

LETTER FROM OUR MANAGING EDITOR

Oxford, May 2018

Dear Reader,

Welcome to the May 2018 issue of St. Antony's International Review (STAIR)!

This issue, *Redrawing the Boundaries of International Law*, examines twin challenges to international law. On the one hand, great powers seem increasingly likely to subvert legal structures, while on the other a growing number of states are increasingly vocal in their critique of inequities of the international legal system. As great powers increasingly circumvent international law, existing fractures and inequities at how these laws apply to the global community are being thrust ever more prominently into the light.

This issue of STAIR seeks to shed some light on modern challenges to international law and how it interacts with the distribution of state power. The dual feature, with the Head of Chatham House's International Law Programme, Ruma Mandal, and Professor Philippe Sands, QC, provides an interesting take on changes and challenges in this field, informed by their diverse backgrounds.

At STAIR we are confident that scholarly knowledge can play a positive role in society, and see our search for excellence in sourcing and publishing articles as part of that role. Our website (www.stairjournal.com) contains details of our upcoming issues, events, and special features. Please do not hesitate to contact us if you would like more information.

I would like to offer my personal gratitude for the hard work by the entire STAIR editorial team, and for the guidance of our senior member Kalypso Nicolaïdis. I would also like to thank the entire STAIR Advisory Board, St. Antony's College, and the Department of Politics and International Relations.

This is my last issue as the Managing Editor of STAIR, an experience I have found both rewarding and challenging. I am grateful for everyone who has read and worked on the journal this year. It is with confidence I leave you in competent hands of next year's Managing Editor, Lin Slapakova.

I hope you enjoy this issue of STAIR.

All the best,

Leah Matchett
Managing Editor

I. Theme Section Introduction *Tuuli-Anna Huikuri, Yuan Yi Zhu*

II. General Section Introduction *Yutao Huang, Mayesha Quasem, Linda Slapakova*

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I. Theme Section

If the “liberal moment” following the end of the Cold War represented a high watermark for the legalisation of international relations, the present decade has seen a backlash against these developments, which seems in retrospect entirely foreseeable. Once seemingly irreversible doctrinal innovations are now coming under sustained challenge; trends which seemed to fulfil historical inevitabilities now look precarious. Whether it is President Trump declaring “an end to the era of multilateral trade agreements,” China dismissing the verdict of the South China Sea arbitration tribunal as “nothing but a scrap of paper,” or Russia annexing territory in a manner that would have seemed anachronistic for much of the last century, international law seems yet again to have reached one of its periodic crises.

Old concerns, which have always hovered in the background, are back with a vengeance. The thorny issue of legal fragmentation – or legal pluralism, depending on one’s attitude – that always eluded a satisfactory solution is now made more pressing by rising powers’ assertions of preferences that are often at odds with the existing legal settlement. Current international legal arrangements are perceived, perhaps rightfully, as the result of a self-interested Western consensus. The understanding and practice of national sovereignty today in, say, Beijing, has little in common with its equivalent practices in European capitals. Even the famed “invisible college” of international lawyers is now perhaps better thought of as a “divisible college” of many different national or regional communities. These scholarly communities overlap to some extent, but also differ in their understanding of international law.¹ All this might not have mattered so much in an era of legal hegemons; however, with the move towards a multipolar and pluralistic international order, it is worth thinking about such matters more seriously than before.

Yet as crises go, the current one feels subdued; there is little sense of a general panic from within the discipline. In the words of James Crawford, although there will be some erosion of the legal order at its margins, its “foundational layers,” which have

sedimented through long usage, will endure.² These core norms are well-internalized by the vast majority of states, and there is little prospect of many states completely extirpating themselves from those norms. As the old aphorism goes, nature abhors a vacuum. Though there are signs that the United States, which has been the central, albeit imperfect, upholder of the international rules-based system in the post-War period, is beginning to disengage from the house which it built, other actors are ready to step into the breach. For instance, the United States' withdrawal from the Paris Agreement was immediately followed by the remaining signatories reaffirming their commitment. Similarly, although China rejected the result of the South China Sea arbitration, it is striking that it took great pains to justify that rejection on legal grounds.³ The backlash against the investment treaty regime likewise does not necessarily represent a backlash against rules of investment per se, but the push-back also reflects the concerns of wider society to better enable protection of the environment, labour rights, and public health.⁴

Moreover, there is a sense of *déjà vu* to the current situation. International law has gone through many previous cycles of development followed by extensive backsliding in the past. It is instructive to look at the history of the relationship between the disciplines of international law and international relations (IR) as an illustration of those cycles. In the early twentieth century, there existed a strong relationship between the two disciplines: idealism, the then-dominant IR paradigm, was concerned with the building of a new, rules-based international system which could stamp out inter-state conflicts, a belief shared by international lawyers. Following World War II, IR became disenchanted with international law, which many saw as a repudiation of idealism and the triumph of the realist paradigm. Realism's advocates considered international law to be, at best, epiphenomenal to power: symbolic of the shift was the arch-realist Hans Morgenthau, who was a trained international lawyer and scholar himself, and yet had come to see World War II as a repudiation of his chosen discipline by the course of history.⁵ In the following decades, international law was thus progressively written out of international relations, as IR scholars – especially the structural realists – saw little reason to engage with a discipline they considered to be irrelevant, with an exception to the English School.

Meanwhile, international law did not simply fade away. When its currency was at its lowest in IR, the bulk of today's international legal structure was being constructed: the century's great multilateral treaties from the UN Charter onward were drafted and signed even if international law seemed irrelevant at the time.

States still needed to make treaties in order to resolve disputes through peaceful means. As a result, the need for international law did not, and could not, disappear. However, international legal scholars were not content with simply being technicians who greased the wheels of the international machinery. Instead, many sought to demonstrate the continuing relevance of international law, notably by attempting to show that it could indeed constrain state behaviour. The past may not be a foolproof predictor of the future, but the fact that the current challenges are far from being unprecedented should give comfort to those anxious about international law's future at a time of power transition.

The disciplines of international law and international relations have long been intertwined, and a range of scholars have attempted to breach the gap between the two, calling for further interdisciplinary cooperation. Even though some legal scholars began to adopt methods derived from the social sciences following the new interest in institutions beginning in the 1970s, there was relatively little exchange between the two disciplines. They "worked independently, published in different journals... and cited each other's work only to a very limited degree."⁶ The rapprochement between the two fields began in earnest in the early 1990s, when Kenneth Abbott and Anne-Marie Slaughter began to argue that recent shifts in IR theory, especially the rise of institutionalism, provided an opportunity for greater convergence between the disciplines, and for legal scholars to employ IR methodologies in their work, sometimes called the "dual agenda."⁷ Since then, there has been a marked rise in the quantity of interdisciplinary work published, which has narrowed this gap.

International law continues to present curious puzzles for scholars of various different approaches of scholarship. Questions of the legal language presented in various treaties and conventions, as well as the practice of enforcement of international law and justice in international politics, continue to attract the attention of practitioners and researchers. However, international law is particularly susceptible to disciplinary blinders, with legal positivists, rational institutionalists, normative theorists, and scholars of international order often influencing separate spheres. Dialogue between different paradigms is essential to address the role of international law in a globalizing world. The theme section seeks to bring together some of the disparate narratives to demonstrate the connections between the challenges faced by international law in the current system. The feature interviews and articles of the section represent some of these differing approaches.

The feature interview with Ruma Mandal, the Head of International Law Programme at Chatham House, addresses the contemporary challenges of the Syrian refugee crisis, and how international law cannot exist in a vacuum, that does not take into account the political climate in Europe. Drawing on her legal policy experience on public law issues both as a legal adviser in the UK Foreign and Commonwealth Office and with the UN High Commissioner for Refugees, Ms Mandal also reflects on the inclusiveness of international law, as well as the relationship between legal academics and practitioners.

The second interview invites Philippe Sands QC to reflect on contemporary challenges of international law through his expansive academic and professional experience as the Professor of Laws and Director of the Centre on International Courts and Tribunals at University College London, and as a lawyer at Matrix Chambers in London. Professor Sands gives his views on big questions about the relevance of the 1945 settlement in the contemporary world, the implications of changing power dynamics for international law, as well as the role of grand theorising within the discipline.

The articles of the issue likewise bring together key dilemmas faced by international legal scholarship: what difficulties emerge from the changing nature of issues, technologies, and actors addressed by international law? Who should be responsible for rewriting and reinforcing the treaties governing the international realm? The first article “The Naval Minefield of Customary International Humanitarian Law” by Chris O’Leary addresses the issue of naval mines and customary international humanitarian law. While other spheres of fighting and weapons have been targets of various international conventions and treaties regulating their use, the Hague Convention (VII) of 1907 relative to the Laying of Automatic Submarine Contact Mines remains the only legal document governing naval mines. The outdated, 110-year-old document continues to be cited as the method for regulating modern technologies of naval warfare, creating potential military tactical traps as well as a legal minefield.

While treaty languages form the core body of international legal research, the implementation and enforcement of international laws is largely a matter of politics. After all, the authority allocated to international courts and tribunals is reliant on cooperation from political actors for practical support. Tom Buitelaar in his article “Blue Helmets and Black Robes: The Cooperation Between Peacekeepers and International Criminal Tribunals” examines the vital support upon which international courts rely in their operations and attempts to implement their

mandate to end impunity. While concerns over states' spatial support for international criminal tribunals has been a topic of extensive discussion, the assistance provided by UN peacekeepers in investigations and arrests has been largely overlooked. The theoretical framework introduced in the article emphasizes that peace operations will assist tribunals when they are willing and capable of doing so, and outlines which factors make such operations more likely. The example case of the arrest of Slavko Dokmanovic illustrates the plausibility of the theory in the UN Transitional Administration for Eastern Slavonia, Baranja, and Western Sirmium (UNTAES).

Beyond the drafting and implementation of legal mandates, international law unavoidably involves an aspect of normative and ethical considerations. "Ranking Agents of Justice: When Should the Corporation Act?" by Athol Williams presents a theoretical argument as to which actors have the responsibility to act to enforce social justice, and in what order should such actors be expected to interfere. The focus is especially on multinational corporations, whose involvement in international issues ranging from labour and human rights to environmental protection has attracted the attention of various political theorists and activist groups alike. The article outlines a novel framework combining role-based and participation-based accounts to identify responsibility-bearers in advancing international justice.

In addressing several of the key dilemmas faced by international legal scholarship, this issue attempt to highlight some of the essential and ongoing debates that continues to characterise both the theory and practice of international relations and international law.

II. General Section

Accompanying a selection of articles addressing a common theme, the General Section of STAIR conventionally presents pieces from a wider variety of disciplines. In this issue, the General Section focuses on international political economy, and more precisely, the connection between governance and foreign direct investment.

Advancing our insight into a relatively under-researched facet of international affairs, Lily McElwee asks the question, "How sensitive is foreign direct investment (FDI) in extractive industries to a country's regime type"? As McElwee states, "Foreign capital presents a means by which resource-rich countries can unlock the revenue potential of local endowments. Because such states often possess weak institutions and infrastructure, it is worth understanding when and how such governance affects the

investment decisions of oil and metals multinational corporations (MNCs).” In examining the role of democratic institutions in investment decisions of multinational corporations, the paper thus makes valuable empirical contributions to studies assessing sectoral FDI determinants.

As it draws attention to a puzzling relationship between politics and economics that may otherwise have been overlooked, we hope that the selected contribution for this issue’s General Section will serve as a thought-provoking addition to the highly relevant pieces presented in the Theme Section.

III. Book Reviews

It is a pleasure to introduce four excellent book reviews in this issue of *St. Antony’s International Review*, as the authors tackle emerging critical literature on some of the most pertinent topics in contemporary international relations. Remnants of the British colonial past in India, “North-South” tensions within institutions of global governance, American foreign-policy making, and theorizing sovereignty in the age of cyber, make up the range of themes covered. They invite us to critically assess some of the key developments in international relations in this century, specifically to reflect on the relevance of the Westphalian state model in contemporary analysis. Boldly dissecting and analysing the arguments in place, the respective reviews provide an in-depth critique of some of the leading work in international relations literature; their reviews collectively present a rising demand in scholarly work for an increase in original research over an over-reliance on existing (often “Western”) narratives on these topics.

Tejas Motwani (University of Oxford) praises Shashi Tharoor’s new book *Inglorious Empire: What the British Did to India*, in which Tharoor is vigorously critical of the common narratives of the British colonization of India. Tharoor, he argues, boldly uses raw examples of the methodological British exploitation of the Indian subcontinent to produce a thrilling historical account. Despite its over-reliance on anecdotes, as Motwani argues, *Inglorious Empire* is meticulous in detail as well as in continuity in critiquing existing narratives of the history of Britain in India. Following up with her own post-colonial critique, Alison Jin (School for Oriental and South Asian Studies) reviews *The Long Battle for Global Governance* by Buzdugan and Payne. The book analyses the Bretton Woods institutions, drivers of contemporary global governance, as a struggle for influence between countries of the Global North and South. Recognizing the value of such a perspective, Jin criticizes Buzdugan and Payne for over-relying on

Western literature having missed an “opportunity to promote the decolonization of knowledge production in history.”

Turning over to foreign policy analysis, Jan Eijking (University of Oxford) reviews Ty Solomon’s *The Politics of Subjectivity in American Foreign Discourses*. Solomon’s book is a discourse analysis of the narrative of American neoconservatives using psychoanalytic theories of Jacques Lacan and Ernesto Laclau. Solomon analyses the narratives of neoconservatives and their opponents both prior to and after 9/11. In an impressive breakdown of a complex book, Eijking’s immaculate attention to detail means he also critiques Solomon for an over-reliance on others’ interpretations of Lacan and at times a repetitiveness. Finally, Timm Schulze (The London School of Economics) discusses *The Stack: On Software and Sovereignty*. *The Stack*, written by Benjamin Brutton, is a bold questioning of the use of existing concepts in IR like state sovereignty in the age of cyber. Positive about this interdisciplinary contribution to emerging literature on how the internet is changing the Westphalian concepts of international relations, Schulze breaks down the book praising its use of Google as the example of a dual presence in both the virtual and national jurisdictions.

Notes

1 Anthea Roberts, *Is International Law International* (Oxford: Oxford University Press, 2017).

2 James Crawford, “The Current Political Discourse Concerning International Law” *Modern Law Review* 81, no. 1 (2018):21.

3 China. Ministry of Foreign Affairs, “Position Paper of the Government of the People’s Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines” (7 December 2014) <http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml> accessed 1 March 2018.

4 Clint Peinhardt and Rachel L. Wellhausen, “Withdrawing from Investment Treaties but Protecting Investment” *Global Policy* 7, no. 4 (2016).

5 Anne Orford, Martin Clark and Florian Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (Oxford: Oxford University Press 2016) 341.

6 Kenneth W. Abbott, “Modern International Relations Theory: A Prospectus for International Lawyers” *Yale Journal of International Law* 14, no. 355 (1989) 337.

7 Abbott, ‘Modern International Relations Theory’; Anne-Marie Slaughter, ‘International Law and International Relations Theory: A Dual Agenda’ *American Journal of International Law* 87, no. 2 (1993).

FEATURE INTERVIEW: MS RUMA MANDAL IN CONVERSATION WITH STAIR

In this interview, Redrawing Boundaries of International Law theme issue editors Yuan Yi Zhu and Tuuli-Anna Huikuri had the chance to present a set of topical questions to Ms Ruma Mandal, the Head of International Law Programme at Chatham House. The conversation included recent developments in the policy of international law regarding refugees, insights into the sociology of the legal profession, as well as Ms Mandal's personal reflections of her career.

Prior to her position at Chatham House, Ms Mandal worked on public international law issues with the UK government as a legal adviser in the Foreign and Commonwealth Office. She also worked with the UN High Commissioner for Refugees, where she drafted a series of guidelines on critical areas of international law regarding protection of refugees, including the question of exclusion from refugee status and the protection of stateless persons. In addition, she has been involved in litigation in the European Court of Human Rights, negotiating international instruments and setting up monitoring initiatives.

STAIR: In the light of the recent Syrian refugee crisis and the influx of refugees coming into Europe there has been an increased public interest towards the international law on refugees. In your opinion, is there something unique about the current refugee crisis in comparison to the past from a legal perspective?

Ruma Mandal: I think in one of the reasons the recent refugee crisis is dominating policy discussions and has received great public attention is precisely the idea that it is somehow unique. Firstly, I don't necessarily think it's unique as a phenomenon. However, this is the first time we have seen relatively large numbers of refugees arriving from outside Europe, which largely explains the public attention. Of course, waves of refugees have been observed in Europe in the past: the Balkans crisis resulted in large numbers of refugees, and one can go much further back to the second world war to find more examples. But these were essentially European refugee flows. I therefore think that now that Europe has to face a

"Ms Ruma Mandal in Conversation with STAIR," *St Antony's International Review* 14 no. 1 (2018): 10-16.

much bigger flow from outside of Europe it has created much more political tension.

From the legal side, I don't see any particularly new legal issues. Many people have questioned whether international refugee law is effective given the perception that the movement of people is much larger now, and in the European context, a lot of governments have not been so supportive of the basic principles of refugee law. But essentially, I don't think it raises new questions about the content of refugee law. It just raises questions about whether the traditional leadership in that area is ebbing away.

STAIR: Do you think that the refugee issue is now more politicized than it has been in the past?

RM: Yes, absolutely. If one looks at the refugee convention, the whole concept of a refugee is not political, it is humanitarian. 20 years ago, as I started working on refugee issues in the European context, they were dealt with by the Ministry of Interior, equivalent of the Home Office. It has now become a foreign policy issue as well. On a global level, the way in which such issues are dealt with has moved from immigration, home affairs, and humanitarian conversation to serious realpolitik. That is a significant difference, which is not entirely related to the issue of refugees itself. It has more to do with broader global politics of mobility, borders, and security.

STAIR: The 1951 Refugee Convention is the backbone of international refugee law, and recently there have been calls to overhaul this regime, argument being that it is no longer fit for purpose because of the very different political context and large numbers of refugees. Other people have also argued that the Convention does not effectively split the burden between recipient states. Do you think that the 1951 Refugee Convention is still fit for purpose, and what changes if any would you like to see to be made to it?

RM: As you say, there are lots of people who advocate the convention being renegotiated. First point would be that reshaping the Convention to be more effective is not really feasible politically. If renegotiation was to be attempted, the result would likely be an even more narrow and probably an even less fit-for-purpose treaty. This is because of the current political attitudes within states towards refugees, and broader issues of human mobility.

In its current form, the Convention in my opinion is still applicable: it outlines that if you have to cross borders out of the

fear for your life, or because of severe human rights violations, another state needs to protect you physically and legally, since you no longer have a parent state that you can rely on. I think this fundamental provision of the convention – which is now arguably also part of international customary law – is still relevant. The problem is precisely that the Convention never dealt with how to share responsibility for the movement of refugees. It essentially states that another state will have to look after a refugee, but it does not present a mechanism for addressing the huge inequality in dealing with what we might call a public good.

In Europe, we are very exercised about this rise in the number of refugees coming here from outside the European continent, but when the crisis is put in a global context, we should be aware that it is a small portion of the number of refugees worldwide. The vast majority of them are in developing countries, who have even less ability to look after them. The issue about fir-for-purpose does not really concern the legal regime per se, as the Convention provides flexibility to states to help each other out. Overall, I don't think the inability to deal with the refugee crisis is a legal failure, it is a political failure. Indeed, states have become more creative over the years to use tools like financial aid to countries hosting refugees. There are all sorts of options to share responsibility so that no one state feels overwhelmed, perhaps because of the accident of its geography.

STAIR: While some countries especially in Western Europe take a lot of refugees, other countries also outside the Western world might be thought to have the responsibility to help because of their size. For example, China officially took some 47 refugees last year. Do you think there is any evidence that these countries are becoming more willing politically to accept responsibility over refugees, or do you remain pessimistic?

RM: I am relatively optimistic with regards to more countries being prepared to take responsibility through financing. In particular regarding the Syria crisis, countries who have not traditionally been big donors, for example, to the UNHCR have come forwards with financial contributions. However, this has to be put in context - the overall picture is bleak for humanitarian funding generally, not just for refugees. It is enormously underfunded. For example, the Syria Conference last week in Brussels failed to raise the targets for critical humanitarian assistance to Syrian refugees in the region. However, within that rather bleak picture there are these positive dynamics of what you might call emerging donors.

Financing is of course only one part of the responsibility equation. In terms of providing access to refugees, or helping another host state through resettlement initiatives, there are some positive developments, for example emerging resettlement countries and community-driven private sponsorship initiatives. With regard to the former, countries like Brazil are now offering resettlement places for example to Syrians coming from Jordan and Lebanon. But overall, there are many states which are relatively well-off economically, and which have small numbers of refugees, who could be argued should do a lot more. The Global Compact for Refugees currently under discussion, although not a legal instrument, will try to create a stronger commitment to responsibility sharing. A number of commentators have presented some creative ideas about how state contributions can be measured, and to form a clear indicator of which states are doing well to create incentives for states. Longer term there is potential for a lot more countries to do more to create effectiveness and predictability in refugee emergency responses.

In addition, there is a lot of policy research at the moment on how one can turn a refugee situation into an economic opportunity, for both the refugees and the host country. It stems from the recognition that refugee situations last longer than they used to: 40 years ago, after a refugee emergency many people were able to go home after a couple of years after the conflict resolves. Now we have people in refugee situation for over 20 years, which is why the emergency crisis approach is no longer appropriate, and economics of refugee crises also need to be considered.

STAIR: The discourse in the West has become focused on the distinction between political refugees, which are considered to be legitimate refugees, and economic immigrants, who are generally described as taking advantage of the refugee regime. Do think that this kind of distinction has any force legally or morally? Is it useful?

RM: The convention quite clearly defines who a refugee is, and the definition is based on those who have lost fundamental human rights protection in their home country. The convention therefore aims to protect the freedom of those whose lives are at risk, but not people who are moving for economic reasons, however understandable those may be. There's been lots of debate about whether that's still morally defensible, or even whether a broader legal interpretation could be possible. There certainly are cases where you see that someone may have been forced to flee because of persecution on the part of the state which would lead

some people to be really economically deprived. This may result for example from a purposeful political strategy of famine. But the convention is not aimed at dealing with people moving because they seek better livelihood opportunities.

However, there is a real issue about how states cooperate to deal with the issue of growing human mobility. There is no equivalent to the Refugee Convention for migration, because states have wished to retain their sovereignty in this area. The Convention is the one area about cross-border movement where states were prepared to give up a degree of sovereignty because of the exceptional nature of the cause of movement. Many are advocating that the Refugee Convention could either be broadened, or we could have a parallel convention, but the politics at present do not make it feasible. A non-legal instrument, the Global Compact on Migration, is currently being negotiated but it is unlikely this will involve significant concessions on state control over their borders. The process is however trying to get states to think more strategically about how they approach migration, and to reconsider the negative, securitised approach to human mobility. That securitised approach drives many people who have no other routes to the global North for economic reasons to try to enter using the refugee route. This is neither good for them, refugees, nor the countries of destination.

STAIR: International law continues to be practiced by a handful of lawyers and arbitrators. Do you think this may have implications for the legitimacy of international law or justice?

RM: Even if you put all of the world's legal professionals together, they are a relatively small group because of the nature of the field. This relatively small group has however grown exponentially. In the last 20 years international law has developed significantly, for example in the areas of international environmental law and international trade law, and there are obviously more lawyers as specialists in these particular areas. As a result, there are also more opportunities for lawyers in governments, academia, as well as private practice, forming an overall larger group.

There are concerns about legitimacy which may be warranted. International law may often feel very remote for most people, and therefore those that are involved in it can sometimes seem like a quite remote part of an elitist project. This is not a good thing for the general understanding and appreciation of what international law is capable of doing within its limits.

STAIR: And do you think there has been any shift towards greater

inclusion to and public understanding of IL?

RM: An interesting development of the last 15 years is the increased civil society embeddedness with the international law world, for example in driving momentum for new treaties or seeking to inform treaty monitoring mechanisms. For example, the Landmines Convention was very much a civil society driven initiative in the beginning. One could therefore claim that there is slightly more democratic involvement in international law.

Naturally, international law still is made by states and interpreted by courts, government lawyers, academics, and private practitioners. But on the other hand, there is more public understanding of international law. The US intervention in Iraq certainly had a negative impact on its reputation, but the incident also highlighted questions of what the role of international law is. IL also tends to turn up much more in domestic courts than before. Many domestic human rights lawyers in Europe are now to some degree international human rights lawyers, as they have to be familiar with the case law at international level and conduct cases at the European Court of Human Rights.

STAIR: In your work, do you see a disconnect between the way IL is practiced on the one hand, and the way it is studied by legal scholars on the other?

RM: Like with any academic fields, there will always be some divergence between study and practice, be it law or say, medicine. One thing I have noticed while working in Chatham House is that the academic international lawyers make great efforts to be connected with practitioners, be they from the government, NGOs or private firms. Anybody who wants to be credible needs to have diverse networks within their own field. In that sense a lot of good IL teaching is grounded in reality.

One of the strengths of IL academics is that they can step back from the day to day practice of law into the more theoretical sphere. While lawyers working for government do not always have much time for high level conceptual thinking, they also need to get the law right, and have defensible, well-grounded arguments. I think this keeps academics and practitioners in balance and provides constructive dynamism.

STAIR: Finally, during your work within the UK government and the UNHCR as a legal counsel, did you ever find any difficulties accommodating to political authorities and their goals? Were there ever situations where you had to think strategically about your advice?

RM: Sometimes as a lawyer when you are working in government or any political environment you might get the role of bringing people back to the rules, and that there may not be as much discretion as the policy-maker might want to have. However, this is your role as advocate legal adviser to be able to engage and explain how policy can be shaped in compliance with the law. In my experience policy makers are open to advice and you can have a constructive solutions worked on together.

These kinds of challenges are what makes work as a legal advisor in a government or with an international organisation rewarding. For me being involved in operational and policy decisions was very rewarding. International law is sometimes perceived as a restraint on policy but it also provides a framework for cooperation, and to be able to be involved in this positive side of it is what I enjoyed the most at the Foreign Office and also working at the UNHCR.

STAIR: Thank you very much for the interview, and the valuable insight into the policy and practitioners side of international law.

FEATURE INTERVIEW: PROFESSOR PHILIPPE SANDS QC IN CONVERSATION WITH STAIR

In this interview, special issue editors Yuan Yi Zhu and Tuuli-Anna Huikuri sat down with Professor Philippe Sands QC to discuss the current state of the 1945 settlement, the role of rising powers in the international legal order, and the place of theory in the study of international law.

Professor Sands is Professor of Laws at University College London and a barrister at Matrix Chambers. He has appeared as leading counsel in many high-profile international law cases, and is an experienced arbitrator. He is also a prolific author: his latest book, *East West Street: On the Origins of Genocide and Crimes against Humanity* (2016) was the winner of the Baillie Gifford Prize, the British Book Awards Non-Fiction Book of the Year, and the Prix Montaigne. A graduate of the University of Cambridge, Professor Sands was called to the English bar in 1985, appointed Queen's Counsel in 2003, and elected a bencher of the Middle Temple in 2009.

STAIR: Many international legal scholars, yourself included, have pointed out the lack of justification under international law for the recent Western strikes on Syria. On the other hand, there is often a great of public pressure in favour of military intervention in extreme humanitarian crises, in spite of the international legal prohibition against the use of force. Do you think that international legal norms concerning use of force will need to evolve to accommodate such interventions if international law is to retain its legitimacy?

Philippe Sands QC: In essence, the claim is that the international legal order of today, based on the 1945 settlement, is no longer fit for purpose. There is truth to that proposition. However, states have not been willing or able to make fundamental changes to that order. So we're in a dynamic of having a 1945 legal settlement in relation, for example, to the use of force, but with new conditions emerging. So how does international law evolve in the face of the inherent conservatism of states? Eventually, as values change, the law follows. We know that international law is not too good at moving in an evolutionary way in the face of changes. It tends to follow, rather than lead. Right now, I don't think international law is likely to evolve in

ways that take account of new values and new considerations. I fear it will take a major conflagration to effect real change.

Interestingly, the U.N. Charter actually posits that tension between what the law allows and what people want. It contains rules on the use of force, on the one hand, and rules on the protection of fundamental human rights, on the other. And it was always known there was going to be a tension. That's why you have Article 2 paragraph 7 of the Charter. The way it was supposed to work was that the Security Council would take decisions, but in the present circumstances, where you have three permanent members generally on one side and two on the other with different perspectives, or vice versa, the system is blocked.

Ironically, we now hear arguments in this country in favour of a Uniting for Peace (U.N. General Assembly Resolution 377) type of approach to bypass the Security Council through the General Assembly. It is ironic because the UK, at this very moment, is arguing before the International Court of Justice that the General Assembly got it completely wrong when, by a very large majority, it referred to the ICJ the question of the Chagos Archipelago. I suppose it can be said that all five of the permanent members of the Security Council tend to adopt a self-serving approach. I don't draw easy moral distinctions between them; the arguments they make appear to be entirely suited to their own political dynamic and political direction. That is not to say that Russia is behaving impeccably, right now. It is not. But then again, is the United States?

That said, to take your point about humanitarian intervention, the rules put in place in 1945 were actually pretty sensible. Plainly, there is in some parts of the world a desire to allow the use of force to protect fundamental human rights when they are violated on a massive scale. And there was a disagreement as to the circumstances in which that should be permitted to happen. In 1999 there was a nudge in favour of a greater use of humanitarian intervention as a justification for the use of force, in relation to Kosovo. But that move was extinguished, at least for the medium term, by the Iraq War. We are now, because of Iraq, stuck in a moment where only in the most exceptional circumstances would human rights arguments be broadly recognized as allowing the use of force. Regrettably, it seems that in relation to Syria today this is not one of those moments.

On the subject of Syria, I noted with the apparent disconnect between the UK and the US. The UK at least made an international legal argument, although it's a pretty hopeless one. The Americans basically realized there was no argument to be made, so they haven't really sought to justify the attack in Syria on legal terms. Which is worse? Which is more problematic? Which is more dishonest? There's a decent debate to be had about that.

STAIR: We are now seeing rising powers such as China and Brazil becoming more involved in the development of international law. However, they have very different understandings of concepts such as sovereignty and human rights. Do you think this poses a fundamental challenge for international law?

PS: International law is a long game. When I was a much younger international lawyer, based in Cambridge, I had a fine colleague, Sir John Baker, who was professor of English legal history. I'd sometimes talk to him at lunchtime about what I was working on. And he would say to me something like: "We had that problem in English law in 1522 and it took us 250 years to sort it out".

The only way one can maintain an optimistic disposition about the future of international law is by recognising that the structure that was put in place in 1945 could not be expected to effect an instantaneous change. It's a multi-century project: we are in the early Middle Ages for international law. You have to look not just ten years, but centuries into the future to see how this evolves. No doubt they will look back at our period, at some point in the future, and smile about the issues that we were discussing.

If you put international law into that broader framework, until 1945 states were more or less absolutely sovereign. They could do pretty much whatever they wanted to their nationals. That changed in 1945 and the struggle is still on. That's why we see Brexit – "taking back control". That is why we see Trump – "making America great again",. And it's no doubt why we see in China a move to abolish presidential term limits, contrary to the trend that was expected. It's about maintaining control in a world that seems frightening and uncontrollable. But international law is a history of a couple of steps forward, then a couple of steps sideways, then one backwards, then perhaps another forward. That's how international law is, and it's how international law will continue to be. Have low expectations, I say.

However, what's interesting right now is that you see the same states adopting different positions in relation to different issues. On the one hand, is there a country in the world today more committed to the rule of law internationally - and multilaterally - in the economic field than China? No, because China is greatly exposed economically. I've sat [as arbitrator] on one of the first investor-state cases involving a state-owned Chinese corporation, and I saw that Chinese company argue powerfully and passionately for the international rule of law. At the same time, I was counsel for the Philippines in the South China Sea arbitration against China and I saw the opposite. It's not irrational behaviour if, when you see your interests as being served by the rule of law, you will push for that in the economic field. But if

you see the international rule of law dynamic as undermining your ability to take sovereignty in the direction you want to take it, namely control of the South China Sea, you might adopt a different position. That's not necessarily an irrational stance. Every state has its internal contradictions.

It is also interesting to see that the two countries that did more than anyone else to put the 1945 settlement onto our international statute books, namely United States and the United Kingdom, have fallen off their perches. Both seem to be staring into an abyss. And the question arises: who will pick up the slack? The EU, to a certain extent, but it is weak. Germany has filled the gap to some extent, but it's not powerful enough globally. And I think the interesting question, beyond what China and Russia will do, is what the BRICs will do. Watch Brazil, India, South Africa as they move as middle powers in a world in which they can both see the attractions and perils of an international rules-based approach. So I think it's in a sense an exciting moment, but also a dangerous moment, for international law. I think we may be approaching a pivotal moment right now.

STAIR: You mentioned that Britain and America, which did so much to build the 1945 settlement, are retreating from it. Why?

PS: I wrote a book in 2005 called *Lawless World*. The starting point for the book is the Atlantic Charter, a remarkable one-page document which crystallizes that moment where Churchill and Roosevelt met off the coast of Newfoundland and decided to remake the world once the war is over. It was built on three pillars: prohibition on the use of force, self-determination (rights for people), and economic liberalisation. Those were the pillars of a legal order. It's beautifully crisp. It's simple. It has a clarity to it, and it provides a reference point for right now: who's going to produce the new Atlantic Charter for our period? It's not immediately apparent.

Why did Britain and America fall off their perches? They overreached in 2003, and they did so in circumstances in which they were no longer able to impose their will. And that happened in part because they adopted contradictory stances in relation to their commitments to the rule of law in those three domains.

If you move forward from the Iraq moment to today, there could be a common connection between Brexit and Trump, and it concerns a perception of a decline in power. In the United States, the common theme of President Trump's "policy", if it can be called that, is the move away from a multilateral approach to a bilateral approach. The reasons behind the change are obvious: if you take the Trans-Pacific Partnership, the reason they don't like that is they got 10 partners who gang up together and get a better deal, so the

United States would rather have 10 free trade agreements than a single TPP and the 10 have said no, we are sticking together. And they are right. The same thing happened in the South China Sea case. China has a divide and rule policy. It doesn't want to address these [territorial] issues in a multilateral forum. I think for the United States, in the face of declining economic and political power, the move from the multilateral to the bilateral is about retaining political leverage. It's about power.

For the United Kingdom, it's more complex. There's a sense of nostalgia, some sort of a desire to imagine a return to a world in which the sun never sets across the empire. Dreams of a new relationship with the Commonwealth. It is completely delusional. Britain is not a major power anymore. Not in military terms, not in economic terms, not in political terms. Many political leaders in this country are having trouble coming to terms with that. Brexit offers some sort of illusion, of the possibility of a return to something else. I think those people are likely to be very disappointed.

There may be common themes for the similar types of approaches that the United States and the United Kingdom have been taking, but the underlying rationale is different and they are motivated by different perspectives, because the two countries are in different stages of their development. The United States remains a global power. The United Kingdom is not. And, to come back to the settlement of 1945, is it not slightly absurd that the United Kingdom and France are permanent members of the Security Council? It's understandable they don't want to drop off. But so long as they stay on, you're not going to have, within the Security Council, a truly effective model for dealing with the kinds of challenges that we face.

STAIR: There has been much discussion within the academic literature about whether there is currently a backlash against international law, and its implication for international law's future. Do you think such theorising is useful? And do you think that there is a difference between how academics and practitioners view the matter?

PS: I tend to be sceptical about grand theories on the future direction of international law. Its future direction will turn on the confluence of perceptions about interest. To the extent that there is a grand theory that could be applied, it's a rather simple one that looks at the economic and political interests on a range of issues in which those who exercise power say to themselves "is it in our interests to proceed in this or that direction when it comes to international law?" What I'm much more interested in are minute details that illustrate why people do things, because the state is not, as such, a real functioning entity. A state is no more than the sum of people who happen to hold power at a particular moment, within that state.

If one comes back to the South China Sea arbitration, why did China not participate? We know there was a difference of view, that in the Ministry of Foreign Affairs, and amongst Chinese scholars and legal practitioners, there was a keen desire for China to participate. It had good arguments. It should have made those arguments in the international domain. But that desire was extinguished at the highest political level in China, for different reasons. So if you're going to try to understand China's decision at that particular moment, you have got to unpack the reality of the decision-making process at the domestic level to see ultimately who took that decision, and why. Why did the Chinese premier take that decision? I don't know. What I do know is he rejected the advice of legal advisers and took a different approach to China's engagement with international law in that domain. But he appears to have taken a different approach when it comes to WTO law, investors-state agreements and investor-state dispute settlement. How do we explain the difference in the approaches that he took? I don't think any grand theory can explain that. We want to get into the mind of the Chinese premier and understand, at a particular moment in time, why he jumped one way on one thing and another way on another thing. I'm not saying it's irrational, but I am saying it turns largely - but not exclusively of course - on the predispositions and desires of individual decision-makers.

I am a legal practitioner. I see how states take decisions and when I'm asked why did the state decide to go in that direction, what you're really asking is why did the prime minister or other person in authority decide to go in that direction. Why did the president decide to go in that direction? Why did the agent in a particular case before in particular court decide to go in that direction? The individual is emblematic of the state but the state doesn't, as such, exist, not in a decision-making sense. As was famously said in the Nuremberg Trials, states don't kill people in large numbers, individuals do. Well, in the same way, states are merely vehicles through which individuals act, and make international law. Individuals make international law. But I'm very much more interested in the psychology of decision-making at particular moments rather than in the international relations-style grand theory of how we explain certain trends and directions.

That may be because I'm influenced by what I see in the courtroom and in intergovernmental negotiations, where the human component can be absolutely critical. I suspect we're seeing that right now in relation to North and South Korea. Is there a grand theory that explains why these two countries are now talking? I've not seen it. There are a series of factors that have influenced leaders of those two countries for a whole range of complex reasons to decide that this is the moment they both want to talk. Who knows what direction it

will take. But I don't believe there's a grand theory that can explain the North Korean moment right now.

That's the essential thesis of *East West Street*, to the extent there is one: individuals make a difference. If you get into the minutiae of a single trial you will see that with international judges. Judges, believe it or not, are also human beings. They come to sit on a case with their own baggage, prejudices, and ideas. They don't operate mechanically according to some grand theory. I see this as an international arbitrator on investor-state cases. I look back and try to understand why I will go in one direction rather than in another one, at a particular moment in a case. It could be the tiniest point of detail on a factual matter, or on a legal argument, that influences me, or counsel for one of the parties has persuaded me because they have made the argument particularly elegantly. I can't explain easily how it is that my decision-making cuts in a particular way.

STAIR: Finally, do you have any thoughts about the role of international law within the broader public discourse?

PS: I was really struck, back in February 2003 when I went with my family on the march against the Iraq War, to see hundreds of thousands of people marching with banners calling for respect for international law. I thought that to be an anthropologically interesting moment. Similarly, if you had asked me two years ago whether a book that I'd written on the origins of genocide and crimes against humanity would sell hundreds of thousands of copies, I would have said no, you are 'barking'. The fact that it has attracted so many readers suggests there are plenty of people out there who are not international lawyers or international relations theorists, but who are nevertheless interested in this thing called international law, which offers for them a hopeful alternative way of dealing with the world. Maybe we should think of international law as a sort of minor - but growing - religious order.

One aspect is clear: we international lawyers spend far too much time talking to each other and not enough time talking to others, across the disciplines, but also with the grand public, as the French like to refer to the intelligent general public that is out there. I am quite sure we international lawyers need to do a much better job of explaining to these audiences what it is that we do, what exactly happened in 1945 that was so significant, why its worth preserving, and the challenges that we face going forward.

THEME SECTION

THE NAVAL MINEFIELD OF CUSTOMARY INTERNATIONAL HUMANITARIAN LAW¹

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Abstract

Naval mines are an often unseen engine of war held in the inventories of over fifty countries and a growing number of non-state organizations. Since the Second World War, there have been twenty-four separate naval mining events, with the first of these (the 1946 mining of two Royal Navy warships off the coast of Albania) leading to the International Court of Justice's inaugural case. The only conventional international law currently governing the use of non-nuclear naval mines is the Hague Convention No. VIII of 1907, negotiated to regulate the use of a specific naval weapon built with early twentieth century technology, and used in the circumstances of wars as then fought. Although ratified by only twenty-seven countries, some jurists now transpose this convention to twenty-first century weaponry with global applicability. Through the two specific lenses of belligerent practice as witnessed during armed conflict and state preparations for war, this article examines this transposition of a convention that, by its own text, limits itself to a specific sub-set of naval mines used in wars in which all belligerents are party to the Convention, to the present situation whereby some practitioners of customary international law (CIL) seek to apply its provisions to all types of naval mines in all conflicts. In doing so, this article highlights a divergence of state practice from CIL desire, as well as the potential for contentious application of CIL to constrain nations from using potentially legitimate methods of offence and self-defence.

Introduction

Naval mines are a pernicious engine of war that have been referred to as "Weapons That Wait".² Containing up to one ton of explosive charge, since the Second World War they have sunk or seriously damaged more United States Navy warships than all other forms of naval warfare combined.³ These weapons are of sometimes debated legality when used, and the 1946 mining of the Corfu Channel, which severed the bows of two Royal Navy warships, led to the International Court of Justice's inaugural case.⁴

This article will examine how a century-old convention that ostensibly governs the fighting conduct of only twenty-

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seven ratified state parties, using 1907 weapons, is now cited as a method of regulating the modern maritime actions of all naval minelaying nations.⁵ This situation has created a legal minefield, and potentially a military tactical trap, for those considering use of a weapon now of a sophistication which exceeds that envisaged when the convention was drafted.

Technological Underpinnings

Naval or sea mines (the terms “naval” and “sea” mine are interchangeable) have no specific definition in international law. Thus, based on the definition of land mines used in the 1980 UN Convention restricting the use of (similar) land-based weapons⁶, naval mines may be viewed as: “munitions placed under, on or in the sea or an inland waterway and designed to be detonated or exploded by the presence or contact of a person or vessel.”

As weapons of war, naval mines have some unique characteristics: they are relatively cheap, highly proliferated, and easy to operate. Once laid (or sown), a mine’s core characteristics then become: independence of operation from outside control; persistence as a threat over a prolonged period; ignorance of ceasefires; and easiness to disown.ⁱ Mines achieve their military aim by causing delay or disruption to the enemy’s plans, normally affected by the creation of fear of mining and of the consequent potential loss of an enemy’s ships, materiel, or personnel through detonation of the mine. Such delay, disruption or fear can be created either by an enemy witnessing mine explosions and damage to their ships when they encounter an unexpected minefield, or by the minelayer stimulating their enemy’s fear of mining by announcing their sowing of naval minefields (including deceptively as a ruse of war).

Modern sea mines of the type covered in this article were invented in 1778 by Dr David Bushnell.⁷ Nicknamed “Bushnell’s Keg,” they consisted of a thirty-five to seventy kilogramme explosive charge contained in a watertight, partially air-filled barrel, which was drifted downriver to impact its target. The next development was to anchor the mine to the sea bed with a heavy weight, which pulled the keg underwater to a pre-determined depth in a manner similar to a yacht’s mooring buoy which has been laid on a rope that is too short for the depth of water. With air in the barrel providing buoyancy to keep the keg just below the surface, the bumping contact from a passing ship’s hull would automatically actuate a striker mechanism, detonating the mine’s main explo-

ⁱ The specific case of controlled mines is examined later in the article.

sive charge against the ship's hull. So was born the "automatic submarine contact mine."

As naval mines developed, testing required the remote underwater detonation of explosives, which was achieved from a shore station attached by an electric detonation cable to more substantial explosive charges laid on the seabed. After the concept was proven in 1842 by Colonel Samuel Colt (of revolver fame), the US Army Corps of Engineers eventually developed this model as a separate type of device, known as a "controlled mine."⁸ This could be laid on the seabed in harbour entrances to allow the safe passage of one's own ships but could be remotely detonated under or in the vicinity of any approaching enemy ship.

By 1907, the above two technologies were in widespread naval use, including during the 1904–1905 Russo-Japanese war. During that war, neighbouring China experienced the adverse side-effects of moored naval mines which had broken free from their heavy anchors and which—still primed to fire on contact—drifted on the sea surface into Chinese waters and sank many of their fishing sampans and trading vessels.⁹

At the opening of the Hague Peace Conferences in 1907 the Chinese issued an impassioned appeal to the world community to regulate the use of such sea mines by stating:

It is estimated that between 500 and 600 of our subjects who followed their peaceful pursuits have thus met a cruel death on account of these agents of destruction.¹⁰

Early stages of the 1907 negotiation included a carefully worded limitation on what would be covered by any treaty and what would not. Specifically, and despite a written proposal by Brazil on July 4, 1907, the technology of controlled mines would not be included.¹¹

Four months of negotiation followed between forty-four state powers which took into consideration not only of the humanity of the existing weapons, but also those of emerging technologies. The British shared with the conference a newly developed dissolving disc of sal ammoniac which, if built into a mine's underwater casing, would dissolve after a pre-determined period of time. This allowed air in the mine to escape, causing the mine to be rendered harmless and to sink.¹² A second sterilizing technology known as a "mooring lever" was also shared, enabling all countries to design a moored mine's firing circuit to be interrupted and thus

rendered harmless if the mine broke loose from its anchor cable.ⁱⁱ

At the end of the negotiations the delegates had agreed a text to be taken back to their governments. Consisting of only thirteen articles, and lasting just three pages of a modern text book, today it forms the only internationally agreed legal framework governing naval mine warfare. It is known as the 1907 Hague Convention No. VIII Relative to the Laying of Automatic Submarine Contact Mines, or “Hague VIII.”

Significantly, only thirty-seven countries “signed” the convention on October 18, 1907, with only twenty of these eventually ratifying and thus becoming bound by its provisions.ⁱⁱⁱ Subsequently, five countries ratified the Convention through accession (two of whom were at the original negotiations),^{iv} and an additional two countries have subsequently ratified the convention through succession, the most recent being South Africa in 1978.^v Thus, of the countries party to the negotiation, twenty-two have never formally agreed to its terms, including Russia, Persia (now Iran), Spain, and Italy.^{vi}

Naval Mines Since 1907

In 1914, only seven years after the signature of the Convention, the First World War broke out and it faced its first test. Developments in naval mine warfare had already advanced the sophistication of automatic moored (submarine) contact mines, whereby internal explosive charge weights were up to two hundred kilogrammes and actuation could be achieved not only by a ship’s hull directly bumping into (contacting) the mine case itself, but also through detecting the electro-potential difference between the iron hull of

ii Mooring levers are part of the firing circuit of some naval mines. While the mine is positively buoyant, the mooring lever is held open by tension in the mooring cable between mine and anchor and it is thus in a position allowing the mine to detonate as designed. If the mine breaks free from its mooring cable the tension in the mooring wire drops to zero, causing a spring in the mooring lever to move it to the closed position, and the mine’s firing circuit is broken. The now unanchored mine is thus rendered harmless.

iii Conference participants party to Hague VIII by ratification:

Austria-Hungary; Belgium; Brazil; Denmark; El Salvador; France; Germany; Great Britain; Guatemala; Haiti; Japan; Luxembourg; Mexico; Netherlands; Norway; Panama; Romania; Siam (Thailand); Switzerland; USA. *Uti possidetis* (ongoing application) may apply to countries created since predecessor-state ratification.

iv Accession states (present at Hague Conference 1907): China; Nicaragua.

(Not present at Hague Conference 1907): Ethiopia; Finland; Liberia.

v Succession States: Fiji; South Africa.

vi States not party to Hague VIII, but present at 1907 Conference: Argentina; Bolivia; Bulgaria; Chile; Colombia; Cuba; Dominican Republic; Ecuador; Greece; Italy; Montenegro; Paraguay; Persia (Iran); Peru; Portugal; Russia; Serbia; Spain; Sweden; Turkey; Uruguay; Venezuela.

a passing ship and a thin copper wire trailed up to one hundred feet from the casing of a moored mine.¹³ Clock mechanisms also allowed more accurate sterilization (rendering harmless) of mines, allowing navies to lay minefields to block an enemy's use of an area in the knowledge that, through pre-set parameters, their mines would become harmless on a given date, thus allowing counter-attacks by their own forces through newly sterilized minefields. Notwithstanding the naval mines used in this period being within the technological range as perceived by the drafters of Hague VIII, numerous divergences from its provisions were noted, which will be examined later.

Technological advances throughout the inter-war years saw a further distancing of Hague VIII from the war-fighting materiel of the day. By 1939, both Germany and Great Britain had perfected a variation of the seabed mine. This meant that instead of remote detonation, the mine could be automatically self-actuated by detecting a passing ship's or submarine's magnetic field.¹⁴

With each seabed mine containing up to one tonne of explosives, as the war progressed these "influence" mines were further developed through the addition of acoustic sensors, which actuated the mine by detecting the underwater sound of passing ships. Pressure sensors were then added to ensure detonation as the ship passed almost directly overhead of the seabed explosive. The relative expense of these influence mechanisms, compared to traditional and cheaper contact actuation, meant that the mines used by both sides included a full spectrum of mine technologies spanning automatic submarine contact mines, automatic seabed (and moored) influence mines, controlled mines, and also drifting contact mines, which were especially effective against shipping in rivers. During the Second World War, British mines alone sunk 1,119 enemy ships, damaging a further 798.¹⁵

The post-war advent of electronics, computing, and global navigation satellite systems (for example GPS) saw further divergence from the materiel baseline that in 1907 underpinned Hague VIII. Modern mines include a plethora of technologies with automatic actuation including the 1907 technology of "contact," as well as the non-contact influences of magnetic, acoustic, pressure, and induced seismic vibration. Combined with modern electronics, such influence mines can be programmed to detonate only when under warships, or even under specific classes of warship. In parallel, the arming of a mine (i.e. when it becomes "live") can be delayed for hours, days, or months, with self-sterilization also programmed to occur at carefully pre-set times or intervals. Unanchored, floating or drifting mines can now be programmed to re-

ceive navigational inputs and only actuate if within a pre-defined geographic area. And oscillating mines can drift unseen in the water column, below the surface, spending time either resting on the seabed or using sub-sea currents to reposition themselves.

The consequence of these advances in technology is not only that the rules crafted during the Hague VIII negotiations do not cater for many of these modern weapons, but alleged and increasingly contentious breaches of the now outdated and probably inapplicable Hague VIII rules are also prevalent during conflicts.

The key provisions of Hague VIII

Examining the content of Hague VIII through a modern lens, the relevant Articles are:

Article 1:

It is forbidden -

1. To lay unanchored automatic contact mines, except when they are so constructed as to become harmless one hour at most after the person who laid them ceases to control them.
2. To lay anchored automatic contact mines which do not become harmless as soon as they have broken loose from their moorings.¹⁶

This article applies to two types of mines. The first type is drifting mines, which were used as part of warship escape and evasion strategies at the start of the 20th century by throwing unanchored mines behind an escaping ship with the intention of them detonating against the hull of a pursuing ship. The rule requiring such mines to “become harmless,” or sterilize, after one hour reflected this tactic and was included to prevent such mines from subsequently drifting into the path of unsuspecting neutral ships or into waters unconnected with the fighting. The second type of mine is the traditional moored contact mine, with the mandated immediate self-sterilization stipulated to fulfil the same objective. Noting the embryonic state of aviation in 1907, this article could never have foreseen the aerial laying of drifting mines into enemy rivers, potentially intended to travel for hundreds of miles downstream through enemy territory before they explode against their prey. And the lack of a 1907 definition of “control” highlights the

difference between mines with today's carefully crafted computer "control" instructions instantly accessing GPS positional updates, and the reasonable expectation in 1907 that control meant a human on a ship. Of key significance is that this article applies only to the laying of contact mines. It makes no mention of mines actuated by the (non-contact) influences of passing ships, using magnetic or acoustic sensors.

Article 2:

It is forbidden to lay automatic contact mines off the coast and ports of the enemy, with the sole object of intercepting commercial shipping.¹⁵

This article has been examined by many scholars who generally conclude that it is ineffectual, firstly, because it applies only off the coast and ports of an enemy and thus not on the high seas, and secondly, because it can be side-stepped by a minelayer declaring that at least some of the target of their mining is military shipping or the shipping of warlike materiel.¹⁷ In respect of modern technology, as written, it also applies only to "contact mines" thus influence mines are, by definition, excluded.

Article 3:

The belligerents undertake to do their utmost to render [anchored automatic contact] mines harmless within a limited time, and, should they cease to be under surveillance, to notify the danger zones as soon as military exigencies permit ... by a notice addressed to ship owners [and] to the Governments through the diplomatic channel.¹⁵

For the purposes of this paper, the first key provision in this article is the timely notification of mine danger zones to the international community, especially to neutral shipping. The implied second provision (but of equal significance) is the care with which minelaying must be undertaken in order to constrain it geographically to notified areas, with accompanying records of mining which are thus required to fulfil Article 5 below. However, such record-keeping of actual minelaying does not preclude the issuance of Article 3 notifications as a ruse of war (i.e. saying mines have been laid, when there are none), which is a militarily useful tactic expressly "not prohibited" by the 1977 Additional Protocol 1 to the Geneva Conventions.¹⁸

Furthermore, and of significance, Article 3 as ratified applies only to anchored automatic contact mines. The Article makes no mention of non-contact mines, despite them existing at this time in the form of controlled mines, thus questioning if it can retrospectively be applied to such mines.

Article 5:

At the close of the war, the contracting powers undertake to do their utmost to remove the mines which they have laid, each power removing its own mines.

As regards anchored automatic contact mines laid by one of the belligerents off the coast of the other, their position must be notified to the other party by the Power which laid them, and each Power must proceed with the least possible delay to remove the mines in its own waters.¹⁵

Supplementing the Article 3 notification of live minefields in order to protect neutral shipping, this article places an obligation on each side “at the close of war” either to clear all of its own mines (notwithstanding the title of the whole VIIIth Convention, “mines” of any type), or in the case of automatic contact mines laid in the territorial waters of an undefeated enemy to pass full details of such minefields to the other party in order to allow them to clear automatic contact mines off their own coast. In order to restore freedom of peacetime navigation as now codified by the United Nations Convention on the Law of the Sea (UNCLOS), Article 5¹⁹ also obliges each party to conduct such mine clearance either by doing “their utmost” or by proceeding “with the least possible delay.”

Article 7:

The provisions of the present convention do not apply except between contracting Powers, and then only if all the belligerents are party to the convention.¹⁵

This is potentially the most significant article when analysing the current status of Hague VIII in respect of Customary International

Law (CIL). Known in 1907 as “The General Participation Clause,”²⁰ it was intended to ensure that all sides to a war were playing by the same rules, and that one (non-ratified) side could not gain a military advantage by using tactics prohibited for use by a Hague VIII ratified opponent.

Article 7 also raises the legal question of *uti possedetis*, whereby a treaty is held to continue to apply to a country whose predecessor country has already acceded to said treaty. World order in 1907 included a number of vast empires of Hague Conference participatory states, including the British Empire, French colonies, Ottoman Empire etc. In 1973 Fiji and then in 1978 South Africa became ratified parties to Hague VIII, being noted by the depositary authority in the Netherlands as having ratified through succession, rather than accession²¹, thus bypassing questions of *uti posseditis*; however, their conscious succession identifies as uncertain the Article 7 legal status of many other emergent countries.

The above debate of accession or succession does however become moot in the case of three of the four largest stockpilers of naval mines²²: China, whose estimated stockpile is over 100,000 naval mines, is a ratified party; however Russia, (with over 100,000 mines, and who arranged the 1907 conference), The Democratic People’s Republic of [North] Korea (about 50,000 mines) and Iran (around 10,000 mines) are not Hague VIII ratified parties, in the last case due to its predecessor state of Persia not ratifying the Convention even after provisional signature. In Europe, mine exporters Italy (whose chief delegate, Count Tournielli, was president of the Third Commission which drafted Hague VIII) and Spain are not party. In the cases of Russia, Persia (Iran), Spain and Italy, non-ratification is a conscious decision, as states do not ‘forget’ to ratify treaties after being party to their negotiation.

Having introduced these potential ambiguities in the application of Hague VIII, this article will now consider current conformity with the principles above, based on belligerent practice as witnessed in conflict.

State Practice

CIL derives in part from Article 38 of the Statute of the International Court of Justice (ICJ).²³ Whilst the judgements of the ICJ will, when available, apply the content of ratified conventions, the court shall also take into account or apply judicial decisions and the teachings of the most qualified publicists of various nations, known as *opinio juris* (and to which this article will return). In determining applicable international law the Court shall also

consider “international custom, as evidence of a general practice accepted as law,” known as state practice.²⁴ Noting that “custom” is defined as “frequent repetition of the same act” and that “practice” is defined as “the process of doing something; habitual action” it is thus instructive to review the repeated and habitual conduct of mining operations during conflict post-1907, focused on the twenty-four naval mining events since World War II (listed at the Annex).²⁵

Within days of the start of the First World War there were allegations of breaches of Hague VIII. Professor Howard Levie describes submissions by the British that German mines were being scattered “indiscriminately about the North Sea” using tactics that “would appear to be contrary to the terms of the Hague Convention of 1907.”²⁶ The German response on November 7, 1914 was to draw attention to Article 7 of Hague VIII, highlighting that Russia (also a belligerent) was not a party to the Convention and thus the convention could not be held to be in force.²⁷

With inter-war attempts to clarify the legal situation surrounding naval mining ultimately unsuccessful,^{vii} similar accusations of breaches of Hague VIII punctuated the European theatre of World War II through alleged undeclared minefields and the use of non-sterilizing mines, accompanied by further assertions of Hague VIII’s inapplicability due to non-parties being belligerents.²⁸ Such allegations were numerically fewer than those made in the First World War²⁹, possibly indicating an acceptance by both sides that non-Hague VIII mining was now the norm.

Thus, in two wars which started seven and thirty-two years (respectively) after the signing of Hague VIII, this convention had already fallen into disrepute due to its own nuanced wording and the available evasions provided by either overly prescriptive or ambiguous text.

In the year after the conclusion of the Second World War, Albania was responsible for undeclared naval mining to prevent free passage through its territorial waters,^{viii} using mines laid in the autumn of 1946 to blow the bows off two British Warships (HM Ships *Samarez* and *Volage*).³⁰ This led to the very first case ever heard by the International Court of Justice (ICJ), to which this paper will return.

vii For example, the League of Nations’ Codification Conference, 1930.

viii Albania has never admitted that it laid the mines. The ICJ found Albania ‘responsible’ for the explosions caused by the mines (ICJ, Corfu Channel Case, Merits, 23), and in 1998 there were press reports (Daily Telegraph, October 28, 1998) of an agreement between Albania and the UK whereby Albania had accepted the principle of liability.

In the same year the outbreak of the First Indo-China War, in what is now Vietnam, saw extensive use of undeclared controlled mining by the Viet Minh.³¹ Noting that Hague VIII does not address controlled mining, it may be seen as significant that this aspiring state organization (the leadership of the Viet Minh went on to form the first Government of Vietnam) felt it unnecessary to declare its minelaying.

The Chinese Revolutionary War saw the port of Shanghai closed between June 9 and 16, 1949, by undeclared Nationalist mining. Indeed, the nationalist military leader (Admiral Kwei Yung-ching), as an official representative of the then recognized government of China, initially denied the laying of mines,³² although it was later admitted that just under fifty mines had been laid.³³ There ensued further naval mining by both sides, with the aspiring state communist forces generally aligning their actions to Hague VIII, despite the apparent nationalist divergence from its provisions. Many insurgents, such as the Chinese communists, aspire to succeed in their campaigns against states and eventually to become recognized as legitimate by other governments. Insurgents thus have an incentive to behave in a legitimate manner in accordance with international general practice accepted as law, such as CIL.

Looking across a range of insurgent mining events exposes varying degrees of Hague VIII alignment, with the Contra rebels in Nicaragua (1984) meeting some Hague VIII provisions (with declaration by radio of their naval mining,³⁴ although the United States was held by the ICJ as having supplied the mines contrary to international law).³⁵ In contrast, the Khmer Rouge (Cambodia, 1975), Hezbollah (Lebanon, 1987), Hamas (Israel, 2006), Tamil Tigers (LTTE) (Sri Lanka, 2008), and the Houthis (Yemen, 2017) all failed to declare their mining, thus they did not align with the 1907 Convention. The use of floating mines by Hamas and Hezbollah that did not sterilize after one hour is a further insurgent divergence from the rules in Hague VIII, providing an indication either that such organizations do not think it applicable to them, even as CIL, or that they are not aware it exists.

The Korean War between 1950 and 1953 included further extensive undeclared naval mining, this time by the state forces of North Korea. But drawing out another key legal issue of state practice, it has to be noted that this conflict has never officially ended, thus presenting a dilemma when assessing compliance with Article 5, which when describing the requirement to clear naval mines or hand over mining plans explicitly begins, "At the close of the war [...]" In this case, naval mining plans have never been handed

over, but it is arguable that no material breach has yet occurred in a war that has not yet (officially) ended.

Multiple mining events in the vicinity of the Suez Canal (1956, 1967, and 1973) have fundamentally been Hague VIII-aligned, even though the principal minelayer (Egypt) is not party to the convention. Further apparent Hague VIII alignment occurred during the Falklands War in 1982 again despite the minelayer (Argentina) not being party to the convention.^{ix} Of legal note, when both examples are examined under a military lens, such Hague VIII alignment can also be explained as being tactically beneficial with the use of Article 1 self-sterilizing mines reducing the threat to the minelayer's own ships, and Article 3 declarations of minefields concurrently deterring an enemy from using the specified water space. Thus, the question of either coincidental alignment with Hague VIII or deliberate, formal compliance remains unanswered.

One of the most extensive mining campaigns of recent years occurred during the Tanker Wars, 1980–1988, in the Arabian Gulf. Both Iran and Iraq conducted undeclared mining, with an International Court of Justice case again reviewing an aspect of international naval mining law in such circumstances.³⁶ At the close of this conflict, Iraq disclosed their mining plans as part of a request for assistance in clearing the mines, but Iran has never matched this gesture even for minefields which contained Iranian mines and were laid in the international waters of the Arabian Gulf. This particular conflict also allegedly included the occasional use of non-sterilizing drifting mines, which are contrary to Article 1 of Hague VIII, and set a (Hague VIII non-conformant) precedent for further use of such weapons by Iraq during the 1991 Gulf War.³⁷

Mining during the two Gulf Wars followed two patterns. Limited declared mining in 1991 by US forces, using air-dropped self-sterilizing influence mines, was Hague VIII-conformant. And after the 1991 Gulf War, Iraq did fulfil an Article 5 objective by handing over mining plans of their extensive defensive minefields, thus allowing allied mine-clearance of remaining anchored and seabed mines. But in a worrying development of their state practice, mining plans for Iraq's albeit much smaller 2003 mining campaign have never been formally handed over or completely recovered.

Returning to a positive note, the 2016 Ukrainian defensive mining around Mariupol has been officially declared, uses mines which do self-sterilize, and remains aligned with the provisions of Hague VIII despite neither Ukraine nor Russia being party.³⁸

ix Argentina signed the convention on October 18, 1907, but failed to formally ratify it.

Thus, of the twenty-four mining events that have occurred since the Second World War, the general participation requirements of Article 7 mean that on no occasion has Hague VIII been triggered and of those twenty-four events only five (the three Suez events, Argentina, and Ukraine) can be argued as aligned with Hague VIII.^x

State Preparations

Having reviewed state practice, including the practice of insurgents and aspiring states, further deductions regarding the internationally accepted applicability (or otherwise) of Hague VIII may be made by reviewing the mine stocks of a number of key countries. This will determine if the weapons they hold ready for conflict are indeed built to Hague VIII standards, thus providing an indication if those countries feel that Hague VIII applies to them as CIL.

Russian mine stocks include thousands of the M-08 automatic moored contact mine, first manufactured in 1908, modified in 1939, and still of great military utility today; this mine does self-sterilize on breaking free from its mooring. The M-08 has been widely exported and reengineered; however, with slight modifications in North Korea, Iran (where it is known as a SADAF-02), and in Iraq (where it is called a LUGM 145). Few of these variants have mechanisms that ensure sterilization “as soon as [the mines] have broken loose from their moorings,” thus indicating that each of these countries does not consider Hague VIII to be relevant to their mine production nor tactical employment. China has developed the P-3 oscillating mine, which drifts unanchored in the water column for periods significantly in excess of one hour before making itself harmless.³⁹ Known mine stocks of other nations do generally comply with Hague VIII sterilization requirements, although many have the ability for such safeguards to be overridden before laying should military tactical necessity require.

The conclusion of this part of the paper is that many states and non-state forces who are the users or stockpilers of significant numbers of naval mines have engaged both in naval mine warfare tactics that are not in accordance with the provisions of Hague VIII, and/or have stockpiles of mines that do not meet Hague VIII

x In ‘ICJ: USA vs Nicaragua, Merits, para 114 (op cit at endnote 35)’, the ICJ found that the USA had breached international law by being complicit in the laying of mines in the territorial waters of another state, thus constituting an unlawful “Use of Force”. Despite both the USA and Nicaragua being party to the convention, neither party claimed the triggering of Hague VIII and the ICJ did not find any party to be in breach of Hague VIII.

standards. Thus naval mining practice across eighteen separate mining events, or seventy-eight percent of twenty-three relevant international or non-international armed conflict mining events since the Second World War,^{xi} as well as both world wars, suggests that many state and insurgent forces do not consider Hague VIII binding in the majority of situations of naval mining. Germany in 1914 is explicit that the Convention's own wording (in that case, Article 7) was an underpinning justification for non-compliance.

Opinions of the International Court of Justice

Three cases heard by the ICJ have directly related to naval mine warfare, thus providing excellent jurisprudential interpretation of the current state of this sphere of International Humanitarian Law (IHL).

The very first case ever heard by the ICJ was between the Government of the United Kingdom of Great Britain and Northern Ireland, and the Government of the People's Republic of Albania and was styled "The Corfu Channel Case."⁴⁰ In the judgement it was held that whilst Albania was not definitively proved as the minelaying nation, they were responsible for either the minelaying or for not reporting what they must have witnessed happening within their territorial waters. Thus, they were held to have failed in their duty to take "all necessary steps immediately to warn ships near the [mine] danger zone."⁴¹

During their submissions to the ICJ, the United Kingdom opined that such obligations to warn are based on Hague VIII, stating that "[a]uthoritative writers upon international law treat the provisions of the Hague Convention No. VIII as declaratory of principles of international law, now generally applicable."⁴² This contrasted with the Albanian position expressed during the investigation undertaken by the United Nations in which, rather than being bound under *uti possidetis* by virtue of the signature of the Ottoman Empire (which, in 1907, governed the region which was to become Albania), the Government of Albania stated that it "was aware of the Hague Convention of 1907, and although it has made no declaration concerning this Convention, the Albanian Government respected it."⁴³

In finding that "obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in

xi The "Sacramento River" mining event of 1980 is domestic criminality and is not attributed to an aspiring state, thus the percentage is derived from eighteen non-compliant mining events out of a total of twenty-three eligible events.

general, the existence of a minefield in Albanian territorial waters” the ICJ found that:

such obligations are based, not on the Hague Convention of 1907, No. VIII, which is applicable in time of war, but on certain and well recognised principles, namely; elementary considerations of humanity, even more exacting in peace than in war; [and] the principle of the freedom of maritime communication.⁴⁴

Thus, in the view of the ICJ, the explicit provisions of Hague VIII were not in force during this naval mining event but the obligation of notification did apply, based on well-recognized considerations of humanity.

In *Nicaragua v. United States of America*,⁴⁵ the ICJ again held that the obligation to provide notification of the laying of minefields derived from “principles of humanitarian law underlying the specific provisions of Convention No. VIII of 1907,” going on to quote from the Corfu Channel judgement above to draw out that this obligation is based on “certain and well recognized principles, namely: elementary considerations of humanity.”⁴⁶ Thus, once again, the ICJ declined the opportunity to make it explicit that Hague VIII applies, as written, to such non-International Armed Conflicts by citing principles underlying Hague VIII, but tying the explicit obligation of notification under IHL to the general principles of humanity.

The ICJ’s judgement in *Islamic Republic of Iran v. United States of America* does not make any mention of the Hague Convention No. VIII.⁴⁷ This case hinged on the justification for a US attack on Iranian oil platforms, which the US stated was a valid act of self-defence in response to a series of armed attacks that included the mining by Iran on April 13, 1988, of the *USS Samuel B Roberts*.⁴⁸ Extensive minelaying operations by Iran in the period 1980–1988 included the seizure by the USA of the Iranian minelayer *Iran Ajr* with mines on board of the same type (SADAF-02, indigenous to Iran) as those recovered from the minefield in which *Roberts* struck two mines. Mines from the *Roberts* minefield had mine serial numbers “matching other Iranian mines” (in that the first six digits of each mines’ serial numbers corresponded with *Iran Ajr* mines), but the ICJ did not apportion to Iran responsibility for the *Roberts* mining, as such evidence was “highly suggestive, but not conclusive.”⁴⁹ Responsibility for any failure to notify that minelaying could not be borne by Iran. The mines themselves were of a type that does not sterilize on breaking loose from its moorings, but again this was not commented upon by the ICJ. The consequence of the above is that

consideration by the ICJ of a case of naval mining that occurred outwith wartime again resulted in the ICJ not promoting the applicability of Hague VIII as CIL.

Opinio juris

Through examining the status of Hague VIII as viewed through the lens of multiple mining events, rather than through the more traditional prism of various written opinions and unclassified military manuals, this paper has shown there is scant practical regard for full Convention compliance. During the assessments above and at the annex the terms alignment and conformance have been used. This is in order to highlight that where there is indeed apparent following by a state of Hague VIII, this may either be conformance as a result of conscious compliance due to a sense of obligation under the Convention, or alternately there may be apparent alignment potentially due to mere coincidence in consequence to other more pressing considerations of military tactics and statecraft.

Opinions of international humanitarian jurists vary in their assessment of the applicability of Hague VIII. Whilst the British cited in their 1947 submission to the ICJ that “[a]uthoritative writers upon international law treat the provisions of the Hague Convention No. VIII as declaratory of principles of international law, now generally applicable,”⁴³ the ICJ itself disagreed by stating in the Corfu Channel case: “such obligations are based ... not on the Hague Convention of 1907, No. VIII, which is applicable in time of war, but on certain general and well recognized principles.”⁴⁵ This made clear that the ICJ-considered Hague VIII was limited by its own (Article 7) wording. This statement would thus, in the view of the ICJ, constrain Hague VIII to international armed conflict. Such an interpretation would also aid an understanding of the ICJ’s decision in the uncontested case of *Nicaragua v USA* when, despite both states being ratified parties to Hague VIII, once again the ICJ decided again that Hague VIII was not the explicit source of law. In this case, the ICJ again found that state obligations relating to naval mine warfare derived from “certain and well recognized principles, namely: elementary considerations of humanity.”⁴⁷

In 1975, prior to the second and third relevant ICJ cases (*Nicaragua* and *Iran*), O’Connell opined that “general considerations tend towards extending the principles of the Hague Convention [No. VIII] to cover all types of mine, whether or not they are moored.”⁵⁰ Through his use of the word “extend” he implies that Hague VIII already had broad application beyond the narrow confines of (1) times of war, (2) conflicts only in which all bellig-

erents are party to the Convention, and (3) automatic submarine contact mines.

Between the second and third ICJ cases, the 1988–94 San Remo Conferences of eminent Humanitarian Law jurists rather narrowly cited apparently Hague VIII conformant state practice in the First Gulf War (1991) as showing that “the provisions of the Convention have continued validity in modern naval warfare” using this as their justification that “building upon the basis of customary law” they could improve upon what they regarded as existing codification.⁵¹ But this assertion by San Remo’s authors ignored the use by Iraq of non-sterilizing drifting mines, such as the Moody mine, which would have contravened Article 1(1) of the convention, and also the lack of official notification or declaration by Iraq of their naval mining.^{xii}

More recently, jurists at Chatham House’s International Security Department Workshop on International Law Applicable to Naval Mines, held in October 2014, agreed with the San Remo Jurists in that:

the Hague Convention has acquired the status of customary international law, thus making it binding on all states.⁵²

And most recently, in an article published in 2016, Associate Professor David Letts (who was a participant at the Chatham House event above) opined that:

it can be argued that the principles regarding the use of mines during armed conflict that are derived from Hague Convention VIII have now become part of the customary law governing the use of all types of these weapons. ... it is only Articles 1–5 of Hague Convention VIII that provide the essential elements of the law which now governs the use of naval mines in armed conflict (both international armed conflict (IAC) and non-international armed conflict (NIAC)).⁵³

This clearly asserts that Hague VIII, Articles 1-5, do now have universal applicability as CIL and apply to all types of naval mines. This is despite an ongoing armed conflict in Yemen in which an aspiring state organization (the Houthis, under the leadership at the time of Yemen’s ex-president Salah)⁵⁴ has laid non-sterilizing au-

xii Also known as the Hoover Bicycle Wheel Demolition Device.

tomatic moored contact mines without any form of declaration.^{xiii} Thus, under Letts's assertion that both Articles 1 and 3 of Hague VIII do apply to such conflicts the logical deduction must be that Letts considers the Houthi actions to be a breach of CIL. Such a deduction would also require similar accusations (or charges) to be levelled against at least one belligerent in each of the seventy-eight percent of non-compliant naval mining events, despite no such charges ever having been framed.⁵⁵

The jurist position regarding the applicability of Hague VIII is straddled in part by Professor Steven Haines's 2014 examination of Hague VIII, which considers the convention more narrowly "as having attained customary status in relation to automatic contact mines alone."⁵⁶ However, the other side of opinion is expressed by Dr James Busuttil, who in 1998 conducted what is probably the most detailed published review of the law regarding naval mining:

The provisions of Hague Convention VIII, the treaty law on conventional naval mine use, bind its few participants in a limited sphere of action, constrained further by its general participation clause. ... Hague Convention VIII provides little practical basis for the legal regulation of the use of mines although it remains binding on its States parties.⁵⁷

This assessment implies that Hague VIII application is limited to automatic contact mines only (which is in accordance with the wording of the convention) and that the general participation clause binds only states that have ratified the convention, and only when all belligerents are party to the convention. Such a view also appears more in line with the statements of the ICJ than do the San Remo and Chatham House jurists, and does not attempt to impose on the twenty-two nations present at the original conference, but who have (consciously) failed to ratify Hague VIII, an international law with which they do not necessarily agree.

Contemporary support for the view of Busuttil was published in the same volume as Haines (2014), when Rob McLaughlin (Associate Professor of Law at the Australian National University) opined:

State practice between 1907 and 1949, although scant, did not seem to take Hague VIII as a start

xiii The author has personal knowledge and experience of these mines.

point. ... there are a range of post-1949 legal factors, such as [UNCLOS] and State practice, which indicate that Hague VIII on naval mines is not entirely relevant to [non-International Armed Conflicts] below the old belligerency threshold.⁵⁸

This supports the judgements of the ICJ, who stated in 'Corfu' that Hague VIII only applied in times of war.

Beyond the confined situation of war, statements of the ICJ regarding the more general considerations of humanity to require declaration of naval minefields, which affect adversely neutral shipping, as per the principles of Hague VIII Article 3, support that obligation in all situations of naval mining in military-civilian shared areas.

In contrast, it is more difficult to argue universal application of the mine-sterilization rules. A drifting mine that sterilizes after fifty-eight minutes is considered humane because it becomes harmless within an hour of control being lost after laying, but one which becomes harmless after sixty-two minutes is not: or a moored mine laid in an exclusively naval port but which breaks loose from its moorings suddenly becomes inhumane unless immediately sterilized, whereas an unanchored mine laid at about the same time may legally drift among warships for some period (e.g. one hour) thereafter.

If assessed against the test of humanity, it is the circumstances of geography and targeting which should dictate the necessity for declarations of mining and of time before sterilization, rather than century-old blanket rules. This broader test of humanity, and its universal application of "elementary principles," is additionally apposite based on its equal application to both state and non-state minelaying forces, thus overcoming the restrictions of Hague VIII Article 7, which constrains the contents of the Convention to "contracting Powers." The test of humanity instead applies the full suite of its principles equally to all combatants—state, aspiring state, and/or insurgent.

Thus, there appears to be a divergence of views on the applicability of Hague VIII. On the one hand, some gatherings of jurists (San Remo and Chatham House) appear to be increasingly citing Hague VIII as applicable to all mines in all situations of naval mining. On the other hand, the ICJ have clearly stated (albeit in 1949) that Hague VIII only applies in times of war and that the international law of naval mining in fact derives from elementary principles of humanity. From a third perspective, at least one belligerent in seventy-eight percent of the naval mining events since

the Second World War, if non-state belligerents are included, has conducted mining in a manner that at least in part diverges from the provisions of Hague VIII. Even if this figure is narrowed to state belligerents, then Albania (1946), China (1949), Pakistan (1971), Iran (1980–), Iraq (1980–), Croatia (1995), Libya (2011), and potentially the USA (1984, per ICJ judgement in an undefended case) have all breached CIL. This would certainly constitute a long list of defaulters for what is purportedly something based on “international custom, as evidence of a general practice accepted as law.”⁵⁹

One clue as to the reason for this apparent divergence between the opinions of jurists and the examples of state practice comes from the response of the United States to the International Committee of the Red Cross (ICRC) review of CIL conducted in 2005.⁶⁰ The methodology underpinning that review, and which also underpinned the 1988–94 San Remo Conferences, uses extensive analysis of state practice as viewed by the verbal or published statements or witnessed acts of states, with the 2005 review asserting that, “Acts do not contribute to the formation of customary international law if they are never disclosed.”⁶¹ Thus, the opinions of many jurists regarding the applicability of Hague VIII may be coloured by the depth and level of military knowledge applied to analysis of the plethora of naval mining events since 1907, and especially since the Second World War. Whilst all research will purport to be thorough, and peer review will be applied to ensure at least a minimum depth and effectiveness of research, military security and the tactical subtleties of naval mining may cloud all but the most obvious of issues, such as the overt and formal declaration of mining.

This view of the necessity of consideration of factors beyond those available to many jurists is supported by a United States of America joint letter from the State Department and the Department of Defense to the ICRC:⁶²

it is important to make clear ... that, based upon our review thus far, we are concerned about the methodology used to ascertain rules. ... the [2005] Study places too much emphasis on written materials, such as military manuals and other guidelines published by States, as opposed to actual operational practice by States during armed conflict. Although manuals may provide important indications of State behavior and *opinio juris*, they cannot be a replacement for a meaningful assessment of operational State practice in connection with actual military operations.⁶³

It is accepted that a lack of clarity in law is disagreeable as it creates uncertainty. However, in the case of the law governing naval mine warfare it appears that certain elements of purported clarity have inadvertently crept into the lexicon of lawyers, despite not in fact meeting the threshold for them to be true CIL.

Reviewing the evidence presented in this paper, it is clear that both ICJ judgement and state conduct in the majority of cases of naval mining supports minefield declaration when such mining affects adversely neutral shipping. Thus, this appears to be a relatively settled (if not completely settled) matter of CIL. In equal measure the legal and navigational need to facilitate effective removal of mines “at the close of war” also appears generally settled.

However, the quoting of Hague VIII rules regarding sterilization of mines—be them for immediate sterilization of moored mines that break loose from their moorings or for sterilization after one hour by (unanchored) drifting mines—appears much more contentious when assessed through the lenses of both extant mine stocks of major mining nations as well as historical precedent.

Thus, it is contended that whilst Articles 3 and 5 of Hague VIII may indeed be indicative of CIL, Article 1 is not. Therefore, Hague VIII is not, as often (mis-)quoted, truly representative of CIL.

Conclusion

Settled IHL regarding naval mine warfare is wholly outdated, designed for a past technological age and when applied as written it binds only twenty-seven states and then only during conditions of war between them and them alone. This leaves a substantial gap in the governance of a widely held and regularly used weapon. This gap could be filled by CIL, properly established and applied.

For any rule to be accepted as having achieved the status of CIL, it has to be proven that it is indeed “customary,” evidenced by a detailed examination of state practice. This was the approach of both the San Remo Conferences of 1988–94 and of the ICRC CIL review of 2005. Through interpretation limited primarily to written texts, vice a practical and tactical examination of state practice, non-universal and outdated elements of Hague VIII have been allowed by CIL jurists to appear alongside some other, actually established, customary state practices. Indeed, and in spite of the best efforts of researchers, the inherent military security surrounding naval mining, as well as the technical subtleties of a nuanced tactical weapon, may be the underlying cause of such inclusion.

The findings of the International Court of Justice have settled the minefield declaration element of law described in Hague

VIII, but they do this through attaching to the principles of humanity the requirement to declare naval mining that will affect adversely neutral shipping. Other aspects described in Hague VIII, such as the necessity for moored mines to sterilize (“become harmless”) on breaking loose from their moorings or the specific requirement for unanchored, or drifting, mines to sterilize a maximum of one hour after control is lost, remain unsettled and in fact disputed through repeated examples of non-conformity by a variety of states, as well as many insurgents and aspiring states (who, it is reasonable to assess, should wish to comply with relevant CIL in order to boost their legitimacy).

The commendable desire of many jurists to codify the otherwise disputed international law of naval mining, including through advancing the concept that Hague VIII is now universal CIL, runs the risk of causing confusion among both lawyers who advise military commanders and also among militaries who seek to ensure their operations comply with the law. It also seeks to impose upon some states compliance with rules with which they have made a previous positive decision not to become party and have subsequently displayed limited or no custom of compliance. The inclusion in opinions on CIL of disputed requirements (such as those which propose the illegality of drifting mines which do not sterilize after one hour) alongside those which are more established (such as the requirement to declare mining that may affect adversely neutral shipping) risks constraining some military commanders to a narrow band of non-contentious tactics, whilst their opponent—advised by different lawyers or who only read the laws of war which are settled—can make full use of a wider range of tactics.

When entering the minefield that is CIL, issuance by jurists of legal advice or constraint in order to maintain position on an ambiguous moral high ground runs the risk of delivering to states who apply the maximum of legal caution the ignominy of military defeat by others who have a broader juridical outlook. Thus, when trying to navigate any legal minefield in respect of declarations of naval mining, the permissible types of naval mines, and their required sterilization mechanisms, it is probably best to return to a statement made during the 1907 negotiations at the Hague:

Military acts are not solely governed by stipulations of International Law ... Conscience, good sense, and the sentiment of duty imposed by the principles of humanity will be the surest guides for the conduct of sailors.⁶⁴

Baron Marschall von Bieberstein (Germany),
September 17, 1907

Annex A: 24 Naval Mining Events Since WWII and Alignment with the Hague Convention No. VIII of 1907

The following table is compiled from a wide range of sources, with each conflict investigated through both primary and secondary histories in order to determine: the type of mines in use (and thus self-sterilization); the timely declaration (or otherwise) of mining; and arrangements for post-conflict clearance of mine-fields. Full details of references will be included as part of a book currently under preparation. Notwithstanding *uti possidetis*, the Article 7 applicability of Hague VIII to all belligerents is a matter of fact determined by cross checking participants with ‘Roberts & Guelff’, *op cit*.

Year(s)	Conflict or Naval Mining event	Description	Conformance or Divergence from Hague VIII
1946	Corfu Channel Case	Albania was complicit in the mining of the Corfu Channel, damaging two British warships.	Art 1: Aligned—mines would self-sterilize. Art 3: Albania did not declare mining. Art 5: Albania did not have any Minesweepers. Art 7: Albania not party to Hague VIII.
1946–1954	First Indochina War	Resistance against French by aspiring state forces of Viet Minh, who laid many controlled mines.	Art 1: Aligned—Viet Minh controlled mines sterilized when cable was cut. Art 3: Viet Minh did not “declare” mining. Art 5: Aligned—Viet Minh cleared own mines. Art 7: Viet Minh not party to Hague VIII.
1949–1958	Chinese Revolutionary War	Nationalist retreat from mainland China, including protective mining, as communist forces assumed control and defensively mined.	Art 1: Aligned. All mines self-sterilized. Art 3: Nationalists initially denied mining communists did declare mining. Art 5: Nationalists did not hand over mining plans, although “close of war” may not have yet been reached. Art 7: Communists not party to Hague VIII.

Year(s)	Conflict or Naval Mining event	Description	Conformance or Divergence from Hague VIII
1950–1953	Korean War	North Korea used mines to hinder UN forces' re-seizure of South Korean territory.	Art 1: Aligned—mines would self-sterilize by design. Art 3: North Korea did not declare mining. Art 5: North Korea did not hand over mining plans, although "close of war" may not have yet been reached. Art 7: Neither belligerent party to Hague VIII.
1956	Suez Crisis	Egypt declared use of mines to close Suez Canal when under assault by UK, French, and Israeli forces.	Art 1: Aligned—mines would self-sterilize. Art 3: Aligned—Egyptian mining was declared. Art 5: Uncertain—UK and FR searched for mines under Egyptian invitation, but Egypt did not hand over plans. Art 7: UK and FR are parties, Egypt is not.
1964–1973	Vietnam	Viet Cong used mines to attack US-led forces opposed to spread of communism. US used mines to blockade North Vietnam.	Art 1: Aligned—Viet Cong controlled mines sterilized when cable cut. US mines sterilized in due course. Art 3: Viet Cong mining was undeclared. US did declare blockade mining. Art 5: Aligned—both sides cleared own mines. Art 7: Vietnam not Hague VIII ratified.
1967	Six Day War	Israeli assault of Suez, which was closed by Egyptian mining.	Art 1: Aligned— Egyptian mines would self-sterilize. Art 3: Aligned— Egyptian mining was declared. Art 5: Uncertain— Egypt closed Suez Canal until 1975. Art 7: Neither belligerent party to Hague VIII.
1971	East Pakistan/ Bangladesh	Pakistani mining of East Pakistan/Bangladesh ports and approaches during secession.	Art 1: Aligned— mines would self-sterilize. Art 3: Pakistani mining was not declared. Art 5: Pakistan did not hand mining plans to multinational clearance forces. Art 7: No belligerents party to Hague VIII.
1973	Yom Kippur War	Egyptian mining of Suez Canal when attacked by Israel. Probable Israeli counter-mining in Canal.	Art 1: Aligned—Egyptian mines would self-sterilize. Art 3: Aligned—Egyptian mining was declared. Art 5: Uncertain—Egypt closed Suez Canal until 1975, inviting a multinational force to clear the minefields but without handing over mining plans. Art 7: Neither belligerent party to Hague VIII.
1974	Cambodia	Khmer Rouge (communists) used mines to blockade Phnom Penh and Mekong River to overthrow government.	Art 1: Uncertain; floating/drifted mines reported. Art 3: Khmer Rouge mining was undeclared. Art 5: Aligned—Communists cleared their own mines. Art 7: Neither belligerent party to Hague VIII.

Year(s)	Conflict or Naval Mining event	Description	Conformance or Divergence from Hague VIII
1980	Sacramento River	"Patriotic Scuba Divers of America" declared they had mined the US port of Sacramento to blockade a Russian grain ship.	Art 1: Uncertain—no mines ever found (it was probably a ruse). Art 3: Aligned—mining was declared. Art 5: Mining plans never handed over. Art 7: US is party; mine-layers were a domestic criminal organization.
1980–1988	Tanker Wars	Iran and Iraq used mines against each other, and Iran used mines to hinder Arabian Gulf commercial traffic.	Art 1: Iran and Iraq both deployed mines that do not self-sterilize. Art 3: Neither party declared all mining. Art 5: Iraq did hand over mining plans to Multinational clearance forces; Iran did not. Art 7: Neither belligerent party to Hague VIII.
1982	Falkland's War	Argentine mining off Falkland Islands whilst they were under occupation.	Art 1: Aligned—Argentine mines self-sterilized. Art 3: Aligned—Argentina did declare mining. Art 5: Aligned—mining plans handed over to UK. Art 7: UK is party to Hague VIII; Argentina is not.
1984	Nicaragua/Contra rebels	Using US-supplied mines, Contras mined Nicaraguan ports to promote their cause.	Art 1: Aligned—all mines self-sterilized. Art 3: Contras declared mining only via radio broadcast. Art 5: Aligned—all mines sterilized by self-destruction. Art 7: Nicaragua (and US mine suppliers) are party to Hague VIII; Contras were not.
1984	Mines of August (Red Sea)	Mining by unknown agents (possibly Libya, Al Jihad, or Islamic Jihad) in Red Sea that hindered free navigation to/from Suez Canal and Hajj.	Art 1: Aligned—all mines self-sterilized. Art 3: No-one declared any mining. Art 5: Multinational force formed to clear mining. Mining plans never revealed. Art 7: Mining party remains unidentified. None of possible mining candidates are party to Hague VIII.
1987	South Lebanese Conflict	Hezbollah mining off Tyre during Israeli operations.	Art 1: Uncertain. All mines were dealt with by Israeli forces. Art 3: Hezbollah mining was not declared. Art 5: Hezbollah mining plans not handed over. Art 7: Neither belligerent party to Hague VIII.
1991	Croatian Civil War	Croatian mining of Yugoslav port of Lora.	Art 1: Aligned—all mines self-sterilized. Art 3: Croat mining was undeclared. Art 5: No evidence of mining plans being exchanged. Art 7: Neither belligerent party to Hague VIII.

Year(s)	Conflict or Naval Mining event	Description	Conformance or Divergence from Hague VIII
1991	First Gulf War	Iraq laid extensive minefields to hinder UN-backed forces liberating Kuwait.	Art 1: Iraq used many non-sterilizing drifting mines and moored mines. Art 3: Iraq mining was undeclared. Art 5: Aligned—Iraq did hand over mining plans to UN forces after conflict. Art 7: Many UN coalition members and Iraq not party to Hague VIII.
2003	Second Gulf War	Defensive mining by Iraq during UK, US and AUS coalition operations against Iraq.	Art 1: Iraq used many non-sterilizing drifting mines. Captured mines did not have sterilization. Art 3: Iraq mining was undeclared. Art 5: Mining plans not handed over after conflict. Art 7: UK and US are party, Australia and Iraq not party to Hague VIII (but Australia does abide by Hague VIII under <i>uti possidetis</i>). ^{xiv}
2008	Sri Lankan Civil War	LTTE used mines to attack Government forces. Sri Lankan Navy (SLN) used mines to box-in LTTE.	Art 1: LTTE mines had no sterilization. Art 3: LTTE did not declare mining. SLN did formally declare mining. Art 5: Uncertain—no evidence of LTTE handing over mining plans. Art 7: Neither belligerent party to Hague VIII.
2010	Gaza Conflict	On 2 February, 2010, Israel found drifting mines on beach at Ashdod, attributed to Hamas.	Art 1: Hamas mines had no sterilization. Art 3: Hamas did not declare mining. Art 5: Mining plans not disclosed. Art 7: Neither belligerent party to Hague VIII.
2011	Libyan Conflict	Pro-Government (Libyan) forces laid mines in entrance to Misrata to prevent rebel resupply.	Art 1: Uncertain—mines destroyed. Art 3: Mining was not declared. Art 5: Mining plans never handed over. Art 7: Many UN coalition members and also Libya not party to Hague VIII.
2015	Ukraine	Ukraine laying of defensive minefields near Mariupol to hinder potential Russian amphibious assault.	Art 1: Aligned—all mines self-sterilize. Art 3: Aligned—Ukraine did declare mining. Art 5: Aligned—Ukraine will clear own mines. Art 7: Neither belligerent party to Hague VIII.
2017	Yemen	Houthi forces laid mines off Al Mocha and Al Midi to hinder Saudi and UAE forces.	Art 1: Mines do not have self-sterilization. Art 3: Houthis did not declare mining. Art 5: Uncertain - Mining plans not yet handed over (but “end of war” not yet reached). Art 7: No belligerents are party to Hague VIII.

xiv See Busuttil, *Naval Weapons*, 46, quoting the 1985 Australian Manual on International Law, which states, “the Convention was ratified for Australia by the United Kingdom in 1909.”

- 1 The opinions in this article are those of the author and do not necessarily represent those of the Government of the United Kingdom.
- 2 Gregory Hartman, *Weapons that Wait: Mine Warfare in the US Navy* (Annapolis: United States Naval Institute, 1979).
- 3 See Winslow Wheeler, "More than the Navy's Numbers Could Be Sinking," *Time Magazine*, December 4, 2012, accessed March 23, 2018, <http://nation.time.com/2012/12/04/more-than-the-navys-numbers-could-be-sinking/>; see also Vice Admiral Albert H. Konetzni, "Mine Warfare," *Department of the Navy's Information Technology Magazine*, January – March 2003, accessed March 23, 2018, <http://www.doncio.navy.mil/chips/ArticleDetails.aspx?ID=3450>.
- 4 International Court of Justice, *The Corfu Channel Case* (United Kingdom v Albania): Merits, Judgement of April 9th, 1949: ICJ Reports 1949.
- 5 The many citations throughout this article provide a variety of sources across the spectrum of views on this topic.
- 6 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects: Protocol II on Prohibitions or Restrictions on the use of mines, Booby Traps and Other Devices, United Nations Document A/CONF. 95/15 dated October 27, 1980; Article 2 para 1.
- 7 The historical summary is derived principally from: op cit, Hartman, *Weapons That Wait*, 17–85; and Captain J.S. Cowie CBE Royal Navy, *Mines, Minelayers and Minelaying*, (London: Oxford University Press. 1949), 7–42.
- 8 Hartman, *Weapons that Wait*, 30.
- 9 Howard S. Levie, *Mine Warfare at Sea* (Dordrecht: Martinus Nijhoff Publishers, 1992), 17.
- 10 James Brown Scott, *The Hague Peace Conferences of 1899 and 1907: A Series of Lectures Delivered Before the John Hopkins University in the Year 1908. Volume I—Conferences*, (Oxford: Clarendon Press, 1908), 576.
- 11 James Brown Scott (Director), *The Proceedings of the Hague Peace Conferences of 1907, Volume III, Minutes of the Second, Third and Fourth Commissions* (New York: Oxford University Press. 1921), 417, 527, and 664.
- 12 Ibid, 406.
- 13 Robert C. Duncan, *America's Use of Sea Mines* (Washington: US Government Printing Office, 1962), 52.
- 14 Duncan, *America's Use of Sea Mines*, 78; See also A.M. Low, *Mine and Countermine* (London: Hutchinson & Co, 1949), 113 et seq.
- 15 Naval Staff History. *British Mining Operations 1939-1945: Vol. 1* (London: Ministry of Defence. 1973).
- 16 Adam Roberts and Richard Guelff (eds.), *Documents on the Laws of War*, third ed. (Oxford: Oxford University Press, 2000), 105 et seq.
- 17 See especially James J Busuttil. *Naval Weapons Systems and the Contemporary Law of War* (Oxford: Clarendon Press. 1998), 21-25; and Steven Haines, "1907 Hague Convention VIII Relative to the Laying of Automatic Submarine Contact Mines", 90 *Int'l L. Stud.* 412 (2014) 425.
- 18 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (1977 Protocol I), signed at Geneva, June 8, 1977; 16 ILM 1391 (1977); Part III, Section I, Article 37, para 2.
- 19 United Nations Convention on the Law of the Sea (UNCLOS), signed at Montego Bay, December 10, 1982, 21 ILM 1261 (1982).
- 20 James Brown Scott (ed.), *Reports to the Hague Conferences 1899 and 1907*,

(Oxford, Clarendon Press, 1917), 26. See Article 2 of the 1899 Hague Convention, which follows the preamble to that Convention.

2 See Roberts and Guelff, *Laws of War*, 43 and 109.

22 Mine Stock Estimates cross-checked with: Robert Hewson (ed.), *Jane's Air-Launched Weapons*, fiftieth ed., (Surrey: Janes Information Group, 2007), 617; Wheeler op cit; Sydney J. Freedberg Jr., "Sowing the Sea With Fire: The Threat of Sea Mines," *Breaking Defence Online*, March 30, 2015, accessed 23, March 2018, <https://breakingdefense.com/2015/03/sowing-the-sea-with-fire-how-russia-china-iran-lay-mines-and-how-to-stop-them/>; Andrew Erickson et al., *Chinese Mine Warfare*, (Newport: Naval War College, 2009), 11; Scott Truver, *Naval Mines and Mining*, Centre for International Maritime Security, December 20, 2016, accessed March 23, 2018 <http://cimsec.org/naval-mines-mining-innovating-face-benign-neglect/30165>; Mine Stocks have thereafter been rounded to representative average values based on a variety of sources, with numbers adjusted to reflect currently (2018) assessed values.

23 Statute of the International Court of Justice, Article 38.

24 Ibid, paragraph 1(b).

25 Both definitions taken from *The Chambers Dictionary*, ninth ed. (Edinburgh: Chambers Harrap Publishers Ltd. 2003).

26 Levie, *Mine Warfare at Sea*, 65–66.

27 Ibid, 67.

28 See Busuttil, *Naval Weapons Systems*, 34 et seq.; Levie, *Mine Warfare at Sea*, 77 et seq. also reviews these allegations.

29 Busuttil, *Naval Weapons Systems*, 37.

30 See Y.I. Chung, *Legal Problems Involved in the Corfu Channel Incident* (Geneva: Librairie E Droz, 1959).

31 For example, see Admiralty Monthly Intelligence Report No 64, for April 1951, dated May 10, 1951, 69.

32 Office of Naval Intelligence Review, August 1949, 31.

33 Admiralty Monthly Intelligence Report No. 49, for January 1950, dated February 10, 1950, 63.

34 Molly Dunigan, et al., *Characterizing and Exploring the Implications of Maritime Irregular Warfare* (Santa Monica: RAND National Defense Research Institute, 2012), 65.

35 ICJ, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Merits, Judgment, ICJ Reports 1986, 14, paragraphs 215, 227 and 237.

36 ICJ, *Oil Platforms* (Islamic Republic of Iran v. United States of America), Judgment, ICJ Reports, 2003, 161.

37 Lee Allen Zatarin, *Tanker War: America's First Conflict with Iran, 1987–1988* (Newbury: Casemate, 2008), 387.

38 Statement by Ukrainian Government Spokesman Broadcast on Ukrainian Television News, March 6, 2016, accessed March 23, 2018, available at <https://www.youtube.com/watch?v=gEjvCHSM2Zg>. See also Admiralty Notice to Mariners 5890/2016 (Mine Danger Area, Gulf of Taganrog) contained in Admiralty Notices to Mariners, Weekly Edition 47, dated November 24, 2016.

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41 Ibid, 23.

42 *Corfu Channel Case*, ICJ papers, Section B—Written Statements: 1. Memo-

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- 43 UN Security Council S/300, dated March 12, 1947, Appendix II: "Questions submitted by the Representative of Australia and out [sic] to the Representative of Albania at the Second Meeting of the [UN] Sub-Committee," Answer to Question 2.
- 44 ICJ, Corfu Channel Case, Judgement, 22.
- 45 ICJ, *Nicaragua v. United States of America*, 14.
- 46 *Ibid*, 112, paragraph 215.
- 47 ICJ, *Islamic Republic of Iran v. United States of America*, 161.
- 48 *Ibid*, 162.
- 49 *Ibid*, 195, paragraph 71.
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- 54 William Zartman, "States, Boundaries and Sovereignty in the Middle East: unsteady but unchanging," *International Affairs* 93, no. 4 (2017): 937–948.
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- 56 Haines, *Hague Convention VIII*, 443.
- 57 Busuttil, *Naval Weapons*, 78.
- 58 Rob McLaughlin, "The Law Applicable to Naval Mine Warfare in a Non-International Armed Conflict," *International Law Studies* 90 (2014), 475–489.
- 59 Statute of the International Court of Justice, Article 38, Paragraph 1(a).
- 60 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law, Vol. 1: Rules* (Cambridge: Cambridge University Press, 2005), reprint 2009.
- 61 *Ibid*, xl.
- 62 John B. Bellinger, III and William J. Haynes II, Initial response of US to ICRC Study on Customary International Humanitarian Law with Illustrative Comments, dated November 3, 2006, accessed January 9, 2018, <https://www.state.gov/s/l/2006/98860.htm>.
- 63 *Ibid*.
- 64 Quoted in Scott, *Minutes of the Third Commission*, 385.

BLUE HELMETS AND BLACK ROBES: THE COOPERATION BETWEEN PEACEKEEPERS AND INTERNATIONAL CRIMINAL TRIBUNALS

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Abstract

Because international criminal tribunals continue to face problems in securing state cooperation, they frequently turn to peacekeepers for assistance in their investigations and arrests. Although peacekeepers have at several critical junctures delivered important support to the tribunals, the assistance has often been inconsistent, selective, and reluctant. This paper seeks to explain this variance by developing a theory of the conditions under which peace operations assist international criminal tribunals. In doing so, it seeks to build on and fill gaps in the literature on peacekeeping and international criminal justice. Beginning with the idea that peace operations will assist tribunals when they are willing to do so, and when the tribunals have the requisite capacity to act on this willingness, this paper stipulates the factors that can make peace operations more or less willing and capable to assist. Then, it addresses the role that the tribunals can play in improving operations' chances of success. As an initial assessment of the explanatory value of the theory, the paper conducts a plausibility probe into the UN Transitional Administration for Eastern Slavonia, Baranjam and Western Sirmium (UNTAES) arrest of Slavko Dokmanovic.

Introduction¹

Since the early 1990s, states have established international criminal tribunals (ICTs) to prosecute those most responsible for war crimes, crimes against humanity, and genocide. These include the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), created by the UN Security Council, and the permanent International Criminal Court (ICC), a treaty institution that came into being in 2002. Supporters hoped that ICTs would provide impartial justice over and above states to deter ongoing and future atrocities,² contribute to reconciliation in divided societies,³ and provide justice to the victims,⁴ ultimately contributing to a more just and peaceful world.⁵ Complementing these purely

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international tribunals are several hybrid courts, placed within a domestic jurisdiction but with a mix of domestic and international staff applying a combination of domestic and international law.⁶ With an increasing number of domestic courts that implement international criminal law, hybrid courts and ICTs together form a patchwork of international criminal justice mechanisms that contribute to the quest to end impunity.

Regrettably, most of the high hopes attached to ICTs have gone unrealized.⁷ One of the most important reasons is that ICTs depend on cooperation from others to implement their mandate.⁸ They need cooperation for many investigative activities (especially to get access to evidence and maintain security for investigators and witnesses), but also to obtain custody over suspects. Yet, despite being instrumental in their establishment, states have rarely been forthcoming in providing this sort of cooperation. Target states (those in which crimes under investigation took place) are either incapable or unwilling to cooperate, while third states have also proven to be “fair-weather friends ... providing support when it suits their interests and just as easily withdrawing support when it does not.”⁹ The ICTY and ICTR usually had the support of the Security Council and maintained overall international support for its prosecutions. Although taking far longer than originally envisioned, both institutions have now closed their doors, having processed 161 out of 161 and 88 out of 95 suspects, respectively.¹⁰ The ICC, lacking a close connection to the Security Council, is still finding its way as it attempts to obtain and maintain state cooperation.¹¹

While the recent literature has extensively studied under which conditions target and third states cooperate (or not), it has largely overlooked cooperation by another type of actors—specifically, peace operations. This is despite the fact that they have played an important role in supporting international criminal justice.¹² In the former Yugoslavia, for example, NATO’s Stabilization Force (SFOR) arrested a total of 27 suspects on arrest warrants issued by the ICTY.¹³ Additionally, UN peace operations in the Central African Republic (MINUSCA), Congo (MONUC/MONUSCO), Côte d’Ivoire (UNOCI), and Mali (MINUSMA) assisted the International Criminal Court by providing protection to its personnel, collecting evidence, and identifying witnesses.¹⁴ Despite playing an important role, the assistance by peace operations has been inconsistent, selective and reluctant. In the former Yugoslavia, SFOR’s support varied both spatially and temporally, with some war criminals being promptly arrested while others roamed free for years.¹⁵ MONUSCO has also been accused of looking away while ICC indictee Bosco Ntaganda

played a very public role in Congolese politics before his eventual surrender and arrest.¹⁶ Thus, there is not only variation between peace operations in how they responded to ICT requests for assistance, but also within them.

Peace operations are authorized by the UN Security Council and deployed under the direction of the UN Secretariat. Over the past seventy years, the UN has deployed dozens of peace operations, with a gradual increase in capacity, an expansion in authorized tasks and more permissive norms governing their actions. There are now over 110,000 UN peacekeepers from 124 different countries deployed in fourteen operations around the world.¹⁷ Peace operations have become “the policy option of choice” when the international community decides to intervene in a violent conflict and has turned into a “ubiquitous feature of multilateral crisis management.”¹⁸

From its beginning, peacekeepers have been expected to adhere to the “holy trinity”: consent, impartiality, and the use of force in self-defence only.¹⁹ Although frequently violated and regularly reinterpreted, this set of basic norms remains essential to distinguish peace operations from regular military operations and is essential for their international legitimacy.²⁰ Given the importance of the holy trinity, assistance by peace operations to ICTs appears puzzling: assisting in the prosecution of members of particular groups will damage their consent to the peace operation, can make the operation appear partial, and will often require the use of force.

In the past few decades, however, both states and the UN Secretariat have been reinterpreting these foundational principles. First, peace operations rarely seek the consent of as many parties on the ground as possible, but instead only seek the consent of the host state and the “main parties.”²¹ Also, the Council more frequently authorizes peace operations with a Chapter VII mandate which allows international enforcement action without the consent of the host state. Second, a new interpretation of impartiality took hold around 1999: instead of treating all parties—aggressors and victims alike—with moral equivalence, the “assertive impartiality” now compels peacekeepers to impartially hold all warring parties to the same human rights standards.²² Last, in order to implement these assertive mandates, peacekeepers receive increasingly robust Chapter VII authorizations to use force, allowing them to use all necessary means to implement their mandate.²³ MONUSCO’s Force Intervention Brigade, which actively supported the government in its military campaigns against militias that did not

comply with UN resolutions, stands out as one of the more robust examples of the new kind of peacekeeping.²⁴

Even if the trend has been toward more robust and complex peace operations, important troop-contributing countries (TCCs, like India and Pakistan) and powerful Security Council members (e.g. Russia and China) contest the effectiveness and appropriateness of blending the distinction between peacekeeping and peace enforcement operations.²⁵ Alex Bellamy and Paul Williams suggest that the contestation over the change in peacekeeping is driven by ongoing differences between Western states who pursue a “politics of protection” and other UN member states who maintain more conservative views on peacekeeping.²⁶

In this article, I seek to explain the variation in assistance delivered by peace operations to ICTs. To this end, I present a theoretical framework that answers the question: under what conditions do peace operations assist international criminal tribunals? Answering this question is relevant for three reasons. First, existing theories of target and third state cooperation fail to appreciate that peace operations face a unique set of issues having to do with their role in international society, their mandate, and the multifaceted decision-making behind them. While paying more attention to these issues, the literature on peacekeeping has so far failed to examine the specific challenges that peacekeepers face when asked to assist ICTs. This paper fills an important gap in the literature and is the first attempt to build a theory on the conditions under which peace operations assist ICTs.

Second, this paper expands our knowledge about how peace operations weigh several important and potentially conflicting values (peace, stability, justice, and organizational interests). As becomes clear from the discussion above, they have to fit assistance to ICTs in a contested normative environment and amid significant changes to peacekeeping practice. The decisions that peace operations make in these contexts are highly significant as they have a lasting impact on the lives of people in conflict zones. Last, in more policy-relevant terms, it is likely that situations in which peace operations are asked to assist ICTs will occur again in the future, and it is important that we understand more about the feasibility of such activities. Even if assistance by peace operations might help solve ICTs’ enforcement problems, the possible adverse consequences such assistance might have need to be taken seriously and weighed carefully before we advocate any expansion of assistance.

My primary goal in this paper is to build on the existing literature to develop a theoretical framework on the conditions under which peace operations assist ICTs. In the first section, I provide a set of theoretical expectations on what makes

the relevant decision-makers within a peace operation willing and capable to assist an ICT. In the second section, I assess the explanatory value that these hypotheses provide by conducting a plausibility probe into the arrest by the United Nations Transitional Administration for Eastern Slavonia, Baranja and Western Sirmium (UNTAES) of Slavko Dokmanovic. In the final section, I discuss the findings of the plausibility probe and propose avenues for future research.

The Conditions under Which Peace Operations Assist ICTs

It seems reasonable to assume that assistance hinges on the presence of a willingness to assist and the requisite capacity to act on this willingness. Indeed, I hypothesize that the two are individually necessary and jointly sufficient for assistance to take place.²⁷ The actions of peace operations, however, have to be fit into their mandate, the legal framework that determines their room for manoeuvre (see section 1.1). Within this context, I expect that there are several factors that might make a peace operation willing and capable to assist (see sections 1.2 and 1.3). As I will discuss below, these factors might interact with each other and take on different salience depending on the circumstances.

The theory's units of analysis are requests for assistance by ICTs to peace operations. The factors contributing to willingness and capability are the explanatory conditions, while the outcome variable is the response of the peace operation to the request.²⁸ An ICT can request several types of assistance from a peace operation, including logistical, security, political, and informational assistance.²⁹ ICTs can also ask peace operations to arrest the individuals they indict. The response to the request can take three forms: no cooperation, partial cooperation (stalling implementation or fulfilling only parts of a request), and full cooperation (completely implementing all aspects of the request for assistance).³⁰

The central actor in this theoretical framework therefore is the individual within the peace operation who decides on the response to the request, whom I will call the *decision-maker*.³¹ This person will often be the Head of Mission, who coordinates the operation's different components and bears final responsibility. The Head of Mission can either take the decision himself or delegate the decision to lower levels in the hierarchy. Who the decision-maker is can vary per case, and any test of this theory would therefore have to pinpoint the relevant individual in that

particular context. Of course, I recognize that decision-making in peace operations is complex and multi-faceted. On the international level, pivotal states, the Security Council, troop-contributing countries (TCCs), ICTs, and the organizational bureaucracy (e.g. the UN Department of Peacekeeping Operations or DPKO) can all try to influence the decision-maker.³² The host state and local actors will undertake similar efforts. Sometimes, these other actors carry such heavy weight that the decision-maker's agency is severely constrained. In what follows, I conceptualize this outside pressure in several ways: coercive (in which case it actively pushes the decision-maker in a certain direction), passive (in which case it functions as top cover enabling the decision-maker to act on his pre-existing willingness), or contributive to other factors such as willingness and capacity.

In order to facilitate future testing, I propose observable implications for each factor. These generally come in two forms: evidence originating from covariation and evidence found in written and oral accounts. Important sources for finding evidence of my hypotheses are UN documents (especially meeting notes and operational documents), communications with the ICT, press briefings, interviews, private communications, and covariational evidence. Each type of evidence brings its own challenges. The exclusive analysis of covariation risks omitting key variables and implies assumptions of causal homogeneity, symmetry, and an independence of explanatory variables, which are difficult to meet in concrete case studies.³³ Looking only at written and oral evidence, however, brings the risk that actors engaged in window dressing (i.e., strategically misrepresented their motives). Several techniques have been developed to counter this problem, such as triangulation and careful interpretation of the context in which statements were made.³⁴ These challenges should be kept in mind when assessing the inferential value of evidence.

1.1 The Legal Framework

The mandate of a peace operation is the legal framework which all of its actions have to be fit.³⁵ It is formulated in a Security Council resolution and states what goals the peace operation should achieve and what tasks it should perform. Mandates vary in the clarity and specificity with which they authorize assistance to ICTs. They can often be vague, as they are the result of intergovernmental bargaining and represent a consensus between the members of the Security Council.³⁶ MONUSCO's

mandate, for example, evolved from a general mandate to support the rule of law to gradually more precise authorizations to assist the ICC in its investigations. Some observers have explained the inconsistency of assistance by pointing to lack of mandate clarity.³⁷ It would be incorrect, however, to see mandates as the definitive statement of the likelihood of assistance. The decision-maker has to translate these broad documents into concrete goals and objectives that can be pursued on the ground, which invariably requires interpretation and adaptation to operational realities. This, in turn, has the potential to lead to reinterpretation and contestation.³⁸

I expect that the primary role of the mandate is to affect the context in which the decision-maker has to respond to a request by shaping the realm of possible options. The precision and clarity with which it authorizes assistance influences the room for interpretation. If the decision-maker has a pre-existing willingness to assist, the mandate can enable or constrain this willingness (and the mandate would thus factor into the capacity side of the theory). To be more specific, I expect that a mandate which explicitly authorizes assistance to ICTs complicates justifying a negative response to ICT requests, while the opposite equally holds. But a clear and precise authorization to assist can also constitute a good reason to respond positively to a request for assistance (and thus make the decision-maker willing to assist).

In other words, the mandate is the framework in which decisions have to be made and thus determines the potential influence of the other hypotheses in this theory. If this were true, I would expect to find the decision-maker justifying his decision to assist by referring to the fact that the activity is covered in his mandate. I would also expect that the extent of assistance covaries with the extent to which the mandate authorizes assistance. Additionally, the decision-maker should be more likely to respond positively to a request with a clear and precise authorization to assist than when this authorization is less clear.

1.2 What Makes a Decision-Maker Willing to Assist?

I contend that without a willingness to assist on the part of the decision-maker, there will be very little to no assistance. I hypothesize that there are three conditions which contribute to this willingness: (1) when the decision-maker expects positive or neutral effects of assistance on other goals of the peace operation; (2) when he has a supportive value system; and (3) when

there is pressure from other actors to respond positively to the request. These three can be roughly equated with more general motivators of action: the logic of consequences, the logic of appropriateness, and the presence of persuasion and coercion, respectively. In practice, however, it is likely that these motivations intertwine: for example, a peace operation might carry out the request for assistance because the decision-maker believes that it will have benefits for the mission, but also because he feels that it ought to do so.

Expected Positive or Neutral Consequences

Assisting an ICT is only one, and rarely the most important, of the panoply of policy objectives of a peace operation.³⁹ The exact goals and objectives vary per mission, but, in general, peace operations aim to achieve or maintain stability, local and international legitimacy, and troop safety and security.⁴⁰ A decision-maker is likely to carefully weigh the consequences of assistance on these other mission goals. If assistance is expected to have either positive or neutral consequences, the decision-maker is more likely to be positively disposed towards fulfilling the request. Such calculations will be heavily influenced by the political and historical context in which the peace operation occurs. The pre-existing stability of the mission area and the timing of the requests are important background conditions for calculating the expected effects of assistance. For example, when the peace operation is in the process of negotiating with an armed group in a highly fragile and divisive context, assistance is more likely to be expected to have negative consequences than in more stable situations. Furthermore, precedents in which the same or another peace operation successfully or unsuccessfully assisted ICTs will inform the calculations as well. An important example is the failed attempt to arrest Somali warlord Mohammed Farrah Aidid by American forces acting under the flag of UNOSOM II; this brought about a strong reluctance to engage in any similar operations for years after.⁴¹

Within this context, I hypothesize that whether the decision-maker expects overall positive or no effects on stability depends on the target of the ICT investigations and the type of assistance requested.⁴² When the suspect is part of an armed group with substantial popular support, antagonizing this actor is more likely to have detrimental effects on stability. When the decision-maker sees this actor as an important partner in maintaining peace, the expected effects on stability will be particularly high. On the other hand, if the decision-maker

has categorized this actor as a “spoiler,” assisting in efforts to remove this actor from the conflict zone might be seen as improving stability.⁴³ In addition, some types of assistance (such as providing transport to investigators or delivering confidential evidence) are easier to undertake with limited visibility and impact, while others (especially the use of force to arrest indictees) will be more readily seen as an attempt to undermine a particular group or actor.

Second, following Whalan’s work on the legitimacy of peace operations, I conjecture that the decision-maker will seek to minimize negative consequences on the peace operation’s local legitimacy.⁴⁴ Whalan argues that local legitimacy is a critical condition for effectiveness, as peace operations need this legitimacy to obtain cooperation with the implementation of their mandates.⁴⁵ Without cooperation, objectives like DDR, rebuilding the rule of law, and organizing free and fair elections will be much harder to achieve. The risk in assisting an ICT lies in particular in the possibility that local actors start to associate the peace operation with the ICT. If investigators are protected by peacekeepers and being driven around in white UN SUVs, and peacekeepers execute ICT arrest warrants, the local population might start to see the peace operation and the ICT as one and the same actor. Any legitimacy perceptions from the one will start to transfer to the other.⁴⁶ I therefore hypothesize that the effects that the decision-maker expects assistance to have on local legitimacy depend on the local attitudes towards the ICT in question. If they are positive, assistance can enhance local support for the peace operation; the reverse, however, might be true if these same local attitudes are negative.⁴⁷ The risk of association is further heightened when the ICT requests highly visible and more controversial assistance (like arresting indictees).

Third, a decision-maker is more likely to respond favourably to an ICT request for assistance when he can do so with low risks to troop safety and security. Such calculations most obviously occur when assistance is risky in and of itself, for example, when the request is for an arrest of a well-defended militia leader.⁴⁸ A decision-maker, however, will also attend to the longer-term consequences. Even a successful raid can cause a backlash among his supporters, manifested by violent demonstrations or reprisals. The risk of association described above implies that when the ICT is seen as partial (as is likely to be the case among the indicted individuals and their supporters), this might damage the peace operation’s perceived impartiality as well. A reduction in perceived impartiality has important consequences for troop safety and security, as armed groups can start

to see the peace operation as a party to the conflict and thus a legitimate target for attack.⁴⁹

If these hypotheses are true, I would expect to find a decision-maker justifying his decision to assist by referring to these expected positive consequences: more stability on the ground, an improvement of local attitudes towards the mission, or a reduction of threats to troop safety and security—or at least to not refer to possible negative consequences it might have. A decision-maker might also refer to precedents in which such expectations were confirmed. If there are strong negative consequences, however, a decision-maker would refer to the risks that assistance will have for the mission's other goals. If the consequences on other goals play an important role, another observable implication is that the peace operation more easily grants ICT requests for low-risk requests (like logistical assistance in stable areas) than high-risk ones (like arrest operations or providing security for investigators in the middle of a conflict zone).

The Decision-Maker's Value System

The second factor that I expect to contribute to a willingness to assist is the value system of the individual deciding on assistance. Support for the anti-impunity norm, a positive attitude towards the ICT, a willingness to take risks, and assertive interpretations of the mandate are particularly important ingredients of a supportive value system. I expect that the individual's value system has an effect on his decisions by shaping how he perceives his interests and categorizes his environment and by providing justifications and motivations for responding to ICT request for assistance.⁵⁰ If the decision-maker supports the anti-impunity norm, he believes that justice is a necessary condition for peace (which also affects the expected effects of assistance on stability) and might pursue efforts to hold those who commit atrocities accountable to the fullest of his abilities.⁵¹ An ICT can lobby the decision-maker to enhance this normative support, while establishing positive relationships might enhance the attitudes towards that particular ICT.

Another important part of the decision-maker's value system is what actions they consider to be appropriate for peace operations. Because of the potential conflicts with the "holy trinity" of peacekeeping, a decision-maker might feel that supporting criminal investigations against some of the parties involved in a conflict is not an appropriate task for peacekeepers. Most military cultures, moreover, encourage a general reluc-

tance of soldiers to be involved in what they see as “civilian” activities.⁵² Finally, some decision-makers are more willing to take risks and interpret the mandate assertively than others. These individuals will be more likely to assist ICTs because they will attach less weight to possible negative expected consequences and need less clear and specific authorizations in their mandate. This is what Boothby refers to as seeing the operation’s mandate as either the “floor” (i.e. the minimum of what it is allowed to do) or the “ceiling” (i.e., the maximum of what it is allowed to do), both of which lead to very different outcomes under the same mandate.⁵³

Overall, I therefore contend that decision-makers who have a supportive value system will try to find ways to assist the ICT while those who do not will try to find ways not to do so. It must be repeated, however, that the extent to which individuals within peace operations can exert agency varies, as sometimes their room for manoeuvre is strongly constrained by other actors. Furthermore, these individuals might find themselves in situations where their value system is contradictory, in that several norms they value prescribe different actions. It is particularly in these cases of normative conflict that top cover for assistance or explicit authorization in a mandate might help in guiding the decision-maker’s actions.

Testing these hypotheses will be a difficult endeavour and the potential of window dressing looms large. Individuals within the UN bureaucracy or the peace operation will often have incentives to claim that they are primarily guided by normative commitments and moral considerations (see the discussion above for strategies to mitigate inferential errors with such evidence). A relatively weak observable implication is that a decision-maker justifies the decision to assist by reference to the belief that the perpetrators of atrocities should be held accountable. A stronger implication is that the decision-maker should respond positively to ICT requests for assistance even in the absence of other factors influencing willingness and with a low capacity. It becomes easier to isolate a role for the value system when the expected consequences are negative, the authorization in the mandate is unclear, and the operation has limited capacity. A finding that the decision-maker similarly acted in support of this value system in other institutional contexts would provide additional evidence for this hypothesis.⁵⁴ Finally, if this hypothesis is true, I expect that when someone who is known to have a supportive value system replaces someone in the mission who is known for a less supportive value system, there should be a change in responses to assistance requests.

Pressure from Other Actors

In many cases, other actors will try to pressure the decision-maker into a particular choice on whether and how to assist the ICT. Although I do not expect all actors to be equally involved in each decision, TCCs, the Security Council, the UN bureaucracy, interested states, the ICT, and local actors might all try to persuade (and sometimes even coerce) the decision-maker into adopting their preferred choice and therefore contribute in a positive or negative way to a willingness to assist the ICT. This pressure, while related to top cover (which I discuss in section 1.3 and plays a more enabling role), is nevertheless analytically distinct, because pressure implies a more active stance on the part of these actors. When the decision-maker experiences top cover for his decision to assist, this enables him to act on his pre-existing willingness while pressure forms a reason in itself to assist.

The pressure can come from several sides and can both contribute to a willingness to assist and detract from it. First, when an important TCC has interests in seeing the ICT succeed or fail (either for normative or political reasons), it can pressure the decision-maker to respond in accordance with the country's position. Interested countries who are not TCCs can apply similar pressure.⁵⁵ Second, the Security Council can push the decision-maker to respond in a particular way to an ICT request for assistance. Beyond including an authorization to do so in a peace operation's mandate, it can issue presidential statements and other communications to put pressure on the decision-maker to respond in the preferred way. Third, actors within the UN bureaucracy (in particular DPKO) concerned about the UN's organizational interests can attempt to ensure that the decision-maker adopts its preferred position by issuing directives and other forms of communication. Fourth, the ICT can use naming and shaming, or more quiet lobbying and persuasion efforts, to try to change to the ways in which the decision-maker sees his interests. In all these situations, other actors attach costs to a favourable or negative response to ICT requests for assistance and therefore influence the willingness of the decision-maker to assist. In the most extreme cases, the decision-maker is coerced into adopting a certain position and his willingness is proxied by the other actors. If these expectations are correct, I would expect to find in documents or interviews that a particular (set of) actor(s) was in contact with the decision-maker, made clear how they want him to respond to the assistance request, and

that the decision-maker subsequently responded accordingly to the pressure.

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1.3 What Enables a Decision-Maker to Assist an ICT?

The willingness examined above will only lead to assistance if the decision-maker has the requisite capacity to do so. Following Paddon, I distinguish capacity into *hardware* (manpower and materiel), *software* (training, expertise, doctrine, local legitimacy etc.), and *top cover*.⁵⁶ Below, I discuss why these factors constitute a peace operation's capacity and how they influence the decision-maker's response to an ICT request for assistance. Nevertheless, It is difficult to say what would constitute "sufficient" capacity; I expect that these calculations depend on the configuration of the factors examined above as well as the type of assistance requested (more risky assistance operations will generally require more capacity).

Hardware

A mission's hardware consists of its manpower and materiel. Almost any assistance operation will require some of these material resources: soldiers and policemen are needed to protect investigators or investigation sites and to conduct arrests, while mobility assets are required to transport ICT personnel. The availability of hardware is determined by the troop ceiling set by the Security Council and the willingness of the TCCs to contribute money, materiel, and manpower to achieve this troop ceiling. Several authors have criticized past and current peace operations for bringing far too few resources to achieve their goals.⁵⁷ And indeed, the resources of peace operations are frequently overstretched and their leaders have to make difficult decisions to allocate scarce resources to what sometimes seems like an overwhelming number of goals and objectives.

More hardware enables more assistance in a number of ways. Foremost, it makes possible operations which would present too many risks with lower capacity because it improves the balance of forces vis-à-vis other armed actors. An example would be the ability of peace operations to confront armed actors opposing arrest operations. A more favourable balance also allows for more coercive strategies against spoilers, such as assistance in prosecution and punishment.⁵⁸ Second, more hardware facilitates the allocation of personnel to assistance in operations instead of other tasks.

If it is true that these factors enable a decision-maker to respond favourably to an ICT request for assistance, I would expect to find more assistance when a peace operation has more hardware. When it is a constraining factor, a decision-maker would state his willingness to assist but refer to a lack of capacity. This kind of evidence would have stronger probative value if the decision-maker consistently refers to a lack of capacity in other situations as well (i.e., an inability to protect civilians because of insufficient capacity).

Software

Software comprises more intangible factors such as expertise, experience, and skills, as well as training, doctrine, and local legitimacy. The same peacekeepers are more valuable when they are more skilled, trained, and experienced in assistance operations. Clear UN and TCC doctrines can help in setting training priorities and outline how to assist ICTs, what the risks are, and what factors need to be considered. A good example of varying peacekeeping doctrines is the gradual reinterpretation of the holy trinity of peacekeeping. Arguably, the expansion of tasks allocated to peacekeepers facilitates assistance because there are more guidelines on how to execute certain tasks. Assistance is also enabled when the peace operation has local legitimacy. Not only does it influence the expected consequences of assistance, but more local legitimacy also allows the peace operation to take more controversial actions without having to fear immediate negative consequences. Better relations with the local population facilitate intelligence gathering, an important aspect of planning operations with minimal amounts of risk.⁵⁹ If these aspects of software indeed enable a decision-maker to assist, one would find that differences in training practices, doctrine, and local legitimacy correlate with different responses to requests for assistance.

Top Cover

A positive response to ICT requests for assistance is enabled when the individual who decides on assistance believes that he has top cover for this action, which means that he expects to be supported in his decision by the Security Council, the UN bureaucracy, pivotal states, and the TCCs.⁶⁰ Top cover is distinct from pressure because the decision-maker has a pre-existing willingness to assist and requires a certain level of support from these other actors that enables him to act on this willingness. Top cover will be especially important when the mandate does

not explicitly authorize assistance to ICTs or prescribes a large number of objectives that are in competition with each other. A lack of top cover, on the other hand, makes it more difficult to anticipate the effects of assistance and could lead decision-makers to adopt a more cautious approach.

A decision-maker is likely to experience top cover when the other actors express support for the anti-impunity norm, and the ICT in question, and do not raise objections to the idea that it is appropriate for peace operations to assist it. It is less likely that he has this experience when the anti-impunity norm and the appropriateness of assistance are contested among these actors. An example of variance in top cover is the changing attitudes of key states towards the ICC. The United States moved from strong resistance during the George W. Bush administration to cautious cooperation during the Obama years.⁶¹ At the same time, the attitudes of some African states towards the ICC (including South Africa, which has been an important participant in UN peace operations) have gradually become less positive.⁶² Supportive TCCs are especially important for top cover because they retain ultimate control over their national contingents, which have “considerable leeway to act at [their] own discretion and remain under the authority of [their] own government[s].”⁶³ A TCC can enable assistance by allowing its troops to be used for this purpose and constrain it by ordering its troops to refuse participation in assistance operations.

An observable implication of top cover influencing the capacity of peace operations is that decision-makers will refer to public or private statements from which it can be inferred that the above-mentioned other actors support the ICT’s activities in the affected country. It can also consist of documents or communications in which the decision-maker asks his superiors (either in the TCC or the UN bureaucracy) how he is supposed to respond to requests for assistance and gets a response clarifying his obligations.

2. The ICTY and UNTAES

In this section, I conduct a plausibility probe to get a sense of how the theoretical expectations formulated above work out in a concrete case of assistance—namely, the arrest by UNTAES of Slavko Dokmanovic on June 27, 1997. Because this article proposes a new theory, it makes sense to choose a positive case with a high value on the dependent variable to explore the relationships between the proposed explanatory conditions and the outcome. In Beach and Pedersen’s terms, because the prior con-

fidence in this theory is low (as it has not yet been tested), one should conduct a “quick and dirty” plausibility probe which will have low certainty and low uniqueness but nevertheless offers some initial confidence that the theory has explanatory value.⁶⁴ I begin by describing the historical context of the establishment and activities of UNTAES, after which I look at whether and to what extent the factors I proposed above influenced the willingness and capacity to assist. As sources, I use UN documents and the scholarly literature on this peace operation. In the conclusion, I reflect on the findings and the extent to which they can be generalized.

2.1 Background

On January 16, 1996, the UN Security Council created UNTAES in eastern Croatia by adopting Resolution 1037. The violent conflicts in the former Yugoslav states had only recently come to an end. Croatian armed forces had recovered most of the territory from Serb secessionists in mid-1995, and UNTAES was supposed to ensure that the last pieces of territory under Serb control would be peacefully transferred to Croatian government authority.⁶⁵ Specifically, Resolution 1037 tasked a Transitional Administrator with a variety of tasks that had the purpose of dismantling the Croatian Serb state structures and maintaining the peace between the different ethnic groups while the region transitioned to Croat government control.⁶⁶ When the mission dissolved in January 1998, it had fulfilled most of its mandate. Although some question the extent to which it truly delivered a sustainable positive peace to the region, most scholars see the mission as a success story. To quote Kofi Annan, it “oversaw—in one of the most successful multifaceted peacekeeping operations in ... history — the peaceful restoration of Croatian sovereignty while creating the conditions necessary for the maintenance of the region’s multi-ethnic character.”⁶⁷

The resolution did not define several key words in the mandate (such as what it meant to “govern” or promote an “atmosphere of confidence”), leaving open the question what specific tasks they would entail.⁶⁸ Although UNTAES therefore had an expansive mandate, it was less robust than those of more recent peace operations. The authorization to use force was limited, especially because of Chinese objections against a Chapter VII mandate.⁶⁹ In addition to the tasks described above, the mandate “[s]tress[ed] that UNTAES shall cooperate with the International Tribunal [for the former Yugoslavia] in the perfor-

mance of its mandate, including with regard to the protection of the sites identified by the prosecutor and persons conducting investigations for the International Tribunal.”⁷⁰ While not explicitly authorizing assistance in arrest operations, the use of the word “shall” does oblige UNTAES to cooperate with the ICTY “in the performance of its mandate.”

In the time that UNTAES was fully operational, between early-1996 and mid-1997, the ICTY’s investigations in the region were focused on one particular atrocity committed by the Croat Serb forces in the early days of the Yugoslav wars. In 1991, Croat Serb forces attacked Vukovar, destroying most of the city in the process and murdering hundreds of civilians. In one incident, they took 260 wounded Croat soldiers from the local hospital and massacred them in nearby Ovcar.⁷¹ In the time before the arrest, the ICTY and UNTAES were already able to build on a track-record of cooperation. In 1996 and 1997, UNTAES provided extensive (logistical and security) support for the excavations of the Ovcar grave site.⁷² Furthermore, the public affairs unit helped the ICTY to reach out to the local media and in this way helped shape public perceptions of its activities.⁷³ On June 27, 1997, this pattern of assistance culminated in the arrest of the former mayor of Vukovar, Slavko Dokmanovic. He was tricked into entering UN-controlled territory, upon which UN troops from Poland promptly took him into custody. The decision-maker in this case was the Transitional Administrator, the American Jacques Klein. Dokmanovic’s arrest would set an important precedent that helped push SFOR in Bosnia into eventually arresting more than twenty suspects for the Tribunal.⁷⁴ This begs the question: What made Klein willing to assist? And to what extent did he have the capacity to act on this willingness?

2.2 Willingness to Assist

In the previous section, I argued that there are three conditions that I expect to contribute to a decision-maker’s willingness to assist: whether assistance is expected to have positive or neutral consequences on other mission goals, the decision-maker’s degree of access to a supportive value system, and pressure from other actors. First, my analysis of UN documents and secondary literature indicates that Klein in fact expected negative consequences from an arrest operation. It is true that UNTAES’s previous logistical and security assistance did not have noticeable effects on stability, the mission’s local legitimacy, or troop safety and security. This might be because of two reasons.

According to Gowan, after the demilitarization was completed in June 1996, the mission “faced no organized military opposition.”⁷⁵ Additionally, both parties to the peace agreement had an interest in maintaining stability.⁷⁶ In contrast, the participation in an arrest operation was feared to have destabilizing effects. The dominant narrative in peacekeeping operations in the former Yugoslavia was that such actions would lead to reprisals against peacekeepers (as they would be perceived as undermining a particular side in the conflict), stoke ethnic tensions, and destabilize the situation significantly.⁷⁷ The ICTY had very little local support, and an association of UNTAES with this institution that was perceived to be partial would have had damaging effects on the mission’s local legitimacy.⁷⁸ The ICTY’s strategy, however, in seeking UNTAES’s cooperation facilitated efforts to minimise the consequences for troop safety and security. Because the indictment was transmitted under seal to the peace operation, Klein was able to maximise the element of surprise and in this way minimise the risks to his troops.⁷⁹ In this way, he could plan an operation with secrecy and speed, and “blu[r] the lines between exactly who was responsible” for the arrest.⁸⁰ In other words, Klein did estimate that the arrest would have negative consequences on the mission’s other goals, but took precautionary measures to minimise these risks.

Second, from the evidence I analysed, it appears that Jacques Klein, the individual who decided on the request for assistance, had a supportive value system. He was impressed by what had happened in his area of command (the Vukovar massacres) and mentioned several times that he thought it was important that those responsible be prosecuted. In meetings between the ICTY and Klein, for example, he expressed his conviction that those responsible had to be held accountable. Even before assuming the post, he told an ICTY official that he would make assistance happen and arrest any suspects found in his area of operation. In fact, “he was not just willing [to]; he was eager.”⁸¹ It is possible that this was Klein’s attempt at disguising his real motives. But given that the expected consequences were negative, the mandate did not specifically authorize arrests, and (as discussed below) there was little public pressure on him to engage in the arrest operation, Klein does not appear to have had strong incentives to misrepresent his motives. Klein further showed a willingness to take risks in other situations as well. On May 14, 1996, he made a show of strength by dislodging the Scorpions, a Serb armed group known for its atrocities that refused to cooperate with UNTAES, from Djeltovici oil field.⁸² To construe a legal authorization for the arrest of Dokmanovic,

Klein combined the specific authorization to assist the tribunal in the mandate and the vague wording of other elements of the mandate. Perhaps because of this relatively clear authorization, and because a willingness already existed, I did not find any evidence of pressure on Klein to act in a certain way.

2.3 UNTAES's Capacity

Klein thus appears to have been willing to assist the ICTY. But did he have the capacity to act on this willingness? Recall that I distinguish a peace operation's capacity into hardware, software, and top cover. In terms of the mission's hardware, the Security Council had authorized a troop ceiling of five thousand troops, six hundred police, and one hundred military observers, which the TCCs did in fact deliver. The mission's civilian component eventually consisted of over a thousand civilian personnel.⁸³ Even if these numbers were small compared to the Implementation Force (IFOR) and SFOR in Bosnia (which had up to sixty-three thousand troops available), the mission faced few security threats, the territory it had to administer was relatively small, and the local parties had an interest in stability as well. Klein also made a point of arranging materiel that would show strength; for example, he used armoured units and attack helicopters to scare off the Scorpions at Djeltovici. Thus, one could argue that Klein had sufficient hardware at his disposal to assist the tribunal.

With regards to the mission's software, what mostly stands out is the availability of the highly trained Polish *Grupa Reagowania Operacyjno-Manewrowego* (Group (for) Operational Maneuvering Response, or GROM) special forces. The GROM had been assigned gendarmerie tasks but had received special forces training from the United States, skills that would play an invaluable role in the Dokmanovic arrest operation.⁸⁴ However, the doctrine of the UN and national militaries had not yet developed any special guidance on assisting war crimes tribunals—it was only after 1998 that such activities were gradually taken up in peacekeeping doctrine—and emphasis was still placed on impartiality and consent.⁸⁵ Furthermore, the local legitimacy of the UN was tarnished because of the failure of the UN mission in Croatia (UNCRO) to keep the UN-protected areas safe, as well as the general failure of the United Nations Protection Force.⁸⁶ Klein did try to make up for this lack of confidence by “meeting local leaders, Serbs and displaced Croats” and attending Serb Orthodox and Catholic church services on a weekly basis.⁸⁷ However, the main reason that UNTAES was able to maintain

local legitimacy was that both parties (the Croat government and the local Serbs) wanted the mission there.⁸⁸ This arguably gave the mission some leeway to take controversial actions.

A similar mixed message appears when assessing the presence of top cover for assistance. Klein and the commander of the Polish contingent apparently did not want to coordinate with their superiors in Washington and Warsaw, because they feared that they would be told to back away from the risky operation. In Borger's words, Klein acted as a "maverick" by not coordinating the arrest operation with Washington in advance.⁸⁹ On the other hand, the UN Office of Legal Affairs supported Klein's interpretation of the mandate; they told him that he was "legally entitled, even obliged" to assist the Tribunal, including in arrests.⁹⁰ The UN Security Council, for its part, had expressed support for UNTAES's assistance to the ICTY, both in the mandate and during the debates leading up to the adoption of the mandate.⁹¹ Several Council members supported the idea that UNTAES would carry out arrests and mentioned the importance of the support to the ICTY. No Council member contested these statements.⁹²

Given the positive outcome of the ICTY's request for assistance, it seems that Klein had sufficient capacity to act on his willingness to assist. This was probably facilitated by Klein's readiness to accept risks (noted above). Combined with the fact that the ICTY had sealed the indictment and cooperated in maximizing the element of surprise (which reduced the risks of the operation), this meant that Klein required relatively little capacity to engage in the arrest of Dokmanovic. In the end, Klein used a small team of Polish special forces to pull off the first-ever arrest operation for an ICT by peacekeeping troops.

Conclusion

In this paper, I sought to develop a theoretical framework that could explain the variation in assistance by peace operations to ICTs. With the legal framework (the mandate) acting as an important background condition, I theorized the conditions under which the relevant decision-maker in the peace operation would be willing to and capable of responding favourably to an ICT request for assistance. In particular, I hypothesized that positive or neutral expected consequences on other mission goals, a supportive value system, and pressure from others can contribute to a willingness to assist, while this willingness can only lead to assistance when it is enabled by the peace operation's hard-

ware, software, and top cover. With a plausibility probe of the Dokmanovic arrest by UNTAES for the ICTY, I illustrated how these different factors worked out in a concrete case. I showed that there was an authorization for assistance and a decision-maker with a supportive value system. These compensated for the negative expected consequences of the arrest operation, which were nevertheless mitigated by the fact that the ICTY had sealed the indictment. Overall, Klein was arguably disposed to assist the ICTY. Together with the fact that Klein had sufficient capacity to act on this disposition, it is not surprising that UNTAES offered full support to the ICTY in its work in eastern Croatia. These findings offer some preliminary confidence that the theory I propose has some explanatory value.⁹³

I hope that this paper has offered a helpful theoretical framework to approach cooperation between peace operations and ICTs. However, future research could undertake more detailed empirical work that would provide harder tests of the theory. This could also help us understand which (combinations of) factors that contribute to willingness and capacity are necessary or sufficient, and whether different combinations of these lead to different degrees of assistance. A further strand of inquiry would be to investigate whether there is a systematic difference in the responses that different types of ICT requests for assistance receive. For example, are security requests significantly more likely to be fulfilled than requests for arrests? Such investigations could help us understand even better the dilemmas that peace operations face when asked to assist ICTs.

Notes

1 The name of this article is inspired by an article in the New York Times, published on 25 April 1995. I wish to thank Jennifer Welsh, two anonymous reviewers, and participants at the BISA-University of Leeds workshop on “Protecting Human Rights in a Changing and Insecure World” for helpful comments on earlier drafts of this paper. Of course, the usual disclaimers apply.

2 For positive accounts, see Payam Akhavan, “Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?,” *The American Journal of International Law* 95, no. 1 (January 2001): 7–31; Hunjoon Kim and Kathryn Sikkink, “Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries,” *International Studies Quarterly* 54 (2010): 939–63; Hyeran Jo and Beth A. Simmons, “Can the International Criminal Court Deter Atrocity?,” *International Organization* 70, no. 3 (2016): 443–75. More critical are Tom Buitelaar, “The ICC and the Prevention of Atrocities: Criminological Perspectives,” *Human Rights Review* 17, no. 3 (2016): 285–302; Kenneth Rodman, “Darfur and the Limits of Legal Deterrence,” *Human Rights Quarterly* 30, no. 3 (2008): 529–60; Leslie Vinjamuri, “Deterrence, Democracy, and the Pursuit of International Justice,” *Ethics and International Affairs* 24, no. 2 (2010): 191–211.

3 For a critical assessment, see Laurel E. Fletcher and Harvey M. Weinstein, "Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation," *Human Rights Quarterly* 24, no. 3 (August 2002): 573–639.

4 For an overview, see Mariana Goetz, "The International Criminal Court and Its Relevance to Affected Communities," in *Courting Conflict?: Justice, Peace and the ICC in Africa*, eds. Nicholas Waddell and Phil Clark (London: The Royal African Society, 2008), 65–72.

5 Goldsmith and Krasner as well as Snyder and Vinjamuri critique these divergent goals, arguing that achieving them in a state-led world is unrealistic. See Jack Goldsmith and Stephen D. Krasner, "The Limits of Idealism," *Daedalus* 132, no. 1 (2003): 47–63; and Jack Snyder and Leslie Vinjamuri, "Trials and Errors: Principle and Pragmatism in Strategies of International Justice," *International Security* 28, no. 3 (2004): 5–44. Cronin-Furman and Kastner add to this that these ambitious but probably unrealistic goals undermine international criminal justice as a whole, leading to unmet expectations and negatively affecting perceptions of the value of international criminal justice more broadly. See Kate Cronin-Furman, "Managing Expectations: International Criminal Trials and the Prospects for Deterrence of Mass Atrocity," *International Journal of Transitional Justice* 7, no. 3 (2013): 434–54; and Philipp Kastner, "Armed Conflicts and Referrals to the International Criminal Court: From Measuring Impact to Emerging Legal Obligations," *Journal of International Criminal Justice* 12, no. 3 (2014): 471–90.

6 Relatively well-known examples are the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia (ECCC). Others were established in East Timor, Lebanon, Bosnia and Kosovo. For hybrid tribunals, see David Cohen, "Hybrid Justice in East Timor, Sierra Leone, and Cambodia: 'Lessons Learned' and Prospects for the Future," *Stanford Journal of International Law* 43 (2007): 1–38; Laura A. Dickinson, "The Promise of Hybrid Courts," *The American Journal of International Law* 97, no. 2 (April 2003): 295–310; Sarah M.H. Nouwen, "Hybrid Courts: The Hybrid Category of a New Type of International Crimes Courts," *Utrecht Law Review* 2, no. 2 (December 2006): 190–214; Sarah Williams, "Hybrid Tribunals: A Time for Reflection," *International Journal of Transitional Justice* 10, no. 3 (2016): 538–47. For an overview of the facts and figures of international criminal justice institutions, see Alette Smeulers, Barbora Hola, and Tom van den Berg, "Sixty- Five Years of International Criminal Justice: The Facts and Figures," *International Criminal Law Review* 13, no. 1 (2013): 7–41.

7 See notes 2–5.

8 Victor Peskin, *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation* (Cambridge: Cambridge University Press, 2008).

9 Eric Stover, Victor Peskin and Alexa Koenig, *Hiding in Plain Sight: The Pursuit of War Criminals from Nuremberg to the War on Terror* (Oakland: University of California Press, 2016), 380. For the distinction between target states and third states, see Mark S. Berlin, "Why (Not) Arrest? Third-Party State Compliance and Noncompliance with International Criminal Tribunals," *Journal of Human Rights* 15, no. 4 (2016): 509–32, 510. 10 For general overviews, see Peskin, *International Justice*; and Stover, Peskin and Koenig, *Hiding in Plain Sight*, Chs. 5–6, 8.

11 See David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (Oxford: Oxford University Press, 2014).

12 I define a "peace operation" as "any military or police force mandated by the United Nations Security Council to establish or maintain peace." This definition includes a range of peace operations, from traditional peacekeeping

missions that keep warring parties apart, to multidimensional peace support operations that are active in rebuilding a post-conflict society in all its aspects, to peace enforcement missions undertaken by regional organizations and individual countries, as long as they operate with a mandate from the Security Council. This article focuses on UN-led missions, however, as it discusses the challenges individuals within UN peace operations face when being asked to assist ICTs. A core argument of the theory is that they have to fit assistance to ICTs in a contested normative environment and amid significant changes to peacekeeping practice. It is likely that the organization's bureaucracy has a stronger interest (than those outside the UN) in maintaining the foundational norms of peacekeeping (discussed further below) in order to keep the institution of peacekeeping sustainable. I use what I consider synonyms (such as peacekeeping forces, peacekeepers or peacekeeping operations) interchangeably with "peace operation."

13 Writing in 2002, Kalinauskas calculated that half of the war criminals detained by the ICTY had been arrested by international military forces, making it its "most effective measure" to obtain custody of the accused. See Mikas Kalinauskas, "The Use of International Military Force in Arresting War Criminals: The Lessons of the International Criminal Tribunal for the Former Yugoslavia," *Kansas Law Review* 50 (2002): 383-429, 385. Although these numbers changed somewhat as time progressed, in 2006 Zhou still concluded that the success of the ICTY "is largely attributable to NATO's involvement in international criminal law enforcement." See Han- Ru Zhou, "The Enforcement of Arrest Warrants by International Forces: From the ICTY to the ICC," *Journal of International Criminal Justice* 4, no. 2 (2006): 202-218, 203.

14 See Margherita Melillo, "Cooperation between the UN Peacekeeping Operation and the ICC in the Democratic Republic of the Congo," *Journal of International Criminal Justice* 11, no. 4 (2013): 763-82; Rod Rastan "The Responsibility to Enforce," in *The Emerging Practice of the International Criminal Court*, eds. Carsten Stahn and Göran Sluiter (Leiden: Koninklijke Brill, 2009), 173-74.

15 See also Majbritt Lyck, *Peace Operations and International Criminal Justice: Building Peace after Mass Atrocities* (London; New York: Routledge Taylor & Francis Group, 2009); and Julian Borger, *The Butcher's Trail: How the Search for Balkan War Criminals Became the World's Most Successful Manhunt* (New York: Other Press, 2016).

16 Stover, Peskin, and Koenig, *Hiding in Plain Sight*, 328.

17 The number of peacekeepers and peace operations comes from: United Nations, "Where We Operate," United Nations Peacekeeping, n.d., <https://peacekeeping.un.org/en/un-peacekeeping-year-review-0>. The number of troop-contributing countries comes from: Ibid., "Troop and Police Contributions," United Nations Peacekeeping, n.d., <https://peacekeeping.un.org/en/troop-and-police-contributors>. Both pages were last accessed on April 3, 2018.

18 The first quote comes from Jeni Whalan, *How Peace Operations Work: Power, Legitimacy and Effectiveness* (Oxford: Oxford University Press, 2013), 1. The second comes from Joachim A. Koops et al., "Introduction: The United Nations and Peacekeeping," in *The Oxford Handbook of United Nations Peacekeeping Operations*, ed. Joachim Koops et al., Oxford Handbooks (Oxford; New York: Oxford University Press, 2015), 1-8, 1.

19 The three principles were included in the "United Nations Peacekeeping Operations: Principles and Guidelines" (United Nations, 2008) which is frequently referred to as the Capstone Doctrine.

20 Alex J. Bellamy, Paul D. Williams and Stuart Griffin. *Understanding Peacekeeping* (Cambridge: Polity Press, 2004), 95.

21 Emily Paddon, "Peacekeeping in the Congo: Implementation of the Protection of Civilians Norm," in *Implementation and World Politics: How International Norms Change Practice*, eds. Alexander Betts and Phil Orchard (Oxford: Oxford University Press, 2014), 160-176, 163-64. See also Bellamy, Stuart, and Griffin, *Understanding Peacekeeping*, 169.

22 Emily Paddon Rhoads, *Taking Sides in Peacekeeping: Impartiality and the Future of the United Nations* (Oxford: Oxford University Press, 2016), 6. See also Dominick Donald, *Active Impartiality: A Survival System for "Grey Area" Peace Support Operations* (London: King's College London, Department of War Studies, 2006).

23 See Mats Berdal and David H. Ucko, "The United Nations and the Use of Force: Between Promise and Peril," *Journal of Strategic Studies* 37, no. 5 (2014): 665-73; Lise Morjé Howard and Anjali Kaushlesh Dayal, "The Use of Force in UN Peacekeeping," *International Organization* 72, no. 1 (2018): 71-103; John Karlsrud, "The UN at War: Examining the Consequences of Peace-Enforcement Mandates for the UN Peacekeeping Operations in the CAR, the DRC and Mali," *Third World Quarterly* 36, no. 1 (2015): 40-54; James Sloan, "The Evolution of the Use of Force in UN Peacekeeping," *Journal of Strategic Studies* 37, no. 5 (2014): 674-702.

24 Denis M. Tull, "The Limits and Unintended Consequences of UN Peace Enforcement: The Force Intervention Brigade in the DR Congo," *International Peacekeeping Online* (August 2, 2017): 1-24.

25 Sandeep Dewan and Lotte Vermeij, "Indian Perspectives on the Use of Force and the Growing Robustness of UN Peacekeeping," *NUPI Policy Brief* (Oslo: Norwegian Institute for International Politics, 2014); Howard and Dayal, "The Use of Force in UN Peacekeeping," 92-96.

26 Alex Bellamy and Paul D. Williams, "The New Politics of Protection?: Côte d'Ivoire, Libya and the Responsibility to Protect," *International Affairs* 87, no. 4 (2011): 825-50.

27 In practice, it might be difficult to clearly distinguish between willingness and capacity and the exact contributions they make to the outcome. However, I contend that they are analytically distinct and should be treated separately in a theoretical framework. Future research might reveal more about the exact interplay of factors in this framework.

28 A case study would thus look at the factors that contribute to willingness (the explanatory variable), how this willingness is influenced by capacity (the moderating variable) and the response of the peace operation to the request (the outcome variable). This conception of a case takes as its guiding principle that one case should consist of one (set of) cause(s) and one outcome. See: Derek Beach and Rasmus Brun Pedersen, *Causal Case Study Methods: Foundations and Guidelines for Comparing, Matching, and Tracing* (Ann Arbor, MI: University of Michigan Press, 2016), 5. I recognize that adopting ICT requests as my units of analysis will in some cases limit the scope of the theory. This is because some peace operations have a mandate to proactively assist ICTs, even without an explicit request to do so. Furthermore, sometimes a TCC directs its troops, which are operating within a peace operation, to fulfil a request for assistance that was issued by the ICT to the TCC. These instances of assistance will also be excluded from the theory, as the request issued to the TCC, not the peace operation. However, by restricting the analysis to situations in which an explicit request is made to a peace operation, it becomes easier to define positive and negative cases, thus making a practical research design more feasible. Furthermore, my research into assistance by peace operations provides reason to assume that assistance in response to requests by ICTs constitutes the bulk of assistance provided by peace operations.

29 Logistical assistance can entail such things as transport and accommodation. Security assistance primarily covers protection for investigators, witnesses, and victims. Political assistance is about diplomatic, rhetorical, and political support for the tribunal, for example by not cooperating with indicted fugitives. Informational assistance includes the provision of evidence for use in the courtroom either in the form of documents or witness/expert statements and information on the whereabouts of indicted fugitives.

30 Parts of this discussion are based on the literature on the measurement of compliance. See, amongst others, Sonia Cardenas, *Conflict and Compliance: State Responses to International Human Rights Pressure* (Philadelphia: University of Pennsylvania Press, 2007), 31–36; and Whalan, *How Peace Operations Work*, 4. 31 I build on an emerging trend in the peacekeeping literature to study the agency of actors within peacekeeping operations. See Paddon Rhoads *Taking Sides in Peacekeeping*, 8; Touko Piiparinen, “The Interventionist Turn of UN Peacekeeping: New Western Politics of Protection or Bureaucratic Mission Creep?,” *Journal of Human Rights* 15, no. 1 (2016): 98–125.

32 For more on pivotal states, see Marina Henke “Great Powers and UN Force Generation: A Case Study of UNAMID,” *International Peacekeeping* 23, no. 3 (2016): 468–92. The role of TCCs is described in Alex J. Bellamy and Paul D. Williams, *Providing Peacekeepers: The Politics, Challenges, and Future of United Nations Peacekeeping Contributions* (Oxford: Oxford University Press, 2013). Barnett and Finnemore have provided an important study of the DPKO’s agency in influencing the course of peacekeeping operations. See Michael N. Barnett and Martha Finnemore, *Rules for the World: International Organizations in Global Politics* (Ithaca, NY: Cornell University Press, 2004), Ch. 5.

33 Gary King, Robert O. Keohane, and Sidney Verba, *Designing Social Inquiry: Scientific Inference in Qualitative Research* (Princeton, NJ: Princeton University Press, 1994), 91. But also Beach and Pedersen, *Causal Case Study Methods*, 28, 228–9, 240; and Alexander L. George and Andrew Bennett, *Case Studies and Theory Development in the Social Sciences* (Cambridge, MA; London: MIT Press, 2005). Its particular strengths, however, lie in providing disconfirming evidence (or what Van Evera called hoop tests). For example, if a change in authorization for assistance does not lead to a difference in the outcome variable, this factor cannot be the sole cause of variation in assistance. Stephen Van Evera, *Guide to Methods for Students of Political Science* (Ithaca; London: Cornell University Press, 1997), 31–32.

34 With triangulation, the researcher attempts to confirm evidence in one source with evidence from other sources. Preferably, the two sources are independent of each other. When analyzing the context in which statements were made, researchers are advised to look at costs and benefits derived from particular statements and at the intended audience. For a good discussion of how to counter some of the challenges when weighing the probative value of such statements, see Andrew Jacobs, “Process Tracing the Effects of Ideas,” in *Process Tracing: From Metaphor to Analytic Tool*, ed. Andrew Bennett and Jeffrey T. Checkel (Cambridge: Cambridge University Press, 2015), 41–73.

35 Additionally, peacekeeping forces will usually have to adhere to Rules of Engagement (RoEs) and Status of Forces Agreements (SOFAs) and operate in the context of Standard Operation Procedures (SOPs). See Ulf Häussler, “The Limits on Law Enforcement by Peacekeeping Operations in Accordance with SOFAs, ROEs and SOPs,” in *Law Enforcement within the Framework of Peace Support Operations*, ed. Robert Arnold (Leiden: Martinus Nijhoff, 2008), 53–74. Furthermore, some ICTs have concluded memoranda of understanding (MoUs) and relationship agreements with relevant actors. For example, the

ICC and the UN have a relationship agreement which states that “[w]ith due regard to its responsibilities and competence under the Charter and subject to its rules as defined under the applicable international law, the United Nations undertakes to cooperate with the Court.” United Nations General Assembly, “Relationship Agreement between the United Nations and the International Criminal Court,” August 20, 2004, UN Doc. A/58/874, Article 15(1). For an example of an MoU, see “Memorandum of Understanding between the United Nations and the International Criminal Court Concerning Cooperation between the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) and the International Criminal Court,” United Nations Treaty Series II-1292 (November 8, 2005).

36 Cronin 2008. (international consensus)

37 Lyck, *Peace Operations and International Criminal Justice*, 140–42. On the one hand, a vague mandate leaves room for the interpretation necessary for adjusting to military and political exigencies on the ground. On the other, a lack of specificity invites inconsistency in application, and makes it difficult for decision makers on the ground to know for certain what actions will fall within the bounds of acceptable behavior, possibly inducing cautiousness and risk aversion.

38 Rarely do mandates explicitly state that peacekeeping force X will do Y under conditions C in manner M. Rather, a mandate usually tasks the force with, for example, protecting the civilians located in the mission area, leaving open the question of what actions this should entail and how this should be balanced with other mission priorities. See Séverine Autesserre, *The Trouble with the Congo: Local Violence and the Failure of International Peacebuilding* (Cambridge: Cambridge University Press, 2010), 34.

39 See the contributions in Ronald Paris and Timothy Sisk, *The Dilemmas of Statebuilding: Confronting the Contradictions of Postwar Peace Operations*, Security and Governance Series (London ; New York: Routledge, 2009).

40 Another way to say this is that the decision-maker wants to minimize the risks of destabilization, expulsion, and physical risks to life and property. See Paddon, “Peacekeeping in the Congo,” 165.

41 See Micaela Frulli, “A Turning Point in International Efforts to Apprehend War Criminals: The UN Mandates Taylor’s Arrest in Liberia,” *Journal of International Criminal Justice* 4 (2006): 351–61, 352–4.

42 At the same time, the targeting can also be meant to persuade the international community to categorize a current partner for peace as a spoiler. See Stover, Peskin, and Koenig, *Hiding in Plain Sight*, 236, 289.

43 A spoiler is an individual or group that is purposively trying to undermine a peace agreement. It was Stedman who popularized the term ‘spoilers’ in the literature. See Stephen Stedman, “Spoiler Problems in Peace Processes,” *International Security* 22, no. 2 (1997): 5–53; and Desirée Nilsson and Mimmi Söderberg Kovacs, “Revisiting an Elusive Concept: A Review of the Debate on Spoilers in Peace Processes: Revisiting an Elusive Concept,” *International Studies Review* 13, no. 4 (2011): 606–26. It is possible that the ICT’s indictment contributes to the categorization of the indictee as a spoiler. After all, being suspected of atrocities is likely to have delegitimizing effects in the eyes of international actors. See James H. Lebovic and Erik Voeten, “The Cost of Shame: International Organizations and Foreign Aid in the Punishing of Human Rights Violators,” *Journal of Peace Research* 46, no. 1 (2009): 79–97; Hyeran Jo and Beth A. Simmons, “Can the International Criminal Court Deter Atrocity?,” *International Organization* 70, no. 3 (2016): 443–75, 450–453. However, this is not necessarily relevant for the theory, because at the moment that the categorization as a spoiler influences the expected effects on

stability, it is no longer relevant what was the driving force behind this categorization.

44 See Whalan, *How Peace Operations Work*.

45 *Ibid.*, 1.

46 Alex J. Bellamy and Charles T. Hunt, "Twenty-First Century UN Peace Operations: Protection, Force and the Changing Security Environment," *International Affairs* 91, no. 6 (2015): 1277–98, 1287–8.

47 Of course, there usually is a diverse set of attitudes towards both the ICT and the peace operation. I assume that the expected effects on the attitudes of the government towards the peace operation are particularly important, because antagonizing the government too much risks the expulsion of the peace operation, while antagonizing the wider population bears less direct risks.

48 In the case that the ICT requests assistance in an arrest, it can reduce the risks to peacekeeping troops by sealing the indictment. Transmitting a sealed indictment to a peace operation gives it the chance to prepare for an arrest operation and maintain the element of surprise. Indeed, the former Prosecutor of the ICTY, Louise Arbour has argued that the moment she started issuing sealed indictments, the tide for assistance by peace operations shifted dramatically. See Louise Arbour, "The Crucial Years," *Journal of International Criminal Justice* 2 (2004): 396–402. On the other hand, sealing the indictment makes it more difficult to mobilize normative pressure against a reluctant decision-maker.

49 Howard and Dayal, "The Use of Force in UN Peacekeeping," 72; Karlsrud, "The UN at War," 51.

50 See, amongst others, Alexander Betts and Phil Orchard, "Introduction: The Normative Institutionalization- Implementation Gap," in *Implementation and World Politics: How International Norms Change Practice*, ed. Alexander Betts and Phil Orchard (Oxford: Oxford University Press, 2014), 1–26, 2; Abram Chayes and Antonia Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge, MA: Harvard University Press, 1995), 113; Christopher Reus-Smit, *The Politics of International Law* (Cambridge: Cambridge University Press, 2004), 3; Beth Simmons, "International Law," in *Handbook of International Relations*, ed. Walter Carlsnaes, Thomas Risse, and Beth A. Simmons (London: SAGE Publications Ltd, 2012), 352–378, 357; Friedrich Kratochwil, "How Do Norms Matter?," in *The Role of Law in International Politics: Essays in International Relations and International Law*, ed. Michael Byers (Oxford: Oxford University Press, 2000), 35–68, 48.

51 It is important to mention that an individual who has not internalized the anti-impunity norm does not necessarily condone or approve atrocities, or that he or she is advocating impunity as such. Rather, it is more likely that the individual believes that prosecution should wait for peace to arrive first, that maintaining stability is more important, or that restorative justice-initiatives (such as a truth commission) are better.

52 They "fear that this trend will detract from more critical missions, degrade military capabilities and morale, and create situations for which soldiers are not trained and equipped" while "[t]hose concerned about human rights and democratic control of armed forces are equally uneasy about military law enforcement." Cornelius Friesendorf and Susan E. Penksa, "Militarized Law Enforcement in Peace Operations: EUFOR in Bosnia and Herzegovina," *International Peacekeeping* 15, no. 5 (November 2008): 677–94, 677. This reluctance does not only cover the assistance to ICTs, but also the increasing involvement in peace- and statebuilding tasks and humanitarian operations. See, for example, Thijs Brocades Zaalberg, *Soldiers and Civil Power* (Chicago: University

of Chicago Press, 2006).

53 Derek Boothby, "The Political Challenges of Administering Eastern Slavonia," *Global Governance* 10, no. 1 (2004): 37–51, 48–49. For example, Patrick Cammaert, a Dutch general who served in leading capacities in several peacekeeping missions, argued that: "In my view, UN peacekeeping mandates and rules of engagement allow military and police commanders to arrest and detain perpetrators of human rights abuses, including sexual violence. Although this can be politically sensitive, it is important that UN forces take firm action regardless of the status of the assailants of sexual assaults and murder." This is a clear example of a decision-maker interpreting his mandate in a way that is coupled to his personal views on peacekeeping and the proper course of action when confronted with atrocities. See Patrick Cammaert, "A Peacekeeping Commander's Perspective: From Headquarters and the Field," *The RUSI Journal* 153, no. 3 (2008): 68–71, 71.

54 Some of these ideas are inspired by Jacobs, "Process tracing the effects of ideas."

55 For example, in the early years of the George W. Bush administration, the US threw its weight around to stop any form of assistance to the International Criminal Court, and it has been argued that this made it impossible for the UN Security Council to mandate the UN mission in the Congo directly with assistance to the ICC. Melillo "Cooperation," 767–68.

56 Paddon, "Peacekeeping in the Congo," 165–66 and note 9.

57 Amongst others, see Simon Chesterman, "From State Failure to State-Building: Problems and Prospects for a United Nations Peacebuilding Commission," *Journal of International Law and International Relations* 2, no. 1 (2005): 155–75; Michael Doyle and Nicholas Sambanis, *Making War and Building Peace: United Nations Peace Operations* (Princeton: Princeton University Press, 2006); Stephen John Stedman, "Introduction," in *Ending Civil War: The Implementation of Peace Agreements*, ed. Stephen John Stedman, Donald Rothchild, and Elizabeth Cousens (London: Lynne Rienner Publishers, 2002), 1–40; Barbara F. Walter, *Committing to Peace: The Successful Settlement of Civil Wars* (Princeton: Princeton University Press, 2002).

58 Nilsson and Kovacs, "Revisiting an Elusive Concept," 620.

59 See Séverine Autesserre, *Peaceland: Conflict Resolution and the Everyday Politics of International Intervention* (Cambridge: Cambridge University Press, 2014), 115–57. She argues that one of the reasons that peacebuilders frequently "fumble in the dark" is the barrier between the local population and international interveners.

60 Paddon, "Peacekeeping in the Congo," 165–66. A well-known example of a lack of top cover, is the perception that Lieutenant General Roméo Dallaire, Force Commander of the peace operation in Rwanda (UNAMIR) at the time of the 1994 genocide, had. He felt that he received very little support from the UN Secretariat to prevent a looming genocide. This feeling was subsequently confirmed by responses he received from DPKO to telegrams in which he requested permission to take action against arms caches which he feared might be used in such an event. See Roméo Dallaire, *Shake Hands with the Devil: The Failure of Humanity in Rwanda* (Toronto: Random House Canada, 2007).

61 See Bosco, *Rough Justice*; Darren Hawkins, "Power and Interests at the International Criminal Court," *SAIS Review* 28, no. 2 (2008): 107–19. The judgment on how the Trump administration approaches the ICC is yet to be made.

62 See Franziska Boehme, "'We Chose Africa': South Africa and the Regional Politics of Cooperation with the International Criminal Court," *International Journal of Transitional Justice* 11, no. 1 (2017): 50–70.

- 63 Bellamy, Williams and Griffin, *Understanding Peacekeeping*, 51.
- 64 Beach and Pedersen, *Casual Case Study Methods*, 288.
- 65 For a general account on the Yugoslav wars, see Laura Silber and Allan Little, *The Death of Yugoslavia* (Penguin Books: London, 1996).
- 66 Most importantly, it would oversee the demilitarization of the region, establish a temporary police force, facilitate the return of displaced persons and refugees, and be involved in ensuring the functioning of civil administration and public services. Richard Gowan, "United Nations Transitional Administration for Eastern Slavonia, Baranja and Western Sirmium (UNTAES) and UN Civilian Police Support Group in Croatia (UNPSG)," in *The Oxford Handbook of United Nations Peacekeeping Operations*, ed. Joachim A. Koops et al., Oxford Handbooks (Oxford, New York: Oxford University Press, 2015), 519.
- 67 Cited in Boothby, "The Political Challenges," 37. Some of the criticisms come from Gowan, "United Nations Transitional Administration," 528–29; Ivan Simonovic and Ivan Nimac, "UNTAES: A Case Study," *Croatian International Relations Review* 5, no. 14 (1999): 9.
- 68 See Boothby, "The Political Challenges," 38–45.
- 69 UNTAES could only act on Chapter VII when it was ensuring the security and freedom of movement of its personnel.
- 70 United Nations Security Council, "Resolution 1037," January 15, 1996, para. 21, Un Doc. S/RES/1037(1996). For a legal discussion, see Susan Lamb, "The Powers of Arrest of the International Criminal Tribunal for the Former Yugoslavia," in *The British Yearbook of International Law*, ed. J. Crawford and V. Lowe (Oxford: Oxford University Press, 2000), 182–83.
- 71 Stover, Peskin, and Koenig, *Hiding in Plain Sight*, 155.
- 72 See the UN Secretary-General's reports on UNTAES of June 26, 1996 (S/1996/472, para. 42) and December 4, 1997 (S/1997/953, para. 6).
- 73 See the Secretary-General's reports on UNTAES of October 1, 1996 (S/1996/821, para. 13) and October 26, 1996 (S/1996/883, para. 18).
- 74 The plan was dubbed "Operation Little Flower." See Borger, *The Butcher's Trail*, 26–33.
- 75 Gowan, "United Nations Transitional Administration," 523.
- 76 *Ibid.*, 529.
- 77 Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton, NJ: Princeton University Press, 2000), 216, 224.
- 78 For an overview, see Sanja Kutnjak Ivković and John Hagan, *Reclaiming Justice: The International Tribunal for the Former Yugoslavia and Local Courts* (Oxford, New York: Oxford University Press, 2011).
- 79 John Hagan, *Justice in the Balkans: Prosecuting War Crimes in the Hague Tribunal* (Chicago: University of Chicago Press, 2003), 100. On page 102, Hagan also notes that the sealed indictment strategy was a way to pressure NATO into more assistance in Bosnia: if the alliance did not act on the indictments, Arbour threatened she would unseal them, embarrassing the alliance.
- 80 *Ibid.*, 103–104.
- 81 Borger, *The Butcher's Trail*, 26–27; Hagan, *Prosecuting War Crimes*, 102. He was also reportedly convinced that he had done the right thing. See Borger, *The Butcher's Trail*, 43.
- 82 Gowan, "United Nations Transitional Administration," 523.
- 83 The contingents of police observers were only ones who did not reach their authorized capacity (only around four hundred were deployed). Real strength (at full deployment, May 1996): 4,849 troops; 99 military observers and 401 police. Maximum civilian component: over 1,000 international and national staff. *Ibid.*, 519.

84 Borger, *The Butcher's Trail*, 28-9.

85 Lyck, *Peace Operations and International Criminal Justice*, 125-139.

86 Gowan, "United Nations Transitional Administration," 524.

87 Boothby, "The Political Challenges," 47.

88 Simonovic and Nimac, "UNTAES," 7.

89 Borger, *The Butcher's Trail*, 42. See also *ibid.*, 32-33.

90 *Ibid.*, 41. I hesitate to say, however, that this implies that the UN bureaucracy in general supported Klein's assertive use of his authority. The first report of the Secretary-General after the arrest, for example, makes no mention of any support to the ICTY. This is remarkable, to say the least. See Secretary-General's report on UNTAES of October 2, 1997 (UN Doc. S/1997/767).

91 Lamb, "The Powers of Arrest," 183-4. The Contact Group, an informal grouping of great powers interested in the developments in the Balkans, also supported the mission. See Simonovic and Nimac, "UNTAES," 7.

92 Lamb, "The Powers of Arrest," 183-4.

93 I do not claim, however, that this means that they are necessarily portable to all other situations, which will have very different historical and background conditions from the cooperation between UNTAES and the ICTY. Care should be taken to carefully assess these contextual factors when trying to understand the decision-making processes of other decision-makers in other peace operations who have to cooperate with other tribunals.

RANKING AGENTS OF JUSTICE: WHEN SHOULD THE CORPORATION ACT?ⁱ

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Abstract

Theorists have argued that under certain background conditions the commercial, for-profit corporation might bear responsibility to act to advance justice. However, other agents, too, may be responsible for taking remedial action, especially when the state defaults. This raises the question of the sequence in which the agents should act. I develop a framework that offers guidance in determining when the corporation ought to intervene to advance justice. The existing literature typically identifies responsibility-bearers solely by their capacity to remedy an unjust situation, which I believe to be too simplistic. I introduce two additional grounds for identifying responsibility-bearers—a role-based account and participation-based account—and show that this pluralist approach delivers a better account of who bears responsibility to act and when to discharge this responsibility.

Introduction

Several theorists, including O'Neill and Caney, have recently argued that the commercial, for-profit corporation may bear responsibility to intervene in public affairs of societies in which they operate to promote social justice.¹ The argument holds that this is particularly the case where citizens suffer the burden of injustices while their government is either unwilling or unable to secure justice. Responsibility attribution is typically made on the grounds that corporations possess the capacity to remedy injustices.

This article considers the role of the corporation in advancing justice, and extends it in two ways. Firstly, I argue that a capacity-based account of responsibility used by others to assign responsibility to the corporation is weak and needs to be augmented with the *participation-based* account. This approach takes account of the role the corporation might have played in bringing about or propagating the injustice (akin to the “polluter pays principle” used in climate justice). Secondly, I argue that, in the presence of other potential agents who could remedy injustices, such

ⁱ The word “when” is used to refer to sequential action, that is, in what order agents should act, not the temporal sense as in, at what time an agent should act.

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as multilateral organizations, foreign states, NGOs, and so on, it is not enough to simply identify the corporation as a responsibility-bearer; we also need to offer guidance on *when* the corporation should step in.

Generally, reference to “responsibility” could broadly mean “responsibility for having done something” (this might be termed “retrospective”) or “responsibility to do something” (this might be termed “prospective”). In this article, I refer to the latter meaning; making an argument for the corporation bearing responsibility to act to advance justice.ⁱⁱ

The article proceeds as follows. In the first section, I briefly outline the existing argument for the corporation as responsibility-bearer, which I will later augment with the participation principle. This is followed in the second section with the development of a justice intervention framework, which provides the theoretical underpinning for identifying responsibility-bearers and ranking them. Finally, in the third section, I apply this framework to the corporation in three different situations of injustice to determine when it would be required to intervene.

The Corporation as Responsibility-Bearer

The thought of corporations bearing responsibility to advance justice might strike some as odd at first. It is unlikely, though not implausible, that entrepreneurs set out to establish new businesses with the goal of making the world more just. Similarly, established multinational commercial corporations are unlikely to have the advancement of social justice as their main objective.ⁱⁱⁱ If the generation of profit for shareholders is the primary purpose of every commercial corporation, why should we look to the corporation to advance justice?

This line of thinking mistakenly suggests that an agent has only one set of duties that it can be called upon to discharge. This is too simplistic a view of the corporation. O’Neill, for example argues that corporations are “economically and socially complex institutions ... their constitutive aims are typically diverse and multiple” and are “evidently capable of throwing their considerable weight in the direction either of greater justice, or of the status quo, or of greater injustice.”² Rather than a narrow focus on shareholder interests, Hsieh sees corporate purpose as “allowing members of society to meet their wants and needs by coordinat-

ii I am grateful to the anonymous reviewer for suggesting this clarification.

iii While “corporation” could refer to a university or public broadcaster such as the British Broadcast Corporation (BBC) who might have social justice objectives, my focus is on the corporation whose main purpose is the generation of profit, the type of corporation that would be listed on a stock exchange.

ing labour and capital in the production of goods and services.”³ Without necessarily neglecting its other responsibilities, the corporation does possess the capacity to advance justice to some degree.

The basic argument put forward by O’Neill and others is that, in a weak state (that is, a state that does not possess the power to secure justice) the corporation, which is assumed to possess the capacity and power to contribute to the advancement of justice, bears a responsibility to do so. O’Neill distinguishes between two types of agents, namely primary agents of justice, who have capacities to determine how principles of justice are to be institutionalized within a certain domain, and secondary agents of justice, who contribute to justice by complying with the demands of primary agents.⁴ Caney suggests that rather than *types* of agents who possess fixed characteristics, agents have *roles* which they play in given circumstances.⁵ In its secondary agent role, the extent of the corporation’s justice advancing activities would be to comply with just legal requirements. However, this changes (the argument goes) when the state is unwilling or unable to secure justice. In such a case the corporation might bear responsibility to act as more-than-secondary agent, indeed assuming primary responsibility to secure justice. Note that such a responsibility, and the type of responsibility considered in this article, is more demanding than is typically considered by theories of corporate social responsibility (CSR). These theories typically consider socially-orientated acts by corporations to be voluntary, and justifiable only if such acts do not impact the generation of profit.⁶ As I will argue, there are circumstances and grounds for assigning this more demanding, non-voluntary responsibility, to the corporation.

To be sure, the corporation is not the only agent that could step in when the state neglects its duties. What role should other states play? What about multilateral organizations such as the United Nations or North Atlantic Treaty Organization, and what about Non-governmental Organizations? If indeed these other agents bear responsibility to advance justice in a domain, in addition to the corporation, the important question for this paper is: *in what order should the agents act?* To begin to answer this question, I now turn to the development of what I have simply termed a *justice intervention framework*.

A Framework for Guiding the Sequence of Justice Interventions

The importance of identifying specific responsibility-bearers is straightforward: the pursuit of justice will be ineffective unless ob-

ligations are assigned to “specific, identifiable agents and agencies which are able to discharge those obligations.”⁷ Miller warns that if responsibility is too widely dispersed, then it is of no motivational value because there is no compulsion for any specific actor to act.⁸ Everyone will wait to see if someone else acts. Most observers of an injustice would assert that *some actor* is morally required to provide the resources and bring about changes in policies and social arrangements necessary to address the injustices, but few feel particularly *responsible* to work towards their enactment.⁹ Consequently, unless we start to define and allocate responsibilities, the practical impact of theorizing principles of justice will necessarily be small.¹⁰ Where multiple agents have been picked out to act, merely identifying them is not enough; without knowing the order or sequence in which they should act and the expected scope of their intervention, we might end up with the same problem as before, in that no-one might act even when we have identified them as responsibility-bearers. We might not want all agents acting simultaneously, not only due to the chaos this might cause, but also because advancing justice might in fact require sequential action. So, in addition to identifying the set of responsibility-bearers, theorizing the responsibility to act must also indicate the order in which agents should act and how the burden of advancing justice should be distributed among them.

Caney offers the useful notion of *levels of responsibility* and suggests that under varying conditions some agents bear greater responsibility to act than others, but offers little guidance on the grounds by which agents could be ranked.¹¹ The *justice intervention framework* developed here seeks to offer this guidance.

We want a framework that offers guidance on when an agent should act, that is, the sequence or order of its intervention, when other responsibility-bearers exist. So we might identify responsibility-bearers x, y and z, but want to determine who should act first, second and, third. Consider a situation where you and a handful of others are gathered outside a burning building with people trapped inside. Who should enter the building to save those inside? If one of you is a trained fireman then it would be reasonable to look to him to be the first to enter the building, after all, he has the training and special equipment to perform the required rescue tasks. But who would be next in line? Imagine the fireman goes into the building and calls for assistance, or imagine if there was no fireman among those gathered. Whose responsibility would it be to incur the cost of entering the building? We would most likely settle on a subset of those gathered who we deem to possess the requirements for someone to perform the rescue operation. So we might rule out the young child, the elderly man, the

woman in a wheelchair, and so on. Essentially what we would do is rank the available would-be rescuers by their potential ability to perform the required tasks. We might decide that the next person in line to enter the building should be the ablest person who has received some emergency training or the strongest person since both would be able to carry the victims out.

Now imagine we discover that among those gathered is a person who was involved in setting the building on fire. We might be inclined to push him to the front of the line to enter the building to rescue the victims, although some might worry that since he started the fire he may not want to rescue those inside. It would be reasonable to expect the person who caused the bad situation to bear some responsibility to fix it. To add one last complication, what if the woman in the wheelchair is the one who started the fire? Now we face a dilemma—we believe that the person who bears responsibility, owing to their causal involvement, should be the one to bring remedy, but we also want the rescue to be successful. It is unlikely that someone confined to a wheelchair would be able to enter a burning building and rescue those trapped inside. Do we therefore rule out the woman in the wheelchair and continue down the line of those gathered to identify the next rescuer or can we still hold the woman primarily responsible?

This example offers us guidance on at least three steps we would need to follow to determine when a target agent should act to remedy injustice, in the presence of other responsible agents:

Step 1: Establish that the target agent bears responsibility to act to remedy the injustice.

Step 2: Identify the set of other responsibility-bearers.

Step 3: Rank the set of responsibility-bearers to reveal when the target agent should act.

Step 1 requires that we develop the grounds for identifying agents who bear remedial responsibility, and then applying it to our target agent, in our case, the corporation. Step 2 requires a scan of possible agents using the grounds established in Step 1 to determine who else might bear responsibility to act, especially those who might have responsibility to act before the target agent. This list of agents will necessarily depend on the background conditions and the injustice in question. Finally, Step 3 requires that we establish a ranking logic and apply this ranking to the agents identified in Step 2 and our target agent. Suppose that Step 3 determines that responsibility-bearers *x*, *y*, and *z* are responsible to act in that order. We think that after *x*, *y* is next most responsible, such that if *x* defaults, then *y* should act. Then, if *x* and *y* defaults,

z should act. It is conceivable that both y and z bear responsibility to act if x should default—if this is the case, then it should be stated clearly in the sequencing of responsibility-bearers.^{iv} In the next section, I will develop the grounds for Step 1 and the ranking logic for Step 3, and then apply the framework to the corporation to answer the question of when it should intervene.

Grounds for Identifying Responsibility-Bearers

The burning building example is a good illustration of the challenge we face in identifying those actors who ought to intervene to remedy an injustice or act to restore justice. In situations where multiple agents are present, it is not obvious who should act first, or who is next in line after the bearer of primary responsibility has acted or neglected to act. The example suggests that there are at least three accounts for identifying responsibility-bearers, namely a *role-based*, a *capacity-based*, and a *participation-based* account.

Role-based identification

Identifying the fireman as the agent to act in our burning building example demonstrates the role-based account of identifying the responsible agent. We do not identify the fireman because of any natural attributes or capacities but because he has been trained and equipped to perform a role in society. We would argue that it is his duty to act and that he is permitted to act since society has legitimized his actions (within a remit) by assigning him this role. We assign to him certain role permissions by virtue of his job: we permit him to break certain road rules, for example, allowing him to speed through traffic or drive up one-way streets in the course of performing his assigned duties. He also bears certain role obligations by virtue of his job; society expects him to enter burning buildings, an expectation we do not have of ordinary citizens. It is not unreasonable for non-firemen to step out of the way so that the fireman can act since it will almost always be better to let those who have been assigned responsibility to get on with the job.¹²

In this way, it is not unreasonable—when looking to an agent to secure justice—that we look to the state. State legitimacy is derived from its commitment to secure the human rights of its citizens. States, too, possess capabilities that may be deemed essential to secure justice—Nagel, for example, argues that the state is the only agent endowed with the required coordination ability and coercion of the scale and type that is required for justice.¹³ Society grants states permission to perform certain duties and

iv I am grateful to the anonymous reviewer for suggesting this clarification.

places role obligations on the state, such as requiring it to remedy injustices that arise, and certainly not to be perpetrators of injustice. Even O'Neill, who challenges the exclusive focus of states as agents of justice, acknowledges that it is hard to institutionalize principles of justice: although states quite often do not do very well as primary agents of justice, they are the best primary agents available, and thus are indispensable for justice.¹⁴

Could a role-based account identify other agents? We certainly would not identify the corporation as an agent of justice on the role-based account. Regardless of our account of the corporation's constitutive purpose, it is unlikely to include the pursuit of justice as its main purpose. We currently do not have any institution other than the state whose role it is to secure justice; that is, an institution whose constitutive purpose includes the securing of justice. While we may assign such responsibility to agents on other grounds (as we will discuss shortly) none have been created for this purpose. This is particularly the case when we are considering global justice: we can justifiably doubt that humanitarian intervention could be codified into international law in such a way that an international body could pronounce on which agent (or agents) should intervene.¹⁵ The weakness of a role-based account of responsibility is that it offers no guidance in the situation where the role-bearer fails to perform its duty, whether through negligence or being unwilling or unable to do so, a situation which is our focus.

Capacity-based Identification

The *capacity principle* states that responsibilities to remedy or protect against harm or injustice ought to be assigned according to the capacity that agents possess to discharge these remedies or protections.¹⁶ In a capacity-based account of identifying responsibility-bearers, lies the fact that an agent possesses the capacity to remedy deprivations, which entails the responsibility to do so.¹⁷ As we did in our burning building example, a capacity-based form of identifying responsibility-bearers picked out the ablest person who has received some emergency training or perhaps the physically strongest person since rescuing the fire victims would entail heavy lifting. While Pattison focuses on effectiveness of interventions in determining who should intervene in humanitarian crises, he acknowledges that capacity to intervene successfully is the most obvious requirement of an agent to intervene.¹⁸

In theorizing responsibility to act to restore or remedy injustice, effectiveness matters significantly. We want the injustice to be effectively remedied, and so it is reasonable that we look to

agents who we deem to possess the requirements to perform the required tasks. As O'Neill points out, capacities are "constitutive of agency, and without agency any account of obligations will be no more than gesture."¹⁹

However, the capacity-based account bears several flaws. In claiming that the possession of the capacity to act entails the responsibility to do so, the capacity principle is "insensitive to costs to potential responsibility-bearers."²⁰ A reasonable constraint to action is that if acting imposes an unfair cost on the agent or creates a new harm then the agent would not be deemed blameworthy for not taking the action.²¹ The principle would pick out for action an agent who may live a frugal lifestyle and save his resources, but would overlook an agent who is reckless with his resources, even if the latter was involved in the injustice. The principle assumes that the capacity possessed by the first agent is unencumbered and so available to be deployed for the remedial purposes, but the agent could have had plans for deployment of the resources. Perhaps a modification of capacity principle would be to assess available or unencumbered capacity which would be less insensitive to the costs to potential responsibility-bearers.

A further weakness is that the principle is conceptually vague: what do we mean when we say that an agent possesses the "capacity to remedy an injustice"? This seems to require the co-ordination of expected actions and resources required for the remedy with some assessment of the agent's possession of these resources and the ability to deploy them effectively. This cannot be known *ex ante*, and as Miller points out, leads us into the terrain of informed conjecture.²² Furthermore, it is unlikely in most cases of injustice that a single agent can bring about remedy. More likely, it will require actions from multiple agents over an extended period, sometimes several years or decades. Therefore, speaking of assigning responsibility to an agent to "remedy" injustice or "restore" justice is misleading. A more accurate statement would be that we are assigning responsibility to contribute to a remedy. What follows is that, in most cases, every conceivable agent would possess some quantum of capacity to contribute to justice, thus rendering the concept completely hollow because responsibility would be too dispersed. While I agree that we should pursue paths that will offer most likely possibility of effective remedy, I do not believe that the capacity-based identification approach offers us the best way to achieve this. Its flaws render it too weak to compel an agent to act. As I show below, I am not arguing that we discard the capacity-based account, but that it will be useful in conjunction with the participation-based account, which offers stronger attribution of

responsibility and overcomes the flaws of the capacity-based account.

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Participation-based Identification

A participation-based identification of responsibility-bearers appeals to our negative duty to do no harm. Agents bear a duty not to cause harm—this duty unfolds into a responsibility to avoid harm, remedy harm, and prevent harm. Remedial responsibility derives from violation of these duties. We assign responsibility to put out the fire or save the trapped victims to the person who set the building alight because of our intuition that an agent who causes harm has a responsibility to act to remedy this harm. The *participation principle* states that an agent can be identified as a responsibility-bearer on the grounds that it participated or participates in direct acts or institutional arrangements that cause or perpetuate injustices. By this principle, we pick out the blameworthy agent. By holding this agent responsible we not only create a mechanism for remedying the injustice, but we also help to put right the moral imbalance between the actor and victims. The principle reflects the ideas of *connection* described by Miller, Young, and others which connect the actor and the injustice or victim of injustice. It also captures Barry's *contribution principle*, in which agents are held responsible for remedying a harm when, and to the extent that, they have contributed to creating harm. Additionally, it includes what Krosiak refers to as *involvement* prior to and during the acts of injustice as a criterion for identifying responsibility bearers.²³

The participation principle picks out actors who are, or have been, *actively* engaged in acts that relate to the victim or social process in perpetrating, benefitting, or perpetuating an injustice. It is not the passive relation that matters or the mere fact of being a member of a community, as Miller suggests, but the act of *actively participating* in the unjust situation.²⁴ In what follows, I identify four ways in which an agent can participate in an injustice, and thus, acquire remedial responsibility on a participation-based account.

Firstly, a *perpetrator* of an unjust act is an actor who *causes* harm to a person or persons with *intention* to cause this harm.²⁵ If person x is identified as having intentionally set the building alight, then x can straightforwardly be identified as the perpetrator. A second way that an agent could participate in an injustice is as a *collaborator*. This is an actor who does not perform the unjust act but *intentionally supports* the perpetrator in his commission of the act. While x might have poured the petrol around the building

and set the fuel alight with a match, his friend *y* could have collaborated by driving *x* to the building, or could have helped him acquire the petrol and matches all with the intent of setting the building alight. Though not as blameworthy as *x*, *y* certainly participates in the unjust act. A third role, that of *bystander* is an actor who neither commits nor supports the commission of the unjust act; however, even though he has some power to stop the act, allows it to happen, especially if he knows that harm will befall the victim. If *z* observes the scene with *x* arriving to set the building alight but does nothing to stop him, even though he is able to, *z* would be regarded as a bystander in the wrongful act and would not be blameless. It might seem harsh to categorize a bystander as participating in the injustice, but by not intervening to stop the injustice, the bystander has contributed to the injustice coming to pass. The bystander would not carry as much moral culpability for the injustice as the other two actors.

A fourth potential role that an actor could play in an injustice is that of *beneficiary*. Suppose that an actor has played no causal role in the process that led to a victim's deprivation but has nonetheless benefited from that process, for example, by gaining resources that belonged to the victim. If, after *x* delivers a disabling punch in the face to *y*, *x* takes money from *y*'s pocket and shares it with his friends, including *z*, who played no role at all in the punching or robbing. We would consider *z* a beneficiary of the unjust acts. By benefitting from the injustice, *z* becomes connected to the victim, *y*. We would judge that the beneficiary has sufficient reason to return the stolen money to the victim since he has been unjustly enriched even if he himself has not behaved unjustly. This idea is illustrated by Thomson in her argument for preferential hiring of black males and women over white males in the United States, given the country's discriminatory past. Referring to white males, she writes:

No doubt few, if any, have themselves, individually, done any wrongs to blacks and women. But they have profited from the wrongs the [white] community did. Many may actually have been direct beneficiaries of policies which excluded or downgraded blacks and women—perhaps in school admissions, perhaps in access to financial aid, perhaps elsewhere.²⁶

Thomson makes the point that the absence of direct acts of injustice does not preclude culpability for such injustices if an actor has benefitted from the injustice. The strength of one's ethical reason to alleviate some hardship or unfair social rules depends on the extent to which one has benefitted from its injustice, even if, by being enriched, you have not behaved unjustly.²⁷

This issue of participation is fairly straightforward when corporations commit direct harmful acts such as endangering the lives or livelihoods of employees, customers or communities through negligent, risky or malicious practices, such as poor factory maintenance, taking on excessive debt, or discharging poisonous effluent from a factory into a water source. But sometimes the nature of a corporation's operations or the nature of the injustice is such that it is not possible to identify a single harmful act or a wrongdoer such as in cases of *structural injustices*. These injustices are propagated through social process and structures through time by agents' every day actions, which are products of previous actions that are coordinated and uncoordinated but mutually influencing actions.²⁸ According to Young, "people act on the basis of their knowledge of pre-existing structures and in so acting reproduce those structures."²⁹ These social norms are often informal, undocumented behaviours, and processes that are built into the normal operations of society and are embedded in social institutions, and thus do not arise from intentional harmful acts. They arise when a social order is characterized by weak or unfair rules, such that deprivations can exist without being easily traceable to the actions of particular individuals or groups.³⁰ Similarly, Pogge argues, that in the global context, by shaping and enforcing the social conditions that avoidably cause devastating poverty, the affluent- through trade and corporate activity- are actively harming the poor, and gaining their wealth at the expense of the poor.³¹ According to this idea, it is the social processes that propagate injustices, and since corporations participate by their actions in the ongoing schemes of cooperation that constitute these processes, they ought to share in the responsibility of the outcomes of these processes. Corporate participation is to be found in shared social arrangements through trade, employment, the banking system and the capital markets, all avenues through which injustices are also metered out on the vulnerable.

A typical objection to the participation-based identification account is that expressed by Pattison, who points to the difficulty in disentangling the role played by a potential responsibility-bearer from that of other agents. Moreover, the agent responsible for the injustice would be ineffective because the victims will resist its involvement in remedy owing perhaps to their distrust of the agent.³² I agree with Miller's response to Pattison, that the claimed indeterminacy of an agent who participated in an injustice is no more indeterminate than the issue of future effectiveness, which the capacity account advocates. Miller writes:

The past may need interpretation, but at least the record is open to inspection, whereas when we are trying to judge who will be most effective in bringing the human rights violations to an end, we are at best in the realm of informed conjecture.³³

The most severe difficulty that the participation-based account faces is the claim that it is self-defeating in cases where an agent may have participated in the injustice but does not possess the capacity to remedy the injustice. The claim is that we are no better off since we would have a responsibility-bearer who cannot act- although there are agents who possess the capacity to act to remedy the injustice, but who have not been picked out by the participation principle. However, as indicated above, the idea of an agent lacking capacity seems mistaken.

Is participation necessary and sufficient? There is greater moral force to assigning remedial responsibility to an agent who participated in someone's suffering but lacks the capacity to remedy the injustice itself, than merely an agent who possesses the capacity to remedy. The idea that an agent needs the capacity to act depends importantly on what the act requires but also what we mean by capacity. The capacity principle rejects the idea that an agent who lacks capacity can be effective in remedying the injustice. This might sound like common sense but it does depend on our definition of capacity. For example, we could identify the agent who bears the capacity to extinguish a burning building as the agent who possesses the skill and equipment to fight a fire. But what about an agent who possesses neither but has the ability to contact the fire station in an emergency which others lack, or possesses the ability to convince a fire chief that this fire is more important than the training his team is about to embark on. The woman in the wheelchair may not be able to enter the burning building but this does not mean she is off the hook. There are actions that she can take that would contribute to the rescue of those trapped inside. These actions may include calling an emergency telephone number, trying to coordinate the rescuers or offering material help, such as water and energy bars to those entering the building to sustain them.

Surely an ability to facilitate the delivery of the remedy contributes to the remedy even if this agent is not part of the actual delivery. This broadens our definition of capacity. In essence, an agent bears capacity if it can contribute, in some way, to the remedy, whether acting directly upon the injustice, marshalling others to act, or making another type of remedial contribution. If we accept that every agent bears this minimum capacity, then our grounds for attributing responsibility can be participation alone. On the grounds of its participation, we hold an agent responsible for ensuring that

the injustice is remedied. This can be achieved through its own action or facilitating the action of others.

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A Logic for Ranking Responsibility-Bearers

Theorists often deal with the concept of responsibility-bearer in a binary fashion, that is, an agent either bears responsibility or it does not. The reality is that agents bear degrees of responsibility. In a globally-connected world, virtually every agent is connected to every other however minute or diffuse that connection might be. A person buying a T-shirt in a London department store is distantly connected to the person manufacturing the T-shirt in a sweatshop in Asia. But we would certainly hold the owner of the sweatshop more responsible for the injustice in the sweatshop than the person in London.

Caney distinguishes between different types of duties that agents of justice can bear.³⁴ A first-order duty-bearer is a duty-bearer who should in the first instance perform the duty. As we have discussed, he, too, acknowledges that first-order duty-bearers sometimes do not do what they are supposed to do. Where there has been a failure to act by a first-order duty-bearer, there needs to be a back-up to step into their place to ensure that the injustice is remedied. This back-up needs to fulfil the role that the original duty-bearer should have performed. This process can then be iterated if the second-order duty-bearer fails to do their job, and so on.

The discussion on the grounds of assigning responsibility offers us the following guidance in terms of factors that we should apply to agents to determine the order in which they should intervene to remedy injustice:

Factor 1: Agent(s) who have been assigned the role by society.

Factor 2: Agent(s) who have participated in the injustice.

Factor 2a: This set of agents is then ranked by levels of participation.

Factor 3: Agent(s) who have not participated in the injustice.

Factor 3a: This set of agents is ranked by effective capacity.

Factors 1, 2, and 3 give us a macro-ranking of the sets of agents, with Factors 2a and 3a ranking the agents within these sets.

The factors are applied as follows: faced with an injustice that requires remedy, we first apply Factor 1 to the set of all poten-

tial agents and prioritize for intervention those agents to whom society has assigned the role to address the injustice at hand. If this agent fails, neglects its duty, or its efforts are insufficient to remedy the injustice, we will look to the remainder of agents to pick out those who ought to intervene. We start by applying Factor 2 to the remaining agents, picking out those who have participated in the injustice whether directly or through institutional arrangements, or whether as perpetrator, collaborator, bystander, or beneficiary. If these agents are ineffective in remedying the injustice we then look to the remaining agents who we rank by their capacity to contribute to the remedial action. This sequential process offers us a guideline for the order in which agents should act. It is not without difficulties as we would expect. The challenge of ranking effective capacity among agents remains, and so does the challenge of ranking levels of participation, especially when agents have participated in different ways. These challenges will need further work to address.

Restatement of the Justice Intervention Framework

The three steps and three factors combine into our framework. The factors are employed to guide decisions for each of the steps.

Steps:

Step 1: Establish that the target agent bears responsibility to act to remedy the injustice.

Step 2: Identify the set of other responsibility-bearers.

Step 3: Rank the set of responsibility-bearers to reveal when the target agent should act.

Factors:

Factor 1: Agent(s) who have been assigned the role by society.

Factor 2: Agent(s) who have participated in the injustice.

Factor 2a: This set of agents is then ranked by levels of participation.

Factor 3: Agent(s) who have not participated in the injustice.

Factor 3a: This set of agents is ranked by effective capacity.

We are now in a position to assess when the corporation should intervene to remedy injustice.

Applying the Justice Intervention Framework: The Case of the Corporation

While our principles of justice and grounds for identifying respon-

sibility do not change as we consider different unjust situations, the actor who is picked out as responsibility-bearer will change depending on the situation of the injustice. We identified the fireman because there was a fire; in a different situation, say a medical emergency, we would look to paramedics or doctors as bearing responsibility on the grounds of their role. In considering when the corporation bears responsibility to act, I propose that we consider three different situations with distinctly different injustices and different remedies. I will consider situations of a humanitarian crisis, such as armed genocide, requiring military intervention, a humanitarian crisis that does not require military intervention, such as mass starvation due to poor governance, and worker exploitation. I hope to show that corporations hold different positions of priority to act in different unjust situations.

In considering the corporation as a bearer of justice-responsibility, I will not seek to present a full defence against objections to the corporation bearing any such responsibility. The most common of these is that the corporation only bears responsibility to its shareholders, and that any other application of its resources would be neglect of this responsibility. Relying on the arguments that others have made, I am here taking as given that the corporation is an agent fit to be assigned moral responsibility, especially in the face of unjust situations and when it has participated in the creation of the injustice.

I will now follow the three steps of the justice intervention framework with the corporation as our target agent, applying the three factors of the framework to each step. For each of the unjust situations we will imagine a country in which the injustice occurs, and then consider who the responsibility-bearers may be. Note that we are not considering a specific corporation in this analysis, but the typical corporation as we experience it in the real world today.

Step 1: Establish that the target agent bears responsibility to act to remedy the injustice.

In none of our three unjust situations would we assign responsibility to the corporation on the grounds that it is its role to restore justice (Factor 1). The corporation's purpose is not to discharge military duties, remedies of mass starvation, or to fight against worker exploitation.

Can a corporation be judged to have participated in these injustices?

Genocide: A humanitarian crisis requiring military intervention could arise, say, in a case of genocide where mass killings

are committed by one section of a population against another. In such a case, the state could either support the killings or lack the power to prevent it. Given the levels of violence and death, it may be justifiable that external military intervention is required to begin the process of restoring justice. It is not inconceivable that some rogue corporation could support the genocide, but this would be unlikely in the normal course of business operations. While some businesses might benefit from a surge in demand for certain products, perhaps medical supplies, we would not consider this unjustified benefit, and therefore would not assign responsibility to the corporation by the participation principle.

Mass starvation: We would assign low responsibility to the corporation, unless it was involved in the structural processes that caused food not to get to people, or prevented a group from being able to access food through hoarding or overpricing products. But in most cases starvation occurs through a combination of environmental, economic and governance issues, the latter being arguably the most significant. Corporations may possess financial resources to procure food and transport it to the area of need. This would be considered relief aid, the remedy required to change the structural injustice of mass starvation requires institutional change which the corporation can support but needs to be enacted by a body with such authority.

Worker exploitation: Corporations can be involved in exploiting employees particularly when they are vulnerable owing to past discrimination or current forms of oppression. Such situations leave people vulnerable to exploitation, a situation where one party uses its superior bargaining position to win favourable terms for it from another party in an agreement between them. The agreement is morally problematic when the powerful party breaches certain fairness expectations to gain unfair terms for itself, at the expense of the weaker party, who has little reason to hope for a better deal.³⁵ Corporations operating in societies with histories of discrimination are most likely to be in situations, wittingly or unwittingly, to exploit workers. Where exploitation occurs anywhere in a corporation's supply chain, the participation principle picks them out to bear some responsibility for remedy.

Step 2: Identify the set of other responsibility-bearers.

Given the scale of the injustices that I want to consider, I will set aside identifying individuals as agents and focus on institutional agents. Institutions fall into three broad categories according to the three sectors in society, namely: public, private, and third

sector. Public sector institutions would include the state and different levels of government whether national, provincial, or local, state agencies such as environment protection agencies, and state-owned enterprises. Private sector institutions are mainly commercial, for-profit corporations, while third sector includes organizations with a social mission, namely non-profit organizations, charities, foundations, and the like. Institutions in all three categories could also be domestic (operating only in the country where the injustice occurs), multinational (operating in multiple countries including the country where the injustice occurs), and foreign (operating only in one country but not where the injustice occurs). Even with these broadly-defined categories we gain a sense of the breadth of possible agents.

Genocide: The role-based account would assign first-order responsibility to multilateral organizations such as the UN, particularly the Security Council, and perhaps other regional institutions such as the African Union if the genocide was occurring in Africa. It is conceivable that the participation principle picks out foreign nations as responsibility-bearers. This would be the case where it could be argued that a foreign nation stirred up racial or sectarian hatred that led to the genocide or supplied military equipment to the perpetrators knowing their plans.

Mass starvation: Other than the domestic state there are no public or private sector bodies constituted to provide for a nation's basic nutritional needs or to deal with situations of large-scale shortages which could result in mass starvation. A global Inter-Governmental Organization such as the World Food Programme does bear role responsibility for dealing with such crises and is equipped to deal with them. If the state has failed to secure the basics of food for its citizens, responsibility to protect obligations might pick out foreign states to intervene, as it would in the case of genocide. The participation principle would identify any agencies that have intentionally deprived groups of citizens of food or neglected to provide for them. These would most likely be domestic agencies.

Worker exploitation: International political theory tends to focus mainly on the question of intervention in relation to humanitarian crises overlooking the injustices that are not considered life-or-death crises but that heap misery upon significant portions of the world's population. The exploitation of people is one such example which comes in many forms, whether inhumane working conditions, slavery, or simply taking advantage of their vulnerability. The participation principle would most clearly pick out corporations as responsibility-bearers for worker exploitation as well as public agencies and industry bodies that either do not

prevent such exploitation when they are able to do so, or actively lobby for such behaviour.

Step 3: Rank the set of responsibility-bearers to reveal when the target agent should act.

A thorough ranking of agents for each of these injustices would be an empirical exercise. What I hope to do here is show that the Justice Intervention Framework provides the normative basis for setting out principles for such a ranking. It allows us to offer an answer to our core question: When should the corporation intervene?

Genocide: The corporation would not be a first-order responsibility-bearer in this situation and even with failures of first-order responsibility-bearers to act, it is implausible that we would see a private organization, such as a commercial corporation, bear responsibility to perform a military intervention either at home or elsewhere. While this might be a fairly obvious conclusion, it is important for clarity that when we talk of corporations bearing responsibility to secure justice, there are limits on the nature of the injustices and the type of interventions that corporations can be seen to be making. This case has made this point clear. Corporations can justifiably stand back to allow agents sanctioned by international law to act.

Mass starvation: The corporation would be closer to the front of the line, so to speak, to act in this case than with genocide but well behind several other responsibility-bearers. This might appear to some as an absurd conclusion, especially those who support a capacity-based view of responsibility. This conclusion seems to suggest that even though a corporation might possess vast financial resources that could contribute meaningfully to saving possibly millions of lives, it does not bear the responsibility to rush to the front of the line to do this. How could we justify such a position? The response calls upon our earlier discussion on the weaknesses of the capacity principle. We can only justifiably require an agent to act to remedy an injustice when it has not participated in its creation, and when doing so will not create a new harm.³⁶ The corporation has numerous claims on its resources in addition to its shareholders, namely employees, customers, suppliers, and other financiers. Abandoning these responsibilities in favour of a crisis, as unpalatable as it might seem, could constitute a harm to these stakeholders. Of course, this does not preclude the corporation from making charitable contributions to the crisis.

Worker exploitation: The framework identifies the corporation as a leading responsibility-bearer when it comes to remedying

the injustice of worker exploitation. After the state, the corporation would be among the next in line to act given its strong participation in the injustice. We would expect the corporation to not only contribute to remedy but also contribute to the promotion of institutions that would prevent this type of employment in the future, as well as changing its operational practices in the interim to avoid continued complicity in the unjust practice.

The thrust of the participation principle is felt most in the worker exploitation case because we can observe how the corporation is entangled in its creation and perpetuation. Even when corporations do not perpetrate these injustices by virtue of participation in the social arrangements of trade, they benefit from it. The strength of the participation principle over capacity or effectiveness is that it not only identifies the responsibility-bearer based on actual evidence of past and current participation, but also appeals to a strong moral principle, that of avoiding doing harm.

Conclusion

In theorizing the responsibility of agents to act to remedy injustice, we face a tension between the effectiveness of the remedy and fairness to the agents. This is especially the case when an agent, such as a corporation, bears responsibilities to its stakeholders. By building the action-guidance framework on the participation principle, we avoid this tension since it eliminates the unfairness of the capacity principle without compromising effectiveness. The resulting framework shows that the corporation can justifiably refrain from action in unjust situations, where it bears no role-responsibility, and where it has not participated in the injustice. However, it is required to be among the first responsibility-bearers to act when it can be judged to have participated.

Notes

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FOREIGN DIRECT INVESTMENT IN EXTRACTIVE INDUSTRIES: DOES DEMOCRACY MATTER?

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Abstract

How sensitive is foreign direct investment (FDI) in extractive industries to a country's regime type? Does this sensitivity vary across the petroleum and metals mining industries? The political economy of when and why multinational corporations invest is particularly relevant within the extractive sector, in which the immobility of capital exposes investors to relatively high post-investment expropriation risks. Using economic concentration and regime trend data from 66 countries for 1970-2012, I perform differences-in-differences analysis involving fixed-effects panel regressions and time-series graphs to determine the absolute and relative sensitivities of investors in metals and petroleum industries to political institutions. I find that improvements in political institutions are associated with a transitory and economically insignificant change in inflows to both oil and metals industries. On a comparative basis, polity is associated with immediate changes in metals FDI and more delayed changes in oil FDI, though the lack of statistical significance prevents definitive conclusions. Potential buffers behind this weak relationship hold important implications for governance in resource-rich countries and represent an avenue for further research.

Introduction

While many countries recognize investment is crucial to economic development, the political economy of when and why investors consent to putting capital at risk is less clear.¹ This question is particularly relevant in the context of transnational capital flows within extractive industries, in which the lack of legal redress outlets and immobility of capital expose investors to relatively high post-investment expropriation risk.² Foreign capital presents a means by which resource-rich countries can unlock the revenue potential of local endowments. Because such states often possess weak institutions and infrastructure, it is worth understanding when and how such governance affects the investment decisions

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of oil and metals multinational corporations (MNCs).³ Foreign direct investment (FDI) is cross-border investment in which a resident entity of one economy obtains a lasting stake in a resident enterprise of another economy.⁴ Primary sector FDI has grown over fourfold in absolute terms since the early 1970s.⁵ Nationalization of primary-sector industries from the 1950s to the 1970s closed many developing markets to outside investment, but political liberalization and growing foreign debt obligations throughout the 1980s and 1990s prompted policy reversals, as the importance of foreign capital to resource-rich economies became clear. Many countries initiated one of several strategies to attract FDI, allowing outright foreign ownership, contracts, production sharing, or joint ventures in the primary sector. Simultaneously, multinational interest in overseas extraction opportunities has strengthened over the past two decades, prompted by rising commodity prices. Global demand for primary products and corresponding MNC interest in expanding overseas makes a study of investor sensitivity to political features in potential investment recipients timely.

This topic is relevant in a development context because foreign capital plays a vital economic role in many resource-reliant countries. Indeed, FDI captures a sizeable share in the resource sectors of major mining and oil economies, ranging from fifty percent to one hundred percent of metals production in mining-based countries, and averaging twenty-two percent of global oil and gas production and fifty-seven percent of production in sub-Saharan Africa as of 2005.⁶

In many of these resource-reliant countries, FDI to extractive industries represents a large share of total inward FDI. As of 2005, extractive industries attracted over twenty percent of inward FDI stock for twenty-two major resource producers, including over fifty percent for seven.⁷ Because natural resource production represents a substantial income source for many countries, it is worth studying the degree to which political institutions represent a pull factor for foreign capital and how such a role may vary across different segments of extractive enterprise. This study examines the determinative role of political institutions on FDI patterns in extractive industries, assessing whether sensitivity of investors to political institutions varies across industries within the primary sector.

Literature Review

Background

The interaction between MNCs and host governments has been studied since the 1970s, when international direct investment

emerged as key fixture of the global economy. One model of this dynamic in particular has served as the foundation for subsequent theoretical literature on MNC motivations and the determinants of FDI flows. Vernon modeled FDI as a negotiation in which bargaining power shifts from investor to host country once the investor has delivered capital to the country.⁸ In this model, delivering capital to a given location exposes such capital to the political and macroeconomic features of a host country. Post-investment risk is greater in the multinational context, because foreign investors cannot rely on domestic political institutions or supranational courts for legal remedies.⁹ The shifting exposure of capital to local institutions points to a shifting power balance between MNCs and host governments over the investment cycle.

The obsolescing bargaining theory provides a baseline understanding of an MNC's investment calculus by conceptualizing direct investors as forward thinking and risk-aware. These assumptions indicate why regime type may factor into the investment decisions of multinationals. Because the influence of the MNC over contract enforcement obsolesces after investing, MNCs look to overt signals revealing country's ex-ante credibility, such as regime type, to determine the risk of expropriation over the long-term.¹⁰

Gaps and Contribution

While there is an extensive theoretical literature on why regime type may be a more or less relevant part of the MNC calculus in general, few scholars have studied the political determinants of FDI at a disaggregated level. Indeed, industry-level FDI literature is primarily constrained by its focus on nonpolitical variables and regional case studies, which together limit empirical and theoretical insights into the relationship between governance and FDI across different forms of capital.

Sector, industry, and even firm-level studies on FDI determinants are widespread, but such studies focus on specific macroeconomic variables rather than political institutions. Walsh and Yu (2011) test the significance of eight variables for FDI flows in the primary, secondary, and tertiary sectors,¹¹ but do not consider the impact of regime type on FDI flows, which may offer a more theoretical basis for understanding how an MNC assesses investment locations than individually testing metrics of "openness," "judiciary independence," or "legal system efficiency".¹² Poelhekke and van der Ploeg test the effect of institutional quality on primary-sector FDI, but use a summed score of institutions based on six indices; this aggregate measure, which combines political and

economic qualities, makes it difficult to draw broader conclusions about sensitivity of extractive FDI flows to governance.¹³

Second, those studies that do consider how the political institutions of a country may shape its attractiveness to investors in extractive industries are temporally or regionally limited. Asiedu and Lien study the interaction effect of democracy and natural resources on FDI, using a dynamic panel model with data from 112 developing countries from 1982 to 2007.¹⁴ The focus on flows to developing countries makes any distinction among sectors specific to a relatively low-income group of countries. Poelhekke and van der Ploeg examine whether natural resources impact the sector and volume of FDI received by a country, but only consider outflows from the Netherlands.¹⁵ Sekkat and Veganzones-Varoudakis study how the effects of political and economic factors on FDI differ between the manufacturing sector and other sectors, but the regional focus on MENA limits their ability to inform theoretical understanding of manufacturing FDI drivers.¹⁶

The restricted focuses of studies on sectoral FDI determinants are partially attributable to data shortages. While measures of political institutions are easily accessible, cross-country time-series measures of FDI stock and flows in different economic sectors are not yet available on a comprehensive basis. Historical FDI data for extractive industries was available for thirty eight to fifty-four countries as of 2005, but only seventeen countries reported metals FDI and oil and gas FDI separately.¹⁷ Further, even in these cases historical data is neither publicly available nor coherently reported. The lack of industry-level FDI data covering an extended set of country-year observations goes far in explaining the current regional or temporal limitations of extant studies.

This study attempts to address each of the gaps detailed above. First, I compare the role of *regime type* in MNC perceptions of a potential investment target across different industries; using regime type as my independent variable provides insight into whether political institutions influence investor decisions in extractive industries. Second, I subset my dataset solely by resource-reliance, rather than a specific geographical grouping, and consider FDI flows from as early as 1970, when such investment first underwent rapid expansion on a global level. Finally, I sidestep data shortages through a proxy approach, using total FDI to resource-reliant economies as a measure of FDI to the resource sector.

Theory

Corporate strategy scholars point to variation in ex post expropriation risk across capital forms as an explanation for variation in

sensitivity to ex ante indicators of such risk (such as government institutions). The immobility of extractive technology reduces the perceived and actual contribution of MNCs post-investment, making such capital more easily appropriable by local governments than that requiring repeated value-added from the investor. This framework implies that, for a given level of property right protection,¹⁸ MNCs in more capital-intensive industries should be more wary of political factors in a host country because such factors reflect government credibility and hence, the chance that sunk capital will be expropriated. *Hence, I predict that FDI in both extractive industries will be sensitive to regime type.*

Restricting analysis to extractive industries holds variation in capital immobility constant, because both metals and oil extraction involve heavy machinery and limited contributions from the foreign investor after such machinery has been delivered. Keeping constant expropriation risk allows me to directly test the importance of features that differ between oil and metals extraction for relative investor sensitivity to political institutions. Because metals extraction is more labor-intensive than oil extraction, it involves greater reliance on politically-determined operational conditions for profitability. *Hence, I predict that for a given improvement in government institutions, metals mining FDI will change at a faster rate than oil FDI.*

Data

Regime Type

In order to group countries according to regime trends, I draw on the widely-used continuous Polity 2 scale of the Marshall and Jaggers' Polity IV Project (2013),¹⁹ which codes country-years on a continuous scale from -10 to 10 based on eleven features of governmental structure. Interruption, interregnum, or transition periods are denoted by specific scores (-66, -77, -88). I code countries as consolidated democracies given a polity score above 66. For ease of interpretation in my regression and graphical analyses, polity scores are scaled to 0-100.

Foreign Direct Investment

FDI inflow in a given country-year serves as the dependent variable. I examine flows rather than stock because of my interest in investor sensitivity to regime trends. FDI inflows for a country-year reflect the degree of investor interest in a country new to a given year, so will capture any change in MNC interest resulting

from a change in regime type. I employ UNCTAD data on FDI flows for 1970 to 2012.²⁰ UNCTAD estimates such data on a net basis, as the sum of new equity purchases, reinvested earnings, and loans from the direct investor to the direct investment enterprise less divestment and both dividend payouts and loans to the investor from the direct investment enterprise. In graphical and regression analyses, I use a log transformation to reduce the skewness of FDI flow values, which generates a more homogenous scale for the dependent variable than would be observed through raw FDI flows without relying on outside controls prone to additional data shortages.

Classifying Countries by Resource Reliance

This paper addresses shortages in sectoral FDI data by examining the share of economic production claimed by each industry. Resource-specific FDI is proxied by total FDI inflows received held by major producers of a given resource. To calculate the economic concentration threshold by which to categorize countries as oil-based or metals-based, I use a four-step process drawing on natural gas and metals production data from Haber and Menaldo,²¹ which spans 165 countries for 1800 to 2008. First, I subset the dataset to 1970 as the technology for commercial oil production was developed in 1859, calculate the portion of GDP claimed by natural gas and metals production for each country-year from the first year in my overall study (1970) to the latest year covered by Haber and Menaldo²²; third, I calculate each country's average metals income and average oil income for the years it is included in the shortened Haber and Menaldo dataset; finally, I then determine the quartile values of these averages to gauge the global range of production levels within each industry.

I select the third quartile as a threshold for classifying countries as resource-reliant. If a given country's average oil income as a share of total production is at or above the third quartile of means across the entire dataset, then that country is coded as oil-dependent; the same process applies for metals-dependent countries. All countries whose average oil and metals income are below the respective third-quartiles of means are coded as neither oil- nor metals-dependent.

Haber and Menaldo classify a country as resource-reliant if over five percent of its GDP is concentrated in resource-based industries.²³ Descriptive statistics reveal that such a threshold is largely met when classifying countries as oil-producers or metals-producers based on the method discussed above; average oil income in oil-based countries is 2.34 percent of GDP while average

metals income in metals-based countries is 6.82 percent. Given the large share of productive capacity concentrated in the metals and petroleum industries, it is reasonable to assume that a majority of inward FDI is directed to these industries.

The threshold process described above results in a classification of countries according to resource-dependence, reproduced in Figure 1.

Figure 1. Countries by Resource Dependence

<i>Metals-Dependent</i>		<i>Oil-Dependent</i>	
Albania	Fiji	Argentina	Iran
Bolivia	Mali	Croatia	Iraq
Botswana	Peru	Hungary	Kuwait
Brazil	Cuba	Indonesia	Libya
Chile	Gabon	Mexico	Oman
Ghana	Guinea	Romania	Qatar
Honduras	Guyana	Venezuela	Russia
Mongolia	Kazakhstan	Nigeria	Saudi Arabia
Sierra Leone	Liberia	Pakistan	Syria
South Africa	Malaysia	Ukraine	Turkmenistan
Zambia	Mauritania	Afghanistan	Uzbekistan
Namibia	Australia	Algeria	Denmark
Papua New Guinea	Canada	Azerbaijan	Ireland
Singapore	Jamaica	Bahrain	Netherlands
Suriname	Sweden	Egypt	New Zealand
Zimbabwe		Equatorial Guinea	Norway
		Trinidad and Tobago	United Kingdom
			United States

For countries meeting both thresholds, I sum the production shares for each over the period 1970 to 2008. If the summed share of oil exceeds the summed share of metals in total production, then the country is classified as an oil-producer.

Classifying countries by economic concentration provides a basis for understanding industry-specific FDI trends in response to regime trends of countries in each set. For both the oil-dependent and metals-dependent groups, I classify countries as democratizers, stable autocracies, stable democracies, autocratizers, or fluctuators based on the country's polity scores during the years covered by the dataset. Those countries that begin with polity scores under 6, and transition to consolidated democracy by 2012 are classified as democratizers; those that maintained a score of seven or above are classified as stable democracies; those countries that maintained a score of six or below throughout are classified as stable autocracies; those countries that fluctuated between consolidated democracy and autocracy two or more times are classified as fluctuators; and those countries that began with scores over six and only saw polity fall across the period are categorized as "autocratizers."

The specific groups produced by this dual classification system are outlined in Figure 2, with resource-dependent countries classified by regime trend and economic concentration. Countries that fluctuate across the period form the basis for brief case studies into the dynamics of foreign investment and regime transitions following the differences-in-differences analysis.

Figure 2. Countries by Resource Dependence and Regime Trend

	Democratizer	Stable		Fall	Fluctuate
		Democracy	Autocracy		
Oil	Argentina	Denmark	Afghanistan	Venezuela	Nigeria
	Croatia	Ireland	Algeria		Pakistan
	Hungary	Netherlands	Azerbaijan		Ukraine
	Indonesia	New Zealand	Bahrain		
	Mexico	Norway	Egypt		
	Romania	Trinidad and Tobago	Equatorial Guinea		
		United Kingdom	Iran		
		United States	Iraq		
			Kuwait		
			Libya		
			Oman		
			Qatar		
			Russia		
			Saudi Arabia		
			Syria		
			Turkmenistan		
Metals	Albania	Australia	Cuba	Fiji	Mali
	Bolivia	Canada	Gabon		Peru
	Botswana	Jamaica	Guinea		
	Brazil	Sweden	Guyana		
	Chile		Kazakhstan		
	Ghana		Liberia		
	Honduras		Malaysia		
	Mongolia		Mauritania		
	Sierra Leone		Namibia		
	South Africa		Papua New Guinea		
	Zambia		Singapore		
			Suriname		
			Zimbabwe		

Methods

Using the groups constructed above, I conduct a differences-in-differences analysis incorporating both time-series graphs and a fixed-effects panel framework. A differences-in-differences framework stimulates an experiment in which democratization serves as a treatment for those countries that democratized over the period 1980 to 2012 and non-democratizers provide a control group, and is therefore suitable for comparative analysis of political effects on FDI in different industries. I evaluate the absolute impact of political institutions on FDI in metals FDI and oil FDI separately by determining the association of polity and FDI inflows for countries concentrated in that industry. Comparing these associations

across the oil and metals groups offers a gauge of relative sensitivity to political institutions by MNCs in these industries.

In addition to regression and graphical analyses, I conduct case studies of two countries representing regime fluctuators: Nigeria for oil producers and Peru for metals producers. Identifying transitions in and out of consolidated democracy for these two examples across 1970 to 2012 provides clues to whether and according to what timeline direct investment changed in response to such transitions among each resource grouping. Hence, case studies enable assessment of regression results, and help uncover mechanisms by which the scale and direction of sensitivity to political institutions may be explained.

Fixed-effects panel estimation

As a baseline specification, I regress FDI on polity within oil-dependent countries and metals-dependent countries. Country fixed-effects account for time-invariant features of countries in the samples, while year fixed-effects account for global trends in FDI flows. I test the impact of these factors on FDI inflows by excluding them in supplementary regressions.

Controls target omitted variables that may impact either extractive FDI or regime type. Including per capita GDP accounts for a country's level of economic development, which may shape both its political institutions and its attractiveness to foreign capital. These inclusions produce the following baseline specification:

$$FDI_{industry} = \beta_0 + \beta_1(\text{Regime Type}) + \beta_2(\text{GDP/cap}) + \beta_3(\text{Country Fixed-Effects}) + \beta_4(\text{Year Fixed-Effects}) + \beta_5(\text{Others})$$

I run separate regressions using unbalanced panel data over the period 1970 to 2012 for each group. I regress FDI on polity in twelve specifications involving country and year fixed-effects, including single lag models up to five years and a five-year distributed lag model for each group. Lag models illustrate changes in FDI attractiveness that may *result* from a change in polity, rather than simply a time-independent correlation between polity scores and FDI inflow.

In four additional specifications, I include primary income on FDI as a control in order to account for the role earnings on investment play in subsequent MNC decisions. Addressing earnings on FDI as a potential driver of future investor interest isolates the degree to which political institutions influence direct investment decisions independent of financial considerations.

Finally, I conduct all regressions excluding first year fixed-

effects and then both year- and country- fixed effects. The former specifications allow me to determine to what extent variation in the outcome variable, FDI inflow, is simply attributable to global shocks unrelated to polity. Excluding both country and year fixed effects provides a raw relationship between polity and FDI in each industry that enables me to indirectly capture the role of global shocks and country-specific factors in the baseline fixed-effects models.

Results

Regression Analysis

Figure 3a. Metals FDI and Polity, controlling for country and year fixed-effects

METALS	1-Year Lag	2-Year Lag	3-Year Lag	4-Year Lag	5-Year Lag	1-Year Lag, controlling for 1- Year Lagged Primary Income
Coefficient	[-0.000586]*	[-0.000539].	-0.000446	0.000377	-0.000366	0.0000312
Polity Change	10.832878	10.911751	10.989398	11.063588	11.140598	11.26398
Effect	-0.006353	-0.005882	-0.004898	-0.004177	-0.004078	0.000351
Effect (%)	-0.64%	-0.59%	-0.49%	-0.42%	-0.41%	0.04%
Observations (n)	1171	1144	1117	1090	1063	902
Control: Primary Income	No	No	No	No	No	Yes
CFE	Yes	Yes	Yes	Yes	Yes	Yes
YFE	Yes	Yes	Yes	Yes	Yes	Yes

Figure 3b. Metals FDI and Polity, controlling for country and year fixed-effects, no country or year fixed-effects

METALS	1-Year Lag	2-Year Lag	3-Year Lag	4-Year Lag	5-Year Lag	1-Year Lag, controlling for 1- Year Lagged Primary Income
Coefficient	[0.151508]***	[0.148857]***	[0.146380]***	[0.144110]***	[0.142248]***	[0.009389]***
Polity Change	10.832878	10.911751	10.989398	11.063588	11.140598	11.263983
Effect	1.641269	1.624295	1.608632	1.594375	1.584731	0.10576
Effect (%)	164.13%	162.43%	160.86%	159.44%	158.47%	10.58%
Observations (n)	1171	1144	1117	1090	1063	902
Control: Primary Income	No	No	No	No	No	No
CFE	No	No	No	No	No	No
YFE	No	No	No	No	No	No

Figure 4a. Oil FDI and Polity, controlling for country and year fixed-effects

OIL	1-Year Lag	2-Year Lag	3-Year Lag	4-Year Lag	5-Year Lag	1-Year Lag, controlling for 1- Year Lagged Primary Income
Coefficient	0.0003905	0.0003575	0.0006191	0.0004639	0.0007332	[0.004699].
Polity Change	9.3868819	8.7861175	8.6991819	8.7988648	9.361005	9.65552
Effect	0.0036652	0.00314142	0.005386	0.0040819	0.0068631	0.004537
Effect (%)	0.37%	0.31%	0.54%	0.41%	0.69%	0.45%
Observations (n)	1202	1172	1142	1112	1082	556
Control: Primary Income	No	No	No	No	No	Yes
CFE	Yes	Yes	Yes	Yes	Yes	Yes
YFE	Yes	Yes	Yes	Yes	Yes	Yes

Figure 4b. Oil FDI and Polity, no country or year fixed effects

OIL	1-Year Lag	2-Year Lag	3-Year Lag	4-Year Lag	5-Year Lag	1-Year Lag, controlling for 1- Year Lagged Primary Income
Coefficient	[0.139996]***	[0.143534]***	[0.143125]***	[0.145511]***	[0.144261]***	0.002374
Polity Change	9.386882	8.786118	8.699182	8.798865	9.361005	9.65552
Effect	1.314126	1.26111	1.245075	1.280332	1.350432	0.02291954
Effect (%)	131.41%	126.11%	124.51%	128.03%	135.04%	2.29%
Observations (n)	1202	1172	1142	1112	1082	556
Control: Primary Income	No	No	No	No	No	No
CFE	No	No	No	No	No	No
YFE	No	No	No	No	No	No

To the degree any relationship between metals FDI and polity is observable, it is transitory and economically insignificant in absolute terms. In fixed-effects models, metals FDI is significantly negatively correlated with polity at the one-year and two-year lags but significance disappears at greater lags (three, four, five) and in the distributed lag. Even at levels in which the relationship is statistically significant, raising polity by the mean of the within-country standard deviations of polity is associated with a 0.64 percent fall in metals FDI at a one-year lag and a 0.588 percent fall at a two-year lag, when controlling for GDP per capita.

No relationship between oil FDI and polity is observable in the baseline fixed-effects model. Unlike metals FDI, the strongest correlation occurs at a delayed lag (five-year) and the weakest at the lower-lag levels (two-year, one-year), but the relationship is statistically insignificant at all lag levels and in the distributed lag. Raising polity by its average standard deviation across thirty-five oil-dependent countries generates a maximum 0.69 percent rise in FDI inflows five years later.

Controlling for primary income earned on FDI in the previous year presents different directional relationships in fixed-effects models but even more compelling evidence that democratic

institutions play a limited role in foreign direct investor decisions. The positive relationship between oil FDI and polity gains statistical significance at the five-year lag, but weakens in absolute terms relative to that discovered in the initial specification and hence remains economically insignificant. Raising polity by the average standard deviation across countries in the dataset boosts oil FDI five years later by 0.45 percent.

Metals FDI becomes positively correlated with polity, but also an order of magnitude *less* associated in absolute terms and hence of even less economic significance as a driver of direct investment. Raising polity by the average standard deviation across countries in the dataset boosts metals FDI just 0.04 percent.

The relationship between FDI in both industries and polity loses significance in the distributed lag models when controlling for income on FDI. Oil FDI remains positively correlated with polity at all lag levels. As in the single-lag models, metals FDI becomes an order of magnitude less associated with polity in absolute terms and relative to oil FDI. This latter relationship remains negative at the two- and four-year lag levels and becomes positive at the one-, three- and five-year lag levels, but it is not statistically significant at any level.

The relative unimportance of polity as a driver of FDI inflows is reinforced by results when fixed effects are removed as controls in the single lag and distributed lag models for each industry. The relationship between FDI inflows in each industry and polity becomes significant at each level in oil FDI and the more delayed (three-, four-, five-year) lags in the case of metals FDI. This confirms a transitory role for polity in shaping metals FDI, and suggests that much of the variation in FDI is attributable to shocks that affect the economies worldwide rather than a specific country's political dynamics.

Graphical Time-Series

Resource-level graphs track FDI trends in each industry for countries that democratized relative to those that remained stably of one regime type; democratization serves as a treatment for those countries that transitioned to democracy over the period 1970 to 2012, while non-democratizers provide a control group. Such graphs not only enable evaluation of the long-run effect of regime trends on FDI inflows but also permit comparison of these effects across FDI in different extractive industries.

If democratic status impacted investment attractiveness, one would expect to see a major divergence in FDI inflow trends among those countries that democratized in the period under

study and those that did not. As Figure 5 demonstrates, FDI inflows do not change considerably following regime change for any of the metals-dependent democratizers; further, democratizing countries witness similar trends in FDI inflow as the stable autocracies in this pool, especially in the case of larger fluctuations. This latter conclusion in particular supports the conclusion that global shocks captured by year fixed-effects may play explain a large part of the variation in FDI inflows.

Figure 6 supports a similar conclusion for oil-dependent countries. While FDI inflow does rise in many countries following democratization, the upward trends appear to have preceded democratic consolidation. Additionally, as for metals-producers, FDI inflows to countries with stable regime types across the period trend in similar directions to democratizers, again pointing to outside factors as explanations for FDI fluctuation.

A determinative role for polity would imply a slope change in FDI trends following democratization (represented by the zero-mark in the figures below). Figure 7 shows that while FDI inflows drop sharply in two countries (South Africa and Brazil), they remain largely flat for the next decade. While FDI inflows in oil producers do not *fall* in any cases directly after democratization, as shown in Figure 8, the dip in FDI flows for some countries (Croatia and Argentina) several years after the regime change and the fact that FDI levels for most countries hit similar highs before democratization suggest a transitory but minor role for polity in shaping oil FDI. These observations point against a causal linkage between polity and direct investment inflow.

Figure 5. Relative Time Series: Democratization and Oil FDI

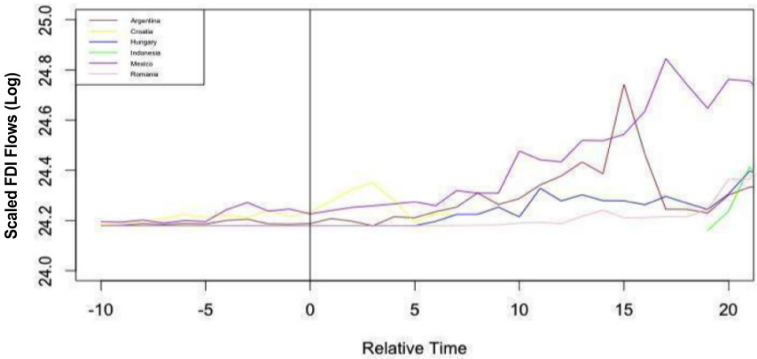


Figure 6. Relative Time Series: Democratization and Metals FDI

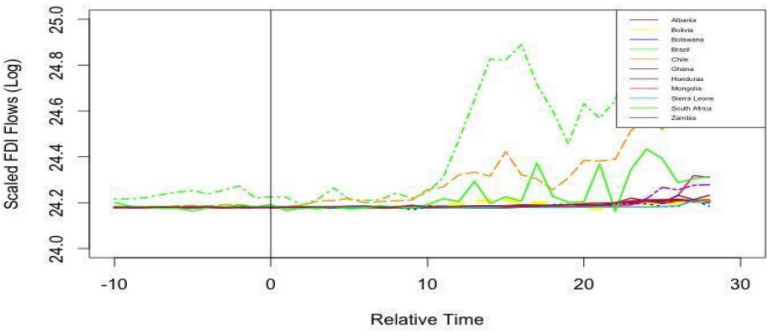


Figure 7. Oil-Dependent Countries: FDI Inflows, 1970-2012

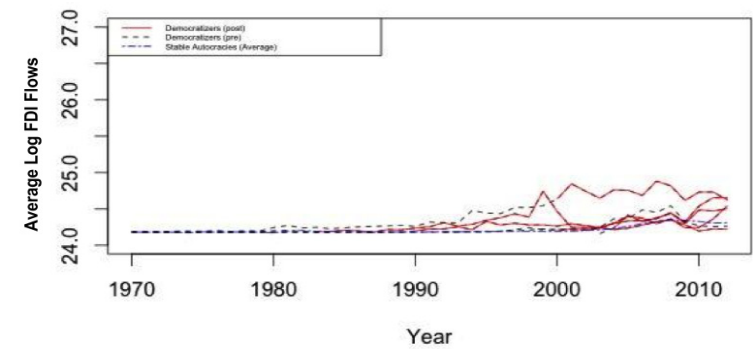
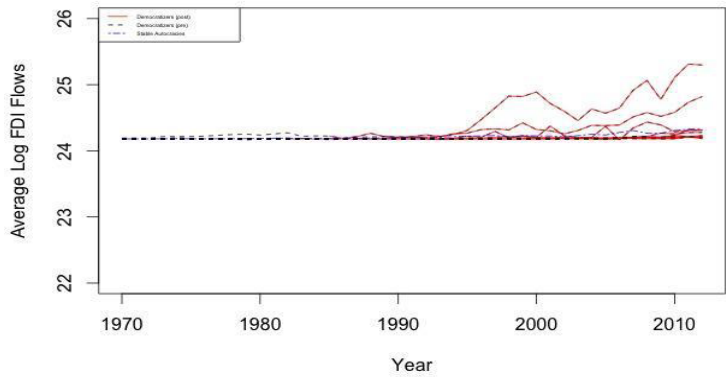


Figure 8. Metals-Dependent Countries: FDI Inflows 1970-2012



The conclusions gleaned from regression analysis are supported by reference to brief country case studies. As noted earlier, Nigeria is chosen for oil producers and Peru for metals producers because each exemplifies an economy that fluctuated in and out of democracy in the period under study, and hence helps assess causality and identify mechanisms behind relationships discovered above.

Nigeria, 1970-2012

In 1970, Nigeria was reunited from a four-year civil war under the military rule of General Yakubu Gowon, who finalized several agreements promoting economic integration in Africa but also initiated an indigenization program through the second National Development Plan in 1972. When General Ramat Muhammed overthrew Gowon in 1975, he ended Nigeria's twelve-state system but imposed a second indigenization decree in 1977, requiring foreign firms to act jointly with state and local enterprises. This second piece of legislation in particular discouraged investment by MNCs, with FDI inflows falling 52.12 percent in 1978 from the previous year.

Nigeria's polity score swung up to seven in 1979 based largely on a transition to civilian rule completed General Olusegun Obasanjo. Despite democratic consolidation, FDI inflows fell forty-six percent year on year in 1980. The economic challenges created by falling oil prices worldwide and growing perceptions of corruption increased dissatisfaction with this "second republic," leading to a military coup by Major General Buhari in 1983. Nigeria fell out of consolidated democracy in 1984 when Buhari suspended political parties. No major fluctuations in FDI are witnessed until a 397.6 percent boost in 1989, simultaneous with a two-point rise in polity and five years after a fall out of democracy.

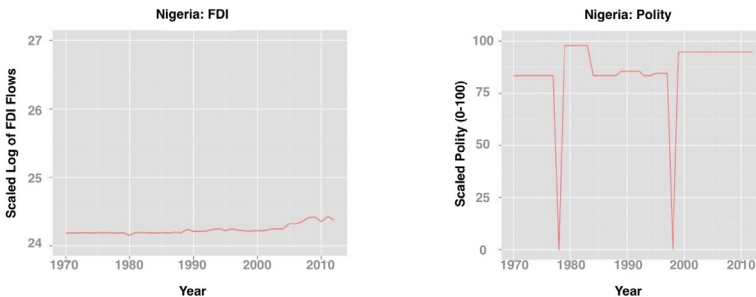
In July 1985, military chief of staff Major General Babatunde Idiagbon announced that the government had no plans to return to civilian rule and by August, the regime was deposed in a bloodless military coup led by Major General Ibrahim Babangida, who ruled through military dictatorship through 1993. When Chief Moshood Abiola of the Social Democratic Party won a majority in the 1993 presidential elections, Babangida annulled the election results. Abiola's administration created an Export Processing Zone Program in which oil and gas MNCs were allowed to hire and fire contractual workers. Despite the social instability and fall in polity in the early 1990s, FDI remained roughly flat and even rose slightly as major MNCs such as Chevron and the Shell Petroleum Development Company of Nigeria bypassed government direction and hired

local military units to secure facilities and suppress protests²⁴

Following an attempted coup in 1997, the Abacha government finally scheduled elections to restore Nigeria to civilian rule for August 1998; the country entered a transition period in 1998, after Abacha's death. His military successor Abdulsalam Abubakar promised free elections would take place in early 1999; former leader Olusegun Obasanjo was appointed president. Polity rose from -6 in 1997 to 4 in 1999, accompanied by implementation of the National Economic Empowerment and Development Strategy (NEEDS), which together with state and local counterparts set out concrete plans for infrastructural development, food and physical security, human capital improvement, and state divestiture from extractive industries as a means to attract FDI in the oil and gas as well as other industries. FDI inflows rose relatively consistently over the next five years, growing 80.6% from 1999 to 2004. During this period, Nigeria joined the New Partnership for Africa's Development with South Africa and Algeria (2001) and created the African Peer Review Mechanism (2003), both designed to preserve governance conditions attractive to foreign investors.²⁵

Nigeria's dramatic fall in FDI following democratization in 1979 and rise four years following two major coups in 1983–85 are not directionally consistent with the positive correlation between polity and oil FDI established via regression results. The fact that the country's autocratic regimes implemented liberalization policies (such as privatizing specific industries) designed to boost foreign investment in extractive industries illustrates why regime type may not be an exclusive indicator of investment attractiveness.

Figure 9. Nigeria

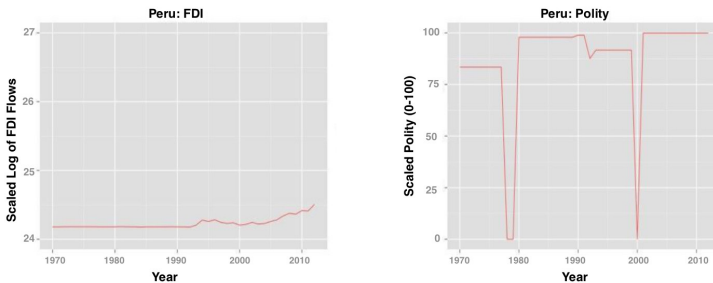


After a period of military rule under left-leaning Juan Velasco and then Francisco Bermudez from 1968 to 1980, Peru democratized in 1980 under a new constitution and the leadership of formerly-ousted Fernando Belaunde Terry. While Belaunde attempted to privatize the country's state-owned enterprises, the sell-off proved difficult because ministers were reluctant to divest personal assets because private sector resources were inadequate. Severe droughts, falling commodity prices, and hyperinflation arising from Belaunde's attempt to comply with IMF demands for monetary stabilization in return for debt rescheduling proved a breeding ground for the emergence of Shining Path, a terrorist group that challenged Peru's civilian leadership throughout the 1980s and 1990s. FDI inflows remained roughly stable throughout the period 1980–90.²⁶

Peru fell into autocracy in 1992 as Alberto Fujimori, backed by the army and citizens dissatisfied with a decade of large deficits, suspended the constitution. While FDI inflows dipped substantially (twenty-seven percent) the same year and remained relatively low during 1993, the downward trend in fact began in 1991. Fujimori continued the privatization of state-owned enterprises and set up a legal framework for foreign investment in 1991 through the Foreign Investment Promotion Law and the Framework Law for Private Investment Growth; along with key victories against Shining Path, these investment-oriented laws spurred privatization of over seven billion dollars from 1991 to 1997, at least partially attributable to foreign investment. While Fujimori reigned autocratically over the next six years, his market-oriented reforms show attention to promoting FDI. Inflows rose significantly in 1993 with the adoption of a constitution and a four-point gain in polity (to 1). FDI dipped in 2000 during a period of political uncertainty, with a transition polity score (-88). The country became a consolidated democracy in 2001, after Congress drove Fujimori into self-imposed exile in Japan over a corruption scandal and reinstated elections. Both Alejandro Toledo from 2001 to 2006 and Alan Garcia from 2006 to 2012 enacted further measures to attract foreign investment in extractive industries, spurring social resistance among indigenous communities that opposed additional mining concessions. Despite this internal unrest and continued conflicts involving Shining Path, the polity rise and directed concessions to foreign investors coincided with an eighty-eight percent rise in FDI inflows a year later (2002) and a largely stable upward trajectory continued through 2012.²⁷

In general, FDI flows to Peru appear to follow polity changes directly at a one-year lag, illustrating temporally similar, but occasionally directionally distinct results from those obtained via baseline fixed-effects estimates. While some FDI inflows do change in the predicted manner following changes in polity, closer examination shows these trends preceded polity changes, hence preventing a causal conclusion. For instance, while FDI inflows dipped substantially (twenty-seven percent) the same year and remained relatively low during 1993, the downward trend in fact began in 1991. Further, FDI inflow continued to fluctuate during periods of stable polity (1993–99) in Peru, supporting the observation that the impact of polity on FDI flows is minor in relation to other determinants. The case of Peru shows these other determinants may include concessions to foreign investors by authoritarian governments. These factors offer potential explanations for the negative relationship observed between polity and metals FDI.

Figure 10. Peru



Discussion

The lack of significance in the distributed lags, as well as the sign-age change for metals FDI when primary income is controlled for, render difficult a comparison of polity as a determinant across the two industries. Nevertheless, several general conclusions can be gleaned from regression analysis.

The first observation is that political institutions appear of limited importance as a driver of FDI flows in both extractive industries. To the degree any relationship between metals FDI and polity is observable, it is transitory and economically insignificant. Further, controlling for primary income earned in the previous year weakens the association of polity and metals FDI by a degree of magnitude, suggesting profitability plays an influential role on the investment decisions of MNCs in metals industries.

The second observation relates to *relative* sensitivities of metals and oil FDI. Metals FDI is more sensitive to regime type

than oil FDI at the one- and two-year lag levels. The strongest relationship between polity and oil FDI occurs at the longest tested delay (a five-year lag) while that for metals FDI is at the most immediate (1-year lag and 2-year lag). A one-unit rise in polity produces a greater absolute change in oil FDI (0.073 percent) than metals FDI (−0.037 percent) after five years, holding constant interim polity scores. Conversely, a one-unit rise in polity produces a smaller absolute change in oil FDI (0.039 percent) than metals FDI (−0.058 percent) after one year, regardless of subsequent polity scores. Hence, polity is associated with immediate changes to metals FDI flows and more delayed changes to oil FDI flows.

Third, while metals FDI is negatively correlated with polity at a short lag, the relationship is likely spurious because it does not hold up in distributed lag and controlled models. Indeed, the directional change in association from negative to positive for metals FDI when primary income from the previous investment year is controlled for raises the possibility that the relationship found in the baseline specification may in fact be driven by *earnings* on FDI as much as by new investor interest.

These conclusions play out in the dynamics between political and investment trends of countries that fluctuate in and out of consolidated democracy over the period 1970–2012. FDI inflows to oil-producer Nigeria are reverse in both directional and temporal terms to those expected based on its democratizations in 1989 and 1999. In metals-producer Peru, FDI inflows largely follow polity changes at a one-year lag, illustrating a similar temporal relationship to that discovered via regression. In general, no major distinctions between the sensitivity of Nigerian and Peruvian FDI flows to polity are observable from the case studies, challenging the theory that metals MNCs are more sensitive to political institutions than oil MNCs.

In addition to supporting the limited association between polity and both oil and metals FDI observable via regression results, the cases point to mechanisms that may explain its limited importance. Autocratic regimes may carry out economic reforms specifically designed to attract investment in the extractive sector. Despite regressing from consolidated democracy in 1992, Peru under Alberto Fujimori saw FDI inflows rise an order of magnitude year-on-year in 1994 and remain high through the 1990s as the autocratic administration opened new economic sectors to FDI, relaxed land-ownership restrictions, and offered foreign investors ten to fifteen year tax-stability packages. Concessions to foreign investors by authoritarian governments may entice MNCs to deliver capital to countries lower on the polity scale.

Second, the weak relationship could also reflect the tendency of some foreign investors to take an active role in securing and operating local enterprises. In some areas, MNCs have been known to pay state and non-state forces to secure operations from piracy. In response to local protests led by Ken Saro-Wiwa in in early 1990s, for instance, oil MNCs in Nigeria directly hired, trained, and armed police and military forces to protect local facilities and even to disrupt protests.²⁸ Perhaps as a result, oil FDI inflows to Nigeria did not change substantially as polity fluctuated throughout the peak protest period (1990–93). Such security forces provide a buffer between the local political and social conditions and the security of foreign investments. Hence even though countries with lower polity scores may be associated with higher appropriation tendencies and such tendencies may concern to foreign investors, MNCs can minimize risk without completing avoiding specific regime types as investment opportunities.

International organizations offer another mechanism by which countries may attract foreign investment regardless of regime type. Joining such organizations allows leaders in host countries to signal recognition that failure to abide by stipulated legal norms will result in retribution from states of investing enterprises and harm future investment prospects. As part of its bid to attract additional FDI in Peru, for instance, the autocratic Fujimori administration ratified the MIGA treaty and the OPIC accords; as mentioned earlier, FDI inflows grew throughout the first half of the 1990s. By reducing the potential losses associated with markets lacking strong political institutions, such external agencies may render regime type a less decisive factor in MNC decisions.

Conclusion

This study has used time-series and fixed-effects methods to evaluate the relationship between regime type and foreign direct investment inflows for oil- and metals-based countries from 1970 to 2012. The relationship between political institutions and investment attractiveness merits continued research given its governance implications.²⁹ If investors in extractive industries are indeed relatively insensitive to regime variables, then autocratic governments have little incentive to improve their institutions in order to attract foreign capital. In this context, the potential buffers between governance and FDI inflow uncovered through case studies present a promising avenue for further study, because they shed light on the conditions under which resource-rich countries can attract foreign capital. If membership in multilateral trade organizations improves such investment attractiveness indepen-

dent of regime changes, then governments may pursue entry to such organizations as a replacement for political development. If governments understand that foreign investors care less about regime type when they are able to import security forces or hire personal security forces locally, then undemocratic regimes can attract additional investment by guaranteeing such freedoms or even hiring out private security forces to MNCs. Hence, further research into the weak association may uncover practical steps by which governments in resource-rich countries can secure FDI without improving local political institutions.

Additionally, data examined here is monadic, focusing specifically on the effect host country regime type plays in FDI decision-making. It would be useful to conduct similar analysis with dyadic data in future research, including both host and home country regime information. This will enable assessment of whether regime type of the investor's home country influences the extent and direction by which regime type figures into an MNC's investment calculus.

Notes

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SHASHI THAROOR, *INGLORIOUS EMPIRE:
WHAT THE BRITISH DID TO INDIA*.
PUBLISHER: HURST & COMPANY, 2017.

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In the beginning, there were two nations. One was a vast, mighty and magnificent empire, brilliantly organized and culturally unified, which dominated a massive swath of the earth. The other was an undeveloped, semi-feudal realm, riven by religious factionalism and barely able to feed its illiterate, diseased and stinking masses. The first nation was India. The second was England.¹

This passage, from Alex von Tunzelmann's 2007 book, *Indian Summer*, encapsulates Shashi Tharoor's arguments in *Inglorious Empire: What the British Did to India*.

Tharoor, a former UN diplomat of thirty years and current member of Indian Parliament, reminds us of the brutish British imperialism, a force that systematically looted and destroyed India. It ruined cultural heritage, destroyed local industries, and left the country in a horrendous condition—with millions killed due to partition, an average life expectancy of only twenty-seven years, and a literacy rate of mere six percent. Along with reminding the readers of the ruthless two hundred year period of British colonialism, Tharoor dismisses arguments by historians, such as Niall Ferguson and Lawrence James, as apologist, neglecting the methodical exploitation perpetrated by the British in the Indian subcontinent. Tharoor substantiates his arguments by using well-cited raw examples that highlight the malevolence of the colonial era. While many of these examples are also used by other historians, Tharoor's use of them in a precise and integrated manner makes the book interesting.

The book begins by describing the massive difference in the Indian economy before and after British rule. In the 1600s, when the British arrived in India through the East India Company, India's share of global gross domestic product (GDP) was twenty-five percent, while Britain's stood at 1.8 percent. By the mid-twenti-

eth century, when the British left India, British GDP rose to ten percent while India's fell to a mere three percent. The Industrial Revolution in Britain, which the British now boast about, happened due to the deindustrialization of India's manufacturing industry. Tharoor exemplifies this through the textile industry, in which Indian-manufactured cloth initially dominated the world market. The British not only forcefully closed down Indian textile industries, but in some cases also cut the thumbs of the handloom weavers so that they were never able to go back to manufacturing. The policies of the British were so cruel that they used Indian raw material to manufacture goods in Britain and then exported the finished product back to India at an astronomical price.

Along with the deindustrialization India, the British imposed heavy taxes on Indians. Indians were made to pay fifty percent of their income as taxes and any default in payment led to torture, jail, and confiscation of land. Tharoor notes that between 1765 and 1815, India paid approximately eighteen million pounds in taxes each year. British rulers in India made fortunes. Robert Clive, who played an important role in cementing British Raj in India, returned to Britain with £234,000 in his first trip and £400,000 in his second trip (which in today's value would amount to many millions). The cruel and insidious garbing of the wealth of another nation, which in today's age would amount to various international sanctions, was not only allowed by the British but was also honoured. Robert Clive, whom the British referred as the "Clive of India," validated his cruel practices and encouraged future British rulers to follow the same path.

While the Empire and its admirers have boasted about the various positives of colonizing India in the past, Tharoor provides a convincing rebuttal of these arguments. The widely held justifications for Empire were that it gave India democracy and rule of law, the railway network, free press, and civil services. Tharoor argues, in response, that it was never the intention of the British to impart the parliamentary system of democracy in India. The basic liberties granted under any democracy were particularly denied to Indians during the British Raj. Tharoor cites Jawaharlal Nehru, the first Prime Minister of (independent) India. In 1936, he wrote a letter to Lord Lothian describing British rule in India as follows:

based on extreme form of violence and the only sanction is fear. It suppresses usual liberties which are supposed to be essential to growth of people; it crushes the adventurous, the brave, the sensitive ... further crushing human dignity and decency, injures the soul as well as the body.²

Tharoor argues that democracy was a mere residue of the British Raj and does not vindicate two hundred years of British exploitation and abuse.

Building on the above argument, the book cites numerous examples of the rule of law being implemented only to boost the control of the British and perpetuate the racial divide in society. White-skinned Europeans could get away with murdering Indians; by contrast, an Indian would be handed a prison sentence ten times higher than that given to any European. Tharoor further argues that the laws established in India were an imposition of British values on Indians without ever considering the local demographic profile. For example, homosexuality was never a crime in India; however, the penal code influenced by British Victorians criminalized it. Similarly, the British criminalized free speech in India through laws of sedition and ensured that any form of dissent expressed was targeted and nipped.

The building of railways in India, Tharoor argues, must be understood as a colonial scam. British investors were guaranteed a five percent return—a rate previously unheard of. This extravagant return on investment was made possible by the exorbitant taxes paid by Indians. In the 1850s and 1860s, each mile of Indian railways cost nine times more than the same in the US. Moreover, the primary purpose of the railways was to transport extracted resources and minerals to the ports to be further shipped to Britain. The movement of Indians was incidental and was restricted to “third-class compartments” only, an animal-like treatment violating individual dignity. Even employment in railways was restricted to Europeans only, and it was argued that it would take three Indians to do the job of a single European. Tharoor explains that British racial theories coloured everything, including press coverage and the civil services. The press—which British claimed to be “free”—had never been as restrictive in India as it was during British rule. The vernacular presses set up in India were highly censored, and repressive laws were used to detain editors and ban publications.

The book, through examples, narrates how civil services were also marred with racial undertones. Though theoretically Indians were allowed to join the Civil Service, in practice, only Europeans were supposed to rule; an Indian deciding the way in which the British would rule was unthinkable. As late as 1930, only four percent of the covenanted positions in the Indian Civil Services were filled by Indians. Indians laboured for clerical jobs, whereas policy-making and enforcement rested with the British. Nehru, while exclaiming the shallowness of the Indian Civil Services, expressed that it was “neither Indian, nor civil, nor service.”³

Two examples of British atrocities particularly stand out in the book. The first is the 1919 Jallianwala Bagh Massacre in which Brigadier-General Reginald Dyer fired 1,650 rounds of bullets on unarmed men, women, and children gathered at a garden to celebrate a local festival. The gall of the British was such that they suppressed this news of barbarism for six months, and later, under the pressure of protests, found Dyer guilty of “grave error.” He was still allowed to retire at the rank of Colonel with a handsome pension. The cold-blooded approval of this deed showcased the colonial will to degrade Indian lives and uphold British acts in every manner.

The second example of grave atrocities committed by the British is the killing of thirty-five million Indians due to recurring famines during British rule. Tharoor is critical of British politician Winston Churchill, a widely admired figure in the UK. It was Churchill, who during the Bengal famine of 1943, ordered for food grains grown in India to be shipped to the UK, while people were dying on Indian streets. Reportedly, this famine caused the death of five million Indians. When Churchill was informed about the massive deaths, he scribbled in the margins, “Why hasn’t Gandhi died yet?”⁴

Though the book presents convincing arguments on the woeful deeds committed during British rule in India, it tends to get derivative at times with its high reliance on anecdotes. Tharoor at a few places goes up and down with the sequences of events, which can be confusing; but, to maintain exact chronology while describing the misdeeds of two centuries can be difficult. Tharoor leaves us thinking reparations should be paid by Britain to India for its cruelties. However, the least that academia can do is its part by teaching the real history to students in schools and ceasing the glorification of colonizers. While many of the narratives mentioned by Tharoor are simply omitted in many accounts, *Inglorious Empire* serves as a valuable reminder of how a few human beings can pulverize fellow beings for maintenance of power and superiority.

Notes

1 Alex von Tunzelmann’s, *Indian Summer: The Secret History of the End of an Empire* (London: Simon & Schuster, 2007), 6.

2 Jawaharlal Nehru, *A Bunch of Old Letters* (Bombay: Asia Publishing House, 1958), 236.

3 Jawaharlal Nehru, *Glimpses of World History: Being Further Letters to his Daughter* (London: Lindsay Drummond, 1949), 94.

4 Mike Davis, *Late Victorian Holocausts: El Nino Famines and the Making of the Third World* (London, New York: Verso Books, 2001), 19.

STEPHEN BUZDUGAN AND ANTHONY
PAYNE, *THE LONG BATTLE FOR GLOBAL
GOVERNANCE*. PUBLISHER: ROUTLEDGE,
2016.

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The existing system of global governance is no longer working.¹ The modern mechanisms and institutions, established during the Second World War by industrialized countries as the foundation of today's global governance, have failed to sustain an effective and stable global economic structure for both the Global North and the Global South. After episodic crises in the global economic system throughout the second half of the twentieth century, the 2008 financial crisis ultimately undermined the authority of the International Monetary Fund (IMF), which was institutionalized to secure global financial stability. There was the need for a new global economic regime to ease the tensions between the Global North and South. In November 2008, the first meeting was held among the Group of 20 (G20) as a more representative institution in the immediate aftermath of the crisis. It included emerging powers such as China, India, and Brazil, to challenge the Group of Eight's dominance of global governance. Six years later, the New Development Bank was founded by the BRICS countries in 2014 as an alternative to the World Bank.

Buzdugan and Payne's book considers these challenges in the global economic order by putting forward a series of questions: Who are the main actors that institutionalized the global governance system, and how representative is this of the world economy? What are the power dynamics between the Global North and South in the construction of global politics and the global political economy?

To address these questions, the book provides the reader with a comprehensive historical approach to the "long battle" between the Global North and South to achieve an efficient and legitimate global political-economic order. Each of the six chapters offers an empirically driven analysis about what roles the North and South have taken in the process of constructing global governance. Going through each decade from the establishment of Bretton Woods to the present, the study maps out the dominant and marginalized actors, incentives, institutions, and narratives, with a focus on

the role and interests of the South. By including the forgotten but critical voices from historically non-dominant countries, this book offers new insights into how the global governance system was created and continues to operate.

The first chapter starts with the foundation of the contemporary global governance system—the Bretton Woods institutions (including the IMF, World Bank, and the General Agreement on Tariffs and Trade (GATT)) in the 1940s. Despite the dominant discourse—the Bretton Woods System being a collaboration of the US and the UK—the analysis of the negotiations highlights the participation of forty-two other countries, especially India and Mexico, who failed to assert their influence in the final arrangement, but did succeed in voicing their demands and goals at the point in time when the global system was formed.

Next, chapter two addresses the fierce debates over the financing of economic development that took place between the United Nations (UN) and the Bretton Woods institutions in the 1950s. Because poor and middle-income countries were dissatisfied with the lack of development assistance they were given, the UN was used as an alternative channel to voice their discontent. The organizational platform enabled countries to put pressure on the hegemonic powers and to address the flaws in the Bretton Woods Institutions. Lastly, the chapter highlights the rapidly growing importance of Asian and African countries in the UN within the context of decolonization, as well as the development of the Non-Aligned Movement (NAM) that emerged as the “Third World” during the Cold War.

The third chapter depicts a seemingly hopeful era in which the US unilaterally ended the pegging of the dollar to the gold standard, which had underwritten the Bretton Woods System, signaling that the US could no longer act as the hegemonic power in the global political economy. This offered a political opportunity structure for the “developing” countries to build the “New International Economic Order” (NIEO), an alternative institutional system to address the common need for wealth achievement and living standard advancement. Yet, despite the dialogues between the Global North and South in Paris (1976–1977) and elsewhere, no fundamental changes of the economic order were achieved. Thus, the Group of 77 (G77)² countries learnt that they had to gain greater influence to negotiate successfully.

Chapter four describes the escalating tensions between the North and the South in the 1980s. It focuses on the Cancún Summit in 1981, when the G77’s demands for the NIEO were rejected and the conversation steered towards the dominant US neoliberal discourse, which delineated “good” and “bad” governments

according to the efficiency of their market mechanisms. Beyond critically discussing the aggressive actions taken by the Reagan administration to promote neoliberalism and that undermined the G77's developmentalism, this book also examines the critical response from leaders of the G77 countries.

The final two chapters look at the evolution of global governance from the 1990s onwards. This period is characterized by the rise of East Asia, whose developmental state model³ challenged US hegemony. These chapters also give a useful comparison of the performance and global influence of poor and middle-income countries between the 1970s and 2000s, showing how they navigated global governance regimes, how they manipulated political pressures on the Global North, and how they articulated their political and economic demands and interests.

To sum up, this book provides a critical reading of the opposition and disagreement to global governance from the Global South, which has been overlooked in the existing literature. Admittedly, because the US has been the most powerful actor in international politics it has also been able to determine the ideology and values of global governance since the 1940s. Despite the notion that history is written by and about the winners, this book, however, highlights the deeply political process by which global governance has been created—through a struggle from the Global South. Ultimately, the authors succeed in their intention of “focusing in the main on the under-noticed and under-researched roles played and perspectives taken by” (p. 6) the Global South.

More specifically, in this decolonizing praxis of writing, unlike previous narratives who focused on the history of international aid from the Global North, this book highlights the agency of the Global South in challenging Western hegemonic norms. For example, in the 1940s and 1950s, the World Bank felt no responsibility nor motivation to lend to the “underdeveloped” countries, which contrasts starkly with titanic efforts to reconstruct post-war Europe through the Marshall Plan. In this battle, this book features V.K.R.V. Rao, a prominent Indian economist, who helped to establish the United Nations Administration for Economic Development and suggested that development aid be structured as grants with nominal interest. However, the US rejected this proposal, affirming its own national interests. The ten-year battle for development financing represents the beginning of the Global South exerting agency through collective interests. Thus, this book pushes the reader to rethink contemporary development aid, which should not be perceived as a generous commitment by the North, but as the result of a persistent struggle from the South. Crucially, the research shows how the South contributed to

knowledge production; it includes key individuals from the South in the historical narrative who are often omitted from mainstream accounts.

Finally, Buzdugan and Payne's analysis relies exclusively on secondary literature and a few official policy documents, most of which were produced in the Global North. This is a shortcoming, considering the authors' stated aim of a reappraisal of global economic governance from the South. The authors missed the opportunity to contribute to the decolonization of knowledge production in history through non-Western documents. Moreover, the book fails to define basic concepts, such as "developed," "industrialized," and "Western," using them interchangeably without justifications. This is disappointing for a book that attempts to correct conventional understandings of contemporary global governance and international political economy discourses. Despite these weaknesses, this succinct account provides readers with both rich detail and fresh insights about the tensions between the North and South in global governance, allowing us to better understand and navigate the greater uncertainty of global governance that lies ahead of us.

Notes

1 Coen, D., Pegram, T., 2015. Wanted: A Third Generation of Global Governance Research. *Governance* 28, 417–420.

2 G77 was a coalition institution formed by developing countries within UNCTAD in the late 1960s, to promote their collective economic demands and improve their negotiation leverage in global governance. China provides consistent political and financial support to the G77, nevertheless it does not consider itself as a member. Thus, G77 is officially named as The Group of 77 and China.

3 The terminology of 'developmental state' is from Meredith Woo-Cumings' *The Developmental State* (1999), which denotes direct government interventions in financial investment and industrial development. East Asia firstly put the notion into practice, which is said to lead to the 1997 financial crisis.

TY SOLOMON, *THE POLITICS OF
SUBJECTIVITY IN AMERICAN FOREIGN
POLICY*. PUBLISHER: UNIVERSITY OF
MICHIGAN PRESS, 2015.

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After truth, we are perhaps before identity. Ever since the intellectual community has given name and rise to the post-9/11 moment, political theories of identity and subjectivity since the likes of Honneth, Fraser, or Butler have inspired much debate in the study of international relations.¹ In particular, research has started to pay closer attention to the role of affect and emotions—while some scholars suggest ways of systematizing and invigorating the largely untrodden paths of this important but complicated topic, others breathe new life into Foucauldian discourse analysis by trying to understand the constitutive power of discourses in the formation of subjects and identity.² Ty Solomon sits firmly among the latter, and with his latest book he has shown why his take on the politics of subjectivity is indispensable.

Why are some discourses more politically effective than others? Solomon answers with the psychoanalytic theories of Lacan and Laclau. With the former, he carves out articulations of subjectivity through affective investment. With the latter, he politicizes this account through the lens of hegemonic contestation. Skilfully, the theories of Lacan and Laclau are unpacked and interwoven to elucidate a rather commonplace undertaking: a discourse analysis of the narratives of neo-conservatives and the Bush Doctrine.

Solomon's theoretical contribution lies in the emphasis on lack as a constitutive disposition of politics. The self's desire for wholeness is understood to derive from the profound insecurity of identity, which "can never be fully fixed or secured" (p. 2). While many IR scholars recognize the fluidity of identity, they often fail to provide an account of why, despite the impossibility of ever fully securing identity, they would "keep trying" to do so (p. 3). Solomon intends to fill this gap.

Solomon then takes this theoretical framework "to the ground," putting forward what dynamics exactly decide the success or failure of a discourse. How did the "war on terror" narrative after the traumatic events of 9/11 achieve hegemonic status? How

can we explain the tides of neo-conservatism? Thorough analysis of affective resonance with the collective subject, Solomon argues, is key to answering these questions.

The book begins by briefly outlining how the thought of Lacan and Laclau could illuminate American foreign policy in ways that standard explanations cannot. Solomon claims that “material factors in world politics do not speak for themselves—they must be interpreted by state actors to become meaningful,” (p. 10) and such interpretation has fundamentally to do with identity. It is one thing to claim that narratives work to establish the commonsensical; it is another to elaborate how desire works to mediate this constitution. To this end Solomon shows how discursive success depends on the luring promise of filling a void that audiences crave to overcome (p. 18).

Solomon elaborates his framework in a very accessible style and does an excellent job at introducing psychoanalysis to an IR audience. He views subject formation through the enjoyment (*jouissance*) that desire promises as an attempt “to construct a subject is driven by something that is absent from it” (p. 51). A given discourse refers to master signifiers (bundles of meaning) which are structured in four basic ideal-type ways: the master’s discourse (of command); the hysteric’s discourse (of protest); the university discourse (of education/indoctrination); and the analyst’s discourse (of analysis/transformation). The subject’s response depends on resonance, which does not necessarily require the subject to be convinced by, but rather its desire to invest in, the discourse in order to achieve certainty and wholeness.

Solomon then brings this in touch with Laclau’s revival of Gramscian hegemony. Laclau treats hegemony as the implicit common sense of a society, where nodal points function much like Lacan’s master signifiers to bind subjects around a particular interpretation. The more these are articulated, the more they are emptied of meaning, as they “stretch” to cover an ever-expanding range of meanings—transcendental meaning is pretended but essentially impossible (p. 64). This constitutive ambiguity gives rise to contestation on the basis of the logics of equivalence and difference (complementary organizing principles). While Lacan shows how the interplay of lack, desire, and fantasy plays into the promising spell of awaiting enjoyment underpinning subject formation, Laclau takes this more explicitly to the political level, where hegemony is the successful reign of a particular fantasy.

Solomon then takes a fresh look at neo-conservatism and the “war on terror.” Solomon first unpacks the discourses that were produced immediately after 9/11 and then those in the decades

leading up to it. In chapter 2 he does not, as is commonly done, argue that the Bush doctrine resonated with American audiences, which presumably helped gather public support for the Iraq war, but instead asks how this resonance came about exactly. The “war on terror” is interpreted as university discourse, where particulars are presented as universals, opinion as fact, and ultimately ideology as “obviousness”: “Bush positions himself as the leader who knows precisely what has happened and what needs to be done” (p. 81).

While discourse structure explains resonance, fantasy explains the relative efficacy of that resonance. Satisfaction (derived from an association with signifiers) gives way to frustration (over the lack that is never fully overcome) and vice versa—fantasy “outsources” the encountered contingencies and ambiguities by projecting them on an Other: in this case “the terrorist”, sole symbol of blockage in the way of attaining jouissance. Fantasy keeps desire burning, as the nation is presented as lacking something it once had—“yet, this missing Thing itself did not exist until it was posited as lost” (p. 91). The failure to fulfil desire, then, always re-engages desire. This ties in directly with Laclau, Solomon contends, for if we accept that fantasy makes dominant discourses desirable, this is precisely what makes for their hegemonic appeal (p. 95). An analysis of speeches by Kerry and Bush during the 2004 US election campaign follows, first through the lens of Lacanian discourse and fantasy, then through the lens of Laclausian hegemonic contestation. Solomon concludes that Kerry’s discourse offered an insecure subject, while Bush was able to present his discourse as commonsensical.

Solomon applies the same analytical method to discourse in the decades prior to 9/11 uttered by neo-conservatives and their opponents. In chapter 3, while Jimmy Carter’s speech on the “crisis of confidence” rendered the collective subject fundamentally unsettled, without an Other to blame or enjoyment to come in sight, neo-conservative godfather Norman Podhoretz in turn presents a concrete obstacle in the way of reaching desire (the Soviet Union). This scapegoat “evokes precisely the kinds of partial enjoyment that Carter’s discourse did not,” explaining the relative success of the neo-conservatives (p. 148). In chapter 4, the decline and subsequent rise of the neo-conservatives are the focus of analysis. In the early 1990s, neo-conservative discourse presents desire as within reach. By contrast, late 1990s neo-conservatives emphasise the fulfilment of desire as a recovery of something once lost. While Othering is one important part of fantasy, and here Solomon’s insights are refreshing, it works so well because it also entails the promise of a “sublime object’ that is felt to have been

lost (though it never existed)” (p. 196). Key to neo-conservatism’s fall and rise in the 1990s is therefore that while early discourse only evoked the former, the new neo-conservatives of the late 1990s were able to mobilize both.

Solomon’s take-home messages are concise and strong: incompleteness, or lack, can be understood as the constitutive of moment of (political) identification and subject formation; promise is power, rather than just rhetoric; and fantasy conceals contingency to produce common sense (p. 205–06). The structure of this dense but insightful book is not always intuitive. For one, while Solomon covers large parts of the Lacanian literature (as it pertains to IR), Žižek’s interpretation of it is sometimes simply adopted rather than bringing in a bit more of Solomon’s very own reading of Lacan. Second, Laclau’s theory of hegemony is at moments left underexplored—Solomon could have provided more justification of his decision to emphasise Lacan over Laclau. On a positive note, however, what stands out is the distanced yet engaged style with which Solomon presents a complementary picture and not an antagonistic case for yet another final word on the “war on terror.” And even if the book is at times repetitive, it performs an empirical rehearsal of a theoretical framework that deserves attention. This makes the book a valuable contribution to scholarship on identity, subjectivity, and emotions in IR that convinces with a powerful psychoanalysis of discursive contestation over interpretive hegemonies and their resonance with and shaping of the collective political subject.

Notes

1 Lois McNay, “The Trouble with Recognition: Subjectivity, Suffering, and Agency,” *Sociological Theory* 26, no. 3 (2008): 271–296.

2 Todd H Hall and Andrew Ross, “Affective Politics after 9/11,” *International Organization* 69, no. 4 (2015): 847–879.

BENJAMIN H. BRATTON, *THE STACK: ON SOFTWARE AND SOVEREIGNTY*. PUBLISHER: MIT PRESS, 2015.

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Digital technology increasingly connects people and machines in ever-denser networks around the world. From communication to shopping, dating, media, finance, warfare, and production, this new connectivity is changing the world around us and perhaps even ourselves. In *The Stack: On Software and Sovereignty*, Benjamin H. Bratton poses the question: to what extent the advent of “planetary-scale computation” (p. 3) might and already has transformed world order as we know it. He persuasively argues that the production of new (cyber) spaces challenges the political geography of the traditional Westphalian system and the institution of state sovereignty.

Bratton begins his argument by critically engaging with controversial political theorist Carl Schmitt’s idea of the *Nomos*—world order as a structure shaped by (horizontal) territorial delineation of the earth. He emphasises that this form of geopolitical order can be transformed: “the stability of geopolitical architectures based on the land-bounded nation-state as the indispensable unit of sovereignty is continually undermined” (p. 4). Bratton’s political geography is predominantly informed by this idea and the thoughts of Paul Virilio, but it should be noted that he rejects the worldview of Schmitt.

In light of planetary-scale computation, *The Stack: On Software and Sovereignty* compellingly questions the continued validity of the state exerting full sovereignty over territory. The author draws on James Scott when observing that novel (digital) technologies “produce new spaces to claim” (p. 8) over which there is a competition between different actors. These new territories are the result of planetary-scale computation emerging into an “accidental megastructure” (p. 5). This is what Bratton labels as “The Stack” (p. 11)—a new vertical totality comprised of six distinct, but dependent layers: Earth, Cloud, City, Address, Interface, and User. These layers are simultaneously computational, physical, and social. Strikingly, it is not only states that try to occupy the new spaces, but also all kinds of non-state actors. Bratton here observes that as these layers overlap; these spaces “can be both inside the line of the Westphalian state and its internal legal optics but outside its borders and sovereignty” (p. 33). Consequently, planetary-scale computation permeates the Westphalian system’s

segmentation into sovereign spaces. Borders become blurred and the layers are located in different jurisdictions at the same time.

The book employs the example of Google to illustrate its abstract theoretical argumentation. Google is a transnational enterprise with a physical headquarters in the United States, but at the same time it is located in the Cloud. Therefore, it is also virtual and present across different national jurisdictions and physical territories at once—posing various problems for traditional sovereignty. Remarkably, Bratton touches on further tangible contemporary issues of sovereignty while examining the different layers of the Stack at length throughout the later chapters of his book. “The first Sino-Google War of 2009” (p. 112), Facebook as a “Cloud Polis” (p. 125), and the “reversible grids” (p. 149) in the City layer are such examples. The level of abstraction and elaborate thought-structures nonetheless are often difficult to grasp and may undermine the readers’ comprehension of the book’s arguments.

The debate about state sovereignty in light of contemporary developments all too often seems to be caught in assessing how and why it is declining or why this is dangerous. In contrast, Bratton’s account of the transformation of sovereignty offers a mostly prosaic examination of this phenomenon. Even more, he refreshingly offers an alternative version of sovereignty which challenges our traditional understanding. Namely, “platform sovereignty” (p. 21) which comes into force where the delineation of what is inside and outside of a given space is automated. Platforms (e.g., Google) are “mechanisms” which define who and what can participate according to given rules, yet at the same time are intermediaries for “unplanned and perhaps unplannable interactions” (p. 374).

Perhaps the biggest merit of *The Stack: On Software and Sovereignty* is its comprehensive attempt to conceptualise the digital transformation of world order. Due to the fluid nature of the phenomenon—we are probably only at the beginning—Bratton in the end raises more questions than he provides in answers. The multi-layered model of the Stack nonetheless offers a rich source for further inquiry and a new research agenda, particularly for International Relations which often focuses narrowly on cyber security. With some notable exceptions such as Couchri (2012) and Kello (2017), the discipline so far has not much to offer in terms of more broadly theorising cyber or the impact of digital technology.¹

In conclusion, *The Stack: On Software and Sovereignty* is a sometimes overly complex, albeit topical, enriching and interdisciplinary contribution to the issue of sovereignty and

world order in our time. Scholars of International Relations interested in political geography who are not afraid to chart the new territories of cyber, and any interested to engage profoundly with digital transformation, will likely find a thought-provoking inspiration.

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Notes

1 Nazli Choucri, *Cyberpolitics in International Relations* (Cambridge, MA: MIT Press, 2012); Lucas Kello, *The Virtual Weapon and International Order* (New Haven, CT: Yale University Press, 2017).