

# **Political Science Graduate Student Journal**

**Volume II**  
*Trends and Dynamics in Global Politics*

Concordia University  
Department of Political Science  
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## **Volume II**

### ***Trends and Dynamics in Global Politics***

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## Foreword

The goal of Concordia's second annual Political Science Graduate Student Conference held on April 19<sup>th</sup> 2013 and this resulting Journal was to promote the work of students from all levels of graduate studies and from a variety of research areas. The organizing committee and editorial team also consisted of both Masters and PhD students from different subfields of Political Science. The project was entirely student led and the team worked in close collaboration with the department's faculty and administration. Incorporating the work of students from all levels with a diversity of research interests provided for an eclectic mix of perspectives and fruitful debate during the conference, as well as an interesting assortment of articles that are sure to spark the interest of any reader.

This year's broad theme, *Trends and Dynamics in Global Politics*, reflected our desire to explore a wide range of issues in global governance and promote the submission of research from students across the discipline on topics that may be increasingly salient in the field and that have important policy implications. As a result, we received submissions from students from across Canada and from a variety of areas. This diversity in contributions allowed us to establish four very unique panels for our conference. The program reflected a strong policy perspective, revealed through papers on identity formation, the economy, security, power and technology, political theory, and gender. This variety of topics underscores the importance of understanding the interconnected nature of such issues in local and global governance.

The papers published in this year's journal highlight timely issues of increasing concern to individuals and governments. Each piece provides perspectives of decision-making across a variety of cases including Europe, Canada, the United States, and China. Kiran Phull discusses the securitization of the European Union's (EU) immigration policies in the wake of the Arab Spring. She explores the increasing concern within



the EU over the influx of immigration and the resulting growth of nationalist governments and anti-immigration policies. Johanu Botha's article shifts the focus from issues of policy-making in EU member states to concerns over the lenses employed in policy formation in the Canadian context. He explores the formation of identities in the policy process, stating that, despite existing debate, the liberal framework remains a relevant theory to explain policy decisions and to inform future policy. The third article in this issue takes an important look at whether an oil embargo would be an adequate strategy to limit Chinese expansionary tactics. Alexandre Léger reviews the effectiveness of sanctions and offers insight into whether these can be an effective policy tool. Finally, Jonathan Romic and Ryan Michael Boivin explore the contemporary issues of cyberspace and cyberwarfare governance. Romic focuses on the tendency of non-state actors such as Anonymous to use cyber technology in order to challenge state authority while Boivin analyzes cyber-attacks such as the Stuxnet virus and seeks to deconstruct the legality of cyber warfare in the context of the United Nations Charter. Both articles present two very different but important perspectives in understanding the role of cyberspace and cyberwarfare.

We hope that these papers will provoke thought on the vast range of global policy and governance issues and that the reader will engage with the ideas put forth by these authors. It is our hope that the Political Science Graduate Student Conference and Journal will continue to grow in the coming years and reflect the same diversity in subject matter and inclusivity of students from all levels in all aspects of the process. It is with pleasure that we present this year's volume of Concordia's Political Science Graduate Student Journal entitled *Trends and Dynamics in Global Politics*.

Osman Shah and Kerry Tannahill

## **Acknowledgments**

The foundation for the success of this year's graduate student conference and journal is attributed to the hard work of Concordia's Political Science department faculty and students. Any project, especially one of this size, would not be possible without the input and dedication of a strong team. First among these are the individuals who were involved in the planning and execution of the conference from which this journal was made possible. This includes students, members of the 2012-2013 Political Science Graduate Student Association Executive: Kerry Tannahill, Kenneth Martin, Nadia Hammouda, Sarah Flesher, Brent Gerchicoff and Ozge Uluskaradag. Each lent their organizational and logistical support from the very beginning, as did PhD Student Teresa Mayne.

In addition, this effort was made possible by the university administration and faculty through their guidance, encouragement, and financial support. We are grateful to Dr. Csaba Nikolenyi for his constant backing throughout the process, Dr. Axel Huelsemeyer for his patience and advice, as well as Dr. Elizabeth Bloodgood, Dr. Julian Schofield, Dr. Daniel Douek and Jeremy Speight for their valuable expertise. We are thankful to the Office of the President, the Dean of Arts and Science, the Office of the Vice President, Research and Graduate Studies, and the Department of Political Science for the financial support that allowed these projects to come to fruition.

Finally, this journal would not have been possible without the dedication of the editorial team. The effort and input of Randy Pinsky was invaluable and the time given by Dr. Emmanuelle Richez, Sarah Flesher, Kerry Tannahill, and Dr. Huelsemeyer was immeasurable for the journal's success. This realization is also underscored by the hard work of Sheila Anderson, Julie Blumer Kathryn Rawlings, and Patricia Macfarlane who keep the department running smoothly every

day. Finally, a special acknowledgement and sincere thank you to all the students who took time to submit their work, present at the conference, and participate in the day's activities as well as to those who worked with us during the journal production process.

Osman Shah, Managing Editor

# **Securitization and the Arab Spring Migration Crisis in the EU**

Kiran Phull  
MA Political Science  
University of Windsor

## *Abstract*

In the European Union (EU), current trends in immigration from external countries and issues in managing the EU's internal and external borders have generated increased concern regarding the future of integration and free movement of peoples across EU borders. Efforts to shape a harmonized EU approach to conceptualizing and managing key issues in migration have been limited, due largely to the preference of member states to maintain sovereign control over matters pertaining to citizenship, borders and national identity. Taking the Franco-Italian border crisis of 2011 as a point of departure, this analysis examines the securitization of EU migration policy in recent years and its impact on the operation of borders within the Schengen area. The 2011 Franco-Italian crisis saw the reintroduction of border controls in France, Italy and other member states such as Denmark in an effort to counteract the arrival of thousands of undocumented migrants and asylum seekers displaced by the Arab Spring. The legality of introducing border controls was brought into question and regulations within the Schengen Borders Code were amended by the European Commission in order to grant EU signatory states greater freedom in controlling national borders. The securitization of migration recognizes that the use of restrictive actions, policy responses and rhetoric facilitate the framing of migration as a destabilizing or dangerous challenge to west European societies (Huysmans 2010), with negative economic, cultural and social implications. In this analysis, the application of the critical lens of Securitization Theory to the Franco-Italian case is used to demonstrate how, in framing Arab Spring migration as a major external threat rather than an international humanitarian crisis, select member states were able to steer regional decision-making and reclaim sovereignty in immigration policy, an area that should fall under EU's shared competence.

### *Biography*

Based in Toronto, Kiran Phull received her B.B.A. in International Business from the Schulich School of Business, Toronto in 2007 with a joint study at the Université Catholique de Louvain, Belgium. Interested in the application of statistical analysis to business problems, Kiran worked as a full-time public opinion research analyst at Ipsos ASI until 2010. In 2012, Kiran received her M.A. in Political Science from the University of Windsor, focusing on quantitative research, border theory and immigration and integration in the European Union. Her areas of interest include statistical research, European Union studies, and international political economy. Kiran currently works as a full-time digital research analyst and plans to pursue a Ph.D. in Political Science.

### *Introduction*

As one of the more salient political issues facing the European Union (EU) today, immigration and the management of internal and external borders are generating increased concern regarding the future of integration and free movement in the EU. In the absence of a regional approach to immigration, recent policy proposals in the areas of asylum, legal migration, visas, border control, irregular migration and anti-discrimination have seen low rates of success in terms of member state harmonization. This has led to a limiting of the EU in shaping a regional framework for conceptualizing and managing key issues concerning migration, with member states instead demonstrating a preference to maintain sovereign control over issues that pertain to citizenship, borders, and identity. In more recent cases, this has resulted in particularly exclusionary responses from some European governments to new migration flows and external immigration to be framed as potentially destabilizing security threats, perceived as seeking to endanger the functional integrity and identity of the state (Huysmans 2006).

Of particular interest to this analysis is the response by France and Italy to the arrival of thousands of migrants and asylum seekers fleeing political unrest in the Middle East and North African (MENA) region between December 2010 and May 2011.<sup>1</sup> The 'Arab Spring' uprisings generated high levels of human displacement within and outside of the Arab world. While European governments expected the uprisings to act as a major push factor for migration into proximate Southern European countries, fears over the number of arrivals were greatly magnified, in part by exclusionary rhetoric employed in the media and by local European political actors. As a result, extraordinary border controls were implemented by France and Italy in 2011 to curb a potentially destabilizing migration

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<sup>1</sup> Beginning in late 2010, populist anti-government movements quickly spread throughout the MENA region. Spurred by Tunisia's December 2010

movement. Both governments also jointly succeeded in pressuring the European Commission (EC) to amend its laws pertaining to free movement in the Schengen zone and the use of border controls.<sup>2</sup>

In reality, the magnitude of the Arab Spring migration wave into the EU—with fewer than 50,000 arriving through 2011—was less significant when compared to other major migration movements into the EU. Sudden external migratory pressures brought on by war or other crises include the arrival of 400,000 refugees to Germany from Bosnia and Herzegovina in the 1990s, as well as the more recent arrival of tens of thousands of Iraqis to Sweden in 2007 and 2008 during the Iraq War. The political integration of Central and Eastern European countries into the EU has also facilitated mass migration movements. The number of legal and illegal Romanian migrants to Italy in 2007, for instance, grew to over one million within a year of Romania joining the EU (Suciu 2010). In each of these cases, sudden border closures were not used to manage the migration flow. This study seeks to situate the EU's approach to managing Arab Spring migration within the context of a strengthening discourse of securitization and great restrictions surrounding immigrants and integration.

The first part of this analysis traces the evolution of immigration policy in the EU towards a harmonized, regionally-adopted approach to immigration. This analysis reveals that gaps emerge between stated immigration policy objectives and observed outcomes. The second part of this analysis applies the critical lens of securitization theory to EU migration, presenting the logic that migration from outside the

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<sup>2</sup> The Schengen Agreement was first signed in 1985 by France, West Germany, and the three Benelux states (Belgium, the Netherlands and Luxembourg) with a commitment to abolish border controls among participatory states. Today, the Schengen zone is comprised of 26 European states that have removed passport and immigration controls at their shared borders, facilitating the free movement of citizens and Schengen visa-holders.

region can be framed as a real threat to national security or a symbolic threat to national identity. The securitization of migration recognizes that the use of restrictive actions, policy responses and rhetoric facilitate the creation of migration as a destabilizing or dangerous challenge to west European societies (Huysmans 2010). This in turn can overshadow the humanitarian aspect of international migration (Pinyol-Jiménez 2011). The securitization discourse has become more pervasive since September 11, contributing to a marked unease regarding the movement and integration of foreigners.

The analysis then turns towards the 2011 Franco-Italian case, highlighting the ability of member states to employ the rhetoric of securitization to shape regional immigration policy when national security is perceived as being under threat. In this light, both France and Italy can be viewed as securitizing actors that, through their policy actions, contributed to the framing of Arab Spring migration as an external threat rather than a humanitarian crisis. On grounds of national security, both states were jointly able to facilitate swift changes to the Schengen Borders Code; changes that grant EU signatory states greater freedom in controlling national borders and reverse some of the steps that have been taken towards immigration policy harmonization. Although the EU continues to move towards the construction of a common legislative approach to immigration, the increased securitized framing of recent issues may be a driving force behind member states' efforts to intercept the process of policy harmonization and reclaim some degree of sovereignty on issues pertaining to international immigration.

#### *Immigration Policy Harmonization in the European Union*

The creation of the European Union following the signing of the Maastricht Treaty in 1992, which effectively dissolved national borders in the administrative sense and led to a reassessment of European citizenship and national sovereignty, stands today as one of the more evident and concrete results of



cooperation between EU member states (Møller 2008).<sup>3</sup> By incorporating a protocol attached to the Treaty of Amsterdam (which came into force in 1999) into the EU framework, the free movement of persons in the territory was guaranteed and signatory states agreed to abolish internal borders, creating a shared external border. Key rules adopted within the framework included the elimination of checks on persons at internal borders, a common set of rules applying to persons crossing external borders, harmonization of the conditions for entry and visa acquisitions, enhanced cooperation in border policing and judicial enforcement, and the creation of the Schengen Information System (SIS)—a shared governmental database used for managing regional security. The EU's free movement policies have naturally created a new context for understanding notions of inclusion and exclusion, with stricter controls placed on the region's external border in order to secure internal freedom of movement. Greater controls have therefore also been placed on the movement of non-European nationals entering the EU (Luedtke 2006).

Since the Amsterdam Treaty, the regulation of non-EU nationals' entry and residence conditions and rights has been transferred to the EU's shared competence (Carrera et al. 2011a). With this transition and the adoption of the Tampere Programme in 1999, the EU has called for the development of a common regional approach to immigration and integration for legally residing third-country nationals (TCNs).<sup>4</sup> The

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<sup>3</sup> The European Economic Community (EEC) was created in 1957 by the Treaty of Rome (also called the Treaty Establishing the European Economic Community). After a series of treaties further deepened the powers of the EEC and widened its membership, the Maastricht Treaty (also called the Treaty on European Union (TEU)) established the European Union and renamed the EEC to simply the European Community (EC). The two treaties continue to exist as separate documents but the Treaty Establishing the European Economic Community has now been renamed (by the Treaty of Lisbon) as the Treaty on the Functioning of the European Union.

<sup>4</sup> Third-country national (TCN) status refers to any individual residing in the EU who is not a citizen of an EU state. Without possession of a visa, TCNs

objective has been to implement regional procedures for admitting and integrating non-EU nationals in accordance with the EU principles of solidarity, sharing of responsibility, cooperation, and respect for fundamental human rights (Carrera et al. 2011b). With the Tampere Programme, the EU also began to forge partnerships with countries of origin in order to address the root causes of emigration. The 2004 Hague Programme resulted in the design of a blueprint for a regional immigration as agreed upon by member states, which evolved into the 2009 Stockholm Programme that stretches to 2014. These measures have sought to create a common area of justice that would include irregular immigration under its jurisdiction. The Stockholm Programme aims at creating a comprehensive and flexible migration strategy, to be achieved through the European Pact on Immigration and Asylum. This initiative would lend the EU decision-making capabilities for regulating family migration, implementing policies for labour migration for different member states, improving conditions for legal migration, promoting the integration of migrants, controlling irregular migration, and improving border controls through Frontex, the EU's primary border patrol agency.<sup>5</sup> Along the lines of the Stockholm Programme, immigration would effectively be EU-controlled. Finally, the entry into force of the Lisbon Treaty in 2009 laid the groundwork for developing a common asylum policy and instituting majority voting and codecision on all aspects of migration policy (Luedtke 2011).

The coordination of EU members to achieve these ends has in reality been fragmented, and so far only moderate

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are not extended the right to free movement in the EU, as defined by the Schengen Borders Code. As of 2009, approximately 25 million TCNs were residing in the EU (Luedtke 2011).

<sup>5</sup> Established in 2004, Frontex is the EU's external border security agency, working on a continuous basis with member state border authorities to monitor both authorized and illegal crossings through the EU's external border.

harmonization in this policy area has been observed (Luedtke 2006). This lag relates in part to the division of competencies at the EU level: “migration matters have been perceived as a field where State sovereignty should not be surrendered...and the common approach has been undesirable” (Weinar 2011, 1). This discord between stated goals and outcomes, referred to as the ‘gap hypothesis’, suggests that a gap exists between official immigration policy objectives or rhetoric and actual policy outcomes, often as a result of bureaucratic inadequacies or political pressure (Cornelius and Tsuda 2004). Empirical evidence from the last decade shows how highly salient immigration policy proposals in the areas of asylum, legal migration, visas, border control, irregular migration and anti-discrimination have had a low rate of harmonization success (Givens and Luedtke 2003).

Economically speaking, external migration is widely held as a positive and necessary process for the EU as a whole (Brücker et al. 2006, Favell 2009, Parsons and Smeeding 2006, Süßmuth and Weidenfeld 2005). Existing widespread domestic labour shortages pose a threat to the region’s global competitiveness. Migration is seen as an economic boon and an underexploited asset that can contribute to economic growth and alleviate some of the costs of Europe’s rapidly ageing population, which would help to sustain domestic social welfare systems. Because EU migration historically developed as a subspace of Justice and Home Affairs, migration has been perceived more as a border management issue rather than a factor of labour economics. Consequently, there has been little focus on building a harmonized policy around the economic potential of TCNs (Weinar 2011).<sup>6</sup>

The creation of a harmonized regional immigration policy has meant both rethinking the role of the European state in the regulation of international migration and embracing

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<sup>6</sup> Justice and Home Affairs (JHA) was introduced as one of the three pillars of the EU under the Maastricht Treaty.

multilateral decision-making (Ugur 2007). Immigration as a policy area has proven to be a strong test of supranational influence (Luedtke 2006). Cornelius and Tsuda (2004, 18) contend that “the ‘harmonization’ of policies is limited not only by the reluctance of individual member states to relinquish sovereignty over immigration control but also by a decision-making process based on unanimity, which allows dissenting member states to block the adoption of common policies”. Unanimity voting can seriously impede steps towards deeper integration, as the process of reaching consensus between twenty-eight member states can be difficult and inefficient. As such, major treaties have worked on limiting the use of unanimity voting, instead moving towards voting by qualified majority and codecision with the European Parliament.<sup>7</sup> While the Lisbon Treaty outlines the requirements to institute qualified majority voting and codecision on matters relating to borders and asylum in 2014, the decision-making tug-of-war until now has slowed the momentum towards a common approach to immigration.

#### *The Securitization of Immigration in the EU*

Since adopting an internally borderless mandate, the proliferation of irregular migration and human trafficking in the EU has necessitated the implementation of a wide range of security measures to guard against a growing underground economy and border infiltration (Huysmans 2006). The

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<sup>7</sup> Under the qualified majority voting and co-decision system that will go into effect under the Lisbon Treaty in 2014, member states are allocated weighted votes and a majority must meet two criteria: (1) number of countries – 55% or more member states must be in support of the decision, and (2) population of countries – this majority of states must represent at least 65% of the total population of the EU. The European Parliament will also have codecision power, allowing it to propose amendments or veto legislation (Luedtke 2009). This voting system is expected to increase decision-making efficiencies.

removal of internal border controls and strengthening of the external EU border shifted the discourse of EU immigration in two key ways. The first was what it meant to be 'legal' or 'illegal' as a resident (Huysmans 2006). Public concerns and administrative worries over illegal entry, crime and the perceived abuse of the immigration system have led to a crackdown on illegal migrants and stricter detention rules.<sup>8</sup>

The events of September 11 affected a second major shift in the framing of immigration debates. Greater security precautions and more vigilant counter-terrorist agendas have been adopted by many member states, and as such, "the EU's capacities in the area of safety and security management have grown considerably" (Boin and Rhinard 2008, 2). Boswell (2005, 1) contends that in the aftermath of 9/11, "concerns about terrorist attacks have contributed to a marked tendency to 'securitize' EU immigration and refugee policy". The post-9/11 immigration discourse therefore focuses on the institutionalization of policies of inclusion and exclusion (Huysmans 2006). Cornelius and Tsuda (2004, 19) demonstrate that after September 11, 2001, "West European governments implemented a variety of immigration control measures in the name of national security, such as increased border surveillance, tightened visa-issuance policies, and special registration and detention programs targeting immigrants from Muslim countries". In analyzing migration as a security issue, Dauvergne (2008) stresses that 9/11 did not mark the beginning of a crackdown on irregular migration, but rather helped to accelerate negotiations and decision-making between member states on issues related to national security and, by extension, immigration. Current-day framing of

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<sup>8</sup> In 2008 the European Parliament passed a standardized policy maximizing penalties for illegal immigrants, allowing member states to detain individuals for as long as 18 months in detention centers and banning re-entry of expelled persons for up to five years.

immigration in popular rhetoric has therefore increasingly focused on the securitization aspect.

The social constructivist framing of securitization, an extension of the Copenhagen School (CS) of International Relations and one of the more recent theoretical developments in the contemporary study of security is grounded in Ole Wæver's conceptualization of a security issue as a perceived existential threat to a recipient society (Charrett 2009). With particular emphasis being placed on the social impact of demarcating a security threat, securitized migration can be defined as the practice of framing migration and refugee flows as a hostile social, economic, cultural or political threat that seeks to endanger the functional integrity and identity of a sovereign community or political unit (Huysmans 2006). CS securitization theory presumes that identifiable or constructed threats become securitized only when a securitizing actor deems it so (Charrett 2009). In this way, the rhetoric employed by a securitizing actor can be sufficient for defining the threshold of inclusion or exclusion in a given community (Scuzzarello and Kinnvall 2013). Securitizing actors "have the ability to manipulate and monopolize security discourses, subsequently allowing them to engender threats, reinforce negative images, manufacture particular subjectivities, and re-establish their position as the security provider" (Scuzzarello and Kinnvall 2013, 17). Importantly, a securitizing actor need not hold a position of power to securitize an issue—CS proponents such as Buzan, Wæver and Huysmans argue that "no one is excluded from attempts to articulate alternative interpretations of security, but as a result of the power structures within the field of security, certain actors, typically state elites, hold an advantage over defining security threats" (Scuzzarello and Kinnvall 2013, 17). The measure of a threat is therefore very much issue-dependent and subject to change with the political climate in which it takes place.

Analyzing the securitization of migration using the hard case of the Franco-Italian Arab Spring migration "crisis"

showcases European reactionary responses towards the anticipated (as opposed to actual) arrival of migrants from the Maghreb. The Arab Spring migration case was not managed according to the EU's directives on asylum and immigration. Rather, France and Italy took matters into their own hands when processing new entrants into Southern Europe and successfully pressured the European Commission to amend regulations pertaining to free movement of legally residing non-European nationals. In securitizing this migration event, France and Italy acted in their national interest and exported the outcome to the level of EU policy.

### *The Franco-Italian Response to Arab Spring Migration*

Through 2011, high levels of human displacement generated by uprisings in North African and Middle Eastern countries forced new mass migration flows to proximate, more politically stable countries, particularly southern Europe. In advance of the first anticipated tides of asylum seekers fleeing the incertitude of the burgeoning 'Arab Spring', Italian politicians and media outlets warned of facing a "human tsunami" or "biblical exodus" of immigrants and asylum seekers to Europe, particularly to proximate southern Mediterranean destinations (Traynor 2011). The natural catastrophe narrative that was used by the Italian government "constructed the Italian community to be in need of protection, even if this entailed the use of armed force" (Scuzzarello and Kinnvall 2013, 98). Predictions reached as high as 1.5 million new entrants directly attributed to the events unfolding in the Arab world, with fears of the economic and social impact of this migration event compounded by the predominately-Islamic makeup of the anticipated arrivals (Squires 2011).

The exact numbers of new entrants to the EU as a direct result of the Arab Spring has been difficult to verify, due primarily to the non-legal or irregular status of migrants upon entry, who can often fall under the radar of border detection

and processing.<sup>9</sup> Additionally, many do not migrate through conventional processes.<sup>10</sup> New entrants into southern Europe in the first part of 2011 were permitted only temporary stay and have since returned to their place of origin. The contribution of this return-migration phenomenon to greater ongoing demographic trends in Europe therefore remains unclear.

Despite these uncertainties, the mass arrivals that were expected in 2011 greatly underwhelmed reception states. Frontex, the EU agency tasked to assist with increased policing and facilitating member cooperation around the region's external borders, reported an influx of 20,000 irregular migrants in the first quarter of 2011 at the central Mediterranean border (Frontex 2011). These numbers were directly attributed to the uprisings in North Africa and were predominately sourcing from Tunisia.

By April 2011, the media were reporting figures around the 25,000-person mark (Fedyashin 2011). The swell peaked at roughly 48,000 people but these numbers have since plateaued (Kersten 2011, Allen 2011). For a region with a combined population of over 500 million people and up to two million external border crossings per week, the numbers in isolation appear comparatively insignificant (Carrera et al. 2011b). To be sure, more unauthorized entries into the EU were recorded in 1999, 2006 and 2008 (Carrera et al. 2011b). The recent Arab-world upheaval has not made an obvious impact on the EU's demographic makeup. The reactionary response to this particular movement may thus be attributed more to its political symbolism than its tangible ramifications.

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<sup>9</sup> The 2008 EU Return Directive (2008/115/EC) classifies irregularity based on "the presence on the territory of a Member State, of a third-country national who does not fulfill, or no longer fulfills the conditions of entry as set out in Article 5 of the Schengen Borders Code or other conditions for entry, stay or residence in that Member State."

<sup>10</sup> Each year, thousands of individuals make perilous attempts to enter Europe through the Mediterranean, resulting in high numbers of largely preventable casualties.



The Pelagic island of Lampedusa is Italy's southernmost point and a primary entry point for migrants from North Africa. The island, with a local population of roughly 5,000, is geographically situated closer to Tunisia. Instigated by Tunisia's 'Jasmine Revolution' the first large waves of migrants to Lampedusa arrived in early January 2011. Lampedusa's singular temporary stay and assistance centre (CTSA) was operating beyond capacity for the first few months of the year.<sup>11</sup>

Upon arrival, North African migrants immediately claimed asylum for entry into Italy. Under EU legislation, applicants for asylum must be processed in the country of arrival. Following the entry of the first 5,000 migrants, the Berlusconi administration called for a blockade of North African ports by Frontex and declared a state of national emergency in February 2011, to last the duration of the year. By resorting to its extra-constitutional powers to manage the crisis, Italy's immediate response identified the migration movement as major security emergency instead of an international humanitarian crisis (Campesi 2011). To manage the arrivals, Italian authorities issued temporary residence permits to undocumented North African immigrants who arrived in Italy before April 5, 2011 (Carrera et al. 2011b).<sup>12</sup> Thus, migrants arriving after this date were to be sent back to their countries of origin by Italian authorities on a case-by-case basis, while those permitted to stay were granted "an automatic right to move freely within the Schengen territory and other EU member states" (Carrera et al. 2011b, 1).<sup>13</sup>

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<sup>11</sup> At Lampedusa alone, roughly 10,500 arrivals were recorded in 2004 and over 31,000 in 2008 (Monzini 2011).

<sup>12</sup> This was a unilateral decision on the part of Italy, based on private readmission negotiations with Tunisia.

<sup>13</sup> Migrants in transit in Italy at this time were housed in migration detention centers. Reports from various NGOs cited the inadequate treatment of migrants, with drinking water shortages, lack of sanitation and poor sleeping arrangements plaguing many of these centres (McMahon 2011).

Given that the majority of new migrants were French-speaking, France expected that large numbers of migrants granted temporary visas would make their way across the border with Italy. The Sarkozy administration reacted strongly to Italy's temporary protection procedures, warning to reinstate controls at the border in order to avert a potentially destabilizing border security threat (Campesi 2011). On April 17, 2011, hundreds of Tunisians travelling by train were stopped by French authorities at the Italian border town of Ventimiglia and sent back into Italy on the basis that they harboured the potential to cause civil disobedience and public disorder even though they were in possession of the legal documentation required by the EU to cross internal borders (Campesi 2011). Though precise figures are difficult to verify, more than half of legally arriving migrants were sent back to Italy by French authorities during this time (Campesi 2011).

Authorized by the French minister of the interior, the sudden reintroduction of border controls was a contentious act but not unique. Belgium, Austria, and Germany followed suit and announced similar measures at the same time, while Prime Minister Mark Rutte of the Netherlands declared in April that "[a]ny Tunisian who got in through the Berlusconi arrangement, must leave the Netherlands" (Carrera et al. 2011b, 2). Simultaneously, the Danish administration unilaterally re-established customs controls on its internal borders as a temporary measure to avoid an "immigration emergency" and curb trans-border crime (Topalova 2011). Though the EC criticized the move, Denmark's actions came in response to pressures from the far-right populist Danish Peoples Party (DPP), which has openly campaigned against immigration in the country. In each case, the perception of these migration flows as a threat to the stability and welfare of the state helped to reinforce the process of securitization by promoting increased border management and creating a general climate of unease among EU citizens. Recent Eurobarometer public opinion polls surveying topical issues

such as xenophobia and citizenship provide evidence that immigration and security are among the top short-term concerns of EU citizens.<sup>14</sup>

The legality of reinstated border controls under the Schengen regime becomes a key question in analyzing EU member state responses to recent migration issues in the region. Under Article 21 of the Schengen Borders Code, member states may authorize border checks so long as they are non-systematic and do not have border control as an objective. By responding to what was perceived as a major security threat with the implementation of systematic checks, France temporarily nullified its commitment to free movement under Schengen and to the idea of common EU action to issues in regional immigration. The European Parliament also outlines regulations with regards to the allowable scope, duration and processes of temporarily reinstating internal border checks; regulations with which France failed to comply (Phull and Sutcliffe 2013).<sup>15</sup> These regulations have been designed to guide decision-making in the area of external migration, so as to avoid diplomatic failures between member states over the handling of new entrants, as evidenced in the Franco-Italian Affair (Phull and Sutcliffe 2013). France and Italy's management of the situation thus demonstrated a disregard for some of the guiding principles underlying these procedural elements in the Schengen agreements.

Italy and France's struggle over the power to define and govern emergency migration generated substantial media hype from the onset of the migration movement. The crisis was framed as "an impending 'humanitarian emergency,' conjuring

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<sup>14</sup> See Eurobarometer 74, "Public Opinion in the European Union," (Autumn 2010).

<sup>15</sup> The Schengen Borders Code suggests that internal border checks on grounds of public policy or national security should last no longer than 30 days and also indicates the procedures to follow in the event that further 30 day periods are required (European Parliament and the Council of the European Union, 2006, Groenendijk, 2004).

up the image of an ‘epochal’ migratory influx about to unfold, its proportions ‘biblical,’ with potentially hundreds of thousands of displaced persons ready to land on European shores.”<sup>16</sup> The rhetoric employed by the media was also used by public-facing officials without scientific basis. Italian Minister for Home Affairs Roberto Maroni publicly spoke of the situation as a ‘securitarian emergency’, demanding an intervention by other EU states to help deal with the influx (Campesi 2011).

Though the EU did provide Italy financial funding for border management, effective readmission negotiations between the EU and countries from where migrants were sourcing in North Africa and the Middle East would have aligned with the EU’s policy objectives in the area of asylum and external migration. Attempts at these negotiations between the EU and source migration countries failed, giving room to member states to respond in their national interest.

Following the reinstatement of border controls, both France and Italy approached EC, calling for revisions to the Schengen Borders Code in order to allow for the reinstatement of systematic passport and immigration checks at borders in the event of a security crisis. In May 2011, the EC communicated new initiatives in light of demands by France and Italy to reform Schengen, introducing two amendments to the Schengen agreements effective September 2011 as part of a new Schengen Governance Package focused on sovereign state security.

The first amendment was the creation of a safeguard clause for ‘truly critical situations’ that pose a threat to public policy or internal security and render a state incapable of fulfilling their Schengen obligations (EC COM(2011) 561). No definition for ‘truly critical situations’ was outlined or agreed upon by signatory states, allowing states to use their discretion

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<sup>16</sup> Guiseppe Campesi, “The Arab Spring and the Crisis of the European Border Regime: Manufacturing Emergency in the

when monitoring migration events. As a result, the EC now holds that member states “may exceptionally and immediately reintroduce border control at internal borders...when there is a serious threat to public policy or internal security” (Babich 2011). In unforeseeable events, member states retain the right to unilaterally reintroduce controls at internal borders limited to a period of five days, which can be prolonged based on negotiations with the Commission (European Commission 2011b). The second amendment allows for the reinstatement of controls for a maximum of six months, a longer time frame than what was previously mandated (EC COM 2011 560).

The ambiguous nature of the 2011 amendments is problematic, specifically due to the omission of a clear definition for the situations in which these regulations would apply. Though ultimately the EC brought swift reforms to the Schengen rules without bureaucratic lag, for many observers, the process showcased the bargaining power of France and Italy that allowed them to induce swift institutional reforms for the EU as a whole (Babich 2011).

In a study testing the legitimacy of the “Franco-Italian affair,” Carrera et al. demonstrate that France and Italy’s actions represent a “race to the bottom” on the European principles of solidarity and the sharing of responsibility (Carrera et al. 2011b). The study argues that the arrival of Tunisian migrants at France’s border is little justification for emergency measures vis-à-vis the reintroduction of border controls and amendments to the Schengen Borders Code. “It is not just the legal commitments of both EU member states that are at stake in this case, but also the overall consistency and legitimacy of Europe’s migration policy, both internally and abroad” (Carrera et al. 2011b, 19). This issue also raised the question of whether the framing of this migration event as a real or perceived security threat has ultimately allowed member states with bargaining power to reclaim a measure of control over the EC in this policy area.

### *The Securitization of the Arab Spring Migration Case*

The EC decision to amend Schengen regulations and grant member states greater control in managing exceptional immigration cases where there exists a serious threat to public policy or internal security is one outcome of a process that aims to guarantee national and EU security by managing and policing internal and external borders. The EC's failure to provide a clear definition of what constituted a public policy or national security threat with regards to immigration is particularly problematic in that it opens the door to different interpretations, and subsequently, different responses that risk becoming highly politicized. The EC now allows for intervention when a particular border comes under unexpected and heavy pressure due to external events, but there is no mechanism in place for measuring threat levels and ensuring that future cases are treated on a regionally consistent basis.

Securitization theory "feeds into the logic that immediate and undemocratic state action is the only method to manage security concerns" (Charrett 2009, 17). Without regional guidelines for measuring threat with regards to immigration, Italy's swift declaration of a state of emergency, without evidence to suggest more than a modest influx of arrivals, and France's sudden selective border closures demonstrate how two separate securitizing actors were able to define the Arab Spring migration flow as inherently dangerous for the EU as a whole. Italy's decision to return new migrants to their country of origin after April 5, 2011 also meant that deportation was the only option offered at a time of major political upheaval in the Arab world. Furthermore, Italy's distribution of temporary visas to a selection of migrants was a measure that typically requires assent from the EU and other member states. Neither Italy nor France was penalized for their policy decisions.

A securitized reading of the Franco-Italian migration event must take into consideration the political climate in which reactionary policy responses are taking place. The post 9/11

crisis of multiculturalism and socio-cultural integration is perpetuated by what Didier Bigo terms “the governmentality of unease” (Charrett 2009, 27). The rhetoric surrounding immigrants, their social, demographic and economic impact on European communities and the insecurity of internal and external borders has translated some of these fears into policy practices directed at non-EU nationals. Bigo asserts that elite actors employ rhetoric and utilize their political position “to ‘create truth’ regarding ‘threats’ to the state, and fabricate or exacerbate fears, such as links between migration and crime or unemployment, in order to legitimize securitizing moves” (Charrett 2009, 27). Charrett (2009) defines a securitizing actor is one who puts forward a claim to securitize an issue, and typically state elites—EU ministries, heads of states, and national parliamentary representatives—hold an advantaged position over defining security threats. Furthermore, Italy’s approach to external migration is often influenced by the popularity of the right-wing Lega Nord (LN) party, who assume an exclusionary stance on the presence of foreigners and hold a strong bargaining position in domestic politics. In fact, recent electoral successes of European right-wing populist parties with anti-immigration platforms have revealed that local political actors are able “to further their own political agendas or increase their own structural power, such as using the securitization of migration as an electoral promise” (Charrett 2009, 27).<sup>17</sup>

Backlash against immigration in European countries is a multidimensional issue, but fears over the economic and social repercussions of large influxes of external migrants play a key role in the securitization debate. Some recent studies analyzing the economic impact of immigrants in European communities have been undertaken to challenge the perception that external migration negatively impacts the domestic economy and

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<sup>17</sup> These include France’s Front National (FN), the Netherlands’ Party for Freedom (PVV), the Danish People’s Party (DF).

reduces the share of jobs available to EU citizens. In a study by Brücker, Frick and Wagner (2006), external migration generates short term fears of reduced wages and increased unemployment for domestic workers. These short term fears are evident in recent public opinion studies and can translate into voting behaviour.<sup>18</sup> Additionally, the authors also find that continued external migration in the long run increases aggregate income in the EU, improves the lives of migrants, and diminishes the rising costs of an ageing European population. In an empirical assessment of European migration, Agiomirgianakis (2006) finds no significant effect on aggregate domestic unemployment rates when migration increases. The study also finds that immigration does not necessarily cause a depression of domestic real wages. Similarly, a study by Galgóczi et al. (2009) contests the claim that the inflow of labour migrants into the EU in recent years has lowered domestic wages and harmed employment opportunities.

The securitization narrative and socio-economic fears that were perpetuated during Arab Spring migration movement into the EU appear, on some level, to have reinforced member state power over immigration policy (Charrett 2009). There is no evidence to suggest that this particular migration movement by itself had a major socio-economic impact on Italy, France, or the EU as a whole. The security rhetoric employed by Italy, France and additionally Belgium, Denmark and the Netherlands, in combination with the inability of the EU to carry out its policy objectives with respect to external migration, allowed the Italian and French administrations to resort to exceptional extra-constitutional powers in governing the issue.

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<sup>18</sup> See Eurobarometer 74, "Public Opinion in the European Union," (Autumn 2010), Qualitative Eurobarometer, "Migrant Integration: Aggregate Report," (May 2011), and Qualitative Eurobarometer, "The European Citizens and the Future of Europe: Qualitative Study in the 25 Member States," (May 2006).



### *Conclusion*

Sudden migratory pressures brought on by political change, wars or other crises are not new to Europe, yet migratory pressures are increasingly causing security tensions at the level of EU governance, among member states, and in local communities. The tightening of European border controls since 9/11 has, in many ways, facilitated a general climate of unease with regards to large-scale migration, even in cases where humanitarian concern ought to perhaps outweigh national security. The Copenhagen School of critical securitization theory attempts to deal with this one-way threat perception, and can be applied to understand how and why actors employ bias in their rhetoric in order to construct security threats that may or may not have a real element of risk.

By the end of 2011, migration from the Arab Spring countries into Southern Europe had not come close to the 'mass exodus' that was expected and feared in Europe, yet this modest migration flow impacted EU immigration and border policy to such a high degree. The temporary impasse between France and Italy over Arab Spring migration management defied the heavily institutionalized liberal values of the European Union. It succeeded in pressuring the European Community to amend clauses in the Schengen Borders Code, ultimately granting greater power to member states to control migration and internal borders. In the process, France and Italy were not only able to legitimize their approach to managing the Arab Spring migration movement by amending Schengen guidelines, but countries like Belgium, Austria, Germany, the Netherlands, and Denmark threatened to follow suit with the reinstatement of controls.

The Arab Spring migration movement is one in a series of highly politicized examples of recent controversies that have strengthened the EU's immigration debate. The high-profile Danish cartoon controversy of 2005, in which the depiction of

the Islamic prophet Muhammad erupted in violence and protests, impeded the integration of Muslim immigrants in Denmark (Marranci 2004). Additionally, the reinstatement of border controls in Denmark in 2011 by the right-wing populist DPP defied Schengen regulations pertaining to free movement but were carried forth without formal action from the EU. In France, the headscarf affair of the 1990s and its culmination in the banning of the 'burqa' and 'niqab' in public spaces in 2011 has created a divide between Muslim and non-Muslim communities in the country over the issue of identity. The sensationalism following the 2004 assassination of Dutch filmmaker Theo van Gogh by a Dutch-Moroccan led to retaliatory violence in the Netherlands and polarized the debate regarding the presence of immigrants in the traditionally tolerant country (Demmers and Mehendale, 2010). In 2009, a constitutional decision banning the construction of mosque minarets in Switzerland was approved, and since then, Switzerland has tightened its immigration laws to curb EU and non-EU immigration (Geiser 2013).<sup>19</sup> The securitization narrative can be applied in each of these cases where the political treatment of migrants or third-country nationals is mediated by securitizing actors at the state level and not by the EU.

The securitization of immigration reveals a dynamic whereby new measures designed to generate greater security, such as Frontex and other border policing initiatives, have in some instances generated greater insecurities because of a starker distinction between notions of inclusion and exclusion in the EU. This security-insecurity paradox has led to the framing of large-scale migration movements less as soft security issues and more as conceivably severe 'transboundary threats' with the potential to cross geographical and functional boundaries (Boin and Rhinard 2008). This not only fuels

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<sup>19</sup> Switzerland is not a member of the European Union but is a party of the Schengen Agreements.

xenophobia and anti-immigrant attitudes in public opinion, but the process of securitization serves to legitimize the political platforms of right-leaning European populist parties gaining support for their increasingly restrictive views on immigration and integration due to the perceived threat to national identity and the domestic labour market.

While official EU policy objectives continue on the path towards the creation a common legislative approach to dealing with external migration and facilitating deeper integration between Europe's native and foreign populations, the securitized rhetoric and reactionary policy responses employed by member states highlight the ability of states to influence regional policy objectives. The gap between stated policy objectives and actual processes and outcomes has, in some cases, allowed member states to reclaim sovereignty in areas that have been transferred to the EU's shared competence. As such, the Arab Spring migration crisis demonstrates how member states are increasingly able to seize key opportunities to steer migration policy towards national interest and define security when critical, high-profile events arise.

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## **Public Policy and Substantive Equality: Recognizing Collective Identities within a Liberal Framework**

Johanu Botha  
MPA Candidate  
University of Manitoba

### *Abstract*

The failure of public policy in Canada to properly address issues of inequality and marginalization have seen a specific criticism come from a group of scholars working within a variety of fields. They are bound together by two themes central to their explanation of inequality in Canada and the public policy that has failed to address it: 1) an emphasis on socially constructed, historically specific identities as key variables in understanding the distribution of resources and power in society; and 2) a broad criticism of liberalism, from the liberal academic work that also focuses on identity, to the liberal democracy that is Canada's political framework. While governments in Canada do need to pay better attention to identity in the policy process, they do not need to move out of the liberal theoretical foundations on which that process is based. Policies that acknowledge identity as a key variable to be taken into account throughout the policy process will require liberal foundations to be both politically feasible, in that a liberal framework in the context of Canada will allow identity-based policies to capitalize more on the existing array of policy windows, and to achieve tangible results, in that a liberal framework provides a concrete direction forward for policy makers as opposed to the 'more theorizing' called for by the authors analyzed here. The work by Hankivsky (2007) and Smith (2007) leans dangerously close to negative discourses that do not provide solid foundations from which to create policy, while the work of Abu-Laban, with its emphasis on the effects of historical processes, can be nuanced so as to fit into a liberal framework that will provide those foundations. Other critical traditions, such as critical race theory and 'oppositional black theory,' do not successfully subvert liberalism's contribution to formulating public policies aimed at reducing inequality between collective identities, and is thus not a satisfactory alternative to the approach taken by the authors described above. Public policy still

requires a liberal framework able to inform future policies, versus simply critiquing current and past ones.

### *Biography*

Johanu Botha was born and raised in South Africa. He immigrated to Canada with his family at the age of 12. After completing high school in small town Manitoba, he pursued a Bachelor of Arts in English, Political Science and Psychology at McGill University in Montreal. Botha found links between all these disciplines through the different ways each could contribute to solving public problems, and this led him to a Master's program in Public Policy and Administration at the University of Manitoba. He is currently in the final year of his Masters and works part time as a Special Projects Coordinator for the Government of Manitoba. His research areas include interrogating the tensions - or lack of tensions - between political philosophy and public policy, and disaster management in the context of Canadian federalism.

### *Introduction*

The failure of public policy in Canada to properly address issues of inequality and marginalization has seen increased criticism from a group of scholars with political science and public administration backgrounds (Abu-Laban 2007, Hankivsky 2007), as well as scholars with interdisciplinary backgrounds like Women's Studies (Smith 2007). These authors are bound together by two themes central to their explanation of inequality in Canada and the public policy that has failed to address it: an emphasis on socially constructed, historically specific identities as key variables in understanding the distribution of resources and power in society, and a broad criticism of liberalism, from the liberal academic work that also focuses on identity, to the liberal democracy that is Canada's political framework. This essay responds to this particular stream of scholarly critique by arguing that while governments in Canada need to pay better, and more nuanced attention to identity in the policy process, governments do not need to move out of the liberal theoretical foundation on which that process is based. In fact, policies that acknowledge identity as a key variable to be taken into account throughout the policy process will require liberal foundations to be both politically feasible, in that a liberal framework in the context of Canada will allow identity-based policies to capitalize more on the existing array of policy windows, and to achieve tangible results, in that a liberal framework provides a concrete direction forward for policy makers as opposed to the 'more theorizing' called for by the authors analyzed here.

The 'liberal theoretical foundations' put forward here employs a nuanced liberalism through fusing the work of Kymlicka, Sandel, Mill and others. It is rooted in a vision of personal autonomy that is "not only consistent with, but even requires, a concern with cultural membership [where] individual choice is dependent on the presence of societal culture" (Kymlicka 1995, 8). These foundations are *not*

influenced by the neoliberal economic approach that is entrenched in both rational-choice theory and the belief that most of society's goods can be allocated according to the market. Neither is it a sort of 'neutral liberalism' that calls on both the citizenry to "set aside" personal moral convictions in order to "argue from the standpoint of a "political conception of person," independent of any particular loyalties" (Sandel 2009, 248), and the state to be neutral on moral questions, so that every person is "free to choose his or her conception of the good life" (Sandel 2009, 246). The liberalism advocated here suggests that such neutrality will at best result in a 'thin' equality: the action or inaction of governments — its policies — cannot assume that simply treating people equally on paper, and remaining neutral to everything else, will provide equality of results in life. A liberalism that seeks to thoroughly address the injustice of inequality — and its catalyst, marginalization — will recognize complex identities and incorporate their differentiated experiences into the policy process. These liberal theoretical foundations are fundamentally concerned with fairness and justice, and can thus be used to advance the idea that the recognition of multi-layered, complex selves in the public policy process is not only needed for effective policy, but for a fair and just society as a whole.

The first section of this paper will briefly define the problem area through tying different identities and marginalization together. It will show why accommodating differences and recognizing identities are roles for public policy, and how a liberal approach is instrumental in advocating for these roles. The second section will explore the work done by Smith on lesbian, gay, bisexual, and transgender (LGBT) struggles and public policy, Hankivsky on gender mainstreaming and intersectionality, and Abu-Laban on a policy analysis agenda that highlights the roles of colonialism, anti-essentialism, processes of racialization, and globalization. It will show how these works, despite their effective and useful critiques of past and present policies, do not provide a suitable

foundation from which to build future policies. Their demonstrations of how identities are key in resource and power distribution, and thus how policy-making blind to differences will perpetuate an oppressive status quo, is overshadowed by a political ideology that is both vulnerable to social fragmentation, and that underestimates the role liberal-influenced policies have played in addressing the very causes they support. The third section will entertain the potential role 'oppositional black theory,' as manifested in Charles W. Mills' "The Racial Contract", may play in a public policy that seeks to alleviate systemic marginalization. Mills displays an articulate skepticism towards the sort of approach exhibited by the authors critiqued here while critically engaging with liberalism's historically significant authors, and thus warrants serious consideration when formulating a framework for future policies aimed at alleviating marginalization. Nevertheless, it will be shown that despite its intimate discourse with Enlightenment liberal thinkers, his perspective does not successfully subvert liberalism's potential contribution to formulating public policies aimed at reducing inequality between collective identities, and is thus not a satisfactory alternative to the approach taken by the authors described above. Public policy still requires a liberal framework able to inform future policies, versus simply critiquing current and past ones. The final section and conclusion will provide the beginnings of such a framework to guide future public policies that aim to effectively respond to inequality and marginalization. It will sketch out how an emphasis on identity is not only able to manifest within a liberal framework, but is indeed best suited to it.

#### *A problem for Public Policy: Marginalization and Identity*

The mere manifestation of difference does not mean that a public policy response is warranted. It is when difference sparks marginalization and systemic inequality that a response

is required. Pal notes the following:

[If] groups were different, but these differences were already accommodated and addressed through social and political institutions, there would be little to discuss in terms of public policy. But the “politics of difference” argues that in fact these differences are routinely and systematically oppressed (Pal 2010, 73).

The authors analyzed in this essay work from a ‘perspective of difference,’ where issues of inequality are tied inextricably to different identities, so much so that the study of difference has become the lens through which inequality is dissected. Hankivsky (2007) notes that it has been argued that the central concern for feminists has moved from a focus on inequality to a focus on difference. This strain of thought is echoed by liberal theorist Kymlicka (2007) in his argument for special treatment of different groups in order to promote social justice. Liberal frameworks can acknowledge that the distribution of power and resources along different collective identity lines is a key dynamic in the inequality found in Canadian society.

A common thread in the work of Hankivsky, Abu-Laban and Smith is the critique of individualist conceptions of liberalism, ones that insist that “equality will best be achieved by treating people as individuals under a system of universally applicable and consistent rules” (Pal 2010, 73). Such conceptions may result in ‘formal equality,’ where all citizens are considered legally equal, but it will not achieve ‘substantive’ equality, which accommodates differences so as to tangibly remedy past and present inequalities in the lives of those who experience them. Smith notes that “in analyzing LGBT claims, we can differentiate between those that focus on similar treatment of LGBT people and straights [...] and those that focus on treating LGBT people differently in the name of *equality of results*” (Smith 2007, 103). In the same vein,



‘gender mainstreaming’ in public policy has recognized “that to overcome past and persistent inequalities, women-specific policies and programs may be required. In so doing, it rejects the traditional “one size fits all” approach to equality” (Hankivsky 2007, 115). This same criticism, however, is leveled at individualist notions of equality *from within* liberalism. Cultural pluralism, a position put forward by Kymlicka (1995, 73), “insists that equality can be achieved only by treating people on the basis of their group affiliation and in some cases treating them according to different rules”. Sandel (2009, 257), in turn, writes that in the case of same-sex marriage, individual autonomy and freedom of choice alone are insufficient in addressing the right to same-sex marriage: the key point liberals should stress is that “same-sex unions are worthy of honor and recognition by the community”. A liberal framework — unless understood in its constrained individualist and/or neutral conception — is thus far from antithetical to policies that seek to address inequality through recognizing collective identities.

Although all three authors do note the nuance available in liberalism for recognizing collective identities in the policy making process, they are quick to add that it is not enough to substantially address marginalization. It is this claim that this essay challenges, not just from a philosophical perspective, but from a policy-making one. Kymlicka stresses the protection a liberal framework can provide to collective identities rooted in social relationships (a protection that is essential to achieving the policy goals of equality these authors have put forward):

Various critics of liberalism — including some Marxists, communitarians, and feminists have argued that the liberal focus on individual rights reflects an atomistic, materialistic, instrumental, or conflictual view of human relationships. I believe that this criticism is profoundly mistaken, and that individual rights can be and typically are used to sustain a wide range of social relationships. Indeed, the most basic

liberal right — freedom of conscience — is primarily valuable for the protection it gives to intrinsically social (and non-instrumental) activities (Kymlicka 26, 1995).

Not only does a liberal framework allow for incorporating collective identities into a policy process that truly addresses the experience of inequality in people's lives, but it entrenches the fundamental protections needed to begin such a process.

### *The Politics of Difference and its Feeble Framework*

Political theorist Wendy Brown has written extensively on why some movements that promote a social justice agenda through interrogating marginalization and inequality succeed in their goals, and why others spiral into ineffective discourses characterized by bitterness, disdain, and defeat; “life-affirming moral passion” converts into “life-negating moralizing rancor” (Brown 2001, 27). The work of the authors analyzed here, sans liberal framework, will be shown to lean dangerously close to falling into the latter category. Brown's explanation for why some discourses turn sour hinges on what occurs when a discourse begins to depend entirely on a discrete social identity — and the historical injuries committed against that identity — for the discourse's legitimacy. Using the very discipline she helped bring to fruition, Women's Studies, as an example, she writes:

Indisputably, women's studies as a critique of [ubiquitous misogyny, masculinism, and sexism] was politically important and intellectually creative. Women's studies as a contemporary institution, however, may be politically and theoretically incoherent, as well as tacitly conservative—incoherent because by definition it circumscribes uncircumscribable “women” as an object of study, and conservative because it must resist all objections to such circumscription if it is to sustain that object of

study as its *raison d'être* (Brown 2005, 120).

What sort of framework is necessary for discourses - like calls for public policy to be more responsive to different identities such as women, the LGBT community, and those affected by colonialism and racialization - to continue their agenda without 'circumscribing the un-circumscribable' and thus becoming incoherent and conservative? At the end of her article "Queering Public Policy", Smith writes that "queer organizations, activists, and citizens will encounter the challenge of retaining their distinctive identities and interests in the face of new opportunities for participation in the policy processes" (Smith 2007, 207). This challenge is a fundamentally important one because how it is handled will determine whether LGBT concerns are positively worked into the public policy process, or whether they languish in a bitter struggle where the struggle has become an end in itself — a preoccupation with simply compiling a litany of injuries committed against LGBT people — rather than a means to achieving the goal of tangible equality.

Hankivsky and Abu-Laban (2007) are aware of the pitfalls Brown describes, since they present many articles addressing them. They stress the importance of *not* prioritizing one specific social identity over others, of not attempting to 'circumscribe the uncircumscribable.' Hankivsky uses an array of sources in her piece that "seriously question the usefulness and adequacy of focusing on gender as the primary axis for understanding inequalities and oppression" (2007, 125). Abu-Laban, in turn, notes the valuable shift from a "one-dimensional focus on gender, or race, or ethnicity, or class to a framework in which [...] forms of difference [are] integrated and seen to interact" (2007, 144). What, however, should this framework look like? Brown notes that those discourses — characterized in their most successful form by the type of movements led by Martin Luther King Junior and Mahatma Gandhi — that achieved their social justice goals through

substantially diminishing marginalization shared specific features, including a relative abstractness of their motivating principle—[a] lack of cultural specificity or attachment to a particular people. While these movements did not wholly eschew the phenomenon of identity produced through oppression, neither did they build solidarity on the basis of that production; rather, solidarity was rooted in shared beliefs. They did not make a cultural or political fetish out of subordinated identities, out of the *effects* of subordination (26, 2001).

How can this ‘discourse trait,’ an abstract principle that is not rooted in a specific identity, but that is essential to successfully fighting marginalization, be reconciled with the legitimate calls by Hankivsky, Abu-Laban and Smith for a public policy more responsive and fair to marginalized identities? The answer is that both the abstract principles of these successful movements and the future action suggested by these authors need to be nuanced, by moving a little closer to each other. There are limits, for example, to the success of movements like those led by King:

[They] might be critically interrogated precisely for their un-reflexive traffic with humanism—their embrace of universal and even essentialized personhood, their inattention to culture difference, their relative neglect of the historically contingent and contextual character of political life (Brown 2001, 26).

This ‘inattention to cultural difference’ is precisely what Abu-Laban (2007), and this essay, want to avoid in the policy process. In order to do so, the grand humanistic claims of personhood (which might precipitate equality before the law, but not in lived experience) of these movements need to be eclipsed in the policy process by another of their shared characteristics: “these movements [also] were fuelled by opposition to specifically articulated political systems or social

arrangements—segregation, colonialism, or caste society—rather than by opprobrium towards persons” (Brown 2001, 26). This is where Abu-Laban’s work can climb on board, as it also advocates a policy agenda “in which colonialism, anti-essentialism, and processes of racialization and globalization are taken seriously” (Abu-Laban 2007, 145). A policy process that analyzes the differentiated effects specifically articulated political or social structures have on different identities, without making a “cultural or political fetish out of subordinated identities,” and seeks only to recognize subordination in order to remedy it, will see a balance between movements like King’s and Gandhi’s, and the work of Abu-Laban. As will be explored in the fourth section, however, Abu-Laban’s framework for facilitating this balance is wanting.

Hankivsky’s work carries potential for striking a balance with these successful movements in that it tries to eschew an attachment to a particular identity. It is far from clear however, how effective, or ‘life-affirming,’ this attempt is. Hankivsky suggests that ‘gender mainstreaming’ in public policy should be replaced by ‘diversity mainstreaming,’ which would not “reject the category of gender, but [would] rather [displace] it as *the* primary axis for understanding discrimination, inequality, and oppression” (Hankivsky 2007, 126). While at first this sounds promising, especially when she adds that diversity mainstreaming would create a “more sophisticated and comprehensive approach to understanding the lived experience of all women and men,” shortly after that she writes that diversity mainstreaming “seeks to go beyond singular categories to *capture multiple grounds of discrimination* so that power and privilege, and intersecting domains of inclusion, exclusion, and inequality, are better understood” (Hankivsky 2007, 127). Rather than transcending the cultural of one identity, Hankivsky’s diversity mainstreaming flirts with creating a perpetually oppressed identity in which all forms of marginalization meet, and where all these forms can

simultaneously be lamented.

Hankivsky notes that diversity mainstreaming “does not take an additive approach to various categories of experience” (2007, 27). Although this appears to avoid Brown’s earlier warning around forming a discourse that depends on one constrained identity (because then that discourse defensively rejects anything that might seek to nuance that identity), Hankivsky’s work becomes the ultimate example of it: it creates the — ironically — universally marginalized identity. Where Brown’s Women’s Studies discipline lashed out at any discourse that suggested an identity beside gender might be important, Hankivsky’s diversity mainstreaming risks lashing out at any suggestion that an identity beside one in which only oppressed elements intersect might be important. This in turn risks a discourse in which the oppressed identity becomes an end in itself, where creating policies as a means to a greater end of social justice (non-oppressed identities) will, ironically, be shut down, for the discourse has become invested in the identity being oppressed.

This dynamic is the result of having no broader framework, no ‘life-affirming’ theoretical foundation, other than the manner in which political and cultural structures treat different identities is oppressive and unjust. Focusing purely on the injustice that results from marginalization aimed at difference will not produce the kind of positive, solution-finding discourse that is likely to find a policy window to jump through:

[The] problem with a politics of difference is that it lacks a vision of the future that overcomes the political significance of such differences, and thus lacks an affirmative collective project. Perhaps it is for this reason that such political formations at times appear more invested in amassing and citing continued evidence of the injury justifying their existence than in figuring alternatives to these conditions (Brown 2001, 40).

This essay does not doubt that Hankivsky is invested in ‘figuring alternatives’ to oppressive conditions, but her characterization of diversity mainstreaming is vulnerable to the situation laid out above, and currently lacks the sort of framework from which to achieve its goal of a policy process that better alleviates marginalization. Hankivsky’s work is a start, but her dismissal of liberal approaches to recognizing and accommodating identities leaves her framework, like Abu-Laban’s, very much wanting.

### *The Limits of Radical Contract*

An ‘oppositional black theory’ criticism of liberalism does not negate the need for a liberal framework within which collective identities can be recognized in the public policy process. Charles W. Mills’ “The Racial Contract” turns classical liberal thought on its head by suggesting that the ‘contract’ upholding political authority does not occur between the governed and the governing state, but rather between — what he distinguishes as — the ‘White people’ of the world to maintain their power over non-white people. White is capitalized because it describes the set of power relations Mills asserts the vast majority of people with white skin have endorsed because it so greatly benefits them. Skin colour may be the physical trait on which this ‘racial contract’ hinges, but it is Whiteness — the agreement amongst most white people to systematically perpetuate their dominance — that is the crucial factor. This agreement, according to Mills, underlies all of the classic liberal thinkers, from Hobbes to Locke to Rousseau to Kant, and is the real contract that has held sway ever since European expansion across the globe; the abstract ‘race-neutral’ liberalism has been, and is, but a mere facade that purposefully ignores the racist dynamics that truly exist.

Despite its foothold in a different stream of thought from the authors critiqued here (its willingness to engage liberal

contractarian theory on its own grounds is implicitly and explicitly dismissive of critical theory's deconstructionist tendencies), this argument is nevertheless vulnerable to many of their work's limitations in terms of providing a framework for concrete future policies. Mills notes the shortcomings of the perpetual deconstruction, or 'more theorizing,' of identities exhibited by these authors, but he does not provide a 'life-affirming' direction forward once the 'racial contract' has been brought to light and interrogated. His 'platforms for action' hinge on both an internal struggle that allows the 'subperson,' the non-white person, to claim "the moral status of personhood" and the "external struggle rooted in the painstaking reconstruction of past and present necessary to fill in the crucial gaps and erase the slanders of the globally dominant European worldview" (Mills 1997, 119). The formulator of public policy, however, cannot help but ask: And then what? It is one endeavour to interrogate marginalization inherent in the past and the status quo, but it is yet another to construct broad principles to avoid such marginalization in the future. While this essay cannot stress strongly enough that interrogating marginalization *should* inform future broad principles, Mills' (1997) work suggests that by simply doing the former the latter will be apparent. The internal and external struggles called for by Mills flirt with the lack of a discourse's future vision as described by Brown. Much of Mill's literature is invested in 'amassing and citing continued evidence of the injury,' and suggests that 'figuring alternatives to these conditions' will simply come from this evidence. This essay, however, argues that an additional framework is needed above and beyond an articulate interrogation of the past and present.

The above begs the following question: Since "The Racial Contract" is theorized in order to terminate the actual 'racial contract' at work within an array of 'liberal countries,' what guides the polis and its policies once that goal has been achieved? Ironically, it appears to be the social contract as espoused by Kant. Despite describing how Kant is not only the



“famous theorist of personhood,” but also of “subpersonhood” (Mills 1997, 1997), Mills hints that Kant’s ideal is indeed noble, and that “the ideals of contractarianism [is not] necessarily problematic,” but that they have been “betrayed by white contractarians” (Mills 1997, 129). This suggests that some version of classical liberal thought is still warranted once the ‘racial contract’ has been terminated. Indeed, many of the ‘praiseworthy whites’ Mills describe as having rejected the ‘racial contract’ — anti-colonialists, civil rights activists, resisters of apartheid, etc.— did so precisely on the moral grounds a liberal philosophy of freedom and equality espoused for them. That most venerable of Apartheid resisters, Nelson Mandela, supported a constitution-writing process that yielded one of the most liberal constitutions in the world, one written by a majority of African National Congress and black politicians (Johnson 2010). Mills is thus caught in a trap that is not particularly useful for formulating public policy: his work simultaneously repudiates, while implicitly, affirming a classically liberal approach (albeit one that has been saved from the ‘racial contract’).

Finally, the stream of thought represented by Mills is problematic in that it participates in a process already critiqued in this essay; it has a tendency to prioritize one social identity above others, leaving its discourse vulnerable to competing narratives of oppression between collective identities, rather than focusing on transcending the oppressive status quo. “The Racial Contract” hopes to “ultimately eliminate race [as a differential entitlement and privilege] altogether” (Mills 1997, 127), but this objective leaves it open to two simultaneous critical questions: First, how will this privilege be sustainably eliminated without an articulated framework *above and beyond* illuminating this oppressive privilege? Second, will this process situate itself as more important than the processes initiated by other collective identities that suffer from other forms of entitlement and privilege? For instance, will the struggles for gender and sexual equality against historically

privileged masculinity and heterosexuality be deprioritized while the 'racial contract' is being fought? These questions show that "The Racial Contract" is limited in providing a forward looking framework from which to formulate policies that will alleviate the inequality among collective identities.

*Abu-Laban within Liberal Parameters: A Policy Framework for Responding to Marginalized Identities*

A framework that focuses purely on the injustice that results from marginalization aimed at difference is limited and incoherent in regards to policy formation. For example, Abu-Laban (2007, 47) notes state influence in identity construction through censuses, and suggests that because in France the census asks no ethnic questions "the immigrant disappears from history". The United States, on the other hand, explicitly asks about race and ethnicity, thereby linking these identities into the welfare state. Given her call for a policy process which acknowledges the identities formed through racialization, and her suggestion that Canadian health policy should extrapolate from American research which stresses the recognition of gender and immigrant-status, it is clear that Abu-Laban prefers the American census versus the French one. That she does not explicitly say so, however, is indicative of the grey, even contradictory, position her approach leaves her in when tackling issues like the census.

Canada has had a long and controversial history around how to categorize the people living within its borders. The first census of the 20th century (held in 1901) saw the federal government create four boxes from which people could choose: white, red, black and yellow. Brown was considered as an option, but was left off the list because "including it would have mucked up the short-form letter categories, leaving two 'b's' in a polyglot of confusion" (Backhouse 1999, 3). This approach was not only problematic because it inextricably intertwined colour with race, but because it assumed static

identities, and allowed the state to discriminate accordingly. Although Abu-Laban leans towards recognizing identity in a census in order to address discrimination, she is hesitant to explicitly advocate for it. This likely comes from a discomfort around the history of people who have had to fill in, and then be defined by, a specific box. It seems to carry an identity-card that stipulates “how black” or “how white” a person is. A census seeking to observe different identities, however, is limited to a certain amount of options, and is thus forced to constrain identity.

Nevertheless, the French option is not satisfactory to Abu-Laban. As has been discussed, formal equality on paper does not translate to equality of results in lived experience. Counting all people as citizens of country X produces only a number, and no tools from which to alleviate lived inequality. The elephant in the room, however, is the fact that inequality in France, as measured by the Organization for Economic Cooperation and Development, is drastically less compared not only to the United States, but also compared to other countries, including Canada, that contain identity-specific questions in their census. While inequality has increased dramatically in the United States and Canada since the mid-1980s to 2008, France is one of the few countries that saw little to no increase in inequality (OECD 2011). This in a country that has a comparatively high score on equality (a country with staggering rates of inequality that did not see such rates increase would not be as impressive). A number of factors could explain this, including a more expansive welfare system, but the point here is that France managed to curb increases in the inequality it does experience *without* defining different identities in its census.

How can identity be recognized and incorporated into the policy process in order to decrease marginalization without at the same time constraining identity, and increasing marginalization, in the process? The approach from which Abu-Laban is currently working does not have the capacity to

thoroughly deal with this dilemma. Inserting Abu-Laban's work into a liberal framework that contains the following two pillars, however, may do so:

1. The fundamental goal of identity-based policies will be empowering the personal autonomy of people to experience and participate in the existence of the collective identities with which they feel a part; and
2. The dynamic between historical/political/cultural processes and collective identities will be incorporated into the policy process according to how these processes have had adverse effects on the experience, participation in, and existence of a collective identity.

The first pillar makes it clear that identity-based policies, and the discourses that feed into them, are a means to a greater end. This point fuses the liberal ideal of autonomy with the inherent value of experiencing solidarity within a collective. It avoids the sort of negative discourse that merely accumulates a list of injuries perpetuated against a collective identity. The prevalence of such negative discourses are part of the reason why some organizations in Canada's women's movement have lost momentum; because the legitimacy of these discourses rely purely on the lists of injuries associated with a specific identity, they are threatened by other identity-based groups which are accumulating their own, potentially longer, lists—it is, in essence, a perverse race towards being 'the most' oppressed. As Rankin and Vickers note, "efforts to deal with critical, complex issues such as racism, ableism and homophobia within feminist institutions such as [the National Action Committee on the Status of Women], unfortunately, resulted in diminished solidarity" (Hankivsky 2007, 121). Some of these dynamics stem from frustrations around the resistance oppressive systems have to change and substantial government cuts to funding, but this essay suggests that the vitriolic nature of some of these organizations is a direct result,

lacking “a vision of the future that overcomes the political significance of [...] differences, and thus lacks an affirmative collective project” (Brown 2001, 40). Pillar one of the liberal framework, suggested here is a discourse that is not an end in itself, but is explicitly a means to a greater end, and thus provides this affirmative collective project.

Pillar one also implicitly provides a point at which public policy can curb the level of its response: those collective identities no longer systematically marginalized and oppressed in social, health, and economic policy are sufficiently empowered and no longer require a greater policy response. This avoids the impossible task of attempting to continuously define all collective identities and measure their competing claims (something no census, no matter how exhaustive, could properly do), even while it allows more precision for the policy process in terms of which collective identities it should respond to, and what tools to use. Pillar one may allow a census like France’s when observing the entire country (thereby avoiding putting citizens in discrete boxes), but will advocate a variety of other policy tools, like surveys and the collection of identity-based data by health departments, in order to properly address the differentiated effects policies have on different collective identities.

That pillar one provides a point where public policy can curb the level of its response is a unique strength of this liberal framework. It allows identity to flourish organically without mechanistic attempts at control. It acknowledges that identity does not occur in a vacuum and that even though it is both a moral imperative and smart policy to recognize a collective identity, the *existence* of that identity does not depend on public policy recognizing it. Indeed, Abu-Laban’s fears of “essentialized” conceptions of identity — that they contain, and can be regulated as, “a unique, fixed essence that can be understood independently of context of intercultural relations can be assuaged by John Stuart Mill’s idea that progress is best served by people engaging in ‘experiments of living’, where

no preconceived, fixed essence defines who people are and how they should live” (Wolff 1996, 136).

This idea also unveils the fallacy in implicitly (or in the case of Smith, explicitly) connecting liberalism with heteronormativity, or liberalism with patriarchy (Smith 2007, 103). Mill’s ‘experiments of living’ is, if anything, critical of the status quo, the norm which suggests ‘this is the way things have to be,’ and of the idea that the right or best way of doing something is the way it is currently done: “It is by observing, and trying out, the various possibilities that we are presented with that [humankind] will be able to learn what sorts of lives will lead to genuine human flourishing” (Wolff 1996, 136). Pillar one seeks to dismantle that which have oppressed different ‘experiments of living,’ and then let the ‘experiment’ continue on unhindered. It should be noted that the idea of ‘experiments of living’ does not mean a highly individualistic experiment; Mill views the value experienced by the self as intrinsically connected to how that value may be experienced by others in the community (Wolff 1996).

The second pillar, which is not mutually exclusive from the first, puts the policy emphasis on discerning how political and cultural structures have oppressed, and are oppressing, different collective identities. This contains a slight, but important difference from Hankivsky’s diversity mainstreaming, which focuses on the variety of ways oppression is manifested in individuals. The framework suggested here does acknowledge that the oppression of collective identities affect the lives of individual human beings in that the first pillar stresses the importance of autonomy and participation; policies within this framework will incorporate how marginalization of collective identities have oppressed individuals who see themselves, or are seen to be, a part of those identities. However, this framework does not provide the same focus on oppression intersecting *within* individuals because that — despite Hankivsky’s intentions — implicitly constructs an identity of oppression.

This is perhaps the fundamental difference between this essay's liberal framework and the frameworks assumed in the stream of research analyzed here. The liberal framework refuses to make oppression a fundamental and perennial feature of any individual or collective identity. As the highlighting of 'adverse effects' in pillar two demonstrate, it will go to great lengths to recognize the effects oppression has had on different identities *in order to remedy those effects*, but it cannot justify making 'oppressed' a fundamental, and thus necessary, trait of these identities. This would inhibit truly addressing the inequality these identities experience because now they are defined by, and have perversely become invested in, that inequality

The liberal framework's refusal to privilege intersecting modes of oppression within people is open to a specific criticism from Hankivsky. She would acknowledge the framework's "focus on accommodating diverse groups and individuals," but would reject what she would call its "notion of unitary subjects," which does not "see identities as socially constructed and consisting of multiple intersecting categories of experience" (Hankivsky 2007, 127). This, however, is a constrained reading of liberalism, and does not fit the framework presented here. A notion of unitary subjects assumes an element of choice in an individual's participation in a collective identity; it assumes that an act of consent by a unitary subject is what makes them a part of the collective. This essay rejects that idea by stressing the *experience* of a person in their collective identity. It acknowledges that these identities are socially constructed and historically contingent, and not rationally chosen. Neither pillar makes any mention of motivated choice. They seem to be written with the assumption that "obligations of solidarity or membership [cannot] be reduced to an act of consent" (Santal 2009, 234). This framework does not ignore the fact that the oppression of a collective identity is ingrained into its experience, but it refuses to make this oppression the key variable in

understanding that identity.

*Conclusion: Nuanced Liberalism and Policy Windows*

The general discomfort with liberalism that the authors analyzed here exhibit has prevented them from situating their critiques within a framework that will allow their suggested policy changes to come to fruition. Perhaps their discomfort can be remedied by reorienting their conception of liberalism which, this essay suggests, is unduly tinged through the authors connecting it with extreme individualism and free-market capitalism. Their conception of liberalism makes a stark contrast between a liberal approach rooted in a discourse of abstract justice and rights on the one hand, and an ostensibly alternative approach of affection, of mutual concern and respect, that cannot be reconciled with a liberal approach, on the other. This contrast is “very useful for thinking about the limitations of all aspects of extreme liberal individualism, [particularly the strand that suggests] social rights and responsibilities are to be understood as arising out of individual actions” (Wolff 1996, 215). Such a conception of liberalism, however, and its understanding of individuals as discrete, unitary subjects, has been rejected by this essay. The authors analyzed here might respond by noting that diminishing the role of the individual is not enough to spark publicly funded policies that would deal effectively with systemic marginalization, and that something new is required. This essay would then note that first, their politics of difference is far from creating such a ‘something new,’ and that second, an ‘approach of affection, of mutual concern and respect,’ can exist within liberalism.

This essay suggests that future policy work with such a conception of liberalism, guided by the two broad pillars discussed here, rather than wait for more critical theories with the hope that continued deconstruction of the concept of identity and its relation to power will provide a suitable



framework through which policies can address marginalization. Brown (2006, 131), who advocates new and non-liberal theorizing to empower marginalized identities, acknowledges that such work will involve “serious and difficult research, arduous thought, and complex theoretical formulations—it will not be conducive to easy polemics or slogans in battle”. Such a task may well be called for in theory formation, but it is hardly a promising framework through which to create current policy. Should such a framework, one that does not spiral into the negative discourses allowed for by the authors analyzed here, but is fundamentally different from a liberal one, become more concrete, then the liberal framework suggested here would provide little resistance to being replaced. As has been stressed, it is not a framework that is interested in perpetuating itself for the sake of doing so.

Finally, Pal (2010, 139) notes that policy windows — “unpredictable openings in the policy process that create the possibility for influence over the direction and outcome of that process” — may open regularly, “but who jumps through successfully or not is still a matter of chance and skill”. The frameworks that are intended by the authors analyzed here to guide their policy suggestions to actual policies is severely crippled by their constrained focus on marginalization as a consequence of difference; this is not enough to guide policies through a policy window when it opens. Despite the substantial capacity of these authors to critically interrogate any and all phenomena that perpetuate the marginalization of certain identities, a life-affirming, positive discourse is needed to have enough support from the crucial actors — political parties and their platforms, elected officials, the public, leaders within the civil service, etc. — in order to jump through a policy window. Translating the policy ideas of these authors into the liberal framework suggested here will be the beginning of such a discourse: government departments that analyze how historical processes create identities that require differentiated policies, and then pitch policies that are not *defined by* injuries

committed, will have a much higher chance of seeing their work appear in budget speeches, throne speeches, and their policy proposals endorsed. Non-government agencies, in turn, may still struggle to take advantage of policy windows if they have few resources and/or little knowledge of government machinery (those skills will still have to be attained), but their requests to have a seat at the decision-making table will have a much higher chance of being heard if those requests are fundamentally about remedying oppression and not reliving it.

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## **China's Achilles' Heel? Debunking China's Oil Insecurity**

Alexandre Léger  
MPPPA Candidate  
Concordia University

### *Abstract*

As China's stance on its territorial island claims hardens and the investment in its navy continues, China's peaceful rise is met with growing apprehension. As contingencies to react to an expansionary China are discussed, the assumption that targeting the country's oil dependency would be crippling permeates the debate. In what way would China be affected by a sanction such as an oil embargo? The purpose of this paper is to debunk this assumption and analyse it within the theoretical framework of the Sanctions Debate. In order to analyse a potential impact of an oil embargo on China, this research explores the cases of two past oil embargoes: the US embargo on Apartheid South Africa and the 1973 US Oil Crisis. From these cases and the current state of China's energy needs, the assumption of a crippling effect of an oil embargo does not pass the test. This is due mainly to China's strong dependency on coal, its centralized state structure to manage an oil restriction and its proactive development of oil reserves and pipelines.

### *Biography*

Alexandre Léger is a student in the Master's in Public Policy Public Administration, at Concordia University. He is also a graduate from Concordia, having obtained a Bachelor of Arts in Political Science and a Minor in Human Rights. Alexandre was recently a recipient of the 2012-2013 Graduate Research Awards for Disarmament, Arms Control and Non-Proliferation, a joint program of The Simons Foundation and the International Security Research and Outreach Programme (ISROP) of Foreign Affairs, Trade and Development Canada (DFATD).

### *Introduction*

China's development policy has long been branded as a peaceful rise, guided more by the aim to become a larger player in a multipolar international system than to grow into a regional or global hegemon. However, with China competing over island territorial claims, there are fears that China's peaceful rise may transform into a more aggressive expansionist policy. This potential is characterised by two thresholds: the first and second island chains. As China's navy gains new capabilities, this power has the ability to flex its military muscle to the limit of this first island chain and is expected to project its power to the second chain in the future. This first island chain includes Taiwan, Guam and the Senkaku Islands. Indicative of growing tension over island claims is the clash of coast guard vessels between China, Japan and Korea over the Senkaku Islands. As China's investment in its navy continues and some believe it has an eye on the outer limits of the Pacific Rim, containing China is a hot button subject. As this scenario is discussed in graduate classrooms, policy forums and magazines such as *The Economist*, the subject of China's increasing oil dependency is quickly raised to be an Achilles' heel to be exploited.

As China's economy has expanded furiously in past decades, so have its energy needs. In 1993, China ceased to be an oil exporting country, as its energy needs surpassed its domestic production. The country's oil dependency has since grown and China is now the second largest oil importer after the United States (EIA, 2012). As the country's dependency on foreign oil continues to increase, most of China's oil is imported by tanker, via the Strait of Malacca. This vital resource is subject to a natural choke point, as tankers pass from the India Ocean into the South China Sea. This gives countries with large naval power, predominantly the United States, the power to restrict oil to China in the Strait.

Such an understanding of China's energy security leads to the assumption that an oil embargo constitutes the key potential means of restricting any move away from the peaceful rise. From news articles to roundtable discussions by experts, this belief is accepted as common knowledge.

While this assumption on China's energy security permeates the debates of Chinese security, it has not been substantiated in academic literature. The purpose of the paper is to debunk this idea of China's Achilles' Heel and discover if it is a reasonable claim. This examination will be done through the lens of theories on economic sanctions, cases of past oil embargos, and the changing reality of China's energy consumption. The theory and cases will serve to indicate which factors lead to the success or failure of embargoes as a sanction, thereafter informing the analysis of China's vulnerability to a restriction of its oil imports.

This paper distinguishes itself as it does not set out to answer a typical research question and demonstrate a theoretical perspective by means of cases. It is rather case-centric. This may be counterintuitive for political science writing, however I believe the purpose of singling out this assumption of China's energy insecurity requires this type of investigation.

#### *Literature Review: The Sanctions Debate*

The theoretical framework which sets the stage for research on oil embargos and their effects is the so-called 'sanctions debate'. The academic discourse on the effectiveness of sanctions is far from harmonious as neither contends that sanctions are completely effective or ineffective. Moreover, what actions and policies are constituted as sanctions themselves is a matter of debate.

In simple terms, the purpose of sanctions is to create an economic crisis in a targeted state. However, the fundamental objective of sanctions is not the economic crisis itself but a



policy change by the targeted country's government. The process must be understood as sanctions having a trickle-down effect onto the population, which then puts pressure on the national government. An economic crisis is to "lead regime supporters to withdraw support from the government, and [...] incite social unrest, forcing governmental collapse" (Schwartzman 2001, 116), thus enabling the enforcement of a political objective on a country. In economic terms, a crisis will also force the government to restrict its spending, targeting the country's defence and national security operations, but also limiting the gains of the political class. While this is the objective of sanctions, the architects of such measures can only hope they unfold as planned as generally, they do not (Kaemfe and Lowenberg 1989; McGillivray and Stan 2004; Morgan and Schwebach 1997).

When reviewing the literature surrounding sanctions, there is a resounding consensus that they do not 'work', to the extent that they do not produce the desired outcome intended by the sanctioning party. This alludes to the fact that sanctions are not effective in pressuring another country into a precise set of policy changes. Therefore, it is generally agreed that sanctions are an ineffective foreign policy tool.

The central piece of literature in the sanctions debate is the work of Hufbauer, Schott and Elliot (1985), as it remains the first and only large-N study on the subject. Their work is the goliath which maintains the academic defence of sanctions as a policy tool. Moreover, *Economic Sanctions Reconsidered History and Current Policy* is the first comprehensive study of sanctions through history with the objective to quantify the success rate. In spite of the consensus that sanctions do not achieve their set-out goals, the authors contend that there is a quantifiable success rate. In their work, they define sanctions succinctly as the "withdrawal or threat of withdrawal of customary trade or financial relations" (Hufbauer, Schott and Elliott 1985, 2). The examination of 103 sanctions dating back to the blockade of Germany in the Great War, provides the

data on their overall effectiveness. It was discovered that 41% of sanctions with modest policy goals achieved their objective as opposed to an 18% success rate for sanctions objectives of major policy change. While far from a stellar standard of achievement, it contradicts the consensus that sanctions are completely ineffective (Kaemfe and Lowenberg 1989; McGillivray and Stan 2004; Morgan and Schwebach 1997; Ang and Peksen 2007).

In direct response to this defense of sanctions, Robert A. Pape published *Why Economic Sanctions Do Not Work* 1997. He begins his analysis by making the observation that the use of sanctions by major powers and the United Nations as a tool of foreign policy is on the rise, as they are viewed as a human alternative to military intervention. However, Pape characterises the 1960s and 1970s as a period where confidence in the efficiency of sanctions dropped significantly. With an emerging “optimism” (Pape 1997, 91) towards sanctions as limited but important tool in the 1980s, Pape engages directly to the work of Hufbauer, Schott and Elliot.

Pape (1997) begins his critic of the large-N study’s data, by de-constructing the definition of sanctions. He warns that sanctions must be understood as a peace time measure. In a case of war, economic sanctions must be regarded as economic warfare instead, where the objective is to attack an enemy’s capabilities. Sanctions target capabilities not as a goal in itself, but as he explains, they serve to pressure the government. He argues that the two terms are used ambivalently, which is a cause for confusion. For a sanctions case to be considered successful, it must be an actual case of a sanction in the first place. Immediately, the first case in the Hufbauer, Scott and Elliot (1990) data set is put into question by Pape (1997). The example of the blockade on Germany in World War I, in his view, should not count in the Sanctions Debate, placing it in the category of economic warfare. This misidentification of the cases accounts for 18 cases out the 41 successful cases in the data set. These cases are rejected by Pape (1997), as the use of

force used in conjunction with the sanction is responsible for the outcome, instead of the sanction itself. For example, relative military power represents a strong disruptive variable (Pape 1997).

In his critique, Pape (1997) gives an overview of the methodology preceding the data set. While the success of the sanction from the view of the sender was the dependent variable in Hufbauer, Scott and Elliott (1989), it is divided into five main components, each with their own success rate (Pape 1997).

Pape (1997) concludes his critique by not only identifying the shortcomings of the current research, but also offering new avenues of research. Mainly, he is interested in understanding what motivates decision-makers to continuously employ sanctions, in spite of their track record. In addition, he suggests that the actual cases of 'success' must be examined, so the factors leading to the success may inform decision making and sanction design in the future (Pape 1997).

Answering in part this line of questioning, many authors propose different understandings of the objectives driving the implementation of sanctions. They do not enter into the debate of the efficiency of sanctions as much as they deconstruct their outcomes. On the one hand, it is argued that the main goal of sanctions is vested in the target country. They can be imposed to achieve symbolic gains or in order to satisfy domestic political interests. In addition, sanctions are held as important to aid in achieving other policy initiatives, not directly related to the issue on the surface. Sanctions are portrayed as a tool in bargaining in a zero sum game between states. The introduction of this notion becomes important when the ramifications of the consequences of a sanction are analysed. When the supply of a resource is boycotted or blockaded, the sanctioning country faces the cost of losing a market or a supplier. The level of dependency of the sanctioned and the sanctioning states thus both become important factors as imposing sanctions has more than a mere political cost. The

economic impact is a two way street. Moreover, the integration of the target country's economy into the global market is a key factor of success or failure. It can increase the country's dependence strengthening the implementation of a sanction but can also open alternate markets for the target country to circumvent the embargo. This can be compounded by the concentrated nature of one's exports (Kaemfe and Lowenberg 1989; McGillivray and Stan 2004; Morgan and Schwebach 1997; Pape 2007).

In analyzing the conditions for success, Ang and Peksen (2007) emerge with a particular outlook. They examine the impact of the issues themselves and their perceived salience by the states and actors involved. Their work is framed by what they view in the literature on the subject, that "conventional wisdom appears to be that sanctions are ineffective and failed policy instruments in the vast majority of cases" (Ang and Peksen 2007, 136). However, their position in the debate is not quite so simple, as Ang and Peksen (2007) challenge the dichotomy of success or failure. While they are not part of the same wave of optimism as Hufbauer, Schott and Elliot (1989), they do not reject sanctions in the likes of Pape (1997) either. They suggest that overall gains are made despite the failure of the dominant policy objective and that compliance becomes more achievable when less extensive demands are made. Furthermore, they place value in the symbolic gains that can be won (Ang and Peksen 2007).

What makes Ang and Peksen (2007) important in the sanctions debate is the articulation of three assumptions on the issue. First, it is assumed that foreign policy making is an issue-directed process and that policy makers concern themselves with issues in international conflicts. Second, it is presumed that the salience that policy makers attach to various issues vary across countries and issues. Third, it is believed that domestic political concerns as well as international politics play a crucial role in determining the salience of a particular issue by different actors (Ang and Peksen 2007).

Despite the debate of the effectiveness of sanctions, they have become an omnipresent element in international relations. This trend, present around the world, is true for the US. The analysis of the United States within the sanctions debate is relevant, as it shows the many sides of this growing trend. The literature on US sanctions highlights a practical element overlooked by the theoretical literature. Despite the agreement that sanctions are not effective foreign policy tools, the number of sanctions undertaken by the US is on the rise. A key factor in the outcome is the number of actors participating in the sanction, as it can be a unilateral policy or shared as a coalition. With the globalisation of trade and multiplication of trading partners, the success rate of unilateral sanctions is decreasing over time. In the case of the United States, the ratio of non-unilateral sanctions is strong and increasing (Elliot 2006).

The sanctions debate continues on in the academic world, while in the domain of policy, sanctions are increasingly being employed. While it is not agreed whether or not they serve a purpose, the importance of the type of sanction, the interdependence of the state and the number of states involved are but some components of a complicated foreign policy tool.

### *Methodology*

Drawing away from the theoretical 'sanctions debate', the oil embargo must be examined as an individual and distinctive form of sanction. Two case studies will provide a useful picture of the ramifications of oil embargoes to inform the study of China's vulnerability. From the theoretical perspective, three key factors will serve in the examination of the cases and analysis of China in particular: the size of the sanctioning party as a provider of oil; the integration of the target country's market; and the ability to circumvent the embargo.

The cases are the US oil embargo on Apartheid South Africa and the 1973 Oil Crisis. The first case will provide a qualitative view of the impacts of an embargo. As a small unitary state which has since changed regimes, data on the repercussions on South Africa is more available. The indicators to understand the impacts will be the different products which became unavailable and the different commercial and state activities which were compromised.

The second case provides an exposure of the impact of an oil embargo on a large scale consumer economy. In this case, where US access to oil was restricted, the goal will be to compare the impact of the embargo on the industrial and the consumer economy. Here the indicators will be the reduction of oil access by sector.

Both cases are true examples of oil embargoes as economic sanction and are not to be misconstrued as economic warfare, according to Pape's (1997) analysis. Similarly, in both cases, the embargos were implemented in a time of peace and served to enforce a larger policy objective.

#### *Embargo on the Apartheid Government of South Africa*

Aiming to isolate the apartheid government into changing its racist internal policies, the United States imposed an oil embargo on the state of South Africa. This embargo was put into effect after and alongside a long list of other sanctions against the nation, as part of an escalation of pressure by multiple countries.

When discussing the interdependence of the target state, South Africa's external trade approximated 26 billion dollars in 1982. The US, West Germany, UK and Japan were the key purchasing powers accounting for more than half of South Africa's trade, at 15 billion dollars. On the financial front, Britain provided 9,6 billion dollars in foreign investment to the country in 1981, representing 34% of South Africa's foreign invest, the US and West Germany accounting for one-quarter

each. Moreover, corporations from the same countries held control of the oil, pharmaceutical, electronics and automobile industries (Rogers 1974).

The escalation of the sanctions began with modest objectives. The symbolic gains were very much at the center of the policy and the sanctions impacted South Africa's prestige on the international stage. The first sanction was the removal of the South Africa from tennis association. This continued with their exclusion from the Olympics. Then, (with strong objectives), an arms embargo was put into place under the direction of a UN resolution. Still preceding the oil embargo, Chase Manhattan refused to roll over the countries loans, which target the South African dependence of foreign capital (Rogers 1974).

The oil embargo entered the stage as part of the Comprehensive Anti-Apartheid Act. It was predicted that the impact of the oil embargo would be low if only enforced by the US. The odds of success rose only slightly if the Organisation for Economic Co-operation and Development (OECD) became involved, as the impact would only be modest. The impact would have only become highly influential if the situation would have spiraled into militarised conflict. The embargo left South Africa with only three small trading partners: Botswana, Lesotho, and Swaziland. On the other hand, the Soviet bloc was an avenue to evade the sanctions (Becker 1987).

Previous to this clash, South Africa prepared against all contingencies. However, an oil embargo was the one eventuality not accounted for, leaving their economy and military unprepared for a shortage of petroleum. The country did have a very limited oil reserve of six months, which could have been rationed to one year. Sasol, a South African oil company, had the means to process oil from coal. Coal liquefaction in this case did play a role in alleviating the shortage however, this process faced serious limitations; aside from the high operation costs, this resource could not have

provided for more than 7-8% of the states fuel needs (Rogers 1974).

As oil represented only 25% of the country's energy requirements, the dependency of South Africa in this sanction case was much lower than other states. Within this category, South Africa faced an almost immediate shortage of petroleum products. Mainly, there was a complete shortage of lubricants and fuel for light aircraft, grounding their small unit of planes used in defence and security operations. A shortage of marine diesel and marine fuel was another sector rapidly effected (Rogers 1974).

The shortage forced a clash between the consumer and industrial sectors of the economy. Personal motor vehicles competed with productive needs, causing an immediate reduction of 10% of manufacturing, as well as triggering domestic inflation.

There were also unexpected impacts on the economy, due to a segmented economy. Relatively labour-intensive sectors expanded as mechanised production slowed down and was even brought to a standstill. Agricultural production was not greatly affected, as it already predominantly relied on the low-productive power of peasant agriculture (Rogers 1974).

With all these impacts on the state and its people, on heavy industry and the commercial economy, there is no sign that the oil embargo had an impact towards the larger policy goal of the sanctions. The Clark Report of the US Senate Committee on Foreign Relations concluded that the oil embargo had "no significant impact". (Hufbauer, Schott and Elliott 1985, 355) More than just the oil embargo accounts for the end of the apartheid regime. The imposition of a severe cost came from the restricted income flow, due to South Africa's dependency on foreign investment. Moreover, the collapse of the Soviet Union in relation to the demise of the Apartheid government complicated the identification of the key factors in the success and failures of the oil embargo as a sanction (Schwartzman 2001).



### *1973 Oil Crisis*

In the winter of 1973-1974, the Organization of the Petroleum Exporting Countries (OPEC) placed an oil embargo on the United States, in reaction to their support of Israel in the October War. This example provides information on the impacts of a shortage on a large consumer economy. It must be noted that there is no clear data on any military impacts, indicating that the maintenance of military capabilities was prioritised and did not face substantial consequences (Holcombe 1974).

In this case, the United States faced a 15% reduction of its total access to oil. While this statistic resembles that of the South African case, the circumstances are notably different. The country's dependence on oil is much greater, with only the access to the oil from the Arab States being jeopardised. Therefore, the impact was that of the loss of one supplier group. The majority of American oil imports were from Canada, via a land route and bypass the direct effect of the sanctions. The US thus had the ability to increase its imports from a strong partner by a safe route. As this embargo was not crippling, the issue is to determine which sectors were affected negatively in comparison to others (Holcombe 1974).

The variation of impacts between sectors shows that the consumer market was predominantly affected, in order to maintain industrial capacity. The distribution lies as such: household and commercial loss amounted to 17%, industrial drop in access was limited to 5% and transportation bore a large hit of 27%. The overall drop of 15% hides the choices made to manage the crisis. Here production was protected over the needs of consumers. Despite the mitigation measures, the US economy faced a reduction in production in an already looming recession. In fact, oil prices in the US increased dramatically by four fold (Holcombe 1974).

In the Hufbauer, Schott and Elliott's evaluation of this sanction, they note that no actual concessions came of this

sanction as Israel held its territories and the US continued its support for its ally. However, they note how the embargo brought international attention to the demands of the sanctioning group and brought the impacts foreign policy directly to the American public at the pumps. (1985) This second aspect relates to the symbolic gains as articulated by Ang and Peksen (2007).

### *China's Oil Dependency*

Following the examination of the two case studies, several key factors and dynamics are at play when discussing the impacts of an oil embargo and its chance of success. From the South African case, the major factors are: the percentage of oil dependence versus other energy sources, the size of the national oil reserve, and the access to alternative fuel. From the 1973 Oil Crisis, the main factors identified are the size of the restriction compared to the whole of the country's oil imports, the impact of the restriction by sector, and the impact on inflation.

In 2012, China's oil imports amounted to 5.5 billion barrels per day. The importance of oil for China's economy was significant but only accounted for 19% of its total energy needs, in 2009. Coal remains the main energy source and meets 70% of China's energy needs. In comparison to the two case studies, in terms of ratios, China is less dependent than South Africa and the US were, and thus less susceptible to such pressures. The size of China's economy is an important consideration. If South Africa felt the impacts of the oil restriction immediately, the impacts could be exponential in the case of China. However, South Africa was not prepared for the eventuality of an oil restriction (EIA 2012).

Since 2001, China has been implementing a three phase plan to build a substantial oil reserve to mitigate potential oil supply disruptions. Stemming from the country's five year plan (2001-2005), a stock-holding system has been included in

the country's plans to assure energy security. The plan sets forth the construction of facilities into 2020, some to be coastal, while others are to be underground. Another indication of China's preparations to manage any potential change in oil access, the National Oil Reserve Center, has been created to implement and oversee this project (IEA 2012).

Another potential mitigation to an oil embargo is the ability to liquefy coal. While in the South African case it proved futile, it may provide a larger bumper if stock-holds to not provide enough oil to wade a large embargo do not exist. As previously mentioned, China's energy needs are already largely met by coal (EIA 2012). Furthermore, China's higher and growing level of industrialisation may provide the needed infrastructure to output more liquefied coal. However, it does not provide specialised fuels or lubricants and is not a primary source of alternative fuel.

China's total oil dependency is actually low compared to its other energy needs. When discussing the restriction of oil, China's dependency is further mitigated by the large number of suppliers upon which it depends. For an oil embargo to have serious impacts, it would have to include multiple actors. Saudi Arabia accounts for approximately 20% of China's imports, which is a larger factor than the US' dependency on OPEC in 1973 (EIA 2012). Depending on which countries would be included in sanctioning; the level of impacts could go either way.

Almost around 60% of China's oil imports arrive by five main ports Ningbo, Quiungdao, Hangzhou, Dalian and Zhangjiang (IEA 2012). As a result, around 60% of China's oil passes by the Strait of Malacca, the natural choke point. This means that US naval power represents a trump card to China's dependence on multiple suppliers, many non-allied to the US. In this scenario, China's oil dependency may become insecure. This is not to say that such a sanction would be crippling however, as some might contend (EIA 2012).

The most important factor is the potential impacts restrictions of varying extents would or could have on different sectors of the economy. Already, the US case shows that restrictions can be managed to protect the industrial output. Considering China's communist form of government, the country may prove to be more able at this type of crisis management, although its use of its oil may hinder its ability to manage a crisis. In 2010, the transportation sector accounted for 40% of China's oil needs. It has been estimated that this will grow to account for 65% of the country's oil demand, by 2035 (IEA 2012). As seen in 1973, the transportation sector bore the brunt of the oil restriction (Holcombe 1974). On the other hand, this may be seen as beneficial, as the industrial sector is not predominantly dependant of oil. However, while production output may not be affected considerably, China's ability to export may very well be affected by the ability to move goods across the country. This means that an oil embargo will have an indirect impact on its production capacities, by grounding goods in the factories and on the roads. Moreover, it will have a devastating impact on the growing urban population, as individual use of gasoline will be restricted more strongly in the transportation sector to protect production. This may prove to be the one element, where the objective of sanctions to impact the population forcing them to in turn pressure the government, will actually hit its mark.

Again, following the US case, prices soared and the country's brittle fiscal balance was pushed over into recession. As China's oil needs grow, its exports are growing at a diminishing rate. This shows that, going into the future, the impacts of an oil embargo or blockade could spill over and lead to a larger crisis (EIA 2012).

Finally, China's increasing energy needs have not made it the vulnerable target it is made out to be. The country's industry is largely protected as they remain a coal consuming sector, where as the transportation section is extremely vulnerable. The effectiveness of an oil embargo on China

would depend on the number of suppliers applying the sanction and the national government's ability to manage the restriction. The country's already existent National Oil Reserve Center demonstrates a proactive level of preparedness, in addition to the construction of oil stock-holding facilities. Therefore, in the current situation, it does not appear that an oil embargo would cripple China, while it would definitely fuel financial and social issues.

*Looking to a Potential Crisis: Policy Prescriptions for All Sides*

As this examination is driven by a proposed or potential policy action, it is necessary to explore how an oil embargo may be mitigated by China. While it has been presented that sanctions are not effective, they are also increasingly used as a foreign policy tool. Thus, means to make such a sanction have optimal potential can be articulated. From the 'sanctions debate', the case studies and the examination of the state of China's oil dependency, recommendations can be made on the subject to stimulate a more dynamic discussion on China's so-called 'Achilles' heel' rather than perpetuate the simple assumption.

The policy prescription for China to mitigate the potential exploitation of its oil dependency focuses mainly on working to diversify its oil sources, but also to reduce the almost unsustainable growth of its oil needs. First, China should continue the development of its oil reserves. The second phase of the stock-hold plan was scheduled to be completed in 2012, with the third phase ending in 2020. The ground work for further development on the strategy should be prepared for it to continue past 2020. After all, as the demand on the resource grows, so does the country's vulnerability (IEA 2012).

Second, the development of China's own national oil resources should become a renewed priority. China's oil production has plateaued over the past decade. The best protection against a long term embargo is the access to

national production. It has been announced that Xinjiang is planned to be developed as the country's larger oil and gas producing hubs. This plan and others concerning domestic production should be favoured. In addition, the development of off-shore resources and renewable resources must be exploited as well (IEA 2012).

Third, China should continue building a more diverse network of suppliers. A focus on Latin America and Africa may provide a more stable supplier group, which would not engage in sanctioning China. More importantly, the development of China's imports should continue to include land based suppliers. Already in 2010, the construction of the East Siberian pipeline was completed, giving China access to Russia oil. Pipelines with Kazakhstan and Myanmar are both under construction. This development of pipeline infrastructure should be continued, as it provides access to foreign oil not passing by the Strait of Malacca (IEA 2012). It must be noted that these recommendations simply show how existing Chinese policies and plans could be continued and expanded upon, which demonstrates that China has identified oil dependency as an issue of energy security and national security. Furthermore, China is proactively addressing this issue, with measures specific to preparing for a potential oil shortage.

However, these measures cannot fully mitigate the problem posed by potential US naval action. While the development of pipelines is a measure which decreases dependency on oil passing through the strait, the majority of China's oil suppliers are in the Middle East, Africa and Latin America, therefore, the emphasis also turns to China's need to reduce the growth of its oil consumption. Already in the country's twelfth five-year plan, the vocabulary has changed from 'intensity control' to 'amount control'. Energy conservation is growing as a priority and many believe, ought to continue (IEA 2012).

The final and most important recommendation to China is not oil related. As seen from the literature on sanctions, the

objective is policy related. The objective of an oil embargo or blockade would have a precise foreign policy goal, not the crippling of China's economy. It is therefore understood that such a sanction would become a tool in the event of a change in China's posture, and as such, it is advisable that China does not adopt an aggressive posture internationally or regionally, as it is vulnerable to such sanctions.

As for the oil suppliers, if they are to enact such a sanction, they should do so as a large united supplier group. While Saudi Arabia could make a dent unilaterally, the success rate of sanctions increases with the number of participants. Moreover, considering China's already implemented mitigation measures, a substantial cut in China's access to oil would need to be restricted, in order to achieve any policy objectives.

Moreover, an oil embargo should be part of a larger body of sanctions to further isolate China. The case of South Africa demonstrates that oil, by itself, is not sufficient to cripple a country and that other measures have a compounding effect.

Countries participating in an embargo must also prepare for impacts on their own economies. By isolating China, they also close their access to Chinese goods, markets and financial support. This is a significant deterrent for African countries which depend on Chinese investment, and is a reversal of the South Africa case.

While the United States is not a supplier to China, its naval power provides a trump card. Yet, the application of a blockade is not a simple measure. If the US is determined to sanction China, it is recommended to block the flow of oil passing through the Strait of Malacca. This should only be done in partnership with other states, mainly suppliers which will be blocked, especially those that are also oil suppliers to the US. Blocking their access to the Chinese market could prompt an oil embargo on the US.

As for the suppliers, the US should prepare for the loss of access to Chinese goods and the Chinese market. Moreover,

the US is dependant of China's support of growing national debt. For the US, the use of an oil blockade as a sanction is not recommended, except in last resort. There are many costs to the sanctioning country, as China is a large producer of goods.

A whole host of other nations hold a stake in this debate such as other Pacific nations like Japan, South Korea, Thailand and even Canada. Moreover, the EU which trades largely with China and many states in Africa which depend on Chinese investment are also stake holders in the debate over China's rise and the reaction to it. Drawing from the Sanctions Debate, sanctions represent a two way street where cost afflict both sides. In this case, a third party is also would bear the cost of the sanction. Therefore, this third party has the ability to lobby against oil restrictions on China's to protect their interests. On the other hand, as a multiplicity of different restrictions increase pressures on a sanctioned state, such third party can countries can participate in an active containment of China's using their individual leverage, as they do not have the means to enforce an oil embargo in particular.

While these recommendations look towards to a situation which will hopefully not come to be, it is important to notice the nature of the recommendations listed for China. They call for the continuance of existing policies China has been implementing. This demonstrates how China is responding to a concern over its energy security into the future. This shows vigilance but also indicates a rational fear of retaliation for future policies. China's tightening stance over the Senkaku Islands also shows this drift away from the peaceful rise.

### *Conclusion*

China's now more forceful stand of its island territorial claims or the development of the Chinese Navy, giving it the ability to project power to the first island chain and eventually beyond, is reshaping the international system's stance towards this



growing power. As policy makers plan contingencies for a more aggressive foreign policy from China, drawing away from the peaceful rise, the country's energy security is portrayed as a key vulnerability and its oil needs, its Achilles' heel.

The purpose of this examination was to debunk this assumption, as it is prevalent in the discussion over China's ambitions in the Pacific. The objective was to examine the vulnerability China's faces towards an oil embargo in Political Science theory and in existing cases of oil embargoes.

Grounding this subject in the literature on sanctions, Hufbauer, Schott and Elliot (1989) appear as the main supporters of sanctions, including embargoes, as having a potential for success in achieving policy goals. The main avenues for success are in minimal objectives. However, Robert Pape (1997) is categorical in the inefficiency of sanctions as a foreign policy tool. Ang and Peksen (2007) offer an avenue on how sanctions are and can be successful, highlighting the salience of the issue over which a country is sanctioned.

In the cases of South Africa and the United States, two main findings need to be underlined. First, the number of sanctioning parties and separate sanctions influence the level isolation of the sanctioned state and its ability to circumvent the restricting measures. Second, the sanctioned state has the ability to manage a shortage, enabling it to protect its industrial output at the disadvantage of its internal consumer economy and transport.

Turning to the case of China, it becomes clear that the impacts of an oil embargo would not be as crippling as popular conception may indicate. While China's oil dependency is an exploitable vulnerability, an embargo or blockade would not afflict China's industrial production as heavily as it would impact the transportation sector. However, from the policy recommendations, it has been seen that China is actively

addressing these issues by a large infrastructure investment in stock-hold facilities, the development of national oil resources, and the construction of pipelines with its neighbours. Moreover, the costs for the sanctioning countries, whether the oil suppliers embargoing China or the US blockading China in the Strait of Malacca, will face large economic costs of their own, acting as a significant deterrent. Overall, the assumption that an oil embargo would provide a simple solution to the issue of an aggressive China does not hold true. Oil does not represent the Achilles' heel it is made out to be. Considering how this assumption influences the debate and the trend toward unilateral sanctions, what other policy options are available to aid in containing an aggressive expansionary push by China?

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## **#CyberRobinHoods? The Rise of Non-state actors in Cyber Space**

Jonathan Romic  
MPP Candidate  
University of Michigan-Dearborn

### *Abstract*

A question which pervades political debates is how non-state actors will or can influence the state. Predicting *how* or whether non-state actors will challenge states however presents a very difficult and troublesome question. The innovative nature and future potential political uses of cyber power and cyber space are also discussed. The use of cyber power by non-state actors may come in the form of organizations that protect the citizens from governments. Or cyber power could be used to facilitate the radicalization of users on the Internet, who in turn attack nations and citizens for political reasons. This paper examines the literature on culture and group formation as a means to understand the potential formation of online groups, the potential for radicalization, and real world political repercussions. Moreover, another issue which is addressed is the role of networking in the formation and actions of these groups. The literature often examines either strong ties or weak ties; the paper widens the aperture of focus and suggests that these ties are mutually beneficial and dependent upon each other for the diffusion of information and power.

### *Biography*

Jonathan Romic is currently a Masters student in Public Policy at the University of Michigan-Dearborn. His research focuses on governance and policy solutions in an increasingly technology driven global environment and its use by non-state actors as challenge to state authority. Jonathan is also an active member of the Canadian International Council (CIC) where he engages in various foreign policy related events and discussions.

### *Introduction*

The advent and swift growth of cyber space demarcated the genesis of a new power context operating in global politics and international relations challenging conventional understandings of power (Nye 2011). It is important to acknowledge that any form of power is ultimately contingent upon the given context within which it operates (Nye 2010). Nye (2010) explains that the low cost of entry, anonymity, and asymmetries have enabled smaller actors to exercise power in cyberspace concomitantly decreasing the differentials of power amongst actors globally. In short, there are many more non-state actors operating within global politics due to the diffusion of power in cyberspace.

A salient phenomenon examined is the exercise of cyber power through communication networks and social media as a means of influencing political and social discourse. Examples include the Arab Spring, London Riots (flash mobilizations), ESDA II (Philippians Second People Power Revolution), and the online hacker group known as Anonymous or as some say-Cyber Robin Hoods. These cases provide examples where traditional power structures were challenged for control by citizens and non-state actors operating through social media and networks. The Arab Spring challenged the governments of the Middle East for political control; this battle was fought both in the streets through mobilization of support and ideologically through social media networks. Cyber power is becoming increasingly important in the gambit of politics and international relations and is being played by actors other than those who are traditionally thought of possessing power, namely; the state. It should be emphasized that the emerging forms of cyber power are under studied with respect to the potential of non-state actors increasingly utilizing it.

Through identifying trends and contexts, we can develop an understanding of how power and counter power are exercised. Given this taste of new power, non-state actors are

increasingly developing novel and new means of employing various forms of cyber power to influence political processes of states. Moreover, the paper examines the developments of cultures and groups online, including social and personal identity restructuring and radicalization, as a means of understanding the development and uses of cyber power by citizens and non-state actors who challenge predominant political structures.

### *Literature Review*

January 20<sup>th</sup> 2001 marked a watershed event in political history- for the first time in history, a head of state, Philippines President Joseph Estrada, lost power due to the Internet and mobile communication networks (Rheingold 2002, Goggin 2006, Castells et al. 2007). In short, this is the first instance in which a mobile phone was employed as a means for the removal of a sitting president of a nation state (Castells et al. 2007, 186). The Arab Spring and the string of political upheavals that followed exemplified another form of cyber power although in this case real time pictures and videos were facilitated and disseminated through social media sites in order to galvanize civil society. In response, governments of the region attempted to block and shut down the Internet. During this period it is speculated that citizens smuggled their SIM cards into surrounding countries in order to disseminate the pictures and videos globally.

According to Nye (2011, 123) 'cyber power' may be defined as "a set of resources that relate to the creation, control, and communication of...information". This also includes the use of cellular technologies and the Internet comprised of networked computers. As it is currently understood, cyber power and its various forms are truly in the embryonic stages of development with respect to its use by non-state actors and citizens. In supplement, Diebold (1966, 2-3) explains we are engulfed in technological changes which



operate as ‘agents for social change’. In other words, we are surrounded by new and emerging technologies which produce changes in our society and often these changes and the ways in which technology will be put to use are not foreseen beforehand. For example, the development and use of the Internet essentially linked the world through computer networks. The Internet also provides a clear example that new technologies are often put to uses much different than the original intention. The use of cellular technologies to mobilize civil society and disseminate information for political ends is another example.

Furthermore, Huntington (1975) states that revolution is an ‘aspect’ of modernization which presents itself during times of political modernization which has lagged behind social changes. Part of the process is the extension of political awareness to new groups and their concomitant mobilization into the active political sphere (Huntington 1975). The potential of new groups entering the political processes through social media is very important as it allows citizens to be much more involved in the process, through information exchange or opinion sharing. This in turn mobilizes new actors from broad backgrounds to engage in forms of political behaviour. The effects of rapid mobilization will be further discussed hereunder. However, the creation of networks is an example of the modernization process which enables a broad spectrum of new actors to communicate with each other.

Castells (2010, 49) states that networks are imbued with significant clout. Moreover, Castells et al. (2007, 213) explains that “when the dominant institutions of society no longer have a monopoly of mass-communication networks, the dialectics of power between and counter power is...altered forever”. The growth of these networks is emphasized by Shirky (2011) who highlighted that the world’s networked population has grown from the low millions in the 1990s to the low billions today. Contextually, another salient issue is the relative inexpensiveness of entry in cyberspace (Sheldon 2011, 97) and

the concomitant asymmetric threats where non-state actors can challenge dominant institutions for social and political clout (Sullivan 2001).

Shirky (2011) explains that social media is a tool which contributes to media consumption, but more importantly, politically speaking, it contributes to the production of media. The production of media during the Arab Spring, for example, entailed the creation of videos and images through cellular technologies. These images and videos were then in turn disseminated through social media sites such as Twitter, Facebook, and YouTube. This was how social media sites were used as a tool to facilitate the creation and exchange of information in order to draw greater awareness to the political issues at hand, both locally and more importantly globally. The implications of this are that anyone can post a video or image on a social media site without any filters, a luxury which traditional news media cannot often obtain. In short, the ability for anyone to produce a consumable form of media and disseminate it in this manner provides a wide variety of perspectives or points of view rather than a single point perspective during a conflict.

With individual contribution comes an individual sense of responsibility and importance. This may come in the form of protesters or online activists during the Arab Spring who felt a sense of political accomplishment through disseminating information, pictures, and videos showing the violent actions of the government. This sense of individual importance and impact on political outcomes is further emphasized by Pateman (1972) who discusses the links between political behaviour and an individual's sense of political efficacy. Political efficacy is the sense that an individual's political actions are important and that they make an impact during the political process. This sense of importance may derive from voting or disseminating political information, pictures, and videos which in turn actually impact and shape the political process. This is an essential link as Pateman (1972, 46)

concludes: “People who have a sense of political efficacy are more likely to participate in politics.” The aforesaid sense of political efficacy may help to understand and potentially explain how or why social networking sites (SNSs) or social media are able to drive social and political movements.

For example, evidence suggests individuals online are susceptible to “recruitment bursts” (González-Bailón et al. 2011, 3). In short, a recruitment burst is the likelihood of actors joining a cause or movement if their network ‘neighbours’ or friends join within a short span of time (González-Bailón et al. 2011, 3). If individuals feel a sense of efficacy deriving from participation in the political process facilitated through social media it may increase the potential occurrence of recruitment bursts. The importance of recruitment bursts online through social media sites cannot be over-emphasized. Huntington (1975, 266) notes that “Revolution is the extreme case of the explosion of political participation”. The potential for extreme political participation is exemplified through recruitment bursts in social media settings which provide an example of the modernization process in which new groups and/or actors may rapidly become involved in the political process.

An example of the potential effects of efficacy in social media can be found in the current trending record for Twitter which stands at 25,088 tweets a second, *on a single topic* (Hernandez 2011). If this trend were to continue, over 1.5 million tweets could potentially be sent in a minute on a single topic. The abovementioned trending example took place during the viewing of a movie which required the viewers to send Tweets in order to help the main character. This example shows a unison or link between an individual’s sense of efficacy and the potential confluence of large scale recruitment bursts. Pateman (1972, 103-4) notes a clear connection which is overlooked between an environment conducive to participation and the development of political efficacy.

Where the literature on social mobilizations requires further critical examination is on the potential political repercussions of efficacy and recruitment bursts through social media. What would result if the abovementioned “recruitment bursts” took place at a key time; say for example, a major governmental election. The effects of which could be the potential mobilization of voters who translate their social media ideas and emotions into votes in the ballot box during elections. This may come in the form of support for less established political candidates or parties. It could be used to topple a political candidate’s election efforts or re-election aspirations.

The election of Roh Moo-Hyun on December 19, 2002, in the South Korean Presidential election is just such an example which may be adduced to show what could happen in other countries. A few months prior to the election, Presidential candidate Roh Moo-Hyun was so low in the opinion polls that other members of his Millennium Democratic Party (MDP) attempted to force him out of the race. On the day of the election at 11 a.m. the exit polls showed that Roh Moo-Hyun was trailing by a margin of up to 2 percent (Castells et al. 2007, 196). However, at midday a group of supporters called Nosamo, set out to mobilize supporters in a last ditch effort to turn around the election. Nosamo set out to turn the election around by sending out over 800,000 e-mails to mobile phones which sent a message of urgency conveying the need to go out and vote. In a sudden turn of events a surge of youthful voters turned up at the polls and by 2 p.m. the MDP candidate Roh Moo-Hyun took the lead in the election polls and went on to win the election (Castells et al. 2007, 196). Although there were certainly other variables which played a part in this case, what is of importance is that under the right circumstances or contexts this could happen in other countries.

What is of further interest is the use of text messaging as a means to vote through televised entertainment shows. These types of shows rely on the user input and the shocking success of this format has resulted in a phenomenon dubbed the

“American Idol Effect” (Castells et al. 2007, 136). This is very interesting as it appears that the success of these shows may be linked with the potential efficacy of how viewers feel as their text messages or votes actually shape the show. According to a Pew Survey conducted in 2008 based on a national sample, forty-six percent of American adults used either e-mail or SMS (text messages) in order to procure campaign information pertaining to the presidential election (Castells 2009, 389).

The incorporation of cellular technology and text messaging may also be found in the American political system (Brooks 2009). The 2008 presidential campaign in the United States offers a quintessential example of this. The Obama campaign used text messages as a means of political communication toward cellular technology users in order to garner political support within the youthful voting demographic (Brooks 2009, 261-2). The aforementioned political examples may also apply in the municipal and state levels of elections as well. For example a constituency could be mobilized to vote, securing a key state in a presidential election. Or it could be used to politically support a candidate from a less popular party like the Green Party or the Independents. Naturally one ought to ask are these informed political decisions or are they short sighted and resulting from the fervor of the moment?

Users of cellular technologies can send messages or text messages which may be clandestine in nature (Elwood-Clayton 2003). Clandestine messages may be used as a means to disseminate sensitive information in order to secretly mobilize and organize non-state actors or political organizations. This may take the form of organizing government protests in secret or by groups online to communicate securely when planning how to achieve political goals. The potential political effect of this tool has been demonstrated to the extent that Cambodia prohibited all SMS communication two days prior to presidential elections (Deibert 2012). An OpenNet Initiative (ONI) found that almost 50% or close to a billion Internet

users live in a country with a form of information blocking or censorship (Deibert 2012). Nye (2010) concludes that networks play an essential element in the 21<sup>st</sup> century power. The reason for this conclusion is that the cyber domain through the use of networks facilitates the diffusion of power to non-state actors who may in turn challenge states or citizens alike politically. This will be discussed in greater detail hereunder when examining Cyber Robin Hood organizations and Nottingham's networks.

### *Cultural Formation and Networking*

Another form of cyber power develops through cultural formation; Goggin (2006) refers to the creation of 'the cellphone culture' and their expression of power in evolving contexts. With context in mind, Turkle (2011, 161) notes that users report 'sensing' their cellphone, suggesting a continuous connection with their communication devices. This sense of ubiquitous connection reported, speaks to the potential use of weak ties such as Twitter and other social networking sites as a means to bring awareness to information and potentially facilitating forms of strong tie activation through the dissemination of information. The spread or dissemination of information is facilitated through weak ties (Granovetter 1973) and small-degree nodes (few social connections) which create a communication short-cut with large-degree nodes (hubs: many social connections) (Doerr et al. 2012, 6).

Currently, social media examples of weak ties are plagued with examples of 'clicktivism' in which one supports a movement on a social media platform rather than actually translating this support into tangible action. Furthermore, it has been shown that it is strong ties which facilitate the transition from passivity to action in high-risk activism (Gladwell 2010 cited Mcadam 1986). Although it should be noted that action, or lack of action, be it passive or indirect ultimately constitute a form of action. One glaring clarification which needs to be

made in the understanding of weak ties and social movements is not that weak ties lack the strength needed to mobilize action which strong ties possess. Rather, the relationship between weak and strong ties should be viewed in the following manner: weak ties facilitate the information and/or ideational exchange and diffusion required that in turn facilitates the activation of strong tie mobilizations. In other words, weak ties are needed to disseminate information to various actors who then in turn are able to activate strong ties in the form of close friends or associates who share similar views. In essence, it is through the facilitation of both weak ties and strong ties that the elements required for mobilization of civil society for political or social ends are produced.

Mesthene (1970, 5) states that history has determined that culture and society are both subject to evolutionary processes due to the alteration of human existence, as exemplified by the Industrial Revolution. The evolution of network based operations was 'solidified' by the information revolution (Lesser 1999, 137-8). The information revolution means that a wide variety of actors are empowered to participate in global politics, not just governments (Nye 2011, 116). The aforesaid actors may include individuals or citizens, private organizations including corporations and non-governmental organizations (NGOs), and more importantly terrorists (Nye 2011).

For example, Dartnell (2006, 32) uses the term 'E-nationalism' to describe a *transnational* network of relations predicated upon common traits: language, historical experience, religion, and culture which are ultimately not tied to physical space or territory. This is a very salient phenomena as members from a plethora of nations may unite under a single banner be it religious, social, or political. The purpose of which may be to exercise influence over nation states through the Internet for protection or detriment of the global citizenry. In confluence with this development is the potential for the Internet to be used as a basis for *ideological and political*

*extremism* and *cyber-radicalism* (Taliharm 2010, 63). In addition, social psychology has suggested that there is fluidity in the structure and creation of one's persona online, with #CyberRobinhoods being a case in point. This issue will be dealt with hereunder.

Ron Deibert (2012) of the Citizen Lab states there is a cyber-spying arms race, which is providing lucrative opportunities for a number of actors including states, non-state actors and terrorists. The National Research Council provides a baleful forecast: "Tomorrow's terrorist may be able to do more damage with a keyboard than with a bomb" (Weimann 2005, 129). Terrorism on the Internet is often viewed as a dynamic phenomenon due to the sudden emergence and swift disappearance of sites (Weimann 2004). There have been numerous evolutions on the battlefield (Levy et al. 2001). One such evolution is the potential use of the Internet and networks as a battleground for political ideology by states, non-state actors and terrorists. With respect to the potential of wars fought through cyber space and networks, there is mixed views in the literature on the topic. There are proponents who argue that any form of cyber war, has never happened, it does not take place in the present, and will most likely never happen in the future (Rid 2012). However, in the definitive advent of cyber wars, this development would bring into question the future balance of power including the supremacy of governments and nation states as the apex of power internationally.

What is of note is that the primary confrontation in international relations is no longer between states but between states and networks (Sangiovanni and Jones 2008). For example, terrorist groups have been gradually adopting networked forms of organization which rely on information technology in order to operate their structures (Arquilla et al. 2009 p.148). This has led scholars to suggest flexibility in strategy (Crenshaw 2000, 456). However, there is nothing inherent which impedes traditional hierarchical state structures



in combating networked opponents (Sangiovanni and Jones 2008, 44).

#### *Online Group Interaction and Identity Formation*

Another area of research is the interplay between individuals and groups online that are formed through social networks. The work of John Turner would be well suited for examining the qualitative micro-analysis of social behaviours which result in political recourse. Turner was a proponent of an Interactionalist approach; in essence, to reduce causal inferences of behaviour to either the social environment (including group relations) or the individual would be to negate characteristics influencing human behaviour (Haslam et al. 2012, also see Turner 1975). In other words, it is not the individual or the group which are solely responsible for some form of action or behaviour; rather it is the interplay between the group and the individual which ultimately shape behaviour. This is further supported by Huckfeldt (2009, 304) who states that social networks are a 'key element' in the development of patterns of interdependence and contextually dependent forms of political involvement.

The 'self-categorization' theory will be implemented to provide the scope of the examination of the 'cyber-world' of social environments. Self-categorization theory is an approach which examines the categorization of the individual and the groups encompassing the realms of social interaction for that individual (Haslam et al. 2012). In essence, it is the way in which we categorize or define ourselves relative to our group memberships and the social interactions governing those memberships (Haslam et al. 2012). Encompassed within group functionality is the theory of social identity, which is the way individuals categorize themselves positively, in groups, incorporating a sense of self through group membership. Moreover, this implicitly involves defining and distinguishing

their group membership or 'in-group' as unique and distinctly positive.

This provides the positive inclusionary elements required for creation of the exclusionary reaction necessary in the creation of 'us' or the 'in-group' as opposed to 'them' or the 'out-group'. The creation of inclusionary and exclusionary characteristics of group memberships provides the cognitive frame from which behaviour, action, and interaction are formalized within a given context. Religion provides an excellent example in which one group viewed as an 'in-group' potentially views themselves as unique representatives of God's true form, with 'us' being distinctly positive (Haslam et al. 2012). Those who believe in other religious deities or lineages of the same religious tree are viewed as the 'out-group' or 'them'. If the rhetoric of this dichotomy appears familiar it is due to the plethora of current conflicts which exemplify this form of in-group/out-group relationship. For example, the 'us' vs. 'them' motif plays out in the sands of the Middle East, exemplified by the claim to rightful ascendancy and succession found in the division between the Sunni and Shia sects of Islam.

Furthermore, self-categorization theory expounds three central frames which provide the underpinnings in the relationship between the individual and the social environment. First, according to Turner, it is the individual's perception of their social identity which ultimately provides the basis from which all group dynamics and behaviour can occur (Haslam et al. 2012). Second, the process of creating the individual's sense of self is dynamic in structure and nature; the individual must position and orientate themselves according to who they are both as individuals and group members within the fluid nature of a social context (Haslam et al. 2012).

The social identity of video game players presents an interesting area of research with respect to the development of online social identities. It has been shown that online video

game persons have become transferable from digital to psychical reality (Castronova 2005). In certain instances the video game player is expected to uphold similar codes of conduct as they would in their guilds (online groups) as they do in physical reality. Moreover, the fluid and often blurred lines between the interplay of digital and physical realms is evident by the fact that “Guilds hold Earthbound meetings” (Castronova 2005, 121). This development speaks to the transference of characteristics, traits and moreover, behaviour of online game users as members of a shared social group. Contextually it appears that there is a blurring of social reality which is developing through the inability of individuals to separate the creation of their cyber selves from their ‘real world’ selves. In other words, new interactive technologies have provided a new and multi-leveled means for the construction of a given individuals social identity.

#### *Nottingham’s Penumbral Networks*

The group Anonymous provides an example of a group which could develop into a Cyber Robin Hood Organization. The use of the term Cyber Robin Hood organizations in the paper does not denote theft from the rich- instead it denotes that these groups could protect the weak from the powerful who abuse their authority. This may take the form of drawing awareness to a law being passed which could enact public protest resulting in the law being quashed. However, groups who predicate themselves upon such a model can also become a sombre threat if their ideology and actions become radicalized. Radicalization on the Internet is often conducted and used as a tool by terrorist groups; this is the process in which people are driven to an extreme political or religious view (Charvat 2010). The process involves employing the Internet as a tool for disseminating propaganda and/or using misleading or misinforming as a means to radicalize those who may be vulnerable or sympathetic to the cause (Charvat 2010, 78). The

radicalization process presents a very interesting dynamic as this process can affect citizens and states alike. In short, the Internet provides a means for individuals to be who they want to be, not necessarily who they are (Charvat 2010, 80), #CyberRobinHoods.

The potential of non-state actors to challenge states political agendas is a very real phenomenon. The emergence of non-state actors such as activist and 'hacktivist' organizations provides an exemplar template for research into the future development and discourse of power in cyber space. The creation of 'hacktivist' organizations marks another potentially double-edged sword, as these organizations may be security threats or government watch dogs. At this point it is important to delineate how cyber power *could* be used and how it *has been* used.

To illustrate an example of how this power has been used, a member of the Legion of the Underground (LoU) group called Bronc Buster declared 'cyber war' on China and Iraq. The reason for this declaration was predicated upon civil rights abuses which took place in the aforesaid states and called for the total destruction of their computer systems (Denning 2001, 275). It is important to emphasize perspective in each case, as these actions may be viewed as a form of protection against civil rights abuses. However, from the Chinese and Iraqi perspectives this declaration of war is a potential national security threat from a cyber-terrorist. Another example of the way in which cyber power was used will be adduced to further support the argument presented. In 2001 there was a mid-air collision between an American surveillance plane and a Chinese fighter aircraft which resulted in a campaign of cyber-attacks from hackers from around the world who took part in the cyber-attacks against Chinese and American websites (Prichard and MacDonald 2004). A cyber-attack is defined as "any action taken to undermine the functions of a computer network for a political or national security purpose" (Hathaway et al. 2012, 826).

It is also important to examine how cyber power could be used. There has been concern over the potential of employing asymmetric methods of attack, such as deploying the use of criminal groups or patriotic hackers (Rid and McBurney 2012, 12). This concern further emphasises the potential for political and diplomatic disputes between states to be subject to further aggression and agitation by the global hacking communities or non-state actors as exemplified by the American and Chinese mid-air collision example, although the degree to which these actors take part in a conflict will vary. Attacks by non-state actors on states could result in a potential *de facto* conflict between states themselves. For example, a conflict between states may derive from the fact that the conflicting states view the actions of these non-state actors as being sanctioned or secretly supported and funded by the state itself, even when this may not be the case. Moreover, states and non-state actors could hire criminal groups to conduct these cyber-attacks as a way in which to appear neutral or friendly while retaining plausible deniability. Another inherent problem is the potential for foreign marionette proxies operating within the networks of states to be used as a means to corrupt and destroy these networks from within.

Furthermore, it has been suggested that no country may be viewed as a 'cyberisland', which means that cyber-attackers honor no national boundaries or pledge allegiance to no national flag (Aaviksoo 2010, 16). This is a very important issue to acknowledge and examine as the abovementioned radicalization process in cyber space is facilitated by both terrorist groups and activist groups. This leaves the question of what is the distinguishing line between the two conceptually—is this perhaps merely a question of perspective? The saliency of this becomes even more evident when considering the amount of hacking tools freely available on the Internet and the propensity of attacks, with one estimate stating 80 million hacking attacks occur in a given day (Gercke 2010, 45). Hansen and Nissenbaum (2009) emphasize the importance of

understanding how networked computers operate in order to understand the potential scope of damage cyber threats and actions may have. It is quintessential to note that actions or the exercise of cyber power taken in cyberspace may have cascading effects which operate outside an intended networks (Hansen and Nissenbaum 2009, 1161).

### *Conclusion*

The use of the Internet by non-state actors has been examined along with the ability of these groups to use the Internet to attack and/or protect states and citizens alike. To say that these developments will solely come in one form or the other is regrettably likely to be a fallacy in logic as it is unfortunately more likely to be a combination of both. However, it appears that non-state actors will continue to facilitate novel means to politically challenge the traditional nation state.

Cyber power is not exercised solely through the facilitation of weak ties to spread information or through the activation of strong ties during high/risk protests. The paper widened the aperture of focus by suggesting that weak and strong ties are mutually beneficial and are ultimately dependent upon each other for the diffusion of information and power. The use of communication networks enables the dissemination of information through weak ties that in turn lead to the activation of strong ties which then leads to action. The paper examined the literature on group formation as a means to show the ideational formation and influence of group formation. The analysis provided insight into the potential formation of online groups, the potential for radicalization, and real world repercussions. The paper also examined literature on culture which was facilitated in order to examine the environment or context in which these groups may develop.

The literature is failing to acknowledge the sombre political and social implications of “recruitment bursts.” As noted these potential ideational “recruitment bursts” may come in the form

of mobilizing apathetic voters during Election Day. The implications of this were shown through the South Korean election. Regardless of the forms of cyber power or the ways support is mobilized, what is certain is that non-state actors will continue to develop and employ novel forms of cyber power and methods of mobilization in order to challenge the state.

Lastly, the paper noted that there is a potential for cyber power to produce cascading effects which operate outside the intended scope of actions or networks. The cascading effects could be triggered by the dissemination of information or cyber-attacks conducted by non-state actors. These attacks could derive from international sources or locally through citizens acting within a state in an attempt to promote or transmute political order. The citizens of the interconnected world have been afforded the opportunity to unite and challenge state practice through cyberspace; the real question is- how will they choose to use that power and for what purpose?

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# **The New Age of Cyber Warfare: Re-Interpreting the Charter of the United Nations for the Cyber Front**

Ryan Michael Boivin  
MA Candidate  
University of Saskatchewan

## *Abstract*

Cyber-attacks continue to be regarded as an international threat, and the regulation of cyberspace is an area of growing concern for international law. This paper addresses the 2010 case study of Stuxnet – a piece of malicious software (malware) that targeted Iranian nuclear facilities located in Natanz and Bushehr. This analysis begins with a general background of relevant literature to the case, followed by an in depth examination of how Stuxnet can be interpreted through international law using the Charter of the United Nations as well as International Court of Justice (ICJ) cases. To provide a contribution towards the already existing body of literature this research examines the following question; are cyber-attacks, specifically the 2010 Stuxnet malware, acts of war under international law? Methods of data collection range from journals, periodicals, seminar lectures, as well as international and domestic case law. Cases from the International Court of Justice (ICJ) are helpful in providing *stare decisis* or legal precedents when interpreting unconventional armed attacks. This paper tests whether or not international laws of war as they currently operate are applicable to cyber-attacks, such as the Stuxnet case. Criteria specifically examined include; 1) a violation of territorial sovereignty, 2) a physical use of force, 3) the right to self-defence and 4) the principle of proportionality. It is hypothesized that if this criterion is fully satisfied, then the Stuxnet attack can be interpreted as a conventional armed attack under the UN Charter and international law. Note however, evidence suggesting that Stuxnet was indeed state-back remains sparse, and therefore for the purposes of this paper it is assumed to be state-backed. No evidence currently exists that would link Stuxnet to any state that would meet the threshold of the UN Security Council.

### *Biography*

Ryan Boivin, born in Sault Ste. Marie, Ontario, began studies at the University of Toronto and graduated in 2011 with a Bachelor of Arts (Honours) degree specializing in Political Science. During his time in Toronto he enjoyed participating in international events and conferences, two of which examined humanitarian issues at the United Nations Headquarters in 2008 and 2009. Ryan is currently a Master of Arts Candidate at the University of Saskatchewan where he works closely with his supervisor, Professor Ron Wheeler. Ryan specializes in issues of cyber security and cyber warfare, and international law.

### *Introduction*

Computer warfare and virtual espionage have traditionally been limited to the confines of science fiction, highlighted in popular films such as *War Games* (1983) and *The Terminator* (1984). Contemporary global society no longer lives in a world where concepts such as cyber warfare, cyber-attacks, and cyber terrorism are restricted to fantasy, however. Along with modern conveniences, our technological and computer dependant world incorporates inherent vulnerabilities within international politics and security. These vulnerabilities are now both directed to, and perhaps even caused by nation-states as well as individuals. The 2010 case of the computer attack known as Stuxnet used malicious software (malware) to exploit a series of these weaknesses, specifically targeting the Iranian nuclear enrichment program by striking two nuclear facilities, Natanz and Bushehr (Porteous 2010).

Stuxnet quickly propagated throughout the world, with 60% of all infected computers traceable to Iran (Farwell and Rohozinski 2011). Stuxnet's software is exceptional and unprecedented in terms of detail. Liam O'Murchu, the Symantec Security Response Supervisor who oversaw the reverse engineering project of the virus, stated that, "we've definitely never seen anything like this before...the fact that it can control the way physical machines work is quite disturbing" (Symantec 2013 1).

What is unique about the Stuxnet worm is that it physically alters infrastructure, causing real physical damage. This case is therefore an interesting example as it provides proof of concept for new technologies in the development of cyber weaponry, something once only theorized (Denning 2000). Military uses of these technologies can affect international customs, diplomacy and law. This paper uses the Stuxnet worm to provide a case analysis of implications for nation-state behaviour within the international community and international law. This analysis tests whether or not cyber-

attacks constitute conventional armed attacks under the conventions of modern international law. The paper starts with, 1) a conceptual framework of cyber-attacks, followed by, 2) a review of the Stuxnet case, 3) arguments as to whether these attacks are conventional armed attacks, and 4) the implications of the results. Although evidence suggesting that Stuxnet was indeed state-back remains sparse, for the purposes of this paper it is assumed to be state-backed. No evidence exists that would link Stuxnet to any state that would meet the threshold of the UN Security Council.

Some of the limitations that this research paper faces include the following. First, given the level of secrecy and lack of open documents surrounding the ongoing issue, it is difficult to find complete information on the case under investigation. That said, this does not mean that the evidence provided here is entirely speculative. Evidence gathered from credible sources in the fields of reverse engineering, international law and security, as well as computer science, provides a substantial amount of information that facilitates a suitable understanding of the current problem of cyber-attacks.

The purpose of this paper is to provide research on an issue that is fresh and still on-going within the realm of the international community. It is my hope that this research will facilitate future initiatives in similar questions regarding the Stuxnet case as well as international legal and state implications. The benefit of investigating an ongoing or recent issue is that information that will be lost in future years may be preserved in the early years of such an investigation. Thus research in this area is both necessary and urgent for the future of international security, comity and cooperation.

This research project is important as one in many first few steps taken to understand the complex and emerging world of international cyber warfare and security, but it is by no means complete in scope or in content. The diversity of legal normative interpretations relating to current customs and law is tremendous. What this paper does do is offer a humble step



forward in understanding one case, that being Stuxnet, and how it can be interpreted in international law. The potential implications and normative frameworks for future cases similar to this one investigated may benefit from these arguments. Cyber warfare is only beginning to emerge within international politics, therefore we must first begin to understand it in order to hope to prevent it.

### *Understanding Cyber Attacks in International Law*

Given new technological capabilities primarily endowed onto states, it is likely that the nature of warfare will be altered in ways that were unimaginable less than a century prior. Questions are now emerging such as where does the use of certain technologies fall within the just war tradition, and does the use of these technologies violate customs in international law (such as the use of unmanned weaponry, *jus ad bello*, *jus ad bellum* conventions, etc)? Due to conflicting views and ambiguities, these issues continue to surface in discussions on the application of international law and governance. By applying insight from state deliberation, a concrete understanding of how states conduct cyber warfare can be achieved. Furthermore, the framework applied most commonly within the literature incorporates principles of international law including domestic municipal law as well as international documents, customs, and norms. Variables such as territorial state sovereignty, what constitutes the use of physical force, the right to self-defence, and the principle of proportionality can also be applied to cyber-attacks using the laws of war and domestic policy as they currently exist.

Up until now, academia has primarily engaged in educated speculation when understanding how cyber-attacks fit into *lex-ferenda* or 'future law' (the law as it should or ought to be) and *lex-lata* (the law as it is). This analysis focuses on *lex ferenda* by examining government policies and legislation, as well as international practice, to investigate how these cases should be

regulated in the future. This exercise is done in an attempt to relate basic fundamental principles to cases of cyber warfare which may not have any formal legal proceedings in the international or domestic courts. Principles are extracted from case law in already existing international and domestic legal cases, treaties, research documents, official domestic policies, and agreed upon customs that govern state behaviour within the international community.

Guided by *lex lata* analysis, the March 2013 Tallinn Manual on the International Law Applicable to Cyber Warfare provides a comprehensive review on the laws of war and how they are currently applied to cyber-attacks and cyber warfare. The report was produced in partnership between NATO and Cambridge University scholars (Schmitt 2013). A commissioned group of legal experts examined the laws of war as they currently apply to cyber-attacks and found that,

The Rules set forth in the Tallinn Manual accordingly reflect consensus among the Experts as to the applicable *lex lata*, that is, the law currently governing cyber conflict. It does not set forth *lex ferenda*, best practice, or preferred policy (Schmitt 2013, 5).

Building on some of the recent breakthroughs in the Tallinn Manual as well as within the international community, this paper explores the laws as they should be (*lex ferenda*), using the Stuxnet case within the broader context of a normative argument. Information is drawn from the Tallinn Manual as well as other sources to provide additional context pertaining to the ongoing development of customs and regulations within the areas of international cyber security and warfare.

Both academics and practitioners alike are adopting normative approaches to contribute to the theoretical application of cyber-attacks within international law (Dinnis 2012). Others disagree however, arguing that cyber warfare does not pose a real threat within the international community

and state there is no need to either re-interpret the law or to issue new laws (Rid 2012). While these authors contend that the threat does not hold any real significance, there is strong evidence that emerging state-backed threats and sophisticated software are being used as weapons of warfare, specifically with respect to cyber-attacks on infrastructure as well virtual espionage (Corbett 2006).

According to Rid (2012), cyber warfare does not pose as high a threat when compared to the media hype and attention some journalists and academics give to the phenomenon. Rid (2012) acknowledges that Stuxnet is likely to be a US backed, highly sophisticated cyber weapon.<sup>20</sup> He notes however that the use of cyber warfare in terms of international convention is not the same for powerful states such as Russia and China. While both of these states have strategic defence systems in place, countries such as Russia and China do not pose a real threat in terms of offensive capabilities. Rid (2012) believes that non-democracies are more heavily concerned with the retention of domestic political power rather than initiating any cyber-attacks of their own, and therefore are less likely to be motivated to launch a cyber-attack in the near future.

These interpretations however stand in stark contrast to both classical and neorealist balance of power theory, as states often have a vested interest in increasing their power to maintain domestic security in an international anarchic system. Not surprisingly, this is exactly what is found when closely examining United States (US) domestic policy.

According to US Secretary of Defense Leon Panetta, “a cyber-attack perpetrated by nation-states or violent extremists groups could be as destructive as the terrorist attack on 9/11. Such a destructive cyber terrorist attack could virtually

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<sup>20</sup> For a further discussion on technical evidence explaining how Stuxnet may have been a US state-backed attack, see Chapter 8: Olympic Games, in, David Sanger, 2012. *Confront and conceal: Obama's secret wars and surprising use of American power*. New York: Random House.

paralyse the nation” (United States Department of Defense 2012).

In a July 2011 report issued by the US Department of Defense (DoD) an early US defense strategy for operating in cyberspace is charted. This DoD report acknowledges the growing development of cyberspace and its role in both the private sector as well as state controlled security. It goes on to include five main strategic initiatives of dealing with military operations in cyberspace:

- Treating cyberspace as an operational domain for the training and organization of strategic initiatives
- A mandate to employ new defense operating concepts to protect DoD networks and systems
- Planning to initiate private-public partnerships to strengthen intelligence as well as research and development on cyberspace and its involvement in defense
- Aims to foster international cooperation on issues relating to defense and cyberspace
- A plan to leverage national ingenuity in a technological workforce for research in technological Innovation

(United States Department of Defense 2011)

The White House has also produced official policy regarding national cyber security. In a May 2011 report entitled, International Strategy for Cyberspace: Prosperity, Security, and Openness in a Networked World, the Obama administration outlined a plan stipulating broad approaches in dealing with the Internet in terms of international security and domestic defense strategy. In this report, US military strategies presented discuss three main objectives:

- A plan to increase the security of military networks and technology
- A strategy to build and enhance alliances to confront cyber threats

- A plan aimed at expanding cooperation with allies to increase collective security

(The White House 2011).

These policies outlined in May and July 2011 by both the White House and the United States Department of Defense remain internally coherent and suggest that the United States has adopted policies to increase domestic cyber security in both heightened technological capabilities and military operations. These domestic policies have international implications when taking into consideration US foreign policy on cyber security and cyber warfare. For instance, if the United States believes that cyber-attacks are considered armed attacks under Chapter VII, Article 51 in the Charter of the United Nations, then it reserves the right to individual self-defence through conventional warfare.<sup>21</sup> As Chapter VII, Article 51 of the UN Charter (1945) states:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

The international customs and laws applicable in response to an armed attack are fairly clear. Two questions however

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<sup>21</sup>Note that this is dependent on the Principle of Proportionality within international humanitarian law (discussed below) which in general refers to the balance between the restrictions on the corrective measure used and the severity of the violated act.

remain ambiguous; what constitutes a cyber-attack, and at what point is a cyber-attack considered an armed attack as outlined by the UN Charter?

In her book, *Cyber Warfare and the Laws of War*, Heather Dinnis (2012, 75) discusses the issue of cyber-attacks with respect to Article 51, stating that, “it is difficult to identify the point at which a computer network attack will rise to the level of an 'armed attack', the threshold that triggers a state's right to self-defence”. This is an important point in the debate of whether or not a cyber-attack is considered an act of war. For instance, traditional international law focuses on the amount of damage incurred to physical property, fatality, injury, and level of overall destruction. While this interpretation of an armed attack under international law is regarded as convention (Robertson 2002, 122-145), cyber-attacks are narrowly targeted so direct physical harm or injury is not likely. As a result, some argue that it would be problematic to confine an armed attack to this narrow a definition (Lin et al. 2012). The problem becomes even more complex when taking into consideration pre-emptive strikes in response to the threat of a conventional attack following a cyber-attack. Determining the origins of the cyber-attack take extensive time and therefore can alter strategic approaches and interpretations of the laws of war.

#### *The Stuxnet Case*

Stuxnet was first analyzed in July 2010 by a Belarus-based security firm that came into contact with the virus from computers belonging to an Iranian client (Denning 2012). The attack had originally surfaced a month prior in June when it targeted two Iranian nuclear facilities; Natanz (a nuclear fuel enrichment facility), and Bushehr (a light water reactor facility) (Porteous 2010). The Stuxnet malware damaged roughly 1,000 of the 9,000 IR-1 centrifuges at Natanz and is believed to have been originally planted into Iran and

propagated throughout the region simply via a USB stick (Porteous 2010). While there are alternative hypotheses as to how the worm infected the nuclear facilities' computer network, this seems to be the most plausible explanation (Nachenberg 2012). The following acknowledges the practical application of the laws of war and international law as it is (*de lege lata*) while focusing on building arguments regarding the laws as they should be (*de lege ferenda*).

Stuxnet's attack on the Iranian nuclear facilities demonstrates the technical capacity and physical impact software can have on critical physical infrastructure. According to Symantec systems security expert Carey Nachenberg, Stuxnet had to complete four main objectives to be considered a successful mission. The first objective of the Stuxnet malware was to propagate on its own through the Iranian nuclear facilities' network. There are three scenarios that speculate how this objective was completed. The most plausible argues that a USB stick or other removable media technology was used to introduce the virus onto the network. This could have been done by simply placing the USB key within the vicinity of the plant, whereby a worker finds the key and uses the drive on a network computer. This hypothesis allows the malicious software to breach hardware and software systems which do not have access to the Internet, while at the same time getting past human guards at the facilities. These isolated systems are often noted to be "air-gapped" and therefore any foreign-launched Internet-based attack is believed to be unlikely (Nachenberg 2012).

The second hypothesis suggests that the software was placed onto a network printer and moved through the facilities' intra-network via this method (Nachenberg 2012). In this scenario, the malware targets a hole in the principal computer connected to the network (via the printer) and uses a day-zero attack to exploit a previously unknown vulnerability. At this point the worm attaches itself to the Microsoft Windows Remote Procedure Call (RPC). RPC's allow all computers on

the network to communicate amongst themselves, so it would have been easy for the worm to propagate itself from computer to computer via holes within the RPCs (Denning 2012).

The third alternative as to how the malware was spread hypothesizes that an insider working at the facility brought the malicious software into the building past security and copied it onto the network. While the main process as to how the worm spread (via the RPCs and zero-day vulnerabilities) remains the same, this alternative speculates that an inside worker was physically present to oversee and man the operation of the project (Symantec 2010). Either by means of a USB key, an inside worker, or a network printer – or a combination of the three – the Stuxnet malware had to find a way onto the network other than using the Internet. This is important because it establishes strong evidence for the existence of a physical breach of territorial sovereignty, and one that is more tangible than simply altering binary code processed over the Internet.

Once onto the network, Stuxnet is not complete in terms of carrying out its targeted objective. According to Ralph Langer, the Stuxnet malware was built to target a very specific type of industrial software developed by Siemens. This software, written with a combination of C, C++ and Step 7 programming code, was designed to target and corrupt a Siemens Simatic S7-300 Programmable Logic Controller (PLC) (Nachenberg 2012). Essentially this PLC – which resembles a little grey box similar to a PC tower – is responsible for controlling the inner workings of industrial mechanics, in this case nuclear centrifuges (McMilan 2010). By attacking the PLC, Stuxnet was able to change the settings or telemetry of the centrifuges. This attack specifically set out to corrupt data files responsible for controlling the temperature and speed of the centrifuges written in Step 7 programming code developed by Siemens. Stuxnet was able to locate the PLC controlling the centrifuges and proceeded to raise the spin rate from 800-1200 Hz to 1410 Hz. This increase occurred periodically for intervals of fifteen



minutes (Nachenberg 2012). Once this was complete, the program went dormant for twenty-seven days and performed another alternation within the telemetry. At this point, Stuxnet slowed the centrifuges to a rate of 2Hz for fifty minutes. This was all done while projecting regular spin rates on the system software in an attempt to decrease the chances of detection by Iranian workers at the facilities.

Due to the sporadic nature of the attack and the sophistication of the malware, Stuxnet was able to go undetected for a long period of time, allowing a substantial disruption of Iran's nuclear facilities. This disruption arguably set the Iranian nuclear program back by roughly two years in terms of research and development. This form of attack is considered a distributed denial of service attack (DDoS) as it is developed for the intent of disabling some type of service, infrastructure, or mechanical process. These types of attacks targeting industrial control systems (ICS) can inflict real damage and have the potential to cause serious injury, fatality, and high levels of destruction (Denning 2012). As a result of these realities, research in cyber warfare and international law remains an important area of focus needed to develop the rules of engagement for new forms of military and strategic operations.

While the damage inflicted in this case did not cause any direct physical harm to people (or at least if it did it went unreported), it does demonstrate that if secured systems such as industrial facilities' PLCs could be successful targets, systems believed to be secure may be more vulnerable than originally thought. This includes industrial facilities in North America as well, responsible for ensuring clean water, energy, and food production.

What does this information mean politically in terms of how it is situated within the framework and practice of international law? How cyber-attacks are treated in international law have real implications for how states outwardly behave and respond to these occurrences. According

to reports, former Iranian President Mahmoud Ahmadinejad examined the Stuxnet case and accused both Israel and Western states of being responsible for the attacks on Iranian nuclear facilities (Reuters 2010).

Questions for international legal experts continue to grow. For example, is Stuxnet a pre-emptive response to a dangerous nuclear program and therefore an action of self-defence by the party which led the attack? Or rather, was this attack an unjustified armed attack prohibited under international law under Article 2(4) in the UN Charter (Farwell and Rohozinski 2011)?

According to Dinnis (2012, 82), “it would appear that while the Stuxnet worm would undoubtedly amount to a use of force, the scale and effects of the attack do not appear to have sufficient gravity to amount to an armed attack”. Taking the opposite interpretation, Walter Sharp (1999) contends that when an aggressor state breaches another state’s sovereignty to break into a system containing critical information relating to national security, then the victim state has the right to respond using force. This is due to Sharp’s interpretation that even though no physical harm or fatalities occurred, based on the use of potential harm, this action should still constitute an armed attack under international humanitarian law.

The main ambiguities within the current literature focus on this central issue, and question whether or not cyber-attacks and weapons should be confined to a separate status outside the current laws of war. While Sharp (1999) suggests that these attacks are bound to the conventional laws of war (as they are considered armed given their physical use of force), the application to Stuxnet using this criteria is controversial nonetheless. To resolve these remaining ambiguities, the following turns its attention to the Stuxnet case under international law.

### *Stuxnet Under International Law: Defining an Armed Attack*

Using the underlying principles of the Stuxnet case, an argument is made given current internationally accepted norms and doctrines, even with no international and domestic legal cases that address the laws of war with respect to state backed or state-led cyber warfare. These principles are derived using various definitions of armed attacks, as well as from closely examining how armed attacks have been interpreted using the UN Charter. Due to the fact that there exists no explicit definition of an armed attack in the UN Charter, defining armed attacks can be achieved using interpretations of legal precedents and currently accepted norms under international law.

According to the Report of the Committee on Foreign Relations, an armed attack in Article 5 of the NATO Treaty is defined as being self-evident. As it states,

Experience has shown that armed attack is ordinarily self-evident; there is rarely, if ever, any doubt as to whether it has occurred or by whom it was launched. In this connexion, it should be pointed out the words “armed attack” clearly do not mean an incident created by irresponsible groups or individuals, but rather an attack by one state upon another (United States Senate 1949).

The latter part of that statement is highly important as the actions of an armed attack must be committed by a state and must be an attack onto another state. This sentiment is congruent with Article 51 of the UN Charter. While many codified documents intentionally leave the phrase “armed attack” vague and open for interpretation, according to Dinnis (2012, 81), “the threshold for an armed attack conducted by a computer network attack must be set in line with current international law regulating the right to self-defence. A state is therefore permitted to respond in self-defence when it is the

victim of a computer network attack causing damage to property or persons of a sufficient scale and effect to elevate it beyond the equivalent of a frontier incident” (emphasis added).

Through providing a suitable definition of what constitutes an armed attack using computer networks, Dinnis (2012) does not interpret the 2010 Stuxnet case as meeting her criteria, however this paper argues otherwise. Furthermore, she notes that a sufficient amount of damage to property may warrant an armed attack. This paper therefore elaborates on the physical use of force and how this can be interpreted using the laws of war for cyber-attacks.

Altering slightly from Dinnis' (2012) criteria, the current argument uses the definition of an armed attack as having occurred if the following principles are clearly applicable to the case under investigation. Principles of international law that must be present to be considered an armed attack include: 1) a violation of territorial state sovereignty; 2) a substantial and clear physical use of force (causing damage to either property or persons); 3) a state's right to self-defence given a violation of the first two principles; and 4) the principle of proportionality under international humanitarian law. The following uses a series of conventions, norms, and international doctrines to present an argument that Stuxnet should normatively be considered an armed attack based on the aforementioned criteria.

#### *Violation of Territorial Sovereignty*

The first of these core principles for testing if Stuxnet did indeed constitute an armed attack is territorial state sovereignty. The principle of territorial sovereignty under international law is one of the critical elements in determining a normative argument as to whether or not the Stuxnet case is an example of an armed attack under international law. The Charter of the United Nations specifically addresses this principle of international law under Article 2 as well as Article

51. Specifically, Article 2(1) states that, “The Organization is based on the principle of the sovereign equality of all its Members” (UN Charter 1945). This implies that each state that is a member of the United Nations General Assembly has sovereign equality before international law.

However, the concept of territorial sovereignty as a governing principle in international law predates the UN Charter, as it is one of the fundamental conventions upon which the international system is built. One of the founding decisions that codified this custom is the Island of Palmas case (1928). This case involved a dispute between the Netherlands and the United States regarding the legal status of the Island of Palmas (Miangas). The case was taken to the Permanent Court of Arbitration in The Hague where then President Max Huber of the Permanent Court of International Justice (PCIJ) ruled that,

Territorial sovereignty...involves the exclusive right to display the activities of a State. This right has as corollary a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and war, together with the rights which each State may claim for its nationals in foreign territory. Without manifesting its territorial sovereignty in a manner corresponding to circumstances, the State cannot fulfill this duty. Territorial sovereignty cannot limit itself to its negative side, i.e. to excluding the activities of other States; for it serves to divide between the nations the space upon which human activities are employed, in order to assure them at all points the minimum of protection of which international law is the guardian (Island of Palmas Case, RIAA II 829, at 839 (1928)).

It was this precedent which codified the custom that is recognized under international law as territorial sovereignty. This notion is defined with respect to the existence of

politically observable geographical territorial boundaries that separate the confines of the state using marked and internationally recognized borderlines. Traditionally this incorporates the use of international law for the governing of land, sea, and air. The additional fronts of space and cyberspace are beginning to incorporate similar principles that are traditionally used for governing the first three dimensions. These two emerging fields have often been referred to as the fourth (space) and fifth (cyberspace) dimensions of warfare. However, while the principles of territorial sovereignty have been applied traditionally to land air and sea, the same concepts can be applicable to the governing structure of both space and cyberspace.

Taking the case of Stuxnet, it is possible to observe how the principles of territorial sovereignty could have been violated given the history of legal and customary precedents in international law. The main breach of sovereignty occurs when a state is responsible for issuing a violation of territory (as defined by the five dimensions above) without the consent of the receiving state. As mentioned above, the 2010 Stuxnet attack was a distributed denial of service attack (DDoS). The issue becomes whether or not the unwelcoming entry of software code into another country is considered a breach of the international principle of territorial sovereignty, assuming evidence can link the code to a state.

There is a commonly held notion that the Internet and cyberspace itself is not bound to any territory but rather occurs in an abstract network throughout the globe, and is therefore not subject to territorial sovereignty. This misconception should immediately be addressed. First, if any tangible or physical effects occur in a receiving country, then this original proposition should not apply as there has been a physical demarcation of the use of force (see argument below) even if it had originated from an abstract network. Second, in the case of Stuxnet this argument is irrelevant, as the software that was launched onto the Iranian nuclear facilities breached an air-

gapped network, and therefore must not have originated through the Internet but through the use of physical hardware.

This logic has been confirmed in the Kunarac et al. case, when the decision of the Appeals Chamber of the International Tribunal for the Former Yugoslavia stated that,

There is no necessary correlation between the area where the actual fighting is taking place and the geographical reach of the laws of war...a violation of the laws or customs of war may therefore occur at a time when and in a place where no fighting is actually taking place. As indicated by the Trial Chamber, the requirement that the acts of the accused must be closely related to the armed conflict would not be negated if the crimes were temporally and geographically remote from the actual fighting.”<sup>22</sup>

Based on this reasoning the attacking state and victim state are equally guided by the laws of war regardless of the attack’s place of origin. Therefore in the Stuxnet case, evidence suggests that even if Stuxnet had not been launched using a physical object (such as a USB key), territorially if the virus meets all other criteria (as described below) it would still be subject to the laws of war and international law as an armed attack. Hypothetically, if Stuxnet was a state-backed pre-emptive strike not sanctioned by the Security Council, this would be an indicator that the actions are likely a violation of the UN Charter and the laws of war.

In the International Court of Justice case, Concerning Oil Platforms (Islamic Republic of Iran v. United States of America) (2003), the ICJ affirmed the principle that anything short of an armed attack is not grounds for the receiving state to launch a reciprocal attack under the right of self-defence

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<sup>22</sup>Prosecutor v. Dragoljub Kunarac et al., Case No. IT-96-. 23-T & IT-96-23/1-T, Decision on Prosecution's Motion for Exclusion of Evidence and Limitation of the Testimony. 3 July 2000.

within the international laws of war. This ruling is in line with the precedent set out by *The Republic of Nicaragua v. The United States of America*. In this case the ICJ ruled that the United States was in contravention of their obligation under customary international law to refrain from violating the sovereignty of another state. The main principle taken from this case is that a state should not use unsanctioned force against another state unless it has first been attacked or threatened. While this is usually framed in the context of conventional warfare and conventional military attacks, when applied to something as complex as the 2010 Stuxnet case, these basic principles provide a strong conceptual framework for placing concrete facts into the abstract reasoning of the laws of war.

Heather Dinnis (2012) argues that the laws of armed conflict will most likely apply to state-backed or state-launched cyber-attacks. She qualifies this however by stating that these laws or customs will apply only when there is a physical manifestation of the attack which could include physical property damage, or even death or injury to individuals. Dinnis (2012, 137) also states that, “it may not be necessary for the level of damage or injury caused to rise to the level of an armed attack,” going on to note that any attack must meet conditions serious enough to elevate it over the *de minimis* level in current international state practice.

As mentioned in the case overview there is strong evidence that Stuxnet was carried out by a physical element due to the fact that the Iranian nuclear facilities at Natanz and Bushehr had an air-gapped network. Therefore it seems logical that at least on some level there had to have been a violation of Iranian state sovereignty and territorial jurisdiction as the malware propagated itself into the country and the nuclear facilities. Also physical infrastructure was altered, and this requires some level of entry into Iranian territory. Furthermore, as the details of the case study demonstrate, the Stuxnet malware was capable of physically altering the telemetry of the



programmable logic controller (PLC) responsible for controlling the spin rates and conditions of the nuclear centrifuges. Due to these facts, there exists sufficient indication for a physical use of force element. To fully investigate the details as to whether or not Stuxnet is normatively capable of being considered an armed attack under international law, the following turns attention to another specific (and perhaps the most important) core principle of armed attacks; a physical use of force.

#### *A Physical Use of Force*

Using evidence from the case study, the following examines the laws of war and how they relate to the physical use of force in international humanitarian law. As mentioned in the previous section, Stuxnet is highly likely to be a state-backed attack. Based on current customs and case precedents in international law, any state-backed or state-led attack is a violation of territorial sovereignty if the attack uses a certain level of serious physical force or breaches state sovereignty without being first approved by the UN Security Council. As it states in Article 2(4) of the Charter, “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations” (UN Charter 1945).

A question still remains however regarding the severity of the force being inflicted onto the state in the attack. In conventional warfare, this breach of international custom and law usually occurs in the form of military action, either by the use of physical weapons such as gunfire, missiles or some form of highly destructive action. This type of force usually results in fatalities, although as stated above it does not have to result in casualties to constitute an armed attack and warfare. Therefore, does the level of force used in the Stuxnet attack meet the criteria of an armed attack?

To review this we must first consider the physical aspects of the case. The PLC is responsible for controlling the inner workings of industrial mechanics for the nuclear centrifuges of Natanz and Busehr. By attacking the PLC Stuxnet altered the telemetry of the centrifuges, corrupting data files responsible for controlling the temperature and speed of the centrifuges. These types of attacks targeting industrial control systems (ICS) can inflict real damage and have the potential to cause serious injury, fatality, and high levels of destruction (Dinnis 2012).

The fact that there were no fatalities in this case does not exclude the implications of an armed attack under the Charter of the United Nations as well. Chapter VII entitled, 'Action with Respect to Threats to the Peace, Breaches of Peace and Acts of Aggression' does not actually define these terms, other than placing the context in terms of the international community. As Article 39 of Chapter VII states,

The Security Council shall determine the existence of any threat to peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security (UN Charter 1945).

The question of legitimacy and the level of physical force required in the resolution rests with the collective decision of the UN Security Council, and under custom, are determined on a case-by-case basis. This answer however is not satisfactory when determining whether or not the Stuxnet case meets this threshold. Therefore, it is possible to speculate based on the decisions of previous cases by analyzing other thresholds for a physical force element.

United Nations Security Council Resolution 216 and 217 adopted on November 12, 1965 and November 20, 1965 respectively, discuss the matter of apartheid and injustice in

South Africa. These decisions called upon all states to condemn the declaration of independence made by a racist minority in Rhodesia, South Africa. The UN Security Council voted 10 to none with France abstaining. The additional resolution 217 determined that,

The situation resulting from the proclamation of independence by the illegal authorities in Southern Rhodesia is extremely grave, that the Government of the United Kingdom of Great Britain and Northern Ireland should put an end to it and that its continuance in time constitutes a threat to international peace and security(emphasis added)<sup>23</sup>

The important principle that should be taken away from this decision is that while the actions conducted by the illegal authorities in Southern Rhodesia were serious, the decision of the UN Security Council was made by the significant threat that this unrecognized state placed on the international community. This is congruent with Article 2(4) of the UN Charter as mentioned above. In line with this reasoning, it seems to follow that based on an interpretation of the cases, resolution, doctrines and customs listed above, a normative argument can be strongly argued that many of the actions Stuxnet produced constituted a serious threat to international peace and security of the international community.

Furthermore, this threat was taken to a higher level by actually causing physical damage to property within another state, in a way that posed an exterior threat by masking the damage. While there was no physical harm that directly resulted in loss of life, the actions of the Stuxnet malware did not work entirely as it was programmed to – recall in this case the virus propagated itself onto computers within the region when it was supposed to be an isolated attack. It can therefore

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<sup>23</sup>United Nations Security Council Resolutions 216/217 (1965) 12-20 November 1965.

be interpreted that a real physical threat that the malware could have malfunctioned in an alternative way – hypothetically causing more physical damage to the nuclear facilities themselves (a nuclear meltdown, potential for loss of life, etc)-exists. This potential threat to loss of life as well as unimaginable destruction is argued here as a warranted threat, and based on this criterion; the Stuxnet malware should be considered an armed attack. Furthermore, due to the reasons listed above, there are reasonable grounds to conclude that the Stuxnet malware specifically constituted 'a threat to international peace and security' as outlined by the UN Security Council.

It is important to note that while the information above explains the process states must take once a threat has been determined, it does not provide sufficient amounts of information in order to determine the nature of what constitutes a threat or attack within international humanitarian law. The recent Tallinn Manual on the International Law Applicable to Cyber Warfare acknowledges that it is possible for cyber-attacks to be considered armed attacks. It is important to note however that it does not provide critical detail regarding under what circumstances this threshold or criteria is met. Regarding the use of force in Section 2: Self Defence, the Tallinn Manual states that, “A State that is the target of a cyber-operation that rises to the level of an armed attack may exercise its inherent right of self-defence. Whether a cyber-operation constitutes an armed attack depends on its scale and effects” (Schmitt 2013, 54).

The following section discusses this in more detail with respect to the applicability of self-defence in cyber warfare and more specifically with respect to the Stuxnet case. Given this definition however it is plain to see that the Tallinn Manual has purposefully remained vague regarding to what extent the 'scale and effects' constitute an armed attack. However, this statement does provide strong support for the argument that cyber operations could in international legal theory constitute

armed attacks. Using evidence described above, it is reasonable to conclude that the Stuxnet attack meets the physical or kinetic criteria in both this paper's definition as well as others mentioned above. Given the destructive physical force used in the attack and the physical damage to property that ensued regarding the nature of the attack, it can be stated that in explicit *lex ferenda* analysis, Stuxnet meets the criteria for an armed attack within the physical force principle.

Debate continues around this case. According to the Tallinn Manual, the group of experts remained divided regarding the central issue this paper addresses. It states that, "No international cyber incidents have, as of 2012, been unambiguously and publicly characterized by the international community as reaching the threshold of an armed attack." After refuting the 2007 Estonia case, the manual goes on to state that, "a closer case is the 2010 Stuxnet operations. In light of the damage they caused to Iranian centrifuges, some members of the International Group of Experts were of the view that the operations have reached the armed attack threshold" (Schmitt 2013, 57-58).

The report states that the reason as to why this is the case is that there is currently a divide in opinion regarding whether or not enough evidence exists to suggest whether or not Stuxnet was state-backed or state-developed. This remains a critical area of concern, however evidence provided by a series of international legal scholars and reports showcase sufficient evidence that at least some state involvement occurred with respect to the development of this malware (Sanger 2012). Specifically identifying which state(s) was responsible however may be more difficult. Given these arguments the following discusses whether or not Iran has a case for self-defence in response to the Stuxnet attack. Part of the arguments will assume that Stuxnet is state-backed for abstract reasoning purposes, however as previously mentioned no evidence currently exists that meets UN Security Council thresholds for state involvement.

### *The Right to Self-Defence*

Given the evidence and arguments presented in the former two principles it is possible to determine in the normative sense whether or not Iran has a case for any right to self-defence under the Charter of the United Nations. To examine this further it would be logical to begin with the UN Charter itself. According to US domestic policy outlined by both the White House and the United States Department of Defence (outlined above) the United States operates under official policy that cyber-attacks are considered armed attacks under Chapter VII, Article 51 in the Charter of the United Nations. Using this logic the United States reserves the right to individual self-defence through conventional warfare as outlined in Article 51, Chapter VII, 'Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression', discussed earlier.

The main issue rests on whether or not Iran is able to gather sufficient evidence (that holds to the higher standards under international law) to present a concrete case outlining specifically which state(s) is/are believed to be responsible for the attack. Furthermore, under international law, this evidence would be required to grant approval by the UN Security Council to be considered just under the current laws of war. Nevertheless, based on the evidence presented here, it is theoretically plausible that Iran has some merit to self-defence that would not entirely be prohibited under the current customs of international law. That being said, it would also be unreasonable for a country to escalate the current level of warfare to something greater than the received attack. Therefore, the principle of proportionality should equally be applicable to cyber-attacks as it is to traditional forms of warfare.

### *Principle of Proportionality*

The principle of proportionality is a legal concept that is not restricted to municipal law but in addition to the domestic courts is also applicable to international humanitarian law. Within the tradition of international law, this basic principle stresses that the punishment or reciprocal action that a state responds with for the purposes of defence, is fitting or approximately equivalent to the nature or severity of the initial prohibited attack. Put simply, under this principle, a balance must exist between corrective actions and the intensity of the initial attack (Shamash 2006). This view is endorsed by the Tallinn Manual's Rule 9 'On Countermeasures', which states, "a State injured by an internationally wrongful act may resort to proportionate countermeasures, including cyber countermeasures, against the responsible State" (Schmitt 2013, 36).

While not applied to Stuxnet in the manual itself, the following builds a case as to how this principle could be applicable to the 2010 Stuxnet malware attack. The first argument relies on a long tradition of this principle. If cyber-attacks can be interpreted as applying to the same rules as conventional warfare under international humanitarian law, then the established precedent regarding the principle of proportionality is in theory, equally applicable to the Stuxnet case.

The principle of proportionality has been codified in various documents on international humanitarian law and has been interpreted as having the spirit of the principle in others (Schmitt 2013). One of these examples is, again, Article 51 of the UN Charter (1945) which states,

Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council

under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

It could be interpreted that because the Security Council is granted the authority to decide whether or not a given response is permissible, the spirit or intent of the Article enacts the principle of proportionality indirectly through its use in practice.

In concert with the UN Charter, the Additional Protocol I, to the Geneva Conventions (1977), outlines the intent of international humanitarian law as it applies to the principle of proportionality as well as to the invention of new weapons and their respective place within the laws of war. According to Article 36 of Additional Protocol I,

In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party (UN Charter 1945).

It would therefore be possible to interpret that not only do the laws of war apply to the traditional or conventional applications of military weaponry, but emerging weapons – even those entirely based on computer software – could potentially constitute weapons of war (Dinnis 2012). Furthermore, it would logically follow that if unconventional weapons are viewed as the same under international humanitarian law as conventional weapons, then they are equally bound to the same principles as such weapons and are subsequently subject to the principle of proportionality.

What does this mean for Iran if they were to respond in some way to the Stuxnet attack (or any other non-conventional attack) using a similar means of force? Similar to the



arguments presented in the previous section, Iran would have the right to respond using the customs of international law and present their case to the UN Security Council.

Nonetheless in terms of this paper and the normative analysis it presents, it would be reasonable to expect Iran to have a strong case for some form of compensation given the current customs within international law. It should be noted here that this argument does not imply that Iran should launch a proportional attack on the aggressor state given the principle of proportionality, if such a state or states could be identified. What it does suggest however is that based on this principle Iran does reserve that right to self-defence even if it would in practice be an unreasonable response based on normative international custom. More reasonably, perhaps, Iran is entitled to some form of compensation or reparations given the damage to property incurred. This argument is contingent on the circumstance that Iran would have a sufficient amount of evidence to demonstrate who in fact was behind the attack (held to the standards of the UN Security Council).

### *Conclusion*

In closing, cyber-attacks can be interpreted as armed attacks under international law. This paper suggests that based on a violation of state sovereignty and a physical use of force, the 2010 Stuxnet attack could be interpreted as an armed attack as defined under current international law in *lex ferenda* analysis, assuming evidence of state involvement. As such, Iran may have a case for self-defence if evidence can be presented that meets the criteria of the UN Security Council. If these criteria were met, the victim state, in this case Iran, would have to respond in accordance with the principle of proportionality. A set of reasonable responses could include economic reparations for incurred property damage on the facility as well as a determined breach of territorial sovereignty. This response is

hypothetical, but it does demonstrate how future cases could or should be treated in international law.

This research is important because it aims to provide new interpretations, insight and contributions on a central question that has not to date been fully answered within the literature. Questions surrounding at what point cyber-attacks are considered armed attacks and therefore weapons of conventional warfare remain relevant and important. The use of the UN Charter, while often criticized for not being adhered to, is also equally as relevant to this issue as it is often employed as a political tool to sanction a military campaign. Furthermore, the central issue as to whether or not cyber-attacks and cyber weapons employ force as defined within the UN Charter and international law is one of the most interesting and thought provoking ambiguities within the current literature.

While more research is needed to better understand this question, the body of current literature and resources such as international case law provide the possibility for new significant contributions toward this problem. It is the aim of this research project to offer some contributions that will work towards filling the existing gap within the current academic literature. Understanding in what ways the Stuxnet case can be interpreted using an international legal framework is important for various reasons – both practical and academic. First, it is important in order to establish a way to frame these problems in an attempt to better understand and predict issues and cases on international cyber warfare. Second, from an academic perspective, establishing a theoretical framework for conceptualizing issues in the emerging sub-field of cyber warfare may offer some interesting contributions relating to the relatively early and underdeveloped academic literature of this phenomenon.

These new theoretical backgrounds will most likely provide a foundation for later theorists to build upon. Furthermore, understanding cyber-attacks has practical significance for

practitioners in government and military affairs. The implications are serious when determining whether or not cyber-attacks are considered conventional armed attacks. If a cyber-attack is deemed to be an armed attack under the UN Charter, then the receiving state can technically respond using conventional warfare. If it is not, the receiving state is bound to a different set of possible responses. In short, the answer to this question shapes state behaviour within the international community.

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