day.² The Society's activities in the Holy Land coincided with the first British consular presence in Palestine, complementing the British government's aspirations to gain greater influence in the Tanzimat-era Ottoman Empire through the protection of minority communities. While the LJS could claim several powerful supporters in Parliament and in the consular offices, British foreign policy mandated not only the protection of the Jews, but also the encouragement of Jewish immigration to Palestine. Meanwhile, unresolved questions about Jewish citizenship in England and England's responsibility for Jews in Palestine remained largely separate issues throughout the 19th century. Still, collaboration between the LJS missionaries and the British government created a strong precedent for aligning British interests with those of Palestine's Jewish communities. In this way, the British integrated many of the later Zionists' main goals into their diplomatic strategy long before Theodor Herzl, Ahad Ha'Am, or Leon Pinsker ever dreamed of writing about a Jewish state.

Unique in Europe, the restorationist bent of this particular branch of evangelical thought sprang from a long history of British interaction with Jewish communities, specifically on the part of the Puritans. When Menasseh Ben Israel, a rabbi from Amsterdam, petitioned Oliver Cromwell to allow the Jews to settle in England, he argued that the Jews were ready to become Englishmen, and would present no threat to English social norms and traditions.³ After the Whitehall Conference of 1655, Cromwell, along with a panel of lawyers and religious authorities, authorized the petition and opened England to Jewish settlement. While their motives were largely economic, Cromwell and his advisors concluded that the Jews must surely be open to conversion as well.⁴ This gave rise to widespread "philosemitism," an attitude of sympathy to the Jews

- 5 Peter Toon, *Puritans, The Millennium and the Future of Israel: Puritan Eschatology 1600–1660* (London: James Clark, 1970), 117.

based on their anticipated conversion. The English hope for Jewish conversion was millenarian in nature; when the question of readmission to England was first considered in 1652, the British were convinced that, through exposure to the godliest people on earth, the Jews would quickly convert. This conversion and their subsequent restoration would inaugurate latter-day glory.⁵ Thus, from the beginning, the relatively positive British relationship with the Jews hinged on their anticipated conversion to an English form of Christianity as a result of exposure to Englishmen. The resulting messianic age, then, would continue to reflect England's spiritual dominance. This attitude was rooted in England's self-image: its rise coincided with its struggle against Catholic powers, most notably in 1588 with the defeat of the Spanish Armada; English historians remembered the event as the "Protestant Wind" that defeated the Spanish fleet. For the British, religion had played a central role in their development as a nation and a world power. Jewish conversion and settlement could serve as instruments in English theological aspirations. Some 200 years after the Puritans made their case, this ideology would help shape Britain's policies in Palestine.

- 6 Kelvin Crombie, *For the Love of Zion: Christian Witness and the Restoration of Israel* (London: Hodder & Stoughton, 1991), 2.
- 7 Crombie, *For the Love of Zion*, 13.
- 8 Ibid.

In Jerusalem, there still stands a plain Anglican church with a menorah on the altar table. Although it shows almost none of the modest ornamentation that Anglican churches normally allow, its interior design includes Hebrew writing, the Star of David, and other explicitly Jewish symbols. It is not a synagogue; a cross was added to the outside in 1948 in order to mark it as a church and ensure that it was not destroyed.⁶ Christ Church, established originally as the private chapel of the British consulate in Jerusalem, has served since 1849 as the center of the London Jews Society's mission in the East. The mission pursued four goals: preaching the Messiahship of Jesus Christ to both Jews and Christians, returning the Church to its Jewish roots, encouraging the physical restoration of the Jewish people to the land of Israel, and encouraging the success of the Hebrew Christian and the Jewish messianic movements.

The London Jews Society was established in 1808, initially as an auxiliary of the London Missionary Society.⁷ Within a year, its leader, Joseph Frey, split off with a smaller group of followers and formed a Society that focused specifically on converting Jews. This was by no means an inconsequential group. As a testament to the widespread popularity of mass conversion, the list of supporters for the newly formed society included some of England's top evangelical preachers, such as Charles Simeon and William Wilberforce.⁸ The Society named their first headquarters 'Palestine Place' and established a 'Jews' Chapel.' By 1815, non-Anglican supporters broke with the group over controversy on the form of worship in the Jews' Chapel; the London Jews' Society remained exclusively Anglican from this point on, and began pouring its energy into missionary activity. This included reaching out not only to the Jews

- 9 Joseph Wolff, *Missionary Journal and Memoir of the Rev. Joseph Wolf, Missionary to the Jews* (New York: E. Bliss & E. White, 1824), 51.
- 10 Wolff, *Missionary Journal and Memoir*.
- 11 Wolff, *Missionary Journal and Memoir*, 3.
- 12 Joseph Wolff, *Journal of the Rev. Joseph Wolff*, (London: 1839). Interior cover summary.

and officials at home, but also to the international community. Almost a century before Herzl, one LJS sympathizer, Lewis Way, toured the capitals of Europe making speeches advocating the restoration of the Jewish people to Palestine.

The memoirs of Joseph Wolff, one of the London Jews Society's most important figures, reveal the key underpinnings of LJS ideology. While the Society boasted a large number of other significant missionaries and public figures, Joseph Wolff was of particular note because he converted to Anglicanism from Judaism. Born in 1796 in Bavaria, Wolff grew up as the son of a rabbi and received a traditional Jewish education. He first considered conversion after a conversation with a Christian barber who enjoined him to read the Old Testament properly and recognize that Jesus was the Messiah. After conversion to Christianity despite his family's disapproval, Wolff left home to travel Europe in search of true Christianity. He arrived in England in June 1819.⁹ Shortly after, he became a missionary and traveled throughout the Middle East, including Palestine and the Levant, India, and much of the Mediterranean. His memoirs, including his own life story up until his arrival in London, were first published in 1824.¹⁰ That Wolff's memoirs were published as propaganda for the Society meant that his editors' worked diligently to attract public interest. In the 1824 edition, an editor ends his preface by appealing to nineteenth century curiosity: "On the whole, the account he now presents to the Public, of Mr. Wolf [sic] and of his missionary exertions, will not be found without interest."¹¹ The 1839 memoirs include an even more colorful description to entice the reader—in his summary of the book's contents, the editor includes not only all of the exotic destinations that Dr. Wolff visited, but also "his adventures with the pirates, &c. &c." and "his missionary operations and researches after the lost ten tribes."¹² Finally, in the much later memoirs of the Bishop Michael Solomon Alexander (another convert from Judaism and the first Anglican bishop to Jerusalem), the editor makes a point of mentioning that he presented his fiancée with a copy of Joseph Wolff's work in an attempt to convert her. Although Wolff and Alexander were contemporaries, the fact that Wolff's memoirs and journals were mentioned in another missionary work published after the First World War indicates that its impact endured long after his death. Wolff's memoirs thus provide a valuable lens through which to understand how the London Jews Society approached self-promotion in the public sphere.

The first part of Wolff's memoirs reiterates the fundamentally pro-British character of the missionary message. He begins with his first contemplation of Christianity, and ends before he even arrives in England. His own conversion process literally lasts years, spanning his travels across the continent in search of true faith. The editor uses this section as an opportunity to criticize the other forms of Christianity practiced in Europe, especially Catholicism, and to assert the superiority of English religion. Wolff's decision to leave Judaism originates both in conversations with kind Chris-

- 13 Wolff, *Missionary Journal and Memoir*, 8.
- 14 Wolff, *Missionary Journal and Memoir*, 8.
- 15 Wolff, *Missionary Journal and Memoir*, 16.
- 16 Wolff, *Missionary Journal and Memoir*, 41.
- 17 Wolff, *Missionary Journal and Memoir*, 26.

tians and scriptural passages, all in keeping with Protestant tradition. He begins the process of conversion by speaking to the barber, who tells him to read the Old Testament with an open mind. An uncle in Bamberg, a Catholic who taught him Latin and history, later reads him the Gospels.¹³ Wolff announces, upon returning home, that he will become a Christian, and must immediately leave his family. From this point, he speaks with, and sometimes studies with, a series of religious authorities all over the continent. First, Wolff arrives in Frankfurt and seeks out a Deist Protestant professor who tells Wolff, “My dear friend, it is not necessary to become a Christian, because Christ was only a great man, such as our Luther: and you can even be a moral man without being a Christian, which is all that is necessary.”¹⁴ Wolff disagrees, and eventually moves on to Halle. He reports being satisfied with the explanation of Christianity of one Professor Knapp, but soon leaves Halle due to harassment from the Jewish community there. He tries to approach the Catholic clergy of Prague and of other cities, but they reject him, claiming prior deceit by Jews seeking conversion.

Wolff continues traveling and reaches Hungary, where he reports:

I found in Erlan, a town of Hungary, a Jewish boy, six years of age, in a house called the house of converts. I asked how this little Jew came there? They answered me he was taken from his parents by force, at the express command of the Bishop. When I heard this, I became indignant, especially when I observed the sorrow of the poor child, who was forced to worship images and not Christ, instead of Jehovah, the God of Abraham, Isaac, and Jacob!¹⁵

As he continues his travels, Wolff discovers that even Catholics that oppose the Pope hold an imperfect faith. He writes:

[t]he fact was, that many Catholics of Germany, who were adversaries of the Pope, became afterwards Socinians, or embraced an allegorical system of Christianity. They adulterated the Gospel with the philosophy of Kant, Hume, Jacob Behmen, Plato.¹⁶

Eventually, Wolff reaches Rome itself—to see whether the evils he has heard about it are true—and begins studying at the Propaganda, under the guidance of one Cardinal Litta. Here, he frequently argues with his teachers, and records his moments of greatest indignation in his memoirs. After one such episode, he complains:

...but when I heard them one day call the Pope God, and heard this title defended by the most learned men of Rome...I could no longer abstain from protesting against such an idolatrous opinion, and exclaimed: ‘The Pope is a man as I am, the Pope is dust of the earth as I am.’¹⁷

- 18 Wolff, *Missionary Journal and Memoir*, 51.
- 19 Wolff, *Missionary Journal and Memoir*, 41.
- 20 Wolff, *Missionary Journal and Memoir*, 18.
- 21 Wolff, *Journal of the Rev. Joseph Wolff*, 31.

He eventually leaves Rome, and informs the Cardinal that he now believed that all of the negative opinions he had heard of the Vatican and the papacy.

While this lead-up to conversion forms the largest part of his memoirs, Wolff never gives an account of the actual conversion itself; he ends shortly after leaving Rome. After a brief summary note from the editor on Wolff's arrival in England and his short stint studying at Cambridge under Charles Simeon, the publication moves straight into Wolff's missionary journal.¹⁸ The most important aspect of Wolff's memoirs, then, lies in his critique of religion outside England. Furthermore, Wolff's conversion to Anglicanism is implied through his physical arrival in England. Clearly, his editor anticipates the readers to connect true faith with his or her own geographical location. Finally, Wolff's embrace of Anglicanism embodies the ideal conversion scenario that the Puritans hoped for in 1655, implicitly linked with British life and culture. In this vein, it is not surprising that the London Jews Society attempted to strengthen its missions through the construction of schools and hospitals — all providing a means of by which to further expose their potential converts to British mores and values.

Wolff's memoirs also begin to reveal the ideological basis for the Society's missionary movement. In his near immediate rejection of the Deist professor's argument that a moral man does not need Christ, Wolff asserts that a belief in Jesus, even before any correct practice or pious action, is the essential precondition for morality. He reiterates this belief in his later rejection of Kant.¹⁹ Kant, who differentiates religion from faith, holds that true religion consists of individual moral perfection. Although Kant nonetheless maintains that Christianity is the only faith through which true religion can be achieved, he fundamentally considers Christianity a means to an end. Wolff and LJS, on the other hand, clearly considered belief in Jesus a prerequisite. He does, like Kant, admit that this belief, and the consequent conversion, must be an act of free will, or it will otherwise have no value. Wolff's memoirs also highlight the importance of the connection between the Old Testament and contemporary Christianity. While Wolff is still wandering, for example, a Protestant priest hands him a Hebrew Bible.²⁰

Wolff's missionary journals also explain the theological basis for LJS activities. This is evident in his opinions on the Jews he meets. He notes, for example:

...I confess that I prefer, and have more confidence in strict, bigotted [*sic*] Jews, than in such so called *liberal Jews*; for with strict Jews one has a foundation on which to build the merits of Christianity, but this is not the case with an Infidel Jew; and so we find that many Pharisees were converted, as Paul, Nicodemus, and Joseph of Arimathea, but never any Sadducee.²¹

Here, Wolff argues that Judaism is not an obstacle to Christianity, but a building block. He continues along these lines in other parts

- 22 Wolff, *Missionary Journals and Memoir*, 72.
- 23 Wolff, *Missionary Journals and Memoir*, 100.
- 24 Wolff, *Missionary Journals and Memoir*, 122.
- 25 Wolff, *Missionary Journals and Memoir*, 146.

of his memoirs, in which he specifies the exact parts of the Old Testament that prove that the Messiah has already come. Wolff is always careful to include dialogues of his debates with the Jews, wherever he visits. In one discussion in Palestine, Wolff addresses two Jews who profess to believe in Jesus as the true Messiah, but fear to do so openly. When Wolff reads specific sections of the Old Testament to strengthen their faith, however, both Jews insist that they had never noticed them before. Again, Wolff makes clear that he considers the Jewish heritage a step towards, rather than an obstacle to, Christianity. Wolff also focuses on the significance of the Hebrew language. In a debate with one group of Jews in Gibraltar, Wolff's entire argument with them rests on the translation of words like "virgin" or "man-child" from Hebrew.²² Here, it is clear that the London Jews' Society differentiated in their preference between the Jews of the New Testament, who had rejected Jesus, and the Jews of the Old Testament, who had laid the foundation for his arrival.

The degree to which Wolff interacts with the British consuls in the areas adds an important political dimension to his journey. As soon as he arrives in Alexandria in 1821, for example, the "Janisary [sic] of the English consul" examines Wolff's baggage. Later that day, he dines with Consuls Salt and Lee.²³ He even refers to this episode in a letter to the British consul in Cairo, whom he addresses as his "Patron," a few days later.²⁴ He was even well enough established at the consulate in Cairo that he returned there one day to find 50 Jews waiting for him.²⁵

- 26 Montefiore Simon Sebag, *Jerusalem: The Biography*, (New York: Alfred A. Knopf, 2011), 350.
- 27 Albert M. Hyamson, ed., *The British Consulate in Jerusalem: 1838-1861 Vol. 1*, (London: Jewish Historical Society of England, 1939), 2.
- 28 Shaftesbury's 1841 achievement of this post, and Alexander's appointment, were both enormous victories for the London Jews Society, since Alexander was himself a converted Jew.

At the time of Wolff's travels in Palestine, LJS missionaries enjoyed a comfortable relationship with the consuls. This is not surprising, considering that the origin of British consular activity in Palestine had coincided closely with that of the missionaries. Another factor was certainly the backing of supporters in Parliament, such as Anthony Ashley, the Earl of Shaftesbury. An evangelical Christian himself, Shaftesbury took on a large role in patronizing the fledgling London Jews Society's early success, and eventually secured the permission of Prime Minister Robert Peel to establish the first Protestant bishopric and church in 1841.²⁶ He also helped persuade his father-in-law, Lord Palmerston, then Foreign Secretary, of the missionaries' usefulness. One of Palmerston's first orders to the newly established consul in Jerusalem instructed him "to afford protection to the Jews generally."²⁷ Opposition from the occasional government official at home did not hamper the missionary zeal of the London Jews Society's supporters. In May 1842, the Earl of Aberdeen wrote to W.T. Young, the vice-consul in Jerusalem, concerning the arrival of Bishop Alexander.²⁸ He cautioned Young to protect Alexander as he would any other British subject of any other profession, but also to

- 29 Hyamson, *The British Consulate in Jerusalem*, 46–47.
- 30 Sebag, *Jerusalem: The Biography*, 350.
- 31 Ibid.
- 32 Hyamson, *The British Consulate in Jerusalem*, 141.
- 33 Hyamson, *The British Consulate in Jerusalem*, 47.

... carefully abstain from identifying [himself] in any degree with his mission, and from assisting to promote any scheme of interference with the Jewish Subjects of the Porte, in which Bishop Alexander may possibly engage. You will clearly understand that Her Majesty's Government will not sanction, either in you or in any other servant of the Crown, any attempts, directly or indirectly, to interfere with the religious tenets of any class of the Sultan's Subjects.²⁹

Young, however, largely ignored him. A fervent evangelical himself, Young had already founded the Jerusalem branch of the LJS in 1839.³⁰ Once Palmerston recovered his position as Foreign Secretary from Aberdeen, he ordered the Jerusalem consul to extend British protection to Russian Jews as well.³¹ The new consul, James Finn, was another evangelical. A colleague of his, Niven Moore, complained to Palmerston that Finn had been “over-zealous in encouraging the conversion of Jews to Christianity” in spite of having been “strictly ordered by Her Majesty's Government to abstain from using any power or influence which his character as Consul and protector of Russian Jews may give him for the purpose of swaying in any manner their religious opinions.”³²

The support of some sympathetic officials, however, did not mean that the British government was prepared to support the entire LJS program. Even before construction on Christ Church was finished, consular officials were acutely aware that their treatment of the Jewish community in Jerusalem could have international repercussions, especially given LJS efforts to achieve the full conversion of the sultan's subjects. Aberdeen's concerns were not easily brushed aside, and a strong tension in policy aims persisted between support for a missionary movement that advanced Britain's policy goals and the desire to maintain the peace between the European powers in the city. In 1842, just after his orders from Aberdeen to desist in supporting the LJS missionary activity, Young reported a conflict with Bishop Alexander over three Jews who had converted to Christianity. According to Young's correspondence, upon hearing of the conversions, Rabbi Isaiah Bordaki (who held authority over Russian and Austrian Jews in Jerusalem,) requested custody of the three former Jews, and complained to Young that they were hiding in the house of one of the missionaries. Young reports,

I immediately addressed a note to Bishop Alexander acquainting him of the circumstance, and hoping he would take such steps as he might deem requisite to avoid a compromise of Her Majesty's Government with Foreign Powers. Your Lordship will observe by the Bishop's reply that he anticipated no difficulty — in the meantime the three Jews continued to be countenanced in their refusal to appear before their Consul.³³

- 34 Hyamson, *The British Consulate in Jerusalem*, 21.
- 35 Ibid.
- 36 Hyamson, *The British Consulate in Jerusalem*, 22.
- 37 Ibid.
- 38 Hyamson, *The British Consulate in Jerusalem*, 49.
- 39 Sebag, *Jerusalem: The Biography*, 356.

Here was evidence of an expanded role for the British consular authorities in managing much smaller details of the legal scene in Jerusalem. Jurisdiction over a given Jewish community within the city now reflected the international balance of power. Indeed, this episode reflects a consistent trend in the consul's increasing involvement in the politics of conversion. Prior to 1839, the office's correspondence included broad issues, such as "Urging on Sultan encouragement of Jewish immigration"³⁴ or "Position of Jews in Palestine."³⁵ By the middle of the 1840's, the correspondence between the consulate and the Government regularly included very specific situations; for example, when a consular official "Declines to intervene, at request of Chief Rabbi, in the case of another convert"³⁶ or the "Wife of [a] convert withholds the children."³⁷ Whatever his personal feelings toward LJS, Young clearly understood his own role in Jerusalem to be first and foremost that of an official of the British Government. In his complaint to Aberdeen, he continues:

The Bishop seems to have regarded the matter in a religious, rather than in a Civil point of view. It appeared to me to be a purely Civil Case...and I have little doubt the parties themselves were encouraged with the idea that they were entitled to British Protection, which I felt it my duty not only to decline recognising, but I urged every argument to induce the Bishop to see the responsibility he was incurring by Sheltering Foreign Subjects who had refused to answer the Summons of their Consul.³⁸

Britain's increased interest in the Jews of Palestine revolved around the Tanzimat Reforms of 1839, a series of changes in Ottoman foreign and domestic policy that significantly altered how the British chose to interact with both the Jewish population and their own missionary presence in Palestine. In the wake of European help in expelling Muhammad Ali from Syria, the Tanzimat Reforms included several provisions that reflected pressure from Western nations. One of these included maintaining the special status of both foreign consuls and Christian churches that Muhammad Ali had granted the European powers in Palestine during his occupation. The consuls could enhance their influence by claiming to represent the interests of parts of the population; Britain, France and Russia each claimed a group of minorities to represent. For Russia, this was simple — by 1846, Russians formed the majority of the 20,000 pilgrims that visited the city in a typical year.³⁹ France, in the meantime, worked to develop its own mission to protect the Catholics, although there were far fewer of them. Britain, however, faced a significant obstacle in pursuing this strategy: there was no indigenous Anglican community in Jerusalem, and the missionary presence hardly approached that of the flood of Russian pilgrims. Instead, the British opted to protect the Jews, even those from outside Palestine. This further aligned their approach with LJS. W.T. Young cleverly combined his own evangelical convictions

- 40 Hyamson, *The British Consulate in Jerusalem*, 4.
- 41 Hyamson, *The British Consulate in Jerusalem*, 33.
- 42 Hyamson, *The British Consulate in Jerusalem*, 25.
- 43 Hyamson, *The British Consulate in Jerusalem*, 29.
- 44 Sebag, *Jerusalem: The Biography*, 357.

with this new policy concern in his correspondence to Palmerston on 14 March 1839:

There are two parties here, who will doubtless have some voice in the future disposition of affairs — ‘The one is the Jew — unto whom God originally gave this land for a possession, and the other, the Protestant Christian, his legitimate offspring.’ Of both these Great Britain seems the natural Guardian, and they are now beginning to take their position among the other claimants.⁴⁰

Most significantly, the British government’s interest in the Jews of Jerusalem became further intertwined with the missionaries’ interest in Jewish restoration. On 11 August 1840, for instance, Palmerston himself urged the Sultan to consider the benefits of allowing increased Jewish immigration to Palestine.⁴¹ Although Palmerston justified this idea in largely economic terms, it is likely that Palmerston sought to further British influence in the region by growing and empowering a community over which the government already held sway.

British concern for the Jews of Jerusalem also stemmed from their preoccupation with Russia. As early as 1839, the British consul reports concern over the activities of the Russian consul to “secure the allegiance of all European Jews.”⁴² Again, Young shrewdly took the opportunity to champion the missionary cause in light of these concerns. On 28 April 1840, he complained to Palmerston:

When I first took up my residence in this Country — The European Jews invariably consulted me in their difficulties, and in conformity with Your Lordship’s instructions contained in Mr. Bidwell’s despatch [sic] No. 2 of last year, I considered it my duty to render them such assistance and advice as I was able to do...but in consequence of the instructions which I have received from Her Majesty’s Consuls General in Egypt, discouraging my interfering on behalf of these people — I have relinquished all official interference on behalf of Foreign Jews — They on finding this to be the case, have ceased to apply to me, and have readily accepted the protection which the Russian Consul has shewn himself willing to afford them.⁴³

In 1844, the British consul warned London that “the Russians could in one night during Easter arm 10,000 pilgrims within the walls of Jerusalem” and take the city.⁴⁴ After this point, the consular records indicate an acute preoccupation with the protection of Russian Jews in particular — a preoccupation highly exacerbated by the tensions preceding the Crimean War in 1853. From 1847 on, the consul corresponds frequently on the topic of British protection of Russian Jews. British influence among the Jews was especially important, since British authorities also considered Jews an independently powerful interest group. This opinion was clearly

- 45 Phoenix, *Scriptural Reasonings in Support of the Jewish Claims to Sit in the Commons House of Parliament* (London: Partridge and Oakey, 1850), 15.
- 46 Hyamson, *The British Consulate in Jerusalem*, 82.
- 47 Hyamson, *The British Consulate in Jerusalem*, 86.
- 48 Sebag, *Jerusalem: The Biography*, 349.
- 49 Hyamson, *The British Consulate in Jerusalem*, 141.
- 50 Hyamson, *The British Consulate in Jerusalem*, 133.

widespread at home; one pamphlet, published in 1850, asked rhetorically: “Does not the fate of Christendom — using the decretal [sic] word in its spiritual sense, seem to rest on the ‘Aye of the Jew?’ Do not the destinies of Europe, and therewith of half the globe, often hang suspended on the pivot of Jewish monetary power?”⁴⁵ Although some officials, like Young, undoubtedly made it their personal goal to push the missionary agenda, the British administration clearly adopted similar goals only so far as to promote their own imperialist policy.

The Society’s cultural imperialism is especially visible in its establishment of civic institutions, such as missionary schools and hospitals. British evangelicals were convinced that exposure to the English way of life would help promote conversion. The Jews of Jerusalem also held this belief, which prompted a boycott of missionary institutions in 1846, after the Rabbis of Jerusalem forbade a Jew who had died in the missionary hospital to be buried in the Jewish burial ground.⁴⁶ Several months later, the consul complained of anti-missionary riots in the city, again largely centered around the hospital.⁴⁷ The Jews of Jerusalem felt harassed, a sentiment that prompted Sir Moses Montefiore to intervene. Montefiore, himself a wealthy British Jew, had gained international fame in his role in the Damascus affair of 1840. After seven Jews in Damascus were accused of killing a Christian servant and using his blood for their ritual, Montefiore traveled to Alexandria and secured a decree from Mehmet Ali that categorically denied the truth of blood libel.⁴⁸ He also enjoyed a cozy relationship with British consuls; he apparently passed through the offices often during his travels to discuss British policy. In one letter to Palmerston, Niven Moore recalls that Montefiore “repeatedly expressed his gratitude for what had been done in regard to the transfer of the Russian Jews to British protection.”⁴⁹ In the wake of aggressive conversion attempts on the part of Finn, however, Montefiore complained to the British consul over the Jews’ treatment, and made a point of founding parallel institutions for the Jews as an alternative to the conversion-driven spaces of LJS. Montefiore offered his own hospital as a potential alternative. The Jews of Jerusalem, however, ultimately rejected Montefiore’s contributions. Although they welcomed him sincerely, Consul Finn reported in 1849 that the Jews of Jerusalem had strongly resisted his attempts to take a census of them, and to provide secular schooling:

A more determined opposition, however, was made to the establishment of schools for teaching European languages, Geography, Arithmetic, &c. They denied their need of such things, especially of the Gentile languages, which would only expose them the more to the seductive arguments of the Christian missionaries.⁵⁰

This assessment likely contains a bias; this is Finn writing, after all. But it is significant that the Jews of Jerusalem apparently took

- 51 Moses Mendelssohn, *Jerusalem, Or, On Religious Power and Judaism* (Hanover: Brandeis University Press & University Press of New England, 1983), 133.
- 52 Henry Street, *A Plea for the Removal of Jewish Disabilities* (London: J. Ridgeway, 1849), 10.
- 53 Street, *A Plea for the Removal of Jewish Disabilities*, 11.
- 54 Street, *A Plea for the Removal of Jewish Disabilities*, 23.
- 55 *Ibid.*

issue with the introduction of English cultural norms just as much as attempts to convert them. They trusted neither the LJS nor Montefiore, while the consulate supported both. It is clear that, while the consular officials may not have been uniformly keen on the prospect of converting the Ottoman Jews, they supported the projects of both the London Jews Society and Montefiore on the basis of the cultural imperialism that they brought to Palestine.

The separation between the treatment of the ‘Jewish question’ at home and in the international sphere also points to the government’s support for the missionaries as purely a tool of foreign policy for expanding their influence. While the London Jews Society established Christ Church in Jerusalem, and the consuls worked to build British influence in the Ottoman Empire through their protection of the Jewish communities in Palestine, Baron Lionel de Rothschild fought for a seat in the House of Commons, sparking a debate on Jewish citizenship in Britain. Indeed, the debate on Jewish emancipation in Britain runs along strikingly similar lines to that of Joseph Wolff in his missionary journals. In one pamphlet from 1849, titled ‘A Plea for the Removal of Jewish Disabilities,’ the author, Rev. Henry Street, challenges the ban on Jews entering parliament on the grounds that religion has absolutely nothing to do with statecraft. In an echo of Mendelssohn’s answer to the question of whether to give to God or Caesar (“Give to Caesar, and give to God too! To each his own, since the unity of interests is now destroyed!”),⁵¹ Rev. Street urges both British citizens and government to “separate religion from politics, that the things of Caesar and the things of God (long intermingled to their common injury,) may be handled by their respective professors according to their intrinsic merits.”⁵² He argues:

...as no act of the State could force a man into the National Church, so none can drive him out of it; neither could an arbitrary act of parliament, constructed by members hostile to the Church, close a pulpit or a pew, — any violation of the rights of conscience, in this respect, is beyond all possibility, and would call down a storm of national wrath.⁵³

Although Street concedes that “the Jew... hugs his errors contrary to all proof and argument,”⁵⁴ he also defends Jews’ capacity to safeguard British morals in a political context. He argues:

...the Hebrew appeals as a test of rectitude to the same moral code which the Christian holds as his governing principle, which code is equally operative in both, as a rule of public and private virtue, it appears unreasonable that these moral qualifications for a public career should be counted only as ‘dust in the balance’ when weighed against the depressing counterpoise of his religious delusion.⁵⁵

- 56 Street, *A Plea for the Removal of Jewish Disabilities*, 1.
- 57 Barnard Van Oven, *Ought Baron De Rothschild to Sit in Parliament?* (London: Effingham Wilson, 1847).
- 58 Van Oven, *Ought Baron De Rothschild to Sit in Parliament?*, 8.
- 59 Van Oven, *Ought Baron De Rothschild to Sit in Parliament?*, 11.
- 60 Van Oven, *Ought Baron De Rothschild to Sit in Parliament?*, 12.

In fact, Street begins his pamphlet with the justification that “[t]he Jew is by religious affinity an half-brother of all Christian people...both profess to walk by the same moral law of the Ten Commandments, and to partake of the promises of Divine favour [sic] existing in the pages of the Old Testament...”⁵⁶ He does not even consider it necessary to mention the question of the Law in his pamphlet; far from a seditious practice, adherence to Jewish law simply safeguards a moral foundation common to both Christians and Jews. Clearly, Rev. Street sees the acceptance of a common moral code, rather than religious dogma, as the prerequisite for British citizenship. The Rev. Street also did not represent an isolated, marginalized opinion; his pamphlet was only one in a flurry of similar pieces published in the 1840’s and ’50’s. In another pamphlet, titled ‘Ought Baron de Rothschild to Sit in Parliament?’ two hypothetical men, Amicus Nobilis and Judaeus, hold a conversation.⁵⁷ Judaeus at once addresses his friend’s concerns over Rothschild’s election by asserting:

There is no such thing as the Jewish nation. It is long since the Jews have ceased to be a nation...Born in England of English parents, I acknowledge no other land as my country; no other nation as my nation...and in this I express the feelings and sentiments of all persons professing the Jewish religion, who have had the good fortune to be born Britons.⁵⁸

Van Oven also includes the question of return to Palestine, and Judaeus admits that “the Jews do, in accordance with their religion, look forward to their restoration to the Holy Land, and that they do pray for that event,”⁵⁹ but ultimately asserts that “they alike regard this as an event not dependant [sic] on human agency, but as an effort of Almighty power...It is almost blasphemy, and certainly a monstrous absurdity...to consider a subject so far beyond human reach.”⁶⁰

The scriptural basis of these arguments, that Jews and Christians ultimately share a common moral foundation, is exactly in line with that of LJS. It was this breed of millenarian dispensationalism, however, that differentiated the LJS from the mainstream political debate on Jewish citizenship in England. Whereas the civic debate concerned itself with the question of full emancipation and integration in British society and governance, LJS was not concerned with British Jews, but all Jews in the world. Conversion was necessary, but only so that the Jews could soon return to Palestine and usher in the messianic age under English leadership. The millenarian focus of the LJS thus made it an implicitly imperialist movement; the Jews were not a part of British society and were not meant to be, but were instead a means to an end.

It is significant that British debates over the future of the domestic and international Jewry did not coalesce in the context of England’s changing political landscape. Especially under Canning and Palmerston, British politicians began to focus more on attracting domestic support for their international policies. Through-

- 61 Marvin Swartz, *The Politics of British Foreign Policy in the Era of Disraeli and Gladstone* (New York: St. Martin's, 1985), 4.
- 62 Crombie, *For the Love of Zion*, 140.

out the course of the 19th century, British Prime Ministers and MP's pushed Britain's advantage in the international arena with an increasing concern for public opinion, reflecting the massive increase in the British electorate that came with voting reform in 1867; in that year alone, the number of eligible voters nearly doubled to about two million.⁶¹ Throughout this period, questions about Jewish citizenship in England and British jurisdiction over Jews in Palestine remained separate. Clearly, both the government and the larger populace considered the question of Jewish restoration in Palestine a foreign policy topic, and unconnected to the status of the Jews at home.

It is clear that the British government by no means based its policy on the agenda of the London Jews Society; rather, the missionaries provided useful partners in achieving objectives determined by the political realities of the post-Tanzimat Ottoman Empire. Yet they did work towards common objectives to such an extent that, years before Theodor Herzl began writing *The Jewish State*, the British government, hand in hand with an evangelical missionary movement, advocated the settlement of the Jews in Palestine and their protection upon arrival. The often-parallel work of the London Jews Society and the British consulates established a strong precedent for the augmentation of British political influence in Palestine through the Jewish community. When the London Jews Society finally did react at the tail end of the nineteenth century, they heartily expressed their full support for the Zionists:

Zionism is a new power in the world and has come to stay. Its object is the arrangement of the national future of the Jews. Consciously, or unconsciously, the Zionists are working out God's purposes for His ancient people, namely, their return to the land of their forefathers.⁶²

Only several decades later, with the skillful lobbying of Chaim Weizmann, the British government would follow.

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From Pentagon Papers to WikiLeaks: U.S. Security and New Media

Anne C. Bloomdahl

- 1 *New York Times Co. v. United States*, 403 U.S. 713 (1971), referred to herein as “the Pentagon Papers case.” See generally, Harrison E. Salisbury, *Without Fear or Favor — An Uncompromising Look at The New York Times* (New York: Times Books, 1980). Although often cited in tandem with the Pentagon Papers case, the “Watergate” publication of secret documents did not involve security leaks but rather revelations of criminal activity by government officials. Still, that investigation is also commonly seen as reaffirming the “crucial role of a free, able, and energetic press” in policing government activities. Katharine Graham, “Personal History,” in Ann G. Serow and Everett Ladd (eds.), *The Lanahan Readings in American Polity*, (Baltimore: Lanahan Publishers, 1997) 573.
- 2 Raffi Khatchadourian, “No Secrets: Julian Assange’s Mission for Total Transparency,” *The New Yorker*, June 6, 2010.

How has the evolution of media in recent decades—in terms of the various types available, the impact of globalization, and an apparent lessening of accountability—affected America’s security stance towards military secrecy, an area of escalating national concern? Specifically, how has the government’s posture (both reactive and proactive) evolved in the forty-some years since the Pentagon Papers decision, a ruling that outlined the constitutional standards regulating governmental “prior restraint” of newspaper publication of military secrets?¹ The recent Internet publication of hundreds of thousands of leaked military documents by a renegade band of geographically-moving targets known as WikiLeaks provokes new questions of secrecy and legitimacy.² Security threats in our altered technological landscape raise issues of first impression outside the legal ambit of precedential cases like the *Pentagon Papers*, thus representing a unique challenge which current U.S. laws and procedures so far seem incapable of coping with effectively. It remains an open question as to how our laws and government procedures might “catch up” with evolving threats engendered by rapid technological advances that spawn new global avenues of communication.

To probe these issues, I first review the established legal standards which constrain the U.S. government regarding prosecution of those who disseminate leaked classified military documents (both in 1971 and now), and then I attempt to assess certain factors which may be found to differentiate the accountability of participants in WikiLeaks revelations from the cases subject to the traditional legal framework.³ Finally, I explore what security challenges the new technology presents and how the U.S. government’s response to such threats prior to WikiLeaks has proven inadequate, suggesting the need for reassessment in order to prevent future (possibly more damaging) national security cyber leaks.

Limits on Constitutional “Free Speech” Regarding Leaked Military Secrets

Although full discussion of the relevant constitutional case law is outside the scope of this paper, consideration of “freedom of speech and the press” as guaranteed by the First Amendment is relevant to understanding the response of the U.S. Supreme Court in the *Pentagon Papers* litigation, where the U.S. government attempted to prevent Daniel Ellsberg’s leaked Vietnam War documents detailing national security secrets from being published in *The New York Times*. The holding in that case reflects the narrow range of legal

- 3 Although this paper was originally written in the midst of several tranches of Wikileaks disclosures, the analysis (with minor updates) remains relevant — soon thereafter, Assange began a long personal battle to avoid extradition to Sweden to face sexual assault charges, all of which Assange and his supporters claim is part of a U.S. plan to bring him eventually to his “day of reckoning” in American courts — wherein he would then attempt to invoke the constitutional rights and protections discussed herein.
- 4 This discussion does not consider all of the specific criminal charges that might possibly be levied against WikiLeaks or its individual members, such as receiving stolen property or abetting a conspiracy, or the specifics of governing law such as the Federal Espionage Act of 1917.
- 5 U.S. Constitution, Amendment 1. By its terms the First Amendment limits only U.S. action, but its guarantees have been incorporated against the states via the Fourteenth Amendment. *Gitlow v. New York*, 268 U.S. 652 (1925).
- 6 Laurence H. Tribe, *The Invisible Constitution* (New York: Oxford Univ. Press 2008), 25–26.
- 7 Tribe, *Invisible Constitution*, 26 (emphasis added).

options historically available to the U.S. in attempting to *prevent* publication of sensitive military information, including leaks such as those occurring recently via WikiLeaks, and essentially the same legal issues will arise with any governmental attempts to prosecute anyone *after-the-fact* for publication of national security leaks (although arguably, post-publication prosecutions may be afforded less protection than the “prior restraint” line of cases).⁴ In a practical vein, comparing the factual circumstances of the *Pentagon Papers* case with correlative aspects of the WikiLeaks situation is also instructive in evaluating the new challenges to government protection of military secrets which are uniquely posed by recent technological advances and the problem of geographic immunity of leak disseminators to U.S. legal process.

The First Amendment to the U.S. Constitution provides, in relevant part: “Congress shall make no law...abridging the freedom of speech, or of the press.”⁵ As Harvard Law School Professor Laurence Tribe explains:

[T]he word “speech” must be understood to encompass not just audible or oral expression but visually readable, written, pictorial, and...symbolic expression as well, including...films and videos. Similarly, the phrase “the press” must certainly be understood to include much more than the printing press as it was known to the Congressional authors of the First Amendment in 1789.⁶

Despite this argument for textual interpretation beyond historic limits, Tribe explicates threshold uncertainties as to whether non-traditional publishers such as Wikileaks (or individuals such as Julian Assange) may claim “press” status for purposes of First Amendment guarantees:

...whether ‘the press’ should be taken to identify a collection of institutions and organizations, as some believe, or should instead be understood to refer to a *set of journalistic and editorial functions, regardless of who performs them*, as I believe it should, involves nontrivial arguments about what the underlying concept embraces...[such as], disagreement over whether freedom of press encompasses a special role for professional journalists or refers instead to a broad freedom, enjoyed by all who would exercise it, to gather and report whatever the reporter views as ‘news.’⁷

Thus, at the outset it remains unclear whether Internet publishers like WikiLeaks (or its leader Assange) would be constitutionally entitled to the full measure of protections afforded to “the press,” whose important function in democracy was considered critical to the result in the *Pentagon Papers* case, as opposed to the possibly lesser guarantee of “free speech” separately provided to everyone else under our Constitution. In this regard, it may be relevant that

8 See Paul Farhi and Ellen Nakashima, “Is WikiLeaks the Pentagon Papers, Part 2? Parallels and Differences Exist.” *Washington Post*, July 27, 2010, C1. Commentators early in the Wikileaks saga began to question the availability of “press” designation: “At issue is whether WikiLeaks should be afforded the same legal protections as a traditional media outlet.” Adam Entous and, Evan Perez, “Prosecutors Eye WikiLeaks Charges,” *The Wall Street Journal*, August 21, 2010, A2.

9 Khatchadourian, “No Secrets,” In any case, this comment reflects such blurring of identities between a non-traditional publisher (totally lacking any “bricks and mortar” operation) and its founder/chief, that it also becomes hard to determine whether there exists any substantial organization to be prosecuted, aside from Assange himself.

10 The classic example is: “The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic.” *Schenck v. United States*, 249 U.S. 47 (1919), 52.

11 U.S. Constitution, Art. 3, Sec. 3(a) (emphasis added). One scholar stresses the limited nature of this provision (“only”) as “underscor[ing] the commitment to broad rights of speech and dissent.” Akhil Reed Amar, *America’s Constitution: A Biography*, (New York: Random House, 2006) 243.

12 *Schenck*, 52.

13 *Schenck*, 52 (emphasis added).

WikiLeaks (while arguably the “press” itself) did in fact first disclose through other established news organizations before dispersing documents directly on the Internet; moreover, even after being consulted by *The New York Times* prior to publication, the White House did not attempt to prevent publication but only requested redaction of “harmful material.”⁸ On the other hand, WikiLeaks does not seem to assert the balanced perspective of normal journalists. As Khatchadourian reports, “Assange, despite his claims to scientific journalism, emphasized to me that his mission is to expose injustice, not to provide an even-handed record of events.”⁹ The importance of this factor remains unclear, as Supreme Court has yet to address the issue of the exact scope of the term “press” in our new internet age — or precisely how the protections which that designation affords may differ from the similarly strong guarantees provided in any case for individual political speech under the First Amendment.

Next, it must be recognized that the protections of the First Amendment, while strong, are not monolithic — thus a balance must be struck where competing public interests may be deemed overriding.¹⁰ Regarding military leaks specifically, the Framers recognized the special case of treason and included in the Constitution a definition, albeit limited, of treason which recognizes punishment for conduct (apparently including speech) that would aid an enemy: “Treason against the United States shall consist *only* in levying war against them, or in *adhering to their enemies, giving them aid or comfort.*”¹¹ Consistent with such concern for national security, the Supreme Court has held that even First Amendment free speech guarantees must endure special scrutiny in “time of war” in order to balance such rights with the country’s military interests:

When a nation is at war many things that might be said in a time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.¹²

The same decision explicated the standard that would apply in future cases, including the *Pentagon Papers*, to determine whether the threat to national security is considerable enough to justify abrogation of free speech rights:

The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a *clear and present danger* that they will bring about the substantive evils that Congress has a right to prevent.¹³

This requirement of proving substantial and imminent harm to the nation provides fertile grounds for defensive arguments in whistle-blowing cases, including those where publication of information results in major breaches of national security such as the

14 Following extensive historic precedent reflecting the original Framers' intention, the Court in *Pentagon Papers* emphasized that "prior restraint" of publication carries a higher burden of proof of imminent danger to national interest than would prosecution of the alleged culprits after the fact — a factor that would seem work against Assange and Wikileaks in defending against future U.S. indictments. Nevertheless, in fact the U.S. did not attempt any prosecution of the *New York Times* after the *Pentagon Papers* case, and has shown no indication that it would do so in the Wikileaks situation regarding such traditional publishers, leaving uncertain the scope of this concern.

15 This specific language and reasoning from the published decision is attributable only to Justices Black and Douglas, who joined in the opinion; all other justices filed concurring or dissenting opinions. Alas, the vagaries of Constitutional law introduced by political appointment of Justices and shifting winds of political thought do not guarantee that these sentiments would issue from all — or even any — of today's Supreme Court Justices. That is one of the variables that Wikileaks and Assange must contend with in assessing vulnerability to prosecution. For better or worse, American constitutional law is not a stable concept but one constantly evolving (although not necessarily forward), just as contemporary technology is.

16 403 U.S. 717 (emphasis added).

Pentagon Papers case and recent WikiLeaks disclosures. Even if the disseminator of secrets is indicted, the burden will be on prosecutors to overcome rights of free speech by showing that actual damage would likely result from the leaked information, rather than mere embarrassment to government officials or agencies. Applying these intentionally protective First Amendment standards to the *Pentagon Papers* case, it is apparent why the Supreme Court ultimately ruled that no "prior restraint" by government was permitted to stop the publication of the allegedly offensive (and possibly dangerous) military documents about Vietnam.¹⁴ On one hand, what was at issue was the right of the recognized "press" to disseminate critical information directly bearing on a contemporary issue of great political import — U.S. involvement in an ongoing foreign conflict. On the other hand, the government's effort to forestall publication by *The New York Times* also asserted the strongest possible reason for *overriding* such guarantee — a nation at war, where the documents allegedly compromised national security interests. Yet, on balance, the Court held that the government did not meet the "heavy burden" that the constitutional standard required. Although the actual holding of that case was on facts apparently stronger than those presented in WikiLeaks, the language of the decision leaves no doubt that the Court was embracing the broadest conception of press freedom as an essential right of the American people to sustain their democracy.¹⁵

Both the history and language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraint.... In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in democracy. The press was to serve the governed, not the governors.... *The press was protected so that it could bare the secrets of government...[and] expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell.* In revealing the workings of government that led to [this] war, the newspapers nobly did precisely that which the Founders hoped and trusted they would do.¹⁶

Accordingly, although the clandestine circumstances under which WikiLeaks has chosen to operate demonstrate a determination to *avoid* the possibility of being held accountable under U.S. law, the clear language of the *Pentagon Papers* suggests that successful prosecution would in no way be insured even by apprehension of the "perpetrators." In fact, the type of information considered most "dangerous" among the Wikileaks disclosures concerned the wars in Iraq and Afghanistan, where the argument for informing the American public of governmental missteps and abuses would seem to echo closely the *Pentagon Papers* language regarding protection

- 17 *Snyder v Phelps*, 562 U.S. ___, 131 S.Ct. 1207 (2011). The Supreme Court, by a vote of 8–1, ultimately agreed with the Appeals Court that even this patently noxious form of speech was entitled to First Amendment guarantees.
- 18 “Lamentable Speech,” Editorial, *The New York Times*, Editorial October 7, 2010. Similarly, a more recent case prioritized the “free speech” of others even over the estimable feelings of military personnel, when the “Stolen Valor Act” (18 USC Sec. 704(b)) was struck down as unconstitutional, even in the case of a person’s deliberate, false claim of having received military honors. See *United States v. Alvarez*, ___ U.S. ___, 132 S.Ct. 2537 (2012).
- 19 Manning is being court-martialed in U.S. military proceedings despite evidence that he suffered mental illness even at the time of the leaks. See “Leak Suspect’s Mental Health Doubted,” *The Washington Post*, September 2, 2010, A6 (“The sergeant who supervised Bradley E. Manning . . . was so concerned about the soldier’s mental health that he disabled Manning’s weapon late last year. . . . Despite those concerns, the sergeant continued to let Manning work as an intelligence analyst, a position that afforded him access to classified databases at a forward operating base in Baghdad. . .”). A recent biography reports that Manning’s mental state has since deteriorated markedly due to the inhumane conditions of his incarceration. Denver Nicks, “Private: Bradley Manning, Wikileaks, and the Biggest Exposure of Official Secrets in American History (Chicago: Chicago Review Press, 2012).

of U.S. citizens’ “right to know,” as against the government’s claim of speculative risks of harm.

Although many consider Assange and his band an unsympathetic lot, it should also be recognized that First Amendment guarantees remain a significant obstacle to the prosecution of politically-sensitive leaks however “unsavory” one may consider the source or their intentions. This enduring strength of “free speech,” even simply in the case of individuals, is poignantly reflected in the recent Supreme Court case of *Snyder v. Phelps*.¹⁷ An editorial published contemporaneously with oral arguments in that case acknowledged the “deeply repugnant” nature of the anti-gay protests at issue, which were deliberately undertaken to obtain maximum publicity at the funeral of a slain soldier, but noted:

All of the sympathy in the case of *Snyder v. Phelps* . . . goes to the family of Lance Cpl. Matthew Snyder, the fallen Marine. But as the appeals court in the case observed, using the words of Justice Felix Frankfurter, ‘It is a fair summary of history to say that the safeguards of liberty have often been forged in controversies involving not very nice people. . . .’ One friend of the court brief called the protesters’ message ‘uncommonly contemptible.’ True, but it is in the interest of the nation that strong language about large issues is protected, even when it is hard to do so.¹⁸

Thus, the range of First Amendment protections for “political speech” that informs the public on national issues provides a broad guarantee of free expression, one that it seems should logically be carried forward into the new media world of the twenty-first century cyber-journalism — and applied to even disagreeable and offensive “publishers” or other unappealing speakers.

The question then remains, where would the current WikiLeaks publication situation fall if prosecuted under such a legal analysis? Primarily, it is difficult to know because, in the decades since issuance of the ruling in the *Pentagon Papers* case, post-release prosecution of the original source of leaks (rather than the publisher) has been the government’s preferred avenue of punishment and prevention. Indeed, U.S. Intelligence Analyst Bradley Manning, who was responsible for leaking the classified material to WikiLeaks, is in jail and awaiting trial.¹⁹ Although notably the U.S. government made no attempt to indict the traditional publishers of the Wikileaks information (including the easily-accessible *New York Times*), it remains unclear exactly whether and how the U.S. government may attempt to prosecute WikiLeaks itself or its leader Julian Assange — assuming that he can even be extradited here.²⁰ If such prosecution were to go forward and be tested by *Pentagon Papers* standards, one can only speculate how a reconstituted (and considerably more conservative) Supreme Court would rule, especially in a time of heightened security concerns post-9/11. No one can reliably predict the stance of the Supreme Court on free speech

20 It should be noted that jurisdictional issues would also attend any attempt to prosecute a non-U.S. citizen under U.S. law, for actions undertaken abroad, simply on the basis that the leak source was American and the impact was felt both in the U.S. and its foreign military operations. Such issues may present another avenue of possible defense.

21 Paul Farhi and Ellen Nakashima, "Is WikiLeaks the Pentagon Papers, Part 2? Parallels, and Differences, Exist." *The Washington Post*, July 27, 2010, C1.

22 Ibid. *The Washington Post* authors also distinguish WikiLeaks from the Pentagon Papers disclosures in terms of the lack of a single critical public message such as high-level disclosures of White House policy.

23 Ibid.

24 Samuel Magaram, *The Atlanta Journal-Constitution*, August 20, 2010, A25. The author asserts: "While leaks of government secrets can play a crucial role in exposing deceit and abuse of power, the unrestricted and inexpert publication of voluminous classified government records poses a significant threat to national security."

25 Magaram, *Atlanta Journal*.

26 Ibid.

in any new era, but I believe that recent attitudinal shifts on the Court indicate that WikiLeaks (or any member of the "press," even if fully recognized as such) might well *not* be deemed to enjoy the same degree of protection as the publishers in the *Pentagon Papers* case, at this particular point in our history.

Specifically, it may be relevant in any constitutional balance of competing interests that media experts have weighed in on the question of the propriety of the particular WikiLeaks disclosures, and the consensus of many news analysts seems unfavorable about the judgment exercised by Assange and his group. Soon after the disclosures, *The Washington Post* interviewed Daniel Ellsberg, who argued that "The parallels are very strong.... This is the largest unauthorized disclosure since the *Pentagon Papers*. In actual scale, it is much larger, and thanks to the Internet, it has moved [around the world] much faster."²¹ However, the article's authors disputed Ellsberg's conclusion, asserting, "Superficially, the two episodes do seem related. In substance, however, the [WikiLeaks] case may be weaker." The authors then cited crucial distinctions, most notably:

The key one is the nature of the documents and the substance of what they reveal. The *Pentagon Papers* were a complete, three-volume history of the [Vietnam] war.... rely[ing] on some of the highest level documentation possible: White House memos, military reports, CIA and State Department cables. They disclosed official secrets... and outright lies, such as Lyndon Johnson's plans to widen the war.²²

The authors then distinguished the initial WikiLeaks disclosures: "By contrast, the Afghan documents — more than 91,000 in all — are a loosely related collection of material covering nearly six years... that leaves out important context," further quoting Steven Aftergood of the Federation of American Scientist's Project on Government Secrecy: "The fact that something is written down and even classified does not make it necessarily true or interesting. Documents can mislead as well as inform..."²³

A similar analysis appears in an article by Samuel Magaram entitled "WikiLeaks is No *Pentagon Papers*" citing the reaction of "the international media watchdog group Reporters Without Borders, which last week condemned the [WikiLeaks] document publication as 'highly dangerous' and irresponsible."²⁴ While acknowledging the crucial role played by leakers such as Daniel Ellsberg in the *Pentagon Papers* case and Mark Felt's role in Watergate, the author distinguishes the WikiLeaks action as indefensible:

Responsible journalists and publishers are the crucial gatekeepers in this one-off disclosure route, notifying government officials and delaying or killing stories that would materially jeopardize national security. In its short history, WikiLeaks has shown an aversion to such conventions.²⁵

- 27 Elisabeth Bumiller, "Gates Found Cost of Leaks Was Limited," *New York Times*, October 17, 2010, A8. Indeed, some commentators later speculated that the Wikileaks disclosures of sensitive State Department cables may ultimately have helped spark the "Arab Spring" uprisings in the Middle East, which many consider a positive historic move towards democracy in that region.
- 28 Whether Assange is already under secret indictment in the U.S. remains a disputed matter, with various news organizations speculating in the affirmative. See e.g. Philip Dorling, "Revealed: US Plans to Charge Assange," *Sydney Morning Herald* February 29, 2012, 1. Wikileaks supporters claim as well that the U.S. is participating in the effort to extradite Assange to Sweden in a concerted effort to silence and punish him. See Michael Moore and Oliver Stone, "Wikileaks and Free Speech," *The New York Times*, August 21, 2012, A19. The authors assert that "Mr. Assange has... committed to traveling to Sweden immediately if the Swedish government pledges that it will not extradite him to the United States. Swedish officials have shown no interest in exploring this proposal... Wikileaks itself has published e-mails from Stratfor, a private intelligence corporation, which state that a grand jury has already returned a sealed indictment of Mr. Assange. And history indicates Sweden would buckle to any pressure from the United States to hand over Mr. Assange." Ibid. See also, John Pilger, "Comment: The Dirty War on Wikileaks: Media Smears Suggest Swedish Complicity in a Washington-driven Push to Punish Julian Assange," *The Guardian* March 10, 2012, 36. However, U.S. Ambassador to Australia Jeffrey Bleich has reportedly "denied that the United States had any interest in Sweden's extradition bid succeeding." See, "No Sign from US of Assange Indictment," *The New Zealand Herald*, May 31, 2012.

Magaram argues that within the WikiLeaks disclosures, the particular content of most significance are "Afghan war documents [that] reveal top-secret methodological information of the sort typically guarded most closely by the government.... how the military operates at the theater and unit level that can be leveraged both by the Taliban in Afghanistan and by adversaries in future engagements," concluding that "[w]hile the damage to national security by the disclosure of event or programmatic information is limited, the harm of divulging methodological information is potentially catastrophic."²⁶ On the other hand, such doomsday projections at the outset of the WikiLeaks disclosures may have been softened by the subsequent concession by Defense Secretary Gates to Congressional leaders that "few if any significant leaks actually occurred."²⁷

After the initial spate of leaks, WikiLeaks has remained in the news, first releasing troves of new documents containing sensitive military and diplomatic secrets (including the horrific "Collateral Murder" video), and then scrambling to defend its leader Julian Assange against sexual assault charges that involve the issue of possible extradition — first to Sweden, and potentially next to the U.S. to face an eventual criminal prosecution for his Wikileaks activities.²⁸ Now holed up in the Ecuadorean Embassy in London (having been granted asylum to avoid extradition), Assange remains a fascinating if polarizing figure. While his personal life and habits may not bear up well under the scrutiny of the public eye, nevertheless no one doubts that the role Assange has played in our military and diplomatic history thus far is enormously significant, and that future events may well enshrine him in our constitutional law canon as well.

Finally, on a First Amendment analysis, the question will always come down to a balancing of benefits of free speech in a democracy versus anticipated harms — a highly factual, nuanced, and speculative analysis that must be made on a case-by-case basis. Despite the press criticisms cited above, and remaining uncertainty as to the extent of any alleged damage to US strategic military interests, ultimately I would argue that, *in this instance*, unleashing these particular graphic stories and images regarding controversial wars, information that has been systematically kept from the American people by our own government, provides a needed wake-up call. The fact that most of what WikiLeaks has disclosed could have been happening *almost entirely out of sight of the American people* strikes me as an affront to our notions of democracy. If there are horrors of war — and demonstrably there are — I contend that we need to understand them and accept our own accountability, not decades after the fact, but now. The very heart of the Founders' First Amendment guarantees was the assumption of an informed public participating in critical governmental decisions — a vision that I believe we have lost in this age of over-classification of "secrets" — and desperately need to recover.

Information Anarchy in the Age of the Internet

29 It is ironic that the U.S. enabled and supported this development of technology, ultimately at our own expense in terms of economic competitiveness — the modern cyber-highway overcame geographic barriers that previously protected our workers from international competition, introducing the persistent challenge of “outsourcing.” See Thomas L. Friedman, *The World is Flat — A Brief History of the Twenty-First Century* (New York: Farrar Straus & Giroux, 2005). Such information superhighway may now present a security “Frankenstein” of our own making, beyond our ability to rein in either with traditional protections or via even the most innovative solutions.

30 It may provide scant comfort to realize that the problem is not limited to government — corporations are suffering at the hands of employees “leaking” proprietary information online as well. “New Spy Game: Trade Secrets Sold Overseas,” *New York Times*, October 18, 2010, A1.

31 Indeed, these are precisely the aspects of cyberspace that the military hopes to utilize in its favor: “Cyberspace allows us to overcome the limitations of distance and time and the barriers of land and sea.” *Air Force Cyber Command Strategic Vision 2008*.

32 See “Back Then: 1971,” *New York Times*, August 1, 2010, 4.

33 By contrast, the Pentagon Papers documents weighed some 200 pounds, which Bob Rosenthal personally hauled away in a suitcase when alerted that the FBI was approaching *The New York Times’* secret publishing venue. *Ibid.*

The activities and effectiveness of WikiLeaks clearly exploit a seismic shift in technology since the Supreme Court described broad protections for “freedom of the speech and of the press” in the seminal *Pentagon Papers* case in 1971. Some forty years later, the prior near-exclusive access of a relatively small number of newspapers (and TV networks) to newsworthy information has been permanently altered by the development of new forms of media, including hundreds of cable television channels. No change however is more significant than the spread of the Internet, involving the proliferation of news, blogs, opinion and social networking via the worldwide Web — instantaneously, and 24/7.²⁹ How then — at least in appropriate cases — can the US government cope with the challenge of monitoring many sources and preventing public dissemination of truly critical military secrets? In attempting to assess the Government’s current position and future potential responses, I have considered the following aspects of Internet leaks of sensitive military information:³⁰

1. Paperless media makes acquisition (as well as transmission) of secret material easier than ever before.³¹ “Deep Throat” no longer needs to skulk around Washington DC parking lots to meet a reporter and hand over laboriously-copied documents, nor does the staff of *The New York Times* need to decamp their physical location in anticipation of the arrival of FBI agents.³² Groups such as WikiLeaks take advantage of multiple forms of new technology to acquire, organize, store and transmit materials, as well as utilize such modern communications to maintain the physical safety of the few people required to perform disclosure functions. The corollary of the ease of operation for whistle-blowers in this electronic age is that old methods of detecting leaks such as physical and telephone surveillance are often less effective in detecting their activities, although new issues of privacy arise concerning data on cell phones, e-mail and other new technologies.

2. The growth in the number of technologically-capable web users means that there are millions of potential “publishers” with computers who can serve as disseminators of sensitive documents, literally to *billions*. Unlike traditional media, no cost or logistical barriers exist to instantaneously disclosing limitless amounts of information.³³

3. The availability of mobile locations enables organizations such as WikiLeaks to “forum shop” for the most hospitable legal jurisdictions, and to move on if necessary to “stay ahead of the law.”³⁴

4. Longevity of disclosures is assured by the “eternity of the internet.” Once information is transmitted, one cannot recall sensitive information by confiscating papers, removing books from

- 34 In an earlier era, the Constitution tried to foreclose such option to escape accountability, at least within the U.S. — Article 4 Section 2 (b) specifically permits extradition of perpetrators of crimes including treason to “the state having jurisdiction for the crime.” However, increasingly we are one global community, and yet, we lack unified political/military sovereignty which can be exercised in the vast reaches of our new “common” public grounds.
- 35 For a trenchant exploration of the personal implications of such permanent records, see Jeffrey Rosen, “The End of Forgetting,” *The New York Times Magazine*, July 25, 2010, 30 (“Legal scholars, technologists and cyberthinkers are wrestling with the first great existential crisis of the digital age: the impossibility of erasing your posted past, starting over, moving on.” *Ibid.*)
- 36 “Brave Thinkers: The General,” interviewed by Elaine M Grossman, *The Atlantic*, November 2010, 103.
- 37 *Ibid.*
- 38 John Bacon, et al, “Marine Who Criticized Obama to be Discharged,” *USA TODAY*, April 26, 2012, 3A.
- 39 “U.S. Allied Sunnis Quitting in Iraq to Rejoin Rebels,” *The New York Times*, October 17, 2010, 1.

libraries, or burning copies of pictures or videos. Such copies do not naturally disintegrate, nor are they subject to government destruction — once Internet leaks are out, they are public “forever.”³⁵

5. An increasing tolerance of Americans for leaks of all sorts, including those emanating from military officials themselves, may render it more difficult to impose a culture of silence to prevent and/or punish particular sources for acting on their own viewpoints. In this vein, several incidents of high-level military disclosure contemporaneous with Wikileaks publications raise the question of whether leaks are becoming the norm, even within the military. For example, consider the boldness with which the top American military commander of US forces in Afghanistan publicly criticized President Obama regarding military strategy (although he subsequently resigned from his post). Perhaps more surprising is the US response to the case of another military officer’s critique of our own intelligence analysts as “‘ignorant,’ ‘incurious,’ and ‘disengaged,’” an assessment “leaked” by the top military intelligence officer in Afghanistan, Michael Flynn, to a Washington think-tank that subsequently published his comments.³⁶ Despite Defense Secretary Gates’ complaint that Flynn should have taken up his concern through “traditional military channels,” Flynn was not punished for this breach of chain-of-command rules and seemed unrepentant, claiming that he had received “easily 15,000 to 20,000 email responses that were all positive.”³⁷ By contrast, recently a lower-level marine who criticized President Obama on Facebook has reportedly faced discharge for that seemingly less consequential offense.³⁸ More typical than these extant examples is the often blasé reporting of unnamed “military and government sources,” such as those quoted in a *New York Times* article regarding Iraqi “Awakening” forces who have strayed to side with the Taliban either overtly or covertly while keeping their coalition force jobs.³⁹ One might speculate that such contemporaneous revelations could be as damaging to morale and the ongoing war effort as leaks of historic military documents by WikiLeaks. Yet it is unclear whether the military approved any such disclosures, and if not, that officials are intent upon hunting down the sources of such stories, which seem to appear daily.⁴⁰ One must wonder: are only high-ranking military members permitted to decide what to leak, even if they have not gone through regular military channels, despite the potential that they know far more of value to our enemies than one apparently disturbed soldier like Bradley Manning? Are we to overlook the fact that such high-level sources of secret information are violating the strict chain of command maintained by our military, especially in wartime situations?⁴¹ Where do we draw the line, or perhaps more pertinent, who should be entitled to draw such a line? If the constitutional calculus comes down to anything relating to the *content* of political speech, that is, whether the speaker — or especially their viewpoint — is favored by a select

40 However, the Obama Administration does appear to be increasing prosecutions: “State Dept. Contractor Charged in Leak to News Organization,” *The Washington Post*, August 28, 2010, 14 (national defense secrets disclosed to Fox News, with lawyers for the defendant protesting that the government was “criminalizing exchanges ‘that happen hundreds of times a day in Washington.’” Also, “Since December, prosecutors have indicted Thomas A Drake, an NSA official, with improperly handling classified information with a Baltimore Sun reporter, [and] secured a guilty plea from Shamai Kedem Leibowitz, a former FBI contract linguist, for leaking documents to a blogger.” Ibid.

41 Public sentiment in favor of criminalizing lower-level leaks is not exactly bolstered when a senior official like Vice President Cheney’s Chief of Staff “Scooter” Libby is convicted of leaking the identity of a CIA agent, specifically for the purposes of smearing her ambassador husband in order to discredit his opposition to the Iraq war — and then Libby is pardoned by President George W. Bush without serving any of his sentence. See Valerie Plame Wilson, *Fair Game — My Life as a Spy, My Betrayal by the White House*. Similarly, how can the public be expected to support legal action against *disseminators* of horrific information when the *perpetrators* of some of the worst atrocities unveiled about recent U.S. war operations are not brought to justice? See, e.g., “Efforts to Prosecute Blackwater Are Collapsing — Contractor Accused of Killing Iraqis and Afghans,” *The New York Times*, Oct 21, 2010, page 1.

group, then that would seem to present exactly the situation most clearly addressed by our First Amendment guarantees of freedom of expression.

6. Finally, the US must contend with general public opposition to any government intervention with open Internet networks. Even absent public cynicism about trusting the US military and intelligence agencies (which has grown in recent decades following numerous disclosures of covert operations such as assassinations of foreign heads of state), Americans bridle at any governmental attempts to regulate Internet content.

At first blush, these issues appear to present nearly insurmountable obstacles to government protection of military secrets. Whether or not a US federal court might authorize as constitutional any government attempts at “prior restraint” in a particularly egregious situation, such decision would provide no practical remedy if injunctions on leaks cannot be made enforceable across cyberborders, as any post-leak prosecution of sources and/or intermediary disseminators would be ineffectual in curing the damage from previous leaks. Equally important, to the extent that such prosecution might impact only someone suffering emotional issues, as Manning reportedly was, one might expect that such other soldiers operating out of true mental illness would not be deterred by such potential legal consequences, as they are not in full control of their senses. Finally, prosecuting Manning does not reach Julian Assange and his cohorts, who have now become global, public magnets for any future leakers.

Regardless of my inclination to favor the airing of politically relevant information, particularly regarding our involvement in foreign wars, I recognize that these expansive aspects of new technology do pose significant risks that require further efforts at protection where clear US security interests are at stake.⁴² Prior to Wikileaks, it appears that the greatest impediment to effective prevention of critical security leaks has been our government’s blindness to the nature and scope of the threat of deliberate leaks by military or security forces themselves. In my survey of numerous sources that discussed the threat of “cyberterrorism” immediately prior to Manning’s disclosures, they are all noteworthy for their near-complete *absence* of any discussion of a WikiLeaks-type scenario. Instead, the various authors echo the US military’s own emphasis on positively exploiting the potential of new technology, as expressed in its Strategic Vision 2020 publication (published before 9/11):

The evolution of information technology will increasingly permit us to integrate the traditional forms of information operations with sophisticated all-source intelligence, surveillance, and reconnaissance in a fully synchronized information campaign. The development of a concept labeled the global

42 Who gets to define these interests remains the glaring problem — it is apparent that U.S. governmental agencies are not necessarily more inclined to share information whether headed by Democratic or Republican President's, as evidenced by the enduring interest in pursuing Assange which has occurred on President Obama's watch.

43 *Joint Vision 2020 — America's Military — Preparing for Tomorrow*, Summer 2000, 62.

44 *Air Force Cyber Command Strategic Vision* (2008), 1. Its goal is to “deter, deny, disrupt, deceive, dissuade and defeat adversaries through. . . destructive and non-destructive, lethal and non-lethal means.” Ibid. 2.

45 Ibid., 091. This is not to say that such systemic attacks do not *also* pose a realistic security realistic threat — see e.g., David Sanger, “Iran Fights Malware Attacking Computers,” *The New York Times*, September 26, 2010, 4.

46 Dan Verton, *Black Ice: The Invisible Threat of Cyber-Terrorism*, (New York, McGraw-Hill 2003) 27. His emphasis is not only on damage possible to computer networks but also physical infrastructure. A second concern is “scrubbing” our own websites to eliminate information useful to al-Qaeda and other subversive agents. Ibid. 115.

47 Edward Yourdon, *Byte Wars — The Impact of September 11 on Information Technology*, (New York, Prentice-Hall, 2002), 146. The “stateless” powers Yourdon consider are “loosely-organized, difficult-to-identify groups like the drug cartels. . . ; the terrorist groups. . . ; the new-generation spinoffs from the Mafia. . . ; and ephemeral hacker groups that communicate and collaborate with one another on the internet.” Ibid., fn omitted, 145.

information grid will provide the network-centric environment required to achieve that goal.⁴³

In a later strategic projection issued in 2008, long after 9/11 and as the wars in Iraq and Afghanistan were dragging on, the US Air Force similarly addressed the development of cyber capabilities by stressing the positive operational use of new media, and secondarily, the need for defensive protection against enemy cyberattacks:

Revolutionary technology has presented cyber capabilities, which can produce decisive effects previously only achieved through kinetic means. . . . Air Force Cyber Command (Provisional) . . . bring[s] together the myriad existing cyber capabilities under a single commander. This new command will provide combat-ready forces equipped to conduct sustained operations in and through the electro-magnetic spectrum, fully integrated with global air and space operations.⁴⁴

Defensive uses remain focused on systems: “Defensive war-fighting in cyberspace will counter an adversary by attacking his networked systems while simultaneously defeating enemy attempts to threaten our[s]. . . .”⁴⁵ This same approach has generally been adopted in popular nonfiction accounts, focusing on military attacks:

Cyberterrorism is the premeditated, politically motivated attack against information, computer systems, computer programs, and data which results in violence against noncombatant targets by subnational groups or clandestine agents.⁴⁶

In his extensive analysis of cyber-security issues, Edward Yourdon only obliquely addresses the leak topic, observing “. . . that hardly anyone watches the programmers.” Later, he issues a warning that sounds prescient, although not directed at a WikiLeaks type of risk:

One of the consequences of [“stateless” powers] is that an organization's risk management strategy becomes more reactive than proactive — after all, if you don't know where your risks are coming from, how can you take proactive steps to confront them? On the other hand, what *can* be done proactively . . . is intelligence-gathering in order to identify potential risks as earlier [sic] as possible. One reason that is particularly important with regard to the “stateless” powers is that they often operate in a secretive fashion until they are ready to unleash their attacks. Thus . . . an organization may have little or no advance warning of a risk that will be exploited by a group of hackers, terrorists or criminals.⁴⁷

48 Richard Clarke, *Cyber War: The Next Threat to National Security and What to Do About It*, (Harper Collins, 2010). The most he notes in this regard is the possibility of cyber espionage, rather than war, which seems more relevant to WikiLeaks — yet his concern remains enemy countries accessing our specific sensitive military information, e.g. F-35 aircraft specifications. He also notes that the designers of the Internet intended to keep it free of government regulation and interference, making it impossible to alter the basic open design at this late date. *Ibid.*, 228, 233.

49 See “An Illegal Search, by GPS,” *The New York Times* October 5, 2010, A30, describing a recent case about GPS monitoring where a panel of the Supreme Court concluded that 4th Amendment rights against unreasonable search and seizures must prevail over policing interests, concluding, “In showing why a powerful advance in technology calls for significantly greater protection of privacy, the [Court] provided an important example of how the law can respond to new circumstances.”

Significantly, the focus of pre-Wikileaks authorities remained on external threats, failing to recognize the possibility of internal leaks having the potentially devastating impact of a lone soldier like Bradley Manning deliberately leaking classified information. Even authors writing in 2010 just prior to WikiLeaks’ publication of Manning’s disclosures, who may have criticized the US Military for failing to meet the challenge of a new electronic age, missed the precise issue of a WikiLeaks scenario — for example, Richard A. Clarke warns:

A nation that has invented the new technology, and the tactics to use it, may not be the victor, if its own military is mired in the ways of the past, overcome by inertia, overconfident in the weapons they have grown to love and consider supreme.⁴⁸

More recent developments do reflect efforts by both the executive and legislative branches to correct lapses, close opportunities for leaks, and implement new strategies for combating Assange’s effectiveness and influence, and one imagines that even more corrective action has actually been taken by our security agencies outside the spotlight of public awareness. Yet such efforts also illustrate the difficulty of revving up our slow-moving government machinery to react swiftly to threats, since the process of enacting effective new legal constraints generally involves legislators, the executive branch, military advisors, industry lobbyists, rights activists and other interest groups — while technology develops at an ever more geometric pace. Add to these issues a confusing mix of fundamental concerns regarding our “democracy” — including that, the Constitution will always demand accountability to our most basic standards of rights — and the task of properly protecting the secrets that are indeed vital to US security remains a daunting one.⁴⁹

Conclusion

In contemplating the difficult balancing of threats and interests discussed herein, searching for effective but reasonable solutions, I return where I began — to a Constitution which I believe embodies the best hopes of our citizenry, containing fluid but essential concepts which have endured since the Founders penned them — precisely because they go to the heart of our democracy. For our country’s ultimate security in this insecure world, I fervently hope that WikiLeaks presents Americans with a much-needed wake-up call to address the underlying circumstances that spawned the leaks — by which I do not primarily mean a renegade disseminator of information, or even the new technologies enabling disclosure, but rather the lethal contents thereof — as I believe that the main reason that Wikileaks documents are “dangerous” is that they unveil and force us to take note of our failings, a function of the First Amendment if ever there was one. Despite

the risks then, at least regarding the particular Wikileaks disclosures concerning the Iraq and Afghanistan wars, I have to side ultimately with Justice Louis Brandeis' notion that "Sunshine is the best disinfectant."

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An Arendtian Analysis of the Truth and Reconciliation Commission

Matthew Shafer

- 1 Desmond Tutu, *No Future Without Forgiveness* (New York: Doubleday, 1999), 9, 11.
- 2 Elizabeth Young-Bruehl, in her book *Why Arendt Matters* (New Haven: Yale UP, 2006), analyzes the TRC in terms of Arendt's work on forgiveness, which is perhaps the most obvious line of approach for a project such as this. Though this essay is informed by Young-Bruehl's work, I will avoid simply replicating her conclusions by focusing not on forgiveness but on the other issues that have been noted.

On May 10, 1994, Nelson Mandela was inaugurated as the first president of South Africa to have been elected by citizens of all races. The selection of a black man as the nation's first post-apartheid executive brought the world "to a standstill," symbolizing a "spectacular victory over injustice, oppression, and evil."¹ Yet, the marvelous dawn that had shattered the dark night of institutionalized brutality was not the end of the pursuit for justice in South Africa; this new beginning was only a prerequisite for the arduous tasks of reconciling with apartheid's horrific past, building a renewed nation that could repair the "web of human action." Critical to these efforts was the Truth and Reconciliation Commission, a remarkable pseudo-judicial body whose mandate was to bring to public view the truth of the violence that had been perpetuated by apartheid and also by those who fought against it. Over the course of two and a half years, the three committees of the TRC interviewed thousands of witnesses, victims, and perpetrators, fundamentally altering public discourse about the atrocities committed, the political transition, and the nature of justice itself.

This essay seeks to analyze the Truth and Reconciliation Commission in terms of the political philosophy of Hannah Arendt, one of the twentieth century's greatest luminaries and a prolific writer on questions that — it will become clear — are at the core of any consideration of the commission's work. After brief attention to the historical context for the TRC (with specific emphasis on the role of violence and nonviolence in resistance to apartheid), this paper will lay out an overview of the nature of the body's work during its years of operation and will demonstrate the ways in which the TRC reflects the ideas of Arendt on the relationship between violence and power, and on the nature of authority.² The work of the Truth and Reconciliation Commission can be understood as an embodied example of many of Arendt's deepest insights, demonstrating the significance of this theorist's work for any account of the modern political world.

Historical Background: Resistance to Apartheid

Since the TRC was formed after the conclusion of a struggle lasting several decades, it cannot be properly understood without some knowledge of the events that preceded it. Apartheid — the Afrikaans word for *apartness* — had its roots in a long history of racial discrimination and oppression that emerged while South Africa was still a dominion of the British Commonwealth. These practices

- 3 Peter Ackerman and Jack Duvall, *A Force More Powerful* (New York: Palgrave, 2000), 337.
- 4 *Ibid.*, 338.
- 5 Young-Bruehl, 114.
- 6 *A Brief History of the African National Congress*.
- 7 Ackerman and Duvall, 339.
- 8 *Ibid.*, 340.
- 9 *Ibid.*, and *A Brief History of the African National Congress*.

were transformed into a concrete, formal system of social control after the 1948 electoral victory of the white National Party; their design and implementation were guided primarily by Hendrik Verwoerd, who would become Prime Minister in 1958.³ Under this system, South Africans were classified strictly according to four racial groups — European/white, Indian, Coloured (mixed race), and African. Despite the fact that this last division contained the vast majority of the population, it was subjected to the strictest controls. The black South African experience was symbolized by the passbook, a legal document in which the permissions required to travel in “white areas” were recorded. Regardless of purpose or intent, travel outside their “racially zoned townships” was strictly prohibited without the proper indications in one’s passbook.⁴ Apartheid was thus characterized by this enforced separation of peoples, implemented through “proletarian state policy.”⁵

With all legislative, executive, and judicial control concentrated in the hands of whites, black South Africans were forced to establish their own independent political entities, which were increasingly criminalized as apartheid continued to take root. The most prominent among these was the African National Congress, which predated the establishment of formalized apartheid. Formed in 1912 to “bring all Africans together as one people to defend their rights and freedoms,” the ANC became the leading representative of black residents of the country.⁶ In the 1950s the ANC led what was called the “Defiance Campaign,” a protracted mass movement of civil disobedience against apartheid regulations. Blacks all over the country consciously disobeyed the passbooks laws and other regulations, but the movement hit setbacks when “violent riots broke out” in 1953 and the government responded with violence and corporal punishment.⁷ Yet nonviolent resistance — comparable in many respects to more famous movements led by Mohandas Gandhi in India and Martin Luther King, Jr., in the American South — continued, culminating in a march of 5,000 deliberately pass-less Africans on a police station in Sharpeville. The protest was met with a violent response by the police, who fired into the crowd. Dozens of black South Africans were killed, and thousands more were arrested in the ensuing weeks as protests and riots spread throughout the country.⁸

Nelson Mandela, a prominent leader of the ANC who had been instrumental in many aspects of the nonviolent movement, now called for an armed response, and thus “the ANC took up arms against the South African Government in 1961.”⁹ Although nonviolent tactics such as strikes, boycotts, and protests continued over the next decades, the liberation movement concluded that civil disobedience alone would fail, making a conscious effort to adopt violent means as a central part of the resistance to the institutional oppression they faced. It was thus during the thirty-four years between the Sharpeville Massacre and the inauguration of Mandela — who famously spent most of those years as a political prisoner on Robben Island — that atrocities were carried out on both sides, as the

10 *No Future Without Forgiveness*, 104.

black majority fought for its freedom from the white minority that, as a result of benefitting from oppression for so many years, clung desperately and violently to its total power. These three decades would be the subject to the investigations of the Truth and Reconciliation Commission, a choice of time period that was therefore “not entirely” arbitrary and that presented the commission with a relatively “limited and manageable” focus.¹⁰ Politically motivated killings, kidnappings, torture, and other human rights violations occurred throughout these dark years, and the memory of these horrors still stood in the foreground of the public consciousness even after Mandela assumed office.

The Truth and Reconciliation Commission

11 *Ibid.*, 20.

12 *Ibid.*, 21.

13 *Ibid.*, 28.

14 *Ibid.*, 29.

15 Priscilla B. Hayner, *Unspeakable Truths* (New York, NY: Routledge, 2011), 27.

It was in this historical context, then, that the new president of the unified nation faced the question of how to fashion justice in a time of transition. Two obvious options were available — Nuremberg-style tribunals and national amnesia — both of these were rejected quickly as not being viable paths forward. As Archbishop Tutu, the TRC’s chairman, put it, the “victor’s justice” of Nuremberg was simply not realistic for the post-apartheid government. Neither the ANC and its allies nor the white government had “won the decisive victory that would have enabled it” to carry out such a process; the country had entered an age of power-sharing democracy, and had not simply reversed the status quo of lopsided control.¹¹ In a new order that — though precipitated by armed struggle — was emerging not from military conquest but from “negotiated settlement,” all “in South Africa had to live with one another,” and so the option of simply setting up courts for one “side” to judge and sentence the other was utterly untenable.¹²

National amnesia, the decision to collectively forget the atrocities of the past by issuing a blanket amnesty for all offenders and for all acts, was rejected as similarly unrealistic for rebuilding South African society. Tutu wrote that “unless we look the beast in the eye we find it has an uncanny habit of returning to hold us hostage.”¹³ It was thus clear that a full reckoning of past terrors would be necessary for the future’s security, requiring the rejection of the temptation of collective forgetting. And because the historical facts of apartheid were not simply events that remained in social memory but were also integral parts of “the identity of who” the victims of that oppression were, to simply forget would have been to deny a fundamental component of the self-understanding of the black majority.¹⁴ With neither tribunals nor amnesia a viable option, a third way was needed — and it was the Truth and Reconciliation Commission that provided this extraordinary alternative.

Following Mandela’s inauguration, preparation for the commission began quickly. In mid-1995 the new Parliament passed into law the Promotion of National Unity and Reconciliation Act, which provided the “most complex and sophisticated mandate for any truth commission to date.”¹⁵ Three committees comprised the

- 16 The summary that follows is based on and includes quotes from *The Committees of the TRC*.
- 17 *Amnesty Hearings and Decisions*.
- 18 *Nelson Mandela: Prisoner Turned President*.
- 19 *No Future Without Forgiveness*, 260.
- 20 *Ibid.*, 54–5; 31.

TRC.¹⁶ The Human Rights Violations Committee (HRV) had the task of investigating human rights abuses under apartheid and by the liberation movement, and its members were tasked with determining “the identity of the victims, their fate or present whereabouts, and the nature and extent of the harm they have suffered.” The HRV could refer victims to the Reparation and Rehabilitation Committee (R&R), which had the responsibility not only to grant limited reparations to those who had suffered but also to more broadly draw up “policy proposals and recommendations on rehabilitation and healing of survivors, their families and communities at large.” Finally, the Amnesty Committee (AC) considered applications for amnesty by those who had carried out “any act, omission or offence associated with a political objective” during the three decades that fell under the TRC’s purview; a full disclosure of all acts by the applicant was required for any amnesty, and the burden of proof for demonstrating such disclosure fell upon the confessors themselves. The function of this committee, in conjunction with the other two, was to bring the truth of all that had happened out into the public view in order to better “look the beast in the eye.” Now, the past could no longer hold South African society hostage, even in memory. (The committee considered over seven thousand applications for amnesty, granting several hundred of them during the three years of its operation.)¹⁷ Acting together, the three committees served to rehabilitate both victims and perpetrators, to provide reparations and forgiveness, and, most importantly, to shine the light of truth into the darkness of the violence that apartheid had engendered, thereby allowing a new society based on rehabilitation and reconciliation among all parties to be constructed.

It is striking that in the wake of a resistance movement that had consciously turned away from relying solely on nonviolence as an adequate political tactic, it was precisely a fundamentally non-violent conception of justice that emerged to address the nation’s transitional dilemmas. Mandela’s election-day proclamation of a “a new era of hope, of reconciliation, of nation-building” signaled that justice would be established in the united South Africa, but that it would not at its core be based on punitive measures.¹⁸ Tutu describes the goal of the TRC as going “beyond retributive justice to restorative justice,” a notion of justice as consisting in repairing human relationships rather than simply punishing those who damaged them in the first place.¹⁹ Tutu explicitly connects this notion of restorative justice to the traditional idea of *ubuntu*, which has at its center the “healing of breaches, the redressing of imbalances, the restoration of broken relationships, [and] a seeking to rehabilitate both the victim and the perpetrator”; this worldview rests in large part on the saying that a “person is a person through other persons” and on the understanding that, because the humanity of each is constituted by the humanity of all, forgiveness itself is “the best form of self-interest.”²⁰ This notion of justice does not entirely rule out violence, but its conceptual core embraces a non-

21 Email to the author,
24 April 2012.

violent orientation toward other persons in the world. Of course, it is important to note that the historical link, if any, between the Gandhian-style tradition of nonviolence and the establishment of the TRC is contested. For example, André du Toit, the director of the graduate program in Justice and Transformation at the University of Cape Town, believes that “there are not any direct linkages between the [Gandhian] tradition of non-violent resistance and the TRC.”²¹ But regardless of their *historical* relationship, there is clearly a *conceptual* connection between the *ubuntu* of the TRC and the *satyagraha* of Gandhi; a nonviolent core is present in both, no matter how independently the notions may have developed in their different contexts.

The TRC as Action-in-Concert: Arendt on Violence and Power

22 Arendt, *On Violence*, 43.

23 *Ibid.*, 56. The explicative discussion, with quotations, in the following paragraph draws exclusively from pp. 44–56 of the same text.

We are now better equipped to examine the TRC in light of the political philosophy of Hannah Arendt. As indicated, this essay will first begin with an analysis in terms of the relationship between violence and power, before moving on to a consideration of authority. In her classic text *On Violence*, written in 1969 at the height of the era’s often violent student protests in American and European universities, Arendt lays out a series of careful conceptual distinctions between such terms as strength, authority, violence, and power, intending with this methodological move to bring clarity to often muddled waters. Her careful analysis is motivated by a conviction that these terms, which are so often used interchangeably, actually “refer to distinct, different phenomena,” the elision of which can cause not just linguistic carelessness but true “blindness to the realities they correspond to.”²² The end result of Arendt’s examination is the startling and unintuitive conclusion that the concepts of power and violence are actually opposites, for “where the one rules absolutely, the other is absent.”²³

In Arendt’s theoretical account, *power* is never individual but exists only in groups, for it “corresponds to the human ability not just to act but to act in concert.” It is for this reason an end itself, an “absolute,” requiring legitimacy but never justification, for it arises naturally and inherently from all collective action among persons in the world. In contrast, violence is fundamentally *instrumental*; it is a means, not an end, always requiring implements and intrinsically intended to increase “natural strength” for the achievement of some other goal. The distinction is much like that between cooperation and coercion; power is the phenomenon that exists in all political action, that which characterizes collective public deeds, whereas violence is merely the tool that is sometimes used when other things do not suffice to achieve the relevant objective. This explains why Arendt regards the two as opposites: coercion is what one turns to when cooperation breaks down. Where there is total cooperation, there is no coercion whatsoever, and where there is total coercion, there is no cooperation in any real sense. Arendt concludes, therefore, that power is bound with the essence

- 24 Ibid., 56.
- 25 Arendt, *The Human Condition* (Chicago: University of Chicago, 1958), 201, 7.
- 26 *No Future Without Forgiveness*, 31, and *The Human Condition*, 7–8.

of government but that violence is not, even though governments must often resort to violence when their power fails or is thrown into question. No matter how often power and violence are intertwined empirically, the theoretical distinction between them could not be more stark; in every instance of their alignment, there is a submerged tension that threatens the stability of whatever system links them together. (One could plausibly argue that this explains in part why violent crackdowns often weaken governments in the long term.)

On the strength of this account, Arendt asserts that “it is not correct to think of the opposite of violence as nonviolence” for to “speak of nonviolent power is actually redundant”; violence can destroy, but never create, power, which is fundamentally nonviolent, as it arises from the shared respect of cooperative action.²⁴ The philosophical underpinnings of this view are expressed more fully in her magnum opus, *The Human Condition*, wherein she writes that power “corresponds to the condition of plurality” — that is, to “the fact that men, not Man, live on the earth and inhabit the world.”²⁵ Because humans, in all their diversity, provide in their plurality the fundamental underpinnings of public political power, the respect for the dignity of other persons that is at the core of nonviolence is of a piece with power itself. Human plurality leads to nonviolent power: this is the basic starting place of the worldview that illuminates Arendt’s political theory.

With Arendt’s views explained in this way, it becomes easy to see how the Truth and Reconciliation Commission embodies many of the principles of her understanding of power and violence. For example, the emphasis on human plurality that provides the philosophical basis for her account is mirrored in many respects by the idea of *ubuntu* that lay behind the work of the TRC. Tutu, in his exploration of this concept, declares that it means in part, “I am human because I belong. I participate, I share,” and so too does Arendt declare that plurality means that “to live” can be synonymous to the phrase “to be among men,” as it did for the Romans.²⁶ These two ideas each emphasize that experiencing and relying on others is a prerequisite for constituting one’s own life in the world.

As we have seen, the idea of *ubuntu* underlays the fundamental nonviolence of the TRC. The implication of this, in light of the parallel with plurality and the way that plurality is the precondition for power, is that the TRC is a striking embodiment of political power in the Arendtian sense. By turning away from notions of justice based in violence, the commission endorsed a vision of South African society rooted in cooperation rather than coercion. Throughout the three tumultuous decades with which the commission was concerned, the violence of the state — in killing protestors, in arresting and torturing resistance leaders, and in its many other forms — demonstrated in the laboratory of history Arendt’s claim that “violence appears where power is in jeopardy,” for the coercive means of the government were employed to preserve the collective ability of white South Africans to *act together* apart from

27 *On Violence* (New York: Harcourt, Brace &, 1970), 56.

28 *Ibid.*, 46.

the participation of blacks.²⁷ This ultimately failed, unsurprisingly in light of Arendt's conclusions, and so the new social order that emerged necessitated different ways of establishing and preserving power.

If power is indeed what arises from human action-in-concert, what better example of the power of the new nation could there have been than the TRC? This organization, a single commission comprising members of each of the country's major demographic subdivisions, both *represented* and *embodied* the broader cooperation that was emerging among the people of South Africa. In its nonviolence, in its willingness to grant amnesty to offenders, and in its efforts to bring victims back into the fold of political order, it demonstrated that the united country was indeed full of power in the fundamentally Arendtian sense. The lack of violence in its tools and actions demonstrated the security and stability of the power that was being established, which had an ever-decreasing need to use coercion to maintain itself. This is not to deny, of course, that there was not still much violence in South African society and even in aspects of the TRC's work; for example, perpetrators who were not granted amnesty could still be arrested and prosecuted. But facts such as these should remind us that, as Arendt herself emphasized, the distinctions between power, violence and other concepts that she laid out "hardly ever correspond to watertight compartments in the real world," but are instead penetrating analytical tools that allow us to better understand the complexities and tensions of political phenomena around us.²⁸ Arendt's recognition of the reality of the infusion of violence into many areas of political life thus provides support for the claim that the TRC embodied her understanding of power — power, yes, in all its complexity, in all its imperfection, but also in its promise of a nonviolent alternative to the coercion and injustice that darkens human society. The Commission, at its core, thus showed the world the truth of the Arendtian claim that power is fundamentally cooperative, that it arises from mutual respect and collective action, and that it can survive and flourish even in the wake of great violence.

The TRC as Founding Act: Arendt on Authority

29 *Ibid.*, 45.

Among the other political terms that Arendt includes in the careful analytic of *On Violence* is authority. Arendt notes that it is "the most elusive of these phenomena," describing it as requiring "neither coercion nor persuasion" to effect obedience, being characterized by immediate recognition.²⁹ Although she points out the ways in which power and authority are often confused, she declines to provide a systematic account of the nature or origins of the latter in this short work. But in her earlier, longer book *On Revolution*, she lays out a much fuller account of how authority can come about, and it is to this work that this paper now turns in order to prepare the way for an examination of the TRC in terms of this equally important concept.

- 30 Arendt, *On Revolution* (New York: Penguin, 1965), 152ff.
- 31 *The Human Condition*, 8.
- 32 Cf. the conclusion of Arendt's *Origins of Totalitarianism* (New York: Harcourt, Brace & World, 1966).
- 33 *On Revolution*, 191.
- 34 *Ibid.*, 193.
- 35 *No Future Without Forgiveness*, 260, 273, emphasis added.

In *On Revolution*, Arendt examines the question of how to establish authority through the problems associated with founding a republic, as exemplified by the competing models of the French and American Revolutions. With full cognizance of the way that most historical claims to authority before these revolutions were grounded in appeal to a divine absolute, Arendt is motivated by a desire to give an account of authority that can preserve it as both fully human and (at least potentially) fully democratic. In earlier political contexts, the appeal to the absolute could interrupt the “vicious circles” of the need to justify human laws on some higher grounding and the need also to legitimate the foundation of a new political body itself.³⁰ But, even in societies such as the United States or South Africa, where religious language and religious beliefs are always at play in moments of political transition, some notion of authority must emerge that can legitimate its establishment even to those who are not comforted by religious sanction, for we live today in a pluralistic, though not exactly secular, age. This problem is of course particularly potent for situations of democratic founding, in which those who have political power and are using it to build a new order nevertheless seem to lack the authority of an existing constitution to ground their actions.

Arendt’s solution to this problem is to appeal to what she calls human *natality*, that is, *birth* as a fundamental part of the “most general condition of human existence.”³¹ Though a full analysis of her concept of natality would far exceed the scope of this essay, it will suffice here to note that it entails for Arendt the capacity of making new beginnings, a capability that is inherent in the human condition and signified by and embodied in every human birth.³² But because the condition of natality gives human action the possibility of forming new beginnings, the establishment of a new constitution does not require appeal to a divine source of legitimacy for its authority. Rather, authority is contained *in the act of foundation itself*.³³ The act of foundation allows for later “augmentation,” occurring in “uninterrupted continuity” which has “inherent authority” because of its connection to that original new beginning.³⁴ Arendt’s understanding of authority ultimately rests therefore on a certain view of the meaning and nature of beginnings as phenomena that can arise through the power of collective human action.

Consider in this light Desmond Tutu’s description of the commission’s work: “[The nation had to] move on to forgiveness, because without it there was *no future* . . . We are saying here is a chance to make a *new beginning*.”³⁵ In Tutu’s understanding of the TRC, the acts of personal and political forgiveness that lay at the heart of its work were not intended merely to draw a horrific chapter of history to a conclusion — rather, they acted to create a beginning for the era that lay ahead. The Truth and Reconciliation Commission was a *founding* act in the Arendtian sense, not merely embodying power but also creating authority, for it interrupted the crystallizing force of a radical beginning with vicious circles that hinder all

- 36 1993 interim constitution, quoted in *No Future without Forgiveness*, 45.
- 37 *The Certification Process*.

attempts to legitimate both law and constitution in some abstract or transcendent way. The TRC rested fundamentally on the human capacity of natality; without the always-present promise of new beginnings provided by the fact of human birth, no founding act as dramatic as that embodied by the commission could ever have come about.

This understanding of the TRC as a founding act makes sense when one remembers that the constitutional background for its work came from the 1993 interim Constitution, which was designed to facilitate the transition by providing a “historic bridge between the past...and a future” that would look very different indeed.³⁶ This document was not intended to be a long-term foundation for society; it was replaced in 1996 (during the TRC process) by a fuller constitution that remains in effect to this day.³⁷ Instead, this interim document was designed to facilitate those acts of establishment that would be necessary for legitimate authority in the future; it was self-consciously transitional, paving the way for new beginnings. As the quoted selection—which comes from a section of the interim constitution entitled “National Unity and Reconciliation”—has made clear, the work that would be taken up by the TRC was understood to be absolutely essential to the formation of these fresh foundations, lying at the conceptual and legal core of the process that would bring the newly democratic nation into existence.

Conclusion

- 38 Arendt, *The Origins of Totalitarianism*, 478–9.

As we have seen, the Truth and Reconciliation Commission embodied the ideas of Hannah Arendt on the nature of power and the question of authority. Whatever its flaws, the proud legacy of the TRC in the world today attests to the unprecedented success of its work; in the years that have followed, it has become a model for similar efforts in nations around the world, demonstrating that alternatives to large-scale retribution and to further institutionalization of violence are not only possible in theory but can be desirable in practice. It has thus affirmed the incisiveness and the enduring relevance of Arendt’s insights, which have yielded analytical and explanatory results in examining the commission despite having been produced many years before its inception. In the end, therefore, the TRC affirms for all in the world the promise that human plurality and diversity can be sources of strength rather than weakness, that power can exist without violence, and that authority can be rightly founded even after the darkest of times; in short, the commission reminds us always that, no matter how dire the circumstances, “every end in history necessarily contains a new beginning,” for “beginning is the supreme capacity of man.”³⁸

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Citizenship Adjudication in the European Union

Zoë Egelman

- 1 Preamble, Treaty on European Union (92/C 191/01) and In the TEU, the six articles include Articles 8 through 8(e). They were renumbered in the Treaty of Amsterdam, signed in 1997, as Articles 17 through 22. For the purposes of this paper, which examines cases referred to the European Court of Justice from before and after Amsterdam, the numbering will consistently follow that of Amsterdam.
- 2 Art 17 EC.
- 3 Art 18 EC. Articles 19 through 22 EC confer additional rights on EU citizens, including rights to participation in European elections and rights to diplomatic representation by the consular authorities of any Member State.
- 4 Jo Shaw, "The Interpretation of European Union Citizenship," *Modern Law Review* 61.3 (1998): 293–317. JSTOR. Web. Accessed 12 Apr. 2012. <www.jstor.org/stable/1097086>, p. 297.

In 1993, the Treaty on European Union (TEU), otherwise known as the Maastricht Treaty, entered into force and transformed the fundamental nature of what would henceforth be called the European Union (EU). Most visibly, the Maastricht Treaty was responsible for the creation of the Euro. In addition to major economic and structural developments, however, the Treaty explicitly heralded a change in the socio-political nature of the EU: for the first time in writing, the notion of European citizenship was born. The Member States "resolved to establish a citizenship common to nationals of their countries;" and they gave form to this aspiration in a newly created Part II of the Treaty, "Citizenship of the Union," which comprises six articles on the nature, rights, and duties of citizenship.¹

The first introduces a concept of European citizenship common to all nationals of the Member States: "Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union."² The subsequent provisions confer further specific rights on EU citizens. This paper will focus on the first of these provisions, which grants citizens of the EU the right to free movement and residence. "Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations laid down in this Treaty and by the measures adopted to give it effect."³ At first glance, the declaration of citizenship seems a highly symbolic gesture, since it was unclear what legal and authoritative force these provisions could carry.⁴ Over time, however, the European Court of Justice (ECJ) was able to furnish the concept of citizenship with more substantial content, pushing the case law in a direction that the Member States could not have predicted.

This paper will show how, since the beginning of citizenship adjudication, the ECJ has shaped the creation of the supranational citizen and, through its case law, expanded Community rights beyond the frontiers of the European national. With the beginning of citizenship case law in *Martinez Sala* (1997), the European national was no longer solely defined by its economic status but took on new legal meaning as a citizen of social and political dimensions. When the Court rendered *Article 18 EC* directly effective in *Baumbast and R* (2002), it expanded the power of Community law to protect the rights of both citizens and non-nationals, opening up the door to the Court's role as an adjudicator of human rights. By 2004, the Court's ruling in *Chen and Zhu* revealed that Community citizenship had subordinated the authority of national citizenship.

- 5 Article 39(2) EC.
- 6 Robin C. A. White, "Free Movement, Equal Treatment, and Citizenship of the Union," *International & Comparative Law Quarterly* 54.04 (2005): 885–905. JSTOR. Web. Accessed 15 Apr. 2012. <www.jstor.org/stable/3663402>, p. 902.
- 7 Article 12 EC.

To understand how these cases were able to give meaning to the idea of a European citizen, it is important to explain the pre-Maastricht legal status of citizens of European Member States in the European Community. In formalizing the concept of the European citizen, Maastricht was a watershed moment that shifted the essence of the European Community from a primarily economic-centered entity to a European Union with social and political, as well as economic, dimensions. Before 1993, the European Community, rooted in the Treaty of Rome, was largely an economic association, with a common market serving as the unifying force among the Member States. Consistent with this purpose, the Treaty of Rome dealt with rights and duties of individuals in an economic context; the "persons" under the jurisdiction of Community law were "workers," i.e. those engaged in economic activity. The right to freedom of movement and residence—later found in Article 18—was included in Article 39 EC in the context of workers' rights. In upholding such rights, the Treaty declared that these freedoms "shall entail the abolition of any discrimination based on nationality between workers of Member States."⁵ Articles 17 and 18 thus opened the rights to freedom of movement and residence from "workers" to "every citizen of the Union." After 1993, the distinction between migrants engaging in economic activity and those European citizens not engaged in economic activity, who were "citizens" regardless of—or despite—their economic status, became one of the central questions in the development of rights for peoples moving within the EU.⁶ On one hand, Articles 17 and 18 opened the rights to freedom of movement and residence from "workers" to "every citizen of the Union." That said, the Court nevertheless took cues from the rights of workers: just as Article 39, and more specifically Article 39(2), linked the right to free movement and the right to non-discrimination, the legal construction of EU citizenship would also understand freedom of movement in relation to the principle of equal treatment with the nationals of the host Member State as conferred by Article 12 EC: "Within the scope of application of this Treaty...any discrimination on the grounds of nationality shall be prohibited."⁷ The following three cases illustrate the development of citizenship case law as the ECJ displaced its focus from the rights of individuals derived from their economic status to rights derived from their status as European citizens.

The ECJ explicitly and specifically addressed the notion of citizenship for the first time in *Martinez Sala*. Ms. Martinez Sala, a Spanish national, had applied for a child-raising allowance in Germany, where she had lived for over two decades, where she was first employed and then unemployed, and where she had received social assistance. Her application was refused, however, on the grounds that she was neither a German national nor in possession of a residence entitlement or permit. Citizenship did not enter the legal discourse of the case until it reached the ECJ. It was the ECJ, and not the referring court, that introduced Articles 17 and 18 into the dispute. In its preliminary reference, the national tribunal

- 8 Case C-85/96 *Martinez Sala* [1998] ECR I-2691, para 19 (1–4) of the judgment.
- 9 Case C-85/96 *Martinez Sala* [1998] ECR I-2691, para 59 of the judgment.
- 10 Article B, Treaty on European Union (92/C 191/01).
- 11 Case C-85/96 *Martinez Sala* [1998] ECR I-2691, para 29 of the judgment.
- 12 Case C-85/96 *Martinez Sala* [1998] ECR I-2691, para 31 of the judgment.
- 13 Case C-85/96 *Martinez Sala* [1998] ECR I-2691, para 45 of the judgment.
- 14 Case C-85/96 *Martinez Sala* [1998] ECR I-2691, paras 58 and 59 of the judgment.
- 15 Case C-85/96 *Martinez Sala* [1998] ECR I-2691, para 56 of the judgment and Case C-85/96 *Martinez Sala* [1998] ECR I-2691, para 59 of the judgment.

makes no mention of these provisions, whereas the ECJ embraced the possibility of using the concept of citizenship to place the case under its jurisdiction, by establishing the case as one of European citizenship and bringing it under articles 17 and 18, and pushing the case law in a direction that the national court had likely not anticipated.⁸ It is not until the end of the case that Articles 17 and 18 enter the judgment.⁹ The order of the Court's proceedings, and thus the manner by which the Court arrived at its treatment of citizenship provisions, is highly revelatory: the Court actively ruptures with the former paradigm of economically-derived rights to "strengthen the protection of the rights and interests of the nationals of its Member States through the introduction of a citizenship of the Union," in what appears to be loyalty to the original aims of the Maastricht Treaty.¹⁰

By the time *Martinez Sala* came to the EJC in 1997, the EU had a corpus of primary and secondary legislation that confers a body of rights on migrant workers who reside in Member States of which they are not nationals; economic engagement had always ensured European nationals rights and security, as migrant workers contribute to the economy and are less likely to be dependent on public finances of the host state. The national court asks in a preliminary reference if the appellant "has the status of worker...or of employed person," based on her employment and social assistance history, with the underlying expectation that her application for social assistance falls under the jurisdiction of Community law only if the appellant herself falls under the protection of Community law.¹¹ The Court argues that there is no single definition of "worker" in Community law, and that this definition differs among regulations and Treaty provisions. The term "worker" as it is written in the Treaty is an incomplete norm whose definition varies according to the area in which the definition is to be applied.¹² The ECJ thus decides that the referring court did not furnish enough information to enable the Court to decide whether Ms. *Martinez Sala* falls under the scope *ratione personae* of the Community law that bestows rights on workers.¹³ In light of this inconclusiveness, the Court leaves this question to proceed with its fourth and final question; as it does so, the Court, in its confusion over the definition of "worker," abandons the concept, pushing it aside to make room for the notion of "citizen." It was generally agreed that a Member State's requiring nationals of other Member States to produce a formal residence permit in order to receive a child-raising allowance constitutes discrimination based on nationality. However, since the appellant's status of worker was unclear, the Court could not immediately claim that *Sala* could derive the right to equal treatment from Article 39.¹⁴ While the German government believed the case to be a matter of German jurisdiction, the ECJ effectively used Article 17 EC to make the case a matter of Community law.¹⁵ The Court employs Article 17 to bring the appellant under scope *ratione personae* of Community law, and as such she is inherently entitled to the right of equal treatment under Article

- 16 Jo Shaw, "Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism," U. of Edinburgh School of Law Working Paper No. 2010/14. (April 7, 2010): 1–30. Web. Accessed 8 Apr. 2012. <ssrn.com/abstract=1585938 or dx.doi.org/10.2139/ssrn.1585938>, p. 2.
- 17 Case C-85/96 *Martinez Sala* [1998] ECR I-2691, para 60 of the judgment.
- 18 Agustín J Menéndez, "European Citizenship after Martínez Sala and Baumbast: Has European Law Become More Human but Less Social?" *RECON Online Working Paper Series* June (2009): 1–31. Web. Accessed 20 Apr. 2012. <www.reconproject.eu/projectweb/portalproject/RECONWorkingPapers.html>.
- 19 Case C-413/99 *Baumbast and R v Secretary of State for the Home Department*, [2002] ECR I-7091, para 76 of the judgment.
- 20 Case C-413/99 *Baumbast and R*, [2002] ECR I-7091, para 81 of the judgment.
- 21 Case C-413/99 *Baumbast and R*, [2002] ECR I-7091, para 82 of the judgment and Case C-184/99 *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, [2001] ECR I-6193.

12 EC. The Court thereby established the necessary link between Articles 12, 17, and 18 EC; this relationship would prove crucial for subsequent case law, which would be built around the idea that the legal basis of Union citizenship was primarily in its operation as an equal treatment rule.¹⁶ The reasoning of the ECJ illustrates that rights under Community law are often inter-dependent; the right to freedom of movement and residence would mean little if, once migrants settled in the host Member State, they faced discrimination.

At this point, the Court's invocation of Articles 17 and 18 EC could not have been possible without the particular circumstances of the case. It was only because Ms. Martínez Sala had been "lawfully residing" in the host Member State that she could rely on Article 18 EC.¹⁷ The Court thus skirts and leaves open the question as to whether this provision could confer rights through direct effect; that is, whether individuals could immediately invoke the provision before national and European courts. For without direct effect, it could not be assumed that non-economically active citizens could claim rights to residence deriving directly from the EU treaty. In *Martinez Sala*, because the appellant was for all purposes a "de facto" member of German society, it was easy for the Court to invoke her rights under Article 17 EC. This reasoning was the necessary stepping-stone that, once established in ECJ precedent, would later enable the Court to render Article 17 EC directly effective.

Before the implementation of the Treaty of Maastricht, this case would have fallen under the purview of the German court system. *Martinez Sala* thus illustrates that, after the codification of citizenship in TEU, Community law, not national law, came to govern the relationship between a Member State and legally resident nationals of another Member State. In its judgment, the Court appeared willing to apply a low threshold for activating the applicability of EU law and in so doing opened up greater possibilities for ECJ rulings on matters of national civil law.¹⁸

In *Baumbast and R* (2002), the ECJ finally ruled that Article 18 EC was directly effective, with the case addressing whether an EU citizen who no longer enjoys a right of residence in a host Member State from his status as a migrant worker "can, as a citizen of the EU, enjoy a right of residence by direct application of Article 18(1) EC."¹⁹ Though these rights before Maastricht could be enjoyed only "on the condition that the person concerned was carrying on an economic activity," since 1993, the Court argued, "Union citizenship has been introduced into the EC Treaty and Article 18(1) EC has conferred a right, for every citizen, to move and reside freely."²⁰ The Court definitively rejects the economic status of individuals as a/the determinant of their rights in the Community. By reiterating that European citizenship is the "fundamental status" of European nationals, the Court extends the breadth of its jurisprudence to protect the rights of all nationals of Member States.²¹ It thereby redraws the economic and political boundaries of Europe, aban-

- 22 Menendez, p. 16.
- 23 Case C-413/99 *Baumbast and R*, [2002] ECR I-7091, para 84 of the judgment.
- 24 Case C-413/99 *Baumbast and R*, [2002] ECR I-7091, para 86 of the judgment.
- 25 Case C-413/99 *Baumbast and R*, [2002] ECR I-7091, paras 86 and 91 of the judgment.
- 26 Case C-413/99 *Baumbast and R*, [2002] ECR I-7091, para 90 of the judgment and Francis G Jacobs, "Citizenship of the European Union? A Legal Analysis." *European Law Journal* 13,5 (2007): 591–610. *Wiley Online Library*. Web. 12 Apr. 2012. <onlinelibrary.wiley.com/doi/10.1111/j.1468-0386.2007.00385.x/full>, p. 596.
- 27 Case C-413/99 *Baumbast and R*, [2002] ECR I-7091, paras 93 and 92 of the judgment.
- 28 White, "Free Movement, Equal Treatment, and Citizenship of the Union," p. 891.
- 29 Menendez, "European Citizenship After *Martinez Sala* and *Baumbast*," p. 1.

doing the concept of "worker" as defining the scope of Community law for that of a "supranational citizen" whose dimensions are social and political, in addition to economic.²²

The Court must nevertheless defend its claim that Article 18 EC can be directly effective as a "clear and precise provision of the EC Treaty," the criteria for direct effect, which could have been difficult given the "limitations and conditions" acknowledged in the provision.²³ To this end, the Court draws on a previous case in its history, which established that Article 39 EC on freedom of movement of workers could be directly effective.²⁴ As for the "limitations and conditions" imposed by Member States on freedom of movement and residence, the Court declares them subject to "judicial review" based on the "principle of proportionality," meaning that national measures must be "necessary and appropriate to attain the objective pursued."²⁵ The validity of all national policies, even those enacted in exercise of exclusive national authority, is consequently dependent on compliance with the requirements of Community law deriving from the right to free movement. The Court thus places another body of national legislation under its purview, extending its ambit into the relationship between a Member State and its own inhabitants.

The "limitations and conditions" to Article 18 EC are based on the idea that the beneficiaries of the right of residence should not "become an 'unreasonable' burden on the public finances of the host Member State," lest European citizens exploit the right to freedom of movement for the purposes of "social benefit tourism."²⁶ In its ruling, the Court found that the United Kingdom's argument on the grounds that Mr. Baumbast's sickness insurance did not cover emergency treatment given in the host Member State to be a "disproportionate interference" in the exercise of his right, since Mr. Baumbast and his family have sufficient resources to avoid being a social burden.²⁷ The Court's ruling, however, left open to the question of whether the right to reside is lost at the point at which self-sufficiency comes to an end.²⁸ Thus, while the Court appears to take a large step in expanding the rights of its citizens by rendering Article 18 directly effective, it is unclear how far-reaching these rights are.

In order to expand the freedom protected by Community law beyond economically active individuals, we see that the Court uses the very arguments and case law with which it originally expanded rights of the economically engaged. It is this very logical continuity in the evolution of the ECJ's jurisprudence on freedom of movement that reveals and unleashes the "emancipatory potential of European law."²⁹ In the case, the Court applies a low threshold for triggering the applicability of EU law to individuals who are not citizens of the EU but only indirectly derive EU rights through a network of interdependent relationships. The Court first rules that a child of a European citizen who has moved to a Member State during the parent's exercise of rights of residence as a migrant worker has the right to reside there in order to continue general

- 30 Case C-413/99 *Baumbast and R*, [2002] ECR I-7091, para 63 of the judgment.
- 31 Case C-413/99 *Baumbast and R*, [2002] ECR I-7091, para 75 of the judgment.
- 32 Case C-413/99 *Baumbast and R*, [2002] ECR I-7091, para 50 of the judgment.
- 33 Case C-200/02 *Zhu and Chen v Secretary of State for the Home Department*, [2004] ECR I-9925, para 15(7) of the judgment.
- 34 Case C-200/02 *Zhu and Chen*, [2004] ECR I-9925, para 27 of the judgment.

education courses; this right is conditional neither on the child's citizenship (whether or not he/she is a European citizen), nor on the parents' status (whether the parents have divorced, or whether only one parent is an EU citizen, or whether the parents have ceased to be migrant workers in the host Member State.³⁰ The Court's ruling has also become the authority for the proposition that a non-national parent of a child residing legally in the EU, even if divorced from an EU citizen who has or once had the status of worker, has a right of residence under the status as the child's "primary carer."³¹ These rulings derive from a socially concerned conviction that, in order to protect the freedom of movement for workers, the law must a priori ensure that the best possible conditions are available for the integration of the Community worker's family in the society of the host Member State. The Court proclaims that such freedoms must be guaranteed "in compliance with the principles of liberty and dignity."³² The ECJ seems to preach a particularly humanitarian role for itself. It interprets the law as generously as possible to grant children rights to continue their education, and thus the rights of both parents to remain with them. Through an indirect chain of collateral rights, the Court thus extends the categories of protected persons beyond not only the traditional groups of economically active persons, but also beyond the realm of the European citizen. As the Court adjudicates on the welfare of third-country nationals residing in its territory, the Court goes beyond the realm of European rights into that of human rights, such as the rights of a child and the right to family life.

In fact, human rights law explicitly entered the Court's jurisprudence two years later, in the case of *Zhu and Chen* (2004). Mr. and Mrs. Chen were Chinese nationals who arranged matters such that their daughter was born in Belfast and would thus acquire Irish nationality. The Court faced the question as to whether the child's status as a citizen of the EU entitled her to reside in the UK under Community law and whether her mother, a third-country national, could also reside there under the status of "primary carer" of her child. The referring court essentially asked the ECJ to rule on matters of human rights when it inquired in its preliminary reference whether the appellants could rely on Articles 8 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).³³ Though the ECJ is able to rule on the case without reading the potentially applicable provisions of the ECHR, nevertheless the Court, in its role as a protector of citizens' rights, rides a fine line in its adjudication over what are specifically European freedoms and what are more generally fundamental human freedoms.

The Court in *Chen* also further undermined the requirement of economic activity for the exercise of free movement and resident rights, upholding the right of movement and residence of a child who is not of age to be either economically active or pursuing general education because the child would not become "a burden on the social assistance system of the host Member State".³⁴ Finally,

- 35 Case C-200/02 *Zhu and Chen*, [2004] ECR I-9925, para 35 of the judgment.
- 36 Case C-200/02 *Zhu and Chen*, [2004] ECR I-9925, para 34 of the judgment.
- 37 Case C-200/02 *Zhu and Chen*, [2004] ECR I-9925, para 39 of the judgment.
- 38 Case C-200/02 *Zhu and Chen*, [2004] ECR I-9925, para 25 of the judgment

the Court went even further than it had in *Baumbast and R* by granting non-nationals rights indirectly derived from dependent relationships. Though secondary Community legislation held that the mother could not derive a right of residence from her child's citizenship since the former is not the "dependent" of the latter, the Court reinterpreted and liberalized the meaning of "dependency" as a two-way, reversible phenomenon: if the child is to be able to enjoy her own right of residence, then she deserves to be accompanied by her primary carer.

In its judgment, the Court held that a maneuver that was designed to create a right of residence for a baby and her Chinese mother in the UK did not preclude the recognition of that right.³⁵ Mrs. Chen's "move to Northern Ireland with the aim of having her child acquire the nationality of another Member State," the government of the UK argued, could be interpreted as an attempt to "exploit the provisions of Community law."³⁶ The UK maintained that Mrs. Chen was "illegally" circumventing national legislation by arranging the birth of her child so as to take advantage of one Member State's rules governing acquisition of nationality. The problem at the heart of this debate lies in the divergent rules of nationality and citizenship among the Member States of the EU. That each Member State has its own rules of citizenship, with differing degrees of openness and exclusivity, becomes apparent and problematic with the formalization of European-wide citizenship and the direct effect of Article 18 EC. The ECJ declares that each Member State has its own authority to lay down the rules for the acquisition and loss of nationality, but any attempt by one Member State to restrict the effects of the grant of nationality by another Member State would not be permissible, since this would amount as a restriction of the "fundamental freedoms provided for in the Treaty."³⁷ Earlier in the case, the Court had reaffirmed its pronouncement in *Baumbast and R* that Union citizenship "is destined to be the fundamental status of nationals in the Member States."³⁸ By quashing the objection that differing national citizenship rules could open the door to a more fluid movement of persons among the Member States, the Court subordinates national citizenship to the overarching Community citizenship. However, it appears that, until the Member States agree to standardize their rules for the acquisition of nationality, third-party nationals might be able to enter the Community by indirect routes in the Member States with the most lenient citizenship policies.

From 1997 to 2004, the evolution of the ECJ case law on citizenship, as illustrated in the analysis of these three cases, illustrates the evolution of the European Union from an economically constituted entity to one of socio-political and economic dimensions. The scope of those who could enjoy Community rights expanded from the "worker" to the supranational citizen. With the enlargement of the scope of application of Community law came the subordination of national citizenship provisions, whose validity would henceforth be subject to compliance with Community law,

as well as the entry of human rights considerations into the ECJ's purview. The bottom line is that the number of people, both European citizens and third-country nationals, who now derive rights under Community law has undoubtedly grown, and this growth and increased mobility raise questions with important ramifications. First, if the ECJ opens the freedom of movement and residence beyond the requirements of self-sufficiency, the erosion of national borders will inevitably challenge the nation-state model of social protection by increasing the availability of social assistance and public finances and raising the allocation of national resources. Second, it is unclear how far the ECJ will go in considering matters of human rights in its case law. Finally, it remains to be seen who benefits from the expansion of Community rights after *Martinez Sala*, *Baumbast and R*, and *Zhu and Chen*; in other words, is there a socio-economic profile of the new right-holders as a result of these cases? What is clear, however, is that what might have appeared to be symbolic rhetoric has in fact had social, political, and economic consequences for Europe.

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- Case C-413/99 *Baumbast and R v Secretary of State for the Home Department*, [2002] ECR I-7091.
- Case C-85/96 *Maria Martinez Sala v Freistaat Bayern*, [1998] ECR I-2691.
- Case C-184/99 *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, [2001] ECR I-6193.
- Case C-200/02 *Zhu and Chen v Secretary of State for the Home Department*, [2004] ECR I-9925.
- Jacobs, Francis G. "Citizenship of the European Union? A Legal Analysis." *European Law Journal* 13.5 (2007): 591-610. Wiley Online Library. Web. 12 Apr. 2012. <onlinelibrary.wiley.com/doi/10.1111/j.1468-0386.2007.00385.x/full>.
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- Treaty on European Union (EU), 7 February 1992, 1992 O.J. (C 19) 1, 31 I.L.M. 253.
- White, Robin C. A. "Free Movement, Equal Treatment, and Citizenship of the Union." *International & Comparative Law Quarterly* 54.04 (2005): 885-905. JSTOR. Web. 15 Apr. 2012. <www.jstor.org/stable/3663402>.

The China Skeptic's Talking Points Memo

Kyle Hutzler

- 1 Naughton, Barry. *The Chinese Economy: Transitions and Growth*. Cambridge: MIT Press, 2007.
- 2 CIA, "CIA — The World Factbook." <www.cia.gov/library/publications/the-world-factbook/>.
- 3 Jiangtao, Shi. "Editor blasts legacy of outgoing leaders." *South China Morning Post*. 4 Sep 2012.

Little more than three decades since the opening of China's economy under the leadership of Deng Xiaoping, the country has emerged as the greatest force reshaping the global economy and, with it, the global balance of power.¹ On the basis of purchasing power parity, Chinese gross domestic product (GDP) now exceeds \$11 trillion, making it the world's second largest national economy, just behind the United States, which it is expected to surpass by all estimates within the next two decades.² On a per capita basis, however, China remains very much a developing country, ranking 120th in the world. If China's development to date and future prospects are unrivaled in scale, so are the multifaceted challenges that threaten further progress. Chief among these challenges are China's aging and increasingly unhealthy population, a polluted environment already pushing the limits of sustainability, and multiple economic and institutional obstacles.

As China prepares to undergo its one-per-decade leadership transition in November, the chorus of observers in and outside of the country calling for reform again crescendos to its most hopeful peak, this time tempered by the dissonance of disappointment from the past ten years. China's breakneck growth over the past decade belies its tepid political stasis, condemned by some even within the Communist Party itself. A recent essay attributed to a leading editor of a newspaper run by the Party's central school is stunning in its forcefulness, writing that country's current leaders of having "created more problems than achievements" and suffer from a "crisis over the legitimacy of its rule."³ China's next generation of leaders do not have the luxury of governing on auto-pilot: they must undertake credible efforts to address the mounting distortions that pervade Chinese society or risk condemning China to the middle income trap with uncertain implications for political stability.

Demographic Challenges

Begin first with China's population. The skeptic's typical refrain is that China will "grow old before it grows rich." Within the past five years, the proportion of China's working population has reached a peak and will begin declining rapidly as the share of the elderly increases—a consequence of China's infamous "one-child" policy. There have been occasional reports of a potential reversal of this policy—already two single-children who marry may have two children of their own—but no reversal will challenge the demographic tidal wave already set in motion. The end of the demo-

- 4 Hong, Shen. "The Mystery of China's Labor Shortage." *ChinaRealTime Report*, February 22, 2010.
- 5 Back, Aaron. "China Statistics Bureau: Urban Wages Rose by Double Digits in 2011." *The Wall Street Journal*, May 29, 2012.
- 6 "China's Labor Tests Its Muscle." *The New York Times*, August 16, 2010.
- 7 More than a third of large manufacturers are considering reshoring from China to the US. Boston Consulting Group. 30 April 2012; Return of manufacturing from China, rising exports could create up to 3 million jobs in the US. Boston Consulting Group. 22 March 2012; Made in the USA — and China. Harold L. Sirkin. *Bloomberg Businessweek*. August 2011.
- 8 Huang, Yanzhong. "The Sick Man of Asia." *Foreign Affairs*. November/December (2011).

graphic dividend means that China's great comparative advantage — cheap labor — is disappearing at the same time it is racing to make the leap to the next stage in economic development.

As China progresses from simple to more advanced manufacturing, there is a demand for more skilled workers. A stream of media reports has highlighted labor shortages in cities throughout China, which is already putting upward pressure on wages.⁴ Wages of urban workers in private enterprises surged 18% in 2011 to an average level of ¥24,500 (\$3,900) per year, an acceleration from 2010 when they rose 14.1%.⁵ Reports of protests by workers indicate, too, that expectations of pay and working conditions are much higher amongst the second generation of workers under China's opening than amongst the first.⁶ Changing conditions in the Chinese interior, long the source of the country's laborers, are also complicating matters. As UC San Diego professor Barry Naughton has observed, because there is little landlessness in China, factors "pushing" migrants into the city are weak, despite the pull of urban wages. As China seeks to develop cities in its interior, this too absorbs labor that otherwise would have gone to the coasts. The result is that the next stage of higher value added manufacturing in the coasts might be undercut by first-stage development in the interior.

But it is not given that China's transition to higher-value added sources of growth will be inherently successful. Higher wages are already prompting some manufacturers to look elsewhere in Asia. As labor costs make China less competitive relative to Asian peers on the low-end, greater US competitiveness means China will face pressure on both ends of the market. According to a survey of US manufacturing executives at companies with sales greater than \$1 billion by Boston Consulting Group, more than one third are planning or considering bringing production back to the United States from China. The leading factors driving their decisions are labor costs — which have remained stagnant in the US for nearly a generation, boosting relative competitiveness — product quality, and ease of doing business. In a separate report, BCG predicts that up to 30 percent of current US imports from China could move back to the US.⁷ But this is not necessarily bothersome to China's leadership, which is seeking to promote more advanced manufacturing and has a still fast growing domestic market to absorb export losses.

With the old comes the sick.⁸ Despite being a middle-income country, China is increasingly suffering from costly first world diseases. One example: China is estimated to have an incidence of diabetes of nearly ten percent; the United States, five times wealthier, has a diabetes incidence of eleven percent. In China, the total number of smokers is equivalent to the entire US population. All told, a 2011 Chinese report estimates that about 13% of China's GDP activity is lost to disease.

If the proportions are worrisome, the sheer scale of the sick will be like nothing the world has ever seen. They will challenge an underdeveloped healthcare system toward which the government

has only begun to seriously direct resources. In 2000, the World Health Organization ranked China, then the world's sixth-largest economy, 144th out of 191 countries in terms of the quality of its health-care system.

Following the dismantling of the "iron rice bowl" of benefits Chinese citizens enjoyed as part of their employment in state-owned enterprises, individual Chinese were forced to burden a significantly higher proportion of health care costs — one reason behind the country's high savings rate. Government spending as a share of health expenditures fell from 39% in 1986 to 16% in 2002. However, following the embarrassment the government suffered in its handling of the SARS crisis, the state has once again started to invest substantial amounts in its healthcare system. It has launched new rural programs and in January 2009, announced plans to invest what would become \$173 billion by 2011. As a result, the government's share of health spending rebounded to 24% in 2010.

The Chinese government's ability to manage its health challenges will be the critical factor in determining whether or not the millions lifted out of poverty will suffer a reversal in their fortunes as they age. As China's decades-long comparative advantage in abundantly cheap labor is diminishing, whether or not the engine of the Chinese economy is sufficiently capable of shifting gears to the next stage of economic growth remains subject to debate.

Environmental Challenges⁹

- 9 Economy, Elizabeth C. "The great leap backward?" *Foreign Affairs*. September/October (2007).
- 10 Economy, Elizabeth C. "China's growing water crisis." *World Politics Review*, 9 August 2011.
- 11 Naughton. 2007.
- 12 Huang. 2011.
- 13 China Digest. "Birth Defects Rise." *South China Morning Post*, 14 September 2012.

Considering the Chinese environment presents the country at its most contradictory — the leading producer of solar panels and wind turbines is also the world's largest emitter of carbon dioxide.

China's population has long confronted the challenges of unfor-giving natural resources: the country's per capita water reserves are only slightly more than one-quarter of the world average.¹⁰ Its hilly terrain allow about one-tenth of a hectare in arable land per capita, or one sixth the levels present in the United States.¹¹ Already scarce, China's land and water is increasingly, and, perhaps irreversibly, polluted, presenting a potentially significant break on economic development.

Despite reducing the amount of carbon equivalents emitted per unit of GDP, or the energy intensity, by half from 1993 to 2009, China is still twice as inefficient as Japan and a third more inefficient than Korea and the US. With a heavy dependence on coal, sixteen of the world's twenty most polluted cities are in China. An estimated 750,000 people die prematurely every year due to air pollution in large cities. According to Yanzhong Huang, a senior fellow at the Council on Foreign Relations, "environmental pollution is also believed to have significantly increased the infertility rate for couples from three percent in 1990 to 12.5–15% today."¹² According to *China Daily*, birth defects have risen by 70% between 1996 and 2010 and are now the second-leading cause of death among infants in China.¹³

- 14 Economy, 2007.
- 15 China's 12th five-year plan: energy. KPMG. April 2011; Use of green power may outstrip 5-year plan. Zhou Yan. *China Daily*. 26 December 2011; China on track to cut energy intensity by 20 percent. Deborah Zabarenko. Reuters. 1 June 2011.

According to Elizabeth Economy, also a senior fellow at the Council on Foreign Relations, up to 10% of China's farmland is currently polluted. Water is far worse: two-thirds of China's cities have less water than they need. Two-thirds of the Yellow River, which supports 150 million people and 15 percent of China's agricultural land, is considered unsafe for human use.

Despite China's commitment to more efficient growth, it is a feeble match against projected demands of an ever-wealthier population for increased consumption—from meat to electricity to gasoline for cars. And these human pressures are nothing quite like the threat posed by climate change: China's government, which has been reluctant in international fora to support a comprehensive global agreement, has forecast it is at risk of a 37% decline in the country's agricultural output due to climate change in the second half of the century. Shanghai is at significant risk from rising sea levels.

The estimated cost of the environmental damage totals 8–12% of Chinese GDP annually.¹⁴ Without dramatic reform and serious lifestyle compromises, China is rapidly stealing from its future for illusory gains today. The Chinese government committed to generating 15% of its energy from renewable resources by 2020. It has promised to reduce its energy intensity by an additional 16% by 2015 after reportedly being on track to achieve a 20% decline by 2010.¹⁵ Despite these ambitious goals, it remains unanswered whether China's leaders—particularly on the local level—are willing to restrain short-term growth in the interest of long-term environmental sustainability.

Economic Challenges

- 16 World Bank and Development Research Center of the State Council. *China 2030: Building a modern, harmonious, and creative high-income society*. The PRC (2012).
- 17 Some analysts believe that underestimation of consumption may artificially inflate investment levels by as much as ten percentage points. Capital controversy. *The Economist*. 14 April 2012; Cox, Simon. "Prudence without a purpose: A report on China's economy" *The Economist*. 26 May 2012.

China is on the path of a critical economic transition that will determine whether it will successfully enter the ranks of developed nations or fall victim to the middle-income trap in which the growth cycle stalls.¹⁶ Key to this challenge is whether China can successfully create a strong environment for the next phase of growth, by educating its citizens for the knowledge economy and supporting a stable policy environment that supports efficiency and entrepreneurship. To do so would require overcoming the substantial policy-driven distortions and inefficiencies that currently undermine China's economy. The longer these distortions are left unaddressed, the more costly they become to proactively unwind.

It is easy to accept the Western misperception of exports primarily driving China's economic growth. But it is not; instead the economy is dominated by investment, which accounts for nearly half of China's GDP, enabled by the country's high savings rate or, in other words, the suppression of consumption.¹⁷ As Simon Cox summarizes, an undervalued currency inhibits imports; a weak safety net requires substantial saving in its own right; and capped interest rates and sheltered markets reward industry profits at the expense of consumers. Where exports and investment have pow-

- 18 “Mixed Bag.” *The Economist*.
21 January 2012.
- 19 Naughton. 2007.
- 20 Magnus, George. “China needs
more than a quick fix for its
property woes.” *Financial Times*.
17 October 2011.

ered China’s growth to date, its future is dependent on supporting consumption and services.

The rate of investment exceeds that of any other major economy including Japan and South Korea at their peaks, attracting many China skeptics such as hedge-fund manager Jim Chanos who points to the most notorious examples of irrational investment and writes off China as “Dubai times 1,000.” Most analyses emphasize that China is more likely misallocating rather than overinvesting more resources than its economy can handle. At an estimated capital stock per person 8% of that of the US and 17% of South Korea, China still has room to run. And relative to its economy, a capital stock of 2.5 times GDP is in line with comparable countries. This does not, however, diminish the concerns about potential misallocation of resources, which nonetheless could trip up growth.

State-owned enterprises are central to the economy’s misallocation of resources. Despite being substantially downsized and restructured in the 1990s, state-owned enterprises (SOEs) remain a significant portion of the Chinese economy — and highly inefficient ones at that. SOEs control a third of assets in the industrial and service sectors of the economy and benefit from preferential financing, land, electricity, and other input subsidies. Unirule, a Beijing think-tank, calculates that without their generous subsidies, state-owned companies between 2001 and 2009 delivered an average real return on equity of -1.47%.¹⁸ Research by several economists suggest that had private enterprise been able to channel more investment relative to the SOEs, China could have achieved the same rate of growth at nearly half the current level of investment. Continued reform of the state sector of the economy is essential to achieving efficient and sustainable growth; but their replacement with highly political involvement in nominally “private” sectors of the economy, with accompanying large subsidies, is little improvement on the distortions that lead to suboptimal investment.

In the short-term, significant risk is intertwined in the fiscal position of the local governments, the strength of the banking system, and the country’s real-estate markets. In 1994, the central government, alarmed by its declining share of tax receipts relative to GDP, implemented a sweeping reform of the country’s tax system. While the reform was very positive for the subsequent increase in efficiency, it sharply cut revenues to local governments. Over the past two decades, China has held its local governments increasingly accountable for substantial amounts of new public spending while restraining their ability to generate revenue through taxes.¹⁹ Limited in their ability to tax or issue debt to support their spending, local governments involved themselves quite heavily in their economies, by taking stakes in large numbers of joint ventures, many of them in real estate, whose value has soared throughout the country. It is estimated that local governments now have more than \$1.4 trillion in off-balance sheet financing vehicles, a substantial amount of which is believed to be seriously underperforming, due to investment in uneconomic projects.²⁰

- 21 Cox, Simon. "Bending not breaking. A report on China's economy." *The Economist*. 26 May 2012.
- 22 Rabinovitch, Simon. "China tells banks to roll over loans." *Financial Times*. 12 February 2012.
- 23 "Storing up trouble." *The Economist*. 5 May 2012.
- 24 Chan, May. "SME crisis 'could sweep China.'" *South China Morning Post*. 4 October 2011.
- 25 Anderlini, Jamil. "China municipalities to issue bonds." *Financial Times*. 20 October 2011.
- 26 US International Trade Commission. "China: intellectual property infringement, indigenous innovation policies, and frameworks for measuring the effects on the US economy." November 2010.

This poses a major threat to the Chinese banking system, a banking system that the government used as a key lever in its response to the 2008 global financial crisis by directing it to inject large amounts of debt into the economy to sustain growth. Lending surged from 122% of GDP in 2008 to 171% of GDP in 2010.²¹ As the bills come due for this debt, analysts have expressed increasing concern that the Chinese banking sector may be vulnerable to a substantial blow.

The real extent of losses are obscured by the fact that banks are simply rolling-over debt that realistically can't be repaid, delaying the inevitable. Indeed, in February, *The Financial Times* reported that the government had instructed banks to rollover their loans to local governments.²² The banks, which are already undercapitalized relative to other emerging market economies, with an equity to asset ratio of 6%, suffer impairment on 10% of assets to wipe out the banking system's profits and more than a third of its equity.²³ Nonperforming loans are currently stated at 1%, but private estimates range easily into the double digits.

While the central government has more than enough resources to absorb any blow to the financial system caused by a provincial financial hangover or banks directly, the turmoil would nonetheless be bad. Most vulnerable to a credit tightening would be small and medium-sized enterprises—which receive less generous financing than the large national champions or provincial favorites—which are reportedly increasingly dependent on non-bank financing at large interest rates.²⁴ Belatedly recognizing a key part of China's debt troubles are linked to restrictions on provinces' fiscal authority, the central government has recently tested the waters by allowing some local governments to issue debt.²⁵

If a hangover is currently being felt in China's economy, it is centered on the floor of the Shanghai Stock Exchange: since reaching its all-time high in the fall of 2007, the Shanghai composite has fallen by more than 50% and languished for more than three years.

Longer term, China's greatest risk is that its economy fails to shift to more advanced, knowledge-based industry and services that generate more value-added. To do so, it needs to reorient its education system away from its traditional emphasis on rote instruction to one that fosters critical thinking and do more to support intellectual property and entrepreneurialism. That only two Chinese universities comprise the global top 100 as ranked by the Times Higher Education survey—the highest ranked only 49th—gives some suggestion of the challenge ahead.

The government, as it has elsewhere, has responded robustly with a web of policies designed to promote "indigenous innovation."²⁶ The government has articulated a plan to increase research and development (R&D) investment to 2.5% of GDP, up from 1.3% in 2005; raise the contribution made by technological advances to economic growth above 60%; limit dependence on imported technology; and become one of the world's most-patented and cited researching nations. China has supported its effort to date through direct R&D spending and subsidies; discriminatory government

- 27 World Intellectual Property Organization. 2012.
- 28 Xinhua. 22 February 2012.
- 29 Shanker, Thom. "US report accuses China and Russia of internet spying." *New York Times*. 3 November 2011.

procurement; and support of proprietary national technology standards — with the eventual desire to make them global — that favor domestic companies. Since 1995, Chinese patent filings have surged thirty-fold to 307,293 in 2010.²⁷ China's investment in innovation continues to grow, increasing 21.9% in 2011 over 2010 and now comprises 1.8% of China's GDP.²⁸

All developing nations depend on technology transfers from more developed nations to kickstart their own growth and China has been successful in attracting research arms of major multinational corporations. But rampant infringement of intellectual property and coercive policies has shaken foreign confidence in China. Treasury Secretary Tim Geithner has gone so far as to characterize the situation as "systematic" theft. The most egregious exemplar of China's desperation to transition to an advanced economy may be found in an US intelligence estimate that accuses China of stealing American companies' intellectual property over the Internet as a matter of national policy.²⁹ Going forward, the clearest indication of whether China is succeeding in its mission to transition to a high-tech economy is likely not to be found in statistics over the amount of patents filed or engineers graduated, but whether the intensity of its industrial espionage activity diminishes — and if China itself becomes a target.

Institutional Challenges

- 30 McGregor, Richard. *The Party: The Secret World of China's Communist Rulers*. (Harper, 2010).
- 31 Barboza, David. "Entrepreneur's rival in China: the state." *New York Times*. 7 December 2011.

Yet beyond demographic, environmental, and economic challenges facing China, one must consider the institutional shortcomings of China's communist, state-driven development model. The Party's unwillingness to accept any growth that threatens its status as the country's power center, endemic corruption and weak rule of law are all significant threats to further progress.

As Richard McGregor writes in his survey of the Chinese Communist Party,³⁰ the principal dilemma China's leaders face with respect to economic development is ensuring that economic prosperity does not produce wealth-driven power centers outside of the Party control. The continued ownership and existence of party committees effectively more powerful than company Board of Directors are the current means by which the Party maintains its control of the country's largest corporations, particularly with respect to their leadership.

Its relationship with entrepreneurs is more mixed, and ultimately the bigger test of the Party's commitment to economic growth. On one hand, it has worked aggressively to cultivate the support of entrepreneurs and integrate them into the Party power structure. On the other, preferential financial and other forms of support for state companies are constant impediments to developing an innovative private sector that will drive the next phase of Chinese growth.³¹ Confronted with the choice of growth, that it cannot channel to its own enrichment, and maintaining power, the Party will choose the latter.

- 32 "Hedging their bets."
The Economist. 26 May 2012.
- 33 2012 American Business
in China White Paper.
AmChamChina. 2012.
- 34 Pak Hung Mo. "Corruption
and economic growth." *Journal
of Comparative Economics*.
2000; Podobnik, et al. "Influence
of corruption on economic
growth rate and foreign
investment." *The European
Physical Journal*. 2008.
- 35 <Cpi.transparency.org/cpi2011>.
- 36 Thornton, John L. "China's
leadership gap." November/
December 2006.

Closely related to the dominance of the Communist Party are the pervasiveness of corruption and a weak rule of law. Indeed, the central bank admitted as much in 2011 when it reported that up to 18,000 officials had fled China between 1995 and 2007 with more than 800 billion yuan in stolen assets.³² Corruption has a very tangible effect on economic growth. Three of the top ten business challenges cited by American businesses in China are directly associated with corruption and rule of law concerns.³³ Pak Hung Mo of the Hong Kong Baptist University finds that a 1% increase in corruption levels reduces growth rates by .72%, attributing heightened political instability as mostly responsible. Podobnik, et al. find that a one unit increase in a country's Corruption Perceptions Index rating (meaning an improvement as published by Transparency International) leads to a 1.7% increase in per capita growth rate.³⁴ Since 2007, China's corruption perceptions score has increased by one tenth of a point to 3.6, with 10 being least corrupt, while its ranking has fallen slightly from 72 to 75th most corrupt.³⁵

The more important story for China's future is less outright corruption but the risk that those who have already overwhelmingly benefitted from reform will actively impede any needed further reform that threatens to undermine their relative power. China's devolution to a crony capitalist state would seriously undermine its growth trajectory.

Finally, one must consider China's institutional strength, including not only its ability to regulate its economy, but all supporting aspects, including education, health care, infrastructure, the environment, and orderly systems, rules, and policies. By this measure, China's progress has been mixed, with generally high levels of literacy and ambitious further plans for its education system, a respectable life expectancy rate, and world-beating signature infrastructure projects; but as previous sections of this paper have illustrated, its management of issues such as the implications of its impending demographic revolution and the environment are less stellar. A continuing impulse to regulate will also be challenged by the country's growing size and complexity: it is easy to regulate a small economy, it is far less so to regulate a more complex one—and with much greater consequences when mistakes are made or market failures left unaddressed. Much rests on the competence of China's emerging generation of leaders, which the Communist Party has long held a monopoly on for lack of opportunities elsewhere. But as Chinese and multinational companies aggressively pursue Chinese talent, the state itself may find its talent pool and regulatory capacity challenged.³⁶

Departures

China's leaders recognize all of the major problems it faces, albeit some more publicly than others—and so do the Chinese people, who are increasingly vocal about very real injustices committed

- 37 Page, Jeremy. "Many rich Chinese consider leaving." *Wall Street Journal*. 2 November 2011.
- 38 Huang, 2011.

in the name of development. In the past three decades, average Chinese have benefited from an extraordinary opening of new possibilities. In many areas, the state government has retreated significantly into the background of daily life, though brooking no surrender in its ultimate political control. The implicit social contract underlining the Communist Party's legitimacy is the economy's growth. The Chinese leadership's aggressive stimulus efforts at any sign of economic slowdown are indicative of their own fear of the precariousness of their rule.

One cannot deny — and indeed one must applaud — the nearly half-billion persons delivered from poverty attributable to China's economic development. The risk, however, that this progress should falter — or simply fail to meet the country's heightened expectations — could result in a painful readjustment of uncertain political volatility.

What may be even more troubling to the Chinese leadership may be the results of a 2011 poll that reported more than half of China's millionaires were in the process of or considering emigrating, with the United States and Canada as their most preferred destination. When those who have most benefitted and stand to further benefit from China's progress are hedging their bets, it calls into question the very integrity of that progress.³⁷ A more morbid variation on the same theme: nearly 300,000 Chinese commit suicide each year, a rate that is among the highest globally.³⁸ In an economy growing wealthier faster than any the world has ever seen, 300,000 Chinese each year are giving the clearest possible vote of no confidence.

American businessmen, in particular, have long been guilty of the hypocrisy of decrying government intervention of any kind in America while simultaneously praising the Chinese government for its management of their economy. While there is nuance in any comparison of such scale between America and China, this hypocrisy is a contradiction that eventually must be reconciled: markets, not governments, create prosperity and China is no exception. It has succeeded where its government has let the market thrive and taken a supporting role, not because of the government. China must fully embrace this reality and let the market deliver prosperity commensurate to China's promise or suffer the consequence of stalled progress.

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China Airborne by James Fallows

Reviewed by Cameron Rotblat

With a recent glut of books from political commentators attempting to explore the modern Chinese economy, *China Airborne* by James Fallows stands out for its unique industry-specific focus. James Fallows, a clear aviation buff and a correspondent for the *Atlantic* who lived in China from 2006 to 2009, weaves together historical research, interviews, personal anecdotes and economic analysis to provide a snapshot of Chinese aviation that will undoubtedly shock those who have not recently flown into China.

The book is full to the brim with surprising anecdotes about the history of aviation in China, from the role of Chinese engineer Wong Tsu in designing Boeing's innovative Model C Seaplane, the first Boeing plane to be purchased by the U.S. military, to the importance of Boeing 707s in the early stages of U.S.-China economic relations. Fallows powerfully illustrates the dramatic changes in the Chinese aviation industry in the past three decades, starting from a time in which Chinese citizens would need official government approval before purchasing an airline ticket. In contrast, presently, Air China, China Southern, and China Eastern are ranked first, third, and fourth worldwide in airline market capitalization, and Beijing Capital, Hong Kong and Shanghai Pudong are all quickly rising to the top of the rankings in annual passenger and cargo traffic. In particular, *China Airborne* details the careful negotiations between Western companies and the Chinese bureaucracy that have succeeded in slowly liberalizing the People's Liberation Army-issued labyrinth regulation on airspace usage.

Yet rather than a history of the Chinese aviation, *China Airborne* is actually an effort by Fallows to make sense of China's current economic challenges through the lens of this particular industry. Emphasizing the massive increase in funding for aerospace research and

air travel infrastructure in China's Twelfth Five Year Plan (2011 to 2016), Fallows argues that China's efforts to develop domestic air travel and aerospace production represent a true test case of China's development. He contends that, since aviation uniquely requires both "hard skills," such as those required in manufacturing and infrastructure construction, and "soft skills," such as smooth coordination between civil, military, and commercial organization, "if China can succeed fully in aerospace, then in principle there is very little it cannot do."

Fallows does an admirable job of distilling the current discordant state of the Chinese economy into engaging prose. His description of China's addiction to infrastructure investment seems particularly prescient given the recent economic reports coming from Beijing. Moreover, the book's discussion of China's challenges in transforming from a producer of low-end parts to a true manufacturing power is surprisingly nuanced, with apt comparisons to economic evolutions in other nations. He offers a set of fascinating comparisons to American economic history, noting the United States' own reputation in the 19th century as a copycat of European technology and innovation and the United States' own struggles with outsized trade surpluses in the 1920s.

Yet, such historical explorations and international comparisons repeatedly make *China Airborne's* exclusive focus on aviation seem unfortunately narrow. In particular, Fallows fails to explore the complex relationship between aviation and high-speed rail in China. Will innovations in one transportation method undermine progress and investment in the other? Do China's leaders consider air and train travel competitive or complementary for domestic travel? Will travel in China become increasingly bifurcated by economic class? The book seems bound to inspire such questions in many readers, but

does not fully discuss any of them. More fundamentally, Fallows fails to explain why he believes aviation rather than high-speed rail offers a better lens into the modern Chinese economy, though both have been the subject of major Chinese investment.

While aviation undoubtedly provides a fascinating perspective from which to investigate modern China, Fallows' oversized focus on private jets and corporate travel significantly weakens his argument. Much of the book is spent discussing the purchase of Cirrus, an innovative Minnesota-based producer of light private aircraft by the Aviation Industry Corporation of China, a Chinese state-owned enterprise. While the purchase clearly sent shockwaves across the private aircraft industry, its relevance to commercial aviation seems small. Similarly, Fallows chronicles the obstacles faced by Western private aircraft salesmen in China in entertaining fashion, but without seriously investigating how the sales must look to the average Chinese citizens. The real question, which Fallows fails to grasp, is not whether China can build planes to compete with Cessna, but whether the average citizen will see those planes as a point of national pride or more evidence of a culture of inequality and corruption. Quite simply, to talk of aviation as a test case of economic development in a country where over 100 million people still live under \$1 a day, without even a cursory consideration of general Chinese public perceptions of aviation investment, is unsatisfactory.

While Fallows' thesis is an overreach and his consideration of the Chinese aviation industry is strangely skewed toward private aviation, the book is still highly engaging and offers a fascinating accompaniment to the developing literature on the history of the Jet Age. Overall, despite a chronic lack of support for its central argument, *China Airborne* is a fun read, with a mix of anecdotes and substance that seems perfect for thought-provoking in-flight reading.

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