

TOWSON UNIVERSITY
JOURNAL OF
INTERNATIONAL
AFFAIRS

The logo consists of a stylized quill pen with a yellow and orange feather, positioned as if writing on a small globe of the Earth. The globe is rendered in shades of grey and black, showing the continents. The quill is positioned to the right of the globe, with its tip touching the top of the globe.

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CALL FOR PAPERS

The Towson Journal of International Affairs is accepting submissions for publication. The submission criteria is as follows:

- The journal seeks to publish original arguments that show extensive, high-level research.
- The primary focus and argument of a submitted manuscript should lie in the field of international relations. Papers focusing on domestic politics will not be considered for publication, unless the topic is the domestic politics that surround a given country's foreign policy.
- Student papers can range from 3,000 to 7,000 words (roughly 10-25 pages), with the ideal length falling between 5,000 and 6,000 words.
- Submissions must use footnotes in accordance with the Chicago Manual of Style.
- Authors of accepted papers agree to allow the editorial board to engage in editing of the manuscript for style, although substantive changes will not be made. Authors will be given the right of final review of their manuscript, and they should expect to be in regular correspondence with the journal as their manuscript proceeds through the each stage on its way to final publication.
- Paper Format: All submissions must be double spaced, 12 point font in Times New Roman. Pages should be numbered in the bottom right corner, have 1 inch margins, with left side alignment, and the paper should have a title page. The authors' identifying information should be restricted to the cover page.
- Authors should prepare an abstract of their work of no more than 200 words.

Papers will be evaluated using both substantive and stylistic criteria. Too many problems with the written presentation of a work may disqualify it even if the argument or subject is compelling.

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**TOWSON UNIVERSITY
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DEDICATION

Dear Readers,

As you will undoubtedly notice, this is a special issue of our journal. It marks our 50th year in publication, a measure of longevity that both surprises and attests to the durability of our mission to publish scholarly commentary on international affairs that welcomes all informed perspectives, whether of senior scholars, perceptive undergraduate students, or anyone in between. Indeed, you will find in this issue examples of research from each kind of scholar. As you will also observe, this volume is dedicated to Dr. Eric A. Belgrad, a co-founder of this journal and the architect and guiding spirit of the Political Science Department at Towson University. Second only to the department itself in Eric's professional legacy, this journal embodies the vision, values, and efforts of a scholar and teacher astute and brave enough to recognize that thoughtful and engaged students can offer insight and analysis that deserve to be read alongside that of their teachers.

Neither a compendium of the best papers that the students attending a given university happen to have written in a given year, as with most publications that feature student writing, nor a traditional journal demanding professional credentials of its authors, the *Towson University Journal of International Affairs* is a hybrid, a peer-reviewed publication that critically evaluates submissions from all authors equally. It is highly unusual in this regard, and it could only have been created by an educator—or pair of educators; Peter P.T. Merani co-founded the journal with Eric—who respected their students enough to recognize the originality and discernment in their ideas. (This is not to say that most submissions are published. To the contrary, most undergo multiple revisions, if they are accepted at all.) When I joined the Towson faculty in 2006, the journal had long been a venerated institution within the Political Science department. Eric let me know within a couple of years of my arrival that he expected me to assume his position as its faculty advisor—but not until I earned tenure, because he wanted me to bring a level of dedication to his special project that would be misplaced for one needing to publish so as not to perish. Right on schedule, he passed the privilege of continuing his work to me shortly after I reached that milestone. As it turns out, this became a transition not only of the journal's leadership but also of its format, as the journal published its last hard-copy volume under Eric's stewardship and its first online issue under mine.

The unique challenges entailed in constructing an online ecosystem to accompany an online publication at first precluded much in-depth collaboration between Eric and I,

although he was always available for guidance when I needed it. But he and I had discussed this issue, this 50th anniversary celebration, as the occasion when we would really work closely together on the journal. He looked forward to digging into the journal's archives and revisiting its history. I, in turn, eagerly anticipated the opportunity to sit at the master's knee and glean the kinds of insights that come only with long experience. That was supposed to happen during the 2015-2016 academic year, and he bequeathed to me the bound volumes of the journal's back issues the summer before to help me prepare for this work. Tragically, this deep collaboration never happened. In September 2015, Eric passed away just as the school year began. On that day, our department lost its anchor: a celebrated teacher, the person who unmistakably made our department what it is today, a dear friend of the department's senior members, and a role model for its newer faculty. This special 50th anniversary issue thus partakes a certain bittersweetness, with the joyful sadness that comes of reflecting on Eric's life intertwining with our review of some notable articles taken from the journal that was always among his proudest accomplishments.

Scholarship, stereotypically, aspires to impartiality, generalizability, and sterile utility. Its value, however, inheres in its sticky adherence to lived relevance. We still read Plato, not because it's fun to be erudite about the writings of long dead white guys, but because his ideas help us to navigate the inevitable challenges confronting us as we seek to create and sustain a just political order. Universities, whence scholarship originates, exist not to cordon off their members from the wider world, but to deepen their preparation for full engagement with that world. In its own way, the *Towson University Journal of International Affairs* and Eric Belgrad synonymously came to embody the university's highest ideals. Dedicated to the dissemination of high-level scholarship but reflecting the solicitude of a to-the-core teacher, Eric created a journal that imbricated the department that he also created—attentive to current affairs, but concerned above all with their effects on the real people who comprise it. It is almost impossible to think about the journal separately from Eric, and because he created the journal in part as a vehicle for training advanced undergraduates in the ways of scholarly research and publication, the journal is equally coterminous with Towson's Political Science Department. According to Eric's vision, the journal and the students who create and sometimes contribute to it thus lie at the nexus where scholarship and democratic citizenship meet.

This issue is organized around its dual mandate of celebrating 50 years of this journal alongside the man who gave 50 years of his life to the institution included in its title. Part One presents three reflections from colleagues who knew Eric best. Nitza Nachmias co-authored a volume on humanitarian interventions with Eric; her essay exposes the wellspring of their concern with this topic. Jack Fruchtman, a leading authority and prolific scholar on constitutional law and Enlightenment political thought, reflects on his nearly 40 years as Eric's colleague and on how Eric shaped Towson's

Political Science department. Finally, Joseph Rudolph, the foremost authority on Kosovo and a widely published scholar of ethnic politics, recounts his years as Eric's closest friend. Both Joe and Jack, as leaders of the department that Eric built, have maintained his tradition of leading by example, as they serve as exemplars of teaching excellence and scholarly productivity on a level that seems almost impossible at a teaching-intensive university such as Towson. All three essays detail exquisitely the character of the man whose loss remains deeply felt.

Part Two of the issue offers examples of Eric's own published writings from these pages. In the first, Eric responds to Richard Falk's article from 1970 in which Falk argues that the Vietnam War rested on misguided assumptions about Chinese military ambitions and American interests in quelling nationalist revolutionary movements in East and Southeast Asia; Falk advocated a complete reversal of US foreign policy in the region, including pulling out of Vietnam. Eric's response was to agree with Falk's diagnosis but reject his suggestion that America's Vietnam policy reflected a deeper ideological predisposition towards imperialism that needed to be reined in. For Eric, Vietnam was an aberration, and a realist approach to foreign policy was both desirable and likely to mark the future of American foreign policy. His 1971 review of Isaac Deutscher's collection of writings about the Soviet Union and China, meanwhile, which he characterized as "quite unsatisfactory as a serious analytical work," showcases both Eric's flair with language and willingness to offer unvarnished, withering appraisals of work that he found subpar. In contrast, his 1972 book review is notable, among other reasons, for offering a critique of a book written by his dissertation chair, Robert W. Tucker (who also published in the journal). Publicly reviewing the research of one's mentor is not for the faint of heart, which is perhaps why it is unsurprising that Eric did it.

No better explanation of the 1994 article co-authored with Nitza Nachmias can be offered than that which Nitza herself provides in her tribute to Eric. This article is a product of the research that Eric and Nitza undertook in preparation of their volume, *The Politics of International Humanitarian Aid Operations*. As with Eric's other research, a realist sensibility suffuses this analysis despite the fact that both its subject matter and general conclusions depart somewhat from orthodox realism. Indeed, it is fairly unusual that an individual who wrote a dissertation on international law would identify so closely with the school of thought considered to be most hostile to it. But a realist writing about international law somehow sounds right and is consistent with Eric's beliefs: conservative yet contrarian, and hard to argue against.

In Part Three, we offer a representative sampling of the articles that have appeared in these pages over the last 50 years. Included are analyses of contemporary issues from distinguished scholars who first presented their papers at Towson's Earle T. Hawkins Symposium on International Affairs, as well as fine examples of student research, such as Jake Loewner's critique of Obama's drone policy, Evelin Andrespok's explanation of South Africa's decision to halt its nuclear program, and Oliver C. Dziggel's analysis of

sanctions as an instrument of US foreign policy. We selected the articles included in Part Three not only because they are fine works of scholarship in their own right, but also because they demonstrate the breadth of the journal's compass in terms of author, subject matter, and analytic perspective.

One nice benefit of surveying scholarly interpretations of contemporary issues is the vantage on history that retrospection can subsequently provide. For example, Michael Curtis (who remains a productive 91-year-old scholar at Princeton), offered an analysis of the prospects for peace between Egypt and Israel under Anwar Sadat and Menachim Begin in our Fall 1978 issue—before hindsight allowed us to declare the Camp David Accords the signal achievement (by far) in an otherwise barren history of progress in that troubled region. Similarly, in our Fall 1992 issue, Harry G. Kyriakodis, then a law school student at Temple University, compared the 1917 Bolshevik revolution with the 1991 coup ousting Mikhail Gorbachev, and in doing so provides readers today with a sharp reminder of how unsettling those tumultuous events seemed at the time. Presumably, we will soon look back on Jake Loewner's aforementioned examination of drone warfare in a similar light, as a reminder of how analysts once thought about a controversial issue that was still new and shrouded in skepticism and legal uncertainty.

International law is a subject that has received considerable attention from a variety of perspectives throughout the journal's history. Linda Bishai, for example, examined the tension inherent in the international legal imperatives of justice and state-centrism in her 1999 article about Bosnia-Herzegovina. R.R. Baxter, who was a Professor of Law at Harvard University and Editor-in-Chief of the *American Journal of International Law* when he published his article on the legal dimensions of the Arab-Israeli conflict in 1971, likewise finds tensions embedded in international legal requirements, although his emphasis lies in the inevitability of resolving such tensions by resorting to politics, not law. Finally, Quincy Wright's 1969 discussion of peacekeeping missions and conflict resolution rued the degree to which great-power conflicts inevitably undermined the effectiveness of peacekeeping efforts.

The last two articles included in Part Three illustrate the breadth of the journal's concerns. In a collaboration that in some ways perfectly captures the spirit of the journal, David W. Dent and his undergraduate student Carol O'Brien co-authored a 1977 examination of the politics sustaining an American embargo of Cuba that seemed as unable to achieve its objectives then as it did when President Obama finally eased them almost 40 years later (and, in doing so faced the same kind of political backlash that Dent and O'Brien would have expected). Finally, James C. Roberts's 2002 exploration of the internet's political possibilities using the analytic leverage provided by constructivist theory offered an original study of two subjects—the internet and constructivist theory—that were each just coming into their own when the article was first published. What gives Roberts's analysis distinctive value—and the same can be said of all of these articles—is that it not only opens a window on an interesting “historical” issue (as that

iteration of the pre-social media internet appears from today's perspective), but it also does so with a rigor and insight that helps us to make sense of contemporary issues as well. The articles in Part Three are presented in reverse chronological order; in keeping with the journal's mission and spirit, we see no need to place the students' articles in a different category than that of distinguished scholars such as Quincy Wright and Richard Falk.

As the journal marks its 50th anniversary with this issue, we find ourselves in the midst of exciting and transformative times, not only for our publication, but more importantly for the country and the world. Donald Trump's ascendancy to the most powerful office in the world has challenged our inherited expectations about the nature and scope of America's global role. Some of these expectations concern issues that most analysts had not only considered long settled, but had regarded as sufficiently well settled as to be unworthy of even revisiting. An American president openly questioning the commitment of the United States to NATO or free trade, for example—even if half-heartedly or facetiously—is akin to a baker questioning the value of flour. To paraphrase Donald Rumsfeld, some of these pronouncements about US foreign policy qualify as “unexpected unexpecteds”: they are not only unexpected, but one should not have expected that a surprise could possibly be hidden in the topic. The attractiveness of dictators such as Vladimir Putin and Rodrigo Duterte fall into this category, as does the potential merit of Japan pursuing nuclear weapons.

In times like these, fresh insights from serious analysts are more vital than ever, and the perspective of youth, of our undergraduate colleagues, acquires perhaps even greater salience than ever. Unencumbered by decades of fixed expectations, they can greet the strange new world of Trump's America with the nimbleness and intellectual agility of youth. They are also adept in the ways of technology and social media in a way that their more learned peers can never match. Consequently, the journal has been rapidly evolving in a process the Eric Belgrad anticipated as necessary when he converted it to an online format. For example, the journal's web site now features blogs analyzing current events from a variety of perspectives. Most of these are written by our students, although our readers are invited to propose blogs of their own. In addition, over the coming academic year, we anticipate adding additional multimedia formats to our website, such as podcasts, to provide new ways for our readers to engage the issues surrounding world politics.

To be sure, the journal will continue to publish research from professors and advanced graduate students. We strongly encourage advanced scholars as well as their students to submit their research papers for publication. We remain ideologically agnostic and methodologically diverse. Eric A. Belgrad and Pete Merani first published this journal 50 years ago and featured undergraduate studies alongside articles written by some of the world's foremost authorities in international affairs. As we embark on the next stage of the journal's history, we remain deeply cognizant of that heritage. Blogs,

websites, and social media are wonderful means of communicating ideas. But the key word in that sentence is “ideas.” The *Towson University Journal of International Affairs* remains committed first and foremost to the respectful exchange of evidence-based analyses and insights about international affairs, whether they come from chaired professors at Ivy League universities or undergraduate students at state universities. This was Eric’s vision, and it remains our mission. We hope you continue contributing to this exchange for the next 50 years too.

Dr. Paul T. McCartney
Faculty Advisor Emeritus

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Eric Belgrad founded the Towson University Journal of International Affairs and was the Chair of the Department of Political Science for more than two decades.

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Michael Curtis is Distinguished Professor Emeritus at Rutgers University and Princeton University, and the author of 30 books on political theory, comparative government, European politics, and the Middle East. Notable among them are *Three against the Third Republic*, *Western European Integration*, *Totalitarianism*, *Antisemitism in the Contemporary World*, and *Religion and Politics in the Middle East*. In addition to Rutgers and Princeton, he has taught at Yale University, Hebrew University, Tel Aviv University, and the University of Bologna. Among his many awards and honors, he was appointed Chevalier of the French Legion of Honor in 2014.

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David Dent was Professor of Political Science at Towson University until his retirement in 2005. He published ten reference books, three successful ten-minute plays, including “Gringophobia,” and is currently Vice President of the Boulder-Cuba Sister City Organization. He has completed four trips to Cuba beginning in 1979.

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Richard A. Falk

Richard Falk is Albert G. Milbank Professor of International Law Emeritus, Princeton University and author or co-author of 20 books, including most recently *Revisiting the Vietnam War and International Law* (2017), as well as the editor or co-editor of 20 more. He has been appointed to various positions by the United Nations High Commissioner of Human Rights, including serving as Special Rapporteur for Palestinian Human Rights. He is a member of the Editorial Boards of *The Nation* and *The Progressive*, and Chair of the Board of the Nuclear Age Peace Foundation. He is a former advisory board member of the World Federalist Institute and the American Movement for World Government. He is Distinguished Visiting Professor in Global & International Studies, University of California at Santa Barbara. During 1999–2000, Falk worked on the Independent International Commission on Kosovo.

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Harry G. Kyriakodis

Harry Kyriakodis is a historian and writer about Philadelphia. He is a founding/certified member of the Association of Philadelphia Tour Guides and gives walking tours and presentations on unique yet unappreciated parts of the city for various groups. Once an officer in the U.S. Army Field Artillery, Harry is a graduate of La Salle University (1986) and Temple University School of Law (1993). He is also the author of four books on Philadelphia, including *Underground Philadelphia*, which is forthcoming in 2018.

Jake Loewner

Jacob Loewner graduated from Towson University in May 2015 with a Bachelor of Science in Political Science and a minor in English. He is a former editor on the Towson University Journal of International Affairs. He is currently pursuing a Masters of Public Policy from the University of Maryland and works at the National Consortium for the Study of Terrorism and Responses to Terrorism (START).

Nitza Nachmias

Nitza Nachmias is a member of the Political Science Department, Haifa University, and Lecturer at Towson University. She also serves as the Dean of the Israel Leadership Institute. She has published four books, including three edited volumes, and numerous articles. She is a frequent speaker at international conferences. In the 1980s she held the positions of Deputy executive director of the National Committee on American Foreign Policy in New York city (1985-1987), and later she was appointed Executive Director of the National Council of Women of the USA (1987-1989), also headquartered in New York City.

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Carol O'Brien earned her B.S. from Towson State University, where she studied with Professor David Dent.

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Joe Rudolph

Joseph R. Rudolph, Jr. is a Professor of Political Science at Towson University, has served as a Fulbright appointee to Czechoslovakia (1991-2) and Kosovo (2011-2), and has published in the field of ethnic politics and conflict management for more than 40 years. He has also been a part of the democratization efforts of the Organization for Security and Cooperation in Europe since 1997, most recently serving twice as an election observer in Ukraine.

Quincy Wright

Quincy Wright was Professor of International Law at the University of Chicago and the University of Virginia. As one of the founders of the Commission to Study the Organization of the Peace, he helped plan the post-war structure of the United Nations. He was the only American scholar to hold the presidencies of the American Society of International Law, American Political Science Association, and the American Association of University Professors. His works encompass 1,155 titles including 21 books, 392 journal articles, 423 book reviews, and 141 chapters or introductions in books by others. His books include: *The Control of American Foreign Policy* (1922), *A Study of War* (1942), *The Strengthening of International Law* (1960), and *The Role of International Law in the Elimination of War* (1961).

PART ONE

DEDICATIONS FROM COLLEAGUES OF DR. BELGRAD



TRIBUTE TO PROF. BELGRAD

Nitza Nachmias

Abstract: A short essay commemorating the life of Eric A. Belgrad.

Tribute to Prof. Eric Belgrad

The Chinese have a beautiful blessing: “May you live in interesting times.” Eric was a blessing. He lived during the most important and turbulent times of the twentieth century and experienced firsthand some of the most exciting but destructive events in human history. Eric was born in Germany, and was four years old when Hitler invaded Poland. But Eric learned about the horrors of Nazism a year earlier, in 1938, during the Kristallen Nacht, when his father was arrested in the middle of the night and taken to the Nazi camp of Dachau. Miraculously, Eric’s father was released and returned home a few week later, and the family fled Germany and found refuge in Belgium. In 1948, when Eric was thirteen, his family moved to the US.

Eric did not like to talk about his difficult years as a child in occupied Europe, surviving the worst human atrocities known to mankind, and I, also a descendent of survivors of the Holocaust, tried to avoid the subject. However, when we met every few weeks, over a glass of wine at the Pikesville Hilton on Friday afternoons, we did find the courage to talk about the unthinkable. Our Friday meetings commenced when we were working on our book. The bar at the Pikesville Hilton was Eric’s favorite meeting place. It was somewhat surrealistic. We were sitting comfortably on soft couches, listening to background music, sipping good, dry red wine, while discussing the most horrific and sadistic historical events that the human mind had created.

I first met Eric in 1992, when I moved to Baltimore from New Mexico and was looking for a teaching job. Eric interviewed me in his capacity as the Chairperson of the department. My first impression of Eric was: He is so European. So elegant. What a change from my previous life experience as an instructor in New Mexico, the Land of Enchantment. He was wearing a colorful bow tie, his French goatee was perfectly trimmed, his questions were short and to the point, and most importantly, he was very, very cordial, formal, respectful, and polite. I could not miss his European upbringing. I later learned that Eric was a descendent of West European assimilated intellectual Jews, who adopted German and French education and culture. It brought to mind Hannah Arendt’s observation, “It is important to bear in mind that assimilation as a group phenomenon really existed only among Jewish intellectuals. ...Assimilation in the sense of acceptance by non-Jewish society, was granted them only as long as they were clearly distinguished exceptions from the Jewish masses even though they still shared the same restricted and humiliating political conditions.”¹ Eric was totally assimilated but continued to maintain his Jewish identity.

He rejected and harshly criticized the traditional East European norms and ways of life of orthodox Jews; he labeled them “black coats” because they wore traditional long black coats.

¹ Hannah Arendt, *The Origins of Totalitarianism*. London: Trinity Press, 1973, p.56.

For Eric, the world for Jews was not the same after the Holocaust. “How can anyone believe in God after Auschwitz?” He asked. He cut off ties with his father who was very religious and strictly followed the old Jewish orthodox traditions. For Eric, he was one of the “black coats.” Eric became an “atheist Jew,” and these feelings were strengthened by his beloved late wife, Gloria, who grew up in Canada, as a daughter to a family of secular Jews. I shared Eric and Gloria’s outlooks about Jewish orthodoxies and secularism. I was born in Israel to refugee parents who escaped Nazi Europe in 1933. In the early 1930’s many Jews could escape Nazi Europe but were encouraged by orthodox leaders to stay. No harm could come to them, they were told, as long as they follow religious orthodox practices; “God will save them.” Indeed, the early immigrants to Israel were secular Jews who were aware of the looming storm and fled Europe to Palestine.

Both Eric and Gloria felt a strong bond to Israel. They followed closely events in Israel, and were especially impressed by the Israeli military establishment. For Eric, the Israeli military, the IDF, was a microcosm of the “Changed Jew.” Gloria, more than Eric, was militaristic. She believed that Israel’s survival was dependent on the strength of its military. She spoke highly of the Israeli soldiers, who defended the newly created state of Israel against its numerous Arab enemies. It was difficult for Gloria, who hardly experienced severe antisemitism and grew up in quiet and peaceful Montreal, to understand why Israel’s Arab neighbors would want to wipe Israel off the face of the earth. On one of my trips to Israel, Gloria asked me if I could get her a miniature gold charm of an Uzi, the famous Israeli gun. She wanted to add the Uzi to a charm bracelet that she had and loved. I could not find an Uzi charm in Israel, so Robert, their son, the artist, made a golden Uzi charm for her. Eric and Gloria’s attachments to Israel deepened when their daughter Allison married an Israeli engineer whom she met in Baltimore, and moved to Haifa, with their family. The three grandsons enlisted and served in the Israeli military; one joined the paratroopers, and another grandson joined the Israeli navy. The youngest served in the army. To his great chagrin, Eric could not visit them in Haifa because of his poor health, but he was compensated and delighted when they came to visit him in Baltimore during long summer vacations.

During our long discussions about our book on humanitarian aid and refugees, it became clear to me that we did not choose the topic of our book incidentally; Eric and I immersed ourselves in the subject of war, violence, human cruelty, and the painful issue of refugees, probably because these problems touched us personally. Perhaps, we were plunging into our similar past, trying to explore and understand the causes and effects of humanitarian disasters. Eric’s opening sentences in the book say it all: “The juxtaposition of the terms ‘politics’ and ‘humanitarian aid’ in the title of this book was hardly fortuitous. It was designed to reflect a fundamental dichotomy characteristic of virtually all aid programs: the humanitarian impulse to relieve the suffering of the victims of war, famine, disease, or natural disasters tends to run counter to the self-serving motives that normally animate the pursuit of national interests.”² Eric’s compassion and empathy to victims of wars and other disasters is seen in every paragraph of his writing. Interestingly, Belgium, the country that provided shelter for Eric’s family during World War II, was the first country in the world to experience an international humanitarian air operation, following the ravages that Belgium suffered during World War I. “Belgium, whose

² Eric Belgrad, “The Politics of Humanitarian Aid,” in Eric Belgrad and Nitza Nachmias, eds., *The Politics of International Humanitarian Aid Operations*, London: Praeger, 1997, p. xiii.

violated neutrality and brutal occupation had been central focus of allied propaganda during the conflict, was identified early as most deserving of aid. Belgium therefore, became the first beneficiary of postwar American relief effort headed by Herbert Hoover. ... This became the first official humanitarian relief effort sponsored and controlled by the U.S. government.”³

The concept of “Responsibility to Protect,” or the responsibility of nations to alleviate human suffering through concerted international effort, is a relatively new concept. It involves national as well as international organizations, private enterprises and individual donors. Eric’s work raised the conceptual, strategic and political dilemmas involved in humanitarian aid. His brilliant analytical discussion shows dilemmas and ambivalence paramount to the subject, dilemmas that are as relevant today as they were when the book was published. Eric was critical of the resources that wealthy nations allocated to humanitarian aid, as well as the donors’ motives. Arguing that, “A defensible test of the validity of any governmental humanitarian aid program might be, not whether the donor will derive some benefit from the program, but whether recipients are likely to benefit as much from the program as the donor,” he concluded, “It is not unreasonable to expect donors to seek some political advantage in connection with succoring these needs.”⁴ I hate to admit that I did not initially recognize the verb “succoring,” as well as many other verbs, nouns, and pronouns that Eric used in his writings. Eric was a magician and a true connoisseur of the English language. While his arguments were analytical, precise, and very clear, his vocabulary was infinite. Eric showed me how the English language could and should be used, but most importantly, how to enjoy it. While I often felt intimidated by Eric’s proficiency with the English language, I am forever grateful to him for showing me its beauty and richness.

Eric addressed the shortcoming of aid programs through the eyes of the victims, but he did not ignore the major human dilemmas involved in helping them. His analytical review of the concept of international humanitarian aid clearly demonstrates the ambivalent motives of the donors, as well as the motives, needs and feelings of the recipients. Eric warned the donors against destroying the recipients’ dignity and humanity while succoring their needs. The refugees are indeed devastated, and in a dire need for aid, but their need for aid should not destroy their dignity and self-respect. “The need for charity must be particularly galling,” he wrote, “for emerging states attempting to assert their national independence after a usually long and demeaning period of colonial subservience.”⁵ While emerging nations often experience civil wars, political chaos, and extreme human suffering, donors should be careful to maintain the recipients’ national dignity and sense of independence when providing aid. Eric considered the issue of self-respect and maintaining the dignity and autonomy of the recipients of international aid a major principle, albeit in the literature it is secondary to the national interest principle.

During our work on the manuscript, I was introduced not only to Eric’s conceptual and analytical thinking but also to his love of art, painting and photography. He was very pedantic, fastidious, and went over every word and phrase in the manuscript with a magnifying glass. In addition, Eric insisted that his wife, Gloria, who was a brilliant lawyer, review the manuscript. Indeed, Gloria became our *de facto* editor, and she edited every one of the manuscript’s 218 pages. Eric also insisted that Gloria review our agreement with the publisher. While I was ready

³ *Ibid.*, p. 43.

⁴ *Ibid.*, p. 5.

⁵ *Ibid.*, p. 34.

to sign the agreement with the publisher with my eyes closed, it took Gloria two weeks to review the agreement and to find a few clauses that she demanded be changed. To my astonishment, the publisher accepted all of Gloria's revisions!

In summary, I probably felt a special bond to Eric because of our shared life experience, because I have been spending a few months a year in Israel, remaining in touch with his daughter in Haifa, and because of our research together. And so went our wonderful friendship, which included a joint book that we edited and was published in 1997. Eric was excited about the project. The refugee issue had a special meaning for him. His parents and mine never enjoyed a refugee supporting network when they escaped occupied Europe. Hardly any doors were open to Jewish refugees. Jewish immigration was globally limited. During our Friday Hilton meetings I once asked Eric if he ever visited his home town in Germany. His answer was very clear; he would never set foot in Germany, and he would never buy a German car. He did go to Belgium once, after the war, to visit the family that hid him during the war, but it was a very disappointing experience. Eric never elaborated on his encounter with the family in Belgium, but I understood that they only took him in for money, not compassion. I told Eric about my traumatic trip to Poland; I visited the small village in Eastern Poland where my father was born and where his family had lived for hundreds of years. I knew that all my father's family members, including his sister's family, were burned alive inside the village synagogue, one day in 1941. No one survived. The fate of Eric's extended family was no different. But what shocked both of us was the world's attitude towards the Jewish refugees. The hundreds of thousands of Jews who survived the Holocaust but could not find refuge. The only door that opened up for the Jewish refugees was the newly created state of Israel.

Eric and I were changed by the horrors of the war. We both wanted to shine a light on the painful issue of refugees. We tried to find some answers and perhaps suggest some ways to help alleviate the pain of refugees, a subject that unfortunately refuses to leave us. Every year more refugees are added to the world. Every day more children lose their parents, homes, and often their lives. In his dedication to our book Eric wrote, "This book is dedicated to the Nachmias grandchild Nir Tomer, and to the Belgrad grandchildren Alex, Benjamin, Max, and Asher. May they grow up and flourish in a world free of war and filled with humanitarian concern." Let us hope and pray that Eric's words may one day become a reality.

Eric A. Belgrad, Personal Memories

Jack Fruchtman

Abstract: A short essay commemorating the life of Dr. Belgrad.

Eric Belgrad, in my judgment, was not a particularly religious man in an institutional sense. I never thought of him as someone who regularly attended synagogue or even at all. I can say that after our first meeting in 1978, when I was an aspiring college instructor, he was a man of great learning and wisdom (there is a difference). He reminded me of some of the great teachers in the Jewish Hasidic tradition, the pious ones or “rebbe,” who taught the truths of humanity or, in other words, how to live a virtuous life. Thirty-five years ago, Nobel laureate Elie Wiesel wrote a book about these men with their “souls on fire,” a term that embodies the impassioned mind and spirit: Eric Belgrad was indeed a soul on fire.

Everything he did—from his classroom instruction to chairing Political Science at Towson University for over 20 years to fostering, and then promoting, the character of the department—he achieved with the zeal and strength of a man with a passionate and fiery vision. He arrived at the department in 1966 as a young man. By the time of his death nearly 50 years later, he had taught and counseled thousands of students: his personality and intellect inspired all of them, and all of us who teach here. How do I know this? The answer is both simple and complicated, simple because he was so easily accessible, complicated because he was a complex man. It is hard for me to believe now that after all the years that have passed, he had “only” been teaching for 12 years in 1978. And yet, to me, he seemed to be at that time the consummate professor: his greying hair with a forelock covering his brow, his smart beard revealing a knowing smile, his twinkling eyes as he looked at you, and his ever so wisp of a Belgian accent. All of these characteristics belied the majesty of the man.

I intuitively understood that he seemed so right to be a college professor in an old fashion way. He read books and journals, not on the Internet, but on real paper. He also read the papers—not some online facsimile, but the real thing. He loved Latin phrases and often quoted them. One that I recall him often using is *ad astra per aspera*, “to the stars with difficulty,” perhaps a phrase reminiscent of his early escape from Nazi Germany and arrival to the New World. He loved Towson University, but with a tough love. The foibles and foolishness of administrators made him laugh as much as it made him angry. You could see, almost feel, the anger coming when he learned of some new silly administrative policy that the Board of Regents or the campus administration had foisted on the faculty. He knew full well that he could do nothing to stop it. Yet, at the same time, that didn’t stop him from pouring out the best invective possible, if only for the moment. It all ended almost as quickly as it began. And we knew it ended when he started to laugh in that wonderful, contagious way.

We forget that his training at Johns Hopkins University, from which he received his Ph.D. in 1969, focused on international relations, in particular international law. He was a student of Robert W. Tucker, an expert in the field, and I suspect Eric expected to teach in that field. In fact, he may well have, though I doubt it, given that when he arrived at Towson in the fall of 1966, Pritam (“Pete”) T. Merani had been on the faculty for a year. He would soon become Pete’s closest colleague and friend. A scholar of Pakistani-Indian territorial disputes in areas like Goa, Pete also taught international law, which meant that Eric would not be teaching it, although like Pete, he focused his earliest research and writing on international law, especially

the law of neutrality and private law in the global system. In any event, Eric focused on other areas of Political Science, because he loved to teach—and never without the crutch of overheads or, God forbid, the progeny of overheads, the PowerPoint, where instructors project a paragraph on a screen and then proceed to read it aloud as if students were illiterate.

I think Eric's greatest love was to teach upper-division courses in political theory. After all, it was his transformation of POSC 101, Introduction to Political Science, into an introduction to political thought as a course for freshmen and sophomores. All current faculty members who teach that course today have followed Eric's lead, but this was not the same in the 1970s. At that time, students were forced to study tedious textbooks with the same official name of the course.

In any event, it was the upper-level courses he loved most, though, for the longest time, I disagreed with the manner in which he taught it. He admired George H. Sabine's classic work, *A History of Political Theory*. First published in 1937(!), it was the first of its kind to be a comprehensive review of all the ideas of the great political philosophers from the ancients to the rise of Fascism and Nazism. Of course, Eric did not use the first edition, but rather the slightly revised editions that followed (there were four in all, ending in 1973). Sabine, who served as a professor and vice president of Cornell University, died 11 years earlier, so afterward, the updates were undertaken by Thomas Thorson of Indiana University.

I thought that because inexpensive paperbacks on individual authors were available, it made more sense for students to collect a small pile of books to read the works in their original or translated forms. Eric was persuaded, however, that this was wrong, because Sabine had been a giant in the field and conveyed the ideas of political philosophers in plain language. Moreover, Sabine's approach to political thought matched Eric's. Sabine wrote that "theories of politics are themselves part of politics" in that they convey a sense of the social and political moment at the time they were written. In other words, political theories are not merely ideas in a vacuum, but they informed us about more than what the writer was thinking: they opened the entire world in which political philosophers lived in ways that studying political institutions or political actors could not. For Eric, this was most satisfying insofar as it allowed his students to gain a deeper knowledge and appreciation of the social and political environment in which ideas flourished, were debated, and even condemned. As it turned out, his students enjoyed the text, and, not unexpectedly, became proficient in the study of the grand history of political thought.

If Eric loved teaching the history and development of political thought, he was clearly an internationalist in his outlook. Perhaps this is related to his European origins, having been born in Belgium and having lived in the South of France during World War II (he became a U.S. citizen in 1953). Thus, more akin to his internationalist outlook, Eric also loved to teach Soviet-American Relations, a course that soon had to be transmogrified into Russian-American Relations after the demise of communism. There, he used another classic text: George F. Kennan's 1961 magisterial *Russia and the West Under Lenin and Stalin*. Eric viewed this work as an invaluable contribution to our understanding of how the emergent Soviet empire and the United States quickly developed an adversarial relationship to complicate an already complex world, leading to the Cold War of the post-World War II era. Like the Sabine book, I thought for a time that this one was dated, but once again I soon saw the wisdom in Eric's choice when I realized that Kennan's insightfulness, complemented by Eric's judgment, gave his undergraduates the proper perspective of the ongoing and developing relationship between the United States and the U.S.S.R., today Russia. Eric greatly admired Kennan, who started his career in the U.S. diplomatic service and rose to become, for a very short time, the United States

ambassador to the Soviet Union. It always seemed to me that the Soviet's 1952 expulsion of Kennan only increased Eric's admiration and respect for the man, who, like Eric, had no truck for Soviet totalitarianism (or any form of tyranny, for that matter).

Eric's guidance in these matters of instruction helped me become a better classroom instructor. Like many faculty members of the late 1970s, early 80s, I taught, as did many instructors, several courses within the three areas of my doctoral work: in my case, political thought, public law, and international relations, including American foreign policy. In 1985, however, when our prelaw advisor, Gerd Ehrlich retired, I soon took on that task, and Eric, who was then chairing the department, mentioned to me that I would soon have to develop the courses that Gerd had taught in constitutional law. When I put this off mainly out of procrastination, Eric again approached me privately in the narrow corridors of Linthicum Hall to tell me to get on with it. Eric's voice was stern and decisive, but when I looked at him, he had that classic twinkle in his eye and a smile on his face. I knew then that while this was an "order," he left it to me to get on with the task he had earlier given me. Today, not only do I teach that one course, but to Eric's delight, I developed it into three.

Eric's contributions to teaching and learning extended beyond the academy. From the 1970s through the 1990s, whenever a major incident occurred in the world, especially when it involved U.S. interests in terms of foreign policy or national security, Eric was called upon by the local television stations to comment. This was especially true when the subject involved the Soviet Union (later Russia) or the Middle East. One example arises when the "Intifadas" (or uprisings) exploded in the Israeli occupied territories (Eric only referred to them as the territories, dropping the word "occupied"), requiring the Israeli Defense to engage in daily struggles with rock-throwing Palestinian youths. Eric's views, like his assessment of most things, were strongly felt and clearly expressed, not in emotional or passionate terms, but in reasoned thinking. I suspect, however, that underlying the clarity of his ideas and expression lay a seething urge to lash out against the uprising.

But not on the air. There, he was the seemingly mild-mannered, professorial analyst, who had the uncanny ability to separate his feelings from his thinking. In 1994, he appeared on C-SPAN to explain the burgeoning new nationalistic forces that were pouring out of Eastern Europe in the wake of the collapse and disintegration of the Soviet Union. He wound up debating a fellow named George Kenney from the Carnegie Endowment for International Peace (today he blogs on "electric politics") over identifying the causes of ethnic and nationalistic violence. In his typical way, Eric was coolheaded and reasoned as he debunked the supercilious and superficial reasoning that Kenney furnished.

While television interviews were time consuming, Eric along with Pete Merani, who died in 1996, also conducted a weekly Sunday morning call-in radio program on domestic and world affairs. I don't know how long the show ran, but it was a serious effort designed to extend his teaching prowess to the larger community. He and Pete invited experts to answer questions and respond to comments from themselves as well as listeners on a variety of important topics. They even included some folks from Towson like Martha Kumar, Joseph Rudolph, and, yes, me from Political Science as well as Robert Caret, the then-Provost of the University and now Chancellor of the University System of Maryland.

And then there was the music. One of the things that moved Eric more than anything, in my judgment, was music, especially the sweet mellifluous sounds of eighteenth-century French baroque composers. While I thought I knew a lot about the eighteenth century, he introduced me

to the wonderful world of Marin Marais, a master of the viol whose work is marvelously accessible today. I first heard his compositions when I wandered into Eric's office probably 25 years or so ago, and instead of focusing on the issue I initially wanted to raise, we talked about Marais and his mesmerizing sounds.

If teaching was one of Eric's major achievements, perhaps the most significant step he took early on was to mold the department according to his vision. He created a model of collegiality, even among a group of highly well-trained, independently minded faculty members, all expert in a wide-ranging array of sub-disciplines. The University has long demanded departmental meetings as the best means to accomplish the work of the departments. Indeed, Eric followed that directive, but only to a minor degree: the tenured and non-tenured faculty met annually in the fall to discuss promotions, tenure, rank, and merit. Eric clearly hated meetings, because he thought they were worthless and mind-numbing and because he saw what happened to academic departments when the issues pulled people apart, caused irredeemable rifts, blew up into rancorous arguments, and created lifelong enemies.

Instead, Eric conducted departmental business in an alternative way. We discussed policies, planning, and staffing just as thoroughly devoid of the conventional bitterness and venom, in the hallways, just as he had accosted me to chat about constitutional law classes. Or even better, we met at a bar to discuss these matters over drinks, first in the Auburn House, and then later at the Berkshire (now the University Club on campus). Even when we "met" for our twice-per-year dinner meetings at the Johns Hopkins Club (among us, Eric was the sole member of the club), we may have chatted briefly about issues, but that wasn't the point. The idea was to enjoy one another's company. Eric could amass a true consensus, a word that he loved to use, so that we could come together without actually, well, coming together in more corporate ways.

For those of us who have served Towson for a while, we have Eric to thank for this: his caring and supportive qualities that brought us to become the distinct and distinctive small unit in the larger entity of the University community. So we bid our Eric, this wonderful man, in the words of Virgil, *sic itur ad astra*, "thus a journey to the stars," in memory of his life's work, his steadfast dedication, and his enduring commitment. He was a man who truly lived with a soul on fire.

Remembering Eric

Joseph Rudolph

Abstract: A short essay commemorating the life of Dr. Belgrad.

The Eric Belgrad who I was fortunate enough to know for nearly half of both of our lives had an enviable range of interests and talents to match. He was an old world scholar, meaning he could eschew those pesky translations of Greek and Latin in teaching his political philosophy classes. He was as accomplished a photographer as anyone can be without crossing over from amateur to professional status. He never drove his large vehicles or built a winter's fire without listening to the classical music whose composers' lives he knew as well as Machiavelli's and Plato's. Above all, he was as good a conversationalist, not to mention friend as anyone could hope to have.

Classical teaching, classical music, classical tastes, and a penchant for black and white photography aside, no one lived more in, or enjoyed the present than Eric. A genuine Holocaust survivor, Eric could still some 70 years later recall almost fondly the young German soldier who held up the train on which he and his mother were fleeing their native Flanders at the French border, not to off-load them into a boxcar bound for an ugly, SS end, but to buy young Eric a candy bar before sending them on their way in their quest to reach neutral Switzerland. It was one of the very few times in which I ever heard him speak of his Jewish past. Rather, his best story concerning his religion centered on the day near Christmas of long ago when the Jewish rabbi who was to marry him arrived unexpectedly, and the resultant near panic with which he and his future bride rushed to stuff their decorated Christmas tree into the closet before opening the apartment door.

But this brings me to the heart of my small footnote to Eric's large life. As nearly as I can tell, mixed in with but never obscured by his wide ranging interests or greater network of friends that most of us collect in a lifetime aside, were Eric's two great passions: one for his beloved wife Gloria of so many years, and the other for the Department he built and stamped, we hope irrevocably, with his profound commitment to quality and collegiality.

Of the former, he unabashedly spoke frequently, including a confession that he once decked his longtime friend, colleague, and co-founder of this *Journal*, Peter Merani for once daring to try to woo Gloria-of-the-tight-sweaters. As for the latter, he never needed to speak of it, though he did often. It was evident every time he came on campus, and his Department adored him for it and sought over the 30 years that I was a part of its faculty to follow his lead as our Department more than doubled in size during his chairmanship. His picture hangs in our Departmental corridor, an unnecessary daily reminder that the Department was his legacy to all of us.

During those years that the Department grew, so did our friendship as I perhaps unceremoniously tried to fill the gap that Pete's resignation left in Eric's schedule. During a sabbatical leave, it was to Eric that my wife and I wrote our weekly insights into early 1990s life in post-communist Czechoslovakia (he particularly savored the tales of the home-made videos submitted to the local television station for its weekend "Strip at Midnight" showings). It was with Eric that we dined at the Ambassador's weekend, make-your-own-bloody-Mary brunch as often as we could for more than 20 years. It was in Eric's house that my wife and I were so

graciously received and comforted the night we returned home to find our own house, belongings, and beloved pets lost in a fire. And it was at the Ambassador that I frequently met Eric for lunch during those dreadful days when Gloria was nearing her end in a nearby hospital. We never spoke of those weekday lunches after her death, but shifted our venue to the Macaroni Grill in Timonium, where we became regulars for lunch, and sometimes for long afternoon chats when the restaurant's midday deal on large bottles of the house wine were too good to miss. I miss his friendship and the ability this May to celebrate his 82 birthday. He was a remarkable man in so many ways. He inspired collegiality, and if you ever wondered what a good man would look like these days, you only had to spend a moment with Eric. I still find myself occasionally looking for his baby-sized SUV as I walk from the faculty lot to our building, and feel the loss anew.

Eric died in September of 2015.

We have not been to the Ambassador or Macaroni Grill since.

PART TWO

CONTRIBUTIONS BY DR. BELGRAD TO THE
TOWSON UNIVERSITY JOURNAL OF
INTERNATIONAL AFFAIRS

The Vietnam War as a Guide to Future American Policy in Asia

Richard A. Falk

***Abstract:** There is a long list of arguments that the American government and media use to justify the position of American militarism and intervention in Vietnam. They range from the necessity for containment of China to upholding the integrity of SEATO, and even to upholding the credibility of American commitments. Similarly there are three very contrasting interpretations on the status American involvement in the Vietnam War. These three interpretations are that the Vietnam War has been a success, an immeasurable failure, or a qualified failure. The latter of these arguments includes the Nixon Doctrine of 1969, which outlines three guidelines for future American involvement in Asia so that the mistakes that were made in American policy with regard to Vietnam would be prevented in the future. However, this article proposes a fourth interpretation of the Vietnam War. This interpretation does not comment on the relative success or failure of the United States in the Vietnam War, because it argues instead that American involvement in Vietnam is wholly unjustified. This fourth position opposes American militarism in Vietnam on political and moral grounds, and argues that a position of non-intervention would follow better with historic trends in Asia as well as American traditional values of self-determination.*

Since 1950 five American presidents have supported a series of policies designed to maintain a pro-West, anti-Communist government in control of South Vietnam. The persistence of such policies exhibits remarkable continuity, given the great difficulties encountered in pursuing this objective. There have been many efforts to explain the origins and durability of this American commitment. None has proved entirely satisfactory. It seems clear that the impetus for the policy had at least three principal foundations:

- The containment of the world Communist movement;
- The more specific containment of mainland China;
- The containment of revolutionary nationalism.

But such goals can be pursued in a variety of ways, and it remains unclear why over the years the United States was prepared to make such immense sacrifices in blood and treasure and prestige for such negligible, and at best, illusive returns.

On a higher level of abstraction there was the recollection that policies of appeasement - what might be the "lesson of Munich" - had not prevented World War II. Prominent American policy-makers in the period during which the buildup of a military commitment to defend the Saigon regime was made seemed to accept as wisdom the idea that the international Communist movement was monolithic and committed to world conquest and that the choice was between "standing up to aggression" and provoking World War III. Such a notion of "containment" or "holding the line," arising out of reaction to Stalinism and persisting into the 1960's, long after the death of Stalin, and the evidence of a deep Sino-Soviet split, was accompanied by an image

of “falling dominoes,” that is, if South Vietnam falls to Communism, then the rest of Indochina, then Thailand, then the Malay peninsula would also fall in almost inevitable succession. Therefore, although the stakes in Vietnam, if taken in isolation might appear small and remote, a large commitment was nevertheless justified it has been argued, because of these larger concerns—namely, the geo-political stability of South Asia and the implementation of the world-order prohibition against a Communist aggressor as a precedent.

Such reasoning is abstract and ideological, and does not fit too well the concrete facts of conflict in Asia, and especially not in Vietnam. When the original economic commitment to the French was made in 1950 the struggle for Indochina was a typical anti-colonial war of independence of the sort that developed in Asia and Africa after World War II. True, the leadership of the Vietnamese independence movement has a Communist background and might be suspected of bringing a liberated Indochina within the Communist orbit of influence. But true also, the pro-colonial Vietnamese were politically isolated in their own country and without any capacity to govern effectively or humanely; as a result the anti-colonial movement in Vietnam developed into a broad united front effort that by the end of the first Indochina War in 1954 had attracted support from many non-Communist elements in the population and Ho Chi Minh had emerged as a national leader of immense stature, commanding respect and allegiance from all segments of Vietnamese society.

In subsequent years the United States involvement—shaped and facilitated by the divided-zone solution adopted at the Geneva Conference of 1954—deepened and became increasingly associated with the techniques of counter-insurgency warfare. The American objective since 1954 has remained constant: a non-Communist South Vietnam as a permanent sovereign state.

Since the Nixon presidency, the tactics of American involvement have emphasized the replacement of American combat forces by Vietnamese combat forces—so-called “Vietnamization”—reinforced by fantastic levels of air support and accompanied by the spread of the zone of violence to Cambodia and the intensification of the American military involvement in Laos. The Vietnam War remains unresolved as of late 1970, negotiations in Paris are stalled on two issues:

- Refusal by the American government to make a commitment to total withdrawal by a definite time;
- An American unwillingness to accept a provisional government for South Vietnam that represents a fair coalition of contending forces.

American support for these principles would probably lead rapidly to peace in South Vietnam and to the likely emergence of a government in Saigon that was neutralist in foreign policy and reformist in domestic affairs, in other words, to an ideological compromise between the goals of the United States and of the National Liberation Front. As well, reunification of Vietnam would be put off for a number of years and the longer-term future of South Vietnam would be allowed to reflect internal forces of national self-determination. The balance of these internal forces would and should lead during a period of several years to the emergence of a pro-NLF government, but one that governed by coalition politics and was quite autonomous in dealing with North Vietnam.

On the basis of the background it seems possible to speculate about what lessons American policy-makers have learned from the long and anguished experience of the Vietnam involvement. Future American policy toward Asia is likely to be guided by which of several interpretations of the Vietnamese experience proves dominant. Already much attention has been given in American intellectual circles to the question “beyond Vietnam” and there are a variety of strenuous efforts being made to present the most influential statement of guidelines for the future. An examination of this debate seems especially important as all of the positions being seriously considered carry forward into the future the mistakes of policy and perspective that prompted the Vietnam involvement.

Before discussing these lines of interpretation, it is necessary to take account of a major caveat in relation to the analysis. Both the debate on “the lessons of Vietnam” and my analysis of it proceed on the assumption that there is a good faith connection between the course of governmental policy and the persuasiveness of alternative lines of argument. With respect to matters bearing on both interventionary diplomacy and national security planning, I have become increasingly skeptical about this connection.¹ In my judgment, the debate may even function to obscure the real bases of national policy and operate as a mystification; that is, the explication of a rationale serves to confuse and distract public opinion rather than to enlighten it. Anyone who has followed closely the evolving annual American debate on the deployment of an ABM system has seen that the rationale is expendable, but the policy is not. As I have already indicated, the American involvement in the Vietnam War has seemed to have the same quality.

Such a hypothesis is implausible without some fuller explanation of why the real bases of policy must remain obscure and tend to be excluded from explicit mention. This is a complicated question that can only be superficially discussed in this setting. It would appear that policy-makers are carrying out a set of policies that contradict popularly held attitudes about why America uses military power in foreign affairs. These attitudes center around a self-righteous conception that whereas other governments have interests, the United States only has responsibilities.² As a result it is an unwritten rule that no responsible defense *or criticism* of U.S. foreign policy positions takes account of self-interested economic motivations and pressures. Only radicals of the right or left, by definition outside the policy-making elite, give some attention to issues of economic self-interest or, as the left puts it, the dynamics of economic imperialism.³

Similarly, it is not considered reasonable to attribute foreign policy positions to the pressures or momentum of domestic political forces. Yet, in the Vietnam setting there is considerable evidence of a bureaucratic momentum that carried forward the policies independent of any rational assessment of their merit. The extent to which the government is itself an unwitting (and perhaps unknowing) captive of the military-industrial complex is part of the problem that is almost always excluded from “responsible” discussions on the future of American policy in Asia. The relevance of the bureaucratization and militarization of American national security policy planning efforts are treated like intellectual ghosts.

¹ See Falk, “Drifting Toward Armageddon,” *The Progressive*, Oct. 1970, pp. 48-54.

² This position is well exposed by Richard J. Barnet in his book *Intervention and Revolution*, New York, World, 1968, esp. pp. 8-46.

³ For instance from the right see Hanson W. Baldwin, *Strategy for Tomorrow*, New York Harper and Row, 1970; from the left William Appleman Williams, *The Roots of the Modern American Empire*, New York, Random House, 1969.

Such matters must be kept in mind. The influence of these economic and governmental forces on policy-making may very well be decisive in the years ahead. If so, the dialectics of intellectual debate are misleading as the outcome of the debate depends on considerations other than degrees of evidence and persuasiveness. Indeed the actual situation may be the reverse—namely, that argument will be appropriated that seems best calculated to uphold a pre-selected policy. Surely during the Kennedy-Johnson-Nixon period of Vietnam involvement, the official search has been for a plausible defense of the interventionary policy rather than for an assessment of its plausibility. Thus, the various lines of explanation relating to deterring wars of national liberation, containing China, upholding the SEATO commitment, avoiding a bloodbath in South Vietnam, insisting that no solution may be imposed on South Vietnam, protecting the honor of the United States, upholding the credibility of its commitments, and so have been relied upon, dropped, revived with no particular qualms so long as the rationale of the moment seemed to develop the best case—given the present context of the war and the criticism of it—for maintaining the policy.

Thus the policy debate is a puppet show of sorts and it may be dangerous to challenge it on its own grounds, because it tends to lend credence to the seriousness of the overall inquiry by acting as if evidence and reasoning are likely to shape future American policy in Asia. Nevertheless, it seems important to explicate the debate, demonstrate why the contending positions are inadequate, and why a position so far excluded from serious attention provides a better guideline for future American policy in Asia.⁴

Several kinds of uncertainties could influence the course and explanation of American policy in Asia. These uncertainties may in the end make the present debate seem very time-bound.

1) The way in which the Vietnam War will end remains obscure; thus, it is unclear whether the outcome of the war will be generally understood as an American victory, a stalemate or compromise, an NLF victory, or indeed whether there will be any American consensus at all. The actualities of the domestic balance of forces in Vietnam make it already clear that the NLF and North Vietnam have scored an extraordinary success against overwhelming odds, although at a very high cost to themselves in death and destruction. But it remains impossible to tell whether the war will eventually end because the Saigon regime collapses, because domestic dissent in America causes a rapid and total withdrawal, or conversely, because the U.S. launches some kind of desperate reescalation, or even because changes in the political climate induce a negotiated compromise at Paris. Future American policy in Asia will depend heavily on how the final outcome in Vietnam is actually perceived by policy-makers.

2) The presentation of American foreign policy during the 1970's will depend heavily on the domestic and foreign stances of a number of key countries, especially Japan, China, the Soviet Union, and India. Whether Japan turns out to be a partner or a rival of the United States remains in some doubt. There are already indications that Japan's continuing economic growth is beginning to hurt the American economy, and some respected analysts expect a revival of fierce economic competition and even trade wars between the U.S. and Japan in the 1970's. Similarly, whether the Soviet Union decides to remain largely aloof from Asian politics is likely to influence U.S. choices in very definite ways. Whether China remains preoccupied with domestic

⁴ I intend to develop this linkage between domestic political forces and the course of foreign policy in subsequent writing.

concerns, or reaches an accord with either the Soviet Union or the United States or both, or whether China engages in a avowedly expansionist foreign policy is likely to shape the U.S. response. Finally, whether India is reasonably successful with a moderate government and remains nonaligned is likely to be important. These kinds of uncertainties are accentuated by their interactive character—China’s response to Japan may influence the Soviet relationship to India, and so on. Also these uncertainties and complications will be effected by what goes on in other regions of the world. A revolutionary surge in Latin America or Soviet pressure in Europe or the Middle East may lead to an American withdrawal from Asia, especially if Japan assumes the American role as surety for the political status quo on the Asian rimland.

Even more important than these external contingencies, are the uncertainties of the future course of domestic politics in the United States. It now appears that domestic social and economic forces are likely to determine the overall orientation of American government, including its foreign policy. In other words, imperialists, isolationists, or world order advocates are likely to be swept into power by reference to issues of employment, inflation, campus unrest, crime control, and even pornography. The substance of foreign policy positions has little independent salience for the American voter at present. Such a situation may change, but that is not likely to be soon.

3) It is even more difficult to assess the consequences for American foreign policy of the increasing significance of ecological strains. Serious forms of environmental decay, population pressure, and resource shortages are almost certain to emerge as the decade proceeds. But it is not clear whether this deepening ecological crisis will lead to more moderate forms of political competition or will induce recourse to desperate political strategies by those governments under the greatest pressure from over-population, poverty, urban crowding, or mass unemployment. The recent upsurge of interest in environmental matters in the United States may lead in the years ahead to a lessening of national concern about maintaining influence in Asia and may even induce a partial reversion to isolationism, especially if the costs of maintaining clear air and clean water are mostly deducted from the defense budget rather than from the welfare budget.

Although their impact cannot now be anticipated in any useful way, these three sets of uncertainties are of great political significance, and it is important to bear them in mind in order to underscore the speculative character of the argument and to encourage a willingness to revise one’s sense of the future when appropriate.

The Three Lessons of Vietnam

Despite these imponderables, three different interpretations dominate the Vietnam debate at the present time: that the war has been

Position 1: A Qualified Success;

Position 2: A Failure of Proportion;

Position 3: A Qualified Failure of Tactics.

Position 1—that the war has been a qualified success—is the view of most professional military men and the American Right. They see American involvement in Vietnam as a proper exercise of military power, but feel that the effort has been compromised by Presidential insistence on pursuing limited ends by limited means. They criticize Washington for seeking “settlement” rather than “victory,” and join the Left in condemning President Johnson for his failure to declare war on North Vietnam. They argue that the armed forces have had to fight the war with one hand tied behind their backs, pointing to the refusal to authorize bombing the dikes in North Vietnam, restrictions on targets in Hanoi and Haiphong, and the failure to impose a blockage on shipping to North Vietnam.

Even though victory has been sought by all means at our disposal, this view does not regard the Vietnam War as a failure. In a characteristic statement, Colonel William C. Moore of Bolling Air Force Base, writing in the *Air University Review*, argues “there is reason to believe that Ho Chi Minh would never have initiated action in Vietnam had he vaguely suspected that U.S. determination would escalate the war to its current magnitude. There is also reason to believe that this lesson has not been lost on other would-be aggressors.”⁵ Such an interpretation of the lesson of Vietnam relies on two assumptions: first, that the Vietnam War was similar to the Korean War in which the United States may also have shrunk back from the complete execution of its mission, but in which it at least displayed a willingness to defend a non-Communist society against attack by a Communist aggressor. According to Position 1, the Vietnam War is not a civil war, but a war of conquest by one country against another, and the NLF is a mere agent of Hanoi whose role is to pretend that the war is a civil war and thereby discourage an effective response in defense. Thus Position 1 accepts fully the image of the war developed during the Johnson Presidency by Rusk and Rostow. The implication for the future is that the United States is not about to be fooled into treating Communist-led insurgencies any differently than outright Communist aggression against a friendly state.

The second assumption of Colonel Moore’s assessment of the Vietnam War has an even greater implication for the future because it purports to find in the experience of Vietnam a demonstration that deterrence works in the counter-insurgency setting as well as it has worked in the nuclear setting. In Colonel Moore’s words, “This willingness to escalate is the key to deterring future aggression at the lower end of the spectrum of war. This, I think, is why history will be kind to President Johnson and Secretary of State Rusk because if we continue to stand firm in Vietnam as they advocate, then the world will have made incalculable progress toward eliminating war as the curse of mankind.”⁶ Thus the key to the future is the American willingness to escalate the conflict to high levels of destructivity—so high, in fact, that no right-minded revolutionary would ever initiate a war if confronted by such a prospect. Position 1 is critical of Johnson’s war diplomacy only insofar as it failed to carry the logic of escalation to higher levels on the battlefield and at home.

This interpretation also claims that the American decision to fight in Vietnam gained time for other anti-Communist regimes in Asia to build up their capacities for internal security and national defense, assuming that the American effort in Vietnam created a shield that held back the flow of revolutionary forces across the continent of Asia. More extravagant exponents of this line of interpretation even contend, on the most slender evidence, that the Indonesian generals

⁵ Colonel William C. Moore, “History, Vietnam, and the Concept of Deterrence,” *Air University Review*, xx, Sept.-Oct. 1969, pp. 58-63.

⁶ *Ibid.*, p. 63.

would not have reacted so boldly and successfully to the Communist bid for power in Djakarta in October 1965, had not the American presence in Vietnam stiffened their resolve.

Advocates of Position 1 tend to admire the Dominican intervention of 1965, where massive force was used and results quickly achieved with little loss of life. The domestic furor over the Dominican intervention disappeared quickly, mainly as a consequence of its success and brevity. Sophisticated adherents to Position 1 admire the Soviet intervention of August 1968 in Czechoslovakia for similar reasons. This model of overwhelming capability (rather than the slow escalation of capability as in Vietnam) is likely to influence the doctrine and future proposals of those who favor interventionary diplomacy.

The second position—that the war is a failure of proportion—is widely held among moderate and influential Americans, especially among civilians of a liberal cast of mind. They feel that the Vietnam War became a mistake at the time President Johnson decided to bomb North Vietnam and to introduce large numbers of American ground combat forces. Position 2 also, by and large, rejects the notion that war was caused by aggression of one state against another, but views Vietnam instead as an international civil war with both sides receiving considerable outside support. One of the most revealing formulations of this position is found in Townsend Hoopes' book, *The Limits of Intervention*. Mr. Hoopes, who served in the Pentagon from January 1965 to February 1969, first as Deputy Assistant Secretary of Defense for International Security Affairs and then as Under Secretary of the Air Force, explains the failure of Vietnam as a result of a loss of a sense of proportion by the men at the top. He builds a convincing insider's case that Johnson and his principal advisers were locked into a rigid and ideological view of the war and hence were unable to moderate the objective to conform with the costs in blood, dollars, and domestic cohesion. Writing of the situation prevailing in Washington late in 1967, just a few months before Johnson's withdrawal speech of March 31, 1968, Mr. Hoopes writes that "The incredible disparity between the outpouring of national blood and treasure and the intrinsic U.S. interests at stake in Vietnam was by this time widely understood and deplored at levels just below the top of the government. But the President and the tight group of advisers around him gave no sign of having achieved a sense of proportion."⁷ Such a view of the lesson of Vietnam had no quarrel with the effort to defend Saigon or to defeat the NLF, but urged that the effort be abandoned if it could not be made to succeed within a reasonable time and at a reasonable cost. Many members of government during the Kennedy period who originally supported America's role in Vietnam came later to hold similar views, concluding either that the war was weakening our ability to uphold more significant interests in Europe and the Middle East, or that the disproportionate costs resulting from the Vietnam War deprived the country of the energies and resources that were desperately needed to solve America's own domestic problems.

Former Ambassador Edwin Reischauer, a respected figure among liberal groups, has carried this kind of analysis to a more general level of interpretation: "The 'central lesson' of Vietnam—at least as the American public perceives it—is already quite obvious...the limited ability of the United States to control at a reasonable cost the course of events in a nationally-aroused less-developed nation...I believe," Reischauer adds, "that we are moving away from the application to Asia of the 'balance of power' and 'power vacuum' concepts of the cold war, and the process we no doubt will greatly downgrade out strategic interests in most of the less-developed world."⁸ According to Reischauer, the means used in Vietnam were disproportionate

⁷ Townsend Hoopes, *The Limits of Intervention*, New York, McKay, 1970, p. 58.

⁸ Richard N. Pfeffer (ed.) *No More Vietnams?* New York, Harper and Row, 1968, pp. 267-268.

to the end pursued, and, in general, a country like the United States cannot effectively use its military power to control the outcome of Vietnam-type struggles.

David Mozingo takes this argument one step further, recognizing the need for a perspective on Asia that is suited to the special historical and political conditions prevailing there, a perspective that might even suggest the end of a rigid policy of containment of China. “Since the Korean War,” he argues, “United States policy in Asia has been modeled after the containment doctrine so successfully applied in Europe after 1947... Washington has seen the problem of Chinese power in Asia in much the same light as that posed by Soviet power in Europe and has behaved as if both threats could be contained by basically the same kind of responses.”⁹ Professor Mozingo argues as follows on the essential difference between Asia and Europe: “In Asia, the containment doctrine has been applied in an area where a nation-state system is only beginning to emerge amidst unpredictable upheavals of a kind that characterized Europe three centuries earlier... The kinds of American technical and economic power that could help restore the historic vitality of the European system would seem at best to have only partial relevance to the Asian situation.”¹⁰ Such a view of the Vietnam experience supports a policy that emphasizes a much more specific, less abstract, appreciation of how to relate American economic, military, and political power to a series of particular struggles for control going on in various Asian countries.

Among the lessons drawn from Vietnam is the futility—perhaps worse than futility—of aiding a foreign regime that lacks the capacity to govern its society and the conclusion that certain types of intervention, if carried too far, help produce results that are the opposite of the goals of the intervenor. The American failure in Vietnam is partly laid to ignorance about Vietnamese realities and partly to exaggerated confidence in the ability of massive military intervention to fulfill political objectives. This is essentially the view of Stanley Hoffmann.¹¹ Again, as with Hoopes, the search is for an effective foreign policy, combined here with a sense of proportion and an awareness of the inherent limits imposed on American policy. But like Colonel Moore’s interpretation, this liberal critique does not repudiate American objectives in Vietnam. The main guideline for the future, according to Professor Samuel Huntington who served as the head of Humphrey’s Vietnam task force during the 1968 Presidential campaign, is to keep Vietnam-type involvements in the future “reasonably limited, discreet, and covert.”¹²

The third and currently dominant interpretation of the Vietnam war—that it is a qualified failure of tactics—is the one favored by President Nixon and important foreign advisers such as Henry Kissinger, William Rogers, and Melvin Laird. The Nixon Doctrine, announced at Guam on July 25, 1969, is an explicit effort to avoid repeating the mistakes of Vietnam, as these leaders understand them, without renouncing the basic mission of American policy. The Nixon Administration is critical of the Vietnam effort to the extent that it believes the same ends could have been achieved at lesser cost in American blood and treasure, and, as a result, with less strain on American society. In his November 3, 1969 address on Vietnam, President Nixon explained the Nixon Doctrine as embodying “three principles as guidelines for future American policy toward Asia”:

⁹ David P. Mozingo, *The United States in Asia: Evolution and Containment*, New York, Council of Religion and International Affairs, 1967, pp. 7-8.

¹⁰ *Ibid.*, p. 8.

¹¹ See esp. Hoffmann in Pfeffer (ed.), *op. cit.*, pp. 198-203.

¹² *Ibid.*, p. 255.

First, the United States will keep all of its treaty commitments; Second, we shall provide a shield if a nuclear power threatens the freedom of a nation allied with us or of a nation whose survival we consider vital to our security:

Third, in cases involving other types of aggression, we shall furnish military and economic assistance when requested in accordance with our treaty commitments. But we shall look to the nation directly threatened to assume the primary responsibility of providing the manpower for its defense.¹³

The “central thesis” of the doctrine, according to the President is “...that the United States will participate in the defense and development of allies and friends, but that America cannot—and will not—conceive *all* the plans, design *all* the programs, execute *all* the decisions and undertake *all* the defense of the free nations of the world. We will help where it makes a real difference and is considered in our interest.”¹⁴ Thus the Nixon Doctrine backs a step away from the world order absolutism of Johnsonian diplomacy and instead advocates specific assessments of each potential interventionary situation in terms of its strategic importance to the United States and the ability of America to control the outcome.¹⁵ It is difficult, however, to extract much sense on concrete policy from the rhetoric of Nixon’s State of the World Message to Congress: “The fostering of self-reliance is the new purpose and direction of American involvement in Asia.”¹⁶

In practical terms such a position remains ill-defined and midway between those of Colonel Moore and Mr. Hoopes: uphold *all* treaty commitments, give *all* allied regimes our help and advice, but get fully involved in a direct military way only when vital interests are at stake and when the military instrument can be used effectively, which means successfully, quickly, and without losing too many American lives. “Vietnamization” as one expression of the Nixon Doctrine, leaves the main burden of ground combat to Saigon’s armed forces, without any reduction in logistic support from the air via B-52 strikes and long-distance artillery support. Ambassador Ellsworth Bunker is reported to have said that the policy of Vietnamization involves only changing the color of the bodies. Another expression of the Nixon Doctrine seems to be an escalation of American involvement in Laos, increasing our covert role in training and financing government forces and engaging in saturation bombing of contested areas, thereby causing a new flow of Asian refugees and thereby depriving the Pathet Lao of its population base.

These three positions identify the present boundaries of serious political debate in the United States. It is likely that the early seventies will witness a struggle for ascendancy between the advocates of the liberal view (Position 2) and the advocates of the Nixon Doctrine (Position 3). Extending the doctrine of deterrence to counterinsurgency situations (Position 1) could gain support if the political forces behind George Wallace and Barry Goldwater gained greater influence as “a third force” in American politics of significantly increased their already strong influence with the Agnew-Mitchell wing of the Nixon Administration.

¹³ President Nixon, “The Pursuit of Peace in Vietnam,” LXI, Department of State Bulletin, pp. 437-443, at p. 440; in his report to Congress entitled “United States Foreign Policy for the 1970’s: A New Strategy for Peace,” *New York Times*, Feb. 19, 1970.

¹⁴ *Ibid.*

¹⁵ See Henry A. Kissinger, “Central Issues of American Foreign Policy,” in Kermit Gordon, (ed.) *Agenda for the Nation*, Garden City, Doubleday and Co., 1968, pp. 585-614.

¹⁶ *New York Times*, loc. cit.

Position 1 accepts “victory” as the proper goal of the American involvement in Vietnam and regards the means used as appropriate to the end of defeating the insurgency in South Vietnam, whether that insurgency is viewed as a species of civil war or as an agency of North Vietnamese aggression. In contrast, Position 2 shifted away from victory as a goal and moved toward the advocacy of some kind of mutual withdrawal of foreign forces and toward some effort to reach a settlement by non-military means once it became evident that the means required for the more ambitious goal were so costly in lives, dollars, and domestic support. Position 3 specifies the goal of the involvement as obtaining conditions of self-determination of South Vietnam and its present governing regime, a position that seems to imply an outcome of the war that is close to total victory; however, there is a certain ambiguity as to whether the real goals are not more modest than the proclaimed goals. In any event, Position 3 regards the means used to have been unnecessarily costly, given the goals of the involvement, and accepts, at least in theory, the desirability of a non-military outcome through a negotiated settlement of the war.

Position 1 seems to interpret Vietnam as a qualified success and to favor, if anything, a less constrained military effort in the future to defeat any Communist-led insurgencies that may erupt on the Asian mainland in the 1970’s. As with the strategic doctrine, the deterrence of insurgent challenges rests on the possession of a credible capability and on a willingness to respond with overwhelming military force to any relevant challenge.

Position 2 is much less tied to an overall doctrine, views the post-Kennedy phases of the Vietnam involvement as a clear mistake, and argues for a much greater emphasis on non-military responses to insurgent challenges. This position also seeks to restrict overt intervention to situations in which its impact can be swift and effective. Position 2, therefore, depends on having a fairly secure regime in power in the country that is the scene of the struggle. It also emphasizes keeping a sense of proportion throughout such an involvement, either by way of a ceiling on the magnitude of the commitment or by way of a willingness to liquidate an unsuccessful commitment.

Position 3 is midway between the first two positions in tone and apparent emphasis. It develops a more globalist strategy, emphasizing that the U.S. has far-flung treaty relations with Asian countries and that it is important to the overall preeminence of the United States in world affairs and to the continuing need to resist Communist pressures everywhere in the world that these commitments be honored. The merits of the particular case are thus tied to a global strategy, but there is an effort to shift more of the burdens of response to the local government. What this means in those cases where the government cannot meet these burdens, as was surely the case in Vietnam all along, is very unclear. What happens under Position 3 when self-reliance fails? The prevailing response to this question may well determine the central line of American foreign policy in Asia throughout the 1970’s. Both Positions 2 and 3 look toward Japan as a more active partner in the development of a common Asian policy. President Nixon’s decision to return Okinawa to Japan by 1972 arises out of this hope for sharing the geopolitical burdens of the region with Japan in the mid- and late seventies.

What is most surprising about these three positions is the extent to which they accept the premises of an American counter-revolutionary posture toward political conflict in Asia. To be clear, however, this espousal of counterrevolutionary doctrine is applicable only in situations that appear to be revolutionary. Where there is no formidable radical challenge on the domestic scene, as in India or Japan, the American preference is clearly for moderate democracy, indeed the kind of political orientation that the United States imposed upon Japan during the military occupation after World War II. However, where an Asian society is beset by struggle between a

rightist incumbent regime and a leftist insurgent challenger, then American policy throws its support, sometimes strongly, to the counterrevolutionary side. As a result, there has been virtually no disposition to question the American decision to support the repressive and reactionary Saigon regime provided that support could have led to victory in Vietnam at a reasonable cost. In fact, the last four American presidents have been in agreement on the political wisdom of the decision to help Saigon prevail in its effort to create a strong anti-Communist state in South Vietnam, thereby defying both the military results of the first Indo-China War and the explicit provisions on the reunification of Vietnam embodied in the Geneva Accords of 1954. Positions 1 to 3 also share an acceptance, although to varying degrees, of the basic postulates of “the domino theory.” Position 2 is least inclined to endorse the image of falling dominoes, and some of its adherents (such as Donald Zagoria)¹⁷ indeed argue that the prospects for Communism need to be assessed on a country-by-country basis, and the success or failure of Communism in Vietnam or Laos will not necessarily have much impact upon the prospect for revolution in other Asian countries.

McGeorge Bundy, a belated convert to Position 2 (after an earlier allegiance to a moderate form of Position 1) gave up on the war because its burden was too great on American society. Nevertheless he took pains to reaffirm the wisdom of the original undertaking: “I remind you also, if you stand on the other side, that my argument against escalation and against an indefinite continuation of our present course has been based not on moral outrage or political hostility to the objective, but rather on the simple and practical ground that escalation will not work and that a continuation of our present course is unacceptable.”¹⁸ Arthur Schlesinger Jr. has said: “The tragedy of Vietnam is the tragedy of the overextension and misapplication of valid principles. The original insights of collective security and liberal evangelism were generous and wise.” Actually, adherents of Position 2, while sharply dissenting from the Vietnam policies of both Johnson and Nixon, still maintain the spirit of an earlier statement by McGeorge Bundy, made at a time when he was rallying support for Johnson’s air war against North Vietnam: “There are wild men in the wings, but on the main stage even the argument on Vietnam turns on tactics, not fundamentals.”¹⁹

Unfortunately, from my perspective, these so-called wild men still remain in the wings, if anything further removed from the center of the political stage, for positions 1, 2, and 3 all affirm the continuing wisdom of two American objectives in Asia: first, to prevent Chinese expansion, if necessary by military means, and second, to prevent any anti-Communist regime, however repressive, reactionary, or isolated from popular support from being toppled by internal revolutionary forces, whether or not abetted by outside help.

The Excluded Fourth Position

There is another interpretation which has been largely excluded from the public dialogue thus far. It repudiates our present objectives in Vietnam on moral and political grounds. It holds, *first*, there is no reason to believe that China has expansive military aims in Asia; *second*, even if China were militarily expansive, it would not be desirable or necessary for the United States to defend China’s victims; and *third*, there is neither occasion nor justification for aiding repressive

¹⁷ See Ping-Ti Ho and Tang Tsou, (eds.), *China in Crises*, Chicago, 1968, Vol. II.

¹⁸ McGeorge Bundy, “De Paul Address,” in Falk (ed.), *The Vietnam War and International Law*, II, Princeton, 1969, pp. 964-975.

¹⁹ Arthur Schlesinger Jr., “Vietnam and the end of the Age of Superpowers,” Harper’s, March 1969, pp. 41-49.

governments merely because they follow anti-Communist policies. I favor this fourth position for several reasons. There is no evidence that China needs containing by an American military presence in Asia. Of course, countries in the shadow of a dominant state tend to fall under the influence of that state whenever it is effectively governed. This process is universal and has deep historical roots in Asia. But there are important countervailing forces.

First, China is preoccupied with its own domestic politics and with principal foreign struggles against the Soviet Union and Formosa.

Second, many of the countries surrounding China have struggled at great sacrifice to achieve independence, and their search for domestic autonomy is much stronger than any common ideological sentiment that might tempt Asian Communist regimes to subordinate their independence to Peking.

Third, China's foreign policy may often have been crude and ill-conceived, but it has rarely exhibited any intention to rely on military force to expand its influence beyond its boundaries; its uses of force against India, Tibet, and the Soviet Union have been to support its claims to disputed territory, and its entry into the Korean War seemed mainly motivated by a reasonable concern about danger to its industrial heartland.

The evidence thus suggests that the American effort to contain China in Asia is a determination to contend with a paper tiger. More significantly, the multifaceted conflicts in Asia, and elsewhere in the Third World, cannot be comprehended in abstract or ideological terms. Asia is undergoing a two-phase revolution that began as a struggle against colonialism and will continue for at least another decade. The first phase is concerned with the struggle to reacquire national control over the apparatus of government by defeating foreign rule. This struggle is largely completed. In most parts of Asia the colonial system has collapsed and foreigners have been removed from power. But in most Asian countries, including South Vietnam, the native groups allied with the colonial system have held onto political power, stifling social progress and economic reform. Thailand, although never formally a colony, continues to be governed by a traditional elite that is ill-inclined to initiate the reforms needed to relieve the mass of its population from ancient forms of inequality and exploitation.

After formal independence is won, the second phase of these national revolutions involves continuation of the struggle against the residues of the colonial system, including the more informal patterns of domination that result from large American donations of military equipment, foreign aid, covert "presence" (i.e. CIA), and political and economic advice. Most governments in Asia today are composed of conservative forces that hold onto their positions of power and privilege with the aid of such donations and advice, usually at the expense of their own people. Therefore, the second phase of the revolutionary struggle involves wresting political control from traditional ruling classes and instituting a mass-based program of land reform, education, public hygiene, social equality, radical consciousness, and economic development. In most of Asia, aside from India, the United States is allied with regimes that are trying to hold back this second surge of the revolutionary energy that has swept across the Third World to crush the colonial system.

Position 4 accepts this analysis of political conflict in Asia and adjusts American policy accordingly. First of all, it seeks accommodation with China through a flexible compromise of outstanding issues, including the future of Formosa. What is implied here is the removal of the American military presence from the area, especially the withdrawal of the Seventh Fleet and the elimination of our military bases on Formosa. Such a course would leave the outcome of the Chinese civil war, which has not yet been fully resolved, to the contending forces on both sides. It would encourage the possibility of negotiations between Peking and Taipei as to the governance of Formosa, perhaps allowing for semi-autonomous status within the Chinese Peoples Republic, with guarantees of a measure of economic and political independence for the island.

An American accommodation with China would help the United States handle an increasingly competitive economic relationship with Japan in the 1970's and give Washington more bargaining power in relation to the Soviet Union. More importantly, accommodation with China could make it possible to proceed more rapidly with arms control and disarmament, to denuclearize world politics, and to resist pressures to proliferate weapons of mass destruction to additional countries.

Position 4 entails the total abandonment of America's counterrevolutionary foreign policy in Asia. This would mean renouncing all treaty relations with governments that are repressing their own populations and holding back the forces of self-determination. Clearly such a revision of policy would require the renunciation of American treaty obligations to promote the security of the regimes now governing South Vietnam, Cambodia, Laos, South Korea, Formosa, Thailand and the Philippines. The only commitment that should be reaffirmed is our obligation under the UN Charter to resist overt military aggression of the Korea-type. Position 4 would also imply an end of large-scale military assistance and covert interference in the affairs of Asian countries. Civil strife is likely to occur in several Asian countries and displace present governments, but to the extent that it tends to reflect the true balance of political forces within these national societies, it would be beneficial for the welfare of the population and for the stability of the country and the region. At present, several regimes are being maintained in power only through a combination of domestic oppression and American support.

There seems virtually no prospect for adoption, or even discussion, of Position 4 during the 1970's unless major shifts in American political life occur. Only extraordinary domestic pressure, fueled perhaps by economic troubles at home and foreign policy setbacks abroad is likely to produce a change of leadership and change of world outlook in America.

Yet in historic retrospect, it is important to appreciate that Position 4 once was close to being our foreign policy. Its rejection by today's American leaders is not an inevitable outcome of American foreign policy in Asia after World War II. Franklin Roosevelt was opposed to restoring the French colonial administration in Indochina at the end of the war. If Indochina had been allowed to become independent after the Japanese left, then Ho Chi Minh would clearly have emerged as the leader of a united Vietnam, and perhaps of a united Indochina. In his initial Proclamation of Independence of September 25, 1945, Ho Chi Minh explicitly referred to the French and American Revolutions as the main sources of inspiration for the Vietnamese struggle for national independence. The Communist response to Ho in the West was not altogether enthusiastic—the Soviet Union withheld recognition from Ho Chi Minh's Republic of Vietnam and in 1947, Maurice Thorez, the French Communist leader who was then Vice-Premier of France actually countersigned the order for French military action against the newly-proclaimed Republic. As O.E. Clubb points out: "In 1945 and 1946 the Ho Chi Minh government looked

mainly to the United States and Nationalist China for foreign political support.”²⁰ In the period since World War II anti-colonialism probably would have been a better guideline for American foreign policy in Asia than anti-Communism. And even now it makes better sense. It would work better because it accords more closely with historic trends in Asia, with the dynamics of national self-determination in most non-Communist Asian countries, and because it flows more naturally out of America’s own heritage and proudest tradition. But to recall our earlier discussion, the whole idea of debate may well be irrelevant, or virtually so. The policy may be merely continuing evidence of the potency of economic and bureaucratic pressures. In this eventuality, those who wield power and are sensitive to the parameters of acceptable variation, are correct to ignore lines of argument that would have to be rejected. But also correct are those who say that no amount of working within the system can secure a humane and rational foreign policy for the United States because its basic orientation is set by those who would maintain an empire abroad for the benefit of its rulers at home. And indeed it appears to be the case that those who stand outside the debate—the adherents of Position 4—are dissociated from any political base that might be used to gain lawful access to power in the near future. It is their dissociation from power, and not the poverty of their analysis, that explains the irrelevance of their plea for an end to empire and the diplomacy of counterrevolution.

²⁰ O. Edmund Clubb, Jr., *The United States and the Sino-Soviet Bloc in Southeast Asia*, Washington, The Brookings Institution, 1962, p. 15.

Dr. Belgrad's Comments

These comments are not specifically directed to American foreign policy with regard to Asia, but rather to the general question of the premises of foreign policy as it will be pursued in the 1970's. Most particularly I would like to begin by asking a number of questions to which Professor Falk might possibly reply. First of all, is our entire experience in Vietnam—particularly since 1965—representative of American diplomacy toward the under-developed areas of the world? Or instead, should this particular experience be seen as representing an extraordinary set of circumstances which we not faced previously and to which we responded in an extraordinary manner, that is to say, a manner in which we would not be likely to respond again in the future? Is this, as Herbert Butterfield would say, a unique, pathological kind of situation to which we made a unique, pathological kind of reply? My own idea on this question is that indeed this is the case. In my view, the entire massive military intervention of the United States in Vietnam was more conditioned by the will of the Johnson administration than by the general popular will, or for that matter, the persuasion of American diplomats. Having dispensed with the Johnson administration, and with its persistently willful response which to the greatest failure of the American interventionism, the Nixon administration will make no such commitment to intervention as was made in 1965. Certainly, I would question whether "containment" as applied to Asia is still a viable policy or is identified by American policy-makers as a viable policy. The fact of the matter is that the Nixon doctrine, to which Professor Falk referred in some detail, clearly seems to imply that the "fight against Communism" is an old fight, which is not to be repeated over and over again, and that the doctrine of containment as applied to China represents an exercise in futility, when it takes the form of massive American military intervention in those areas which are identified as being threatened by "Communist" subversion, either internal or external. Hence, I would question whether we should not regard Vietnam as an experience to be taken outside of the line of general continuity of American foreign policy. If this form of containment policy is no longer the accepted standard of American response to challenges labeled as "Communist," the determination of the direction of foreign policy and of expectations to be achieved thereby will be formed in terms of traditional views, and most particularly the criterion of well-defined national self-interest will presumably be the dominating factor in guiding such foreign policy.

One somewhat tangential point to which I would like to respond is the question of ecology and foreign policy which Dr. Falk has discussed at some length. I wonder whether this ecological concern which Professor Falk expressed represents the beginning of an abiding American interest which will over-shadow all of our traditional concerns with the rest of the world. I suspect that this may be just one more fad which will run its course of public exposure and vanish, as all other fads have vanished in the past. My own view is that this ecological concern, as important as it is, obviously cannot maintain the kind of dynamic militancy which marks it now at its inception. Popular interest in this concern is bound to abate, and more traditional interests will regain their accustomed prominence; whereas the rhetoric of ecology will remain with us for some time, the substance of policy will again address itself to the essentials of defense and foreign policy. If we were to look at the question of identification of national self-interest, we would come rapidly to the conclusion that the Nixon doctrine indeed seems to address itself not to ideological concerns, nor to the establishment of a new version of a blockade of Chinese expansionism in Asia, but rather to the identification of active American

interests from point to point along the Asiatic mainland; furthermore this identification is in terms of the quality and quantity of American response where these interests may be challenged. It is all too facile to dismiss the Nixon doctrine as a rather shabby political trick when it may be in fact one more point in the evolution of a continuity in foreign policy based upon the recognition that confrontation with communism no longer is feasible or desirable as the sole rationale for global intervention. On the basis of the espousal of these new limits to the exercise of American military power, American foreign policy may abandon its ideological basis of the past twenty-two years and turn to a greater degree of realism as expressed purely in terms of national interest. In fact one might very well say that the Nixon doctrine isn't a doctrine at all but rather it is the application of Dr. Kissinger's insights in the needs of realistic foreign policy, an approach in which I have a good deal of confidence. Therefore, I would argue that the American position with regard to Asia in the 1970's must be based upon flexibility both as to the identification of American national interests in the area, taking as a basic premise that there probably are no major American national interests which require massive intervention of the Asiatic mainland.

My criticism of Professor Falk's paper is that there is a necessity to avoid tautological, ideologically-premised positions with regard to American foreign policy. I feel that the extended criticism of intervention on the Asiatic mainland is in fact akin to beating a dead horse. The trauma of Vietnam has been lived through. No purpose is served by forecasting a bleak future on the basis of a deviation from realism in foreign policy. The evidence at hand is that the lesson has been learned; now we must carefully avoid the other extreme, a sort of political neo-isolationism in which the very idea of *any* kind of intervention, political, military, or economic is regarded as sinful or immoral.

Five Decades of Humanitarian Aid: The Case of UNRWA

Nitza Nachmias and Eric A. Belgrad

Abstract: *The United Nations Relief and Works Agency (UNRWA) is an anomaly in the list of United Nations agencies. It is the oldest temporary agency of the United Nations, created in the wake of Palestinian refugee crisis in the late 1940s. Its sole purpose is to deal with the Palestinian refugee crisis, a much different mandate than that of other UN agencies, which have a broader and more global focus. Everything down to its modus operandi, requiring constant contact with clients as opposed to the detached modus operandi of other agencies, makes this agency significantly different from other UN agencies. And that is perhaps why the UNRWA seems to be in a constant state of flux regarding its operations, its goals, and its future. Since its inception, the UNRWA has changed from an agency providing relief and repatriation to Palestinian refugees to becoming the sole provider of education, housing, and other forms of aid to these refugees. Initially conceived as a temporary solution to the refugee problem, the UNRWA has become a problem in solving the plight of the Palestinians. This paper analyzes the mandate and operating methods of the UNRWA, discusses its transformation over the last fifty years, and theorizes about its uncertain role in the future with the increasing authority of the Palestinian Liberation Organization (PLO).*

As United Nations peace-keeping operations grow in number, intensity and complexity, UNRWA (United Nations Relief and Works Agency) presents a fifty year record of peace-servicing, an invaluable body of experience to analyze and study for both academicians and practitioners in the field. During the past five decades, the work of UNRWA has been carried on against the backdrop of dramatic changes in regional and global environments. Globally, the post-Soviet era introduced new opportunities for peace, as the Middle East ceased to constitute a theater for playing out East-West tensions. Regionally, the most important changes consisted of the various disengagement and peace agreements concluded during the period under consideration between Israel and its antagonistic neighbors, including the September, 1993, Israeli-PLO Declaration of Principles (DOP). However, none of these agreements contained concrete provisions or specific procedures to resolve the most intractable of all the issues dividing the parties, that of the Palestinian refugees, so as to obviate the need for continued interventions by UNRWA.¹

It is the purpose of this article to examine the anatomy and evolution of UNRWA in the context of the global and regional environments within which UNRWA has functioned; to evaluate the Agency's organizational and substantive contributions to the promotion of peace and the resolution of the Middle East refugee problem; and suggest how similar organizations may be useful in the future, when they will have to operate under entirely new and different regional and global arrangements. More particularly, analysis will focus on structures and procedures controlling UNRWA's activities; UNRWA's original mandate, and how it was

¹ The DOP did not deal with Palestinian refugees directly. It declared that the negotiations during the five-year transitional period "shall cover the remaining issues, including: Jerusalem, refugees, settlements..." (Article V, No. 3).

changed (formally or informally) to adjust to new environmental realities; UNRWA's unique status within the United Nations system; past and present support systems undergirding UNRWA; and, conversely, limitations and constraints within which the Agency had been forced to operate. The underlying assumption is that UNRWA's experience, while ostensibly unique, is, in fact, applicable within broader political, social, and economic contexts.

General Observations

From the start, UNRWA has been unique, both as to its mandate and its *modus operandi*. It is the oldest and largest temporary United Nations humanitarian agency², created by the United Nations General Assembly on December 8, 1949 (General Assembly Resolution 302 (IV))³, as a temporary relief agency in response to the urgent problem of the Palestinian refugees. UNRWA replaced the short-lived UNRPR (United Nations Relief for Palestinian Refugees), a stop-gap agency created by the General Assembly in November, 1948, to provide emergency services to a small number of homeless and hungry Palestinians who had recently fled their homes and were crowded together in squalid make-shift camps. By June, 1949, it had become clear that the refugee problem would not be solved quickly, and that UNRPR lacked the means and authority to deal with this growing problem.

A Palestinian refugee, as defined by the General Assembly Resolution 194 (III) of December 11, 1948, was a person whose normal residence was Palestine for a minimum of two years before the 1948 Arab-Israeli war and who lost both home and livelihood as a result of the conflict and took refuge in one of the areas which today comprise Jordan, Lebanon, the Syrian Arab Republic and the West Bank and Gaza Strip.⁴

Direct Descendants of registered refugees were also deemed eligible for UNRWA's assistance.

The two-year residency provision enabled transients to be treated as if they had been permanent residents of Palestine, permitting them to acquire refugee status and rendering them eligible for resettlement, repatriation or financial compensation. When UNRWA was founded in 1949, United Nations officials estimated the refugee population to be between 330,000 and 500,000.⁵ Between 1949 and 1993, the number of refugees increased by about 500 percent; by 1993, 2.8 million refugees received UNRWA's assistance. In 1992-93, 393,000 pupils attended

² In 1992, UNRWA was authorized by the General Assembly to continue in operation through 1996.

³ General Assembly Resolution 302 (IV) was legally binding on all parties within its operational intent. By contrast, most other General Assembly resolutions do not automatically acquire such a binding character. Rather, they are not unlike United States Congressional resolutions – more in the nature of advisory policy statements.

⁴ The validity of the two-year residency standard may well be questioned, given the migratory patterns of populations in the Middle East and that recent emergence of many of its population groups from their historic nomadic existence. The two-year standard would appear to be more appropriate to settled populations occupying well-defined boundaries for many generations, such as those in Western Europe. This issue is particularly worthy of consideration in light of the documented massive migrations of populations from Syria, Lebanon, and Transjordan to Palestine a few years before the 1948 partition. See, e.g., Joan Peters, *From Time Immemorial: The Origins of the Arab-Jewish Conflict over Palestine* (New York: Harper & Row), 1984. The wording of Resolution 194 deserves more attention than has hitherto been accorded to it, namely, its three qualifying requirements (residence, livelihood, and the abandonment of same) which *collectively* define refugee status. No mechanism was put in place whereby refugee claimants were required to provide proof that they could satisfy all three jurisdictional elements before they could acquire the official status of refugees. Instead, a mere self-declaration of refugee status, asserting the existence of all or just some of the three qualifying requirements, has been accepted by UNRWA from the beginning as the sole necessary condition for granting refugee status.

⁵ Milton Viorst, *UNRWA and Peace in the Middle East* (Washington, D.C.: The Middle East Institute, 1984), p. 5.

UNRWA's elementary and preparatory schools. The Agency's forecast for 1994-1995 is for over 416,000 students.⁶

UNRWA's 1993 regular budget exceeded \$250 million (not including \$20 million for various emergency programs). A United Nations task report of September, 1993, asked for a 55 percent increase in UNRWA's 1994 budget, or an increase in \$138 million, to develop new support programs for the interim period of Palestinian autonomy "that will be vital in the West Bank and Gaza Strip."⁷

UNRWA has not attempted to modify its role in light of the Declaration of Principles or, as it is sometimes known, the Israeli-Palestinian Accord of September, 1993, which provides for a measure of Palestinian autonomy and which, therefore, would warrant a transfer of authority from UNRWA to the new Palestinian Council for carrying out essential educational and economic activities.

As the United Nations' largest humanitarian operation, UNRWA employs over 20,000 local Palestinian people and is managed by about 135 international civil servants; it is far larger than the other two United Nations sponsored humanitarian relief agencies, UNICEF (United Nations International Children's Emergency Fund) and UNHCR (United Nations High Commissioner for Refugees).⁸

Inevitably, the population of the refugee-clients has come to include large numbers of second and third generation refugees. Most of these consider the camps the only homes they have ever known. Some 940,000 refugees still live in 59 refugee camps in four countries—Israel (West Bank and Gaza), Lebanon, Syria, and Jordan. In addition, UNRWA has provided services to between 600,000 and 800,000 displaced people (exact number not available). The category of "displaced people" was added to UNRWA's mandate after 1967⁹, to accommodate the Six day War refugees who fled mainly to Jordan¹⁰ and Lebanon. These included some 200,000 refugees from 1948, who were displaced for the second time.¹¹ A smaller number of Palestinians became displaced when they fled from Jordan in 1970, following clashes Jordan and the PLO ("Black September"). The protracted civil war in Lebanon during the 1970's and 1980's made still more refugees charges of the already overburdened Agency.

As a general rule, most United Nations humanitarian operations are carried out by the UNHCR (United Nations High Commissioner for Refugees), which was established shortly after UNRWA but which, instead of replacing or incorporating the earlier agency, operates on a level that is parallel to it. The rationale for this separate status derives from the fact that the General Assembly saw it fit to single out the Palestinian refugees from all the other refugee categories by taking direct responsibility for the Palestinians: it created UNRWA as the protecting agency

⁶ Report of the Commissioner-General of UNRWA, October 6, 1993, United Nations Document A/48/13.

⁷ *Ibid.*

⁸ Report of the Commissioner-General of UNRWA, July 1, 1988-June 30, 1989, Document A/44/13 1989, pp. 28-30.

⁹ UNRWA distinguished between "refugees", that is, people who lost their homes and livelihood in 1948, and "displaced" people, that is, people who fled the West Bank after 1967 mainly to Jordan, Syria, and Lebanon.

¹⁰ Over one million refugees live in Jordan, the largest refugee concentration in any Middle Eastern country. Jordan's indigenous population is about 3.5 million.

¹¹ The General Assembly gave special attention to Palestinians displaced as a result of the Six Day War. In its Resolution 32/90 B.4 of December 13, 1977, the General Assembly endorsed UNRWA's humanitarian efforts on behalf of displaced persons. The Secretary-General issued a report (United Nations Document A/32/263) which supported this assumption of responsibilities. Subsequently, the General Assembly adopted Resolution 32/90 E, reaffirming the right of newly-displaced persons to return to their homes, and placing them in the same category of eligibility for UNRWA assistance as the Palestinian refugees.

especially dedicated to this class of refugees. UNRWA was formed to be an autonomous United Nations agency that is directly accountable to the General Assembly. It is an operational agency, incorporated under Article 22 of the United Nations Charter rather than being based on an international treaty or convention, as are most other United Nations agencies.¹² At its inception, it was assumed that establishing UNRWA by treaty would necessitate the unwarranted delay of a lengthy ratification process.

The “W” in UNRWA reflects the General Assembly’s original intent to create public works operations to provide permanent employment for refugees while at the same time building infrastructures essential to the camps. When the public works plan failed (see discussion below), UNRWA shifted its focus to education, with health services and relief as second and third priorities.

UNRWA’s modus operandi has been unlike that of UNICEF or the UNHCR. The latter two global United Nations welfare agencies have focused on formulating and coordinating programs requiring the maintenance of minimum contact with their clients. They have also avoided direct contact with their own local personnel, leaving the implementation of programs to host governments and to various private agencies. In contrast, UNRWA has not only kept close contact with the recipients of its services, but has preferred to have its own personnel carry out its programs. Consequently, UNRWA has become the second largest employer in its theater of operation. By working through its own people, UNRWA risks conflicts of interest that other agencies avoid by acting through the instrumentalities of host governments or private charitable organizations.

As an international humanitarian agency, UNRWA provides support services to refugees by attempting, not always successfully, to regulate and coordinate the functions of various host governments, private organizations, and local enterprises; as a non-elected, non-accountable bureaucracy, it employs thousands of people and performs functions usually rendered by elected local governments.

In its fifth decade of providing refugee services, UNRWA has failed to help the refugee camps evolve local government capable of implementing measures essential to their own well-being. The agency appears to have followed a path that had the effect, by design or inadvertence, of encouraging continuing dependence on the part of the refugees. The very existence of UNRWA may have discouraged the local residents from assuming responsibility for their own welfare. The lack of local autonomy may have also induced the shifting of responsibility for the refugees from Arab countries and from Israel to the international Agency. This situation could not help but foster misunderstanding and friction between the agency, the host governments and the clients.

The General Assembly’s persistent efforts to foster and expand UNRWA’s role arose out of stubborn belief that the United Nations was responsible for the events that led to the refugees’ flight from Palestine and should, therefore, accept the refugees as its wards. Accordingly, the United Nations undertook to provide its protection and its support until such time that the refugees should no longer need the umbrella of its agencies. In this, the United Nations was strongly influenced by its first mediator in Palestine, Count Folke Bernadotte. In his 1948 report to the General Assembly, Bernadotte asserted “that both in origin and disposition the refugee problem entailed a United Nations responsibility.”¹³ Bernadotte’s argument was primarily legal,

¹² UNICEF and the UNHCR, also set up by the General Assembly, provide interesting contrasts. By contrast, UNRWA (United Nations Relief and Rehabilitation Administration) was founded by treaty (1943).

¹³ Edward H. Buehrig, *The UN and Palestinian Refugees*, (Bloomington: Indiana University Press, 1971), p. 11.

not humanitarian. He contended that, since the Palestinians were without citizenship and were residents of a former League of Nations mandated territory, the international community had a continuing responsibility for them until a final settlement was achieved.

Adopting Count Bernadotte's argument, General Assembly Resolution 194 (III) of December 11, 1948, reached a profoundly influential political conclusion, proclaiming that dispossessed Palestinians had a right of repatriation or compensation. This resolution has had a long-term political effect, defining the political context within which problems concerning the refugees have been debated. The creation of UNRWA was an unprecedented consequence of these political conclusions. The Agency was given the unique assignment of supporting and protecting the rights of a particular national group. "No other [such] intergovernmental international organization exists."¹⁴

Only when the protracted nature of the Palestinian refugee issue became evident, after the failure of numerous efforts to settle the Arab-Israeli conflict, did the United Nations replace its initial legalistic approach to the issue of the refugees with a more humanitarian one. This was reflected in changes (discussed later) in UNRWA's mandate and duties. However, the *raison d'être* of UNRWA remained unchanged: to endeavor to bring about a political solution to the problem of the Palestinian refugees, namely, repatriation, compensation, or settlement of refugees in countries of the first asylum. UNRWA has insisted that even the signing of the Declaration of Principles (DOP) between Israel and the PLO in September 13, 1993, did not change the Agency's status or obligations. Indeed, Ilter Trukmen, the Commissioner-General of UNRWA, asserted that "in the Gaza Strip and West Bank, the situation in principle will be no different."¹⁵ Commissioner Turkmen's position seems to confirm that UNRWA, like most established bureaucracies, is attached to its power base and is reluctant to yield any part of its authority.

A review of UNRWA's operations reveals major political and administrative dilemmas which have not been resolved and which evidently affect its work. First, as a non-territorial entity operating within the territorial boundaries of sovereign states, the Agency performs tasks normally carried out by governments: it has become virtually a non-territorial government. However, unlike sovereign governments, UNRWA has no jurisdiction over either the territory in which it operates or over the inhabitants which it services. As an autonomous international body, it cannot be subjugated or subordinated to the authority of any sovereign government; conversely, no sovereign government would debase its sovereignty by submitting to the authority of UNRWA. This situation often impedes the performance of UNRWA and leads to inevitable clashes with host governments and with clients. In short, on the issue of the powers, authority, and accountability of international "non-territorial administrations,"¹⁶ the case of UNRWA deserves particular attention.

¹⁴ Benjamin Schiff, "Assisting the Palestinian Refugees" in Emanuel Adler and Beverly Crawford (eds.) *Progress in Post War International Relations* (New York: Columbia University Press, 1991), p. 363.

¹⁵ Statement of the Commissioner-General to the Special Political and Decolonization Committee (the Fifth Committee), November 15, 1993. See also, Don Peretz, *Palestinians, Refugees, and the Middle East Peace Process* (Washington, United States Institute of Peace Press, 1993), p. 107, in which Commissioner-General Turkmen is quoted as saying that when the Palestinians in the West Bank and Gaza achieve autonomy, "The agency will be dissolved, transferring its facilities, structures and services to the emerging Palestinian institutions." The contradictory positions taken by the Commissioner-General on this vital issue clearly reflects unresolved stresses within UNRWA occasioned by developing Palestinian autonomy and the Agency's reluctance to relinquish power.

¹⁶ The term was used Buehrig, p. 7.

Second, as a United Nations agency, UNRWA and its functionaries might expect to enjoy corporate and personnel immunity from territorial authorities. However, this has not always been the case. For instance, acting on Israel Defense Forces (IDF) intelligence reports that UNRWA's camps were being used to train PLO members and harbor terrorists, Israel has occasionally raided and searched UNRWA's offices and compounds. No international authorization of doing so was ever requested or granted.¹⁷

Third, it has been argued that UNRWA was not actually helping the refugees, but that its operations were counterproductive. The Agency's existence "has reified, for Palestinians, their refugee status... [T]he refugee camps... have been breeding grounds for national violence... and... [their] facilities have been used for military purposes."¹⁸

Fourth, some have contended that UNRWA's operations, by enhancing the refugees' living situation, have made them more comfortable, and thereby reduced the refugees' discontent and their motivation for a permanent settlement of their status. It has been argued that UNRWA might actually have alleviated the need for a permanent solution.

On the other hand, continued and ever-growing discontent of large numbers of refugees suggests that UNRWA's humanitarian and social operations have been irrelevant to the refugees' attitude toward their political and social situation. Indeed, the growing feelings of animosity, frustration and anger in the ranks of UNRWA's clientele, culminating in the 1987 outbreak of Intifada in the Gaza Strip, indicate that UNRWA has had little, if any, effect on the temperature of the political climate among refugees.

Fifth, UNRWA's critics have also argued that the Agency has succumbed to major bureaucratic pathologies. They have alleged that UNRWA has become a self-serving, work-generating agency with little regard for the real interests of its own clients. Its employment of refugee-workers is said to be suffused with favoritism and patronage, and its services inefficient and ineffective. UNRWA vigorously denies these charges, using healthcare and education records as proof of its effectiveness. UNRWA asserts that, due to its efforts, the refugees are better housed, better fed, healthier, and better educated. Furthermore, UNRWA takes pride in its record of protecting the refugees' human rights. The Agency contends that it accomplishes all this with a minimal overhead: headquarters personnel account for only 2 percent of the total number of area posts (20,592 total posts for 1992).¹⁹

Finally, UNRWA's critics have argued that it has habitually exceeded its mandate, which was limited to the humanitarian aspects of the conflict, *i.e.*, that since UNRWA's mission did not contemplate the Agency's direct involvement in the Palestinian-Israeli political conflict, the Agency should not have aspired to affect the outcome of that struggle.

During UNRWA's years as a temporary humanitarian agency, the General Assembly never sought to enlarge the Agency's role to that of a permanent political institution. UNRWA, however, contends that its mandate is sufficiently broad for it to fulfill its part in the international commitment to the final settlement of the Palestinian-Israeli conflict: providing Palestinian refugees with the proper relief, education, and health care was to be UNRWA's contribution to

¹⁷ In June 1982, after it invaded Lebanon, Israel announced that it had discovered documents proving that UNRWA's school at Sibliin was used by the PLO to train terrorists. Reports published in Israel's *Ha'aretz* daily, June 27-30, 1982.

¹⁸ Schiff, p. 364.

¹⁹ The cost of the international posts for 1992-1993 (two years) was \$20,605,000. Projected cost for 1994-1995 (two years) is \$20,440,000. This cost is covered by the regular budget of the United Nations. UNRWA paid its international staff \$6,108,000 out of its budget. The projected cost for the next two years is \$5,601,000. This decline in overhead contrasts with the increase in the number of refugees eligible for services.

the peace process.²⁰ Nevertheless, it can be shown that UNRWA's activities did not, in fact, merely play the positive role it claims in furthering the peace process nor that the Agency limited itself to the humanitarian ventures which were entrusted to it, at its formation. If the United Nations hoped to encourage the settlement of the Israeli-Palestinian conflict through the activities of UNRWA, it was bound to be sorely disappointed.

Structures and Procedures

In order to allow UNRWA broad freedom of action in the field, the United Nations General Assembly shaped it as an operational organization with a unique corporate status, "capable of engaging in the commercial transactions and establishing legally defined relations with governments, other international organizations, and employees."²¹ UNRWA has provided a large array of municipal services to a vast population located in five different states, and it has had to manage and control a large administrative and professional apparatus, while being left to fend for itself, both in policy-making and in collecting its own voluntary contributions. It has operated on two-year budget cycles, with the United States as its major contributor (\$68 million for FY 1993). The Agency is headed by the Commissioner-General (originally titled a Director), who is appointed by the United Nations Secretary General. No process of approval or confirmation is required for appointment. The Commissioner-General, whose term of office is five years, reports directly to the General Assembly by way of the Fifth Committee (Political and Decolonization). After the Commissioner-General's report has been discussed in the Fifth Committee, it is forwarded to the General Assembly for resolution and voting.

In 1991, the autonomous authority of the Commissioner-General was further broadened. The General Assembly agreed to eliminate the provision in UNRWA's mandate requiring the Commissioner-General to reach decisions "in consultation with the Secretary General." While the Commissioner-General no longer needs to consult the Secretary General, he is still expected to consult and work with an Advisory Commission. This body, which was originally comprised of representatives from France, Britain, the United States and Turkey, was later enlarged to a membership of ten nations by adding representatives from Syria, Jordan, Egypt, Lebanon, Belgium, and Japan.²²

In order to facilitate negotiations, Advisory Commission members receive accreditation to each of the host countries, Israel, Egypt, Jordan, Lebanon and Syria. Contrary to expectations, the addition of host Arab governments to the Advisory Commission did not improve the Commission's work: it alienated Israel and led to development of friction between itself, contributing governments, and often even the Commissioner-General. The structure of the enlarged Commission also impeded the development of minimum consensus essential for the Advisory Commission to be effective. In fact, UNRWA became almost self-contained, with its staff appointed or removed solely by the Commissioner-General. This official promulgated his own rules and regulations without interference, as long as these did not expressly conflict with United Nations rules and regulations.

Because UNRWA assumed full responsibility for Palestinian refugees in almost all spheres of life, it has had a virtually free hand in setting policies and priorities, and in allocating

²⁰ General Assembly Resolution 302 (IV) of December 8, 1949, said: "Continued assistance for the relief of the Palestinian refugees is necessary... to further conditions of peace and stability."

²¹ Buehrig, p. 6.

²² Original resolution establishing the Advisory Commission, General Assembly Resolution 302 (IV), paragraph No. 8.

resources. Indeed, UNRWA's far-ranging administrative bureaucracy has been the source of political decisions affecting the lives of millions of people. Notwithstanding its operational autonomy, UNRWA has had to give considerations to terms of relevant General Assembly resolutions, the limitations imposed by its own financial and operational capabilities, the priorities and preferred policies of the Advisory Commission, when it chose to make these known, and, finally, the burgeoning needs of its clients. Except for salaries of United Nations international staff members, who are on the regular United Nations payroll, UNRWA has depended entirely in voluntary contributions to fund its budgetary needs.

Budgetary constraints have always played a major role in UNRWA's operations and development programs. Unlike UNICEF and UNHCR, UNRWA's expenditures "are not subject to formal approval either by its Advisory Commission or by the Special Political Committee of the General Assembly."²³ This is because UNRWA's founding resolution did not include provisions for formal consideration and approval of its budget: "its fund-raising techniques and budgetary methods developed idiosyncratically within the UN family."²⁴ In recent years, the Advisory Commission has declined to review UNRWA's budget without providing justification for its failure to do so. As might be expected, such broad budgetary discretion can have a negative effect on contributors and encourage them to condition the amount of their pledges on desired policy concessions: "Consequently, a contributor is well positioned to use the pledging conference—the final stage of UNRWA's annual appearance at the General Assembly—as an occasion for attaching conditions to its contribution."²⁵

This awkward situation is a consequence of the resolution which founded UNRWA. Because the Agency's resolution was loosely drawn, UNRWA was denied the authority and support systems needed to define its mission clearly, the appropriations to fund its budgets, the administrative structure to recruit and supervise its personnel properly, and the leadership to be held accountable before appropriate United Nations bodies. Moreover, the lack of a Board of Governors resulted in a lack of political guidance. Realistically, the annual review of UNRWA's report by the general assembly could not serve as an adequate policy forum. Unlike the annual reports of UNICEF and UNHCR, which are first considered by the Economic and Social Council and which are then transmitted to the General Assembly with the Council's recommendations, UNRWA's annual report is submitted directly to the General Assembly (the Fifth Committee) by its President. UNRWA's Advisory Commission, which has the right to scrutinize the report prior to submission, has traditionally refrained from making any recommendations, probably because the commission itself has not been able to develop a consensus on controversial issues. General Assembly reviews of annual reports do not usually lead to resolutions providing detailed operational instructions. The General Assembly's abdication of supervisory authority has left UNRWA virtually autonomous in all of its policy-making process, such as in policies underlying establishment of its extensive educational system. In short, in fulfilling the principal parts of its mandate, UNRWA has received scant guidance from appropriate General Assembly resolutions, and no financial support.

It is difficult to reconcile the acutely sensitive political context in which UNRWA must operate with the demonstrable lack of guidance and control from either the Advisory Commission or the General Assembly. The Commissioner-General and his staff are left with the burden of making all the decision and paying all the bills.

²³ Buehring, p. 53.

²⁴ Schiff, p. 370.

²⁵ *Ibid.* p. 53.

The lack of a governing or an overseeing body for such a vital organization as UNRWA is troubling. The miscalculation at the time of the formation of UNRWA—that it would be a temporary, very short-lived agency—led to the mistaken assumption that a responsible, business-like oversight apparatus would not be necessary. It is unclear why the General Assembly has subsequently failed to fill this administrative and policy-making vacuum. It should be noted, however, that UNRWA's officials have made no secret of the fact that both the Commissioner-General and the staff have come to enjoy their autonomous status and feel that additional bureaucratic controls are unnecessary.²⁶

And yet, UNRWA's freedom of action carries with it a heavy price. The lack of guidance and control has discouraged the much needed backing and support that an active Board of Directors or a resolute Advisory Commission could have provided. The failure to establish a legitimating backdrop is especially troubling when one considers the hostile environment in which UNRWA must operate and the almost total lack of cooperation that it receives from most host countries. Had the Agency been able to marshal the broad political reinforcement and resources needed to operate successfully under such adverse circumstances, it might well have been able to match the relative success of the UNHCR.²⁷ As it is, however, UNRWA has been accused of a lack of accountability, inefficiency, and even of corruption. Its very isolation has fed allocations that, by becoming embroiled with the disputing parties, it has limited its ability to provide essential humanitarian services in a neutral, disinterested manner.

UNRWA's budgetary practices have also been called into question. Until the mid 1980's, UNRWA used to submit artificially inflated budget requests in the hope of increasing its funding. By doing so, UNRWA jeopardized the trust of its donors. At the end of the 1980's, UNRWA found itself in a severe financial crisis. While the number of dependents for which it cared had increased, the voluntary contributions needed to pay for this care had shrunk. UNRWA had to reduce its work force and to overhaul its budgetary and fund-raising procedures. It realized that it had to consult the Advisory Committee and to develop a greater degree of financial accountability. In 1986, the first informal meeting of the donor states was held at UNRWA's Vienna headquarters, and, for the first time, budget proposals and long-term plans were introduced. The tactics of submitting inflated budgetary requests was abandoned, while new financial controls were instituted. Since 1986, these informal meetings have become established practice. Moreover, a closer working relationship has developed between UNRWA's officials and representatives of the donor states. Such closer contacts have made it easier for the United States government, UNRWA's largest donor, to induce Congress to respond more positively to UNRWA's financial needs.²⁸ The fact that, for almost five decades, UNRWA could function without proper financial accountability and control standard shows: (a) how autonomous United Nations agencies can become, (b) the vast power and authority that the head of a United Nations agency can exert, and (c) the effects of a lack of administrative regulatory mechanisms within the United Nations system.

Of the three main UNRWA operations, education has become the most important, with relief occupying last place on its priority list. UNRWA provides education to about 20 percent of its clientele, with the intent of making them productive, "socially useful human beings who

²⁶ Interview with William Lee, UNRWA's liaison in New York, November 20, 1993.

²⁷ "UNHCR has been remarkably successful in healing political ruture [the reference is mainly to Europe after World War II] while UNRWA has not." Buehrig, p. 58.

²⁸ In 1993, the United States contributed \$68 million out of a total budget of 300 million.

contribute to society rather than impose a burden on it.”²⁹ An Agency staff of approximately 10,000 provides education to over 390,000 elementary and preparatory school children in 641 UNRWA schools. Eight vocational and technical training centers provide over 5,000 training places for refugees.³⁰ In 1993, the distribution, by place of residence, of UNRWA’s clientele was as follows:

Lebanon	328,176 refugees
Syria	314,039 refugees
Jordan	1,072,561 refugees
West Bank	479,023 refugees
Gaza Strip	603,380 refugees

UNRWA assumes that the actual number of refugees is higher, as some of the refugees have failed to register.

In 1993, 392,757 students were enrolled in educational or training programs. UNRWA also provided university scholarships for outstanding students. The number of aid recipients rose in 1993 from 661 to 746 students. Educational programs have followed the curricula of the host countries in which they are offered, namely, Lebanon, Jordan, Syria and Egypt (in Gaza), in cooperation with and guidance from UNESCO, which supplied 12 staff members to UNRWA. However, growing criticism about inadequate supervision, inappropriate authority exercised by local teachers to promote political agendas, and a lack of integrated educational objectives prompted the introduction of reforms in UNRWA’s educational system. As of July, 1993, UNRWA decided to reorganize the education department by integrating all divisions into one institute, the UNRWA Institute of Education, located in Amman, Jordan. At the same time, the office of its Director of Education was moved from Vienna to the same location. Due to a lack of job opportunities for its graduates, UNRWA’s two-year teacher-training program was phased out. Instead, Jordan now requires a full four-year academic degree in education of UNRWA-trained teachers. In 1993, UNRWA reported the following statistics for students registered in its schools:

Lebanon	33,172
Syria	60,216
Jordan	152,350
West Bank	42,310
Gaza Strip	104,709
Total:	392,757

Because of future budget restrictions, the number of students in educational institutions is to be cut in half.

About half of the total operational budget of UNRWA is spent on education—in 1992, \$137.5 million out of a total budget of \$274.9 million, in 1993, \$141.3 million out of a total budget of \$298.7 million. The proposed budget for 1994 allocates for educational purposes \$150.4 million out of a total budget of \$309.1 million.

While it is clear, from the large share of the budget and large proportion of employees assigned to it, that education has been UNRWA’s most important operation, this function has also given rise to the greatest degree of controversy. Criticism has been mounting from Israel and

²⁹ Introduction to the Report of the Commissioner-General, July 1, 1977. United Nations Document A/33/13, p. 2.

³⁰ UNRWA Update, April 1993. All statistical information cited herein regarding populations and UNRWA educational enterprises rely on this source.

from several of the contributing states that, because UNRWA's school curricula replicate those of Jordan, Syria, Egypt and Lebanon, they include, perforce, anti-Israeli propaganda and slander. Israel has charged UNRWA with knowingly allowing the Palestinians in its employ to use the Agency's educational system to promote an anti-Israel agenda to an extent that clearly violates UNRWA's mandate.³¹ In addition, Israel has maintained that UNRWA should not be permitted to contest Israel's right to use security measures as a prerogative of Israeli sovereignty.

The Palestinians, on the other hand, have charged UNRWA with cooperating with their enemy (Israel), accusing the Agency of failing to protect their human rights, especially by virtue of failing to prevent Israel from what they see as arbitrary closing of schools.

UNRWA's health care and relief operations are less extensive than those relating to education, but they follow the same principles and procedures. UNRWA's health department employs 32=,203 professional and auxiliary health workers (1992-1993), including 207 doctors and dentists, 683 nurses, hygienists and midwives and 230 paramedical staff members. The Agency delivers services to 2.8 million eligible Palestinians. The program provides preventative, natal and clinical health care. The number of area health care workers in Gaza is high in proportion to the number of clients because of the special needs of the refugee population in its nine refugee camps.³²

UNRWA's third function has been to provide temporary relief services to those refugees unable to support themselves. The relief program, which itself has given rise to some controversy, has disturbed some cash to eligible refugees, but most of the aid has consisted of food rations donated by the EEC from its surpluses. While UNRWA preferred granting food rations to granting payments, it found that barter among Palestinian refugees could not satisfy all of their needs. In 1982, when UNRWA experienced a severe financial crisis, hard decisions had to be made concerning reductions in relief programs, including the distribution of food rations. In determining priorities of categories of aid, UNRWA chose not to cut the education budget, but to reduce relief distributions, instead. Since the mid 1980's, direct relief and food rations have been given only to the most vulnerable groups, especially to children from 6 to 36 months of age and to sick and handicapped refugees. The program for 1994-1995 has been further reduced: it includes 250,000 children (6 to 36 months), 143,200 pregnant women and nursing mothers, and several hundred chronically sick people.

UNRWA's expenditures for relief for 1992-1993 were \$62,525,000. The budget request for 1994-1995 is \$71,791,000.³³ The number of beneficiaries for 1992-1993 was almost 2.8 million people. The number of special hardship cases was 178,575. UNRWA predicts that the number of refugees eligible for relief might increase due to the deterioration in socio-economic conditions and the decline in support from oil producing Arab countries. Palestinian support of Saddam Hussein during the Gulf War resulted in a sharp decline relief aid from Arab countries.

³¹ Since 1988, the Israeli authorities have often ordered schools in the West Bank and Gaza closed, arguing that the schools "were a beachhead on which young Palestinians organize for trouble. It has fewer security problems when schools were closed." Viorst, (*Olive Branch*), p. 16. See also Schiff, pp. 374-375. Schiff explains that since "the Jordanian curriculum is used in the West Bank, the Egyptian curriculum in the Gaza Strip, the political slant... is shaped by these governments."

³² See Report of the Commissioner-General, July 1, 1992-June 30, 1993, United Nations Document No. A/48/13, October 6, 1993, pp. 52-53.

³³ The persistent increase in the birth rate among refugees, the continued reductions in contributions from Palestinians following Gulf War, and the rising tide of Palestinian unemployment in Gaza and in the West Bank since the outbreak of the Intifada – all these have given rise to increased dependence on UNRWA's welfare program, notwithstanding the Agency's efforts to reduce its welfare budget.

In addition, the number of Palestinians employed in these countries and their essential money-transfers suffered a devastating decline which has not been fully reversed since the end of the Gulf War.

The Future Role of UNRWA

Because UNRWA is a unique organization in its structure, mandate and modus operandi, the evolution of its future operations is open-ended and difficult to predict. First there is every expectation that UNRWA's operations in Lebanon (where it was headquartered until the late 1970's) will probably continue without major changes. In 1992, UNRWA registered 319,427 Palestinian refugees there. It is highly unlikely that a significant number of them will be allowed to return to Israel or to territories turned over to Palestinian control. The DOP (Declaration of Principles between Israel and the PLO) provides that, during the interim five year period, negotiations will be held to cover remaining issues, including those concerning refugees.³⁴ Clearly, neither Israel nor the PLO put the refugee issue near the top of their respective priority lists, as the DOP includes no specific provisions concerning the matter of resettlement or repatriation of refugees.

Second, UNRWA's operations in Syria, serving 299,207 Palestinian refugees (1992), will probably not change in any meaningful way. On the other hand, changes may be expected in UNRWA's operations in Jordan, in the West Bank and in the Gaza Strip. During 1992, UNRWA provided services to 1,010,719 Palestinian refugees living in Jordan. The high reproductive rate of that population (3.7 percent per year) increases the number of refugees in Jordan by almost 50 percent every decade. Over half of the population of Jordan is Palestinian, and, as UNRWA's figures show, a third of Jordan's 3 million people are registered Palestinian refugees.³⁵ If the current incremental rate of increase of the refugee population is maintained, and if the nature of UNRWA's activity does not change, UNRWA will have to greatly expand its operations in Jordan. Providing education, health care and relief to over a third of the country's population would force the Agency to become a government within a government.

In that event, UNRWA's only option would be to gradually transfer its responsibility for the education, health care and relief of the refugee population to an appropriate political authority. If the October 26, 1994 Jordanian-Israeli peace agreement includes some sort of interim or long-term settlement of the Palestinian refugees in Jordan, the future of UNRWA's operation in Jordan is likely to be altered.

The UNRWA areas of operation most likely to be affected in the near term by the Declaration of Principles and the resulting political changes are in the West Bank and in Gaza. It is as yet unclear what mechanisms will replace UNRWA's services under provisions of an interim or a permanent political agreement between Israel and the elected Palestinian Interim Self-Government Authority (the Council created pursuant to the terms of the DOP). Indeed, the question of UNRWA's role was not specified in the protocol signed in Washington in September, 1993, as neither the Agency nor its activities and presence in the West Bank and Gaza are mentioned. And Yet, the DOP and the terms negotiated under its aegis are bound to form a vitally relevant basis for UNRWA's continued existence and operations.

³⁴ DOP, Article V, No. 3.

³⁵ Statistics of refugee populations service by UNRWA are to be found in Viorst, *Reaching for the Olive Branch*, p. 83.

Under provisions of the DOP, the Council will assume overall responsibility for the well-being of the Palestinian people during a transitional period not exceeding five years. Although the contemplated creation of an independent Palestinian state is at least five years away, the elected Palestinian Council will exercise vast authority in areas currently served by UNRWA. “Immediately after entry into force of this DOP... authority will be transferred to the Palestinians in the following spheres: education and culture, health, social welfare, direct taxation, and tourism.”³⁶ The omission of any mention of UNRWA or of a transfer of its roles and functions to the Palestinian Council was probably not an oversight; it would seem to portend a series of major changes to be visited upon UNRWA and its role in Gaza and in the West Bank.

The DOP provides further that the Council will exercise a number of economic functions, that it will “promote economic growth... establish a Palestinian Electricity Authority, Gaza Sea Port Authority, a Palestinian Development Bank.”³⁷ Again, the document’s failure to account for UNRWA, which has been in the forefront of economic activities in the area for almost half a century, implies a radical shrinking of the Agency’s future role.

Both the Palestinians and Israel have assumed that the developed countries will make available extensive resources necessary to ensure the successful implementation of this historic agreement. Indeed, about \$2 billion was quickly pledged for the projects mentioned, including education, health care, job creation, law and order, security, trade and tourism, and, especially, for economic reconstruction.

It is unclear why UNRWA was neither mentioned in these plans nor asked to provide its services or experience to the planners, but it must be assumed that the Agency’s erstwhile patrons and clients have decided to develop alternative means of providing essential services in the area. Notwithstanding the fact that UNRWA’s present clients will undergo a dramatic change of status once they come under the control of the Palestinian Council, UNRWA does not envision its future fading away, either during the interim period (the five-year period of Palestinian autonomy during which the ultimate status of the Palestinians and of Israel will be determined), or during its aftermath.

The view of UNRWA as to its future role and the view of other significant parties on that subject do not coincide. The conclusion is irresistible that the DOP’s silence in the subject of UNRWA suited the needs of both Palestinians and Israel. For their own reasons, both wished to keep UNRWA out of the picture—Israel, because it does not trust UNRWA and the Palestinians, because of their need to assert independent authority and control over the pledged economic resources. UNRWA, which has been fighting for decades to get the kind of funding pledged in the aftermath of the DOP negotiations, has refused to bow out gracefully at this stage, but, rather has been quick to offer its help to the political newcomers. The Agency argues that it has rich and invaluable experience in the fields critical to a successful settlement: hands-on experience in Gaza and the West Bank in providing education, health care, relief and public administration. UNRWA claims to be the Palestinians’ best ally in the new, developing situation. It feels that Israel and Palestinians ought to accept UNRWA’s contributions and allow the Agency to continue and even expand its operations.³⁸

³⁶ DOP, Article IV, No. 2.

³⁷ DOP, Article VII, No. 4.

³⁸ See, for example, letter dated October 6, 1993, from the Chairman of the Advisory Committee to the Commissioner-General, saying: “In order to ensure the further progress of the peace process, it is imperative that a significant improvement in the social and welfare services and the daily life of the Palestinians be achieved... UNRWA had unique competence in these fields...[i]t is therefore essential to build a firm financial base for the

Immediately following the September agreement, UNRWA published the findings of a special task force, titled "Supporting the Transition: An Immediate Response of the United Nations to the Interim Period in the West Bank and Gaza Strip" (September 1993). In this report, UNRWA argued that it should increase its activities by 55 percent in the first year of the interim period, with an increase of \$138,250,000 over and above the regular \$250,000,000 budget. In essence, the report maintained that until the Palestinians are ready to assume complete responsibility for their lives, UNRWA should augment its ongoing programs because of its "capacity to launch immediately activities which will help create and sustain improved conditions."³⁹ UNRWA has also expressed the wish to serve as an intermediary agent between the Palestinians and the contributors, "to ensure a smooth transition to subsequent phases at which time programs run by organizations such as the World Bank, other organizations of the United Nations system and bilateral aid agencies will have become operational."⁴⁰ Furthermore, the Agency has offered to help "mobilize and support the coordination of the large international effort from the non-United Nations sources."⁴¹ What remains unspoken in UNRWA's offers is that since the Agency's budget is almost entirely dependent on voluntary international contributions, and since the same contributors are asked to provide the wherewithal for Palestinian autonomy, UNRWA is likely to find itself without financial means unless it finds a way to gain control of the funds raised on behalf of the Palestinian Council.

UNRWA's vast bureaucracy is now evidently fighting for its continued existence, in clear contradiction of its charter which provided for a limited, temporary existence. Like most bureaucracies, UNRWA finds it difficult to adapt to unexpected changes; it thrives on permanent, predictable conditions. Faced with the unexpected Israeli-Palestinian dialogue, the Agency has myopically attempted to preserve a *status quo* which no longer exists. UNRWA clings to the improbable belief that it will continue to be "the second largest single employer, after the (Israel) Civil Administration.... [O]utlays [will] account for about one third of all public expenditures in the West Bank and about half in Gaza."⁴² UNRWA has not come to grips with the realization that the inception of Palestinian self-rule, UNRWA's situation will doubtless be suddenly and radically transformed. Like any other bureaucracy, the Agency recoils from relinquishing the vast power and resources it formerly commanded. In a somewhat condescending tone, UNRWA has claimed that "the capacity of the incoming Palestinian authority to assume responsibility for services in education, health, social services, income generation, hospital care, etc., should be supported."⁴³ Brushing aside that fact that an autonomous Palestinian rule will shortly be in place, UNRWA continues to proclaim that "United Nations assistance should address the needs of the health and education sectors, through upgrading existing facilities and constructing new ones where needed."⁴⁴ In a mood of "business as usual," UNRWA appears ready to overlook the fact that the PLO has had a shadow government in place for many years, capable of providing well-established education, health and welfare programs to thousands of people. It would seem to behoove UNRWA to realize that the Palestinians could take over its operations in short order. Accordingly, instead of contemplating

Agency." United Nations Document A/48/13, October 6, 1993. A United Nations Task Force Report of September, 1993, stressed the same points. By contrast, see Commissioner-General Turkmen statement quoted in footnote 15.

³⁹ Special Task Force Report, September, 1993, p. 2.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ *Ibid.*

expansion, UNRWA would now be well-advised to contract its operations, encouraging the Palestinians to take control over their lives and provide their people with those essential services for which they used to depend on UNRWA.

One of the most important lessons derived from the UNRWA experience concerns the issue of dependence. During its almost five decades of operation, UNRWA has created great dependence on its services: as much as half of the population in the West Bank and Gaza relies on the Agency for its livelihood. Instead of fostering its clients' self-reliance, UNRWA actually did the reverse: it encouraged dependence and reliance on humanitarian aid and relief while failing to encourage the growth of private industry and business in the area. For example, the graduates of UNRWA's education system could either work for UNRWA, leave their homes to find jobs in other countries, or remain in place and be unemployed. A third generation of Palestinian refugees is in the process of seeing UNRWA as an essential source of education, employment and social services; if UNRWA has its way, many more generations will become addicted to the Agency's largesse.

It is not likely that the Palestinian governing Council will continue to accept the existing conditions of dependence, although UNRWA's officials claim to have reached tacit agreements with the PLO to that effect.⁴⁵ It is even less likely that the Palestinian governing Council will relinquish authority to a United Nations agency over significantly sensitive political issues such as education and health care. The Council is even less likely to transfer financial resources under its control to a United Nations agency, for the "privilege" of managing the construction of new projects under the flag of the United Nations. An autonomous political authority like the Palestinian Council simply would not accept an international agency as the second largest employer in its bailiwick. In short, UNRWA is like an old dowager who seeks to compete romantically with a young bride at her wedding; UNRWA is the inevitable rival of the contemplated Palestinian Council and does not seem to realize it. Even Israel has acknowledged the fact that the time has come to transfer authority to the Palestinians. Perhaps it is time for UNRWA to come to the same realization.

⁴⁵ *Ibid.*

A New Isolationism: Threat or Promise

By Robert W. Tucker¹

Book Review by Eric A. Belgrad

Professor Robert Tucker's book, which was released during the height of the presidential fever amidst a welter of national publicity, attempts to re-examine the basic premises in which American policy has been based since the end of the Second World War. The endorsements on the back of the book by Senators Fulbright and Church indicate that Professor Tucker shares the doubts expressed by these critics and others of the fundamental perceptions of the American role in world affairs which have undergirded the foreign policies of the Nixon Administration and of its immediate predecessors: it promises "to think the unthinkable" about the validity of neo-isolationist thought.

Unfortunately, the Tucker analysis suffers from an abundance of straw men which are set up and brilliantly knocked down, thus weakening an otherwise valuable re-examination of American foreign policy. For example, Professor Tucker begins with a discussion of President Nixon's recent contention, in 1971, that "the great internationalists of the post World War II period have become the neo-isolationists of the Vietnam War period and especially of the period accompanying the ending of the War." Professor Tucker then poses the question as to whether presidential fears of a revival of isolationism is not in fact a rhetorical diversion to serve to obfuscate the real issue of American policy in South-East Asia. Dr. Tucker relates that critics of the president claim that to equate a redefinition of America's role in the world with neo-isolationism is to confuse the issue. Since Professor Tucker makes no attempt to rebut this point of view, we must assume that he shares it, and in sharing it, he makes common cause with such critics as Professor Abram Chayes and other foreign policy brain-trusters who serve the McGovern camp. While it is true that these critics of the Administration's foreign policy claim to advocate a "new internationalism," their recommendations, which include a massive cutback in U.S. military capability, the unilateral withdrawal from various parts of the world without consultation, massive reduction in American troop levels in Western Europe contrary to the expressed desires of NATO – all these indicate that the "new internationalism" contains rather important elements of the old isolationism. As Professor Tucker points out, one of the hallmarks of isolationism is unilateralism and it is precisely this unilateralism, linked with an out of hand rejection of any mutual security arrangement based on old or new treaty commitments, which marked the hey-day of classical isolationism (from Washington's farewell address to the America-Firsters) and which underlies one aspect of the new isolationism.

Professor Tucker states that "a new isolationism might well develop under the banner of a new internationalism. However, it is termed, it would still be isolationist if characterized by the refusal to entertain certain relationships and to undertake certain actions." The problem here is

¹ Robert W. Tucker, *A New Nationalism: Threat or Promise* (New York: Universe Books, 1972).

that Professor Tucker confronts us with a fundamental semantic problem. If the new isolationism is different from the old, the only visible feature of that difference can be found in the name. Granted that isolationism today can be tolerated better than in 1940 by the United States because of the present nuclear stalemate and that traditional mutual security systems no longer hold the promise of deterrence by virtue of the decreasing credibility of the threat of retaliation, granted that economic necessities weight more heavily for those nations presently in the American sphere of influence than on the United States itself, the question remains whether the aspirations of America in securing a world which conforms to a particular desired image can be abandoned forthwith without creating incalculable changes within the very fabric of the American peoples.

More important, it can be argued that the new isolationism does not differ materially from the isolationism of the period 1919-1939. While it is true that the continued existence of strategic thermonuclear weapons in the hands of the United States would protect far better the physical security of the country than was possible in the Inter-War period, the conditions of strategic stalemate, whether involving two, three, or more parties, nevertheless recreate the possibilities of approximating the conditions of isolation of pre-nuclear days. If, as Professor Tucker admits, the old isolationism represented an unwise policy then, its lack of wisdom remains evident today, a problem which the Tucker argument does not meet. On the other hand, if the present nuclear context does provide some arcane variant to a policy of isolationism, then a further problem arises. Professor Tucker recommends neo-isolationism only because the physical security of the United States cannot come into question; underlying this contention are two highly questionable assumptions: (a) the threat of use of the thermonuclear deterrent in defense of the United States is entirely credible to an opponent and (b) the United States deterrent has achieved such a plateau of effectiveness that at no time in the future will it again be subject to challenge. The first of these assumptions implies a willingness on the part of the United States to respond to *any* threat to the national security with massive nuclear strikes at the challenger. Yet the evidence is clear that the United States is not willing to accept the onus of a nuclear first strike in defense of even a vital interest – and much less to protect a marginal one. If the United States no longer wishes to jeopardize New York or Chicago in defense of London and Paris, why would such a risk be assumed for San Juan or Pago Pago?

The second assumption is based on a dangerous conception of strategic realities. While Professor Tucker's analysis of American first and second strike capabilities is correct (in fact, it is vindicated by the American position in the SALT I talks) for the present, it takes no account of future technological possibilities. If any of the members of the nuclear club should develop effective counter-measures against a missile attack, they will immediately gain an immense strategic advantage against the other members of the club in that they would no longer have to fear retaliatory strikes. While it is true that under these circumstances alliance would not be of any consequence, it is equally clear that active cooperating between the United States and its allies also provides the benefits of joint benefits from the kind of research which will prevent too great a technological gap from developing.

Finally, one of the benefits which Professor Tucker anticipates from any American policy of neo-isolationism is that erstwhile allies will be forced to look to their own security, thus realizing their own strategic potential instead of relying on the American nuclear shield. The difficulty here is that one cannot contemplate this broad proliferation of nuclear weapons and delivery system with any degree of optimism. The greater the number of nations having a nuclear capability the greater the chance of political miscalculation in the use of these weapons. Therefore, the withdrawal of major powers from the international scene, which stimulates the development of nuclear capability on the part of smaller nations may be seen as a stimulant to the kind of adventurism which inevitably leads to the outbreak of cataclysmic world conflict.

If complete American isolationism does not seem advisable, what remains of the Tucker thesis? Most important is the insight that the alliance systems, which today ties the United States to all parts of the world, was designed in an earlier era, when the American strategic advantage was unquestioned, when the antagonism between East and West was total and implacable, and when Western Europe depended for its political, military, and economic survival on the United States. None of these circumstances hold true today, and yet the alliance system remains unchanged for all intents and purposes. Clearly, present circumstances require a review of United States commitments throughout the world. To the extent that the threat to Western security has lessened, the totality of American commitments to the defense of the West can be lessened. To the extent that the monolithic nature of Russian communism has eroded, the largely "anti-communist" position of the United States is subject to dilution. To the extent that the Western Europeans equal the United States in economic power, the cost of defense rightly becomes a matter of partnership in which the Europeans must assume their fair share. To the extent that the United States has come to realize that its resources are limited, it must measure more carefully the scope for development of these resources, and especially when contemplating any act of intervention in a marginal area. Professor Tucker's thesis then should be seen as a catalyst to a re-examination of the premises of American foreign policy and not as a retreat from all the United States has represented in the post War world.

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Russia, China, and the West 1953-1966

By Isaac Deutscher¹

Book Review by Eric A. Belgrad

This book represents a collection of essays and newspaper articles dealing with Russia during the period of de-Stalinization and published posthumously, some three years after Deutscher's death in 1967.

Penguin's backleaf description of the book hints at both the strengths and weaknesses of the book. These can be best summarized as "the immediacy of contemporary journalism" and "an attempt to present the texts in a narrative sequence so that they form, in as far as is possible, a continuous commentary."

The journalistic immediacy is indeed evident in every page of Deutscher's text; the episodes of Russian internal and external policies are told with a startling bravado, since Deutscher claims knowledge of the deepest motives underlying the policy-making leadership in the Kremlin. The feeling of the book is of a chatty, frothy newspaper column, in which Khrushchev, Beria, Molotov, Kaganovich, Mao, Malenkov, Zhukov, and other Communist leaders cheerfully flit about, pirouetting this way and that, like so many marionettes on an historic string of Deutscher's devising. No attempt is made to place Soviet policy in a serious historical or doctrinal framework. Instead, cheerfully confident tautological generalities leap at the reader from practically every page, striking an equal balance of astonishment and delight at the author's courage. Early in an article dated 5 March 1954, Deutscher confidently tells us

Contrary to popular belief, the spectre of a rearmed Germany does not cause a single sleepless night to the men in the Kremlin, who know perfectly well how many sleepless nights that spectre must cause to Germany's Western European neighbors. (p. 15)

Not very much later, (10 February 1955) he explains the dismissal of the "consumptionists" led by Malenkov, by invoking the spectre of a rearmed Germany, which immediately causes the Kremlin to abandon its ideas of economic liberalization in favor of a massive armaments increase. He concludes that

Molotov apparently had this counter-coup to the armament of Western Germany in mind when he said at the last session of the Supreme Soviet that the 'Western Imperialists' would adopt a different language *vis-à-vis* Russia once they saw what were the Soviet counter-measures. (p. 33)

A similar ambivalence may be found in Deutscher's description of the roles of individual members of the Politburo. In an article dated 26 February 1956, he described Mikoyan's role at the Twentieth Party Congress, which was devoted to the denunciation of the personality cult, as that of chief architect of a movement to re-establish collective leadership. Here Mikoyan is pictured "as the mouthpiece of militant anti-Stalinism" (p. 58), demolishing the person and the doctrine of his erstwhile master in a speech where "he consciously borrowed... terms, as well as many other ideas and formulas, from none other than Trotsky, who coined them." (p. 59) Yet at

¹ Isaac Deutscher, *Russia, China, and the West 1953-1966*, ed. Fred Halliday (Middlesex: Penguin Books, 1970).

the end of the book, Mikoyan, who is described as the architect of Khrushchev's downfall, finds himself forced out of the Politburo "without even a vote of thanks for his forty years service." (p. 325) This dismissal is then characterized as giving much satisfaction to "crypto-Stalinists," who, in the same article, are shown to have been cast aside permanently: "The Congress did not rehabilitate Molotov and Kaganovich, the Stalinist die-hards whom Khrushchev had expelled from the Party." (p. 324) The Twenty-Third Congress thus seems to cast aside the Stalinists and anti-Stalinists at the same time, and Mikoyan's role in forty years of Party leadership is left in a miasma of contradictions.

The intrinsic problem of the book is that it is nothing more than a collection of articles written by Deutscher over a period of thirteen years, which have no unifying idea or principle to hold them together. This episodic treatment is further aggravated by the fact that the editor of this collection was not sensitive to the all too obvious contradictions and confusions of these articles, so that the general chronological framework which is provided in no way alters the fact that the book is very confusing and quite unsatisfactory as a serious analytical work. Beyond this, Deutscher's avowed Marxism, though framed in the guise of anti-Stalinism and anti-Khrushchevism, makes a number of so-called insights in the role of such Western Marxist as Thorez and Togliatti highly suspect, from an ideological and historical viewpoint.

The book does contain a chronology of events which may be helpful to the reader who is not acquainted with the major events of the last two decades, but this chronology is not keyed to specific articles describing the events listed. A rather extensive index is also available, but there is no bibliography, and no authorities are cited by way of verification of Deutscher's numerous controversial assertions. On balance, then, the book is of no intrinsic value to the serious student of Soviet affairs; but rather, it must be considered at best as a collection of dated articles suitable for casual bedtime reading.

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PART THREE

**GREATEST HITS:
OUTSTANDING CONTRIBUTIONS TO THE
TOWSON UNIVERSITY JOURNAL OF
INTERNATIONAL AFFAIRS**

Make No Drones About It: Evaluating the U.S. Drone Program Based On Domestic Policy Standards

Jacob Loewner

Abstract: *United States policymakers have set strict standards on the parameters of drone use. They have thereby laid out before the public an idealized narrative of the effectiveness of drones, as well as the restraint with which they are used. Beyond this lofty rhetoric, however, the U.S. government has been incredibly reluctant to furnish information on its drone program. To complicate matters further, the rhetoric on the drone program put out by the administration is rarely corroborated by facts on the ground due to frequent civilian deaths, signature strikes, and the targeting of Americans. This piece analyzes the realities of the drone program against the backdrop of the idealized rhetoric laid out by the Obama Administration and finds that the rhetoric is not supported by the facts on the ground. As such, the piece argues for increased transparency and more effective human intelligence to be applied to the drone program.*

Introduction

In January 2015, the United States conducted a drone strike that led to three deaths which had enormous and widespread consequences. A drone strike targeting an Al Qaeda compound on the border between Pakistan and Afghanistan led to the death of Ahmed Farouq, an Al Qaeda leader and American citizen, and two hostages, one an American and the other an Italian.¹ The United States did not know that the hostages were present, and did not specifically target the American Al Qaeda leader.² According to President Obama and the White House Press Secretary, the United States acted on the best intelligence that it had available, which included “hundreds of hours” of surveillance of the site.³ The tragic circumstances surrounding this case led the Obama administration to release an almost unprecedented, yet still relatively scarce, amount of information on a particular drone strike. Even so, the White House still refused to acknowledge on the record that a drone carried out the attack, preferring to call the attack a “counterterrorism operation.”⁴ Unfortunately, according to UN reports, narratives such as these are not isolated incidents; they are often the realities of the U.S. drone program.⁵ In order to mitigate future tragedies and to avoid international scrutiny, U.S. drone policy must be critically examined and evaluated. This piece will attempt to contribute to the aforementioned evaluation.

¹ Jeremy Diamond, “U.S. Drone Strike Accidentally Killed 2 Hostages,” *CNN*, April 23, 2015, accessed May 9, 2015, <http://www.cnn.com/2015/04/23/politics/white-house-hostages-killed/>.

² Ibid.

³ Ibid. ⁴ Ibid. ⁵ Ben Emmerson, “A/HRC/25/59: Report of the Special Rapporteur on the Promotion and Protection of Human

Rights and Fundamental Freedoms while Countering Terrorism, Ben Emmerson,” *United Nations Council on Human Rights*, February 24, 2014, 10-19, accessed March 9, 2015, <http://justsecurity.org/wpcontent/uploads/2014/02/Special-Rapporteur-Rapporteur-Emmerson-Drones-2014.pdf>.

Regardless of the nationalities of the civilians who have died as a result of U.S. drone strikes, anecdotes such as these raise important questions about both the standards that the United States sets for its drone program and the effectiveness of the intelligence behind them. To be sure, drones offer an effective way to kill terrorists with comparatively fewer risks to both U.S. personnel and to civilians than other counter-terrorism methods.⁴ As will be examined throughout this analysis, United States policymakers have been careful to set strict standards on the parameters of drone use. Policymakers have laid out before the public an idealized narrative of the effectiveness of drones, as well as the restraint with which they are used. Beyond this lofty rhetoric, however, the U.S. government has been incredibly reluctant to furnish information on its drone program. To complicate matters further, the rhetoric on the drone program provided by the administration is rarely corroborated by facts on the ground due to frequent civilian deaths, signature strikes, and the targeting of Americans.⁵ Recognizing this, the United States should bolster its human intelligence apparatus and employ other counterterrorism methods such as ground troops in conjunction with drones. Such action would bring the drone program in line with the high standards the administration has placed upon it.

Stated U.S. Drone Policy

In order to make an effective evaluation about the U.S. drone program, it is necessary to have a standard by which to evaluate it. Some scholars have set that standard as international law and others have sought to evaluate drones on their practicality and effectiveness as a counterterrorism mechanism.^{6,7} These metrics are certainly important, and they will be touched on throughout this analysis, but it is also necessary to evaluate the drone program based on the standards that the U.S. government itself has placed on it.

As previously alluded to, the U.S. government very rarely releases substantive information on its drone policy. The closest to definitive comments on policy that has been released to the public come from a 2013 speech that President Obama gave at the National Defense University, and an accompanying fact sheet released by the White House. In his speech, Obama claims that for the U.S. to carry out a drone strike, “there must be near-certainty that no

⁴ William Saletan, “In Defense of Drones,” *Slate*, March 13, 2013, accessed April 12, 2015.

http://www.slate.com/articles/health_and_science/human_nature/2013/02/drones_war_and_civilian_casualties_how_unmanned_aircraft_reduce_collateral.html.

⁵ Cavallaro, James, Stephan Sonnenberg, and Sarah Knuckey, “Living under drones: death, injury, and trauma to civilians from US drone practices in Pakistan: Overview,” *NYU School of Law and Stanford Law School*, (2012), accessed March 8, 2015.

http://law.stanford.edu/wpcontent/uploads/sites/default/files/publication/313671/doc/slspublic/Stanford_NYU_LIVING_UNDER_DRONES.pdf.

⁶ For an international legal perspective, see Mahmood Ahmad, “The Use of Drones in Pakistan: an Inquiry into the Ethical and Legal Issues,” *Political Quarterly* 85, no. 1 (January 2014): 65 and 68, accessed March 8, 2015,

[http://eds.a.ebscohost.com/eds/pdfviewer/pdfviewer?sid=ef256a5e-2237-40db-ae72-](http://eds.a.ebscohost.com/eds/pdfviewer/pdfviewer?sid=ef256a5e-2237-40db-ae72-ba03a162d46%40sessionmgr4002&vid=7&hid=4102)

[ba03a162d46%40sessionmgr4002&vid=7&hid=4102](http://eds.a.ebscohost.com/eds/detail/detail?sid=ef256a5e-2237-40db-ae72-ba03a162d46%40sessionmgr4002&vid=18&hid=4102&bdata=JnNpdGU9ZWRzLWxpdmUmc2NvcGU9c2l0ZQ%3d%3d#db=ecn&AN=1380314); for a practical perspective, see Daniel Byman, “Why Drones Work: The Case for Washington’s Weapon of Choice,” *Foreign Affairs* 92, no.4 (2013), accessed March 8, 2015.

[http://eds.a.ebscohost.com/eds/detail/detail?sid=ef256a5e-2237-40db-ae72-](http://eds.a.ebscohost.com/eds/detail/detail?sid=ef256a5e-2237-40db-ae72-ba03a162d46%40sessionmgr4002&vid=18&hid=4102&bdata=JnNpdGU9ZWRzLWxpdmUmc2NvcGU9c2l0ZQ%3d%3d#db=ecn&AN=1380314)

[ba03a162d46%40sessionmgr4002&vid=18&hid=4102&bdata=JnNpdGU9ZWRzLWxpdmUmc2NvcGU9c2l0ZQ%3d%3d#db=ecn&AN=1380314](http://eds.a.ebscohost.com/eds/detail/detail?sid=ef256a5e-2237-40db-ae72-ba03a162d46%40sessionmgr4002&vid=18&hid=4102&bdata=JnNpdGU9ZWRzLWxpdmUmc2NvcGU9c2l0ZQ%3d%3d#db=ecn&AN=1380314).

civilians will be killed or injured.”⁹ Obama goes on to refer to this as “the highest standard we can set.”¹⁰ President Obama surely knows that civilian deaths are one of the most potent arguments against drone warfare and by setting this standard he attempts to address the doubts of all but the most stalwart humanitarians.

Released the same day as the president’s speech, the fact sheet, summarizing a classified Presidential Policy Guidance on targeted killings, echoes and corroborates the information presented in Obama’s speech. For instance, the document clearly states that it is the policy of the United States “not to use lethal force when it is feasible to capture a terrorist suspect, because capturing a terrorist offers the best opportunity to gather meaningful intelligence and to mitigate and disrupt terrorist plots.”¹¹ This policy furthers the high standard placed on the drone program as it indicates that drone strikes are not the first option on the table and the ability to capture terrorists will be examined before drones or other lethal methods are considered. In addition, the document explains that force will only be used against “a target that poses a continuing, imminent threat to U.S. persons.”¹⁰ The document makes this requirement even more stringent by immediately qualifying that being a terrorist does not by definition mean that one is necessarily posing a continuing and immediate threat and that only those who are can have lethal force used against them.¹¹ The fact sheet also goes on to address concerns of international law and sovereignty claiming that the United States respects both and that its policy adheres to both.¹⁴

In short, this document answers nearly every criticism of U.S. drone policy. As such, if the United States adheres to its presented policy, then there is little argument that can be made against the administration’s use of drones. Nevertheless, to determine if the government is adhering to its policy, one must analyze the decisions made and the actions taken on individual drone strikes. Unfortunately, except in extreme cases such as the aforementioned drone strike which killed Western hostages, the U.S. government does not release information about the circumstances of individual strikes.¹² Perhaps the most telling evidence of the zealotry of the administration’s protection of any information relating to the drone program comes from an interview with Obama’s first press secretary, Robert Gibbs. In the interview, Gibbs states that “one of the first things they told me was, you’re not even to acknowledge the drone program.

⁹ Barack Obama, “Remarks by the President at the National Defense University,” *The White House*, May 23, 2013, accessed March 8, 2015, <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-nationaldefense-university>. ¹⁰ Ibid. ¹¹ The White House, “Fact Sheet: U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism

Operations Outside the United States and Areas of Active Hostilities,” *The White House*, May 23, 2013, accessed March 8, 2015. <http://www.whitehouse.gov/the-press-office/2013/05/23/fact-sheet-us-policy-standards-and-procedures-use-force-counterterrorism>.

¹⁰ Ibid.

¹¹ Ibid.

¹⁴ Ibid.

¹² Milena Sterio, “The Covert Use of Drones: How Secrecy Undermines Oversight and Accountability,” *Albany Government Law Review* 8 no. 1, (2015): 164-5.

http://www.albanygovernmentlawreview.org/Articles/Vol08_1/8.1.129-Sterio.pdf

You're not even to discuss that it exists."¹³ While this narrative has become slightly more open (the Obama administration is now willing to acknowledge the program's existence) little else has substantively changed.¹⁴

A more recent example of the administration's desire to maintain an aura of secrecy around the drone program comes from a lawsuit between the American Civil Liberties Union (ACLU) and the Central Intelligence Agency (CIA). In 2010, ACLU filed a Freedom of Information Act (FOIA) request to the Departments of State, Defense and Justice, as well as to the CIA. According to the ACLU, the request sought documents pertaining to "when, where, and against whom drone strikes can be authorized, and how the United States ensures compliance with international laws relating to extrajudicial killings."¹⁵ While the three departments agreed to furnish some, but not all information, the CIA denied the request outright.¹⁹ The CIA issued, and a D.C. District Court originally upheld, what is known as a "Glomar response," wherein it refused to either confirm or deny even the existence of any documents acknowledging the drone program.¹⁶ This response was given with the justification that "whether such [documents] even exist is a properly classified fact."¹⁷

The ACLU filed suit against the CIA, disputing the "Glomar response." Recently, a D.C. Circuit Court ruled that even though the government had not admitted to the existence of the CIA drone program in an official capacity, the overwhelming acknowledgement of the program by "anonymous" government officials meant that the program itself could not reasonably be considered classified.¹⁸ The Circuit court therefore ruled that the CIA's original response was inadequate and required the agency to begin the FOIA process anew.¹⁹ As a result, the CIA "searched for and acknowledged the existence of twelve legal memoranda and thousands of classified intelligence products."²⁰ The agency then released a redacted white paper from the Department of Justice, but withheld the other 11 memoranda and all of the intelligence reports.²¹ This slight victory for the ACLU was short-lived. In June of 2015, the same D.C. District Court that upheld the CIA's original Glomar response ruled that because of potentially sensitive national security information contained in the CIA's documents, the agency was not mandated to furnish any documents, even redacted ones, to the ACLU, effectively ending the FOIA request.²² While national security concerns are undeniably legitimate, applying such a broad ruling to all CIA documents containing information on drone strikes ensures that scholars, journalists, and the

¹³ Lloyd C. Gardner, *Killing Machine: the American Presidency in the Age of Drone Warfare*, (New York: The New Press, 2013), vii.

¹⁴ Sterio, "The Covert Use of Drones," 134.

¹⁵ "ACLU v. CIA - FOIA Case for Records Relating to Drone Killings," last modified July 24, 2014, accessed May 9, 2015. <https://www.aclu.org/cases/aclu-v-cia-foia-case-records-relating-drone-killings?redirect=cases/predatordrones-foia>.¹⁹ Ibid.

¹⁶ Andrew Christy, "The ACLU's Hollow FOIA Victory over Drone Strikes." *George Mason Law Review* 21 no.1 (2013): 2-3.

¹⁷ Ibid.

¹⁸ Ibid., 2.

¹⁹ *American Civil Liberties Union v. Central Intelligence Agency*, 10-436 F. Supp. 2d 74, 1 (D.D.C. 2015) https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2010cv0436-74.

²⁰ Ibid.

²¹ Ibid., 1-2.

²² Ibid., 34.

public at large will remain woefully uninformed of the government's official decisions made and actions taken on drone strikes.

With the government's unwillingness to divulge information on the drone program, the only way to adequately analyze whether the realities of the U.S. drone program are adhering to government standards is to rely on the facts gathered after the strikes by third party organizations. Several organizations have collected data on drone strikes and their consequences, but three of them, the Long War Journal, the New America Foundation, and the UK-based Bureau of Investigative Journalism, stand out as having the most reliable information.²³ Several journalists as well as academics use the data from one or all of these organizations when conducting research on drone strikes.²⁴ Highlighting their authority on drone strikes, the Human Rights Clinic at Columbia Law School chose to audit these three organizations because they were deemed to be the most influential organizations devoted to tracking drone strikes.²⁹ Unfortunately, the facts on the ground gathered by these groups often tell of frequent civilian deaths, signature strikes, and American targets. Such realities cannot logically align with an adherence to the lofty policies laid out by the Obama administration.

The Realities of the Drone Program

Civilian Deaths

Having laid the backdrop of the stringent U.S. policy on drone strikes, it is now appropriate to examine the data available on the realities of the program itself. One of the most strident arguments against the U.S. drone policy is that civilians, including women and children, are inevitably killed by drone strikes. Scholars have used this claim to make moral, practical, and international legal arguments for why the drone program should be reevaluated. The civilian casualties surrounding drone strikes are therefore one of the most important metrics by which to evaluate the drone policy and determine if it is adhering to the strict guidelines purportedly adopted by the government.

The U.S. government has not publicly released an official tally of the number of civilian deaths caused by its drone program. Occasionally, the administration will acknowledge civilian deaths that result from high-profile strikes, but these instances are rare.²⁵ Demonstrating the administration's unwillingness to acknowledge civilian deaths is the fact that in June of 2011, Obama's top counterterrorism advisor, John O. Brennan, claimed that U.S. drones had not killed a single civilian since August 23, 2010.²⁶ This estimation was contradicted by "even the most conservative nongovernmental civilian casualty estimates"²⁷ Because the government's scarce

²³ Saletan, "In Defense of Drones."

²⁴ Ibid.; Chantal Grut, "Counting Drone Strike Deaths," *Columbia Law School Human Rights Clinic*, (2012): 4, <http://web.law.columbia.edu/sites/default/files/microsites/human-rightsinstitute/files/COLUMBIACountingDronesFinal.pdf>. ²⁹ Grut, "Counting Drone Strike Deaths," 4.

²⁵ "Acknowledge All Civilian Drone Strike Deaths, Human Rights Groups Urge President Obama." May, 13 2015, accessed 9/22/15, <http://www.reprieve.org/acknowledge-all-civilian-drone-strike-deaths-human-rights-groups-urgeobama.html>.; Grut, "Counting Drone Strike Deaths," 9.

²⁶ Cavallaro, Sonnenberg, and Knuckey, "Living Under Drones," 32; Tom McCarthy, "John Brennan: CIA Veteran who Became Obama's Drone Champion," *Guardian*, January 13, 2013, accessed September 26, 2015, <http://www.theguardian.com/world/2013/jan/07/john-brennan-cia-drones-obama>.

²⁷ Cavallaro, Sonnenberg, and Knuckey, "Living Under Drones," 32.

acknowledgements are so widely recognized as inaccurate, it has fallen to independent organizations to attempt to tally civilian casualties. The Long War Journal estimates that 150 civilians had been killed in drone strikes between 2006 and 2012; the New America Foundation estimates that 305 had been killed in that time; and, the Bureau of Investigative Journalism estimates that between 2004 and today there have been between 423 and 962 civilian deaths attributable to drones.²⁸ Because of its extensive and well-documented use of credible sources and its propensity to send its own independent researchers to the areas where drone strikes have occurred, the Bureau of Investigative Journalism provides what appears to be the most accurate numbers on civilian casualties from drone strikes.²⁹ Indeed, the aforementioned audit of the three organizations found the Bureau to have a “more methodologically sound count of civilian casualties” than the other two.³⁵

It is doubtful, based on the sheer volume of civilian deaths, that the government is going to great lengths to have “near certainty” that no civilians will be harmed in the individual strikes that it carries out. It must be made clear, of course, that civilian casualties will inevitably occur in any counterterrorism strategy and drones are no different. The battlefield where civilians cannot be harmed has not been shown to exist in the modern era. It is true that drones offer the best, or, as one scholar put it, the “least worst” counterterrorism strategy in terms of civilian casualties.³⁶ The ratios of civilian casualties associated with conventional air strikes and ground troops are much higher than that of drone strikes.³⁰ Even so, the simple fact that drones kill fewer civilians than other counterterrorism strategies does not necessarily mean that the methods in which they are used cannot or should not be improved upon. A scalpel is a far better tool for conducting surgery than is a hatchet. To ensure its effectiveness, however, one must ensure that the scalpel is sharp and is being wielded by someone with the proper intelligence and skill set. The same is true of drones. If the administration purports that it adheres to the “highest standard” of mitigating civilian casualties, then the drone program must be evaluated by those standards. Presently, the relatively high number of civilian casualties belies the government’s position.

Moreover, it is likely that the government’s numbers for civilian casualties are so low because the government rarely investigates whom it actually kills. There are, of course, some practical reasons for this as some individuals are burned or dismembered beyond recognition and the areas where these strikes are conducted are hard to access.³¹ Nevertheless, researchers at New York University (NYU) and Stanford claim that there is “little evidence that US authorities have engaged in any effort to visit drone strike sites or to investigate the backgrounds of those killed. Indeed, there is little to suggest that the US regularly takes steps even to identify all of those killed or wounded.”³² This raises distinct questions of how the administration can make definitive claims about the accuracy of drone strikes and the low risk of civilian casualties. Even

²⁸ Saletan, “In Defense of Drones”; The Bureau of Investigative Journalism, “Get the Data: Drone Wars,” *The Bureau of Investigative Journalism*, May 7, 2015, accessed May 10, 2015, <http://www.thebureauinvestigates.com/category/projects/drones/drones-graphs/>.

²⁹ The Bureau of Investigative Journalism, “Get the Data: Drone Wars.” ³⁵ Grut, “Counting Drone Strike Deaths,” 5. ³⁶ Saletan, “In Defense of Drones.”

³⁰ *Ibid.*; Obama, “Remarks by the President.”

³¹ Cavallaro, Sonnenberg, and Knuckey, “Living Under Drones,” 33.

³² *Ibid.*

if the government did conduct internal investigations into those killed by drone strikes, as some unofficial government sources have claimed,³³ it is unlikely that the results of such investigations would be released for public scrutiny. As such, it becomes nearly impossible to independently confirm that the U.S. is adhering to the standard that for a strike to occur there must be near certain intelligence indicating that civilians will not be harmed.

Signature Strikes

Another reality of the U.S. drone program that contradicts the narrative of rigorous standards put forth by the administration is the use of so-called “signature strikes.” Scholars define signature strikes as “a drone strike on suspected terrorists or militants whose identities are not known, but whose ‘pattern of life activity’ would seem to indicate that they are involved in some militant/terrorist activity.”³⁴ These strikes bear a stark contrast to “personality strikes,” which identify and target specific terrorists who are high-ranking members of Al Qaeda or other dangerous terrorist organizations.³⁵ The January 2015 strike which killed the American and Italian hostages reportedly did not target a specific individual, but rather the Al Qaeda compound itself, therefore classifiable as a signature strike.³⁶ Beyond the general definition of signature strikes, the government provides scant information on these strikes. More importantly, the government provides no indication as to the criteria that must be met before a signature strike can be launched.³⁷

Signature strikes, by their definition, contradict the stated policy of the United States. The aforementioned fact sheet demands that for lethal force to be used, it must target an individual or individuals who pose a continuous and imminent threat. It is certainly arguable that anyone who associates with Al Qaeda or any other such terrorist groups is an enemy of the United States. It is significantly less certain, though, that anyone who associates with those groups necessarily poses an “imminent threat,” a term that also remains publicly undefined by the U.S. government. It is unreasonable to think that the government could make such a definitive claim about the threat an individual poses without knowing the identity of that individual. The argument could of course be levied that the United States should be able to conduct signature strikes. This argument is advanced on the basis that it is likely that the people associating themselves with terrorist organizations would like to harm the U.S. and its interests.³⁸ While this argument has merit, if the U.S. asserts highly stringent standards in its official policy, then the drone policy must be evaluated on those standards. A logical examination of the definition of signature strikes yields the conclusion that they do not adhere to the idealized policies laid out in the White House fact sheet. This evaluation is likely to remain in place unless the administration releases further

³³ Letta Tayler, “A Wedding that Became a Funeral: US Drone Attack on Wedding Procession in Yemen,” *Human Rights Watch* (2014): 12, accessed March 9, 2015, http://www.hrw.org/sites/default/files/reports/yemen0214_ForUpload_0.pdf.

³⁴ Sterio, “The Covert Use of Drones,” 163.

³⁵ Cavallaro, Sonnenberg, and Knuckey, “Living under drones,” 12.

³⁶ Diamond, “U.S. Drone Strike Accidentally Killed 2 Hostages.”

³⁷ Jo Becker and Scott Shane, “Secret ‘Kill List’ Proves a Test of Obama’s Principles and Will,” *New York Times*, May 29, 2012, accessed May 10, 2015, <http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-alqaeda.html>.

³⁸ Byman, “Why Drones Work”; Anderson, “The Case for Drones,” 17.

information on the specifics of how intelligence is analyzed and what criteria must be met before an individual can be determined to pose an imminent threat.

Targeting Americans

While signature strikes raise important concerns about using force when the United States does not have a specific, identified target, there are also concerns when the U.S. targets an American citizen. Targeting an American raises questions about the U.S. Constitution and the right to due process, questions that are simply not raised when terrorists without American citizenship are killed. As such, this topic must be addressed in any analysis that seeks to evaluate the standards of the U.S. drone policy. The most well-known case of drones targeting an American is the strike that targeted and killed Anwar Al-Awlaki, a leader of Al Qaeda in the Arabian Peninsula who, allegedly, was involved in the plotting of the attempted Christmas Day underwear bombing. President Obama maintained in his speech to the National Defense University that it was completely legal under domestic law to target and kill Awlaki and that because Awlaki was actively plotting to attack the U.S., his citizenship did not shield him from lethal action.³⁹

To further justify his point, Obama also made the analogy that a SWAT team would not be questioned if it used lethal force against an American sniper firing into a crowd of innocents. Obama's implication was clear that the same lethal force could be justified against an American terrorist.⁴⁰ This very analogy was echoed recently by Tom Donilon, former national security advisor to President Obama, on Meet the Press.⁴¹ This logic fails when considering the fact that the sniper would be presenting a clear and present danger when firing into a crowd; in this instance, lethal force is undeniably justified. It would not be justified, however, if a SWAT team came to the would-be sniper's home the day before his planned attack and shot him. While analogies are generally meant only to be illustrative, the fact that both the president and his senior advisors rely on this logic and do not see the flaws within it is disconcerting. Obama's remarks are bolstered by a Department of Justice memo, which describes in detail the legal justification for targeting and killing Awlaki. The memo discusses several possible statutes that justify the use of force against terrorists, even with U.S. citizenship. The document also examines statutes that could potentially prohibit the CIA or Department of Defense (DoD) from carrying out such an attack and then proceeds to explain why those prohibitions do not apply to the Awlaki case.⁴²

While the justification of Awlaki's death is relatively straightforward from the administration's perspective, several scholars and analysts disagree.⁴³ One of the most potent

³⁹ Obama, "Remarks By the President."

⁴⁰ Ibid.

⁴¹ "Meet the Press Transcript - April 26, 2015" *NBC*, April 26, 2015, accessed May 11, 2015. <http://www.nbcnews.com/meet-the-press/meet-press-transcript-april-26-2015-n350661>.

⁴² Office of the Assistant Attorney General, "Memorandum for the Attorney General RE: Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al- Aulqi" *U.S. Department of Justice*, July 16, 2010, accessed May 10, 2015, <http://www.washingtonpost.com/r/20102019/WashingtonPost/2014/06/23/National-Security/Graphics/memodrones.pdf>.

⁴³ Alice K. Ross, "Legal Experts Dissect the US Government's Secret Drone Memo: A Round-Up," *The Bureau of*

critiques comes from constitutional law expert Steve Vladeck, who articulates that, regardless of the memo's explanation of due process, it does not, and cannot, satisfy other important constitutional questions. For instance, he argues that the memo is very specific to the circumstances surrounding Awlaki at the time that the memo was written.⁴⁴ At that time, it was concluded by intelligence analysis that Awlaki posed a continuing and imminent threat, and that his capture would be unfeasible.⁴⁵ This justification notwithstanding, Awlaki was killed 14 months after the writing of the memo and, while the memo does allow for the CIA and DoD to "monitor whether changed circumstances" would permit the capture of Awlaki, it is not clear that those reevaluations ever took place.⁴⁶ Furthermore, Vladeck raises the point that the memo only provides an executive review of due process, not a judicial one. Vladeck succinctly articulates the problem with a purely executive review as he notes that "[t]he Supreme Court has *never* identified a situation in which whether the government provided due process can be confirmed without at least some judicial assessment, at some point, of the government's conduct" (author's emphasis).⁵⁴ Therefore, the memo, because it is a wholly executive document, cannot adequately confirm the constitutionality of Awlaki's killing.

Moreover, other scholars point out that the memo spends the majority of its time justifying lethal action for the DoD and comparatively little time discussing the legality of the CIA, a civilian agency, taking lethal action against an American citizen.⁴⁷ Ultimately, it was the CIA that conducted the drone strike that killed Awlaki and therefore the legal justification has fewer legs to stand on than if the DoD had taken the action. In addition, the circumstance of the Awlaki case that is by far the most concerning is that the memo was drafted on July 16, 2010, but the first known U.S. attempt to kill Anwar Al-Awlaki was on December 24, 2009, over six months prior to the official justification from the Department of Justice.^{48,49} Though a traditional aircraft, not a drone, conducted this first strike, it bears extreme significance to this case. Had the strike been successful, the U.S. would have targeted and killed a U.S. citizen overseas without official Department of Justice justification.

The above analysis indicates that neither the position of the government nor that of the critics is wholly unassailable. Therefore, the legality of the CIA's targeting and killing of Anwar Al Awlaki is at best questionable. The memo also raises further concerns about how closely the United States adheres to the policies laid out by the administration. While the memo uses the language of the fact sheet in claiming that Awlaki presented an imminent threat and his capture was unfeasible, it still leaves vague terms such "imminent" woefully undefined and presumably

Investigative Journalism, June 25, 2014, accessed May 10, 2015,

<http://www.thebureauinvestigates.com/2014/06/25/legal-experts-dissect-the-us-governments-secret-drone-memo-around-up/>.

⁴⁴ Steve Vladeck, "The Constitutional Question the Drone Memo Didn't—and Couldn't—Answer," *Just Security*, June 24, 2014, accessed May 10, 2015, <http://justsecurity.org/12086/drone-memo-constitution/>.

⁴⁵ Office of the Assistant Attorney General, "Memorandum for the Attorney General," 40.

⁴⁶ *Ibid.*; Vladeck, "The Constitutional Question"

⁵⁴ *Ibid.*

⁴⁷ Ross, "Legal Experts Dissect."

⁴⁸ The Bureau of Investigative Journalism, "Get the Data: Drone Wars Yemen: Reported U.S. Covert Actions 2001-49," *The Bureau of Investigative Journalism*, March 29, 2012, accessed May 13, 2015,

<http://www.thebureauinvestigates.com/2012/03/29/yemen-reported-us-covert-actions-since-2001/>.

up to the sole interpretation of officials in the executive branch.⁵⁰ Moreover, because the memo is so specific to Awlaki's case, it cannot be generalized to legally justify the killing of future American citizens who join terrorist organizations overseas.⁵¹

Moving Forward: Improvements to the Drone Program

Why Improvements are Needed

It is imperative to emphasize that the criticisms laid out above should not be taken as a call to end the drone program altogether. Such an argument would be shortsighted and ignore the myriad advantages that drones have over other mechanisms of war. Compared to other counterterrorism strategies, drones kill a fewer percentage of civilians.⁵² Likewise, drones significantly, if not completely, reduce the risk to American servicemen and women by removing a human presence from the battlefield. Furthermore, drones display the United States' military and technological prowess to the enemy. In this way, drones are not unlike the Great White Fleet sent on tour by Theodore Roosevelt to remind the world that America had the military might necessary to achieve its foreign policy goals.⁵³ However, these strategic advantages can only be maximized if drones are made more effective by further reducing the number of civilian deaths and allowing more public scrutiny of the program, such as that advocated by the ACLU. These recommended measures ensure that the United States is following the legal and moral imperatives that the administration insists that it is.

Before delving into the specific policy changes that the U.S. should adopt to add transparency and accuracy to its drone program, it is important to understand the factors demanding these policy changes and why such factors matter. There are several practical reasons for why the United States should bring its drone program up to the rigid standards that it has set for itself. These practical reasons extend far beyond the naïve normative argument that a government should be honest with its citizens. One such factor is that, by adhering to the strict standard of "near certainty" that no civilians will be harmed, the U.S. will reduce the potential for civilian casualties even further. In so doing, the United States will mitigate the risk of blowback, or creating more radicalization by killing civilians. Blowback has been referred to by scholars as "the most prominent critique" of the drone program because, if it exists, it has the potential to undermine the effectiveness of the entire program.⁵⁴ By killing fewer civilians, terrorists will have less potent propaganda from which to draw upon to radicalize the general population.⁵⁵ Another factor that should lead the United States to improve the transparency and accuracy of the drone program is the fact that the current use of drones is eroding the U.S.'s

⁵⁰ Office of the Assistant Attorney General, "Memorandum for the Attorney General."

⁵¹ Vladeck, "The Constitutional Question."

⁵² Saletan, "In Defense of Drones."

⁵³ George C. Herring, *From Colony to Superpower: U.S. Foreign Relations Since 1776* (New York: Oxford University Press, 2008): 349.

⁵⁴ Kenneth Anderson, "The Case for Drones," *Commentary* 135, no. 6 (June 1, 2013): 14, accessed May 10, 2015, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2047537.

⁵⁵ Audrey Cronin, "Why Drones Fail," *Foreign Affairs* 92, no. 4 (2013), accessed March 8, 2015, <http://eds.a.ebscohost.com/eds/detail/detail?sid=ef256a5e-2237-40db-ae72->

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international credibility and alienating its allies. The most venerable international institution, the United Nations, has on multiple occasions called for the U.S. to be more judicious and transparent in its use of drones. For example, in 2010, Philip Alston, the UN Special Rapporteur on Extrajudicial Executions, issued a report on drone strikes, particularly those used by the United States. In his report, Alston claimed that the “strongly asserted but ill-defined license to kill without accountability is not an entitlement which the United States or any other states can have without doing grave damage to the rules designed to protect the right to life and prevent extrajudicial executions.”⁵⁷ Alston goes on throughout the report to call into question the international legal premises on which the United States has built its policy on targeted killings through drone strikes.⁵⁸ This report from the UN indicates the international unease relating to the U.S.’s liberal use of drone strikes to conduct targeting killings.

What is more, the Alston report was not an isolated occurrence but rather was one in a string of other such reports. A more recent report by Benjamin Emmerson, the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, similarly calls into question the lack of transparency in the United States’ drone program. In his report, Emmerson calls on the U.S. to release detailed information on 30 cases where drone strikes have allegedly killed a significant number of civilians, especially children.⁵⁹ The significance of these reports is unlikely to be lost on the Obama administration. Throughout his presidency, Barack Obama has tried, where it has been realistic, to rebuild relations between the U.S. and the UN. In 2009 for example, the U.S. ran for and was elected to serve on the Human Rights Council.⁶⁰ While the use of drones is far from the only policy that calls the United States’ human rights record into question, these reports by the UN Special Rapporteurs undoubtedly add to the negative light in which other countries view the United States.

Arguably more important than UN criticisms are the criticisms of the drone program made by key U.S. allies. While the drone program has relatively widespread support domestically, with nearly two-thirds of Americans approving of killing terrorists overseas with drones,⁶¹ the international opinion of the program is starkly different. The international community, removed from the idealized rhetoric advanced by the Obama administration, is, by majority, opposed to the U.S. drone program. This is evidenced by a Pew Research poll which indicates that majorities in many of our regional allies and even our strongest Western European allies are opposed to drone strikes. This is true in the Middle East where 90% of Jordanians oppose U.S. drone strikes along with 83% of Turks.⁶² Opposition extends to Western Europe

⁵⁷ Office of the High Commissioner for Human Rights, “Un Expert Criticizes ‘Illegal’ Targeted Killing Policies and Calls on the US to Halt CIA Drone Killings,” *United Nations* (June 2, 2010), accessed March 8, 2015, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10094&LangID=E>.

⁵⁸ Philip Alston, “A/HRC/14/24/Add.6: Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston,” *United Nations Council on Human Rights*, (May 28, 2010), accessed March 8, 2015, <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf>.

⁵⁹ Emmerson, “A/HRC/25/59”

⁶⁰ Thomas Weiss, David Forsythe, Roger Coate, and Kelly-Kate Pease, *The United Nations and Changing World Politics*, (Boulder, CO: Westview Press, 2008), 213.

⁶¹ Alyssa Brown and Frank Newport, “In U.S., 65% Support Drone Attacks on Terrorists Abroad,” *Gallup*, March 25, 2013, accessed March 8, 2015, <http://www.gallup.com/poll/161474/support-drone-attacks-terrorists-abroad.aspx>.

⁶² Pew Research Center, “Global Indicators Database: Drone Strikes,” *Pew Research Center*, September 2014, accessed May 11, 2015, <http://www.pewglobal.org/database/indicator/52/survey/16/response/Disapprove/>.

where 72% of French citizens and 59% of UK citizens oppose the United States' zealous use of drone strikes.⁶³ Most importantly, over two-thirds of German citizens oppose U.S. drone strikes.⁷⁰ This is incredibly important because German airbases play an essential role in the U.S. drone program. Though Germany prefers to downplay the relationship between German airbases and the U.S. drone program, recent evidence has surfaced alleging that drones rely on the Ramstein airbase in Germany to launch lethal attacks.⁶⁴ The negative German public opinion of U.S. drone strikes is embodied by a recent protest against the base.⁶⁵ In order to ensure that Germany continues to allow its airbases to be a hub for U.S. drone activity, the U.S. must assuage the German public's discontent. The United States should therefore increase the transparency of its drone program and maintain the high standards it has set for itself.

Improving the Drone Program

To achieve the Obama administration's high standards of "near certainty" that civilians will not be harmed in a strike and that targets will pose an "imminent threat" to the United States, the U.S. must improve its mechanisms for gathering intelligence, particularly human intelligence (HUMINT). The Al Qaeda compound that was targeted in the drone strike that killed the 2 hostages was under "constant surveillance" in the days leading up to the drone strike, and indeed the intelligence was able to correctly identify the building as an Al Qaeda compound.⁶⁶ Despite its success, the surveillance obviously and unfortunately failed to determine the presence of the hostages. While there is no guarantee that HUMINT would have discovered the hostages, it would have provided a better opportunity to make that discovery than an aerial, top-down view of the compound.

Beyond this hypothetical, there are scholars who agree that, despite the technical advances of the 21st century, the value of human intelligence cannot be overstated. The geospatial intelligence (GEOINT) provided by drones and satellites is highly important but it fails to capture the nuances that can be captured by HUMINT. For example, Gabriel Margolis notes that the increased emphasis on the technical side of intelligence gathering, including geospatial and signals intelligence, has left HUMINT either lacking, absent, or susceptible to counterintelligence.⁶⁷ As a result, Margolis argues, some of the worst intelligence failures in recent memory can be attributed to a lack of adequate HUMINT.⁶⁸ Furthermore, the more autonomous drones become, the more removed from human "ethical thinking, adaptability, and critical reasoning," they become.⁷⁶ It is undoubtedly necessary to keep and to expand this link

⁶³ Ibid.

⁷⁰ Ibid.

⁶⁴ Jeremy Scahill, "Germany Is the Tell-Tale Heart of America's Drone War," *The Intercept*, April 17, 2015, accessed May 10, 2015. <https://firstlook.org/theintercept/2015/04/17/ramstein/>.

⁶⁵ "Hundreds Gather at Ramstein to Protest US Drone Strikes," *Stars and Stripes*, September 26, 2015, accessed September 28, 2015, <http://www.stripes.com/hundreds-gather-at-ramstein-to-protest-us-drone-strikes-1.370552>.

⁶⁶ Diamond, "U.S. Drone Strike Accidentally Killed 2 Hostages."

⁶⁷ Gabriel Margolis, "The Lack of HUMINT: A Recurring Intelligence Problem," *Global Security Studies* 4 no.2 (2013): 43, <http://globalsecuritystudies.com/Margolis%20Intelligence%20%28ag%20edits%29.pdf>.

⁶⁸ Ibid., 50. ⁷⁶ Christian Science Monitor Editorial Board, "Drone Strikes that Hit Civilians: Time to Rethink Intelligence," *Christian Science Monitor*, October 22, 2013, accessed May 10, 2015, <http://www.csmonitor.com/Commentary/themonitors-view/2013/1022/Drone-strikes-that-hit-civilians-Time-to-rethink-intelligence>.

between human thought processes and drones to better ensure that strikes are targeting legitimate targets and that risk to civilians is minimized to the greatest extent possible.

One of the best ways to achieve increased human intelligence, and with it more accurate targeting information for drones, is to combine drone strategy with a more conventional strategy of ground troops.⁶⁹ Though the term “boots on the ground” has become politically toxic following the quagmires of Iraq and Afghanistan, it is important to note that the deployment of ground troops does not necessarily mean a full scale invasion or occupying force, but rather can include strategically implanted elite teams such as the Navy SEALs. In 2004, the United States implemented an effective policy of using SEALs and other Special Forces for gathering human intelligence. These elite units proved “highly adept” at gathering intelligence.⁷⁰ Furthermore, there are reports that the army developed and maintained effective intelligence networks while deployed in Iraq and Afghanistan.⁷¹

HUMINT provides another more nuanced and complete layer of intelligence which would allow the United States to make more informed decisions regarding the immediacy of the threat posed by certain targets and the likelihood of civilian casualties. Moreover, having boots on the ground would allow for more opportunities to conduct capture missions rather than use lethal force, which would achieve the dual purposes of eliminating the terrorist threat as well as potentially gleaning more intelligence through interrogation.⁷² If no boots are on the ground, capture will rarely if ever be a feasible option.

While it is true that America’s war weariness may have made the option of boots on the ground inviable, there is increasing evidence to suggest that deploying U.S. troops may not remain a politically toxic counterterrorism strategy for long. In a Quinnipiac University poll, for example, nearly two thirds of American voters support sending ground troops to Iraq and Syria to combat the Islamic State of Iraq and Syria (ISIS).⁷³ Across all categories, including party identification, gender, and age, there are majorities that support sending in ground troops.⁷⁴ Further bolstering the suggestion that Americans are moving beyond the hesitancy imposed by the Iraq war is the finding that only 39% of voters are concerned that the U.S. will get too involved militarily against ISIS, while 53% are concerned that the U.S. will not go far enough.⁸³ Of course, one poll does not and should not signal a sea change in American foreign policy, but it does indicate that as the threat of terrorism continues to rise and as time continues to put distance between the public and the wars, Americans may be more willing to support ground troops as a viable counterterrorism strategy.

⁶⁹ Douglas C. Lovelace, forward to *The Effectiveness of Drone Strikes in Counterinsurgency and Counterterrorism Campaigns*, by James Igoe Walsh, (Carlisle, PA: U.S. Army War College Press, 2013), vii.

⁷⁰ Ann Scott Tyson, “Boots on Ground, Now Also the Eyes: Special Operations Forces are Doing more Intelligence Gathering in Terror War.” *Christian Science Monitor*, March 11, 2004, accessed May 10, 2015, <http://www.csmonitor.com/2004/0311/p01s02-usmi.html>.

⁷¹ Ibid.

⁷² The White House, “Fact Sheet.”

⁷³ Tim Malloy, “U.S. Voters Back 2-1 Sending Troops to Fight ISIS, Quinnipiac University National Poll Finds,” Quinnipiac University Poll, March 4, 2015, accessed April 4, 2015, http://www.quinnipiac.edu/images/polling/us/us03042015_Uic472gg.pdf.

⁷⁴ Ibid.

⁸³ Ibid.

Further corroborating the poll data is the fact that several high-ranking U.S. Generals and military strategy experts have recently stated that ground troops may be necessary to achieve our counterterrorism goals, particularly with regard to ISIS. President Obama has repeatedly stated that his goal is to “degrade and destroy [ISIS].”⁷⁵ While these terms are alliterative and attention grabbing, Marine General James Mattis argues that in terms of substance, they would require two different strategies. To “destroy” ISIS would require more than airstrikes and advisors.⁷⁶ Mattis does not advocate for a full-scale invasion akin to Iraq or Afghanistan, but he notes that sending a limited number of U.S. combat troops might spur our regional allies to do the same.⁸⁶

Mattis’s criticism of Obama’s flat out rejection of ground troops does not occur in isolation. Others, such as General Lloyd Austin, “the top commander of U.S. forces in the Middle East,” have also advocated for the insertion of a limited number of Special Forces to more effectively combat ISIS.⁸⁷ Arguments such as these have led Martin Dempsey, the Chairman of the Joint Chiefs of Staff and by extension Obama’s top general, to state that he would not rule out the eventual return of ground troops to the Middle East.⁷⁷ While president Obama must account for the political consequences of deploying ground troops when making his decisions, these generals are able to make recommendations based on their strategic assessment of the situation, adding significantly to the weight of their recommendations.

Conclusion

The United States government has provided disturbingly little substantive information on the drone program to its citizens. Of course, some of this secrecy is legitimated by the need to protect national security, sources and methods. Nevertheless, this analysis has shown that the government has undoubtedly been overzealous in its lack of transparency. Compounding this problem is the fact that the idealized rhetoric on drone policy that the Obama administration has released has contradicted the realities of the program that exist on the ground. If the drone program actually adhered to the strict standards laid out by the administration, there could be almost no logical challenge to the program both in terms of moral standards as well as international and domestic legal standards. As such, the U.S. has a strong incentive to improve its drone program to bring it within the standards that the administration itself has placed.

While tragic, the deaths of the American and Italian hostages referenced throughout this work have provided the United States with an important impetus to become more transparent and peel back the veil of its drone program. This opportunity for the government to take stock of its drone program should not be squandered. It is also imperative that this review does not become lost in the bureaucracy of the Executive Branch. The government must be more willing to release information to the public on the U.S. drone program, provided that it does not hinder national

⁷⁵ Barack Obama, “Statement by the President on ISIL,” *The White House*, September 10, 2014, accessed May 11, 2015. <https://www.whitehouse.gov/the-press-office/2014/09/10/statement-president-isis-1>.

⁷⁶ Paul Szoldra, “Legendary Marine General James Mattis: To Fight ISIS, 'Boots On The Ground' Needs To Be An Option,” *Business Insider*, September 18, 2014, accessed May 11, 2015.

<http://www.businessinsider.com/mattistestimony-isis-2014-9>. ⁸⁶ Ibid. ⁸⁷ Rajiv Chandrasekaran, “Countering Islamic State will be Hard in Iraq and Harder in Syria, Officials Say,” *Washington Post*, September 10, 2014, accessed May 11, 2015, http://www.washingtonpost.com/world/nationalsecurity/countering-islamic-state-will-be-hard-in-iraq-and-harder-in-syria-officials-say/2014/09/10/de74d448-394311e4-9c9f-ebb47272e40e_story.html.

⁷⁷ Szoldra, “Legendary Marine General.”

security. This will allow for scholars and experts not caught in the bureaucratic inertia of Washington to objectively analyze the drone program that is quickly becoming our most prominent counterterrorism strategy. Analysis is needed not only on the criteria that are actually being used to determine the legitimacy of lethal force, but also on the intelligence itself, to ensure that it is the most complete and accurate possible.

The United States counterterrorism strategy cannot afford to be one-dimensional. The terrorist threats that face the U.S. require a multi-pronged approach. While drones are an effective means of countering the terrorist threat, they will become infinitely more effective if they are paired with other counterterrorism strategies such as ground troops. The decision to deploy Americans to a theater of war must always be made with prudence and caution. It must also be made, however, on the basis of strategic assessments rather than solely on political expediency. For the United States to have an effective and comprehensive counterterrorism strategy, drones must work in tandem with other strategies. The drone program must also be bolstered by more effective intelligence to ensure that it can meet the worthy ideal that the Obama administration has set.

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Why South Africa Dismantled Its Nuclear Weapons

Evelin Andrespok

***Abstract:** This article analyzes the nuclear disarmament of South Africa through neorealist, liberal, and constructivist lenses in order to determine which theory most accurately describes why South Africa ended their nuclear weapons program. It argues that constructivist theory best explains the end of South Africa's nuclear program because of its ability to explain how domestic decision making affects how the state interacts in the international system. Under President De Klerk, South Africa became the first and only state to give up its nuclear arsenal without international pressure to do so. According to neorealists, South Africa pursued disarmament in order to form stronger alliances. Under liberal theory, South Africa pursued disarmament due to the democratic and economic developments the state underwent in the 1990s with the end of apartheid. The nuclear program proved to be a huge burden on the economy and therefore had no place in the post-apartheid South African society. Finally, constructivist theory argues that nuclear disarmament occurred because of the prevailing desire in South African society to identify as a Western state. To pursue this identity would mean giving up nuclear weapons to appeal to Western states, and in turn South Africa would be given the opportunity to join Western collective security organizations.*

We must ask the question, which might sound naïve to those who have elaborated sophisticated arguments to justify their refusal to eliminate these terrible and terrifying weapons of mass destruction—why do they need them anyway!

(Address of Nelson Mandela at the 53rd UN General Assembly, New York, 21 September 1998)

Introduction

The then-president of South Africa, Frederik de Klerk announced in his speech to the Parliament on 24 March 1993 that “at one stage South Africa did develop a limited nuclear deterrent” but that in 1989 his government had decided to end the program and ordered in 1990 to dismantle and destroy all of the nuclear devices (Myre, par. 14, 19). This made South Africa the first country in the world to give up its nuclear program voluntarily.

This paper will give neorealist, liberal and constructivist explanations of why South Africa dismantled its nuclear program. I will start by briefly explaining the historical facts of the case. I will then argue that from the realist perspective the reason for dismantling the program was to increase South Africa's power and to allow for better alliances. Liberals would argue that the program was ended because the country democratized and liberalized its market, and constructivists would say that the dismantling happened because the dominant identity in the society wanted to appeal to the Western countries. I will close by arguing that the constructivists' theory provides the most focus on detail and thus is most accurate in explaining each individual case study.

Background

In order to understand fully why South Africa dismantled its nuclear weapons, it is necessary to examine first the history of its nuclear weapons development. J. W. De Villiers, Roger Jardine and Mitchell Reiss write in their 1993 *Foreign Affairs* article “Why South Africa Gave Up The Bomb” that South Africa initially started its nuclear program after World War II when its abundant uranium resources were desired by the United States and Britain. The winners of the war needed to sustain their existing nuclear programs and bought South Africa’s uranium through the Combined Development Agency to do so.

De Villiers et al. then say that by the end of the 1950s, South Africa decided to use some of its resources to build a nuclear program of their own. This program was proposed for peaceful purposes only (Ibid., 99). By 1969 South Africa already experienced considerable technological success which inspired the government to build a pilot uranium enrichment plant, named the Y-plant, outside Pretoria (Ibid., 99). In 1971 the government approved preliminary nuclear explosives research and three years later authorized nuclear explosive capability, still for peaceful purposes. Despite protests from the Soviet Union and the United States, who had discovered the South African nuclear site, the first bomb was built by 1979. Inspired by these developments, the government ordered six more nuclear devices to be built. (Ibid. 100)

In his famous speech to the parliament in 1993, de Klerk explained the program to develop limited deterrent nuclear military capability was adopted in 1974 to protect against the Soviet expansionist threat in southern Africa as well as prevailing uncertainty concerning the designs of the Warsaw Pact members. The buildup of the Cuban forces in Angola from 1975 onwards reinforced the perception that a deterrent was necessary—as did South Africa’s relative international isolation and the fact that it could not rely on outside assistance, should it be attacked (Collings, par. 2-3).

These threats were considerably diminished and the nuclear deterrent became superfluous after the Soviet Union collapsed, Namibia gained independence, Angola became more peaceful and Cuba withdrew its 50,000 troops from South Africa (de Villiers et al., 102). The change in the security situation was also argued by Frederik de Klerk in 1993 to be one of the main reasons for concluding the program (Myre).

By the time of de Klerk, who is mostly known for ending the apartheid regime in South Africa, assumed the presidential office in 1989, six bombs had already been assembled and the seventh was in the process of development. He revised the nuclear program and in 1990, determined to terminate it (de Villiers et al.). The Y-plant was closed by 1 February 1990, and the weapons were assembled between July 1990 and July 1991 (Lieberman, 74). On 10 July 1991 South Africa also signed the Non-Proliferation Treaty and formed a safeguard agreement with the International Atomic Energy Agency in September 1991 (De Villiers et al. 104), an expression of the strong commitment South Africa had to its new policy.

Realism

Building on this timeline of South Africa’s nuclear program, we can proceed to examine the reasons for dismantling it. I will start with the realist interpretation, as it was the first

international relations theory. It is necessary to mention that realism is internally very diverse and various authors have differing and often conflicting explanations for events. The structural constraints of this paper do not allow me to analyze all of the existing viewpoints, so I have chosen the ones that I feel are most useful in explaining in South Africa.

Despite the differences among realist authors, they all discuss international relations in terms of power because “power is always the immediate aim” (Morgenthau, 27) of states’ foreign policy. There is considerable debate among realist about the definition of power and its long-term goals, though. The main developer structural realism, Kenneth Waltz argues that power is defined in terms of a state’s capability to achieve its goals (Waltz, 93). Hans Morgenthau, the founder of modern realist theory of international relations, more broadly reasons that power can be military, political, economic, etc. in nature, but its function is always to serve the national interests of a state by giving the exerciser of power control over the actions of those who are subject to power (Morgenthau, 27-29). Waltz sees the states as having a more specified goal than mere influence. For him, states, at a minimum, desire to guarantee their preservation and, at a maximum, gain universal domination (Waltz, 117). He argues that to reach those goals, states use either internal means like increasing economic capability and military strength, or external means like strengthening their alliances and weakening opposing ones (Ibid.).

One argument both Waltz and Morgenthau would agree with is that power-seeking behavior will result in a balance of power wherein having more power is better than having less (Waltz, 117). Therefore, according to the survival-domination approach and Morgenthau’s view that a perfectly virtuous state always weighs the consequences of its alternative political options when seeking power (prudence) (Morgenthau, 10), South Africa stopped its nuclear program in order to improve its position on the preservation-domination scale and to increase its dominance in the region and internationally through economic power and alliances rather than through military means.

Kenneth Waltz wrote that defense spending “is unproductive for all and unavoidable for most” (104) but as we can see, South Africa serves as an example of a state where it was not unavoidable to reduce spending significantly while not giving away power. At the time of implementation, South Africa’s nuclear program cost 750 million rand, which was less than 0.5 percent of the country’s defense budget (De Villiers, et al., 102). From the late 1970s through the 1980s, South Africa’s annual military budgets were between 2 and 4.5 billion rand (4 and 5 percent of gross national product). Despite being expensive, the program was still easily affordable for the government (Lieberman, 55). There was only a remote threat to South Africa of invasion or nuclear blackmail throughout the development of the nuclear devices (Ibid., 58). The threat reduced even more at the end of the 1980s after the Soviet Union collapsed and Angola became more peaceful. The nuclear weapons then quickly became an excessive strain on South Africa’s resources.

A great number of the newspaper articles and interviews that were published after de Klerk’s speech in 1993, pointed out the president’s comment that “a nuclear deterrent had become not only superfluous, but in fact, an obstacle to the development of South Africa’s international relations” (as cited in Myre par. 18). The government was especially worried about the relations with other African nations (De Villiers et al., 102-103). The only realistic threats

were the Angolan and Namibian rebel forces, though, and the “utility of nuclear weapons for meeting these threats, even if they materialized, was borderline considering the diplomatic and security risks as well as the budgetary costs involved” (Lieberman, 58).

All things considered, the cost-benefit calculus demonstrated to the government that South Africa needed political rather than military means of increasing power. The nuclear deterrent and the strategic ambiguity of the country were more of a burden than a benefit (De Villiers, et al., 103). A realist like Morgenthau would say that terminating the nuclear program in these circumstances was good foreign policy because that kind of “rational foreign policy minimizes risks and maximizes benefits and, hence, complies both with the moral precept of prudence and the political requirement of success” (Morgenthau, 8). South Africa improved its economic power by becoming more efficient and its political power by having good relations with countries in Africa and the West that it needed to cooperate with.

At this point it is important to acknowledge that there also exists a significantly different school of thought in realism. To be precise, realists like Scott D. Sagan argue that economic considerations cannot justify complete nuclear disarmament. Nuclear disarmament is not a viable or smart policy option because small decisions (i.e. decisions by any one state to enact a disarmament program) are unstable. There will always be at least one state that will “cheat” and try to develop nuclear capability in a crisis situation. This selfish behavior of states will eventually increase the likelihood that nuclear weapons will actually be used (Sagan, 86). Disarmament would make a state vulnerable to attacks by more powerful states (Ibid., 87). From this perspective, South Africa made a mistake by dismantling its nuclear weapons because it increased its vulnerability. However, as there is not sufficient evidence to prove that South Africa actually became more insecure and exposed to any realistic threats, I have not accepted it as an explanatory instrument in my analysis.

Liberalism

The power-centered discourse is not the only way of explaining why South Africa dismantled its nuclear weapons. The liberal theory, well-exemplified in Michael Mandelbaum’s “The Ideas that Conquered the World: Peace, Democracy, and Free Markets in the Twenty-First Century,” advises to examine the structure of the society, the economic system of the country and whether the state is at peace or not (1). Mandelbaum argues that democratic order, free markets and peaceful relationships between countries increase the human happiness and therefore the preferable foundation for any country’s policies (Ibid., 402). According to this logic, liberals would say that South Africa’s nuclear disarmament followed from democratization and market liberalization that together lead to desiring more peaceful relationships with other countries.

The idea that democratic countries rarely fight each other in wars is the underlying assumption of the liberal democratic peace theory presented by Mandelbaum (243). The theory argues that we can assume that democratic societies can reach compromises and manage differences or conflicts without the use of violence; force is used only for defensive purposes (Mandelbaum, 250-1). Therefore, the development of South Africa’s nuclear program is explicable through the changes in the social order. The apartheid government was not democratic

and did not follow the principle of defensive armament, which led to the establishment of the nuclear program. After the threat from the Soviet Union, Angola and other countries decreased, and as the nation became more democratic, the country became more prone to reaching compromise without the use of military force. The nuclear weapons were not usable anymore and destroying them was the most logical option.

Another key feature of the democratic peace theory is transparency. That means that each country knows which arms the others have, what they used them for and when they plan to use them (Mandelbaum, 114). Neoliberals like Robert Keohane argue that demands for accountability and transparency have increased the discovery and development of important resources and issues in the modern globalizing society (Keohane et al., 18). For liberals, transparency is best pursued through institutions (Mandelbaum, 115) like the Non-Proliferation Treaty that South Africa signed. Mandelbaum argues that complying with the standards of the Treaty enables countries like South Africa to get the benefits of nuclear abstinence by guaranteeing to others that they are committed to their decisions (Ibid., 215). Transparency was clearly one of the main reasons president de Klerk revealed the nuclear program to the parliament and to the international community in 1993. In his speech he said that he truly believed that the voluntary termination of the nuclear weapons program and revelation of all information concerning it would reinforce the government's commitment to assuring transparency (Collings, par. 30).

Liberals further say that the emergence of free markets was another contributing factor for dismantling the nuclear weapons in South Africa. The liberal theory reasons that even though "a market economy is a necessary but not a sufficient condition for democratic politics" it still improves democracy and will ultimately lead to peace (Mandelbaum, 266-8). Marina Ottaway explains in "South Africa: A Struggle for a New Order" that South Africa liberated its economy in the 1990s because "there was a growing consensus that it was the economic kingdom that counted most, not as something to be conquered by politicians but as something to be left to follow its own rules and logic, free of political interference" (192-3). It was thought that politicians ought to develop democracy and "the free market would do the rest" (Ibid., 193). By acting on that demand the government created conditions for democracy and peace which also meant dismantling the nuclear weapons.

Constructivism

Constructivists contest the assumptions liberals and realists make about the workings of the international system. Alexander Wendt, the founder of the constructivist theory states in "Social Theory of International Politics" that the constructivist should expect the agents and structures to engage in a relationship of co-determination (94). He argues against taking agents and structures as separate like realists and liberals do and challenges students of international relations to look at "the ways in which state identities rather than just behavior are affected by the international system, and the ways in which those identities are constituted rather than just caused by the system" (Ibid., 21). Therefore, according to the constructivist theory, South Africa dismantled its nuclear program because of a desire to pursue an identity as a Western country.

In one of his earlier articles, Wendt defines identity as a “relatively stable, role-specific understandings and expectations about self” (1992, 397). Ted Hopf from Ohio State University further explains that we all live in certain social cognitive structures and participate in several discourses which constitute the social practices and identities of us and Others (Hopf, 3-4). In his opinion, foreign policy decision makers are incorporated into the social cognitive structures that embrace the identities and discourses and these very identities constitute how the decision makers understand themselves and make decisions (Ibid., 20). It is also important to note that each society consists of several competing identities that mutually shape each other but that there is usually one that is dominant and ultimately determines the foreign policy of that state (Ibid., 1).

In the case of South Africa, the identity of the white minority government was dominant and was the one that affected the country’s policies. William J. Long and Suzette R. Grillot explain that dominant South African identity in their article “Ideas, Beliefs, and Nuclear Policies: The Cases of South Africa and Ukraine.” The white leaders of South Africa identified the country as belonging to the West by engaging in a policy of sending “an enduring invitation to Western nations to include South Africa in their collective security arrangements and to accept it as an ideological, security and economic partner” (Long and Grillot, 30). In the 1970s, acquiring nuclear weapons was a means of joining the collective security (Ibid.) and internalizing some of the Hopfian Other’s identity. By the late 1980s, as mentioned above, South Africa did not have real usage for its nuclear weapons anymore and they had become a burden to the country’s economy. At that time South Africa was unable to blackmail the West, yet it still wanted to remain a part of it. This presented a necessity for a new strategy that was enacted in 1989 when Frederik de Klerk was elected president and the deconstruction of the apartheid system began. Ending apartheid was a landmark shift in strategies because after the Cold War ended, the apartheid system was one of the country’s major obstacles to getting out of its political isolation. There were simply no reasons, political or otherwise, for the West to tolerate South Africa’s racist domestic policies. (Ibid., 32).

The constructivist explanation also differs from realists and liberals on the extent to which they think strategic and economic national interests played a role in South Africa’s decision to dismantle their nuclear weapons. Hopf reasons that evidence of the existence of an interest does not mean that the interest has been identified and contextualized (16). Instead, he argues, interests are implications of identity and even though “individuals always operate according to their interests ... those interests do not always correspond to the ones assigned by the omniscient objective observer” (Ibid., 18). Rather than taking the argument that South Africa dismantled its nuclear weapons because it was in their geostrategic and economic interests to do so as a theoretical truth, constructivists seek to understand how South Africa’s dominant ideology shaped its interests. They argue that South Africa’s desire to be accepted by the West led to the liberalization of markets and disarmament because that was what the Western discourse of the time constituted of.

Which Theory Explains Best?

It is clear that the realist, liberal and constructivist explanations about why South Africa dismantled its nuclear weapons are competitive with each other. Even though there is merit in each of them, constructivism does the best job in explaining the nuclear disarmament because it has the most in-depth insight into the Issue.

In essence, realists only analyze state as actors in the international relations system. Liberals, too, look at the state as an actor on the systemic level, but also explain that a state's policies are determined by whether there is democracy, free market and/or peace on the domestic level. Constructivists do not deny that there is an international system within which states act or that the three core liberal values affect relations between countries, but they do take the analysis one step further and argue that analysts of international relations cannot take theoretical assumptions as *a priori* true.

Constructivism argues that in order to be able to explain states' policies with the most precision we need to understand who the domestic decision makers are and what identities they represent. This approach makes the most sense because none of the three theories has denied the existence of identities. Constructivism is the only one that provides a coherent explanation of how these identities influence international relations.

Specifically, in the case of South Africa we can see that at the beginning of de Klerk's rule, the "personality" of the state as Wendt calls it (1999, 10) was to try to be like the West and to become their friend for ally. The aspirations to identify with the Western countries did lead decision makers to adopt policies that in the end resulted in the liberal ideals of democracy, free trade and peace, and that realists would explain as attempts to guarantee power and security. Yet, they did so because of the nature of South Africa's identity not because of the realist and liberal assumptions that states always act the same way when faced with questions about the future of their nuclear weapons.

Also regarding South Africa, realism and liberalism fail to explain why their assumptions about states in an international system hold true. Realism does not demonstrate successfully why countries are always interested in preserving their security and why the decision makers pursue the goal of maximizing their relative power, be it economic, military, or political. Liberalism falls short explaining why countries decide to comply with the norms and standards set by institutions even after they have joined. The theory seems to assume that all states' identities constitute that institutions are effective if they comply with their norms. Yet, this assumption is not consistent with the rest of the theory which argues that, on the domestic level, states are different.

Conclusion

All in all, even though the three theories have some overlap and agreement about the way the international relations' system is organized, they still remain distinct in explaining the motives of the actors in that system. In light of many of the current political issues, South Africa's nuclear disarmament serves as an especially interesting case study to be used for

demonstrating these theories. Looking at the three different theories' explanations helps to understand the variety of ways international policies can be perceived.

To be precise, this paper demonstrated that for realists like Hans Morgenthau and Kenneth Waltz, the central point of discussion is the distribution of power. They claim that South Africa dismantled its nuclear weapons to be more efficient and shift its power from the military to economic sphere.

Liberals like Michael Mandelbaum argue that, due to the democratization and liberation of markets that occurred with the fall of the apartheid regime in South Africa, the country became more prone to peace. South Africa was able to implement and maintain the disarmament program because of the pressure that was put on it by the framework of the Non-Proliferation Treaty it joined.

Alexander Wendt and Ted Hopf as constructivists reject the assumptions liberals and realists make about the motives of South Africa altogether. They argue that it engaged in the nuclear disarmament strategy because its new identity produced a desire to become like its Western counterparts. In order to be able to become a part of the West the white elite portrayed South Africa as a peaceful, democratic and cooperative state. For that insightfulness, depth and individual-case-based analysis of it, the constructivist approach seems most reasonable in explaining the actions of South Africa.

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Knowledge Constitutive Interests and the World Wide Web: Can the Internet Be an Emancipatory Medium?

James C. Roberts

***Abstract:** The Internet has great potential as a medium for social change in international relations by providing a forum where ideas can be explored, transmitted, and archived in real time. In order to answer the question, “can the internet become an emancipatory medium?” two bodies of literature must be evaluated: Habermas’ work on cognitive interests, discourse, and communicative action, and the metatheoretical approach to international relations called constructivism. By evaluating these two literatures, one can examine the potential of the Internet both as a “medium for emancipation,” a tool used to liberate people oppressed by political or economic structures, and as an “emancipatory medium,” a forum by which those structures can be critically examined in our construction of social reality. This study examines the possibilities and barriers for the Internet, yields guidelines for evaluating web site content, and presents conclusions about the potential and reality of the Internet.*

Introduction

The Internet has great potential as a medium for social change in international relations. It provides a forum where ideas can be explored, transmitted, and archived in real time. People and groups can publish their ideas and make known their struggles without the editorial filters of traditional publications. The Internet makes such publications available to millions of viewers at a minimal cost. E-mail and web sites can also be used to rally and organize activists. The Internet’s communications technologies make discourse possible that builds consensus and thus speeds the process of reconstructing international relations and our society at large. Yet, the Internet may not be the panacea for social change and reconstruction that many would hope. The digital divide prohibits access to Internet technology based on class and income. The Internet’s reliance on centralized servers and communications networks permits those with political power to intercept messages for surveillance and to censor information. Authorship of web sites can sometime be obscure, concealed, or fabricated, making it difficult to evaluate the intent and validity of claims made on the sites.

Can the Internet be an emancipatory medium in international relations? Addressing this question first requires a theoretical and conceptual definition of emancipation in relation to international relations. This definition is found in two bodies of related literature – Jürgen Habermas’ work on cognitive interests, discourse, and communicative action, and the metatheoretical approach to international relations that has come to be known as constructivism. Framing the discussion in light of these two literatures allows for examining the potential of the Internet both as a medium for emancipation and as an emancipatory medium. To be a medium

for emancipation is to be a tool for liberating peoples oppressed by political or economic power structures. To be an emancipatory medium is to provide a forum by which those structures can be critically examined and altered in our construction of social reality. The semantic difference in these two goals belies their obvious connection. One liberates people while the other liberates theory and practice. To succeed at one without the other is, ultimately, to fail at both.

This study introduces paths to answering its question. It proceeds by first examining the conceptual definitions of emancipation and emancipatory interests in the work of Habermas and his critics and the recent literature on social constructivism. Next, the study examines the possibilities for and barriers against emancipatory interests on the Internet. It is hoped that this examination will yield some guidelines for evaluating web site content within the framework of the question. The guidelines for content will be applied to some web sites and some conclusions will be drawn about the potential and reality of the Internet as an emancipatory and constructivist medium.

Habermas, Constructivism, and Emancipatory Interests

It is true that there is no unified school of social constructivism in the study and practice of international relations.² Yet, the approaches to constructivism that lead down from Onuf's defining work share at least one common tenet – that language matters – for it is in words that international relations is defined (constructed) and played out.³ Müller goes so far as to call it an “undeniable fact that international politics consists predominantly of actions that take the form of language.”⁴ A number of authors, including Onuf, have turned to the work of Jürgen Habermas to find theoretical foundations for the connection between language and social construction in his theory of communicative action. Communicative action is derived from discourse between agents that is “oriented towards achieving, sustaining, and reviewing consensus – and indeed a consensus that rests on the intersubjective recognition of criticisable validity claims.”⁵ In Habermas, constructivist theory finds an ally that locates action as a means for building consensus and thus reifying an intersubjective socially constructed world.

In addition to the theory of communicative action, three other theories of communication by Habermas add to the understanding of emancipation and emancipatory interests and the Internet. The three theories are his taxonomy of cognitive interests expressed in *Knowledge and Human Interests*, the concept of the public sphere,⁶ and his approach to discourse ethics.⁷

² Lars Lose, “Communicative Action and the World of Diplomacy.” Chapter in *Constructing International Relations – The Next Generation*. Edited by Karin Fierke and Knud Jørgensen (Armonk, NY: M.E. Sharpe, 2001). p. 181.

³ Karin Fierke and Knud Jørgensen, *Constructing International Relations – The Next Generation* (Armonk, NY: M.E. Sharpe, 2001).

⁴ Harald Müller, “International Relations as a Communicative Action,” chapter in *Constructing International Relations – The Next Generation*, edited by Karin Fierke and Knud Jørgensen. (Armonk, NY: M.E. Sharpe, 2001), p. 161.

⁵ Jürgen Habermas, *The Theory of Communicative Action, Vol 1: Reason and Rationalization of Society*, translated by Thomas McCarthy (Cambridge: Polity Press, 1984). p. 17.

⁶ See Jürgen Habermas, “The Public Sphere: An Encyclopedia Article,” chapter in *Critical Theory and Society: A Reader*, edited by Stephen Bronner and Douglas Kellner, translated by Sara Lennox and Frank Lennox (New York: Routledge, 1989), pp. 136-144 and *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*, translated by Thomas Burger with the assistance of Frederick Lawrence (Cambridge, MA: MIT Press, 1991).

⁷ See Jürgen Habermas, *Moral Consciousness and Communicative Action*, translated by Christian Lehnardt and Sherry Weber Nicholsen (Cambridge, MA: MIT Press, 1990).

Habermas defines emancipatory interests in relation to a taxonomy of knowledge constitutive interests, also referred to as cognitive interests. David Held states that Habermas' approach to knowledge is "historically rooted and interest bound."⁸ Habermas defines human interests in terms of the need to produce for material existence and the need to communicate with others. This translates into two types of cognitive interests – interests related to controlling the environment (both physical and social) and interests related to developing common meaning of phenomena. The first of these he calls technical cognitive interests and he claims that it is the underlying interest of the empirical-analytical sciences. The empirical sciences use information to secure and expand control over feedback monitored action. That is, "technical control over objectified processes."⁹

Habermas calls the second type of cognitive interest practical cognitive interest. He claims that this is the underlying interest of the historical-hermeneutic sciences. "The historical-hermeneutic sciences gain knowledge by meaning, not observation."¹⁰ They disclose reality

"...subject to a constitutive interest in the preservation and expansion of the intersubjectivity of possible action-orienting mutual understanding. The understanding of meaning is directed in its very structure toward the attainment of possible consensus among actors in the framework of a self-understanding derived from tradition."¹¹

There are biases that distort communication and knowledge bound up with the cognitive interests of both of these approaches to knowledge. The technical cognitive interests of the empirical sciences distort communication and knowledge because of their need to standardize method as a way to validate claims. Habermas claims that "in the empirical-analytic sciences the frame of reference that prejudices the meaning of possible statements established rules both for the construction of theories and for their critical testing"¹² and that "...facts relevant to the empirical sciences are first constituted through an a priori organization of our experience in the behavioral system of instrumental action."¹³ Thus the requirements of the scientific method itself (falsifiable hypotheses, replicability, etc.) and the means for validation, such as the arbitrary alpha level of .05 in statistical inference, while necessary for the creation and transmission of technical information, bias the knowledge generated from the information. Knowledge gained from practical cognitive interests carry biases as well. These are derived from the parsimony that meaningful communication requires. Habermas claims that "...the rules of hermeneutics determine the possible meaning of the validity of statements of the cultural sciences."¹⁴ Later, he states

"It appears as though the interpreter transposes himself into the horizon of the world of language from which a text derives its meaning. But here too, the facts are first constituted in relation to the standards that establish them. Just as the positivist self understanding does not take into account explicitly the connection

⁸ David Held, *Introduction to Critical Theory: Horkheimer to Habermas* (Cambridge: Polity Press, 1980), p. 254.

⁹ Habermas (1971), p. 310.

¹⁰ Ibid.

¹¹ Habermas (1971), p. 310.

¹² Habermas (1971), p. 308.

¹³ Habermas (1971), p. 309.

¹⁴ Ibid.

between measurement operations and feedback control, so it eliminates from consideration the interpreter's pre-understanding. Hermeneutic knowledge is always mediated through this pre-understanding."¹⁵

Because of the direct connection to human history through the need to control the environment for production and the need to communicate, most forms of knowledge are based in either technical cognitive interests or practical cognitive interests.

Habermas speaks of another cognitive interest that is, as Held points out, derived from the human capacity to be "self-reflective and self-determining, to act rationally."¹⁶ Emancipatory cognitive interest "releases the subject from dependence on hypostatized powers."¹⁷ Hypostatized refers the condition of hypostasis which is defined by *The American College Dictionary* (1966) as "a. that which stands under and supports; b. the underlying or essential part of anything as distinguished from attributes; substance, or essential principle." Thus to be released from dependence on hypostatized power is to lay bare the "thing in itself," to borrow a phrase from Kant. According to Habermas, emancipatory interests are the cognitive interests of the critically oriented sciences.¹⁸ Knowledge pursued by the critically oriented sciences attempts to "achieve human autonomy and self understanding by bringing to consciousness previously unapprehended determinants of the human species 'self-formative process.'"¹⁹ That is, knowledge derived from emancipatory cognitive interests is the knowledge that is needed to recognize historically constructed behavior and, ultimately, to restructure it to abolish oppression and exploitation and achieve freedom.

Habermas' concept of the public sphere is an idealized communication forum where all citizens have equal access and where a semblance of public opinion or public consensus is formed through discourse. The public sphere "mediates between the public and the state."²⁰ Habermas traces the history of the public sphere as public discussions about the political power that "grew out of a specific phase of bourgeois society." In this history, he illustrates that the public sphere first grew out of the coffee houses and salons of the late 18th and early 19th century where the new bourgeoisie tried to find consensus to promote policies affecting their interests derived from a growing capitalist economy to arcane absolutist monarchies. Habermas documents how the idealized public sphere of the 18th century Parisian salon and the town meeting of 19th century New England gave way to a mediated public sphere first captured in the print medium of newspapers and later in the electronic medium of radio and television. In the age of public relations, the public sphere must now be "arduously constructed case by case, a public sphere which earlier grew out of the social structure."²¹ The public sphere contributes to the possibility of emancipation by providing the forum in which public discourse can critically evaluate claims and examine alternative social constructions.

From the previous discussion, emancipation is obtained through autonomy of the agent. For the public sphere to be an effective medium for emancipation, first it must be free from interference of prior power commitments that prohibit free expression of ideas and second it must have rules of operation that encourage and permit the kind of discourse that will lead to

¹⁵ Ibid.

¹⁶ Held, p. 255.

¹⁷ Habermas (1971), p. 311.

¹⁸ Habermas (1971), p. 308.

¹⁹ Richard K Ashley, "Political Realism and Human Interests," *Internatoinal Studies Quarterly*, 25:2. 1981.

²⁰ Habermas (1989), p. 137.

²¹ Habermas (1989), p. 141.

critical examination of ideas and public consensus. Evaluation of the first of these two criteria involves careful examination of the sponsorship and intent of the forum itself. Such an evaluation is relatively easy in the transparent world of the town meeting but is more difficult in the mediated environment of the Internet. Habermas himself sets forth guidelines for the evaluation of the second of these criteria for an emancipatory public sphere in his discussion of discourse ethics.

In the discourse ethics, Habermas sets forth the conditions for communication that can lead to democracy, freedom, and emancipation. Discourse in the public sphere, properly done, can lead to emancipation. The discourse ethics centers around the idea of an ideal speech situation. For such a situation to emerge in a public sphere, its participants must adhere to the following set of rules:²²

- “1. Every subject with the competence to speak and act is allowed to take part in a discourse.
- 2a. Everyone is allowed to question any assertion whatever.
- 2b. Everyone is allowed to introduce any assertion whatever into the discourse.
- 2c. Everyone is allowed to express his attitudes, desires and needs.
3. No speaker may be prevented, by internal or external coercion, from exercising his rights as laid down in (1) and (2).”²³

The ideal speech situation emphasizes the autonomy of the participating agent. The agent is autonomous in relation to other agents engaged in the discourse while at the same time the agent is autonomous of the other power commitments that derive from the political or economic setting of the discourse. The agent is not independent, however, of the exegesis of the discourse itself. Each participating agent must acknowledge the autonomy of the other agents, especially in relation to claims of validity. Perzynski notes three criteria for validity claims attributed to Habermas.²⁴

- All of those affected by a norm must agree that they accept its consequences and side effects. All must understand that the norm may bring constraints and that any constraint satisfies all interests.
- The conditions for the practical discourse out of which universally valid norms may emerge include the participation and acceptance of all who are affected by such norms, as such norms meet their interests.
- Only those norms can claim to be valid that meet (or could meet) with the approval of all affected in their capacity as participants in a practical discourse.

²² Dennis Gaynor, 1996. *Democracy in the Age of Information: A reconception of the Public Sphere*. Downloaded from <http://georgetown.edu/faculty/bassr/gaynor/intro.htm> on February 22, 2003. Quoting Jürgen Habermas, *Moral Consciousness and Communicative Action*, translated by Christian Lehnardt and Shierry Weber Nicholsen (Cambridge, MA: MIT Press, 1990), p. 86.

²³ At The time this paper was written, a copy of *Moral Consciousness and Communicative Action* was not available to its author. Therefore I am relegated to using others’ characterizations of Habermas’ words with hopes and expectations that they are correct.

²⁴ Adam Perzynski, 2001, “The Internet and the Theories of Jürgen Habermas,” <http://socwww.cwru.edu/~atp5/habermas.html> (accessed February 15, 2003).

It is this communally accepted intent of the public sphere that sets the conditions for ideal speech.

For Habermas, the emancipatory interests of knowledge and emancipation of individuals from social, economic, and political forces of oppression are inextricably linked. He refines this idea in his theory of communicative competence²⁵ in which he claims that all speech is an attempt to achieve consensus through discourse²⁶ – an attempt that is often doomed to failure. Its failure provides a measure of the degree to which it embodies so called distorted communication. Held captures Habermas' connection between consensus and emancipation as follows:

“The process of emancipation, then, entails the transcendence of such systems of distorted communication. This process, in turn, requires engaging in critical reflection and criticism. It is only through reflection that domination, in its many forms, can be unmasked.”²⁷

In summary, then Habermas believes the public sphere has the potential to be emancipatory *because* it is capable of discourse that leads to communicative action, but only if it is free of prior power commitments (political, economic, social, or personal); its discourse is conducted by implicit rules that permit equal and free access for all its participants; and its participants explicitly recognize the communal intent of finding consensus. Thus, if the Internet is to be an emancipatory medium, it must first be sustainable as a public sphere. It must also permit equal and free access for all persons concerned and it must not be constrained or regulated by political economic, or social forces. Finally, those who engage in online discourse must explicitly recognize the intent of coming to general consensus. The next section of this study will examine the Internet at large in relation to these criteria and identify barriers to their being achieved.

Emancipatory Interests and the Internet

Much has been written, online and off, about the possibility of the Internet becoming the new public sphere. One of the most influential of these articles is by Mark Poster. Poster notes that much of the discussion about the impact of the Internet has centered on the transformative effect of its technology. This discussion has focused on access, technological determinism, encryption, commodification of information, and intellectual property.²⁸ He claims that few approaches to the impact of the Internet address the question of cultural identity formation. For example the commodification of information “translates the act of shopping into an electronic form” but more important is how it “institutes new social functions.”²⁹ The question concerning the effect of costless reproduction of communication of information is the wrong question. The Internet imposes a “dematerialization of communication and in many of its aspects a transformation of the subject position of the individual who engages within it.” The Internet “installs a new regime of relations between humans and matter...reconfiguring the relation of the

²⁵ Habermas (1984).

²⁶ Held, p. 256.

²⁷ Ibid.

²⁸ Marc Poster, “CyberDemocracy: Internet and the Public Sphere,” in D. Porter (ed.), *Internet Culture* (London: Routledge, 1997), p. 201.

²⁹ Poster, p. 202.

technology to culture and thereby undermining the standpoint from which, in the past, a discourse developed...about the effects of technology.”³⁰ He proceeds to use a somewhat dubious analogy to make his point by claiming that

“...the Internet is more like a social space than a thing; its effects are more like those of Germany than those of hammers. The effect of Germany upon the people within it is to make them Germans...As long as we understand the Internet as a hammer we will fail to discern the way it is like Germany.”³¹

Rather than focusing on the instrumentality of networked communication, Poster asks whether there are new forms of relations occurring within the Internet “which suggest new forms of power configurations between communicating individuals?”³² He then frames the question in terms of the possibility of the Internet becoming a new public sphere and asks

“If there is a public sphere on the Internet, who populates it and how? In particular one must ask what kinds of beings exchange information in this public sphere? Since there occurs no face-to-face communication, only electronic flickers on a screen, what kind of community can there be in this space? What kind of disembodied politics are inscribed so evanescently in cyberspace?”³³

Poster characterizes Habermas’ concept of the public sphere as a “homogenous space of embodied subjects in symmetrical relations pursuing consensus through the critique of arguments and the presentation of validity claims” and then contends that it is systematically denied in electronic communication.³⁴

One of the barriers to the Internet becoming a public sphere that Poster identifies exists in the creation of an individual identity on the Internet. He claims that, “On the Internet, individuals construction their identities in relation to ongoing dialogues, not as acts of pure consciousness.” The benefit of this fluid definition of the self is that it permits people to step out of identities imposed by sensory cues such as visual identification by race or gender or auditory identification by inflection or accent. There are problems, however, with this self identification. First, it is transitory. Poster gives the example of a man who entered an Internet discussion as a woman to experience the intimacy he had observed in conversations between women.³⁵ While the man may have learned something about such intimacy, the women were exploited and hurt upon discovery of the man’s identity. Another problem with self identification is that it is not based in true historical and cultural experience. The man’s communications in the previous example could only be based on what he thought a woman’s interaction might be – not based on the cultural and social history that a woman would bring to the discourse. Such fabricated identities distort communication and can hardly be the basis for Habermas’ ideal speech situation.

Other barriers to ideal speech on the Internet derive from the atomized access that decentralized communication permits. The typical mode of Internet access involves the person

³⁰ Poster, p. 205.

³¹ Ibid.

³² Poster, p. 206.

³³ Ibid.

³⁴ Poster, p. 209.

³⁵ Poster, p. 212.

sitting alone at a computer interacting only through the keyboard and the monitor. Joseph Lockard notes that "...the netsurfer rides alone, solitary even amid electronic crowds."³⁶ Lockard believes that his lonely approach to community building fails.

"Instead of real communities, cyber consumers sit in front of the Apple World opening screen that pictures a cluster of cartoon buildings which represent community functions (click on post office for e-mail, a store for online shopping, a pillared library for electronic encyclopedias, etc.). Cyberspace software commonly imitates 'community' in order to further a nonexistent verisimilitude. What the software addresses is desire for community rather than the difficult-to-achieve, sweated-over reality of community."³⁷

Lockard further condemns cybercommunity as "an element in the ideological superstructure over the material base of cyberspace (computers, software, labor costs,) an element that facilitates technological acceptance, integration, familiarity, and consumption."³⁸ If this characterization is correct, then the public sphere of cyberspace is not free of prior power commitments – especially those that derive from an attempt to instantiate a sense of online community for the purpose of furthering commercial interests of the market place.

A significant question that must be addressed in the examination of the Internet as a tool for emancipation is whether or not communication behavior is affected differently by computer mediated communication than face-to-face communication. That behavior is different in this medium is not disputed. For example, a recent study of online commerce shows that cognitive barriers to unregulated buying are directly attacked by the nature of cyber commerce, increasing the problem of compulsive shopping.³⁹ Lincoln Dahlberg identifies a number of additional factors of computer mediated communication that create barriers to development of an emancipatory public sphere on the Internet.⁴⁰ Among these barriers are a dearth of reflexivity in computer mediated discourse, a lack of respect for the views of others, and domination of discourse by certain individuals and groups. Another study indicated that cooperation in computer mediated communication is less stable than cooperation that emerges in face-to-face communication.⁴¹

Some differences in computer mediated communication behavior may enhance the ability of the Internet to establish ideal speech. Sirkka Jarvenpaa and Dorothy Leidner found that trust develops more quickly in computer mediated communication but that it also tends to be more

³⁶ Joseph Lockard, "Progressive Politics, Electronic Individualism, and the Myth of Virtual Community," chapter in *Internet Culture*, edited by David Porter (London: Routledge, 1997), p. 223.

³⁷ Lockard, p. 224.

³⁸ Ibid.

³⁹ Robert LaRose, "On the Negative Effects of E-Commerce: A Sociocognitive Exploration of Unregulated On-line Buying," *Journal of Computer Mediated Communication*, volume 6, number 3, 2001. Accessed at <http://www.ascusc.org/jcmc/vol6issue3/> on February 23, 2003.

⁴⁰ Lincoln Dahlberg, "Computer-Mediated Communication and The Public Sphere: A Critical Analysis," *Journal of Computer Mediated Communication*, volume 7, number, 2001, accessed at <http://www.ascusc.org/jcmc/vol7/issue1/> on February 23, 2003.

⁴¹ Elena Rocca and Massimo Warglien, 1996. "Computer Mediated Communication and the Emergence of 'Electronic Opportunism,'" Technical Report 1, CEEL (Computable and Experimental Economics Laboratory,) downloaded from <http://eprints.biblio.unitn.it/archive/00000034/> on February 23, 2003.

fragile and temporal.⁴² Other studies have shown that computer mediated communication can help people overcome shyness.⁴³

The digital divide presents one of the most significant barriers to the Internet becoming an emancipatory medium. Equal and free access to the discourse is clearly one of the most important criteria for the public sphere – although it must be noted that Habermas' own examples of the 18th century salons and coffee houses were hardly all inclusive. While access to the Internet is growing significantly, it is still a medium affected by class, income, and wealth. Barriers to access go beyond the ability of individuals to remedy. Until world wide satellite access becomes a reality, access to the Internet still requires substantial local network and server hardware. Figure 1 shows the growth in the estimated number of people who have access to the Internet world wide from 1995 through 2001.

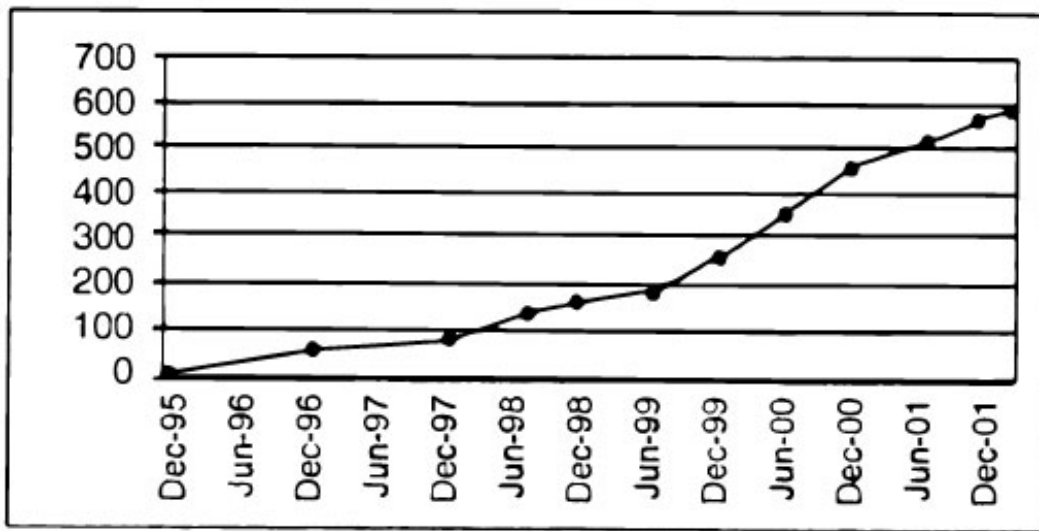


Figure 1: Number of People World Wide with Access to the Internet from 1995-2001. Compiled from data from NUA Internet Surveys at http://www.nua.com/surveys/how_many_online/world.html.

While it is clear that the number of people with access to the Internet is growing, two other facts about figure 1 are important to note. First, the total number of people with access in May 2002, the most recent date, point is 580.78 million, which is only an estimated 9.75% of the world's population. Second, the Internet grew rapidly in its early years, but the rate of growth has been falling off since December 2000. This is probably due to an increasing saturation of the market in the developed world and the lack of capitalization of the Internet in the less developed world.

This digital divide that is emphasized when the rates of access are compared across continents. It is estimated that in January 2002, approximately 164.16 million people in the United States had access to the Internet. That is approximately 58.5% of the population. This

⁴² Sirkka Jarvenpaa and Dorothy Leidner, "Communication and Trust in Global Virtual Teams," *Journal of Computer Mediated Communication*, volume 3, number 4, 1998, accessed at <http://www.ascusc.org/jcmc/vol3/issue4/> on February 23, 2003.

⁴³ Derek Lane, "Computer-Mediated Communication in the Classroom: Asset or Liability?" Workshop presented at the Interconnect '94 Teaching, Learning, & Technology Conference, October 14, 1994, download from <http://www.uky.edu/~drlane/techno/cmasset.htm> on February 23, 2003.

compares with 26.28% in France and 1.61% in Kenya in approximately the same time frame (Data are taken from the NUA Surveys web site at http://www.nua.com/surveys/how_many_online/). The Internet is a long way from providing the universal free and equal access that is required of ideal speech in the public sphere.

This divide of access also affects content of the Internet. English is still the language of the web, further limiting access and empowering American-centric and Euro-centric content. As Joseph Lockard puts it, "In the chaos of globality, an American identity imprints itself on the Internet by default of any other seriously contending ideology."⁴⁴

From the above discussion, the chance for ideal speech in a public sphere of the Internet seems bleak. Possibly the pessimistic outlook is due to the youth of the Internet. While e-mail and USENET date back to the 1960's and 1970's, the Internet we know today did not come into existence until the creation of the world wide web by CERN in 1991 and the first graphic browser (Mosaic) in 1993.⁴⁵ The medium is only 10 years old and it is growing and changing rapidly. While Mark Poster provided a thorough critique of the use of the Internet as a public sphere, he also admitted to its potential.

"The magic of the Internet is that it is a technology that puts cultural acts, symbolizations in all forms, in the hands of all participants; it radically decentralizes the positions of speech, publishing, film-making radio and television broadcasting, in short the apparatuses of cultural reproduction."⁴⁶

Case Studies of Internet Emancipation from an Unrepresentative Sample of Two

The discussion so far has focused mostly on the interactive aspects of the Internet such as e-mail, list-serves, discussion groups, USENET groups, or MUD's.⁴⁷ The emancipatory potential of the Internet is also found in the one-way communications of the World Wide Web. To be emancipatory, in Habermas' context, in addition to contributing information to the discourse of the public sphere, web sites must derive from emancipatory cognitive interests.

There are examples of web sites that approach the requirements for emancipatory interests. One such site is the home site of the Independent Media Centers (<http://www.indymedia.org/>). The Independent Media Center (IMC) is a collection of web-based grass-roots news groups that operate their own web sites and interconnect to each other through the Internet. IMC started by covering IMF/World Bank anti-capitalist protests (specifically the "Battle in Seattle" in 1999). IMC covers protests and demonstrations from inside – that is, from the perspective of those organizing and participating. Each IMC is an autonomous group that organizes its own structure and mission. The indymedia.org group that sits at the center of the organization does not try to direct the organization. It merely manages the communication and provides a central web page for communications. Global decision making is explicitly democratic and decentralized. The site operates an open publishing newswire to which anyone can submit a story. Editors do clean up the stories and perform some filtering to avoid

⁴⁴ Lockard, p. 228.

⁴⁵ Robert Zakon, *Hobbes Internet Timeline*, 2002, <http://www.zakon.org/robert/internet/timeline/>.

⁴⁶ Poster, p. 211.

⁴⁷ MUD stands for Multiple User Dimension and is a multi-user programming environment in which users meet and interact in a fabricated social setting. Its origins come from online role playing games but variations on MUD's are now being used in education, business, and other endeavors.

duplication. Instructions for creating and uploading digital image, audio, or video files are included on the web site. Articles in many different languages are accepted.

The Independent Media Center meets many of Habermas' criteria for emancipatory interests. Access is open to those who have the technology to use it. While there is little interaction directly, the information on IMC forms a part of a larger body of information that underlies public discourse on politics, economics, and society. The decision making within the IMC is distinctly democratic and attempts to empower participants equally. The IMC is no more inhibited by prior power commitments than any other Internet site. Finally, due largely to the types of people who participate, the content of the material on the Independent Media Center newswire explores power commitments that form the hypostatized forces of social interaction thus providing a critique that could reduce their influence.

Geocities.com is not your typical emancipatory web site. In fact, many critical theorists might be hard pressed to accept that any commercially sponsored web site has the potential for emancipatory content. One must remember, however, that the coffee houses and salons of Habermas' early public sphere did not give the coffee away. There were prices to be paid to use the facility. What gives Geocities its potential emancipatory content is its approach to easy access to the World Wide Web. Geocities (www.geocities.com) is a service provided by Yahoo, one of the Internet's largest commercial sites. Geocities offers free web sites to anyone who wants one. Perhaps "free" is the wrong adjective since they come replete with advertising. For \$4.95 per month, a user can get an ad-free web site. Prices and services go up from there. Much of the content is commercial or personal in nature. Some of the content is clearly political and some of the content embodies emancipatory cognitive interests. For example, a subject search of Geocities sites for anarchism returned 539 sites. A search on the keywords "feminist politics" returned 8 member pages and 939 web sites, one self-proclaimed to be a site for "teenage anarcho-feminists" – complete with bomb making recipes.

Conclusions

It is unclear how much either Indymedia.com or the political content of Geocities.com add to the emancipatory discourse of the public sphere. Both sites have exclusionary qualities, if for no other reason than it takes a computer to access them. Neither site provides two-way communication that is necessary for discourse. The unregulated content of Geocities succumbs to the criticisms of computer mediated discourse raised by Dahlberg. Yet, both sites provide some hope for the nascent emergence of a public sphere in the Internet. Both sites provide free access of a sort and both sites encourage unregulated participation.

The Internet does not yet yield the ideal speech situation that a truly emancipatory public sphere would. There are many barriers to such a situation – some of which may be insurmountable with the current technology and organization of the Internet. Nevertheless, the medium is young and by decentralizing communication and as Geocities does, the Internet may yet develop its emancipatory potential.

Is International Law Compatible with Peace in a War-Torn Society? Trials and Tribulations in Bosnia

Linda S. Bishai

***Abstract:** The role of law in an international system reflects a type of reciprocal justice in which states consent to fulfill certain obligations in the interest of maintaining a well-regulated and orderly society. International law is created through the will of states to promote structure in the international system. Thus, law and order are mutual outcomes. However, in certain circumstances, as seen in Bosnia-Herzegovina, law is used to create political justice, putting it in conflict with the order provided by the system and society of states. This article examines the contrast between the application of order in an attempt to settle disputes amidst social chaos, and the application of justice in an attempt to locate and punish individual perpetrators of universal crimes. The International Tribunal for the Former Yugoslavia was created in response to demands for justice in the face of horrific crimes in Bosnia. However, the US-sponsored Dayton Peace Agreement represented an exercise in dispute settlement focusing on the establishment of order regardless of the possible criminal histories of the negotiating parties. These two attempts to solve Bosnia's problems contradicted one another, vividly illustrating the inadequacy that comes from pursuing order and justice in mutual exclusivity.*

Introduction

The international system is widely perceived as one which is based on the relationship between interdependent yet equally sovereign states. The role of law in this system reflects a type of reciprocal justice in which states consent to fulfill certain obligations in the interests of a well-regulated and orderly society. International law is created through the will of states to promote structure in the international system. Thus, law and order in this sense, are mutual outcomes of one another.

In certain cases, however, a conflict arises which forces law and order into a hostile rather than cooperative relationship. These are cases involving a conception of law as justice, based on individual human rights. In the words of International Relations Theorist, Hedley Bull: "there is ...an inherent tension between the order provided by the system of society and states, and the various aspirations for justice that arise in the world politics".¹ The violent conflict in Bosnia-Herzegovina is such a case. The attempt by the international community to stop the fighting and create order was accompanied by an attempt to deal with the universal outcry at the crimes against humanity which were being committed in the region. This article will examine the contrast between the application of conceptions of order in an attempt to settle disputes amidst social chaos, and the application of conceptions of justice in an attempt to locate and punish individual perpetrators of universal crimes.

¹ Hedley, Bull. *The Anarchical Society: A Study of Order in World Politics* (New York: Columbia Press. 1977) 86.

The International Tribunal for the Former Yugoslavia was created in 1993, by the UN Security Council, when there was no end in sight to the violence and hostilities. It was widely considered to be merely a symbolic gesture in response to international horror at the nature of the hostilities occurring in the region, yet the project has gathered momentum and now stands poised as the litmus test of the will of the world community to give effect to the declarations of the need to punish crimes against humanity. Meanwhile, the US-sponsored Dayton Peace Agreement represented an exercise in the dispute settlement which focused on the establishment of order regardless of the “justice” of the compromise and irrespective of the possibly criminal histories of the negotiating parties. Because of the methods and compromises use in the Dayton negotiations, the aims and activities of the Tribunal caused problems of contradiction for the Implementation Force. Likewise, the final settlement, without limiting the goals of the Tribunal, provided a compromise which allowed the imperative of justice in prosecuting war crimes to be paid mere lip service. These two attempts to solve Bosnia’s problems vividly illustrate the often stark choice between justice and order in the international system.

The Need for Justice

From 1991 onwards, the media world focused constant attention on the viciousness of the Yugoslav conflicts. Shocking photos of death camps and rape victims, coupled with the arrogant and defiant statements of Serb and Croatian nationalist leaders, gave the international public a sense of helplessness. Even when the U.N. declared safe-havens and sent in troops, the continued bombardment of Sarajevo and the relentlessly building number of civilian deaths caused a sense of outrage which could no longer be neglected outside of the region. The sense of “human justice”² had been so deeply violated that the Security Council, pursuant to its powers under Article VII of the Charter, created the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (the Tribunal). Although individual persons have previously been prosecuted for such crimes, under the 1945 London Agreement which established the jurisdiction for the Nuremberg Tribunals, the creation of an international civilian court under the auspices of the U.N. is something quite new.

The creation of the Tribunal alone has opened up a floodgate of legal activity amongst human rights lawyers and activists – from those who advocate a permanent international criminal tribunal, to those who strive to see the standards developed in various humanitarian law conventions plainly applied, to women’s rights groups who demanded (and got) recognition of rape as a crime against humanity. The Tribunal “is being most closely watched as a test of whether the international community can apply the network of laws that it was been building since World War II to punish those who commit atrocities during wartime, either between nations or within the boundaries of a single country”.³ The consensus among international observers is that if this Tribunal can be seen to establish a legitimate process for the prosecution of the humanitarian crimes, then the entire international system will benefit from an enriched sense of moral justice and legal order, and the path to the permanent International Criminal Court will be made considerably smoother. If, however, the Tribunal fails, then the chance for a legal

² Hedley Bull’s term for justice in the moral sense.

³ *American Bar Association Journal* vol. 82 (April 1996), 53.

means of redressing such crimes will be proven a chimera, and the international system will be confirmed in its inability to enforce its own humanitarian standards.

Under the terms of its Statutes, the Tribunal is competent to prosecute Grave Breaches of the Geneva Conventions of 1949 (Art. 2), Violations of the Laws or Customs of War (Art 3.), Crimes of Genocide (Art. 4) and Crimes Against Humanity (Art. 5). One of the first questions that Tribunal had to face was a challenge to its own jurisdiction in the case of Dusko Tadic. Jurisdiction was attacked on the basis of three arguments:

[F]irst, that the Tribunal has not been validly established, because the United Nations Security Council lacked the power to do so; second, that the primary of the Tribunal's jurisdiction over that of national courts...was unlawful; and third, that the Tribunal lacked subject matter jurisdiction, because the articles of the Statute named in the indictment (Articles 2, 3, and 5) are applicable only to international armed conflicts, and the alleged crimes, if proven, were committed in an internal armed conflict.⁴

The challenges were rejected both by the trial and the appeals chambers of the Tribunal, but not without carefully reasoned opinions. It is evidence of the seriousness with which the Tribunal sees its task that the judges did not deal with the issues peremptorily by holding that they were not justiciable because of the Tribunal's origin as a creation of the Security Council. Instead, the approach followed was one which maintained the right of an accused person to challenge the validity of the procedure being used against him. "For a criminal tribunal in particular, it is reassuring to know that it finds inherent to the exercise of its judicial function the jurisdiction to examine the legality of its establishment."⁵

Even though the Tribunal was created in response to demands to justice in the face of horrific crimes, there was a common understanding amongst the judges of the need for procedural justice as well as human justice. Otherwise, the breach of justice would be confirmed rather than expiated. The Tribunal must continue to walk a delicate tightrope between protecting the rights of the accused (procedural justice), and protecting the rights of the of the victims as well as providing both a condemnation of and a deterrent to such rimes (human justice). In this struggle, the Tribunal has had to continually update and fine-tune its rules of procedure, which are based on an amalgam of various national systems. Among the difficulties has been an interpretation of Rule 75, which gives a judge the competence to "order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused."⁶ This rule, similar to one in Article 22 of the Statue, have led a trial chamber of the Tribunal to interpret the protection of witness identity to include withholding names of victims and witnesses indefinitely from the accused and defense counsel. This interpretation has been maintained through several versions of the rules of evidence and procedure, and has led one prominent legal analyst to comment:

From a legal policy point of view, it seems obvious that the Tribunal's priority should be to do justice to Tadic and at the same time maintain its credibility...[T]hat is most nearly consistent with international law as reflected in the International Covenant on Civil and Political Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the Universal Declaration of Human Rights.

⁴ George H. Aldrich, "Jurisdiction of the International Criminal Tribunal for the Former Yugoslavia". *American Journal of International Law* vol. 90 no. 1(January 1996), 64.

⁵ Aldrich, 65.

⁶ ABA Journal, 58.

It seems to me that axiomatic that the Tribunal should presume that the Security Council in establishing the Tribunal intended that its Statute should be interpreted in a way that is consistent with international law.⁷

With the eyes of the entire international community watching its every move, the Tribunal cannot afford a misstep. If it does not produce justice credibly and continuously for each of the accused defendants, it will not have produced justice at all.

Although the Tribunal was created eight years ago, it got off to a hopelessly slow start. Three years after its creation, it had only begun one trial due to the difficulty of gaining custody of indicted suspects. When the peace talks were beginning in Dayton in November 1995, members of the Tribunal staff feared that their ability to continue the business of prosecution would be hampered further. In a bid to keep its mission in the forefront of the Dayton proceedings, the Tribunal's Prosecutor issued second indictments against Bosnian Serb leaders Radovan Karadzic and Ratko Mladic. Deputy Prosecutor, Graham Blewitt, admits that they were hoping that "[t]he indictments would send a strong reminder to negotiators that there were major criminals who had to be dealt with. We wanted to make it harder for them to do away with the tribunal."⁸ The peace process, which focused on the cessation of hostilities, posed a definite risk to the justice process, which focused on individual accountability regardless of political (and negotiating) clout. The implications of taking the mission of the Tribunal seriously are that all individuals who have been indicted, no matter how powerful or politically crucial, be taken into custody to be politically impossible – but, international lawyers urged, such a principled stance would be justice to a region in desperate need of it.

These aspects of the Tribunal's mission have become more and more visible in the last five years, and the continued partisanship of the three parties to the Bosnian conflict, in the face of the Dayton mandate for cooperation, have given new credibility to the idea that order cannot be imposed without a widespread trust that justice has been done. The Tribunal now has a respectable 42 proceedings currently underway, not including the most recent and visible public relations victory of gaining custody over the infamous former president of Yugoslavia, Slobodan Milosevic. Thus, in a short span, the court has gone from a shaky half-hearted gesture by the international community to the glittering feature topic of evening news across the globe.

The Need for Order

The voluntary handover of Milosevic by the government of Yugoslavia has recalled international attention to the unheeded indictments of the Bosnian Serb leaders, Karadzic and Mladic. Fears of widespread rioting and disorder by the Bosnian Serb population if their arrests were attempted now seem overrated, and many international figures (including Dayton architect, Richard Holbrooke) are now calling for these two accused war criminals to share Milosevic's fate. How did they manage to evade international justice for so many years? Again, the contradictory goals of justice and order go far in explaining a strange discrepancy. During the course of the summer of 1995, events in the Balkan conflict began to unfold in ways which made negotiation a possibility rather than a pipe dream. The fall of the UN "safe areas" gave momentum to U.S. and European attempts to bring about a settlement. Additionally, the Bosnian Serbs suffered from Croat and federation attacks and the authority for forces on the ground

⁷ Monroe Leigh. "The Yugoslav Tribunal: Use of Unnamed Witnesses Against Accused". *American Journal of International Affairs* vol. 90 no. 2 (April 1996). 238.

⁸ *ABA Journal*, 61.

changed from the UN to NATO.⁹ This combination of events led to a situation in which, while still having broadly different expectations and goals, all parties could agree that stopping the fighting was a desirable achievement. Still, it is unlikely the parties could have met without the forceful invitation and participation of the United States. Playing the role of host and mediator, the U.S. put its diplomatic prestige at risk. Having practically guaranteed to help enforce any agreement with some of its own troops, U.S. negotiators were not going to lightly give up the unique opportunity to be the architects of peace.

The tactics used at Dayton to make an agreement more likely ranged from seclusion, to high-tech computer map simulations, to sleep deprivation. Assistant Secretary of State, Richard Holbrooke, presented the parties with a long draft treaty and then proceeded to steer them through all the necessary alterations and compromises, badgering them past any entrenched difficulties. His methods were so relentless that the victims of his particular brand of persuasion coined the term “getting Holbrooked” to describe it.¹⁰ In fact, Holbrooke may have developed a whole new method of dispute settlement – coercive conciliation. Questionable as they were, the methods got results. But at what expense? U.S. officials were not under any illusions about the lack of commitment to a unified Bosnian state. One official described the different goals of the three leaders as completely contradictory, including the fear of Milosevic “that after a so-called decent interval he’ll try to absorb all of Bosnia. He may try for an Anschluss.”¹¹ Even with these grave doubts about the value of the parties’ promises, the teams of negotiators in Dayton struggled to achieve an agreement.

Although a deal was finally signed, the chaotic mess of Bosnia has yet to develop into a stable peaceful state. The compromises were many and difficult and have continued to haunt the peace. The Bosnians have up effective control over the entire region that would come to be known as Republika Srpska and had to settle for an extremely weak central government structure. The Bosnian Serbs gave up eastern Slavonia and the idea of a divided Sarajevo, and the Croats gave up various parts of territory conquered from the Serbs. Although the agreement contains strong language about human rights standards and laws, provisions are only made for reporting and monitoring, not enforcing. Political will to make the bifurcated state structure work remains lacking. One of the major problems in guaranteeing the validity of the parties’ agreement was the lack of a permissible Bosnian Serb representative, since the leader at the time, Karadzic, was a suspect indicted by the Tribunal in the Hague. Although he was denied a presence at Dayton and in the subsequent Bosnian state, his influence and methods continue to be felt. Slobodan Milosevic served as an official representative for the Bosnian Serbs at Dayton, but there is reason to doubt that they felt their interests were preserved. One of the Bosnian Serbs who served in the small delegation accompanying Milosevic declared “[t]he agreement that has been reached does not satisfy even a minimum of our interests.”¹² Not only does a statement like this distract from the likelihood of the terms of the agreement being honestly pursued, but it casts doubt upon the credibility of the method of negotiation. Again the requirements of justice and order seemed at loggerheads. A better order could have been achieved by giving voice to the chosen representative of one of the parties rather than his proxy. Yet, the demands of justice required that no indicted person be involved in any internationally sponsored process since that

⁹ *Time Magazine* vol. 146, no. 19 (November 6, 1995).

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *TIME DAILY* 11/22/95 [found at <http://pathfinder.com>].

would undermine the chances of bringing him to justice in the future. In fact, it is precisely this point – in reverse – that has led some to criticize the trial of Milosevic in the Hague, on the theory that peaceful negotiations with criminally inclined leaders will become impossible in future conflicts.

The side effect of all the compromises involved in the agreement is that difficulties with implementation have been plaguing the UN and SFOR since the beginning. Originally, the Bosnian President, Alija Izetbegovic, refused to negotiate until promises were made to extradite the indicted leaders, Karadzic and Mladic. This demand was softened to the point where Article IX of the General Framework Agreement (GFA) merely states the “obligation of all parties to cooperate in the investigation and prosecution of war crimes and other violations of international humanitarian law.”¹³ This has meant that Bosnia’s first six years as an independent republic have been marred by perceptions that those guilty of war crimes may escape the rule of law with impunity. Additionally, Article IX of the Constitution of Bosnia and Hercegovina (Annex 4 of the GFA), categorically states that “No person who is serving a sentence imposed by the Tribunal and who has failed to comply with an order to appear before the Tribunal, may stand as a candidate or hold any appointive, elective, or other public office in the territory of Bosnia and Hercegovina.”¹⁴ Although Karadzic resigned his post as Bosnian Serb President, subsequent Serb leaders who emerged to fill the void were seen as operating under his influence. This situation has been slow to change – due in part to an active partisan media campaign by all three parties to the conflict operating within Bosnia that has perpetuated the agenda of hard-line nationalists and separatists.¹⁵

The ironic tragedy of the Dayton peace is that the cease-fire it upheld undoubtedly preserved lives, yet, by hastily seizing the moment, the negotiators created a rickety peace and an exceptionally weak central government, which has been picked at and thwarted from its very beginning. Peace and order are of undoubtedly great moral and political value. But if order is perceived to have been established in a careless or overly compromised way, it will not be observed. All three parties to the Bosnia conflict have been guilty of tailoring the peace to their own needs rather than attempting to rebuild and cooperate. Just after the Paris signing of the Dayton agreement, Croatia released a man indicted by the Hague Tribunal who had been in a local jail on an unrelated charge. A journalist covering the area stated bleakly that “[n]o one should be optimistic that there will be sufficient justice to convince the various populations in Bosnia that the wicked have been punished.”¹⁶ Even the ethnic “cleansing” continued after the agreement: a group of elderly Muslims were driven out of Banja Luka, and towns were returned to the respective entities in looted and burnt out condition. The sense lingers that the peace in Bosnia relies primarily on the presence of foreign soldier and not on local institutions. Although the conflict is no longer hot, the stability of the peace undoubtedly depends on the willingness of foreign leaders to remain involved. This is hardly a successful outcome for the Dayton negotiators.

¹³ General Framework Agreement for Peace in Bosnia in Hercegovina, (*The Dayton Agreement*, November 21, 1995).

¹⁴ Bosnia Peace Agreement: Annex 4: Constitution of Bosnia and Hercegovina (<http://www.state.gov/www.regions/eur/bosnia/dayann4.html>)

¹⁵ Daniel Deluce, “Media Wars” *NATO Review* vol. 48 (Winter 200-2011), 16-21.

¹⁶ *TIME DAILY* 12/08/95 [found at <http://pathfinder.com>]

The text of the agreement describes an orderly state which allows each entity to form associations with its affiliated neighboring state, a state in which much attention is paid to human rights and freedoms, and which incorporates all of the humanitarian conventions already present in international law. And yet, there is no specified mechanism for identifying and capturing war criminals. The dirty work is left up to the piteously understaffed Tribunal in the Hague – which depends upon the will of the local police for obtaining custody over the accused. Even for IFOR troops, which include the best-trained and staffed military forces in the world, regard the arrest of war criminals as something of a nuisance. NATO commanders have “balked at doing anything to either seek out war crimes suspects or to safeguard sites of reported crimes, including mass burials sites that were discovered” claiming that those activities would be “mission creep” and would “jeopardize the safety of their troops.”¹⁷ Although the troops have pledged to arrest the accused criminals they come into contact with in the course of their duties, these duties have proven to be remarkably without incident in terms of local confrontations. There is a widespread feeling of cynicism regarding the task of the troops in Bosnia, since many of the people indicated by the Tribunal are within their easy reach. Recently there has been increased pressure on NATO to make the effort to arrest and transport the indictees in Bosnia. The situation reflects a sea of change in perception of the legitimacy of the Tribunal vis a vis the Dayton Accord. Today, out of 67 persons indicted by the Tribunal, the Court has custody or contact with 42 persons (3 have been provisionally released) there are 24 accused currently at large. The Court’s recently acquired custody over Milosevic has simply driven the starkness of the contrast home. Despite Milosevic’s personal remarks to the Court that it was not a legal body and he did not recognize it, the Court entered a plea of “Not Guilty” on his behalf, and he will be extended all of the protections elucidated in the Tribunal’s statute. A former head of state is being prosecuted before and international tribunal – and yet order in Yugoslavia has not come to an end.

Just as the Tribunal in the Hague is founded upon the necessity of an apparent political impossibility, the Dayton Agreement rests upon a cornerstone which seems to require the silencing of the claims of justice. The peace envisaged at Dayton requires the sanctioning of the results of the war. The spoils of force and ethnic cleansing have been endorsed for the sake of order. Theoretically, the two institutional solutions to the Bosnian problem cancel each other out. But the Tribunal and the Peace Agreement need each other to work – each is based upon principles that shore up the foundations of the other. Prosecuting individuals who relied on criminal terror to achieve political aims is a necessary part of healing a country torn up by nationalist hatred, but merely writing the rules does not create the society envisioned by them. Political settlement that addresses the concerns of all the groups comprising the society is necessary for law and prosecution of criminals to be seen as legitimate. On the other hand, establishing an orderly society by force without attempting to address concerns for justice regarding past events is counter-productive. The specter of recent unpunished crimes, especially those of a widespread, organized political nature, will obstruct the worth of civic trust so necessary for long-term order.

Conclusion

The most powerful indictments being issued in Bosnia are those of civilian residents who suffered more from the denial of their humanity than from the bullets and shells:

¹⁷ *ABA Journal*, 61.

[T]he world has only shown us that nothing is sacred when it comes to promoting its own order at the expense of ordinary people reduced to being miserable, hungry and cold. After Dayton, all the actors with bloody parts in the play have kept their roles. The winners are criminals and thieves, demagogues and warmongers, the ideologues of totalitarianism, of one nation and one state, controlled by one party. The defeated are those who believed people find happiness in justice and diversity. Between such sides, there can only be control but never peace.¹⁸

What the Bosnian conflict starkly reveals is the utter impossibility of pursuing order and justice in mutual exclusivity. The need for the creation of a Tribunal that could fairly pursue justice in a war-torn wreck of a country was profound and imperative. Yet to create the Tribunal without any kind of orderly control over the raging chaos of Bosnia was to condemn it to play a role of symbolic gestures and inconvenient snooping regarding the powers-brokered peace process. In contrast, the Dayton peace was almost perceived as an end in itself. If a document was signed, any kind of document, then there would be peace – and the conference would be deemed a success. But this goal-oriented approach applied sterile problem-solving techniques to an intensely psychological situation, without regard for the need of these peoples to heal, and the necessity of justice for that social healing. One fears that Bosnia may no longer be susceptible to a reconciliation of order and justice, but perhaps the lesson may still be learned.

Although he favored a conservative and somewhat instrumental approach to international relations, even Hedley Bull recognized that Order and Justice can not exist in isolation. They must be regarded as complementary, and mutually reinforcing:

Any regime that provides order in world politics will need to appease demands for just change, at least to some degree, if it is to endure; and thus an enlightened pursuit of the goal of order will take into account also of the demand for justice. Likewise the demand for just change will need to take account of the goal of order; for it is only if the changes that are effected can be incorporated in some regime that provides order, that they can be made secure.¹⁹

The future of international law and dispute settlement, then, lies in pursuing as far as possible the idea the idea of “enlightened order”. For settlement will never be complete without an accompanying sense of human justice done, and justice will be reduced to empty symbols in the absence of accompanying security and order.

¹⁸ Zlatko Dizdarevic, “City Divided, City Defeated” *Time Magazine* vol. 146, no. 24 (December 11, 1995).

¹⁹ Bull, 95.

The 1991 Soviet and 1917 Bolshevik Coups Compared: Causes, Consequences, and Legality

Harry G. Kyriakodis

***Abstract:** This article measures the success of the two major coups de'etat in Russian history, the 1991 Soviet coup and the 1917 Bolshevik coup through comparison, and argues the illegality of the 1991 Soviet coup. The 1991 Soviet coup was a result of the Communist Party's dissatisfaction with Gorbachev's increasing power as he attempted to slowly transition the Soviet Union into a more capitalistic society by instituting new economic reforms. Gorbachev was betrayed by eight members of his inner circle, which resulted in a failed three day coup d'etat against him. This coup brought about the end of the Soviet Union, as the incident's inefficiency cemented anti-Community sentiment within the public. The 1917 Bolshevik coup was a result of Vladimir Lenin and the Bolsheviks orchestrating the overthrow of the Provisional Government through the use of conspiracy tactics and sudden violence. As in 1991, economic woes were at the root of the coup, but the Bolsheviks were more effective in exploiting the social unrest within the country. While the coups contrasted in terms of effectiveness and efficiency, they were similar in cause, and both effectively brought about the end of the incumbent regime. Finally, the 1991 Soviet coup was illegal, as the steps taken by the eight conspirators violated the Soviet Union's succession rules, and was thus, illegitimate.*

Introduction

On the morning of August 19, 1991, the people of the Soviet Union (and the world) were startled to hear that Mikhail Gorbachev had been ousted from power in a right-wing military coup d'etat. Hard-line Communists, most of whom Gorbachev had appointed to office, temporarily deposed the rightful Soviet President in three dramatic days which shook the world. This extraordinary event in the history of the Soviet Union not only threatened Gorbachev's efforts to democratize the country, but also placed in jeopardy years of progress in East-West relations which occurred during President Gorbachev's administration.

After a brief review of what a coup d'etat is, this comment will consider the Soviet coup of August 1991 ("the August coup") in detail, beginning with an analysis of the coup's underlying causes, and focusing on how it was conducted and why it failed. After suggesting that the takeover could have succeeded if better executed, this work will examine how the coup helped bring about the actual end of the Soviet Union.

The August coup will also be compared to Russia's Bolshevik coup of 1917. Better known as the "October Revolution," the Bolshevik coup essentially created the Soviet Union after Communist forces ousted the existing short-lived democratic government.

Although the Bolshevik and the August coups have many disparities, it will be seen that they possess several interesting and striking similarities. The most profound connection between the two is that the August coup can be regarded as having effectively restored the democratic form of government which the Bolshevik coup deposed.

This comment will then explore the constitutional legality of the August coup leaders' actions in overthrowing President Gorbachev and declaring a state of emergency throughout parts of the Soviet Union. It will be shown that although the substitution of the Soviet Vice President for Gorbachev was technically constitutional, it was nevertheless unlawful and illegitimate since it was fraudulently based.

The Coup d'Etat

A *coup d'etat* (French: "stroke of state") is defined as a "political move to overthrow existing government by force."¹ A more complete definition is that a coup (or putsch) is the sudden substitution of key incumbent government authorities by an individual or small group, usually without any intended or actual change in the government structure itself.² The setup of a successful coup regime is essentially the same as that of the old government, with the exception of the top leader or group of leaders.³

A coup is distinguished from a revolution in that a revolution is clearly an extra-constitutional means of bringing about a change of state *government*, whereas a coup d'etat involves an unlawful change of state *leadership*.⁴ Unlike a revolution, a coup generally does not bring about broad social and economic changes; existing social and government institutions are usually left untouched in coups d'etat.⁵ Yet sometimes a coup may develop into much more than the replacement of one set of government authorities by another, and may indeed be the first step of a full revolution.⁶ In such cases, the coup acts as the triggering event that brings about eventual revolutionary change in a nation.⁷

This is certainly the case with the August 1991 Soviet coup. The brief ousting of Mikhail Gorbachev clearly demonstrated to the Soviet public (and the world) Gorbachev's lack of authority, and also highlighted the ineffectiveness and disintegration of the Soviet Union's entire

¹ BLACKS LAW DICTIONARY 351 (6th ed. 1990).

² Farooq Hassan, *A Juridical Critique of Successful Treason: A Jurisprudential Analysis of the Constitutionality of a Coup d'Etat in the Common Law*, 20 STAN. J. INT'L L. 191, 198 (1984). Leaders of coups d'etat are usually part of the ruling regime itself and normally leave old governmental institutions and policies in effect after taking over key government positions. *Id.* 197.

³ *Id.* 198.

⁴ *Id.*

⁵ *Id.* Unlike revolutions, coups usually do not involve popular participation and are usually carried out without bloodshed. *Id.* 196. Because of this, "[c]oups d'etat ... where power changes hands from one man to another, from one clique to another ... have been less feared because the change they bring out is circumscribed to the sphere of government and carries a minimum of unquiet to the people at large ..." HANNAH ARENDT, ON REVOLUTION 27 (1963). Furthermore, [T]he focused, concentrated violence of [a] coup seems preferable to the bloody hazard of revolution or civil war. The blow is directed exclusively against the real sources of governmental power, and, if it succeeds, there is no undue disruption of the state. Even from the humanitarian point of view there seem to be strong arguments in favor of the coup, for casualties are likely to be kept to a minimum, and these casualties – from the viewpoints of the rebels – are not suffered by innocent soldiers or citizens but by those very men whose mismanagement of affairs has made change necessary. D. J. GOODSPEED, THE CONSPIRATORS: A STUDY OF THE COUP D'ETAT 232-33 (1961). This fairly describes the Soviet coup, as the conspirators moved only against Gorbachev, since they considered him the sole cause of the Soviet Union's problems and the only constitutional obstacle to their goals.

⁶ Hassan, *supra* note 2, 196.

⁷ *Id.* 197. A coup and a resulting revolution cannot be distinguished when this happens, since such political events run together and end where no one thought they would. Eugene Kamenka, *The Concept of a Political Revolution*, in REVOLUTION 134 (Carl J. Friedrich, ed. 1966). "The definition of revolution is not the beginning, but the end of an inquiry into social upheaval, social change, and the translocation of power." *Id.*

Communist government. This revolutionary process culminated with the sweeping change of power from the central Soviet government to the former Soviet republics, followed by Gorbachev's resignation late that year.⁸ Even more revolutionary is that the August coup helped bring about the end of Communism as a political force in the world.⁹

Gorbachev and the Soviet Union

Gorbachev's Reforms

Mikhail Gorbachev became leader of the Soviet Union following several years of instability in the country's leadership.¹⁰ Gorbachev was nominated General Secretary of the Communist Party Central Committee on March 11, 1985.¹¹ A staunch communist, Gorbachev became the youngest man since Joseph Stalin to be the most powerful man in the Soviet Union.¹² He immediately appraised the country's economic and social situation and realized that the Soviet Union was still practically a third-world country.¹³ He recognized that the Communist Party and the vast military-industrial bureaucracy were strangling the nation.¹⁴ Gorbachev decided to modernize his country, although he did not intend to dissolve its Communist system.¹⁵

Gorbachev began by initiating economic reforms under the concept of *perestroika*, which means "restructuring" or "rebuilding."¹⁶ Industries were made more self-sufficient, employees began to be paid based on their productivity, and bureaucrats were told to stop interfering with

⁸ Francis X. Clines, *Gorbachev Resigns as Last Soviet Leader; U.S. Recognizes Republics' Independence; Communist Flag Is Removed; Yeltsin Gets Nuclear Controls*, N. Y. TIMES, Dec 26, 1991, Aa1.

⁹ Ironically, although Communism was the primary revolutionary movement of the early 20th Century, before the August coup, it has always ruthlessly extinguished any rebellion threatening its existence. Kamenka, *supra* note 7, a197. Take for example the Soviet Army's violent suppression of the 1956 Hungarian Revolt and the 1968 Czechoslovakian Revolt. *Id.* The major problem which had prevented revolutions in Communist countries in the past was that power was exclusively concentrated in the state and rigorously controlled by authorities. *Id.* The revolutionary change of political power which occurred in the Soviet Union and other European Communist states since the late 1980s could not have happened without Gorbachev's reforms loosening the yoke of Communist state repression.

¹⁰ Michael J. Bazyler, *The Gorbachev Revolution*, 12 WHITTIER L.R. 147 (1991). Following the death of Leonid Brezhnev on November 10, 1982, Yury Andropov became leader of the Soviet Union until his death on February 9, 1984. Andropov's successor, Konstantin Chernenko, had been in power for less than a year before dying on March 10, 1985. BRITANNICA BOOK OF THE YEAR 548 (1986) [hereinafter 1986 BRITANNICA]. Chernenko's death marked the final passing from Soviet politics of a generation of leaders who had come into power under Leonid Brezhnev. *Id.*

¹¹ 1986 BRITANNICA, *supra* note 10, 548. The Secretary General and various powerful government ministers involved in operating the Soviet Union comprised the "Politburo," the executive committee of the Communist Party Central Committee. THE SOVIET UNION THROUGH ITS LAWS 239 (Leo Hecht ed. & trans. 1983). *Id.* The Politburo's mission was to make policy for not only the Communist Party, but also for the entire nation. *Id.* Gorbachev also simultaneously became Chairman of the Presidium of the Soviet Parliament, the Supreme Soviet. (Gorbachev handed the Chairmanship to Andrey A. Gromyko in June of 1985.) Although the Presidium was the highest policy-making body within the Parliament, the 2500-member Congress of the Peoples' Deputies was the Soviet Union's supreme constitutional authority. *Id.*

¹² 1986 BRITANNICA, *supra* note 10, 548.

¹³ Bazyler, *supra* note 10, 128.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Mikhail Gorbachev set out his plan for the Soviet Union's economic reform, including the introduction of capitalistic principles, in PERESTROIKA: NEW THINKING FOR OUR COUNTRY AND THE WORLD (1987).

everyday economic matters.¹⁷ Citizens were even permitted to hire workers and start their own private business enterprises.¹⁸

To further social growth, Gorbachev instituted the policy of *glasnost* (“openness”), which refers to greater democratization of Soviet society.¹⁹ Until Gorbachev came to power, the Soviet Union was a totalitarian society in which only the words and thoughts of the Communist Party were sanctioned.²⁰ After Gorbachev placed into effect the principles of *glasnost*, individuals were permitted to speak out, even against the Communist Party.²¹ Censorship was curtailed and public debate encouraged.²²

Although a firm Communist himself, Gorbachev resolved to loosen the Communist Party’s omnipotent control over the Soviet government. To accomplish this, Gorbachev began asking the Supreme Soviet (the country’s Parliament) for more power for himself.²³ The Parliament responded by creating a strong five-year presidency for Gorbachev in March 1990.²⁴ By the end of 1990, Gorbachev had received the authority to nullify a Soviet republic’s legislation by presidential decree.²⁵

Gorbachev’s Loss of Authority

The powers which Gorbachev secured made him a virtual dictator. He issued presidential decrees whenever he felt that the integrity of his office was threatened.²⁶ For example, when demonstrators heckled him at the 1991 May Day Parade in Red Square, he immediately issued a decree making it a criminal offense to insult the President of the Soviet Union.²⁷ This order largely went unheeded; however, despite his increased *power*, Gorbachev’s *authority* – the general population’s acceptance of his right to rule – actually declined strikingly during 1990 and 1991 as the Soviet people saw that his economic reforms had failed and the country was headed towards economic ruin.²⁸ Issuing presidential decrees at a rapid rate could not help matters when nobody obeyed them.²⁹

¹⁷ Bazylar, *supra* note 10, 128.

¹⁸ *Id.* 149.

¹⁹ *Id.* 147.

²⁰ *Id.*

²¹ *Id.*

²² *Id.* 148. For a report on how censorship lessened after Gorbachev took office, see *How Soviet Censorship is Easing Up*, IZVESTIYA, Nov. 3, 1988, *trans. in* 40 CURRENT DIG. OF SOVIET PRESS 1 (No. 44)(1988).

²³ Henrik Bering-Jensen, *Sorry Mood in Capital of a falling empire*, INSIGHT, May 14, 1990, 15.

²⁴ *Id.* See Article 127 of the final Soviet Constitution for the provisions creating the Soviet presidency.

²⁵ Gorbachev’s power to rule by decree was listed as one of the President’s powers in the Soviet Constitution: “On the basis of and in fulfillment of the USSR Constitution and USSR laws, the USSR President issues decrees that have binding force throughout the country.” Art. 127, par. 5 KONST. SSSR. Some members of the Supreme Soviet worried about the concentration of so much power in one man, especially considering that Gorbachev constitutionally had more authority than any Soviet leader since Stalin. Bering-Jensen, *supra* note 23, 16. Other members of the Parliament regarded Gorbachev’s strengthening of power as political opportunism and an attempt to create a new powerbase to replace that of the weakening Communist Party. *Id.* They felt that if Gorbachev wanted a popular mandate for more power, then he should call for a presidential election. *Id.* His supporters responded that this was impossible since an election might provoke a civil war. *Id.* There was a more practical reason not to call for a general election: considering the mood of the country, Gorbachev simply would not have won re-election. *Id.*

²⁶ Henrik Bering-Jensen, *In the Midst of the Storm Rides a New World Order*, INSIGHT, Dec. 24, 1990-Jan. 7, 1991, 9.

²⁷ *Id.*

²⁸ *Id.* The economic troubles of the Soviet Union before the coup are discussed in the text accompanying *infra* notes 37 through 41.

²⁹ *Id.*

A telling example of Gorbachev's general lack of authority before the August coup was his relationship with Boris Yeltsin, the first popularly-elected President of Russia.³⁰ Gorbachev had made Yeltsin Communist Party leader of Moscow soon after 'coming into power, but dismissed him in 1987 and removed him from the Politburo.³¹ Their principle disagreement was that Yeltsin advocated moving the Soviet Union to a free market economy as quickly as possible, while Gorbachev desired a much slower pace.³²

By late 1990, Gorbachev had evidently taken steps to reverse the forces of *glasnost* and *perestroika*, perhaps as one last effort to preserve his political future and keep the Soviet Union together.³³ Government censorship was partially reinstated in early 1991.³⁴ The K.G.B. became more powerful, with its hard-line Communist chairman, Vladimir A. Kryuchkov, stressing law and order as the solution to the nation's problems.³⁵ To help make things easier for himself in dealing with right-wing government forces, Gorbachev chose a career Communist Party member, Gennadi I. Yanayev, as his Vice President.³⁶

³⁰ Celestine Bohlen, *Coup Set Yeltsin at Center Stage*, N. Y. TIMES, Aug. 20, 1991, A11. Trained as an engineer, Yeltsin was once close friends with Gorbachev. *Id.*

³¹ *Id.* Yeltsin publicly quit the Communist Party in July of 1990. *Id.*

³² *Id.* The already bitter feelings between the two widened after Gorbachev tried (but failed) to prevent Yeltsin from becoming Russian President. *Id.* For a description of the relationship between Yeltsin and Gorbachev before, during, and after the August coup, see JOHN MORRISON, *BORIS YELTSIN: FROM BOLSHEVIK TO DEMOCRAT* (1991).

³³ Stephanie B. Goldberg, *Danger on the Right: The Soviet Union Retreats from Reform*, A.B.A. J., May 1991, at 71. For further discussion on the end of democratic reform in the Soviet Union, see Bill Keller, *Mourning Soviet Reform: Many Regard Legislature's Session as End of Democratization and Onset of Reaction*, N.Y. TIMES, Dec. 29, 1990, 1. It is not clear whether Gorbachev's decision to restrict the country's reforms was his alone or resulted from right-wing pressure on him to do so. Resolution of this question is difficult since it was hard-line Communists who tried to depose the President, with disastrous results.

³⁴ Goldberg, *supra* note 33, 71. For instance, the Kremlin cut the frequency of the Russian republic's most popular radio station and tried to close a competitor of the Soviet news agency Tass. *Id.* Also, a television show covering the shootings which occurred in Lithuania in January 1991 was edited to conform with Communist Party rhetoric. *Id.* For a report on Gorbachev's desire to restrict the Soviet press, see Esther B. Fein, *Gorbachev Urges Curb on Press Freedom*, N.Y. TIMES, Jan. 17, 1991, A3.

³⁵ Goldberg, *supra* note 33, 71. Gorbachev issued a decree increasing K.G.B. authority at the expense of civil liberties and commercial development after Kryuchkov addressed the December 1990 meeting of the Congress of the People's Deputies to complain about the Soviet Union's ills and the threat of its collapse. Bill Keller, *K.G.B. Chief Warns Against West's Aid to Soviet Economy*, N.Y. TIMES, Dec. 23, 1990, 1. The K.G.B. chief had called for "decisive measures" to contain ethnic violence, saying that the country "will not escape upheavals with more serious and painful consequences." *Id.* Kryuchkov also blamed the West for disseminating "anti-Soviet propaganda," and maintained that foreign aid was "economic sabotage." *Id.* 12. Given that Vladimir Kryuchkov was one of the conspirators in Gorbachev's overthrow, it may be that Gorbachev's decree increasing K.G.B. authority was an attempt on his part to placate the conservative K.G.B. chief. Unhappy with right-wing influence over Gorbachev, Soviet Foreign Minister Eduard Shevardnadze stunned the Soviet Union and the world by resigning during the same meeting of the People's Congress. Bill Keller, *Shevardnadze Stuns Kremlin By Quitting Foreign Ministry and Warning of 'Dictatorship'*, N.Y. TIMES, Dec. 21, 1990, A1.

³⁶ Bill Keller, *Gorbachev Names a Party Loyalist to Vice Presidency*, N.Y. TIMES, Dec. 27, 1990, A1. This was a fateful step for Gorbachev, as it was Gennadi Yanayev who played a critical role in the August coup by taking over as Soviet President upon Gorbachev's ouster. Yanayev presented himself to the Supreme Soviet as a "Communist to the depth of [his] soul" *Id.* Parliament members did not initially approve Yanayev for the newly-created vice presidency, but acquiesced after Gorbachev insisted that Yanayev was a man he could trust. Esther B. Fein, *In Hard Battle, Gorbachev Gets Aide He Chose*, N.Y. TIMES, Dec. 28, 1990, A1. See *infra* note 60 for discussion on Gorbachev's inability to appoint to power friends who were truly loyal to him. See *infra* note 189 and accompanying text for further discussion on the Soviet vice presidency (and its establishment).

Conditions Before the Coup

In spite of Gorbachev's initiatives, conditions in the Soviet Union became worse during his last years in office.³⁷ With shortages of even the simplest necessities, the public soon regarded Gorbachev's economic reforms under *perestroika* as failures.³⁸ Food rationing was introduced in Moscow and Leningrad for the first time since World War II, and buyers had to wait in line for hours if food was available.³⁹ As people became more tired of waiting for the promises of *perestroika*, they became less tolerant of Gorbachev.⁴⁰ Soviets saw Mikhail Gorbachev as the cause of their hardship.⁴¹

Citizens, particularly hard-line Communists, had also become acutely aware that their empire was being lost.⁴² Gorbachev pulled the Soviet Army out of Afghanistan in 1988 after the Soviet Union had spent eight fruitless years at war.⁴³ Communist regimes fell like dominos in Eastern Europe.⁴⁴ The Warsaw Pact disbanded and the Berlin Wall came down. Buoyed by the collapse of European Communist governments, Lithuania declared its independence from the Soviet Union in 1990.⁴⁵ Nationalism and ethnic strife rose throughout the Soviet republics.⁴⁶ Older members of Soviet society soon realized that everything they had suffered and struggled for, everything Lenin promised under the "enlightened future of socialism," was nothing more than a sad illusion.⁴⁷

³⁷ Bazkyler, *supra* note 10, 149.

³⁸ *Id.* One cause of the failure was that Communist Party bureaucrats controlling the Soviet Union's pervasive military-industrial complex were unwilling to give up their power and control of the economy. *Id.* 149.

³⁹ Bering-Jensen, *supra* note 26, 8. The Russian city of Leningrad, the Soviet Union's second largest city after Moscow, provides an excellent microcosm of the connection between the Bolshevik and August coups and their aftermaths. Founded by Peter the Great in 1703 as St. Petersburg, the city was renamed Petrograd in 1914. THE NEW ENCYCLOPEDIA BRITANNICA, MACROPAEDIA, vol. 22, *Leningrad* 953 (15th ed. 1987). In 1924, the city was renamed Leningrad upon Lenin's death that year to honor him for leading the October Revolution (the Bolshevik coup) in 1917. *Id.* In response to the tumultuous events of 1991, Leningrad returned to its original name of St. Petersburg two weeks after the August coup. Serge Schmemmann, Soviets Recognize Baltic Independence, Ending 51-Year Occupation of 3 Nations, N.Y. TIMES, Sept. 7, 1991, 1.

⁴⁰ Bazkyler, *supra* note 10, 149.

⁴¹ Bering-Jensen, *supra* note 23, 10. Also blamed were: (1) old-time Communists, stubbornly resisting change; (2) Soviet Jews, up to their conspiratorial efforts; (3) the Baltic states (Latvia, Estonia, and Lithuania), upsetting the country with their demands for independence; (4) the Muslims, creating trouble in the Soviet South; (5) Westerners, meddling in the affairs of the Soviet Union; and of course (6) bureaucrats, for being bureaucrats. *Id.*

⁴² *Id.*

⁴³ *Id.* 11. The Afghan war drained the country's treasury and killed thousands of conscripts. *Id.* Waged in the name of socialism, the war's underlying purpose was to stabilize the Muslim situation within the Soviet Union itself by halting the creation of a new Muslim fundamentalist nation at the Union's southern border. *Id.* Already demoralized with its defeat in Afghanistan, the Soviet Army returned home to an even bleaker environment. *Id.* The Afghan defeat also added to the discontent and sorry mood of the Soviet people, especially the leaders of the August coup. *Id.*

⁴⁴ Within six months, the people of Eastern Europe had regained freedoms denied to them for forty years under oppressive Soviet-backed Communist governments. Flora Lewis, *Legacy of 1991: Phoenix or Empty Ashes?* 1992 BRITANNICA BOOK OF THE YEAR 4 (1992).

⁴⁵ But in January of 1991, the Soviet military charged into Lithuania with the purpose of taking over a militant Lithuanian broadcast center. Bill Keller, *Soviet Loyalists in Charge After Attack in Lithuania; 13 Killed; Crowd Defiant*, N.Y. TIMES, Jan. 14, 1991, A1. Gorbachev was said to have tacitly approved of the invasion, which resulted in several deaths. *Id.* Gorbachev repeatedly declared that Lithuania's claim of independence was illegal. *Id.*

⁴⁶ *Id.*

⁴⁷ *A Day in the Death of the Soviet Union*, INSIGHT, Nov. 19, 1990, 12. Some people actually expressed nostalgia for the rigid order of Joseph Stalin: "[Russians] need an iron fist," said one Russian. *id.* 10 "This is what Stalin

The huge military-industrial complex came to loath Gorbachev and his liberal economic and social reforms.⁴⁸ The military leadership was considerably upset with the Communist Party's loss of power under Gorbachev, as well as the Soviet Union's declining international strength.⁴⁹ The possibility of civil war was a topic of conversation for months throughout 1990 and 1991; persistent rumors of a military coup buzzed around Moscow.⁵⁰ The situation became such that it was not clear whether political authority was coming from Gorbachev, the Communist party, the Supreme Soviet, or the Soviet republics.⁵¹

While the Soviet empire fell apart, Gorbachev became increasingly isolated from the public and the events transpiring. There were public demonstrations against Gorbachev.⁵² By mid-1991, conditions in the Soviet Union had become ripe for a drastic event to occur.⁵³ And Gorbachev was just about everybody's target of choice.

The Soviet Coup

The Committee of Eight and Its Justification

A right-wing, military-backed coup d'état ousted Mikhail Gorbachev from power for three days starting the night of August 18, 1991.⁵⁴ While he was vacationing at Cape Foros in southern Crimea, an eight-man group calling itself the "State Committee for the State of Emergency in the U.S.S.R." ("the Emergency Committee") sent emissaries to Gorbachev demanding that he immediately declare a state of emergency in the Soviet Union and then

provided, and during that period, we had something to believe in. We had a leader and we had ideas. We have nothing now." *Id.*

⁴⁸ Bill Keller, *Soviet Military Grows Resentful at Gorbachev's Policy of Change: Many Middle Ranking Officers Favor Hard Line*, N.Y. TIMES, Dec. 24, 1990, 1.

⁴⁹ *Id.*

⁵⁰ *A Day in the Death of the Soviet Union*, *supra* note 47, 10.

⁵¹ Goldberg, *supra* note 33, 71.

⁵² Bering-Jensen, *supra* note 26, 8. Such demonstrations against Gorbachev as occurred at the 1991 May Day Parade would have been unthinkable under previous Soviet leaders. *Id.* Ironically, Gorbachev's *glasnost* policies had opened the door to political demonstrations in the first place. Despite all this, Gorbachev was still popular throughout the world, and had even won the 1990 Nobel Peace Prize for his contribution in ending the cold war. *Id.* But fearing being deposed while out of the country, Gorbachev cancelled his trip to receive his award. *Id.* Indeed, only three days before the August coup attempt, the Kiplinger Washington Letter noted that although Gorbachev was popular elsewhere in the world, he could not win a free election at home. KIPLINGER WASH. LETTER, vol. 68, No. 33 (Aug. 16, 1991).

⁵³ Even more than a year before the August coup, Professor Michael J. Bazylar concluded a speech presented at the 1990 International Law Symposium at Whittier College School of Law with: "With the Soviet economic faltering, the often-asked question is whether Gorbachev will stay in power. No one can predict the answer, but we should not be too surprised if one morning we read in the newspapers that he has been overthrown." Bazylar, *supra* note 10, 150.

⁵⁴ Gorbachev's removal from power was orchestrated similarly to the deposal of Nikita S. Khrushchev twenty-seven years earlier. *Recollections of Khrushchev*, N.Y. TIMES, Aug. 20, 1991, A10. Like Gorbachev, Khrushchev was a different type of Soviet leader, and, again like Gorbachev, was actually more respected in the West than in his own country. *Id.* The 1964 ouster of Khrushchev occurred when the leader was away on vacation, as with Gorbachev, when the Communist Party Central Committee suddenly decided to replace Khrushchev with Leonid Brezhnev as Party leader. *Id.* A meeting of the Presidium of the Supreme Soviet then stripped Khrushchev of his Prime Minister's post and replaced him with Aleksei Kosygin. *Id.* Khrushchev was so easily deposed because the Communist Party was in firm control of the Soviet Union and the populace at the time, as opposed to its relative lack of control of the country and people by August 1991. Also, there was no reason in 1964 for Soviet citizens to protest who their leader was anyway, as there were no democratic reforms at stake.

voluntarily relinquish power to the Committee.⁵⁵ Vehemently refusing,⁵⁶ Gorbachev was placed under house arrest in his villa.⁵⁷ The coup leaders then tersely announced the takeover and the imposition of a state of emergency to the Soviet public.⁵⁸

The members of the “Committee of Eight” were all stalwart members of the Communist Party Central Committee who disagreed with Gorbachev’s social and economic initiatives.⁵⁹

⁵⁵ MIKHAIL GORBACHEV, *THE AUGUST COUP: THE TRUTH AND THE LESSONS* 19 (1991). The representatives were Oleg D. Baklanov, deputy Chairman of the National Defense Council and a member of the Emergency Committee; Valery I. Boldin, Gorbachev’s chief of staff; Oleg Shenin, secretary of the Communist Party Central Committee; General Valentin Varennikov, chief of Soviet Ground Forces; and Major General Yuri S. Plekhanov, head of K.G.B. security for high government officials. *Id.* The reason and logic behind the conspirators’ specific demands of Gorbachev are discussed in the text accompanying *supra* notes 194 through 196. Gorbachev was reportedly paid \$500,000 by HarperCollins for *The August Coup*, a 127-page account of his experiences during the takeover. Esther B. Fein, *Gorbachev Memoir Affirms Socialism*, N.Y. TIMES, Oct. 27, 1991, 12. For review of Gorbachev’s memoir, see Phillip Taubman, *Three Who Made a Revolution*, N.Y. TIMES BOOK REV., Dec. 8, 1991, 3.

⁵⁶ Gorbachev told the men: So tomorrow you will declare a state of emergency. When then? Can you plan for at least one day ahead, four steps further – what next? The country will reject these measures.... The people are not a battalion of soldiers to whom you can issue the command ‘right turn’ or ‘left turn, march’ and they will all do as you tell them. It won’t be like that. Just mark my words. GORBACHEV, *supra* note 55, 21-23.

⁵⁷ *Id.* 27. Along with Gorbachev and his wife were other members of his family and 32 loyal bodyguards. Although virtually cut off from the world during his three days of house arrest, Gorbachev was able to keep abreast of coup developments by monitoring the British Broadcasting Corporation, Radio Liberty, and Voice of America broadcasts. *Id.*

⁵⁸ The following are excerpts from the Emergency Committee’s resolution announcing the ouster of Gorbachev and the imposition of a state of emergency in the Soviet Union:

In view of Mikhail Sergeevich Gorbachev’s inability, for health reasons, to perform the duties of the U.S.S.R. President[,] and of the transfer of the U.S.S.R. President’s powers, in keeping with Paragraph 7, Article 127 of the U.S.S.R. Constitution, to U.S.S.R. Vice President Gennadi Ivanovich Yanayev,

With the aim of overcoming the profound and comprehensive crisis, political, ethnic and civil strife, chaos and anarchy that threaten the lives and security of the Soviet Union’s citizens and the sovereignty, territory integrity, freedom and independence of our fatherland,

WE RESOLVE:

1. In accordance with Paragraph 3, Article 127, of the U.S.S.R. Constitution and Article 2 of the U.S.S.R. law “on the legal regime of a state of emergency” and with demands by broad popular masses to adopt the most decisive measures to prevent society from sliding into national catastrophe and insure law and order, to declare a state of emergency in some parts of the Soviet Union for six months from 04:00 Moscow time on Aug. 19, 1991.
2. To establish that the constitution and laws of the U.S.S.R. have unconditional priority throughout the territory of the U.S.S.R.
3. To form an Emergency Committee for the State of Emergency in the U.S.S.R. in order to run the country and effectively exercise the state-of-emergency regime, consisting of [The names and titles of the eight Committee members were listed here.]
4. To establish that the U.S.S.R. Emergency Committee for the State of Emergency’s decisions are mandatory for unswerving fulfillment by all agencies of power and administration, officials and citizens throughout the territory of the U.S.S.R. G. Yanayev V. Pavlov O. Baklanov
Text of Resolution Ousting Gorbachev and Forming a Ruling Committee, N.Y. TIMES, Aug. 20, 1991, A14.

See infra note 189 and accompanying text for discussion of Article 127, Paragraph 7, of the Soviet Constitution.

See infra note 195 and accompanying text for discussion of Article 127, Paragraph 3, section 15, which addressed the President’s authority to declare a state of emergency.

⁵⁹ Francis X. Clines, *K.G.B.-Military Rulers Tighten Grip; Gorbachev Absent, Yeltsin Defiant*, N.Y. TIMES, Aug. 20, 1991, A1. *See infra* note 64 for speculation as to why these men wished to seize Soviet power.

Representing every part of the huge Soviet military-industrial complex, the conspirators were: Soviet Vice President Gennadi I. Yanayev, who had taken over as acting President; K.G.B. Chairman Vladimir A. Kryuchkov; Defense Minister Marshal Dmitri T. Yazov; Prime Minister Valentin S. Pavlov; Interior Minister Boris K. Pugo; Oleg D. Baklanov, deputy Chairman of the National Defense Council; Vasily A. Starodubtsev, Chairman of the Soviet Farmers' Union; and Aleksandr I. Tizyakov, President of the Association of State Enterprises.⁶⁰

⁶⁰ *Id.* Ironically, these individuals were all Gorbachev appointees and were friends of his! For example, in an attempt to appease hard-liners, Gorbachev appointed an old Communist friend, Boris Pugo, as head of the Interior Ministry in December 1990. Esther B. Fein, *Skillful Party Climber*, N.Y. TIMES, Aug. 21, 1991, A10. A Western diplomat stated that Boris Pugo was regarded as a "reactionary in *glasnost* clothes" and a "wild card" in the Gorbachev clearly took a bad political gamble when he chose him." *Id.* See *supra* note 36 for discussion on Gorbachev's appointment of Gennadi Yanayev as his Vice President in 1990 to appease conservatives.

In a precursor to the August coup, Prime Minister Pavlov went to the Supreme Soviet in June of 1991 to ask for additional powers for himself, without Gorbachev's permission or knowledge. Bill Keller, *The 3-Day Fiasco: Anatomy of a Failed Strike at the State*, N.Y. TIMES, Aug. 25, 1991, 1, 16. Kryuchkov, Yazov, and Pugo endorsed Pavlov's attempt to usurp some of Gorbachev's authority. *Id.* A few days later, however, Gorbachev cleared up the problem and joked (in the presence of these men) "The coup is over." *Id.* Apparently, Gorbachev could not see that his conservative "friends" were serious in their dissatisfaction with his leadership and liberal reforms.

After the coup crumbled, Aleksandr N. Yakovlev, a key architect of Gorbachev's reform policies, placed the blame for the August coup on Gorbachev himself for choosing "a team of traitors." *Ex-Aide Blames Gorbachev for 'Team of Traitors'*, N.Y. TIMES, Aug. 22, 1991, A 13. "Why did he surround himself with people capable of treason?" Yakovlev asked. *Id.* Aleksandr Yakovlev was once thought to be a potential candidate for Communist Party Chairman but quit the Party a few days before the August coup after warning Gorbachev that a plot against him was in the works. *Id.* Gorbachev did not listen.

In assessing Gorbachev's decisions regarding his appointees, consider the following: The head of state must delegate authority to make and enforce decisions to assistants whom he cannot observe directly and continuously. The larger the size of his administration[,], the more indirect his knowledge of its members becomes. To the extent that he can, he will surround himself with those who seem reliable, but [that] action has unwished for consequences. It makes him vulnerable to the intrigues of his assistants, for they cannot be effective in their public responsibilities unless they have the right to access him, to move freely in critical areas, to meet with colleagues to discuss common or overlapping jurisdiction, and to have subordinates trained to follow orders without question. All of these rights give conspirators invaluable advantages in executing coups d'etat. And needless to say, the same reasons which make [the] administrative head a possible victim of a few of his officials apply with much stronger force to his own ability to conspire to deprive them of their constitutional powers. David A. Rapoport, *Coup d'Etat: The View of the Men Firing Pistols*, in *REVOLUTION* 68-69 (Carl J.I Friedrich, ed. 1966).

Leaders of regimes where coups d'etat are more common usually know that they are likely to be deposed by violent means, just as Gorbachev had premonitions that he would be ousted (see below). *Id.* 71. However, most leaders do not know who the usurpers will be or when they will strike, and do not know what will happen to their lives, families and fortunes. *Id.* 72. A prudent leader will realize that those most likely to threaten him are posing as loyal supporters occupying positions of trust and protected by the regime itself. *Id.* This is very applicable to Gorbachev.

In states where coups often happen, there can be little mutual confidence among officials. *Id.* How can a leader contend with problems facing his country when he does not know who his true supporters are, and when he knows that those commanding the government's bases of power are able to either initiate or join in an attempt to oust him? *Id.* Obviously, leaders in such a position are not very effective, and this can be said of Gorbachev and the situation in which he found himself by August 1991.

Although it is true that Mikhail Gorbachev did nothing to prevent a coup despite being warned that certain individuals were eager to overthrow him, it may be fairer to say that he did not act because he did not have the governmental or political authority to do anything (and did not know what to do anyway). Gorbachev later maintained that his inactivity was actually purposeful:

Of course I did foresee the theoretical possibility of a sharp conflict between the forces of renewal and reaction....From the very beginning of the crisis brought about by the radical transformation of our society[,] I tried

The specific event sparking the takeover was Gorbachev's endorsement of a new Union treaty with nine of the fifteen Soviet republics which would have produced a drastically redesigned Soviet Union.⁶¹ The pact, which was to have been signed on August 20, would have certified the republics as autonomous states, with pre-eminence in economic policy, and possessing the authority to suspend laws of the central Soviet government.⁶² The treaty also amounted to virtual acceptance of the independence claims of the six republics which had indicated they would not sign.⁶³ By limiting the Kremlin's power over the Soviet republics and Soviet society overall, the new Union treaty clearly posed an imminent threat to the interests and power of the institutions represented by members of the Emergency Committee: the military, the K.G.B., and the underlying Communist Party.⁶⁴

The group most likely to initiate any form of government overthrow, especially a coup d'état, is the military leadership, since it has control over the country's armed forces.⁶⁵ Elements of the military leadership are usually involved in orchestrating a coup even if the coup leaders are civilians.⁶⁶ This is the case with the August coup. Although the Committee of Eight was comprised primarily of Soviet civilian government directors, it does appear that Dmitri Yazov, Vladimir Kryuchkov, and Boris Pogo were the coup's true masterminds.⁶⁷ These three men controlled the Soviet empire's vast military forces, powerful K.G.B. units, and dreaded Interior Ministry police.⁶⁸

As an excuse for its actions, the Emergency Committee maintained that Gorbachev was ill and unable to carry out his duties.⁶⁹ "He is very tired after these many years," contended

not to allow an explosive resolution of the contradictions to take place. I wanted to gain time by making tactical moves, so as to allow the democratic process to acquire sufficient stability to ease out the old ways and to strengthen people's attachment to the new values. In short, I wanted to bring the country to a stage where any such attempt to seize power would be doomed to failure.

GORBACHEV, *supra* note 55, 13. If he was to be taken at his word, then perhaps Gorbachev knew what he was doing all along.

⁶¹ Clines, *supra* note 59, A1.

⁶² Bill Keller, *Gorbachev and His Fateful Step*, N.Y. TIMES, Aug. 20, 1991, A1, A10. See *supra* note 58 for the Emergency Committee's statement announcing the ouster of Gorbachev. The statement's second resolution declared that the Soviet Union's constitution and laws had unconditional priority throughout the Soviet territory. The Committee of Eight apparently wished to ensure that the Soviet republics had absolutely no notions to the contrary.

⁶³ *Id.*

⁶⁴ *Id.* Boris Yeltsin remarked after the coup that the new Union treaty would have "strip[ped]...the architects of the putsch of their offices, and herein lies the secret of the conspiracy and the main motivation behind the actions of the parties to it. Their demagoguery about the fate of the homeland is little more than trickery concealing their personal selfish interests." Serge Schmemmann, *Gorbachev Back as Coup Fails, But Yeltsin Gains New Power*, N.Y. TIMES, Aug. 22, 1991, A1, A10. A Soviet political commentary had this to say about the conspirators: What happened on the morning of Aug. 19 can be viewed as a conspiracy against the Gorbachev-Yeltsin political alliance by the main central structures of the former unitary imperial state that is doomed to disappear. They see no place for themselves in the future, or they see a place that is so unfamiliar and humiliatingly modest that they cannot accept it. Stanislav Kondrashov, *Political Commentator's Opinion: Trails Behind, Trials Ahead*, IZVESTIYA, Sept. 25, 1991, *trans.*, in 43 CURRENT DIG. OF SOVIET PRESS 1 (No. 34)(1991).

⁶⁵ Hassan, *supra* note 2, 198.

⁶⁶ *Id.*

⁶⁷ Stephen Kinzer, *Three in Coup Feared U.S. Dependency*, N.Y. TIMES, Oct. 7, 1991, A7.

⁶⁸ *Id.*

⁶⁹ *Excerpts From the New Leader's Remarks: 'Law and Order'*, N.Y. TIMES, Aug. 20, 1991, A12. The claim that Gorbachev was ill did not convince the Soviet public. Francis X. Clines, *Resistance to Soviet Takeover Grows as Defiant Crowds Rally for Yeltsin*, N.Y. TIMES, Aug. 21, 1991, A1. Boris Yeltsin demanded that the physician drafted the following statement while Gorbachev was under house arrest:

Gennadi Yanayev, “and will need some time to get better... and it is our hope ... that Mikhail Gorbachev, as soon as he feels better, will take up again his office.”⁷⁰ Gorbachev’s whereabouts were initially unknown, although Yanayev stated that Gorbachev was undergoing “treatment” in the south of the country.⁷¹

With reference to reports that have appeared in the mass media that M.S. Gorbachev is unable to carry out his duties as President of the USSR on account of his state of health[,] I consider it my professional duty and my duty as a citizen to state the following:

I have been M.S. Gorbachev’s personal physician since April 1985. I have observed no substantial changes in the state of Mikhail Sergeyevich’s health recently. I see no reason as far as his health is concerned why M.S. Gorbachev should not carry out the duties he is invested with. I am prepared to discuss this opinion with any competent commission of Soviet or foreign specialists. GORBACHEV, *supra* note 55, 95.

While under house arrest, Gorbachev dictated a declaration in which he attested to his good health and addressed the constitutionality of the Emergency Committee’s actions. (Note that it is often Gorbachev’s style to refer to himself in the third person as “the President” in his writings and speeches):

I bring to the attention of the Congress and the U.S.S.R. Supreme Soviet the following DECLARATION:

1. G. I. Yanayev’s assumption of the duties of President on the pretext that I am ill and unable to carry out my responsibilities is an attempt to deceive the people and thus cannot be described as anything but a coup d’etat.
2. That means that all subsequent acts are also illegal and unlawful. Neither the President nor the Congress of the People’s Deputies has given Yanayev such authority.
3. Please convey to comrade Lukyanov my demand for the urgent summoning of the Supreme Soviet of the U.S.S.R. and the Congress of the People’s Deputies to consider the situation that has arisen. Because they and only they have the right to decide the question of the measures to be taken by the government and the means of putting them in practice.
4. I demand the immediate suspension of the activity of the State Committee for the Emergency until the above decisions have been taken by Supreme Soviet or the Congress of the People’s Deputies of the U.S.S.R.

The continuation of these actions and the further escalation of measures taken by the State Committee for the Emergency can turn out to be a tragedy for all the peoples, further aggravate the situation and even completely wreck the joint work that the Centre and the republics have begun in order to find a way out of the crisis.

GORBACHEV, *supra* note 55, 25-26. Gorbachev also managed to produce a videotape to be shown to authorities and the Soviet people in which he discussed his health and the legitimacy of the Emergency Committee’s acts. See *id.* 91-93 for a transcript of this videotape. After the coup, Gorbachev asked “How could these people talk about my health, when their own hands were shaking so?” Francis X.

Clines, *Gorbachev Recounts Telling Plotters: ‘To Hell With You’*, N.Y. TIMES, Aug. 23, 1991, A13.

⁷⁰ *Excerpts From the New Leader’s Remarks: ‘Law and Order’*, *supra* note 69, A12. Yanayev further stated: “[C]an you imagine the stress that he has had to endure over the past six years[?] I hope my friend, President Gorbachev, will return to his office and we will work together [again].” *Id.* At this press conference, television cameras repeatedly focused in on Yanayev’s trembling hands and overall nervous demeanor.

⁷¹ *Id.* Soon after the coup began, various political commentators and experts on the Soviet Union gave their opinions on the putsch and its chances of success. See *Voices of I.S. Scholars: These Forces Go Way Back in Russian History*, N.Y. TIMES, Aug. 21, 1991, A12. Princeton University Professor Stephen F. Cohen pointed out that while the takeover was a shock, it was not a surprise: “These people and the institutions that they represent – the military-industrial complex, the K.G.B., the [Communist P]arty apparatus, the Ministry of the Interior and the state collective farm structure – were the primary targets of Gorbachev’s reforms.” *Id.* University of California at Berkeley Professor Gail Lapidus noted that the Emergency Committee was clear in what it was against: “It is opposed to reform, democratization, the opening to the West and the significant devolution of power to the republics and the secession of some. It does not have a cohesive program of its own.” *Id.* Professor Roald Z. Sagdeyev of the University of Maryland noted that the coup leaders were not using the old Communist jargon of the past. Instead, “they [were] trying to paint themselves as apolitical, on the side of order and legality and against chaos and civil war.” *Id.* Zbigniew Brzezinski, national security adviser to President Carter stated: “In the long run, the coup will most certainly fail. There is no way of putting the old system back together with a military putsch... The putschists represent a bankrupt past, in many respects a criminal past.” *Id.* Condoleezza Rice, former chief Soviet specialist at

Individuals or groups instigating coups d'état also usually claim that the deposed political system had enough problems to warrant a swift change of leadership and that their drastic actions will cure the nation's ills.⁷² Yanayev, for example, declared that the Emergency Committee was "guided by the principle that sometimes there are critical situations that call for immediate actions."⁷³ The Committee of Eight thus believed that the takeover was necessary considering the economic and political crisis facing the Soviet Union. A formal statement from the Emergency Committee to the Soviet people stressed that Gorbachev's reforms had entered "a blind alley," with "[l]ack of faith, apathy and despair" as having "replaced the original enthusiasm and hopes."⁷⁴ Furthermore, all democratic institutions created by the popular will are losing weight and effectiveness right in front of our eyes. This is a result of purposeful actions by those who, grossly violating the fundamental law of the U.S.S.R., are effectively in the process of staging an anti-constitutional coup and striving for unbridled personal dictatorial powers.⁷⁵

The Emergency Committee seemed to have implied that one of the reasons for the seizure of power was that the office of the presidency had become too powerful, especially in light of the additional powers the Supreme Soviet had granted Gorbachev during the previous year and a half. However, while Gorbachev indeed had almost dictatorial powers *on paper* before the August putsch, he actually had little tangible authority by that time. The notion that Gorbachev had almost become dictator of the Soviet Union can surely be regarded as merely a shallow and convenient pretext for the Emergency Committee.

Action and Reaction

The coup conspirators moved quickly to reimpose hard-line control in the areas with the greatest insurgent opposition to Communist authority: Moscow, Leningrad and the Baltics

the National Security Council, clarified the situation when she pointed out that the August coup was not a true military coup: "There's a lot of calling this a military coup. The military's involved but this is a right-wing putsch. This is all right-wing. That makes it more dangerous." *Id.*

⁷² Hassan, *supra* note 2, 197. They do this to justify their obviously illegal actions. *Id.* If the masses agree with the usurpers' reasons for the takeover, then the takeover will probably be considered legitimate. *Id.*

⁷³ *Excerpts From the New Leader's Remarks: 'Law and Order'*, *supra* note 69, A12.

⁷⁴ *State of Emergency Committee's Statement "A Moral Danger Has Come"*, N.Y. TIMES, Aug. 20, 1991, A13.

Following are more excerpts from the Emergency Committee's statement:

Compatriots, citizens of the Soviet Union, we are addressing you at the grave, critical hour for the destinies of Motherland and our peoples. A mortal danger has come to loom large over our great Motherland.... It is high time people were told the truth: *If urgent and decisive measures are not adopted to stabilize the economy, hunger and another spiral of impoverishment are imminent in the near future....* Only irresponsible people can bank on some aid from abroad. No handouts can solve our problems; *our rescue is in our own hands.* The time has come to measure the authority of every person and organization by their real contributions to the rehabilitation and development of the national economy.... Prefectures, mayoralities and other illegal structures are increasingly replacing, de facto, popularly elected governing councils.... The pride and honor of the Soviet people must be restored in full. *The Emergency Committee for the State of Emergency in the U.S.S.R....takes upon itself the responsibility for the fate of the country and is fully determined to take most serious measures to take the state and society out of the crisis as soon as possible....* We intend to restore law and order straight away, end bloodshed, declare a war without mercy to end the criminal world, [and] eradicate shameful phenomena discrediting our society and degrading Soviet citizens.... Our prime concern is the solution of the food and housing problems. All available forces will be mobilized to meet these, the most essential needs of the people. We are calling upon workers, peasants, working intelligentsia, all Soviet people to restore... labor discipline and order, [and] raise the level of production in order to resolutely march ahead.... *We call upon all citizens of the Soviet Union to grow aware of their duty before the country and render all possible assistance to the Emergency Committee for the State of Emergency in the U.S.S.R. and efforts to pull the country out of the crisis....* *Id.* (emphasis added).

⁷⁵ *Id.*

republics (Lithuania, Latvia and Estonia).⁷⁶ Military officers appeared at city halls and other bases of legitimate authority in these regions and announced that they were in charge on behalf of the Emergency Committee.⁷⁷ There were swift crackdowns in the Baltics, with Soviet troops surrounding and taking over television stations in Latvia and Lithuania.⁷⁸

After flooding Moscow with troops and tanks, the coup leaders immediately banned protest meetings and suspended publication of many newspapers and journals which had enjoyed relative freedom of the press under *glasnost*.⁷⁹ The Committee of Eight also moved against independent broadcast outlets, such as Radio Russia, by having soldiers block entry to the broadcast studios.⁸⁰

Public attention quickly turned to the one dominating figure left on the political stage: Boris Yeltsin, the only nationally and internationally known leader in Moscow possessing legitimate government authority.⁸¹ When the putsch started, Yeltsin publicly condemned it as “unconstitutional and unlawful” and immediately issued an order countermanding the Emergency Committee’s decrees.⁸² Seeking to rally resistance, Yeltsin climbed atop an armored vehicle before 20,000 cheering Moscovites in front of the Russian Parliament and called for a general strike to protest to takeover.⁸³

Yeltsin warned the public not to antagonize the Army troops, and promised legal protection for soldiers who defied the coup leaders.⁸⁴ The Troops themselves were confused by

⁷⁶ Clines, *supra* note 59.

⁷⁷ *Id.*

⁷⁸ *Id.* The Soviet Army had already been occupying a Lithuanian broadcasting center seized since its bloody assault on it during the January 1991 invasion. See *supra* note 45 for further discussion on the Lithuanian invasion.

⁷⁹ Francis X. Clines, *Independent Newspapers Draw Coup’s Early Fire*, N.Y. TIMES, Aug. 20, 1991, A11. The new regime required newspapers to register with the central government to be permitted to publish again, thus virtually assuring that the newspapers would not be allowed to reopen. *Id.* Gennadi Yanayev justified these actions by maintaining that independent newspapers had “played a certain role” in bringing on the crisis that was engulfing the nation. *Id.* *Moscow News*, in an attempt to defy the new registration requirement, began distributing news snippets with fax machines throughout the city. *Id.* Within 24 hours, the democratic forces rallying against the coup apparently managed to construct a communications network better than that of the Committee of Eight’s.

⁸⁰ *Id.* see *infra* note 114 and accompanying text for discussion on the importance of keeping the public uninformed during a coup d’etat.

⁸¹ Celestine Bohlen, *Coup Sets Yeltsin at Center Stage*, N.Y. TIMES, Aug. 20, 1991, A11.

⁸² *Id.* Yeltsin also issued an order putting Soviet government agencies under Russian control. *Id.*

⁸³ Clines, *supra* note 59. The following are some of Yeltsin’s remarks: Citizens of Russia: On the night of 18-19 August 1991, the legally elected President of the country was removed from power. *Regardless of the reasons given for his removal, we are dealing with a rightist, reactionary, anticonstitutional coup....* [W]e proclaim all decisions and instructions of this committee to be unlawful.... We appeal to citizens of Russia to give a fitting rebuff to the putschists and demand a return of the country to normal constitutional development.... We are absolutely confident that our countrymen will not permit the sanctioning of the tyranny and lawlessness of the putschists, who have lost all shame and conscience. We address an appeal to servicemen to manifest lofty civic duty and not take part in the reactionary coup. Until these demands are met, we appeal for a universal unlimited strike. *Yeltsin’s Remarks: A ‘Reactionary Coup’*, N.Y. TIMES, Aug. 20, 1991, A11 (emphasis added). As these works indicate, Yeltsin was primarily concerned with the takeover itself; Gorbachev and his fate were only secondary to Yeltsin.

⁸⁴ Bill Keller, *Sporadic Mutinies Rack Soviet Army*, N.Y. TIMES, Aug. 21, 1991, A1. Following is part of Yeltsin’s address to Soviet troops maneuvering throughout Russia: Countrymen: An attempt to stage a coup d’etat has been made. The President of the Country, the Commander in Chief of the armed forces of the U.S.S.R. has been removed from power. The Vice President, the Chairman of the K.G.B., the First Deputy of the Chairman of the Council of Defense, have formed an unconstitutional body and have hereby committed a grave crime. The country is faced with the threat of terror.... Soldiers and officers, at this tragic hour, I call on you. Don’t let yourselves be misled. Don’t allow adventurists to use you as blind weapons.... Think about your loved ones, your friends and your people. At this difficult hour of decision, remember that you have taken an oath to your people, and your weapons can be

the takeover and were unsure of their role in enforcing the Emergency Committee's claim to power.⁸⁵ Many soldiers told Moscovites that they would not obey orders to shoot; others altogether defected to Yeltsin's side.⁸⁶ This did not bode well for a successful coup d'état.

The Emergency Committee warned Yeltsin that it was prepared to "dismantle" agencies resisting its authority.⁸⁷ For a time, the scene was set for a confrontation at the Russian Parliament between army troops under the Emergency Committee's command and those loyal to Yeltsin.⁸⁸ Furniture, old cars, buses, and other obstacles were piled in the streets of Moscow to hamper tank movements and to serve as barricades in front of Yeltsin's headquarters.⁸⁹ On the second night of the coup, Soviet Army command ordered tanks to roam the streets to intimidate the populace and enforce an 11PM military curfew.⁹⁰ In the coup's first instance of actual violence, three Moscovites were killed by an armored troop vehicle during the night's chaos.⁹¹

The Emergency Committee soon found that an increasingly resentful public was ignoring its executive decrees and orders, not to mention the military curfew.⁹² Despite intense dissatisfaction with the current state of affairs, nearly every Soviet citizen opposed the coup as an illegitimate usurpation by volatile elements of the Communist system. "We are seeing the agony of the old regime," said Oleg D. Kalugin, a former K.G.B. officer who had become the Soviet agency's biggest critic.⁹³ "These are old guys, simply crazy."⁹⁴ The putsch was obviously missing the key legitimizing ingredient of a successful coup d'état: public support. Leaders of other Soviet Republics began to denounce the coup as an unlawful seizure of power.⁹⁵ Latvia and Estonia declared their total independence from the Soviet Union, joining Lithuania. World opposition to the takeover was almost universal.⁹⁶ U.S. Secretary of State James Baker, for example, released a statement warning the Emergency Committee: "The whole world is

turned against the people. You can erect a throne using bayonets but you cannot sit on bayonets for long.... Clouds of terror and dictatorship are gathering over Russia but this night will not be eternal and our long-suffering people will find its freedom once again, for good. Soldiers, I believe at this tragic hour you will take the right decision. The honor of Russian arms will not be covered with the blood of the people. *Entreaty To Troops By Yeltsin*, N.Y. TIMES, Aug. 21, 1991, A10.

⁸⁵ Keller, *supra* note 84. See *infra* note 118 for discussion of the Soviet military's role in the coup.

⁸⁶ *Id.* One high-ranking tank officer said that he and others went over to defend the Russian Parliament because they considered the orders of the conspirators illegal. Peter Gumbel & Gerald F. Seib, *Spotlight Is on Yeltsin As Soviet Coup Effort Runs Into Roadblocks*, WALL ST. J., Aug. 21, 1991, A1, A8. Asked if he was afraid of reprisals, the officer said "History will judge us." *Id.*

⁸⁷ Clines, *supra* note 59.

⁸⁸ *Id.*

⁸⁹ Celestine Bohlen, *Bare-Fisted Russians Plot a Last Stand*, N.Y. TIMES, Aug. 21, 1991, A9. Members of Yeltsin's Russian government were issued bullet-proof vests, helmets, and gas masks in preparation for a battle with government troops. *Id.* However, other than a few pistols, the Yeltsin forces were only armed with sticks, stones, and Molotov cocktails. As one man said, "we could not hold off [the Army] more than five minutes. This is mostly symbolic." *Id.*

⁹⁰ Clines, *supra* note 69.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* In 1990, Major General Kalugin had been stripped of his rank, awards and pension for publicly criticizing the K.G.B. *Id.* Gorbachev restored these to Kalugin after the coup.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ But Saddam Hussein supported the coup, maintaining that a Soviet Union with a hard-line government was necessary to act as a counterbalance to the United States. *Hussein's Council Welcomes Coup*, N.Y. TIMES, Aug. 22, 1991, A1, A10.

watching. *Legitimacy in 1991 flows not from the barrel of a gun but from the will of the people. History cannot be reversed. Sooner or later your effort will fail.*⁹⁷

The Coup Plotters: Incompetence and Responsibility

Before Baker could deliver his message, however, the coup had begun to falter, with military forces withdrawing from Moscow, Leningrad, and the Baltics. Pursued by a task force led by Russian Republic's Vice President, several members of the Emergency Committee (including Vladimir Kryuchkov and Dmitiri Yazov) flew off to meet with Gorbachev and personally beg for forgiveness.⁹⁸ They were arrested upon arriving in the Crimea. Gorbachev said he would ensure that the conspirators carried the "full responsibility" for committing a "state crime."⁹⁹

In Moscow, Prime Minister Pavlov was under arrest and hospitalized, apparently ill from drinking.¹⁰⁰ Interior Minister Boris Pugo had killed himself with a shot to his head.¹⁰¹ Gennadi Yanayev remained in his Kremlin office until Gorbachev loyalists came to arrest him.¹⁰² He tried to excuse his acts by claiming that the other putsch members threatened him with imprisonment if he did not cooperate with them.¹⁰³ Ordered to remain in his office, Yanayev had drunk himself to unconsciousness by the next morning.¹⁰⁴ The coup was over.¹⁰⁵

Persons (such as the cast of the Committee of Eight) who engage in rebellions against legitimate state authority must consider the consequences.¹⁰⁶ If the takeover succeeds, then there

⁹⁷ Adam Clymer, *NATO Expresses Concern*, N.Y. TIMES, Aug. 22, 1991, A15 (emphasis added).

⁹⁸ Sege Schmemmann, *Gorbachev Back as Coup Fails, But Yeltsin Gains New Power*, N.Y. TIMES, Aug. 22, 1991, A1, A10.

⁹⁹ *Id.* Upon his return to Moscow, Gorbachev addressed cheering Moscovites: Let me tell you the most important thing. Everything we have done since 1985 has borne fruit. Society and our people have changed and that has proved to be the major obstacles in the way of the gamblers.... I congratulate our Soviet people, who do have the sense of responsibility and dignity and who have shown concern that due respect is displayed to those people who have been entrusted with authority, by [the] people. And it is not just an insignificant group of people who used attractive slogans and [were] trying to take advantage of the problems that we are aware of and concerned about and that we want to deal with. [The conspirators] wanted to push people to the road which would have led our society to a catastrophe. But they have failed, and this is a major victory for *perestroika*... Gorbachev's First Remarks: 'They Failed', N.Y. TIMES, Aug. 20, 1991, A11.

¹⁰⁰ Bill Keller, *Gorbachev Says Coup Will Hasten Reform; Yeltsin Leads the Celebration in Moscow*, N.Y. TIMES, Aug. 23, 1991, A1, A8.

¹⁰¹ *Id.* To the end, however, Pugo maintained that the coup was politically and morally correct. *Id.* Pugo had also shot his wife but only injured her.

¹⁰² Peter Gumbel, *How Not to Mount a Coup: The Lessons From the Kremlin*, WALL ST. J., Aug. 29, 1991, A1.

¹⁰³ *Id.* It does appear that Vladimir Kryuchkov and Dmitri Yazov were the masterminds of the coup and could have forced Yanayev to heed them.

¹⁰⁴ *Id.* The Emergency Committee members apparently spent most of their time drinking rather than planning and managing their takeover. Dmitri Yazov later admitted that he, Vladimir Kryuchkov, and Boris Pugo were all drunk on August 18 at a key meeting at which the coup was hastily planned. Kinzer, *supra* note 67, A7.

¹⁰⁵ Charged with high treason, Kryuchkov later said that he had no regrets. Kinzer, *supra* note 67, and A7. But Yazov took full responsibility for the actions of the Soviet armed forces during the coup and said he was very sorry for all that had happened. *Id.* For the opinion of the plotters' wives that the men innocent and that Gorbachev was the true villain of the events of August 1991, see Fen Montaigne, *Wives of Coup Plotters Speak Out: Soviet Women Passionately Defend Their Husbands*, PHILADELPHIA INQUIRER, Nov. 11, 1991, 1-A.

¹⁰⁶ ERIC A. NORDLINGER, *SOLDIERS IN POLITICS: MILITARY COUPS AND GOVERNMENTS* 63 (1977). After all, a coup d'etat is "purposely undertaken...to achieve consciously formulated goals, with an awareness of the possible costs and risks involved." *Id.* Coups obviously attract men willing to gamble to change their personal circumstances in a single act. David A. Rapoport, *Coup d'Etat: The View of the Men Firing Pistols*, in *REVOLUTION* 66 (Carl J. Friedrich, ed. 1966). The initiators must use their forces to gain full advantage of

is no problem, since the resultant new regime will justify its founders.¹⁰⁷ In pursuit of its goals, a revolutionary group can easily justify its actions if the incumbent government is regarded as incompetent, tyrannical or illegitimate.¹⁰⁸ But if the rebelling group fails, all its acts hostile to the rightful government are illegal and the conspirators will be guilty of treason, the gravest crime of most legal systems.¹⁰⁹

The Executive Committee member surely comprehended the two possible results of their actions to remove Gorbachev. If the coup had succeeded, they would have made sure that their resulting hard-line government justified their actions. Soviet history books would begin describing Gorbachev as an ineffective leader who deserved to be overthrown for bringing only hardship, shame, and despair to the Soviet Union. But with the coup's collapse, the conspirator's acts were declared unconstitutional, as were the decrees and laws they passed.

What Went Wrong?

At first, the Bush administration was uncertain as to whether the conspirators would fail, despite the ineffective manner in which they organized and conducted their coup.¹¹⁰ U.S. officials considered the large number of armed forces at the Emergency Committee's disposal and initially felt that the takeover could last for some time.¹¹¹ But after learning of the heavy public resistance against the Committee and reports of mass army defections, administration officials concluded that the putsch was "implemented in stages" and "very amateurish."¹¹²

The Bush administration was also astounded that the Emergency Committee neglected to cut Soviet communications with the rest of the world, which let the world's media fully record and report upon events happening during the coup.¹¹³ "One of the first things you do [to bring about a successful coup d'etat]," an official remarked, "is seize communications facilities so the outside world doesn't know what's going on. The world is getting a good look at what is going on [in the Soviet Union]."¹¹⁴

Soviet citizens themselves returned to the *pre-glasnost* era method of gathering non-official news: monitoring the Voice of America, the British Broadcasting Corporation, and radio Liberty. Throughout the coup, resistance forces gained and disseminated information by relying

surprise, and if surprise is thwarted, they become vulnerable to a counterstroke. *Id.* A coup which misfires exposes the initiators, revealing them to be the antithesis of what they had seemed to be. *Id.* 67. This is true with the August coup; Gorbachev found that his "friends" were not as trustworthy as he supposed them to be.

¹⁰⁷ Hassan, *supra* note 2, 197.

¹⁰⁸ *Id.* The government is likely to be viewed this way if it cannot preserve social or political order, and this failure will provide the public a reason to support the overthrow. *Id.* 198.

¹⁰⁹ *Id.* 193. The members of the Committee of Eight were indeed charged with high treason. Kinzer, *supra* note 67, A7.

¹¹⁰ Andrew Rosenthal, *Sizing Up New Bears*, N.Y. TIMES, Aug. 21, 1991, A11.

¹¹¹ *Id.*

¹¹² *Id.* Another official stated: "What is striking is how limited the writ of the coup plotters seems to be." *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* In a successful coup, the capture of communications facilities is a necessity. GOODPSEED, *supra* note 5, 227. They are needed by the usurpers for their own use and, equally important, they must be denied to the legitimate government. *Id.* Also, after a coup has begun, radio and television propaganda can gain time for the development of the revolt and can confuse and dishearten government supporters. *Id.* Although the Emergency Committee managed to close most Moscow radio stations, it failed to silence the station broadcasting the voice of democratic radical Gavriil K. Popov, the city's first popularly-elected mayor. Popov's pleas to Moscovites to support Yeltsin resulted in over 200,000 people gathering outside the Russian headquarters the day after the coup began. This surely was not foreseen by the putsch leaders.

heavily upon foreign television and radio sources, as well as local telephones, fax machines, and computer nets.¹¹⁵ Thus the Emergency Committee could do nothing to prevent ordinary citizens from learning first-hand of the events transpiring throughout the country; everybody immediately knew what was at stake.¹¹⁶ The age of instant information might prove to be a permanent obstacle for those wishing to usurp governments in the future.¹¹⁷

In spite of the Committee of Eight's inability to prevent world and public access to news and information about the coup, it is probable that the August coup could have succeeded had the Emergency Committee resolutely used the formidable military, K.G.B., and Interior Ministry forces available to it.¹¹⁸ A bloody act of brute force may have terrorized Soviet citizenry into humble submission, just as the massacre of thousands of students in Tiananmen Square squashed the Chinese democratic movement of 1989.¹¹⁹

Yet the Emergency Committee did not even set the forces at its command in Moscow against resistance forces based at the Russian headquarters.¹²⁰ Even the relatively easy act of

¹¹⁵ Flora Lewis, *Legacy of 1991: Phoenix or Empty Ashes?* 1992 BRITANNICA BOOK OF THE YEAR 6 (1992).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ The Committee of Eight ordered the tanks they sent to Moscow to only aimlessly circle the city. Patrick E. Tyler, *Leadership of Soviet Military Facing Shuffle and Reduced Independence*. N.Y. TIMES, Aug. 23, 1991, A14. U.S. officials later estimated that only fifteen of the Soviet Union's 180 Army divisions were involved with the takeover. *Id.* "They used only a fraction of their assets and the question is why?" a U.S. official wondered. *Id.* U.S. military intelligence also reported that only token elements of the Soviet Union's crack special forces, the Spetsnaz, were deployed in Moscow. *Id.* "The intelligence boys say it was small potatoes." *Id.* One reason for the Soviet military's limited use is that its diverse composition, from conscripts born and raised in the several Soviet republics, made it very unstable. *Id.* The military was, like the rest of the country, torn by divided political and ethnic loyalties and differences over the changes happening in the Soviet Union. *Id.* There was also a generation gap between the older right-wing officers and the younger democratic-minded officers. *Id.* During the coup, some wary field commanders cancelled regular training exercises and confined their troops to barracks to apparently make sure that their units would not be involved in the putsch. *Id.* The Ministry of Defense, under the Emergency Committee's control, did not order these troops out of their barracks because it apparently did not know, or want to know, what would happen. *Id.* The Committee of Eight may have also misjudged the loyalty of troops under its command by sending mainly ethnic Russian soldiers into Moscow. The troops were surrounded by fellow Russians which tried to talk them out of supporting the Emergency Committee. Peter Gumbel & Gerald F. Seib, *Spotlight Is on Yeltsin As Soviet Coup Effort Runs Into Roadblocks*, WALL ST. J., Aug. 21, 1991, A1, A8.

¹¹⁹ During the coup, Condoleezza Rice, former chief Soviet specialist at the National Security Council, noted that: "Success for the plotters would be if they were able, without massive bloodshed, to silence the democratic forces.... When Gorbachev was President, he didn't have the stomach for major bloodshed. But it's anybody's bet whether Pugo and Kryuchkov and Yazov do." *Voices of U.S. Scholars: These Forces Go Way Back in Russian History*, N.Y. TIMES, Aug. 21, 1991, A12. As it turns out, like Gorbachev, these men did not have the stomach for bloodshed, especially since such action could have easily developed into an uncontrollable civil war.

It was the opinion of one general supporting Yeltsin that Defense Minister Dmitri Yazov may have developed reservations about ordering troops to attack the Russian Parliament, since he realized there would have to be much blood spilled if the Emergency Committee's plans were to succeed. Bill Keller, *The 3-Day Fiasco: Anatomy of a Failed Strike at the State*, N.Y. TIMES, Aug. 25, 1991, A1, 16. "If he wanted, [Dmitri Yazov] could [have] pulverize[d] everything standing in the way of the armed forces." *Id.* See *infra* note 120 for more discussion on what the Emergency Committee had planned to do with the Russian Parliament building.

The August coup leaders apparently did not understand that "[a] government which lacks a right to rule... depends almost entirely on its ability to coerce." David A. Rapoport, *Coup d'Etat: The View of the Men Firing Pistols*, in REVOLUTION 71 (Carl J. Friedrich, ed. 1966).

¹²⁰ Internal division and indecisiveness among the coup leaders was apparently why resistance forces in Moscow and around the country were not attacked. Boris Yeltsin later said that according to documents seized after the coup, the plotters had prepared a detailed plan to overrun his Russian headquarters. Serge Schmemmann, *Yeltsin Says Elite K.G.B. Unit Refused to Storm His Office*, N.Y. TIMES, Aug. 26, 1991, A1, A12. A Soviet Anti-Terrorist Group

arresting or otherwise eliminating Boris Yeltsin before starting the coup would have made the Committee's chances for success much better.¹²¹

The conspirators apparently lacked the necessary ruthlessness for a violent government takeover, in which Gorbachev, Yeltsin, and a few thousand protestors would have been killed instantly.¹²² They tried for a soft threatening coup, relying on their belief that the Soviet people would simply revert to their 70-year old habit of cowering before Communist governmental authority.¹²³ But things were different in the Soviet Union by August 1991, and the Emergency Committee overlooked the authority Boris Yeltsin commanded not with force, but with popularity. Authority and governmental legitimacy derived from popular support were concepts the old Communists did not understand.

The August Coup's Aftermath

The End of Soviet Communism

Communist Party leaders emerged after the takeover to denounce the Emergency Committee, and asked the public to be gentle in applying epithets.¹²⁴ However, Party bosses soon realized that they were no longer in a position to request or demand obedience from the Soviet people. Citizens saw that Communism was the principle force behind the coup, and joked about

(under the Interior Ministry's command) was to storm the building and capture or kill Yeltsin. But despite threats from the K.G.B., the Group refused to participate. *Id.* This delay permitted Yeltsin's supporters to assume positions in the Russian headquarters and also allowed thousands of Moscovites to rally around the building. *Id.* "What is incredible," said Yeltsin, "is that the organizers of the coup did not expect this." *Id.* The attack was repeatedly postponed until it was cancelled altogether. *Id.*

¹²¹ By the takeover's end, members of the Emergency Committee may have wondered whether they should have deposed *Yeltsin* rather than Gorbachev. Yet in an astounding slip-up, the Committee of Eight failed to even arrest Yeltsin. Arresting or otherwise eliminating him on the day of the coup would have been easy since Yeltsin was lightly guarded and had flown home by commercial airline from a well-publicized trip to Kazakhstan. Bill Keller, *Subplots Within the Plot Intrigue Coup Theorists*, N.Y. TIMES, Aug. 28, 1991, A10.

¹²² Consider the following in assessing the Committee of Eight's handling of the coup: The military conspirators were to a large extent the creatures of their own training and environment. And if this should be held against them, it should also be remembered that this was what had made them conspirators in the first place.... They were officers and gentlemen, and therefore totally unfit to be conspirators. GOODSPEED, *supra* note 5, 206. Although these words refer to the men who had attempted to assassinate Adolph Hitler in Rastenburg in 1944, the same can be said of the Emergency Committee members and their attempted takeover of the Soviet government. Furthermore, it seems true with the August coup that "the kind of men most attracted to political power are seldom best fitted to wield it. Much more frequently, those who have gained control of the state by violence have proved themselves unable to govern well." *Id.* 235.

¹²³ Serge Schmemmann, *Across Europe to Moscow, the Trial of Freedom Reaches Tyranny's Epicenter*, N.Y. TIMES, Aug. 25, 1991, Sec. 4, 1. Only a few years earlier, the smallest show of government force would have curbed the slightest public rebellion. *Id.*

¹²⁴ Francis X. Clines, *A Thick Russian Porridge, 'Not the Way to Do a Coup'*, N.Y. TIMES, Aug. 21, 1991, A1, A14. The secretary of the Central Committee, Sergei Kalashnikov, told people not to use the word "junta" and asked them to consider the eight members of the Emergency Committee as merely having "made a blunder in the estimation of a difficult situation." *Id.* He also said that the coup should not be used to strike a blow against the Communist Party's reputation. *Id.*

Russian citizens began to wonder why the Supreme Soviet waited until the coup's end before condemning the takeover. *Id.* Soviet lawmakers contended that they had condemned the coup in its first few hours, but only bothered publishing their statement a few days later. *Id.* Gorbachev himself was not pleased with this explanation. He stated that the conspirators would not have been able to carry out their plans if the Parliament had immediately held an emergency meeting to deal with the crisis. GORBACHEV, *supra* note 55, 43. "[I]f the Supreme Soviet had met on 19 August the coup could have been halted at the very beginning." *Id.*

the irony of it all: “We knew that Communism couldn’t do anything right.”¹²⁵ Even hard-line Communists not involved in the takeover were critical of the coup leaders, who were all un-charismatic men closely identified with the archaic Communist Party.¹²⁶

The failed coup d’etat legitimized the claim of the country’s democratic reformers that they were the rightful heirs to power. In the coup’s wake, the Communist Party was humiliatingly routed from all levels of Soviet government.¹²⁷ The privileges of Party membership, such as limousines and special housing, were abruptly halted, and symbols of Communism were angrily removed from their haughty positions throughout the cities of the Soviet Union.¹²⁸ The Soviet people realized there would never be another opportunity to do away with Communism and its sources of power (the K.G.B., the military, and the Interior Ministry).¹²⁹ They wanted to make sure that Communism could never later re-group and reassert its control.

Communist Party members protested against “attempts to hold the entire party responsible for criminal actions of a handful of adventurers.”¹³⁰ And speaking before the Supreme Soviet on August 23, even Gorbachev responded reservedly to actions taken against the Communist Party. “No one has the right to set the task of banishing socialism from our country,” Gorbachev said.¹³¹

Death Blow to Gorbachev and the Soviet Union

Yet Gorbachev himself took a step towards banishing socialism from the Soviet Union when he resigned as General Secretary of the Communist Party a few days later.¹³² And with Communism under assault throughout the country and his own leadership in shambles as a result of the putsch, Gorbachev changed his mind about defending the Party and proceeded to ban it from any role in Soviet government.¹³³ This move ended 74 years of Communist rule in the

¹²⁵ Bill Keller, *Old Guard’s Last Gasp*, N.Y. TIMES, Aug. 22, 1991, A1. This sentiment perfectly described the whole Communist machine, which had ruthlessly imposed its will on other countries but could not manage overthrowing of its own government. *Id.* Even the name of the Emergency Committee for the State of Emergency in the U.S.S.R. was made an object of ridicule, since the Russian initials, G.K.Ch.P, resembled the sound of “a cat choking on a hairball.” *Id.* A11.

¹²⁶ *Id.* “When I first heard of [the coup] on Monday, my personal reaction was positive,” said an Army colonel who had long advocated a state of emergency for the Soviet Union. *Id.* “But as soon as I saw it was constructed of decrees, all on paper, I quickly became disappointed. [The Committee of Eight] displayed military incompetence, inconsistency, a lack of concrete actions.” *Id.*

¹²⁷ Celestine Bohlen, *Many Communists Desert Party For Its Complicity in Failed Coup*, N.Y. TIMES, Aug. 24, 1991, A1. Communist leaders across the county were locked out of the offices in mass retribution for the Party’s involvement in the putsch. *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* Lawmakers viciously scorned Gorbachev for remaining loyal to the Party despite its clear complicity in the coup. *Id.*

¹³² Bill Keller, *Gorbachev Quits as Party Head; Ends Communist’s 74-Year Rein*, N.Y. TIMES, Aug. 25, 1991, 1. Gorbachev, however, did not give up his Party membership.

¹³³ *Id.* Gorbachev also ordered the end to all Communist activities within the military, the K.G.B., and the Interior Ministry. *Id.* On August 29, the Supreme Soviet suspended all Communist Party activities pending investigation into its role in the coup. Serge Schmemann, *Soviets Bar Communist Party Activities*, N.Y. TIMES, Aug. 30, 1991, A1. The Supreme Soviet was the only national institution with the formal power to legally act against the Communist Party in this manner. *Id.*

Soviet Union and effectively left Gorbachev without any powerbase. Gorbachev's actions amounted to the final surrender of the old right-wing order to the new democratic order.

Upon hearing that the coup was over, President Bush offered the following reason for its collapse: "[The conspirators] underestimated the power of the people, they underestimated what a taste of democracy and freedom brings."¹³⁴ Bush also remarked that Boris Yeltsin's standing in the Soviet Union and the world had increased because of the putsch.¹³⁵ Indeed, it seems that the overthrow attempt against Gorbachev was the best thing that could have happened to Yeltsin (and the Russian republic), considering how it accelerated the ultimate demise of the Soviet empire, thus enabling Yeltsin to finally gain the sovereignty for Russia he had actively sought.¹³⁶

It was clear that the balance of Soviet power had shifted in Yeltsin's favor and away from either Gorbachev or the hard-line Communists. Although Gorbachev emerged from his house arrest in good physical condition, his political status had become even more ambiguous than it was before the putsch.¹³⁷ Citizens began regarding him as a fool for appointing to power the men who had tried to overthrow him, despite warnings from both friends and enemies that he should not have trusted them.¹³⁸ Some Soviets even speculated that Gorbachev had secretly helped organize his own removal.¹³⁹

Finally, the coup not only inflicted a fatal blow to Soviet Communism, but only a few months later brought down Gorbachev and the entire Soviet empire as well. The sudden beginning and end of the coup created a fresh state of confusion and uncertainty in the Soviet Union, which added to the state crisis the country had been experiencing in the years before. Gorbachev tried to maintain a federation of former Soviet states over which he could preside, but the republics instead decided to create a "Commonwealth of Independent States."¹⁴⁰ In December 1991, eleven of the fifteen former Soviet republics signed the agreement, which effectively terminated the Soviet Union.¹⁴¹ On Christmas Day, Gorbachev bowed to the inevitable and resigned as President of a country which no longer existed.¹⁴²

¹³⁴ *Excerpts From Bush's Talks: Gorbachev Says 'Things Are Under Control'*, N.Y. TIMES, Aug. 22, 1991, A15.

¹³⁵ *Id.* President Bush stated: "[Yeltsin] has shown tremendous courage.... I think he will have a well-earned stature around the world that he might not have had...before all this happened." *Id.*

¹³⁶ *Id.*

¹³⁷ Keller, *supra* note 125, A1, A11.

¹³⁸ *Id.* "Gorbachev's problem all along was that he trusted the wrong people," said one Moscovite. *Id.* "He never had any trust in us." *Id.* Even Gorbachev's longtime friend Anatoly Lukyanov, Chairman of the Supreme Soviet, and Valery Bolding, Gorbachev's own chief of staff, were implicated in the conspiracy. Oleg Kalugin, the K.G.B. general who had become the K.G.B.'s biggest critic, said of the situation: "The saddest thing is that the President didn't listen to us. We told him that he mustn't keep the structures that at any moment could organize a putsch against him." Peter Gumbel & Gerald F. Seib, *Gorbachev's Downfall Raises Political Specter For Soviets and West*, WALL ST. J., Aug. 20, 1991, A1, A11. See *supra* note 60 for further discussion on Gorbachev's inability to appoint loyal subordinates and his failure to heed warnings that a coup against him would occur.

¹³⁹ Keller, *supra* note 125, A1, A11. In these people's view, Gorbachev hoped the coup would either succeed, in which case he could return as dictator, or fail, in which case he would come out as a heroic leader. *Id.* President George Bush discounted such notions: "To suggest that...President Gorbachev would plot to put the people of the Soviet Union through this kind of trauma and the rest of the world...makes absolutely no sense at all." *Excerpts From Bush's Talk: Gorbachev Says 'Things Are Under Control'*, N.Y. TIMES, Aug. 22, 1991, A15. See GORBACHEV, *supra* note 55, 28, for Gorbachev's denial of these allegations.

¹⁴⁰ For a text of the agreement creating the Commonwealth of Independent States, see *Text of Protocol: 11 States 'On an Equal Basis'*, N.Y. TIMES, Dec. 22, 1991, 12.

¹⁴¹ Soviet Georgia decided not to join the Commonwealth and the three Baltic states had earlier declared their respective independence from Moscow.

¹⁴² Frances X. Clines, *Gorbachev Resigns as Last Soviet Leader; U.S. Recognizes Republics' Independence; Communist Flag Is Removed; Yeltsin Gets Nuclear Controls*, N.Y. TIMES, Dec. 26, 1991, A1.

The Bolshevik Coup d'Etat (The October Revolution)

Russia's Provisional Government and Lenin

The plight of the Soviet Union in its final two years of existence has been compared to that of Russia before the October Revolution of 1917: a steady erosion of central governmental authority, and the legitimate ruler losing control of the country.¹⁴³ The 1917 February Revolution against the ancient Russian monarchy had resulted in a representative Provisional Government charged with maintaining order and establishing democratic reforms.¹⁴⁴ This unstable but legitimate government consisted of leaders of the bourgeois liberal parties, and its ascent to power was tolerated by the council (soviet) of workers' deputies elected in the factories of Petrograd,¹⁴⁵ the Russian capital. Like similar labor councils in cities throughout Russia, the Petrograd Soviet itself was composed of a majority of Menshevik and Socialist Revolutionary leaders who regarded the February Revolution as a revolt of the emerging middle class, not the lower class. Thus, they believed that the Provisional Government should be headed by leaders of the middle class itself.

The Petrograd Soviet also contained a minority of Bolsheviks (Communists), inspired by Lenin (Vladimir Il'ich Ul'ianov) and supported by common workers, soldiers, and peasant farmers (i.e. the lower class). Lenin exhorted fellow Bolsheviks not to support the Provisional Government, calling it imperialistic and undeserving of support, despite its legitimacy and clear democratic leanings.¹⁴⁶ He argued that the Provisional Government was merely a dictatorship of the bourgeoisie that sought to continue repressing the lower class and to keep Russia in the war with Germany.¹⁴⁷ Lenin also claimed that the Provisional Government was incapable of responding to the needs of the lower class, which wished to seize Russia's landed estates away from the middle and upper classes.¹⁴⁸

According to Lenin, only a soviet government directly ruled by the masses could divide Russian property amongst workers, soldiers, and peasant farmers.¹⁴⁹ By September 1917, he had persuaded fellow Bolsheviks that the workers soviets must overthrow the Provisional Government.¹⁵⁰ The new government would then negotiate a general peace with Germany, as well as nationalize all land to later divide it among the lower classes.

¹⁴³ Bering-Jensen, *supra* note 26, 8.

¹⁴⁴ The Russian Revolution of February 1917 was a mass revolt of people who could no longer bear conditions under the tsarist monarch. *See generally* HERBERT J. ELLISON, HISTORY OF RUSSIA 281-314 (1964). Immediately after the February Revolution, Russia was governed by a legitimate parliamentary body called the "Provisional Committee of the Duma." *Id.* 206-214. After the Duma dissolved, the Provisional Government came into being, led by Prince Georgi E. Lvov. *Id.* 217. After Lvov resigned, Alexandr F. Kerensky led the Provisional Government. *Id.* For information specifically on the October Revolution (more exactly, the Bolshevik coup d'etat), *see generally* ROBERT V. DANIELS, RED OCTOBER: THE BOLSHEVIK REVOLUTION OF 1917 (1967); JAMES BUNYAN & H. H. FISHER, THE BOLSHEVIK REVOLUTION: 1917-1918 (1934); D. J. GOODSPEED, THE CONSPIRATORS: A STUDY OF THE COUP D'ETAT 70-107 (1961); FELIKS GROSS, THE SEIZURE OF POLITICAL POWER IN A CENTURY OF REVOLUTIONS 217-235 (1958).

¹⁴⁵ *See supra* note 39 for discussion on the name of this Russian city and its relevance to this comment.

¹⁴⁶ Gross, *supra* note 144, 219-223.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* 217. Lenin raised the battle cry "All power to the Soviets!" to call for soviets throughout Russia to seize power from the Provisional Government. *Id.*

Meanwhile, the Provisional Government, headed by Socialist Aleksandr F. Kerensky, had lost popular support by September of 1917.¹⁵¹ Increasing war-weariness, the breakdown of the economy, and un-fulfilled promises of democratic reform overtaxed the patience of the masses.¹⁵² Workers, soldiers, and peasant farmers were united in demanding immediate and fundamental change. And not only was the ineffectual Provisional Government forced to contend with the leftist Bolsheviks attacking it, but right-wing former autocrats were also trying to topple it in order to restore the Russian monarchy.

With the slogan “Peace, Land, and Bread,” the Bolsheviks capitalized on the entire situation and managed to win a majority in the Petrograd Soviet and other soviets throughout Russia.¹⁵³ Leon Trotsky was later elected chairman of the Petrograd Soviet. Lenin decided that the time was ripe to depose Kerensky and the whole Provisional Government.¹⁵⁴ At a meeting of the Bolshevik Central Committee on October 10,¹⁵⁵ Lenin won a majority in favor of preparing an imminent armed takeover of Petrograd.¹⁵⁶ He entrusted Trotsky to take the necessary steps to gain the military’s support and to train armed workers (“Red Guards”) for an insurrection.¹⁵⁷

The October “Revolution”

On October 24, Aleksandr Kerensky sent loyal soldiers to close a Bolshevik newspaper (*Rabochii Put*--“Worker’s Way”), an act which the Bolsheviks considered the beginning of an expected government move against them.¹⁵⁸ In response, the Bolsheviks called on Red Guards and sympathetic soldiers and sailors to defend the Petrograd Soviet. They met only slight resistance from Provisional Government troops.¹⁵⁹ However, subsequent resistance in Moscow to the Bolshevik takeover resulted in many deaths. Following the tactics Lenin and Trotsky had prepared in advance, the rebel forces seized telegraph, telephone, power and railway stations, as well as important bridges in Petrograd. Once the instruments of power were captured, the already week Provisional Government was truly doomed.¹⁶⁰

¹⁵¹ *Id.* 218.

¹⁵² *Id.*

¹⁵³ *Id.* 227.

¹⁵⁴ *Id.* 228.

¹⁵⁵ The dates used in this comment when referring to the October Revolution correspond to the Julian Calendar which Russia was still using in 1917. Thus the “October” Revolution of October 24-26 (Julian Calendar) actually occurred on November 6-8 (Gregorian Calendar). Like the August coup, the Bolshevik coup spanned three days which shook the world.

¹⁵⁶ Gross, *supra* note 144 228. The Bolshevik Central Committee passed this resolution: “Recognizing that an armed uprising is inevitable and the time is ripe, the Central Committee proposes to all organizations of the party to act accordingly and to discuss and decide from this point of view all the practical questions.” *Id.* According to Trotsky, “It was a question of taking full possession of Petrograd in the next 24 hours. That meant to seize those political and technical institutions which were still in the hands of the government.” LEON TROTSKY, *THE HISTORY OF THE RUSSIAN REVOLUTION* 207.

¹⁵⁷ Gross, *supra* note 144 229. Lenin stayed hidden throughout the coup because he was wanted by the Provisional Government for allegedly assisting the German war effort. *Id.* Trotsky thus followed Lenin’s instructions as to how to properly conduct a government overthrow. *See infra* notes 172 and 173 and accompanying text for discussion on Lenin’s instructions regarding successfully executing an armed insurrection.

¹⁵⁸ *Id.* 234.

¹⁵⁹ *Id.* The show of arms was enough; there was only a small loss of life with the Bolshevik coup. *Id.* Three or four Army cadets defending members of the legitimate Provisional Government at Petrograd’s Winter Palace were killed. *Id.* 235. (Similarly, three resisters were killed in the 1991 Soviet coup.)

¹⁶⁰ The crumbling Provisional Government appealed to the Russian citizenry, to no avail: Citizens! Save the fatherland, the republic, and freedom! *Maniacs have raised a revolt against the only governmental power chosen by the people – the Provisional Government....* Citizens, you must help the Provisional Government. You must strengthen its authority. You must oppose these maniacs, with whom are joined all enemies of liberty and order

The next day, the Bolsheviks proclaimed the overthrow of Kerensky's Provisional Government and declared that the workers' soviets controlled Russia.¹⁶¹ Consisting of a majority of Bolsheviks, the Congress of Soviets quickly ratified the new regime and elected Lenin as its chairman.¹⁶² Overnight, Lenin had turned from fugitive (in the eyes of the Provisional Government) to head of the world's largest country.

The Bolshevik coup's success can be attributed to leadership abilities and organizational skills of Lenin and Trotsky, although it may be more accurate to say that the victory resulted from the instability of the Provisional Government. Also, the Bolshevik coup was not a spontaneous movement by the Russian public as was the February Revolution; the masses were mostly apathetic to the Provisional Government's overthrow.¹⁶³ Such passivity, however, made the coup easier for the Bolsheviks to successfully undertake.¹⁶⁴ Lenin and Trotsky took advantage of the overall social unrest at the time to take control of the government and to keep this control after resistance had ended.

The Bolsheviks' use of conspiracy, tactics, and sudden violence to overthrow the existing lawful regime made the October Revolution a classic example of a well-executed coup d'état.¹⁶⁵ Yet Bolsheviks were reluctant in 1917 (and to this day) to call events of October 24-26 a "coup." Instead, the overthrow has been glorified in Communist history as the "October Revolution."¹⁶⁶ This designation made the coup sound as if all Russians supported the Bolsheviks and participate in the uprising.

The Bolshevik coup was truly an unfortunate part of Russian history. Consider the following in light of recent events in what was the Soviet Union:

The February Revolution was the democratic revolution of Russia. Never before and never after have the Russians been as free as they were between the February and October Revolutions of 1917. It was a painful period. But freedom was born out of slavery. The February Revolution had overthrown the centur[ies]-old autocracy. The Bolshevik, October Revolution killed not autocracy but the young, Russian democracy. A short-lived, weak one, but the only one Russia ever had.¹⁶⁷ It took about 70 years for Russians to taste (relative) freedom again,

including the followers of the old regime whose purpose is to destroy all conquests of the [February R]evolution and the future of our dear fatherland... *Appeals of the Provisional Government*, IZVESTIIA, Oct. 26, 1917, 3 reprinted in BUNYAN & FISHER, *supra* note 144, 101-102 (emphasis added). Compare the Provisional Government's plea with the statements of both Mikhail Gorbachev and Boris Yeltsin upon the Emergency Committee's seizure of power, *supra* notes 69, 83, and 84. Aleksandr Kerensky valiantly organized forces to recapture Petrograd several days later, but his troops fought half-heartedly and were beaten. He fled to Paris, eventually settling in the United States where he lived until his death in 1970 at age 89. His account of the Bolshevik coup is in his book *The Catastrophe* (1927).

¹⁶¹ The Bolsheviks broadcast the following proclamation on October 25 upon their success: The Provisional Government is deposed. The state authority has passed into the hands of the Military Revolutionary Committee, the organ of the Petrograd Soviet of Workers' and Soldiers' Deputies acting in the name of the Petrograd proletariat and garrison. The causes for which people were struggling – immediate democratic peace, abolition of the [landlord's] right to the land, labor control of industry, and a Soviet form of government – are not all guaranteed. Long live the revolution of Workers, Soldiers, and Peasants! *The Provisional Government Is Deposed*, NOVAIA ZHIZN, Oct. 26, 1917, 1, reprinted in BUNYAN & FISHER, *supra* note 144, 100. Compare the Bolsheviks' proclamation with the Emergency Committee's statement announcing its takeover, *supra* note 58.

¹⁶² Gross, *supra* note 144, 234.

¹⁶³ *Id.* 231.

¹⁶⁴ *Id.*

¹⁶⁵ GOODSPEED, *supra* note 5, 105.

¹⁶⁶ *Id.*

¹⁶⁷ Gross, *supra* note 144, 235.

under Mikhail Gorbachev. His reforms and, finally, the end of Soviet Communism (and the Soviet Union itself) can be regarded as having in effect *restored* Aleksandr Kerensky's Provisional Government! The August coup thus helped reinstate, hopefully permanently, Russia's first representative, democratic government.

The Bolshevik and August Coups Compared

Similarities Between the Two Coups

A comparison between the Bolshevik coup of 1917 and the August coup of 1991 may not at first seem appropriate. First of all, Lenin and the other Bolsheviks were not members of an existing regime.¹⁶⁸ Thus the common definition of a coup d'état as originating from within the existing government does not apply to the Bolshevik coup. Furthermore, the Bolshevik coup was not specifically aimed only at Aleksandr Kerensky; Bolshevik forces attacked and deposed the entire Provisional Government. In the August coup, the Committee of Eight moved only against Mikhail Gorbachev and left most of the Soviet Union's government intact.

However, there are several remarkable similarities between the Bolshevik and August coups. Both the Bolshevik and August coups culminated revolutionary periods in Russian and Soviet history, periods which ended the existence of both nations. The similarities of the coups probably stem from the likeness of the Soviet empire's social-economic situation in 1991 to that of the Russian empire in 1917. The August coup happened during a difficult time in Soviet history, just as the Bolshevik coup occurred during a very unstable time in Russian history. As in 1917 Russia, the Soviet Union's economy was in shambles by 1991.¹⁶⁹ The democratic and economic reforms Gorbachev had instituted were not proceeding as planned, just as those of the Provisional Government were not successful. The Soviet central government and the Russian Provisional Government had lost popular support, as did their respective leaders, Gorbachev and Kerensky.¹⁷⁰ Like the Russian citizenry in mid-1917, Soviet citizens were demanding and expecting drastic change, starting with the possible removal of Gorbachev himself. Like the usurping Bolsheviks, the August coup's Emergency Committee took advantage of the general social unrest to seize power.

In both 1917 and 1991, the people of Russia and the Soviet Union even had similar demands from the unstable existing governments: food and land. In 1917, Russia was

¹⁶⁸ In fact, Lenin was wanted by the Provisional Government at the time of the coup for allegedly assisting the German war effort. *Id.* 229.

¹⁶⁹ The absence of a reliable economic foundation is a common element in societies where coups take place, since this usually creates an atmosphere ripe for political violence. Hassan, *supra* note 2, 194. The occurrence of a coup may not indicate a simple breakdown in the legal system, but instead may be an unavoidable reaction to circumstances in developing countries which lack the prosperity and stability necessary for more orderly behavior. *Id.* 195. These typical conditions preceding a coup d'état seem to be true with both the August coup and the Bolshevik coup (the October Revolution). The Soviet Union, still a virtually undeveloped nation in 1991, was obviously undergoing severe economic and political difficulties in the years before the coup occurred, as was Russia in the early part of this century.

¹⁷⁰ Like Gorbachev, Kerensky was more liked abroad than by his own people. The Allies especially preferred to deal with him and his democratic Provisional Government rather than the radical or conservative forces struggling for power in Russia at the time. This is the same situation as before the August coup: Western governments, especially the Bush Administration, strongly supported Gorbachev rather than either Boris Yeltsin (and the liberal forces he led) or the conservative forces in the Kremlin who were challenging Gorbachev. This support for Gorbachev lasted well after the coup ended, even when it was clear that the balance of power had shifted to Yeltsin and his democratic followers.

experiencing a terrible shortage of food which made the masses restless and desirous of change. In 1990, food shortages in Moscow and Leningrad forced the introduction of rationing for the first time since World War II, and the public was angry that such shortages could occur in a country considered a world power. As for land, the Bolsheviks of 1917 advocated the seizure of land from the upper class so as to divide it amongst the masses. By 1991, Gorbachev's economic reforms under *perestroika* had permitted private ownership of real property and business enterprises to exist for the first time in the Soviet Union. Common citizens saw that they could participate in capitalism to make a profit for themselves. Realizing that the Committee of Eight was a threat to Gorbachev's reforms, Soviets wished to ensure that the coup members would not turn the country back to what it had been before Gorbachev took office.

Like Mikhail Gorbachev in 1991, Aleksandr Kerensky was beset with political pressures from both the right and left. The conservative monarchists of 1917 roughly correspond to the right-wing Emergency Committee, which represented Communists who had lost power in the late 1980s under Gorbachev, just as the tsarists lost power in 1917. Despite the Bolshevik coup resulting in a totalitarian state, the Bolsheviks were (on the surface) the most liberal (i.e. radical) of the forces involved in Russia's 1917 power struggle. The Bolsheviks can thus closely compare to the great number of liberal, reform-minded individuals who rallied against the August coup conspirators. (Of course, there is a major difference: the democratic forces of 1991 contested the Committee of Eight's takeover and sought to restore the legitimate Soviet government, whereas Bolshevik forces took steps to topple Kerensky and his legitimate and democratic Provisional Government.) Finally, many Russian soldiers and sailors supported Lenin and the Bolsheviks in overthrowing Kerensky's government, just as elements of the Soviet military supported Yeltsin's democratic forces in resisting coup plotters.¹⁷¹

The "Art" of Insurrection

Weeks before the Bolshevik coup, Lenin had written a long letter to the Bolshevik Central Committee entitled "Marxism and Insurrection"¹⁷² in which he described the tasks necessary to achieve successful armed revolt. The letter concludes with: In order to treat insurrection in a Marxist way, i.e., as an art, we must ... without losing a single moment, organize a *headquarters* of the insurgent detachments, distribute our forces, move the reliable regiments to the most important points ... arrest the General Staff and the government, and move against the officer cadets ... We must mobilize the armed workers and call them to fight the last desperate fight, occupy the telegraph and the telephone exchange at once, move our insurrection headquarters to the central telephone exchange and connect it by telephone with all the factories,

¹⁷¹ The analogy between the Bolshevik and August coups does have an interesting and frightening component: Boris Yeltsin must parallel Lenin as the leader of their respective liberal forces! Both Lenin and Yeltsin possessed magnetic personalities which enabled each of them to command great popular support. Neither the 1991 Emergency Committee nor the 1917 Provisional Government understood the political authority such support could mobilize. Also, Yeltsin placed the needs and desires of Russia and its citizens above those of the Soviet Union and the other Soviet republics' citizens, much as Lenin sought (so he said) to help Russia's poor laborers, soldiers, and peasant farmers. Furthermore, Yeltsin was convinced of the rightness of openly (and remorselessly) aiding the final downfall of Gorbachev (and the entire Soviet empire) in late 1991. Like Yeltsin, Lenin was thoroughly convinced of the rightness and necessity of forcefully deposing Aleksandr Kerensky and the Provisional Government.

¹⁷² LENIN, COLLECTED WORKS, vol. 26, 22 (Yuri Sdobnikov & George Hanna, trans. 1964). Lenin wrote "Marxism and Insurrection" on September 13 and 14, 1917 (Julian Calendar). *Id.* 27.

all the regiments, all the [other] points of armed fighting, etc... [I]t is impossible to remain loyal to Marxism ... unless insurrection is treated as an art.¹⁷³

Upon overthrowing the Provisional Government, the Bolsheviks issued the following decree: “All railroad stations and the telephone, post, and telegraph offices are occupied. The telephones of the Winter Palace and the [District Military] Staff Headquarters are disconnected. The State Bank is in our hands. The Winter Palace and the [military] Staff have surrendered ...”¹⁷⁴ It is clear that the Bolsheviks had fully adhered to Lenin’s instructions as to how to properly and successfully seize government power.

As members of the Communist Party Central Committee, the August coup conspirators should have been familiar with Lenin’s teachings.¹⁷⁵ But the members of the Committee of Eight were apparently bad Marxists-Leninists; they did not treat their revolt as an “art.” For example, they failed to move battalions loyal to them to key points (and even had difficulty finding any battalions loyal to them).¹⁷⁶ The telephones in Moscow continued working throughout the coup, allowing resisters to rally against the Committee. Newspapers opposing Gorbachev’s ouster continued to be published in secret, and the public was, of course, able to tune into foreign radio stations for non-official news.

The Legality of the August Coup

Rules of Succession

In his article *A Legal Theory of Revolutions*, Professor Ali Khan of Washburn University developed a theory to determine the legitimacy of revolutions and other forms of political upheaval (including coups d’etat).¹⁷⁷ The theory focuses on the significance of *succession rules*.¹⁷⁸ Succession rules are the power-conferring procedures through which: (1) legislators acquire the legal right to make laws, and (2) executives (or leaders) acquire the legal right to enforce laws.¹⁷⁹

¹⁷³ *Id.* (emphasis in original). The notion that insurrection should be considered an “art” came from Karl Marx’s writings, although Friedrich Engels actually originated the idea. *Id.* 21, a.6.

¹⁷⁴ *The Revolution Has Triumphed*, NOVOE VREMIA, Oct. 26, 1917, 2, reprinted in BUNYAN & FISHER, *supra* note 144, 100.

¹⁷⁵ Serge Schmemmann, *Et Tu, Anatoly? In Moscow It Has a Certain Ring*, N.Y. TIMES, Aug. 28, 1991, A10. Lenin after all had founded the Communist Party and was himself the plotter of a successful coup d’etat. *Id.* In the form of a seven page pamphlet, “Marxism and Insurrection” should have been readily available to the Emergency Committee. *Id.* It may also have been wise for the Committee of Eight members to have read *Coup d’Etat: A Practical Handbook* (1968) by Edward Luttwak before beginning their adventure. This 189-page book provides step-by-step instructions as to how to properly plan and execute a successful coup d’etat.

¹⁷⁶ Schmemmann, *supra* note 175, A10.

¹⁷⁷ Ali Khan, *A Legal Theory of Revolutions*, 5 B.U. INT’L L.J. 1 (1987). Khan’s theory is based on “social approval” of revolutions and other types of government revolt. Since the theory of social approval regards revolutions in the legal, not sociological sense, it need not and does not recognize the distinction between revolutions and coups d’etat. *Id.* 5.

¹⁷⁸ *Id.* 2. Succession rules must be rooted in communal consent to provide a legal structure to translate the will of the people into rightful governmental authority. *Id.*

¹⁷⁹ *Id.* Almost every nation stipulates its succession rules in its constitution (or an alternate device). *Id.* 19-20. Valid succession rules can thus be used to distinguish between the ruling acts of legitimate authority-bearers (such as leaders or legislators) and those of illegitimate authority bearers (such as gunmen or government rebels). *Id.* For example, the orders of a state’s executives and legislators are generally considered lawful (even if unfair or coercive) as long as they operate under proper succession rules. *Id.* 20. On the other hand, a gunman cannot invoke

There are two types of succession rules. The “successor-in-title” rule prescribes the *legal mode* of determining a successor.¹⁸⁰ Such a succession rule denotes the manner in which successive leaders and legislators legitimately gain their authority, such as the election process or succession through title or rank.¹⁸¹ The other kind of succession rule is the “rule of devolvement contingencies.”¹⁸² A devolvement contingency is a *specific event* which must occur before the office and power of a law maker or law enforcer is passed to his successor, such as when an existing office-holder dies and the legal successor-in-title assumes the office.¹⁸³

A *legitimate* succession takes place only when *both* succession rules are followed. A particular event required by the rule of devolvement contingencies must occur, and the individual succeeding to the office must then meet the nation’s successor-in-title requirements.¹⁸⁴ A change of government leadership is *illegitimate* when a revolutionary group takes possession of state control in violation of either type of succession rule.¹⁸⁵

The overthrow of a leader is unlawful if the principle usurper is not his successor-in-title, *even if* the requirements of the devolvement contingencies are completely met.¹⁸⁶ Alternatively, if a leader is forced to leave his office in a manner contrary to or not specified in the appropriate rule of devolvement contingencies, the succession is unlawful *even if* the individual assuming office is the true successor-in-title.¹⁸⁷

Succession Rules of the Soviet Constitution

This was the case in the August coup. Vice President Gennadi Yanayev was indeed the constitutionally-designated successor to Mikhail Gorbachev.¹⁸⁸ Article 127, Paragraph 10 of the last Soviet Constitution, which ostensibly reflected Soviet society’s will regarding the country’s leadership, read that the Vice President would assume the presidency if the President was incapacitated:

In the President of the USSR is unable to continue performing his duties for one reason or another, pending the election of a new President of the USSR[,] his powers are transferred to the Vice-President of the USSR, or, if this is impossible, to the Chairman of the USSR Supreme

even a legitimate rule of the legal system to prove the validity of his coercive order, despite having all the force necessary to demand obedience. *Id.*

¹⁸⁰ *Id.* 24.

¹⁸¹ *Id.* For example, the office of the President of the United States devolves only to the Vice President, the constitutionally-designated presidential successor.

¹⁸² *Id.*

¹⁸³ *Id.* In the United States, only the death, resignation, or constitutional removal of the President from office serve as valid contingencies required before the Vice President may assume the presidency. *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* 3. If the new regime attains power through the nation’s existing succession rules, no revolution occurs in the legal sense, even if the new government intends to revolutionize the country. *Id.* 4. On the other hand, if a group of individuals seize power in violation of existing succession rules, a revolution in the legal sense does take place, even if the group does not intend to effect any social changes. *Id.* 5.

¹⁸⁶ *Id.* 25.

¹⁸⁷ *Id.* 24. Of course, a revolution or coup is certainly unlawful when leaders or legislators are deposed in violation of both the legal and contingent rules of succession. *Id.*

¹⁸⁸ As Yanayev announced upon the Emergency Committee’s seizure of power, “[D]ue to the [Mikhail Gorbachev’s] inability to continue in office, and under article 127.7 of the U.S.S.R. Constitution...the Vice President [Yanayev himself] has taken office of the U.S.S.R. President.” *Excerpts From the New Leader’s Remarks: Law and Order*, *supra* note 69, A12.

Soviet.... In such an event, the election of a new President of the USSR is to be held within three months.¹⁸⁹

This constitutional provision, in effect at the time of the August coup, made Gennadi Yanayev President Gorbachev's lawful successor-in-title. The Emergency Committee members must have felt that having the actual successor-in-title assume the Presidency would lend the coup a somewhat legitimate appearance.¹⁹⁰

However, the rule of devolvement contingencies mentioned in the constitutional provision was not truly satisfied because the Committee of Eight had contrived the excuse that Gorbachev was ill and thus was "unable to continue performing his duties."¹⁹¹ In actuality, Gorbachev was healthy and fully able to fulfill his presidential duties.¹⁹² Therefore, despite technically fulfilling the succession rules specified in the Soviet constitution, the substitution of Vice President Yanayev for President Gorbachev was *unconstitutional* since it was fraudulently effected.¹⁹³

If Gorbachev had truly become incapacitated (through no act of the Emergency Committee), then Yanayev's assumption of power would be considered legitimate. Instead of a coup d'état, there would only be a lawful (though unwanted) change of leadership under the Soviet Constitution's succession rules. And logically, the Soviet people could not challenge such a legitimate transfer of power properly effected under these rules. After all, the succession rules supposedly reflected the Soviet people's collective will regarding their country's presidential succession. Only the matter of the constitutionality of the Emergency Committee itself would pose a problem to the new regime, but Yanayev could logically claim the executive right, as President, to have created such a group.

¹⁸⁹ Art. 127, part 7, KONST. SSSR. The December 1990 changes to the Soviet Constitution creating the vice presidency were reported in *The Law on Changes in the Constitution*, PRAVDA, Dec. 27, 1990, TRANS. IN, 43 CURRENT DIG. OF SOVIET PRESS 20 (No.48) (1991).

¹⁹⁰ See *supra* note 103 and accompanying text for discussion of Yanayev's claim that Vladimir Kryuchkov and Dmitri Yazov had forced him to participate in the coup. Considering the overall illegality of the August coup, it did not matter anyway whether or not Yanayev had assumed the presidency.

¹⁹¹ The quoted language is from the constitutional provision noted in the text. See *supra* note 69 on the matter of Gorbachev's health. The burden is on the successor-in-title to prove that all of the proper devolvement contingencies have been met, and successors usually make a formal public announcement to this effect. See *supra* note 58 for the Committee of Eight's statement as to Gorbachev's incapacity and the necessity of having Yanayev and the rest of the Committee of Eight assume control over the government.

¹⁹² In assessing the Emergency Committee's actions, consider also Article 127, Paragraph 8 of the Soviet Constitution: The President of the USSR possesses the right of immunity and can be removed only by the Congress of the People's Deputies if he violates the USSR Constitution and USSR laws. Such a decision is adopted by at least a two-thirds vote of the total number of the Deputies to the Congress of the USSR People's Deputies, at the initiative of the Congress itself or of the USSR Supreme Soviet, taking into consideration the conclusions of the USSR Constitutional Review Committee. Art. 127, par. 8, KONST. SSSR.

¹⁹³ As Soviet Foreign Minister Aleksandr A. Bessmertnykh stated when asked about the constitutionality of the Committee of Eight's actions: The Constitution and laws [of the Soviet Union] do provide for the possibility of conveying authority from the President through the Vice President and [it] is quite clearly indicated how this is to be accomplished. Today we have not gotten an answer yet on the main question; namely, whether President Gorbachev was in agreement that his power had to be conveyed[,] and if he was not in a physical state to give such an agreement, we have to know what his physical condition was.... We did not get an answer to either of these two questions. Therefore...yes, this change [of leadership] was unconstitutional. It was not done in accordance with the Constitution of the Soviet Union. *Top Minister's Reaction: 'Unconstitutional' Act*, N.Y. TIMES, Aug. 22, 1991, at A14. Bessmertnykh was himself on vacation and apparently truly ill during the time of the coup. *Id.* Interestingly, upon his return to Moscow during the takeover, the Emergency Committee did not detain the Foreign Minister. *Id.* Gorbachev later removed Bessmertnykh from office, citing the minister's passivity during the putsch.

The Legality of the State of Emergency

The Committee of Eight obviously desired a state of emergency imposed in parts of the Soviet Union so as to be able to constitutionally declare rigid Communist control over the militant republics and to freely repeal many of Gorbachev's democratic reforms.¹⁹⁴ Under the final Soviet Constitution, there were only two ways for the President to legally declare a state of emergency: (1) The Presidium of the Supreme Soviet or any one of the Soviet republics could request the President to do this, or (2) the President on his own initiative could do so as long as he submitted this decision to the Supreme Soviet for subsequent ratification.¹⁹⁵

The Emergency Committee members knew they could not safely (or successfully) request either the Supreme Soviet or the republics to ask Gorbachev to impose a state of emergency. They were left only with the alternative of having Gorbachev do so under his own constitutional authority. Realizing that Gorbachev would not agree to this, the coup perpetrators tried to force him to resign 'voluntarily.' When Gorbachev refused, they decided to depose him, and justified their actions by asserting that Gorbachev's health prevented him from continuing his presidential duties. However false it was, this lie served as a legitimate reason to install Yanayev as President of the Soviet Union, according to the Soviet constitution. Once in power, "President" Yanayev could legally proceed to take action and make changes on behalf of the Committee of Eight, including proclaiming a state of emergency in parts of the nation.¹⁹⁶

Conclusion

The August 1991 Soviet coup stemmed from the desire of the old-guard Communists to declare a state of emergency throughout parts of the Soviet Union. Such a state of emergency would have allowed the Executive Committee to legally reimpose stern Communist control throughout the country. Overthrowing Gorbachev was the only practicable means of accomplishing this objective. However, besides not reflecting the will of the Soviet people, the Committee of Eight's actions were clearly illegitimate and unconstitutional. The entire takeover

¹⁹⁴ See *supra* note 58 for text of the first resolution the Emergency Committee passed upon deposing Gorbachev: the declaration of a state of emergency "in some parts of the Soviet Union for six months from 04:00 Moscow time on Aug. 19, 1991." Boris Yeltsin pointed out the reason why the Committee of Eight selectively imposed the state of emergency only in Moscow, Leningrad, and the Baltic states: "These actions are not aimed against Kazakhstan or Uzbekistan, but against democratic Russia. The state of emergency has been imposed only where the leadership is democratic.... This makes clear against whom this putsch was made." Clines, *supra* note 69.

¹⁹⁵ Article 127, Paragraph 3, section 15, of the last Soviet Constitution delineated the Soviet President's authority to declare a state of emergency: The President of the USSR: 15. [I]n the interests of ensuring the safety of USSR citizens, issues warnings about the declaration of a state of emergency in specific localities, and when necessary introduces a state of emergency at the request or with the consent of the Presidium of the Supreme Soviet or the supreme body of state power of the relevant Union republic. In the absence of such consent, introduces a state of emergency with immediate submission of the decision for ratification by the USSR Supreme Soviet.... In the instances indicated in the first part of this point, the President may introduce temporary presidential rule, while observing the sovereignty and territorial integrity of the Union republic. The conditions applying under a state of emergency, as well as under presidential rule, are determined by law. Art. 127, par. 3, sec. 15, KONST. SSSR.

¹⁹⁶ During the press conference announcing Gorbachev's ousting, Yanayev did declare that the legality of the state of emergency would be settled at the meeting of the Supreme Soviet the following week. *Excerpts From the New Leader's Remarks: Law and Order*, *supra* note 69, A12. Later, in an interview from the Matrosskaya Tishina Prison where he and the other plotters were awaiting trial, Valentin Pavlov said that he and the other plotters simply hoped that the Supreme Soviet would approve of the Emergency Committee's actions and that afterwards "things would work out." Kinzer, *supra* note 67, A7.

was based on fraud and thus violated the lawful presidential succession rules specified in the Soviet Union's Constitution.

Although Gorbachev's ousting was only temporary, the Emergency Committee's takeover irreparably and fundamentally affected the Soviet Union, just as the Bolsheviks' success in 1917 forever changed Russia and the world. George F. Kennan, a leading American historian on the Soviet Union, stated that the aborted August coup even eclipsed the Russian Revolution of February 1917 in importance.¹⁹⁷ "I find it difficult to find any other turning point in modern Russian history that is so significant as this one," he said.¹⁹⁸ Kennan also praised Mikhail Gorbachev, saying that despite his weaknesses, he was the one who made the fall of the Soviet empire possible by opening Soviet society.¹⁹⁹

Yet Kennan saw that Gorbachev's moment in history was over.²⁰⁰ And this turned out to be true. Gorbachev failed to realize (or accept) that the forces of glasnost and perestroika could not be controlled by him (or even the Committee of Eight).²⁰¹ Ironically, Mikhail Gorbachev became a victim of his own reforms: a danger to the old order and an obstacle to the new. *Id.* The August coup is laced with many intertwined ironies: Gorbachev was betrayed by old friends (the conspirators), and saved by an old enemy (Boris Yeltsin). And Yeltsin rescued the man whose downfall he had actively sought and advocated. The Emergency Committee tried to restore traditional Communist authority in the Soviet Union, but wound up eliminating Communism from the country altogether. Gorbachev was the only Soviet leader to survive an attempted coup, and yet was the only Soviet leader to resign his post. Yet the most profound irony of the events of 1991 is that the Soviet Union essentially finished its existence with a coup after having been born of a similar political event, the 1917 Bolshevik coup, only seventy-four years earlier.

¹⁹⁷ Neil A. Lewis, *Kennan Says Failed Coup Eclipses '17 Revolution*, N.Y. TIMES, Aug. 24, 1991, 9. Mr. Kennan is among the last of a group of scholar-diplomats who specialized in Soviet affairs and affected the course of post-World War II history by doing so. *Id.*

¹⁹⁸ *Id.* Kennan continued: For the first time in their history, the Soviet people have turned their back on the manner in which they've been ruled – not just in the Soviet period but in the centuries before. They have demanded a voice in the designing of their own society.... *Even 1917 had nothing quite like this. It's the most hopeful turning point I've ever seen in Russian affairs. Id.* (emphasis added).

¹⁹⁹ *Id.*

²⁰⁰ *Id.* "Everyone...in public life has his hour and his period. You can't expect to have really more than one and I think Gorbachev...has pretty well exhausted what he had to give to the Russian situation." *Id.*

²⁰¹ Serge Schmemmann, *Across East Europe to Moscow, the Trial of Freedom Reaches Tyranny's Epicenter*, N.Y. TIMES, Aug. 25, 1991, Sec. 4, 1.

The Reagan Pipeline Sanctions: Implications for U.S. Domestic Policy and the Future of International Law

By Oliver C. Dziggel

***Abstract:** For nearly two years under President Ronald Reagan, the United States issued economic sanctions against the Soviet Union in response to the Soviet Union declaring martial law in Poland. While on the surface this seems to be a legitimate argument given Reagan's staunch anti-communist stance, in reality the sanctions were an attempt to prevent oil pipelines from entering Western Europe from Russia. This article analyzes the motives, effectiveness, and legality of the sanctions passed by the Reagan administration through the Export Administration Act of 1979. Economic sanctions are a common tool of international relations, typically used in response to unfavorable or unwarranted behaviors of other states. In this context, the Reagan pipeline sanctions were not out of the ordinary, and the United States was within its international legal rights to exercise said sanctions. However, the method by which the sanctions were employed raised questions about its legality. Firstly, the Export Administration Act of 1979 was interpreted to stop the use of licensed American technologies from being used in the construction of a Euro-Siberian pipeline, regardless of any contracts already in place, raising the issue of ex post facto applications of the law. Additionally, this interpretation of the law by the Reagan administration can be seen as violating international law and the sovereignty of foreign states by imposing U.S. law on foreign soil. As such, the sanctions caused outrage in Western Europe, the U.S.'s allies seeing this as an infringement on their rights as sovereign states to conduct business. This article concludes with suggestions for better U.S.-European cohesion regarding the Soviet Union.*

For close to two years, the United States maintained economic sanctions which were aimed at the Soviet Union but which in their application most directly affected its four closest allies in the Western world. The official reason for the imposition of the sanctions was the Soviet role in the declaration of martial law in Poland; the vehicle for the sanctions was the embargo of American goods and technology deemed vital to the completion of the Euro-siberian natural gas pipeline; and the mechanism for their imposition was the Export Administration Act of 1979.¹

Strictly speaking, the sanctions were a failure, just as previous U.S. attempts to unilaterally embargo its grain, goods or technology were diluted by the nature of the liberal

¹ The S.U. announced that its security was threatened by the civil unrest in Poland (*New York Times* [NYT], 11 December, 1981, 4:3); martial law was declared in Poland, (*NYT*, 13 December, 1981, 1:6); the S.U. announces the imposition of martial law in Poland one hour after the Poles first are informed, (*NYT*, 13 December 1981, 13:1); President Reagan announces economic sanctions against the S.U., (*NYT*, 29 December 1981, 1:6); defected Polish Ambassador cites S.U. role in martial law imposition, (*NYT*, 29 December 1981, 6:1). The EAA of 1979: 50 *USCA App. sec. 2401 et seq (SUPP. 1981)*.

international trade order it helped to create.² At the time that Mr. Reagan lifted the sanctions, on 13 November 1982, there was indeed little progress to report an easing of conditions in Poland and it was abundantly clear that even the toughened and expanded sanctions had made virtually no impact upon the Europeans' decision to proceed with their commitments for the construction of the line.³

Economic sanctions, even closely observed "universal" ones, have a remarkably low rate of success, yet they continue to be employed as an instrument of foreign policy and international law.⁴ Given the long-term counterproductive side-effects, (whether measured in lost jobs and markets, increased diplomatic tensions, or political capital spent), the symbolic quality of economic sanctions is at best dubious if not all together archaic. Furthermore, in the case of the Reagan Euro-siberian pipeline sanctions, a number of serious questions have been raised as to the compatibility of the U.S. sanctions mechanism and enforcement effect with accepted standards and precedents in international law.

This paper proposes to examine the Euro-siberian pipeline sanctions in the international legal context. There are two elements to the discussion: The first is an examination of the pipeline sanctions in the context of international economic sanctions, for which there is ample international legal precedent to suggest that the U.S. was within its prescribed legal rights in electing to construct an embargo. The second is an inquiry into the *modus operandi* of the Reagan sanctions, from which it is equally clear that the *ex post facto* and extraterritorial application of U.S. municipal law is in violation of international law, and arguably the enabling Act itself.⁵

On balance, the U.S. sanctions offer some valuable long-term contributions to the vitality of international law, even as the short-term objectives operated as a dysfunction of that system. For the U.S. domestically, it is quite likely that Congress will step in to revise existing Public Law to better reflect existing international law (ie: to alter the language in order to eliminate future conflicts-of-law by tightening municipal controls), and in so doing, enhance American interests and reinforce the structure of international law in the long run.⁶ The Judicial branch has

² See for example: *An Assessment of the Afghanistan Sanctions, Report*, Subcommittee on Europe and the Middle East, of the House Committee on Foreign Affairs, (Library of Congress, Congressional Research Service [CRS]), (97th Congress, 1st Session), GPO: April 1981.

³ Bernard Gwertzman, "Lifting of Sanctions," *NYT* 15 November 1982.

⁴ See: C. Lloyd Brown-John, *Multilateral Sanction in International Law, A Comparative Analysis*, NY: Praeger (1975); Margaret Doxey, *Economic Sanctions and International Enforcement*, NY: Oxford University Press (1971); Johan Galtung, "On the Effects of Economic Sanctions: With Examples in the Case of Rhodesia," *World Politics*, Vol. 19, No. 3. April 1967, 378-416.

⁵ Charles Maechling (op-ed), "Pipeline Embargo: Reagan's Off Base," *NYT*, 8 August 1982; Leslie Gelb, "Pipeline: An Impasse with No End in Sight," *NYT*, 31 August 1982; and Stephan Rosenthal, testimony in *Hearings: Soviet-European Gas Pipeline*, Subcommittee on International Economic Policy of the Senate Foreign Relations Committee, (97th Congress, 2nd Session), at page 43. Rosenthal states that some lawyers in the Administration have concluded that there is insufficient legal basis for applying U.S. export law to frustrate the contracts the European contacts the European licensees have undertaken. (Obviously a minority view.) In addition, the *NYT* reported that, "the legality of whether the U.S. can enforce such a ban beyond its borders may have to be decided in court, according to administration officials" (Steven Weisman, *NYT*, 23 July 1982, A1).

⁶ See generally, *Hearings: Soviet-European Gas Pipeline*, (op cit). And more recently, Hearings of the Senate Banking Committee pertaining to the renewal of the EAA of 1979, held 3 February 1983.

already made significant contributions in this regard, in recent Supreme Court rulings pertaining to corporate practices and antitrust.⁷

For the international system as a whole, the sanctions evoked a renewed interest and activity on the part of the Western trading nations in the establishment and reinforcement of multilateral coordinating forums for a broad range of priority issues which are destined to become sources of potential conflict in the decade ahead. Prominent areas of concern include: technology transfers and trade (particularly in the East-West security framework), communications and advanced technology systems and services (computers, satellites, trans-national data flows and fiber optics), energy (nuclear proliferation, alternate resources, oil and natural gas), and the global monetary system (international banking standards, developing country debt, inflation control and interest rate policy coordination). To meet these challenges, the U.S. has committed itself to long-term coordinated studies, consultations and negotiations within the framework of a number of multipartite international organizations (such as the Organization for Economic Coordination and Development, COCOM, the International Energy Agency and the North Atlantic Treaty Organization). At a minimum, it can be hoped that this interaction will help to alleviate future tensions resulting from the dogmatic and self-centered disregard for the community of nations. And taken to its maximum potential, it can result in the furtherance of international law and international organization, and thereby bring about a sense of peaceful coexistence and enhance national security.

The starting point for this analysis will be a brief background examination of the Euro-siberian pipeline project which is the impetus for the legal conflict. The chronology of events and the description of the pipeline deal from its inception are vital to a complete understanding of the particular policy stances taken by each of the disputants. (An annotated chronology follows the text, see Annex One.) Next will follow a survey of the broad theoretical concepts incorporated in the Reagan decision to block the construction of the pipeline as a method of sanctioning a perceived international lawbreaker and the European perspective as to why this unilateral action is unacceptable, regardless of the guiding rationale. The U.S. sanctions will be discussed in terms of the principles of economic welfare and the desire to advance certain ideologically-oriented foreign policies. The European counter-actions will be examined in the context of a proper and valid preservation of national sovereignty and the endemic obligation to fulfill binding legal contracts (ie: the triumph of law and economics principles over politics).

This will be followed by a substantive analysis of the EAA as domestic legislation with extraterritorial application and its compatibility with the standards and norms reflected in international law. The keystone to this discussion will be the derivation of the intent and the provisions of the Act as distilled from Congressional and Executive decisions and statements, and from prominent legal opinion and judicial precedents. In this regard, parallels will be drawn to relevant examples of other U.S. attempts to extend extraterritorial reach, as in the fields of antitrust and financial regulation. In addition, foreign countervailing measures will be assessed

⁷ See *Halophane Co. v. U.S.*, 352 US 903 (1956) aff'g per curiam, 119 F. Supp 114 (S.D. Ohio 1954); quoted in Kenneth Feinberg, "Economic Coersion and Economic Sanctions," *American University Law Review*, Vol. 30-323, Winter 1981, 323-348. For other recent developments in U.S. antitrust, see Karen Kane, "Judicial Confirmation of Considerations of Comity and International Relations in the Exercise of Extraterritorial Jurisdiction of the Sherman Act," *Delaware J Corp L*, 5:292-318 (1980).

from the perspective of the inherent dangers these actions and reactions could pose for the future of amicable international relations.

And finally, these observations will be condensed into a cogent assessment of their value and possible contribution to the effectiveness of international law. In this vein, conclusions will also be drawn as to why the existing international law was unable to respond more directly and decisively to the crisis incurred by the pipeline sanctions, and what progress can be expected in the near future on the substantive issues which prompted the imposition of these policies.

Negotiations began for "Russia #6" approximately six years ago.⁸ It represents the Soviet Union's third gas-for-export pipeline, and their sixth from the Yamburg/Urengoi gas fields (on the Yamal peninsula) west towards European Russia and its Eastern client states. As recently as a year ago, there was no open Western consensus as to the precise route the pipeline would take, nor where it would finally hook up with the West European network. The most recent information indicates that the Soviets plan to first expand the production from Urengoi fields to accommodate the initial contractual requirements (set to begin by late 1983 or early 1984), and then late "phase in" additional fields and lines to meet the incrementally expanded commitments. The pipe will pass through Czechoslovakia (which is partially responsible for the construction of that portion of the link) and will ajoin the Western network of Uzhgorod on the Czechoslovakian frontier with the Federal Republic of Germany (FRG). (Refer to maps in Annex 2, 3, and 4.)⁹

The present 5000 kilometer, 56-inch diameter pipeline project promises to be one of the largest engineering feats in recent history. Even so, the starting point for the negotiations proposed a pipeline of even more grandiose proportions, reportedly quadruple of Europe's present energy demands. The original proposal was to involve between 10 -15 billion dollars of European capital, plans to develop natural gas fields even further east along the Yamal peninsula and a target export capacity to Western Europe to reach up to 60 – 70 billion cubic meters (bcm) per year (ie: constituting about 10 percent of Soviet gas exports).¹⁰

Under present agreements, "Russia #6" will represent about 15 percent of the total value of various Soviet pipeline projects to be built over the next decade, according to U.S. estimates.¹¹

In the early 1970s, both the U.S. and Japan were also involved in the process of seeking Soviet gas. In 1977, Japan was able to conclude a deal to drill offshore oil near Sakhalin Island. (Portions of that project were also affected by the Reagan sanctions and the Japanese announced plans to reschedule certain operations as a result.) The first American bid for the Siberian gas was led by a consortium of three Texas-based corporations in 1971-72 during the Nixon administration, but failed.¹² The second effort, by the El Paso Corporation, Occidental Oil of Los Angeles and the Bechtel Corporation, actually sank 50 million dollars into exploratory efforts before dropping out.¹³

⁸ Miriam Karr and Roger Robinson, "Europe's Big Gamble on Soviet Gas," *NYT*, 19 April 1982. The term "Russia #6" is used throughout EC documentation to distinguish that project from other pipeline or natural gas negotiations.

⁹ Ed A. Hewett, "The Pipeline Connection: Issues for the Alliance," *The Brookings Review*, Fall 1982, 15-16.

¹⁰ *Ibid.*, 15-16.

¹¹ Bernard Gwertzman, *op cit.*

¹² John Hardt, "Soviet Pipeline Factsheet: Energy Equipment Sales to the USSR," U.S. Library of Congress, CRS, 15 July 1982, (mimeo), 4

¹³ Victor Perlo, "Reagan's Pipeline Vendetta," *New World Review*, July/August 1982, 15.

In the “North Star” project, the main Western negotiator was American-based Tenneco. The plan was to carry 20 bcm from Urengoi to Murmansk by pipeline, and then transport it by ship to the U.S. The deal, like its other American predecessors, fell through because of “the U.S. government reluctance to contemplate loans and guarantees in the magnitude implied by the deal (set at 7 billion dollars).” Another U.S. – S.U. deal also collapsed due to financial constraints.¹⁴

In 1978, the European Community (EC) financed the “MEGAL” pipeline system, which connected several European networks to a Siberian natural gas outlet on the Czechoslovakian border. It was to be the first leg of a system that was intended to eventually network most of Europe with sources in the S.U., Iran and North Africa, as well as the EC’s “domestic” sources such as in the Netherlands.¹⁵ Stemming partly from earlier plans and partly in response to U.S. concerns of “energy cut-off blackmail,” the EC has re-emphasized that it is proceeding with these plans to tie all of its member states together under one network, so that any unforeseen cutbacks or shortages can be met by adequate “domestic” reserves.¹⁶

Based on these previous arrangements, Soviet gas deliveries to Western Europe reached 23.5 bcm per year in 1980.¹⁷ According to the EC, the new Soviet gas supplies will significantly diversify Europe’s sources and thereby conserve “domestic” European gas. The additional gas will represent less than 4 percent of the EC’s total energy consumption and approximately one-third of its gas consumption. Of course, the energy consumption blend in each member state will vary according to its own resources and foreign acquisitions.¹⁸ By 1990, European countries will be relying on Soviet natural gas to the following amounts: the FRG, 34 percent; France, 26 percent; Italy, 35 percent; the Netherlands, 11 percent; and Belgium, 40 percent.¹⁹

At this time, seven West European countries are expected to benefit from the Urengoi gas deliveries – Italy, the Netherlands, Belgium, Austria, Switzerland, France, and the FRG. Only the latter two, however, have at present concluded contracts for the Siberian gas (roughly 10 bcm per year each). In addition, Italy, Great Britain, France and the FRG will also be supplying the Soviets with pipeline components such as pumping stations, large diameter high pressure steel pipes, turbines and computer controls. It has been speculated that the Netherlands withdrew from the negotiations (competition) for the finance credit portion of the deal when it was determined that they were out of the running for equivalent orders of goods and services in the pipeline project.²⁰ However, the early reportage which suggested that the Euro-siberian pipeline was essentially a pipeline-for-gas “swap” represented a considerable oversimplification of the matter, as will be shown below.

The “deal” is actually comprised of three separate elements, all negotiated on a bilateral basis between the various West European concerns and the Soviet state trading agency. The

¹⁴ Hewett, *op cit*, 15.

¹⁵ European Investment Bank, “Press Release, 20/78 (8 June 1978)” 1.

¹⁶ See: “Europe Protests Bans By Reagan,” and “Text of Common Market Statement on Embargo,” *NYT*, 13 August 1982.

¹⁷ Karr and Robinson, *op cit*.

¹⁸ Text of EC statement, *NYT*, *op cit*.

¹⁹ EC “Newsbrief, 23/24 Nov 81.” In addition, Austria is to receive 82% of its natural gas through Soviet imports (*NYT*, 15 November 1982, *op cit*).

²⁰ “The Gas Bubble Breaks,” *Europe Magazine* (EC), April 1982.

breakdown can be made as follows: 1) official credit lines, 2) equipment and pipeline sales, and 3) sale of the natural gas.²¹

(1) *Official credit lines extended to the S.U.* – A total of between 5-15 billion dollars has been organized by a consortium of European banks headed by Deutsche Bank, which can be used to purchase equipment manufactured in each of the West European participant countries. The loans had been agreed to in principle as early as 2 February 1982, but as domestic interest rates rose a short time thereafter, the bankers became unwilling to assume the additional risk. (The Soviets had insisted on single-digit interest rates and the interbank rate at that time was 13 percent.) The final agreement encompassed a 10-year loan with a 3-year grace period, at an interest rate of 7.75 percent.²² *The Economist* reported that “agreement became possible when the Bundesbank quietly increased from DM 3 million to DM 5 million the discounting facilities it provides the AKA Ausfuhrkredit GmbH, which act as a private export bank.²³ This procedure brought down the nominal rate to the Soviets to an acceptable 9.18 percent – the difference to be made up on higher prices for equipment sold to the Soviets. The Soviets, in prime capitalist form, chose to pit various national banks against each other in order to receive the most competitive offer. It has been speculated that as time grew nearer to the 1984 deadline for its 5-year-plan, the Soviets became more flexible in negotiations, and more generous in their demanding terms. (Still, most sources believe that the lion’s share of the benefits accrue to the S.U. from the negotiated deal.)²⁴ The FRG will officially insure 85 percent of its 2 billion dollar commitment, while the French government will underwrite 100 percent of its 1 billion dollar portion of the loan, after amending their original commitment to insure only 85 percent of the total.²⁵ This French extension reverses its February 10, 1982 “gentleman’s agreement” to lend the final 15 percent (140 billion dollars) at market rates with no government guarantees, as the FRG is doing. But the French have argued that without the additional government guarantees, they are at a competitive disadvantage due to the lower underlying inflation rates in the FRG.²⁶ The accord signed by the consortium of western banks on July 13, 1982 provides for credits of DM 2.8 billion initially (but this amount can be raised to as high as DM 4 – 5).²⁷ The effective rate is said to be 9.6 percent taking into account the additional surcharge on the equipment delivered to the S.U.²⁸ France’s state-subsidized credits are at a flat rate of 7.75 percent. Britain’s Morgan Gren Fell & Company merchant bank has extended a 348 million dollar line of credit at developed countries consensus rates. It is also backed by Her Majesty’s Government Exports Credit Guarantee Department.²⁹

²¹ Hewett, *op cit.*

²² *Facts on File*, 1981, 205.

²³ “Fudged Finance,” *The Economist*, 1 August 1982, 60.

²⁴ “How the Deal Was Done,” *Financial Times*, 30 August 1981.

²⁵ Henry Trewhitt, “Pipeline Challenges Builders and Nations,” *Baltimore Sunpapers*, 2 March 1982. See also Peter von der Heydt (op-ed), “The Pipeline Sanctions: Both Sides Have Erred,” *Wall Street Journal*, 4 August 1982.

²⁶ *Facts on File*, 1982, 459. For an elaboration on the French argument and credits disputes, see also: Felix Kessler, *Wall Street Journal*, 15 November 1982, and Flora Lewis, *NYT*, 16 November 1982.

²⁷ “This Week in Germany – 16 July 1982,” FRG Information Office, 1.

²⁸ “Fudged Finance,” *The Economist*, 1 August 1982, 60.

²⁹ Steve Mufson, “Anatomy of the Continuing Soviet Pipeline Controversy,” *Wall Street Journal*, 31 August 1982, 29.

(1) *Equipment and pipeline purchases.* With the bank credits, the Soviets will be purchasing the following:

- 22 compressors from general contractors of Germany's Mannesmann and France's Creusot-Loire, for 940 million dollars,
- 19 compressor stations from Nuovo Pignone Company Italy for 560 million dollars, and
- approximately 700,000 to 1 million tons per year of large diameter high pressure steel pipe from Mannesmann and others.

Under these contracts, major suppliers are:

- West Germany's AEG-Kanis (five 10-megawatt turbines for the head stations and 42 25-megawatt turbines from the line stations),
- West Germany's Demag (five turbines for the head stations),
- Britain's John Brown Engineering (21 25-megawatt turbines),
- France's Creusot-Loire (42 gasline compressors),
- Dresser-France (21 gasline compressors),
- France's Thomson/CSF (computer controls),
- Alstom-Atlantique of France (40 25-megawatt rotor sets),
- Italy's Nuovo Pignone (57 turbines and 57 compressors).³⁰

In the context of private exposure to losses, the *Financial Times* of London reported the details of risks to suppliers as follows:

“The initial exposure of companies is probably confined to about 5 percent of the contract value, according to bankers handling financial negotiations. Financial exposure starts at the time of down payment but one supplier noted that contracts allow for change of status in export licenses and they specify that the supplier needs to gain the license to gain the down payment.”³¹

The report went on to say that the most vulnerable point in the “safety net” is a time deadline. If components are not received within a specified period of time, the Soviets have the right to cancel the entire order, and the Europeans are left to finance their stock. It would seem reasonable to assume that part of the reason that Italy, France, Great Britain and the FRG were so quick to order their firms to commence shipping their contracted equipment to the Soviets despite the Reagan sanction was to avoid this potentially expensive predicament.

(3) *Sale of the natural gas.* West Germany's Ruhrgas AG acted as the purchasing agent for Germany and France, in a commitment which will raise imports from the S.U. gradually from 1984 – 1987 to approximately 60 bcm per year.³² Ruhrgas, a private firm, is Germany's largest bulk natural gas transporter and operates the longest transport pipeline network in the FRG. In France, the state has a controlling interest in Gaz de France (GDF), which will be obtaining the Siberian gas via Ruhrgas; the general public receives its residential gas almost exclusively from GDF (by about 95 percent).³³ The gas purchase agreements have a 25-year duration, at an undisclosed official rate (estimated to be approximately 5.70 dollars per billion BTU, based on a

³⁰ Elizabeth Pond, “The ABC's of the Soviet Pipeline,” *Christian Science Monitor*, 1 September 1982, 1. See also: Paul Cheeseworth, “Hard Choices for Europe,” *Financial Times*, 22 February 1982.

³¹ Cheeseworth, *op cit*.

³² Hewett, *op cit*, 16.

³³ *Medium-Term Prospects on the Community Gas Sector*, EC, 28 September 1972, 81.

price escalator formula tied to the OPEC oil pricing BTU equivalent).³⁴ It is expected that the Soviets will be able to amortise their loan credits within four to ten years – thereafter, they will be receiving Western hard currency in return. Based on an import schedule of an additional 35 – 40 bcm per year at 20 – 25 pfennig per bcm, the Soviets could earn between DM 6 -8 per year.³⁵ This would mean that earning would jump from 3 billion dollars to 11 billion dollars by 1987. Still, it is estimated that it will probably not be large enough to forestall the decline in hard currency earnings from total energy, as the S.U. may cease to be a net exporter of oil by 1990. In 1981, the S.U. earned 14 billion dollars in non-natural gas energy exports, mostly oil. And significantly, total energy exports constitute 70 percent of all S.U. hard currency trade receipts.³⁶ These projected earnings do not take into account, however, the secondary costs associated with the building of the pipeline. The Soviets must provide labor, equipment and transport, infrastructure investment (towns, roads, communications, etc.), as well as some additional coordinating and management assistance.³⁷ One source states that “for each dollar spent on imported technology and equipment, an equivalent ruble expenditure of two dollars is required to cover local infrastructure costs – taking the total price for the Yamburg line to about 45 billion dollars.”³⁸

Over the course of time, the U.S. has raised a number of serious questions as to the political dangers for Europe in entering into a contract of such magnitude and such duration with the S.U. (while still emphasizing that the official reason for the sanctions is the imposition of martial law in Poland). These include: energy dependence (with the risk of political blackmail by the Soviets), concessionary credit arrangements (this pertains also to the previous loans to Poland, where the export-to-debt-service ratio is said to be excess of 140 percent), and the transfer of sensitive goods and technology to the S.U. (with potentially dangerous military applications and a net R&D savings to the East Bloc). These issues will be discussed in more detail below.

Mr. Reagan’s decision to unilaterally impose economic sanctions against the Soviet Union indicates four important points: 1) that he was unsuccessful in bringing a halt to the flow of technology and pipeline components to the S.U. from Western Europe through negotiation, corporate leverage or political pressure; 2) that he believed that there was a linkage between economic deprivation and political change; 3) that he concluded that unilateral U.S. action would have some measure of effect, despite vocal disapproval from the West Europeans (who vowed to proceed with plans to complete the pipeline); and 4) that he felt that the U.S. possessed a viable enforcement mechanism, at least to the extent that announcement was to be seen as more than a mere threat or pure political rhetoric.

It can be said that the first phase of the sanctions, the control of exports of goods and technology from U.S. soil, was met with general compliance and in no way challenged the norms

³⁴ CRS has reported this schedule, but so far this has been the only precise data available on the price structure per se. See: *Soviet Gas Pipeline: Overview of U.S. Sanctions and their Implications*, Library of Congress, CRS, 1982 (11 page mimeo).

³⁵ A four year estimate is presented in “Europe Ready to Finalize Huge Gas Deal,” *German Tribune*, 12 April 1981.

³⁶ Hewett, *op cit*, 18.

³⁷ *Ibid.*

³⁸ Karr and Robinson, *op cit*. See also: John Schutte, Jr., “Pipeline Politics,” *SAIS Review*, Summer 1982.

of international law and convention.³⁹ But the second phase of the sanctions, the attempted extraterritorial reach of U.S. law to foreign soil to dictate the actions of foreign corporations and foreign governments, is very much an infringement of sovereign rights and greatly contested under international law.

International law does provide for the use of economic sanctions as a form of coercive self-help short of war. Multipartite sanctions are codified in the U.N. Charter under Chapter VII. It is incumbent upon the Security Council (SC) to “determine the existence of any threat to peace, breach of the peace, or act of aggression” (Article 39), and the employment of economic sanctions is among the measures stipulated under Article 42 to “maintain or restore international peace and security.” Clearly the intent of the Charter was the universal application of sanctions by the full membership of the U.S. against an international law breaker as a form of collective security measure.

In this regard, the U.S. sanctions pose two problems. First, the U.S. and the S.U. are both permanent members of the SC and are therefore both capable of vetoing any propositions or recommendations repugnant to their own national self-interest. Second, the Reagan sanctions were imposed in the name of promoting “foreign policy” rather than protecting its “national security.”

Preservation of the latter is of course a universally accepted application of international law. The former, the management of foreign affairs, is also an important and broadly recognized doctrine of international law, but generally only to the extent that it does not impede the actions of other sovereign states. Interventions are acceptable only under specific conditions: 1) as justified by a treaty; 2) under collective action; 3) upon the explicit invitation of a state; and 4) on humanitarian grounds.⁴⁰ The Reagan administration maintains that the sanctions were imposed on humanitarian grounds (to protest the Soviet involvement in the imposition of martial law in Poland). The underlying reason, however, is a perhaps misguided belief that economic denial will bring the S.U. “to its knees” – certainly a strong element of economic warfare through commercial intercourse, or the denial thereof.⁴¹

In a manner of speaking, war has already been declared upon the U.S. – at a commercial level at least. In 1957, Nikita Khrushchev was quoted as saying: “We declare war upon you (the U.S.) in the peaceful field of trade.”⁴² But, in fact, the actions undertaken by the S.U. were merely one aspect of the ongoing Cold War hostilities between East and West since World War II. The ambiguity between a willful policy of constrained commercial relations and the full declaration of war was best described by Churchill in his reflection on the 1935 League sanctions against Italy: Stanley Baldwin, the incumbent British Prime Minister was resolute on the issue

³⁹ Two reports of violations are fully discussed in: Robert Cole, “U.S. Cites Pipe Sanctions in Making First Seizures,” *NYT*, 16 October 1982. On 8 October 1982, 30 cases of parts were seized at the Red Hook Terminal in Brooklyn. On 15 October 1982, 3 million dollars worth of turbine parts were seized (made by G.E. for Nuovo Pignone of Milan, which claimed that parts were destined for use in Algeria). Nuovo Pignone was added to the Commerce Dept. “blacklist” on 4 September 1982; G.E. claimed it hadn’t violated any restrictions in effect at the time.

⁴⁰ See generally: J.L. Briefly, *The Law of Nations*, Oxford: Clarendon (1963); T.J. Lawrence, *The Principles of International Law*, Boston: Heath (1906); and Sir Arnold McNair, *The Law of Treaties*, NY: Columbia Univ. Press (1938).

⁴¹ Frederick Painton, “Imbroglia Over a Pipeline,” *Time*, 2 August 1982, 30-31.

⁴² Quoted in Robert L Allen, *Soviet Economic Sanctions*, Washington D.C.: Public Affairs Press (1960), 39.

that “sanctions meant war; secondly he was resolved that there must be no war; and thirdly, he decided upon sanctions.”⁴³

At the theoretical level, one scholar has defined economic warfare as the “conscious attempt to increase the relative economic, military and political position of a country through foreign economic relations.” He went on to state that:

“The action must be purposeful, otherwise a nation merely in pursuit of the benefits of trade would be considered engaging in economic warfare if the action should improve its relative position. Economic warfare does not imply success. Rather it is the attempt that counts; a nation may fail and its actions may even have the reverse effect.”⁴⁴

There is, however, a very substantial difference between economic sanctions and economic warfare. Sanctions can, of course, be employed within the context of an economic war. But the declaration of sanctions does not generally, in and of itself, imply a declaration of economic warfare.

The distinction between the two concepts originates with the differences in the final goals sought, and particularly in the time-frame in which they operate. “Economic warfare seeks to affect and absolute change in the status of the target state and perhaps incidentally to spark structural changes within the state’s political and economic system.” Sanctions, on the other hand, “may be designed to affect the entire social system (as in Rhodesia). Generally, however, a more usual goal is to impose a price for the offending state’s continuation of an offensive policy or practice and if necessary to cause a change in that state’s political system or political attitudes – that is, to force the offender to renounce or alter a policy or mode of behavior.”⁴⁵

Sanctions, then, can be interpreted as not being designed to destroy a state outright, but merely to bring about a change of policy by making the continued implementation of a particularly policy a costly economic endeavor. When applied in conjunction with a declared state of war, it is clear that the distinction becomes less obvious. Historically, sanctions have evolved as an instrument of warfare; more recently, however, they have become more useful as an instrument for punishing an international lawbreaker. This reflects both the advancement of military technology and destructive capabilities to the point where its application is extremely costly and lethal (particularly true for nuclear capability), and the development of international law to a point where international standards for conduct (such as self-determination and basic human rights) have been effectively codified and are broadly adhered to, and avenues of redress are available in the form of international courts for arbitration and settlement.

The objectives for the imposition of economic sanctions can be identified as follows: 1) Primary: concerned with actions and behavior of a state against whom they are directed (the so-called “target state”); 2) Secondary: relating to the status, behavior, and expectations of the government(s) which are imposing the sanctions (ie: the “imposing states”); 3) Tertiary: concerned with the broader international system as a whole (either to the structure or the operation of the international system).⁴⁶

⁴³ James Barber, “Economic Sanctions as a Policy Instrument,” *International Affairs* (London), July 1979, Vol. 55, No. 3, 367.

⁴⁴ Allen, *op cit*, 28.

⁴⁵ Brown-John, *op cit*, 17.

⁴⁶ Barber, *op cit*, 370.

This is to say that, in the first instance, sanctions seek to redirect the behavior of the target state. Secondly, they seek to demonstrate the effectiveness of the imposing government(s) – for instance, that of the U.S. in controlling events in the Caribbean basin or that of the S.U. in Eastern Europe.⁴⁷ The implication of the success in this area is the moral, military, political or economic superiority of the imposing state(s) upon the target state. Conversely, of course, the failure of these sanctions can be seen in a similar light – which is perhaps why Mr. Reagan sought to use a shadow “agreement” among the allies as his political “fig leaf” in lifting the sanctions.⁴⁸ And thirdly, the imposition of sanctions to stave off an impending belligerent act or to enforce basic human rights is an essential mandate of international law in the quest to improve the international system. As Professor Hindmarsh once observed: “Sanctions are seen as the means for enforcement of the enlarged application of international law.”⁴⁹

Still, there is a general agreement among scholars that economic sanctions alone have not been an effective instrument in the attainment of their officially declared objectives.⁵⁰ Politicians, however, do not share this view – perhaps because their standard of measurement reflects a different calibration for success.

The prevailing view of sanctions encompasses three main points: 1) aside from purely punitive or symbolic considerations, sanctions have not been useful devices to induce, persuade or compel the target to comply with desired modes of behavior; 2) they may be dysfunctional by serving to make the target *less* rather than *more* compliant; and 3) while some effects may be deprivational, other effects may be very beneficial for the target, enhancing its political and economic situation in ways not foreseen by the senders.⁵¹

Integral to the success of sanctions is the degree of intensity to which a government commits itself to fulfill them. This level of commitment has often depended on that state’s direct interest in the case – “Sanctions against Iran were much more rigorously enforced by the U.S. and sanctions against Rhodesia... were much more strictly applied by Britain than by most other countries.”⁵² Furthermore, it has been noted that “embargoes (sic) on imports from a target country, except in the case of scarce commodities (eg: certain minerals), have tended to be more effective than prohibitions on exports to them as a natural function of the intense competition for export markets.”⁵³ This reflects the fact that while sanctions are decided by the government, and compliance is required by all sectors of society (individuals, groups, firms, financial organizations, etc.), the sacrifices are often incurred unevenly, as some companies (exporters to the target state) may be forced into bankruptcy, while others may even prosper from the demise of a foreign competitor.⁵⁴ The distribution of the burden of the sacrifice is often much easier to bear in the target state, where the hardships imposed can result in a unity against the oppressor

⁴⁷ *Ibid.*, 380.

⁴⁸ Henry Trewhitt, “France Has It Both Ways on Trade Accord,” Baltimore Sunpapers, 12 November 1982.

⁴⁹ Albert Hindmarsh, *Force in Peace: Force Short of War in International Relations*, Port Washington (NY): Kennikat (1973).

⁵⁰ See generally: Barber, *op cit*, 373-4; Doxey, *op cit*, 140. Specifically on Rhodesia, see: Galtung, *op cit*, p. 409+, Leonard Kapungu, *The UN and Economic Sanctions Against Rhodesia*, Lexington: Heath (1973), 128; and Harry Strack, *Sanctions: The Case of Rhodesia*, Syracuse (NY), Syracuse Univ. Press (1978), 238.

⁵¹ Strack, *op cit*, 13.

⁵² Robin Renwick, *Economic Sanctions*, Cambridge (MA): Harvard Univ. Press (1981), 79.

⁵³ *Ibid.*, 80.

⁵⁴ Barber, *op cit*, 377.

and an even greater determination to resist. The notion of “reverse psychology” was described in the following terms: “these assumptions of political collapse following hard upon economic disaster have proved to be unfounded. Indeed, economic sanctions have generally had the opposite effect of creating a sense of community in the target state.”⁵⁵

In some instances, though, governments may in fact be satisfied with the secondary, or demonstrative, quality of the sanctions. It may be that their desire is to win political capital to use in negotiations with the target state. In that case, one would anticipate that the heaviest burden resulting from the sanctions should fall upon the target state, and the imposing state uses the sanctions to negotiate a more favorable agreement. Or, in a similar fashion, if it is the intent of the imposing state to illustrate its willingness to “go the extra mile” in forcing the target state to a position of weakness (or to emphasize that certain threats made are more than political rhetoric), then the imposing state may wish to accentuate the high cost of the sanctions to its own economy – the acceptance of high costs demonstrates greater political will and resolve.⁵⁶

Alternately, the sanctions could be intended to be more symbolic than effectual – or intended purely for “domestic consumption.” Former British Prime Minister MacMillan wrote in his memoirs that “it is generally important for governments to be seen to be concerned and busy.” To illustrate this point even more poignantly, he quoted Foreign Minister Lloyd George in his assessment of Britain’s commitment to the League sanctions against Italy in 1935: “They came too late to save Abyssinia, but they are just in the nick of time to save the government.”⁵⁷

The termination of economic sanctions can be an equally vexing problem for the imposing state, particularly if they did not bring about desired change in the target state – and then particularly so if they were also designed to impress opinion in third countries. In general, one would expect that the leadership of the imposing state would have made the appropriate contingency plans in advance, in order to be able to retreat gracefully from a situation gone amok.⁵⁸ If the benefits to be derived from the sanctions are to be meaningful, then a careful calculus of all necessary prerequisites and possible outcomes must be undertaken well in advance, and the leadership must “make a large, and of necessity, unquantifiable allowance for

⁵⁵ *Ibid.*, 376.

⁵⁶ Renwick, *op cit*, 85.

⁵⁷ Quoted in Barber, *op cit*, 380.

⁵⁸ An interesting “timing theory” appears to have evolved out of the particular sequence of events surround Mr. Reagan’s decisions to broaden the sanctions on 18 June 1982, as well as to terminate them on 13 November 1982. One account asserts that it was the “flip assessment by Bonn and Paris that the painstakingly worked out Versailles compromise was a worthless piece of paper with no impact on ‘business as usual’ with the S.U. that triggered the U.S. sanctions on oil and gas transmission equipment in the first place.” Jess Lukomski, *Journal of Commerce*, 16 November 1982). In other words, the broadened sanctions represented a rather childish display of upmanship prompted by the Europeans’ cocky dismissal of earlier U.S. threats. (See also: Gwertzman, *NYT*, 15 November 1982 and Pine, *Wall Street Journal*, 15 November 1982).

But even more speculation surrounded Mr. Reagan’s termination of the sanctions on the afternoon of Saturday 13 November 1982. That same morning Mr. Reagan had visited the Soviet embassy in Washington to offer his condolences upon the death of Mr. Brezhnev. The previous day, Mr. Andropov had been named Mr. Brezhnev’s successor and the Polish media had erroneously announced Mr. Walesa’s release from official interment. And finally, the announcement came on the eve of Chancellor Kohl’s first official visit to the U.S. Mr. Reagan was therefore in a prime position to score big political points in the timing of his termination announcement – offering the Soviets the prospects of improved relations under the Andropov regime, as well as cementing relations with Europe via Mr. Kohl’s visit. For elaboration, see: Flora Lewis, “Pipeline Politics,” *NYT*, 16 November 1982, A27, and Jack Anderson, “High Tech Pipeline in Moscow,” *Washington Post*, 26 December 1982 D7.

the redirection of trade, leakages, disguised exports, and so forth.”⁵⁹ In other words, it must be realistic in its assessment of the possible outcome of the sanctions, or else risk both an unfavorable resolution of events or political embarrassment.

As alluded to above, there are several types of economic sanctions that can be applied, ranging from the very passive to the very active. A *boycott* is the refusal to import goods and services from a particular target state. An *embargo* is the denial of exports to a target state. Both of these are generally seen as rather passive, and they are also very often confused in popular literature. On the most active end of the spectrum is the economic *blockade* or “quarantine,” which is an attempt to rigorously enforce the economic isolation of a target state by breaking all of its commercial ties with the rest of the world. Often this policy has to be supported with military involvement, such as mining the harbors of the target state, or encircling it with ships or land forces.⁶⁰

Without multinational support, these long-establish methods can only be effective if the imposing state is the major trading partner of the target state, or perhaps even the monopoly seller or market (or has such a degree of military superiority that it can apply an effective quarantine without outside resistance).

In recent history, even economic sanctions with world-wide support and U.N. mandate, such as the Rhodesian episode, have proven to be not fully successful in establishing economic isolation. “Rhodesia is the only case in which an effort has been made to maximize sanctions on each of these three scales – universal, comprehensive, and mandatory. It took 30 months to reach that position, and even then the application of sanctions did not gain universal support.”⁶¹ As in the case of an economic cartel, surreptitious avoidance (or open disregard) of an established code of conduct can bring a windfall of profits – as South Africa and Switzerland both serve to illustrate.⁶²

More recently, new and more sophisticated methods of applying economic pressure have been devised and successfully implemented. In response to the seizure of its embassy in Tehran, the U.S. government ordered certain Iranian financial assets frozen in American banks.⁶³ And as will be discussed more fully below, the U.S. has sought to stop the flow of ideas (ie: technology, licenses, and patents) and services (banking, management, engineering and insurance) abroad under the Export Administration Act of 1979 (EAA).⁶⁴

⁵⁹ Renwick, *op cit*, 58.

⁶⁰ Brown-John, *op cit*, 16.

⁶¹ Barber, *op cit*, 368. For a step-by-step analysis of the Rhodesian sanctions, see Strack, *op cit*, 16+.

⁶² See: Renwick, *op cit*, 84, and for a more recent illustration of cartel-breaking benefits, see: “Britain, Norway Lower Oil Price; Nigeria Expected to Follow Suit,” *Washington Post*, 19 February 1983 A1, A14.

⁶³ On the Iranian Assets cases: Executive Order #12, 170, 3 CFR 457 (1979): President Carter blocked removal of Iranian government property from the U.S. For amplification see: Feinberg, *op cit*, 336.

⁶⁴ For a thorough treatment of the relationship between technology transfers and national security issues, see: John V. Granger, *Technology and International Affairs*, SF: Freeman 1979, (especially Chapter 5: Export Controls [74-91]). Particularly relevant is the examination of the so-called “Bucy Report,” prepared for the Defense Science Board, which made three specific recommendations: “1) Technology contained in applied research or development may be of significance for selected areas,” but it is “control of design and manufacturing *know-how* [that] is absolutely vital to the maintenance of U.S. technological superiority. Compared with this, all other considerations are secondary; 2) A new systematic approach to controlling technology exports is overdue. This perspective *should focus on technology and not end product of technology*.... and 3) For the most critical technologies, the U.S. should

The immediate origin of the application of the EAA can be traced to a U.S. response to a form of economic sanctions imposed upon it by the Arab oil exporting states in the early 1970's. The Arabs sought to enforce a boycott of commerce with American corporations that were also doing business with Israel. The purpose of their boycott, then, was to affect a change of trading behavior of American corporations in an indirect manner. The U.S. has incorporated similar "end-user" clauses in certain export licenses (particularly high tech and military hardware) to prevent the re-sale of these goods to states deemed hostile to American interests.⁶⁵ The intent of Congress in enacting the present version of the EAA is not at all clear and is greatly disputed both here and abroad. The Act warrants a more substantive analysis also because it is the authority under which Mr. Reagan imposed the economic sanctions against the Soviets.⁶⁶

The pipeline sanctions were first imposed by Mr. Reagan on December 29, 1981, approximately two weeks after the Polish government declared a state of martial law on December 13, 1981.⁶⁷ But it was not until immediately following the Versailles economic

not release know-how beyond its borders and then depend upon COCOM agreements for absolute control." (Granger, 84) (Emphasis added).

On the costs of technology transfers from the West to the Soviets and the East Bloc, see *The Economist*, 20 November 1982, 22, and Jack Anderson, *op cit*, *Washington Post*, 26 December 1982. Anderson documents 19 specific military and industrial secrets obtained by the S.U. Examples include: ultra precise ball-bearing technology – which the S.U. used for its SS19 missile guidance systems; electro-optic sensors – used for laser range finders for tanks; and propulsion devices – such as missile case filament winding.

⁶⁵ Pertinent controls sections of the EAA: 50 USCA App. sec. 2405 (a)(1) (Supp. 1981). On Arab boycott see: House Report #95-190, 4-6. On the EAA of 1977, see Public Law 95-52, Title 1, sec. 204, sub-sec 11 (2), 95 sec 235. On end-user clauses see: International Traffic in Arms Regulations and the Mutual Security Act of 1954, Trading With the Enemy Act, 50 USC App sec 1 et seq (1970). For an annotated description of U.S. export controls see: 15 CFR, sub-sec 368-399.2. (See also: Hacking, *op cit*, 7 and the testimony of Marcuss, Senate Hearings, *op cit*, 3 March 1982.)

Four U.S. government agencies control export licensing: 1+2) State (in consultation with the Defense Department): arms, ammunition, implements of war (including space items) and related data and equipment – under the International Traffic in Arms Regulations and the Mutual Security Act of 1954, as amended; 3) Nuclear Regulatory Commission – has statutory responsibility over nuclear materials and technical data; and 4) Commerce Department – regulates the major portion of U.S. exports – those not classified under the above three headings. (Granger, *op cit*, 86.) For an annotated description of regulation controls under the EAA, see Marcuss, testimony for Senate Hearings, *op cit*, 3 March 1982.

There are two types of required export licenses: 1) *general license*. Established by the Commerce Department. No application is required and no documentation is issued – no restrictions on re-export apply. 2) *validated license*. A document, ie permission, issued by Commerce authorizing a specific export in accordance with the terms of the license. Contains restrictions on re-export and is subject to revision, suspension or revocation without prior notice. (Marcuss, *op cit*, 30.)

Penalties under U.S. export control law includes fines which can reach up to 250,000 dollars per person and 1 million dollars per firm or, if greater, five times the value of the prohibited transactions; jail sentences can be up to 10 years maximum. (Richard Lawrence, "France Rejects U.S. Sanction," *Journal of Commerce*, 23 July 1982.)

Under Secretary of Commerce Ulmer stated that the penalties were 'discretionary' pending investigation. (In other words, the administration may find that the corporation did all it could to comply with U.S. law, blame France for the violation, and then let the matter rest.) If deemed necessary, a warning letter is issued, and the corporation is placed on a denial list ("black-listed"), meaning that it would be prohibited from receiving the export of any goods or data from the U.S. (Clyde Farnsworth, "Collision is Near on Soviet Pipeline," *NYT*, 12 August 1982 D1, D6).

⁶⁶ On the dispute, see: Leslie Gelb, "Pipeline: An Impasse With No End in Sight," *NYT*, 31 August 1982; Marcuss and Rosenthal, testimony for Senate Hearings, *op cit*, 3 March 82, 43-44. And more recently, hearings were held in the Senate Banking Committee on the subject of the renewal of the EAA (3 February 1983).

⁶⁷ On Mr. Reagan's first sanctions announcement, see: *NYT*, *op cit*, 29 December 1981, 1:6; on martial law declaration, *NYT*, *op cit*, 13 December 1981, 1:6.

summit meeting in June 1982 that the Reagan sanctions flared up as a major policy dispute between the Western powers and as a direct challenge to international law.⁶⁸

On June 18, 1982, Mr. Reagan broadened the restrictions incorporated in the U.S. sanctions to include also the dissemination of technical data and licenses from the U.S., in addition to the actual goods and services covered in the original (December 29, 1981) edict. In so doing, the U.S. attempted to extend its long reach of law to foreign shores in an effort to prohibit the manufacture of U.S.-licensed products intended for the pipeline, as well as their subsequent re-export from foreign states to the S.U.⁶⁹

The announcement was met with immediate and heated denunciations from the West European capitals, accentuated by a 14-page formal protest document issued by the EC. At issue was not only the question of the nature of the sanctions' reach (ie: their attempted extraterritorial application), which was seen as an unacceptable violation of European sovereignty, but also their *ex post facto* demands (retroactively applied to licensed items already en route or under contract), which was seen not only as a breach of contract, but also as a break from the "assurances" to the contrary made by the U.S. at the Versailles summit (and earlier).⁷⁰

At home, the broadened sanctions also caused a political stir, and was the apparent "straw that broke the camel's back" which prompted the resignation of U.S. Secretary of State Alexander Haig, Jr. Mr. Haig was seen as Europe's "point man" in working to achieve the removal of the sanctions, but his effectiveness was reportedly greater hampered as a result of his

⁶⁸ On the Versailles Summit, see: RC Longworth, "Summit Virtually Ignores World Trade Chaos," *Chicago Tribune*, 11 June 1982; "Failure at Versailles," *Wall Street Journal* (editorial), 8 June 1982; Donald Regan, "The Versailles Summit and the World Economy," *Wall Street Journal*, 15 June 1982; Herbert Rowan, "The Summit Produced Few Real Decisions," *Washington Post*, 13 June 1982.

For official statements, see: "Press Conference of President Francois Mitterrand," Versailles, 5 June 1982 (French government release); "President Reagan Attends Economic and NATO Summits," *Dept. of State Bulletin*, July 1982, 1-9; International Communication Agency – *Morning Digest. Foreign Media Response*, (4, 5, 6, 9, 10, 14 June 1982) (Summary – President's European Trip, 14 June 1982); White House Press Office – *News Releases*, "Background Briefing of Senior Administration Official (Regan)," 27 May 1982, (35 page mimeo), "Briefing With Regan," 25 May 1982 (38 page mimeo), "Statement of the President," 6 June 1982 (2 page mimeo).

⁶⁹ Leslie Gelb, "U.S. Hardens Curbs on Soviet Gas Line," *NYT*, 19 June 1982, 1:2.

⁷⁰ In response to U.S. urgings, the 24 members of the OECD "took action to lift the minimum interest rate on export credits to the Soviets to more the 12 percent, bringing them in line with their rates to other major borrowers." As a consequence, Eurocredits were running at 33 percent of the previous year. (Peter Osnos, "U.S., Allies Still Far Apart on Trade Curbs," *Washington Post*, 20 November 1982. This is partly a reflection of the banks' attempts to tighten their belts to counterbalance the previous over-extensions of credit lines to Eastern Europe (*Der Spiegel*, #23/1982). On 15 April 1982, the *New York Times* reported that "the Reagan administration has decided to avoid further conflict with European allies and will seek instead to establish common ground rules for East-West trade at the Versailles Summit." On the Versailles Summit "deal," *Newsweek* reported that "The U.S. would reluctantly go along with Western Europe's plan to finance a gas pipeline to Siberia if France and the other Allies reciprocated by cutting back on cheap credits to the S.U." (2 August 1982, 37).

Chancellor Schmidt quoted the EC Statement of 22 June 1982 in assailing the U.S. actions, saying that the restrictions on licenses "implies an extraterritorial extension of U.S. jurisdiction... contrary to the principles of international law." On 24 June 1982, he was quoted as reaffirming the German commitment to "keep the contractual obligation" to the S.U. (*Facts on File*, 1982, 459 and *Newsweek*, 2 August 1982, 39.) Britain and France voiced similar sentiments (Susannah Kirkman, "EEC Chastises Reagan For Pipeline Restrictions," *Baltimore Sunpapers*, 30 June 1982.

frequent and well publicized clashes with his Cabinet colleagues on a broad range of issues, including the pipeline sanctions.⁷¹

As mentioned above, the basis for the Reagan sanctions was the EAA of 1979, which is a direct descendent of the Export Control Act of 1949 and has seen numerous revisions and reforms in the thirty years in force.⁷² The provisions under which Mr. Reagan imposed the embargo of U.S. technology and equipment have the peculiar language enabling the President to “prohibit or curtail the exportation of any goods, technology, or other information subject to the jurisdiction of the U.S. or exported by any person subject to the jurisdiction of the U.S., to the extent necessary to further significantly the *foreign policy* of the U.S. or to fulfill its declared international objectives.” (emphasis added)⁷³

The primacy of foreign policy considerations over “declared international objectives” such as maintaining the Western alliance (or even implicit ones such as the dedication to the spirit and the letter of international law) represents a steady deterioration of American leadership in the vanguard of the creation of international law and the reinforcement of international organization.⁷⁴

It is clear that the promotion of national foreign policy is an integral operation of the state in the modern international system and can be a vital link for international cooperation in that regard; but it is equally obvious that major policy decisions based purely on foreign policy considerations (as opposed to the “national security” or “vital interests” formulations), are repugnant to the spirit and long-term objectives of international law. The most incompatible

⁷¹ Secretary of State Haig’s resignation is offered and accepted, 25 June 1982 (*NYT*, 26 June 1982, 1:6, 4:2). A summary of Mr. Haig’s clashes is compiled in the same issue, page 6:2. See also Bernard Gwertzman, “Lifting of U.S. Sanctions,” *NYT*, 15 November 1982.

⁷² For some historical background on the EAA, see: David Lord Hacking, “The Increasing Extraterritorial Impact of U.S. Laws,” *Northwestern J of International L and Business*, 1: 1-10, Spring 1979, p. 7+; and “EAA – amendment H.R. 6838,” U.S. House Report, Committee on Foreign Affairs, (97th Congress, 2nd Session), House Report 97-762 (18 August 82). See also: 15 CFR pt 374 (1981), 15 CFR pt 374 (1974), and 15 CFT pt. 372.12 (b)(1), (1959).

⁷³ EAA of 1979, sec 2405 (a)(1); On the application thereof “The June order required that: 1) All persons within a third country may not re-export machinery or components for the exploration, production, transmission or refinement of oil and natural gas, if of U.S. origin, without the permission of the U.S. government; 2) Any person subject to the jurisdiction of the U.S. (including U.S.-owned or partly-owned corporations or subsidiaries in other countries) must get prior written authorization by the Office of Export Administration for export or re-export to the USSR of non-U.S. goods and technical data related to oil and gas exploration, production, transmission and refinement; and 3) no persons in the U.S. *or in a foreign country* may export or re-export to the USSR foreign products for similar purposes derived from U.S. technical data – a criterion very broadly defined.” (Quoted from “The Giants Lower Arms,” EC Commission, Background Report, 8 November 1982, ISEC/B35/82, p. 5).

On the legal authority for the broadened sanctions under the EAA, a report issued for the Subcommittee on Economic Policy and Trade of the House Foreign Affairs Committee stated: “The amended regulations control the foreign-made products of U.S. technical data, regardless of when the data was exported from the U.S., if the right to the use of the data is subject to a licensing or compensation agreement with persons subject to U.S. jurisdiction or if the recipient of the data has agreed to abide by U.S. export control regulations.” (“Legal Authority Under the EAA of 1979, as amended,” Committee Draft Document, mimeo, 2). It goes on to say that “regulations covering re-export of U.S. goods or technical data clearly advise exporters and foreign importers prior to export from the U.S. that subsequent shipments will be subject to controls in effect *at the time of re-export*” (p.4). “As with other controls, foreign importers are placed on notice that U.S. content in foreign products may subject such products to *subsequently imposed* U.S. controls” (emphasis added, p. 5)

⁷⁴ One might cite the U.S. role in the creation of the UN and the IMF as major contributions to international law and organization, while the U.S. opposition to the UN Law of the Sea Treaty could be said to represent a rather negative stance.

aspect of that provision or criterion is the fact that foreign policies can change as frequently as administrations change (or even more frequently than that, as Mr. Carter illustrated), while one can assume that the vital issues that define national security are potentially more concrete and substantable, and hence more defensible in the international legal context. Taken to the extreme, however, even the boundaries of “national security” policy can be so far reaching so as to make them unacceptable as an international legal defense.⁷⁵ As will be elaborated below, the developing notion of legal comity in international relations promises to be a significant contribution to the future of international law.

In a very real sense, the EAA has already inched a bit closer to the spirit of international law (*vis-à-vis* the concept of reciprocity and sovereign rights and duties), despite its recurrent use as a divisive or coercive foreign economic policy instrument. In revising the language of the Export Control Act of 1949, Congress (in 1969) removed a significant criterion for the consideration of an export license in deleting the phrase “export makes a significant contribution to the... economic potential of such nation or nations...” from the EAA of that year. In its effect, the change reflected the “Congressional feeling that the possibility that the export would strengthen the economy of the receiving nation was not of itself contrary to the security or foreign policy of the U.S.” A subsequent amendment even added language stating that “it is the policy of the government to encourage the widest possible range of exports, including technical data, for peaceful uses.”⁷⁶

In recent Congressional hearings, there is evidence of a certain continuation of this outward-looking trend.⁷⁷ There are at least three underlying reasons for this seemingly benevolent action. The first is that there is a growing Congressional concern that increased U.S. protectionism will be met with protectionism abroad, which could in turn lead to an all-out trade war – obviously not the recipe for a global recovery. Thus, certain obstructionist schemes such as domestic import legislation, anti-competitive non-tariff barriers and DISC’s (Domestic International Sales Corporations), are undergoing a healthy re-evaluation. More positive steps are also being undertaken to enhance U.S. industrial competitiveness and make U.S. law more compatible with international law.⁷⁸

The second reason for the Congressional action in this area is a desire to reform the Department of Commerce, something which has been attempted for the last two decades, but still lacks the momentum to produce conclusive results. The argument is that the Commerce Department cannot be simultaneously effective in promoting U.S. trade abroad while also being charged with the responsibility of vigorously applying the restrictive regulations mandated by law. Congress is looking at proposals to make the export control arm a separate entity, or to turn the authority over to the Customs Bureau (under the auspices of the Department of the Treasury) in order to better regulate these sensitive exports.⁷⁹

⁷⁵ The Soviets stated that their national security was being affected by the Polish unrest (and pressured the Polish government into imposing martial law), (*NYT*, 11 December 81, 4:3).

⁷⁶ Granger, *op sit*, 87.

⁷⁷ U.S. Senate Banking Committee Hearings, *op cit*, 3 February 1983. Among the specific recommendations made was the establishment of an Office of Strategic Trade – aimed at consolidating export control enforcement and ending agency infighting.

⁷⁸ Marcuss, *op cit*.

⁷⁹ U.S. Senate Banking Committee Hearings, *op cit*.

The third reason is that Congress seeks to create a more active role for itself in the formulation and implementation of future U.S. foreign economic policy. It can do so directly through a greater involvement in the control of corporations (MNC's) and export/import regulations (for example, by re-shuffling the Commerce Department authority).⁸⁰ Or it can do so by influencing the Executive branch. This past term, the House had passed a bill which would have repealed the Reagan sanctions, yet even if it would have survived a veto, the President would still have the authority to re-impose the same sanctions (as is still the case in the current EAA). Nonetheless, Congress would have made its policy point. Alternately, Congress could go even further by re-defining the President's authority under certain legislation. It could, for example, specify that the export controls may only be used in a declared state of national emergency. In the current EAA, the President *is* required to consider a grocery list of potential side-effects (including "the reaction of other countries to the imposition or expansion of such export controls..."), but he is not required by law to make those deliberations public.⁸¹ It should also be pointed out that the president has numerous other methods of imposing economic sanctions under his emergency powers.

These three key points are certain to be among the central themes discussed during the course of Congressional deliberations on export controls in the present Spring term, since the EAA is up for renewal this year. Foremost on the agenda will have to be a clarification of Congressional intent on the subject of jurisdiction over export controls, their prescribed proper application and limits. It is apparent from previous hearings, critical literature as well as Administration and Cabinet statements, that there are still many substantive questions that need to be answered.

To answer these questions, Congress will have to clarify the following five "grey areas" which were exposed as a result of the frictions incurred by the Reagan sanctions:

First, there is an "open question" as to whether Congress intended for the EAA to go beyond the control of actual exports from the U.S. and attempt to reach out to affect goods and technologies already exported to a foreign state. The EAA was "traditionally interpreted by U.S. government officials to give them control over commodities and technology originating in the U.S., even if only a small part of the product originated in the U.S." In broad application, this would give jurisdiction over foreign-produced machinery of which a U.S.-licensed technology was a contributing component.⁸²

⁸⁰ *Ibid.*

⁸¹ Generally, see: Arthur Downey, testimony, U.S. Senate Hearings, *op cit*, 3 March 1982 (p. 25). The specific considerations for the President are as follows: "1) probability that such controls will achieve the intended foreign policy purpose, in light of other factors, including availability from other countries of the goods or technology proposed for such controls; 2) compatibility of the proposed controls with the political objectives of the U.S., including the effort to counter international terrorism, and with overall U.S. policies toward the country which is the proposed target of controls; 3) the reaction of other countries to the imposition or expansion of such export controls by the U.S.; 4) the likely effects of the proposed controls on the export performance of the U.S., on the competitive position of the U.S. in the international economy, on the international reputation of the U.S. as a supplier of goods and their employees and communities, including the effects of the controls on existing contracts; 5) the ability of the U.S. to enforce the proposed controls effectively; and 6) the foreign policy considerations of not imposing the controls. 50 USCA App sec 2405 (b) (Supp 1981). (Quoted by Marcuss, Hearings, *op cit*, p. 38).

⁸² Rosenthal, *op cit*, 44.

Second, a further refinement of that same argument proceeds along the lines of control over goods and persons “subject to the jurisdiction of the U.S.” This too, would permit application to extend to foreign-based subsidiaries of American corporations or licensees by virtue of jurisdiction over their American counterparts or home office.⁸³ Both arguments one and two conflict with that foreign state’s right to control commerce within its own sovereign jurisdiction, as well as to conduct its own foreign policy (if the U.S. prohibits the sale or re-sale of legally-licensed technology to a third state).⁸⁴

This brings up point three – the *ex post facto* application of the controls. If the goods and technology were in fact legally licensed from U.S. firms, and if legally binding contracts and commitments have been made pertaining to the subsequent re-export of those goods and technology – does the U.S. have the right to demand a suspension of the entire process in order to comply with “foreign policy objectives?” The Europeans have a long tradition for putting commercial ventures above politics, but even the U.S. must recognize the value of *pactus in servanda* – honoring the sanctity of contracts. Furthermore, as one former Cabinet official pointed out, “the *ex post facto* character of the action... may be in violation of the due process clause of the Constitution.”⁸⁵ In general practice, contract provisions are construed in terms of the reasonable expectations of the contracting parties towards their fulfillment – therefore no “perpetual veto” clause on the part of the U.S. is foreseen or permissible in international law.⁸⁶ And in light of Mr. Reagan’s “soft-peddling” any options to broaden the sanctions at the time of the Versailles summit, it is clear that “(his) breach was aggravated by his failure to give prior notification, let alone to consult.”⁸⁷

Point four relates to the foreign reaction to the U.S. extraterritorial reach. In response to earlier U.S. exercises of antitrust and discovery procedures, several European countries have taken to the defense and have developed so-called “blocking statutes.” Recent U.S. Supreme Court rulings on comity and the international “Hague Convention on Taking Evidence” notwithstanding, our allies fear that without the formation of countervailing statutes, they will run the risk of continued American infringements upon their legal sovereignty.

Taking the example of antitrust, the American view is that “the relevant markets of antitrust concern are not neatly arranged according to national boundaries,” and that therefore the U.S. “...must be concerned with restrictive activities offshore which interfere with its own

⁸³ *Ibid.*

⁸⁴ On the question of extraterritoriality – is it obtained only through the foreign nation’s consent, see: John H. Wigmore, *A Guide to American International Law and Practice*, NY: Bender (1943), 47.

On corporate jurisdiction, the *Restatement (Second) of the Foreign Relations Law of the U.S.* (1965) states: “A corporation or other private legal entity had the nationality of the state which created it” (sub-sec 27, 39-40). Furthermore, it has been noted by the Courts that “if an American corporation owns sufficient stock of a foreign subsidiary to elect a majority of the board of directors, then it possesses necessary control” (In *Re Investigation of World Arrangements*, 13FRD 280, 285 (D.D.C. 1952), (Quoted in Feinberg, *op cit*, p. 335.)

⁸⁵ Former Commerce counsel Marcuss was quoted in Leslie Gelb, *op cit*, 31 August 1982.

⁸⁶ Rosenthal, *op cit*. Also, see generally, the concept of *rebus sic stantibus* in Brierly, *op cit*; and McNair, *op cit*.

⁸⁷ Maechling, *op cit*.

economy and society.”⁸⁸ That view is basically a restatement of the classic “effects doctrine” which has evolved out of the *American Banana* and *Alcoa* court cases.⁸⁹

The European view obviously reflects the perspective from the standpoint of those states on the receiving end of that doctrine, as best expressed by a member of the British House of Lords: “We do not oppose the rationale of antitrust... we do, however, take exception to the belief that antitrust objectives can be achieved internationally only by the extraterritorial application of U.S. law.”⁹⁰ The British response to the U.S. intrusion upon its jurisdiction was the Protection of Trading Interest Act of 1980. Although the Act is basically designed to “block investigation and discovery, the obtaining of documentary evidence, the compelling of testimony and the carrying out of judgements” pertaining to antitrust, it is clear that complimentary statutes designed to block other forms of U.S. economic imperialism are in great danger of gaining currency among our trade partners.⁹¹ The Trading Act was imposed by the Thatcher government to order British corporations to defy the Reagan ban. Although Mrs. Thatcher was vocal in her opposition to the sanctions, the government issued a carefully worded statement to the effect that the government supports defiance, but does not directly order noncompliance of the Reagan sanctions.⁹² Mysteriously, this form of “hedging” was also repeated by France and Germany.⁹³ The motive for this delicate manoeuvre is not clear at this point in time. Perhaps it was just a

⁸⁸ James A Rahl, “International Application of American Antitrust Laws: Issues and Proposals,” *Northwestern J Int L and Bus*, 2: 334-83, (Autumn 1980), 341.

⁸⁹ Feinberg observes that the U.S. “may claim subject matter jurisdiction over activity or conduct occurring outside its territory, if direct, *foreseeable* effect will occur...” The argument is that “the U.S. must protect its citizens from economic misconduct initiated abroad from otherwise safe havens.” (pp. 326-7) “Compare: *American Banana Co. v. Limited Fruit Co.*, (213 US 347, 356 [1909]) – ‘(T)he general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done’ with *U.S. v. Aluminum Co. of America* (148 F 2nd 416, 443 – 2nd Cir [1945]) – ‘(I)t is settled law... that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends’ (fn: p. 326).

An important clarification of the extent to which the Sherman Act may be applied extraterritorially occurred in *Mannington Mills v. Congoleum Corp.* (595 F 2nd, 1287, 3rd Cir [1979]) – It concluded that once subject matter had been determined, the courts should consider the interests of other nations (see: Kane, *op cit*, pp. 292-3). In effect, the narrow “effects doctrine” of *American Banana* had already been rendered obsolete under *Timberlane Lumber v. Bank of America* (549 F 2nd 597, 608-12, 9th Cir [1976]), *Zenith Radio Corp. v. Matsushita Elec Industrial Co.* (494 F Supp 1161, 1181 E.D. Pa [1980]), and *Dominicus Americana Bohio v. Gulf + Western Industries* (473 F Supp 680, 687, SDNY [1979]): “(H)istory has proven *American Banana* to be not a seminal decision but an aberration... There is now a broad agreement that is holding on the issue of jurisdiction is obsolete” (Feinberg, *op cit*, p. 327).

⁹⁰ Hacking, *op cit*, 3.

⁹¹ Rahl, *op cit*, 348. See also: “When the Pipeline Row Is Over,” *The Economist*, 30 October 1982, 19. *Other states with blocking statutes include: Australia, France, New Zealand; Canada has legislation pending. The U.K.’s Protection of Trading Interests Act of 1980 is reprinted in 959 Antitrust and Trade Regulation Report (BNA) at F1 (10 April 1980). See also comments by Lord Kilgerran in Milstein, “Debate: Extraterritorial Application of U.S. Antitrust Law,” 50 *Antitrust J* (Nov 81) at p. 624.*

⁹² Rita Dallas, “Britain Orders Firms to Defy,” *Washington Post*, 3 August 1982, A1. Three of the four companies ordered to defy are U.S. subsidiaries (Smith International [North Sea], Baker Oil Tools [UK], and AAF Ltd). While the British government supports, but does not order non-compliance, disregard of the Trade Secretary’s “suggestion” carries a maximum fine of 1750 dollars and possible jail terms for violators.

⁹³ *Facts on File*, 1982, 459. In addition, see: “Communique From the Office of the Prime Minister,” 22 July 1982 and “News and Comments – Vol. 82/26,” 24 June 1982 for French government documentation. For the FRG, see: “Statements and Speeches: Ambassador Peter Hermes, Milwaukee 14 May 1982 (Vol. 5/12, 25 May 1982),” and “This Week in Germany,” issues 17 June, 25 May, 2 July, 9 July and 16 July 1982.

method of avoiding possible future arguments under the “foreign government compulsion” principle as a legal defense in damage suits.⁹⁴ Or perhaps they felt that there had already been sufficient injury inflicted upon the body of international law, without adding additional blows to a moot issue.

The final “grey area” warranting Congressional action is whether the EAA should continue to be a potential instrument of U.S. foreign policy (as differentiated from national security). A corollary to this question is the definition of what constitutes the appropriate forum for the control of sensitive exports to the S.U. – and indeed, whether the regulation of trade should even be a policy instrument.

The Executive branch would argue that trade controls are an essential part of the repertoire of effective diplomacy – both as a “carrot” and as a “stick.” The opening of U.S. markets to Peking is seen as a powerful bargaining chip in the negotiations to establish normal political relations with the People’s Republic; and, it is argued, the denial of trade to the Soviets is an important instrument of “leverage” when seeking a particular policy concession. In the real world, however, these assertions do not really prove valid, particularly vis-à-vis superpower relations. Whereas there may be some intuitive validity in that argument in the rare case in which the U.S. is either the sole market for a good or the monopoly producer (arguably certain military hardware), experience has shown that if sufficient political will exists, any foreign state can easily circumvent any U.S. obstructionist policies. In some cases, the egocentric policy can even result in permanent and irreversible damage to the U.S.⁹⁵

Perhaps the most convincing arguments as to why the U.S. should refrain from resorting to the “trade lever” in pursuing foreign policy objectives are purely economic ones. Since WW II, the U.S. has been seen at the forefront of efforts to establish and maintain a liberal international economic order (which translates into positivist international legal order) – both for ideological as well as security reasons. An inadvertent side-effect of that policy is economic interdependence. Although foreign trade represents a relatively small percentage of U.S. Gross National Product (GNP), there are nonetheless many thousands of industries and jobs directly tied to international markets, both as a result of competing imports and U.S. export competitiveness (or lack thereof).⁹⁶

⁹⁴ For an explanation of enforcement of foreign government compulsion defense, see: *Interamerican Refining Co. v. Texaco Maracaibo Inc* (307 F Supp 1291, D Del [1970]): “The Courts of the U.S. will not impose liability where the acts under scrutiny were required by the country in which a defendant does business” (Kane, *op cit*, p. 293fn). On the Act of State and the Foreign Government Compulsion defenses, Rahl writes, “Two corollary questions of great importance merit study. One is whether strong encouragement or persuasion by a state which falls short of probable compulsion should ever be given status as a defense...” Presently, this is not the case, he concludes.

⁹⁵ Generally, see: *An Assessment of the Afghanistan Sanctions*, Report, Subcommittee on Europe and the Middle East of the House Foreign Affairs Committee (Library of Congress, CRS) (97th Congress, 1st Session), Washington DC: GPO (April 1981).

⁹⁶ The number of people abroad who are directly or indirectly support by U.S. economy is estimate at 20 million; if every employee supports four others, 80 million; ITT alone supports 400,000 globally outside the U.S. (Hacking, *op cit*, p. 10fn). Furthermore, U.S. government actions are compelling U.S. MNC’s to divert sensitive operations abroad. For example, the Cameron Iron works of Houston has received a 100 million dollar contract in the S.U. for oil and gas well equipment (unrelated to the Siberian gasline project). It side-stepped the December Reagan prohibitions against trade with the S.U. by contracting through its German subsidiary and having subsidiaries in Germany, France, and Scotland assemble the equipment (Marcuss, “Firms Are In a Bind Over Pipeline,” *Washington Post*, 9 August 1982.

In establishing a reputation as an unreliable trade partner, the U.S. is defeating the comparative advantage it may possess in particular sectors, and it is denying itself the role of leadership in the transition from an industrial to a service society. By attempting to preserve a perceived monopoly by applying economic sanctions contrary to international law and her long-term interests, the U.S. is ignoring a lesson experienced centuries ago by the British, who attempted to preserve their “monopoly” of (weaving) mill technology through the attempted extraterritorial application of domestic law. At that juncture, mill technology fled the constrictive British environment and flourished in the more liberal American colonies. By adhering to a policy that was unenforceable and counterproductive, Britain took the first steps toward her own decline, while simultaneously contributing to the speeded development of a commercial adversary.⁹⁷

The Reagan sanction were not the first American use of economic sanctions, nor were they the first attempt to block European plans to diversify energy stocks and to create employment via the construction of a pipeline from Soviet Siberia. In 1962, for example, President Kennedy was successfully able to pressure German Chancellor Adenauer to drop plans for an oil pipeline from Siberia to Western Europe, which was also to employ Western technology and Western large diameter pipe. At that time, the U.S. was able to squash the effort through its NATO network.⁹⁸

President Reagan, however, faces a different Europe today than the Europe of the early 1960's. For one thing, the relative economic status of Europe vis-à-vis the U.S. has changed substantially, partly as a result of American policies and misfortunes (such as Vietnam and deficit spending, and Watergate) and partly as the result of the creation of the EC, which has deflected economic dependence on external resources and has reinforced intra-european trade and development. As a direct consequence of the awakening of a separate European (economic) identity, Europe has also developed a very distinct political conscience, based on shared mutual interests among the European states, and often highlighted by the collective differences within the U.S.⁹⁹

Among the more noticeable differences to emerge in recent years has been the issue of détente. For the three decades following the close of WWII, the U.S. has dominated discussions of East-West policy; on a purely military plateau, this monopoly is perhaps understandable – since the U.S. nuclear “umbrella” has served well to shield Western Europe from the perceived Soviet threat. (This has also meant that relatively fewer European resources have had to be earmarked for defense purposes, and hence available for more productive uses, such as expansive social welfare programs, increased industrial development, etc.) The U.S. has

⁹⁷ Compare this analogy with the “Bucy Report”(supra, footnote 64). There are two obvious problems with regulations essentially aimed at controlling ideas: 1) it would mean a curtailment of the movement of technology to friendly countries, whose attitudes are perhaps less stringent, vis-à-vis trade with a third country, and 2) controlling the movement of know-how is equivalent to controlling the movement and activities of people (Americans, as well as foreign nationals) who may have gained design and production engineering experience through the study at U.S. universities or through employment by U.S. firms (Grange, *op cit*, p. 85).

⁹⁸ Steven Mufson, *Wall Street Journal*, 14 July 1982, p. 32.

⁹⁹ Note for example the cohesive and forceful negotiations conducted by the EC on steel quotas in the Summer of 1982. For a summary of EC-US grievances or sources of conflict, see: EC Commission Background Report, “The Giants Lower Arms,” 8 November 1982.

benefitted from this policy not only through the stability this produced in Western Europe, but also through the prosperity which spread world-wide from the massive influx of American Marshall Aid as well as the liberal international trade order that was established under American direction. The political dividends were paid to the U.S. in the form of undisputed American leadership role for close to twenty years. During the early post-war years, the U.S. military presence paralleled her economic hegemony in that region – and her policies were without question mutually beneficial in the short-run.

The present Euro-siberian pipeline debacle can be seen in the context of Europe's growing political independence. But contrary to Washington's sense of logic, the progressive easing of tensions with the East on the part of the Europeans does not foreshadow a forsaking of Western ideals, nor does it necessarily mean that Europe is intent on ending one form of hegemony only to turn to another. Instead, the Europeans perceive a vital interest in reducing tension with the S.U., their geographical neighbor, both for security reasons as well as for potential commercial value. Their political argument is that stronger economic interdependence between East and West will contribute to improved overall cooperation in the long term; relations such as the pipeline project merely exemplify the comparative advantages of the two regions – fair exchange is beneficial to both parties.¹⁰⁰

The U.S. sees this increasing interaction and interdependence as potentially harmful, primarily because it represents a limiting factor in European options vis-à-vis East-West relations and hence portends a serious cleavage in Atlantic cohesion. But as one observer correctly noted, "it is America that henceforth must adjust to this condition or incur the onus of endangering Allied unity."¹⁰¹

It is therefore essential that the U.S. take the initiative, not to employ futile obstructionist policies such as the unilateral pipeline sanctions, but rather to construct and reinforce collective bodies for cooperative consultation and joint policy formation. The "agreements" reached among the allies can really only be seen as stalling tactics in lieu of more substantive discussions in a more appropriate operative forum. Perhaps existing organizations such as COCOM can be strengthened to better serve the multifarious needs of the Atlantic partners; or perhaps entirely new bodies will have to be formed in order to embrace the highly technical and complex details comprising transnational data flows and security. It is clear that these concerns are not shared *only* by the Western industrialized states alone; there is an increasing awareness among the Less Developed Countries (LDC's) and the Newly Industrialized Countries (NIC's) that they too have a real stake in the management of data flows and the allocation of technological resources.

For this reason it is clear that unilateral mandates are unacceptable, just as a "tyranny of the majority" is quintessentially divisive. For the U.S. to establish a common ground for the resolution of these potential conflicts, it should take the high ground and define the boundaries of the dispute by creating the forum for the discussion. The positivist element in the formation of international law is as inevitable as it is regrettable; still, the U.S. stands to lose more than it can possibly gain by insisting on playing by rules superceded by current events. (U.S. Colonial history comes to mind again – as the poorly equipped and severely understaffed Colonists

¹⁰⁰ Hewett, *op cit*, 19.

¹⁰¹ Robert Tucker, "...No, the Act is Right," *NYT*, 8 August 1982.

wrought havoc upon the British forces who insisted upon formation fighting, Continental-style, in the wilderness.)

The U.S. can learn from the pipeline sanctions and move immediately to enhance international law at two levels: First, it can incorporate the legal concept of comity into its relations with the international community by first reinforcing its practice domestically. As defined by the Supreme Court, comity “involves the extent to which the courts of one country will pay regard and give effect to the decisions and orders of another country.”¹⁰² In this context, Congress should mandate the consideration of extraterritorial effect in relevant legislation in order to balance the scale to an equilibrium point – ie: to neutralize any potentially coercive extraterritorial incursions upon foreign sovereignty (albeit, obviously not such an extent so as to curtail the Executive’s powers and prerogatives or “hamstring” the full range of national security options).

Second, the U.S. should “externalize” these policies via existing forums for international legal cooperation (such as UNCTAD, COCOM, GATT, etc.) in order to provide for their adoption through custom, and it should expedite the formulation of needed international guidelines through multipartite conventions and treaties. In addition, the formation of adjunct forums to focus specifically on the issues of greatest concern to the U.S. for the decade ahead should be conducted with an interest in furthering international organization and in the spirit of international law.

The U.S. possesses the economic and political resources to bring about these positive changes; it has the technological advantages and scientific skills to maintain its leadership role in this arena, as well as built-in incentives to protect not only her own endowments but also to preserve the environment in which they best operate; it needs to gather the political will to implement those policies which best serve the universal long-term interest. To wait for the next storm to reinforce its shelter may be too late.

In conclusion, one important point must be made. For the U.S. to be able to prove conclusively that existing U.S. Public Law provides adequate jurisdictional justification for the attempted extraterritorial application of those provisions is, in the final analysis, still not a sufficient burden of proof to suggest that the provisions will or can be successfully enforced. The clearest direct result of the entire Reagan pipeline sanctions episode is that on the political level, the U.S. has squandered its diminishing remaining political capital on efforts that were doomed for failure from their genesis, in light of their inherent international legal defect.

Moreover, as a result of this failed attempt, the international legal system as a whole has been substantively reinforced, and there are now strong indications that this new consciousness will provide a certain momentum for further improvements in the field of international law creation. The emerging concern for comity in municipal courts is certainly a positive step – and one element of hope to counterbalance the generally negative demeanor incorporated in recent “blocking statutes” and protective trade measures.

¹⁰² Feinberg, *op cit*, 336.

It would have been quite interesting to have seen the sanctions case go before the International Court of Justice at The Hague (a non-existent possibility, of course, since the U.S. had made it clear from the start that it would not submit itself to this forum of legal rigor).¹⁰³

In previous cases pertaining to the question of extraterritoriality and conflicts of laws jurisdiction, the I.C.J. has generally issued rulings restricting the assertions of extraterritoriality and sided in favor of the municipality in which the entity in question is legally domicile.¹⁰⁴ And as mentioned above, the U.S. Supreme Court has concurred with these decisions, in cases which pertain to the attempted application of foreign jurisdiction upon U.S. soil.¹⁰⁵

These two factors underscore the fact that the U.S. must therefore discount its presumption of control via antitrust laws, securities regulations and legislation such as the EAA, which are based primarily upon “control over ‘American persons’ including corporations and companies producing under American licenses.”¹⁰⁶

If, on the other hand, the U.S. wishes to rely on the enforcement of “end-user” clauses contained in certain validated export licenses, it may perhaps stand on firmer legal foundations. As Professor Lauterpact noted: “The legal nature of private law contracts and international treaties is essentially the same... Every treaty contains rules governing the international conduct of the signatory states, and every treaty, law making or not law making, is a source of international law for the contracting parties – and for no one else. Only agreements (which serve identical aims to contracting parties) may be regarded as sources of international law.”¹⁰⁷ Thus, if the European firms submitted themselves to certain and very specifically detailed criteria at the time of signing the contracts, whose effects may be altered or revised by subsequent events, and which may indeed call for the submission of their domicile state’s sovereignty, then the U.S. can

¹⁰³ Gelb reported at “Administration officials have said that they are not about to let the matter be adjudicated by the International Court of Justice in The Hague, with all the consequences for American law that an adverse decision would hold.” Secondly, she noted that the U.S. would be equally reluctant to press the issue in U.S. municipal courts, as it would surely entail a long process of appeals, and in the end France could just ignore the verdict, if found favorable. *NYT*, 31 August 1982.

¹⁰⁴ *Ibid.*

¹⁰⁵ This follows similar actions abroad. In 1953, the Hong Kong Supreme Court ruled that American goods, once placed on Hong Kong soil, were “discharged” and were “no longer subject to the jurisdiction of the U.S.” The goods in question were then delivered to China and no formal U.S. protest lodged. In the mid-1960s, the Fruehof Corporation told its French subsidiary not to ship tractor trailers to China. The French courts put the company under French receivership, the trailers were dispatched according to the contracts. The Johnson Administration took no punitive action. And, finally, the U.S. Supreme Court decided recently in *Avaglino v. Sumitomo/Shojo America* that the American subsidiary of a Japanese firm was subject to U.S. law where it concerned hiring practices. (The above cases were cited in Gelb, *op cit*, *NYT*, 31 August 1982.

¹⁰⁶ *Ibid.*

¹⁰⁷ H. Lauterpact, *Private Law Sources and Analogies of International Law*, NY: Longmans (1927), 156-157.

Note to the Reader: To date, the *Wall Street Journal* has been the only public source of information regarding the specifics of the license contracts. It reproduced the relevant passages from the G.E.-licensing contracts as follows: “... To facilitate the furnishing of data under this agreement, Alsthorn hereby gives its assurance in regard to any General Electric origin data that unless prior authorization is obtained from the U.S. Office of Export Administration, Alsthorn will not knowingly... export to any country Group Y any direct product of such technical data if such direct product is identified by the Code Letter A. Alsthorn further undertakes to keep itself informed of the regulations (including amendments and changes thereto) and agrees to comply therewith.” The *Wall Street Journal* explained that “Group Y” referred to certain countries, including the S.U., and that the “Code Letter A” is the status Mr. Reagan gave the rotors and other equipment and data in his 18 June 1982 edict. (*Wall Street Journal* (editorial), 23 July 1982.)

expect these obligations to be fulfilled, just as any other treaty in force among the Atlantic allies. The fact that the European states which are affected by these actions will naturally find any U.S. attempts to exercise enforcement under these agreements repugnant and injurious to their sovereignty is all the more reason to anticipate either cooperation and consultation to abridge the effects of these agreements, or to expect European moves to prevent such incursions in the future.

Now that the U.S. sanctions have been lifted, this particular case is moot. Nonetheless, it is clear from the detailed examination of the surrounding international legal issues involved, that the U.S. and her Western allies must take immediate and affirmative actions to remedy this malaise and to strengthen the laws governing peaceful coexistence through international law.

ON THE ROAD TO PEACE IN THE MIDDLE EAST

Michael Curtis

***Abstract:** Egyptian President Anwar Sadat's visit to Jerusalem in November of 1977 appears to be a hopeful event, signaling the departure from negative Arab behavior towards Israel. For Egypt, a prospective peace with Israel offers the opportunity to pay real attention to their problems at home, instead of focusing on foreign issues. Egypt has experienced riots all across the country due to increased military spending and negligence towards citizens' needs. No matter the motive for seeking peace with Israel, this is an admirable move by Sadat, and if there is to be longstanding peace in the region, other Arab states should follow. The United States will also have to play a vital role if there is to be peace. The US should act as a mediator between the parties, while being careful not to advocate for any side. Currently, the Carter Administration's policies have lacked consistency on this issue. They need to develop an intermediary stance, and work with both sides to facilitate peace. However, Carter can only do this if the Arab states agree to work with them as well.*

The dramatic initiative of President Sadat of Egypt in going to Jerusalem in November 1977, speaking before the Israeli Knesset, and setting in motion, at least temporarily, a new round of negotiations on the Arab-Israeli conflict has not itself altered the existence and perpetuation of that conflict. The essence of the conflict remains the unyielding, implacable refusal of the Arab states in general to recognize the Jewish right to self-determination and a state of their own and an Arab unwillingness to accept Israel as a member of the family of nation-states in the Middle East. Other issues, including those of territorial jurisdiction and the destiny of the Palestinian Arabs, though important themselves, have surfaced as a result of the four wars which occurred due to the general refusal over a thirty-year period to acknowledge Israel's existence and security needs. This refusal, exacerbated by the acute divisions and bitter rivalries among the Arab countries, the unrelenting intransigence of the Palestine Liberation Organization in calling for the elimination of the state of Israel in its National Charter and Covenant, and the differing interests and involvements of the two superpowers¹, has always in the past made a peaceful settlement difficult, if not impossible, to achieve.²

The action by President Sadat in November therefore appeared to be a hopeful departure from the negative pattern of behavior the Arabs have exhibited for thirty years. Sadat has been rightfully applauded for this courageous and pioneering act. It is appropriate that the first step toward a constructive dialogue between Israel and the Arab states should come from a country that has suffered 100,000 casualties and wasted £40 billion in wars against Israel. Egypt, a country with an illiterate population of 70 percent, a per capita yearly income of about \$325, and a foreign debt of \$13 billion, experienced rioting all over the country when increases in food prices were announced in January 1977, yet allocated 25 percent of its budget to military

¹ Blema Steinberg, "Superpower Conceptions of Peace in the Middle East," *Jerusalem Journal of International Relations*, 2 (Summer 1977), pp. 67-96.

² Yehoshafat Harkabi *Arab Strategies and Israel's Response* (New York: Free Press, 1977).

purposes in 1977. A prospective peace with Israel clearly offers the possibility of enabling Egypt to pay real attention to unfulfilled aspirations and economic problems confronting her today.³

Regardless of his motives, Sadat has earned admiration for his gesture. The Egyptian leader, who for years has been declaring that it would be left to the next generation to decide on the possibility of normalization of relations with Israel and who, in mid-1977 unexpectedly reduced the time for decision on the issue to five years, appeared in Jerusalem in November, having changed his position, proclaiming, "we welcome you to live among us in peace." His implicit recognition of the state of Israel, his stated genuine desire to achieve a resolution of the conflict by peaceful means and his renunciation of war as a solution can both be accepted at face value. However, due to the euphoric atmosphere generated by Sadat's visit, less attention was paid to his main two demands. The first was that "we insist on complete withdrawal" from Arab territories, including Arab Jerusalem. The second was "the achievement of the fundamental rights of the Palestinian people, including their right to establish their own state." Sadat had already made the same demands in a speech on November 8, 1977 and already knew of Prime Minister Begin's rejection the following day of this extreme formulation of the Arab position.

The Jerusalem visit was followed by a meeting of Sadat and Begin in Ismailia on December 25 and 26. Sadat himself stated that at the meeting "Begin announced that everything was negotiable and open to discussion... Moshe Dayan was flexible in the talks."⁴ Two ministerial committees, one on politics to meet in Jerusalem and the other on military affairs to meet in Cairo, were established and began deliberations.

As astonishing and dramatic as Sadat's initiative in going to Jerusalem was, his suspension of these talks on January 18, when five of the seven sections of a draft joint statement of the principles had been approved, was even more surprising. The impulsiveness of Sadat's action, which startled even his own foreign minister, may have arisen from a number of motives. Sadat himself, like the rest of the world, may have been swept up by the mood of the euphoria produced by his visit and consequently became chagrined at the realization that his demands were not automatically acceptable and that agreement between the parties would not be easily reached. His action may have resulted from the personal pique occasioned by the somewhat undiplomatic response by Prime Minister Mohammed Kamel. Sadat's act may have been a matter of policy in an attempt to get the United States to apply pressure on Israel to change its negotiating posture or to lay the foundation for a more effective claim for arms supplies from the U.S. It may have resulted from the differences inherent in the decision-making process of the two political systems which arose from the fact that policy formulated by one individual in one system was likely to be more personal and easier to change than that which was the outcome of deliberation by the members of a coalition government. Perhaps most significant of all for Sadat was the dawning awareness that the logic of events might oblige him to sign a unilateral agreement with Israel which other Arab states would refuse to endorse.

The Egyptian President now experienced what Israelis have endured for so long: the refusal of Arab leaders to participate in face-to-face negotiations with Israel. He could understand the refusal of the Arab states to meet with him to discuss his visit to Israel, but he must have been distressed by the Tripoli summit meeting of Syria, Libya, Algeria, South Yemen, and the P.L.O.—with Iraq, regarding even this as too moderate a response—which rejected any participation in a peace conference, accused him of high treason, and declared that his initiative

³ Lance Taylor, "The Political Economy of Egypt: An Opening to What?" Unpublished paper delivered at the American Economic Association meeting, New York, December 28, 1977.

⁴ *October Magazine*, Cairo, January 1, 1978.

would "tilt the international balance in favor of the Zionist and imperialistic forces and infringe on the national independence of the countries of Asia, Africa and Latin America." Equally as distressing was the refusal of King Hussein of Jordan, in his usual opportunistic fashion, to join the talks unless there was a prior unconditional acceptance by Israel of his demands, which include not only withdrawal of Israeli forces, but also the return of the Arab refugees of the 1948-49 war and the placing of East Jerusalem under Arab sovereignty.

President Sadat explained the recall of his political delegation from the meetings in Jerusalem by declaring that his two conditions—total withdrawal by Israel and implementation of "the rights of the Palestinians," which in its new phraseology became self-determination for the Palestinians—had not been accepted. The different perspectives taken by the two sides indicate the measure of their disagreement. While Israel, after thirty years of war, wanted peace and security, the Arabs demanded control of former Arab territory and justice for the Palestinian Arabs. At Ismailia on Christmas Day, Begin presented a detailed and comprehensive peace plan. If Sadat had taken a personal risk by his peace initiative and his implicit recognition of the state of Israel, as the sad events at Larnaca airport in Cyprus were to show, Begin had taken a national risk for peace by immediately agreeing to withdrawal from certain territory. Yet Sadat complained, "Begin gave me nothing. I gave him everything."

The Sadat position suffers from two deficiencies. The first is his insistence on preconditions before any real negotiations can take place. Praiseworthy though Sadat's initiative may have been, it does not entitle him to automatic acceptance of his demands. Rather, it must be seen as the starting point of a process of complex negotiations in which compromise formulae must be found. The second deficiency is his minimization of the Begin peace plan. The Israeli Prime Minister proposed the withdrawal of Israeli forces from Sinai and the acknowledgment of Egyptian sovereignty over it. His 26-point plan for the West Bank and Gaza included abolition of Israeli military government and the establishment of self-rule. At their introduction, the Begin proposals were regarded by President Carter as a good basis for negotiation and by Secretary of State Vance as "a notable contribution" and "a constructive approach."

After a brief period of enthusiasm, the road to peace appears to be as rocky as ever. An underlying problem is that the Egyptian-Israeli dialogue is operative on two levels, bilateral and comprehensive, at the same time. The formula for bilateral agreement between Egypt and Israel, in the absence of issues extraneous to Egyptian territory or Israeli security, is readily available. In direct negotiations both sides can agree on demilitarization in Sinai, on limited force zones in the area, on early warning systems, on free navigation through the Suez Canal and in the Gulf of Aqaba, and on a joint committee to resolve the outstanding problems. But Sadat believes himself to be constrained by external Arab factors. In this view, and in the absence of Syria, Palestinian moderates, and above all, Jordan from the negotiating process, neither a bilateral nor a comprehensive settlement of the conflict can be reached, nor even a set of principles upon which a settlement can be based. An essential and minimum requirement for progress in the negotiations is that Jordan be persuaded to participate in them and help solve the issue of the Palestinian Arabs.

Two further problems have affected the intermittent nature of the negotiations. One is the arms package deal formulated by the Carter administration, which Secretary of State Vance argued has to be seen in the context of both the negotiating process and the objective of a peace settlement. The second is the more intricate, complex, and divisive issue of Israeli settlements in occupied territory.

The February 1978, \$4.8 billion proposal of 60 F-15 fighter bombers for Saudi Arabia, 50 F-5 fighters for Egypt, and 15 F-15 and 75 F-16 planes for Israel, is regarded by Vance as a package which must be accepted or rejected as a whole by congress. The challenge to Congress in this fashion occasions a degree of concern, if not alarm. President Sadat has complained of the "arrogance" of Prime Minister Begin, resulting from the present Israeli possession of American weapons, and has argued that Egypt should acquire "equivalent bargaining power" by the provision of similar weapons of its own. Saudi Arabia has made clear it feels it is owed American weapons of the most sophisticated kind and has selected the F-15, the most advanced combat plane in the world. The proposed package seems therefore to be a material rather than a symbolic tribute to President Sadat for his policy of seeking a peaceful solution of the conflict and his promise to continue the negotiating process, and a reward for the economic and political role played in recent years by Saudi Arabia. It would supposedly bolster the forces working for a settlement.

The Vance proposal should be seen not in a vacuum but in the context of the familiar asymmetrical relationship of the two sides to the conflict. Israel has been wholly dependent on the supply of American arms and on those which it can produce itself. The Arab confrontation states have been amply provided with arms not only from the United States but also from Western Europe, and particularly from the Soviet Union.⁵ Syria has received at least \$1 billion in Soviet arms, including 50 MIG-23 fighter bombers, 140 MIG-21 fighters, 20 Sukhoi fighter bombers, 15 surface to-air-missile batteries, T-62 tanks, Scud missiles, and armored personnel carriers. Iraq has received \$4 billion in Soviet arms and Libya has more than 1300 Soviet tanks and 20 MIG-23 aircraft.

Egypt has an arsenal of 30 MIG planes, Scud missiles, Frog missile launchers, and 1000 tanks, and has ordered from France 14 Mirage V fighter bombers and 40 Mirage F-1 fighters, in addition to the 44 it already possesses.

From France and Britain, Egypt is now obtaining surface-to-air missiles, anti-tank missiles, patrol boats, and service aircraft. Egypt already possesses 20 C-130 U.S. transport planes, but the F-5, which Sadat has incorrectly described as "a tenth-rate plane," will be the first combat aircraft supplied by the U.S. Even if one admits that F-5 is not as important as the F-15 or F-16, it still requires U.S. technical infrastructure (command channels, etc.) that makes Egypt prepared to receive U.S. equipment and weapons given to other Arab countries.

Saudi Arabia has already spent \$12 billion on U.S. arms and military infrastructure in the last four years. Its weaponry includes 110 F-5E fighters, 250 M-60 battle tanks, 400 Maverick air-to-surface missiles, 6 batteries of Hawk surface-to-air missiles, and 2000 Sidewinder air-to-air missiles, as well as 300 French AMX tanks. Saudi Arabia is rapidly building a military complex at Tabuk which is well within F-15 range of Israel. The U.S. may have accepted the Saudi argument that the new planes are necessary to defend its oil fields and to protect itself against Iraq, South Yemen, or any other potential enemies. But the new Tabuk complex is located 900 miles northwest of the oil fields and only 125 miles from Israel. It is difficult to see how it can be rationally regarded as an appropriate base for its purported functions. The U.S. may see the F-15's as token appreciation of Saudi political moderation, willingness to increase oil production, and efforts to minimize the rise in oil prices, or it may have deferred to Saudi Arabian perception of the delivery of the planes as the test of the mutual relationship. Yet, at the same time the U.S. may have set in motion a dangerous process of military escalation. The

⁵ Sources: *International Defense Review*, Geneva, August 1976; Institute of Strategic Studies, London, report, 1977-78.

Administration has, for the first time, proposed providing Saudi Arabia with advanced weaponry which can destroy aircraft far from its borders and which, in spite of technical difficulties, can be transferred in the event of war to other Arab states, as 38 Libyan Mirages were sent to Egypt in 1973, though this was contrary to French policy.

There are a number of troubling thoughts in this regard. If one of the motives of the U.S. in providing the planes for Egypt was to encourage it to continue the round of negotiations, this may be counterproductive because the prize of weapons, which Sadat has been seeking so assiduously, was agreed to at a very early stage in the process. Moreover, honoring peacefully-intended rational policy would seem to suggest further economic assistance rather than arms for Egypt. The U.S., which has already provided Egypt with over \$4 billion in economic aid since 1973, helped clear the Suez Canal, aided the reconstruction of Suez cities, and could foster the mood for and increase the desirability of peace more readily by continuation of such aid.

The Administration may also have misperceived reality by ignoring or dismissing the role of Saudi Arabia as a confrontation state and regarding it simply as an interested party. In fact, the stronger role of the Saudis is evident in a number of ways. Saudi forces were sent to Jordan in both the 1967 and 1973 wars, though they apparently did not engage in battle. The Saudi brigade sent to fight in the Golan Heights in 1973 did not pull out until 1974. In December 1975, Saudi forces, with American weapons, joined Syrian troops in Joint exercises in the Golan Heights to rehearse the recapture of lost Syrian Territory. The Saudis have made no secret of their intentions to assist in any future war. In 1976 King Khalid said:

When we build up our military strength we have no aims against anybody, except those who took by force our lands and our shrines in Jerusalem—and we know who that is... The strength of Saudi Arabia is a strength for the whole Arab and Islamic world. We always intended to make use of all military equipment that might help build our military strength.

On December 5, 1974, the Saudi Defense Minister stated, “All we own is at the disposal of the Arab nation and will be used in the battle against the common enemy.” For many years the Saudis have financed the arms purchases of a number of Arab States. The use of an oil embargo in 1973 and the constant threat to use it again in appropriate circumstances against any supporter of Israel can be regarded as war by other means. Sheik Yamani himself, in a speech at the University of Edinburgh in November, 1976, said that within the Arab camp “the most extreme saw the embargo as a punitive measure and an instrument of revenge, whereas the most reasonable and rational saw it as a means of attracting the attention of Western nations and governments to the Palestinian problem and the Israeli occupation of Arab lands.” Moreover, the stress which Saudi Arabia places on the significance of the worldwide economic boycott against Israel, and in its secondary and tertiary aspects against Jews in general, makes it a leader even among the confrontation states.⁶ The Administration has ignored the possibility that American technicians, accompanying the new planes and other hardware, may be dragged into compromising or dangerous situations.

The increased Saudi military might constitute a new threat to the southern borders of Israel and to navigation in the Red Sea. The Saudi strength in frontline planes will be greater than that of Israel. The necessary diversion of Israeli forces from other fronts to defend the country against a possible Saudi attack inevitably weakens Israeli defense. For Israel, the

⁶ Walter Nelson and Terrence Prittie, *The Economic War Against the Jews* (New York: Random House, 1977).

package deal not only changes the nature of the security problem but has also, unfortunately, led to the questioning of the reliability of American commitments. In the previous Administration, Israel had been denied promised concussion bombs by President Ford. The new proposal is a violation of the 1975 agreements, when Israel accepted the Sinai II arrangements, by which Israel was promised 50 F-15's, and expected 150 F-16's.

The equity of the proposed package must be examined in the sober light of reality rather than fanciful euphoria. It is not obvious that the package deal is a useful contribution either to the negotiation process or to American national interest in general. Nor is it correct to argue that the Arab states will automatically turn to other suppliers if the American weapons are not provided. It is acknowledged that the F-15 plane is a much better product than the French Mirage, and it is improbable that the wealthy Arab states will settle for less than the best.

A major divisive issue, both within Israel and between Israel and the United States, is that of the settlements in occupied territory, which Secretary Vance argued in February 1978 "violate international law" and should not exist, and which President Carter regards as an obstacle to peace. For purposes of analysis, the Sinai settlements can be separated from the others.

These settlements, containing 1500 people, are located in the Rafah corridor, which comprises about two percent of the total area of Sinai, which is itself about six percent of the whole of Egyptian territory. Historically, the corridor has been the land route for both peaceful and military purposes from Egypt to the Middle East land mass. Many of the critical battles were fought there in the four Arab-Israeli wars and it was also the area from which Israeli troops withdrew after the 1949 and 1956 wars. Israeli withdrawal, under American pressure in the latter case, was followed almost immediately by the entrance of Egyptian troops and the start of fedayeen raids into Israel. Sinai can scarcely be regarded as territory which is sacred or historically significant to Egypt. It is only seventy years since Britain imposed the Rafah-Aqaba line on the Turks as a border; only in 1917 was the territory formally annexed to Egypt by British policy. Until 1967 there was almost no Egyptian development of the area except for military bases.

The existing Israeli civil settlements, providing security for Israel by blocking access to the territory for potentially hostile military forces or for terrorists, do not challenge the sovereignty of Egypt over the area. Reconciliation between that sovereignty acknowledged by Israel and the existence of the settlements if devoid of military personnel, does not in itself appear difficult to reach. Paradoxically, such reconciliation may have been made more difficult by the strong statements of Secretary Vance, which suggest incompatibility with the position the U.S. occupies and the role as mediator in these delicate issues which the U.S. currently plays. Indeed, the case might be made that the doctrine in international law of *uti possidetis*, the maintenance of the cease fire status quo until peace negotiations are completed, might provide a legal basis for the control of territory and could at least render the Vance position subject to dispute.

A similar case can be made for the settlements, containing 3700 people, in the Golan Heights, where security is clearly the dominating concern for Israel. The settlements in the West Bank and Gaza present a more complicated problem because they are related not simply to the desire for security, as those in the Jordan Valley are, but also to the final political disposition of the area.

It is arguable whether the 1949 Geneva Convention, which forbade voluntary transfer of population and which stems from the revulsion against the Nazis' forcible transfer of population, is pertinent to the existence of these settlements. Unlike Sinai and the Golan Heights, the West

Bank is an area in which Jewish residents have lived for centuries. By the 1947 U.N. Partition Plan, Jewish settlements were to remain under the anticipated new Arab political structure. But all were eliminated as a result of the 1948-49 war. Some of the settlements, in Gush Etzion, Hebron, and the Jewish Quarter of the Old City of Jerusalem, are thus de facto returning to their old habit.⁷ The question of sovereignty of the area remains open, regardless of the settlements. The formal annexation of the territory by Jordan in 1950 was accepted by only two states, Britain and Pakistan. The disposition of the settlements thus depends on the resolution of the political destiny of the area. What is needed now, as Abba Eban has recently written in his autobiography, is “an effort at innovation, not of memory.”⁸

That effort will not be made easier by the incessant Arab repetition of the demand of implementation of “the legitimate rights of the Palestinians”, always left in an undefined, imprecise fashion, or by the Arab refusal to begin negotiations until Israel has unconditionally accepted the demand. More recently, the Arab position has been argued in terms of the necessity for self-determination by the Palestinians or for the establishment of a Palestinian state.

The Arab view is that the Palestinian Arabs are the central element of the whole Arab-Israeli conflict. But to accept this position is to deny the possibility of any peaceful resolution of the problem. Humanitarian concern for the Palestinian Arabs is understandable, and the need to find an acceptable political formula to solve the problem is crucial. But to search for that formula in the absence of a perceived willingness by the Arab leaders to coexist with an Israel with secure and recognized borders and with a population accepted on an equal basis as fellow Palestinians, through predominantly Jewish, is a pointless and vain undertaking. The very use of the word Palestinian to refer to the Arab population suggests the denial of the existence of a Palestinian Jewry.

Resolution of the conflict requires correct definition of “Palestine” and of the people or peoples who can legitimately be regarded as citizens of such an area. It also requires a decision on whether Palestinian Arabs are to be regarded primarily as nationals of an area or as members of the wider Arab nation now consisting of some 130 million. The primary difficulty in providing a universally acceptable definition is that “Palestine” has never been an independent geo-political entity since biblical times, when it was under Jewish control. The only proper definition in the contemporary world is that of the 1922 Mandate, given by the League of Nations to Great Britain, which included the territories of what are now the states of Jordan and Israel, and the West Bank and Gaza.⁹ The Arab formulation of “Palestinian self-determination” or “legitimate rights” has never clarified whether it is applicable to the whole original Mandate area of 44,000 square miles or that part of it which is west of the Jordan River, which includes Israel and which is about 10,000 square miles, or to the present West Bank and Gaza territory of about 2300 square miles.

The demand for a Palestinian Arab homeland or state ignores that such a state in fact is already in existence. If one defines the character of a state by the majority of its inhabitants, Jordan, with a population about 55 percent Palestinian, could logically be regarded as a Palestinian state or homeland. From 1948 to 1967, when the West Bank and Gaza were under Jordanian control, there was no demand for the creation of an independent Palestinian state. It may well be that the conviction of a Palestinian nationalism has grown in strength in the last decade and constitutes a significant new factor in the maelstrom of Middle East politics.

⁷ Msgr. John Osterreicher and Anne Sinai, eds., Jerusalem (New York: Day, 1974). pp. 137-47.

⁸ Abba Eban, *An Autobiography* (New York: Random House, 1977).

⁹ Richard Memertzhagen, *Middle East Diary, 1917-1956* (New York: Yoseloff, 1959).

Caution on this matter is advisable for two reasons. The first is the inherent ambiguity in Arab self-definition. The first article of the 1968 Palestinian National Covenant states that "the people of Palestine is a part of the Arab Nation." One might reasonably conclude from this that the Palestinian Arab people can be regarded as citizens of any Arab state in which they reside. Secondly, the assertion of self-determination ought to relate to some specific territory and to be framed in a way that does not suggest the elimination of an already existing state. In the same Covenant, Article II states that "Palestine with its boundaries that existed at the time of the British Mandate is an integral regional unit." Again, the logic of such a declaration suggests the elimination of the present state of Israel or of Jordan or both. The role of the Administration in calling at different times for "a Palestinian homeland" and for "Palestinians to participate in their own self-determination" has perpetuated the ambiguity rather than helped clarify the problem.

In principle it is justifiable that the inhabitants of an area should possess political autonomy or be given the opportunity to rule themselves. But such a right is not self-evident if its implementation does violence to others. Under present conditions, the case is clearer for a West Bank and Gaza entity to be associated with Jordan in some federal relationship than for a separate state to be established. This conclusion arises from a number of factors. A small and densely-populated state would constitute a danger to security for both Israel and Jordan. This would certainly be the case if the state were controlled by extremists who view the creation of such a state as a prelude to further expansion. The dominant feature of the Palestinian Covenant is the call for the destruction of Israel. Every prominent leader of the P.L.O. has called for the continuation of the struggle until the whole of Palestinian soil is retrieved. From an economic point of view, it is arguable whether such a state could be viable. There would be a real possibility that the Soviet Union, by economic as well as military assistance, might strengthen its influence in the area. Recent actions by the Soviet Union in the Horn of Africa strengthen this possibility. It is not coincidental that the Soviet Union, while supporting the existence of an Israel with sovereignty over the June 4, 1967 borders, also strongly advocates the creation of a Palestinian Arab state in the West Bank and Gaza which would almost certainly depend on it for support and which would help perpetuate Arab-Israeli differences. Moreover, the creation of such a state does not address itself to the refugee problem as a whole; the refugees who left what is now Israel in 1948 might find the establishment of such a state in the West Bank and Gaza purposeless.

The problems inherent in the creation of a 22nd Arab state, as well as the general difficulties in the resolution of the whole conflict, are compounded by the presence of an intransigent P.L.O alternating terrorist activity with political bombast in an uncompromising manner. The myth of the moderation of the P.L.O, accepted by part of the Washington political elite, has been dispelled by the rejection of such moderation at the leadership meetings in March and August 1977, and by the adherence to basic objectives of the Palestinian Covenant, which include the destruction of Israel.¹⁰

What is the role of the U.S in the Middle East today? Recent statements by the State Department¹¹ argue that U.S. must take into account terrorism, the support around the world for Palestinian nationalism, oil supplies, oil revenues and capital holdings by the Arab oil producing countries, the fact that Saudi Arabia and Algeria are "organizers of the poorer nations," and the growing economic market in the Middle East, as well as the needs of Israel. Essentially there are

¹⁰ Michael Curtis, "The Myth of the Moderation of the PLO," *Bulletin of APPME* (October 1977), P. 2

¹¹ Speech by Harold H. Saunders, Acting Secretary of State for Near Eastern and South Asian Affairs, in Washington, D.C., February 28, 1978

seven major concerns for the U.S. in the Middle East: desire for peace and stability in the area, upholding the long-term commitment to the survival of Israel, assuring the flow of Middle Eastern oil to itself and to the industrialized world in general, maintaining good relations with the moderate Arab countries and fostering trade with them, avoiding confrontation with the Soviet Union, preserving its own influence in the area, and helping mediate a solution to the Arab-Israeli conflict.

The upholding of the commitment to Israel has been of mutual benefit. The existence of a strong Israel, with a deep underlying national consensus, has provided a unique element of stability in the kaleidoscopic politics of the Middle East, where the nature of regimes in general is dependent on one individual or an elite group. President Sadat himself has acknowledged that his view of Egyptian-Israeli relations may not be shared by his successors. For the U.S., the stability of Israel constitutes the essential basis on which its influence in the area rests. Certainly, it would be premature for the U.S. to base long-term policy in the area on conditions which may exist only temporarily; rulers have an uncertain hold on power and the states engage in constantly changing rivalries and divisions, of which the civil war in Lebanon has been only the most recent example. It is the strength and stability of Israel that has helped the U.S. preserve its facilities in Oman and Bahrain to counter the Soviet bases in South Yemen and in East Africa. It can even be argued that the full economic cost of Middle East oil might be considerably greater if Saudi Arabia were not aware of the political advantages of U.S. pressure on Israel in return for moderation in the rise in oil prices. Moreover, in an age when political liberty and democratic political systems are a rare and precious commodity, the preservation and strengthening of the only democratic state in the Middle East, and a highly successful state at that, is an increasingly significant moral imperative for the U.S. In Israel Mrs. Carter does not have to dine separately from or walk behind the President as she was obliged to do on the recent Presidential visit to the Middle East.

The upholding of this material and moral commitment to Israel is not incompatible with the existence of friendly relationships with the Arab countries or with the desire to increase trade with them. This is particularly true concerning relations with the moderate countries in the Persian Gulf and Arabian Peninsula area. The expansion of trade with the Arab oil-producing countries in recent years has been considerable. In 1972 U.S. exports to these countries amounted to \$3.2 billion; in 1976 they increased to \$13 billion. Although the Soviet Union approved the Arab oil embargo instituted at the Yom Kippur war in 1973, and hoped for both political advantage and economic benefit as a result, the oil-producing states maintained both their trade ties with the West and their political opposition to the Soviet Union. Ironically, the Soviet Union has been among the nations most affected by the inflation produced in the Western countries because of the dramatic rise in oil prices.

It is futile to deny the danger to the U.S. and all the other industrial countries of their dependence on Arab oil. In 1973, Arab oil constituted 22 percent of oil imports; by 1976 the proportion had risen to 38 percent. But this increase does not necessitate American economic dependence on Saudi Arabia nor acquiescence towards its political views in the Middle East or elsewhere. The Administration has not yet fully appreciated that Saudi Arabia, with its considerable investments, bank deposits, commercial holdings in the U.S., and present and committed trade contracts with American business, is now more dependent on and concerned for the economic prosperity of the U.S. than ever before. From an economic point of view, it would be fair to conclude that Saudi Arabia needs the U.S. as much as, if not more, than the U.S. needs Saudi Arabia. Moreover, not only Saudi Arabian economic development, but also its military

structure has been dependent on American supplies. Its protection from outside intervention has, to a large degree, resulted from American friendship. That friendship would quickly be ended by another oil embargo like that of 1973. The U.S. has not yet made it sufficiently clear that there are limits to Arab oil power. The presence of a strong Israel in 1967 prevented Nasser's scheme for controlling the peninsula oil, through his military operation in Yemen, from succeeding. Similarly, in 1970 Israel prevented Syria from invading Jordan and possibly blocking access to the oil fields. The maintenance of Israel will help the assistance of Saudi Arabia from possible threats by the Soviet Union or other powers. Protection from internal subversion or from Yemen or Iraq is possible only by cooperation with the U.S.

The U.S. has necessarily been asked to mediate in a situation where no other state can, since the General Assembly of the United Nations has been discredited as biased due to its unceasing attacks on Israel. The U.S. has abided by Security Council Resolutions 242 and 338 which articulate the principles upon which a general settlement of the conflict can be reached: withdrawal by Israel from occupied territory, acceptance by the Arabs of an Israel with secure and recognized borders, free navigation in the area, and a solution to the refugee problem. The U.S. has alternated in the stress it places on either the search for a comprehensive settlement or partial accords, and wavered in the degree of support for the Israeli position. This is a result of the multiple objectives which American policy pursues. Unlike the Soviet Union, which for over twenty years has maintained its military, economic and political support for the Arab position and shown no interest in ameliorating relations with Israel, with which it has broken diplomatic relations, the U.S. has been concerned with maintaining or expanding its influence in the Arab states while maintaining support for Israel at the same time.

The equivocation in the American Position has been more pronounced since 1969, when Secretary of State Rogers introduced his two plans based on "even-handedness" and when Israel was refused the Phantom jets it wanted. During the Yom Kippur war, it was only after the rapid and enormous military re-equipping of the Arab armies by the Soviet Union that the U.S. began to send vital supplies to Israel. It was the extraordinary Israeli military resurgence and strength that allowed Secretary Kissinger to conclude the shuttle, step-by-step negotiations which led to the three partial accords which constitute his major diplomatic achievement.

More recently, the Carter Administration has adopted an even more equivocal position, while its policy on Middle Eastern matters has seemed to lack consistency and clarity. It has wavered on the interpretation given to Resolution 242. From an assertion that the Resolution did not require total withdrawal by Israel, it has retreated to a view that it "neither endorses nor excludes the June 4, 1967 line as the final political border," and a declaration that withdrawal on all three fronts was essential. In October 1977 the U.S. was implying that the P.L.O. might be brought into the discussion of a settlement. In 1967 Israel suffered from the failure of the U.S. to honor its commitment of 1957 when Nasser denied the Israelis the right to navigate the Straights of Tiran. In October 1977, the Carter Administration similarly refused to abide by the commitments made in December 1973 and September 1975 in which the U.S. promised to oppose P.L.O. participation in the Geneva conference as long as that organization refused to recognize Israel or accept 242 as the basis of negotiations, and agreed to "consult freely" and "concert" its positions with Israel on plans for the reconvening of the conference. The Soviet-American communique of October 1977 was a breakage of that agreement. On different occasions President Carter or Secretary Vane have spoken of the P.L.O. as representing "a substantial part" of the Palestinians, of the need for a Palestinian homeland, of the "legitimate rights" of the Palestinians, of Sadat as "the world's foremost peacemaker" and of differences

with Israel on the interpretation of Resolution 242. If there is to be any possibility of a solution to the conflict, it is vital that the U.S. act as a mediator between the parties. It is equally important that the U.S. should not itself advocate the basis upon which negotiations should be conducted or a settlement be reached. Everyone concerned for a just and lasting peace in the Middle East must hope that the Carter Administration will be able to maintain the distinction between mediation and advocacy.

The Politics of the U.S. Trade Embargo of Cuba, 1959-1977

David W. Dent And Carol O'Brien

Abstract: This article argues that the economic sanctions against Cuba do not serve US interests and thus should be discontinued. Both Presidents Eisenhower and Kennedy viewed Castro as a significant communist threat to the US. They imposed strict economic sanctions against his regime, hoping that Cuba's ties with the USSR would weaken and that the Castro regime would eventually collapse under economic strain. To the vexation of US officials, the opposite occurred as Cuba was pushed directly into the USSR's political and economic orbit, as the Soviets came to Cuba's aid to soften the impact of the sanctions. Moreover, the economic sanctions strengthened the resolve of the Cuban people to stand up to America, their imperialist aggressor. While attempts were made in the mid 1970's to lift the embargo, US officials felt that doing so would be too apparent of a mea culpa and thus would harm the US's image as an avid champion of democracy and capitalism. Although lifting the embargo would symbolize the end of US hegemony in the Western hemisphere, America has much to gain from doing so.

Techniques of economic reward and punishment have played a key role in the politics of Cuban-American relations since the early part of the twentieth century.¹ Once Cuba was separated from Spanish colonial rule, the interests of the United States gradually developed into a "special relationship" where Cuban political and economic life were tied very closely to the American system. This close relationship was a partial contributor to the Castro revolution that began in 1959 with the overthrow of Fulgencio Batista. The closest links were clearly in the areas of trade and investment. As Blasier points out, prior to the Cuban Revolution:

The United States brought about two-thirds of Cuba's exports and paid, under the quota system, large premiums, sometimes approaching nearly twice the world-market price for Cuban sugar. In exchange, Cuba offered the United States tariff preferences, which was only one of several reasons why the United States sold Cuba nearly 70 percent of its imports. United States interests controlled a declining, but still large, percentage (about 40 percent) of raw sugar production, 90 percent of telephone and electric services, and 50 percent of public service railroads. In addition, U.S. banks had about 25 percent of all bank deposits in the nation.²

Thus, the sweet sugar quota and the deeply entrenched economic interests of the United States set the stage for the instruments of foreign policy that would be employed to respond to Castro's revolution as it began to take shape after 1959. Although certainly other instruments (unilateral and multilateral) of foreign policy were devised and implemented to strangle the Cuban economy

¹ For an excellent treatment of the economic instruments of foreign policy, see K.J. Holsti, *International Politics: A Framework for Analysis* (Englewood Cliffs, NJ.: Prentice-Hall, 1967), pp. 284-292.

² Cole Blasier, "The Elimination of United States Influence," *Revolutionary Change in Cuba* ed. Carmelo Mesa-Lago (Pittsburgh: University of Pittsburgh Press, 1971), p. 54.

and thereby discredit the Cuban Revolution, the trade embargo formed the core of retaliatory action toward Cuba from 1960 to the present day. The purpose of this paper will be to examine the rationale and effectiveness of a policy of economic coercion that has been in operation for almost twenty years.

The length of time that the United States has sought to discredit the Castro regime and the ineffectiveness of the policy of economic denial would seem to point to underlying motives that go beyond the mere threat to billions of dollars of U.S. private investment. Nevertheless, six American presidents have treated Castro's Revolution with the same suspicion, ideological resentment, and fear even though the politics of hostility between Cuba and the United States has been toned down considerably. Even the American press has more recently shown a more favorable image of Fidel Castro and the Cuban Revolution.³ The underlying hypothesis of this paper is that American foreign policy objectives in dealing with Fidel Castro were essentially political and not economic. That is, the economic instruments of foreign policy designed to choke the Cuban economy were intended to meet specific political-security objectives rather than strictly economic motives. Thus, the Cuban trade embargo was designed and implemented by the United States to weaken the Castro regime, contain the spread of Castroism, and loosen the ties with the Soviet Union.⁴

Motivations Underlying the Implementation of Economic Sanctions

Eisenhower: From "Watchful Waiting" to Retaliation

One of the mysteries of Cuban-American relations shortly after Castro came to power is the assumption that severe economic sanctions would bring about the downfall of Castro and the end to the Cuban Revolution. The discussions within the foreign policy elite clearly reveal the underlying assumption that once the United States stopped buying Cuban sugar, the Cuban economy would collapse, the Russian would not take up the slack, and the Caribbean would quickly return to the hegemonic fold of the United States.

Between January 1959 and March of 1960, the Cuban policy of the United States was clearly one of forbearance to the changes taking place within Cuba and Fidel Castro's attacks on the United States (see Figure 1). As Slater points out⁵:

Although relations between the Eisenhower administration and Castro were bad to begin with and became continually worse throughout 1959, the administration was unwilling to take the sort of drastic action that would have been necessary to overthrow Castro—action that was demanded in an increasingly strident manner in the United States and by a number of Latin American governments.... There is even evidence that the United States sought to gain Castro's friendship by offering him substantial economic assistance.

³ John C. Pollock and Eileen M. Cohen, "Political Reporting on Revolution: Cuba in Cross-National Perspective," June 1976 (mimeo).

⁴ Lynn Darrell Bender, *The Politics of Hostility: Castro's Revolution and United States Policy* (Hato Rey, Puerto Rico: Inter-American University Press, 1975), p. 35.

⁵ Jerome Slater, *The OAS and the United States Foreign Policy* (Columbus, Ohio: Ohio State University Press, 1967), pp. 136-137.

The turning point in the policy of forbearance or “watchful waiting” occurred in February 1960 when the Russians and Cubans signed a trade pact in which Soviet oil would be exchanged for large amounts of Cuban sugar.

This key economic exchange and ideological linkage set in motion the nature of the U.S. response. In Eisenhower’s words, “The possibility that Cuba’s government might definitely become a Communist satellite, though still discounted by most of my advisors, was disturbing. I remarked that if the Soviet Union had the temerity to make a mutual security treaty with Cuba, we would have a situation that the United States could not tolerate.”⁶

Eisenhower’s motives for retaliation centered on Castro’s ideology and his possible friendship with the Soviet Union: was he or wasn’t he a Communist? When the American Society of Newspaper Editors invited Castro to come to Washington to speak at the National Press Club on April 17, 1959, Eisenhower refused to see him on grounds of Castro’s policies and his leftist ideology. For example, President Eisenhower notes in his memoirs that:

Having personally become highly suspicious that Castro was a Communist and deeply disgusted at his murderous persecution of his former opponents, I inquired whether we could not refuse him a visa. Advised that under the circumstances this would be unwise, I nevertheless refused to see him.⁷

The task of talking to Castro was given to Vice-President Richard M. Nixon who reached the conclusion, after his three-hour talk with Castro, that there was little doubt as to what should be done. According to Nixon, “I was convinced that Castro was either incredibly naïve about Communism or under Communist discipline and that we would have to treat him and deal with him accordingly—under no further illusions about ‘fiery rebels’ in the ‘tradition of Bolivar.’”⁸ It was almost one year later, however, before Eisenhower decided to act by ordering the Central Intelligence Agency to begin its training of Cuban exiles in Guatemala for an eventual invasion of Cuba.⁹ Vice-President Nixon’s position had finally prevailed although Eisenhower never revealed his specific motives for initiating the CIA plan during the spring of 1960. In late 1960, during the presidential contest between Nixon and Kennedy, Nixon expressed his lack of forbearance concerning the developments in Cuba: “I said the time for patience was over, that we must move vigorously—if possible, in full association with our sister American republics—to eradicate this ‘cancer’ in our own hemisphere and to prevent further Soviet penetration.”¹⁰

⁶ Dwight D. Eisenhower, *Waging Peace, 1956-1961* (New York: Doubleday, 1965), p. 534.

⁷ *Idib.*, p. 532.

⁸ Richard M. Nixon, *Six Crises* (New York: Doubleday, 1962), p. 352.

⁹ Eisenhower, *op. cit.*, p. 533.

¹⁰ Nixon, *op. cit.*, p. 352.

**Figure 1. The Dynamics of Economic and Political Hostility:
U.S.-Cuban Relations, 1959-1962**

Cuban Policy Decision	U.S. Counter	Cuban Retaliation
Castro visits the U.S. and meets with Vice-Pres. Nixon (April, 1959)	Nixon memo of visit says that Castro is either "incredibly naive about Communism or under Communist discipline" (April, 1959)	
Agrarian Reform Law Promulgated (May, 1959)	State Department protests seizure of U.S. Property without compensation (May, 1959)	
Trade Agreement with U.S.S.R. (Feb., 1960)	Castro's accusations termed "irresponsible" by State Dept. Gen. Eisenhower authorizes training of Cuban exile force in Guatemala (March, 1960)	Castro seizes and nationalizes American-owned oil companies (May, 1960)
First shipment of Soviet crude oil arrives for refining in American-owned companies (May, 1960)	U.S. Government pressures American-owned oil companies to refuse to refine the "Red" petroleum (May, 1960)	American sugar mills seized and nationalized (Aug., 1960); Castro nationalizes remainder of U.C.-owned properties (October, 1960) Cuba walks out of OAS meetings (Aug., 1960)
Castro requests that U.S. Embassy staff be reduced to 11 members claiming that spies exist (Jan. 1961)	Meeting of OAS in San José, Costa Rica condemns intervention by extracontinental force as endangering American solidarity (Aug. 1960)	Raul Roa delivers charges against U.S. before UN Security Council of economic aggression and imminent military attack (Jan. 1961)
Castro announces his conversion to Marxism-Leninism in speech (Dec., 1961)	U.S. embargo of exports to Cuba (October, 1960) Eisenhower severs diplomatic relations saying he has had enough (Jan. 1961)	Erection of Soviet missiles in Cuba (Summer, 1962) Castro's <i>Second Declaration of Havana</i> coins phrase "The duty of every revolutionary is to make revolution."
Bay of Pigs invasion (April, 1961)	Castro is excluded from OAS (Jan., 1962)	
Embargo imposed by U.S. & OAS (Feb., March, 1962)		

During June of 1960 the House Agricultural Committee took up the highly volatile issue of the expiring Sugar Act of 1948. The debates that ensued reveal that the Cuban policy of the United States was clearly moving into a new stage of retaliation and hostility toward the Castro government. The Cuban-Soviet trade pact, the refusal of U.S. companies to refine the “Red” oil from the Soviet Union, and the confiscation of U.S. property, all prompted the members of the Committee to support some form of economic strangulation of Cuba. Congressman Rivers: “Think of what is happening—Castro’s Communism—both must be destroyed. . . . Let us take a little of the Rivers’ venom and stiffen up their backbone. They need to know what the people of this nation think. The policy-makers are out of step with the people of America. American feeling has nobody to tell Castro how we feel. God save America.”¹¹ Congressman Rogers argued that it was past time to do something about the deteriorating Cuban situation. According to Rogers,

the national interest dictates that the Cuban quota should be cut and I hope that the President will exercise the authority which he requested and which is provided in this bill. If we are leaders of the free world, we cannot sit idly by exercising patience and forbearance in the face of threats made by a Communist puppet. Castro has delivered the challenge—I say, let us call his bluff.¹²

Congressman Haley’s attacks centered on the assumption that Castro could be destroyed by cutting off his sugar purchases.

I am glad that the Congress has finally decided to do something . . . about Fidel Castro’s Cuba. I said a few weeks ago that I thought the time had come to deal with Castro by hitting him where it hurts: In the pocketbook. The President’s proposal that he control sugar quotas would open the door to doing that.¹³

And Congressman McDowell reiterated the assumption that the Cuban economy would not withstand a sharp reduction in the favorable quota:

Without the continuing purchase of the 3 million tons which is taken up by the American market, the Cuban economy will flounder.¹⁴

Congressman Dixon urged that the President be given the authority to protect the United States against “a communist menace at our very doorstep.”¹⁵

Kennedy: Ideological Resentment and Retaliation

John F. Kennedy’s position vis-à-vis Cuba began to take shape during the presidential campaign of 1960. The Key question came down to whether Castro was a Communist and the ideological-security threat envisioned by a Cuban-Soviet alliance. At first, Castro clearly aligned Cuba with the West in the Cold War where democratic reforms and respect for foreign

¹¹ U.S. Congress, House, *Congressional Record*, 86th Cong., 2nd session, 1960, Part 11, p. 15228

¹² *Ibid.*, p. 15230.

¹³ *Ibid.*

¹⁴ *Ibid.*, p. 15232

¹⁵ *Ibid.*, p. 15243

investment would be insured.¹⁶ At the time, however, it was by no means easy to ascertain the nature and direction of the Cuban Revolution although Castro became increasingly annoyed at the overriding ideological resentment building up in the United States. As Thomas points out,

. . . the constant and obsessive concern of North American, public and private, with the single question of Communism irritated Castro and indeed others in his entourage: it was as if the U.S. did not care what Cuba was, provided that it was not Communist.¹⁷

Kennedy's approach to Castro was to essentially carry out the policies that had evolved during the end of the Eisenhower administration. His concern and motives were clearly more political than economic when he declared at a press conference in late January 1961 that:

What we are . . . concerned about is when these movements [Cuban Revolution] are seized by external forces and directed not to the improving of the welfare of the people involved, but toward imposing an ideology which is alien to this hemisphere.¹⁸

The same argument was reiterated after the Bay of Pigs fiasco when President Kennedy again spoke of the "menace of external Communist intervention and domination in Cuba." In speaking of the need to preserve freedom, Kennedy stated that:

The American people are not complacent about Iron Curtain tanks and planes less than ninety miles from our shores. But a nation of Cuba's size is less a threat to our survival than it is a base for subverting the survival of other free nations throughout the hemisphere.¹⁹

Thus we see how the ideological theme of anti-communism is intertwined with the policy of economic strangulation of Cuba. What Castro had done, according to Lester Langley, to make his regime so reprehensible was "his open denial of the Jacksonian credos of democracy, capitalism, and progress."²⁰ By 1964, the United States had convinced the Organization of American States to end trade relations and diplomatic contacts with Cuba.²¹ Nevertheless, the action taken by the O.A.S. was more a symbolic form of cooperation with the United States than an effective way of weakening the Cuban Revolution economically.²²

The retaliatory policies of the Eisenhower-Kennedy years including the elimination of the sugar quota reveal that the primary motive was political rather than economic. As Professor Blasier points out;

. . . perhaps the decisive motivation was not primarily that Castro threatened U.S. private interests and the traditional Cuban political structure, but that Castro was becoming a

¹⁶ Hugh Thomas, *Cuba: The Pursuit of Freedom* (New York: Harper and Row, 1971), p. 1211.

¹⁷ *Ibid.*

¹⁸ John W. Gardner, ed. *To Turn the Tide* (New York: Harper and Row, 1962), p. 42.

¹⁹ *Ibid.*, pp. 45-46

²⁰ Lester D. Langley, *The Cuban Policy of the United States* (New York: Wiley, 1986), p. 187.

²¹ Anna P. Schreiber, "Economic Coercion as an Instrument of Foreign Policy: U.S. Economic Measures Against Cuba and the Dominican Republic" *World Politics* (25 April, 1973), p. 389.

²² *Ibid.*

channel for the introduction of Soviet political and military influence into the Western Hemisphere.²³

The hostility generated by the early containment policy to stop Castro was eventually to become a self-perpetuating set of responses by both countries, thus making the return to a policy of “peaceful coexistence” almost impossible.

Why Didn't the Economic Sanctions Work Against the Castro Regime?

The irony of the policy of economic denial against the Cuban economy was that no one seemed to question its consequences and the simple fact that the trade embargo produced the exact circumstances that it was supposed to eliminate. For example, as Blasier points out, “the cut in the sugar quota literally put Castro at the Communists’ mercy, and logically led to the radicalization of the Cuban Revolution. . . .”²⁴ He goes on to point out that:

What is puzzling, and disturbing, is that there is little or no evidence that leaders in the Department of State or in the Congress seemed to have been aware that their own actions would lead precisely to the circumstances they claimed they were trying to avoid.²⁵

How do we explain this shortsightedness and the fact that the economic sanctions against Cuba did not bring about their intended effects? What went wrong with the major assumptions built into U.S. policy of containment of Cuba?

As Professor Bender points out, the policy of containing Cuba had four major components or goals: 1) weaken the Castro regime politically, 2) discredit the Cuban economic model, 3) contain the spread of Castroism, and 4) weaken the ties with the Soviet Union.²⁶ The attempt to strangle the Cuban economy with a trade embargo strengthened rather than weakened the Castro regime. The economic blockade had a positive psychological effect on the Cuban people, mobilizing their energies to withstand the hardships that the embargo imposed on Cuba. The famous *New York Times* journalist who covered Cuba during the early years of the Revolution, Herbert Matthews, argues that “The psychological effect of economic warfare on a proud and nationalistic people is to draw them together against the power or powers seeking to harm them.”²⁷ And Professor Horowitz points out that “The simple psychological fact that people under external pressure may react by greater effort, by greater sacrifice, apparently does not penetrate the Latin American desks in the State Department.”²⁸ However, Professor Horowitz neglects to point out that there were dissenting voices: former Ambassador Philip Bonsal maintained that the United States should never have reversed its pledge of nonintervention in the internal politics of Cuba.²⁹ The trade embargo served to reaffirm the legacies of American intervention in Cuban affairs; in the minds of the Cuban leaders, the trade embargo was a

²³ Blasier, *op. cit.*, p. 68.

²⁴ *Ibid.*, p. 76.

²⁵ *Ibid.*

²⁶ Bender, *op. cit.*, p. 35.

²⁷ Herbert L. Matthews, *Fidel Castro* (New York: Simon and Schuster, 1969), p. 238.

²⁸ Irving Louis Horowitz, “United States-Cuban Relations” *Transaction* (April, 1969), p. 43.

²⁹ Philip W. Bonsal, “Cuba, Castro and the United States” *Foreign Affairs* 45 (January, 1967), p. 271.

“Godsend” because it helped to keep alive in Cuba the traditional image of America as an imperialist aggressor.³⁰

The efforts to discredit the Cuban economic model were successful in that the trade embargo generated severe strain in the early years of the Cuban Revolution. Castro has clearly acknowledged the strains that the embargo created in the first four years of the Revolution. As Mankiewicz and Jones illustrate in their recent interview with Castro, the costs of sea transportation increased because trade was no longer just 90 miles away, access to American technology and patents was cut off, loans could not be obtained, and trade with other countries was curtailed because many countries feared U.S. retaliation.³¹

Despite the problems of poor planning, bureaucratic ineptitude, and the failure of moral incentives, the Cuban economic model has survived with the assistance of large doses of Soviet aid and trade with both Communist and non-communist nations. For example, Cuba now trades with most of the countries of Latin America, Europe, Japan, Canada, in addition to the Soviet bloc trading partners.³² In 1974, exports to non-communist countries were over \$500 million and imports exceeded \$400 million.³³

The element of the containment policy associated with the “export of Revolution” and the containment of Castroism was based on the notion that the Cuban Revolution was exportable and would soon spread to the rest of Latin America. Again, the United States expected the worst from the Cuban Revolution, failing to recognize that Cuba possessed a different set of conditions which brought about the rise of Fidel Castro. One can argue that Castroism was successfully contained but the failure of the Revolution to spread had more to do with the “nonreceptivity of the Latin masses” than the efforts to strangle the Castro forces by trade embargoes and ideological ostracism.³⁴ And Che Guevara’s efforts to bring Revolution to Bolivia only served to highlight the inapplicability of the Cuban model to other parts of Latin America.³⁵

Perhaps the most unsound assumption of the policy of Cuban containment was the objective designed to weaken ties with the Soviet Union and thereby drive the Russians out of the U.S. “sphere of influence.” The gradual reduction of the U.S. sugar quota and the efforts to “hit Castro in the pocketbook” by choking the economy only served to push Cuba into the economic and political orbit of the Soviet Union. What is interesting to note in the Russian acceptance of Cuban trade is that without the recent internal changes in the Soviet Union beginning in 1955 the Cubans would indeed have had no where to turn. But Nikita Khrushchev replaced Stalin and his foreign policy quickly expanded the “sphere of influence” of the Soviet Union. Moreover, the ability to export a surplus of oil did not materialize until after 1958. Thus, the coincidence of the dynamics of change in the Soviet Union served to open doors for the Cuban-Soviet link which could not have happened if Castro had been successful when he

³⁰ Philip W. Bonsal, *Cuba, Castro and the United States* (Pittsburgh: University of Pittsburgh Press, 1971), p. 166.

³¹ Frank Mankiewicz and Kirby Jones, *With Fidel: A Portrait of Castro and Cuba* (New York: Ballantine Books, 1975), pp. 114-116.

³² U.S. Congress, House, Committee on International Relations, *U.S. Trade Embargo of Cuba*, 94th Cong., 1st Session, (Washington, D.C.: U.S. Government Printing Office, 1976), p. 74.

³³ *Ibid.*

³⁴ Edward J. Williams, *The Political Themes of Inter-American Relations* (Belmont, Calif.: Wadsworth, 1971), p. 60.

³⁵ Bender argues that, “If ‘Che’ Guevara’s heroic Bolivian folly in 1967 proved anything, it was certainly that the ‘objective’ conditions for revolution in Latin America are simply not yet present.” Bender, *op. cit.*, p. 36.

stormed the Moncada Army Barracks in 1953.³⁶ Perhaps a different American president and a higher tolerance for foreign ideologies would have seen a different set of responses to the Cuban Revolution between 1959-1962.

The continuation of the trade embargo despite its ineffectiveness reflects the often-contradictory nature of United States policy towards Latin America. With the case of Cuba we see a policy of “pan-Americanism” occurring simultaneously with a thrust of big-stick interventionism in the name of anti-communism. According to Williams, “This dualism. . . has made a vacillating, unpredictable mess of U.S. policy.”³⁷ And while we continue to choke the Cuban economy with a trade embargo, at the same time we continue to trade with other communist countries such as the Soviet Union and China. When the U.S. continues trading with Iran and South Korea despite serious violations of human rights and then uses the human rights issue as a reason for continuing the embargo against Cuba, the befuddling dualism in our foreign policy is highlighted.

The trade embargo against Cuba has been perpetuated, despite its anachronistic assumptions and effects, because of the continued belief in what Abraham Lowenthal calls the “hegemonic presumption.”³⁸ This concept, a carryover from “White Man’s Burden” and the Monroe Doctrine, refers to the belief that the Western Hemisphere is part of the U.S. sphere of influence. If the trade embargo were suddenly lifted, it would be an admittance to policy makers in the United States that influence and hegemony has waned.³⁹

Reducing the Politics of Hostility: Efforts to Revive the United States-Cuban Trade Relationship

Over the past five years there have been efforts both in Cuba and the United States to work toward a removal of the trade embargo. When asked about the recent improvement in relations between the United States and Cuba, Fidel Castro placed the economic blockade (Castro’s term for the trade embargo) at the forefront of obstacles to a rapprochement between the two countries:

I think that any step...must first be taken by the United States. Because the major, fundamental problem is the economic blockade. It was a decision taken by the United States, which it has maintained, for the purpose of preventing the economic development in Cuba and choking the Revolution. To tell you the truth, it has been a hard struggle, the fight against the blockade, but we have survived. The Revolution was not asphyxiated, ... and we believe that nothing can prevent our country from maintaining this level of development in future years.⁴⁰

Beginning in 1973, efforts have been taken by both the United States and Cuba to revive the United States-Cuban trade relationship while at the same time returning to a more harmonious

³⁶ In 1953, Castro made a vain attempt to assault the Moncada Army Barracks to spark an uprising against the Cuban dictator, Fulgencio Batista. See Edward Gonzalez, *Cuba Under Castro: The Limits of Charisma* (Boston: Houghton Mifflin, 1974), pp. 79-110.

³⁷ Williams, *op. cit.*, p. 56.

³⁸ Abraham F. Lowenthal, “The United States and Latin America: Ending the Hegemonic Presumption” *Foreign Affairs* 55 (1976), pp. 199-213.

³⁹ *Ibid.*, p. 206.

⁴⁰ Mankiewicz and Jones, *op. cit.*, p. 113.

pattern of political relationships (see Figure 2). Perhaps the major turning point was the “memorandum of understanding” to curb hijacking of ships and aircraft between the two nations signed in February of 1973. The success of this initiative was followed by a visit to Havana by Senators Javits, Pell, and McGovern. After his visit to Havana, Senator McGovern reported that Castro “had made it clear that he would be willing to begin the thaw if the United States took the first step by removing its embargo on the shipment of food and drugs to Cuba.”⁴¹

The change in attitude among members of the U.S. Congress is rooted in major foreign policy changes with other Communist foes such as the Soviet Union and China initiated during the Nixon Administration. The growing feeling among members of the U.S. Congress is that to maintain a cold war relationship with Cuba while “warming up” through détente with the Soviet Union and China is foolish and detrimental to American foreign policy.

The first serious effort to remove the anachronistic policy of trade restrictions with Cuba occurred in May, 1975 when the Bingham Resolution (H.R. 6382) was introduced to repeal various statutes on the trade restrictions. The Bingham Resolution would have the effect of “withdrawing specific Congressional authority under...the Foreign Assistance Act of 1961 and various executive regulations for a complete and total embargo of Cuba.”⁴² This piece of legislation was quickly countered by anti-Cuban members of Congress who opposed a relaxation of trade restrictions on Cuba on essentially ideological grounds. For example, two Florida Congressmen, Clause Pepper and Bill Chapper, Jr., sponsored a bill to continue the trade embargo against Cuba.

The debates that ensued were surprisingly similar to those sparked by the initial hostility to Castro and the Cuban Revolution. That is, the motivations for altering the Cuban policy of the United States focused heavily on political rationale rather than the costs and benefits of the present policy of economic strangulation. In speaking against any sort of détente with Cuba, Dr. Jorge Mas Canosa, a prominent Cuban-American, said that to resume trade with Cuba would be to legitimize the Cuban confiscation of American property thereby encouraging other countries to respond in the same manner. While addressing the joint hearings of the House International Relations Sub-committee on International Trade and the Sub-committee of International Organizations, Dr. Mas set forth three basic reasons why the United States should not resume trade and diplomatic relations with Cuba:

1. It will be a violation of treaties and resolutions approved by the Organization of American States as well as of Public Law 87-733 of 1962.⁴³

2. It will be a decisive blow to the cause of Democracy in the Western Hemisphere, as United States surrenders to the Castro regime the traditional principles on which this nation was founded.

⁴¹ U.S. Congress, House, *Congressional Record*, 21, 94th Cong. 1st session, June 20, 1975, p. H5911.

⁴² *Ibid.*

⁴³ “The OAS in January 1962 adopted a series of resolutions expelling Cuba from the Organization because of its Marxist-Leninist government. In July, 1964, it adopted resolution condemning Cuba for ‘acts of aggression’ against Venezuela and directing OAS members to suspend diplomatic and trade relations except for humanitarian shipments of medicine and food.” (from *Congressional Quarterly*, May 17, 1975, p. 1015) Public Law 87-733, approved on October 3, 1962 by the U.S. Congress, stated that the “United States was determined to prevent ‘by whatever means necessary, including the use of arms,’ Cuban aggression and its buildup of a military force that would endanger the security of the United States.” (from *Congressional Quarterly*, May 17, 1975, p. 1015).

Figure 2. Towards a New Relationship: From Containment to Limited Normalization, 1973-1977

Date	United States Action	Cuban Response
Feb., 1973	Cuba and the U.S. sign a five-year "memorandum of understanding" to curb hijacking of ships & aircraft between the two nations (a bilateral decision)	Cuban adherence to the agreement contributes to a considerable reduction in the number of airline hijackings to Cuba.
April, 1974	Javits-Pell mission to Havana pursuant to their amendment calling for a review of U.S. policy toward Cuba. Javits-Pell Amendment passes in Senate.	Castro states that the trade "blockade" (embargo) must be lifted before normalization negotiations can begin.
Aug., 1974		
May, 1975	Bingham Resolution (H.R. 6382) introduced in House to lift the trade embargo.	Castro indicates that he would consider bilateral talks if the U.S. partially lifts the embargo allowing food and medicine.
May, 1975	McGovern visit to Cuba indicates that "a very significant change" in Cuba's position has taken place.	
May, 1975	Ford Administration states that no action will be taken on the embargo of Cuba until OAS sanctions are lifted.	
July, 1975	OAS lifts economic and political sanctions imposed in 1964 making way for further U.S.-Cuban negotiations.	Castro government returns \$2 million to Southern Airways from earlier hijacking-ransom. Castro sends approx. 15,000 Cuban troops to fight on side of MPLA in Angola. Troops remain in Angola after MPLA victory.
Aug., 1975	U.S. relaxes embargo on trade with Cuba by permitting foreign subsidiaries of American firms to export goods to Cuba.	
Oct.-Dec., 1975		
April, 1976	U.S. elections and Castro's success in Angola lead the U.S. to revert to past policies toward Cuba. Sec. of State, Kissinger declares that normalization of relations cannot continue while Cuban forces are in Angola.	
Feb., 1977	Carter Administration declares willingness to discuss a normalization of relations <i>with</i> Cuban troops in Angola.	Havana and Washington sign a fishery agreement and a provisional maritime boundary agreement. Castro responds by establishing similar forms of diplomatic communication with the U.S. Castro allows 54 Americans and their families to leave Cuba for the U.S.
March, 1977	Carter Administration lifts 17-year ban on travel to Cuba.	
April, 1977	Asst. Sec. of State for Latin American Affairs, Terence Todman, visits Cuba to discuss fishing and Maritime rights	
Sept., 1977	"Interest Sections" established for purposes of quasi-diplomatic communication.	
Sept., 1977		

3. It will be a violation of all moral principles by resuming relations with a regime labeled properly by the International Commission of Jurists as the most “cruel, inhuman, and degrading known to America.”⁴⁴

The motivations stated by Dr. Mas and supported by many members of the U.S. Congress serve to illustrate that the refusal to lift the trade embargo is still more of a political issue for the opponents of détente with Cuba. The key problem, according to the pro-embargo forces in Congress, is the fact that the United States’ “sphere of influence” has been penetrated by the Soviet Union. For example, Senator Buckley urged that before the U.S. resumed trade with Cuba, Castro’s regime should renounce its alliance with the U.S.S.R., “order the withdraw of Soviet military and intelligence operatives and deny the use of Cuban territorial waters and basing facilities to the Soviet navy...”⁴⁵ Congressman Pell feels that to recognize Cuba and to open up trade would only frustrate the goal of Cuban exiles who wish to return to a free and democratic Cuba.⁴⁶

The proponents of lifting the trade embargo and beginning a détente with Cuba claim that the embargo is out of date, ineffectual, and harmful to our relations with other countries in the hemisphere.⁴⁷ Congressman Harrington, for example, proposed a bill in February, 1975 that would end economic sanctions against Cuba. His motivations were clearly to “bring relations with Cuba more in line with...recent efforts toward rapprochement with...the People’s Republic of China and the Soviet Union.”⁴⁸ It had become clear to Congressman Harrington that the original intention of these sanctions—to weaken the Castro regime and purge the island of Communist influence—had not worked since Communist influence is greater and Castro’s regime is stronger today than when the policy of “strangulation” began. In addition, it can be argued that the United States—by continuing to ostracize Cuba—has damaged its reputation in Latin America because it has chosen to ignore the Latin American trend toward the opening of trade and diplomatic relations with Cuba.

While little progress toward a rapprochement with Cuba took place while Richard Nixon was president, the Ford Administration adopted a policy of limited hostility toward the Castro regime by leaving the decision of hemispheric relations with Cuba in the hands of the Organization of American States. While speaking before a reception of O.A.S. delegates on May 10, 1975, President Ford stated that “We recognize that every state has the right to adopt its own system of government and its own economic and social organization.: Secretary of State Kissinger’s position was more cautious in a speech given in Houston on March 1, 1975: “If the O.A.S. sanctions are eventually repealed, the United States will consider changes in its bilateral relations with Cuba.” In effect, Kissinger was arguing that the perpetual antagonisms between the United States and Cuba were senseless and that the United States would simply follow in the footsteps of the other countries of the Western Hemisphere. In other words, the United States would respond but not lead or initiate a reduction in the politics of hostility.⁴⁹

⁴⁴ U.S. Congress, House, *Congressional Record*, 21, 94th Cong. 1st session, May 22, 1975, p. 44868.

⁴⁵ *Congressional Quarterly*, 33 (May 17, 1975), p. 1014.

⁴⁶ *Ibid.*

⁴⁷ U.S. Congress, House, Extensions of remarks, Congressman Michael Harrington speaking for his resolution to repeal P.L. 87-733 and for his bill to end economic sanctions on Cuba, *Congressional Record* 21, 94th Cong., 1st session, February 10, 1975, p. E508.

⁴⁸ *Ibid.*

⁴⁹ *Congressional Quarterly*, 33 (May 17, 1975), p. 1015.

In July of 1975 the Organization of American States met in Costa Rica where the member nations, with the acquiescence of the United States, voted to “remove sanctions imposed against Cuba in 1964 and to allow freedom of action on trade matters to member nations.”⁵⁰ The next month the U.S. State Department announced that the ban on foreign subsidiaries of American companies exporting to Cuba would be lifted. However, there would still be no direct trade between the United States and Cuba. In order to conform to the actions of the Latin American countries, the State Department also announced two further steps to facilitate the new policy: 1) An end to the prohibition on aid to nations that permit their ships or aircraft to carry goods to or from Cuba; and 2) the initiation of steps to modify regulations that deny docking and refueling in the United States to ships of other nations that trade with Cuba.⁵¹ These moves were clearly motivated by several Argentine firms (subsidiaries of American companies) that had been granted licenses to ship goods to Cuba after threatening to nationalize the companies if authorization was not forthcoming. Castro’s response to these U.S. initiatives was positive in that nearly \$2 million was returned to Southern Airways from an earlier hijacking and ransom escapade.

Although the efforts to normalize relations between the United States and Cuba reached an optimistic high by the summer of 1975, they were quickly reversed by the sending of close to 15,000 Cuban troops to fight on the side of the MPLA (Popular Movement for the Liberation of Angola) in Angola. The position of the United States government was that no further steps could be taken while Cuban troops were stationed in Angola. This was further complicated by the Republican battle between President Ford and Ronald Reagan for the convention nomination in 1976 and Castro’s continual support for the independistas (those in favor of independence) in Puerto Rico. Thus, election year politics served to place the Cuban policy of the United States in a type of “deep freeze” until a new administration was inaugurated in early 1977.

The Carter Administration was immediately confronted with the task of developing a strategy for dealing with two issues of major importance in U.S.-Latin American relations: 1) a new treaty with Panama concerning the operation and defense of the Panama Canal, and 2) the normalization of relations with Cuba. President Carter clearly put the Panama issue at the top of his Latin America agenda so that U.S.-Cuban relations have only changed slightly while the trade embargo continues as key obstacle to a full normalization of relations. Nevertheless, the first six months of the Carter Administration have brought a lifting of the seventeen-year ban on travel to Cuba, and the first visit to Cuba by a high ranking government official (the Assistant Secretary of State for Latin American Affairs, Terence Todman) since President Eisenhower severed relations in early 1961.

The strains of shifting the Cuban policy of the United States over the past four years demonstrates the essentially bureaucratic nature of American foreign policy toward the Latin American nations. That is, if the trade embargo is lifted completely and a pattern of normal trade is resumed between the U.S. and Cuba, new working relationships between the foreign policy machinery and the Cuban government would have to be worked out. There is no doubt that Cuba, Castro, and the Cuban Revolution are considerably different from what existed in 1959. Cuba’s industries and banks have been nationalized, farms collectivized, and an entire generation of Cubans have only had the opportunity to experience the kind of government and society that now exists. The crux of the problem of normalization is that bilateral relations will never become “normal” again due to the changes within Cuba due to the Revolution and the changing political

⁵⁰ “U.S. Relaxes Ban Against Trading with the Cubans,” *New York Times* (August 22, 1975), p. 1.

⁵¹ *Ibid.*, p.3.

realities between the United States and the rest of the world. The United States will have to adjust to a “normalization” of relationships in which Americans will no longer be able to dominate the Cuban economy through investment, political pressure, and luxurious trade policies.⁵² Major bureaucratic and political hurdles remain before the trade embargo can be terminated and a new trade relationship established. Even though the President of the United States has a large say in what the Cuban policy of the United States will be, other bureaucratic entities such as the Departments of Treasury, Agriculture, and Commerce are legally involved in any future efforts to reverse the policy established under Eisenhower and Kennedy.⁵³

The Costs of Continuing the Trade Embargo Against Cuba

The trade embargo against Cuba has cost the United States approximately \$7 billion dollars in trade.⁵⁴ The slack in the Cuban economy created by the embargo in the early 1960's was quickly taken up by the Soviets and later by other countries such as France, Canada, and Japan. In short, the United States embargoed itself while attempting to “punish” Cuba for its ideological deviance.⁵⁵ Cuba has demonstrated that it has the will to exist close to the United States while developing an economic and political system different from those in the Western Hemisphere. For better or for worse, Fidel Castro intends to forge ahead with the goals of the Revolution while at the same time coexisting with other nations of the world. As Castro insists;

Cuba must move forward with its program of nation building. We cannot afford to divert our energies and resources to wars or disputes with our neighbors. Instead, we must coexist with those countries whose government and economic system differs from ours.⁵⁶

So despite the legacy of U.S. hostility to the Cuban Revolution and the difficulties of shifting to a normalization of trade between the two countries, a continuation of the embargo will continue to mean lost jobs and revenue for the United States treasury and its citizenry.

The trade embargo against Cuba also reflects political and humanitarian costs that are often neglected in assessing the impact of 18 years of economic denial. For example, issues such as food exportation and health care tend to become political “pawns” in the politics of the current trade embargo. When the embargo was first enacted the shipment of foodstuffs and medicines were permitted; however, the shipments were stopped after a few months due to harassment by American workers.⁵⁷ An American physician who visited Cuba recently acknowledged that he saw no medical goods of recent origin while on the island.⁵⁸ The trade embargo has prevented the flow of medical and scientific information to Cuba so that medical research is sorely out of date, particularly in the treatment of cancer, heart ailments, and respiratory illnesses. The

⁵² *U.S. Trade Embargo of Cuba, op. cit.*, p. 266.

⁵³ Jorge L. Dominguez, “U.S. Policy Toward Cuba: A Discussion of Options,” *The Americas in a Changing World* (New York: Quadrangle, 1975), pp. 117-127.

⁵⁴ *U.S. Trade Embargo of Cuba, op. cit.*, p. 207.

⁵⁵ “The paramount question is whether the United States will take one step forward and lift its embargo of Cuba or take two steps backward and be embargoing itself by being one of the few countries not trading with Cuba.” *Ibid.*, p.80.

⁵⁶ *Ibid.*, p. 269.

⁵⁷ Edward Boorstein, *The Economic Transformation of Cuba* (New York: Monthly Review Press, 1968), p. 32.

⁵⁸ *U.S. Trade Embargo on Cuba, op. cit.*, p. 233.

humanitarian aspects of this policy are captured by a statement made by Dr. H. Jack Geiger, after inspecting Cuban medical advances:

In peacetime circumstances, an embargo that restricts the flow of medical and scientific books and journals, and the free exchange of scientific and medical information and knowledge, is a contravention of every principle of scientific and academic freedom—the very freedoms whose abrogation we are so quick to deplore in selection other nations. It politicizes science and medical research, and puts us in a position of withholding such knowledge for political reasons. And it interferes with the further free development of medical and biological knowledge, which is, or should be, an international human activity above national political considerations.⁵⁹

The embargo as it now stands works to the detriment of the United States to both solve its domestic economic problems and emphasize a policy of human rights in international affairs. It is not unreasonable to foresee a more humane treatment of political prisoners in Cuba with a more “normal” pattern of political and economic relationships between the United States and Cuba. At least ending the trade embargo and establishing diplomatic relations would give the United States a voice in any future discussion of human rights violations in Cuba.⁶⁰

The removal of the trade embargo could also be of benefit to the United States in its balance of payments and in employment with the export sector of American manufacturing. According to the Department of Commerce, Cuba has shown an interest in importing such manufactured items as video and food processing equipment, automotive vehicles, and air conditioning equipment. The United States could stand to benefit from the Cuban export of sugar cane, cigars, rum, fish, citrus products, and nickel. Although the Soviet Union buys a large share of the annual Cuban sugar crop, Cuba exported only 15% of its cigars to the Soviet Union in 1972 and roughly one-third of its citrus crop in the same year.⁶¹ Fidel Castro has had to pay dearly for the rapid transformation of Cuba from a capitalist, market economy to a centrally planned, socialist economy but the U.S. trade embargo has not prevented the Cuban Revolution from marching forward so that the “blockade” remains basically a symbol of past hostilities. What is needed at this juncture is a sense of perspective and realism concerning a policy that is not only anachronistic but doomed to extinction. A new Cuban policy is needed in order to forge ahead with solving problems in both the United States and Cuba. The seventeen-year embargo has in many ways assisted the Cubans in their economic transformation because it has been a catalyst for reducing the high level of dependency on the United States and creating a heightened sense of national identity. This notion summed up well by Robin Blackburn who stresses that “The greatest achievement of the Cuban Revolution is the economic field is that Cubans now make their own mistakes.”⁶²

⁵⁹ *Ibid.*, p. 238.

⁶⁰ *Ibid.*, p. 125. For Castro’s views on President Carter’s “human rights” policy, see B.C. Bradlee, “Don’t Talk to Castro About Human Rights,” *Washington Post* (March 6, 1977), p. C-2.

⁶¹ U.S. Department of Commerce, *United States Commercial Relations with Cuba: A Survey* (Washington, D.C.: Government Printing Office, 1975), p. 27.

⁶² Robin Blackburn, “The Economics of the Cuban Revolution,” *Latin America and the Caribbean: A Handbook*, ed. Claudio Velez (New York: Praeger, 1968), p. 622.

Concluding Remarks

In reviewing the politics of the trade embargo against Cuba for the past seventeen years, it becomes clear that the objectives of the early policy of economic denial have proved to be either counter-productive or have failed. As such, the continuation of the essential parts of the policy of containment of Castro's Revolution only serves to reinforce the underlying principle of the efforts to strangle the Cuban economy; namely, to punish Cuba for its anti-United States belligerency. The fact that Castro is still alive, despite CIA efforts to assassinate him, and the Revolution continues, is only a bitter reminder to those architects of the early efforts to undermine the Castro regime. What has been created is a set of self-perpetuating hostilities based more on ideological rigidity and resentment than the realities of the decline of the United States domination in Latin America. This is summed up nicely in the conclusion presented by Anna P. Schreiber in her study of U.S. economic sanctions against Cuba.⁶³

Although economic coercion would thus appear not to serve many U.S. interests, it was applied because it met public demands for action against Castro. The government, reflecting the demands of an enraged public, was unwilling to allow Castro to benefit in any way from U.S. trade. The policy was a punitive reprisal against actions interpreted as being contrary to U.S. interests. In addition, economic coercion was applied and maintained as a symbolic affirmation of the U.S. belief in its right to maintain a position of pre-eminent influence in Latin America. It was a declaration of U.S. opposition to the spread of revolution and Communist influence in an area deemed to be within its 'sphere of influence.' For more than a decade, successive U.S. Administrations have felt that such a symbolic statement needed to be made in a forceful, concrete fashion. With the passage of time, goals and attitudes may well evolve and U.S. policy-makers may finally decide that the utility of economic coercion as a symbol has decreased.

The Cuban policy of the United States between 1959 and 1977 may well represent the turning point in what has been called "a special relationship" or "sphere of influence" in the Latin American area. Cuba has clearly demonstrated its ability to challenge the hegemony and domination of the Latin American area by the U.S. and the contagion effect of the Cuban Revolution has given Latin America confidence in steering its own path to developmental change without the paternalism of the United States. Who could have possibly imagined twenty years ago that the barbudos (Castro's bearded guerrillas) fighting in the Sierra Maestra mountains would be able to carry out a radical revolution while at the same time gradually establishing a political alliance with the Soviet Union?

The significance of these changes that have taken place in Cuba are that they have formed the catalyst for the rest of Latin America to experiment with different ideologies, economic systems, trade relationships, and the purchase of military hardware from outside the United States. The Latin American states are definitely more powerful than in the past and more firmly in touch with developing outside the sphere of U.S. domination. The signs of change are evident in the decline of Latin American exports to the United States, the trends toward nationalization with compensation in Venezuela and Peru, the role of Venezuela and Ecuador in OPEC, and the fact that Japanese investment in Brazil now exceeds that of the United States. Thus, the Cuban Revolution has had a major impact on the shifts that have occurred in the U.S.-

⁶³ Schreiber, *op. cit.*, p. 405.

Latin American relationship. And if we can take the pronouncements of the Carter Administration with any degree of sincerity, then there is some room for optimism in the future of Cuban-American relations where our Latin American policy is based on mutual respect rather than a special relationship.⁶⁴

Economic coercion as an instrument of foreign policy represents a paternalistic attempt to “punish” Cuba for straying too far from the basic tenets of American foreign policy: conservative change, capitalist economic development, and a Christian ethic. The changes that have taken place over the past seventeen years will make the eventual removal of the trade embargo more a part of larger, global issues and concerns than strictly bilateral issues between the United States and Cuba. The more quickly the United States recognizes the importance of dealing with Cuba as a part of global problems—human rights, conserving world resources, providing an adequate supply of energy, etc.—the sooner it will be able to concentrate on the problems of the 1980’s. According to Professor Lowenthal, “A quick and clear gesture to establish relations with Cuba... would help signal the new administration’s desire to end Cold War policies and practices...”⁶⁵ This action would signal the end to the utility of a Latin American policy that imposes unilateral blockades and has a low tolerance for political diversity in the Western Hemisphere. The failure to establish mutually respectful relations with Cuba by ending the policy of economic denial only postpones and complicates the issues that the United States will face in the Caribbean and the rest of the Third World in the future. In this respect, the eventual complete removal of the U.S. trade embargo of Cuba may well symbolize that the U.S. presumption of hemispheric hegemony is over.

⁶⁴ Abraham Lowenthal, Speech delivered at the 9th Annual Hawkins Symposium on International Affairs, Towson State University, March 23, 1977.

⁶⁵ Abraham Lowenthal, “Ending the Feud with Castro’s Cuba,” *Washington Post* (January 9, 1977), pp. C1-2.

The Law of War in the Arab-Israeli Conflict: On Water and On Land

R.R. Baxter

***Abstract:** International law, plagued by political interests, failed to govern the Arab-Israeli conflict triggered by the 1948 termination of the Mandate of Palestine. Considering no peace settlement is in prospect, laws should be written neutrally, void of political bias, with emphasis on protection of individuals and non-participant states. Moreover, international supervision should be executed by impartial entities, such as Protecting Powers, rather than political agencies, who have proven lack of credibility when inquiring into Israeli conduct. The history of the Straits of Tiran and Suez Canal demonstrate how armistices do not override rights, and that the belligerent that occupies a waterway may exercise the same rights, including seizure and denial of passage, as it can on the high seas. Additionally, the West Bank — despite the four Geneva Conventions of 1949 and the Hague Relations of 1907 — became de facto Israeli territory, although it was not overtly annexed, which would have broken international law. Israel argued that the Civilians Convention did not apply to the West Bank as the occupied territory, due to the 1949 Armistices, was never under Jordanian sovereignty; therefore, Israeli sovereignty could legitimately extend into the terra nullius. Furthermore, due to disputed territorial claims, the human rights of the population, especially combatants, in occupied lands have been contested and often considered violated.*

In the light of history, the conflict between Israel and the Arab States – now seen as a series of outbreaks of violence – will be viewed as one protracted war beginning with the termination of the mandate for Palestine in 1948. The duration of the violence may be such that the war will, like the Hundred Years War or the Thirty Years War, come to be identified by its duration.

The twenty-three years of the war have been rich in episodes and in drama. The conduct of the war in both its land and maritime dimensions has given rise to a correspondingly wide range of legal questions turning on the *ius in bello*. One might have expected that in a war fought by legally sophisticated states in full view of the international community and with ample discussion in the United Nations, international law would have played an important part in the restoration and maintenance of order. International law has bulked large, but disagreement about its application has not given it the stabilizing influence that might justifiably have been expected of it.

The grim fact is that narrow legal questions, such as the applicability of the Geneva Civilians Convention of 1949 in the areas occupied by Israel or the right of ships carrying goods of Israeli origin to pass through the Suez Canal, have not been approached on a narrow and technical basis. Instead, their resolution has turned on political determinations or mixed legal and political considerations. As I will have occasion to show, there is actually a hierarchy of questions, so ordered that what may lawfully be done in a particular instance depends on the answer to yet more general questions. And those general questions will be answered in one way or the other according to the view taken of the ultimate political question of the very existence of Israel itself.

Let me be more specific about this hierarchy of questions: In the case of the two major international waterways controlled at one time by the United Arab Republic – the Suez Canal and the Strait of Tiran – questions have arisen about the right of Israeli-flag vessels and neutral ships carrying goods to or from Israel to pass through the waterways. The United

Arab Republic naturally attempted to take advantage of its strategic position athwart these waterways to interdict the passage of ships and cargoes that might aid its enemies. Neither the customary law nor the treaty law on passage through these waterways is free of ambiguity and doubt. However, the central problem at a number of junctures has been whether the United Arab Republic is entitled to exercise what are essentially belligerent rights when conditions of peace had been or should have been established. Was there any continuing need to exercise rights of visit and search and to seize vessels and cargoes? Now that the Sharm el Sheikh area is controlled by Israel and the Suez Canal is blocked, these problems may seem to be of only historical interest. But with the reopening of the Canal and a shift of fortunes in the control of the Gulf of Aqaba, these issues could become live ones again. And consideration will certainly have to be given to them in any peace settlement that is worked out.

In the Six-Day War of 1967, Israel occupied large areas that had formerly been under the control of Arab States. It has refused, however, to acknowledge that it is under a legal duty to administer all of these areas in conformity with the rules laid down in the Geneva Convention Relative to the Protection of Civilian Persons in Time of War.¹ The legal case of Israel has been that much of these areas was never lawfully under the sovereignty of the Arab States that claimed them. Therefore there is no belligerent occupation of enemy territory, and the law of belligerent occupation and the Geneva Civilians Convention are not for application.

Legal issues such as these might seem on superficial examination to be ones that could fairly readily be resolved by resort to familiar legal techniques of amassing and analyzing the evidence of the law, interpretation of the treaties and so forth. But these are not narrow and technical questions. As has been seen, they can be answered only on the basis of answers to other questions with a higher political content. If there is no longer a state of war – or if there was never one – between Israel and the Arab States, there is no longer any basis for Egyptian interdiction of the passage of ships and cargoes through the waterways it controlled. The legality or illegality of Israel's administration of the occupied areas depends on where sovereignty over those areas lawfully rests. And one must also ask whether there has been only one prolonged conflict or, on the other hand, a series of conflicts such that each new outbreak of violence must be seen as a new act of aggression to be met by a new exercise of the right of self-defense. In the latter events, each new resort to force must be measured against the standards of article 2, paragraph 4, and article 51 of the United Nations Charter, prohibiting the use of force except in self-defense. Israel and the Arab States have quite different perspectives on the situation. Questions of this order turn out to be mixed legal and political ones. They cannot, however, be answered satisfactorily, under the present state of the law, without resolution of the fundamental issue that has been the cause of twenty-three years of intermittent fighting. That issue is the right of Israel to exist, to be recognized, and to be secure. And that ultimate issue is a political one.

It is in the interest of Israel to consolidate its position as the State that has, in the perspective of today, prevailed in the war. For this reason it demands recognition of its existence by the Arab States, direct negotiations with those States to symbolize that recognition, and proper measures for its security. Over the course of the years, this has been a recurrent theme – that the war is over, that peace has been re-established, and that peaceful relations must be carried on. So long as Israel is looked upon as an interloper, an expansionist, and an aggressor, the Arab States desire to carry on the conflict. In their view, Israel must not be allowed to retire from the field of battle in secure possession of the spoils

¹ Dated at Geneva, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365.

of 1967. Either a peace settlement or force must deprive Israel of what it has gained.² The existence, dimensions, and security of the State of Israel are at stake. For that reason, Israel talks of peace, while the Arab States contemplate war. To leave the dimensions of Israel as they are now would be to the advantage of Israel. To change them, if necessary by force, would serve the interests of the Arab States.

And so the hierarchy may be observed: At the bottom, rules of international law to be applied to specific ships, specific people, specific buildings; in the intermediate rank, mixed legal and political questions about the recognition of the State of Israel, the extent of its territory, and the existence of war; and at the apex, like the *grund-norm* of Kelsen's system, the question of the existence and preservation of Israel. Thus, the answers to the majority of narrow legal questions have depended on the position taken on the paramount political question.

With this mode of analysis in mind, let us now turn to the question of passage through international waterways controlled by the United Arab Republic. When war broke out between Egypt and Israel in 1948, the Egyptian Government instituted inspection of ships passing through the Suez Canal and provided for the seizure of cargoes and ships in conformity with the normal law relating to prize and contraband in time of war. Egypt was not precluded from such action by the fact that it did not recognize the newly established State of Israel. So far as Israeli warships were concerned, it would have been foolhardy for any such ships to attempt passage through a narrow artificial waterway running through Egyptian territory. The waterway had been closed to enemy ships in previous conflicts, and the restrictions imposed by Egypt were in conformity with past practise, including that of Great Britain during the Second World War.

The Convention of Constantinople of 1888, which was and remains the basic instrument regulating international use of the Suez Canal, provided that the Canal is "to be free and open, in time of war as in time of peace, to every vessel of commerce or of war, without distinction of flag."³ That this did not confer a right of passage on Egypt's enemies in time of war was made clear by article X of the Convention:

Likewise, the provisions of Articles IV [dealing with the passage of vessels of war of belligerents], V [dealing with the embarkation and disembarkation of troops in the Canal area], VII [prohibiting the stationing of vessels of war in the Canal], and VIII [charging the agents in Egypt of the signatory powers with supervision of the execution of the treaty] shall not stand in the way of any measures which His Majesty the Sultan and His Highness the Khedive in the name of His Imperial Majesty and within the limits of the Firmans granted, might find it necessary to take to assure by their own forces the defense of Egypt and the maintenance of public order.

But article XI stipulates that "the measures taken in the cases provided for by Articles IX and X of the present Treaty shall not interfere with the free use of the Canal..." These provisions of the Convention of Constantinople may seem to take away with one hand what is given by the other. But if they are read together, they appear to be susceptible to rational interpretation. "Measures... to assure... the defense of Egypt" must certainly extend to the exclusion of enemy warships. If they did not, then Israeli warships would have been able to

² This political problem is central to the dispute over the correct interpretation of Security Council Resolution 242, Nov. 22, 1967, U.N. Doc. S/RES/242 (1967), calling for "Withdrawal of Israeli armed forces from territories occupied..."

³ Art.1, 15 Martens, N.R.G. 2nd ser. 557 (1891).

pass with impunity through the very territory of Egypt and through the territorial waters of Egypt providing access to the Canal. Israeli warships, subject to attack by Egyptian warships on the high seas would have been legally immune from attack and capture only within the territory of Egypt itself. That interpretation of the Convention is on its face absurd. Similar considerations apply to the passage of Israeli-flag merchant ships and of neutral ships carrying contraband, such as military supplies destined for Israel, through the Canal. Egypt found it necessary to its own defense, as permitted by the Convention, to deal with enemy and neutral ships and cargoes within its territory in the same way in which it was permitted to deal with such ships and cargoes on the high seas or in its territorial sea. Again, it would be too much to expect that the Canal would be a permitted passage and a privileged sanctuary for ships and cargoes aiding the enemy. The freedom of passage guaranteed by the Convention “in time of war as in time of peace” is thus freedom for neutral ships not carrying contraband and does not extend to neutral ships carrying contraband and to Israeli-flag merchant vessels.⁴

The legal position was altered by the conclusion of the General Armistice Agreement at Rhodes on February 24, 1949.⁵ Egypt maintained its restrictions after that agreement entered into force. On its face, the Agreement might seem to forbid Egypt to do so. It provided that “no aggressive action by the armed forces – land, sea, or air – of either Party shall be undertaken, planned, or threatened against the people or the armed forces of the other...” and that “no element of the land, sea, or air military or paramilitary forces of either Party, including non-regular forces, shall commit any warlike or hostile act against the military or para-military forces of the other Party, or against civilians in territory under the control of the Party...”⁶ In 1951 Israel complained to the Security Council that the Egyptian controls, which had been further refined and developed, were in violation of the General Armistice Agreement, which had been adopted “with a view to promoting the return of permanent peace in Palestine.” Here we see one of the first appearances of the theme to which I alluded earlier. It was the position of Israel that the purpose of the General Armistice Agreement has been to bring about peace and that Egypt no longer had the right to impede the passage of Israeli ships and goods.⁷ It was also pointed out that the Armistice was of an exceptional character by reason of its having been concluded under the auspices of the United Nations. It was not the ordinary agreement calling for the temporary suspension of hostilities concluded by belligerents in the past.

Egypt was not at the time interested in terminating its belligerency against Israel or in recognizing the existence of that State – measures which were necessarily interdependent. It could point to the recognized law concerning armistices, which only suspend hostilities and do not bring about a termination of the state of war between the belligerents. Moreover, according to the established law, an armistice does not terminate the right of visit, search, and seizure unless it expressly so provides.⁸ Egypt could point to the fact that free passage for Israeli ships and cargoes could assist preparations for a resumption of hostilities by Israel and would strengthen its capacity to make war.

In the event, the Israeli position turned out to be the more persuasive one in the Security Council. A resolution adopted on September 1, 1951 recited that “since the

⁴ Baxter, Richard R., *The Law of International Waterways*, 1964, p. 222-224.

⁵ 42 U.N.T.S. 251.

⁶ Art. 1, para. 2, and art. 2, para 2.

⁷ U.N. Security Council Off. Rec. 6th year, 549th meeting 2-24 (S/PV. 549) (1951).

⁸ 2 Oppenheim, *International Law* 848-49 (7th ed. Lauterpacht 1952); Castrén, *The Present Law of War and Neutrality* 130 (1954); 2 Rolin, *Le Droit modern de la guerre* 294 (1920); and see Baxter at 227, n 189.

Armistice regime which has been in existence for nearly two and a half years is of a permanent character, neither party can reasonably assert that it is actively a belligerent or required to exercise the right of visit, search, and seizure for any legitimate purpose of self-defense.”⁹ The resolution went on to call upon Egypt to terminate its restrictions. Egypt, invoking its right of self-defense, did not comply. It continued to visit and search vessels and to seize offending cargoes. Israel continued its protests. A curious juridical situation was produced by a Russian veto in 1954 of a resolution, which would have called upon Egypt to comply with the resolution of September 1, 1951.¹⁰ But the situation remained fundamentally unchanged until the nationalization of the Suez Canal Company and the outbreak of hostilities in 1956. The majority of the members of the Security Council were prepared to urge Egypt to comply with the resolution of September 1, 1951. Egypt continued to maintain that the state of war had not ended and that its controls in the Canal were essential to the defense of Egypt against a possible renewal of active hostilities by Israel.

After the Suez Canal Company had been nationalized in 1956, the Security Council declared in its resolution of October 13, 1956:¹¹

[T]here should be free and open transit through the Canal without discrimination, overt or covert – this covers both political and technical aspects.

But it was at pains to add that “The sovereignty of Egypt should be respected.” The resumption of hostilities in the form of a concerted attack on Egypt by Israel, France, and Great Britain later in that year indicated that there was a solid foundation for the Egyptian contention that the war was not yet over and that measures for the protection of the Canal were still necessary. Once actual hostilities had resumed, it is difficult to say that the need for the right of visit, search, and seizure no longer existed. Nevertheless, states continued even in 1957, after a major resumption of hostilities in the Six-Day War, to allude to the resolution of September 1, 1951, which had been adopted on the assumption that a gradual transition to peace had taken place.

The Canal was reopened in 1957. Egypt declared that it would “afford and maintain free and uninterrupted navigation for all nations within the limits of and in accordance with the provisions of the Constantinople Convention of 1888.”¹² However, no Israeli-flag vessels were thereafter allowed through the Canal. Quiet arrangements were nevertheless made for the passage of vessels flying other flags, even though they were chartered to Israeli firms and even though they carried Israeli cargoes.¹³

A more severe policy was initiated in 1959. Ships chartered to Israeli firms were halted and goods of Israeli origin were removed. Goods were condemned but there was no condemnation of the vessels in prize. Later years saw an unclear situation, although it seemed that certain arrangements has been made that goods title to which has already passed to the purchaser would be let through the Canal even though they might be of Israeli origin. There were continued detentions of neutral vessels and condemnation of their cargoes.¹⁴

So the situation remained until 1967, when the Six-Day War closed the Canal

⁹ U.N. Doc. No. S/2298/Rev. 1 (1951).

¹⁰ U.N. Security Council Off. Rec. 9th year, 664th meeting (S/PV.664) (1951).

¹¹ U.N. Doc. No. S/3675 (1956).

¹² Art. 3 (a), Egyptian Declaration of April 24, 1957, annexed to letter to the Secretary-General of the United Nations from the Egyptian Minister for Foreign Affairs of the same date (U.N. Doc. No A/3576, S/3818) (1957).

¹³ Baxter, *op. cit.*, p. 234.

¹⁴ *Ibid.*, p. 235.

altogether. The renewed combat offered further evidence that hostilities had only been suspended and that the war had not terminated. The Canal remains closed. The President of the United Arab Republic has declared that the Canal will be reopened if Israel agrees to carry out the Security Council Resolution of November 22, 1967, which calls for Israeli withdrawal from territories that it occupies.¹⁵

The various stages of the Arab-Israeli War were similarly reflected in the changing status of the Straits of Tiran. These straits afford access to the Gulf of Aqaba, a body of water ranging from three to seventeen miles in width. At the mouth of the Gulf are the two islands of Tiran and Senafir, claimed by both Saudi Arabia and Egypt but occupied by Egypt during the earlier phases of this history. Entrance into the Gulf through the straits thus involved passage through the territorial sea of Arab states.

In the eyes of the Arab states, the littoral state of the Gulf are three, all of them Arab – Egypt, Jordan, and Saudi Arabia. Israel possessed an outlet to the sea at Eilat, but its right to this area was not recognized by the Arab states. They therefore contended that the Gulf was entirely made up of Arab waters and that there was no right of free entry into it.¹⁶ The situation afforded a further illustration of how sharply focused legal questions actually turn on wider political considerations – in this case, the non-recognition of the State of Israel and its territorial claims.

In principle, under the Geneva Convention on the Territorial Sea and Contiguous Zone of 1958, there is to be no suspension of the right of innocent passage in “straits which are used for international navigation between one part of the high seas and another part of the high seas *or the territorial seas of a foreign State*.”¹⁷ The United Arab Republic was not, however, a party to this treaty. The Convention said nothing about the situation in time of war.

As in the case of the Suez Canal, it would be difficult to believe that the rights of visit, search, and seizure might be exercised on the high seas but not in the territorial seas of a belligerent state. On the assumption that Egypt had sovereignty over Sinai, although this was disputed, and Egypt was validly in occupation of Tiran and Senafir, a ship entering the Gulf would be subject to visit, search, and seizure while passing through the territorial seas of an Arab state that was at war with Israel. The exercise of those rights was facilitated in this case by the Egyptian command of the Straits through its shore batteries.

As has previously been observed, an armistice does not of itself terminate the rights of visit, search, and seizure. The armistice provided that no element of the Israeli sea forces could pass within three miles of the coastline of Egypt, but this provision applied only to warships, and nothing was said as to merchant vessels.¹⁸

No legal problems about passage through the Straits arose until after the conclusion of the armistice in 1949. At that time contraband control was established, as in the case of the Suez Canal.¹⁹ The Security Council Resolution of September 1, 1951 did not clarify the situation.²⁰ By its terms, it applied only to the Suez Canal, but the statement in the resolution that there was no further need for the exercise of belligerent rights in the Suez Canal pointed toward a similar conclusion as to the Straits. Israel protested the restraints that were placed on

¹⁵ U.N. Doc. S/RES/242 (1967)

¹⁶ Hammad, *The Right of Passage in the Gulf of Aqaba*, 15 *Revue égyptienne de droit international* 118, 123-140, (1959).

¹⁷ Emphasis supplied. Art. 16, para. 4, 15 U.S.T. 1606, T.I.A.S. No. 5639.

¹⁸ Egyptian-Israeli General Armistice Agreement, signed at Rhodes, Feb. 24, 1949, art. 2, para 2, 42 U.N.T.S. 251.

¹⁹ Baxter, *op. cit.*, p. 210.

²⁰ U.N. Doc. No. S/2322 (1951).

passage through the Straits, as it had with respect to the denial of passage through the Canal.²¹ An attempt was made to refer the matter to the Mixed Armistice Commission, but the Soviet Union cast its veto in the Security Council against this reference.²²

Control of the Straits was one of the Israeli objectives in the hostilities of 1956. Israeli forces seized the Sharm el Sheikh area and the islands commanding the entrance to the Gulf. The Israeli troops were withdrawn and replaced by those of the United Nations Emergency Force only when Israel received assurances that free and unimpeded passage would be allowed through the Straits.²³ On February 11, 1957, the United States declared that it was "On behalf of vessels of United States registry... prepared to exercise the right of free and innocent passage and join with others to secure general recognition of this right."²⁴ Israel warned that it would regard any attack on an Israeli-flag vessel as an attack entitling Israel to exercise its inherent right of self-defense under Article 51 of the Charter.²⁵ The first test passage of a United States vessel was successful, and Israeli-flag vessels continued to pass through the Straits. Egypt and the other Arab states protested but there was nothing that they could do.²⁶

On May 18, 1967, President Nasser dramatically called for the withdrawal of UNEF from the Sharm el Sheikh area, and the Secretary-General reluctantly ordered the troops out.²⁷ For days later, Nasser announced that the Straits were again closed to Israeli vessels.²⁸ The United Arab Republic was prepared once more to exercise the normal right of a belligerent controlling straits to interdict the passage of enemy ships and of contraband. In the Six-Day War of June 5 to 10, 1967, Israeli Forces drove out the Egyptians and once more occupied the Sharm el Sheikh area. Freedom of navigation was restored, not on the basis of any legal resolution of the matter but through the military power of Israel. Since then, Israeli ships, including tankers carrying oil from the oilfields in Sinai seized by Israeli, have passed freely through the Gulf and the Straits.

The history of the Straits of Tiran since 1949 has not really made any substantial contribution to the law of straits, but it has lent emphasis to the strategic importance of these narrow waterways. The belligerent that occupies the land commanding strategic straits may exercise there the same rights of visit, search, and seizure as it can on the high seas. It has no lesser right in its own waters than it has elsewhere on the sea. In this lies the significance of the Straits of Tiran to Egypt. A belligerent may also use its command of the land bordering the straits to secure freedom of passage for its own vessels and cargoes. In this lies the significance of the Straits of Tiran to Israel.

Having thus observed the law and practise of passage through a canal and a strait in time of war, we must now turn to the law governing the conduct of warfare between Israel and the Arab States on land. The governing law is essentially the four Geneva Conventions of

²¹ Letter of Jan. 28, 1954 from the Permanent Representative of Israel to the President of the Security Council (U.N. Doc. No. S/3168) (1954).

²² U.N. Security Council Off. Rec. 9th year, 664th meeting 12 (S/PV.664) (1954).

²³ Statement in the U.N. General Assembly by Foreign Minister Golda Meir, March 1, 1957, U.N. Gen. Ass. Off. Rec. 11th Sess., Plenary 1275 (A/PV.666) (1957).

²⁴ Aide-Memoire handed to Israeli Ambassador Eban by Secretary of State Dulles, Feb. 11, 1957.

²⁵ Statement by Foreign Minister Meir, *supra* n. 27.

²⁶ N.Y. Times, July 8, 1957, p. 1, col. 8.

²⁷ Special Report of the Secretary-General on the United Nations Emergency Force, May 18, 1967 (A/6669) (1957).

²⁸ U.A.R. Statement on Withdrawal of U.N.E.F. and Closing of Strait of Tiran to Israeli Ships, 6 Int. Legal Materials 573 (1967).

1949 for the Protection of War Victims – the Wounded and Sick; the Wounded, Sick and Ship-wrecked; Prisoners of War, and Civilians²⁹ - and the Hague Regulations of 1907.³⁰ The Arab States and Israel are all parties to the Geneva Conventions of 1949; the Hague Regulations are binding on all states by reason of their having passed into customary international law.³¹

The institution which exists to supervise the carrying out of the Conventions and to facilitate communication between the belligerents is that of the Protecting Power.³² The Protecting Power is a state designated by a belligerent to look after the interests of its personnel who are under the control of its adversary. A Protecting Power may be designated by each belligerent, or the same Protecting Power may act on behalf of both of the belligerents. But in either event, the Protecting Power must be designated by the State upon whom the prisoners of war or civilians depend and must be accepted by the other belligerent. No Protecting Power has been designated throughout the protracted hostilities between Israel and the Arab States. Israel is not recognized as a state by its Arab neighbors, which on that account refuse to deal with it. This is thus a further instance in which recognition policy has made impossible the application of technical rules of international law. Aside from the problem of non-recognition, it is not in any event easy in these days to find a state or states that are willing to take on the thankless task of being intermediary between two implacable opponents.

It must be noted, however, that there are instances in Arab-Israeli relations in which practice has taken account of the realities of the existence of the State of Israel. There have been exchanges of prisoners between the adversaries. Armistice agreements have been concluded between officers of the armed forces acting on behalf of their governments, although those concluding the agreements are referred to only as “parties”. And there has been both Israeli and Arab participation in the Mixed Armistice Commissions under the four Armistices concluded between the Arab States and Israel.

The most interesting problems of the law of land warfare have arisen out of the Six-Day War and the events that have followed.

Israel has refused to concede the applicability of the Geneva Civilians Convention of 1949 to the areas that it occupies as the result of this conflict, although it carries out many of the provisions of the treaty. The justification that has been advanced for Israel’s unwillingness to invoke the Civilians Convention is that that country is not in what is technically known as “belligerent occupation” of the West Bank, because the law of belligerent occupation applies only to sovereign territory of the enemy that has been occupied and the West Bank is not subject to the sovereignty of Jordan.

To understand this argument, one is forced to go back to the Mandate over Palestine, concluded under the auspices of the League of Nations. The subject of where sovereignty over a mandated area lies used to be a favoured subject of academic disputation – In the people of the area? The mandatory power? The League of Nations? The Principal Allied and Associated Powers? Sovereignty, the argument went, must lie somewhere; territory cannot be left in a vacuum.

²⁹ All dated a Geneva, Aug, 12, 1949; 6 U.S.T. 3114, 3217, 3316, 3516, T.I.A.S. No. 3362, 3363, 3364, 3365.

³⁰ Annexed to Convention No. IV of The Hague, 18 Oct. 1907, 36 Stat. 2277, T.S. No. 539, 1 Bevans 631.

³¹ Under the Judgement of the Nuremberg Tribunal. Nazi Conspiracy and Aggression; Opinion and Judgement 83 (1947).

³² Arts. 8/8/8/9 common to the four Geneva Conventions of 1949; see Levie, Prisoners of War and the Protecting Power, 55 Am. J. Int’l L. 374 (1961).

When Great Britain terminated the Mandate over Palestine in 1948, hostilities broke out. In the course of these the Kingdom of Transjordan and Egypt sent troops into Palestine. In doing so, they were, according to the legal case made out for Israel, guilty of an act of aggression against the newly established State of Israel in violation of Article 2, paragraph 4, of the United Nations Charter. The Armistices that were concluded in 1949 continued similar provisions, of which the following is typical:

It is ... recognized that no provision of this Agreement shall in any way prejudice the rights, claims and provisions of either party hereto in the ultimate peaceful settlement of the Palestine question, the provisions of this Agreement being dictated exclusively by military, and not by political considerations.

According to this line of argument, the West Bank remained under belligerent occupation – belligerent occupation by the forces of the Arab States. It is by no means clear whether under the Charter, an aggressor can claim the rights of a belligerent occupant, but it is not necessary to decide that question.

If these premises are accepted, then Israel during the Six-Day War drove a belligerent occupant out of the Old City of Jerusalem and the West Bank. Its forces and administration filled a vacuum left by the expulsion of the belligerent occupant unlawfully present there. Israeli sovereignty, the argument continues, may lawfully be extended to these areas, since no state may lawfully oppose it. No state can show a better title, as Dr. Yehuda Blum puts it.³³ The logical consequence of this line of argument is that Israel is not legally obliged to comply with the Geneva Civilians Convention of 1949 and the Hague Regulations.

This view is not shared by the majority of the members of the United Nations. In response to complaints that Israel was changing the status of the Old City, the General Assembly adopted resolutions on July 4 and 14, 1967, calling upon Israel “to rescind all measures already taken and to desist forth-with from taking any action that would alter the status of Jerusalem.”³⁴ That injunction indicates that the occupied portion of Jerusalem was not territory to which Israel has a better title than any other state.

The Israeli conduct particularly complained of, was the application of Israeli laws to the occupied areas and the expropriation of property.³⁵ As early as 1968, the Security Council asserted that all legislative and administrative measures, including expropriation of land and properties, which tended to change the legal status of Jerusalem are invalid.³⁶ The same assertion was made more urgently in Security Council Resolution 267 of July 3, 1969.³⁷ There were complaints of the violation in particular of Articles 53 and 54 of the Geneva Civilians Convention, respectively forbidding the destruction of property and alteration of the status of public officials.

The burning of the Holy Al Aqsa Mosque on August 21, 1969 led to a resolution on the Security Council which for the first time expressly mentioned the Geneva Conventions,

³³ Blum, Y. Z., *The Missing Revisioner: Reflections on the Status of Judea and Samaria*, 3 *Israel L. Rev.* 279 (1968). at 294.

³⁴ Res. 2253 (ES-V), July 4, 1967, and Res. 2254 (ES-V), July 14, 1967, U.N. Gen. Ass. Off. Rec., 5th Emerg. Sp. Sess., Supp. No. 1, at 4 (A/6798) (1967).

³⁵ For a defense of the Israeli administration of occupied areas generally, see *Legislation and Administration of Justice in the Israel-Held Areas*, 8 *International Problems* 36 (1970).

³⁶ Res. 252, May 21, 1968, U.N. Security Council Off. Rec. 23rd year, Resolutions and Decisions 9 *S/INF/23/Rev. 1) (1970).

³⁷ U.N. Security Council Off. Rec. 24th year, Resolutions and Decisions 3 (S/INF/24/Rev. 1) (1970).

which Israel was called upon “scrupulously to observe.”³⁸

In justice to Israel, it must be observed that these resolutions of the Security Council and of the General Assembly were largely politically motivated. They do not necessarily constitute authentic interpretations of the proper scope of application of the Geneva Civilians Convention. But law and politics can never be separated, and what is decided in a political forum like the Security Council must inevitably have some effect on the law.

Enough has been said to show the nature of the fundamental difference between Israel and the Arab States about the law applicable to Israel’s occupation forces and administration. It is unfortunate that Israel has not been persuaded to act on the basis of the situation *de facto* that existed in mid-1967 – that is to say, the long occupation of the area by Jordan – and accordingly, to apply the law governing belligerent occupation. Perhaps the law should operate on the principle that territory in dispute should be regarded as protected by the law of belligerent occupation as against any which displaces the authority of the state which is normally in control of the area or has been long in control of it. Alternatively, both parties might be held to an obligation to respect the laws in force within the disputed area.

Against this background of controversy about the applicability of the Geneva Civilians Convention of 1949, the precise measure of the obligations of Israel is not altogether clear. Although it is undisputed law that the annexation of enemy territory which is belligerently occupied is forbidden while the war is still in progress, Israel would maintain that the rule does not apply to the West Bank, which in its view of history constitutes *terra nullius*.³⁹ Israel has thus far avoided the overt annexation of territory, which could properly take place only at the time of a final peace settlement, but there has been a certain creeping annexation. This has been accomplished through extension of the law of Israel to the occupied areas, the transfer of population to the areas over which it exercises military control, and by integration of the economy of the occupied areas with that of Israel. Israeli destruction of buildings from which hostile activities have been carried on has been one of the more dramatic ways of asserting authority in the occupied areas.⁴⁰ It has been asserted that this conduct is in violation of article 22 of the Civilians Convention, which forbids collective penalties and reprisals. The response of Israel has been that the destruction has not been accomplished by way of punishment but as a measure for the protection of its occupying forces and its nationals.

There can be no doubt about the applicability of the Geneva Prisoners of War Convention of 1949 to the continuing war between Israel and the Arab States. The record here is not a perfect one, although probably superior on the whole to the record of compliance with the Civilians Convention. There were charges, for example, that Egyptian soldiers whose positions has been overrun and who had been disarmed had simply been allowed to wander in the desert during and after the Six-Day War, until they were returned to the United Arab Republic through the assistance of the International Committee of the Red Cross.⁴¹

The guerrilla warfare that has been waged against the occupying forces of Israel has given rise to problems – not altogether novel – about the eligibility of captured persons for treatment as prisoners of war under the pertinent Geneva Convention. There is a question about whether guerrillas meet the qualifications of lawful combatants under Article 4 of the Prisoners of War Convention. Their status is also affected by whether they operate in Israeli territory or in occupied territory or whether they are based on Arab territory that is not

³⁸ Res. 271, Sep. 15, 1969, *id.* at 5.

³⁹ The principle was expressly recognized by the International Military Tribunal at Nuremberg. *Nazi Conspiracy and Aggression; Opinion and Judgment* 82 (1947).

⁴⁰ *N.Y. Times*, Nov. 6, 1969, p. 1, col. 2; *The Economist*, March 16, 1968, p. 26.

⁴¹ International Committee of the Red Cross, *Annual Report*, 1967, at 7.

occupied by Israel but enter Israeli-held territory on raids. If members of Al Fatah or the Popular Front for the Liberation of Palestine come from within Israeli territory and operate there, they are engaged in non-international armed conflict with Israel and are therefore covered only by Article 3 common to the four Geneva Conventions of 1949. This article provides minimum safeguards for persons involved in civil conflict but makes no reference to treatment of combatants as prisoners of war. If the attacks come from persons within the occupied areas, then the position of the combatants will turn on the political status of the territory, illustrating once more how the operation of legal rules may be dependent upon the political perspective taken on the status of territory. If the occupied areas are assumed to be Israeli territory, then those persons who attack the occupying forces are participants in a civil conflict and are protected only by Article 3. But if the territory is actually, for example, Jordanian, then they participate in an international conflict, and it is necessary to decide whether they qualify for treatments as prisoners of war under Article 4 of the Prisoners of War Convention. Irregulars must meet four requirements if they are to be held as prisoners of war: They must be “commanded by a person responsible for his subordinates,” they must have “a fixed distinctive sign recognizable at a distance,” they must carry arms “openly,” and they must conduct “their operations in accordance with the laws and customs of war.” While the first of these requirements can probably be satisfied by most “freedom fighters” or guerrillas, the others are incompatible with the policy of stealth and surprise which is essential to the successful conduct of irregular warfare. The General Assembly in its Resolution 2621 (XXV) called for treatment in conformity with the Geneva Prisoners of War Convention of 1949 of all “freedom fighters under detention.”⁴² Although the main thrust of the resolution was against colonialism, a sufficiently latitudinarian construction of “freedom fighter” would permit the inclusion of those who fight against foreign occupation. And that might sweep up members of Al Fatah or the Popular Front for the Liberation of Palestine.

The investigations that have been conducted by United Nations organs of the Israeli occupation have been strongly politically colored. They have been inspired by the Arab States and have received the support of developing countries. As early as 1968, the Security Council has asked that a humanitarian mission in the Middle East be conducted by the Secretary-General.⁴³ The Arab States allowed in the Special Representative of the Secretary-General, but he was refused entrance into “the Arab territories under military occupation by Israel.”⁴⁴

The General Assembly also established a special committee to “investigate Israeli practises affecting the human rights of the population of the occupied territories,” made up of Ceylon, Somalia, and Yugoslavia – none of which was friendly to Israel or could even be regarded as neutral in this policy.⁴⁵ On the basis of the report submitted by the body, the General Assembly called on Israel to comply with the Geneva Conventions of 1949, the Universal Declaration of Human Rights, and various resolutions adopted earlier.⁴⁶ The Committee called for further investigations and for cooperation with the International Committee of the Red Cross. It proposed in particular a new form of investigation, in which each occupied state and Israel would each nominate a neutral state. The General Assembly

⁴² Para. 3(6)(a), U.N. Gen. Ass. Off. Rec. 25th Sess., Supp. No. 28, at 1 (A/8028) (1971).

⁴³ Res. 259, Sep. 27, 1968, U.N. Security Council Off. Rec. 23rd year, Resolutions and Decisions 11 (S/INF/23/Rev. 1) (1970).

⁴⁴ Report by the Secretary-General in accordance with the Security Council Resolution 259 (S/8851) (1968).

⁴⁵ Res. 2443 (XXIII), Dec. 19, 1968, U.N. Gen. Ass. Off. Rec. 23rd Sess., Supp. No. 18, at 50 (A/7218) (1969).

⁴⁶ Res. 2546 (XXIV), Dec. 11, 1969, U.N. Gen. Ass. Off. Rec. 24th Sess., Supp. No. 30, at 55 (A/7630) (1970).

would arrange that the interests of the Palestinian people would be represented by a state or by an international organization. The complaint would then be investigated by representatives of the complaining and responsible states. Nothing has come of this proposal.

The Human Rights Commission established in 1969 a sub-committee with the same membership as the working group on the treatment of political prisoners in Southern Africa.⁴⁷ In 1970, it reported that, although it has not been allowed into the areas concerned, it had heard of unlawful detentions, denials of a fair trial, and pillage. It called for the return of their proper place of residence of persons who had been deported or transferred and for the compensation of those whose houses had been unlawfully demolished.⁴⁸ It is not clear that all of the acts complained of were actually violations of international law, even under the assumption that they took place in belligerently occupied areas. An occupant can intern inhabitants of the occupied area, assign residence, and may move individuals about for military purposes, within the limits established by the Geneva Civilians Convention.⁴⁹

* * *

The facile response to all of this tangled history of dealings between the Arab States and Israel is to say that all of these problems will be resolved when the peace settlement is reached. This conclusion is true but trivial, when there is no peace settlement in prospect. One must rather look to the lessons which should be learned for today.

The first task in any legal analysis of these issues is to segregate the purely legal questions from the political context in which they arise. How the two elements are intermingled has been a recurrent theme of these remarks. In the course of performing this operation of distinguishing the legal from the political, it will be seen that different views of the political situation and different recognition policies are at the root of controversies about when and where certain accepted bodies of law apply. Whether a state of war exists or not will determine whether the law of visit, search, and seizure is operative. Whether territory is Israeli, Jordanian, or *res nullius* will dictate what body of law governs the treatment of combatants placed *hors de combat*. The most satisfactory criteria for the applicability of law are thus seen to be factual ones – not political ones and not for that matter legal ones, for political and legal criteria governing the application of legal rules unfailingly turn out to be subjective criteria dictated by policy or prejudice.

The content of the law must also be neutral. The governing rules are unsatisfactory if, in time of war, they turn on the legality or morality of the cause for which the war is fought. The belligerents must be on a basis of equality, and no preference should be given to one side over the other. Preferential treatment strikes at the root of the reciprocity which is the main support – under certain circumstances the only support – of compliance with the law.

In time of war, particular emphasis must be placed on the protection of individuals and of non-participant states, for both human beings and governments can be caught in the cross-fires of war. It must be a particular task of the law to limit the scope of war and to free as many persons and entities as possible from its effects. If the situation is seen in this light, there is a relationship between protecting civilians from unnecessary suffering and the protection of neutral states from unnecessary interference. At this point the law of war and the

⁴⁷ Res. 6 (XXV), March 4, 1969, Commission on Human Rights. Report of the Twenty-fifth Session 183 (E/4621, E/CN.4/1007) (1969).

⁴⁸ Report of the Special Working Group of Experts. Feb. 11, 1970 (E/CN.4/1016/Add.2) (1970).

⁴⁹ Geneva Convention relative to the Protection of Civilian Persons in Time of War, dated at Geneva, Aug. 12, 1949, arts 78 and 49, 6 U.S.T. 3516, T.I.A.S. No. 3365.

law of neutrality – the law of belligerent occupation and the law relating to the passage of neutral merchant ships – reflect a similar policy.

And finally, if there are to be supervision, scrutiny, and control exercised over the conduct of belligerents, those functions must be performed by impartial international entities, such as Protecting Powers or the International Committee of the Red Cross, rather than through political agencies, even though they be constituted under the auspices of the Security Council or the General Assembly of the United Nations. Again, neutrality and detachment must be the dominant themes. The bodies that have been set up to inquire into Israeli conduct in the occupied areas have lacked credibility because they were politically motivated and politically constituted.

These are the standards that should be applied. Without them the law can falter and then collapse under the weight of the political problems, as, one regrets to say, the law often seems to have done in the Arab-Israeli conflict.

Conflict Resolution and the United Nations Peace-Keeping Forces

Quincy Wright

Abstract: *The problems of conflict resolution and peace maintenance depend on the great powers relying on international agencies to maintain and develop international law, rather than a system of diplomacy, power politics, and mutual deference. A permanent and more centralized UN peace-keeping force would increase global stability but decrease the independence of states. However, if diplomacy fails, states should accept limitations on national sovereignty to permit third party decision of international disputes in order to effectively achieve a peaceful world order. The UN peace-keeping forces have overall been successful at de-escalating conflicts despite obstacles presented by states, including: ambiguity regarding whether members are obligated to pay for peace-keeping forces or if contributions are voluntary; unclear guidelines about when peace-keeping forces can be used; conditionality's of the states providing contingents; and concerns of the states in which contingents function.*

The Development of Conflict

A brief consideration of the normal stages of international conflict may assist in understanding the problem of conflict resolution and the role of United Nations peacekeeping forces in solving that problem. International conflict can hardly arise unless there is some inconsistency in the perceptions, beliefs, ideologies, interests, policies, or claims of two states but such inconsistencies may exist for a long time without awareness of them by either state or, if they are perceived, without action by either to resolve them, thus manifesting the “tolerance” called for in the preamble of the U.N. Charter. However, in a world shrinking under the influence of modern technology, communications, interdependencies, and vulnerabilities of all states tend to increase, inconsistencies tend to be perceived, and tensions tend to rise, and to escalate through successive stages marked by changes in the “rules of the game.” These stages have been designated by the terms, *situation, dispute, conflict, hostilities, war.*¹

A *situation*, as used in the U.N. Charter is “a state of affairs which has not yet assumed the nature of a conflict of a conflict between parties but which may, though not necessarily, come to have that character.”²

A *dispute*, as defined by the World Court is “a disagreement on a point of law or fact, a conflict of legal views or interests between two persons.”³ In International affairs it usually implies that diplomatic communication has been initiated.

¹ Quincy Wright, *Problems of Stability and Progress in International Relations* (Berkeley: University of California Press, 1954), p. 142ff.

² Leland, M. Goodrich and Edvard Hambro, *Charter of the United Nations: Commentary and Documents* (2nd ed.; London: Stevens and Sons, Ltd., 1949). P. 249. William L. Tung. *International Law in an Organizing World* (New York: Cromwell Co., 1968). P. 299.

³ *Palestine Concession*, Permanent Court of International Justice, Serial A, no. 2 (1924), p. 11.

A *conflict* is a dispute in which one or both parties contemplate or threaten dictatorial, coercive, or hostile measures, thus “endangering the maintenance of international peace and security.” It is often manifested by such “non-amicable” methods of settlement as display of force, retorsion, reprisals, or intervention, methods apparently forbidden by the Kellogg-Briand Peace Pact and the U.N. Charter.

Hostilities, or war in the material sense, is a situation in which armed force is employed on a considerable scale in an attempt to dictate the settlement of a dispute or conflict between states (or between factions within a state, civil strife). The Charter forbids the threat or use of force or a threat to the peace or breach of the peace in international relations, except in defense against armed attack.

War in the legal sense is a condition in which the parties, whether a state or insurgents are recognized as belligerents equally entitled to engage in hostilities to settle a dispute or conflict, and during which third states are bound to be neutral.⁴ The parties to the Kellogg-Briand Pact “condemned recourse to war for the solution of international controversies, and renounced it as an instrument of national policy in their relations with one another.” They also agreed that “the settlement or solution of all disputes or conflicts. . . shall never be sought except by peaceful means.” The U.N. Charter, in forbidding the use or threat of force and in forbidding neutrality in hostilities in which the United Nations is taking “preventative or enforcement actions” also “outlawed war” but did not distinguish it from hostilities and did not use the term except in the preamble which declared the purpose “to save succeeding generations from the scourge of war.”

To accomplish this purpose the United Nations seeks to maintain respect for national sovereignties; to eliminate all threats or uses of force in international sovereignties; to eliminate all threats of force in international relations; to assure the peaceful settlement of all disputes and situations which may “endanger the maintenance of international peace and security” and to promote international cooperation to establish political, legal, economic, social, and cultural conditions favorable to peace.

The Maintenance of Peace and the United Nations

The United Nations can not normally deal with international *situations* or *disputes* unless they have developed into *conflicts* or *hostilities* endangering the maintenance of international peace and security. Doubtless the problem of maintaining peace in the world depends ultimately on building conditions of peace often involving peaceful change of legal rights and of political, economic, social and ideological conditions, not only in international relations but also in the internal affairs of some states.⁵ Although the United Nations may not make binding decisions to *build peace*, the General Assembly, the Economic and Social Council and the Specialized Agencies may make studies and recommendations to the end. In spite of much effort they have not succeeded in changing the fundamental structure of the world society, from a balance of power, to an effective system of international law and organizations as hoped for by the Charter,

⁴ Quincy Wright, *A Study of War* (2nd ed.; Chicago: University of Chicago Press, 1965), p. 8.

⁵ Wright, *A Study of War*, pp. 15-44ff. Twenty-two of the thirty-one instances of hostility which resulted in more than three hundred and thirty-four deaths since WWII originated in civil strife. See also Wright, “Peace-Keeping Operations of the United Nations,” *International Studies*, VII (October, 1965), 174-183.

nor in remedying many racial, economic, cultural, political and other conditions unfavorable to peace, especially those responsible for the ideological cold war and the economic gap between rich and poor countries.

The United Nations have been no more successful in *peace-making*, that is in achieving a settlement of international disputes and situations. It can consider them only if they endanger international peace and security and it may then be too late to act with maximum effectiveness.⁶ In any case, U.N. organs can only make recommendations which it is hoped may contribute to agreement between the parties. The Security Council can make authoritative decisions, but only to maintain or restore international peace and security if there has been a “threat to the peace, breach of the peace or act of aggression.”

The U.N. has had some success, in spite of the hampering influence of the great power veto in the Security Council, in peace keeping by achieving cease-fire agreements or armistices, but, since a settlement of the underlying dispute has not usually been made, supposedly temporary cease-fire lines have remained indefinitely, inciting the hostile powers at each side to violate them and renew hostilities, as in Palestine, Kashmir, Korea, the Straits of Formosa, Germany and Vietnam.⁷

The problem of peace-making, that is, of settling a dispute between sovereign states, is inherently difficult. The only ways appear to be agreement of the parties, authoritative decision by an outside agency or procedure, dictation by one party, or the passage of time.⁸ It is a principle of international law that a sovereign state is not obliged to submit a dispute to any external authority unless it has consented to its jurisdiction *ad hoc* or by prior agreement. Some states have consented in advance to submit legal disputes to the International Court of Justice or to arbitration, but few have done so without reservations.⁹

The Charter does not give the Security Council authority to settle disputes definitively, and there are no general agreements requiring settlement by other political agencies or by plebiscite, although the Charter supports the “self-determination of peoples” as a general principle. Consequently, there is seldom an obligation to submit important disputes to any form of third party decision or definitive procedure. The Charter principles, requiring respect for the sovereign equality of all members and forbidding the use or threat of force in international relations, forbid dictation by one party in international disputes. The result is that, if Charter principles are observed, agreement between the parties is the only direct way in which important disputes can be settled. If direct negotiation fails the United Nations has sought to assist agreement by the use of mediators, commissions of inquiry of conciliation, advisory opinions of the International Court of Justice, or recommendations by regional agencies, by the Security Council or by the General Assembly, but if all these efforts fail to induce the parties to reach

⁶ United Nations, Commission to Study the Organization of Peace, 17th Report, “New Dimensions for the United Nations,” (May, 1966), p. 126.

⁷ Wright, “Peace-Keeping Operations of the United Nations,” 174-183

⁸ These three terms bear an analogy to executive action to maintain order and law, judicial actions to settle disputes and apply law, and legislative action to adapt law to changing conditions.

⁹ The Connolly amendment by the U.S. Senate reserved the right of the U.S. to refuse to submit and dispute which it considered domestic.

agreement, the only remaining means of settlement is the lapse of time, which it is hoped may so change circumstances that the dispute will become unimportant; that the parties will agree on a settlement or on submission to adjudication or arbitration; or that the legal principles of obsolescence, prescription, or general recognition will operate. Obsolescence, or the principle "*rebus sic stantibus*," asserts that an agreement ceases to be binding if the conditions which induced the parties to sign it have changed. Unfortunately the parties usually differ on the application of the principle but seldom agree to submit the issue to adjudication. The principle of prescription asserts that a *de facto* boundary, occupation or possession will, if uncontested over a sufficient period of time, establish the possessor's legal title.¹⁰ There has, however, been no tendency for both states divided by recent cease-fire lines to acquiesce in it and so to permit this principle to operate. It is often said that general recognition by the members of the community of nations may convert a *de facto* into a *de jure* situation, but with the political divisions of the contemporary world, general recognition of the claim of one party in a controversial situation is likely to be long delayed, even if a unanimously accepted resolution of the General Assembly is construed as general recognition, which it hardly can so long as some important states are not members.¹¹

It appears, therefore, that failure of the parties to agree is likely to result in no settlement indefinitely or for a long period. Peace, however, requires that disputes be settled, consequently that all states accept adjudication, arbitrations, plebiscite, the authority of the United Nations, or other agency or mode of definitive decision if the parties fail to reach agreement within a reasonable time. This is recognized within states, but few states at the present time are willing to accept this conclusion, which they think would sacrifice an important attribute of sovereignty in international relations.

Even if disputes remains unsettled, international conflict and hostilities could not occur if all states became members of the United Nations and observed their obligations to refrain from the threat, force and intervention as required by the Charter and international law. It is clear, however, that sovereign states, especially the great powers, can not now be relied on to observe these obligations if they believe an interest which they consider important can be served by the use force or threat to dictate a settlement or to implement a policy.¹² All of the great powers have used forcible measures, difficult, if not impossible to reconcile with Charter obligations, since 1953 when the Korean hostilities ended soon after the death of Stalin and the inauguration of Eisenhower and a period of *détente* seemed to be emerging. The Soviet Union invaded Hungary in 1956; China invaded India in 1962; and the United States invaded Lebanon in 1958, Vietnam in 1965, and the Dominican Republic in 1965.

¹⁰ Tung, *International Law*, p. 164. Fifty years was considered sufficient by the British-Venezuelan arbitration over the British Guiana boundary in 1899.

¹¹ See also Wright, "Article 19 of the League Covenant and the Doctrine 'Rebus Sic Stantibus,'" *Proceedings*, American Society of International Law, 1936, 64; Wright, "Custom as a Basis for International Law in the Post War World," *Indian Journal of International Law*, January, 1967, volume 7, 8.

¹² See remarks by former U.S. Secretary of State Dean Acheson, *Proceedings*, American Society of International Law, 1963.

France unsuccessfully resisted colonial self-determination movements in Algeria and Indochina, as did Britain in South Arabia. The lesser states, with less military capability, have been more observant of their obligations to refrain from the use of threat of force in international relations, but many of them have been afflicted by civil strife which has sometimes developed into large scale hostilities, as in Nigeria and has often incited great powers to intervene, directly or indirectly, often on grounds of assisting "wars of liberation" or of "containing communism." Lesser states have also, on a number of occasions, violated cease-fire lines or armistices as in Palestine, Kashmir, Laos, Yemen, and Vietnam, and in a few cases conflicting territorial claims or expansionist demands have led them to minor hostilities as in West Iran, Kuwait, Goa, and the frontiers of Senegal and Guinea, Ruanda and Burundi, and Ethiopia and Somalia. Portugal has resisted self-determination movements in Angola, Mozambique, and Portuguese Guinea. Such local hostilities are not likely to escalate unless great power intervene directly by military action or indirectly by incitement or supply of arms.¹³

Basically the problem of conflict resolution and peace maintenance depends on a changed attitude of the great power, putting concern for world order ahead of imperial ambitions; mutual trust ahead of mutual suspicion; and disarmament ahead of armament superiority, thus relying for security and justice on the capacity of international agencies to maintain and develop international law, rather than on a system of diplomacy, power politics, and mutual deterrence. There is no reason for thinking that policies seeking military dominance or a balancing of military power can permanently prevent general war. They have never done so in modern history for more than a generation¹⁴ and the recent policies of mutual deterrence among nuclear powers gives no more promise. The stability of this system depends on mutual confidence that a nuclear first strike is incredible because of the capacity of the rival to deliver an unacceptable retaliatory second strike. Recent history, however, indicated that nuclear powers may make nuclear threats, as they did in the Cuban missile crisis of 1962, and that the target of such threats may consider them credible. If it did not the threat would be idle. It is difficult to see how a threat can be credible and incredible at the same time. To the danger of nuclear threat is added the dangers of accident, preemption, miscalculation, and the hope that a sudden first strike against nuclear bases may so weaken the enemy that he will desist from a retaliatory strike to save his cities. Furthermore the tension generated by escalation and continued frustration during conventional hostilities may induce resort to nuclear weapons in the effort to achieve military victory.¹⁵ One nuclear war would be one too many for the human race.

Policies of power balancing and mutual deterrence must be superseded by policies for building international law, international organization, and international procedures assuring the peaceful settlement of international disputes, if states are to enjoy security and if mankind is to enjoy peace. The United Nations lack competence to assure such procedures under the Charter. It can, however, do much to prevent incipient hostilities and stop actual hostilities which may have

¹³ Wright, "Peace-Keeping Operations of the United Nations," see note 6.

¹⁴ On reasons for the collapse of the balance of power see Wright, *A Study of War*, p. 760ff, 1528ff, and on occurrence of general wars since 1600, p. 647ff.

¹⁵ *Ibid.*, p. 1512ff.; Herman Kahn, "The Arms Race and Some of its Hazards," in Richard Falk and Saul Mendlovitz, *The Strategy of World Order* (New York: World Law Fund, 1966), vol. 1, p. 17ff.

time to build conditions of peace. For this adequate peace-keeping forces can be of great assistance.

From Peace Enforcement to Peace-Keeping

The United Nations practice in maintaining peace has greatly changed since the Korean hostilities from 1950 to 1953. It was expected at San Francisco that the great powers would recognize an overriding interest in maintaining peace and would carry out the collective security system outlined in Chapter VII of the Charter. This required them to agree on earmarked contingents of air, sea and land forces to be immediately available for enforcement measures against any state found to be an aggressor in the sense that it had utilized armed force in international relations contrary to its Charter obligations.¹⁶ The Charter forbade all such uses except in self-defense or under authority of the U.N. It therefore excluded all first uses of armed force since individual or collective self-defense was permissible only against a prior illegal "armed attack," and the United Nations could not authorize any use of force except as a preventative or enforcement measure against a use, or immediate threat to use, armed force illegally. Furthermore it was assumed that the Security Council, advised by the Military Staff Committee, would prepare for the organization and command of the earmarked forces and would immediately determine the aggressor and mobilize adequate forces against him. It was recognized that the veto would prevent enforcement measure against the great powers, but it was hopefully assumed that the memory of the war would persist, and that these powers could be relied upon to observe their Charter obligations and to cooperate in collective security action. Since they controlled most of the armed force of the world, such actions would confront any potential aggressor with such overwhelming power that he would desist, and actual enforcement measures would not be necessary.

The development of the cold war, mutual recriminations, the use of the veto by the great powers, and the failure to agree on the contingents for U.N. service prevented operation of this system. The Korean operation was possible because the Soviet Union, which would have vetoed it, had temporarily withdrawn over the issue of admitting Communist China to United Nations, and Communist China, another potential vetoer, was not represented in the U. N. Fifteen states voluntarily contributed contingents, of which that of the United States was much the largest, on recommendation of the Security Council. With the South Korean army of 300,000, a force of over a half million was under U.N. command. The operation, originally intended to drive the North Korean aggressor back of the cease-fire line, was successful after three months, but the effort, stimulated by General MacArthur who had been put in command of U. N. forces, to unify the whole of Korea, induced the entry of large Communist Chinese forces, frustrated unification, prolonged the hostilities for three years, and finally resulted in an armistice at substantially the original cease-fire line.¹⁷ After the Soviets had returned to the U. N., they utilized the veto,

¹⁶ Harvard Research on International Law, "Draft Code on Aggression," *American Journal of International Law*, supplement 1939, vol. 22, p. 847; Wright, *A Study of War*, pp. 341, 891gg., 1340, 1553, and *American Journal of International Law*, July, 1956, vol. 50, p. 526.

¹⁷ Wright, *Problems of Stability and Progress in International Relations*, p. 97ff.

inducing the United States to propose the “Uniting for Peace Resolution” under which consideration of a conflict situation could be transferred to the veto-free General Assembly if that body found that the Security Council which under the Charter had first responsibility in such matters, was unable to function because of a veto. The Soviet Union considered the resolution unconstitutional but it was used to declare Communist China an aggressor and to impose certain sanctions upon it in spite of Soviet objections. The Soviet Union, however, accepted by abstention the transfer of the Suez situation to the General Assembly in 1956 after Great Britain and France had vetoed a resolution in the Security Council and also on the General Assembly resolution to establish a peace-keeping force. In the Middle Eastern crisis of 1967 it concurred in summoning an emergency session of the General Assembly and in several Assembly resolutions, while the Security Council was meeting.¹⁸

The Korean experience convinced many that the collective security system contemplated by chapter VII of the Charter could not be relied on, and since then the United Nations has developed a different system called “peace-keeping” rather than “peace enforcement.” This system utilizes the authority of the U. N. to call upon the parties engaged in hostilities to observe “provisional measures” provided for in article 40 of the Charter. Under this peace-keeping system, primary attention is given to promoting international cooperation in the field of disarmament, economic and social welfare, cultural exchanges, and the self-determination of peoples, especially colonial peoples, in order to develop an atmosphere favorable to peace. If a situation or dispute believed to endanger international peace and security occurs, it is placed on the agenda of the Security Council or the General Assembly by a member or by the Secretary-General. This body decides whether it in fact endangers international peace and security which may be the case, even though primarily one of civil strife, because of the danger of foreign intervention, as in the one of civil strife, because of the danger of foreign intervention, as in the Congo and Rhodesian situations. The U. N. organ will then seek to achieve agreement by the parties to a procedure which it deems appropriate or to terms of settlement. If this effort is not successful and hostilities occur, a cease-fire or armistice will be recommended as a provisional measure without any decision as to which party is the aggressor. Both will be called upon to respect the cease-fire line and an observation commission will be sent to the area protected if necessary by peace-keeping forces. The Security Council, which has initial responsibility for provisional measures, will function as long as possible but, if hampered by a veto, the problem will be transferred to the General Assembly under the Uniting for Peace Resolution. Peace-keeping in the broad sense, therefore, embraces peace-building and peace-making, as well as peace-keeping in the narrow sense.¹⁹

If one or both parties refuse to accept the cease-fire, and hostilities continue, the Security Council may determine the aggressor, giving due consideration to non-compliance with the provisional measures, as it did in the Hungarian case. The possibility of enforcement measures will then be considered. They were not applied in the Hungarian case, and in other cases where

¹⁸ Wright, “Intervention, 1956.” *American Journal of International Law*, Pril, 1957, col. 1, p. 257ff.; Wright, “Legal Aspects of the Middle East Situation,” *Law and Contemporary Problems*, Winter 1968, vol. 32, 69 ff.; Edvard Hambro, “Peace-Keeping Operations,” *Indian Journal of International Law*, October 1967, vol. 7, p. 474.

¹⁹ For summaries of the United Nations peace-keeping and peace-making actions see note 28.

aggression was charged, no finding was made and no enforcement measures applied. Economic measures were imposed in the Rhodesian case.

The Use of Peace-Keeping Forces

United Nations peace-keeping procedures have, therefore, come to center around efforts to bring hostilities to a speedy end by inducing the parties to accept a cease-fire order or an armistice, and to maintain the cease-fire line by the presence of peace-keeping observers and forces with, as Secretary-General Dag Hammarskjöld said, a police rather than military character.²⁰

Such forces, permanently embodied and individually recruited, as are members of the Secretariat, were proposed in 1943 even before the United Nations Charter was signed by private organizations such as the Commission to Study the Organization of Peace²¹ and in 1948 by Secretary-General Trygve Lie.²² The latter proposed a small United Nations Guard of some 300 with some 800 reserves. This proposal was debated at length in the United Nations and finally accepted on November 22, 1949, after modifications which provided for a "Technical Field Service," the members of which would not be armed a panel of "Field Observers."²³ This service has been established and has served U.N. missions abroad especially in transport and communications.²⁴

In his twenty-year program for achieving peace through the United Nations, submitted in the spring of 1950, Secretary-General Lie proposed not only United Nations Guards but a larger permanent force, which the United States representative characterized as a "United Nations Legion," recruited by the United Nations on a voluntary basis and supplementing national and regional contingents.²⁵ The Commission to study the Organization of Peace has suggested that such a force of some 2,000 might be kept ready for service on United Nations bases in various parts of the world. Such a force would be supplemented, if necessary, by national forces voluntarily ear-marked for collective security action in serious emergencies.²⁶ The collective measures committee set up during the Korean crisis recommended that states ear-mark forces for U. N. service but few did so at the time. More recently Secretary-General U Thant has urged

²⁰ Lincoln P. Bloomfield, "Peace-Keeping and Peace-Making," *Foreign Affairs*, XLIV (July, 1966), 672; Hambre, "Peace-keeping Operations," 469.

²¹ United Nations, Commission to Study the Organization of Peace. 4th Report, Part I, "Security and World Organization," (November 1943), p. 27. Also, 5th Report, "Security Through the United Nations," (June, 1947), p. 20. See also Carnegie Endowment for International Peace, *International Conciliation* (January, 1944), 55 and (June, 1947), 434.

²² United Nations, Commission to Study the Organization of Peace, 6th Report "United Nations Guards," (September, 1948, p. 7ff. Also Trygve Lie, *In the Cause of Peace—Seven Years With the United Nations* (New York: Macmillan, 1954), p. 192ff.

²³ Lie, *In the Cause of Peace*, p. 192ff.; Also United Nations, Commissions to Study the Organization of Peace, "United Nations Guards," (September, 1949), and 7th Report, *Collective Security under the United Nations*, (July, 1951), p. 24.

²⁴ Everyman's United Nations (7th ed.; New York: United Nations Publications, 1964), p. 63.

²⁵ Lie, *In the Cause of Peace*, p. 280; United Nations, Commission to Study the Organization of Peace, 7th Report, p. 25.

²⁶ *Ibid.*, 7th Report, p. 24ff.; Also, 17th Report, *New Dimensions for the United Nations*, (May 1966), pp. 27, 128ff. reprinting recommendations of the Committee on Arms Control and Disarmament of the White House Conference on International Cooperation, Section 6, (November, 1965), p. 217.

such action and Canada, the Netherlands, New Zealand, and the Scandinavian countries have ear-marked forces of some 1000 each together with logistic equipment. Great Britain has considered such action and it has been suggested in the United States Congress, but contingents from the smaller countries have been considered preferable.²⁷

In practice, no permanent United Nations force has been organized apart from the small unarmed technical field service which is not really a peace-keeping force. Forces have however, been created *ad hoc* to serve during particular emergencies. A force of some 700 was used in the Palestine situation in 1949; of 100 in Kashmir since 1949, of some 5000 in Sinai area from 1956 to 1967 (UNEF); of over 20,000 at the maximum in the Congo from 1960 to 1964 (UNOC); and of 7000 in Cyprus since 1964. Small forces have been used in Indonesia from 1947 to 1950; in Korea since 1947, apart from the large forces during the war from 1950 to 1953; on the Greek frontier from 1947 to 1954; in Lebanon in 1958; in West Irian in 1962; in Yemen in 1964; and, for brief periods, in Laos, Cambodia and Malaysia.²⁸

The plan for collective security forces in Chapter VII of the Charter contemplated large air, sea and land contingents provided mainly by the great powers through detailed agreements with the Security Council. In contrast, peace-keeping forces have been recruited by the Secretary-General under authorization by the Security Council or the General Assembly by voluntary enlistment or, for the larger forces, by acceptance of contingents offered by members considered neutral in this situation, placed under control of the Secretary-General. Contingents from the great powers have been avoided.

The flexibility in regard to size, nationality, and utilization of such *ad hoc* peace-keeping forces has been advantageous and in the main such forces have been successful in policing cease-fire lines, protecting missions, and facilitating transportation and communication services.²⁹

The Congo operation (UNOC) provided the most important test involving, as it did, forces of considerable size and military action. The initial instructions required the force to maintain neutrality between the contending factions in the Congo and not to use arms except in

²⁷ Bloomfield, "Peace-keeping and Peace-making," 675ff.

²⁸ "United Nations Stand-by Peace Force." Address given by Secretary General U Thant at Cambridge, Massachusetts, June 15, 1964; Also, Wright, "Peace-keeping Operations of the United Nations," 186, lists 78 disputes and situations which came before the U.N. from 1946 to 1965, in 45 of which hostilities occurred involving U.N. forces in 8. A cease-fire was accepted in 14 and the U.N. made recommendations for settlement in 48, successfully in 23. Fourteen were settled outside of the U.N. but 41 remained unsettled. Of the 45 situations involving hostilities, the U.N. made recommendations for settlement in 25, successfully only in 11. Of the 20 in which it made no recommendations, 23 had been settled but 22 dangerous situations remained unsettled in 1965. Five have been settled since but some "peace suborgans" of which 25 were for observation, policing or other "peace-keeping purposes," and the remaining 44 for mediation, conciliation, or other "peace-making purposes." See "Consensus and Authority behind U.N. Peace-Keeping Operations," *International Organization*, XXI (Spring 1967), p. 266, 279ff. Mark Zacher has listed 81 instances in which the Secretary-General was delegated peace maintaining tasks by the Security Council (28) or by the General Assembly (53) from 1946 to 1966. With this authority the Secretary established 8 peace-forces and 33 observers and investigating missions for "peace-keeping." He also established 40 agencies for mediation, conciliation, or other "peace-making activities. Zacher also lists 32 instances in which the Secretary-General acted independently to maintain peace. These summaries indicate that the role of the Secretary-General in this field has tended to increase since 1953, especially in taking independent initiatives. See "The Secretary-Generals' and the United Nations' Pursuit of Peaceful Settlement," *International Organization*, XX (Autumn, 1966), 739ff.

²⁹ *Ibid.*

self-defense, but this proved unworkable because policing operations necessarily imply a distinction between lawful and unlawful acts of violence. Not until the Congo had been admitted to the U. N. and the Leopoldville government of Kasavubu had been recognized as the lawful government competent to suppress insurrection could this distinction be made and violent action by seceding provinces such as Katanga, and mercenaries serving them, as well as by mutineers from the Congolese army, tribal dissidents and unorganized rioters be characterized as unlawful and subject to suppression by the United Nations forces. This was explicitly permitted by the Security Council resolution of February 21, 1961 which the Secretary-General pointed out was a "decision" binding on all members although the Soviet Union and France had abstained.³⁰ Such suppression, however, ended the neutrality of these forces in the civil strife and involved them in military action which was eventually successful in preventing the secession of Katanga, and the intervention of foreign powers. United Nations forces were withdrawn in June, 1964, partly because of the difficulty of financing them. In spite of differences between the Soviets and the Western powers and threats of intervention, the Security Council was able to function with one or more of the great powers abstaining, but not vetoing, on all the important decisions. This was in part due to the unwillingness of any of them to offend the African states which generally supported the United Nations effort and were anxious to avoid intervention by any outside state.³¹ After the withdrawal of the United Nations forces a rebellion in Stanleyville led to massacres of both whites and natives. A rescue mission of Belgians in American transports was criticized by some as an intervention, but the incident was soon ended. It raised the issue of whether "humanitarian intervention" is permissible.³²

On the whole the use of U. N. peace-keeping forces has been successful in spite of difficulties arising especially from the uncertainty of financing, and from the claims of the state in whose territory they function and of the state supplying contingents to order their withdrawal. These difficulties were emphasized in the premature withdrawal of the Congo force (ONUC) because of lack of funds, and of the Middle Eastern force (UNEF) just before the seven day war in June, 1967 because Egypt demanded its withdrawal from its territory. India said it would withdraw its contingent, and Israel refused to permit the force on its territory. This force had kept moderate peace in the Sinai area for a decade but the agreements by which it was established in 1956 left the Secretary-General no alternative to withdrawal.³³

³⁰ *The United Nations Review* (March, 1961), 1, 9, and (April, 1961), 1.

³¹ *Everyman's United Nations*, p. 143 ff.; Wright, "Legal Aspects of the Congo Situation," *International Studies*, IV (March, 1961), I ff., 17. On the problem of consent see Mona Harrington Gagnon, "Peace Forces and the Veto: the Relevance of Consent," *International Organizations*, XXI (Autumn, 1967), pp. 812, 831.

³² U.S. Department of State, Bulletin LI, (1964), p. 840 ff.; *Ibid.*, LII, (1965), pp. 16, 22.; Richard H. Lillich, "Forcible Self-help by States for Protection of Human Rights," *Iowa Law Review*, LIII (October, 1967), 338 ff.

³³ United Nations, *Monthly Chronicle*, IV no. 7 (1967), 135.; Wright, "Legal Aspects of the Middle East Situation," *Law and Contemporary Problems*, XXXIII (Winter, 1968), 23.; Yashpal, Tandon, "UNEF, the Secretary-General and International Diplomacy in the Third Arab-Israeli War," *International Organization*, XXII (Spring, 1968), 529 ff. argues that while withdrawal of the UNEF was inevitable, the Secretary-General should have protested more than he did.

Problems of Peace-Keeping Forces

A survey of practice indicates that the use of peace-keeping forces and observers involves numerous problems—legal, political, logistic, administrative, and financial.

Legal problems have concerned the Charter authority to establish, station, and pay such agencies. For the first, authority has been found in the capacity of the Security Council and the General Assembly to establish “subsidiary organs,”³⁴ and of the Secretary-General to administer decisions and recommendations of these organs, and, to send observers to troubled areas on his own responsibility to advise him on the performance of his function “to bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security.” His duty to appoint the staff of the Secretariat is also relevant.³⁵ The uniformed guards at the U. N. building in New York constitute a small peace-keeping force and they may also be used for protecting U. N. buildings and missions abroad. Ample authority to establish such forces exists in the Charter.

It has been usual to obtain the consent of the state in whose territory a force is to be stationed and this may be necessary if the force is based on a recommendation of the General Assembly, as was the Middle Eastern force, although a duty to admit them may be found in the Charter obligation of members to accord to the United Nations the legal capacity and the privileges and immunities necessary for the exercise of its functions and fulfillment of its purposes.³⁶ If the operation is based on a decision of the Security Council, as was the Congo operation, all members are under a clear obligation to admit the force to their territories in order to carry out that decision.³⁷ It can also be argued that the members are obliged to receive from the Secretary-General observers and diplomatic missions as well as to send them to the New York headquarters, and also to permit the entry of small guard forces to protect such missions.³⁸

The International Court of Justice held in an advisory opinion that the expenses of such forces, whether authorized by the Security Council or the General Assembly, constitute “expense of the organization” which may be voted and apportioned in the general budget by the General Assembly, establishing an obligation of members to pay the amount apportioned to them.³⁹ This interpretation, though accepted by the General Assembly, including the United State, has been objected to by the Soviet Union, France and other states who insist that U. N. forces can only be established by agreements as provided in Chapter VII of the Charter and must be paid for as provided in such agreements or by voluntary contributions. The refusal of these states to pay has been reluctantly acquiesced in and the General Assembly has not deprived them of their vote as it is legally obliged to do.

Political problems have concerned the purpose for which such forces may be used. They have been used for protection of observers, transportation and communication services and policing troubled areas and cease-fire lines. They have not been used for “enforcement action”

³⁴ Tandon analyzes the *effective*, in contrast to the *legal* authority to establish these organs by the degree of consensus behind them. *International Organization*, XXI (Spring, 1967), p. 267 ff.

³⁵ See Zacher, note 28.

³⁶ See Tandon, note 33.

³⁷ See Bloomfield, note 20.

³⁸ See note 6.

³⁹ Advisory Opinion on Certain Expenses of the United Nations (1962). International Court of Justice, 15.

against an aggressor, although they may have to engage in military action to maintain order as they did in the Congo. While it is recognized that a permanently embodied force would be more efficient, and such a force was recommended by Secretary-General Lie, political opposition has prevented such a force except for the small technical field service, and Secretary-General Hammarskjold recognized the expediency of utilizing only *ad hoc* forces. To maintain the neutrality of such forces it has been recognized that they should not be drawn from the great powers. No great power has provided contingents for U. N. forces except the United States and France in Korea, before the concept of “peace-keeping” forces had developed, and the United Kingdom in Cyprus, where U. K. forces, already there, were embodied in the U. N. force. Canada, Sweden, Ireland, Australia, and Yugoslavia have contributed to most of these forces but thirty other countries from Europe, Asia, Africa, and Latin America have also contributed contingents.⁴⁰

Determination of the need for peace-keeping forces and their operations in a particular conflict situation is a political and strategic problem to be normally determined by the Security Council or the General Assembly, but these bodies have been inclined, because of political differences preventing precise instructions, to delegate much authority to the Secretary-General who can be better informed on the situation. “Let Dag do it” became a popular phrase. It is difficult, however, for the Secretary-General to avoid offending one or another of the parties to the conflict, or a great power. Consequently he has sought to obtain as detailed instructions as possible from the political bodies.⁴¹ Trygvie Lie found himself in political hot water over the Korean operation as did Dag Hammarskjold in the Congo crisis.

The *logistic* problem involves obtaining rights of passage, usually accorded and the procurement of trucks, ships, and planes for rapid transport of contingents from various parts of the world to the center of action. Member states have contributed such equipment as well as men. The United States provided transport planes for the Congo operation and Britain has promised transport vessels for future operations. There has been less reluctance to accept such contributions from great powers than to accept human contingents. Dependence on great powers for logistics might, however, sometimes give undue political influence to some suppliers.

Among *administrative* problems are the mode of recruitment. Smaller forces have been recruited by the Secretary-General by enlisting persons individually but larger forces have been composed of contingents sent by states on suggestion of the Secretary-General on the basis of the geographic, linguistic and political relation of the contributor to the area and the parties, in order to assure neutrality, efficiency, and acceptability by the parties to the conflict. Control of the Korean force was delegated to the United States which appointed General MacArthur as Supreme Commander, but subsequent forces have been under control of the Secretary-General within the authority given him by the Security Council or the General Assembly. States contributing contingents have assumed they could withdraw them but the Secretary-General has attempted to obtain commitments placing the contingents under his authority while the emergency continues. Such efforts were not wholly successful in either the Congo or the Middle Eastern operations. Problems of command, discipline, language, strategic planning, etc., have

⁴⁰ Wright, *A Study of War*, p. 1546; Bloomfield, “Peace-keeping and Peace-making,” 675 ff.

⁴¹ Commission to Study the Organization of Peace, 17th Report, p. 204 ff. Tandom points out that the increasing independence of the Secretary-General has added to his vulnerability (See note 28).

been dealt with by the Secretary-General who provides rules and gives orders through the commander on the spot. Obviously these problems could be better met if a permanent force, command, and general staff were established, but this has proved politically impossible up to date and multinational *ad hoc* forces of considerable magnitude have functioned with reasonable efficiency.

The *financial* problem has been the most serious. Even small peace-keeping forces add greatly to the modest budget of the United Nations. Operations in the Congo more than doubled the budget.⁴² Some states fear that such a force may encroach on their national sovereignty or their foreign policy. If United Nations forces were built up as nations disarmed, the United Nations would play a steadily increasing role in the balance of military power and in international politics. This would tend to increase the effectiveness of international organization and international law augmenting the security of all states, but it would decrease the independence of states, especially of the great powers. Consequently the idea of a financial veto developed especially by the Soviet Union and France, giving them the power by refusing to contribute to hamper the establishment, not only of a permanent U. N. peace-keeping force but of any *ad hoc* force. They argued on the constitutional ground that any U. N. force had to be established by special agreements with the Security Council as provided in Chapter VII of the Charter and could be used and financed only as provided in these agreements or on decision of the Council in which each great power has a veto. As noted, this legal argument is not convincing. The position seems actually to reflect attitudes of extreme nationalism and fear of effective international organization, attitudes which have not been characteristic of either the Soviet Union and France in all periods or recent history. In addition to the position of these great powers, some of the poor countries, while favoring a U. N. force, were alarmed at the costs and wished to shift the financial burden to the richer countries.

The International Court of Justice has, as noted, sustained the full authority of the General Assembly to include the costs of peace-keeping forces, whether authorized by the Security Council or the General Assembly, in the regular budget of the U. N. and to apportion it among the members.⁴³ The Soviet Union and France have not accepted this advisory opinion and it has not been enforced. United Nations committees have been making efforts to reach a compromise. An Irish proposal would permit the great powers to refuse to pay for forces to whose sending they objected and would provide a special scale of apportionment for other members bearing most heavily on the great powers. The Soviets objected and agreement has not been reached.⁴⁴ Voluntary subscription has been relied on to maintain the Cyprus force.

The Problem of World Peace

The use of peace-keeping forces has undoubtedly contributed much to the efficiency of the United Nations in dealing with conflicts and hostilities. There can also be no doubt but that solution of the problems mentioned, especially those of finances, would increase this efficiency.

⁴² See note 28.

⁴³ See note 39.

⁴⁴ Document A/SPC/L, 148 and debate in Special Political Committee of the United Nations General Assembly, (November 14-December 8, 1967), summarized in *International Organization*, XXII (Summer, 1968), 916 ff. See also, Hambre, "Peace-keeping Operations," 476, 480 ff.

Apart from *peace-keeping*, major problems remain if the United Nations is to achieve its purposes. *Peace-making* and *peace-building* are also necessary. More effective means must be found for settling disputes and situations which cause resorts to force, and behind this is the problem of creating basic conditions of peace in the world. These conditions include a world opinion recognizing the necessity in the nuclear age of a stable order resting on effective international law and organization rather than on national policies of balancing power or mutual deterrence. Such a world order requires states to accept limitations of national sovereignty to permit third party decision of international disputes if diplomacy fails, and to effect peaceful change of situations threatening hostilities. Adequate procedures for developing international law and international organization to keep them abreast of a rapidly changing world are also conditions of peace as are agreements for general and complete disarmament. Progress toward the latter was made in the United States-Soviet accord on principles in the McCloy-Zorin "joint statement" of 1961.⁴⁵ Perhaps the most important condition for such a world is perception by the great powers of their long-run national interest in establishing, in practice as well as in law, a world of peaceful coexisting states, in the words of President Kennedy, "a world safe for diversity."⁴⁶

⁴⁵ Richard Falk and Saul H. Mendlovitz, eds., *The Strategy of World Order*, Vol. 3., (New York: World Law Fund, 1966), p. 280 ff.

⁴⁶ Address, American University, June 10, 1963, quoted in Wright, *A Study of War*, p. 1562.