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Defending the Cyber Realm

Alex Middleton

Introduction

THERE is a widespread belief that as societies and governments become increasingly reliant upon information technology, they in turn are becoming more vulnerable to a whole range of cyber-threats.[1] Whether these dangers are capable of generating enough damage to warrant a redistribution of government resources is the question at the heart of this essay. This paper provides an evaluation of the cyber-threat arguing that it deserves recognition as a top-tier priority given that it poses some significant challenges to both national security and economic prosperity. Whilst cyber-crime falls under this category and is estimated to cost the UK economy alone £27 billion annually,[2] it is simply not feasible in an essay of this length to give it the attention it deserves. Therefore, whilst it is referred to on occasion, a detailed discussion of the topic is omitted from the analysis. Instead the paper argues its case through focusing on how cyberspace could potentially serve as a platform from which hostile states and terrorist groups could direct attacks against key national infrastructures as well as on other government, military and private sector targets. Furthermore intellectual property theft is identified as a key concern.

Rather than attempting to justify elevating the status of cyber-threats through relying upon a broad discussion of how these risks fare when compared with more traditional perils, the piece aims instead to detail their severity. It further argues that meeting the cyber-threat is likely to demand a considerable amount of resources but that this is necessary given the consequences for failing to do so could be catastrophic. It does, however, insist that there exists a significant degree of crossover between

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[1] Eriksson, J. & Giacomello, G. "The Information Revolution, Security, and International Relations: (IR) Relevant Theory? *International Political Science Review*, 27 (2006) p. 226.

[2] BBC News, 'UK cyber crime costs £27bn a year - government report'. *BBC News* (online), 17 February 2011. Available at http://www.bbc.co.uk/news/uk-politics-12492309. (Accessed 18 March 2012).

these and other major threats, so that a cyber defence budget would also often serve the aims of other departments.

Dangers from the Cyber Realm

In June 2010, it was discovered that the controversial Natanz nuclear facility in Iran had been attacked. What had caused the destruction of many of the sites centrifuges was neither a bomb nor a missile but a highly sophisticated piece of malware; a computer worm that has become known in the cyber-world as Stuxnet.[3] Unlike in a conventional attack, determining the culprit has proven difficult, as is often the case in a cyber-assault, where perpetrators are able to operate behind false IP addresses, foreign servers and aliases.[4] Indeed, the anonymity that the cyber realm can offer is one of the many advantages of these types of attacks. Whilst the identity of the aggressor in the Stuxnet case remains unknown, according to Claire Yorke, an expert in cyber security at the think tank Chatham House, there should be little doubt as to the type of actor involved:

> 'Although the origin of the virus is still unknown, its sophistication and complexity suggests it would have required significant time and resources beyond the capability of non-state actors'.[5]

Indeed, Stuxnet is but one of the many cyber-attacks that are alleged to have been orchestrated by a nation-state. Media reports and even the Iranian government suspect that the United States and Israel were involved.[6] However true these allegations, it has now been estimated that over thirty states have developed specialized cyber-warfare units with aggressive computer-warfare programs.[7] Richard Clarke, a former Special Advisor to the President for Cyber Security, insists that several states, including the US, possess the capability to launch cyber-attacks that could

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[3] Farewell, P. & Rohozinski, R. 'Stuxnet and the Future of Cyber War', *Survival: Global Politics and Strategy*, 53, (2011) p. 24.

[4] Cornish, P. et al, 'On Cyber Warfare, (London, Royal Institute of International Affairs, 2010) p.13. Available at http://www.chathamhouse.org/sites/default/files/public/Research/International%20Security/r1110_cyberwarfare.pdf (Accessed 18 March 2012).

[5] Hopkins, N. 'Stuxnet attack forced Britain to rethink the cyber war'. *The Guardian* (online), 30 May 2011. Available at http://www.guardian.co.uk/politics/2011/may/30/stuxnet-attack-cyber-war-iran (Accessed 18 March 2012).

[6] Hopkins, N. 'Stuxnet attack forced Britain to rethink the cyber war'.

[7] Adams, J. 'Virtual Defense' *Foreign Affairs*, 80 (2001) p. 102.

potentially devastate a modern nation.[8] By failing to adopt new defensive strategies to counter the threat, many nations, he insists, are running serious risks to peace, order and stability, as well as to individual and national economic well-being.[9]

As far back as 1997, the Joint Chiefs of Staff have run Information Warfare (IW) exercises designed to improve the United States' response to cyber incidents. The first of which codenamed Eligible Receiver served as a wakeup call for many, demonstrating how vulnerable the nation was to this new form of attack and quite how devastating it could be when utilized. Using only commercial equipment and tools downloaded from the Internet, agents of the National Security Agency (NSA), adopting the role of foreign cyber-warriors, were able to break into the power grids of nine American cities as well as disrupt their 911 emergency systems.[10] Having proven that hackers could switch off the power in multiple cities and prevent local emergency services from responding to the crisis,[11] the agents then proceeded to hack their way into thirty-six Pentagon computer networks - only two of which were detected - where they would then have the power to override the command-and-control systems and issue bogus instructions to key personnel and equipment.[12] As James Adams states, 'this group of hackers using only publically available resources were able to prevent the United States from being able to wage war effectively'.[13] Cyber-attacks then possess a unique appeal to rogue states and terrorist organisations not only for the anonymity they provide - which decreases the risk of retaliation - but also in that they offer an asymmetric advantage. Formerly formidable opponents, states such as the US and the UK who have sizeable defence budgets, are now weaker, due to an 'electronic Achilles heel'.[14] The reliance of modern militaries on computer technologies - from GPS satellites used to guide missiles to unmanned, pilotless drones - leads Clarke to boldly assert that 'the U.S. military is no more capable of operating without the Internet than Amazon.com would be'.[15]

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[8] Clarke, R. & Knake, R. *Cyber War: The Next Threat to National Security and What to do About it* (New York, Harper-Collins Publishers, 2010), p.31.

[9] Clarke, R. & Knake, R. *Cyber War.* p.xiv.

[10] Adams, J. 'Virtual Defense'. p. 101.

[11] Adams, J. 'Virtual Defense'. p. 101.

[12] Adams, J. 'Virtual Defense'. p. 101.

[13] Adams, J. 'Virtual Defense'. p. 101.

[14] Lewis, J. 'Assessing the Risks of Cyber Terrorism, Cyber War and Other Cyber Threats'(Washington DC: Center for Strategic & International Studies, 2002), p.1

[15] Clarke, R. & Knake, R. *Cyber War.* p. 93.

Nearly two decades on from Eligible Receiver, the Internet remains much the same, with hackers continuing to find and exploit new vulnerabilities in systems that allow for unauthorised access. Clarke provides a five page account of what a modern full scale state-sponsored cyber-assault might look like in his recent publication *Cyber War*. What can be drawn from this piece is that if anything the situation has only got worse. In this hypothetical scenario, the US is under cyber-attack and by hacking into the control systems of a few key national infrastructures, the anonymous aggressors are able to conduct a vicious assault on the nation that sees lethal clouds of chlorine gas being released from chemical plants, subways and freight trains derailing, passenger planes colliding in mid-air, all whilst much of the eastern half of the country is left without power. Furthermore, the perpetrators have managed to corrupt sensitive data belonging to financial institutions as well as the military.[16] Far from being the type of overdramatized scenario that could only appear in a Hollywood movie, Clarke insists that a nation-state has the capacity to carry out such an attack today, in the space of fifteen minutes and all without a single terrorist or soldier ever needing to appear.[17] Why an attack of this magnitude has not yet occurred, he believes, is for the same reason that the nine nations with nuclear weapons have not made use of them since 1945; the political circumstances, as of yet, have not warranted its use.[18]

Intellectual property theft is among the major concerns for many of today's most technologically advanced and industrialised states. Stockholders and taxpayers pour billions of dollars into funding various research projects. The analyses and results of these are often accessible to hackers who, once they have compromised the system, are able to access the information which can then be copied, deleted and/or edited at will. For Clarke, the ability of adversaries to steal trade secrets as well as sensitive military information could have such a profound impact as to alter the balance of power within the international system.[19] Jonathan Evans, the incumbent head of Britain's Security Service MI5, also views this as a major issue. Evans recently wrote to three hundred leading companies advising them that the Chinese government had most likely already penetrated their networks,[20] stressing the need for them to tighten

[16] Clarke, R. & Knake, R. *Cyber War*. pp. 64-68.
[17] Clarke, R. & Knake, R. *Cyber War*. pp. 67-68.
[18] Clarke, R. & Knake, R. *Cyber War*. p. 68.
[19] Clarke, R. & Knake, R. *Cyber War*. p. 237.
[20] Clarke, R. & Knake, R. *Cyber War*. p. 58.

their security measures and protect their intellectual property which undeniably forms an integral part of the UK economy.

Cyber Security Budgets

Governments are now waking up to the idea that the cyber realm hosts a great number of dangers that could have a profound impact on the welfare of the state and its citizens. Cyber-threats were a prominent feature in the 2010 National Security Strategy, in which the new UK coalition government outlined it as one of only four "Tier 1" priorities which also included International Terrorism.[21] The Strategic Defense Review that followed declared that an additional £650 million would be added to the cyber security budget so that both the government and private sector could bolster their online defences.[22] This move could be seen to demonstrate a significant shift in government priorities in which cyber-threats take precedence over more conventional concerns, with funds being stripped from other vital areas. Indeed, the same review announced that overall defence expenditure would be slashed by 8 per cent over the next five years and would include 42,000 job losses within the MOD and armed services.[23] However, when considering the implications for failing to do so, the reallocation of resources appears to be a prudent move. In financial terms, the cost of dealing with cyber-attacks on commercial systems in the U.S. already exceeds $50 billion a year.[24] The infamous "I love you" worm that was launched in 2000 by a single university student in the Philippines is estimated to have cost $3 -$15 billion in damages.[25] What a state or well-funded terrorist group intent on causing excessive damage and disruption could do then is truly an unsettling thought. A cyber defence budget of £650 million would no longer appear to be a disproportionate sum to allocate towards countering the threat.

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[21] HM Government, 'A Strong Britain in an Age of Uncertainty: The National Security Strategy' (London: Her Majesty's Stationary Office, 2010) p. 11. Available at http://www.direct.gov.uk/prod_consum_dg/groups/dg_digitalassets/@dg/@en/documents/digitalasset/dg_191639.pdf?CID=PDF&PLA=furl&CRE=nationalsecuritystrategy (Accessed 18 March 2012).

[22] HM Government, 'Securing Britain in an Age of Uncertainty: The Strategic Defence and Security Review' (London: Her Majesty's Stationary Office, 2010) p. 47. Available at http://www.direct.gov.uk/prod_consum_dg/groups/dg_digitalassets/@dg/@en/documents/digitalasset/dg_191634.pdf?CID=PDF&PLA=furl&CRE=sdsr (Accessed 18 March 2012).

[23] BBC News, 'Defence review: 'Cameron unveils armed forces cuts'. *BBC News* (online), 19 October 2010. Available at http://www.bbc.co.uk/news/uk-politics-11570593 (Accessed 18 March 2012).

[24] Dunnigan, J. *The Next War Zone - Confronting the Global Threat of Cyberterrorism* (New York, Kensington Publishing Corp, 2002), p. 156.

[25] Lewis, J. 'Assessing the Risks of Cyber Terrorism. p. 9.

In 2010, the London based think tank Chatham House produced a paper that argued 'Cyberspace has merely extended the battlefield and should be viewed as the fifth battlespace alongside the more traditional arenas of land, air, sea and space'.[26] This new domain of warfare, they declare, is open not only to nation-states but to a host of actors including terrorist cells and organised crime groups, who may choose to use it as a platform that may enable them to meet their political or financial objectives.[27] In keeping with Clarke's stark warning, but written many years before, the National Research Council, in a paper entitled *Computers at Risk*, argued that 'tomorrow's terrorist may be able to more with a keyboard than with a bomb'.[28] There is then a strong degree of crossover when dealing with the cyber issue. Through funding projects that aim to tackle the cyber issue, governments might well be simultaneously funding other departments that aim to counter terrorism, organised crime or the proliferation of nuclear weapons, as many adversaries could use cyberspace as a means to achieve these ends.

Cyber Skepticism

In a paper written for the Center for Strategic and International Studies, James Lewis presents a highly skeptical view of what the likelihood and effectiveness of launching a cyber-attack would be. Whilst admitting that many computer networks remain vulnerable to attack, 'few critical infrastructures', he claims, 'are equally vulnerable'.[29] He argues that an attack directed against the national electric grid in the US, which is often cited as a potential target for hostile states and terrorist groups, would have limited consequences given that it is not controlled by one central organisation, but by some 3,000 public and private sector groups.[30] To cause large scale disruption, Lewis contends, would then require cyber-warriors to simultaneously attack multiple targets, something he views as an enormous task. His argument, however, fails to recognise that not all energy suppliers contribute equally and that a strategic attack against only a couple could be all that is needed to bring a thriving metropolis to a grinding halt.

[26] Cornish, P. et al, 'On Cyber Warfare'. p. 11.

[27] Cornish, P. et al, 'On Cyber Warfare', p. 11.

[28] National Research Council, 'Computers at Risk' (Washington DC: National Academy Press, 1991), p. 7.

[29] Lewis, J. 'Assessing the Risks of Cyber Terrorism. p. 1.

[30] Lewis, J. 'Assessing the Risks of Cyber Terrorism, p. 5.

The idea that terrorists or other potential aggressors could hack into nuclear weapons systems and cause a major catastrophe, reminiscent to scenes in the 1983 film *WarGames*, is perhaps a little too farfetched. Joshua Green is keen to emphasize that such systems are protected by 'air gapping', meaning that they are not physically connected to the Internet or any open network which makes it almost impossible for an outsider to gain unauthorised access to the systems.[31] Similar safety measures also exist for many government and military networks such as the US Department of Defense Secret Internet Protocol Router Network (SIPRNET) which is used to transfer classified information between relevant departments.[32] Cutting off all outside users heavily reduces the risk of an adversary being able to steal sensitive information or cause disruption to services but it does not eradicate it. The Department of Defense has already experienced several incidents where malicious software has moved over to their most sensitive air gapped networks,[33] and indeed the aforementioned Stuxnet worm is thought to have been unleashed when a user uploaded the malware via USB.[34] The Natanz computer network was itself air gapped and was considered by many to be impenetrable. Pentagon information security experts who have grown accustomed to these problems have labeled it "the sneakernet threat".[35] To argue that our most sensitive information is inaccessible because certain networks maybe air gapped is then ill founded. Air gapping as an answer to the cyber-threat is of course not a credible solution. Looking at the wider issue, these dangers extend beyond military networks and directly target the private sector, as well as individuals. To implement similar measures in these theatres would call for the disbandment of the Internet altogether. Its use may protect systems from attacks but there are obviously ways around it. Furthermore, to believe that all valuable information is stored on air gapped networks would be a ludicrous assumption.

Conclusion

Since the "dot-com" boom era of the mid-1990s, the Internet has enabled millions of users worldwide to share a wealth of information. What had

[31] Weimann, G. *Terror on the Internet: The New Arena, the New Challenges* (Washington DC, United Institute of Peace, 2006), p.166.
[32] Dunnigan, J. *The Next War Zone.* p. 182.
[33] Dunnigan, J. *The Next War Zone*, p. 183.
[34] Farewell, P. & Rohozinski, R. 'Stuxnet and the Future of Cyber War'. p. 24.
[35] Clarke, R. & Knake, R. *Cyber War*, p. 171.

started out as a research project for the US government, cyberspace has now undeniably helped to develop international trade and commerce as well as bringing people from all corners of the globe closer together through the use of email, chatrooms and social media platforms. However, it also possesses a darker quality, one that enables organised crime syndicates to siphon billions from an unsuspecting public and more recently it has served as a platform from which hostile actors could launch devastating attacks that are capable of crippling a modern state. The anonymity, low cost and asymmetric properties of cyber-attacks makes them a highly attractive tool for advancing political or financial objectives.

Cyber-threats encompass a host of dangers that include fraud, intellectual property theft, cyber-espionage, as well as attacks on military, government and private sector targets. Depending upon the actor initiating the strike, it could also fall into other categories such as organised crime and terrorism. By funding cyber security projects one might not necessarily be taking away resources from these other areas as these dangers are capable of crossing over into the cyber realm. In essence, this piece argues that cyber-threats deserve recognition as major threats given the potential damage they could inflict upon areas critical to the adequate functioning of the state. Furthermore, the considerable degree of overlap that exists between cyber-threats and other concerns such as inter-state hostilities, terrorism and organised crime, justifies the need to provide sufficient political capital to the departments that are tasked with tackling this emerging security concern.

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Lewis, J. 'Assessing the Risks of Cyber Terrorism, Cyber War and Other Cyber Threats' (Washington DC: Center for Strategic & International Studies, 2002). pp. 1-12.

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Food Security in the Contemporary World: Making Security Sustainable

William Barnes

THE concept of food security is dynamic; it has been changing to incorporate new ideas over the years since it was established. In this piece, I will argue that if cultural acceptability is to be added as a tenant of food security then so must sustainability. Cultural acceptability addresses the needs of various ethnicities, for example providing kosher foods for the Jewish population and halal foods for the followers of Islam. Since there is a new focus on the environment with initiatives such as the Kyoto Protocol, this piece concludes further that sustainability should also be an integral part of food security as a concept, if food security is to maintain its legitimacy as a concept.

Changing demographics over the last two hundred years, especially since the advent of the Industrial Revolution, have altered the landscape of the developed world. Prior to the late 1800s, populations were more geographically scattered than today in an agrarian, agricultural setting. Following the technological and industrial advances that have occurred since this time, the majority of the populace moved to an urban environment. The migration to cities has changed the methods of providing sustenance to people. The structure is no longer that of a typical agrarian society. Instead, the food production and distribution systems are dominated by the corporate world which has led to the bulk of the food production system being in the hands of a few select companies.[1] It is this "oligarchy" that causes a problem for the concept of food security in the urban environment.

The five main tenets of the concept of food security are: quality; quantity; safety; palatability and cultural acceptability. Until the mid-1990s, food security was only defined by the trio of quality, quantity and safety. However since then, the concept of cultural acceptability has worked its

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[1] Dobson, P. et al. 'The Patterns and Implications of Increasing Concentration in European Food Retailing', *Journal of Agricultural Economics* 54 (2003). pp. 111-125.

way into the food security nexus. Culturally acceptability refers to the access to food stuffs that are acceptable for a designated population, for instance access to kosher food for the Jewish population.[2] These elements encompass the major areas relating to food security, but there is an extra dimension that needs to be incorporated: sustainability. The inclusion of sustainability is necessary due to the changing geography of human society, with the ever-increasing focus on globalisation and corporate integration.

Sustainability, for the purposes of this exploration, will be the inclusion of urban and peri-urban agriculture, that is those outside the city limits but not in rural (i.e. suburban areas), to supplement the prevalent food system in place today. The currently prevalent food system is taken to refer to the corporate-centred, large-scale food production system which predominates in the developed world.

The developed world is usually conceptualised as exempt from issues of food security. Affluence and privilege supposedly indicate that people's "fundamental needs" have been met: clothing, shelter, clean water and adequate food. However, this is not the case. For example, the Community Food Security Coalition's North American Urban Agriculture Committee laments that 'one of the worst paradoxes in human history and one of the consequences of the economic structure of the current food system is hunger in the midst of plenty'.[3] It is this "hunger" that needs to be explored. For the following discussion, the concept of food security is the one defined by the International Food Policy Research Institute, which now covers the following:

- Quantity: energy
- Quality: provision of all essential nutrients
- Safety: free from toxic factors and contaminants
- Palatability: taste, texture and so on

[2] Ruel, M. T. et al., 'FCND Discussion Paper No. 51 - Urban Challenges to Food and Nutrition Security: A review of food security, health, and caregiving in cities', International Food Policy Research Institute (online) (Washington: 1998). p. 5.

[3] Brown, K. H. and Carter, A. 'Urban Agriculture and Community Food Security in the United States: Farming from the City Center to the Urban Fringe A Primer Prepared by the Community Food Security Coalition's North American Urban Agriculture Committee'. October 2003. Community Food Security Coalition (online). Available at: http://www.foodsecurity.org/pubs.html#urban_ag (Accessed 11 November 2011). p. 4.

- Common Availability: nationally, in local markets, and eventually at the household level
- Cultural Acceptability[4]

Within the context of a First World urban environment, several facets take on increased importance. The concept of quantity, for the most part, is the least pressing issue. Generally, there is an available food supply that meets the necessary caloric intake for the population. Therefore, it is the other factors that come into sharp relief – the concepts of quality and acceptability being two of the most difficult to fulfil.

The United States, for example, does not share the same problems as a famine-stricken Ethiopia of the early 1980s, but it has its own problems regarding nutrition. Meeting the nutritional requirements in an aggregate sense is not an issue, 'in the US, where food insecurity has been a persistent, if less severe problem, the concept of food security replaces the medical model of hunger and malnutrition during the 1980s.[5] The issues of safety, quality and cultural acceptability consequently come into question with regard to food security in the First World urban environment.

The practically oligarchic structure of the retail distribution and processing of the food supply to large urban conurbations in the developed world is of acute importance to the planning and safety aspects of food security. The concentration of responsibility for the majority of production in very few raises concerns regarding the adverse effects that partial failure could hold for a large number of people. The socio-economic implications for the state in question, both domestic and abroad, would be of unprecedented dimensions.

At present, there is an issue of quality, in terms of nutritional value, that is of most pressing concern for the urban environment. Food in the current system, supplying the major retail establishments and food shops, is bound by their structures of economic productivity and profit. In accordance with "capitalist motivations" these are put ahead of the inherent quality of the food supplied. On average the distance "from field to plate" in the US is between 1500 and 2500 miles. As a result of extensive transit periods -

[4] Ruel, M. T. et al., 'FCND Discussion Paper No. 51 - Urban Challenges to Food and Nutrition Security: A review of food security, health, and caregiving in cities', International Food Policy Research Institute (online) (Washington: 1998). p. 5.

[5] Allen, P., 'Reweaving the Food Security Safety Net: Mediating Entitlement and Entrepreneurship', *Agriculture and Human Values*, 16 (1991) pp. 117-129 (p. 118).

ranging from one week to two - a significant proportion of the produce is lost to spoilage. This consistent loss to spoilage represents approximately *half* of the crops gross yield.[6] As a consequence, there is a distinct predisposition and inclination among farmers and crop producers to opt for, not the most palatable or nutritious produce, but those most resilient to the rigours and harsh conditions of industrial harvesting and distribution.[7] This is a pressing issue, particularly in the US and Europe, and especially the United Kingdom.

Medical News Today estimates that the volume of malnourished individuals across the European Union amounts to a shocking fifty million.[8] There have been several recent studies done on the topic of the prevalence of malnutrition, especially among the ageing sectors of the population. Up to ten per cent of those suffering from malnutrition are above the age of 65. Even more disturbingly, the proportion of individuals admitted to hospitals and nursing homes classified as suffering from malnutrition rises to a staggering one third.[9] This problem relates, in part, to two distinct obstacles faced by the general public of First World urban environments. Firstly, the aforementioned problems faced by the currently prevalent structure of the food production industry, especially with regard to the overriding economic pragmatism of producers, impacts other areas of the food security dynamic. These include the cultural acceptability and common availability of nutrient-rich produce. Secondly, the socio-cultural effects of the capitalist, consumerist drive, which continues to shape the Western economic system.

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[6] Brown, K. H. and Carter, A. 'Urban Agriculture and Community Food Security in the United States: Farming from the City Center to the Urban Fringe A Primer Prepared by the Community Food Security Coalition's North American Urban Agriculture Committee'. October 2003. Community Food Security Coalition (online). Available at: http://www.foodsecurity.org/pubs.html#urban_ag (Accessed 11 November 2011). p. 2.

[7] Brown, K. H. and Carter, A. 'Urban Agriculture and Community Food Security in the United States: Farming from the City Center to the Urban Fringe A Primer Prepared by the Community Food Security Coalition's North American Urban Agriculture Committee'. October 2003. Community Food Security Coalition (online). Available at: http://www.foodsecurity.org/pubs.html#urban_ag (Accessed 11 November 2011). p. 2.

[8] Medical News Today (online), 'Malnutrition: Europe's Hidden Weight-Problem – Medical Nutrition International Industry', 31 August 2009, Available at: http://www.medicalnewstoday.com/releases/162253.php (Accessed 13 November 2011).

[9] Medical News Today (online), 'Malnutrition: Europe's Hidden Weight-Problem – Medical Nutrition International Industry', 31 August 2009, Available at: http://www.medicalnewstoday.com/releases/162253.php (Accessed 13 November 2011).

The underlying economic ramifications of the Western market's capitalist perspective have further implications for the aspects of food quality and quantity.[10] The Americanised Western consumer culture is a particularly distinct trend, especially when taking into account the development of the "McCulture" that has taken on a life of its own in recent decades. In a modern urban environment, individuals are bombarded with the advertising and branding techniques of large corporations, such as Wal-Mart, Tesco, Morrisons and Publix. On every corner, franchises are peddling their high-calorie, nutritionally lacking, "fast foods". On the topic of nutritional responsibility such corporations argue that it is a free choice consumers make to partake in the commodities that they supply. This, however, has been opposed on several fronts, most prominently on that of the addictive nature of their products.

There have been several studies conducted which have found that it is less a question of "gluttony and fecklessness" that contributes to the consumer choice to partake in fast food, and more due to the addictive nature of the food itself: something conspicuously overlooked in the multi-nationals' arguments in support of free choice.[11] However, lobbying stifles the initiative of policy makers to construct policies that would benefit the population as a whole. On the regulatory level, this is something that needs to be taken into consideration. Framed in the traditional paradigm of free choice, this makes for a fairly grim outlook for those concerned about their nutritional and cultural "rights" in terms of food security. This is not to say that individual consumer choices are not a major factor in maintaining their own health and choice of food, but it is a concern for the governing institutions and requires further scrutiny - there is need for further inquiry into the nature of the food on offer and the chains that supply it.

The concept of cultural acceptability as an addition to the food security nexus is a relatively recent phenomenon. The cultural pluralism stemming from globalisation and the "shrinking" of the world gave rise to this previously overlooked factor. In a similar vein, the issue of sustainability needs to work its way into the conception of food security when considering the progression of globalisation and the environmental impacts of the modern lifestyle on the planet. The promotion of sustainable urban and peri-urban agricultural projects will reduce the

[10] Food Sovereignty: Taking Back Control of Our Food System. War on Want Position Paper. (August 2011). p. 4.

[11] Morgan, K. et al. *Worlds of Food: Place Power and Provenance in the Food Chain* (New York: Oxford University Press, 2006) p. 3.

impact on the environment, reducing the carbon footprint of the traditional food production system as well as reducing the mileage of the distribution process. The practices of urban agricultural projects also span the full length and breadth of the concept of food security. In addition to the conscious decisions concerning caloric intake that these projects further, they address the variables of nutritional content and palatability. Furthermore, they reduce concerns over toxic contaminants and cater to the cultural proclivities of those who seek to express culinary consciousness through the food they eat.

Currently there are a variety of initiatives in place in large urban environments that help to contribute to the quality of the nutritional intake of those who engage in them. The Community Food Security Coalition has compiled a list of activities that would be included under the umbrella heading of Urban Agriculture which includes 'fish farms, farm animals at public housing sites, municipal compost facilities, schoolyard greenhouses, restaurant-supported salad gardens, backyard orchards, rooftop gardens and beehives, window box gardens and much more'.[12]

In *Are We Planning for Sustainable Development?*, the authors review the planning agenda of urban agriculture across 105 communities in the US and find that 'many communities are now embracing the concept [of urban agriculture], but their planners may only have a superficial understanding of how to translate it into practice.[13] Structural failings of this kind need to be highlighted by policymakers as coherent approaches to practice are essential for an integrated approach to food security in the urban environment.

The inclusion of sustainability into food security will bring to the fore of policymakers' consciousness the need for such practical applicable methods for the promotion of urban agriculture. The UK has a vibrant tradition of allotments stretching back to the Medieval and Early Modern

[12] Brown, K. H. and Carter, A. 'Urban Agriculture and Community Food Security in the United States: Farming from the City Center to the Urban Fringe A Primer Prepared by the Community Food Security Coalition's North American Urban Agriculture Committee'. October 2003. Community Food Security Coalition (online). Available at: http://www.foodsecurity.org/pubs.html#urban_ag (Accessed 11 November 2011). p. 1.

[13] Philip R. Berke, Maria Manta Conroy, 'Are We Planning for Sustainable Development?' *Journal of the American Planning Association.* 66:1, (2000).

periods with the first references dating back to the 1500s.[14] Allotments are plots of land allocated to individuals either for rent or as part of tied employment for the cultivation of crops for individual, non-commercial use. In such an environment that has a distinct tradition of allotments and gardening developing policies, catering to the strength of the historical tradition is the most advisable approach. This raises other issues that need to be taken into account, such as soil quality. To illustrate, a study conducted at the Walker Road allotment in Newcastle-upon-Tyne found that the proximity of the allotment gardens to a waste plant in the vicinity lead to heavy-metal contamination of the soil that could potentially pose a risk to allotment holders at this location. If a concerted effort is made to include sustainability as a defining feature of food security, issues like this will need to be taken into consideration by city planners before expanding or initiating new projects. Such forethought will prevent potentially hazardous problems.[15]

In other locations that do not have a similar tradition, urban agriculture offers a unique opportunity to develop projects that are specific to the needs of the community in question. In the US, there has been a trend toward community gardens, particularly in inner city areas such as the Bronx, New York. This area contains approximately 175 community gardens. "Family health" was among the top three of the benefits felt by participants in such projects. This in and of itself is confirmation of the inadequacies of the commercial food structure currently in place. Furthermore, '31% of the interviewed gardeners shared more than half [the produce that they generated]'.[16] This further indicates the far reaching effects of activities like community gardens, that make available fresh, nutritious produce, not only to the growers, but to friends, neighbours, other members of the community or other members of the gardening project itself.

[14] Allotment History – A Brief History of Allotments in the UK. Available from: http://www.allotment.org.uk/articles/Allotment-History.php (Accessed 12 November 2011).

[15] For more information see: Pless-Mulloli et al. , 'The legacy of historic land-use in allotment gardens in industrial urban settings: Walker Road allotment in Newcastle upon Tyne, UK' in *Land contamination & Reclamation* 12:3 (2004). p. 250.

[16] Althaus Ottmann et al. 'Community Gardens: An Exploration of Urban Agriculture in the Bronx, New York City.' Paper given at . MillionTreesNYC, Green Infrastructure and Urban Ecology: A Research Symposium, March 5-6, 2010. Available at: http://www.milliontreesnyc.org/html/research/index.shtml (Accessed 11 November 2011).

In urban environments where malnutrition is a chronic problem, development of similar practices may relieve the healthcare system of some of the costs associated with poor food quality. If the option was available to the members of community gardens to supply hospitals or nursing homes in the vicinity with their surplus produce, the financial pressure associated with food provision and security could be significantly reduced. This holds true, in particular, in welfare states where the healthcare system is funded by public monies. Some of the sustainability ventures already in place have instituted such projects. The Garden Project in Michigan, for instance, after harvesting, distributes the surplus crops to food pantries, residents of low-income housing, humanitarian organisations and 'particularly to senior citizens'.[17] Distribution of surplus produce could contribute to the issues of malnutrition of those patients admitted to hospital, as well as with improving the nutrient intake of those over the age of sixty-five.

Therefore, the incorporation of sustainability into the definitional notion of food security is imperative. In addition to alleviating some of the environmental pressures modern society faces, the benefits contribute to other areas of food security and have the potential to create a mutually beneficial relationship. The choices made by those who are participating in sustainable urban agricultural projects contribute to mitigating the financial pressures of supplying individuals with food, increasing the nutritional content of individuals' intake by expanding the variety of food available for consumption and reducing the risks inherent in the oligarchic structure of commercial food production. Moreover, there are significant social benefits associated with the remaining categories: common availability and cultural acceptability. Through the multiple options available to individuals via garden stores and, more importantly, the internet, common availability and sustainability go hand-in-hand in urban agricultural projects. This also sees the additional benefit of potential support for small-scale, local businesses. Cultural acceptability is also enhanced as sustainable agricultural projects support this aspect of food security by increasing the individual's free choice as well as relieving pressure on the producers to cater to increasingly complex cultural requirements.

[17] Brown, K. H. and Carter, A. 'Urban Agriculture and Community Food Security in the United States: Farming from the City Center to the Urban Fringe A Primer Prepared by the Community Food Security Coalition's North American Urban Agriculture Committee'. October 2003. Community Food Security Coalition (online). Available at: http://www.foodsecurity.org/pubs.html#urban_ag (Accessed 11 November 2011). p. 1.

The programs and initiatives that would have the most effect are relatively simple to integrate into food production systems. They would be similar to those of the Garden Project in Michigan, but would also include coordination with the local governing body to distribute to the public sphere. Other such projects that would be relatively cheap to introduce, and have nevertheless a high potential for significant impact on the carbon footprint resulting from the travel implications of large scale commercial agriculture, would be to institutionalise such initiatives such as the *Research & Develop it Yourself* project for hydroponic window gardens integrated into the catering departments of large businesses to contribute to the produce they would otherwise purchase. The range and flexibility of numerous pre-established and emerging innovative projects such as these, if incorporated into the consciousness and policy of the public sector could see reductions on manifold levels and in a variety of areas. In the UK alone, malnutrition is estimated to incur a cost of 10.5 billion Euros a year.[18] With the initiation of public sustainable urban agriculture programs this figure would undoubtedly decline.

One other present concern is the environmental impact and carbon footprint of states. A comprehensive drive to include sustainability under the heading of food security would drive the public sector to push corporations to work toward the edicts of the United Nations Framework Convention on Climate Change's Kyoto Protocol,[19] particularly if the initiation of such projects were to be a method of obtaining carbon credits where urban and peri-urban agricultural projects are able to minimise the carbon footprint and impact by reducing the distribution and delivery methods currently being employed by large scale agricultural producers. In addition, the outcome of such a policy initiative could have a serious impact on the health and wellbeing of those employed in industrial and commercial sectors by securing and enhancing their nutritional rights promised by a secure food supply. Moreover, the *Brundtland Report* stresses the need for sustainability, 'that meets the needs of the present without compromising the ability of future generations to meet their own

[18] Euractiv.com EU news and policy debates across languages (online), 'Malnutrition costs more than obesity', 24 November 2006. Available at: http://www.euractiv.com/health/malnutrition-costs-obesity/article-159951 (Accessed 11 November 2011).

[19] United Nations. (1998). *Kyoto Protocol* . New York: United Nations Framework Convention on Climate Change.

needs';[20] this is not exclusive to the concept of food security. It should, in fact, be an essential feature of food security because, as Hopkins and Puchala say, 'securing adequate food is one of the oldest problems confronting political institutions'[21] and should therefore be a duty, not just an ambition, of policy makers and urban planners.

In conclusion, the associated benefits of sustainable urban agricultural projects should mark the importance of the inclusion of sustainability as one of the tenants of the concept of food security - in addition to the recently added tenant of cultural acceptability - as it is clearly factor. In an increasingly multifarious society that gives rise to extensive challenges for policymakers, the inclusion of sustainability will go a long way towards addressing the problems associated with food production, consumption and also, and in particular, food security.

[20] Brundtland, G. H., *Our Common Future: World Commission on Environment and Development* (Oxford, OUP, 1987). Available at: http://www.un-documents.net/ocf-02.htm (Accessed 10 November 2011).

[21] Raymond F. Hopkins and Donald J. Puchala (1978). Perspectives on the international relations of food. International Organization, 32 , pp. 581-616.

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Ruel, M. T. et al., 'FCND Discussion Paper No. 51 - Urban Challenges to Food and Nutrition Security: A review of food security, health, and caregiving in cities', International Food Policy Research Institute (online) (Washington: 1998).

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Morgan, K. et al. *Worlds of Food: Place Power and Provenance in the Food Chain* (New York: Oxford University Press, 2006).

Pless-Mulloli et al. , 'The legacy of historic land-use in allotment gardens in industrial urban settings: Walker Road allotment in Newcastle upon Tyne, UK' in *Land contamination & Reclamation* 12:3 (2004).

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Creating Europe: The Discourse of Civilisation

Benjamin Walton

They made us leave history – our history, to follow them, right at the back, to follow the progress of their history.

Amilcar Cabral *Return to the Source* (1973)[1]

Introduction

TODAY political philosophy is generally conducted in the light of the perceived triumph of liberalism. That is, it typically proceeds from the assumption that it is unreasonable, if not irrational or pathological, to resist liberalism whether as a mode of thought or as a social order. Despite critics' repeated attempts to demonstrate the incoherence of liberal values, they appear to have stood the test of time - so much so, that the solutions to the world's pressing social problems are largely being conceived of within the parameters of a *liberal* world order.[2] However, E. P. Thompson asks rhetorically: 'How did ideas of equality, liberty and community lead to relationships of power, domination and fratricide?'[3] The argument that Hobson poses is that while liberalism stands for progress, human rights, and emancipation based on the belief that these are universal norms and principles. It turns out, nevertheless, that for Eurocentric liberalism these apply only to particular societies where individuals allegedly attain full rationality, in "civilized Europe".[4] Arguably, these principles cannot apply

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[1] Cited in Young, R, J, C. *Postcolonialism: A Very Short Introduction* (New York, Oxford University Press, 2003), p. 18.
[2] Nicolacopoulos, T. *The Radical Critique of Liberalism: in Memory of a Vision.* (Australia, Re.Press, 2008), p. 3.
[3] Mehta, U, S. *Liberalism and Empire* (Chicago, University of Chicago Press. 1999), p. 190.
[4] Hall, M. and Hobson, J, M. 'liberal International Theory; Eurocentric but not always Imperialist' *International Theory 2:2* (2010) p. 213.

to non-European polities given that they are comprised of "irrational" individuals and institutions.

It was this view that provided the basis for the "civilizing mission" of the colonial system; ultimately providing a variety of doctrines of justification and imperial visions.[5] The concept of colonialism is best captured by Parker, who notes that it is 'most useful not when used synonymously with a post-independence historical period in once colonised nations, but one that begins in the moment that colonial power inscribes itself onto the body and space of its Others and which continues as an often occulted tradition into the modern theatre of world politics'.[6] When undertaking a positive inquiry into the contemporary world - with its prevailing economic, social and political structures – no other epoch will provide one with a more comprehensive understanding of the hegemonic structures at work than that of European colonial rule – that is, those European states that participated in colonialism to a certain extent during the age of imperialism. It is a fundamental period in regards to the implications it had, and continues to have, on political discourse.

The purpose of this essay, therefore, is not to provide a plan for the radical transformation of liberal societies, denying absolutely their moral and political superiority as compared with their historical and contemporary social alternatives.[7] Rather, the piece aims to critically reflect on how the liberal virtues of rationalism, progress and emancipation that were developed during a time when Europe itself was struggling with its own identity, shaped the contemporary in such a manner as to maintain relationships of power and domination. I intend to draw my conclusion by separating this article into two coherent sections. The first will address the transition from the medieval period, through the nominalist revolution to the enlightenment; focusing on the notions of modernity, rationality and the concept of universals. In a similar way, I will demonstrate to what degree the secularisation of philosophy and the fractured sense of unity within Europe determined its interaction with the world thereafter. I will then examine the notion of irreconcilable difference used by Europe to construct and maintain its hegemony.

[5] Lander, E 'Eurocentrism, Modern Knowledge, and the 'Natural' Order of Global Capital' *Epistemologies of Transformation. Department of Culture and Identity. Roskilde University,* 6 (2009) p. 42.
[6] Childs, P. *An Introduction to Post-Colonial Theory* (New Jersey, Prentice Hall, 1997), p. 3.
[7] Nicolacopoulos, T. '*The Radical Critique*', p. 4.

The Consecration of Europe

While the modern world became conscious of itself in the sixteenth and seventeenth centuries, it would be as much as a mistake to believe that modernity began at this time, as it would be to believe that human life begins when one first becomes self-conscious.[8] The transition to modernity did not appear, fully grown, but rather developed over a long period of time and amongst a variety of social-historical contexts. For that reason, to begin to understand the nature and structure of the modern world, one must cast a wider net of inquiry by examining its early "preconscious development". It was during the late medieval period, for instance, that contestations arose regarding the doctrine of nominalism, initiating a crisis in Christian thought relating to the nature of God and, as such, the nature of being itself.[9] Although deeply rooted in Church politics and the relationship between temporal and Church power in medieval Europe, the debate took the form of a theological dispute regarding the metaphysical status of universals. The dominant theology within the Church was Thomism, which contended that the social and political world could be understood as a divinely ordered series of laws governed by the existence of universal law.[10] Time was an unfolding of God's will; the world had a specific beginning, course of development and end, a course allegorically described in the scripture.[11] Accordingly, any doctrine that was considered "new" or secular was invariably equated with decline and degeneration. Through the controversial writing of William of Ockham, among other nominalists, a position emerged which challenged the existence of universals as the manifestation of divine reason.[12] God was no longer bound up within the innate reason of the universe, but as having an arbitrary relationship with the world. This makes possible the fundamental re-appropriation of time as linear, infinite and progressive rather than degenerative.[13] The nominalist God, a universal ideal, is therefore not a being in the same sense as all beings, but an inferior operative force, a realisable principle within man alone. This ensured that reason replaced syllogism as the basis of inquiry, paving the way for a rational sense of

[8] Gillespie, M, A. *The Theological Origins of Modernity* (Chicago, University of Chicago Press, 2008), p. 19.
[9] Gillespie, M, A. '*The Theological*', p. 20.
[10] Oberman, H. The Pursuit of Holiness in Later Medival and Renaissance religion, *An Irish Quarterly Review,* 75 (1979) pp. 349.
[11] Gillespie, M, A. '*The Theological*', p. 20.
[12] William of Ockham. *Philosophical writings* (Indianapolis, Hackett Publishing Company, 1990), p. 70.
[13] Gillespie, M, A. '*The Theological*', p. 20.

judgement to shape modernity as God was no longer considered the pinnacle of a rational order.

As a result, in the late fifteenth and early sixteenth centuries, Europe entered into its own secularised version of Christendom which began to decline as a unifying narrative.[14] Europe thereafter, choose not to derive its identity from within – as constructing a homogenous political and cultural identity was unattainable – but rather to formulate a system of global contrasts backed by the universal belief in reason and particulars gained from the nominalist revolution.[15] Rather than signifying a radical break from the Christian world-view, Europe simply became less subservient to the old nexus of Christendom and its "alter ego" Islam. The new polarity was one of "civilisation" versus "nature", or Europe versus the non-European world, which itself could be conceived as barbarous and "uncivilised".[16] Europe became increasingly focused on the utopian ideals of progress - which became synonymous with the idea of modernity. Backed by Christian humanism on one hand, and reason and logic on the other, Europe had successfully managed to consign the sphere of the particular to the realm of the universals, providing a sense of modernisation and superiority throughout.

With the final collapse of Christendom as a political system following the great crisis of the *Ancien Regime* after 1789, new cultural-political spaces were created in which ideology came to have an increased importance.[17] It was in the eighteenth century that the idea of Europe as a cultural model became closely linked with the emergence of a Western European polity of nation-states.[18] The Enlightenment philosopher, Jean Jacques Rousseau, envisioned an age when 'there is no longer a France, a Germany, a Spain, not even England, there are only Europeans. All have the same tastes, the same passion, and the same way of life'.[19] This statement captures the inquiring sprit of a century that sought to inaugurate the ascendancy of a new secular philosophy of history erected upon the foundation of reason. Consequently, Europe's ideas were judged to be universally valid for all peoples while non-Europeans' ideas were seen to be deviations from the

[14] Delanty, G. *Inventing Europe: Idea, Identity, Reality* (London, Macmillan Press LTD, 1995), p. 65.
[15] Osterhammel, J. *Colonialism: A Theoretical Overview* (Princeton, Markus Weiner Publishers, 2005), p. 111.
[16] Delanty, G. *'Inventing Europe'*, p. 65.
[17] Delanty, G. *'Inventing Europe'*, p. 65.
[18] Delanty, G. *'Inventing Europe'*, p. 70.
[19] Hampson, N. *The Enlightenment* (London, Penguin, 1984), p. 71.

norms established by Western rationalism. Europe, therefore, was able to construct an impassioned imperialism of reason: for the West wishes not only to convince others that it is right, but its goal is to persuade others that there is a universal and unconditional value of rationalism.[20] According to Max Weber, 'rationalism cannot be solely identified with the forces which have resulted in modernity in the west'.[21] At best, one can speak of a genealogy of rationality, together with the particular necessity of rationalisation, rather than an overriding unitary teleology of reason.[22]

Though the terms *civilise* and *civilised* already existed by the eighteenth century, it was the French philosophers of the 1760s that assigned to it the notions of progress, reason and modernity.[23] The enlightenment, therefore, laid the basis for a new framework of world civilisation by freeing human imagination and science from the traditional constraints of the Christian world-view. Europe established a hierarchy of civilisations that was determined according to a linear progression, meaning the non-European world was seen as what Europe had once been; it was immature, stagnant and inherently incapable of progress.[24] According to Gayatri Chakravorty Spivak, it was 'the subaltern, the fisher and the grass-roots peasant, who produces a constant interruption for the full *telos* of reason and rationality'.[25] However, these developments should not let us lose sight of the fact that the secularised remnants of the Christian world-view, having survived the transition to modernity, continued to provide substance for new forms of European identity based as much on Christian humanism and notions of civilisation as on rationalism. It was by the means of the myth of the "fall of man" and the promise of salvation, that fallen humanity could be redeemed. This Christian ethic was captured in the emergence of a "civilising mission" in the nineteenth century, in which Europe came to represent the normative hallmarks of civilisation and believed it bore the responsibility for rejuvenating the "lost" civilisations.[26]

Constructing an irreconcilable difference

[20] Sartre, J. *Anti-Semite and Jew* (New York, Grove Press, 1960), p.115.
[21] Foucault, M. *Critical and Effective History: Foucault's Methods and Historical Sociology* (London, Routledge, 1994), p. 87.
[22] Olssen, M. *Structuralism, Post-Structuralism, Neo-Liberalism: Assessing Foucault's Legacy', Journal of Education Policy* 18 (2003), p. 197.
[23] Delanty, G. '*Inventing Europe'*, p. 82.
[24] Rousseau, S. *Exoticism in the Enlightenment* (Manchester, Manchester University Press, 1990), P.43.
[25] Spivak, G, C. 'Responsibility' *Boundary,* 27 (1999) p. 42.
[26] Delanty, G. '*Inventing Europe'*, p. 85.

One of the most profound legacies left by the enlightenment period was the interest in other cultures; the "Other" became an object of curiosity, providing a means of establishing and maintaining an identity in the uncertain world of modernity. In sustaining the dichotomy of "Self" and "Other", the identity of Europe as a universalising and unifying world-view was secured.[27] There were no longer problems of the universal versus the particular, rather a European expression of a "universalist project" of nationalism, aimed at civilising the world and spreading its culture. It was precisely the notion that Europeans differ utterly and essentially from non-Europeans that legitimised colonial expansion. The supposed inferior mental and physical abilities attributed to non-Europeans rendered them incapable of the large-scale cultural accomplishments that only modern Europe could achieve. Theologically, difference was explained as the depravity of heathens, and from a technological perspective, difference was evident to Europeans in the allegedly inferior ability of non-Europeans to control nature.[28] This was the idea of what Joseph Rudyard Kipling, the poet laureate of high imperialism, celebrated in his famous poem 'The White Man's Burden'. In Kipling's rendering of the myth, the Anglo-Saxon race was the most fit to bear the burden of civilisation.[29] However, it could be maintained that this binary method of division - which was dominant in the age of imperialism - perpetuated difference, ignored similarities and was too simplistic.

The main area in which the normative ethic of "Otherness" shaped the world was in fostering negative connotations and beliefs regarding race and superiority. The very idea of "Otherness" was imposed by colonial powers in order to conquer and exploit colonised areas. Jürgen Osterhammel, author of *Colonialism: A Theoretical Overview*, argued that 'the most important difference with regards to maintaining colonial rule and the subsequent impact it would come to have on the 'Third World', takes a biological form. To Europeans, race was the ultimate version of the difference axiom'.[30]. Similarly, "Otherness" also worked to establish and legitimise dominant and unequal relationships of gender. The opposition of the female oriental slave and the male western traveller was the perfect foil for the invention of a specifically Western identity based on patriarchal

[27] Delanty, G. *'Inventing Europe'*, p. 88.
[28] Osterhammel, J. *Colonialism* , p. 110.
[29] Delanty, G. *'Inventing Europe'*, p. 89.
[30] Osterhammel, J. *Colonialism* , p. 111.

notions of superiority and intellectual mastery.[31] As Helmut Kuzmics notes, it is 'from Algeria to the Antipodes, that the female black body, when viewed through the colonial lens, represents all that is dangerous and unknown in an alien land'.[32] This notion of gender made available a discourse of power and authority based on a particular conception of hierarchy, dependency and control. It is evident, therefore, that the discourse of both racial and gendered inequalities established in Europe drove colonial expansion, established unequal relationships of domination and power on all fronts, and ultimately shaped and continues to shape the modern world.

The idea of Europe as being the repository of civilisation, liberation and progress provided legitimacy to imperialism and the extermination of other cultures. With the backing of normative Christian values and the moral responsibility of civilising other cultures, Europe armed itself with an arsenal suitable for the justification and legitimisation of a "hegemony of ideas". Hegemony in this sense was evident through its ability to control the means of communication, to impose "Otherness" on non-Europeans and to ensure they perceived themselves in the language of the dominant.[33] Similarly, Europe established institutions that reproduced both the machinery and the discourse of domination. Namely, through Western academia and "Third World" education systems, colonisers reproduced the dominant knowledge for the purpose of maintaining its own existence.[34] The "hegemony of ideas", therefore, ultimately shaped the Third World through its cultural influence: it influenced ideas, institutions and society within colonised countries through domination rather than consent. Jacques Derrida argues against the use of universals as being rational, as he believes that 'we can do little more than reveal, over and over again, the subjective and arbitrary nature of our categories (otherness) and the uncertainty of knowledge derived from them'.[35]

Much of European fascination with the "Other" was an expression of power relations: authority versus powerlessness was the basic structure that underlined the interaction of the two world views. In representing the

[31] Delanty, G. *Inventing Europe*, p. 89.
[32] Kuzmics, H. *Authority, State and National Character* (Hampshire, Ashgate Publishing Limited, 1988), p.121.
[33] Williams, P. *Colonial Discourse and Postcolonial Theory* (Hertfordshire, Harvester Wheatsheaf, 1993), p. 134.
[34] Sartre, J. '*Anti-Semite*', p.114.
[35] Brydon, D. *Postcolonialism: Critical Concepts* (New York, Routledge, 2001), p. 919.

"Other" as weak, the West was expressing an attitude of dominance. This type of discourse describes the particular kind of language which specialised knowledge has to conform to in order to be regarded as true. According to Foucault, 'discourse always involves a form of violence in the way it imposes its linguistic order on the world; knowledge has to conform to its paradigms in order to be recognised as legitimate'.[36] In this sense, the discourse of civilisation and "Otherness" was less a body of objective scholarly knowledge, than a discursive construction, whose conceptual structure determined the way in which Europe understood the non-European world. This instituted a relationship of power, of cultural domination, and of exploitation; thereby constituting a system of apparent knowledge about the "Other" in which they are not allowed or invited to speak.[37] What gave power its hold was quite simply the fact that it did not take the form of force, which says no, but was perpetuated by producing knowledge and discourse. For that reason, it must be considered as a productive network which flows through the entire social body much more than as a negative instance whose function is repression.[38] However, discourse in this sense stresses the restrictive and homogenising qualities, and does not take into account its own effects of destabilisation. Therefore, when considering discourse as a whole, one must make allowances for the complex and unstable process whereby discourse can be both an instrument and an effect of power, but also a hindrance, a stumbling block, and a point of resistance.[39]

Conclusion

What at first sight appears to be a contradiction, whereby the nineteenth century witnessed the triumph of Western liberalism at the very same time that British imperialism expanded, turns out to be entirely consistent given that liberalism's Eurocentric evolution renders it inherently colonialist. Historically, it was from the diverse traditions established during the nominalist revolution that the identity of Europe was born as a self-negating modernity. The renaissance and the enlightenment, and the ideas which they gave birth to – Christian humanism, progress and the nation-state – provided Europe with its internal solidarity thereafter. Accordingly,

[36] Young, R, J, C. 'Foucault on Race and Colonialism', *New formations*, 25 (1995), p. 58.

[37] Foucault, M. *The History of Sexuality, Volume One: An Introduction.* (London, Allen Lane, 1978), p. 100.

[38] Foucault, M. *Power, Truth, Strategy.* (Sydney, Federal Publications, 1979), pp. 35-36.

[39] Young, R, J, C. 'Foucault on Race and Colonialism', *New formations*, 25 (1995), p. 59.

the unifying ideas of these universalistic movements served to reinforce ethno-culturalism, and diversity became tolerated only within the context of the particularism of European culture.

It was by means of its imperial face that Europe was able to display a unified identity to the rest of the world – one that was constructed on the foundations of reason, rationality and modernity. This illustrates quite forcibly the role played by the perpetual "Other" whose existence always had to be maintained in order for it to be denied - an existence, however, that is inevitably and sharply at odds with the self-understanding of the indigenous non-Western cultures it purports to represent. In the relationship between Europe and the "Other", a dualism was constructed in which the hegemonic identity of Europe could be sustained as one representing freedom, progress and civilisation. To contrast this, and the condition of its existence, was the notion of the primitive and despotic man, the mysterious woman and backward and degenerate cultures. It is evident, therefore, that when casting an inquiry into the effects that colonialism has had, and continues to have, on the modern world, no other knowledge will provide a better understanding than the thought and mentalities that drove colonialism in the first place. It is only when dissecting the notions of "Otherness" and "civilisation" that one can fully appreciate the legacy that colonialism has left, the hierarchies it has established and the relationships it maintains today.

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International Cooperation in Combating Threats to Maritime Security: Global Maritime Security and International Law

Stephanie Fitzgerald, Asger Holst-Jensen, Sander Steendam and Alexandra Alehammar Wallinder

It may be said that a cooperative international law based on a community of interests has developed in the field of crime prevention and punishment.

Luc Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives* (2003)[1]

1. Introduction

IT is important to note that the duty to cooperate, despite at times having been called a fundamental principle of international law,[2] has not been adequately defined.[3] An expansive interpretation would be 'the duty to reach an agreement', which would thus be breached if states fail to agree on a matter.[4] A more restrictive interpretation would limit this duty to the obligation to negotiate an agreement in good faith.[5]

Regardless of this debate, there is certainly evidence of some kind of duty to cooperate under international law. Two of the purposes of the United Nations (UN) mentioned in *The Charter* are to maintain international

The authors wrote this piece while studying Law during an exchange semester at the University of Malta.

[1] Reydams, L. *Universal Jurisdiction: International and Municipal Legal Perspectives* (Oxford, Oxford University Press, 2003).
[2] ITLOS 2001 MOX Plant Case (Ireland vs. United Kingdom).
[3] Allen, C. H., *Maritime counterproliferation operations and the rule of law* (Westport, Praeger Publishers, 2007), p. 107.
[4] ITLOS 1999 Southern Bluefin Tuna Cases (New Zealand vs. Japan; Australia vs. Japan).
[5] PCIJ 1931 Railway Traffic Case (Lithuania vs. Poland); 1957 Lanoux Arbitration Case (Spain vs. France).

peace and security through collective action, and to achieve international cooperation in solving problems of an economic, social, cultural, or humanitarian character.[6] A 1970 UN General Assembly resolution recommends the codification of the duty to cooperate in accordance with the Charter and goes on to specify that this includes cooperation in the maintenance of international peace and security.[7] Since then, several Security Council Resolutions have imposed duties to cooperate in the fight against global terrorism and Weapons of Mass Destruction (WMD) proliferation,[8] supporting the hypothesis of a more general duty to cooperate in the field of global security.

No one can deny that in the light of the jurisdictional difficulties caused by the different maritime zones and the almost intrinsically transnational character of maritime threats, there is a pressing need for an extensive form of cooperation in this field.[9] However, has this need led to a duty to cooperate that goes beyond the doctrine of good faith? This piece will look for evidence of such a duty in the different international law instruments dealing with the most urgent threats to maritime security today.

2. Threats to Maritime Security

2. 1 Port Security

Ports are essential to the world economy as well as the national economy of states due to increased global trade. Simultaneously, however, seaports are regarded as vulnerable to threats due to the huge amount of incoming traffic that they need to control. International cooperation and coordination is crucial to ensure security in port areas. Globalisation has made information exchange easier and this facilitates increased cooperation between states. The information-based society also has its negative sides. Terrorists and smugglers can receive information more freely, which entails a system to protect delicate information.

After the September 11th attacks, the United States initiated a revision of the international instruments available to fight threats against port

[6] Article1 Charter of the United Nations.

[7] UN General Assembly Resolution 2625 (XXV): Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States.

[8] Security Council Resolutions 1373, 1526, 1540.

[9] The UN General Assembly explicitly recognizes this need in Resolution 63/111 para. 61.

security.[10] In January 2002 the International Maritime Organization (IMO) assembly adopted a resolution[11] requesting a review of the different instruments with the aim of increasing maritime security. Amendments were made to the Safety Of Life at Sea (SOLAS) convention, including the introduction of a new chapter XI-2, with the purpose of detecting and taking preventive measures against threats to maritime security. Ports and ships used for international trade were specifically affected.[12] Furthermore, the International Ship and Port Facility Security (ISPS) Code[13] was implemented through the amendments of the SOLAS convention to increase the international cooperation within an international framework realising, among other things, an increased exchange of intelligence information and standardising methods and technical requirements for ships.[14] The international cooperation has afforded better knowledge about threatening situations at sea before ships reach ports, making it possible to prevent threats to a wider extent. Not only has the possibility to prevent crimes increased, the focus on security in ports has also intensified. For example, every contracting party to the SOLAS convention now has an obligation to conduct measures to ensure security in the ports, including ensuring security around critical infrastructure and structures or areas which would cause loss of life or great economic losses if damaged.[15]

However, the cooperation framework under the ISPS code can be criticised for not taking developing countries' needs into account. The maritime threats against developing countries have a different character. The in-port security is in many ways more lax, which makes these ports more exposed to thefts and similar kinds of threats against maritime security. In the long run, this makes ports in developing countries less desirable for international trade, which in turn could limit development in these countries.

There have been other initiatives for increasing port security. The Container Security Initiative (CSI) for instance, is a US-led initiative focused on freight containers. The system prevents maritime threats

[10] McNicholas, M. *Maritime Security – An Introduction (*Burlington, Oxford, Elsevier, 2008), p. 89f.
[11] IMO Resolution A.924(22).
[12] 2004 amendments to the Convention on Safety of Life at Sea 1974, especially chapter XI-2.
[13] IMO International Ship & Port Facility Security Code.
[14] United Nations, *Maritime Security: Elements of an analytical framework for compliance measurement and risk assessment* (London and Geneva, United Nations, 2006). p. 3.
[15] The ISPS Code sect. 15 and McNicholas, M. *Maritime Security – An Introduction* (Burlington and Oxford, Elsevier, 2008), p. 109f.

through screening of containers in the port of departure. Information about the goods carried by the ship can consequently be acknowledged before reaching the port of destination, often an American port, and be granted entrance into the state of destination more quickly. The system is reciprocal but is mainly used to ensure security in American ports.[16]

It can be said that the ISPS code validates Reydam's statement of a cooperative international law developing as far as port security is concerned. As shown, there has been development in this area over the recent years. Preventing threats to port security is important and international cooperation has proven to be vital. The current system is not perfect, there are many deficiencies, which, among other things, the critique against the ISPS code obviously shows. Furthermore, the CSI programme is far from perfect in its ambition to prevent threats to port security. It would be desirable if more states used the system, making it a sincerely reciprocal system. Although the current framework for preventing threats to port security is far from perfect, it creates possibilities for increased international cooperation.

2.2 Drug Smuggling

Drug smuggling via the sea is one of the principal ways in which criminal groups traffic drugs. Since this criminal activity has emerged, its complexity and capacity has continued to expand, resulting with difficulties in controlling the smuggling of illegal substances. The smuggling operation is efficient and very well organised. It is estimated that large numbers of containers carry drugs every year and are transported on container vessels.[17] This shows there is a problem with identifying containers carrying drugs, and consequently preventing the passage of illicit substances. The unauthorized trade of drugs has led to the consent that international cooperation is needed to combat this crime. The UN Convention[18] Against the Illicit Traffic of Narcotic Drugs and Psychotropic Substances is a major source of law preventing drug smuggling. The purpose of the convention appears in article 2, promoting cooperation among parties so that they may address the various aspects of illicit traffic more effectively. The scope of this cooperation is defined in

[16] McNicholas, M. *Maritime Security – An Introduction (*Burlington, Oxford, Elsevier, 2008), p. 126f.
[17] See Drug Enforment Adminstration (DEA) Museum & Visitors Center (online), 'DEA on the Sea'. Available at: http://www.deamuseum.org/als/sea.html (Accessed 25 June 2012).
[18] The United Nations Convention against illicit traffic in narcotic drugs and psychotropic substances (The Vienna Convention), 1988.

article 17, emphasising cooperation to the fullest extent possible in order to suppress illicit traffic by sea. The article was implemented in an agreement by the Council of European Union[19] in 2005. In addition to the Convention there are various resolutions and circulars by the IMO focusing on the threat of drug smuggling. Furthermore there are regional agreements with the aim of preventing the smuggling of drugs, for example the Caribbean Regional Maritime Agreement based on the Vienna Convention. The agreements cover ship-riding, ship-boarding, pursuit and the cooperation on maritime enforcement. This development has unfortunately not progressed in the same way in South East Asia.[20] Yet, it can be concluded that cooperation in the field of drug smuggling and international law based on the community of interests to combat the threat has indeed developed.

2.3 Migrant Smuggling

In The Tampa incident, a ship flying under the Norwegian flag rescued 438 irregular immigrants in the Indian Ocean in 2001.[21] The ship was refused entry into Australian territorial waters, despite the migrants' needs. This triggered a diplomatic dispute between Australia and Norway. The captain of the Norwegian ship proceeded to enter Australian waters. Eventually, the asylum seekers were taken to various islands instead of Australia, where their refugee status was assessed. The difficult situation that arose regarding the disembarkation of the rescued persons clearly demonstrates the difference in character the transnational crime of migrant smuggling has compared to other crimes. When states are using interception as a means of averting threats, human rights cannot be ignored. International law requires that this specific threat is dealt with in accordance with the human rights regime regardless of the status of these persons.

The United Nations Convention on the Law of the Sea[22] does not address the threat of migrant smuggling in any specific way, besides being a reason

[19] Council of European Union's agreement on illicit traffic by sea in 2005.

[20] Martin, T. A. 'Drawing Lines in the Sea'. In *U.S. Naval Institute Proceedings*, 134.12 (December 2008)

[21] Tauman, J. E. 'Rescued at Sea, But Nowhere to Go: The Cloudy Legal Waters of the Tampa Crisis'. In*Pacific Rim Law and Policy Journal*, 11. 2 (January 2003).
Australasian Legal Information Institute A Joint Facility of UTS and UNSW Faculties of Law (online), 'Victorian Council for Civil Liberties Incorporated v Minister for Immigration & Multicultural Affairs (& summary) [2001] FCA 1297 (11 September 2001). Available at: http://www.austlii.edu.au/au/cases/cth/federal_ct/2001/1297.html (Accessed at 25 June 2012).

[22] The United Nations Convention on the Law of the Sea - UNCLOS 1982.

for regarding the passing of a vessel as non-innocent, thus giving the coastal state the right to refuse the entry of the vessel into territorial waters.[23] It is also possible for a state to regulate the innocent passage of a vessel to prevent the infringement of the state's immigration laws.[24]

The smuggling protocol, supplementing the UN Convention Against Transnational Crime, is specifically aimed at combating migrant smuggling with regards to the protection of the people subject to the crime, rather than focusing on state security.[25] The crime is defined in article 3 a) as;

> 'the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident'

The smuggled persons are not themselves criminalised unless they took part in the smuggling.[26] All state parties are obliged to criminalise the offence under national law.[27] The protocol recognizes the transnational nature of the crime as well as the link to organized criminal groups.[28] Trafficking is a crime that in some cases overlaps with migrant smuggling as it includes the transport of persons which can include illegal entry.[29]

The duty to rescue a vessel in distress is an individual obligation of the ship-master imposed by international law.[30]The International Convention on Maritime Search and Rescue[31] provides for a framework in which rescue operations must be coordinated when a vessel is in distress.[32] When the vessel in question carries irregular migrants with the aim of crossing borders, the rescue operation is complicated by states' unwillingness to allow disembarkation of the rescued persons in their territory. The duty of coordination, noted above, also includes the requirement of

[23] UNCLOS art 19.2 (g).
[24] Art 21 UNCLOS.
[25] Protocol against the Smuggling of Migrants by Land, Sea and Air supplementing the United Nations Convention against Transnational Crime, signed in Palermo entered into forced in 2004.
[26] Art 5 and art 6 the Smuggling Protocol.
[27] Art 6 the Smuggling Protocol.
[28] Art 4 the Smuggling Protocol.
[29] Art 3 Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children supplementing the United Nations Convention against Transnational Crime.
[30] UNCLOS art 98, art 12 The Convention on High Seas 1958.
[31] The International Convention on Maritime Search and Rescue 'the SAR Convention'.
[32] International Convention on Maritime Search and Rescue, 1979, amended in 2004.

disembarkation to a place of safety for those recued.[33] There is no obligation of the SAR state responsible for the coordination of the rescue operation to disembark the persons rescued. However, the SAR state has a primary responsibility to make sure that a place of safety is provided, and when states fail to cooperate, the SAR state often ends up disembarking.

Interdiction at sea of vessels carrying irregular immigrants is within the rights of the sovereign state according to the United Nations Conventions on the Law of the Sea (UNCLOS). This has, however, been criticized because there is a potential violation of human rights when this is done without determining the status of the persons onboard the vessels. According to the principle of non-refoulement stated in article 33(1) the Refugee Convention, no state is allowed to return a person with refugee status to a territory where they would face persecution.[34]

2.3.1 International Cooperation to Combat Migrant Smuggling

The states targeted by migrant smugglers as the destination of embarkation want to avert this threat;[35] therefore interdiction often occurs in the high seas. The arrest and prosecution of the perpetrators is consequently reserved for the flag state of the vessel as it has exclusive jurisdiction. It must be determined that the vessel is lacking nationality, or can be assimilated as to lacking nationality in order for the coastal state to exercise jurisdiction. The smuggling protocol provides for the mechanism to request confirmation by the flag state of the nationality of the vessel, as well as receiving authorization to take 'appropriate measures' if it is suspected that the vessel is engaged in migrant smuggling.[36] The claimed flag state must respond expediently, but if no response or authorization is received the coastal state cannot act. Bilateral treaties can be used to facilitate the arrest of the smugglers as in the case with the US and the Bahamas where international cooperation can be more effective.[37]

[33] The amendments to the SOLAS convention.

[34] The 1951 Convention Relating to the Status of Refugees, with supplementing protocol from 1967, see also art. 3 The European Convention on Human rights.

[35] States see illegal entry as a major threat to state security. It is vital for every state to have some control over which persons enter their territory. The migrant protocol has made it clear that the persons themselves are not to be criminalized, but there may be a terrorist on the boat with the migrants and some of the migrants might be economic migrants without the right to asylum; hence why irregular migrants are seen as a threat to state security.

[36] Art 8 the Smuggling Protocol.

[37] 'Agreement concerning cooperation in maritime law enforcement between the US and the Bahamas. Signed at Nassau June 29, 2004. Entered into force June 29, 2004.

The fact that both Australia and the US are still using interdiction/interception as a tool to avert the threat of migrant smuggling[38] demonstrates the lack of international cooperation needed to ensure that the smugglers are being held responsible. Despite this, the safety of migrants and human rights must be adhered to. Australia has, through legislation, made it impossible for people coming by sea to certain islands within Australian territory to make asylum claims in the same way as people arriving in other ways to the mainland.

Italy's agreement with Libya concluded in 2008 is an example of international cooperation to avert the "threat" of migrant smuggling without an extensive regard to human rights.[39] The Italian state justifies its actions of turning around boats coming from Libya, without determining the status of the passengers, with state sovereignty and security, thus ignoring the critique that the substance of the agreement violates human rights. The situation with Italy and Libya is an example of externalization of Italian borders as some asylum claims can be made in Lampedusa. In this way the state of Italy actually exercises jurisdictional control in areas where it does not have jurisdictional responsibilities.

2.3.2 Cooperation within the European Union

The EU has acceded the UN Convention Against Transnational Organized Crime and its protocols and the smuggling protocol consequently requires the member states to ratify it.[40] The European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX)[41] has the power to perform border checks and surveillance within the common internal borders established by the Schengen Agreement, including sea fronts.[42] The operations shall according to the regulation respect the international law of the sea as well

[38] Van Selm, J. and Cooper, B. *The new boat people: Ensuring Safety and Determining Status* (Report of the Migration Policy institute, 2005), p. 11.
[39] Glennon, M 'Italy-Libya Connection', published at Human Rights Watch (online), 23 September 2009. Available at: http://www.hrw.org/news/2009/09/23/italy-libya-connection (Accessed 25 June 2012).
[40] OJ L 262 22/09/2006 p. 24.
[41] European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.
[42] Art 6, Regulation (EC) 863/2007, did not apply to Denmark and the UK, for the Schengen agreement see OJ 22.09.2000 "The Schengen Aquis".

as the non-refoulement obligation.[43] The European Commission has also acknowledged the need for cooperation between member states in regards to the disembarkation of rescued immigrants and respecting human rights when intercepting vessels.[44] Due to the Dublin Regulation the member state which is the first point of entry for an irregular migrant is responsible for processing any asylum claim.[45] This taken together with the sharing of information under the Schengen Agreement has led to the situation where immigrants continuing through Europe are sent back to the state where the external border was crossed, and countries such as Poland, Hungary, Italy and Greece end up facing the pressure of migrant smuggling themselves.[46]

Some trends of non-cooperation and focus on state sovereignty have survived in this area. If states do not cooperate effectively in the procedure of finding a safe place to disembark rescued persons, individual ship-masters might ignore their duty to rescue.[47]

2.4 Maritime Terrorism

Before 1988, maritime terrorism was not a crime covered by international law. This was a lacuna that became painfully obvious after the Achille Lauro incident in 1985,[48] when the United States[49] called the hijacking of the cruise ship an act of piracy. This characterisation was both contested and supported by legal experts[50] and called for clarification as of to which regime applies to this kind of attack. In response to the legal confusion and

[43] Art 2 and p 18 in the preamble.
[44] 'Study on the international law instruments in relation to illegal immigration by sea. Commission staff working document'. SEC Document, published 15 March 2007, pp. 4 – 6.
[45] Art 10, Regulation (EC) 343/2003.
[46] UNHCR The United Nations Refugee Agency (online). 'Ten Point Plan of action for refugee protection and mixed migration for countries along the Eastern and South Eastern borders of European Union member states'. 29 June 2007. Available at: http://www.unhcr.org/4688b4af2.html (Accessed 12 January 2011).
[47] Nessel, L. A, 'Externalized Borders and The Invisible Refugee'. In *Columbia Human Rights Law Review* 40.3 (Spring 2009), p. 634.
[48] McGinley, G. P. *'The AchilleLauro Affair – Implications for International Law'*, in Tennessee Law Review 52 (1985); Constantinople, G. R. 'Towards a new definition of piracy: the *Achille Lauro* incident', In *Virginia Journal of International Law* 26 (1986); Gooding, G. 'Fighting Terrorism in the 1980s: The Interception of the AchilleLauro Hijackers'. In *Yale Journal of International Law* 12 (1987)
[49] An American citizen was killed during the hijacking.
[50] McGinley, G. P. *'The AchilleLauro Affair – Implications for International Law'*, in Tennessee Law Review 52 (1985); Constantinople, G. R. 'Towards a new definition of piracy: the *Achille Lauro* incident', In *Virginia Journal of International Law* 26 (1986); Gooding, G. 'Fighting Terrorism in the 1980s: The Interception of the AchilleLauro Hijackers'. In *Yale Journal of International Law* 12 (1987)

at the initiative of the IMO,[51] the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation[52] was signed in Rome on the 10th of March 1988.[53] Article 3 of this convention criminalises a series of acts, which were expanded by the 2005 Protocol, and considered forms of maritime terrorism.[54]

2.4.1 The SUA Convention

The initial Convention Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention) provided for major flaws in a classic transnational crime punishment regime, modeled after earlier UN terrorism treaties.[55] These flaws were slow ratification and a lack of preventive measures.[56] The SUA regime improved significantly after the September 11th attacks inspired a greater level of cooperation[57] in the 2005 protocol,[58] which states a commitment to cooperate and how this is to be achieved.

The new article 8bis,[59] of the SUA convention imposes a general duty to cooperate to the fullest extent, preventing and suppressing transnational crime. This article also gives a duty to answer all requests from other state parties in regard to this article as expeditiously as possible. One such request would be a party issuing assistance, if it has reasonable grounds to suspect an offence under the SUA Convention involves a ship flying its flag. Other parties are then obliged to assist within their means.

[51] International Maritime Organisation.
[52] The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, *SUA Convention.*
[53] Halberstam, M. 'Terrorism on the High Seas: The AchilleLauro, Piracy and the IMO Convention on Maritime Safety', In *The American Journal of International Law* 82 (1988).
[54] Article 3 SUA Convention.
[55] The 1970 The Hague Convention for the Suppression of Unlawful Seizure of Aircraft and the 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation.
[56] Robert C. Beckman, 'The 1988 SUA Convention and 2005 Protocol: Tools to Combat Piracy, Armed Robbery, and Maritime Terrorism' in Rupert Herbert-Burns and others (eds), *Lloyd's MIU Handbook of Maritime Security* (Florida, Auerbach, 2008) 188-190.
[57] IMO Assembly Resolution A.924 (22); Beckman, R. C. 'The 1988 SUA Convention and 2005 Protocol: Tools to Combat Piracy, Armed Robbery, and Maritime Terrorism', in Rupert Herbert-Burns and others (eds), *Lloyd's MIU Handbook of Maritime Security* (Florida, Auerbach, 2008), p.188.
[58] Entered into force 28 July 2010.
[59] Article 8 bis SUA Convention (2005 protocol).

The article also contains ship-boarding provisions similar to the ones found in some drug and migrant smuggling treaties.[60] More specifically, it allows a party to board and search a ship flying the flag of another party if it has reasonable grounds to suspect that the ship or a person on board is involved in an offence under the SUA Convention. Authorization by the flag state remains a requirement, but parties can notify the IMO Secretary-General that if there is no response from the state regarding the request within four hours, authorization may be assumed. In the same way a party can also notify that it authorises a requesting party to question the persons on board to determine if an offence has been or is about to be committed.

Finally, the article encourages parties to harmonise standard operating procedures for joint operations and to conclude bilateral agreements to improve the effectiveness of their cooperation in regard to their obligations under article 8bis.[61] The U.S.-led Proliferation Security Initiative could be seen as this kind of arrangement.[62]

2.4.2 The Proliferation Security Initiative

The Proliferation Security Initiative is a global effort to increase international cooperation in interdicting shipments of WMD[63] related materials. By itself it does not create new international law, but aims to use the already present legal framework[64] as effectively as possible through joint training exercises and bilateral boarding agreements.[65] The participants to the initiative also commit to a series of interdiction principles, which include adopting streamlined procedures for rapid exchange of relevant information.[66]

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[60] For example the 2003 Aruba agreement or the 2004 U.S.-Bahama's agreement.

[61] Article 8 bis SUA Convention (2005 protocol).

[62] Beckman, R. C. 'The 1988 SUA Convention and 2005 Protocol: Tools to Combat Piracy, Armed Robbery, and Maritime Terrorism' in Rupert Herbert-Burns and others (eds), *Lloyd's MIU Handbook of Maritime Security* (Florida, Auerbach, 2008) p. 196.

[63] Weapons of Mass Destruction.

[64] Transporting WMD's on board of a ship is an offense under article 3bis of the SUA Convention.

[65] Such agreements exist between the U.S. and Antigua and Barbuda, The Bahamas, Belize, Croatia, Cyprus, Liberia, Malta, The Marshall Islands, Mongolia, Panama and St. Vincent and the Grenadines. Although not the largest of countries, all of these are known to have a rather large number of ships flying their flag; Congressional Research Service, *Proliferation Security Initiative (PSI)* (RL34327, 2010) http://www.fas.org/sgp/crs/nuke/RL34327.pdf (Accessed 4 December 2010).

[66] Bureau of International Security and Nonproliferation, 'Interdiction Principles for the Proliferation Security Initiative' (U.S. Department of State Website, September 4, 2003) http://www.state.gov/t/isn/c27726.htm (Accessed 4 December 2010).

2.5 Piracy

'Maritime piracy consists of:
(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
(i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
(ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b)'.[67]

Once considered a thing of the past,[68] piracy today is a rising threat affecting a number of regions and attracting growing international concern.[69] Yet, the Law of the Sea Convention of 1982 already prescribed a duty to 'cooperate to the fullest extent in the repression of piracy on the high seas'.[70] Problems with the definition of piracy,[71] and the fact that the Convention only covers piracy on the high seas,[72] caused this provision to be ineffective despite its universal acceptance.[73] The 2005 SUA Protocol is

[67] Article 101 UNCLOS Convention.
[68] Dickinson, E. D. 'Is the crime of piracy obsolete?' In *Harvard Law Review 38* (1925).
[69] International Chamber of Shipping/International Shipping Federation, *Pirates and Armed Robbers* (London, Marisec, 2004), p. 6ff; Tolley, W. K. *Maritime Safety, Security and Piracy* (London, Informa Publishing, 2008), pp. 91-94.; International Maritime Organization (online), *Address of the Secretary-General at the opening of the ninety-seventh session of the legal committee*, 15 November 2010; International Maritime Organization (online), 'Reports on piracy and armed robbery', Available at: http://www.imo.org/OurWork/Security/PiracyArmedRobbery/Pages/PirateReports.aspx (Accessed 10 June 2012); Travel.State.Gov. A Service of the Bureau of Consular Affairs U.S. Department of State, 'International Maritime Piracy'. Available at: http://travel.state.gov/travel/cis_pa_tw/piracy/piracy_4420.html (Accessed 5 December 2010).
[70] Article 100 UNCLOS.
[71] Piracy must be for private ends and requires the attack of one ship against another.
[72] Or in an exclusive economic zone.
[73] Beckman, R. C. 'The 1988 SUA Convention and 2005 Protocol: Tools to Combat Piracy, Armed Robbery, and Maritime Terrorism', in Rupert Herbert-Burns and others (eds), *Lloyd's MIU Handbook of Maritime Security* (Florida, Auerbach, 2008), p. 188.

faced with the opposite problem; although containing promising solutions, an insufficient number of states have ratified it.[74]

However, there have been improvements to the situation; as seen in Asia where the number of serious cases of piracy dropped in 2010 due to extensive regional cooperation.[75] In the Straits of Malacca there have been joint anti-piracy drills, security pacts, coordinated air and sea patrols, a regional information network and a joint sea surveillance system.[76] Indonesia, Singapore and Malaysia have even agreed to give each other permission to pursue pirates into their respective territorial waters, an important development in an area with no other maritime zones.[77] This cooperation culminated in the 2004 Regional Cooperation Agreement on Combating Piracy and Armed Robbery against ships in Asia, RECAAP.[78] Among other cooperative measures the agreement creates an Information Sharing Centre[79] in Singapore. This proved effective and inspired the IMO to push for more of this kind of cooperation in other troubled areas.[80]

In January 2009, this effort led to the signing of a regional agreement called the Djibouti Code of Conduct.[81] Signatories to the Code agree to cooperate in the investigation, arrest and prosecution of piracy suspects,

[74] Beckman, R. C. 'The 1988 SUA Convention and 2005 Protocol: Tools to Combat Piracy, Armed Robbery, and Maritime Terrorism', in Rupert Herbert-Burns and others (eds), *Lloyd's MIU Handbook of Maritime Security* (Florida, Auerbach, 2008), p. 190; Tolley, W. K. *Maritime Safety, Security and Piracy* (London, Informa Publishing, 2008), pp. 94-95; Especially the non-ratification by Indonesia, Malaysia and Thailand is problematic.

[75] UN General Assembly Resolution 63/111 para 65;
Xiang, L. W. 'Regional Cooperation Key to Curbing Piracy'. *Asiaone News* (online), 30 April 2010. Available at: http://www.asiaone.com/News/AsiaOne+News/Singapore/Story/A1Story20100430-213291.html (Accessed 5 December 2010).

[76] Tolley, W. K. *Maritime Safety, Security and Piracy* (London, Informa Publishing, 2008), pp. 94-95; Xu Ke, 'Myth and Reality: The Rise and Fall of Contemporary Maritime Piracy in the South China Sea' in Shicun Wu and KeyuanZou (eds), *Maritime Security in the South China Sea* (Farnham, Ashgate, 2009).

[77] Tolley, W. K. *Maritime Safety, Security and Piracy* (London, Informa Publishing, 2008), pp. 94-95.

[78] The 2004 Regional Cooperation Agreement on Combating Piracy and Armed Robbery against ships in Asia, RECAAP. See: Ministry of Foreign Affairs in Japan (online), 'Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia'. Available at: http://www.mofa.go.jp/mofaj/gaiko/kaiyo/pdfs/kyotei_s.pdf (Accessed at 12 June 2012).

[79] Information Sharing Centre *ISC.*

[80] International Marintime Organization (online). 'Piracy and armed robbery against ships'. Available at: http://www.imo.org/OurWork/Security/PiracyArmedRobbery/Pages/Default.aspx (Accessed 5 December 2010).

[81] The Code of Conduct concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden.

the interdiction of suspect ships, the rescue of victim ships and proper treatment of the persons on board, the conduct of shared operations, and the sharing of information.[82]

Complementary to the Code, there are several relevant UN Security Council Resolutions aimed at facilitating anti-piracy cooperation in the region. Specifically they call upon nations with military capacity in the area to actively fight piracy on the high seas off the coast of Somalia,[83] and allow these nations to operate in Somali territorial waters[84] using land-based operations.[85] In Resolution 1918, the Security Council calls upon all states to criminalise piracy, to prosecute piracy suspects apprehended off the Somali coast,[86] and to fully implement the Djibouti Code of Conduct as soon as possible.[87] Although most of the eligible states[88] have signed the Djibouti Code, it remains to be seen whether, together with the relevant UN resolutions, it will lead to cooperation effective enough to tackle the piracy problem in the Gulf of Aden.

Conclusion

There has been a development towards international cooperation in the area of transnational crimes against maritime security. Although the focus on state sovereignty has remained, it has been necessary to cooperate in the effort to combat contemporary threats. UNCLOS was created in a different time and had the aspiration to fight maritime crime, but achieved limited success. Due to an increasingly globalised world and with new technology available, organised crime today operates all over the world. The transnational character of these crimes makes it impossible for one state to fight them alone. Economic factors and each state's individual interest, of course, determine how far cooperation will extend.

Furthermore, even if sufficient legal instruments are provided through bilateral or regional agreements, not all states have the resources to act. They might not even have an interest in, for example, preventing the

[82] International Maritime Organisation, '*Djibouto Code of Conduct.* Available at: 'http://www.imo.org/OurWork/Security/PIU/Pages/DCoC.aspx (Accessed 5 December 2010).
[83] Security Council Resolution 1838.
[84] Security Council Resolutions 1816 (June 2008), 1846 (December 2008) and 1897 (November 2009).
[85] Security Council Resolution 1851.
[86] Also to imprison piracy convicts.
[87] Security Council Resolution 1918.
[88] 16 out of 21 states.

smuggling of migrants or drugs originating from their shores, save for political reasons. The solution seems to be for more developed countries to take more responsibility. Economic interests are deemed to come before taking responsibility for human rights which explains the more advanced cooperation when it comes to threats that have a negative impact on trade such as piracy and terrorism. Since bilateral agreements, which entail mechanisms where authorisation is deemed to be given are expressed in a number of agreements in very similar ways, it could be argued that regional customary law is being developed. Progress has been more successful in some areas of threats to maritime security compared to others. However, it can be observed that we are generally moving towards a more comprehensive international cooperation to combat transnational maritime crime.

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The Interests of Minority and Majority Shareholders in the EU

Angelika Gorak and Sofiya Kartalova

1. Introduction

THE recent economic crisis proved to be immensely threatening to the economic equilibrium within the European Union (EU). Beginning in the United States, it then proved its "domino effect" by covering the EU, resulting in so-called 'financial stress' in all the Member States.[1] In this context, some possible explanations for the crisis are worth mentioning: unsustainable macroeconomic inequalities, a lack of adequate policies preventing adventurous risk-taking on the global scale,[2] a complete failure in the system of global financial governance and its regulatory framework.[3] Many of these explanations point toward wrong decision-making on the part of majority shareholders. Had there been a proper system of internal checks and balances within the companies, the financial backlash would not have been as devastating to the economy.

The following piece explores a variety of mechanisms and principles that the EU uses to guard the interests of minority and majority shareholders. The analysis shall be undertaken on several plains: the balance of power in

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[1] Collyns, C. 'The Crisis though the Lens of History', *Finance and Development A quarterly magazine of the IMF*, 45. 4 (Dec 2008). Available at: http://www.imf.org/external/pubs/ft/fandd/2008/12/collyns.htm (Accessed 23 April 2012).

[2] 'Portfolio diversification is not enough to manage credit risk, and it cannot fully replace due diligence' quoted in Sacasa, N. 'Preventing Future Crises Priorities for Regulatory Reform After the Meltdown'. *Finance and Development A quarterly magazine of the IMF* 45.4 (2008) Available at: http://www.imf.org/external/pubs/ft/fandd/2008/12/sacasa.htm (Accessed 23 April 2012).

[3] Levine, R. 'The Governance of Financial Regulation, Reform Lessons from the Recent Crisis', *International Review of Finance* 12.1 (2012), Available at: http://www.imf.org/external/np/seminars/eng/2011/res2/pdf/rl.pdf (Accessed 23 April 2012) pp. 39-56.

the company; minority and majority shareholders; and empowerment and protection. The underlying idea of this piece is to provide an overview of how the EU regulates the often clashing and overlapping interests of shareholders.

1.1. Defining minority shareholders

Minority shareholders are those board members that possess less than 50 per cent of the shareholdings in a company.[4] There are two approaches to identifying this group. Firstly, the quantitative approach depends on the percentage of capital owned, though this is often regarded as outdated. Secondly, the qualitative approach considers that control is of utmost importance, an approach often regarded as more realistic.[5] For the purposes of this piece, let us accept that the objective numerical disadvantage of minority shareholders naturally results in decision-making impotency within the business organisation.

1.2. Defining majority shareholders

A majority shareholder is a person or a company that owns more than 50 per cent of the stock within companies, which usually allows them to control the company's transactions, and more importantly, elect the board of directors.[6] Thus, they are in *de facto* control of the company, which entails deciding directly or indirectly on the salaries of the management, on dividends, causing a break-up of the corporation, deciding on the merger, cash-out public shareholders, amending the rules on incorporation and selling the assets.[7]

It must be noted that a shareholder who 'owns a majority interest' or 'exercises control' over the business or corporation is subject to fiduciary duty towards minority shareholders, which may be both directors and controlling stockholders.[8] Thus, the fiduciary duty, based on the trust between the trustee and the beneficiary, gives a sort of "security" to minority shareholders and also disengages controlling shareholders from

[4] Lee, J. 'Four Models of Minority Shareholder Protection in Takeovers'. *European Business Law Review*. 16. 4. (2005) pp. 803 – 830 (p. 803).
[5] Szentkuti, D. *Minority shareholder protection rules in Germany, France and in the UK- A Comparative Overview.* Thesis submitted at Central European University. March 2007, p. 9.
[6] The Free Dictionary by Farlex, 'Majority Shareholder'. Available at: http://financial-dictionary.thefreedictionary.com/Majority+Shareholder (Accessed 02 July 2011).
[7] Szentkuti, D. *Minority shareholder protection rules in Germany, France and in the UK- A Comparative Overview.* Thesis submitted at Central European University. March 2007, p. 9.
[8] Levy, R. E. 'Freeze-out Transactions The Pure Way: Reconciling Judicial Asymmetry between Tender Offers and Negotiated Mergers', *West Virginia Law Review* 106 (2004) pp. 305-357 (p. 320).

'self-dealing transactions'.[9] In order to balance this striking inequality of roles, this fiduciary duty extends to all responsibilities given to controlling shareholders in case of breakup of the corporation, merger with another company, in case of cash-outs, selling of corporate assets and others. Furthermore, majority shareholders are subjects to the duty of care, which stands for acting in a good faith, with ordinary care and 'in a manner the director reasonably believes in the best interest of the corporation'.[10]

1.3. Minority shareholders: A position of disadvantage

The crux of minority protection can be found in the antagonistic relationship between the controlling bodies of a company, including its directors and majority shareholders, and the reluctant minority shareholders, in case of a change in corporate control. This balancing act could be viewed as a matter of survival in the "corporate jungle". Those who manage to usurp control are in the company's "driver's seat", creating the rules and possessing more comprehensive and solid influence. These problems are countered by minority protection and minority empowerment, which are two sides of the same coin. The former is about the intervention of the state, in its judiciary or legislative capacity that is entrusted with modelling and enforcing the external legislative framework of controls. Nevertheless, this is not about the state "picking sides", since it is at no point directly accountable to the minority shareholders. Minority empowerment is about the internal checks and balances in the struggle for power and granting clear-cut rights to the minority within the business entity itself.[11] This piece sees both interpretations as relevant for the purposes of outlining the interests of minority shareholders.

Traditionally, the minority shareholders' position is disadvantageous, being at a greater distance from the information flows and the decision-making process. In the case of cross-border mergers within the EU, for example, the situation is relatively more inclusive in terms of consultation, although the final choice is made by the majority shareholders. Nevertheless, in cross-border mergers, approval requires a positive vote cast at the general meetings of the totality of the concerned companies.

[9] Levy, R. E. 'Freeze-out Transactions The Pure Way: Reconciling Judicial Asymmetry between Tender Offers and Negotiated Mergers', *West Virginia Law Review* 106 (2004) pp. 305-357 (p. 320).

[10] as cited in Levy, R. E. 'Freeze-out Transactions The Pure Way: Reconciling Judicial Asymmetry between Tender Offers and Negotiated Mergers', *West Virginia Law Review* 106 (2004) pp. 305-357 (p. 321).

[11] Lee, J. 'Four Models of Minority Shareholder Protection in Takeovers'. *European Business Law Review.* 16. 4. (2005) pp. 803 – 830 (pp. 805-808).

The conditions for equal treatment of minority and majority shareholders are better, since the process occurs at the same moment in time and under identical terms. However, the possibility of indirect benefits for the majority shareholders is not to be dismissed and, therefore, the question of what remedies are available for the minority is still relevant. Apparently, there are only two options left – filing for damages or selling the shares. Both options can result in monetary compensation.[12]

2. Majority shareholders: Abuse of power

Although having been given an "assurance" in the duty of loyalty and duty of care, the minority shareholders at large still seems to have an antagonistic approach towards majority shareholders. The literature mainly focuses on the ways in which the majority shareholders may abuse their powers and "consume corporate wealth", for example by paying themselves excessive salaries, withdrawing funds, or blocking a value increasing tender. It may be rebutted, however, by the fact that in concentrated ownership model, the majority is directly involved in the management of the company. Thus, the majority shareholders play an active role in scrutinising the management. Furthermore, mechanisms such as corporate control transactions, accounting rates of return of the company, a so-called transparency policy are available for the minority shareholders to prevent mismanagement.[13] More precisely, after a scandal related to Enron, the European Commission launched the Communication on the statutory audit followed by an Action Plan on Modernizing Company Law, focusing mainly on corporate governance enhancement and transparency.[14] Furthermore, after the Parmalat insolvency issue – the collapse of a food and dairy corporation, which the BBC described as 'Europe's biggest bankruptcy'[15] - the reforms in the field

[12] Wyckaer, M. and Geens, K. 'Cross-border mergers and minority protection: An open-ended harmonization', *Utrecht Law Review* 4.1.(March 2008). pp. 45-52. (pp. 45-47).
[13] Holderness, C. G. and Sheehan, D. P. 'The Role of Majority Shareholders in Publicly Held Corporations, An Explanatory Analysis', *Journal of Financial Economics* 20 (1988), pp. 317 -346.
[14] McCahery, A. J and Vermeulen, P.M. E. 'Corporate Governance Crises and Related Party Transactions: A Post-Parmalat Agenda' in Klaus J. Hopt, Eddy Wymeersch, Hideki Kanda, and Harald Baum (eds) *Corporate Governance in Context: Corporations, States, and Markets in Europe, Japan, and the US*', Oxford; New York: Oxford University Press, 2005, pp. 215-246 (p. 220).
[15] BBC NEWS, 'Italian dairy boss gets 10 years'. *BBC news* (online), 18 December 2008. Available at: http://news.bbc.co.uk/go/pr/fr/-/1/hi/business/7790803.stm (Accessed 28 July 2012).

of accounting and audit controls were necessary. The scandal confirmed regulatory problems on both Member State and EU levels. It unveiled that the European system attracted private benefits extraction; controlling shareholders have developed a variety of techniques to tunnel assets and profits. The collapse of Parmalat has made the EU realise that the accounting frauds and abuses coming from the board of directors were not solely an American problem.[16] A need to introduce high quality company disclosure systems and regulations designed to protect investors were clearly missing in EU legislation. Therefore, the EU had been encouraging an adoption of the Financial Sector Assessment Program (FSAP), a United States-style corporate governance and securities law system. It has, however, struggled to create any measures on the national level, as various interest groups, national governments, have opposed it.[17]

Nevertheless, realistically, takeovers remains the trickiest of control transfers for vulnerable and powerless minority shareholders, since they are in the danger of becoming victims in a clash between titans, the target company and the one initiating the merger. First, they have no standing to bring action against the controllers for breach of fiduciary duty. Secondly, the Takeover Directive[18] (or any European harmonisation instrument, for that matter) has failed to enlist specific rights belonging to or any express duties owed to this category of shareholders, nor does it speak of any legal bases for those. Thirdly, enforcement rules for regulatory offences are underdeveloped, because they do not cover private actions. Last, but not least, the legal system is not particularly favourable to law enforcement in relation to private investors.[19]

[16] McCahery, A. J and Vermeulen, P.M. E. 'Corporate Governance Crises and Related Party Transactions: A Post-Parmalat Agenda' in Klaus J. Hopt, Eddy Wymeersch, Hideki Kanda, and Harald Baum (eds) *Corporate Governance in Context: Corporations, States, and Markets in Europe, Japan, and the US*', Oxford; New York: Oxford University Press, 2005, pp. 215 – 246 (p.220).

[17] McCahery, A. J and Vermeulen, P.M. E. 'Corporate Governance Crises and Related Party Transactions: A Post-Parmalat Agenda' in Klaus J. Hopt, Eddy Wymeersch, Hideki Kanda, and Harald Baum (eds) *Corporate Governance in Context: Corporations, States, and Markets in Europe, Japan, and the US*', Oxford; New York: Oxford University Press, 2005, pp. 215 – 246 (p.220).

[18] Directive 2004/25/EC of the European Parliament and of the Council of 21 april 2004 on takeover bids

[19] Lee, J. 'Four Models of Minority Shareholder Protection in Takeovers'. *European Business Law Review.* 16. 4. (2005) pp. 803 – 830 (p. 803, p. 807)

3. Protection of Minority shareholders

Joseph Lee[20] explores the rationale behind the need to protect minority shareholders. The proprietary argument notes that shareholders entertain a proprietary interest in a company's investments. Their rights could be appraised as those of passive owners and residual claimants, or could be construed as active ones, retaining entitlement over dividends, votes, equal treatment, law suit and others. In the meantime, the contractarian point suggests that the minority shareholders enter a unanimous and voluntary agreement with the company. The terms of the contract, based on fiduciary principles of trust between a trustee and a beneficiary, have the power to raise the price per share, if found favourable by investors. Furthermore, another theory is that the controlling actors owe a duty of care to their fellow minority board members. A fourth important hypothesis is that of corporate democracy. It concerns the legitimacy of the rule of the majority, and the paper-thin boundary between that and a regime where the will of the minority is ignored. Corporate democracy is envisioned as a process of deliberation, where all points of view are taken into account and equitable principles are respected. Last, but not least, the distributive justice argument rejects state intervention in a free competitive market. Following the social meritocratic principle within the closed community of a company, even the minority shareholders should be entitled to reap the benefits of their contributions.

4. Models of empowerment of minority shareholders[21]

Lee proposes four general models of granting extra rights to minority shareholders, inspired by the English practice: internal control, market control, regulatory control and private action. The internal control pattern entails mechanisms inside the corporate structure, like board and general meetings. The underlying principle is that a company is master of its assets and the directors are bound to the company by means of a fiduciary duty. The privilege to bring action against the directors is conferred on the company. The minority shareholders may also start proceedings against directors by means of the doctrine of derivative actions originally coined in English law (*Foss v Harbottle*[22]).[23] Almost all Continental European

[20] Lee, J. 'Four Models of Minority Shareholder Protection in Takeovers'. *European Business Law Review*. 16. 4. (2005) pp. 803-830 (p. 809-813).

[21] For an extended discussion of the EU's protection of shareholders, see appendix.

[22] (1843) 2 Hare 461.

states, except for example the Netherlands, have accepted law suits by derivative shareholders. If damage sustained by negligence is inflicted on the company's assets, the shareholders can only sue in the company's name. The shareholder can only liquidate the entire damage, not only the part equated to their stake. This mechanism has been designed to resolve the majority versus minority conflict: the wrongdoer enjoys the support of the majority in the general meeting, exercises "wrongdoer control", or is under the wing of the majority, should the breach of duty have benefited the controlling shareholder. Thus, a minority law suit reaffirms the principle of equal treatment of shareholders. However, problems arise where the interests of the company and those of the minority do not match.[24]

Lee's second model is the market control model. In this case, the forces of supply and demand determine the price per share, which in turn is symptomatic of the management and performance of the company.[25] Critics have established that there is indeed a correlation between those factors:

> 'Minority shareholders in countries whose laws promote and protect shareholder rights are probably *more* likely to be able to have the kinds of boards that they desire. In addition, corporate boards in countries where the law supports board oversight and actions are probably *more* likely to be effective. We hypothesise, therefore, that "good" shareholder laws and "good" boards go hand-in-hand, in the sense that they must be *complements*'.[26]

[23] Lee, J. 'Four Models of Minority Shareholder Protection in Takeovers'. *European Business Law Review*. 16. 4. (2005) pp. 803-830 (p. 814).
[24] Kalss, S. 'Shareholder Suits: Common Problems, Different Solutions and First Steps towards a Possible Harmonisation by Means of a European Model Code', *European Company and Financial Law Review* 6. 2 (2009), pp. 324-347 (pp. 339-340).
[25] Lee, J. 'Four Models of Minority Shareholder Protection in Takeovers'. *European Business Law Review*. 16. 4. (2005) pp. 803 – 830 (p. 815).
[26] Kim, K. A., Kitsabunnarat, P. and Nofsinger, J. R., 'Shareholder Protection Laws and Corporate Boards: Evidence from Europe', Working Paper. Published 1 February 2005. Available at: http://finance.ba.ttu.edu/new/documents/researchSeminars/spring2005/Law%20and%20Corporate%20Governance.pdf (Accessed 23 April 2012).

In order for this theory to work, shares sold in the market must comprise a substantial part of the total shareholdings. This trading must be done without any restraints and the company must be facing a takeover.[27]

With regards to markets which are subject to regulatory control, the state is the main actor, occasionally delegating to self-regulatory bodies of public authorities. It is a case of external supervision and inspection of mergers under a pre-established comprehensive framework. The state pursues the public interest, sometimes even at the expense of that of the shareholders or with a great deal of arbitrariness.[28]

The last model is the private actions model, which is most favoured by the authors. It is basically the right to a self-defence reaction in case harm is inflicted or unjust and inequitable treatment is demonstrated by the majority shareholders on the minority shareholders. It should be their prerogative to seek redress and compensation in court as well as cease the relevant authorities for malpractices. The judicial system should be more accommodating both financially and procedurally for minority shareholders.[29]

5. Trends in Europe

Having examined these theoretical concepts, it is encouraging to see that, in 2001, there was a gleam of hope for minority shareholders in the EU in forms of the Legrand decision in France. A billion-euro takeover was stopped on the grounds that the terms of the deal were unfavourable towards minority shareholders. '[T]he message to French companies is that they can no longer treat their investors, especially minority shareholders, with disdain…[The cases of Deutsche Telekom, Telekom Italia and Hermes all confirm this positive trend.]'.[30] It seems that the Europe Union has awakened to the idea of minority shareholder protection as an actual concept.

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[27] Lee, J. 'Four Models of Minority Shareholder Protection in Takeovers'. *European Business Law Review*. 16. 4. (2005) pp. 803-830 (p. 815).
[28] Lee, J. 'Four Models of Minority Shareholder Protection in Takeovers'. *European Business Law Review*. 16. 4. (2005) pp. 803-830 (p. 817).
[29] Lee, J. 'Four Models of Minority Shareholder Protection in Takeovers'. *European Business Law Review*. 16. 4. (2005) pp. 803-830 (pp. 817-818).
[30] The Economist, 'Europe's revolting shareholders' *The Economist* (online), 10 Mat 2001 Available at: http://www.economist.com/node/620394 (Accessed on 20 June 2011).

6. Shareholders' interests at EU level

More generally, the starting point of a discussion of the EU's mediation between minority and majority shareholders, should be determining the legal basis of the EU's interference in protection of shareholders' rights. This is said to be Article 54 (3)(g) of the EEC Treaty (later followed by Article 44 (2) (g) of the EC Treaty), which postulates that one of the prerequisites of the freedom of establishment and the promotion of integration is the co-ordination of safety measures for the protection of the interests of members in companies, including shareholders. This was a mission entrusted to the Commission and the Council of Ministers.[31] It set off an avalanche of measures, starting off with the Fifth Directive. Originally, it envisioned the general meeting as the key tool for this task, with the second and third proposals putting forward the one share-one vote principle. which means that each share entitles to the same voting right.[32] However, the project was dropped in 2001. Next, the 1999 Financial Services Action Plan emphasised the need for uniformity across a single market of financial services, doing away with the significant national differences in shareholders' rights regulation. The Societas Europea Regulation and Directive represented a missed opportunity for modelling such rules. In 2003, the "Modernising Company Law and Enhancing Corporate Governance in the European Union – A Plan to Move Forward" (Company Action Plan 2003) put shareholders' protection on top of the list of priorities in EU company law. This should happen in a three-fold way: 1) access to information, 2) other shareholders' rights and 3) shareholder democracy. In fact, the construction of this piece has been influenced by this pattern to a certain extent. Finally, Directive 2007/36/EC, known as the Shareholders' Rights Directive, tends to the same problems. It has been recognised as the first attempt by the Commission to build direct standardised regulation in relation to shareholders' rights in listed companies, not simply piecemeal solutions. Its aim is to reinforce cross-border participation of shareholders at the general meeting and to bring transparency for investors and the public for a more effective version of corporate governance.[33]

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[31] Hong, F. X. 'Protection of the Shareholders' Rights at EU Level: How Far Does It Go?', *European Company Law* 6. 3 (2009), pp. 124-130. (p. 124).

[32] Norges Bank, 'Shareholders rights'. *Norges Bank Investment Management* (online), accessible at: http://www.nbim.no/en/press-and-publications/feature-articles/2006/Shareholder-rights/ (Accessed 02 July 2011).

[33] Hong, F. X. 'Protection of the Shareholders' Rights at EU Level: How Far Does It Go?' *European Company Law* 6. 3 (2009), pp. 124-130 (p. 124-125).

6.1. The EU and the flow of information and transparency

The next section will introduce some solutions introduced by EU legislation and Member States to tackle the issue of shareholders' rights to information and transparency. It has been recommended to introduce collective board responsibility for financial disclosure, more disclosure of related party transactions and off-balance sheet transactions. Therefore, minority shareholders have been given the opportunity to monitor suspicious behaviour of majority shareholders by gathering both public and private information.[34] The Fourth Directive has introduced a requirement for the preparation of balance sheets, profit and loss statements, annual reports, to which the minority shareholders have been given full access. However, it must be notes that the information given is not always accurate; some companies may even extend the adoption of annual accounts up to as much as 13 months which decreases its reliability. Furthermore, under IAS 24 the EU requires all listed companies or related parties to disclose the nature of the relationship between interested parties, following also the information about the transaction itself, any outstanding balances, including expenses and debts.[35] Also, the Commission has made attempts to improve the transparency of European Private Companies (SPEs) by an amendment to Seventh Directive, requiring companies to disclose all off-balance sheet activities which influence the company. The aim of the amendment is to introduce more transparency to the investors.

6.2. Shareholder democracy in the EU

The concept of shareholder democracy within the European Union has been introduced by a recommendation of the High Level Group of Company Law Experts on takeover regulation in 2002.[36] Having been inspired by the Sarbanes-Oxley Act, European legislation also aims at the creation of independent boards of directors and audit committees, that could certainly reflect the problematic concept of "democracy".

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[34] McCahery, A. J and Vermeulen, P.M. E. 'Corporate Governance Crises and Related Party Transactions: A Post-Parmalat Agenda' in Klaus J. Hopt, Eddy Wymeersch, Hideki Kanda, and Harald Baum (eds) Corporate Governance in Context: Corporations, States, and Markets in Europe, Japan, and the US', Oxford; New York: Oxford University Press, 2005, pp. 215-246 (p.220).

[35] McCahery, A. J and Vermeulen, P.M. E. 'Corporate Governance Crises and Related Party Transactions: A Post-Parmalat Agenda' in Klaus J. Hopt, Eddy Wymeersch, Hideki Kanda, and Harald Baum (eds) *Corporate Governance in Context: Corporations, States, and Markets in Europe, Japan, and the US*', Oxford; New York: Oxford University Press, 2005, pp. 215-246 (p. 220).

[36] Khachaturyan, A. 'The One-Share-One-Vote Controversy in the EU', *European Business Organization Law Review*, 8 (2007) pp. 335-367.

It has been proven, that in order to restrain majority shareholder opportunism it is necessary to create an independent board and give the power to non-executive directors in the areas of the conflict of interest, such as executive remuneration decisions and audit supervision. The Commission has proposed a set of non-binding minimum standards and recommendations for independence of the board and identification of conflicts of interests and also suggested that audit members shall be composed exclusively of non-executive, independent directors.[37]

Lastly, it must be noted that the development of corporate governance system at national level still remains very unclear. So far, there have been no developments in this area due to seemingly unbridgeable differences in languages and doctrines. The divergence had been clear as to give an example of the presence of block holder systems in France and Germany and a dispersed equity system in the UK and a hybrid system in the Netherlands.

Within the corporate structures, the voting rights are not always divided equally among all holders of the same shares. Admittedly, it has been established that shareholders' voting rights shall be divided in relation to the capital commitment by all of them. In the US, most listed companies follow the aforementioned 'one-share one-vote rule'.[38] However, in the EU this is not the case, as the power is concentrated in the hands of a minority of large shareholders, who control the majority of voting rights. It has been confirmed that one-third of EU companies do not follow the one-share one-vote principle. In 2005, a study, commissioned by the Association of British Insurers (ABI), a group of large institutional shareholders, confirms the grave reality – 'in Europe...shareholders count themselves lucky if they have a vote'.[39] It shows further that

> 'only two-thirds of the big European firms included in the FTSE Eurofirst 300 index operate a rule of one share, one vote. In the other third of firms, power tends to be concentrated in the hands of a minority

[37] The Commission of the European Communities, 'Commission Recommendation of 15 February 2005 on the role of non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board'. *Official Journal of European Union*, 25.2.2005. Available at: http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:052:0051:0063:EN:PDF (Accessed 01 July 2011).

[38] http://www.nbim.no/en/press-and-publications/feature-articles/2006/Shareholder-rights/ (Accessed 02 July 2011).

[39] The Economist, 'What Shareholder Democracy?' *The Economist* (online), 23 March 2005. Available at http://www.economist.com/node/3793305?story_id=E1_PSJPPDV (Accessed 20 June 2011).

> of big shareholders who control a majority of the voting rights. Practice varies widely across Europe. A mere 14% of the firms in the sample from the Netherlands allow their owners one vote per share; 25% of the Swedish firms; and 31% of the French companies. Things are far more democratic in Germany (97%) and Britain (88%). One-fifth of the companies issue shares with multiple voting rights, giving additional votes to selected shareholders. One in ten firms imposes a ceiling on the number of votes that can be exercised by any one shareholder, irrespective of how many shares he owns'.[40]

The European Commission seeks to discourage companies and states that hamper foreign investment through golden shares or unfair national laws. Charlie McCreevy, the EU Internal Market Commissioner, approved of the 'elimination of discriminatory treatment of shareholders by an introduction of one-share once vote principle across EU'.[41] Certain deviations from that anticipated rule are as follows: multiple voting shares, priority and golden shares,[42] voting rights ceiling,[43] non-voting shares. It must be noted that the introduction of the one-share one-vote rule may encourage companies to transform into pyramidal structures, create "negative voting arbitrage", encourage value decreasing transactions or even become a takeover defence. The rule has proved to be more politically attractive than economically efficient.

Conclusively, there are few legislative alternatives. Firstly, EU policy-makers may just leave the problem open and may not legislate on this issue at the EU-level and in the outcome focus on reinforcing the rules on non-executive directors in the areas on minority/majority conflict of interest, focusing also on disclosure standards. Secondly, they may create an opt-in/opt-out provision for the Member States. This would allow companies to opt into a one-share one-vote statutory provision or opt out by either charter or by law provision. This could further be strengthened by harmonised transparency requirements and enforcement rules.[44]

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[40] The Economist, 'What Shareholder Democracy?' *The Economist* (online), 23 March 2005. Available at http://www.economist.com/node/3793305?story_id=E1_PSJPPDV (Accessed 20 June 2011).

[41] Buck, T. 'EU seeks to end bias among shareholders'. *Financial Times* (online), 16 October 2005. Available at http://www.ft.com/cms/s/0/ae17a66e-3e6f-11da-a2cb-00000e2511c8.html#axzz21vL9n1lG (Accessed 28 July 2012).

[42] These grant special rights to the holder irrespective of his equity stake.

[43] A prohibition to vote above certain threshold, irrespective of the number of shares.

[44] Khachaturyan, A. 'The One-Share-One-Vote Controversy in the EU', *European Business Organization Law Review*, 8 (2007) pp. 335-367 (p. 16).

6.3. Equal treatment of shareholders in the EU

This equal treatment rule concerns capital reductions and share repurchases. Article 42 of the Second Directive postulates that 'the laws of the member states shall ensure equal treatment to all shareholders who are in the same position'. Meanwhile, Article 19 of the Second Directive ensures that share purchases shall be conducted 'without prejudice to the principle of equal treatment of all shareholders who are in the same position'. However, the implementation of the rule differs greatly across Member States: first, the courts may fall back on general principles of fairness to adjudicate, as in the cases of Germany, Austria, and the Netherlands; secondly, the concept could be expressed as a prohibition that imposes criminal liability, dealing with capital reductions, capital redemption and share repurchases, if the shares must be cancelled, as in France and Belgium; thirdly, the unequal treatment of shareholders in share repurchases or capital reductions could also be allowed at large, but the minority shareholders at a disadvantage must confirm the general meeting's decision by a majority vote, as in Spain and Portugal. The United Kingdom and Italy abstain from legislating in this area.[45] All in all, the following observations come into light: '(1) the European principle of equal treatment of shareholders plays a small role, because EU member states must follow rules granting participation of minorities in the decision-making process, and minorities have substantial protection devices against majorities' or directors' abuses; and (2) EU member states' implementation of the equal treatment rule is not homogeneous. Thus, the advantages of a mandatory, but vague, equal treatment norm are not clear'.[46]

Concluding remarks

The EU is gradually awakening to the benefits behind better shareholders' protection. This piece has made it clear that both practically and theoretically such an initiative reflects the needs of the corporate entities and the current economic climate. Without making shareholders masters

[45] De Luca, N. 'Unequal Treatment and Shareholders' Welfare Growth: 'Fairness' V. 'Precise Equality'', *Delaware Journal of Corporate Law (DJCL)*, 34. 3 (Nov 2009). Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1503089 (Accessed 24 April 2012). pp. 853-920 (pp. 871-873).

[46] De Luca, N. 'Unequal Treatment and Shareholders' Welfare Growth: 'Fairness' V. 'Precise Equality'', *Delaware Journal of Corporate Law (DJCL)*, 34. 3 (Nov 2009). Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1503089 (Accessed 24 April 2012). pp. 853-920 (p. 875).

of their own fate, giving them free will and a voice and entrusting them with the necessary tools to make an informed choice, the capital markets will remain lacking in involved investors that can bring back the lost vitality of today's economy.[47]

[47] Masauros, P. E. 'Is the EU Taking Shareholder Rights Seriously?: An Essay on the Impotence of Shareholdership in Corporate Europe' *European Company Law* 7. 5 (2010), pp. 195-203 (p. 203).

Appendix:

Methods of protection within the EU

The conventional methods employed in the EU to ensure minority shareholder protection at EU level are mandatory takeover bid, squeeze-out and sell-out, setting the price per share as well as the takeover defences (board neutrality, breakthrough, reciprocity).

1. Mandatory takeover bid rule

The mandatory takeover bid is a mechanism designed to uphold the principle of equal treatment of shareholders and to prevent the majority shareholders from interfering directly with the bid. Directive 2004/25/EC, now widely applicable across continental Europe, was originally inspired by a piece of English legislation.

The aforementioned directive makes it compulsory for every owner of a third of the voting rights in the target company to place an offer on the table for the rest of the shareholdings of the business organisation (Article 4). The required percentage is usually 30, but it could be lowered or increased depending on the jurisdiction in question. The chosen source for reaching the set volume or the legal capacity of the owner of the shares is immaterial. The subjective timing test of prospective fulfilment of possession is now substituted for the objective one which is actual ownership.

The purpose of the mandatory takeover bid is to protect the value of the shares as well as to ensure the "peace of mind" of the minority shareholders. Even though they find themselves in dire straits at the mercy of the new shareholder, they are not to be taken advantage of. However, the mechanism is not without faults. It has been criticised for being too rigid and generally having an adverse effect. It is also lacking in justifications for a mere partial bid. It has been criticised for f being impractical,conditional and sketched in bulk, without any thought given to price restrictions or means of payment.

2. Squeeze-out

Another option is the "squeeze-out" rule. In short, the majority shareholder is allowed to make an offer for all the rest of the shares and occupy the company once and for all. The opportunity arises where the controlling shareholder is in possession of 90 to95 per cent (the percentage varies from one jurisdiction to another) or the shares. Prospective attainment of shares is also included, for no less than 90 per cent.. The time limit allowed for the acceptance of the offer is three months. It depends on the Member States to ensure fair remuneration. It was justified in the following way: ,the presence of minority shareholders after a takeover bid leads to various costs and risks, the squeeze-out right makes

takeover bids more attractive for potential bidders and may be viewed as a counterpart to the mandatory bid rule, and the squeeze-out right is more efficient than a delisting procedure. The Group notes that property rights are protected at national and international level, but observes that various courts in the Member States have ruled that the squeeze-out right is not to be regarded as incompatible with these protective provisions'.

3. Sell-out

At the same time the minority shareholders may require the majority to buy out their shares ("sell-out right"). Its existence is explained thus: 'the majority shareholder may be tempted to abuse his dominant position after a takeover bid, minority shareholders cannot obtain appropriate compensation by selling their shares in the market if it has become illiquid, the sell-out right is an appropriate mechanism to counter the pressure on shareholders to tender in the takeover bid, and finally the sell-out right is to be regarded as a counterpart for the squeeze-out right'.

4. Setting price per share

The next problem is how to set the price per share. The whole point of any measures would be to provide a equitable payment that does not take advantage of the fact that minority shareholders are backed up in the corner. The Takeover Directive provides that shares should be bought at the highest price paid for the same securities by the person making the bid, over a period varying from one jurisdiction to another. It must be a minimum of six months and a maximum of twelve months prior to the launch of the bid. 'The justification for this method can be found in Winter Report, according to section 2.2 of which the highest price paid rule offers the double benefit of allowing the minority shareholders to fully share the premium paid by the acquirer at any time in the period under consideration, while at the same time giving the offer or the certainty that he will not have to pay more in the mandatory bid than he has been willing to pay in the preceding period and as a result permitting him to determine himself at which maximum price he is prepared to acquire all securities of the company'.

5. Takeover defences

There are two alternative caveats: the post-bid defence (which diminishes the volume of shares the bidder may attain or attempt to increase the value of the bid) and pre-bid defence (which "gets in the way" of acquisition like share transfer restriction).

5.1. Board neutrality rule

The board neutrality rule is a derivative of post-bid defences, and during the bid period ensures that approval is given from general meeting of shareholders before the board of the company dare to tread any further. Hence, this may provide a smoother transitional period for the takeover by placing certain restrictions on the board's power and assure the peaceful co-operation between the management and the shareholders.

5.2. Breakthrough rule

The breakthrough rule is an antithesis for pre-bid defences during a takeover. It also aims at removing the hurdles in the way of the takeover, but through imposing limitations (share transfer and voting restrictions) throughout that authorise the bidder to alter the articles of association or even get rid of the board. Regulating the balance between capital and control, the concept allows superseding voting rights at the general meeting.

5.3. Reciprocity principle

Reciprocity principle entitles Member States to give significant leeway to a company that applies the board neutrality rule and/or the breakthrough rule simultaneously to oppose the bidder who abides by different rules. This 'reciprocating power' can be only in case of an explicit permission by the Member State and the general meeting of the company.

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