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EDITOR’S NOTE

Vol. 2, No. 2

Defining International Public Policy:

During the course of the past year it has become increasingly apparent how critical it is to have a clear and precise definition of International Public Policy. Until now, our definition has been open to “all areas of governance and public policy that are either international or strongly affected by international factors”. As an emerging subfield, International Public Policy requires a more precise definition as to which themes fall within its remit and how the field may be distinguished from other related fields.

We believe the issues that fall under the purview of International Public Policy relate to the following challenge: There is an increasing recognition that traditional approaches to Public Policy fall short when facing the challenges of a modern, and increasingly complex and interdependent world. Today, certain aspects of governmental capacity and authority have arguably been diminished, and, in the absence of world government, International Public Policy relies on horizontal and decentralised networks comprised of various stakeholders across many sectors. Problems of effective resource management, population, crime, information, health and many others now cross national boundaries with the consequence of blurring the intersection of government, industry and civil society while requiring coordinated action between these sectors. It is essential that we seek ways to understand how these primary sectors of international society function, while at the same time developing formal and informal international mechanisms that are effective, equitable, accountable and legitimate. In essence, how can the world foster a more effective system of global rulemaking without sacrificing an unacceptable amount of citizen control? International Public Policy is therefore the study of processes where networks, systems of governance, and multidisciplinary international factors interact, towards expanding theory and developing practical policy solutions to increasingly complex and diffuse global challenges. Areas related to this definition include international law, international political economy, development studies, international or comparative politics and administration, and human rights. These disciplines are all relevant for articles in the International Public Policy Review, however, the above-mentioned elements must also be present.

This issue has five articles and one note. Jonathan Bond’s article on the constitutional courts in Hungary and Poland explains how policies were enacted in order to create functional and independent courts systems in challenging political environments. He compares the two countries’ processes, giving an excellent example of a topic relevant to IPP. Charles-Henry Courtois’ paper on the European Union Savings Directive explains how that policy was created in the EU as an intergovernmental organisation. Madeeha Bajwa and Evgeny Postnikow’s article on the potential of a denationalisation of the military investigates British and French contributions to international treaty obligations in relation to questions of defence and state sovereignty. Daniel Swift provides an analysis of the human capital models’ influence on state power. His contribution suggests a necessity for governments to strengthen equity and education, among others. Alexander Spencer’s very interesting article on counter terrorism in Europe seeks to understand how new European Union members have handled the challenges of building up counter-terrorism measures and investigates the strength and weaknesses of these varied approaches. Wendy Michell’s note on Thomas Pogge’s notion of human rights examines the notion of a universal responsibility for equality, and how governments should meet the challenges of global resource disparity.
We hope the reader will take pleasure in this fall issue of the International Public Policy Review. This is an exciting time as we are involved in an emerging, and increasingly important, field. As this year’s general editors, we are grateful for the opportunity to take part in the truly rewarding endeavour. Turning this journal over to a new generation of students at the UCL School of Public Policy, we wish them great success.

On behalf of the General Editors

Mette Østergaard
Joshua Mendelsohn
Adam Landsman

Copenhagen, London and Washington DC
November 2006
CONCERNING CONSTITUTIONAL COURTS IN CENTRAL AND EASTERN EUROPE

Jonathan Bond ‡

ABSTRACT

More impressive than the proliferation of constitutional courts throughout Central and Eastern Europe is the success of some, but not all, of these courts in transforming themselves into viable, formidable political actors despite the hostility of other branches of government and the absence of recent national experience with truly independent judiciaries. This essay examines this question by exploring the experience of Hungary and Poland’s constitutional tribunals, courts which were broadly similar in transitional profile but greatly divergent in outcomes. After identifying these key similarities and differences, the essay argues that at least two factors explain the contrasting experiences of these two countries: the context of legal continuity and the courts’ strategic responses to that context.

Keywords: Central and Eastern Europe (CEE); Polish Constitutional Tribunal; Hungary Constitutional Court; Constitutional Democracy; Rule of Law; Legal Continuity

1. INTRODUCTION

The global reach achieved by the twin phenomena of the judicialization of politics and the politicization of the judiciary has become a point of consensus for comparative legal scholars.1 Ironically, the very field which may offer both the most important recent application of these theories and the most fertile ground for discovering new lessons of judicial politics -- namely, the constitutional courts of emerging post-communist states of Central and Eastern Europe (CEE) -- is the area which woefully remains the most “under-theorized” of any.2 Indeed, it is difficult to overstate the magnitude of the change in legal institutions and judicial politics which has taken place in less than two decades. Prior to 1989, only two states in the region possessed anything like a constitutional tribunal,3 neither of which gave the slightest hint of a robust constitutional review power.4 Within a few years of the collapse of the Iron Curtain, every transitioning state in the

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4 This is hardly surprising, of course, given the place of the constitution in communist legal philosophy: “In communist theory the constitution did not present a constraint on the state, nor was it a meaningful source of individual rights.” M. Brzezinski, The struggle for constitutionalism in Poland (London: Macmillan, 2000), p. 130. Moreover, “Quite apart
region had set up some form of constitutional court. In the words of one former constitutional court president, “they served as a ‘trade mark’ or as a proof of the democratic character of the respective country.”

Though the rapid proliferation of these tribunals throughout CEE since 1989 is itself a phenomenon of great intrigue and importance, the more important mystery is the success of some of these courts in propelling, guiding, safeguarding, and making themselves essential to the larger transformations to constitutional democracy of their respective states. The courts contributed to the process of transition to democracy in a number of vital ways — some quite general, and some highly country-specific — though detailing the content of these respective contributions (and unravelling the ongoing debate concerning the import of various contributions) is not the focus of this analysis. Suffice it to say that several of the CEE states’ new constitutional courts provided an effective political check on other branches of the national (and in some cases local) government, partially diffused some of the most explosive conflicts over both substantive issues and inter-branch power struggles, and generated an until-then unfathomable degree respect for the primacy of constitutional law and compliance with the courts’ edicts. By their mere existence and survival, a number of the courts “revealed a radical development in the transition out of the Soviet-style governmental system of entirely centralised state power.” In sum, where they persevered, the courts were both the co-authors and hallmarks of the transformation.

The more pressing question, however, is how those courts which did contribute positively to the transition managed to transform themselves into viable, formidable political actors despite the absence of so many of the ingredients deemed essential to the creation of a powerful court. This

from the legal definitions of their competence, the genuine powers of both were inevitably subject to the restrictions stemming from Communist party rule. Sadurski, “Postcommunist constitutional courts,” p. 1.

5 Id.


7 Moreover, the difficulty in explaining the proliferation of the basic constitutional court model lies not in finding a reason that a CEE country might integrate the institution into its new post-communist constitution, but rather which of the myriad possible explanations holds true in each particular case. As will be discussed below, the specific actor(s) and their respective motive(s) in creating the tribunals can have tremendous consequences for the success of the court.

8 Sadurski’s summary is most fitting, despite its sardonic tone: “This is a heart-warming, feel-good story. It is a story about the courageous, principled, enlightened men and women of integrity who, notwithstanding the risks, take on the corrupt, ignorant, populist politicians. This is a story of the court as a noble ‘forum of principle’ to be contrasted with the elected branches and their practices of horse-trading, political bargains and opportunistic deals. This is a story about a respect for paramount values, announced in a Constitution, but which are not for every mortal to be seen, as they often remain ‘invisible’.” Sadurski, “Postcommunist constitutional courts,” pp. 7-8. There are, however, important reasons view with some scepticism the most far-reaching of the praises lauded upon the courts by scholars in the first few years of transition. As Sadurski himself observes — extending the famous argument put forward by Martin Shapiro much earlier concerning the courts of Western Europe — the symbiotic relationship between the constitutional court judges and the legal academic community should at least raise some suspicion — especially in states such as Hungary and Poland where the vast majority of judges were former law professors. Id., pp. 10-12.

9 In a number of cases, the effect of the court co-opting parties to fundamental political disputes over the substance of law and translating their disputes into matters of ‘objective’ legal inquiry had an effect analogous to removing the Cobalt-60 (or similar additive) from a ‘dirty’ bomb: the bomb still presents a very real and lethal threat, but its toxic aftereffects are squelched. A classic instance of this is the set of statutes reviewed by the Hungarian Constitutional Court concerning the lifting of the statute of limitations on crimes committed by government officers and others during the communist period but not prosecuted within the prescribed period (for obvious reasons). In this most sensitive of disputes, the Court (initially) ruled against those seeking to lift the statute of limitations, on grounds of preserving the rule of law qua legal certainty, and yet those proponents yielded to the Court by re-crafting their bill several times until they hit upon a formula the court accepted. H. Schwartz, The struggle for constitutional justice in post-communist Europe (Chicago: University of Chicago Press, 2000), pp. 100ff. As Kim Lane Scheppele argues on both juridical and sociological grounds, this co-opting comprises a critical contribution by the court. Scheppele, “ Constitutional negotiations,” pp. 233-36. Moreover, her argument raises a persuasive implicit, if not explicit, challenge to the argument recently reiterated by Jeremy Waldron against this co-optation process by courts exercising judicial review. J. Waldron, “The core of the case against judicial review,” Paper presented at Colloquium in Legal and Social Philosophy, School of Public Policy, University College London, London, UK, 16 March 2005, available online: <http://www.ucl.ac.uk/spp/download/seminars/0405/Waldron-Judicial.pdf>.

10 See generally C. Dupré, Importing the law in post-communist transitions: the Hungarian Constitutional Court and the right to human dignity (Oxford: Hart, 2003); see also Sadurski, “Postcommunist constitutional courts,” passim.

paper aims to probe this question in regard to CEE constitutional courts by drawing on the specific experience of the constitutional adjudicatory bodies in Hungary and Poland from their inception (in 1989 and 1985, respectively) through the first decade of transition. These cases are chosen for their broad similarities of context (discussed below) and yet their strikingly divergent outcomes. After first highlighting the fundamental features shared by the constitutional courts of CEE countries, the contrasting experiences and legacies of both the Hungarian Constitutional Court (Alkotmanybirosag) and the Polish Constitutional Tribunal (Trybunal Konstytucjyny) are very briefly outlined. This is followed by the articulation and analysis of two lessons drawn from the Hungarian and Polish experience concerning the conditions necessary for a court to be a net-positive force in its parent state’s successful transformation to constitutional democracy. Ultimately, it is argued here that the emphasis some in the literature place on court strategy — particularly, strategies in which the court passively abstains from contentious political issues — is misguided. Instead, successful net contribution by a constitutional court depends on the court’s response to its institutional and structural context — such as the framework of legal continuity inherited by the Hungarian Constitutional Court — and the overall strategy the court adopts to preserve both itself and the constitutional order.

2. THE COURTS IN CONTEXT

2.1. The Common Task: Challenges Confronting New CEE Constitutional Courts

While the experiences and outcomes of the constitutional tribunals newly established in CEE countries have been anything but uniform since 1989, the tasks and challenges the courts (initially) faced shared many common features. In every state where they were established — and in unity with their antecedents in Western Europe, specifically Germany (and to a more limited degree in North America) — the courts initially lacked “the power of the purse or the sword” and had “no established prestige, tradition or long-standing public acceptance.” Moreover, they faced a legislature at best only fractionally interested in creating a strong judiciary, suffered from the “inexperience...in protecting constitutional rights and liberties,” and confronted a culture already conditioned to evade the law. In concrete political terms, the constitutional tribunals were obliged to both survive attacks by other government entities and actively check improper encroachments by those entities. At the jurisprudential level, the courts struggled to give law, and specifically constitutional law, some different, durable, comprehensible significance than it had held for decades prior — in short, to “elaborate a meaning for all these new constitutional words and concepts.” Thus, though the particular political challenges faced by the constitutional courts

12 As will be discussed in detail infra, this strategy of court abstention from intense political conflict is that propounded by Epstein, Knight, and Shvetsova based on their theoretical and subsequent empirical work concerning the Russian Constitutional Court. L. Epstein, J. Knight, and O. Shvetsova, “The role of constitutional courts in the establishment and maintenance of democratic systems of government,” Law & Society review vol. 35, no. 1 (2001), pp. 117-164. The shortcomings of their theoretical model and its inability to account for the experiences of either Hungary or Poland are also described in a later section. A challenge to their model grounded in the Hungarian experience also necessarily raises a partial critique of Shapiro’s self-described “tentative argument” for a disjunction between courts establishing and/or shoring up the “rule of law in the primitive sense” in the court’s early years on the one hand and involvement in controversial questions (especially those among other branches of government) on the other. M. Shapiro, “Some conditions of the success of constitutional courts: lessons from the U.S. experience,” in W. Sadurski, ed., Constitutional justice, east and west: democratic legitimacy and constitutional courts in post-communist Europe in a comparative perspective (The Hague: Kluwer Law International, 2002), pp. 55-59.

13 Schwartz, p. 5. Certainly a number of the states — including Hungary and Poland — enjoyed a strong legal, even constitutional heritage which operated until the onset of the World Wars I and II, but in no country was this preserved in any but the most superficial sense under its respective communist regime. Id.

14 A. Fijalkowski, “The judiciary’s struggle towards the rule of law in Poland,” in J. Pribán and J. Young, eds., The rule of law in Central Europe: the reconstruction of legality, constitutionalism and civil society in the post-communist countries (Aldershot: Dartmouth/Ashgate, 1999), pp. 243-44.

15 Dupré, p. 38. As discussed infra, one fascinating hidden mechanism utilised specifically by the Hungarian Constitutional Court — and likely several others — to endow old legal vocabulary and syntax with new meaning was the deliberate importation of foreign and international legal principles (beyond specific precedents). In short, the court had to overcome the inertia of the political and popular perceptions of law, its function, its potential, and its tendencies. As Dupré argues, the Hungarian Constitutional Court’s employment of imported principle presented a modern analogue of
may have differed, and though the tools with which each one approached the common task were unique, each court ultimately confronted this same (though stylised) underlying puzzle.

These commonalities among their goals and obstacles, however, should not lead one to gloss over the differences between the courts themselves as they were designed or the dissimilarities of their origins. Seven distinctions are evident even between such relatively comparable cases as Hungary and Poland. First, each enjoyed a long and robust legal history and culture respecting the rule of law prior to the World Wars. Second, each had exhibited close ties to Western Europe for centuries. Third, each began its respective path to transition several years before the fireworks of 1989. Fourth, each had experimented at least one adjudicatory entity under communist rule antecedent to its present constitutional tribunal. Fifth, each preserved a significant level of legal continuity with its communist past. Sixth, each shared in common much of the same structure for its constitutional tribunal, and finally, even though each faced many of the same legal issues, often presented in the context of strikingly similar cases, several critical differences led the two constitutional courts down very divergent initial paths. After briefly summarizing the structure, origins, and operations of each of these two courts, several of the most noteworthy distinctions between the two will be brought to light.

2.2. Hungary: Crusading “from the Margins”

Like the courts of each of the CEE states, the Hungarian Constitutional Court was faced with the dual tasks of fostering legitimacy in the constitutional order while preserving itself as a potent political entity. Part of its success may well be traceable to Hungary’s strong legal heritage. Though it lacked a formal written constitution until 1949, it had enjoyed -- with certain notable exceptions -- the “mildest form of communism in Central and Eastern Europe.” The notion of establishing some form of constitutional adjudicatory body can be dated at the very least to the early 1980s, and even (by some scholars) to the late 1950s when major constitutional reforms began to surface in professional legal circles. Moreover, and unsurprisingly in an oft-described “nation of lawyers,” the mechanics of the transition process were saturated with legal formality: “each step in this process, no matter how unexpected, was controlled and accompanied by a legal response” such that “each development has been matched by a legal innovation.”

What truly set the Court apart from its counterparts, most notably during its first decade of operation (under the indomitable direction of its first president, László Sólyom), was its awareness earlier courts’ appeals to principles of natural law. In essence, imported law could provide an objective point of reference (viz. objective in the sense of a Hartian rule of recognition – i.e. that it could be identified without controversy) and could be appealed to in a way that other principles outside the text of the Hungarian constitution could not be. Id.

16 Poland, for instance, being home to the first written constitution in Europe, viz. that of May 1791. See Brzezinski, The struggle.

17 See Schwartz, passim. Though both courts were confronted with strikingly similar cases and issues in a number of instances (as might be expected, given the similar nature of their transition-based challenges, such as carving out a separation of powers doctrine and coping with the hardships of economic restructuring and privatisation), perhaps the most illustrative is the cases facing each court, respectively, concerning the president’s powers of appointment (specifically, to reject an appointment or remove an official already in place) vis-à-vis state radio and television supervisory officials. In both cases, the courts were asked to intervene in a dispute between presidents which claimed final authority over appointment (and thus rejection and/or removal of candidates) and parliaments who claimed this to be a legislative prerogative. In both cases, the courts upheld the powers of their respective parliaments over and against the claims of the presidents, and each court in turn went on to bolster its decision against end-run attempts by the executive to circumvent the rulings through challenges to retroactivity of rulings, etc. Schwartz, pp. 60–63, 84–85; on Poland, see also Brzezinski, The struggle, pp. 52ff. and Fijalkowski, pp. 250–25.


19 In contrast to Poland, for instance, where (as noted above) a written constitution had been established for more than a century before World War I, despite repeated partitions and re-partitions by neighbouring powers. See Brzezinski, The struggle.

20 Dupré, p. 5.

21 Schwartz, p. 76.

22 Dupré, p. 29.
of the import of these objectives and, in turn, its remarkable success towards achieving both.\textsuperscript{23} Even before the details of its operating structure (left so ambiguous in the revised constitution) were finalised, “when it started working in January 1990, it was already clear that the Court was going to be powerful.”\textsuperscript{24} At its height, the court was judged by numerous observers to have been “perhaps the most activist constitutional court not only in the CEE but also in the world.”\textsuperscript{25} Within six years of its creation, the court had struck down more than two hundred national laws, or nearly one-third (30.2\% between 1990-95) of all those brought before it for review.\textsuperscript{26} As Schwartz observes, “what is especially surprising, given the wide scope and deep impact of the Court’s decisions, is the support the Court has enjoyed from all sides so far, despite many criticisms.”\textsuperscript{27}

The real mystery of the Hungarian case, however, is how the Court safeguarded the new constitutional order and commanded obedience and respect for itself without notably greater initial stock of concrete, material resources or initial political force than other courts enjoyed. The powers accorded to the Constitutional Court by the 1989 amendment (which almost entirely reshaped the Hungarian constitution\textsuperscript{28}) were, to be sure, much wider than those afforded to other CEE states.\textsuperscript{29} Even though “the entire chapter dealing with the court appears in the margin” of the revised constitution,\textsuperscript{30} it specifically conferred upon the Court the powers (\textit{inter alia}) to: 1) strike down national laws and international treaty obligations in conflict with the constitution (and higher-order treaties); 2) hear “constitutional complaints” directly from citizens (thus, effectively removing the third-party gatekeepers restricting which issues which entered its docket); 3) declare failure of the legislature to act to be “unconstitutional by omission”; 4) to adjudicate other direct conflicts between state organs; and 5) to oversee impeachment of the president.\textsuperscript{31} The puzzle, however (to be explored in the discussion below) is how these powers delegated to the Court on paper became real enough for the court to command the obedience and deference, which it did, fundamentally changing the shape of Hungarian constitutional law in the process.

2.3. Poland: Beyond a ‘Potemkin’ Tribunal

As noted earlier, the initial conditions preceding reform in Poland shared a number of common points with the situation in Hungary. Like Hungary, Poland was a state with a relatively similar exposure and adoption of the rule of law prior to the World Wars, in which the democratic opposition to the communist regime had been operating in force for at least the decade before 1989. Also in which legal continuity with the old regime would be upheld in many ways, and moreover, in which the new constitutional adjudicatory body was already in some form of

\textsuperscript{23} Id.; Scheppele, “Constitutional negotiations,” pp. 220ff.
\textsuperscript{24} Dupré, p. 6.
\textsuperscript{26} Scheppele, “Constitutional negotiations,” p. 224; Schwartz, pp. 106-7. This excludes court involvement in review of local government acts, for which it was explicitly constitutionally empowered, as well as cases alleging ‘constitutional omissions’, an idiosyncrasy (at the time) of the Hungarian constitutional model.
\textsuperscript{27} Schwartz, p. 107, also notes several further evidences of the astounding degree of deference the Court enjoyed: “In May 1996, Prime Minister Gyula Horn, who a year earlier had seen 26 provisions of his 159-paragraph austerity package struck down by the Court at enormous cost to the budget, praised the Court for its protection of social welfare rights. Opinion polls confirm its high standing with the public at large; in both 1993 and 1995 the Constitutional Court was found by far more people to be serving society than either the parliament or the government. Even when the Court struck down key parts of the 1995 austerity package, the government – which proposed the package – did not challenge the Court’s right to rule in the way it did but, as in almost every other case, tried to reshape the law to meet the Court’s complaints. Only once did the parliament overturn a decision by the Court by amending the constitution.”
\textsuperscript{28} The 1989 amendment has been described as “almost a complete rewrite” of the constitution, such that “the revision of the Constitution was so extensive that some wags commented that only the location of the capital remained.” Schwartz pp. 82, 77. The peculiarity was not the degree of change in the text (given that so many other CEE states soon adopted entirely new constitutions), but rather that Hungary achieved this near-total revision while nominally preserving legal continuity from the communist regime. This, as discussed below, was not the determining factor in the Hungarian success, but was undoubtedly very significant in shaping the Court’s responses to many of the challenges it faced Dupré, pp. 29-31.
\textsuperscript{29} Schwartz, pp. 77ff.
\textsuperscript{30} Id.
\textsuperscript{31} Dupré, pp. 35-6.
operation for several years before the large-scale restructuring began (whereas in Hungary only Court’s predecessor had been established before 1989). Until 1997, however, the experience of its Constitutional Tribunal was almost the complete opposite of the Hungarian Constitutional Court. Intentionally created as a weak organ without binding adjudicatory powers in cases of statutory review, without the capacity to hear direct complaints from citizens, and encumbered by numerous procedural strictures (including a narrow statute of limitations), the Tribunal was rendered in its initial phase “nearly impotent as a protector of the constitution.”

The regime, in no way intending to implement an independent body that would authentically check the constitutionality of its actions, wanted the Tribunal to present the illusion of constitutional legality without challenging its most fundamental assumptions.

Though within the spheres where it was given a meaningful degree of final authority the Tribunal exercised it with consistency, such scope was simply too limited for the Tribunal to reach the level of effectiveness enjoyed by the Hungarian Constitutional Court. Except for substatutory laws, for instance, until 1997 the Tribunal’s decisions regarding the constitutionality of statutes could be directly overridden by a two-thirds vote in the Sejm. Moreover, its strategy of avoiding highly controversial political questions (and reaching unpopular holdings) where it lacked final authority appeared to backfire: it was notably in the cases where the Tribunal deferred most visibly to one or both other governmental branches (or political parties) where it was perceived by those other actors as “bow[ing] to political expediency at the expense of constitutional coherence.”

The Tribunal’s role and potential were dramatically changed with the larger political changes brought in 1989, including the replacement of half of its judges. Consequently, the court “assumed an increasingly active role in constitutional matters, demonstrating a determination to instil [sic] normative characteristics into Polish Constitutionalism” and abandoning its prior reluctance to mount a challenge to statutes in the face of a potential veto by the Sejm. The key to the changing fortunes of the Tribunal, in the eyes of a number of observers, was the change in the court’s attitude towards and strategy for asserting its own position. For example, in the early 1990s (especially in and after 1993), the court began a concerted attempt to enforce in practice the separation of powers it had heralded on paper since its creation. As a result, by the mid-1990s “the Tribunal emerged as an institution quite different from the unadventurous and somewhat compliant body which it had appeared.”

This de facto change in the Tribunal’s role and station in Polish constitutional politics was further cemented by the expansion of its authority by the 1997

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32 See generally Schwartz; Brzezinski, The struggle; Halmai, “The Hungarian approach.”
33 Brzezinski, The struggle, 159.
35 Brzezinski, The struggle, pp. 150ff.; Schwartz, p. 62. An interesting result of the narrow competences afforded to the court—which effectively limited its domain to striking down executive-branch secondary legislation—was that the court’s decisions largely went to bolstering the authority of the Sejm, preserving the unity of power the court’s proponents had created the Tribunal to challenge. Brzezinski, The struggle, pp. 158ff.
36 Brzezinski, The Struggle, p. 175. An illustrative case of this more general pattern is that of the Tribunal’s involvement in the debate over religious instruction in public schools. In that case, the Tribunal upheld the validity of an executive branch secondary legislation permitting such instruction, very clearly sidestepping its own precedents on specific executive authority. The near-disaster created by the holding was averted in large part by a peculiar move by the Tribunal: just two weeks after its decision was published, “Two weeks after the decision was issued, the Tribunal held a closed hearing and decided to send a message to Parliament, stating that the Religious Education Act of 1961,” which had been cited (and upheld in the case) as the executive branch’s authorizing statute for the secondary legislation in question, was unconstitutional. When confronted with this more legally coherent and much less deferential position, the Sejm complied by properly amending the Act to preempt the unconstitutionality of the secondary legislation as the Tribunal directed. Id., pp. 179-80.
37 Id., p. 163.
38 Id., pp. 163-65; Schwartz, pp. 71ff.)
Constitution, which finally granted the Tribunal a significant scope of final authority in primary legislative matters as well as the right to hear citizens’ complaints directly.\textsuperscript{40}

2.4. Contexts in Contrast: Who is the Court’s Principal?

Despite their aforementioned broad similarities concerning the initial institutional, political, and legal-historical context, the environments into which the new Hungarian and Polish constitutional adjudicatory bodies created in 1989 and 1985, respectively, were born also differed in several crucial respects. Perhaps the differences are best summarised by reference to a single familiar (if oversimplified) characteristic of each of the courts: viz. if the court is indeed an agent, who or what was its principal at the time of its inception?\textsuperscript{41} In other words, while the Hungarian Constitutional Court was the offspring of a clear intersection of perceived (ex ante) interests of both the communist regime and the increasingly powerful opposition, the Polish Tribunal was stillborn by design, reflecting the aims of the communist regime to create a façade of constitutionally limited governance. In the particular experiences of Poland and Hungary, this difference may do much to account for the differences in formally ascribed powers, support and deference from other political actors, and the courts’ own attitudes towards their status and objectives.

Though it followed on the heels of at least two antecedent constitutional bodies, the Hungarian Constitutional Court in its present incarnation was an outcome of the Round Table Talks of 1989.\textsuperscript{42} Though Hungary was not entirely unique in that the idea of a body empowered to conduct constitutional review was discussed for decades prior to transition,\textsuperscript{43} what set it apart in this vein was the way that both the outgoing regime and the ascending opposition (specifically, the Opposition Round Table) each had independent reasons for creating a constitutional court with substantial authority and independence.\textsuperscript{44} At the most general level, the parties to the Talks did adhere to the familiar principal-agent path: “To protect rights and to resolve disputes among the new power centres, such as the president and Parliament, the Communists and the opposition agreed to establish a Constitutional Court modelled on the German tribunal.”\textsuperscript{45}

\textsuperscript{40} Id., pp. 183-85. Both of these key reforms, inter alia, were recommendations the Tribunal offered when asked by the 1992 Constitutional revising committee for its own suggestions of reforms. By the time the 1997 Constitution was being prepared, it had become clear not only to the Tribunal but to all of “those at the forefront of Poland’s constitutional renewal” that the “limitations on the Tribunal’s procedure and jurisdiction had to be abandoned and that the Tribunal had to be transformed into a body with genuine power to ensure the constitutional consistency of all legal acts.” Id., pp. 182-83. As will be discussed below, the radical change in the perceptions of non-judicial actors of the virtues of a powerful, independent constitutional court appears to have been at least in large part a positive response to the Tribunal’s increased assertiveness beginning in the early 1990s (i.e. before its powers were formally expanded). Id., pp. 175ff.

\textsuperscript{41} This is not to suggest, however, that either the classic or some modified principal-agent framework is the most appropriate construct for understanding the creation or development of either the Hungarian or Polish constitutional bodies — or other newly established CEE courts for that matter. Though criticisms of the principal-agent formulation are nearly countless, the general critique has been put forward in specific reference to these courts by Sadurski quite compactly: “The traditional paradigm of the judicial process is of a neutral umpire adjudicating between two parties and dispassionately dispensing justice. This description may fit contractual disputes but is a scarcely an apt description of courts seized on constitutional disputes. When engaged in abstract review, constitutional courts rather act as an additional legislative chamber which may, often on the basis of vague and eminently controversial constitutional pronouncements, strike down legislation enacted by another body, which is also committed to implementation of the same constitutional norms.” Sadurski, “Postcommunist constitutional courts,” p. 12.

\textsuperscript{42} The structure and strength of the Polish court was also revisited during Poland’s own Round Table Talks, though the court in this instance had already been functioning for three years. See generally Fijalkowski.

\textsuperscript{43} Dupré 2003, p. 5. However, both the scope of and sources informing the Hungarian discussion of a constitutional court were quite different than those of surrounding states. For instance, Schwartz cites an unpublished manuscript by Schepple as indicating that “the idea for the court originated with the Socialist Justice Minister Kalman Kulczar, who was with Hans Kelsen at the University of California at Berkeley in the early 1960s” (Emphasis added; Schwartz, pp. 270-71 at note 9 [referring to 77], citing: ‘Schepple, American University, Washington D.C., Sept. 27, 1996, transcript on file with author’. [Schepple’s paper could not be located by the present author].)

\textsuperscript{44} Schwartz, p. 77.

\textsuperscript{45} Id.
In the Hungarian case, however, the Court was designed as more than merely a safeguard and completer of the parties’ ‘contract’. Citing the observations of Peter Paczolay, then chief counsellor to the Court, Schwartz comments:

the opposition sought broad powers for the Court because it was a new institution and could therefore be truly independent; the Communists also wanted a strong Court because they hoped it would protect them against reprisals if they lost power. It is unlikely that either side fully grasped the potentialities of this kind of tribunal.46

Evidence supporting the latter observation includes, inter alia, the power given to the court concerning “preventive review” of constitutionality, one of many consequences of the “hastily enacted” Act on the Constitutional Court of 1989.47 In all events, the same considerations which motivated both sides to create a powerful court in general also extended to compromises over specific powers. Schwartz again condenses the debate:

According to one observer, the actio popularis [i.e. the mechanism for direct citizens’ complaints to the Court for constitutional review] was adopted because the opposition was afraid that all high state offices would be filled by former Communists, so they wanted to open up the possibility that ordinary citizens can get to the Court easily. Others suggest that it was to enable the Court to review the entire legal system, because the more people had access, the more issues would get to the Court.48

In either case, both outside observers and the Court itself (in the person of Court president Sólyom) concurred that the inclusion of the actio popularis was “immensely important in the Court’s first years,” in that the channel was both utilised with great frequency and in turn led to some of the court’s most notable policy decisions, including the striking down of the death penalty and the extension of fundamental rights to property, data privacy, and expression, in addition to the Court’s then-unique formulation, in its own words, of “general rights of personality.”49

Such an intersection of interests could hardly contrast more with the political landscape underlying the creation of the Constitutional Tribunal in Poland in 1985. Not by its own volition, but rather entirely to satiate (and silence) the calls for genuine constitutional limits on state power which resulted in the 1985 revision to the Polish Constitution, the communist regime allowed the creation of the Tribunal, and even then merely as a façade. In the words of Justice Zakrzewska, the Tribunal was from birth “undoubtedly an ‘unwanted child’ of the former regime and certainly an institution forced on political authorities.”50 Professor Hubert Izdebski describes the motives and outcome more broadly:

[T]he promulgation of article 33a (establishing the Tribunal) was done almost exclusively for foreign consumption. The regime did not genuinely intend to create a Constitutional Tribunal in Poland. Instead, the regime, hoping to repeat Czechoslovakia’s ‘creation’ in 1968 of a constitutional court (which was never established under the Communists), intended to simply pass a constitutional amendment stating that a Constitutional Tribunal will exist, without ever actually implementing it. However, after the declaration of martial law in Poland, the democratic movement grew stronger, and the regime had to make further concessions and eventually was forced to concede the implementation of the Tribunal.51

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46 Id.
47 Id., p. 78. To summarise, the dispute concerned the scope of the Court’s power to review legislation prior to promulgation. In formal terms, the Act on the Constitutional Court did not specify when a proposed bill became eligible for review by the Court (e.g. from the moment of proposal vs. only in its final stage, etc.). Ultimately, the Court itself resolved this problem by expressing its refusal, on grounds of separation of powers, to review statutes until their final form had been reached by the legislature prior to submission to the president. Dupré, pp. 36-7.
48 Schwartz, p. 80.
49 Id., p. 82; Halmai, “The Hungarian approach,” pp. 196-98.
51 Schwartz, p. 264 at note 10, quoting Brzezinski’s interview with Izdebski, from Brzezinski, “The emergence.”
Thus, what may have seemed to outsiders as a laudable and ambitious, if poorly planned, effort to "combine two concepts: the sovereignty of Parliament and the supremacy of the Constitution," was in fact designed from the beginning to be incapable of the latter.\textsuperscript{52} Thus, it seems impossible (without distorting and/or perverting the principal-agent framework beyond reasonable bounds) to cast the Polish case in its initial phase as an instantiation of the principal-agent formula akin to that of the Hungarian Court.

3. Drivers of Constitutional Court Legacies: Two Lessons From Hungary and Poland

Though the foregoing brief summary of the diverging paths tread by the new Hungarian and Polish constitutional courts sheds some light on the dynamics of court success in transitioning CEE states, more compelling insights remain to be drawn. The key question, posed at the outset, remains unanswered: viz. what enables some courts to successfully contribute (both in their decisions and in their mere survival as effective actors) when their initial strength is as limited as those which failed (in comparative terms)? More bluntly, by what craft or magic did their powers on paper (and in some cases, powers not formally delegated at the outset) become real and effective instruments of control in an environment that had not known constraints on the unitary power of the state for decades? Two key aspects of the Hungarian and Polish experiences, connecting to two different strands within the literature, warrant attention: the framework of legal continuity into which the courts were respectively incorporated, and the strategy adopted by the courts.\textsuperscript{53}


That the formal structure of a constitutional court apparatus should affect its behaviour and success is almost tautological. The manner in which structure informs operation is an entirely different (and open) question. Though any number of models of the interaction of formal and informal determinants of judicial power developed in reference to established Western constitutional courts might be retooled to fit the CEE context, a more intriguing enterprise is to work such an analysis in the opposite direction.\textsuperscript{54} One particular consideration regarding the legal

\textsuperscript{52} Schwartz, p. 51.

\textsuperscript{53} It must be noted, however, that these factors are not purported to be either 1) exhaustive by any means of the set of all contributing or determining factors, 2) universal to courts starting from markedly different initial contexts (e.g. those of ‘transitioning’ Central Asian states), or 3) supported by a near-unanimous consensus in the empirical literature. Instead, they represent suggestions for influential or potentially determining factors which empirical inquiry has begun to explore.

Also, in addition to these two ‘lessons’, a third, more amorphous but potentially more enlightening aspect—the ‘demand for constitutional law’—warrants attention, but must be omitted here for due to space constraints. For an excellent examination of this dimension, see K. Pistor, “The demand for constitutional law,” Constitutional Political Economy vol. 13 (2002), pp. 73-87; D. Berkowitz, K. Pistor, and J.F. Richard, “The transplant effect,” American Journal of Comparative Law vol. 51, no. 1 (2003a), pp. 163-204; D. Berkowitz, K. Pistor, and J.F. Richard, “Economic development, legality and the transplant effect,” European Economic Review vol. 47, no. 1 (2003b), pp. 165-195. See also Dupré’s superlative discussion of the dynamics of legal importation, especially as it relates to the larger subject of “legal transplants” as first developed by Alan Watson, in comparative perspective to legal reception, legal importation, and other similar constructs. Dupré’s volume (developed from her Ph.D. thesis) is an outstanding application of an importation model to Hungary’s use of Germany’s law of human dignity. See A. Watson, Legal transplants (Edinburgh: Scottish Academic Press, 1974). Moreover, Dupré’s very intriguing suggestion in her final chapters that the Hungarian Constitutional Court used foreign and international law as a proxy for natural law of a certain stripe, which could not be appealed to directly. Dupré’s work, though not without shortcomings, undoubtedly can withstand the critiques raised by some of its more critical reviewers. See, e.g., S. Zifcak, “Book Review: Importing the law in post-communist traditions [sic]: the Hungarian Constitutional Court and the Right to Human Dignity,” American Political Science Association Law & Politics Book Review vol. 14, no. 2 (2004), n.p., available online: <http://www.bsos.umd.edu/gvpt/lpbr/subpages/reviews/Dupre204.htm>.

\textsuperscript{54} Scheppele, “Constitutional negotiations,” p. 220. Scheppele frames the project in persuasive and insightful terms: “While most analysts of regimes undergoing democratic transformation see the new governments as distinctively different from more established democracies because the new ones are not fully ‘consolidated’...I believe that we can learn a great deal about the more established democracies from looking at the experiences of the newcomers. In short,
framework into which constitutional courts are born is brought to light by the Hungarian experience. The choice which predated the Hungarian Court, but which the Court embraced and enforced, to preserve legal continuity with the prior regime will be discussed.

Among the many aspects of the Hungarian transition to constitutional democracy peculiar to Hungary, the 'legal' (viz. within the bounds of law operating at the time) nature of its revolution is the most notable. The Constitutional Court itself coined the term which became in time both its favourite epithet and perhaps the hallmark of the Hungarian experience: Hungary had undertaken, said the Court, a "revolution under the rule of law." From a technical perspective, it is noteworthy that even the groundbreaking 1989 'Amendment' to the constitution was drafted and adopted following the legal requirements to the letter. As Dupré observes,

[...] this had a very clear procedural implication: the post-communist amendment was adopted in strict compliance with rules set out in the communist constitution. Substantially, however, its content was determined by the Round Table talks held over the summer of 1989.

The effects of such technical continuity were given depth by the Court's own decisions. The Court, which would go on (led by Sólyom) to construct and elaborate an explicit theory of underlying "invisible constitution," established as its most important early precedent that because the 'revolution' had been achieved without dissolving the old legal relationships, and more importantly because respect for the rule of law in the newly transformed Hungary would hinge on how existing laws were treated by the Court, such laws (both constitutional and statutory) of the old regime would be respected until they were repealed. The Court would, however, endow these existing rules, along with underlying concepts of 'law' and 'constitution', with new meanings entirely foreign to those such laws and ideas held under communist rule.

That such a striking modus operandi adopted by the Court would influence both the cases it would take on as well as the holdings it would reach in those controversies was inevitable. The more important dynamic for purposes of analysis, however, is the use such a decision could be

moments of political transformation are good to study not because they are different in kind from what becomes normal politics, but precisely because they reveal in sharper relief the problems buried in what passes for normal in 'consolidated' democracies." One might note in addition to the CEE transition cases' ability to portray similar problems in "sharper relief" that such instances also present them within a much more compact time horizon, bringing problems such as that of legal continuity within the scope of examination where they had been, perhaps, too amorphous or inchoate to investigate over the course of the centuries by which they evolved in Western contexts (e.g. though not impossible, there are numerous theoretical and empirical obstacles to studying legal continuity at the same level of detail in cases where legal restructuring took place much more gradually, such as in former dominions of the British Empire).

55 Such an argument concerning continuity might also be extrapolated from the Polish experience, though along different lines. Specifically, given the institutional continuity of the Constitutional Tribunal which began operations in 1986 and continued after 1989, one might expect to see similar results from its own decisions as those seen in Hungary. However, in this case, perhaps it is better to perceive the continuity the Polish Tribunal reflected in same way as one sees the relationship of the Tribunal to the ruling communist regime: continuity might well have been forced on the Polish court, the latter paying grudging respect (or perhaps lip-service), where it may have preferred to follow the route of the Czech Constitutional Court in electing a radical break with justice of the past. This is, however, only speculation.

56 Dupré, p. 29, citing the words of an opinion by Sólyom. The original opinion is available in the only published compendium in English of the Court's most notable decision in Sólyom and Brunner 2000. For the decision cited by Dupré, see L. Sólyom and G. Brunner, Constitutional judiciary in a new democracy: the Hungarian Constitutional Court (Ann Arbor: University of Michigan Press, 2000), p. 38.

57 Dupré, p. 30.

58 The Court’s elaboration of its doctrine of an “invisible constitution” is highly interesting, described by Schwartz, pp. 82-3, as follows: “Early on, the court announced that in order to fill in the gaps and cope with the inconsistencies and contradictions, the Court would develop an ‘invisible Constitution,’ a ‘system of dogma,’ principles and methodology drawn from contemporary constitutional thinking in leading national and international courts around the world, including the U.S. Supreme Court. Using these principles, the Court has recognised rights only indirectly referred to in the Constitution, thereby drawing charges of ‘judicial activism’ and of ‘disregarding the written constitution,’ charges common in the United States and elsewhere whenever a Court moves beyond the bare text.” In addition, the Court imported from the Italian Constitutional Court the notion of a “living constitution,” which meant (in the Court’s own words) that the Court was not limited to “[review] the language of the law itself...but rather the meaning and the content that can be attributed to it from the consistent and unitary practice of applying law.” Id., p. 83.

59 Id., p. 82.

60 Dupré, pp. 29ff.; Schwartz, pp. 82ff.
put to in directly and indirectly supporting the Court’s larger task of safeguarding the rule of law. In the aforementioned case of a proposal to lift the statute of limitations for crimes not prosecuted under the prior regime—what has since been termed “the now-classic post-Communist conflict between those who seek justice for the abuses by the former regime and those who seek reconciliation”—the Court’s ruling, legal rationale, and its stated motivation for its decision were all derived from its earlier commitment to legal continuity. The underlying logic employed by the Court ran essentially as follows: the Court existed to establish and preserve the rule of law; the rule of law chiefly consists of and thus mandates legal certainty; legal certainty requires fulfilling the reasonable expectations of citizens and other parties to disputes based on existing law; thus, fulfilling these expectations requires upholding laws (at least nominally) from the prior regime, until they are either repealed or found incompatible with the constitution on other grounds. Applying the same general principle to the issue of the statute of limitations, the Court’s syllogistic argument ran as follows: 1) laws of the prior regime are presumed prima facie to be valid; 2) the statute of limitations in effect at the time had been enacted pursuant to the necessary procedures of the time; 3) quod erat demonstrandum, the statute could not be lifted retroactively.

On the jurisprudential plane, of course, the Court was directly affirming the rule of law as it existed in Sólyom’s conception—namely, as largely consisting of legal certainty. At a more general level, however, the Court succeeded in bringing the contestants into the less hostile realm of legal controversy. In so doing, the Court matched its strategy to the context by capitalizing on the underlying dynamic of continuity. Indeed, the Hungarian Constitutional Court’s utilization of continuity bears a striking resemblance to several aspects of the familiar “judicialization” scholars of constitutional courts have long examined, especially under the rubric of triadic dispute resolution. That is, one way a tribunal can attempt to gain legitimacy as an impartial decision-maker is to resolve their dispute by reference to established, objective, and even apolitical legal norms through a logical, impartial and perhaps mechanical reasoning process. In short, the court must convince the parties that their political dispute is indeed a legal one which an existing rule already exists to govern. In the case of Hungary, it may be argued, preserving legal continuity gave the Constitutional Court a super-legal (in the positivist sense) norm to which it could appeal.

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61 This is the Zétényi-Takács law, which the Court first reviewed in decision 11/1992. For the text of the opinion, see Sólyom and Brunner, pp. 214-28; for an insightful discussion of the case, see Scheppele, “Constitutional negotiations, pp. 225-26.

62 Schwartz, p. 100.


64 One interesting peculiarity of the structure of the Hungarian Court’s operation was that one justice was assigned by the president of the Court to present the case to the select panel or full bench of the Court hearing the case. Sólyom, incidentally, usually assigned this role to himself in important cases, thus the Court’s final opinion usually reflected not just an after-the-fact rationalization for a decision, but the argumentation Sólyom (or the presenting justice in question) had used to persuade his colleagues to vote with the majority. See Halmay, “The Hungarian approach, p. 199; see also Dupré, passim.

65 Schwartz, pp. 100-2. The court did make specific appeal to conventional maxims (viz. nulla poene sine crimen, nulla crimen sine lege) in approving the effect of their decision to protect those whose actions were not criminal at the time (for retroactive criminal statutes were sure to follow retroactive statute of limitations statutes). Schwartz, pp. 100ff.


69 Stone Sweet, p. 16. Notably, this represents a court with an alternative to seeking legitimacy by reaching resolutions only when they fall within the mutual preferences of two contesting parties. As discussed below, recognizing this alternative avoids making a false assumption that new constitutional courts can only survive and/or expand their power by reaching decisions agreeable in substance to both parties.

Thus, by capitalizing on continuity, the court enabled itself to seek legitimacy by preserving an ‘objective’ set of meta-norms to govern disputes between other branches of government.

As noted earlier, rather than ignore or openly defy the Court’s decision, the Parliament scaled down its proposal and fit it into the Court’s dictated bounds of legal permissibility until they struck upon a formulation the Court could accept.\(^{71}\) As this mode of decision-making was amplified throughout the Court’s activity in its first decade, so was the Court’s prestige and power. Thus, a critical element of the structure into which the Court was initially woven (one which might have seemed, at first, to constrain the Court’s ability to challenge other branches and thus limit its ability to uphold the rule of law) became a key component of its ultimate contribution to constitutional democracy in Hungary.

### 3.2. Strategy: Fortune Favours the Bold

A second (and potentially even more controversial) dimension of the Polish and Hungarian experiences that may illuminate constitutional courts’ paths to power regards the more concrete puzzle of court strategy. Though many attempts at probing, unravelling, demystifying, and even optimising court strategy have pervaded the literature for decades, the application of such studies to the field of the new CEE (and other post-communist) constitutional courts is comparatively new.\(^{72}\) The most thorough recent effort along these lines is that by Epstein, Knight, and Shvetsova, in which they develop and test a model of judicial strategy which, though drawn from Russian data, they explicitly intend for extension across many, if not all, CEE and post-communist states.\(^{73}\)

Despite the virtues of their model and their empirical investigation, however, the experiences of Hungary and Poland highlight theoretical and perhaps even empirical problems, discussed in this section. This result is important, as it undermines their core conclusion (to a certain extent) that constitutional courts seeking to play their proper role in “the establishment and maintenance of constitutional democracies” must essentially duck, keep their head covered, and avoid becoming a target of the more potent other branches.\(^{74}\) The analysis of Hungary (and also of Russia) by Scheppele points the way to what might become a more suitable model of courts’ strategic action in this context.\(^{75}\)

Though the Epstein, Knight, and Shvetsova model deserves far more detailed attention (to appreciate its virtues as well as its deficiencies), for the present purpose an extremely brief précis must suffice. In short, the ‘players’ are the court, the executive, and the two houses of the legislature, and the game spans from the moment a court decides whether to take on a case to the point where the court has rendered its decision and the other players decide how to respond. (Thus, in its basic structure, the game is very familiar.) What Epstein, Knight, and Shvetsova add is the notion of “tolerance intervals” — the range surrounding a non-court player’s preferred position, which, so long as a court decision falls within that range, the player finds it too ‘costly’ to challenge. Given three players, Epstein, Knight, and Shvetsova argue that a court which wishes to strengthen itself (and thus the constitutional order) in both the short- and long-term must take decisions which lie in the overlap of these three other players’ tolerance intervals for the issue at hand, or else those players will override the court’s decision in some fashion.\(^{75}\)


\(^{72}\) Epstein, Knight, and Shvetsova, pp. 118ff.

\(^{73}\) This is, of course, a caricature of their suggested strategy, but not by much. Indeed, Epstein, Knight, and Shvetsova (and others voicing similar arguments) might defend the plausibility of their conclusion by claiming only to have argued the less controversial position that “all constitutional courts, even those in advanced democracies…must be attentive to the preferences of external actors if they wish to advance their goals.” Id., p. 125, following G. Vanberg, *The politics of constitutional review: constitutional court and parliament in Germany*, Ph.D. dissertation, Dept. of Political Science, University of Rochester, Rochester, NY, [Cited in Epstein, Knight, and Shvetsova, “The role of constitutional courts,” *supra*], pp. 3ff.).

\(^{74}\) See Scheppele, “Constitutional negotiations.”

\(^{75}\) Epstein, Knight, and Shvetsova, pp. 127ff.
conclusion thus reinforces the wisdom affirmed many times over in other (non-CEE) studies and commentaries on court behaviour and strategy, including that of Shapiro.76

Though many complications and deficiencies with the model (as Epstein, Knight, and Shvetsova construct and apply it) could be explored, the most pressing are also the most obvious. Most importantly, in the context of transitioning CEE states, why should the model make it structurally impossible for the court to side with one political branch against another? While Epstein, Knight, and Shvetsova dismiss this possibility in a footnote as outside the scope of their model,77 they offer no explanation for building a model, which ignores this dimension in the first place. Indeed, as the experiences of Poland, Hungary, Russia, and very possibly almost every other CEE constitutional court testify, the most pressing political disputes are almost certain to be those in which one branch of the government is pitted against another in a power struggle.78 Even in the courts’ other primary domain—the protection of individual human or ‘basic’/‘fundamental’ rights—the conflicts are often cast as an inter-branch competition. Such an omission is not merely a structural defect of the model, but rather affects the entire operation of their mechanism to identify the optimal court strategy.

Correcting the omission also points to the source of Epstein, Knight, and Shvetsova’s counterintuitive conclusion. Even in the hyper-abstract realm of the most basic triadic dispute model, the fact that a mediator which holds for one side loses some semblance of impartiality—diminished by the degree to which the mediator can endow its decision with the appearance of legal objectivity79—is joined by the result that the winning side, after winning, explicitly or implicitly supports the authority of the mediator to have ruled in such a dispute. Consequently, when the next dispute arises, that winner has already committed itself (in some degree and at some level) to the legitimacy of the mediator. Returning to the concrete world of CEE constitutional court politics, even in the case of Poland’s early years—where, as a function of its constitutional strictures, the Tribunal could essentially only rule in ways that strengthened the Sejm in disputes with the executive—the Sejm found itself bound later on to support the Tribunal’s authority in inter-branch disputes.80

The consequences of this correction are far-reaching. The court in the Epstein, Knight, and Shvetsova model, for instance, need not make all of its decisions only where an intersection of the other branches exists. Instead, perhaps, it could side with one or another party in the hope that the combined strength of the court and the winner combined could sustain attacks on the court’s power by the loser.81 Inversely, one could conjecture that such contestant parties would have an interest in preserving a more powerful court if they suspected—as was evidently the case even before the creation of the Constitutional Court in Hungary—that they might need to rely on the court as an ally against an oppressive majority.82 Also effectively written out of the model are the role of the public’s respect for a court which stalwartly challenges the other branches (despite Epstein, Knight, and Shvetsova’s attempt to include this in the construct) and the importance, even before transition, of foreign opinions as a constraint on the behaviour of non-court actors.83

The more striking reason to question at least the universal applicability of the fundamental Epstein, Knight, and Shvetsova model, however, is the actual experience of Hungary and Poland.

76 Shapiro, “Some conditions,” pp. 57-59. Shapiro’s advice comes in the explicit context of providing guidance (viz. a warning) to new CEE courts, and constitutes the conclusion to a chapter (in a volume on the CEE constitutional courts) in which he attempts to extract lessons from twentieth century U.S. legal history for the courts’ benefit. Id.

77 Epstein, Knight, and Shvetsova, p. 132, note 22.

78 See generally Schwartz; Brzezinski, The struggle; Halmai, “The Hungarian approach.”

79 Stone Sweet, pp. 12ff.


81 Additionally, as Schwartz, pp. 72-73, notes, even in Poland prior to 1997—when the Sejm could overrule decisions of the Tribunal to strike down legislation—the Tribunal’s ability to issue a controversial ruling which many in the Sejm opposed was enhanced when the Court’s decision effectively split the opposition in the Sejm. This suggests that where parties, rather than the political actors modelled by Epstein, Knight, and Shvetsova, act in concert, a court’s strategic calculus might be worlds apart from that suggested by Epstein, Knight, and Shvetsova.

82 Schwartz, p. 77.

83 This was clearly part of the calculus in the concession by the Polish communist regime even to create the Tribunal, as noted supra; it may, moreover, have been part of many political actors’ responses to unfavourable court decisions in the years since, such as the acceptance by the then-ruling party of the Ukrainian Supreme Court’s decision concerning the validity of the elections, though this is an empirical question all its own.
Though certainly not identical to the Russian context, they present possibly more relevant examples for other CEE states.84 The most important inference to draw from both the Polish and Hungarian instances in this regard is that it was not when the courts respectively deferred to the other branches, or even refrained from adjudicating in controversial cases, that they gained the respect and power which each eventually did. Rather, it was precisely in their moments of well-calculated boldness that they achieved the most. As Scheppele85 explains both insightfully and concisely, the secret to the Hungarian Constitutional Court’s success was to be found in a form of implicit negotiation, back-and-forth, with the particular branch contesting its decision. As noted above in the statute of limitations case, the Court established a pattern of setting out a comparatively strong position on an issue (for example, frequently citing the legislature as having acted “unconstitutionally by omission”), and then making tactical concessions as the contending party began to comply in apparent good faith. In sum, by giving itself sufficient room to bargain—which it could only accomplish by asserting itself quite boldly at the outset—the Court enabled itself to contribute much both to the substantive policy it preferred and the respect by other political actors for its authority over the constitution (and thus for the rule of law in general).86

Moreover, though Epstein, Knight, and Shvetsova focus on distinguishing courts in ‘constrained’ vs. ‘unconstrained’ categories as the literature has defined them,87 the conclusion from the experience of other states reinforces an interpretation such as Scheppele’s. That is to say, whatever degree of formal authority (and political adversity) a court faces, there is not yet, as Epstein, Knight, and Shvetsova assert, empirically-backed theoretical justification for a CEE constitutional court adopting a strategy of hiding from serious conflicts and pronouncing a decision only where agreement already exists in effect. As Brzezinski asserts, for instance, it was when Poland’s Tribunal was boldest (in defending a plausible view of what the constitution required) that it gained the most public and political respect, and consequently obedience.88

Moreover, as Scheppele observes, even in Russia—where the Court had been repeatedly constrained by actions of the executive from its earliest years—the Court found a way to increase its authority through the ‘back door’, as it were, by issuing “delimitations” (rulings issued by the Court for cases it did not actually hear, but based on presentations of the merits in writing) which eventually gained their own force as precedents in the Court’s jurisprudence.89 It is by means of these instruments, and not in its deferential decision-making in cases on its formal docket, that the Court began fulfilling its mandate to protect individual rights against state encroachment.90 Thus, as should now be evident, while attempting to extrapolate a universal theory of optimal constitutional court strategy from the Polish, Hungarian, or any other case would be unwise, the evidence from those experiences is sufficient to highlight deficiencies in that offered by Epstein, Knight, and Shvetsova. While developing and testing an alternative model is not the purpose here, the insight offered by Scheppele—combined with an application of the most basic tenet of the triadic dispute model which allows the court (as it should be expected to do) to side with one side over and against the other—should be the starting point for a robust ‘implicit negotiation’ model.

4. Conclusion

The dilemma faced by the new CEE constitutional courts from their creation—how to safeguard a new constitutional order subject to the rule of law (a term which as yet had a confused, if any, meaning in the new CEE republics)—continues to present difficulties not only in countries which struggled at first, but even in some of those where the adapted constitutional court form had reached its pinnacle. Even the Hungarian Constitutional Court, where judicial activism had reached a new plateau in the eyes of many observers, has since become strikingly quiet since the departure of its ambitious first president, and has now taken on quite a different,

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84 See Sólyom, “The role of constitutional courts.”
85 See Scheppele, “Constitutional negotiations.”
87 Epstein, Knight, and Shvetsova, pp. 123-27.
88 Brzezinski, The struggle, p. 165 and passim; see also Schwartz, pp. 72-73.
90 Id., pp. 231ff.
more passive character.\textsuperscript{91} This experience should warrant caution in placing excessive weight on any short list of characteristics as determinative of court success. At the same time, even such new developments serve to reinforce the inferences explored above—most notably that a passive strategy on the part of the court does not, despite the predictions of some observers, necessarily or automatically lead to a safer position for a constitutional tribunal.

Moreover, while the lessons described above may not speak to the experience of states such as the Czech Republic, in which, the clear break with the past legal order affected during the political upheaval was embraced by the courts to a much greater degree. Despite these limitations, the experiences of Poland and Hungary have much to offer those interested in the potential for constitutional courts to, by their own initiative, and despite seeming constraints, contribute meaningfully to the state’s path towards constitutional democracy. Specifically, those courts which respond appropriately to their inherited structural environment—including that received by Hungary in the form of ‘legal continuity’—and which adopt a non-passive strategy (such as ‘implicit negotiation) will be at the very least in the best comparative position to establish and preserve the new constitutional order, and to enhance their own power.

\textbf{References}


\textsuperscript{91} See K.L. Scheppele, “The new Hungarian Constitutional Court,” \textit{East European Constitutional Review} vol. 8, no. 4 (Fall 1999), n.p., available online: \texttt{<http://www.law.nyu.edu/eecr/>}. 


THE IMPACT OF THE EUROPEAN COMMISSION ON THE COUNCIL OF MINISTERS’ DECISIONS IN THE FIELD OF EUROPEAN TAXATION

The Case of the European Savings Directive

Charles-Henry Courtois ‡

ABSTRACT

The European Savings Directive (ESD) is the first concrete agreement on direct taxation in the EU. Its aim is to tax cross-border income of EU residents. In an international climate of fight against money laundering and in a context where modern states require constant flow of tax income, the European Commission and the ECOFIN Council of Ministers played the front roles in agreeing to a common direct taxation policy. In order to diminish the effects of globalisation over mobile capital of individuals following the SEA and EMU, the EU has successfully negotiated with a series of third countries and dependent territories their adhesion to the ESD.

The diverging preferences of the European actors explain the dynamics of the ESD. Whilst the Commission originally pushed for a harmonisation of tax measure, Member States remained jealous of their sovereignty over tax matters, although they recognised that illegal tax avoidance needed urgent addressing. Frightened by the fiscal integrationist stance of the Commission, the Council maintained a firm hand on the policy process, reducing the role of the Commission to a functionalist one. An international environment dictating the agenda, a restricted delegation and the requirement for unanimous voting in the Council severely restrained the margin of action of its agent. The Commission recognised it could never obtain from Member States its first preference policy choice and readily collaborated with the Council, because the ESD was a substantial advancement from the status quo.

The final outcome of the ESD is a direct result of inter-state negotiations. Asymmetry of information, linking of issues and exogenous factors were successfully used by one Luxembourg to “hijack” the policy process and nullify the reach of the ESD. Together with other offshore centres, Luxembourg is the big winner of the ESD negotiation process: it affirms its position as a compliant and co-operative Member State whilst preserving intact its finance industry, the core of its economy.

Key words: European integration; Financial impacts of globalisation; Cross-borderer taxation

1. INTRODUCTION


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force on 1\textsuperscript{st} July 2005 across all EU Member States and in some non-EU members. The ESD applies to individuals who are resident in a member state and benefit from savings income paid to a bank account in a different country party to the directive. Its aim is to “enable income”\textsuperscript{2}, in the form of interest payments made in one (EU) Member State to “beneficial owners” who are individual residents for tax purposes in another (EU) member State, to be made subject to effective taxation in accordance with the laws of the latter Member State” (Activities of the European Union 2005). It effectively means that European states will exchange information on privately owned bank accounts with other states so that taxes can be levied on income earned abroad. Importantly, the scope of the directive is not limited to the EU: to further combat tax evasion, the EU has successfully tied to the ESD a number of outside jurisdictions, in an effort to globalise the reach of the directive. The purported aim of these third party international agreements was to reduce the negative impact on the tax income of EU Member States of jurisdictions considered as tax havens. The ESD is therefore a pivotal and very current topic within an EU integration debate and within an international collaboration debate to reduce the extent of fiscal evasion. It appears to reaffirm a movement of increased European integration, inscribes itself in an OECD logic of fight against money laundering and harmful tax practices and touches one of sovereign states’ most sensitive field: their fiscal autonomy and their tax revenues.

Motivation of the different EU supranational and national actors on reaching a compromise can be understood, yet uniformity should not be assumed: not all EU countries suffer from an erosion in their tax base. Whilst it is understandable that France, Germany or the UK would want to consolidate their tax revenue flow, other EU members such as Luxembourg, Belgium or Austria benefit from the private banking industry to a large extent – all of them have strict banking secrecy laws and Austria’s banking secrecy is enshrined in its constitution. On the other hand, the motivation of independent countries such as Switzerland or of associated territories, such as Jersey and Guernsey, may appear at first sight more intricate to grasp. 

Procedurally, the European Commission holds the sole right of initiative to propose any directive to the Council of Minister, whilst all taxation decisions require the unanimity of the Council\textsuperscript{3}. With so many different and divergent interests in the EU, a consensus on such a disputable issue is difficult to reach. Nonetheless, the ESD has been adopted and has now entered into force. Against the odds and the opinion of some scholars, EU countries have managed to strike an agreement. As we will see below, it is widely accepted that the preferences of each body do not always match and, in the case of taxation, several crucial assumptions about each body and the states themselves need to be formulated and understood.

What is of major importance in the context of the ESD is the way in which the Commission and the Council interacted within the particular context of unanimity and in such a sensitive area as taxation. More particularly, what were the dynamics between the two bodies and which were the factors and reasons for the Council to agree on a common direct taxation policy as, at first sight, the policy advantages of tax competition would seem to eradicate any possible agreement. Moreover, this directive could only be implemented if other non-EU countries were to adhere to it. Once again, the interaction between the bodies and the delegation to the Commission for negotiating with such countries needs to be analysed to ascertain the way in which the Commission tried to impose its own preferences.

I have conducted several interviews with the stakeholders. I have interviewed the drafters of the second and third ESD drafts from the Commission, Mr. Germano Mirabile and Mr. Bernardus Zuijendorp, the Luxembourg Permanent Representative, Mr. Jean-Pierre Lahire, and three other Permanent Representatives from three Member States who wished to remain anonymous. I further interviewed two state officials from an associated territory who also requested to remain anonymous.\textsuperscript{4}

I will first contextualise the topic, introducing the importance of taxation globally and within a European context. The history of the ESD and its terms will be explained. I will then undergo a

\textsuperscript{2} To the exclusion of the issues relating to the taxation of pension and insurance benefits.

\textsuperscript{3} For ease of reference, I will refer to the ECOFIN Council as the Council

\textsuperscript{4} All interview audio files and transcripts are available upon to the author.
literature review which will help clarify the dynamics between the Commission and the Council,
looking at the issues of agenda setting, delegation and the problem of unanimity in the Council
and how all these affect the Commission. Finally, an analysis of the ESD will be undertaken, in
light of the above. I will demonstrate that the ESD represents the upper limit of EU Member States
cooperation on tax matters and that the Commission did not have any opportunity to disengage
itself from the scrutiny of the Council in order to impose its own views on taxation. Furthermore, I
will show how one state managed to ‘hijack’ the ESD to nullify its effects, because of the
substantial threat posed to its national economy.

2. CONTEXTUALISING THE ESD

In which context did the ESD arise? To which extent has taxation become a core EU policy, to
the point that Member States felt the necessity for an agreement which tied extra-EU countries to
its application? I will first look at the importance of taxation to states in today’s world, where
globalisation is present, and at the history of fiscal co-operation in the EU. I will thereafter present
the history of the ESD and its final terms.

2.1. Importance of taxation to states and the impact of globalisation

The ESD aims to compensate the states from the loss of revenues generated by the
globalisation of world markets and by the easiness of cross-border exchanges, in a context of
inability of some states to re-structure their fiscal systems.

According to Schumpeter, the modern state is a “tax state”.5 It requires more and more
income to sustain its economic development and to fulfil its welfare role. Rational taxpayers can,
in many cases, “avoid high domestic taxes by shifting the tax base to a lower tax country”.6 As
income is hidden from tax authorities, a vicious circle emerges. As “the level of taxation reaches
30, 40 or even 50 percent in contemporary welfare states, the premium on tax avoidance and tax
evasion arises”,7 triggering further raises in taxes.

What lies at the heart of this analysis is that individuals have higher capital mobility than
companies and are more difficult to control because of a lack of compulsory accounting reports.
They are able to transfer moneys across borders, in effect hiding their assets and their income from
their national tax authorities.

Governments, in order to compensate for lost income, decided to shift the tax burden to non-
mobile capital, i.e. to wage income most notably.8 In an endless inflationary cycle, states increased
wage income tax rates to sustain national revenues and lowered non-resident income taxes rates,
to attract foreign investments in an attempt to compensate for national under-investments.

In addition, the countries’ tax systems were devised when globalisation was not an issue. They
relied on the impermeability of national borders.9 Restructuring internal tax systems to induce
better productivity and reduce wastes has proved difficult: in many instances, the internal
bureaucracies’ power was too limited to allow for in-depth changes.10

As states struggle to retain national mobile capital, they fight against each other, lowering
taxes on non-resident investors to attract more foreign mobile capital. Radaelli11 (Table 1 below),
summarises the combined effects of globalisation and of lack of coordination on the states. As the
SEA opened the borders, the burden of tax was placed more and more on wages income, whilst
taxpayers easily invested outside their national borders. EU tax policy became a vital issue for the
Common Market.

7 Dehijia and Genschel, 403.
8 And to a lesser extent to inheritance and gift tax and to transactional taxes (such as stamp duty on property sales
and purchases).
9 Genschel, 53.
10 C. Radaelli, “Harmful tax competition in the EU: policy narratives and advocacy coalitions” Journal of Common
Market Studies 37, no. 4 (1999): 673 or also see E. Suleiman, Dismantling democratic states (Princeton: Princeton University
11 Radaelli, “Harmful tax competition in the EU: policy narratives and advocacy coalitions”, 669
The raising of taxes in OECD countries coincided with the rise of offshore centres. Lack of international tax coordination meant that offshore centres took advantage of the situation, allowing foreign investors to open bank accounts in their home currency, sheltering themselves from currency risks. The result was an “anti-economic capital flight of the largest magnitude”.\textsuperscript{12} These offshore centres had little to lose in terms of capital flight, yet a lot to win in terms of foreign capital.\textsuperscript{13}

The competition to attract foreign mobile capital was leading to a “rate” race to the bottom which could only have damaging issues for the EU. It created fiscal constraints for which political integration seemed the only viable solution for larger countries.\textsuperscript{14}

\textbf{2.2. The history of fiscal cooperation in the EU}

Although taxation is a core issue in national policy, “surprisingly, little attention has been paid to European fiscal policy in political sciences”.\textsuperscript{15} Only a handful of scholars have looked into the subject, and therefore limited analysis and history background are available. Nearly all of them, during the 1990’s, saw tax cooperation in the EU as impossible.

\begin{table}[h]
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\begin{tabular}{|l|}
\hline
\textbf{Table 1. The narrative of harmful tax competition} \\
\hline
- Progress of negative integration through the Single European Act \\
- Capital flows are liberalised \\
- Taxation is not coordinated, special tax regimes are not controlled by EU policy \\
- Tax base erosion – tax degradation – race to the bottom in capital income taxation \\
- Tax burden place on to non-mobile factors, typically labour \\
- Doomsday scenario. What happens if Member States do not act together? \\
  1. Crisis of the welfare state \\
  2. The lack of co-ordination is damaging to the edifice of the single market \\
  3. The lack of tax co-ordination aggravates the problem of unemployment in Europe \\
- Unemployment and the single market are at the core of EU policy \\
- New and comprehensive view of taxation in the EU is needed \\
- Tax policy becomes a core policy of the EU \\
\hline
\end{tabular}
\end{table}

\textsuperscript{12} Genschel, 56. \\
\textsuperscript{13} Genschel, 57. \\
Since the 1960s, the coordination of direct taxation was recognised by the Commission and tax experts as an important issue: the European market cannot function if tax barriers impede international trade, investments and business. EU direct tax interest from the Commission dates as far back as 1962, when the first committee to look into fiscal issues was created.\(^\text{16}\) However, up until the 1980s, the results achieved were virtually non-existent in terms of direct taxes.\(^\text{17}\) This is because Member States see taxation as one of the last bastions of sovereignty and a measure of control over their income and expenditures. In 1990, although the Commission was pushing for further fiscal integration to compensate for the fiscal distortions within the EU, an “intergovernmentalist” coalition, made up of finance ministers and national revenue authorities, resisted to changes, no matter how tax competition would distort the internal market.\(^\text{18}\)

Scholars have often dismissed fiscal cooperation in the EU because of the past failures of coordination, although the EU represents one of the most successful inter-state co-operations in the world.\(^\text{19}\) When analysing the ESD in 1999, Dehejia and Genschel commented:

“Why does the large state not make the small state behave? Why does it not use its power to change the payoffs faced by the small state? In terms of the case study, she may ask how Luxembourg and the United Kingdom – a midget state and an ideologue – could possible have been powerful enough to block tax cooperation for an extended period of time, despite salience for notionally powerful states such as France and Germany. (…) Evidently, the cause of cooperation failure in tax harmonisation\(^\text{20}\) was not only the opposition of the United Kingdom and Luxembourg but also the lack of resolve of the co-operation states to overcome this opposition by appropriate threats or measures.”\(^\text{21}\)

Considering the ESD as a harmonisation measure, they conclude by explaining the failure of an agreement, that “states (…) have no incentive to cooperate. They are better off under tax competition”.\(^\text{22}\) Harmonisation, they argue, “leaves the governments of large countries with the unattractive choice of seeking global tax cooperation, which for practical reasons is largely illusory, or regional cooperation, which, due to the outside world constraint, is only of limited use and possibly self-harming”.\(^\text{23}\) Whilst authors have underlined the unwillingness of Member States to either harmonise their tax rates or forego tax competition, the ESD rationale lies elsewhere. Undercurrent to the ESD is the illegal avoidance of personal income tax by individuals resident in the EU. There is a major difference between Member States having the liberty to set tax rates corresponding to their economic needs and the behaviour of an individual seeking to evade taxes in his home jurisdiction, operating undeclared foreign bank accounts.

Member States cannot and will not agree to give their sovereignty over tax matters away to Brussels at this stage of European integration. In my interviews with Permanent Representatives of Member States and the drafters of the ESD, all stressed that this directive was in no way a harmonisation measure. In every country, evading due taxes is illegal and the ESD is a measure to enforce the due payment of taxes in the taxpayers’ home jurisdiction. The ESD is not an anti-tax competition or a tax harmonisation measure, but a tax cooperation measure. Nonetheless, even the press and reputable accountancy firms have mistaken this directive as a harmonisation measure.\(^\text{24}\)

In their analysis, Dehejia and Genschel nonetheless point out an important issue: “in a multi-country world with full tax mobility, there should not be important gains from coordination within any small group\(^\text{25}\) because most of the cooperation benefit will leak to the non-cooperating outside

\(^{16}\) Radaelli, “Harmful tax competition in the EU: policy narratives and advocacy coalitions”, 665.

\(^{17}\) Radaelli, “Harmful tax competition in the EU: policy narratives and advocacy coalitions”, 667.

\(^{18}\) Id.

\(^{19}\) Dehijia and Genschel, 404.

\(^{20}\) Emphasis added

\(^{21}\) Dehijia and Genschel, 419-420.

\(^{22}\) Dehijia and Genschel, 424.

\(^{23}\) Dehijia and Genschel, 425.


\(^{25}\) Emphasis original
world”. Any viable proposed solution to the taxation problem in the EU would have to account for the outside world and tie in outside jurisdictions.

2.3. The history of the ESD

The origins of the ESD trace back to 1988 with the directive for liberalisation of capital movement. With EMU, European markets opened, making capital more mobile than ever before. A first draft of the directive, in February 1989, met the resistance of the Council and was soon “gathering dust on the shelves”. In the Commission’s own words during my interview, “this approach was an harmonisation one, based on a single withholding tax to be applied throughout the Union”.

Discussions re-emerged in 1993 and 1994. Germany had seen an outflow of capital to other European countries following the creation of a national deposit interest retention tax in January 1993. For the first time, a “coexistence” approach was suggested, allowing each Member State to either operate a withholding tax or provide information on savings income to other Member States. However, discussions were soon aborted: Luxembourg Prime Minister Jacques Santerre threatened to veto the directive and the ESD fell off the agenda.

During an informal ECOFIN meeting in Verona on 13th April 1996, the Commission suggested that the main problems faced by Member States were the “functioning of the single market, the degradation of the fiscal systems and the unemployment” and this was followed by a formal report from the Commission. For the first time arose the idea of a Tax Package made of three elements: a Code of Conduct, the ESD and the interest and royalty directive.

In September 1997, the Council requested to the Commission for a second draft of the ESD, with strict guidelines on the content of the expected draft. In May 1998, the Commission submitted a proposal, adhering in full to the Council requirements. Although this second proposal formally introduced the principles of the coexistence model, the Council realised the problems of the principles it had advocated: they were very limited and lacked clarity on the revenue-sharing process. Furthermore there was no equilibrium in the second draft: Member States could freely choose between an exchange of information and a withholding tax but the draft did not provide for a compensation mechanism for countries opting for the exchange of information. There was no flow of revenue from withholding tax countries to the others, inciting Member States to select the withholding tax option.

The second problem was the lack of transition procedures from one regime to another: the choice of country for either exchange of information or withholding tax was final. This was a problem to some Member States, especially the UK. It felt that the exchange of information was the right way forward and that this proposal froze future progress.

The final problem was a technical one related to Eurobonds. The Eurobond market had originally come to London because of the existence of a withholding tax in the US: introducing a withholding tax could trigger the fleeing of the Eurobond market outside the UK. Although there was some legal debate on whether the introduction of the ESD would lead to such extremes, the UK began to argue strongly that the only way forward compatible with single market objectives was automatic information exchange. It threatened to veto the whole tax package unless the coexistence model was dropped. The UK press took hold of the argument and reported that the ESD jeopardised “lucrative investments worth billions of euros, and (would) cost thousands of jobs”.

These events led to the Santa Maria da Feira conclusions of 20th June 2000 in which the Council drafted new guidelines for a third proposal. These included:

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26 Dehijia and Genschel, 420 and 424-425
29 Radaelli, “The code of conduct against harmful tax competition: open method of coordination in disguise?”, 518.
- a default regime of exchange of information
- a system of transfer of income for the Member States opting for the withholding tax regime
- a system for the countries opting for withholding tax to move towards exchange of information seven years at the latest after the entry into force of the directive
- a joint mandate to the Presidency and the Commission to enter into discussions immediately with the US, key third countries (Switzerland, Liechtenstein, Monaco, Andorra and San Marino) to promote the adoption of equivalent measures in those countries, and
- a commitment from the Member States concerned to promote the adoption of the same measure in all relevant associated dependent territories (mainly the Channel Islands, the Isle of Man, and the dependent and associated territories in the Caribbean)

Under the impulse of Luxembourg, Member States realised that the success of the ESD depended on the co-operation of other important financial centres. The proposal was finalised by the Commission in July 2001.\(^{31}\)

On 27\(^{th}\) November 2000, three Member States were allowed to elect the withholding tax option.\(^{32}\) Luxembourg chose this option because it feared it would lose financial business and income to other financial centres if it were to opt for automatic exchange of information. Austria chose this option because banking secrecy is part of the Austrian constitutional and no amendments were planned. Finally, Belgium also chose this position because of its own banking secrecy laws.

Several issues still needed to be clarified: the rate of withholding tax, the revenue sharing dispositions and the technical issues of UCITS (Undertakings for the Collective Investment of Transferable Securities). UCITS are financial funds only issued by three countries in the EU: Luxembourg, France (under the name of Sicavs) and Ireland. Luxembourg and Ireland had a restrictive interpretation of the directive: they did not believe it applied when in presence of funds of funds (as opposed to funds investing directly in securities). Following other technical discussions, the ESD was finally adopted in June 2003 although discussions regarding interpretation of other clauses continued. Gradually, Luxembourg became isolated. In June 2005 it had to give in, under the pressure from Germany and because the start date of the ESD scheduled for 1\(^{st}\) July 2005 was looming.

The agreement with Switzerland, a *sine qua non* condition for the entry into force of the ESD,\(^{34}\) was not free of conflicts either. Switzerland requested the benefits of two other directives: the parent-subsidiary directive, which granted a special tax regime to corporate vehicles, and the interest and royalties directive, part of the original tax package. After negotiations, the EU caved in: on 2\(^{nd}\) June 2004, an agreement with Switzerland was signed.

Negotiations with other third countries and with dependent territories proved easier: all agreed to implement the directive as long as a “level playing field” was respected. Importantly, the Channel Islands and the Isle of Man had already committed to the directive under the condition that Switzerland would agree to it. These lengthy negotiations pushed back the entry force date from 31\(^{st}\) December 2004 to 1\(^{st}\) July 2005.

2.4. Explanation of the ESD and of its functioning

The ESD allows for two regimes: an exchange of information regime (or reporting regime) and a withholding tax regime (see Figure 1 below). Under the exchange of information regime (article 8), financial institutions based in the EU making payments of savings income will be required to provide information about their clients and their income to local tax authorities, which will in turn transmit these to the clients’ national tax authorities. All EU Member States, bar three, apply this regime. Luxembourg, Belgium and Austria benefit from the withholding tax regime (article 11.1).

\(^{31}\) This requirement was later dropped, as the US did not want to deal with the EU but wanted to implement bi-lateral agreements with Member States directly

\(^{32}\) Radaelli, “The code of conduct against harmful tax competition: open method of coordination in disguise?”, 519.

\(^{33}\) Radaelli, “The code of conduct against harmful tax competition: open method of coordination in disguise?”, 520.

\(^{34}\) Radaelli, “The code of conduct against harmful tax competition: open method of coordination in disguise?”, 520.
It allows them to apply a withholding tax to the savings income without having to divulge any
details on individual clients or their income earned to the tax authorities, but only during a
transitional period scheduled to last 7 years from the date of entry of the ESD (article 10). Member
States which joined the EU recently did not have a choice on the regime and are subject to
exchange of information.

All the collecting of information (article 8.1) and the withholding of tax (article 11.2) will be
done through local Paying Agents,35 “irrespective of the place of establishment of the debtor of the
debt claim producing the interest” (article 1.2). Member States must therefore take the necessary
legal measures to ensure that the tasks necessary for the implementation of the ESD (cooperation
and exchange of information) are carried out by paying agents established within their national
borders.

Third countries and dependent or associated territories which agreed to the ESD generally
apply a withholding tax.36 Dependent or associate territories (including Jersey, Guernsey, the Isle
of Man, Gibraltar, the Faeroe Islands and the Cayman Islands most notably) did not negotiate
directly with the EU and held negotiations with the country they are associated with instead.

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35 i.e. the financial institutions making the payments on the account of the beneficiaries
36 Out of these countries, only the Cayman Islands will exchange information with EU Member States.
The Directive had to be transposed in each Member State’s national law (article 17.1), whilst third countries and dependent and associated territories had to implement “equivalent measures” locally in order to define the scope of the directive along the same interpretation as all other states.

The amounts raised using the withholding tax will be split as follows: 25% will be kept by the withholding tax country and 75% will be returned to the country in which the individual is resident (article 12). The withholding tax rates are uniform across all countries as follows (article 11.1):

- 15% for the first three years (1 July 2005- 30 June 2008)
- 20% for the next three years (1 July 2008- 30 June 2011)
- 35% thereafter (1 July 2011 thereafter)

In 2012, a further vote will take place in the ECOFIN Council for those countries still applying withholding tax to move to automatic exchange of information.

The scope of the ESD covers interest from debt claims of every kind (article 6.1): cash, corporate and government bonds and other similar negotiable debt securities. The definition of interest includes accrued and capitalised interest (“zero-coupon” bonds) and interest obtained as a result of indirect investment through investment funds. Importantly, the ESD only covers debt claims: dividends and capital gains on shares, options and structured products are outside the scope. Furthermore, only individuals will be subject to the ESD. Trusts (whether charitable or patrimonial, and whether onshore or offshore) and corporations (whether major corporations or offshore private companies) are excluded from the scope of the ESD. As the entry into force of the ESD was on 1st July 2005, information and money transfers will not happen until at least 1st July 2006.

3. Literature Review

The Commission and the Council form the executive of the EU. This study will concentrate on the three main issues which were an inevitable part of the policy process: the role of the agenda setter, the principal-agent problem and the bargaining process in a decisional unanimity environment. This is important, because, as Franchino words it, “executive politics in the European Union is about delegation and control”.38

3.1. The power of the agenda setter

Understanding the problems linked with agenda setting will be a valuable addition to a better discussion of the relationship between the Commission and the Council, and more particularly in the context of EU taxation. This is because “rules governing who is the “agenda setter” and who can exercise a “veto” change the dynamics of legislative bargaining”39 and because the first power of the Commission is one of legislative power of policy initiation40. In holding the proposal initiative, the Commission holds a “gatekeeper” position in EU politics41 as it can choose which proposals are made and when they are made.

In general terms, the agenda setter is usually in a better position than the veto player, although this depends strongly on the rules regulating the acceptance or the sanctioning of the proposal by the veto player. If the latter has no power of making counter proposals or of sanctioning the agenda setter, then the agenda setter will make proposals which it knows will be accepted. However, if the support of the veto player becomes compulsory, then the veto player gains

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37 The withholding tax is sometimes called a “retention rate” to distinguish between this levy in EU Member States and this levy in other territories.
substantial agenda setting powers. In the context of the Council, this is all the more important when the veto player is made up of different actors, each with their own preferences. Assumptions need to be introduced at this point, relating to the preferences of the European institution for further European integration. I will adhere in this study to the preferences of the different actors as laid out by Garrett and Tsebelis:

- the Commission and the Council of Ministers all have preferences for more European integration.
- the preferences of the Commission are “more extreme than those of any member of the Council of Ministers”.42

Under consultation procedure, the Commission holds the right of initiative of any proposal, which is usually accepted by the Council under a qualified majority (QMV) whilst any amendment to the proposal requires unanimity. As it is more difficult for the Council to amend a proposal than to accept it, the Commission therefore holds a powerful agenda setter role43. If the Council of Ministers, as the veto player, is strongly united against the Commission or prefers the status quo to the new proposal, the Commission will refrain from putting forward any proposal, for fear of being rejected. We can therefore theorise the outcome of any proposal from the Commission as follows:

- if the preferences of the Council of Minister are closer to those of the Commission than to the status quo on a particular issue, the proposal will be accepted
- if the proposal does not threaten the interest of the Council or the sovereignty of the states they represent, the proposal will also be accepted.

The agenda setting powers of the Commission will be highly linked to the opportunities given by the QMV procedure to reach a consensus and to use the preferences of states to its advantage. As Pollack words it, “the influence of an agenda setter will, ceteri paribus,44 be greatest where the voting rule is some sort of majority vote, and where the amendment is restrictive – in other words, where it is easier to adopt the agenda setter’s proposal than to amend it”.45

On the other hand, the formal agenda setter’s proposal requires unanimity from the legislative body, the role of the agenda setter as such would be very limited, even “minimal or non-existent”.46 Under unanimity rules, the Commission will only put forward a proposal to the Council when:

a) it is sure that the proposal will meet the approval of all members of the Council, or when
b) it is requested by the Council to do so, but still, only in its own timing.

This is because the higher the number of veto players, the harder it will be for the agenda setter to propose a policy which will gather a consensus.47

Further to point b. above, why would the Commission respond to the request of the Council to table a proposal if the former has higher preferences for European integration than the latter? If the

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44 Emphasis original
45 M. Pollack, “Delegation, agency and agenda Setting in the treaty of Amsterdam,” (1999), 5, via European Integration online Papers (EIoP), http://eiop.or.at/eiop/texte/1999-006a.htm
Commission feels that the request from the Council leads to more integration than the current status quo, the Commission will seize its opportunity to increase European integration, regardless of its own more “extreme” preferences.

Finally, Pollack sees the Commission as having an informal agenda setting role on top of its “formal agenda setting” powers above. Informal agenda setting is “the ability of a ‘policy entrepreneur’ to set the substantive agenda of an organisation, (...) through its ability to define issues and present proposals than can rally consensus among the final decision makers”. Pollack sees the Commission as an entrepreneur, as defined by Kingdon, which uses the asymmetry of information between the different actors to its advantage. However, this is not the Commission’s prerogative: as long as the entrepreneur is taken seriously, is known for his political abilities and that a window opens, this role can be undertaken by other institutions and governments. Also, the political and economic environments play a major importance in the policy process: they are a condition for the opening of a window.

Agenda setting, in the context of EU taxation, is therefore not the appendage of the Commission. Veto players, policy environment and unanimity restrict its role. We will see later in which extent this influenced the ESD policy process.

3.2. The delegation rationale and process

The Treaty of Rome has delegated many powers to the Commission (the agent), on behalf of the Council (the principal). Because the Commission has been the main beneficiary of the delegation of powers in the EU, “different mechanisms have been set up to control its activities”. Following rational choice theory, the principal-agent approach to delegation adopts a functional logic: principals delegate some political powers to agents in order to lower the transaction costs of policymaking. Pollack believes that there are four fundamental functions which multiple principals delegate to their agents in the EU: monitoring the compliance of agreements between the different principals, solving problems of “incomplete contracting”, managing an asymmetry of information to the detriment of Member States and setting an independent agenda to avoid the same issues coming back to the table of negotiations.

Sociological institutionalists believe that “political principals may delegate powers and design political institutions for reasons of normative legitimacy, regardless of the functionality, or dysfunctionality, of those institutions”. Sociological institutionalists therefore see delegation as institutional isomorphism, whereby designs of successful institutions are mirrored to create new institutions in the hope that similar achievements can be attained.

Rare are the instances where both principals and agents have similar policy preferences. As a consequence, “agents have the desire to move from the principals’ original policy intention”. These policy preferences differences result in two types of agency problems: slippage and shirking and costs linked to controlling and minimising agency losses. Franchino posits that this slippage and shirking – which he names bureaucratic drift and defines as “ability of the agent to enact an outcome different from that preferred by its political principals” – is the main issue faced by principals wanting the agents to follow the initial policy objectives. In order to reduce such liberty, two types of mechanisms can be used by principals: monitoring the agency and

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49 Id.
51 Franchino, “Control of the Commission’s executive functions”, 64.
54 Hix, “Executive politics”, 4
making it report to the principal, although these can have high transaction costs. Majone therefore believes that logic of delegation can follow two paths: one of cost reduction (efficiency), and one of independence of the delegate, ensuring credibility of the policy.

Interestingly, Majone argues that full delegation of political rights to an agent results in a trustee relationship between the agent and the principal. However, we can see several flaws in this reasoning. One is to do with general trust relationships in which a trustee has to act in the best interest of the beneficiaries. Under trust law, a trustee has to act with duties of care and diligence so as to preserve trust assets – in this case political rights. This sometimes means that trustees can decide not to act, or act more conservatively than desired by the beneficiaries, depending on what the trustees consider best for the beneficiaries. A trustee will generally be more conservative in his views than the beneficiaries. In our assumptions seen above, the Commission has stronger preferences for further European integration than the Council: it does not have “conservative” preferences when it comes to the EU. Therefore, the Commission cannot use its independence to impose its own more intense preference on the Council in a trust context: under common law this would be seen as not acting with due care and diligence.

The second issue is specific to the EU taxation environment. Because of the requisite of unanimity, the Council makes the final decision. When transposed to trust law, this would constitute a “sham”, as the trustee (the Commission) has no real ownership of the trust assets. In the case of taxation, where states do not want to lose their fiscal sovereignty, the trust argument cannot withstand scrutiny.

In which cases can the Commission escape the control of governments and use the principal-agent relationship to its advantage? This depends on the autonomy agents enjoy from their principals and on a number of factors: “the nature of their tasks, the institutional rules under which they operate, the degree of conflict between the principals, and the amount and quality of information the principals have about their agents”. Schmidt summarises the cases where, in a principal-agent relationship, the agent can use its mandate to free-ride on the principal’s mandate. Three arguments are put forward: when the agent can use information asymmetries to its own profit, when politicians give away long term advantages to the bureaucrats in favour of short term benefit and when the agent can use the division when in presence of multiple principals to achieve their goals.

Although the Commission can better evaluate the effect a single currency has on the movement of capital and the theoretical fiscal implications for the states, one could argue that, as far as fiscal matters are concerned, Member States have better information at their disposal about their national economies than the Commission. Furthermore, Schmidt’s last argument cannot be successfully argued when principals need to reach a decision unanimously. To understand the dynamics of the Commission and of the Council, we must therefore look on the impact unanimous voting has on the two institutions.

3.3. The impact of unanimous voting on decision taking

Under unanimous voting, as seen above, the powers of the Commission as an agenda setter are restricted. Which margins of action in terms of influence does the Commission have in such instance to influence the members of the Council?

Unanimity voting in the Treaty of Rome has been only kept for issues which gather the greatest potential disagreement from the Member States. According to Franchino, it is a “sign of conflict among the Member States about the substantive content of common policies” and is maintained

60 Majone, 113.
61 Hix, “Executive politics”, 5
62 Schmidt, 41.
63 Franchino, “Control of the Commission’s executive functions”, 76.
in policy areas where countries “certainly do not want the Commission involved in implementation”.64

Tax matters in the EU fall into that category: article 99 of the Treaty of Rome relates to indirect taxation, and whilst direct taxation is not explicitly mentioned, articles 100 and 220 of the treaty are employed in that domain. Article 220 refers to the abolition of double taxation within the Community and Article 100 states that: “The Council shall, acting unanimously on a proposal from the Commission, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the common market”.

Although this article is a “catch all” provision, its scope is further defined in article 100a, which provides for the adoption of measures by a qualified majority, except for fiscal measures (Article 100a 2).

Those three sets of articles have a common denominator: the requirement for unanimity for any taxation decision. Procedurally, when the decision rule is unanimity, abstentions are not counted as ‘no’ votes.65 What therefore counts for measures to be adopted is the salience of issues to the states and the extent to which countries can influence and withhold their position under the pressure from both the Commission and other countries.

Hix defines the dynamics of voting using the concept of “pivotal” actor, which gives to such actor more power when it comes to bargaining concessions.66 The fact that the Council needs to adopt decisions at unanimity means that the Council has in effect “non-decision-making power”67: it is easier for the Council to reject the proposal than to accept it. Each country has the possibility to reject the proposal and is therefore a pivotal actor. A Member State that chooses to take an extreme position on an issue is more able to draw the outcome towards its position68 whilst the more intensely a government prefers an agreement, the greater its incentive to offer concessions and compromises.69 Because of these divergences and because of the original reasons for unanimous voting, conflicts within the Council are expected to be greater than under QMV.70 Reaching an agreement therefore depends on two factors: the salience of any issue to the actors (directly linked to preferences), and the oppurtunity for actors to use strategic bargaining against their support (reflecting lower preference intensities).

Preferences are not only a particular set of policy objectives which need to be achieved, but also a set of underlying rational objectives independent of any particular international negotiation.71 Bailer hypothesises that the more intense the preferences of an actor under this context, the more likely she is to be successful in her negotiations.72 Some scholars believe that countries’ economic size in negotiations is an important factor of success: the more powerful the country, the more successful it will be73 because it is an indicator of exogenous power. On the other hand, smaller countries limit their attention to issues that they consider vital to their interest,74 because of the political turmoil it would cause if small countries were to continuously veto proposed legislation.

Preferences are not static: they are determined by a number of factors, such as the political and economic environment of the Member States, and are therefore likely to evolve across time. Bailer makes a difference between exogenous factors, determined by the actor’s environment, and endogenous factors, linked to the attributes of the negotiators and the situation in which

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67 Bachrach and Baratz 1962, quoted in Radaelli, “Harmful tax competition in the EU: policy narratives and advocacy coalitions”, 668.
70 Franchino, “Control of the Commission’s executive functions”, 77.
71 Moravcsik, 20.
72 Bailer, 105.
73 Bailer, 101.
74 Mattila, 33.
bargaining takes place.\textsuperscript{75} This is a sociological institutionalist view and will see how relevant it has been to the ESD negotiation process, especially when the Commission negotiated with Switzerland.

Unanimous voting situations also allow states, for which issues do not have the importance they have for others, to demand side payments.\textsuperscript{76} This encourages log-rolling, lowest common denominator bargain\textsuperscript{77} or outright obstruction. This is not a factor linked to the economic size of the country, and this is a position which is taken at the outset or during the negotiation process, knowing full well that compromises will have to be made from both sides to reach an agreement.\textsuperscript{78} Some states may take a deliberate extreme position, at a moment expected by no one, to attach their support of an issue to another one, unrelated to the current negotiations.

Using salience of issues and strategic bargaining, it is possible to theorise the effect of proposals’ outcome in the Council using a one-dimensional model of decision-making when unanimity is required (see Figure 2). Although this model is limited as it takes into account only one issue at a time, it is nonetheless useful to understand how decisions can be reached.

If we theorise a model with seven countries,\textsuperscript{79} we need to posit certain assumptions about the preferences of the players, bearing that the horizontal line represents the policy dimension:

1. The status quo is to the left of the policy preferences of all players (represented on the figure by SQ), and
2. The preference of the Commission (greater than any of the members of the Council), is to their right (represented on the figure by C).

Under this model, each country (coded 1 to 7) positions itself on the policy dimension. Country 1 is the most to the left of the Commission and closer to the status quo than any other actor. According to the model, any final decision will be between SQ and Pu, both equidistant from country 1’s position (represented by area A). If the Commission makes the formal proposal, Pu will be suggested, as country 1 is indifferent between the proposal and the status quo. Although this is the closest point to the Commission’s preferred point that will be accepted by unanimity in the Council, Mattila and Lane clarify that “it certainly is not the preferred outcome of the Commission”.\textsuperscript{80}

![Figure 2. One-dimensional special model of decision making in the Council](image)

Therefore, we can summarise the outcome of negotiations requiring unanimous consent as likely to be affected by three factors:

\textsuperscript{75} Bailer 100.
\textsuperscript{76} Moravcik, 75.
\textsuperscript{77} Hix, “Executive politics”, 6
\textsuperscript{78} Bailer, 103.
\textsuperscript{79} Mattila and Lane, 34.
\textsuperscript{80} Mattila and Lane, 35.
a) the value of the new policy when compared to the status quo, 
b) the opportunity for issue linkage or side payments, and 
c) the position of the veto player and of the agenda-setter on the policy dimension.81

Agenda setting, delegation and unanimity are all important to understand the dynamics of the actors in the context of the ESD. I will now examine how these different factors influenced the ESD process and how the dynamics between the Commission and the Council shaped the outcome of the directive.

4. Analysis of the ESD

Bearing in mind the assumptions regarding the preferences of actors already detailed in part 2, I will concentrate on testing the following hypothesis:

Once the ESD in the hands of the Commission, the Council loses its hold on the directive, assuming that:
- The ESD is not the Commission’s first choice
- Nonetheless, the Commission sees the ESD as a further step towards European integration and is keen to push the directive

Several other assumptions are necessary, drawn from the above study, and relating to the specificity of fiscal matters in the EU:
- Fiscal revenues are of utmost importance to Member States
- The Commission has preferences for further European fiscal integration than the Council
- States do not want fiscal harmonisation because loss of sovereignty would result in a loss in competitive advantage and of control over tax revenues
- The states which have most to lose from tax evasion or from non-fiscal co-operation between Member States (i.e. those who charge the highest tax burden on their citizens) are more keen to see the ESD adopted
- The states which have less to lose from non-agreement will only agree to the ESD after some bargaining or against compensation
- For larger states, tax cooperation is vital because of the lack of possibility to reform their national tax system.

4.1. Clarification of the agenda setter

There is no doubt that the formal agenda setter is the Commission: it is a treaty requirement and a proposition was tabled in May 1998. What about its role as an informal agenda setter? Although the requirement for unanimity reduces the powers of the Commission, has it influenced member States through the different proposals and reports made throughout the 1990s?

A report made by the Commission in 1996 pointed out the distorting effects of taxation in the EU to the Member States and starting in 1989 several attempts had been made to find common grounds for harmonisation. In addition, at the end of the 1980’s and through the 1990s, a number of conventions and summits were held to fight money laundering and to help coordinating fiscal cooperation.82 The Financial Action Task Force (FATF), an independent body established in 1989 by the G7, was set up to review all aspects of international money laundering and anti money laundering policies and legislation worldwide and has issued annual reports since. This is relevant to the issue of the ESD because, in many Member States, fiscal evasion is a criminal offence: the proceeds of fiscal evasion are treated as proceeds of crime and fall into the category of money laundering. In 1988, the UN organised Vienna Convention promulgated for the first time the introduction of a specific offence of laundering the proceeds of drugs related crimes (not sure what

81 Moravcik, 63-64.
82 M. S. Parkinson, Trust creation law and practice, 2nd Ed. (Birmingham: Central Law Training, 2003): 72-76.
is meant ???) into the domestic law of Member States. In 1990, the Strasbourg Convention extended the definition from drugs related offences to all criminal conducts, including tax evasion. In 1991, the EC Directive 91/303 imposed an obligation on members to legislate against money laundering.

Alongside this fight against money laundering, in 1998 the OECD released a report, "Harmful Tax Competition: An Emerging Global Issue" and created a special forum, "Forum on Harmful Tax Practices" to discuss harmful tax practices in Member Countries and the issue of tax havens. Since then, the Forum has produced regular progress reports and, in cooperation with a number of tax havens, created a "Model Tax Agreement on Exchange of Information in Tax Matters" to combat fiscal fraud.

This international momentum, coupled with the loss of state revenues during the 1990s, helped the cause of the Commission. As Radaelli correctly underlines, “the evolution of the policy environment should not be overlooked. The liberalisation of capital movement, the critical debate on competitiveness, the new tax agenda of the Organisation for Economic Cooperation and Development and the presence of centre-left governments in most of the Member States should be taken into consideration”.83 The pressure of the Commission alone could not have put the ESD on the agenda: during the early the 1990s, several attempts on behalf of the Commission were bitterly fought by the UK and Luxembourg, with the latter threatening to use its veto should any proposal be put forward.

The needs of governments during the 1990s to reduce the loss of revenues examined in part 1.1 played a greater part in the agenda setting than the impulse of the Commission. However, the need for smaller countries that were benefiting from the flow of mobile capital not to be seen as outlaws also played its role. Both my interviews with the Luxembourg Permanent Representative and the officials from the associated territory showed that their willingness to discuss the ESD was heavily influenced by the international agenda. One of the officials from the associated territory remarked: “the world is no longer divided between offshore and onshore jurisdictions, but between co-operative and non-cooperative jurisdictions. We want to be seen as co-operative”. This view was shared by many interviewees, which felt that the more economically important countries wanted to push the directive for internal fiscal reasons whilst the smaller countries were keen to follow the momentum for reputation purposes.

The Commission’s 1998 draft faithfully reflected the Council’s September 1997 recommendations. Instigated by the Member States, the Commission understood that this proposal would represent the furthest point states would go in terms of fiscal co-operation. Nonetheless, the drafters regretted that the UK, which had originally agreed to the conclusions, had not given sufficient thought to the ESD at the time and revised its position mid-way through the negotiation process. This led to the third draft in 2001, driven by the UK recommendations.

All through the legislative process, it is my beliefs that the Commission understood that its agenda setting powers were limited. Because the Council’s request increased European integration, and as the Commission realised that this proposal was the best possible achievable outcome, it was happy to act only as a formal agenda setter. Although the Commission’s 1996 report on tax distortion in the EU pointed out some major discrepancies to Member States, the need of governments to increase their tax income and the international climate of fight against money laundering and harmful tax practices played a greater role in the agenda setting process than the impulse of the Commission.

4.2. The delegation process in the ESD

The issue of delegation is twofold: one relating to the discussions between the Commission and the Council, and the other in relation to the negotiations with third countries. Both aspects are totally distinct, yet inseparable for a successful outcome. If we adhere to the logics of efficiency and credibility,84 then the support given to the Member States by the Commission would fall into the category of efficiency whilst the negotiations with third countries would fall into the category

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83 Radaelli, “Harmful tax competition in the EU: policy narratives and advocacy coalitions”, 662.
84 Majone, 103-104.
of credibility. The Commission drafted the directive and proposed solutions to solve intra-Council problematic issues and represented an EU united voice in negotiations with the outside world.

As, Franchino points out that “when exercising powers that are delegated to reduce workload and improve efficiency in decision-making, the Commission will be 1) more constrained in general, and 2) more subject to national-specific constraints in particular, than when exercising powers that are delegated to solve the problem of commitment”.\textsuperscript{85} The ESD is a good example of such constraints: the Commission was tied by the requirements of the Member States, who feared too integrative proposals and the loss of fiscal sovereignty. Therefore, the transcription of the ESD to the national law was left to the Member States to implement. Most conflicts inside the Council were related to reaching an agreement on the terms of uniform national implementation regulations. Delegation to the Commission happened through functional drafting of articles as and when solutions were found, and problems were solved at the Council level.

However, it would be unfair to restrict the role of the Commission to that of a drafter, as all Permanent Representatives underlined the commitment of the Commission to propose constructive solutions when deadlocks occurred. The Commission, acting as a rational actor, realised that the process was already problematic enough and did not want to jeopardise the process by going one step too far for the Member States. The Council’s monitoring of the Commission was not necessary. Any slippages or shirking would have been coldly met by the Council and would have certainly threatened the whole process.

So, did the Commission use asymmetries of information to propose solutions, which went beyond the intention of the Member States? It transpires from my interviews that this did not happen, mostly because the asymmetry of information in fiscal matters favoured the Member States, not the Commission.

Additionally, in their negotiations with third countries, once again the Commission was very restricted: the Presidency of the EU was mandated to hold all talks alongside the Commission. This was an \textit{ex-ante} step driven by the fear that the Commission, the EU international negotiator, would propose an overly generous deal to third countries with the view of securing their agreement. The monitoring of the Commission was also done \textit{ex-post}, by asking the Commission to regularly report to the Council and instructing it not to commit to any agreement without its prior approval. The support of the Commission in these negotiations was heavily praised by one particular Permanent Representative, when he said that the human and technical support of the Commission was the reason for a final agreement with Switzerland.

From the Council’s point of view the outcome of the negotiations was somewhat successful: all third countries agreed to implement the ESD into their local legislation. Only Switzerland, because of its crucial financial importance, managed to obtain the benefit of the interest and royalty directive (part of the original Tax Package), and of the parent-subsidiary directive 90/435/EEC.

Overall, the delegation to the Commission was purely functional: it was aimed at reducing costs and, because of a difference in fiscal integration preferences recognised by the Member States, the Council made sure that it had full control of the Commission with \textit{ex-ante} and \textit{ex-post} controls. However, these elements alone do not explain why the Commission did not shirk - the unanimity requirement at the Council level also played its part.

4.3. The impact of unanimity on the ESD

Arguably, the unanimity requirement was the major factor in the final wording of the ESD. As each country was a potential veto player, conflicting requests and threats punctuated the policy process until a common ground was found and a final agreement reached.

The model detailed in part 2.3 above theorises the outcome of voting under a unanimous context. Admittedly, the model is one-dimensional and cannot fully explain the ESD multi-dimensional process of bargaining and concessions. Franchino argues that “the combination of unanimity and intensive conflict across Member States led to a complex pattern of mutual concessions which however, as expected, never departed from extensive reliance on national

\textsuperscript{85} Franchino, “Efficiency or credibility? Testing the two logics of delegation to the European Commission”, 680.
administrations and the exclusion of the Commission from implementation”. Although this appears to be true, the evidence from the different interviews conducted seem to point towards two distinctive periods during these intergovernmental negotiations: the first between 1997 and 2001 when the UK was isolated in the Council, and a second one, from 2001 onwards when Luxembourg became isolated.

Throughout the process, my interviews confirmed that France and Germany remained constant in their position: both wanted to push the directive as efficiently and quickly as possible. They found natural allies in Northern European Member States, because “Nordic countries are more respectful of morality and the rule of law” (found in two interviews with Permanent Representatives). Moreover, it is easy to understand how the UK managed to deeply influence the process and obtain a third draft: its political and economic power and the use of the press were overwhelming enough to fundamentally change the ESD in 2001.

More difficult to grasp is how Luxembourg had such an impact on the ESD. The issues of UCITS, withholding tax rates, grandfathering clauses and accrued interest were all raised by Luxembourg. Luxembourg, to its own admission, did find allies in certain circumstances to help its cause: Ireland on UCITS and Belgium on withholding tax. However, these allies were not constant throughout the policy process and only Luxembourg maintained a “hard” position because of the salience of the ESD issue to its economy: the financial industry accounts for 22% of Luxembourg’s GDP.

According to the Commission, Luxembourg realised at an early stage that they could not resist long against the pressure from Germany: where the UK had managed to tilt the directive towards its objectives, Luxembourg did not have sufficient economic and political power to resist. In addition to the might of their neighbour, reputation and prestige were important political objectives for Luxembourg: it did not want to be seen as the outlaw of Europe. Prime Minister Jean-Claude Juncker, a member of the Christian Social People’s Party, was in principle in favour of the ESD and did not want Luxembourg to use its veto powers. The interview with the Luxembourg Representative confirmed this: “We were told that we could only use our veto every ten years. As we had already used it in the early 90s with Santerre, a solution had to be found.”

This is where Luxembourg played its trump card: in a masterstroke it conditioned its agreement to the ESD to a similar agreement with Switzerland and the Channel Islands. The phrase “level playing field” started to crop up in discussions, boosted by the policy environment of more compliance with legal standards. As third countries would never agree to exchange information with the EU, Luxembourg had found the perfect way to hold its ground. In my interview with the officials of the dependent territory, they confirmed that their agreement to the ESD was conditional to Switzerland agreeing to the directive too. The policy process became an “all or nothing” deal. Other Member States realised the advantage of linking Switzerland, Liechtenstein and the Channel Islands to the ESD, in the hope of boosting their future tax revenues and decided to support Luxembourg.

Although Franchino in his forthcoming book convincingly explains delegation and unanimity for the ESD from an internal EU point of view, it appears to me that unanimity in the Council can only be fully explained by introducing exogenous factors and this international negotiation element. Other factors are also necessary in order to understand the reaching of an agreement. Firstly, the ESD was linked to the overall Tax Package: what Luxembourg lost in terms of attracting portfolio income, Belgium and Ireland lost in terms of competitive corporate taxation: “the package deal approach facilitated agreement and put pressure on reluctant countries”. Secondly, some countries had internally used the prospect of the forthcoming ESD to announce fiscal amnesties: Italy, Germany, Greece and Belgium all announced amnesties in the period 2002-2003 when it became apparent that the ESD was to become reality. As the drafters of the ESD told me, “a tax amnesty is more interesting to you if you know that in 6 month’s time your income will

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88 Radaelli, “Harmful tax competition in the EU: policy narratives and advocacy coalitions”, 673.
89 Radaelli, “Harmful tax competition in the EU: policy narratives and advocacy coalitions”, 674.
be taxed”. Without the credible threat of the forthcoming ESD, amnesties would not have been successful. Italy, for example, recouped CHF 8 billion from Switzerland.90

Finally, as observed in part 2.3, “the more heterogeneous Member States are, the more they can gain from linking decisions. Thus, the Council members have good incentives to engage in negotiations that involve several decisions simultaneously”. 91 This is exactly what happened when Italy decided to link its support to the directive to an agreement on unrelated special terms in the payment of its milk fines, in March 2003, just as the ESD was to be agreed in its final format.92 This occurred after the end of the Italian amnesty and coincides with an apparent new disinterest from Italy for the ESD. One Permanent Representative remarked: “we became concerned about the commitment of Italy in 2003 on reaching an agreement”. The Commission believes that the timing of Italy could not have come at a worse time for the German amnesty: “this delay certainly had a negative impact on the German tax amnesty: had it happened earlier, the amnesty would have had probably more success. Countries were forced to anticipate the timing of the amnesties in comparison of the realistic possibility of arriving at a conclusion of the directive”.

5. Conclusion

As detailed in part 1, when “tax legislation is adopted unanimously, it grants considerable discretion to Member States whilst it restricts the Commission”, 93 This is exactly what happened in practice with reference to the ESD: the Commission had preferences for further European fiscal integration when compared to the Member States, who were jealous of their sovereignty over tax matters. When the request from the Council for the ESD came, the Commission was happy to comply: this was a step away from the status quo although it poorly reflected its first choice proposal. The Commission was keen to see the ESD adopted and all interviews praised the Commission for its dedication to solve issues, propose new drafts and find terms with third countries. Its agenda setter role was severely limited: the economic, political and legal policy environment arguably played a greater role in the agenda setting process than the Commission.

The Council took all necessary steps to avoid the ESD slipping out of its hands: delegation was limited, and even then was still subject to ex-ante and ex-post controls, both internally and externally. The process was kept intergovernmental and Member States were keen to reach an agreement, their eyes on future tax benefits, to the extent that the actor with least preferences for European integration, Luxembourg, could hijack the directive. Luxembourg managed to use the unanimity requirement to its advantage and shape the ESD to its own benefit and transformed an EU directive into an international agreement which could only be settled through a lowest common denominator, and which granted Luxembourg the status of a co-operative and compliant country.

Several Member States, such as France, Germany and the UK, are confident that exchange of information and withholding tax will substantially boost their tax revenues over the next years.94 If the ESD, as confirmed by my interviews, is the most extreme fiscal integration possible in Europe for the time being, then it is my view that the tax income benefits to the bigger states will be minimal. The officials from Luxembourg and the dependent territory I interviewed were quite adamant that virtually no moneys will be sent to other Member States. Obviously, and contrary to traditional rational choice principal-agent assumptions,95 the asymmetry of information in the ESD favoured the withholding tax countries. As they have conducted industry surveys, their financial sectors are well aware of the cost of losing capital to other centres and of the particular situations of their clients. Adequate steps will have been taken by these states and their financial industry to avoid loosing capital to other financial centres outside the EU.

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91 Mattila and Lane, 46.
92 Radaelli, “The code of conduct against harmful tax competition: open method of coordination in disguise?”, 520.
Clients of banks have a plethora of solutions at their disposal to avoid being caught in the net of the ESD. They can easily convert their current assets to other non-taxed assets and banks have already started to offer solutions to the ESD issue, proposing structured products that fall outside the scope of the directive but which maintain the same characteristics as currently taxed assets.

Furthermore, higher profile private bank clients with very mobile capital often use offshore trusts and companies to hold their assets, vehicles which fall outside the scope of the ESD. Common law countries or countries signatory to the 1985 Hague Convention on the Law Applicable to Trusts and on their Recognition will have a competitive advantage to retain clients. It should therefore be no surprise to note that, on 1st July 2004 Luxembourg ratified this international convention and that Switzerland is now in the process of ratifying it too. In addition, the Channel Islands, Liechtenstein, Monaco, Singapore and Hong Kong all already have trust laws.

Furthermore, at the end of the transitional period, the chance of “withholding tax countries” to move to automatic exchange of information is very limited. A move towards exchange of information will require unanimous voting from the Council, and the Luxembourg Representative confirmed to me that Luxembourg will seriously consider using its veto if forced to take a decision.

Although the Commission has now received a mandate from the Council to negotiate the application of the ESD to other countries (primarily Hong Kong and Singapore), these jurisdictions will have had time to learn from their counterparts how to retain mobile capitals. Even if some funds are transferred outside to non-signatory countries, it is highly uncertain that the banks concerned will lose business: all major private banks have offices worldwide and assets will remain within the same financial institution.

It is therefore my belief that the benefits to the Member States will be marginal, if not inexisten, and that only “small” tax evaders will be caught by the ESD. In the words of the Commission, “the effects of the ESD cannot be negative: at best states will get more money, at worst none”. I disagree with that statement. For banks, gathering information on the clients and the income earned and either transmitting it to their national tax department or withholding the tax due will be expensive. For national administrations, receiving information from the banks and from foreign tax authorities will also translate into additional costs. The Luxembourg Permanent Representative was rightly dubious whether the amount of tax collected and retained by the Grand Duchy through the withholding tax would be sufficient to recover the implementation costs of the ESD to the industry and to the country. In Switzerland alone, banks have reported that implementing a new IT reporting system has cost over CHF 300 million. Bearing in mind that the predictions of minimal income flow and the high costs to the financial industries and national administrations, the whole ESD process will only have been a symbolic political gesture.

Rejecting the null hypothesis is not possible: the Commission did not free-ride on the States to impose its views, because it realised during the negotiations and with the learning of past failed attempts that trying to go one step too far would result in the whole process collapsing. Successfully captured by Luxembourg through the unanimity requirement and the tying of third countries, the momentum towards further fiscal European integration has reached its peak. Amortisation will help financial centres spread their costs whilst national administrations will increase theirs, by collecting information and capturing “small fish”. The big winners of the ESD are the offshore centres which see their reputation enhanced, gained credibility on the international scene while limiting the loss to their financial industries to implementation costs.

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97 Radaelli, “The code of conduct against harmful tax competition: open method of coordination in disguise?”, 579.
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DENATIONALISATION OF THE MILITARY?
The British and French Armies in the Context of Defence Co-operation

Madeeha Bajwa and Evgeny Postnikow ‡

Abstract

The monopoly of the legitimate use of force is a key component of the modern statehood. The growing multilateral defence co-operation poses a challenge to this monopoly. This paper attempts to analyse whether multilateral defence structures cause denationalisation of the military focusing on Britain and France. The European Security and Defence Policy (ESDP) and North Atlantic Treaty Organisation (NATO) are chosen as the principal challengers to a state’s control over its military. We compare two time periods, 1960/70s and 1990/00s, to establish whether a state’s monopoly has been undermined. The results demonstrate that even though Britain and France have given some part of their autonomy to the aforementioned structures, they retain the full control over their respective armies. It is too soon to speak of a major transformation of the nature of the nation state.

Keywords: military; defence; security; ESDP; NATO; international institutions; state

1. INTRODUCTION

The monopoly on the physical use of violence is one of the most essential properties of modern statehood.¹ This monopoly is traditionally divided between the police and the military. While the former provides the means for sustaining internal order (within the borders of the state), the latter is the means of dealing with external order (the surrounding consisting of other states). The armed forces are, therefore, crucial for the state’s survival in the ‘anarchical’ international environment. According to conventional wisdom, it would be appropriate to say that globalisation process erodes the state’s sovereignty. This is an interesting proposition to analyze concerning multilateral defence structures as the member states of such bodies are seen as more and more willing to pool their resources to resolve various collective action problems. For example, the nascent European Security and Defence Policy (ESDP) which is an integral part of EU’s second pillar, the Common Foreign and Security Policy (CFSP), imposes certain commitments on the member states armed forces and thus alters the role of the military in the state’s machinery. On the other hand, the members of the North Atlantic Treaty Organisation (NATO) are committed to each other’s security and to this end have common defence planning procedures and an integrated military structure. Though NATO’s military and political structure has been reorganised following the end of the Cold War to adapt itself to peacekeeping and crises management tasks, its role in terms of collective defence remains the same.

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Thus, this paper seeks to provide an answer to the following question: does the state lose control over its military with the increase of defence co-operation? In order to do this we will look at the status quo of the 1960/70s when the nation-state had full monopoly over the use of force and compare it with the 1990/00s when the idea of defence co-operation seemed to override this monopoly. Put differently, we investigate whether the increased defence co-operation results in denationalisation of the military. The central argument of our study is that the change in the constellation of power within the international system in the 1990s (following the end of the Cold War) required new responses that were and are increasingly sought inside the multilateral defence structures; at the same time the monopoly of the state is now undermined as it is particularly keen on retaining its freedom to act unilaterally.

We attempt to achieve a comprehensive and multi-dimensional understanding of the issue at stake, focusing on France and Britain for a number of practical reasons. First, both states are essential actors in the world affairs and the major players within the EU. Second, these two countries are interesting cases as they diverge in their visions of what European integration should aim for and what place security and defence issues should occupy in it. Lastly, the position of the military in the machinery of the state is quite different in France and Britain. The role of these two states in the two major multilateral defence structures (NATO and ESDP) is crucial to analyze in order to determine whether they have lost their sovereignty/monopoly over their militaries.

The remainder of this paper is structured as following: first, we briefly introduce the conceptual scheme that we apply in this study; second, we identify the challenge posed to the monopoly of the state (Britain and France) over its military by multilateral defence structures (NATO and ESDP). We proceed with an appraisal of the status quo in the 1960/70s using Britain and France as case studies; then, we trace the main developments in the 1990/00s and their impact on the state of affairs in the military of the two countries; next, we compare the two cases; finally, we explain the change and examine how it affects the monopoly of the state.

2. Conceptual Scheme

The nature of the military can be conceptualised along the following lines: functions and organisation. In this paper we conceive of the primary functions of the military as confined to territorial defence and extra-territorial operations. Territorial defence in our analysis refers to the protection of the nation-state (no matter how broadly defined) against any threat to its integrity. By extra-territorial operations we mean all kinds of interventions performed by the state’s military outside its territory. On the other hand, by military organisation we mean the basic characteristics constituting the national military, such as weapons (nuclear/conventional), the relationships with existent frameworks of international security co-operation, and the style of military bureaucracy (which encompasses a range of issues from spending to the structure of national armed forces). Figure 1 encapsulates our conceptualisation.

Figure 1: Conceptualizing the Military

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In order to operationalise our case, we compare two time periods: the 1960/70s, the “golden age” of the state according to Leibfried and Zurn3 and the 1990/00s when the state’s monopoly is arguably undermined by a number of changes. Table 1 gives a snapshot view of this. It is important to keep in mind that the categories employed in this conceptual scheme are not entirely differentiable but are fairly ideal-typical and consciously chosen for the sake of analytical clarity. The concrete case studies will make use of this scheme but certain overlaps are unavoidable.4 The next section introduces these changes for the state of the military in greater detail.

Table 1: Operationalising the Change

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<th>1960/70s</th>
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3. INTRODUCING THE CHALLENGE: MULTILATERAL DEFENCE STRUCTURES

Multilateral defence structures touch upon the monopoly over the legitimate use of violence, which is the centrepiece of state sovereignty. It is imperative to see how such co-operative arrangements function.

3.1. The North Atlantic Treaty Organisation (NATO)

From the founding of NATO in 1949 until the break up of the Soviet Union in 1989, it can be argued that NATO was the primary instrument of collective defence for its member countries against Soviet aggression.5 After the end of the Second World War it was clear to Western European States that their individual national power was insufficient to deter the Soviet threat and that American military and strategic engagement was needed. The essential feature of NATO that really set it apart from previous defensive alliances was that all Treaty Members were obliged to come to the aid of any other member country.6

The end of the Cold War forced the Alliance to restructure itself. Its expansion and enlargement, both territorially and functionally, seems to be indicative of an attempt by NATO to carry out a balancing act between its older collective defence role as a protection against potential external threats while at the same time pursuing a new role in promoting a more secure post-Cold War Euro-Atlantic order.7 The challenge for NATO was to clarify the relationship between its long

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3 Ibid.
4 E.g. international security arrangements belong clearly to the organisational part of the military but at the same time it is clear that in terms of functions territorial defence for the member states is unthinkable without NATO.
7 Yost, “NATO”: xii.
standing core collective defence function and its new missions in support of collective security.⁸ Therefore, the Alliance is first becoming “a much more institutionalised system, where trust and information about other states’ capabilities and intentions, and the credibility of their commitments to joint policies and rules of behaviour is high.”⁹ Second, NATO has responded to the new threats in the post-Cold War era by defining the terms and conditions for the use of military forces.¹⁰ Jachtenfuchs argues, “In areas where they believe unilateral action to be ineffective, member states have formally pooled their resources in the field of military power.”¹¹

For this reason, NATO’s structure has been moving towards easily deployable, multinational and multi-service command structures—like the Combined Joint Task Forces (CJTF). A CJTF is a multinational and multi-service task force organised for a specific mission (task), which could be humanitarian relief, peacekeeping and peace enforcement as well as collective defence. Also, at a meeting in June 2003, Allied defence ministers approved plans for the creation of the NATO Response Force (NRF). NRF is another example of easily deployable and multinational command structures—it is made up of land, air, maritime and Special Forces components, which is on constant standby at high readiness.¹²

3.2. European Security and Defence Policy (ESDP)

The EU is no longer solely a civilian power. The establishment of the second pillar of the EU, the CFSP, and the subsequent creation of the ERRF, its military “muscle”, at the Helsinki Summit in 1999 ended the long history of “civilian power Europe,” as well as the fierce debates between the proponents of the exclusiveness of transatlantic ties and those insisting on Europe’s self-sufficiency in the military and defence sphere. The idea of Europe being a purely civilian power was always contested by many critics insisting that if the EU aims to play a more significant role in world affairs and catch up with its economic might, it must not solely rely on the North Atlantic framework, but instead, assume a greater responsibility for its own defence. It seems that finally with the creation of ESDP and RRF these demands are increasingly becoming a reality.

ERRF is an audacious enterprise: the Member States committed themselves to the creation of the task force that must be able to deploy troops consisting of 50,000-60,000 persons within sixty days for the duration of at least one year. They should be able to implement the full range of ‘Petersberg tasks,’ originally defined by the Western European Union (WEU) in 1992 and incorporated into the Amsterdam Treaty on the European Union in 1997. The ‘Petersberg tasks’ are humanitarian and rescue tasks, peacekeeping tasks, and tasks of combat forces in crisis management. In 2001, at Laeken Summit, ERRF was declared operational, and in the Headline Goal agreed in Helsinki, the member states proclaimed that the task must be completed by 2003. The process was somewhat hampered, and in 2004 this deadline was extended to 2010. Nonetheless, RRF has an intergovernmental nature: national governments retain the power to decide whether their troops will take part in any particular operation.

Clearly, the creation of the ESDP and ERRF put certain pressures on the Member States, as it unavoidably demands the restructuring of the national armed forces and increasing the military expenditure. The command structures that, in the case of EU-led military operations, are switching from the national to the EU level signify the loss of national control over a considerable part of the agenda. On the other hand, the participation of states in the framework of NATO also poses a certain threat to the unilateral state control over military force.

Thus, the whole idea of fighting wars through the institutional framework of the EU, especially in terms of integrated command structures, is quite novel and its meaning should be thoroughly investigated from the nation state’s perspective. The next two sections do exactly that by introducing their impact on Britain and France.

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⁸ Ibid.: 4.
⁹ Jachtenfuchs, “Monopoly”: 45.
¹⁰ See Section 7.1 for a systematic overview of these new threats.
¹¹ Jachtenfuchs, “Monopoly”: 45.
¹² (NATO 2005 available at: [http://www.nato.int/docu/briefing/nms-e.pdf](http://www.nato.int/docu/briefing/nms-e.pdf)).
4. Britain

No understanding of British military and defence policy would be complete without recognizing the country’s unique historical trajectory. Though Britain’s vast Empire disintegrated after the Second World War, it aspired to retain its status as a world power and thus formally retained many of its pre-war territories and responsibilities. For this reason Churchill declared in 1950 that Britain’s interest was being the point of intersection of three circles of influence: the relationship with the USA, the Commonwealth, and Europe.\(^\text{13}\) Despite these grand intentions, Britain’s post-war military and defence engagements underwent continuous process of contraction and decline largely due to insufficient resources to meet the country’s defence commitments.\(^\text{14}\) Britain consistently resisted initiatives that it interpreted as competing with NATO and American initiatives.\(^\text{15}\)

Therefore, Britain’s approach to European security integration was at best wary. Britain had been sceptical of ideas of the European Defence Community (EDC) and proposed the creation of the Western European Union (WEU) (which nonetheless failed to develop into a significant European institution). The overall experience of both these attempts (EDC and WEU) reinforced the British conviction that the Community method of promoting European collaboration was misconceived and doomed to failure.\(^\text{16}\) “The lesson that British policy makers took from the episode was the wisdom of their own preferred pragmatic approach to European co-operation, which did not involve any abrogation of national sovereignty.”\(^\text{17}\)

Britain is an interesting case primarily due to its problematic relationship with any endeavours towards security integration and its jealous protection of its national interests. If it can be demonstrated that it has ceded it sovereignty to security institutions then this definitely has implications for the nature of the future nation state. The comparison between the two time periods selected for the purposes of this study is significant because the 1960/70s were significant for the British military as they represented a stabilisation of Britain’s defence role. By 1975, Britain’s unilateral extra-territorial operations virtually ceased and the withdrawal of many residual forces deployed beyond Europe “…marked the end of Britain’s world role.”\(^\text{18}\) On the other hand, the 1990/00s are significant as they demonstrated that a transformation of the security environment led to a change in the functions and organisation of British military.

4.1. 1960s-1970s: The Status quo

4.1.1. The Organisation of Defence/Military

It is generally argued that the ambitious British defence policy in the 1950s led the military to become increasingly overstretched. Defence expenditure was at about 7.8% in 1956 (due to the burden of the Suez Canal incident and the Korean War) of GDP despite a weak economy. It was hoped that nuclear weapons would reduce the high expenditure of defence firstly by reducing armed forces (it was hoped from 690,000 to 375,000 by 1962) and secondly, by being a deterrent and thereby reduce the need for conventional weapons. In practice this did not reduce the burden of military commitments.\(^\text{19}\)

The Labour victory in 1964 resulted in the attempt to balance commitments and capabilities more evenly. The 1965 Statement on the Defence Estimates accused the previous administration for

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\(^{14}\) Ibid.


\(^{18}\) Croft et. al “Awkward”, p. 18.

\(^{19}\) The levels of manpower under arms were 3 million in 1947 to around 320,000 by 1985. The most important aspect of this reduction is the end of conscription in 1957 (which was gradually phased out in the early 60s). See John Baylis, “Greenwoodry and British Defense Policy”, *International Affairs*, Vol. 62, No. 3, (1986), pp. 443-457.
allowing Britain’s defence forces to become seriously overstretched and under-equipped. It instead argued that the level of military expenditure should be considered in juxtaposition with the essential requirement to maintain the country’s financial and economic strength. Based on this review a new approach to defence planning, management, and control was announced. This approach was the program budgeting process which, it was asserted, would equate more effectively the ends of defence planning and the costs of achieving them. However, the Defence Review of 1964-65 was followed by the July 1966 economic crisis which necessitated further defence cuts. For this reason a second Defence Review was therefore initiated in the middle of 1966 and emerged in July 1967. The major decision of this Review was to reduce the British forces in Europe and to start a phased withdrawal of forces from Malaysia and Singapore (though the government retained its military presence East of the Suez). Following the devaluation of the pound in November 1967, the British Government declared its intention to withdraw British forces from the Far East and the Persian Gulf by 1972. The Statement on the Defence Estimates in February 1968 emphasised the British commitment to NATO and made Europe the focus of British defence planning.

Though the 1970 Defence Review by the new administration did not change much in terms of real outcomes, the following Review in 1974 planned a progressive decrease in defence expenditure as a proportion of gross national product from 6.6 percent in 1974 to 4.5 percent in 1984. The ten-year program aimed to achieve “a new balance between commitments and capabilities to meet the Government's strategic priorities”. The Review determined to reduce commitments outside Europe as much as possible and also identified after discussions with NATO and European allies the areas where and how British military forces could most effectively contribute. These various Defence Reviews were significant as they demonstrate that the 1960s and 70s represented a certain ‘coming-of-age’ for British defence strategy. Figure 2 illustrates a stabilisation of military expenditure over the period. A long-term plan had been initiated by 1974 and throughout the 1960/70s the attempt was to equate capabilities with commitments (in sharp contrast to the overstretching of the 1950s).

4.1.2. Intergovernmental institutions and British military/defence

In the 1960s Britain was not a member of the EU, though attempts to become one were made but vetoed by France. The rationale behind these attempts was purely economic and in no way touched upon the military. Britain finally joined the EC in 1973 which already makes the 1970s a turning point for Britain (though European security integration not an option for Britain). At this point in time NATO was enshrined as the security framework and Britain consistently attempted to keep United States in the system as a significant actor. The construction of the Berlin wall in 1961 and the Cuban Missile Crises of 1962 merely highlighted the importance of NATO to British strategists.

4.1.3. The Functions of the Military/Defence

British military planning focused on collective defence within NATO against the threat posed by the Warsaw Pact, and in that context maintained forces for four specific defence roles: nuclear

20 Ibid.
21 Ibid.
22 Ibid.
23 Ibid.
24 Ibid.
25 Ibid.
26 George “Awkward”: 14.
27 Yost “NATO”: 36.
deterrence, home defence, forward defence of the European mainland, and maritime defence of the Eastern Atlantic.²⁸

In terms of territorial defence, Britain’s nuclear program was considered to be a critical aspect of its defence strategy. The Labour Party’s electoral success in 1964 did not mean an abandonment of strategic nuclear weapons (though discourse to that effect had been evident in 1960-61). The reasons behind this decision were that firstly, these weapons were considered vital means for influencing American and NATO nuclear strategy, secondly, they were relatively low cost, thirdly Britain desired to be a nuclear power as long as France was and lastly, the electoral appeal of having nuclear weapons made it desirable.²⁹ This strategy and rationale was maintained throughout the 60s and 70s and there was inter-Party consensus on the matter.

Britain had two main roles in NATO during the Cold War. Firstly, it had to defend 200 kilometres of the intra-German border, and maintain a military presence in Berlin. Secondly, from the late 1960s it had a significant naval role. Prior to this the naval role was primarily related to Britain's post-colonial responsibilities but after the withdrawal from east of Suez this role was redefined to a NATO one directed towards the defence of Europe. This was so because NATO had altered its strategy from the doctrine of massive retaliation (i.e., strategic nuclear response) to the doctrine of flexible response (i.e., initial response with conventional forces). Therefore, there was a need for a naval role in the Eastern Atlantic and Channel areas to protect conventional forces in time of war.

Moving on to the extra territorial defence function, Britain carried out unilateral foreign military intervention more than thirty times between 1949 and 1970.³⁰ Wingen and Tillema discovered that most interventions were post-war Empire in the immediate vicinity of an army base, experiencing political violence, whose authorities might officially request British action (see appendix for a complete list of the interventions and their duration).³¹ The frequency of interventions decreased in the latter part of the 1960s. Wingen and Tillema argue that these interventions were not on the basis of great power interests or in favour of its trade monopolising, but rather to facilitate orderly withdrawal from Empire, which Britain was dismantling.³² The turning point is the 1966 defence review which clarified that Britain was no longer willing to deploy its armed forces in major operations abroad without the support of its allies and the 1970s saw the beginning of the process of defence interest and concentration in Europe.³³

4.2. 1990-onwards: the new world order?

4.2.1 The Organisation of Defence/Military

The end of the Cold War led the Thatcher government (1987/90) and the two administrations of John Major to extensively restructure their military forces. There was a reduction of these forces by nearly a third (in Germany, the Royal Navy and elsewhere) and over a fifth in defence spending from 1990 to 1998. Nevertheless, in the late 1990s Britain still had 15,000 forces in Northern Ireland and had externally established the basis for stronger military ties with Central and Eastern European countries and for a larger contribution to UN and other peacekeeping and humanitarian operations in Bosnia, Kosovo etc.³⁴ The aim was to restructure the way the military plans, prepares and executes operations in order to be rapidly deployable and flexible.

In the 1990s Britain started stressing the importance of conventional force projection and it “gave up its role in nuclear artillery, its air-launched nuclear weapons, and the Royal Navy […] has

³⁰ Military intervention is defined as the overt use of military force in another country.
³² Ibid.
³³ Baylis “Greenwoodry”.
given up any nuclear weapons role”.\textsuperscript{35} The 1998 Strategic Defence Review (SDR) articulated Britain’s nuclear posture:

“This Strategic Defence Review will result in a reduction in the size of our nuclear arsenal together with a re-affirmation of the importance of the nuclear deterrent to the country’s security. Our Trident submarines will remain on a continuous patrolling pattern but the number of warheads on each boat will be reduced to 48 from the maximum of 96 announced by the previous Government.”\textsuperscript{36}

Military expenditure had peaked in 1985/86 which was the last year of a NATO commitment to raise expenditure by 3\% per annum. By 1988 the UK commitment to NATO constituted 95\% of defence spending. During the 90s military expenditure declined sharply in real terms. Meanwhile the economy continued to grow, so that defence as a percentage of Gross Domestic Product (GDP), fell by more than one-half between 1985/86 and 2000/01.

4.2.1.1. Intergovernmental Institutions and British Military Organisation

The post Cold War strategic environment spelled out a different and far more important role for intergovernmental institutions. It seemed that purely national contingencies and interventions would be the exception rather than the rule and that military forces in the future will always be employed in conjunction with allies.\textsuperscript{37} The main change in the 1990/00s from the 1960/70s in terms of intergovernmental organisations was that there was a shift from an Atlantic to a Continental approach towards defence/security. The idea of integrating defence and security in a framework other than NATO had been brought up but never seriously pursued by Britain due to the structural constraints and British preference for the transatlantic alliance posed by the Cold War.\textsuperscript{38} This preference continued into the 1990/00s but the turning point came at the St. Malo Summit of December 1998 where the UK and France announced their intention to co-operate more extensively on military operations outside of Western Europe.\textsuperscript{39} Even more importantly, significant steps were made towards the Europeanisation of security. Nonetheless, for the Britain the St. Malo Summit did not imply a loss of sovereignty to European level institutions. Even five years later, after a European Council Meeting, held in Brussels in October 2003, Jack Straw made it clear to the House of Commons that any augmentation of EU’s defence capabilities would remain within the context of the NATO alliance.

4.2.2. The Functions of Defence/Military

The 1991 White Paper identified Britain’s defence roles in traditional Cold War ways and just trimmed down each role. ‘Instabilities in Eastern Europe’ were considered replacements for the Soviet threat. It was the 1993 White Paper (Statement on the Defence Estimates 1993) that actually attempted to redefine Britain’s defence roles into the following:

1) The defence of Britain and its dependent territories;
2) Britain’s contribution to NATO – “to insure against a major external threat to the United Kingdom and our allies”; and
3) Britain’s contribution to international peace and security, including peace-keeping.\textsuperscript{40}

\textsuperscript{35}Croft et. al “Britain”: 80-81.
\textsuperscript{37}Sabin “British”.
\textsuperscript{38}Croft et. al “British”: 52.
\textsuperscript{39}Ibid.: 63.
It is useful to look into these three all-embracing but rather vague roles in more detail. The first refers to the territorial function of the British military. It included the defence of current NATO territory and of Britain’s remaining overseas dependencies. British military involvement in the early 90s in the Persian Gulf, northern Iraq, Cambodia and the former Yugoslavia that ‘promoting the United Kingdom’s wider security interests’ cannot be easily determined. Nuclear weapons remained important in the transformed post-Cold War climate. The 1998 Strategic Defence Report emphasised that nuclear force is based on “the minimum necessary to deter any threats to our vital interests and therefore establishes continuity in the British nuclear position with enhanced flexibility on how to deploy nuclear force”. The other two defence roles are extra-territorial. The collapse of the Soviet Union spelled the end of the existence of an easily identifiable monolithic threat. During the 1990s and 2000s threats emanated from a number of nations and sub state groups, who were not merely possible aggressors against NATO territory but were also threats to other regional states, their own people, or Western citizens abroad, which the military needed to defend itself against. The last role included contributing to the promotion of Britain’s wider security interests through the maintenance of international peace and stability. This included capabilities for intervention, peace-keeping forces under international backing, inspection and implementation of arms control treaties, and military assistance and exercises with other countries.

5. France

France has always been “the great champion of European integration”. However, this position was somewhat uneven throughout time and followed varied patterns depending on changing political leadership. This applies even more to the military and defence issues where the French pursued a unique and sometimes controversial policy, oscillating between full independence and willingness to co-operate through various international security arrangements. Generally, it has been argued that the European defence project has been shaped primarily by the French vision. Therefore, this makes France an extremely interesting case to investigate when one talks about the integration in security and defence matters. From the end of the WWII France tried to take the leading role in European defence mainly in order to constrain the potential revival of German nationalism. These attempts were not very successful mostly because of the strong US presence in Europe and the wars the French Army fought in Algeria and Indochina. The situation stabilised in the 1960/70s but by the 1990/00s France did not abandon its aspirations to be a key military power.

5.1. Status Quo in the 1960/70s

Discussing French politics in the 1960s in general, and the state of affairs in the French military in particular, is virtually impossible without making reference to Gaullism. According to Philip H. Gordon, the Gaullist model for French national security is characterised by “the absolute need for independence in decision making, a refusal to accept subordination to the United States, the search for grandeur and rang, the primacy of the nation-state, and the importance of national defence”. The influence of Gaullism in defence policy remained strong throughout different presidencies and was still tangible during Chirac’s tenure. All in all, “…since 1958 and the Gaullist legacy, France had implemented the most independent and the most nationalist of military policies within the European Union (EU)” which was largely consistent with the traditional French exceptionalism.

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41 Sabin “British”.
42 Cited in Keohane “Security”: 150.
43 Sabin “British”.
45 Ibid.
The Gaullist vision of defence was codified in the 1972 *Livre blanc sur la défense national* that stated the main objectives, means and organisation of the French military.\(^\text{47}\)

### 5.1.1. The Organisation of Defence/Military

Within this period of time the role of nuclear forces was crucial for sustaining France’s position in the global world order and it was asserted through deterrence strategy. The independent nuclear force was realised at the cost of a French contribution to the European defence.\(^\text{48}\) Thus, the development of nuclear arms was given a strong priority at the expense of conventional forces that were intended “to play a part in setting up the deterrent mechanism of a soon-to-be nuclear France.”\(^\text{49}\) This development deviated significantly from NATO plans to create a conventional force in order to avoid an early resort to nuclear force. In sum, “the French were able to subordinate their conventional forces almost entirely to their own national goals.”\(^\text{50}\)

Compulsory conscription was assumed to be the most efficient way of manpower recruitment. The military expenditure was diminishing continuously over the 1960s from 7.7% of GDP in 1956 to 4.2% in 1970, which was not an indication of the unimportance of security and defence issues, but rather was determined by the need of funds for economic revival.\(^\text{51}\)

As discussed above, the overarching principle of Gaullist policy regarding security and defence matters was preserving enough room for unilateral action. Therefore, it was crucial to sustain the ascendancy of national command. For this purpose France did not take any part in integrated NATO command structures after its walkout from the organisation in 1966. A number of agreements with NATO concerning the use of the French armed forces in the European conflicts were signed but nevertheless France reserved the right to hold its forces at home.\(^\text{52}\) Formal cooperation with its European partners was also implemented through the somewhat morbid Western European Union (WEU) that appeared on the ashes of the EDC in 1954 and whose inadequacy suited French interests very well. All in all, the trend for the French military was maximum flexibility for cooperation with allies wherever such need was identified.

### 5.1.2. The Functions of Military/Defence

Following the Gaullist views the independence in the security and defence policy was vital for French national interests and hardly any signs of defence cooperation in terms of territorial defence could be discerned in the 1960s. France distanced itself from questions related to the establishment of any common European security and defence structures after two remarkably unsuccessful attempts to create a supranational defence policy in 1954 and 1962.\(^\text{53}\) Moreover, the withdrawal from the North Atlantic alliance that reached its apogee in 1966 signified the climax of France hanging onto its national sovereignty. Following the divorce with NATO, territorial defence was exercised by reliance solely upon the national armed forces.

Extraterritorial operations were mainly confined to interventions into the domestic affairs of a number of African states when friendly regimes were threatened or when former colonies faced an external threat.\(^\text{54}\) These interventions basically followed the old colonial style and were performed solely on a unilateral basis. Furthermore, they had no real significance in regards to transatlantic and continental affairs. Continental defence was the main concern of the French. As the 1972 *Livre blanc sur la défense national* stated, “[I]t would be illusory to claim to ensure the security of our


\(^{48}\) Gordon, “Certain”: 43.

\(^{49}\) Ibid.: 55.

\(^{50}\) Ibid.: 57.

\(^{51}\) Baylis “Greenwoody”: 446.

\(^{52}\) Gordon “Certain”: 74.

\(^{53}\) 1954 was the year when the French successfully buried the idea of the European Defence Community (EDC) and 1962 denotes the failure of the Fouchet Plan aimed at creation of a European political union.

\(^{54}\) Rachel Utley “Not to do less but to do better…: French military policy in Africa”, *International Affairs* 78, no. 1, (2002): 129-146.
territory without taking interest in the realities that surround it”.

At the same time, these realities were understood in a narrow sense consisting of nation-states and the French national interests in the Gaullist understanding of the state in which the nation had to be protected.

5.2. Trends in the 1990/2000s

According to Rynning, the soil for the major transformation of the French defence policy in the 1990/00s was prepared by the “exhausted atmosphere” of the Mitterrand era of the 1980s. During this period, France’s ambition was to maximise national advantage and was less concerned with integration in military and defence affairs. There have been several attempts to increase defence co-operation, most notably within the scheme of the joint Franco-German brigades. But the truly major change happened in the 1990s after the establishment of the CFSP in 1993 and ESDP in 1999 and France’s slow return to NATO. The political climate changed significantly as Jacques Chirac took the post of president. These events, as well as the change in international security environment, had a great impact on the state of the French national armed forces.

5.2.1. The Organisation of defence/military

In terms of organisation, the French defence policy in the 1990s can be characterised by two intertwining trends: on the one hand, the return to NATO, and, on the other, a willingness to cooperate with other EU member states in security and defence matters by means of building an operational ESDP. However, it should be noted that any talk about a truly supranational army was cut off at the outset. These two trends had a huge impact on the organisation of the French military, which underwent major military reforms between 1991/96.

Restructuring the national armed forces was the key feature of French military reform in the 1990s. It aimed at allowing an integrated approach to the post-Cold War world and assumed reconfiguring the army for interventions, particularly in Europe. In the 1990s, France decided to abolish conscription and opted instead for a fully professional army, which can also be explained by the emergence of new threats requiring more rapid force projection.

The emphasis of the military reform was on conventional force projection and symbolized a move away from national and nuclear priorities. At the same time, this reform “predicated quite explicitly on the imperatives of Europeanization”.

Even the renewed nuclear doctrine waspronounced in the terms of the European affairs. Therefore, Europeanisation was used as a means to legitimise military reform. As Howorth has argued, defence reform is “explicitly and repeatedly justified and presented as a response to the urgent need for ‘Europeanisation’”.

French military expenditure has been falling gradually in the 1990s and was a steady concern of those insisting on building a strong military capability for the EU. According to the SIPRI Military Expenditure Database in 1990, military spending totaled 3.5% of GDP and by 2003 this number had fallen to 2.6%. In the same fashion, the money allocated for the force de frappe fell from 30% of the overall military budget in the mid-1980s to 10% in the 1990s.

The European dimension on the one hand, and the gradual reintegration with NATO on the other dominated the new institutional thinking in the 1990s. As some observers have commented, “...the international dimension is inescapable not only because, politically, the framework for any engagement can only be multinational, but also because the overall deployment of the necessary
means, particularly airborne, is now beyond the scope of any single country.” The French military policy swerved towards the “multinational action paradigm” served by an immediately available army to participate in multinational interventions mainly in Europe. Concerning its relationships with NATO, France was propagating radical restructuring of the Alliance and was an ardent supporter of the creation of the European Security and Defence Identity (ESDI) within NATO that would mean strengthening the European pillar of the Alliance. This was fully implemented in 1996 with the signing of the Berlin plus agreements.

5.2.2. The Functions of Defence/Military

France’s return to NATO’s orbit had a crucial impact on the organization of its territorial defence. The gradual demise of the WEU, whose integration into the EU France was arduously promoting, left the ESDP and NATO as the main institutional choices for the French in the sphere of defence co-operation. Although France remained outside the integrated NATO command structures, it participated in NATO-led peace-keeping and peace-enforcement operations, which as it has been already mentioned, signifies the importance of interventions in the functions of the military.

Extra-territorial operations were mostly envisioned for the European theatre. The interventions were supposed to be performed through the multilateral defence structures: the CJTF within NATO and the ESDP. The importance of the latter was officially recognised at Saint-Malo summit in 1998 when France coupled with Britain in order to create a strong European military capability to be able to carry out the full range of Petersberg tasks. This move also meant that France believed that the new risks are shared by the EU partners: “It cannot be ruled out that, as the interests of the European nations converge, France’s conception of her vital interests will coincide with that of her neighbours.”

In sum, the military reform of the 1990s “meant that the age of ‘national deterrence’, built on the principle of national independence, served by the force de frappe, and centred on the mission of territorial defence through conscription, was on the decline”. The move from accentuating territorial defence in the 1960s to extra-territorial operations in the 1990s was another major trend during this period. Finally, if in the 1960s nuclear arms were considered the apex point of the military organisation, in the 1990s conventional forces were given a priority over nuclear weapons and the emphasis was put on the development of rapid force projection and building a strong European military capability. Rapprochement with NATO was another remarkable trend. Nevertheless, intergovernmentalism remained the overarching framework within which security and defence co-operation took place.

6. COMPARING THE TWO CASES

This section compares the French and British cases in terms of their similarities and differences. The means through which territorial and extra-territorial functions were carried out in the 1960s for Britain were solely through NATO whereas France acted unilaterally to protect itself. In the 1990/00s it can be argued that both states moved towards participation in intergovernmental security arrangements for extra-territorial operations, like in the cases of Kosovo and Bosnia in the 1990/00s. Britain moved from reliance on solely NATO to reliance on both ESDP and NATO whereas France moved from strict unilateralism to multilateralism. Therefore, the nature of the change is far more profound in France than in Britain.

In terms of military organisation, spending in Britain and France steadily declined from the 1960/70s to the 1990/00s.

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63 Boyon cited in Howorth “France”: 34.
64 Irondelle “Europeanization”: 215.
In terms of weapons, we observed a shift from the reliance upon nuclear weapons to conventional weapons, which were considered more suitable for the new security environment in the 1990/00s. In terms of military styles, conscription had been abolished in 1960s in Britain but in France it remained the main source of manpower recruitment until very end of the 1990s. Essentially, in both countries attempts were made to restructure the armies so that they would become more flexible and rapidly deployable. Therefore, the organisation of the military in France and Britain is moving along similar lines.

Both countries in their respective discourses on the role of the military moved away from narrowly defined defence policy towards a more holistic conception of security that is best dealt with as a collective endeavour.\textsuperscript{67} There was a movement towards convergence in the two countries regarding their views on security integration. Britain moved closer to the continental affairs from a purely Atlanticist position whereas France returned to the transatlantic orbit by rejoining NATO in 1990s. This movement towards convergence led to the St. Malo Declaration of December 1998, where Britain and France announced their intention to co-operate more extensively on military operations outside of Western Europe.\textsuperscript{68} Even more importantly, significant steps were made towards the Europeanisation of security. Nonetheless, the St. Malo Summit did not automatically imply a loss of sovereignty for state control over their militaries, as any potential co-operation would only be possible on the basis of intergovernmental bargaining. We summarise our findings in Table 2.

\textsuperscript{67} Howorth “France” and Croft et. al “Britain”.

\textsuperscript{68} Croft et. al “British”: 63.
Table 2: Comparing the Two Cases

<table>
<thead>
<tr>
<th>1960's/70's</th>
<th>1990's/00's</th>
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<tr>
<td><strong>Functions:</strong></td>
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<tr>
<td>Territorial (France: unilateral</td>
<td>Territorial: NATO</td>
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<tr>
<td>Britain: NATO, bilateral</td>
<td>B: NATO</td>
</tr>
<tr>
<td>Extra-territorial (France: unilateral</td>
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<td>Britain: unilateral</td>
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<tr>
<td><strong>Organizations:</strong></td>
<td></td>
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<tr>
<td>B: nuclear</td>
<td>B: conventional</td>
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<tr>
<td>Military bureaucracy: F: conception</td>
<td>Military bureaucracy: professional</td>
</tr>
<tr>
<td>B: professional</td>
<td>B: professional</td>
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<tr>
<td>Arrangements: B: NATO</td>
<td>Arrangements: B: NATO, ESDP</td>
</tr>
</tbody>
</table>

7. Explaining the Change

This section of our paper attempts to explain the sources of the change that we identified in sections 4 and 5. It is a common pitfall of many approaches in international relations (IR) to concentrate on either structures or agents for the sake of a coherent explanation consistent with a theory. We think that explaining the aforementioned changes in the British and French militaries and defence organisation and structures will be flawed if we consider only the transformations within the international system or those whose origin lies within the confines of the nation state. For this reason we propose a two-pronged explanation that will focus on both the agency and structural aspects of the change. It is clear that neither occurs independent of the other and that they mutually reinforce each other—although, for the purpose of analytic precision we will separate them into two different sub-units.

7.1. Structure

Our argument is that transformative changes in international structure had a profound impact on the state’s military functions and organisation. Indisputably, the change in the European security landscape occurring after the end of the Cold War was one of the main causes of the transformation of the military. The demise of the Soviet Union terminated the long-lasting East-West enmity and brought about a sigh of relief to the Europeans. As Barry Buzan et al. have concisely put it, “in the mid-1990s, most of the Western European states [have] face[d] little in the way of existential military threats”. Furthermore, today war among the Western European states is no longer simply unthinkable. At the same time “classical political security concerns appear but are mostly conceived for ‘Europe’ not individual states.” Given the decline of the US military presence in Europe, uniting efforts in building common defence structures becomes a sole possibility.

The 1990/00s are much more complex than the 1960/70s in terms of the number of actors in the international system (either national, international, transnational or sub-national). Also, the post-Cold War scenario is one of increasingly open borders where flows of trade, investment, people and issues can no longer be confined to national boundaries. Moreover, relevance of “classical political security concerns” has been gradually taken over by a wide range of new problems for which ad hoc based co-operation is no longer sufficient. Though European interstate

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wars no longer pose a threat to OECD states, there are three new types of threats that Europe particularly faces.\textsuperscript{72}

1. **Transnational terrorism.** Rapid development of mass communication technologies and the opening of the borders within Europe allow terrorists to move freely and transfer dangerous ideas and technologies easily and quickly. Furthermore, potential access of terrorists to weapons of mass destruction significantly increases the insecurity of states. In this case, states are faced with the possibility of large scale destruction by a small radical group like Al Qaeda. The terrorist attacks in Madrid and London exemplify the enormous magnitude of transnational terrorism and its disastrous effect for the internal stability of states. An adequate military response should take into account the emergence of a new transnational space where terrorism thrives. In order to be effective, any response to this threat would require collaborative effort of the states concerned.

2. **The proliferation of Weapons of Mass Destruction (WMD).** Despite increased international treaty regimes regulating WMD, these remain a real threat and lead to the possibility of an arms race in the proximate European neighbourhood. Even worse, the potential for terrorist outfits to acquire such weapons increases with proliferation.

3. **Failed states and organised crime.** Such states become host to criminal elements who seek to profit from the weakness of the state. Such a scenario leads to illegal influxes of refugees and drugs into Europe through the Balkans, Central Asia and Eastern Europe.\textsuperscript{73} The destabilizing effects of this problem have been already experienced by Europeans following the crises in Bosnia and Kosovo.

4. “Taking these different elements together – terrorism committed to maximum violence, the availability of weapons of mass destruction and the failure of state systems – we could be confronted with a very radical threat indeed.”\textsuperscript{74}

These new structural changes in the nature of war and conflict itself have profound implications for national policies and international institutions. Countries now require completely different methods to protect themselves against the new emerging threats and effective crisis management policy that is the purpose of Petersberg tasks enshrined in the ESDP. The effectiveness of responses to these new threats depends to a large extent on cohesiveness among the EU member states in pursuing a common security and defence policy. The intensive attempts to declare the ESDP operational are evidence that such need is understood by national elites. The ESDP is, thus, the mechanism envisaged to deal with new threats. At the same time, the intergovernmental nature of the second pillar is unlikely to change in the near future as Member States are obstinately hanging onto their national sovereignty in all questions pertaining to the ‘high politics.’\textsuperscript{75} This dynamic does not allow the EU to supersede the state’s control over its military. Moreover, the readiness of both France and Britain to resort to unilateralistic measures over vital questions, such as establishment of the Contact group to handle the Balkan crisis in 1996, exemplifies the narrow scope of co-operation in security and defence areas and the supremacy of national interests. The latter are sustained through the state’s monopoly over its armed forces.\textsuperscript{76}

Nevertheless, NATO remains fully responsible for territorial defence. Moreover, NATO with its CJTF is now capable of leading “out-of-area” operations that correspond to the extra-territorial

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\textsuperscript{73} Solana “Secure”.

\textsuperscript{74}Ibid.: 6.


function of the military. The nascent ESDP can be seen rather as a complementary mechanism to NATO as it is supposed to carry out operations where the Alliance is not engaged.

In a nutshell, common threats require common reactions; ESDP is the new mechanism designed to supplement NATO, although NATO continues to be the dominant security and defence arrangement encompassing both territorial and extra-territorial (“out-of-area”) functions. Furthermore, despite a changing international structure and the changing nature of threats faced by states, the mechanisms employed are entirely intergovernmental, securing the possibility of unilateral action.

7. 2. Agency

By agency we mean changes within the nation-state and their impact on the military functions and organisation. According to Theo Farrell and Terry Terriff the sources of military change are best conceptualised along the lines of culture, technology and politics.77 Seen from the nation state perspective this model implies the preponderance of national military culture, the state’s level of technological advancement and significance of domestic political discourse. The term culture in the context of this study primarily refers the organisation of the national military bureaucracy.78 By political discourse we mean a broad spectrum of ideational factors influencing decision-making. The influence of these three factors on the state’s monopoly over its military will be examined in this section.

1. Technology.79 In terms of technological development, Western militaries—and France and Britain are not an exception here—are concurrently going both high-tech and low-tech. States are becoming low-tech by giving priority to conventional weaponry in order to fight the new intra-state conflicts and high-tech in order to deal with threats emanating from revolutionary changes in the sphere of information and communication.80 Here the impact of technology on the organisation of the military is quite straightforward. Due to this fact, some observers predict a growing influence of technologists and technocrats over the military. Contrary to this view of technocratic control is the argument that in order for a technological innovation to be implemented in the military sphere there must be a strong interest in it among the powerful military bureaucracy.

2. Organisational Culture. It is a widely shared notion that military organisations like any other large organisations, tend to resist change.81 Although, the preference of the military for tested strategies and structures is well known, the institutional adjustment of military bureaucracy to the realities of a more Europeanised domestic policy and the revolution in information and communication technologies is certainly needed. This adjustment is sought in the framework of multilateral defence structures, as pursuing unilateral interventions is getting more costly for states, not to mention the fact that unilateral action often lacks necessary legitimacy. In addition, the demand for more rapidity and deployability of forces makes it a favourable option to search for adequate measures within the EU and NATO frameworks without changing radically the structure of national armed forces. The solution is to be found in the ERRF and CJTF, whose intergovernmental mode of action and reliance upon the already existent defence structures82 permits a case-by-case approach that ensures primacy of national interests regarding questions of vital importance. In other words, the participation in multilateral defence arrangements opens a

77 Theo Farrell and Terry Terriff, eds., The Sources of Military Change: Culture, Politics, Technology (Boulder CO: Lynne Rienner, 2002).
78 For an excellent example of how national strategic culture shapes the state’s policies see Elisabeth Kier, Imagining War: French and British Military Doctrine between the Wars, (New Jersey: Princeton University Press, 1997).
79 We include technology in the agency aspect because in the military field, the state possesses the full control over technological innovations.
80 Farrell and Terriff “Sources”, p. 3.
81 Ibid: 265.
82 The ERRF is made operational largely through the NATO assets.
window of opportunity for the national militaries. As Jeffrey Legro has noted, “the beliefs and customs embedded in national bureaucracies can determine national aims”. 83

3. Political Discourse. The Europeanisation discourse has been defining the debates about the role of the military throughout the 1990/00s as means to legitimise military reform in Britain and France. The emergence of epistemic communities (i.e. military experts and technocrats) with strong Europeanist inclinations on both sides of the Channel was also a defining feature of national political discourse on the military. One of the reasons behind the Saint-Malo declaration of 1998 is this new political discourse. “‘European autonomy’ would underpin the ‘vitality of a modernised Atlantic Alliance’”. 84 Thus, the word ‘autonomy’ mentioned in this declaration represents a new reality for the European security order.

After examining the main changes within both structure and agency it is important to state and recapitulate that the two are mutually interlinked and reinforce each other. For instance, the pressures emanating from the international system require finding effective tools to deal with them in cases where unilateral action would be ineffective. These tools are found within the framework of the ESDP and existent NATO structures. Moreover, the national political discourse, the organisational culture of the military and technology are all significantly affected by the changes in the security environment.

8. CONCLUSION: WHAT’S AT STAKE FOR THE STATE?

We looked at the state of the military in the context of increasing defence co-operation and identified similar trends in both France and the UK. Then we proceeded with explaining those trends in terms of structural and agential characteristics. Now the question arises; what significance do these changes and trends have for the state and its monopoly on the use of force? Has there been a transformation of the legitimate use of force from the domestic level to multilateral defence structures? It is important to distinguish between ‘transformative’ change and mere change. Zurn and Leibfried argue that transformative change has three distinct characteristics: first, it reflects the changing nature of the state and not that of a particular policy; second, it should encompass the entire OECD world, or at least be widely observed; and third, the change should result in the transformation of the nation-state as a whole. 85 Using the measurement applied by Zurn and Leibfried we would argue that the changes in the military experienced by Britain and France denote mere change and not a transformative one. First, the change has occurred only in defence policy and not in the nature of the state as it seeks solely intergovernmental as oppose to supranational solutions. Second, the focus of our study does not allow us to generalise to the whole OECD world, and if similarities can possibly be discerned in the EU it is not necessarily the case that they will hold for other OECD countries. Similarly, we cannot argue that the change we identified will transform the national constellation as a whole because the state retains the monopoly over the military. Our central argument was that the change in the constellation of power within the international system in the 1990s necessitates new responses that need to be efficient but at the same time not undermine the autonomy of the state. This has been achieved through an intergovernmentalist approach towards defence co-operation.


REFERENCES


## APPENDIX

### British Military Interventions 1949-1970

<table>
<thead>
<tr>
<th>Country</th>
<th>Date Began</th>
<th>Date Ended</th>
<th>Date Began</th>
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<tr>
<td>16. Singapore</td>
<td>10-27-56</td>
<td>11-1-56</td>
<td>27. Tanganyika</td>
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<td>11. Egypt</td>
<td>11-9-56</td>
<td>11-16-56</td>
<td>28. Uganda</td>
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<td>12. Malawi and Tanzania</td>
<td>7-33-57</td>
<td>8-17-57</td>
<td>29. British Guiana</td>
<td>5-25-64</td>
</tr>
<tr>
<td>14. Malta</td>
<td>4-16-58</td>
<td>5-1-58</td>
<td>31. Hong Kong</td>
<td>6-30-67</td>
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<tr>
<td>17. Zanzibar</td>
<td>6-9-61</td>
<td>6-20-62</td>
<td>34. Leeward Islands</td>
<td>3-19-69</td>
</tr>
</tbody>
</table>

* The intervention involved three incidents: 1) British troops firing across the border (8-31-63); 2) the RAF bombing a Yemeni fort (3-29-64); and 3) British artillery shelling across the border (4-23-67). Since all three stemmed from ongoing action in Aden, they are counted as one intervention.

**Source:** Wingen, J. V. and H. K. Tillema (1980)
HUMAN CAPITAL INVESTMENT AS A REALIST FOREIGN POLICY

Daniel Swift ‡

Abstract

Policy-makers and theorists have yet to develop an accurate means to predict differential rates of state power growth over time. Early frameworks, starting with Robert Gilpin in 1981, relied on traditional power metrics, such as military and economic might, to predict power convergence over time. These models, however, failed to account for reality and were inconsistent with newer, widely-accepted notions of economic growth. Human capital-based models, in contrast, not only provide more informed and accurate predictions than neoclassical models; they yield valuable insights into the technology and weapons innovation process, military resource allocation decisions, and strategic incentives. These newer models place rates of human capital investment at the heart of cross-country income and technological inequality. As the distribution of power ultimately rests on an economic and technological base, states interested in maximizing their share of military power should, ironically, pay close attention to their domestic health and education levels.

Keywords: human capital; foreign policy; and education

1. SYSTEMIC CHANGE AND DIFFERENTIAL RATES OF POWER GROWTH

Students of international relations (IR) define international political systems according to the number of their great powers, just as economists distinguish markets by the number of major firms competing. Therefore, the structure of any international political system necessarily changes with shifts in the distribution of power among major states. In every international system there are continual occurrences of political, economic, and technological change that promise relative power gains and losses among major powers. Thus, “a process of disequilibrium and adjustment is constantly taking place”.1 After all, without relative shifts in the power balance, the world political system would remain indefinitely in equilibrium, and states would neither rise nor fall in comparison to one another. States, however, inevitably experience differential rates of power growth, and according to realist IR theory, this causes a “fundamental redistribution of power in the system” via armed conflict.2

In a realist world, leaders are assumed to be bent on maximizing their level of relative power; they are players in the so-called “zero sum” game. Yet the best means to evaluate and maximize one’s own power in relation to others seems unclear. In fact, no one, IR theorists included, has been able to establish a clear and accurate method to predict differential power growth – we only know

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2 Ibid.
that such shifts are inevitable. I believe that our predictive shortcomings are the result of outdated and ambiguous measurement tools.³ Whereas economists can simply look to marginal price changes to determine changes in market structure, world leaders have no clear metric to mark and predict power changes in today’s technology intensive, nuclear deterrence world. Traditional power measures, such as gross domestic product (GDP), conventional military size, and population do not translate cleanly into power and are not predictive of future levels of power.⁴ Thus, traditional measures tell us little about pending changes in the distribution of power across states. In working toward overcoming this impasse, I will turn to basic principles of human capital theory to formulate new power metrics, which will allow policy-makers to better predict and manage future structural shifts.⁵

2. Predicting Structural Change

My theory relies on easily quantifiable measures of human capital investment, which are determinant of future GDP levels, population figures, organizational efficiency, and, most importantly, future rates of technological innovation. Extensive economic evidence suggests that human capital is the most significant determinant of future economic growth and technological capability.⁶ Since economic wealth and technology are the foundations of traditional power, relative rates of human capital investment should reliably predict shifts in the hierarchy of states.⁷

To bolster this important point I will illustrate the synergy between technology, economic growth, and human capital formulation, as described by human capital theorists. One major insight of this school, pioneered by Gary Becker, is that inter-generational investments in human capital are not subject to diminishing marginal returns. In other words, rates of return on investments in human capital rise rather than decline as the stock of human capital increases.⁸ In the study of strategy, a failure to “keep-up” with the economic growth literature results in a narrow reliance on neoclassical notions of power, which only consider traditional factor inputs – land, labour, capital, and sometimes technology; but not human capital nor industrial organization. Neoclassical models predict power convergence between rich and poor countries because of diminishing marginal returns (DMR) to reproducible capital.⁹ The core DMR prediction of the neoclassical growth models is not only inconsistent with empirical reality; it has been exposed as theoretically flawed.¹⁰ Yet the causal logic of one of the core IR studies relies on the neoclassical notion of diminishing marginal returns as a source of differential power growth among states: namely, Robert Gilpin’s War and Change in World Politics.

After establishing that human capital is the most important determinant of future wealth, I will develop a model that examines the effect of human capital accumulation on military resource allocation and behaviour, especially the incentive and ability to invest in military technology.¹¹

³ This predictive failure is most clearly demonstrated by the sudden and unforeseen end of the Cold War. Professor Robert Pape, in an unpublished paper entitled “Major Power Declines: Why Some end Peacefully,” October 2001, states the end of the Cold War “did not appear to fit with our standard theories explaining conflict and cooperation in international politics.” Drawing on recently uncovered Soviet documents, Pape claims that the peaceful fall of the Soviet Union was precipitated by the apparent gap in technological capabilities between the USSR and the U.S., especially in microelectronics.

⁴ I assume that traditional power measures, such as GDP and conventional military strength, are dependant on economic wealth. Moreover, cross-country income levels in time t have no significant relationship to income levels in time period t + 1. Barrow, Robert. “Economic Growth in a Cross Section of Countries.” Quarterly Journal of Economics 106 (1991): 409.

⁵ It is worth noting that Waltz and Gilpin’s original theories are deeply rooted in microeconomic principles, and thus the field of IR has easily incorporated economic “imports” before.


⁷ Gilpin.

⁸ Becker 1993.

⁹ Barrow.

¹⁰ Ibid.

¹¹ Becker 1993; Barrow.
Evidence indicates that technological breakthroughs are not random, as Gilpin suggests, but are rather a function of sustained investments in human capital. Human capital is not only the foremost input for technology production; it is also a necessary characteristic for the adoption of pre-existing technology.\(^\text{12}\) By increasing the marginal productivity of technology investments and increasing wage rates, I posit that human capital accumulation creates a strong incentive for militaries to substitute away from labour and toward technology. This strong substitution effect, along with a simple income effect, means that high human capital countries will experience increasing returns to technological investment, causing a divergent trend in technological capabilities across national militaries.

The model’s divergence conclusion is consistent with the recursive nature of human capital theory. For instance, on a micro-level, poorer parents face capital constraints and a limited ability to invest in their children’s human capital. The children of poorer parents, in turn, face a low incentive to invest in their own human capital, as they begin life with relatively little education. Many factors, including health decisions, drive the vicious or virtuous cycles that are the root cause of cross-family and cross-country inequality. This is not to say convergence cannot happen. However, convergence only occurs when a country’s human capital investments far exceed those generally associated with a country at a similar per capita income level.\(^\text{13}\)

While human capital theory is socio-economic at its core, it yields analysis that has serious implications for international and domestic policy-makers. The trade-offs implicit in the human capital development process imply that excessive military consumption can displace investments in a nation’s future ability to project power. In particular, America’s striking military outlays for Operation Iraqi Freedom (OIF) – conservatively estimated at $300 billion to $700 billion when compared to a continued policy of containment – combined with intensive Chinese human capital investment, is causing an unstable brand of power convergence.\(^\text{14}\) During the Cold War, in contrast, the U.S. was able to balance resource decisions relatively well. While the Soviets engaged in excessive military consumption, America invested in its people’s health and education and reaped the benefits. As China and India have learned from America’s rise, America should learn from Russia’s fall. The spread of nuclear weapons and the rise of the information economy have made technology more crucial, and thus education and health are necessarily more important. Policy-makers interested in predicting and avoiding dangerous periods of convergence in the international system should pay close attention to domestic health and education investment levels.

2.1. Traditional Vs. Human Capital Metrics of Power

As mentioned, predicting changes in state power is essential to those engaged international policy formulation. Ideally, we would want a set of predictive tools which captures and tracks the roots of power by: (1) helping us forecast future economic growth; and (2) allowing us to assess relative growth in technological capabilities. Against these criteria, I will evaluate predictive models based on traditional measures of power versus human capital-based models.

2.1.1. Traditional Power Metrics

In measuring the relative power of states, IR theorists commonly rely on traditional power metrics: GDP, population, conventional military strength, and technological sophistication. For instance, Robert Gilpin notes: “the concept of power is one of the most troublesome in the field of international relations...power refers simply to the military, economic, and technological capabilities of the states.”\(^\text{15}\) What can traditional power measures predict about our first criteria, or relative rates of future economic growth and decline? To answer this question, I turn again to Robert Gilpin’s “War and Change in International Politics.” In his seminal book, Gilpin seeks to

\(^\text{12}\) Eicher.
\(^\text{13}\) Barrow.
\(^\text{15}\) Gilpin, 13.
explain changes in the international system through the differential growth of power across states. For Gilpin, the differential growth of power among states alters the cost-benefit calculations of states seeking to change the structure of the international system to their advantage, causing a disjuncture between prestige and actual power. Gilpin grimly predicts that “although resolution of a crisis through peaceful adjustment of the systemic disequilibrium is possible, the principle mechanism of change throughout history has been war.”

In Gilpin’s theory, future power levels are determined by differential rates of economic growth. For Gilpin, “the distribution of power itself ultimately rests on an economic base, and as sources and foundations of wealth change...a corresponding redistribution of power among groups and states necessarily occurs.” The neoclassical notion of diminishing marginal returns causes much of the differential economic and power growth portrayed in his theory. The law of diminishing marginal returns (DMR), as formulated by neoclassical economists, states the following:

An increase in some inputs relative to other fixed inputs will, in a given state of technology, cause total output to increase; but after a point the extra output resulting from the same additions of extra inputs is likely to become less and less. This falling off of extra returns is a consequence of the fact that the new “doses” of the varying resources have less and less of the fixed resources to work with.

Gilpin asserts that three general conclusions follow as a consequence of the law of DMR. First, as factor inputs are increased or added to another constant factor, the economic growth and power of a country will increase rapidly. Second, in the absence of technological innovation or increased factor input, output will increase at a decreasing rate or stagnate. Third, and most importantly, the economic growth of a country will follow an “S” curve. In other words, initially the society will grow slowly, and then it grows at an accelerated rate until it reaches a maximum rate of growth; thereafter, growth takes place at a decreasing rate. Gilpin predicts that in most cases a slowing growth rate is a prelude to an absolute decrease in the rate of economic growth, and therefore a prelude to the eventual economic and political decline of the society.

In Gilpin’s view of differential power growth, which was consistent with the neoclassical growth models of the time, a country should not be able to maintain a leading position in the system because DMRs will make hegemony more and more difficult to maintain over time. Thus, the hegemonic power is left with three options in the face of inevitable declining power: (1) either conquer more territory, bringing more land and potentially labour into the production process; (2) innovate at a pace that outstrips the diffusion of technology; or (3) expand economically.

In Gilpin’s theory, all three of these choices eventually create the same endpoint: a relative decline in the hegemony’s power and systemic adjustment. For Gilpin, this prediction neatly explains the rise and fall of empires over the course of human history.

When we subject Gilpin’s notion of DMR returns to more modern economic theory and evidence, however, we start to see major flaws in his reasoning. Principally, the hypothesis that poor countries grow faster, on average, than rich countries – the convergence prediction – seems to be inconsistent with the cross-country evidence, which indicates that per capita growth rates have little correlation with initial levels of per capita product. For instance, Robert Barrow’s famous cross-country analysis of economic growth for 98 countries between 1960 and 1985 demonstrates that the average growth rate of per capita real gross domestic product from 1960 to 1985 is not significantly related to the 1960 value of real per capita GDP.

In his book, however, Gilpin does consider the effect of technology in his DMR argument, which has increased at a growing rate over the relevant time period. Thus Gilpin’s theory can

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16 Gilpin, 15.
17 Ibid, 67.
19 Gilpin.
20 Ibid.
21 Ibid.
22 Barrow.
logically accommodate a system in a prolonged state of equilibrium: technology develops and spreads so quickly that all states maintain a steady rate of return on factor inputs. The seamless spread and adoption of technology, however, is a brave assumption, especially given the disparities in education levels across countries. Further, Gilpin provides no predictive framework or process in which to consider technology’s impact. Gilpin addresses technological innovation through the lenses of Marxism and the “new economic history,” and finds no adequate means to account for it. In other words, due to a lack of sufficient theory at the time, he is forced to treat technological innovation as random or exogenous, which gives us little foresight as to tomorrow’s differential rates of technological development.

3. HUMAN CAPITAL MEASURES OF POWER

3.1. Definition

Human capital is the knowledge, skills, and health of people. The term “human capital” derives from the idea that expenditures on education, training, medical care, etc. are investments in capital. These investments share some similarities with traditional physical capital investments. For instance, human capital investments are subject to depreciation – human capital investments require maintenance and continuing investment (similar to learning and maintaining a foreign language). However, investments in education and health produce human, not physical or financial, capital because you cannot separate a person from his or her knowledge, skills, or health the way it is possible to move financial and physical assets while the owner stays put. Thus, human capital is not redeemable – it cannot be used as collateral. Also, human capital is latent. We cannot directly observe human capital. Yet we can observe it indirectly in wages (productivity), education levels, and health. Finally, human capital is unique in that the organizations that produce the educational aspect of human capital are not profit maximizing: families, universities (for the most part), and public schools.

In an effort to keep complexity to a minimum, I will focus primarily on the educational aspects of human capital. However, some health aspects will be included in the modelling process. Thus, for the purposes of this paper, human capital is a function of education (EDU) and Health (HL) – measured only in quantity of years.

Human Capital (H) = y (EDU, HL)

3.2. Human Capital as the Root of Current Power: Causing Economic Growth via Technology

As mentioned, neoclassical economists have had no trouble explaining why, throughout history, so few countries have experienced sustained, persistent per capita economic growth. After all, if per capita economic growth is caused by the growth of land, labour, or capital, diminishing returns from additional factor inputs eventually eliminate future growth – much like what was outlined by Gilpin. The real puzzle, therefore, is not the lack of growth, but the fact that the U.S., Europe, and many Asian countries have had sustained exponential growth during the past one-hundred years. In turn, these select countries have utilized that economic growth to build powerful, large, and technologically sophisticated militaries, through which they project power.

24 See Appendix, Table 2: Labour Force with Tertiary Education (as a % of the total), Table 3: Adult Illiteracy Rate in 2000, and Table 4: Cross-Country Illiteracy Rates Over Time.
25 Gilpin.
28 The fact that human capital can not be used as collateral has significant consequences. Because there is no collateral – unless courts are willing to enforce indentured servitude or slavery contracts – human capital investments will be subject to imperfect capital markets. This makes it very hard for poorer families, as they will be forced to self-finance. Rich families, in contrast, will face no capital constraints.
29 Ibid.
30 In human capital theory, the effects of health investments reinforce and complement the education effects. Thus, the theory does not “turn on” health aspects and I choose to omit them for simplicity.
Most growth analysts – including Gilpin – suspect that the answer to our puzzle lies in the accelerating rate of technological innovation among western nations, which raises the productivity of other factor inputs. Indeed, the rate of innovation has been staggering. Consider that in 1905 the first mechanized flying machine covered an aerial distance of only a few meters. Sixty years later, a man walked on the moon and one billion people watched it happen on television.

Figure 1\textsuperscript{33} The Effects of Technology on World Population

![Figure 1: The Effects of Technology on World Population]

Human capital theorists agree, in part, with the assertion that technology causes growth. Human capital theorists also argue, however, that the application of scientific knowledge to the production of goods has greatly increased the value of education, technical schooling, and on-the-job training as the growth of knowledge has become embodied in people – in scientists, technicians, managers, and other contributors to output.\textsuperscript{34} Empirically, in all countries that have maintained persistent economic growth, we witness large increases in education levels and improvements to health, as measured by life quality and quantity. Table 5 in the appendix uses panel data for every country from 1950 to 2000, with fixed effects and time fixed effects, to demonstrate the robustness of the correlation between per capita GDP and nine human capital variables.\textsuperscript{35} But which way is the causation running? Does education cause technological growth, which in turn causes growth? Or, is education simply a secondary effect of wealth, and not a cause? The answer to these various questions, as I will show, is that human capital, technology, and economic growth are synergistically linked.

We should certainly be sceptical of claims that education is unrelated to technological innovation, and thus growth. After all, education is the largest input into organizations that produce technology. Universities run on brain power, not physical capital. Second, technology must be widely adopted to create substantial gains in per capital income. Education is essential to the rapid introduction of new goods and the widespread adoption of technology. The so-called “absorption effect” is widely credited for allowing inverse movements in the relative wage and supply of skilled labour in response to bursts of technological change.\textsuperscript{36} Education is also helpful in coping with changing technologies and advancing productivity in the manufacturing and service

\textsuperscript{32} See Figure 1

\textsuperscript{33} This graph is taken from Robert W. Fogel’s article “Catching Up With the Economy,” American Economic Review 89 (March 1999): 2-3.

\textsuperscript{34} Becker 1993.

\textsuperscript{35} See Appendix, Table 5: Per Capita GDP and Human Capital.

\textsuperscript{36} Eicher.
sectors. Therefore, it is difficult to presuppose a uniform, wide-spread adoption of new technologies across states – as is needed by Gilpin to account for the lack of income convergence – as states have vastly different absorption capabilities.37

Compelling evidence of the link between human capital and technology also comes from agriculture. Education is of little use in traditional agriculture because farming methods are easily passed down from parents to children. Farmers in developing countries are among the lowest skilled members of the labour force.38 By contrast, modern farmers must utilize hybrid seeds, breeding methods, chemical-based fertilizers, complicated equipment, and intricate futures markets for commodities.39 Education is of great value because it helps farmers adapt more quickly to changing technological conditions. Therefore, it is no surprise that farmers are about as well educated as industrial workers in a modern economy.

The claim that human capital is the cause of growth and technology is well established in the economic growth literature.40 Economists have developed methods to break the simultaneous causation puzzle of education, human capital, and technology. For example, one study finds that the increase in schooling of the average worker between 1929 and 1985 accounts for about one-fourth of the rise in per capita GDP for that period, controlling for the effects of wealth.41 Keep in mind that this number does not consider the effects of health, on-the-job training, and other kinds of human capital.42

Since human capital is embodied knowledge and skills, and economic advancement depends on advances in technological and scientific knowledge, economic and technological development presumably depends on the accumulation of human capital.43 Tables 6 and 7 in the appendix examine the relative and absolute intensity of high tech experts for all countries from 1950 to 2000. Controlling for wealth, commercial energy production, fixed, and time fixed effects; countries that export more high technology goods (both as absolute value and as a % of exports) have higher per capita health spending, larger tertiary enrolment levels (as a % of gross), and a more highly educated labour force. Moreover, as we model human capital investment, we discover that initial levels of human capital are highly predictive of future human capital levels. Therefore, human capital levels are predictive of economic and technological advancement.

4. Predicting Structural Change with Human Capital Variables

4.1. Model Assumptions

While neoclassical economists and IR theorists, such as Robert Gilpin, predict convergence (in the absence of technological advancement), human capital theorists predict very different patterns of growth. Introducing human capital as a factor input allows us to introduce the concept of increasing marginal returns. The reasoning behind this assumption is that education and other sectors that produce human capital use educated and other skilled inputs more intensively than sectors that produce consumption goods and physical capital.44 The assumption of a rising rate of return on education is not unique to economists. There is a similar assumption in the education literature, which maintains that learning of complicated mathematics and other advanced materials is more efficient when the building blocks of elementary education are firmly in place.45

37 See Appendix: Tables 2,3, and 4.
38 Becker 1993.
39 Ibid.
42 The effects of health are well documented by University of Chicago professor Robert Fogel, who notes that dramatic health improvements over the past 100 years have allowed humans to dramatically increase body size, life expectancy, and vital organ function to the point that we are physiologically distinct from other generations of Homo sapiens.
43 Becker 1993.
45 Ibid.
The inter-generational approach also relies on assumptions about fertility rates and population demographics. Namely, higher fertility rates in the current generation "increase the discount on per capita future consumption in the inter-temporal utility functions that guide consumption and other decisions."\(^{46}\)

\[ V_p = u(c) + a(n) V_{n+1}, \text{ where } c = \text{ parental consumption, } n = \text{ number of children, } a = \text{ discount rate} \]

This assumption means that high fertility rates discourage investment in human capital by increasing the discount rate of investment in children relative to consumption - a result backed by very robust empirical results.\(^{47}\) Conversely, high human capital stocks reduce the demand for children because time is the largest input in caring for and producing children, and time is expensive for high human capital individuals.\(^{48}\) Hence in developed countries, the shadow price of children overwhelms the income effect associated with an increase in income for a normal good (children) - even when strict separability in the utility function is assumed. Thus, in a country such as Somalia, where child mortality is very high, a parent faces a low shadow price of children; due to low returns for investment in human capital and a relatively high wage for child labour. In a modern economy the probability of death is very low, and the value of human capital investments to the child is very high and increasing. Thus, increasing human capital levels creates the incentive to make a shift from quantity to quality of children. This effect explains why poorer people, across and within countries, tend to have more children. The quantity / quality trade-off, along with the assumption of increasing returns to human capital investment, reinforces a two steady state conclusion: a high fertility, low human capital society that is stagnating; and a low fertility and high human capital society that is growing. Thus initial levels of human capital, technology, and subsequent productivity shocks, determines whether a country grows or stagnates.

5. A Model of Human Capital

To further demonstrate why human capital is the root of differential power growth, I will quickly present a family-based microeconomic model. The model examines investments in children. It will neatly and quickly illustrate the recursive properties of human capital investments, and how these virtuous and vicious cycles are the cause of cross-country and cross-family income inequality.

5.1 The Family Model\(^ {49}\)

Taking the assumptions above, the simple formulation is:

\[ V_t = U(C_p) + aU(Y_c) \]

- Utility function faced by parents, \( C_p \) is parental consumption, \( Y_c \) is parental investments in the child, and \( (a) \) is a discount rate

Subject to budget constraint

\[ W_p = C_p + Y_c \]

- Budget constraint, parents can only spend on consumption or invest in their children

\[ H_c = f(Y_c, H_p, A_p) \]

- The child’s human capital is some function of parental investment, parental human capital, and ability - with a degree of inheritability greater than zero but less than one.

\(^{46}\) Ibid.  
\(^{47}\) Barrow; See Table 5 in Appendix.  
\(^{49}\) Becker 1991.
\[ W_p = (H_p) \]

- Parent’s wealth is a function of their human capital. This assumption is based on a robust empirical base, as the correlation between education and income is one of the strongest in the social sciences (Becker 1993).\(^{50}\)

With: \( U' > 0, U'' < 0, \) and \( a' < 0 \)

Although the model can be easily adapted to include many aspects, I chose to utilize the simplest possible formulation to demonstrate the recursive effects on human capital: a one parent, one child, and a two period model. To adopt the model to cross-country evaluations, simply use the average variable value for each country and the effects will hold.

Without formally deriving a single variable we can witness an income effect in the budget constraint, whereby rich parents will spend more on both consumption \((c)\) and investments in children \((Y_c)\). The fact that human capital cannot be used as collateral strengthens this effect. Because human capital cannot be used as collateral against a loan – unless courts are willing to enforce indentured servitude or slavery contracts – capital markets will be inefficient, forcing poor families to internally finance. Rich families, in contrast, will be able to invest in their children to the point where the marginal returns to capital equal the marginal returns to human capital investment. Thus, if we assume that poor parents are as good at investing their children as rich parents; imperfect capital markets mean that the children of richer parents still receive more human capital investment, even though the children of poorer parents have a higher marginal return.

Evidence suggests, however, that high human capital parents are more able investors in their children’s human capital. In simple Markov form: \( H_c = \alpha + IH_p + \epsilon \), where \( H_c \) = child’s human capital, \( H_p \) = parent’s human capital, \( I \) = ability of investor (if \( 1 < I < 0 \), then high human capital parents are better investors), and \( \epsilon \) = luck.\(^{51}\) Further, if we incorporate the child’s ability, the children of high human capital parents become even more productive investments. It makes no difference to us whether ability is genetically transmitted or learned. To arrive at this conclusion we only need to assume the following: (1) on average, the children of high ability parents will be more able than the children of less able parents; and (2) that more able children will pursue more education. In simple Markov form: \( A_c = \alpha + hA_p + \epsilon \), where \( A_c \) = child’s ability, \( h \) = degree of inheritability (if \( 1 < h < 0 \), then high ability parents are more likely to have high ability children). Now, the degree of inequality among families is a function of the investment skill of the parent \((I)\), the degree of inheritability \((h)\), and the willingness of poorer families to reduce current consumption in order to internally finance human capital investments. Hence, the theory makes two fundamental predictions: (1) an income effect where richer parents, unconstrained by capital markets, will invest more in their children’s human capital; (2) a substitution effect whereby the children of richer parents will be more productive investments, meaning that richer parents not only invest more absolute resources in their children, they invest more relative resources.\(^{52}\)

Another feature of human capital investments is that investments in a single child are subject to diminishing marginal returns. After all, the learning of an individual child is limited by the finite nature of time – only 24 hours in the day. Recursive inter-generational human capital investments, however, are not subject to DMR. If we expand this model from two to three periods, we see that there is no DMR on the ability to create knowledge – this rests on the assumptions made above about the nature of learning and the factor inputs of knowledge. For instance, a few years ago, as part of a college-wide activity, undergraduates at the University of Chicago designed a nuclear reactor from scratch without faculty assistance. Fifty years ago, the same activity at the same university required the brightest minds in the world and the resources of the Manhattan Project.

When we expand the model beyond two time periods, we also see how cross-family inequalities are reinforced over time. As children mature into adulthood, they face decisions about continued investments in human capital. Extensive evidence suggests that high human capital

\(^{50}\) See cross-country evidence in this paper.

\(^{51}\) Becker, 1991

\(^{52}\) Ibid.
people (or nations) will have a greater incentive to invest in human capital into adulthood because of increasing returns to human capital investment. For instance, the child of rich parents with an elite private school education is much better equipped than a poor child from Chicago’s South Side to pursue a graduate education. In fact, this inequality magnifies if we bring our ability and parental investment variables back into the analysis. Remember that initial human capital levels are determined by our parents’ investment choices. Thus, poor people and countries face a double disadvantage: namely, decisions to invest in human capital later in life will depend upon their parent’s investment decisions.

When we integrate the models into a three period formulation we get a formal expression of the “double disadvantage” conclusion:

\[ V_t = U(C_p) + aU(W_c) \]

Subject to budget constraint

\[ W_p = C_p + Y_c \]
\[ W_c = rH_c \]

\[ H_1 = f(Y_c, H_p), \quad \text{Childhood: human capital depends on parents’ investment decisions and parents’ ability to invest in their children's human capital, which is a function of parents' human capital levels} \]

\[ H_2 = f(H_1, Y_2), \quad \text{Early Adult: human capital depends on human capital levels in childhood and self investments in early adulthood, which are dependent on childhood investments} \]

\[ H_3 = rH_2, \quad \text{Later Adult: human capital depends on human capital levels in the early adult period and } r, \text{ which is the rental price of capital} \]

These strong recursive effects explain patterns of economic growth over the past 150 years better than the neoclassical models. For instance, Barro’s cross-country economic growth study found that for a given starting value of per capita GDP, a country’s subsequent growth rate is positively related to measures of initial human capital. At first glance, the model seems to predict that the rich countries will get richer, while the poor get poorer or grow more slowly. Yet, if this is true, how do we explain the dramatic growth of countries like China and India? Over the past 15 years, they have grown rapidly from low levels of initial human capital. Barro goes on to explain that: “given the human capital variables, subsequent growth is substantially negatively related to the initial levels of per capita income.” Thus, for China and India, their growth can be explained by the fact that their human capital levels far exceed those generally associated with a country at a similar per capita income level.

While current GDP levels, military strength, and technological development, tell us nothing about tomorrow; human capital investment levels are a sound predictor of economic and technological growth. Yet human capital is latent. How do we observe and measure human capital? Economists usually look at fertility rates and education levels to formulate human capital indices. Fertility rates are a key component of the family model, and are easily available. Education levels are somewhat more difficult to measure, especially in the developing world. However, both measures are easier to understand and use than most variables used in IR.

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54 Ibid.
55 Barrow, 409-411.
56 See figure I, and Appendix, Table 5.
57 See figure V, and Appendix, Table 5.
58 For instance, the statistical side of the democratic peace debate remains bogged down by conflicting definitions of what constitutes a war, a democracy, and even an alliance (Spiro 1994).
Human capital variables are subject to measurement error, but are far more suitable for “large N” analysis. If we can agree to use human capital as a proxy for power, then new avenues in statistical testing should open up to IR theorists.

6. Modelling Human Capital and Military Technology Levels

Human capital formulation not only changes the incentives faced by families, it also changes the incentives faced by militaries - the organ most commonly associated with the balance of power. Andrew Francis, a Ph.D. candidate in the department of Economics at the University of Chicago, finds that human capital is negatively associated with the likelihood of conflict at both the dyad and nation levels of analysis.\(^59\) Since human capital raises the value of life and in turn the economic cost of injury and death, Francis postulates that it increases the cost of international conflict. At the dyad level, this relationship holds with and without controls for the potential complementarities between human capital and military productivity.

This is not to argue that educated countries are morally superior or inherently more peaceful. In fact, when the countries in the dyadic pairs are labelled with either an L or an H (L corresponds to the lower level of human capital in the dyad and H the higher human capital country), the L is a more important determinant of peace than the H. In other words, holding real per capital GDP constant, changes in the human capital of the less developed country have a greater impact on the likelihood of militarized conflict between a pair of countries.\(^60\) Thus, low human capital countries become relatively more pacific with each additional “unit” of human capital. The pacifying effect of human capital, especially for low human capital countries, is, I believe, part of a military substitution effect driven by rising human capital stores.

Human capital investments provide people with skills that are valued in the labour market. Hence, the opportunity cost associated with military service and, consequently, the amount that the government will have to compensate those who choose to work in the military sector both increase with human capital. Even if military service is not voluntary, human capital raises the cost of conflict on the budgetary, expenditure, and liability side, especially if civilian deaths are involved.\(^61\)

The increasing cost of manpower (i.e. military labour) will affect military resource allocation decisions. Specifically, high human capital countries will face the incentive to substitute toward technology intensive warfare and weapons. This substitution effect is accelerated by the notion that countries with high human capital stores may be better able to develop military weapons through research and development effect.\(^62\) The extent to which there is an open market for weapons – i.e. countries with low human capital can purchase military technology developed by high human capital countries – moderates the second effect.\(^63\) Nevertheless these powerful substitution incentives may be responsible for driving down U.S. troop numbers over the past decade. Also, this logic points to the folly of the Iraq occupation. Powerful incentives have made the U.S. military relatively technology intensive, and, therefore, unable to perform labour intensive tasks, such as large occupations.\(^64\)

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\(^60\) Ibid.

\(^61\) The Coase Theorem implies that political leaders will generally have the incentive to utilize human resources in an efficient manner, especially when powerful autocrats exercise de facto ownership over citizens. Note that this logic contrasts with the Kantian view that a monarch or dictator, isolated from the direct burdens of battle, will heedlessly enter into war (Francis 2005).

\(^62\) See Appendix, Tables 7 and 8, which demonstrate that levels of high technology exports are highly correlated with human capital levels, controlling for income, energy production, fixed, and time fixed effects.

\(^63\) Francis.

\(^64\) Under the theory, if occupation is to occur, then natural resource rich countries are more likely to be occupied. The wealth of high human capital countries is embodied in its people. Such wealth can only be extracted via slavery - a difficult and frowned upon practice. In this sense, increasing human capital levels reduce the likelihood of being concurred by a rational advisory.
6.1 What Does Human Capital Tell Us about the Ability to Innovate?

What determines a state’s ability to innovate now and in the future? Earlier I argued that human capital is related to general technology levels. Can the same be said for military technology, especially technologies that might shift the overall balance of power, such as improved ICBM targeting systems? Because modern weapons are so research intensive, their production has raised the barriers that states must jump over if they are to shift the balance of power in their favour. Therefore, in considering the effect of human capital on the balance of power, I devote special attention to its relationship with military technologies.

6.1.1 Assumptions

\[ M = f(W, P) \]

- The military budget is a function of national wealth (W) and some vector of resource allocation preferences (P)

\[ T_n = f(H, Y_t) \]

- Military technology is a function of human capital (H) and investment in technology (Y)

\[ W = rH \]

- Wealth is a function of human capital

The first conclusion follows from the first assumption. Quite simply, higher human capital countries are richer, and consequently are able to spend more on military technology (Y) and other military expenses and acquisitions. Table 8 reveals that richer countries tend to spend more absolute resources on their militaries than poorer countries. If we hold human capital constant and only examine the effects of preference on total military expenditure, we come to the simple conclusion that countries that wish to spend more on their military do so. The income effect is very robust, if obvious.

The following regression table (8) covers for all countries from 1950 to 2000. Table 8 demonstrates that, on average, richer countries spend more on their militaries, while controlling for military capability.

<table>
<thead>
<tr>
<th>Dependent Variable: real military expenditures (Current US$)</th>
<th>(1)</th>
<th>(2)</th>
<th>(3)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Regressors</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>rgdp – real GDP (Current US$)</td>
<td>835.194** (55.74554)</td>
<td>528.24** (83.843)</td>
<td>630.697** (63.508)</td>
</tr>
<tr>
<td>Health – total health expenditures (current US$)</td>
<td>-198.81 (721.5819)</td>
<td>-2942.77** (548.13)</td>
<td></td>
</tr>
<tr>
<td>labeduter - Labour force with tertiary education (% of total)</td>
<td>344368.3** (40531.33)</td>
<td>-2942.77** (548.13)</td>
<td></td>
</tr>
</tbody>
</table>

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66 See Appendix, Table 8 & 9. See Table 9: when we switch the dependent variable to military expenditures are a percent of GDP; however, we find that poorer countries, on average, spend a large fraction of their GDP on their militaries. This finding is consistent with the overall divergence prediction. Rich countries or high human countries have a “double advantage” in that they can outspend low human capital countries, while still spending a smaller fraction of their income.
The model also allows us to witness and test a substitution effect. Because the production of military technology is a function of human capital (H) and absolute levels of military technology spending (Yt), we expect to see high (H) countries invest a larger percentage of their military budgets on technology, since high (H) countries experience higher returns to technological investment. This effect is catalyzed by the increasing cost of military labour associated with increases in human capital. Thus, an increase in human capital will cause a country to invest more relative resources in technology and less in labour: a substitute toward technology and away from labour.

Table 10: Military Substitution Effect

<table>
<thead>
<tr>
<th>Dependent Variable: Number of Soldiers</th>
<th>1</th>
<th>2</th>
<th>3</th>
</tr>
</thead>
<tbody>
<tr>
<td>Regressors</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Rgdp - real GDP (current US$)</td>
<td>-4.5679** (1.0315)</td>
<td>2.3614** (.04333)</td>
<td></td>
</tr>
<tr>
<td>Pop - population in thousands</td>
<td>2.3543** (.04411)</td>
<td>2.3455** (.04306)</td>
<td>.0011** (.00022)</td>
</tr>
<tr>
<td>Milexp - military expenditures in thousands</td>
<td>.001148** (0.0023)</td>
<td>.0011** (.0002)</td>
<td>.0011** (.00022)</td>
</tr>
<tr>
<td>Milcap - military capability index, Singer et al. 1972</td>
<td>8756029** (23820.1)</td>
<td>90322** (309662)</td>
<td>88041** (318091.5)</td>
</tr>
<tr>
<td>Dem - Polity IV score</td>
<td></td>
<td>-6614.9** (477.43)</td>
<td>-6461.472** (479.608)</td>
</tr>
<tr>
<td>Growth - % growth in real GDP</td>
<td>-3538.54** (36.61)</td>
<td>-6614.9** (477.43)</td>
<td>-3105.7** (528.065)</td>
</tr>
<tr>
<td>Hitech - High-technology exports (current US$)</td>
<td>-2.20e-06** (5.58e-07)</td>
<td>-2.47e-06** (5.45e-07)</td>
<td>-2.28e-06** (5.48e-07)</td>
</tr>
<tr>
<td>Schtert - School enrolment, tertiary (%) gross</td>
<td>-539.0205* (434.054)</td>
<td>-145.65 (427.4513)</td>
<td>-71.4099* (427.7596)</td>
</tr>
<tr>
<td>lableduter - Labour force with tertiary education (% of total)</td>
<td>-4271.08** (971.04)</td>
<td>-1911.82** (970.384)</td>
<td>-1925.729** (969.559)</td>
</tr>
</tbody>
</table>

The regression table (10) covers all countries from 1950 to 2000. The model examines the average effect of increasing national troop numbers on seven human capital measures, controlling for: national wealth, population, military expenditures, military capability, form of government (polity score), economic growth, volume of high technology exports, and two measures of natural resource wealth. Even after controlling for so many variables, the negative effects on the human capital variables are uniformly negative and acute (except for health spending per capita). In this formulation, choosing a dependent variable is problematic. By selecting troop numbers and controlling for so many characteristics, I seek to demonstrate the substitution effect away from labour, or less spending per soldier. However, I cannot prove that resources are being shifted to technology investments. This is hard to prove because detailed cross-country time series military budgets are tough to acquire.
<table>
<thead>
<tr>
<th></th>
<th>31.17** (8.8394)</th>
<th>37.49167** (7.253)</th>
<th>53.089** (8.8336)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>ores - Ores and metals exports (% of merchandise exports)</strong></td>
<td>-805.1796** (153.229)</td>
<td>-880.118** (150.73)</td>
<td>-877.0086** (150.603)</td>
</tr>
<tr>
<td><strong>death - Death rate, crude (per 1,000 people)</strong></td>
<td>10656.8** (944.3203)</td>
<td>9198.23** (931.79)</td>
<td>9362.88** (932.515)</td>
</tr>
<tr>
<td><strong>Illyfem - Illiteracy rate, youth female (% of females ages 15-24)</strong></td>
<td>-1550.388** (544.598)</td>
<td>-1796.46** (533.725)</td>
<td>-707.8297 (819.4487)</td>
</tr>
<tr>
<td><strong>Ilia - Illiteracy rate, adult total (% of people ages 15 and above)</strong></td>
<td>-1475.96** (656.584)</td>
<td>-1039.71* (638.56)</td>
<td>-1663.712** (534.9967)</td>
</tr>
<tr>
<td><strong>Fixed Effects (by region)</strong></td>
<td>YES</td>
<td>YES</td>
<td>YES</td>
</tr>
<tr>
<td><strong>Time Fixed Effects</strong></td>
<td>YES</td>
<td>YES</td>
<td>YES</td>
</tr>
<tr>
<td><strong>Adjusted R Squared</strong></td>
<td>0.8385</td>
<td>0.8439</td>
<td>0.8441</td>
</tr>
</tbody>
</table>

Even with evidence of a quality / quantity trade off, we are still left with an important and unexplained variable: policy preference. Does human capital affect military strategy? Or is strategy simply a function of traditional realist variables, such as geography and perceived threats? Certainly, traditional realist variables affect military strategy. However, human capital levels might also have an effect on military strategy via the substitution effect.

As mentioned, high human capital countries experience a strong incentive to substitute toward technology, stemming from the relatively high cost of labour and the relatively high returns to research and development. Moreover, because technologically intensive militaries are suited toward certain types of conflicts, we should expect to see high human capital countries engaging in relatively more “technology type” conflicts, and avoiding labour intensive endeavours. I postulate that “technology type” conflicts will roughly consist of low risk, technologically intensive interventions. For example, air or missile strikes over vast distances against low technology countries that are unable to inflict civilian causalities on the high (H) aggressor. The 2 by 2 diagram below reflects the incentives for conflict across high and low human capital countries under my theory. The diagram assumes two types of countries: high technology and high human countries that are able to inflict civilian casualties on any aggressor and low technology and low human capital countries that can not.

- **U** = unfavourable outcome
- **F** = favourable outcome
- **A** = ambiguous outcome
Thus, as (H) increases, the benefits of attacking defenceless low (H) countries increases. Once low (H) countries reach a certain development threshold (the ability to inflict expensive causalities on the aggressor), however, the incentive to launch technology type attacks drops significantly. The logic of the 2 by 2 diagram fits with Francis’ second empirical finding: holding real per capital GDP constant, changes in the human capital of the less developed country in the dyad has a greater pacifying impact on the likelihood of militarized conflict between the pair. It should also be noted that although the diagram presents a static game, over time low tech countries experience an enormous incentive to build a technical base – in order to escape unfavourable (U) or ambiguous (A) outcomes. That incentive leads to a swelling in the number of technologically advanced countries, and thus less total incentive for conflict.

Human capital accumulation might have some effect on policy choices by making certain types of conflict less costly, but realist variables are still the most important component of strategy. For instance, North Korea is a low (H) country that spends a large fraction of its GDP on the military because it needs a certain force type to quell domestic opposition and protect itself from foreign enemies. More military spending creates a general income effect: more money will flow to both military consumption and technology.

Large amounts of military spending, however, might drive down public sector human capital investment, which is the source of wealth and technology. Human capital is unique in that the organizations that produce human capital are not profit maximizing. In fact, many of the human capital producing organizations in the U.S. are publicly funded. In the family model, parents are faced with the temporal decisions: to consume now (including military consumption) or invest in human capital. If military spending remains too large for too long, then productive human capital investments and thus future wealth and military power might be jeopardized. Another way to say this is that excessive military consumption might cause a short-term spike in military technology, while detracting from the long-run productivity of that investment. To illustrate, the U.S. occupation of Iraq might be “crowding out” possible investments in education and health. Therefore, the occupation is perhaps affecting our long-run ability to create wealth and power.

7. Predictions and Conclusions

In general, we expect to see cross-country economic growth rates and technology capabilities – or power – to be in line with cross-country levels of human capital investment. At the macroeconomic level, virtually no income convergence has occurred in the last 40 years. Income, however, is not human capital. Indeed, the absence of reduction in cross-country inequality up to 1990’s, noticed in previous work, is in stark contrast with the reduction in inequality after

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incorporating gains in health – measured in quality and quantity of years. Incorporating longevity into a “full” measure of income changes traditional results; countries starting with lower incomes tended to grow faster than countries starting with higher incomes. Becker, Philipson, and Soares, researchers at the University of Chicago, “estimate an average yearly growth in “full-income” of 4.1 percent for the poorest 50% countries in 1960, of which 1.7 percentage points are due to health, as opposed to a growth of 2.6 percent for the richest 50% countries, of which only 0.4 percentage points are due to health.” Thus, the neoclassical convergence prediction has the right conclusion, but with the wrong reasoning.

In human capital models, convergence can still take place under two conditions: (1) long-term convergence; when the leading state in the system allocates too much wealth toward military consumption, thus “crowding-out” public sector human capital investments, while a non-hegemonic state(s) invest more wisely in their own human capital; or (2) a short-term convergence where a low (H) country engages in overly burdensome defence spending. Short-term convergence is short-term because such investments will become unsustainable due to depreciation of (H). The Soviet Union is a prime exemplar of short-term convergence.

The technological emergence of China and India might seem to be unexplained by the two conditions of convergence put forward, but, in fact, both cases fit under long-term convergence. China and India’s technological and economic growth is underpinned by human capital investments that far exceed those generally associated with a country at a similar per capita income level – witness their vast improvements in life expectancy. Simply put, their relative rates of (H) investment are large, and the growths of their human capital investment rates can, theoretically, serve as a measure of their ability innovate and grow in the future.

Despite China and India’s recent and intense investments in (H), however, the U.S. benefits from an enormous lead in initial human capital endowments. As initial levels of human capital are the best predictor of future human capital levels, it should come as no surprise that the United States enjoys technological primacy. Unable to spend or produce at American levels for research, development, and weapons production, middle powers who try to compensate with short-term spending sprees will find themselves constantly falling behind.

The current state of affairs, however, does not mean that the U.S. is free to make poor allocation decisions without suffering any consequences. After all, just because the U.S. is experiencing strong incentives to invest in technology, avoid labour intensive wars, and invest in human capital does not mean that the U.S. will do so. The makers of U.S. foreign policy should be especially wary of China’s recent educational achievement, coupled with classic “imperial overstretch” – as described by Jack Snyder.

Traditionally, the U.S. has been able to balance resource decisions relatively well. The spread of nuclear weapons and the modern economy have made technology more crucial, and thus education is necessarily more important. Policy-makers should be aware that the next great power shift will likely be the technological ability to break the dynamic of mutually assured destruction (MAD) that has keep the peace between the great powers for more than 50 years. That innovation will be the result of sustained investments in human capital. For the sake of stability, America’s educational and health infrastructure must up to the task.

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69 Ibid, 1
70 Waltz.
71 Jack Snyder, “Imperial Temptation,” The National Interest 71 (Spring 2003).
Basic Comparative Statistics

School enrollment, tertiary (% gross)

Health Expenditure Per Person

Year
PER CAPITA GDP

Year
0 5000 10000 15000 20000 25000 30000 35000 40000

Per Capita GDP (current US$)

US
Japan
China
India
UK

REFERENCES


**APPENDIX**

**Table One: Service Sector Intensity**

<table>
<thead>
<tr>
<th>Year</th>
<th>US</th>
<th>China</th>
<th>Japan</th>
<th>Russia/USSR</th>
<th>UK</th>
</tr>
</thead>
<tbody>
<tr>
<td>1970</td>
<td>0</td>
<td>10</td>
<td>20</td>
<td>30</td>
<td>40</td>
</tr>
<tr>
<td>1973</td>
<td>10</td>
<td>20</td>
<td>30</td>
<td>40</td>
<td>50</td>
</tr>
<tr>
<td>1976</td>
<td>20</td>
<td>30</td>
<td>40</td>
<td>50</td>
<td>60</td>
</tr>
<tr>
<td>1979</td>
<td>30</td>
<td>40</td>
<td>50</td>
<td>60</td>
<td>70</td>
</tr>
<tr>
<td>1982</td>
<td>40</td>
<td>50</td>
<td>60</td>
<td>70</td>
<td>80</td>
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<tr>
<td>1985</td>
<td>50</td>
<td>60</td>
<td>70</td>
<td>80</td>
<td>90</td>
</tr>
<tr>
<td>1988</td>
<td>60</td>
<td>70</td>
<td>80</td>
<td>90</td>
<td>100</td>
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<tr>
<td>1991</td>
<td>70</td>
<td>80</td>
<td>90</td>
<td>100</td>
<td>110</td>
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<tr>
<td>1994</td>
<td>80</td>
<td>90</td>
<td>100</td>
<td>110</td>
<td>120</td>
</tr>
</tbody>
</table>

**Table Two: Labor Force with Tertiary Education**

<table>
<thead>
<tr>
<th>Year 2000</th>
<th>U.S.</th>
<th>China</th>
<th>Japan</th>
<th>Mexico</th>
<th>Russia/USSR</th>
<th>U.K.</th>
<th>Afghanistan</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>45</td>
<td>10</td>
<td>15</td>
<td>20</td>
<td>15</td>
<td>5</td>
<td>5</td>
</tr>
</tbody>
</table>

**APPENDIX**
Table 3: Adult Illiteracy Rate in 2000

![Chart showing adult illiteracy rates across countries in 2000.](chart)

Table 4: Cross-Country Illiteracy Rate

![Chart showing cross-country illiteracy rates over years.](chart)

Table 5: GDP and Human Capital

<table>
<thead>
<tr>
<th>Dependent Variable: GDP (per capita GDP)</th>
<th>Regressors</th>
<th>(1)</th>
<th>(2)</th>
<th>(3)</th>
<th>(4)</th>
<th>(5)</th>
<th>(6)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Health: expenditures per capita (U.S. Dollars)</td>
<td>4.1161** (.06911)</td>
<td>3.8503** (.07149)</td>
<td>3.343826** (.0818681)</td>
<td>Phy: physicians (per 1,000 people)</td>
<td>1096.6** (51.246)</td>
<td>847.814** (53.586)</td>
<td>524.962** (57.57148)</td>
</tr>
</tbody>
</table>

** indicates significance at the 0.05 level.
<table>
<thead>
<tr>
<th>total (births per women)</th>
<th>(160.53)</th>
<th>(143.73)</th>
<th>(154.887)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fert^2</td>
<td>507.3**</td>
<td>305.507**</td>
<td>242.992**</td>
</tr>
<tr>
<td></td>
<td>(16.552)</td>
<td>(14.225)</td>
<td>(15.0271)</td>
</tr>
<tr>
<td>Illa: adult illiteracy rate (% of people above age 15)</td>
<td>34.752**</td>
<td>(10.678)</td>
<td>-15.00467</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>(9.882)</td>
</tr>
<tr>
<td>Schter: school enrolment, tertiary (% of gross)</td>
<td>133.20**</td>
<td>(5.11416)</td>
<td>44.13109</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>(5.105673)</td>
</tr>
<tr>
<td>Lapeduterfem: labour force with tertiary education (% of female labour force)</td>
<td>96.201**</td>
<td>(5.4579)</td>
<td>34.04633**</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>(4.960413)</td>
</tr>
<tr>
<td>Illyfem: Illiteracy rate, youth female (% of females ages 15-24)</td>
<td>-91.83**</td>
<td>(13.237)</td>
<td>-23.70573*</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>(12.33586)</td>
</tr>
<tr>
<td>Illy^2</td>
<td>.61314**</td>
<td>1.00514**</td>
<td>.2759244**</td>
</tr>
<tr>
<td></td>
<td>(.08221)</td>
<td>(.077213)</td>
<td>(.0754784)</td>
</tr>
<tr>
<td>Fixed Effects (by region)</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td></td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Time Fixed Effects</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td></td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Adjusted R squared</td>
<td>0.6389</td>
<td>0.4975</td>
<td>0.6631</td>
</tr>
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<td></td>
<td>0.5683</td>
<td>0.5224</td>
<td>0.6755</td>
</tr>
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</table>

<table>
<thead>
<tr>
<th>Table 6: High-Tech Exports and Human capital (absolute)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dependent Variable: high-tech - High-technology exports (current US$)</td>
</tr>
<tr>
<td><strong>Regressors</strong></td>
</tr>
<tr>
<td>Health – total health expenditures (current US$)</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td>schtert - School enrolment, tertiary (% gross)</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td>Illa - Illiteracy rate, adult total (% of people ages 15 and above)</td>
</tr>
<tr>
<td>Fert - Fertility rate, total (births per woman)</td>
</tr>
<tr>
<td></td>
</tr>
</tbody>
</table>
### Table 7: High Tech Exports and Human Capital (as a % of manufactured exports)

<table>
<thead>
<tr>
<th>Dependent Variable: high-tech - High-technology exports (% of manufactured exports)</th>
<th>(1)</th>
<th>(2)</th>
<th>(3)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Regressors</strong></td>
<td><strong>.051457</strong>** (.0117)</td>
<td><strong>.06499</strong>** (.01240)</td>
<td><strong>.05829</strong>** (.01226)**</td>
</tr>
<tr>
<td>Health - health expenditure per capita (current US$)</td>
<td></td>
<td></td>
<td><strong>.002997</strong>** (.00023)**</td>
</tr>
<tr>
<td>Schert - School enrolment, tertiary (% gross)</td>
<td><strong>.09244</strong>** (.01560)</td>
<td><strong>.09839</strong>** (.01561)</td>
<td><strong>.0140913</strong>** (.0167696)**</td>
</tr>
<tr>
<td>Labeduter - Labour force with tertiary education (% of total)</td>
<td><strong>.00288</strong> (.006)</td>
<td><strong>.0033265</strong> (.00593)</td>
<td></td>
</tr>
<tr>
<td>Illa - Illiteracy rate, adult total (% of people ages 15 and above)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>CGDP, per capita GDP (current US$)</td>
<td><strong>.0003686</strong>** (.0000271)**</td>
<td><strong>.0003717</strong>** (.00002)**</td>
<td><strong>.0001977</strong>** (.00003)**</td>
</tr>
<tr>
<td>Energy -Commercial energy production (kt of oil equivalent)</td>
<td><strong>-3.21e-06</strong>** (6.81e-07)**</td>
<td><strong>-3.97e-06</strong>** (6.76e-07)**</td>
<td></td>
</tr>
<tr>
<td>ores - Ores and metals exports (% of merchandise exports)</td>
<td><strong>0194348</strong>** (.0054)**</td>
<td><strong>021898</strong>** (.00534)**</td>
<td></td>
</tr>
<tr>
<td>Fixed Effects (by region)</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
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<tr>
<td>Time Fixed Effects</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
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<tr>
<td>Adjusted R Squared</td>
<td>0.2435</td>
<td>0.2477</td>
<td>0.2663</td>
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### Table 8: Income Effect and Trade-offs

Dependent Variable: real military expenditures
### Table 9: Income Effect and Trade-offs

<table>
<thead>
<tr>
<th>Dependent Variable: per capita military expenditures (Current US$)</th>
<th>(1)</th>
<th>(2)</th>
<th>(3)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Regressors</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>rgdpr – real GDP (Current US$)</td>
<td>835.194** (55.74554)</td>
<td>528.24** (83.843)</td>
<td>630.697** (63.508)</td>
</tr>
<tr>
<td>Health – total health expenditures (current US$)</td>
<td>-198.81 (721.5819)</td>
<td>-2942.77** (548.13)</td>
<td></td>
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<tr>
<td>labeduter - Labour force with tertiary education (% of total)</td>
<td>344368.3** (40531.33)</td>
<td>-2942.77** (548.13)</td>
<td></td>
</tr>
<tr>
<td>Milcap - military capability index, Singer et al. 1972</td>
<td></td>
<td>4.78e+08** (7599299)</td>
<td></td>
</tr>
<tr>
<td>Fixed Effects (by region)</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Time Fixed Effects</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
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<tr>
<td>Adjusted R Squared</td>
<td>0.0643</td>
<td>0.0782</td>
<td>0.4715</td>
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</table>

### Table 10: Military Substitution Effect

<table>
<thead>
<tr>
<th>Dependent Variable: Number of Soldiers</th>
<th>(1)</th>
<th>(2)</th>
<th>(3)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Regressors</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>rgdpr – real GDP (current US$)</td>
<td>-4.5679** (1.0315)</td>
<td></td>
<td>2.3614** (0.4333)</td>
</tr>
<tr>
<td>Pop – population in thousands</td>
<td>2.3543** (0.04411)</td>
<td>2.3455** (0.04306)</td>
<td>0.0011** (0.00022)</td>
</tr>
<tr>
<td>Milexp – military</td>
<td>0.001148**</td>
<td>0.0011**</td>
<td>0.0011**</td>
</tr>
<tr>
<td></td>
<td>Estimate 1</td>
<td>Estimate 2</td>
<td>Estimate 3</td>
</tr>
<tr>
<td>------------------------</td>
<td>------------</td>
<td>------------</td>
<td>------------</td>
</tr>
<tr>
<td>expenditures in thousands</td>
<td>(.00023)</td>
<td>(.0002)</td>
<td>(.00022)</td>
</tr>
<tr>
<td>Milcap - military capability index, Singer et al. 1972.</td>
<td>8756029** (23820.1)</td>
<td>90322** (309662)</td>
<td>88041** (318091.5)</td>
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<tr>
<td>Dem – Polity IV score</td>
<td>-6614.9** (477.43)</td>
<td>-6461.472** (479.608)</td>
<td></td>
</tr>
<tr>
<td>Growth – % growth in real GDP</td>
<td>-3538.54** (36.61)</td>
<td>-6614.9** (477.43)</td>
<td>-3105.7** (528.065)</td>
</tr>
<tr>
<td>High tech – High technology exports (current US$)</td>
<td>-2.20e-06** (5.58e-07)</td>
<td>-2.47e-06** (5.45e-07)</td>
<td>-2.28e-06** (5.48e-07)</td>
</tr>
<tr>
<td>School enrolment, tertiar (% gross)</td>
<td>-539.0205* (434.054)</td>
<td>-145.65 (427.4513)</td>
<td>-71.4099* (427.7596)</td>
</tr>
<tr>
<td>Labour force with tertiary education (% of total)</td>
<td>-4271.08** (971.04)</td>
<td>-1911.82** (970.384)</td>
<td>-1925.729** (969.559)</td>
</tr>
<tr>
<td>Health expenditure per capita (current US$)</td>
<td>31.17** (8.8394)</td>
<td>37.49167** (7.253)</td>
<td>53.089** (8.8336)</td>
</tr>
<tr>
<td>Ores and metals exports (% of merchandise exports)</td>
<td>-805.1796** (153.229)</td>
<td>-880.118** (150.73)</td>
<td>-877.0086** (150.603)</td>
</tr>
<tr>
<td>Death rate, crude (per 1,000 people)</td>
<td>10656.8** (944.3203)</td>
<td>9198.23** (931.79)</td>
<td>9362.88** (932.515)</td>
</tr>
<tr>
<td>Labour force with tertiary education, female (% of female labour force)</td>
<td>1493.782* (817.501)</td>
<td>-821.846 (819.321)</td>
<td>-707.8297 (819.4487)</td>
</tr>
<tr>
<td>Illiteracy rate, youth female (% of females ages 15-24)</td>
<td>-1550.388** (544.598)</td>
<td>-1796.46** (533.725)</td>
<td>-707.8297 (819.4487)</td>
</tr>
<tr>
<td>Illiteracy rate, adult total (% of people ages 15 and above)</td>
<td>-1475.96** (656.584)</td>
<td>-1039.71* (638.56)</td>
<td>-1663.712** (534.9967)</td>
</tr>
<tr>
<td>Fixed Effects (by region)</td>
<td>YES</td>
<td>YES</td>
<td>YES</td>
</tr>
<tr>
<td>Time Fixed Effects</td>
<td>YES</td>
<td>YES</td>
<td>YES</td>
</tr>
<tr>
<td>Adjusted R Squared</td>
<td>0.8385</td>
<td>0.8439</td>
<td>0.8441</td>
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</tbody>
</table>
COUNTER-TERRORISM IN NEW EUROPE
What have the new EU members done to combat terrorism after September 11th?

Alexander Spencer ‡

Abstract

In recent years the nature of terrorism has changed dramatically and has taken on a new combination of characteristics. The fight against this terrorism has become a global concern and central issue of international government policies. Counter-terrorism policies have transformed all around the world, and the importance states place on certain aspects of their counter-terrorist measures vary considerably. There is no agreement on how best to fight terrorism. Within the European Union (EU) this disagreement is the most visible, with some countries supporting the United States in their military fight against terrorism, while other strongly oppose it. This paper will focus on five of the ten new EU members that joined in 2004 (Estonia, Poland, the Czech Republic, Slovenia and Malta) and review some of their existing counter-terrorism measures. In doing so the paper will examine the strengths and weaknesses of each individual state’s policy and highlight some of the general trends and patterns among them.

Keywords: counter-terrorism; public policy; enlargement; new Europe; European Union

1. INTRODUCTION

Since the terrorist attacks of 11 September 2001 (hereafter 9/11), states around the world have reviewed their counter-terrorism policies. Most of the emphasis when studying these policies has been on the United States and its most powerful traditional allies from the European Union (EU) such as the United Kingdom, Germany and France.1 Until now there has been very little research into the counter-terrorism public policies of the new EU members.2

Due to the global nature of terrorism today it is also important to think about counter-terrorism in a global way. The uncovering of terrorist cells around the world that were involved in the organisation and execution of 9/11 has made it painfully clear that terrorism can not be fought by individual states. With the new EU members now firmly part of the western democracy and its institutions it is important to research their counter-terrorism policies. Experts on the subject of

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counter-terrorism argue that “[a] chain is only as strong as the weakest link.” By this they emphasise the idea that weaknesses in dealing with terrorism in one country can directly affect the security of other countries. An example of this could be the lack of effective airport security in one country which could result in a plane being high-jacked by terrorists who might then use the plane as a guided missile to attack another country. Therefore global security can be seen to depend on the complex interdependence of countless national counter-terrorism measures at all levels. Identifying the strengths and weaknesses of the counter-terrorism policies of the new EU members should provide a useful insight into the overall situation regarding the fight against terrorism in Europe and the world as a whole.

The aim of this paper is to briefly examine and compare the counter-terrorism public policies of five of the ten new European Union Member States in order to assess their individual strengths and weaknesses. In doing so, one hopes to highlight some of the general trends and patterns that have emerged within this group of countries. The five countries which have been selected represent a good cross-section of the new members, with Estonia from the Baltic, Poland and the Czech Republic being larger states from the centre of eastern Europe, Slovenia formerly part of Yugoslavia and Malta representing one of the two new South Mediterranean members. Although the focus will predominantly be on these five states and their public policies concerning counter-terrorism, the other five members will be mentioned throughout.

The paper will focus on the achievements of each state in five areas relating to the fight against terror. First, the paper will examine the intelligence structure within the new EU Member States, referring to the way the gathering, analysis and distribution of information about terrorism is organised. Furthermore the essential parts of the existing national anti-terrorist legislation in each state will be highlighted. In addition, the international conventions and protocols relating to terrorism will be studied in order to identify what states have ratified which conventions and made them part of their national legislation. Next the paper highlights the extent to which each state cooperates internationally in the fight against terrorism and how far each new member has implemented measures to tighten internal security such as stricter border controls, aviation security, and the protection of important infrastructure and government facilities. Finally, the paper will evaluate to what extent and how each new EU member has taken part in military actions abroad against terrorism. These five areas have been chosen because they represent a wide range of theoretical ways for combating terrorism today.

The descriptions of each individual state’s counter-terrorism policies are based on desk research. The main methods of research include examination of government websites, government reports, and press releases. The extent to which accessible reports or data were available was in some occasions limited due to the often confidential nature of the subject. Furthermore one has to keep in mind that theoretical counter-terrorism policies outlined in government reports are constantly evolving and changing, and that the practical application of such measures can not be truly evaluated by the research methods used. Nevertheless the research will give some insight into the existing counter-terrorism policies and most importantly will highlight general trends and patterns but also clear differences among the new EU members.

Before being able to examine the counter-terrorism public policies of the new EU Member States it is necessary to establish exactly what is meant by this term. Therefore this paper will first briefly examine some different definitions of what public policy is and how counter-terrorism can fit within such a definition. The next section will review five of the new members and some of their counter-terrorism policies within the six areas mentioned above. After that the paper will highlight some of the general trends and weaknesses of the counter-terrorist policies adopted by the new EU members.

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2. COUNTER-TERRORISM AND PUBLIC POLICY

Counter-terrorism and public policy have rarely been discussed together explicitly using these terms; a fact which seems predominantly to come down to the problem of definition on both sides. Using a very wide definition such as Thomas Dye, and claiming that “[a]nything a government chooses to do or not to do” represents public policy, firmly placed counter-terrorism measures inside the public policy domain together with almost everything else. Other more restrictive definitions by authors such as William Jenkins claim public policy is “a set of interrelated decisions taken by a political actor or group of actors concerning the selection of goals and the means of achieving them within a specified situation where those decisions should, in principle, be within the power of those actors to achieve.” Here it seems more difficult to place counter-terrorism in the realm of public policy. One is left here with the problem of pointing to a clear goal of counter-terrorism. If the goal is to stop terrorism, is this really in the power of actors to achieve, especially those five new members of the EU? One could consider definitions which lie somewhat between the two mentioned above. James Anderson believes public policy to be “a purposive course of action followed by an actor or a set of actors in dealing with a problem or matter of concern.” Viewing counter-terrorism as a public policy with such a definition does appear justified, as very few would deny that terrorism is, or is claimed to be, a problem or a matter of concern.

As with public policy, the problem of establishing a universal definition of terrorism has been covered extensively. However, one can to some extent side-step the problem of implying a moral judgement associated with the terrorist / freedom-fighter dichotomy, as well as avoid the concern of differentiating terrorism from guerrilla fighters, criminals, or psychopaths. We can consider counter-terrorism as referring to all kinds of policies, operations, and programs that governments implement to combat terrorism regardless of whether one agrees with who this terrorist is claimed to be. As long as the policy is declared as a measure of combating terrorism, we may consider it a counter-terrorism public policy. This could include policies such as enhanced border and airport security, tightened security at embassies, the implementation of new anti-terror laws, the investment in anti-terror technology, the establishment of crisis management plans, the restructuring of security services and the creation of whole new bureaucratic counter-terrorism departments. The paper will nevertheless focus solely on five specific instruments, which are considered to be ways of dealing with terrorism: intelligence, anti-terror legislation, international co-operation, enhanced internal security, and a military response.

J. Bowyer Bell points out that intelligence, the use of often covert means to gather and interpret information about an enemy, is the most important method of combating terrorism as it can provide the information necessary for pre-emptive military attacks abroad, as well as the data needed by police and security services to act within one’s own state to prevent terrorist attacks. Hoffman and Jennifer Morrison-Taw add to this, suggesting that it is not only the intelligence itself which is needed but that the intelligence has to be dealt with by an “effective overall command and coordination structure.” They argue that it is essential in an anti-terrorism campaign that

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intelligence information is collected correctly, properly analysed, and then effectively co-ordinated and distributed to the security forces engaged in tactical operations. In their view this can only be achieved by a centralised, co-operative, and integrative intelligence organisation. Without such a structure there is a potential for confusion and competition amongst different security agencies about who is responsible for what. The lack of such an organisation will lead to inefficient gathering and channelling of intelligence information. They also highlight the idea that only with such a structure of centralised intelligence is it possible to develop a unified plan and carry it out.12

Bruce Berkowitz highlights the limitations of intelligence as a method of combating terrorism. He argues that reliable specific information is hard to come by, as the infiltration of terrorist groups has become increasingly difficult. Information on terrorist groups is therefore only partial, ambiguous, and often unreliable. In addition, analysing such information is often more difficult than actually gathering it. Therefore the goal in the fight against terrorism today is often not to obtain exact information on the next terrorist operation, but to gather data on strategic intentions of terrorist groups.13

Some authors highlight the importance of anti-terrorist legislation, arguing that terrorism can be reduced through domestic laws. They emphasise the need for stronger counter-terrorism laws in order to deter terrorists and make them consider the consequences of their contemplated actions. As well as this, they stress that anti-terrorist legislation can reduce terrorism by imposing long-term imprisonment for terrorist group leaders and perpetrators, which in turn will disturb the management of the terrorist network, as well as suppress and delay further terrorist attacks.14

Helen Fenwick disagrees with the idea that domestic anti-terrorist legislation will deter terrorism. She points out that most terrorist attacks against European states occur abroad and therefore it is more difficult to bring the perpetrators to justice. In most cases the states have to rely on foreign governments to convict or extradite the terrorists. As well as this, she highlights the fact that harsh terrorism laws, long prison sentences, or even the death penalty will not deter a terrorist who is prepared to give his own life for the cause of his struggle.15

Martin Navias underlines the importance of legislation in the fight against the financing of terrorism. He suggests that money is the most important component of the preparation for any terrorist network. Without money terrorist groups are unable to act or maintain a network. The financing of terrorism can be countered by legislation which makes it possible to freeze accounts of individuals, terrorist groups, and countries sponsoring terrorism.16

Jonathan Winer and Trifin Roule criticize this and highlight the fact that the fight against terrorist financing faces several problems. Terrorism is generally funded by micro-financing or short term money such as the illegal sale of drugs, illegal trading with weapons, and other transnational criminal activities, but also from legal sources such as gifts and donations from supporters or Diaspora and charities. Most of these transactions are extremely difficult to follow as they use false names for account holders, use intermediaries, and combine funds from legal and illegal sources. Most of the money laundering laws and anti-terrorist financing measures are insufficient as they only really address macro-financing; in other words significant financing operations which use known channels and financial institutions. Most of the money used to fund terrorist acts is transferred informally, thereby bypassing the formal banking system.17

Apart from the domestic anti-terrorist legislation M. Cherif Bassioumi stresses the importance of international conventions and protocols against terrorism. Not only can these conventions and protocols provide a bare minimum of anti-terrorist legislation for many countries, but they can

12 Ibid, pp. 9-12.
also contribute to the international standardisation of counter-terrorist measures. Most of the conventions and protocols outline concrete measures and policies that each signatory should ratify and implement into its own domestic legislation. Early examples of these include the Convention on Offences and Certain Other Acts Committed on Board Aircraft in 1963, and the Convention for the Suppression of Unlawful Seizure of Aircraft in 1970. More recent examples include the International Convention for the Suppression of Terrorist Bombings in 1997, and the International Convention for the Suppression of the Financing of Terrorism in 1999.

However, Todd Sandler points out that although international conventions and protocols are well intended, they are not very effective as there is no central enforcement agency that can force states to comply. He also believes that in order for these conventions and resolutions to be accepted globally they had to be drafted in such a way as to permit too many loopholes and too much autonomy on the part of the signatories. Walter Enders et al agree and highlight that in many of the cases there is no significant statistical reduction in the number of attacks after the adoption of many of these conventions and protocols.

Nora Bensahel gives prominence to the importance of international co-operation among different governments and security forces. She points out that terrorist groups are spread all over the world and the fight against a global terrorist network such as Al-Qaeda requires co-ordinated efforts of a large number of countries. As Bensahel points out, this international cooperation takes the form of different coalitions operating in different policy areas rather than one large “coalition against terror”. She believes that there are at least five different coalitions involved in combating terrorism such as military, financial, law enforcement, intelligence, and reconstruction coalitions. These coalitions are made up of different members and responsible for different tasks, and together “they form a complicated, interlocking web, and their actions both enable and constrain the actions of the other”. She argues that this co-operation will not only prevent the free movement of terrorists or the use of cross-border bases or sanctuaries, but it will also improve the co-ordination and sharing of intelligence collection and distribution.

Authors such as Richard Aldrich disagree and argue that total global co-operation between governments is impossible. He stresses the great importance governments place on their autonomy over national security, highlighting that only during times of great threat or war do states give up parts of their autonomy and form close alliances. Every state perceives the threat it is facing very differently and sometimes even possesses economic interests that are at odds with certain counter-terrorist measures.

Others take a more traditional approach to dealing with terrorism and emphasise the need for increased internal security in order to prevent particular types of attack. They argue in favour of improved border and airport security through the introduction of improved metal detectors, x-ray machines, and computerised identity recognition systems. In addition, they may suggest that other measures to tighten internal security, such as the fortifying or securing of important buildings and infrastructure, increasing the number of visible security patrols, and improving access control in public places, are possible ways of preventing terrorist attacks.

Enders and Sandler criticise the idea that increased internal security can stop terrorism. They point out that when one type of terrorist attack becomes more difficult or more expensive, terrorists normally find alternative ways of attacking. They believe that whereas secured borders deflect attacks elsewhere to, for example, embassies or tourist resorts abroad, other internal security measures can make terrorists choose other targets or use other methods of attack. They

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point to examples such as the introduction of metal detectors in airports which resulted in the increase of other forms of terrorist acts.25

Barry Posen argues in favour of a strong military presence as a way of combating terrorism, which can take both an offensive and a defensive form. On the one hand he highlights the fact that military forces can under certain circumstances be used to defend the state against direct terrorist attack by protecting potential vulnerable targets at home and abroad. On the other hand he suggests that direct military strikes can limit the power and influence of terrorists and leave them isolated and on the defensive. Military forces can be used to find and destroy terrorist infrastructure such as hideouts, bases, and training camps. Physical damage can leave the targeted group cut off from its resources and distract them from new acts of terrorism, as well as erode their standing by exposing their vulnerability. Not only can a large offensive military operation provide the surveillance that makes it hard for them to plan and organise attacks, but “[e]ven unsuccessful action, which force terrorist units or terrorist cells to stay perpetually on the move to avoid destruction, will help to reduce their capability”.26 In addition, Mark Kosnik claims that when military strikes expose the weakness of terrorist groups they reduce the fear produced by the terrorists and create a “vacuum effect” which can draw other states into co-operation against terrorism. Furthermore, the mobilisation of a large part of the armed forces following a terrorist attack can play an important symbolic role by demonstrating the determination of the state to bring those responsible to justice.27

Karl-Heinz Kamp agrees with Kosnik and emphasises that the offensive military capability together with strong challenging rhetorical statements can act as a strong deterrent against further terrorist attacks and the sponsoring or harbouring of terrorists. He sees the invasion of Afghanistan and the fairly aggressive rhetoric by the US administration as an example of this. Furthermore he cites the fact that further large violent terrorist attacks following 9/11 have not materialised in the US, and that many of the states renowned for harbouring or tolerating terrorist activities within their borders, such as Libya and Sudan, have joined in the condemnation of international terrorism.28

Some, such as Paul Wilkinson, have pointed out the limitations of a military response to terrorism which does not use ordinary or conventional combat methods. He highlights the fact that terrorists generally do not engage in extensive operations with thousands of combatants that could be prevented by the deployment of a large number of troops. Furthermore, he emphasises the potential for collateral damage, casualties to innocent civilians and one’s own servicemen, resulting in the alienation of allies and the eroding of international credibility.29 Other authors have pointed out that the military response in the form of retaliatory raids has had very little long-run impact on terrorism. Brophy-Baermann and Conybeare came to the conclusion in their study of Israeli retaliation raids that they only temporarily suppressed terrorism and that it returned to its old level within eight months.30 In a similar study Enders and Sandler show that US raids on Libya in 1986 provoked an increase in terrorism which returned to the old level within several months.31

As we have seen, the definition of terrorism is controversial but necessary in order to assess the counter-terrorism policies of the new EU members. The main characteristics of terrorism today include religious motives, a global, decentralised, highly unpredictable nature, the use of new techniques and different targets, its orientation towards mass casualties and destruction, and the lack of effective demands. In addition there is no agreement on the correct or best counter-terrorism policy. Analysts have put forth numerous theories ranging from improved intelligence structures, stronger anti-terrorist legislation, increased international co-operation, tighter internal

security, and the establishment of special counter-terrorism units for use in military actions abroad. In the next section this paper will examine which counter-terrorism policies the new EU members employ to deal with terrorism today.

3. Counter-Terrorism in the New EU Members

The EU itself has established a number of different measures aimed at combating terrorism. Some of these measures include the extension of investigative powers of the European police office (Europol); the establishment of a “counter-terrorism coordinator”; a common definition of terrorism; a European arrest warrant; the establishment of a common range of penalties for terrorist offences; regulations that make it possible to freeze terrorist funds anywhere in the EU; and the standardisation of airport security, to name but a few. When the new members joined the EU on 1 May 2004 they were obliged to adopt the existing EU body of laws including those relating to terrorism. This paper will examine some of the measures that Estonia, Poland, the Czech Republic, Slovenia, and Malta have adopted independently from the EU. The focus will be on the five areas mentioned in the introduction which include their intelligence structure, the anti-terrorism legislation, international co-operation, internal security, and the military action abroad.

3.1. Estonia

Shortly after 9/11 the Estonian Government Security Commission adopted a national action plan of measures against terrorism which outlines the “implementation of international legal measures; support for international efforts; enhanced readiness of Estonian state institutions and greater co-operation between them; enhanced border control; suppression of the financing of terrorism; enhanced international cooperation in police and judicial matters, including information exchange, [and] assessment of domestic security requirements and legislation.” According to the Estonian Security Agencies Act the combat of terrorism and crimes associated with terrorism is in theory the responsibility of the Security Police Board. However, there are other agencies such as the Central Criminal Police, who are responsible for planning some counter-terrorist activities, and again other institutions such as the protection police, who are responsible for safety and protection of the high public officials and foreign guests from terrorist attacks. According to the Security Authorities Act there is a legal obligation for government agencies to assist one another and there are also a number of specific co-operative agreements between various government institutions that outline the procedures for aiding each other. Furthermore, in order to enhance the domestic co-operation a working group of different government agencies responsible for the arrangement and implementation of joint activities was established. However, according to an Estonian government report presented to the United Nations “Estonia has no special strategies for inter-agency co-operation. Estonia has adopted a multi-agency approach for tackling … terrorism”. This indicates that although there have been some attempts at improving co-operation between different agencies through working groups and other co-operative agreements, the Estonian intelligence structure is not fully co-ordinated and lacks a clear command structure.

Estonia has amended much of its existing legislation regarding terrorism in the recent years and it has increased the severity of punishments for different terrorist offences ranging from three years to life imprisonment. In addition, Estonia has introduced the Surveillance Act and the

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36 United Nation Security Council, Supplementary Report to the Counter-Terrorism Committee” regarding the implementation of resolution 1373 (2001) (1 August 2002), Document-number: S/2002/870, 8.
Security Authorities Act which provide measures for organising surveillance activities in the fight against terrorism.\textsuperscript{38} Since the ratification of the International Convention for the Suppression of the Financing of Terrorism, the financing of terrorism in any way is considered a crime.\textsuperscript{39} These concrete measures indicate that Estonia views anti-terrorist legislation as a main method of combating terrorism. The fact that Estonia has ratified all international conventions and protocols relating to terrorism, including the ratification of four conventions within half a year of 9/11, provides further support for this proposition. Taking into consideration that the ratification of such conventions involves amending a large amount of domestic legislation, this achievement is commendable.\textsuperscript{40}

Apart from very close co-operation with its Baltic neighbours Latvia and Lithuania, Estonia has co-operated with foreign states and institutions against terrorism. A co-operation agreement between Estonia and Europol was signed in 2001 and Estonian police participate in the task force for combating organised crime in the Baltic Sea Region.\textsuperscript{41} In addition, Estonia has co-operation agreements with several countries on combating organised crime and terrorism which entail the exchange of sensitive information about terrorist groups and their plans. Agreements have been reached with the Czech Republic, Hungary, Slovenia, Germany, France, the UK, Turkey, Romania, Ukraine, Moldova, Kazakhstan, Israel, India and China.\textsuperscript{42} Overall Estonia has sixteen bilateral agreements relating to terrorism, which compared to all the other new EU members is below average.

Internal security in Estonia has been improved by the introduction of an integrated technical surveillance system on its borders. This system is made up of fifteen control centres equipped with computers, communications systems, radar, infrared cameras and other detection systems.\textsuperscript{43} Furthermore Estonian Border Guards check travel documents more stringently, examine them for forgery, and compare them to a regularly updated database which stores information on terrorists and their supporters. Additionally, they have paid more attention to the enforcement of airport and aviation security measures at Tallinn Airport.\textsuperscript{44} However, compared to many of the other members Estonia has not placed as much emphasis on protecting itself from direct terrorist attacks.

Even though Estonia does not possess a special counter-terrorist unit per se, it does have a Quick Response Department (SWAT) which is part of the Central Criminal Police\textsuperscript{45}. Estonia’s contribution to military actions abroad have consisted of a de-mining team and two explosive-detection dog teams in support of the ISAF in Afghanistan. In Iraq Estonia has contributed a cargo-handling team and a twenty-four man infantry platoon under US command.\textsuperscript{46} So far Estonia has not contributed combat troops to the wars in Afghanistan and Iraq.

Although Estonia has implemented measures in all six areas, the focus seems to have been placed on anti-terrorist legislation as a means of combating terrorism. Estonia has attempted to improve co-operation between agencies but still lacks a fully co-ordinated intelligence structure. In addition, its international co-operation in comparison to the other new EU members is below average and it is less concerned with its internal security as it does not participate directly in the physical fight against terrorism by committing troops.

\textsuperscript{42} United Nations Security Council, Report to the Counter-Terrorism Committee, S/2001/1315, pp. 11.
3.2. Poland

In Poland the tasks of identifying, preventing, and detecting terrorism as well as the prosecution of terrorists are generally entrusted to the Internal Security Agency (ISA). However, the Police also investigate some terrorist acts more closely connected to criminal matters. At the same time the financing of terrorism is dealt with by the General financial information inspector, the Office for Organised Crime of the National Prosecutor’s Office, and the State Protection Agency.\(^{47}\) In 2002 in order to co-ordinate and ensure the concentration of efforts made by these different agencies, the Polish government appointed the Inter-sector Centre for Fighting Organised Crime and International Terrorism. The organisation is chaired by the Minister of Internal Affairs and Administration and has co-ordination and operational competence deriving from individual competence of the institutions which form it, such as the ISA, police, border guards, and the General Financial Information Inspector.\(^{48}\) This Inter-sector Centre increases effective co-operation between the agencies responsible for fighting terrorism and to a certain extent it is beginning to establish a coordinated intelligence structure. However, the fact that the Centre derives its authority from the institutions it is made up of illustrates that it lacks the autonomy to act as the head of the intelligence structure.

Since 9/11 the government of Poland has established a special commission to increase the severity of sanctions for acts associated with terrorism and has broadened the context to which it applies.\(^ {49}\) In addition, Poland has tightened its licensing law for the export, import, storage, and transit of strategic goods such as explosives, weapons, dual-use technology, and other dangerous materials.\(^ {50}\) Nevertheless, until very recently Poland did not have a definition of ‘terrorism’ and as a result Poland did not have a specific law against the financing of terrorism and could not easily freeze funds or assets of suspected terrorists. It was only in September 2003 that Poland ratified the Convention for the Suppression of the Financing of Terrorism, making the financing of terrorism a specific crime.\(^ {51}\) Poland has only ratified eleven international conventions, with the most recently ratified being the International Convention on the Suppression of Terrorist Bombing in February 2004, and the Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation in September 2004. This suggests that Poland does not place as much emphasis on the legalistic measures as on other means of combating terrorism, such as intelligence and military action abroad.\(^ {52}\)

Poland has been fairly active within NATO and regional anti-terrorist initiatives. For example it hosted the Warsaw Conference on Combating Terrorism in November 2001 which included leaders from Central, East and Southeast Europe and outlines some of the measures necessary to combat terrorism.\(^ {53}\) In addition to this, Poland has concluded around twenty-five bilateral agreements relating to the fight of terrorism, which is far above average. Agreements have been reached with all new EU member states, except Estonia and Malta, as well as with Bulgaria,

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Croatia, Egypt, Finland, France, Greece, Spain, the Netherlands, Ireland, Morocco, Germany, Russia, Romania, Thailand, Tunisia, Turkey, and the Ukraine.54

After 9/11 the State Protection Service and the police have increased internal security of strategic significant sites in Poland. For example, the Institute of Atomic Energy has taken more stringent measures for the physical protection of nuclear material.55 In addition, the control of Polish borders has been tightened and the scrutiny of travel-documents increased. The recruitment and training of border guards has also increased and the EU has supported the implementation of new technology and equipment such as off-road vehicles, helicopters, and patrol planes, as well as a new communication network.56

Poland has contributed the most out of all new EU members to the military engagements in Afghanistan and Iraq. Polish Special Forces have taken part in operations in Afghanistan and Iraq, and in September 2003 a Polish-led multinational division took control of the Central-South security zone in Iraq. At present there are around 2000 Polish troops in Iraq and approximately 100 military personnel are involved in mine-clearing in Afghanistan.57

Overall, Poland has been very active in almost all of the six areas. The main emphasis has been on the military fight against terrorism and the use of special forces. In addition, internal security, international co-operation, and the intelligence structure have also been improved. However, Poland has given less priority to anti-terrorist legislation, particularly in the form of international conventions and protocols, as it has still not ratified one of the more important conventions, the Convention on the Marking of Plastic Explosives for the Purpose of Detection.

3.3. Czech Republic

Similarly to the Baltic States, but in contrast to Poland and Slovakia, the Czech Republic has formulated a publicly available National Action Plan to Combat Terrorism. Traditionally the Security Information Service (Bezpecnostni Informacni Sluzba, BIS) is responsible for collecting information in the field of terrorism, while other bodies are responsible for the actual action taken after the analysis. In order to enhance the efficiency of co-operation between these agencies, like in Estonia, several co-operation agreements and an implementing protocol on co-operation between the Police of the Czech Republic and BIS have been signed.58 In addition, the Police Presidium began an in-depth reorganisation of its services in 2002 that focuses on the creation of the Criminal Police and Investigation Service, which co-ordinates the activities of the main specialised departments. As part of this reorganisation the Czech Republic is in the process of implementing legislation which will improve the co-operation between different intelligence services and the police and will strengthen the authority of certain intelligence services. Furthermore, a new department was formed to serve as the counterpart of Europol and of the anti-terrorist forces of the EU Member States and candidate countries. In addition, the government established the Financial Police in August 2003, a specialist unit that combats financial crime including the financing of terrorism. Although an increase in co-operation between different security agencies is slowly evolving there is still no clear chain of command in the intelligence structure. Different

agencies and departments at different administrative levels are still combating terrorism separately without fully co-ordinating their effort.\textsuperscript{59}

Although the Czech Republic has laws against many activities which would fall under the category of terrorism, it did not have specific anti-terror legislation until shortly after the Madrid bombing. As Cyril Svoboda the Czech Foreign Minister has pointed out, the Czech Republic “needs a new piece of legislation dealing with the special protection against terrorism...[t]he legal environment we have got is good, its well functioning, but not for such a dangerous phenomenon as terrorist attacks.”\textsuperscript{60} However, the existing Czech legislation does include many laws which are useful in the fight against terrorism. For example, it does recognise the crime of ‘terror’ and it is possible for the Czech security bodies to intercept communications by suspects and record telephone conversations. Furthermore, according to Czech law it is possible to freeze assets in criminal proceedings on the order of the presiding judge, the state prosecutor, investigator, or the police. The freezing of assets can also occur out of court by issuing a suspension order for up to 72 hours as a means to investigate a suspicious transaction and, if needed, to initiate criminal proceedings.\textsuperscript{61} In addition, any kind of financial institution has to report suspicious transactions to the authorities.\textsuperscript{62} Finally, all trade with and transit through the Czech Republic of weapons and dangerous material requires a permit which can only be issued to certain people.\textsuperscript{63} Nevertheless, the Czech Republic is the only new EU member who has not ratified any further international conventions since 9/11. So far it has only ratified nine out of twelve international conventions and protocols related to terrorism. It is currently undertaking legislative measures required for the ratification of the International Convention for the Suppression of the Financing of Terrorism, but until now the ratification is pending review. The Czech Republic has not signed or ratified the ocean related anti-terror conventions such as the Convention for the Suppression of the Unlawful Acts against the Safety of Maritime Navigation and the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on Continental Shelves.\textsuperscript{64} Although the Czech Republic is a landlocked country, other new landlocked EU members such as Hungary and Slovakia ratified these conventions in 1992 and 2001. This shows that the Czech Republic places less importance on anti-terror legislation than some of the other new EU members.

Co-operation between intelligence services of the Czech Republic and allied foreign services has improved. International police co-operation was commenced with Europol, Interpol, the British Centre for Monitoring Terrorist Acts Committed, and the PWGT as early as 1999.\textsuperscript{65} The Czech Republic has also established over twenty-four bilateral agreements related to the fight against terrorism. Some of these include agreements with Estonia, Latvia, Lithuania, Hungary, Slovakia, Slovenia, Belarus, Bulgaria, Ukraine, Croatia, Macedonia, Romania, Yugoslavia, Italy, Belgium, Ireland, the United Kingdom, Germany, France, Austria, Canada, Israel, Japan, and the US. Given that the Czech Republic has twice as many bilateral agreements relating to terrorism than Slovenia, it becomes clear that Czechs do see international co-operation as a key feature of the struggle against terrorism.\textsuperscript{66}

The Czech Republic has introduced extensive internal security measures. For example, borders have been tightened through the introduction of new technical equipment such as thermal vision

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units and CO2 detectors.\textsuperscript{67} In addition, authorities have intensified checks of airport property as well as passengers, luggage, and goods being transported by air. Czech Airlines (CSA) has also introduced stricter security measures, and sky-marshals operate on routes operated by Czech carriers to high-risk destinations such as Israel and the US.\textsuperscript{68} Furthermore, the Czech Republic has increased the protection of military sites, strategic buildings, and infrastructure such as Temelin and Dukovany nuclear power plants, by introducing various measures such as the extension of no-fly zones.\textsuperscript{69} Many government buildings, Jewish, and US premises, are under constant surveillance by Czech police patrols, and other security measures such as CCTV and security traffic measures have been installed. Czech military police are also providing protection for an increased number of people deemed at risk from terrorist attack.\textsuperscript{70} As part of the National Action Plan, the Czech Republic has strengthened control measures related to the non-proliferation of weapons of mass destruction, as well as conventional weapons, ammunition, and dual use technology. This strengthening has included thorough checks of buildings in which explosives and weapons are manufactured or stored, in order to prevent theft or illegal manufacturing.\textsuperscript{71} As can be seen from these measures, the Czech Republic has placed great importance on its internal security in comparison to many of the other states, which again runs parallel to their increased military contributions to the fight against terrorism.

Compared to Poland the military contributions by the Czech Republic are small. So far the Czech government has provided a nuclear-biological-chemical (NBC) unit and a military field hospital for operations in Afghanistan, and following that, in Iraq. Additionally, it provided around 80 military policemen and several experts to the Coalition Provisional Authority. Furthermore, the air force has provided one TU-154 aircraft with a mission to support NATO Airborne Early Warning, and more recently the Czech Government has deployed 120 special-forces troops to Afghanistan.\textsuperscript{72}

When examining the measures implemented by the Czech Republic it becomes clear that on the one hand the government has focused its attention on certain issues such as internal security, international co-operation in the form of bilateral agreements, and the military fight against terrorism. On the other hand it seems to have neglected the legalistic measures in the form of international conventions against terrorism. Although it has improved co-ordination between agencies it also lacks a clear hierarchical intelligence structure.

3.4. Slovenia

As in most of the other new EU Member States, Slovenia does not have a single body that specializes in combating of terrorism. There are two intelligence and security services in Slovenia, which are engaged in international counter-terrorism—the Slovenian Intelligence and Security Agency and the Intelligence and Security Office within the Ministry of Defence.\textsuperscript{73} After 9/11, the Slovenian government established an interdepartmental working group, which is supposed to provide guidelines and monitor all counter-terrorism measures and activities within Slovenia, as well as implement restrictive measures. This body consists of representatives from many different ministries and other institutions, including the Prime Minister’s office, Foreign, Defence, Interior, Justice, Finance, Health, and Transport Ministries, as well as the Slovenian Intelligence and Security Agency.\textsuperscript{74} In addition, a number of formal and informal inter-ministerial groups have


\textsuperscript{68} United Nations Security Council, Report by the Czech Republic to the Counter-Terrorism Committee, S/2001/1302, 9-10.

\textsuperscript{69} Ministry of the Interior of the Czech Republic, National Action Plan to Combat Terrorism, 39.


\textsuperscript{71} Ministry of the Interior of the Czech Republic, National Action Plan to Combat Terrorism, 33-35.

\textsuperscript{72} US Department of State, Pattern of Global Terrorism 2003, pp. 44.


been established with a view to improving the efficiency of exchanging relevant information between different national agencies. Although the establishment of an interdepartmental working group will improve co-operation between agencies, there is no clear intelligence structure or chain of command for dealing with terrorism related issues.

Slovenia has introduced anti-terrorist legislation, which establishes acts of terrorism as punishable offences. Slovenia has also outlawed the solicitation of and association with terrorists, and the acquisition of weapons and other means to commit terrorist acts. In 2001 a new Money Laundering Act came into force and although most of Slovenia’s legislation in regards to the financing of terrorism complies with most recommendations made by the Financial Action Task Force, Slovenian law does not expressly state that funding of terrorism from legal sources is a criminal offence. Funds intended for the financing of terrorism can only be seized if the funds derive from criminal offences. If they are from legal sources then certain conditions have to be provided; one of these being a suspicion that legally acquired funds would be used for the financing of a group for the purpose of perpetrating a criminal offence. Since 9/11 Slovenia has been fairly slow in ratifying international conventions and protocols relating to terrorism. The fact that Slovenia has only ratified ten conventions together with the problems of its financial legislation (i.e. that the financing of terrorism from legal sources is not easily punishable) indicates that anti-terrorist legislation is not one of Slovenia’s main priorities in the fight against terrorism.

Slovenia is a member of the PWGT and was one of the first among EU candidate countries to sign the agreement on cooperation with Europol. However, Slovenia has only twelve bilateral agreements on the co-operation against terrorism with the Czech Republic, Slovakia, Hungary, Poland, Austria, Bulgaria, Romania, Croatia, Albania, Macedonia, Yugoslavia, and the US. This clearly highlights that although Slovenia has co-operation agreements with neighbouring states, there is a lack of international co-operation.

Slovenia has been active on the agenda of border security within the region. For example, an international conference on border security was held at Bled in Slovenia in 2003. This was in part organised by the Slovenian Ministry of Defence and had the purpose of bringing together experts from a number of different countries in order to exchange ideas and enhance existing policies. In addition, border security in Slovenia has been improved by the construction of new facilities and the upgrading of equipment together with the introduction of a new specialised unit responsible for border control. Furthermore, the checking of visa applicants and the validity of guarantors on applications from potentially risky countries has been improved. Although Slovenia claims to have implemented improvements in air traffic safety and also in the protection against potential biological and chemical threats, further detailed information was not available.

So far Slovenia has not participated in any military actions against terrorism abroad in a support or combat role. The Slovenian Ministry of Defence points out that “[t]he decision to participate in the Nato-led ISAF peace support operation was taken by the government … and we are looking at a possible deployment in spring 2004.” However, until now Slovenia has not become involved directly in the conflicts in Afghanistan and Iraq.

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76 D. Rupel, Speech held at the Warsaw Conference on Combating Terrorism (Ljubljana: Ministry of Foreign Affairs of the Republic of Slovenia, 2001), 2-3.
On the whole, Slovenia has implemented the fewest measures. Although it has taken some action to improve regional co-operation, enhance internal co-operation between agencies, increase the severity of some anti-terrorist legislation, and slightly tighten internal security, Slovenia has not taken part in military operations against terrorism.

3.5. Malta:

Malta’s Immigration and Security Police are responsible for checking people entering Malta, identifying possible terrorist suspects and arresting them. At the same time, the Malta Police, as well as maintaining public law and order, is also responsible for part of the immigration process and other state security functions at the Airport. Interagency co-operation exists between the institutions responsible for combating terrorism, but there is no institution responsible for enhancing co-operation or directly co-ordinating counter-terrorist measures. The absence of any institutional framework and the lack of an intelligence structure will directly affect the efficiency of any counter-terrorist measures. However, one should bear in mind that due to the size of Malta, inter-agency co-operation can be established more easily on an ad hoc basis. For example, co-operation between immigration and the police can be easily established because the Principal Immigration Officer is also the Commissioner of the Police.

Although acts closely associated with terrorism were punishable under the criminal code up until the adoption of the EU wide definition of terrorism, Malta did not have a definition of “terrorism” or “terrorist acts” in its legislation. Nevertheless, after 9/11 the government of Malta has regularly issued a list of entities and individuals whose assets are to be frozen to the Central Bank of Malta, which in turn circulates it to all credit and financial institutions in Malta. Besides this, all banks have to report suspicious transactions, and customs reports large amounts of incoming cash to the police and investigates large amounts of outgoing cash. The freezing of assets can also been made possible by means of a court order. Malta has ratified all twelve international conventions relating to terrorism, and was one of the first countries to sign and ratify the Convention for the Suppression of the Financing of Terrorism in 2001. This implies that Malta views anti-terrorist legislation as an important part of the fight against terrorism.

In comparison with many of the other new members of the EU, a co-operation agreement with Europol was only negotiated fairly late in November 2003. Malta has signed sixteen bilateral agreements on co-operation against terrorism with Hungary, Cyprus, Slovakia, Italy, Spain, Sweden, France, Greece, Russia, Israel, Libya, Egypt, China, Albania, Tunisia, and Turkey.

With regard to internal security, Malta has upgraded its border surveillance equipment. For example, Malta is one of the only EU Member States that has increased its border security through the introduction of the Personal Identification Secure Comparison and Evaluation System (PISCES). The system was donated by the United States and is designed to monitor and restrict the movement of terrorists by analysing traveller information through making real-time comparisons of travel documents with the FBI database, thereby allowing the possible interception of terrorist suspects. Equipment, such as x-ray machines for the detection of weapons and hazardous materials has been made available to some customs stations. In addition, Malta, like Cyprus, has a 100% screening process whereby all hand baggage, mail, courier bags, and other aircraft cargo is screened. The Armed Forces of Malta carries out constant surface patrolling and

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86 J. Borg, Statement by the Hon. Joe Borg Minister of Foreign Affairs of Malta At the OSCE Ninth Ministerial Council (Valletta: Ministry of Foreign Affairs, Press Release, 3 December 2001), 3.
89 M. Vella, “FBI may have its bugs on Malta’s arrivals and departures”, Malta Today, June 27, 2004, 4.
frequent aerial surveillance, both inshore and offshore, and they are also responsible for the control of merchant ships entering and leaving the Mina harbour. 90

So far, while Malta has established a small universal special police unit, it has not contributed to any military actions abroad against terrorism. Broadly, Malta has placed the most emphasis on anti-terrorist legislation, but has also implemented some measures to improve internal security and international co-operation.

4. GENERAL PATTERNS AND TRENDS OF COUNTER-TERRORISM IN NEW EUROPE

4.1. Intelligence Structure

When examining the intelligence structures of all the new EU Member States several observations can be made. Half of the states, including Estonia, Latvia, Lithuania, the Czech Republic, and Hungary, have issued a publicly available national counter-terrorism plan, whilst others have not formulated a coherent plan or have conducted their policymaking covertly. All have attempted to improve their intelligence gathering and analysis domestically and internationally. However, none of the states have a totally centralised national body to organise and orchestrate counter-terrorism measures, and generally their institutional frameworks consist of many players with partial responsibilities and partial authority.

There are clear differences between the states’ national institutional intelligence structures. Some share the responsibility amongst many different government agencies at different regional or national levels, while others have a more centralised structure. Malta is the only state that has not implemented concrete measures to enhance its intelligence structure. Several of the states such as Estonia, the Czech Republic, and Hungary have established types of bilateral co-operation agreements between various institutions involved in the fight against terrorism. Other states such as Estonia and Slovenia have also supplemented or replaced these agreements with the introduction of a working group or commission for improving the co-operation between different institutions fighting terrorism. Again, other states such as Slovakia and Cyprus have tackled the problem of co-ordination within the intelligence structure by setting up small units that specialise in the fight against terrorism. States such as Poland and Hungary have established more formal centres or committees responsible for counter-terrorist co-operation within their country such as the Inter-sector Centre for Fighting Organised Crime and International Terrorism and the TKB. 91

It is apparent from examining the reports that states such as the Baltic States and Slovenia, which have gained, or regained their independence relatively late, have been less successful at co-ordinating their intelligence structures than states such as Poland, Hungary and Cyprus, which have been established for longer. Overall this could indicate that the establishment of successful institutions, including an intelligence structure and networks of co-operation between them, has taken a considerable amount of time and cannot be easily created. 92 States such as the Czech Republic and Slovakia, which split in 1993, have performed better in improving the co-operation of their intelligence structures than the Baltic States and Slovenia, but generally worse than Poland, Hungary and Cyprus. This might be due to the fact that the Baltic States and Slovenia had to create many of their government institutions, including their intelligence service, from scratch. The Czech Republic and Slovakia had not been occupied to the same extent and were able to use many of the existing institutions after the peaceful split. In this case, Malta does not fit neatly into this framework, as it has not taken substantive measures to enhance co-operation between agencies.

90 T. Borg, (2003) Opening speech by Minister for Justice and the Interior Dr Tonio Borg at the 50th European Civil Aviation Conference (Valletta: Ministry of Justice and Home Affairs, Press Release September 2003), 1
However, as mentioned in the case study, Malta’s size, with a population under 400,000, makes co-operation between institutions possible without having to implement concrete measures.93

4.2. Anti-Terrorist legislation

All new EU members have relied on their criminal code to crack down on terrorists, based on the principle that every terrorist action will also be punishable by criminal law. There are some difficulties with this, as can be seen in the case of Slovenia where there is a problem prosecuting the financing of terrorism by legal means, or the membership of a terrorist organisation, as there is no real crime involved as defined by the statutes. However, all states have increased their ability to prevent money laundering and have strengthened their anti-terrorist legislation to some extent. Seven of the ten new EU members have ratified all twelve international conventions and protocols relating to terrorism. Within these seven it is possible to further group some states together. For example, Slovakia and Hungary had already ratified almost all conventions prior to 9/11, while Cyprus and Latvia managed to ratify all conventions before 2003. Malta had ratified the last convention at the end of 2003, while Estonia and Lithuania have only completed ratification in 2004. Poland is still missing one convention, Slovenia two, and the Czech Republic still has to ratify three conventions. The two countries that have provided the most combat troops to military operations in Afghanistan and Iraq, Poland and the Czech Republic, are also among the three states, together with Slovenia, that have ratified the fewest international conventions against terrorism. In addition, most states that have not contributed to military efforts, such as Malta, as well as those states that have only sent support troops, such as the Baltic States and Slovakia, have ratified all conventions and integrated the necessary amendments into their domestic legislation. On the one hand, this difference could symbolise an ideological contrast of how best to fight international terrorism. On the other hand the fact that Hungary has ratified all ten conventions and contributed many troops to Afghanistan and Iraq implies that this difference could simply be due to the military capability of each new EU member.94

4.3. International co-operation

Considering that not all bilateral anti-terrorist agreements between countries are made public, the figures show an interesting pattern.95 When examining the number of agreements among the new EU members, Hungary is the only one to have agreements with all its fellow new members. The Czech Republic with eight agreements, and Poland and Slovakia with seven, follow closely. Most others have five, and Malta only three. This same pattern is also visible when looking at the overall number of co-operation agreements. Slovakia, the Czech Republic, Poland and Hungary have approximately twenty to thirty agreements world-wide, whilst the rest of the new EU members have only around twelve and nineteen (see appendix). A possible explanation for this pattern could be the population size of each of these four states, compared to the other new EU members. These four states have the largest populations ranging from 5.4 million in the case of Slovakia to 38.6 million in the case of Poland, whereas all the other states have population sizes between around 400 thousand and 3.6 million people.96 These numbers can have an impact on the size of state institutions and the number of personnel in the diplomatic corps responsible for establishing bilateral agreements with other states. In addition, these four states also have the

largest GDP and potentially more resources, and therefore might be seen as better partners in the war against terrorism.97

4.4 Internal security

Overall, all new EU members have increased their internal security structures by improving border controls through the introduction of new technology, infrastructure, and training. In addition, all have increased security of commercial aviation, designated objects, and components of critical infrastructures, and to a lesser extent, dignitaries. It is difficult to assess whether the tightened security at borders and airports in all the new EU Member States is due to a real fear of terrorists entering their territory or high jacking their planes, or whether they were more concerned with meeting the requirements for the accession to the EU. Although, all countries generally rate the likelihood of a domestic attack as low, some states have taken more precautions than others. For example, the Czech Republic is the only one of the new EU members that has introduced sky-marshals on certain flights, while Hungary has taken some precautionary measures against potential terrorist attacks with chemical, biological and nuclear weapons. Generally, it can be seen that the states that are more involved in military actions abroad, such as Poland, Hungary and the Czech Republic, have been more active in increasing their internal security and protecting strategic sites and infrastructure.98

4.5. Military action abroad

The military contribution to the fight against terrorism has been very different among the new EU Member States. Some, such as Estonia, have contributed mainly support units in the form of cargo-handlers, de-mining teams, and engineering units, but have not sent actual infantry or combat troops. Others, such as Latvia and Lithuania, have contributed just over one hundred support troops each to operations in Afghanistan and Iraq, while Hungary has sent around 400 in total. The Czech Republic has sent combat troops to Afghanistan in the form of special-forces units. Poland, with over 2000 troops, is the main contributor, not only among the new EU Member States, but also among the whole of Europe. Slovenia, Cyprus, and Malta have so far not actively contributed to the military fight against terrorism.99

When considering why these states contributed to military actions abroad one has to take into consideration that all are fairly recent members of NATO and have, or are trying to establish, close ties with the US. It is noticeable that the states that have been members of NATO since 1999, such as the Czech Republic, Hungary and Poland, have contributed large amounts of troops and special forces. Furthermore, these states were part of the group of eight European countries who openly supported the United States ambitions to disarm Iraq, even though Germany and France opposed such measures.100 In addition, all states that provided support troops such as Estonia, Latvia, Lithuania, and Slovakia have recently joined NATO in April 2004. The exception is Slovenia, which also joined NATO and is currently considering sending troops. The non-NATO members, such as Cyprus and Malta, have not sent troops.

5. Conclusion

Having examined some of the counter-terrorism public policies implemented by the new EU members, one essential question remains. Has it been effective? The issue of analysing public policy and evaluating its effects is one of the main tasks of public policy studies. However, this is not so easy when wanting to examine the effectiveness of the counter-terrorism measures. For one, this is due to the fact that it is virtually impossible to set performance targets on counter-terrorism issues. Although some might argue that the numbers of terrorism related arrests are indicative of the success of present counter-terrorism measures, one should stress that most research is based on reports by the media, which often publicise arrests but do not report if a suspect is released without charge. So far, governments do not normally report statistics on this issue, and any research on counter-terrorism efforts will always encounter a certain lack of transparency due to the confidential nature of the subject. The unsatisfactory answer often given highlights the number of attacks and casualties or looks at the quantity of arrested or killed terrorists. However appealing and easy, taking a ‘body-count’ or ‘number of incidents’ approach to measuring success can be deceptive. So what standards could be used to assess the success or failure of existing counter-terrorism measures? Newer developments in public policy studies, which examine the social construction of policy problems, might prove valuable. Without doubt, more detailed research is needed in order to gain an insight into the usefulness of discourse analysis in examining not only the construction of public policies but also its ability to come up with an alternative way of evaluating the outcome and effectiveness of different public policies.

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**APPENDIX: BILATERAL AGREEMENTS RELATING TO TERRORISM**

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| Ukraine |        | X         | X      | X          | X        | X       | X       |         |       |
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| Bulgaria |      | X         | X      | X          | X        | X       |         |        |       |
| Romania |        | X         | X      | X          | X        | X       |         |        |       |
| Croatia |        | X         | X      | X          | X        | X       |         |        |       |
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105 **Source:** Reports by the new EU members to the United Nations Security Council Counter-Terrorism Committee.
NOTES ON THOMAS POGGE’S “HUMAN RIGHTS AND GLOBAL JUSTICE” AND “RECOGNISED AND VIOLATED BY INTERNATIONAL LAW: THE HUMAN RIGHTS OF THE GLOBAL POOR”

Wendy Mitchell ‡

Abstract

Pogge’s conception of human rights pushes the emphasis on collective responsibility for human rights violations, and at a time when ‘world debt relief’ is politically viable, at least in principle, it is an appealing paper. It is appealing because it makes current popular support for a more just global economic system not simply desirable but morally mandatory. As a consequence, it forces affluent Western states to take responsibility for their impact on the severe poverty of the developing world. Despite these appealing characteristics, I argue against Pogge’s expansive notion of human rights violation on three key points. First, his understanding of citizens as organisers of their society’s institutions I argue is a misrepresentation of the current relationship between citizen and state in Western liberal democracies. This is crucial to his point that citizens are thereby responsible for the actions and dynamics of those institutions. Second, I argue that Pogge’s theory disregards intention and locates moral praise or blame in circumstances that are often out of the individual’s control and should rightly be placed on governments and other official governing bodies. Third, I argue that his notion of compensation is inadequately justified, and has unpalatable consequences.

Keywords: Thomas Pogge; human rights; compensation

1. INTRODUCTION

This paper focuses on a recent paper delivered by Thomas Pogge, “Recognized and Violated by International Law: The Human Rights of the Global Poor”.¹ It is an elaboration on a section of his 2002 book, World Poverty and Human Rights, and as such will be treated comparatively.² Though there has been little time for response to Pogge’s latest ideas, I hope to bring some discussion points into focus and prompt further, more extensive commentary.

Pogge’s conception of human rights pushes the emphasis on collective responsibility for human rights violations, and at a time when “world debt relief” is politically viable, at least in

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principle, it is an appealing paper. It is appealing because, rather astonishingly, it makes current popular support for a more just global economic system not simply desirable but mandatory, in a moral sense. Pogge’s argument is premised on his chapter in World Poverty, which runs as follows:

1. Human rights are moral claims on the organisation of one’s society
2. Citizens are collectively responsible for the organisation of their society
3. It follows from this that human rights make demands on (especially influential) citizens
4. These demands mean that citizens are responsible for re-organising their society’s institutions if those institutions are responsible for human rights violations
5. If citizens fail to do so, they are human rights violators

In “Recognized and Violated”, Pogge expands this to an international context, and calls the citizens of economically prosperous Western countries violators of the human rights of citizens of more economically deprived countries.

This would have clear consequences for international policy on debt relief and other economic aid to developing countries: a resulting effect is that such relief is a strong and direct responsibility of good government and not a supererogatory act of goodwill. Such an argument would supersede practical discussions of whether or not debt relief is politically rational or economically astute. It would also transform the way in which we traditionally conceptualise human rights violations: the policy of developed countries would be considered directly responsible for economic disadvantage in other areas of the world. The international policy of advantaged countries would be forced to address the issue of debt relief with an urgency and focus previously unseen, or be accused of systematic human rights violations.

However, there are a number of moves here that are not explained, and Pogge’s conception of responsibility lacks clarity as a result. In section one, I question Pogge’s very premise: are citizens in fact collectively responsible for the make-up of their society? How much influence do individuals (individually or collectively) have on the institutional arrangements of the countries in which they reside? Moreover, Pogge conflates individual and collective responsibility rather carelessly, so even if we accept Pogge’s assumption that citizens are responsible, there must still be a much more thorough analysis of how individual duties are elicited from this collective responsibility. In section two I propose that this conflation causes problems further on in his theory of global responsibility. The notion of individual intention, for example, is made redundant; the justness of an individual’s actions is assessed only by reference to collectively organised institutional arrangements. The move between points two and three of Pogge’s argument, as outlined above, is, then, an awkward one, as it works (perversely) to disempower the individual in striving for just institutions by typecasting them in the role of prima facie violator. Pogge is then forced to create the safety net conception of “compensation”, so that individuals who find themselves in an unjust collective end-state can be vindicated of this title. I argue in section three that compensation is not sufficient to create retrospective justice, and is a capitulation to a utilitarian mindset.

Further, I would like to propose some linguistic restraint in the use of the term “violator”. Pogge uses the term without due care, his intention presumably to have maximum impact on his readership and provoke them to activism on behalf of the radical economic inequalities between the West and the “rest”. However, there are profound consequences for these loose semantics which Pogge fails to acknowledge fully.

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3 At an Amnesty International event on 11th June 2006, comedian and activist Mark Thomas pointed out that as little as 5 years ago talk of world debt relief was dismissed as wildly naïve and unrealistic for government policy. Recent years have shown a huge acceleration in its popularity.

4 I take for granted in this essay that we can consider the actions and contributions of Western governments as contributing systematically to the disadvantage of other countries. This is a highly debatable point, and one which I do not have the space to consider fully in this paper. For this reason, I will follow Pogge’s argument this far, and focus my criticisms elsewhere.
There are two problems with using such a thin conception of the term “violation”. First, it relies on the notion of compensation. Since it is unfeasible for them to stop contributing economically (they do so through everyday consumption or labour) citizens are violators of human rights if they do not ‘compensate’ for their contribution to violating institutions. In “Recognized and Violated”, Pogge has developed the idea to include economic compensation from citizens of affluent Western societies to the economically disadvantaged. The justification of this expansive understanding of compensation is inadequate, designed to engender maximum collective guilt, and not necessarily the most useful way to approach global responsibility. This will be further discussed in section three. Secondly, by extension, the essential character of a human rights violation is lost; that of official disrespect which Pogge himself advocates in 2002, in his chapter of Human Rights and Global Justice, “How should human rights be conceived?” This is a central feature of a human rights violator, which is diffusion of its force by Pogge in the very same essay which provides such careful definitional work on the concept.

A refutation of Pogge’s argument is in no way a wholesale denial of our responsibility for human rights violations being carried out systematically in our own societies. Neither do I shirk the responsibility of Western peoples for their contributions to the structural economic disadvantage of developing countries. However, there are more fruitful ways of understanding this responsibility than those proposed by Pogge in these papers.


Pogge’s argument is that human rights are moral claims on society’s organisation. He positions this against a conventional “interactional” model, where governments and individuals simply have a negative responsibility to not violate human rights. Recall my formulation of the second stage of Pogge’s argument: “Citizens are collectively responsible for the organisation of their society”. In Pogge’s view, not only are citizens responsible for this organisation, but “not violating” this responsibility extends to the duty of all citizens actively to create institutional structures which secure human rights. Because human rights are moral claims on the organisation of society, then, they necessarily make claims on the organisers of society and particularly, on the more influential organisers. For Pogge, these organisers are the citizens themselves.

What Pogge considers to be one of the great strengths of his argument is its ability to circumvent conventional libertarian objections to economic and social rights (so-called “positive rights”). He manages this by formulating the act of upholding a violating institution as a positive violation of human rights; we are positively interfering with the negative right through our contribution. This is analogous with any other negative right: we are actively interfering in the economy, which for Pogge is philosophically equivalent with an interference in the right to privacy, or the right to bodily integrity. This taxonomic reshuffle separates Pogge’s economic rights from the controversy that those rights usually provoke, owing to their perceived expense, their difficulty in implementation, and the tradition that they are matters for government policy. Pogge clarifies his point by using the example of a citizen sustaining a social order based on slavery through the contribution of taxes or labour to the economic order. In this case, even the citizen who does not own slaves is still positively contributing to the imposition of a coercive institution on slaves, a violation of the negative libertarian duties of non-interference.

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5 Pogge, “Recognised and Violated by International Law.”
6 Pogge, World Poverty and Human Rights, 64.
8 Ibid.
9 Ibid., p. 65; see also Pogge, “Recognised and Violated by International Law,” 3.
11 Pogge, World Poverty and Human Rights, 66.
First, it is necessary to draw attention to something that Pogge describes himself, in *Human Rights and Global Justice*, as part of his initial definition of human rights violations: particular violations are distinctive because they are *official*.\(^\text{12}\) A criminal act would not be perceived as a human rights violation, no matter how reprehensible, unless official institutions carried it out themselves, condoned it, or systematically failed to punish it. The reason that Pogge gives for this understanding of human rights is that official violations are not simply taking the object or benefits of the rights from an individual, they are attacking the very right itself; the concepts of right and justice are subverted by official actions.\(^\text{13}\) For Pogge, this feature is constitutive of the character of a human rights violation. Pogge proposes quite an expansive understanding of “official” action here. He includes the actions of a guerrilla movement or of a large corporation, as well as of a government or a government institution. I think this is justified; it is acceptable that official, in a loose sense, can mean not only public officeholders but also “those who occupy positions of authority within a society”, under certain conditions.\(^\text{14}\) The problem comes when Pogge extends his conception of “official” to those “in whose name such officials are acting”.\(^\text{15}\)

This is where stage two of his argument comes into play, for official disrespect, according to Pogge, exists also because officials act directly in the “name” of their citizens. Citizens are implicated because they uphold social institutions which officially disrespect human rights. There is rather a perplexing consequence to this. If we take a country, \(X\), which employs sweatshop workers to manufacture and export textiles, then those workers are necessarily contributing to the economy of \(X\). According to Pogge, these workers, as citizens, are the ultimate guardians of what happens on their territory.\(^\text{16}\) Their inability to restructure society makes them human rights violators. And yet, they are also, clearly, the victims of a human rights violation.

This is a simplification of Pogge’s argument, but it is a point that reveals the slightly problematic territory into which the theory can stray. Pogge may answer by calling this a distortion; that, of course, there are complex reasons why these workers are unable to reformulate their institutions effectively: they are un-influential, disenfranchised. But this example does uncover a question raised by Pogge’s argument: How effectively are citizens responsible for the organisation of their society? It seems to me that there is a leap in the argument at stage two, where Pogge assumes a kind of direct involvement in social organisation that many citizens simply do not have. Even in developed Western countries, for example, it has been widely argued that democratic processes are no longer majoritarian processes. To name a few points of a practical nature: there is widespread apathy in general elections, increased executive power has resulted in decisions against the will of the majority, government is less accessible and more technocratic, bureaucracy has complicated democratic processes.\(^\text{17}\) We need not say in all cases. But in some cases, the citizen is not the organiser and, by extension, does not have the empowerment of the reformer. It is crucial to Pogge’s theory that the citizen and the state are intrinsically and directly connected, yet this relationship is in many ways dysfunctional.

Pogge might answer that degree of responsibility could be directly proportional to degree of influence. Indeed, he considers more influential citizens to have greater responsibility. However, his argument is not conducted with any meaningful analysis of the relationship between responsibility and what creates responsibility. Rather, he explicitly states that every citizen of Western society is directly responsible for global human rights violations simply by virtue of their socio-economic status.

This makes it at best unclear what motivates Pogge’s responsibility conception. Further problems stem from this lack of clarity, which are discussed in sections two and three. It should be

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\(^{12}\) Ibid., 57-58.

\(^{13}\) Ibid., 57-59.

\(^{14}\) Ibid., 58.

\(^{15}\) Ibid.

\(^{16}\) Ibid., 63.

clear that they are initiated by Pogge’s fuzzy analysis of causal responsibility: his elision of collective and individual responsibility, and of the state and the individual. And so, even if we accept that only “influential” citizens are human rights violators, until we have better definitional work on the responsibility conception, the theory continues to produce consequences that seem intuitively unjust to individuals.\(^\text{18}\) This is because Pogge continues to theorise around a more sophisticated discussion of what constitutes causal responsibility.

3. **Teleological Problems: The Dismissal of Intention in Pogge’s Theory**

Pogge attempts to broach the problem by implying that the dysfunctional relationship between the citizen and the state is not necessarily a problem; he states explicitly that an active minority will do.\(^\text{19}\) However, Pogge originally brands citizens as collectively responsible for the makeup of their society. What happens to those who are not able to take responsibility, or even those who do not accept responsibility, for the violating institutions? To Pogge, these people are violators of human rights. And yet, these people are not necessarily just those who do not pay attention to social problems like our apathetic voters, and they are not just those who are too vulnerable to have influence, like our sweatshop workers. And so we arrive at another major problem with Pogge’s theory: it is entirely dependent on the results of compensatory action. Even if we protest and try to restructure our institutions, we are still violators until we have succeeded. And as we have noted, it is not necessarily possible (though not impossible) to achieve results. It is of especial interest that if democratic processes between citizens and their own governments have become weaker, democratic processes between citizens of contributing governments and international or supranational institutions such as the World Bank are virtually non-existent.

Further, the fact that an “active minority” is adequate for Pogge begins to unmask the character of his theory. If an active minority seek and succeed in their reformation of democratic institutions and this leads to a better implementation of human rights, then all other (apathetic, belligerent, powerless) citizens are no longer violators, for their economic contributions now are to a just order. And yet, this wholesale absolution seems strange, in consideration of their continuing passivity. This is an odd notion of causal responsibility, which writes off those who try but do not succeed and admonishes those who fail to utilise their reforming power. This happens without discrimination and entirely as a result of how organisational institutions stand at the end of the process. More, there is still a bizarre apportionment of blame or praise even if institutions are reformed from “above”, without any democratic input at all. Think, for example, of executives negotiating and ratifying international treaties without the involvement of parliament or referendum.

How, then, can we adequately compensate for the massive economic gains in Western countries from the economic human rights violations in developing countries? Pogge himself must admit that it is not really feasible to stop contributing.\(^\text{20}\) We are tarred by the same brush as the violating institutions in Pogge’s method until we achieve results. This kind of “original sin” attitude of Pogge’s approach is useful to him because it highlights the contributions of the Western world to structural economic inequality. However, this consequence of casting each individual as either “violator” or “violated” in a largely arbitrary fashion is unjustifiable. As earlier noted, because every person in some way contributes to this global order, even those in developing countries, it also inevitably leads to everyone being both violator and violated, and the value of the distinction is lost.

\(^{18}\) It could also be pointed out here that a human rights violation seems an absolute term: one is either a violator or not a violator. Pogge’s terminology insists on this kind of absolute responsibility, and this prevents him from considering the relevance of degree of responsibility.

\(^{19}\) Pogge, *World Poverty and Human Rights*, 62.

\(^{20}\) Pogge’s expansive notion of the violator means he must concede that not contributing is impossible: this is his reason for introducing the notion of compensation. Pogge, “Recognised and Violated by International Law,” 3-4.

\(^{21}\) Ibid., 3n.
4. **Pogge’s Compensation is Incompatible with the Language of Rights**

Next, I would like to draw attention briefly to a point that Pogge makes only in “Recognized and Violated by International Law: The human rights of the global poor”. Here, Pogge uses the example of Oskar Schindler as a human rights violator who “more than adequately” compensated for his economic contributions to the Nazi regime through his protection of some of the victims of that regime. The notion of “compensation” is thoroughly misappropriated in application to a human rights violation. Compensation is inevitably quantifiable. If I contribute to the deaths of ten people, but protect fifteen, then presumably I have adequately compensated. I am no longer a human rights violator. But this utilitarian tendency is intuitively unacceptable in the language of human rights, for it diminishes the integrity and centrality of the sacrificed individual and effectively renders them without any rights at all. My compensation against the system does not undo my contribution to it; to the deaths of the first ten people. As much as Pogge may protest, I do not believe that it is possible to avoid these kinds of utility balancing acts when dealing with “compensation”, and its language is unproductive for dealing with human rights.

Compensation is a way of avoiding problems with Pogge’s assumptions about responsibility and societal organisation. This way, if citizens find themselves in an unjust institutional “end-state”, which they cannot change, they are able to reclaim justness through the act of compensation. Compensation in this way acts as a “get-out” clause which is intended to divert Pogge’s audience from why compensation needs to be introduced in the first place. The answer to this question is that compensation allows citizens to distinguish themselves as individuals in a way that is prevented by Pogge’s responsibility conception, where they are institutionally branded in accordance with collective results. In other words, compensation reintroduces individualism into Pogge’s collective responsibility. It should be noted that this is a necessary manoeuvre on Pogge’s part because it seems unjust for well intentioned individuals to be branded as human rights violators simply because of their inevitable contributions to unjust institutions.

5. **Concluding Remarks**

I have two summarising points to make on Pogge. The first is that a better language might be the language of fairness. Instead of violations and compensation, I think that Pogge is really discussing fairness and responsibility. We have a very real moral obligation to change the institutional structures of our society, national and global, without having to rely on collective guilt at our massive human rights violations of the third world. We do not decide the system we are born into, or our role in contributing to that system (though we may decide how we contribute). Pogge’s language renders us all victims of our role, and therefore disempowers us from acting for reform. Our economic contribution to the world order does not make us causally responsible for the actions and dynamics of that world order. However, we could feasibly still say that it is distinctly unfair that we receive such benefits while developing countries suffer for them. There is a human rights violation here, but there is not a direct connection between the institutional violators and each and every individual who contributes to those violators. In *Human Rights and Global Justice*, Pogge jumps from a notion that people may “feel” implicated in the actions of their government and its officials to the notion that they are implicated in those actions. The reason that we are morally implicated in global injustice is not because we are contributing to it (though we are, of course), but because we are part of an unjust system that we may have the power to rectify.

My second and final point is that according to Pogge’s model, the human rights of Westerners must also be violated in their involvement in this system, because such rights are (taken on a universal scale) insecure. Pogge points out that one of the strengths of his argument is that rights fulfilment is linked to the insecurity of the institutional rights system rather than to every individual criminal act. That is, a human rights violation can be said to exist when:

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A person may fully enjoy X even while her access to X is insecure (as when persons relevantly like her . . .) are beaten or threatened.23 [emphasis added.]

However, it cannot exist when a rogue government official commits a crime in a society which is generally very good at protecting human rights institutionally. Though we may be benefiting from the economic system presently, economic rights are not secure. And this is where his emphasis on the distinct character of “official disrespect” is important; for it truly brings home the fact that this violation is an attack on rights themselves, and not just the objects of those rights. Though, as citizens of affluent countries we may enjoy the objects of our rights, do we enjoy the security of the rights themselves? The answer is no, for there are people relevantly like us who do not.24 So it follows that if Western economies do not have respect for human rights, it is not just to the detriment of the victims in developing countries, but to the detriment of global society, for global society’s rights are insecure. It is not so unlikely, for example, that powerful corporations could violate the economic rights of those in developed countries as well as those in developing countries. The point that Pogge rightly makes is that the system is the most important aspect of rights to get “right”, in order to implement rights successfully and fully. If the system is wrong, then violations occur. If we are interested in protecting human rights, then it is in our interests and in the interests of fairness to establish a set of credible institutions. In the meantime, our involvement in the world does not make us prima facie human rights violators, just as the contributions of the sweat-shop workers of Country X do not make them violators. But that is not to suggest that we are admonished from moral responsibility.

In conclusion, we may still consider debt relief and other economic aid for the third world morally necessary. It may be valuable from a policy perspective, as Pogge’s work suggests, to reconceptualise our understanding of moral responsibility with regard to other countries when our governments are involved in their systematic disadvantage. It is also important to engage with the idea that such economic poverty can be considered a violation of human rights and move away from a blanket attitude that the black box of state alone takes responsibility for its own problems. Whether this necessitates a further leap to the kind of blame culture that is implied by Pogge’s paper is another question. Pogge begins with the kind of international policy that he desires and works backwards philosophically. This methodological approach has obviously attractive policy outcomes – taking third world poverty seriously – but also irretrievably confuses some of the theoretical issues at stake.

References


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23 Ibid., 58.
24 This necessarily takes Pogge’s Cosmopolitanism as read: we accept his (controversial) idea that there is a global society of individuals. Relevantly like us, then, signifies the fact that there are the same global institutions governing Western and non-Western countries alike. Whether we have domestic institutions which guarantee our rights becomes irrelevant when we are dealing with Pogge’s idea of cosmopolitan justice.