

ASPJ Africa and Francophonie

1st Quarter 2015

Volume 6, No. 1

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The *Air and Space Power Journal* (ISSN 1931-728X), published quarterly, is the professional journal of the United States Air Force. It is designed to serve as an open forum for the presentation and stimulation of innovative thinking on military doctrine, strategy, force structure, readiness, and other matters of national defense. The views and opinions expressed or implied in the *Journal* are those of the authors and should not be construed as carrying the official sanction of the Department of Defense, Air Force, Air Education and Training Command, Air University, or other agencies or departments of the US government.

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Corruption, the Scourge of Humanity

*I have seen corruption boil and bubble
Till it o'er-run the stew.*

—Shakespeare, *Measure for Measure*

Corruption is apparently as old as the world; it goes back at least to when a society organized for the first time, creating public institutions as a means of survival. It is a worldwide, disastrous phenomenon. Corruption exists in the private sector but primarily involves government officials. It is multifaceted, and the equivalent terms are endless: *red envelopes* in China or *brown envelopes* in Angola, *bakchich* in the Arab world, *matabiche* in Central Africa, *payola* in the Philippines, *propina* in Latin America or *pots-de-vin* in France.

Although corruption may be more noticeable in poor countries and dictatorships (often the same), it is not absent in rich countries and democracies. The cost of corruption is difficult to assess because it occurs between individuals in the greatest secrecy. According to the International Chamber of Commerce and other agencies, however, “Estimates show that the cost of corruption equals more than 5% of global GDP [gross domestic product] (US \$2.6 trillion), with over US \$1 trillion paid in bribes each year”; furthermore, “corruption adds up to 10% to the total cost of doing business globally, and up to 25% to the cost of procurement contracts in developing countries.”¹ It costs Europe 120 billion euros a year or about 1 percent of economic output; China, 10 percent of its GDP per year; and Africa, roughly \$150 billion a year.² It is worth noting that Russian president Vladimir Putin “has been named corruption’s ‘person of the year’ for 2014 by an international group of investigative journalists” and that he “has been a finalist’ every year since the ‘award’ began!”³

Of course, democracies are not immune to corruption. The dubious funding of political parties offers an example, but the rule of law and mature institutions are ramparts against systemic corruption. In contrast, corruption is more widespread in developing countries and those in transition—not because they are different from other nations but because the conditions are ripe. State institutions are weak; government policies or regulatory agencies contain loopholes that permit illegal activities; and institutions such as parliament, the judiciary, and civil society—including the press—that usually serve as safeguards are marginalized or themselves affected by corruption. Therefore, these countries are locked in a vicious circle of corruption. The Algerian Feddal Halim, deputy secretary-general of the National association de lutte contre la corruption (National Association in the Fight against Corruption), describes the Kafkaesque, nightmarish, vicious circle of corruption:

Law 06-01 addressing the prevention of and fight against corruption was passed in a corrupt environment by the National People’s Assembly, which is a product of a corrupt political election. The assem-

bly enacted only one law decriminalizing corruption and facilitating not only the corrupted and the corrupters but also the practice of corruption and the maintaining of corruptibility. Corruptibility is a mechanism for creating and enabling the widespread use of the corruption space. Let me explain: the administration managed to package and create a climate conducive to instilling a generalized guilty conscience, and since a corrupt person is never more at ease than in the presence of another corrupt individual, the best way to guard against honest people is to produce more corrupt ones.⁴

Corruption has become a major problem. According to experts on the subject, systemic corruption becomes particularly prevalent in the absence of adequate legislative control, judicial or autonomous control bodies, media professionals, and representatives of independent civil society. Corruption cannot be defeated if civil liberties are not firmly guaranteed. This scourge of humanity should be fought globally because it is the enemy of security, development, progress, and peace. The United Nations Office on Drugs and Crime points out that “fighting corruption is a global concern. Corruption is found in both rich and poor countries, and evidence shows that it hurts poor people disproportionately. It contributes to instability and poverty and is a dominant factor driving fragile countries towards state failure.”⁵

Good governance—one of the answers to systemic corruption—“recognizes the integrity, rights, and needs of everyone within the state. It offers a way of managing power and policy, while government serves as an instrument to do so.”⁶

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*The views and opinions expressed or implied in this article are those of the author and should not be construed as carrying the official sanction of the Department of Defense, Air Force, Air Education and Training Command, Air University, or other agencies or departments of the US government.

Notes

1. “The Business Case against Corruption” (n.p.: International Chamber of Commerce, Transparency International, United Nations Global Compact, and the World Economic Forum Partnering against Corruption Initiative, n.d.), [2], accessed 22 January 2015, <http://www.weforum.org/pdf/paci/BusinessCaseAgainstCorruption.pdf>.

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3. “Russia: Investigative Journalists Name Putin Corruption’s ‘Person of the Year,’” *Ethical Alliance Daily*, accessed 22 January 2015, <http://ethicalalliance.org/daily-news/russia-investigative-journalists-name-putin-corruptions-person-of-the-year/>.

4. “La corruptibilité et la corruption en Algérie” (quoted passage translated from French by the editor), *Le Quotidien d’Algérie*, 28 August 2013, <http://lequotidienalgerie.org/2013/08/28/la-corruptibilite-et-la-corruption-en-algerie/>.

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6. Rémy Mauduit, “Governance and Democratic Transition,” *Air and Space Power Journal—Africa and Francophonie* 4, no. 3 (3rd Quarter 2013): 3, http://www.au.af.mil/au/afri/aspj/apjinternational/aspj_f/digital/pdf/articles/2013_3/editorial_e.pdf.

Sudden Rain

The Effect of Conflict on Women's Mobilization

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Sudden rain brings the sheep and goat under the same roof.

—Liberian proverb

This article examines the effect of conflict on both the origins and efficacy of women's mobilization. Applying Ted Gurr's rebellion framework to women's movements during conflict, we discover several important similarities between drivers of minority rebellion and women's mobilization. In our case studies of Liberia and the Democratic Republic of Congo (DRC), we find Gurr's understanding of group cohesion in general—and group identity specifically—as critical in comprehending the conditions under which we might expect women to mobilize. Preconflict levels of human and social capital among women appear significant in Liberia as compared to the DRC and proved important in explaining modern mobilization in Liberia. As conflict intensifies and active grievances increase, we also see that external actors play a significant role in outcomes for women. Furthermore, our research confirms Gurr's emphasis on the importance of the state and democratization as society transitions from conflict to recovery.

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Although Gurr's framework serves as a useful lens through which to view the role of conflict in women's mobilization, our work identifies areas for modification or further research. Primarily, we find that women's persisting grievances offer little explanatory power in predicting effective communal protest or rebellion in either Liberia or the DRC, perhaps due to the repressive culture regarding gender expectations. Rather, active grievances springing from the consequences of conflict appear to play a more significant role. Finally, we note inherent differences between women's organizations and ethnic groups that require further research. Particularly in the transition to postconflict recovery, the role of the state differs in the inclusion of women versus that of ethnic minorities.

The first part of this article offers a review of the literature on women's empowerment. Here we explore the theoretical underpinnings of the importance of women to societal well-being as well as the conditions under which they pursue increased empowerment. The second part addresses the effect of conflict on cultural change as it relates to women. We examine the mechanisms by which individual women suffer as well as gain because of war, and we introduce Gurr's framework to understand communal effects. The third part applies the model to women in both Liberia and the DRC, concentrating on the most recent conflicts in those states. Finally, the article concludes with a summary of our findings, potential policy implications, and areas for further research.

Women's Empowerment

A review of research on women's empowerment reveals a growing consensus on the importance of women's inclusion for societal well-being. One need look no further than the comments of Kofi Annan, former secretary-general of the United Nations (UN), to understand the near universality of this perspective: "It is impossible to realize our goals while discriminating against half the human race. As study after study has taught us, there is no tool for development more effective than the empowerment of women."¹

Unsurprisingly, gender equality plays a significant role in the UN's Millennium Development Goals. Seeking to alleviate poverty and assist transitioning states in moving from insecurity to stability, these objectives represent the international community's best efforts to meet the needs of the world's poorest. The empowerment of women serves as one of the primary mechanisms in those efforts to eradicate extreme poverty, promote universal primary education, and extend gender equality.² Thus, in this respect, women's empowerment is a necessary condition for the eradication of extreme poverty and state stability.

As constructed by the UN, women's empowerment might be considered a goal with intrinsic value, not simply instrumental worth. Similar to Amartya Sen's ideas of development as freedom, affording women the ability to self-determine affirms basic human rights.³ As full citizens and agents of change, empowered women have access to resources and opportunities. They also exercise their political voice and enjoy the same freedom from violence as their male peers. As such, the literature on development and gender

emphasizes the role of empowerment in building more representative institutions for all members of society, not simply women.

At a societal level, a growing body of literature points toward women's empowerment as not only an end in itself but also a means to economic growth. A recent study in the United States concludes that increased participation by women and minorities in the labor force explains 15 to 20 percent of aggregate growth in output per worker between 1960 and 2008.⁴ Similarly, research indicates that the growth differential between East Asia and other slow-growth regions, including sub-Saharan Africa, is partially attributable to gendered differences in education.⁵ Eliminating barriers to entry for women in specific sectors, one study argues, could result in up to a 25 percent increase in labor productivity as market forces more efficiently allocate human capital.⁶ Additionally, as the World Bank notes, with women's labor force participation and educational achievement rates increasing around the world, noninclusive economies are likely to be left further behind.⁷

As important as inclusive policies are for social well-being, historical evidence indicates that such policies rarely materialize naturally. In its 2013 report on the global gender gap, the World Economic Forum assesses that both North Africa and sub-Saharan Africa fall consistently last in several gender-equality categories. These categories include but are not limited to economic participation and opportunity, educational attainment, and political empowerment.⁸ Sadly, these conditions are unlikely to change without an exogenous impetus. Esther Duflo concludes, "Equality between men and women is only likely to be achieved by continuing policy action."⁹ A 2001 World Bank report reinforces the idea that economic growth is not enough to ensure gender equality. Instead it is also necessary to reform economic and legal institutions and take measures to correct the gaps in political voice and access to resources.¹⁰ This article examines conflict's potential for catalyzing such political, economic, and legal reforms.

Thus far, we have discussed women's empowerment as if it is a universally understood term. It is not. Both in definition and understanding, empowerment of women takes different forms throughout the literature. Lotsmart Fonjong explains five stages of empowerment—welfare, access, "conscientisation," participation, and control—noting that "empowerment is only real when women have attained control over themselves, resources, factors of production and decision-making, be it at home or in the public arena." She claims that this progression must occur before women reach the control stage. In other words for all levels, men and women must experience equality for basic needs, have access to resources and services, remain aware of inequities, participate in the allocation of resources and services, and, finally, exercise control as defined above.¹¹

This construct of empowerment parallels the idea of practical and strategic interests. According to R. Ray and A. C. Korteweg,

Practical gender interests arise from women's position in the sexual division of labor and tend to involve struggles not for liberation but for the ability to fulfill their roles as wives and mothers. These interests, which stem from women's lived experiences, are inductively derived. Strategic gender interests, on the other hand, are derived deductively, seek to

change the rules under which women live, and can be arrived at only after practical interests have been taken into account.¹²

If we measure these strategic interests in terms of women's roles across society, the economy, and politics, including important policy outcomes for all citizens, then we could better explore the conditions that lead to this outcome. Mi Yung Yoon concludes that while opportunities for education and employment for women affect women's representation in legislatures in the developed world, these factors do not similarly affect women in the developing world. For these women, proportional-representation voting systems and culture have the greatest effect on their empowerment at the highest level. Furthermore, "egalitarian culture fosters women's involvement in electoral politics, but hierarchical culture impedes it. How favorably or unfavorably the society views women's involvement in politics depends on where its culture lies in the egalitarian-hierarchical cultural spectrum."¹³ Yoon agrees that although it is critical to understand the political, economic, and social context, "culture, which shapes people's views toward women's roles, appears to play a significant role, irrespective of levels of economic and political development."¹⁴

Importantly, cultures are mutable and not fixed. The question becomes one of how culture changes (the latter defined as "the set of learned behaviors, belief, attitudes, values, and ideals that are characteristic of a particular society or population").¹⁵ Certainly, there are contexts in which worldviews or frames of mind are more easily challenged. When identities change, they then inform interests—and interests move people to mobilize. These changing identities do not occur in a vacuum; rather, they are a response to alterations in the political, societal, and economic contexts that holistically can affect cultural change. The latter, then, is not disconnected to the political, economic, and other changes, especially crises. Case studies will further our understanding of international, regional, state, and local interactions and illuminate their influence on women's identities, interests, and mobilization.¹⁶ We direct our attention to how conflict and war, the most disruptive change to a society, can affect identity and interests—and thus mobilization. Our discussion also focuses on the nature of that mobilization to the extent that it affects women's empowerment at the highest level when a lasting peace is established.

Women and Conflict

Historical understandings of gender roles in conflict might be categorized as men doing and women being.¹⁷ According to this conventional understanding, men prosecute wars as soldiers, politicians, and leaders. Women, on the other hand, are passive victims, attempting to survive or at least support their men until peace is restored. Such a perspective confines women's outcomes in the aftermath to a small set of unappealing permutations, all centered on the losses they suffer. Likely, this understanding of women as passive victims never passed close scrutiny. Whether they served as spies, the backbone of insurgent logistics, or even active fighters, women's place in the history of warfare is much more than that of victims. Moreover, as warfare trends away from conventional interstate

conflict, reality demands a new comprehension of the way women both participate in and are affected by violent conflict. Somewhat paradoxically, we see that as women become more involved in war fighting, whether intentionally or not, their opportunity for short-term emancipation increases after the struggle ends.¹⁸

Violent conflict both intentionally and unintentionally changes the dynamics of power in a society. In some sense, conflict is entirely about power—some fighting to gain it, and others doing everything necessary to maintain it. If gender relations are a form of power structure, as many feminist authors suggest, one should similarly expect that relationship to change during violent conflict.¹⁹ We examine the ways in which women are affected by war, specifically through changes in the power relationship between men and women, emphasizing the potential gains that women may acquire through conflict. With these possibilities set forth, we apply Ted Gurr's framework for understanding why ethnic groups mobilize to further our understanding about why women mobilize. This application will shed light on gaps of the framework when applied to women; further, it will help identify the mechanism by which some seeds of social transformation take root after the shooting stops while others wither in the immediate aftermath.

Gurr's framework offers a holistic approach toward understanding group rebellion through uncovering the interaction of phenomena defined by the group, the state, and the international system. He further explains that "in conflict analysis the competing theoretical perspectives are *relative deprivation* and *group mobilization*: the former contends that people's discontent about unjust deprivation is the primary motivation for political action, whereas the latter emphasizes leaders' calculated mobilization of group resources in response to changing opportunities" (italics in original).²⁰

Gurr's framework brings these two factors together, explaining their interaction with a micro and macro perspective—namely, examining group, state, and global contexts (see the figure below). He addresses how collective disadvantage, group identity, and repressive control affect persisting grievances and the extent of group cohesion "as a function of a group's social, political, and economic organization, past and present" and characterizes mobilization as "the extent to which group members are prepared to commit their energies and resources to collective action on behalf of their common interests."²¹

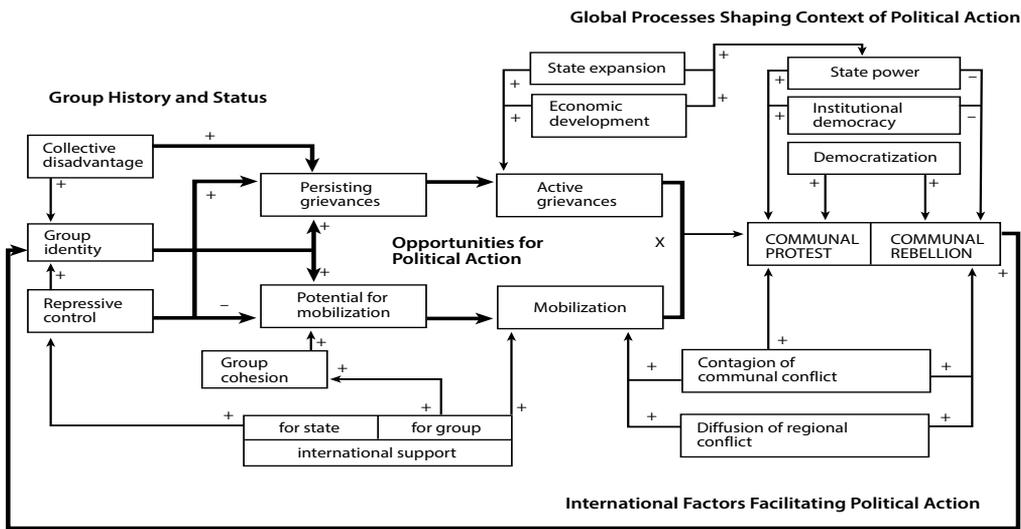


Figure. Processes of communal mobilization for political action. (Ted Gurr, "Why Minorities Rebel: Explaining Ethnopolitical Protest and Rebellion," in *Minorities at Risk: A Global View of Ethnopolitical Conflicts*, ed. Ted Gurr [Washington, DC: United States Institute of Peace Press, 1993], 125. Reprinted with permission from the Endowment of the United States Institute of Peace.)

Key to this examination is the idea of political opportunity that leaders might seize based on group factors, state and societal dynamics, and international developments. The factors that might affect any of these elements are numerous although Gurr observes some important considerations. For example, the state-making process in many areas of the developing world produces stressors that can exacerbate grievances as power and resources are highly contested; developments across the globe can influence groups, whether they are, as he describes, a *diffusion* or *contagion* of conflict. Diffusion is a tangible spillover of conflict while a contagion may inspire others toward action.²² Finally, mobilization resulting in either protest or outright rebellion relies on the efficacy of the political institutions. Effective democratic institutions will encourage protest and resolution, but weak or failing organizations may encourage rebellion.²³

Within Gurr's framework, group identity is largely influenced by collective disadvantage, repressive control, and, importantly, existing communal protest or rebellion. It is, therefore, worth recognizing the significant losses unique to women in conflict zones and the impact of those losses on group identity. Particularly in a society in which the individual is defined by his or her connection to family, clan, or ethnic group, loss of identity may be the most significant cost of war for women.²⁴ Since the majority of refugees are women and children, conflicts that displace the population, such as those in Sudan or the DRC, threaten women's sense of belonging. This loss of identity often lingers upon resettlement as many social bonds are permanently severed.²⁵ Perhaps most vividly, women also suffer loss of bodily integrity during times of war. For example, a 1999 survey of 1,125 Rwandan women indicated that almost 75 percent of the respondents had experienced sexual violence during the genocide.²⁶ More than just a by-product of the fighting,

rape and other forms of sexual assault have increasingly become tools intentionally used in the attempt to dominate the enemy. Relatedly, women's health is particularly at risk during times of violent conflict. Whether by direct force or necessity, outbreaks of conflict are closely correlated with increases in prostitution and the health risks associated with such dangerous activity.²⁷

The literature emphasizes the losses of women in war, but this consequence does not appear to hold true for all women in all respects.²⁸ Important for the purposes of this article, war may offer opportunities for women to actively reorder the power structure of gender relations in their lives. Gurr's framework captures these potential gains as opportunities for political action. Much of this change appears to come through the dynamic nature of family roles during the period of conflict. Such hostilities, particularly intense intrastate varieties, may significantly increase the number of households headed by women. In postconflict Cambodia, up to 30 percent of families operated without an adult male.²⁹ Similarly, in Rwanda, pregenocide data indicates approximately 20–25 percent of families were headed by a woman. Postgenocide, that ratio climbed to approximately 35 percent.³⁰

In such situations, women must assume the additional burden of feeding and supporting their families. In their comparative analysis of five conflict regions in Africa, Judy El-Bushra and Ibrahim Sahl find that in each case the economic role of men in society decreases as a result of conflict.³¹ Consequently, women took on significantly greater responsibility for the economic well-being of the family, increasing their authority within the family if not in the community as a whole. Similarly, Krishna Kumar found elevated rates of female participation in the labor force in conflict areas. In Cambodia, Kumar noted that the absence of men during the conflict created increased opportunities in not only agricultural production but also textiles and construction.³² In another piece by El-Bushra, after confirming the head-of-household transformation in conflict areas, she went further, describing several additional factors that increase the economic role of women, even in the presence of men. The author observed that women in Uganda enjoyed greater freedom of movement during the war, which allowed them to cultivate fields that men could no longer access. Further, she reported that in Sudan and Angola, violence displaced the rural population into urban areas where women's income-generating abilities were greater than those in rural areas. Displacement of women during the war also exposed them to new skills and ways of life.³³

Just as conflict can serve as a catalyst for women's economic activity, so have many women in war-torn regions seen an expansion of their roles in social and political structures. According to Codou Bop, wars of independence, in particular, offer a theoretical promise of change in the power relationships between men and women.³⁴ In many African struggles for social and economic liberation, political leaders drew upon a Marxist-Leninist ideology that emphasized the injustice of class- and sex-based inequalities.

Similarly, describing the new roles of men and women in Uganda, Joan Kakwenzire claimed that "the multiple roles that women have taken on have engendered a new race

of women. They have realized the potential of their own strength and this awareness has led some of them toward a more favorable socio-economic position."³⁵

This thread of literature highlights the increased social consciousness of women as a by-product of forced entry into the public realm. Specifically, some women acquire new confidence, organizational skills, and, importantly, a vision for the future. This transformation often may manifest itself in an increased ability to take the lead in forming organizations to champion their causes. For example, El-Bushra and Cecile Mukarubuga found postgenocide Rwandan women gathering to develop agricultural co-ops, build houses, and start savings and credit schemes.³⁶ Similarly, Kumar observed increased collective action by women leading to elevated political participation in a six-country study. Specifically, he cited the experience of women as leaders in refugee camps translating into at least temporary increases in influence upon return to their original communities.³⁷ Notably, Patti Petesch explains the rise of women in postconflict politics and collective groups through the lens of social capital. As conflict destroys the fabric of traditional society, women form new formal and informal networks to adapt and survive. According to Petesch, relative to the old power structure, women realize an increase in social capital, enabling their entrance into significant political and social groups.³⁸

In Gurr's framework, both the likelihood of protest and gains from that action are affected by internal factors such as democratization and by external factors such as contagion of communal protest. Although Gurr's model allows for permanent gains to minorities, many of the social, economic, and political advances won by women during the fighting seem to be fleeting. Although some gender norms may be suspended or refigured in the actual combat period, accumulating evidence now indicates that this shift is not often permanent.³⁹ The reasons for this apparent reversion to the traditional gender roles are as varied as they are uncertain. According to Sheila Meintjes and her colleagues, many women fail to consciously internalize or conceptualize the changes in their roles; without a conscious translation, there can be no organized effort to carry wartime gains into the peace.⁴⁰ Alternatively, women's activity and activism are largely discounted as accidental and of minimal consequence as politics return to the previous hierarchical order.⁴¹ Even women who work for peace at the grassroots level during the peak of conflict, creating a strong sense of community, are dismissed as volunteers or charitable works even though they have a political impact.⁴² As such, they are often excluded from formal peace and postconflict political processes. Finally, changes in gender roles may increase the workload for women because time allocated to economic and political tasks does not often result in decreased work in traditional roles such as child rearing and household chores.⁴³

The remainder of this article sets about examining why some women's movements are able to mobilize and gain traction enough to influence national-level decision makers. Using Liberia as our primary case and the DRC as our secondary case, we examine women's mobilization during conflict through Gurr's three primary nodes: group history and status, international factors facilitating political action, and global processes shaping context for political action.

Case Study: Liberia

Liberia serves as our primary case study for a few important reasons. Primarily, the mobilization of Liberian women in 2002 is one of the most strident in history. The intensity of collective action remains unmatched even in countries such as Rwanda that have seen greater increases in women's postconflict political participation. Furthermore, the Americo-Liberian experience in Liberia provides some variance that may be exploitable for deeper understanding of the role of preconditions for mobilization. Finally, the mobilization was effective. Not only did the movement influence the Liberian Peace Agreement to contain at least some "gender balance" provisions, but also it contained enough momentum to materially influence the election of Africa's first woman president and to place a number of women in critical ministerial positions. If we hope to examine Gurr's framework fully, it is important to have at least one case that agitates to full communal protest. Arguably, the women's movement in Liberia supplies that case.

Liberia's modern history is as unique as it is troubled. In the early 1800s, the American Colonization Society, comprised largely of white slave owners and supported by the United States government, began facilitating the transport of freed slaves to what today is known as Liberia.

Unsurprisingly, the indigenous populations actively resisted the new colonizers, and years of conflict ensued. Possessing both superior weapons and support from the United States, the so-called Americo-Liberians subdued the native population and eventually established the first African republic in 1847.

The first Liberian constitution borrowed heavily from the American version, but the black colonizers fared no better than their former white owners in treatment of "uncivilized" populations. Although Americo-Liberians, often referred to as "Congo people" by the native inhabitants, never exceeded an estimated 6 percent of the population, they dominated all spheres of power in society for almost 140 years. Until 1980, Liberia's political and economic systems remained the exclusive domain of the Americo-Liberian elite. Although that dynamic changed in 1980 with the bloody coup led by Samuel Doe, the new Afro-Liberian government proved no better at sharing power. Doe, an ethnic Krahn, quickly elevated members of his ethnic group at the expense of others, a trend that intensified as Doe himself faced increasing threats to his reign.

As a result of Doe's repressive regime and power-sharing failures, Liberia devolved into a full-fledged civil war by 1989. Under a firebrand Americo-Liberian named Charles Taylor, the National Patriotic Front of Liberia forces gradually gained position as the dominant armed group, eventually resulting in Taylor's election as Liberian president in 1997. However, any expectation of peace under Taylor evaporated in April 1999 when the Guinean-backed Liberians United for Reconciliation and Democracy invaded northern Liberia. By 2003 that group and the Ivoirian-backed Movement for Democracy in Liberia controlled almost two-thirds of Liberia and held the capital of Monrovia under siege.

Under these conditions in late 2002 and 2003, the women of Liberia mobilized for peace. In what would eventually involve thousands of women in Monrovia but repre-

sented across the nation, the women's movement gained international attention as it pressured Taylor and the rebel leaders to reach a lasting peace. Future Nobel Peace Prize winner Leymah Gbowee led both Muslim and Christian women in daily prayer meetings and protests at the Monrovia fish market, eventually gaining an audience with both President Taylor and the rebel leaders. Within two years, the women not only influenced an eventual peace but also significantly affected the campaign of Ellen Johnson Sirleaf, the first woman elected head of an African state.⁴⁴

Group History and Status

In his model, Gurr begins with the primacy of grievances and associated group identities as the base from which later mobilization will occur. Strong group identities, combined with and often the result of deep grievances, increase the likelihood of group mobilization. Similarly, weak grievances and group identities deprive leaders of the fuel necessary to energize a movement. Thus, we begin the examination of Liberia by considering the group history, status, and traits of women in Liberia prior to the civil war (persistent grievances) and as changed *through* the war (active grievances).

As in most traditional societies, preconflict Liberian women suffered some level of persistent grievance, defined by Gurr as "economic and political discrimination" that restricted group members' access to desirable economic resources and opportunities and to political rights and positions.⁴⁵ Women in the Americo-Liberian segment of society were less constrained, but the average Liberian woman maintained little control of her life's outcomes. Her reproductive capacities and labor-market participation were largely determined by the men in her life. Within marriage, children belonged to the lineage of the father, and the wife had no claim on their property should she leave her husband. In the labor market, women's opportunities were limited to local activities, and women entrepreneurs were uncommon.⁴⁶

Despite their lack of formal societal control, women in Liberian history have not been without agency or a demonstrated ability to organize. On the contrary, Liberian women, both in traditional and Americo-Liberian society, seem to have commanded significant levels of influence. In the traditional portions of Liberia, this influence came through powerful secret societies known as Sande. In these organizations, elder women controlled junior dependents and could exact labor and resources from the families of new inductees. Interestingly, the Sande is a specific manifestation of what some scholars have identified as a "dual-sex hierarchy" common in West Africa in general.⁴⁷ Under such a hierarchy, each sex manages its own affairs, and women are represented at all levels. Although separate from the formal male power structure, women often occupied recognized positions of authority, holding court, issuing summonses, and generally managing the daily affairs of the community's women.⁴⁸ Prevalent in Liberia, the Sande exemplified a parallel structure of government and appears to provide a precedent for women to mobilize in their own interests. In other parts of the country, women in the Grebo, Sapo, Kru, and Krahn tribes regularly organized parallel political institutions as checks on the

men in official political organizations.⁴⁹ Thus, while men and women may not have been considered equal in indigenous Liberian societies, women possessed agency in their lives and had recourse in the face of poor treatment.⁵⁰

Some Liberian women also benefited from a number of unique privileges because of their Americo-Liberian heritage. Although not legal equals to men, women in nineteenth-century Liberia owned land and entered into legal contracts.⁵¹ In 1946 women gained suffrage several years before those in most other African countries. As Liberia experienced macroeconomic expansion after 1950, Americo-Liberian women enjoyed gains in education, labor-force participation, and political involvement. By 1980 women held eight ministerial positions in the Doe government, comprised 30 percent of the university and secondary teachers, and held almost 15 percent of the judicial positions.⁵² Thus, it is clear that women in Liberia possessed significant human and social capital prior to the onset of conflict in 1989.

Using Gurr's model, one would not predict that the women of Liberia were primed for rebellion prior to the initiation of conflict in 1989. They certainly lacked the full status of men in Liberian society, but their *collective disadvantages* and the level of *repressive control* both seem no greater than—and were possibly less than—those of most other women in traditional African societies. Gurr's model relies upon both collective disadvantage and repressive control to determine the level of group cohesion and identity. In preconflict Liberia, however, cohesion between women appears more a function of dominant cultural norms of a dual-sex political structure and the Sande than a product of relative deprivation and persistent grievances.

Although preconflict persistent grievance carries minimal significance, active grievance for women in Liberia became acute during the war. As the conflict in Liberia intensified and spread, more and more Liberians, particularly women and children, moved from the countryside to seek refuge in Monrovia. By 2002 the US Committee for Refugees estimated that more than 30,000 internally displaced persons resided in camps in and around Monrovia. The inhabitants were predominantly unaccompanied women and children.⁵³ As noted in our literature review, such displacement has significant deleterious effects on existing social networks. This loss of network was undoubtedly painful and even deadly for many, but it may also have contributed to the reshaping of identities necessary for a unified mobilization of women. In her autobiography, Gbowee detailed the process by which she and other community leaders attempted to build a women's identity within the Women in Peacebuilding Network (WIPNET). In one exercise, she explicitly told the trainees, "We are not lawyers, activists or wives here. We are not Christians or Muslims, we are not Kpelle, Loma, Krahn or Mandigno. We are not indigenous or elite. We are only women."⁵⁴ The most public slogans of WIPNET exemplified the primacy of womanhood over other identities: "Does the bullet know Christian or Muslim? Does the bullet pick and choose?"⁵⁵

The displacement of thousands of women and children to refugee camps in Monrovia also significantly increased the size and concentration of potential protestors. This concentration of a large number of displaced women in the capital area became critical

for the movement for a number of related reasons. First, these women were prime candidates to join an organized rebellion. Several economists have noted the importance of opportunity costs in determining the likelihood of men joining armed rebellion.⁵⁶ According to these theories, as viable economic alternatives decrease, men (and women) are more likely to join rebellions since their next-best alternative is less attractive. Similarly, women in the refugee camps had few, if any, alternative means by which they could improve their current situation. With nothing to lose, they made prime recruits. Their proximity to Monrovia also meant that group communication was possible. In the early days of the mobilization, WIPNET leaders leveraged a contact within a radio station owned by a Catholic church to organize women across Monrovia. Given a general lack of communication infrastructure in Liberia at the time, such organization would have been difficult, if not impossible, if a significant mass of women had not been centrally located in Monrovia. As some scholars have noted, effective mobilizations must also gain access to key political actors. In Liberia this meant Charles Taylor and, later, the rebel leaders in Monrovia. Thus, the high density of women willing and able to mobilize in the capital city was a necessary condition for the success of the movement.⁵⁷

As in Monrovia, the intensity of the conflict disrupted not only social networks but also entire social constructs around the country. Stephen Ellis points out that in the areas of greatest fighting, women assumed significantly more important roles as heads of households. In many regions, men could not travel freely since they were assumed to be potential enemies. In this environment, women increased their participation in the labor market because they could pass through checkpoints more easily. They travelled more widely as traders and, eventually, as entrepreneurs. Women also enhanced their economic roles as the traditional trading ethnic groups of Mandingo and Lebanese left the increasingly ethnically divided conflict zones.⁵⁸ In many cases, economic independence shifted the power structure of gender relations, as evidenced by higher rates of divorce when women were economically independent from men.⁵⁹

International Factors Facilitating Political Action

Given a set of existing group characteristics, Gurr's framework examines the impact of various international factors on minority-group mobilization and political action. According to Gurr, these factors primarily facilitate proactive mobilization of minority groups by increasing a group's access to resources and political opportunities. Specifically, he identifies the importance of contagion of communal conflict, diffusion of conflict, and international support.

As applied to the mobilization of women in Liberia, the role of preexisting peacebuilding networks seems to be of particular significance. Prior to establishment of the WIPNET in Liberia, a number of its founding members received training and motivation through the West Africa Network for Peacebuilding (WANEP). Founded by Sam Doe, WANEP was a transnational peace organization focused on building grassroots organizations across borders and on emphasizing nonviolent strategies to address the is-

sues of war and human-rights abuses.⁶⁰ In 2001 Thelma Ekiyor, an active member of WANEP, successfully petitioned it to fund an organization specifically for women to work for peace.⁶¹ The result was the establishment of WIPNET in Liberia, the entity primarily responsible for arranging the famous fish market protests of 2003.

Women organizing throughout the region laid the groundwork for the mobilization that would pressure for peace in Liberia.⁶² As WIPNET established itself, members received training and support from other active regional women's activist groups. Both the Mano River Union Women's Peace Network, working for women throughout Sierra Leone, Liberia, and Guinea, and the Liberian Women's Initiative were involved in organizing women to end the war and to become part of earlier peace processes. Gbowee and other future prominent members of WIPNET leveraged the existing networks and best training practices of these organizations to build Liberian Mass Action for Peace, a more inclusive, action-oriented campaign. This movement included not only the Christian Women's Initiative but also several Muslim women's organizations in Monrovia.⁶³

Gbowee's push for action also benefited from increased international attention paid to the role of women in peacemaking and postconflict reconstruction. In 2000 the United Nations Security Council passed Resolution 1325 on women, peace, and security—the organization's first legal, formal document urging all parties to the conflict to elevate the participation of women in peace and security efforts. In part due to growing international emphasis on gender issues in conflict and the strategic messaging abilities of the WIPNET women, regional and international media latched on to the stark images emanating from the Liberian Mass Action for Peace campaign in Monrovia. This reporting likely increased both the legitimacy and influence upon which Gbowee and her supporters would capitalize at the Accra peace negotiations.

As WIPNET's parent organization, WANEP also provided reach into neighboring countries that would prove instrumental in pressuring both the Taylor regime and rebel leaders into peace talks. Upon receiving an audience with Taylor, the women of WIPNET set about locating the rebel leaders in Sierra Leone. Using connections in that country and support from WANEP there, WIPNET sent several representatives to confront the rebel leaders in their Freetown hotels. Simultaneously, WANEP in-country organized local women to line the streets surrounding the rebel lodging until the leaders at last agreed to meet the WIPNET representatives and eventually join in the peace talks in Ghana.⁶⁴ WANEP also facilitated the transport of several key WIPNET leaders, including Gbowee, to Ghana for the peace talks. After a month of glacial progress, the WIPNET leaders, with the assistance of local WANEP leaders, organized over 200 women to physically barricade the delegates in the assembly room. The women agreed to leave only when the chief mediator personally guaranteed immediate progress.⁶⁵

Global Processes Shaping the Context of Political Action

Gurr's framework describes state power in terms of furthering democratization through institutions. Effective democratic institutions set conditions that incentivize protest over

rebellion. Gurr observes that “the resolution of ethno-political conflicts in institutionalized democracies depends most fundamentally on the implementation of universalistic norms of equal rights and opportunities for all citizens.”⁶⁶ In short, democracy induces protest rather than rebellion since political leaders are attuned to the interests and grievances of their citizens.⁶⁷ Michael Lund also provides a comprehensive overview concerning conflict prevention. His model highlights the complexities involved with transitional democracies in a postconflict phase, addressing issues such as instability, social dislocations, and economic crisis. Furthermore, he cites numerous outside actors that can help or hinder such progress.⁶⁸ As many scholars indicate, the process of state making is inherently unstable. This is particularly true as a state tries to consolidate its power, often at the cost of human rights.⁶⁹

In many ways, it is too soon to fully evaluate the postconflict period and transition to democracy in Liberia as it relates to women's empowerment. The process affects not only women's empowerment gains as expressed through the women's movement but also their roles across society, including the political arena. The International Crisis Group observes the uneven nature of Liberia's transition: “Despite marked improvements, numerous grievances that lunged Liberia into bloody wars from 1989 until President Charles Taylor left . . . remain evident: a polarised society and political system: corruption, nepotism and impunity; a dishevelled security sector; youth unemployment; and gaps and inconsistencies in the electoral law.”⁷⁰

Gbowee affirms this point, relating that “Liberia still has a long way to go.” She describes the social fragmentation, corruption, and rampant unemployment as just some of the challenges Liberia continues to face. However Gbowee explains, “And yet—my country has enjoyed eight years of peace.”⁷¹ From this point, she recounts positive indicators. From the perspective of women's empowerment, she lists numerous women who continue to work throughout society and politics, as well as the continued gathering of WIPNET.⁷² The grassroots efforts that helped bring the war to an end are now involved in the peace-building process; women did go to the polls in 2005 and continue to play a participatory political role.⁷³

Interestingly, none of the rebel groups took part in the electoral arena and seemed to be placated with Taylor's ousting and pursuing either business or participating in other ways in the transitional government.⁷⁴ Moreover, the 2005 elections occurred without an incumbent.⁷⁵ Sirleaf won the presidency, but it is important to note that outcomes for other women were less inspiring. Although women comprised 50 percent of the electorate, only 5 of 30 women were elected as senators (17 percent) and only 8 of 64 as representatives (12.5 percent). That said, it is still remarkable to have a woman president and large turnout of women at the polls.⁷⁶ Whether these different factors merged to help President Sirleaf's successful election is hard to know, but long-term success for all Liberians will depend on the continued institutionalization of policies, good governance, and reconciliation

Case Study: Democratic Republic of Congo

War ends nothing.
—Congoese proverb

The DRC serves as our secondary case study. On the surface, the conflicts in Liberia and Congo share many characteristics. Similar to Liberia, the DRC has experienced almost two decades of conflict. Both nations have seen periods of widespread war followed by a tenuous peace and simmering hostilities that eventually reignited into more devastating strife. As in Liberia, the Congo has been the playground of foreign actors, largely stemming from an interest in valuable natural resources. Further, although the conflict in the Congo has been greater in terms of sheer numbers, the intensity of fighting and the resulting impact on the civilian population, including that on women, are reasonably comparable. Despite these apparent similarities, the ability of women to mobilize effectively for political action in the DRC does not match that of the women in Liberia. Understanding that peace is only just taking hold in the DRC, we apply Gurr's framework in hopes of identifying potential causes for this differential.

It is difficult to provide a simple definition of the violence of the Congo. To summarize Jason Stearns in his seminal work on the conflict in the Congo, *Dancing in the Glory of Monsters*, the conflict cannot be explained through stereotypes or stories; rather, it is a product of "deep history" and all the entangled interactions that come with it.⁷⁷ The violence in the Congo is sometimes called "Africa's world war." The conflict takes place mainly in the eastern portion of the country. However, at times the violence has reached across the nation, directly involving dozens of militias and at least seven countries.⁷⁸

The history of the DRC is rich in conflict and turmoil. It began as a Belgium corporate state under King Leopold II, who exploited the DRC for its rich rubber and mineral deposits. Under his reign, the DRC was known as the Congo Free State from 1885 until 1908. In 1908 King Leopold II relinquished his hold on the Congo, and until 1960 it was controlled by the Belgium parliament and referred to as the Belgian Congo. In 1960 the Belgians ceded authority over the country to its citizens. Following five years of political infighting, Mobutu Sese Seko rose to power and renamed the country Zaire in 1965. Mobutu remained in power until the First Congo War in 1996.⁷⁹

That war resulted from the spillover of the fighting in Rwanda. The Tutsi Rwandan Patriotic Front (RPF) pursued the fleeing Hutu genocidal Interahamwe militia into what was then still Zaire. The RPF believed that Mobutu was protecting the Interahamwe militia and ultimately marched on the capital Kinshasa to depose him in 1997.⁸⁰ With the eventual outcome clear, Mobutu fled the country, and the RPF-backed Laurent Kabila assumed control of the state, renaming it the Democratic Republic of Congo. With a tenuous peace in place, the RPF retreated to the border, setting up operations to continue its pursuit of Interahamwe. The relative peace did not last long. In 1997 the Second Congo War began between the DRC and RPF. Quickly escalating, this violence included the neighboring countries of Angola, Namibia, Zimbabwe, and Uganda. It con-

tinued until peace talks in 2002; however, various militia groups have continued to fight within the DRC's borders.

In response to the violence plaguing the eastern portion of the DRC, the UN has maintained a constant presence there since 1998. On 1 July 2010, through Resolution 1925, the UN Security Council established the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) to use all necessary means to protect civilians, humanitarian personnel, and human-rights defenders under imminent threat of physical violence and to support the government of the DRC in its stabilization and peace-consolidation efforts.⁸¹ MONUSCO played a vital role in helping to defeat the latest rebel group, M23, and negotiate peace between it and the Congolese government in December 2013.

Unlike their counterparts in Liberia, women in the DRC have yet to mobilize effectively for political action. Although some pockets of collective action have formed, the movements are limited to certain areas and have had little to no effect on national-level outcomes. The application of Gurr's framework can help to account for this failure to occur. As with Liberia, we begin with the group history and status of the women in the DRC prior to the ongoing violence (persistent grievances) and then consider how war has influenced them (active grievances).

Preconflict Congolese women suffered from what Gurr referred to as "economic and political discrimination" identified as patterned social behaviors by other groups (and the state) that systematically restrict group members' access to desirable economic resources, opportunities, political rights, and positions.⁸² There is no evidence of a powerful secret society like the Liberian organization Sande. It appears that the dual-sex hierarchy does not exist to the extent it does in West African countries. As in many other sub-Saharan African countries, it is possible that the nonexistence of such a dual-sex hierarchy can be attributed to development of the Congo during its decolonization period. Indigenous men also lost significant status during this time, and some scholars believe that this loss contributes to the current subjugation and violence toward women in the Congo. During the colonial era, men throughout sub-Saharan Africa suffered humiliation and relinquished various rights. As an outlet to these frustrations, many of them chose to demonstrate power and control through violence and domination over local women.⁸³ Whereas both indigenous and Americo-Liberian influences offered Liberian women some status in society, those in the DRC did not experience the same preconflict social standing.

Over the years, the conflict in the Congo has escalated many of these persisting grievances into active ones. The Congo is quite possibly the most dangerous place in the world to be a woman. In fact, Eastern Congo has been called the "rape capital of the world" by UN Special Representative Margot Wallström. One report claims that 48 women are raped every *hour*.⁸⁴ Furthermore, numerous studies demonstrate how surges of rebel activity in the country are closely correlated with sharp increases in sexual assaults on women and girls.⁸⁵ The Gender Parity Index also attests to the increasing vulnerability and disadvantage that women confront in the DRC. Not only do fewer girls

attend primary and secondary school, but also the gap is even larger in the conflicted Eastern Congo. Additionally, 23 percent of females face extreme educational poverty (fewer than two years of school) as opposed to 7 percent of males.⁸⁶ Restricted access to education, coupled with the constant threat of sexual violence, contributes to the lack of mobilization of Congolese women.

Despite intense, active grievances, we find no evidence of the widespread mobilization of women in the DRC as we do in Liberia. Although the exact reason is unclear, Gurr's framework offers some possible explanations. First, persisting grievances and active grievances increase the likelihood of mobilization, but they are not deterministic. Rather, one must consider the relative cohesion and identity of the group as it relates to the potential for mobilization. In the Congo, the fractured nature of the conflict is inhibiting group cohesion. A majority of the fighting occurs in the Eastern Congo while the Congolese government institutions are primarily in Kinshasa, over 1,000 miles to the west. Given the lack of both transportation and communication infrastructure in the Congo, this geographic fact has effectively isolated the women most affected by the conflict.

Geography has also inhibited Congolese women from forming a collective identity as women. Unlike the situation in Liberia, internally displaced persons have not fled to the nation's capital, instead living in the bush or insecure refugee camps of Eastern Congo. Since 2012 an estimated one million people have been displaced in the DRC eastern provinces of South and North Kivu, major ethnic and political flash points in the country.⁸⁷ A 2013 report by the Norwegian Relief Council found that this constant need of internally displaced persons to flee places "further strains on social cohesion" and that "there is a chronic absence of state institutions and services" present in these camps.⁸⁸ As Gurr's model would predict, this constant destruction of social ties and low group density have largely inhibited a united mobilization.

Perhaps the most striking difference between Liberia and the DRC is the absence of a preexisting women's network to assist mobilization. Apparently the DRC has no traditional women's political infrastructure like the Liberian Sande or more modern regional organizations like WIPNET. Without the human and social capital afforded their Liberian counterparts, Congolese women have struggled to overcome cohesion and identity challenges. Unlike Leymah Gbowee, who could rely on women from Sierra Leone to Ghana in her quest to end the violence, leaders in Congo's limited women's movements have little influence on decision makers at the national level.

However, the existence of a few dynamic grassroots organizations offers some hope for the future. One of these—the Women's Media Association of South Kivu (AFEM), founded by journalist Chouchou Namegabe in 2003—includes women active in South Kivu's media and news organizations. It specializes in the production of rural and urban radio shows promoting women's issues. Its mission is to work for women's and Congolese women's advancement through available media outlets.⁸⁹ The impact produced by this organization is still regional and centered in South Kivu. However, it is possible that with the support of international actors, its influence could allow women to mobilize in a

similar fashion to WIPNET in Liberia. Perhaps over time, the influence of other women's groups outside the Congo will influence the human and social capital necessary to ignite an effective women's movement in the DRC that will benefit the country's future.

Conclusion

Although definitive statements of causation derived from a two-country case study would be ill advised, this article highlights several important issues for further research as well as some potential policy implications. Both Liberia and the DRC experienced a brutal conflict, but only the women in Liberia seemed to mobilize, based on their identity as women. Not surprisingly, we have found that each case must be studied holistically in terms of its preexisting conflict conditions, the conflict, and postconflict contexts. Particularly, Gurr's discussion on group cohesion and identity seem most important for understanding the potential for mobilization among women faced with conflict. In Liberia the historical and modern social networks for women helped foster an identity based in gender when they confronted the severe brutality of the conflict that led to mobilization. Leaders were able to tap into this network to drive action. Although many microlevel networks were destroyed by the war and its resulting displacement, the *precedent* for collective action seems to have supplied the social capital necessary for women to mobilize effectively.

In terms of Fonjong's stages of empowerment, conflict may obviate a linear progression for societies in which women possess agency resulting from preexisting social structures. One might reasonably assert that although welfare, the first of Fonjong's stages, declined during conflict in both Liberia and the DRC, the Liberian women's experience with dual-sex hierarchies and women's organizations facilitated rapid transition to the highest stage: control. Similarly, an examination of Ray and Korteweg's practical versus strategic interests indicates that conflict in Liberia seems to have provided a catalyst toward strategic interests even as practical interests remained largely unmet.

Although imperfect, Ted Gurr's minority-rebellion framework proved a useful construct for understanding the importance of identity in women's movements during conflict. In Liberia a number of factors drove women in Monrovia to subordinate ethnic and socioeconomic identities in favor of identity as a woman. As the war disrupted previous social ties to existing identities, both resident and displaced women in Monrovia found commonality in their acute suffering and active grievances. Congruent with Gurr's model, this combination of strong identities and intense grievance provided the fuel necessary for women like Gbowee to ignite mobilization in the form of communal protest. In contrast, while Congolese women share the active grievances of Liberian women, they appear to lack the group identity necessary to mobilize effectively for political action. This deficiency is likely due to a number of factors such as geographic isolation, lack of access to national-level leaders, and little precedent for women's mobilization upon which to draw.

Despite these findings, several questions remain unanswered and require further research. The mobilization of women in Liberia produced internationally noted outcomes such as gender balance in the peace accords and the election of a woman president, but current outcomes for the average Liberian woman remain disheartening. As noted by Sharon Abramowitz and Mary Moran, a 2010 report by the United Nations Development Programme found that gender equality for the average Liberian woman was lower than in much of the rest of Africa.⁹⁰ Understanding this paradox would represent a significant extension of our research. More broadly, a comparison of traditional societies and outcomes for women in postconflict transitions continues to be an area for additional research, raising a number of policy implications. First, women need to be included in the peace-building process, not only to advocate for women but also to include important societal policies for everyone. Second, the transitional postconflict process is dangerous and fraught with complex challenges. A country must heal among warring parties and, in many cases, must rebuild its economy while incorporating a power-sharing arrangement. Third, regional and international actors should empower, not impose. In other words, external actors must work with local stakeholders to help craft sustainable solutions to the myriad challenges faced by postconflict societies. Finally, as noted earlier in this article, each case must be considered in the unique context of not only the current conflict but also the historical precedents of the culture in which it occurs. A country's woes have no one answer, especially as they relate to women. Future research can only help provide better awareness, better questions, and, hopefully, more adaptable and applicable solutions.

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The United States in the Horn of Africa

The Role of the Military

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This article focuses on the role that the US military has played in the Horn of Africa, especially since 11 September 2001. It addresses whether or not the organization has embraced strategic knowledge and perspective in its overall approach in countering violent extremism and assisting with sustainable development, as well as in designing activities and modifying them over the years. In particular, it examines the civil affairs (CA) activities of the Combined Joint Task Force–Horn of Africa (CJTF-HOA) in attempting to win hearts and minds and build partnership capacity.¹ In the 2000s, well drilling by US military CA units was intended to provide environmental security and sustainable development for Somali pastoralists, win their hearts and minds, and prevent them from sympathizing with violent extremist organizations, particularly al-Shabaab in Somalia.² The strategic shortcomings of the hearts-and-minds campaign led the CJTF-HOA in the 2010s to embrace strategic knowledge and shift to an approach that emphasized building the partnership capacity and CA capabilities of Eastern African militaries. In particular, the CJTF-HOA's strategic concentration has been on strengthening the capabilities of militaries involved in peace enforcement in Somalia and enabling them to win hearts and minds.

The article also analyzes the strategy of the US government towards countering violent extremism in Somalia and the Horn of Africa since the US Embassy bombings by al-Qaeda in August 1998 and especially since 11 September 2001. The US approach has been an “indirect” one, which contrasts with direct intervention in Afghanistan and

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This article is reprinted courtesy of the Institut de recherche stratégique de l'École militaire (IRSEM), Paris, France, from Maj Gen Maurice de Langlois, retired, ed., *Global and European Union Approach*, no. 35 (Paris: IRSEM, October 2014), 92–102, <http://www.defense.gouv.fr/irsem>.

Iraq. The United States has relied on partners in Uganda, Burundi, Ethiopia, Kenya, and Djibouti as well as Somalis themselves to do the fighting in Somalia; further, it has helped rebuild the Somali state and strengthen states and societies in the struggle against extremism. America has conducted “dual track” diplomacy, supporting the reconstitution of the Republic of Somalia as well as nonstate actors such as warlords and the breakaway Republic of Somaliland, which would fight against violent extremists. It also conducted what has been called “drone diplomacy” against violent extremists. At issue are lessons learned over the past decade and areas where various components of US strategy stand and where they might lead. Also at issue is US support for sustainable development in the Horn. Since 2009 the US Agency for International Development (USAID) has taken the lead in sustainable development, and the US military has dropped back to a supporting role.

The Department of State (DOS) and Department of Defense (DOD) have had divergent approaches towards the Horn of Africa. The DOD has concentrated on counterterrorism by special operations forces and drones as well as regionwide engagement and the building of partnership capacity, particularly through the CJTF-HOA. The DOD has been reluctant to become too deeply involved in Somali affairs, partly because of the October 1993 “Black Hawk down” experience (and the death of 18 US special forces personnel), which led to the withdrawal of US peacekeeping and enforcement forces. Since then, America has been unwilling to put “boots on the ground” in large numbers in Somalia again. Furthermore, the invasion and occupation of Afghanistan and Iraq monopolized the DOD’s attention since 2001. CJTF-HOA personnel have not been allowed to operate in any part of Somalia although US special forces have remained active there covertly. The CJTF-HOA has played a lead role in military strategy in the Horn of Africa, having devised the hearts-and-minds campaign and built the partnership-capacity approach. Recently, US Africa Command (AFRICOM) has worked to control US security policy in the Horn, subordinating the CJTF-HOA and attempting to wrest control of security cooperation from US embassies in the region.

The DOS responded with the East African Counter-Terrorism Initiative and later the East African Regional Strategic Initiative, both launched as interagency efforts to enable African states to strengthen their borders, intelligence, and policing capacity as well as enhance aviation security and safety.³ Moreover, the DOS has backed African and Somali partners to defeat al-Shabaab and reconstitute a state in Somalia, an action that would put an end to a significant source of violent extremism in the Horn of Africa. This included supporting proxies in Somalia, hoping that they would curb extremist expansion. Initially, the DOS supported Somali warlords as a counter against extremists. In December 2006, the United States acquiesced to the Ethiopian invasion of Somalia as a way of defeating extremist elements of the Islamic Courts Union.⁴ Since 2007 America has spent \$650 million, and the DOS has led in arranging a wide range of support for the African Union Mission in Somalia (AMISOM) and the Transitional Federal Government (TFG) in Somalia in hopes that they could defeat al-Shabaab and establish national security and constitutional order. The European Union contributed a similar

amount (411 million euros) over the same period. The strategy met with skepticism from those who asserted that Somalia could hope for nothing better than “stability” and a balance of power among the clans and subclans.⁵ However, in 2012 the DOS strategy scored significant successes when AMISOM and Somali forces pushed al-Shabaab out of urban centers in Somalia and put in place a new constitution and government of Somalia with a president from civil society. The United States has entered a new phase in Somalia that calls for deciding whether to continue to engage indirectly or become more directly involved in rebuilding that country and preventing the resurgence of al-Shabaab and violent extremism.

Strategic Knowledge and Perspective

Strategic knowledge and perspective in countering violent extremists involve evaluation of US interests and goals as well as the ways and means to achieve them. The primary US interest is security from violent extremist attacks against not only US embassies, businesses, and citizens in the region but also the homeland. One threat comes from pro-al-Shabaab Somali nationals living in Minneapolis and other American cities who could mount attacks on the homeland and in the Horn of Africa. Al-Shabaab, which has links with al-Qaeda Central along the Afghan-Pakistan border and al-Qaeda in the Arabian Peninsula, has issued threats against US interests. However, the threat from al-Shabaab is less serious than the one posed by the al-Qaeda organizations, which could still carry out attacks on the United States and its interests. Al-Shabaab has struck outside Somalia but has not yet attacked US interests in Africa or the United States.

Given American interests and the threat, the strategic options have been elimination, containment within the borders of Somalia, or marginalization within Somalia. Elimination would have proven overly costly and unachievable; al-Shabaab has been too elusive and would probably morph into a Somali nationalist organization. Containment is viable but risky; al-Shabaab still could strike US interests in the Horn of Africa and the homeland. The marginalization of al-Shabaab is feasible and the most desirable choice for US security interests, weakening the organization so that militants cannot attack the United States and its interests. In regard to ways of realizing the ends, the United States had three options. The first option involved securing the borderlands of Somalia in Kenya, Ethiopia, and Djibouti and conducting counterterrorism operations inside Somalia. The second entailed working with African forces and Somalis to marginalize al-Shabaab and reconstitute the Somali state. The DOD chose the first option starting in 2003, and the DOS adopted the second option starting in 2006. In regard to means, pursuing an elimination strategy and placing US boots on the ground in Somalia would have cost tens of billions of dollars and American lives. The containment of al-Shabaab has cost the DOD billions of dollars, and the marginalization of that organization has cost the DOS hundreds of millions of dollars spent on Ugandan, Burundian, and Kenyan forces. America eschewed a third option to put large numbers of US boots on the ground in Somalia to eliminate al-Shabaab.

The CJTF-HOA plan to win the hearts and minds of Somali pastoralists did not seem indicative of strategic knowledge and perspective. Instead, it addressed a peripheral issue that, at the most, may have had limited bearing on Somalia, and it attempted to contain al-Shabaab rather than marginalize the movement. Further, the strategy of US CA teams working with African CA teams to build their capabilities appears to have had limited impact. In particular, Ugandan and Kenyan CA teams have not engaged with Somalis as the United States might have liked.

In explaining the US military's shortcomings in embracing strategic knowledge and perspective in the Horn of Africa, one hypothesis holds that the more casualty averse a military force, the less its ability to apply strategic knowledge and perspective to fighting extremists. Another maintains that the US military will probably seek out roles and missions no matter how detached from strategy when it has little strategic vision, thus producing "mission creep."

Concerning organizational learning, the CJTF-HOA and its CA teams rotate every year or less while diplomacy, development, and defense officials in the US embassies do so every three years. The following hypothesis seems to apply to the US military in the Horn of Africa: stable, mature organizations with leaders held accountable are better able to learn and change in an ambiguous environment, whereas unstable organizations with constantly rotating leaders are not as capable of learning.⁶

Evidently, the DOS strategy and approach were more effective than those of the US military. The DOS focused on Somalia and devised plans to push back violent extremists and reconstitute the Somali state, thereby marginalizing al-Shabaab and exhibiting strategic knowledge and perspective. The State Department also exhibited organizational learning and adjustment from its failed approaches. In fairness to the DOD, its mission was to support the DOS in security cooperation pertaining to Somalia, and AFRICOM and the CJTF-HOA conducted considerable training and a number of exercises with Ugandan, Burundian, and Kenyan forces. However, the DOD also demonstrated a reluctance to engage with AMISOM and the Somali TFG before 2012.

The State Department Approach in the Horn of Africa: Focus on Somalia

It appeared that Somalia would prove the most difficult of all failed states to reconstitute with a top-down security and state-building approach. Therefore, the DOS was advised to confine its efforts to a bottom-up peace-building approach. In terms of state security, Somalia has ranked at the bottom of the list of failed states because it has lacked state institutions for more than two decades.⁷ The TFG was supposed to pave the way for the reconstitution of government in Somalia, but it has been corrupt and heavy-handed.⁸ In terms of state failure and elite corruption, the situation in Somalia is comparable to the cases of Afghanistan and the Democratic Republic of the Congo.

Assistant Secretary of State Johnnie Carson articulated the top-down state-building policy of the Obama administration in March 2010:

U.S. policy in Somalia is guided by our support for the Djibouti peace process. The Djibouti peace process is an African-led initiative which enjoys the support of IGAD, the Intergovernmental Authority on Development. It also enjoys the support of the African Union and the key states in the region. The Djibouti peace process has also been supported by the United Nations, the European Union, the Arab League, and the Organization of Islamic Conference. The Djibouti peace process recognizes the importance of trying to put together an inclusive Somali government and takes into account the importance of the history, culture, clan, and sub-clan relations that have driven the conflict in Somalia for the past 20 years.⁹

Policy circles debated the feasibility of a top-down security approach for Somalia versus a bottom-up “stability” one, which would take into account representation from clans and interclan dynamics.¹⁰ For more than five years, the DOS and other entities pursued a policy of attempting to establish nation-state security in Somalia so that al-Shabaab could be defeated and the process of peace building, renewal, and representation could begin to take hold throughout the country. The argument maintained that state security was essential before representation and renewal could fully develop. In this vein, Ugandan and Burundian AMISOM peacekeepers (i.e., peace enforcers) and TFG forces fought to gain control of Mogadishu from 2007 to 2011.

In spite of the difficulties with state building and stability in Somalia, the DOS and other entities continued to pursue a top-down security approach due to an inclination towards states and sovereignty as the basis for peace and security. They persisted with the Somali peace process that led to establishment of the TFG and AMISOM along with the ultimate goal of reconstituting the Republic of Somalia. The DOS supported the African Union, Intergovernmental Authority on Development, and concerned African states in the peacemaking, enforcement, and state-building project, hoping that the Somalia problem could finally be resolved and prevent al-Qaeda and other extremists from establishing a base there. Thus, the DOS and other entities inherently believed that the establishment of a skeleton state—with some form of representation and a protomilitary—would inevitably enhance security, bring stability, and bolster confidence that interclan dynamics could be managed by an inclusive government.¹¹ In that vein, Somali leaders received an August 2012 deadline to pressure them to end the TFG and establish a permanent government in Mogadishu.

Contrary to the contention that a top-down security approach by the DOS would not prove feasible in Somalia, AMISOM and TFG forces strengthened and went on the offensive against al-Shabaab. Between 2007 and 2011, training and equipping of Ugandan and Burundian AMISOM forces under the DOS's Africa Contingency Operations Assistance and Training program by contractors (e.g., Bancroft Global Development Corporation) were important in raising the level of AMISOM forces to a point where they could fight al-Shabaab and prevail.

Analysis shows that the top-down, indirect approach of the DOS with a concentration on Somalia has brought significant change to Eastern Africa and that several factors have partially validated it. The DOS cultivated Uganda and Burundi, both of which made

a long-term commitment of several thousand troops to the AMISOM mission. The State Department ensured that AMISOM forces were properly trained and equipped. The political process moved forward to the point where the United States recognized the Republic of Somalia in January 2013—for the first time in 22 years. In comparison, the US military approach was more indirect and less effective than that of the DOS.

The US Military Approach in the Horn of Africa and the Combined Joint Task Force—Horn of Africa

After the US Embassy bombings in Kenya and Tanzania in August 1998, the United States identified the Horn of Africa as one of the areas where al-Qaeda had to be countered. In particular, al-Qaeda operatives were moving back and forth between the East African coast and the Arabian Peninsula. The DOD and US Central Command established the CJTF-HOA in Djibouti to interdict al-Qaeda militants.

Such interdiction of al-Qaeda operatives diminished, leading to a search for other roles and missions. CA activity began in 2003 as the CJTF-HOA explored new roles and missions. In 2005 the task force's CA activity ramped up in a campaign to win hearts and minds in Kenya, Ethiopia, and Djibouti. It included the drilling of wells for Somali pastoralists living in areas adjacent to Somalia (especially in Kenya's North East Province and Ethiopia's Somali or Ogaden Province) to provide water for sustainable development, especially for their herds. The CJTF-HOA's CA teams also built schools and clinics to help local populations in the provision of education and health care. The strategy to provide Somali pastoralists with water would supposedly win Somali hearts and minds for the United States and Horn of Africa states while lessening support for violent extremists, including al-Qaeda. It sought to win over Somalis in Ethiopia's Ogaden/Somali Region and Kenya's North East Province and thereby have an effect inside Somalia since clan linkages exist across borders. Further, the strategy envisioned building rapport between Ethiopian and Kenyan authorities and their Somali populations.

Somali pastoralists have faced such problems as excess livestock and insufficient water and grazing land. They move back and forth from Ethiopia, Kenya, and Djibouti to Somalia seeking these necessities. However, the CJTF-HOA teams have had limited knowledge of not only Somali pastoralists and clan politics but also sensitivities of the Ethiopian and Kenyan governments towards their Somali populations.

The CJTF-HOA campaign was based on the experience of two commanding generals who had served with the US Marine Corps as noncommissioned officers in the Civil Operations and Revolutionary Development Support counterinsurgency program in Vietnam.¹² The CA campaign launched with approval of the Ethiopian and Kenyan governments and limited participation by some of their militaries. The campaign experienced some initial successes—for instance, in drilling wells side-by-side with Kenyan drilling teams in the Mandera Triangle where Kenya, Ethiopia, and Somalia meet. The CJTF-HOA also began to cooperate with USAID in its CA projects. The “diplomacy,

development, defense” approach emerged, including cooperation among the CJTF-HOA, USAID, and US embassies in the region.¹³

The campaign scored some initial successes but experienced serious setbacks in Ethiopia in 2007 and Kenya in 2009. In 2007 Ethiopia asked the CJTF-HOA’s CA teams to leave the Ogaden/Somali region, believing that they were aiding elements associated with the Ogaden National Liberation Front. A particularly important event occurred when armed US military personnel entered the Ogaden region and attempted to deceive Ethiopian security personnel into thinking they were Red Cross aid workers.¹⁴

Some officials in US embassies in the region were skeptical about the CJTF-HOA’s chances of succeeding in its CA campaign.¹⁵ In 2008 a study commissioned by the political affairs office in the US Embassy in Nairobi led to the CA teams being asked to vacate the Mandera Triangle. Afterwards, the Kenyan government asked them to leave North East province altogether. Therefore, sensitivities of the two most important states in the Horn of Africa, as well as those of skeptical US officials, circumscribed the CJTF-HOA and its CA activities in the most strategic areas. Forced to reformulate its approach, the task force became less attentive to Somali pastoralists and less effective in helping to reach US security goals.¹⁶

In 2007 AFRICOM joined the CJTF-HOA as military organizations involved in promoting sustainable development; plans proceeded until AFRICOM became fully operational in October 2008. In 2009 the Obama administration came to office, and the State Department asserted its lead role in US African policy, advising AFRICOM and the CJTF-HOA to play a supporting role to USAID and US embassies in promoting sustainable development, which led to a scaling back of their sustainable development roles. In early 2011, Gen Carter Ham became commander of AFRICOM and moved it further away from a development role and more towards making it a more traditional geographical *combatant* command.

The CJTF-HOA has continued to try to locate CA teams in “strategic locations” near Somalia. For instance, teams are in the vicinity of Dire Dawa and Harar in proximity to Ethiopia’s Somali Region. At the same time, CA teams have carried out projects in countries that support US goals in the Horn, including Djibouti, Uganda, and Burundi. Djibouti is the default location where CA teams have been sent when they cannot be placed elsewhere.¹⁷

The CJTF-HOA commander must deal with the problem of a combined joint task force operating in a Title 22 environment in which the DOS and ambassadors are in charge rather than a Title 10 war-fighting environment.¹⁸ Commanders in Southwest Asia are accustomed to operating in Title 10 environments where war-fighting authorization has allowed them greater power in what they can do and how they spend money. However, in a Title 22 environment, the US ambassador is in charge and can veto or modify any CA project as well as uses of Title 10 funds.

The US Sixth Fleet, operating out of Bahrain as part of US Naval Forces Central Command, has been responsible for most of the international waters off the coast of Somalia and for US counterpiracy efforts. The latter have been one of the CJTF-HOA’s

lines of effort but mainly in a supporting role. Ultimately, the stabilization of Somalia with the task force's help should lead to further reductions in piracy.¹⁹

The CJTF-HOA also has sought to influence host militaries so that they become proficient in CA, hoping they can win hearts and minds at home and in Somalia. However, Kenya and Uganda CA teams have engaged with the CJTF-HOA, but they have not applied their training and expertise in Somalia. The Kenyan military's CA teams were split up and embedded in companies.²⁰ Uganda has not deployed CA teams to Somalia. Burundian troops have engaged with Somalis in Mogadishu, but the military did not have CA teams to carry out that task. The Ethiopian military claims that it is still a popular-based institution after 20 years in power and has refused to engage the CJTF-HOA CA teams.²¹ The Rwandan Defense Force has engaged with the teams; however, its CA teams are in Darfur rather than Somalia. The question is whether or not the CJTF-HOA will assist in developing CA teams for the military of the Republic of Somalia.

In 2009 the DOD and AFRICOM decided to keep the CJTF-HOA because of its strategic location, and by 2012 3,500 troops and representatives from 14 countries were stationed there. The CJTF-HOA allowed the United States to respond to contingencies within the Horn, supplied in-theater personnel for AFRICOM, and provided additional resources to embassies in the region. The task force had demonstrated that it could build relationships and goodwill with officials where CA and other activities were held. Lastly, the task force was positioned to counteract regional terrorist threats, as noted in its mission statement:

The mission of CJTF-HOA involves an indirect approach to counter violent extremism. CJTF-HOA, as part of US African Command (AFRICOM), conducts operations to strengthen partner nation and regional security capacity to enable long-term regional stability, prevent conflict and protect US and Coalition interests. CJTF-HOA builds friendships, forges relationships, and creates partnerships to enable African solutions to African challenges. CJTF-HOA aims, through its combined joint forces, to improve security, increase stability and strengthen sovereignty in the Horn of Africa and Eastern Africa region through being a model for the integration of Defense, Diplomacy and Development efforts.²²

In comparison with the DOS's approach of trying to reconstitute the state in Somalia, the US military's attempts to win hearts and minds and build partnerships in the Horn of Africa do not appear to have had a strategic effect in advancing US interests against the violent extremist threat. The DOS has been accused of being too diffuse in its approach to security challenges while the DOD has been more focused. In this case, the DOS—particularly the US Embassy in Nairobi—concentrated on defeating the main threat; the DOD and CJTF-HOA did not.

Conclusion

The US military in the form of AFRICOM and the CJTF-HOA has encountered difficulties in embracing strategic knowledge and perspective in its overall approach to countering violent extremism. The US military's mistakes that were made by CA teams in Kenya and Ethiopia revealed a deficiency in strategic knowledge and perspective in assisting with sustainable development and winning hearts and minds.

With the help of the Obama administration, the State Department, and USAID, the military has adjusted its role and is a subordinate actor in the sustainable development field. However, the military still experiences difficulties in designing and executing activities and modifying them over the years. It continues to lack sufficient strategic knowledge and perspective to meet the challenges of the Horn.

The constant rotation of CJTF-HOA commanders and the swings between active and passive commanders have upheld the thesis from contingency theory that the organization has not been as effective as it should have been. The longer tenure of leaders in the embassies (and defense offices) has been accompanied by greater strategic knowledge and perspective in dealing with the Eastern African region—specifically Somalia (and Sudan / South Sudan) and security issues in the region. In regard to organizational learning, the CJTF-HOA and its CA teams rotate every year or less while diplomacy, development, and defense officials in the US embassies do so every three years. The hypothesis that unstable organizations with constantly rotating leaders are not as capable of learning has been upheld and applies to the US military in the Horn of Africa. In contrast, relatively stable and mature organizations—such as the embassies—with accountable leaders are better able to learn and change in an ambiguous environment.

Any explanation of the US military's shortcomings in embracing strategic knowledge and perspective in the Horn of Africa and fighting extremists must consider casualty aversion as a significant factor. The DOD has been reluctant to commit to any program or project that might lead to a repeat of the "Black Hawk down" experience. Iraq and Afghanistan seemed to end casualty aversion; however, the fundamental problem has stemmed from Black Hawk down 20 years ago and the DOD's reluctance to engage in the stabilization of Somalia, as evidenced by a lack of engagement with AMISOM and the TFG.

The hypothesis that the US military likely will seek out roles and missions—no matter how detached from strategy-producing "mission creep"—has been upheld in this case. This is not mission creep in regard to escalating force but expanding the mission into areas of little strategic knowledge and perspective in order to keep the task force actively engaged.

The different perspectives of the embassies, the CJTF-HOA, and AFRICOM are indicative of the stovepipe (narrow) vision of US agencies. At times and for some, it appeared that the larger strategic aims established by the United States in Africa got lost in the tactical and operational shuffle. The same has applied to Southwest Asia, especially in countering al-Qaeda, al-Shabaab, and other violent extremist organizations. Evaluation

of the US military in the Horn of Africa indicates that the United States could do other things with hundreds of millions of dollars to combat violent extremism instead of continuing to fund the CJTF-HOA's CA teams.

Notes

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Power, Security, and Justice in Postconflict Sierra Leone

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The international community established a Special Court for Sierra Leone (SCSL) in 2002. However, this article contends that relatively little political acceptance of justice as a peace-building mechanism has occurred and that the court consequently fails to fully address core justice issues and grievances that constituted key drivers of the conflict. The failure to establish or reform justice systems that Sierra Leoneans actually access—including district courts, chiefdom courts, and other local mechanisms—and the establishment of an entirely international court have led to a continuation of prewar political patterns in the countryside and the inability of the international community to address local justice issues.

The article addresses the related matter of justice more broadly, beyond the transitional phase. The SCSL and the Truth and Reconciliation Commission (TRC) “dual track” approach was designed not only to be transitional but also to lead to a more just postwar settlement. The article argues that to a large degree, this has not happened. Furthermore, despite the short-term success of the transitional program in bringing a small number of perpetrators to justice very publicly, a failure to take into account local approaches to justice and the close relationship of power and justice at the local level has meant that justice remains somewhat elusive for many people across the country.

The transitional justice mechanisms in Sierra Leone rested primarily on a bureaucratic-institutional model that has always been weak within Sierra Leone and, to a certain extent, has always been subjugated by a charismatic and patronage system with multiple, competing, and complementary political powers.¹ The emphasis on legal-bureaucratic approaches clearly satisfied international authority but did not penetrate into the country through its lack of recognition of alternative sources of justice, their division into a “modern/traditional” dichotomy that relegated the traditional to the second tier of a hierarchy, and a disinclination to recognize the interrelated nature of power and justice in Sierra Leone.

For most people, justice is not dispensed from formal, modern systems but from a dense network of institutions at the local level, which may or may not be codified or even

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visible. These institutions constantly change and are subject to a variety of controlling bodies that regulate the meaning and enforcement of common law. Indeed, even the formal institutions of local and magistrate courts draw on common law rather than state law in many of their cases, and this practice is open to interpretation and influence according to changing local customs. Different social structures exercise influence over justice processes and outcomes. These biases exist despite the public, national agreements, for example, to enforce human-rights legislation. Local power is at least partly exercised through the appointment to courts and through the role of elders within villages, many of whom are relatively old and male. As documented, this situation leads to institutional bias within the customary system, particularly against women and individuals classified as youths.

Transitional Justice Mechanisms in Sierra Leone

The SCSL was established through an agreement between the United Nations (UN) and the government of Sierra Leone with the aim of bringing to justice those who bore the most responsibility for the human-rights abuses perpetrated during the war. The latter included the leadership of all sides, particularly the Revolutionary United Front (RUF) and the Armed Forces Revolutionary Council as well as—and more controversially—the Civil Defense Forces. In addition, the court also tried Charles Taylor for crimes in Sierra Leone and still seeks a former leader, Johnny Paul Koroma. The court was explicitly created as a hybrid institution mixing domestic and international staff and approaches as part of a post-2000 expansion of international law into non-Western societies. Like its equivalents in East Timor and Cambodia, the special court was located in the country where the abuses happened and sought to meet the justice needs of local people as well as international legal standards.

In targeting senior members of the armed groups, the SCSL not only wished to show impartiality in terms of which side stood trial but also resolved that senior leaders could not enjoy impunity when it came to international law. Notably, the court did not have a mandate to tackle wider issues within Sierra Leone and, perhaps more controversially, could not pursue those responsible for individual crimes carried out by rank-and-file members of the groups. In this regard, the SCSL has been relatively successful. Despite the fact that Sam Bockarie, Sam Hinga Norman, and Foday Sankoh all died during the process, they and the other senior actors have actually been prosecuted, convicted, and sentenced, sending a powerful signal to others. Undoubtedly, however, the failure to prosecute any but a very small number of leaders has created considerable disappointment within Sierra Leone.²

Although the SCSL has been described as a “hybrid,” there are questions about how far the court made real concessions to the local social environment within which it operated. In particular, the Civil Defense Forces trial, as it was called, represents an important element of the transitional justice process since it put on trial a group of Kamajor fighters who operated on the side of the democratically elected government and against the RUF.

Widespread belief held that the Kamajors, who gained their power from local hunting traditions, were impervious to bullets as a result of magic. Consequently, they were willing and able to defend their communities against the RUF and to support or reestablish civilian rule. At the same time, the Kamajor tradition, by its very nature, is violent, and several reports indicate that its members use terror techniques similar to those of the RUF.

Against this socially embedded structure, the SCSL levelled an array of international law on child soldiers, atrocities, and belief systems that represented a failure to understand the context in which it was operating and a related inability to grasp the nature of the Sierra Leonean ideas of justice. At the same time, Tim Kelsall points out that the SCSL also did not recognize that the notion of superior responsibility was problematic in an organization like the Civil Defense Forces and that the witness statements used to convict those leaders were flawed since the witnesses gave evidence on a different basis than the expectations of the court.³ All of these issues damaged the legitimacy of transitional justice within Sierra Leone beyond Freetown.

The SCSL was designed to enact retributive justice through trying “those who bear the greatest responsibility,” but the TRC sought to bring restorative justice to individuals and to the country as a whole. The TRC described its work as carrying out a “series of thematic, institutional and event-specific hearings in Freetown.”⁴ This process was supplemented by four days of public hearings and one day of closed hearings in each of the 12 district headquarters towns across the country. The hearings were intended to “cater for the needs of the victims” and to promote “social harmony and reconciliation.”⁵ The hearings consisted of witnesses, perpetrators, and victims all telling their stories to a panel of commissioners and a “leader of evidence.” The TRC did not specifically aim to gather new information since an earlier evidence-gathering phase had occurred; rather, it wished to allow for catharsis through storytelling and recognition that, hopefully, would facilitate wider societal healing.

However, several scholars have pointed out that the TRC failed to provide what the local people wanted or needed.⁶ Even though the truth-telling aspects of the process had logic based on reconciliation between clear protagonists (e.g., Rwanda), its value is significantly reduced where the boundaries between the violent groups are less well defined and it becomes more difficult to determine “other” particular identities. As Gearoid Millar points out, the real issue in Sierra Leone is that the theory of how conflict resolution should work does not hold up in a situation in which clear identities are hard to find.⁷

The basic assumptions of the TRC were similar to those in other TRC examples; that is, the conflict happened between groups that dehumanized each other through hatred and an in-group/out-group dichotomy.⁸ However, in Sierra Leone, very little clear demarcation and certainly no clear divisions existed along ethnic or religious lines, for example. Instead of a clearly delineated, structured conflict between two distinct protagonists, Sierra Leone was an evolving morass of different groups with unclear command structures and institutional organization, characterized partly by shifting alliances and changing loyalties and motivations.⁹

Indeed, the TRC partly identified successive governance problems at the beginning of its own report: “While there were many factors, both internal and external, that explain the cause of the civil war, the Commission came to the conclusion that it was years of bad governance, endemic corruption and the denial of basic human rights that created the deplorable conditions that made the conflict inevitable.”¹⁰

This situation led to a wave of opportunism as different, fragmented groups recruited disenfranchised and alienated youth. In other words, this was not a structures conflict that allowed a TRC to persuade one side to reconcile with another. In fairness, the TRC did not intend to do so, specifying that it wished to reconcile victims and perpetrators. The hearings were designed to create “a climate which fosters constructive interchange between victims and perpetrators” and to “promote healing and reconciliation and to prevent a repetition of the violence and abuses suffered.”¹¹ However, the situation in Sierra Leone, partly because of its fluidity and partly because of sympathy with some of the young men within the RUF, did not generate significant hatred of perpetrators. In fact, similarly to Northern Uganda, it is striking how many people regard perpetrators as “our brothers” or “our children.”¹²

To What Extent Should Sierra Leone’s Transitional Justice Processes Be Considered a Success?

Regardless, the SCSL did achieve a number of firsts, including hearing cases of gender-based crimes and child soldiers as well as those involving responsibility for war crimes by individuals in leadership positions. Importantly, it was the first to receive the specific mandate to prosecute people who bore the most responsibility for serious crimes; the first to sit in the place where those crimes were committed; the first to be overseen by a management committee of independent member states; the first to provide some scope for the appointment of local officials; and the first to be funded voluntarily by member states of the UN. In legal terms, it also set a number of important precedents, including establishment of a principal defender to ensure a fair defense, an outreach office, and a Legacy Phase Working Group to assure a lasting legacy for the court. In addition, the SCSL was the first body to sit alongside a truth and reconciliation process. However, a number of areas regarding the success of the SCSL and its twin process, the TRC, remain open to question.

Firstly, the Sierra Leone legal profession stayed away from the court, believing that its proceedings lacked legitimacy—a perception not helped by some early decisions. This attitude reflected a more general view arising from the establishment of the SCSL after the TRC. Specifically, many Sierra Leoneans felt excluded from the discussions about creation of the court. This top-down approach caused significant issues, and even the UN recognized its error when it tried to include Sierra Leonean actors late in the day. At the same time, concerns arose over the perceived privileging of the SCSL over the TRC, which resulted in a statement from a group of nongovernmental organizations requesting parity between the two.¹³ That is, the TRC was seen as having local legitimacy as a result

of local consultation and active Sierra Leonean participation; moreover, it was less controversial than the special court.¹⁴

Secondly, both the TRC and the SCSL have had differing impacts. The TRC is perceived to be quite broad, constructing a particular narrative of the conflict, whereas the SCSL is seen as far too narrow—partly a result of the UN’s insistence on efficiency. Toward this end, the SCSL has proven remarkably efficient in terms of its narrow mandate, resulting in fewer trials at lower cost and indictments issued within nine months. However, the trials themselves have been slower. Further, the fact that the SCSL model operates outside the usual constraints of the local legal system has had some advantages. Significant issues have arisen, not least of which is the idea that the SCSL has been “parachuted in” and is unrelated to the domestic legal system and that the extremely small number of people tried amounts to no more than a symbolic gesture, particularly if there is no real legacy within the justice system more broadly. Kelsall points out some real issues in establishing responsibility in organizations that lack clear command structures.¹⁵

The TRC and the exercise in “truth telling” that comprised the core of the process had a different sort of effect. Extensive local research on the TRC by Rosalind Shaw and Millar shows clearly that the process itself was largely regarded as redundant by most Sierra Leoneans.¹⁶ Although the external imposition of a process was considered a cathartic experience for both individuals and society as a whole, clearly a deep misconception existed about what the process was supposed to achieve and the nature of justice expected from it. Millar points out that the impact and perception of the TRC depended very much on the initial expectations of the individual taking part.¹⁷ At its core, this depends on what constitutes restorative justice for an individual—telling one’s story is not necessarily restorative justice if the initial infringement has been social, economic, or cultural, or even all three. In other words, the effect of the TRC was limited by its dearth of engagement with local systems and perceptions of justice and redress.

The impact of the TRC process was further limited by its attempt to seek out narratives that engaged with hatred or “othering” of specified groups within society. TRCs in Rwanda and South Africa, for example, worked partially because of the narratives to be written of oppression by a clearly identifiable group against another in an institutionalized conflict. Such was not the case in Sierra Leone, so the process of the TRC needed to change to adapt to the context of transitional justice—something it could not do.

Thirdly are the issues concerning legitimacy. The TRC, for all its faults, enjoyed significant local support among both civil society groups and most of the political and professional class within Sierra Leone. Despite its limitations, the TRC report stands as a monumental effort of narrative reconstruction and assimilation of evidence. One may question its overall impact, but it was an invaluable research exercise that enjoyed support and legitimacy. However, as the TRC Act itself states, the commission was empowered to “seek assistance for traditional and religious leaders to facilitate its public sessions and in resolving local conflicts arising from past violations of abuses in support of healing and reconciliation.”¹⁸ Despite this recognition of the issue, the actual use of traditional justice actors in the process remained very weak throughout.¹⁹ The SCSL, though, was affected

from its inception by the perception that it was an “international court” creating what the International Center for Transitional Justice labelled a “spaceship phenomenon,” whereby local people came to perceive the court as an interesting curiosity that had very little effect on their lives.²⁰

Fourthly, questions have arisen regarding fairness, specifically in relation to the standards of the defense counsel available. Within the court, defendants received an unusually high level of institutional support, to the extent that a report by the International Center for Transitional Justice identifies the level of support as higher than the usual provisions in other trials.²¹ Clearly, international justice demands performance of a certain standard of justice, but certainly the perception in Sierra Leone was that the defendants received special treatment in both their defense and the standards of accommodation they enjoyed while on trial, held to be better than that for most Sierra Leoneans.²²

The question of the TRC’s and SCSL’s success remains somewhat thorny. Even on its own criteria, the TRC failed to meet its own aims of reaching out to traditional justice mechanisms that dominate justice beyond Freetown. An inability to recognize that justice is essentially political in Sierra Leone meant that both the TRC and SCSL did not reach out as widely or as effectively as they desired. The SCSL remained largely an international court, detached from both the legal profession in Sierra Leone or most of the population, who were either unaware of or unconcerned with the very small number of cases dealt with. The success of the SCSL remains primarily in the efficiency of concluding a small number of cases in a cost-effective way, but even here analysis by Kelsall, among others, points to issues with understanding of culture, definitions of categories, reliability of witnesses, and the culpability of individuals in decentralized command and control mechanisms.²³

The TRC, on the other hand, represents a mechanism that raises differing views on the process. In particular, discussion has taken place about the scope of the TRC as a whole and whether the “truth” could be realized—or if reconciliation was a realistic goal in such a traumatized country.²⁴ At the same time, several of the issues raised in criticism of the SCSL also occurred in relation to the TRC—specifically, whether or not witnesses told the truth at all, given the alien nature of the process through its adversarial approach, the lack of cross-referencing and cross examination, and the large number of people involved in the conflict who did not testify at all. Nevertheless, the report itself enjoys almost universal respect, standing as an impressive historical document in its own right and probably the definitive account of the war, despite its faults.

At the same time, in some of its long-term goals, the TRC process fell short of its aims. In terms of addressing impunity, the commission had no power to compel the giving of evidence and was relatively unsuccessful in its attempt to generate a virtuous circle of confession and forgiveness. The closest it came to this objective was in recognition of what “our side” did during the war rather than individual culpability. Further, the TRC lacked any teeth and believed that for the perpetrators themselves to participate at all was sufficient “punishment”—a belief rather weakened by the fact that not many participated.

One of the defining features of the TRC was the emphasis on victims and restorative justice, particularly through recognition of suffering through public hearings. However, this is a very Western cultural approach, and Kelsall, among others, criticizes it as too alien for many victims and too formal a mechanism.²⁵ The lack of funding also meant that in many cases the expense of attending the TRC fell on the participant; thus, it actually cost people to give evidence. Coupled with the government's disinclination to provide reparations for the testimony and a perceived lack of emphasis on victims, despite public promises, it is hardly surprising that the TRC is regarded with some cynicism among victims.²⁶

Cynicism and perceived failure are undoubtedly linked to the matter of the government's inability to address underlying issues that led to war in the first place. Without structural reform and engagement with local processes and politics, one can hardly imagine how longer-term reconciliation can take place. The TRC was supposed to lead to reconciliation through the perpetrators recognizing and confessing their crimes and the community then forgiving them, but without support packages, training, employment, and a change in the political systems of inclusion and exclusion, there is no real foundation for reconciliation. At the same time, the Sierra Leone war was relatively unstructured in that no clear institutional boundaries existed and several changes of side occurred during the conflict. In some places, it took the form of a generational convulsion or an agrarian slave revolt and certainly a revolt against authority in the countryside, where the role of the chiefs and local political systems became central.²⁷

The Truth and Reconciliation Commission, the Special Court for Sierra Leone, and Justice in Sierra Leone

One little-discussed question asks how much the TRC and SCSL have affected justice more broadly in Sierra Leone. Clearly, this point is critical if there is to be a lasting legacy. However, very little linkage existed, and in fact the postwar interventions were dominated by reestablishing security through disbanding the RUF, forming a new military, and reconstructing the Sierra Leone Police.²⁸ One of the unintended consequences of a focus on policing was that reforms of other institutions forming part of the justice sector moved forward more slowly. This lag in the development of justice alongside security has been characteristic of the reform process right from local courts, formal legal systems, and prisons to ministerial development. Even by 2008, the police themselves were regularly commenting that weaker capacity across justice institutions was undermining effectiveness through an inability to process cases.²⁹

Although some development of the justice system has taken place at a relatively late stage in the postconflict reform process, the capacity to use these courts had not necessarily developed.³⁰ The legacy of a failing justice system that had built up over several years was still being felt in Sierra Leone as late as 2008. In particular, the system faces a huge backlog of cases—including those awaiting trial, imprisonment, or enforcement decisions—poor record keeping, and insufficient space in prisons.

In common with many countries, Sierra Leone also has issues in incorporating traditional systems within the justice system as a whole. It is clear that the traditional system, operated by paramount and section chiefs, offers access to many more people than the formal state system. The traditional system has been seen as part of the justice sector reform supported by donors at least partly because the formal system does not reach into the countryside.³¹ Local citizens have made limited use of traditional systems in Sierra Leone to affect reconciliation and peace building within local communities although the extent of this usage remains underresearched.³²

In hindsight, it is easy to criticize the lack of progress in justice reform, but one should recognize that the justice sector had been subject to a very long decline. Reconstructing a legal system takes time and investment. By 2008 the Sierra Leone Bar Association included approximately 200 members, virtually all of whom reside in Freetown, thus leaving access to justice extremely difficult for those who live in the countryside. Given the fact that the RUF may be considered a rural-based organization, the lack of justice in the countryside must be seen as extremely risky in a fragile country and a very real threat to any process of reconciliation.³³

Moreover, prior to the emergence of the Justice Sector Development Programme, which started in 2005, the Ministry of Internal Affairs, responsible for governing the justice sector, had received no assistance. This omission has had implications in terms of a lack of representation for the police and justice sector at the ministerial level, access to government resources for justice in general, and leadership for the justice sector as a whole. In conjunction with the decentralization process, this situation produces considerable variation in interpretation of customary law at the local level, with lack of coherent and effective central oversight. A broad and detailed consultation at the village level carried out by the Department for International Development concluded that the populace had a general desire for better governance rather than abolition of the chieftom system.³⁴

Local support for the chieftancy might be surprising, given its role as a key element in driving the population into conflict by enhancing its economic, social, and political alienation.³⁵ The rule of a rural, male gerontocracy in the countryside, complete with degraded and corrupt links to elements of the state and particularly to the diamond trade in diamond-bearing areas, meant that the chieftom system had been in decline for a long time before the war eventually destroyed large parts of it. It was not an accident that the first target sought out by RUF fighters during the war, in almost every case, was the chief, closely followed by the district officer. One should also note that reconciliation relies on similar systems at a local level, creating a whole series of political biases and issues over access and accountability.

The reality of local justice for most people in Sierra Leone is not a bifurcated system with two mutually exclusive and antagonistic systems (formal versus informal) but a hybrid consisting of a number of differing choices with a wide variety of differing possible outcomes. This fact is reinforced not only by the apparent contradiction of having a “modern” government system coexisting with a “traditional” one, but also by the willing-

ness of local people to exercise a preference for the lowest possible level of justice (i.e., the most local to them) and to “shop around” for the desired forum for any given situation.³⁶

The reality of justice is that of shades of gray rather than a sharp division between “formal” or “informal” exist, with the District Magistrates’ Court at the formal, state end of a spectrum and the informal family elements at the other. The government of Sierra Leone itself estimates that around 70 percent of people in the country cannot access the formal state system and rely on the customary system through the local courts or informal mechanisms at the local level (such as talking to the chief) that remain undocumented.³⁷ Again, this means that reconciliation at a local level frequently relies on former combatants being subject to the rule of a chief who may be related to a victim of those combatants and who also might use the court as a source of power rather than a source of justice.

For example, during the consultations on the draft Local Courts Act in 2006, one paramount chief directly equated justice with power by stating that “if you take the authority of the local courts away from the Paramount Chiefs, they won’t have any power.”³⁸ In some chiefdoms, the close alliance among the local council chief administrator, the chief, and senior councillors means that the magistrates and local courts can be placed under significant pressure to bring about particular outcomes, usually in favor of the family or interests of the local political elite.³⁹

Powerlessness and Access to Justice

The previous section outlined the nature of political power and pointed to the close link between local political power and justice, which becomes clear when we examine the lack of access to justice of specific groups within society. Urban areas may offer an option of a formal justice mechanism, usually a magistrates’ court or an appeal court, but in rural areas most of the population relies on access to local courts, presided over by a board appointed by the paramount chief, leaving the chiefdom as the only real actor “beyond the tarmac road.”⁴⁰ The local courts mainly investigate and make judgements based on customary law, and chiefs have the power to set bylaws in conjunction with predominantly male elders. Consequently, citizens do not necessarily know the bylaws that apply to them or realize that they may contravene human rights.⁴¹ At the same time, a poor person has little chance of bringing a successful case against a chief or a member of a chief’s family.

One additional factor is the continuing importance of kin groupings to rural society. Chiefs themselves are constrained by ruling family and kin linkages as well as traditions within the rural hierarchy.⁴² Family history is frequently taken into account in selecting people for formal positions, so descendants of chiefs are more likely to gain positions of influence than are relative newcomers. Kinship also has the effect of restricting power to a particular ethnic group—the *indigenes*—or the original founders. Because chiefdom and kinship are so tied to the land, legitimacy is usually linked to the length of time that a particular family has occupied a piece of land.

This practice places certain groups of people in an increasingly powerless position. Non-*indigene* (stranger) women and youth are in particularly vulnerable positions with almost no representation and no power to influence decisions in local courts. Paramount chiefs are frequently cited as hearing cases when they have no mandate to do so, and individuals who oppose the chief are likely to be ostracized from the community.⁴³ Young men are expected to obey their elders while (male) elders wield power in families, social groupings, and justice forums like the courts. “Youth” in Sierra Leone, as elsewhere, is a social category, having more to do with social status, belonging, and kinship relations than with age.⁴⁴

Women have also been marginalized by the customary system of justice although this pattern varies between the north and south of the country.⁴⁵ The customary system tends to govern domestic issues that concern many women while women also face higher barriers to entry to the formal sector in terms of financial and social issues. The management of domestic affairs, dominated by men, is institutionally biased against women and frequently violates their constitutional and human rights. Many of these practices continue within the customary system despite the introduction of human-rights legislation, including women having the status of “minors” in many local courts.⁴⁶ Research within the chiefdoms in 2002 revealed comments from women that expressed pleasure at being asked their opinion because they “are not considered worthy of taking any challenging responsibility other than cooking and nursing children.”⁴⁷ The same report goes on to note that the following were all rigorously supported by local courts: polygyny (one man with several conjugal relationships), leviratic marriage (inheriting a brother’s wife), collecting “marriage tax” while girls were still at school, hearing serious rape cases in local courts rather than district courts (and therefore treating them as minor cases), and patrilineal inheritance.⁴⁸

Conclusions: The Impact of the Truth and Reconciliation Commission and the Special Court for Sierra Leone

The TRC did realize some outreach, but it is also clear that there has been very little penetration of the underlying justice systems that face most people in the countryside. Insufficient funding for the TRC, poor sensitization across the countryside, and even significant gaps in geographical coverage added to a significant shortfall in terms of the methods used by the TRC. In particular, in a country where many people had nothing and where a campaign partly relied on amputations that robbed families of breadwinners, justice meant getting some form of compensation. Storytelling came in a poor second to many, especially when it was not always clear who was to blame.

The SCSL, though, had an even narrower remit than the TRC and arguably has been more problematic in terms of impact beyond Freetown. In keeping with the TRC, a strong demand for some form of reparation has always existed, even though it is ac-

knowledge that this was not in the remit of the court. This fact led many individuals to question the value of the court and the perceived distance between international versions of justice and local ideas of what constituted justice. The situation was further exacerbated by the location of the court in Freetown and its lack of effective outreach, including that to local organizations such as the Amputee Association, which actually threatened to boycott the court over reparations. Undoubtedly, this has limited the impact of the SCSL within the country itself.

The limitations can also be perceived in terms of something that court has done well but has seen limited application in the broader justice system—specifically, the position of women and gender crime as a significant element of war.⁴⁹ Consequently, significant work has occurred internationally in terms of recognizing sexual and gender-based violence, as well as humanitarian law and witness protection as an element thereof. Given the nature of the local justice system, however, one has to ask why the court and the institutions around it did not try to transfer some of those approaches to the broader justice mechanisms as part of its legacy.

Importantly, the local legal community has largely shunned the court, and the bar association has provided very mixed views about its effectiveness since the supposed “hybridity” of the court proved a bit less hybrid than it expected. The bar association itself expected that as many as half the posts in the court would go to local professional staff; in reality, virtually no Sierra Leonean lawyers are working in the court, and all of the major roles have been taken by international staff. In fact the SCSL statute says that three Sierra Leonean judges should be in the trial and appellate courts. The government of Sierra Leone then changed this wording to “nominees of the government,” resulting in the appointment of one Sierra Leonean judge, another who had been lecturing in the United States since the 1980s, and an Australian. This early disappointment was then followed by work in a severely dysfunctional and underresourced legal system beyond the court, fuelling a perception that long-term justice was not really what the court was interested in. Further, many of the elite in Freetown feel that “this is not how we do things in Africa” and that individual guilt is not a traditional way to deal with the justice issues. For example, the case of Sam Hinga Norman and the Civil Defense Forces, outlined above, was a serious miscalculation that has led significant groups within the country to view the court as an entirely external imposition with little to do with local justice.⁵⁰ For many people in the countryside, Norman was a hero, not a criminal, and support for him in the south was so strong that it became part of the political cause of senior politicians like Charles Margai, himself a defense counsel before the court.

So where does that leave an analysis of the SCSL and the TRC? This article has outlined some of the core issues with both bodies and then put them into the broader context of justice in Sierra Leone. The study shows that the legacy of the both the TRC and the SCSL remains extremely weak. The real question is why?

Firstly, a number of technical issues indicate why lack of impact might be the case. Take for instance an issue about funding for the SCSL and the TRC, to the extent that many members of the court, for example, were accused of spending more time trying to

raise money than doing anything else.⁵¹ The TRC also suffered from financial shortfalls that clearly limited its ability to reach all parts of the country and spend enough time gathering testimony. Despite the excellence of the final report, it remains flawed due to the lack of coverage and the nature of the evidence. At the same time, the absence of any reach into local justice systems effectively means that the customary systems play almost no part in reconciliation efforts.

Secondly, the nature of intervention is necessarily “international,” and the SCSL in particular exhibited some of the weaknesses of this approach, privileging international staff over local staff, applying international rules to local problems, and appearing to apply justice to persons regarded as local heroes. A complete failure to establish any meaningful links with the local judiciary, let alone with any broader justice mechanisms in the country, has severely limited the legacy of the court itself.

Even the TRC, which had a mandate to engage with these broader groups, in many ways failed because the mechanisms used were based on a series of misconceptions of justice (see below). Furthermore, tensions existed between the two that unusually coexisted. Since both had funding problems and some degree of overlap, they competed for the same staff. Moreover, the TRC was undoubtedly hampered by the perception that if someone gave testimony, then that person was also in danger of being dragged before the SCSL.

Thirdly, the nature of justice in Sierra Leone is not the same as perceptions of justice internationally—at least in terms of how justice is performed. In particular, Kelsall addresses these failings as representing a “politics of culture”—specifically, around the guilt or otherwise of individuals as perpetrators, whereas local traditions would not seek individual guilt; around the role played by child soldiers in a culture where the age of participating in hunter groups, for example, remains very young; and around significant questions about the nature of a “witness” in Sierra Leone and what that actually means.⁵² Expectations of payment for testifying at the TRC and the validity of some witnesses’ statements at the SCSL raise issues concerning how well such mechanisms can reach “the truth.”

All of these matters relate to both the TRC and SCSL. In an area where the TRC should have performed well—violence against women and children—issues arose with the sensitivity of the process, specifically requiring the victims to testify.⁵³ The experience of local methods of reconciliation did not call for children to testify and offered a form of “cleansing” and reacceptance into the community that the TRC did not.⁵⁴ Perhaps the most telling finding with regard to women was that the SCSL has had an enormous effect on recognition of the crime of sexual violence within international law while the actual justice available to many local women remains somewhat opaque.

Lastly, one needs to reflect on the meaning of hybridity with respect to the SCSL in particular. Specifically, hybridity has to be more than employing a couple of local people. The failure of both the TRC and the SCSL to leave a lasting legacy on the domestic justice system, thus preventing meaningful reconciliation over time, amounted to a wasted opportunity. The inability to actually develop a hybrid mechanism whereby an

international system could interact with the dense network of local institutions that offer justice in Sierra Leone means that the international effort remains something of a “spaceship” intervention.

International legal interventions face difficult choices. Local institutions are greatly flawed, but so are the formal legal frameworks and institutions in countries like Sierra Leone. Interventions confront a balance of how to interact with flawed local systems used by people. This article contends that the SCSL and TRC in many ways missed opportunities to engage with these systems to make them more representative and less political in a local sense. Selecting the “spaceship” model or leaving local justice systems to deal with the issue is not a hard choice. The spaceship model severely limits impact—and, therefore, reconciliation—whereas the version of reconciliation offered by local systems is related to the preservation of a social hierarchy that benefits some at the expense of others. Where both exist, one can carry out successful intervention in enabling those seeking justice to access beneficial choices for them.

For international justice mechanisms like the SCSL and the TRC, this means that they must be properly resourced, flexible enough to deal with local mechanisms, properly explained to the local population, sensitive to needs and local customs, and able to involve local people within them. The experience of Sierra Leone comes very close to a mixture of poor financing and misunderstanding (the TRC) and a parachuted-in court of foreigners “doing justice” to a small group of Sierra Leoneans.

Notes

1. Paul Richards, *Fighting for the Rain Forest: War, Youth, and Resources in Sierra Leone* (Portsmouth, NH: Heinemann, 1996).

2. Tim Kelsall, *Culture under Cross-Examination: International Justice and the Special Court for Sierra Leone*, Cambridge Studies in Law and Society (New York: Cambridge University Press, 2009), 3; and Atlas Project, *Transitional Justice in Sierra Leone: Analytical Report*, Atlas Project Report (London: British Institute of International and Comparative Law, July 2010), “abstract,” http://projetatlas.univ-paris1.fr/IMG/pdf/ATLAS_SL_Final_Report_FINAL_EDITS_Feb2011.pdf.

3. Kelsall, *Culture under Cross-Examination*, 2–3.

4. Truth and Reconciliation Commission, *Final Report of the Truth and Reconciliation Commission of Sierra Leone* (Freetown, Sierra Leone: Truth and Reconciliation Commission, 2004), 181.

5. *Ibid.*, 231.

6. Rosalind Shaw, *Rethinking Truth and Reconciliation Commissions: Lessons from Sierra Leone*, United States Institute of Peace Special Report no. 130 (Washington, DC: USIP Press, 2005); Paul Jackson, “Chiefs, Money and Politicians: Rebuilding Local Government in Post-war Sierra Leone,” *Public Administration and Development* 25, no. 1 (February 2005): 49–58; and Kelsall, *Culture under Cross-Examination*, 1–35.

7. Gearoid Millar, “‘Our Brothers Who Went to the Bush’: Post-identity Conflict and the Experience of Reconciliation in Sierra Leone,” *Journal of Peace Research* 49, no. 5 (September 2012): 717–29.

8. *Ibid.*

9. Richards, *Fighting for the Rain Forest*, “Conclusion.”

10. Truth and Reconciliation Commission, *Final Report*, 1.

11. *Ibid.*, 24.

12. Jackson, “Chiefs, Money and Politicians,” 49–58; and Millar, “Our Brothers,” 717–29.

13. Tom Perriello and Marieke Wierda, *The Special Court for Sierra Leone under Scrutiny*, Prosecutions Case Studies Series (New York: International Center for Transitional Justice, March 2006), <https://www.ictj.org/sites/default/files/ICTJ-SierraLeone-Special-Court-2006-English.pdf>.
14. Ibid.
15. Kelsall, *Culture under Cross-Examination*, 1–35.
16. Shaw, *Rethinking Truth and Reconciliation Commissions*; Shaw, “Memory Frictions: Localizing the Truth and Reconciliation Commission in Sierra Leone,” *International Journal of Transitional Justice* 1, no. 2 (2007): 183–207; and Gearoid Millar, “Local Evaluations of Justice through Truth Telling in Sierra Leone: Postwar Needs and Transitional Justice,” *Human Rights Review* 12 (2011): 515–35.
17. Millar, “Local Evaluations.”
18. Truth and Reconciliation Commission Act 2000, 10 February 2000, pt. 3(2), <http://www.usip.org/sites/default/files/file/resources/collections/commissions/SeirraLeone-Charter.pdf>.
19. Luc Huyse and Mark Salter, eds., *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences* (Stockholm: International Institute for Democracy and Electoral Assistance, 2008).
20. Perriello and Wierda, *Special Court for Sierra Leone*, 1–44.
21. Ibid., 2.
22. Ibid.
23. Kelsall, *Culture under Cross-Examination*, 1–35.
24. Bates, *Transitional Justice*, 3.
25. Kelsall, *Culture under Cross-Examination*, 1–35.
26. Shaw, *Memory Frictions*, 251–58.
27. Richard Fanthorpe, “On the Limits of the Liberal Peace: Chiefs and Democratic Decentralization in Post-war Sierra Leone,” *African Affairs* 105, no. 418 (January 2006): 27–49; Paul Jackson, “Reshuffling an Old Deck of Cards? The Politics of Local Government Reform in Sierra Leone,” *African Affairs* 106, no. 422 (January 2007): 95–111; and Paul Richards, “To Fight or to Farm? Agrarian Dimensions of the Mano River Conflicts (Liberia and Sierra Leone),” *African Affairs* 104, no. 417 (October 2005): 571–90.
28. Paul Jackson and Peter Albrecht, *Security Sector Transformation in Sierra Leone, 1997–2007* (Basingstoke, UK: Palgrave, 2010); and Lisa Denney, *Justice and Security Reform: Development Agencies and Informal Institutions in Sierra Leone* (Abingdon, Oxon: Routledge, 2014).
29. Anthony C. Howlett-Bolton, *Aiming for Holistic Approaches to Justice Sector Development*, Working Paper Series, Security System Transformation in Sierra Leone, 1997–2007, Paper no. 7, Global Facilitation Network for Security Sector Reform (GFN-SSR) and International Alert (Birmingham, UK: University of Birmingham Press, 2008), 1–3.
30. Jackson and Albrecht, *Security Sector Transformation*.
31. The commonly cited figure—but very difficult to verify—is that around 80 percent of people access justice through traditional mechanisms.
32. Bruce Baker, “The African Post-conflict Policing Agenda in Sierra Leone,” *Conflict, Security & Development* 6, no. 1 (April 2006): 25–50.
33. Jackson, *Reshuffling the Deck*, 95–96.
34. Richard Fanthorpe, Alice Jay, and Victor Kalie Kamara, “A Review of the Chiefdom Governance Reform Programme, Incorporating an Analysis of Chiefdom Administration in Sierra Leone,” unpublished report (Freetown, Sierra Leone: Department for International Development, November 2002).
35. Jackson, *Chiefs, Money and Politicians*, 58.
36. Tim Kelsall, “Law and Legal Institutions in an Upcountry Sierra Leonean Town,” 2006, unpublished report prepared for Timap for Justice and the National Forum for Human Rights, Sierra Leone.
37. Atlas Project, *Transitional Justice in Sierra Leone*, 5–10.
38. R. E. Manning, “The Landscape of Local Authority in Sierra Leone: How ‘Traditional’ and ‘Modern’ Justice Systems Interact,” in *Decentralization, Democracy, and Development: Recent Experience from Sierra Leone*, World Bank Country Study, ed. Yongmei Zhou (Washington, DC: World Bank, 2009), 131, <https://>

openknowledge.worldbank.org/bitstream/handle/10986/2672/503610PUB0Box31601OFFICIAL0USE0ONY1.pdf?sequence=1.

39. Clare Castillejo, *Building Accountable Justice in Sierra Leone*, FRIDE Working Paper 76 (Madrid: FRIDE, January 2009), 1–21, http://fride.org/descarga/WP76_Building_Accountable_Eng_ene09.pdf. Kelsall also reports a case of a man's daughter being beaten by another child and involving the paying of hospital fees, but he also seeks compensation for the beating. The treasury clerk is a friend of the offender's mother and intervenes, promising to settle the case privately. The case is not settled, however, and the man either has to go to the district appeal court or the magistrates' court, where he will incur considerable costs for fees, a letter, and an arrest. Of course, he could go to the treasury clerk's boss, the local court supervisor, but he is a relative of the treasury clerk. Kelsall, "Law and Legal Institutions."

40. Bruce Baker, "Beyond the Tarmac Road: Local Forms of Policing in Sierra Leone and Rwanda," *Review of African Political Economy* 35, no. 118 (2008): 555–70.

41. Castillejo, *Building Accountable Justice*, 1–2.

42. Secret societies come in here partly since they perform a regulatory function in society, including influencing the chief.

43. Castillejo, *Building Accountable Justice*, 1–21; and Richards, "To Fight or to Farm?"

44. Richard Fanthorpe, "Neither Citizen nor Subject? 'Lumpen' Agency and the Legacy of Native Administration in Sierra Leone," *African Affairs* 100, no. 400 (2001): 363–86; and Paul Richards, "The Social Assessment Study: Community-Driven Development and Social Capital in Post-war Sierra Leone," 2003, unpublished paper commissioned by the Community Driven Development Group of the World Bank for the National Commission for Social Action of the Government of Sierra Leone.

45. Castillejo, *Building Accountable Justice*, 1–3.

46. *Ibid.*, 10–11.

47. Fanthorpe, Jay, and Kamara, "Review of the Chiefdom Governance Reform Programme," 31.

48. *Ibid.*

49. A. Tejan-Cole, "Sierra Leone's 'Not-So-Special' Court," in *Peace versus Justice? The Dilemma of Transitional Justice in Africa*, ed. Chandra Lekha Sriram and Suren Pillay (Oxford, UK: James Currey, 2010), 223–48.

50. Exacerbating this perception is the position of the United States, which pressured the SCSL to sign Article 98 in 2003. The latter states that the court would not hand over US citizens to the International Criminal Court, fuelling a view that the court was just another arm of US foreign policy.

51. Tejan-Cole, "'Not-So-Special' Court."

52. Kelsall, *Culture under Cross-Examination*, 1–35.

53. Thelma Ekiyor, "Reflecting on the Sierra Leone Truth and Reconciliation Commission: A Peace-building Perspective," in Sriram and Pillay, *Peace versus Justice?*, 223–48.

54. *Ibid.*, 223.

The Erosion of Noncombatant Immunity in Asymmetric War

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The protection of noncombatants from direct, intended harm during armed conflicts is recognized as of major importance in both the law of armed conflict and moral thinking about war. Indeed, it has been a particularly distinctive feature of both the law and moral discourse on war since World War II, occupying a place of major importance in both. Asymmetric warfare, though, poses significant challenges to the effort to protect noncombatants in the way of war. In such warfare, recognizing noncombatants is not always clear, and each party to the conflict may have a different conception, up to and including denial that the enemy has any noncombatants. Moreover, the very definition of asymmetric warfare indicates that the means available and employed by each party in the conflict are different in character, so different standards may apply to the weapons used by each and to their targets. Another issue is accountability. Violations of noncombatant immunity may be punished as a war crime, but the irregular nature of the forces on one side in asymmetric warfare makes investigation and prosecution of suspected crimes extremely difficult. Consequently, soldiers in the regular force may be held to a higher standard than those in the force opposing them. This article explores issues posed by asymmetric war and irregular warfare more generally to the protection of noncombatant immunity, arguing that both the law and moral discourse need to adapt to meet these problems.

Historical Background

War is inherently destructive of lives, property, and the fabric of ordinary life. For some people, this fact is ample reason to abolish war. A considerable body of literature

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making this argument reaches from Erasmus's *Dulce bellum inexpertis* (War is sweet to them that know it not) through literary and historical works reacting to the loss of life in World War I to antinuclear books like Jonathan Schell's *The Fate of the Earth*.¹ For other people, however, like the various kinds of advocates for total war throughout history, this inherent destructiveness is a virtue to be amplified in the entire subjugation or even elimination of the enemy. In contrast to both of these positions, all the major cultures of the world have produced moral and legal traditions as well as other institutional structures that undertake to restrain the destructiveness of war.

In the just war tradition as it developed in the medieval West, canon law between the late tenth and thirteenth centuries identified certain classes of people who should not have war made against them (i.e., not subject to direct, intentional attack): the clergy, members of religious orders, pilgrims on the road, women, children, the aged, the physically and mentally infirm, peasants on the land, townspeople, and innocent travelers, as well as their property. The reasoning here was straightforward. These classes of people do not normally take part in war and so should not have war made against them. If any individuals from any of these classes should engage in the war or give direct support to it in any way, then they forfeit their immunity.² In the period of the Hundred Years' War (midfourteenth through midfifteenth centuries), the chivalric code was absorbed into the developing tradition on just war, naming the same categories of people as noncombatants but adding provisions specifically concerning combatants. Knights taken prisoner in combat should not be killed but might be held as prisoners for ransom or released on parole (if they promised not to engage in the fighting for the duration of the war). Any nonknights serving in the enemy army, though, might be killed. This latter provision was actually an effort aimed at mitigation of war by limiting it to men of the knightly class, those properly socialized in how to fight and in whom they should properly fight.

In the modern period, the restraints on war defined in just war tradition provided the basis for the development of codes of military discipline and for a conception of customary rules for warfare—"the laws and customs of war." These in turn laid the foundation on which positive international law on war began to develop in the latter part of the nineteenth and early twentieth centuries.³ Although the law of armed conflict in contemporary international law is defined by the agreement of states to be bound by the rules it specifies, this background in Western moral tradition remains visible in how the law is structured and what it contains.

The "regular"—that is, rule-defined—warfare established in this way fundamentally depends on the agreement of states. In the early development of positive international law regulating the conduct of war, the states signatory to the formal agreements were bound by the law. Those states, in turn, agreed to regulate their armies accordingly. The context assumed was a formally declared war involving parties to the agreement described as "belligerents" (i.e., states engaged in war).⁴

Other kinds of armed conflict were not addressed in the law at this early stage for major reasons. First, the deep historical precedent was to regard all such armed conflicts as unjust. The underlying just war tradition in Western culture had originated in an effort

to limit the right to use armed force in a violence-prone society by restricting that right to a temporal ruler with no temporal superior. Others who resorted to force were understood as acting unjustly and harming the peace of the society in question, whether they were persons internal to that society or external to it, projecting armed force across its borders.⁵ As this moral tradition developed, it continued to regard any form of “private” use of armed force as inherently unjust, whatever the reason for it. One finds a particularly striking historical example in Luther’s explosive reaction to the German peasants’ rebellion of 1624, when he exhorted the German nobility to “stab, smite, slay” the peasants in arms without mercy—though earlier he had shown sympathy with the peasants’ grievances.⁶ A decisive turning point in the historical tradition came in the American Civil War, when the Union decided—but only after spirited debate—to treat the Confederates as legitimate belligerents, not as rebels whose rights were not guaranteed by the “laws and customs of war” as understood at the time.⁷ But the older way of thinking remained in the use of armed force against indigenous rebellions in the colonial wars of the later nineteenth century. This mind-set produced an unhappy legacy: the sowing of the seed of unlimited war in the collective memories of the peoples of former colonies, a seed that has borne repeated fruit and is exemplified today in the ongoing wars of Central and West Africa and in the attacks on civilians justified in the ideology of al-Qaeda and the behavior of those it has inspired.

Protection of Noncombatants in Recent Law and Moral Discourse

As noted earlier, in its early development, positive international law on war held states responsible for any violations. A decisive shift in the law as to who is accountable, from states to individuals, begins with the war crimes tribunals after World War II. The first unequivocal language marking this shift appears in Article IV of the 1948 Genocide Convention: “Persons committing genocide or any of the other acts enumerated in Article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.” Articles V and VI continue by spelling out the procedures for punishment of such persons.⁸ The 1949 Geneva Conventions similarly identify individual persons to be held finally accountable for violations of any of the conventions though they make the contracting states responsible for their punishment.⁹ The 1949 Conventions also took two other important steps away from previous assumptions about the international law regulating armed conflict, extending its requirements to parties in conflict even when they are not signatories of the conventions and to certain noninternational armed conflicts.¹⁰ Finally, the 1949 Conventions offered the most fully developed legal regulations up to that time for treatment of the whole spectrum of persons who might be victims of war: not only combatants rendered hors de combat by sickness, wounds, shipwreck (at sea), or being taken prisoner but also civilians as a class (to which the whole of 1949 Convention IV is devoted).

The 1977 Protocols to the 1949 Conventions continue along the same trajectory, aiming to “reaffirm and develop the provisions protecting the victims of armed conflicts and to supplement measures intended to reinforce their application,” addressing both international armed conflicts (Protocol I) and certain forms of noninternational armed conflicts (Protocol II).¹¹ The protection of civilians in the way of war is particularly fully developed, with parties to an armed conflict required to “distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”¹² As this language suggests and the later definition of civilians clarifies, the term *civilians* here refers to those classes of people who in the moral literature are normally referred to as “noncombatants.”¹³ Thus with the 1949 Conventions and the 1977 Protocols, the positive law of armed conflict has importantly converged with the concerns of the deeper moral tradition to mark off such classes of people and avoid direct, intended harm to them. This convergence is also signaled in another way. The requirement that civilians be distinguished from combatants has given rise to the idea of a “principle of distinction” between these two types of people, corresponding directly to the “principle of discrimination” generally used in recent moral discourse.

Although the first responsibility for enforcing the requirements specified here and punishing violations is placed on the parties to the conflict, the establishment of war crimes tribunals for specific conflicts and, ultimately, creation of the International Criminal Court have provided a legal framework beyond the level of the states for punishing persons who have violated the rules thus established. The Rome Statute of the International Criminal Court gives it jurisdiction over four categories of offenses: genocide, crimes against humanity, war crimes, and aggression.¹⁴ Since, in practice, not all states can be relied on to enforce the rules against these kinds of actions, in a fundamental sense this is a logical next step following on the definition of such behavior in armed conflict as criminal and assigning responsibility for such behavior to the individual persons who have committed it. Creation of such tribunals also puts pressure on states to punish the sorts of violations listed.

Recent moral discourse relating to protection of noncombatants has by no means been so broadly gauged or so finely grained. That portion of moral discourse which is pacifist includes all that is done in war within its overall critique and condemnation of war as such as inherently evil. If we think of the three pillars of the recovery of the just war idea—Paul Ramsey’s two books from the 1960s, Michael Walzer’s *Just and Unjust Wars* a decade later, and the United States Catholic bishops’ pastoral letter *The Challenge of Peace*—both Ramsey and the Catholic bishops essentially left the matter of noncombatant immunity at the level of nuclear strategy.¹⁵ For both, the focus was United States military policy and actions. They simply did not address how to transfer this reasoning in some way to limitation of the behavior of others in irregular warfare of the recent sort. Walzer’s development of his analysis by use of historical examples from various wars led him into more fine-grained considerations of whether someone is a noncombatant or not and exactly what protections are owed to noncombatants in various kinds of circum-

stances. In this vein, he extended requirements of the rule of double effect beyond where Ramsey had left the matter, introducing a third stipulation that the military act in question positively seek to avoid or minimize harm to noncombatants. However, this element was only one in a large study undertaking a more general exploration of the requirements of just war for modern war as a whole, illustrated by the historical examples provided. These illustrations were valuable for anchoring Walzer's reflections, but they look back in time. Further, in his discussion of noncombatant immunity, Walzer did not anticipate the ways irregular warfare has come to be fought.

If we think of more recent moral discussions of contemporary warfare, we find similar trajectories. Consider, for example, talks about the moral implications for non-combatants of dual-use targeting or drone strikes. Frequently such moral discourse has concentrated on showing the immorality of such practices, with the result that they effectively become an attack on how the United States makes war. So far as similar practices are adopted by other highly developed countries, they too become a target for the same criticism. Every war, though, has two sides (at least), and the protection of noncombatants is a matter of the policies and practices of all parties to a conflict. This includes the terrain of contemporary irregular warfare, which recent moral discourse has largely failed to engage. Although it is right to raise moral concerns about drone strikes that mistakenly or disproportionately kill civilians, the direct and intended targeting of civilians has become a common feature of irregular warfare of all sorts, and moral discourse has neither engaged this directly nor considered how to weigh it in calculations of proportionality when criticizing actions used against forces employing such means. The moralists here might well look to the example of the lawyers regarding the full range of discourse needed. Moreover, they might well do more to take into account the moral difference between directly and intentionally attacking civilians and harming them collaterally or by mistake when the direct and intended purpose of an action is an attack against a combatant target.

A significant influence on both moral reflection (particularly that growing out of the work of Walzer) and law in recent decades has been the growth in attention to human rights since World War II.¹⁶ As statements of an ideal, the body of material defining various kinds of human rights is impressive, and protection of the rights identified transfers easily to parameters for the protection of noncombatants in the law of armed conflict and moral discourse on war. Yet, the ideal is not the same as the reality. There remain differences, some substantial, among the various international statements as to the nature of the rights defined; their sources; the protections given them; and the sanctions, if any, to be imposed on violators. Some of the disparities are grounded in cultural differences, including religious belief and practice as well as long-standing cultural mores. Some trace to particular political aims of individual states and blocs of states; others reflect the influence of nongovernmental organizations and private voluntary organizations on the shaping of given agreements. Not all the rights identified in the various international instruments have the same priority, and, indeed, it is difficult to know exactly how to chart the relative priority of all the kinds of rights identified. When one compares the protections explicitly given or implied in international human rights law to those in the international

law on armed conflict, the latter are clearly more specific and focused as operational guides. Increasingly, however, human rights law has come to be used as providing a broader frame and rationale for the protections and restraints set out in the law of armed conflict. For example, the offenses listed as “crimes against humanity” in Article 7 of the Rome Statute of the International Criminal Court include protections based in the various human rights agreements. In Article 8, though, “war crimes” are defined first in terms of specific violations of the law of armed conflict but then additionally defined by reference to the same offenses named in Article 7.¹⁷ Yet, the fact remains that the differences referred to above make this much less a precise listing of rights-based offenses than it is intended to be.

The law of armed conflict has proceeded by establishing rules for the conduct of warfare, including the protection of noncombatants: the goal is “regular” or rule-governed warfare. At least thus far it has not entirely succeeded in this objective, but the framework it has defined is an impressive one. Fundamentally, even though for more than half a century the law has sought to hold individuals accountable for violations of the established rules, the law depends ultimately on the cooperation of states. The content of the law is itself understood to be the product of agreements among states, including the assent to be bound by the rules agreed to. In reality, of course, some elements of this framework of rules enjoy less general support than others, and states often disagree on the meaning of matters to which they have formally acceded. Further, states are not equal in their ability to enforce the established laws during circumstances of armed conflict. The rule-governed warfare the law seeks to create thus remains a goal rather than a completed achievement.

Particular Challenges to Noncombatant Protection in Irregular and Asymmetric Warfare

The discrepancy between goal and reality is aggravated when one or more of the parties to an armed conflict ignores, denies, or overrides the rules—that is, in irregular warfare in all its forms, including asymmetric conflicts. The nature of irregular warfare presents serious challenges to the effort to limit the destructiveness of warfare by regularizing it. Four particular kinds of issues are especially problematic.

Cultural Differences

First, recent irregular warfare has frequently been defined in terms of significant cultural differences, particularly ethnic or religious dissimilarities or both, between the warring parties. When a conflict is framed in this way, from the perspective of each side all members of the enemy group—not just those persons who function as combatants—are perceived as equally enemies and may be deemed liable to be killed, driven out, or subjected to other damage. Examples abound, including the wars of the breakup of Yugoslavia; the Rwandan genocide of 1994; the Tamil-Sinhala conflict in Sri Lanka; the frequent, recent,

and ongoing wars in Central Africa; the simmering Pakistani-Indian conflict; and the terrorist activity of such groups as the Irish Republican Army and al-Qaeda. As a particular example, realist analysts have often tended to dismiss the religious element in al-Qaeda's actions, but doing so ignores the plain language of statements from its leaders, which describes an ongoing struggle on behalf of Islam itself against Western aggression.¹⁸ The cause for war is depicted as religious, and all Americans and their allies are equally subject to being killed, with no distinction between combatant or noncombatant. The appeal to norms that transcend anything in common between the parties to the conflict effectively makes everyone identified with the enemy worthy of being attacked and killed: *all* Americans are guilty of attacking "Allah, his messenger, and Muslims." Al-Qaeda rejects efforts to provide for noncombatant protection defined not only in just war tradition and in international law but also in Islamic tradition.

What can be said against this? In the West, the horrors of religiously motivated warfare experienced in the Thirty Years' War led to the denial of religion as a justifying cause of war, beginning with the Peace of Westphalia. That denial carries over into international law, in which the only legitimating cause for a state to go to war is defense against "armed attack" or assisting another state in its own defense against such attack. So what is at stake in the claim that religion justifies attacks against civilians and military alike is both a denial of the combatant-noncombatant distinction and a denial of the effort to exclude religious difference from among the justifying causes for war. The same can be said for the claim that ethnic difference justifies war—indeed, justifies indiscriminate war—as exemplified, for example, by the Hutu massacre of Rwandans of Tutsi and mixed ethnicity in 1994. Quincy Wright observed several decades ago in his pioneering book *A Study of War* that war across major cultural boundaries is especially hard to moderate, and here we see this manifest in the denial that internationally recognized norms in fact matter in such warfare.¹⁹ Reaffirming and enforcing these norms present a problem to the entire international community.

Exactly how best to do so, though, remains largely unaddressed and uncertain, as enforcement in particular would likely require more aggressive use of military measures against violators. But who is to do this? At this writing, French troops are in the Central African Republic assisting the government against insurgents who have routinely attacked civilians. Recently, French troops also intervened in Mali to repel advances by fighters from al-Qaeda in the Islamic Maghreb who, as they took over population centers, routinely attacked ordinary civilians. At the same time, though, the United States and Britain have withdrawn all troops from Iraq, and the Iraqi government has proven unable to offer secure protection to its population from al-Qaeda-affiliated insurgents; further, NATO nations have withdrawn their forces from Afghanistan, and United States forces are scheduled to withdraw in 2014. Except for France's willingness to intervene militarily as needed in former French colonies, no Western country today shows much interest in such military action, even in cases of serious humanitarian need. Nor do they have much room to do so in terms of international law. The iteration of the Responsibility to Protect doctrine that came out of the 2005 World Summit has restricted authority to intervene

for such purposes (except in cases of intervention by invitation, as exemplified by the French in the Central African Republic and Mali) to the Security Council. The council has authorized such action only once—in the case of the Libyan revolution—and has a much more general record of not acting. Nor does the institutional structure of United Nations peacekeeping operations provide much hope for the kind of robust military action that would be needed in cases of serious danger to a civilian population caught in the midst of irregular war, as memorably exemplified by the failure of peacekeeping forces in Rwanda at the time of the 1994 massacre to stop it or protect the victims.

Distinction between Noncombatants and Combatants

Even if all members of the enemy group are not regarded as equally subject to targeting, the question of exactly who is a noncombatant and who a combatant in irregular warfare may be unclear and, in practice, difficult or impossible to discern. In such warfare, combatants are typically attired in the clothes they would normally wear in their civilian lives; they may continue to live at home with their families or be sheltered and fed in friendly neighborhoods; they may move into and out of combatant functions frequently and seamlessly. Paul Ramsey once acidly commented that no just war thinker ever assumed noncombatants would be separated from combatants by roping them off “like ladies at a medieval tournament.”²⁰ In fact, though, medieval just war thinking proceeded by identifying classes of persons—including women as a class, not just “ladies at a . . . tournament”—normally to be treated as noncombatants. Ramsey’s observation may have been useful in the context in which he offered it (an argument for counterforce nuclear targeting and against counterpopulation targeting). Irregular warfare, though, is conducted by individuals and small groups of fighters in contexts where noncombatants are typically among and around the combatants on one or both sides. Thus, it is of the utmost importance to recognize the noncombatants—not only to permit the targeting of combatants but also, and very importantly, to let the fighters on both sides know who among the enemy poses a threat.

In this respect, one particular element in the development of international law on armed conflict has in fact contributed to creating ambiguity regarding who is a combatant and who a noncombatant. Francis Lieber’s rules concerning members of irregular groups involved in warfare, originally set out in the context of the American Civil War but subsequently adopted into international law at the 1907 Hague Conference and carried forward intact in the 1949 Geneva Conventions, required that the following conditions be satisfied:

- (a) that of being commanded by a person responsible for his subordinates;
- (b) that of having a fixed distinctive sign recognizable at a distance;
- (c) that of carrying arms openly;
- (d) that of conducting their operations in accordance with the laws and customs of war.²¹

Consider, by contrast, this language from the 1977 Geneva Protocol I, Article 44, paragraph 3, which modifies conditions (b) and (c) above:

Recognizing . . . that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:

- (a) during each military engagement, and
- (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.²²

What does this mean in practice? An example will help to answer this question. During the invasion of Iraq by American forces in 2003, according to news stories at the time, members of the Fedayeen Saddam (a paramilitary group) approached an advancing American unit dressed as ordinary Iraqi Bedouin.²³ When they got close enough to attack, they opened their robes, took out weapons, and opened fire. Since Iraq had not ratified the 1977 protocols, one may argue that the Fedayeen were governed by the rules of 1949 Geneva Convention III, by which this was clearly a violation of the law of armed conflict. (The same holds from the perspective of the United States, which has signed but never ratified the 1977 protocols.) Nonetheless, from the perspective of the 1977 protocols, the matter is more ambiguous. More to my present point is that such behavior (other similar incidents occurred) led the American troops to mistrust all civilians, treating them as combatants until proven otherwise. This mind-set led to a number of events in which civilians were fired on as they approached checkpoints in vehicles while attempting to flee combat areas. In other words, the behavior of the Fedayeen, which might be read as permitted by the modified Lieber rules found in 1977 Protocol I, undermined the protection of noncombatants by creating ambiguity as to who is a noncombatant and endangered genuine noncombatants who were behaving in a way that seemed to pose a threat.

The 1977 Protocol I, of course, pertains to international armed conflicts, and so it applies to the 2003 Iraq war (though neither the United States nor Iraq have ratified the protocols). But the sort of behavior found in the above example, as well as the same sort of effect, is endemic to noninternational conflicts in which the combatants very often dress the same way as civilian noncombatants and use this fact to gain military advantage. That the Lieber rules as modified by 1977 Protocol I may have a tendency to import this erosion of noncombatant protection into noninternational conflicts suggests that some new attention to this version of the Lieber rules may be in order. At the very least, moralists might take critical note of the effect of the change in these rules on eroding the combatant-noncombatant distinction as it has to be made in the heat of combat.

Decisions Regarding Weapons and Targets

Insofar as the armed conflict in question is asymmetric, widely different means are available by each party to the conflict, and each has equally dissimilar structures for command and control. This fact returns us to an issue already broached in the above discussion of the first challenge posed by irregular warfare to noncombatant protection. As a result of the asymmetry between the parties to the conflict, different standards may apply to the

types of weapons used by each party and the decisions made concerning their targets. Although almost any weapon can be used discriminately or indiscriminately, a fundamental difference exists between the direct, intended targeting of noncombatants or intentional disregarding of noncombatants present in a targeted area and the effort to target only combatants while accepting the possibility of harm to noncombatants and seeking to minimize it. That is, the issue is not centrally the weapons themselves (e.g., missile strikes from remotely piloted aircraft [drones] versus the explosion of a car bomb by a suicide bomber) but the nature of the decision behind a given strike and its intention. The actual nature of a particular strike and the trail of decision leading to it are relatively straightforward to investigate for a sophisticated, well-organized military force. By contrast, irregular forces have every incentive to promote ambiguity in the results of their actions and to keep hidden their decision trail, the motives for the particular decision, and the person or persons responsible for it. These persons are also typically kept hidden, so bringing them to accountability is difficult and may be impossible, at least in the limited time frame in which it would easily be tied to the harm to civilians in question. The moral critics of contemporary asymmetric war have tended to go after the low-hanging fruit represented by the actions of the more highly organized and technically able party to the conflict, and the law is more easily applied to the military actions of well-organized and well-armed forces. Reaching inside the command and decision structure of irregular groups, however, is often impossible, and the perpetrators of specific actions deemed wrong are often beyond the reach of sanctions or even (in the case of suicide bombers) dead.

One way to think about this matter is that perhaps it would be good to return to the older standard whereby irregular warfare itself was regarded as wrong so that persons engaged in it could be proceeded against as persons without combatant rights. The difficulty with this approach is that it may slide into extreme measures involving the disregarding of all rights for persons identified with such warfare. To approach the matter this way is hard in any case for democracies (as the controversy over the “enemy combatants” detained at Guantanamo exemplifies) though relatively easier for autocratic or despotic governments. At the same time, though, moral warrant for it can be found in both the Western and Islamic traditions—to name only two of the major cultural and moral traditions involved in asymmetric conflicts today.

Accountability

There remains the problem of adjudicating accountability. Violations of noncombatant immunity may justify punishment as a war crime, but in irregular warfare the nature of the forces and their actions makes the gathering of evidence, the identification of responsible individuals, and the capture of those to be tried difficult or even impossible, undercutting the legal process. When the conflict in question is also asymmetric, with regular forces on one side and irregular ones on the other, the potential for enforcement of the rules for right conduct is also asymmetric. For regular forces the functioning of command

and control, including the keeping of records for each operation, provides a chain of evidence that is, in principle, straightforward to access. Consequently, one can identify the persons involved in the violation in question and, at least in principle, determine responsibility for the violation. As a result, soldiers in the regular force can be held to a higher disciplinary and judicial standard for their conduct than those in the irregular force opposing them. Their relative vulnerability on this count also opens the door for political motivations in singling out cases to investigate and/or prosecute. This prospect puts the fairness of the law in question and thus further undermines its protections as to be trusted. Thus, not only is noncombatant protection undermined, but also military personnel on the side that is held to the rules are disadvantaged relative to those on the other side, who may fight unrestrainedly with no substantial fear of being judicially held to account for their actions.

Conclusion

This article has been a pessimistic review of the matter of noncombatant protection in contemporary asymmetric warfare. Although the protection of noncombatants has developed as a major theme in both moral reflection on warfare and the international law of armed conflict, efforts to offer such protection remain fragile. This protection is especially endangered in irregular warfare, in which irregular forces may not share the underlying moral values and purposes defining such protection but may offer different justifications that define everyone as an enemy worthy of death and other harm. These same forces, typically nonstate actors, ignore or deny the restraints laid out in international law and in any case cannot easily be reached by sanctions the law provides. We need to pay more attention to the negative implications of this situation by all who are or may be in a position to affect future policy and action.

Notes

1. Desiderius Erasmus, *Bellum Erasmi* (London: Thomas Berthelet, 1533); and Jonathan Schell, *The Fate of the Earth* (New York: Knopf, 1982).

2. James Turner Johnson, *Ideology, Reason, and the Limitation of War: Religious and Secular Concepts, 1200–1740* (Princeton, NJ: Princeton University Press, [1975]), 43–46.

3. See, for example, 1907 Hague Convention IV, preamble, in Adam Roberts and Richard Guelff, *Documents on the Laws of War*, 3rd ed. (Oxford, UK: Oxford University Press, 2000), 69–70.

4. *Ibid.*, Arts. 1 and 2.

5. James Turner Johnson, *Sovereignty: Moral and Historical Perspectives* (Washington, DC: Georgetown University Press, 2014), 28–32. Cf. Johnson, *Just War Tradition and the Restraint of War: A Moral and Historical Inquiry* (Princeton, NJ: Princeton University Press, 1981), 127, 162–65.

6. Clyde L. Manschreck, *A History of Christianity*, vol. 2 (Englewood Cliffs, NJ: Prentice-Hall, 1964), 36–38.

7. Johnson, *Just War Tradition*, 306–22.

8. Roberts and Guelff, *Documents*, 181–82.

9. See, for example, 1949 Geneva Convention I, Art. 49, in Roberts and Guelff, *Documents*, 198.

10. *Ibid.*, Art. 2; and 1949 Geneva Conventions, Common Art. 3, in Roberts and Guelff, *Documents*, 198–99.
11. 1977 Protocol I, preamble; cf. Protocol II, preamble, in Roberts and Guelff, *Documents*, 422–23, 483–84.
12. 1977 Protocol I, Art. 48, in Roberts and Guelff, *Documents*, 447.
13. *Ibid.*, Art. 50, 448–49.
14. See Art. 5, par. 1, in “Rome Statute of the International Court,” accessed 11 December 2014, http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf.
15. Paul Ramsey, *War and the Christian Conscience: How Shall Modern War Be Conducted Justly?* (Durham, NC: Duke University Press, 1961), and *The Just War: Force and Political Responsibility* (New York: Charles Scribner’s Sons, 1968); Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Books, 1977); and National Conference of Catholic Bishops, *The Challenge of Peace: God’s Promise and Our Response* (Washington, DC: United States Catholic Conference, 3 May 1983), <http://www.usccb.org/upload/challenge-peace-gods-promise-our-response-1983.pdf>.
16. See, for example, David Rodin, *War and Self-Defense* (Oxford, UK: Oxford University Press, 2003). For international statements on human rights, see “Human Rights,” United Nations, accessed 13 December 2013, <http://www.un.org/en/rights/index.shtml>.
17. See “Rome Statute.”
18. See, for example, the declaration of “Jihad against Jews and Crusaders: World Islamic Front Statement,” Federation of American Scientists, 23 February 1998, <http://www.fas.org/irp/world/para/docs/980223-fatwa.htm>.
19. Quincy Wright, *A Study of War*, 2nd. ed. (Chicago: University of Chicago Press, [1965]), 1344–54.
20. Ramsey, *Just War*, 145.
21. 1907 Hague Convention IV, Annex, Art. 1, in Roberts and Guelff, *Documents*, 73. The language here is that found in 1949 Geneva Convention III, Art. 4 (2), in *ibid.*, 246. The provisions are the same as in the earlier contexts.
22. Roberts and Guelff, *Documents*, 444–45.
23. *New York Times*, 24 March 2003, B6; and “Iraqis Fake Surrender and Put Prisoners on TV,” *Star-Ledger* [Newark, NJ], 24 March 2003, 1.

Religion in Military Society: Reconciling Establishment and Free Exercise

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The First Amendment of the US Constitution's Bill of Rights declares that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." In military society, a unique collision of "rights" between nonestablishment and religious freedom requires an equally unique accommodation of religious practices—that is, *an agreement that allows people, groups, and so forth, to work together*. Many recent news reports indicate that our commanders and senior leadership lack clear guidance for parsing the complicated ground that separates "church and state." Because both the (non) Establishment and Free Exercise Clauses of our Constitution have equal weight, the government may not become "entangled" in religion or show it hostility.¹ By examining military society through both lenses—(non) establishment and free exercise—commanders can more clearly understand their responsibilities to service members as they carry out the mission. This article addresses establishment and free exercise in light of constitutional case law, offering four simple tools for making better decisions.

The Military Community

Military installations are isolated communities of culturally diverse people whose right of freedom of religion has been limited for the sake of the mission. Service members are American citizens protected by the Constitution and are on loan from 50 sovereign states while they continue to advocate for their legal and social preferences through the voting booth. In civilian communities, social and cultural standards found in laws and policies differ from town to town and state to state; they are established from the bottom up. For example, a Christian community will tend toward Christian standards; a Jewish community, Jewish standards; a progressive community, progressive standards; or a family

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community, family standards. In local politics, the religious and the secular all have equal access to the voting booth. In contrast, on military installations, all religious institutions have been fenced out, and political interaction between religious communities and elected officials does not exist. On fenced military communities, commanders are expected to maintain the constitutional balance of (non) establishment and free exercise. To do so, they have both a judge advocate general (JAG) and a chaplain to advise them.

To make things more difficult, military installations are a public-private hybrid consisting of government mission and family life. For instance, an aircraft hangar may be used for maintenance in the morning and a school-sponsored event in the afternoon. Funding options are equally confusing. Taxpayer dollars are limited to direct mission requirements that include mandatory funding for chaplain salaries, chapel buildings, and religious worship services while chapel tithes and offerings from the collection plate are also used to fund unit-focused programs such as barbecues in the dormitories and work centers. Commanders must understand that simply scrubbing the religious from military installations or restricting it to the interfaith chapel is not what the writers of our Constitution intended. Consequently, the provision of the right of free exercise through religious accommodation is a direct mission requirement.² From the assembly of the Continental Army onward, citizen Soldiers, Sailors, Airmen, and Marines are primarily religious people with religious families, holding religious ethics and living religious lives on government property.

Establishment and Free Exercise: A Condition of Respect

The US Constitution ensures that religion in the public square does not end on military installations. Some people believe that neutrality toward church and state equates to the absence of the religious on government property and in government operations. By using constitutional case law, we will see that this position is emphatically false. The court of *Lemon v. Kurtzman* observes that “judicial caveats against (government entanglement in religion) must recognize that the line of separation, far from being a ‘wall,’ is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.”³ Additionally, *Lynch v. Donnelly* notes that

no significant segment of our society, and no institution within it, can exist in a vacuum or in total or absolute isolation from all the other parts, much less from government. “It has never been thought either possible or desirable to enforce a regime of total separation.” . . . Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any. . . . Anything less would require the “callous indifference” we have said was never intended by the Establishment Clause. . . . Indeed, we have observed, such hostility would bring us into “war with our national tradition as embodied in the First Amendment’s guaranty of the free exercise of religion.”⁴

Thomas Jefferson used the term *wall of separation*, writing to religious people in 1802 for the express purpose of allaying the churches’ fears that the government would

attempt to control their religion. Jefferson stated, “Believing with you that religion is a matter which lies solely between Man & his God . . . I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should ‘make no law respecting an establishment of religion, or prohibiting the free exercise thereof,’ thus building a wall of separation between Church & State.”⁵ Jefferson intended the exact opposite of humanists’ use of the phrase today in their attempt to keep religion out of government. In fact,

in 1962, [Supreme Court] Justice Potter Stewart complained that jurisprudence was not “aided by the uncritical invocation of metaphors like the ‘wall of separation,’ a phrase nowhere to be found in the Constitution.” Addressing the issue in 1985, Chief Justice William H. Rehnquist lamented that “unfortunately the Establishment Clause has been expressly freighted with Jefferson’s misleading metaphor for nearly 40 years.”⁶

Far from banning religion in the public square, the (non) Establishment and Free Exercise Clauses were drafted in a way that allowed people of all faiths—and none—to equally live out their lives on common ground. The founding fathers intended to require American citizens to maintain a condition of mutual respect while they shared the same space. A much better metaphor than “separation of church and state” is “a level playing field for all political issues to be heard equally.”⁷ Americans cannot choose one of two paths to arrive at common ground. The nonreligious cannot walk the road of (non) establishment and arrive at free exercise. In the same way, the religious cannot walk the road of free exercise and arrive at (non) establishment. Common ground is a level playing field upon which both parties must agree to live as coequals. Respectfully sharing space on a level playing field involves four constitutional principles.

Hostility toward Religion Is Not Neutrality

On military installations, some of what passes as neutrality toward religion is actually hostility—the primary concern of the religious majority on military installations today. We have already examined the Supreme Court statement that the Constitution “affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.” Additionally the court of *Rubin v. City of Lancaster* cautions that “the danger that such efforts to secure religious ‘neutrality’ may produce ‘a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious.’”⁸ A recent survey of Air Force chaplains included the statement “I believe Airmen are free to practice their religion except where military necessity dictates otherwise.”⁹ The chaplains were asked to agree or disagree on a scale of one to four. A subsequent memorandum from the chief of chaplains notes that 82 percent of chaplains believe that Airmen can practice their religion freely.¹⁰ The corollary holds that, of approximately 500 active duty chaplains, 90 believe that Airmen cannot practice their religion freely. An additional concern is that the survey did not measure the ethos—the atmosphere of free exercise. In other words, is there a pervasive institutional bias against the religious that causes reli-

gious people or military leadership to “walk on eggshells”? To walk on eggshells in the matter of religion is not evidence of neutrality but of hostility.

God Is Presupposed on Government Property

Lynch v. Donnelly affirms that “there is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789” and that “we are a religious people whose institutions presuppose a Supreme Being.”¹¹ The courts imply that because our government as a whole presupposes a supreme being, each department of our government must also presuppose a supreme being. The Department of Defense (DOD) is not free to banish God from the public square. In principle, the writers of the Constitution clearly expressed that God is not confined to the chapel but walks the parade ground, the maintenance bay, and the flight line.

For example, with regard to paintings, sculpture, and other displays, *Lynch v. Donnelly* affirms the propriety of nonproselytizing religious art in public places:

Art galleries supported by public revenues display religious paintings of the 15th and 16th centuries, predominantly inspired by one religious faith. The National Gallery in Washington, maintained with Government support, for example, has long exhibited masterpieces with religious messages, notably the Last Supper, and paintings depicting the Birth of Christ, the Crucifixion, and the Resurrection, among many others with explicit Christian themes and messages. The very chamber in which oral arguments on this case were heard is decorated with a notable and permanent—not seasonal—symbol of religion.¹²

The walls of many DOD headquarters buildings, dining facilities, and other common areas are adorned with art and sculpture of many kinds. Art and sculpture with religious overtones are not, on their face, subject to removal or limitation. Regarding symbols of religion, *Lynch v. Donnelly* affirms the constitutionality of the National Day of Prayer, paid federal holidays of religious origin, the phrase “one nation under God” in our pledge of allegiance, the phrase “in God we trust” on our currency, and Christmas crèches owned and displayed by the government for secular purposes.¹³ Religion is welcomed to pervade the public square, and it is the commander’s constitutional duty to ensure that religion is welcome on military installations.¹⁴

God May Be Invoked and Welcomed during Government Business

Whether from a military chaplain or a volunteer from a local house of worship, prayer at government events is constitutional.¹⁵ *Marsh v. Chambers* affirms the propriety of prayers during government assemblies.¹⁶ These prayers are, and have always been, religious in nature and not simply ceremonial.

Regarding religious practitioners with whom he disagreed, founding father Samuel Adams said that “he was no bigot, and could hear a prayer from a gentleman of piety and virtue, who was at the same time a friend to his country.”¹⁷ According to *Lynch v. Donnelly*, “It is clear that neither the 17 draftsmen of the Constitution who were Members of

the First Congress, nor the Congress of 1789, saw any establishment problem in the employment of congressional Chaplains to offer daily prayers in the Congress, a practice that has continued for nearly two centuries. It would be difficult to identify a more striking example of the accommodation of religious belief intended by the Framers.”¹⁸ Religious invocations at government events are an acknowledgement that people of faith have an allegiance to “the Supreme Judge of the world,” who is higher than any law of humankind.¹⁹ If we use the level playing field analogy, then providing a respectful presence for a religious prayer is no different than doing so for another nation’s national anthem.²⁰ One does not have to agree with all members of a diverse population to be respectful.

The Threat of Litigation Cannot Be Grounds for Marginalizing the Religious

Lynch v. Donnelly affirms that “a litigant cannot, by the very act of commencing a lawsuit, however, create the appearance of divisiveness and then exploit it as evidence of entanglement.”²¹ Ethical leaders must be concerned about good order and discipline.²² However, the principle of good order and discipline cannot be used as a *carte blanche* to bulldoze all traces of the constitutional rights of a vulnerable class of citizens. Balance is critical! On the one hand, we must not violate the Establishment Clause by offending the nonreligious with the appearance of a government-endorsed religion. On the other hand, we must not violate the Free Exercise Clause by demonstrating hostility to religion through the systematic purging of everything with a religious overtone. Angry agitators, religious or atheist, must not be the determining factor for leadership decisions. The courts have provided much guidance for walking this tightrope and have supplied the groundwork for ethical decision making in a military context. In partnership, the JAG and Chaplain Corps must revisit the US Constitution and case law to move forward *collaboratively*, crafting policies and using explicit language that describes a level playing field on which respectful people may agree to disagree. In all cases, DOD policies must clearly define and prohibit hostility toward religion.

Four Tools for Parsing Establishment and Free Exercise

In the past few years, installation commanders in a number of reported incidents have apparently been advised to focus exclusively on the Establishment Clause in an attempt to secure religious neutrality. Unfortunately, in some cases their intended defensive action for (non) establishment was rightfully perceived as offensive to free exercise. In the same way we use 3-D movie glasses, commanders must intentionally look through both lenses of (non) establishment and free exercise to see the constitutional picture clearly. The following four simple tools for discerning the line between the Establishment and Free Exercise Clauses use court decisions as a guide. These court decisions are few, readily available, and easily read.

Historic Practice

Marsh v. Chambers tells us that the constitutionality of government-paid chaplaincy and legislative-type prayer is not found in any “test” but in historic practice.²³ Responding to a suit in which a complainant objected to a government-paid chaplain for the Nebraska Legislature, the Supreme Court held that

the Nebraska Legislature’s chaplaincy practice does not violate the Establishment Clause. . . . The practice of opening sessions of Congress with prayer has continued without interruption for almost 200 years, ever since the First Congress drafted the First Amendment, and a similar practice has been followed for more than a century in Nebraska and many other states. . . . Standing alone, historical patterns, cannot justify contemporary violations of constitutional guarantees, but there is far more here than simply historical patterns. In this context, historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress—their actions reveal their intent.²⁴

The court of *Marsh v. Chambers* appeals to the contemporary practices of those who actually penned the law. The writers of the Constitution did not forbid what they themselves permitted.²⁵ When confronted with questions about the scope and practice of chaplains and public prayer, one should employ the first tool to determine if historic practice exists.

Context

Lynch v. Donnelly upheld the constitutionality of a private association to erect a Christmas display on public property on the basis of context:

The Court has recognized that “total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable.” . . . The narrow question is whether there is a secular purpose for Pawtucket’s display of the creche. . . . Here, whatever benefit there is to one faith or religion or to all religions, is indirect, remote, and incidental; display of the creche is no more an advancement or endorsement of religion than the Congressional and Executive recognition of the origins of the Holiday itself as “Christ’s Mass,” or the exhibition of literally hundreds of religious paintings in governmentally supported museums.²⁶

Another case, *County of Allegheny v. American Civil Liberties Union*, concerns the constitutionality of a crèche placed on the “Grand Staircase” of a county courthouse. The crèche was part of a larger holiday display dispersed throughout the grounds. The court found that the *location* of the crèche was unconstitutional, based on the context:

The creche sits on the Grand Staircase, the “main” and “most beautiful part” of the building that is the seat of county government. . . . No viewer could reasonably think that it occupies this location without the support and approval of the government. Thus, by permitting the “display of the creche in this particular physical setting,” . . . the county

sends an unmistakable message that it supports and promotes the Christian praise to God that is the creche's religious message.²⁷

This case tells us that discerning the line between “a secular purpose” and promoting a religion involves not the religious presence or practice but the context in which it is found. A frontline supervisor, for example, may be religious and live his or her religious life at work. A supervisor, however, must not live this religious life in such a way that it would give *reasonable* people the appearance of favoring the religious over the nonreligious or others of differing faiths. It is a difficult line, but simply “playing it safe” and sanitizing the area violates the supervisor's constitutional rights. When confronted with an object or practice with religious overtones, one should use the second tool to observe the context.

The Lemon Test

In the absence of precisely stated constitutional prohibitions, we must draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: “sponsorship, financial support, and active involvement of the sovereign in religious activity.”
—*Lemon v. Kurtzman*

This three-point litmus test, also known as the “*Lemon* test,” determines the dividing line between free exercise and establishment.²⁸ A more recent case, *Lynch v. Donnelly* (1984), offers additional clarification for application: “In the line-drawing process, we have often found it useful to inquire whether the challenged law or conduct has a secular purpose, whether its principal or primary effect is to advance or inhibit religion, and whether it creates an excessive entanglement of government with religion.”²⁹ The descriptions and examples below are brief. Commanders and senior leadership would benefit greatly by reading the court decision for themselves.

The first point of the *Lemon* test evaluates for the legitimacy of a secular purpose. The question at hand is, Does the mere presence of a religious symbol or practice on government property imply government *sponsorship* for a specific religion or religion over nonreligion? The *Lynch v. Donnelly* court addresses the often misused metaphor of a “wall” of separation between church and state, observing that the “metaphor itself is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state” and that “total separation is not possible in an absolute sense.”³⁰ Religious symbols and celebrations may be found on government property for secular reasons and are not, in themselves, evidence of government sponsorship.

The second point of the *Lemon* test evaluates whether or not a symbol or practice's primary effect advances or inhibits religion. This is assessed through context. Regarding the City of Pawtucket's practice of including a crèche in its larger holiday display, the court found that, as mentioned above, “whatever benefit there is to one faith or religion or to all religions, is indirect, remote, and incidental; display of the crèche is no more an advancement or endorsement of religion than the Congressional and Executive recognition of the origins of the Holiday itself as ‘Christ's Mass,’ or the exhibition of literally

hundreds of religious paintings in governmentally supported museums.” Again the issue is context. Whether we are looking at a holiday scene or viewing a picture on a wall, the government’s question should be, In the eyes of a reasonable person, does this act or display give the appearance of government advancement or inhibition of a particular religion or religion over nonreligion?

The third point of the *Lemon* test evaluates unnecessary government entanglement. In other words, if we go down this road, will the government have to spend significant resources in policing and monitoring to ensure that secular-religious lines are not crossed or that no significant amount of manpower and funding is expended? The court found that

entanglement is a question of kind and degree. . . . There is no evidence of contact with church authorities concerning the content or design of the exhibit prior to or since Pawtucket’s purchase of the creche. No expenditures for maintenance of the creche have been necessary; and since the city owns the creche, now valued at \$200, the tangible material it contributes is *de minimis*. In many respects, the display requires far less ongoing, day-to-day interaction between church and state than religious paintings in public galleries.³¹

Allowing the religious time and space in the public square is not government entanglement with religion. Even the government purchase and maintenance of religious items for secular purposes do not constitute entanglement with religion.

Let us examine three recent examples of DOD intervention in religious issues and apply the *Lemon* test to each one. Again, the three questions are as follows: (1) Does the mere existence of a religious symbol or practice on government property imply government sponsorship for a specific religion or religion over nonreligion? (2) Does the context of a religious symbol or practice on government property advance or inhibit a specific religion or religion over nonreligion? (3) Will the religious symbol or practice be an entanglement to the government due to significant amounts of monitoring, funding, or manpower?

The first example comes from a June 2013 news story reporting that “an Air Force video saluting first sergeants—produced by an Air Force Chaplain—was removed by order of the Pentagon because it mentions the word ‘God,’ even though it was never intended as required viewing.”³² The video was produced in conjunction with a number of first sergeants and intended as a humorous parody of a Super Bowl commercial. In directing the removal of the video, “the Chief of the Air Force News Service Division stated incorrectly, . . . ‘Proliferation of religion is not allowed in the Air Force or military. How would an Agnostic, Atheist or Muslim serving in the military take this video?’”³³ Applying the *Lemon* test, we ask, Does the video have a secular purpose? Yes. Is the video’s primary effect to advance or inhibit religion? No. Does the video foster excessive government entanglement? No. If all the facts are as stated, then the Pentagon’s actions appear to violate the Constitution’s First Amendment by favoring nonreligion over religion and evidence of hostility toward religion. Additionally, the Pentagon’s position was eventually

reversed. No evidence of malice exists—only the lack of clear, objective written guidance from our most senior policy makers.

The second example is from a news report that the Air Force's Rapid Capabilities Office (RCO) removed the Latin name *Dei* (God) from its logo after objections by the Military Association of Atheists and Freethinkers: the "RCO patch logo previously included the motto 'Opus Dei Cum Pecunia Alienum Efficemus' (Doing God's Work with Other People's Money), an inside joke among RCO members. Caucus members say it was changed to 'Miraculi Cum Pecunia Alienum Efficemus' (Doing Miracles with Other People's Money)."³⁴ Applying the *Lemon* test, we ask, Does the logo have a secular purpose? Yes. Is the logo's primary effect to advance or inhibit religion? No. Does the logo foster excessive government entanglement? No. If all the facts are as stated, then the Pentagon's actions appear to violate the Constitution's First Amendment by favoring nonreligion over religion and evidence of hostility toward religion. Additionally, atheist groups have petitioned our courts for years to remove the phrase "in God we trust" from our monetary notes and coins.³⁵ The courts have repeatedly and emphatically rejected their argument: "In dismissing the suit, U.S. District Judge Harold Baer, Jr., wrote that 'the Supreme Court has repeatedly assumed the motto's secular purpose and effect' and that federal appeals courts 'have found no constitutional violation in the motto's inclusion on currency.' He added that while the plaintiffs might feel offended, they suffered no 'substantial burden.'"³⁶

The third example involves the removal of religious artwork from a dining facility. A painting entitled *Blessed Are the Peacemakers*, a 9-11 memorial gift to the installation, had long been displayed on a dining facility's wall. An atheist organization petitioned for and was granted the removal. A news report also relates that the wing commander said that "he will be ordering another inspection to rid his base of anything else like what had been hanging in the dining hall."³⁷ Applying the *Lemon* test, we ask, Does the artwork have a secular purpose? Yes. Is the artwork's primary effect to advance or inhibit religion? No. Does the artwork foster excessive government entanglement? No. If all the facts are as stated, then the commander's actions appear to violate the Constitution's First Amendment by favoring nonreligion over religion and evidence of hostility toward religion. Another report indicated that the commander maintained that "the painting violated military regulations governing the free exercise of religion" and that "the . . . [regulation] states that we will remain officially neutral regarding religious beliefs—neither officially endorsing nor disapproving any faith belief or absence of belief."³⁸ The commander cited the regulation correctly, but his interpretation was faulty. He had no "test" available to determine the ground between neutrality and hostility.

The three-part *Lemon* test is a simple tool for items with religious content. Each point of this test involves some subjectivity. Thus, it is critical that *both* the JAG, arguably representing (non) establishment, and the chaplain, representing free exercise, have equal input into a commander's decision process. We must use the 3-D glasses! When faced with an object or practice with religious overtones, ethical leaders should utilize a respect-

ful, methodical, and equitable process to find the balanced position. The third tool in the box is the *Lemon* test.

Bottom-Up Consensus

Commanders at all levels are unelected stewards who have limited legal authority to constrain constitutional rights to accomplish their missions. Primary drivers for poor command decisions include haste, misinformation, or personal bias. Regarding removal of the artwork from the dining facility, for instance, a report noted that the non-DOD complainant “gave the Air Force an hour to take action” and that the subsequent removal took place in 56 minutes.³⁹ This was a top-down decision. When dealing with social issues, religious or otherwise, the community must be consulted from the bottom up and must take time to contact the JAG, chaplain, senior leadership, and the installation’s private organizations. The Air Force’s integrated delivery system should have an opportunity to broker a peaceful settlement among organizations. Any *appearance* of the imposition of a commander’s personal preference for cultural and religious standards that exceed those necessary for the mission may be construed as social engineering and must be seen as a catastrophic moral violation of professional ethics. Commanders must never use their positions to impose any religious or cultural standard, whether Christian, Jewish, Muslim, Wiccan, atheist, conservative, or progressive. In social issues within a closed community, “good order and discipline” is not a top-down affair.⁴⁰ Ethical commanders allow members of their community to speak to one another, advocate for their positions, and, most of all, be respected. Then and only then do ethical commanders make command decisions. The fourth tool is bottom-up consensus.

Legal “Tests” or Historic Practice?

In 2007 the *Air Force Law Review* published an article entitled “Religion in the Military: Navigating the Channel between the Religion Clauses.”⁴¹ For seven years, it has remained a significant “think piece” for making Air Force policy; indeed, the article is listed as a reference in the current Air Force JAG publication *The Military Commander and the Law*.⁴² The legal assessments and conclusions of the authors—Maj David E. Fitzkee, USA, retired, and Capt Linell A. Letendre, USAF—regarding the Chaplain Corps’s scope and practice and the provision of public prayer are horribly wrong.

Referring to *Marsh v. Chambers* (1983), Fitzkee and Letendre correctly remark that “the court has upheld an opening prayer for a legislative session relying on the historical exception but has denied a moment of silence in public schools using the *Lemon* analysis.”⁴³ The authors clearly delineate between historically sanctioned prayers at a historically rooted, adult-dominant event from prayers at a child-dominant public school event. Then, inexplicably, they choose to argue the validity of historical prayer in military settings (*Marsh* language) from the same category as prayer at school graduations and football games (*Lemon* language).⁴⁴ In short, they switch from historical precedent to “tests.”

Fitzkee and Letendre complete their conversion with the following statement: “When facing the challenging question of prayer at an official military function, one must navigate through the array of legal opinions deliberately and with full understanding of the particular context in which the prayer will be given.”⁴⁵ Absolutely not! In a legislative or military setting, prayer is found constitutional through historic practice; context is irrelevant. Worse, they end their analysis by declaring,

Unlike a school environment, where students can vote on whether or not to have a message and decide what the content of the message should be, the military does not put to a vote whether to have an “opening message” at a change-of-command or a dining-in. Instead, a commander typically decides that there will be an invocation and routinely asks a chaplain to perform this duty. This overt government involvement, both in the decision making and delivery of an invocation, results in clear government speech, thereby compelling Establishment Clause analysis.⁴⁶

Do Fitzkee and Letendre really believe that the framers of our Constitution held that military commanders who request chaplain invocations at change-of-command ceremonies are guilty of violating the Establishment Clause? The Supreme Court does not agree.⁴⁷ To examine the constitutionality of the Chaplain Corps’s scope and practice, one must consult the best court ruling—*Marsh v. Chambers* (historic practice).

A Word about Ceremonial Deism

At the time of this writing, in *Town of Greece v. Galloway*, the Supreme Court is deliberating the consequences of a relatively new artificial construct called “ceremonial deism.”⁴⁸ At issue is “whether the court of appeals erred in holding that a legislative prayer practice violates the Establishment Clause.”⁴⁹ In other words, is a prayer at a government event really a prayer? To understand the debate, one must grasp the origins of ceremonial deism. The original term comes from an unpublished 1962 lecture at Brown University given by Yale Law School dean Eugene Rostow in which he proposed that “certain types of religious speech, which he called ‘ceremonial deism,’ were ‘so conventional and uncontroversial as to be constitutional.’”⁵⁰ Reflecting on this reference in 1984, Justice William Brennan offered his dissenting opinion in *Lynch v. Donnelly*:

While I remain uncertain about these questions, I would suggest that such practices as the designation of “In God We Trust” as our national motto, or the references to God contained in the Pledge of Allegiance to the flag can best be understood, in Dean Rostow’s apt phrase, as a form of “ceremonial deism,” protected from Establishment Clause scrutiny chiefly because they have lost through rote repetition any significant religious content.⁵¹

In his ponderings of uncertainty, Justice Brennan implies that he personally finds that these religious references have no “significant religious content.” The original intent of the authors is lost on him.

In 1989 Justice Brennan's thoughts became a legal player through the majority opinion of *County of Allegheny v. American Civil Liberties Union*:

The concurrence, in contrast, harmonized the result in *Marsh* with the endorsement principle in a rigorous way, explaining that legislative prayer (like the invocation that commences each session of this Court) is a form of acknowledgment of religion that "serve[s], in the only wa[y] reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society." . . . The function and history of this form of ceremonial deism suggest that "those practices are not understood as conveying government approval of particular religious beliefs."⁵²

With regard to legislative prayer, the justices chose not to refute *Marsh's* historic-practice argument and so added a new proposition on top of it. The *County of Allegheny* court stated that it has "harmonized" *Marsh* with "this form of ceremonial deism" so that legislative prayer should be viewed as a method of "solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society" (see above). But by artificially separating the act of prayer from its religious content, the Supreme Court has created additional confusion. The decision of *Town of Greece v. Galloway* may be intended as clarification. Will the Supreme Court uphold the original intent of the framers of the Constitution, meaning that public prayer is an example of free exercise, or will it overturn *Marsh* and pursue ceremonial deism in the name of (non) establishment? It is doubtful that the Supreme Court would overturn *Marsh*. However, it is almost certain that it will also continue to "harmonize" the founders' religious intent with antireligious ceremonial deism.

In the foreseeable future, regardless of *Town of Greece v. Galloway*, the American people should expect that the painting *The Baptism of Pocahontas* will remain on the Capitol Rotunda wall and that the National Gallery of Art will continue to display *Rabbi* and fund the maintenance of the *The Sacrament of the Last Supper*.⁵³ The Senate chaplain will continue his or her duties, ensuring that "all sessions of the Senate have been opened with prayer, strongly affirming the Senate's faith in God as Sovereign Lord of our Nation."⁵⁴ Each of these long-standing government practices provides examples of how our commanders should manage religion on their installations.

Conclusion

In the twenty-first century, US military society has entered a new era of cultural change, and we have been given few tools to make the transition. Indeed, we have not even framed the questions. Military leaders have sworn to support and defend the Constitution of the United States, and service members depend upon those in authority to act honorably. Leaders must be concerned about good order and discipline but must never use this as an easy excuse to sanitize religion. We can neither endorse religion nor show it hostility. We should use the four tools for discerning the line between establishment

and free exercise. The only way to determine constitutionality in matters of religion is to look through both the 3-D lenses of (non) establishment and free exercise. In practice, the JAG office represents the commander and has given the appearance of advocating for the institution over the rights of the individual. The scale has tipped in favor of (non) establishment. The scale must now be balanced to include the weight of free exercise. It is most critical that the Chaplain Corps “get smart” on constitutional law. Our JAGs and Chaplain Corps should transparently work together to restore First Amendment balance throughout the DOD. Constitutional free exercise must always remain a positive principle to be celebrated and not simply the dark side of (non) establishment.

Notes

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4. *Lynch v. Donnelly*, Supreme Court, 465 US 668 (1984) / *Committee for Public Education and Religious Liberty v. Nyquist*, 413 US 756, 760 (1973). See, for example, *Zorach v. Clauson*, 343 US 306, 314, 315 (1952); *Illinois ex rel. McCollum v. Board of Education*, 333 US 203, 211 (1948); *Lynch/Zorach*, 314; *Lynch/McCollum*, 211-12; and *Lynch*.

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10. Office of the Chief of Chaplains to ALMAJCOM-FOA-DRU / wing chaplains, memorandum, 25 September 2013.

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12. *Ibid.*

13. *Ibid.*

14. *Ibid.*

15. *Rubin*.

16. *Marsh v. Chambers*, Supreme Court, 463 US 783 (1983).

17. *Ibid.*

18. *Lynch*.

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22. “Punitive Articles of the UCMJ: Art. 134, General Article,” *Army Study Guide*, accessed 14 March 2014, http://www.armystudyguide.com/content/army_board_study_guide_topics/military_justice/punitive-articles-of-the-.shtml.

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24. *Marsh*.
25. *Ibid*.
26. *Lynch*.
27. *County of Allegheny v. American Civil Liberties Union*, Supreme Court, 492 US 573 (1989).
28. *Lemon*.
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Remediating Space Debris

Legal and Technical Barriers

JOSHUA TALLIS*

S*pace*. The word says it all: a pristine expanse with boundless potential and enough room for anything we could throw at it. However, words can be misleading. Outer space may be nearly boundless, but the neighborhood we populate is not. Currently about 500 operational satellites are in low Earth orbit (LEO), about 80 in medium Earth orbit (MEO), and about 400 in geosynchronous orbit (GEO).¹ Accompanying those working instruments are 17,000 pieces of catalogued debris in LEO; 1,000 in MEO; and 1,000 in GEO.² Every one of those measurable space objects is hurtling around the globe at an astonishing 7–12 kilometers per second, topping speeds on the imperial scale of 15,000 miles per hour.³ One need only conduct a Google image search for *satellite* to see that space—at least the part of it that we have to contend with—is far from spacious. Moreover, the threat of space debris in a crowded Earth orbit has significant national security implications.

Such debris not only constitutes a hazard to life on the planet but also, as a loaded minefield, can precipitate a considerable loss of critical infrastructure. Yet, little progress has occurred in the remediation of space debris. This article highlights some of the significant legal and technological barriers to implementing such remediation, with political considerations intermixed in both, concluding that alleviating legal restrictions is the better avenue for encouraging any meaningful focus on this issue.

Trackable (orbital) debris, is a catchall term for any nonoperational piece of hardware in orbit. Particulates can range from a detached screw to an entire dislodged booster. The smaller (1–10 centimeters) remnants of disintegrated and exploded satellites number in the millions, and, despite being the size of paint chips, they can easily kill an astronaut on a space walk or rip a hole through the *International Space Station*. Furthermore, though fewer in number, larger pieces of space junk—such as decommissioned satellites or abandoned segments of flight vehicles—pose a considerable risk across LEO and to the constellations of tightly orchestrated satellites in GEO. Larger debris presents a greater future risk of fragmentation; thus, their removal disproportionately benefits orbital stability.

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Antisatellite (ASAT) missile tests (such as the Chinese Fengyun trial), orbital collisions (such as the Cosmos-Iridium crash), and jettisoned capsules are among the principal sources of these materials. So why should the United States care?

First, reentering material threatens infrastructure and people, potentially leaving a wake of destruction on Earth's surface that, although sounding like science fiction, occurs far more frequently than commonly believed. For example, in 1978 a Russian spy satellite (*Cosmos 954*) failed to separate from its nuclear reactor before reentry, littering the Canadian arctic with radioactive debris when it crashed. In 1979 the American *Skylab* space station descended uncontrolled, striking parts of western Australia. More recently, four solid rocket motors have crash-landed in Uruguay, Saudi Arabia, Thailand, and Argentina since 2001.⁴ Second, the *International Space Station* is also frequently at risk of damage, placing in danger the lives of astronauts on board and in transit. By some estimates, over the course of a typical mission, space shuttles confronted a 1-in-250 chance of suffering catastrophic damage from a high-velocity micrometeor or piece of debris.⁵ In the course of 100 missions, that risk would reach a cumulative 33 percent—an admittedly dramatic but illustrative assessment.⁶ Finally, space junk could disable a host of satellites critical to global commerce, national defense, international navigation, and agriculture.

So why not simply launch the space vacuums and clean up the mess we have made? As with many international crises, the solution to this issue is far more complicated than the circumstances that created it. A host of legal, political, and technical considerations persist in making space debris a topic of frustration. Everyone agrees that something must be done; very few agree on just exactly what that something is. Preventing the creation of future debris has been a rallying point for a number of spacefaring nations. However, it is a Band-Aid fix to a still-growing problem, albeit one that encourages greater utilization of technology and personal responsibility among agencies the world over. Still, as long as trash continues to clutter the skies, the risk to national security and economy will persist. Some observers, such as Donald Kessler, a physicist with the National Aeronautics and Space Administration (NASA), even suggest an instance of critical mass at which time the abundance of debris material in LEO could cascade into perpetual chain-reaction accidents—a phenomenon known as the Kessler syndrome.⁷ Reports circulated by NASA's Johnson Space Center support at least some aspect of Kessler's theory: even had all launches stopped in 2005, the preexisting cloud of orbital trash at the time was large enough to continue creating debris faster than atmospheric drag could remove it.⁸ Thus, although attempts at debris mitigation are critical to having some effect on long-term sources of debris from ASAT explosions and ejected mission modules, such limited efforts do not offer a solution to the wider problem. The overall clutter of catalogued debris likely would continue to increase even if satellite launches stopped tomorrow. Clearly, something must be done—but what?

Legal Barriers

Popular perception views technology as an exponentially expanding industry that, much like Moore's Law, continuously pushes its own boundaries. Such rapid growth is infrequently, if ever, matched by an equal evolution in the legal framework that governs it. Consequently, in many ways the controlling space law and treaties are hindrances to addressing contemporary problems because of their obtrusively outdated nature. In 1967 the United States signed the Outer Space Treaty (OST), which broadly defined the most significant Cold War aims of what was then a bipolar celestial contest. In 1968 the United States and USSR added an Astronaut Rescue Treaty to this agreement, and in 1972 the Liability Convention became another addendum. By 1979 both the Registration Convention and the Moon Agreement had become final caveats to this body of international law.⁹ Since then, governments have necessarily oriented space law around this paradigm, producing results which have not always been favorable to meeting burgeoning contemporary challenges.

First and most significantly, as of 2006, no international agreement or United Nations (UN) document had used or defined the term *space debris*.¹⁰ It is impossible to address a problem that is neither identified nor institutionally acknowledged. Admittedly, Article IX of the OST condemns the harmful contamination of space although it does so in a rhetorical fashion and without mechanisms for enforcement or clear understanding of what contamination means.¹¹ Aiding in the reluctance of states to engage in a discussion on this topic is the inclusion of Articles VI and VII in the OST. Together, they form a broad conceptualization of liability in which a state is liable not only for the material it launches but also for any orbital devices launched by nongovernmental entities within that state's domestic borders.¹² In 1967 when the United States and Soviet Union were the only two nations with serious space capabilities and their respective governments provided the launch sites and overall vision for the space industry, that clause was a minor matter. Today, when space technology has become an ever-growing component of global commercial activities and when the space community has become increasingly commercialized (and eventually privatized), Articles VI and VII heap an overwhelming degree of liability on states, given the prevalence of corporations currently in the space business.

Ironically, the similarly outdated 1972 Liability Convention further complicated the question of fault. This convention attempted to define negligence in a manner that would encourage the international community to behave responsibly in space. However, for such an agreement to have any considerable effect on debris remediation, its tenets must be straightforward and enforceable. Such is not the case. The first and most critical determination to make in exposing liability is the identification of objects involved in a given collision. In 1972 tracking equipment that could have any meaningful technological effect on these talks did not exist. Furthermore, although US Strategic Command's (USSTRATCOM) contemporary Space Surveillance Network has a far greater capability to detect and monitor orbital debris, it is far from perfect and not universally accessible. Yet, even if a claimant could accurately identify the party involved in an orbital collision,

the issue of negligence remains to be determined. Legally, deciding the orbital parameters is the last affirmative action taken by a state in launching a satellite (without standard station-keeping maneuvers); merely launching a satellite does not constitute negligence.¹³ Some individuals believe that Inter-Agency Space Debris Coordination Committee guidelines, expanded International Telecommunication Union registration, or the standard practice of boosting payloads to graveyard orbits offers avenues for assigning fault to those who do not comply with such norms in the future. To date, however, no dominant, rules-based order has reached global consensus.

Finally, the Liability Convention leaves us without a clear answer to the question of what constitutes causation. We have no rules of the road in space—no way of telling who was driving in the wrong lane or who ran a red light (only GEO slots require registration with the International Telecommunication Union). Moreover, functional satellites can often maneuver small distances. If a nonoperational piece of debris struck an operational satellite that did not jettison (move out of the way), is that contributory negligence? So far, because such questions have no firm answers, catastrophic events like Fengyun continue to pollute near Earth orbits, and the international community feels no legal compulsion to act. In reality the Liability Convention did not convene with the intention of protecting space; rather, it was a political treaty meant to solidify key national interests in still poorly understood technical and judicial fields.¹⁴ Still, without a compelling legal (and consequently economic) incentive to patrol space, the remediation of refuse will continue to be purely a matter of lip service for most states.

For argument's sake, let us assume that states genuinely wanted to fix this problem and agreed to uniformly address every issue raised thus far. Only a handful of nations can actually remove debris from LEO, MEO, and GEO (mainly the United States and Russia). Imagine, in a joint project, that these states develop a clever mechanism for the remediation of medium to large pieces of nonoperational orbital material. Despite these efforts, according to both the OST and the Registration Convention, salvage rights in orbit do not exist. Anything put into space remains the property of the entity that launched it—even if that property explodes into 5,000 pieces. Therefore it is illegal to move or remove any object in space that does not belong to the launching state or state of registry performing the action—at least not without permission.¹⁵ The provisions of the OST's Article VIII, which embodies this rule, may therefore bar Russian or US efforts to clean up debris in this scenario, assuming, of course, that states can even identify the owner of a certain piece of debris—no simple task. Further, lest we forget, what if in the effort to clean up debris, we create more? In that circumstance, we would find ourselves back at the circular discussion of liability.¹⁶

As we can see, remediation of space debris meets its first major obstacle in the perplexing legal regime that makes incentivizing action through liability and ownership laws ambiguous and difficult to enforce. To be sure, some solutions are being considered as pressure mounts to solve this worrisome problem. Damage-compensation funds, apportionment of damages based on market-share liability, and fault-based standards for damages have all been suggested.¹⁷ None has achieved consensus, but the mere fact that

such matters are under discussion is a promising indication that the issue of remediating space debris is gaining ground. However, until liability, ownership, causation, rules of the road, and negligence are clarified and orbital debris is officially codified as a problem, motivation for greater action will continue to languish.

This reluctance among states to interact within a maladaptive legal system surrounding the space environment, expressed in the lethargy of international action, also finds roots in domestic political and defense considerations. Any conversation about the legislative regime cannot be disentangled from the rationale driving state actors. For many nations, reluctance to address this subject is driven largely by the defense apparatus. In the United States, NASA and the Department of Defense (DOD) have historically partnered on the topic of debris mitigation and adhere to strict guidelines as a means of helping reduce space debris.¹⁸ Similarly, such efforts have passed the UN General Assembly for simple enough reasons: everyone can agree that creating even more space junk is a bad idea. Additionally, although the 2010 US *National Space Policy* instructed NASA and the military to pursue research and development on debris remediation, the policy lacked any timetable, rendering the instruction functionally useless.¹⁹ Additionally, the government has yet to seriously task any agency with actually removing any debris, adding to the confusion in Washington.²⁰

One reason for this disinterest in remediation stems from the types of technology that space cleanup would produce. Similar to concerns over satellite-maintenance craft, the ability to dock and tamper with another satellite or fragment thereof leads inevitably to issues of dual use (civil and military applications of a related hardware) in space technology. For example, a craft that could patrol and collect small debris could similarly be tasked to deorbit components of satellites belonging to another nation or competitive entity. The DOD and its counterparts in major spacefaring nations such as Russia and China have no interest in promoting the growth of such capabilities—not because they favor orbital clutter but because a civil technology that would remedy the problem invariably carries with it national security ramifications. As space trash nears critical mass, such priorities may shift. Until that time, those in favor of investment in space debris technology and legislation will continue to meet strong opposition among governments.

Technical Barriers

So what can be done about existing debris? The answer, on the hardware side, is some method of active debris removal (ADR)—an industry moniker for “something.” Recent events, such as the Chinese ASAT test in 2007 and the collision of Russian (*Cosmos 2251*) and American (*Iridium 33*) satellites in 2009, have brought increased attention (and refuse) to the topic of debris remediation.²¹ One cannot overstate how critical an issue debris has become as a consequence of these two instances. Together, they have increased trackable material by nearly one-third. In response, the technical community has been tasked, despite the immense barriers noted in the previous section, with exploring some realistic and economical ADR systems for deployment within a reason-

able though unspecified time frame. However, something seemingly as simple as requesting designs for ADR concepts is inevitably tied up in myriad technical and political considerations. This section outlines some of the obstacles to technological innovation in this field, with a heightened focus on the impact of policy choices on the developing technology.

Technical developments in fields that project little to no short- or medium-range economic advantages do not tend to garner private resources. Some people believe that government research grants should fill this gap—a belief implying that, for better or for worse, political considerations directly affect the migration of technology in such industries. The effects of this correlation are obvious in highly politicized debates on climate change or stem cell research. Moreover, despite the lower profile, this relationship plays an equally significant a role in ADR investment. Because defense concerns and legal uncertainties motivate governments to defend the status quo, no profound government push has driven technological developments. Furthermore, even should political motivations converge to produce a discernible mandate for ADR research, engineers will inevitably face constricting parameters from defense agencies concerned about dual-use applications. For example, a giant laser (an actual suggestion) designed to heat up one side of a piece of debris, causing it to collapse out of orbit, is essentially a giant ray gun. If it can deorbit a decommissioned satellite, then it can just as easily disable an operational one.

Additionally, assuming the existence of positive responses from the defense community, a favorable legal climate, and supportive American political will, there remains a point of debate regarding exactly what type of ADR projects merit the limited resources made available to the Defense Advanced Research Projects Agency and NASA. Such determinations would require prioritizing either the removal of smaller debris, which aids in safeguarding existing operational satellites, or the remediation of larger debris, which contributes to the long-term stability of orbital systems.²² Arguments for the former stress the use of tight resources in addressing immediate issues. Small debris is problematic to track, and the number of individual pieces extends into the millions. Difficulty cataloguing and monitoring so much debris means that objects like paint chips and loose screws present the greatest short-term threat to operational satellites. Arguments for the latter stress the projections that removing even as few as five of the highest-risk large pieces of debris can considerably stabilize the orbital environment.²³ Because actors can easily catalogue large debris, such materials present a more limited immediate threat. However, as noted above, the fragmentation potential of a big piece of orbiting junk presents an outsized, long-term risk. This vulnerability will inevitably need to be addressed although the necessarily myopic nature of politics (and the presence of more pressing considerations) makes the seemingly simple task of removing only a handful of pieces of debris difficult.

Similarly, policy makers face a related choice between targeted and dragnet technologies, each posing its own benefits and issues as well.²⁴ Dragnets are particularly useful after a catastrophe, cleaning up clusters of debris before they spread by capturing a

large amount of material—similar to a trawler dredging the ocean floor. However, dragnets may be just as undiscerning as a dredge—inexact in what they collect. Targeted techniques may be more equipped to mitigate the chances of specific collisions. Thus, assuming that we can address all of the political, legal, security, economic, and prioritization problems, what technology is currently available for research investment?

The first step in answering that question involves enhancing situational awareness in space. To date, only USSTRATCOM monitors space debris in anything resembling a comprehensive fashion, opening a host of ethical questions on its own. For instance, is the United States obligated to warn a foreign company or country of an impending collision? However, this single monitoring task relies on aging technology to track only tens of thousands of the millions of pieces of man-made junk in space. In 2013 sequester constraints forced the US government to scrap an S-band radar system known as Space Fence, representing an attempt to upgrade some of the infrastructure the joint force uses to track space debris. In June 2014, the government revitalized the program, awarding Lockheed Martin a contract of nearly one billion dollars to resume work on the project. The legacy tracking system can track debris around the size of a basketball in LEO whereas the proposed Space Fence will be able to track debris down to the size of a baseball or smaller.²⁵ This increased ability could result in the number of catalogued pieces of debris shifting from nearly 20,000 to closer to 200,000.²⁶ Yet, no matter whether Space Fence survives future cuts, any attempt at debris remediation will require affording USSTRATCOM the resources to continue combing software-based predictive models enhanced by a growing ability to spot-check more debris. Such a capability is a prerequisite to any attempt at remediation since we cannot remove what we cannot find. Similarly, enhanced situational awareness contributes to alleviating a number of the technical issues plaguing the debate on liability.

Yet, eventually, remediation will demand the physical removal or deorbiting of space debris, and we have no shortage of proposals on how to do that. One popular concept in circulation calls for use of a tether, utilizing either electromagnetics or momentum exchange. Such devices usually target larger debris, causing such materials to drop out of LEO or flinging them into graveyard orbits above GEO—in much the same way an object tied to a rope can be sent flying. The electrodynamic variant has gained prominence recently: a \$1.9 million grant from NASA to Star Technology and Research made news in March 2012.²⁷ The advertised layout of the company's ElectroDynamic Debris Eliminator used a fleet of 12 craft launched into LEO, working in unison to grab debris and drag it to short-lived orbits before cascading out of circulation. The company, which has received other government grants in the past, projected that a fleet of this size conceivably could remove all current LEO trash over two kilograms within seven years.²⁸ Consequently, although this targeted system carries with it the benefits of accuracy and control, it is designed to choreograph in such a manner that it produces the long-term benefits of a dragnet approach as well. Whether it can truly keep up with the natural increase of debris, whether deorbited material runs the risk of reaching the surface, and whether such a large and mobile fleet further increases the chances of collisions are ques-

tions that still need answers, leaving this regimen as one among a host of uncrowned contenders for the title of panacea. It joins the ranks of lasers and harpoons in the ever-growing club of designs vying for a slice of the inevitable windfall that a likely crisis would produce. Though just one example, the ElectroDynamic Debris Eliminator demonstrates the complexities involved at every level of technical development and the associated costs for even nonoperational prototypes.

Space is an incredibly hostile environment. The absence of atmosphere, high radiation levels, extreme temperatures, and the remote aspect of operations all make remediation a technical issue of the highest complexity. Additionally, with costs so exorbitant, outcomes so uncertain, priorities so ambiguous, and technologies still untested, ADR will continue to linger at the mercy of political whim. Only after such uncertainties are settled can the arduous process of technical trial and error begin. Space cleanup will not be a quick fix, and scientists concerned about the immediacy of the crisis undoubtedly will continue to see solutions pushed to the horizon until those who control the flow of funding are persuaded to make the necessary political and economic investments.

Finally, any discussion of the role of commercial air and space cannot ignore the reality that private industry is a growing segment of the launch-and-payload market. NASA increasingly relies on commercial partners (Orbital Sciences Corporation and Space Exploration Technologies Corporation [the latter more commonly referred to as SpaceX]) to meet its resupply obligations for the *International Space Station*. The Boeing Company, Sierra Nevada Corporation's Space Systems, and SpaceX also compete to provide commercial American access to LEO, a capability the United States has lacked since termination of the shuttle program in 2011. SpaceX announced in August 2014 that it had selected Brownsville, Texas, as the site of a private commercial spaceport where the company intends to conduct upwards of a dozen commercial launches annually. Given these developments as a backdrop, it is obvious that private corporations cannot simply look at space remediation as an industry cash cow. Air and space companies must be included in a regime that fairly distributes the responsibilities of debris prevention and remediation in a way that meets their role in the modern system. Updating the Liability Convention could provide one framework for helping expand the international legal and financial responsibilities of commercial launch companies. International bodies such as the International Telecommunications Union (a UN affiliate) offer yet another avenue within which policy makers can discuss this decidedly multinational issue. However, no matter the method for addressing the rights and responsibilities of private companies, any broader discussion of the legal and technical barriers to space debris remediation must recognize that this issue is no longer solely a governmental one.

Conclusion

Evidently, space debris is a complicated and inherently international topic having direct ramifications for national security. However, with material and responsibility spread among multiple nations and liability a major cause of concern for every partici-

pant, solutions can originate only in a global forum. Policy makers can address technical issues with funding; funding for such projects comes from the political establishment; and the political establishment listens to lawyers and generals. The best way to appease that core constituency is to reach a multilateral consensus on an international set of standards and programs that eliminate uncertainty and the fear of legal reprisal against those who seek to fix the problem. This is the capstone of barriers to space debris remediation. If nations could concur on fundamental negligence principles and rules of liability in this context, while uniting technologically (as they have done with the *International Space Station*) to respond to the issue, then the remaining conflicts would not disappear—but they would become far more manageable.

In a joint venture, the DOD could monitor openly the capabilities of participating agencies. Furthermore, it is inevitable that most military communities will eventually see debris as an unavoidable threat to national security. Thus, the status quo will not survive. With the defense community on board, political support for ADR becomes sustainable, consequently opening funding in the budget process, which large companies and entrepreneurs alike can manipulate to the gain of ADR research grants. Additionally, given an agreement on enforceable liability and causation standards, investment similarly will follow in enhanced monitoring and situational awareness capabilities. By establishing a coherent set of incentivizing ground rules, we expose the tangles of space debris remediation to realistic solutions. If the international community can come together, the cleanup of space refuse becomes a far more promising venture.

Notes

1. Secure World Foundation, *Space Sustainability: A Practical Guide* (Broomfield, CO: Secure World Foundation, 2014), 8, http://swfound.org/media/121399/swf_space_sustainability-a_practical_guide_2014__1_.pdf.

2. Ibid.

3. Noncatalogued pieces of debris are projected to be in the millions. Catalogued debris is only the material that current sensors can measure and spot-check.

4. National Aeronautics and Space Administration (NASA), “Reentry of U.S. Rocket Stage above South America,” *Orbital Debris Quarterly News* 15, no. 3 (2011): 3. In none of these cases were lives lost, but they do represent the periodic (if infrequent) occurrence of dangerous reentries.

5. John Matson, “U.S. Taking Initial Steps to Grapple with Space Debris Problem,” *Scientific American*, 31 August 2011, <http://www.scientificamerican.com/article.cfm?id=orbital-debris-space-fence>.

6. Ibid.

7. Kessler’s calculations have been misapplied in pop culture, but the theory remains both viable and accepted as a theoretical scenario. In 2010 Kessler explained his updated position on the syndrome and his general support for the model it produced in the following paper: Donald J. Kessler et al., “The Kessler Syndrome: Implications to Future Space Operations” (paper presented at the 33rd Annual American Astronomical Society Guidance and Control Conference, Breckenridge, CO, 6–10 February 2010), <http://webpages.charter.net/dkessler/files/Kessler%20Syndrome-AAS%20Paper.pdf>.

8. NASA Orbital Debris Program Office, “Orbital Debris Remediation,” Johnson Space Center, 21 August 2009, <http://www.orbitaldebris.jsc.nasa.gov/remediation/remediation.html>. A study referenced by

NASA concludes that the collision of satellites already in orbit by 2005 would eventually be enough to replace and exceed the amount of debris greater than 10 centimeters that would be lost to atmospheric drag. In other words, for every piece of debris that burned up in Earth's atmosphere, new accidents would create at least one new piece of debris even if we never launched another payload into space again.

9. Cesar Jaramillo, ed., *Space Security 2010: Executive Summary* (Kitchener, Ontario: Pandora Press, June 2010), 12, <http://swfound.org/media/29036/ssi2010executivesummary.pdf>.

10. Michael W. Taylor, "Orbital Debris: Technical and Legal Issues and Solutions" (LLM thesis, McGill University, 2006), 39–40, <http://fas.org/spp/eprint/taylor.pdf>.

11. *Ibid.*, 76.

12. *Ibid.*, 42.

13. *Ibid.*, 77.

14. The Convention on International Liability for Damage Caused by Space Objects (Liability Convention) entered into force in 1972—five years after the signing of the Outer Space Treaty. The convention's most fundamental provision is that all liability for a launch is held by the launching state. Consequently, only states can make claims against one another under the convention guidelines; corporations and individuals are precluded from doing so. In 1972 these concepts were relatively uncontroversial since only the superpowers could even think of launching satellites into orbit. However, in an increasingly commercialized and vastly expanded industry, private companies play an undeniable role in the launching of payloads and the ownership and operation of satellites in orbit. As a consequence, the international system is unlikely to embrace a legal regime that holds states entirely financially responsible for the impact of the actions of corporations or of individuals launching from within their borders. Equally, a regime that marginalizes an increasingly important community in the air and space industry—commercial launch operators—is sure to be nonfunctional. In fact, despite 89 signatures, the convention has been successfully used only once, in the case of the *Cosmos 954* crash mentioned earlier.

15. Taylor, "Orbital Debris," 80.

16. It is important to note that, no matter how significantly we address the inadequacies of the legal regime, collective action will always remain an obstacle to debris remediation. As with tackling climate change, cleaning space debris is an expensive project with few immediate prospects of financial gain for those actors who pay to address it. This author believes that an updated legal framework makes issues of collective action easier to discuss. Nevertheless, the fact remains that projects of collective origin and collective rectification are profoundly difficult political issues that, by definition, do not easily lend themselves to simple solutions.

17. Taylor, "Orbital Debris," 85.

18. Dave Baiocchi and William Welser IV, *Confronting Space Debris: Strategies and Warnings from Comparable Examples Including Deepwater Horizon* (Santa Monica, CA: RAND Corporation, 2010), 83, http://www.rand.org/content/dam/rand/pubs/monographs/2010/RAND_MG1042.pdf.

19. Matson, "U.S. Taking Initial Steps."

20. NASA Orbital Debris Program Office, "Orbital Debris Remediation."

21. *Ibid.*

22. *Ibid.*

23. *Ibid.*

24. Baiocchi and Welser, *Confronting Space Debris*, 46.

25. The new Space Fence will replace nine VHF-band radars with ground-based radar positioned on the Kwajalein Atoll in the Marshall Islands. The new detectors will use a compressed S-band to catalogue and spot-check objects down to the size of a baseball in LEO.

26. Josh Tallis, "Lockheed Wins Contract to Track Space Trash," *Spaceflight Insider*, 4 June 2014, <http://www.spaceflightinsider.com/space-flight-news/lockheed-wins-contract-track-space-trash/>.

27. Douglas Messier, "Company Gets \$1.9 Million from NASA to Develop Debris Removal Spacecraft," *Parabolic Arc* (blog), 12 March 2012, <http://www.parabolicarc.com/2012/03/12/company-gets-1-9-million-from-nasa-to-develop-debris-removal-spacecraft/>.

28. "ElectroDynamic Debris Eliminator (EDDE) Vehicle," Star Technology and Research, accessed 15 December 2014, <http://www.star-tech-inc.com/id121.html>.