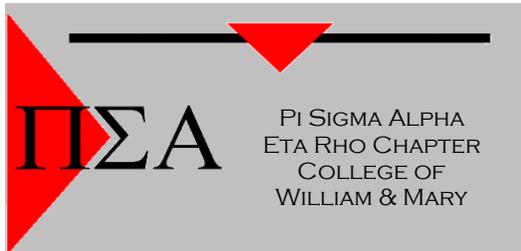


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AARON BRANCH, JUSTIN DE BENEDICTIS-KESSNER,
JESSICA GALLINARO, AND EMILY GOTTSCHALK-MARCONI
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EDITOR'S PREFACE TO THE FALL 2010 EDITION

We are pleased to present the Fall 2010 edition of *The Pi Sigma Alpha Undergraduate Journal of Politics*. This is the thirteenth edition of the *Journal* sponsored by Pi Sigma Alpha, the National Political Science Honor Society, and the twentieth edition since initial publication.

There are many people we wish to recognize. First, we would like to thank the Pi Sigma Alpha Executive Council and the Executive Committee, as well as the editors and advisors of the *Journal* at Union College for the three years prior to this issue. The *Journal* would not be possible without their dedication. Additionally, we wish to acknowledge all of the student Editorial Board members and faculty Advisory Board members, as well as the many additional members of the faculty in the Government Department and Information Technology at the College of William & Mary for their guidance. Their continual dedication and efforts make the *Journal* a reality. Finally, we are deeply grateful for the enthusiasm of our two Faculty Advisors, Ron Rapoport and Chris Nemacheck.

This Fall 2010 issue is our first as Editors of the *Journal* and the first issue of the *Journal* published wholly online. We have been privileged to receive fantastic submissions from colleges and universities across the United States. We have enjoyed our initial experience and look forward to more!

Thank you,

The Editors

SUBMISSION OF MANUSCRIPTS

The Pi Sigma Alpha Undergraduate Journal of Politics welcomes submissions from undergraduates of any class or major; submissions from Pi Sigma Alpha members are especially encouraged. Our goal is to publish manuscripts of the highest quality. In general, papers selected for publication have been well-written with a well-developed thesis, compelling argument, and original analysis. The maximum page length for submissions is 35 double-spaced pages. Manuscripts should include an abstract of approximately 150 words. Citations and references should follow the American Political Science Association *Style Manual for Political Science*. Authors may be asked to revise their manuscript before it is accepted for publication. Submissions must be in the form of a Microsoft Word document and should be e-mailed to psajournal@wm.edu. Please include name, university, and contact details (i.e., mailing address, e-mail address, and phone number).

Conventional Weapons, National Security, and the American Conscience

Kira Allman, College of William & Mary

Conventional weapons trade has long been a part of American security strategy, but it has increased in importance particularly since 9/11. Because of a lack of sufficient legislative and executive oversight, particularly in the last decade, American troops (as well as allies) have received inferior armaments. In addition conventional weapons approved by the US have found their ways into global circulation in unintended ways. This paper examines the history of conventional weapons trade, explains the failure to impose needed oversight, and shows serious effects of the lack of oversight. It concludes with suggestions for improving oversight and control of the conventional weapons trade by the US and the global community.

Conventional weapons trade has increasingly emerged as an important component of American national security strategy. Paradoxically, arms trade is conceived as both serving the security interests of the state and contributing to destabilization and insecurity abroad. “Once you sell arms to another country, you lose control over how they are used. And the weapons, unfortunately, don’t have an expiration date,” says Travis Sharp, a military policy analyst at the Center for Arms Control and Nonproliferation in a 2008 *New York Times* article (Lipton 2008). This paper will examine conventional arms trade¹ as an extension of national security by focusing on two fundamental security concerns: the safety of American military personnel supplied with weaponry overseas and the “grey market” of unsuccessful or illicitly diverted arms transfers that enter global circulation. These dual concerns will serve as a

¹ For the purposes of this paper, the definition of conventional arms is broad and will rely primarily on the UN definition that is employed by the General Accounting Office when reviewing trade policy: “Small arms are those weapons manufactured to military specifications and designed for use by one person, whereas light weapons are those used by several persons working as a crew. Ammunition and explosives needed for small arms and light weapons are also included in the definition.” This is cited in the GAO Report to the Honorable Diane Feinstein, *Conventional Arms Transfers: U.S. Efforts to Control the Availability of Small Arms and Light Weapons*, 2000.

guide for evaluating the existing dimensions of the military-industrial-congressional complex as articulated in President Eisenhower's 1961 farewell address:

This conjunction of an immense military establishment and a large arms industry is new in the American experience. The total influence – economic, political, even spiritual – is felt in every city, every Statehouse, every office of the Federal government. We recognize the imperative need for this development. Yet we must not fail to comprehend its grave implications. Our toil, resources and livelihood are all involved; so is the very structure of our society.

In the councils of government, we must guard against the acquisition of unwarranted influence, whether sought or unsought, by the military-industrial complex. The potential for the disastrous rise of misplaced power exists and will persist. (Eisenhower 1961)

His remarks were a call for awareness—a mandate for circumspection. Since 2001, the arms trade has achieved new prominence in the interest of national defense, and its repercussions have become more acutely apparent. The exigencies of the arms trade require active solutions including multilateral collaboration, proactive bureaucratic, executive, and congressional oversight, restrictions on commercial latitude and contracting, and the contribution of exemplary legal frameworks for international adoption.

Arms Trade: A Historical Perspective

Ultimately, the current arms trade situation has its basis in a long trend that began in earnest during WWI. The 1934 Nye Commission drew public attention to conventional arms trade by investigating bribery by U.S. munitions companies and their involvement in arming Europe during WWI, ultimately committing the U.S. to full military engagement (Nye Commission Report 1936). In 1941, the Lend-Lease Act was passed, officially changing weapons transfers from a private (corporate) matter to a public one, recognizing the close connection between foreign policy and the exchange of military technology (Ferrari et al. 1987, 18). From that point on, military grants became a tool in policy making. Eisenhower and

Kennedy's commitment to collective security fostered an ideology that made arming allies a strategic goal, reducing the need for direct U.S. involvement overseas (Ferrari et al. 1987, 20).² The Foreign Military Sales Act in 1968 tried to control arms transfers by limiting the president's authority to sell to countries with dictatorial leadership or poor social development, but the Nixon Administration quickly made arms sales a foreign policy tool for reducing real American presence abroad (Ferrari et al. 1987, 21).³ Arms transfers increased despite an amendment to the Foreign Military Sales Act authorizing Congress to use a limited veto over arms transfers (Ferrari et al. 1987, 22).

This trend shifted slightly in 1976 with the Arms Export Control Act (AECA), which redirected attention from *selling* to *control* and *monitoring* (Ferrari et al. 1987, 23-24). However, the 1979 Export Administration Act included important exemptions and loopholes, including allowing the president to determine which articles qualify as defense articles and which states are reasonably deemed foreign allies. It also exempts government officials who are authorized to engage in arms transfer contract negotiations from registering appropriately with the State Department (U.S. Code Collection 2008). Despite President Jimmy Carter's directive (PD-13) arguing for U.S. leadership in the reduction of arms trafficking, President Ronald Reagan superseded the directive in 1981 and instituted structural reform that included concessional financing for countries like Egypt, Sudan, Somalia, and Greece, making it easier for those countries to purchase weapons (Ferrari et al. 1987, 33). Later, Sudan would experience genocide and Somalia would deteriorate into warring factions, eventually becoming a dark legacy of the Clinton Administration during the 1992 Operation Restore Hope (BBC News 2008; Global Security 2008). The 1981 Foreign Aid Authorization Bill allowed non-NATO sales to be handled through commercial channels regardless of size or price, and in 1983 the Congressional veto over arms transfers was ruled unconstitutional.

This is not to say that conventional arms trade has always been on a positive trajectory since WWI. In 1986, the Biden-Pell-Levine bill attempted to draw a distinction between noncontroversial sales and sensitive ones after a fiercely debated sale to Saudi Arabia

² Kennedy forebodingly worried about the long-term implications of short-term cost-saving arms transfers.

³ This policy was articulated in the Nixon Doctrine in 1969.

(Ferrari et al. 1987, 35). The same year, the Iran-Contra scandal rocked the Reagan Administration and called into question the oversight process for arms transfers, both public and clandestine. The U.S. came face to face with the paradox of arms transfers during the First Gulf War in 1991 as Iraq invaded Kuwait with highly sophisticated weaponry that was supplied by Western states (Laurance 1992, 3).⁴ That same year, the United Nations General Assembly passed Resolution 46/36 “Transparency in Armaments,” creating the UN Register of Conventional Arms to record member states’ arms transfers and procurements (The United Nations General Assembly 1991). The Clinton administration attempted to expand the goal of transparency with the 1996 Wassenaar Agreement to coordinate multilateral export controls domestically and in accordance with the UN resolution, but it failed to make any large changes in policy. Since then, an unwieldy definition of noncontroversial sales to NATO allies has been established through the Defense Trade Security Initiative, and transfers to the developing world remain the proverbial elephant in the room (Grimmett 2007; Directorate of Defense Trade Controls 2000). Addressing oversight in conventional arms trade needs to be a central goal in post-9/11 administrations facing threats from non-state actors and a black market trade.

Conventional Weapons Security Today

Trade in conventional weaponry is cited by the United Nations as a significant factor in instability, regional conflict, disruption of humanitarian projects, and human rights abuses (Disarmament: Conventional Arms 2008). Developing nations are the top recipients of weapons transfers and arguably the least stable members of the international community. In 2006, 71.5 percent of U.S. government-to-government foreign military arms sales went to the developing world (Grimmett 2007, 2). There has been a notable increase in sales to countries with questionable human rights and political stability records after September 11, 2001, raising questions about the priorities of the United States foreign policy (Arms Trade 2007). Conventional weapons are an important part of an international

⁴ More information on this topic can be found in *Arm in Arm: The Political Economy of the Global Arms Trade* by William W. Keller, HarperCollins Publishers Inc.: 1995.

security calculus. Trade in weapons has long been used as a diplomatic tool to exercise influence, but in 2008 the Bush Administration oversaw Foreign Military Sales amounting to \$32 billion in arms deliveries worldwide—a substantial increase from around \$12 billion in 2005 (Moodie 1994, 133; Lipton 2008). It is clear that arms trade is used as an incentive to American allies in the War on Terror, regardless of how peripheral their role, and the contracts established under the Bush administration set in motion an upward trend in arms sales (Arms Trade 2007).

The use of weapons transfers as a component of foreign policy stems from a variety of motivations, including building and maintaining alliances, incentivizing wartime partners, ensuring critical access to resources like oil, and garnering votes within international organizations (Hartung and Berrigan 2008). All of these objectives fall under the umbrella of preserving national security interests. Selling light weapons and small arms reduces the need for the United States to put boots on the ground in unstable regions and helps support the self-defense capabilities of American allies (Ferrari et al. 1987, 58). United States involvement in Afghanistan and Iraq has committed it to operations in the Middle East and has resulted in increased conventional arms sales to that region.

A clear pattern has developed in weapons sales, both Foreign Military Sales (FMS) and Direct Commercial Sales (DCS) where immediacy and commercial advantage take precedence over procedural compliance. The *New York Times* published a substantial article in March 2008, exposing U.S. defense contractor AEY for providing inadequate and faulty munitions material to Afghan military and police forces. Finding itself engaged in two wars in Afghanistan and Iraq, the Pentagon began spending billions on private contractors to provide weapons to indigenous allies.

AEY was a company that received a contract under hasty pressure from ill-equipped Afghan military members. The company obtained weaponry and ammunition from obsolete stockpiles in Eastern Europe and used middle men to transport it around the world. By occasionally using illicit pathways, AEY was able to present a low-cost bid, attracting the Pentagon, which did not exercise a stringently thorough vetting process. AEY expanded its defense contract to include supplying weapons to U.S. forces in Iraq. Complaints from militaries in Iraq and Afghanistan exposed deteriorated ammunition, worn weapons, and malfunctioning equipment dating from the 1960s. Although NATO and Russia have

established age limits and methodology for testing such munitions, the U.S. Army Sustainment Command commented that the U.S. has no such system in place since they are foreign weapons and there are no U.S. quality standards for them (Chivers 2008). The investigation of AEY for their semi-legal network of arms dealers and their dangerously subpar merchandise eventually led to the jailing of company executives. AEY is by no means the only example of questionable contracting in the field of arms trade. A 2009 *Wired Magazine* article revealed a U.S. purchase of Mi-17 helicopters from Russia through a no-bid deal with ARINC, a communications and engineering firm with very limited prior purchasing and distribution experience. The helicopters were bound for Iraq and Afghanistan but were not delivered, costing the U.S. hundreds of millions of dollars. The lack of oversight requirements prompted Republican Senator Richard Shelby to write a letter of concern to the Secretary of Defense (Weinberger 2009).

Two years prior to the AEY scandal, Kenneth J. Krieg, Undersecretary of Defense, received what should have been a startling letter from Amnesty International. The letter accused Taos Inc., a U.S. company holding Department of Defense (DoD) contracts of engaging in business with companies that practiced arms trafficking, including munitions transfers to Liberia in 2002 (Arriaga 2006). The company is connected to a complicated web of arms trade contracts linking the DoD with stockpiles of small arms and light weapons in Bosnia and Herzegovina. Though technically a private company arrangement, the Iraq arms deal was authorized by the Bosnian government with end-user certificates from the U.S. Coalition Provisional Authority (CPA). Although NATO intelligence and sources within EUFOR and OSCE attest to arms brokering involving Bosnia, coalition forces in Iraq claim not to have received any weaponry.

The full Amnesty report on arms diversions describes the structure of contractors like Taos Inc. to be “a pyramidal structure with a primary contractor sitting at the apex astride a collection of largely unregulated, secretive companies operating out of private apartment buildings and gun shops.” (Amnesty International 2006, 112). The lack of proof that the weapons actually reached the coalition forces in Iraq raises questions about whether they were siphoned off to the grey market that exists between state-sponsored trades and illicit black market trafficking (Amnesty International 2006, 17). In 2008, Solomon Moore published an investigative piece

in the *New York Times* revealing that the United States had provided Iraqi forces with inadequate, outdated, and malfunctioning small arms, prompting the Iraqi Army to enter into an \$833 million arms deal with Serbia without competitive bidding or corruption investigations. The transfers involved payments in cash and unidentified middle men, resulting in faulty or nonexistent materials and creating a rift between U.S. officials and the Iraqi military elite over the procurement of weapons (Moore 2008). Questions surrounding U.S. arms trade to Iraqi military forces highlights the challenges and essentiality of both quality assessment and end-user checks.

In the interest of cutting costs, the DoD increasingly relies on selling contracts not only for the provision of arms but the transport and testing of arms. Private firms involved in military logistics increase the number of actors involved in a conventional arms transfer and the difficulty of verifying receipt of the full delivery (Amnesty International 2006, 47-49). Complicating the commercial involvement of private companies, the DoD has not been vigilant in administering end-use checks, which verify how materials transferred through Foreign Military Sales (government-sanctioned sales to foreign states or militaries) are used after the transfer. The General Accounting Office released a full evaluation of DoD end-use checks in 2000, finding that checks have generally not been completed (General Accounting Office 2000a, 6). Adding to this poor record of oversight in conventional arms transfers, the Congressional Research Service Report to Congress in 2007 states that “it should be noted that data maintained on U.S. *commercial* sales agreements and deliveries are incomplete, and are not collected or revised on an on-going basis, making them significantly less precise than those for the U.S. FMS program” and that “there are no official compilations of *commercial agreement* data comparable to that for the FMS program maintained on an annual basis (Grimmett 2007, 26).”

Despite the fact that the United States has the most expansive legal controls on arms exports and transfers, it frequently fails to follow its own protocol, and the loopholes within existing law allow for broad interpretation of roles and responsibilities (Stohl 2004, 24). For instance, the 1979 Export Control Act permits authorized officials to bypass regulations by exempting individuals acting in an official capacity from submitting registration materials, giving the Pentagon reasonable latitude in contracting with private companies

and decreasing the amount of time that a contract needs to be examined (U.S. Code Collection 2008). In this way, the circulation of arms worldwide becomes less transparent and the mechanisms to track the ultimate destination of transfers become almost insurmountably complicated (Keller & Nolan 1997-1998, 113).

As discussed above, a primary impetus for increasing arms sales over time has been national security objectives. In a world where allies can defend themselves, stability will decrease the need for U.S. military involvement. However, U.S. Foreign Military Sales after 9/11 have primarily gone to developing countries, and many of those countries have questionable human rights and stability records according to the Center for Defense Information (Grimmett 2007, 8; Cooper 1994). When the Pentagon enlists private contractors, the number of actors in the process of freight-transport increases and the likelihood of weapons being siphoned off to other locations becomes high (Amnesty International 2006, 61). Thus, despite the fact that the 1997 Foreign Operations Appropriation Act restricts weapon sales to countries with questionable records on domestic political freedoms and human rights, the weapons or the money that is paid to uninvestigated contractors may bypass the stipulations of the document. The process of transferring weapons (both legally and illegally) often involves unmarked or disguised packaging and a variety of freight stops (Gabelnick & Stohl 2003, 16; Stohl 2004, 24). And most weapons that are traded on the black market were originally sold and produced legally (Stohl 2004, 22). Thus, weapons and the money used to purchase them disappear and reappear on a regular basis. Despite seemingly tight bureaucratic controls on both commercial and military sales, the United States cannot boast a sound record in tracking small arms trade destinations. A May 2008 Washington Post article reports that the Pentagon cannot account for \$15 billion of goods and services ranging from trucks, bottled water and mattresses to rocket-propelled grenades and machine guns that were bought from contractors in the Iraq reconstruction effort (Hedgpeth 2008).⁵

A blurring of bureaucratic roles and emphasis on expediting the licensing process has also contributed to the lenient monitoring practices. The Department Directorate of Defense Trade Controls

⁵ For more information on this topic, see the November 1, 2007, *New York Times* article by Eric Schmitt and Ginger Thompson, "Broken Supply Channel Sent Arms for Iraq Astray."

(DDTC) has the authority through the Arms Export and Control Act to control arms exports and administer the arms exporting licenses (General Accounting Office 2005, 13). The DDTC is a department within the State Department, responsible for foreign affairs and assessing the diplomatic implications of military and commercial transfers (Directorate of Defense Trade Controls 2008). Staff positions that involve reviewing licenses are frequently taken by military officers to “expedite licensing reviews,” and private contractors are cited as providing support to all DDTC activities (General Accountability Office 2005, 21). A clear priority has been set for facilitating license approval, especially in a time of war. During a 2003 conference on “Transatlantic Defense Industrial Cooperation” in Belgium, Assistant Secretary for Political-Military Affairs Lincoln Bloomfield outlined policy goals for arms transfers as examined under NSPD-19, a secret Bush Administration evaluation of U.S. arms export policy (Bloomfield 2003; White House Office of the Press Secretary 2002). Bloomfield articulated that the directive would investigate: “how to work with our Congress to ensure that no part of the executive-legislative approval and oversight process for arms transfers unduly harms the ability of our defense companies to compete in legitimate overseas project opportunities” (Bloomfield 2003).

However, a GAO report on defense trade after 9/11 said that no significant changes had been made to arms transfer policy following the 2001 terrorist attacks (General Accountability Office 2005, 16). In addition, the processing time for staffed license application review actually decreased from about 79 days in 1999 to about 51 days in 2004, while incoming cases for review increased by 25 percent (General Accountability Office 2005, 23-24). Further demonstrating this transition to fast processing, the DDTC implemented an expedited review for all transfers involving Operation Iraqi Freedom and Operation Enduring Freedom where licenses can be approved in 2-4 days (General Accountability Office 2005, 29). Certainly arms transfers are more pressing during wartime, but strict monitoring guidelines need to be followed in order to ensure the safety of U.S. personnel overseas as well as innocent civilians in the developing world. The AECA established a “watch list” to enable the State Department to deny licenses to persons convicted of violating various laws, including certain laws related to export controls, foreign corrupt practices, espionage, and improper communication of classified information, as well as persons who are ineligible to

receive import or export licenses from any U.S. agencies.” But in 2005, the DDTC did not know how many applications were actually screened against the watch list, and between September 2001 and 2005, only one percent of applications for arms transfer licenses were denied (General Accountability Office 2005, 26, 28).

In terms of the relationship between arms sales for foreign policy leverage and stability in the developing world, there is no clear evidence that conventional sales cement alliances or produce long-term results. In the 1970s, the U.S. transferred over \$11 billion in arms to Iran to support the Shah, which actually helped to hasten his overthrow (Keller & Nolan 1996, 115). In the 1980s and 1990s, the United States was a major contributor to Saddam Hussein’s stockpiles of conventional weapons, whether directly or with tacit permission and full knowledge of the transfers. A 1991 CBS interview with arms dealer Sarkis Soghanalian revealed U.S. complicity in the arming of Iraq. In 1992, Congress introduced 40 bills addressing conventional arms transfer controls and almost none were passed (Moodie 1994, 138).

Conventional arms sales remain a key foreign policy tool without significant oversight. After 2001, national security objectives shifted, and that shift was accompanied by a financial commitment in key areas. In 2002, President George W. Bush named Iraq as a primary member of the Axis of Evil in his State of the Union address, and as late as 2008, Iraq consumed \$12 billion per month while the U.S. engaged in stability and wartime operations there, though this amount has since declined (White House Office of the Press Secretary 2002; Hanley 2008). Donald Rumsfeld argued for an Africa Command to aid the United States in her operations overseas, focusing on areas that might be safe havens for terrorists. Kenya received eight times as much military assistance during the five years after 9/11 as it did in the five years prior (Center for Defense Information 2007). Yet, in 2008, the Kenyan elections spurred mass violence that resulted in the deaths of hundreds and the displacement of hundreds of thousands of Kenyan citizens (Sanders 2008).

Arms trade is not used as a reward for domestic stability or even successful counterterrorism efforts. Other countries receiving significant arms transfers between 2002 and 2006 include India, Pakistan, Saudi Arabia, China, Egypt, Venezuela, Israel, U.A.E., Algeria, and Malaysia (Grimmett 2007, 62). At the time of this article’s publication, the State Department’s most recent assessment of travel conditions in Pakistan reads:

The presence of Al-Qaida, Taliban elements and indigenous sectarian groups poses a potential danger to American citizens, especially in the western border regions” and “sectarian and extremist violence has resulted in fatal bomb attacks in Islamabad, Rawalpindi, Karachi, Peshawar, Quetta, Lahore, and other Pakistani cities in 2006, 2007 and 2008. Since 2007, over 1,000 bombings have killed more than 1,000 people throughout Pakistan and injured many more. (U.S. Department of State Bureau of Consular Affairs 2008)

If arms are a reward for stability, this is not demonstrated by comparing U.S. arms distribution records with State Department stability assessments (Grimmett 2007, 62).

The second caveat regarding the use of conventional arms sales, whether they be Foreign Military Sales (supervised by the DoD) or Direct Commercial Sales (supervised by the State Department), foster a militarized diplomatic paradigm. Transfers of weaponry often promote the building of roads and facilities to accommodate updated weapons technology. The foreign policy argument then holds that infrastructure in developing countries is aided and expanded when advanced military equipment is traded to the developing world (Pierre 1982, 37). When coupled with the global ideology that makes fundamental a right to defense and the forceful preservation of sovereignty, arms trade becomes the language in which the world communicates and establishes hierarchies of power (Moodie 1994, 138). However, this militarization of aid also encourages militaristic government structures and places emphasis on military rather than political development in countries with limited democratic experience (Pierre 1982, 37). As a result, the arms trade as it is practiced through contemporary policies does not stabilize instable regions or alliances, nor does it promote the ideals on which the political identity of the United States lies.

Policy Suggestions and Monitoring Strategies

The above analysis of current and past arms trade policies has raised issues concerning conventional weapons transfers as a component of the national security apparatus. At least 500,000 people are killed yearly as a result of hundreds of millions of small arms in worldwide circulation (Stohl 2004, 21). As the United States engages militarily

on fronts in the developing world, American military personnel will likely face enemies armed or funded by conventional arms transfers. Several factors need to be rigorously addressed to stymie this growing inevitability: weapon quality controls, licensing processes, global agenda setting, delineation of bureaucratic roles, and development of legal frameworks.

Since the 1980s, weapons transfers have increasingly become commercially driven and cost-oriented. The cost-cutting objectives motivate contractors to subcontract to foreign suppliers that obtain weapons from stockpiles overseas, the U.S. military needs a stringent and systematized method for testing the quality and perishability of those weapons. According to the *New York Times*, both NATO and Russia have procedures for running such diagnostics (Chivers 2008).

Creating regular and methodical information exchange among allies can assist in filling quality-assessment functions that the U.S. military cannot logistically manage in the time of war (Moodie 1994, 142).⁶ Importantly, *all* arms transfers from contractors commercially or through FMS should go through quality assurance checks to ensure the safety of American soldiers who benefit from the transfers and the weapons' effectiveness for use by allies. Additionally, sending arms transfers for NATO inspection could provide a checkpoint for recording deliveries and checking for diverted materials.

Multinational solutions to the failures of arms transfer policies can also aid in a number of other areas including shrinking the grey market and tracking transfer destinations and receipts (Stohl 2004, 26). Transparency for commercial sales and FMS must be paramount. Free trade in the realm of arms transfers does not amount to sound security policy (Keller & Nolan 1996, 122). The UN Registry is a step in the right direction, but the United States, with perhaps the largest body of arms control law in the world, needs to take a leadership role in promoting strict monitoring of arms transfers.

Ultimately, this approach promotes security more than providing expedited arms transfers to fair-weather allies in the War

⁶ There is reason to believe that sharing good intelligence with the developing world can reduce perceptions of external threats and thereby reduce the demand for massive weapons stockpiling and conventional arms transfers, according to Moodie in "Constraining Conventional Arms Transfers" (142).

on Terror. The risk to the United States posed by diverted weapons or arms transfer funds is conceivably much greater in the post-9/11 environment than prior. In the interest of transparency, a global method for marking and tracing weapons needs to be established, and clear freight-routing reports must be reviewed prior to transfers (Stohl 2004, 25). Each freight stop must be recorded upon arrival since arms embargoes on debarred countries are frequently violated in the process of transporting arms abroad (Stohl 2004, 22). The licensing process should expand to review those factors as well as firm reputation and destination stability. Again, the United States can take a primary role in promoting this objective.

Finally, the multinational approach needs to involve both supplier and recipient dialogues (Moodie 1994, 140). This solution addresses the issue of militarized diplomacy and the ideology that makes guns that currency of international prestige (Sislin 1994, 671). Utilizing arms transfers in the developing world must be strictly isolated from the objective of political and social development. State Department grants and aid must be distinct from military transfers, and infrastructure development must be reviewed and approved if not entirely funded by the State Department.

This distinction is an important one in the bureaucratic structure of arms trade. Each department must fulfill its role as articulated in existing law. The State Department handles licensing of all arms transfers including commercial sales because of the direct connection between military transfers and diplomacy. All arms sales are fundamentally political in nature (Moodie 1994, 133). Free market trade and low-cost bidding should not be the determinants of arms trade contracting since arming today's allies (who may become tomorrow's enemies) might have unforeseen national security consequences that the financial market cannot fully regulate.

Licensing should not focus on expedition but on thoroughness. Contracting creates numerous variables in the process of transferring conventional weapons from one location to another, and therefore the approval process needs to be stringent to prevent diversion. A GAO report on Foreign Military Sales in 2000 outlined profound failures in the DoD within its end-use monitoring program. End-use monitoring must be a priority and must be completed and recorded systematically to ensure proper use of weapons transferred in their final destinations. In conjunction with the objective of ensuring end uses consistent with U.S. national security interests, the DDTC must compare contract license applications systematically with the AECA

watch list and submit questionable applications for secondary and tertiary review, if needed. Cost-cutting measures such as licensing contractors to perform arms transfer logistics require more oversight, not less, in order to ensure that commercial objectives are not slighting national security priorities.

Based on the insecurities caused by improperly applied weapons standards, inadequate oversight, and licensing inconsistencies, it is apparent that addressing the problems of conventional arms trade requires a critical policy review. The cases presented here within the last decade illustrate the immediate importance of bureaucratic oversight and the systemic failures that cost not only money but also lives. President Eisenhower called the military-industrial complex an “imperative need,” and its centrality to contemporary national defense is evidenced by the institutionalization of bureaucratic linkages and processes that perpetuate it. Perhaps the arms trade today is a calculated risk that the United States cannot avoid, but it is a manageable one. Institutional changes can improve the safety of American personnel abroad and reduce the susceptibility of arms trade to diversion and arrogation to the black market.

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One Last Hurdle: The Constitutionality of the Health Care Mandate

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The Individual Responsibility Policy, more commonly known as the “health care mandate,” is an integral part of the Patient Protection and Affordable Care Act (PPACA), the long-debated health care reform bill that was passed in early 2010. After an examination of the policy behind the mandate, along with an analysis of the intended effects of the legislation, this paper evaluates the constitutional arguments brought forth by lawsuits challenging the policy. Contrary to lawsuits filed by fourteen Attorneys General, this paper finds the Individual Responsibility Policy is constitutional. The ability of Congress to enact a health care mandate is derived from previous uses of the General Welfare and Commerce Clauses of Article 1, Section 8, as well as Supreme Court precedent regarding both federalism and individual rights.

Following the signing of The Patient Protection and Affordable Care Act (PPACA), fourteen Attorneys General from across the United States filed lawsuits against the Departments of Labor, the Treasury, and Health and Human Services. The lawsuits claim the individual mandate to purchase health insurance, known as the “Individual Responsibility Policy,” within the text of the 1,200-page bill, is unconstitutional. This paper evaluates the constitutional arguments brought forth by the lawsuits challenging the policy. After providing the political context of the passing of the bill, an examination of the policy behind the mandate, and an analysis of the intended effects of the legislation, this paper assesses the claims of unconstitutionality. In assessing the lawsuits’ argument, this paper examines Congress’ use of the Commerce Clause, the General Welfare Clause, the principles of federalism, and individual rights to enact the health care mandate.

I find through this analysis of the legislation and the lawsuits that the Individual Responsibility Policy is constitutional. Although there seems to be a dearth of direct Supreme Court precedent, as well as no direct mention of health care in the Constitution, Congress and President Obama are well within the limits of the federal government’s powers. The ability of Congress to enact a health care mandate is derived from previous uses of the General Welfare and

Commerce Clauses of Article 1, Section 8, as well as Supreme Court precedent regarding both federalism and individual rights.

The Political Landscape of PPACA

On March 23, 2010, President Barack Obama signed The Patient Protection and Affordable Care Act into law, capping off, as the *New York Times* said later that day, “the most expansive social legislation enacted in decades” (Stolberg and Pear 2010). The signing of the bill accomplished the President’s (in conjunction with the rest of the Democratic Party’s) top priority, as dictated at the beginning of his term (Schaeffer 2010).

The signing of this bill signaled the end of a legislative debate regarding health care, but a judicial debate remains. Controversy surrounded the PPACA long before there was any semblance of a written bill; and, now that such a bill passed, protests abound. The debate helped spark the creation of the Tea Party Movement, and Congressional Republicans quickly adopted a “repeal and replace” campaign. Leaders of the opposition, from Speaker of the House John Boehner to commentator Glenn Beck, continue to call for protests. But amidst the cries of ‘Don’t tread on me’ or ‘Keep government out of my Medicare’ there are legitimate constitutional questions concerning PPACA.

The Policy Behind the Mandate

The Individual Responsibility Policy, or the requirement (as stated in the bill), is presented in Sec. 5000A of the PPACA. The ‘Requirement to Maintain Minimal Essential Coverage’ is defined as “An applicable individual shall for each month beginning after 2013 ensure that the individual ... is covered under minimum essential coverage for such month” (Patient Protection and Affordable Care Act, 2009, 111-148; Hereafter PPACA). In the most basic terms, the mandate is a requirement, enforced through the Internal Revenue Service, which gives an individual two basic options. First, the individual can buy health insurance (not necessarily through the Exchange set up later in the bill) for oneself and any dependants or, second, the individual can receive a tax penalty on their next tax return. This is the essence of the mandate. The “Minimum Essential Coverage” that Sec. 5000A refers to is laid out in Sec. 1302. It can be either a government-sponsored program (Medicare, Medicaid, and

CHIP are all mentioned along with other government programs), an employee-sponsored plan, an individual plan (offered in the individual market within a state or in the exchange), or ‘grandfathered’ health plans (which are defined, along with the other types of plans, in Sec. 2791 of the Public Health Service act, which the PPACA amends).

The penalty, or the “applicable dollar amount,” starts at \$750 or 2.5% of income (whichever is greater) in 2016, and is then multiplied by a cost-of-living adjustment. This would seem unfair to those who cannot pay \$750 a year, but exemptions are incorporated in the bill. The four main exemptions are specific religious groups, members of a health care sharing ministry, Indians, and individuals who qualify for hardship exemptions. Along with methods for exemption, PPACA includes other economic devices and reforms to further lower the cost of now-required health insurance. Because the bill is a budget and tax bill, the main methods of providing assistance to afford and purchase insurance are tax breaks and credits. There are small business tax credits that relieve the burden that the bill would have otherwise created on already financially strained businesses. It also aims to increase the likelihood that more citizens will become covered and follow the mandate without needing to apply for exemptions. In addition to the tax credits and exemptions for small businesses, individuals will also qualify for various tax credits depending on the cost of their plan, their income level, the number of dependents provided for, and many other qualifications. This goes along with the general ‘cost-sharing’ reductions throughout the bill. All of these requirements, penalties, exemptions, and reforms related to the creation of The Individual Responsibility Policy are intended to be economic in nature. The PPACA also states that these economic reforms are legitimate, claiming, in Sec.1501 (a) (1), “The individual responsibility requirement provided for in this section... is commercial and economic in nature, and substantially affects interstate commerce.” (PPACA, 2009) The mandate is an economic tool, created and sustained through government regulation, taxation, and participation.

The Intended Effects of the Mandate

The Individual Responsibility Policy was created first and foremost as a cost saving measure. The effect of the mandate is not to establish a “nanny state” as said by the conservative pundit Bill

O'Reilly. The intended effects and benefits are laid out in Sec. 1501 of PPACA; they are explicitly economic in nature and focused on saving costs in many facets of the healthcare industry. The mandate is designed to regulate commercial activity, specifically, "financial decisions about how and when health care is paid for, and when health insurance is purchased" (PPACA, 2009, 111-148).

The rationale underlying Congressional justification to regulate health insurance is twofold. First, most health insurance that is provided in the United States is from companies that are either national or semi-national. This means that any insurance company that conducts business beyond one state is subject to regulation by Congress via the interstate commerce clause. Second, the cost of national, interstate, health care commerce is \$2.5 trillion. That amounts to 17.6 percent of the national economy. This is one of the largest industries in the current economy of the United States and is projected to increase to an approximate value of \$5 trillion by 2019.

Congress expresses a need to regulate an industry that deals between states. This regulation will seek to prevent economic instability in one of the largest industries and seeks to protect Americans who would be subject to significantly increased prices if no action were taken. This is not to be misinterpreted as a punishment for the private insurance companies. The mandate, as stated in Sec. 1501 (a)(2)(C), "will add millions of new consumers to the health insurance market, increasing the supply of, and demand for, healthcare services," which will benefit the insurance companies by increasing the number of premiums being paid each month. This increase of customers is a substantive rights achievement for a healthier populace because the mandatory purchase of insurance "achieves near-universal coverage" again by building upon national private insurers (PPACA, 2009).

The PPACA was created, in part, to reign in the health insurance industry before costs became so high that they negatively affected the customer: the American public. The mandate is also designed to increase financial stability for families and individuals. The bill asserts that half of all bankruptcies in the United States are caused in part by medical expenses. The mandate adds millions of customers to insurance rolls, which will reduce the cost of medical emergencies on families, further promoting financial security. Most of these intended outcomes from the mandate derive from what the bill showcases as the preeminent economic reasons why a mandate is necessary:

If there were no requirement, many individuals would wait to purchase health insurance until they needed care. By significantly increasing health insurance coverage, the requirement, ... will minimize this adverse selection and broaden the health insurance risk pool... which will lower health insurance premiums. The requirement is essential to creating effective health insurance markets in which improved health insurance products [are] guaranteed..." (PPACA, 2009, Sec.1501 (a) (2) (G)).

Although there are sections of the PPACA which were created to eliminate the social disparity that a lack of health insurance creates, the reasoning behind the Individual Responsibility Policy is not to create the substantive right to access to health insurance. It is an economic tool developed by Congress through a revision in the tax code to regulate interstate commerce in the health care industry. The intended effects of the mandate are to cut down on soaring costs and to provide economic stability for the numerous parties affected by the health care industry.

Oppositional Opinion

The PPACA, as well as most forms of major health care reform in America's history, have garnered vociferous opposition from the days of its early conception (Lepore 2009). The bill, although passed by a majority, split the Democratic Party and was decried by an relentless protest campaign. Within all the concerns voiced, there were legitimate questions of the validity and constitutionality of the actions Congress was taking. On March 23, 2010, minutes after PPACA was signed into law, 13 states (Florida, South Carolina, Nebraska, Texas, Utah, Louisiana, Alabama, Colorado, Michigan, Pennsylvania, Washington, Idaho, and South Dakota) filed a lawsuit challenging the constitutionality of the mandate. This lawsuit, filed by Bill McCollum, Attorney General of Florida, against Secretary of Health and Human Services, Kathleen Sebelius, succinctly states the legal argument that will be used by those challenging the bill.

The twelve Republican Attorneys General and Louisiana's James Caldwell, claim that the PPACA "represents an unprecedented encroachment on the liberty of individuals..." and attempt to prove this by presenting a three-tiered argument (McCollum et al. 2010). First, they maintain that Congress is not explicitly given any power

to mandate the purchase of health insurance to citizens in the Constitution. Thus, the Individual Responsibility Policy enacted through the PPACA would be a violation of the 10th Amendment, which states “The powers not delegated to the United States by the Constitution... are reserved to the States respectively...” (McCollum et al. 2010, 15). The lawsuit then goes on to claim an issue of taxation, citing Article 1, Sections 2 and 9, which prohibit direct taxes (McCollum et al. 2010, 16). This charge states that Congress is not only overreaching their authority, but is in conflict with the limits set forth in the Constitution on taxation. Thirdly, Florida and the cosigning 12 states bring up multiple policies that will violate the lines of federalism. The PPACA is exhibited as not only an “unprecedented encroachment on the liberty of individuals” but also “represents an unprecedented encroachment of the sovereignty of the states,” in the lawsuit (McCollum et al. 2010, 3).

Similar charges have been made by Kenneth Cuccinelli, Attorney General of Virginia. In his lawsuit, also filed against Secretary Sebelius, the overwhelming burden that the Individual Responsibility Policy places on the state is used as the basis for a violation of federalism (Cuccinelli 2010). Along with the accusation of misplaced federal oversight, Attorney General Cuccinelli challenges the commercial nature of the PPACA’s reforms, therefore challenging the use of the Commerce Clause (which is used as a main argument for Congressional jurisdiction in the bill) (Cuccinelli 2010).

The Attorneys General Tom Miller, from Iowa, and Richard Cordray, from Ohio, have come out in adamant support of the mandate and against the lawsuits filed by their 14 counterparts. Both Miller and Cordray claim in a co-authored Op-Ed, “For Congress to have the power to pass this legislation... the health care problem need only [to] affect interstate commerce. It clearly does” (Cordray and Miller 2010). Along with Iowa’s and Ohio’s attorneys general, Oregon’s Governor Ted Kulongoski and Attorney General John Kroger have come out in support of the Congressional mandate to purchase insurance. The Oregon Justice Department, under Kroger, will pursue the formation of a coalition of states that are in support of the mandate in order to compose a joint amicus brief (Ross 2010).

Commerce Clause Controversy

Under Article 1, Section 8, Congress has the enumerated power to regulate interstate commerce. The ability of Congress to regulate interstate commerce is not being challenged by the opposition. Rather, the opposition questions whether health insurance falls under the realm of interstate commerce; and, even if it does, whether Congress can regulate individuals on such a basis. If one of the cases is brought to the Supreme Court, the Justices could look at both statistical evidence and nearly seventy years of precedent to justify Congress' place in regulating insurance. The Individual Responsibility Policy, which on the surface looks to primarily affect an individual's finance, is explained in the PPACA as a large-scoped cost saving method. It hopes to prevent a cumulative "Cost-Shift" burden on to other aspects of the health care industry, which lands this act of regulation into regulating actions that affect interstate exchange (ElBoghdady 2005). This most recent regulatory role that Congress has taken in the PPACA is backed by numerous Supreme Court cases.

Justice Black asserts Congress' power to regulate insurance in *United States v. Southeastern Underwriters Association*, 322 U.S. 533 (1944). Justice Black first states the interstate nature of insurance companies. Black's rationale is very similar to Congressional justification in the health care reform bill. According to Black, "The decisions which that [insurance] company makes... concern not just the people of the state where the home office happens to be located. They concern people living far beyond the boundaries of that state" (*Southeastern Underwriters Ass'n.* at 541). Justice Black's decision will be very crucial to the interpretation of the new case because it concerned "an Act of Congress ... [and] whether the Commerce Clause grants to Congress the power to regulate insurance transactions stretching across state lines" (*United States v. Southeastern Underwriters Ass'n.* at 534). The Court ruled in favor of Congress, reinforcing its right to regulate insurance.

The current Supreme Court might be hesitant to rule on Congress' regulatory power with the backing of just one case without additional precedent regarding the ability of Congress to regulate seemingly private affairs. However, the Court that will rule on the challenges to the PPACA will find relevant precedent to maintain the recently passed Act in *Wickard v. Filburn*, 317 U.S. 111(1942) and its more recent counterpart, *Gonzalez v. Raich*, 545

U.S. 1 (2005). *Wickard*, 317 U.S. 111, although pertaining to wheat production in the 1940s, provides a relevant interpretation of Congressional regulatory powers. In the case, Justice Jackson maintained "even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce" (*Wickard*, 317 U.S. at 125).

Professor Jim Chen, from University of Louisville's Law School, highlights *Wickard's* modern importance. He states "in the wake of New Deal-era Supreme Court jurisprudence, it has become clear that Congress has acquired the authority to regulate private economic activity..." (Chen 2003). A similar case was brought up in 2005, which will have a large impact on the potential ruling that can come from the PPACA. *Gonzales v. Raich*, 545 U.S. 1 serves two important roles in determining the ability for Congress to regulate health insurance on such an individual level. First, the decision reiterates *Wickard's* relevance in the current case. The majority opinion delivered by Justice Stevens asserts that "*Wickard* thus establishes that Congress can regulate purely intrastate activity that is not itself 'commercial,' in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity" (*Gonzalez v. Raich*, 545 U.S. at 18). Second, Stevens proceeds to rule "Where necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not themselves substantially affect interstate commerce" (*Gonzalez*, 545 U.S. at 35). This is easily applied to the newly developed role Congress has taken to regulate the individual purchase of health insurance nationwide. The Patient Protection and Affordable Care Act is a law that regulates intrastate activities in order to effectively regulate insurance, an industry that the Court maintained as one affecting interstate commerce. Therefore, Congress is able, within the bounds of the Commerce Clause, to mandate the purchase of health care to individuals.

The Promotion of General Welfare?

Beyond the fundamental issue of whether Congress has the power to regulate health insurance or not, is the question asked by both lawsuits, Florida, et al. and Virginia's, as to whether the action used to enforce the regulation, taxation, is constitutional. That is, does the

individual mandate to purchase insurance enforced through a tax penalty fall within the scope of the Congress' ability to tax found in the General Welfare Clause of Article 1, Section 8, Clause 1? The Individual Responsibility Policy is enforced through an income tax (as outlined earlier) and the very nature of the PPACA is a tax code amendment. In fact, the long title of the PPACA as passed through the House of Representatives is "An Act to amend the Internal Revenue Code of 1986..." The PPACA is a tax bill that is intended to regulate the insurance industry through the IRS tax code.

The Congress is able to use taxation as a method to regulate insurance because, as Justice Stone writes in the majority opinion of *Sonzinky v. United States*, 300 U.S. 506 (1937), "Every tax is in some measure regulatory." Justice Stone goes beyond this statement to defend taxes similar to the penalty tax in PPACA: "a tax is not any the less a tax because it has a regulatory effect... and it has long been established that an Act of Congress which on its face purports to be an exercise of the taxing power is not any the less so because the tax is burdensome or tends to restrict or suppress the thing taxed" (*Sonzinky*, 300 U.S. at 513).

From this it seems that the mandate to purchase, in which Congress is using the tax to regulate health insurance, has been upheld; there is also no issue in the use of taxes to promote the general welfare of Americans. The latter position is supported by Justice Cardozo's opinion in *Helvering v. Davis*, 301 U.S. 619 (1937), another 1937 case that has relevance to the debate on health care reform. Cardozo states "When money is spent to promote the general welfare, the concept of welfare or the opposite is shaped by Congress, not the states. So the concept be not arbitrary, the locality must yield. U.S. Constitution, art. 6, par. 2" (*Helvering*, 301 U.S. at 645). This gives Congress the ability to tax for the welfare of Americans, an area under which healthcare clearly falls.

There is also the issue of whether the tax itself is a direct tax, and therefore unconstitutional. This has absolutely no standing since the tax is laid out in proportion to income, a power Congress has held since the 16th Amendment was ratified in 1913. In 1796, Justice Paterson set up a three-pronged way of understanding taxes in the United States, which continues to be the foundation of how taxes are viewed. In his opinion from *Hylton v. United States*, 3 U.S. 171 (1796), Justice Paterson laid out three types of Congressional taxation: direct taxes, indirect taxes, and excise taxes. Paterson goes further in affirming that if there ever is a question as to whether a tax

is indirect or direct, a tax should be considered indirect because of the interpretative room given by the framers of the Constitution (Hall 2009, 42-43). The Patient Protection and Affordable Care Act is a revision of the IRS tax code, and it lays out the Individual Responsibility Policy as an income tax: a constitutional measure to lay and collect taxes to promote the general welfare.

Cooperative Federalism

The Individual Responsibility Policy is not only constitutional by the terms of Congress' regulatory reach under the Commerce Clause and by Congress' ability to lay and collect the tax from the General Welfare Clause. It will also follow in the modern lines of federalism. When assessing the viability of Congress to mandate insurance to citizens of all states, the Court will look at recent applicable court cases. The Supreme Court will look for how the mandate could cross over the constitutional lines of federalism and what the PPACA does to prevent Congressional overreach.

When the Virginia Senate passed a bill stating "No resident of this Commonwealth . . . shall be required to obtain or maintain a policy of individual insurance coverage," it was a direct challenge to PPACA (Jost 2010). The Senate of Virginia is attempting to block the mandate by following the precedent set by the Supreme Court in *Printz v. United States*, 521 U.S. 898 (1997). In this 1997 case, the Court ruled that the Brady Bill, a bill that raised protests from states similar to those occurring now against the PPACA, was in violation of the principle of federalism because it violated the 10th Amendment, which states "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Contrary to what is posited by those opposed to the PPACA, *Printz* does not justify a nullification of the mandate to purchase health insurance. Justice Scalia, in the majority opinion for the case, pointed out, "the precise issue before us here... is the forced participation of the States' executive in the actual administration of a federal program" (*Printz*, 521 U.S. at 918) The Court in *Printz* ruled that Congress could not force state and local law enforcement to conduct the specific duties that the Brady Bill enumerated. It did not, however, rule the Brady Bill unconstitutional.

In *Reno v. Condon*, 528 U.S. 141 (2000), the Court found itself in a similar situation to that in *Printz*. In *Reno*, the state of South

Carolina argued that a congressionally-enacted law went beyond the boundaries of federalism. In a unanimous decision, delivered by Justice Rehnquist, the Court upheld *Printz* and ruled in favor of Congress because there was no forced participation in administering the federal program, as in *Printz (Reno)*, 528 U.S. 141).

Mark A. Hall summarizes the Court's rationale in simple terms, "When Congress 'does not require the States in their sovereign capacity to . . . enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals,' the Court has ruled that there is no federalism constraint on Congressional power" (Hall 2009, 43). The current case of the mandate in the PPACA demonstrates that Congress is abiding by the federalism boundaries drawn by *Printz* and *Reno*. The PPACA sets up the mandate to purchase under federal execution; the state has no role in enforcing the mandate.

The one part of the bill that might violate federalism principles is the establishment of exchanges proposed in Section 1321 in the PPACA. Nonetheless, if states do not create the exchanges, Secretary Sebelius will create and maintain one for the state. This route of action is backed by *New York v. United States*, 505 U.S. 144 (1992), where Justice O'Connor delivered the opinion of the court. O'Connor's ruling serves as a good summary of how the PPACA might be viewed: "where Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress' power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation" (*New York*, 505 U.S. at 167). The Court will most likely find that Congress has created an Act that "establishes a program of cooperative federalism that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs" (*Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264, 289 (1981)). This is lauded by Justice Marshall as a constitutional approach to enacting federal programs at a state level (*Hodel* 452 U.S. 264).

While states' rights activists join the fray of PPACA protests and attorneys general from around the nation file lawsuits claiming to defend the sovereignty of their respective states, it is very unlikely that claims relating to federalism will undermine their legislation. Section 1321 of the Patient Protection and Affordable Care Act, entitled "State Flexibility in Operation and Enforcement of

Exchanges and Related Requirements,” establishes a system of cooperative federalism to execute the statutes in a constitutional manner.

The Impact and Possible Future

The Individual Responsibility Policy, as presented in Section 5000A of The Patient Protection and Affordable Care Act (Pub. L. No. 111-148) is in the end a constitutional measure. It is within the breadth of power that Congress is given in the Commerce Clause. This is an integral argument for the opponents of the bill, but even the Supreme Court’s more conservative Justice, Antonin Scalia, who many liberals fear will oppose the PPACA, explained, “Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce” (*Gonzales v. Raich*, 545 U.S. 1, 37 (1992), Scalia, A., concurring). The claim that the mandate to purchase insurance is unconstitutional in the way it delivers its penalty is also baseless. The Act itself is an amendment to the IRS tax code and the penalty is assessed in a clearly constitutional income tax. Furthermore, President Obama and Congress are not overstepping the modern lines of federalism. The PPACA sets up a system of cooperative federalism that has previously been proven as constitutional by the Court.

The Patient Protection and Affordable Care Act and its Individual Responsibility Policy will stand the test of a Supreme Court case. However, as President Obama said in an e-mail sent out the day of the bill’s passage in the House of Representatives, “This day is not the end of this journey. Much hard work remains” (Obama 2010). The mandate is just a part of the massive bill presented by Obama and Congress. There are many other facets besides the mandate and the PPACA that could perhaps violate the Constitution. Along with that, if the Supreme Court does not overrule the mandate, then it could usher in a new era of radical reforms that push the limit of the Commerce Clause and the central government’s role in the federal system.

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Nagorno-Karabakh and Abkhazia: An Examination of Conflict Stalemates

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For over fifteen years, the status of two separatist Caucasian republics, Abkhazia and Nagorno-Karabakh has been uncertain. Since the end of the civil wars, when these regions fought against Georgia and Azerbaijan, respectively, the republics have been nominally independent. However, both states are still claimed by Georgia and Azerbaijan. Consequently, scholars label these situations “frozen conflicts,” in which the separatist republics are unwilling to join states that continue to claim them and there is a lack of military action from both sides. The status of both breakaway regions is unique in the international system, thereby meriting analysis. This study examines why these frozen conflicts have persisted in the Caucasus region. The research here is comparative and qualitative in nature, applying four hypotheses explaining why the frozen conflicts continue to both cases. The article deduces that foreign interference, elite greed, and a lack of effective mediation in each case are likely determinants of why a resolution has not been achieved in either case.

With the USSR's disintegration in the early 1990s, a number of new political actors emerged from the remnants of the ethnically heterogeneous nation. Consequently, a host of new interethnic conflicts formed in the superpower's wake, as contention for political space gave way to violence and chaos. During this period, the Caucasus region became an epicenter for interethnic warfare as the mountainous area saw a number of bloody civil wars. Two particularly fractious secessionist conflicts in Abkhazia and Nagorno-Karabakh characterized the severity of the chaos. Abkhazia saw a violent war marked by ethnic cleansing as the once autonomous Soviet republic fought to separate itself from Georgia from 1992 to 1993. Similarly, from 1988 to 1994, the ethnic Armenians of the Nagorno-Karabakh region fought to secede from Azerbaijan with the help of neighboring Armenia (O'Ballance 1997).

While the causes and events of these interethnic wars are by no means unique when compared to conflicts of a similar nature, their outcomes are peculiar. In both scenarios, the wars ended in what political scientists refer to as a “conflict stalemate” (Rutland 2007). During the course of the separatist wars, violence reached intense levels that saw ethnic cleansing of the Abkhazian capital of

Sukhumi, the shelling of Azeri villages by Armenian forces, and the involvement of other regional actors within the conflict (O'Ballance 1997, 56). Eventually, fighting in the breakaway regions halted through official ceasefires; however, neither situation was successfully resolved via negotiation.

As a result, the territories that fought to secede currently remain in a precarious position. Fighting has died down to negligible levels with a few minor exceptions in Abkhazia, as Abkhaz military forces engaged in sporadic and markedly less violent skirmishes with Georgia in the Kodori Gorge in 1998, in 2001, and briefly during the South Ossetian War (George 2009); the regions remain separatist republics with *de facto* independence. Nevertheless, they are still legally recognized as residing within the boundaries of their former states.

Due to the current decline in violence and lack of a negotiated settlement in Abkhazia and Nagorno-Karabakh, I believe both conflicts exemplify a stalemate position. To prove this theory, I examine why this situation persists and why peace negotiations have not succeeded, despite previous attempts at conflict resolution by primary and external actors such as the OSCE Minsk Group, the international mediator of the Nagorno-Karabakh conflict (Carley 1998).

Implicit in this analysis is the assumption that neither conflict can return to previous levels of hostility and that Georgia and Azerbaijan will not resume military campaigns against the secessionist regions. Such an assumption is not far-fetched given present attitudes and realities. Since 1995, Azerbaijan has tried to “achieve diplomatically what it failed to do on the battlefield,” using peace negotiations as the primary means to resolve the Nagorno-Karabakh issue (Croissant 2008, 135). Renewing conflict is simply not productive for Azerbaijan considering the possible harm it would cause its burgeoning oil industry and the likelihood of swift international intervention should war restart (Croissant 2008). While a remote possibility at one point, the renewal of a military campaign by Georgia against Abkhazia is also unlikely given the nation's military defeat and Russia's intervention two years ago in the South Ossetian War. The war “destroyed the bulk of Georgian military industry” and indicated a willingness by Russia to militarily support Georgia's secessionist foes (Peimani 2009).

The other fundamental assumption at the heart of this very research question is that Azerbaijan and Georgia have strong

preferences for retaining the breakaway regions within their borders and wish to maintain territorial integrity. These desires are prompted by state building efforts on the part of Georgia and Azerbaijan to both consolidate the center and to avoid other possible breakaway regions within their boundaries (King 2001). The leaders of both countries have repeatedly expressed their unwillingness to allow the separatist regions to legally secede from their territories, and the stance of each country in negotiations reflects an unflinching opposition to secession.

To address the question of why neither conflict has been resolved, I posit a number of possible hypotheses that could explain the current entanglement. The first is that external actors, namely Armenia and the Russian Federation, have sought either to maintain the status quo or to stifle the peace process for their own interests. If such a hypothesis were valid, then clear indications of an external actor's malignant interference in negotiations would be observed if it strongly favored one side and took conscious steps to hamper negotiation. The second hypothesis explains that the conflicts have not been resolved because elites within both separatist republics have no interest in peace proposals that would rob them of select benefits they currently enjoy. Should this hypothesis hold true, we would see prior settlements fail to provide acceptable incentives for the leaders of the breakaway regions.

A third possible explanation is that successful negotiation has not been possible because both secessionist republics actually seek to be incorporated within the territories of other existing nations, namely Russia and Armenia. Such a hypothesis is predicated on Georgia and Azerbaijan's unwillingness to allow any solution that involves the legal removal of the regions from their boundaries. If this were a possible explanation for the current stalemate, then we would see a high degree of cooperation, blurring the lines of interstate relations, between the separatist republics and other nations. The fourth hypothesis flows from Chaim Kaufman's logic behind partition in "Possible and Impossible Solutions to Ethnic Civil Wars." In this article, Kaufman (1996) posits that secessionist conflicts "harden" preferences and identities making post-war negotiation unfeasible. This hypothesis holds that the aftermath of ethnic conflicts produces a set of attitudes and realities unfavorable to the very process of negotiation. If this hypothesis is valid, then impediments to the peace process (based on war related grievances)

and an added emphasis on ethnic markers between the secessionist republics and their former states would be observed.

In drawing a conclusion from these hypotheses, three issues must be noted. First, factors behind the stalemate may have changed or become less significant over time. Second, despite common characteristics between Abkhazia and Nagorno-Karabakh, it is entirely feasible that the reasons for a conflict stalemate may differ between the two states. Finally, the hypotheses in this study are all tested against secondary sources rather than primary sources or “on the ground” research. This study has attempted to exclude research of a biased nature; however, there is a possibility the conclusions drawn from these secondary sources may be skewed considering the varying perspectives in the literature on the two secessionist conflicts. Consequently, the findings of this study should be viewed as interpretive—rather than definitive—explanations of the conflict stalemates.

Hypothesis 1:

According to the first hypothesis, it is possible that external actors, namely Russia and Armenia, have hindered conflict resolution to achieve their own aims. This hypothesis is developed by Robert Stedman (1997), who states there are “spoilers” in the peace process who have an interest in derailing a successful outcome for their own benefit. Stedman might suggest that in the cases of Abkhazia and Nagorno-Karabakh, Russia and Armenia are spoilers. I propose a model of external spoilers who are not necessarily interested in restarting a conflict but still wish to stifle successful negotiation.

Before clarifying whether or not this hypothesis has validity, it should be noted that both Armenia and Russia have legitimate interests in blocking the peaceful resolution of conflicts in these regions. Namely, both nations stand to gain by either increasing territorially or boosting their political stature and leverage in the Caucasus region.

Armenia is clearly vested in the outcome of the dispute over Nagorno-Karabakh given its ties to the territory’s significant Armenian ethnic majority (O’Ballance 1997, 22). This presents the possibility that Armenia may try to derail a peace settlement because it desires to incorporate Nagorno-Karabakh within its boundaries and simultaneously weaken Azerbaijan.

Bertril Nygren (2008) argues that Russia is also concerned with the peace process in both regions because it wishes to maintain geopolitical and strategic primacy in the Caucasus as well as leverage over Azerbaijan and Georgia. Dov Lynch (2004) agrees Russia “is deeply involved at multiple levels in sustaining a status quo that serves its interests.” Since Georgia has begun to challenge Russia’s regional hegemony and develop closer ties with the West, Russia possesses even greater motivation to curb its growth (Lynch 2004). To illustrate this point, when Georgia attempted to reassert its sovereignty in Abkhazia, Russia undermined this effort by granting Russian citizenship to Abkhazians, establishing a currency zone within the region, and maintaining a troop presence there (Levy 2010). Russia’s influence in blocking successful negotiation between Abkhazia and Georgia effectively facilitated the current stalemate. Consequently, it might be simple to view Abkhazia as a pawn in Russia’s greater machinations.

However, as Peter Rutland (2007) notes, a matter of “agency” must be given to the separatist republic in deciding its future. To that end, the elites and inhabitants of Abkhazia are not so much under Russia’s direct control as swayed by a number of incentives provided by Russia (which will be explained further in the examination of the second hypothesis). In providing such incentives, the Russian Federation undercuts Georgia by courting favor with the local Abkhaz elites and offering them benefits Georgia might not be able to offer.

In the case of Nagorno-Karabakh, regional expert Patricia Carley (1998) suggests Russia originally sought to interfere with negotiations by favoring Armenia and the breakaway republic over Azerbaijan. However, the same mechanism of Russian interference may no longer be relevant in explaining the continued stalemate in Nagorno-Karabakh. Bertil Nygren argues Russia currently has “nothing to gain from a continued conflict” in the region, as their bilateral relations have improved with all the negotiating parties (Nygren 2008, 109). Instead, the regional superpower has developed a more neutral stance regarding Nagorno-Karabakh in recent years because stalling negotiations no longer provides the same geopolitical incentives.

Armenia exercises a much greater influence on the outcome of the peace process. Armenia is a primary negotiator in the peace talks held by the OSCE Minsk Group and has more capabilities for spoiling conflict resolution (Carley 1998). Yet there exists little

evidence that Armenia has also acted as a “spoiler” in recent years. The nation has repeatedly cooperated in peace talks and, according to regional expert Taleh Ziyadov (2010), has extended land-swapping deals to Azerbaijan in an effort to resolve the conflict. Surprisingly, Nagorno-Karabakh frequently blocks peace plans supported by Armenia, such as the failed 1997 OSCE proposal (Ziyadov 2010, 115). While there have been several impasses in negotiations, this does not mean that the Caucasian nation wishes the present situation to continue. In actuality, Armenia, more so than any other party, has taken substantial steps to achieve rapprochement.

After evaluating this hypothesis, I find that the exercise of influence by external actors does hamper conflict mediation in Abkhazia but not in Nagorno-Karabakh. Abkhazia’s ability to sustain itself as a *de facto* separatist republic is helped in large part through Russian aid and interference. Without this external financial and military support, a resource-starved and deprived Abkhazia could have been militarily defeated by Georgia or capitulated to plans for territorial reintegration long ago. So, an external spoiler model does explain why a thaw in negotiations has been able to persist. However, even though Russia’s interference in conflict resolution exacerbates divides between Georgia and Abkhazia, it does not explain why these divisions exist in the first place.

Hypothesis 2:

A second hypothesis regarding the intractable stalemate in both separatist republics posits that elites in the territories actively block negotiation because they are unwilling to lose the privileges they enjoy in the current status quo. This scenario assumes that peace settlements fail to secure the fundamental interests of the separatist political leaders. Such an argument is derived from V.P. Gagnon Jr. (1995), who suggests elites will do whatever they can to secure their own power and maximize their own gains.

In the breakaway regions, separatist leaders have a set of unique benefits. Foremost, the elites of Abkhazia and Nagorno-Karabakh enjoy external patronage (which includes monetary and military aid) from their more powerful neighbors, Armenia and Russia (Kolstø 2006). Excluding these benefits, Charles King (2001) believes that elites in each territory also have interests in ruling over “states that now function about as well as the recognized countries of which they are still formally constituents.” That is, the governments of Abkhazia

and Nagorno-Karabakh are functionally equivalent to the governments of Georgia and Azerbaijan. Politicians in the two contested territories enjoy tangible economic and military power as leaders of de facto states with control over armies, development, and economic policy. In a more informal capacity, King also argues that the status quo is particularly beneficial to separatist leaders as they “benefit from untaxed trade and production flowing from the former war zones” (King 2001, 525). It then stands to reason that elites have no incentive to come to the bargaining table if these benefits are not preserved in peace plans offered by their former states.

Azerbaijan and Georgia have both presented plans for conflict resolution that have sought to accommodate elite preferences. In 2008, Georgian President Mikhail Saakashvili offered Abkhazia a peace settlement that gave it guarantees of territorial autonomy and power-sharing while allowing the republic to retain control over its economic affairs (Socor 2010). Under the plan, Abkhazians would gain large representation in the Georgian legislature, and an ethnic Abkhaz would hold a newly created office of Vice President. By catering to the interests of Abkhaz political elites, Georgia is acknowledging the role that benefits to the elites have in the process of resolving the conflict. The external patronage of Abkhazia was also partly accounted for as “Georgians... spearheaded the opening of the railroad connection connecting Abkhazia to Russia,” though much of the original plan also sought to limit the degree of Russian involvement in the region (George 2009). However, even before the outbreak of the South Ossetian War, these proposals were rejected by Abkhaz leaders who “insist[ed] on full separation from Georgia” (Socor 2008).

Azeri attempts to incorporate Nagorno-Karabakh by giving the region a high degree of autonomy have met similar failures. A 1997 peace plan was rejected by the leaders of the separatist republic because it would have required the removal of Armenian troops within the region and did not grant Nagorno-Karabakh the de jure separation it desired, and therefore did not ensure a place in a future government for the elites (Ziyadov 2010, 115). While Azerbaijan did not quite account for the external benefits of Nagorno-Karabakh in this peace plan, it did try to accommodate the benefits of regional elites through a plan for autonomy. However, much like Georgia’s guarantees, this plan did little to induce the Nagorno-Karabakh republic to formally incorporate itself within the territorial boundaries of Azerbaijan.

In both scenarios, there are visible incentives for the elites to block peace settlements that would deprive them of rewards they currently enjoy. Even if the negotiating governments try to account for such preferences (as Georgia did, to some degree), Georgia and Azerbaijan's inability to provide the same level of ruling power that the regional elites have within the current *de facto* states presents another serious hurdle. Past and present plans for settlement remove the military powers held by these leaders and divvy up their security and economic functions. As the leaders of Nagorno-Karabakh and Abkhazia are not in dire straits at the current time, it may not be in their best interests to decrease their level of power and acquiesce to the plans for incorporation presented by Azerbaijan and Georgia. While Viacheslav Chirikba (2004) argues that Georgia in particular could force Abkhazia to accept a plan for autonomy through tightening "significant political, economic, and military pressure," this option is untenable given the aforementioned external patronage of the region.

This perspective assumes a model of elite greed in which high-ranking political figures are seeking personal gain at the expense of the population. While arguments against elite greed frequently note that they give little agency to the population at large, in such a model, the people are puppets subject to the desires of their leaders.

I find in these scenarios that elite greed and popular will are not incompatible, and that the leaders of the separatist publics are not necessarily going against the wider public interest. For example, the Abkhaz people have a strong preference against reintegration with Georgia as an outcome of negotiations, as proved by a 1999 referendum in which the republic's population voted for independence from Georgia (Nygren 2008, 134). A recent 2010 public opinion survey reinforced this point: nearly 80% of Abkhazia's ethnic Abkhaz majority believed the region should remain independent (Kolossoff 2010). Similarly, a 2006 referendum in Nagorno-Karabakh found an overwhelming proportion of the population supported the region's *de facto* statehood separate from Azerbaijan ("Nagorno-Karabakh Conflict" 2009).

However, it should be noted that in the case of Abkhazia, popular support may be a result of a lack of knowledge among the population due to the limited accessibility and scarcity of print and electronic news sources in the republic (Hammerer 2010). It is also possible that by rejecting current plans for rapprochement, elites are adequately judging the utility of reincorporation for their states. Both

Charles King and Viacheslav Chirikba have posited the breakaway republics are able to provide effective political rule and a degree of economic well being for their populations on par with that provided by the nations from which they seceded. If this is the case, then there may not be much practical need for them to reintegrate with their former countries (Chirikba 2004, 348).

The model of elite greed proposed here offers one direct reason as to why no successful outcome has been reached in negotiations. It exposes a key area that peace settlements have not properly addressed thus far. More broadly, this issue shows a fundamental point of contention between the negotiating parties that has led to an impasse in negotiations. Whether the conclusion here demonstrates state, elite, or popular interests against reintegration, it can be ascertained that there is a pervading opposition within separatist republics toward legal and political reintegration with their former states. As such, the results of this model imply what kind of peace proposals are likely to succeed in resolving the conflict.

Hypothesis 3:

A third hypothesis postulates that the desire of Abkhazia and Nagorno-Karabakh to incorporate their territories within those of their external benefactors, Russia and Armenia, stifles negotiation. This theory is predicated on the belief that these regions cannot exist as purely independent entities. Dov Lynch (2002) cites location and limited resources as two reasons why these states will not be able to function independently – separate both from their former states and their external benefactors. As previously mentioned, both Georgia and Azerbaijan are vehemently against outcomes in the peace process that would involve the removal of the breakaway republics from the control of their respective states. Accordingly, they strongly oppose incorporation of the separatist republics within another country.

It is then possible that a desire for this sort of incorporation by the breakaway regions is what continues to drive the current stalemate. The likelihood that Abkhazia wishes to incorporate itself within the Russian Federation and that Nagorno-Karabakh wants to do likewise in relation to Armenia is conceivable. Both territories have close relationships with their neighbors and have incentives for integration. Nagorno-Karabakh has an ethnic impetus considering its Armenian character as well as an economic impetus in attaining

sorely needed economic benefits. The economically destitute Republic of Abkhazia also stands to benefit in joining the Russian Federation by gaining increased trade and social welfare aid (George 2003, 133). Yet the question remains whether the separatist states actually desire this sort of integration and whether or not this is an issue that currently blocks negotiation.

In the case of Abkhazia, the republic has taken significant strides to build a close relationship with Russia beyond ordinary interstate cooperation. There is no border visa requirement between the two states, the republics share a common currency, and Abkhazians are granted Russian citizenship (Lynch 2002, 846). Such policies may indicate that Abkhazia genuinely seeks to become part of the Russian Federation. When presented alongside the public stance of Abkhazia, however, the hypothesis presented here does not ring true. Abkhaz politicians continue to proclaim their independence from Georgia and have asked Russia to recognize their independent status (Peimani 2009, 284).

Similarly, Russia has insisted that it is a neutral party to the conflict with no interest in integrating Abkhazia (Nygren 2008, 143). It is possible that Russia may genuinely not wish to integrate Abkhazia within its border as it has few incentives to do so. Both Viacheslav Chirikba and Bertril Nygren note that Russia's current support for Abkhazia, a separatist republic, is at the expense of its relations with other states. While Russia's leaders are burdened by their ties to the breakaway territory, they acknowledge the unpleasant reality that its other allies do not support Abkhazia (Nygren 2008). Perhaps the increased interstate cooperation between Russia and Abkhazia should be framed not as a merger between the two nations but rather as a marriage of convenience that allows the greater power to put pressure on Georgia and the lesser state to receive a number of rewards in turn.

The relationship between Nagorno-Karabakh and Armenia, while evidencing similar cooperation such as military aid, is markedly different from the relationship between Russia and Abkhazia. Rather than a choice made through geopolitical practicality, Armenia has maintained strong ties with Nagorno-Karabakh since its birth and was its primary supporter during the fractious war it fought with Azerbaijan. Furthermore, unification between the two territories was an early aim of Armenians in both the larger nation and in the separatist republic. Hooman Peimani (2002) writes that from the outset of the Nagorno-Karabakh war, the

inhabitants of the territory “resorted to arms to secure their independence from Azerbaijan and unify with Armenia.” Similarly, early on in the conflict, Armenia dedicated “substantial effort... to achieving [a] political union” with Nagorno-Karabakh (Croissant 1998, 69). Yet following the aftermath of the war the public attitudes of both states toward integration have changed. Nagorno-Karabakh repeatedly issues declarations for self-determination insisting that it must retain sovereignty as part of any outcome to the peace process, much as Abkhazia has done in relation to Russia (Ziyadov 2010, 110).

Armenia, in what was partly a conscious means of gaining leverage in negotiations, also renounced any territorial claims to the region and even refused to recognize any independent status on its part (Croissant 1998, 70). Even if such proclamations are dubious and the final prospect of Nagorno-Karabakh becoming a truly independent state and not joining Armenia is questionable, the fact that unification with Armenia is not used as a tool in the bargaining indicates that it has less importance. The immediate matter of contention for negotiations is Nagorno-Karabakh’s desire to gain *de jure* separation rather than any attempt to form a broader union with Armenia. While a territorial union might be a genuine fear of the Azeri government, the recent round of negotiations has seen Armenia call for Nagorno-Karabakh’s sovereignty as part of a peace settlement (Ziyadov 2010, 129). This outcome—rather than one of territorial integration with Armenia—remains the primary obstruction in current peace talks.

The separatist states are far from puppets of larger states wishing to subsume them, though they may appear to be. Abkhazia and Nagorno-Karabakh are frequently burdensome to their external patrons. For example, Russia’s commitment to Abkhazia has given it fewer options for policy choices towards Georgia, and has forced it to deploy troops on several occasions to support Abkhazia (Peimani 2009, 285). Armenia’s relationship with Nagorno-Karabakh has landed it in a similarly undesirable position. In 1998, the republic refused to go along with the set of negotiations favored by Armenia and prompted a public outcry within Armenia that led to the resignation of Armenian President Ter-Petrosian (Ziyadov 2010, 116).

Ultimately, the possibility of the separatist republics integrating within the territories of their external patrons does not appear to be a substantial causal mechanism that blocks a successful outcome in

negotiations. Similar to the external spoiler model, it overemphasizes the role of outside participants in the conflict and takes away agency from the separatist republics that have the final say in how the current stalemate will be resolved.

Hypothesis 4:

A final hypothesis that offers a more convincing causal mechanism for the current predicament is that the extremely violent nature of both conflicts has made negotiation incredibly difficult. This perspective is drawn from the ideas of Chaim Kaufman, who argues that conflicts harden ethnic identities and promote distrust, hostility, and resentment between ex-combatants (Kaufman 1996, 139). This perspective assumes that post-war reconciliation and integration is unfeasible given the negative effects of conflict. Settlements involving disputed regions that might have been acceptable before the start of the conflict may be no longer viable. Animosity and mistrust bred by the events of war may have caused the actors, particularly the separatist republics, to champion goals unacceptable to their former foes. Additionally, the violent and cleaving nature of a conflict may enforce rigid ethnic divisions that make reintegration unlikely. If this hypothesis is true, then we should observe clear shifts in pre and post-war attitudes to negotiation, and the reinforcement of ethnic boundaries in viewpoints towards certain outcome possibilities.

In Abkhazia, there is a clear change in pre-war and post-war attitudes to negotiation. Prior to the Georgian-Abkhaz war in 1991, former Abkhaz Supreme Soviet Deputy Vladislav Ardzinba accepted plans that included autonomy and quota representation for the region (George 2009, 118). However, as noted in the discussion of the second hypothesis, similar proposals for peace presented in 2008 were deemed insufficient by the Abkhaz government. Simmering animosity has left the leaders of Georgia and Abkhazia apprehensive of the peace process and has provoked actions negating the infrequent talks between the two republics. During talks in 2004 and 2005, each state bowed out of negotiations after accusing the other of trying to upset the peace process and provoke military action (Nygren 2008, 142). More recently, lingering animosity was evident in Abkhaz president Sergei Bagapsh's pronouncement that Georgia has been the real threat to Abkhazia over the last 20 years ("Abkhaz Leader" 2010).

The shift in pre- and post-war attitudes in Nagorno-Karabakh is not quite as evident. Armenians within the region were not previously offered a plan for settlement, and were trying as early as 1988 to remove from themselves from the boundaries of Azerbaijan. While this might be evidence that the war has done little to diminish the likelihood of negotiation given prior existing difficulties, other issues of the current peace process show how the conflict has had a divisive impact on opinions regarding resolution. Some of the key points of contention that frequently stall peace talks stem directly from the conflict. The continued Armenian troop presence in Nagorno-Karabakh, used by the republic to preserve a defensive buffer, has been an issue that Azerbaijan has consistently had to wrestle over in negotiations. Additionally, the right of Azeri refugees leftover from the war to return to the region has produced an impasse in talks as the Nagorno-Karabakh government fears a new wave of Azeri migration would undermine its influence (Ziyadov 2010, 129). In both these instances, security concerns originating from the previous war have continued to block the peace process.

It must be conceded that the next measure of this hypothesis—an examination of whether ethnic identities have been reinforced because of conflict—is considerably difficult to assess. While differences in opinion over the desired outcome of the conflict exist between opposing ethnic groups, this is not necessarily a result of ethnic identity. However, it is reasonable to assume ethnicities have hardened in both stalemates considering the violent and divisive nature of the original conflicts as well as the rigidity of post-war ethno-territorial boundaries. As previously mentioned, the Georgian-Abkhazian conflict saw a bloody and schismatic conflict marked by the ethnic cleansing of Georgians in the Abkhazian capital of Sukhumi by Abkhaz military forces. The Nagorno-Karabakh War suffered from violence of a similar nature as fighting around the town of Khojali on February 26, 1992 saw ethnically motivated mass killings of Azeri by Armenian forces (De Waal 2003). As the violence was predominantly ethnic in both cases, it is not unreasonable to assume that the secessionist conflicts reinforced ethnic cleavages between the combatants consequently hurting prospects for reintegration and promoting mistrust between ethnic groups.

Yet, the territorial separation of ethnic groups following conflict may be a better indicator of ethnicities hardening as a result of conflict. Prior to the wars of the early 1990s, both Nagorno-

Karabakh and Abkhazia had heterogeneous populations in which different ethnic groups lived in close proximity. However, the aftermath of the conflict shows clear territorial markers between the ethnicities that fought one another in the secessionist wars. A 1989 Soviet census found Georgians constituted 46% of Abkhazia's population, but the ensuing war displaced some 250,000 Georgians from the region (George 2009, 128). Similarly, Thomas De Waal (2003) states that almost all of Nagorno-Karabakh's former 37,000 Azeri inhabitants were killed, fled, or expelled because of the conflict in the region. The refugees displaced by these conflicts have since been unable to return to their former homes, which has led to a rigid ethno-territorial separation that has likely hardened ethnic identity and created a class of internally displaced people whose right of return has been a point of contention in peace talks.

The nature of negotiations in both scenarios indicates post-conflict grievances and attitudes may stifle efforts to resolve the current situation. Yet the actions taken in recent years by Abkhazia, Nagorno-Karabakh, and their respective former states also indicate a strong security dilemma that has undermined negotiations and fed into post-conflict grievances. From this particular hypothesis, a more comprehensive causal explanation behind the failure of negotiations emerges. Post-conflict grievances and a security dilemma illuminate core issues of mistrust, animosity, and fear that created and continue to drive the conflict stalemates. Unlike the other hypotheses, this model explains the very divisions that make negotiation difficult.

Opposing views to Kaufman's model (such as Arend Lijphart and Michael Horowitz's) argue that actors could overcome post-conflict issues and achieve integration through power-sharing institutions where both actors are given a stake in government (Lijphart 1991). However, as the second hypothesis shows, the separatist republics have rejected these governmental mechanisms as their current networks of power give them no incentive to accept anything less than total sovereignty.

Another counterpoint to this model presented by Barbara Walter (2009) suggests that while the aftermath of an ethnic conflict is fraught with many issues, these issues can be addressed through peacekeeping and mediation efforts by an external actor. However, in Abkhazia there was no objective, no neutral peacekeeping force, and no immediate plan for post-conflict reconciliation. Instead, Russia's peacekeeping efforts took into account the nation's foreign policy interests over the need for successful mediation.

While the Nagorno-Karabakh peace process might have had a more effective international mediator in the OSCE Minsk Group, this organization did not initially formulate cohesive plans for conflict resolution. Thomas de Waal notes that it was not until 2001 when the major nations of this group—Russia, France, and the United States—truly began working together to develop effective negotiations. Even then, these countries preferred to work diplomatically with the actors involved rather than conduct a substantial “on the ground” intervention (De Waal 2003, 267). In the examples of Abkhazia and Nagorno-Karabakh, a lack of effective and consistent mechanisms for post-conflict reconciliation has produced a largely unsuccessful and stagnant set of negotiations continuing the current stalemate. Without active mediation by a neutral third party, the combatants in both conflicts have had little success in resolving post-war issues through the negotiating table and animosities remained that have confounded the peace process.

Conclusion

After examining why a stalemate has persisted, I have found several differences but substantially more similarities between the unresolved situations in Abkhazia and Nagorno-Karabakh. Foreign interference of spoilers in negotiations is currently only pertinent to Abkhazia; even there, it plays a secondary role that facilitates an impasse in negotiations but does not cause it. While the territorial integration of Nagorno-Karabakh may be an eventual possibility, the possibility of incorporation of both separatist republics within other countries does not substantially hurt the peace process. I find that the inability of peace settlements to give enough incentives or assurances to elites has been a major roadblock in conflict resolution. Additionally, the qualities that have made negotiation problematic and negated the possibility of integration are born from leftover animosities from the secessionist wars and a security dilemma that has persisted in their aftermath.

In simpler terms, I believe the answer to this stalemate lies in the fundamental difference in preferences regarding the issue of reintegration. Georgia and Azerbaijan wish to preserve their territorial integrity and maximize the influence of the center in an effort aimed towards state building and ensuring rule over other possible secessionist regions like Ajaria in Georgia (Zürcher 2007). In holding these fixed preferences, both countries will consistently

disagree with separatist republics that are intent on maintaining self-rule.

Dov Lynch argues “the self-declared states may accept confederal ties with the metropolitan state” (Lynch 2004, 51). For instance, briefly during the course of negotiation in 1997, Nagorno-Karabakh offered to remain within Azerbaijan so long as it was under a confederation (Croissant 1998, 138). If this were to happen, the preservation of the separatist republics would only be nominal as the territories still seek to preserve sovereignty whether it is *de facto* or *de jure*, an outcome that both Georgia and Azerbaijan reject. Considering these disagreements, is there a common outcome both sides can agree on? In the past, James Fearon (1995) posited that two sides in a conflict should be able to reach some sort of settlement given the costly nature of war. However, the current status quo in Abkhazia and Nagorno-Karabakh is not so costly for every actor. The leaders of the separatist republics only seek to benefit from retaining sovereignty in the present situation, and seem to have no immediate impetus to resolve the stalemate given the rewards they enjoy and the unlikely possibility that hostilities will resume.

With this continued quagmire, the question remains: How can the stalemate be resolved? Clearly, a military resolution is not an option. Autonomy would have been a satisfactory solution for Abkhazia before the outbreak of conflict, and though it was not extended in the case of Nagorno-Karabakh, it might have been a viable option there as well. However, the wars created not only an environment of mistrust and hostility, but also entrenched a set of elites within the territories opposed to any outcome other than independence.

In searching for a means to remedy the present situation, Azerbaijan and Georgia must realize that they cannot restore sovereignty and dissolve tensions in the disputed territories overnight. As much as Azerbaijan and Armenia may want to fully incorporate the breakaway regions within their nations, this would not be feasible without further negotiation. The Caucasian republics should continue to lure elites in the breakaway republics with incentives of further political control. For instance, the previously referenced institutional framework of confederation may be one useful method of preserving Georgia and Azerbaijan’s mutual desires to retain territorial integrity. Should these incentives still fail, Azerbaijan and Georgia might best be served by maximizing whatever gains they can get in exchange for legally acknowledging

the sovereignty of the territories. In Azerbaijan's case, territorial swaps offered by Armenia in negotiations over Nagorno-Karabakh's independence may serve as another means by which the country could benefit through accepting the breakaway region's sovereignty (Ziyadov 2010, 116). A longer-term strategy for Georgia and Azerbaijan might also involve waiting for the interests of local elites in the regions to change. If either Russia or Armenia were to decrease their support for the elites of the republics, these elites might then be willing to consider whatever they had previously been offered by Georgia and Azerbaijan.

It appears Georgia and Azerbaijan still do not accept that they have little chance of reincorporating these separatist regions at this point in time. In the future, Azerbaijan may be better suited to accept this reality and finally achieve a solution to the separatist stalemate. Unlike the talks regarding Abkhazia, the Nagorno-Karabakh peace process has produced a number of proposals on which both sides have agreed. Furthermore, the international mediator of these talks, the OSCE Minsk group, provides an objective framework for negotiations.

In contrast, negotiations between Georgia and Abkhazia are unlikely to bear any fruitful settlement in the near future. Relations between the two have been tense since the South Ossetian War, and the Russian Federation may continue to meddle in the region. Even still, the likelihood that either Georgia or Azerbaijan will shift their position any time soon seems unlikely considering their fixed preferences in previous negotiations. International or external pressure on these actors may provide one mechanism to induce them to accept alternate proposals for peace.

The violent and divisive interethnic wars in Abkhazia and Nagorno-Karabakh produced conditions for mistrust and fear between actors. Because the region lacked comprehensive and neutral mediation, the negative repercussions of conflict went unaddressed. Instead, the former combatants sought to maximize their preferences, thereby complicating negotiation and producing the current stalemate. Without a clear shift in attitudes by either actor, the stalemate seems likely to continue. Unfortunately, as the impasse toward a solution persists, the divisions between the actors involved only seem to grow wider, diminishing any normalization of relations in the region and any chance of reconciliation between the former combatants.

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Accountability v. Impunity: Kosovo, East Timor, and the Manipulation of International Justice

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In this paper, I provide a substantiated theory to explain why the comparable crises in Kosovo and East Timor of 1999 were treated differently. More specifically, I seek to address why the leaders at the highest level of Serbia had their day in court, while their Indonesian counterparts have enjoyed impunity. I show that the disparity is best understood by looking at the United States' role as an "agenda setter" that pushed for accountability against Serbia (an ideological rival) and downplayed or ignored the crimes of Indonesia (an important geopolitical client state). The United States accomplished this by influencing where tribunals would be used and how well supplied they would be. Additionally, the U.S. provoked extradition and compliance by means of economic dis/incentives. This paper concludes that while the International Criminal Court (ICC) eliminated the ad-hoc tribunal system, agenda-setting will still be available to strong states by influencing extraditions.

A decade has passed since the crises in Kosovo and East Timor prompted international intervention and the subsequent creation of two new states. The meaning of these events continues to spark debate in a several different ways, including the evolving notion of humanitarian intervention—culminating in the “Responsibility to Protect” resolution—and successful examples of nation building. However, by pairing Kosovo and East Timor as a case study we can also investigate another important question concerning the push for what Yves Beigbeder (2005) has called “international justice against impunity.”

This paper’s central aim is to definitively answer the question: How did it happen that high level suspects in Serbia¹ were held accountable while high level suspects in Indonesia have effectively

¹ One of the frustrations in discussing Serbia over a span of fifty years is its many name changes. Over the years Serbia has been a part of: the Socialist Federal Republic of Yugoslavia (1945-1991), the Federal Republic of Yugoslavia (1992-2003), the State Union of Serbia and Montenegro (2003-2006), and Serbia (2006-present). In all of these formulations Belgrade, Serbia was the political capital. I have chosen to sacrifice 100 percent accuracy for clarity by referring primarily to Yugoslavia as anything before 2000 and Serbia as anything after.

enjoyed impunity? I will demonstrate that the asymmetrical actions of the United States, which were based on historical relations, geopolitical importance, and preference to protect a client state, are largely responsible for this disparity.

This case study also reveals the principal weakness of accountability: justice against impunity is expensive. While the tendency may be to forget about atrocities and look to the future, justice only stands a chance when either a powerful state (or group of states) is willing to back accountability against impunity or when a state is too weak and lacks a powerful benefactor to provide it impunity. This is a reality that outlives the Security Council's ad-hoc system of tribunals and will remain a structural flaw of the International Criminal Court. Combined with the United States' expressed disdain for the Court (witnessed in the passage of American Service-Members' Protection Act), we are provided with a good outline of the expected limitations of the court and serious questions about its future use.

Kosovo and East Timor: a cause for comparison?

It is well worth asking: are the cases of Kosovo and East Timor comparable? If so, how? For all their differences, they are comparable in a few key ways that make a comparison of their differences in treatment a useful case study. Developing the separate narratives at length is worthwhile; however, in the interest of space I will only introduce three causes for comparison before discussing the differences.

1. Both are comparable in terms of their root causes: a struggle for self-determination from a regional hegemon.

The status of Kosovo in the 20th century included many periods of change. Following World War II, Josip Broz Tito's desire to unite Yugoslavia was actualized using repression, especially for Kosovar Albanians in the earliest years. By the late 1960s, activism had loosened Belgrade's centralized control of the Kosovo province, which subsequently led to the autonomous status of Kosovo. The progress was short lived. By the 1980s, Belgrade reversed its policies and constricted the rights of Kosovar Albanians (who were a large majority the Province). Capitalizing on the ethnic tensions and hoping to consolidate control of Kosovo, Slobodan Milosevic

revoked its autonomous status in 1990. Following the Bosnian war, tensions in Kosovo reached a boiling point. The peaceful efforts of the Kosovar Albanians were failing to effect change as Belgrade's recourse to violence and repression grew in frequency and intensity. As the Kosovo Liberation Army (KLA) began mounting an armed struggle, a predictable pattern of escalating violence emerged. By 1998, Amnesty International reported, "[p]olice ill-treatment [was] an everyday occurrence in Kosovo province. Human rights abuses such as torture, extrajudicial executions and unfair trials of political prisoners occur regularly" (EUR 1998).

For East Timor, Portugal's Carnation Revolution in April 1974 quickly led to independence movements in the former colony. Indonesia immediately began to express interest in adding East Timor as a new province and virtually created the pro-integration party (APODETI). Facing widespread indigenous support for an independent state, Indonesia launched Operation Lotus, a huge invasion of the capital city, Dili. A popular opposition formed, and guerilla warfare followed, continuing into the 1990s. In the late 1970s, the conflict reached its height as Indonesia used starvation tactics to undermine popular support for the resistance. An endemic culture of torture, rape, and extrajudicial killings characterized Indonesia's 25 year occupation, which claimed as many as 200,000 East Timorese lives (about a third of the total population).

2. Both cases are comparable in terms of the level of crime that directly preceded international intervention in 1999. A comparison of the highest level indictments reveals a qualitative similarity concerned with the same legal questions.

Table 1: Comparing the Atrocities in 1999

	Kosovo		East Timor
Population	2,000,000 ²		815,000 ³
Majority	Kosovar Albanians (90%) ⁴		Independence (78%) ⁵
Minority	Ethnic Serbs (10%)		Integration 22%
	Before NATO	After NATO	
Displaced Persons	400,000 (22%)	1.6mn (90%)	400,000- 500,000 (49- 62%) ⁶
IDPs	350,000 (21%) ⁷	863,000 (48%)	200,000- 300,000 (25- 37%)
Refugees	<50,000 (<1%)	590,000 (32%)	200,000 (25%)
Crimes Against Humanity			
Murder	500-2,000 ⁸	10,000	1,400 ⁹
Forced deportation	--	800,000 (44%) ¹⁰	200,000 (25%) ¹¹

² Given the problems with estimating the population for Kosovo, an estimate of two million is generally accepted as accurate.

³ Population estimate for Timor-Leste is from the UN World Population Prospects.

⁴ Estimated percentage of Albanians in Kosovo is taken from *The Kosovo Report* (2000, p. 108).

⁵ Percentages of those favoring independence vs. integration are determined by the referendum held at the end of August 1999.

⁶ For the lower figure of displaced persons see Mydans, Oct. 1999; for the higher estimate see Human Rights Watch, "Indonesia."

⁷ The numbers of displaced persons (before and after the NATO bombing campaign) are taken from *The Kosovo Report* (2000). The pre-NATO number of IDPs is calculated by the number of refugees reported by Amnesty International at the end of September 1998.

⁸ The lower number of murdered Kosovar Albanians preceding the NATO bombing is taken from Nicholas Wheeler (2003) while the higher estimate is the high-end estimate of *The Kosovo Report*.

⁹ The number of East Timorese killed is taken from the CAVR report.

By the end of the Kosovo War, nearly the whole population was displaced, and an estimated 10,000 people were killed. Instances of torture, rape, and destruction of property were also widespread. Similarly, when the violence ended in East Timor, the majority of the country had been displaced, and an estimated 1400 people were killed. Again, torture, rape and destruction of property were widespread. In terms of population size, the levels of crime were comparable.

Comparing the indictments from the UN-backed courts of the highest ranking civilians and military officers charged with criminal misconduct highlights these similarities (see Wiranto et al. from the Special Panel for Serious Crimes in East Timor and Pavkovic et al. from the International Criminal Tribunal for Yugoslavia). Both of the indictments contain five counts that deal with three major crimes: murder, deportation/forced transfer, and persecution. The content and wording of the indictments are noteworthy and appear to nearly parallel one another:

¹⁰ The number of forcibly deported Kosovar Albanians (800,000) is taken from an ICTY indictment, (Pavkovic et al. 2003, 7)

¹¹ The number of forcibly transferred persons is taken from the arrest warrant for General Wiranto, 2003.

Wiranto et al.

Count 1: "...the murder of hundreds of East Timorese civilians as part of a widespread or systematic attack directed against a civilian population with knowledge of the attack..."

Count 3: "...the deportation or forcible transfer of the population of East Timor as part of a widespread or systematic attack directed against a civilian population with knowledge of the attack..."

Count 4: "...persecution of an identifiable group within East Timor as part of a widespread or systematic attack directed against a civilian population with knowledge of the attack..." where persecution is described as: (1) murder (2) physical assaults / beatings (3) unlawful detentions and (4) widespread destruction of property

Pavkovic et al.

Count 3: "...murdered hundreds of Kosovo Albanian civilians. These killings occurred in a widespread and systematic manner..."

Count 1: "...perpetuated the actions...which resulted in the forced deportation of approximately 800,000 Kosovo Albanian civilians..."

Count 5: "...utilized the means and methods...to execute a campaign of persecution against the Kosovo Albanian civilian population based on political, racial, or religious grounds..." where persecution is described as: (1) murder (2) beatings (3) unlawful arrests (4) forcible transfer / deportation (5) destruction of property and religious sites (6) sexual assault

3. Both share an important temporal element. By international relations standards, the crises peaked nearly in tandem. NATO began bombing Kosovo in March 1999 while Australian Peacekeepers landed in East Timor on 20 September 1999.

The timing is important because the development of these two crises shared the stage with the same world events and political climate. Had the crises occurred several years apart, comparisons would be that much less meaningful as the Cold War or the “global war on terror” would add a qualitative difference. Their temporal proximity adds significantly to the comparison.

Nonetheless, there are several differences in treatment worth mentioning. These can be used to explain why there was impunity of high-ranking suspects for Indonesian crimes, while individuals of similar status in Serbia were punished. To cite a more specific case, why was Indonesia allowed to oversee the security of the referendum for East Timorese independence, while Yugoslavia was confronted with the ultimatum of bombing or occupation?

The historical pattern of Indonesia’s involvement in East Timor should have suggested the continued threat of violence to obtain political objectives. In the case of the August 1999 referendum, the resulting atrocities and intimidation were entirely predictable and often explicit. Despite the highly publicized announcements of withdrawing 1000 Indonesian Special Forces in August 1998, the *New York Times* reported an estimated 11,000 Indonesian troops remained, with perhaps as many more secret police (Mydans 1999). Months before Portugal, Indonesia, and the UN Secretary General agreed to allow Indonesia oversee the security during the referendum (called the May 5 Agreement), the *New York Times* was reporting that “small armed bands” who were opposed to independence were willing to “fight...with weapons provided to them by the Indonesian military” (Shenon 1999). Meanwhile, Stanley Roth, the Assistant Secretary of State for East Asian and Pacific Affairs, confirmed that the State Department had been given “numerous reports that the Indonesian Army [had] been arming” the opposition militia groups.

Maintaining peace, security, and democratic outcomes was undermined by Indonesia’s brutal invasion—and subsequent occupation—of East Timor. Less than a month before the May 5 Agreement, the Indonesian Army was actively participating with the local militias in a massacre of pro-independence leaders that left “flesh hanging from the church walls” (Nairn 2009). This devastation highlighted Indonesia’s inability to accomplish the task of overseeing security.

The fact that the principal tormentors of the East Timorese were responsible for their security was not the only implication of Article 3 of the May 5 Agreement. Article 3 also meant that UN

peacekeepers were not present in East Timor until mid-September, 1999. This was weeks after the results of the referendum were made public and the Indonesian Army and militia violence had run its course. Reports from the first peacekeepers as they arrived found "There [was] no peace to keep: East Timor's tiny capital is a dead city, burned, looted, evacuated" (Mydans 1999).

Some aspects of the differences in response verge on the fantastic. Despite the widespread forecast of a pending "campaign of terror" to be led by the Indonesian Army, the United States "[shied] away from an early deployment of UN or international troops" out of respect for Indonesia's sovereignty. However, President Bill Clinton did convey in a letter to Indonesian President Habibie that "if the rampage worsens" there may be a "veiled threat" of blocking IMF/World Bank funds (U.S. Treads Gingerly on the East Timor Issue 1999).

Four days after the results of the referendum were made public, EU special envoy David Andrews decried "the massacre of innocent civilians and other acts of wanton terrorism," urging Secretary of State Madeline Albright to commit U.S. "political, economic and financial muscle" to persuade Indonesia to halt the atrocities or allow the international community to intervene to stop the violence and restore order (Andrews Succeeds in Fulfilling Objectives as EU Special Envoy 1999). By this time, UN officials were reporting that 200,000 East Timorese had fled the violence and "an almost complete pullout" of international observers was underway. The deference shown for Indonesia's sovereignty was again made explicit: "Both the Clinton Administration and the United Nations reiterated...that they would not intervene without Indonesia's permission." US Secretary of Defense William Cohen stated that the United States "is not planning on any insertion of peacekeeping forces" ("Arguments Raised for, against US Role in Timor" 1999). Although a bombing campaign was never threatened, UN Peacekeepers ended the violence when they arrived on September 20, 1999.

In contrast to the political (and to some extent economic) divide in East Timor, the atrocities in Kosovo were defined by a clear ethnic divide between the Serbs and the Kosovar Albanians. One of the justifications for the NATO bombing campaign was the alleged existence of a plan to ethnically cleanse Kosovo called Operation Horseshoe. Today, it remains unclear whether Serbia planned to ethnically cleanse Kosovo prior to (and independent of) the NATO

bombing campaign and whether the plan of ethnic cleansing would have been pursued regardless of NATO's actions.

Among others, Peter Ronayne (2004, 63) claims that a covert plan "had been drawn up months before and showed that, while Milosevic was engaged in political theatre at Rambouillet, his forces had been preparing to destroy the Kosovar Albanians." Mark A. Wolfgram (2008, 153) argued that the alleged Operation Horseshoe was politically convenient and fell prey to "the illusion of multiple sources and the illusion of independent confirmation." The Kosovo Report acknowledges the ambiguity surrounding the alleged existence of Operation Horseshoe, emphasizing, "it was a serious mistake by the NATO countries not to foresee that the bombing would lead to severe attacks on the Albanian population" (Independent International Commission on Kosovo 2000, 89).

For the purposes of this paper, the question need not be thoroughly discussed. It is clear that Serbian generals, not NATO, are directly responsible for these atrocities. However, the distinction between the pre- and post-NATO responses demonstrates that when the levels of atrocities were most comparable (that is, before the NATO intervention), the situation in Kosovo was treated differently from the situation in East Timor. Whereas Serbia was approached with the illegal threat of force by NATO to bring an end to the atrocities in Kosovo, Indonesia was allowed a free hand to torture, kill, and intimidate the East Timorese.

Essential to this critique is an understanding of the diplomatic efforts attempted with Serbia. When comparisons between Kosovo and East Timor were made, they were easily dismissed by "pointing out that other diplomatic avenues were closed with Yugoslavia and the Kosovar Albanians had never been permitted to vote for independence, two key differences from East Timor" (Arguments Raised for, against US Role in Timor 1999).

To provide support for this theory, the conferences in Rambouillet deserve some attention. Departing from convention, the negotiations "were carried out against the backdrop of the threat of NATO air strikes," which is explicitly forbidden by article 2(4) and article 42 of the U.N. Charter. Moreover, "[e]ven of the principles [drafted before the meeting] were non-negotiable" of which two were irreconcilable" (Bieber and Daskalovski 2003, 4, 105-6), namely, the ambiguous status of Kosovo and the military occupation of Serbia by NATO forces. The portrayal of Yugoslavia as unyielding for rejecting NATO's ultimatum is unwarranted because

no sovereign nation would agree to these terms. Historian Howard Zinn notes that Milosevic did make a counter proposal on March 23, 1999, which rejected a NATO occupation but favored dialogue leading “toward the reaching of a political agreement on a wide-ranging autonomy for Kosovo....” He continues:

The Serbian proposal was ignored, and was not reported in the major newspapers of the United States. The following day, NATO forces (meaning mostly U.S. forces) began the bombing of Yugoslavia. (Zinn 2003, 660)

Was Milosevic serious in his counter proposal or buying more time to continue committing atrocities against the Kosovar Albanians and advancing plans of ethnic cleansing? Accordingly, what was gained (or reasonably expected to be gained) from ending attempts at negotiations in favor of a bombing campaign, which served to perpetuate the Serbian violence?¹² It is not clear why “diplomatic avenues were closed with Yugoslavia.”

The issue of voting for independence is also not so straightforward when viewed through a legal framework in early 1999. In the years that have followed NATO’s intervention, a debate over the legality of recognizing the independence of Kosovo has remained. For example, the American Society of International Law assembled a group of international lawyers, which included the respected Justice Richard Goldstone, to consider this legal question in April of 2008. The major issue is that United Nations Security Council Resolution (UNSCR) 1244, which established the United Nations Mission in Kosovo (UNMIK), laid out provisions for its autonomy, and “[reaffirmed] the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and other states of the region.” The language is emphasized again in Annex II of the resolution. The Kosovo crisis should be resolved through:

[a] political process towards the establishment of an interim political framework agreement providing for

¹² There is reason to believe that the Clinton administration understood that the bombing campaign could increase the “campaign of ethnic cleansing” and “was likely to provoke a Serbian killing spree” (Wheeler 2003, 268-9). The quotations belong to CIA Director George J. Tenet and Chairman of the Joint Chiefs of Staff General Harry Shelton.

substantial self-government for Kosovo, taking full account of the Rambouillet accords and the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other countries of the region.

This is distinct from the legal issue in East Timor, which was annexed in violation of the most basic principles of international law by Indonesia in 1976 and condemned by UNSCR 384, which “[recognized] the inalienable right of the people of East Timor to self-determination and independence in accordance with the principles of the Charter of the United Nations” and “[called] upon the Government of Indonesia to withdraw without delay all its forces from the Territory” of East Timor. UNSCR 389 passed a year later, reiterating the previous year’s resolution with the notable abstention of the United States. Aside from Australia, no country ever legally recognized Indonesia’s annexation of East Timor.¹³

This significant difference of treatment offers a good measure of how influential countries such as the United States approached these similar crises.

Kosovo and East Timor: explaining the difference in treatment

To explain the difference in accountability and impunity, one must consider the evolution of the International Criminal Tribunal for Yugoslavia (ICTY), the Indonesian Human Rights Court (HRC), and the Serious Crimes Process (SCP) in East Timor;¹⁴ the United States’ relationships Yugoslavia and Indonesia through the 1990s; the amount of pressure the international community placed on Yugoslavia and Indonesia to prosecute or extradite the alleged criminals; and the amount of resources allocated to the UN-sponsored courts. The principal findings to these questions are:

¹³ Australia’s recognition of East Timor as a province of Indonesia coincided with an agreement with the Government of Indonesia to exploit the natural gas and oil fields in the Timor Gap. Many of these deposits fall within Timor-Leste’s exclusive economic zone and have been the subject of legal battles since the country’s independence.

¹⁴ I use the term “Serious Crimes Process (SCP) in East Timor” to refer collectively to the Special Panels for Serious Crimes and Serious Crimes Unit. That is, the judicial and investigative halves charged with pursuing accountability.

1. The existence of the ICTY prior to the atrocities in Kosovo allowed for immediate action, while the “manifestly inadequate” Indonesian HRC prevented the creation of an international tribunal and delayed serious efforts for accountability.
2. The United States led the campaign to isolate Yugoslavia during the height of its atrocities in the early 1990s by means of sanctions and the use of force, while at the same time it took important steps to expand trade with Indonesia and made mild efforts to curb its military cooperation. During the 1970s, at the height of the atrocities in East Timor, the United States actively participated by increasing arms sales and providing important (and perhaps enabling) diplomatic support.
3. Tremendous international pressure was placed on Serbia to extradite its alleged criminals to the ICTY, while no serious pressure was placed on Indonesia to pursue accountability via the HRC or to extradite the alleged criminals to SCP in East Timor.
4. The amount of resources allocated the ICTY far outnumbered the amount given to SCP in East Timor in terms of money, training, and forensic specialists.

A synthesis of these principle findings reveals that the political isolation of Serbia was the major reason international efforts for accountability were able to move forward. Unlike the Indonesian atrocities, the Serbian atrocities were not fought with western weapons and diplomatic support. Unlike Indonesia, Yugoslavia was not an important geo-political or economic client state of a powerful country like the United States.

Tribunal, No Tribunal

Our comparison of the efforts to achieve accountability in Kosovo and East Timor benefits greatly from comparing the three different courts created to address the grievances. The ICTY dealt exclusively with the crimes committed in the former Yugoslavia (including Kosovo). The atrocities in East Timor led to the creation of two different courts: the Indonesian Human Rights Court (HRC) and the Special Panels for Serious Crimes in East Timor. Considering them in turn reveals important asymmetries. Chief among them is that the ICTY was created years before the 1999 atrocities in Kosovo with

massive support from western countries (especially the United States), while the occupation and long history of atrocities in East Timor were essentially ignored. This had significant implications in 1999 because a relevant legal body was able to actively pursue accountability in Kosovo from the start, while in East Timor a legal body was yet to be created. Furthermore, in an apparent trend respectful of Indonesian sovereignty, Indonesia was permitted to create a national court that was widely believed to be wholly inadequate and has avoided the establishment of an autonomous international tribunal.

In July 1992, as the Bosnian War escalated, reports of atrocities prompted the first Bush administration to introduce a war crimes commission in the United Nation Security Council. The United States quickly emerged as a leader, favoring the establishment of a tribunal, and it put forward considerable diplomatic effort to that end. The Security Council encouraged all states and relevant organizations to collect and present evidence of violations to the 1949 Geneva Conventions on the laws of war. The Council also established a group of lawyers to decide who should be prosecuted. The United States compiled its own list of war criminals and submitted it to the United Nations. Shortly after taking office and vowing to move forward with the war crimes tribunal, the Clinton administration sent its first report to the UN (the fifth from the US) and offered to host the tribunal in the United States. This demand for accountability in the Balkans marked the United States as the most active Security Council member. When a report by UN lawyers assessed that a tribunal's efforts likely would not result in accountability for the highest ranking officials short of regime change (Burns 1993), the United States made clear its intentions to underwrite the tribunal's effectiveness. One *New York Times* headline declared: "White House is Adamant on Balkan War Crimes" (Lewis 1993). The US vowed not to grant or recognize any amnesties for alleged war criminals in Yugoslavia and threatened to push for sanctions against any country harboring alleged criminals.

The establishment of the ICTY had important implications for atrocities in Kosovo. Aside from having a functioning and well-trained staff that had already been indicting and trying individuals for the earlier atrocities, the mere existence of the Tribunal represented a political deterrent. That is to say, Yugoslav leaders should not have been surprised that they might one day be held accountable for their decisions.

The Tribunal's jurisdiction was made clear from the onset of violence. On March 10, 1998, the Office of the Prosecutor issued a press release from ICTY Prosecutor Louise Arbour, reiterating that the ICTY Statute established jurisdiction "over serious violations of international humanitarian law committed in the territory of Yugoslavia since 1991" which, she added, "is ongoing and covers the recent violence in Kosovo," (International Criminal Tribunal for Yugoslavia, Press Release 1998). In November 1998, following the escalating violence and the Gornje Obrinje Massacre, Arbour attempted to lead a team to investigate the crimes, but was denied visas by Yugoslavia. After the Racak Massacre in January 1999, she again attempted to launch an investigation, but Yugoslav guards refused her entry at the Macedonian border (Perlez 1999). As the violence in Kosovo escalated, there was a relevant court with jurisdiction that could make legitimate legal demands.

As noted above, Indonesia was allowed a remarkable level of autonomy in handling 'the Timor question.' Significantly, Indonesia was permitted the oversight of security for the popular consultation in September 1999, and its sovereignty was greatly respected as the campaign of terror was unleashed. The United States originally rejected the deployment of international peacekeepers and only considered the possibility of a "veiled" economic threat as a disincentive to ending the violence. This high level of respect for Indonesian sovereignty was unparalleled in US relations with Yugoslavia and continued after the Indonesian backed atrocities.

The UN International Commission of Inquiry on East Timor (ICIET) conducted investigations in Indonesia and East Timor immediately following the atrocities and recommended the creation of an international tribunal to pursue justice. The ICIET doubted both the ability and willingness of Indonesia to conduct adequate trials against their nationals – a conclusion shared by the three UN Special Rapporteurs sent to East Timor in October 1999 (ASA 2004, 6). A contemporary report from Amnesty International also noted that President Habibie's Indonesia shared a "striking similarity to the repressive methods employed by the former Suharto regime" and that other national attempts at accountability had stalled or failed (ASA 1998). Despite these recommendations and warnings, Indonesia managed to forestall an international tribunal by agreeing to establish a national Human Rights Court.

This arrangement resulted in the Indonesia's well-received Commission of Inquiry into Human Rights Violations in East Timor

(KPP HAM) Report¹⁵ and a “manifestly inadequate” series of trials by a Commission of Experts who were appointed by the Security Council and Secretary-General to oversee the judicial progress concerning the atrocities in East Timor (S/2005/458, 88). The disparity between the Indonesian KPP HAM Report and the trials that were supposed to reexamine its initial findings has been observed by other credible organizations. In their World Report (2001, 192) Human Rights Watch noted, “KPP HAM issued a thorough and professional report,” the quality of which, “served to give the Indonesian effort more credibility than it otherwise might have had.” Similarly, Amnesty International summarizes the KPP HAM Report’s detailed findings, but did not “consider the Indonesian process related to crimes in Timor-Leste to have been truthful, honest or fair” (ASA 2003).

The gaps between the KPP HAM Report and the trials are significant. They are detailed in great length by a number of important reports including a Summary Report to the Secretary-General and the report by Amnesty International. Generally, the reports make the same argument: the prosecution downplayed or ignored the key findings of the KPP HAM Report. Specifically, the Indonesian Attorney General’s Office avoided the conclusions that linked the Indonesian Army and police to the militias and the systematic campaign of violence, that there was knowledge of the violence at the highest levels of command, and that the violence included the crimes against humanity of mass murder, torture, enforced disappearances, sexual slavery and rape, and a scorched earth policy (S/2005/458, 5-6, 38-79; ASA 2004, 24-48). The Ad Hoc Court acquitted all of the defendants with the exception of Eurico Guterres who served two years of his ten-year sentence before the Indonesian Supreme Court overturned his conviction in 2008.

It is difficult to understand why the Security Council forestalled an international tribunal favoring the creation of a national Indonesian court if accountability against impunity was the determining consideration. News articles often reported that some members of the Security Council were opposed to the creation of an international tribunal, especially veto-holding powers, Russia and China. U.S. officials did not consider the endeavor feasible because

¹⁵ The full KPP HAM Report is available in chapter three of *Masters of Terror: Indonesia’s Military and Violence in East Timor* (2006).

the cost, trouble of extradition, and lack of benefits for Indonesia or East Timor. None of these concerns applied to Serbia. In the early 1990s the U.S. led a campaign in the Security Council, winning abstentions from Russia and China and (with European powers) went to great efforts to ensure the extradition of the alleged Serb war criminals.

As predicted, the Indonesian HRC was ultimately a failure. Similarly, the Serious Crime Process (SCP) in East Timor faced a number of challenges from its inception in 2000. Establishing the SCP meant starting from scratch. The Indonesian withdrawal brought about the destruction of all the institutions of civil society and left behind what Amnesty International called a “virtual vacuum” (ASA 2004, 7).

The International Center for Transitional Justice noted the early trouble with Serious Crimes Unit (SCU), the investigative half of the SCP, in coordinating its efforts with the Serious Crimes Panel, the judiciary half. The earliest personnel of the SCU lacked local language skills and did not adequately involve the Timorese or respected human rights organizations familiar with the history of conflict (Reiger and Wierda). The Amnesty International report (ASA 2004, 7-20) also describes the first two years in particular as marked by a lack of resources and poor planning.

After the first several years, many of these problems were resolved, and the remaining impediments were largely political. Perhaps the ultimate problem was Indonesia’s unwillingness to cooperate. The SCP mostly convicted low-ranking offenders who did not bear the greatest responsibility for the systematic nature of the atrocities. All of the high-ranking, Indonesian military and civilian officials were safe in Indonesia, which refused to recognize the legitimacy of the SCP.

The independence of the General Prosecutor was called into question after he submitted an indictment against the individuals most responsible for the atrocities (all of which were Indonesian) to the Special Panels for Serious Crimes only to recall it and the Court’s warrant after receiving a phone call from the President of Timor-Leste’s, Xanana Gusmão’s, office.

The leadership of Timor-Leste adopted the view that short of the UN or international community’s ability to ensure Indonesian cooperation or the creation of an international tribunal, there was no point in maintaining the SCP with the nascent country’s limited resources for an endeavor that did not seem realizable. It was viewed

as more important in the short and long term to pursue policies of “friendship” with Indonesia, a regional giant and important trading partner. Timor-Leste could not defend itself against Indonesia independently, and the symbolic value of trying was far outweighed by more practical, economic concerns. The SCP concluded its work in May 2005 without trying the Indonesian generals or civilian leaders alleged to have been the most culpable for the systematic campaigns of terror in late 1999.

In the early 1990s, the United States firmly backed the creation of the ICTY, which was available to hold the accused generals accountable for the atrocities in Kosovo. The creation of an international tribunal for East Timor was temporarily set aside favoring the Indonesian Human Rights Court despite the understanding that it would likely fail to be a serious endeavor. When the court failed an international tribunal, it was not created. The United States did not lead a campaign in the Security Council to win the votes necessary to create a competent tribunal but advocated a truth commission. Meanwhile, the SCP in East Timor continued with minimal international support and remained unrecognized by Indonesia.

Sanctions and Intervention v. Expanding Trade and Military Assistance (Before 1999)

The United States emerged as the leading proponent of strict sanctions and the use of force against Yugoslavia in the 1990s while simultaneously celebrating the expansion of trade relations with Indonesia and taking mild steps to curb its level of military involvement.

U.S. involvement in the earlier (and much worse) atrocities in East Timor dates back to 1975, when the United States facilitated an invasion and provided large amounts of materiel and diplomatic support for the subsequent, continuing occupation. Judging the second half of the twentieth century as a whole, US policy towards Yugoslavia and Indonesia is inconsistent or even inverted in the terms of this study: The crimes of Indonesia were quickly forgotten and no effort was made to address the ongoing occupation and low level violence of the 1980s and 1990s. In contrast, the crimes of Yugoslavia became an international ordeal that spurred the creation of the first international tribunal.

Scholars on the topic of economic integration and cooperation between the United States and Yugoslavia have defined it as “generally positive” through the 1980s in its “ability to overcome difficulties over roughly four decades, despite the profound differences in circumstances and ideology that separated the two countries” (Lampe, Prickett, Admović 1990). The nominal value of Yugoslav imports and exports follow a trajectory of more or less steady growth up until the beginning of the 1990s. The following decade and a half proved to be an economically tumultuous period due to sanctions and NATO bombing campaigns aimed at halting the atrocities.

On the issue of sanctions, the United States led the Security Council in pressing for the most severe sanctions against Yugoslavia. While China and Russia originally opposed the early oil embargo (and the tighter sanctions that followed), the United States eventually managed to get these two permanent members to abstain from the Security Council vote and (arguably) dictate the terms of the resolution (“US Shouldn’t Dictate to Other Countries: Yeltsin” 1993).

The United States also led the way on the issue of the use of force. The world’s seven largest industrial countries released a declaration in Munich on July 7, 1992, that included the threat of military force. The United States took a leading role in the effort. Secretary of State James Baker stated the U.S. “served as a catalyst for action” (Gordon 1992) in the declaration. Chairman of the Joint Chiefs of Staff, General Colin Powell, said that the United States was prepared to return war ships into the Adriatic Sea. Britain and France hesitated on the declaration, fearing retaliatory attacks against their peacekeepers in the conflict area. However, as Serb bombing raids rose in frequency, the first Bush administration sought to introduce a United Nations resolution that would ban Serb war flights. This U.S.-backed version of the resolution was tougher than an earlier version approved by France because it included options for enforcement. The Security Council approved NATO’s Operation Deny Flight in April 1993 to enforce the no-fly zones. As the atrocities escalated, the mission changed to Operation Deliberate Force (an intense 21-day bombing campaign) in August 1995. This led to the Dayton Peace Agreement, which was signed on December 14, 1995.

Brad Simpson offers an excellent summary of the burgeoning U.S./Indonesian relations in the years following the military coup that deposed President Sukarno and established the Suharto

dictatorship in 1965. An especially brutal year followed in which the new rulers systematically killed, tortured, and arrested Communist Party members based on their political affiliation. Perhaps 500,000 were killed while hundreds of thousands more were detained and tortured. It was the effective liquidation of the Communist Party. Simpson writes that, in the immediate aftermath of the carnage, geopolitical concerns led the United States and Japan to create the Inter-Governmental Group on Indonesia (IGGI), which helped underwrite the Suharto Regime by supplying it with about \$450 million annually (Simpson 2005, 283). In the decade that followed before the invasion of East Timor, the United States became one of Indonesia's principal military suppliers. It was in this period that Indonesia became a US client state.

Following the Carnation Revolution (1974) in Portugal the 'Timor Question' quickly surfaced: What would be the future status of the Portuguese colony, East Timor? Fearing that an independent East Timor would cause further instability, Suharto's generals advocated preventing such an outcome.

Operasi Komodo was the solution. This covert operation originally aimed to sway the Timorese toward integration with Indonesia by use of propaganda, but eventually expanded to include violence. Another important component of the operation involved winning approval from important foreign countries to annex the region (Simpson 2005, 286).

The United States could hardly claim to have been in the dark about the coming Indonesian invasion. Simpson draws on a large number internal government documents that all agree on this issue. For example, Simpson (2005, 287-8) describes a large-scale, joint military operation in South Sumatra predating the invasion of East Timor, which was viewed by western officials (including those from the U.S.) as a dry run of the eminent invasion of East Timor, following which "[a] general policy of silence" was advocated by Secretary of State Henry Kissinger when the US Ambassador to Indonesia outlined the fact that "we have considerable interests in Indonesia and none in Timor." Simpson (2005, 290) concludes that, by July 1975, as the Ford Administration was promising "surplus naval vessels, tanks and aircraft" and raising military assistance to \$43 million for FY 1976, US intelligence was "well aware of Jakarta's intention to absorb Portuguese Timor by force if necessary." In Jakarta, directly before the invasion, President Suharto asked President Ford to understand the pending invasion. Ford

replied, “We will understand and will not press you on the issue. We understand the problem and the intentions you have” (Simpson 2005, 296). Kissinger advised that “[i]t is important that whatever you do succeeds quickly” (Simpson 2005, 296). The writing was on the wall; the coming invasion of East Timor was not a surprise in the highest echelons of US leadership.

US policies after the invasion on December 7, 1975, remained favorable to Indonesia’s ambitions. Despite the fact that 90% of the weapons used during the invasion came from the United States, the plans to double military aid for FY 1976 continued followed by an additional increase for FY 1977 bring that year’s total to \$47.4 million (Simpson 2005, 300). Congressional efforts to suspend aid made no progress.

The United States continued supplying millions of dollars worth of arms through the Foreign Military Sales program, the Commercial arms sales program, and the Military Assistance Program and Excess Defense Articles as well as nearly uninterrupted diplomatic support until 1999. By the early 1990s, the violence in East Timor had simmered down, and the Indonesian presence was focused on maintaining a level of fear by extrajudicial measures that insured compliance with Jakarta’s nationalist ambitions for the territory. Amnesty International reports from the period repeatedly documented torture and maltreatment, sexual abuse, and extrajudicial executions. Following the November 12, 1991 massacre of at least a couple hundred East Timorese who gathered at the Santa Cruz cemetery to mourn the murder of a pro-independence youth, international outrage prompted significant changes in US/Indonesian relations.

Previous unsuccessful congressional efforts to address Indonesian atrocities in East Timor (including a letter to Secretary of State James Baker by a majority of the House of Representatives) were finally able to make progress. Whereas a year earlier, in the first Bush administration, the United States (joined by Australia and Japan) blocked a critical U.N. Human Rights Commission resolution calling for investigations of alleged torture and extrajudicial executions, the Clinton administration shifted to supporting the 1993 version. Starting FY 1993, the U.S. placed tighter restrictions on the sale of weapons to Indonesia and banned all International Military Education Training funds. The ban was not, however, a separation of the historically close relations between the United States and Indonesia. Rather, it was far less severe than some reporting

indicated. By the end of 1993, the Clinton administration admitted that the United States continued to train Indonesian officers despite congressional objections. The State department clarified that “[C]ongress’s action did not ban Indonesia’s purchase of training with its own funds, but rather cut off the United States funding for possible training” (Indonesia Military Allowed to Obtain Training in U.S. 1993). The United States also continued to annually give tens of millions of dollars in US Security Assistance until the fiscal year of 2000. In 1998, it was discovered that the Pentagon had secretly been providing the Indonesian military with Joint Combined Exchange Training (JCET) on a monthly basis since 1992 (Myerscough 2006). The JCET program included training in special operations including air assault and urban warfare as well as psychological warfare. The program also included the training of the notorious Kopassus commando unit—referred to as “the most feared, most hated, and most abusive Indonesian unit in East Timor” (Indonesian Army Recruits Training in Vermont 1999).

Congressional attempts to limit US military assistance to Indonesia had no effect on non-military trade. Significant trade deals were underway in the early 1990s with great pomp and circumstance and absent much concern for human rights in East Timor. For Example, Secretary of Commerce Ronald H. Brown dismissed arguments that privileged human rights over the Clinton administration’s proactive promotion of US multinational corporate interests as “silly,” instead signing contracts totaling around \$40 billion for US business in Indonesia (Lippman 1994).

Overall, trade between the United States and Indonesia expanded greatly over the second half of the twentieth century. By the early 1990s (coinciding with the high level of international attention on the violence in East Timor and Congressional efforts to ban military assistance) U.S. trade with Indonesia was experiencing one of its most prominent periods of growth. Indonesia’s economy prospered as the decade’s annual exports nearly tripled, rising from \$3.3 to nearly \$10 billion dollars (U.S. Trade in Goods (Imports, Exports and Balance) by Country 2010).

The United States (among other western nations) supported Suharto’s 1975 invasion of East Timor and provided materials beginning in the late 1970s, throughout the 1980s, and into the 1990s. As the level of atrocities in Yugoslavia during the early 1990s reached the same level of violence found in East Timor during the late 1970s, the United States and other western nations did not have a

reason to supply weapons or political support to enable and maintain Milosevic's atrocities. Instead, the United States led the effort to halt the violence and weaken Yugoslavia by introducing a criminal tribunal, advocating exhaustive sanctions, and forcefully intervening. In East Timor, an unusually large massacre that happened to be captured on film finally caused enough popular outrage to force Congress to curtail military aid (though, significantly, no effective legal efforts were considered to address the more than fifteen years of illegal occupation or accountability for the massive atrocities of the recent past).

By the mid 1990s, the United States was demanding accountability for the recent atrocities in Yugoslavia and circumventing Congress to fund the ongoing atrocities in (and the occupation of) East Timor.

Pressure to Extradite v. Bailouts and Renewed Military Assistance (After 1999)

Another significant, inconsistent decision that the United States made regarding the 1999 atrocities in Kosovo and East Timor was the diplomatic support it lent the ICTY and the Serious Crimes Process (SCP) in East Timor. The United States did not make a uniform effort to ensure the extradition of the indicted generals and high-ranking officials in Indonesia as it did against those in Serbia. In fact, U.S. policies towards Indonesia appear directly opposite to the policies with Serbia. The United States did not play a proactive role in compelling Indonesia to pursue accountability domestically or to cooperate with the UN-sponsored Serious Crimes Process in East Timor. Economic aid and financial assistance were discussed without thought of using these as incentives. Perhaps the most telling example of the apparent disregard for Indonesian atrocities was the second Bush administration's desire to reestablish military links with Indonesia.

In continuation of the aggressive policies to extradite wanted Serbs to the ICTY, the Clinton administration issued a \$5 million incentive for information leading to the arrest or conviction of former Serbian President Slobodan Milosevic, amongst other suspected criminals in June 1999. By the end of June 2001, the Serbian government extradited Milosevic, prompting an argument over the constitutionality of the decision. The extradition

immediately preceded an international donors' conference, which attempted to raise \$1.25 billion in loans and grants to rebuild the Serbian economy (Milosevic Extradition Unlocks Aid Coffers 2010). The United States, threatening to boycott the conference, made its attendance conditional on Serbia's extradition of Milosevic. Coffers opened generously at the conference. The European Union, the World Bank, and the United States pledged the overwhelming majority of the credit. The U.S. pledge was nearly twice as large as originally expected, totaling \$181 million. In 2005, following substantial pressure from the EU and U.S., Serbian Prime Minister Kostunica reversed his earlier policy of non-cooperation with the ICTY. In January, after continued isolation from the EU and a \$10 million aid cut by the U.S., Serbia extradited the high-priority suspect, former General Vladimir Lazarevic. Also in April, Serbia extradited another high-priority general, Nebojsa Pavkovic, in hopes of starting the long process of integration into the EU (Wood 2005). By 2007, Prime Minister Kostunica's policy of waiting for indicted suspects to surrender before extraditing them to the ICTY was abandoned, as one of the final high-priority suspect, General Vlastimir Djordjevic, was arrested in June (Serbia Arrests a Fugitive Tied to Crimes in Kosovo 2007). This reversal in Serbian policy was, according to the Guardian of London, "largely a result of international pressure, sanctions and Serbia's international isolation, and ... sparked by shifting US policy" (Taylor 2005).

Indonesia was a different story entirely. After Indonesian President Wahid left office in July 2001, the US State Department and the National Security Council considered a plan to quickly resume economic aid to Indonesia on the condition that the new President, Megawati Sukarnoputri, implement economic reforms (Will U.S. Resume Aid? That Depends on Jakarta 2001). By September, the United States promised \$530 million in new financial aid as the effects of the East Asian financial crisis continued to linger (Arnold 2001). The same month, the IMF offered a \$395 million loan.

In October 2002, Indonesia was again in need of more grants and credit to keep its economy afloat. Forecasting a budget deficit of 1.3 percent of the GDP, Indonesia was expected to seek \$3 billion in new aid (Arnold 2002).

Throughout these years, the discussion surrounding the economic concerns was technical. Discussions considered the dynamic and failing sectors, investment climate, projected deficit,

and expected inflation. It was business as usual, with scant mention of human rights and absolutely no suggestion that aid would be conditional on Indonesian efforts to pursue accountability domestically or cooperate with the Serious Crimes Process in East Timor.

Even more strikingly, U.S. policy planners began advocating a return to the historically close military ties with Indonesia. The second Bush administration took up the debate in 2002, warning that renewed military ties were not to be taken as a sign of Washington's acceptance of past human rights abuses, but that the benefits of a professional army would "outweigh the disadvantages" (Bonner 2002). It appears no consideration was given to making the Serbian army more professional in light of its alleged benefits. By August, Secretary of State Colin Powell indicated that direct military training would soon be resumed via the Pentagon budget, avoiding Congressional oversight. In all, some \$50 million was expected to be spent through the next two years (Purdum 2002).

Less than two weeks after Secretary of State Powell's announcement, the ad-hoc Human Rights Court (created in a national effort to seek accountability for the atrocities in East Timor) acquitted six defendants of alleged crimes against humanity. Officials in the second Bush administration expressed disappointment because the verdict would not be helpful to the administration's effort to re-establish military relations (Perlez 2002). Not satisfied with the aid sent through the Pentagon, the second Bush administration challenged the congressional ban in 2005. Congress rejected removing the bans but compromised by adding a clause that allowed the Secretary of State to bypass the restrictions on aid for national security concerns.

Only two days after the appropriations bill was signed, Secretary of State Condoleezza Rice began exercising her new powers. By early 2006, Rice effectively nullified the congressional ban returning US/Indonesian military relations to the pre-1993 period (Myerscough 2006; Weisman 2006).

Making renewed military ties with Indonesia (on the condition of the extradition of high-priority suspects) was not a Clinton or Bush administration policy. The idea of demanding accountability through a competent national court or cooperation with the SCP in East Timor also does not appear to have been considered. More generally, the human rights situation in Indonesia was not entirely ignored in the military-aid debate. However, it appears more often as

liturgical platitudes absent any serious efforts to realize even minimal results.

Perhaps the most significant inconsistency in treatment of the atrocities in Serbia and Indonesia was the decision to compel extraditions. The ICTY would likely have been as ineffective at trying individuals from Serbia as the SCP in East Timor was with Indonesia if influential European countries and the United States did not use funding and regional integration as an incentive to induce compliance. The fact that the west was willing to provide large bailouts to Indonesia and that the second Bush administration sought to renew closer military ties under the rubric of the so called global war on terror highlights the lack of concern for accountability in Indonesia.

Resources

A final difference between the international efforts in Kosovo and East Timor is the allocation of resources to their respective tasks. This might be better understood as a measure of international commitment than the dominant factor determining the success or failure of either court. Evidently, it is clear that more dollars, training, and forensic specialists were available for Kosovo than East Timor.

The Serious Crimes Process (SCP) in East Timor was an example of a mixed national-international tribunal, which consisted of panels with one local and two international judges. Compared with the international tribunals for Rwanda and Yugoslavia, the mixed courts East Timor and Cambodia are much cheaper. Frustration with the soaring budgets of the ICTY and ICTR helps explain the shift to the cheaper mixed option (and eventually to the ICC). However, the SCP in East Timor operated with the lowest budget of any of the major UN-sponsored tribunals.

Table 2: Financing for Courts¹⁶

International Criminal Tribunal for Rwanda (annual estimate)	\$83,000,000
International Criminal Tribunal for the former Yugoslavia (annual estimate)	\$80,500,000
Special Court for Sierra Leone (three year estimate)	\$75,000,000
Extraordinary Chambers in the Courts of Cambodia (three year estimate)	\$56,300,000
Serious Crimes Process in East Timor (two year estimate)	\$14,358,600

A straightforward comparison of the budgets is not as indicative as might be imagined for a number of reasons. Obvious differences (such as the tasks before the courts and the real value of a dollar in the ranging economies) complicate the comparisons. The point, however, is that the budget for the SCP was notably less. This becomes truly noteworthy when considering the continued lack of resources that characterized the SCP, especially in its earliest years.

A number of authors and reports have described the lack of resources that hindered the SCP. Yves Beigbeder (2005, 142) wrote that the East Timor Court “has done a credible job” despite “[suffering] from a lack of investigative continuity, a lack of resources, a lack of outreach to the overwhelming rural and illiterate population.” The Amnesty International report, *Justice for Timor-Leste* (ASA 2004, 10), noted a “lack of capacity,” “poor administration,” and a difficulty in finding enough judges to sit in both of the Special Panels of the SCP. The Summary Report to the Secretary-General (S/2005/458, 19,23,31,36-7) noted that the Court’s difficulties in terms of resources, capacity, and expertise

¹⁶ My estimates come from the following sources: (1): S/2005/458, 29. (2): Beigbeder 2005, 120. (3): “Third Annual Report of the President of the Special Court for Sierra Leone, 2005-2006,” 6. (4): “UNAKRT: Finances.” (5): The budget for the ICTY varies greatly. The estimate represented is taken from the “Summary of the Report to the Secretary-General” (S/2005/458, 29). According to the ICTY website (“The Cost of Justice”), the budget has grown steadily over the years. The budget for 1994 was just under \$11 million while the most recent budget for 2010-2011 is just under \$302 million. The ICTR follows a similar trend.

which was manifested by inadequate training, limited investigations, and lack of translators.

Malcolm Dodd's experience as a forensic expert in both Kosovo and East Timor highlights some important differences between the two cases. Dodd describes his team of fifteen in Kosovo as "a comfortable situation in comparison to East Timor," where he was part of a team of three (2006, 189-98). However, Dodd valued his experience in East Timor because it allowed him to refine his skills examining skeletal remains. Dodd was the first expert to examine the bodies in East Timor in February of 2000, five months after the atrocities. Most of the bodies Dodd examined were completely skeletonized due to the monsoon rains and the local fauna, which predated the bodies significantly. Dodd's experience in Kosovo was different in that all the bodies were in one piece, though in wide ranging degrees of decomposition. Other differences included the working conditions. In East Timor Dodd conducted the examinations in a improvised mortuary and the steel trays that held the bodies sat on top of fragile wooden trestles. Dodd described the water pressure and ventilation as marginal. The examinations in Kosovo were conducted in a typical post mortem room with a portable image intensifier that greatly reduced the task of finding and localizing projectiles and shrapnel. The autopsies were preformed on stainless steel tables and the water pressure was good.

The lack of funding, resources, and trained professionals for the SCP in East Timor helps explain some of the court's ineffectiveness. Resolving these problems would not, however, have compelled Indonesia to cooperate. The lack of resources may reflect the relative lack of international interest in pursuing accountability in East Timor with respect to Kosovo.

Conclusion

Arresting Indonesia's atrocities would likely have been possible if the United States simply ended its complicit (and too often active) participation in the occupation and atrocities that defined it. The corollary topic about the ostensible use of NATO in a humanitarian-savvy, post Soviet world is another topic which I do not have space to address at length. However, the inconsistent response of the United States to Kosovo and East Timor outlined above strongly suggests the claim should not be accepted at face value. The United

States' unpredictable application of humanitarian concerns suggests that it was not genuine, but politics as usual.

This comparative study of the United States' inconsistent treatment of the atrocities in Kosovo and East Timor provides significant evidence that the international regimes against impunity are highly susceptible to the influence of powerful states' agendas. Pursuing accountability appears to require two conditions:

1. The criminal must be from a weak state that is not a client state of a powerful patron.
2. A powerful state must be willing to pay the costs associated with accountability, and the host country must be compelled to extradite the suspects if/when national courts fail.

While the creation of the International Criminal Court can be considered an improvement from the ad-hoc tribunal system of the 1990s, it is important to note that, were the atrocities of Kosovo and East Timor to have happened today, there is little reason to believe the outcomes would be significantly different. The flaw of agenda setting effectively remains. If the ICC is going to survive as more than a tool of powerful states to pressure weaker states, it will have to overcome these persistent strictures. Enthusiasm for the current regimes against impunity should be approached with caution. Proponents who accept them because they do achieve some level of accountability should temper their enthusiasm by acknowledging the regimes' deep seated flaws, the hypocrisy they perpetuate, and the necessity for finding a replacement insulated from the current flaws witnessed in this study of the United States' manipulation of international justice to protect a client state and punish an ideological rival.

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