Change is coming for the Yale Journal of International Affairs. A historically graduate student publication, we decided this semester to begin incorporating undergraduate students in associate positions. Our hope is that broadening our team will allow us to both take advantage of the incredible talent and enthusiasm of the greater student community and to craft a more sustainable model for the Journal moving forward. While the Journal will continue to be managed by dedicated graduate students, our time in our programs is limited, typically just two short years. We are hopeful that through involving select undergraduates, we will be able to build a level of institutional knowledge that will better allow our publication to progress over time.

In addition to transitioning the composition of our team, we will also bolster our online presence—placing greater emphasis on the content of our website, www.yalejournal.org. In the coming year, we plan to develop a blog that will provide a forum for more students to weigh in on important issues in international affairs.

Though we will continue to publish our regular print journal we hope to leverage our website as a platform for time sensitive publications as well as for video footage of select interviews with key experts and practitioners. Our first video will feature excerpts from our recent interview with Luis Moreno-Ocampo, former lead prosecutor of the International Criminal Court (an edited, print version of the interview is included in this issue).

I look forward to the transition ahead and am confident in the positive impact these changes will have on the Yale Journal of International Affairs. I am honored to have been a part of the ongoing dialogue that comprises this incredible product and hope you enjoy our latest edition.

Lindsey E. Walters
Editor-in-Chief
ARTICLES

MOCTAR ABOUBACAR

Emerging Donors and Knowledge Sharing for Development: The Case of Korea

The field of international development cooperation is being increasingly influenced by “emerging donors,” countries like South Korea which are capitalizing on their own development history to engage developing countries with innovative policy experiences. These newly formulated development cooperation initiatives face significant challenges, however, especially when negotiating what role the state should play in interpreting a country’s past development. South Korea’s case shows that if emerging donors can address key issues inherent to knowledge sharing in their new programs, they could mobilize a wealth of policy know-how to augment development initiatives in other countries.

PIA REBELLO BRITTO AND BRIANCE MASCARENHAS

Alternating Current: Developing Transformative Leaders in a Multi-Polar World

Globalization is creating the need for international transformative leaders who can envision and realize opportunities for expansion and collaboration. The specific skill set needed by these leaders and how to develop them have not been clear. This paper clarifies the skill set needed by transformative global leaders. It suggests that alternating exposures in the home and host countries can broaden mindsets on important dimensions, scaffolding the development of leaders. These alternating, complementary exposures help to develop a multi-polar view and an appreciation of theory-practice, vision-execution, sustainability, formal-informal savvy, and lifelong learning. This approach is illustrated for developing students into leaders in the international policy and business fields.

DR. MICHAEL D. GAMBOINE AND JOHN J. MCGARRY


Despite their well-documented and unsavory reputation, private military security companies (PMSCs) remain critical to U.S. foreign policy. Hard-won reform has emerged concurrently with greater U.S. dependence on private military security contractors. Current American policy reflects accumulating experience but is hampered by uneven application. Iterative reform has not produced a strategic vision for PMSCs within American policy. Moreover, what satisfies the rule of law in Washington is distinct from
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Literature on the resource curse has attempted to explain all manner of failure in the political and economic institutions of resource rich countries. Much of the literature, however, ignores the failings of legal institutions. While some developments occur out of government interest in natural resource sectors such as investor protection frameworks, others, like redress mechanisms for pollution, suffer from arrested development. This paper uses the Nigerian case to illustrate the serious effect this type of institutional crisis can have on the ability to mitigate the negative externalities of resource development. It considers how failure in one institutional context directly affects other jurisdictions by examining the increased use of extra-territorial jurisdiction to try multi-national extractive companies for pollution committed abroad.

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The apparent use of chemical weapons by the Assad regime in Syria and the potential development of nuclear weapons by Iran have brought “red lines” to the forefront of public discourse and policy-making. In the former, U.S. President Obama threatened retaliatory measures were Syria ever to use chemical weapons against rebels in its civil war. Earlier, Israeli Prime Minister Netanyahu literally drew a red line on a chart during his speech at the United Nations, indicating that Iran would not be permitted to move beyond a given stage of uranium enrichment with an implied threat of military action should that line be crossed.

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the administration has actually augmented and increased its activities in its “secret war” on information and those actors deemed to be adversaries and threats to “states secrets.” Instead of a dramatic break from the policies of his predecessor, Obama’s approach to the balance of national security objectives and privacy concerns, has deeply contravened the administration’s initial pronouncements of a new “openness” and “transparency.” It will be shown that these actions have also extended to the global stage, particularly those that have impacted the U.S.-Russian “re-set” and bilateral relations with Germany. Indeed, from the treatment of whistleblowers to the assertive expansion of National Security Agency (NSA) surveillance programs, it has been an amplified “business as usual” approach that could significantly mar the Obama administration’s legacy.

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ADAMA DIENG

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Adama Dieng is the UN Special Advisor on the Prevention of Genocide. He recently visited Yale and YJIA spoke with him shortly after his visit.

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Luis Moreno-Ocampo was the first Chief Prosecutor of the International Criminal Court. Previously, he was the Deputy Prosecutor in Argentina during the “junta trial” in 1985 and the Prosecutor in the trial against a military rebellion in 1991. This year he’s joining the Jackson Institute at Yale as a Senior Fellow.

XINGZUI WANG

97 Transparency as Professionalism
Xingzui Wang is currently a World Fellow at Yale and the Vice President of the China Foundation for Poverty Alleviation. He has over twenty years experience working on issues of rural poverty and development in China. Under his watch the Foundation grew to serve over 1.5 million people each year.

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Emerging Donors and Knowledge Sharing for Development: The Case of Korea

By Moctar Aboubacar

Abstract—The field of international development cooperation is being increasingly influenced by “emerging donors,” countries like South Korea which are capitalizing on their own development history to engage developing countries with innovative policy experiences. These newly formulated development cooperation initiatives face significant challenges, however, especially when negotiating what role the state should play in interpreting a country’s past development. South Korea’s case shows that if emerging donors can address key issues inherent to knowledge sharing in their new programs, they could mobilize a wealth of policy know-how to augment development initiatives in other countries.

The past few years have seen the beginnings of three large shifts in international aid to developing countries. Firstly, the rise of middle-income economies such as China, India, Pakistan, and Nigeria has tilted the balance of poverty away from low-income countries. With the majority of the world’s poor no longer living in the poorest countries, debates are rife among aid donors about whether the focus of development aid should be on poor people, or poor countries. Secondly, the methods of development practice are undergoing increased scrutiny. The ongoing evidence debate and heightened interest...
in new methodologies such as randomized control trials (RCT), are prime examples of a broad contestation of past methodologies. Thirdly, the 2008 financial crisis has precipitated a gradual retreat of ‘traditional’ Western donors from the center-stage of development aid, and has begun to place new actors closer to the spotlight. The fourth High Level Forum on Aid Effectiveness in Busan, Korea in 2011 confirmed this trend with its focus on incorporating new strategies in planning and financing development through the private sector and emerging donor countries.

The rise to prominence of emerging donor countries—countries which have seen significant economic progress over the past decades and which have developed sizeable foreign aid programs—is an ongoing process, and competition with the sheer scale of aid from the United States and Western Europe is still not comparable. But countries such as South Korea, Japan, Turkey, Brazil and others are increasingly developing their own approaches and methods to helping other countries. They are namely mobilizing lessons learned from their own histories of development, sharing experiences and adapting older policies and ideas to the new century.

The Republic of South Korea (below Korea) is one of these few countries to have gone from aid recipient to aid donor. In the 1950s and 60s, Korea was just emerging from the devastating Korean War and had a per capita GDP lower than that of the Philippines and an industrial base that was all but decimated in the war. In just four decades, however, Korea graduated to middle-, then high-income country status, and now leads the world in key industries such as electronics and shipbuilding.

Korea is also one of just two members of the Organization for Economic Cooperation and Development (OECD)’s Development Assistance Committee to have previously received foreign development assistance. With a rapidly expanding foreign aid budget, Korea has heavily invested in development cooperation programs that capitalize on lessons from its own past economic growth. As such, creating coherent development programs based on the Korean development experience is central to the future of Korea’s international development cooperation. However to ensure effectiveness, Korea will need to shape its knowledge-sharing programs into more coherent open initiatives which promote a truly pragmatic look into its rich development history.

Korea’s experience-based aid initiatives are relatively young, and are encountering problems which could threaten their relevance to, and positive impact on, less developed countries. Korea (and by extension, all of the emerging donors who are in the beginning phases of formulating their development cooperation) must seriously reexamine and address a number of potential shortcomings endemic to their aid systems.

**Analyzing Past Policies**

The Korean government’s Knowledge Sharing Program (KSP) has been the flagship of its development experience-based cooperation since its inception in 2004. The
program engages low- and middle-income countries on questions of economic and social development policy, finding and assisting in the implementation of policy solutions and recommendations based on Korea’s own low- and middle-income past. In 2011, the program partnered with twenty-five countries in KSP initiatives. KSP also uses researchers affiliated with the state’s Korea Development Institute School of Public Policy to publish extensive analysis on topics in Korea’s economic development in a project called the “modularization” of Korea’s development experience.6

The program is bringing forward alternative policies derived from Korea’s own development experience and has the potential to act as a channel for heterodox economic policy formulation and implementation in developing countries. These policies include designing export initiatives fueled by monetary policy and central bank control in the Dominican Republic, or protecting domestic industries as a part of economic diversification in Gabon.7

In many instances, the tools of policy have changed with time; KSP’s policy recommendations are not a carbon copy of the policies which saw Korea’s rise over the last half century. Protectionist trade policies, for example, are advocated only insofar as they do not conflict with the regulations of the global trade regime, and while emphasis is placed on developing export-orientated growth strategies, this is advocated more through gradual deregulation than through industrial policies.

Changes in the policy toolbox notwithstanding, a careful examination of KSP policy recommendations to other countries along with the contents of the KSP modularization shows that the goals of policy remain very similar to those advanced during Korea’s low- and middle-income years.8 These goals are to deepen national industrial capabilities (through economic restructuring and simultaneous export-oriented and domestic market-centered approaches) and to create a knowledge-based economy which prizes research and development, information technology, and higher-value inputs to increase total factor productivity.9 While keeping intact the basic goals of Korean development policy in the 1960s, 70s, and 80s, KSP is adapting Korea’s own development experiences to the realities of developing countries today.

Growing Pains

Despite the efforts of the Knowledge Sharing Program, however, Korea’s development experience-based cooperation efforts have several clear limitations which reduce the effectiveness and meaning in harnessing successful development stories.

Firstly, there are factors which inhibit the scale, scope, and efficiency of Korean aid in a larger sense. Most of these elements are well-known in the Korean development policy community,10 and have recently been highlighted in the 2012 OECD Development Assistance Committee’s peer review of Korea’s development assistance. They include low overall levels of ODA to GNI (0.12 percent in 2011) and a high ratio of tied-to-untied aid (68 percent to 32 percent in 2010).11 In addition, Korean aid faces the dual challenge of aligning its thematic focuses with its various country partner strategies and in better incorporating results-based management frameworks into projects on the ground in developing countries.
All these limitations have been debated at length leading up to and since OECD’s 2012 Peer Review. To the extent that they inhibit the development of aid programs in general, these elements also adversely affect the operation and positioning of knowledge- and experience-sharing programs. In the wake of the publishing of the 2012 Peer Review results, there has been an effort by the Korean government to address the main obstacles highlighted by the review team. Despite a general agreement in the Korean aid community on the need for reform, however, the specific policies in question are still a matter of debate. In response to the Peer Review, the Korean government is proposing gradual changes, focused on the size of Korea’s aid package and the way in which it monitors aid. These changes include engagements to increase overall Official Development Assistance (ODA), increasing the portion of untied grant aid in Korea’s ODA allocations, and improving aid program evaluation processes for better results-based management.\textsuperscript{12}

Other voices in the Korean aid community, notably in civil society, have pointed out that while progress on certain fronts (notably in increasing the size of overall ODA) is being made, other more fundamental issues are being left aside. Civil society has held campaigns for more accountable and efficient Korean aid, most recently advocating that Korea join the International Aid Transparency Initiative.\textsuperscript{13} Furthermore, civil society continues to advocate that the Korean government solve the problem of aid fragmentation in accordance with the recommendation of the Peer Review, by consolidating its various tied- and untied-aid agencies under one single organization.\textsuperscript{14} Despite stated willingness by government actors to act on certain provisions for improving the quality of Korea aid, existing tensions among agencies have inhibited comprehensive and deep-reaching reforms for more efficient aid.\textsuperscript{15}

There are still more serious limitations which touch directly on Korea’s knowledge-sharing initiatives, possible solutions to which could give direction, not just to Korea, but to other emerging donors with similar aid architecture and orientations. Development experience-based aid programs are susceptible to politicization and monopoly by the state of a contested past, as well as being prone to adopting an overly narrow economic view of development, which may limit an otherwise rich repertoire of development lessons.

**Politicizing the Past**

Korea’s knowledge-sharing initiatives are suffering from the monopoly that the Korean state holds over interpreting and reproducing the Korean development experience. Given the continued political significance of certain historical policies and the serious fragmentation problem of Korean aid, not only is doubt cast on the idea of a single unified “Korean model” or “Korean experience,” but formulating development policy based on
the Korean experience can be highly politicized, and may in turn suppress new interpretations of how Korea developed.

The clearest example of how knowledge sharing can be politicized in Korea is the Saemaul Undong, or New Village Movement. The New Village Movement was an integrated rural development movement initiated by Korean strongman Park Chung-Hee’s government in the early 1970s. Through state subsidies of agricultural production and heavy investment in rural infrastructure, the movement sought to close the rural-urban gap by encouraging people in the countryside to take an active role in building their communities. This model of rural development, however, has also been criticized for its totalitarian nature; Park also used the movement as a method of control to solidify the country’s military dictatorship and tighten Korea’s Republican Party’s influence, effectively making the New Village Movement an extension of authoritarian power.

This history makes trying to export the New Village Movement program to other countries a singularly political affair. Since the election of Park’s daughter, Park Geun-Hye, to the presidency last year, the Korean executive branch has been promoting the use of Saemaul Undong as an aid program by encouraging its aid agencies to boost spending for similar rural development programs and by encouraging the UN to incorporate similar programs in its development policies.

Yet within Korea there has been much opposition to the state’s interpretation of the New Village Movement and to the Ministry of Strategy and Finance’s designation of the movement as a “successful case.” Whether the movement was a success or not depends on whom you ask. On one hand, the government identifies three basic success factors in the movement: the state’s ability to supply villages with raw materials (such as cement), the competitiveness among villages which lead to more efficient work, and the spirit of cooperation within villages that made community cohesion possible. These factors can be applied, according to the government, in developing countries that are experiencing rural poverty and where the state is able to generate these factors.

On the other hand, civil society and some academics present an alternative view with lessons from the experience of the New Village Movement. In many instances the importance of the coordinating role of the government is put forward. During the 1970s, it is argued, rural incomes were boosted mainly through state subsidies of both domestic agricultural supply and demand. These interpretations underline the state’s role in market coordination, and look to state-centered policy recommendations for developing countries which are traditionally less emphasized or even omitted from the state’s own analyses.

Still more scholars and non-governmental organizations have made the claim that the renewed push to expand Korea’s New Village Movement programs overseas is more informed by political and diplomatic considerations than by recipient country
Korea’s aid is highly fragmented, with more than thirty different government bodies involved in international development aid. The interpretation of any country’s past carries important political implications for its present; the government’s formulation of policy for development cooperation with foreign states becomes de facto an issue of domestic policy.

Absent from the Debate: Civil Society

The Korean state’s control over experience-based development policy and its severe aid fragmentation show how problematic it is to consolidate a single model for export in the context of development cooperation. The absence of a single model does not mean that effective knowledge sharing is impossible, as long as the void is filled with a constructive, cross-cutting social dialogue that seeks to bring out the nuances of Korea’s past and ongoing development.

The interpretation of any country’s past carries important political implications for its present; the government’s formulation of policy for development cooperation with
foreign states becomes *de facto* an issue of domestic policy. Given a history of rapid industrialization and economic growth under authoritarian rule like Korea’s, it could be expected that social movements and civil society actively voice disagreements in content and interpretation of development policies, especially should this development cooperation purport to revive old authoritarian-era economic policies.

While the Korean government is advancing an agenda for experience-based knowledge sharing on theoretical and implementation fronts, Korean development NGOs and civil society – while actively critical of other aspects of Korean aid – are, however, not making their presence felt on these issues. The relative silence of civil society on development knowledge sharing has several causes. Firstly there are few Korean NGOs which actively monitor and engage with Korea’s development policy. This translates in practice to fewer policy papers and smaller, less diversified civil society representation at multiparty events and panels: in short, lower visibility and impact.

Secondly, there is as of yet little connectivity between domestic development policy focused Korean NGOs and their counterparts which directly implement and supervise programs in developing countries. This means that civil society contestations of the Korean state’s development policies are not necessarily linked to evidence from Korean development NGOs overseas. This disconnect fails to link contemporary development projects back to the successes or failures of the Korean development experience.

Lastly, there exists an important gap in connectivity between civil society organizations working on domestic development issues and development NGOs. A country’s development experience can be accessed and analyzed through a number of intermediaries (including state ministries and foreign aid organizations), but civil society is one of the few alternative, non-statal sources of “development history.” They are well placed to put forward a different story on the effects of state development policies. These organizations include trade unions, business cooperatives, government oversight groups, and more. These organizations’ interaction with domestic development NGOs to produce a broader contestation of the state’s discourse of development cooperation, however, is very limited. Instead, Korean development NGOs are much more active in building alliances with international civil society and have developed tight ties with certain state development apparatus, as evidenced by the regular appearances of development NGO papers in Korea International Cooperation Agency (KOICA) publications.

These three points all drive home the absence of any prolific contestation of the state’s analysis of Korea’s development history. While there are certain examples of Korean NGOs and think tanks putting forward alternative versions of Korean development and alternative policy recommendations these are few in number. The state still very much holds a monopoly on policy implementation and discourse surrounding Korea’s development experience.

**A Narrow Vision of Development**

Furthermore, the idea of a Korean model of development, as well as the packaging of that model, has confined itself to a narrow, mostly economic interpretation of development.
Korea’s astounding rise from abject poverty to the world’s thirteenth economy certainly does have relevant policy lessons to give in terms of economic development.

But the Korean example is also germane to many other fields, which are very important to the development of a country. An examination of the most coherent effort to map Korea’s development history and lessons for other countries, the KSP Modularization work demonstrates this lack of thematic diversity. The project refers to numerous topics that are related to industrialization and economic development, such as public works and tax reform, but barely mentions other important aspects of development. While some important themes such as welfare policy and environmental conservation are featured, many topics that are critical to development, such as organized labor and press, are ignored.

Yet Korea has just not seen gains in its GDP since 1960. Growth was accompanied, at different stages, with labor movements, freedom of the press initiatives, and many other social advancements. How did this progress come about? What was the relationship between, for example, industrialization and environmental conservation? What factors fostered the meteoric growth of civil society organizations in the period just after democratization in the late 1980s and early 1990s, and what effect did this have on Korea society? All of these questions are vital to a holistic understanding of how Korea enacted such a rapid social and economic change in so little time.

These questions are also equally important to understanding the effects of economic policies in broader society. There is a noticeable gap in the empirical literature on Korean economic development, as most of it skirts around—or does not lend serious weight to—intrinsically social impacts of economic phenomena. This is very valuable to developing countries today, which are increasingly looking beyond simple prescriptions for growth and more toward mechanisms to lower social risk, redistribute wealth, and build up resiliency.

Policy Recommendations

Korea’s development experience, despite its great promise for developing countries, is not living up to its potential. In order to correct this, Korea must highlight the value that its development history brings to the makeup of international development cooperation. In a post-financial crisis world, where contestations of financial liberalization, as well as neoclassical economic principles, are gaining in popularity, Korea can make the bold move of promoting its heterodox economic stances and principles, especially with regard to industrial policy, which contributed in such large part to the country’s success. In a recent article, economist Dani Rodrik emphasized this point as a key value added in the development cooperation policies of emerging donors:

Their own development experience makes countries like China, India, and Brazil resistant to market fundamentalism and natural advocates for institutional diversity and pragmatic experimentation. They can build on this experience to articulate a new global narrative that emphasizes the real economy over finance, policy diversity over harmonization, national policy space over external constraints and social inclusion over technocratic elitism.
Secondly, Korea must work toward open and pragmatic methods for interpreting its past. It must shy away from preferring political and national strategic interests to development effectiveness. This also means opening up a national discussion on its development history, fostering dialogue where it’s lacking among civil society organizations, and enabling non-state organizations to collaborate and bring forward different, competing interpretations and actuations (through implementation in the field) of the Korean development experience. The government needs to be pragmatic in this approach, ready to change up old toolboxes and staid methodologies, while willing to call into question the development paradigms within which it is working.

Together with these measures, NGOs need to increase their presence in these debates and play a larger role, not just in bringing constructive critiques to existing frameworks, but in shaping future aid policy. In order to involve a broader swath of civil society in the aid debate, existing umbrella organizations such as the Korean Civil Society Forum on International Development Cooperation (KoFID) must frame their policy debates, advocacy efforts, and academic research in a way that can appeal to various other types of domestic civil society organizations. One possible unexplored avenue for this kind of cooperation is the linkage between migrant worker organizations in Korea and Korean-led development efforts in the workers’ home countries. Expanding the actors present in these debates will bring a more holistic interpretation of Korean experiences to bear on development policy.

Lastly, Korea stands to make a stronger contribution to international development cooperation if it challenges the boundaries of where and how its development history can be applied. Beyond economic policy, there is a trove of lessons regarding the development of Korean society, in success and failure, which respond to new needs and interests of developing countries. This recommendation aligns well with the previous one: it is only by engaging a broad cross-section of society on the question of Korea’s past development that various social issues can be brought to light.

These policy recommendations are formulated based on the Korean example, but the underlying idea that a country’s development experience needs to be analyzed and interpreted in a holistic manner—thinking beyond the state when necessary—applies to all emerging donors. Countries such as Brazil, Turkey, Japan, China, South Africa and others have real contributions to make to the international community, and must shape their development cooperation policies accordingly. Knowledge sharing for development must not be a single-minded drive to define and operationalize the past, but a whole-of-society approach to explore and share its nuances and contingencies. 

– Scott Ross served as Lead Editor for this article.
NOTES


5 While the phenomenon of new development aid donors can be ascribed to the rise in the past two decades of middle-income countries and regional powers in certain parts of the world, including the BRICS, there are instances of emerging donors engaging in knowledge sharing programs as early as the 1970s and 1980s. This is the case of Japan’s Kaizen development methodology and of Brazil’s social protection programs such as Bolsa Família.


7 Korea Development Institute Center for International Development, “Moving to the Diversification of the Gabonese Economy: Lessons Learned from Korea” (2012).


13 This advocacy was done through several social media channels, garnering press coverage as evidenced in the following story: “The Government Must Become a Signatory to the IATI.” Accessed December 11, 2013, <http://m.mt.co.kr/new/view.html?no=2013082614268278136>.


17 Youngmi Kim, Geudeurui Saemaeurundong (Seoul: Pureun Yeoksa, 2009).


19 This very recent expansion in New Village Movement operations overseas has not yet made the subject of any clear strategic position paper by Korea’s development actors. It has, however, made the object of working plans to expand the budget to New Village Movement programs in certain countries, namely in Rwanda and Nepal. A May 2013 conversation between the author and KOICA Rwanda’s Deputy Representative has confirmed that the country office is currently working to expand the scale of village-based rural development interventions in direct response to the new Korean administration’s stated interest in New Village Movement development projects abroad.

20 President Park’s engagement of the United Nations, namely through official meetings with the (Korean national) UN Secretary General Ban Ki-Moon, has made echoes in the Korean press and in popular commentary.

21 Korea Development Institute School of Public Policy and Management, “Modularization of Korea’s Development Experience: The Successful Case of the Korea’s Saemaul Undong (New Community Movement)” (2011).

22 Ibid.

23 Youngmi Kim, Geudeurui Saemaeurundong (Seoul: Pureun Yeoksa, 2009).


29 The main Korean NGOs dealing with Korea’s development policy are ODA Watch, the People’s Solidarity for Participatory Democracy’s International Cooperation Committee, and the umbrella organization for Korean development NGOs, the Korean Civil Society Forum for International Development.


32 Korea Development Institute School of Public Policy and Management, “Modularization of Korea’s Development Experience: The Operation of Nationwide Health Insurance and its Implications” (2011).

33 Korea Development Institute School of Public Policy and Management, “Modularization of Korea’s Development Experience: The Operation of the Environmental Charging System in Korea” (2012).


Abstract—Globalization is creating the need for international transformative leaders who can envision and realize opportunities for expansion and collaboration. The specific skill set needed by these leaders and how to develop them have not been clear. This paper clarifies the skill set needed by transformative global leaders. It suggests that alternating exposures in the home and host countries can broaden mindsets on important dimensions, scaffolding the development of leaders. These alternating, complementary exposures help to develop a multi-polar view and an appreciation of theory-practice, vision-execution, sustainability, formal-informal savvy, and lifelong learning. This approach is illustrated for developing students into leaders in the international policy and business fields.

INTRODUCTION

Globalization presents diverse potential opportunities for expansion and collaboration between nations, but specific talents are necessary to envision, realize, and manage them.

Pia Rebello Britto (PhD Teacher’s College, Columbia University) is the Senior Advisor and Global Chief for Early Childhood Development at UNICEF. She earned her PhD in Developmental Psychology from Columbia University in 1999. Prior to her position at UNICEF, she was an Assistant Professor at Yale University and the Associate Director of the Edward Zigler Center for Child Development and Social Policy at Yale. Dr. Britto is known internationally for her work on creating evidence-based early childhood programs and policies, primarily in low- and middle-income countries.

Briance Mascarenhas (PhD University of California, Berkeley) is Professor and Head of Management at Rutgers University-Camden. He has held faculty appointments at New York University, Rice University, and the University of California, Berkeley. He has been ranked among the top ten researchers in international strategic management and in international business. He conducts research and advises on market entry strategy, developing core competencies, overcoming management bias, and setting CEOs’ agendas in multinational companies. He has been honored with the School of Business and Provost Teaching Excellence Awards, and the Rutgers University Leader-in-Diversity and Faculty Scholar-Teacher Awards.
There is a need for international transformative leaders who are well grounded in their disciplines, who have a broader vision that transcends countries and cultures, and who have a desire and ability to bring about positive change. While there is a great need for transformative leaders to address fundamental, pressing global issues of poverty, health, the environment, and economic growth, it is unclear how to develop such leaders. Moreover, such leaders are not being developed soon enough (Treverton and Bikson, 2003).

Leaders have been exhorted to develop broad and narrow views of their organization and world in order to combine big-picture thinking with flawless execution (Kaipa and Radjou, 2013). However, subtle perceptual filters and restricted career exposures continue to channel and reinforce functional, tactical, or domestic thinking and impede the development of global leaders.

Building on the general conceptual foundation of the need to develop and combine narrow and broad views in leaders, this paper defines the skills needed by transformative leaders in the international context and specifies the developmental model for building them.

This article first clarifies the mindset and skills needed by international transformative leaders. Next, it articulates a pedagogical model based on alternating, complementary exposures in the home and host countries on multiple dimensions in order to broaden student mindsets, scaffolding their development into leaders. The model is then illustrated with two case studies of developing leaders in international policy and international business fields. The implications for the institution, faculty, and students are discussed. The conclusion outlines promising future avenues for leadership development.

MINDSET AND SKILLS NEEDED

What are the skills that are needed by the next generation of international transformative leaders? Future leaders need an appreciation of the following issues:

A multi-polar world—industrialized, emerging, and developing nations. Economic and political power is shifting from industrialized to emerging nations. An appreciation of their varying historical and institutional contexts is needed. They need to challenge domestic mental frames and adopt a transnational one through introspection and reflection.

The fundamental long term forces affecting the world. Globalization, urbanization, and digitization, and multi-speed economies are secular trends shaping the global economy.

Subject knowledge and its translation into practice. The basic academic disciplines provide an understanding of accumulated research-based findings and evidence, and a deep, external view. Leaders need an appreciation of practices found internationally—of how
things function in a different context. They will need to bridge theory and practice, and content (what needs to be done) with process (how to do it), in order to become transformative leaders who are capable of bringing about positive change.

*Private, government, and Non-Government Organizations (NGO) parties.* Leaders need to know the relative roles of these three basic types of organization and how they interplay with others.

*Emotional Intelligence.* Inter-personal skills are important to read a specific local context, develop enduring relationships which will help to open doors, and ‘get things done’ without formalization.

*Sustainable Development.* A broader outlook is needed to expand the future pie rather than seeking to capture a larger share of the existing pie. The United Nations (www.unglobalcompact.org) has urged leaders to move beyond the single bottom-line focusing on near term profit towards improving the triple bottom-line impacts on 1. people, 2. planet, and 3. sustainable profit. Sustainable profit generation involves more efficient investment, less debt, and greater sharing of the returns with multiple stakeholders.

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**The premise underlying scaffolding, similar to that of building construction, is that learning is supported through social interaction, or guidance of a teacher and peers, that enable the learner to bridge the distance between their current stage of knowledge and potential acquisition of new knowledge.**

Ability to learn in a dynamic and diverse world. Leaders need research skills to continually learn in a rapidly changing world. They also need to know how to research international contexts when the needed information is often not codified, available in traditional media, or all in one place.

**DEVELOPMENTAL MODEL**

A major challenge across disciplines striving to train students to succeed in global contexts and economies is finding the appropriate pedagogical techniques to facilitate that learning. The classroom, both physical and virtual, is limited in its ability to provide such exposure. We articulate a leader development approach based on the combination of two concepts—scaffolding and alternating exposure.

The concept of scaffolding is potentially useful in the development of international leaders. Students’ learning needs to be scaffolded through exposure to diverse settings to develop the mindsets needed for leadership. Scaffolding, a theory of learning, draws on social interactions as a way to acquire new knowledge dependent on previous learning (Vygotsky, 1978). Scaffolding can provide a temporary, accumulating, supporting structure intended to develop a deeper learning of new concepts and mindsets. The premise underlying scaffolding, similar to that of building construction, is that learning is supported through social interaction, or guidance of a teacher and peers, that enable the learner to
bridge the distance between their current stage of knowledge and potential acquisition of new knowledge. Scaffolding techniques enable the learner to expand their knowledge from what they can learn independently to what they can learn with guidance. The “zone of proximal development” is the scaffold that is created by the teacher, and often peer group, that helps the learner advance their individual learning from what they can do unaided to what they could not do without help.

The concept of alternating exposures is also instrumental in developing international leaders. Nikola Tesla’s design of the alternating current system, which has become dominant in power generation and transmission, provides a useful analogy for leader development (Seifer, 2001). Just as switching magnetic polarity generates alternating electric current, exposing students to complementary, alternating experiences in both the home and host countries on various dimensions develops broader mindsets needed by leaders. Just as alternating current faces less resistance in transmission because of its two-way flow and ability to modulate the level of current, a broader leader mindset built on multiple perspectives will be able to better understand, adjust, and face less resistance in bringing about international change.

The suggested development approach is depicted in Figure 1. The bottom part of the figures shows the alternating, complementary exposures between the home country or country of residence and host country or country being visited along multiple dimensions. These complementary cycles, followed by reflection, discussion, and interaction, help to develop broader mindsets on various dimensions that are scaffolds for building leaders. This approach aims to build the following mindsets through targeted alternating, complementary exposures. By targeting the development of multiple, specific scaffolds in a short time period this approach seeks to provide an efficient and comprehensive learning approach relative to unplanned international study experiences.

**Figure 1. Model of Alternating Exposures Building Scaffolds for Leader Development**
host countries. Existing leadership development approaches are often domestically oriented (Morrison, 2000), while we need internationally applicable ones. Thus exposure is needed to more than the home country. Countries are developing with varying resources, through different paths, and at different speeds. It would be unrealistic to expect a cookie-cutter development approach that will be successful in all contexts found in a multi-polar world. Since national contexts vary substantially, these international exposures should be targeted to countries where the leader is interested in bringing about transformational change.

Span Theory and Practice: Academic exposure provides the broad view that has been proven through systematic research findings over time and that is reflected in parsimonious conceptual frameworks. It can also help to develop a richer understanding of complex problems by bringing to bear multiple academic disciplines. This theoretical exposure needs to be balanced with immersion in real world practice to develop an understanding of the institutional context. This immersion can occur through local site visits, direct observation and interaction, and field work.

Vision and Execution: A broad view is needed to see the larger picture and secular trends. This broad vision must be translated into the desired policy. Policy content refers to what policy should be adopted. An understanding of the host country environment, or policy context, is also needed in order to execute the policy. The policy needs to be enacted through a sequence of specific, supportive levers that need to be pulled, and that dovetail with one another. Specifically, within the local context what available resources can be reallocated to support the initiative; how can a supportive culture be built; how can the new skills needed be obtained through training or recruiting; how can new metrics be devised in the local context to monitor the change; and can the local rewards and recognition system be adjusted to support the strategic change. Unless these multiple steps, that adapt the policy content to the policy context, are taken and choreographed, a new strategy will not gain traction and come to fruition. Both vision and execution skills are important for bringing about the right type of change.

Sustainability: Traditionally many decisions have been made by focusing on the near term profit goal of shareholders. This narrow mindset has often reflected a win-lose approach and assumed that the pie is fixed. In the future, leaders will increasingly be called to generate a more sustainable profit that satisfies multiple stakeholders, including people and planet needs, instead of only shareholders. The challenge will also be how to expand the future pie, instead of dividing the existing pie. This broader mindset can help to reduce resistance to change by the stakeholders affected.

Formal/Informal Savvy: There is usually a formal structure and informal mechanism for conducting activities. While the formal structure is codified and can be studied from the home country, there may be a difference between prescription and practice. In order to get things done on the ground, informal relationships are pivotal. These informal relationships require a long horizon because they are time-consuming to cultivate, but can cut through red tape and be enduring. Understanding the roles and limits of formal and informal mechanisms are instrumental for becoming an effective leader.

Life-long Learning: Leaders need research skills to stay abreast of a rapidly changing world where the data is not available in one place. To reduce management bias, decisions
should be evidence-based and supported by research. In the home country, secondary data is usually accessible cost-effectively and should be researched before going abroad. Primary data gathering can then be collected in the host country to confirm and balance the view generated at home. Secondary data may be aggregated, while primary data tends to be micro-level, complementing each other. The complementary home and host country exposures help to develop an appreciation of primary and secondary research in an international context.

We have created a series of innovations that expose students to the foundational knowledge of the field coupled with immersion in the international setting to which they professionally aspire. This model of professional development is similar to medical training, where central to a physician’s training is medical residency to practice patient care across a variety of clinic and hospital-based settings. The innovation is in the adaptation of the medical training model to the challenges of global leadership in policy and business across diverse, relevant contexts in low and middle income countries. Next, we demonstrate the development approach in two disciplines, international policy and business, illustrating the opportunities and advantages for multiple stakeholders.

**Developing International Policy Leaders**

With respect to policy development, the pedagogical model seeks to train students interested in careers in international policy, diplomatic corps, and public service. The chasm between the worlds of policy makers and scholars is wide and deep. Several theories have been put forth to explain this divide. One posits that scholars generate data based on criteria of validity and reliability, whereas policy makers require data on the basis of utility (Huston, 2008). Another suggests that the end goal of science is to create knowledge, whereas the end goal of policy makers is to apply knowledge (Shonkoff, 2000). A deeper examination of the chasm, however, reveals that it can be crossed, provided that the appropriate bridges are created. Both constituencies do not accept the status quo (knowledge for scholars and state of affairs for policy makers) and both constituencies require information for change. To that end, the agents of knowledge and information, academics and scholars, need to develop the skills and capacity to translate knowledge for policy utility, such that policy makers can apply it for their purposes (Britto, Engle, & Super, 2013).
The translation of knowledge for policy is more than a simple matter of converting the language or the format of a presentation. Translation calls for understanding the policy development process and knowing how to extract the relevant and valid “information” from the vast body of evidence, so that informed decisions ensue. As we know, in addition to information, there are several competing influences on policy, namely, Ideology, Institutional Emphasis, and Infrastructure for Implementation (Weiss, 1995). Ideology typically refers to the political persuasion and values of the decision makers that influence policy. Often ideology has strong historical underpinnings. Institutional emphasis refers to the manner in which policies are translated and the prioritization of policy actions. Infrastructure for implementation draws on the human and resource capacity to develop and apply policies. Often information is not incorporated into policies because the technical capacity for implementation is weak. Therefore, policy studies programs need to train students about the influence of these four main vectors on policy development and implementation. In addition, they must give credence to the role students need to play as they move into their professional lives, most particularly for careers in development, international relations, public service, and the diplomatic corps.

In addition to understanding these various influences, students need an appreciation of the governance of a country and the relationship between national governments and international development partners (Britto, Yoshikawa, van Ravens, Ponguta, et. al., in press). The key functions of governance are development, coordination, monitoring, training, and finance. These functions, central to the effective implementation of a system, require multiple actors or stakeholders to take on responsibilities linked with creating the system, coordinating the activities of it, monitoring it for results, training the service providers, and finally ensuring sustainability through effective finance. Characteristics of the policy process are hard to capture in a classroom setting, even with the most ingenious instructional methods because of the contextual influences on policy-making. Therefore, creative instructional methods are required for students to learn about national level policy development and implementation in various socio-political contexts.

The model for international policy leadership development entails in-class learning with international field experience. (Home study versus local immersion in Figure 1). The focus of the in-class teaching is on policy development and implementation. (i.e., the Policy Content cycle in Figure 1) Students are exposed to the relationship between international agencies and international development frameworks, human rights instruments in policy-making and the social and economic development of countries. Thereafter students participate in a policy development experience in a country. (i.e., the Policy Context cycle in Figure 1) Thus policy experience is typically set up in partnership with a country working on developing a national social policy. Students observe and participate in meetings with high-level policy makers and international development partners. This experience is qualitatively different from an internship or individual study abroad on two levels. First, in an internship, the student travels or works alone without the benefit of having the group learning that is important to reflection and debriefing on the policy development process. The onus on extracting the learning from the experience rests solely on the student’s ability to extract meaning from the experience. In this model, however, the learning and meaning from the experience
is scaffolded by the faculty through having the student reflect upon his or her observations and the faculty helping the student interpret those observations within the context and theoretical paradigms of international policy. Furthermore, when these discussions occur in a group with other students, the process is further scaffolded by students who help one another interpret and analyze their observations and experiences. This group learning has proven to be very beneficial for understanding policy development. Second, in a traditional study abroad program, while students are exposed to living in another country, it is rarely outside of academic boundaries. Though students live abroad and learn about new cultures and systems of government, the experience does not allow for the applied learning opportunities of policy training. Traditional study abroad often occurs within a classroom setting away from real policy-making and implementation.

The goal of combining the classroom instruction/discussion of evidence-based policy planning with hands-on policy development work in a country is to enhance policy planning knowledge and policy skills development. The combination of policy content and practical skills is vital for successful development of international diplomatic and public service leaders.

This model is part of the curriculum of a course offered by the Jackson Institute for Global Affairs of the MacMillan Center for International and Area Studies at Yale University. The course, *Critical Issues in Development Policy*, was offered in the spring semester in its initial years, providing in-country travel during spring break. Traditionally this course attracted students from multiple departments and professional schools at Yale, including international relations, international development economics, public health, nursing, forestry and environmental studies, divinity, and law. The course was divided into three sections: 1. introduction and orientation to conceptual paradigms and country context; 2. in-country visit; and 3. analyses and policy report. Each of these sections is described briefly below.

The first section of the course occurred prior to spring break. The students learned about early childhood development, which was the focus of the national policy, including effective approaches and services to address issues of child survival, health, education, protection, care and well-being. The students also learned about national social policies and their characteristics (Britto, Cerezo & Ogubunfor, 2008). They became exposed
to different models and processes for policy-making. In addition to the conceptual and theoretical frameworks, the students spent time learning about the socio-economic and political context of the country for which the policy was being developed. Through a reading of national reports on the country and a systematic analysis of national guiding documents (e.g., poverty reduction strategies, health and education national plans) the students became familiar with the critical issues facing young children and families and the laws and national strategies required to address these issues. By the end of this section of the course, students were prepared to work in a country with a solid knowledge of the content area, country context and policy development process. (i.e., the Home Study and Academic Theory cycles in Figure 1).

The second part of the course was the in-country visit, which occurred during spring break. The students and faculty traveled for a week, supported by several departments at the university, primarily those whose students were engaged in the policy work. Past travel has included visits to Lao PDR and Angola. The in-country work was in the form of policy development workshops that last for five days. The workshops were attended by key stakeholders and actors in policy development in the country—and include representatives from government, at national and sub-national levels, the international development community, NGOs, private sector and sometimes community leaders. The government representation was traditionally the strongest, given that these were national policies, adopted by the country’s government. The holistic nature of Early Childhood Development (ECD) requires multi-sectoral representation—from the several different ministries and offices of national executive offices. This experience was unique for students because they had the opportunity to observe and learn how evidence and information is understood and used by policy makers. They listened to and analyzed how policy makers select the evidence they need and the degree to which they have access to knowledge and the latest research. Given the interactive nature of these workshops and the designed small group discussions, the students were also able to see the interface between policy, politics, and science. It represented a truly unique experience to study national leadership (i.e., the Local Immersion and Institutional Practice cycles in Figure 1).

In the third part of the semester back at Yale, students analyzed the workshop and group discussions through written reports and presentations of what they learned. These analyses were developed into a set of recommendations and outline for national policy. In doing so, the students had to balance evidence on best practices, policy implementation capacity, resources of the country, and the national vision/goals for ECD. Drafting integrative recommendations that were both evidence-based and suitable for the country context was a learning experience for students on the application of knowledge for policy.

This innovative pedagogical model was rated by an overwhelming majority of the students in the course evaluations over a three-year period as one of the best learning experiences in policy development. They attribute their steep learning trajectory to the opportunity to participate in the policy meetings with guided practice and ability for reflection. The combination of studying policy issues in the classroom at home, becoming well-versed and applying them to a real policy process abroad that needs to be participatory and
nationally relevant, is what brings together the content and process of policy development. This unique combination has left a lasting and formative impact on students.

**Developing International Business Leaders**

CEOs of international firms typically wrestle with multiple challenges—developing growth avenues, raising productivity, competing for talent, managing diverse risks, tightening corporate governance, creating new innovation models, improving sustainability, and building out new infrastructures (Mascarenhas, 2009). At the Rutgers School of Business, an emphasis is placed on the development of international business leaders through a combination of classroom instruction at home and field visits to business organizations abroad to provide a richer picture of these issues. This aim is pursued through the following methods.

Before the trip, students develop a deep knowledge by reading discipline-based academic material. They also research a leader who has transformed the host country in any field—the arts, politics, sciences, or business. This exposure provides personal inspiration from a proven entrepreneur role model that has made positive change in the host country. For example, for the international field study in Brazil in 2012 and 2013, students studied transformative leaders such as Santos Dumont (aviator), Oscar Niemeyer (architect), Dilma Rousseff (first female President), Carmen Miranda (singer and dancer), and Sergio DeMello (humanitarian diplomat).

In planning the international field study, the instructor reads about and selects sites to visit, including economic, political, social, and cultural institutions that all reflect points of interest in that context. The instructor selects the industries and companies to visit—a mix of transnational firms with operations in that country and local companies. Students begin conducting research about the host country and its organizations utilizing secondary data sources at home (see the Secondary Research cycle in Figure 1). They choose a particular institution on the itinerary to research in order to uncover its history and significance. They develop a research brief and make a presentation to the class. Each presentation is followed by a discussion, which clarifies remaining questions that they will seek to resolve during the overseas visit, utilizing primary research methods. (See the Primary Research cycle in Figure 1.)

This protocol exposes students to discipline-based learning at home and practice-based information abroad. It also encourages research on their part to encourage continuous learning. Further, it demonstrates the relative roles of primary and secondary data research and how their combination is useful for researching international contexts cost-effectively.

Because of this preparation, students have a deeper, broader foundation to interpret what they encounter during the visit, (see the Academic Theory cycle in Figure 1). They are also eager to resolve on-site the questions that emerged during their preparation at home. The research briefs are compiled into a guide that students use to direct their overseas trip.

During company visits abroad, students meet and interface with executives who give them a strategic overview of the firm. The overview covers the most important
issues from that national context which affect the firm’s strategy and operations. This presentation is followed by a question, answer, and discussion session in which students probe deeper. Students are also taken for a tour of the firms’ facilities and operations (i.e., the Institutional Practice cycle in Figure 1).

The business school has offered international field studies to promote learning by immersion for over a decade in targeted African, Asian countries, European, and Latin American countries. They have proven to be a valuable method for building camaraderie and enduring relationships among institutions, students and instructors. Students have been encouraged to reflect, share, and discuss how their experiences provided new insights on how to conduct business locally, between the host and home countries, and for their career-development plans. These field trips are so unique and successful that they have become signature attractions in the business school.

The travel component of international field studies at the Rutgers School of Business occurs during the mid-term break or between-terms’ break. They have proven popular and draw students from multiple fields including business, law, and nursing. The academic component involving preparation and debriefing is conducted before and after the trip over a few weeks’ time.

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**IMPLICATIONS**

Expanding the walls of the classroom to train the next generation of policy and business leaders has been a successful pedagogical experiment and learning experience for students. It also supports the university’s mission to be globally relevant and innovative. In this section, we discuss the potential advantages of this approach and also the challenges that need to be addressed in future years.

For the university or home institution, these courses generate a great enthusiasm for education and learning. Participating students have found it to be a deep, personal learning experience and highly recommend it to others. For institutions, this model can help to attract additional students to the program and encourage alumni involvement in participating in or designing the international field studies.

For the faculty who adopt this approach, it enables teaching critical issues to the students in a realistic manner. No simulation exercise, however sophisticated, compares to an actual country visit and immersion in its policy and business contexts. Such experiences also increase the faculty’s teaching repertoire and skills for other courses.
For the students, of course, the benefits are tremendous. It helps develop the mindset and skills needed by international transformative leaders. Students obtain a strong grounding in relevant academic disciplines. They expand their domestic mindset to encompass a global, nuanced view. They interact with and gain an appreciation for the different players abroad that they will have to work through to bring about positive change. They also develop secondary and primary research skills to become lifelong learners and chart international waters.

CONCLUDING COMMENTS

Developing international leaders is a pressing challenge. Leaders need to develop multiple contrasting skills spanning the science and art of execution, researching secondary and primary data sources, understanding theory and practice, appreciating content and process. We have illustrated the pedagogical model in two different fields that develops these complementary skills to prepare students for international leadership roles.

Leadership development is an ongoing journey. The programs that we have outlined are continuously improving with experience and feedback. Future challenges are to encourage more faculty to lead such courses as prior faculty become too familiar with a particular host country reducing the sense of a new adventure.

Such a course is not, however, without its challenges. It’s a very time-consuming and labor-intensive course for the faculty, coordinating the schedule for the visit and making travel arrangements for the entire group. Ensuring that the agenda goes as planned is also critically important. There is a need to support the faculty member, and provide for continuity across years and faculty members. To defray these support costs, there is a program cost that must be paid for by the students and/or the department.

Another great responsibility is traveling abroad with a group of students and ensuring their safety and well-being at all times. Given this is a university sponsored trip and an educational activity, ensuring the students are well taken care off is a great imperative and often a large responsibility. Risk management is an important consideration in designing the program and the curriculum.

Another challenge of this approach is the potential that it may not be offered to students on a regular basis. Students enroll in the course with the expectation that it will include an experience in the host country. If that component is missing from the course it tends to have a negative impact on the students’ motivation to learn. Such opportunities need to be built into the course structure on a consistent basis.

The programs can be continuously improved to have a larger impact. One opportunity is to expand the window of learning from a short trip within a term to year-round learning. This may be achieved by developing extended collaborations with international partners and having students working on larger, longer-term projects, year after year.

Another opportunity is to move the learning from passive observation to more active international service-learning. This may be achieved by developing longer-term implementation projects, such as technical, feasibility, and/or marketing plans, on which
There is potential here to develop a multi-disciplinary perspective by unifying students from diverse academic fields who participate in these field study projects together, in teams, to cultivate an even richer understanding as they develop workable solutions to any problem presented to them.

students work year-round, present, and help to implement with the local partners during their trip.

The program can be expanded from a focus on training home-country students to developing a multi-way training program that also develops host country participants. This could be achieved by training and arranging reverse visits of host-country students.

There is potential here to develop a multi-disciplinary perspective by unifying students from diverse academic fields who participate in these field study projects together, in teams, to cultivate an even richer understanding as they develop workable solutions to any problem presented to them.

We have argued that alternating, complementary exposures in the home and host countries has been an efficient model to expand mindsets, building scaffolds for global leadership development. Several dimensions have been included, but as the world changes and new issues become important, the model should be expanded to incorporate them.

— Daniel Tam-Claiborne served as Lead Editor for this article.

REFERENCES

Abstract—Despite their well-documented and unsavory reputation, private military security companies (PMSCs) remain critical to U.S. foreign policy. Hard-won reform has emerged concurrently with greater U.S. dependence on private military security contractors. Current American policy reflects accumulating experience but is hampered by uneven application. Iterative reform has not produced a strategic vision for PMSCs within American policy. Moreover, what satisfies the rule of law in Washington is distinct from the operational reality in conflict zones scattered around the world. Despite these obstacles, contractors and policy makers will continue to integrate a growing body of policy into the PMSC industry. The stakes involved are neither theoretical nor rhetorical, but grounded in the simple need for practicality and survival.

Introduction

Private Military Security Companies have something of an unsavory reputation in the context of U.S. national security policy; a great deal of that stigma has been well earned. In public forums and as part of official investigations, contractors have become synonymous with waste, fraud, and abuse. As late as 2011, the Commission on Wartime Contracting in Iraq and Afghanistan noted that poor planning, management
Yet the United States has been dependent on these companies for almost a generation and remains so today. When the Cold War concluded in the early 1990s, policy makers accepted the logic of private sector efficiencies applied to national defense. Military contractors offered the benefit of improving military combat capability—the so-called “tooth-to-tail ratio” prized by the Pentagon. Today, as the United States winds down military operations in Southwest Asia and retrenches its conventional military forces, U.S. foreign policy is increasingly dependent on private military security.

Contemporary scholarship has examined many of the existing and potential failures of private military security contractors. Numerous authors have successfully separated the modern “mercenary” from more traditional definitions of the term. Other scholars have addressed the legal implications of regulating military contractors, both as a function of individual national policies and international law. Overall, this scholarship has done more to illustrate the potential risks involving military contractors than to outline their successful contributions to U.S. power in the 21st century.

This article will challenge these characterizations. Significant reform has emerged concurrently with greater U.S. dependence on private military security companies. Many PMSCs became “self-regulating dogs of war” in order to retain market viability. The regulatory state has also adapted to policy failures. Well-publicized crimes committed by companies such as the now-defunct Blackwater periodically mobilize lawmakers to revise important components of U.S. policy. But it is at the lower echelons of the U.S. defense and security establishment that more effective reforms have appeared, particularly since the 2003 invasion of Iraq. These ongoing modifications to good practices reflect many hard-earned lessons learned over more than a decade of war in the Middle East and Southwest Asia.

The iterative process of PMSC regulation raises questions about the effectiveness of reforms. As the 2012 attack on the U.S. consulate in Benghazi proved, terrorists and other asymmetrical threats have adapted their methods to bypass improvements to U.S.
security policies and exploit ongoing vulnerabilities. In another important sense, the Benghazi attack revealed a number of ongoing deficiencies with U.S. security policies. Today, policy in the United States is far more deliberate in its regulation of PMSCs, but the question remains whether operational effectiveness has increased or whether companies merely comply with the letter of the law. At the same time, the Iraq war may have encouraged operational reforms, but the extent to which they percolated upward to enhance cooperation between policy makers and their PMSC industry counterparts remains unclear.

The change in administration—and in U.S. military activity abroad—necessitates further questions about private security’s place in the future of U.S. strategy. Where the Bush administration improvised to address mistakes made in Iraq and Afghanistan, Barack Obama’s policy team had the benefit of hindsight regarding PMSCs and U.S. national security abroad. Current U.S. policy appears intent on military retrenchment overseas and shifting security responsibilities from the Pentagon to the State Department. As has been the case in the past, private contractors are at the forefront of this transition, continually expanding their portfolio as security for an increasing array of U.S. activity abroad. Are contemporary PMSCs part of a larger strategic conversation that addresses threats to U.S. interests abroad and an appropriate portfolio of responses to these challenges?

Private Security in the Postmodern Era

Since the conclusion of the Cold War, accumulating threats and declining resources have defined U.S. national security policy. Following the death of the Soviet Union in 1991 was a proliferation of “sub state actors,” tribes, ethnic groups, and religious factions that followed none of the predictable rules of conventional warfare. Concurrently, the United States, like many of its former Cold War contemporaries, exploited the post-1991 “peace dividend” by shedding billions of dollars in defense commitments. Although politically popular, these reductions trimmed more than institutional fat, cutting deeply into operational muscle.

As the United States and its allies soon discovered, security remained an ongoing and expanding need throughout the 1990s. Economic opportunities flourished in the new world order. Many of these, however, were located in nations that were either crumbling (Sudan) or challenged by endemic instability (Colombia). Threatened by rising crime rates and terrorist attacks, corporations increasingly militarized their operations overseas. Bodyguards and armed vehicle escorts became a ubiquitous feature of new age capitalism. Moreover, as the victors of the Cold War celebrated, they also had to address some of its consequences. Humanitarian crises and the imperative to aid the weak and endangered ethnic minorities that reemerged from the shadow of superpower confrontation took center stage in the 1990s. Operation Provide Comfort, launched in April 1991 to assist Kurds displaced and threatened by Iraq, began a long chain of interventions in Africa, Europe, and Asia.

Private military contractors proved to be extremely useful in filling multiplying gaps between need and capability. Advocates within the Pentagon argued that contractors
were a “force multiplier,” following the fairly straightforward logic that, by delegating logistical tasks to the private sector, the U.S. military could subsequently focus upon combat operations. Explicit in this logic was the need to “transform” and “revitalize” military defense planning in ways that would conform to free market principles.6

Before the September 11th attacks on the United States, contractors primarily earned their money in support capacities. When Kellog, Brown & Root (KBR) won the first Logistics Civil Augmentation contract in 1992, it was primarily responsible for “life support” such as dining facilities and laundry service. As the 1990s proceeded, the line separating logistics from combat began to blur. When the 1st Armored Division deployed to the Balkans in 1995 as part of Task Force Eagle, it received overhead imagery from the private company AirScan.7 In January 1996, the Croat government contracted Military Professional Resources Inc. (MPRI) to conduct its Long Range Management Program, essentially allowing the company to completely reconstruct its military doctrine from old Warsaw Pact standards to those more in line with NATO and the United States.8

After the September 11th attacks, U.S. dependency on private contractors grew, but regulatory standards failed to keep pace with their rapidly expanding use. First, U.S. policy makers applied force multiplication on an enormous scale, introducing private corporations into support operations on a theater level. When the United States launched Operation Iraqi Freedom in 2003, KBR took responsibility for housing, dining facilities, bath and shower units, janitorial services, recreational facilities, water distribution, electrical work, carpentry, construction, and virtually every remaining non-combat effort in the country. Overall, the estimated value of KBR contracts for operations in Iraq and Afghanistan between 2002 and 2004 was $10.8 billion. By 2009, the total value of KBR contracts with the U.S. military exceeded $30 billion.9

A second trend was the increasingly difficult distinction between private military contractors and conventional forces. In extremely dangerous environments like Iraq and Afghanistan, civilian companies attempting to conduct military support operations and “nation building” projects (e.g., demining, restoration of electrical power, and oil refining) without protection from the host nation or the United States quickly reverted to acquiring or creating their own security forces.

U.S. regulatory standards failed to keep pace with the scale and complexity of these events. Prior to September 2001, two laws established federal authority over contractors: the Military Extraterritorial Jurisdiction Act (2000) and the Special Maritime and Territorial Jurisdiction provisions contained in the U.S. code of federal regulations.10 An additional strata of laws generally complied with existing U.S. statutes as well as international standards: the Anti-Torture Statute (18 U.S.C. Code, Section 2340A), the Genocide Statute (18 USC, Section 1091), the Walker Act (18 USC, Section 960),
and the War Crimes Act (18 USC, Section 2441).\textsuperscript{11} The primary focus of both sets of regulations was jurisdiction and punishment for crimes committed by private military contractors regardless of their combat or logistical specialty.

Although these regulations were intended to be comprehensive, they contained serious gaps. U.S. policy largely failed to comprehensively address the fundamental standards—recruiting, training, discipline, and equipment—affecting PMSCs before and during their deployment. Similarly, U.S. policy prior to September 11th and for much of the so-called “global war on terror” offered little guidance with respect to day-to-day operations. In many cases, regulatory responsibility fell to individual contract officers assigned to monitor specific tasks performed by private companies in the field. While cost containment was an important feature of the contract process, these contract officers lacked effective methods to measure performance or remediate poorly performing companies.\textsuperscript{12} Consequently, when the law or federal regulations did apply, it was normally for punishment of bad acts and crimes after the fact.

These gaps were the product of a larger failure to integrate private military contractors into U.S. military planning. Even though the U.S. military came to rely upon the private sector for logistical and combat support functions, it failed to effectively manage overseas operations. In fact, Defense Department control over military contractors actually atrophied in the years following the September 11th attacks. The 2007 Gansler Commission Report noted that general officers were eliminated from the contracting support field in 1998 and not replaced nine years later. Despite a rapid increase in workload as result of “contingency operations” that began with Operation Enduring Freedom in Afghanistan, inadequate staffing remained a serious problem for U.S. military operations. As will be discussed below, during the 2003 invasion of Iraq, the U.S. military was poorly prepared to either include contractors into operational plans or monitor the burgeoning numbers of companies active in the country.\textsuperscript{13}

**Private Security and Operation Iraqi Freedom**

Private military contractors were essential to Operation Iraqi Freedom. When coalition forces entered the country in March 2003, the conventional wisdom governing “rapid decisive operations” assumed that private companies freed U.S. forces to exclusively concentrate on their combat missions.\textsuperscript{14} The unforeseen results of poor planning, however, very quickly transformed reliance to outright dependence as stability collapsed in the aftermath of the invasion.

Coalition victory did not account for the absence of basic public services, particularly police, fire, water, and electrical power. The absence of adequate infrastructure affected both the Iraqis’ quality of life and the capability of coalition occupation forces. As it had in past deployments, the private sector filled the vacuum. By July 2007, there were 190,000 contractors of all types in Iraq, compared to 160,000 U.S. troops.\textsuperscript{15}

Private contracting also extended beyond infrastructure projects. In the early phases of the Iraq war, the United States relied on armed private contractors to close the gap between multiplying security threats and military capabilities on the ground. The rapid increase in PMSCs reflected the dramatic nature of the problem. Between 2003 and
2007, the number of contractors specifically assigned to security duties grew from 10,000 to almost 30,000.16

As their numbers and involvement in combat operations grew, armed contractors experienced an array of difficulties in Iraq. Some of these were rooted in basic capability. At no point in the early stages of Iraqi occupation did PMSCs possess the same numbers, training, equipment, or firepower as U.S. military units. Similarly, the processes governing the recruitment and training of contractors varied significantly across the spectrum of companies in Iraq. Some were fully vetted; others were hired with little more than a handshake.

Private military corporations in general also became media magnets during the course of the conflict in Iraq. In part, this was because of the burgeoning number of companies active in the country and the seeming novelty presented by this updated version of the traditional “mercenary.” In another more important sense, contractors drew international attention because of their own scandalous actions. When the Abu Ghraib scandal broke in 2004, individuals working for the Titan Corporation and CACI were quickly implicated for their direct involvement in prisoner abuse.17 Friendly-fire incidents between PMSCs and regular forces also made the headlines. In May 2005, contractors employed by Zapata Engineering allegedly opened fire on U.S. Marine positions in Fallujah, resulting in their arrest and expulsion from the country.18 Public criticism peaked after the September 2007 Nisoor Square incident, when Blackwater security contractors allegedly killed seventeen Iraqi civilians.19

The problems produced by poor recruiting and vetting practices, inadequate equipment, friendly fire, or illegal acts were symptoms of much larger failures in U.S. policy. As Dale Herspring and other scholars note, after September 11th the civilian and military hierarchy in charge of the global war on terror was badly divided by personality conflict and institutional rivalry.20 Until Lieutenant General David Petraeus and Ambassador Ryan Crocker restored productive relations in 2007, contractors were consigned to the periphery of planning and operations.

These well-publicized problems overshadowed early efforts to mitigate the problems of military contracting in Iraq. In June 2004, Coalition Provisional Authority (CPA) Order Number 17, “Status of the Coalition Provisional Authority, MNF-Iraq, Certain Missions and Personnel in Iraq” made private military security contractors accountable to CPA regulations. That same month, the CPA issued its “Rules for the Use of Force” (RUF), a policy intended to govern contractors and coalition forces alike. The new rules set basic standards for use of deadly force under three conditions: (1) self-defense; (2) defense of persons specified in the PMSC contract; and (3) the prevention of “life threatening offenses against civilians.”21

While laudable in its intent, the RUF was open to interpretation in practice. For contractors and regular U.S. units, “self-defense” lacked specificity. For example, when a PMSC guarding a fixed facility received indirect fire from insurgents, they sometimes took it upon themselves to root out the threat at its source, a process that might require moving some distance from their base of operations. These types of initiatives often occurred with the full support of the U.S. military. A 2008 Congressional Budget Office
report noted that local military commanders had discretion with respect to application of the RUF for armed contractors.\textsuperscript{22}

By the second year of the war, in response to increasing civilian casualties at the hands of PMSCs, the U.S. military tightened the procedures for reporting and investigating contractors. The policy reiterated earlier regulations that required armed contractors to be registered and licensed while operating in Iraq. Moreover, if an Iraqi civilian came to harm as a result of a PMSC action, the new rules were much more prescriptive. They required contractors to remain at the location of the incident to provide first aid and medical evacuation. The local military commander also had to file a situation report for each incident involving a weapons discharge. All of these actions were subject to a preliminary inquiry by the military unit in charge of the contractors.

In October 2005, Headquarters, Multi-National Corps-Iraq took the issue of regulating private military contractors in the other direction. Rather than address the aftermath of bad acts committed by PMSCs, the U.S. military focused instead on regulating their daily operations. Included in the list of prohibited behavior that the U.S. command deemed “essential to fostering U.S.-host nation relations and combined operations of U.S. and friendly forces,” was entrance into a mosque without proper cause or authorization, fraternization with the local population, and the personal possession of alcohol, narcotics, or pornography.\textsuperscript{23}

The U.S. military also took steps to ensure the physical accountability of armed contractors operating in Iraq. Between 2004 and 2007, the U.S. Army contracted Aegis Specialist Risk Management to develop a system that could track every convoy escort and security team detail run by PMSCs. Centrally controlled in Baghdad and utilizing military GPS capability, the system would have provided real-time information on the whereabouts of thousands of armed contractors throughout the country.\textsuperscript{24} Again, actual practice diverged significantly from the Army’s plans. Compliance with some early reforms was entirely voluntary. Many contractors refused to participate, citing the need to protect proprietary information critical to their businesses.\textsuperscript{25}

Above and beyond CENTCOM and MNF-I Headquarters regulations were the individual PMSC contracts. These documents established the specific terms and conditions governing services provided by armed contractors to the U.S. government. Contracts articulated allowable types of weapons and ammunition, a critical component of combat capability. All PMSCs submitted “Staff Judge Advocate (SJA) Weapons Certification Packets” consisting of eleven forms, including Department of Defense Form 2760, a self-declaration that the individual was not prohibited from possessing a firearm under the terms of 18 USC 922(g)(9): EO 9397 (Lautenberg Act).
Most contracts also required PMSCs to regularly train their personnel while on the job. The U.S. government conducted quarterly audits to ensure company employees—American nationals, foreign expatriates, so-called “third country nationals,” and local Iraqis—were qualified with their assigned weapons and understood the current rules of engagement. The SJA Arming Packet went so far as to mandate that PMSCs submit the individual’s weapons zero target as proof that his assigned weapon was properly sighted.26

An obvious flaw in individual contracts was their assumption of good faith on the part of PMSCs, a proposition that was difficult to enforce in some cases. Prior to their deployment, for example, contracts commonly required PMSCs to conduct background checks on all employees, specifically for felony convictions or instances of domestic violence. Unfortunately, many companies were unwilling to pay the cost of due diligence for adequate criminal background investigations. As a result, PMSCs sometimes provided former felons, dishonorably discharged military personnel, and other individuals ineligible to possess a firearm in the United States, with state-of-the-art weaponry.27

By 2007, the accumulation of problems involving private armed contractors—punctuated by the deaths of Iraqi civilians at Nisoor Square—prompted sweeping reforms as to how the United States regulated PMSCs. An initial attempt came in the form of the Military Extraterritorial Jurisdiction Act (MEJA)’s Expansion and Enforcement Act (H.R. 2740) that made all contractors, regardless of their contracting agency, subject to prosecution in U.S. courts. Although the measure passed overwhelmingly in the House of Representatives, the Senate never adopted it.28

Concrete change finally came with an amendment to the 2007 Defense Authorization Act. Sponsored by Senator Lindsay Graham (R-SC), the revision placed all civilian and military contractors working for the federal government under the jurisdiction of the Uniform Code of Military Justice (UCMJ). Previously, this type of jurisdiction applied only when the country had officially declared war. Graham’s measure expanded the military’s domain to include a “contingency operation” such as the deployment of U.S. forces to Afghanistan and Iraq.29

The Departments of State and Defense also agreed at the end of 2007 to jointly implement core policies for the accountability, oversight, and discipline of armed contractors.30 Some portions of this effort were relatively simple. A State-Defense memorandum created a common list of terminology relevant to military activity in combat. The document defined what constituted an “imminent threat” or “hostile intent.” Other portions of the memo addressed basic prerequisites for contractors to carry arms.31 To improve PMSC “accountability and visibility,” State and Defense also agreed to build a “mutually agreeable common database” for overseas operations.32

A final major policy change came in 2008 with the Status of Forces Agreement (SOFA) between the United States and Iraq. Though the agreement primarily established a
timetable for U.S. military withdrawal, it also banned certain PMSCs—most notably, Blackwater—from the country and subjected remaining companies to Iraqi law for violations of policy and local statutes. Consequently, contractors providing special protective services for U.S. officials lost the limited immunity previously granted by the U.S. government in exchange for their services.

As the United States began its withdrawal from Iraq, PMSC regulation became increasingly elaborate and dedicated to closing holes left open by previous policies. Existing standards regarding arming, records-keeping, and training remained in place. In addition to quarterly audits and regular review of records, the Department of Defense also obliged contractors to report on “active, non-lethal countermeasures” employed by PMSCs in the course of their regular duties. New policy considered war zones to be areas where “enhanced coordination” was necessary. While the “Geographic Combatant Commander” did have local discretion to tailor “PSC (private security company) guidelines and procedures for the operational environment in their area of responsibility,” the relative operational freedom characterizing the early stages of the war was gone. In 2008, for example, the Coalition Munitions Clearance Program required contractors to maintain a continuous video record of their activities on missions.

Unfortunately, many of the reforms initiated as the Iraq war wound down were incomplete and hampered by a lack of cooperation between State and Defense. The U.S. Commission on Wartime Contracting in Iraq and Afghanistan noted that the U.S. military and Department of State maintained a separate contract management system for acquisitions, audits, and other routine logistical functions. It was not until 2010 that the State Department included a complete drug and alcohol prohibition policy as part of its Worldwide Protective Services contract, for example. The military, in contrast, proscribed this particular behavior as early as 2004. Institutional segregation interfered with the transfer of hard-won lessons from the Pentagon to civilian hands at Foggy Bottom. As the State Department took on an increasing array of security duties, this separation created unnecessary redundancies and avoidable mistakes that would come to plague American PMSCs in Afghanistan and Libya.

Private Military Security After Iraq

The 2008 election was an important milestone with respect to U.S. security policy and PMSCs in particular. By this point in time, it was abundantly clear that the logic of private sector efficiency applied to national security had lost its sheen. When Barack Obama rejected “the false choice between securing this nation and wasting billions of taxpayer dollars,” he spoke to a new conventional wisdom that treated private military companies more as a liability to future policy than an asset.

Yet despite this sentiment, it was equally clear that PMSCs were an increasingly important feature of U.S. foreign policy after 2008. This was due, in part, to U.S. military retrenchment. While U.S. forces flowed into Afghanistan between 2009 and 2012, new law mandated force restructuring. For the Army alone, this meant reducing its combat brigades from 45 to 33 by 2017. Consequently, the United States had far
fewer conventional military units to rely upon either to reinforce diplomatic initiatives or physically protect U.S. interests abroad.

Moreover, as conventional military forces shrunk, U.S. policy makers increasingly embraced the idea of a “diplomatic surge,” first in Iraq and, later, in numerous other hot spots. Shifting U.S. policy responsibilities from the Pentagon to the State Department was in part a carry-over from the Bush administration when U.S. forces withdrew from Iraq. Under the direction of the Obama White House, however, the diplomatic surge took on much more expanded form around the world. In Afghanistan, diplomatic officials undertook a series of new responsibilities centered on nation building, which included economic development, instruction in governance and the rule of law, internal reconciliation projects, and a host of other activities. Although these enterprises were dedicated to the “soft” or “non-kinetic” use of U.S. power, they were almost always conducted in extremely dangerous areas. In contrast to previous policy that required withdrawal from dangerous locations—Pakistan, South Sudan, Yemen, and Libya among many others—it became standard practice for U.S. foreign policy to upgrade its presence in hazardous areas of the world.

PMSCs were critical to restore “lost functionality” once the U.S. military relinquished its security responsibilities to the State Department. In a July 2010 briefing to the Commission on Wartime Contracting, State Department officials pointed out fourteen separate areas of concern, activities ranging from the recovery of wounded personnel and damaged vehicles to communications, explosive ordnance removal, and “PSC inspection and accountability services.” According to an April 2010 report by Ambassador Patrick Kennedy, Under Secretary of State for Management, the Diplomatic Security Service (DSS) was, “inadequate to the extreme challenges of Iraq.” These transitional problems in Iraq foretold the difficulties awaiting the State Department on a global scale.

To meet these many shortfalls, the Obama administration resorted to military contractors. In 2009, the administration awarded $485 million to eight companies providing security for the Americans remaining in Iraq. As U.S. forces began their phased withdrawal under the 2008 Status of Forces Agreement, private security contractors took up their duties, particularly as convoy escorts and bodyguards for U.S. civilian officials. Eventually, 11,162 armed private security contractors were active throughout Iraq. Worldwide, 90 percent of the 34,000 personnel employed by the Bureau of Diplomatic Security were contractors.

The results of these efforts in Iraq and, later, Afghanistan were mixed at best. Even when the State Department did find contractors to meet operational requirements in Iraq and a growing list of dangerous locations, the acquisition process remained problematic. The 2010 Commission on Wartime Contracting report repeatedly mentions the chronic absence of contract management personnel and resources, a situation in which “inadequately staffed and resourced oversight could multiply opportunities for contractor mistakes or misconduct.” Moreover, existing law required federal agencies to accept low bids for goods and services, thus continuing the ongoing difficulties inherent with “lowest price, technically acceptable” contracts, a practice that one PMSC executive described as “a race to the bottom.”
These systemic failures were responsible for the 2009 scandal involving the ArmorGroup North America security contract for the U.S. embassy in Kabul. Of the numerous PMSCs operating in Afghanistan, only two companies offered bids that complied with the State Department’s legal requirements. Consequently, embassy security was plagued by poor training standards, improper employee documentation, and inadequate logistical support.\(^5\)

In recent years, the State Department has devoted considerable energy to fixing these problems. In 2011, it transitioned to “best value” contracts, a process that included “specific key metrics such as a bidder’s past performance, personnel staffing capacity, and training capabilities.”\(^5\) This new process levees a host of new requirements on prospective PMSCs. Individual applicants have to possess at least one year of military, police, or protective security experience. Training standards also reflect general improvements. Contractors hired as Personal Security Specialists must undergo more than 300 hours of approved government training before serving overseas.\(^5\)

While improved standards address the overall quality of PMSC hires, they have created bottlenecks interrupting the timely deployment of contractors. According to one U.S. Government Accountability Office (GAO) report, the Diplomatic Security Service planned to hire 350 personnel for overseas duty in 2010, but had to delay their dispatch overseas until they completed necessary training. A lack of experience in the growing ranks of the DSS is an additional concern. New recruits do not have adequate foreign language abilities or relevant background in security duties. In their desire to fill leadership slots, the DSS sometimes places inexperienced individuals above their normal pay grades.\(^5\)

The State Department’s most important reform is with respect to contract oversight. Rather than rely upon PMSCs to regulate themselves, individuals working as federal employees now provide that service. Hired as “Security Program Analysts” and Personal Services Contractors” they are full-time and temporary workers paid under the existing GS scale for their expertise. Operating under overlapping layers of U.S. law, federal regulations, and international agreements, they both monitor PMSCs contract compliance and formulate revisions to existing standard operating procedures.

Security Program Analysts and Personal Services Contractors serve as “accountability agents” in much the same manner as lawyers from the Judge Advocate General’s Corps who are routinely embedded in conventional combat units. While the practice is more manpower-intensive, it allows for a much more rapid response to changes in the operational environment or mission. Additionally, as federal employees, these agents have a clearly delineated place in the existing State Department hierarchy.

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Conclusions

As the Obama administration’s first term came to a close, it appeared that U.S. policy regarding PMSCs might be approaching a point of productive equilibrium. More than a decade of war in Iraq and Afghanistan produced many hard-won lessons that the United States now applies to its military contractors. PMSCs no longer exist on the periphery of U.S. regulatory policy. The old conventional wisdom that applied free market efficiencies to national security has dissipated in the wake of massive waste and public outrage. Today, the U.S. government has closed many gaps between itself and the PMSC industry. It is now directly involved in hiring, training, operations, contract oversight, and virtually every other aspect of what used to be “private” military contracting.

While current U.S. policy governing PMSCs is the product of accumulating experience, it has not, however, applied evenly to all facets of their use. PMSC operations in the field have improved to the point where contractors comply with a complex web of directives emanating from official U.S. policy and federal law. Much of this progress was the result of an unlikely coalition of PMSC operators, military commanders on the ground, and U.S. civilian officials who built a piecemeal compilation of policies that satisfied imposed priorities. Operationally, these policies serve as the boundary lines that separate good practices from potentially illegal or criminal acts.

Yet what satisfies the rule of law in Washington is distinct from the operational reality in conflict zones scattered around the world. Clearly defined policy is subject to local filters regardless of U.S. policy makers’ best intentions. The operating environment in a host nation like Libya or Yemen reflects complex circumstances. Religious or ethnic animosity and political parochialism—sometimes existing in concert—often dictate the suitability of outwardly dictated standards. Local national guards employed by PMSCs potentially suffer from the same vulnerabilities and other unanticipated circumstances. On the ground, the success or failure of U.S. policy may hinge on a local guard who cannot read.

Moreover, by definition, iterative reform has not produced a strategic vision for PMSCs within U.S. policy. The contingency environment that dominated the Iraq war encouraged a more intelligent approach to using military contractors. The sum of all these parts did not, however, generate the wisdom or the perspective necessary for the longer view. Perhaps more importantly, despite the difficulties produced by military contractors in Iraq, the U.S. government has never completely divorced itself from the imperative of cost-efficiency that attracted policy makers to PMSCs in the first place. U.S. officials have historically expected the “self-regulating dogs of war” to evolve in order to maintain their military contracts. During the course of the ensuing Iraqi occupation, PMSCs did just that, adapting their practices to U.S. reforms. In a
very important sense, their success prolonged the compartmentalization of military contractors into logistical, as opposed to strategic, planning. A senior U.S. officer stationed in Baghdad clearly articulated this segregation of purpose in 2004: “We fight the war, and they do the shit work.” Five years later, this relationship was largely unchanged.

When the Obama administration took charge in 2009, it chose the logic of the marketplace over a strategic vision with respect to PMSCs. Faced with an enormous domestic economic crisis at home, the new leadership sought out military retrenchment that would extract conventional U.S. forces from global hotspots. Military security companies offered the dual advantages of delegating the financial and political costs of U.S. foreign policy. Absent from this calculation was a greater sense of American interests abroad, PMSCs place in meeting them, or evolving threats to both. As the 2012 embassy attack in Benghazi indicated, without clear guidance from the top, ambiguity cascades as it reaches the operational level with tragic results. It would be predictable to claim that this latest scandal initiated yet another round of reform within the U.S. foreign policy establishment. Instead, the Benghazi attack has become enmeshed in partisan political bickering of the same type currently plaguing the domestic policy debate.

One saving grace in this story may be PMSCs and U.S. officials directly responsible for them. Despite the lack of clear strategic guidance, both contractors and U.S. policy makers will continue to pursue reform. Operational necessity requires not only recovery of “lost functionality,” but progressively greater levels of aptitude necessary to match the dynamic nature of security threats abroad. More broadly, contractors and their “accountability agents” will attempt to divine a means to integrate a growing body of policy into the culture of individual PMSCs and the industry itself. The stakes involved are neither theoretical nor rhetorical, but grounded in the simple need for practicality and survival.

— Dov Friedman served as Lead Editor for this article.

NOTES

MICHAEL D. GAMBONE AND JOHN J. McGARRY


See <http://www.law.cornell.edu/uscode/18/usc_sec_18_00000007----000-.html> Accessed August 12, 2011.


CBO, Contractors’ Support of U.S. Operations in Iraq, 19. It was common practice for contractors to coordinate their local activity with the military through the Force Protection Operations Center (FPOC) or a similar facility.


Ibid., 4–5. See also HQ, MNF-I, Approval of Request to Authorize Private Security Company Arming for TETRA Tech EC, Inc., n.d.


Memorandum of Agreement (MOA) Between the Department of Defense and the Department of State on USG Private Security Contractors, December 5, 2007, 1.


Ibid., 8.


Ibid., 1–2.

38 YALE JOURNAL OF INTERNATIONAL AFFAIRS


41 Ibid.


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The United Nations Security Council and the Emerging Crisis of Legitimacy

By Joy Gordon

Abstract—For many years, the Security Council of the United Nations was seen as paralyzed and ineffectual. But in the aftermath of the Cold War, the Council became much more active, and in some cases, was accused of overreaching. Some have argued that this puts the Council’s legitimacy into question. A series of recent European court rulings have provided support for this view, in that they find that some of the Security Council’s enforcement actions are inconsistent with international law.

During the Cold War, the UN Security Council was often viewed as weak and ineffectual, paralyzed by the opposition of its permanent members. The dismantling of the Soviet Union marked a new era for the Council, which some hailed as an opportunity for the Council to finally take up the role it was intended for, in regard to global security. Some held that the “successful combination of American military capacity and Security Council legal authority” represented the joining of power and legitimacy.1 Others criticized the new era of activism as overreaching:

There is a lack of consistency in practice, a failure to articulate principled lines of distinction identifying when a UN response is appropriate, and a reliance on unrestricted mandates to coalitions of States led by the United States. The Security Council is perceived as a geopolitical instrument.2

In recent years, there have been new situations emerging which suggest that the Council may be using its extraordinary powers in ways that exceed its authority, or serve the narrow political interests of its members rather than the mandate of ensuring peace and security within the international community. These situations raise questions regarding the basic legitimacy of the Security Council as a body of global governance. Legitimacy involves not only the operation of the machinery of power, but the right to

Joy Gordon is Professor of Philosophy at Fairfield University. She is the author of Invisible War: The United States and the Iraq Sanctions (Harvard University Press, 2010). She teaches and publishes in the areas of political philosophy, international law, and human rights.
do so. ³ Power is often understood as involving “guns, money, technology, geography, and so on.” ⁴ By contrast, legitimacy entails entitlement to power, not merely its exercise; it is an entitlement that is socially recognized. ⁵ Legitimacy may be found in legality: the law may provide the authorization to exercise power and may be widely recognized as a valid source of authority. But one can also envision the possibility of legalized tyranny. For example, legislation that is properly adopted can authorize a state to engage in atrocities or other human rights violations. Consequently, legitimacy is grounded not only in legal authorization, but also in norms of what is right, fair, or appropriate. ⁶

It is increasingly common to hear people speak of a crisis of legitimacy on the part of the UN Security Council. ⁷ Some have questioned the Council’s legitimacy on the grounds that it failed to act effectively in urgent situations such as those in Bosnia and Rwanda, or its diminished significance as states act unilaterally, as was the case in the United States’ military attack on Afghanistan in 2001 and Iraq in 2003. ⁸ Conversely, neo-conservatives in the United States have argued that the Council faces a crisis of legitimacy because it impedes the United States in its efforts to address global terrorism and other security threats. ⁹ But there is another set of concerns as well, related to whether the Council genuinely represents the will of the international community or is simply a tool of the permanent members that gives them access to the machinery of global governance.

Chapter VII of the UN Charter mandates the Council to respond to aggression, breaches of peace, and threats to peace. The Council has considerable discretion to decide whether such a situation is present. ¹⁰ Once it has done so, it is authorized to take actions that may include (but presumably are not limited to) diplomatic measures, economic sanctions, and military intervention. ¹¹ Once the Council determines what measures it will impose, all the member states of the United Nations are bound to execute these measures. Article 25 provides, generally, that the member states “agree to accept and carry out the Council’s decisions.” Article 48 explicitly provides that the member states shall take whatever actions are required to carry out the Security Council’s decisions for the maintenance of international peace and security. ¹²

Under the Charter, the obligation of states to comply with Security Council decisions is nearly absolute. There is no provision for states to refuse to carry out Council resolutions, or even to question them. Article 24 seems to provide some limitation on enforcement actions the Council may take: in executing its duties concerning international peace and security, the Council “shall act in accordance with the Purposes and Principles of the United Nations.” ¹³ But these are vague statements which leave considerable room for interpretation. ¹⁴ It is not even clear that the Council must act in accordance with international law. Under Article 1, the Council is required to act “in conformity with the principles of justice and international law,” but this clause applies only in the context of peaceful settlements such as arbitration. In regard to measures that use force to stop aggression or remove threats to the peace, there is no such limitation. ¹⁵ According to the Charter, the Council is not even bound by international treaties, such as the Genocide Convention. Article 103 provides that, in the event of a conflict between a treaty and a Security Council resolution, the Security Council resolution is binding. ¹⁶

In the event that a person, company, or state believes that a Security Council resolution is in any way illegal, there is no court where one can bring legal action against the
Council or ask the court to interpret the Charter or the law and issue a ruling that can be enforced. The International Court of Justice (ICJ) can only hear adversarial cases brought by states against other states.\textsuperscript{17} The ICJ can provide an advisory opinion on a matter concerning the Security Council, but only in response to a request from the Council itself (or the General Assembly, or in certain circumstances, other UN agencies).\textsuperscript{18} But even where that is done, an advisory opinion is not binding or enforceable. Thus, the Council operates under a mandate that is exceedingly broad and vague. At the same time, there is a fundamental lack of accountability. States generally have no means to question whether Chapter VII measures are necessary or legitimate, nor can they refuse to implement these measures. No state or person can bring a suit before a court to determine whether the Council has acted illegally or improperly. The Council itself could seek an advisory opinion, but it is unlikely that it would do so. If there are sufficient votes to adopt a resolution, it would make little sense for the same parties to ask a court to second-guess their decision. Indeed, the Council has rarely sought an advisory opinion from the ICJ.

The lack of accountability is especially problematic in light of the extraordinary powers of the five permanent members (P5) of the Council. The United States, Britain, Russia, China, and France all have the power to veto any resolution. In effect, the P5 have impunity in certain regards since no Chapter VII resolution can be adopted that condemns or imposes measures in response to aggression, breach of peace, or threat to the peace by one of the permanent members. In addition, in the event that a state obtains a judgment from the ICJ and the defendant state refuses to act in accordance with the court’s ruling, the only recourse to enforcing the judgment is through the Security Council.\textsuperscript{19} Thus, the fundamental structure of two of the central institutions of global governance is such that the abuse of power is an ongoing possibility; there is no legislature that can limit the Council, and no court that can directly overrule it.

During the first forty years of the Council’s existence, there was little chance that the Council would abuse its power. The mutual vetoes of the Soviet Union and the Western nations meant that the Council as a whole was paralyzed. There was little danger of the Council enacting measures so extreme as to raise questions about their legality. When the Soviet Union was dismantled in 1991, however, the situation abruptly changed. Russia, which took over the seat held by the former Soviet Union, was in no position to contest the Western powers on the Council, and China had no interest in doing so. In the early 1990s, the Council’s balance of power disappeared and the United States and Britain, with the support of France, led the Council in adopting measures that were more extreme and far reaching than ever before seen in the history of the United Nations. In particular, there was a series of Chapter VII measures by the Council that raised concerns.
The most controversial of these were the economic sanctions imposed on Iraq in response to Iraq’s invasion of Kuwait in the summer of 1990. Initially, the sanctions did not even allow Iraq to import food.20 The massive bombing campaign of the Persian Gulf War of 1991 destroyed nearly all of Iraq’s infrastructure, including electrical generators, water and sewage treatment plants, roads, bridges, and factories. The destruction of Iraq’s infrastructure was followed by epidemics of cholera and typhoid, malnutrition was rampant, and health care and education deteriorated precipitously. All of this continued for over a decade.21 Two senior UN officials resigned, maintaining that the Security Council was itself committing human rights violations in conflict with the Council’s charge to ensure global peace and security.22

The case of the Iraq sanctions was the most visible situation where the Council was accused of acting illegally and improperly, but there were others as well. In 1988, an airliner passing over Lockerbie, Scotland was bombed, killing nearly 300 people. The United States and the United Kingdom demanded that Libya extradite two men suspected of participating in the bombing. Libya refused, citing the 1971 Montreal Convention concerning aviation crimes. The Montreal Convention required a state to either extradite suspects or prosecute them; Libya offered to do the latter, but refused to extradite the suspects. In response, the Security Council, at the behest of the United States and Britain, imposed sanctions on Libya. Libya then brought an action against the United States and Britain before the ICJ, asserting that the Council had no right to punish a country that was in full compliance with its international obligations. The court deferred to the Council on the grounds that under Article 103 of the Charter, the Council’s decision overrode any international treaties.23 But in a concurring opinion and a dissent, two judges raised the question of whether there were limits on what the Council could legally do.24 Legal scholars argued that the court’s ruling put into question whether the Council was in fact bound by international law.25

There were also other occasions in the early 1990s when the legitimacy of the Council’s actions was questioned. In 1993, the Council established the International Criminal Tribunal for the former Yugoslavia26 and in 1994, established the International Criminal Tribunal for Rwanda27 in response to the human rights violations taking place there. In both cases, the Council cited Chapter VII as the basis of its authority. But this interpretation was subject to challenge. The member states of the United Nations grant wide powers to the Council “in order to ensure prompt and effective action,”28 envisioning emergency situations where a more deliberate, inclusive process would not be feasible. Some suggested that it seemed questionable to invoke emergency powers in order to create entire judicial bodies, which would be conducting prosecutions lasting months or years.29

By 1996, the balance of power within the Council had shifted once more. Russia and China were more vocal in opposing the United States and Britain, and France was no longer a consistent ally. There were fewer occasions where judges or scholars suggested that the Council was abusing its authority or was itself violating international law. But the events of September 11, 2001 changed that. In several contexts, there was the sense that terrorism constituted an emergency that demanded immediate action, along with the suspension of structures of accountability. This was apparent in the increased use of financial sanctions, specifically asset freezes on individuals and companies.
It is difficult to imagine that asset freezes of a few hundred people—not aggression against a nation, or bombing of a population—would be the sort of issue that would bring into question the fundamental legitimacy of the United Nations Security Council. But it has, in fact, happened. On one hand, asset freezes seem like the mildest of penalties. They are not as severe as an actual fine. Assets are not seized, they are frozen. Yet the asset freezes imposed by the UN Security Council in response to international terrorism were problematic in part because they were preventative, not punitive. They were measures imposed not to punish those who had committed wrongful acts, but to effectively bankrupt those who might commit acts of terrorism. Although there have been several cases that have come before national and regional courts, the Kadi case is one of the most influential. It is also a case that has gone on for over a decade and shows the shift in judicial thought on this question.

In 1999, the UN Security Council invoked Chapter VII and adopted Resolution 1267 which imposed a set of measures to freeze funds of those with ties to terrorist operations, specifically the Taliban, Al-Qaeda, and Usama bin Laden. It also established a committee to designate the funds that were to be frozen. Two years later, immediately after the bombing of the World Trade Center, the committee added a number of names to the list of “specially designated nationals” — the individuals, foundations, and companies with putative ties to Al-Qaeda, whose assets were to be frozen by all member states of the United Nations. In October 2001, at the request of the United States, Yasin Kadi, a wealthy Saudi businessman, was placed on the list. In response to the Security Council resolution, the European Council and Commission adopted regulations implementing the asset freezes, including Kadi’s assets within Europe. The Security Council’s sanctions committee did not provide Kadi with the particulars of the claims against him, nor did it give him the opportunity to review and respond to the evidence upon which the claims were based. Kadi brought a suit in the European Court of Justice seeking annulment of the regulations, maintaining that these measures violated his right to judicial review, the right to property, and the principle of proportionality.

In 2005, the General Court dismissed the case, reasoning that the European regulations, “being designed to implement a Security Council resolution leaving no latitude in that regard, could not be the subject of judicial review.” The court considered the possibility that it might have jurisdiction in the event that the European regulations violated *jus cogens*, the fundamental principles of international law, which are binding on all subjects of international law, including the United Nations. But it found that there was no violation of *jus cogens*. Thus, it seemed that within the Security Council, the sanctions committee could add names to the lists without notice or opportunity to be heard; and there was no venue in which the person listed could challenge their status.

The due process issues raised by the asset freezes were widely criticized. A study commissioned by the UN’s Office of Legal Affairs found that the Security Council measures failed to provide for basic principles of due process, including the right of the individual to be heard and the right to an effective remedy before an impartial authority. In response to these criticisms, the Security Council made modest changes. It began providing the sanctioned individuals with notice that their assets had been frozen and allowed those sanctioned to request that the committee “de-list” them. The Council later established an ombudsperson to review these requests and make recommendations.
to the sanctions committee. The Council did not and still does not, however, provide individuals with the evidence on which the sanctions are based, making it nearly impossible to challenge or disprove it. The Council also does not permit an impartial body to review its decisions.

In 2008, the Grand Chamber of the European Court of Justice overturned the General Court’s ruling. The court now held that, to be lawful, all acts of the European Union must respect the fundamental rights that are contained in the treaty establishing the European Community. The court also held that the courts of the European Union must ensure the review, “in principle the full review,” of these acts. Thus, while the court was directly addressing the legality of regulations adopted by the European Union, the court was indirectly intervening in the implementation of a UN Security Council resolution.

In response to that ruling, the sanctions committee of the Security Council sent Kadi a summary of the reasons for his inclusion on the list. The sanctions committee did not provide a detailed explanation, or the evidence on which the claims were based. Kadi denied the claims, noting that three national authorities had already conducted extensive criminal investigations against him for the same reasons and had determined there were no grounds to prosecute him. The European Commission renewed the asset freezes against Kadi on the grounds of his putative association with Al-Qaeda. In 2010, however, the European Court of Justice once again intervened. The court ruled that it had an obligation to review all acts of the European Union for conformity with treaties, including measures adopted by the EU to implement Chapter VII resolutions adopted by the Security Council. In July 2013, the Grand Chamber’s most recent ruling affirmed this and annulled the EC’s regulations, which froze Kadi’s assets pursuant to the Chapter VII resolutions.

The Kadi case, and similar cases that have recently come out, mark a radical shift in the legal landscape. The Kadi ruling from the summer of 2013 has the effect of rejecting Article 103 of the Charter. Where Article 103 provides that Security Council resolutions override any treaties, the Kadi ruling finds that the EU cannot implement a Security Council measure if it conflicts with the terms of the treaty of the European Community.

But what is equally significant is simply that the courts are now beginning to intervene in the implementation of Chapter VII resolutions.
The judicial developments that we are starting to see in *Kadi* and similar cases suggest a sea change in international law. There is recognition by the courts that the Council is indeed capable of acting unwisely and even illegally, and that when it does so, the Council’s fundamental legitimacy as a body of global governance will be called into question.

The implications are enormous. The Charter envisions that the Council will have broad powers that are subject to the oversight of no other body so that the Council may respond by whatever means are needed to address a global crisis. The usual structures of accountability that one would find in other institutional settings, such as judicial review, are not part of the institutional machinery precisely because it would allow for “prompt and effective” action. The Charter incorporates not merely a posture of deference to the judgment of the Council, but makes it structurally impossible for states or others to question or decline to abide by it. The judicial developments that we are starting to see in *Kadi* and similar cases suggest a sea change in international law. There is recognition by the courts that the Council is indeed capable of acting unwisely and even illegally, and that when it does so, the Council’s fundamental legitimacy as a body of global governance will be called into question.

– Denise Lim served as Lead Editor for this article.

**NOTES**

4 Ibid., 161.
5 Ibid.
6 Ibid., 158.


Ibid., Art. 41 and 42.

Ibid., Art. 48(1).

Ibid., Art. 24(2).

Ibid., Art. 1.

Ibid., Art. 1(1).

“In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.” Ibid., Art. 103.

“Statute of the International Court of Justice,” Art. 34(1).

Ibid., separate opinion of Judge Shahabuddein and dissenting opinion of Judge Weeramantry.


Ibid., para. 18.

Ibid., para. 19.

Ibid., para. 20.

Bardo Fassbender, “Targeted Sanctions and Due Process: The responsibility of the UN Security Council to ensure that fair and clear procedures are made available to individuals and entities targeted with sanctions under Chapter VII of the UN Charter,” Office of Legal Counsel United Nations Office of Legal Affairs, (March 20, 2006).


United Kingdom v. Yassin Abdullah Kadi, para. 22.

Ibid., para. 23.

Ibid., para. 27.

Ibid., para. 31.

Ibid., para. 33.

Ibid., para. 97.

Abstract—Literature on the resource curse has attempted to explain all manner of failure in the political and economic institutions of resource rich countries. Much of the literature, however, ignores the failings of legal institutions. While some developments occur out of government interest in natural resource sectors such as investor protection frameworks, others, like redress mechanisms for pollution, suffer from arrested development. This paper uses the Nigerian case to illustrate the serious effect this type of institutional crisis can have on the ability to mitigate the negative externalities of resource development. It considers how failure in one institutional context directly affects other jurisdictions by examining the increased use of extra-territorial jurisdiction to try multinational extractive companies for pollution committed abroad.

Introduction

Governments who want to benefit from new discoveries of oil, gas, and minerals often need to put in place new institutions to manage the resource rents as well as secure and sustain investment. Some institutions, however, such as those meant to mitigate the negative environmental and social externalities of resource exploitation, remain in a suspended state of arrested development.
Literature on the resource curse has attempted to explain all manner of failure in the political and economic institutions of resource rich countries. Much of the literature, however, ignores the failings of legal institutions. A functioning and trusted legal system is an important foundation for crystalizing the best industry practices. As one of the first ports of call for citizens adversely affected by industry activity, legal institutions also provide pivotal conflict mitigation and redress mechanisms. I argue that there is a crisis of legal institutions, particularly the state’s ability to secure gateways to environmental justice in resource rich states.

An Institutional Paradox

Countries of the global South are making the choice to exploit their natural resources and capitalize on windfall rents. From East Africa alone, the global energy market may soon expect contributions from Tanzania, Kenya, Uganda, and Ethiopia. The potential contribution to socio-economic development for these countries could be exceptional.

But as past decades of research have shown, despite the economic opportunities presented by resource wealth, exploitation isn’t always a good decision. Resource dependence is frequently found alongside less welcome phenomena, such as corruption and violent conflict. Dependence also affects how political leaders make decisions given the potential to entrench oppressive regimes while de-stabilizing more democratic ones.

The executive and legislative branches of government are often the focus of studies on how decision-making can be skewed by resource dependence within the rentier state. What is less obvious, yet fundamental, is how resource dependence affects the judiciary and legal systems more broadly. Legal institutions include constitutional structure, legislation, legal education, adjudication, and legal assistance. History plays a large role in how these institutions have formed, and resource dependence affects how these institutions will develop to address the natural resource sector in the future.

The rentier mentality – the phenomenon by which large sums of unearned income from one sector change how governments make decisions – can have a severe effect on a society’s social fabric. At worst, when de-linked from citizen expectations and demands, perverse decision-making can dismantle trust between state and people and foment violent conflict. Economic institution building is important for reducing uncertainty for investors and securing the necessary inflows of foreign direct investment to start
unlocking resource rents. In the best-case scenario, these institutions will develop and address the worrying macroeconomic stresses of resource dependence in order to glean the largest financial benefit from the subsoil asset.

There is a complementary need, however, to develop sound institutions in order to combat the negative externalities of what resource exploitation does to the environment and people. These institutions do not have the same direct or immediate impact on a rentier state’s financial inflows. At best, such institutions are forgotten, underfunded, or ignored. At worst, they are contrary to their ultimate purpose of creating working mechanisms to mitigate the dangers of resource exploitation for the physical environment and its inhabitants.

Oil, gas, and minerals are found in some of the most beautiful, remote, and ecologically fragile places in the world. It is an inherent challenge for both old producers and new to exploit deposits in these areas without compromising the environmental or potential human development costs of oil pollution.

Institutions of Environmental Justice

Resource dependent economies need comprehensive and enforced environmental regulation and redress mechanisms moreso than in normal circumstances because of how the industry interacts with the environment. While important, environmental regulation and the surrounding legal framework can be seen as costly to a government’s share in resource sector profits. The very nature of their dependence perverts the ability for positive developments to take place.

Oil, gas, and minerals are found in some of the most beautiful, remote, and ecologically fragile places in the world. It is an inherent challenge for both old producers and new to exploit deposits in these areas without compromising the environmental or potential human development costs of oil pollution. Nigeria, in West Africa, for example, has long struggled with this challenge as it contains Africa’s largest wetland resting upon extensive oil reserves.

New producers in East Africa will face similar challenges. A haven of bio-diversity, Uganda’s Albertine Graben sits above that country’s oil reserves. In Kenya, the semi-arid grazing lands found around Lake Turkana conceal potentially transformative hydrocarbon reserves and precious fresh water stores, and are vital for local pastoralist livelihoods. For these places, getting the balance right between resource exploitation and environmental regulation and enforcement will be more than just an agenda set by conservationists. Legal institutions concerned with environmental justice are a practical and necessary priority for governments with an interest in securing promising prospects for long-term investment.

In an ideal system — uncompromised by the political and economic reality of staying in power and securing more money to do so — governments would embed fair principles...
in distribution of benefit and burden from resource exploitation across new institutions. It would be protected in a constitution, executed through evidence-based legislation, enforced appropriately by sufficiently empowered and funded agencies, and adjudicated by an independent and uncompromised judiciary that has the capacity and requisite technical knowledge to decide justly. Just as there is, however, no such rational economic man that is often talked about in economics, there is also no such perfect and just legal system that exists in the world today.

By looking at the nature of development of legal institutions to address environmental externalities of the oil sector, government leaders and practitioners can begin considering how to engage with legal institutional development, particularly in light of large-scale reform processes.

The Nigerian Case

Nigeria, the world’s twelfth largest producer of oil, is one of the most well-studied countries in terms of how oil has affected its economy, development trajectory, and politics. There have been limited studies, however, examining how legal institutions fit into resource curse discourse. By Sub-Saharan African standards, Nigeria is an older oil producer that provides insight into how institutions developed to manage oil exploitation. Many claim that Nigeria is an exception because of the severity of its problems with oil-related violence and environmental pollution, but these claims are overstated. There are many phenomena that occur or have occurred which have already taken shape in newer producers.

Nigeria is a federal republic comprised of thirty-six states with a total population of 170 million people represented by 250 ethnic groups. While states have their own court systems and are able to collect some taxes, they are largely dependent on money transferred to them by the federal government due to the overwhelming contribution of oil revenue to total government revenue. As much as 80 percent of the country’s total revenue comes from the oil sector.

The past two decades have shed light on the severity of the environmental pollution caused by oil sector activities in the Niger Delta. The 2011 UNEP study commissioned by the Nigerian federal government on the state of environment in Ogoniland in Rivers State observed that “[t]he oil industry has been a key sector of the Nigerian economy for over 50 years. But many Nigerians have paid a high price.” The two-year evaluation found that it would take 25 to 30 years to clean up the legacy of pollution from the last 40 years of oil spills, caused by oil theft, pipeline leakage, and equipment failure. While the government commissioned the report, they have thus far not acted on any of the authors’ recommendations. The following sections will consider three ways in which economic dependence on the oil sector has affected how legal institutions address oil pollution.

The Constitution’s Crisis of Legitimacy

The ushering in of the Fourth Republic in 1999 was a pivotal moment in Nigeria’s democratic history. Terry Lynn Karl’s research in Venezuela demonstrated how
important regime transition is for petroleum resource management. “Regime change is a critical juncture—a moment for dismantling or reinforcing cages. New regimes do not inherit a clean slate; they are grafted onto preexisting state institutions, either by altering their characteristics or by reinforcing existing political and economic practices and thus entrenching them more deeply.”

Based on an analysis of Nigeria’s legal institutions, the transition from military regime to democracy has had mixed results in altering the trajectory of state decision-making in the oil sector.

The first sign that transition had not prompted an ideological shift in the new federal government’s stance toward oil management was found in the country’s constitution. The current constitution, like similar versions before it, was drafted by a military regime as a decree and later translated into a constitution for the newly formed federal republic. Institutional development in the democratic era has been built on the foundation of preferences of what was a closed, undemocratic policy-making process of a preceding regime. A few illustrative examples provide some of the challenges for institutional development that originate in the constitution.

Firstly, the brand of federalism espoused in the constitution restricts oil-producing states from having any control over the largest sector actively operating within their borders. This means that states cannot collect taxes on those assets or legislate on any aspect of sector operations, including environmental legislation. There are few incentives for state-level government to take up the cause of environmental monitoring without affording them any power or resources.

Secondly, the way in which the federal government closely guards the oil sector manifests itself in constitutional provisions for adjudication relating to the oil, gas, and mineral sectors. The constitution requires that all oil- and gas-related cases go to a federal court in the first instance. Federal courts, as compared to state courts, are less accessible, more expensive to file in, and more intimidating. They make it more difficult for those adversely affected by oil sector activity to seek redress.

Furthermore, the constitution does not prioritize its provisions into any form of hierarchy. There is a clear contradiction between the states’ right to adjudicate cases related to the Constitution’s Chapter IV “Fundamental Rights” and the states’ inability to hear cases relating to the oil sector. The lack of hierarchy leaves oil-rich states in limbo and at the mercy of the Federal appeals process.

The Legal and Regulatory Vacuum

There is an intricate web of legislation that directly and indirectly affects the way in which legal institutions have developed to address the social and environmental externalities
of resource exploitation. Directly, laws from the pre-democratic era continue to govern institutional arrangements for environmental protection, monitoring, oil pipelines, and gas flaring. Indirectly, laws created both before and immediately following the founding of the Fourth Republic encourage foreign direct investment, which restricts other arms of government and citizens from seeking redress for wrongs committed in the course of resource exploitation. In all this legislation there are explicit exception clauses for oil, gas, and mineral sectors that diminish or entirely relieve the sector from any meaningful monitoring or accountability.

The NESREA Act, Act 57 of 2007 is regarded by some as a watershed moment for environmental legislation in Nigeria. The law created the Nigerian Environmental Standards, Regulation, and Enforcement Agency which oversees all aspects of environmental protection in the country. For the oil and gas sector, it was a major setback in securing environmental justice. Despite the far-reaching abilities of the new agency to create, monitor, and enforce an environmental legal and regulatory framework, it was not empowered to have any control over the oil sector. For almost every point in the law that creates an institution for environmental monitoring or a process for enforcement, there is also an exception clause that excuses the oil sector from such regulation, without providing an alternate party to pick up those responsibilities.

The Oil in Navigable Waters Act, 1968 was created to implement the International Convention of the Prevention of Pollution of the Sea by Oil. While the act legislates against the dumping of hydrocarbon products such as crude oil, fuel, lubricating oil, and diesel into waterways, it also provides numerous defenses that make it hard to understand how any suit brought against a polluter under this law would be successful. Admissible legal defenses include accidental dumping caused by vessel damage and even deliberate dumping if done in the process of protecting the vessel or its cargo. Should a party breach the act, criminal proceedings against the party can only be taken forward by the Attorney General. This means that citizens themselves do not have the standing to file suit against polluters directly. Should the Attorney General decide to take the case forward and a fee is levied upon the polluter, it is only vaguely written that the fee should be remitted to parties adversely affected by the oil spill with no clear responsibility for any party to clean up the spill.

Finally, all versions of the Associated Gas Reinjection Act from 1978 to 2008 have counterproductively put a price tag on flaring. Flaring is a serious problem in Nigeria and has been for the past 50 years. Where there is oil, there is associated gas. The gas must be disposed of in some way and can be used for energy, re-injected to build pressure on the oil well, or burned off. While methods have since been developed to usefully appropriate associated gas for general energy needs, the easiest method for disposing of gas on older installations is flaring. The detrimental effects of flaring are well documented and include air, noise, and land pollution which cause acid rain, respiratory diseases, and uninhabitable areas due to severe noise. Instead of giving companies a reason to stop flaring, the Reinjection Act simply monetizes the process at a relatively cheap rate. The Minister of Petroleum Resources is granted powers to give gas-flaring licenses, legitimizing the otherwise prohibited activity. More recent amendments to the law create more punitive measures in order to curb flaring, but these changes have been of little influence.
Legislation provides an opportunity to clarify and shape how a host of legal institutions operate within the constitutional framework. The above legislation tends to favor the polluting industry without the necessary balancing backstops that would provide the means for adequate and reasonable measures of access to justice.

**Vested Interests Immobilize the Law-Making Process**

It is well publicized that Nigeria’s legal framework for addressing oil sector governance is outdated. Since the dawn of democracy, it has been on the legislators’ agenda to reform the piecemeal approach to governance with a more comprehensive structure. Despite lively debate between government, international oil companies, civil society, and increased media coverage of the legislative process to pass the Petroleum Industry Bill (PIB) in recent years, the government has failed to push legislation through to the National Assembly and replace a host of dictator-era laws. Failure to pass a comprehensive piece of legislation comes at a time when foreign investment in the sector is waning and companies are concerned about the prospect of future operations without a PIB.28

This failure to pass a PIB highlights how vested economic and political interests in the sector perversely affect the institutional development process. Some of the most contentious aspects of the proposed bill relate not to its core administrative and operational functions for managing the sector, but to significant pork barrel provisions. For example, versions of the bill have included questionable funds for oil exploration in the North and additional money for host oil communities in the Niger Delta.29 In a sector that has developed without citizen trust in the government’s ability to distribute resources fairly, the willingness to move forward with legislative change comes at a high cost.

**Institutional Crisis and Globalization: A Shift in Responsibility**

Institutional crises do not occur in a jurisdictional vacuum. This is particularly true within a global market where natural resources are extracted, refined, and sold all over the world. What happens to institutions of resource governance in one country can affect and be affected by other institutions internationally. Extra-territorial jurisdiction (ETJ) cases for environmental pollution, for example, hold multi-national enterprises accountable for their activities outside of their home jurisdiction. ETJ is a process by which an entity or person is sued outside of the country or jurisdiction where the wrong was committed. There are many ways in which this type of legal institution has advanced in the past decades. In recent years, John Ruggie has led the charge as United Nations special representative for business and human rights.30 Courts in some of the world’s wealthiest countries have turned their attention to the activities of multi-nationals abroad, using international norms and activist judiciaries to provide a mechanism for redress to deal with the consequences of these companies’ operations globally.
Human rights lawyers in the United States have used the Alien Tort Statute, a piece of legislation from the late eighteenth century, as a tool to try cases related to multi-nationals’ activities abroad in U.S. courts. Recently, other important jurisdictions have started to expand the purview of their own legal institutions to address the complexities of multi-national behavior. With the help of international environmental NGOs like Friends of the Earth, a group of Nigerian farmers sued the Dutch parent company Shell and its subsidiaries in a Dutch court seeking damages for environmental pollution committed in Nigeria. A London-based personal injury and human rights law firm, Leigh Day, filed suit in the UK against Shell for compensation and cleanup following two oil spills in 2008 in the Bodo community of Rivers State in Nigeria. The suit was filed on behalf of 11,000 members of the Bodo community after Shell admitted liability for the spills and negotiated cleanup and compensation.

Such institutional developments push a post-Westphalian construction of sovereignty, which shifts the way in which responsibilities are assigned for monitoring and limiting the behavior of actors that operate in a globalized world. Today the legal protections of the parent-subsidiary multi-national structure are questioned more than ever before due to institutional crises within compromised domestic contexts.

**Conclusion**

This paper has laid out a way of thinking about legal institutional development in the context of resource dependence. Legal institutions developed to mitigate the negative social and environmental externalities of resource extraction are subject to arrested development due to the state’s dependence on resource rents. The implications for such institutional crises are serious. National stability, the well-being of citizens in resource rich areas, and the effect on the investment climate for FDI can all be negatively impacted. When legal institutions are in crisis, the aggrieved and disenfranchised are more likely to seek out less favorable avenues for conflict mitigation such as protests, riots, and violent conflict. The Nigerian case study has shown that the nature of this arrested institutional development in the resource dependent context has multivariate yet interrelated causes and serious consequences.

Institutional crises do not happen in a jurisdictional vacuum. Institutional development may be stunted or perversely shaped in the domestic context, but it also forces developments of other kinds of institutions in other jurisdictions as evidenced in the proliferation of extra-territorial jurisdiction cases in the United States, the United Kingdom, and the Netherlands.

There are a variety of implications for resource rich countries and their international partners. A theory of legal institutional development in resource dependent contexts...
can inform development policy and international development assistance. Bilateral donors and international financial institutions create programs in partnership with resource rich governments to improve a range of institutions thought to contribute to equitable development outcomes. But rarely do these programs converse on their activities or consider how they might affect each other. Without such consideration in a resource dependent environment, both types of interventions run the risk of being less effective in achieving their goals.34

– Denise Lim served as Lead Editor for this article.

NOTES


5 Gray, Matthew. 2011, “A Theory of ‘Late Rentierism’ in the Arab States of the Gulf,” Center for International and Regional Studies, Georgetown University, School of Foreign Service in Qatar, 1.


12 UNEP, 2011, 7.

13 Karl, 1997, 92.


19 Fundamental Rights include the right to legal counsel, right to life and personal dignity, and the right to assembly


Ibid.

The Oil Terminal Dues Act similarly focuses on the aspect of oil production where oil is transported for sale on the global market. The legislation has provisions intended to curb pollution during this oil transfer, however it contains similar deficiencies to that of the Oil in Navigable Waters Act.

See Jonah Gbemre v. SPDC and Ors (unreported FHC/3/C/53/05, November 14, 2005).


Akpan and Milieudefensie v. Royal Dutch Shell and SPDC, District Court of The Hague, January 30, 2013, LJN BY9854 (Netherlands).


Abstract — The apparent use of chemical weapons by the Assad regime in Syria and the potential development of nuclear weapons by Iran have brought "red lines" to the forefront of public discourse and policy-making. In the former, U.S. President Obama threatened retaliatory measures were Syria ever to use chemical weapons against rebels in its civil war. Earlier, Israeli Prime Minister Netanyahu literally drew a red line on a chart during his speech at the United Nations, indicating that Iran would not be permitted to move beyond a given stage of uranium enrichment with an implied threat of military action should that line be crossed.

Although much attention has been directed to the politics surrounding red line threats and their potential effectiveness, little or no consideration has been given to how international law conditions such threats and the options available when target states cross those lines. Although the use of red lines has long been a fixture of international relations, and has been particularly prominent in cases involving the potential development or use of chemical, biological, radiological, or nuclear (CBRN) weapons, existing international legal rules make the use of such lines of questionable strategic value. Indeed, they complicate the ability of actors to draw those lines in the first place. They also restrict the options available to actors in carrying out responses.
when those red lines are crossed. International law often proscribes specific actions or behaviors that states may adopt when responding to the crossing of said lines, thus hampering state’s ability to respond.

International legal limits on drawing red lines are more than subjects for esoteric debate. Policy makers consider those rules in making decisions about threatening and actually responding to undesirable behavior, although we recognize the legal considerations are not always determinative or even the most important factor. Following the use of chemical weapons in Syria, President Obama specifically cited international law as a key consideration: “My Syrian red line is conditional on international cooperation and law.” Even if international law is not the driving force behind decisions, the ability to cite international law as a justification assists leaders in selling actions to domestic political audiences who might be skeptical of taking military action in the absence of an immediate threat.

The credibility of the response threat is diminished when such actions will themselves be contrary to international law. Red line targets might discount the likelihood that its opponent will actually carry out the threat if it’s against international law; this uncertainty might make a party more likely to cross the red line as its benefit-cost calculation might shift in favor of continuing with the development or actually using CBRN weapons. Carrying out threats in violation of international law brings certain reputational costs that affect a state’s ability to gain cooperation from others in the future. Furthermore, violating international law in carrying out a red line threat might shift global attention and condemnation onto the responder and away from the original violator. Thus, Israel has repeatedly been the focal point of criticism for its retaliatory raids against targets in Gaza and in southern Lebanon even as its actions were in response to illegal rockets’ attacks from those areas.

We begin our analysis with a discussion of red lines and their purposes.

What are Red Lines and Why Are They Used?
The use of the term “red line” in discussions of foreign policy may be a relatively recent phenomenon, but the concept itself dates back as far as threats themselves. In foreign policy, the use of threatened force to achieve policy goals is known as coercive diplomacy, the success of which depends on a state’s ability to threaten retaliation or punishment credibly and whether the magnitude of the punishment costs are sufficient to induce compliance.
Red lines are a form of coercive diplomacy whereby statements or communications are made that specify actions or behavior that, if adopted, may result in the imposition of punishment or some other form of response by a sender state, or group of states, against a target state or states. In specifying actions or behavior that will lead to punishment, red lines clearly delineate compliance—with a demand for certain actions—from noncompliance. Red lines are employed to alter, or in some other way affect, the decision-making of another country over a specific issue. The issue in question influences not only the likelihood of a red line being used, but also the form a red line might take.

Coercive diplomacy divides into two distinct categories: deterrent and compellent threats—each of which applies to certain circumstances and follows a different logic. Deterrent threats attempt to maintain the status quo while compellent threats seek to alter it in favor of the threatening party. Deterrence employs military threats to convince a potential aggressor that any attempt to change the status quo will be prohibitively costly and likely to fail, the classic case being the threat of nuclear retaliation if attacked with either conventional or military force. A state can issue deterrent threats to prevent aggression aimed at its own territory (direct deterrence) or the territory of another state or entity (extended deterrence), including the territory of the target state, in the case of red lines pronounced against the use of chemical or biological weapons against a state's own population. Furthermore, deterrence can aim to head off an urgent threat of aggression (immediate deterrence) or to prevent the occurrence of such threats altogether (general deterrence). Red lines can be associated with any of the four types of deterrence resulting from combinations of these two dimensions.

Red lines can also serve a compellent purpose if the “noncompliance line” is drawn at a point that differs either from the current status quo or the expected future status quo. Israel's red line on Iran's production of highly enriched uranium is an example of a state drawing a line in anticipation of future behavior. A state issues a compellent red line to introduce a demand for change that will be met with punishment unless the demand is satisfied by the target state (e.g., in 1998 Turkey demanded that Syria expel the Kurdish PKK group from its territory). Unlike deterrent red lines, which are drawn and then held passively for an indefinite period, compellent red lines tend to be more time bound. Compellent threats generally come with a deadline, beyond which inactivity or insufficient compliance with the demand will be punished, such as the case with the current red line for Syria and the abandoning of their chemical weapons capabilities. Because compellent threats require clear compliance with specific demands, success is easier to recognize than with deterrence. In deterrence, even if the undesired action does not occur it does not necessarily follow that the red line threat was responsible.

Legal Problems with Drawing CBRN Red Lines

Although red lines may be employed over a variety of issue areas, they are particularly salient and common in situations involving CBRN weapons. Red lines in this context tend to focus either on the production of CBRN weapons or their use. For the former, because of the dual-use many of the technologies required for the production of
CBRN weapons, red lines are often used to deter the acquisition or development of those technologies either most conducive for the production of such weapons, or most reflective of a militarily oriented production capability. These red lines compel the target state to accept a level of development that might be regarded as suboptimal.

Red lines for nuclear weapons, for example, generally focus on restricting those actions that distinguish the development of a strictly civilian/commercial capability from a dual-use or overtly military capability. It is more likely that red lines would be placed at earlier stages of development, such as on the production of significant quantities of highly enriched uranium or plutonium-239. Setting these early red lines acknowledges there is still some likelihood a state that crosses such a line may not be seeking nuclear weapons production capability. Alternatively, red lines may be placed on specific behaviors, such as purposeful concealment of nuclear-related activities. The United States issued three red line ultimatums to Taiwan in the late 1970s intended to prevent the enrichment of uranium and the reprocessing of plutonium.

Because international law puts few restrictions on peaceful nuclear energy production, finding an optimal point at which to draw red lines proves challenging. Under the Nuclear Non-Proliferation Treaty (NPT), only the actual production of nuclear weapons is prohibited. States may therefore claim a right to develop or acquire any nuclear-related technologies or level of capability they desire. At the same time, very few activities—other than those late in the nuclear weapons development process, such as the manufacture of plutonium metal—cannot be explained away as civilian or commercial in intent. Yet if a state wishes to prevent another state’s acquisition of nuclear weapons, issuing a red line for this late stage may have little impact on preventing their acquisition of a nuclear weapons production capability and proliferating states have the legal right to go right up to the threshold of nuclear weapons production.

International law also expresses ambiguity about the legality of red line threats themselves—much less about carrying them out. Threats involving military force are illegal under Article
2 (4) of the UN Charter. The International Court of Justice issued an advisory opinion in which it did not render a judgment on whether deterrent threats were legal or not.7 Thus, certain kinds of red line threats might be beyond the scope of law, although the specifics are yet to be legally determined.

A similar dynamic exists for the acquisition or production of biological, chemical, and radiological weapons and again stems from dual-use character and international law that permits peaceful activities. Many of the necessary requirements for the production of these weapons can be gained as byproducts of—or under the guise of—civilian or commercial processes. The components necessary for the manufacture of chemical weapons, for example, are also used in industrial processes. This not only makes them widely available, but also makes distinguishing between civilian/commercial and military activities difficult. Furthermore, states are afforded the right to develop and possess the majority of these chemicals under the terms of the Chemical Weapons Convention (CWC), so long as they are not used in the production of chemical weapons. States seeking to limit the production of chemical weapons are therefore most likely to act to deter the weaponization of toxic chemicals (and biological agents, as in the production of biological agents); yet the lion’s share of the work in producing chemical weapons is in the production of the chemicals themselves, not in their weaponization. Unlike the production of nuclear weapons and the production of weapons-usable materials, however, there is no logical earlier stage where red lines might be used. This is also the case for radiological weapons. It is perhaps for this reason that red lines for chemical, biological, and radiological weapons focus more on their use than on their production. On that point, international law is clear, prohibiting the use of these weapons under any circumstance.

Legal Limitations When Red Lines Are Crossed

If international law creates difficulties in setting red lines for the development of CBRN weapons, it imposes even greater constraints on the ability of states to carry out the threats when those red lines are crossed.8 Generally speaking, when target states take actions that go beyond the limits imposed by others, the responses of individual states and the international community fall on the coercive side of the foreign policy menu, ranging from sanctions to military force, although certain legal instruments might also be available.9

Unless they are forbidden by existing agreements (e.g., a trade treaty), economic and other sanctions against norm-breaking states are permitted by international law. Yet use of sanctions against red line-crossing states are only an available form of response for those states that have some sort of economic relationship, such as mutual trade or shared membership in international financial institutions. For example, in 1992 the United States threatened sanctions against Algeria—with whom they had substantial economic relations—over its secret construction of a heavy water reactor. This threat played a major role in leading Algeria to sign and ratify both the Non-Proliferation Treaty and an IAEA Safeguards Agreement. In many cases, however, such relationships do not exist, making it unlikely that economic sanctions will be used as punishment or retaliation for the crossing of a red line. Case in point, North Korea does not trade
extensively with other states, at least overtly, and thus economic sanctions imposed for its nuclear activities are likely to be more symbolic (e.g., restricting imports of luxury goods) than substantive.

Multilateral sanctions require the sending state(s) either gaining agreement from other states informally or obtaining authorization from a collective body. The latter is conditioned by the legal rules of the organization, which might impose norms of unanimity of action (e.g., European Union) or place procedural impediments in the way of collective action. The United Nations is illustrative, in that impositions of economic sanctions normally require approval of the Security Council. As demonstrated in the cases of Sudan, Bosnia, and Syria, the Security Council often reaches a stalemate. The need for nine affirmative votes from members of the Council and for the absence of a veto by any permanent member impedes multilateral sanctions. In many cases, the target state may safely assume that crossing the red line will result in sanctions only from the threat-sending state.

Threatening sanctions against red line violators might also be an ineffectual deterrent because violators often are already under heavy sanctions. The failure of extant sanctions to compel or deter behavior is one of the primary motivators of red line threats. At that point, few painful additional sanctions remain, and it is clear that those additional measures will not represent much of a punishment. Iran and Syria are already under crippling sanctions from the West, and there is little more that could be done to those states, short of military action.

More common than sanctions is the threat of military force following crossing the red lines; destroying nuclear facilities in an air strike is an example. Yet international legal rules are especially restrictive in allowing the military force as a response. Traditional law allows military force only in support of a right of self-defense; such a right is only operative in the face of an “armed attack,” and cannot be used preemptively or preventively. Yet redlining is distinct from traditional deterrence of an attack and involves preventing action well short of an actual attack against the sender or an ally. Recent redlining has dealt with nuclear or chemical weapons development, not a military attack. Furthermore, unilateral humanitarian intervention and the “responsibility to protect” are not yet embedded as international legal rights and obligations, and are thus questionable as legal justification for military action after a red line violation. Legal authorization for military force, in the absence of self-defense, could be approved by the UN Security Council, as was the case in the Libyan civil war. Yet, as noted above, the legal requirements for approval in that body make it highly unlikely that it will be given in many, if any, future cases.

Even in the case of the use of chemical weapons in Syria, a war is ongoing and international law restricts the actions that third party states can undertake in civil wars. Generally they are prohibited from military intervention or from supplying military aid.
Thus, American military strikes against the Assad government would under virtually any scenario be illegal, even as it might have been prompted by the international legal violation of using chemical weapons.

Should states ignore limitations on military force initiation (jus ad bello), there are still international legal limitations on how military force would be used (jus in bello). Military action is supposed to be “proportional” to the original offense, and this has been operationally defined in terms of the number of deaths in the original incident. Yet this standard makes little sense when applied to red lines that involve only the development of certain CBRN weapons, short of their use. Almost any military response is likely to involve loss of life and damage, making the use of force illegal even if it had been legally authorized. The use of military force also must take care not to target civilians or indiscriminately result in their harm. This is difficult in any armed response that is directed at weapons production facilities that are often located in or near populated areas.

Attacking such facilities might also result indirectly in civilian casualties. For example, bombing Syrian chemical weapons facilities might have resulted in the release of chemical agents into the atmosphere, resulting in civilian deaths, perhaps even in excess of those killed in the original chemical weapons usage.

Standard international law permits aggrieved parts to retaliate in kind when violations of certain kinds of agreements (e.g., trade), and such reciprocity is one of the bases for ensuring compliance with international law rules. The ability to deter the use of nuclear weapons has always rested on the ability of a state to both demonstrate their retaliatory capability and communicate their willingness to use said capability if and when a pronounced red line is crossed. Whether this logic extends to the deterrence of the use of chemical, biological, or radiological weapons is questionable, given that the logic of deterrence rests on the assumption that the responding state responds in a like manner.

Nevertheless, international arms control agreements do not permit responses in kind from aggrieved parties, except in self-defense and uses of CBRN weapons generally do not have a defensive, as opposed to deterrent, character. Regardless, using such weapons by third parties to a conflict, as many red line sending states will be, is never justified under international law. International law on the conduct of war has been formulated with the underlying principles of limiting the use of force in all circumstances and preventing the escalation of conflicts. Of course, even if retaliation in kind were permitted under international law, this would not even be possible for most states as the Chemical Weapons Convention prohibits the possession of such agents, making such retaliation impossible. The net effect, however, is that international law restricts (and attacking government targets such as Syria military facilities qualify) that assists the rebels. Thus, American military strikes against the Assad government would under virtually any scenario be illegal, even as it might have been prompted by the international legal violation of using chemical weapons.
the responses in light of red line violations and thereby undermines the credibility of
the initial red line threats.

If international law severely constrains military responses to red line violations, what
legal options are available? Generally, states can pursue adjudicatory strategies, but
these are also hampered by the rules and practices of the main legal institutions for
such disputes, namely the International Court of Justice and the International Criminal
Court respectively. We note at the beginning that these institutions are only available
for legal disputes, namely those that might involve a violation of international law. Yet
as noted in the previous section, many red lines are drawn to deter behavior that is
permitted by such law, albeit undesirable for political or other reasons.

A state could bring a case to the International Court of Justice if a red line involving a
violation of international law, especially a treaty obligation, has occurred. Yet the red
line sending state has to have suffered some harm as the plaintiff and it is not always
clear that this would be the case; the development of nuclear weapons or the use of
biological or chemical agents against a domestic population does not produce a direct
harm to a third-party state. Furthermore, the Court must have jurisdiction to hear the
case and this is defined by the scope of acceptance, as modified by any reservations,
of the Court made by the disputants. Historically, relatively few cases have made their
way to the ICJ, 154 contentious and advisory opinions since 1946, or barely more
than two per year. Such cases have also been largely over “low politics” issues such as
maritime rights and debt, and among states with mostly friendly relations, as opposed
to the kinds of issues and disputants that characterize the drawing and crossing of red
lines. ICJ processes are also notoriously slow, perhaps desirable for cooling-off periods,
but counter-productive in terms of halting behavior such as weapons development,
which might proceed unabated during the legal process. Ultimately, implementation
of rulings of the Court depend on the cooperation of the parties or Security Council
enforcement; the former might be moot if the red line has already been crossed and
problems with the latter have been repeatedly noted above and will again provide a
legal constraint in the following discussion.

The International Criminal Court is available to prosecute individuals, specifically
national leaders, whose red line crossing actions fall under the jurisdiction of that court.
Yet the crimes for which prosecution is possible include a narrow set of war crimes,
such as aggression, genocide, and crimes against humanity. Perhaps only the use of
CBRN weapons, as opposed to their development, would qualify; in recent times,
only chemical weapons in use in Syria would fall under this definition. Thus, legal
jurisdiction limits make this option likely to be an exception at best, if available at all.

For those instances that do fall under the ICC scope, other jurisdiction and procedural
rules of the Court hamper the effectiveness of red line threats. Only 122 states (out of
nearly 200) are parties to the Rome Statute and this has several implications for dealing
with red line crossing behavior. First, the Court has jurisdiction only over crimes on
the territory of member states or persons who are nationals of those states. Yet more
than 70 states have declined to join the Court and these include many key states that
might be the subject of red line threats, including Pakistan and all Middle Eastern
states (except Jordan). In addition, members of the African Union are considering a
mass withdrawal from the ICC for what they perceive as bias against activities on their continent and a blind eye toward crimes elsewhere. Thus, the ICC might be legally restricted in dealing with red line crimes occurring in several geographic regions and involving the states most likely to be the targets of red line threats. The only alternative is if a case is referred to the Court by the Security Council, and it has done so only once (Sudan) and is hamstrung by the political differences among its permanent members. Even with a clear legal path to prosecuting individuals, the process is very slow. Cases must first be investigated by the ICC prosecutor before indictments are brought. Member states must assist in the capture of indicted suspects, but this has proven difficult, as illustrated by two cases, that of President Al-Bashir of Sudan (warrant issued in 2009) and that of Joseph Kony (warrant issued in 2005); neither has been arrested and, in the case of the former, remains a head of state. Accordingly, potential defendants of the ICC might find threats of legal prosecution as less than credible should they cross red lines. The jurisdictional scope of the ICC is limited to a small set of crimes, legal procedures and practical realities in implementation suggest that legal responses will be cumbersome with a significant risk of failure.

**Conclusion**

Red lines, the use of compellent threats to induce or prevent certain behaviors, are a foreign policy tool that is used with some frequency and success in international affairs and is particularly salient in cases involving the production or use of CBRN weapons. International legal rules may complicate the ability of states to make red line threats and to do so credibly as the law establishes some prohibitions on their execution, as was the case for the United States and Syria. Currently, there are no international legal limits on the production of technologies for peaceful nuclear energy projects or on the production of most chemical or biological agents so long as no weaponization occurs. This leaves sending states few legal options beyond placing a red line at the production of nuclear weapons or the clear aggressive use of chemical or biological agents. Even in the case of anticipating and heading off such illegal actions, red line-setting states may be barred by international law from issuing compellent threats and must instead rely on legally ambiguous deterrence. Even when the action that crosses the red line is in and of itself illegal, as in the case of the production of certain nuclear materials or the use of any CBRN weapon, there are still legal limits on a red line-setter’s response. Options for punishing the crossing of red lines include sanctions, military force, and international adjudication, yet all have constraints on their use. Sanctions suffer from the fewest legal barriers to use, but target states are often under some level of sanction already and further multilateral action against them requires overcoming the collective action problems inherent in the international system. Both the initiation of force and its application once begun are highly restricted by international law, regardless of the legality of the sender’s red line. Adjudication by the ICJ or the ICC is only an applicable strategy if the action that crossed the red line also violated international law. Even in such seemingly limited cases, adjudication suffers from jurisdiction issues, deliberately slow procedures, and
some of the same issues with Security Council agreement and enforcement, as do other methods of punishment.

What might be the solutions to the dilemma of seeking to prevent undesirable behavior, especially that which violates international law, while being constrained oneself by that very same international legal system? One choice is to ignore international legal concerns and move ahead with whatever red line threats and responses are thought to achieve the preferred goals. This has the advantage of giving great policy flexibility, but it carries with it some risks. It undermines the legal order that many of the red line threats are designed to uphold and potentially sets a dangerous precedent for other states to act in similar fashions that are inconsistent with international law. Illegal threats and responses might also limit the potential for international support that could be critical for the target state to comply with the demands or for carrying out responses, especially those involving military force.

More desirable in some ways would be an alteration of international legal standards that would permit greater use of military force in particular to support red line threats. This would enhance their credibility and provide some mechanism for punishment and redress that are now inadequately provided by diplomacy and adjudication. Of course this is easier said than done, as such changes cannot be made unilaterally by the United States or any other state, and it is doubtful that consensus exists to sanction greater use of military action than is already permitted. There is also the risk that some states will exploit the opportunities created by more flexible international law and use of military force that undermines global values and would themselves constitute threats to international peace and security. It is likely that policy makers will need to live with the inherent trade-offs that international law mandates in the context of red line threats. Y

– Dov Friedman served as Lead Editor for this article.

NOTES

8 Such international legal limitations share some similarities with ethical standards as outlined in Just War theory (jus bellum iustum), but these are not synonymous and indeed ethical standards might impose more stringent conditions on the use of force. For example, see Michael Walzer, Just and Unjust Wars (New York: Basic Books, 1977).
9 These responses are not necessarily mutually exclusive.
10 See Article 51 of the UN Charter.
Augmenting State Secrets: Obama’s Information War

By Aiden Warren and Alexander Dirksen

Abstract—This article will argue that while the Obama administration promised considerable change in the areas of transparency, intelligence gathering, and national security, it has differed very little from the Bush administration. In fact, it will contend that in many instances, the administration has actually augmented and increased its activities in its “secret war” on information and those actors deemed to be adversaries and threats to “states secrets.” Instead of a dramatic break from the policies of his predecessor, Obama’s approach to the balance of national security objectives and privacy concerns, has deeply contravened the administration’s initial pronouncements of a new “openness” and “transparency.” It will be shown that these actions have also extended to the global stage, particularly those that have impacted the U.S.-Russian “re-set” and bilateral relations with Germany. Indeed, from the treatment of whistleblowers to the assertive expansion of National Security Agency (NSA) surveillance programs, it has been an amplified “business as usual” approach that could significantly mar the Obama administration’s legacy.

Introduction

In the lead-up to the 2008 Presidential Election, candidate Barack Obama signified that, should he be elected, “reversing President Bush’s policy of secrecy” would be a key tenet of his presidency. Indeed, under the leadership of his predecessor, the United States had witnessed the first attack upon its soil since Pearl Harbor; an attack which spurred a global “War on Terror” that consumed both the public consciousness and the remainder of the president’s first and second terms in office. The Bush drive would come to challenge long-standing pillars of international law, including the legal...
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justification for military engagement and the nature in which prisoners of war could be captured, questioned, and tried. Additionally, Bush’s tenure would mark the beginning of a rapid escalation in funding for both military operations and intelligence-gathering capabilities.2 While the capacity of military and intelligence agencies increased, the range of information available upon their actions was concurrently reduced, as the administration worked actively to classify materials and deny information requests.3 During the concluding period of the Bush administration, many had hoped the era of covert practices and programs—which had undermined the nation’s moral foundation in the name of counterterrorism—would end.

On President Obama’s first day in office, he called for a “new standard of openness” in the federal government and proposed three prominent acts in the name of increased transparency.4 In the “Transparency and Open Government” memorandum for the Heads of Executive Departments and Agencies, Obama declared that his Administration was committed to creating an unprecedented level of openness in government. Specifically, he pointed to improving the public trust via the establishment of a system that encompassed transparency, public participation, and collaboration. Obama concluded that “openness will strengthen our democracy and promote efficiency and effectiveness in Government.”5 The Presidential Memorandum on the Freedom of Information Act (FOIA) called upon all agencies to “adopt a presumption in favor of disclosure” in regards to its requests, while the Presidential Memorandum on Transparency and Open Government declared that the government would “take appropriate action, consistent with law and policy, to disclose information rapidly in forms that the public can readily find and use.”6 The newly inaugurated president also issued an Executive Order addressing the release of Presidential records by the National Archives and Records Administration (NARA).7 Declaring that “transparency and rule of law will be the touchstone of this presidency,” the acts garnered the praise of the heads of both the National Security Archives and the Citizens for Responsibility and Ethics in Washington.8

Yet while such promises have been – and continue to be – made by the administration, the reality differs markedly from the rhetoric within the Oval Office. Instead of a dramatic break from the policies of his predecessor, there has instead been an apparent continuation of and, in some cases, an augmentation of, these efforts. Access to information believed to be crucial to public discussion and debate remains difficult to obtain, while the administration is willing to test diplomatic relations in attempts to prosecute whistleblowers who seek to release information they believe has been unjustly withheld. Moreover, while the government actively works to safeguard “state secrets,” it simultaneously accumulates more of them than ever before, collating a significant amount of data through classified programs that are exempt from the traditional avenues of public

[W]hile the Obama administration has promised considerable changes in the realm of transparency, intelligence gathering, and national security, it has differed little from the Bush administration in its substantive approach.
access. By tracing the administration’s actions regarding these issues, we illustrate that while the Obama administration has promised considerable changes in the realm of transparency, intelligence gathering, and national security, it has differed little from the Bush administration in its substantive approach. In Obama’s pursuit of a “secret war,” he has in fact overseen both the continuation and emboldening of efforts, so as to distance aspects of the administration from public oversight that could present considerable implications for the state of the nation’s democracy.

Closing the Window of Transparency

With an array of new federal programs and further policy directives—all with the stated aim of improving public access to public or declassified federal government data—the Obama administration, early in the first term, appeared to be transforming rhetoric into action. The implementation of Data.gov, a new federal website to “increase public access to high value, machine readable data-sets from the federal government,” was launched in March 2009, and its presence was bolstered that December with the Open Government Directive, which required all federal agencies to post three “high value data sets” to the platform for public access within forty-five days. Additionally, Executive Order 13526 of December 2009 established a National Declassification Center to help “streamline the declassification process,” while Executive Order 13556 of November 2010, stipulated “standardized processes for managing information that requires protection but is not classified.” Further developments took place in the form of a March 2009 memorandum in which Attorney General Eric Holder rescinded his predecessor’s 2001 stance on FOIA requests, declaring that “an agency should not withhold information simply because it may do so legally.” Most recently, the “Open Data Policy” Memorandum, issued by the executive office in May 2013, sought to “institutionalize the principles of effective information management at each stage of the information’s life cycle to promote interoperability and openness.” In essence, the message of increased transparency in government has been emphasized by the president himself who encouraged the development of “specific commitments to promote transparency” during his 2010 address to the United Nations General Assembly.

During the first year of the Obama administration, 319 FOIA lawsuits were filed (in contrast to 278 FOIA during the last year of the Bush administration), suggesting that any notions of change would take longer than anticipated. Still, many people remained optimistic. A 2009 audit conducted by the National Security Archive of George Washington University revealed, however, that “only four agencies show both increases in releases and decreases in denials under the FOIA.” A follow-up report released in 2012 stated that “62 out of 99 government agencies have not updated their FOIA regulations” since Holder’s 2009 memorandum. The findings of the report were included within a letter drafted to Melanie Pustay of the Office of Information Policy by Darrell Issa and Elijah Cummings of the Committee on Oversight and Government Reform, in which they concluded that, “it is unknown whether agencies are complying with the Attorney General’s presumption of openness.” Moreover, in a March 2013 study by the Center for Effective Government, despite concluding that “agencies have
generally improved their processing rates,” it noted that “between 2008 and 2012, the percentage of FOIA requests in which some information was withheld grew to 54 percent of all requests processed.” Notwithstanding their initial aims, the extensive list of memorandums, policies, and frameworks, has created what many have described as a gatekeeper-style transparency—where the window into the government is opened to the public eye in a very selective fashion, and can be closed at will.

The War on Whistleblowers

Those attempting to release critical classified information outside of the aforementioned bureaucratic constraints have faced stern responses from the Obama administration, mirroring or exceeding the harshness of those from the Bush administration. Despite describing the acts of whistleblowers as those of “courage and patriotism” that “should be encouraged rather than stifled,” Obama’s pursuit of whistleblowers has taken place on a scale never before seen in the Oval Office. As noted by journalist Amy Goodman in 2012, “evoking the Espionage Act of 1917, the administration has pressed criminal charges against no fewer than six government employees, more than all previous presidential administrations combined.” Whistleblower Peter van Buren, who revealed wasteful spending during the Iraq War, described the administration’s approach in the following terms:

The Obama administration, which arrived in Washington promoting “sunshine” in government, turned out to be committed to silence and the censoring of less-than-positive news about its workings. While it has pursued no prosecutions against CIA torturers, senior leaders responsible for Abu Ghraib or other war crimes, or anyone connected with the illegal surveillance of American citizens, it has gone after whistleblowers and leakers with ever increasing fierceness, both in court and inside the halls of various government agencies.
Of course, the core test pertaining to Obama’s commitment to whistleblower protection came early in his first presidential term with the case of Thomas Drake, whose proceedings were launched under the Bush administration. In 2010, ten charges were brought against Drake by the Department of Defense, with five citing the Espionage Act. Yet when faced with the prospect of having to reveal information upon a covert intelligence program in order for the case against Drake to proceed (coupled with the revelation that documents leaked by Drake that the government had claimed to be classified were in fact unclassified materials), the government sought a plea bargain with Drake in June 2011 after five years of investigation. Nevertheless, as noted by Yale law professor Jack Balkin, the Obama administration’s willingness to continue to pursue a whistleblower case launched by his predecessor suggests that the White House has “systematically adopted policies consistent with the second term of the Bush Administration.” The case brought against former CIA officer Jeffrey Alexander Sterling gave credence to this claim, with Sterling being indicted by the U.S. Justice Department in January 2011 for his disclosure of information about a clandestine U.S. government program to New York Times columnist Jim Risen. Risen, who was issued a subpoena by the Bush administration to testify upon his source, was issued a second subpoena authorized by Attorney General Eric Holder on May 24, 2011. It was later suggested in a court filing that “federal law enforcement officials . . . obtained extensive records about his phone calls, finances and travel history,” during their investigation of Sterling. Recently, in a July 25, 2013 letter to Holder, Risen’s legal team argued that it would be “utterly inconsistent with the guidelines” for federal prosecutors to maintain their drive in forcing Risen to testify on his sources for a 2006 book that discussed a CIA effort to trip up Iran’s nuclear program more than a decade ago.

The International Impact

While the aforementioned examples clearly illustrate the Obama penchant to investigate and prosecute in his information war, the controversial case of Edward Snowden—and that of Chelsea Manning before him—best exemplifies the discrepancy between the Obama administration’s claims regarding whistleblowers’ protections and the actions undertaken in the name of national security. Despite the differences between the two cases in the type of information released and the manner in which the information has been distributed, the White House portrayed both acts negatively. In both instances, Obama has made public statements against the whistleblowers, noting the illegality of their actions. In speaking on the Edward Snowden case, President Obama offered a pointed rebuttal of his previous position on whistleblowers, saying he doesn’t “welcome leaks, because there’s a reason why these programs are classified.” Of course, the fervent pursuit of whistleblowers has come at a political cost to the Obama administration, as evidenced by the cancellation of a summit with Russia’s Vladimir Putin in response to his granting Snowden asylum, thereby eliminating an opportunity for the two leaders to address political tension over the Syrian conflict.

The international context of Obama’s information drive became even more prominent with the Merkel spy revelations. In late October 2013, it was revealed that the NSA had not only monitored U.S. citizens’ phone records, but also those of foreign leaders,
including German Chancellor Angela Merkel. Der Spiegel reported that Merkel’s mobile phone had been on an NSA target list since 2002, under the name “GE Chancellor Merkel.” It was also apparent that the monitoring operation was still in place as recently as Obama’s visit to Berlin in June 2013. Despite White House claims about the extent to which Obama knew of the operation, Merkel’s spokesperson, Steffen Seibert, described the events as “completely unacceptable” and a “grave breach of trust.” According to Mark Mazzetti, administration officials said the NSA, in its push to build a global data-gathering network that can reach into any country, “has rarely weighed the long-term political costs of some of its operations.” Indeed, America’s image has been sinking in Germany and Europe ever since the revelations began, to the extent that many EU negotiators are “losing their zeal to discuss a free-trade agreement with America without clarifying their overall relationship.” Moreover, the damage to core American relationships deriving from Obama’s “war on information” continues to mount. In September 2013, President Dilma Rousseff of Brazil postponed a state visit to the United States after Brazilian news media reports – fed by material from Mr. Greenwald – that the NSA had intercepted messages from Ms. Rousseff, her aides, and the Petrobras state oil company. Additionally, other Snowden documents indicated that United States intelligence services gained access to former Mexican President Felipe Calderón’s communication.

Accumulation of New Classified Information: An Orwellian Oval Office

Preceding the sensational cases discussed in the above, of course, was the expansion and sophistication of federal intelligence oversight capabilities that began in the immediate wake of the 9/11 attacks. The USA PATRIOT Act (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act) of 2001 “cast aside longstanding constitutional limits on government investigators,” altering elements of the oversight capabilities instilled within the Foreign Intelligence Surveillance Act (FISA) of 1978. Of particular note were the sections of the legislation which addressed wiretapping, the collection of materials relevant to an investigation, and the “lone wolf” provision. Despite some opposition by senators on both sides of the aisle, all three provisions were re-invoked by Obama before they were set to expire on May 27, 2011. In a similar fashion, elements of the Protect America Act of 2007 were incorporated into the FISA Amendments Act of 2008 when it was set for renewal, with this Bush-era legislation reauthorized for an additional five years at the end of 2012. A proposed amendment by Senator Jeff Merkley to increase transparency in how the bill’s provisions were interpreted was comfortably defeated, 54–37, and the Senate renewed the legislation.

With the renewal of the FISA Amendments Act, the President firmly reestablished the legislative and legal foundation for Bush’s intelligence operations.
foundation for Bush’s intelligence operations. Yet while congressional support for intelligence programs in the name of national security remained relatively high, public criticism mounted. Testimony by Mark Klein (a former AT&T technician) and Scott Marcus (a former senior advisor for Internet technology at the FCC) regarding the secretive rerouting of Internet traffic by the NSA formed the basis of Jewel v. NSA, a case filed by the Electronic Frontier Foundation in 2008. The Obama administration sought to have the suit dismissed by invoking the “state secrets privilege.” The court rejected these claims in July 2013, allowing the case to proceed “under the supervision of a public federal court.” While the establishment of a new NSA data facility in Bluffdale, Utah renewed debate about Obama’s commitment to breaking away from Bush era surveillance policies, the type of surveillance detailed by Klein and Marcus and filed under the Jewel v. NSA case would gain new meaning and relevance with the leaks of June 2013.

These leaks, surrounding a classified intelligence program, revealed the full extent to which the Obama administration has pursued all angles of technology and science in its secret wars on both an international and domestic level. The presence of the PRISM program was first revealed in a series of reports from The Guardian and The Washington Post, based upon a forty-one-slide PowerPoint presentation leaked by Edward Snowden. Representing “one of the most significant breaches in the strict secrecy of the NSA since its creation in 1952,” the files sparked controversy across the United States and abroad due to the far-reaching implications of the program. Initial reporting by The Guardian suggested that the NSA was able to access data “directly from the servers” relating to “customers of participating firms who live outside the US, or those Americans whose communications include people outside the US.” Participating companies noted on the slides included Microsoft, Yahoo, Google, Facebook, YouTube, Skype, and Apple. Following the initial reporting upon the PRISM program, additional slides from the leaked PowerPoint presentation were also published by The Guardian, detailing, among others, the presence of the classified XKeyscore and BOUNDLESS INFORMANT programs.

Upon release of the Guardian and Washington Post reports detailing both the phone record collection and PRISM, the administration was quick to defend their use. On June 7, 2013 President Obama addressed reporters, noting that “we have established a process and a procedure that the American people should feel comfortable about” in their oversight, and that the two programs “were originally authorized by Congress” and “have been repeatedly authorized by Congress.” When asked about the PRISM program, the administration found an unlikely ally in former president George W. Bush, who noted that “I put that program in place to protect the country,” as “one of the certainties [of PRISM] was that civil liberties were guaranteed.” While promises to pursue “appropriate reforms” to the surveillance programs were made in early August by the administration (including reform of Section 215 of the PATRIOT Act and the appointment of a lawyer “to argue against the government at the Foreign Intelligence Surveillance Court”), efforts by Congressman Justin Amish which aligned with these
promises in July were downplayed and dismissed by White House spokesperson Jay Carney, calling into question the administration’s commitment to reform.\textsuperscript{55} Steadfast support for the NSA programs by the Obama administration has continued despite a growing body of evidence suggesting frequent and pervasive abuse of the scope of the NSA’s powers. In June, a draft report by the NSA Inspector General obtained by \textit{The Guardian} revealed that “the Obama administration for more than two years permitted the National Security Agency to continue collecting vast amounts of records detailing the email and internet usage of Americans.”\textsuperscript{56} Following a lawsuit filed by the Electronic Frontier Foundation, the Obama administration, in 2011, was forced to release an eighty-six-page opinion of the secret Foreign Intelligence Surveillance Court (FISC) on August 21, 2013, which found that “the surveillance conducted by the NSA under the FISA Amendments Act was unconstitutional and violated ‘the spirit of’ federal law.”\textsuperscript{57} According to the declassified documents, Judge Bates noted that the NSA “frequently and systematically violated” its own oversight requirements, collecting up to 56,000 emails of Americans “with no known connection to terrorism.”\textsuperscript{58} In the ruling, Bates declared that “contrary to the government’s repeated assurances, the NSA had been routinely running queries of metadata using querying terms that did not meet the required standard for querying.”\textsuperscript{59} Despite Director of National Intelligence James Clapper’s admission that “the court found the NSA in breach of the Fourth Amendment,” the Obama administration fought against a suit that requested the opinion under Freedom of Information provisions.\textsuperscript{60} The \textit{Washington Post} highlighted the administration’s reluctance to release information about the nature of the classified programs, noting that “the Obama administration has provided almost no public information about the NSA’s compliance record.”\textsuperscript{61} Yet while many assume the NSA changed its practices following the 2011 FISA court findings, Snowden’s leaks to \textit{The Guardian} suggest the certifications required to conduct intelligence operations in cooperation with American technology firms were merely modified to allow the program’s continuation, with the costs of these changes covered by Special Source Operation federal funds.\textsuperscript{62} Reporting by \textit{The Guardian} also revealed that by December 2012, a new program (“One-End Foreign (1EF) solution,” codenamed EvilOlive) had been established to conduct precisely the same type of surveillance Obama administration officials claimed had ceased by in 2011.\textsuperscript{63} Among Snowden’s leaks, a May 2012 internal audit revealed 2,776 incidents of “unauthorized collection, storage, access to or distribution of legally protected communications,” undermining Obama’s attempts to instill confidence in the privacy safeguards of the national intelligence community.\textsuperscript{64} Described as “extremely disturbing” revelations by House Minority Leader Nancy Pelosi, the leak demonstrated the degree to which the public – and, in some cases, policy makers in Washington – had remained in the dark regarding the full extent of the NSA’s surveillance activities.\textsuperscript{65} NSA Director of Compliance John Delong was quick to respond, claiming the number of deliberate violations was tiny and appropriate oversight mechanisms are in place, Yet Pew polls from July showed “a majority of Americans – 56% – say that federal courts fail to provide adequate limits on the telephone and internet data the government is collecting as part of its anti-terrorism efforts.”\textsuperscript{66} In the same week as the leak of the
internal audit, a report by *The Wall Street Journal* suggested that the NSA has “the capacity to reach” 75 percent of American internet traffic. The NSA later denied the claim;\(^{67}\) but by early September, however, President Obama had begun to acknowledge the considerable reach of its intelligence programs. While in Sweden, Obama explained at a press conference, “the United States has enormous capabilities when it comes to intelligence — in the same way that our military capabilities are significantly greater than many other countries, the same is true for our intelligence capabilities.”\(^{68}\) In justifying the need for such potential, Obama was quick to invoke Bush-era sentiments of the changed post-9/11 global landscape, suggesting that despite broader public discourse on the issues of transparency, accountability, and openness, much remains unchanged from the post-September 11 moment.

**Conclusion: An Unplanned Legacy**

In response to the escalating debates and criticism surrounding Obama’s information drive, the President said that he would endorse more oversight, transparency, and “constraints” on the use of Section 215 of the Patriot Act, which allows for the bulk collection and storage of domestic telephone records. Additionally, he stressed that he wanted to increase public confidence in the Foreign Intelligence Surveillance Court by including a “checker” to FISC proceedings who would posit privacy and civil liberties concerns against the government lawyers — who have attained surveillance powers via the court without being challenged before the judges. The President said that the panel would “consider how we can maintain the trust of the people [and] how we can make sure that there absolutely is no abuse in terms of how these surveillance technologies are used.” While this has been considered a positive by some commentators, the hard truth is that the new entity will be under the Office of the Director of National Intelligence, and will thus not be truly independent.\(^{69}\) Moreover, the panel’s meetings are and will continue to be closed to the public, while its membership is comprised of officials “friendly” to the intelligence community, the president, or both. Glenn Greenwald, the lawyer-blogger who has published numerous leaked documents from the former NSA contractor Edward Snowden, has defined the panel as “a total farce,” while other civil liberty proponents question the legitimacy and any notion that it will engender change.\(^{70}\)

Indeed, as the full extent of federal oversight capabilities continues to be revealed, the perception of the president as one to forge a new path for citizen rights and government transparency has forever been altered.
legacy would be the entrenching of the intelligence services’ powers and privileges at
the expense of citizen privacy. Despite promising a dramatic shift in Washington’s ap-
proach to the balance of national security objectives and privacy concerns, the Obama
administration has diverged little from Bush administration policies, evoking the risk of
the “unknown” to justify practices that infringe on citizens’ freedom and liberty. From
the treatment of whistleblowers to the expansion of NSA surveillance programs, the
Obama administration has pursued “business as usual” regarding domestic surveil-
ance. What implications does this have for the state of democracy in the United States?
In some ways, this depends largely upon the nature of the Obama administration’s
response to the concerns outlined herein. If meaningful measures are taken to reign in
the nation’s vast intelligence apparatus to reinstate the necessary checks and balances
that ensure transparency and accountability, the President may help create a more open
federal administration. However, even if such reformist measures are taken, concerns
remain. The favoring of national security priorities over citizen privacy and government
transparency is a trend that binds the Bush and Obama administrations. The trend
forces us to consider what position future presidents may take when confronted with
the ever-present and delicate balance between these two objectives.

– Dov Friedman served as Lead Editor for this article.

NOTES

1 Barack Obama, The Blueprint for Change: Barack Obama’s Plan for America, 55. Available from:

2 The estimates for the cost of the wars in Iraq and Afghanistan range from 1.5–6 trillion dollars, while a 2010 estimate
by the Washington Post suggests that “some 1,271 government organizations and 1,931 private companies [now]
work on programs related to counterterrorism, homeland security and intelligence in about 10,000 locations across the
Ernesto Londono, “Iraq, Afghan wars will cost to $4 trillion to $6 trillion, Harvard study says,” The Washington Post,
war-veterans>.


3 Scott Shane, “Increase in the Number of Documents Classified by the Government,” The New York Times, July 3, 2005,


5 Barack Obama, “Transparency and Open Government: Memorandum for the Heads of Executive Departments and

6 The Presidential Memorandum on the Freedom of Information Act:

Presidential Memorandum on Transparency and Open Government:
The Presidential Memorandum on Transparency and Open Government established the Open Government Initiative, which sought
to promote “transparency, openness and collaboration.” This was followed by the “National Plan” for Open Government (issued on
September 20, 2011), a supplementary policy which highlighted open government accomplishments to date and outlined future
open government initiatives.


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The ambitious Data.gov project has come under criticism for its selective nature of releasing information. As noted by Amy Bennett of advocacy group Open the Government, what qualifies as a “high level data set” to be released on Data.gov remains largely undefined, leaving agencies the freedom to choose what information is released to the public.


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Executive Order 13556 - Controlled Unclassified Information:


15 The Freedom of Information Act declares that “any person has the right to request access to federal agency records or information except to the extent the records are protected from disclosure by any of nine exemptions contained in the law or by one of three special law record retention exclusions.”


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<http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB405/>.


One of the most prevalent clauses employed to withhold information is the “state secret’s policy. The “state secrets” policy was established through the 1953 Supreme Court ruling United States v. Reynolds. Such a policy could only be invoked if “there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged.” United States v. Reynolds: <https://supreme.justia.com/cases/federal/us/345/1/case.html>.


22 Peter van Buren, “Fear the Silence, Not the Noise,” Tom Dispatch, February 9, 2012:


23 An NSA official with previous experience with the CIA, Drake had raised concerns surrounding the decision to implement an intelligence program developed by government contractors for data collection (codenamed “Trailblazer,” at an estimated cost of $1.2 billion) over an alternative developed within the government (codenamed “Thin Thread,” at an estimated cost of $3 million) that included far greater privacy safeguards and was believed to be more effective at interpreting intelligence.

Peter van Buren, “Obama’s Unprecedented War on Whistleblowers,” Salon, February 9, 2012:

<http://www.salon.com/2012/02/09/obamas_unprecedented_war_on_whistleblowers/>.

24 Government Accountability Project, “NSA Whistleblower Tom Drake:”


www.thenation.com/article/161376/government-case-against-whistleblower-thomas-drake-collapses>


These disclosures were published in Risen’s book State of War: The Secret History of the C.I.A. and the Bush Administration. The New York Times declined to publish a piece submitted by Risen on the subject matter following a U.S. government request in the name of national security.


Seeing to clarify discrepancies in the manner in which intelligence was obtained by national security agencies, FISA ensured that warrants were required for all wiretap/spying operations, granted by a newly established FISA court.


Merkley’s amendment “would have required the government to either declassify Foreign Intelligence Surveillance Court (FISC) opinions, or provide unclassified summaries of those opinions.” As it currently stands, FISC rulings remain classified, and as such, the legal justifications for federal intelligence programs remain inaccessible to those outside of Washington. Mark Rumold, “A New Year, A New FISA Amendments Act Reauthorization, But the Same Old Secret Law,” Electronic Frontier Foundation, January 10, 2013, <https://www.eff.org/deeplinks/2013/01/new-year-new-fisa-amendments-act-reauthorization-same-old-secret-law>

“Jewel v. NSA,” The Electronic Frontier Foundation, <https://www.eff.org/cases/jewel>. The EEF filed a similar case (Hepting v. AT&T) in 2006, which was dismissed on the grounds of the retroactive immunity granted to telecommunications providers under the FISA Amendments Act.

“Hepting v. AT&T,” The Electronic Frontier Foundation, <https://www.eff.org/cases/hepting>


A copy of the slides leaked by Snowden may be viewed here: <http://commons.wikimedia.org/wiki/Category:PRISM_(surveillance_program)>

XKeyscore was described by the NSA within the PowerPoint slides as a program that collects “nearly everything a user does on the internet,” and can be used “to obtain ongoing “real time” interception of an individual’s internet activity.” Due to the high level of internet traffic on a daily basis, such data can only be stored for a short time frame by the NSA. However, “interesting” internet traffic can be further delegated to a series of other databases (MARINA, Pinwale and TrafficThief), which are able to hold the data for a longer period of time. Glenn Greenwald, “XKeyscore: NSA tool collects “nearly everything a user does on the internet,” The Guardian, July 31, 2013, <http://www.theguardian.com/world/2013/jul/31/nsa-top-secret-program-online-data>

Boundless Informant is described within the leaked PowerPoint slides as a means of “recording and analyzing where its intelligence comes from.”


Amish had sought an amendment to a defense-spending bill that would limit the NSA’s ability to access American phone records to those under a criminal investigation. Carney described the amendment as a “blunt approach” that would “hastily dismantle” a key counterterrorism tool.


59 Ibid.


68 Video from the press event may be viewed here: <http://www.nbcnews.com/video/nbc-news/52919132#52919132>. 


70 Ibid.

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The Electronic Frontier Foundation. “Jewel v. NSA.” <http://www.eff.org/cases/jewel>


SEEING ATROCITY CRIMES AS PROCESSES, NOT SINGLE EVENTS

An Interview with U.N. Special Advisor Adama Dieng

YJIA: While at Yale you spoke about the importance of managing diversity in order to prevent conflict. Can you talk a bit more about how you support member states in achieving this? Is this something you are currently working on within the Central African Republic?

Dieng: Almost all societies have diverse populations. Divisions between national, racial, ethnic, and religious groups and tensions fueled by past and present patterns of discrimination are among the key risk factors for conflict and atrocity crimes. Managing diversity constructively and building resilient, inclusive, and transparent societies is crucial for the prevention of violent conflict as well as atrocity crimes, which we define as genocide, war crimes, ethnic cleansing, and crimes against humanity.

My office supports Member States in preventing atrocity crimes through our ongoing engagement on these issues; by raising awareness about the causes of, and precursors to atrocity crimes, the measures that can be taken to prevent them, and through our capacity building program. For example, we provide technical assistance to Member States and regional organizations on early warning and response mechanisms. Since 2010, the office has provided support to the Regional Committee of the International Conference on the Great Lakes Region (the ICGLR) on the Prevention and Punishment of Genocide, War Crimes, and Crimes against Humanity and all forms of Discrimination. Through this forum we have also supported the establishment of national committees by several of the Member States of the ICGLR, including Tanzania, Kenya, Uganda, Zambia, and South Sudan. These committees, while they face challenges, can play an important role in preventing future atrocities.

We have also supported the initiative of Member States to establish national focal points on the prevention of genocide and on the responsibility to protect and to create regional

Managing diversity constructively and building resilient, inclusive, and transparent societies is crucial for the prevention of violent conflict as well as atrocity crimes.

Adama Dieng is the UN Special Advisor on the Prevention of Genocide. He recently visited Yale and YJIA spoke with him shortly after his visit.
networks that can offer support to their members. We have much to learn from the initiatives of those States that are trying to integrate the prevention of atrocity crimes into the work of their national administrations.

In preparation for the 2013 report of the Secretary-General on the responsibility to protect, which focused on the primary responsibility of States to protect their populations and what this entailed, my Office undertook a broad consultative process with Member States and civil society. The result was a comprehensive collection of best practises and recommendations, which could help Member States in fostering inclusive and resilient societies and in managing diversity.

Concerning the Central African Republic, we have been monitoring developments there since 2011. I am deeply concerned about the deteriorating security situation, the breakdown of law and order and the widespread, unchecked serious human rights violations and abuses against the civilian population, which are increasingly taking on sectarian elements. This is particularly tragic as people of different religions and beliefs have lived peacefully together in the Central African Republic until now. I have stated before that it is time to act in a decisive manner if we are to prevent a descent into hell in this country. I, together with my colleagues from the Office of the High Commissioner for Human Rights and the Office for the Coordination of Humanitarian Affairs, alerted the Security Council about our concerns at an Arria-formula meeting of the Council on November 1st. We called on the international community to take concrete measures to support the transitional government of the Central African Republic, which lacks the capacity to prevent atrocity crimes. In addition, I have called for the establishment of an international commission of inquiry and for accountability. I reminded the Council that the Central African Republic is state party to the International Criminal Court. My statement to the Council was widely reported in the media, which will hopefully draw more attention to this, unfortunately, often ignored crisis.

You also mentioned that there is a lack of discussion about morality in terms of international relations and foreign policy. Do you think current prevailing attitudes toward international morality are too permissive?

Dieng: I believe, and have stated before, that the international community does not always live up to its potential when it comes to preventing atrocity crimes. Too often we find ourselves looking back and having to admit that we could and should have done better, and done more. The genocides of Rwanda and Srebrenica are two severe cases in which the international community has failed to prevent and
respond in a timely manner. And, right at this moment, in Syria we are once again seeing how a lack of response costs lives every single day. It seems that morality often has to stand back, behind other interests, and that is certainly something we need to discuss more.

Speaking about the prevention of atrocity crimes, it is interesting to note that many States—especially in the developed world—perceive prevention first and foremost as a foreign policy matter rather than a domestic concern, linked to their aid and assistance to other States. This perspective fails to acknowledge that atrocity crimes can happen anywhere and anytime, and that no State is immune to them.

YJIA: In times of conflict, when political and legal institutions are frail, how do you go about strengthening institutions in order to prevent further escalation of violence? Is there any process of prioritization in terms of capacity building between judicial and democratic institutions?

Dieng: What I would like to emphasize here is that atrocity crimes are processes, not singular events. They do not simply occur overnight, but are being foreshadowed by the presence of risk factors and early warning signs, often over a period of years. Thus, there are many opportunities to prevent crises from escalating. After they reach a certain stage, however, the options for action are both more limited and more costly.

My Office has developed a framework of analysis to assess the risk of genocide, and is in the process of expanding this framework to assess also the risk of war crimes, crimes against humanity, and ethnic cleansing. Having these analytical tools is one important step toward successful prevention, as for each risk factor identified there is an opportunity to address that risk through appropriate preventive action. I cannot stress enough the importance of remaining alert, and taking early measures for prevention.

A government’s lack of capacity to take the necessary measures for prevention is of course a risk factor in itself. And often, as history has painfully taught us, national institutions often fail completely once there is a situation of armed conflict or a situation in which atrocity crimes are being committed, particularly when the State is the perpetrator. The strengthening of both judicial and democratic institutions plays a vital role in building resilience to the risk of atrocity crimes, and international, regional as well as sub-regional mechanisms can assist with this process. We have seen, too, that post-conflict transitional justice processes, in the form of truth-seeking, individual prosecutions, reparations, and institutional reform, can be very helpful in promoting reconciliation and preventing relapse into further violence. Reviewing constitutional protections, fostering political pluralism and creating legitimacy through respect for the rule of law in all areas of government, are also important steps toward the restoration of peace and stability. There is a way out of crises. However, we should remember that responses to atrocity crimes will always be more costly and more complicated than their prevention.
YJIA: Your Office has worked with Roberta Cohen and the Brookings Institute in pioneering the idea of “sovereignty as responsibility.” Can you talk us through some of the steps you take in persuading States to adhere to this principle and the implications for the Responsibility to Protect?

Dieng: My predecessor in this position, Francis Deng, worked with Roberta Cohen to develop the concept of “sovereignty as responsibility.” They argued that sovereignty can no longer be seen as a barrier to interference, but as a charge of responsibility under which the State is accountable to its people. During periods of conflict, particularly internal armed conflict, States have often failed to take responsibility for the protection of their populations and this failure has resulted in calls for action by the international community, including through intervention, in the most serious cases of State failure.

What we should keep in mind when talking about the responsibility to protect is that it is a principle that seeks to strengthen the sovereignty of states, not weaken it. History has shown that building societies resilient to atrocity crimes reinforces State sovereignty and increases prospects for peace and stability. The international community has a responsibility to support States in this regard, and to assist States that are under stress. My engagement with States has been very positive. They recognize the logic of this argument and are looking for ways in which to build their capacity to prevent atrocities so that their societies will flourish and will not be faced with the terrible human, political, economic, and social consequences of atrocities and conflict.

I should say that the 2013 report of the Secretary-General on the responsibility to protect underlines that there is no one-size-fits-all approach to atrocity prevention. It stresses that each context is different and sets out a variety of ways in which States can live up to their responsibilities.

YJIA: The RtoP states “the international community must be prepared to take stronger measures, including the collective use of force through the UN Security Council.” Do you think this statement has contributed toward a greater reluctance of countries to publicly state a finding of genocide?

Dieng: I would not say that States are reluctant to publicly state a finding of genocide. In fact the word “genocide” is overused and often misused. We should be careful with terminology and focus instead on facts, the careful, credible documentation and reporting of developments worldwide.
reporting of developments worldwide that could increase the risk of genocide and the provision of this information to those in a position to influence policy and action in a timely manner including, ultimately, the Security Council.

It is true that some States have raised concerns about aspects of implementation of the responsibility to protect, which they see as a challenge to sovereignty. The actual wording of the commitment made by all States in paragraph 139 of the World Summit Outcome is to “take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case by case basis and in cooperation with relevant regional organisations, as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations.” You will note the very careful language in this clause. As I noted earlier, responsibility is in fact an ally of sovereignty; collective action by the international community to protect populations is not called for where a State fully discharges its sovereign responsibility to protect.

In reality, also, the Security Council is extremely reluctant to authorize the use of coercive measures, even in the most extreme cases, as we have seen in relation to the Council’s deliberations on the tragic situation in Syria.

I believe that a focus on preventive measures undertaken by Member States and with the assistance by the international community, also described as pillar I and pillar II of the responsibility to protect concept, has the potential to address existing negative perceptions, establish clarity about and build trust in the concept. The clear focus on prevention in the 2013 report of the Secretary-General on the responsibility to protect was widely welcomed by Member States. During the informal, interactive dialogue of the General Assembly on the responsibility to protect in September 2013, States also overwhelmingly agreed that the General Assembly should continue consideration of the concept and that the next report and debate should focus on how the international community can assist States in protecting their populations from atrocity crimes.

**YJIA:** Some, such as Prof. William Schabas, argue that the International Criminal Tribunal for the former Yugoslavia confirmed a restrictive interpretation of the definition of genocide. Do you agree? Do you think wider concerns that the 1948 Genocide Convention is too limited will be solved by the evolution of international law?

**Dieng:** My mandate as Special Adviser as well as the work of my Office is primarily forward-looking. Our focus is to prevent atrocity crimes from happening in the first place, rather than interpreting them based on legal categories in retrospect. While such discussions are certainly necessary and useful in terms of legal purposes and the prosecution of crimes, we have to be very careful to not hold up preventive action with discussions on terminology. When it comes to saving populations from atrocity crimes, we simply do not have that time.

**YJIA:** How do you respond to critics who argue that the International Criminal Justice system and the human rights discourse have become politicized, conforming to principles of neocolonialism?
Dieng: Recently, as I explained at Yale, I have been concerned about developments that indicate an undermining of the International Criminal Court. My concern especially focuses on the relationship between the ICC and the African Union. In this context it is important to note that the establishment of the ICC was in fact an African achievement. It is doubtful that today the Rome Statute of the International Criminal Court would even exist had it not been for the—voluntary—support of so many African states. Further, we should not forget that five of the eight situations currently before the Court have been referred by African States themselves. I am, and always have been, a strong advocate for the work of the International Criminal Court, which is of critical importance for the pursuit of accountability. It is crucial to address these heinous crimes at the international level, especially in cases where national mechanisms lack the capacity to prosecute such cases, or where it is politically difficult for them to do so. I say this, bearing in mind not only the importance of ensuring accountability for past atrocities, but also because ensuring accountability decreases the likelihood of future atrocities. We should never forget that there can be no peace without justice.

YJIA: Looking forward, are you optimistic about the role of supranational legal structures in terms of the prevention of genocide? How do you think current stalemates within international institutions can be overcome? Is this where morality comes back into the picture?

Dieng: Some of the main risk factors associated with genocide are a history of genocide or other atrocity crimes against a particular population group and a lack of accountability for past atrocities. Thus, it remains extremely important to support both national and supranational legal structures and accountability processes. A fair and transparent accountability process does not only serve as deterrent, but also restores credibility in national institutions and helps with the difficult process of reconciliation in societies divided and damaged by conflict, thus reducing the risk of future atrocities.

We all have a role to play in advocating for preventive action, including national accountability processes and supranational legal structures, such as the ICC. We should engage with those actors who have concerns about the structures. Not to support accountability would be to fail the victims of atrocities.

— Interview conducted and edited by Louisa Brown.
A World in Need of a Grand Strategy
An Interview with Luis Moreno-Ocampo

YJIA: Mr. Ocampo, we’re delighted that you’re joining the Jackson Institute. Why did you decide to come to Yale this year?

Moreno-Ocampo: For my nine years as prosecutor I saw how the twenty-first century was changing the way in which we manage violence in the world. What I’ve learned is that I need to learn how to transform that experience into information and knowledge. That is why I like the Jackson Institute because firstly, it is global affairs, not international relations. I am doing a course on Gaddafi, because my feeling is that Gaddafi expressed something new, he showed the possibility to have a new global order, and also the limits—because nothing was perfect with Gaddafi—but there’s a possibility there. No one is thinking in a global strategy, a grand strategy, for the world. I believe that we need a grand strategy—not just for one country but also for the world.

I believe that we need a grand strategy—not just for one country but also for the world.

YJIA: Let’s go back to your time in Argentina. How do you think your experience as a prosecutor in the junta trials shaped your experience at the ICC [International Criminal Court]?

Moreno-Ocampo: When I was 32 years-old, suddenly I was involved in the junta trial in Argentina, the first trial where the top leaders of the country were prosecuted for massive atrocities. Argentina had a dictatorship, we went to the Malvinas-Falklands War, and then the dictatorship collapsed and we went to free elections. All of the information about the crimes committed by the dictatorship appeared and there was a big debate: what to do? It’s amazing because Argentina has sixty years of coups d’état, and suddenly people are voting for law, and the Congress adopted immediately a law that no amnesty is valid here. The first act of the president was to request a case against the generals, and for some crazy reason I became the deputy prosecutor of the junta trial. It was my first criminal case; I never did a case before, so it was interesting. Argentina transformed this into a basic foundation of the new democracy.

Luis Moreno-Ocampo was the first Chief Prosecutor of the International Criminal Court. Previously, he was the Deputy Prosecutor in Argentina during the “junta trial” in 1985 and the Prosecutor in the trial against a military rebellion in 1991. This year he’s joining the Jackson Institute at Yale as a Senior Fellow.
Normally people assume that the police and the army control the criminals, and in this case the army and police were the criminals. And normally people assume the community is against the criminals, but in Argentina, many people—including my mother—were in favor of the criminals, so everything was different, and for me it was fascinating to see the limits of how lawyers think. Lawyers believe everything is the law, but in fact it is not—the law is relevant, and being Argentinian, I know how relevant the law is—the law in my country was the difference between life and death, so for me the law is no detail. But there are other dynamics, political dynamics, and how they mix—that for me was shocking.

In Argentina, [what] I learned, was that the killings, the dirty war, was not just an Argentinian problem, but part of the Cold War. The corruption cases were also global; the money was coming from outside, going outside, so that’s why we need to do something global. We had a country committed to requesting justice and the leaders ensuring justice. At the ICC it’s different. The global community is like a unicorn, you can see a picture but it does not really exist. That’s why in some way it was much more complicated and different [at the ICC] but I believe there is a global contingency in some way, it’s moving and growing.

**YJIA:** Do you think there is a trend toward a globalization of the ICC despite the fact that a number of countries including the United States and China seem determined not to submit to its jurisdiction? Is that a threat to the future of the ICC?

**Moreno-Ocampo:** No, it’s showing something normal. The law is a tool for the weakest, no? If I am very strong, I don’t need the law, I can tell you what to do. But if you are weaker, you tell me, “Hey, you cannot do that. You should not do that, if you do that the police are there, the judge is there.” The fact that the biggest countries are not there and the Court is still working shows the power of the idea. I hope Climate Change is not ruining everything but if we are good, in twenty to forty years there will be a convergence.

When I started, President Bush was talking about me in his campaign with Kerry, “an unaccountable prosecutor” he was totally against. Just one year later he accepted the Darfur referral. In 2011, fifteen countries, China, Russia, India, the U.S., accepted the referral in Libya in one day—consensus. So, for me that is fantastic because it is the only twenty-first-century institution and it is working against all the predictions. That is what I think we need to understand better.

When I was at Harvard teaching, I had to leave because I was appointed prosecutor, and a colleague of mine told me: “You should reject the offer, Luis, it would be a shame for you, you will spend nine years at The Hague doing nothing on a single salary, because, without the U.S., how can you conduct investigations, how can you arrest people?” That was my challenge, and after nine years, we did it, the Court is in function.
I feel that we are not conceptualizing the changes, which are so fast, and I hope that my present place at Jackson Institute can help me to learn how to transform this experience into information—I have to learn how to be in touch with people like you. I believe that my generation, we were located in national systems, I see it in my colleagues, they cannot think in a global way. For you, it’s normal, you were born global, and we need that.

**YJIA:** In terms of creating a global strategy, how do you think you can persuade states to sign up to a global vision, to have more globalized institutions, when they might regard them as a threat to their sovereignty?

**Moreno-Ocampo:** Yes, I agree, that’s why the ICC is such an interesting and unique example. States agree to reduce their sovereignty to have a common system, but this also shows the limits because the agreement is very basic—it’s not about human rights, it’s just massive atrocities. I think something we have to learn is that globality means the limit is very, very small. For instance, I went to Libya, to Misrata, and one of the leaders showed me a museum of the martyrs with pictures of the people who died or were wounded in the fight with Gaddafi. I told them, “look, it’s very impressive to see the faces, but I don’t see here the faces of the girls raped, and I understand that you don’t want to expose them, but you should not marginalize them again.” One of them said “no, no, no, we are aware of that, and that’s why we have a program for them, we have a human rights program for them.” He explained to me, he gave me a lesson on tolerance and respect for differences. He said: “The problem is the girls raped lost their virginity, and therefore they cannot be married, they will be marginal forever. So, to fix the problem, we propose that people should marry them. To show leadership, if I have two wives, I marry two girls.” If you are a 15 year-old girl from Libya, you were raped, and your best option is to be the third wife or fourth wife of this 45 year-old man. What should I say? Nothing. That’s a national issue, there are many issues that should be solved nationally, there is no way that a global court could face—could help. We have to learn and to apply the proper solutions for some of the new problems of the world.

**YJIA:** Do you think there is a balance between seeking justice and seeking peace?

**Moreno-Ocampo:** This is a real issue, and it’s interesting because until the end of the Cold War, the overwhelming focus was on conflict between states and the threat to international peace and security. Since the Kuwait crisis, and the wars in Iraq, it was clear that an internal crisis could be transformed into a threat to international peace and security. So even before the formation of the ICC, the Security Council recognized that internal conflicts are threats to peace and security. There are two reasons for this. Firstly, no conflict is local; the genocide in Rwanda cost one million people, but then, the war in Congo affects seventeen countries and almost four million lives. Secondly, if you allow national leaders to be in power by committing massive atrocities, or to gain power through atrocities, you know your work will be difficult, because the effects of their actions will cross borders; they will be aggressive to others, or they will allow organized crime to develop in their countries, as with Al-Qaeda. The ICC is needed in the world today. No massive atrocity is just a national atrocity. Internal conflicts and
atrocities are threats to international peace and security. The ICC is part of the solution. Peace should be based on the principle that no leader is allowed to commit massive atrocities to stay in power. That’s a rule that’s difficult to enforce, but the rule is there.

**YJIA:** Can the ICC deal with transnational terrorist threats like Al-Qaeda?

**Moreno-Ocampo:** Of course! For organized crime, I don’t think the ICC would be the only solution. I remember, in Mexico in the 1980s we were thinking that organized crime was a Colombian problem just passing through Mexico to the U.S., but now we cannot control it. If we deny the problem, we cannot control it. We should really think about organized crime, because if not we will lose control and that’s not just a national issue. Somalia piracy is a similar example; it’s crazy how we are dealing with it. There are some issues we are not dealing with properly, and we need to think on that.

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When Rwanda happened, the world said no one cares about what happens in Africa, now we care about what happens in Africa but some people care about the leaders of Africa.

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**YJIA:** I don’t think we can have an interview without touching upon criticisms of an African bias within the ICC. Do you think the ICC is doing enough to address these criticisms?

**Moreno-Ocampo:** [Laughing] It’s funny. When this campaign [was] started by President Bashir, I remember the chair of the African Union going to see Ban Ki Moon and saying there’s an African bias. Ban Ki Moon told him “look it’s about genocide in Darfur, there’s no African bias.” When Rwanda happened, the world said no one cares about what happens in Africa, now we care about what happens in Africa but some people care about the leaders of Africa. For me, it’s interesting because you are not asking me about the genocide of Darfur; you’re asking me about an African bias, that’s a success of Bashir. He convinced us, abusing the colonial past, that it’s wrong to prosecute an African leader when he’s killing African victims. What’s happened, they have the right to kill African victims? Should European countries with their colonial past do nothing? The facts are: President Bashir is indicted for genocide in Darfur and he’s still committing the genocide, still women are raped massively and we’re not even talking about that. The law says I should prosecute cases where there is genocide and no national proceedings; the law is not saying I should present blonde, black, different genders, different countries. I don’t need to do gender representation. I have to focus on the crimes committed.

**YJIA:** Do you think the ICC needs to do more in terms of communicating this?

**Moreno-Ocampo:** No, the ICC needs to do nothing. You should scream each time [The] New York Times, says: “Why ICC is not in Syria, Iraq?” You should say: “Look, New York Times, there is no jurisdiction for the ICC, you are requesting intervening when there is no jurisdiction.” Do you see Supreme Court judges here explaining what they’re doing? No. We need people, communities explaining. The ICC is doing nothing wrong.
YJIA: How much flexibility should the ICC have when there are concerns that a prosecution might have negative consequences for national stability? For example in Kenya, some claim the charges against the President and Prime Minister are making it more difficult to transition into a functioning democracy after violent elections . . .

Moreno-Ocampo: I would say “read,” read the past and learn. In 2009, everyone was desperate in Kenya thinking there would be violence in 2012, at the next elections. When I was working on Kenya, I went there and met the president and prime minister and they said they would support the prosecutor, and in fact the elections were pretty quiet and calm. I resisted the idea of some, that I should arrest Kenyatta Uhuru, to [prevent him] from running to be a candidate for the presidency. I moved no finger; it was not my role to try to stretch the judicial system to define an election in Kenya. The voters in Kenya elected and Kenyatta was smart enough to present a reconciliation process. Now, they are pretending “we cannot be prosecuted.” Well, O.K., [you may be] president, but you should respect the law, and in fact, respecting the law is the way to keep Kenya stable. The ICC is helping a lot, even today, to keep Kenya stable.

YJIA: Are there ways the ICC can help national-level trials take place, working in a facilitating position as a mediator rather than having to take people to The Hague?

Moreno-Ocampo: I know how important it is to be as local as you can. The legal standard is clear; the ICC has no primacy in the national system. Libya has the primacy to prosecute cases themselves. The ICC is basically like a panopticon. ICC is watching; states are doing more. Colombia is an example. The best outcome for the ICC will be zero cases, because zero cases means “no genocide” or that the international system is working. ICC is just a back-up system.

YJIA: In the case of Libya could you talk us through how do you decide who should be tried where?

Moreno-Ocampo: For us it’s obvious. We collect evidence, we review the evidence, and we define who is prosecuted, and that’s it. We follow the evidence. Diplomats don’t understand that. We try to prosecute those who are most responsible. We are not investigating who pulled the trigger, we are investigating who organized the system, gave an instruction, that’s what we did with Gaddafi’s regime. At the beginning I was insisting to my people that the evidence is good for Gaddafi but not for the others, but they convinced me that we also had enough for Saif and Sanoussi. We have good evidence that Saif was organizing the massacres and Sanoussi was implementing the decisions.

YJIA: So with people like Sanoussi in the Libya case, how do you decide who gets tried in Libya and who gets tried in ICC?

Moreno-Ocampo: When I received the referral, we started the investigation immediately, and in the middle of the conflict we had the evidence and we indicted Gaddafi, Saif, and Sanoussi. When Saif was arrested, I went to Tripoli to try to convince the government to let us do it. The leader of the government said to me, “Prosecutor, we are very grateful for what you did, because in those days we could not. But now we are a government, we should do it ourselves.” Saif is still in discussion, because it’s a
problem, but in Sanoussi they won. The ICC judges accepted the primacy of the national state. The problem with Saif is the fact that he is not yet in the custody of the national government. Saif is under the custody of the local militia, which is not giving access to the national government, so that is a real issue. As soon as this problem is solved, I think the Libyans will win the case.

In nine years the ICC became operational, it started with the U.S. and China strongly against and in 2011 they’re both in favor, that is the reality, it’s not idealism.

The issue is not about the court operations. The issue is about how humanity should enforce the same rules.

*YJIA:* Do you think some people see the ICC producing threats that don’t necessarily materialize in anything?

*Moreno-Ocampo:* Yeah I agree. Look, you don’t need to believe. Something is happening here. In nine years the ICC became operational, it started with the U.S. and China strongly against and in 2011 they’re both in favor, that is the reality, it’s not idealism. If State’s are committed to executing the warrant, then the threat will be much stronger.

We need to understand, to use it better. I did an op-ed on Syria because we can use the ICC in Syria, for the future. You can say: “In June 2014 the Security Council can decide whether to have the ICC there, six months to stop the crimes and negotiate a solution. If not, the ICC will intervene and to be sure they are afraid, request plans to arrest people.” With this combination then you send Kofi Annan, not naked as before. You send Kofi Annan with a threat and then you change the situation. It’s funny because, what I’m saying is exactly what any federal prosecutor in the U.S. would do to destroy mafias or organized crime. They use the law to threaten and to manage people but that’s new in international relations. That’s why, for me, one of the things I want to do at the Jackson is to try and see how to harmonize better the political decisions, the judicial decisions, and the media decisions. We should integrate and provide some tools. In twenty years the world stopped smoking in bars. We can stop leaders to commit massive atrocities.

*YJIA:* How do you see the ICC evolving in the future?

*Moreno-Ocampo:* The ICC is succeeding; the issue is that we’re not taking advantage of it. We need to understand how to control other massive atrocities, organized crime, human trafficking. The ICC is a beautiful global model because it respects national states. We need to learn how to transform this model to different areas. The issue is not about the court operations. The issue is about how humanity should enforce the same rules. I hope in the next semester we can start to find a new way of thinking. There is a possibility to do something big in the world today. We can do it. Live for it. Fight for it, or it will be impossible. It’s your generation who can do that.

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*Interview conducted and edited by Louisa Brown with assistance from Mads Neumann and Scott Ross.*
Transparency as Professionalism
An Interview with Xingzui Wang

YJIA: The China Foundation of Poverty Alleviation is the largest NGO [Non-Governmental Operation] in China. Could you give us a little bit of background on the Foundation and how it works with governmental institutions?

Wang: I’ll start by giving you some context as to how Chinese NGOs were founded. From 1949 to 1979, there were no NGOs of more than one term. Only after Deng Xiaoping started the reform agenda in the late 1970s when some of the functions were removed from the government to the market, did they emerge. Economic development did not benefit all the people. No matter how powerful the government is they are not able to reach out to every corner of society to meet the individualized needs of these marginalized people. It was at this time that there was a need for NGOs. Retired senior government officials, created all the “Gongo’s” so naturally they had a strong affiliation with the government, they were extended arms of the government.

YJIA: So do you see the creation of these NGOs coming from a sense of market failure first and foremost or from a government failure?

Wang: That’s right, as a result of market or government failure, or both. That’s why government bodies created them. This of course restricted the growth and development because they used administrative powers to implement projects. They didn’t care about whether the money from donations reached their potential beneficiaries, and how the money impacted these marginalized people. There is a national foundation, and they channel the money from Beijing to province to prefecture, to county to village and who knows where the money has gone? The entire process is not transparent. Our organization was managed like this. There was a crisis in the late 1990s, we were on the verge of bankruptcy and we realized it was extremely important for the organization to be restructured. A radical reformed agenda was put up. One of the most important acts was what we called “de-gongoing,” the process of moving away from the government to become a real NGO.

All Chinese NGOs have administrative affiliation or government status, for example if you a ministerial-level foundation, that means the chairman of your foundation is a minister. We wanted to remove those kinds of things, make it more market-based.

Xingzui Wang is currently a World Fellow at Yale and the Vice President of the China Foundation for Poverty Alleviation. He has over twenty years experience working on issues of rural poverty and development in China. Under his watch the Foundation grew to serve over 1.5 million people each year.
A chairman is a chairman, a CEO is a CEO. It has no connection with whether you are ministerial or vice ministerial government official. Then we applied the principles of business management into the NGO. As a result, the efficiency and effectiveness has increased significantly. In the past decade the number of our staff has increased from 20 plus to around 1200, and annual revenue has increased twenty-five times as compared to ten to fifteen years ago.

They don’t interfere in senior management elections, they don’t interfere in our regular operations, and they don’t interfere in our organizational management. We have a kind of a cooperative government structure.

YJIA: And this restructuring, the introduction of greater market based principles- how has it affected governmental relations?

Wang: Now we are partners with the government. We are not enemies, not opponents, not rivals. Of course in political terms they are our host organization, so we have a government ministry to host us. You have to be hosted by the government ministry before you can actually register with the registration authority; it’s a pre condition. I think our relations are very good, we understand each other, we support each other, and we work on similar priorities. They don’t interfere in senior management elections, they don’t interfere in our regular operations, and they don’t interfere in our organizational management. We have a kind of a cooperative government structure.

YJIA: You are also a board member of the China Foundation Center, a transparency promoting organization within the Chinese NGO sector. Has this “de-gonging” been successful in terms of increasing transparency within the sector?

Wang: I think that transparency is a part of professionalism. Of course at that time there was never any requirement at all for the government to disclose any information about how their money, or budget, was spent. So the NGOS were not encouraged. When they got the money from the government, they delivered the money to different levels of government; they were not really involved in designing, planning, implementing, and monitoring the value of the projects. They didn’t have that kind of professionalism and capacity to deliver a project to people who needed it. As a result, they don’t have data of the projects, who the beneficiaries were, and what the impact of the projects on the targets was. They couldn’t disclose information, and that’s why they couldn’t be transparent.

Moving away from the government and becoming a market-based NGO, following the principles of business, helps to build a capacity of professionalism. I think that the word “professionalism” is the big issue in order for an organization to be transparent. As far as we’re concerned, apart from building professionalism, and ourselves being transparent, we’re supporting the whole NGO sector to build capacity in this area. So
in 2011, we, along with dozens of Chinese NGOs founded China Foundation Center, inspired by the Foundation Center in the U.S. based in New York.

I did some hard work in 2011; in 2012 the center has developed a Foundation Transparency Index (FTI). The FTI has about sixty indicators. These indicators collect information about an NGO, what their research is, what their mission is, who their chairman is, who their director is—all kinds of legal information. It also collects data on their finances: how much money they raise and spend on projects, and how much money they spend on administration. There is project information [that looks at] how many projects are being implemented, where they are, what they do, what kind of people they target. Then they have information on donors, who they are, what they do.

This initiative has been broadly welcomed by NGOs and by the government. The FTI is an automatic information system. Once you provide all the information they can provide a score. The score or performance is reflected and displayed on the website. So anyone interested in the NGO sector, about the degree of transparency of a particular organization or NGO, you can actually find the information on the website.

YJIA: You’ve been working on poverty alleviation for the past twenty years, what are some of the most successful policies you’ve witnessed?

Wang: In terms of poverty reduction, the most important factor is overall economic growth. The second reason nationwide poverty reduction has been so successful is that it has been led and driven by the government. I suspect China is one of the few countries in the world that has a nationwide poverty reduction program. The central government is the institution that works out a plan, and works out a budget, and has an entire system that is reaching village level. They work with multilaterals like the World Bank. NGOs do play some role, but as you know, NGOs are a new thing and are pretty young and their capacity, of course, is rather limited. As far as I can see, the most important thing for an NGO is to identify issues. Given that they are working in communities, they have very close contact with people in need, they are relatively more sensitive to social issues and can identify the issues earlier than other stakeholders of society. They find a way to address these social issues, and on the basis of that they develop a model, then they advocate the issue in society which will arouse the interest of another stakeholder, particularly government, and businesses.

Let me give you an example. Poverty in universities was once a severe problem. In the 1980s and early 1990s [the] Chinese education system was public, the government sponsored it all. When I was in university, I didn’t have to pay anything, on the contrary, I was given an allowance to cover my living costs. Our education was free. After the middle 1990s this policy was changed, so all universities, even public ones, charge now, and it’s very high, particularly in comparison to the poverty line. The poverty line at the time was 1000 Yuan, which is $115 a year, and in university you’re spending something like 10000 Yuan, which is ten times the annual income of a family.

In our investigation surveys, we found that the poverty percentage in universities was
20 to 30 percent, and 8 percent were part of absolute poverty. We then launched this new “Great Wall” project, which provides scholarships to poor university students, and some other NGOs followed. After eight or nine years of hard work, this became a heated topic in society. Wen Jiabao was premier at that time and said: “Yes, we’ve got money.” That next year they allocated something like 16 billion Yuan or around $2.6 billion in U.S. dollars a year to sponsor poor university students. This is a role NGOs can play. We identified a problem, found a solution, and the government followed. Actually, the standard the government adopts is just like ours. For example, we give 2000 Yuan a year to students to cover their living costs and the government exactly followed that standard.

**YJIA:** You’ve largely focused on rural poverty so far in your career, how has urbanization affected your work on poverty?

**Wang:** Currently in terms of the number of poor people in China, the official figure is 120 million, out of which 100 million are rural poor, while only 20 million are urban poor. Poverty is really dependent on the speed of urbanization, if it’s a man-made push toward urbanization, forcing people without the skills to move to urban areas, then there is bound to be more poverty there. The new government seems very enthusiastic about urbanization, and recently there has been a lot of criticism. They should not develop a policy to speed up urbanization but they [government] say that urbanization is a result of economic growth.

**YJIA:** So do you think there should be a greater focus given to rural poverty over urban poverty?

**Wang:** I think the government has already paid a good deal of attention to rural poverty, nationwide programs have been implemented since the early 1980s to support rural poor. Instead of increasing resources toward rural poverty, I think the priority on poverty reduction should be shifted. After three decades of massive poverty reduction, basic infrastructure like roads, electricity, water have been largely resolved, or improved. Rather than simply provide these people with enough food or clothes, housing or shelter, it’s now more important to improve their income and social services—like health, education, and safety net—these sort of things.

A poor village in China is a very harsh place to live. Farming the land is almost impossible. It’s very hard to lead a decent life. Most of the people there are very poorly educated. They maybe have no education at all, or two to three years of very basic education, so they don’t have required skills, they can’t even read. Even if they move to the city, they can’t work there. Only if they received better education, vocational education or higher education will they move to the city and find better jobs. Rather than simply giving money to people, you should find
a way to build their capacity. Vocational education I also think is extremely important. Poor kids, because of family circumstance, will not be able to go to universities like in Beijing or Shanghai; vocational education, however, is everywhere, costs less, and many manufacturing industries require skilled workers.

**YJIA:** Centralization appears to have been critical in alleviating poverty in China, do you see this as an alternative model to poverty alleviation that emphasizes decentralization?

**Wang:** I think so, but China’s success is not just based on centralization, it’s a combination of decentralization and centralization. In terms of mobilization of resources, I think centralization is really good. But in terms of project implementation, in the initial years it was too centralized. The World Bank and the UNDP [United Nations Development Programme] came to China and taught the Chinese government about participatory appraisal and planning and that was adopted. So at the planning and implementation stage there was a kind of decentralized approach. I think there should be a combination. If you have a central will and you are determined to tackle this problem, in terms of resource mobilization, centralization is really good.

**YJIA:** Some statistics suggest there has been greater instability this year in China, is this something you’ve found?

**Wang:** I think so. The government spends a lot more money on safeguarding and maintaining social stability, but I think they should resolve some of the problems that have been causing instability.

I think the social sector represented by NGOs should play a greater role. Currently it’s really tiny, about six million people are employed which is less than 1 percent of the national labor force. The funds and annual revenue of the NGO sector last year was roughly 81.7 billion, which is only about 0.16 percent of the GDP, in the U.S. it’s about 2 percent of GDP. I think that in terms of upcoming reforms there should be less restrictions and more support for NGOS on the ground. Growing a more robust social sector should be one of the priorities of reform. 

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_Y– Interview conducted and edited by Louisa Brown._
The Age of Democracy and Reason—Can South Asia Find Lasting Peace?

By Probal DasGupta

Around 2005, South Asia was a patchwork of two dictatorships, two monarchies, and three democracies—including one engaged in a civil war. Eight years later, the region boasts six countries with democratically elected governments, while the lone dictatorial regime lumbers its way toward democracy. So, is a region with a reputation for producing a mélange of autocratic governments, strife-torn states, and monarchies, undergoing a political catharsis?

In a historical first, six countries in the region have gone, or will go, to polls between 2013 to 2015. Unexpected things have happened: Pakistan underwent a democratic process to elect a government, Bhutan transitioned from monarchy to democracy, Nepal and Bangladesh brace themselves for acrimonious elections, India yearns for better governance, and Myanmar moves fitfully toward a more democratic system.

Most of these countries are still transitioning from being authoritarian states to newly formed pluralistic societies with shared problems of unrest, uncertainty, and violence. In this context, the occurrence of elections in this region is like a silent revolution that promises positive change, political multilateralism, and social inclusivity. Whether governments can enforce peace in the region, however, will depend on their capacity to engage with other states in the neighborhood to achieve common goals.

Take the example of Bangladesh. Ten years ago, Bangladesh was dubbed the world’s jihadi capital with fledgling terror camps in the country that aided insurgent organizations in northeastern India and Pakistan. Over the last five years, the current Awami League government in Dhaka clamped down on clandestine terrorist camps. This facilitated the dismantling of major insurgent groups in India that fed off these camps, primarily the United Liberation Front of Asom (Ulfa).

For its part, Indian intelligence helped Bangladesh nip a Hizb ut-Tahrir-supported coup bid against the Dhaka government in 2012. Such actions increased mutual trust, translating into both increased cross-border trade and $7–$9 billion worth of direct

Probal DasGupta specializes on investment and political risks in South Asia and works as an Associate Director (South Asia) for Control Risks—a global political and business risks firm. Mr. DasGupta holds a master’s degree in international affairs (MIA) from Columbia University in New York.
Indian investment in power and road infrastructure in this region—a move which could further isolate insurgent groups that have been trying to win local support.

In Myanmar, the changing political landscape raises hopes of free and fair elections in 2015 and it increases confidence among neighbors and investors. A people’s government would have greater public approval in addressing internal strife in Kachin and could help prevent the exploitation of recent Buddhist-Muslim religious riots\(^2\) by Lashkar-e-Taiba and al-Qaeda.

As a new democracy, Nepal is trying to achieve political stability. Having flirted with monarchy and violent communist upheavals, the country’s politicians have now been consolidating ties with the government in Delhi. Increased information sharing between the two countries led to the arrest in Nepal of Yasin Bhatkal, a notorious terrorist wanted for multiple attacks in India.\(^3\) In return, India provided logistical assistance and training to the Nepal administration before the November 2013 elections. Both nations have begun to see explicit value in bilateral cooperation on security issues.\(^4\)

The optimism in the eastern part of South Asia is mostly absent in its western part. The government in Pakistan relies on the support of radicalized sections of the Pakistani army and remains vulnerable to the surge of extremist elements. President Nawaz Sharif, upon his reelection in June of this year, raised hopes of reinitiating dialogue with India, relegating the more contentious issues to the backburner.\(^5\) Despite the overture, major strikes in September by infiltrators in Indian Kashmir derailed talks between the two countries and punctured Sharif’s credibility.

The inability of national leaders such as Imran Khan to condemn the Taliban for its attack on child activist Malala Yusufzai reveals the Pakistani government’s total lack of control over the country’s radical elements. The Pakistani government will need to show more resolve and decisiveness to face internal and external threats and reorganize its internal political power equations to establish preeminence of the elected civilian government over the intelligence services and the army. A more credible internal authority will help the government fruitfully engage with the governments of India and Afghanistan. President Sharif’s appointment of a new army chief is a step in that direction. India goes to the polls in 2014, and the recent remarks of its ruling party and opposition leaders, coupled with President Sharif’s promises, indicate a possible opening for dialogue. How India and Pakistan deal with the withdrawal of Allied forces from Afghanistan in 2014 and the increased likelihood of infiltrations and terrorist strikes in India, however, remains a standing question.

The upcoming elections—including the one in Afghanistan in 2014—provide opportunities for states to elect and empower their governments. Empowered governments are able to exercise better internal controls and engage each other more credibly. As the smaller nations in eastern South Asia—Bhutan, Bangladesh, and Myanmar—have moved in that direction, whether the region’s larger nations follow suit remains to be seen. \(^\text{Y}\)

– Mads Neumann served as the Lead Editor for this op-ed.
NOTES


4 Deccan Herald, “Tunda, Bhatkal were arrested in Nepal,” August 30, 2013, <http://www.deccanherald.com/content/354266/tunda-bhatkal-were-arrested-nepal.html> (accessed October 20, 2013).

TAKE A LOOK AT THE TAG CLOUD from this journal’s webpage, http://yalejournal.org/. The frequency with which a given word or phrase is tagged in relation to the YJIA’s content is shown by relative size, an indication of that topic’s level of coverage. For example, protracted American military and political engagement in the Middle East is highlighted by the prominence of words like “Afghanistan,” “Pakistan,” “Syria,” “Libya,” “Israel,” and the term “Middle East” itself. The importance of China in global politics and economics is clear as well. The size of thematic keywords such as “development,” “diplomacy,” and “terrorism” is evidence of ongoing concerns with these issues. The list is alphabetical, and easy to scan for topics of reader interest. Recently, I did, and was struck by the feeling that something was missing. Perhaps this is unfair—there are, of course, many topics “missing,” because no journal or news source can cover everything—and it certainly reflects my own biases. But my question remains: where is Japan?

As a historian of Japan and an avid follower of the news on Japan and its international affairs, this omission is mysterious. I am puzzled not just by the conspicuous absence of the world’s third largest economy, but also of the United State’s most important strategic and economic partner in Asia. Take economics. Japan’s importance to the U.S. economy is actually increasing; imports from resurgent Japan were up 18 percent in 2013.¹ This alone should put Japan somewhere on our radar. And what of the American-led, twelve-party Trans-Pacific Partnership (TPP)? Japan is the second-largest participant in ongoing negotiations toward a regional free trade bloc agreement.

What does the omission of Japan from the word cloud tell us? One might suggest, for example, that it indicates the Obama administration’s “pivot to Asia” was mistaken given the global realpolitik, or that U.S. interest in foreign and international affairs is colored by ideological or economic agendas.² I do not claim to have an answer in either case. But we should be wary of the transparency of the quotidian. By this I mean that we rarely notice things until they change, until they are threatening—or threatened—or lost. Historians have historically been particularly guilty of this fallacy: we have tended

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Nathan Hopson is a historian of modern Japan. He is currently a postdoctoral associate at Yale University’s Council on East Asian Studies, where he is completing a book manuscript on Japanese postwar regionalism and nationalism in global context.
to write histories of change, not constancy, histories of impactful events, not states of being. To be sure, a history of wars and coups d’état and economic crashes and natural disasters is more exciting. And to be sure, these dramatic and epoch-shaping events have meaning. But such histories are more the products of exclusion than of inclusion; they often leave out the details of daily life, and exclude women, children, minorities, the elderly, nature, etc.

Leaving Japan out of our thinking on international affairs carries with it the same risk of badly warping our understanding of the world, until it is too late. In addition to long-standing disagreements with South Korea on historical interpretation, the return of Japan’s hawkish prime minister Shinzo Abe escalated a preexisting territorial row with China, with serious implications for U.S. foreign policy. Mr. Abe’s commitment to “active pacifism” includes transforming Japan’s Self-Defense Forces into a National Defense Army, asserting the right of collective self-defense, and accompanying revision of Japan’s “Peace Constitution.” Japan’s neighbors are not amused. Because of American treaty obligations—as well as our containment agenda vis-à-vis China—some observers are concerned about military implications for the United States.

In his Pulitzer-prize winning Embracing Defeat, historian John Dower suggested that the United States and Japan have been locked in an embrace since Douglas McArthur stepped onto the tarmac outside Tokyo, corncob pipe jutting from his mouth. Japan was the United States’ most intimate and important Asian economic partner, political ally, and military installment throughout the Cold War, and remains so today. We share more core values and interests than not: The United States and Japan are both Pacific nations, developed democracies, economic giants, providers of massive foreign aid, and more. Dower was right, though no one ever said our passionate postwar embrace was an equal partnership. Indeed, the Japanese have a less romantic phrase to describe our relationship: “When America sneezes, Japan catches cold.”

My suggestion here is that America ought to be a bit more concerned about catching a cold from Japan. The problem with contagions is that the most effective ones are so precisely because they are undetectable until it is too late. To put it another way, shark attacks are terrifying, but bee stings kill more people. More vigilant attention to the everyday—and to Japan as neighbor, ally, and trading partner—is key to heading off unpleasant surprises down the road.

— Mads Neumann served as the Lead Editor for this op-ed.

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Since the end of World War II, China has been involved in more territorial disputes than any other state. The vast majority of them, seventeen out of twenty three according to M. Taylor Fravel, have been settled by bilateral agreements, “usually by compromising over the sovereignty of contested land.”¹ Over half of these seventeen settlements have come since 1991.² Beijing’s conduct in this regard has been consistent with, and is in part the basis for, a prevalent view in much of the western academic literature on the People’s Republic of China’s (PRC) contemporary grand strategy. The literature has underscored the centrality of Chinese reassurance and the necessity of maintaining an essentially peaceful regional environment that enables Beijing to continue concentrating resources on domestic economic, technological, and military development.³ Beijing’s strategy, as one scholar put it, has “emphasized actions, and not just words, to reassure China’s neighbors and to enhance the PRC’s reputation as a more responsible and cooperative player.”⁴ According to this prudential calculus, as China continues its development, an aggressive posture toward its territorial conflicts is unlikely as the costs would outweigh any gains.⁵

Over the last several years, however, Chinese conduct with respect to several of its outstanding territorial disputes has been widely viewed as significantly more assertive and less compromising. Since 2012, Chinese government ships and aircraft have regularly entered the disputed waters and airspace around the Senkaku/Diaoyu Islands, a collection of islets in the East China Sea claimed by both Beijing and Tokyo but which have been administered by the latter since 1972.⁶ In a particularly disturbing episode in early 2013, a Chinese military vessel was said to have aimed a fire-control radar at a Japanese destroyer.⁷ In the spring and summer of 2013, People’s Liberation Army (PLA) detachments crossed the Line of Actual Control (LAC) with India, establishing camps in eastern Ladakh and Arunachal Pradesh and displaying signs calling for the withdrawal of Indian forces.⁸ According to the Indian government, since 2010 there have been over 600 Chinese violations of the LAC.⁹

Andrew Taffer is a PhD candidate at The Fletcher School of Law and Diplomacy, Tufts University. He formerly served as a Research Fellow with the U.S.-China Economic and Security Review Commission and as an analyst with the Long Term Strategy Group.
With reference to the prevailing understanding of PRC strategy, China’s conduct in the South China Sea has been arguably even more puzzling. In 2012, during a months-long standoff with the Philippines around the Scarborough Shoal, China reportedly deployed nearly 100 vessels to the area, quarantined valuable Filipino exports, and finally roped off the lagoon’s entrance, effectively taking de facto control of the shoal. That summer, China announced the initiation of “combat-ready patrol[s]” in disputed areas of the sea and the garrisoning of Yongxing (Woody) Island. Beginning in 2013, Hainan Province authorized maritime agencies “to board or seize” foreign ships that “illegally” enter Chinese waters in the South Sea. Chinese naval and coast guard vessels later in the year began circling the Second Thomas Shoal, 120 nautical miles from Palawan, where Filipino marines have been living on a ship grounded over a decade ago.

What makes China’s assertive conduct in the South China Sea particularly disconcerting is that it has gone a long way toward bankrupting a large reserve of good will Beijing built up over years of courting Southeast Asian states earlier in the century, and often with great success. Much of the multilateralism and cooperation highlighted in the scholarship on contemporary Chinese strategy was with Southeast Asian states. Observers remarked on the initial successes of Beijing’s approach, and some argued that far from balancing against China, Southeast Asian states were accommodating its rise. Beijing’s recent conduct, however, has exacerbated the security dilemma unfolding in East Asia between the PRC, on the one hand, and its neighbors and the United States, on the other. Animated largely by what is perceived to be an increasingly antagonistic Chinese posture, the Philippines and Vietnam have been deepening their military ties with the United States. According to the logic of the literature on Chinese strategy, this seems to be precisely the kind of dynamic Beijing has been eager to avoid.

Does Beijing’s recent conduct along its border with India and in maritime East Asia—and its apparent willingness to incur greater costs and risks—constitute or portend a changing territorial dispute strategy? It has been argued that Beijing’s strategy in the South China Sea is to “delay” resolution of the disputes while seeking to “deter other states from strengthening their own claims at China’s expense.” While Beijing is not seeking the immediate resolution of any of its disputes, its behavior does not seem intended to maintain the status quo. It may be that, through periods of conciliation and escalation, China is aiming to change the status quo in ways that strengthen its claims. Whether or not this is correct, developments over the past number of years warrant re-examining not only our understanding of China’s approach to its territorial conflicts but also, more generally, its strategy for managing its rise in Asia.

—Mads Neumann served as Lead Editor for this op-ed.

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4 Avery Goldstein, Rising to the Challenge, 118.


First, the resurgent. While “America is in decline” is often presented as a fact rather than a contention, there is evidence that the United States is rebounding. For the first time since late 2007, U.S. home equity exceeds mortgage debt.1 Despite its sluggish recovery, the Economist predicts that the United States “will add more to global economic growth next year than China (at market exchange rates).”2 Its seemingly entrenched trade sclerosis also appears to be giving way; the Obama administration approved free-trade deals with South Korea, Colombia, and Panama in 2011, and is moving purposefully to finalize the Transatlantic Trade and Investment Partnership and the Trans-Pacific Partnership. The biggest factor in America’s comeback may well be the energy renaissance that it is experiencing: which observer a decade ago would have volunteered the possibility of U.S. energy independence by 2035?

The second America—the dysfunctional one—has received considerably more attention. It is the America of George Packer’s The Unwinding and Joseph Stiglitz’s The Price of Inequality; the America whose much-vaunted dream appears to be out of reach for a growing number of its citizens, and whose mode of governance is under growing attack at home and abroad. Writing on the 150-year anniversary of the Gettysburg Address, Harvard University President Drew Faust argued that:

We are far from modeling to the world why our—or any—democracy should be viewed as the “best hope” for humankind. The world sees in the United States the rapid growth of inequality; the erosion of educational opportunity and social mobility that ‘afford all an unfettered start, and a fair chance, in the race of life;’ the weakening of voting rights hard-won over a century of post-Reconstruction struggle.3

Approval for Congress has reached 9 percent, and a graphic that came out earlier this year demonstrates how rapidly Republican senators and their Democratic counterparts

Ali Wyne is an associate Harvard University’s Belfer Center for Science and International Affairs and a contributing analyst at Wikistrat.
are drifting apart, as the inclination toward moderation goes from virtue to liability. A visitor from outer space who spent some time learning about the first America would find the second one’s existence difficult to understand. It is not that the country’s leaders ignore the latter; they routinely, sincerely lament it and highlight the dangers of its continuation. The trouble is that the country’s preeminence—admittedly diminishing, in relative terms—has allowed them to be complacent about moving from words to reforms.

I happened to interview political-risk guru Ian Bremmer on the evening of October 17th, more than two weeks after the U.S. government had shut down but less than twenty-four hours after it had narrowly avoided defaulting on its debt. We discussed how the shutdown had opened up the United States and its institutions to international ridicule. Echoing its advocacy of recent years, China called for a “de-Americanized world” (this time, its call elicited considerably more attention because of how rapidly it has ascended within the global pecking order). And, as was to be expected, the shutdown renewed concerns about the United State’s ability to sustain its alliances and lead abroad. Former Under Secretary of Defense for Policy Michèle Flournoy recently argued that “[w]hen America’s inability to reach common-sense compromise grinds governance in Washington to a virtual halt, our competitors and adversaries abroad begin openly questioning our staying power on the world stage and making mischief. They also question the reliability of our security commitments and begin hedging their bets.”

But Bremmer’s larger observation was that, as on many a previous occasion, the United States had the luxury to sweep its dysfunctional governance under the rug—partly because of favorable trends, some of which I noted earlier, and partly because of enduring strengths. The dollar, for example, remains the world’s only reserve currency: ironically, then, even when investors rail against U.S. financial mismanagement, they are more likely than not to pour their money into dollar-denominated assets. U.S. military power underpins the global commons more than that of any other country. And for all of the (often deserved) flack that the “Washington Consensus” has received since the collapse of Lehman brothers, no coherent ideological replacement has emerged. I recently heard a Chinese official’s quip that the Washington Consensus and Beijing Consensus had only one commonality: they were both created in Washington.

I am not a declinist. I do worry, however, that the second America will come to constrain the first one more and more if policy makers continue to substitute avowals of U.S. exceptionalism for efforts to redress political paralysis (and the attendant societal ills). The question that most countries confront is whether they can reform in spite of their weaknesses; for the United States, one could well ask if it can reform in spite of its strengths.

— Mads Neumann served as Lead Editor for this op-ed.
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