

Kennedy School Review

JOHN F. KENNEDY SCHOOL OF GOVERNMENT
HARVARD UNIVERSITY

VOLUME 5, 2004



THE WAR ISSUE: CAUSES, CONDUCT, AND CONSEQUENCES

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Editors-in-Chief

Philipp C. Bleek, MPP '04

Roger Tansey, MPA '04

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Philipp C. Bleek
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EDITORIAL INTRODUCTION

THE WAR ISSUE: CAUSES, CONDUCT, AND CONSEQUENCES

In a year that has seen the continued emergence of an increasingly coherent and notably virulent strain of international terrorism, the launch of a U.S.-led preventive war against Iraq, and ongoing struggles with post-conflict stabilization and reconstruction in Iraq and Afghanistan, the relevance of examining the causes, conduct, and consequences of armed conflict scarcely requires justification. History is alive and well; conflict in all its ugly manifestations is here to stay for the foreseeable future.

“The War Issue: Causes, Conduct, and Consequences” is admittedly broad in its sweep. The *Kennedy School Review* has a tradition of addressing broad topics, in part because greater weight is given to publishing the strongest work produced by students at Harvard University’s John F. Kennedy School of Government than to focusing on a narrowly defined theme.

As the articles collected in this volume make clear, there is value in breadth. And breadth need not imply lack of coherence. Both individually and as a whole, these articles shed much-needed light on armed conflict and related issues. Each tackles a key set of questions, reflecting on issues of vital importance for policy makers, non-governmental practitioners, and analysts of conflict writ large.

What are the implications for U.S. policy makers of the nuclear doctrinal debates in which Chinese policy makers are currently engaging? Can a philosophy of individual self-defense morally ground a just war? Would a preemptive nuclear strike by the United States to take out weapons of mass destruction require Congressional authorization? Are suicide bomb attacks always contrary to the law of war? Can the application of negotiation theory and psychology provide a path towards peace in Colombia? Can a division of labor between war-fighting and peacekeeping form the basis for a strengthened, more efficient transatlantic alliance? How has religious diversity among the Kurds shaped both their internal culture of tolerance and their external predisposition toward conflict?

All of these are important questions, and each of the articles makes a significant contribution towards addressing them. Our hope is that by circulating some of the Kennedy School’s best scholarly work, the *Kennedy School Review* can help build a sense of intellectual community at the School while fostering both internal and external debate on issues we believe are vital now and for the foreseeable future.

Philipp C. Bleek
Editor-in-Chief

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Editor-in-Chief

CHINA'S NUCLEAR POSTURE AT THE CROSSROADS: CREDIBLE MINIMUM VERSUS LIMITED DETERRENCE AND IMPLICATIONS FOR ENGAGEMENT

PHILIPP C. BLEEK

Chinese nuclear thinking remains heavily veiled, but newly available primary sources and recent scholarship yield tantalizing insights. What emerges is a set of contradictions in posture, doctrine, and aspirations clustered around "credible minimum" and "limited" deterrent options, with profoundly different implications for the future of China's nuclear deterrent. Although some of these apparent contradictions may stem from insufficient information, as a whole they appear to be indications of a vigorous internal debate and hence signs of a nuclear posture in flux. As a result of this state of flux, actions by other actors that influence China's nuclear decision making assume particular importance. China has shown itself to be susceptible to both offensive/threatening (e.g., foreign missile defense deployment) and engaging/binding (e.g., arms control) influences. American policy makers in particular should bear China's current "sensitivity" in mind as they consider the impact of both threatening and engaging actions on China's future nuclear doctrine and posture.

A Veiled Posture and Doctrine

Less is known about China's nuclear posture, that posture's underlying doctrine, and the country's nuclear aspirations than those of any of the other declared nuclear weapons states.¹ Despite studied ambiguity on the part of Chinese officials, there is a broad-based consensus among analysts that quantitative and qualitative estimates of China's current nuclear forces can be bounded with reasonable confidence.² The same cannot be said of the country's nuclear doctrine. China has long taken strong public stances on a range of nuclear weapons doctrinal issues, in effect defining a public doctrine based on positive and negative declaratory constraints. But the behind-the-scenes stances of its policy makers have remained largely opaque.

Although all nuclear weapon-possessing states maintain considerable secrecy around their nuclear programs, China guards its nuclear secrets even more jealously. As Brad Roberts, Robert Manning, and Ronald Montaperto observe, "China is quite deliberately the least transparent of the acknowledged nuclear powers."³ Chinese nuclear secrecy has deep-seated roots. There is clearly a tradition of state and especially military secrecy in China.⁴ As Michael Chase, James Mulvenon, and Evan Medeiros note, "Chinese strategic thinkers have traditionally placed a great deal of emphasis on secrecy and deception."⁵ That said, it is unclear to what extent reliance on quotes like Sun-Tzu's classic "warfare is the art of deceit" comprises meaningful analysis, rather than orientalism or the potentially tautological "uniquely Chinese" approach adopted by some analysts.⁶

Chinese nuclear secrecy runs counter to the Cold War notion that transparency fostered predictability which in turn promoted stability. But that concept was based on large, survivably postured, roughly equal nuclear forces in the hands of the two Cold War superpowers. The radical asymmetry between China's "mini-deterrent" and the overwhelmingly more powerful American and Russian nuclear forces it must face may indeed make nuclear ambiguity the most prudent strategy. This is particularly the case in the context of a minimum deterrent doctrine, which holds that a credible risk of losing a few high value targets is sufficient to deter a potential adversary from launching a full-scale attack. This doctrinal approach appears to have shaped China's current forces.

That said, one widely suggested explanation for China's nuclear secrecy does not hold water. Roberts, Manning, and Montaperto argue that,

... the lack of transparency is intended to sow doubt about the exact nature of China's military capabilities, with the apparent hope that some will overemphasize China's military might (and thus perhaps be deterred beyond what operational factors would imply) while others underemphasize that might (thus helping China to reap the public diplomacy benefits of a military posture based on minimal capabilities, even weakness).⁷

The fact that the authors advance no argument for why both over- and under-emphasis will occur in directions that favor China, rather than in the opposite direction or in unpredictable ways, only emphasizes the flawed or at least incomplete nature of the explanation advanced for China's decision to "sow doubt." It makes more sense to think of China's preoccupation with secrecy as the country's low-budget, far less effective equivalent of the essentially invulnerable American Trident ballistic missile submarine. Secrecy makes a potential enemy less certain that it will be able to evade or minimize retaliation following a first strike on China; hence, secrecy enhances the deterrent effect of China's small nuclear arsenal. Uncertainty rather than over- or under-estimation is thus the essential product of secrecy. Considered from such a perspective, secrecy appears a rational response to the situation in which China finds itself.

An undated lecture apparently delivered to a military class in the late 1990s by a senior Chinese People's Liberation Army official and recently translated by the U.S. Defense Intelligence Agency sheds sufficient light while buttressing the above arguments to justify a lengthy quote:

... we show certain things and do not show certain things ... We vigorously publicize the progress in the development of the Second Artillery and some achievements in it [sic] training launches, but we do not show the performance, quantity and positioning of our nuclear weapons if we can hide them. It is commonly known among foreign countries that the scale of the nuclear force of China is not large, but they are not necessarily very clear just how small it is. There are all kinds of speculations in reports from foreign news agencies, and we take a laissez-faire attitude toward these speculations. Japan says that we have more than three hundred nuclear warheads, and we do not deny this rumor. The United States says that we have more than five hundred nuclear warheads, and we do not refute it, either. Comrade [Deng] Xiaoping once said, we just let others guess, and guess itself is a kind of deterrence. Since the enemy does not know for certain, it does not have the absolute confidence that it will be able to deprive us of nuclear arms through a nuclear first strike. Therefore, it will not venture to go off the deep end. This will enable us to achieve the goal of avoiding nuclear war.⁸

New Primary Sources Provide Tantalizing Insights

Despite China's persistent secrecy, in recent years information on Chinese nuclear doctrinal thinking has begun to be unearthed. A small group of path-breaking scholars have capitalized on newly available primary source material to lift the veil and offer tantalizing insights into Chinese nuclear thinking. This paper draws on much of this recent scholarship as well as directly on a few key primary sources, attempting to synthesize this material to present a coherent, comprehensive picture of what can currently be ascertained and what remains unknown.⁹

Roberts, Manning, and Montaperto have termed China “the forgotten nuclear power.”¹⁰ But if the term was ever appropriate to China, in light of the wealth of recent scholarship that no longer appears to be the case. Today Russia, with its vast, poorly secured nuclear arsenal and complex, deserves the sobriquet more than China, which—along with more recent entrants to the nuclear club India, Pakistan, and North Korea—has increasingly been hogging the media and scholarly limelight.

Why Doctrine Matters

China’s nuclear doctrinal thinking has particular analytical salience because doctrinal choices, rather than, for example, technological or economic constraints, seem to bear the greatest responsibility for China’s current nuclear posture.¹¹ China has large fissile material stockpiles—the acquisition of fissile material remains the most challenging step in the deployment of nuclear weapons—sufficient to increase its current arsenal substantially, perhaps as much as several times over.¹² And its developing country and aid recipient status notwithstanding, economically booming China also has the financial resources to fund such an increase, if desired, as its burgeoning space program makes clear. As Roberts, Manning, and Montaperto argue, “The small size of China’s arsenal can be traced to . . . doctrinal concepts.”¹³ Or, as Chase, Mulvenon, and Medeiros summarize the issue, looking forward, “Doctrinal issues . . . are closely intertwined with the modernization of Chinese nuclear forces. Chinese nuclear analysts are engaging in a debate that may redefine Chinese nuclear doctrine which directly affects force structure.”¹⁴

A Chinese Perspective on Nuclear Doctrine

Before delving into the specific contradictions found in Chinese nuclear posture, doctrine, and aspirations, a brief discussion of Chinese analysts’ approach to nuclear doctrinal issues is warranted. A recently published Chinese military textbook cogently sums up three doctrinal approaches—maximum, limited, and minimum deterrence—that appear to be widely accepted among Chinese nuclear analysts.¹⁵

Maximum deterrence seems to describe the arsenals of the United States and Russia—at least vis-à-vis China if not each other—and is characterized as requiring “powerful nuclear superiority” and using “threats of large scale nuclear attacks to contain the adversary.”¹⁶ At its logical extreme, this strategy requires sufficient dominance to be able to execute a nuclear “first strike” while minimizing “one’s own losses,” hence calling for overwhelming force dominance abetted by a “complete missile defense system.”¹⁷ This doctrinal approach draws frequent criticism from Chinese analysts, and to some extent may have taken the place of deterrence as the straw man of Chinese nuclear doctrinal debate, now that that previously frequently disparaged term has been widely accepted.

Minimum deterrence, a concept widely used in Western literature, is predicated on the notion that states will be reluctant to risk even a modest nuclear attack on high-value targets like population centers.¹⁸ As a result, a modest nuclear arsenal composed of “a small number of one type of weapon” and “targeted at the adversary’s cities” is sufficient for deterrence purposes if said adversary would not have high confidence in eliminating the arsenal with a first strike.¹⁹ Such a counter-value-based approach tends to focus on using nuclear weapons only to deter the use of nuclear weapons or similarly large-scale threats to national survival. This is the nuclear doctrine traditionally ascribed to China but is also a doctrine that has consistently drawn criticism from Chinese nuclear analysts as being insufficient for deterrence purposes.²⁰

Finally, limited deterrence describes an intermediate approach whose emphasis is on maintaining a deterrent “sufficient to give the other side a certain level of unacceptable damage . . . thus containing nuclear war.”²¹ In some Chinese writings this term seems to describe a

doctrine that resembles a robust version of minimum deterrence consistent with the stringent requirements set forth by nuclear theorist Albert Wohlstetter, but in other contexts this doctrinal approach also seems to encompass intra-conflict escalation control and counterforce war fighting.²² Limited deterrence is the doctrine most widely favored by Chinese nuclear analysts in available writings, as documented most extensively by A. Iain Johnston.²³

Contradictions in Posture, Doctrine, and Aspirations

China's current nuclear posture, the doctrine underlying that posture, and the country's nuclear aspirations are characterized by a series of contradictions clustered around minimum and limited deterrent options. The distinction between current doctrine and posture and "aspirational doctrine" was recently made by Gill, Mulvenon, and Stokes, who argued that "the evolution over time of China's doctrine and force structure is the story of trying to close the gap between real capability on the one hand, and what one might call 'aspirational doctrine' on the other," a gap they and other scholars have termed the "capabilities-doctrine gap."²⁴

It bears emphasizing that contradictions are found not merely between current posture and aspirations, although current posture leans more heavily toward the minimum side and aspirations seem to lean more heavily toward the limited side. Contradictions are also found within current posture and within aspirations, with expressions of both minimum and limited deterrence in the posturing of current forces and in discussion of China's nuclear aspirations.

Current Posture and Doctrine

China's nuclear posture has traditionally been identified as consistent with a minimum deterrence doctrine. Roberts, Manning, and Montaperto, for example, write that "from its start in the 1960s, China's nuclear posture has been one of 'minimum deterrence.'"²⁵ Such a posture and doctrine are consistent with the public declaratory statements Chinese officials have made about their country's nuclear forces and intentions. Most significantly, Chinese officials have pledged not to use nuclear weapons first in a conflict—a pledge that does appear to have affected force posturing rather than being mere rhetoric. China's public statements amount to a de facto declaratory doctrine, since China has otherwise not articulated a public doctrine for its nuclear weapons, preferring studied ambiguity (see previous discussion, pp. 1-2).

China's long-range or "strategic" nuclear forces—composed of roughly twenty nuclear-armed ICBMs—are postured in a manner essentially consistent with a minimum deterrent doctrine.²⁶ These weapons are few in number. They are relatively inaccurate and hence must be mounted with powerful multiple-megaton warheads. The missiles are liquid-fueled, requiring hours to fire and making launch on warning or under attack infeasible. And substantial effort has been devoted to enhancing their survivability, for example by basing them in caves and by constructing dummy missile silos.

At the same time, China has put considerable effort into developing non-strategic nuclear forces that appear designed to be used in counterforce, war-fighting roles against U.S. forces and bases in Asia and whose posture therefore cannot be characterized as minimum.²⁷ Observing that "viewed as an organic whole, the Chinese nuclear force structure defies simple categorization as either a limited or minimal deterrent," Gill, Mulvenon, and Medeiros attempt to resolve this contradiction by disaggregating the various portions of China's current arsenal.²⁸ They posit that China's nuclear forces can be thought of as three-tiered, with strategic forces postured as a second-strike minimal deterrent, non-strategic theater systems postured in a more offensively oriented limited manner, and non-nuclear but nuclear-capable ballistic missile forces assigned to play explicitly war-fighting-related roles.²⁹

This approach is illuminating but unsatisfactory. When seeking to extrapolate doctrine from posture, forces must be assessed in the aggregate—it is precisely the "organic whole" that

is the relevant frame of reference. For example, it would be a mistake to conclude that the U.S. nuclear posture is a combination of maximum deterrence counterforce and limited deterrence escalation control merely because the country fields both highly alerted, multiple-warhead intercontinental-range missiles and aircraft-delivered gravity bombs currently maintained at low levels of alert. In fact, it might be more coherent to conclude that China's current posture is consistent with the limited deterrent espoused by many Chinese analysts, with theater forces facilitating counterforce escalation control and strategic forces providing the counter-value last line of defense and ultimate deterrent.

The critical substantive question then may be whether China's non-strategic forces can fairly be characterized as war-fighting-oriented. Although some analysts—most notably Gill, Mulvenon, and Stokes—have characterized them as such, relatively little analytical evidence is offered for that judgment, although some of the Chinese doctrinal discourse related to targeting also buttresses the argument. Nonetheless, the mere existence of shorter-range nuclear-armed missiles need not violate a minimum deterrent approach, particularly given the proximity of potential threat Russia. And China's theater missiles appear sufficiently inaccurate—albeit due to technological constraints rather than by design—to make them effective only against relatively “soft” targets, rather than the hardened or at least semi-hard counterforce targets that a true limited doctrine would require the ability to hold at risk.

Understanding the posturing of China's non-strategic forces should be a research priority for at least one other (admittedly purely speculative) reason. It is possible that non-strategic forces are postured in a manner that strategic forces would be, absent resource-related, technological, or political constraints. This is possible because each of those constraints can be expected to apply more strongly to strategic than non-strategic forces. Strategic forces are more costly to deploy than non-strategic forces, so resource limits would restrict their expansion more strongly than in the case of non-strategic forces. Strategic forces require more sophisticated technological capabilities—additional rocket stages, more powerful fuels, and more robust, miniaturized warheads; hence, technological limitations would constrain strategic deployments more than they would non-strategic deployments. Finally, Chinese policy makers are likely to be most resistant to military advocacy for enlarged strategic forces because of the visibility of those forces, evinced by the fact that many foreign media and think tank references refer only to its twenty-odd ICBMs and ignore the hundreds of other warheads in its arsenal entirely. If accurate, these suppositions might make China's non-strategic nuclear forces harbingers of likely future changes in its strategic force posture if and when existing constraints are lifted or softened.

Aspirational Posture and Doctrine

Among Chinese nuclear analysts, there appears to be overwhelming advocacy for a limited deterrence approach that encompasses larger and more aggressively postured forces.³⁰ There is also corresponding advocacy of launch-on-warning or launch-under-attack nuclear war-fighting capabilities and intra-conflict escalation control and of the extension of deterrence beyond merely deterring full-scale nuclear or conventional attack.

At the same time, there is some advocacy for the traditional minimum deterrent approach. For example, the previously cited lecture apparently delivered by a senior People's Liberation Army (PLA) official supports a minimum deterrent approach, although with some incongruities that hint at positions more consistent with a limited approach.³¹ A number of analysts have concluded on the basis of primary source materials and examinations of China's current posture and modernization efforts that China is in fact seeking a credible minimum rather than a limited deterrent.³²

And given China's more minimum-oriented current posture, it seems reasonable to infer that non-military officials, whose views analysts know much less about, are more inclined toward a minimum deterrent approach. In fact, there are indications that the political con-

straints of no-first-use imposed by non-military officials are resented by military officials.³³ As such, their continued imposition speaks to the influence of civilian policy makers, who are apparently overriding their military counterparts on this and likely related issues.

Interpreting the Contradictions

In some cases, apparent contradictions or tensions within and between China's nuclear posture, doctrine, and aspirations may simply be a result of a lack of information. For example, relatively little is known about process issues—how debates on doctrine and posture are conducted and how decisions that affect ongoing development and deployment efforts are made on the basis of those debates. To the extent that apparent contradictions result from limited information, scholars are largely hostage to the passage of time and the gradual release or leakage of information.

One possible interpretation is that China is engaging in the same kind of vigorous debates that semi-independent, government-funded research institutes (e.g., the Institute for Defense Analyses or the National Defense University) do in Washington, while China's internal doctrinal policies are in fact far more consistent than they appear. But the Chinese debate is qualitatively different than the vigorous think tank debate in the United States. Primary sources make clear that officials at the highest levels of the military are considering these issues. That said, it is not clear whether officials at the highest levels of the central government are considering them, and that is arguably more important. So there is room for debate and disagreement here

It is also difficult to judge whether this debate is a new development—certainly, elements of Mao Zedong's thinking were equally contradictory. Serious doctrinal debate dates back only to the mid-1980s, and some have argued that until recently China has not had a true nuclear doctrine at all.³⁴ So the apparent contradictions may be not so much signs of a newly contentious doctrinal debate as indications of an emerging debate.

But the key question is whether China's doctrine and posture are currently in flux, regardless of the novelty of that development. And the overall pattern strongly suggests that the contradictions discussed above are inherent to China's current posture, doctrine, and aspirations and not just a result of incomplete information or a debate with little bearing on actual nuclear policies. China appears to be at a crossroads, with a nuclear doctrine and posture in flux.

China at the Crossroads

China's nuclear deterrent is at a crossroads, with two paths its current and future modernization efforts could take. These paths have dramatically different implications for the future of China's nuclear forces. China does not yet appear to have chosen a path, but given the rather different requirements and implications of each path, it will have to choose. One path, credible minimum deterrence, is closer to China's current nuclear posture. It calls for an emphasis on concealment and secrecy, on operating in a post-attack environment, on developing and fielding more survivable mobile missiles, and on developing and fielding ballistic missiles submarines, if feasible. All of these would be emphasized over the quantitative size of future forces. The other path, limited deterrence, calls for the development of war-fighting capabilities that would allow calibrated responses short of a full nuclear attack, a move toward a launch-on-warning or launch-under-attack posture; the development of a broader spectrum of capabilities ranging from a robust nuclear triad of land-, sea-, and air-based forces to the deployment of enhancing space-based assets; the deployment of substantially larger nuclear forces; and even the possible incorporation of missile defense capabilities.

At the same time, it is important to emphasize that the two paths are not entirely mutually exclusive. For example, mobile systems and submarines—both more survivable platforms—would be an asset under both minimum and limited postures. Nonetheless, which doctrinal vision wins the argument has huge implications for the direction China takes. Johnston has

argued compellingly that among military analysts, the limited vision is winning the argument.³⁵ But to date, analysts have far less insight into the nuclear doctrinal thinking of non-military policy makers, those responsible for the public doctrinal commitments and current nuclear posture more consistent with a minimum deterrent doctrine.

Implications for Engagement

If China's approach to nuclear weapons is currently in flux, that implies that the country will be particularly sensitive to other actors' actions that affect China's nuclear decision-making calculus. Admittedly China is likely to use actions taken by the United States and other countries to justify the steps it takes, but those actions will also have direct effects—China's justifications will be more than mere rhetoric. As Johnston has argued, "The pace and scope of Chinese nuclear weapons modernization is in large measure dependent on what happens outside China's borders, in international institutions and in American decisions about strategic policy over the next few years."³⁶

One possible counterargument is that China is on an incremental, inexorable modernization path on which external developments have little bearing. For example, the U.S. intelligence community projects that by 2015 China will have seventy-five to one hundred warheads on *long-range* ballistic missiles.³⁷ China's nuclear modernization has been and is likely to continue to be gradual. But that need not imply insensitivity to external impulses. The consequences of U.S. actions now may not be seen for years to come, but the very gradualism of the process makes it all the more important to anticipate possible effects now because by the time consequences are evident, it will be too late to modify the actions that triggered them.

If we accept that China's nuclear posture and doctrine are currently in flux and that modernization is indeed likely to be affected by the actions of other states, what are the possible state actions that might be relevant? There are at least two types: 1) offensive or threatening actions, such as the deployment of missile defenses or advanced conventional weapons, the enunciation of preemption or prevention policies, or the adoption of unwelcome political positions with regard to Taiwan; and 2) binding or engaging actions, such as incorporating China into multilateral or bilateral arms control commitments, such as a ban on nuclear testing, a fissile material production cap, or nuclear-weapon-free zones.³⁸

Offensive/Threatening Influences

China has shown itself susceptible to offensive/threatening influences. A classic realist approach to international relations, with its focus on power, particularly of the military variety, has potential explanatory power in this area. Although such approaches have limitations in explaining certain phenomena—why a state might subject itself to certain arms control commitments, for example—realist approaches do a good job explaining longer-term, broader-brush responses to shifts in power. The *Realpolitik* world view that appears to have widespread currency among Chinese policy makers buttresses the analytical validity of this approach. As Johnston has pointed out in the Chinese context, "*Realpolitik* world views are associated with a keen sensitivity to relative power capabilities."³⁹

Other analysts have echoed this conclusion. Although Roberts, Manning, and Montaperto argue that China "will continue to [modernize its nuclear arsenal] regardless of the actions of other nations," they also point out that

external developments will influence the final contours of China's nuclear modernization program. In fact, Western actions have already had some effect, and not for the better. The Gulf War and the air war over Kosovo, for example, reinforced Chinese worries that precision-guided conventional weapons could destroy China's existing nuclear second-strike capability.⁴⁰

The authors also point out that “Beijing will almost certainly regard the plans for the deployment of [national missile defense] as a challenge to its own nuclear deterrent. As a result, Chinese decision-makers may even now have begun worst-case planning to offset what they perceive to be an emerging threat.”⁴¹ Of course missile defenses are far from new on the international scene. Former U.S. president Ronald Reagan proposed the deployment of very substantial defenses in the early 1980s, and U.S. efforts to deploy limited missile defense systems date back even farther than that. Nonetheless, recent moves in Washington to begin deploying limited national missile defense capabilities that are intended to be precursors of far more extensive systems are likely to be deeply threatening to China.⁴² Missile defense is particularly threatening to China in the context of scenarios related to Taiwan, which in recent years have become a focus for Chinese military planning. Both national missile defenses that China perceived as giving the United States greater freedom of action in a potential crisis over Taiwan and, perhaps even more importantly, local or regional defenses that affected China’s ability to threaten Taiwan or U.S. forces in the region would be profoundly threatening to China and hence would likely spark a significant response.

Binding/Engaging Influences

China has shown itself to be particularly vulnerable to binding or engaging influences. Classic realist approaches do a poor job explaining why a state like China would limit its ability to modernize its nuclear forces by signing the Comprehensive Nuclear-Test-Ban Treaty (CTBT), for example.⁴³ International relations theories that focus on norms and state identity or self-image are more potent analytical tools in this regard. Such approaches may have less currency in explaining long-term, broad-brush developments around the globe, and their contingent nature may make meaningful generalizations across states more difficult. But identity- or image-based approaches are of particular value in understanding China, which has exhibited notable susceptibility to identity-related constraints in the context of international agreements. China’s decisions to join both the Nuclear Nonproliferation Treaty and, more recently, to sign the CTBT are arguably less than rational from a classic realist perspective, but are consistent with what appears to be a longstanding Chinese desire not to be viewed as a pariah state in the international system.

At the same time, it is easy to exaggerate the potential causal relationships between U.S. attempts to engage China and future nuclear force modernization. An example of what might be termed a “dis-engaging influence” is illustrative. Gill, Mulvenon, and Stokes write that “[The CTBT’s] defeat in the [U.S.] Senate should prepare us for the likelihood of a resumption of Chinese testing and thus the possible conquering of important developmental hurdles in the area of smaller warheads.”⁴⁴ China is admittedly likely to be particularly sensitive to the actions of other states (most notably the United States), but absent renewed U.S. testing and/or the collapse of the test ban treaty globally, China appears unlikely to begin testing again in the near future, as Gill, Mulvenon, and Stokes seem to expect. But just because the causal effects are not iron-clad does not mean they are not significant. Given the effects of voluntary constraints on China’s current posture—and few would argue that the CTBT does not substantively hamper China’s nuclear modernization efforts, or even that its no-first-use pledge is not a limitation on its nuclear forces against which some of its military officials appear to chafe—engagement is a potentially productive long-term strategy for affecting China’s nuclear future.

Areas for Future Scholarship

If the hypothesis posited herein—that China’s nuclear doctrine and posture are in a state of flux—is correct, then scholars should look for signs that China is leaning toward or has chosen one of the paths outlined here. Contradictions identified above can be tracked and new con-

traditions evaluated if they emerge. If those contradictions begin to resolve themselves, that will be evidence that China is moving down a particular path.

Another fruitful avenue for future research is to look for signs that China is responding to significant actions taken by other actors. China may be in flux and hence more sensitive to the actions of other actors, but just how sensitive remains unclear. For example, if the Bush administration proceeds with current plans to deploy an initial missile defense capability as early as 2004, followed by more ambitious, integrated theater and national defense platforms, the above analysis has posited that China is likely to respond vigorously. Of course, given the highly secretive and ambiguous nature of Chinese policy making in this area, it will be difficult to gauge responses, particularly in the near term. But good scholarship thrives on such challenges.

Finally, essentially all areas of Chinese nuclear posture, doctrine, and policy making remain less than fully understood and hence merit further study. Certain areas, such as those related to process, remain particularly poorly understood. Other areas for potential investigation, such as China's non-strategic nuclear forces, discussed above, are research priorities because of their potential to shed light on China's current and future nuclear doctrine and posture more broadly. But as in the past, such study will continue to be largely hostage to the release—intentional or not—of primary source information from China. One thing is clear: China's nuclear policies bear watching. Scholars, for their part, have a vital role to play by continuing to parse what little does emerge from China and by ensuring that potentially significant nuances are not lost in the inevitable filtering and simplifying process that occurs in both public debate and the halls of power.

Conclusions

As a result of the state of flux that currently characterizes China's nuclear doctrine and posture, the future of China's nuclear forces will be particularly sensitive to the actions of other nations in the coming years. U.S. policy makers should take this sensitivity into consideration when weighing the costs and benefits of actions likely to affect China. China and its nuclear posture and doctrine cannot be treated as a constant. Of course with sufficient time nothing in the international system is constant, but the key argument advanced here is that, given the state of flux of its nuclear posture, China is likely to be particularly sensitive to external influences.

These observations do not mean that the United States should not deploy missile defenses, improve the capabilities of its conventional or nuclear weapons, or adopt potentially provocative policies vis-à-vis Taiwan; nor do they mean that the United States must engage China in bilateral or multilateral arms control efforts. But they do mean that U.S. policy makers would be well advised to make cost-benefit assessments of relevant policies that carefully consider potential impacts on China's future nuclear posture and doctrine.

Endnotes

¹ Of the five declared nuclear weapons states recognized in the 1970 Nuclear Nonproliferation Treaty, China is clearly the least transparent. That said, even the relatively transparent United States is not quite as transparent as is often assumed. The information exchanges mandated under the Strategic Arms Reduction Treaties with the Soviet Union and then Russia allowed the size of U.S. strategic nuclear forces to be estimated with a high degree of accuracy, but the precise numbers of strategic weapons and warheads remained and remains classified. The new Strategic Offensive Reductions Treaty recently signed by Moscow and Washington contains no similar verification provisions and although Moscow has publicly called for their negotiation, the current administration in Washington has expressed no interest in doing so. And non-strategic weapons stockpiles have been and continue to be relatively nontransparent. Finally, although less is known about China's nuclear forces than those of the other declared nuclear weapons states, there is a case to be made that even less is known about the postures and doctrines of non-recognized nuclear-capable states like Pakistan, India, and Israel.

² Assessments of China's nuclear capabilities from governmental and non-governmental sources are relatively consistent, and debate about the size and capabilities of China's nuclear arsenal occurs mostly at the margins. See National Intelligence Council (NIC), "Foreign Missile Developments and the Ballistic Missile Threat Through 2015," Unclassified Summary of the National Intelligence Estimate (December 2001); Robert Norris and Hans Kristensen, "NRDC Nuclear Notebook: Chinese Nuclear Forces, 2003," *Bulletin of the Atomic Scientists* 59 (2003): 77–80.

³ Brad Roberts, Robert A. Manning, and Ronald N. Montaperto, "China: The Forgotten Nuclear Power," *Foreign Affairs* 79 (July/August 2000): 54; Brad Roberts, Robert A. Manning, and Ronald N. Montaperto, "China, Nuclear Weapons, and Arms Control: A Preliminary Assessment" (paper presented at roundtable for the Council on Foreign Relations, the National Defense University, and the Institute for Defense Analyses, Washington, DC, April 2000), 34.

⁴ Roberts Manning, and Montaperto, "China, Nuclear Weapons, and Arms Control," 34.

⁵ Michael Chase, James Mulvenon, and Evan Medeiros, "China's Evolving Nuclear Calculus: Modernization and the Doctrinal Debate" (paper presented at the RAND/Center for Naval Analyses annual conference on the PLA, "The PLA Revolution in Doctrinal Affairs: *Zhanyi Xue* and Beyond," Alexandria, VA, December 2002), 11.

⁶ See, for example, Chong-Pin Lin, *China's Nuclear Weapons Strategy* (Lexington, MA: Lexington Books, 1988), passim. Somewhat less problematically, see Chase, Mulvenon, and Medeiros, 48.

⁷ Roberts, Manning, and Montaperto, "China, Nuclear Weapons, and Arms Control," 34.

⁸ U.S. Defense Intelligence Agency (DIA), trans., "The Strategic Use and Development of the Second Artillery in the New Period," undated and not further identified. Obtained from A. Iain Johnston, November 2003.

⁹ U.S. Defense Secretary Donald Rumsfeld recently made the known-unknown distinction in a notably cogent comment that was widely mocked as nonsensical in the American and international media. Rumsfeld said, "There are known knowns; there are things we know we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns—the ones we don't know we don't know." (U.S. Department of Defense (DOD), "DOD News Briefing: Secretary Rumsfeld and General Myers," February 12, 2002, http://www.defenselink.mil/news/Feb2002/t02122002_t212sdv2.html. The remark won Rumsfeld the annual Foot in Mouth Award of the British Plain English Campaign, although that country's *Economist* subsequently came to the defense secretary's defense. See "Rum Remark Wins Rumsfeld an Award," *BBC News*, December 2, 2003, <http://news.bbc.co.uk/2/hi/americas/3254852.stm>.) The key, then, is to attempt to compile a comprehensive set of knowns and unknowns. Only if previously unknown

unknowns can be incorporated into the known unknown category can they be flagged for further study that could facilitate a move into the known category. And even if they remain in the unknown category, accurate identification of unknown data is vital to an accurate analysis of what is known.

¹⁰ Roberts, Manning, and Montaperto, "China: The Forgotten Nuclear Power," 53.

¹¹ *Ibid.*; Roberts, Manning, and Montaperto, "China, Nuclear Weapons, and Arms Control," 31.

¹² *Ibid.*, 35; Bates Gill, James Mulvenon, and Mark Stokes, "The Chinese Second Artillery Corps: Transition to Credible Deterrence," in *The People's Liberation Army as Organization*, ed. James C. Mulvenon and Andrew N.D. Yang (Washington, DC: Rand, 2002), 537.

¹³ Roberts, Manning, and Montaperto, "China, Nuclear Weapons, and Arms Control," 31.

¹⁴ Chase, Mulvenon, and Medeiros, 3.

¹⁵ A. Iain Johnston, "China's New 'Old Thinking': The Concept of Limited Deterrence," *International Security* 20 (1995/6): 12.

¹⁶ Wang Wenrong, ed., *Strategy* (Beijing: Chinese National Defense University Press, 1999), 359. Note: The passages cited herein were translated by A. Iain Johnston and obtained by the author November 26, 2003.

¹⁷ *Ibid.*

¹⁸ *Ibid.*, 360.

¹⁹ *Ibid.*

²⁰ Johnston, "China's New 'Old Thinking,'" 18.

²¹ Wang, 360–361.

²² Albert Wohlstetter, "The Delicate Balance of Terror," RAND, Paper P-1472 (December 1958). Available online at <http://www.rand.org/publications/classics/wohlstetter/P1472/P1472.html>; Johnston, "China's New 'Old Thinking,'" 19.

²³ Johnston, "China's New 'Old Thinking,'" *passim*.

²⁴ Gill, Mulvenon, and Stokes, 512; Johnston, "China's New 'Old Thinking,'" 31.

²⁵ Roberts, Manning, and Montaperto, "China: The Forgotten Nuclear Power," 56.

²⁶ Norris and Kristensen, 77–80.

²⁷ Gill, Mulvenon, and Stokes, 540–541.

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ Johnston, "China's New 'Old Thinking,'" 19–21.

³¹ DIA.

³² Gill, Mulvenon, and Stokes, *passim*; Chase, Mulvenon, and Medeiros, *passim*.

³³ Johnston, "China's New 'Old Thinking,'" 21–23.

³⁴ John Wilson Lewis and Hua Di, "China's Ballistic Missile Programs: Technologies, Strategies, Goals," *International Security* 17 (Fall 1992): 6–7, as cited in Gill, Mulvenon, and Stokes, 542–543.

³⁵ Johnston, "China's New 'Old Thinking,'" *passim*.

³⁶ A. Iain Johnston, "Prospects for Chinese Nuclear Force Modernization: Limited Deterrence versus Multilateral Arms Control," *China Quarterly* 146 (June 1996): 549.

³⁷ NIC, 5–6.

³⁸ This discussion treats China as an essentially unitary actor. An alternative approach might be to consider bureaucratic factions within China advocating for different doctrinal approaches and evaluate external impulses in light of their effect on factional dynamics. Hence an explicit U.S. policy of preventive war might strengthen the hand of military hardliners advocating for more aggressive nuclear weapons policies vis-à-vis those advocating more traditional, defensive approaches to nuclear weapons.

³⁹ Johnston, “Chinese Nuclear Force Modernization,” 550.

⁴⁰ Roberts, Manning, and Montaperto, “China: The Forgotten Nuclear Power,” 53–54.

⁴¹ *Ibid.*, 54.

⁴² Wade Boese, “DOD Wants to Field Defenses Without Calling It Deployment,” *Arms Control Today* 33 (March 2003): 24.

⁴³ Roberts, Manning, and Montaperto, “China: The Forgotten Nuclear Power,” 54–55.

⁴⁴ Gill, Mulvenon, and Stokes, 536.

ANSWERING RODIN'S ATTACK ON JUST WAR'S ETHICAL GROUNDING: IMMINENCE, NECESSITY, AND PROPORTIONALITY IN SELF-DEFENSE AND IN WAR¹

BRANDON DEL POZO

One common way to morally justify war is by basing it on the widely accepted ethical doctrine of personal self-defense. By either analogy or reduction, war is likened to individuals defending themselves from a threat of death or other serious harm. David Rodin contends that either method fails to provide a persuasive justification because the conduct of war as we have come to accept it includes acts that exceed what we would permit in cases of justified personal self-defense. Specifically, self-defense has parameters of necessity, proportionality, and especially imminence that appear to be ignored in the conduct of war. This essay contends that because the nature of combat in war differs from the type of personal combat that forms the basis of our intuitions about personal self-defense, this claim can only be accurately evaluated by considering what these parameters require in the context of a new understanding formed by the true nature of combat in a large-scale war. In doing so, this essay argues that what appear at first to be problems in reducing war to a series of personal self defenses are adequately explained when one considers an elastic concept of imminence and the appropriate features of proportionality and necessity. Theories of personal self-defense provide an adequate ethical basis for a just war.

"It's a word that issues a warning that marches a nation to war."

—William Safire, on the word *imminent*²

Introduction

It is my belief that we have natural rights to life and liberty simply because we are human beings, and that coming to a satisfactory understanding of when it is morally permissible for one human being to deny these rights and to kill another is perhaps the most important project in the field of ethics. It is a widely acknowledged idea that, given appropriate circumstances, one person may employ deadly force against another in the name of self-defense without violating her moral duties.³ This essay will discuss how suitable this idea is in the ethical grounding of a theory that accounts for when it is just for a nation to go to war. It is possible that if the circumstances of warfare between nations could be reduced to an aggregation of innumerable personal self-defenses, then a theory of self-defense, when applied to the proper attendant circumstances, could justify the use of deadly force in war.

In practice, this justificatory approach is not an uncommon one. David Rodin, however, has recently issued a fresh and insightful challenge to this notion by arguing that this justificatory link between defense of the person and the nation is highly problematic and ultimately fails.⁴ He argues that because the similarities between personal combat for self-defense and combat in the conduct of a just war are lost in many of modern war's commonly accepted key practices, a theory of just war cannot find an adequate moral basis in personal self-defense;⁵ that a just war theory is more difficult to ground than has been initially thought. This essay seeks to address Rodin's criticism with the goal of demonstrating that there is indeed an adequate ethical grounding of just war theory in its characterization as a special, aggregated case of justified personal self-defense.

One of the main areas of contention in this regard hinges on the concept of the imminent threat. As I will outline below, the idea that one person immorally poses an imminent lethal

threat to another is a necessary component of a theory of personal self-defense. We can easily see how the burglar in our home, pointing a gun at a victim as she pleads for her safety, issues a threat of imminent serious physical injury or death that a person in the normal conduct of affairs does not.⁶ It is certainly in line with our considered judgments that the burglar has forfeited his right not to be harmed insofar as the victim has the right to defend herself from his threat. While the ideal outcome would end in his apprehension by the police, it would not necessarily be an immoral end to the situation if in the course of this apprehension—or the victim's own self-defense more generally—this man ended up gravely injured or killed.

But what of the soldier sound asleep in his tent when it is struck with a bomb? What of the recruit who has just joined the army and has never threatened anyone's life himself, but who is killed by a raid on a rear staging area? What of the soldier retreating from the field in defeat, or the mechanic in a supply depot behind the lines, both of whom could even be killed with their back to the enemy as they flee the fight? In warfare, these men and women are routinely killed and are widely accepted to be fair targets as per both the Geneva Convention⁷ and just war theory, yet Rodin believes that "it would be difficult to view such acts of military attack as cases of personal self-defense on the part of soldiers."⁸ After all, the victims of such attacks do not pose an imminent personal threat to anyone at the time of their death as we understand the idea as used in personal combat. For this reason, either imminence is not a component of just war theory and therefore we cannot base such a theory on a reduction to personal self-defense, or we must somehow demonstrate a broader concept of imminence that not only makes intuitive sense in personal combat but also in the realm of large-scale warfare.

By looking closely at personal self-defense and then at the nature of warfare, I will seek to justify a concept of imminence that adequately accounts for personal self-defense as a basis of just war theory. I will try to show that the scale and length of warfare introduces certain rhythms to human behavior that differ from those we intuitively understand in personal combat, but that these differences do not rob warfare of a concept of imminence that would permit the range of actions that just war theory presently accords it. In this way, I will try to save the personal self-defense justification of just war theory from its critics by incorporating into our understanding of imminence the "imminence of the ongoing enterprise." This conception paints imminence as the product of a demonstrated intent to harm a person that is combined with the ongoing participation in a project aimed at doing so.

I will also briefly sketch an argument for the use of force in self-defense that does not have as its sole basis the threat of serious physical injury or death. Perhaps we may also justify the use of force against another because that person seeks to unjustly imprison a victim, or curtail her rights or freedoms. In this way, it is even possible that the bar for personal self-defense as applied to war has been set too high. If this conception has merit, then it becomes significantly easier to ground just war theory in personal self-defense by using it instead of a narrower conception that does not allow for violence in cases of an imminent abridgement of freedoms, instead stopping at threats of serious physical injury and death.

A Sketch of Just War Theory

It is not the intent here to argue the finer points of just war theory, but instead to paint it in a broad brush for the purposes of framing the discussion that follows. Just war theory has both secular and religious groundings, both yielding similar conclusions about when it is morally permissible to wage war.⁹ The first presupposition of just war theory, sometimes suppressed in its articulation, is that there ought to be no war, but that one nation attacks another unjustly. Once this attack occurs, the attacked nation may defend itself by engaging in war with the aggressors.

The war that ensues has the features we have come to expect of combat: all soldiers under arms who have not surrendered or who are not too gravely wounded to fight are fair targets for attack, wherever they may be. This includes sleeping soldiers, retreating soldiers, soldiers in training, and those who serve in support capacities that do not involve actual armed combat, including clerks, cooks, and mechanics.

The industrial infrastructure that supports the enemy's army is also a suitable target for destruction in a justly conducted war: factories that manufacture arms, uniforms, and supplies for the war effort may be destroyed, even though civilian employees are killed in the process as an unintended side effect of these efforts.¹⁰ This would indicate that private contractors such as those of the Blackwater Company that supplement the U.S. government's occupation efforts with heavily-armed "civilian" personnel would be fair targets in war or rebellion against the United States. That this could mean the death of a large number of civilians speaks more to the problems of privatizing certain services than it does the moral debate: the killing of the civilians in the destruction of infrastructure is not the intent of such engagements, but the instrumental result of the destruction of the enemy's war-making apparatus. It is illuminating to note that few of the civilians presently operating in a support capacity in occupied Iraq were doing so before the declared "end to major hostilities." At the same time, civilians cannot be gratuitously targeted by the opposing armies. This suggests that as far as just war theory is concerned, much of the way nations have waged war in the last century was morally wrong, from the firebombing of Japanese and German cities by the United States and its allies, to the outright atrocities committed by the Germans and Japanese themselves.

Just war theory, then, seeks to incorporate many of our basic sensibilities about justice and fairness once we have concluded that a war must unfortunately take place. It allows for an unmitigated contest of might between two opposing armies and their direct support infrastructure, but seeks to isolate this contest from the civilians that make up the balance of the nation. It also presumes that war can only be justly waged by one side, namely the side of the victim. For this reason, it concludes that war is rooted in an injustice but acknowledges that war is a peculiar animal that can only be stopped by force in kind.

The Moral Argument for Personal Self-Defense

That human life is accorded such high value throughout the body of ethical theory leads to something of a paradox when we consider the case of self-defense. While it is wrong to kill, it is acceptable to kill someone who is attempting to kill you. In the barest deontological terms, we have a right not to be killed and a duty not to kill, but we may forfeit this right when we attempt to kill someone else (besides, of course, someone who is unjustly trying to kill us). While this does not mean that we are free to kill someone just because they have tried to kill us, it does mean that we may use an amount of force in our defense that, in being adequate enough to stop the threat at hand, might also result in the death of our foe.

This business of killing extends down into the realm of harm, where the same idea applies. We may not harm others without their permission except insofar as we need to in order to prevent them from harming us. Indeed, our intuition suggests that proportionality is a component of a self-defense theory. Because violence against any person is fundamentally undesirable, one ought to commit only as much violence as is necessary to eliminate the threat at hand. If a person is attacked in the street by a man who strikes her with his fists, she may fight back in order to save herself, and I may kick a person who is slapping me. At the same time, few would agree that I could shoot a person who is slapping me, or that the woman being punched in the street could then get in a car and run the man over. Because violence by nature cannot always be precisely controlled, it is reasonable for the doctrine of proportionality to also include some leeway to account for the unforeseen circumstances of an action. For example, if I am justified

in punching someone because she is doing so to me for no apparent reason, it is possible for me to inadvertently blind my opponent with a thumb to her eye as she unsuccessfully ducks the blow. This was not the intent of my counterpunch, but the response to a circumstance set in motion by my attacker that by its very nature could not be perfectly executed. Nonetheless, I am still morally obliged to seek a force option that is not gratuitously harmful beyond the point that it takes to end the threat at hand.

The other two limitations of a person's right to self-defense are necessity and imminence. Necessity indicates that there must be a need to resort to violence. If it is possible to safely flee rather than kill a person, we are obligated to do so. This might seem like it is at odds with our conduct of warfare, but it is not, and it will be discussed below. The nature of imminence—that there is an impending harm that requires immediate action to fend off—is the central focus of this essay.

With proportionality, necessity, and imminence, we have the traditional parameters of a right to self-defense.¹¹ There is much more work to be done in justifying personal self-defense than I have done so far; however, a person who does not believe in the validity of this concept will also not accept the remainder of the argument presented, no matter how persuasively a link between self-defense and just war is argued. For this reason, accepting a doctrine of personal self-defense as briefly outlined above is a necessary jumping-off point for this discussion.

From Personal Self-Defense to the Just War: By Analogy or Reduction?

Rodin identifies two principal ways by which we can base a justification for just war theory on a corresponding one of personal self-defense: by analogy and by reduction. The argument by analogy takes the concept of the "person" and replaces it with that of the "state." Reduction seeks to reduce warfare in all its complexity to an aggregation of individual acts of self-defense, each of them justified by a conception of personal self-defense.

Rodin feels that the "the reductive strategy in its purest form . . . is a clear failure."¹² He also feels that the argument from analogy is ultimately inadequate but makes the stronger case of the two. I disagree and will focus primarily on the reductive approach for my own justification, but it is first necessary to discuss certain significant problems of the personal defense analogy that make it an unfavorable alternative to the reductive approach.

It has always been problematic to take the characteristics of a person and apply them to a nation with the purpose of extending a theory meant for persons to nations, which of course contains people but is in no way a person *per se*. For a demonstration of the problems of this transition, we may consider Thomas Pogge's analysis of various ways of applying John Rawls's principles of justice to the international order.¹³ Rawls's device of the "original position" as presented in *A Theory of Justice*¹⁴ provides a rational means for individuals to choose the principles that will inform the basic character and structure of their political institutions. The end result is supposed to be two principles,¹⁵ which most readily apply at the national level.

Pogge surmises that there are at least three ways to apply the device of the original position internationally. One is by individuals holding first a domestic original position and then another original position for the international order ("R1"). Another possibility would be individuals deliberating in a domestic original position and then states deliberating in an international original position ("R2"). Of the three he considers, this technique most closely resembles the argument by analogy. The final possibility is that all people could deliberate in one original position that could serve to provide for both the principles of domestic order and international relations ("G").¹⁶ R1 can be characterized as a reductive approach, but G is the most purely so of the three.

While Rodin accepts that states have a "common life" of some inherent value, he argues that it is not of the same degree and nature as the value of an individual human life.¹⁷ He suggests that "it is not clear that such a value is sufficiently objective to ground an international right of national defense."¹⁸ He also suggests the possibility that the value of states as found in their underlying autonomous citizens and communities is of sufficient weight to be an adequate moral substitute for the individual person. He rejects this idea, however, because "when one attempts to spell out what this collective national autonomy could amount to in practice, it is all but impossible to construe it as the expression of an authentic moral value."¹⁹

In the context of his analysis of Rawls, Pogge seizes on R2 as inadequate for similar reasons that Rodin rejects the self-defense analogy. Nations are not moral ends in and of themselves, and to imbue them with the rights and responsibilities that people hold is conceptually troublesome. Because any particular state is simply a contingent institutional construction, and not the necessary product of human social interaction, it is unclear why such states must have the same moral qualities as persons; there is certainly no compelling *prima facie* reason. In fact, the organization of nation states and how they relate to each other often seems to engender conditions that seek to undermine the rights and values of people. From competition for scarce resources to the partiality nations show for their own citizens to the phenomenon of war itself, the state seems to work against our conception of how the person ought to be treated. Like Rodin, Pogge feels that the idea of the morally valuable state *qua* morally valuable person is not compelling.

Pogge's ultimate choice for translating a domestic arrangement of institutional justice into an international one is G, the most purely reductive. This approach does not privilege the nation-state from the outset and side-steps concerns about the nation-state's inherent moral equivalency to the person. He feels that the case for an analogical method cannot be made, and the reduction is the only justifiable way to complete his project.

My intent here has not been to show that the strength of one reductive approach inherently lends itself to another. Instead, it has been to show that reductive approaches in similar questions have been deemed more useful and effective than their analogical counterparts because they avoid the serious shortcomings of the person/nation analogy. The burden still remains to show that an adequate case of reduction can be made in the particular case at hand.

Imminence and the Ongoing Enterprise

I will now argue that provided that we view war as an ongoing enterprise bent on our unjust defeat or destruction by force, any person who meets certain basic requirements as an actor in this enterprise can be seen as *ipso facto* posing an imminent threat to us. Because of this, we may enjoy the permission of using physical force against these actors up to and including a level that results in their death.

Such an argument would suffice to preserve the reductive justification of war in the face of Rodin's objections because a lack of sufficient imminence (and the problems of proportionality this engenders) is the main avenue by which Rodin refutes the war/self-defense relationship. He does so by arguing that there are several instances in war in which people are killed, but the threat is not imminent in the way we understand the concept in personal self-defense and therefore falls outside the parameters reserved for such defenses. He cites, as I have above, examples of attacks on sleeping soldiers, soldiers running in retreat, new recruits, and soldiers who do not directly participate in combat or bear arms, such as supply personnel and mechanics. It is plain to see that in our present understanding of warfare, these individuals can be attacked, wounded, or killed at any time prior to surrendering or the formal cessation of hostilities.

At first, the lack of imminence in these cases seems compelling. After all, in our common intuitive understanding of self-defense, it is difficult to see how someone may shoot a sleeping person or a person running away from us. This hesitance on our part, however, may be because our basic understanding of personal self-defense issues from our understanding of personal combat. Warfare certainly consists of a fair amount of personal combat, but it is fundamentally different in many ways.

In the effort to show how these counterexamples are in fact not as compelling as they may seem, I will first highlight and then bracket off the case of enemy soldiers who seek to surrender. As alluded to earlier, surrendering is clearly a case where the imminence and necessity of the situation are no longer sufficient enough to justify the use of force. Domestically, in policing, an officer may use force in order to subdue a suspect to the extent that this suspect offers active physical resistance. If this suspect were to surrender, the force used against him must stop and he must be taken into custody. Of course, this is because surrendering is an act with very particular specifications that are relevant to considering how imminent a person's threat is: by its definition, surrendering means that the actor truly no longer wishes to fight and makes this intent unquestionably clear by subjecting himself to the mercy of his foe. A person cannot simultaneously sincerely seek to surrender and also pose an imminent threat. Because this relationship is tautological, it makes for an easy case against the unnecessary use of force on the surrendering party.

It also allows us to separate out all the other cases where a person does not seek to surrender. For example, retreating is not surrender, and neither is resting. These are acts which must be evaluated on their own merits, but we cannot presume that the actors doing these things do not pose imminent threats because they are included in the same category of acts as surrendering. In fact, the only other act which seems to be correctly included is that of a soldier being wounded to the extent that he cannot pose an imminent threat of serious injury or death even if he wanted to. Surely enough, using force against such a person is against the laws of war and easily falls outside the scope of moral justification. In the same way that good Samaritan laws presume an unconscious person has given us permission to render him aid, a severely wounded soldier who is helpless to fight can be presumed to have surrendered whether he would like to or not.²⁰

So what of these other cases that are not surrender, but which do not pose the same degree of impending lethal threat that personal combat does? It is possible that they fail the imminence test because the person executing them, by simple virtue of doing something other than actively seeking to harm me, does not seek to do me harm at that time. A retreating soldier does not seek to harm me; if I let him, he would just run away out of my sight. A sleeping soldier seems interested only in rest while he sleeps, and a mechanic is only interested in fixing the motors on tanks in a depot. A new recruit has never even fired a shot in anger.

This line of reasoning leads to a position that I believe very few people would accept. If we do not permit the concept of imminence sufficient elasticity to include at least some actions that do not evince a clear intent to pose immediate harm, then we are in an untenable position as regards self-defense generally. Specifically, such an inelastic interpretation would mean that the only time we would be justified in using physical force against an aggressor would be at the very instant that he is trying to do us harm: when his fists are in the air, when his bullets are in flight, or when his sword is in motion towards us. In any other case, how could we be certain that he intends to do us harm at that time? If you strike at me and miss, how may I be sure that you mean to strike at me again, even though you still stand before me? Perhaps you are considering running away or contemplating the possibility of surrender. If you shoot at me and empty your gun's magazine, then take off running to hide behind a brick wall, you may be reloading to continue the attack, but you also may be waiting for an opportune time to flee in defeat. If I cannot act except with a conception of imminence that embodies an incontrovertible certainty of your intent to harm me at that instant, then I have no grounds for the use of

force at any other instants than the very ones where you are doing me harm. Otherwise, the intent evinced by a foe during other actions that are not in and of themselves acts of intended harm is impossible to fathom.

This diverges wildly from many people's understanding of what is reasonable and necessary in personal combat. Fighting has a rhythm born of its nature as a human activity and culminates when one person gets and exploits a strategic or tactical (depending on the scale) upper hand. Once a person establishes an intent to harm us by declaration or action, we presume that intent remains until it is clearly abandoned by surrender or convincing defeat. In the interim, the course of the fight is a result of our assessments of the situation, our training and tactics, our endurance and plans, and our mutual endeavor to seek out and exploit the best positions possible.

Rest and retreat are direct manifestations of this. Personal combat is extremely exhausting, and boxers, for example, spend a fair amount of their training time simply gaining the endurance to outlast their opponent during the course of a round. That a boxer is getting too tired to continue the fight and must stop swinging in order to dodge his opponent does not signal to that opponent that it is time to let up, but instead that he must press the fight because his training and strategy will soon prevail. If I am set upon by a killer who opens with a salvo of blows that soon falter as he tires, few would think I must let him catch his breath before I continue my efforts to defeat him and save my life.²¹ His resting—an action that is not aimed at harming me in and of itself—is still instrumental to the project of my harm and is merely an indication of the impending success of my efforts at defense.

Sleep is just an extension of this. Enemy soldiers go to sleep wanting to kill their foe, then wake up wanting to kill their foe. If they were to be awakened from their sleep with a start, they would do so prepared to kill their foe. Because war is a longer project than a street brawl, sleep is a necessary form of rest in its execution; however, this sleep should not exclude a person from the possibility of harm any more than a rapist stopping to rest for a few moments as he regains his strength to fight his victim should. If an enemy army could kill and defeat its foes before its soldiers needed to sleep, it gladly would. That these soldiers must sleep in the ongoing course of the war does not change the fact that their project has caused them to forfeit the right not to be killed. That a person's moral status can change as the result of an involuntary and temporary pause in his action due to biological necessity does not accord with the traditional reasons we cite for such changes in status, such as a change in the conscious intent of the actor. Must we also grant quarter to the soldier who pauses in battle to urinate?

Retreat, now separated from surrender, is seen in its proper light as the enemy's endeavor to evacuate an unfavorable position, conserve his strength, and continue the enterprise of my defeat or destruction at a time and place more advantageous to him.²² Consider a case where I am standing in the middle of a large, open field, and my enemy seeks to shoot me from behind. He needs to get close to me to ensure that he can shoot accurately, so he stalks his way across the field; however, as he gets within range, he steps on a twig and alerts me to his presence. I turn, weapon at the ready, and he lets off a few wild shots and flees in a state of panic. For some reason thinking aloud, he says "I had a favorable position but lost it. I must now retreat to the safety of a nearby boulder, rethink my plan, and try to shoot my foe from there." Why has this attitude—a result only of the dissolution of his battle plan due to a twig underfoot in this case—restored my foe's right not to be harmed by me? All of the salient reasons for the enemy's initial forfeiture of his rights are still there. The only reason I am not dead is because the enemy's plan had some shortcomings and was hampered by bad luck. He has not, however, surrendered as a result, but has instead altered the plan to kill me in the near future from a position that offers him a chance at tactical reflection and reduced risk. Yet Rodin believes such circumstances of retreat—in either personal combat or in the course of a battle between armies—restores important moral rights to my enemy because his threat is no longer "imminent" in

some way. In battle, such soldiers are gunned down with their backs to us. In a personal encounter, the gunman fleeing an exposed position for a more tenable one to reconsider the course of the fight is also a fair target. To identify an important objection that will be addressed shortly, this is notwithstanding my legal and moral duty to retreat from the fight at the first safe opportunity as mandated by the necessity parameter of self-defense.

Before discussing this duty of the victim to retreat, a brief look at the recruit and the mechanic is in order to complete the illustration of imminence as I have presented it. Suppose that my brother knows that members of the clan in the next village are unjustly seeking to kill me and take my farmland, and he has learned that their preferred approach to attack me is along a certain path between our villages. He waits there, and moments after hearing shots behind him in the direction of the big open field, he sees an armed enemy clansman running down the path toward my location. He recognizes the man as an adolescent from the clan who has never fought us before, but has been training in the use of weapons for some time now in order to join in the fight against me at an opportune time. As the adolescent charges down the path, he exclaims, "It sounds like my brother needs help killing our enemy. I've never been in battle before, but my training is now complete, and I'll rush there to assist him. With my additional strength, we'll have a great advantage."²³ Now it is true that this person has never posed a direct, personal threat to anyone in my clan. He has never fired a shot in anger; however, our intuition seems to indicate that it would be foolish for my ally not to shoot this man, who is seeking to alter the course of the fight by his participation. In rushing into the battle, the adolescent has forfeited his right not to be killed and poses an imminent threat to me in the context of the fight at hand.

The cook and the mechanic are instrumental to the harm pending against me, but it just so happens that the army must have some infantry, some tankers, and some cooks and mechanics. In rear guard actions and surprise attacks, these support soldiers become fighters like the rest of the army; the recent example of U.S. Army Private Jessica Lynch illustrates this. A soldier in a non-combat support unit, she and her convoy fought with and killed several enemy soldiers before their own defeat. If a person joins the army knowing he will be part of an endeavor aimed at my destruction, it is unclear why the fact that he may be better suited to cooking or repair—or perhaps not, but somebody must do these things, and so he is chosen at random to fill the task—ought to give him special protections that are not afforded the soldier who is better suited to infantry combat or is likewise randomly assigned to it. Consider that if the war goes poorly for my enemy, and he chooses not to capitulate, many of these cooks and mechanics will indeed become infantrymen as the situation gets more desperate. It seems, as mentioned above, that the only exception to this arrangement is the corpsman: the unarmed soldier whose only purpose for being on the field is to save human lives.

What this illustrates is that imminence may have many physical manifestations, but by nature it covers these manifestations elastically, in proportion to the scope and scale of the project undertaken. In a street robbery, imminence may be the display of a knife and issuance of a gruff threat. In war, it may be massing fifteen armored divisions within twenty miles of a nation's border after you have openly declared that your best interests would be served by conquering it. In either of these cases, when to counter with force seems to be a strategic consideration, not a moral one. Yet one involves an enemy who is twenty miles away—ostensibly not even within the range of your guns—and impending actions that could take hours or days to perform, while in the other case there is one person who is mere inches away from you, threatening an act that could take mere seconds.

This conveys the fact that the only significant constant in determining the imminent threat is the mental state of the attacker. This mental state must be reasonably discerned first by the relevant actions he has taken, then possibly supplemented by things he has declared, and can be assumed to exist so long as he is engaged in the project he started and has not given robust

reasons, such as capitulation or defeat, to presume otherwise. If this is the case, then we have no reason to reject a theory of just war that is reductive to instances of personal self-defense on the grounds that the requirement of imminence does not translate from the latter to the former. Instead, it seems that a more nuanced and in-depth understanding of the nature of imminence only bolsters this type of reductive justification.

The Duty to Retreat

A serious objection to the illustrations above lies in the legal and possibly moral requirement that in personal combat, once my opponent flees as he does above, I must seek to retreat to safety myself. Indeed, this is true as per the courts. In some legal jurisdictions, while people are permitted to defend themselves from ongoing threats using force, if they are presented with an avenue of retreat, they must take it.²⁴

In order to illustrate an important misunderstanding of why this is a realistic general moral requirement, we must first place this duty within its larger context in an organized society. The duty to retreat stems from the necessity principle. If the victim has the opportunity to disengage without causing harm to his foe, then it is not necessary to cause the harm and therefore he morally ought not to; there is a less violent and harmful way to achieve the same end of self-preservation.

Let us suppose, however, that the person in individual combat does run away. Consider the woman who runs from the deranged former spouse bent on extracting “revenge.” This is a suitable case because as in warfare—and unlike the case of a street mugging—the intent of the aggressor is not likely to change just because an escape has been made. She locks herself in her house and for the time being is safe from the man; however, the only reason this is a coherent choice for her is because there is a society in place that has a comprehensive mechanism of law enforcement and the courts for handling the situation from there that privileges her personal safety and shifts the onus of self-defense from her own devices to those of the society at large.²⁵

If the threat is ongoing and the woman is able to escape, she has the option of alerting government functionaries who will protect her and also attempt to apprehend the person who has made the threat to her safety. They will do so not only in instances where the threat is ongoing, but also in cases where the threat ended upon conclusion of the incident, such as that of the foiled robber who merely sought a target of opportunity. The interests of justice include not only protection, but also adjudication and punishment. This argument is strengthened by the fact that the government cultivates a cadre of specialists in order to achieve these goals. Police officers, judges, lawyers, and correction officers are exclusively trained to bring about these ends, are equipped properly, and have dedicated their careers to protection, apprehension, and adjudication.

What if there were no such institutions in place? If the deranged former spouse says, “I will not rest until I have taken your home from you and killed you,” but there is no police force to intervene, the necessity of using harm does not disappear just because an avenue of escape has been offered in a particular confrontation. All escape offers is an opportunity for the victim to make better defensive plans and for the aggressor to plan a better, more concerted attack. In cases where there is no organized society to appeal to—precisely the case of the international community—escape (now more insightfully read as “retreat”) is not a moral obligation to avert harm, but a tactical consideration.

It is illuminating to note that all state laws in the United States support this interpretation of the duty to retreat. Such laws make it clear that a police officer has no duty to retreat in a confrontation. An interpretation of this is that the citizen must retreat because the state does not have to on her behalf. This indicates that the necessity principle, while still in effect, is more

complex than it first seems. In the state of nature, where there is no police force or other arbiter between agents, the victim of an ongoing enterprise of violence that is not curtailed by meaningful abandonment of the aggressor's intent needs to take some action to end it or otherwise live under the constant threat of harm. In civilized society, she must retreat, but only because the necessity of protection and redress has been shifted to someone else with special training in the capacity of meting out violence.

Once police officers seek to apprehend an individual, he must succumb to their efforts or face the use of force. When officers come for the deranged ex-spouse, the resistance he offers will be met with proportional force aimed at overcoming it. If the man were to threaten the police with deadly force, then the police would use deadly force for their own protection as well as to effect the apprehension. With this, we arrive at the precise situation we see in war: a case where we would otherwise be justified in apprehending the people who threaten us, but the level of force inherent in the enemy's project immediately elevates the endeavor to a series of deadly force encounters. This leads us back to our responsibilities upon an enemy's surrender and also bolsters our understanding of the permissions we have when we are faced with enemies who are retreating and sleeping. We could, for instance, try to apprehend and capture sleeping soldiers and mechanics, but our knowledge that they intend to use deadly force against us makes this an imprudent gesture; we are under no obligation to shoulder the difficulty of the situation that will develop when they wake up or otherwise turn to confront us.

Lowering the Bar of Self-Defense

Once we acknowledge that there is some elasticity to the concept of imminence that is contingent on the scope of the enterprise it concerns, it is possible to also wonder if a threat of injury or death in and of itself is too high a standard for the use of force against an opponent. What if an opponent said, "I just want your house and your money. If you give them to me, then you have my word that I will not harm you. If you resist, it is only then that I will force you to hand them over."

This presents a situation where the victim has the opportunity to avoid all use of force by handing over material possessions. It is possible for me to simply abandon my home, my village, or my nation and not have to harm anyone, avoid being harmed myself, and never have to be witness or participant to an incident of violence. Likewise, a band of thugs may come to my home and say, "This home is now ours, and we will use its residents for labor in order to support a lavish lifestyle for ourselves. If you do not comply, we will use increasing levels of force until you either comply or are killed." Again, we are faced with the threat of force and a clear way to avoid it, but this time in exchange for a loss both of material possessions and autonomy.

It is presumably our right to enjoy autonomy and our justly accumulated possessions free from the specters of annexation and slavery. One deontological conception of such rights suggests that inherent to their very meaning is the provision that we can protect them through force when they are threatened.²⁶ Anything less makes the concept of such rights largely incoherent. This means, in the context here, that we can use force in warfare not only because enemy soldiers are actually engaging in a range of combat operations against us and because this a threat to our lives, but also because they are threatening our autonomy and freedom with a recourse that is a threat to our life. If someone marches into my home, there is an intuition that I may attack them to force them out even if they made their way in silently and unnoticed, without doing me any harm.

This enables us to briefly discuss a unique feature of proportionality, which is that proportionality is multidimensional. It is measured not only by the nature of what an enemy is trying to do to me, but also by what he is prepared to do if I resist. For example, let us say that some-

one wants to come into my home and demonstrates intent to steal an apple pie. While I may use force to eject them from my home, it is clear I may not kill them for their pie-stealing desires as readily as I could kill a person who enters my home to commit rape.²⁷ The intent of the person, in this way, is one dimension of proportionality. As the crime becomes more invasive and more violent, the means by which I may repel it may become more violent in kind.

The second dimension to proportionality is delineated by what the opponent is prepared to do to realize the end. Ideally, it would be proportional to the end itself: he would be committed to only using a modicum of force to steal something such as a pie; however, this is not a necessary relationship. The person could also be willing for some reason to take this pie at gunpoint, or simply to shoot me and walk off with the pie. This second dimension—what recourse the opponent is prepared to resort to—when taken with the first dimension of the nature of his goal, collectively define what level of force I may resort to.

In the case of war, this indicates that the victim may resort to the use of deadly force if the enemy wants something that is not of considerable intrinsic value but is willing to kill for it. It may be sad to know that our enemy is willing to kill for our national supply of pies, but this does not mean that, because we can only resort to protecting our pies by answering lethal force with force in kind, we have no right to do so because the stakes are merely pies. This would mean in the international community that any state that was willing to kill for seemingly small gains ought to be awarded the gains without resistance. More importantly, it also indicates that we do not have to be faced with an immediate threat to our lives per se in order to be justified in using possibly lethal force, but that we may do so if the enemy is seeking something of sufficient value, such as our very freedom and well-being.²⁸

This consideration of proportionality and a bar of self-defense that is lowered from one requiring that violence only answer violence to one that also includes a threat to infringe upon our rights completes my account of self-defense's relationship to just war theory. Combined with the accounts of imminence and necessity that I have offered, it can be seen that the second dimension of proportionality—that we may resort to a given level of violence not only in response to like violence but also in order to give our rights as people adequate meaning—adequately grounds the manner in which just war theory allows armies and their soldiers to comport themselves in combat.

Conclusion

Our right to self-defense, predicated on the inherent value of our life and our freedom, is strong and runs deep. That complex political institutions such as states, just as easily and effectively as individuals, can come to threaten our right to self-defense does nothing to circumscribe it. We must be careful not to let the complexity of a project such as war obscure what is happening at its root: our lives and rights are being threatened in an ongoing and imminent way, and we are entitled to use force to end these threats. It would be unfortunate if a nation-state—which has greater opportunity for reflection, negotiation, and compromise with its opponents than the desperate street criminal—was able to threaten us in a way that, because of its scale, meant we had to shoulder an additional set of burdens and limitations to our conduct order to survive.

It goes without saying that war is always a tragedy and the means of last resort. It is equally apparent that modern wars seem to be more problematic in their justification than the ones in our recent memory such as World Wars I and II. This essay does not have to contend with examining whether wars such as the most recent one in Iraq are just. Instead, it has sought to refute Rodin in one crucial regard: to demonstrate that when we are genuinely threatened and our cause is just, the moral grounding for our vigorous and lethal defense can be reduced to something as simple and intuitive as our right to defend our individual lives and freedoms.

Endnotes

¹ I would like to thank Arthur Applbaum of Harvard University for his comments and suggestions. It should go without saying that all of the shortcomings contained herein are owned solely by the author.

² William Safire, "On Language: Imminent," *The New York Times Magazine*, February 8, 2004, 24.

³ For a critical examination of the ethics of self-defense that does not merely presume it is a self-evident right, see Judith Jarvis Thomson, "Self-Defense," *Philosophy and Public Affairs*, 20 (1991): 283–310.

⁴ The complete account of Rodin's view can be found in his book *War and Self-Defense* (New York: Oxford University Press, 2002). This essay, however, is in response to Rodin's specific argument as made in "War and Self-Defense," *Ethics & International Affairs* 18 (2004): 63–68. Rodin is not the first to claim that traditional just war theory is bankrupt for one reason or another, especially as the face of warfare has changed in the modern age. See also Donald Wells, "How Much Can the 'Just War' Justify?" *The Journal of Philosophy* 66 (1969): 819–829.

⁵ Rodin, "War and Self-Defense," 66.

⁶ There have been several instances of conduct that inadvertently seemed like a lethal threat, a classic example being an adolescent who points a realistic-looking water pistol at an off-duty police officer. The relevant thing to consider for this essay is a criteria of reasonableness in perception of the threat.

⁷ The Geneva Convention describes a set of rules for the legal conduct of war, as just war theory provides for a set of moral principles. For this reason, it will be tempting for practitioners to point to the Convention and the theory as the final, satisfactory justifications of certain types of conduct in war. Of course, this does not follow if the justifications do not have a sufficient grounding themselves. Throughout this essay, we will not have the luxury of assuming that any of these systems or theories are morally correct just because they are the ones we happen to employ at present.

⁸ Rodin, "War and Self-Defense," 66.

⁹ Wells, 821, *passim*. Wells presents a concise survey of secular and religious accounts of just war theory. See also Michael Walzer, *Just and Unjust Wars* (New York: Basic Books, 1977).

¹⁰ Warfare involves numerous cases where combatants do things that may have unintended side effects. For example, it is not uncommon to bombard an enemy position with artillery rounds or a large quantity of bombs knowing that they will obliterate, say, the infantry unit that is the target but will also kill the medics in the unit or perhaps some civilians nearby that are normally not legitimate targets. Many times restrictive rules of engagement prohibit actions that will result in significant "collateral damage." However, when such actions are taken, they are usually justified by arguing that the collateral damage was an unintended side effect of the main goal of just combat. The ethical debate around this is an extensive one that is out of the scope of this essay. See Warren Quinn, "Actions, Intentions and Consequences: The Doctrine of Double Effect," *Philosophy and Public Affairs* 18 (1989): 334–351, and Alison McIntyre, "Doing Away with Double Effect," *Ethics* 111 (2001): 219–255.

¹¹ To round out this brief sketch, see David Wasserman, "Justifying Self-Defense," *Philosophy and Public Affairs* 16 (1987): 356–378.

¹² Rodin, "War and Self-Defense," 66.

¹³ Thomas Pogge, *Realizing Rawls* (Ithaca, NY: Cornell University Press, 1989), 240–280.

¹⁴ John Rawls, *A Theory of Justice*, revised ed. (Cambridge, MA: Belknap Press, 1971), 1999.

¹⁵ John Rawls, *Political Liberalism*, revised paperback ed. (New York: Columbia University Press, 1996), 5.

¹⁶ Pogge, 242–244.

¹⁷ Rodin, “War and Self-Defense,” 66–67.

¹⁸ Rodin, “War and Self-Defense,” 66.

¹⁹ Rodin, “War and Self-Defense,” 66–67.

²⁰ There is a third case, that of the corpsman. Unarmed soldiers with conspicuous markings whose only purpose is to render aid to injured personnel are excluded from the list of acceptable targets. Within the humanitarian moral limitations imposed on warfare and also personal self-defense, this exclusion is reasonable. The thought seems to be that rendering aid to injured people is, in some way, removed from the ongoing endeavor of warfare.

²¹ Jeff McMahan, “War as Self-Defense,” *Ethics and International Affairs* 18 (2004): 75–80 at 76.

²² McMahan, “War as Self-Defense,” 76. This point and the argument directly preceding it substantially mirror Jeff McMahan’s: “. . . retreats in war are presumptively strategic . . . They enable soldiers to recover, regroup, and renew the attack.”

²³ It is clear that assembling an army by conscription poses special problems; however, it can be presumed of most people who are conscripted into an army that, although they would prefer not to fight, they inevitably enter battle as basically willing participants. There are numerous instances of people who have been conscripted and whose conscience absolutely forbids participation in the project, regardless of the consequences. This factor introduces another moving part to our considerations, one that could have a significant impact on just war theory, but it is not one that affects the course of this particular discussion.

²⁴ LaFave & Scott, quoted in Lawrence Alexander, “Self-Defense and the Killing of Noncombatants: A Reply to Fullinwider,” *Philosophy and Public Affairs* 5 (1976): 408–415 at 411; Jeff McMahan, “Self-Defense and the Problem of the Innocent Attacker,” *Ethics* 104 (1994): 252–290 at 265.

²⁵ Even this claim may be too strong. Some people believe that as a practical matter certain governments are unable to provide the type of protection that invokes a duty to retreat, or that in any event a person never cedes the right of self-defense to a duty to retreat because the right is inalienable. These arguments, however, do not weaken the ultimate point here because a capable government makes the best possible case for the duty to retreat, and any other arrangement diminishes its power as an objection.

²⁶ Alan Gewirth, “Why Rights Are Indispensable,” *Mind* 95 (1986): 329–344 at 335–336.

²⁷ Do not confuse this argument with one that wonders if we can ever truly know a person’s intent (it might look like pie-stealing, but it could well be rape) and so we are entitled to make judgments that privilege our own safety over that of the aggressor in the face of this uncertainty. Since we are only interested in the role of intent here, we may suppose to know the true intent of the actor and see how changing it changes our rights and responsibilities. The epistemic question of uncertainty is another consideration entirely.

²⁸ McMahan, “War as Self-Defense,” 77–78.

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PREEMPTING PREEMPTION: NUCLEAR FIRST-USE AND THE ROLE OF CONGRESS

JEFFREY L. SCHULTZ

A preemptive nuclear strike by the United States using "bunker-buster" nuclear weapons to eliminate a rogue state's weapons of mass destruction (WMD) would be unconstitutional without congressional authorization. Only Congress can authorize such an attack, which would violate international law. Customary international law requires that true preemption, a form of self-defense, be proportional to the threat. The Constitution's use of force framework is wise: Congress is given ultimate lawmaking power (including the power to override international law if conflicting) and the specific power to declare war because it is the most democratic branch, best able to engage in wide-ranging debate and deliberation that takes note of constituent opinion. Though the president speaks with a "unitary voice" for the nation in diplomacy, Congress oversees his foreign policy and national security strategy. Congress has ultimate authority to decide how to fund and deploy the nuclear arsenal and the coordinate authority to decide when and how such weapons ought to be used. Unless proportionately responding to repel a sudden attack, the president must obtain authorization from Congress—ideally through a legislative scheme, but, failing that, by obtaining approval of a standing consultative committee of key congressional leaders—before using even low-yield nuclear weapons to eliminate a rogue state's WMD. This position reflects constitutional imperatives and the custom and usage between the branches during the nuclear age. While unwieldy, this approach might result in a continuous adjustment of U.S. national security strategy through a process of negotiation and consultation between the political branches. Indeed, it appears to be the only workable trade-off between democratic and constitutional legitimacy and efficiency and functionalism concerns, and is far preferable to continuing to muddle through a "zone of twilight" with respect to U.S. nuclear posture in a dangerous and unstable time.

Introduction: Iraq Sets the Stage

By signing on to the war in Iraq, the U.S. Congress endorsed the first application of the Bush administration's ambitious new doctrine of preventive war. The joint resolution by Congress endorsing the president's proposed action has been referred to as a "blank check."¹ Some in Congress may have been willing to defer to the president's initiative out of solidarity or apathy, while others may have been counting upon the UN Security Council to endorse the campaign against Saddam Hussein and therefore grant it political legitimacy and international legality, taking the responsibility away from Congress.²

Unlike the passive Congress, the British Parliament engaged in vigorous debate on the legality and merits of the war in Iraq, with Prime Minister Tony Blair delivering a speech in defense of the war described by one commentator as "magnificent."³ Senator Robert C. Byrd fulfilled his accustomed, lonely role as champion of Congress's prerogatives, lamenting in a 19 March 2003 Senate floor speech, "When did we decide to risk undermining international order by adopting a radical doctrinaire approach to using our awesome military might?" The Bush administration, Byrd complained, "had made the world a more dangerous place by flaunting the nation's superpower status and asserting a new doctrine of preemption without international sanction."⁴

The preemption doctrine to which Senator Byrd was alluding is contained in President George W. Bush's National Security Strategy,⁵ but somehow escaped detailed scrutiny from a Congress that "never really gave the doctrine a lot of thought."⁶ Despite holding several hearings to consider the work of the Hart-Rudman U.S. Commission on National Security,⁷ review

U.S. national defense strategy options,⁸ and authorize the fiscal year 2003 defense budget,⁹ the 107th Congress focused on the War on Terrorism, homeland defense, ABM Treaty withdrawal, the proposed national missile defense system, and a host of other topics, while for the most part overlooking the preemption doctrine contained in the National Security Strategy and classified Nuclear Posture Review.¹⁰ In an extraordinary hearing outside its usual oversight authority, only the Senate Foreign Relations Committee looked over the administration's new proposed strategy with a critical eye and marshaled witnesses to oppose some of its assumptions.¹¹

Chairman Biden opened the Senate Foreign Relations Committee hearing by airing his fears of "the development of new nuclear weapons, including low-yield earth penetrators that could blur the traditional firewall between conventional and nuclear weapons and, hence, make nuclear war more likely."¹² Nuclear deterrence, opposition to first-use and promotion of non-proliferation regimes have been U.S. policy and, arguably, international law for almost sixty years. Biden's concern about so-called "bunker-buster" nuclear weapons seems due in some part to nuclear non-proliferation concerns and his disapproval of the Bush administration's opposition to continuing to respect in practice the Comprehensive Nuclear Test Ban Treaty regime, since new or modified nuclear weapons would require testing. "If we test to develop new weapons," Biden continued, "the message will be that we value those weapons more than we do non-proliferation. And other countries will take their cue from us."¹³

The committee's witnesses also raised other concerns beyond the undermining of non-proliferation efforts. Dr. Steven Weinberg, a Nobel Prize-winning physicist, described a penetrator nuclear weapon's "worrisome radiation effects," noting that "the fallout produced by a one-kiloton explosion at a depth of eighty feet¹⁴ would kill everyone within a radius of about half a mile."¹⁵ Dr. Weinberg concluded that "you can't get down deep enough into the earth to avoid a tremendous amount of fallout."¹⁶

Alternatives to nuclear bunker-busters are available, as Admiral William A. Owens, a former vice chairman of the joint chiefs of staff, assured the committee. He referred to the American "information umbrella"—consisting of satellites, tactical sensors, unmanned aerial vehicles, and other means for near twenty-four-hour threat surveillance—combined with conventional force, as a "much more effective deterrent [than the nuclear umbrella], and we have an ability to use it preemptively when we know that [a WMD] capability is being developed."¹⁷

Diplomat and arms control negotiator Paul H. Nitze has also forcefully argued that available conventional weapons outmatch the capabilities of comparable nuclear arms and are "safer, cause less collateral damage, and pose less threat of escalation than do nuclear weapons," while offering "far greater flexibility in a variety of situations where use of any sort of nuclear weapon would be politically or militarily impractical."¹⁸ Nitze actually goes beyond the tactical strike advantages, arguing that a shift in the United States' principal strategic deterrent to powerful and precise conventional arms could be justified both "as a coldly rational approach" and "a morally correct foreign policy choice," since "smart" conventional weapons actually provide "a more credible deterrence" than nuclear weapons "because we can—and will—use them."¹⁹

The final witness before the Senate Foreign Relations Committee hearing, Joseph Cirincione of the Carnegie Endowment for International Peace, pointed to the moral hazard created by the Nuclear Posture Review, from which the "most pernicious aspect . . . is the great leap backward that it takes to the discredited nuclear policies of the 1950s. The review puts forward a nuclear weapon as simply another weapon, part of a continuum of military options merging seamlessly with advanced precision-guided munitions."²⁰ Cirincione noted that Vice President Dick Cheney had attempted to calm the uproar over the leaked Nuclear Posture Review by calling it a routine exercise and implying that it is subject to continual updating and review, which it definitively is not.²¹ The previous Nuclear Posture Review was released by the Clinton administration in September 1994.

The prospect of war has a way of clarifying the mind—even that of a congressman. There was in fact more debate in the Congress about the Nuclear Posture Review once press reports revealed the administration “ha[d] not ruled out using nuclear weapons against Iraqi President Saddam Hussein if he deploy[ed] weapons of mass destruction against the United States or its allies.”²² On 5 March 2003, for example, during the tense period immediately before the start of the war in Iraq, Senator Durbin introduced a draft Senate Resolution 76, which would have expressed the sense of the Senate that “the President’s policy of preemption, combined with a policy of first-use of nuclear weapons, creates an incentive for proliferation of weapons of mass destruction, especially nuclear weapons and is inconsistent with the long-term security of the United States.”²³

To be fair, it is important to point out that previous Congresses failed to address the first hints of a changed nuclear posture when the preemption doctrine was developing during the second Clinton administration. “In November, 1997, President Clinton issued a highly classified Presidential Decision Directive, giving new guidelines to the military on targeting nuclear weapons,” which “according to reports . . . allow[ed] for the use of nuclear weapons against ‘rogue’ states—those suspected of having access to weapons of mass destruction.”²⁴ As the record shows, the issue under consideration is not “personal” to one particular administration, but is about the extent of presidential power to unilaterally determine national security policy and unilaterally use force consistent with that policy.

National Security and the Struggle between the Executive and Legislative Branches

The sometimes unwieldy separation of powers set down in the U.S. Constitution makes it, as Edward S. Corwin famously quipped, “an invitation to struggle for the privilege of directing American foreign policy.”²⁵ In the separation of powers debate, Corwin seems to come down firmly on the side of Congress. He elaborated:

The principle that the national government is as to external affairs a completely sovereign government being conceded, it logically follows that Congress’ legislative power in the same field is also plenary. Except indeed for its inability to require the President to exercise his concurrent powers in the same field, Congress has approximately as broad powers over such matters as has the British Parliament. And once Congress has legislated, the President of course becomes constitutionally obligated to take care that its laws be “faithfully executed” . . . Congress has, to repeat, vast powers to determine the bounds within which a President may be left to work out a foreign policy.²⁶

The struggle between the legislative and executive branches is perpetual and cyclical.²⁷ In the immediate aftermath of World War II, when the United States first achieved strategic dominance over world affairs, many commentators felt that the president was likewise obtaining supremacy over Congress. The U.S. Supreme Court appeared to espouse such presidential dominance of foreign relations in the 1936 *Curtiss-Wright* decision, a case still cited by advocates of executive power, for Justice Sutherland’s invocation of the inherent sovereignty of statehood as a source and justification for presidential power extending beyond those powers expressly enumerated in the U.S. Constitution.²⁸ Beginning in the 1970s, however, the pendulum seems to have swung back in Congress’s favor, as evidenced by a number of studies describing a “resurgent” Congress²⁹ in the aftermath of the Johnson and Nixon presidencies. Congressional activism on foreign policy was apparent throughout the Reagan years and, after

the Republican "revolution" in Congress in 1994, during the later Clinton years.

In the midst of the Korean War, the courts dealt a severe blow to an unpopular president, Harry S. Truman, and to presidential foreign relations power, in the so-called "steel seizure case," *Youngstown v. Sawyer*.³⁰ Rejecting the president's order to keep open striking steel mills he judged necessary to the war effort (and, therefore, in the interest of U.S. national security), "Justice Black rejected, for the Court, the concept of inherent powers which would operate to extend Presidential authority beyond the Constitution" and determined for the court that "the President's power, if any . . . must stem either from an act of Congress or from the Constitution itself."³¹

Justice Robert H. Jackson's even more famous concurrence in the case set up a three-part test for determining the extent of the president's power in foreign relations: (1) at its strongest when backed by express or implied authorization of Congress; (2) in a middle-range "zone of twilight" in the presence of congressional silence; or (3) at its weakest when in conflict with the express or implied will of Congress.³²

When determining the extent of presidential authority in foreign affairs, it is important to consider functionalist arguments as well. There is potentially more at stake when an issue of national security and use of force is involved than there would be in the case of a dispute over routine domestic matters. The strongest functionalist argument in favor of presidential supremacy in foreign relations can be boiled down to the famous axiom that "the Constitution is not a suicide pact."³³ At the start of the twenty-first century, the concept of state sovereignty is still the basic building block of the international system. The instinct for self-preservation at the very core of that concept pushes even democratic states to place their foreign policy in the hands of professionals with substantive expertise and rapid reflexes to deal with complex modern problems and hair-trigger threats.

U.S. Supreme Court justice Arthur Goldberg later put his own famous repetition of the "suicide pact" phrase into context, in testimony before Congress, speaking against yielding too much principle in favor of functionalist concerns. He sided with the legislative power, disapproving the executive's exercise of "so-called inherent powers . . . [due to] the exigencies of modern times and the necessity in this troubled nuclear age for the Executive taking action to protect our Nation."³⁴ As Justice Goldberg told the Senate Committee on the Judiciary, the Constitution "is not a suicide pact, but any concept that Congress would be delinquent in protecting our Nation's conduct of foreign affairs seems to be one which does not do justice or credit to the responsibility and the character of the men and women whom the people have elected to represent them in Congress."³⁵ A pure functionalist might applaud the evolution away from a democratic foreign policy as good and necessary in the nuclear age. Nevertheless, strong advocates of legislative supremacy such as Wilson (in his earlier writings), Corwin, Jackson, and Goldberg, as well as a host of interpretative theories—textualism, intentionalism, adaptivism (constitutional custom) and democratic (process) theory³⁶—argue otherwise.

The first three of the above-referenced theoretical approaches have been discussed previously, in advance of functionalism concerns. The final approach, democratic process theory, can be summarized as follows: the president and vice president are the only elected members of the executive branch, a sprawling bureaucracy where even those officials high enough to require congressional confirmation can hardly be considered popular representatives in the same way as members of Congress. While voters may judge a presidential candidate's foreign policy competence, they do not have an opportunity during an election to consider a platform of detailed foreign policy proposals. Therefore, there is a democratic disconnect in the area of foreign policy unless Congress, the branch that consults most frequently with its constituents, has ultimate authority. Nevertheless, while electoral concerns make the Congress more accountable, they also make legislators more risk-averse. The current unsettled state of law and practice regarding the use of force and the applicability of the War Powers Resolution confus-

es the issue and may make Congress more loath to declare war if, arguably, all of the conditions of that controversial legislation are not met.³⁷

The courts and Congress give some wartime deference to the president as commander-in-chief, but even a healthy deference should not be stretched too far.³⁸ Because Congress has sole power to declare war under article I, section 8 of the Constitution, it effectively has the right to acquiesce (or not) in the dimming of its own powers temporarily during wartime. Arguably, Congress has tried to avoid declaring war in some instances precisely because it does not want to yield its authority, increase deference toward the executive, and, more cravenly, take responsibility for an action that may prove unpopular if ultimately unsuccessful.

The Supreme Court's *Curtiss-Wright* decision, often interpreted as favorable to the executive power, is on firmest ground when read in favor of the argument that the president takes the initiative in foreign relations, speaking for the whole nation in its diplomacy. The national security gloss often placed on the case may sustain the further functionalist argument that the president is better situated to gather intelligence and keep secrets.³⁹ But under *Youngstown*, and in light of the Constitution's "faithful execution" clause,⁴⁰ the balance shifts if Congress speaks—even in wartime.

Justice Jackson's concurrence in *Youngstown* is instructive. *Curtiss-Wright*, he avers, "involved not the question of the President's power to act without congressional authority but the question of his right to act under and in accordance with an Act of Congress . . . assailed on the ground that it delegated legislative power to the President."⁴¹ He concludes by observing that the *Curtiss-Wright* case:

recognized internal and external affairs as being in separate categories, and held that strict limitation upon congressional delegation of power to the President over internal affairs does not apply with respect to delegations of power in external affairs. It was intimated that the President might act in external affairs without congressional authority, but not that he might act contrary to an Act of Congress.⁴²

For practical reasons, Congress is reactive in foreign policy and diplomacy in order to avoid sending mixed messages to other states. Constitutionally speaking, the president has the right to name and recall ambassadors, and plenary power to recognize foreign governments. But where the use of force is involved, the constitutional text reserves to Congress the sole power to declare war.⁴³ Perhaps more important, considering the number of undeclared wars in American history, is the fact that Congress has the exclusive power to fund (and therefore defund) and to make rules to regulate the armed forces of the United States.⁴⁴

Under uninterrupted constitutional practice since the use of the first nuclear weapons by the United States against Japan in the closing days of World War II, Congress has demonstrated that it has the authority to pass the affirmative legislation necessary to control nuclear first-use. Even if Congress chooses not to impose a legislative straitjacket,⁴⁵ the president alone does not have sufficient authority to make first-use of nuclear weapons absent some congressional approval.⁴⁶ The wisdom of Congress's reticence in declaring war from the standpoint of its own institutional prerogatives is clear. According to the Constitution, the power to attack first requires that one also be able to declare war—a power belonging exclusively to Congress under the express language of the document, as we have seen. But if the president can argue that we are already in a war, such as an ongoing "War on Terror" in the aftermath of the Iraq War, for which he received Congress's blessing, then he can claim expansive independent powers in the prosecution of such a war, including the choice of weapons and tactics. In such a "zone of twilight," only an act of Congress—such as the recently repealed ban on "mini-nukes" and bunker-busters—can tilt the constitutional balance clearly in its favor. If Congress wishes

to force the president to consult prior to launching a nuclear preemptive strike, it had better say so by means of legislation.

Means of Influence: Chadha and the Continuing Power of the Purse

In the 1983 *Chadha*⁴⁷ case, the U.S. Supreme Court rejected the use by Congress of a “legislative veto” mechanism to review and approve executive action that failed to comply with legislative process by not obtaining the approval of both chambers of Congress. The decision was controversial; the legislative veto was widespread, having developed over many years as a result of custom and usage between the political branches, a process some identified as an effective and efficient negotiation and consultation.

As a result of *Chadha*, Congress now lacks this straightforward means to retain some control over the executive branch when it makes a broad grant of power pursuant to legislation. *Chadha* has caused Congress in some cases to return to a “short-leash approach,” that is, according to one prominent account, “in many instances an alternative counterproductive to Congress, the Presidency, and, above all, the national interest.”⁴⁸ The more recent rejection of the line-item veto by the Supreme Court in *Clinton v. New York*,⁴⁹ can be seen as a companion piece to *Chadha*, preserving a traditional, formal understanding of separation of powers, under which Congress has exclusive power to appropriate and spend funds.

In the aftermath of *Chadha* and *Clinton v. New York*, Congress’s purse-string power looks like its best, most unimpeachable tool for conditioning the president’s foreign policy. It can even be used as a soft legislative veto, such as when Congress requires its approval to be obtained prior to the reprogramming by the executive of designated funds. Congress’s recourse to its purse-string power to try to shape foreign policy can be seen in the fact that even with the Iraq war under way “top House and Senate lawmakers plan[ned] to give President Bush far less flexibility than he want[ed] with the funds Congress [would ultimately] provide for the war with Iraq.”⁵⁰ It was also evident when the president’s request in fall 2003 for an additional \$87 billion in funding to cover troop deployment and reconstruction operations in Iraq met with unexpected resistance in the Congress.

The 2003 *Defense Budget Act* adopted the purse-string approach to the nuclear first-use issue, denying funds for formal design studies for a so-called robust nuclear earth penetrator (RNEP) weapon promised to the National Nuclear Security Administration under Title XXXI of the bill prior to passage.⁵¹ The act also required the secretary of energy, if developing a new or modified nuclear weapon (which seems clearly to include the RNEP referred to in the Nuclear Posture Review), to specifically request funds for such activities in the budget of the president for any fiscal year, and, if at an advanced stage of the development process, to make a dedicated line item request.⁵²

Senator Durbin’s Senate Resolution 76 criticizing the present administration’s nuclear posture shows that there has been some vocal opposition in the Congress to the so-called doctrine of preemption contained in the most recent National Security Strategy and, specifically, to the possible use of nuclear weapons to take out weapons of mass destruction abroad. Yet it is difficult to imagine a groundswell developing in Congress large enough to cause the administration to reconsider its preemption doctrine entirely in light of its potential to make nuclear first-use more likely. The 108th Congress, which repealed the ban on mini-nukes and bunker-buster research in the 2004 *Defense Budget Act*, does not appear to appreciate the danger.

The practical drawback to the use of purse-string power by Congress in the case of nuclear first-use is obvious: budget cutting is hardly instantaneous in effect, nor is it a precision weapon. The impact of prospective cuts may be negligible where research or development of a controversial weapon has already begun. In the absence of a specific legislative prohibition

following the enactment of the 2004 *Defense Budget Act*, the Department of Defense may undertake feasibility studies and related research on mini-nukes.⁵³ The signal is clear to any rival power around the world paying attention. The U.S. policy of encouraging non-proliferation worldwide, including by means of programs aimed at retiring old Soviet nuclear weapons, could be devastated by an appearance of a double standard.

With American conventional superiority so clear, there will surely be great interest in any research the United States undertakes on the sort of low-yield nuclear weapon that an out-manned enemy might be tempted to resort to in the field, or which a terrorist organization would most easily be able to deploy. Unless the U.S. military shows that such a weapon is superior to the conventional alternative for striking hardened or underground targets, the lifting of the research ban could be opening Pandora's box without gaining anything in return. Larger bunker-busters—although more difficult to use as precision weapons—are well past the research stage, having been deployable since about 1997.⁵⁴ Even though the 2004 *Defense Budget Act* followed its immediate predecessor in requiring a specific request from the Department of Energy before allowing testing or production of RNEPs, existing missiles or aboveground nuclear weapons could always be re-purposed without specific permission of Congress or line-item disclosure in the president's budget request, one clue that would tip off opponents of such a controversial measure.

In the post-September 11 environment of perpetual insecurity it is hard to imagine any movement arising to control defense spending with the same traction and bipartisan impact as the combination of the left-wing "nuclear freeze" movement and conservative defense budget criticism of the early 1980s. In fact, despite having the power to do so, Congress has almost never cancelled a major weapons system outright.⁵⁵ When the nation's safety should be the first concern, the zigzag course charted by the Congress, interacting over time with pork-barrel politics, partisan concerns, and a short horizon, seems a dangerous route upon which to continue. More consultation between the political branches, together with a longer time-horizon would hopefully lead to a more rational policy that balances non-proliferation concerns with the needs of national security. The occasion of the Nuclear Posture Review, taking place approximately once per decade, provides a good opportunity for oversight of nuclear strategy and tactics by Congress, with both political branches working together on the shape of the optimal strategy.

Based on the comments of a number of experts called to testify in the Senate Foreign Relations Committee hearing discussed earlier, as well as the concerns expressed by Paul H. Nitze and others, it appears that Congress should make a stronger case in law for using conventional weapons to eliminate WMD facilities. From a practical and moral perspective, it is essential to avoid creating a disaster of nuclear fallout and destruction when the intelligence on threats is never airtight. (It has turned out to be erroneous before, as in the case of the Sudanese factory mistakenly bombed as a dual-use chemical weapons facility during the Clinton administration.).

From the perspective of both international and U.S. federal law, the use of a conventional weapon is less likely to constitute a violation of the principle of proportionality typically associated with the *Caroline* case.⁵⁶ The use of a nuclear weapon in anticipatory self-defense to eliminate a threat pursuant to which the very survival of the defending state is not at risk is a violation of international law according to the International Court of Justice.⁵⁷ In the last event, since the power to declare war and to decide to violate international law is exclusively within Congress's constitutional power, should Congress fail to convince the president to employ conventional weapons, and he or she judges a nuclear first strike necessary to take out a WMD threat, only Congress has the ultimate authority to ratify such action anyway.⁵⁸

While strategy is best developed for the long term, circumstances can change overnight. For that reason, a standing committee of key members of Congress should be constituted by law to be consulted on the formulation of the Nuclear Posture Review and, thereafter, anytime the president feels that it is in the national security interest of the United States to deviate from

established policy on preemptive nuclear strikes. By delegating its power to approve a preemptive nuclear strike to a bicameral committee, Congress would avoid being bypassed entirely and would recognize that secrecy and timing concerns may make consultation and deliberation by the Congress as a whole impracticable.

Given that it has few independent means of developing intelligence outside the executive branch, however, Congress is at a severe informational disadvantage. In practice, members of Congress sitting on a consultative committee will feel enormous pressure to take the president at his word about the facts on the ground. In light of the recently released Kay Report of the Iraq Survey Group, which details the lack of any evidence of weapons of mass destruction in Iraq following more than one year of a massive U.S. military presence in that country, this informational imbalance is particularly troubling. Under the status quo, Congress's foreign affairs committees are generally less demanding about information than they could be. Nevertheless, if the president were more concerned about being denied authority to launch an attack because existing legislation required consultative committee approval in such a case, he or she would have more incentive to consult with the Senate and House Intelligence and Armed Services Committees—or the full Congress for that matter—and keep them better informed all along.

More ongoing negotiation and contact would finally place the responsibility for developing “big picture” strategy—including the deployment and use of nuclear weapons—where it belongs: between the branches, in a process of co-determination. This need not lead to the sort of gridlock commonly associated with the budget process. While the National Security Strategy is required to be produced yearly (thus far, the Bush administration is in breach, having only produced one document in 2002), it is more of a philosophical overview than a planning document. The Nuclear Posture Review, on the other hand—which, as we have seen, sets a number of long-term planning and budgetary wheels in motion—is produced only once per decade. It does not seem unreasonable that the U.S. Congress and the president should re-examine U.S. nuclear strategy and negotiate its contours once per decade, rather than leaving such an important and constitutionally fraught task solely in the hands of the executive.

Conclusion: Congress Must Speak on National Security Strategy

The time is ripe to set up the congressional consultative committee on the use of force that has been proposed many times, in many forms, over the last thirty years.⁵⁹ Abandoning last-resort nuclear deterrence in favor of a preemption doctrine that allows the president the flexibility to employ a host of new, specialized nuclear weapons such as mini-nukes or bunker-busters is bad policy, even if Congress currently backs it. Nevertheless, the decision to abandon deterrence with Congress's acquiescence does not threaten democracy and the constitutional separation of powers as much as a unilateral decision by the president to carry out a nuclear strike. If a president strikes first preventively, he or she has no clear constitutional authority. In such circumstances, the executive would most likely rely upon the “inherent authority” some claim for it under *Curtiss-Wright*, the 1947 *National Security Act*, and even Alexander Hamilton's *Pacificus* papers.⁶⁰ As we have seen, purse-string restrictions alone cannot prevent the president from making a preemptive nuclear strike using specially designed bunker-busters or, if unavailable, a re-purposed aboveground nuclear bomb. A consultative committee similar in structure to the one proposed by Congressman Lee Hamilton (see Appendix B) would more closely fulfill a constitutional design that requires consultation between the political branches where the use of force is concerned.

A consultative process is more realistic and flexible than legislative handcuffs. Congress could grant its members via legislation a right to bring an action for declaratory judgment and injunctive relief against the president for violating statutory guidelines setting forth in detail

how he can act under circumstances involving first-use. But the courts are reluctant to get involved in any dispute touching on separation of powers and are deferential in a wartime setting (which arguably applies now, since the U.S. is waging a war on global terrorism).

Even if the courts were amenable to jumping into a "political question" involving a struggle for supremacy between the executive and legislative branches, they could not in any case act quickly enough to stop the president from making a rapid, secret strike on an enemy WMD facility in violation of law. An effective total legislative ban or straitjacket regarding first-use is probably impossible, and would remove any flexibility whatsoever, in a wager by Congress that there could never be an instance where it is necessary for the United States to strike first.

International law is an important consideration and feeds back into the constitutional arguments. The UN Charter permits the use of force under article 51 only for purposes of individual or collective self-defense or pursuant to express approval by the Security Council. We can reasonably discount the possibility that any president could or would be able to obtain UN Security Council approval for a nuclear preemptive strike, leaving self-defense as the only potential justification.

For a preemptive nuclear strike to constitute a permissible form of self-defense under international law, however, it must be necessary and proportional to an immediate threat. Based on the radiation fallout that would result even from a mini-nuke—as earlier cited congressional hearing testimony shows—a nuclear first strike for purposes of preemption would violate the *Caroline* doctrine because it would cause damage far in excess of any demonstrable harm it would theoretically be defending against. Unless the very existence of the United States is at stake, a disproportionate nuclear attack would therefore not be permissible under international law. The *Caroline* doctrine requiring proportionality "is firmly established as an integral aspect of both customary international law and, by extension the UN Charter," by virtue of its incorporation into article 51 of the charter, the provision allowing individual or collective self-defense.⁶¹

A preemptive strike that might be permissible with conventional weapons would, if nuclear and disproportionate to the threat, violate customary international law, "part of federal common law . . . binding on every executive branch official, including the President."⁶² Only congressional authorization can "legalize" such a violation of international law by the president. Looking at the constitutional text, court interpretations, custom, and international law as incorporated into U.S. law, the cumulative weight of the analysis shows that the separation of powers tilts definitively toward the Congress under the Constitution in the case under discussion. Both functionalist and democratic process approaches also support the same conclusion. If forthcoming studies support earlier congressional testimony in concluding that conventional weapons can eliminate WMD threats just as effectively as nuclear weapons, Congress should direct the president to adjust U.S. strategy accordingly. Regardless, Congress should agree on rules with the president within a legislative framework that includes a consultative committee to allow Congress a more direct and regular role in fine-tuning U.S. nuclear strategy and posture. The more indirect oversight of the purse-string approach is just not effective in restraining the president from taking immediate action.

The merits of the U.S. National Security Strategy and Nuclear Posture Review as presently drafted should receive further airing and debate before the full Congress, as Vice President Dick Cheney seemed to promise. From a legal standpoint, however, such a review is insufficient. With respect to nuclear first-use, the president lacks legal authority to execute the new doctrine of preemption, even though he has declared such a policy under both the National Security Strategy and Nuclear Posture Review. Congress must find a way to speak through legislation and consultation to endorse, condition, or ban the new doctrine (in the last case, perhaps temporarily until a new legislative scheme can be agreed upon; this would also give the president incentive to negotiate and consult with Congress on how such a scheme would

work).

As Justice Jackson's tripartite analysis in the *Youngstown* case shows, where, as here, the president does not have plenary power to act (because he would violate the UN Charter and customary international law, each incorporated into federal common law), Congress must provide authorization, preferably through a consultative committee that does not sacrifice the executive's speed advantage in an emergency. Without such authorization, adrift in a "zone of twilight," the president lacks sufficient independent power to use a nuclear strike to remove a WMD threat, and such a preemptive attack would violate the U.S. Constitution as well as international law.

APPENDIX A

S.R. 76 (5 March 2003)

Whereas press reports show that the December 31, 2001 Nuclear Posture Review states that the United States might use nuclear weapons to dissuade adversaries from undertaking military programs or operations that could threaten United States interests;

Whereas the Nuclear Posture Review, according to such reports, goes on to state that nuclear weapons could be employed against targets capable of withstanding non-nuclear attack;

Whereas the Nuclear Posture Review is further reported to state that, in setting requirements for nuclear strike capabilities, North Korea, Iraq, Iran, Syria, and Libya are among the countries that could be involved in immediate, potential, or unexpected contingencies;

Whereas the September 17, 2002 National Security Strategy of the United States of America states that "[a]s a matter of common sense and self-defense, America will act against such emerging threats before they are fully formed," and that "[t]o forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively";

Whereas the December 2002 National Strategy to Combat Weapons of Mass Destruction states that "[t]he United States will continue to make clear that it reserves the right to respond with overwhelming force including through resort to all of our options to the use of [weapons of mass destruction] against the United States, our forces abroad, and friends and allies";

Whereas United States nuclear policy, outlined in 1978 and restated in 1995 and 2002, includes, in the context of gaining other nations' support for the Treaty on the Non-Proliferation of Nuclear Weapons, a "negative security assurance" that the United States would not use its nuclear force against a country that does not possess nuclear weapons unless that country was allied with a nuclear weapons possessor;

Whereas the Under Secretary of State for Arms Control and International Security, John Bolton, recently announced the Administration's abandonment of the so-called "negative security assurance" pledge to refrain from using nuclear weapons against non-nuclear nations;

Whereas reports about the Stockpile Stewardship Conference Planning Meeting of the Department of Defense, held on January 10, 2003, indicate that the United States is engaged in the expansion of research and development of new types of nuclear weapons;

Whereas this expansion of nuclear weapons research covers new forms of nuclear weaponry that threaten the limitations on nuclear weapons testing that are established by the unratified, but previously respect-

ed, Comprehensive Nuclear Test-Ban Treaty;

Whereas these policies and actions threaten to make nuclear weapons appear to be useful, legitimate, first-strike offensive weapons, rather than a force for deterrence, and therefore undermine an essential tenet of nonproliferation; and

Whereas the cumulative effect of the policies announced by the President is to redefine the concept of preemption, which had been understood to mean the right of every state to anticipatory self-defense in the face of imminent attack, and to broaden the concept to justify a preventive war initiated by the United States, even without evidence of an imminent attack, in which the United States might use nuclear weapons against non-nuclear states: Now, therefore, be it

Resolved, That it is the sense of the Senate that the President's policy of preemption, combined with a policy of first use of nuclear weapons, creates an incentive for proliferation of weapons of mass destruction, especially nuclear weapons, and is inconsistent with the long-term security of the United States.

APPENDIX B

Model for Consultative Committee (Consultation Act of 1993)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Consultation Act of 1993".

SEC. 2. STANDING CONSULTATIVE GROUP.

(a) ESTABLISHMENT.-THERE SHALL BE WITHIN THE CONGRESS A GROUP OF MEMBERS OF CONGRESS TO BE KNOWN AS THE STANDING CONSULTATIVE GROUP (HEREINAFTER IN THIS ACT REFERRED TO AS THE "CONSULTATIVE GROUP").

(b) PURPOSE.-

(1) IN GENERAL.- (A) THE PURPOSE OF THE CONSULTATIVE GROUP SHALL BE TO FACILITATE IMPROVED INTERACTION BETWEEN THE EXECUTIVE BRANCH AND THE CONGRESS WITH RESPECT TO THE USE OF UNITED STATES MILITARY FORCE ABROAD, INCLUDING ANY SUCH USE DESCRIBED IN SECTION 3 AND SECTION 4(A) OF THE WAR POWERS RESOLUTION (50 U.S.C. 1542 AND 1543(A)).

(B) TO THE FULLEST EXTENT PRACTICABLE, CONSULTATIONS IN ACCORDANCE WITH THIS SUBSECTION SHOULD OCCUR BEFORE THE UNITED STATES ENGAGES IN DISCUSSIONS WITHIN THE UNITED NATIONS, WITHIN ANY REGIONAL ORGANIZATION IN WHICH THE UNITED STATES PARTICIPATES, OR WITH OTHER COUNTRIES ON THE POSSIBLE USE OF UNITED STATES MILITARY FORCE ABROAD, INCLUDING IN PARTICULAR ANY SUCH USE UNDER CHAPTER VII OF THE UNITED NATIONS CHARTER AND ANY SUCH USE THAT MIGHT INVOLVE PLACING ELEMENTS OF THE UNITED STATES ARMED FORCES UNDER THE OPERATIONAL CONTROL OF A FOREIGN NATIONAL.

(2) REGULAR CONSULTATIONS.-IN CARRYING OUT PARAGRAPH (1), THE CONSULTATIVE GROUP AND THE PRESIDENT (OR SENIOR MEMBERS OF THE ADMINISTRATION INVOLVED WITH NATIONAL SECURITY ISSUES) SHOULD MEET REGULARLY FOR DISCUSSIONS AND CONSULTATIONS.

(3) SPECIAL CONSULTATIONS.-THE CONSULTATIVE GROUP AND THE PRESIDENT (OR SENIOR MEMBERS OF THE ADMINISTRATION INVOLVED WITH NATIONAL SECURITY ISSUES) SHOULD ALSO MEET WHENEVER UNITED STATES MILITARY ACTION ABROAD IS BEING CONSIDERED BY THE PRESIDENT AND SENIOR MEMBERS OF THE ADMINISTRATION.

(C) MEMBERSHIP.-THE CONSULTATIVE GROUP SHALL CONSIST OF THE FOLLOWING MEMBERS OF CONGRESS:

(1) HOUSE OF REPRESENTATIVES.-THOSE MEMBERS OF THE HOUSE OF REPRESENTATIVES DESIGNATED BY THE SPEAKER OF THE HOUSE (AFTER CONSULTATION WITH THE MINORITY LEADER OF THE HOUSE). THE MEMBERS SO DESIGNATED SHOULD INCLUDE MAJORITY AND CORRESPONDING MINORITY REPRESENTATIVES OF THE HOUSE LEADERSHIP AND THE FOLLOWING COMMITTEES: THE COMMITTEE ON FOREIGN AFFAIRS, THE COMMITTEE ON ARMED SERVICES, THE PERMANENT SELECT COMMITTEE ON INTELLIGENCE, AND THE COMMITTEE ON APPROPRIATIONS.

(2) SENATE.-THOSE SENATORS DESIGNATED BY THE MAJORITY LEADER OF THE SENATE (AFTER CONSULTATION WITH THE MINORITY LEADER OF THE SENATE). THE SENATORS SO DESIGNATED SHOULD INCLUDE MAJORITY AND CORRESPONDING MINORITY REPRESENTATIVES OF THE SENATE LEADERSHIP AND THE FOLLOWING COMMITTEES: THE COMMITTEE ON FOREIGN RELATIONS, THE COMMITTEE ON ARMED SERVICES, THE SELECT COMMITTEE ON INTELLIGENCE, AND THE COMMITTEE ON APPROPRIATIONS.

(D) DEFINITION.-AS USED IN THIS SECTION, THE TERM "MEMBER" INCLUDES, IN THE CASE OF THE HOUSE OF REPRESENTATIVES, THE RESIDENT COMMISSIONER TO THE UNITED STATES FROM PUERTO RICO AND DELEGATES TO THE HOUSE.

SEC. 3. RULE OF CONSTRUCTION. The conduct of consultations pursuant to section 2(b) of this Act with respect to a possible or an ongoing United States military action abroad shall not be construed as a grant of authority from the Congress to the President to conduct such military action.

Endnotes

¹ Lee Hamilton (former congressman), telephone interview with the author, March 21, 2003. Other commentators have expressed similar views. Hamilton criticized a "timid Congress . . . that rarely makes the decision to go to war, even though the Founders clearly intended it to be Congress'[s] decision," and concluded, "it is amazing to me how little Congress wants to use its [war] power."

² Under past practice, the UN Security Council would probably limit itself to approving "all necessary measures" or some such convenient euphemism for military force. As John Hart Ely notes, in the run-up to the Gulf War the first President Bush "lobbied hard for the endorsement of the UN Security Council while treating that of Congress as optional . . . [The president] agreed to seek congressional endorsement only after he had received quite firm assurances that he would get it." John Hart Ely, *War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath* (Princeton, NJ: Princeton University Press, 1993), 50–51. Ironically, the first President Bush's tactic to disarm Congress may have helped convince the second President Bush that he needed the Security Council approval that he ultimately failed to obtain.

³ Timothy Garton Ash, "The War After War with Iraq," *New York Times*, March 20, 2003, A31.

⁴“Senator Deplores Attack on Iraq,” *New York Times*, March 20, 2003, A18.

⁵ White House, National Security Council, “The National Security Strategy of the United States,” <http://www.whitehouse.gov/nsc/nss.html>. The National Security Strategy, prepared by the administration pursuant to Sec. 108 of the *National Security Act* of 1947, was transmitted to Congress on 23 September 2002, amidst both congressional and worldwide debate over the possibility of an impending U.S. attack on Iraq. The doctrine states in relevant part that “[a]s a matter of common sense and self-defense, America will act against . . . emerging threats before they are fully formed” and “[t]o forestall or prevent . . . hostile acts by our adversaries, the United States will, if necessary, act preemptively.”

⁶ Jeremy Stone, telephone interview with the author, March 21, 2003. Jeremy Stone is the former president of the Federation of American Scientists.

⁷ House Committee on Armed Services, *U.S. National Security Strategy*, 107th Cong., 1st sess., 21 March 2001; House Committee on Armed Services, *U.S. National Security Strategy and the Quadrennial Defense Review*, 107th Cong., 1st sess., 21 June 2001.

⁸ House Committee on Armed Services, *U.S. National Military Strategy Options*, 107th Cong., 1st sess., 20 June 2001; Senate Committee on Armed Services, *Defense Strategy Review*, 107th Cong., 1st sess., 21 June 2001.

⁹ The 2003 defense budget bill as reported did reflect some debate in Congress regarding the U.S. nuclear posture. The “Additional View” section referenced two discarded provisions: the Tauscher-Allen amendment, which would have prohibited the development or deployment of nuclear-tipped ballistic missile interceptors, and the Spratt amendment, which would have required congressional notification in advance of any future underground nuclear testing. The dissent states that both amendments “speak to the need for caution in expanding applications for nuclear use” and reflect a preference for “countering the very real threat of hard and deeply buried targets on advanced conventional weapons and enhanced intelligence.” House Committee on Armed Services, *Bob Stump National Defense Authorization Act for Fiscal Year 2003*, H.R. 4546, 107th Cong., 2nd sess., 3 May 2002, 581. Several witnesses at the Senate Foreign Relations Committee hearing two weeks later echoed this preference explicitly. (See note 11 below.) The 2003 defense budget bill was ultimately enacted into law on 2 December 2002. *Bob Stump National Defense Authorization Act for Fiscal Year 2003 (2003 Defense Budget Act)*, *Statutes at Large* 116 (2002): 2458. In the final version as passed, the 107th Congress retained the ban on developing low-yield nuclear weapons contained in Sec. 3136 of the *National Defense Authorization Act for Fiscal Year 1994 (1994 Defense Budget Act)*. *Statutes at Large* 107 (1993): 1547. The 108th Congress subsequently repealed the blanket ban on low-yield nukes, while leaving the door open, if the secretary of energy obtains specific congressional authorization, to the development and engineering of “a robust nuclear earth penetrator weapon,” the “bunker-buster” weapon referred to herein. *National Defense Authorization Act for Fiscal Year 2004 (2004 Defense Budget Act)*, *Statutes at Large* 117 (2003): 1392, Section 3116, “Repeal of Prohibition on Research and Development of Low-Yield Nuclear Weapons.”

¹⁰ The Nuclear Posture Review, conducted by the Department of Defense, was submitted to Congress on December 31, 2001, pursuant to Sec. 1041 of the *Floyd D. Spence National Defense Authorization Act for FY 2001*, *Statutes at Large* 114 (2000): 1654A–262.

¹¹ Senate Committee on Foreign Relations, *Examining the Nuclear Posture Review*, 107th Cong., 2nd sess., 16 May 2002. Chairman Biden described the hearing as “rather unusual” for the committee because the subject was a Defense Department document and justified the departure from its usual turf on the grounds that “especially in the realm of strategic policy, decisions regarding the structure and possible use of our nuclear arsenal are fraught with foreign policy implications.”

¹² *Ibid.*, 1.

¹³ *Ibid.*, 2. The 108th Congress was sufficiently concerned with the mixed message that its repeal of the

blanket prohibition of mini-nukes may give to other states that it required the secretaries of state, energy, and defense to jointly submit by 1 March 2004 a report assessing how repeal of the ban formerly contained in Sec. 3136 of the 1994 *Defense Budget Act* would affect the U.S. ability to achieve its non-proliferation objectives. The 2004 *Defense Budget Act*, Sec. 3116(d). As of this writing, the unclassified report has yet to be delivered to Congress as required

¹⁴ This is the depth that represents the weapon's maximum penetration, according to most scientists. Senate Committee on Foreign Relations, 35.

¹⁵ *Ibid.*

¹⁶ *Ibid.*, 53. Under Sec. 1033 of the 2003 *Defense Budget Act*, the secretary of defense was mandated to commission from the National Academies of Science a study of the short-term and long-term effects on local civilian populations and U.S. military personnel from an attack on a WMD facility using a nuclear "bunker-buster," a non-penetrating nuclear weapon, or, alternatively, a conventional weapon whose blast would release WMD contamination from the target site. The report, due midyear 2003, had still not been completed as of 10 April 2004, according to the National Academies of Science Web site (<http://www.nationalacademies.org/ocga/reso.nsf/Documents/Congressionally+Mandated+Reports?OpenDocument>).

¹⁷ Senate Committee on Foreign Relations, 15. A similar view can be found in Michael A. Levi, "Fire in the Hole: Nuclear and Non-Nuclear Options for Counter-Proliferation," Non-Proliferation Project, Carnegie Endowment for International Peace, (November 2002), available online at <http://www.ceip.org/files/pdf/wp31.pdf>.

¹⁸ Paul H. Nitze, "Is It Time to Junk Our Nukes?" *The Washington Quarterly* 20 (Summer 1997): 97.

¹⁹ *Ibid.*

²⁰ Senate Committee on Foreign Relations, 45.

²¹ Sec. 1031 of the 2003 *Defense Budget Act* required a report from the Defense Department to the Armed Services Committees detailing a strategic force structure plan for nuclear weapons and delivery systems for 2003–2012 consistent with the Nuclear Posture Review, which implied that the latter document had been accepted as final and applicable during the next decade, pace Cheney.

²² Ellen Sorokin, "Administration Won't Bar Use of Nuclear Weapons," *Washington Times*, January 27, 2003, 1.

²³ S.R. 76, 108th Cong., 1st sess., *Congressional Record*, 149, daily ed. (5 March 2003): S3165, S3197–S3198 (statement of Sen. Durbin). The full text of Senator Durbin's resolution is reproduced in Appendix A.

²⁴ Hans Kristensen, "Nuclear Futures: Proliferation of Weapons of Mass Destruction and U.S. Nuclear Strategy," British American Security Information Council, Basic Research Report No. 98.2 (March 1998), available online at [http://www.basicint.org/pubs/Research/1998nuclearfutures\(2\).htm](http://www.basicint.org/pubs/Research/1998nuclearfutures(2).htm).

²⁵ Edward S. Corwin, *The President, Office and Powers, 1787–1957; History and Analysis of Practice and Opinion*, 4th rev. ed. (New York: New York University Press, 1957), 176.

²⁶ *Ibid.*, 190, 192.

²⁷ One of the great scholars of the American political system, Woodrow Wilson, later to become an activist foreign-policy president, described the presidency as all but irrelevant in the post-Civil War era, with the government dominated, as he felt it inevitably must be, by standing committees of Congress. Woodrow Wilson, *Congressional Government: A Study in American Politics* (Boston: Houghton, Mifflin and Company, 1885). Following the Spanish-American War and the presidency of T.R. Roosevelt, however, he almost completely reversed his opinion in his subsequent volume, seeing a return to presidential leadership reminiscent of the early days of the United States. Woodrow Wilson,

Constitutional Government in the United States (New York: Columbia University Press, 1908).

²⁸ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

²⁹ See Randall B. Ripley and James M. Lindsay, eds., *Congress Resurgent: Foreign and Defense Policy on Capitol Hill* (Ann Arbor, MI: University of Michigan Press, 1993). cf. Barbara Hinckley, *Less than Meets the Eye: Foreign Policy Making and the Myth of the Assertive Congress* (Chicago, IL: University of Chicago Press, 1994); Stephen R. Weissman, *A Culture of Deference* (New York: Basic Books, 1995). Although they acknowledge the congressional "staff explosion" and new restraints on the intelligence community, in a rejoinder to Ripley and Lindsay, Hinckley and Weissman still see an underlying culture of deference even where Congress has supposedly challenged the White House's foreign policy goals.

³⁰ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

³¹ Senate Committee on the Judiciary, Subcommittee on Separation of Powers, *Congressional Oversight of Executive Agreements*, 92nd Cong., 2nd sess., April 24, 1972, 12 (Statement of Hon. Arthur J. Goldberg). The doctrine of inherent powers was again rejected by Justice Hugo Black (writing for a plurality) in *Reid v. Covert*, 354 U.S. 1 (1957), a case involving presidential action taken by means of a sole executive agreement without a congressional grant of authority or consent.

³² *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Justice Jackson, concurring).

³³ The original words, reworked in popular parlance as above, are attributed to Justice Jackson: "There is a danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact." *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949), cited in *Bartlett's Familiar Quotations*, gen. ed., 17th ed. (Boston: Little, Brown and Company, 2002), 734

³⁴ Senate Committee on the Judiciary, 12.

³⁵ *Ibid.*

³⁶ See Nathan J. Diament, "Foreign Relations and Our Domestic Constitution: Broadening the Discourse," *Connecticut Law Review* 30 (1998): 30. Diament applies a number of democratic theories to gain new insight into foreign relations and the separation of powers under the Constitution. Whether the courts are mediating—in most cases, they invoke the "political question" doctrine to stay out of a dispute between the political branches—a failure in the foreign relations area to look to democratic principles and the unique checks and balances in the U.S. system is a potentially fatal oversight, destroying the constitutional and democratic legitimacy that everyone—including the functionalists—wants to preserve.

³⁷ The author does not examine the War Powers Resolution in detail here since its time constraint and post-facto reporting requirement, even if triggered, would be of no use in preventing a preemptive nuclear strike. There is simply no way for Congress or the courts to act in time to call back forces or cut off funding for a missile attack or bombing. As we have seen in Iraq, a massive invasion with land forces is a different story, requiring congressional cooperation through the funding process and therefore giving Congress a significant role—with or without the War Powers Resolution. If the president believes a preemptive strike is necessary, he would not be able to consult the full Congress on grounds of both secrecy and practicality to obtain an approval that could satisfy the War Powers Resolution anyway; thus, some argue that he should be required to consult with a special committee of Congress before taking such a drastic step. (For more detail on proposals for just such a consultative committee, see notes 46 and 59 below.)

³⁸ The U.S. Supreme Court long ago decided a case touching on one of the most controversial episodes of the Civil War, upholding the suspension by President Lincoln of the writ of habeas corpus, as well as the use of military commissions to try civilians accused of crimes during wartime (the latter an issue familiar from the current war on terrorism). The court limited its holding by denying the executive any

special, elastic powers during wartime. "The Constitution of the United States," the Court majority emphasized, applies "equally in war and in peace." *Ex parte Milligan*, 71 U.S. 2 (1866). *Milligan* confirms with respect to the separation of powers regarding use of force that once war is declared, the whole power of conducting it belongs to the president, but it reinforces, as a result, the essential importance of Congress's power to declare war in the first place: "Lest this grant of power should be so broad as to tempt its exercise in initiating war, in order to reap the fruits of victory, and, therefore, be unsafe to be vested in a single branch of a republican government, the Constitution has delegated to Congress the power of originating war by declaration, when such declaration is necessary to the commencement of hostilities, and of provoking it by issuing letters of marque and reprisal; consequently, also, the power of raising and supporting armies, maintaining a navy, employing the militia, and of making rules for the government of all armed forces while in the service of the United States" (*Ibid.*, 28–29). It is no great leap to conclude that this same scheme sees Congress with ultimate power to determine the deployment of U.S. nuclear forces and their use in a preemptive strike.

³⁹ With respect to intelligence operations, even a prominent democratic process theorist of the Constitution has said that the War Powers Resolution would not apply to a "covert war." Hart Ely, 108.

⁴⁰ U.S. Constitution, art. 2, sec. 3.

⁴¹ *Youngstown Sheet & Tube Co. v. Sawyer*, 637.

⁴² *Ibid.*

⁴³ U.S. Constitution, art. 1, sec. 8, cl. 11. Based on debate over the final draft of this provision by the Federal Convention of 1787, the president can act unilaterally only to repel sudden attacks. See Louis Fisher, "Sidestepping Congress: Presidents Acting under the UN and NATO," *Case Western Reserve Law Review* 47 (1997): 1237.

⁴⁴ U.S. Constitution, art. 1, sec. 8, cl. 12–14. The air and nuclear forces are not explicitly anticipated in the text, but even the strictest interpretivist would admit that they must be included under such provisions.

⁴⁵ According to a definitive account, "the biggest obstacle to congressional influence" is not constitutional but "the ideological composition of the House and Senate. No dominant coalition exists in Congress around a particular view of what constitutes a 'proper' U.S. nuclear weapons policy." James M. Lindsay, *Congress and Nuclear Weapons* (Baltimore: Johns Hopkins University Press, 1991), 151. Legally, Lindsay is clear that "Congress is free to alter [nuclear] programs as it sees fit" (4).

⁴⁶ See Jeremy J. Stone, "Presidential First Use Is Unlawful," in *First Use of Nuclear Weapons Under the Constitution, Who Decides?* ed. Peter Raven-Hansen (New York: Greenwood Press, 1987), 3. See also Joseph R. Biden, Jr., and John B. Ritch III, "The War Power at a Constitutional Impasse: A 'Joint Decision' Solution," *Georgetown Law Journal* 77 (1989): 394. In addition to scrapping the War Powers Resolution and replacing it with a new act containing more specific guidelines on the use of force, Biden and Ritch also propose a consultative committee of top congressional leaders (not a novel proposal—see note 59 below). They could not have anticipated the drastic change in nuclear doctrine that would occur thereafter, including a greater possibility of first use under the National Security Strategy and Nuclear Posture Review in force today, and the loosening of restrictions on further nuclear development wrought by the *2004 Defense Budget Act*. Their proposal, admittedly more streamlined than the War Powers Resolution, could be side-stepped easily if the president invoked its "emergency clause" to allow himself full discretion to act, which defeats the purpose of the law in the first place.

⁴⁷ *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919 (1983).

⁴⁸ Thomas M. Franck and Clifford A. Bob, "The Return of Humpty-Dumpty: Foreign Relations Law after the Chadha Case," *American Journal of International Law* 79 (1985): 912.

⁴⁹ *Clinton v. New York*, 524 U.S. 417 (1998). The Court in *Clinton* arguably acted for the same formalistic reasons that it threw out the legislative veto in *Chadha*. The Supreme Court's concern in both cases

may have been one of disentangling the branches, not allowing one to tie the other down in a way that would avoid a process of negotiation and consultation to determine the best policy. The court, usually loath to act, was tie-breaking here to restore an equilibrium that allows the branches to struggle (read: negotiate) where it is healthy and useful to do so. As Franck and Bob conclude in their article on *Chadha*, "meaningful consultation between the branches . . . affords the best way to avoid damaging disputes over statutory meaning and encourages delegation broad enough to permit essential flexibility in the conduct of U.S. foreign relations by the President" (912).

⁵⁰ Alan Fram, "House, Senate Ready Versions of War Bill," *Yahoo! News*, March 31, 2003, accessed online at <http://dailynews.yahoo.com/>.

⁵¹ A total of \$22 million was promised by the bill, including \$7 million in reprogrammed funds from FY 2002, with a projected cost to completion of \$46 million to repackage an existing stockpile warhead. See House Committee on Armed Services, *Bob Stump National Defense Authorization Act for Fiscal Year 2003*, 411. The final *2003 Defense Budget Act*, in denying such funds, ultimately upheld the ban on "mini-nukes" contained in Sec. 3136 (the Furse-Spratt amendment) to the *1994 Defense Budget Act*, banning any research and development that would lead to a new nuclear weapon with a yield of less than 5 kilotons. As noted earlier, the ban was repealed in 2003 by Sec. 3116 of the *2004 Defense Budget Act*.

⁵² See *2003 Defense Budget Act*, Sec. 3143.

⁵³ A Pentagon conference on "small strike" nuclear weapons was to take place at U.S. Strategic Command headquarters in August 2003, according to a leak to the Los Alamos Study Group, to "address future weapons needs based on [the] Nuclear Posture Review." Although secret, the meeting was rumored to include panel discussions on the military advantages of new "low-yield weapons, EPWs [earth-penetrating weapons], enhanced radiation weapons, [and] agent defeat weapons" currently in development, and "brainstorm[ing] ways to get this new generation of nuclear weapons into production." Joel Bleifuss, "The First Stone: Nukes for Every Occasion," *In These Times*, March 31, 2003, 10.

⁵⁴ See Levi, note 17 above.

⁵⁵ See Lindsay, 118.

⁵⁶ U.S. Secretary of State Daniel Webster, protesting the destruction by British forces of an American vessel, the *Caroline*, used to provision Canadian rebels while anchored on the U.S. side of the Niagara River during the 1837 Canadian insurrection, addressed the British government in a letter dated 24 April 1841, in which he laid out the requirements for permissible anticipatory self-defense under international law: necessity, proportionality of response, and immediacy of threat. See Leo Van Den Hole, "Anticipatory Self-Defence under International Law," *American University International Law Review* 19 (2003): 69, 97.

⁵⁷ *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, opinion requested by the United Nations General Assembly, 1996 ICJ 244 (July 8), para. 105(2)E., cited in *Ibid.*, 104.

⁵⁸ Michael J. Glennon, "May the President Violate Customary International Law?: Can the President Do No Wrong?" *American Journal of International Law* 80 (1986): 923.

⁵⁹ The history of proposals from the introduction of the War Powers Resolution (vetoed by Nixon, who was then overridden by Congress) to the end of the second Reagan administration is summarized below. "In 1973 Representative Clement Zablocki introduced a bill (H.R. 8735, 93rd Cong.) to create a Joint Committee on National Security . . . It was to have no legislative duties, its principal function being to provide a manageable forum for regular consultation between the President and congressional leaders. Although the proposal received support from a number of key Members and, subsequently, officials of the Ford Administration, it never reached the floor of either House. More recently, Senator Robert Byrd introduced [in 1986] a resolution (S.J. Res. 340, 99th Cong.) that would have amended the War Powers Resolution by designating a specific group of legislators to be consulted. Members designated by this

measure are the Speaker and President Pro Tem., the Majority and Minority Leaders of the two Houses, and the chairman and ranking minority member of the House and Senate Armed Services, Intelligence, and Foreign Affairs/Relations Committees." Marc E. Smyrl, *Conflict or Codetermination? Congress, the President, and the Power to Make War* (Cambridge, MA: Ballinger Publishing Co., 1988), 148–150. The Carter administration also proposed setting up a "crisis consultative committee" in 1977 and Senator Byrd along with Senators Nunn, Warner, and Mitchell took a second shot at setting up a consultative committee with S.J.R. 323, 100th Cong., 2nd sess. (1988). Michael J. Glennon, *Constitutional Diplomacy* (Princeton, NJ: Princeton University Press, 1990), 310. Professor Harold Hongju Koh of Yale University seems more favorably disposed toward the Byrd-Nunn-Warner-Mitchell proposal than Professor Glennon, seeing some promise in a consultative committee structure to allow the president and Congress to work together to create rules "to address the currently unregulated problem of short-term military strikes by expressly authorizing the President to engage in certain activities for which he currently lacks express statutory authorization." Harold Hongju Koh, *The National Security Constitution: Sharing Power after the Iran-Contra Affair* (New Haven, CT: Yale University Press, 1990), 192. Most recently, Congressman Lee Hamilton introduced a bill in the House on 28 October 1993 to establish a similar standing group within the Congress to meet regularly for discussions and consultations, particularly with respect to the use of U.S. military force abroad. *Consultation Act of 1993*, 103rd Cong., 1st sess., H.R. 3405. The act is reproduced in its entirety in Appendix B.

⁶⁰ Robert F. Turner, "The Power of the Purse," in *The Constitution and National Security*, eds. Howard E. Shuman and Walter R. Thomas (Washington, DC: National Defense University Press, 1990), 76.

⁶¹ Michael C. Bonafede, "Here, There and Everywhere: Assessing the Proportionality Doctrine and U.S. Uses of Force in Response to Terrorism after the September 11 Attacks," *Cornell Law Review* 88 (2002): 168–169.

⁶² Glennon, *May the President Violate Customary International Law?* 923.

A LEGAL ANALYSIS OF SUICIDE BOMBING: BLOWING UP THE LAW OF WAR?

ROGER TANSEY

The various Palestinian resistance groups that sponsor suicide bomb attacks, such as Hamas or Islamic Jihad, have long claimed that such attacks comport with the laws of war. This article analyzes these claims and finds that these attacks against civilians, even against settlers in the occupied territories, violate international customary law, the Geneva Conventions, and other treaties. As such, these violations constitute war crimes. But surprisingly, not all suicide attacks are unlawful. Suicide attacks against exclusively military targets may be lawful, and the fact that the bomber chose to commit suicide in the course of the attack is of no legal import. International law does provide a remedy for suicide attacks against non-military targets in that the Geneva Conventions allow and, it can be argued, even require all states to seek out and prosecute prospective suicide bombers and those who support them. The failure of countries to do so is not a failure of the law; it is a failure of political will.

Introduction

Not all of the power of a suicide attack comes from the bomb. The very idea of a person willing to blow himself to bits is a powerful statement in itself, beyond the understanding of most. Aside from the destruction of those around him, a suicide bomber also causes a less obvious, but no less corrosive erosion of the rule of law. Those promoting suicide attacks have claimed that those acts are sanctioned by the laws of war. It is therefore surprising that a review of the published literature shows no works discussing the legal claims made by suicide bombers or the organizations which sponsor them. This article will therefore review such attacks from the perspective of the law of war, also known as international humanitarian law (IHL),¹ and assess their legality under those laws. Because they have been studied the most, suicide bombers in the context of the Palestinian-Israeli conflict will be the focus of this article although the legal conclusions contained herein are equally applicable to attacks elsewhere.

This article has seven sections. The first section discusses the nature of suicide attacks; the second section discusses the relevant international law and its applicability to Israel and the Palestinians;² the third section discusses the legality of suicide attacks against civilians; the fourth section covers suicide attacks against the military; the fifth section discusses other violations of the law of war; the sixth section discusses various defenses claimed by the supporters of suicide terrorists; and the final section concludes with several observations.

The Nature of Suicide Attacks

Definition and Description

Although suicide attackers have existed throughout history,³ the first suicide bomber from a Palestinian group struck on 16 April 1993 at a restaurant in the Jordan Valley.⁴ Since that time, there have been 209 attacks in Israel, and such attacks have become ubiquitous, appearing almost daily in conflicts involving Sri Lanka, Israel, Afghanistan, Chechnya, or Iraq. While their motivations may vary, the attackers' goal does not: to kill, maim, or terrorize a population, usually composed of civilians.

With the rise of the intifada in Israel in 2001, the number of suicide attacks has grown dramatically. Between 1993 to 2000, there were an average of only 5.8 suicide attacks per year in

Israel and the occupied territories. In 2000, there were five attacks; when the intifada began in 2001, that number rose to 52; and in 2002, there were 68.⁵ The preferred method of attack is to carry bombs on the body (77 percent) or packed into cars (23 percent).⁶ Suicide bombers are also the most lethal form of terrorism: while accounting for only 3 percent of terrorist attacks from 1980 to 2001, they caused almost half the casualties.⁷

Suicide attacks may be defined simply as attacks in an armed conflict, either internal or international, during which the attacker intentionally dies.⁸ This method of attack depends on the death of the terrorist, for if he doesn't die, the attack is usually a failure. Suicide attacks have many advantages. The terrorist chooses the time and place of attack, and since he (or, increasingly, she) is usually not captured, there is no one to interrogate afterwards, no need to plan an escape route.⁹ Suicide attacks are thus very effective, and in a highly asymmetrical war where one side has all the power, such attacks may be all that the weaker side feels it can muster.¹⁰ One expert defines them thus:

Suicide terrorism is the most aggressive form of terrorism, pursuing coercion even at the expense of losing support among the terrorist's own community. What distinguishes a suicide terrorist is that the attacker does not expect to survive the mission and often employs a method that requires the attacker's death in order to succeed (such as planting a car bomb, wearing a suicide vest, or ramming an airplane into a building). In essence, a suicide terrorist kills others at the same time as he kills himself. In practice . . . suicide terrorists often seek simply to kill the largest number of people as possible.¹¹

Suicide bombers do not operate alone. They are recruited, trained, financed, and sent on their missions by various Palestinian and international resistance organizations. These organizations will be discussed next.

Resistance Organizations Supporting Suicide Attacks

The Palestinian Authority

On an official level, the Palestinian Authority (PA) disapproves of suicide attacks. Yassir Arafat, president of the PA, has said that suicide attacks "have given the Israeli government the excuse to reoccupy our land." As such, he believes that such "operations must be totally stopped."¹² Ahmed Qurei, prime minister of the PA, also obliquely condemns such attacks while also usually condemning the often-violent Israeli responses to them.¹³

Nevertheless, it should be noted that a recent report from Human Rights Watch has strongly criticized the PA's passive support of suicide attacks. While Israel accuses the PA of actively ordering and carrying out suicide attacks, Human Rights Watch finds no evidence for such direct participation. Nevertheless, the report condemns the PA for its failure to prevent such attacks and for creating an atmosphere that allows other, more militant groups to undertake such attacks without fear of any consequences.¹⁴

These other, more militant Palestinian organizations that quite publicly plan and carry out suicide attacks in Israel proper or within the occupied Palestinian territories are the following:

Hamas

Hamas, also known as the Islamic Resistance Movement, was formed by Sheikh Ahmed Yassin in 1987 as an offshoot of the Muslim Brotherhood in Palestine. It is both a terrorist organization, attacking Israelis in the occupied territories and in Israel, as well as a large social service agency. The stated goal of Hamas is to establish an Islamic Palestinian state in place of Israel.¹⁵ Between 1993 and 1999, the majority of all suicide attacks (68.4 percent) were committed by Hamas. More recently, from 2000 to 2003, Hamas' share of suicide attacks dropped to 39.8 percent as additional organizations became active.¹⁶

Palestinian Islamic Jihad

The remaining 31.6 percent of the attacks committed during 1993-99 were planned by Palestinian Islamic Jihad (the PIJ). The PIJ was founded in the 1970s by militant Palestinians in the Gaza Strip. It is committed to the creation of an Islamic Palestinian state and the destruction of Israel through holy war. The PIJ also opposes moderate Arab governments that it believes have been tainted by Western secularism.¹⁷ During the most recent period, from 2000 to 2003, the PIJ's share of suicide attacks dropped slightly, to 26.4 percent.¹⁸

Fatah

Fatah is a terrorist organization with international reach, founded by Sabri al-Banna (a.k.a., Abu Nidal) in 1974 when it split from the Palestinian Liberation Organization (PLO). In November 2002, Abu Nidal died in Baghdad; the current leaders of the group are unknown. Also known as the Abu Nidal organization, the Revolutionary Council, Arab Revolutionary Brigades, Black September, and Revolutionary Organization of Socialist Muslims, Fatah has committed terrorist attacks in twenty countries, killing or injuring almost nine hundred people.

Although Fatah has not attacked a Western country since the late 1980s, the organization was responsible for major attacks in the Rome and Vienna airports in December 1985, the Neve Shalom synagogue in Istanbul, and the Pan Am Flight 73 hijacking in Karachi in September 1986.¹⁹ Between 2000 and 2003, Fatah began to sponsor suicide attacks in Israel and the occupied territories, committing 30.1 percent of such attacks.²⁰

Popular Front for the Liberation of Palestine

The Popular Front for the Liberation of Palestine (PFLP), was founded by George Habash in 1967. The PFLP is opposed to negotiations with Israel and has committed numerous international terrorist attacks since the 1970s.²¹ The PFLP began operating at the beginning of the current intifada, committing 3.7 percent of suicide attacks from 2000 to 2003.²²

Motivation of Suicide Bombers vs. the Organizations That Send Them

If the motivation behind a group sponsoring suicide attacks is political, what drives a suicide bomber? The most common explanation of suicide bombers themselves is religious fanaticism, and, despite Islam's prohibition against suicide, that may be true.²³ He (and 99 percent of the time the bomber is a he) is likely to be young (the average age of suicide bombers is 21.8), unmarried (91.6 percent), religious (65.3 percent), employed (62.3 percent), and educated to the high school level (53.1 percent).²⁴

But recent studies show a more complicated picture. One study has tracked the 188 suicide attacks that have taken place from 1980 to 2001. This study showed that suicide attacks since the 1980s have actually been designed with a sort of "strategic logic," usually to obtain territorial concessions from a liberal democracy. And while the motives of the individual attacker

may indeed be irrational or fanatic, those of the organizations that recruit and train him are not. For wealthier nations, military and economic power are the tools of coercion; for Hamas and the other resistance organizations, the coercive tool of choice is the suicide bomber.²⁵

Since 1980, every suicide attack has been directed against a democracy, seeking territorial concessions, usually through the withdrawal of the democracy's armed forces from land that the attacker considers his homeland. The ultimate goal is usually the creation of an ethnic homeland.²⁶ Unfortunately, suicide terrorism has been steadily increasing since the 1980s for one reason: it works.²⁷

The suicide bomber has thus become the equivalent of a high-tech weapon for those who cannot afford a stealth bomber or a Tomahawk missile. And the suicide bomber is indeed used just like any other weapon of war. It is therefore of interest to analyze a suicide attack under the traditional laws of war much as any other method or means of attack may be. The next section will therefore discuss the relevant international law and its applicability to the two main parties involved in the conflict.

Relevant International Law and Its Applicability to Israel and the Palestinians

While this article is not meant to be a treatise on international law, a discussion of some issues is in order. The first question involves what international law applies to the Middle East conflict. Since the discussion concerns chiefly the laws of war, the following treaties are relevant: the Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, The Hague, 18 October 1907,²⁸ the Geneva Convention Relative to the Treatment of Prisoners of War;²⁹ the Geneva Convention Relative to the Protection of Civilian Persons in Time of War;³⁰ and the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts of 8 June 1977.³¹ It should be noted that, as a general rule, states are bound by treaties only if they have signed them.³²

In addition to treaties, international law has another source, what is known as international customary law. International customary law has been defined as that which "results from a general and consistent practice of states followed by them from a sense of legal obligation."³³

While ordinarily there are no differences between treaty law and international customary law, there is one important distinction: while states are bound by treaties only if they have signed them, all states are bound by customary law. Nevertheless, if, as will be shown here, a treaty merely codifies what has already been longstanding customary law, the treaty (or at least those portions reflecting customary law) will also be binding, whether or not a state has signed the treaty.

These general observations about international law raise some threshold questions. First, have the Israelis or Palestinians signed any of the relevant treaties so as to be bound by their provisions? Second, whether or not the parties have signed any treaties, does international customary law contain any relevant norms? Third, since the Palestinians are not yet a sovereign state, to what extent, if any, does treaty law or international customary law even apply to them? In short, before suicide attacks can be analyzed under the laws of war, it must be determined what the relevant law is and whether or to what extent it is binding on the parties. The following sections will therefore attempt to answer these preliminary questions.

Obligations of Israel under International Law

Treaty Obligations

Israel has indeed signed the Third and Fourth Geneva Conventions but not the Additional Protocols.³⁴ While Israel contests the applicability of the Geneva Conventions to the Palestinian conflict, the Israeli Supreme Court has nevertheless held that Israel does indeed consider itself bound by their humanitarian provisions.³⁵

International Customary Law

In regard to international customary law, the Israeli Supreme Court has held that the Hague Regulations of 1907 are also binding on Israel because they are “commonly regarded as customary law.”³⁶ Thus, although Israel did not sign the Hague Regulations, their provisions are binding on Israel since they merely reflect what was already considered international customary law.

Obligations of the Palestinians under International Law

Treaty Obligations

The question of how, or whether, the Palestinian side, as a non-state actor, may be bound by treaties is more complicated, since there is as of yet no Palestinian state to accede to them. Nevertheless, even if the Palestinians are held to be non-state actors, they can still be bound by treaties and can be held liable for violations of international law.

Most on point, cases have held that non-state actors can be held criminally liable for the commission of genocide, war crimes, and terrorism, and they do not need to be acting in concert with, or under the authority of, a state actor. In *Kadic v. Karadzic*, liability was predicated on the court’s holding that “under the law of war as codified in the Geneva Conventions, all ‘parties’ to a conflict—which includes insurgent military groups—are obliged to adhere to these most fundamental requirements of the law of war.”³⁷ Specifically in regard to genocide, *Kadic* held that the “authorities unambiguously reflect that, from its incorporation into international law, the proscription against genocide has applied equally to state and non-state actors.”³⁸ The Red Cross certainly considers the conventions applicable to non-state actors.³⁹

International Customary Law

In regard to the liability of non-state actors, there does not appear to be any distinction between violations of treaty law versus violations of international customary law. As *Kadic* notes, “The liability of private persons for certain violations of customary international law (for example, prohibitions against slavery or piracy) . . . was early recognized by the Executive Branch.”⁴⁰

Which Provisions of IHL Have Become International Customary Law and Thus Binding on the Parties?

Since it appears that international law may indeed bind Israel and the Palestinians, it now must be determined what specific treaties or customary law apply. The International Court of Justice answered this question in the *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*.⁴¹ In this case, the court examined IHL and determined which portions have become so universally accepted that they can be considered binding international customary law. The court even went so far as to specifically list those treaties and conventions that are so

universal that they have reached the status of international customary law and are thus binding on all states. These treaties are also those that are relevant for an analysis of suicide bombings:

[T]he part of conventional international humanitarian law which has beyond doubt become part of international customary law is the law applicable in armed conflict as embodied in: the Geneva Conventions of 12 August 1949 for the Protection of War Victims; the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of 18 October 1907; the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948; and the Charter of the International Military Tribunal of 8 August 1945.⁴²

The court has thus supplied a roadmap for applying the appropriate IHL law to suicide attacks. Portions of the *Nuclear Weapons* case will therefore be cited where relevant to determining the applicability of IHL to suicide bombers.

The Legality of Suicide Attacks against Civilians

Hors de Combat

It is important to remember that international humanitarian law is not the law of human rights. Under IHL, violence is officially sanctioned, and the destruction of life, limb, and property is indeed the inherent result and purpose of war. While IHL accepts this destruction, its true purpose is to mitigate suffering as much as possible, consistent with military objectives.

Within IHL, there is a tempering of the propensity for outright, unabridged, total war. In the law's concern for the protection of civilians, the sick, the wounded, and the captured, one can derive the general principle that those who are *hors de combat*, those who do not fight or are no longer able to fight, are not to be considered military targets. Since they are not fighting, their destruction no longer serves any legitimate military objective. Attacks against civilians are thus legally different from attacks against the military.

The Principle of Distinction and the Protection of Civilians

To extend any protection to civilians at all, it therefore becomes vitally important to be able to distinguish between them and lawful combatants.⁴³ Without this so-called "principle of distinction," the protections provided civilians under the law of war would be greatly compromised.⁴⁴ The International Court of Justice in the *Nuclear Weapons* case noted that this principle of distinction and the protection of civilians are among the most important rules of IHL that have become binding customary law. The court stated:

The cardinal principles contained in the texts constituting the fabric of humanitarian law are the following. The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; *States must never make civilians the object of attack . . .*⁴⁵

This principle of protecting civilians is set forth in Article 27 of the Fourth Convention as follows:

[Civilians] are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices and their manners and customs. They shall be humanely treated and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.

Thirty years later, Additional Protocol I put it thus:

The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence *the primary purpose of which is to spread terror* among the civilian population are prohibited.⁴⁶

Bearing this distinction in mind, it should be noted that, from 2000 to 2003, only 26.5 percent of suicide attacks in Israel or the Occupied Territories were directed at the military. The remaining 73.5 percent of suicide attacks were directed against civilians in restaurants, malls, entertainment areas and shopping streets, bus stations, or other places of public transport.⁴⁷ Thus, in regard to suicide attacks against civilians, such attacks clearly violate one of the most fundamental principles of IHL.

Genocide

Suicide bombers also appear to be guilty of genocide. The International Court of Justice in the *Nuclear Weapons* case specifically mentioned the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 as being a part of international customary law. In particular, the court approvingly quoted Article II of the convention. This article defines genocide as:

any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part . . .⁴⁸

Suicide attacks, which appear to be directed at Israelis or Jews because they are Israelis or Jews, would thus meet any one of the three elements listed above and would thus constitute genocide. These elements are still quite valid and have been most recently been adopted verbatim in the 1993 Statute of the International Criminal Tribunal for the Former Yugoslavia.⁴⁹

“Means of Injuring the Enemy Is Not Unlimited”

Indiscriminate Attacks

Suicide bombers also appear to violate the prohibition against indiscriminate attacks. The International Court of Justice has approvingly quoted, “as relating to the laws and customs of war,” Article 22 of the Hague Regulations, which states that “the right of belligerents to adopt means of injuring the enemy is not unlimited.”⁵⁰

Included within this prohibition are several related but different principles that moderate the rush to total war. It is, for example, a binding principle of customary law that “States must never . . . use weapons that are incapable of distinguishing between civilian and military targets.”⁵¹ The reason is obvious: weapons that cannot be used against military targets without indiscriminately also killing civilians are unlawful.

Article 51 of the Additional Protocol I describes the ban against indiscriminate attacks as follows:

- (4) Indiscriminate attacks are prohibited. Indiscriminate attacks are:
- (a) those which are not directed at a specific military objective;
 - (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or
 - (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol;
- and consequently, in each case, are of a nature to strike military objectives and civilians or civilian objects without distinction.⁵²

The official Commentaries to Article 51 call it “one of the most important articles in the Protocol. It explicitly confirms the customary rule that innocent civilians must be kept outside hostilities as far as possible and enjoy general protection against danger arising from hostilities.”⁵³

A bomb is not like a gun. It cannot be aimed or directed in one direction, nor focused only on one group. Once detonated in a crowd of civilians, a bomb will instead “indiscriminately” blow up anyone who happens to walk by. As such, suicide bombs clearly seem to violate the prohibition against indiscriminate attacks.

Principle of Proportionality

Even though IHL accepts the use of violence and allows for incidental loss of civilian life, the law would not appear to sanction suicide attacks against civilians. The court in the *Nuclear Weapons* case held that the principle of proportionality, which seeks to limit civilian loss, is a binding rule of international customary law. The principle of proportionality requires that any loss of civilian life must not be excessive compared to the anticipated military advantage:⁵⁴

Among others, the following types of attacks are considered excessive:

[A]n attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.⁵⁵

In a mixed crowd of civilians and military, a bomb cannot solely “be directed at a specific military objective.” Unless a bomber is surrounded only by the military, a bomb is indeed an excessive weapon. It would also seem that the principle of proportionality is of no defense because there can be no direct military advantage to an attack only on civilians. If the suicide attack is itself unlawful, then it would seem that no lawful military advantage whatsoever could be anticipated so as to legitimate the attack.

Crimes against Humanity

Suicide bombers also commit crimes against humanity, which denote murders on a large and systematic scale. As noted, the court in the *Nuclear Weapons case* considered the Charter of the International Military Tribunal of 8 August 1945 (the Nuremberg Charter) to be binding customary law. Under the Nuremberg Charter, suicide bombings would thus constitute crimes against humanity. The charter defines crimes against humanity as the following:

CRIMES AGAINST HUMANITY: namely, murder, extermination . . . and other inhumane acts committed against any civilian population . . . or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal . . .⁵⁶

More recent definitions of crimes against humanity include the commission of an act (such as murder) “as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack . . .”⁵⁷

Suicide bombers commit murder and extermination against Israeli citizens because of their religion or nationality. Hamas, the PIJ, and the other organizations openly boast of recruiting, training, equipping, and sending the bombers along their way, and the attacks are thus certainly committed with knowledge on the part of these organizations. As such, the detonation of a suicide bomb also appears to constitute a crime against humanity.

The Legality of Suicide Attacks against Armed Forces

Suicide Attacks against the Military Are Not Per Se Unlawful

The situation may be quite different, however, concerning suicide attacks against the military. Attacks against the military—as opposed to those against civilians—are not, *per se*, unlawful. After all, combatants are supposed to attack the armed forces and military objectives of the enemy. The kamikaze pilots of World War II, for example, were in full uniform and only attacked military targets. That they also chose to commit suicide in their attacks does not render their attacks unlawful.⁵⁸ But are suicide attackers like lawful kamikaze pilots?

Licensed to Kill: Suicide Bombers as Lawful Combatants?

The answer to the above question depends on the definition of a combatant under the laws of war. If a belligerent meets the definition of a combatant, he is granted immunity for the commission of what would otherwise be a crime (the murder of the enemy power’s nationals, destruction of its property, etc.). In essence, someone who meets the definition of a combatant is privileged and thus has a license to kill. Since not everyone captured in the course of armed conflict will be a lawful combatant, the law of war has developed identifying rules. Could suicide bombers, like kamikaze pilots, be considered lawful combatants and thus privileged to carry out their attacks?

To be considered a lawful combatant, a belligerent must meet the conditions set forth in Article 4 of the Third Convention. This article defines a lawful combatant as someone in the

regular army⁵⁹ or in an “organized resistance movement” who meets all four of the following conditions:

- (a) that of being commanded by a person responsible for his subordinates
- (b) that of having a fixed distinctive sign recognizable at a distance
- (c) that of carrying arms openly
- (d) that of conducting their operations in accordance with the laws and customs of war⁶⁰

Considering the structure of the resistance groups, Hamas, the PIJ, etc., it would seem that the first condition, having a command structure, is indeed met. It seems equally clear, however, that the other three conditions are not only not met, they are—by definition—intentionally ignored by a suicide bomber.

Suicide bombers certainly do not want to be identified before exploding their bombs and therefore never wear “fixed distinctive signs” or carry their bombs openly. Thus, conditions (b) and (c) are not followed by suicide bombers, which precludes their classification as lawful combatants. Most importantly, suicide bombers could never meet the fourth condition above. They violate so many of the most fundamental principles of IHL (such as targeting civilians) that they could never qualify as lawful combatants. They are thus not privileged to kill and are so-called “unlawful combatants,” or, more properly, criminal civilians.

This is so because everyone who fails to meet the definition of a combatant under Article 4 is considered a civilian under the Fourth Geneva Convention.⁶¹ Nevertheless, although a suicide bomber is a civilian, this does not mean that he is immune from attack. In exchange for protection from attack, civilians lose the right to take a direct part in hostilities. If civilians, such as terrorists, do pick up arms (or a bomb), they lose their protected status and become legitimate military targets.⁶²

Perfidy

In regard to attacks against the military, suicide bombers, above all else, violate the ancient prohibition against perfidy. Arising directly from the chivalric code governing knights during medieval jousting tournaments, perfidy refers to a “breaking of faith, a broken word, dishonesty, the unfaithful breaking of promises, a deliberate deception.” Perfidy is a crime specifically prohibited by both the Third Geneva Convention and Additional Protocol I. Article 37 of the Additional Protocol states, “It is prohibited to kill, injure or capture an adversary by resort to perfidy.” Perfidy is defined as:

Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence.

The convention gives a specific example of perfidy as “the feigning of civilian, non-combatant status,”⁶³ which is, of course, precisely what suicide bombers do.

There are three related elements of perfidy which are: (a) gaining the confidence of an enemy; (b) intending to betray that confidence; and (c) doing so by misusing an element of the law of war (such as pretending to be a civilian when you are not). The heinousness of perfidy is the:

deliberate claim to legal protection for hostile purposes. The enemy attacks under cover of the protection accorded by humanitarian law of which he

has usurped the signs. It is by inviting the other's confidence with the intention or the will to betray it that renders perfidy a particularly serious illegality, as compared with other violations of international law, and which constitutes for its perpetrator an aggravating circumstance.⁶⁴

In a recent egregious example of perfidy, the first female bomber sent by Hamas not only pretended to be a civilian, but "reportedly feigned a limp and told soldiers and security guards that a metal plate in her leg would likely set off their metal detectors."⁶⁵ This allowed her to enter a border post where she was to have been searched by a female agent, but the bomber blew herself up once inside. In addition, children as young as eleven have recently been sent as suicide bombers.⁶⁶

Other Violations of IHL, Regardless of Civilian or Military Status of Victim

Suicide bombings also criminally violate the law of war in other ways, where the civilian or military status of the victim is irrelevant.

Unnecessary Suffering

In the *Nuclear Weapons case*, the court noted that previous treaties had "already condemned the use of weapons 'which uselessly aggravate the suffering of disabled men or make their death inevitable.'" The court continued, noting that the Hague Regulations "prohibit the use of 'arms, projectiles, or material calculated to cause unnecessary suffering.'"⁶⁷

The court defined "unnecessary suffering" as "a harm greater than that unavoidable to achieve legitimate military objectives."⁶⁸ Attacking civilians is manifestly not a "legitimate military objective" and is thus completely avoidable. And attacking the military in a manner that causes unnecessary suffering also fails to serve any legitimate military objective. Moreover, suicide bombers usually pack their bombs with nails, shards of metal, or small screws, specifically to increase the pain, suffering, and death caused.⁶⁹ Whether directed at civilians or soldiers, such bombings are in clear violation of the prohibition against "unnecessary suffering."

Treacherous Wounding

The Hague Regulations also note that "it is especially forbidden . . . to kill or wound treacherously individuals belonging to the hostile nation or army."⁷⁰ A suicide bomber dressed as a civilian would thus appear to be acting "treacherously" when wounding enemy civilians or the military.

Grave Breaches of the Geneva Conventions

Suicide bombers also commit "grave breaches" of the Geneva Conventions. The Conventions contain prohibitions against these "grave breaches," which include a) willful killing; b) willfully causing great suffering or serious injury to body or health; and c) the "extensive destruction . . . of property, not justified by military necessity and carried out unlawfully and wantonly."⁷¹ Suicide bombing clearly fits within these categories.

It should be noted that "willful killing" in this regard specifically refers to killing civilians by way of reprisal.⁷² Hamas, the PIJ, and the other resistance organizations frequently state that suicide bombers are sent as a form of reprisal. As discussed below, killing civilians by way of reprisal is forbidden.

War Crimes

The Nuremberg Charter, which the International Court of Justice has held to reflect customary law, specifically includes within its definition of war crimes the murder of the civilian population.⁷³ The charter also notes that war crimes are “violations of the laws or customs of war.”⁷⁴ Thus, all of the previously noted violations of the Hague Regulations, the Geneva Conventions, or international customary law, would also be considered war crimes.⁷⁵

Defenses Offered by Resistance Organizations

In defense of their actions, Hamas and the other organizations that organize suicide bombings have put forth the following rationales for their acts.

Reprisals

It is often asserted by Hamas and the other armed Palestinian groups that the suicide bombers are acting to avenge, or as reprisals for Israeli attacks or incursions.⁷⁶ Such reprisals, however, are expressly prohibited under the Hague Regulations⁷⁷ and the Geneva Conventions. Article 33 of the Fourth Convention provides, “No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited . . . *Reprisals against protected persons and their property are prohibited.*”⁷⁸

The Commentary to Article 33 makes it clear that this section prohibits “penalties of any kind inflicted on persons or entire groups of persons, in defiance of the most elementary principles of humanity, for acts that these persons have not committed.”⁷⁹ Therefore, attacking Israeli citizens because of the actions of the Israeli military would appear to be prohibited since the citizens are not personally responsible for the acts of the military. In regard to reprisals, the commentary notes, “The principle of the prohibition of reprisals against persons has now become part of international law in respect of all persons, whether they are members of the armed forces or civilians protected by the Geneva Conventions.”

Israelis Are Not “Civilians” within the Meaning of the Conventions

It is also frequently asserted by the various resistance groups that Israeli citizens, and especially settlers in the occupied territories, are not civilians within the meaning of the Geneva Conventions.⁸⁰ For example, when the late Sheikh Ahmad Yassin, the spiritual leader of the Palestinian Group Hamas, was asked by a reporter if Israeli citizens should be left out of the conflict, he replied, “The Geneva Convention protects civilians in occupied territories not civilians who are in fact occupiers . . . All of Israel . . . is occupied Palestine. So we’re not actually targeting civilians—that would go against Islam.”⁸¹

Sheikh Yassin was quite mistaken. The result of such thinking would be the complete derogation of the laws of war, since every side always believes absolutely in the rightness of its cause. Whatever one thinks of settlers who misappropriate the land of the Palestinians, whether in the occupied territories or in Israel proper, Israeli civilians, like suicide bombers themselves, remain just that: civilians. A review of Article 4 shows again the requirements for combatant status. In essence, this is membership in either a regular or irregular army (or in a militia or volunteer corps that is a part of the army) while meeting the previously mentioned four conditions. Ordinary civilians do not meet this test, and everyone who does not fit the definition of Article 4 is considered a civilian and not a legitimate target.⁸²

Neither are Israeli citizens within the ambit of Article 4(A)(4) of the Third Convention, which provides that those “who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply

contractors, members of labour units or of services responsible for the welfare of the armed forces" must be granted prisoners of war status if captured.

This provision was meant to provide prisoner of war status to those who were essentially civilians, but who followed the army about in a support capacity. Settlers in the occupied territories do not follow the armed forces around, nor do they normally provide services such as those clearly listed in the article. The commentaries to this article make it clear that "the capacity in which the person was serving should be a determining factor."⁸³

In any event, this excuse does not explain why suicide bombers frequently kill women, children, and normally unarmed civilians in the territories. So, unless settlers *accompany* the army to serve in a *support capacity*, this provision does not convert legitimate civilians into legitimate military targets. It must therefore be emphasized that unarmed civilians, whether in Israel or in the occupied territories, whether settlers or not, are *hors de combat* and not legitimate military targets.

Command Responsibility

Obviously, successful suicide bombers cannot be prosecuted. And while prosecution of the leaders does not appear to be politically feasible, it should be noted that the law does provide a remedy. Under the doctrine of command responsibility, those who recruit, train, and otherwise assist suicide bombers may be held liable for their acts.⁸⁴ The leaders of Hamas, the PIJ, and others can not escape liability merely because they are not the actual suicide bomber. The Nuremberg Charter, for example, contains the following:

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.⁸⁵

Under the Geneva Conventions, punishment for committing "grave breaches" was considered so important that parties to the treaties are required "to provide effective penal sanctions for persons committing, or *ordering to be committed*, any of the grave breaches . . ."⁸⁶ Jurisdiction is universal and countries actually have an affirmative duty "to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts."⁸⁷ Under these provisions, it would appear that countries are not only allowed to arrest and try those promoting suicide attacks, it could certainly be argued that they have an affirmative duty to do so.

Of note, the more recent Statute for the International Criminal Tribunal for the Former Yugoslavia also criminalizes those who conspire to commit, incite, attempt, or are complicit in genocide.⁸⁸ Case law construing the law of war has also long held that those in charge can be liable for the war crimes of their subordinates.⁸⁹ Thus, while the successful suicide bomber cannot be prosecuted, Hamas, the PIJ, or any other group or individual assisting the bomber in his or her mission may be.

Conclusion

It has been the aim of this article to show that, despite repeated assertions from the leaders of Hamas, the PIJ, and other resistance groups that they are acting within international humanitarian law, they clearly are not. Suicide bombers and those who recruit, train, and equip them are common war criminals. Under the Geneva Conventions, every country has a duty to seek them out and, if caught, to either try them or turn them over to another country for trial.

That such prosecutions have not happened is not a failure of the law; the treaties and the military tribunals since World War II, from Nuremberg to the former Yugoslavia, amply show that the law is able to provide a remedy. It is instead a failure of political will on the part of the international community to strongly and unequivocally condemn suicide bombing, to refrain from financing it, and to bring to justice those responsible for it. It is indeed true that suicide bombers blow up more than themselves when they detonate their bombs. By deliberately targeting civilians, such bombers undermine the very foundations of international humanitarian law and target the civilizing impulses from which it springs. While the law may provide answers, it is up to the international community to provide action.

Endnotes

¹ The classical term for the field is "the law of war." More recently, the phrase "international humanitarian law" has come into favor. Both are used interchangeably herein. The phrase "the law of armed conflict" is also used. See, e.g., Department of Defense, General Counsel, "Military Commission Instruction No. 2," (30 April 2003), <http://www.defenselink.mil/news/May2003/d20030430milcominstno2.pdf> (using both "the law of war" and "the law of armed conflict" interchangeably).

² Since this article is concerned only with suicide attacks, it does not discuss larger policy issues involved in the conflict, nor does it cover other alleged violations of the laws of war, such as Israel's own settlement policy in the Occupied Territories.

³ The best-known suicide attackers from history are probably the kamikaze pilots from Japan in World War II. Around the turn of the last century, the Moros in the Philippines also used such attacks against the American General Jack Pershing and his troops. Others have noted that "suicide terrorism is nothing new in human history; it first appeared long before the Palestinian-Israeli struggle. This phenomenon was seen among the Jewish Sicaris as early as the first century, among the Moslem Hashishiyun in the eleventh century and among the Asians in the eighteenth century [citation omitted]. In the late twentieth century, suicide terrorist attacks took place in countries such as Lebanon, Egypt, Turkey, and Sri Lanka." Arie Perliger and Leonard Weinberg, "Altruism and Fatalism: The Characteristics of Palestinian Suicide Terrorists," National Security Studies Center of the University of Haifa, http://terrorismexperts.org/terrorism_research_suicide1.htm.

⁴ *Ibid.*

⁵ National Security Studies Center of the University of Haifa (NSSC), "The Profile of the Suicide Terrorist: An Empirical Analysis of Palestinian Terrorism in Israel," http://terrorismexperts.org/terrorist_profile.ppt, slide 2.

⁶ *Ibid.*, slide 9.

⁷ Robert A. Pape, "Dying to Kill Us," *The New York Times*, September 22, 2003, 17.

⁸ Program on Humanitarian Policy and Conflict Research, International Humanitarian Research Project, Harvard University, "Suicide Attacks Against Civilians during an Armed Conflict," <http://www.ihlresearch.org/ihl/feature.php?a=44>. This Web site defines suicide attacks as only against civilians, but for

the purposes of this article, we will review attacks against both civilians and the military. For the purposes of this article, it is assumed that the dispute constitutes an international armed conflict within the meaning of the Geneva Conventions.

⁹ NSSC.

¹⁰ Robert A. Pape, "The Strategic Logic of Suicide Terrorism," *American Political Science Review* 97 (August 2003), 1, 3.

¹¹ *Ibid*, 4.

¹² "Arafat: Suicide Bombings Must Stop," *The Guardian*, June 20, 2002, <http://www.guardian.co.uk/israel/Story/0,2763,740762,00.html>.

¹³ Islam Online, "Israel Kills 5 Palestinians, 3 Israelis Dead In Tel Aviv Attack," Dec 25, 2003, <http://www.islamonline.net/English/News/2003-12/25/article10.shtml>.

¹⁴ Human Rights Watch, "Erased in a Moment: Suicide Bombing Attacks Against Israeli Citizens" (2002), 109-110.

¹⁵ Department of State (DOS), "Patterns of Global Terrorism, 2002" (April 30, 2003), Appendix M, <http://www.state.gov/s/ct/rls/pgtrpt/2002/html/19991.htm>.

¹⁶ Ami Pedahzur, "The Changing Patterns of Suicide Terrorism before (1993 – 1999) and during (2000 – 2003) the Al-Aqsa Intifada," National Security Studies Center of the University of Haifa, http://terrorismexperts.org/changing_patterns.ppt, slide 6.

¹⁷ DOS.

¹⁸ Pedahzur, slide 6.

¹⁹ DOS.

²⁰ Pedahzur, slide 6.

²¹ DOS.

²² Pedahzur, slide 6.

²³ Although "suicide is a very serious misdeed in Islamic theology and law, [and] the believer who commits suicide commits a grave sin and is consigned to hell," recent reinterpretations of Shi'a religious doctrine, now view "self-annihilation" as a "norm that is now accepted as a valid discharge of religious obligation under the law of military jihad." Bernard K. Freamon, "Martyrdom, Suicide, and the Islamic Law of War: A Short Legal History," *Fordham International Law Journal* 27 (December 2003): 299.

²⁴ Pedahzur.

²⁵ Pape, "Strategic Logic," 2.

²⁶ *Ibid*.

²⁷ Suicide terrorists obtained the departure of French and American troops from Lebanon in 1983, the Israelis from Lebanon in 1985, and the Israelis from the West Bank and Gaza Strip in 1994–95. Pape, "Strategic Logic," 3. Indeed, the Bush administration has announced that American troops will be leaving Saudi Arabia, which was the stated goal of the mastermind of the September 11 attacks, Osama bin Laden.

²⁸ "Regulations Respecting the Laws and Customs of War on Land, Article 4, Annex to the Hague Convention [No. IV] Respecting the Laws and Customs of War on Land" (1907 Regulations/Hague Regulations), 18 October 1907, 36 U.S.T. 2277, T.S. No. 539, 1 Bevans 631. The Regulations may also be found on the Web site of the Red Cross at

<http://www.icrc.org/ihl.nsf/385ec082b509e76c41256739003e636d/1d1726425f6955aec125641e0038bfd6?OpenDocument>.

²⁹ “Geneva Convention Relative to the Treatment of Prisoners of War” (Third Geneva Convention/Third Convention), 12 August 1949, 6 U.S.T. 3316; T.I.A.S. 3364; 75 U.N.T.S. 135. The Third Convention may also be found on the Web site of the Red Cross at

<http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6fef854a3517b75ac125641e004a9e68?OpenDocument>.

³⁰ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 Aug. 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. (Fourth Geneva Convention/Fourth Convention) The Fourth Convention may also be found on the Web site of the Red Cross at

<http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6756482d86146898c125641e004aa3c5?OpenDocument>.

³¹ “Protocol to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts” (Additional Protocol I/Protocol I), 8 June 1977, 1125 U.N.T.S. 3; 16 I.L.M. 1391. Protocol I may be found on the Web site of the Red Cross at

<http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/f6c8b9fee14a77fdc125641e0052b079?OpenDocument>.

³² *The Case of the S.S. Lotus (France v. Turkey)*, 1927 PCIJ (ser. A) No. 10 (September 7), 18:

“International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law . . . *Restrictions upon the independence of States cannot therefore be presumed*” (emphasis added).

³³ Werner Ebke et al., *Commentary on the Restatement (Third) of the Foreign Relations Law of the United States* (Washington, DC: American Bar Association, 1992), sec. 102(2). See also Louis Damrosch, et al., *International Law, Cases and Material* (St. Paul, MN: The West Group, 2001), 59, which defines international customary law as having, “two distinct elements: (1) ‘general practice’ and (2) its acceptance as law.”

³⁴ Israel ratified the Geneva Conventions in 1951. See Federal Department of Foreign Affairs, Switzerland, “Protections des victimes de la guerre,” <http://www.eda.admin.ch/eda/f/home/foreign/intagr/train/iprotection.html>.

³⁵ The court does not, however, define the “humanitarian” provisions. See, e.g., HCJ 5591/02, *Yassin v. Commander of the Kziot Military Camp*, 12, (“The validity of the [Fourth] convention . . . is not a subject of dispute before us, as Israel sees itself as bound by the humanitarian provisions of the convention”); HCJ 3278/02, *The Center for the Defense of the Individual v. IDF Commander*, 23, (“As is well-known, Israel considers itself bound by the humanitarian directives of this Convention”). Both cases can be found online via the search form at <http://62.90.71.124/eng/verdict/framesetSrch.html>.

³⁶ *Ajuri v. IDF Commander in the West Bank and Gaza*, HCJ 7015/02 (2002), 13. This case can be found online via the search form at <http://62.90.71.124/eng/verdict/framesetSrch.html>.

³⁷ *Kadic v. Karadzic*, 70 F3d 232, 243 (1996); Common Article 3 of the Geneva Conventions binds not all states involved in a conflict but simply, any “party to the conflict . . .” See Third Geneva Convention, Article 3.

³⁸ *Kadic v. Karadzic*, 241-42.

³⁹ The Red Cross has noted that “only States may become party to international treaties, and thus to the Geneva Conventions and their Additional Protocols. However, all parties to an armed conflict whether

States or non-State actors are bound by international humanitarian law.” International Committee of the Red Cross, ICRC, *Who Is Bound by the Geneva Conventions?*

<http://www.icrc.org/web/eng/siteeng0.nsf/iwpList444/3D0F7A4F95BB755FC1256CF5004B6181>

(emphasis added).

⁴⁰ *Kadic v. Karadzic*, 239.

⁴¹ *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* [hereinafter, the Nuclear Weapons case], 1996 ICJ (Jul. 8), 266, 81, <http://212.153.43.18/icjwww/icses/iunan/iunanframe.htm>.

⁴² *Ibid.* If the court accepted the Geneva Conventions as binding customary law, the same cannot be said of Additional Protocol I. Some states strongly dispute various portions of the protocol and the court therefore held that only those portions of the protocol that were already considered international customary law at the time of drafting can be considered binding. *Ibid.*, 84 (“In particular, the Court recalls that all States are bound by those rules in Additional Protocol I which, when adopted, were merely the expression of the pre-existing customary law”).

⁴³ The phrase “lawful combatant” was evidently first used in *Ex Parte Quirin*, 317 US 1, 21 (1942) and, although frequently used by scholarly writers and the popular press, it is actually not a defined term in international law.

⁴⁴ Ingrid Detter, *The Law of War*, 2nd ed. (New York: Cambridge University Press, 2000), 135.

⁴⁵ *Nuclear Weapons Case*, 78, emphasis added.

⁴⁶ Additional Protocol I, Article 51(2), emphasis added.

⁴⁷ Pedazhur, slide 11.

⁴⁸ *Nuclear Weapons Case*, 26.

⁴⁹ UN, *Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY)*, Article 4, UN Doc. S/25704, 1993, at 36, annex, and Add.1, <http://www.un.org/icty/basic/statut/S25704.htm>.

⁵⁰ *Nuclear Weapons Case*, 77; For the most recent statement of this principle, see Protocol 1, Article 35 (1) (“In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.”).

⁵¹ *Nuclear Weapons Case*, 78.

⁵² Additional Protocol I, Article 51 (4).

⁵³ Commentaries to Article 51, Additional Protocol I. Commentaries to Article 51 may be found on the Web site of Red Cross at

<http://www.icrc.org/ihl.nsf/b466ed681ddfcd241256739003e6368/5e5142b6ba102b45c12563cd00434741?OpenDocument>.

⁵⁴ The court stated, “The submission of the exercise of [force] to the conditions of necessity and proportionality is a rule of customary international law.” *Nuclear Weapons Case*, 41.

⁵⁵ Additional Protocol I, Article 51(5).

⁵⁶ Charter of the International Military Tribunal, Nuremberg, of 8 August 1945, Article 6 (c). This is also known as (and referred to here in) as the Nuremberg Charter. The Nuremberg Charter may be found on the Web site of the Avalon Project of Yale Law School at

<http://www.yale.edu/lawweb/avalon/imt/proc/imtconst.htm>.

⁵⁷ UN, *Rome Statute of the International Criminal Court* (17 July 1998), Doc. A/CONF.183/9, Article 7(1) <http://www.un.org/law/icc/>.

⁵⁸ “The problem of suicide bombers must be understood in a definitional context. The problem does not

relate to combatants (exemplified by the Japanese kamikaze pilots in World War II) who undertake a suicidal mission against legitimate military objectives of the enemy (U.S. warships in the case of the kamikaze pilots) without any attempt to disguise their combatant status. These are simply brave members of the armed forces of a belligerent country who are prepared to give their lives for the success of their lawful military mission." Yoram Dinstein, "Defining Suicide Bombing," (2003), <http://www.ihlresearch.org/ihl/feature.php?a=44>.

⁵⁹ Third Geneva Convention, Article 4(A)(1).

⁶⁰ *Ibid.*, Article 4(A)(2). There are other categories, such as war correspondents, civilian flight crews, the merchant marines, not relevant here. See, generally, Article 4(A)(3)–(6).

⁶¹ Or, more properly, a "protected person" under the Fourth Geneva Convention, Article 4.

⁶² Protocol I, Article 51 (3).

⁶³ Protocol I, Article 37.

⁶⁴ Commentary to Article 37, Protocol I. Commentaries may be found on the Web site of Red Cross at <http://www.icrc.org/ihl.nsf/WebCOMART?OpenView&Start=1&Count=150&Expand=5#5>.

⁶⁵ Molly Moore, "Young Mother Kills 4 at Gaza Crossing," *The Washington Post*, January 15, 2004, A12, <http://www.washingtonpost.com/ac2/wp-dyn/A15098-2004Jan14>.

⁶⁶ "A Double Dose of Violence Leaves 19 Israelis Dead," *New York Times*, March 4, 2003, 2.

⁶⁷ *Nuclear Weapons case*, 77, citing Hague Regulations, Article 23 (e).

⁶⁸ *Ibid.*, 77.

⁶⁹ "Investigators said the bomb was particularly large and studded with metal nails, screws, and spikes that turned to deadly shrapnel" (in reference to a suicide bombing on a bus which killed eleven civilians, wounded forty-five, and strew body parts throughout the street). "Troops' Bodies Arrive as Israel Mourns Bomb Toll," *Los Angeles Times*, January 30, 2004, 1, <http://www.latimes.com/news/printedition/front/la-fg-prisoners30jan30,1,5367420.story?coll=la-headlines-frontpage>.

⁷⁰ Hague Regulations, Article 23 (b).

⁷¹ Fourth Geneva Convention, Article 147.

⁷² Commentaries to Article 147, Fourth Geneva Convention. Commentaries may be found on the Red Cross Web site at <http://www.icrc.org/ihl.nsf/b466ed681ddfcfd241256739003e6368/659a26a51bb6fe7ac12563cd0042f063?OpenDocument>.

⁷³ Nuremberg Charter, Article 6 (b) .

⁷⁴ *Ibid.*

⁷⁵ See also, U.S. Army, "The Law of Land Warfare," FM 27-10 (15 July 1976), ch 8, pt II, §499, <http://www.adtdl.army.mil/cgi-bin/atdl.dll/fm/27-10/Ch8.htm>. ("The term 'war crime' is the technical expression for a violation of the law of war by any person or persons, military or civilian. Every violation of the law of war is a war crime.")

⁷⁶ See, e.g., Islam Online, "Israel Kills Palestinian, Foiled Attack Targeted Tel Aviv Café," <http://www.islamonline.net/English/News/2002-10/12/article44.shtml>: " Hamas said it carried out [a suicide bombing] to avenge an Israeli air raid on Gaza City in July in which 15 civilians were killed . . . It was also intended as retaliation for an army incursion into the Gaza Strip town of Khan Yunis Monday October 7, in which 17 people were killed, most of them civilians."

⁷⁷ Article 50 provides, "No general penalty, pecuniary or otherwise, shall be inflicted upon the population

on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible." Hague Regulations.

⁷⁸ Emphasis added.

⁷⁹ Commentary to Article 33, Fourth Geneva Convention. Commentary may be found on the Red Cross Web site at

<http://www.icrc.org/ihl.nsf/b466ed681ddfcfd241256739003e6368/36bd41f14e2b3809c12563cd0042bca9?OpenDocument>.

⁸⁰ See David Zev Harris and Herb Keinon, " Hamas Leader: All Israelis Are Legitimate Targets," *The Jerusalem Post*, October 12, 2000, <http://www.jpost.com/Editions/2000/10/12/News/News.13596.html>. In this document, Abu Shanab, a Gaza University professor and head of Hamas's political wing, says, "We are in a state of war, and in a state of war all Israeli targets are legitimate." See also Sonja Pace, "Islamic Jihad Says Israeli Bombing Gift to Iraq," *Iraq Crisis Bulletin*, April 1, 2003, http://www.iraqcrisisbulletin.com/archives/040103/html/islamic_jihad_says_israeli_bom.html: "[L]ocal al-Aqsa commanders have said that Israeli soldiers and settlers in the West Bank and Gaza remain legitimate targets."

⁸¹ "No Israeli Targets Off-limits, Hamas Spiritual Chief Warns," *St. Petersburg Times*, August 11, 2001, 9A, http://www.sptimes.com/News/081101/news_pf/Worldandnation/No_Israeli_targets_of.shtml.

⁸² Third Geneva Convention, Article 4.

⁸³ Commentary to Article 4(A)(4), Third Geneva Convention. Commentary may be found on the Red Cross Web site at

<http://www.icrc.org/ihl.nsf/b466ed681ddfcfd241256739003e6368/eca76fa4dae5b32ec12563cd00425040?OpenDocument>.

⁸⁴ See, e.g., the Rome Statute, Article 28 (which provides for the criminal responsibility of commanders and other superiors).

⁸⁵ The Nuremberg Charter, Article 6.

⁸⁶ *Ibid.*, Article 146, emphasis added.

⁸⁷ *Ibid.*

⁸⁸ *Ibid.* This statute also prohibits "(b) conspiracy to commit genocide; (c) direct and public incitement to commit genocide; (d) attempt to commit genocide; and (e) complicity in genocide."

⁸⁹ See, e.g., *In re Yamashita*, 327 US 1, 16; 66 S.Ct 340; 90 LEd 499 (1946) (U.S. military tribunal holding that a commanding officer of the Japanese army may be held criminally liable under the laws of war for brutal acts of homicide, violence, and cruelty committed by his troops against unarmed civilians and prisoners of war).



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A CHANCE FOR PEACE? RECOMMENDATIONS FROM NEGOTIATION THEORY TO DEMOBILIZE THE PARAMILITARIES IN COLOMBIA

GILLES SERRA¹

This paper analyzes the ongoing negotiations to demobilize thirteen thousand illegal paramilitaries in Colombia by December 2005. The stakes for the Colombian people are great: success in these negotiations would go a long way in solving their thirty-nine-year-old civil war. The paper describes the historical context for the negotiations and closely analyzes the parties, their interests, and their alternative strategies. Several concepts from negotiation theory, psychology, and economics are brought into the analysis to make recommendations on the steps that could be taken to reach a successful agreement.

Introduction

The conflict between the government and the illegal armies in Colombia has shaped every aspect of life in the country. At the political level, the guerrillas and paramilitaries have obstructed the government's performance through intimidation and corruption: mayors and congressmen are routinely kidnapped or assassinated for propaganda or funding purposes, and public investment is often thwarted by terrorist attacks. At the economic level, the connivance of illegal armies and drug dealers has allowed the war to grow to unique proportions in Latin America. The left-wing guerrillas have some fifteen thousand fighters and the right-wing paramilitaries have some thirteen thousand fighters. Both groups have abundant resources from drug production (Colombia produces 80 percent of the cocaine in the world). In fact, as Table 1 illustrates, the rebel groups in Colombia have a combined annual income of approximately 1 billion dollars, not too far from the government's defense budget of 2.5 billion dollars.²

Table 1. Income of Guerrillas and Paramilitaries in Colombia in 1998 (in millions of dollars)

Taxation of drug production	\$551
Extortion	\$311
Kidnappings	\$236
Total	\$1,098

Colombia's Defense Budget in 2000, Military and Police Combined (in millions of dollars)

Total	\$2,473
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Source: Angel Rabasa and Peter Chalk, *Colombian Labyrinth*, Project AIR FORCE Series (Santa Monica, CA: RAND, 2001), 32 and 105.

At the social level, life has also deteriorated because of thirty-nine years of civil war. In 2002, the country suffered three thousand kidnappings including more than 120 children. Some 1.5 million people have been displaced from their homes over the past decade. The country has an annual murder rate of thirty thousand, the highest in the world.³

This paper analyzes the ongoing negotiations between the government of Colombia and the paramilitary group Autodefensas Unidas de Colombia (AUC) to demobilize their thirteen thousand illegal fighters by December 2005. The stakes in these negotiations are enormous for the Colombian people: if successful, the negotiations would fully disarm the largest right-wing paramilitary group, which is arguably the main source of violence and crime in the country. Such disarmament would allow the government to face a one-front, rather than a two-front, war and to focus all its resources against the left-wing guerrillas, the remaining rebel group. The government's increased military power might convince the guerrillas to start peace negotiations of their own, opening a chance to finally reach peace with all the illegal armies in Colombia.

With the stakes so high, no resource should be spared in leading the negotiations to a successful end. This paper will illustrate how to use several specific tools from negotiation theory, psychology, and economics to design a mutually beneficial agreement that could be accepted by all parties and the international community.

Section II of this paper briefly describes the historical context of the war in Colombia, chiefly a series of failed peace negotiations that serve as a warning of obstacles to come. Section III analyzes the interests and strategies of the parties at the negotiating table and describes the current configuration of coalitions: the main coalitions are currently so rigid and extremist that they risk obstructing the debate. Two major processes that unfold simultaneously are examined in the subsequent sections: the bargaining process and the implementation process. In Sections IV and V the risks involved in each of those processes will be identified and recommendations given to prevent them. The recommendations for the bargaining process involve a middle-of-the-road compromise between the AUC and the government, and the recommendations for the implementation process include building a "grand coalition of the center" in Colombian society. Finally Section VI, the concluding section, describes how the current negotiations with the AUC relate to the left-wing guerrillas and why the government could sequence some negotiations with them.

Historical Context

La Violencia

For over half a century, political violence has plagued the provinces of Colombia. Its roots can be traced to the period of widespread political unrest that started in 1948 called *la violencia*. Following the revolution in China and, more importantly, the revolution in Cuba in 1959, armed communist guerrillas consolidated their presence in Colombia and in many other Latin American countries. Two of the earliest guerrilla groups remain active today: the Revolutionary Armed Forces of Colombia (FARC) and the National Liberation Army (ELN). As a reaction to the guerrilla expansion and the inability of the state to contain it, rich landowners and cattle ranchers in Colombia recruited and armed peasants for protection. These initially scattered groups eventually merged into the AUC, whose mission has been to eliminate left-wing guerrillas and their supporters. The AUC's illegal operations have ranged from mass murders in guerrilla-sympathizing towns to kidnapping, extortion, and targeted assassinations of liberal candidates and congressmen. It is noteworthy for the purposes of this paper that the U.S. government shares some responsibility in the creation of these "self-defense" groups. In 1961, President Kennedy openly promoted and financed self-defense groups in Latin American to contain the spread of communism.⁴

The Illegal Armed Groups

Believed to have between fifteen thousand and twenty thousand members, the FARC is the largest guerrilla organization in Latin America. It was founded in 1966 with a Marxist ideology and initially sought to launch a social revolution and overthrow the government. In the 1980s, however, the FARC evolved from an ideology-driven to a profit-driven guerrilla movement. The growth of the illegal narcotics industry in Colombia provided the FARC with a steady source of income by protecting and taxing the coca plantations, airstrips, and cocaine processing plants.⁵ Today, opinion polls estimate FARC support among the Colombian population at 5 percent. The ELN, a much smaller group, has similar characteristics and history.

The right-wing armies were organized by farmers and landowners as a reaction to the guerrilla threat. Those regional groups eventually merged under the umbrella organization AUC in 1997. Though illegal, these counter-insurgent groups have often operated with the tacit approval of the local authorities, not only defending local landowners, but also staging attacks against ELN and FARC strongholds. The paramilitaries, as they came to be known, were also touched by the drug industry, and many evolved from spontaneous self-defenses into drug dealers and ruthless death-squads. On 10 September 2001, the U.S. government officially declared the AUC a terrorist organization, and in September 2002, the United States requested the indictment of the AUC leaders on charges of drug trafficking.

The Peace Negotiations

Negotiations with left-wing guerrillas in Colombia consist mainly of a long history of failures (with a few exceptions, like the successful demobilization of the communist guerrilla group M19 in 1984). A full account falls beyond the scope of this paper, but the list below provides a sample of the failed negotiations of the past twenty years.

- Truce of 1984: broken when M19 seized the Palace of Justice.
- Truce of 1984-87: broken when the FARC ambushed an army unit.
- Negotiations of 1991: broken when the FARC ambushed the president of the senate.
- Negotiations of 1992: broken when EPL kidnapped and killed a government minister.
- Negotiations of 1994: failed when the FARC demanded a demilitarized zone.
- Negotiations of 1998: postponed indefinitely after FARC leader failed to show up at the negotiations.
- Negotiations of 1999-2000: failed when the FARC walked away in protest for the government's failure to combat right-wing paramilitaries.

In contrast, the first attempt at negotiating with the right-wing paramilitaries is showing much promise. President Alvaro Uribe achieved a landslide first-round victory in Colombia's presidential elections on 26 May 2002. He ran on a platform of security that combined military toughness against the guerrillas with an unprecedented willingness to negotiate with the paramilitaries. The electorate was tired of the escalating violence and frustrated with previous administration's dovishness. Uribe pledged to drastically increase military spending and double the size of the security forces to tackle the armed groups more effectively. To facilitate negotiations, the administration went so far as to modify legal statutes that expressly forbade negotiations with illegal entities. His approach has had mixed results: the FARC and ELN have systematically refused to negotiate with the Uribe government and have stepped up their attacks, but the AUC has been more receptive.

A new chapter in the search for peace began in December 2002, when the AUC agreed to meet with a government commission to explore peace talks. On 15 July 2003, after seven months of secret meetings, an accord was signed at Santa Fe de Ralito, in which both the gov-

ernment and the AUC agreed to begin formal negotiations with the objective of fully demobilizing the AUC by December of 2005. Since then, negotiations have progressed steadily despite national and international skepticism. In a highly publicized event on 25 November 2003, eight hundred AUC members handed over their weapons to the government's peace commissioner marking the spectacular beginning of the demobilization process.⁶

The Structure of the Negotiations

This section addresses the following questions: Who are the negotiating parties? What are their interests? And what coalitions have they formed?

Parties and their Interests

Even though the main negotiators are the government and the AUC, they are not the only parties influencing the process. The major stakeholders can be categorized into three groups, according to their degree of involvement with the negotiations: (1) the parties at the table; (2) the parties under the table; and (3) the parties off the table.

- **Parties at the table**
 - Colombian government
 - AUC
 - Catholic Church (mediator)
- **Parties under the table**
 - Colombian army
 - U.S. government
- **Parties off the table**
 - Ombudsman of Colombia
 - Colombian voters
 - Victims and their families
 - FARC and ELN
 - NGOs and human rights groups

The parties at the table include the government (represented by the president, Alvaro Uribe, and his peace commissioner, Luis Carlos Restrepo) and the AUC (represented by its founder and political leader, Carlos Castaño, and its military leader, *Comandante* Salvatore Mancuso).⁷ The government and the AUC have aligned interests on the issue of defeating the FARC.⁸ The difference lies in the government's interest in punishing past offenses and the AUC's desire for a general pardon.⁹ The AUC's wish for a pardon explains why it invited the Catholic Church to serve as a mediator: the AUC hopes that the church will champion the forgiveness of their past sins.

The parties under the table, the U.S. government and the Colombian army, are powerful actors that exert their influence by holding unofficial or secret meetings with the parties at the table.

The parties off the table are groups that do not participate directly in the negotiations but are very active in the public debate surrounding them. International human rights groups and victims associations, who advocate a strong punishment for the AUC, have been especially vocal in the public debate. The ombudsman of Colombia, as well as the moderate majority of Colombian voters have played a marginal role so far. Section V of this paper recommends that their points of view be taken more into account. And finally, the FARC and ELN are off the table but on the negotiators' minds, given that the outcome will set a precedent for future negotiations with them.

All the parties involved, as well as Colombian society at large, are sharply divided on the issue of how much legal pardon to offer the AUC. Their respective positions are represented in Figure 1, which depicts the positions of each of the main parties along two dimensions: the left/right political spectrum, and their desire to punish/pardon the members of the AUC. The ellipses represent the coalitions that have traditionally existed among the parties.

Parties' Alternatives to a Negotiated Agreement

Success in these negotiations depends largely on the parties' motivation to compromise. That motivation, in turn, depends on each party's best alternative to a negotiated agreement (BATNA).¹⁰

- The government's BATNA is low:

If the negotiations fail, the government would lose credibility among Colombian voters and the international community. President Uribe is currently popular among voters, but he would not be able to endure the failure of a highly publicized demobilization process. Should this demobilization fail, he would lose any prospect of amending the constitution to allow his reelection, a goal he is presumably seeking. To maintain the status quo would mean the continuation of an expensive and deadly war against the AUC, taking resources away from the war against FARC and ELN.

- The AUC's BATNA is *high but decreasing*:

It can be argued that AUC's BATNA is quite high: AUC currently has large revenues from illegal activities (drug production, extortion, kidnappings) that it would have to forgo should it demobilize. Nevertheless, recent factors have deteriorated the AUC's BATNA, which explains why it has been contemplating demobilization. A key factor was the United States' decision to include the AUC in its list of foreign terrorist groups in September 2001 and to request the extraditions of Castaño and Mancuso on charges of drug-trafficking in September, 2002. Such strategic moves by the U.S. government greatly reduced the AUC's BATNA for two reasons. First, the United States froze the AUC's American assets and prohibited Americans from doing business with it, thus reducing its cash flow. Secondly, these moves affected the AUC's public image by comparing the AUC to Al Qaeda. As can be inferred from interviews, this had a deep psychological impact on the AUC leaders, who consider themselves freedom fighters, not terrorists.¹¹

The negotiations at present have two parallel processes unfolding simultaneously: the bargaining process and the implementation process.¹² Each presents its own challenges, and each is crucial for the overall success of the negotiations. Both processes, along with respective recommendations, are discussed in the following two sections.

The Bargaining Process

This section addresses the following questions: What should be discussed at the negotiating table? Who should agree to yield on which issue? And who should agree to what commitments?

The Issues

Even though the public debate has centered on the issue of legal pardon, the negotiators ought to bring in more issues that will allow them to *trade on differences*. Indeed, single-issue

negotiations tend to be very contentious, and a frequent recommendation in negotiation theory is to include sufficient issues to allow a rich set of side deals and compensations.¹³ There are four issues that this paper considers crucial to the negotiation discussions: the *reintegration* of paramilitaries into society; the *perks* offered by the government to those paramilitaries who demobilize; the *reparation* of past crimes; and the *legal pardon* of former paramilitaries.

The first issue, the reintegration of paramilitaries into society, is an issue where the interests of all the players are aligned. In negotiation theory this is called an integrative issue.¹⁴ The second issue, the perks offered by the government to those paramilitaries who demobilize, are deal-sweeteners: they have a negligible cost to the government, but the AUC perceives them as very attractive. The third and fourth issues, the reparation of past crimes and the legal pardon of former paramilitaries, are two issues where the interests of the parties are completely opposed, which in negotiation theory are called distributive issues.

Once an agenda of issues has been set, each issue should be subdivided according to its possible outcomes. We have subdivided each issue in three types of outcomes: low, middle, and high.

Table 2 (a). Reintegration of paramilitaries into society

Low reintegration:	Middle reintegration:	High reintegration:
<p>The demobilized paramilitaries would not adjust well to civilian life and would look for illegal means of survival. Society would treat them as pariahs, and the FARC would routinely assassinate them. They would return to mugging, stealing, and drug-trafficking, or even resume their paramilitary activities.</p>	<p>The former paramilitaries would be offered reeducation, would be admitted to universities, and would be hired in public jobs; society would accept them, and the government would protect them from the FARC and ELN.</p>	<p>In addition to the actions for middle reintegration, the AUC would reorganize itself as a civic organization. The former paramilitaries and their leaders would run in elections for public office. The rank-and-file would be incorporated openly in the Colombian army to fight against the FARC and ELN.</p>

Table 2(b). The perks offered by the government to demobilized paramilitaries

<p>Low perks:</p> <p>No perks would be offered by the government.</p>	<p>Middle perks:</p> <p>The government would offer them free services, such as legal advice and psychological counseling.</p>	<p>High perks:</p> <p>In addition to the services provided with middle perks, the government would offer them advantageous credits and loans.</p>
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Table 2(c). Reparation of past crimes

<p>Low reparation:</p> <p>Stolen land would be returned, but not land that was "forcefully bought." The AUC would give useful data about their crime operations but not apologize for them. They would stop harassing their victims but would not repay them.</p>	<p>Middle reparation:</p> <p>The AUC would agree to return all stolen land to displaced populations and to give cash transfers to victims and their families. AUC members would be forced to do social work in their communities, and their leaders would publicly apologize for their excesses.</p>	<p>High reparation:</p> <p>In addition to middle reparation, the AUC would actively collaborate with the government against drug lords (by providing information) and against left-wing guerrillas (with logistics and planning).</p>
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Table 2(d). Legal pardon of former paramilitaries

Low pardon:	Middle pardon:	High pardon:
<p>Paramilitaries would face justice under the current penal law. They would face jail in Colombia and/or extradition to the United States for drug trafficking. They would have no civil rights.</p>	<p>AUC members would be legally pardoned if they surrendered their weapons and subjected themselves to due process before a judge. They would not be subject to the current penal laws for their war crimes, but some of them might have to serve some alternative sentences such as restricted geographic freedom, diminished civil rights (barring them from elections and public service), prohibition from contacting victims, expulsion from the country if they are foreigners, or prohibition to bear arms.</p>	<p>An amnesty would be granted to all demobilized AUC members. Their past actions would not be considered crimes and would not generate a police record. None of the leaders would be extradited, and they would immediately have full civil rights.</p>

Because the reintegration of paramilitaries into civil society is an integrative issue, it is straightforward to optimize the payoffs of all the parties by choosing the highest level of reintegration. Another straightforward choice is for the government to offer the highest level of perks: it carries virtually no cost to the government and is highly attractive to the AUC. We recommend that the government offer those perks as deal-sweeteners: there is evidence that people tend to accept a deal when they are offered “something extra” to sweeten it.¹⁵

The two remaining issues, however, are highly contentious and will be subject to strained negotiations and difficult tradeoffs. They are addressed below.

Pareto Optimal Deals

A major failing in these negotiations would be to leave value at the table—that is, to reach a mediocre deal that could have been improved for both parties. In economic theory this is known as a Pareto suboptimal deal. Any good agreement between the government and the AUC must be Pareto optimal—that is, there must not exist another agreement where both parties would be better off.¹⁶ It can be very difficult, however, for negotiators to identify the Pareto optimal deals when they lack information about each other’s exact payoffs. We address this

information problem below by constructing a point structure for each negotiator's preferences.

The first advice for parties to reach a Pareto optimal deal is to avoid being too rigid. Negotiators who are too rigid in their demands (so-called positional negotiators), tend to generate bad sentiment among their counterparts, leading to an impasse. For this reason, it is recommended that players be willing to compromise.

More than compromise, however, this paper recommends that parties keep their demands moderate and aim at middle-of-the-road outcomes on every issue. For example, it would be unwise to settle on a deal that agrees on a high level of reparation and a high level of pardon, which could be called "high-high." Even if this seems like a sensible compromise (the government gets its preferred outcome on reparation in exchange for the AUC getting its preferred outcome in pardon), it is too extreme. Indeed, as will become clear in the following paragraphs, both parties would be better off by agreeing to a more moderate compromise, such as a middle level of reparation and a middle level of pardon, which could be called "middle-middle."

This is more easily illustrated by drawing a Pareto frontier, which is the set of all Pareto optimal deals. In what follows we illustrate how the Pareto frontier can be drawn and used by the negotiators. The construction involves making some assumptions about the preferences of the negotiators and using a point structure. The Pareto frontier for this negotiation is shown in the graph below, and the exact steps to construct it are outlined in the appendix of this paper.¹⁷

In Figure 2, all possible agreements concerning reparation and pardon, and their respective utility for the government and the AUC, have been plotted. For example, we can see that the agreement of low reparation and high pardon, called low-high, gives 0 points to the government and 100 points to the AUC.

There are four agreements that lie under the Pareto frontier and are therefore Pareto suboptimal: middle-high, low-low, high-high and high-middle. Those agreements have the flaw of "leaving value on the table" and should never be chosen in a final deal. For example, the deal high-high is a waste, given that both the government and the AUC could simultaneously be made better off by agreeing on the deal middle-middle; which also illustrates our previous claim that the deal middle-middle should be preferred to high-high. On the other hand, five agreements are Pareto optimal and could be chosen in a final deal according to this criterion: low-high, low-middle, middle-middle, middle-low and high-low.

Zone of Possible Agreement

The previous analysis of the Pareto frontier assumes that there actually exists a zone of possible agreement (ZOPA).¹⁸ This is only true if some possible agreements are better than the parties' BATNAs. Fortunately, there seems to be a significant ZOPA in this negotiation.

As was discussed in Section III, the government's BATNA is quite small, which can be assessed to be around 25 points in our scoring system. The AUC's BATNA is high but decreasing and can be assessed to be around 65 points. The ZOPA is composed of all the deals that yield higher points to both parties.

From Figure 2, it can be seen that the ZOPA contains only three possible deals: middle-high, low-middle, and middle-middle. All other deals would be unacceptable to at least one of the parties. For example, the government could offer the Pareto optimal deal consisting of a middle level of reparation and a low level of pardon (middle-low), which it prefers to its BATNA, but the AUC would walk out since it provides it a lower payoff than its BATNA. Of the three agreements within the ZOPA, only two are Pareto optimal and could be chosen as a final deal: low-middle and middle-middle.

Fairness Criteria

For the AUC and the government to agree on any deal, that deal would have to be perceived as fair by both parties. Indeed, there is much research documenting that people reject unfair deals even when they are beneficial to them.¹⁹

As can be seen in Figure 2, the AUC's BATNA is much higher than the government's BATNA—that is, the AUC has a much better walk-out option than the government. The fact that the AUC has a higher BATNA than the government should be reflected in the final outcome. Otherwise the AUC might feel treated unfairly and break the talks. Of the two Pareto optimal deals within the ZOPA, low-middle reflects the advantage of the AUC described above, whereas middle-middle does not. From that point of view, low-middle can be considered more fair than middle-middle.²⁰ In fact, we prove in the appendix that low-middle satisfies two fairness criteria widely used in bargaining theory: the Nash bargaining solution and the maximin value. Therefore, it is recommended that the parties settle on an agreement with a low level of reparation and a middle level of pardon. Table 3 summarizes the recommended agreement on all the issues.

Table 3.

Reintegration	Perks	Reparation	Pardon
<i>High</i>	<i>High</i>	<i>Low</i>	<i>Middle</i>
The former paramilitaries should be offered reeducation, should be admitted at universities, and should be hired in public jobs; society should accept them, and the government should protect them from the FARC and ELN. The AUC should reorganize itself as a civic organization. The former paramilitaries and their leaders should be allowed to run in elections for public office. The rank-and-file should be incorporated openly in the Colombian army to fight against the FARC and ELN.	The government should offer the paramilitaries free services, such as legal advice and psychological counseling, as well as advantageous credits and loans.	The AUC should commit to return all stolen land, but not necessarily the land that was "forcefully bought." The AUC should give useful data about their crime operations but should not be required to apologize for them. They should stop harassing their victims but might not repay them.	AUC members should be legally pardoned if they surrender their weapons and subject themselves to due process before a judge. They should not be subject to the current penal laws for their war crimes, but some of them might have to serve some alternative sentences such as restricted geographic freedom, diminished civil rights (barring them from elections and public service), prohibition from contacting the victims, expulsion from the country if they are foreigners, or prohibition to bear arms.

The Implementation Process

The implementation process addresses the following questions: How can the deal be honored? How can promises be kept? What steps must each party take to fulfill the commitments it made?

The signing of a peace agreement does not guarantee per se that its implementation will be successful.²¹ There are two important challenges still remaining: first, debriefing the content of the negotiations to each constituency; and second, implementing each party's obligation in the agreement.

Debriefing Constituencies through Parallel Negotiations

In addition to its front-channel negotiations with the AUC, the government is accountable to numerous constituencies with which it needs to have parallel negotiations. In particular, the government will need to make any agreement as palatable as possible to the Colombian voters and the international community. Any pardon to the AUC will be especially hard to swallow for the victims and their NGOs.

Psychological theories would suggest paying special attention to how the issues are framed in "hard to sell" cases.²² In particular the government must frame the appropriate reference point against which the agreement should be compared. For example, the public should be reminded of other successful amnesties throughout history (like those in Sierra Leone, Northern Ireland, and Colombia itself). The win-win side of the demobilization (that is, the integrative issues of the negotiations) should be made especially salient. The government's spokesmen should convey that the reintegration of paramilitaries is not a "surrender" but a "reincorporation of former fighters" from which society will benefit at large.

Unfortunately, the public debate is dominated by partisan institutions with specific agendas. As is apparent from the graph in Section III, all the preexisting coalitions have extreme views. For any sensible agreement to be accepted, the president and his peace commissioner must build a grand coalition of the center by strengthening the moderate parties and weakening the coalitions at the extremes, to make the political landscape look like Figure 3. This approach has been effective in other international peace negotiations. It was achieved, for example, by George Mitchell when he mediated the conflict in Northern Ireland and was also used by Nelson Mandela in South Africa and Yitzhak Rabin in the Israeli-Palestinian conflict.²³

Building a grand coalition of the center consists of empowering the moderate parties so as to generate a broad consensus on the key issues. This difficult task can only be accomplished by carefully reshaping the role of each party.

To begin with, the ombudsman should serve as a counterbalance to the inflexible human rights groups and victims' NGOs, who currently risk derailing the negotiations with their radical demands.²⁴ The newly appointed ombudsman would be a credible champion for victims' rights, while also keeping in mind the success of the demobilization.²⁵

The church could be a valuable ally on the issue of reintegration. It can help in the dialogues with society to gain its long-run support, also called Track II negotiations. The church mediators should be more active in appealing to the "fraternity of Colombians" to "forgive" the AUC, as well as convincing the AUC to "purify their sins" by fully collaborating with the government.

The Colombian military, which is less drug-obsessed than the U.S. government, should design the military strategy. It is also well documented that there is covert sympathy between the AUC and some officers in the Colombian military,²⁶ which has embarrassed the government on many occasions but can now be used advantageously. By forming a grand coalition of the center, the government would have tighter control over the military, which can in turn establish secret back-channel negotiations with the AUC.

Lastly, in the debate over pardons, so far dominated by international lobbying groups, a voice should be given to the millions of Colombians who are actually suffering the consequences of war and are thus much more receptive to a compromise amnesty.

Implementing the Agreement

For the promises made during any agreement to be credible, they will need to be backed by institutional changes. In particular, the AUC needs to be reassured that the government will effectively protect its members and will not imprison them ex-post. A new law therefore needs to be passed to effectively tie the hands of the government after the demobilization. Such a bill, called the *Law of Penal Alternatives*, has already been submitted by the government to Congress where it is currently being debated. In spite of its many positive features, the *Law of Penal Alternatives* has been harshly criticized both by domestic and foreign observers. Those observers have tended to dismiss it as a “veiled amnesty” that will result in too much pardon to individuals who have committed crimes against humanity. For example, a well-known international NGO states that “once passed by parliament—the ‘law for the reinsertion of members of armed groups’ will result in impunity for war criminals.”²⁷

This paper takes a critically different stance on the issue of pardon. Although it would be ideal to demobilize and then punish the individuals who have committed atrocious crimes, it is not realistic.²⁸ Advocating a harsh punishment, as the international NGOs do, fails to acknowledge the simple logic that paramilitaries will not demobilize if they face such a prospect. This is illustrated in Figure 4.

The paramilitaries prefer an alternative sentence to remaining illegal and prefer remaining illegal to being in jail or extradited; thus, they will demobilize only if they are assured of court trial under an alternative law. If they believe that the court will apply the existing penal law and thus impose jail or extradition sentences, they will simply not demobilize.

This paper’s recommendation thus follows from the diagram: the government must apply a tough alternative law, but not so tough that it would deter the paramilitaries from demobilizing.²⁹ Those intermediate sentences might include house-arrest, fines, community service, and other alternatives to jail or extradition.

It must be noted that the Law of Penal Alternatives should be vocally defended by the large majority of people who would benefit from a successful demobilization—that is, the people whose lives will be in less danger if peace is reached; they are the “potential victims” of the AUC, so to speak. Unfortunately, being a large and dispersed group, the potential victims cannot organize a collective action to effectively defend their interests. In contrast, the past victims are a small, homogeneous, and highly motivated group which has effectively organized to defend its interests. As a result of this imbalance, there is a bias in the public debate toward punishing past crimes rather than avoiding potential crimes.

Conclusions

The negotiations to demobilize the members of the AUC have justifiably attracted a lot of attention, both in Colombia and in the international community. The stakes in these negotiations are enormous: if successful, they will open a window of opportunity to solve one of the longest and bloodiest civil wars in Latin American history. In the introduction, it was claimed that a successful negotiation would increase the feasibility of pacifying the remaining warring actors. In this conclusion, it is worth outlining how.

The negotiations with the right-wing paramilitaries increase the government’s prospect of negotiating with the left-wing guerrillas in two ways. First, if the demobilization of the AUC is successful, it will set a useful precedent reassuring the FARC and ELN that the government can reintegrate them into society safely and efficiently. Indeed, not only will the government

have gained experience and credibility, but any institutional arrangements, such as the Law of Penal Alternatives, would be equally applicable to the potential demobilization of the left-wing guerillas.

Secondly, after demobilizing the right-wing paramilitaries, the government will have more resources to fight the left-wing guerrillas, giving the guerillas a stronger incentive to engage in peace talks. In effect, strengthening the military will decrease the left-wing guerrillas' BATNA until they agree to join the negotiating table.³⁰

Should the negotiations fail, the violence will resume, accompanied by the traditional human rights atrocities that Colombians have endured for decades. Fortunately, these negotiations have a good chance of succeeding. Given the large zone of possible agreement, the decreasing BATNAs, the Law of Penal Alternatives being discussed in Congress, a burgeoning coalition of the center, the useful mediation by the church, and the new appointment of an ombudsman in Colombia, the overall prospects for a successful negotiation are promising.

No effort should be spared, however, to reach the goal of one day demobilizing all the illegal armies in Colombia. As part of that effort, the tools of negotiation theory and economic theory should be put to practice in the demobilization of the AUC and in all the subsequent negotiating challenges.

Appendix 1: Constructing the Pareto Frontier

Following Raiffa's *The Art and Science of Negotiation*, this appendix explains how to represent the preferences of the two main parties, the government and the AUC, as an additive scoring system. Note that the tables below are not meant as a literal description of the parties' actual preferences (there is not enough information available to us for that), but rather as an illustration of how the actual negotiators can use this technique themselves. Table A1 below assigns points to each party for each outcome. First, note that the government gets higher points the more reparation and lower points the more pardon. The reverse is true for the AUC.

Second, note that the government cares more about pardon than it cares about reparation, which is represented by assigning a weight of 0.6 to pardon and a weight of 0.4 to reparation. This is due to loss aversion: the government thinks of reparation as a gain and pardon as a loss. There is abundant psychological research documenting that losses loom larger than gains in people's minds.³¹ Similarly, it can be assumed that the AUC also suffers from loss aversion: it assigns a larger weight to reparation, which it codes as a loss, and a lower weight to pardon, which it codes as a gain. Another feature of this point structure is its concavity: the AUC gains enormously by going from a low to a middle level of pardon (represented by 70 points), whereas it gains little by going from a middle to a high level of pardon (represented by 30 points). This is meant to represent the phenomenon of decreasing marginal utility. Finally we assume that the parties evaluate any deal by simply weighing and adding the points obtained in each dimension. So, for example, the government considers a deal consisting of a middle level of reparation and a low level of pardon to be worth $28 + 60 = 88$ points. This illustrates the possible tradeoffs among issues. For example, the AUC is willing to go from a low to a middle level of reparation (thus losing 18 points) in exchange for going from a low to a middle level of pardon (thus gaining 28 points). At the same time we see that the government is unwilling to accept that same tradeoff.

Table A1 allows us to calculate the points that each possible deal (nine in total) yields to the government and the AUC. This is illustrated in Table A2. In Section IV those deals were plotted in a two-dimensional space, where the x-axis represented the points for the government and the y-axis represented the points for the AUC. The Pareto optimal deals are those where neither of the parties can be made better off without making the other worse off. For example,

the high-high deal is not Pareto optimal: if the government and the AUC changed to the middle-middle deal, they would both increase their points from 40 to 70. The middle-middle deal is Pareto optimal because any alternative deal that increases the points of the government necessarily decreases the points of the AUC, and vice versa.

Table A1

	Government			AUC		
	weight	points	weighted points	weight	points	weighted points
Reparation	0.4			0.6		
low		0	0		100	60
middle		70	28		70	42
high		100	40		0	0
Pardon	0.6			0.4		
low		100	60		0	0
middle		70	42		70	28
high		0	0		100	40

Table A2

Reparation	Pardon	Value to the Government	Value to the AUC
low	low	60	60
low	middle	42	88
low	high	88	100
middle	low	70	42
middle	middle	28	70
middle	high	100	82
high	low	82	0
high	middle	40	28
high	high		40

Appendix 2: Fairness Criteria for the Pareto Optimal Deals

We prove here that the low-middle deal is more fair than the middle-middle deal according to two fairness criteria widely used in bargaining theory: the Nash bargaining solution and the maximin value.³² That is, in the bargaining between the government and the AUC over the issues of reparation and pardon, agreeing on a low level of reparation and a middle level of pardon does more justice to the parties' relative BATNAs than agreeing on a middle level of reparation and a middle level of pardon.

Nash Bargaining Solution

If we call x the difference between the government's payoff and the value of its BATNA, and we call y the difference between the AUC's payoff and the value of its BATNA, then the Nash bargaining solution is the deal that maximizes the product of x times y , called the Nash product. As was said in Section IV, the government's BATNA is assessed at 25 points and the AUC's BATNA at 65 points. Therefore, with the deal middle-middle, which gives payoffs of 70 to the government and 70 to the AUC, the Nash product is $(70-25) \times (70-65) = 225$. On the other hand, with the deal low-middle, which gives payoffs of 42 to the government and 88 to the AUC, the Nash product is $(42-25) \times (88-65) = 391$. Therefore, the deal low-middle maximizes the Nash product. It is fair to move from middle-middle to low-middle because "the proportional gain for [the AUC] is more than the proportional loss for [the government]."³³

The maximin value

We first define the potential of each party as its maximum feasible payoff, minus the value of its BATNA. Given that the maximum feasible payoff for the government is 70 (from middle-middle) and its BATNA is 25, its potential is $70-25=45$. Given that the maximum feasible payoff for the AUC is 88 (from low-middle) and its BATNA is 65, its potential is $88-65=23$. The excess of each party is defined as its payoff from the actual deal minus the value of its BATNA. The proportion of potential (POP) is defined as the excess of each party divided by its potential, and the minimum proportion of potential is the smallest among the government's POP and the AUC's POP. All these values are given for each party, for each of the two deals low-middle and middle-middle, in the following table.

Table A3

	Government	AUC	
Deal middle-middle			
Payoff from deal	70	70	
Maximum feasible payoff	70	88	
BATNA	25	65	
Potential	45	23	
Excess	45	5	
Proportion of potential	1	0.217391304	
Minimum proportion of potential			0.217391304
Deal low-middle			
Payoff from deal	42	88	
Maximum feasible payoff	70	88	
BATNA	25	65	
Potential	45	23	
Excess	17	23	
Proportion of potential	0.377777778	1	
Minimum proportion of potential			0.377777778

The maximin value is the deal that maximizes the minimum POP. Given that the minimum POP with the deal middle-middle is 0.217 and with the deal low-middle is 0.378, the deal that maximizes the minimum POP is low-middle. The maximin value, low-middle, is fair because it makes the worse-off party as well-off as possible.

Endnotes

¹I wish to thank professors Robert Bates, Iris Bohnet, and Jorge Dominguez for valuable comments at several stages of this research. I also thank Daniel Gingerich, Catalina Ortiz, and my editors, Regina Ryan and Roger Tansey, for their thoughtful comments. This paper draws on some previous research that I did with Carmen de Pierola, Mauricio García, Sreemati Mitter, and Patricio Sampayo. All errors are my own.

²Angel Rabasa and Peter Chalk, *Colombian Labyrinth*, Project AIR FORCE Series (Santa Monica, CA: RAND, 2001).

³Fernando Cepeda Ulloa, "Colombia: The Governability Crisis," in *Constructing Democratic Governance*, ed. Jorge I. Dominguez and Michael Shifter (Baltimore, MD: John Hopkins University Press, 2003).

⁴International Crisis Group (ICG), "Colombia: Negotiating with the Paramilitaries," Latin America Report No. 5 (16 September 2003).

⁵For example, in October 1999, the FARC charged \$5,263 to "protect" a laboratory, and \$4,210 to "protect" a hectare of poppy field. See Rabasa and Chalk, 32.

⁶Juan Forero, "800 in Colombia Lay Down Arms, Rekindling Hopes," *The New York Times*, November 26, 2003, 1.

⁷Carlos Castaño initiated the peace talks and signed the demobilization accord in Santa Fe de Ralito, but he eventually retired from the negotiations in April 12, 2004, leaving Salvatore Mancuso as the main AUC negotiator. Castaño was later kidnapped and his whereabouts remain unknown. See CNNenEspañol.com, "El paradero del jefe paramilitar colombiano es aún un misterio," <http://CNNenespanol.com/2004/americas/05/05/colombia.paramilitar.ap/index.html>.

⁸It is noteworthy that both the father of Uribe and the father of Castaño were assassinated by the FARC.

⁹Carlos Castaño, AUC, "Un Mensaje a los Colombianos: un Planteamiento al Gobierno y a Todas las Autodefensas," http://www.colombialibre.org/detalle_col.php?banner=Editorial&id=2464.

¹⁰The BATNA refers to the party's payoff should the negotiations fail; it is their status quo. If negotiators' BATNAs are too high, they will have a large incentive to walk away from the negotiations, and therefore it is desirable that all negotiators have low BATNAs for the negotiations to be successful.

¹¹"Jefe Paramilitar Carlos Castaño Propone Tribunales Regionales de la Verdad," *El Tiempo*, December 4, 2003, Online edition.

¹²Indeed, the first phase of the demobilization was implemented in November 2003, despite the lack of any final agreement on the bargaining process.

¹³Leigh Thompson, *The Mind and Heart of the Negotiator*, 2nd ed. (Upper Saddle River, NJ: Prentice Hall, 2001), 63.

¹⁴Howard Raiffa, *The Art and Science of Negotiation* (Cambridge, MA: Harvard University Press, 1982).

¹⁵Thompson, 151.

¹⁶Technically, a deal between two people is defined as Pareto optimal if none of the parties can be made

better off without making the other worse off. If, on the other hand, both parties could feasibly be better off (or one better off and the other indifferent), then the deal would be defined as Pareto suboptimal.

¹⁷ Even though we believe that these assumptions are realistic and the results are robust, this analysis does not intend to predict the exact outcome of the actual negotiations, but rather to illustrate how the Pareto frontier can be used by the negotiators to reach a successful agreement.

¹⁸ The ZOPA refers to the set of all bundles that are acceptable to both parties. A larger ZOPA increases the likelihood of finding mutually beneficial agreements.

¹⁹ Colin F. Camerer, *Behavioral Game Theory: Experiments in Strategic Interaction*. Princeton, NJ: Princeton University Press, 2001), 43-117.

²⁰ Note that by fair we do not mean just. The deal low-middle is fair from the bargaining point of view, but it might still be unjust, especially to the victims. We address justice in the following section.

²¹ In fact, regarding civil wars, of all the peace agreements signed between 1940 and 1992 only 57 percent were successfully implemented. See Barbara F. Walter, *Committing to Peace: The Successful Settlement of Civil Wars* (Princeton, NJ: Princeton University Press, 2002), 6.

²² Thompson, 146.

²³ Daniel Curran and James K. Sebenius, "The Mediator as a Coalition Builder: George Mitchell in Northern Ireland," *International Negotiation* 8 (2003): 111-147.

²⁴ An instance of this risk happened when Human Rights Watch pressed all the American states to boycott the negotiations as long as Colombia did not "establish clear criteria insuring that the gravest crimes against humanity, atrocious offenses and violations of the humanitarian international law, are duly investigated and their perpetrators prosecuted." "Human Rights Watch pide a países americanos no respaldar verificación del proceso con paramilitares," *El Tiempo*, February 3, 2004, Online edition.

²⁵ Volmar Pérez Ortiz was appointed defensor del pueblo in September 2003. See www.defensoria.org.co.

²⁶ ICG, "Negotiating with the Paramilitaries."

²⁷ ICG, "Colombia: President Uribe's Democratic Security Policy," Latin America Report No 6 (13 November 2003).

²⁸ Economist, "Columbia's Paramilitaries: Disarming, Bit by Bit," January 31, 2004, 35.

²⁹ To be exact, the government needs to maximize the toughness of the alternative sentence, subject to the alternative sentence being no worse than remaining illegal.

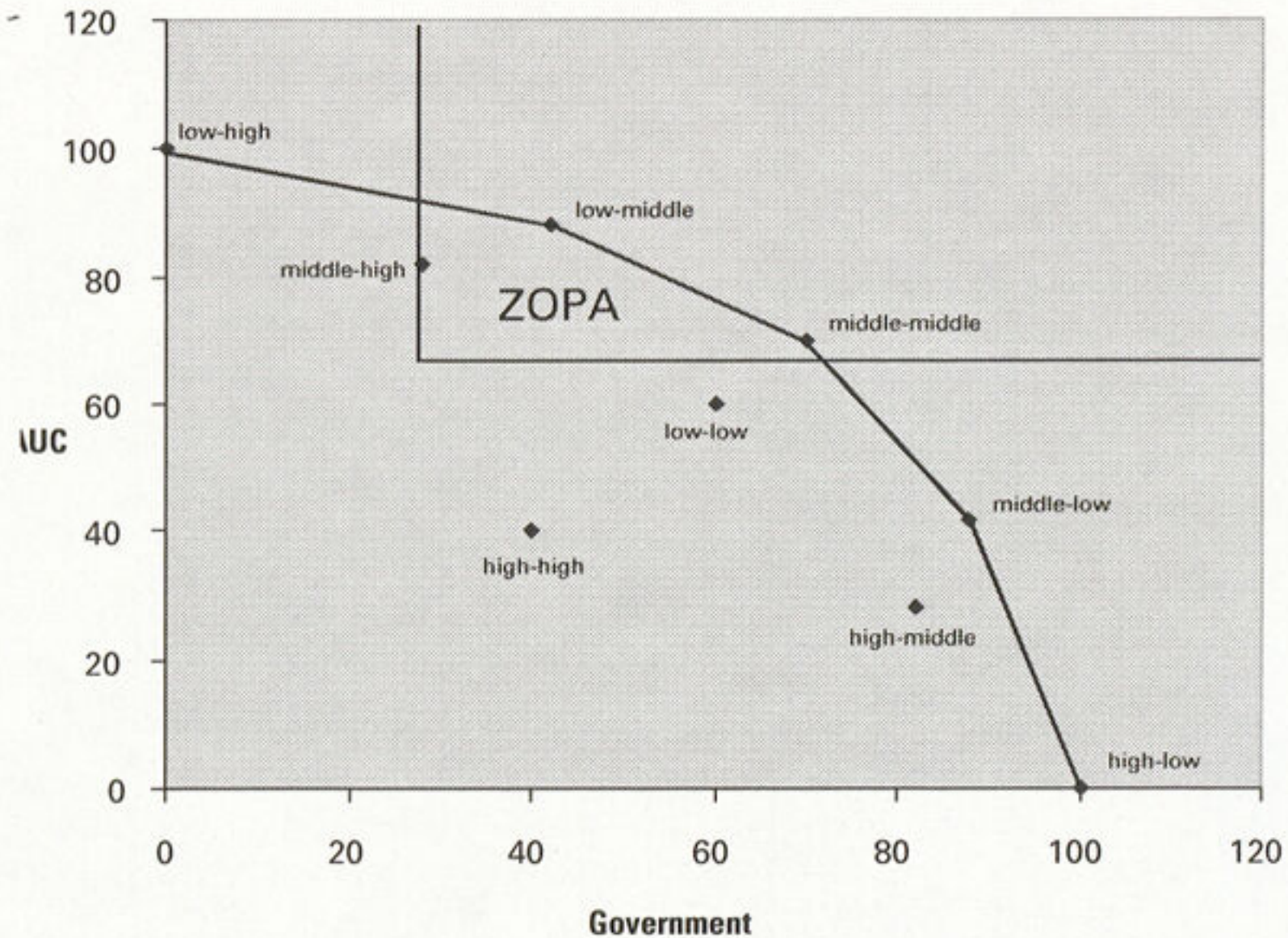
³⁰ A more detailed analysis of the potential negotiations with the FARC and ELN can be found in Carmen de Pierola, Mauricio García, Sreemati Mitter, Patricio Sampayo, and Gilles Serra, "A Bid for Peace: The AUC-Colombia Negotiations," (final memo for STM-221B, Harvard University, Cambridge, MA, 2003, original).

³¹ Daniel Kahneman and Amos Tversky, "Prospect Theory: An Analysis of Decision Under Risk," *Econometrica* 47 (1979): 263-91.

³² In both cases, we follow the interpretation provided by Howard Raiffa, John Richardson, and David Metcalfe, *Negotiation Analysis: The Science and Art of Collaborative Decision Making* (Cambridge, MA: Belknap Press of Harvard University Press, 2002).

³³ Raiffa et al., 356.

Figure 1. The Existing Coalitions



This figure depicts the positions of each of the main parties along two dimensions: the left/right political spectrum, and their desire to punish/pardon the members of the AUC. The ellipses represent the coalitions that have traditionally existed among the parties.

Figure 2. Pareto Frontier and Zone of Possible Agreement

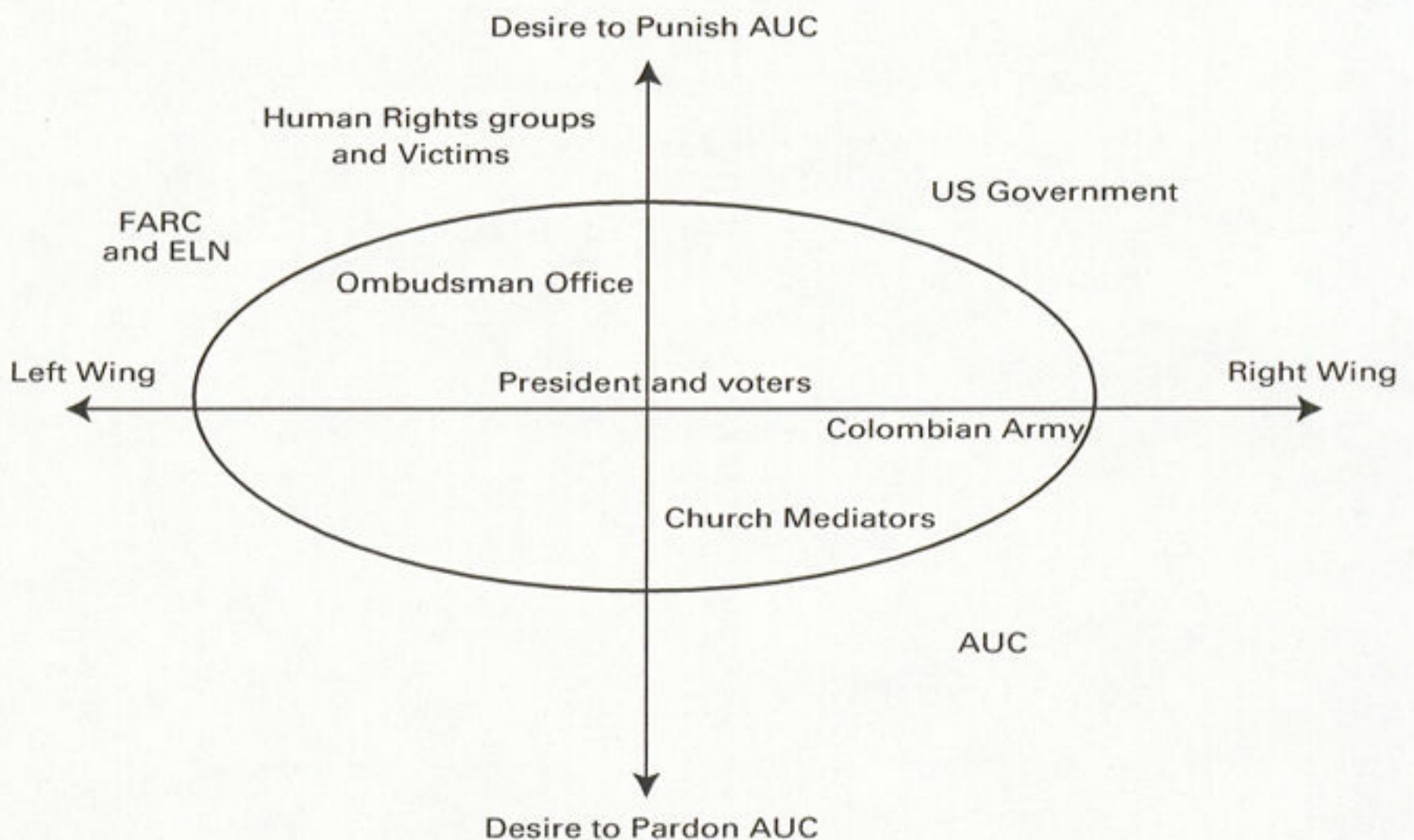


Figure 3. A Grand Coalition of the Center

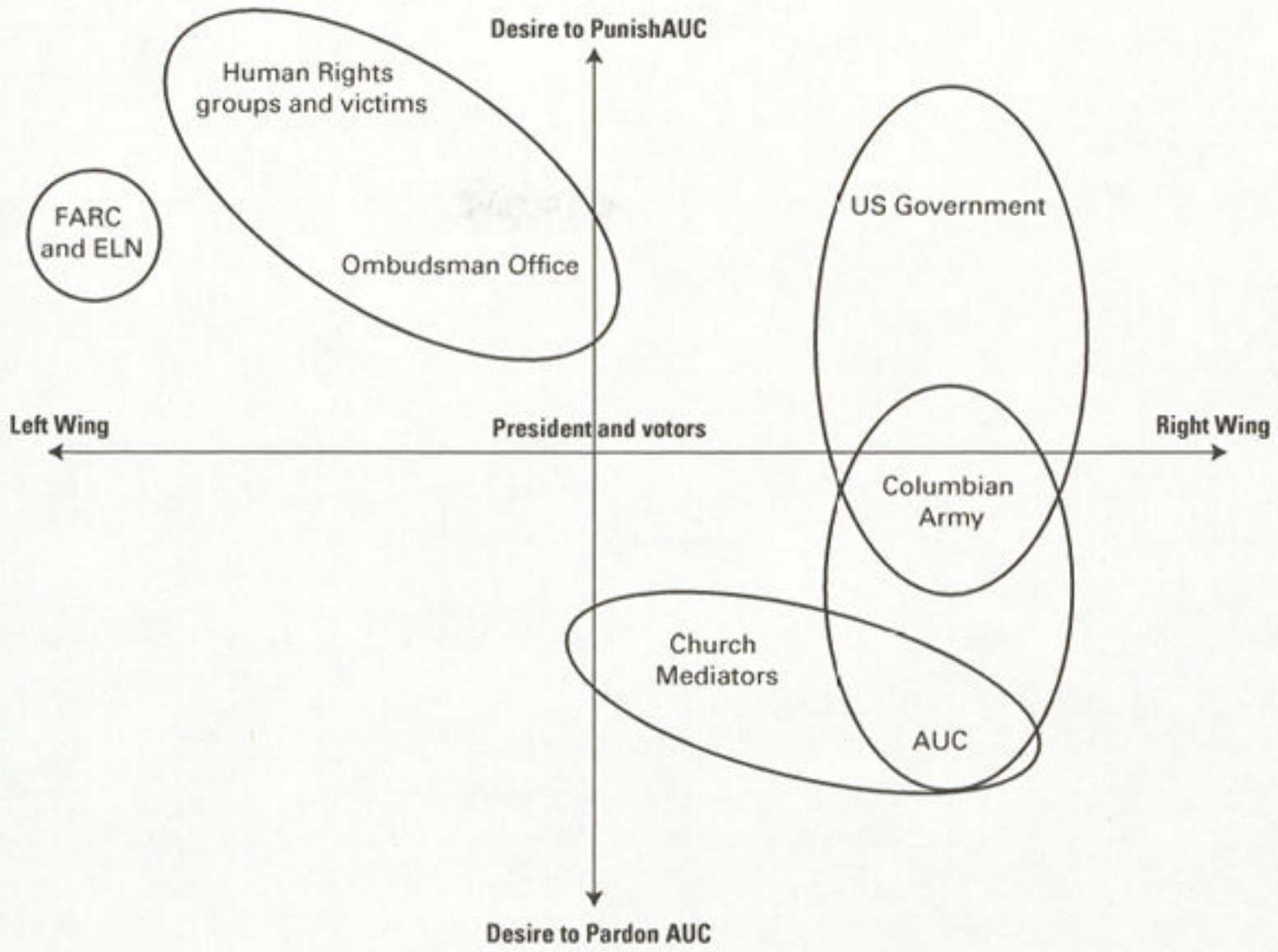
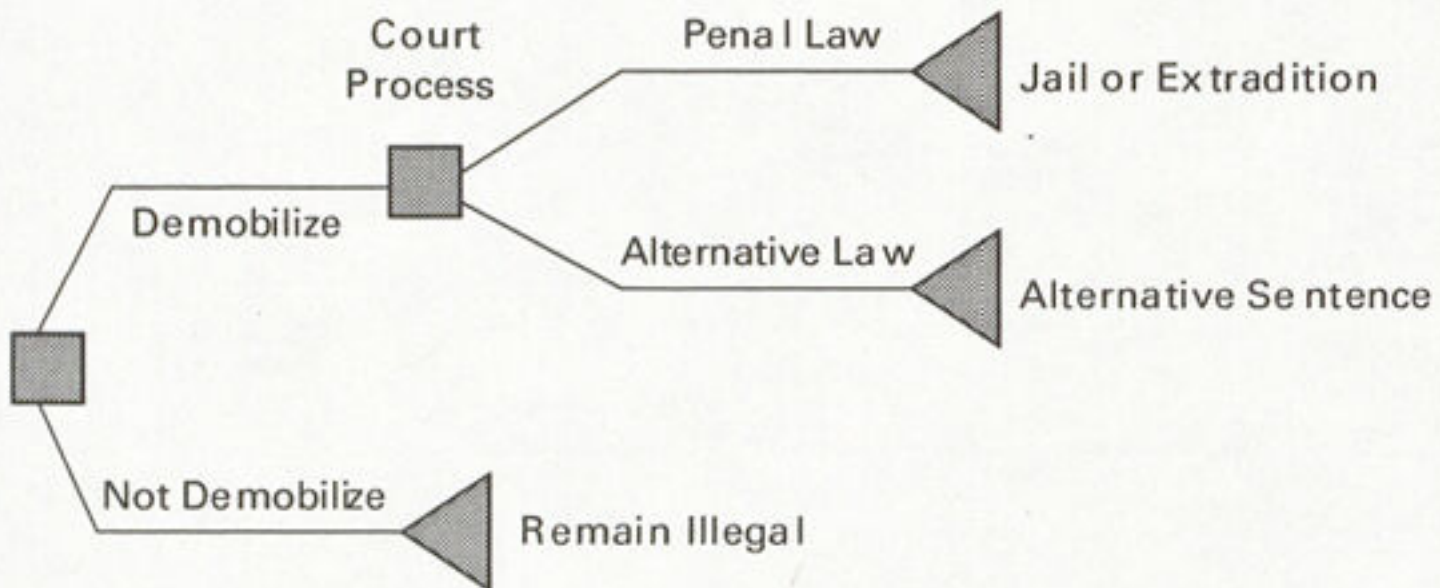


Figure 4. The Paramilitary's Decision Tree





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CRAFTING A SUSTAINABLE TRANSATLANTIC SECURITY PARTNERSHIP: FOCUSING ON COMPARATIVE ADVANTAGES

JOHN P. COGBILL

The U.S. Army is conducting combat and peacekeeping operations at an unsustainable pace. The costs of these operations come at the expense of military modernization. Europe has underfunded defense for the last fifty years and risks becoming irrelevant as a military force and a strategic partner. The United States and Europe must find an improved basis for the transatlantic security partnership for this century. By focusing on comparative advantages, the U.S. advantage in joint war fighting and the European advantage in peacekeeping, the NATO allies can make better use of their national resources. Not only will this division of labor result in more efficient allocation of defense dollars, but the combined nature of these operations will add global legitimacy to future endeavors, which will translate into greater international cooperation and trust.

The U.S. Armed Forces are heroically, but painfully, executing an unsustainable military strategy in the global War on Terrorism. Since the terrorist attacks of September 11, 2001, much has been asked of U.S. servicemen and women, and much has been given. As of July 2003, the U.S. Army had 368,900 soldiers deployed overseas in 120 different countries, 136,141 of whom were citizen soldiers from the reserve components.¹ More than half of the Army's currently deployed soldiers are engaged in some form of nation-building or peace operations, be it the more aggressive peacemaking operations in Iraq or the less dangerous peacekeeping operations in places like Kosovo, Bosnia, or the Sinai.² Regardless of the type of peace operation being conducted, there is a heavy cost, not only in human sacrifice and expanding budgets, but also in the opportunity costs of training for war or investing in modernization. Therefore, it is critical that the United States seek new multilateral solutions to the challenges of global leadership, especially in conducting peace operations, by engaging its allies and forging a new transatlantic security partnership.

A New Reality

Several significant events, both at home and abroad, have caused the United States to reassess its national security priorities. September 11 was a tragic reminder that the future threats to the nation will be diverse and will reach beyond the conventional battlefield and into the world's cities and communities. Gone is the bipolar world of the Cold War where the United States, alongside its NATO allies, eventually triumphed in a costly, but necessary, test of wills against a monolithic and threatening superpower. In its place is a complex multipolar world with asymmetric threats of catastrophic terrorism by rogue states and non-state actors seeking to capitalize on current trends in proliferation of weapons of mass destruction. These threats are becoming increasingly high-tech and will require billions of defense dollars to counter, or at least mitigate. As President Bush noted in his 2002 address to the U.S. Military Academy:

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The gravest danger to freedom lies at the crossroads of radicalism and technology. When the spread of chemical and biological and nuclear weapons, along with ballistic missile technology—when that occurs, even weak states and small groups could attain a catastrophic power to strike great nations.

Because of the severity of this threat and the unforgiving consequences of inaction, the Bush administration has made national missile defense a priority.³ In addition to protecting the homeland from ballistic missiles and weapons of mass destruction, the United States must also continue to invest in the modernization of its conventional military forces. This evolutionary process of improving the lethality and interoperability of major war-fighting systems is called military transformation. While U.S. war-fighting capabilities are currently unmatched by any potential adversary, it must maintain its long-term strategic dominance over rising powers, such as China, which continues to invest billions of dollars to modernize and equip its military. While it is unlikely that the United States will have a true strategic competitor for the next fifteen to twenty years, China's military could become a significant concern, especially if China's economic boom and military spending patterns continue at the current rate.

Although difficult to accurately calculate, Chinese gross domestic product (GDP) growth per annum over the last ten years has averaged over 8 percent, while the United States has averaged only 3 percent. At this growth rate, China, which currently has a total GDP one-half the size of the U.S. \$10.5 trillion GDP, is expected to close the U.S.-China GDP gap in the next thirty years.⁴ Equally alarming is the fact that China is spending 4.3 percent of GDP on defense, if one considers purchasing power parity and China's disguised investments in personnel and infrastructure, compared to the United States, which is currently spending approximately 3.5 percent of GDP on the military.⁵ In order to maintain military preeminence and defend against the potential threat of a future military superpower, the U.S. must aggressively advance its efforts to transform the Armed Forces while still meeting its vast current operational commitments.

Finally, the United States is now faced with strained relations between its historical European allies and with rising anti-American sentiment around the world. The decision to invade Iraq without approval from the United Nations Security Council alienated the United States from its traditional European allies, with the exception of the governments of the United Kingdom, Spain, Poland, and Italy. In a recent Pew global attitudes survey, favorable opinions of the United States by citizens from Britain, Italy, Germany, and France were down 5 to 20 percent, with the highest unfavorable ratings in France and Germany. Many in Europe perceived the U.S. invasion as a unilateralist act by a global hegemon, apathetic to the will of the international community. This rift has even threatened the sanctity and viability of NATO, the United Nations, and other international institutions. Regardless of the motivations of the governments on either side of the Atlantic, the reality is that the United States is saddled with the Herculean task of rebuilding Iraq and has received little to no support from its allies France and Germany.

Stretched Too Thin

With over 150,000 soldiers deployed in support of Operation Iraqi Freedom this summer, another ten thousand in Afghanistan in support of Operation Enduring Freedom, some five thousand troops in the Balkans, over thirty thousand troops facing down a menacing threat from the North Koreans on the Korean peninsula, and thousands of troops spread around the world fighting the global War on Terrorism, the U.S. Army risks becoming a victim of its own success.⁶ While the Army has over 485,000 active duty soldiers, only approximately two-thirds of those soldiers are war fighters in the traditional sense of the term.⁷ This means that in

FY 2003, twenty-four out of thirty-three brigade combat teams (73 percent) were deployed away from their home bases and families. Many soldiers are just now returning to the United States after ten to twelve-month deployments in Iraq, only to be told to begin preparing and training for yet another deployment. Others are returning to their home stations and being re-assigned to other units that are either in remote locations, hence qualifying as unaccompanied tours, or that have just received deployment orders to relieve units currently serving in the Middle East. In order to meet this shortage of manpower, the Army has been forced to adopt painful stopgap measures, such as extending the length of operational tours from six months to one year, preventing certain high-demand soldiers from leaving the military, and mobilizing large numbers of reservists and national guardsmen. With over half of the active duty force married, and with employer patience with repeated reservist absences from the workplace growing thin, the prospect of extended and more frequent deployments could start to have a demoralizing effect on the all-volunteer force in the United States.⁸

Beyond the effects of extended peace operations on troop morale, the United States must confront the economic reality of going it alone. While facing a budget deficit of \$500 billion in 2004, the U.S. Congress passed a supplemental spending bill which authorized \$87 billion to fund ongoing operations and reconstruction efforts in Iraq and Afghanistan.⁹ This spending package nearly tripled the amount collected at the World Donor's Conference for Iraq, which netted a paltry \$33 billion from the rest of the global community.¹⁰ The Iraq budget is in addition to the growing U.S. defense budget, which is expected to reach \$399 billion in 2004, totaling 51 percent of all U.S. discretionary spending for the year.¹¹ Nearly 40 percent of the annual defense budget is dedicated to operations and maintenance (O&M) to pay for ongoing operational deployments and to repair aging equipment.¹² As operations—specifically peace operations—increase, military readiness decreases as aging or damaged equipment goes unattended. From 1994 to 1998, the incremental costs of peace operations ranged from \$2 to \$4 billion per year, with the majority of that consisting of O&M expenditures, during a period of time in which the United States had less than fifty thousand soldiers deployed in low-intensity operations such as Haiti, Bosnia, Kosovo, Macedonia, and the Sinai Peninsula, in any given year.¹³ The unfortunate irony is that while the United States is spending more than it ever has on defense, its capital assets, which include the soldiers as well as the equipment they operate, are beginning to show the detrimental effects of doing too much with too little.

Opportunity Costs of Peace Operations

Aside from the budgetary challenges imposed by being overextended in peace operations, there are also significant opportunity costs. One such cost is the lack of investment in military transformation. Transformation is an expensive and visionary endeavor that requires significant investment in research, development, and procurement to guarantee that the future force is properly equipped to fight and win its nation's wars throughout a broad spectrum of combat operations. This includes investing in improvements in command, control, and communications networks, space-based surveillance capabilities, unmanned vehicles and aircraft, joint combat systems, and, of course, missile defense. While the Congressional Budget Office estimated the annual modernization requirement to be at least \$90 billion per year, this year's modernization budget proposal fell \$20 billion short.¹⁴ With operational deployments on the rise, it can be expected that even less will be spent on modernization next year. This failure to invest in transformation can have long-term ramifications as other countries such as China continue to modernize and as the known enemies of the Western world, such as Al Qaeda and North Korea, continue to seek weapons of mass destruction and devise more innovative methods of delivery.

Another critically important cost of shouldering such a large peacekeeping burden is the lost training opportunities for soldiers, sailors, airmen, and marines to hone the necessary skills

to accomplish their primary mission, which is to fight as a joint force to win their nation's wars. From 1989 to 1996, thirty-two out of thirty-three military operations were classified as operations other than war.¹⁵ This trend grew out of a period of unrest where the Department of Defense feared losing its relevance after the fall of the Iron Curtain and the loss of its longtime enemy, the Soviet Union. In fact, many saw peace operations as a way for the military to expand its global presence while preserving the current force structure.¹⁶ Aside from the financial costs, however, there were exorbitant readiness costs. Joint Military Publication 3-07.3 expressed this duality in peace operations as follows:

Peacekeeping requires a complete change in orientation for military personnel. Before the peacekeeping mission, training is provided to transition the combat ready [sic] individual to one constrained in most, if not all, actions. At the conclusion of the peacekeeping mission, certain actions are necessary to return the individual to a combat-oriented mindset.¹⁷

Even when the peace operations are more rigorous and combat-oriented, combat units do not have the ability to conduct collective maneuver training or to train as a combined arms team where they can integrate all of the battlefield systems to include land-, sea-, and air-based systems because of the physical restrictions of their encampments and the overwhelming mission requirements that are placed upon them. As a result, maneuver units return to their home stations physically and mentally exhausted, but unfit to deploy in support of high-intensity combat operations. Therefore, after the customary fourteen- to thirty-day leave period, soldiers return to find themselves at the beginning of another intensive field training cycle that typically culminates with a month-long deployment to one of the major combat training centers and, perhaps, another operational peacekeeping deployment.

Proposed Remedies

There is little disagreement among policy makers and the military leadership that the current pace of operations is unsustainable; the physical, psychological, and financial costs of overcommitment are too high. It is also readily apparent that nearly half of the 368,900 soldiers deployed in the summer of 2003 were conducting peace, or stability, operations. While most can agree on the nature of the problem, there is much debate about the potential solutions.

One readily apparent solution to the manpower shortage is to permanently increase manpower. Increasing the size of the U.S. Army by anywhere from twenty thousand to fifty thousand soldiers, or approximately two divisions, is an idea that gained momentum with several senior Army leaders and many members of Congress.¹⁸ This proposed expansion, alluded to by the Army's newly appointed chief of staff, General Peter Schoomaker, during his confirmation hearing testimony to the Senate Armed Services Committee, would increase the size of the Army and the number brigade combat teams by six or ten brigades, depending on the composition of the newly formed divisions. Even with an additional ten brigades, if current operational trends continue, 60 percent, as opposed to 73 percent, of the Army's brigade combat teams would be deployed next year. Such an increase in the force structure, as opposed to a rebalancing of forces, is estimated to cost at least \$2 billion per year (\$60,000 per soldier per year) in personnel costs alone.¹⁹ This number does not include any additional infrastructure that would have to be constructed in order to house and equip more troops, nor does it account for the implementation time lag, especially since much of the military's excess capacity has been destroyed or sold during the base realignment and closure (BRAC) process.

Unfortunately, adding more end strength would not reduce the amount of money currently being spent on operations at the expense of modernization. This increase would also be direct-

ly in opposition with Secretary of Defense Donald Rumsfeld's vision for a lighter, more nimble, more technologically advanced army that is capable of projecting force abroad from home station or from forward deployed bases. While the additional soldiers would be a welcome relief to the overworked troops currently facing back to back deployments, this remedy cures a symptom, but not the illness. Despite Secretary Rumsfeld's desire to rebalance forces rather than add to the force structure, the president has exercised his emergency powers, granted by Congress, to exceed authorized force levels by thirty-three thousand troops, yet this temporary increase has done little to relieve the pressure of the current operational tempo.²⁰

Another proposed solution to this manpower crisis is to require the Marine Corps to increase its involvement in peace operations. Marines have traditionally been regarded as a rapid-response, forced-entry capability but are rarely required to maintain an ongoing presence in an area of operations for a long period of time—a task relegated, instead, to the U.S. Army. If the Marines were to reduce their numbers at such forward bases as Okinawa or Guam, they could potentially contribute fifteen to twenty thousand additional troops to Iraq.²¹ This is probably the most feasible short-term solution, one being partially implemented already with the recent deployment order to fifteen hundred Marines to Iraq, because it would not require any adjustments to the overall size of the force or necessitate additional infrastructure investments; however, it does not solve the long-term problem of over commitment. The strains of these operations would not disappear; they would merely be passed, or shared, between the two services. Increasing the operational tempo of the Marines would alleviate some of the Army's pain; however, sometimes, pain is the body's way of telling the brain that something is gravely wrong.

A third possible solution, albeit highly controversial, is relegating peace operations to private firms. This concept relies upon a growing privatized military industry staffed by retired generals, former commandos, or other thrill-seeking "guns for hire." Instead of just contracting logistics services, as the Department of Defense currently does with such companies as Brown and Root, these firms would be paid to conduct the full range of military operations, from establishing safe havens, to evacuating non-combatants, to separating warring factions with force when necessary. This market-based solution capitalizes on the uncertainty of the current security environment and a growing trend among large companies and governments towards outsourcing. Not only would this relieve the United States of some of its peacekeeping commitments, but it could be done relatively less expensively than the United States, NATO, or the United Nations could do if they were to perform the same missions. For example, a private firm called Executive Outcomes estimated that it could have responded to the genocide in Rwanda with a 1,500-man force in two to six weeks and provided a safe haven for six months at a cost for \$150 million (approximately \$600,000 a day), compared to the U.N. costs of \$3 million per day, which resulted in a military failure and the death of hundreds of thousands of Africans.²²

Although the privatization option seems attractive from an economic and political perspective, there are several negative repercussions to consider. The most dangerous consequence is the lack of accountability of the individual soldiers or, more appropriately, mercenaries. There is also a lack of accountability, as well as a lack of credibility, for the nation employing such a firm. Other countries might question the resolve of a country that is not willing to commit its own troops serve in an operation. Finally, peacekeepers for hire do not resolve the larger, global issues of using force unilaterally or out of purely national interest. What is needed instead is a more multilateral solution, integrating the strengths of the militaries of the United States and its European allies, which can restore the traditional cooperative sentiments between the United States and the other members of NATO.

Marching Forward . . . Out of Step

The United States and its NATO allies stood firmly together during the Cold War in order to deter acts of aggression or war by the former Soviet Union. This shared commitment to the collective security of Western democracies seemingly solidified U.S.-European foreign policy objectives during this tenuous period. There were domestic divergences, however, that began to form small fissures that would one day rupture the very foundation of the transatlantic alliance. While the U.S. continued to invest heavily in military readiness and modernization in order to provide an umbrella of protection for itself and the rest of Europe, many in Europe withdrew inside their borders, focusing instead on their domestic agendas, such as post-war economic development and the eventual European integration.²³ This growing chasm finally engulfed U.S.-European relations after the decision by the United States to invade Iraq for its continued violations of UN security resolutions.

Modern-day differences between the United States and the European Union, exposed by the Iraq War, must be understood if these two powers are going to work together to craft a viable solution to the security problems facing the world. The United States views the threat of terror as an existential threat that threatens its vital national interests whereas Europe sees it as an ongoing problem that does not warrant the excessive use of force, especially against a sovereign nation.²⁴ Despite the recent fallout, there are several timely examples of U.S.-European cooperation that are worth noting. U.S. and European NATO forces worked extremely well together in orchestrating the Bosnia, Kosovo, and Macedonia campaigns and have managed to gradually pass the torch of control to regional powers, to the EU in the case of Macedonia. The most successful example of cooperation is the assumption of command by NATO forces in Afghanistan following a U.S.-led invasion to destroy the Taliban. This, however, is where transatlantic cooperation ends, with the exception of the United Kingdom, Italy, and Poland, who continue to assist the United States Armed Forces in Iraq. A very vocal minority of European nations, led by France and Germany, and perhaps now Spain as well, has been critical of U.S. involvement in Iraq and has instead focused on the development of a new European security and defense policy (ESDP), separate from NATO.

Even aside from ideological differences and bruised egos, there are larger, more complex reasons why the U.S.-European strategic alliance must be revamped. The European allies are trying to maintain their relevance in an international military arena that exceeds their current capabilities. There is an enormous capabilities gap between the United States and its European allies, including the British Armed Forces, that makes coalition warfare, especially high-intensity warfare, difficult, if not downright dangerous. Even in the recent drive to Baghdad in Operation Iraqi Freedom, the battle planners at the U.S. Central Command seemed to separate the U.S. from the British forces by geographic regions, keeping the British forces isolated near the port of Umm Qasr, south of Basra, in order to minimize any potential friendly fire or interoperability problems with the U.S. forces.²⁵ This capabilities gap is the result of years of underinvestment in defense by the European nations. Compare the United States' proposed 2004 defense budget of over \$400 billion with its next highest contributing ally, the United Kingdom, which will spend only \$38.4 billion.²⁶ France and Germany, the other European heavyweights, have only proposed to spend \$29.5 billion and \$24.9 billion respectively.²⁷ As a percentage of GDP, the United States is spending between 3.3 percent and 3.6 percent on defense while the European average for NATO countries is only 2.2 percent, despite a pledge by all NATO countries to spend at least 3 percent of GDP on defense.²⁸ This number would be much lower if it eliminated two outliers, Greece and Turkey, who are each spending around 4.5 percent of GDP in an arms race against each other. Furthermore, the United States is outspending the rest of Europe by 500 percent on readiness, modernization, and procurement of new equipment, despite its current dominance in military modernization efforts.²⁹ In an effort to integrate the disparate NATO forces, Alliance defense ministers recently agreed to a new

streamlined military command structure to oversee the combined allied transformation process; however, this reorganization cannot account for the years of lost investment and will most likely be too little, too late.³⁰

A Sustainable Security Paradigm

The U.S. military is overextended; military transformation is being sidelined by the rising costs of peace operations; the capabilities gap that exists between the United States and its European allies is nearly insurmountable; and the United States and Europe are moving in divergent directions in national security policy. If the leaders of the Western democracies wish to maintain a global leadership presence without collapsing beneath their ideological differences, they must work together to craft a mutually beneficial transatlantic security partnership. Both the United States and Europe should exploit their differences in capabilities, budgets, and manpower by integrating their strategic aims into a new security paradigm that capitalizes on comparative advantages and creates a military division of labor and responsibility. Specifically, the U.S. military should limit its role in military operations to high-intensity joint war fighting and concede the lead role in peacekeeping missions and other smaller scale contingencies to its NATO allies, who have a comparative advantage in these more constabulary peace operations.

While the U.S. maintains a clear advantage in war fighting, America's NATO allies have proven themselves to be capable peacekeepers in places like Haiti, Bosnia, Macedonia, and, most recently, Afghanistan. Peacekeeping operations require less high-technology equipment and less combined arms integration; therefore, the European armies and police forces would be better suited to perform these tasks. The U.S. military, on the other hand, has invested heavily in modernization over the last fifty years and clearly maintains a comparative advantage in the more capital-intensive war-fighting tasks.

In this new security construct, a NATO force, comprised primarily of U.S. troops, would rapidly project power to an area of operations and decisively win the combat phase of the operation. Once the enemy was defeated, the United States would assume a diminished role in the security phase in support of the rest of the NATO countries. This combined strategy between the United States and its NATO allies would be mutually beneficial in the same way that free trade provisions benefit trade partners. Not only would it make more efficient use of the U.S. military's war-fighting capabilities, but it would also reduce European defense-spending requirements by eliminating the need to invest in the high-technology combat systems required for joint war-fighting missions. Thus, as in free trade, the trading partners (the U.S. and the E.U.) enjoy greater consumer choices (strategic options) and lower prices (more efficient use of defense dollars).

While this model of U.S. and European integration focuses on specialization amongst allies, it is not a pure model of Ricardian comparative advantage. Ricardo's model suggests specialization based on different factor endowments among countries. Accordingly, the net result of trade is that the integrated countries enjoy greater choices and lower prices, due to more efficient use of natural resources, than they did in autarky. In this slightly modified security model, the differences are less about factor endowments (because the United States and European Union have very similar economies) and more about differences in budgetary priorities over the last fifty years which have resulted in varying levels of defense infrastructure. In the end, both the United States and European Union will benefit from the more efficient allocation of resources and the increased strategic options made possible by the division of labor.

The U.S. Advantage in Joint War Fighting

Ever since World War II, and continuing throughout the Cold War to the present time, the United States has made huge investments in defense relative to the rest of the world, especial-

ly its European allies. Despite the evolution of defense industries from large public enterprises to more competitive private firms, there are still enormous fixed costs in defense spending, especially in research and development. Prior investments in defense and the benefits of huge-scale economies give the United States an edge in acquiring and producing the most technologically advanced military equipment.

The effects of this long-term commitment to military modernization were most recently seen in the U.S. campaign in Iraq where U.S.-led coalition forces quickly and ably destroyed the Iraqi Army and Republican Guard units in a striking display of modern military might, with few losses of American lives and only minimal collateral damage inflicted upon non-combatants. This attack made unprecedented use of new technologies, such as GPS-directed cruise missiles, "smart bombs," stealth technology for bombers, unmanned aircraft, satellite communications, digital command posts, and improved ground-to-air communications. This technology allowed the U.S. forces to find, fix, and destroy enemy locations with precision and improved lethality, even as the Iraqi regime tried to hide its assets near, and sometimes inside, the local civilian population and sacred landmarks. Even more impressive than the state-of-the-art equipment, some of which was only slightly modified since the last Gulf War, was the ability of the U.S. soldiers and commanders to integrate these assets and selectively bring all of these destructive forces to bear on the Iraqi military, a testament to the quality of the U.S. military's combined training centers and the investments in professional military education for its officer and non-commissioned officer corps. It is the aftermath of high-intensity combat, the peace operations, which have proven to be the most challenging for the technologically advanced American forces.

At the margin, producing additional units of this new equipment is relatively cheap. These lower marginal costs make it possible for the United States to equip its NATO allies more cost-effectively than the non-U.S. NATO members could equip themselves. This arrangement, where the U.S. produces the high-tech military hardware and then distributes it to the NATO allies, would also simplify interoperability concerns between allied forces because all countries would be operating from similar command and control platforms at the center of their networked systems. This is an ongoing initiative in the NATO Allied Command Transformation office, which is run by the commander of U.S. Joint Forces Command (USJFCOM), the military command that pioneers transformation and joint war-fighting efforts for the U.S. military.

European Comparative Advantage in Peace Operations

European defense-spending priorities make clear that European armies are more committed to manpower maintenance than to investment in technology and military hardware. Some of these countries even have specific manpower commitments in their constitutions and utilize compulsory service mandates in order to fill their ranks. Non-U.S. NATO forces include over 1.4 million troops, even though only eighty thousand of these soldiers are currently capable of being deployed on actual missions in countries such as Iraq, according to former NATO secretary general Lord George Robertson. This steady supply of manpower, albeit at varying degrees of readiness, makes manpower relatively less expensive than it is in the United States—where, when U.S. Armed Forces exceed their active duty force structure in the process of fulfilling their missions, they draw from the reserve components. These reservists are forced to leave their full-time employment in order to complete their missions. Such call-ups involve high mobilization costs and obvious opportunity costs, especially if the reservists own small businesses or they are self-employed.

European countries also bring other skills and attributes to peace operations and police work that give them a relative comparative advantage. European involvement in peace operations dates back to the colonial days, when their armies managed to maintain peace in their

colonies with minimal manpower. Although they often enjoyed a significant military technological advantage over their subjects, they became very skilled at integrating local leaders into the security framework and leveraged the assets of the host nation through their colonial offices. Europe's close borders and diverse cultures also assisted them in assimilating more easily with local populations. The current multicultural and multilingual European force would also benefit from these skills in modern peace operations, especially in the former colonial regions, such as Africa and southwest Asia, which happen to lie along the "arc of instability" extending from West Africa to Southeast Asia.

Finally, peace operations align more precisely with the European defense vision than they do with the U.S. national security strategy. The United States views peace operations as a burdensome, but necessary, follow-up to combat operations. This fact was accentuated when the Department of Defense shuttered its Peacekeeping Institute early this year, only to reopen it as the magnitude of the peacekeeping efforts in Iraq became clear. On the other hand, the European countries increasingly see peace operations as a way to maintain military relevance, as the United States once did after the collapse of the Soviet Union. In fact, the focus of the proposed European Defense Force, as set forth by the Helsinki European Council in December 1999, is the completion of the "Petersburg Tasks," which consist of humanitarian and rescue missions, peacekeeping, and crisis management tasks for combat forces, to include peacemaking.³¹ According to the resolution, this European force would deploy beyond the confines of the European continent to conduct humanitarian interventions under a United Nations mandate. A recent example of such a deployment is the French intervention last October in western Africa to establish a "confidence zone" between warring factions. In this operation, the French deployed four thousand soldiers to the Ivory Coast to separate the rebels from the government forces in order to prevent another possible genocide similar to the tragedy in Rwanda. It is worth noting that although the deployment occurred without a U.N. resolution, the French hope to evolve the mission into a U.N. operation.

While the French intervention into the Ivory Coast provided a positive case study for an expanded European security role, the E.U. countries continue to be challenged by a lack of military infrastructure, such as planning facilities, transport aircraft, and long-range secure communications equipment necessary to perform missions outside of Europe.³² Once again, this lack of sophisticated military hardware provides a perfect opportunity for U.S.-European cooperation. If the Europeans wished to deploy a force to accomplish such a mission, but lacked sufficient strategic military assets, the United States could assist by providing the necessary airlift capabilities and the communications infrastructure to support the mission.

Costs and Benefits

There are obvious economic benefits, for both the United States and Europe, from this new security partnership. From the U.S. perspective, one benefit of the division of labor is that the agreement would significantly reduce American manpower requirements, potentially allowing the United States to reduce the size of the Army by nearly two divisions. If actual downsizing of the force is politically unfeasible given the current commitment in Iraq, the United States could at least return to its congressionally authorized force levels, which it is currently exceeding by thirty-three thousand troops. The pursuant reduction in force structure and liberation from the expensive incremental costs of peacekeeping operations could reduce O&M spending by nearly 30 percent, which could be reinvested in modernization programs.

The European NATO allies would also benefit from this partnership because they would be able to focus their resources on their ability to perform the Petersburg Tasks, instead of trying to fund the expensive combat systems required for large-scale, high-intensity war-fighting missions—although they would still need to invest enough in defense to adequately equip their

forces to escalate from peacekeeping to peacemaking operations if the situation required it. The Europeans would also free up more defense dollars to invest in niche areas such as special operations soldiers and consequence management assets, to include chemical and biological decontamination equipment, which will be necessary for the collective fight against terrorism.

Perhaps one of the greatest benefits from this new security partnership, in addition to a more efficient realignment of resources and mission priorities, would be a reconciliation in U.S. and European foreign policy. By focusing on comparative advantages and dividing the labor to support different phases of future military operations, the Americans and Europeans will be forced to integrate their planning and decision making during the preliminary stages of any operation. The NATO allies will be inextricably woven together throughout the evolution of the process, even if they lead the effort in different phases of the operations: the United States in the high-intensity phase and the Europeans in the peace operations phase. This mutual reliance will encourage sharing of responsibilities and burdens, not only in the execution phase of an operation, but also in the lead up to war.

The multilateral nature of the operations will not only increase the number of stakeholders in the prospects for a successful outcome of a mission, but it should also improve cooperation in the United Nations Security Council. This positive spillover cannot be overstated. With a UN mandate comes a perception of international legitimacy and broader support, specifically in resources, from the international community. The use of NATO, as well as the United Nations when applicable, is paramount to maintaining productive working relationships with our military allies. Joseph Nye, dean of the John F. Kennedy School of Government at Harvard University, likens international institutions to a toolbox into which nations willingly place foreign policy tools. Nye warns that if the United States chooses a unilateral course, it might "find others increasingly reluctant to put tools in the toolbox."³³ The United States is already feeling the pain of trying to do an exceedingly difficult task with too few tools in the toolbox. Ideally, this new partnership will increase U.S.-European interdependence and ultimately provide more cohesive, and more internationally acceptable, foreign policy decisions.

As evidenced by the recent disagreements within the UN Security Council and the World Trade Organization, two of the most visible international institutions, multilateral decision making and policy formulation can be extremely challenging. There are certain trade-offs that come with these institutions, the largest of which is reduced, but not foregone, national sovereignty. Robert Lawrence, a Harvard economist, describes this relationship as a "trilemma," with legitimacy, mission, and means all competing against one another in a zero-sum game.³⁴ Therefore, in this multilateral setting it is critical to maintain a sense of balance among these three notions in order to achieve a positive outcome.

Despite the challenges to national sovereignty presented by international coalitions, the difficulties in achieving consensus will be somewhat reduced because this partnership will be built upon the bedrock of NATO, a time-tested institution that has withstood the strains of more than fifty years of global change and has only recently been shaken by the U.S. decision to liberate Iraq. Additionally, while international consensus is preferred, failure to reach agreement on a particular operation would not prevent a member from acting unilaterally if it were absolutely necessary. Although it would put an increased strain on military resources, notably soldiers, the United States could "power down" from high-intensity combat operations to peace operations with the necessary training and deployment of the reserve component. Similarly, the Europeans would still have sufficient defensive capability to protect themselves or conduct a limited intervention independent of the United States although they would lack the advanced offensive weaponry and lift capability necessary to project a large combat force beyond Europe's borders unless they increased their defense spending dramatically. Such increases in defense expenditures, however, are highly unlikely given the fiscal challenges of several E.U. countries, notably France and Germany.

Other criticism will come from those who view this change as a withdrawal by the United States from global engagement and the instruments of "soft power," such as humanitarian aid and other nation-building activities. But military force, in the form of peacekeepers, is only one instrument of national power. The United States has other agencies, governmental and non-governmental, that are better suited than the Department of Defense to handle these types of humanitarian tasks. Not only can the United States rely on some of its "softer" agencies, such as the State Department and USAID, but the willingness to share responsibility with its European allies will soften the stereotypical image of the U.S. as a "hyperpower" or unilateral hegemon.

Conclusion

The unsustainable commitments of the U.S. military, the estrangement between NATO allies, and the increasing interest of the European Union in ESDP, perhaps even independently of NATO, all lead to the inevitable conclusion that the United States and Europe must find a new and improved basis for the transatlantic security partnership. By focusing on comparative advantages, the NATO allies can find more efficient and politically palatable uses of their national resources. By minimizing involvement in peace operations, the United States can allocate more resources to military transformation and longer-term, but costly, programs such as national missile defense and space-based operations, so that it can protect itself and its allies from the growing threat of terrorism and loose nukes or from a longer-term threat from rising powers such as China. The increased European role in peace operations and post-conflict reconstruction will allow the European members of NATO, especially the newly admitted Eastern European countries, to focus on their comparative advantages, reduce their spending on expensive combat systems, and have a greater voice in strategic allied decision-making. Finally, the inclusive nature of these operations will add increased global legitimacy to future endeavors, which will translate into greater international cooperation and, potentially, the strengthening of other multinational institutions.

Although cracks in the transatlantic alliance had been slowly forming for years, it was ultimately the war in Iraq that brought the once-inseparable NATO partners to a near impasse. Given the vast asymmetric threats of political terror, radical Islam, and the pursuit of weapons of mass destruction by rogue states, the United States and European Union cannot afford to watch fifty-plus years of unwavering military partnership dissolve over a misalignment of national interests. Iraq was a breaking point, but it can also provide the opportunity to rebuild the historic alliance in the spirit of collective security and burden sharing originally conceived when the North Atlantic Treaty was signed on 4 April 1949. Going forward to sixty years after the Normandy invasion, 6 June 2004 would be a historic and defining moment for the United States and its NATO allies to make the necessary commitment to ensure the peace and security of democratic countries around the globe through a new, more cooperative, more efficient, transatlantic security partnership.

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RELIGION AMONG THE KURDS: INTERNAL TOLERANCE, EXTERNAL CONFLICT

VANESSA G. ACKER

This essay examines the impact of the unique religious composition of Kurdistan on Kurdish political identity. Unity within Kurdistan's diverse population arises from its culture of tolerance, which in turn comes from its long history of diverse religious traditions. The Kurdish propensity for tolerance is a key element in their desire for an independent political system and is a primary reason for their conflict with the various intolerant states among which the Kurds find themselves. This essay outlines measures that should be taken to resolve these conflicts and discusses the potentially positive role the Kurds could play in bringing lasting peace and stability to the region.

The Kurdish nation, estimated to be the world's largest ethnic group without its own state, is currently spread among four countries that have variously attempted to undermine or completely eliminate their Kurdish populations. While the vast majority of literature about the Kurds is limited to discussion of the nation as a victim of history or as an obstacle to regional stability, this essay examines the Kurds' potential contributions to a solution for lasting stability in the Middle East. It examines the Kurds in the context of the unique religious composition of Kurdistan, which straddles the modern borders of Turkey, Syria, Iran, Iraq, and the southern Caucasus. It is argued that the culture of tolerance, influenced by a historical myriad of religious convictions, is a key element in the Kurds' conflict with various intolerant states. In conclusion, this essay outlines measures that states should take to resolve this conflict and suggests how the Kurds could contribute to lasting peace and stability in the Middle East.¹

Religion among the Kurds

This section briefly surveys the unique religious composition of Kurdistan, providing a context for an analysis of Kurdistan's conflicts with its neighbors and its desire for independence. The religious context is crucial to understanding Kurdish ethnicity and culture, the nature of Kurdish nationalism, and the potentially positive influence the relatively tolerant Kurds could have on Islam in general.

The Influence of Older Religions

Kurdish culture has been affected by a number of older religions. Lack of recorded history makes it impossible to trace the concrete origins of many modern Kurdish religious and social practices. There are parallels, however, between contemporary religious practices and those of older religions known to have existed on Kurdistan's territory.

Mesopotamian and Anatolian cults played a significant role in the area before recorded history. Judaism appeared in Kurdistan in the eighth century b.c., when the Jews were exiled from Palestine by the Assyrian kings of Israel and Judah.² Contact with Judaism likely introduced the Kurds to the concept of monotheism.³

Zoroastrianism, with its parallels to both Christian and Islamic teachings (e.g., the concrete definition of good and evil, and the idea of a savior), likely reinforced the notion held by some Kurdish communities that all religious systems teach one essential truth.⁴ The celebration of a spring New Year (still observed by Kurds and Muslim Iranians) is also rooted in Zoroastrian tradition.⁵ The modern Kurdish religions of Ahl-e Haqq and Yezidism likely take their teachings of four elements from a branch of Zoroastrianism known as Zurvanism, in which the num-

ber four is a holy number.⁶ Confusion between ancient Iranian faiths and Zoroastrianism about the nature of the spirit that brought light into the world also perhaps contributed to the belief held by Yezidis that good equals evil.⁷

Hellenistic cults, which swept through Kurdistan with the conquest of Alexander the Great in 331 b.c., likely fostered the concept of gods with human qualities (and humans with divine qualities)—a concept still taught by the modern cults of the Ahl-e Haqq and the Yezidis.⁸ Manichaeism also influenced the Kurds, possibly formulating the modern belief of some Kurds that the same truth underlies the messages of several prophets.⁹

Christianity also played a significant role in Kurdistan, perhaps contributing the belief among the Ahl-e Haqq and the Yezidis that God's spirit can become incarnate in a man.¹⁰ The large number of Christian monasteries, many of which predate Islam, undoubtedly affected the ideas of the surrounding population. The tradition of the Eucharist, for example, may have influenced the ritual communal meal, which has become strongly associated with love.¹¹ Yezidism reveres some figures of Christian origin as saints, and the Christian ritual of baptism has inspired a similar ritual in that faith.¹²

Religions Native to Kurdistan

Most non-Muslim Kurds follow one of several indigenous Kurdish faiths of remarkable originality, each of which is a variation on ancient religions based on a "Cult of Angels."¹³ Only three branches of the Cult of Angels have survived from ancient times: Yezidism, Alevism, and Yârsânism. All denominations of the cult hold a fundamental belief in luminous, angelic beings who protect the universe from an equal number of balancing dark forces of matter.¹⁴ Another shared conviction is that of the transmigration of souls through numerous reincarnations.¹⁵

Members also believe in a "boundless, all-encompassing, yet fully detached" Universal Spirit (Haq), who created the material world but has since stayed out of its affairs except to "bind it together with his essence."¹⁶ Religions stemming from the Cult of Angels are truly universalistic, as they view all other religions as legitimate manifestations of the same original idea of human faith in the spirit. The founders of these other religions are merely viewed as examples of the creator's continuous involvement in world affairs as a new prophet who continually brings salvation to the living.¹⁷

The three branches of the Cult of Angels diverge on their methods of worship and the emphasis they place on certain angels and symbols. Yezidis are mistakenly known by outsiders as "devil worshippers" and, as a consequence, have been severely persecuted. This mistake is likely due to Yezidis' reverence for Maluk Tawus, or the Peacock Angel, who embodies both the good and the evil elements necessary for the functioning of the world.¹⁸ Birds are symbols of divine manifestations for the Yezidis and play a central role in the Yezidi version of world creation¹⁹ (e.g., the idea that the world was created from pieces of the shell of a cracked egg). Almost all Yezidi believers are Kurds located in the northern parts of Kurdistan, much of which is located in the former Soviet Union. The atheist tenets of the communists and their lack of tolerance for religion were quite detrimental to the Soviet Yezidi community,²⁰ and today the Yezidis constitute less than 5 percent of the Kurdish population.

Alevis hold that Ali, the first Muslim Shiite imam, is the most important of the angels of the Universal Spirit. Despite the importance of Ali, Alevism remains a thoroughly non-Islamic religion due to its thorough grounding in the Cult of Angels. Some Alevis revere the image of a sword in a rock as a deity, an image that might have indirectly influenced the legend of King Arthur and Excalibur in England.²¹ Alevism has spread beyond the Kurds to the Syrian Arabs, where Alevis constitute 15 percent of the population, and to the Turkmen communities in Turkey, where the Turkmen Alevi community is now larger than the Kurdish Alevi community.²²

Believers in Yârsânism, 10 to 15 percent of the Kurdish population, are concentrated in the southern parts of Kurdistan, primarily in Iran and Iraq. According to Yârsânism, humans are the end product of a worldly journey of the soul that evolves from inanimate objects, to plants, to animals, and then begins a series of human incarnations (which can last up to fifty thousand years) that eventually result in the unification of the soul with the Universal Spirit.²³ Because of their strong belief in reincarnation, the Yârsâns seldom mourn the dead—some Yârsâni priests even try to identify the exact newborn to which the soul of a deceased person has transmigrated.²⁴

Yârsâns are divided unequally among several sects: the Ahl-i-Haq, whose leaders merged superficially with Shiite Islam in an attempt to protect Ahl-i-Haq followers from the wrath of intolerant Muslims; the Tâyfâsan, more urban and less vocal about association with Shiite Islam than the Ahl-i-Haq; and the traditionalists, or Yârsân, by far the largest sect of the three, and the most faithful to the tenets of the ancient religion.²⁵ The traditionalists, who make no pretense to be Muslims, are most readily targeted for abuse by their Arab and Iranian Muslim neighbors.²⁶

Kurdish Islam

Modern-day Kurds are predominately (approximately two-thirds),²⁷ though loosely, Sunni Muslim. Geopolitical accident rendered the Kurds mediators of the three great cultural traditions of Islam. Kurdistan both united and separated the Ottoman Turks, the Persians, and the Arabs, and for centuries Kurdish men of letters have therefore spoken all three languages in addition to their own dialect of Kurdish.²⁸ Due to this linguistic competence, they have often acted as mediators between these various cultures. Many of them studied in one part of the Muslim world and later taught in another.²⁹ Indeed, the culturally sensitive Kurdish Ulams exercised great influence in Islamic centers like Medina and Cairo and had significant followings in India and on the Indonesian archipelago.³⁰

Though the nature of Kurdish nationalism has been predominately secular, the Kurds have at times deliberately used religion to distance themselves from the Turks and the Arabs—Kurds even take pride at their “un-Islamic” form of Islam.³¹ Kurdish Islam differs from the beliefs of most Islamic nations due to its syncretistic nature and incorporation of elements from older cults. Isolated communities have often preserved customs and beliefs and even developed entire religious systems that contain elements alien to mainstream Islam.³² In Kurdistan, these older beliefs contributed to mysticism, metaphysical speculation, and a firm belief in miracles and sainthood that diverges from traditional Islamic teachings.³³ Furthermore, the largely non-literate nature of traditional culture in Kurdistan led inevitably to an understanding of religious truths quite different from those of the highly literate Sunni or Twelver Shiite Islam.³⁴

The group-oriented culture and communal loyalties of the Kurds, combined with the predominance of oral traditions that incorporate elements of older religions, has made Kurdish Islam significantly more charismatic than other, more literate forms of Islam. The majority of Kurdish Muslims follow the charismatic Sufi branch of Islam, held by many orthodox Muslims to be a heresy.³⁵ Kurdish Sufism spread beyond the borders of Kurdistan and had a significant and controversial impact on Islam in nineteenth century Istanbul.³⁶

The place of women in Kurdish society, though not as egalitarian as that of women in the West, puts Kurds among the more liberal of Muslim societies. Kurdish women, for example, do not cover their faces or wear the *abbaye* or *chador*, the all-covering garments worn by some Arab and Iranian women. In Syria, Kurdish women even play a significant leadership role in the branch of Islam known as “Kaftyra,” which promotes a peaceful interpretation of Islam.³⁷

Kurdish women also have fewer constraints on their professional lives than many of their Arab and Iranian counterparts and are often educated and work outside the home. Even in rural areas, women earn money by tilling the fields and harvesting crops. Non-governmental organ-

izations run by Kurdish women in Iraq were key to the survival of the Iraqi Kurds living under Saddam Hussein.³⁸ Women have also been a key force in peshmerga operations in Iraq. Many female Kurds lent their support to war efforts by organizing safe havens for the fighters, and some even joined the ranks of the peshmerga themselves, living in the same harsh battle conditions as their male counterparts.³⁹

Intolerant Neighbors and Conflict

While the relatively tolerant mentality engendered by a historical coexistence of various religions and ethnicities has encouraged cooperation within Kurdistan, it has also contributed to an external clash of interests with Kurdistan's neighbors. The Kurds have the paradoxical status of being both great warriors and eternal victims. While Kurdish warriors were renowned by Assyrian kings and Ottoman rulers for their fighting prowess and are legendary in modern times as peshmerga, or "those who do not fear death," the Kurdish people have nevertheless fallen victim to repeated attempts of ethnic cleansing, forced resettlement, and eradication of the Kurdish culture and language.

The Kurds struggled throughout the twentieth century to gain rights within the borders of existing states. National ideology in these states, however, was guided by the chauvinistic nationalism of dominant ethnic groups and was intolerant of minority beliefs and cultures. Turkey, Syria, Iran, and Iraq each took steps to assimilate or destroy the Kurds, whom they perceived as a threat to their territorial integrity.

From 1960–1975, the Iraqi government carried out an extended campaign of "Arabization" of its Kurdish areas, which included forbidding the use of Kurdish in schools and mass media, destroying villages, deporting Kurds, and transplanting Arabs into Kurdish areas. When Iraq went to war against Iran in 1980, the Iraqi Kurds supported the Iranians, and toward the end of the war the Iraqi government retaliated with an extensive, devastatingly cruel campaign against the Kurds.

Between February and August of 1988, hundreds of Kurdish villages in northern Iraq were annihilated, and as many as two hundred thousand Kurds were killed in air strikes, chemical weapons attacks, and mass executions.⁴⁰ Both the tremendous cruelty of these acts and the swelling numbers of Kurdish refugees during the first Gulf War focused international attention on the long-ignored plight of the Kurds. Throughout the 1990s, the Kurds in northern Iraq lived in relative peace, sheltered by American-led allied protection under the "Northern Watch." Today they are navigating a position within the fragile new Iraqi government.

The situation of the Kurds in Turkey, where over half of the world's Kurds reside, has been equally bleak. The fall of the Ottoman Empire brought increased suffering to the Kurds, many of whom believed Turkish general Mustafa Kemal Atatürk's promise to create a Moslem state of Turks and Kurds.⁴¹ When the state was created in July 1923, however, Mustafa Kemal immediately broke his promise of Kurdish autonomy and embarked on a campaign to squelch Kurdish culture by denying its existence.⁴²

The massive repression that followed the 1980 military coup ignited the Kurdish Workers' Party's (PKK's) armed struggle for the creation of an independent Kurdistan. Though the guerillas, by and large, did not represent the views of most Kurds, the movement brought about still more repression by the Turkish government, which ingeniously fragmented the Kurds by employing impoverished Kurds in its army and police force to fight the PKK.⁴³ These tactics caused more than five million Kurds to flee Turkish Kurdistan over a span of eighteen years.⁴⁴

The 1999 capture of PKK leader Abdullah Ocalan ended the PKK movement but has not produced the level of Turkish support for which the Kurds hoped. While the central government has passed laws favorable to the Kurds, local authorities have undermined their implementation. For example, despite national legislation allowing for pedagogy in Kurdish dialects,

local authorities have made it impossible for Kurdish language schools to open because of alleged failures to comply with building standards and other various bureaucratic delaying tactics.⁴⁵ Furthermore, Turkey's Kurdish regions are economic worlds apart from the rest of Turkey due to the lack of central government investment and attention. These disparities only serve to further alienate Turkey's Kurds.

Iranian rulers, from the Reza Shah between the wars to the religious leaders of the Islamic Republic, banned the Kurdish language for education and publication except during two short-lived periods: the Mahabad Republic in 1946 and the first four years following the Ayatollah Khomeini's revolution in 1979.⁴⁶ Unlike its neighbors, Iran has not carried out large-scale oppression of its Kurdish population. It has, however, successfully marginalized the Kurdish movement by assassinating its most effective leaders, mostly on foreign soil.⁴⁷ It has also failed to aid the Kurds at numerous occasions following Kurdish support for Iranian leadership in its conflict with Iraq. The withdrawal of Iranian support for the Kurds in Iraq led to the collapse of Kurdish resistance in the 1970s and Saddam Hussein's subsequent razing of Kurdish villages along Iraq's borders with Turkey and Iran to create a security zone. The Kurds again supported Iran militarily in the 1980s and were consequently slaughtered in Hussein's 1988 Anfal campaign.

Since the 1997 election of Muhammad Khatami to be president, Iran has taken measures to reverse years of discrimination against its Kurdish population. Khatami's representatives in Iran's Kurdish region have allowed both Sunni and Shiite Kurds better representation in provincial bureaucracy and have granted them greater cultural rights.⁴⁸ Nevertheless, religious conservatives remain wary of Sunni Kurds and anxious about Kurdish admiration for the relative autonomy of Iraqi Kurdistan. Consequently, Iran is seeking alliances with governments of countries who feel similarly threatened by their Kurdish populations.⁴⁹ Iran and Turkey have already pledged to cooperate in the event of a declaration of independence by Iraqi Kurds, fearing the spread of a pan-Kurdish movement to their own populations.⁵⁰

Syria's Kurdish population is relatively small but has suffered nonetheless under Syria's intolerant regimes. During the Ba'ath Revolution of the 1960s, Syria embarked on an Arabization campaign to disperse and destroy Kurdish nationalism by forcibly resettling the Kurds from their mountainous homeland into the interior of the country and undermining Kurdish culture and language.⁵¹ The Syrian government denied many Kurds their citizenship and banned Kurdish language publications after Syrian independence in 1946.⁵² The Kurds also became pawns in a Turkish-Syrian dispute over water, as Syria alternately supported and shunned the PKK to gain favorable concessions from Turkey.⁵³

The Nature of Political Development in Kurdistan

Political development in Kurdistan has been both constrained and defined by existence within intolerant states. The Kurds have long felt a distinctive Kurdish identity but have failed to achieve a unified Kurdish state. This failure can be explained by both geography and, after the nineteenth century, foreign intervention in regional affairs. A country of high mountains and a web of valleys, Kurdistan is at the crossroads of the routes linking Asia to Europe and Russia to the Arab Middle East. These routes facilitated not only trade, but also a series of invasions that destroyed the internal social and political processes that might have led to a unified Kurdish political entity.⁵⁴ Throughout their history, the Kurds have been dominated by others: the Sumerians, the Akkadians, the Babylonians, the Assyrians, the Parthians, the Persians, the Romans, and the Armenians.

The twentieth century division of Kurdistan among four nation-states has rendered the Kurds a remarkably disunited nation, at variance with itself not only in language and religion, but also in political identity. Further contributing to this diversity is the variety of non-Kurdish

ethnicities in Kurdistan. All of these elements point to only one certainty in Kurdistan's political development: unity must be forged through diversity and consensus.

A Precedence of Self-Rule

While never an independent state, Kurdistan has experienced varying levels of autonomy throughout its history. Recognizing the distinct ethnic identity of the Kurds, Seljuk Sultan Sanjar created a province of Kurdistan in 1150.⁵⁵ The longest period of peace in Kurdistan began with the Turco-Kurdish agreement of 1515, which granted the Kurds general autonomy within the Ottoman Empire. The Kurds first tried to establish their political independence in the nineteenth century, as revolutionary French ideas of nationalism and the nation state penetrated the Ottoman Empire.⁵⁶ Both Britain and Germany helped the Ottomans squelch this attempt at democracy, setting a precedent for the almost-constant foreign intervention in the area that would follow.⁵⁷

Indeed, foreign intervention has been a key factor in the failure of the Kurds to establish a political unity. The international Treaty of Sevres, drawn up after the First World War, called for the establishment of an independent Kurdistan but was ignored by the two great colonial powers at the time, France and Britain, as they demarcated new national boundaries on the ruins of the Ottoman Empire. By 1925, Kurdistan had been divided among five countries, and the stage had been set for the tragedies that would befall the Kurds in the twentieth century.

If the Kurds were a thorn in the side of the Ottoman and Persian Empires, they represented a threat to the very political existence of the countries created by the 1925 division. The Kurds responded to the intolerance they encountered as a result by fighting, both with their swords and their pens.⁵⁸

The fight for Kurdish rights by the sword and the pen is perhaps epitomized best by Mustafa Barzani, who emerged as a champion of Kurdish rights and nationalism because of his military expertise and political participation in the establishment of the short-lived Kurdish autonomous republic (the Mahabad Republic, 1946–47) in Iran.⁵⁹ After World War II, the Kurdish elite in Iraq became involved in various political parties. They opposed British influence and the Iraqi royal government and advocated the democratization of Iraq.

One of these, the Kurdish Democratic Party (KDP) founded by Mustafa Barzani, was composed entirely of Kurds. After the collapse of the Kurdish resistance in 1975 following the shah's withdrawal of support for the Kurds, the KDP leadership decided that continuing resistance against the Iraqi government would be futile. Disagreeing with this position, Jalal Talabani formed a splinter party, the Patriotic Union of Kurdistan (PUK).

In the 1990s Kurdish factions, who were continually fighting one another as they warred against the Iraqi government, made an effort to resolve their differences and present a united Kurdish front to the Iraqis and to the world. In 1992, they organized democratic elections for a legislative assembly for the Iraqi Kurdish Autonomous Region and a leader of the Kurdistan Liberation Movement. The seats in the assembly were divided between the PUK and the KDP, and the Christians received five seats of their own. International observers and journalists, who turned out in force for the event, declared the elections to be free and fair.⁶⁰ While the euphoria of the peaceful elections faded with the increasingly desperate situation of the Kurds, affected both by the international sanctions against Iraq and by continued conflict with the government of Saddam Hussein, the Kurds had demonstrated their potential to put aside their differences and function peacefully within a democratic system.

Secularism and Political Identity

An important feature of Kurdish nationalism is its secular nature. This feature challenges many prevailing schools of thought that, in the aftermath of the Islamic revolution of Iran, view

religion as the engine of social change in the Islamic world. Kurdish nationalism is actually detached from religion to such an extent that Turkey, a regime espousing secularism, has organized and financed Islamic revivalist groups in Kurdistan in order to undermine the nationalist movement.⁶¹

It is also significant that in contemporary Iran, where the state religion, Shiite Islam, differs from the Sunni beliefs of most Iranian Kurds, the Kurdish nationalist movement has not focused its attention on obvious religious inequalities (like the restriction barring Sunnites from the top leadership positions in the government), but on secular nationalist demands such as political, administrative, linguistic, and cultural autonomy.⁶² The KDP, which spans the social spectrum of illiterate traditionalists and communist intellectuals, speaks to the idea of tolerance for and survival of the Kurds.⁶³

Because of the wide range of religious convictions and social practices in Kurdistan, the Kurds find their political unity in tolerance for each other and also in the goal of achieving tolerance from the governments of the countries among which they are dispersed.

Symbiotic Interethnic Relationships

Kurdistan is a patchwork of ethnicities. The Christian communities in Kurdistan, which all speak non-Kurdish tongues as their first languages, have lived symbiotically with the Kurds for centuries. The main groups of Christians in the region today are the Armenians (many of whom fled during the Turkish massacres of 1915), the Syrian Orthodox, and the Assyrians.⁶⁴

Jews were significant members of the Kurdish community until the 1950s, when the vast majority of Kurdish Jews moved to Israel. The Jews and the Kurds have a unique relationship. This is partly due to the number of Kurdish Jews residing in Israel, but can also be explained by kinship inspired by both nations' shared status as minorities in the Middle East, struggling to establish a homeland located within the boundaries of other states.

As one Jewish Kurd explained, "The Kurds identify with the Jews as a persecuted race."⁶⁵ Israel has provided aid to the Kurds on several occasions, and a discussion with the Israeli prime minister was key in persuading then-secretary of state James Baker to visit Kurdistan in the wake of the Gulf War.⁶⁶ Indeed, one scholar notes that Jews had better relations with non-Jews in Kurdistan than in Europe and that the symbiotic relationship between the Kurdish Muslims and Jews gave rise to a unique civilization in Kurdistan.⁶⁷

The Turkomans are also an important minority in Kurdistan. The large percentage of ethnic Turks in northern Iraq was one of the reasons that Turkey never gave up its claim to the area.⁶⁸ Despite their cultural ties to Turkey, Turkomans are supportive of the idea of broader autonomy for Kurdistan. One ethnic Turkoman living in northern Iraq asserted that "Turkomans, Kurds and Christians are like brothers living in the same area; we depend on one another."⁶⁹ This sentiment was voiced repeatedly to U.S. soldiers by the inhabitants of the Assyrian Christian villages of Pall Uskuf, Tall Kaif, and Kermalis and the Turkoman village of Altun Kupri following their liberation from Saddam Hussein's regime in spring 2003.⁷⁰ All expressed their unequivocal desire to be under the jurisdiction of the Kurds rather than that of Baghdad.⁷¹

Achieving Peace and Stability

Stability in the Middle East will remain elusive without a satisfactory political solution to the Kurdish problem. In Turkey, Syria, and Iran, this political solution lies in the implementation of policies that will integrate the Kurds by making existence within these states attractive. In Iraq, the key to stability is the granting of the widest possible autonomy for the Kurds, whose decade of experience as a de facto autonomous democracy can be an asset to Iraq's formation of a democratic state. The Kurds, who have an historic role as mediators between the great

Islamic traditions and cultures, can also play a potentially significant role in the resolution of other Middle East conflicts.

Syria, Iran, and Turkey should shift from viewing their Kurdish citizens as liabilities to treating them as valuable members of society. Greater tolerance for the Kurds will engender Kurdish loyalty to the central governments. Each of these states should discourage Kurdish separatism, not by stifling it with intolerant policies, but by integration through attraction. This would entail a departure from the historical precedent of forcible assimilation and the implementation of policies that make existing within state structures a more attractive option than independence.

While Iran's implementation of many progressive policies in support of Kurdish language and culture, its schizophrenic support for and fear of the Kurds (which is largely a reflection of Iran's own internal ideological struggle) has prevented Iranian Kurds from fully integrating into Iranian government structures. Iran should allow the Kurds to have a greater voice in their own governance, permitting them an ethnic Kurdish provincial governor. Shiite Iran should not fear a backlash from Sunni Kurds. The primary issue for Iran's Kurds is the right to their own culture and way of life. Furthermore, the Kurds' tendency to separate religion from politics suggests that differences in religion would not be an issue unless the central government forces the question.

Turkey has made significant legislative progress in its treatment of the Kurds, but it should ensure the compliance of local Turkish authorities with laws allowing for greater freedom in Kurdish cultural practices. The central government should also show its commitment to integrating the Kurds by stepping up economic assistance and development to the impoverished Kurdish region in Southwestern Turkey. Furthermore, a formal Turkish expression of contrition for past injustices would go a long way towards repairing the psychological damage of years of intolerance. This could entail an amnesty for PKK fighters and compensation for the one million Turkish Kurds forcibly displaced during the PKK rebellion.⁷² As it pursues E.U. membership, it is in Turkey's best interests to promote tolerance and human rights on its own territory.

In post-war Iraq, the Kurds find themselves with the opportunity to achieve even greater political legitimacy in the broadly defined autonomy that has been conferred on them by the post-Saddam regime. Iraqi Kurdistan has a precedence of self-rule, having developed the beginnings of a stable democracy during a decade of foreign protection from the intolerant regime of Saddam Hussein. Kurdish experience should be viewed by Iraq's Sunnis and Shiites as an asset, and Kurds should be actively engaged in the establishment of democracy in Iraq.

Syria, Turkey, and Iran worry that this political strengthening of the Kurds in Iraq will unleash a new wave of pan-Kurdish nationalism and calls for an independent Kurdistan. At present, however, it seems that the Iraqi Kurds are simply content to live free from persecution. Perhaps the sentiments of most Kurds could be explained by the comments of Hero Talabani, the wife of PUK head Jalal Talabani, who asserts that "the Iraqi Kurds don't want or need independence . . . If Iraq achieves a true democracy, we can live in our houses in peace, go to school in peace, send our husbands to work in peace . . . Human rights? Maybe in a few years you won't find a human here. You must start with survival."⁷³

Greater autonomy for Iraqi Kurdistan will not unleash the pan-Kurdish nationalism feared by neighboring states if those states make life more attractive for their own Kurdish populations. The greater Kurdish nation is quite diverse and would not necessarily form a cohesive state. The majority of the Kurds simply want the freedom to exist without being persecuted for their cultural practices and ethnicity. States should compromise by granting the Kurds greater autonomy and cultural rights. Greater tolerance towards the Kurds would remove Kurdish incentives to secede.

The surprisingly large scope of historical influence wielded by Kurdish religious figures, demonstrated by both the spread of Alevism and unique Kurdish Islamic practices beyond the boundaries of Kurdistan, suggests the potential for Kurds to play a vital role in contemporary discussions among conflicting branches of Islam and between Islam and other religions. Indeed, the historical role of the Kurds as mediators between various cultural traditions of Islam could be revitalized to deal with contemporary conflicts in the Middle East. Specifically, the Kurds could be engaged in a broad dialogue on the Israeli-Palestine conflict and perhaps on lingering disagreements between Iran and Iraq.

Kurds should not be viewed by the international community solely as victims, and should be more actively engaged on regional issues. As the Kurds attain their own goals of greater cultural freedom, they should reexamine their place in history and their potential to promote peace and stability in the Middle East. The Kurdish experience with diversity and religious tolerance is unusual in the Middle East, and the Kurds are in a unique position to use their experience to build bridges between the divided societies of the region.

Endnotes

¹ For the purposes of this essay, the following definitions, taken from *Webster's Dictionary*, will be used: Religion is defined as a supernatural constraint, sanction, religious practice, perhaps from religare to restrain, tie back; a cause, principle, or system of beliefs held to with ardor and faith. Tolerance is defined as a sympathy or indulgence for beliefs or practices differing from or conflicting with one's own. Conflict is defined as a competitive or opposing action of incompatibles or an antagonistic state or action.

² Philip G. Kreyenbroek, "Religion and Religions in Kurdistan," in *Kurdish Culture and Identity*, ed. Philip Kreyenbroek and Christine Allison (London: Zed Books, 1996), 88.

³ *Ibid.*, 88.

⁴ *Ibid.*, 89.

⁵ M. Boyce, *A History of Zoroastrianism I, II* (Leiden and Cologne: W. Kohlhammer, 1982), 107f, cited by Kreyenbroek, 89.

⁶ G. Widengren, *Die religionen Irans* (Stuttgart: W. Kohlhammer, 1965), 291, cited by Kreyenbroek, 89.

⁷ Kreyenbroek, 90.

⁸ *Ibid.*, 90.

⁹ *Ibid.*, 91.

¹⁰ *Ibid.*, 91.

¹¹ *Ibid.*, 91.

¹² Nelida Fuccaro, *The Other Kurds: Yazidis in Colonial Iraq* (New York: I.B. Tauris & Co, 1999), 15.

¹³ Mehrdad R. Izadi, *The Kurds* (Washington, DC: Taylor and Francis, 1992), 137.

¹⁴ *Ibid.*, 136.

¹⁵ *Ibid.*, 136.

¹⁶ *Ibid.*, 136.

¹⁷ *Ibid.*, 138.

¹⁸ Fuccaro, 15.

¹⁹ Izadi, 156.

²⁰ For more information on Kurdish religious practices in the Soviet Caucasus, see T.F. Aristova, *Kurdi Zakafkazy* (Moscow: Nauka, 1966), 168–178.

²¹ Izadi, 151.

²² *Ibid.*, 150.

²³ *Ibid.*, 147.

²⁴ *Ibid.*, 146.

²⁵ *Ibid.*, 146.

²⁶ *Ibid.*, 146.

²⁷ Martin Van Bruinessen, “Religion in Kurdistan,” *Kurdish Times* 4 (Summer/Fall 1991), 7.

²⁸ Martin Van Bruinessen, “The Impact of Kurdish Ulama on Indonesian Islam,” in *Islam des Kurdes*, ed. Martin Van Bruinessen and Joyce Blau (Paris: Institut National des Langues et Civilisations Orientales, 1998), 86.

²⁹ *Ibid.*, 86.

³⁰ For more information on this, see Martin Van Bruinessen’s excellent article on the impact of Kurdish Ulama on Indonesian Islam, in which he identifies characteristics of the Kurdish Ulamas that made them particularly appealing to Indians and Indonesians.

³¹ See Van Bruinessen, “Religion in Kurdistan,” which quotes the Kurdish saying, “Compared to the unbeliever, the Kurd is a Muslim.” He notes that the Kurds utter this with a certain sense of pride, and that one often comes across beliefs and practices in Kurdistan that are hard to reconcile with Islamic orthodoxy.

³² Kreyenbroek, 85.

³³ Martin Van Bruinessen, “The Impact of Kurdish Ulama,” 102.

³⁴ Kreyenbroek, 85.

³⁵ Izadi, 158.

³⁶ Thierry Zarcone, “Quelques Shaykh Soufis Kurdes,” in *Islam des Kurdes*, ed. Martin Van Bruinessen and Joyce Blau (Paris: Institut National des Langues et Civilisations Orientales, 1998), 110.

³⁷ For more information, see Annabelle Böttcher, “L’élite féminine kurde de la Kaftariyya- une confrérie naqsbandi damascene,” in *Islam des Kurdes*, ed. Martin Van Bruinessen and Joyce Blau (Paris: Institut National des Langues et Civilisations Orientales, 1998).

³⁸ Teresa Thornhill, *Sweet Tea with Cardamom: A Journey Through Iraqi Kurdistan* (London: Pandora, 1997), 45–58.

³⁹ For a description of the life of a female peshmerga, see Thornhill, 45–58.

⁴⁰ John C. Randall, *After Such Knowledge, What Forgiveness? My Encounters With Kurdistan* (New York: Westview Press, 1999), 214.

⁴¹ Michael M. Gunter, *The Kurds in Turkey: A Political Dilemma* (Boulder, CO: Westview Press, 1990), 12.

⁴² Kendal Nezan, “The Kurds: Current Position and Historical Background,” in *Kurdish Culture and Identity*, ed. Philip Kreyenbroek and Christine Allison (London: Zed Books, 1996), 11.

⁴³ *Ibid.*, 15.

⁴⁴ *Ibid.*, 15.

⁴⁵ "Glimmerings of Intolerance," *The Economist*, December 13, 2003, 46.

⁴⁶ Randall, 25.

⁴⁷ Martin Van Bruinessen, "Diversity and Division among the Kurds," in *Kurdish Ethno-Nationalism Versus Nation-Building States* (Istanbul: Isis Press, 2000), 24.

⁴⁸ "Neighbors from Hell," *The Economist*, December 14, 2002, 38.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ See Ismet Cheriff Vasily's *The Syrian Mein Kampf against the Kurds: The Persecution of the Kurdish People by the Ba'ath Dictatorship in Syria* (n.p., 1978).

⁵² Randall, 25.

⁵³ In his essay on Turkey and Syria since the Gulf War, Robert Olson notes that the Syrians courted the PKK by offering their leader Abdullah Öcalan shelter from the Turks. See Robert Olson, "Turkey-Syria Relations Since the Gulf War: Kurds and Water," *Middle East Policy* 5 (May 1997): 168–194.

⁵⁴ Nezan, 12.

⁵⁵ *Ibid.*, 10.

⁵⁶ *Ibid.*, 13.

⁵⁷ Like much of the Middle East, Kurdistan became yet another forum for U.S.-Soviet power plays during the Cold War.

⁵⁸ For an in-depth look at the parallels between the development of Kurdish nationalism and Kurdish literature and language in the twentieth century, see Amir Hassanpour, *Nationalism and Language in Kurdistan, 1918-1985* (San Francisco: Mellen Research University Press, 1992).

⁵⁹ For more information on the Republic of Mahabad, see John Bulloch and Harvey Morris, *No Friends but the Mountains: The Tragic History of the Kurds* (New York: 1992), 98–118.

⁶⁰ Mary Ann Smothers Bruni, *Journey Through Kurdistan* (Austin: Texas Memorial Museum, 1995), 74.

⁶¹ Hassanpour, xxiv.

⁶² *Ibid.*, xxv.

⁶³ Sandra Mackey, *The Reckoning: Iraq and the Legacy of Saddam Hussein* (New York: W.W. Norton and Company, 2002), 217.

⁶⁴ Kreyenbroek, 92.

⁶⁵ Smothers Bruni, 79.

⁶⁶ Joyce Blau, "Juifs et Musulmans au Kurdistan," in *Islam des Kurdes*, ed. Martin Van Bruinessen and Joyce Blau (Paris: Institut National des Langues et Civilisations Orientales, 1998), 200.

⁶⁷ Blau, 206.

⁶⁸ Smothers Bruni, 85.

⁶⁹ *Ibid.*, 85.

⁷⁰ Captain McDonald [first name withheld upon request], U.S. Army Special Forces, interview with author, Cambridge, MA, 30 October 2003.

⁷¹ *Ibid.*

⁷² This idea was expressed in "Hope in the Air," *The Economist*, March 13, 2004, 53.

⁷³ Smothers Bruni, 58.

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