Dual Track Compliance: Addressing Russian Violations of the Intermediate-Range Nuclear Forces Treaty

William Caplan

The Intermediate-Range Nuclear Forces (INF) Treaty, signed in 1987, prohibits the deployment and testing of ground-based nuclear and conventional missiles and their associated launches with maximum ranges between 500 and 5,500 kilometers by the United States and Russia. However, the United States has determined that a new Russian cruise missile violates the limits expressed in the treaty. To bring Russia back into compliance with the INF Treaty, the United States must undertake a combination of military punishments and diplomatic incentives to provide leverage in negotiations with the Russians. On the military side of the equation, the United States should invest in cruise missile detection and defeat capabilities, announce that it will begin research on a follow-on to the Pershing II missile with intermediate ranges, and deploy a series of non-INF Treaty violating conventional and nuclear strike capabilities to Europe. Diplomatically, the United States should offer a five year extension of the Measure for the Further Reduction and Limitation of Strategic Offensive Arms (New START) and mutual transparency measures at Ballistic Missile Defense (BMD) sites in Europe should Russia come into compliance with the treaty. This will mimic the dual-track decision that was used to get Russia to agree to the INF Treaty in the 1980s. It is of the utmost importance to salvage the treaty to prevent a loss of US credibility with its European allies.

Operation Simoom: A Process of Post-Cold War Polish Intelligence Reform

Will Chim

A little known intelligence operation in 1990 provides an unprecedented lens into the process of intelligence reform of post-Soviet states, in this case specifically, Poland in 1989 and 1990. Though little is known about the US-Polish plan to rescue six CIA operatives in Saddam Hussein’s Iraq, the operation sheds light on the process by which democratizing Poland chose to rebuild its intelligence services after the Cold War and initiate intelligence cooperation with Western states. Many of Poland’s intelligence officers working with the United States on this operation were just years prior on the other side of the Iron Curtain working in concert with the KGB against the West. Operation Simoom represented an opportunity for both Poland and the United States to respond to and benefit from the shifting security environment in Europe. The operation allowed Poland to demonstrate both its adept tradecraft and commitment to post-Soviet reform, and allowed the United States to acquire vast amounts of
information on Soviet intelligence and reorient Polish intelligence’s allegiance from the Soviet Union to the West.

Time for a New Convention? Northern Triangle Asylum Seekers in the United States ..........31
Alexandra Carr

This article challenges the assertion that the UN Convention on Refugees continues to adequately provide protection to persecuted individuals through the case of those fleeing gang violence in the Northern Triangle of Central America. Specifically, individuals seeking asylum in the United States for the purpose of avoiding coercive recruitment into gangs have had difficulty in establishing their definitional membership of a persecuted group and demonstrating their home state’s unwillingness or inability to protect them against persecution. This article uses case study examples from Honduras, El Salvador, and Guatemala as positive examples of instances in which individuals met reasonable standards to qualify for asylum, but were denied based on the limitations of language in the UN Convention on Refugees and US case law.

Banking the Bomb: Improving the Engagement of Financial Institutions in Efforts to Counter Proliferation Financing .................................................................49
Darya Dolzikova

Since the nuclear attacks on Nagasaki and Hiroshima, the nature of the nuclear threat and the proliferation of nuclear and radiological (NR) technology and materials have morphed significantly. No longer limited to state-to-state proliferation of NR technology, equipment, and material, today’s NR proliferation networks are increasingly involving complex webs of licit and illicit state and non-state actors and dual-use goods. The discovery of the A.Q. Khan network in the early 2000s demonstrated the role that individuals can play in the global proliferation environment. Evidence that terrorist groups, including al-Qa’ida and the Islamic State of Iraq and the Levant (ISIL), have actively pursued NR capabilities has further highlighted the inadequacy of a proliferation regime designed to counter state-to-state proliferation and ill-adapted to the ongoing paradigm shift in NR proliferation. Authorities have rightly recognized the importance of disrupting the financial flows that support proliferation networks, but the approaches to countering proliferation financing (CPF) that have been articulated thus far have been largely ineffective in targeting the unique nature of the threat. This article outlines current CPF efforts and suggests approaches to addressing shortcomings in existing regimes, focusing specifically on the role that financial institutions (FIs) can play in improving CPF regimes. Financial institutions are key stakeholders in a strengthened counter-proliferation regime; by engaging more effectively with relevant
government and international actors, they can be effective frontline allies as well. This article proposes a series of guidelines for FIs and government actors to improve FI engagement in CPF efforts and to increase the utility of FI engagement to government and international CPF efforts.

Evaluating the US Drone Program in a Just War Context .................................................................64
Shannon Dick

Unmanned aerial vehicles, or what are more commonly referred to as drones, have become a key component of US counterterrorism policy. Under the Obama administration, armed drones were used to strike terrorist targets in a number of theaters, both within and outside of active combat zones. Officials described drone strikes as an ethical means to combat the terrorist threat, thereby employing aspects of Just War Theory to justify the use of force. Yet US policy surrounding such use, as established during the Obama administration, is riddled with uncertainties and the lack of clarity about key concepts used to justify the use of force via armed drones raises a number of questions about the extent to which the US drone program reflects key just war principles. Thus, increasing transparency and public understanding of the United States’ use of armed drones is essential for developing policies and practices on the use of armed drones that better aligns with Just War Theory.

Book Review: Intelligence Arabic by Julie C. Manning with Elisabeth Kendall ............................77
R. Morgan Byrne-Diakun
Dual Track Compliance: Addressing Russian Violations of the Intermediate-Range Nuclear Forces Treaty

William Caplan

The Intermediate-Range Nuclear Forces (INF) Treaty, signed in 1987, prohibits the deployment and testing of ground-based nuclear and conventional missiles and their associated launches with maximum ranges between 500 and 5,500 kilometers by the United States and Russia. However, the United States has determined that a new Russian cruise missile violates the limits expressed in the treaty. To bring Russia back into compliance with the INF Treaty, the United States must undertake a combination of military punishments and diplomatic incentives to provide leverage in negotiations with the Russians. On the military side of the equation, the United States should invest in cruise missile detection and defeat capabilities, announce that it will begin research on a follow-on to the Pershing II missile with intermediate ranges, and deploy a series of non-INF Treaty violating conventional and nuclear strike capabilities to Europe. Diplomatically, the United States should offer a five year extension of the Measure for the Further Reduction and Limitation of Strategic Offensive Arms (New START) and mutual transparency measures at Ballistic Missile Defense (BMD) sites in Europe should Russia come into compliance with the treaty. This will mimic the dual-track decision that was used to get Russia to agree to the INF Treaty in the 1980s. It is of the utmost importance to salvage the treaty to prevent a loss of US credibility with its European allies.

Background

In the late 1970s, the Soviet Union began deployment of the SS-20 Saber missile in its Eastern European territories. This missile had a maximum range of roughly 5,000 km and used a mobile launcher, which meant it could threaten a number of targets in North Atlantic Treaty Organization (NATO) countries of both military and political significance. The new missile replaced the older SS-4 and SS-5 systems and awakened fears in NATO countries that the Soviets’ state of the art missile put the United States at a disadvantage. In response, the United States replaced its medium-range Pershing I ballistic missiles with the more accurate, longer range Pershing II missile in addition to 464 ground-launched cruise missiles (GLCMs). This occurred in conjunction with negotiations aimed at imposing limits on both sides’ intermediate-range missiles, in a strategy that was termed the ‘dual-track decision.’ Though the Soviet Union

initially reacted negatively to the GLCM and Pershing II deployments, they eventually agreed to the ‘Zero Option’ proposal in which all intermediate-range ballistic and cruise missiles were banned.

The INF Treaty was signed on December 8, 1987 and entered into force June 1, 1988. The treaty resulted in the destruction of all ground-launched ballistic and cruise missiles and their launchers with ranges between 500 and 5,500 km fielded by the United States and the Soviet Union. The treaty also banned the testing of these weapons; however, as the treaty did not cover air- or sea-based weapons within these ranges or their testing, it remains possible to test these devices on land so long as it is distinguishable from ground-based launchers. It is also important to note the treaty did not ban missiles with ranges beyond those designated by the limits, even though they could theoretically fly to targets below their maximum range, or missile defense interceptors with ranges applicable to treaty limits.²

Recent Violations

In a 2014 State Department report, titled “Adherence to and Compliance with Arms Control, Nonproliferation and Disarmament Agreements and Commitments” (henceforth referred to as the Compliance Report), the United States indicated that Russia was in violation of its obligations to not “possess, produce or flight-test a ground-launched cruise missile” within INF Treaty-prohibited ranges.³ These accusations continued in the two subsequent Compliance Reports.⁴ Tests of this new cruise missile began as early as 2008, yet the noncompliance statement could not be established until sufficient evidence had been gathered, which occurred at some point leading up to the 2014 Compliance Report. The missile was tested at the Kapustin Yar site at ranges officials assessed as between 500 km and 5,500 km—ranges banned under the INF Treaty.⁵ US intelligence declared with high confidence that the system exists and is in violation of the treaty, a determination made using US national technical means of verification.⁶ US diplomats raised the issue with their Russian counterparts for the first time in 2013, which was met with denials after the United States refused to present enough data to prove Russia was

² Woolf, “Russian Compliance with the Intermediate Range Nuclear Forces (INF) Treaty.”
⁵ Woolf, “Russian Compliance with the Intermediate Range Nuclear Forces (INF) Treaty.”
⁶ Ibid.
in noncompliance with the treaty, as well as Russian counter-accusations of non-compliance. In October 2016, the United States called a meeting of the Special Verification Commission (SVC), the body established by the INF Treaty to address noncompliance accusations, yet did not make any headway on a resolution. The issue entered the public spotlight when the New York Times reported in February 2017 that the Russians had moved their missile, now identified as the SSC-8, from the testing to deployment stage.

Implications of Violations

This Russian development of new intermediate-range nuclear capabilities comes at a troubling time in European affairs. The recent Russian annexation of Crimea ignited fears that President Vladimir Putin is intent on re-establishing the Soviet Union’s sphere of influence over Eastern Europe. Russia has also used nuclear threats when countering the expansion of NATO capabilities into Eastern Europe, coupled with the placement of two additional nuclear-capable missiles in the Kaliningrad annex: the sea-based Kalibr cruise missile and ground based Iskander-M short range ballistic missile. Violating the INF Treaty by fielding the SSC-8 demonstrates that Russia may be trying to do a “soft” withdrawal from the treaty through noncompliance in order to hold more NATO targets at risk with non-strategic nuclear capabilities.

The implications of this are twofold. First, it demonstrates the credibility of Russian analysts who indicate that Russia’s war-fighting strategy is to “escalate to de-escalate,” using non-strategic (also known as tactical) nuclear weapons in a previously conventional conflict to demonstrate resolve and convince the other side to abandon the conflict for fear it would escalate further. This serves to deter NATO, as it may convince members that fighting Russia is not worth risking nuclear escalation on their own territory. Second, it may fracture the alliance by bringing up the age-old resolve question: is the United States willing to trade New York for Frankfurt? If the United States believes that Russia is willing to use these intermediate-range forces in a conflict, American leaders may face a situation where they have to escalate to the use of nuclear forces themselves or acquiesce to Russian victory. This would be damaging for US credibility in the alliance in a potentially irrecoverable way and would make deterrent threats

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7 Woolf, “Russian Compliance with the Intermediate Range Nuclear Forces (INF) Treaty.”
aimed at Russia much more difficult. Therefore, reversing deployment of the SSC-8 missile and bringing Russia back into compliance with the INF Treaty is of paramount importance both due to the material capability and symbolic reversal to Russia’s newfound nuclear escalation strategy.

Policy Prescription

The United States should use an updated version of the dual-track decision, originally employed to get the Soviet Union to agree to the INF Treaty in the 1980s, to bring Russia back into compliance. On the military side, the United States should begin to deploy more assets to Europe, both defensive measures aimed at countering Russia’s missile developments and offensive means to threaten targets in Russia and pressure Moscow to the negotiating table. On the diplomatic side, the United States should indicate that it will engage in confidence building and transparency measures to address Russian missile defense concerns if it abandons the SSC-8 as well as begin talks regarding the extension of the New START treaty in exchange for INF Treaty compliance. This combination of military “sticks” with diplomatic “carrots” should provide the conditions necessary for a grand bargain that will keep both the United States and Russia on their current arms control track and prevent the collapse of the INF Treaty.

Military Sticks

The military responses need to have two primary goals. First, defend against the advantages that Russia gains from having cruise missiles with ranges in violation of the INF Treaty. Second, the United States needs to hold Russian targets at risk in a similar way that the Russians threaten NATO targets with the SSC-8. Pursuit of both goals is necessary to convince Russia that it cannot leverage the missile’s capabilities due to defensive measures, while making Russia less secure from the increased number and range of capabilities deployed in response to their violation.

I. Missile Defense

Increased missile defense capabilities in Europe should be developed with the goal of countering cruise missiles launched from within Russia’s main land and the Russian exclave in Kaliningrad. Currently, the missile defense assets deployed in Poland and Romania associated with the European Phase Adaptive Approach (EPAA) are aimed at countering ballistic missiles launched from Iran, so NATO members are incredibly vulnerable to Russia’s asymmetric cruise missile advantage. The first step should be the deployment of a detection capability that will be able to give defensive systems notice of incoming cruise missiles in a way that the United States’
radar currently cannot. For example, capabilities like the Joint Land Attack Cruise Missile Defense Elevated Netted Sensor System (JLENS) could be pursued.\textsuperscript{11} Although the program is still in its infancy and its success is far from certain, giving the program additional attention or developing capabilities with similar effects would go a long way toward improving the United States’ ability to defend against cruise missiles. Following the detection capability, defeat capabilities should be developed under the guidance of the upcoming Ballistic Missile Defense Review (BMDR) that will moot the advantages provided by the SSC-8.\textsuperscript{12} While an impervious cruise missile shield against Russian capabilities is probably impossible due to resource and physical constraints, the United States should develop enough of a cruise missile defense capability to put doubt into the minds of Russian military planners that a first strike with cruise missiles would be successful, as some targets may be left unscathed and used for a retaliatory attack.\textsuperscript{13} Missile defense will also have the effect of reassuring Eastern European allies who, after seeing the Russian annexation of Crimea, have worried about the more aggressive and revisionist agenda of the country in its old Soviet sphere of influence. The perception that the United States can defend NATO countries from the non-strategic nuclear threat posed by the SSC-8 will prevent a fracturing of the alliance over the fear that the United States does not want to place its assets at risk over another country’s security.

The potential downside of this strategy is that it may play into already present Russian fears regarding NATO missile defense capabilities. Even though EPAA poses no threat to Russian strategic weapons, the Russians fear that additional missile defense sites may upset strategic stability vis-à-vis the United States. Accelerating missile defenses may cause Russia to double down on their tactical nuclear capabilities such as the SSC-8 in an attempt to overwhelm NATO defenses. However, there are three reasons that cruise missile detection and defeat capabilities should still be pursued despite these concerns. First and foremost, the United States needs to ensure that its soldiers and allies are protected from the threat of Russian cruise missiles. Given that there is already a sizable asymmetry between NATO and Russian non-strategic nuclear weapons that will only grow, preventing these weapons from holding more assets at risk is critical to maintain an effective deterrent in Europe. Second, Russian fears about BMD in the EPAA can be assuaged with transparency and confidence building measures, which will be


\textsuperscript{12} Ibid.

discussed in the diplomacy section of this paper. This will help counter the Russian narrative regarding the EPAA Aegis sites in Poland and Romania being used against Russian assets and ease tensions regarding the security of Russia’s strategic weapons arsenal. Finally, the first step among many to convince Moscow that violating the INF treaty is a bad idea is to deny a benefit from pushing further down the cruise missile path. Even a modest capability to defend against cruise missiles should provide enough doubt in the mind of the Russian military to pull off a debilitating first strike against NATO forces to convince them that their continued deployment of the SSC-8 does not provide much value added to Russia’s national security.

II. Strike Capabilities

In terms of offensive strike capabilities to gain leverage over the Russians, the United States should look to both conventional and nuclear options that do not violate the treaty, yet would increase the range of capabilities to hold Russian targets at risk. With the Nuclear Posture Review (NPR) currently under development by the Trump administration, some nuclear capabilities could be included as a part of the document to demonstrate long-term US intent to the Russians regarding nuclear strike capabilities without necessarily resulting in the deployment of capabilities. This will give the United States time to negotiate with the Russians regarding their noncompliance. The NPR should include a recommendation to research a follow on to the Pershing-series of missiles, retired under the original INF Treaty.\textsuperscript{14} This would signal that the United States is having second thoughts about the treaty in response to Russia’s violations and function as a reminder that the Russians do not want US GLCMs on their border, without actually deploying a treaty-violating capability.\textsuperscript{15} In conjunction, the United States should have secret negotiations with its allies in NATO indicating that it does not actually plan on following through with deployment and that it is simply a negotiating tactic, so they do not have to worry about reigniting the public debate over additional deployments of nuclear weapons on their soil that occurred during the initial dual-track decision in the late 1970s. To provide a more immediate show of strength to be used in negotiations, the United States should take the Tomahawk Land Attack Missile-Nuclear (TLAM-N) out of retirement and deploy submarines


with this capability to Europe.\textsuperscript{16} As this is a sea-based capability, it does not violate the INF Treaty, even though it has ranges prohibited under the treaty if it were a land-based system. This system would allow the United States to have a non-strategic nuclear long range strike system that holds many Russian targets at risk while avoiding basing issues inherent in a return of GLCMs to Europe. The deployment of these missiles to the European theater would also give the United States a capability that could be immediately withdrawn in response to successful negotiations in bringing Russia back into compliance with the INF Treaty by eliminating the SSC-8. Finally, the United States should stockpile conventional long-range strike missiles in Europe, such as the AGM-158B Joint Air to Surface Standoff Missile Extended Range (JASSM-ER), for use both on US platforms and available for use by NATO allies.\textsuperscript{17} The JASSM-ER could be used in conflict with Russia to take out targets at standoff ranges; thus, the deployment of this capability would put doubt in Russia’s mind about the success of an invasion if NATO forces could eliminate significant amounts of an invasion force without putting their own assets at risk. This combination of long-term and immediate nuclear deployments with conventional capabilities should be sufficient to convince Russia that their own strategic interests are in danger and bring them to the negotiating table.

There are risks inherent to this leg of the strategy. First, Russia may use the deployment of additional strike capabilities and research into a new GLCM capability to bring additional accusations of US noncompliance with the INF Treaty at an SVC convening. These steps would potentially give Russia a stronger basis for complaint about INF Treaty compliance regarding US missile defense, drone, and strike capabilities. Second, Russia may step up their risk taking and threaten the United States and its NATO allies as a result. Opening more vulnerability on the Russian side could result in Moscow doubling down on brinksmanship in an attempt to get NATO to back down on its offensive weapon deployment, rather than drawing them to the negotiating table with the United States. Third, bringing back the TLAM-N could take time and have additional consequences outside of the Russian INF Treaty violations context, such as by encouraging moves by China to counter this capability should it be deployed to the Pacific.

However, these risks do not outweigh the benefits of pursuing this strategy. First, none of the actions suggested above actually violate the INF treaty. TLAM-N and JASSM-ER capabilities are sanctioned under the treaty due to their method of delivery and were developed by the United States even after signing onto the INF Treaty in 1987. Research into a new


\textsuperscript{17} Karako, “How to stop Russia from cheating on missile treaty.”
GLCM capability would violate the treaty only if it crossed over into the development and testing phase. Simply conducting a feasibility study that weighs the pros and cons of a Pershing follow-on does not violate the letter of the INF Treaty, but would certainly have the intended effect of pressuring the Russians into discussions with the United States regarding its long-term interest in GLCM capabilities. Regarding the risk of additional nuclear brinksmanship, given the extent to which this is occurring in the status quo, it is not clear how much more this could develop short of Russia publicly violating the INF Treaty. Russia already explicitly communicates nuclear threats to countries it tries to intimidate in Europe, such as in 2015 when it indicated to Denmark that it would be the target of Russian nuclear missiles should it join the NATO missile defense network. Beyond this, Russian attempts to coerce NATO members in an even more overt manner would likely only be able to occur by increasing capabilities. It is difficult to imagine what this would entail outside of some sort of additional indication that it has violated the INF Treaty, given the diversity of assets on its Western border and in Kaliningrad.

Considering Russia’s strategy seems to be avoidance of a public violation of the INF Treaty at all costs, the risk of new nuclear threats is not great enough to deter additional military capabilities in Europe. The TLAM-N’s redeployment is also not worrisome. The capability would be highly survivable on a submarine and would benefit the US deterrence posture and provide allied assurance in East Asia. In light of increased provocations from North Korea and continuing territorial grabs from China, having an additional flexible option from the United States in the region would help quell discontent from its allies regarding the US ability to respond to threats without having to rely on vulnerable dual-capable aircraft. In addition, the capability could be developed as a component of the current nuclear modernization plan, leveraging programs that are already in development. Although it would take time to recertify the missiles and boats for the nuclear mission as well as resources to deploy the missile and find boats available for them, the TLAM-N would have enough of a positive impact that it would be well worth the cost.

*Diplomatic Carrots*

On the diplomacy side of the dual track strategy, the United States needs to offer concessions that will be viewed as a diplomatic reward for Russian compliance with the INF Treaty, rather than solely pursuing military sticks, which could be viewed as inherently

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19 Winnefeld and Miller, “Bring Back the Nuclear Tomahawks.”

escalatory. In a vacuum, the military measures described above could be viewed as a return to the Cold War era pre-INF Treaty where the United States and Soviet Union were prepared to wage nuclear war with each other over Europe with non-strategic capabilities. Therefore, the addition of a further reward for Russia will demonstrate that the United States is not suggesting Russian compliance with the INF Treaty as a baseless gesture while undergoing a massive arms buildup in Europe, but rather signaling it wants to return to the status quo arms control world seen pre-SSC-8 development. This can be accomplished through two primary diplomatic measures: offering to begin negotiations to extend New START in exchange for INF Treaty compliance and mutual transparency measures for missile defense sites.

I. New START Extension

The United States should indicate that Russian compliance with the INF Treaty is a prerequisite for discussions to extend New START for an additional five years to 2026. By doing this, the United States will further the stabilization effects of New START by limiting each side’s strategic nuclear arsenals while simultaneously reinstating the restriction on non-strategic nuclear weapons. This would be viewed as a significant carrot on Moscow’s side. Russian nuclear analysts indicate that due to the pace of Russia’s nuclear modernization and the aging rate of its Cold War arsenal, Russia will likely find itself with launchers underneath the New START caps with or without an extension of the agreement.21 This means that New START’s extension is a no cost option for Russia: if the treaty is extended then it will maintain strategic parity with the United States while keeping pace with their modernization plans that would have been implemented either way. Russia’s leadership seems to be aware of this. President Vladimir Putin insisted that Russia and the United States extend the treaty in a phone call with President Donald Trump in February 2017. President Trump’s rebuff of this offer cast doubt onto whether a New START extension is something both parties seek, which provides leverage for the United States in framing the extension as a carrot in an INF Treaty negotiation.22 The extension of New START would provide benefits to the United States as well, such as underscoring the tradition of arms control between the two countries and allowing monitoring and verification procedures.

that allow the United States to keep an eye on the Russian arsenal.\textsuperscript{23} Therefore, the United States would be able to offer the extension as a means to quell Russian concerns about the United States’ strategic arsenal, something that it cares very deeply about with regard its own security and over which it might be willing to part with the SSC-8 missile.

There are a number of reasons linking the treaties may not be an ideal method for stopping INF Treaty violations. First, Russia may call the United States’ bluff and refuse to change its approach to the INF Treaty, operating under the assumption that the United States will decide that extending New START is in their interest despite INF Treaty violations. If the United States is serious about arms control, it would not risk letting two landmark treaties fall apart when it could still salvage New START at the very least, not providing much incentive for Moscow to move on the INF Treaty front. Second, there is a risk that Russia could attempt to broaden the conversation from just the New START treaty to other issues. Russia may attempt to push more of their own objectives on other arms control treaties or even attempt to extract concessions on other issues altogether, such as Ukraine or Syria, once it is demonstrated that other issues are on the table for discussion outside of non-strategic nuclear weapons. Finally, linking the treaties together could potentially bring up a host of other compliance issues related to New START that would have to be addressed in addition to the INF Treaty violations.

These issues with treaty linkage would give pause to most US administrations, yet the current political environment is very permissive for this approach to succeed. The Trump administration’s refusal to engage with Putin over the possibility of a New START extension in February significantly reduces the probability that Russia will be able to call the United States’ bluff. While Russia could count on United States support for New START during the Obama administration due to the centrality of the treaty for the administration’s arms control agenda, Trump’s hostility toward the treaty should put doubt into Moscow’s mind about whether the treaty has the same value it did only a year ago in the eyes of Washington. Russia would likely take up the opportunity to see an extension of the treaty, under the calculation that the security benefits it would derive from New START would outweigh those from violation of the INF Treaty, especially if confronted with other military “sticks.” It is a difficult to say definitively that Russia will not bring up other issues or treaties when in negotiation with the United States over the INF Treaty violations once a New START extension has been raised. Ensuring the talks stay limited to these two treaties will fall to the negotiating team, which will have to employ two strategies in order to keep the discussion on New START and INF.

First, it will have to indicate that only treaties that reduce or limit the number or types of nuclear weapons will be discussed. By indicating the only reason New START is being raised is its function as a confidence building measure to offset any worries about strategic stability as a possible reason for Russian INF Treaty violations should sufficiently explain the logic behind the two treaties’ linkage. Second, negotiators should attempt to hold the line on any attempt to broaden negotiations but, if necessary, indicate a willingness to engage on other issues but not offer any tangible promises on those fronts. For instance, if Russia raises renegotiation of New START or reduction in sanctions related to Crimea, the United States negotiators can say that they will discuss those issues at a later time, but talks may not yield anything of substance. Setting up a talk that goes nowhere will have the same effect as not broadening the negotiations, but that will make actually following through on New START extension of paramount importance to make sure no goodwill was lost. Finally, there should be no real worry of New START noncompliance issues. The State Department reported in its independent compliance assessment of New START in 2016 that Russia is in compliance and issues have been effectively handled through the Bilateral Consultative Commission.²⁴ While this by no means indicates that there will not be issues in the future, it does bode well that noncompliance will continue to be handled through appropriate channels.

II. Missile Defense Transparency

The second diplomatic carrot should be an offer from the United States for mutual transparency over missile defense programs in Europe. As mentioned earlier, the EPAA is a measure aimed at countering Iran’s ballistic missile defense capabilities and preventing NATO allies from being held at risk from these weapons. However, Russia is fearful that Aegis ashore sites are actually for use against its strategic nuclear arsenal, despite the fact that it would not be physically possible to intercept the missiles from these sites and there are not enough interceptors currently deployed with these systems to prove a threat to Russia’s strategic nuclear weapons.²⁵ These fears over the survivability of its Intercontinental Ballistic Missiles (ICBMs) may be driving Russia’s push toward non-strategic systems as a means to deter the United States and NATO from engaging in an Eastern European conflict. An offer by the United States to begin transparency measures such as exchanges of data and a verification and dispute resolution for

both US and Russian BMD sites should help reduce these Russian fears. Data exchanges could include interceptor numbers, site locations, speed and range, which could minimize uncertainty on both sides regarding the survivability of strategic arsenals. Verification by national technical means, inspections, or observation tests would help build trust, ensuring that both sides do not believe strategic stability has been upset.

The risk inherent in this strategy is that it may not be sufficient to reduce Russian skepticism toward US BMD while giving them important information regarding its capabilities. Even under an INF-compliant Russia, they may pocket the concession of learning about US missile defense capabilities yet continue their public statements regarding the instability emanating from Aegis ashore sites in Eastern Europe and investing in non-strategic conventional and nuclear strike capabilities that are not limited by the treaty. However, at this point the United States would be able to make the argument that it had done everything in its power to assuage Russia’s missile defense fears and provide evidence that it was not a threat to Russia’s deterrent. As it stands, Russia remains publicly unconvinced regarding these sites, yet the United States does little outside of reactive public statements to counter this narrative. Making every effort to be transparent regarding the range and depth of these capabilities would give the United States and NATO a strong counter-narrative on missile defense at the very least, and, in the best case scenario, would provide a basis for Russia to not feel as though strategic stability between itself and the United States is destroyed and come back into compliance with the INF treaty with peace of mind.

Execution

In order to use this combination of military and diplomatic incentives to bring Russia back into compliance with the INF Treaty, the United States should reconvene the SVC after it has released the NPR and BMDR with recommendations for new capabilities (new GLCM and cruise missile defense) and deployed cruise missile detection capabilities (potentially JLENS at the onset), JASSM-ER missiles, and TLAM-Ns to Europe. Russia may even convene the SVC prior to this in response to any of the military moves that the United States has made earlier in the process (e.g., if Russia believes the TLAM-N deployment to be in violation of the treaty), which would allow the United States to still negotiate with Russia over their compliance without having to exercise its full range of options. Once the SVC has been convened, the United States should indicate that the negotiations only encompass arms reductions and limitations and refuse

to broaden discussions to anything beyond nuclear and conventional strike capabilities in Europe and associated countermeasures. The United States should indicate that it is willing to withdraw the TLAM-N and discontinue research and development into a new GLCM capability in exchange for Russia verifiably ending its development and deployment of INF Treaty violating capabilities and destroying all SSC-8 missiles that have been produced. In addition, the United States will limit its cruise missile defense capabilities to detection systems (which cannot defeat cruise missiles, only provide warning of them) and stay on track with the EPAA, but begin negotiations for mutual ballistic missile defense transparency measures. Finally, the United States should indicate to Russia that upon verification of INF Treaty compliance it would begin the process of extending the New START treaty for an additional five years.

Conclusion

The United States must use an updated version of its dual-track decision, first undertaken during the height of the Cold War, to bring Russia back into compliance with the INF Treaty. Under this strategy, the United States will be able to leverage new nuclear and conventional capabilities in Europe to ensure that Russia does not continue to violate, and risk breaking, the landmark arms control treaty, while establishing a base of trust for both the extension of New START and missile defense transparency measures in Europe. The combination of hard power sticks with soft power carrots should be sufficient to convince Russia that it is in their national security interest to abandon the SSC-8 program and comply with the INF Treaty. In the event that Russia decides that it would rather continue to violate the INF Treaty rather than accede to the US demands, the United States will be well placed to deter Russia given its increased capabilities in Eastern Europe, retaining faith in the NATO alliance and providing a flexible range of responses in any given crisis with Russia.

About the Author

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Operation Simoom: A Process of Post-Cold War Polish Intelligence Reform

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A little known intelligence operation in 1990 provides an unprecedented lens into the process of intelligence reform of post-Soviet states, in this case specifically, Poland in 1989 and 1990. Though little is known about the US-Polish plan to rescue six CIA operatives in Saddam Hussein’s Iraq, the operation sheds light on the process by which democratizing Poland chose to rebuild its intelligence services after the Cold War and initiate intelligence cooperation with Western states. Many of Poland’s intelligence officers working with the United States on this operation were just years prior on the other side of the Iron Curtain working in concert with the KGB against the West. Operation Simoom represented an opportunity for both Poland and the United States to respond to and benefit from the shifting security environment in Europe. The operation allowed Poland to demonstrate both its adept tradecraft and commitment to post-Soviet reform, and allowed the United States to acquire vast amounts of information on Soviet intelligence and reorient Polish intelligence’s allegiance from the Soviet Union to the West.

The Cold War marked one of the most intense periods of covert intelligence and espionage in modern history. US intelligence agencies battled the Russian Committee for State Security (KGB) and its affiliated services in the Warsaw Pact and across the world. However, as communism began to fall across Europe in the late 1980s, the relationships between Western intelligence agencies and Soviet satellite states changed. This shift is best illustrated by the joint US-Polish operation to rescue six US operatives in Iraq in 1990. Known as Operation Simoom, this rescue marked the start of the post-Cold War era of intelligence cooperation and improving relations between the United States and former Warsaw Pact states. Operation Simoom demonstrates how Polish intelligence reformed during the post-Cold War transition period into the 1990s and worked with the West, though Polish officers who assisted in the rescue were the same who spent their careers working against the United States. Likewise, Simoom further shows how American intelligence was motivated to seek out partnerships with reforming Eastern European nations to seize great opportunities to turn former Soviet states against the KGB. The operation stands out as an example of tradecraft and intelligence cooperation, one that had lasting effects on US-Polish relations, Polish intelligence reform, and the post-Cold War world order.
In 1990, six undercover Central Intelligence Agency (CIA) and Defense Intelligence Agency operatives investigating Iraqi troop movements required immediate rescue. When Saddam Hussein invaded Kuwait, the ensuing chaos forced the operatives into hiding in Baghdad, as they lacked diplomatic immunity allowing safe exit from the country.\(^1\) The United States requested assistance from its allies to arrange a rescue operation, but Poland was the sole nation to offer support. Some in Polish intelligence felt a rescue attempt was too risky—the Saddam Hussein regime could target Polish nationals in Iraq in retaliation should the operation become public, but Director Gromoslaw Czempinski of the newly-created Polish foreign intelligence service Urząd Ochrony Państwa (UOP) saw the rescue as a unique opportunity. Czempinski argued the operation was a crucial moment for newly-democratizing Poland to demonstrate to the United States that it could become a trusted political partner. By August 1990, the CIA and Warsaw were in frequent contact developing a plan to evade Iraqi security forces searching for the six Americans and extract them from Baghdad.

What came to be known as Operation Simoom was run largely by Czempinski alone. According to Milt Bearden and James Risen, who authored one of few available accounts of the operation in their book *The Main Enemy: The Inside Story of the CIA’s Final Showdown with the KGB*, Czempinski entered Iraq with a small team of Polish intelligence officers and improvised a rescue plan.\(^2\) The finalized operation called for establishing contact with the American spies, supplying them with Polish passports, and escaping from Iraq via buses of Polish and Russian construction workers. Poland had existing ties throughout Iraq at this time due to construction contracts in progress by Polish engineering firms that presented a credible cover.\(^3\) Once on the buses, the Americans traveled to a Polish construction camp and received a brief respite before continuing out of the country on another bus for workers. As the story goes, the bus reached the Iraqi-Turkey border at which point an Iraqi guard who spoke some Polish asked one of the Americans a question in Polish. The American spy, who did not know a word of Polish, either pretended to be drunk or feigned fainting.\(^4\) Avoiding raising suspicions, the bus successfully crossed the border into Turkey, rescuing the American agents. The Americans then returned home via Warsaw. Unfortunately, this is the most complete account available of the rescue. There is a scarcity of declassified material on the operation, though many critical insights on US-

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\(^1\) Milt Bearden and James Risen, *The Main Enemy: The Inside Story of the CIA’s Final Showdown with the KGB* (New York: Random House, 2003), 439.

\(^2\) Ibid., 450.


\(^4\) Ibid.
Poland intelligence sharing and political reform in Poland can be gleaned from what is already known.

This covert action, coined Operation Simoom based on a 1999 Polish film adaptation and named for the Arabic word for the powerful dust storms of the Middle East, has no formal name and is not found in any unclassified official materials other than secondhand sources including several news articles and books on Cold War intelligence. However, the value of this operation to the United States, Poland, and their post-Cold War relationship is immeasurable. Not only did the Polish agents successfully rescue the American operatives but through their connection with Poland’s construction business in Iraq also supplied the United States with considerable intelligence on Iraq, including maps of Baghdad and details about military installations throughout Iraq. This additional information on the Iraqi military reportedly proved useful during Operation Desert Storm. William H. Webster, then Director of Central Intelligence, said of the operation, “It was high risk” and that the Poles “deserve a lot of credit.” The CIA had nothing but the highest praise for the work of Polish intelligence and from the United States’ perspective the operation was a resounding success. The same can be said of Poland’s perspective.

For Poland and the nascent UOP, Operation Simoom was far more than a demonstration of Polish intelligence capabilities. Rather, the operation cemented Poland’s role as a true post-Cold War ally of the United States. Interior Minister Andrzej Milczanowski, who kept secret the entire operation from Poland’s Prime Minister, was ecstatic at the operation’s success and proudly greeted the rescued Americans as they passed through Warsaw en route home. The operation had a profound effect on US-Poland relations—debt relief negotiations became far more positive, and as a thank you gesture the United States reportedly urged other governments to forgive half of Poland’s foreign debt, totaling $16.5 billion. Additionally, though the Solidarity-led government of Poland was still suspicious of the Soviet-era Polish intelligence services in 1990, the operation helped end debate over their future and validated Milczanowski’s decision to retain many of the Soviet-era officers. On a larger scale, Operation Simoom also represents a significant shift in US-Poland relations after the Cold War and gives a

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5 Pomfret, “Polish Agents Rescued.”
7 Pomfret, “Polish Agents Rescued.”
8 Bearden and Risen, The Main Enemy, 450.
9 Pomfret, “Polish Agents.”
10 Bearden and Risen, The Main Enemy, 413.
valuable example of how the United States Intelligence Community transitioned from antagonism to cooperation with Poland’s intelligence services.

What makes Operation Simoon unique is the Polish officers who worked to rescue the stranded American spies were previously aligned against the United States, including Czempinski himself. After occupying Poland at the end of World War II, the Soviet Union installed both a puppet government and new Soviet-styled intelligence services, all filled with either Soviet advisers and officers or Polish officers trained in schools sponsored by the Russian People’s Commissariat for State Security (NKVD). Soviet leadership structured Poland to act as its main military communication channel between the Soviet Union itself and East Germany and “the heart of the main Soviet security zone in the region.” Historically, the region of Poland was also the main avenue by which enemy forces traditionally approached Russia: Napoleon in 1812, the Central Powers in 1914, and the Third Reich in 1941, for example.

There was a clear need for the Soviet Union to maintain Poland under its influence and thus a complex system of Soviet control permeated Poland’s institutions, particularly its domestic and international security services. The Soviet Union preserved this arrangement until the 1980s when it began to deteriorate.

After Solidarity’s victory in the 1989 parliamentary elections, it was understood that the Soviet-era Służba Bezpieczeństwa (SB) was likely to be dismantled. The SB by 1989 had 24,000 employees and was widely despised in Polish society due to its heavy surveillance of Solidarity, the Catholic Church, and other elements of Poland’s culture and economy. The SB engaged in near-constant monitoring of Solidarity leader Lech Wałęsa until its dissolution—there was simply no place for this relic of the Cold War in Poland’s future. In May 1990 the SB was officially replaced by the UOP, but the transition from the SB posed a daunting challenge: how best to handle former SB officers and ensure a modern, democratic character for the new agency, befitting Poland’s new path? Instead of opting for the “zero option” of establishing a new intelligence agency from scratch, the nascent democratic Polish government chose to build the new service from the remnants of the SB itself by retaining many experienced SB officers and hiring new employees from outside, including from Solidarity activists.

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12 Ibid., 4.
13 Ibid.
15 Ibid.
There were various screening criteria for existing SB officers seeking continued employment in the UOP including previous work performance, moral character, patriotic attitude, and others—10,451 of 14,034 screened applicants were approved for continued employment within the UOP.\textsuperscript{16} In an effort to reform the public image of Poland's intelligence services, the new UOP was forbidden from using journalists as intelligence sources and from using the media for political influence or any intelligence purposes.\textsuperscript{17} For Interior Minister Milczanowski, these were difficult but necessary reforms. These choices were critical to Poland's ability to modernize its security and intelligence services as the country democratized. Had Poland not retained many of its most experienced intelligence officers, Operation Simoom likely would not have happened.

Milczanowski and Czempinski were on the front lines of Poland's intelligence reform efforts in 1989. Milczanowski, a former defense attorney and once-imprisoned Solidarity activist, was appointed to handle intelligence matters after Solidarity took control of the Polish government.\textsuperscript{18} He battled with the difficult decision of how to address Poland's intelligence situation—the Cold War was winding down and Poland still had enemies on its borders, which required effective, efficient intelligence services. Milczanowski ultimately decided that Poland could not afford the “zero option,” recalling the debilitating effect of Vaclav Havel's new government dismissing the entire Czech intelligence service for inexperienced hires.\textsuperscript{19} Milczanowski chose Czempinski as an advocate for existing SB officers under consideration for continued employment in the UOP, creating a curious hierarchy in which the ex-Communist spy would serve the ex-dissident.\textsuperscript{20} The two men would develop a close and efficient relationship despite clashing over which officers should be retained or cut loose. This balance between Czempinski, Milczanowski, and the Solidarity government was crucial to Poland's intelligence reform and demonstrated to the United States and other prospective allies that Poland was prepared to work with the West on intelligence and other issues.

Czempinski himself occupied a preeminent position among Poland's intelligence officers and personality played a large role in the state’s intelligence reforms. Described as a “tall, hawk-nosed man with a piercing stare,” Czempinski's career in Polish intelligence was one of rapid ascent and success.\textsuperscript{21} Czempinski was a clever intelligence and counterintelligence operations

\textsuperscript{16} Stephane Lefebvre, “Poland’s Attempts to Develop a Democratic and Effective Intelligence System,” 473.
\textsuperscript{17} Ibid., 475.
\textsuperscript{18} Bearden and Risen, The Main Enemy, 413.
\textsuperscript{19} Ibid., 413.
\textsuperscript{20} Ibid., 413.
\textsuperscript{21} Ibid., 381.
master, bold and imaginative, but he also had an entrepreneurial and practical streak—by 1989, he felt the winds of change and had doubts about Poland’s future.  

His career and Poland’s government were now in the hands of Solidarity—the opposition whom Czempinski had spent years putting behind bars for defying the regime. It is likely that Czempinski was a shrewd realist and understood that with Poland’s political shift came a critical opportunity for its security services to reform and instead work with the West.

While the United States and Poland had strained Cold War relations and hostile intelligence competition, Operation Simoom was an unparalleled opportunity to forge a new future. Despite the democratization and modernization of the Polish UOP, the CIA understood that Polish officers with whom it was working to rescue American operatives were until recently their Cold War enemy. One source writes that the KGB did not end its formal ties with Polish intelligence until March 1991—the implications of working with an intelligence agency still rife with KGB connections cannot be ignored.  

A similar process of “grandfathering in” existing intelligence officers also occurred in Hungary and Czechoslovakia and caused considerable apprehension within NATO—national control and loyalty of post-Soviet intelligence institutions became a major objective of post-Cold War reform efforts in these states.  

Despite NATO’s reservations about democratizing Warsaw Pact states, it is clear that the United States and the CIA saw Operation Simoom as an extraordinary opportunity to forge new ties with these states and develop previously-unthinkable intelligence gathering and sharing operations in Eastern Europe.

What adds another layer of intrigue to the post-Cold War US-Poland intelligence relationship is that the CIA and the Polish SB worked against one another in Poland throughout the 1980s via Solidarity. While the SB endeavored tirelessly to infiltrate and discredit the Solidarity movement, the CIA began providing covert support to Solidarity starting in the Carter administration.  

The CIA support started small, comprised mostly of modest amounts of money and support for a Solidarity-backed magazine, but by the mid-1980s increased greatly to include large sums of money, printing and broadcasting equipment, and photocopying machines—all for the purpose of “underground political warfare” against the communist Polish regime and Soviet Union.  

While the SB continued its operations against Solidarity and Lech Wałęsa, Polish

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22 Bearden and Risen, *The Main Enemy*, 381.
26 Ibid., 100.
counterintelligence head Władysław Pożoga claimed proudly that the Polish services were well aware of CIA backing of Solidarity, saying, “We had infiltrated the [Solidarity] underground with precision.”27 Were this really the case, it would have been a massive counterintelligence failure on the part of Poland to allow CIA support of Solidarity to continue, as the Western support was crucial in keeping Solidarity operations going until 1988. Polish historian Andrzej Paczkowski notes CIA support was “meaningful” and without it “chances for further activity [by Solidarity] would have been considerably reduced.”28 Several conclusions are possible: Polish counterintelligence did not know about Western and CIA support for Solidarity, did not know its power and extent, or was aware and chose not to act. Though Pożoga similarly claims that counterintelligence allowed “all the equipment go through and allowed contacts to continue” as a way of “keeping tabs on the Underground,” the true extent of Solidarity infiltration is unclear.29 What is certain, however, is that while Poland viewed Solidarity as a serious political threat, the Soviet Union viewed it as a paramount strategic threat, at least in the first half of the 1980s.

The unique cultural connection between the United States and Poland as well as Poland’s internal political climate also played a critical role in the eventual intelligence relationship between the two states at the end of the Cold War. Poland’s close connection to the Soviet Union and Soviet security and military structure were not the only concerns of the United States. Throughout the 1980s the Polish People’s Republic dealt with the tenacious opposition presence of the Solidarity movement, requiring constant attention and monitoring from Polish internal police. Poland also faced persistent Western pressure throughout the 1980s during the Reagan administration. The United States historically has had a large, distributed population of Polish immigrants who retain cultural and religious connections to Poland, and this link was further enhanced by the influence and standing of Polish Pope John Paul II, a central figure of the end of the Cold War and a supporter of Solidarity. The United States had many reasons, both cultural and political, to keep watch over developments in Poland and look to involve itself at the right moment, especially as Soviet control over Eastern Europe weakened in the late 1980s.

Former DCI Webster is quoted as saying that by 1991, the CIA had reached out to and established “discreet and non-provocative” contacts with former Warsaw Pact nations and that the CIA had “good ties” with intelligence services of Hungary, Czechoslovakia, and Poland.30 Conversely, the Soviet Union was extremely concerned with the possibility of the United States

30 Garthoff, The Great Transition, 618.
liaising with the former Warsaw Pact members and creating security and intelligence sharing arrangements. The exact fears of the Soviets were indeed realized—states like Poland that engaged in targeted, organized political and intelligence reform were quicker to receive foreign aid from the West and accelerated these bonds. Furthermore, the possibility of future membership in NATO played an incentivizing role for the former Warsaw Pact states that cannot be understated—the more these states reformed and sought membership, the more attractive they would become for partnership with Western states in a variety of political endeavors, including intelligence. Poland in 1989 and 1990 essentially was a battleground for influence by the United States and Soviet Union, with the United States possessing the clear edge.

The clear benefits of such partnerships and external economic and political assistance certainly facilitated and encouraged intelligence reform in Warsaw Pact states. Though it is true that the many of the documents, understandings, and partnerships which established NATO/EU pre-accession requirements were not introduced in Poland until 1991, the goal of Western integration and modernization was a priority from the early days of the Solidarity government. Finally, it is worth noting that the post-Cold War international landscape represented a marked shift in security considerations for states like Poland—there were more complex threats in the changing European balance of power and Poland now had to handle its own internal and external security. The attractiveness of intelligence cooperation among like-minded democratically-reforming states also likely assisted in post-Soviet intelligence reform—such cooperation leads to the sharing and development of mechanisms for developing democratic intelligence institutions and common standards and practices. Even without the possibility of US/NATO aid and assistance, post-Soviet intelligence reform was clearly an important priority with concrete, valuable benefits for nascent democracies like Poland. Operation Simoom was the first major test for Poland’s revamped intelligence services and was a significant opportunity to show its capabilities. Poland’s motivations to assist in the rescue operation are clear but those of the United States are a little more difficult to determine.

Without additional information or yet-declassified material, it is tough to ascertain when United States intelligence decided not only to develop intelligence relationships with post-Soviet Poland, but also to trust and request Polish assistance. From available sources, there is one most likely possibility in the specific case of Poland. As the Soviet Union did not formally dissolve

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31 Watts, “Intelligence Reform.”
33 Watts, “Intelligence Reform.”
until December 26, 1991, it is highly unlikely that the United States waited until the fall of the Soviet Union to court Poland. Operation Simoom took place in 1990, thus it appears that one significant catalyst for the United States’ initiation of cooperation with Poland was Solidarity’s 1989 parliamentary election victory. Once Solidarity had a clear victory and political and intelligence reforms began, it is likely the CIA began courting Polish intelligence and developing a cooperative relationship. This would explain the CIA’s willingness to turn to Poland in Operation Simoom if it had already developed an intelligence relationship in the previous year. To be sure, it is possible that the CIA was simply in a difficult position with the stranded American operatives and needed any possible assistance, and Poland was the only country to offer after other allies declined. Pragmatism, of course, often requires difficult compromises, but despite any reservations it is clear that in the context of Operation Simoom, the United States trusted Poland to get the job done well.

Poland’s relationship with the Soviet Union after 1989 may provide the best insight into why the United States was so quick to establish close ties with the fledgling democratic nation. Poland, a cornerstone of the Warsaw Pact, was the headquarters of the Soviet Union’s Western Theater of Operations against NATO.\(^{34}\) Poland produced large amounts of munitions and supplies for the Soviet military and itself possessed the third largest army in Europe after the USSR and West Germany. Furthermore, Poland’s geographical location was strategically significant for Soviet communications and transportation. For this reason, the Kremlin saw Solidarity not just as a political nuisance but a significant threat. Warsaw Pact Marshal Viktor Kulikov was assigned as crisis manager to handle the Polish government and through the early 1980s oversaw plans for possible Warsaw Pact intervention in Poland and pressured the Polish government to decisively crush Solidarity.

The new Solidarity-led government in Poland viewed the Soviet Union and KGB with heavy suspicion, which influenced its early relationships with Western intelligence. In 1989 there was an immediate growth in tensions between Poland (as well as Hungary and Czechoslovakia) and the Soviet intelligence agencies that was further reinforced by the desire of these nations to initiate cooperation with the West.\(^{35}\) Polish agencies almost immediately established joint efforts with Western agencies on international terrorism, organized crime, drug trafficking, smuggling, and security of nuclear power installations.\(^{36}\) According to Cold War historian Mark Kramer, the appointment of former Solidarity activist Krzysztof Kozłowski as internal affairs minister

\(^{34}\) Fischer, “Solidarity, the CIA, and Western Technology,” 453.


\(^{36}\) Ibid., 250.
signaled Poland's serious commitment to reform and a greater desire to integrate with western intelligence agencies.\textsuperscript{37}

Given Poland's geographic prominence and importance to Soviet strategy and logistics, it is sensible that the CIA and Western intelligence services jumped at the chance to establish ties at the earliest opportunity. Alternative analysis claims that Warsaw severed its intelligence ties with the KGB in 1989, long before Operation Simoom and that the CIA made a fast effort to ingratiate itself with the post-Communist Polish intelligence services that same year.\textsuperscript{38} Robert Gates, then Deputy National Security Adviser to President George H.W. Bush, is on record saying that the CIA hoped to lay the foundation for future cooperation and also provide assistance to intelligence services establishing their independence from the KGB.\textsuperscript{39} This would have been a massive blow to the Soviet Union even that late in the Cold War—the result was a larger distraction for the Soviets who now had to handle possible espionage and subversion on their borders from a former critical ally now working with an enemy.

From these revelations the goals and methods of the CIA become evident. It likely does not matter that the Polish SB (soon to be UOP) was a former adversary and replete with officers who engaged in years of intelligence operations against the West and United States. The CIA-supported Solidarity victory in the 1989 free parliamentary elections and the Soviet Union's unwillingness to involve itself militarily in Poland's domestic affairs likely were the only preconditions the US needed to quickly forge intelligence ties with Poland. Thus, long before the CIA needed to rescue its operatives in Iraq, the United States' opportunities in Poland were innumerable. Soviet intelligence left behind a multitude of files in Poland that included damaging information about KGB intelligence and counterintelligence, such as its connections to international terror and other black ops.\textsuperscript{40} Prior to the conclusion of the Cold War, there were clear strategic and tactical benefits for US intelligence to gain a foothold in Poland and penetrate the Iron Curtain.

Meanwhile, the KGB did make serious attempts to recruit agents in Poland who would continue working for the USSR despite recent political changes. These agents were to erase or remove as much evidence and records of KGB activity as possible from their respective intelligence agencies in order to prevent Western intelligence agents from attaining them. These efforts bore some success—tens of thousands of files and documents were confiscated or shredded though Western agents still recovered troves of priceless information on KGB


\textsuperscript{38} Fischer, “Solidarity, the CIA, and Western Technology,” 454.


\textsuperscript{40} Fischer, “Solidarity, the CIA, and Western Technology,” 454.
activities. KGB efforts to cover up its activities in Eastern Europe simply could not compensate for the insurmountable loss of its East European allies, especially those that turned toward the West. Despite the clear signaling from Mikhail Gorbachev by 1989 that the Soviet Army would not intervene in the internal politics of Soviet republics, time was still a factor. The United States had to take advantage of Poland’s opening to the West and build a cooperative relationship while there was still Soviet intelligence to be seized. Thus, it made sense to take the risk to develop intelligence relationships even before it became clear Poland was genuinely seeking political and security reform.

There are numerous critical lessons in intelligence to be gleaned from the case of Operation Simoom and Poland’s intelligence reforms from 1989 to 1991. Simoom remains the best example of the process and fruits of post-Cold War intelligence reform. Poland’s experience as a Soviet satellite state and its success transitioning into a nascent democracy is shared with many of its neighbors, but it is Poland’s specific intelligence and security situation that sets it apart from those same neighbors. Aside from East Germany, no other Warsaw Pact state played as critical a role in the Soviet security, foreign policy, and military structures as Poland. Poland thus held special importance to both the United States and the dissolving Soviet Union in 1989. Both superpowers of the waning Cold War had large incentives and a strong desire to ally with this nation in transition. The United States stood to gain untold amounts of Soviet intelligence from Poland’s agencies, and Poland could quickly distance itself from its Soviet yoke and ingratiate itself with the West. The actions of both nations throughout 1989 and 1990 make these incentives even clearer.

Poland’s successful and quick transition of its intelligence services arguably served as the main factor in the rapid growth of its relationship with Western intelligence. While it is true that the CIA would have had interest in Polish ties regardless, the speed and seriousness with which Poland sought to reform its intelligence agencies certainly played a major role in demonstrating its commitment to shedding its Soviet past. Especially important was the selection of Solidarity activists Milczanowski and Kozlowski to handle the intelligence transition, another critical signal that Poland intended the new UOP to be a modern, sophisticated, and Western-friendly agency. The strong working relationship between Milczanowski and Czempinski despite their considerable differences facilitated the transition from the SB to the UOP and saved Poland time and anguish versus the “zero-option” route. Milczanowski’s judgment to retain seasoned SB officers was best for Poland’s immediate concerns and priorities, establishing a democratic intelligence apparatus, handling the Soviet Union on its border (and attempting to infiltrate

Polish security services), and engaging in intelligence dialogues with the West. From an intelligence-policy perspective, Poland’s leadership made crucial decisions in 1989 to set itself up for a relatively smooth transition and ensure that the United States and other Western nations would see Poland as a reliable ally. By the time Operation Simoom occurred in 1990, Poland was prepared to step up and demonstrate its commitment to its new Western allies and show that its intelligence capabilities were capable and efficient.

For the United States, Operation Simoom and its backstory are an example of setting strong, clear intelligence priorities when confronted with great upheaval in the international system. It is clear from context that the United States was waiting for an opportunity to engage with the Warsaw Pact nations at the first available chance when the Soviet Union began to step back and political reform took hold. While there were reservations from NATO over the retention of Soviet-era intelligence officers, it appears likely that the CIA and United States Intelligence Community were more enthusiastic about Poland opening up after Solidarity’s election victory. This presented a rare chance to forge ties with a nation previously aligned with the Soviet Union and potentially uncover Soviet intelligence files and information which ultimately proved a great boon to the United States.

Operation Simoom is a fascinating look into the state of intelligence relations between the United States and democratizing Poland in 1990 and sheds light on the process of intelligence reform in post-Soviet states. While the operation itself is laudable for being adeptly-executed intelligence tradecraft, the lasting impact of the operation is that it exists at all and how it shaped modern US-Poland relations. The improbability of Poland being the sole partner for the United States in the CIA rescue operation is similarly impressive, as is the precision and skill with which Polish intelligence officers pulled off the rescue. And while both the United States and Poland received concrete benefits in the form of rescued operatives and Iraqi plans for the US and possible debt forgiveness for Poland, more important is the impressions left with each nation about the other’s resolve and capabilities in the post-Cold War world. Poland demonstrated that its intelligence reform efforts were genuine and that the UOP could be trusted and tasked with sensitive, challenging operations. Similarly, the United States saw firsthand the progress that post-Soviet Poland made in reforming its institutions in a relatively short amount of time.

Operation Simoom ultimately stands out in the annals of intelligence history as a unique, impressive example of intelligence cooperation between the United States and a formerly adversarial state. It represents the strength of less than one year’s worth of reforms in Poland in its efforts to democratize its political system and intelligence apparatus. Most of all, it represents
a clear win-win situation for both sides of an intelligence sharing arrangement—the United States and Poland both had much to gain from the operation and its success cemented what would become a strong and fruitful post-Cold War relationship.

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Time for a New Convention? Northern Triangle Asylum Seekers in the United States

Alexandra Carr

This article challenges the assertion that the UN Convention on Refugees continues to adequately provide protection to persecuted individuals through the case of those fleeing gang violence in the Northern Triangle of Central America. Specifically, individuals seeking asylum in the United States for the purpose of avoiding coercive recruitment into gangs have had difficulty in establishing their definitional membership of a persecuted group and demonstrating their home state's unwillingness or inability to protect them against persecution. This article uses case study examples from Honduras, El Salvador, and Guatemala as positive examples of instances in which individuals met reasonable standards to qualify for asylum, but were denied based on the limitations of language in the UN Convention on Refugees and US case law.

Introduction

Since 1951, the United Nations Refugee Convention has guided its member states in protecting those fleeing persecution. The United States became a party to this Convention’s Protocol in 1967 and codified its provisions in the Immigration and Nationality Act of 1980. Largely formulated in the wake of the World Wars, the Convention has become controversial in recent years due to the changing nature of the global order and the evolving structure of many states. Some analysts have called for its revision while others claim it maintains its capacity to protect those whom it was originally designed to protect.¹

Legal scholar Andrew Schoenholtz argues that the refugee definition, as articulated in the original Convention, “has proven adaptable to the changing nature of persecution.”² He posits that the original flexibility in the Convention’s language “has enabled states to protect refugees from new kinds of persecution and from both non-state and state agents of persecution.”³

This article challenges that assertion using the case of those seeking protection in the United States from gang violence in the Northern Triangle. Through the example of certain Central American nationals who were denied asylum in the United States, this article argues that

² Ibid, 84.
³ Ibid, 91.
either the United States is wrongly interpreting the Convention, or the Convention is failing to protect those it was designed to protect and thus needs to be updated.

This article will proceed as follows. It will first outline the original UN Refugee Convention as it is codified in US law, explaining the definition of refugee necessary to obtain asylum. Next it will briefly outline Schoenholtz’s assertion that this definition continues to be sufficient to the protection of those it was designed to protect. The following section will then use the example of asylum seekers from the Northern Triangle countries of Central America to refute his assertion, outlining a pivotal case in US law where those fleeing gang recruitment were denied asylum despite their persecuted status. This article will argue that because the regimes in Honduras, El Salvador, and Guatemala have proven unable to provide protection to those fearing persecution within its borders, all those seeking protection elsewhere should be eligible under the convention. Finally, the article will conclude by weighing the options for improved protection, arguing that instead of an updated UN Convention, the United States should change its interpretation of the existing law to protect those persecuted for resisting recruitment by criminal gangs.

Design and Intentions of the U.N. Refugee Convention

Formulated in 1951, the Convention Related to the Status of Refugees was designed to prevent a recurrence of what the world had just witnessed in World War II: the demise of those persecuted by the Nazis due to the inability of these persons to seek protection. Originally signed by European states, the Convention was expanded in 1967 with the Protocol Relating to the Status of Refugees. The United States was not an original signatory to the Convention but was later a signatory to the Protocol, thus binding it to most aspects of the Convention. Furthermore, most aspects of the Convention were codified in US law in 1980 with the Refugee Act. The two key provisions of these international agreements as well as US law are first the definition of a refugee and second the principle of non-refoulement.4

According to the Refugee Act (and the UN Convention), a refugee is

“Any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of

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persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”

The Act also specifies that a refugee cannot include “any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.”

The principle of non-refoulement is articulated in Article 33 of the Convention. It states that “no contracting state shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion” with the exception of a refugee who could be regarded as “a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.”

The Convention was not designed for refugees fleeing conflict that does not involve targeted, individual persecution, for example, generalized situations of civil war. Though the homicide rates in the Northern Triangle rival those of countries embroiled in true civil conflict, no person fleeing the three states of the Northern Triangle is doing so due to the generalized, indiscriminate political violence that accompanies civil conflict.

Is the Convention Still Doing Its Job?

Many have noted the changing nature of statehood and the international order since the creation of the Refugee Convention, and question whether these shifts have affected the

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5 An Act to amend the Immigration and Nationality Act to revise the procedures for the admission of refugees, to amend the Migration and Refugee Assistance Act of 1962 to establish a more uniform basis for the provision of assistance to refugees, and for other purposes, Public Law 96-212, U.S. Statutes at Large 102 (1980): 201-206. A “particular social group,” though designed to be flexible in its application, is not a catch-all term for any person who does not meet the other four categories. Rather, a particular social group is a group that has particular and well-defined boundaries, that possesses a recognized level of social visibility, and whose members share a common, immutable characteristic. Furthermore, in the United States there is a one-year limit on the ability to seek asylum. As outlined in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, “an asylum applicant filing after April 1, 1998, must apply within one year of his or her last arrival, unless there are changed circumstances which materially affect his or her eligibility for asylum, or extraordinary circumstances relating to the delay in filing.”

6 An Act to amend the Immigration and Nationality Act to revise the procedures for the admission of refugees, to amend the Migration and Refugee Assistance Act of 1962 to establish a more uniform basis for the provision of assistance to refugees, and for other purposes, Public Law 96-212, U.S. Statutes at Large 102 (1980): 201-206.


Convention’s effectiveness. Some see the old Convention language as too inclusive, criticizing it for a perceived facilitation of migration from less developed countries to more developed countries for economic opportunity. Others think it is too limiting, arguing for it to be updated to adequately protect those fleeing persecution who, because of outdated language, have been denied it. The United Nations High Commissioner for Refugees (UNHCR), the international organization responsible for facilitating refugee resettlement into member states, has acknowledged that “states face considerable challenges as they try and reconcile their obligations under the Convention with problems raised by the mixed nature of migratory movements, misuse of the asylum system, increasing costs, and the growth in smuggling and trafficking of people.” Still, UNHCR has encouraged states to continue to apply the Convention’s framework, offering states assistance with the interpretation of the Convention’s provisions through its *Handbook*.¹⁰

Legal scholar Andrew Schoenholtz has sided with this camp, arguing for the continued relevance and capacity of the original Convention to protect refugees in a shifting global order. He notes a changing relationship between the state and its constituents in many parts of the world. He references “ungoverned spaces where state control is absent, weak, or contested” that emerged after the end of the Cold War in which non-state actors emerged as regional authorities and provided state-like functions. Examples of this phenomenon include Hezbollah in Lebanon or the FARC in Colombia.¹¹ Schoenholtz argues that the emergence of these types of non-state actors is not an affront to the original refugee definition, as the language does not allude to the identity of the persecutor (i.e. the persecutor does not have to be the state or its agents for one to receive protection under the Convention).¹² Still, cases in which the persecutor is a non-state actor have proven controversial due to the Convention’s language that mandates protection of those “unable or unwilling to avail himself or herself of the protection of that country.”

In many countries, the state is willing but unable to provide protection to those fearing persecution by non-state actors. In a judgment as to whether those facing persecution in a country whose state is “willing but unable” to provide protection are refugees or not, the European Council asserted in 2004 that “protection is generally provided when the actors take reasonable steps to prevent the persecution of suffering or serious harm, *inter alia*, by operating

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⁹ Schoenholtz, 90.
¹¹ Schoenholtz, 93.
¹² *Ibid*, 100.
an effective legal system for the detection, prosecution and punishment of acts constituting persecution of serious harm, and the applicant has access to such protection.”¹³ In other words, the European Council defines a working rule of law as the litmus test by which a state is viewed as willing and able to provide protection to a person fleeing persecution from a non-state actor within its territory. There would not, therefore, be a necessity for such a person to receive protection (asylum) from another state. Taking this interpretation, it follows that a person who faces persecution in a country where there is no “effective legal system” cannot be protected by their own government and would therefore be eligible for asylum in another country; see Figure 1 below for a graphical depiction of how to determine refugee eligibility.

**Figure 1: Steps to Determine Asylum Eligibility**

1. **Step 1:** Does the person have a well-founded fear of persecution?
   - Yes
     - **Step 2:** Is it on account of race, religion, nationality, political opinion, or membership in a particular social group?
     - Yes
       - **Step 3:** Can he/she escape persecution by relocating within the country of origin?
       - Yes
         - **Step 4:** Is the person’s state willing and able to protect him/her? (i.e., does the home state have an effective rule of law?)
         - No
           - **Step 5:** Has the person persecuted others or committed a particularly serious crime?
           - No
             - **Not a Refugee**
           - Yes
             - **Refugee**
       - No
         - **Not a Refugee**
   - No
     - **Not a Refugee**

Schoenholtz argues that despite the controversies, there have been enough instances in US jurisprudence of eligible refugees receiving asylum to conclude that the Convention and its Protocol continue to fulfill the original goals of their design.\textsuperscript{14} This article challenges that conclusion. Waves of individuals fleeing persecution in Guatemala, Honduras and El Salvador continue to arrive in the United States seeking protection. Though some have been granted asylum, many more are denied. This article argues that many fleeing the Northern Triangle who have been denied asylum should be granted protection due to a.) their ability to meet the refugee definition by being persons with a well founded fear of persecution based on political opinion and b.) the inability and at times unwillingness of the regimes of these states to provide protection. The next section will profile one prominent case of persons fleeing gang violence in the Northern Triangle who have sought and been denied asylum in the United States. In contrast to the court’s decisions, these persons should meet the definition of a refugee because they are persecuted by these gangs on account of political opinion. Furthermore, as the following section will explore, the states of El Salvador, Honduras, and Guatemala have shown their inability to protect such refugees.

**Gang Victims Seeking Asylum—A Particular Social Group and Political Opinion**

To reiterate for emphasis, in order to be eligible for asylum, a person must demonstrate that the situation from which he or she is fleeing in the home country is “persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”

The number of asylum cases of persons fleeing gang-related persecution in the Northern Triangle is large, and can be categorized as follows: 1.) persons resistant to gang recruitment, 2.) current or former gang members, 3.) witnesses and informants against gangs, and 4.) the family members of those in the first three groups. Case history shows that those in the third and fourth circumstance have had relative success receiving asylum by arguing membership in a particular social group along the lines of “witnesses who testify against gangs” or “family members of gang members.”\textsuperscript{15} As such, the Convention has proven to uphold its purpose to protect these individuals.

Individuals in the second category, those seeking asylum who are current or former gang members, have not been as successful. Recall, however, that the Convention and US code both

\textsuperscript{14} Schoenholtz “The New Refugees and the Old Treaty,” 81-126.

have provisions barring those who have persecuted others (even if they are, in turn, being persecuted) or who have committed particularly serious crimes from receiving asylum. Gang members from the Northern Triangle have, in most cases, persecuted others or committed such crimes, and therefore denying asylum to such applicants is within the definition of the Refugee Convention.

Those falling in the first category—persons resistant to gang recruitment—have been mostly unsuccessful in asylum claims,¹⁶ and this article argues for the provision of asylum to these applicants specifically.¹⁷ The following section reviews one asylum case that exemplifies this situation in which the respondents were not granted asylum. This case merits close examination because it is considered to be seminal in the development of case law covering contemporary maras, or gangs, in the Northern Triangle; that is, because no guidelines yet exist from the Department of Justice regarding Northern Triangle gang persecution and asylum for adjudicators to follow, decisions are made by following precedents set by previous adjudication. On this topic, Matter of S-E-G is well known and often referenced.¹⁸

**Matter of S-E-G**

In 2006, three siblings from El Salvador sought asylum in the United States after fleeing the MS-13 gang in their neighborhood. In their hearing, the two brothers testified that the MS-13 stole money from them, and harassed and beat them for refusing to join the gang, while the sister testified that the gang members repeatedly threatened to rape her.¹⁹ They did not report the beatings or threats to the two police officers in their neighborhood, fearing retaliation from gang members due to a corrupt police force. When the gang finally told the male siblings that they must join the gang or else “their bodies might end up in a dumpster or in the street,” all three siblings fled. They had, several months earlier, seen the MS-13 kill another young boy in

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¹⁷ Additionally, in asylum hearings, if it is determined that a defendant could have sought refuge elsewhere in his or her country of residence, he or she would not be eligible for asylum in another country. This caveat, however, is mostly irrelevant to those fleeing persecution based on resisting gang recruitment in El Salvador, Guatemala, and Honduras. These countries are small, but more importantly, the two main gangs operate a network that spans across the Northern Triangle. This isn’t to suggest that the gangs operate under a hierarchical structure in which those across the entire territory respond to a central command, but rather that relationships exist in which information can be shared about a person’s whereabouts easily, making it hard to seek refuge in another national locale.

¹⁸ David Neal and Juan P. Osuna, “Particular Social Group Part II,” (lecture, Georgetown Law Center, Washington, D.C., October 2, 2016).

their neighborhood for refusing to join, and thus believed the gang members’ intention to follow through on the threats.\textsuperscript{20}

The two male respondents argued that the particular social group on account of which they were persecuted was “Salvadoran youth who have been subjected to recruitment efforts by MS-13 and who have rejected or resisted membership in the gang based on their own personal, moral, and religious opposition to the gang’s values and activities,” while the female respondent argued membership in the particular social group of “family members of such Salvadoran youth.” All three also argued that the gang members persecuted them on account of their political opinion: that of opposition to the gang’s activities.\textsuperscript{21}

In the hearing, the judge found the siblings ineligible for asylum because the “beatings and threats against the respondents were based on the gang’s desire to recruit new members and fill their ranks, rather than to punish the respondents for their membership in a particular social group or their political opinion.” The court also concluded that the three siblings did not establish that the government of El Salvador was “unable or unwilling to control the criminal gangs” and that it had in fact “made a number of efforts to control the gangs and had arrested and prosecuted their members through various gang suppression programs.”\textsuperscript{22} The following sections will challenge this interpretation.

**Opposing the Case Law—Political Opinion**

As exemplified by the above case, US law has established that those who have been targeted for recruitment by gangs in the Northern Triangle and have refused do not qualify for refugee protection because their persecution was not on account of their political opinion or membership in a particular social group. Note that in *Matter of S–E–G* the courts did not deny that refusing gang recruitment constitutes persecution—they only differed as to the motivation for this persecution. UNHCR also supports this, writing in its guidelines that, “forcible recruitment attempts, including under death threat, by violent groups, would normally amount to persecution.”\textsuperscript{23} Still, not only did the court convey that these individuals weren’t persecuted on account of political opinion or membership in a particular social group, but it also determined

\textsuperscript{20} *Ibid.*  
\textsuperscript{21} *Matter of S–E–G.* Board of Immigration Appeals.  
\textsuperscript{22} *Ibid.*  

38
they would not be eligible for protection because the government of El Salvador had proven willing to prosecute this persecution.

Thus, the issues on which this article refutes the court are whether refusal to succumb to gang recruitment constitutes a political opinion and whether the Northern Triangle countries are willing and able to provide protection to those fleeing persecution by gangs. The first issue is explored below while the second will be treated in the subsequent section.

Case law guiding whether or not refusal to join a criminal gang constitutes a political opinion was actually first decided by the United States Supreme Court in 1993 in the case *Immigration and Naturalization Service v. Jairo Jonathan Elias-Zacarias*. This was before the emergence of the contemporary *maras* like Barrio 18 or the MS-13; nevertheless, it has continued to inform modern adjudication, as in the above *Matter of S-E-G*.24 In *Elias-Zacarias*, the defendant, also from El Salvador, refused to join the guerilla forces and sought asylum in the United States, arguing persecution on account of political opinion. Specifically, he argued that not taking sides with any political faction is itself the affirmative expression of a political opinion. The court disagreed; however, the justices were divided. Justices Stevens, Blackmun, and O'Connor dissented, holding that a political opinion can be expressed negatively as well as affirmatively, that a refusal to join a criminal gang is precisely “the kind of political expression that the asylum provisions of the statute were intended to protect.” They cite the United States Congress’s original intent in passing the Refugee Act of 1980 as being to “give the United States sufficient flexibility to respond to situations involving political or religious dissidents and detainees throughout the world.”25

This article argues that the dissenting Supreme Court Justices in *INS v. Elias-Zacarias* articulated the correct opinion that refusal to join a criminal gang is itself a political opinion, especially given the situation in the Northern Triangle, where gangs have essentially come to replace the state in certain swaths of territory. In a country where criminality exerts such a profound influence, an individual’s decision to resist joining in this behavior, especially when that individual may possess few significant alternative economic, protection, or relocation opportunities, should be considered a political opinion.

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24 Another notable contemporary case of denial of recruitment resistance as political opinion is *Rivera Barrientos v. Holder* in 2011. In this case, the applicant testified as saying to the MS-13, “no, I don’t want to have anything to do with gangs. I do not believe in what you do.” The gang responded, “if you don’t want to join with us, if you don’t want to participate with us, if you are against us, your family will pay,” and subsequently gang-rape her. The court determined that this persecution in the form of gang-rape occurred for “recruitment purposes” rather than on account of her political opinion.

opportunities, is the exact type of expression of political opinion that the Convention and the Refugee Act were designed to protect.

For the reasons above, persons persecuted for resisting gang recruitment are indeed being persecuted on account of one of the five protected grounds—political opinion. As previously explained, the last requirement for one to qualify for asylum is that the person must be unable or unwilling to avail him or herself of the protection of the country of origin, provided that the person can show a well-founded fear of persecution on account of race, religion, nationality, political opinion or membership in a particular social group, and is unable to relocate safely within the country of origin. The next section will show why the governments of El Salvador, Guatemala, and Honduras have shown themselves to be unwilling and or unable to provide protection to those being persecuted.

**Opposing the Case Law – Inability to Provide Protection**

Political scientists have articulated different notions of what constitutes statehood; nevertheless, as it relates to refugees, accepted wisdom about the state indicates an element of security. Legal scholar Andrew Shacknove illustrates this conception, writing that, “in exchange for their allegiance, citizens can minimally expect that their government will guarantee physical security, vital subsistence, and liberty of political participation and physical movement.”

Under this paradigm, individuals fleeing mara persecution in the Northern Triangle should be eligible for asylum because of the inability of the governments of El Salvador, Honduras, and Guatemala to offer such guarantees. By several measures, the governments of these countries are not operating effective legal systems that prosecute cases of persecution.

The United States government itself reports on these circumstances in its annual State Department country reports on crime and human rights. Its 2015 Human Rights Report for El Salvador shows that the Inspector General’s office received 709 complaints of police misconduct. The document also reports, “the judiciary suffered from inefficiency, corruption, political infighting, and insufficient resources.” According to the report, not only were there a small number of convictions in the cases that actually went to trial but 106 judges were also investigated for judicial misconduct, eroding the public’s respect for the judiciary.

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and Safety Report, the Department concedes that the Mexican transnational drug trafficking organization, Los Zetas, has infiltrated El Salvador.\textsuperscript{28}

The case of El Salvador is not unique in the Northern Triangle. Regarding Guatemala, the State Department documents in its 2015 Crime and Safety Report a “police/judicial system that remains either unable/unwilling/both to hold many criminals accountable,” and that “well-armed criminals know there is little chance they will be caught or punished.”\textsuperscript{29} Its Human Rights Report notes that in the first nine months of 2015 in Guatemala, 1,215 complaints alleging misconduct by police personnel were documented. It reports that specifically regarding gang responses, security officials engaged in indiscriminate and illegal detentions, filed fabricated drug charges, and were involved in kidnappings for ransom. Furthermore, it documents the arrest of 602 public officials for corruption, as reported by the country’s Public Ministry.\textsuperscript{30}

Finally, in its 2015 Human Rights Report for Honduras, the State Department wrote that police there continue to face charges of “human rights abuses, abuse of authority, corruption, and ties to organized crime,” and as of September, the country’s body to investigate police received 493 complaints.\textsuperscript{31} While these numbers of reported complaints are high, it’s important to remember that those incidents actually reported are likely a fraction of the true number. Just as in the case \textit{Matter of S-E-G}, many people don’t report crime or misconduct due to either fear of reprisal or lack of hope that justice will be served.

Beyond the US State Department, authorities, academics, and organizations around the world have reported on and attempted to measure these governments’ inability to combat gang violence. The high homicide rates in these states have become infamous. The homicide rates in Honduras, El Salvador, and Guatemala have reached higher than 90, 100, and 30, respectively, per 100,000 of population at various points in the past ten years (the global average in 2012 was 6.2 per 100,000 of population for comparison).\textsuperscript{32} While an attention-grabbing homicide rate does not provide a complete picture of a government’s ability and willingness to confront such


homicide epidemics, it is an important statistic to consider. When the statistic is broken down by territories within a country—as homicide statistics within these countries can vary greatly across territories—evidence can be drawn about the gangs’ increasing claim over certain zones of territory. For instance, in the Honduran city of San Pedro Sula, the homicide rate was 171 per 100,000 people in 2014, while San Salvador saw 199 homicides per 100,000 people in 2015.33 This, combined with reports that, for instance, two-thirds of registered homicides in El Salvador are committed by gang members, points to the absence of the state’s ability to exert power in certain gang-held zones across these countries.34

The gangs in the Northern Triangle have emerged with such force as to now operate zones of territory in which the state is virtually absent. Corruption has facilitated this evolution in part, and it has also become increasingly relevant as the links between these gangs and transnational organized crime of Mexican drug-trafficking cartels grow. Cartels have shown significant links to police forces in all three states, in turn facilitating greater networks of corruption between these police forces and the local gangs.35 Because of this, legal scholar Nicolas Serna argues that asylum claims related to gang persecution should not be dismissed “if the petitioner abstained from seeking national protection as, owing to the high levels of corruption and inefficiency, not filing a complaint is often a logical step to avoid increasing the risk of harm.”36

Indeed, the degree of gang penetration into state institutions has led to the state becoming, in the words of analyst Douglas Farah, “non-functional” in much of the national territory. These territories are not ungoverned; rather, the power group that “exercises real political and military control” in these spaces is “less and less often the state.”37 This manifests in low rule of law indicators, which Farah argues has been replaced by “transactional relationships built on the exchange of goods and services among state and non-state actors.”38

33 Cantor, “As deadly as armed conflict?”, 81.
34 Ibid, 84.
36 Ibid, 30. This is also pertinent to women fleeing sexual violence of the gangs. In the UNHCR original research report Women on the Run: First-Hand Accounts of Refugees Fleeing El Salvador, Guatemala, Honduras and Mexico, 60 percent of women interviewed had reported attacks, sexual assaults, rapes, or threats to the police, all of whom said they received inadequate protection or no protection at all. 40 percent of women interviewed did not report this type of harm to the police at all, as they “viewed the process of reporting to the authorities as futile.”
38 Ibid.
The rule of law has indeed deteriorated according to The World Justice Project’s annual global Rule of Law Index. El Salvador, Honduras, and Guatemala ranked 75,39 102,40 and 9741 out of 113 countries measured worldwide in 2015; all three countries also ranked poorly on the World Justice Project’s Order and Security and Absence of Corruption measurements. The Rule of Law indices indicate the low performance of Northern Triangle countries, especially Honduras, on criminal justice indicators. Though certain measurements seem to match other lower middle-income countries, it is important to consider the Northern Triangle statistics in concert with the instance of persecution. For example, though Guatemala actually outperforms the average lower middle-income country on “due process of law,” its low performance on “effective investigation,” “timely and effective adjudication” and “no discrimination” is a factor that would directly impact a person’s inability to seek protection within the borders of his or her country when under the threat of death, prompting the decision to seek asylum elsewhere.

Additionally, corruption remains an issue, and though no perfect measurement of corruption exists, additional data from Transparency International and Americas Barometer is helpful. In its 2015 Corruptions Perceptions Index, Transparency International ranked Honduras 112, Guatemala 123, and El Salvador 72 out of 168 countries worldwide.42 Latin America Public Opinion Project’s Americas Barometer also measures perceptions of corruption, state capacity, and confidence in institutions.43 This study demonstrates low rankings for confidence in trust in national police forces and the judicial systems across all three countries in the Northern Triangle:

- 50.8 percent of the public in El Salvador had confidence in the national police;
- 46.8 percent of the public in Honduras had confidence in the national police;
- 38.1 percent of the public in Guatemala had confidence in the national police;
- 47.5 percent of the public El Salvador had trust in the judicial system;
- 46 percent of the public in Honduras had trust in the judicial system; and
- 43.9 percent of the public in Guatemala had trust in the judicial system.

These statistics, taken together, challenge the claim that these governments are able to adequately protect their citizens, especially given the outsized threat posed by gangs in the Northern Triangle region. Harvard asylum law professor Deborah Anker has posited that just as misunderstanding about Central America’s civil wars led to relatively low numbers of Salvadoran and Guatemalan grants of US asylum in the 1980s and 1990s, current misunderstanding about the lack of rule of law due to the gang menace is impeding Northern Triangle citizens’ contemporary ability to receive asylum. Given the US State Department’s own reporting on these countries’ conditions, it is confusing why this would be the case; nevertheless, court rulings show it could be true.

In the 2005 case *Murcia-Pleitez v. Gonzales*, the court denied refugee status to a Honduran asylum-seeker, holding that the applicant could not prove that the gangs were too strong for the police to control because the applicant did not show “collusion between the group that persecuted the alien and law enforcement structure.” Similarly, in another 2005 case the Board of Immigration Appeals denied asylum, holding that “the Honduran government’s special police force [had] improved conditions and therefore it [was] not more likely than not that a person who [had] been previously tortured by gang members [would] be tortured in the future.” This case was decided by applying the test established through previous case law in *Zheng v. Ashcroft* that says “in order to acquiesce in acts of torture by a private party, the government must both have knowledge of the torture and must breach a legal duty to intervene to prevent said torture.”

Though these cases are from 2005, their legal precedents continue to inform current decisions regarding the Northern Triangle. Unfortunately, based on the aforementioned analysis, their precedents are misapplied and the decisions are misguided. The gang phenomenon has only become more deleterious in the past 11 years and thus these interpretations, problematic in 2005, are now even more so. Government knowledge of persecution (gang recruitment backed by the threat of death constitutes persecution, according to UNHCR) happening anywhere in its territory is not an appropriate litmus test for the Northern Triangle, as research from analysts such as Farah, outlined above, indicates. Proper understanding of country conditions in El

46 Ibid.
47 Ibid.
48 Guidance Note on Refugee Claims Relating to Victims of Organized Gangs.
Salvador, Guatemala and Honduras would recognize these states’ inability to protect those facing persecution for resisting gang recruitment.

Conclusion

This article has argued that due to the absence of rule of law in the Northern Triangle countries, individuals who refuse recruitment by criminal gangs are persecuted on account of political opinion and therefore should be granted asylum. That this continually does not occur refutes legal scholar Andrew Schoenholtz’s assertion that the Refugee Convention maintains its flexibility and ability to provide protection to those it was designed to protect.

In order to rectify the situation, there are two options. First, the United States can change its interpretation of what constitutes a political opinion. If done, by either the Supreme Court or a cabinet of the executive branch, there would be no need to update the Convention or US law. However, should the United States maintain its current interpretation, it is clear that the Refugee Convention and the Refugee Act of 1980 have become outdated and their language should be revised. Persons facing persecution for refusing to join gangs, whose governments are unable to protect them, are exactly the type of individuals whom the Convention was designed to protect, and therefore one of these two options will be necessary to exact the Convention’s potential.

Policymakers will continue to disagree over how to respond to the recent surge of Central American migrants to the United States. Some claim this migration is entirely economic, arguing that the United States does not hold responsibility for poor socio-economic conditions in Guatemala, Honduras and El Salvador and therefore should reject this migration. Others argue that deteriorating security conditions in these Northern Triangle countries should elicit a compassionate response from the United States in which all of these persons are allowed to remain in some capacity. Though economic migration to the United States continues from many parts of the world, in Latin America, crime victimization is a significant driver of intentions to migrate to the United States. According to Latinobarómetro, the probability of seriously considering family migration to the United States was 30 percent higher among those reporting that they or a family member had been a victim of crime in the past year. If security conditions remain poor in the Northern Triangle, this phenomenon will clearly continue.

The United States has neither the capacity nor the responsibility to offer protection or residency to all those fleeing adverse economic conditions or any person who has been a victim of

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crime. That is why proper interpretation of the Refugee Convention and the Refugee Act of 1980 is so crucial. By offering guidelines as to which persons deserve protection, these laws simplify a complicated and often morally ambiguous decision for adjudicators and policymakers.

The decision to offer protection requires interpretation, and the United States has faced much scrutiny for what many perceive to be a callous response to increased Central American migration. For instance, in its 2015 publication “US government deporting Central American migrants to their deaths,” the UK newspaper The Guardian reported on three individuals living in the United States after fleeing violence in Honduras who were removed by US immigration officials and subsequently killed in their home nation.\(^\text{50}\) Beyond these three men, the report mentions a forthcoming academic study identifying as many as 83 US deportees who have been murdered upon return to their Northern Triangle countries since January 2014.\(^\text{51}\)

While this is indeed unfortunate, each case must be evaluated according to its unique facts to determine if a person meets the refugee definition as outlined by US and international law. An updated interpretation or a new law would give the public a clear barometer by which to hold the US government accountable. All cases of migration are sure to have characteristics that elicit empathy and emotion, and thus having an objective measure of how to grant protection will ease the debate on the correct response to circumstances of mixed migration. By declaring the refusal to join a criminal gang to be a political opinion and recognizing the current inability and/or unwillingness of the governments of El Salvador, Honduras, and Guatemala to provide protection to such persons, the United States can clarify who is eligible for protection and execute its duty to those fleeing persecution.

About the Author

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\(^\text{51}\) Ibid.
Appendix I: Further Cases of Asylum Denied Relating to Persecution for Refusing Gang Recruitment in the Northern Triangle

<table>
<thead>
<tr>
<th>CASE</th>
<th>YEAR</th>
<th>FACTS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Erlin Bueso Avila v. Holder, Attorney General</td>
<td>2011</td>
<td>A Honduran citizen said he suffered persecution from the MS-13 after refusing recruitment due to his religion and was severely beaten on several occasions. The court maintained that his persecution was not on account of his religion.</td>
</tr>
<tr>
<td>Matter of E-A-G</td>
<td>2007</td>
<td>A Honduran male whose brother was a former member of the MS-13 but then murdered by the MS-13 for leaving, started receiving threats from the gang. In the U.S., he was originally granted asylum but the DHS appealed, claiming that those opposed to gang membership are not a particular social group and it is not a political opinion, and the asylum was denied.</td>
</tr>
<tr>
<td>Romero-Rodriguez v. US Attorney General</td>
<td>2005</td>
<td>Two brothers fleeing gang recruitment in Honduras were denied asylum in part because the “Honduran government was attempting to control the lawlessness that exists in that country.”</td>
</tr>
<tr>
<td>Mayorga-Vidal v. Holder</td>
<td>2012</td>
<td>A Salvadoran man feared persecution due to membership in social group of “young Salvadoran men who have resisted gang recruitment and whose parents are unavailable to protect them.” The court said this group is too large, diffuse, and subjective, and denied him asylum.</td>
</tr>
<tr>
<td>Rivera-Barrientos v. Holder</td>
<td>2012</td>
<td>A woman fearing persecution in El Salvador sought asylum, arguing membership in the proposed social group of “El Salvadoran women between the ages of 12 and 25 who have resisted gang recruitment.” The court held that the group lacked social visibility and subsequently denied her petition.</td>
</tr>
<tr>
<td>Zelaya v. Holder</td>
<td>2012</td>
<td>“Young Honduran Males who refuse to join MS-13, have notified the authorities of MS-13’s harassment tactics, and have an identifiable tormentor within MS-13” do not constitute a socially distinct and sufficiently particular group.</td>
</tr>
<tr>
<td>Pirir-Boc v. Holder</td>
<td>2014</td>
<td>Particular social group of “persons taking concrete steps to oppose gang membership and gang authority.” Gang members beat the petitioner severely after he convinced his brother to leave the MS-13. The Board of Immigration Appeals reversed the initial judge’s approval.</td>
</tr>
<tr>
<td>Castro Ramirez v. Gonzalez</td>
<td>2006</td>
<td>Persecution based on a refusal to join a gang doesn’t constitute persecution based on one of the five protected grounds.</td>
</tr>
<tr>
<td>Hernandez-Donis v. Attorney General</td>
<td>2007</td>
<td>A Guatemalan national recruited to join gang, refused, and was physically assaulted. The immigration judge found that he did not show he was persecuted based on political opinion and his beatings did not rise to the level of persecution.</td>
</tr>
<tr>
<td>Argueta v. Gonzalez</td>
<td>2007</td>
<td>The immigration judge held that young men who are persecuted for resisting gang recruitment do not constitute a social group.</td>
</tr>
<tr>
<td>Ayala-Euceda v. Gonzalez</td>
<td>2007</td>
<td>Young males who resist gangs are not members of a particular social group</td>
</tr>
<tr>
<td>Lopez-Monterros v. Gonzalez</td>
<td>2007</td>
<td>Young males who resist gangs are not members of a particular social group.</td>
</tr>
</tbody>
</table>

This table was compiled by the author from multiple sources and includes only those who were persecuted for resisting recruitment and is not exhaustive—further cases of denied asylum for resisting recruitment can be found, as can denied cases regarding informants or those who were suspected of being gang informants; those who refused to pay gang extortion tax; those who were victims of gang violence not relating to recruitment or extortion; those who were family members of gang members; etc.
Appendix II: Alternative Forms of Protection Under U.S. and International Law for Those Ineligible for Asylum

<table>
<thead>
<tr>
<th>Type of Protection</th>
<th>Requirements</th>
<th>Bars</th>
<th>Benefits</th>
<th>Evidentiary Requirement</th>
</tr>
</thead>
<tbody>
<tr>
<td>Withholding of Removal</td>
<td>Persons facing persecution in their home country on account of race, religion, nationality, political opinion, or membership in a particular social group.</td>
<td>Persons who have persecuted others, committed a particularly serious crime in the United States, or found to be a danger to the security of the U.S. are ineligible. No one-year bar (like asylum).</td>
<td>Permission to work. No relief for their family members. No opportunity to transition to Legal Permanent Resident.</td>
<td>Must establish that it is “more likely than not” that he or she will face persecution (asylum seekers, on the other hand, must only show an approximate ten percent chance that he or she will be persecuted).</td>
</tr>
<tr>
<td>U.N. Convention Against Torture</td>
<td>Persons who will be tortured upon removal to their home country, “inflicted by or at the instigation of or with the consent or acquiescence of a public official.” The torture does not have to be on account of one of the five grounds.</td>
<td>No bar for those who were past persecutors or those who committed particularly serious crimes. No one-year bar (like asylum).</td>
<td>Permission to work if granted withholding of removal under CAT, work permit may or may not be given if granted deferral of removal under CAT (possible detention). No guarantee to stay in the U.S. and may be removed to a safe third country.</td>
<td>Must show that it is “more likely than not” that individual will be tortured.</td>
</tr>
<tr>
<td>Temporary Protected Status</td>
<td>Any person who is a national of a country designated by the executive branch or Congress and was in the United States before the day that TPS was declared. TPS is often given in cases of natural disaster of civil strife.</td>
<td>TPS only applies to those already in the U.S., not those in the country designated for TPS who then migrate.</td>
<td>Permission to work. TPS is temporary and can be renewed every 6 or 18 months. If not renewed, any person formally receiving TPS is eligible for removal.</td>
<td>Show of nationality of country designated for TPS.</td>
</tr>
</tbody>
</table>

This table was compiled by the author from various sources.
Banking the Bomb: Improving the Engagement of Financial Institutions in Efforts to Counter Proliferation Financing

Darya Dolzikova

Since the nuclear attacks on Nagasaki and Hiroshima, the nature of the nuclear threat and the proliferation of nuclear and radiological (NR) technology and materials have morphed significantly. No longer limited to state-to-state proliferation of NR technology, equipment, and material, today's NR proliferation networks are increasingly involving complex webs of licit and illicit state and non-state actors and dual-use goods. The discovery of the A.Q. Khan network in the early 2000s demonstrated the role that individuals can play in the global proliferation environment. Evidence that terrorist groups, including al-Qa'ida and the Islamic State of Iraq and the Levant (ISIL), have actively pursued NR capabilities has further highlighted the inadequacy of a proliferation regime designed to counter state-to-state proliferation and ill-adapted to the ongoing paradigm shift in NR proliferation. Authorities have rightly recognized the importance of disrupting the financial flows that support proliferation networks, but the approaches to countering proliferation financing (CPF) that have been articulated thus far have been largely ineffective in targeting the unique nature of the threat. This article outlines current CPF efforts and suggests approaches to addressing shortcomings in existing regimes, focusing specifically on the role that financial institutions (FIs) can play in improving CPF regimes. Financial institutions are key stakeholders in a strengthened counter-proliferation regime; by engaging more effectively with relevant government and international actors, they can be effective frontline allies as well. This article proposes a series of guidelines for FIs and government actors to improve FI engagement in CPF efforts and to increase the utility of FI engagement for government and international CPF efforts.

Introduction

Efforts to control the spread of nuclear weapons date back to before the Nagasaki and Hiroshima bombings. Yet, over the past seventy years the nature of the proliferation threat has evolved significantly. From fears of the emergence of new nuclear states, attention has shifted to an arguably more complex dynamic—the proliferation of nuclear and radiological (NR) technology and materials to and by non-state actors. Empowered by globalization and the information technology revolution, private actors play an increasingly large role in shaping the
economic, political, and security landscape of today's world.¹ NR proliferation is no different. The discovery of the A.Q. Khan network in the early 2000s and rising concerns over terrorist actors following the attacks of 9/11 have further highlighted the serious risks that non-state actors pose in the arena of NR proliferation. Evidence has shown that terrorist groups like al-Qa’ida and the Islamic State of Iraq and the Levant (ISIL), have been actively pursuing NR capabilities.²

The changing nature of the NR proliferation threat must be accompanied with a comparable change in counter-proliferation efforts. However, these measures have largely failed to keep pace. Authorities have rightly recognized the importance of disrupting the financial flows that support proliferation networks; similar finance-focused efforts have yielded notable results in the fights against drug trafficking, terrorism, and other forms of illicit activity. Sanctions and the freezing of funds have been popular tools in the fight against terrorist groups like al-Qa’ida and drug networks like the Mexican Sinaloa cartel. The freezing of bank accounts was a major component of the international fight against the famed Medellin Cartel in the 1980s and 1990s.³ The chokehold put on North Korean financial activities following the US Treasury’s 2007 designation of Macao-based Banco Delta Asia, based on allegations of the bank’s involvement in North Korean smuggling and counterfeiting operations, is a prime example of the effects that targeting financial flows can have on illicit networks.⁴ Investigations into the financial accounts and dealings of prominent American Muslim leader Abdurahman Alamoudi was a critical piece in the investigation that tied him to a plot for the assassination of Saudi Crown Prince Abdullah⁵ and eventually led to his twenty-three-year prison sentence.⁶

⁵ For more on the investigation into Alamoudi’s financial activities, see Juan C. Zarate “Financial Chokepoints” in Treasury’s War (New York: PublicAffairs, 2015), 105-108.
Similarly, efforts have been made, both by national governments and international organizations like the Financial Action Task Force (FATF) to translate the “follow-the-money” approach that has long underpinned operations against drug trafficking and terrorist networks to efforts to counter illicit proliferation of NR-related technologies and material. However, the approaches to countering proliferation financing (CPF) that have been articulated thus far have been largely ineffective in targeting the unique nature of the threat. They rely too heavily on counter-proliferation methods developed for a state-centric threat and have failed to differentiate proliferation financing from other forms of illicit financial activity. This failure to tailor CPF regimes to the unique nature of proliferation networks, often centered around non-state actors and dual-use goods, has meant that these regimes have been far less effective than they could be otherwise. Critically, governments have not yet figured out how to engage financial institutions (FIs) in a way that would most effectively leverage FIs’ extensive expertise and familiarity with financial networks, actors, and patterns to make meaningful contributions to national and international CPF efforts.

Governments must work in concert with FIs to develop proliferation-specific typologies to help FIs better understand and identify proliferation-related activities and actors. FIs themselves have a critical role to play in the development of these typologies, but must be given the opportunity and necessary outlets to communicate relevant knowledge to governments. As such, communication practices must be strengthened, both between FIs and government, and between FIs themselves. Furthermore, FIs must be given an incentive to comply with, and actively engage in, the government’s CPF efforts and to prevent wasteful over-compliance and de-risking.7 This article will propose guidelines for the development of CPF regimes and mechanisms that engage FIs effectively and maximize the utility of the expertise and information they bring to the table. It will propose the clear articulation of proliferation-specific financial activity; the improvement of information-sharing practices between government agencies and FIs; the inclusion of a greater variety of government and financial sector actors in CPF efforts; and the design of CPF regimes that solicit wide buy-in from FIs. The article concludes by highlighting particular challenges that are likely to persist in FI-government cooperation on CPF and in CPF efforts more broadly.

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7 De-risking refers to the decisions by financial institutions to avoid business with clients that pose a larger compliance risk than the institution wishes to take on. Instead of accepting and taking-on the risk posed by a prospective client, the institution foregoes business with that client altogether.
Current CPF Efforts

While the nature of the proliferation threat and proliferation networks have shifted from state-sponsored nuclear weapons programs to a more fluid web of licit and illicit non-state actors trading in a wide variety of sanctioned and unsanctioned dual-use goods, counter-proliferation measures have failed to keep up. National and international CPF regimes have thus far relied on a combination of traditional counter-proliferation measures—namely, sanctions—and tools developed for various other types of financial crime to address proliferation financing. Neither approach is particularly well suited to addressing the unique challenges posed by modern proliferation methodologies.⁸

Existing regulations to tackle other forms of financial crime, like money laundering, corruption, or terrorist financing are not entirely suited for application to CPF. While proliferators may engage in various forms of illicit financial activity—illicit actors that sell radioactive material on the black market may also be part of a terrorist network, or may be engaged in the black market trafficking of other goods⁹—the nature of proliferation networks is unique enough that it requires the articulation of distinct mechanisms to effectively understand and disrupt them. The nature of the products being sold within a proliferation network, the actors involved, and the shipping routes and hubs that draw proliferation transactions are each different from those of other illicit networks and leave a different financial trail. The biggest challenge in tracking illicit proliferation flows, as opposed to the flow of drugs, for instance, is the dual-use nature of many NR technologies and materials. Isotopes that may be used for a radiological dispersal device also have legitimate medical and industrial applications. Some of the mechanical components of centrifuges used for uranium enrichment have uses in legal industrial activities, outside of military nuclear programs. Unlike members of a terrorist or drug smuggling network, participants in an illicit proliferation chain may not even know they are part of an underground proliferation network; manufacturers and shipping companies often do not know the final destination or end users of the materials they are handling.

The dual-use nature of the materials sold and transported through proliferation networks and the involvement of licit and often unwitting actors in proliferation chains also means that

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sanctions—the traditional financial tool of coercion—are not always useful to CPF efforts. Sanctions are often too focused on particular entities, individuals, and states to address the very wide variety of activities and actors that make up a modern non-proliferation network. Dual-use goods may not appear on export control lists or raise particular suspicions. For instance, the United Nations (UN) Panel of Experts on Iran noted that only ten percent of the items it was investigating are mentioned on export control lists. Furthermore, manufacturers and shippers of products within proliferation networks are often entirely licit and unwitting actors and often do not appear on sanctions lists. When facing proliferation networks, authorities are thus presented with both unique challenges and opportunities that should be recognized and can be leveraged for the development of more effective CPF regimes.

The limited and currently underdeveloped CPF approach is true of both US national and international efforts. UN CPF efforts have been focused on the implementation of financial sanctions against Iran and North Korea, with only a brief mention of the need to target broader proliferation financing as mandated by UN Security Council Resolution 1540. The FATF has published a number of guidance documents on CPF, but they have mostly focused on states’ compliance with UN sanctions regimes. The 2008 Typologies Report on Proliferation Financing attempts to move past simple sanctions compliance by articulating proliferation financing typologies and addressing the complexity of proliferation financing networks and risks. However, the proliferation typologies identified in the report overlap heavily with those developed for other forms of financial crime.

American CPF efforts have also failed to articulate proliferation-specific typologies and regulations and to move past simple sanctions compliance. Whereas the USA PATRIOT Act recognizes the importance of identifying and combatting terrorist financing, and articulates specific mechanisms to engage the financial sector in the efforts, no similarly comprehensive and activity-targeted initiatives have been developed for CPF. The only CPF-specific regulation, besides legislation on the implementation of WMD-related UN sanctions, is Executive Order 13382, “Blocking Property of Weapons of Mass Destruction Proliferators and Their

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Supporters.” Signed in 2005, the Executive Order freezes the assets and property of WMD proliferators and members of their support networks, denies them access to the US financial and commercial systems, and adds a number of entities to the Office of Foreign Assets Control (OFAC) Specially Designated Nationals (SDN) list. While the document recognizes the specific threats posed by weapons proliferators, and targets their access to the US financial system, the regulation proposes no new approaches to CPF, does not articulate proliferation typologies, and does little beyond expanding the OFAC sanctions regime.

**Implementation Guidelines: Identifying and Addressing Challenges**

To be effective, CPF efforts need to address challenges specific to proliferation financing and to take advantage of patterns and behavioral signatures unique to proliferation networks in order to better understand their nature and manner for disruption. FIs handle a wealth of information on proliferation-related financial transactions and should be front-line allies in government CPF efforts. However, FIs do not have the technological or law enforcement expertise, the resources, or the mandate to conduct thorough forensic analysis of this information. The failure of national and international efforts to develop regulations and mechanisms specifically-suited to engaging FIs in CPF efforts has prevented critical FI-government cooperation on the issue and the transfer of information from FIs to relevant government and law enforcement agencies, where it can be effectively analyzed and leveraged for further CPF policy development. As such, governments must take the lead in addressing the challenges that have prevented FIs from actively contributing to CPF efforts.

1. Developing Proliferation-Specific Typologies

Many FIs have a weak understanding of what proliferation financing actually looks like, what their risk exposure is, and how to mitigate it. A 2015 report by the Royal United Services Institute (RUSI) on ongoing international CPF efforts highlighted FIs’ ignorance on the subject, citing one FI representative as stating that, “If we saw a nuclear weapon listed on trade

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15 For more on the need to develop unique proliferation typologies, including feedback from government agencies and financial institution representatives, see G Hund, RA Weise, and GA Carr, “Meeting Summary of Kitchen Cabinet on Financial Due Diligence to Reduce Proliferation Risks,” prepared for the U.S. Department of Energy by Pacific Northwest National Laboratory, July 2016, 4-5, and Emil Dall et al., “Out of Sight, Out of Mind?” 16-17, 26-27.
documentation, we would not process the payment.” Such a gap in knowledge is an immense impediment to FIs’ capabilities to become active allies in CPF efforts.

Some national and international efforts have already been made to produce a list of proliferation financing typologies that would help FIs identify proliferation-relevant transactions and information, but they have largely failed to articulate red-flags unique to proliferation financing. Instead, lists of proliferation identifiers have relied excessively on red flags developed for other forms of illicit financial activities. The FATF Proliferation Financing Report is the most prominent of such efforts to date. While it presents a number of red flags unique to proliferation financing, the majority of the typologies are identical to those used for identifying instances of money laundering, corruption, and terrorist financing. Proliferation financing may involve these forms of illicit financial activity, but relying on existing red flags is insufficient. The unique nature of proliferation financing networks requires the articulation of specifically-tailored red flags to identify and understand them.

As the 2015 RUSI report highlights, proliferation typologies must move away from individual and product-focused identifiers, which have been the drivers behind current sanctions-focused CPF efforts, towards more activity-specific red flags. By focusing on proliferation-specific patterns or behavior signatures, instead of particular sanctioned individuals or listed export goods, FIs and authorities can avoid the pitfall of dismissing an entity or good simply because it is not listed. The FATF Report suggests some behavior-based red flags that may indicate proliferation activity; for instance, “the shipment of goods inconsistent with the technical level of the country to which it is being shipped,” or the shipment of goods “through [a] country with weak export control laws or weak enforcement of export control laws.” These suggested red-flags are a good starting point for the development of a more comprehensive list of behavior-focused proliferation typologies. Such an approach is much better suited to the complex nature of proliferation networks that more often than not involve unwitting licit actors and dual-use goods that would not appear on sanctions or export control lists.

FIs must play an important role in developing proliferation-specific typologies by providing government agencies and law enforcement with the information they need to better understand proliferation financing patterns and actors. However, they should not be expected to develop red flags independently. As noted earlier, FIs do not have the capacity or expertise to conduct such analyses. Improved communication between FIs and government will be critical to

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18 Emil Dall et al., “Out of Sight, Out of Mind?” 6-7.
efforts for the development of proliferation red flags. The following section will discuss how information-sharing practices can be improved.

II. Improving Information-Sharing Practices

Financial institutions, government agencies, and law enforcement authorities already collect a wealth of information on financial transactions, trade patterns, and relevant actors and networks that support proliferation activities. However, current information-sharing regimes between government agencies and FIs are inefficient. The reporting requirements for Suspicious Activities Reports (SARs), mandated by the Bank Secrecy Act of 1970 and amended by the USA PATRIOT Act of 2001 are not as clear as they could be. The lack of guidance on what constitutes suspicious activity, and which SARs are useful to government and which are not, combined with high penalties for compliance failures, has resulted in so-called “defensive filing.” In other words, FIs over-report financial transactions deemed suspicious to avoid accidentally under-reporting and facing severe penalties. Such excessive reporting is a waste of both FIs’ and government agencies’ resources and time, which could be directed to more productive CPF efforts. Improving guidelines on identifying and reporting suspicious activity could go a long way towards stemming over-reporting. The development of proliferation-specific red flags will be helpful to this end. Additionally, increasing feedback mechanisms from government agencies to FIs on the impact of SARs and their utility could also be helpful. Some have suggested that a more regular or thorough version of the Treasury Department’s Financial Crimes Enforcement Network’s (FinCEN) biannual SAR Activity Review could be one such mechanism. Others have raised concerns that a SAR deemed irrelevant today may contain critical information for a future investigation; limiting the submission of SARs increases the probability of such an oversight. However, the cost of over-reporting does not justify hedging for the possibility of an SAR’s potential future utility.

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20 For more on the need to improve information-sharing practices as part of CPF efforts, also see Emil Dall et al., “Out of Sight, Out of Mind?” 27-30 and G Hund et al., “Meeting Summary of Kitchen Cabinet on Financial Due Diligence to Reduce Proliferation Risks,” 4-5.


22 Ibid.


More robust information-sharing should also be encouraged between FIs of various jurisdictions. Proliferation networks make use of numerous financial institutions across international jurisdictions for a variety of financial services. FIs must therefore be able to easily exchange information on their customers and on suspicious transactions to better understand and mitigate their own risk exposure and to piece together patterns that may help government authorities and international organizations like the FATF to get a larger picture of international proliferation patterns. An information-sharing mechanism could be developed using, or based on, the Society for Worldwide Interbank Financial Telecommunication (SWIFT) system, or FinCEN’s current online bulletin board for consulting banks on their transactions with individuals associated with money laundering or terrorist financing. Conversely, government agencies could share with international counterparts relevant information collected from their respective FIs through SARs. Such an information-sharing utility would create a single forum for the exchange of information, simplifying the process for FIs. It would also allow for the creation of a recorded narrative of FI to FI communication that government agencies may find particularly useful in improving their own CPF efforts and guidelines.

Ultimately, FI-government information-sharing needs to move beyond suspicious activity reporting, to include more rigorous reciprocal communication over regular transaction patterns, developments in CPF policy and law enforcement and investigation developments. As has been stressed throughout this article, not all proliferation-related activity may appear suspicious. Gaining a wider understanding of transaction patterns and how they may relate to patterns of proliferation will create a more comprehensive, and ultimately more useful, picture of the proliferation threat and how best to address it.

Increased information sharing will undoubtedly raise concerns over customers’ privacy and liability from FIs and issues of citizens’ privacy and national security from national governments. However, there is room for cooperation short of running into these challenges and methods can be developed to mitigate concerns once they do arise. For instance, section 351 of Title III of the USA PATRIOT Act expands the Bank Secrecy Act’s safe harbor provision, granting immunity to employees or agents of institutions that may be liable under contracts or agreements when they voluntarily disclose suspicious activity to relevant government agencies. This addresses some of the FIs’ concerns over customer privacy and potential breaches of contract. Some have suggested that guaranteeing protection in future cases of authorized

information-sharing, by including any future information-sharing systems among the authorities banks can share information with freely, could go a long way towards reassuring FIs. Another possible solution may be the creation of a third-party or multilateral clearing house which could scrub SARs submitted by national governments before they are disseminated to other members. The FATF, as the leader in international CPF efforts, should play an important role in coordinating such international information exchanges.

III. Diversifying Actors Engaged in CPF Efforts: Government Agencies

A greater number of government agencies must contribute to the CPF dialogue. Currently, government CPF efforts are being led almost exclusively by agencies traditionally responsible for the development and implementation of financial regulation—namely, FinCEN and OFAC. The Department of State’s Office of Counterproliferation Initiatives has also contributed to CPF efforts, mostly through international policy and regulation consultations, within the UN or the FATF, for instance. Other departments, like the Department of Defense, the Department of Energy and the Department of Homeland Security, while engaged in counter-proliferation efforts, do not focus on countering the financing of proliferation activities.

Export control and customs/border control agencies in the Departments of State, Commerce and Homeland Security in particular need to be more closely involved in CPF efforts, both as sources and consumers of information on proliferation patterns. For instance, information on the issuing and denial of export licenses could be used by other government agencies and FIs to contextualize financial transactions. The same is true of information collected on the nature of the cargo being exported, and the routes it travels. On the flip side, export control authorities have expressed the potential that information on financial transactions collected by FIs and Treasury could have to inform their understanding of the end-users of cargo, to detect illegal operations and to assist law enforcement authorities in better understanding the nature of the transaction.

32 Ibid.
One way to improve information-sharing between export and border control agencies, other government departments and FIs would be to grant the proliferation experts from export control agencies access to SARs, which are currently reviewed only by financial regulation and law enforcement authorities. Access to SARs should also come with increased cooperation between proliferation and financial experts from the Departments of the Treasury, State, Commerce, Homeland Security, Defense, and Energy to share best practices, reduce “language barriers,” and better understand each other’s perspectives of the proliferation risk.

IV. Diversifying Actors Engaged in CPF Efforts: Financial Sector and Industry

A wider array of financial and industry actors must also be engaged in CPF efforts and must be given the appropriate tools to do so. The reliance on existing financial crime regulation has meant that FIs not addressed in existing regimes have also been overlooked in CPF efforts. The Bank Secrecy Act and the USA PATRIOT Act’s Title III focus primarily on banks, informal money transfer networks, credit unions, CFTC-regulated or registered futures commission merchants, commodity trading advisors, and commodity pool operators. This list overlooks FIs and industry actors that are critical components of the proliferation supply chain that need to be included into CPF regimes and given the proper tools, incentives, and protections to encourage cooperation.

Freight forwarders and shipping companies could be encouraged to share information on the nature, origin, and destination of cargo with export and border control agencies. Producers of dual-use goods could report information on orders to government trade and commerce agencies. Similarly, freight forwarders, dual-use goods producers, insurance providers and other actors in the proliferation supply chain should be mandated to report to government authorities denials of service or other potentially suspicious information. For instance, insurance companies may refuse to insure the export of cargo to an individual on a sanctions list for WMD proliferation; however, there is currently no formal mechanism to report this denial to the appropriate authorities. Some industry representatives choose to provide suspicious information to government and law enforcement authorities, but have expressed frustration at the lack of

33 G Hund et al., “Meeting Summary of Kitchen Cabinet on Financial Due Diligence to Reduce Proliferation Risks,” 1.
34 Ibid.
36 G Hund et al., “Meeting Summary of Kitchen Cabinet on Financial Due Diligence to Reduce Proliferation Risks,” 2-3; Andrew Kurzrok and Gretchen Hund, “Stopping Illicit Procurement.”
feedback they have received on the usefulness of their reports.\textsuperscript{37} Producing a regular unclassified analytic product similar to the SAR Activity Reviews for industry and FIs currently not covered by SAR reporting obligations, would be helpful to encourage and continually refine FI SAR and filing strategy, improve industry reporting and targeting of illicit activities, and help industry better understand their role in CPF efforts.\textsuperscript{38}

One type of FI which could be particularly instrumental to CPF efforts, but which has thus far been largely overlooked, is the insurance sector—namely, insurance companies dealing with marine cargo transportation.\textsuperscript{39} Insurance companies collect information on customers and cargo to evaluate and price the risk of a particular insurance policy. Insurers can thus be both valuable sources of information in CPF efforts, and can also incentivize other members of the supply chain to be more diligent in mitigating proliferation-related risks. Unlike banks, which prefer to not engage with risky customers for fear of being unable to meet regulatory compliance standards, insurance companies are more likely to work with risky customers than to deny them service.\textsuperscript{40} This willingness of insurance companies to accept a higher customer risk-profile means that more information is gathered on risky customers, making it easier to identify them and track their activities. For this reason, insurance companies can be particularly useful allies in the CPF fight.

Additionally, insurance companies can increase the cost of an insurance policy for a customer that fails to implement sufficient internal compliance programs aimed at mitigating proliferation-related risks.\textsuperscript{41} Higher insurance premiums could potentially incentivize manufacturers of dual-use goods, shipping companies, and other members of a potential proliferation supply chain to be more proactive in addressing their vulnerability to exploitation by proliferators. Finally, insurance companies can be mandated to check for export licenses before underwriting insurance policies to manufacturers and cargo handlers,\textsuperscript{42} as yet another measure to prevent the export of unauthorized materials, track export patterns on dual-use goods, and identify non-complying exporters.

\textsuperscript{37} Andrew Kurzrok and Gretchen Hund, “Stopping Illicit Procurement,” 16.

\textsuperscript{38} Ibid.

\textsuperscript{39} G Hund et al., “Meeting Summary of Kitchen Cabinet on Financial Due Diligence to Reduce Proliferation Risks,” 2-3.

\textsuperscript{40} Ibid.


\textsuperscript{42} G Hund et al., “Meeting Summary of Kitchen Cabinet on Financial Due Diligence to Reduce Proliferation Risks,” 1.
To encourage more FIs and industry representatives to contribute to CPF efforts, existing regulations need to be extended to cover these new actors. The mandating of SAR submissions, or reports on denials of service for a larger number of relevant actors could be one important step. Protections similar to the safe harbor provisions for FI reporting to government authorities should be extended to insurance companies, freight forwarders, dual-use goods manufacturers, and other components of the proliferation supply chain. Fear of breaching customer privacy obligations may prevent these actors from sharing relevant information on suspicious activities or customers with authorities. Reassuring them of their liability immunity in relevant cases will be critical to soliciting their cooperation.43

V. Maximizing Buy-In from Financial Institutions

A major risk of demanding increased participation of FIs in CPF efforts, particularly in cases where it involves the imposition of additional regulatory obligations, is the phenomenon of de-risking. As part of the efforts to counter terrorist financing in the wake of the 9/11 attacks, financial regulations, due diligence obligations, and penalties for non-compliance greatly expanded for FIs. Afraid of accruing crippling penalties for due diligence oversights and unwilling to commit the resources necessary to meet these increased due diligence and regulatory compliance obligations, many FIs have chosen instead to end their relationships with particularly high-risk customers. This has had the effect of pushing risky actors—those most likely to be involved in illicit financial activity—to informal financial channels, where they cannot be monitored or targeted as easily. Soliciting increased FI engagement in CPF efforts, especially if it comes in the form of expanded regulatory obligations, must be accompanied with measures that will incentivize FIs to actively participate in CPF regimes at best and could stem broader de-risking by FIs at the very least.

CPF mechanisms need to be designed with a view on efficiency—streamlining reporting requirements where possible, improving FIs’ understanding of their role within CPF efforts and shifting away from FIs responsibilities, for which they do not have the resources or mandate, and onto appropriate government agencies and law enforcement authorities instead. The policy suggestions outlined in this article should help address these issues. Improved communication between FIs and government on the utility of SARs and increased guidance on SAR filing processes and requirements should help FIs adopt more efficient and less resource-intensive reporting practices. The articulation by government agencies of proliferation financing typologies

43 G Hund et al., “Meeting Summary of Kitchen Cabinet on Financial Due Diligence to Reduce Proliferation Risks,” 1.
should also make identifying suspicious activity simpler for FIs, which will also help reduce the resources FIs need to devote to their investigative efforts and the number of SARs they file. Finally, engaging more actors in CPF efforts, particularly on the side of the government, will hopefully help reduce the burden that FIs currently feel they face on information gathering and information analysis by shifting some of those responsibilities to the government and law enforcement authorities that have the resources, expertise, and mandate to perform that work effectively. National governments should also involve FIs in discussions with authorities in particularly risky jurisdictions to develop approaches for reducing risk in those markets.44

Conclusion

The guidelines for improving FI engagement in CPF efforts presented here are a sampling of essential upgrades to current activities and guidelines and will face a number of notable challenges to their implementation. Some of the foreseeable obstacles have been identified here, others will become apparent as new regulations and practices are developed and implemented. Ultimately, the relationship between FIs and government on CPF efforts, and on financial regulation more generally, must shift towards a more collaborative and reciprocal partnership. Both the government and FIs are invested in the reduction of risks within the financial system and a more cooperative and supportive relationship will be mutually-beneficial. Channels of communication must remain active and easily accessible to all parties and regulators should involve FIs in the development of financial regulation to ensure buy-in.45 Governments should actively solicit evaluations from FIs on which regulatory practices are helpful in reducing risk while also providing FIs with feedback on the effectiveness of SARs and on policy developments. FIs can be critical allies in CPF efforts and valuable sources of information and expertise. However, they cannot be expected to operate independently; governments must assume responsibility for developing the guidance that FIs need to identify and reduce risk to their own institutions and to the financial system more broadly. Instead of telling FIs what not to do, governments need to develop the habit of more effectively communicating to the financial sector how they can become more effective allies.46

45 “Stemming the Tide of De-Risking through Innovative Technologies and Partnerships,” Intergovernmental Group of Twenty Four, Alliance for Financial Inclusion, 4.2.
About the Author

Darya Dolzikova holds a Master of Arts in Security Studies from Georgetown University, where she focused on WMD proliferation, terrorism and Russian foreign and security policy. While at Georgetown, University, she worked as a graduate research assistant at the university’s Center for Security Studies, conducting research on the Iranian nuclear program and the Russia-Iran relationship. Darya has published pieces on Russian foreign policy and on nuclear proliferation issues in Lawfare and in the Bulletin of the Atomic Scientists Voices of Tomorrow feature.
Evaluating the US Drone Program in a Just War Context

Shannon Dick

Unmanned aerial vehicles, or what are more commonly referred to as drones, have become a key component of US counterterrorism policy. Under the Obama administration, armed drones were used to strike terrorist targets in a number of theaters, both within and outside of active combat zones. Officials described drone strikes as an ethical means to combat the terrorist threat, thereby employing aspects of Just War Theory to justify the use of force. Yet US policy surrounding such use, as established during the Obama administration, is riddled with uncertainties and the lack of clarity about key concepts used to justify the use of force via armed drones raises a number of questions about the extent to which the US drone program reflects key just war principles. Thus, increasing transparency and public understanding of the United States’ use of armed drones is essential for developing policies and practices on the use of armed drones that better aligns with Just War Theory.

Introduction

On November 3, 2002, US officials looked on as an unmanned Predator drone struck a moving vehicle in Yemen believed to be carrying al-Qa’ida operatives responsible for the 2000 attack on the USS Cole that killed 17 Americans. In one swift move, the Predator released a laser-guided Hellfire missile, hitting the SUV with precision and killing all six men inside. This episode represented the first lethal drone strike on al-Qa’ida operatives outside of a declared battlefield and so launched the United States’ drone program.

In time, US officials would come to rely on drone strikes to conduct counterterrorism operations, and the US drone program would become a central pillar of the Obama administration’s counterterrorism policy. In justifying this remote form of warfare, the Obama administration frequently stated that the use of force via armed drones represents an ethical means to combat terrorism while minimizing the risks to civilians and US military and intelligence personnel—employing Just War principles to justify the United States’ use of force by unmanned systems. Yet the secrecy surrounding the US drone program and the lack of clarity about key concepts used to justify the use of force challenges assessments about the extent to

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which the US program did indeed adhere to the principles of Just War Theory and thus align with broader US interests as articulated by the Obama administration. As the Trump administration may be poised to adopt many of the policies and practices surrounding armed drone use put in place by the Obama administration, policymakers would do well to increase transparency and, by extension, public understanding of the US drone program to better reflect just war and rule of law principles.

Background on Lethal Drone Operations

Significant forays into the use of armed drones to strike high-value targets initially began in the years following al-Qa’ida’s coordinated attacks on US embassies in Kenya and Tanzania in 1998. When US officials concluded that the attacks were sponsored by Usama bin Ladin, military and intelligence officials sought a means to quickly act on intelligence regarding his whereabouts.\(^3\) Thus, the military and the CIA looked to the Predator drone as a means to attack bin Ladin on short notice, should the opportunity arise.\(^4\) Despite this initial push to weaponize drones to assist in counterterrorism operations, lethal drone strikes remained a rarity until 2008 when then-President George W. Bush authorized the CIA to conduct covert strikes against al-Qa’ida leaders in Pakistan.\(^5\) Thereafter, the United States began to use armed drones to conduct targeted strikes against terrorist groups much more frequently. The program expanded considerably under President Obama, and as such, the Obama administration offers the best case study to date for examining armed drone use. Throughout President Obama’s tenure, drones evolved from persistent intelligence-gathering platforms to relatively new weapons systems that offered unique capabilities for using force against the United States’ adversaries. From its origins in the Bush administration, the United States’ lethal drone program expanded into a larger campaign against al-Qa’ida operatives in numerous countries—from Afghanistan and Yemen, to Somalia, Pakistan, Libya, Iraq, and Syria.\(^6\) Indeed, military and intelligence officials alike have advocated for the use of armed drones, particularly due to the advantages drones provide.

\(^3\) Whittle, *Predator*, 160-163.


\(^6\) In general, the Obama administration did not provide much information on drone operations, though President Obama did release more details on the US drone program near the end of his term. However, numerous media reports and other unofficial accounts consistently tracked both overt and covert use in numerous countries. See: The Bureau of Investigative Journalism, “Get the Data: Drone Wars,” accessed June 20, 2016, https://www.thebureauinvestigates.com/category/projects/drones/drones-graphs/; New America, “World of Drones,”
The US military has used these systems for a variety of purposes, including to monitor threats, to gain greater situational awareness of battlefields, and to support ground forces in Afghanistan and Iraq—among numerous other uses. The CIA too has maintained its engagement in the US drone program, participating in lethal operations against terrorist targets, particularly in hostile environments or in “areas outside active hostilities,” such as in Pakistan, Somalia, and Yemen. Both military and intelligence officials have commented on the benefits afforded by drones to target terrorists. Such benefits include persistence, operational reach, and precision. Because drones have the ability to loiter over designated areas for extended periods of time, they are seen as useful tools for acquiring more intelligence on a given target and allowing the United States to quickly act on that intelligence if required. Additionally, longer loitering and flying times allow militaries to operate in areas that may otherwise be too costly or dangerous to engage. Drones are also equipped with sophisticated sensor technologies and laser- and/or GPS-guided munitions that provide for more precise information collection and accurate targeting respectively, thereby reducing the risk of civilian casualties.

Yet even with these noted benefits, the Obama administration’s use of armed drones faced considerable scrutiny. Specifically, there were concerns that the United States became overly reliant on lethal drone strikes to counter terrorist threats at the expense of a larger

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strategy. Indeed, numerous experts, including former military and intelligence officials, questioned the extent to which the armed drone program contributed to broader US objectives of defending the homeland and eliminating the threats posed by al-Qa’ida and its affiliates. Experts also questioned whether the US drone program served more as a stop-gap measure to minimize the terrorist threat rather than committing additional resources to address al-Qa’ida’s influence more broadly. Additionally, former government officials argued that the opaque nature of the Obama administration’s decision-making process for conducting lethal drone strikes posed certain challenges to core rule of law principles that have traditionally guided the United States’ use of force. These principles are rooted in Just War Theory, and the Obama administration’s indistinct interpretation of and adherence to such principles risked a number of unintended consequences counter to US interests.

**Jus ad bellum & Jus in bello**

The United States has consistently invoked key principles of Just War Theory to guide its military engagements abroad. The theory is used as a means to differentiate between justifiable and unjustifiable uses of force, and is broadly concerned with two central questions—namely, when is it appropriate to go to war (jus ad bellum) and how should wars be fought (jus in bello). The theory rests on the notion that even in the most extreme situations of warfare, certain principles should guide countries’ behaviors. More specifically, jus ad bellum provides conditions

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under which countries may resort to the use of force. These conditions include the presence of a proper, responsible authority to make the decision to go to war; a just cause; right intention; a reasonable likelihood of success; and only using force as a last resort.\textsuperscript{16}

By comparison, \textit{jus in bello} governs how combatants employ force during war. It regulates the moral conduct of war by emphasizing the principles of proportionality and distinction, among others. The principle of proportionality in particular dictates that parties in conflict must avoid civilian casualties to the greatest extent possible and that collateral damage resulting from an attack must not be disproportionate to the anticipated value of military action.\textsuperscript{17} The principle of distinction states that force can only be directed towards enemy combatants and therefore requires that parties in conflict clearly distinguish between combatants and civilians and/or civilian objects.\textsuperscript{18}

The Obama administration frequently cited these principles when discussing the United States’ lethal drone program. In detailing the policies behind US operations against al-Qa’ida, for example, President Obama stated that the United States is “at war with an organization that...would kill as many Americans as they could if we did not stop them first,” and subsequently described US counterterrorism operations and the use of lethal drone strikes as components of “a just war—a war waged proportionally, in last resort, and in self-defense.”\textsuperscript{19} Additionally, former CIA Director John Brennan commented on the ethical nature of drone strikes, stating that they conform to the principles of necessity, distinction, proportionality, and humanity.\textsuperscript{20}

Yet the Obama administration’s reliance on drones raised important questions about the methods and metrics by which US officials determined when and where it was appropriate to employ lethal force, and who was a legitimate target of drone strikes. All of these aspects represent key considerations for conducting a just war. The Obama administration, however, did not provide many details on how it evaluated these determinations. The lack of information in this regard inhibited assessments of the US drone program’s overall effectiveness and the extent to which the Obama administration’s targeted strike decisions aligned with its stated commitment to just war principles. Indeed, drones and other means of waging war—such as

\begin{thebibliography}{99}
\bibitem{source2} United Nations Treaty Series, \textit{Additional Protocol I}.
\bibitem{source3} Ibid.
\bibitem{source4} Ibid.
\bibitem{source6} Brennan, “The Efficacy and Ethics of the President’s Counterterrorism Strategy.”
\end{thebibliography}
increasingly sophisticated robotic systems—have the potential to change the calculus for using force, and this could test the United States’ adherence not only to *jus ad bellum* principle of last resort, but to the *jus in bello* principles of proportionality and distinction as well.²¹ These challenges are compounded by the lack of available information on the Obama administration’s decision-making processes in this regard.

**Proportionality and Distinction**

One of most contentious issues surrounding the US drone program is the impact that lethal strikes are believed to have on civilians. As noted above, the notions of proportionality and distinction contained within Just War Theory require that parties in war avoid civilian casualties to the greatest extent possible and only target military persons and objects thereof. With regard to the principle of proportionality, Obama administration officials highlighted the unique attributes of lethal drones as providing for considerably more precision in targeting terrorists than other methods of force—such as manned fighter aircraft or reliance on local forces that may not maintain the same standards for assessing collateral damage.²² According to this reasoning, the use of lethal drones minimizes the risk of civilian casualties and thus represents a more humane use of force than other mediums.²³ However, while drone technology itself may offer the opportunity to more clearly distinguish between combatants and civilians in this regard, it is not clear that the Obama administration’s internal processes for differentiating between these two groups were as distinct.

Indeed, on the notion of distinction between civilians and combatants, it is not clear whom the Obama administration viewed as legitimate targets for lethal strikes in the broader war against al-Qa’ida. President Obama stated that al-Qa’ida and its associated forces may be subjected to targeted drone strikes, but he largely did not provide insight on the groups or individuals who comprised these forces.²⁴ The Obama administration similarly was not

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²² Brennan, “The Efficacy and Ethics of the President’s Counterterrorism Strategy.”


²⁴ In 2013, the administration released an unclassified fact sheet detailing the United States’ policy for conducting lethal drone strikes. The fact sheet states that the President “will use all available tools of national power to protect the American people from the terrorist threat posed by al-Qa’ida and its associated forces,” but it does not offer a definition for associated forces or provide insight as to who constitutes such forces. This raises questions about how the administration distinguishes between combatants and non-combatants when operating in already complex and ambiguous environments. See: White House, *US Policy Standards and Procedures for the Use of Force in*
forthcoming in detailing the criteria used to determine who might be targetable, or in elucidating the process through which such determinations were made. Therefore, it is unclear how the Obama administration defined “combatants” or “civilians”, or how officials interpreted the concept of direct participation in hostilities—particularly in the already ambiguous context of the global war on terror. This uncertainty posed a direct challenge to the principle of distinction in that the lack of clarity made it difficult to assess whether drone strikes were (and are) appropriately distinguishing between civilians and al-Qa’ida militants.

A further challenge posed by the Obama administration’s seemingly broad interpretation of associated forces is the impact such an interpretation could have on decisions to use force in a number of theaters and against a wide variety of actors. By maintaining a potentially broad interpretation of who constitutes an associated force, the Obama administration could have, in effect, lowered the threshold for the use of force and decided when and where to conduct strikes absent considerable public debate on the appropriate and acceptable use of lethal force that could then guide broader strategic considerations. Indeed, the lack of information on the US drone program under the Obama administration limited greater understanding of who represented a legitimate target and under what circumstances US officials found it acceptable to conduct lethal drone strikes. The Obama administration was therefore relatively free to rely on drones as the default strategy against al-Qa’ida, thereby placing a primacy on the use of force to address terrorist threats. This preference, however, runs counter to just war standards that emphasize the notion of last resort.

First or Last Resort?

The Obama administration stated that it only conducted lethal drone strikes as a last resort, when capture was not feasible or when it was considered too dangerous to employ other instruments of power. It is unclear, however, how officials reached these decisions and if the use of lethal force via drone was indeed considered only after other options were exhausted and/or deemed to carry too much risk. To be sure, there are legitimate security concerns posed by deploying US forces to—or relying on local forces in—many of the conflict zones in which

Counterterrorism Operations Outside the United States and Areas of Active Hostilities, May 2013, accessed June 21, 2016, [link]


drones operate. Such concerns include risks of US casualties, of less discriminate use of force by local partners, and the potential for an escalation in violence.\textsuperscript{28} Yet the lack of information on how (or whether) the Obama administration assessed and reassessed the costs and benefits of lethal drone strikes gave the appearance of an undue reliance on targeted strikes as the principal means to conduct counterterrorism operations over other potentially non-lethal methods—such as efforts to disrupt terrorists’ financing or communications processes.\textsuperscript{29} Such reliance on armed drones placed a primacy on the use of lethal force, and may therefore contradict the Obama administration’s stated commitment to the principle of last resort.

Indeed, the Obama administration’s reliance on lethal drone strikes appears to have relegated alternative methods for confronting terrorism threats to secondary or even tertiary considerations. Over the course of its tenure, the Obama administration conducted over 500 drone strikes in non-battlefield settings and expanded the US drone program to at least seven countries: Afghanistan, Iraq, Libya, Pakistan, Somalia, Syria, and Yemen, according to publicly available information.\textsuperscript{30} Such an expansion represented a considerable increase in the use of armed drones in counterterrorism operations. Additionally, in response to increased use, the US drone program became a global enterprise over the course of President Obama’s tenure, with bases in at least ten countries to further support US operations.\textsuperscript{31} President Obama himself remarked on the ease with which the administration employed armed drones against terrorist targets, stating “it became so easy to use them without thinking through all the ramifications.”\textsuperscript{32} Such sentiments touch on the risks of bypassing the just war principle of last resort in counterterrorism efforts against al-Qa’ida. Namely, in employing a seemingly drone-first strategy, the Obama administration opened itself up to greater possibilities of something going


\textsuperscript{29} Zenko, “Reforming US Drone Strike Policies.”


awry, which could ultimately have led to adverse effects or unintended consequences that ran counter to US objectives and overarching interests.

Unintended Consequences and the Likelihood of Success

The potential for the United States' lethal drone program to work against broader US interests presents a considerable challenge to just war principles. The Obama administration viewed the use of armed drones as a crucial means for disrupting terrorist plots against the United States and destroying al-Qa’ida’s power and influence in multiple countries around the world.33 Yet, if it was found that the lethal drone program does more harm than good—be it through engendering resentment, fueling al-Qa’ida’s recruitment efforts, prolonging the costs incurred by a seemingly limitless war, or setting a dangerous precedent for the unilateral use of force—it could implicate the program’s overall likelihood of success and represent a moral failing by just war standards.34 This is far from a settled issue, however, as it is particularly difficult to assess the extent to which the drone program achieved its objectives under the Obama administration and supported broader strategic goals.

For example, some reports indicate that lethal drone strikes may generate backlash and fuel anti-American sentiment in affected regions.35 This may be due at least in part to potential collateral damage from drone strikes, even if limited, and the perception that such strikes cause excessive civilian casualties.36 Indeed, local residents may become hostile to the United States, which would ultimately work against the larger counterterrorism goals of gaining support from

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local populations.\textsuperscript{37} The resulting effect may then feed into the power and influence of al-Qa‘ida and its associated forces by provoking greater sympathies for terrorist groups and potentially serving as a recruitment tool to increase their ranks, thereby undermining both the United States’ short-term objectives of degrading such terrorist organizations as well as longer-term strategic interests of combatting extremism.

Additionally, should the Obama administration’s reliance on drones have posed a challenge to the principle of last resort, it could have the unintended effect of weakening the propensity towards discrimination and proportionately when deciding to use armed drones. This could arise from continued efforts to seek out al-Qa‘ida operatives with the aim of disrupting their operations and ultimately eliminating the group as a serious threat to the United States—coupled with an inadvertent relaxation of the Obama administration’s standard for “near certainty” that no civilians be harmed in a targeted drone strike.\textsuperscript{38} The Obama administration received some criticism for this sort of action, in which media reports criticized the presumed metrics used to classify enemy combatants. These reports noted that, when determining how many combatants vs. civilians were wounded or killed in a given drone strike, the administration considered “all military-age males in a strike zone as combatants.”\textsuperscript{39} Such a methodology, if indeed employed, would challenge the Obama administration’s adherence to the principles of proportionality and distinction by circumventing meticulous assessments of who represents a combatant and who might be a civilian.

Similarly, if the United States largely bypassed the notion of last resort when deciding to target terrorist operatives, it may have inadvertently created an opportunity for other countries to do the same should they acquire similar capabilities. Under the Obama administration, the United States maintained dominance over the use of lethal drones.\textsuperscript{40} From this position, the Obama administration could have set a de facto standard for lethal drone use that other countries may choose to model as they develop their own programs and capabilities.\textsuperscript{41} Yet the US standard


\textsuperscript{38} White House, US Policy Standards and Procedures for the Use of Force in Counterterrorism Operations.


\textsuperscript{41} Indeed, a number of countries already possess armed drones, with more pursuing programs to develop or otherwise acquire this technology. Reports of other countries’ use of armed drones in combat have indicated that some governments, such as the United Kingdom and Pakistan, are in fact adopting some of the standards set by the
under President Obama was largely characterized by secrecy, with officials releasing information on US rules guiding the use of force in December 2016, at the end of the Obama administration. The limited availability of information until this point challenged assessments of the United States’ justifications for the use of force and the extent to which such justifications adhered to various just war principles. The proliferation of such a standard for lethal drone use could therefore have the unintended consequence of weakening broader adherence to the norms established by the international rule of law. Given the Obama administration’s stated commitment to the principles contained within the international rule of law, it is likely not within the United States’ interest for other countries to engage in similar programs that place an undue emphasis on the use of force at the expense of significant consideration of alternatives and largely absent an understanding of the justifications for force.

A Way Forward

The United States lethal drone program raises a number of important questions regarding justifications for the use of force. Indeed, many questions remain in large part due to the lack of clarity surrounding the Obama administration’s interpretation of key rule of law principles that are rooted in Just War Theory and the uncertainty about the extent to which the Trump administration will adopt its predecessor’s policies. Remaining issues include explanations about who constitutes a legitimate target, how the Obama administration distinguished between combatants and civilians in the already murky war on terror, and under what circumstances the Obama administration found it acceptable to conduct lethal drone strikes. The lack of information inhibits assessments of the specific benefits derived from drone strikes and the impact that such strikes may have on broader strategic objectives.

All of these issues touch on key considerations for conducting a just war. The impact of drone strikes on civilians, for example, directly applies to the notions of distinction and proportionality. Similarly, a preference for the use of armed drones over other methods of force and/or statecraft holds considerable implications for the notion of last resort and the thresholds at which US officials are willing to employ the use of force against an adversary—particularly when such use poses less risk to US personnel. Finally, a reliance on armed drones to carry out United States’ use of lethal drone strikes. See, for example: Spencer Ackerman, “Drone strikes by UK and Pakistan point to Obama’s counter-terror legacy,” *The Guardian*, September 9, 2015, accessed June 24, 2016, https://www.theguardian.com/us-news/2015/sep/09/obama-drone-strikes-counterterror-uk-pakistan.

42 Brooks, “Cross-Border Targeted Killings.”

US counterterrorism objectives poses certain challenges to the concept of likelihood of success, especially if drone strikes prompt considerable blowback from local populations and inadvertently work against longer-term US interests.

Thus, there is a need for greater transparency on the policies governing and the justifications underpinning the United States’ use of lethal drones. By increasing transparency surrounding the US drone program, policymakers could provide greater understanding of the rationale behind the United States’ decisions to use force via armed drone and, in so doing, better ensure that such decisions consider and indeed adhere to just war principles, such as those of likelihood of success, last resort, and proportionality and distinction.

To be sure, greater transparency could come with certain risks. More clarity about the US drone program could allow adversaries to modify their own operations and better avoid targeted strikes and/or considerably raise the risks to civilians. Indeed, there are a number of legitimate national security reasons for maintaining a certain degree of ambiguity about the use of armed drones. Yet greater transparency about the US drone program would not necessarily undermine such national security requirements, and could simultaneously advance US national security policy goals. For example, increased clarity about the legal framework and procedures guiding decisions to use armed drones could improve partners’ and allies’ understanding of the US drone program and its adherence to rule of law norms, and in turn promote greater counterterrorism cooperation. 44 Additionally, greater transparency could lend to the establishment of an appropriate international standard to guide the use of armed drones in such a way that adheres to US values and interests, particularly as more countries seek to acquire armed drone technology. 45

More information on the US drone program would also support objective assessments of the drone program’s costs and benefits, the degrees to which it is achieving its objectives, and the ways in which it supports larger US goals. 46 In this way, the United States’ lethal drone program could lead to greater and more assured adherence to the principles of Just War Theory to which the United States is committed.

46 White House, “Remarks by the President at the National Defense University.”; Brennan, “The Efficacy and Ethics of the President’s Counterterrorism Strategy.”; White House, “Remarks by the President at the United States Military Academy Commencement Ceremony.”
About the Author

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Book Review: *Intelligence Arabic* by Julie C. Manning with Elisabeth Kendall

*R. Morgan Byrne-Diakun*

In her new book, *Intelligence Arabic*, Julie C. Manning with Elisabeth Kendall presents Arabic linguists with a robust tome of vocabulary terms and phrases geared specifically towards the practice and theory of intelligence. As part of the Edinburgh University Press series “Essential Middle Eastern Vocabularies,” *Intelligence Arabic* constitutes one of the first serious attempts at a comprehensive treatment of English–Arabic translations in the realm of intelligence studies. Students of Arabic will find Manning’s book a niche but useful guide to a tranche of Arabic terminology for future or current careers in national security and intelligence.

Although mainly a translation guide, Manning’s book includes a short introduction outlining the practical importance of a shared intelligence lexicon in both Arabic and English. As the precision of language remains a challenge for intelligence practitioners worldwide, Manning sees decreasing linguistic miscommunication and ambiguity as a “key to the success of partnerships between Western and Middle Eastern intelligence services.” Indeed, for Western intelligence services, the importance of intelligence liaison relationships with Middle Eastern and North African countries is hard to understate—US counterterrorism efforts in particular are heavily reliant on the effective coordination of operations and communication of information with a variety of Arabic-speaking intelligence and security services. As such, *Intelligence Arabic* may serve as a useful guide for US intelligence practitioners working on some of the nation’s most pressing security issues.

*Intelligence Arabic* consists of lengthy chapters of vocabulary organized by major intelligence functional areas and collection disciplines. A section on general intelligence terminology leads off the book, providing translations for concepts ranging from military intelligence to definitions of the core functional and foundational concepts of each intelligence discipline. The book’s human intelligence chapter contains translations of terms and phrases used to describe the agent acquisition cycle and the development of human sources of intelligence. The next chapter on operations elucidates translations for concepts related to covert action, physical security, and intelligence tradecraft. The counterintelligence chapter provides translations related to information security, access controls, and counterespionage. Manning’s chapter on signals intelligence contains translations related to technical collection, cryptography, and cyber operations and systems. Finally, the book concludes with a useful index of translations.
Manning’s book has several strengths that are worth noting. First, for every translated term and phrase, the book provides definitional translations designed to explicate the contextual meaning of the terms, as they are understood by Western intelligence services. This is a useful addition to the book that may lend itself to helping overcome real barriers of cultural misunderstandings common in translations; in particular, English intelligence terms laden with idioms or cultural references are thoughtfully and comprehensively defined in both languages. Second, the translation of all terms using Modern Standard Arabic (MSA) expands the utility of the book, making it accessible and applicable to intelligence services across the Middle East and North Africa. Third, although Manning notes that many terms could likely fall into multiple chapters, her careful organization of terminology for translation into the major functional areas of intelligence can serve to quickly aid the reader with a focus on their particular job duties or interest areas. Finally, comprehensive audio recording guides that accompany the book can provide beginner and intermediate Arabic readers with a beneficial pedagogical tool for pronunciation.

The book provides translations for an extremely wide variety of intelligence terms and concepts, but its contextual translation of intelligence concepts from a Western perspective into Arabic may fail to always grasp the context of how Arab intelligence services understand those concepts. As a counterpoint to its MSA translations, the next edition of Intelligence Arabic might consider including sections on country-specific terminology in colloquial aamiya Arabic as short primers for intelligence practitioners slated to work in those countries. As colloquial dialects are generally used in spoken Arabic more than written Arabic, the task of characterizing these phrases in a book would be a challenging but rewarding next step towards building a more comprehensive linguistic bridge between Arabic and English in the field of intelligence. Given the diversity and complexity of Arabic dialects, a more specific focus on the terms and phrases used by different countries across the MENA region may even provide Western intelligence practitioners with a more nuanced comparative understanding of how natives of countries in the region practice and perceive their vocation.

Overall, Western intelligence practitioners already professionally proficient in Arabic will find Intelligence Arabic a welcome addition to their library as a translation guide for some of the more esoteric terms and phrases related to their field. Similarly, Arab intelligence services will likely greatly benefit from the book, both for its precise translations but even more for its contextual definitions of intelligence terms that would otherwise be obscured by unknown
cultural references and differences in professional practices. Beginner and intermediate Arabic students will likely find the book challenging, but not inaccessible. All readers will appreciate the well-developed contextual definitions of the book, which can readily serve as an intelligence dictionary as much as a translation guide.

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Robert Morgan Byrne-Diakun is a master's degree candidate at the Georgetown University Security Studies Program, with a concentration in intelligence studies. An Arabic linguist, Morgan has lived and worked in the Middle East as an interpreter and currently works as a contractor in the US defense community. He has served as the Editor-in-Chief of the Georgetown Security Studies Review since June 2016.