Towards the Eradication of Child Labor in Pakistan

Doreen S. Denice

In Pakistan, a country where roughly half of the child population lives below the poverty line, child labor is a pressing and deeply entrenched phenomenon. This article will describe the problem of child labor, and present the various attempts at eliminating child labor spearheaded by the Society for the Protection of the Rights of the Child (SPARC), a leading nongovernmental organization in Pakistan. After assessing the utility of SPARC's efforts, the paper will present several recommendations that can help reduce the extent of child labor in Pakistan.

Child Labor in Pakistan

In the sixth edition of the annual report of the Pakistani Society for the Protection of the Rights of the Child (SPARC), a leading nongovernmental organization in Pakistan, SPARC warns that the situation for children in the country is not improving, particularly in the case of child labor and school attendance. [1] The report, titled *The State of Pakistan's Children: 2002*, analyzes and documents the situation of children in Pakistan measuring children's everyday conditions against international commitments and standards. The report provided the following statistics on child labor in Pakistan:

- The Federal Bureau of Statistics (FBS) found that the number of working children in Pakistan is approximately 3.5 million. Officially, children make up about 7% of the total work force. However, government statistics omit children under age 10 and those working in family and small businesses which are not registered with the government. However, given that 23 million school-aged children are not attending school, SPARC believes that the actual number of child laborers "must be higher than suggested by official figures." [2]

- In 2003, UNICEF estimated that eight million children under the age of 14 are engaged as laborers, mostly in brick kiln factories, carpet weaving centers, agriculture, small industries, and domestic services.

- The FBS Survey shows that of all children working in Pakistan, about 73% (2.5 million) are boys and 27% (950,000) are girls. Some 2.1 million children are between 10 and 14 years of age and the rest are between five to nine years of age.

- The survey also concluded that more than 2.9 million children work in rural and 400,000 in urban areas, making the ratio of rural to urban child laborers 7:1. In the provinces there is the following distribution: Punjab province, 1.94 million (60%); North West Frontier Province (NWFP), 1.06 million (32%); Sindh Province, 298,000 (.09%); and Balochistan Province, 14,000 (.004%).

- The survey found that 71% of the total working children are engaged in agriculture, sales, services, mining, construction, manufacturing, domestic service, and transport sectors. About 46% work more than

35 hours per week, while 13% work more than 56 hours per week.

The SPARC report "emphasizes the high incidence of child labor as the most pressing child rights issue which is directly linked to the state of education in the country,"[3] making note of several problems linked to the prevalence of child labor:

First, in Pakistan almost half of the total child population lives below the poverty line "with little hope of escape, given the present insufficient allocation of resources needed for their physical, mental and emotional well-being."[4] The social divide, which favors the distribution of government-funded services in favor of the upper class, is of paramount significance. Government policies need to address the underlying question of disparity to ensure that all sectors with the greatest positive impact on children's development and future are protected from expenditure cuts, and that any existing expenditures are allocated fairly across all the population.

> Child labor is a socially acceptable phenomenon in Pakistan.

Second, section 89 of the Pakistan Penal Code empowers parents, teachers and other guardians to use corporal punishment in order to discipline and correct the behavior of children under the age of 12. Corporal punishment is cited as a major contributor to the "alarming school dropout rate in Pakistan."[5]

Third, in rural areas, schools are usually inadequate or inaccessible. The cost of books and supplies are not affordable to many families, who are said to prefer the "present value of the income a child earns by working, as opposed to the future value of education."[6]

Fourth, child labor is a socially acceptable phenomenon in Pakistan. Whether in family businesses or in families bonded to their employer, children are expected to contribute to the family welfare. Child labor is seen as an apprenticeship that can help to prepare the child better for the future than would a formal education. Contributing to this attitude is the fact that the educated sector suffers from a high unemployment rate.

Fifth, business profit and competitiveness perpetuate child labor. Employers argue that children are cheaper to employ, easier to control, and can sometimes be as productive as adults. For example, carpet-weavers, who employ 1.2 million children, claim that children's fingers make them more skilled than adults. A study revealed that over 80% of carpet workers in Punjab province were children under the age of 15.

Finally, although bonded child labor (debt incurred by a child's parents or guardians which binds a child to an employer in a condition of servitude to pay off the debt) is illegal under Article 11(2) of the Constitution of Pakistan, bonding was not acknowledged by the government of Pakistan until recently.[7] The Bonded Labor (Abolition) Act 1992 was the first law to officially recognize the existence of bonded labor and cancelled all bonded debt. However, the new law "has not had a noticeable effect."[8] Although the government does not keep statistics on bonded labor, the United Nations estimates that there are millions enslaved as bond laborers in the country. Debts are passed down from parents to children. Illiteracy can keep the workers from knowing their rights, so booklets published on the subject by NGOs may be useless unless the population can be educated as to their rights by other means.

SPARC's Activities in Pakistan

At the suggestion of UNICEF's program officer in Islamabad, SPARC's formation was modeled on that of Defense for Children International. SPARC reports a good relationship with its donors and does not lack funding, supported by the Canadian International Development Agency, the Norwegian Agency for Development, the United Nations, and the International Labor Organization, among others. Most of SPARC's publications are available in English and in Urdu, three major books out of which "can be said to be the first of their kind,"[9] including one on child labor. SPARC has also produced a documentary on the subject and is

working on a second documentary on child prostitution in Lahore's red light district.

Through the International Labor Organization (ILO), SPARC has become one of the initial partners in the International Program for the Elimination of Child Labor (IPEC) under its Mini Program. In 1995 SPARC printed its first brochure on child labor—a poster titled 'Stop Child Labor' with the help of UNICEF, and two audio-cassettes on the state of child labor in Pakistan with the financial assistance of ILO IPEC.

In addition, SPARC drafted a bill to amend the Constitution of Pakistan to set the legal age for employment in Pakistan to age 16. Introduced by National Assembly member Shahid Khaqan Abbasi, the bill unfortunately was not passed.[10] Nonetheless, SPARC has continued to ask successive governments to upgrade their laws to set a legal age limit for employment in Pakistan, although they have not yet been successful in doing so.

Individual studies on child labor have also been conducted and published by SPARC. In 1996, for example, the organization conducted a survey of 400 "'randomly selected"[11] working children under the age of 18, from 20 different localities and two villages in the periphery of Islamabad. Given these 'random selection' criteria, one problem becomes apparent from the very outset–employers had to give approval for the children to participate.

SPARC has also published a handbook on the legal provisions of various laws concerning child labor, titled: *Child Labor: The Legal Aspects* in 1997 and 1998 to create awareness and encourage

Typical Classroom in privately funded school for girls, Punjab Province, Pakistan Feb. 2004. D. Denice seated next to teacher at front table.

the government to make efforts to implement all laws related to child labor.

In addition to publications and documentaries of the child labor situation in Pakistan, SPARC participated in a Global March Against Child Labor traveled through Pakistan. The March passed through 26 countries in Asia, and on its first day in Pakistan in April 1998 attracted a crowd of more than 10,000 people on Lahore's Mall Road. The government of Pakistan also showed support for the March, placing supplements in major newspapers, and in issuing welcoming statements from the President and Prime Minister of Pakistan. After the March, SPARC started to hold meetings across the country on child right's issues, and particularly on the subject of child labor:

One major consultation was held in June 1999 in Islamabad and asked what Pakistan was doing to abolish child labor. The consultation was held for international organizations working in the children's rights arena and for the diplomatic community in Pakistan. Government officials were invited to respond to queries.

On September 8 and 9, 1999, SPARC organized its first ever International Conference on the State of Child Labor in South Asia, and its deliberations were published in a book titled, *The State of the Child Labor in South Asia.*

In June 2000, SPARC organized a meeting in Lahore on the ILO Convention on the Worst Forms of Child Labor, which Pakistan subsequently signed and ratified in August 2001.

SPARC contends that the government of Pakistan must play a more active role in fighting child labor, especially given the limited resources of the NGO community. Millions of dollars are

spent on 'models,' but the government is not moving beyond them to implementing actual widespread programs. The organization believes that there is an acute need to invest more in the social sector on the part of the Pakistani government.

Analysis of SPARC's Activities and Impact on Child Rights

While SPARC has made a wide range of efforts, they have been primarily through research and advocacy. The organization has conducted interview studies, issued publications on child labor statistics, and used conferences, public marches, posters, and brochures to generate public awareness of the problem.

SPARC should be commended for its efforts. The fact, however, remains that hardly a dent has been made in the actual rates of child labor in Pakistan. The organization needs to show some muscle in its efforts and convince the Pakistani government to pass and enforce legislation aimed at significantly reducing and, ultimately, abolishing child labor.

In addition, all further work on the subject must emphasize the importance of access to free and compulsory education, a fundamental right of children that is not realized in Pakistan. Budget allocations for education are only 2% of the GDP and are not utilized efficiently. Planning, monitoring, textbook materials, building structures, and human resources are all sorely lacking. This is not only in the interest of Pakistani children and development NGOs, but also in the interest of major Western nations.

Recommendations

Poverty levels in Pakistan appear to necessitate that children work in order to allow families to reach their target take-home pay. While the lack of economic opportunity for adult employment in Pakistan needs to be studied and taken into consideration in any plan to eradicate child labor, the following paragraphs will discuss policies that directly target the problem of child labor.

Richard Blackhurst, for example, a noted trade economist, states that imposing tariffs on imports—either for particular products (carpets, soccer balls, etc.) or in general—would reduce the number of jobs available to children in those industries.[12] Blackhurst's suggestion, however, would cause many children to instead seek alternate employment in the informal non-traded services sector where wages are lower, such as employment as maids, nannies, and street vendors. If children work to achieve a target weekly wage, then it would be likely that they would work more hours in new lower paying jobs. In other words, increased trade restrictions could in fact lead to an increase in child labor.

Ideally, child labor in its hazardous and exploitative forms should be completely eradicated. The Pakistani government ratified the International Labor Organization (ILO) Convention on the Worst Forms of Child Labor (182) in August 2001 and it is obligated to take steps to remove children from these occupations. The U.S. Government should use its influence with the Pakistani regime, and particularly its relationship with President Pervez Musharraf, to influence the enforcement of this convention.

In addition, the Pakistani government formally presented the National Plan of Action of Child Labor by the cabinet in May 2000. The *Education Reform Action Plan (2001-2005)* recognized that education provides capabilities and entitlements to children at risk. It also suggested that within the ESR Action Plan (2001-2005), educational opportunities will be enhanced through launching of formal and non-formal literacy/education programs for child laborers.[13] Pakistani children should have access to free primary school education, yet education in Pakistan is essentially a provincial affair.

The United States should help improve the public education system, as has also been recommended in the *9/11 Commission Report*. According to the report,

> Sustaining the current scale of aid to Pakistan, the United States should support Pakistan's government in its struggle against extremists with a

comprehensive effort that extends from military aid to support for better education, so long as Pakistan's leaders remain willing to make difficult choices of their own.[14]

Satloff suggests that the American school system currently utilized overseas in 132 countries is already playing a vital role in the international culture wars and deserves more support.[15] The 185 schools that have spread over 132 countries, educating the countries' elite classes, can make a difference among the elite. Yet, much more needs to be done to further the lack of educational opportunities in countries like Pakistan for the general population.

Although U.S. funding for the Pakistani education system through USAID/Pakistan has recently been increased, it should be expanded to include programs geographically located throughout Pakistan.[16] According to the Government of Pakistan's Poverty Reduction Strategy Paper (PRSP) entitled *Accelerating Economic Growth and Reducing Poverty: The Road Ahead*, "the education service industry in Pakistan is faced with a multitude of challenges from lack of infrastructure and facilities to severe shortage of qualified and trained teachers."[17] Pakistan's *Education Sector Reform (ESR) Action Plan (2001-2005)* is embedded in its PRSP. An 'Education For All' (EFA) Plan of Action (2001-2015) and EFA Fast Track Initiative has been developed with development partners to enhance quality and coverage in education. A list of education projects funded by Pakistan's development assistance partners contains a wide

Both primary and secondary school aged girls attended this private school, Feb. 2004. These girls boarded at the privately funded school and likely would have been child laborers had it not been for their elite sector benefactors. This school could be used as a model to be funded by Multinational Corporations in Pakistan.

variety of projects, many of which are province-specific.[18]

Cohen states that both the American and Pakistani governments are aware of the collapse of Pakistan's education system, but they tend to look at different dimensions of the problem. Washington focuses primarily on *madrassas*, seeing them as breeding grounds for terrorism. The Pakistani government offered a three-year grant package for registered madaris beginning in 2002-03 in an attempt to develop uniformity of curriculum and through the introduction of general education subjects in madrassas. Thus, although the U.S. aid package included a multi-year $100 million educational program, as of 2003, only $21.5 million of American aid was directed at primary education and literacy—about half the cost of an F-16. And of this, aid experts note, a large percentage of this amount would be swallowed up by administrative costs.[19] (Recently, USAID has increased its total estimated funding for education to $265 million for the six-year strategic plan period from 2002-2007. FY 2005 funding was in the amount of $66 million.)[20]

Multinational Corporations wishing to operate in Pakistan should be required to provide wages for its employees high enough that families can afford to send children to school. Furthermore, they should be required to donate funds by province-sector to help organize primary schools for children in Pakistan. Elite women within each province could be identified who would assist in the administration and development of such schools. This would help to establish schools, and enable them to be

developed in a culturally acceptable manner, at reasonable cost.

Private model schools already in existence should be copied for their low-cost factors. For example, there is a primary school for girls in a rural area in Punjab province which utilizes a landowner's property and building and functions as a school. Approximately 400 day students and 40 boarding students live and study in sparse but clean facilities. Food, clothing, and funds for textbooks are donated by local women, and this school has operated for almost 10 years without government subsidies. Access to well-trained teachers, however, remains a problem. A centralized agency offering to train teachers for schools run by elite sector benefactors might be an excellent way to offer universal access to primary education in Pakistan's rural village areas.

Conclusion

It is estimated that Pakistan employs more than 3.3 million children in its formal economy. Projects like Pakistan's SPARC, which can target only thousands of children, can hardly be expected to eradicate the problem. While the government of Pakistan is signatory to the convention on the Rights of the Child and has stated its commitment to its implementation, child labor has been socially acceptable in Pakistan—a tradition that continues to be a barrier to its elimination. Parents continue to see child labor as a suitable apprenticeship opportunity, and they tend to opt for employment today in order to realize immediate family income needs, rather than investing in education that promises increased future productivity. To eradicate child labor, Pakistan must first ensure more employment opportunities for its adult working population, which is plagued by a high number of educated unemployed workers. To that end, multinational corporations need better incentives to relocate and offer jobs to Pakistani nationals.

U.S. lawmakers have attempted to introduce bills that would prohibit the import of products made with the help of child labor.[21] However, these bills may not serve to eradicate child labor and may, instead, increase the incidents of child labor.

Foreign assistance has been directed at the education sector, but the authorities have failed in the past to make optimum use of these funds or fairly distribute them. SPARC's report, *The State of Pakistan's Children: 2002,* emphasizes the high incidence of child labor as the most pressing child rights issue in Pakistan and links it directly to the state of education in the country.[22]

Finally, grassroots efforts utilizing local elite women to organize and fund schools combined with centralized teacher training could be encouraged to develop schools which are culturally acceptable, efficiently managed, affordable, and well-attended.

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1 U.N. Wire, "NGO Says Child Rights Situation Stagnant; US Pledges Funds," June 6, 2003. Available at www.unwire.org/UNWire/20030606/34117_story.asp

2 "Child Labor" SPARC, Islamabad, Pakistan, pg 1. Available at www.sparcpk.org/CRs-CL%20in%20Pakistan.htm

3 "The State of Pakistan's Children 2002," Society for the Protection of the Rights of the Child, 6th edition. Available at www.sparcpk.org/publications

4 Ibid, pg 2.

5 Ibid.

6 Ibid.

7 Ibid. Bonded laborers in the brick kiln industry successfully brought a case against a brick kiln owner and in 1989 a Supreme Court decision limited case advances (peshgi) to one week's wages.

8 SPARC Website report on Child Labor, pg. 2. Available at www.sparcpk.org

9 Ten Years Report: SPARC, Islamabad, Pakistan, pg 7. Available at www.sparcpk.org

10 Ibid, pg 12.

11 Children were selected on the basis of their willingness, availability, and their employer's willingness for the children to participate in the survey therefore the survey could not be considered a true random sampling.

12 Ibid.

13 Pakistan Education Sector Reform Action Plan (2001-2005), pg 132. Available at
 www.moe.gov.pk/esrbook/ch.7.doc

14 The 9/11 Commission Report, United States Printing Office, 2004, pg 387.

15 Robert Satloff, The Battle of Ideas in the War on Terror (Washington, DC: Washington Institute for Near East Policy), pg 41.

16 USAID/Pakistan, which began its program in 2002 after a seven-year pause due to US-imposed nuclear non-proliferation sanctions, states its largest commitment in Pakistan will be in education and plans to spend $67 million to improve basic, higher and vocational education in Pakistan in FY 2005. It was limiting its programs to Balochistan, Sindh and the Federally Administered Tribal Areas (FATA). On July 7, 2005 the US Government announced it will include the Islamabad Capital Territory Area in providing $14.9 million (Rs. 894 million) funding 7000 government schools for school improvement to launch the USAID-funded School Improvement initiative under the Education Sector Reform Assistance Program. . Funding has been increased and USAID's current 6-year, strategic plan period (2002-2007) is $265 million ($178 million for basic education and $87 million for higher education). Available at www.usaid.gov/pk/education/background/index.htm

17 Pakistan Poverty Reduction Strategy Paper, IMF Country Report No.04/24, December 2003, pg 67. Available at www.imf.org/external/pubs/ft/scr/2004/cr0424.pdf

18 The Ministry of Education, Government of Pakistan identifies the following Development Assistance Partners: USAID, Japan International Cooperation Agency (JICA), Deutsche Gesellschaft fur Technische Zusammenarbeit (GTZ) , Asian Development Bank (ADB),UNICEF, World Food Program (WFP), Norwegian Agency for Development Corporation (NORAD) and Canadian International Development Agency (CIDA). Available at www.moe.gov.pk/donorassistance.htm

19 Stephen P. Cohen, The Idea of Pakistan, (Washington, DC: Brookings Institution, 2004), pg 314.

20 Available at www.usaid.gov/pk/education/background/index.htm

21 These bills include The Harkin Bill, the International Child Labor Elimination Act, the Child Free Consumer Information Act, and the Sanders Amendment. See SPARC's "Ten Years Report, pg 16.

22 "Child Rights in Pakistan: 2002,", pg 2.

The Constitution and Its Interpretation: An Islamic Law Perspective on Afghanistan's Constitutional Development Process, 2002-2004
Andrew Finkelman

Among the many daunting challenges of nationbuilding, the process of constitutional development has proved particularly obstacle-ridden. Integrating customary or religious legal traditions with modern statutory provisions in order to form a cohesive national charter is a difficult task, but one that remains essential for the viability of a constitution.[1] Recent UN missions to East Timor (UNTAET) and Kosovo (UNMIK) provide key lessons for this process, and for the larger nationbuilding project underway in Afghanistan, but fail to address a defining aspect of the Afghan scenario: Islam.

This paper will investigate the role and impact of Islamic law, *shari'a*, on Afghanistan's constitutional development process. Examining the Islamic content of the new Afghan constitution will in turn provide the basis for an analysis of the international community's constitutional development initiatives in general. It will also reveal the impact of those efforts on the extent and nature of the Afghan constitution's embrace of Islam. Furthermore, several normative considerations for Afghanistan's constitution-making will be discussed with reference to the country's new judiciary, and how the new constitution lends itself to interpretation by that body.

Background

"We want to share in democracy and to learn, but if it is outside the context of Islam, then we do not want it."[2]

Establishing a purely secular legal system in Afghanistan has never been a viable option, given that distrust of central government is deeply entrenched, and Islam is the most common source of identity,.[3] Even the Afghan constitution of 1964, which was regarded as the nation's most progressive constitution and a model for its new charter, declared the country to be an Islamic state with a deeply rooted Islamic heritage. Against this backdrop, a UN-sponsored international conference took place in Bonn, Germany, in December 2001 and set Afghanistan on its path towards reconstruction. The meeting produced a blueprint for nationbuilding, termed the "*Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions*." The Bonn Agreement outlined a fixed timetable for reconstruction, and called for a three year, phased process of political transformation to be implemented by the UN Mission to Afghanistan (UNAMA) and foreign aid agencies. An Emergency Loya Jirga (a tribal grand council) held in June 2002 elected members of the Afghanistan Transitional Administration (ATA) who would govern what was later renamed the Transitional Islamic State of Afghanistan, headed by Pashtun leader Hamid Karzai.[4] The agreement mandated the formation of a

Constitutional Commission to begin work on a draft constitution. The draft constitution was to be finalized and approved in a Constitutional Loya Jirga to be convened within 18 months of the establishment of the ATA.[5]

Islamic Content of the Afghan Constitution and the International Community

The Constitution

The constitution born out of the Bonn process is essentially a moderate document. The text recognizes religious rights for non-Muslims,[6] subordinates customary and religious law to positive legislative statutes, prohibits gender-based discrimination, establishes a human rights commission, and embraces the Universal Declaration of Human Rights.[7] The constitution does not even make mention of the term *shari'a*. Yet, its embrace of Islam and Islamic law is unambiguous and, in the case of several prominent provisions, potentially problematic.

> The constitution does not even make mention of the term *shari'a*. Yet, its embrace of Islam and Islamic law is unambiguous and, in the case of several prominent provisions, potentially problematic.

The first three articles each relate to Islam in some respect. Article One declares Afghanistan to be an "Islamic Republic" while Article Two adopts Islam as the state religion. These are intended primarily as a symbolic statement of identity, and will have little practical effect, at least in the short term, because they impose no concrete obligations..[8] The third of these introductory provisions is the most important. The 'repugnance' clause, as it is termed, has in various forms been a mainstay of prior Afghan constitutions. Purporting to prohibit statutes at odds with Islam, it reads: "*In Afghanistan there shall be no law repugnant to the ordinances of the sacred religion of Islam and other values in this constitution.*"[9] This is a subtle, but significant revision to a provision that is otherwise equivalent to its 1964 permutation. The earlier version merely referred to the "basic principles of the sacred religion of Islam;" the 2004 text substitutes this wording with "ordinances of the sacred religion of Islam." The 1964 construction implied that statutes repugnant to subsidiary rulings in Islamic law, but which did not oppose the basic principles of Islam, could be tolerated.[10] Conversely, with the 2004 rewrite, any ruling in the annals of *shari'a* could in theory be used to substantiate a claim of repugnance.[11]

In practice this means that together with the guarantee of judicial review (Article 121), the repugnance clause makes the Afghan Supreme Court a particularly strong platform for potential spoilers. Sitting atop a three-tiered unitary judiciary, the Supreme Court is empowered to "review the laws, legislative decrees, international treaties and international covenants for their compliance with the Constitution and provide their interpretation in accordance with the law." The decision to hand the Supreme Court such oversight powers is surprising, since Afghanistan had no prior history of judicial review. In a letter to Afghanistan's Constitutional Commission warning it of the danger of such a provision, one scholar alluded to neighboring Iran and described the decision to allow "appointed Islamic jurists to have the monopoly over interpreting the Shari'a in opposition to an elected parliament" as the "gravest mistake in the constitutional history of Iran."[12]

Article 130 defines the scope and applicability of *shari'a* in relation to statutory law. Consonant with its 1964 counterpart, the constitution only recognizes application of Hanafi jurisprudence where the constitution and "other laws" are silent.[13] This provision clearly establishes the priority of the constitution and positive law over un-enacted Islamic law. Where direct reference to *shari'a* would have been expected in this section, the term is notably absent. This decision obviously reflects the overwhelming support Hanafi doctrine enjoys across Afghanistan.[14] The phrasing prevents judges from selecting rulings from outlying juridical frameworks, such as the Hanbali,[15] but also purports to induce a degree of objectivity into *ijtihad* (independent reasoning) by restricting direct recourse to the *Qur'an* and *hadith*, thereby constricting the extent of an individual judge's

personal interpretation. While the effect of this may be to prevent renegade judges from imposing their own archaic interpretations of *shari'a*, it may also restrict the type of contextualization and flexibility a court needs to "serve justice in the best possible manner."[16] In either scenario, Article 130 places great stake in the particular interpretative penchants of future Afghan jurists. A later article breaks further constitutional ground in that it provides for the application of Shi'a law in matters of personal status involving the minority Shi'a population.[17]

The Process

In order to fully understand the constitution's incorporation of *shari'a* law, and the legal consequences which arise therefrom, it now remains to investigate how the international community influenced the document. This investigation requires that one ask two distinct but related questions: To what extent did foreign actions influence the Islamic provisions of the constitution? Was this influence the result of conscious goals of these international actors, and, if so, were their objectives met? In the end, it is not clear that foreign attempts to shape the constitutional approach to *shari'a* proved dispositive. The effects and implications of the new constitution are presently being played out. Identification of the causal links between international initiatives and constitutional results is further muddled by Afghanistan's complex religious and political dynamics.

The Constitutional Commission, the one body mandated by the Bonn Agreement to deal specifically with constitutional drafting and public consultation, was inaugurated in April 2003. The thirty-five member commission inherited a preliminary version loosely based on the 1964 constitution from a nine-member drafting commission.

UNAMA and the ATA organized multi-stage popular consultation and education initiatives while the draft underwent debate and review. Commission members along with UNAMA staffers met with citizens and distributed questionnaires across the country—and in the refugee communities of Pakistan and Iran—

soliciting advice on the constitution.[18] These public consultation initiatives were preceded by a public education campaign and simultaneous provincial elections for Constitutional Loya Jirga delegates. As a final step, the Constitutional Loya Jirga successfully debated and adopted Afghanistan's new charter in January 2004, a mere year and a half after the establishment of the ATA.

Evaluation

In contrast to previous Afghan constitutions, which had been drafted in secret and imposed with no public debate, this round of constitution-making was a remarkable improvement and a success in its own right—both for Afghanistan and for advocates of democracy in Southwest Asia. It appears that Afghans have accepted the document as an authentic and legitimate expression of nationhood. Although security situation has worsened in 2005, with the country still mired in small-scale war, encouragingly, the constitution and its interpretation have not yet emerged as a major cause of tensions among Afghan factions or of the violence which has afflicted the southern and eastern portions of the country in particular. Notwithstanding this achievement, the process resulted in a constitution that, due to the nature and extent of its Islamic content, is what one constitutional advisor to UNAMA described as "a package deal that contains potential contradictions to spark future conflicts."[19] Most importantly, the Afghan process lacked several elements key to the constitution-development process.

Firstly, there was a lack of transparency and inclusiveness. Previous nationbuilding experience has shown that it is vital that a

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national 'conversation' be held in an open forum, whereby the population achieves ownership of their national charter through widespread participation.[20] Despite the promise of 'broad consultation' on the composition of the commission, the appointment process was "opaque and secretive," as described by the International Crisis Group.[21] From the start, the makeup of the Constitutional Commission reflected the entrenched interests and power of the conservative parties. Moderate Islamic leaders were excluded from the thirty-five member commission, which instead reflected the interests of *jihadi* groups such as *Shura-yi Nazar* and Abd al-Rab al-Sayyaf's *Ittehad-e Islami Afghanistan*.[22] The ATA's secretive selection of *mujahidin*-era hardliners had two consequences: First, their presence at the highest levels of decision making provided an ideal platform from which to push for inclusion of *shari'a* norms in the constitution—an effort that proved successful in many cases. The lack of transparency in the appointments also sent the message to the Afghan people that the drafting process was only an elaborate political theater designed to buttress the interests of the powerful.

The accelerated timeframe, allowing a mere 13 months for drafting, public education and public consultation, and with a limited budget, further hampered public inclusion. A maxim of the modern approach to the development of the rule of law is that a public education campaign must precede popular consultation to ensure meaningful participation.[23] Given that Afghanistan's education infrastructure had been virtually eliminated under the Taliban, Afghans could not be expected to make a valuable contribution to the constitutional process without being first informed of the nature and possibilities of representative democracy. The Secretariat of

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the Constitutional Commission produced booklets summarizing, among other issues, the Bonn process and the history of constitution-making in Afghanistan.[24] While it is difficult to estimate how many of these books were circulated or what percentage of the population was able to review them given widespread illiteracy, we do know that numerous delays left only a few precious months for this vital effort. Public education initiatives thus did not serve their vital role, nor could they have.[25]

More troubling still was how the distribution of the draft constitution was withheld until the final months of 2003,.[26] Releasing an advance copy of the draft constitution would have been an easy step to make the process more transparent, but this was not done until the eve of the Constitutional Loya Jirga, for fear of empowering Islamist groups. Even the Afghan Independent Human Rights Commission questioned the secrecy of the process.[27] This is not to say that concern over extremist groups was completely misplaced. Conservatives pushed for making Islamic law supreme over its civil counterpart, for applying *shari'a* rulings which are discriminatory towards women, and for reducing religious minorities to *dhimmi* (minority, literally "protected") status.

Nevertheless, attempts to mute fundamentalist voices during the drafting period may serve to embolden hardliners in the long run.[28] To the extent that conservative elements feel excluded, they are handed ready-made reasons for later challenging the constitution. A report by Harvard University's Conflict Prevention Initiative from 2003 confirms that conservatives perceived themselves as being excluded from the process: "HPCR research demonstrates that there are significant political and legal actors, largely representing a more conservative position, who feel that they are being left out of the current legal reform process. Many such leaders command a large segment of public opinion, or are seen as respected religious scholars."[29] Radical Islamic groups are well organized and well funded in Afghanistan, and Afghan history bears witness to the ability of

mullahs to use Islam effectively as a purely political tool to resist change.[30]

Further, there is little proof, despite concerns at the time, that further engaging hardliners in discussion would have allowed them to push Afghanistan's constitution towards a more rigid, fundamentalist direction to Islamic law. Indeed, their influence was already guaranteed, with or without their involvement in the pre-Jirga debates. The disproportionate representation of Islamist conservatives on the Constitutional Commission (each of them appointed by President Karzai) and in the Constitutional Loya Jirga had already ensured that their input would be heard at the highest levels.[31] The voices of Abd al-Rab al-Sayyaf, and others like him who enjoy the legitimacy of Islamist credentials, were heard inside the Jirga tent to no small effect. The chairman of the event, Sighbatullah Mojededdi, aired his views on the inferiority of women from the Jirga platform before later lambasting those who opposed naming Afghanistan an Islamic Republic, calling them "infidels."[32] And it was an elected representative to the Constitutional Loya Jirga, namely the Saudi backed Sayyaf—infamous for persecuting the Shi'a Hazaras and as doctrinaire as any of the Taliban leadership—who is credited with forcing Karzai into accepting the repugnance clause into the Constitution.[33] International negotiators conceded to fundamentalists on several points, but they did manage to draw lines in sand to protect the status of women and to prohibit codification of *shari'a*-based limitations on international human rights obligations.[34]

In short, further engagement of the conservative religious segment in Afghanistan by the international community would not have hurt, and might have added to a more transparent process. In any case, experience showed that overly aggressive drafting timetables, secretive appointments, and attempts to stifle debate are clearly ineffective strategies in dealing with Islamists. Despite the failures on the consultation and civic education fronts, given the debilitating Bonn timetable and lack of funding, it is indeed doubtful whether UNAMA could have done

much beyond hard-nosed negotiating at the Constitutional Loya Jirga to modify the constitution's approach to Islam. The latter approach was at least successful in curbing the most retrograde constitutional impulses of the Afghan fundamentalists but hardly stymied the conservative agenda as a whole. Engineering a potentially unstable balance of giveaways to conservatives and liberals alike, which is what eventually occurred, is likely the best result international efforts could have achieved.

Normative Considerations for Islamic Provisions in the Afghan Constitution, and its Interpretation

The challenges of influencing the constitutional integration of *shari'a* law are formidable when attempted within a holistic framework for the development of the rule of law. Such a framework must be built on a foundation of local participation, sensitivity to cultural norms, and an appreciation that a document imposed from the outside will have little future. The presence of Islamic law is not an excuse to disregard these maxims. On the contrary, *shari'a* can abet a constitution's legitimacy while engendering a sense of ownership and national unity. Use of customary norms, which generally enjoy a greater level of trust and adherence by the population, has proved vital in the past.[35] In the case of Afghanistan, which has suffered years of ethnic strife, political infighting and hostility between Sunni and Shi'a, Islam creates perhaps the sole shared value system around which the population may rally.

To be sure, secular illegitimacy and fundamentalist discrimination are the Skylla and Charybdis menacing the international community's approach to Islamic law. A secular legal framework will be seen as illegitimate, and therefore ignored. Certain tribal practices, which

> A state legal system perceived as Islamic will certainly not eliminate tribal law, nor should it, since some tribal mechanisms can prove useful for local dispute resolution.

clearly violate human rights standards, will continue to flourish.[36]   By contrast, giving a polysemous *shari'a* elevated status *vis-à-vis* the government's civil statutory authority could invite the application of a decontextualized interpretation of the antiquated decisions which have more in common with 7th century Arabia than with modern day Afghanistan. Establishing mechanisms of government that can regulate interpretation of Islamic law in the legal system is essential.   A state legal system perceived as Islamic will certainly not eliminate tribal law, nor should it, since some tribal mechanisms can prove useful for local dispute resolution.   However, failure to co-opt Islamic law may result in alternative centers of political power and legitimization, which will have an unequivocally destructive effect on national government.[37]

> The present regime exists and is able to sustain itself only through international assistance; it has little future without the patronage of external supporters.

Central government in Afghanistan is already feeble; stripping it of Islamic legitimacy will only make it weaker.

Strictly defining the set of inviolable Islamic norms and indicating an approach to the acceptability of *ijtihad* are essential. Constitutions define the relationship of a state and citizens, and "recognize and proclaim the religious and national identity of the people, and proceed to the main objective, which is to define the organization of the state based on the rule of law."[38]   In harmonizing state and *shari'a* law within a constitution, ambiguity can be dangerous .[39]   When application of *shari'a* law is mandated in such a document, as is the case in Articles 3 and 130, dangers inhere in imprecise constitutional wording and in misconceived governmental power structures.

An elemental question must also be considered: should the international community even contemplate shaping the Islamic content of the constitutions of Muslim countries and the religious approaches of their judges? Indeed, one school of thought might suggest that, since nationbuilding should be driven by native citizens

rather than foreign consultants, integration of religious mores into government ought to take place unfettered.   There is merit in this perspective, since allowing 'locals' the lead role in re-forging a broken nation lends the process indispensable legitimacy.[40] Remaining true to the country-specific Islamic identity of the nation in question must therefore be a stated goal of the international community, but it *should* seek minimize the extremist threat.[41]   The Afghan people and their leaders bear responsibility for the success of their nation, but the present regime exists and is able to sustain itself only through international assistance; it has little future without the patronage of external supporters. Importantly, Afghans seem to be largely accepting of this reality and to desire foreign help. Few have interest in seeing a return of the Taliban, nor, given the country's tradition of pious adherence to a moderate version of Islam, do they wish to cede control to extremist mullahs. This being the case, the international community can and should engage with Afghan leaders, conservative and liberal alike, to ensure that the popular will of the people finds expression in the constitution. Given that the aid community has generally enjoyed the good will of the Afghan people, at the time of the Constitutional Loya Jirga and now, international intervention towards this end represents positive engagement not onerous interference.

Unfortunately, the nature of the constitutional process and events in Afghanistan over the past twenty years conspired to provide conservative elites and warlords a prime opportunity to integrate their religious viewpoints in the constitution.[42] However, there is no reason that the religious views of entrenched conservatives had to form an unalterable component of a permanent constitution. One more effective approach for the international community could have been to implement an interim constitution.[43] This procedure, which has been used successfully, most notably in South Africa, could have reduced the long term impact of the Islamists by allowing for popular review and renegotiation of the constitution after a set period of years.[44]   Reformulating Afghan constitutional development as a two-stage process

would have given security, civic, and legal education initiatives time to work. The results of these would likely have been a population less threatened by warlordism, aware of the possibilities of democracy and the formation of a group of moderate Islamic jurists, educated outside *madrassas*, and able and willing to formulate a coherent mixture of Islamic values and civil law.[45]   Another approach, as contemplated by President Karzai,[46] could have been to build in a constitutional review process to take place five or ten years down the road. Convincing the Afghan legislature to revisit troublesome constitutional provisions, especially those relating to Islam, would now be facilitated if such a step had been mandated from the outset.

Consideration of Islamic law-sensitive legal development in Afghanistan, however, cannot take place without some reference to the judiciary as the institution charged with interpreting the new constitution. Because the Supreme Court has the power to reject virtually any law or treaty as un-Islamic, the prospect of a Court controlled by Islamic fundamentalists could, in the opinion of one expert, be catastrophic.[47]   Mohammad Kamali, a constitutional advisor to the ATA, frames the issue thus:

> An enlightened approach to the Shar'[i]a, to matters of interpretation and ijtihad, can be conducive to the establishment of a just government that is observant of its duty to serve the people. A rigid and doctrinaire approach to the Shar'[i]a can, on the other hand, also turn it into an instrument of oppression…Past experience tends to show that they [shari'a and statutory legislation] are not natural allies; to forge a good and purposeful pattern of interaction between them requires resource development, fresh and relevant research as to how to build a people-friendly legal order in which the traditional and the more modern legal acumen can work together to realise the objectives of the new constitution[48]

Judicial capacity building can begin by reforming the Kabul *shari'a* faculty as a means of fostering the "enlightened" approach that Kamali advocates. This is especially important in light of Article 118 of the constitution. The provision allows jurists to be appointed to the Supreme Court bench with just an Islamic law background and no civil law experience, stating that judges "should have higher education in law <u>or</u> in Islamic jurisprudence."[49] As noted in a recent conference on Afghan legal development,[50] a new approach to Islamic legal instruction should de-emphasize the concept of imitation (*taqlid*) and bolster the practice of *ijtihad* to contextualize Islamic norms as a means to deliver "justice in the best possible manner," as permitted by Article 130. Traditionalists might counter that such a method contemplates altering laws that are unalterable. However, this modern view would not reformulate the theory of *ijtihad* itself, but permit it to be applied even by secular judges outside the restricted class of *ulama* in the name of social justice.[51] With this modern approach of flexible *ijtihad*, the incompatibility between Islamic law and the state begins to fall away.[52]

> A new approach to Islamic legal instruction should de-emphasize the concept of imitation (*taqlid*) and bolster the practice of *ijtihad* to contextualize Islamic norms as a means to deliver "justice in the best possible manner."

The point is not to engage in a theoretical discussion of the new Islamic jurisprudence, but rather to illustrate that such theories already exist and should be actively acknowledged, embraced, and employed as a means of countering conservative religious factions. The type of "resource development" Kamali has called for is not accomplished overnight. There are few quick-fixes in the legal development field, especially in a country with entrenched religious, tribal, and patriarchal structures. Strategic initiatives designed to engender key changes in Islamic jurisprudence are no exception. But promoting moderate Islamic capacity is likely to cultivate judges and legislators who place greater value in

realizing the constitution's rights-affording provisions than exploiting its religious content.

The heated discussion over reformulating Islamic law for the 21st century—to say nothing of the debate over Islam and democracy—has produced many proposals, few concrete solutions and even fewer examples of demonstrated success. We are now witnessing a desperate effort to make sure a final resolution in Afghanistan places it definitely in the latter category. While the constitution could provide a spark for future conflict, it may also prove workable in the long term. A keener awareness of, and informed approach to the *shari'a* in Afghan legal reform is hardly a magical remedy, but it may be the beginning of a solution.

1 On the value of integrating customary legal traditions into the formal judicial system in a post-conflict country, see Ranheim, Christian. "Legal Pluralism in East Timor: The Formal Judicial System and Community Based Law" United States Institute of Peace. October 2003.

2 Melia, Thomas O. "Afghan Perspectives on Democracy: A Report on Focus Groups in the Kabul Area On the Eve of the Emergency Loya Jirga"; National Democratic Institute for International Affairs, 15. Available at: http://www.accessdemocracy.org/NDI/library/1411_af_report_052802.pdf; (accessed November 28, 2004) quotation from a university-educated Pashtun woman.

3 Lau, Martin. "Afghanistan's Legal System and its Compatibility with International Human Rights Standards"; p. 27; Available at: http://www.icj.org/IMG/pdf/doc-51.pdf (accessed November 28, 2004)

4 Jirga is the Pashtun word for "assembly"

5 Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions. December 1, 2003. Available at: http://www.unama-afg.org/docs/bonn/bonn.html. (accessed December 5, 2004)

6 Article Two states: "followers of other religions are free to exercise their faith and perform their religious rites within the limits of the provisions of law". Although the final version is more tolerant than was the draft, which only provided for freedom to perform religious rites, it remains to be seen whether the provision will be interpreted as guaranteeing unequivocal "religious freedom. For criticism of the draft version, see testimony of President of the Institute on Religion and Public Policy: Congress, House, Committee on International Relations, Subcommittee on International Terrorism, Non-Proliferation and Human Rights, State Department Report on International Religious Freedom, 108th Congress, February 10, 2004. Available via Lexis-Nexis.

7 See Articles 131, 22, 58 and 7

8 Kamali, Mohammad. "Islam and Its Shar'a in the Afghan Constitution 2004, With Special Reference to Personal Law". Paper given at the conference on "The Shari'a in the Afghan Constitution and its Implication for the Legal Order: Family and Succession Law, Commercial Law and Trade." February 23rd and 24th. 4

9 Id, at 13. I rely on Mohammed Kamali's translation of Article 3 of the 2004 constitution from the official Dari, as well as his translation of the 1964 language.

10 Id, 13.

11 Id, 14. Kamali describes the Afghan parliament's debate on the Marriage Law of 1971, in which opponents of reform of child and marriage law were able to point to "almost any provision of Islamic law on the topic of their concern". With the expansion of the possible bases for the repugnance argument expanded in the 2004 constitution, such arguments are likely to be seen again.

12 Arjomand, Said Amir. "The Role of Religion and the Hanafi and Ja'fari Jurisprudence in the New Constitution of Afghanistan." Available at: http://www.cic.nyu.edu/pdf/E14RoleofReligioninConstitutionArjomand.pdf (accessed November 28, 2004)

13 The Hanafi School is one of the four primary schools of shari'a, and predominates in Afghanistan.

14 Kamali, 8. The author's conclusions are drawn from his experience traveling the country as part of the Constitutional Commission.

15 The Hanbali school (named after its founder, Ahmad ibn Hanbal) became the conservative response to the rise of the rationalist Mutalizite party in 9th century Baghdad. Hanbali fiqh relies heavily on the Qur'and and sunna, to the exclusion of techniques of personal opinion and analogy. The Hanbali school is favored by the Wahhabi "unitarians" and is currently dominant in Saudi Arabia.

16 Article 130 also mandates that the court's decision be made "in a way to serve justice in the best possible manner"

17 Rubin, Barnett R. "Crafting a Constitution for Afghanistan" Journal of Democracy 15, No. 3, July 2004, 14.; Kamali, 11.

18 Kamali, 8.

19 Rubin, 13.

20 Hart, Vivien. "Democratic Constitution-Making" United States Institute of Peace Special Report. Available at http://www.usip.org/pubs/specialreports/sr107.html. (accessed October 3, 2004) 2.

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21 International Crisis Group. "Afghanistan's Flawed Constitutional Process" ICG Asia Report No. 56; June 12, 2003. Available at http://www.reliefweb.int/library/documents/2003/icg-afg-12jun.pdf (accessed November 16, 2004) at 16.

22 Shura-yi Nazar means "Supervisory Council of the North" a mujahidin group founded by former President Rabbani and Ahmed Shah Massoud. Sayyaf is a Saudi-backed, Wahabbi Pashtun warlord. See Gannon, Kathy. "Afghanistan Unbound" Foreign Affairs Volume 83, issue 3.

23 A statement by East Timorese NGOs issued during that nation's constitution-making process best articulates the importance of such public information and civic education initiatives: "[a] people have to be provided with the information on the choices that have to be made, information on what a Constitution is, information on the options available to them on the fundamental issues. They will then need time to consider and debate so that they are able to form opinions, time to hold discussions in order to seek consensus…None of this can happen in three months. See Louis Aucoin and Michele Brandt, "East Timor's Constitutional Passage to Independence" (Draft) United States Institute of Piece Project on Constitution-Making, Peace building and National Reconciliation. April 15, 2003

24 The Secretariat of the Constitutional Commission of Afghanistan, "The Constitution Making Process in Afghanistan." Available at: http://www.constitution-afg.com/resrouces/Constitution-Making%20Process%20Final.doc (accessed December 15, 2004)

25 International Crisis Group, 18.

26 International Crisis Group, 16. ICG interviews with UNAMA staff form the basis for this contention. Farooq Wardark, Director of the Secretariat of the Constitutional Commission responded to the ICG commentary in a letter disputing some of Aziz Huq's conclusions regarding the ATA's public consultation efforts. Apart from stating that the ATA would meet with "religious leaders," Wardak does not respond to Huq's characterization of the ATA's position vis à vis the empowerment of Islamists. Letter available at: http://www.constitutionafg.com/resrouces/The%20ICG%20Report, %20edited% 20by%20Farooq%202.doc. For more on the ATA's withholding of the draft constitution during public consultations sessions, see Rubin, 10.

27 Agence France Presse, "Afghanistan Launches Public Consultation on Constitution Amid Criticism," June 3, 2003, in Ariane Brunet and Isabelle Solon Helal, "Seizing and Opportunity: Afghan Woman and Constitution-Making Process" (Rights & Democracy Mission Report). Droits et Democratie. September 2003. Available at: http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN016657.pdf (accessed December 14, 2004)

28 International Crisis Group, 26.

29 Harvard Program on Humanitarian Policy and Conflict Research- Conflict Prevention Initiative. "Afghan Legal Reform: Challenges and Opportunities (HPCR Policy Brief, January 2003)" Available at: http://www.preventconflict.org (accessed November 28, 2004)13.

30 King Amaanullah, who attempted to institute radical progressive reform in the 1920s, was eventually defeated by a coalition of disparate tribal elements led by politically minded mullahs under a banner of Islam. See Poullada, Leon B. Reform and Rebellion in Afghanistan, 1919-1929. (Ithaca, NY.:Cornell University Press, 1973), 131.

31 Stephen Grahm. "Women's Rights, the Place of Islam are Focal Points in Afghanistan Debate" St. Louis Post-Dispatch. December 20, 2003. Available via Westlaw. (accessed November 25, 2004)

32 Amy Waldman, "Meeting on Constitution, Afghan Women Find Old Attitudes" The New York Times, December 16, 2003, A1. See also "Mujaddedi calls delegate 'infidel'" (accessed December 10, 2004); available from http://www.rawa.org/ai-lj.htm (accessed December 2, 2004)

33 Ustad Abdul Rasul Sayyaf (accessed December 4, 2004); available from http://www.globalsecurity.org/military/world/afghanistan/sayyaf.htm. For information on Sayyaf's atrocities, see Gannon, 1. For more on Sayyaf's Wahabbi beliefs and on Wahhabism itself, see also Algar, Hamid. Wahhabism: A Critical Essay. (Oneonta, NY: Islamic Publications International, 2002).

34 See Rubin, 14 for a discussion of the provisions to which Islamist elements removed their opposition (Articles 2, 3, 7 and 22)

35 This is especially true in Afghanistan, where decades of war, religious tyranny by the Taliban, corruption and misrule have instilled a large degree of mistrust of the central government in the Afghan population. On flexibility and efficiency of customary legal systems, See Ranheim.

36 For a discussion of Pashtun customary laws (including the concept of Poar, where in penance for a murder the perpetrator's family may be forced to provide the family of the victim with "two fair and virgin girls") see International Legal Foundation "The Customary Laws of Afghanistan" (2003) Available at: http://www.theilf.org/ILF_cust_law_afgh_10-15.doc (accessed December 1, 2004)

37 Lau, Martin. "Islamic Law and the Afghan Legal System" Available at: http://www.bglatzer.de/arg/arp/lau.pdf; (accessed November 8, 2004)

38 See Arjomand, 2; See also Hart.

39 Kamali discusses the problem of ambiguity in light of hudud punishments, banking interest and women's rights. See Kamali, 3.

40 Carothers, Thomas. Aiding Democracy Abroad: The Learning Curve. (Washington, DC.: Carnegie Endowment for International Peace, 1999) 260, 266.

41 Such threats may materialize in the form of mullahs serving their own political or social ends by obstructing reform from a platform of apparent Islamic legitimacy. Moreover, while myriad treatises have demonstrated the compatibility Islam and democracy, some may attempt to apply shari'a penalties such as the hudud punishments, or God's "restrictive ordinances," which call for death by stoning, amputation, etc. which are prima facie at odds with human rights standards, the application of which the international community has the right to prevent. See Schact, Joseph. An Introduction to

Islamic Law. (Oxford, UK: Clarendon Press, 1964) 175. Also, certain verses of the hadith also call for stoning, see Volume 3, Book 49, Number 860 of the Bukhari translation.

42 Intimidation efforts were widespread in the CLJ elections, while many of the eventual delegates were either closely tied to Karzai or to the warlord factions. See Sifton, John. "Flawed Charter for a Land Ruled By Fear: Afghanistan." International Herald Tribune. December 22, 2003. Available via WestLaw.

43 Barnett R. Rubin, former advisor to UN SRSG Lakhdar Brahimi, endorsed such an approach. See Rubin, 19.

44 East Timor provides a good example of where entrenched political interests, the Freitlin political party in this case, exerted undue influence in the constitutional process and were able to ignore the results of a popular consultation because they were in power at the time. See Louis Aucoin and Michele Brandt.

45 Ambassador-at-Large for Religious Freedom in the US Department of State, John Hanford, identifies the lack of jurists trained outside a "religious milieu" as a major problem for Afghanistan, and recommends training. See Congress, House, Committee on International Relations, Afghanistan: Democratization and Human Rights on the Eve of the Constitutional Loya Jirga, 108th Congress, 1st Session, November 19, 2003

46 In his final speech to the Constitutional Loya Jirga, President Karzai reflected the value of flexibility in constitution-making: "The constitution is not the Koran. If five or ten years down the line we find that stability improves, proper political parties emerge, and we judge that a parliamentary system can function better, then a Loya Jirga can at a time of our choosing be convened to adopt a different system of government." See "Address to the Closing Session of the Constitutional Loya Jirga" by Hamid Karzai, January 4, 2004. Available at: http://www.unama-afg.org/docs/ (accessed December 15, 2004)

47 Thier, Alexander. "Judiciary Not Upholding Afghan Law." Seattle Post-Intelligencer. January 20, 2004. Availablevia Westlaw.

48 Kamali, 18.

49 Emphasis added.

50 "The Role of Law in Modern Afghanistan" Roundtable Recommendations, held in Rome Italy in December 2002 by the International Development Law Organization. Emphasis added.

51 Haider, Nadya. "Islamic Legal Reform: The Case of Pakistan and Family Law" Yale Journal of Law and Femininism. 2000. 293.

52 From the remarks of Mr. Yadh Ben Achour, Professor of Public Law, Faculty of Legal, Political and Economic Sciences of Tunis published in the "The Role of Law in Modern Afghanistan" Roundtable Report, held in Rome Italy in December 2002 by the International Development Law Organization. The Iranian intellectual 'Abolkarim Sourush provides insights for this approach in pieces such as Theoretical Contraction and Expansion of the Shari'a and A Theory of the Development of Religious Knowledge, where he posits a vision of a "religious-democratic state" See Schirazi, Asghar. The Constitution of Iran: Politics and the State in the Islamic Republic. (London: I.B. Tauris Publishers, 1998) Trans. John O'Kane. 281.

National Security Implications of Al-Takfir Wal-Hijra
Joshua L. Gleis

Background

The radical Islamist movement *Al-Takfir Wal-Hijra* originated in Egypt in the 1960s as a radical offshoot of the Muslim Brotherhood. Believing that much of the world is heretical, members of the movement adhere to a strict Salafi interpretation of Islam, and aim ultimately to return to what they consider to be a true Islamic society—the Islamic caliphate. This interpretation thus requires that its followers purify the world of infidels. The group is known for perpetrating violence against those it considers *kufar* (heretics), including those Arabs and Muslims whom *Takfiris* do not consider to be living in accordance with true Islam.[1] According to the U.S. Department of Justice, Takfiris are guided by fatwas issued by influential radicals, such as the "blind sheikh," Omar Abdel Rahman.[2]

The movement was founded by an agricultural engineer named Shukri Mustafa in Egypt in the 1960s. During his stay in prison, Mustafa had been part of a Muslim Brotherhood splinter group, Jama'at al-Muslimeen (Society of Muslims) that believed in a radical interpretation of Egyptian writer Sayyed Qutb's text Ma'alim fi'l-Tariq (Milestones on the Road).[3] As is explained on the website Perspectives on World History and Current Events, "the name al-Takfir w'al-Hijra was applied to Jama'at al-Muslimeen by journalists after the group became publicly known."[4] True Takfiris still prefer the denomination of Jama'at al-Muslimeen. However,

as the site points out, "[a]s a descriptive name, Takfir Wal-Hijra has far more utility than Jama'at al-Muslimeen. Takfir is a verb which means to declare kufr (infidel), that is, to excommunicate. The hijra is the flight, or migration, of Muhammad and his jama'at from Mecca to Yathrib (Medina) in 622 AD."[5]

The Takfiri name re-emerged in the late 1990s and early 2000s. A group calling itself Takfir Wal-Hijra that opposed the Syrian government and non-observant Muslim Lebanese[6] also took credit for the killings of Christian civilians in the Dinnieh area of Lebanon.[7] In the 1990s the name resurfaced yet again with attacks on mosques in the Sudan as well as against Sudanese government interests. These attacks were carried out under the leadership of Abbas Al-Bakr Abbas and with members who had been formerly of Ansar Al-Sunna Al-Mohamadiya.[8]

Takfir Wal-Hijra is not simply a terrorist organization. Instead, it is better described as a radical ideology than an organization per se—a web of Islamic militants around the world connected only by their beliefs.[9] As a result, it has been depicted by some as an "Islamic fascism" of sorts.[10] Indeed, Takfiris are seen as so extreme that even many radical Islamists such as Abu Hamza, the claw-handed imam of London's Finsbury Park Mosque who has endorsed and defended the 9/11 attacks, described Takfiris as "nothing but a bunch of extremists… [they] create nothing and destroy everything. It is not right to

be as harsh as they are. These people want to be judges and executioners."[11] As an ideology, Takfir Wal-Hijra today operates with no overall central structure; it is impossible to attribute one leader to the movement.[12] There are, however, some figures within the movement who are worth noting:

Shukri Ahmed Mustafa (1944-1978). As previously described, Mustafa was Takfir's founder and spiritual leader, and a disciple of Sayyid Qutb. Mustafa was also thought by some to be the Mahdi who, according to Islamic tradition, would be the deliverer of the end of time.13 In the Egyptian crackdown on Islamic extremism in the 1970s, Mustafa was captured and executed.

Youssef Fikri (aka: the "Emir of Blood") was the spiritual leader of a Takfir Wal-Hijra group in

> Future attacks in Europe will likely be a result of the merging of the expertise of Al Qaeda elements with the ideology of the Salafi Takfir Wal-Hijra movement.

Morocco. He was captured in 2002 in Casablanca and sentenced to death. It is said that he killed his own uncle because Fikri believed he was living with a prostitute and had ties to communism.[14]

Bassam Ahmed Kanj (alias: Abu Aisha, aka the 'Afghan Arab') was the leader of a terrorist group of 200-300 Lebanese fighters that Lebanese authorities called Takfir Wal-Hijra.[15] It is reported that while working as a taxi driver in Boston, Kanj befriended Riad Hijazi, who later plotted to bomb tourist targets in Jordan over the millennium celebrations.[16] He was killed by Lebanese forces in Lebanon in 2000.[17]

Due to the loose structure of the Takfir Wal-Hijra movement, it is very difficult to estimate the number of adherents. The movement has a known presence in North Africa, as well as in Western European countries such as France (in at least 16 mosques), Germany, Italy and the United Kingdom—the latter believed to be a major hub for recruitment.[18] Takfir Wal-Hijra also has a presence in various countries in the Middle East, East Africa, and in North America.[19] Many governments, particularly those in North Africa,

have labeled their Islamist opponents as members of Takfir Wal-Hijra in order to discredit them politically, adding to the confusion over who is in fact truly Takfiri.[20] While the size of the movement is unknown, considering its presence in dozens of nations and involvement in terrorist acts around the world, the number is likely in the thousands.

Links with Al Qaeda

Takfir Wal Hijra is now also associated with Al Qaeda, although the depth of their relationship is unclear and debated among experts. While many Al Qaeda members are Takfiri, Takfir Wal-Hijra is not an affiliate of Al Qaeda and operates independently. Takfiri have been implicated in several terrorist plots attributed to Al Qaeda elements. They are believed to have provided support for the March 11, 2004, train bombings in Madrid. There is a growing fear that Takfiri are mobilizing to carry out additional operations in Europe.[21] Takfiri were also known to have fought the Soviets alongside Osama bin Laden's mujahideen in Afghanistan,[22] and it is believed that bin Laden has been a Takfiri financier.[23]

Ayman Al-Zawahiri, Al Qaeda's presumed second-in-command, and Mohammed Atta, lead suicide hijacker in the 9/11 attacks, are two among several international terror masterminds also linked to Takfir Wal-Hijra.[24] Some believe that Abu Musab al-Zarqawi, Ramzi Yousef, Khalid Shaikh Mohammed, Ali Mohammed (of the U.S. Special Forces) and Mahmoud Abouhalima are/were Takfiri as well. This is supported by the fact that as part of their cover they acted as non-observant Muslims, a practice associated with Takfiris who justify such behavior for jihadist purposes of waging Jihad. However, Takfiri elements are also believed to have attempted the assassination of Osama bin Laden when he was living in Sudan in 1996.[25]

Due to the similarities and connections between Al Qaeda and Takfir Wal-Hijra, future attacks in Europe will likely be a result of the merging of the expertise of Al Qaeda elements with the ideology of the Salafi Takfir Wal-Hijra movement.[26] As Dr. Mamoun Fandy, an Egyptian-born professor of politics and senior fellow at the James A. Baker III

Institute of Public Policy, has stated: "[Takfir] is very central to the Al Qaeda movement." [27]

Since the 9/11 attacks there have been several events that may be associated with members of the Takfiri movement. In 2002, a Takfiri terrorist sleeper cell that was planning attacks on airliners, the U.S. embassy in Jordan, Disneyland, and a Las Vegas casino, was captured in Michigan. [28] In Morocco, more than 400 persons belonging to a group known as *Al-Salafiyah al-Jihadiyah* and Al-Takfir Wal-Hijra were arrested for the murder of over ten Moroccan citizens who had "deviated from Islamic Sharia." [29] Dutch authorities have added that the murderer of Dutch filmmaker Theo Van Gogh, Mohammed Bouyeri, was also Takfiri. [30]

Some believe that it is now in Europe where Takfir Wal-Hijra should be of most concern to top anti-terrorism authorities. *Jane's Intelligence Review* has predicted that "Al Takfir Wal-Hijra now presents perhaps the most pressing security concern [in Europe]." This has been supported by the French terrorism expert Roland Jacquard [31] and by leading European scholar on radical Islam, Gilles Kepel, who noticed a significant increase in the number of European Muslims embracing Salafi and jihadist schools of thought. Kepel contends that "Salafist jihadists are now a burgeoning presence in Europe, having attempted more than 30 terrorist attacks among European Union countries since 2001." [32] Further evidence of this can be found in the case of Djamel Beghal, a French Algerian who was arrested in Dubai. Beghal and other associates have admitted to being members of a Takfiri terrorist cell that had planned a suicide attack on the U.S. embassy in Paris and a canteen located at the NATO airbase at Kleine Brogel in Belgium. [33]

National Security Implications for Middle Eastern States

The implications of Takfir Wal-Hijra's popularity and growth for the national security policies of Middle Eastern states are significant. Today's media makes much of Wahhabi elements (more accurately known as *Muwahhibun*) present throughout the Middle East. [34] While this concern

is legitimate, more attention should be paid to the radical Salafi elements such as the Takfiris. They are not only widely present in Middle Eastern states today, but have also proven less interested in compromising and cooperating with Arab governments, such as Saudi Arabia and Sudan. Furthermore, they have shown their continued ability and willingness to target non-Muslims and Muslims alike in a number of Middle Eastern countries. In Lebanon, for example, Takfiris did not only target Christian pilgrims but also fought for the overthrow of the Syrian and Lebanese governments.

At first glance, Takfiri aims of overthrowing the Syrian or Lebanese governments may not appear to be in conflict with United States interests in promoting democracy throughout the world. Takfiris, however, are not interested in establishing a democracy or even a moderate Islamic regime. Rather, they are concerned with creating an extremist Islamic government that would make highly conservative Muslim states such as the Islamic Republic of Iran look free and open. Furthermore, the reemergence of such elements in Lebanon would add to the already volatile situation there that has led to the recent departure of Syrian troops from Lebanon and is marked by tensions with the pro-Syrian government in Beirut. [35] Considering these events, and recent doubts raised over Syrian President Bashar al-Assad's ability to retain power following the most recent political storms, any new activity is likely to further ignite and complicate the already unpredictable environment. [36]

The latest upsurge in terrorist attacks in Egypt by Islamic extremists is another sign of the danger posed by Takfir Wal-Hijra. [37] These attacks may significantly damage the vital Egyptian tourism industry that only recently was beginning to recover from the previous attacks in Luxor. [38] If Takfiris were to employ their high level of training, support and expertise to carry out attacks on a larger, more strategic scale, the political and economic impact on the Egyptian state could be disastrous. Such actions could even lead to the overthrow of the regime of President Hosni Mubarak. Such a move would be

catastrophic for U.S. interests, considering that a stable Egypt is central to U.S. interests in the Middle East, and that the United States has pumped billions of dollars in aid to the Mubarak government.[39] The Lebanese and Egyptian instances are merely two small examples of the Takfiri movement's potential for causing future upheaval in Arab states if scholars and policymakers continue to neglect this movement.

There is a debate as to what more Middle Eastern states can do to counter the threat posed by radical Islamism, including Takfir Wal-Hijra. While some argue that democratizating the region is key to eliminating this threat, others counter that elections would only allow Islamic groups such as the Muslim Brotherhood to gain political legitimacy. The answer probably lies somewhere in between. It appears necessary that Middle Eastern states slowly move towards democratic reform—a move that is critical not only for the improvement of the Arab people, but for U.S. interests and global stability as well. However, such steps must also be accompanied by the simultaneous outlawing of political groups that preach hatred or seek to restrict citizens' freedoms. Indeed, this would not be unlike what Western democracies have already done in some instances.[40]

> When the media today reports of attacks by Muslim extremist 'Wahabbis' or associates of Al Qaeda, the perpetrators are likely to be Salafi adherents of Takfir Wal-Hijra.

National Security Implications for Western States

Western states must also pay more attention to the Takfiri movement. Takfiris have a strong presence in the West, and their practice of temporarily ignoring Islamic precepts for the sake of Jihad enables them to more easily infiltrate and maintain a low-key presence there. This modus operandi renders them particularly dangerous; unlike other Islamic terrorists who had lived in Muslim communities, Takfiris often live separately from such groups. They can thus be harder to identify. Furthermore, members of Takfir Wal-Hijra come from a wide range of the economic spectrum, from the slums in Morocco to the educated classes in Egypt.[41] They thus have a special gift for being able to blend in with their surroundings. Considering that a large number of intelligence leads are procured by the general public tipping off law enforcement agencies, this characteristic has the potential of eliminating a critical resource of intelligence collection. This author predicts that as anti-Muslim sentiment increases in Europe, and as the alienation of the European Islamic community continues to rise, extremist Islamic terrorists and their support base will rise concomitantly.[42]

Conclusions - Outlook and Future Indicators

Takfir Wal-Hijra members pose a serious security risk to the Western world. They operate such that they blend into Western 'infidel' societies unnoticed, and they come from widely divergent economic backgrounds[43]—from the slums in Morocco to the educated classes in Egypt.[44] These characteristics, together with the ruthlessness, dedication, experience, and large number of Takfiri members in Western Europe, come together as ingredients for a potentially deadly mix. Indeed, it is no surprise that Takfiri elements were connected to the Madrid bombings of March 11, 2004. When the media today reports of attacks by Muslim extremist 'Wahabbis' or associates of Al Qaeda, the perpetrators are likely to be Salafi adherents of Takfir Wal-Hijra.

Due to the nature of the movement and its ideology, it is extremely difficult for Western countries to successfully defeat such a group. Consequently, Western states must work to support elements in the Arab and Muslim worlds that seek to combat these extremists. This must be done not solely through military power and support, but also through improving the educational, social, political, and economic situations of the Muslim population around the world. It will also require Western nations to work specifically to better integrate the European Muslim populations into the mainstream communities. Such encouragement, coupled with increased vigilance and intelligence focused on

Takfiris and Salafists, will help diminish the number of attacks that are still to come. Improving intelligence may prove to be particularly difficult and will require Western countries to associate themselves with figures that may have blood on their hands. In the long term, agents should be placed in the lower echelons of the movement, from where they will have to slowly work their way up over time. Until the severity of this movement is recognized, and the appropriate steps are taken, the United States and indeed the entire Western world will remain at serious risk.

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The Psychological Battle For Iraq: Lessons from Algeria
Kafia Haile

In Iraq today, despite President George W. Bush's declaring an end to the war in Iraq, fighting between U.S. forces and insurgents continues to foster instability in the region. Insurgency warfare is a relatively new field for U.S. war planners. In order to evaluate which strategies are most effective in defeating transnational insurgents, the United States should pay particular attention to the case of the French military in Algeria. Napoleon Bonaparte once said, "There are but two powers in the world, the sword and the mind. In the long run the sword is always beaten by the mind."[1] State-sponsored military forces use their firepower to convince the population that they are the most probable victors in a war. Insurgents, lacking equal military power, instead must turn to psychological warfare to advance their interests and give them an advantage over occupying forces. The French military's experience in the Algerian Revolution is a case study of the importance of developing psychological strategies to combat insurgency in the Middle East, and the possible consequences of a failure to do so.

In Algeria, France secured a military defeat over the Front de Libération National (FLN), but it lost the support of Algerian civilians due to the adverse effects of its relocation programs, numerous instances of torture, its inability to explain its presence in Algeria, and its failure to protect Algerian civilians from terrorist attacks. FLN rebels, lacking the munitions to win a military battle against the French, instead opted

for psychological tactics to counter the notion that France remained in control of Algeria and to gain popular support for their revolt.[2] Their tactics were two-fold—they first worked to convince the population that occupying forces were either incapable of or unwilling to protect them. They also manipulated occupying forces into engaging in behavior that demonstrated their disrespect for Algerian culture.

Insurgents in Iraq now employ many strategies once used by the FLN. The United States risks making mistakes in Iraq that are similar to those of the French in Algeria. Coalition forces are at present focusing on combating insurgents and rebuilding of infrastructure. Certainly these activities are vital; they contribute to the growing self-sufficiency of Iraq as a sovereign and independent state, and demonstrate to the Iraqi population that the Coalition is sincerely interested in building a stable and secure Iraq. However, the French/Algerian example shows that the Coalition must also put mechanisms in place to punish atrocities directed at Iraq's population. This paper analyzes what strategies formerly used by the FLN are now being used in Iraq with marked success. It consequently recommends that the United States adopt a psychological strategy that better incorporates Iraqis into the process of the rebuilding and stabilization of their country, thus giving them a stake in the outcome of the battle against insurgents.

TACTICS

Perceptions of Occupying Powers

As noted above, one of the greatest psychological weapons employed by FLN insurgents in Algeria was to make the region appear unstable under the control of Western powers. Neutral Algerians endured frequent raids on their villages by French soldiers seeking to capture suspects accused of firing at their personnel. However, the same effort was not put forth to punish those FLN members who attacked Algerians accused of collaborating with the French.[3] The organization capitalized on these circumstances, pointing to them as proof that the French military considered Algerian lives to be of less worth than French ones and that it would not ensure Algerians' security. This psychological warfare also fortified the FLN with new recruits. Fearing France's extreme use of violence, previously neutral Algerians turned to the FLN as their only source of protection. Indeed, the largest numbers of FLN recruits came from areas where French troops had just exacted reprisals for the deaths of its soldiers.[4]

> Insurgents, lacking equal military power, instead must turn to psychological warfare to advance their interests and give them an advantage over occupying forces.

Further, the FLN's leadership played upon Algerian fears that all Algerians risked torture or death at the hands of the French, regardless of their political affiliation. Algerians were well aware of France's widespread application of torture for intelligence gathering purposes, and insurgents disseminated the erroneous information that extra-judicial executions perpetrated by the French included Algerians without connections to the FLN.[5] Such information was not difficult for the local populace to believe, given that French forces had in truth killed numerous Algerians, both FLN combatants and innocent non-members. However, what the FLN neglected to reveal was that all too often these innocent individuals had been apprehended because actual FLN members had named them during torture sessions.[6]

The success of the insurgent information campaigns in stirring distrust among the local populace was further facilitated by France's lack of response. France did not engage in counter-information campaigns which may have convinced some that many of those arrested were not "innocent noncombatants," but FLN members. This was a tactical error. Algerians felt the burden of harboring insurgents in their communities, and many hoped that the French military would form a force in local villages strong enough to prevent insurgents from establishing a safe haven among civilians. In his book *Algeria in Turmoil,* Michael Clark cites one French journalist's perspective on what might have led neutral Algerians to instead cooperate with the French:

> The bandits have relatives, friends, in all the little eagle-nest villages. The people there live in the grip of fear, yet not daring to speak, much less to point the rebels out to the authorities. And yet with a single voice they implore the aid and protection of our [French] troops and long for some sign of French presence. 'Ensure our security!' is what one hears at every turn; 'then we will be able to help you rid us of the handful of rebels who now give the law to us all.'[7]

Given this reality, had the French military consistently demonstrated its willingness to protect Algerians from the FLN, it might have had better success extracting information and countering the movement. Instead, knowing that France would not respond and was reserving its military force for confrontation with insurgents, the FLN was able to use fear and intimidation with impunity, both as a recruitment tool and to silence opposition to the insurgency.

Lastly, the FLN did all it could to highlight the occupying forces' inability to comprehend regional culture, and alienate them from the Algerian population. For example, although the FLN based its ideology on sovereignty for

Algeria, it included Islamic beliefs in its statement of objectives, thus sharpening the cultural divide. As a result, they were able to convince some Algerians of their cause who otherwise might have resisted the FLN's beliefs.[8] They furthermore recognized the effectiveness of the media in publicizing their cause, and were highly skilled at using and manipulating the press to their advantage. Those who survived the grueling interrogation sessions shared their stories of French cruelty, and publicity became an effective tool to gain international attention.[9]

Insurgents in Iraq have succeeded in using many of the same psychological weapons employed by the FLN in Algeria. They have been able to make the region appear unstable under the control of Western powers, and have convinced the population that the Coalition is unable or unwilling to protect it. Their efforts have been facilitated by the fact that many Iraqis were already predisposed against the United States before the U.S. military attacked Iraq in March 2003. The perception that the United States was indifferent to human security in Iraq was already widespread, since many Iraqis had experienced adverse conditions under United Nations sanctions and held the United States responsible for advocating in favor of the sanctions.[10] In addition, the prolonged presence of Western troops in Saudi Arabia, combined with U.S. policies interpreted as more favorable towards Israelis than Palestinians, encouraged general Arab opposition to an increased U.S. presence in the Middle East.

With these strikes already against them in the eyes of the Iraqi people, U.S. forces needed to immediately demonstrate their concern for Iraqis' well-being in order to reduce the potential for future popular uprisings. Instead, the U.S. military failed to effectively react to reports of occupying forces engaging in attacks against innocent people. A major example is the Arab media's portrayal of a Coalition raid on an insurgent safe house as a ruthless attack on innocent members of a wedding party. Although most of the casualties were women and children, U.S. intelligence had indicated that the wedding party's home was also a safe house for suspected

terrorist, Abu-Mus'ab al-Zarqawi.[11] Broadcasts of the wedding video appeared in Arab and American media, but the United States did not adequately use the media to provide evidence of Zarqawi's association with the suspected safe house.

The United States has furthermore missed opportunities to either prevent attacks or strike back at insurgents that terrorize the Iraqi people. Many among Iraq's civilian population fear that the U.S. and Iraqi governments are unable to protect them as attacks on the Iraqi National Guard (ING) increase. Recruits to the ING return home from training centers without weapons and face insurgents who target them for kidnappings and murder. President Allawi publicly held the United States responsible for the November murder of members of the ING.[12] While U.S. military assaults on insurgents continued after the ING murders, U.S. forces did not specifically announce their intent to capture insurgents responsible for the murders.

> **The Coalition must also put mechanisms in place to punish atrocities directed at Iraq's population.**

Also as in the Algerian example, Iraqi insurgents highlight the occupying forces' inability to comprehend regional culture, and have emphasized situations where they have been ignorant or disrespectful of local values. For example Shii cleric Muqtada al-Sadr chose an ingenious way to make U.S. forces appear disrespectful of important religious sites for Shiite Muslims. Al-Sadr stationed his Mehdi Army at a Shiite cemetery, renowned for being the final resting place of the Shiites' revered Imam Ali.[13] From the base of the shrine, the Mehdi Army could fire at U.S. troops; however, when troops were forced to fire in response, they risked demolishing the shrine and incurring the wrath of Iraq's Shiite majority.

Consequences and Impact of Tactics

The overall consequence of such psychological tactics is the alienation of Iraqi civilians. To succeed in countering the psychological impact of the insurgency, the US

must move quickly to replicate the relative daily stability and security in which Iraqis lived prior to the war. Otherwise, severe unemployment and destruction of common social structures, common factors of war, will result in a population simultaneously desensitized to the daily battles occurring around it, and subject to growing stress and frustration in the face of both physical and economic insecurity. Such was most certainly the case in Algeria. As with any population, Algerians were profoundly concerned for their families' physical and emotional security during the war. The French response was to erect relocation zones that grouped civilian Algerians into ghettos distanced from insurgent strongholds. Unfortunately, these zones not only lacked the familiar social structures, but also had high instances of unemployment.[14] Therefore, any Algerians collaborating with the French were faced with the choice of security at the cost of almost definite job loss and subsequent unemployment in one's new location. Such failure by French authorities to meet Algerians' need for work in order to care for their families sparked anger among civilian Algerians at the war's complete upheaval of their normal lives. Absence of employment and disruption of the social structure left any Algerians who wanted to remain neutral with few options; both anger and necessity may have pushed some to join the FLN.

Iraqi civilians find themselves in a similarly difficult situation. Overwhelmed by instability, many Iraqis experience great difficulty obtaining employment.[15] Lack of economic opportunity becomes a tremendous incentive for Iraqi locals to oppose the US military presence in their country. For unemployed Iraqis, the sight of numerous US contractors employed in Iraq, while so many Iraqis remain unemployed could result in greater support for the insurgency.

> To succeed in countering the psychological impact of the insurgency, the US must move quickly to replicate the relative daily stability and security in which Iraqis lived prior to the war.

Conclusions and Recommendations

Democracy's Obligation

The Bush administration has until now instilled doubt among Iraqis concerning American intentions by frequently altering its stated justifications for invading Iraq. The most current justification for the U.S.-led invasion of Iraq comes from President Bush's 2002 National Security Strategy of the United States. In his strategy President Bush offered what would become his reasoning behind the Iraqi invasion—as the leader of a superpower and democratic nation, he was obligated to bring freedom to other nations.[16] Furthermore, the presence of weapons of mass destruction obligated him to act in the name of national security.

McClintock states that the most appealing ideologies are those which take into account the population's immediate concerns and motivate them to resist insurgents in favor of the ultimate benefits they will reap from putting the ideology into action.[17] Thus, from the American public's perspective, Bush's ideology was indeed appealing on both levels. The search for weapons of mass destruction responded to Americans' fear of an impending attack. At the same time, it relates the military intervention in Iraq to an interest in political freedom and concern for the welfare of Iraqis.

The same ideology was not as effective with the Iraqis, nor did it stimulate the same enthusiasm for the invasion. Its major failure was to not effectively explain how locating weapons systems would change Iraqi lives. However, the ideology of democracy's obligation could have satisfied the Iraqi populace had it been better conveyed and acted upon. First and foremost, the U.S. military must now present a single justification for their presence in the region. Such a justification must consider the insurgents' stated goals, and then convincingly refute them.[18] The United States should be forthright in stating its intentions. In the battle for people's hearts and minds, the military is responsible for executing a clear goal that Iraqis can understand, consistent with an ideology that they can support. This will relieve Iraqis of part of their psychological

burden, allowing them to comprehend U.S. actions, perceive concrete steps towards reaching stated outcomes, and believe U.S. assurances that it will eventually withdraw its troops.

Secondly, the U.S. military must take responsibility for Iraqis' physical security. If the true reason for having intervened in Iraq is to bring freedom to its people, then the justifications of war obligate the United States to target insurgents as well as help civilians rebuild institutions important to their daily lives. To counter insurgent claims that occupying powers are indifferent to the population's suffering, the military should interact with the local population as direct service providers, offering medical assistance and infrastructure construction.[19]

It must furthermore invite Iraqis to join in their own emancipation from violence and instability. Improved and more visible U.S. military-Iraqi civilian cooperation in rebuilding infrastructure is sure to improve Iraqi belief in American dedication to achieving stability in the country. Iraqi participation in the practical application of democratic ideology will give them an investment in the outcome of Coalition activities—military and otherwise—in the country. Once Iraqis notice U.S. forces contributing to the restoration of normal life, incentives for joining the insurgency will diminish. Reconstruction of schools, businesses, and other symbols of community is crucial in order to prevent the civilian population from suffering a psychological defeat amidst instability. It would allow them to return to as much of their regularly scheduled daily activities as possible, provide an essential means to block the realities of war from their minds, and temporarily set aside the negative psychological effects of witnessing an insurgency.

Correcting Erroneous Perceptions

The media can be either adversary or ally for a military institution, depending, in part, on the extent to which its activities attract publicity. As mentioned previously, the French military grew infamous in the media for its torturing of Algerians. In Iraq, insurgents also use negative media to their advantage. Arab news stations will continue to broadcast images of U.S. attacks on apparently unarmed Iraqis, and the tragedy of Abu Ghraib is notorious in the Middle East, with the images of abuse emblazoned in Arab minds.

The U.S. must better counter negative images and respond to potential scandals. Media involvement could contribute to psychological security through verifying the U.S. military establishment's commitment to protecting Iraqis and punishing crimes against civilians. It should disseminate information that depicts the United States as ensuring Iraqi civilian security. Furthermore, U.S. forces must quickly detect perpetrators of civilian abuse and conduct damage control by showing that such actions have serious repercussions. In the case of Abu Ghraib, the U.S. military made a wise strategic decision in trying the officers less than a year after the story became public. However, the soldiers' trials received dramatically less press attention than the initial prison scandal. In addition, the outcome of the soldiers' cases lacked sufficient penalty to positively affect the perception of the U.S. military. Publicizing the Abu Ghraib trials and adequately punishing the perpetrators would have demonstrated American conviction that Iraqis' lives are just as valuable as those of U.S. soldiers.

> The U.S. military must now present a single justification for their presence in the region. Such a justification must consider the insurgents' stated goals, and then convincingly refute them.

Such publicity is an important psychological tool for retaining the support of U.S. citizens, as well. In the case of Algeria, allegations of torture and French military deaths led the French population to question why their government remained devoted to retaining Algeria. Media reports, fueled by the writings of francophone intellectuals like Frantz Fanon and Jean-Paul Sartre, challenged the validity of continued Algerian colonization. Information campaigns could serve to avoid this eventuality and ensure that the American public's opposition to the war does not reach levels of the Vietnam Era.

Positive media depictions of the U.S. military would also benefit the work of military intelligence. The Algerian case demonstrates how France's inability to guarantee their safety dissuaded Algerian civilians from cooperating with the military.[20] Frequent press releases from the U.S. Defense Department and information from soldiers stationed locally in Iraq will keep Iraqis aware that temporary U.S. occupation is more advantageous than sustaining the insurgency. The more trust fostered between Iraqi civilians and U.S. military authorities, the less difficult it should become to obtain Iraqi cooperation.

The United States must also counter its image problems in the countries that border Iraq. Just as the Tunisian government encouraged its citizens to participate in Algeria's revolution, institutions within Syria and Iran advocate transnational insurgency as a means of preventing instability in their own countries. Clerics who fear the U.S. war on terror will target Syria offer financial compensation to volunteers who will go to Iraq and carry out an insurgency, hoping that the violence will occupy the attention of U.S. forces and keep them busy.[21] Iran's government likewise foresees a future U.S. invasion as a possibility, particularly since President Bush named the state an "axis of evil."[22] Considering Iran could constitute the next setting for the war on terror, Iran's government stands to gain from a protracted war in Iraq. The Shiite majority in Iran

also has government support in transporting insurgency to Iraq. Jordan's King Abdullah alleged that the Iranian government assisted over one million Iranians to enter Iraq in order to illegally vote for Shiite political leaders in an attempt to ensure Shiite dominance in the new government, [23]

Given the increase in the activities of violent non-state groups, future wars will increasingly involve insurgents who will use psychological tactics and ideology to gain leverage in asymmetric military battles. U.S. officials recognize the growing need to develop tactics aimed at countering such groups. The prospect of an increasing number of insurgencies makes effective response to psychological warfare all the more important in Iraq. The French experience in Algeria is a testimony to the severe consequences which may result when a military establishment disregards psychological strategies of 'weaker' opponents. The French military failed to appeal to Algerians' basic security needs for protection from attacks and maintenance of their usual way of life, and was ultimately forced to withdraw in humiliation. The United States has made progress in the psychological battle by training Iraqis to protect their own country, conducting democratic elections, and creating a provisional government composed of Iraqis. However, U.S. policy makers must continue to foster nationalism in Iraq by having locals work together towards the common goal of stability.

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Islamic Republic of Iran Broadcasting: Public Diplomacy or Propaganda?

Anna Tiedeman

"The best propaganda and lies are the worst. To be persuasive we must be believable; to be believable we must be credible; to be credible we must be truthful. It is as simple as that."

– Edward R. Murrow

Introduction

Public diplomacy is heralded as the solution for winning hearts and minds around the world, but it is a rather vague and all encompassing term. Its goal is to educate, inform and engage foreign publics in an attempt to win their favor. States conduct public diplomacy in an attempt to sway foreign publics, who in turn could exert influence on their government's foreign policy decisions. Public diplomacy activities often include exchange programs, educational campaigns, and strategic messaging aimed at foreign publics. International broadcasting in particular is often an integral part of overall public diplomacy efforts, as it provides a media platform for one party to reach various large audiences simultaneously. Such large scale efforts at strategic messaging, or mass education, however, are often called propaganda. Many do not distinguish between public diplomacy and propaganda, saying that the former is simply a euphemism for the latter. This paper will examine this contention, and seek to define those characteristics that differentiate one activity from the other. It will then analyze Iran's international broadcasting arm, the Islamic Republic of Iran

Broadcasting (IRIB), in order to determine whether the organization is a tool of public diplomacy or propaganda.

Public Diplomacy Defined

Textbooks define traditional diplomacy as the "putting of foreign policies into practice" via "political contact between governments of different nations."[1] The roots of diplomacy trace back to the word diploma, a Greek word meaning a folded piece of paper. This folded paper implies a level of secrecy between the holder of the paper and the recipient.[2] The contents of the paper would be closely guarded and only shared with a small number of people. This traditional form of diplomacy was practiced by high level government ministers behind closed doors and only the results were made available to the public. Royce Ammon refers to traditional diplomacy as "old diplomacy" and says this form was practiced from the Renaissance period until World War I. Following the war, "new diplomacy" emerged, relying on newsprint and global television rather than on handwritten correspondence.[3]

The communications revolution that began at that time has steadily shifted, and continues to shift, the paradigm of diplomacy. Ammon argues that advances in communications have affected the way diplomacy is conducted in three ways: "first, by displacing traditional methods; second, by increasing the diplomatic influence of non-traditional sectors; and third, by accelerating diplomacy's pace."[4] Today's version of

diplomacy—what Ammon calls 'telediplomacy'—is characterized by its reliance on real time television. International broadcasting of radio and television has transformed diplomacy and world affairs. Global broadcasting not only defines the method of diplomacy, it also plays a significant role in shaping policy outcomes.[5]

Public diplomacy was created out of necessity in this new diplomacy context. No longer able to keep the public out of foreign affairs, world leaders tried instead to control or manage information available to foreign publics.

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The founding definition of public diplomacy comes from Edmund Gullion, Dean of the Fletcher School of Law and Diplomacy, upon the establishment of the Edward R. Murrow Center of Public Diplomacy in 1965. The Fletcher catalogue described public diplomacy as:

> …the role of the press and other media in international affairs, cultivation by governments of public opinion, the non-government interaction of private groups and interests in one country with those of another, and the impact of these transnational processes on the formulation of policy and the conduct of foreign affairs.[6]

The University of Southern California's Center on Public Diplomacy offers an even broader definition of public diplomacy, extending its reach to include all government, NGO and private sector and cultural influencers of a foreign public. The Center:

> …studies the impact of private activities - from popular culture to fashion to sports to news to the Internet - that inevitably, if not purposefully, have an impact on foreign policy and national security as well as on trade, tourism and other national interests. Moreover, the Center's points of inquiry are not limited to U.S. governmental activities, but examine public diplomacy as it pertains to a wide range of institutions and governments around the globe.[7]

Political scientist Joseph Nye describes public diplomacy as a policy expression of what he terms 'soft power.'[8] Soft power, he states, "is the power of getting others to want the outcomes you want; it is the power of attraction. Instead of resorting to threats or physical force, soft power rests on the ability to seduce people into creating certain outcomes."[9] Nye also points to a variety of factors in addition to government policy that may contribute to soft power, including prevailing culture, attitudes, and values.

Mark Leonard, who directs the Foreign Policy Centre in London, breaks down public diplomacy into three dimensions.[10] The first dimension is daily communication. At a basic level, this involves being present to offer a country's point of view to journalists, diplomats, and the country as a whole. This ability to offer 'our side of the story' is essential because without it the audience is only hearing what their own government or media is telling them. If the goal is to influence or change minds of the publics, first one has to have access. In addition, the messages conveyed must be seen as credible by the audience and must be consistent with the prevailing national position. Messages that contradict peoples' personal experiences will lead to confusion and ultimately distrust of the message sender. Perception is crucial in public diplomacy. Without the trust of the audience, the messages will fall on deaf ears.

Strategic communications is the second level of public diplomacy, according to Leonard. In order to ensure consistency, a single theme or strategic message must be projected by all official outlets. Strategic messages are usually conveyed and reinforced through a series of events and messages. In this phase, it is crucial that the message is constant and consistent.

Finally, at the heart of public diplomacy lies the third dimension, the development of long term human relationships. These relationships are built over long periods of time through

exchanges, training exercises, conferences, scholarships, and access to media channels, among other activities.

In addition to direct government public diplomacy efforts, there is also indirect public diplomacy. The brands and representatives of a country's companies often are more available to people around the world than are government officials.[11] American culture as conveyed by Hollywood, McDonald's, or Tiger Woods, for example, often has a significant impact on the way foreign publics view America. Real time television can also exert an indirect effect on policy; global television can first shape public opinion, which may subsequently influence foreign policy.[12]

Iran's Public Diplomacy

Iran is actively involved in public diplomacy, attempting to win hearts and minds abroad. However, unlike in the United States, where the government is expressly forbidden from using public diplomacy tactics on its own domestic residents, no such distinction exists in Iran. .Islamic Republic of Iran Broadcasting (IRIB), the broadcasting arm of the Iranian regime, broadcasts both domestically on television and radio channels, as well as internationally on several radio channels and on the internet in over 24 different languages. According to the IRIB official website, the network pursues the goal of "familiarizing different world nations with Iran's history and culture as well as its different regions and historical sites." In addition, the Voice of Justice program is a "campaign against the U.S. interventionist policies."[13]

In its use of IRIB, Iran is actively involved in all three stages of public diplomacy as defined by Leonard. First, it dedicates all television, print, radio and internet sources to daily dissemination of the government messages and news. Second, it crafts consistent strategic messages and conveys them through those channels, a task that is facilitated by the government's control over virtually all legal media outlets in the country. Third, Iran participates in international exchanges, dialogues, conferences and other long-term relationship-building exercises, welcoming

foreign groups of students, sports teams, and artists to come to Iran and learn about its culture. In addition, the IRIB website provides a significant amount of material about Iran's culture and history.

The IRIB also fits with the explanation of public diplomacy offered by Monroe Price, co-director of Oxford University's Program in Comparative Media Law and Policy. Price argues that states have an interest in political stability and require citizens to 'buy in' to their messages in order to maintain control. Public diplomacy, he explains, is the crucial tool by which states compete in a 'market of loyalties' for the hearts and minds of citizens. This interchange occurs in what Price describes as a market as divided between 'sellers' and 'buyers' of information. The sellers control the means of communication and are able to convert myths, dreams, and history into power by crafting an identity that includes a loyalty to the state as a key element. Meanwhile, market buyers receive this information and adopt, or 'pay,' for this identity with 'loyalty' or patriotism that creates stability and allows the buyer to maintain control.[14]

> Unlike in the United States, where the government is expressly forbidden from using public diplomacy tactics on its own domestic residents, no such distinction exists in Iran.

This market is all the more essential in a dictatorship or closed society. Leaders rely on selling their messages domestically and abroad in an effort to maintain power and sustain the loyalty of their people by projecting a sense of identity to the buyers. In Iran, the IRIB is the primary market tool for selling the Iranian government's messages both internally and externally, in the hopes that it will pay off by creating stability. The government-sponsored network is comprised of seven domestic radio stations; 40 provincial radio stations broadcasting from Iran's 26 provinces; an international radio service with programs in more than 24 languages; eight domestic television channels; and satellite channels in Persian, Arabic, and several European languages. The IRIB also

publishes its own newspaper, *Jaam-e Jam*. The English language service began broadcasting in 1956 and gained a higher priority after the 1979 revolution as a means for "elaborating on the revolution's stances and the ideals of the Islamic system."[15]

Propaganda

The question is then whether Iranian international broadcasting efforts also share elements of propaganda tactics. The American Heritage Dictionary defines propaganda as:

1. The systematic propagation of a doctrine or cause or of information reflecting the views and interests of those advocating such a doctrine or cause.
2. Material disseminated by the advocates or opponents of a doctrine or cause: *wartime propaganda.*[16]

The IRIB's stated objective of "familiarizing different world nations with Iran's history and culture as well as its different regions and historical sites" fits with this definition, especially the Voice of Justice program described as a "campaign against the U.S. interventionist policies."[17]

The network could equally well fit under the definition of propaganda by Paul Linebarger, an expert in psychological warfare, who in 1954 wrote that, "…propaganda consists of the planned use of any form of public or mass-produced communications designed to affect the minds and emotions of a given group for a specific purpose, whether military, economic, or political."[18]

This definition, however, is problematic in that it overlaps with definitions of public diplomacy. What, then, differentiates one activity from the other? The *Economist* notes that the word propaganda "has come to have a derogatory meaning, of the dissemination of untruths."[19] If this is the case, are both only aspects of the same activity, and perception the only real difference, with propaganda evoking a distinctly negative reaction and public diplomacy a more favorable one?

Public Diplomacy vs. Propaganda

Terry Deibel and Walter Roberts address this question by breaking public diplomacy down into two different schools of thought. What they term the 'tough-minded' school "hold[s] that the purpose of public diplomacy is to exert an influence on attitudes of foreign audiences using persuasion and propaganda," while the 'tender-minded' school, "argues that information and cultural programs must bypass current foreign policy goals to concentrate on the highest long-range national objectives. The goal is to create a climate of mutual understanding."[20]

Mark Leonard provides an example of the tender-minded school when he writes:

Public diplomacy is about building relationships: understanding the needs of other countries, cultures and peoples; communicating our points of view; correcting misperceptions; looking for areas we can find in common cause. The difference between public and traditional diplomacy is that public diplomacy involves a much broader group of people on both sides, and a broader set of interests that go beyond those of the government of the day. Public diplomacy is based on the premise that the image and reputation of a country are public goods which can create an enabling or a disabling environment for individual transactions. [21]

Edward Kaufman, a member of the Broadcasting Board of Governors, argues the more tough-minded side, stating:

Military power alone is often insufficient to resolve modern conflicts and will likely be unable to end this current war against terrorism. Effective broadcasting to 'win hearts and minds' strengthens the traditional triad of diplomacy, economic leverage, and military power and is the fourth dimension of foreign conflict resolution.

Particularly in times of crisis, the United States must deliver clear, effective programming to foreign populations via the media.[22]

Thus, the tough minded see propaganda as an *aspect* of public diplomacy that is essential for winning hearts and minds. For the tender hearted, however, the distinction between public diplomacy and propaganda is more pronounced—they are more in favor of exchanges and dialogues, and less likely to rely solely on mass media broadcasting techniques. This is not to say that tender-hearted diplomats see no role for mass communication. As British Foreign Secretary Anthony Eden aptly stated in 1937, "It's perfectly true, of course, that good cultural propaganda cannot remedy the damage done by a bad foreign policy, but it is no exaggeration to say that even the best of diplomacy policies may fail if it neglects the task of interpretation and persuasion which modern communications impose."[23]

Regardless of which school of public diplomacy one ascribes to, there is another element that differentiates propaganda from public diplomacy. The Arabic Media Outreach coordinator at the Office of Strategic Communications Center in Baghdad highlights the interactive nature of public diplomacy. He argues that "propaganda can be a public diplomacy tool, but public diplomacy generally implies greater involvement of people on both sides."[24] Public diplomacy has shifted over the years since its creation after the Second World War, and has gradually evolved to provide a greater role for dialogue and understanding. Whereas propaganda has strictly been the communication of one-way messages from one party to another, public diplomacy has included in its mission the desire to learn from the 'other side' and understand their needs as well.

Perhaps the clearest distinction between public diplomacy and propaganda is 'spinning' versus lying. Heritage Foundation analysts Stephen Johnson and Helle Dale argue that propaganda, in contrast to public diplomacy,

…is information deliberately propagated to help or harm a person, group, or institution, regardless of whether the information is true or false. To many not aware of its exact meaning, propaganda suggests disinformation. Public diplomacy and public affairs officers have always maintained that any information they convey must be truthful. Propaganda or not, it must deal with the facts.[25]

This definition helps explain the negative connotation often associated with propaganda but less present with public diplomacy, and raises the idea of 'the truth' in conveying information to mass audience. While both public diplomacy and propaganda seek to convey information and persuade audiences, only public diplomacy maintains an adherence to conveying 'facts.' John Matel, Public Affairs Officer at the U.S. State Department, writes that "while advocacy (and 'spin') is definitely a part of [U.S.] public diplomacy, deception is not. In my nearly twenty years in the business, I have never been a part of a campaign that systematically distorted facts."[26] This cannot be said about the IRIB.

> Public diplomacy has shifted over the years since its creation after the Second World War, and has gradually evolved to provide a greater role for dialogue and understanding.

Leonard argues that those who treat the term public diplomacy as a mere euphemism for propaganda miss the point. Simple propaganda often lacks credibility, and this is counterproductive as public diplomacy. Conveying information and selling a positive image is part of public diplomacy, but public diplomacy also involves building long-term relationships that create an enabling environment for the carrying out of government policies."[27]

Moving Beyond Propaganda – Building Credibility

It is credibility that is the key to effective public diplomacy, according to Lee McKnight, former head of the Edward R. Murrow Center at the Fletcher School of Law and Diplomacy. Iran, however, is consistently ranked as one of the least trusted news sources in the world by international news monitoring agencies. The 2003 Radio Free Europe/Radio Liberty Iran Report states, "the news provided by state television and radio is biased and inaccurate and the entertainment available there is not appealing." In addition, it cites a Freedom House survey released on December 18, 2003, which placed Iran in the "Not Free" category. On a scale of one to seven, with seven being the least free rating, Iran earned a six for political rights and civil liberties.[28]

Leonard argues that the first step in moving beyond propaganda to meaningful public diplomacy is understanding the audience and listening to their needs in the hopes of persuading them to change their minds, rather than with the goal of proving that one side is right.[29] The experience of the listener should matter as much as the message being sent.[30] The IRIB does not seem to have an active listening component by which it could understand, much less respond to, the audiences which it is trying to reach.

> Lacking any reference to understanding the needs or interests of their audiences, and disinterested in any sort of dialogue, the IRIB cannot be seen as anything more than a tool of propaganda.

Building relationships, the third dimension of public diplomacy, is also crucial to moving beyond propaganda and making messages relevant to their intended audiences. Opening a dialogue of understanding is a much more effective tool for proving the relevance of a country to a foreign audience than the broadcasting campaigns of the IRIB, which can be easily dismissed as state-sponsored propaganda.

To gain credibility, the IRIB needs to host dialogues that engage the audience, acknowledge another side of the argument, and highlight common ground.

Joseph Nye argues that soft power, and public diplomacy as an expression thereof, rest on some shared values. Since soft power means getting others to want the same outcomes you want, that requires understanding how the other side is hearing your messages, and fine tuning it accordingly.[31] The IRIB appears to be less focused on listening and understanding their audiences to adjust messages than on the messages themselves. Consequently, it has been unable to build the credibility necessary to move from propaganda to public diplomacy.

Conclusion

Public diplomacy exists to provide information and broadcast 'our side of the story' internationally, while also engaging in meaningful dialogue and fostering understanding of both sides. Propaganda, in contrast, is a one-way conversation carried out from the pulpit of mass media platforms directly appealing to the emotions of mass audiences. When public diplomacy efforts are perceived as propaganda campaigns, they not only become ineffective, but they actually backfire and may cause mistrust and resentment of the sender.

While Iran does engage in some forms of public diplomacy including exchanges and dialogues, the IRIB is a classic tool of propaganda. Apparently unconcerned with who is actually listening on the other end, the IRIB exists exclusively as a vanity broadcaster proclaiming the message of the government both internally and to foreign publics. Lacking any reference to understanding the needs or interests of their audiences, and disinterested in any sort of dialogue, the IRIB cannot be seen as anything more than a tool of propaganda.

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