INTERNATIONAL LAW AND UNGOVERNED SPACE

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ABSTRACT

Ungoverned spaces, strictly defined as "spaces not effectively governed by the state" exist all over the world, presenting particular difficulties to public international law, which is historically premised on sovereignty and state control. Examples of such spaces include cyberspace, south-central Somalia and the Federally Administered Tribal Areas along the Afghan-Pakistan border. These spaces destabilize the international system in novel ways—and they might also be dangerous. Many of the terrorism plots from the late twentieth and early twenty-first century emanated from "safe havens" afforded by ungoverned spaces. The lack of governance over certain spaces also raises concerns over development, including the health, education, human rights and economic welfare of affected populations. To address the challenges posed by ungoverned spaces, both to the discipline of international law and to the stability of the international system, this article first derives a nuanced understanding of the issue from both the security and legal literatures. It then formulates an interpretive international legal framework and tests it against the real-world example of Somalia. Through this process it develops a complex argument on how international law should apply to ungoverned space.

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TABLE OF CONTENTS

INTRODUCTION

Taking the world as it is, the "international community" is comprised of (at least) 193 nation-states. It is axiomatic that each of these forms varies in its political effectiveness, yet most would agree that in one way or another they do in fact exist. A higher number of stronger, better functioning political communities now exert control than at any other point in human history. Disagreements as to "statehood" do take place, but they generally occur on the margins. The outcome of negotiations over Kosovo's final status, for instance, will affect its ability to engage in relations with other members of the international community, although how far this goes is riven with speculation. Palestine also poses challenges to the *status quo,* but the ways in which its status might affect its power are not altogether clear. Such contestations are important, but relatively rare.

By one count these political communities have collectively joined forces to form approximately 64,000 inter-governmental or international organizations.[1] These organizations range widely in size, geographical representation, complexity and competence. The United Nations (U.N.), for instance, includes all 193 member-states and is charged with, among other things, securing international peace and security for the entire planet. Formal mechanisms like the U.N. exist in parallel with more informal "G-*x*" organizations, such as the G-20, G-7 (or G-8) and the counterbalancing G-5, N-11 and G-173 movements that they engender. Within the formal structures, other, so-called "specialized agencies," focus more narrowly on a particular subject area, such as economics, health, labor, energy or the environment. Still others maintain a strictly limited geographic and subject-matter focus. The International Centre for Insect Physiology and Ecology (ICIPE), for instance, attempts to "develop, introduce and adapt new tools and strategies for arthropod management that are environmentally safe, affordable, appropriate, socially acceptable and applicable by the target end-users," which consist predominantly of poorly-developed states in sub-Saharan Africa.

In an effort to further organize relations between themselves, states have concluded hundreds of thousands of agreements, commonly referred to as treaties, accords, compacts and conventions. Inter-governmental or international organizations often arise out of, or are also parties to, such agreements. "Controversial candidatures"[2] often seek to assert their status through accession to existing treaties or the promulgation of new agreements with recognized states. There are currently over 30,000 treaties registered with the Secretary-General of the U.N. pertaining to issues as broad as international trade and as narrow as the control of "obscene publications." The oceans have their own specific legal regime consisting of a series of intricate and comprehensive conventions concluded in 1958, 1982 and 1994. No less than five international

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[1] *See* UNION OF INTERNATIONAL ASSOCIATIONS, YEARBOOK OF INTERNATIONAL ORGANIZATIONS 2011-2012 (2012).

[2] IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (7th ed.) (2008) 65.

agreements address the international law of outer space. In September 2010 reports emerged that the U.N. was considering the appointment of a "space ambassador for extraterrestrial affairs," charged with making the first official response to any "travelling aliens" and representing humanity in "inter-cosmic discourse."[3] It appears that international law, even in fragmented or imagined form, does go "boldly where no man has gone before."[4]

Given these layered, over-lapping forms of political and legal organization, it would be easy to assume that "governance" admits of no noticeable gaps. Certainly at this point in the nation-state project there must not, at a bare minimum, remain swaths of geographic territory that have not been tamed by the state. A quick survey of the world, however, indicates otherwise. In many places political arrangements exist that function outside the control of internationally recognized governments. Examples from recent history have arisen within the geographical areas of: Afghanistan; Argentina; the Balkans; Brazil; China; Colombia; Côte D'Ivoire; the Democratic Republic of the Congo; El Salvador; Guatemala; Guinea; Haiti; Honduras; Indonesia; Iran; Iraq; Liberia; Libya; Malaysia; Mexico; Northern Ireland; Pakistan; Paraguay; the Philippines; Uzbekistan; Sierra Leone; Somalia; and Sudan. The Federally Administered Tribal Areas on the border of Afghanistan and Pakistan, and the south-central portions of Somalia represent two of the most notorious examples, but they are not alone. "Zomia," an ungoverned space in the southeast Asian highlands first identified by the Dutch historian William van Schendel in 2002, purportedly includes Tibet, parts of southwestern and eastern (Xinjiang) China, northern and northeastern parts of India including Kashmir, most of Nepal and Myanmar, all of Bhutan and Laos, parts of Thailand and Bangladesh and large areas of Afghanistan, Pakistan, Tajikistan and Kyrgyzstan.[5]

Historically such "lawless anomalies"[6] were surprisingly common, even in the middle of developed states. Starting in the Middle Ages, debtors and criminals sought refuge from arrest in London's dozen or so legal safe havens until the English Parliament abolished the last of them in 1723.[7] The most famous of these was Alsatia, "a small area west of Temple,

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[3] *See* Mark Brown, *Astrophysicist to be named U.N.'s Alien Ambassador,* Wired.co.uk (Sept. 27, 2010) http://www.wired.co.uk/news/archive/2010-09/27/alien-ambassador.

[4] The quote is from *Star Trek,* the idea is from Michael Scharf & Lawerence Roberts, *The Interstellar Relations of the Federation: International Law and "Star Trek The Next Generation,"* 25 TOL. L. REV. 277 (1994) (analyzing the use of *Star Trek* as a pedagogical aid in teaching international law).

[5] *See generally* JAMES SCOTT, THE ART OF NOT BEING GOVERNED: AN ANARCHIST HISTORY OF UPLAND SOUTHEAST ASIA (2009); Frank Jacobs, *The Undiscovered Country,* N.Y. TIMES ONLINE (Feb. 14, 2012) http://opinionator.blogs.nytimes.com/2012/02/14/the-undiscovered-country/; *see also* Samrat, *In India's North, Youth Crave Global Links, Development,* N.Y. TIMES (Mar. 14, 2012) (discussing northeast India).

[6] Jacobs, *supra* note 5.

[7] *See id.*

between Fleet Street and the Thames on the site of a former Whitefriars monastery"[8] in downtown London. It has been the subject of lore,[9] and it even survives in the legal lexicon. In 2007, Lord Justice Stephen Sedley of the Court of Appeal of England and Wales criticized the establishment of a Serious Organised Crime Agency within the English government by claiming that "the state has set out to create an *Alsatia*—a region of executive action free of judicial oversight."[10]

Despite the seemingly inexorable march toward the eradication of "refuges, sanctuaries, freetowns [and] zones of no control"[11] the latest World Bank governance indicator dataset[12] provides empirical evidence of the extent to which ungoverned space within states continues to constitute a "chronic international problem."[13] Moreover, with the advent of the internet and other information communications technologies, much of the man-made "virtual" space has eluded centralized, state or governmental regulation. Operational zones, such as those applicable to peacekeepers and private military contractors, are often formally regulated but functionally lawless. Collectively, these "ungoverned" actual, virtual and operational spaces pose a conundrum to a global governance system that is premised on sovereign control. The international system relies on states' capacity to govern their own space[14] and when they fail to do so, the results might be dangerous. Many of the terrorism plots from the late twentieth and early twenty-first century emanated from "safe havens" afforded by ungoverned spaces.

A lack of governance also raises concerns over development, including the health, education, human rights and economic welfare of affected populations. States that lack an effective government are unable to provide for their citizens. Building codes are ignored and sanitation services are discontinued. Borders and coastlines are left unpatrolled. Collectively these symptoms have obvious internal effects, but they also apply externally. The lack of an effective government makes treaty-making, treaty compliance and requests for assistance from international development organizations, such as the International Monetary Fund (IMF), a practical impossibility. Diplomatic and consular relations also break down when sending states recall their representatives. Such

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[8] *Id.*

[9] *See id.* According to the Jacobs article, the poet and playwright Thomas Shadwell characterized the place in his 1688 play *The Squire of Alsatia* as "an unconquered affront to English rule." *See id.*

[10] R v. (UMBS Online Ltd) v. SOCA (May 2, 2007) EWCA Civ. 406, ¶58 (emphasis in original).

[11] Jacobs, *supra* note 5.

[12] World Bank, *World Governance Indicators Dataset* (2010) http://info.worldbank.org/governance/wgi/index.asp [hereinafter *World Bank Governance Indicators*].

[13] Richard Shultz, Douglas Farah and Itamara Lochard, *Armed Groups: A Tier-One Security Priority,* Inst. for Nat'l Sec. Studies Occasional Paper 57 (2004) 58.

[14] *See* Robert Rotberg, *Failed States in a World of Terror,* 81 Foreign Affairs 127, 128 (Jul./Aug. 2002).

externalities isolate the receiving state and exacerbate the negative effects of ungoverned space. Nonexistent customs and control and the absence of sanitation increase the risk of the transnationalization of crime and disease. Furthermore, without proper safeguards and regulation, aspects of the environment, biodiversity, plant and animal life might also suffer. Finally, unfettered transnational corporations including from the financial, military-industrial, private health, extraction and energy sectors act with impunity, effectively outside of anyone's jurisdictional control. This enables a freedom of action that could lead to disastrous consequences.[15] Existing governance arrangements provided by international and domestic law fail to address in full any of these potential challenges to the international system.

In contrast to the many challenges, ungoverned spaces also present an expanded array of options for those actors seeking either to counter perceived threats or to compensate for governance deficits. In the interstices of governance, new standards and practices evolve that defy the formal rule-making procedures of the international system. State military forces, for instance, have used the "unwilling or unable" standard in international law to justify targeted killing operations against terrorist suspects on the territory of other states without that state's official consent.[16] These attacks have eliminated dangerous actors from the battlefield while avoiding the necessity of obtaining consent from potentially hostile governments; however, they might also violate human

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[15] *See e.g. Kiobel v. Royal Dutch Petroleum Co.* (*see* Brief for the Petitioner, Kiobel v. Royal Dutch Petroleum Co., No. 10-1491 (U.S. June 6, 2011)), which is currently before the U.S. Supreme Court illustrates this point. The case addresses the issue of corporate liability under the U.S. Alien Tort Statute (ATS), which states that "[t]he district courts [of the United States] shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." *See* 28 USC § 1350. It represents one of several cases brought against Royal Dutch Petroleum (d/b/a Shell), following violent suppression of the Movement for the Survival of the Ogoni People (MOSOP) who were demonstrating against Shell's extraction of oil from the Niger delta. The plaintiffs in *Kiobel* allege "various violations of the ATS, including torture, extrajudicial killings and crimes against humanity, which were committed against them by the military dictatorship in power in Nigeria from 1992 to 1995, aided and abetted by Shell." Brief for the Petitioner at 1, *Kiobel* (No. 10-1491). Shell's liability rests on whether the Court decides that international law applies to corporations, otherwise the ATS would be inapplicable and the company's alleged acts will likely go unpunished. The emergence of private security firms as active contributors to war-fighting effects represents another challenge to governance and accountability. *See generally* Laura Dickinson, *Military Lawyers, Private Contractors, and the Problem of International Law Compliance*, 42 N.Y.U. J. Int'l L. & Pol. 355 (2009-2010) (analyzing the problem of private military contractors who operate outside the formal strictures of military law and practice).

[16] *See e.g.* Attorney-General of the United States Eric Holder, Speech at Northwestern University Law School, Chicago, Illinois (March 5, 2012) *available at* http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html (describing the U.S. legal position on the targeted killing of terrorist suspects as part of the ongoing armed conflict with al Qaeda and associated groups).

rights and contravene state sovereignty.[17] National governments and powerful software corporations weary of the dangers posed by governance deficits in cyberspace have leveraged their respective competitive technological advantages to engage in increased monitoring and surveillance. This has intercepted criminal plots and spared civilians from harm, but has also raised concerns about the protection of privacy and the freedom from unlawful search and seizure. Such actions challenge or exceed existing legal authorities in novel ways, but as the results indicate they are not without positive effects. The concern is that few review mechanisms exist to examine the relevant conduct. Extralegal or *ultra vires* measures, strictly defined as acts "not regulated or sanctioned by law,"[18] of this kind are enabled by the lack of intelligible standards and governance arrangements applicable to the space. The rightness or wrongness of the act depends in large part on the altruism of the actor. To the extent constraints exist they are predominantly self-imposed. The check provided by formal law and governance is either absent or ineffective. Acts are neither strictly outlawed, nor explicitly authorized.[19]

Ungoverned spaces therefore create a freedom of action that is both ripe with potential *and* susceptible to abuse. While it is possible to reshape these spaces in the image of democracy (or some other idealized conception of "good governance") and build accountability into the new institutional arrangements, the danger also exists that they may serve as the private playground of special interests and nefarious, criminal actors. As such, each ungoverned space should be seen in dualist terms: it provides opportunities and presents challenges. This is true regardless of either the nature of the space or status of the actor. The next level of analysis is more difficult: how, and in what ways, does each ungoverned space affect each actor? The same question can be asked from the opposite perspective: how does each actor affect each ungoverned space? As a medium, ungoverned space may constrain or empower. Formal, legitimate governance arrangements might encounter difficulties, or they might capitalize on limited oversight to beneficial effect. Similarly, illicit and/or self-interested actors may find ungoverned space either amenable or antithetical to their interests. Informal arrangements may enjoy increased

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[17] For one view *see generally* United Nations Human Rights Council, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (*prepared by* Philip Alston).

[18] MERRIAM-WEBSTER DICTIONARY ONLINE *available at* http://www.merriam-webster.com/dictionary/extralegal. Ian Brownlie defines *ultra vires* as "unathorised by legal authority." *See* BROWNLIE, *supra* note 2, at li.

[19] For international lawyers, this type of situation will of course bring to mind the famous *Lotus* case from 1927, where the Permanent Court of International Justice stated: "International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. *Restrictions upon the independence of States cannot therefore be presumed.*" S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, ¶44 (Sept. 7) (emphasis added).

power, but they may also take on responsibilities that make the exercise of that power subject to greater scrutiny and higher levels of external interference. The space itself is also elastic, and the dynamics are subject to change based on the action or inaction of the relevant actors.

When cartographers encountered uncharted, far-off, seemingly ungoverned areas during the Middle Ages, a common practice was to mark them with the moniker *sic sunt dracones* ("here be dragons"), thus ascribing a certain danger to the unknown. For their part, on the issue of governance, the ancient Greeks sought guidance from the gods. *Eunomia*, the goddess of law and legislation, and the other daughters of *Zeus* and *Themis* (*Dikē* and *Eirene*) maintained the stability of society and served as the stewards of humankind. They were the "law-givers." This contrast of fear and faith, uncertainty and belief, dragons and goddesses, captures the essence of the ungoverned space dilemma. In order to understand and engage the issue properly, its dualist nature must be embraced and studied.

Modern states and international organizations are rightly concerned about these ungoverned spaces, and this has led to significant attention from the policy-making community. The obvious target has been the potential security concerns arising out of the absence of governance.[20] Before he became president, Senator Barack Obama stated in an April 2007 address to the Chicago Council on Global Affairs that "the impoverished, weak and ungoverned states [are] the most fertile breeding grounds for transnational threats like terror and pandemic disease and the smuggling of deadly weapons" allowing terrorists and illicit groups to "operate freely in the disaffected communities and disconnected corners of our interconnected world."[21] The Council on Foreign Relations (CFR), a non-partisan think tank that exerts considerable force in U.S. policy circles, reiterated this position when it created a new *International Institutions and Global Governance* program in May 2008, announcing that: "For the first time in modern history, the main threats to world security emanate less from states with too much power (e.g., Nazi Germany) than from states with too little (e.g., Afghanistan)," the focus of collective security should therefore shift from "counter-balancing aggressive powers to assisting fragile and post-conflict countries in achieving effective sovereign statehood, including control over 'ungoverned spaces.'"[22]

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[20] *See e.g.* ANNE CLUNAN & HAROLD TRINKUNAS (eds.), UNGOVERNED SPACES: ALTERNATIVES TO STATE AUTHORITY IN AN ERA OF SOFTENED SOVEREIGNTY (2010); ROBERT LAMB, OFFICE OF THE U.S. SECRETARY OF DEFENSE FOR POLICY, FINAL REPORT OF THE UNGOVERNED AREAS PROJECT, THREATS FROM UNGOVERNED AREAS AND SAFE HAVENS (2008); ANGEL RABASA, ET AL., UNGOVERNED TERRITORIES: UNDERSTANDING AND REDUCING TERRORISM RISKS (2007).

[21] Senator Barack Obama, Speech to the Chicago Council on Global Affairs, Chicago, Illinois (Apr. 23, 2007) *available at* http://www.cfr.org/us-election-2008/remarks-senator-barack-obama-chicago-council-global-affairs/p13172.

[22] Council on Foreign Relations, International Institutions and Global Governance Program (May 1, 2008) http://www.cfr.org/content/thinktank/CFR_Global%20_Governance_%20Program.pdf.

The attention paid to ungoverned space by the policy-making community extends beyond mere rhetoric; it has become an important aspect of policy implementation. For instance, The Department of Defense/Department of State joint report to Congress on the issue of foreign military training for fiscal years 2010 and 2011 discloses a number of expenditures associated with countering the presence of ungoverned space in various countries, including Mauritius, Namibia, Kyrgyzstan, Maldives and Tajikistan.[23] The increased use of unmanned aerial vehicles (UAVs or drones) to carry out targeted killing operations in Yemen, Somalia, Pakistan, Afghanistan and elsewhere, which began under the Bush administration and have been increased by the Obama administration should also be seen as part of the larger commitment to countering the use of ungoverned space within these territories by illicit groups. Such measures represent the new harbingers of control—efforts taken to protect the country and project law and order.

The shift in the awareness and activity on the part of U.S. policymakers to the global threat posed by ungoverned space in the post-9/11 period also resulted in the undertaking of two important government-sponsored research initiatives. The first was the Ungoverned Areas/Safe Haven (UGA/SH) project launched by the Office of the Under Secretary of Defense for Policy, which culminated in a final report authored by Robert Lamb titled *Ungoverned Areas and Threats from Safe Havens* ("Lamb's report"). Lamb's report is split up into three main sections. The first presents a framework for understanding UGA/SHs and analyzing the numerous factors (geographical, political, social, etc.) that help to generate and sustain them. It addresses four basic questions: what are safe havens, what forms do they take, what makes them possible and what makes them problematic to U.S. (and international) security.[24]

The second research initiative was sponsored by the U.S. Air Force at the RAND Corporation and resulted in the production of a report in 2007 titled *Ungoverned Territories: Understanding and Reducing the Terrorism Risks* ("RAND report") edited by Angel Rabasa. The objective of the RAND report was to "understand the conditions that give rise to ungoverned territories and their effects on U.S. security interests and to develop strategies to improve the U.S. ability to mitigate these effects—in particular, to reduce the threat posed by terrorists operating within or from these territories."[25] The study was based on an analysis of eight case studies: the Pakistan-Afghan Border Region; the Arabian Peninsula; the Sulawesi-Mindanao Arc; the East-Africa Corridor; West Africa; the North Caucasus; the Colombia-Venezuela Border; and the Guatemala-Chiapas Border.

Understanding the unique dynamics of the ungoverned space in question represents a necessary corollary to countering the threats caused by that space. As Ken Menkhaus has written, "the challenge to analysts and

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[23] *See* DEPARTMENT OF DEFENSE AND DEPARTMENT OF STATE, JOINT REPORT TO CONGRESS, FOREIGN MILITARY TRAINING FOR FISCAL YEARS 2010 AND 2011, VOL. I (2011).

[24] LAMB, *supra* note 20, at 14.

[25] RABASA, *supra* note 20, at iii.

policy-makers is to push beyond the obvious bromides about the dangers of ungoverned spaces and assess more specifically what kinds of dangers they do and do not pose, and under what specific conditions of state failure."[26] By focusing merely on the absence of a formal government structures, policy-makers may miss this important connection between ungoverned space and the actual circumstances that lead to security threats or human degradation. One way to "push beyond the obvious bromides" as Menkhaus suggests, is to devote more attention to analyzing and undermining the supportive relationship between illicit actors and the local or informal governors in areas outside of state control.[27] Another is to explore ways to effectively enable and incentivize weak governments to fulfill their governance responsibilities so that they may control their territory and provide for their populations.[28]

Speaking to this issue, Stewart Patrick has identified a number of limitations that result from a narrow view of ungoverned space as well as suggestions for approaching the issue constructively. In Patrick's view, the concept of ungoverned space can be misleading, even unhelpful because it oversimplifies the links between state weakness and transnational terrorism, which are "uneven and highly contingent."[29] Further, it can encourage "short-sighted policy responses that focus on the symptoms of state weakness instead of its underlying causes."[30] One limitation of the ungoverned space concept is that it can encourage a focus on remote locations, while overlooking urban and even virtual havens.[31] A second is that it understates the obstacles posed in ungoverned spaces to illicit actors themselves.[32] The connection between a safe haven and an ungoverned space is arguably a contradiction, as anarchic environments may present "insuperable difficulties"[33] for illicit actors. For Patrick this suggests a third limitation to the ungoverned spaces concept, which is that the emergence of a true haven requires more than the absence of a state. It also requires the "support of local power-wielders and the sympathy, or at least acquiescence, of the local population."[34]

In a similar vein, Lamb went to great lengths in his report to emphasize that it is the *way* a space is governed that matters, not merely whether it is governed or not. For example, weakly governed societies may have governance gaps that enable illicit actors. At the same time, highly

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[26] Ken Menkhaus, *Terrorist Activities in Ungoverned Spaces: Evidence and Observations from the Horn of Africa,* Paper prepared for the "Southern Africa and International Terrorism" workshop (Jan. 25-27, 2007) 2.

[27] *Id.*

[28] *Id.*

[29] Stewart Patrick, *Are 'Ungoverned Spaces' a Threat?* COUNCIL ON FOREIGN RELATIONS ONLINE (Jan. 11, 2010) http://www.cfr.org/somalia/ungoverned-spaces-threat/p21165.

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

governed societies have legal protections, such as freedom of speech or protection from unlawful search and seizure that provide a freedom of action for all actors, including illicit groups. Therefore, in Lamb's view, "the degree of governance matters, but the particular way a place is governed matters more: the manner of governance affects local conditions and resources that are available for illicit actors to exploit, and affects the policy instruments that are available to the [counter force] to address those conditions or target those resources."[35] Taking this into account Lamb's framework is organized around those conditions and resources and his strategy is designed to facilitate analysis and counter-action across the governance spectrum, from under-governed to misgoverned, contested and exploitable areas as well as to purer forms of ungoverned space.

This attempt to look beyond the mere lack of governance and to discern the underlying conditions of ungoverned space is also taken up by Anne Clunan and Harold Trinkunas in their edited volume published in 2010 titled *Ungoverned Spaces: Alternatives to State Authority in an Era of Softened Sovereignty.* As a result of their study of ungoverned space, Clunan and Trinkunas conclude that "ungoverned space is both more widespread than popularly imagined and at the same time less ungoverned than some might expect."[36] The goal of their inquiry was to "highlight the conditions...in which the concern over ungoverned spaces has emerged and the new conceptions of authority and security that these conditions demand" as well as how "these conditions shape the effectiveness of different policy responses."[37] What they found was that "[u]ngoverned spaces and the alternative authority structures they represent...are here to stay...and states should focus on how best to manage, exploit, and coexist with them to provide human and national security to their populations."[38] Moreover, what is required of policymakers and analysts is a "nuanced understanding of the conditions under which ungoverned spaces become threats and what sorts of security they threaten."[39]

While the majority of the attention directed toward ungoverned space has emanated from the security discourse and focused on the threats posed by the use of that space by terrorists and other illicit actors, development and governance theorists have for some time shown a concern for the notion of "good governance" both within and among states. In the aftermath of the Cold War, the World Bank began to focus on governance issues as part of its development programs, and the topic soon made its way onto the docket of the Organisation for Economic Co-operation and Development (OECD)[40] and the United Nations

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[35] LAMB, *supra* note 20, at 4.

[36] CLUNAN & TRINKUNAS, *supra* note 20, at 275.

[37] *Id.* at 11.

[38] *Id.* at 12.

[39] *Id.* at 276.

[40] OECD has also produced a document guiding intervention in failed states. *See generally* Organisation for Economic Co-operation and Development, *Principles for Good International Engagement in Fragile States and Situations* (April 2007) (putting

Development Program (UNDP). The U.N. Millennium Declaration directly linked human rights and good governance, [41] and other commentators have speculated on the existence of an emerging right in international law to democratic governance.[42] The central focus of this literature differs from the security discourse, but the two are connected and in some ways complimentary. The governance literature evaluates what counts as effective and responsive governance, [43] and thus adds substance and depth to the question of whether and under what conditions its absence might wrestle control away from the state and toward informal actors. It also addresses certain aspects that the security literature is quick to gloss over, such as the connection between governance, development, human rights, political participation and individual empowerment. The Organization of American States, for instance, maintains a Department for State Modernization and Good Governance, which is tasked with decentralization, transparency, and institution-building, among other governance issues. Such problems are not limited to poor, developing states. They also affect the world's most advanced democracies. Charles Kupchan has written that "[t]he mismatch between the growing demand for good governance and its shrinking supply is one of the gravest challenges facing the Western world today."[44]

The security literature addressing ungoverned space and the new emphasis on good governance, generally, have combined to give renewed prominence to existing writings on "governance without government"[45] and "order without law." [46] Simmering theories on multilevel, consociational and decentralized arrangements have also come to the fore. [47] Whether the lack of an effective government represents a

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forth ten principles to maximize the impact of international engagement while minimizing unintentional harm).

[41] *See* United Nations General Assembly, *United Nations Millennium Declaration*, art. 24-25, A/RES/55/2 (Sept. 18, 2000).

[42] *See generally* Thomas Franck, *The Emerging Right to Democratic Governance*, 86 Am. J. Int'l L. 46 (1992) (concluding that democracy is "on its way" to becoming a global entitlement).

[43] *See* Samuli Seppänen, Good Governance in International Law (2003) 123.

[44] Charles Kupchan, 91 Foreign Affairs 62 (Jan./Feb. 2012).

[45] *See generally* James Rosenau and Ernst-Otto Cziempel, Governance without Government: Order and Change in World Politics (1992); James Rosenau, *Patterned Chaos in Global Life: Structure and Process in Two Worlds of World Politics*, 9 Int'l Political Science Rev. 327 (1988); James Rosenau, *The Relocation of Authority in a Shrinking World*, 24 Comparative Politics 253 (1992); James Rosenau, *Governance in the Twenty-first Century*, 1 Global Governance 13 (1995).

[46] *See generally* Robert Ellickson, Order without Law: How Neighbors Settle Disputes (1994); Peter Huang & Ho-Mou Wu, *More Order without More Law: A Theory of Social Norms and Organizational Cultures*, 10 J. L. & Econ. Org. 390 (1994); Robert Ellickson, *The Aim of Order without Law*, 150 J. Institutional & Theoretical Econ. 97 (1994).

[47] For edited collections on this issue *see e.g.* G. Shabbir Cheema & Dennis Rondinelli (eds.), Decentralizing Governance: Emerging Concepts and Practices (2007); Mwangi Kimenyi & Patrick Meagher (eds.), Devolution

hindrance to effective governance is, for some, an open question. Creative conceptions of statehood,[48] international legal personality and sovereignty have further altered the parameters of the debate.

For their part, international law scholars have added legal analysis to the issues raised by ungoverned space and the absence of effective government. Generally, this has occurred under the rubric of "failed" or "collapsed" states[49] and the need for a reconceptualization of existing legal structures and arguments. For instance, Chiara Giorgetti advocates for a set of normative rules that should guide international intervention in areas outside of sovereign control. She presents eight "guiding principles for action to maintain international public order in situations of state failure," which include state duties to: cooperate; protect; notify; and provide assistance; and impose additional responsibilities on international actors, such as the U.N. Secretary-General, Security Council and General Assembly.[50] Importantly, Giorgetti maintains that these principles do not violate international norms on non-intervention,[51] because to hold as much is "based on a wrong understanding of the meaning of sovereignty."[52] In her view, the non-intervention norm must be "assessed against the interests of other states in reducing threats to security" as well

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[48] *See e.g.* Note (Robert Malley, Jean Manas and Chrystal Nix), *Constructing the State Extraterritorially: Jurisdictional Interest, the National Interest, and Transnational Norms*, 103 Harv. L. Rev. 1273 (1989-1990); John Ruggie, *Territoriality and Beyond: Problematizing Modernity in International Relations*, 47 Int'l Org. 139 (1993).

[49] "Ungoverned space" or its variants "ungoverned area" and "ungoverned territory" have not yet received any sustained attention in the international legal canon. The closest scrutiny to date was from a short piece in *Foreign Affairs* by Michael Crawford and Jami Miscik. *See* Michael Crawford and Jami Miscik, *The Rise of the Mezzanine Rulers: The New Frontier for International Law*, 89 Foreign Affairs 123 (2010). But that article left more questions than answers (discussed *infra*). Other pieces have addressed the issue under the general heading of failed-states. *See e.g.* Theresa Reinold, *State Weakness, Irregular Warfare, and the Right of Self-Defense Post 9/11*, 105 Am. J. Int'l L. 244 (2011); Ryan Vogel, *Drone Warfare and Armed Conflict*, 39 Denv. J. Int'l L. & Pol'y 101 (2010); Vonda Felbab-Brown, *The Political Economy of Illegal Domains in India and China*, 43 Int'l L. Rev. 1411 (2009); Charles Norchi, *The Legal Architecture of Nation-Building: An Introduction*, 60 Me. L. Rev. 281 (2008); Note, *Counterinsurgency and Constitutional Design*, 121 Harv. L. Rev. 1622 (2008).

[50] *See* Chiara Giorgetti, A Principled Approach to State Failure: International Community Actions in Emergency Situations (2010) 184-185.

[51] *See id.* at 185. These norms are articulated in the Charter of the United Nations, art. 2, paragraph 7 as well as in *The Declaration on the Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, G.A. Res. 2625 (XXV), U.N. Doc. A/2625 (Oct. 24, 1970).

[52] Georgetti, *supra* note 50, at 185.

as the "existing duty of cooperation and right of interaction that exists in the international community."[53]

Neyire Akpinarli formulates another approach to the issue. She writes that the "*absence of effective government* is unquestionably one of the most important challenges to international law today."[54]   In her view, the absence of effective government implicates not only issues of peace and security, but also history, politics, economics, human rights and development. The interventionist and self-serving policies that developed states have pursued with regard to failed states, and the weakness of the international legal framework applicable in the absence of effective government, have only deepened the divide between the rich (North) and the poor (South). According to Akpinarli, there are major problems with the legal basis and praxis of this approach. In order to properly address the issue, powerful, developed states must break the habit of imposing their norms on the weak. As she concludes: "[p]eace can only be established once international law protects the interests of all nations, respecting and responding to their different cultural values."[55]

Writing at the intersection of law, security and policy, Michael Crawford and Jami Miscik posit in a 2010 *Foreign Affairs* article titled *The Rise of the Mezzanine Rulers: The New Frontier for International Law* that the failure of formal governance structures can also be traced to the emergence of "mezzanine" actors, who insert themselves at the "level between the government and the people."[56]   These actors—such as Hezbollah, the Afghan and Pakistan Taliban, al Qaeda, al Shabaab, Lashkar-e-Taiba and the Haqqani network, to name a few—prey on weak governments, "jeopardize domestic stability"[57] and create transnational security threats. Importantly, they also present a major challenge to international law. According to Crawford and Miscik, the model of international law premised on the predominance of nation states "has not kept pace with this challenge."[58] For them the "gulf between international law and local realities frustrates efforts to tackle the problems posed by mezzanine rulers."[59]   To remedy this paralysis, governments seeking to counter the rise of mezzanine rulers have no choice but to "work over time to recast the international legal environment."[60]

Sadly, however, in their short article Crawford and Miscik offer few detailed prescriptions on how international law must change. Their contribution is to issue a challenge, not to present a comprehensive solution. Similar to Giorgetti, they advocate for a recalibration of the

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[53] *Id.* at 188.

[54] *See* Neyire Akpinarli, The Fragility of the 'Failed State' Paradigm: A Different International Law Perception of the Absence of Effective Government (2010) 1 [emphasis added].

[55] *Id.* at 235.

[56] Crawford and Miscik, *supra* note 49, at 123 .

[57] *Id.*

[58] *Id.* at 124.

[59] *Id.*

[60] *Id.*

norm on non-intervention as it applies to "areas outside of sovereign control" (or "ungoverned spaces") and they also argue that "the distinction between war (to which the law of armed conflict applies) and peace (to which regular international law applies), is outmoded;"[61] however, their analysis remains superficial. They call on states "to modernize international law so that it addresses the problem of ungoverned spaces,"[62] but in the end, their doubts as to the alacrity of such a process lead them to advocate for a number of interim political measures and engagements aimed at stemming the exigencies of the threat.[63]

Crawford and Miscik's challenge, however, is tantalizing; and this article takes the bait. Because of the ways that ungoverned space imperils existing relations between states and exposes gaps in the global governance system, it represents both a fundamental affront to the existing international legal system and a laboratory for innovation. It is here that the "dynamics of international law"[64] can be expounded and put to good use. At its core the discipline is concerned with the governance of sovereign equals; however, it can and should go deeper. In many instances—such as with respect to individual criminal responsibility, human rights and internal war—the law in fact does extend beyond the level of sovereign interactions, but such enlargements, to the extent that they have been codified, are not enough to account for the complete set of vagaries raised by ungoverned space. Rather, the issue demands a fresh look at the extant legal framework.

The question becomes a familiar one: what is to be done? Contrary to Crawford and Miscik's implicit assumption, political engagement and the reform of international law are not exclusive propositions. The situation is quite the opposite. Political engagement informs the development of legal norms, and legal norms provide a framework that guides political engagement. The two are mutually constitutive. Therefore, the interim measures that Crawford and Miscik suggest will have a profound effect on the possibilities for the law. This raises a whole host of questions. Should the international community impose governance from the "outside"? Should "weak," "failing" or "failed" states receive assistance from donors to build their own forms of institutional governance? Should such issues be left to the sovereign control of domestic politics? What is required for sovereign control to exist? Should strong states take an active, interventionist role? Can we engage in a series of "re's" (e.g. reimagining, reconstructing, reinvigorating, recasting, remaking and rethinking) to build the international legal architecture in such a way as to enfranchise, empower and "responsibilize" controversial candidatures, including mezzanine actors, secessionist movements, warlords, insurgents, criminal organizations and other armed groups? Is it possible to innovate our way

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[61] *Id.* at 130.

[62] *Id.* at 132.

[63] *Id.* at 130-132.

[64] My thinking on this issue is informed by the framework of normative and operating systems of international law put forth in Paul Diehl & Charlotte Ku, The Dynamics of International Law (2010).

out of the ungoverned space morass? Are the answers to these questions different for virtual space, which challenges the sovereign framework in novel ways? Is "modernization" enough or is a complete reconception of the framework of global politics and governance necessary? Are these all false choices? Can anything be learned from previous deviations and expansions from established international legal doctrine?

To answer these questions, this article picks up where Crawford and Miscik left off and expands the inquiry. It adopts the degree of analytical rigor advocated by Menkhaus, Lamb, Clunan and Trinkunas, and attempts to develop a nuanced vision of ungoverned space. It then formulates an interpretive international legal framework and tests it against this vision. Through this process it develops a complex argument on how international law should apply to ungoverned space. Such a methodology represents the only way to respond to the challenge to international law, while simultaneously accounting for the complexities of the issue as they are expressed in both the security and legal literatures.

Specifically, the article proceeds in four stages. Section I surveys the different definitions of ungoverned space from the literature. From there it analyzes various typologies that have emerged and proposes a synthesized version. Finally, in direct response to Crawford and Miscik, it examines the various sources of governance that exercise authority and power in ungoverned space. Section II addresses the applicability of international law to the issue. It also undertakes a review of the myriad methods of international law that may be used to conceptualize and address the diverse range of issues raised by ungoverned space. It lays out the challenges that ungoverned space poses to the existing legal framework, and presents three options, or techniques, for addressing the existing gaps in the law. These are: state responsibility; principled engagement; and innovation. The state responsibility argument is the least creative. It represents the law as it is (*de lege lata*) and for that reason it is easily critiqued. However, because it serves as a point of departure, examining the specific ways in which it fails has some value. The second technique, principled engagement, builds on Giorgetti's work, and attempts to push emerging norms (*in statu nascendi*) in a particular direction, namely toward a more flexible interventionist policy. Despite its flexibility, this technique must include normative limits, and it is here that the evolving contours of the "unwilling or unable" standard and Giorgetti's eight principles emerge as a useful argumentative devices. Because the technique of principled engagement involves the use of analogical reasoning, previous shifts in international law are also particularly relevant. In its form, function and application it comes closest to Crawford and Miscik's call for a "recasting" of international law. The third technique goes much farther than the preceding two. It sheds the received understandings of international law and radically reimagines the discipline to match the realities of ungoverned space. This involves tearing apart and reconstructing the law into what it should be (*de lege ferenda*) so that it can capture the true power and responsibility dynamics that exist. The challenge of this latter technique is to innovate *within* the discipline; to stay

inside the reasonable limits of the doctrine and to resist a slip into the domain of politics and social commentary. As Akpinarli has written with regard to her project, the difficulty is to respect "the parameters of international law while taking a fresh approach from that of the mainstream."[65] In short, the hardest part of the radical technique is determining how to drastically alter the conversation while continuing to speak in the vernacular of international law. Section III applies each of the three techniques to the real-world example of Somalia. It tests the underlying assumptions and analyzes the results. Section IV examines the possible alternative futures that may result from the application of each of the techniques. The thesis is that the issue of ungoverned space necessitates a radical change in the way in which international law relates to its subjects, and that the third technique is the most effective response. However, in order for such a move to be taken seriously it must not disregard existing international legal structures and doctrine. If it eviscerates the distinction between law and politics it will be cast aside as heretical, and it will not be regarded as a serious attempt to solve the problem from the perspective of law. The lesser departures from existing doctrine offer fewer risks of dismissal, but they are also limited in rather obvious ways, which weakens their transformational power. It might be easy to view the second technique involving principled engagement as the "Goldilocks" solution to the problem; not too much and not too little. But as the analysis shows, this approach merely repeats and entrenches the mistakes that led to the emergence of ungoverned space in the first place. It also represents an unsustainable solution to the problem.

I.   UNDERSTANDING UNGOVERNED SPACE

"And this also... has been one of the dark places of the earth."
–Joseph Conrad, *Heart of Darkness*

"Outside and inside form a dialectic of division, the obvious geometry of which blinds us as soon as we bring it into play in metaphysical domains. It has the sharpness of *yes* and *no*, which decides everything."
–Gaston Bachelard, *The Poetics of Space*

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[65] AKPINARLI, *supra* note 54, at 3.

A.   Overview

Governance is a matter of degree. At first glance this may appear to contradict the title of this article. The notion of "ungoverned space" seems to imply a binary vision of governance: either a space is governed, or it is not. In actuality, however, in almost every realm of human endeavor governance exists in some form.   Paradoxically, as noted in the introduction, it is widely agreed that governance may even exist without government. The two are separate yet related concepts. Thus the term ungoverned space as it is used in this article does not refer to a complete lack of governance *per se*. Rather it denotes a break between a space and the governance of that space *by the state*. Therefore it can be defined simply as:

> *Ungoverned space* **is a space not effectively governed by the state.**

Phrased differently, the space lacks effective *government*, which represents the state, but not necessarily effective *governance*, which may flow from various sources other than the state. In order to understand the proposed definition, three of its constituent (or "loaded") terms require additional definition and explanation. These are: "effectively governed" (otherwise understood as "effective governance"), "state" and "space." Under the general definition of statehood, a number of sub-terms also require attention; these include: "effective government," "independence" and "capacity."   Because it cuts across all aspects of international law, "sovereignty" also represents a term that must be illuminated.

Generally speaking, ungoverned space may emerge in various forms and from various actions taken or not taken by the state. In some cases states may be *unwilling* to govern, while in other cases they may be *unable* to do so. Alternatively, states may have chosen to *delegate* governance over a particular space to someone or something else, such as an international organization, corporation, tribe, clan or local power-broker (sometimes referred to as a "warlord"). In still other cases there may exist *vacuums* where no state or delegate exists to exercise control over a space. This creates a scenario where governance often devolves out of necessity to local or informal actors. Finally, *parallel*, often informal forms of governance may exist alongside formal forms. In each of these situations *misgovernance, malgovernance, alternative governance, under-governance, contestation* and/or *weak governance* might result.

Despite the shortcomings flowing from its binary nature, the term ungoverned space serves as a useful heuristic through which not only truly ungoverned but also the various *less-than-governed* spaces can be identified and analyzed. That is because while governance may take place along a continuum, under the current international legal system the host state retains responsibility for controlling and governing its territory.   Its responsibility remains "on" at all times. Even where informal or local actors are able to "step into the shoes" of the formal government and

provide alternative governance structures, the space remains ungoverned by the formal government. This creates major problems for existing international law, which assumes that unitary governments with the requisite capacity will assume their rights and fulfill their international obligations, both internally and externally. To be sure, governments fail and rise anew all the time, but when states themselves fail, the system has no means to replace them. Informal or local governors may emerge, but often they too will fail to provide adequate governance structures. This might happen for myriad reasons, such as a lack of capacity, lack of legitimacy, the presence of conflict or insufficient political will. In turn, fragmentation might occur, resulting in the proliferation of governance across a wide spectrum of actors, each with a stronger or weaker claim to represent the state in its internal and external relations. Moreover, because they lack a formal status, despite their claims, informal actors are generally not viewed as subjects of international law. Legal subjectivity continues with the state even though no actor exists with the sovereign capacity to engage in internal and external relations on that state's behalf.

This section addresses these and related challenges by first identifying the different working definitions of ungoverned space. Because the ungoverned space discourse arose out of the failed state literature, the latter is also examined in some detail. After examining the various definitions, the term "effectively governed" is defined. From there, the analysis moves to the various typologies that have been suggested. The section also puts forth a synthesized, simplified typology that incorporates elements of existing proposals from both the ungoverned space and the failed state literatures. The analysis then shifts to the meaning of "space" in the ungoverned space literature. Based on the literature it derives a definition for the term. Finally, in direct response to Crawford and Miscik's conception of the "mezzanine" ruler, the focus shifts to identifying the various sources of governance that exist within ungoverned space. This part tackles the complex question of statehood and subjectivity under international law and also seeks to identify the various alternative governors who might emerge as the new subjects of an international legal framework applicable to ungoverned space. It also provides a working definition of "state."

B.   *Definition(s)*

1.   Ungoverned space and related terms

While ungoverned space has no universally accepted definition, the security literature does set forth a number of proposals both for the term itself and for various related terms, such as *safe haven, ungoverned area, ungoverned territory,* and *(terrorist) sanctuary.* Each of these definitions employs slightly different language. Although the substance is largely the same, some distinctions do exist. For instance, the Lamb report defines *ungoverned area* as:

> A place where the state or the central government is unable or unwilling to extend control, effectively govern, or influence the local population, and where a provincial, local, tribal, or autonomous government does not fully or effectively govern, due to inadequate governance capacity, insufficient political will, gaps in legitimacy, the presence of conflict, or restrictive norms of behavior. "Ungoverned areas" should be assumed to include under-governed, ill-governed, contested, and exploitable areas.[66]

These ungoverned areas exist not only in underdeveloped foreign countries, but also in strongly governed countries, where illicit actors "sometimes take advantage of 'blind spots' in governance capacity and political will, pockets of social discontent, geographical remoteness, or overcrowding."[67] They may also exist in other "strongly governed countries that voluntarily abdicate control over part of their territory as a matter of policy."[68] Importantly, each ungoverned area represents a potential *safe haven*, which Lamb defines as:

> A place or situation that enables illicit actors to operate with impunity or evade detection or capture, including ungoverned, under-governed, misgoverned, or contested physical areas (remote, urban, maritime) or exploitable non-physical areas (virtual) where illicit actors can organize, plan, raise funds, communicate, recruit, train and operate in relative security.[69]

Lamb's two-step definition is notable because it draws a line between ungoverned areas and safe havens. Ungoverned areas are only *potential* safe havens. This emphasizes that it is the not only the lack of governance but also the underlying conditions of the specific ungoverned area that translates it into a useful space for illicit groups. As he writes, "[t]he pertinent question with respect to ungoverned areas is not about the *degree* of governance but about the *manner* of governance: *Who is, and who is not, governing an area, and what are the consequences of the particular way they govern?*"[70]

Similarly, the RAND report also utilizes a two-step definition, although the terminology and connection between the two-steps is slightly different. The report first defines *ungoverned territory* as:

> An area in which a state faces significant challenges in establishing control. Ungoverned territories can be failed or failing states, poorly controlled land or maritime borders,

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[66] Lamb, *supra* note 20, at 16.

[67] *Id.* at 16.

[68] *Id.* at 16.

[69] *Id.* at 15.

[70] *Id.* at 20.

or areas within otherwise viable states where the central government's authority does not extend. Ungoverned territories can also extend to airspace, for instance, air routes through South and Central America and the Caribbean that the countries affected are unable to control—routes that drug smugglers use to transport illegal drugs.[71]

Further, ungoverned territories have the potential to become *terrorist sanctuaries,* which are defined as:

> Geographic areas, infrastructure, and facilities where terrorists can conduct training and indoctrination; develop networks that may subsequently serve as a source of operational, financial, and other support; and plan and launch operations. They may also include financial, cyber, and propaganda nodes that allow terrorists to advance their cause.[72]

Whether a particular ungoverned territory may also serve as a terrorist sanctuary depends on a two dimensional framework consisting of *ungovernability* and *conduciveness.*[73] The higher the "score" on either dimension, the more likely it is that an ungoverned territory will also serve as a potential terrorist sanctuary. Beneath *ungovernability* there are four variables that describe the extent to which a territory is ungoverned. These are: the level of state penetration of society; the extent to which the state has a monopoly on the use of force; the extent to which the state can control its borders; and whether the state is subject to external intervention by other states.[74] With regard to *conduciveness,* there are also four variables that "differentiate ungoverned territories that are likely to provide terrorist sanctuaries from ungoverned territories that are unlikely to provide terrorist sanctuaries."[75] These are: adequacy of infrastructure and operational access; sources of income; favorable demographic and social characteristics; and invisibility.[76] The point to be made here is that, similar to the Lamb Report, the RAND report distinguishes ungoverned territories that are likely to pose a threat (e.g. by becoming terrorist sanctuaries) from those that are not. In short, the lack of governance matters, but it represents only a first step in the analysis.

Clunan and Trinkunas drive this point home by emphasizing that it is not necessarily *ungoverned spaces* that should concern us because they are actually quite rare, but rather it is the contested or "differently" governed

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[71] Rabasa, *supra* note 20, at xv.

[72] *Id.* at 2.

[73] *Id.* at 2-4.

[74] *Id.* at 3.

[75] *Id.* at 4.

[76] *Id.*

spaces where "other types of actors [besides states] rule."[77]   For them, "[u]ngoverned spaces...exist where territorial control has been voluntarily or involuntarily ceded in whole or part to actors other than the relevant legally recognized sovereign authorities" and in order to understand whether such spaces pose a threat the essential issue is "not lack of governance per se but rather *who* governs these spaces"[78] that matters. Clunan and Trinkunas critique the focus on state control, and instead argue that *alternative governance* and *softened sovereignty* should be seen as the defining characteristics of ungoverned space. Through focusing on these attributes, policy-makers will be able to more fully understand the nature of ungoverned space and more accurately determine whether, in what ways and under what conditions it must be addressed.

Likewise, Menkhaus uses the term *ungoverned space* to describe:

> [a] political condition along a spectrum which includes complete state collapse; intermittent, predatory state presence, usually in the form of a garrison state; partial state collapse, wherein a state authority exists but has no writ in certain regions within its territory; and weak or failed states, which maintain only a cosmetic and ineffective presence in frontier zones or large urban slums that are essentially beyond the control of government authorities.[79]

He then goes on to note, however, that "ungoverned spaces are not anarchic" and in fact "[e]ven in zones of complete state collapse" there exist "a variety of local arrangements and systems" which he calls "governance with a small g."[80] These local security and governance systems are different from state systems, but they are also quite complex. They typically involve "hybrid arrangements"[81] drawing on a number of local sources of authority.   These local systems of governance are also "overlapping, fluid, fragile and vulnerable to spoilers, and generally illiberal, but they do provide a measure of security, predictability, and rule of law in the absence of state authority."[82] The point again is to look beyond the mere lack of state sponsored governance and examine closely whether to what extent governance may exist at all. If it is *alternative, hybrid, local, small g* or any other form, then it must be carefully examined. Only through such a process will policy-makers "push beyond the obvious bromides" and capture a fuller understanding of the particular ungoverned space.

Crawford and Miscik define *ungoverned space* as "areas beyond the control of the state" where formal governments "fail to supply critical services to their citizens because they lack adequate resources, the

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[77] CLUNAN AND TRINKUNAS, *supra* note 20, at 17.

[78] *Id.* at 17-19 [emphasis added].

[79] Menkhaus, *supra* note 26, at 3.

[80] *Id.* at 4.

[81] *Id.*

[82] *Id.*

necessary skills, or the political will to do so."[83] According to them, four factors give the mezzanine actors operating in such spaces an edge: modern communications; new military technology; government support; and a lack of outside scrutiny.[84] The communications advantage is linked to global interconnectedness as well as the lack of governance over the internet. New military technologies, such as the high-technology drones and low-technology improvised explosive devices (or IEDs) are both more transportable and more readily available than the traditional, heavy, hard-to-operate weapons of the past. Government support gives life to and sustains these actors through protection and insulation from the outside world. And finally, unlike formal governments who have found themselves the subjects of increased scrutiny flowing from heightened international attention and the rise of social media, informal actors face "limited accountability, domestically and internationally," and therefore "are inclined to take greater risks."[85] This operational leeway results in part from the fact that as a general rule such actors are not subject to international law, which allows them to hide behind the sovereignty of the host state when it comes to international enforcement actions.

2.   Failed state and related terms

The definitions and explanations offered by Lamb, RAND, Menkhaus, Crawford and Miscik reflect a conceptualization of ungoverned space that is clearly linked to the notion of state failure. This article's proposed definition also relies on the state's inability to effectively govern a particular space as a fundamental part of its composition. Therefore, definitions from earlier pioneering writings on the idea of *failed states* are clearly relevant.

The term "failed state" first appeared in Gerald Helman and Steven Ratner's *Foreign Policy* article from 1993 titled *Saving Failed States*. In that article, they use the term to describe a "state [that was] utterly incapable of sustaining itself as a member of the international community" stricken by "civil strife, government breakdown, and economic privation."[86] They also related the concept to *debellatios*, which was the term used to describe the destroyed German state in the immediate aftermath of World War II.[87] For Helman and Ratner, state failure could occur along a continuum consisting of three categories: First, *failed states* are those whose government has been "taken overwhelmed by circumstances"; second, *failing states* are those whose "collapse is not imminent but could occur within several years"; and third, *newly independent states* are those whose "viability is difficult to assess."[88] At the time of their writing, they placed

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[83] Crawford and Miscik, *supra* note 49, at 126.

[84] *Id.* at 128.

[85] *Id.*

[86] Gerald Helman and Steven Ratner, *Saving Failed States*, 89 FOREIGN POLICY 3 (1992-1993).

[87] *Id.*

[88] *Id.* at 5-6.

Bosnia, Cambodia, Liberia and Somalia in the failed state category. Ethiopia, Georgia and Zaire represented examples of potentially failing states. And the Soviet Union and Yugoslavia were offered as instances of potential failure or dissolution.

Helman and Ratner's article served as a rallying cry for post-Cold War U.S. and U.N. policy, as well as a basis for intervention in many of the states they listed. It remains a matter of dispute whether the phenomenon they identified represented a new development in international affairs, or a whether they had merely changed the conversation on issues such as intervention, security and development.[89] Regardless of the answer, nineteen years after Helman and Ratner's article, the term still has no agreed upon definition and some view the concept as a mere return to colonial notions of dominion by powerful states.[90]

Writing in 1995, then U.N. Secretary-General Boutros Boutros-Ghali described the emergence of the problem through internal conflict as follows:

> "A feature of such conflicts is the collapse of state institutions, especially the police and judiciary, with resulting paralysis of governance, a breakdown of law and order, and general banditry and chaos. Not only are the functions of government suspended, but its assets are destroyed or looted and experienced officials are killed or flee the country. This is rarely the case in inter-state wars. It means that international intervention must extend beyond military and humanitarian tasks and must include the promotion of international reconciliation and the re-establishment of effective government."[91]

Following the dramatic 9/11 terrorist attacks the issue took on a pronounced security-centric dimension. Writers also reiterated that the symptoms of state weakness could proliferate as never before, and that this aspect, in particular, had transformed state failure into an acute international threat. Robert Rotberg summed-up this view in 2002, when he wrote that:

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[89] *See* James Crawford, The Creation of States in International Law 719 (2d. ed. 2007).

[90] *See generally* Ruth Gordon, *Saving Failed States: Sometimes a Neocolonialist Notion*, 12 Am. U. J. Int'l Pol'y 903 (1997); Ruth Gordon, *Saving Failed States: Sometimes a Neocolonialist Notion*, 91 Proceedings of the Annual Meeting (American Society of International Law): Implementation, Compliance and Effectiveness 420 (1997); Ralph Wilde, *The Skewed Responsibility Narrative of the Failed States Concept*, 9 ILSA J. Int'l & Comp. L. 425 (2003).

[91] United Nations, *Report of the Secretary-General on the Work of the Organization, Supplement to an Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations*, A/50/60 (Jan. 25, 1995) (*prepared by* Boutros Boutros-Ghali) at ¶13.

> "[t]he threat of terrorism has given the problem of failed nation-states an immediacy and importance that transcends its previous humanitarian dimension [...] Although the phenomenon of state failure is not new, it has become much more relevant and worrying than ever before. In less interconnected eras, state weakness could be isolated and kept distant. Failure had fewer implications for peace and security. Now, these states pose dangers not only to themselves and their neighbors but also to peoples around the globe. Preventing states from failing, and resuscitating those that do fail, are thus strategic and moral imperatives."[92]

Similar to Helman and Ratner, Rotberg also defines state failure along a continuum. He identifies "several revealing signposts"[93] from the economic and political dimensions that mark a state's descent. Economic indicators include corruption, graft and plummeting standards of living. On the political side malfeasance by leaders, characterized by the subversion of prevailing democratic norms, the coercion of judicial institutions and the suppression of civil society, undercuts their authority. Eventually these two paths converge. As the state provides fewer and fewer services to its citizens it loses its legitimacy. At this final stage, typified by the "absence of authority,"[94] the state collapses and "separation, autonomy or total takeover"[95] follow.

Importantly, Rotberg, like Lamb, Clunan, Menkhaus and the authors of the RAND study, also notes that state failure is not homogeneous. On this point, he writes:

> The nature of state failure varies from place to place, sometimes dramatically. Failure and weakness can flow from a nation's geographical, physical, historical, and political circumstances, such as colonial errors and Cold War policy mistakes. More than structural or institutional weaknesses, human agency is also culpable, usually in a fatal way. Destructive decisions by individual leaders have almost always paved the way to state failure.[96]

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[92] Rotberg, *supra* note 14, at 127. Perhaps reflecting the urgency of the post-9/11 environment, the quotation from Rotberg comes under the heading: "THE ROAD TO HELL." *Id.*

[93] *Id.* at 128.

[94] *Id.* at 133.

[95] *Id.* at 130.

[96] *Id.* at 127-28. Outside intervention can also create the conditions for state failure. On this point, Ned Parker writes with regard to the U.S. intervention and subsequent withdrawal from Iraq:

> "Nine years after U.S. troops toppled Saddam Hussein and just a few months after the last U.S. soldier left Iraq, the country has become something close to

Rotberg's dual emphasis on human agency and the place-to-place differentiation of state failure clearly parallels the definitions and understandings put forth by the other writers with respect to ungoverned space. It accentuates the notion that state failure is a complex, multi-causal phenomenon. At the same time, Rotberg's description and analysis of the issue suggests that certain structures, such as geography, history and politics will be relevant across all spaces.

3.   International law's approach

The legal literature has focused on the absence of effective government and the loss of sovereign control as the markers of ungoverned space and state failure. From the international law point of view, a failed state, while retaining legal capacity, has in all practical purposes lost the ability to exercise it.[97] The term "failed state" has only recently entered the legal lexicon; however, and because of the discipline's reliance on concepts such as statehood, sovereignty, capacity and territorial control for its architectural foundations, international lawyers have had a difficult time formulating a comprehensive doctrine applicable to the issue. Giorgetti exposes this disconnect by noting that "[i]f at all, international law views failed states as states with ineffective governments,"[98] rather than as complete collapses that make impossible the performance of external and internal obligations. The doctrine is at best incomplete. In this way, the preference for stability and order in the international legal system serves as a restraint to the development and acceptance of new and innovative ideas.

Nonetheless, because of the prevalence of the failed state discourse, authors have attempted to define the issue within the confines of international law. Daniel Thürer describes a failed state according to its political, legal, social and humanitarian characteristics, noting "[a] state is usually considered to have failed when the power structures providing political support for law and order have collapsed."[99] The "elements" of state failure that Thürer provides include: the internal collapse of political

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a *failed state.* Prime Minister Nouri al-Maliki presides over a system rife with corruption and brutality, in which political leaders use security forces and militias to repress enemies and intimidate the general population. The law exists as a weapon to be wielded against rivals and to hide the misdeeds of allies. The dream of an Iraq governed by elected leaders answerable to the people is rapidly fading away.

Ned Parker, *The Iraq We Left Behind*, 91 FOREIGN AFFAIRS 94 (Mar./Apr. 2012) (emphasis added). Certain preventive measures can also be taken to mitigate the effects of collapse. *See* Daniel Byman, *Preparing for Failure in Syria: How to Stave Off Collapse*, FOREIGN AFFAIRS ONLINE (Mar. 20, 2012).

[97] Daniel Thürer, *An Internal Challenge: Partnerships in Fixing Failed States*, 29 HARV. INT'L REV. 42 (2008).

[98] *See* GIORGETTI, *supra* note 50, at 6 *citing* Wilde, *supra* note 90, at 426.

[99] Thürer, *supra* note 97.

and legal systems; the absence of capable bodies representing the state at the international level; and the loss of the monopoly of power by the police, judiciary and other state bodies.[100]

Giorgetti defines "failing or failed" states as those that are "unable to fully perform their obligations towards their citizens and the international community."[101] As she notes, the international community now imposes more obligations on states, increasing the likelihood of failure.[102] For instance, new standards of governance have emerged requiring states to protect the civil, political economic and cultural rights of their citizens requiring "innumerable actions daily"; moreover, states have become increasingly inter-dependent, resulting in an elevation in the number and quality of obligations owed by states to each other and to the international community as a whole.[103] Of course even strong, stable states violate their obligations on a daily basis, but in these situations it is not a lack of capacity that causes them to do so.

The value of Giorgetti's construction is twofold. First, she shows the increased burdens placed upon states in the complex, twenty-first century world; and second, she rightly articulates the problem as bi-directional. When states fail to uphold their internal obligations to their own citizens, such as, for instance, on the issue of human rights, they also violate obligations owed to the international community, either as a whole (in the case of *jus cogens*) or to other parties under specific agreements, such as the International Covenant on Civil and Political Rights (ICCPR). The same is true from the opposite perspective. When a state violates its external obligations owed to other states under, for instance, the *jus ad bellum*, it might also violate its internal obligations owed to its own citizens under democratic principles of accountability and the authority to put the country at war. Because of the bi-directionality of the problem, each instance of state failure is compounded twofold, making it even more difficult for weak states to fulfill their obligations.

Akpinarli focuses on the absence of an effective government as the indicator of state collapse and failure. According to her, governmental failure can emerge in two ways: the collapse of state institutions, namely the political, legislative, executive and judicial apparatuses; or through internal armed conflict and chaos.[104] A government is ineffective if it cannot realize its internal or external obligations. She also notes; however, that "this collapse should be understood in the broad sense and not restricted to the current governing authority, although the lack of a governing authority makes the phenomenon more visible and exacerbates the long-term ruin of the political, economic and social structure."[105] This echoes the understandings presented by Lamb and Menkhaus, both of

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[100] Thürer, *supra* note 97.

[101] *See* GIORGETTI, *supra* note 50, at 6.

[102] *See id.* at 1.

[103] *See id.*

[104] *See* AKPINARLI, *supra* note 54, at 11.

[105] *See id.*

whom emphasized the importance of looking at the *way* in which a particular space is governed.

Focusing on the security aspect of the issue, Theresa Reinold writes that "weak states" should be understood both as those "unable to exercise effective territorial control" and as those who exhibit an "unwillingness to prevent irregular activity on its territory."[106] When a state fails to uphold its territorial responsibilities, even where it acts in good-faith but lacks capacity, Reinold takes the position that it should be held accountable for the violative act.[107] Her view finds support in Judge Bruno Simma's separate opinion from the *Armed Activities on the Territory of the Congo*[108] case, where he notes:

> [I]f armed attacks are carried out by irregular forces from such territory against a neighbouring State, these activities are still armed attacks even if they cannot be attributed to the territorial State, and, further [...] it "would be unreasonable to deny the attacked State the right to self-defence merely because there is no attacker State and the Charter does not so require."[109]

Finally, John Yoo takes a proactive approach to the issue. While he follows the mainstream discourse in defining failed states as "nations that cannot perform their domestic functions or meet their obligations under international law because of the collapse of central government authority,"[110] he also writes that "[f]inding a comprehensive and effective solution to the challenges of terrorism, human rights violations, or poverty requires a better understanding of how to restore failed states."[111] It also demands new approaches from international law. Rather than advocate for the rebuilding of states out of the ashes of a failed states—what he terms the "restoration of the status quo *ante*"—or push for the replacement of states by temporary international administrations, which occurred for instance, in Kosovo and East Timor, Yoo puts forth what he terms the "intermediate position," [112] in which international law encourages intervention. He articulates his stance as follows:

> [i]t argues that nation-states remain the most important actors with the capacity to fix failed states, and with the

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[106] Reinold, *supra* note 49, at 244.

[107] *See id.* at 284.

[108] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 ICJ Rep. 168 (Dec. 19)

[109] Separate Opinion of Judge Bruno Simma Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 ICJ Rep. 168 (Dec. 19) ¶12 (*quoting* the separate opinion of Judge Peter Kooijmans from the same case).

[110] John Yoo, *Fixing Failed States*, 99 Cal. L. Rev. 95, 100 (2011) *citing* Helman and Ratner *supra* note 86.

[111] Yoo, *supra* note 110, at 96.

[112] *Id.* at 98.

resources to increase global public goods and reduce global public "bads." Removing obstacles in international law and policy to intervention in failed states will more effectively allow nation-states to tackle the problem. This solution does not discard state sovereignty, but it may require accepting adjustments to the borders of failed states, possibly resulting in smaller, more numerous, states.[113]

In addition to seeing the matter through the lens of state and governmental failure, international legal commentators also approach governance issues through a discourse on the principle of "the common heritage of mankind." The concept first arose in 1967 out of the negotiations which eventually led to the 1982 U.N. Convention on the Law of the Sea, and was later applied to Antarctica, the moon and outer space. It essentially sets aside certain areas to be held in international trust for the benefit of all mankind, including future generations. Since 1967, progressive attempts have been made to apply the principle to various other resources, including solar energy, endangered species, genetic resources, tropical rain forests, cultural heritage, technology, trade commodities and others.[114] While the principle continues to evolve, it is generally agreed to have five elements:[115]

1. Areas designated as the common heritage of mankind shall not be appropriated;
2. The use of areas and their resources that fall under the common heritage of mankind will be governed and managed by an international authority;
3. There will be active and equitable sharing of benefits from the exploitation of the common heritage area and its resources;
4. The area and resources will be used for peaceful purposes;
5. Resources will be protected and preserved for the benefit of all mankind.

Looking prospectively, the principle has particular relevance to cyberspace and other virtual ungoverned spaces. Unlike the territorial examples discussed under the rubric of failed states, which arise out of the collapse of preexisting and presumptively effective governance institutions, these technological spaces have never been controlled by a government.

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[113] *Id.* (footnotes omitted).

[114] *See* KEMAL BASAR, THE CONCEPT OF THE COMMON HERITAGE OF MANKIND IN INTERNATIONAL LAW (1997) xx. For a review of the conceptual construction of the common heritage of mankind principle, as well as its connection with the emerging "common concern of mankind" principle, *see generally* ANTÔNIO AUGUSTO CANÇADO TRINDADE, INTERNATIONAL LAW FOR HUMANKIND: TOWARD A NEW *JUS GENTIUM* (2010) 327-350.

[115] These are adapted from Kemal Basar's list. *See* BASAR, *supra* note 114, at xx-xxi.

Upon their release of ARPANET to the public in the 1980s and early 1990s, for instance, the U.S. Department of Defense's (DOD) created a whole new space, requiring entirely *de novo* forms of governance. Since that point, the internet has never been under the direct and effective control of anyone. Like the U.S. National Aeronautic and Space Administration's (NASA) mission to the moon and its development of geo-orbital satellite technology, DOD's distribution of cyberspace created an ungoverned space where no demand for governance had previously existed.

In addition to its relevance to emerging regimes for the governance of *de novo* spaces, the common heritage principle can also be applied to situations of temporary international administration over territory, although in this case certain alterations are required. For instance, when an international organization takes control of a territory, such as East Timor or Kosovo, the primary obligation it owes is to the individuals living within that territory. Therefore, its actions must first and foremost benefit population *x,* rather than mankind as a whole. Such territorial administration will also be temporary, serving as a foundation upon which self-government and self-determination can develop.

Finally, the common heritage principle can also be utilized to better understand situations where states have delegated governance responsibilities over a particular space, either to an international institution or some other actor, or where governance authority has been seized by informal actors. In the former instance the state is exercising its sovereign authority by deciding *to move the locus of governance authority,* yet it retains certain responsibilities. For truly common spaces, such as the high seas or outer space,[116] detailed treaty provisions set out various state obligations creating a multi-layered governance regime. With regard to territorial spaces within the borders of states, such as Native-American reservations in the United States, the formal governments have taken a proactive step to devolve governance to other actors. In the latter cases where the governance authority has been wrestled from the state by informal or mezzanine actors, the state should also retain some level of formal responsibility. For instance, as Reinold alluded to in her theory on capacity and violative acts, they should remain responsible for cross-border armed attacks emanating from their territory. In each instance, the common heritage principle and the values underlying it help to fill-out the governance picture. The state remains formally involved in some capacity, and its actions must be for the benefit of the governed as well as the

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[116] Of course both the high seas and outer space only came to be treated as common areas through the exercise of human agency and the winning-out of one argument over another. Substantial disagreement, for instance, arose over the freedom of the high seas during the late sixteenth and early seventeenth century, particularly between the English jurist John Selden and the Dutch jurist Hugo Grotius. Selden advocated for sovereign dominion and Grotius supported the freedom principle. Eventually, Grotius' view carried the day, and his treatise *Mare Librium* serves as the foundation for the modern law of the sea. The dispute is chronicled *in* Edward Gordon, *Grotius and the Freedom of the Seas in the Seventeenth Century,* 16 WILLIAMETTE J. INT'L L. & DISPUTE RES. 252 (2008).

greater international community. Likewise, the formal delegates of power enjoy rights that are counterbalanced by responsibilities. The issue lies with the informal actors who have illegally seized authority. Under the current international legal regime, they have neither internal nor external responsibilities, and this must change. The resulting innovation could be informed by the values underlying the common heritage principle. Specifically, such informal actors should act primarily for the benefit of the governed population while also upholding their obligations to mankind writ large.

4.   The definition's loaded terms: "Effectively governed"

Each of the definitions, including the one proposed in this article, employ "loaded" terms that require additional clarification. The first of these relates to governance, or as it used in the proposed definition, "effectively governed." The World Bank, which collects and analyzes governance data from all states, defines *governance* itself as: "the traditions and institutions by which authority in a country is exercised [, which includes] (a) the process by which governments are selected, monitored and replaced; (b) the capacity of the government to effectively formulate and implement sound policies; and (c) the respect of citizens and the state for the institutions that govern economic and social interactions among them."[117] It then constructs two measures corresponding to each of these three areas, resulting in a total of six dimensions of governance: voice and accountability; political stability and absence of violence/terrorism; government effectiveness; regulatory quality; rule of law; and control of corruption.[118] It then scores each state according to the dimensions.[119]

The exact content of *governance* varies according to the context however; its basis lies in the *social contract* between the government and the governed. This social contract includes responsibilities in the areas of health, education, security, transportation, law enforcement, disaster relief and the provision of vital services, such as food, water, electricity and waste disposal. Importantly, these responsibilities might be legal or non-legal. Legal responsibilities are codified by law. An example is Medicare and Medicaid in the United States. Non-legal responsibilities emerge from the

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[117] *See* Daniel Kaufman, Aart Kray and Massimo Mastruzzi, World Bank Governance Indicators: Methodology and Analytical Issues, Policy Working Paper 5430 (Sept. 2010) 4 [hereinafter *World Bank Governance Indicators*].

[118] *See id.*

[119] Determining what constitutes *effective governance* or *effectively governed* within this framework can be difficult; however the World Bank does provide some guidance. It assigns numerical values to each dimension, ranging from -2.5 to 2.5. Scores at the low-end indicate "weak" governance, while scores on the high-end show "strong" governance. The scores generally accord with common-sense. On the "voice and accountability" dimension, for instance, North Korea scored the lowest (-2.21), while Norway scored the highest (1.62). *See World Bank Governance Indicators, supra* note 117. On the dimension of "government effectiveness" Somalia scored the lowest (-2.24) while Singapore scored the highest (2.25). *See id.*

legitimate expectations of the governed population. Examples include the maintenance of roads and the disposal of garbage. Such responsibilities are sometimes, but not always, uncodified. Collectively, this social contract between the government and the governed represents another source of internal obligation for the state.

The literature on *good governance* also adds substance to what it might mean to *effectively govern* a particular space. For its part the World Bank defines *good governance* as: "...epitomized by predictable, open and enlightened policy making; a bureaucracy imbued with a professional ethos; an executive arm of government accountable for its actions; and a strong civil society participating in public affairs; and all behaving under the rule of law."[120] Samuli Seppänen uses five attributes to describe *good governance*, these are: transparency; responsibility; accountability; participation; responsiveness; and rule of law.[121] According to the U.N. *good governance* promotes: "...equity, participation, pluralism, transparency, accountability and the rule of law, in a manner that is effective, efficient and enduring."[122] Translating these principles into practice requires the "holding of free, fair and frequent elections, representative legislatures that make laws and provides oversight, and an independent judiciary to interpret those laws."[123]

The definitions, attributes and implementation requirements of good governance are helpful, but ultimately they set the bar too high. They represent the ideal, but the focus here is more on *effectiveness* and *control* than it is on perfection. A government that *effectively governs* performs its internal obligations, including the provision of order, security, law, property rights [124] and the protection of human rights, while simultaneously fulfilling its external obligations to other members of the international community. Therefore, the proposed definition for the term *effectively governed* is as follows:

> **A state *effectively governs* a space, if it demonstrates the ability and the willingness to fulfill its internal and external obligations on a consistent and continuous basis.**

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[120] *See* World Bank, *Governance: The World Bank's Experience* (1994); *see also* World Bank, *What is Governance?* http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/MENAEXT/EXTMNAREGTOPGOVERNANCE/0,,contentMDK:20513159~pagePK:34004173~piPK:34003707~theSitePK:497024,00.html.

[121] *See* SEPPÄNEN, *supra* note 43, at 5-6. Seppänen's first five good governance attributes were previously articulated by the now defunct U.N. Commission for Human Rights. *See id.* at 6.

[122] United Nations, Global Issues, Governance, http://www.un.org/en/globalissues/governance/ (accessed Mar. 19, 2012).

[123] *Id.*

[124] *See* FRANCIS FUKUYAMA, STATE-BUILDING: GOVERNANCE AND WORLD ORDER IN THE 21ST CENTURY (2004) 1.

C.   Typology

    1.   Examples from the literature

In addition to offering various definitions, the literature also identifies certain *types* of ungoverned space that may be combined to form a *typology*. Lamb first separates safe havens into two types: physical (place) and non-physical (activities).[125] This is an understandable distinction given that illicit actors operate within and through various kinds of UGA/SHs, and those spaces fall neatly into the physical/non-physical dichotomy. In some cases there will of course be overlap. Illicit groups may carry out activities through ungoverned non-physical space from a particular ungoverned geographical location. However, in those situations, it still makes sense to understand illicit actors as operating within (or through) two separate ungoverned spaces, one physical and one non-physical, because the governors of each space, to the extent that they exist at all, will likely be different.

    With regard to physical safe havens, Lamb notes that while it may be easy to differentiate them based on geography (i.e. land or sea), the most important distinction between the different variants of physical safe havens, both for the illicit group and the counter-force, is population density. He therefore recommends splitting the physical safe havens into *remote, urban,* and *maritime* sub-categories.[126] The task of sub-categorizing non-physical or functional safe havens is slightly more difficult because there is no one dimension across which they all vary.[127] *Legal havens, ideological havens, recruiting havens* and *belief system havens* may be created in various ways and exist indistinguishable from one another. The one area, in Lamb's view, that does seem to represent a distinct phenomenon is the *virtual* or *cyber haven,* which rely on physical infrastructure but exist in the nebulous world of cyberspace. These are "safe havens in the sense that they enable illicit actors to operate while evading detection or capture, but they are safe havens that exist not as a physically contiguous space, like a remote, urban, or maritime area, but as a network."[128] Lamb's methodology yields the following typology of safe havens:

LAMB'S "SAFE HAVEN" TYPOLOGY:[129]

Physical			Non-physical
Land		Water	Network
Remote	Urban	Maritime	Virtual

    The RAND report also attempts to typologize the different forms of ungoverned space by analyzing eight case studies (the Pakistan-Afghan

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[125] LAMB, *supra* note 20, at 21.

[126] *Id.*

[127] *Id.*

[128] *Id.* at 22.

[129] *Id.*

Border Region; the Arabian Peninsula; the Sulawesi-Mindanao Arc; the East-Africa Corridor; West Africa; the North Caucasus; the Colombia-Venezuela Border; and the Guatemala-Chiapas Border), and evaluating them based upon the *ungovernability* and *conduciveness* framework. The conclusion of the report is that ungoverned territories fall into a three-part typology: *contested, incomplete* and *abdicated governance.*[130]

Contested governance occurs when "a group refuses to acknowledge the legitimacy of the government's rule and pledges loyalty to some other form of social organization, such as an insurgent movement, tribe or clan, or other identity group."[131] In situations of *incomplete governance* "a state seeks to exert its authority over its territory and produce public goods for its populace, but lacks the resources to do so."[132] Finally, in cases of *abdicated governance* "the central government, instead of operating to produce public goods such as safety and order, infrastructure and services, abdicates its responsibilities for poor provinces and regions where it concludes that maintaining a presence is not cost-effective or where ethnic minorities with whom the government shares little affinity predominate."[133]

In his article *Here be Dragons: Dangerous Spaces and International Security,* Phil Williams also develops a "rudimentary typology" of "dangerous spaces," which is the term he uses to "provide a viewpoint for understanding the variety of ways in which security challenges emanate within and from different kinds of spaces," including ungoverned spaces.[134] Williams' typology consists of the following: strong, stable states with governance gaps; weak and failed states with capacity gaps and functional holes; alternatively governed spaces; confrontational spaces: borders, border zones and prisons; concentrated spaces, zones of social exclusion and feral cities; the spaces of dangerous flows: illicit commodities, dirty money and digital signals.[135]

In his work on feral cities Richard Norton also presents a useful typology. He first defines *feral city* as "a metropolis with a population of more than a million people in a state the government of which has lost the ability to maintain the rule of law within the city's boundaries yet remains a functioning actor in the greater international system."[136] He categorizes the "health" of cities in three ways: "green" (healthy), "yellow" (marginal) and "red" (going feral) along four criteria: *government; economy; services* and *security.*[137] In table form, and with accompanying descriptions, his typology is the following:

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130 RABASA, *supra* note 20, at 30.

131 *Id.*

132 *Id.*

133 *Id.* at 30-31.

134 Phil Williams, *Here be Dragons: Dangerous Spaces and International Security, in* ANNE CLUNAN & HAROLD TRINKUNAS (eds.), UNGOVERNED SPACES: ALTERNATIVES TO STATE AUTHORITY IN AN ERA OF SOFTENED SOVEREIGNTY (2010) 36.

135 *See generally id.*

136 Richard Norton, *Feral Cities,* Vol. LVI (No. 4) *Naval War College Review* 97, 98 (2003).

137 *Id.* at 101.

NORTON'S "HEALTH OF CITIES" TYPOLOGY[138]

	Government	**Economy**	**Services**	**Security**
Healthy ("Green")	Enacts effective legislation, directs resources, controls events in all portions of the city all the time. Not corrupt.	Robust. Significant Foreign investment. Provides goods and services. Possesses stable and adequate tax base.	Complete range of services, including educational and cultural, available to all city residents.	Well regulated by professional, ethical police forces. Quick response to wide spectrum of requirements.
Marginal ("Yellow")	Exercises only "patchwork" or "diurnal" control. Highly corrupt.	Limited or no foreign investment. Subsidized or decaying industries and growing deficits.	Can manage minimal level of public health, hospital access, potable water, trash disposal.	Little regard for legality or human rights. Police often matched/ stymied by criminal "peers."
Going feral ("Red")	At best has negotiated zones of control; at worst does not exist.	Either local subsistence industries or industry based on illegal commerce.	Intermittent to nonexistent power and water. Those who can afford to will privately contract.	Nonexistent. Security is attained through private means or paying protection.

Importantly, Norton addresses the issue of what new challenges feral cities pose. For instance, he notes that while in the past some governments may have *opted* not to enforce the rule of law in certain cities, under the feral city framework, they no longer have the choice.[139] This tracks the typology for ungoverned space generally, which recognizes a difference between *abdicated* (or *misgoverned*) space and purer forms of *ungoverned* space, where the element of choice has been removed. Furthermore, as a result of this seizure of power, the formal leadership will likely be "massively ignorant of the power structures, population and activities within a feral city."[140] Conversely, for the illicit actors themselves, the feral city represents a treasure trove of intelligence collection possibilities. The issue has been taken up elsewhere in the literature as well, including by Max Manwaring who has written extensively on the issue of urban gangs and insurgency movements.[141] There is a growing concern that entire cities, such as Lagos and Bangkok will soon follow Mogadishu and "go feral."[142] In Karachi,[143] Mexico City, Sao Paolo, Johannesberg, Bangkok and Medellín the process may already be underway.

Finally, Jean-Germain Gros presents a useful five-part typology for failed states consisting of the following categories: *anarchic, phantom* (or

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[138] The table is reproduced from Norton's article. *Id.*

[139] Norton, *supra* note 136, at 99.

[140] *Id.*

[141] *See e.g.* MAX MANWARING, STREET GANGS: THE NEW URBAN INSURGENCY (2005).

[142] Norton, *supra* note 136, at 101.

[143] *See* Steve Inskeep, *Cities Beyond the Law,* NY Times (Dec. 4, 2011) at SR4, *available at* http://www.nytimes.com/2011/12/04/opinion/sunday/in-pakistan-ungoverned-zones.html?ref=world&pagewanted=all; Lamb, *supra* note 20, at 25.

mirage), *anemic, captured* and *aborted.*[144] *Anarchic* states have no centralized government whatsoever, and armed groups fight to take control of a "non-existing state."[145] Examples include Somalia and Liberia from the early 1990s. Closely related to *anarchic* states are *phantom* or *mirage* states, where there is a semblance of authority that exhibits its efficacy in certain limited areas such as the protection of the formal government, but in all others it is "utterly invisible."[146] An example of a *phantom* or *mirage* state from the present-day according to Gros's typology might be the Karzai regime in Afghanistan or the Transnational Federal Institutions in Somalia. *Anemic* states are those in which a modicum of centralized authority exists, but it is so "emaciated" that areas outside of the capital city or other limited environments are left entirely to fend for themselves[147] According to Gros, such anemia may arise from two sources: insurgency; or the lack of modernity. Haiti is an example of the latter, while Cambodia represents an example of the former. *Captured* states have a strong centralized authority but it is "captured by members of insecure elites to frustrate—and in the extreme eradicate—rival elites."[148] For Gros, the Rwanda of the early 1990s represents the archetypical example of the *captured* state. Finally, *aborted* states are there are states that failed *in vitro*, meaning that "they experienced failure even before the process of state formation was consolidated."[149] The recent formation of South Sudan might represent an illustrative example of an *aborted* state: it is failing before it ever had a chance to form.

Importantly, Gros notes that these categories "do not remain fixed" and that "states may straddle them at particular points in their history."[150] They also not be seen as "stages" of state failure; rather, a state may slide back and forth, skip certain statuses altogether or remain stuck in a particular situation for an extended period of time. There might also be overlap. For instance, Gros notes that states may "exhibit more than one attribute simultaneously."[151] This explanation evinces an understanding of the fluid nature of state failure. In this way, Gros's contribution provides useful descriptions for the different ways in which states can fail, and serves as a supplement to the typologies for ungoverned space discussed previously. In turn, his typology also presents internal and external actors seeking to counteract the process with a functional, intelligent and nuanced framework.

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[144] *See* Jean-Germain Gros, *Towards a Taxonomy of Failed States in the New World Order: Decaying Somalia, Liberia, Rwanda and Haiti,* 17 Third World Quarterly 455, 458-461 (1996).

[145] *Id.* at 458-59.

[146] *Id.* at 459.

[147] *Id.*

[148] *Id.* at 460.

[149] *Id.* at 461.

[150] *Id.*

[151] *Id.*

2.   Synthesizing a useful version

The typologies proposed by Lamb, the RAND report, Williams, Norton and Gros represent important efforts to categorize ungoverned spaces according to the spaces' different dimensions. Separating the various types of ungoverned space helps to clarify each type's distinctive characteristics. While constructive to some extent, this is of course an imperfect exercise. Every ungoverned space is unique, dynamic, elastic and contingent in both time and space. They expand and contract, overlap and dissolve, appear, disappear and reappear according to any number of internal and external forces. For these reasons any typology is of limited utility. In order to counteract a particular ungoverned space it is imperative to develop a deep and nuanced understanding of *that particular ungoverned space* and then adjust that understanding over time to respond to changing circumstances.

Nonetheless, based on a review of the typologies it is possible to identify certain commonalities in the way policy-makers think about ungoverned space. First, it is clear that ungoverned space is not a binary phenomenon, but rather a matter of degree. Each of the authors constructed some sort or spectrum or continuum to describe levels of governance, and avoided the pitfall of seeing governance merely through the lens of the state. It should be noted that before reaching his final physical/non-physical typology premised largely on geographical and functional attributes, Lamb identified a continuum of ungoverned spaces and corresponding types of safe havens. It consisted of the following: ungoverned areas (comprehensive haven); under-governed areas (partial haven); misgoverned areas (including state-sponsored havens); contested areas (conflict zones and situations of competing governance); exploitable areas (functional or non-physical havens). [152] Lamb's continuum represents a slightly more complex version of that adopted in the RAND report, and also closely tracks the rationale for the typologies of Williams, Gros and Norton. Norton adds something novel to the understanding with his "green," "yellow" and "red" indicators. These serve as signals to both internal and external actors about the relative dangerousness of the situation. They also inform what level of intervention might be necessary to reverse the process.

Second, the spatial characteristics of the ungoverned space matters. Williams clearly has this in mind when he speaks of "confrontational spaces," "concentrated spaces," and "dangerous flows." In order to properly understand Williams' typology, his view of "space" as both "physical and non-physical" must also be adopted. Lamb draws a line between the two, and focuses on population density as a defining characteristic of physical safe havens. This yields his "remote," "urban" and "maritime" typology. In either case, the important point is that *where* the ungoverned space exists, and *what resources* surround it are vital for understanding the space and the opportunities that it might offer for illicit groups.

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[152] Lᴀᴍʙ, *supra* note 20, at 18.

The third commonality concerns how the ungoverned space is used. This relates to Lamb's point about functionality, but properly conceptualized trends even farther toward *instrumentality*. There is a sense that illicit actors are operating as much *through* ungoverned spaces as they are operating *in* ungoverned space. Williams captures this most cogently in his description of "dangerous flows," which evokes an image of illicit actors using the streams of commerce, data production and information exchange to pursue their aims. Even in physically contiguous ungoverned space, actors do not limit their activities to that space alone but instead seek to project power outward, using the ungoverned space as a base for the achievement of their transnational or global aspirations. In this way, the space is *instrumentalized* to serve the ends of the particular group operating within it.

The fourth, implicit commonality that exists among the different typologies refers to the particular *history* of the ungoverned space. For each space it matters how the current state of affairs came to pass. For instance, Gros's five types each arise from a particular genesis. This is most explicit with regard to *anemic* states, which arise either from insurgency or lack of modernity, but it is also implicit with regard to *anarchic* and *aborted* states. Similarly, Norton's typology for feral cities relies first upon the failure of the formal government to "maintain the rule of law"[153] within the cities borders. Lamb, Williams and the authors of the RAND study similarly presuppose a precipitating event prior to the emergence of the ungoverned space.

Finally, the fifth and perhaps most obvious commonality relates to the *actors* that are present within the particular space. Each of the typologies assumes that a particular actor or set of actors will use the ungoverned space. In the security literature, the actor or actors are often presumed to be illicit, but that need not always be the case. Even if illicit actors are present in ungoverned spaces, they are not all created equal. Some may be interested in trafficking and lucrative criminal activities, others in avoiding detection and planning far-flung terrorist attacks. In contrast, purely peaceful actors may seek out ungoverned spaces to avoid the persecution or stifling regulation of the malfeasant state. The point is that the particular actor matters, especially with regard to the problems and opportunities presented by the ungoverned space.

Joining together these strands it is possible to synthesize a typology of ungoverned space that is premised on the five commonalities. Accordingly, it has five aspects:

> ***Aspect 1: Spatial characteristics***
> ***Aspect 2: Actors***
> ***Aspect 3: Genesis***
> ***Aspect 4: Degree of governance***
> ***Aspect 5: Degree of instrumentality***

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[153] *See* Norton, *supra* note 136, at 98.

In addition to the five aspects, each aspect has sub-categories and descriptions that put it into operation. In table form the typology is the following:

THE "SYNTHESIZED" UNGOVERNED SPACE TYPOLOGY: FIVE ASPECTS

1. Spatial characteristics	2. Actors	3. Genesis	4. Degree of governance		5. Degree of instrumentality	
Question 1: What are the geographical or other physical/non-physical observable traits of the particular space?	*Question 2:* What is the nature of the actors who are exercising power within the particular ungoverned space?	*Question 3:* How did this particular space became an ungoverned space?	*Question 4:* What is the level of governance that currently exists within the ungoverned space?		*Question 5:* To what level can the particular space be used by the actor operating within that space?	
			Categories (pick one):		*Categories (pick one):*	
			Low	*Descriptions:* Chaos; Contestation; Violence; Upheaval; Malgovernance	Low	*Descriptions:* Disconnected; Inaccessible; Unsupportive; Poor fit; High barriers to entry; Weak infrastructure
Descriptions: • Land • Sea • Air • Outer space • Virtual • Operational	*Descriptions:* • Illicit • Armed • Violent • Peaceful • Ambitious • (Dis)organized	*Descriptions:* • Collapse • Conflict • Abdication • Incapacity • Delegation • *De novo*	Moderate	*Descriptions:* Misgovernance; Under-governance; Governance "gaps"	Moderate	*Descriptions:* Loose connections; Mildly accessible; Indifferent; Loose fit; Weak barriers to entry; Functional infrastructure
			High	*Descriptions:* Alternative governance; Informal order and peace; "Governance w/o government"	High	*Descriptions:* Highly connected; Easily accessible; Supportive; Good fit; Low barriers to entry; Strong infrastructure

As a preliminary note, recall that in order for a space to qualify as an *ungoverned space* at all, it must meet the following definition:

> *Ungoverned space* **is a space not effectively governed by the state.**

Where, *effectively governed* is defined as:

> **A state** *effectively governs* **a space, if it demonstrates the ability and the willingness to fulfill its internal and external obligations on a consistent and continuous basis.**

Therefore, the synthesized ungoverned space typology *only applies once the state no longer effectively governs the space.*

Given the intricacies of ungoverned space, the typology is necessarily complex. In order to simplify its application, it comes with a

straightforward method. First, every aspect includes a pre-packaged question. These questions are the following:

> *Question 1, spatial characteristics*: **What are the geographical or other physical/non-physical observable traits of the particular space?**

> *Question 2, actors*: **What is the nature of the actors who are exercising power within the particular ungoverned space?**

> *Question 3, genesis*: **How did this particular space became an ungoverned space?**

> *Question 4, degree of governance*: **What is the level of governance that currently exists within the ungoverned space?**

> *Question 5, degree of instrumentality*: **To what level can the particular space be used by the actor operating within that space?**

In answering the questions, those applying the typology must select a sub-category or description that matches the particular ungoverned space under review. Once this is repeated for each aspect, the set of categorizations and descriptions are combined into a paragraph matching the following template:

> *Template for typologizing ungoverned space*

>> *[Ungoverned space x] is an [insert Aspect 1: spatial characteristic categorization] ungoverned space, which includes the following actor(s) [insert actual names of actors]. These actors can be described as [insert Aspect 2: actors' descriptions]. The space arose out of [insert Aspect 3: genesis description(s)]. The present degree of governance in the space is [insert Aspect 4: degree of governance categorization] and the situation can be described as [insert Aspect 4: degree of governance descriptions]. The space is [insert Aspect 5: degree of instrumentality categorization] in its degree of instrumentality due to its [insert Aspect 5: instrumentality descriptions].*

This brief, one-paragraph *typologization* of the ungoverned space provides a wealth of information. It both describes the space in detail and informs the approaches that may be used to address the problems and opportunities presented by the space. As articulated by the template, each of the five aspects of the typology represents a separate yet related inquiry. Each space is made up of a combination of elements from all five; however, the unique mix of elements may vary. Each has different actors, becomes ungoverned in a particular way, is governed in a particular way, has particular spatial attributes and can be used for different purposes. While there is no one-to-one association between sub-elements, certain

combinations do give rise different scenarios. For instance, cyberspace may be *typologized* in the following way:

> *Cyberspace is a virtual ungoverned space, which includes a wide range of actors, from states, corporations and firms, to individuals and groups. These actors can be described as largely peaceful; however, a significant illicit element (i.e. cybercrime) exists. The space arose* de novo *out of the ARPANET project developed by the U.S. Department of Defense. The present degree of governance in the space is high, and the situation can be described as informally ordered. The space also scores highly in its degree of instrumentality due to its high connectedness, strong infrastructure, good fit and low barriers to entry.*

Because of this unique mix, actors seeking to govern cyberspace must realize that a great deal of informal governance and order already exists. Private actors, such as internet security companies, serve as checks on illicit activities. At the same time, these private actors lack the formal enforcement authority of the state. Therefore, the high degree of instrumentality represents a legitimate concern. If illicit actors are able to exploit the lack of formal governance authority in cyberspace, they may be able to project power with ease. In spaces such as cyberspace that score high-high on the degree of governance and degree of instrumentality aspects, the nature of the actor is particularly important. The fact that cyberspace arose as a *de novo* ungoverned space is also instructive. This means that the space has never been governed, and that new structures and theories of governance may be required.

Conversely, south central Somalia can be *typologized* quite differently. The paragraph that results from the template is the following:

> **South central Somalia (non-Mogadishu)** *is a land (terra firma) ungoverned space, which includes the following prominent actors: al Shabaab; Hizbul Islam; AMISOM; the TFG; UNPOS; Kenya; Ethiopia; and the Darood, Rahnweyn, Dir and Hawiye Somali clan families. These actors have different aims and modus operandi. For example, al Shabaab is violent, armed, ambitious, engaged in illicit activities and loosely organized. It is comprised mostly of members of the Hawiye clan family. Conversely, UNPOS is ambitious, peaceful and highly organized. For its part, the TFG is peaceful but poorly organized; it is ambitious but it lacks capacity to fulfill its goals. The clan families are highly organized internally, but only loosely connected to each other. They are armed, but not necessarily violent, and their ambition is limited to self-governance and balance of power politics. The remaining actors—Kenya, Ethiopia and AMISOM—are highly organized, armed and ambitious in pursuing their strategic security interests. This confluence makes for a volatile dynamic. The space arose out of conflict and the collapse of the Siad Barre regime in 1991. The present degree of governance in the space is low and the situation*

can be described as chaotic, violent and contested. The space is also low in its degree of instrumentality due to its inaccessibility, unsupportive local population and weak infrastructure.

This *typologization* tells potential actors in south central Somalia a great deal about the space. First and foremost, the information provides a starting point for the rebuilding of governance structures in the country. Moreover, understanding the specifics of *how* the government collapsed, and *what* actors are presently engaged in the space represent pre-demarcated lines of inquiry. Each of these descriptions helps to inform an understanding both of the space itself, and of the means that might be employed to counteract its governance deficits. For instance, because south central Somalia scores low on both the degree of governance and degree of instrumentality aspects (low-low), those seeking to address the problems and opportunities presented by the space should be most concerned with the territory itself, including the local population, and less about the projection of issues to other spaces. The ungoverned nature of south central Somalia may be used to develop new governance norms for that particular area, but it is unlikely to allow for the realization of broader goals. Eliminating al Shabaab in Somalia, for example, may only cause it to splinter into neighboring states, such as Kenya, Eritrea and Ethiopia.

These brief illustrations indicate the value of the methodology. By leading with a question and then placing the answer within a concise description of the space, the straightforward method simplifies an admittedly complex typology. The natural question that it raises, however, relates to responses. Given the *typologization* paragraphs that were just outlined, what specific responses are available to actors seeking to mitigate the problems and capitalize on the opportunities presented by the space? Unfortunately, there is no geometric answer to this challenge. The different aspects interact in too many different ways, and the issue of ungoverned space is too complex for any one set of responses to be sufficient. Nevertheless, this does not prevent certain blanket conclusions. For instance, low degree of governance and high degree of instrumentality (low-high) spaces are of the most concern. When combined with violent, armed and ambitious actors the issue becomes even more salient. These spaces likely require a *coercive* response, perhaps including the use of force. Conversely, high degree of governance and low degree of instrumentality (high-low) spaces represent lesser hurdles. They can likely be dealt with *diplomatically* and the use of force will only be necessary in extreme cases. Spaces with a moderate degree of governance and a moderate degree of instrumentality (mid-mid) likely necessitate a *bargaining* approach. The remaining combinations—low-low, low-moderate, moderate-low, moderate-high, high-moderate, and high-high—also likely fall under the *bargaining* umbrella. The following matrix captures these conclusions:

RESPONSE MATRIX BASED ON ASPECTS 4 AND 5 OF THE TYPOLOGY:

		Degree of instrumentality		
		Low	Moderate	High
Degree of governance	Low	*Bargaining*	*Bargaining*	*Coercive*
	Moderate	*Bargaining*	*Bargaining*	*Bargaining*
	High	*Diplomacy*	*Bargaining*	*Bargaining*

Coercive responses are the most robust, they might include the use of force and the general attitude of the response is confrontational and adversarial.

Bargaining responses include a mixture of demands and incentives; they include firm negotiations and resolve.

Diplomacy is the most flexible response, it includes the exercise of soft power and the urgency of a final outcome is not necessarily salient. Rather, it is about managing a relationship between actors.

The other aspects of the typology (*spatial characteristics, actors* and *genesis*) fill in the gaps in the description, and inform the range of practical steps that might be taken, but they are not usually determinative. Violent, armed and organized actors for instance, may serve to elevate the response from *bargaining* to *coercive* but this need not always occur. The take-away point from this discussion is that while certain generalizations can be drawn, the response to a particular ungoverned space must follow from a rigorous factual investigation along the five aspects of the typology. Because of its value in creating a vocabulary to facilitate this investigation, each aspect of the typology deserves an additional step-by-step examination.

The first aspect, *spatial characteristics,* is the simplest. As noted in the typology table, it includes six sub-categories: *land, sea, air, outer space, virtual* and *operational.* These cover the entire spectrum of ungoverned spaces. The *spatial characteristics* aspect asks to the question: *What are the geographical or other physical/non-physical observable traits of the space?* Its value is that it informs the range of actual responses that might be available to address the problems and opportunities presented by the particular space. Obviously, the actual mechanics of the approaches to ungoverned spaces arising in *cyberspace* and the *sea,* for instance, will be drastically different. Cyberspace requires a great deal of technical computing expertise, while

the sea presents high barriers to entry and comes with its own set of technological challenges. The same can be said for the other categories. Each comes with its own intrinsic characteristics, which in turn impose limitations and present possibilities. The definitions of the categories for the *spatial characteristics* aspect of the typology are the following:

Aspect 1: Spatial characteristics

> *Question*: **What are the geographical or other physical/non-physical observable traits of a particular space?**

> > **Land** is geographic space (*terra firma*).

> > **Sea** refers to all seas, including the territorial sea, the contiguous zone, the exclusive economic zone and the high seas; it also refers to areas below the water level, including the continental shelf, the subsoil and the deep seabed.

> > **Air** is all of the navigable airspace between sea level and the altitude that can sustain earth orbit.

> > **Outer space** begins at the lowest level above sea level that can sustain earth orbit and extends outward to include the universe and celestial objects.

> > **Virtual** space refers to the internet, cyberspace and other man-made networks.

> > **Operational** space is defined as the space within which individuals engage in a set of specific activities, such as professional transactions or official duties; it includes *regulatory* spaces and *flows.*

The second aspect of the typology is *actors.* It includes six descriptions: *illicit, armed, violent, peaceful, ambitious* and *(dis)organized.* The question attached to this aspect is: *What is the nature of the actors who are exercising power within the particular ungoverned space?* The answer requires two steps. First, the actors themselves must be identified. This demands substantial intelligence gathering and analysis. Second, the *nature* of those actors must be determined. Unlike the categorical distinctions attached to the *spatial characteristics,* the *actors* descriptions are not mutually exclusive. Rather, they are intended to serve as a vocabulary for formulating a description of the different power-brokers within the space. The definitions for each are the following:

Aspect 2: Actors

Question: **What is the nature of the actors who are exercising power within the particular ungoverned space?**

Illicit actors are those engaged in criminal enterprises, such as trafficking, extortion, corruption, armed robbery, kidnapping, murder and other similar activities.

Armed actors include actors who have access to arms caches, including light and heavy weaponry.

Violent actors routinely use or threaten violence as a means to achieve their goals. They form a particular subset of *illicit* actors.

Peaceful actors obey laws and social norms and are interested in peacebuilding, peacekeeping and development. They are the antithesis of the violent actors.

Ambitious actors are those for whom the *status quo ante* is not enough; they seek more power and more influence in the spaces in which they operate. They might also seek to *project power* outside of the particular space to a greater extent than less motivated actors.

(Dis)organized refers to the level of organization of the particular group. Organized actors may have clear lines of command and maintain internal discipline; disorganized actors may be loosely aggregated, undisciplined and undirected.

The third aspect, *genesis,* also has six descriptions. They are: *collapse, conflict, incapacity, abdication, delegation* and *de novo.* This aspect asks the question: *How did this particular space become an ungoverned space?* The answer is vital because it addresses the root causes of the particular ungoverned space. The focus of this aspect is on the *history* of the space. This history will inform the possibilities for the future. Because ungoverned spaces arise in many different ways, and are sometimes multi-causal, it is possible that the descriptions are not mutually exclusive. For instance, a *conflict* may lead to a *collapse,* or an *abdication* may lead to *conflict.* Other combinations are also possible. For this reason, similar to the *actors* aspect, the descriptions are not categorical. Despite the potential overlap, the descriptions are comprehensive. Every ungoverned space that arises can be described according to at least one of the six descriptions. Due to this dynamic, the *genesis* descriptions are not categorical. Rather, they represent *ways to understand* the particular space. They are operationalized through the *typologization* process. The full-text of Aspect 3 is the following:

Aspect 3: Genesis

*Question***: How did this particular space became an ungoverned space?**

Collapse indicates that the governance institutions that previously existed fell-apart entirely, leaving a complete absence of government.

Conflict refers to cases of internal war and other clashes that led to either the collapse or the severe weakening of governance institutions; the victor of the conflict may or may not replace the preexisting government.

Abdication describes the voluntary or involuntary release of control over a particular space by the governance actor; it entails the whole-sale departure of the preexisting structures. It indicates an unwillingness to govern.

Incapacity occurs when the governance institutions lack the ability to fulfill their internal and external obligations.

Delegation is similar to *abdication*, however, in this case the governance actor retains *de jure* obligations and does not necessary lack the willingness to govern; it is similar to the principal-agent relationship.

De novo ungoverned spaces are those that are "born" ungoverned; they bypass the failure process because they were never governed in the first place.

The fourth aspect, the *degree of governance*, has three levels: *low, moderate* and *high*. The *low* level is characterized by *chaos, contestation, malgovernance, violence* and *upheaval.* These are the most extreme ungoverned spaces. The *moderate* level includes situations of *misgovernance* and *under-governance*, and while they are less severe than the *low* level spaces, significant governance gaps exist. Finally, the *high* level includes *alternatively governed, informally ordered* and *"governance without government"* spaces. At the *high* degree of governance, actors other than states have emerged to exercise significant control and fulfill most (if not all) of the internal and external obligations usually associated with effective governance. While each ungoverned space falls into one of the three categories, the characteristics are not mutually exclusive. Within the *high* category, for instance, the space may not fall neatly within the *alternatively governed* or *informally ordered* definitions. The object is to place each space generally within one of the categories, using the characteristics as a useful guide. The definitions for each category and characteristic are the following:

Aspect 4: Degree of governance

Question: **What level of governance currently exists within the ungoverned space?**

Low degree of governance spaces indicate a potential emergency situation; they are characterized by *chaotic* or *contested* governance. *Violence* and *upheaval* are sometimes hallmarks of these spaces, although they are not prerequisites.

> ***Chaos*** refers to a complete lack of governance, even in informal forms.

> ***Contested*** governance refers to situations where two or more governance actors compete with one another to govern a particular space.

> ***Malgoverned*** situations occur when the governance actor exercising control intentionally violates its obligations, either toward the individuals over whom it exercises *de facto* control or to the international community as a whole.

Moderate degree of governance spaces suggest an opportunity for constructive engagement. The situation is worrisome, but not likely to become an emergency. These situations are characterized by *misgoverned* or *under-governed* spaces where significant *governance "gaps"* exist.

> ***Under-governed*** connotes situations where significant "gaps" exist in the governance architecture. It might include persistent failures to uphold internal and external obligations.

> ***Misgoverned*** represents a lesser degree of *malgovernance.* In situations of misgovernance, the governance actor violates its obligations, either toward the individuals over whom it exercises *de facto* control or to the international community as a whole, but in this case it is unintentional.

High degree of governance spaces offer a chance for diplomatic engagement. These situations are similar to formal effectively governed spaces, differing only in substance.

> ***Alternatively governed*** situations are those where another actor has "stepped into the shoes" of the state to provide a non trivial amount of governance; these instances are largely peaceful and the forms they may take are diverse.

> ***Informal order*** represents a variant of *alternative governance,* where an *informal* actor exercises substantial governance and provides significant order to the space.

> ***"Governance without government"*** represents a step-up from both *alternatively governed* and *informally ordered* spaces; it occurs when

the space has all of the attributes of effective governance, minus the formal infrastructure of the state government. These situations might include formal international regimes.

The fifth and final aspect is the *degree of instrumentality*. It also has three categories: *low, moderate* and *high*. These categories are framed by six general characteristics: *connectedness, accessibility, support, fit, barriers to entry* and *infrastructure*. The object is to estimate the level to which the space can be *used* by the actors operating within it. The degree of each characteristic determines the categorization. While *low* categorizations may not score toward the low on every characteristic, for instance, the collective score will be toward the lower end of the spectrum. The same holds for the other two categories. The definitions for the *degree of instrumentality* aspect are the following:

Aspect 5: Degree of instrumentality

Question: **To what level can the particular space be used by the actor operating within that space?**

Connectedness refers to the number and quality of connections a particular ungoverned space has with other spaces.

Accessibility is the level to which the ungoverned space can easily be reached from other spaces; its opposite is *remoteness.*

Support refers to the level of assistance, protection, cooperation and/or cover provided to the actor by the other actors within the space.

Fit is the conduciveness of the particular ungoverned space to the particular actor operating within it given that actors attributes and aspirations.

Barriers to entry are the obstacles that must be overcome for an actor to operate within a particular space.

Infrastructure is comprised of the basic facilities, services, and installations needed for the functioning of the actor within the space.

Low degree of instrumentality spaces are characterized as being *disconnected, inaccessible, unsupportive,* a *poor fit* and having *high barriers to entry* and *weak infrastructure.*

Moderate degree of instrumentality spaces are characterized as being *loosely connected, mildly accessible, indifferent,* a *loose fit* and having *weak barriers to entry* and *functional infrastructure.*

> ***High degree of instrumentality*** spaces are characterized as being *highly connected, easily accessible, supportive,* a *good fit* having *low barriers to entry* and *strong infrastructure.*

3. The definition's loaded terms: "Space"

The synthesized typology offers some substance to the meaning of "space" by splitting the *spatial characteristics* of each space into six sub-elements: *land*; *sea*; *air*; *outer space*; *virtual* and *operational*; however, the term itself still requires additional explanation. The typologies from the literature refer to "space" variably; treating it is a construct over which governance must be exercised but not defining it with great clarity. The most in-depth treatment comes from Williams, who makes seven assertions about "space":[154]

  1. Space can be controlled.
  2. Space can be filled by things or people.
  3. The corollary of space being controlled or filled is that this process often leaves gaps.
  4. Space can be contested.
  5. Space can be "flows," through which people, money, commodities, information, messages, digital signals, and services move.
  6. Spaces can provide economic and social opportunities.
  7. Spaces can also be understood in terms of time.

Williams' assertions cut across the different aspects of the synthesized typology, reflecting the various ways in which space can be understood, used, described and created. It is clear from his assertions that space can be "physical or nonphysical,"[155] and that it can also be subject to multiple degrees of governance authority, from the formal and effective, to the informal and contested.

For what it is worth, the Merriam-Webster dictionary defines "space" ten different ways.[156] The most relevant are:

  1. A period of time.
  2. A limited extent in one, two, or three dimensions.
  3. An extent set apart or available.
  4. A boundless three-dimensional extent in which objects and events occur and have relative position and direction (infinite *space* and time).
  5. Physical space independent of what occupies it (*absolute space*).

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[154] Williams, *supra* note 134, at 37-39.

[155] *See id.* at 39.

[156] MERRIAM-WEBSTER DICTIONARY ONLINE *available at* http://www.merriam-webster.com/dictionary/space (accessed on Mar. 20, 2012).

Based on Williams' analysis, the understandings from the preceding sections and the common-sense, dictionary definition of the term, it is possible to define "space" as:

> **A s*pace* is a cognizable physical or non-physical extent that can be effectively governed by the state.**

D.   *Variations on the source of governance*

The discussion and analysis thus far focused on setting the parameters of ungoverned space. The emphasis has been on figuring out what it is, articulating the different forms it might take and establishing an understanding of its limits and possibilities. The concentration now moves to formulating an initial response to the challenge issued by Crawford and Miscik that the rise of the mezzanine ruler represents the next frontier in international law. To do so, this section identifies the different governance actors who operate within ungoverned space, as well as the sources of their authority. They fall into two broad categories: formal and informal.

1.   Formal

Formal governance actors include states, international organizations and, in some limited circumstances, individuals. Such actors have the status of subjects of international law, and accordingly they have certain international legal rights and obligations. Because international law is premised on the sovereign equality of states, the state continues to represent the indispensable governance actor in the international realm. The same is true domestically, where the state embodies the apex of governance authority. The state is responsible to its own people, as well as the other subjects of international law, including other states, international organizations of which it is a member and, when applicable, to the citizens of other states. By definition, in the case of ungoverned space the state does not effectively govern. This does not necessarily mean, however, that it is completely absent. On the contrary, it often continues to exist in lesser form, exercising power where possible, and in some cases, reversing the trend of its own failure. For the people, things and spaces over which it exercises control, the state persists as a formal source of governance.

The formal institutions of governance that make-up the state form another meta-institution: the *government*. While the structure of government varies across the world there are some common attributes. It is usually formed according to law; it serves as a political representative in domestic and international fora; and it is recognized as the legitimate authority by those over whom it exercises control. While not required, many governments are also formed according to a constitution. According to Max Weber, government is: "...a compulsory political association with continuous organisation whose administrative staff successfully upholds a claim to the monopoly of the legitimate use of force in enforcement of its

order in a given territorial unit."[157] By replacing Weber's "territorial unit" with the proposed definition of "space," it is possible to extend his conception of government to include the compulsory political organization of any given space. In short, wherever there is a space, there is an opportunity for government.

Governments usually develop according to domestic or local rules. As such, there is no rule in public international law that mandates a particular form of government as a prerequisite to the establishment of a state. A state's choice of form is viewed as a matter "essentially within [its] domestic jurisdiction" and thus it is protected from outside intervention by Article 2(7) of the U.N. Charter. The ICJ validated this position in its *Western Sahara* advisory opinion, in which it stated that "[n]o rule of international law, in the view of the Court, requires the structure of a State to follow any particular pattern, as is evident from the diversity of the forms of State found in the world today."[158] While the Court's view generally holds true today, there are certainly some forms of government, such as despotism, Fascism and Nazism that are disfavored, to say the least, by the international community.[159]

International actors with formal status may also exert governance authority within ungoverned space. While there is no global "constitution" or "world government," international law does recognize the legal personality of organizations that are formed according to international agreements, such as treaties.[160] The supreme international organization in existence today is the U.N. and the organization has intervened in a number of situations to exercise temporary governance authority over "special territories." It did so first under trusteeship arrangements, which took place under the Charter's "international trusteeship system."[161] This resulted in the temporary administration by the Trusteeship Council of a number of territories that eventually achieved self-determination, including: Togo, Somalia, Cameroon, Tanzania, Rwanda, Burundi, Western Samoa, Nauru, New Guinea, Micronesia, the Marshall Islands, Northern Mariana and Palau.[162]

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[157] Max Weber, The Theory of Social and Economic Organisation (1947) 154.

[158] Western Sahara, Advisory Opinion, I.C.J. Reports 1975, ¶94.

[159] *See e.g.* United Nations, General Assembly resolution 36/162, A/RES/36/162 (Dec. 16, 1981)¶1 (condemning "all totalitarian or other ideologies and practices, in particular Nazi, Fascist and neo-Fascist, based on racial or ethnic exclusiveness or intolerance, hatred, terror, systematic denial of human rights and fundamental freedoms, or which have such consequences").

[160] *See* Reparation for injuries suffered in the service of the United Nations, Advisory Opinion, I.C. J. Reports 1949, *p.* 174, 179 (Apr. 11).

[161] *See* U.N. Charter, art. 75-85. The U.N. international trusteeship system followed-on from the mandate system established by the League of Nations as a mechanism to ease the decolonization process. The legal framework of the League of Nations system can be found in Article 22 of the Covenant of the League of Nations.

[162] *See* The United Nations and Decolonization, Trust territories that have achieved self-determination *available at* http://www.un.org/en/decolonization/ selfdet.shtml (accessed Mar. 21, 2012); The United Nations and Decolonization,

The involvement of the U.N. in the governmental administration of ungoverned spaces has evolved along with its role in peacekeeping missions. Two major interventions in the late 1990s pushed its state-building role to the point where it became a *de jure* governmental authority. The first was the U.N. Interim Administration in Kosovo (UNMIK), which was authorized under Security Council resolution 1244 (1999) to "perform basic civilian administrative functions where and as long as required" for the Kosovars.[163] The second was the U.N. Transitional Authority in East Timor (UNTAET). In its resolution 1272 (1999), the Security Council authorized UNTAET to "establish an effective administration" and "provide security and maintain law and order throughout the territory of East Timor."[164] Both UNMIK and UNTAET were created by the Security Council acting under Chapter VII of the U.N. Charter. This procedure has three effects. It gives the missions a formal status; it negates the prohibition in Article 2(7) on non-intervention; and it requires the other member states of the U.N. to "carry out" the Security Council's decision.[165]

Finally, external actors also serve as formal sources of governance in ungoverned spaces. Powerful states that intervene to protect their security interests, for instance, may for a time assume a formal role in other states. This occurred notably in Germany after World War II where the Allied powers assumed supreme authority over the *debellatios.*[166] A similar arrangement was instituted in Japan during the same period,[167] and the practice continues today in other places. For example, in 2003 the U.S. temporarily assumed governance authority in Iraq following the second Iraq war through the "Coalition Provisional Authority." It maintained *de jure* control until the formation of an interim Iraqi government in 2004. Such actions obtain a formal status both through the legal documents that establish them, such as status of forces agreements, and through the operation of international law. The Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, for instance, requires

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Trust and Non-Self-Governing Territories (1945-2002) *available at* http://www.un.org/en/decolonization/nonselfgov.shtml (accessed Mar. 21, 2012). The U.N. Trusteeship Council suspended its operations on November 1, 1994, after Palau became independent.

[163] *See* United Nations, Security Council resolution 1244 (1999), S/RES/1244 (June 10, 1999) ¶11 (b). The remainder of UNMIK's mandate is provided in operative paragraphs 11 (a), (c), (d), (g), (e), (f), (h) and (k) of 1244 (1999). *See id.*

[164] *See* United Nations, Security Council resolution 1272 (1999), S/RES/1272 (Oct. 25, 1999) ¶2 (a) and (b). The remainder of UNTAET's mandate is provided in operative paragraphs 2 (c), (d), (e) and (f). *See id.*

[165] U.N. Charter, art. 25.

[166] For a brief discussion of the Allied occupation of post-World War II Germany *see* GIORGETTI, *supra* note 50, at 11.

[167] *See id.* at 12 *citing* MICHAEL KELLY, RESTORING AND MAINTAINING ORDER IN COMPLEX PEACE OPERATIONS: THE SEARCH FOR A LEGAL FRAMEWORK 128, 249 (1999).

"occupying powers" to fulfill a number of obligations, including the provision of humanitarian supplies and the protection of human rights.[168]

2. Informal

Of course, as Crawford, Miscik and others point out, often times within ungoverned spaces formal actors are neither the most important nor the most powerful sources of governance. The situation of ungoverned space is defined by the failure of the state to effectively govern, and it is into this void that various other actors might rush to exercise power and control. Some of these actors will be formal delegates of the state, such as international organizations or other states, but in most circumstances the authority will be informal, *ad hoc* and haphazard. Because of their lack of pedigree and status, such informal actors fundamentally challenge the structure of international law. The immediate question becomes: Who are these informal actors who emerge to exercise governance authority in ungoverned spaces? And further: How do they do it?

Informal actors may take many forms, and to continue on the theme thus far, this will depend to a large extent on where they operate. In Somalia, for instance, informal governance takes the form of patrilineal clans and the application of *xeer* (or customary laws).[169] In Afghanistan, *Pashtun* tribes exercise informal governance authority through the *shura* council and the application of *sharia* law. In cyberspace, the informal form of government, *lex electronica* is reminiscent of the *lex mercatoria*, or private economic law, used by European merchants during the medieval period and it is driven by whoever participates in the space.[170] Each of these arrangements is dictated by endogenous and exogenous circumstances; the informal actor has certain capabilities and comparative advantages, and the broader context of ungoverned space provides certain opportunities which also introducing various limitations. Other examples of informal actors might include so-called "warlords," secessionist movements, terrorist groups or even corporations.

For the purposes of this article, it will be easiest to think of informal actors as those who are *not* presently subjects international law. This precludes sub-national actors who are integrated into the state apparatus, but includes, on a case-to-case basis the mezzanine actors put forth by Crawford and Miscik, as well as other "controversial candidatures" and

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[168] *See* Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (Aug. 12, 1949) art. 47-78; *see also* Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, I.C.J. Reports 2004, *p.* 136 (July 9) ¶86 *et seq.* (addressing the obligations of Israel under international humanitarian law and international human rights law with respect to the Occupied Palestinian Territories).

[169] *See generally* MICHAEL VAN NOTTEN, THE LAW OF THE SOMALIS (2005).

[170] *See generally* Gunther Teubner, *Societal Constitutionalism: Alternatives to State-centered Constitutional Theory, in* CHRISTIAN JOERGES, INGER-JOHANNE SAND & GUNTHER TEUBNER (eds.), CONSTITUTIONALISM AND TRANSNATIONAL GOVERNANCE (2004) 3.

"special types." According to Ian Brownlie the established international legal persons are: states; political entities legally proximate to states (such as the Free City of Danzig or the Vatican); *condominia* (which are a joint exercise of state power within a particular territory); internationalized territories (where states agree that a particular territory will have an international status); U.N.-administered territories (such as Kosovo and East Timor); international organizations; and the agencies of states.[171] In addition, there are also "special types of personality," which include: non-self governing peoples; national liberation movements; states *in statu nascendi*; belligerent and insurgent communities; entities *sui generis*; and individuals.[172] The final group of "controversial candidatures" includes municipal corporations and "intergovernmental corporations of private law."[173] These non-established entities are "special" and "controversial" in the sense that sometimes they are subjects of international law, and sometimes they are not. Much depends on the factual circumstance and the practical effectiveness of the actor. "Indeed," as Brownlie notes "the role played by belligerent communities indicates that, in the sphere of personality, effectiveness is an influential principle."[174]

In a strict sense, nothing in international law stops current subjects, such as states and international organizations, from concluding an international agreement that either includes informal actors or extends international law to apply to informal actors. An example of the latter practice is the 1977 Additional Protocol (AP II) to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of Non-International Armed Conflicts. Article 1 of AP II states the protocol shall apply to "...dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement [it]." This provision was implemented because members of the international community foresaw the emergence of such entities as potential international legal persons. It also reflects the prevailing view at the time that "colonial countries and peoples" should enjoy a right to self-determination and be free from colonial control.[175] The problem with such extensions is that they are sporadic, leaving some entities subjects of international law, if at all, only in certain contexts.

As a general rule then, informal actors in ungoverned space should be understood as those who are neither recognized nor treated as subjects of international law by the other actors within the system. They are the outsiders to the international community. While their status may vary depending on the context—and this requires careful scrutiny to

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[171] *See* Brownlie, *supra* note 2, at 58-61.

[172] *See id.* at 62-65.

[173] *Id.* at 65-66.

[174] *Id.* at 64.

[175] *See e.g.* United Nations, General Assembly resolution 1514 (XV), *Declaration on the granting of independence to colonial countries and peoples*, A/RES/1514 (XV) (Dec. 14, 1960).

determine—in the contexts when they are not international legal subjects, they are informal actors.

3.   The definition's loaded terms: "State"

The final "loaded" term from the proposed definition is "state." Much has been written on the issue, and it is not the intention to rehash that whole discussion here. The purpose is to distill a useful definition of the term that informs an understanding of ungoverned space.

The starting point for understanding what it means to be a "state" in the international legal order is Article 1 of the 1933 Montevideo Convention on the Rights and Duties of States (Montevideo convention), which is generally accepted as articulating the legal criteria for statehood. It holds that:

> The state as a person of international law should possess the following qualifications:
>
>> (a) A permanent population;
>> (b) A defined territory;
>> (c) Government; and
>> (d) Capacity to enter into relations with the other states.

Brownlie calls the Montevideo convention criteria "no more than a basis for further investigation."[176] He equates the fourth criterion of "capacity" with independence, and also adds that the following have also been used as statehood criteria: degree of permanence; willingness to observe international law; certain degree of civilization; sovereignty; and function as a state.[177] His short definition of a state is "a stable political community, supporting a legal order, in a certain area."[178]

For the purposes of ungoverned space, the most important criteria of statehood are government, capacity/independence and sovereignty. The government condition was discussed previously under the heading of formal sources of governance, and to this Brownlie adds that the best evidence of a stable political community is "the existence of an effective government, with centralized administration and legislative organs." Akpinarli defines this "effectiveness" according to its internal and external aspects. The internal aspect is "the state's capacity to maintain order and govern the permanent population of a defined territory."[179] The external aspect is "the state's capacity to represent its people in the international arena, participate in international relations, and exercise its rights and fulfill its duties under international law."[180]

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[176] BROWNLIE, *supra* note 2, at 70.

[177] *Id.* at 70-76.

[178] *Id.* at 71.

[179] AKPINARLI, *supra* note 54, at 10.

[180] *Id.*

The capacity/independence criterion is widely viewed as decisive, and it is also the most difficult to define. It often manifests itself through recognitions by other states, although the majority view on this point is that recognition is declarative rather than constitutive, meaning the capacity and/or independence is presupposed and does not depend on the act of recognition. The criterion is also sometimes conflated with government effectiveness, creating an infinite digress into whether either is reliant on the other. The best way to think of capacity may be the simplest: Does the entity do the things one might expect of a state? As Brownlie notes: "Certainly if an entity has its own executive and other organs, conducts its foreign relations through its own organs, has its own system of courts and legal system, and particularly important, a nationality of its own, then there is *prima facie* evidence of statehood."[181] Clearly some level of organization and means to carry-out the difficult tasking of governing is required, although what exactly that entails is not altogether clear.

Sovereignty is another concept that is challenging to define with clarity. What it *means* is that the state may act independently and that its domestic affairs should not be interfered with by other states. In effect, however, states may choose to forfeit or delegate control over their domestic affairs, and yet retain status as states. In recent years sovereignty has also implied responsibility; if that responsibility is breached, the argument goes, then sovereignty is forfeited.[182] The Permanent Court of International Justice in the *Wimbledon* case conceived sovereignty as the power of the state with the limits of international law, which implies that the concept might be flexible.[183] For the purposes of ungoverned space, sovereignty is the ability to maintain internal order *plus* the ability to act independently according to international obligations.

Two novel conceptions of statehood merit mention before moving to a definition of state for the purposes of ungoverned space. Each helps to illustrate how the state might govern a "space" as opposed to a "territory." The first is proposed by John Ruggie, who writes of the need for "multiperspectival institutional forms" as a replacement for the territorial political unit. In his view, "[n]onterritorial functional space is the place wherein international society is anchored"[184] and this "unbundled territoriality"[185] needs to be realized and embraced in order to make institutional transformation less arduous. This will also ease the solution of international, "transterritorial"[186] problems. According to his analysis,

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[181] BROWNLIE, *supra* note 2, at 72.

[182] For an example of this argument written mostly from the perspective of security *see e.g.* Michael Chertoff, *The Responsibility to Contain: Protecting State Sovereignty Under International Law*, 88 FOREIGN AFFAIRS 130 (Jan./Feb. 2009).

[183] S.S. Wimbledon, 1923 PCIJ (ser. A) No. 1, at 15. For a discussion of this idea *see generally* Georg Nolte, *Sovereignty as Responsibility*, 99 PROCEEDINGS OF THE ANNUAL MEETING (AMERICAN SOCIETY OF INTERNATIONAL LAW) 389 (2005).

[184] *See* Ruggie, *supra* note 48, at 165.

[185] *Id.* at 171.

[186] *Id.* at 165.

such a move would radically transform the study of global ecology, international security and microeconomics, to name a few.[187]

The second is put forth by Robert Malley, Jean Manas and Chrystal Nix. They argue for a conception of the state that is based on what it *does*; in particular, the way it which it *becomes itself* through the exercise of jurisdiction. As they write, the state should be seen as "a discontinuous pattern of jurisdictional assertions"[188] But that is merely the end product. In the beginning "[t]here is no predetermined entity faced with discrete decisions of a jurisdictional nature."[189] Rather they assert that the "decisions themselves define and shape the state in a substantive manner."[190] Each decision to assert jurisdiction "generates a disordered pattern we choose to call the state."[191]

The theories of Ruggie, Malley, Manas and Nix are useful for conceiving how a state might govern *both* a territory *and* a non-physical space. For Ruggie, the real political action takes place in "functional space," while for Malley, Manas and Nix, the state only becomes such through an exercise of control: the assertion of jurisdiction. Each theory illuminates, in its own way, the possibilities for state exercises of governance authority in ungoverned spaces. The analysis they provide, however, is second-order. A prerequisite for statehood remains the control of territory. If that "anchor" is abandoned, then the proliferation of state actors risks spiraling out of control. Therefore, for the purposes of the proposed definition, a state should be understood as:

> **A *state* is a stable political community that controls a territory, supports a legal order, acts independently and effectively governs.**

The term "territory" is narrower than "space." It refers only to geographical *terra firma.* It is used here to preclude from the definition of statehood a stable political community that supports a legal order, acts independently, effectively governs but controls *only* a non-physical space. The state may govern non-physical spaces, but an entity that governs *only* non-physical spaces is not a state It is at this point that the novel theories inform the analysis. They present a way of thinking about statehood and governance that is decoupled from territoriality.

Putting together the four separate definitions developed in the preceding sections produces the following set of definitions for ungoverned space and its "loaded" terms:

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[187] *See id.* at 171-74. For the role of law and legal analysis in the creation of new institutional forms *see generally* Roberto Mangabiera Unger, *Legal Thought as Institutional Imagination*, 59 MODERN LAW REVIEW 1 (1996).

[188] Malley, Manas and Nix, *supra* note 48, at 1304.

[189] *Id.*

[190] *Id.*

[191] *Id.*

> **_Ungoverned space_ is a space not effectively governed by the state.**
>
> **A _state_ is a stable political community that controls a territory, supports a legal order, acts independently and effectively governs.**
>
> **A state _effectively governs_ a space, if it demonstrates the ability and the willingness to fulfill its internal and external obligations on a consistent and continuous basis.**
>
> **A s_pace_ is a cognizable physical or non-physical extent that can be effectively governed by the state.**

II.   WHY INTERNATIONAL LAW MATTERS

"It may break, you may shatter, the vase if you will—But the scent of the roses will cling round it still."

-Thomas Baty, *The Twilight of International Law*

A.   *Preliminary note*

Ungoverned space presents problems and creates opportunities. The subject of this section is why international law represents the best means to address both sides of the issue. At first glance it might appear that international law is a clumsy tool for confronting ungoverned space. First off, the discipline's title seems to belie an intrinsic self-limitation. Inter-*national* law is meant to apply between *nations*, to somehow stitch together various sovereign actors and create a legal framework governing their relations. By its definition, ungoverned space lacks an effective state. Second, international law has as its sources: treaties, custom and general principles of law. Creating an international law applicable to ungoverned space would require mobilizing that architecture and applying it to a novel issue. This represents a formalistic, not to mention time-consuming process.[192] Third, international law exhibits a preference for stability and continuity. As a set of rules, the system is intended to resist disruption; when things go awry, subjects look to the law to mitigate their disputes. It is "the gentle civilizer of nations"[193] not a weapon of policy formation and change. Therefore, it might rightly be asked: Why does international law matter?

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[192] For an example of an attempt to develop international into a new realm and the problems associated with such an effort *see* Lawrence Gostin and Allyn Taylor, *Global Health Law: A Definition and Grand Challenges*, 1 PUB. HEALTH ETHICS 53, 55-56 (2008). The field of "global health governance" represents an operational ungoverned space.

[193] *See generally* MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960 (2004).

One response is that law is not as inflexible as some might imagine. Throughout its history, the discipline has responded ably to crises in the worldwide system of political relations. In this way, international law has proven to be both resilient and adaptive. The history of international politics has been punctuated by "volcanic" moments joined by changes in international law, and this has in turn provided a framework for future debates. World War I, World War II and 9/11 and the ensuing legal responses represent three salient examples. There are many others. Daniel Webster's famous articulation of self-defense ("...instant, overwhelming, and leaving no choice of means, and no moment for deliberation") arose not out of thin air, but in response to Great Britain setting fire to the steamship *Caroline* and sending it over Niagara falls; an act that killed an American citizen and set off a heated diplomatic dispute between the two governments. The test was later applied by the Nuremberg tribunal, and it served as the baseline for the so-called *Bush Doctrine* articulated in the *National Security Strategy of the United States* from 2002. Even that great specter of modern international law's creation, the Treaty of Westphalia, came into being not because the various jurists convened to address *prospective* problems, but because political actors were forced into reconfiguring their relations to recover from the scourge of war. Their response was to make the recourse to force more difficult, and this was done through law. The principle of "reciprocal amity" that the treaty enshrined serves as the foundation for prohibition on the use of force "against the territorial integrity or political independence of any state" articulated in Article 2(4) of the U.N. Charter. The development of nuclear weapons and their use in Nagasaki and Hiroshima spawned the Nuclear Non-proliferation Treaty and the prohibition on the deployment of nuclear weapons to outer space, and today, as cyberspace threatens to unseat longstanding mores of international politics, international lawyers are scrambling to formulate legal principles applicable to the domain.

This history speaks to law's relevance, as far as it goes; however, the recurring cycle of crisis-and-then-change also exposes another apparent weakness in international law. Law's power is easily subjugated: it appears to be the cart, not the horse. Rarely has the discipline been out front of problems, anticipating solutions and molding outcomes in advance. The real action seems to lie with politics; and law provides the post-hoc rationalization of hard-fought political battles. This criticism is reasonable, but not altogether complete. It is true that change in international law is reliant to some extent on political crisis. But that refers more to the sweeping, dramatic changes than it does to the slower, evolutionary, more incremental alterations in the content and structure of the law. The hindrance rests more with the mindset of the international jurist than it does with the discipline itself. The attitude that any change must be small in order to be professionally legitimate limits the imagination.[194] Jurists

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[194] An example of this in practice is the recent advisory opinion from the International Court of Justice on the issue of Kosovo's declaration of independence, where the court interpreted the request from the U.N. General Assembly ("Is the unilateral declaration of independence by the Provisional

feel as though they must proceed in this way in order to be accepted. It is a self-limitation born out of professional self-preservation and it persists until a moment of crisis, whereupon the international jurist seizes the moment to give life to some dramatic, seismic set of ideas. They might have been there all along,[195] but the distance between the practitioner and the theoretician was too broad. Unable to gain traction and credibility, the ideas needed a hook, and the hook was the crisis.

The position taken here, however, is that change in international law does not depend solely on crisis. Instead the basic driver of change is the formulation of new ideas. Ungoverned space is not a crisis; rather, it presents a set of problems that open-up the system to critique and contestation; it offers an opportunity to reform the existing international political and legal order. Because of the way it challenges the fundamental architecture of the system; ungoverned space serves as a potential laboratory for the testing of new ideas about international law and governance. If mobilized properly international law can still get ahead of the issue and preempt politics. In order for this to happen the problems and opportunities must first be described and defined. That was the mission of the preceding section and they are distilled again here. The next step is to develop a complex international legal argument to address it. The only way for this to occur is to formulate innovative ideas that present practical solutions. The argument must break the equilibrium that keeps the established order in place by exposing insufficiencies in the

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Institutions of Self-Government of Kosovo in accordance with international law?") in the narrowest possible way, thus limiting itself to a subservient role on the issue of self-determination. *See* Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo, Advisory Opinion, I.C.J. REPORTS 2010, ¶56 (July 22). This timidity was lamented in the declaration and separate opinions of some of the Court's more precocious judges, including Brunno Simma, Abdulqawi Yusuf and Antônio Augusto Cançado Trindade, who called for a more active engagement on the issues on behalf of the Court. *See* Declaration of Judge Simma, Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo, Advisory Opinion, I.C.J. REPORTS 2010 (July 22) *available at* http://www.icj-cij.org/docket/files/141/15993.pdf; Separate Opinion of Judge Yusuf, Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo, Advisory Opinion, I.C.J. REPORTS 2010 (July 22) *available at* http://www.icj-cij.org/docket/files/141/16005.pdf; Separate Opinion of Judge Cançado Trindade, Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo, Advisory Opinion, I.C.J. REPORTS 2010 (July 22) *available at* http://www.icj-cij.org/docket/files/141/16003.pdf. The technique of "trimming" is another illistration of the limits of the legal imagination. *See generally* Cass Sunstein, *Trimming*, 122 HARV. L. REV. 2009 (1052).

[195] An example of this phenomenon is the international legal response to terrorism in the post-9/11 period. While these responses were widely seen as innovations at the time, most of the ideas already existed prior to the attack. *See generally* Michael Reisman, *International Legal Responses to Terrorism*, 22 HOUS. J. INT'L L. 3 (1999). If they had been openly discussed and developed more fully prior to 9/11, the mistakes of the post-9/11 period might have been avoided.

current system and offering new avenues for development. To gain acceptance, these solutions must also be attractive to the right audience, namely, policy-makers and other international jurists. To win-over this discerning crowd, the ideas should be rigorous, careful and, above all, articulated in the powerful language of international law.

B. *Problemitizing ungoverned space*

As the review of the literature from the preceding section on definitions and typologies shows, ungoverned space presents problems both to the international community writ large and to the structure of international law. However; the issue also presents opportunities for the exercise of power and the development of new forms of governance authority. This dual-nature is unique, and it does not stop at the initial level. Rather, the problems posed by ungoverned space may give rise to opportunities that go beyond the mere solution of the problems. Subsequently, these new opportunities might create their own follow-on problems. For example, consider the situation of a state that intervenes in a territorial ungoverned space to protect its own legitimate security interests. This original act is *prima facie* legitimate because it is taken solely out of self-defense. But what if the state decides not to cease its intervention after the exigencies of the threat have been extinguished? This would create subsequent problems unrelated to the original problem posed by ungoverned space, which was the security threat necessitating self-defense. Worries over imperial overreach or neo-colonialism, for instance, might arise. Another example might be a situation where informal actors seek to exercise governance over a *de novo* ungoverned space, such as cyberspace. The act might seem legitimate at first; the space was ungoverned and some group organized themselves to govern it, closing a governance gap that had previously existed. At the same time, however, subsequent issues of accountability might arise. It might also be the case, for instance, that the new governors come to exert power beyond what the rest of the community views as legitimate. By that point the arrangement may be entrenched. Now that the informal actors are in charge, who is overseeing them to make sure they are acting appropriately?

This analysis highlights both the problems and opportunities of ungoverned space. It represents an effort to *problemitize* the issue and it makes the duality of ungoverned space explicit. In this context, the problems and opportunities presented by ungoverned space fall into two categories: practical and structural. The practical problems/opportunities can then be placed into four sub-categories: *security*; *development*; *economy*; and *human rights.* Likewise, the structural problems/opportunities can also be placed into four sub-categories: *subjectivity*; *responsibility*; *uncertainty*; and *reciprocity.* The following provides a description and brief analysis of each. The programmatic intention is to highlight the ways in which international law might respond.

    1.   Practical

    Security. The majority of the ungoverned space literature has focused on security issues. The typical narrative holds that such spaces create "safe havens" or "zones of operation" where illicit actors may operate free from the control of law enforcement. As the preceding discussion showed, however, the symptoms of ungoverned space are not so simple. The way a space is governed, combined with its underlying spatial characteristics as well as the goals of the specific group influence whether and to what effect the space can be utilized. For states weary of their own security, the threat of ungoverned space has served as a justification for intervention. The U.S. drone program represents one prominent example of this practice. From both sides, the security aspect of ungoverned space therefore destabilizes the international political and legal system. This creates problems and presents opportunities for the development of better international rules based on the new practical and factual realities.

    Development. The absence or disempowerment of formal actors in ungoverned spaces eliminates a major source of development assistance and puts at risk the attainment of development goals. Development, broadly understood, consists of the issues articulated in the United Nations Millennium Declaration, which include: eradicating extreme poverty and hunger; achieving universal primary education; promoting gender equality and empowering women; reducing child mortality; improving material child health; combating HIV/AIDS, malaria, and other illnesses; ensuring environmental sustainability; and creating a global partnership for development.[196] The declaration also identified the promotion of democracy as an important goal.[197] In ungoverned spaces the actor formally responsible for taking action on these issues does not have the capacity to act. This increases the burden on the other participants in the system. Conversely, certain ungoverned spaces also present opportunities for development. The use of social media and cyberspace, for instance, allowed protestors during the Arab Spring in 2011 to avoid the censure of their authoritarian governments. Non-governmental organizations and other global health actors operating in ungoverned spaces have been able to reach out directly to affected populations without confronting the bureaucracy of the host government. On both sides of the development issue, international law can and should evolve to regulate and incentive good conduct.

    Human rights. Directly linked with the issue of development, but meriting its own mention is the issue of human rights. Since the end of World War II and the founding of the U.N., the issue of individuals' human rights has been regulated directly by international law. This brought individuals into the fold of the international legal system. In the

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[196] *See generally United Nations Millennium Declaration, supra* note 41.

[197] *See id.* at ¶ 24.

ungoverned space context, individuals still enjoy international human rights protection; however, the immediate provider of these rights, the state, is either absent or ineffectual. Rights forming the basis of *jus cogens* norms, such as the right to be free from cruel, inhumane or degrading treatment, represent obligations that are placed upon all states, but run-of-the-mill rights, such as the freedom of speech and emerging rights, such as the right to democratic governance, go largely unprotected and unfulfilled. In ungoverned spaces, where the state does not effectively govern, international law must place responsibility for the protection of human rights directly on the informal authorities that have stepped into the governance void. Only in this way will the international community ensure that human rights are protected, and violations of those rights are punished appropriately.

Economy. Many ungoverned spaces are cut-off from the rest of the world. In a globalized economic system this creates serious problems. Some of the least governed countries in the world, many of which properly fall under the proposed definition of ungoverned space, are also among the poorest. Somalia, Chad and Sudan rank first, second and third in the Fund for Peace 2011 Failed State Index.[198] Not coincidentally, the three countries also rank at or near the bottom in per capita gross domestic product.[199] From the opposite perspective, however, such ungoverned spaces also create opportunities for economic growth. Because of cyberspace, the individual is a more powerful economic actor now than at any other point in human history. The dispersed economic impact of cyberspace is basically immeasurable, both for the local and international economies. Profit opportunities for large internet and technology companies, such as Google, are essentially limitless. Finally, opportunistic corporations are able to capitalize on the absence of formal law and regulation to reap fantastic profits, especially in the energy and natural resource sectors. International law should step into this breach to provide rules that protect the least advantaged, and regulate in the activities of the powerful and strategic actors.

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[198] *See* Kristen Blandford, Annie Janus and Kendall Lawrence, *The Troubled Ten: The Failed State Index's Worst Performers*, FUND FOR PEACE (June 20, 2011) http://www.fundforpeace.org/global/?q=node/130. The remainder of the top ten was: Congo; Haiti; Zimbabwe; Afghanistan; Central African Republic; Iraq; and Cote d'Ivoire. *See id.*

[199] The per capita GDP in Somalia is $600, ranked 220th in the world. *See* Central Intelligence Agency, *World Factbook*, Somalia, https://www.cia.gov/library/publications/the-world-factbook/geos/so.html. Chad ($1,900 per capita GDP) and Sudan ($3,000 per capita GDP) do not fare much better, ranking 190th and 170th, respectively. *See* Central Intelligence Agency, *World Factbook*, Chad, https://www.cia.gov/library/publications/the-world-factbook/geos/cd.html (accessed Mar. 23, 2011); Central Intelligence Agency, *World Factbook*, Sudan, https://www.cia.gov/library/publications/the-world-factbook/geos/su.html (accessed Mar. 23, 2011); s*ee also* World Bank, GDP Per Capita, http://data.worldbank.org/indicator/NY.GDP.PCAP.CD (accessed Mar. 23, 2011).

2.   Structural

Subjectivity.   Ungoverned spaces present clear challenges to international legal subjectivity. As Crawford and Miscik note, informal, mezzanine actors have not generally been treated as subjects of international law. Similarly, international law generally does not apply to private security contracting companies, private-public partnerships, corporations, global health actors, NGOs, armed groups and other "special" or "controversial" actors. Nonetheless, in ungoverned space, such actors exercise power that affects the other participants within the international system. Because domestic law is usually also absent or ineffectual within ungoverned spaces, international law must reform itself and expand to include these informal actors. By doing so the discipline not only strengthens the international system, but also empowers itself.

On this point, it is useful to think of the various subjects of international law as "vehicles" for the evolution of the discipline. They shape and are shaped by the law, and in this way the two exist in a mutually constitutive relationship. Because of this relationship, it is anachronistic to limit the subjects of international law to two categories: states and non-states. Rather, it is useful to perceive each vehicle for what it is, and then analyze its relationship both with international law as well as with the other actors. This motivates a more realistic inquiry into how international law is made and applied. For instance, it might be said that states are universally concerned with security and economic development, but only partially committed to other issue areas, such as human rights, the environment, biodiversity, cyber law and so on. Because states also exercise the most power of any international legal actor they should be expected to get most of what they want when they want it: they drive the development of laws applicable to the use of force and commerce. However, because they are less occupied with the other specialized issues on a daily basis, they might merely react to emerging ideas that arise in civil society by promulgating vague, "framework" treaties, holding conferences or making policy statements. For their part, civil society organizations are usually committed to specific issues, but less involved with the broader international legal discourse. They also generally lack the power or expertise to deal with issues of interest to states, such as economics and international security. They exercise some influence, but their power is easily curtailed when it opposes state interests. Therefore, while civil society organizations may drive the development of certain issues, such as human rights norms, the development of these norms takes significant time, and they may be forced to accept a great deal less than they envisioned.

Issues are also subjugated to the interests of more powerful actors. They have a broad range of concerns, from human rights, to development, to the environment, economic growth, criminal law, and so on, but they may not share the states' concern with far-flung issues of "national security" and they may lack the perspective to appreciate broader concerns about economic growth. They too might be law-makers, but their relationship

with international law is easily filtered by the state, which generally decides when individuals should participate by either inviting them to the table or extending the application of the law to include them. Theirs is an asymmetrical power relationship, and as a result individuals acting in advocacy roles generally have a limited role in the formation of international norms. The point is that each actor affects and is affected by international law in different ways. And that each actor affects and is affected by the other actors in different ways. A useful theory on the structure of international law should account for this broad range of interests and be able to illustrate the dynamic interactions between them. It should recognize that different actors have different roles and that the relationship of these different actors to each other and to the discipline of international law shifts and evolves over time. It must also embrace and operationalize the discipline's comparative advantages, namely certainty and the provision of order among actors with different and sometimes opposable interests.

Reciprocity. Because international law currently applies to some actors operating internationally, but not others, the reciprocal foundations of the order are undercut. This is clear especially in ungoverned space, where the role of formal actor is either reduced or eliminated and informal actors emerge to take their place. Because international law has no central enforcement organ, such as a court with compulsory jurisdiction or a global police force, the order relies on reciprocity as a *de facto* check against rule-breaking. Under the current order, actors in ungoverned spaces are not dissuaded by the fear of reprisals or countermeasures *because so few legal rules exist to break in the first place.* By bringing informal actors within the purview of international law as subjects, the other participants in the system reinstate reciprocal enforcement mechanisms to the system.

Responsibility. Ungoverned spaces break down and challenge the formal structures of international law and order. As a result of perceived threats emanating from ungoverned spaces, international organizations and affected states have sought to intervene to protect their respective interests. Intervention of this kind implicates international legal responsibility; however, the rules have not evolved to account for the changing circumstances presented by ungoverned space. In addition, where local or informal actors have emerged to provide governance, they often operate in a legal netherworld devoid of formal rules and processes. This general breakdown necessitates the import of *more* international law, while simultaneously highlighting the ways in which it must *evolve* and *improve* in order to close responsibility gaps. The failure to do so will lead to impunity and a dangerously unfettered freedom of action. This problem/opportunity is closely related to issues of *impunity* and *enforceability.* In order to address it, international law must develop a method of *responsibilization* for actors within ungoverned spaces.

Uncertainty. Ungoverned spaces put extant legal rules in doubt and highlight gaps where no rules exist at all. This creates uncertainty in the political and legal order. Faced with this uncertainty, citizens may not know who their leaders are, and practitioners operating in ungoverned spaces may not know what law, if any, applies to their activities. When doubt and uncertainty persists, new practices emerge. Powerful actors have an advantage because they are able to exert influence and project power, but international jurists are also well-placed to drive the development of new rules. Using the deterministic language of international law, they are able to create new orders that had not existed previously, thus closing the gaps in the law and reducing the uncertainty of the political and legal system.

C.   *International law's comparative advantages*

Why is international law the most useful way to approach the problems and opportunities presented by ungoverned space? For starters, it is "the language of international relations"[200] consisting of a uniquely powerful vocabulary and the vernacular.[201] Even critical international legal scholars, such as David Kennedy[202] and Martti Koskenniemi,[203] who point to the limitations in the structures of international legal argument, find value in the common vocabulary of international law *through* which arguments can be made. This vocabulary enables an ordering of the relations between disparate actors. It can also be persuasive.[204] As the former Under-Secretary General for Legal Affairs at the United Nations, Hans Corell has written: "First and foremost should be noted the growing realization that the effective application of the rules and principles of international law is the surest way towards peace and harmony among nations."[205] While

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[200] *See generally* United Nations, International Law as a Language for International Relations (1996); *see also* World Peace through Law: The Athens World Conference (1964).

[201] *See generally* David Kennedy, *The Mystery of Global Governance*, 34 Ohio N.U. L. Rev. 827 (2008) [hereinafter *The Mystery of Global Governance*]. But the professional vocabulary of international law is not without its limits. *See* David Kennedy, *When Renewal Repeats: Thinking Against the Box* 32 N.Y.U. J. Int'l L. & Pol. 335, 441 (1999-2000) [hereinafter *Thinking Against the Box*]. For an interesting analysis on the use of language in legal argument *see also* Duncan Kennedy, *A Semiotics of Legal Argument,* 42 Syracuse L. Rev. 75 (1991).

[202] *See* David Kennedy, International Legal Structures (1986).

[203] *See* Martti Koskeniemmi, From Apology to Utopia: The Structure of International Legal Argument (1987).

[204] *See e.g.* Ian Johnstone, *The Role of the U.N. Secretary-General: The Power of Persuasion Based on Law*, 9 Global Governance 448 (2003); Ian Johnstone, *Security Council Deliberations: The Power of the Better Argument*, 14 Eu. J. of Int'l L. 437 (2003).

[205] *See* International Law as a Language for International Relations, *supra* note 200, at 3. For an interesting discussion on the role of law in international affairs between some of the luminaries of the discipline at the tome *see generally* J.L. Brierly, *International Law: It's Actual Part in World Affairs*, 20 Int'l Affairs 381 (1944) (and accompanying discussion).

international law may not be the sole determinant of world order, the claim that it is an important factor "cannot be denied."[206]   Second, international law lends itself to rejuvenation. It does not remain static. In the words of Roberto Unger: "We made it, so we can remake it."[207] And since "we are more than them"[208] we are best placed to create an international law that applies to the contemporary issues that we face, including ungoverned space.   The only thing stopping a whole-sale reconstruction of the law is a practical and necessary commitment to uphold the integrity of international legal doctrine. Paradoxically, the presence of doctrine and the limitations it imposes, while seemingly a negative, actually represents the third comparative advantage of international law. The doctrine exerts its own independent force because it lifts international law above the political discourse and gives it the air of objectivity and determinacy.   In this way, law "displaces chaos."[209] Its objective nature and binding force "create stability and certainty in social relations and impose order where such relations are in danger of breaking down."[210]   The doctrine's power leads to the fourth comparative advantage: international is generally recognized and obeyed.   Louis Henkin's famous assertion that "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time"[211] remains as powerful and true today as it did when he first made it in 1968.[212]

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[206] D.P. O'Connell, *The Role of International Law*, 95 Daedalus 627 (1966).   Of course, international law has failed famously to prevent conflict and destructive war time and time again throughout history.   On this point, Phillip Jessup lamented in 1940:

> Impotent to restrain a great nation which has no decent respect for the opinion of mankind, failing in its severest test of serving as a substitute for war, international law plods on its way, followed automatically in routine affairs, invoked, flouted, codified, flouted again but yet again invoked. The Legal Adviser of the United States Department of State still sits at his desk in the old State, War and Navy Building in Washington and his counterpart sits at Downing Street, the Quai d'Orsay and the Wilhelmstrasse. It is not their task to frame policies. *But can one say that the international law with which they deal has no reality?*

Phillip Jessup, *The Reality of International Law*, 18 Foreign Affairs 211 (1940) (emphasis added).   While international law certainly is not indestructible, the position taken here is that it offers the best *opportunity* for peace and good order, not that it succeeds every time.

[207] Notes from lecture by Roberto Mangabiera Unger, *Law and Legal Thought in the Twenty-first Century*, Harvard Law School (Mar. 12, 2012) (on file with author).

[208] *Id.*

[209] Marc Weller, *International Law and Chaos*, 52 Camb. J. Int'l L. 6 (1993).

[210] *Id.*

[211] Louis Henkin, How Nations Behave 47 (2d ed. 1979).

[212] *See e.g.* Harold Koh, *Why Do Nations Obey International Law?* 106 Yale L. J. 2599 (1996-1997).

Capitalizing on these four strengths, international jurists have developed a number of methods that utilize international law's unique vocabulary to address international problems. These include, but are not limited to: legal positivism, the New Haven School, international legal process, critical legal studies, international law and international relations, feminist jurisprudence, and law and economics. [213] As an illustrative experiment, in 1999 the American Society of International Law (ASIL) held a symposium in which they asked scholars associated with these approaches to apply their method to a specific problem, namely, the "the question of individual accountability for violations of human dignity committed in internal conflict, with respect to both the substantive law and the mechanisms for accountability."[214] The answers were quite diverse, but the variety of ways in which the issue was argued exemplifies the versatility and power of international legal argument. Particularly relevant to issue of ungoverned space, a number of methods focused on the development of *de lege ferenda,* articulating ways to "improve, reform or critique existing law."[215] In answering the question posed in the symposium, the authors "demonstrated not only the relative merits of their methods, but also the value of having a wide range of methods to bring to bear on issues that stir the conscience and move us to professional and personal action."[216] Far from being "full of sound and fury signifying nothing"[217] this diversity of views and methods signals the relative strength of international law in addressing international problems.

The wide array of issue areas, to which international law has been applied form part of an emerging *universal legal order.*[218] The development of international law in these different forms has served to overcome some of the structural disambiguates of the system. As the break-up of Yugoslavia during the 1990s and the recent intervention in Libya have shown, massive abuses of power within states are now interpreted as threats to international public order, which "shock the conscience" and cannot be ignored by international law. The Responsibility to Protect (R2P) represents both a moral imperative and a budding rule of international law. The recognition that all of humankind is part of an international society necessitates a legal system, and international law provides it. According to Phillip Allot: "International law is the law of international society embodying the common interest of all humanity."[219]

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[213] *See* Anne-Marie Slaughter and Steven Ratner, *Appraising the Methods of International Law: A Prospectus for Readers,* 93 AM. J. INT'L L. 293(1999).

[214] *See id.* at 295. For the answers to the question from the various viewpoints *see generally Symposium on Method in International Law,* 93 AM. J. INT'L L. 302 (1999).

[215] Anne-Marie Slaughter and Steven Ratner, *The Method is the Message,* 93 AM. J. INT'L L. 410, 416 (1999).

[216] *Id.* at 423.

[217] WILLIAM SHAKESPEARE, MACBETH, Act V, Scene 5.

[218] *See generally* PHILLIP ALLOT, EUNOMIA: NEW ORDER FOR A NEW WORLD (2001).

[219] *See id.* at xxxv. This assertion forms the text of Article 2 of Allot's proposed "Treaty on the Constituting of International Society."

D.   Introducing the three techniques

Taking into account these comparative advantages, international law can address the issue of ungoverned space through the use of three different techniques. At the outset, *technique* as it is proposed here should be differentiated from *method* as that term was used in the 1999 ASIL symposium.   While *method* lined-up with the notion of *schools* of international law and *ways to think about* the discipline, technique should be understood as falling into three categories: *de lege lata*; *de lege in statu nascendi*; and *de lege ferenda*. Each refers to how far it breaks from existing practice. The first is the most conservative. It applies the law as it is, using whatever methods or interpretive tools are at its disposal. Anything is fair game, but the meta-rule is that deviations from the mainstream must be limited to the interpretation of existing rules. This technique might fit nicely within a positivist conception of international law, but that is not necessarily required. There are other ways to recognize what the rules of international law *are* other than merely looking to written agreements (treaty law) or *opinio juris* to determine whether states have consented. What the technique does impose is a limitation. It holds that legal analysis may no further than to apply the law *as it is.* This restriction applies even if the answers that the analysis yields are unsatisfactory. The technique takes the position that if the answer is deficient, the law itself must be changed through the formal process of law-making and revision. In short, this technique anchors its analysis in *existing legal authority* and it relies on *existing sources.* Its touchstone is Article 38 of the Statute of the ICJ, which states that international conventions, international custom (as evidence of a general practice accepted as law or *opinio juris*) and "general principles of law recognized by civilized nations" represent the *only real* sources of international law.[220]

The second technique focuses on the development of emerging rules of international law. It does not limit itself to a rote application of existing rules, nor does it require an exact formulation of a rule as a prerequisite for its status as a *legal rule.* Rather, it picks-up on the unfinished bits and pieces of existing rules and postulates a legal analysis based on where the rules might be headed. It then drives law in that direction. It is less conservative than the preceding technique because it unabashedly creates law and does not limit itself to the subservient role of interpretation. The policy and process methods of international law might be seen as corresponding to this technique, as does just about any method of legislation.[221] Practitioners of this technique are law-makers but they are not wholesale revisionists. They require an emerging rule as the spark to create something that departs from the mainstream.

The third technique is the most ambitious. It seeks to make the law *as it should be* rather than *how it is.* It also has no qualms about creating rules

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[220] Statute of the International Court of Justice, art. 38.

[221] On the issue of legislation s*ee generally* JEREMY WALDRON, THE DIGNITY OF LEGISLATION (1999).

that have not yet emerged or that are wholly novel. In style and ambition this technique might correspond to methods such as critical legal studies and feminist jurisprudence, but it is not limited to them. Any revisionist, bold attempt to remake law and legal analysis falls into this category. The challenge for this technique is to remain within the realm of law and legal doctrine. In order to be persuasive, it must not go too far afield. The way to achieve this aim is continue the conversation in the language of law. This is the case even if the ideas proposed have no claim to preexistence in either the established or emerging corpus of rules.

The three techniques correspond with what might be thought of as three different ways of *practicing* international law. At one end of the spectrum there is the rote application of routine rules. This works most of the time because the rules have evolved to account for expected problems. At certain points, however, such as during times of tumult brought about by war or crisis, or with the advent of new technologies, the rote application of the rules loses its effectiveness. During these periods the limits of international law become so glaring that to continue along the current path would be hopeless. The lexicon and ambit of international law needs to be reshaped. Faced with such a challenge, the two other techniques present alternative possibilities. The first counsels small steps, the second larger ones. In order to proceed along either path, the practitioner needs new ideas.

The need for new ideas makes the scholar of international law particularly relevant. "[A]nimated both by professional ambition and a desire to help the field [,] [t]hese exceptional individuals come up with ideas about how the field should respond to new conditions and provide helpful analyses of what has gone wrong."[222] Practitioners of the second technique look for ideas that are "sensible and useful;" if they satisfy that criteria then they will be adopted by the practitioner and might help form "a new disciplinary consensus about how a wide range of problems might be addressed."[223] If they are not useful, or if they venture too far, they will be "left to one side."[224] On the other hand, practitioners of the third technique might look for more innovative ideas. They see the problem as presenting something fundamentally new, and they are tired of the old strategies that have failed in the past. Their demands might be less immediate; what they want is a system that projects *into the future.*

The point to be made here, before going into a formulation of the three techniques as they apply to ungoverned space, is that the practitioner is the consumer of new ideas. Ultimately, no matter how conservative, creative or proactive an idea might be, it will be judged based off of whether it fits with what the practitioner wants. The goal, then, of the three techniques, is to offer practitioners three different ways of thinking about how international law should apply to the problem. The hypothesis

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[222] *Thinking against the Box, supra* note 201, at 398.

[223] *Id.*

[224] *Id.*

is that the third technique represents the best, but by no means the only way of thinking about the issue of ungoverned space.

With that in mind, the three options, or techniques, for addressing ungoverned space are: state responsibility; principled engagement; and innovation. The state responsibility argument is the least creative. It represents the law as it is (*de lege lata*) and for that reason it is easily critiqued. However, because it serves as a point of departure, examining the specific ways in which it fails has some value. The second technique, principled engagement attempts to push emerging norms (*de lege in statu nascendi*) in a particular direction, namely toward a more flexible interventionist policy. Despite its flexibility, this technique must include normative limits. The third technique goes much farther than the preceding two. It sheds the received understandings of international law and radically reimagines the discipline to match the realities of ungoverned space. This involves tearing apart and reconstructing the law into what it should be (*de lege ferenda*) so that it can capture the true power and responsibility dynamics that exist. The challenge of this latter technique is to innovate *within* the discipline; to stay *inside* the reasonable limits of the doctrine and to resist a slip into the domain of politics and social commentary.

1.   State responsibility (*de lege lata*)

Responsibility of states for their internationally wrongful acts is "a general principle of international law, a concomitant of substantive rules and of the supposition that acts and omissions may be categorized as illegal by the rules establishing rights and duties."[225] The starting point for the state responsibility technique is the meta-rule in international law which holds that states are responsible for upholding their international obligations (*pacta sunt servanda*). In accordance with the technique, the rule of *pacta sunt servanda* should be understood as an *existing* rule of international. It is articulated by the *Vienna Convention on the Law of Treaties* (VCLT) as requiring that: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."[226] The same good-faith obligation also applies to commitments arising under customary international law.

Given this rule and the obligations it imposes, the next step in the analysis is determining the content of state obligations with respect to ungoverned space. First, a number of general principles exist. These are listed in the Article 2(4) and Article 2(7) of the U.N. Charter as well as *The Declaration on the Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United*

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[225] BROWNLIE, *supra* note 2, at 434.

[226] VIENNA CONVENTION ON THE LAW OF TREATIES, art. 26.

Nations.[227]   Collectively, the principles that are relevant to ungoverned space, are the following:

- States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the U.N. (*e.g.* U.N. Charter, Art. 2(7));
- States shall not intervene in matter within the domestic jurisdiction of any state, in accordance with the U.N. Charter (*e.g.* U.N. Charter, Art. 2(4));
- States shall cooperate with one another in accordance with the U.N. Charter;
- States shall respect equal rights and self-determination.

Second, there are certain obligations that every state owes by virtue of their status as *jus cogens*. In some cases these are redundant. The non-use of force and non-intervention principles obligations set out under Article 2(4) and Article 2(7) of the U.N. Charter, and that are reiterated in the Declaration, for instance, have been interpreted as *jus cogens,* as has the principle on self-determination. Other *jus cogens* obligations that might be relevant to ungoverned space are:[228]

- Prohibition against acts of aggression;
- Permanent sovereignty over natural resources;
- Prohibition against genocide;
- Principle of racial non-discrimination;
- Prohibition on trade in slaves;
- Prohibition on piracy;
- Prohibition on torture, cruel, inhumane and degrading treatment.

Third, specific international obligations will apply in specific circumstances.   These are as diverse as the different international agreements that exist in the world; however, it is not difficult to imagine a few examples. For instance, if a state fails to prevent the causation of environmental harm to the atmosphere emanating from ungoverned space within its territory and it is a party to the *Convention on Long-Range Transboundary Air Pollution,*[229] it might be liable under that agreement. Another example might be if the state allows its territory to be used for the trafficking of human beings. In this case, if it is a party, the state would violate its obligations under the *Convention for the Suppression of the Traffic in*

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[227] *See The Declaration on the Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, supra* note 51.

[228] *See* BROWNLIE, *supra* note 2, at 511.

[229] 1302 U.N.T.S. 217 (Nov. 13, 1979).

Persons and of the Exploitation of the Prostitution of Others.[230] Countermeasures and other responses in the event of breach might also take place according to the four corners of the international agreement.

Rules for determining when state responsibility attaches are codified in the International Law Commission Articles on the Responsibility of States (ILC Articles).[231] While not formally binding, the ILC Articles mirror customary international law in most respects.[232] They set out rules on the general principles of responsibility, attribution, breach, circumstances precluding wrongfulness and reparations. Particularly relevant to the issue of ungoverned space is Article 23, paragraph 1 (*Force Majeure)* of the ILC Articles, which states:

> The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to *force majeure* that is the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.

According to Article 23, paragraph 2 of the ILC Articles, this shall not apply where "the situation of *force majeure* is due, either alone or in combination with other factors, to the conduct of the State invoking it; or the state has assumed the risk of that situation occurring." Nonetheless, according to the commentary of the ILC:

> Material impossibility of performance giving rise to *force majeure* may be due to a natural or physical event (e.g. stress of weather which may divert State aircraft into the territory of another State, earthquakes, floods or drought) or to human intervention (e.g. loss of control over a portion of the State's territory as a result of an insurrection or devastation of an area by military operations carried out by a third State), or some combination of the two.[233]

This provision has clear relevance to ungoverned space; however, the problem with state responsibility rules is that they either exist or they do not. In the case of *force majeure* caused by an insurrection movement, the state may escape liability, but the insurrection movement itself also avoids responsibility, leaving the aggrieved state without recourse.

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[230] 96 U.N.T.S. 271 (July 25, 1951).

[231] United Nations, International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts (with commentaries)*, 2 I.L.C. YEARBOOK 31 (2001) [hereinafter *ILC Articles*]. The text of the ILC Draft Articles was adopted by the United Nations General Assembly in its resolution 56/10 *see* A/RES/56/10 (Dec. 6, 2001).

[232] *See generally* BROWNLIE, *supra* note 2, at 433-474.

[233] *ILC Articles, supra* note 231, at 76.

Another major issue is that in most cases, state responsibility rules persist even in the event of state failure. *Force majeure* in Article 23 of the ILC Articles sets a high standard that is not often met. As the ILC notes in the commentary:

> *Force majeure* does not include circumstances in which performance of an obligation has become more difficult, for example due to some political or economic crisis. Nor does it cover situations brought about by the neglect or default of the State concerned, even if the resulting injury itself was accidental and unintended.[234]

Most often state failure occurs due to the conduct of the state in question. This creates a major gap in the law. If the state is unwilling or unable to fulfill its obligations, for instance, what good does it do the international system to hold them responsible? In the absence of effective government, both the state and the international community suffer from the state's inability to fulfill its duties and exercise its rights.[235] One solution to this dilemma might be that a breach followed by a determination that a state is unwilling or unable to uphold its obligations could give rise to the right on the part of the aggrieved state or states to take ameliorative action. While justifiable, this approach leads to two follow-on questions. First, when is a state unwilling or unable to meet its obligations? Second, what law should apply to the ameliorative action? A technique premised on pure state responsibility cannot answer either of these questions. Nor does it address issues of *de novo* ungoverned space, where no state has primary responsibility. Rather, for these answers recourse must be made to the more proactive techniques.

2.   Principled engagement (*de lege in statu nascendi*)

In this context, the principled engagement technique addresses the unwilling or unable standard in international law, as well as the rights of states to intervene in ungoverned spaces. While the "unwilling or unable" standard has existed for a considerable period of time, it remains unclear exactly, and in what circumstances the threshold for the test is reached. Moreover, the rules on intervention, while formally settled in Article 2(4), Article 2(7) and Chapter VII of the U.N. Charter, have undergone significant change in the post-Cold War period. Both areas are therefore properly characterized as *de lege in statu nascendi*.

International law currently gives states little guidance about what factors are relevant to making a determination that another state is unwilling or unable to perform its international obligations.[236] While the test finds its origins in neutrality law and early writings on the law of

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[234] *ILC Articles, supra* note 231, at 76-77.

[235] *See* AKPINARLI, *supra* note 54, at 145.

[236] *See* Ashley Deeks, *"Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defense*, 52 VA. J. INT'L L. 483, 485-86 (March 2012).

belligerency, it lacks determinacy.[237] The standard has also made its way into the Rome Statute establishing the international criminal court, but there has been little discussion about what the test requires.[238] This omission is particularly relevant in the situation of self-defense. While more than a century of state practice suggests that it is lawful for a state that has suffered an armed attack by an insurgent or terrorist group, to use force against that group if the state of origin is unwilling or unable to suppress the threat, to date there are no clear answers about how the process should work.[239]

In an attempt to close the gap in the unwilling or unable test with respect to the use of force in self-defense, Ashley Deeks has proposed a set of normative principles that would require the victim state to:

1. Prioritize consent or cooperation with the territorial state over unilateral uses of force;
2. Ask the territorial state to address the threat and provide adequate time for the latter to respond;
3. Reasonably assess the territorial state's control and capacity in the relevant region;
4. Reasonably assess the territorial state's proposed means to suppress the threat; and
5. Evaluate its prior interactions with the territorial state.[240]

The implication of Deeks' test for ungoverned space is significant but at the same time, it is segmented to one part of the issue. She provides a very useful set of criteria *if the state still exists* and the issue is one of self-defense, but in the event that the state has collapsed and the intervention is for humanitarian purposes, then her set of normative principles is of limited utility. If the state is completely failed or absent, what criteria should a victim state apply? Moreover, outside of the self-defense situation, which presupposes an armed attack emanating from the state of origin, the test does not inform the action of states.[241]

Similar to Deeks, Reinold notes the confused nature of the unwilling or unable standard in international law. She writes that the post-9/11 practice has "strengthened the notion that sovereignty entails responsibility for the effective control of one's territory and that failure to discharge this obligation legitimates a military response."[242] The enforcement action taken against the Afghan Taliban, which had neither

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[237] *See generally id.* at 496-506.

[238] *See* Rome Statute of the International Criminal Court, art. 17, 18.

[239] *See* Deeks, *supra* note 236, at 486.

[240] *See id.* at 490, 506-533.

[241] In fairness, Deeks does not try to address these situations. Her test is purposely limited to the self-defense context. I am merely pointing out how difficult it is to create an unwilling or unable test that accounts for the many different issues raised by ungoverned space.

[242] Reinold, *supra* note 49, at 245.

directed nor controlled the perpetrators of 9/11, for instance, "broke with traditional norms for attributing private action to a state but was nonetheless greeted with widespread approval or at least tacit acquiescence by the vast majority of states."[243] In addition to Afghanistan, Reinold describes examples from Georgia, the Democratic Republic of the Congo, Lebanon, Iraq, Ecuador and Pakistan, where the unwilling or unable standard has been variably applied to justify intervention in self-defense. She attempts to provide clarity to the "threshold requirement, the attribution standard, and the (re-)interpretation of the principles of necessity and proportionality" but in her own words "only partially reduce[s] the legal uncertainty" citing the "emerging trend that states are making indiscriminate use of the unwillingness and inability scenarios to justify military action in states harboring irregular forces."[244]

This lack of clarity leads Giorgetti to lament the absence of a principled approach to international engagement in failed states. She recommends eight "guiding principles for action to maintain international public order in situations of state failure:"[245]

> *Principle 1*: States have a duty to cooperate and protect one another in the various spheres of international relations in order to maintain international peace and security.
>
> *Principle 2*: Every state has a duty to notify other states of any emergency occurring in its territory which could have transboundary effects. Notification must be done as soon as possible after the discovery of the emergency and should indicate the location of the threat, the nature of the threat, and its possible effects.
>
> *Principle 3*: International organizations and other organizations present on the ground may bring to the attention of the international community any emergency situation that threatens peace and security and may have a transboundary effect, in the absence of state's notice.
>
> *Principle 4*: Every state has the duty to provide assistance on demand to states that request such assistance to address emergency situations which may have a transboundary impact that poses a risk to international peace and security. All states involved in the provision of assistance must cooperate in the management of the operations. The United Nations may provide assistance and guidance as required.

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[243] *Id.*; *see e.g.* United Nations, Security Council resolution 1363, S/RES/1363 (Sept. 12, 2001); United Nations, Security Council resolution 1373, S/RES/1373 (Sept. 28, 2001).

[244] *See* Reinold, *supra* note 49, at 284-85.

[245] *See* GIORGETTI, *supra* note 50, at 184-85.

Principle 5: The [U.N.] Secretary-General and other competent actors may request assistance to deal with an international threat to peace and security in the absence of a state request for assistance. In such a case, every effort should be made to consult with national authorities before any action is taken.

Principle 6: As a last resort, and if the risk is imminent, the authority to address the emergency situation in a state that is incapable of action may be given by the Secretary-General or Security Council directly to specific international organizations and state members.

Principle 7: Any action taken without the express request of a member state must be limited, as much as possible, to addressing the international consequences of the emergency as threats to its security. Every effort should be made to consult local authorities.

Principle 8: Whether a State is incapable of taking action in an emergency may be assessed by the [U.N.] Secretary-General of the U.N. in consultation with the Security Council, General Assembly or a purposely created Committee. Such assessment shall be limited to the specific emergency and shall bear no consequence to the sovereignty and existence of the state.

Giorgetti admits that her principles, taken at face value, might be susceptible to the claim that they violate principles of non-intervention; however, she notes that such a critique would be based on a "wrong understanding of the meaning of sovereignty."[246] Rather than being coercive, Giorgetti views "interventions to fulfill the international obligations of other states" as serving the collective general interest; according to her, the "tension with possible interventions in internal affairs of states is not there"[247] Therefore, the prohibition on intervention, which is premised on preventing forcible or dictatorial interference, does not apply. Finally, in contradiction to the technique of state responsibility, Giorgetti also argues that "the inability of a failed or failing state to perform certain international obligations should [be] separate and distinguishable from their international responsibility."[248] Taken as a whole her conception closes the gap that existed in the state responsibility framework because it views state responsibility as independent of actions taken by the international community to address the symptoms of state

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[246] *See* GIORGETTI, *supra* note 50, at 185.

[247] *See id.* at 186.

[248] *See id.* at 188.

failure. In effect, the intervening state acts not out of self-interest, but to fulfill the obligations of the failed state. Such action "lifts-up" the failed state instead of punishing it for its inability to fulfill its own obligations.

Finally, adopting another variant of the principled engagement and progressive development technique, Yoo asserts that international law needs to be "reworked."[249] The proper role of international law, he writes, is to *enable* intervention in failed states, not restrict it. "Rather than place barriers before intervention of any kind, international rules should allow nations to overcome the informational and commitment problems with intrastate bargaining."[250] In his view, intervening nations can advance this process by "serving as an impartial conduit for information, such as each group's military strength, willingness to fight, probability of prevailing, and values placed on winning increased resources and population."[251]

The proposals of Deeks, Reinhold, Giorgetti and Yoo each employ variations on the second technique. They take *de lege in status nascendi* and drive it in a particular direction. Their efforts have obvious benefits over the state responsibility technique. For one, they are eminently more flexible and reactive to change. In addition, they close clear gaps in the governance system, such as in the aftermath of a state's unwillingness or inability to fulfill its international obligations. Their efforts also recognize the new reality of the international system: Powerful states will not sit idly by while security threats and humanitarian disasters mount around them. The increase in the practice of intervention necessitates a fresh look at the principles that underlie non-intervention and state sovereignty norms, and these techniques provide it.

In their approaches, however, they also engage in the kind of interventionist mindset that could ensconce the ungoverned space dilemma. No matter how "principled" or "normative" the intervention, when conceived through the failed state discourse, the proposals solidify existing power dynamics because they frame the issue in two ways: either the *strong help themselves* (*unwilling or unable* standard); or the *strong help the weak* (*principled engagement*). By expending so much effort to subvert the principle on non-intervention, they limit the possibilities of their arguments. Without even acknowledging it, they have taken small steps instead of large ones. They also act hypocritically.[252] Each approach requires an "emergency" in order to activate itself. In many ways, the justifications read like a gloss on a *fait accompli*; non-intervention is dead, but not completely. In its place they have constructed new principles. But these new principles are only a reform of the old approaches. They justify *more* intervention and they make it more intelligent, but then what? Article 2(7) of the Charter lingers and the only ones seeking to redefine its terms are those who want more intervention, not less. The technique advocates

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[249] Yoo, *supra* note 110, at 141.

[250] *Id.*

[251] *Id.*

[252] On the hypocrisy of intervention by the powerful north in the developing south *see generally* AKPINARLI, *supra* note 54, at 149-228.

for redevelopment of international law from the top-down, rather than from the bottom-up, where the real issues lay.

3.   Innovation (*de lege ferenda*)

In some ways, the innovative (*de lege ferenda*) technique is the least difficult to implement. Instead of grinding over the definitions of existing legal terms and arguing for small-scale reform, it fully recognizes that its ideas take place outside the mainstream legal discourse.[253] That is not to say it lacks self-awareness. Rather it is liberating. The system of rules and axioms no longer provides the only structures for argument. Law is no longer geometry; it is practical and malleable. The jurist becomes the master of the process. Seen this way the discipline can be mobilized to address actual problems, such as those raised by ungoverned space, without expending so much energy getting rid of what already exists. Because it is a deviation[254] from the received understandings, it is free from the strictures of the other two techniques.

At the same time, if the goal is to persuade and gain acceptance, the innovative technique faces a struggle. Punctuating the equilibrium that already exists and proving to practitioners that the break-away approach has practical merit is challenging in any environment, but the opposition is even more fierce in law, where routine is favored and innovation of any kind is viewed with suspicion. Forging ahead in this environment requires not only good ideas, but also a systematic and strategic plan.

An effective strategy statement consists of the following elements: objective; scope; and advantage.[255] Therefore, as applied to the innovative theory the three elements of its strategy are:

> The *objective* is to create an international legal theory that addresses four practical problems/opportunities raised by ungoverned space: security; development; human rights; and economics.

> The *scope* of the theory is international law and ungoverned space.

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[253] This brings to mind the so-called "New Stream" and "New Thinking" schools of international law. For a useful bibliography *see e.g.* David Kennedy and Chris Tennant, *New Approaches to International Law: A Bibliography*, 35 Harv. J. Int'l L. 417 (1994); *see also* David Kennedy, *My Talk at ASIL: What is New Thinking in International Law?* 94 Proc. of the Annual Meeting (American Society of International Law) 104 (2000).

[254] For interesting insights into the role of deviationist doctrines *see generally* Roberto Mangabiera Unger, The Critical Legal Studies Movement (1983).

[255] *See* David Collis and Michael Rukstad, *Can You Say What Your Strategy Is?* Harv. Bus. Rev. 2 (April 2008); *see also* Michael Porter, *What is Strategy?* Harv. Bus. Rev. 4 (Nov./Dec. 1996) (writing that "competitive strategy is about being different").

> **The *advantage* of the innovative model is that it is not bound by existing rules or precedent.**

Operationalizing these three elements yields this strategy statement for the innovative technique:

> **To heighten security, increase development, protect human rights and stabilize the economic conditions in ungoverned spaces by offering a useful, practical, fair and flexible international legal theory to international jurists who advise political leaders.**

Determining the subjects of the legal theory follows from the strategy statement. Because the ends are practical, so are the means. In order to heighten security, for instance, the theory must address the security threats directly. The same can be said for the other issues: development; human rights; and the economy. This requires making the actual actors in ungoverned space directly accountable: it is a process of responsibilization. The formal/informal status of the actor does not matter; rather, the question is whether the actor exercises power. Instead of relying on formal indicators to determine subjectivity, the innovative approach subjectifies those actors that exercise actual influence based on a factual determination. The prerequisite for responsibilization is empowerment. Rather than artificially apportioning power, the innovative technique merely *recognizes* its factual manifestation. Where power exists, accountability attaches.

The content of the theory is determined with reference to the particular ungoverned space; however, in determining *how the law is made* and *to whom it applies* the following principles will always be informative:

1. The international law of ungoverned space arises out of interactions between the different actors who exercise power in that space; it is a *diffuse* law-making process that cannot be co-opted by any single actor.

2. The determination of who qualifies as a subject of international law in ungoverned space shall be made according to factual circumstances rather than formal categories.

3. All actors who exercise a non-arbitrary amount of power in ungoverned space are subject to the international law of ungoverned space.

4. All subjects of the international law of ungoverned space are responsible for their actions and omissions in ungoverned space.

5. The responsibility of subjects is determined by the amount of power that they factually exercise; with more power comes more responsibility.

6. There is no *unilateralism* in ungoverned space; each act or omission takes place against the backdrop of the international law of ungoverned space; it is informed by the existing legal rules and impacts but does not determine the future of the legal order applicable to the space.

Each of these principles addresses the two central innovations of the technique: making international law apply to informal actors who exercise power in ungoverned space; and deriving a law-making process that incorporates these new actors. The innovative technique holds that preconceived notions of subjectivity hinder, rather than help, the development of a useful international law applicable to ungoverned space. Instead of requiring abstract categorical decisions to be made (*i.e.* state/non-state), it counsels a fact-based inquiry. The technique asks: Who is exercising power within this ungoverned space? What is the history? What are the problems? What are the opportunities? What actions are the actors taking? How does each exercise of power impact the overall environment? The outcome of these and other related questions determines who is a subject of the international law of ungoverned space and who is not. It also informs how the law is made. In some cases, states will remain the sole subjects, in others subjectivity will attach to informal actors and individuals. Instead of binary subjectivity, new ideas of multi-level subjectivity emerge in ungoverned spaces. The question becomes: How much power is needed for an actor to be a subject of international law in ungoverned space? By exercising a non-arbitrary amount of power and influence in the multilateral environment of ungoverned space, an actor presents a *prima facie* case for being subject to the law of ungoverned space. The factual elements of that participation subsequently determine whether and to what effect responsibility attaches.

As noted, the answers to the questions also determine how the rules are made. Because the "new subjects" of international law in ungoverned space exercise varying levels of influence and power, not all responsibility is created equal. Some actors exercise responsibility in all circumstances, while others do not. A fundamental premise underlying the innovative technique is that ungoverned space is a *community* issue. The membership in this community shifts depending on the particular ungoverned space, but the fact remains that multiple perspectives with multiple interests are at play. Each ungoverned space exhibits different power relationships and capacities. The variety of interests and actors creates opposable rights and duties between the members of the community. The interactions between these different community members allows for the development of legal rules. The resulting law-making process is *diffuse* because it is spread across the different actors exercising power within the space.

Because it departs so drastically from the current mainstream discourse it might seem that the innovative technique has rarely been applied by international jurists; however, in the long history of the discipline, it has actually been an integral and omnipresent driver of change. The fields of public international law, private international law, international economic law, international environmental law, the law of armed conflict and so on are replete with innovative deviations from the received understandings of the mainstream. The ones that stick, such as the mainstreaming of human rights, the liberalization of trade and the creation of the International Criminal Tribunal for the former Yugoslavia, just to name a few, break the equilibrium, attract an audience and offer a useful alternative to the *status quo.* They are effective, realist, practical and accurate. Each project began as an attempt to remake the international order according to a certain vision of what *should be.*[256] The best innovations create value without forcing sacrifice. They provide answers to complex problems and create order out of uncertainty.

The proposed international law of ungoverned space does all of these things. Out of the uncertainty and chaos, it presents a method for apportioning responsibility and fostering order. The issue of ungoverned space demands new thinking, and the innovative technique provides it. Instead of harping on the stale concepts of sovereignty and intervention, filling-in preexisting tests that benefit powerful actors, such as the unwilling or unable standard, or accepting the established categories of legal subjectivity it reimagines the way in which international law applies and is made. The result is a legal process that is more realistic, more accurate, more effective and more practical than either the orthodox or the progressive development approach.

Given these principles and considerations it is possible to define the "international law of ungoverned space" as:

> **The *international law of ungoverned space* encompasses the legal norms needed to create the conditions to attain the highest possible level of security, economic stability, human rights and development for actors operating within ungoverned spaces. It seeks to facilitate cooperative and mutually-respectful behavior among the key actors that significantly influence conditions within ungoverned spaces, including states, international organizations, informal governance actors, corporations and individuals. The law of ungoverned space should promote accountability and responsibility, coordinate activities, facilitate communication, monitor progress, provide clarity and guide behavior. In formulating the law actors should be led by the overarching considerations of effectiveness, respect for diversity, equality, justice, the persistence of international obligations, the maxim *ex injuria non oritur jus* and the imperative to *do no harm.***

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[256] *See The Mystery of Global Governance, supra* note 201, at 835.

The definition serves multiple aims. First, it clarifies the scope of the international law of ungoverned space. It "encompasses the legal norms needed to create the conditions" to address the four practical problems/opportunities presented by the issue. Second, it articulates the goals of the enterprise, which are: to facilitate cooperation among the various actors that "significantly influence conditions within ungoverned spaces"; to promote accountability and responsibility; to coordinate activities; to facilitate communication; to monitor progress; to provide clarity; and, importantly, to guide the behavior of *all actors.* Finally, it identifies the "overarching considerations" that should lead activities in ungoverned space. These relate to the *creation* of the law because they guide interactions between actors. They are also *operative.* They save the international law of ungoverned space from some of the more obvious hazards that might arise, while simultaneously informing its subsequent development. Over time they may expand and contract, or take on new meaning. They are tailored to reflect the problems and opportunities, as well as the motivations of the different actors, weak and powerful, who take action in ungoverned space. At the outset, they include the following: effectiveness; respect for diversity; equality; justice; the persistence of international obligations; the maxim *ex injuria non oritur jus*; and the imperative to *do no harm.* These overarching considerations are necessarily general and abstract, and the enigmas inherent in them will have to be worked out through practice. As a general rule, they reflect the skeletal rules of the order. They provide the parameters for acceptable behavior.

These overarching considerations also add substance to the principles, which refer to *how the law is made* and *to whom it applies.* In this way, they represent the next step in the innovative process. Thus described, the international law of ungoverned space has many strengths; however, it also faces many challenges. In particular, the principles and overarching considerations raise a number of questions. Foremost is the obstacle of remaining within the language of the law. Because the technique deviates from the mainstream, it will struggle to gain adherents unless it is persuasive, useful and self-aware. The proposed principles and definition attempt to strike a balance between the development of a new way of thinking about law and legal processes for ungoverned space, and the usage of a legal vocabulary that provides order and clarity. The jurists who develop the international law of ungoverned space must remain committed to an honest and rigorous *legal analysis* of the problems and opportunities raised by the issue.

Eight additional challenges also merit brief scrutiny. First, there is a practical question of how to identify and understand power relations in ungoverned space. This will require extensive sociological, political and anthropological research, intelligence analysis and access to information. Certain standards must also be developed to guide decision-making processes. These might include certain indicators of power, such as obedience, allegiance and compliance. The method for determining these factual relationships is unaddressed in the principles and overarching

considerations. It must be attained through sustained engagement and scrupulous review of the particular situation. In this way, legal subjectivity must be brought down from the high level of formal abstraction, to the ground level of factual analysis.

Second, the issue of how the innovative technique will bring more subjects into the orbit of the law presents a challenge to the state-centric system. In the past, when international law has been expanded to include new subjects, the driver for the change has been formal governments, either acting alone or in concert. This can be seen, for instance, in human rights treaties, AP II, and in bilateral investment regimes that enable private actors to haul states before dispute resolution tribunals. In the case of ungoverned space, the drivers for change may not be limited to states (or their surrogate international organizations), but may also include individuals, corporations or informal actors. Realizing these dynamics and formulating a process for bottom-up law-making is essential. The position taken in the proposal is that law-making is *diffuse* and that it reacts to contributions made by different actors. The vagaries in this process will have to be solved through practice, but the necessary direction must be to realize that actors other than states are *law-makers* and not merely *law-takers.*[257] The particularities of how legal rules will emerge from such a *diffuse* process will only be determined as a result of repeated interactions between the different power-wielding actors.

Third, there is a question of timing. Previous innovations in international law have often resulted from crisis. The position taken here is that ungoverned space does not present a crisis, but rather an opportunity to innovate. Because of the challenges and demands presented by the issue, international law can be reimagined and remade so that it better relates to the particular factual situation. The innovative technique must address the issue of mobilizing the international community to act without the hook provided by a crisis. The actual problems and opportunities presented by ungoverned space, and the demands they place on the international community necessitate action, but mobilizing disparate actors toward a common aim will require sustained diplomatic effort on the part of interested actors. Part of the solution to this challenge may lie in the way the innovative technique is communicated to the different actors. It must be shown that adherence to the proposed international law of ungoverned space benefits all interests. Further, and vitally, it must be demonstrated that the technique does not require trade-offs on any of the four practical problems/opportunities. Security, for instance, will be enhanced rather than weakened through a collaborative rule-making process that includes contributions from all actors. To the extent that this assertion can be borne out through empirical analysis, the case for the international law of ungoverned space will be significantly strengthened.

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[257] *See generally* Jean D'Aspremont, *International Law-Making by Non-State Actors: Changing the Model or Putting the Phenomenon into Perspective? in* Math Noorman & Cedric Ryngaert (ed.), Non-State Actor Dynamics in International Law: From Law-Takers to Law-Makers 171 (2010).

Fourth, the technique runs the risk of legitimizing actors who have come to exercise power through illegal, unjust or illegitimate means. As noted, an important element of the technique must be the overarching consideration of the maxim *ex injuria non oritur jus*, which holds that no benefit may arise from an illegal act. Order must not be placed above justice and fairness in the hierarchy of goals for the development of the law. This consideration must be balanced against the application of the law to power dynamics as they factually exist, instead of according to formulaic categories. It is also directly related to the issue of hegemonic control. No one actor must be enabled to co-opt the law-making process. Rather, a community effort, driven by the interactions among a group of actors must result in the development of set of legal rules and norms that is applicable to all of them. This discounts the viability of unilateral acts as determinative of the law and it counteracts the concern that the international law of ungoverned space may be used as a tool of the powerful to exercise dominion over the weak. Conversely, it also addresses the potential criticism that the technique will be hijacked by nefarious and self-interested actors, such as armed groups, who operate outside the confines of traditional international law.

Fifth, and related, the technique raises the contentious issue of the right of self-determination. Self-determination represents an important vehicle for bringing informal actors under the umbrella of the international law of ungoverned space. In particular, the right to remedial self-determination offers informal actors and groups a method by which to escape the strictures of failed or failing states. However, the right to self-determination is not absolute. It must be realized without forfeiting the obligations of international responsibility. Internally, it requires that individuals have a say in the arrangements that govern them. Externally, it requires the fulfillment of the rights and duties incumbent on members of an international community. The commitment to uphold international obligations must be seen as a necessary corollary of the right. At the same time, respecting the right represents an important and non-derogable international obligation. The issue becomes more complex in virtual and *de novo* ungoverned spaces, but the duality remains. If the right to self-determination is to exist, it must accord with obligations to the greater community.

Sixth, the technique must address the use of force. It is a sad commentary on the current state of human evolution that the use of force remains omnipresent. Because the innovative technique is premised on factual circumstances, it must honestly attend to this inevitability. The central challenge is to minimize violence, while at the same time allowing for the possibility that in certain contexts, the use of force will *improve* the situation—not only for the exerciser but also for the other affected actors. One way to do this is to stop *justifying* the use of force according to legal principles. In the sixty years since the ratification of the UN Charter, it has become clear that it is impossible to eradicate international violence through law alone. This does not mean that law has no relevance. Rather it is only one mechanism among many that must be deployed. In order to

be effective in its role, the law must be firm. While force may be unavoidable, it should almost always be *illegal* except in a very limited set of circumstances. The ambitious expansion of the doctrine of self-defense, for instance, renders the general rule meaningless. Actors who exercise force must be willing to accept the consequences of their actions; if the costs outweigh the benefits, than the actor will decide against the act. Too often, the issue of ungoverned space has been used as a yet another legal justification for the recourse to force as means to adjudicate disputes. In effect this allows the actor to exercise force without encountering some of the act's associated costs. The first and second techniques both exhibit this tendency. The unwilling or unable standard, in particular, exists almost exclusively to *enable* forceful intervention. The U.S. capture or kill mission against Osama bin Laden in Pakistan, and the widespread use of drones to carry out targeted killings against alleged members of armed groups represent two clear examples of this phenomenon. For all of their positive effects, such missions also entail unintended consequences. Within the legal system, they weaken the viability of norms prohibiting the use of force, thus lowering transaction costs for the recourse to force. Practically speaking, they foster resentment and powerlessness. They might also destabilize already fragile political organizations. To deal with this issue, the international law of ungoverned space counsels a collaborative process for the formulation of use of force rules. Rather than impose an unrealistically demanding standard on weak actors, which they had no part in creating, and then justifying uses of force according to the prerogatives of the powerful, the innovative technique demands that any use of force must reflect the perspectives of both sets of actors.[258] This is reflected in the principles. Moreover, the overarching considerations apply to *any and all action* taken in ungoverned space. Specifically, every legitimate actor is entitled to recognition and mutual respect. With *more* power comes *more* responsibility to obey the resulting rules. Engagement

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[258] A positive example of this technique in practice is the recent memorandum of understanding reached between the United States and Afghanistan on the issue of "night raids" against suspected insurgents operating in Afghanistan's ungoverned spaces. *See* Alissa Rubin, *Deal Reached on Contested Afghan Night Raids*, NEW YORK TIMES ONLINE (April 8, 2012) http://www.nytimes.com/2012/04/09/world/asia/deal-reached-on-controversial-afghan-night-raids.html?_r=1&hp#. According to the agreement, "responsibility for carrying out the operations" will be handed to Afghan forces; however, the agreement also allows for "continued American involvement." *See id.* This arrangement recognizes the perspectives and concerns of both parties. While it represents a positive development—and an improvement over the application of the paternalistic *unwilling or unable* standard—a true manifestation of the innovative technique in the Afghan case would also enlist the legitimate forms of informal governance operating in the ungoverned spaces. In this way, all three levels of actors—U.S., Afghani and informal—would share variegated responsibility for addressing security threats. The resulting legal regime applicable to the space would reflect the outcome of interactions between the different actors, which would be guided by the principles and overarching considerations of the proposed international law of ungoverned space.

will always be favored over unilateral actions, including on the important issue of the use of force. In the unfortunate event that the use of force is necessary, such a determination should reflect the outcome of interactions between the different legitimate actors operating within the space.

Seventh, the international law of ungoverned space must not worsen the situation. In this way, the constitutive effect of the law should be studied and understood. As applied to complex situations, the law may not only serve as an organizing and simplifying force, but it also may add to the chaos and complexity while entrenching unequal and unjust governance arrangements. Accordingly, the overarching consideration to *do no harm* should be interpreted as a categorical imperative. This relates to physical harm, but it also goes farther. It includes precautions to avoid the unintentional infliction of economic, social and psychological harm and it relates, again, to the issue of trade-offs. The value of human rights, for example, should not be mortgaged in the interests of security. The sole driving force of the innovative technique is to improve the situation across all four of the practical problems/opportunities—security, development, human rights and economics—without sacrificing any one of them.

Eighth, and finally, the international law of ungoverned space must respond to the likely critique that it does not adequately address the issue of *uncertainty*, which was put forth earlier as a structural problem/opportunity to international law presented by ungoverned space. The proposed principles and definition represented an initial response to this challenge, but it must be acknowledged that they only lay the groundwork for the continued and subsequent development of a fully-functional law of ungoverned space. What the proposed theory lacks in certainty, at least at the outset, is compensated by its strict devotion to practicality. Formal categories of subjectivity, for instance, may provide more analytic clarity than fact-based inquiries into the dynamics of power, but they are also fictional and detached from the realities of ungoverned space. Further, general tests, such as the unwilling or unable standard, may seem like useful, ready-made equations for determining the legality of particular acts, but in reality they are subject to blatant manipulation by powerful actors. The result is a general *weakening* of the law. Instead of guiding action, the discipline is denigrated and becomes an *ex post facto* argumentative technique to justify predetermined aims. Briefly stated, it succumbs to the temptation of *instrumentalization*. On the contrary, the innovative technique fully recognizes the complexity of ungoverned space. Rather than representing a burden, the issue is an opportunity for the application of the law to a *real situation*. It is only through a realization that the discipline has always been "paradoxically open to a proliferation of mutually destabilizing readings" and that the textual history of international law has "*never* been a territory of unequivocal and continuous meaning" that international jurists may attain the perspective necessary to

imagine alternative futures for themselves and for the discipline. [259] International jurists bemoan the limits of international law, but they have no one but themselves to blame. By accepting as presumptively valid the obvious limitations of the orthodox and progressive development techniques, they internalize a structure that is itself a limitation on their freedom of action. As a discipline international law has never been settled. Its subjects, objects, aspirations and aims have been in constant flux, and this is not likely to change. Uncertainly inheres in the system, and the discipline exists in a state of perpetual development. Dissident thought of the type presented by the innovative technique challenges inherited structures. It should be welcomed and, if proven effective, embraced. As Richard Ashley and R.B.J. Walker conclude, international jurists must put aside self-limitation and "get on with the difficult and discipline labors of thought in the struggle for freedom."[260] In the much bleaker times of 1929, Alejandro Alvarez also discarded capitulation to societal whims and reaffirmed his commitment to *understanding* the world around him. "Given the *uncertainty* in international life and the law of nations," he professed "the question which presents itself is to know what investigations or researches must be undertaken to bring it to an end, and particularly to give this law (of nations) its true character and all the force and prestige which it lacks to-day."[261] Mobilizing the insights of Ashley, Walker and

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[259] Richard Ashley and R.B.J. Walker, *Reading Dissidence/Writing the Discipline: Crisis and the Question of Sovereignty in International Studies*, 34 INT'L STUD. Q. 367, 387 (1990).

[260] *See id.* at 414.

[261] Alejandro Alvarez, *The New International Law*, 15 TRANSACTIONS OF THE GROTIUS SOCIETY 35, 37 (1929). Alvarez concluded his remarks with a tremendous articulation of the "three great circles of international law," which have particular relevance to the three techniques articulated in this article. He described the three great circles as follows:

> In conclusion: international life presents at present three great circles which embrace international relations and indicate the place which International Law must take in future:
>
> 1. There are many questions which must receive a juridical solution. They form International Law, properly so called, and must be regulated not by the old conception of traditional justice, but by new conceptions of economic, social and general utility.
>
> 2. Questions which are incapable of being subjected to legal rules and which therefore depend not so much on International Law as on politics. These questions must no longer be solved by arbitrary conceptions, but should be governed by the principles of morality, justice and equity.
>
> 3. It is necessary to educate public opinion and the ideas of people, mainly those of the new generation, because so long as the "international spirit" is not inculcated in the masses, no

Alvarez, we must build, construct, critique and innovate that which is lacking in our discipline. Where darkness exists, we must bring it to light.

III. APPLYING THE THREE TECHNIQUES

The previous section presented the practical and structural problems and opportunities posed by ungoverned space. It also introduced the three techniques in detail: state responsibility (*de lege lata/orthodoxy*); principled engagement (*de lege in status nascendi/progressive development*); and the proposed international law for ungoverned space (*de lege ferende/innovation*). This section illustrates the three techniques by applying them to the real-world example of present-day Somalia. It proceeds in three steps. First, it provides a brief history of Somalia, including the international legal regime that is currently applicable to the territory and its adjacent waterways, as well as current state-building efforts presently underway. Second, it *typologizes* and *problemitizes* the ungoverned spaces of Somalia according to the schemes outlines in the preceding sections. Finally, it applies the three techniques of international law and shows how each differs in its application and results.

A. *Relevant history of Somalia*

Somalia is often put forth as the paradigmatic example of state failure. Since the fall of the Mohammed Siad Barre regime in 1991 the numbers are striking. Persistent conflict has displaced more than 1.5 million people and resulted in an additional 800,000 refugees.[262] Life expectancy is among the lowest in the world. Famine and drought wreak havoc throughout the countryside. The toll on Somalis from hunger and violence in the last twenty years is staggering: between 450,000 and 1.5 million have died.[263] The economy is in tatters, with an average GDP of only $600 per capita.[264] Proliferation, nonexistent law enforcement and failed interventions on the part of the international community have precipitated the rise and rise of dangerous armed groups, such as al Shabaab, Hizbul-Islam and al Qaeda. In the absence of a functioning economy, pirates torment the coastline, operating unfettered and terrorizing both the population and international waters in search of sustenance. It is T.S. Eliot's *Waste Land* meets Mad Max's *Thunderdome*.

> respect for legal rules and their strict observance is possible by nations. International relations should be inspired by what the great English jurist [Jeremy] Bentham calls "the common and equal utility of all nations" and also by solidarity and co-operation.

See id. at 48.

[262] *See* Internal Displacement Monitoring Centre, *Somalia: New Displacement and Worsening Humanitarian and Protection Crisis for IDPs* (2011) at 2.

[263] *See* John Norris & Bronwyn Bruton, *Twenty Years of Collapse and Counting: The Cost of Failure in Somalia*, CENTER FOR AMERICAN PROGRESS (2011) at 1.

[264] CIA World Fact Book, *supra* note 199.

As a result of these perceptions many policy makers see the country as hopeless and *ungovernable* absent the formation of a strong, centralized state. International engagement strategies to date have been driven by a single imperative: to revive the central government. Despite the expenditure of more than $55 billion dollars, *thirteen* separate incarnations of centralization have ended in failure. These repeated attempts have foundered due to poor design and corrupt execution, leaving the population deeply distrustful of national government. The fourteenth and most recent attempt, the Transitional Federal Government (TFG), which was created through protracted international mediation brokered by the Intergovernmental Authority for Development (IGAD) and the UN in Nairobi from 2002 to 2004, has struggled to gain legitimacy among the population. The current roadmap process for ending the transition[265] coordinated by the UN Political Office in Somalia (UNPOS) sets ambitious goals for constitution-drafting, security, reconciliation and good governance, but it operates on a condensed time-frame and the security situation has prevented the holding of direct elections to political posts.

Outside of the international consensus, the recognition that centralized government does not represent the sole means by which to organize the political life of the Somali population has led to multiple new theories on governance. These include fresh ideas on devolution, which refer to the distribution (or re-distribution) of authority from centralized to local governments. Accordingly, Somalia serves as a case study for both the failures of centralized government and the possibilities of alternative forms. Since 1991 a number of mechanisms and institutions, including cross-clan collaborations, regional groupings, ideological federations and business alliances have emerged to close the governance gap left by the absence of a centralized government. Precipitated by necessity, yet closely linked to the underlying sociological characteristics of the region, these various local and informal actors have combined to create a complicated yet resilient mosaic of overlapping governmental authority.

The key to understanding the Somali political mindset lies in appreciating the factors that motivate the Somali conception of political organization, namely kinship and its specific kind of social contract.[266] The Somali kinship structure is premised on agnatic (patrilineal) lineage, or clans. There are approximately 100 clans for the five million people in Somalia, though the size and power of each clan varies considerably. All clans belong to a clan family, which consists of related clans and represents the highest level of political solidarity within the Somali nation or ethnic group. There are six major clan families that fall into two groups: the agro-pastoral (*Digil* and *Rahanweyn*); and the nomadic (*Hawiye, Dir, Isaq* and *Darood*). While clanship represents the first principle of Somali politics it is

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[265] Consultative Meeting on the Ending of the Transition in Somalia, Signed Statement on the Adoption of a Roadmap (Sept. 6, 2011).

[266] *See generally* Joakim Gundel, *Clans in Somalia*, ACCORD (2009) (*hereinafter* Gundel 2009); Jama Mohamed, *Kinship and Contract in Somali Politics*, 77 Africa 226 (2007); I.M. Lewis, A Pastoral Democracy: A Study on Pastoralism and Politics among the Northern Somali of the Horn of Africa (1961).

"imaginary" absent the rules of order.[267] *Mag*-paying[268] (or blood payment) groups, which are premised on lineal sub-sets within each clan, represent the most important level of social organization for each individual. Members of a *mag*-paying group pay and receive damages in concert for death or injuries sustained, or inflicted, by a member of the group. All Somali men belong to a *mag*-paying group, and their social and political relations are defined by contracts (customary laws or *xeer*) that are entered into within and between *mag*-paying groups.[269] The participation of women in the formation and practice of *xeer* is negligible because they do not enjoy equal political rights.[270]

The juridical-political operational structures of the clans are also indispensable to an understanding of Somali attitudes toward law and governance. Disputes that arise between members of the same *mag*-paying group are taken before a *shir*, which is an open council administered by *xeer beegti* (or wise judges) who are selected for their legal expertise. The *shir* represents the most important institution of governance in the Somali pastoral society, and in addition to serving as the venue for mediating disputes it is also the place where groups take decisions on war and peace, debate political issues and alter existing contracts.[271] Next to the *shir* the *Gurti* serves as the governing body of the clan, consisting of elders (or *odayaal*) from the various social units that make up a given community. Its responsibilities include nominating heads of the *mag-paying* groups, called *aqiil*,[272] who lead the *mag-paying* groups and function as decision-makers, judges and conflict-mediators for their fellow clan members. The *aqiil* system in Somaliland is not purely a traditional system. In fact, it was an innovation introduced by the British during the colonial administration, and it has since evolved as a hybrid between modern and traditional forms of governance.[273] Operating above the *aqiil* at the level of the clan-family are the clan-heads, known as *Suldaan* in Somaliland, and referred to as *Issim* in Puntland and *Duub* in south central Somalia.[274] The *Suldaan* is an older, more traditional institution that pre-dates the *aqiil*. While initially hostile to the *aqiil*, the *Suldaan* have since accepted the role of such intermediary leaders. The *Suldaan* are also selected by the *Guurti* through a decision called *Guurti Ka Hadh* (a decision no one can deny). As the

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[267] *See* Mohamed, *supra* note 266, at 226.

[268] *Mag*-paying groups are also referred to as *diya*-paying groups.

[269] *See generally* Gundel 2009, *supra* note 266.

[270] *See generally* Andrew Le Sage, *Stateless Justice in Somalia: Formal and Informal Rule of Law Initiatives*, CENTRE FOR HUMANITARIAN DIALOGUE (2005).

[271] *See generally* LEWIS, *supra* note 266; Joakim Gundel, *The Predicament of the 'Oday': The Role of Traditional Structures in Security, Rights, Law and Development in Somalia*, DANISH REFUGEE COUNCIL (2006) (*hereinafter* Gundel 2006); MICHAEL VAN NOTTEN, THE LAW OF THE SOMALIS (2005).

[272] In south and central Somalia, these individuals are called *nabadoon*.

[273] Gundel 2006, *supra* note 271, at 13-14.

[274] *See id.* at 13. For the sake of simplicity and because the terms are used to describe the same level of traditional leader in each region, I will use *Suldaan* to refer to all three.

"corporate political head" of the clan, the *Suldaan* exercise considerable authority.[275] They are the most important conflict mediators in inter- and intra-clan relations, and their status makes them *biri-mageydo* (untouchable) during periods of armed conflict.[276]

In this very fluid order there are no completely stable units and substantial overlap and redundancy exists. Nevertheless, as a result of its adherence amidst the Somali people, since the collapse of the Somali state the clan system as a whole has been indispensable in creating a modicum of peace, security and order among the population. Traditional structures formed the basis for the emergence of Somaliland and Puntland as self-sufficient political units in the 1990s.[277] In the south and central areas of Somalia clan leaders have also attempted to establish new administrations premised on traditional structures. Unlike their northern counterparts, however, their efforts have been frustrated by a precarious security situation, typified by warlordism and the rise of al Shabaab, as well as the disruptive effects of the large-scale international intervention projects aimed at reestablishing the centralized state in Mogadishu.

The UN and Intergovernmental Authority on Development (IGAD) negotiators who oversaw the establishment of the TFG in Nairobi in 2004 made a superficial attempt at fair representation between clans through the so-called "4.5 formula," whereby the four largest clan families (*Rahanweyn, Hawiye, Dir* and *Darood*) all received sixty-one seats in the Transitional Federal Parliament (TFP) and the other clans split the remaining thirty-one seats. However, the approach left many clans feeling disenfranchised,[278] and the TFG's legitimacy has suffered as a result. Subsequent minor adjustments to the composition of the TFP have done little to alter the attitudes of these marginalized groups.

Clans present two paradoxes that are particularly relevant to the application of the three techniques. First, the majority of armed conflicts in Somalia have been fought along clan lines, yet their engagement also offers the best chance for peace and reconciliation. *Suldaan, aqiil,* and *xeer beegti* serve as multi-level conflict mediators, *xeer* provides a basis for negotiated settlements and *mag*-paying groups deter killing by increasing its costs. Al Shabaab's insurgency against the TFG and the group's interaction with the clans clearly illustrates this paradox. Al Shabaab is composed mostly of members of the *Hawiye* clan family, but in the south and central portions of the country opportunistic clan elders from other families who are bent on expanding their own powers have also cooperated with al Shabaab. This has enabled the group to expand its footprint and influence in Somalia with a relatively small fighting force of only several thousand fighters. However, because it is self-serving such support is also precarious. It will last only as long as al Shabaab remains

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[275] Gundel 2006, *supra* note 271, at 14; *see generally* Gundel 2009, *supra* note 266.

[276] *See* LEWIS, *supra* note 266, at 205.

[277] *See* Gundel 2006, *supra* note 271, at 16.

[278] Stephanie Hanson and Eben Kaplan, *Somalia's Transitional Government,* CFR.org, http://www.cfr.org/somalia/somalias-transitional-government/p12475 (May 12, 2008).

influential. The number of hardcore ideological believers within al Shabaab's ranks is estimated to be only 300 to 800 individuals.[279]

Second, despite internal organization, clans are highly resistant to exogenous control and centralized governance. In this "nation of poets,"[280] the Somali preference for individualism and unilateral action is reflected in the following proverb:

> *I and Somalia against the world. I and my clan against Somalia. I and my family against the clan. I and my brother against the family. I against my brother.*

This kind of sentiment helps to explain why efforts at centralized governance and intervention have failed repeatedly in Somalia. Individual freedom is closely guarded by Somalis, and it is not something they forfeit lightly. Despite the support of the UN, the European Union (EU), the United States, the AU, IGAD and various other external stakeholders, the TFG has proven ineffective in uniting the Somali population. The imposition of governance from outside of Somalia has been anathema to the Somali conception of individual, localized empowerment. Moreover, because TFG officials gained their positions through international negotiations, rather than local elections, Somalis have never had a chance to participate in the government's formation. This disconnect was exacerbated by the TFG's inability to convene on Somali territory until 2006. Its failure to garner political legitimacy among the local population has placed the TFG at real risk of collapsing without ever emerging out of the transitional phase.

Somalia's informal systems of governance have generally been accorded little to no role in external efforts to revive the Somali political landscape.[281] UNPOS, for instance, has continuously pursued a policy emphasizing the importance of national government. In recent reports on Somalia to the UN Security Council, the Secretary-General has reiterated the importance of "assisting the TFG in consolidating its authority."[282] In his own words, the strategy of the international community since 2008 has been: to support the TFG in completing the tasks needed to end the transition, notably finalization of a constitution; to assist the TFG to broaden the base of the peace process through outreach and reconciliation; and to support the development of basic state governance

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[279] Stephanie Hanson, *Al Shabaab*, CFR.org, http://www.cfr.org/somalia/al-shabaab/p18650 (Aug. 10, 2011).

[280] *See generally*, Said S. Samatar, *Somalia's Horse that Feeds His Master*, African Languages and Cultures. Supplement, No. 3, Voice and Power: The Culture of Language in North-East Africa. Essays in Honour of B. W. Andrzejewski (1996) 156.

[281] *See generally*, Ken Menkhaus, *Governance without Government in Somalia: Spoilers, Statebuilding and the Politics of Coping*, 31 INT'L SECURITY 102 (2006/2007).

[282] United Nations, Report of the Secretary-General on Somalia, S/2011/549 (Aug. 30, 2011) at ¶103.

and institutions, especially in the security sector.[283] By acting as a *de facto* military for the TFG, the African Union (AU) Mission in Somalia (AMISOM) also supports the myth of TFG control. The recent increase of AMISOM troops authorized by the UN Security-Council represents the latest overture.[284] Despite international and regional support, the TFG most resembles the government of a city-state with Mogadishu as its only area of effective control. It is essentially powerless absent the extensive and continuous counterinsurgency action carried out by AMISOM forces against al Shabaab. And as the April 2012 suicide attack on the Somali national theater indicates,[285] the security situation remains precarious.

Both the UNPOS and AMISOM mandates are provided by UN Security Council resolutions adopted under Chapter VII of the UN Charter. As such they form an important part of the *lex scripta* applicable to Somalia. Presently, UNPOS responsibilities include the implementation of the Djibouti peace process; assisting the re-establishment, training and retention of the Somali security forces (military, police and judiciary); providing good offices and political support for the efforts to establish lasting peace and stability; coordinating counter-piracy initiatives in the region; working with the TFG to improve its capacity to address human rights issues, justice and reconciliation, and; coordinating the work of the UN in Somalia.[286] The mission is based in Nairobi but also maintains offices in Mogadishu, Somaliland and Puntland.[287]

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[283] United Nations, Special Report of the Secretary-General on Somalia, S/2012/74 (Jan. 31, 2012) at ¶4.

[284] United Nations, Security Council Resolution 2036, S/RES/2036 (Feb. 22, 2012) at ¶2.

[285] *See* Press Release United Nations Political Office for Somalia, SRSG Outraged Over Suicide Attack at National Theatre, Press Release 08/2012 (April 4, 2012).

[286] The current UNPOS mandate is articulated in operative paragraph 16 of UN Security Council resolution 1863 (2009), which was adopted under Chapter VII of the UN Charter. *See* United Nations, Security Council Resolution 1863, S/RES/1863 (Jan. 16, 2009) at ¶16.

[287] Additional relevant UN Security Council resolutions for UNPOS and AMISOM include the following: Resolution 2036, S/RES/2036 (Feb. 22, 2012); Resolution 2020, S/RES/2020 (Nov. 22, 2011); Resolution 2015, S/RES/2015 (Oct. 24, 2011); Resolution 2010, S/RES/2010 (Sept. 30, 2011); Resolution 2002, S/RES/2002 (July 29, 2011); Resolution 1976, S/RES/1976 (Apr. 11, 2011); Resolution 1972, S/RES/1972 (Mar. 17, 2011); Resolution 1964, S/RES/1964 (Dec. 22, 2010); Resolution 1950, S/RES/1950 (Dec. 23, 2010); Resolution 1918, S/RES/1918 (Nov. 27, 2010); Resolution 1916, S/RES/1916 (Mar. 19, 2010); Resolution 1897, S/RES/1897 (Nov. 30, 2009); Resolution 1872, S/RES/1872 (May 26, 2009); Resolution 1853, S/RES/1853 (Dec. 19, 2008); Resolution 1851, S/RES/1851 (Dec. 16, 2008); Resolution 1846, S/RES/1846 (Dec. 2, 2008); Resolution 1844, S/RES/1844 (Nov. 20, 2008); Resolution 1838, S/RES/1838 (Oct. 7, 2008); Resolution 1831, S/RES/1831 (Aug. 19, 2008); Resolution 1816, S/RES/1816 (June 2, 2008); Resolution 1814, S/RES/1814 (May 15, 2008); Resolution 1811, S/RES/1811 (Apr. 29, 2008); Resolution 1801, S/RES/1801 (Feb. 20, 2008); Resolution 1772, S/RES/1772 (Aug. 10, 2007); Resolution 1766, S/RES/1766 (July 23, 2007); Resolution 1744, S/RES/1774 (Feb. 20, 2007); Resolution 1725, S/RES/1725 (Dec. 6, 2006); Resolution 1724, S/RES/1724 (Nov. 29, 2006);

In accordance with UN Security Council resolution 1772 (2007)[288] and resolution 2036 (2012)[289] AMISOM's mandate includes the following tasks:

> (a) To support dialogue and reconciliation in Somalia by assisting with the free movement, safe passage and protection of all those involved with the process referred to in paragraphs 1 to 5;[290]

Resolution 1676, S/RES/1676 (May 20, 2006); Resolution 1630, S/RES/1630 (Oct. 25, 2005); Resolution 1587, S/RES/1587 (Mar. 15, 2005); Resolution 1558, S/RES/1558 (Aug. 17, 2004); Resolution 1519, S/RES/1519 (Dec. 16, 2003); Resolution 1474, S/RES/1474 (Apr. 8, 2003); Resolution 1425, S/RES/1425 (July 22, 2002); Resolution 1407, S/RES/1407 (May 3, 2002); Resolution 1356, S/RES/1356 (June 19, 2001).

[288] *See* United Nations, Security Council Resolution 1772, S/RES/1772 (Aug. 10, 2007).

[289] *See* United Nations, Security Council Resolution 2036, S/RES/2036 (Feb. 22, 2012).

[290] This refers to operative paragraphs 1 to 5 of UN Security Council resolution 1772 (2007), wherein the UN Security Council:

> 1. *Stresses* the need for broad-based and representative institutions reached through an all-inclusive political process in Somalia, as envisaged in the Transitional Federal Charter, in order to consolidate stability, peace and reconciliation in the country and to ensure that international assistance is as effective as possible;
> 2. *Welcomes* the convening of the National Reconciliation Congress (NRC) at the initiative of the Transitional Federal Institutions, and *urges* all parties to support the NRC and participate in the political process;
>
> 3. *Stresses* the need for the NRC to be an all-inclusive intra-Somali political process involving all stakeholders including all political leaders, clan leaders, religious leaders, the business community, and representatives of civil society such as women's groups;
>
> 4. *Urges* the Transitional Federal Institutions and all parties in Somalia to respect the conclusions of the NRC and to sustain an equally inclusive ongoing political process thereafter, and *encourages* them to unite behind the efforts to promote such an inclusive dialogue;
>
> 5. *Reiterates* the need for the ongoing political process to both agree on a comprehensive and lasting cessation of hostilities and to produce a road map for a comprehensive peace process, including democratic elections at the local, regional and national levels as set out in Somalia's Transitional Federal Charter.

(b) To provide, as appropriate, protection to the Transitional Federal Institutions to help them carry out their functions of government, and security for key infrastructure;

(c) To assist, within its capabilities, and in coordination with other parties, with implementation of the National Security and Stabilization Plan,[291] in particular the effective re-establishment and training of all-inclusive Somali security forces;

(d) To contribute, as may be requested and within capabilities, to the creation of the necessary security conditions for the provision of humanitarian assistance;

(e) To protect its personnel, facilities, installations, equipment and mission, and to ensure the security and freedom of movement of its personnel;

(f) To establish a presence in the four sectors set out in the AMISOM strategic Concept of January 5, [2012],[292] and to take all necessary measures as appropriate in those sectors in coordination with the Somali security forces to reduce the threat posed by *al Shabaab* and other armed opposition groups in order to establish conditions for effective and legitimate governance across Somalia.

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[291] Somali Transitional Federal Government, National Security and Stabilization Plan (NSSP): 2011 to 2014 (Oct. 18, 2011) *available at* https://www.cimicweb.org/cmo/medbasin/Documents/Horn%20of%20Africa/Somalia/20111111%20TFGOVERNMENT%20NSSP%2018%20October%202011%20including%20FOREWO_1.pdf. According to the executive summary, the NSSP:

> "[D]efines the process by which the Federal Government of Somalia will lead in re-orienting the policies, structures and operational capacities of security and justice institutions and groups in Somalia, in order to make them more effective, efficient and responsive to the provision of security and justice needs of its people. Its main focus is to consolidate military and security gains in the South Central region of Somalia, particularly in Mogadishu, Puntland and Galmudug; while concurrently creating the enabling environment for completion of the remaining transitional political tasks: the constitutional making process, political outreach and reconciliation, and good governance..."

[292] This strategic concept was approved by the AU Peace and Security Council in its *communiqué* from January 5, 2012. *See* African Union, Peace and Security Council, 306th Meeting, Addis Ababa, Ethiopia, *Communiqué*, PSC/PR/COMM(CCCVI) (Jan. 5, 2012) at ¶3.

The UN Security Council also decided that AMISOM must act "in compliance with applicable international humanitarian and human rights law, in performance of this mandate and in full respect of the sovereignty, territorial integrity, political independence and unity of Somalia." On February 22, 2012, the authorized force strength of AMISOM was increased from "12,000 to a maximum of 17,731 uniformed personnel, comprised of troops and personnel of formed police units."[293] AMISOM forces operate in Somalia under a status of mission agreement (SOMA), concluded between the TFG and the AU on March 6, 2007.[294]

Other international *lex scripta* for Somalia include the multiple resolutions adopted by the UN Security Council on the issue of piracy. Notably, the Security Council, in its resolution 1816 (2008) adopted under Chapter VII of the UN Charter, inverted the notion of "hot pursuit"[295] and authorized foreign military vessels to *enter* Somali territorial waters to repress piracy under certain conditions. Specifically, in operative paragraph 7 of the resolution, the Security Council decided that states cooperating with the TFG in the fight against piracy may, after providing advance notice to the TFG and to the UN Secretary-General:

> Enter the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea, in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law; and use, within the territorial waters of Somalia, in a manner consistent with action permitted on the high seas with respect to piracy under relevant international law, all necessary means to repress acts of piracy and armed robbery.

In resolution 1851 (2008), the Security Council expanded the authorization to include action taken *on the territory* of Somalia. Specifically, the resolution, which was also adopted under Chapter VII of the UN Charter, provided that:

> States and regional organizations cooperating in the fight against piracy and armed robbery at sea off the coast of Somalia for which advance notification has been provided by the TFG to the Secretary-General may undertake all necessary measures that are appropriate in Somalia, for the purpose of suppressing acts of piracy and armed robbery at

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[293] *See* United Nations, Security Council Resolution 2036 (2012), S/RES/2036 (Feb. 22, 2012).

[294] Status of Mission Agreement between the Transitional Federal Government of the Somali Republic and the African Union on the African Union Mission in Somalia (March 6, 2007).

[295] *See* United Nations Convention on the Law of the Sea (Dec. 10, 1982) at art. 111.

> sea, pursuant to the request of the TFG, provided, however, that any measures undertaken pursuant to [this] authority [...] shall be undertaken consistent with applicable international humanitarian and human rights law.[296]

The original authorizations were for a limited duration—six-months and twelve months, respectively—but they have since been renewed multiple times,[297] most recently in resolution 2020 (2011), where the Security Council extended both authorizations for an additional twelve months.[298] They are now set to expire on November 22, 2012.

As result of the danger posed by Somali pirates, a number of states and international organizations, including the U.S., EU, Russia, Turkey, South Korea, Pakistan, Denmark, the United Kingdom (UK) and NATO, now patrol the Gulf of Aden, Gulf of Oman, the Arabian Sea, the Red Sea and the Indian Ocean with vessels and military aircraft. Combined Task Force 150 (CTF-150), a naval force based in Djibouti comprised of approximately fifteen vessels from the U.S., four European countries, Canada, and Pakistan, conducts antipiracy patrols in the area.[299] Since its inception, CTF-150 has been commanded by France, the Netherlands, the UK, Pakistan, Canada and Australia. Combined Task Force 151 (CTF-151) is another multinational task force established in January 2009 to conduct counter-piracy operations in the area. Its mission is "to actively deter, disrupt and suppress piracy in order to protect global maritime security and secure freedom of navigation for the benefit of all nations."[300] CTF-151 is presently commanded by the Thailand and it has previously been commanded by the Denmark, South Korea, Pakistan, Turkey and the U.S. Combined Task Force 152 (CTF-152) represents yet another naval operation in the region. It patrols the Arabian Gulf and seeks to limit

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[296] United Nations, Security Council Resolution 1851 (2008), S/RES/1851 (Dec. 16, 2008) at ¶6.

[297] *See* United Nations, Security Council Resolution 1846 (2008), S/RES/1846 (Dec. 2, 2008) at ¶10; United Nations, Security Council Resolution 1851 (2008), S/RES/1851 (Dec. 16, 2008) at ¶6; United Nations, Security Council Resolution 1897 (2009), S/RES/1897 (Nov. 30, 2009) at ¶7; United Nations, Security Council Resolution 1950 (2010), S/RES/1950 (Nov. 23, 2010) at ¶7; United Nations, Security Council Resolution 2020 (2011), S/RES/2020 (Nov. 22, 2011) at ¶9.

[298] United Nations, Security Council Resolution 2020 (2011), S/RES/2020 (Nov. 22, 2011) at ¶9. In addition to providing naval defense for Somalia, the international community has shouldered a number of other state-like tasks in the absence of a functioning Somali government. These include, air transport and safety, transboundary issues of public health, economic and business relations, and diplomatic and representative functions. For a review of the international assistance regime for these matters *see* GIORGETTI, *supra* note 50, at 30-32, 36-41.

[299] Robert Kaplan, *Center Stage for the 21st Century*, 88 FOREIGN AFFAIRS (Mar./Apr. 2009); Combined Task Force (CTF) 150, Combined Maritime Forces, http://www.cusnc.navy.mil/cmf/150/index.html (accessed on Apr. 13, 2012).

[300] Combined Task Force (CTF) 151, Combined Maritime Forces, http://www.cusnc.navy.mil/cmf/151/index.html (accessed on Apr. 13, 2012).

illegal and destabilizing activities, including piracy.[301] Together, these Combined Maritime Forces (CMFs) patrol more than 2.5 million square miles in international waters.[302]

Given the lack of formal judicial infrastructure in Somalia, major international efforts have also been made to address the piracy issue through criminal prosecutions and specialized anti-piracy tribunals.[303] As of this writing, these initiatives remain in the nascent phase. In its latest resolution on the issue, adopted on November 22, 2011, the Security Council reiterated its decision to consider establishing specialized anti-piracy courts "as a matter of urgency"[304] in Somalia and other states in the region with substantial international participation and/or support. It also highlighted "the importance of such courts having jurisdiction over not only suspects captured at sea, but also anyone who incites or intentionally facilitates piracy operations, including key figures of criminal networks involved in piracy who illicitly plan, organize, facilitate, or finance and profit from such attacks." [305] Finally, it emphasized the need for strengthened cooperation in holding such individuals accountable.[306] In this regard, the Security Council called upon all states "to criminalize piracy under their domestic law" and to "favourably consider the prosecution of suspected, and imprisonment of convicted, pirates apprehended off the coast of Somalia, and their facilitators and financiers ashore, consistent with applicable international law including international human rights law."[307]

As a direct result of the peacekeeping and piracy issues, as well as the proliferation of arms and the failure of the central government to provide law and order, Somalia is also currently the object of a comprehensive sanctions regime imposed by the UN. The regime consists of blanket embargoes on arms and charcoal, as well as a targeted embargo on arms, a travel ban and an assets freeze that applies to certain listed individuals. The Security Council first imposed a general and complete arms embargo on Somalia on January 23, 1992. [308] Exemptions were subsequently

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[301] *See* Combined Task Force (CTF) 152, Combined Maritime Forces, http://www.cusnc.navy.mil/cmf/152/index.html (accessed on Apr. 13, 2012).

[302] *See generally* Combined Maritime Forces, Overview, http://www.cusnc.navy.mil/cmf/cmf_command.html (accessed on Apr. 13, 2012).

[303] *See generally* United Nations, Security Council, *Report of the Secretary-General on the modalities for the establishment of specialized Somali anti-piracy courts,* S/2011/360 (June 15, 2011); United Nations, Security Council, *Report of the Special Advisor to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia,* S/2011/30 (Jan. 25, 2011) (submitted by Jack Lang). Lang's in-depth report contained twenty-five different proposals for the eradication of piracy.

[304] United Nations, Security Council Resolution 2020 (2011), S/RES/2020 (Nov. 22, 2011) at ¶16.

[305] *Id.*

[306] *Id.*

[307] *Id.* at ¶15.

[308] United Nations, Security Council Resolution 722 (1992), S/RES/722 (Jan. 23, 1992) at ¶5.

added,[309] in particular with respect to efforts to combat piracy. On November 20, 2008, the Security Council imposed targeted sanctions,[310] including an arms embargo, travel ban and assets freeze on individuals and entities who meet the following criteria: engaging in or providing support for acts that threaten the peace, security or stability of Somalia; acting in violation of the general and complete arms embargo; or obstructing the delivery of humanitarian assistance to Somalia.[311] The criteria were later expanded to include individuals and entities found to be recruiting or using children in armed conflicts in Somalia or found to be responsible for the targeting of civilians including women and children.[312] In its resolution 2036 (2012), the Security Council banned the import and export of charcoal to and from Somalia.[313] The reasoning behind the provision was that trade in charcoal represents a "significant revenue source" for al Shabaab and that it "exacerbates the humanitarian crisis."[314]

A few additional historical and contextual notes merit mention with regard to Somalia. First, different actors have had varying levels of success operating in the space. This speaks to the importance of the underlying characteristics, both with regard to the space itself and in relation to the particular actor. For instance, while al Shabaab has been relatively successful (until recently[315]) in controlling territory, gaining support from the local population and projecting power from the space, al Qaeda's experience has been much more trying. Despite operating in the region to varying degrees since the 1990's, al Qaeda has struggled to be effective. Somalia's "lawlessness and isolation, which many cite as ideal for Al-Qaeda's efforts, were seen by the group itself as constraining its ability to

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[309] *See e.g.* United Nations, Security Council Resolution 1356 (2001), S/RES/1356 (June 19, 2001) at ¶2-3; United Nations, Security Council Resolution 1725 (2006), S/RES/1725 (Dec. 6, 2006) at ¶6-7; United Nations, Security Council Resolution 1744 (2007), S/RES/1744 (Feb. 20, 2007) at ¶6-7; United Nations, Security Council Resolution 1772 (2001), S/RES/1772 (Aug. 20, 2007) at ¶11-12; United Nations, Security Council Resolution 1846 (2008), S/RES/1846 (Dec. 2, 2008) at ¶12; United Nations, Security Council Resolution 1851 (2008), S/RES/1851 (Dec. 16, 2008) at ¶11.

[310] United Nations, Security Council Resolution 1844 (2008), S/RES/1851 (Nov. 20, 2008) at ¶1, ¶3 and ¶7.

[311] *Id.* at ¶8.

[312] United Nations, Security Council Resolution 2002 (2011), S/RES/2002 (July 29, 2011) at ¶1.

[313] United Nations, Security Council Resolution 2036 (2012), S/RES/2036 (Feb. 22, 2012) at ¶22.

[314] *See id.* at preamble.

[315] *See* Bronwyn Bruton and J. Peter Pham, *The Splintering of Al Shabaab: A Road from War to Peace,* FOREIGN AFFAIRS ONLINE (Feb. 2, 2012) *available at* http://www.foreignaffairs.com/articles/137068/bronwyn-bruton-and-j-peter-pham/the-splintering-of-al-shabaab?page=show; Afyare Abdi Elmi and Abdi Aynte, *Negotiating an End to Somalia's War with al Shabaab: Why Military Solutions Are Not Enough,* FOREIGN AFFAIRS ONLINE (Feb. 7, 2012) *available at* http://www.foreignaffairs.com/articles/137085/afyare-abdi-elmi-and-abdi-aynte/negotiating-an-end-to-somalias-war-with-al-shabaab?page=show.

create a secure base for operations."[316]   Paradoxically, the group has actually enjoyed much more success operating in Kenya, where the central government exerts significantly more control and the population as a whole is significantly more law abiding.

The experience of the international community has also been decidedly mixed. The peacekeeping and peace enforcement missions that were dispatched in the wake of the collapse of the Said Barre regime in the early 1990s, including the United Nations Task Force (UNITAF), *Operation Provide Relief, Operation Restore Hope*, the United Nations Mission in Somalia I (UNISOM I) and its successor, the United Nations Mission in Somalia II (UNISOM II), were largely failures. The lasting image of a dead American soldier being dragged through the streets following the failed Army Ranger capture-or-kill mission against Mohamed Farrah Aidid in Mogadishu on October 3, 1993 typified the international ineptitude and domestic ruthlessness. While it was hardly an isolated case, the televised footage of the Aidid episode did serve as the trigger for President Bill Clinton's decision to immediately withdraw U.S. forces.[317]   The U.N. missions soon followed suit and a skeletal UNPOS was reconstituted in Nairobi in 1995. Present-day AMISOM and UNPOS efforts, supported by American money and technology, Burundi and Ugandan troops, and Kenyan and Ethiopian proxies, have fared better, but any gains remain ephemeral absent sustained attention to the root causes of Somalia's political dysfunction. As Bronwyn Bruton and J. Peter Pham have noted, "beating the terrorists in Somalia might, in some sense, win the war" but "it will not keep the peace."[318]

As this narrative indicates, Somalia has had a prolonged and tortured relationship with the international community. The on-again, off-again interventions have disrupted local dynamics and inspired spoilers to resist any external attempts at peacebuilding. After a period of relative dormancy, international engagement resurged in the late 2000s. This is manifested in the current UN-sponsored drive toward the formation of a centralized government in Mogadishu. Despite the recent "taste of hope" in the country,[319] these state-building measures do little to address Somalia's latent political dilemmas. A quick survey of the responsibilities included in the aforementioned "roadmap" for ending the TFG's transitional period reveals the shortcomings of the latest round of international engagement and domestic policy-making. For example,

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[316] Ken Menkhaus & Jacob Shapiro, *Non-State Actors and Failed States: Lessons from Al Qa'ida's Experiences in the Horn of Africa, in* ANNE CLUNAN & HAROLD TRINKUNAS (eds.), UNGOVERNED SPACES: ALTERNATIVES TO STATE AUTHORITY IN AN ERA OF SOFTENED SOVEREIGNTY (2010) 78.

[317] This operation is chronicled in MARK BOWDEN, BLACKHAWK DOWN: A STORY OF MODERN WAR (1999). The infamous "get Aidid" resolution that authorized the operation was passed by the U.N. Security Council on June 6, 1993. *See* United Nations, Security Council Resolution 837 (1993), S/RES/837 (June 6, 1993) at ¶5.

[318] *See* Bruton and Pham, *supra* note 315.

[319] *See* Jeffrey Gettleman, *A Taste of Hope in Somalia's Battered Capital*, N.Y. TIMES (Apr. 4, 2012) at A1.

although it remains a feeble and corrupt actor, the TFG is granted a great deal of autonomy under the roadmap's constitutional aspect. In drafting the constitution, the TFG is directed to consult with all stakeholders; however, the modalities for this cooperation are left to the discretion of the TFG, which in practice has led to the exclusion of most citizens from political decision-making. The Garowe Principles,[320] agreed upon at the first Somali National Consultative Constitutional Conference on December 24, 2011, make some improvements to the roadmap framework, but unresolved issues remain. In particular, it is unclear to what extent the new process of constitution-making departs from the failed initiatives of the past. The timeline for the process is also extremely condensed, which may lead to hasty compromises and sloppy draftsmanship. The principles envision a three-step process to the formation of a constitutional parliamentary system. First, a committee of experts will draft the constitution, due on April 20, 2012. That draft will then be handed over to a National Constituent Assembly for review and ratification. Finally, after provisionally adopting the draft constitution (presumably), the assembly will dissolve, giving way to a new federal parliament. This will occur no later than May 22, 2012. The parliament itself is supposed to commence its functions on August 21, 2012.

While the sequential build-up of the system makes logical sense, it is overly formulaic, and the composition of the political bodies is not representative of the Somali population. For instance, the National Constituent Assembly "shall consist of a *maximum* 1,000 delegates, 30% of which shall be women."[321] No minimum number is given. Further, the assembly is not an elected body, rather delegates will be nominated by "all roadmap signatories and civil society" on the basis of the 4.5 formula.[322] This is the same formula that has delegitimized the TFG in the eyes of the Somali population. Even worse, because the "prevailing security situation will not permit direct elections" the initial composition of the federal parliament, which includes 225 members, 20% of whom must be women, will also be formed according to the same 4.5 formula.[323] The principles do envision discarding the 4.5 formula after the expiration of the first parliamentary term, stating that it shall "never" again be applied as "the basis for power sharing,"[324] but by that point the damage will already have been done. Once again, an unrepresentative and detached body will attempt to enforce its vision of governance on a recalcitrant and disenfranchised Somali population.

B.   *Typologizing and Problemitizing Somalia*

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[320] The Garowe Principles, First Somali National Consultative Constitutional Conference (Dec. 24, 2011).

[321] *Id.* at ¶1(d).

[322] *Id.* at ¶1(c).

[323] *Id.* at ¶2(c)(i).

[324] *Id.* at ¶2(c)(ii).

Using the models derived in Part I and Part II, respectively, it is possible to *typologize* and *problemitize* Somalia according to its unique characteristics and attributes. Before doing so, however, it is useful to recall the proposed set of definitions for ungoverned space:

> *Ungoverned space* **is a space not effectively governed by the state.**

> **A** *state* **is a stable political community that controls a territory, supports a legal order, acts independently and effectively governs.**

> **A state** *effectively governs* **a space, if it demonstrates the ability and the willingness to fulfill its internal and external obligations on a consistent and continuous basis.**

> **A s***pace* **is a cognizable physical or non-physical extent that can be effectively governed by the state.**

Applying this set of definitions to the facts, Somalia certainly qualifies as an *ungoverned space.* The Somali *state*, while retaining international recognition, membership in international organizations—such as the UN—and a modicum of power, has not *effectively governed* Somalia since at least the early 1990s. The thirteen failed attempts to rebuild the central government and the struggles of the TFG to effectively govern even a small percentage of the Somali territory and population serve as testaments to this conclusion. The pervasiveness of armed groups, the starvation and economic deprivation of the people, corruption, pollution and the piracy issue each represent additional convincing evidence of the inability of the Somali state "to fulfill its internal and external obligations on a consistent and continuous basis." This ineptitude is not limited to one part of Somalia; rather it applies broadly across the country's different constituent parts, including its territory, air, sea, virtual and operational spaces.

Having established that Somalia qualifies generally as an ungoverned space within the set of proposed definitions, the inquiry moves to *typologizing* the space according to its particular attributes and characteristics. As a threshold matter, and in accordance with the foregoing description of the government's failures, it should be noted that Somalia is not a monolithic space. Rather, it represents a collection of constituent spaces that must be typologized separately. To exemplify the typology, this analysis focuses on two categories of space: Somalia's land territory (*terra firma*) and territorial sea. Not surprisingly, the different subsections of these two categories are also subject to different descriptions. The general failure of the Somalia state resulted in fragmented governance arrangements throughout the country. The south and central land areas, for instance, where al Shabaab, Hizbul Islam and al Qaeda exercise the most power, and where the clan systems are the least organized, represent a different type of ungoverned space than the city of

Mogadishu, where the TFG and AMISOM exercise a modicum of control. By contrast, Somaliland and Puntland, where autonomous administrations have emerged are *more* governed than either of the preceding spaces. On the issue of the coastline and territorial sea, the ungoverned space can be split up into two subsections: the territorial sea forming part of the Gulf of Aden and the territorial sea forming part of the Indian Ocean.[325] Each is subject to its own particular dynamics and governance arrangements.[326] Typologizing this selection of Somalia's constituent ungoverned spaces yields the following:

Land territory (terra firma)

> **South central Somalia (non-Mogadishu)** *is a land (terra firma) ungoverned space, which includes the following prominent actors: al Shabaab; Hizbul Islam; AMISOM; the TFG; UNPOS; Kenya; Ethiopia; and the Darood, Rahnweyn, Dir and Hawiye Somali clan families. These actors can be described variably. For example, al Shabaab is violent, armed, ambitious, engaged in illicit activities and loosely organized. It is comprised mostly of members of the Hawiye clan family. Conversely, UNPOS is ambitious, peaceful and highly organized.*

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[325] It should be noted that Somalia claims a 200 nautical mile territorial sea. *See* Law No. 37, *Law on the Somali Territorial Sea and Ports* (Sept. 10, 1972) *available at* http://faolex.fao.org/docs/pdf/som4925.pdf. This number far exceeds the twelve mile territorial sea allowed by the United Nations Convention on the Law of the Sea (UNCLOS). *See* United Nations Convention on the Law of the Sea (Dec. 10, 1982) at art. 3. Somalia ratified the convention on July 24, 1989. *See* Decree No. 14, *Instrument of Ratification* (July 24, 1989) *available at* http://www.somalilandlaw.com/Ratification_of_UNCLOS_1989_Eng.pdf. Since ratification, however, Somalia has failed to harmonize its domestic and international obligations. This has created significant discord and confusion. As Thilo Neumann and Tim René Soloman note:

> As of today, Somalia is one of six coastal states that persist in claims to territorial seas exceeding twelve [nautical miles]. Members of the international community have explicitly protested Somalia's territorial sea claim. The resulting ambiguity over Somalia's territorial sea leads to difficulties in monitoring fishing activities off the Somalian [*sic*] coast and potentially hinders Somalia in executing its rights of maritime jurisdiction.

Thilo Neumann and Tim René Soloman, *Fishing in Troubled Waters: Somalia's Maritime Zones and the Case for Reinterpretation*, 16 AM. SOC. OF INT'L L. INSIGHTS (Mar. 15, 2012). The maritime borders in the Gulf of Aden between Yemen, Somalia and Djibouti have also not been demarcated by the adjacent states. The width of the area is approximately 180 nautical miles, which is less than the 200 nautical mile territorial sea unilaterally claimed by Somalia.

[326] They are also subject to different levels and types of piracy. *See generally* United Nations, United Nations Institute for Training and Research, *Spatial Analysis of Somali Pirate Attacks in 2009* (June 7, 2010) *available at* http://unosat-maps.web.cern.ch/unosat-maps/SO/CE20100714SOM/UNOSAT_SOM_CE2010-PiracyAnalysis_Report_HR_v1.pdf.

For its part, the TFG is peaceful but poorly organized; it is ambitious but it lacks capacity to fulfill its goals. The clan families are highly organized internally, but only loosely connected to each other. They are armed, but not necessarily violent, and their ambition is limited to self-governance and balance of power politics. The remaining actors—Kenya, Ethiopia and AMISOM—are highly organized, armed and ambitious in pursuing their strategic security interests. This confluence makes for a volatile dynamic. The space arose out of conflict and the collapse of the Siad Barre regime in 1991. The present degree of governance in the space is low and the situation can be described as chaotic, violent and contested. The space is also low in its degree of instrumentality due to its inaccessibility, unsupportive local population and weak infrastructure.

Mogadishu is a land (terra firma) ungoverned space, which presently includes the following actors (who are all signatories to the "roadmap"): the TFG; AMISOM; the EU; UNPOS; IGAD; the government of Galmudug; the government of Puntland; the League of Arab States; the Organization of the Islamic Conference; and the Islamic group Ahlu Sunna Wal Jama'a (ASWJ). Collectively, these actors can be described as peaceful and ambitious in their pursuit of political control in Mogadishu. They are resisting al Shabaab and Hizbul Islam, two "spoilers" who have been pushed out of the city by AMISOM forces, but remain an ever-present threat. Mogadishu arose as an ungoverned space out of conflict and the collapse of the Siad Barre regime in 1991. Subsequent international interventions failed to provide order and security to the space. The present degree of governance in Mogadishu is moderate and the situation can be described as under-governed, with significant "gaps." The space exhibits a moderate degree of instrumentality due to its relative accessibility, its position as the capital of Somalia and its fractured but functional infrastructure.

Somaliland is a land (terra firma) ungoverned space, which includes the following prominent actors: the Isaq and Darood Somali clan families; Ethiopia; UNPOS and the autonomous government of Somaliland. These actors can be described as peaceful and relatively highly organized; they are also ambitious in their desire for independence. The government of Somaliland has chosen not to participate in the "roadmap" or constitution-making process alongside the TFG. The space arose out of conflict and the collapse of the Siad Barre regime in 1991. The Isaq-led Somali National Movement declared independence on May 18, 1991. The present degree of governance in the space is high and the situation can be described as informally ordered. Somaliland has a constitution; executive branch; legislature; judiciary; and three main political parties: the United Peoples' Democratic Party, the Peace, Unity, and Development Party, and the Justice and Development Party. Through these mechanisms, the government of Somaliland exercises a substantial amount of governance authority. The space exhibits a moderate degree of instrumentality due to its nascent political connections with foreign governments, its functional, if limited, infrastructure and its accessibility.

Puntland is a land (terra firma) ungoverned space, which includes the following major actors: the Darood Somali clan family; the government of Puntland; and

UNPOS. These actors can be described as predominantly peaceful and relatively well-organized. Puntland declared independence in 1998 in response to the Somali civil war. It originally arose out of conflict after the collapse of the Siad Barre regime in 1991. The present degree of governance in the space is moderate and the situation can be described as under-governed, with significant gaps. The government of Puntland takes part in the TFG and has contributed to the "roadmap" process; however, the legitimacy and effectiveness of that entire project remains in doubt. The space is also moderate in its degree of instrumentality due to its substantial connections with other political actors in the region and its relative accessibility.

Territorial sea

The territorial sea forming part of the Gulf of Aden *is a sea ungoverned space, which includes the following major actors: Somali pirates and criminal organizations; shipping corporations; private navies;[327] NATO; UNPOS; the International Maritime Organization (IMO); the government of Somaliland; CTF 151; CTF-152; and over thirty states, including the U.S., U.K., Russia and Turkey. These actors can be described as having interests that are diametrically opposed. The Somali pirates, who are loosely organized, are engaged in purely illicit activities, and are often armed and violent, attempt to carry out their activities against the counter-forces of the IMO, NATO, CTF-151, CTF-152 and the various state actors. The space arose out of the collapse of the Siad Barre regime in 1991, but it was also precipitated by the 2004 tsunami, which decimated the Somali fishing industry.[328] The present degree of governance in the space is at a moderate level; despite the massive international effort, the situation can be described as under-governed, with significant gaps. The space is high in its degree of instrumentality, and because of the high volume of shipping traffic in the Gulf of Aden, it is a nearly perfect fit for piracy.*

The territorial sea forming part of the Indian Ocean *is a sea ungoverned space, which includes the following actors: Somali pirates and criminal organizations; al Shabaab; shipping corporations; private navies; NATO; UNPOS; AMISOM; the IMO; the TFG; CTF 151; CTF-152; and over thirty states, including the U.S., U.K., Russia and Turkey. These actors can be described as having interests that are diametrically opposed. The Somali pirates, who are loosely organized, are engaged in purely illicit activities, and are often armed and violent, attempt to carry out their activities against the counter-forces of the IMO, NATO, CTF-151, CTF-152 and the various state actors. For its part, al Shabaab supports and is supported by pirate activities, and this also brings it*

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[327] On this point *see* Michelle Weise Bockmann, *Somalia Piracy Spurs Private Gulf of Aden Navy to Start within Five Months*, Bloomberg.com (Nov. 7, 2011) http://www.bloomberg.com/news/2011-11-07/somalia-piracy-spurs-private-gulf-of-aden-navy-to-start-within-five-months.html; *see also* Gulf of Aden Transits, goagt.com (accessed Apr. 13, 2012).

[328] *See* United States Agency for International Development, *Somalia - Complex Emergency and Tsunami* (June 17, 2005) at 1 *available at* http://www.usaid.gov/our_work/humanitarian_assistance/disaster_assistance/countries/somalia/fy2005/somalia_ce_sr01_06-17-2005.pdf.

> *into conflict with the mitigating forces. The space arose out of the collapse of the Siad Barre regime in 1991, but it was also precipitated by the 2004 tsunami, which decimated the Somali fishing industry. The present degree of governance in the space is low and the situation can be described as chaotic and malgoverned. The space has a moderate degree of instrumentality. A great deal of shipping comes through the area, making it attractive for piracy activities; however, the vast amount of space, and the ability of shipping companies to avoid the coastline with alternative routes, renders it less useful than, for instance, the Gulf of Aden.*

As the analysis indicates, each ungoverned space in Somalia is subject to a different description. Regardless of the target, however, the method is the same. All five aspects of the typology must be applied systematically. This process creates an understanding of the space and allows it to be described according to a common vocabulary. It also brings to light the different salient considerations of the ungoverned space, including its physical/non-physical characteristics, actors, genesis, governance arrangements, and degree of instrumentality. Finally, it informs the application of certain responses. Recall that for most spaces, a *bargaining* approach that mixes incentives and demands represents the most appropriate response. The *typologization* paragraph provides a backdrop for how that bargaining might take place. It also gives information on the incentives that might entice actors during the bargaining process. For the *coercive* and *diplomatic* responses that take place at the opposite ends of the ungoverned space spectrum, the description provided by the typology is also invaluable. *Coercion* requires knowledge of the demands and capabilities of the targeted actor. Similarly, an intimate knowledge of the target's ambitions and sources of conduct strengthens and empowers the careful practice of *diplomacy.*

The next step is *problemitzing* the space. This process uses the *typologization* paragraph as a launching pad for its analysis. Recall the four practical problems and opportunities (*security, development, human rights* and *economic*) presented to the international system writ large and the four structural problems and opportunities (*subjectivity, responsibility, uncertainty,* and *reciprocity*) presented to international law by the issue of ungoverned space. Each space yields a different set of conclusions across the different problems and opportunities. For instance south central Somalia lacks even basic security, and the opportunities for countering the dangers this raises are stymied by the persistence of al Shabaab and the support the group receives from opportunistic Somali clan families. Nonetheless, AMISOM has managed to address the unstable security situation by leveraging the same lack of governance. The absence of TFG interference gives AMISOM great freedom to carry out its mandate on its own terms, and engagement with clan leaders offers the same possibilities for cooperation that is experienced by al Shabaab. Similarly, U.S. drone strikes in Somalia[329]

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[329] *See e.g. Deaths in US Drone Strike in Somalia,* Al Jazeera.com (Feb. 25, 2012); Peter Bergen, *Warrior in Chief,* N.Y. Times (Apr. 29, 2012) at SR1.

capitalize on the widely-held consensus that the TFG is unable or unwilling to control its internationally recognized territory.

The other practical challenges are similarly two-sided. While the lack of a functionally-centralized economy has been blamed for causing the material deprivation of the Somali population, in its place a large-scale informal economy financed by remittances from the *diaspora* has thrived.[330] This practice, which is known in Somalia as *hawala,* is particularly strong in Somaliland, where remittances have been used to finance infrastructure projects, telecommunications, media and transportation. These initiatives lead to increased development and expand the range of employment opportunities that are open to Somalis. With increased economic activity, the incentives for engaging in illicit activities, such as piracy, decrease. Despite its lack of formality, the remittance-financed sectors of the Somali economy are factually regulated. In the absence of state oversight for financial institutions, the *hawala* "relies on reputation and trust" and the clan system serves as its guarantor.[331] Rather than treating the lack of a formal economy as a void that must be filled by formal institutions, the international community can better spur growth and opportunity in Somalia by supporting the *hawala* system, granting lines of credit to remittance financed projects and improving the tracking of financial transfers.[332]

The structural problems and opportunities presented to international law are also prominent in Somalia's ungoverned spaces. Given the multitude of formal and informal actors, the issue of *reciprocity* is particularly acute. In the territorial sea of the Gulf of Aden, for instance, it is unclear what law applies to which actors. Accordingly, there is substantial inequality in legal obligations. The CMFs, such as CTF-150 and CTF-151 operate under rules of engagement reflecting UNCLOS provisions, international humanitarian law and human rights law. Somaliland claims independence, but the international community continues to recognize Somalia as a unitary state. UN Security Council resolutions direct actors taking counter-piracy initiatives in Somalia's territorial waters to consult with the TFG,[333] rather than the *de facto* authorities in Hargeisa (Somaliland). The pirates and criminal organizations operate according to their own rules. What law they do

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[330] *See* Alex de Waal, *Getting Somalia Right This Time*, N.Y. TIMES ONLINE (Feb, 21, 2012) http://www.nytimes.com/2012/02/22/opinion/getting-somalia-right-this-time.html?pagewanted=all [hereinafter *Getting Somalia Right*]. De Waal makes the interesting observation that "Somalia needs a chamber of commerce before it needs a cabinet." *Id.*

[331] Alex de Waal, *Class and Power in a Stateless Somalia*, SOCIAL SCIENCE RESEARCH COUNCIL (Feb. 20, 2007) http://hornofafrica.ssrc.org/dewaal/printable.html [hereinafter *Class and Power*].

[332] *Getting Somalia Right, supra* note 330.

[333] *See* United Nations, Security Council Resolution 1816 (2008), S/RES/1816 (June 2, 2008) at ¶7; United Nations, Security Council Resolution 1846 (2008), S/RES/1846 (Dec. 2, 2008) at ¶10; United Nations, Security Council Resolution 1851 (2008), S/RES/1851 (Dec. 16, 2008) at ¶6.

respect is informal. It includes the *mag*-paying groups and the use of *xeer, shir, aquil, Guurti* and *Suldaan* for dispute resolution. Accordingly, the different actors in the Gulf of Aden operate in parallel legal orders. In a situation where enforcement and adjudication are rare, who decides which law applies to whom (*subjectivity*) and under what circumstances? A legal theory seeking to capitalize on the *reciprocity* challenge must account for the myriad actors and attempt to stitch the disparate legal orders together into a cohesive and mutual set of obligations.

This dilemma is also reflected in the other structural problems and opportunities presented by Somalia. A situation where different actors operate according to parallel sets of rules clearly creates *uncertainty*. Even within the particular orders, disagreement exists as to the content of the law. For instance, formal actors struggle to reach agreement over whether the piracy issue in the Gulf of Aden and the Indian Ocean constitutes an armed conflict for the purposes of international humanitarian law. For its part, the UN Security Council has deferred the issue. In 2008, it decided that counter-piracy measures "shall be undertaken consistent with applicable international humanitarian and human rights law,"[334] but this statement fails to identify the specific circumstances in which the different law would apply. What has emerged is a *modus operandi* according to which the laws of armed conflict, human rights law and the laws of the sea are applied without an agreement about which particular obligations are legally required. The commitments are loose and subject to exception depending on factual imperatives. Because most operations in Somalia will not be reviewed in judicial *fora*, the exact content of the rules remains uncertain. Like the timeless phrase, the law continues to exist as if "through a glass, darkly."[335]

In such an order it is also extremely difficult to apportion *responsibility*. The *uncertainty* challenge makes clear that the content of the rules is indeterminate. To prescribe responsibility, international law requires a preexisting legal obligation. In short, there can be no crime without law (*nullum crimen sine lege*). In Somalia's ungoverned spaces, the different actors do not agree over the structure and content of the law, which presents serious ethical, moral and legal dilemmas to the assignment of culpability. Further, even where the content of the rules is clear, there is no agreement regarding the subjects of the law. This *subjectivity* challenge is particularly powerful with respect to informal actors, such as the Somali clan families and the spoiler elements, namely al Shabaab, Hizbul Islam, al Qaeda and the various piracy and criminal organizations. Under rules of legislative jurisdiction, international criminal law or state responsibility, international jurists might devise a *responsibilization* regime according to the international *lex lata*. Such a framework, however, would be out of touch with the ungoverned realities of Somalia, where the *de jure* power of the TFG has no factual basis. The informal actors operating in Somalia did

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[334] *See e.g.* United Nations, Security Council Resolution 1851 (2008), S/RES/1851 (Dec. 16, 2008) at ¶6.

[335] The New Testament, 1 Corinthians 13:12.

not take part in the formulation of the rules and as a result, they do not view the formal strictures of international law as applicable to their activities. A more effective and practically relevant *subjectivity* dynamic would engage the different informal actors directly and incorporate them alongside formal actors in a collaborative law-making process.

C.   *Applying the three techniques*

1.   State responsibility (*de lege lata*)

International lawyers are driven by a blessed rage for order, in our case a rage to impose and maintain order through words, in a world that much needs order, whether at sea or on land or in the air or in space—or indeed in cyberspace.
–James Crawford, Manley O. Hudson Lecture, 106th Annual Meeting of the American Society of International Law, March 30, 2012[336]

The limitations of the orthodox, state responsibility (*de lege lata*) technique with regard to Somalia are obvious. Because the country has no effective government, the idea of state responsibility is a fiction. However, because it exists as the mainstream practice, the particular application and shortcomings of the state responsibility technique merit examination. The usual entry point for the application of international law is a legal problem. In the Somali context, this might include many possible scenarios. Based on the ungoverned spaces described in the preceding section, and for the purposes of this explanation, it is useful to consider three: security issues raised by pirates, environmental degradation caused by the lack of sanitation services, and human rights abuses inflicted upon the population by armed groups.

Recall that the responsibility of states for their internationally wrongful acts is "a general principle of law, a concomitant of substantive rules and the supposition that acts and omissions may be categorized as illegal by the rules establishing rights and duties."[337] The content of state responsibility is made up of general principles, such as *jus cogens*[338] and those articulated in *The Declaration on the Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*[339] and the UN Charter, and specific international obligations that apply based on international agreements. In this regard, the VCLT, which is often referred to as the "treaty on treaties," is particularly

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[336] *See* James Crawford, *International Law as Discipline and Profession,* Manley O. Hudson Lecture, 106th Annual Meeting of the American Society of International Law, 106 ASIL Proc. 216 (2012).

[337] *See* Brownlie, *supra* note 2, at 434.

[338] *See supra* page 70.

[339] *See The Declaration on the Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, supra* note 51.

instructive. [340] In addition, the rules for determining how state responsibility should apply are codified in the ILC *Articles.*

As a state member of the international community, the general principles of international law, *jus cogens* and customary international obligations are presumed to apply to Somalia absent its persistent and continuous objection. With regard to ungoverned space, these include the norms on the non-use of force (except in self-defense or with the authorization of the UN Security Council [341]), non-intervention, [342] cooperation, self-determination, a prohibition against acts of aggression, a prohibition on piracy, and a prohibition on torture, cruel, inhumane and degrading treatment.[343]

The next step in the application of the state responsibility technique is to determine which positive obligations Somalia has made under international law. A review of the UN Treaty Database reveals that Somalia is presently a party to 204 international agreements that have been registered with the UN Secretary-General, including various instruments relevant to the issues of piracy, environmental degradation and human rights.[344] For example, the aforementioned UNCLOS, to which Somalia has been a party since July 24, 1989, requires states to cooperate in the eradication of piracy.[345] Somalia's accession to the *Convention on the International Maritime Organization*[346] on April 4, 1978 made it a member of an organization whose purpose is to:

> To provide machinery for co-operation among Governments in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade; to encourage and facilitate the general adoption of the highest practicable standards in matters concerning the maritime safety, efficiency of navigation and prevention and control of marine pollution from ships; and to deal with administrative and legal matters related to [these purposes].[347]

On the issue of environmental protection, Somalia is a party to various treaties, including but not limited to the *United Nations Framework*

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[340] While Somalia is not a party to the VCLT, many of the treaty's provisions are accepted as customary international law by the international community. *See generally* ANTHONY AUST, MODERN TREATY LAW AND PRACTICE (2000).

[341] UN Charter, art. 2(4) and Chap. VII.

[342] UN Charter, art. 2(7) and Chap. VII.

[343] *See* BROWNLIE, *supra* note 2, at 433-474.

[344] *See* United Nations Treaty Database, http://treaties.un.org/pages/UNTSOnline.aspx?id=3 (accessed Apr. 30, 2012).

[345] *See* UNCLOS, art. 100-107.

[346] 289 U.N.T.S. 3 (Mar. 17, 1958).

[347] *See id.* at art. 1(a).

Convention on Climate Change (UNFCCC) [348] the *Kyoto Protocol,* [349] the *Convention on Biological Diversity,* [350] the *Vienna Convention for the Protection of the Ozone Layer,* [351] and the *Basel Convention on the Control of Transboundary Movement of Hazardous Waste.* [352] Each of these positive obligations brings particular rights and duties. For instance, under the *Basel Convention on the Control of Transboundary Movement of Hazardous Waste* the Somali government must "[p]revent the import of hazardous wastes and other wastes if it has reason to believe that the wastes in question will not be managed in an environmentally sound manner." [353]

Finally, Somalia is a party to a number of landmark human rights agreements, including the *International Covenant on Civil and Political Rights* (ICCPR) [354] (and its *optional protocol* [355]), the *International Covenant on Economic, Social and Cultural Rights* (ICESR) [356] and the *Convention against Torture and other Cruel, Inhumane or Degrading Treatment* (CAT). [357] Under the ICCPR, the government is responsible for protecting the rights of its citizens, including the right to life, [358] the right to be free from arbitrary detention, [359] the right to be free from discrimination, [360] and, when violations occur, for facilitating access to effective remedies. [361] Similarly, in accordance with Article 2 of the ICESR, the government must "take steps" to progressively achieve the "full realization" of *inter alia* the right to work, [362] the right to an adequate standard of living, [363] and the right to education. [364] The CAT directs states to "take effective legislative,

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[348] 1771 U.N.T.S. 107 (May 9, 1992). Somalia became a party to the UNFCCC when it acceded to the convention on September 11, 2009.

[349] 2303 U.N.T.S. 148 (Dec. 11, 1997). Somalia became a party to the protocol when it acceded on July 26, 2010.

[350] 1760 U.N.T.S. 79 (June 5, 1992). Somalia became a party to the convention when it acceded on September 11, 2009.

[351] 1513 U.N.T.S. 293 (Mar. 22, 1985). Somalia became a party to the convention when it acceded on August 1, 2001.

[352] 1673 U.N.T.S. 57 (Mar. 22, 1989). Somalia became a party to the convention when it acceded on July 26, 2010.

[353] *See* Basel Convention on the Control of Transboundary Movement of Hazardous Waste, *supra* note 352, at art. 4(2)(g).

[354] 999 U.N.T.S. 171 (Dec. 16, 1966) [hereinafter ICCPR]. Somalia became a party to the ICCPR when it acceded to the covenant on January 24, 1990.

[355] 999 U.N.T.S. 171 (Dec. 16, 1966). Somalia became a party to the ICCPR optional protocol when it acceded to the agreement on January 24, 1990.

[356] 993 U.N.T.S. 3 (Dec. 16, 1966) [hereinafter ICESR]. Somalia became a party to the ICESR when it acceded to the covenant on January 24, 1990.

[357] 1465 U.N.T.S. 85 (Dec. 10, 1984) [hereinafter CAT]. Somalia became a party to the CAT when it acceded to the convention on January 24, 1990.

[358] ICCPR, *supra* note 354, at art. 6.

[359] *Id.* at art. 9.

[360] *Id.* at art. 26.

[361] *Id.* at art. 2.

[362] ICESR, *supra* note 356, at art. 6.

[363] *Id.* at art. 11.

[364] *Id.* at art. 13.

administrative, judicial or other measures to *prevent* acts of torture in any territory under its jurisdiction."[365]

Despite the formal ratification of these various instruments by the TFG and previous governments, the factual power of the government to provide for its citizens is no greater than it would be in the absence of any commitments at all. *De jure* obligations do not prompt the realization of factual power and control. Rather as soon as they are made they quickly disappear. Throughout Somalia's ungoverned spaces, pirates operate unfettered, pollution spills onto the land and into the sea, and Somali men women and children fend for themselves outside of the *de facto* control or protection of the formal government.

In general, the gap between the Somali government's obligations and its effectiveness in practice suggests a troubling conclusion. The commitments it has made under the various treaties represent little more than aspirations. They exist in the realm of international obligation, but nowhere else. Moreover, the acceptance of those commitments by the other members of the international community is at best hopeful and at worst deceitful. While it may be *hoped* that by bringing Somalia into the fold, the international community will be able to reform the country's conduct and enable it to build capacity, a pessimist might view the practice as creating a marker by which Somalia can be held responsible for its bad acts. The shortcoming of state responsibility lies in its inadequacy in accounting for governmental ineffectiveness. Somalia is neither empowered nor protected through the process. In the absence of such a framework, the methods for holding transgressors responsible rely on unilateral and international intervention. In this dynamic, the interests of the Somali people are left in the hands of external actors.

This assertion is illustrated by Security Council decisions on Somalia in the post-1991 period. The action of the Security Council has consistently moved in the direction of enforcement and intervention. As a party to the Charter of the UN, Somalia is under an obligation to "accept and carry out the decisions of the Security Council."[366] This makes the resolutions of the Security Council adopted under Chapter VII of the UN Charter binding on the government. In an effort to control the piracy situation, for instance, the Council has chosen to significantly expand the power of states to take actions in Somalia's territory.[367] These resolutions contain two diametrically opposed principles that expose the fundamental flaw in the state responsibility technique. First, they *reaffirm* respect for the "sovereignty, territorial integrity, political independence and unity of Somalia,"[368] while at the same time they *take into account* of the "lack of

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[365] CAT, *supra* note 357, at art. 2(1).

[366] *See* UN Charter, art. 25.

[367] *See e.g.* United Nations, Security Council Resolution 1816 (2008), *supra* note 287; United Nations, Security Council Resolution 1846 (2008), *supra* note 287; United Nations, Security Council Resolution 1851 (2008), *supra* note 287.

[368] *See e.g.* United Nations, Security Council Resolution 1816 (2008), *supra* note 287, at *preamble.*

capacity"[369] on the part of the TFG to interdict the threat. This creates a dynamic whereby the failure of Somalia to fulfill its obligations under the *lex lata* is presumed to be temporary. Yet under the mechanics of the state responsibility doctrine, as well as the various treaties to which Somalia is a party, Somalia's obligation to fulfill its international commitments does not cease.[370] Faced with this contradiction, the international community either ignores or a gnosticizes Somalia's failure to live up to its obligations under the treaties to which it is a party. Into the responsibility void the Security Council authorizes emergency ameliorative action. Thus implemented, the entire doctrine of state responsibility is predicated on capacity, and once the power of the state vanishes, the rules fall short and the international community scrambles to respond. Even in situations of *force majeure*, which absolve the state of otherwise wrongful acts, the existing state responsibility system does not provide a useful legal framework for response. Chapter VII is a blunt tool, and in any case, the presence of the veto often paralyzes its use. Countermeasures also fall short. They "are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible state"[371] and, at any rate, they do not apply to the core interests of states.[372] This inadequacy leads to a demand for additional juridical solutions. The mainstream rejoinder to the failures of state responsibility is to venture into reformation and principled engagement (*de lege in statu nascendi*).

2.   Principled engagement (*de lege in statu nascendi*)

"A screaming comes across the sky. It has happened before, but there is nothing to compare it to now."

–Thomas Pynchon *Gravity's Rainbow*

The Security Council's assertion that the TFG "lacks the capacity" to interdict the piracy threat emanating from Somalia's coastline and territorial waters, and the inadequacy of state responsibility to counsel a useful response, gives rise to a need for additional standards. Faced with the limitations of state responsibility, the natural turn is to assert the second technique—principled engagement and the progressive development of *de lege in statu nascendi*. Much like the first technique, the second technique presupposes a sovereign, effective government in Somalia. At present, despite all factual evidence to the contrary, the international community recognizes the TFG in Mogadishu as fulfilling

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[369] *Id.*

[370] This assertion holds true except in very limited circumstances, such as under Article 4 of the ICCPR. *See* ICCPR, *supra* note 354, at art. 4. The ILC is currently undertaking a study on the effect of armed conflicts on treaties. In general, while treaty obligations incompatible with the conduct of hostilities may cease, such as those pertaining to navigation and commerce, the vast majority of obligations continue unabated during the period of conflict.

[371] *ILC Articles, supra* note 231, at art. 49(2).

[372] *See id.* at art. 50.

that role. It is only after the TFG has failed, or an issue arises that is too difficult for it to handle, that the second technique applies. Therefore, to a large extent, the second technique is also predicated on a fiction. By manufacturing a sovereign and presumptively effective government it creates the necessary prerequisite for its own application.

In practice, the second technique is applied without substantial legal justification. As has been shown, the Security Council has merely *taken into account* the TFG's lack of capacity en route to authorizing intervention. Similarly, the details of the U.S. drone program currently underway in the country [373] has not been publically divulged. Moreover, the legal justifications for individual attacks have been kept confidential. Speaking of the practice of drones strikes and targeted killing more generally, Legal Adviser of the U.S. Department of State, Harold Koh remarked in March 2010:

> Thus, in this ongoing armed conflict, the United States has the authority under international law, and the responsibility to its citizens, to use force, including lethal force, to defend itself, including by targeting persons such as high-level al-Qaeda leaders who are planning attacks [...] Of course, whether a particular individual will be targeted in a particular location will depend upon considerations specific to each case, including those related to the imminence of the threat, the sovereignty of the other states involved, and the willingness and ability of those states to suppress the threat the target poses.[374]

Similarly, the current Attorney-General of the U.S. Department of Justice, Eric Holder qualified the use of drones according to the same vague standard in a March 5, 2012 speech:

> We are at war with a stateless enemy, prone to shifting operations from country to country. Over the last three years alone, al Qaeda and its associates have directed several attacks—fortunately, unsuccessful—against us from countries other than Afghanistan. Our government has both a responsibility and a right to protect this nation and its people from such threats. This does not mean that we can use military force whenever or wherever we want. International legal principles, including respect for another nation's sovereignty, constrain our ability to act unilaterally. But the use of force in foreign territory would be consistent with these international legal principles if conducted, for

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[373] *See* Mohammed Ibrahim, *U.S. Drone Strike Kills Foreign Commander Fighting for Militants in Somalia*, N.Y. Times (Jan. 23, 2012) at A4.

[374] Harold Koh, Legal Adviser, U.S. Department of State, Speech to the American Society of International Law, *The Obama Administration and International Law* (March 25, 2010) http://www.state.gov/s/l/releases/remarks/139119.htm.

example, with the consent of the nation involved—*or after a determination that the nation is unable or unwilling to deal effectively with a threat to the United States.*[375]

Attorney-General Holder goes on to explain the circumstances in which a strike against a U.S. citizen in a foreign country would be justified:

> Let me be clear: an operation using lethal force in a foreign country, targeted against a U.S. citizen who is a senior operational leader of al Qaeda or associated forces, and who is actively engaged in planning to kill Americans, would be lawful at least in the following circumstances: First, the U.S. government has determined, after a thorough and careful review, that the individual poses an imminent threat of violent attack against the United States; second, capture is not feasible; and third, the operation would be conducted in a manner consistent with applicable law of war principles.[376]

Given these broad and under-supported assertions, it might rightly be asked how the second technique represents an improvement over the first. The answer to this question depends in large part on how the technique is used by the international jurist. Recall that Deeks proposed five normative principles that the victim state should follow before taking any action under the unwilling or unable standard.[377] Applying these five principles to Somalia it is at least possible to envision a more productive legal standard. For instance, Deeks first suggests that consent or cooperation should be prioritized over unilateral uses of force. The extent to which this is meaningful will depend on the mindsets of the actors involved. Prioritization is a matter of perspective, and it is highly subjective. Deeks also proposes that the victim state should ask the territorial state to address the threat, and provide adequate time for the latter to respond. This makes logical sense—and it should be noted that the Security Council resolutions authorizing increased action to eradicate piracy in Somalia do contain notice provisions[378]—however, in practice it might be difficult to market the practice to states.   Distrust between governments or a belief that the territorial state might be unable to keep a proposed mission confidential, often prevent advance consultation. In his justification for the May 2011 U.S. Navy Seal raid against Osama bin Laden's compound in Abbottabad, Pakistan, for instance, Harold Koh makes no mention of the need to consult:

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[375] Holder, *supra* note 16 [emphasis added].

[376] *Id.*

[377] *See supra* at page 73. *See also* Deeks, *supra* note 236, at 490, 506-533.

[378] *See* United Nations, Security Council Resolution 1816 (2008), *supra* note 287, at ¶7; United Nations, Security Council Resolution 1846 (2008), *supra* note 287, at ¶10; United Nations, Security Council Resolution 1851 (2008), *supra* note 287, at ¶6.

> Given bin Laden's unquestioned leadership position within al Qaeda and his clear continuing operational role, there can be no question that he was the leader of an enemy force and a legitimate target in our armed conflict with al Qaeda. In addition, bin Laden continued to pose an imminent threat to the United States that engaged out right to use force, a threat that materials seized during the raid have only further documented. Under these circumstances, there is no question that he presented a lawful target for the use of lethal force.[379]

In the hands of governments, Deeks' remaining principles are also subject to various outcomes. For instance, her suggestion that states should reasonably assess the territorial state's control and capacity in the relevant region may either serve as a restraint or an enabler. The same can be said of her principle that states should reasonably assess the territorial state's proposed means to suppress the threat. Both principles presume knowledge on the part of the victim state about the territorial state's capabilities; information which can only really be gleaned through continuous consultations and interactions. This discrepancy is accounted for by Deeks' final principle, which would require states to evaluate prior interactions with the territorial state before taking action. Such reliance might work if the two states have engaged in productive interactions in the past; however, if the relevant actors have been disconnected for a considerable period of time, then prior interactions will be less pertinent. In the case of Somalia, the relevant external parties have engaged in continuous negotiations with the TFG since 2004. The lack of progress results not from an absence of interaction, but from a failure to focus on the Somali actors that actually matter. The TFG simply has no power to affect outcomes in the vast majority of Somali territory.

Applying Giorgetti's eight "guiding principles for action to maintain international public order in situations of state failure"[380] widens the scope of possibilities to include non-security issues in Somalia, but the manipulability of the technique remains. In the context of environmental protection, for instance, the TFG's lack of surveillance capability prevents it from bringing issues to the attention of external actors. Similarly, international actors such as AMISOM and UNPOS have been preoccupied with the security situation in the south and central portions of the country. Damage that occurs in rural or hard-to-reach areas may go completely undetected by anyone acting in a formal capacity. If environmental harm

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[379] Harold Koh, *The Lawfulness of the U.S. Operation against Osama bin Laden*, OPINIOJURIS.ORG (May 19, 2011) http://opiniojuris.org/2011/05/19/the-lawfulness-of-the-us-operation-against-osama-bin-laden/. The fact that Pakistan was not consulted might have been due to concerns that bin Laden was being sheltered by Pakistani elements. *See* Carlotta Gall and Eric Schmitt, *Amid Skepticism, Pakistan Calculates Response*, N.Y. TIMES (May 3, 2011) at F1.

[380] *See supra* at page 74-75. *See also* GIORGETTI, *supra* note 50, at 184-85.

is discovered by an external actor, then consultation with the TFG might be counterproductive. The involvement of the central government has the potential to enflame local tensions. Avoiding such conflicts altogether could lead to a dangerous alternative—unregulated and uncoordinated unilateral action.

As this brief analysis shows, there are positives and negatives to the application of the second technique. On the positive side, the invocation of progressive standards has the potential to increase the power of the deliberative process and pull it in the direction of the principles.[381] Instead of making decisions based on individual prerogatives, actors participating in the constitutive law-making endeavor must make some effort to justify their acts against a set of "normative" criteria. This has obvious advantages over the state responsibility model, where the assignment of responsibility often represents the end of the inquiry. However, the second technique also has drawbacks. First, no criteria are truly normative. Every test, including the unwilling or unable standard, and principled frameworks of the type that Deeks and Giorgetti propose, are open to subjective manipulation. To this end it is almost impossible to find an application of the unwilling or unable standard that did not come out in favor of the state applying the test. The application of facts to standards can always be finessed by the skilled jurist. Second, the technique repeats the mistake of the state responsibility doctrine by focusing almost exclusively on a presumptively effective government. In Somalia, where the TFG is a fiction, this will not work. Other ungoverned spaces will present similar problems. When the state fails to effectively govern a space, alternative actors emerge to exercise power. A technique that puts formal categories above factual circumstances is inaccurate. Moreover, the result will be predictable. Because ungoverned spaces always lack effective state governance, intervention will always be justified. The only effect of the progressive technique will be to frame *how* the intervention will occur. On that point as well, the technique favors powerful external actors. Because they apply the standard, intervention takes place on their terms and serves their interests.

3.   Innovation (*de lege ferenda*)

"Although his story illustrates the dead ends and difficulties of innovation in the international legal profession, he nevertheless plays the part committed to the promise of its possibility."
                    –David Kennedy *When Renewal Repeats: Thinking against the Box*

Ungoverned space clearly presents a difficult problem for international law; however, much of this struggle results from the rigidity of the mainstream practice. The reverence for stability, internal coherence and legal *science* renders the law weak and maladroit in the face of a novel challenge. Law is not science, nor is it geometry. The system of rules and

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[381] *See generally* IAN JOHNSTONE, THE POWER OF DELIBERATION (2011).

axioms are not the only structures for argument. Law has within it argumentative tools that can be mobilized to address actual problems. The challenge is punctuating the equilibrium that already exists and persuading relevant actors to ascribe to a deviationist viewpoint. By placing the jurist at the center of the process and prioritizing facts over fictions, the third technique attempts to open up the discipline to new challenges and new applications.

Recall that the two central innovations of the technique consist of applying the law to informal actors who exercise factual power in ungoverned space, and deriving a collaborative *law-making* process that incorporates these new actors. The technique takes the position that preconceived notions of subjectivity hinder, rather than help, the development of an effective law of ungoverned space. For instance, with regard to Somalia, both the state responsibility and the principled engagement techniques began the process by examining the capacity of the presumptively effective government in Somalia. This was their only subject. When the TFG failed to fulfill its internal and external obligations, the machinery of the techniques facilitated the assignment of responsibility and intervention. The purpose of these outcomes was ostensibly to restore international public order, but in reality, they had the effect of justifying action by external actors across a wide-range of objectives. By limiting the focus to one, central actor, the techniques stimulated the creation of internally coherent legal theories. The problem with these legal theories is that they have little to no basis in fact. This conclusion is especially salient in Somalia. The TFG never was *able*, and the commitments that it made under international legal agreements were always mere aspirations. To presume otherwise is to emphasize pure argumentative structures and formal subjectivity at the expense of factual analysis. The innovative technique attempts to reverse this trend.

To do so, it proposes six core principles that determine *how the law is made* and *to whom it applies.* As a reminder, these six principles are the following:

1. The international law of ungoverned space arises out of interactions between the different actors who exercise power in that space; it is a *diffuse* law-making process that cannot be co-opted by any single actor.

2. The determination of who qualifies as a subject of international law in ungoverned space shall be made according to factual circumstances rather than formal categories.

3. All actors who exercise a non-arbitrary amount of power in ungoverned space are subject to the international law of ungoverned space.

4. All subjects of the international law of ungoverned space are responsible for their actions and omissions in ungoverned space.

5. The responsibility of subjects is determined by the amount of power that they factually exercise; with more power comes more responsibility.

6. There is no *unilateralism* in ungoverned space; each act or omission takes place against the backdrop of the international law of ungoverned space; it is informed by the existing legal rules and impacts but does not determine the future of the legal order applicable to the space.

With regard to Somalia's ungoverned spaces, the content and subjects of the law will differ depending on the context. This does not mean, however, that the law is always "up for grabs" or that certain commonalities will not exist. Across the different spaces, the method for applying the law and determining its subjects is the same. The starting point is factual analysis. For instance, in the *terra firma* territory of south central Somalia, al Shabaab (predominantly comprised of members of the *Hawiye* clan), Hizbul Islam, Kenya, Ethiopia, the TFG, UNPOS, AMISOM, and the *Darood*, *Rahnweyn* and *Dir* clan families each exercise a non-arbitrary amount of power and influence. (Depending on the modalities of its participation— much of which is shrouded in mystery—the U.S. night also fall into this group.) Therefore, in accordance with the third principle, each of these actors qualifies as a subject of the law. In this capacity, they are responsible for their actions and omissions. By virtue of the fifth principle, those who exercise more power, including AMISOM, Kenya and UNPOS (and perhaps the U.S.) have a special responsibility to obey the law.

With each act or omission on the part of these subjects, the content of the law evolves. It is informed by existing legal rules, but these rules are not determinative of the future legal order. Rather, they represent one important consideration. Therefore, the Security Council mandates of UNPOS and AMISOM are not irrelevant; and the UN Charter framework that gave rise to these instruments cannot be wholly cast aside. Similarly, the justifications that Kenya asserted prior to its October 2011 military operation in Somalia [382] represent an element that informs the development of the rules. In its actions, the Kenyan military must be held accountable to its declarations. All of this preexisting law and legal argument *matters*, but it does not create an impregnable fortress of axioms and rules. Rather, subsequent practice of the various actors, including those not formally recognized by the mainstream application of international law, drives the development of the law in particular directions. The key is to recognize that the law-making apparatus is diffuse

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[382] *See* Richard Downie, *Kenya's Military Operation in Somalia*, CSIS.org (Nov. 3, 2011) http://csis.org/publication/kenyas-military-operation-somalia.

and that it cannot be commandeered by any particular actor, no matter how powerful.

Remember as well that in this diffuse law-making process, certain over-arching considerations apply.[383] In line with the definition of the "international law of ungoverned space" each actor should be led by a commitment to effectiveness, respect for diversity, equality, justice, the persistence of international obligations, the maxim *ex injuria non oritur jus* and the imperative to do no harm. These considerations relate to the creation of the law, but they are also operative. They add substance to the six principles of the technique without presuming a final form for the law. In Somalia's ungoverned spaces, the considerations have clear relevance. In undertaking counterinsurgency action, for instance, AMISOM must consider not only its mandate but also how its activities will impact the plethora of other actors within the space. Similarly, UNPOS and the TFG must not simply genuflect to powerful actors. The appropriate solution lies between the law that exists and the factual manifestations of power that occur on the ground. The resulting legal order emerges through purposeful interactions. In creating this body of rules, the international legal jurist must remain self-aware. Solutions must be crafted in the language of law, and *legal analysis* must guide the process.

As applied to Somalia, the innovative technique must also overcome the eight challenges referenced previously.[384] In particular, the identification of the *real* power dynamics in the space must be rigorous. The *typologization* and *problemitization* steps are only the beginning. Continuous efforts must be made to map the law to the actors within the space. Second, the actual process of law-making remains a work-in-progress. The details will have to be worked out through the interactive process. Third, the technique must not legitimize actors in Somalia who gain power through illegal, unjust or illegitimate means. The determination of illegality will depend on the rules in existence *at the time*. While this will necessarily change depending on the law-making process, assumptions of power through force will always be disfavored. Therefore, as presently constituted, al Shabaab remains an illegitimate actor whose actions should not impact the development of legal rules in a way that favors its cause. In contrast, the various clan systems that have emerged to provide a minimum of peace and security in northern Somalia do have an important role to play in creating the new order. Fourth, the innovative technique must mitigate the use of force. More deliberations with more actors will have some effect, but twenty-years of armed conflict in Somalia has made force and violence a part of the culture. The law must offer alternative avenues for dispute resolution and the attainment of group objectives. Finally, as applied to Somalia, the innovative technique must endeavor to reduce *uncertainty*. This will represent an on-going effort that will be guided by a devotion to the practical realities of the space. Rather

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[383] *See supra* at page 80-81.
[384] *See supra* at page 82-86.

than abdicate the challenge through a retreat to abstraction and fictionalization, the technique will confront uncertainty at its roots.

IV.   ALTERNATIVE FUTURES

The future international legal order applicable to ungoverned space is indeterminate. What results will depend on the outcome of competitive contestations between the three different techniques. While not mutually exclusive in all circumstances, the techniques are fundamentally at odds. The approach that offers the best outcomes without necessitating undue sacrifice will emerge as the favored practice. The thesis is that the issue of ungoverned space necessitates a radical change in the way in which international law relates to its subjects, and that the third technique is the most effective response. However, in order for such a move to be taken seriously it must not disregard existing international legal structures and doctrine. If it eviscerates the distinction between law and politics it will be cast aside as heretical, and it will not be regarded as a serious attempt to solve the problem from the perspective of law. The lesser departures from existing doctrine offer fewer risks of dismissal, but they are also limited in rather obvious ways, which weakens their transformational power. Whether the innovative technique gains traction will depend on how it fares in a number of "battlegrounds." At a minimum, these consist of the following: *accuracy*; *fit*; *effectiveness*; and *projectability*. The result of these contests and the emergence of one technique over the others will also have profound and lasting effects for international relations, international legal subjectivity and the general practice of international law.

A.   Battlegrounds

The three techniques will compete for adherence in four separate but related battlegrounds—*accuracy*; *fit*; *effectiveness*; and *projectability*. These address, at a basic level, what jurists and policymakers expect the law to accomplish and how they expect it to relate to other disciplines. What the audience seeks is a method to provide order in ungoverned space. To be accepted, each technique must respond to this demand. At the outset it must be noted that punctuating the equilibrium that already exists and proving to practitioners that the deviationist technique has merit will be difficult. However, it is not impossible. True innovations are successful because they offer a better way forward. If the third technique is able to fulfill that challenge, than it is possible for it to displace the entrenched incumbents.

1.   Accuracy

Accuracy refers to how close the analysis provided by each technique comes to what might be observed empirically. It assumes that the law must accurately depict the world it seeks to regulate. The position taken here is that the orthodox technique departs greatly from the world around it.

Abstract rules, general categories, constructive fictions—these are all elements of the law on state responsibility. In a world of perfectly equal, sovereign states, such a system might function. However, in the real world of disaggregated political arrangements and proliferated ungoverned spaces, it is wildly inaccurate. The second technique comes closer, but it also makes abstract assumptions. The unwilling or unable standard, for instance, presumes an effective government and makes its departure based on that government's capacity (or lack thereof). For its part, the innovative technique takes the world as it is. After a rigorous factual analysis, it constructs the law based on function, rather than on form.

2.   Fit

Fit is the relationship between a particular legal technique for addressing ungoverned space and the greater body of international law and international relations that exists around it. The three techniques do not exist in a vacuum. Rather, they are part of a complex system of rules, rights, duties, obligations, objectives, policies and interests that comprise relations between international actors. The better the fit between the technique and the background in which it is applied, the more likely it will be to gain support. Because of its long history—as well as its status as the current orthodoxy—the state responsibility technique might appear to represent a good fit for the larger system. However, in a world of imperfect political arrangements significant complications arise. For instance, the state responsibility technique does not sufficiently address state failure. Because this phenomenon is pervasive, rules on state responsibility represent a poor fit for the policy-making demands of national and international leaders. The second technique fares much better. However, it also has certain deficiencies. It fits well because it allows powerful states to justify desired acts. Its shortcoming is that it does not account for the longer-term aspirations of the international community. While emergency action may serve short-term imperatives, it does not address root causes. On the issue of fit, the innovative technique serves these long-term goals, but it complicates existing arrangements. Convincing states to enfranchise informal actors within the international legal framework will be difficult, especially when the mainstream practice of international law continues to embrace formal subjectivity. Previous innovations in this direction, including human rights law and international trade law, took significant time to develop.

3.   Effectiveness

The third battleground is *effectiveness*. In a results-oriented society, each technique must prove that it offers a better solution to a complex problem. The issue becomes how to determine which result is "better." This will unquestionably have a subjective element and the opinions of particular actors will matter more than others. For instance, the appraisals of powerful states and their leaders will exert more force than weak actors.

Similarly, the opinions of internationally active actors with stakes in ungoverned spaces will matter more than actors without vested interests in the issue. However, there is also room for objectivity in determining effectiveness. In particular circumstances, particular techniques will outperform others by a large margin. The point is simple: in order to gain traction, each technique must prove that it has the ability to solve the problem better than its competitors. The difficulty for the third technique in this scenario is convincing jurists that is worth applying in the first place.

4.   Projectability

Projectability refers to the usefulness of the technique over the longer term. International jurists and policymakers want to solve the issue of ungoverned space now and for the future, and each technique must attend to this need. Accordingly, each technique must prove that it has two key strengths. First, that it can reliably be applied to various situations and yield positive results. One-off successes are not projectable. Second, the technique must show that the solutions it obtains are lasting. Ephemeral compromises and *ad hoc* stop-gaps will not inspire the confidence of the audience. True solutions must build progressively and prevent relapse.

B.   Impact

The outcome of these battlegrounds and the adoption of a particular technique to address the issue of ungoverned space will have a profound impact on a number of areas. These effects are not limited to certain issues, such as armed conflict, intervention, environmental protection and human rights, or regimes of legal rules. Rather, they will pervade the minds of the jurists and policymakers that address the issues and put legal rules into execution. What the techniques expose is that these individuals can approach their professional responsibilities in one of three ways. They can either be part of the mainstream, in which case they will lean toward the orthodoxy. In this situation their fidelity lies with the larger system. To the extent that they believe anything, it is that the system as a whole has merit. The second way takes the established orthodoxy and attempts to reform it. These individuals acknowledge that the mainstream is limited, but they remain faithful to its basic structures. The third way represents a major break. It counsels innovation. Individuals falling into this category are fed up with the existing structures. Instead of reforming from within, they seek to be born again—throwing off the limitations of the orthodoxy and setting out in new directions in search of new solutions.

The current mainstream approach has created a legion of international jurists who are conservative in their professional ambitions. Even if they lack faith in the merits of the system, they do not see a way out. They keep an "ironic distance"[385] from the material, perpetuating the

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[385] *See generally* ROBERTO MANGABIERA UNGER, SOCIAL THEORY: ITS SITUATION AND TASK, Vol. II (2004).

established practice even as they profess not to believe in it. The result is a highly resilient *status quo*. In the past, the only way this stasis has been broken has been through crisis. In these instances international jurists have momentarily snapped out of their trance-like states to respond to new demands for better solutions. The problem with making change dependent on crisis is that law is always lagging. Instead of framing issues prospectively, it serves the subservient role of retrospective rationalization.

Imagine, for a moment, that the third technique for addressing ungoverned space gained traction and attained mainstream adherence. What would happen? What would determine its success or failure? In general, the answers to these questions depend on the hopefulness of the examiner. An optimist will look at the third technique and see boundless potential. Through enfranchising new actors and de-formalizing international law, possibilities for a more realistic legal order will emerge. Weak actors and strong actors will cooperate in a diffuse and collaborative law-making process that balances their interests and brings peace and order to chaotic and dangerous environments. In contrast, a pessimist will look at the proposal and see another means to commandeer the legal system. For instance, because of the technique's reliance on factual power, the strong actor need only invade the ungoverned space and establish itself as the *de facto* ruling authority. Thus entrenched, all inchoate rules will pass through its filter. The original act, even if unlawful, will go unpunished because the theory lacks mechanisms for effective enforcement.

In this scenario, both optimists and pessimists can put forth a defensible claim that their description of the theory is correct. This result is to some extent unavoidable. The skilled jurist will always find ways to manipulate the law to suit his advantage. The object of the third technique is to make some of these claims less believable than others. When tested against the six principles and "overarching considerations" the hope is that the optimist viewpoint will convince more actors to conduct themselves in accordance with the law's collaborative tenets.

Another impact merits brief mention. Assuming, once again, that the third technique is able to gain a critical mass of adherents—what might this mean for the formal/informal dichotomy in international law? If the distinction is eliminated completely, does that weaken or strengthen the discipline? The mainstream presumption is that actors endowed with formal authority will make decisions of greater legitimacy than informal actors. The third technique puts this idea in doubt. In fact, it argues that a truly accurate and effective law of ungoverned space will engage both formal and informal actors *on the level*. While the judgment on whether this practice will have the effect of strengthening or weakening international law is premature, in today's world there does appear to be an emerging belief that formality has run its course. As Yochai Benkler has written with regard to the impact of the *Anonymous* group in the ungoverned space of cyberspace:

Perhaps that is the greatest challenge that Anonymous poses: It both embodies and expresses a growing doubt that actors with formal authority will make decisions of greater legitimacy than individuals acting collectively in newly powerful networks and guided by their own consciences.[386]

CONCLUSION

This article began with a challenge—to develop a complex argument for how international law should apply to ungoverned space. In formulating a response, it proceeded in four stages.

Section I surveyed the different definitions of ungoverned space from the literature. It then put forth the following set of definitions to apply to ungoverned space:

> *Ungoverned space* **is a space not effectively governed by the state.**

> **A** *state* **is a stable political community that controls a territory, supports a legal order, acts independently and effectively governs.**

> **A state** *effectively governs* **a space, if it demonstrates the ability and the willingness to fulfill its internal and external obligations on a consistent and continuous basis.**

> **A s***pace* **is a cognizable physical or non-physical extent that can be effectively governed by the state.**

From that point, it analyzed various typologies that have emerged and proposes a synthesized version. The resulting typology is guided by five questions:

> *Question 1, spatial characteristics***: What are the geographical or other physical/non-physical observable traits of the particular space?**

> *Question 2, actors***: What is the nature of the actors who are exercising power within the particular ungoverned space?**

> *Question 3, genesis***: How did this particular space became an ungoverned space?**

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[386] Yochai Benkler, *Hacks of Valor: Why Anonymous is Not a National Security Threat*, FOREIGNAFFAIRS.COM (Apr. 4, 2012) http://www.foreignaffairs.com /articles/137382/yochai-benkler/hacks-of-valor?page=show.

> ***Question 4, degree of governance*: What is the level of governance that currently exists within the ungoverned space?**

> ***Question 5, degree of instrumentality*: To what level can the particular space be used by the actor operating within that space?**

Section II addressed the applicability of international law to ungoverned space. It reviewed of the myriad methods that may be used to conceptualize and confront the diverse range of questions raised by the issue. In particular, it presented the problems and opportunities that ungoverned space poses to the existing legal and operational framework. These were broken into two categories, practical and structural. The four practical problems/opportunities are: *security*; *development*; *economy*; and *human rights*. The four structural problems/opportunities are: *subjectivity*; *responsibility*; *uncertainty*; and *reciprocity*.

Section II also introduced three options, or techniques, for addressing the existing deficiencies in the law. These were: state responsibility; principled engagement; and innovation. The state responsibility argument is the least creative. It represents the orthodoxy and it applies the law as it is (*de lege lata*). For that reason it was easily critiqued as being inept in responding to the novel issues raised by state failure and ungoverned space. The second technique, principled engagement, built upon the work of Deeks and Giorgetti, and reviewed attempts to push emerging norms (*in statu nascendi*) in a particular direction, namely toward a more flexible interventionist policy. This technique is reformist. It takes the orthodox approach and attempts to progressively develop it with presumptively objective tests. In this context, the unwilling and unable standard was critically reviewed. Despite its flexibility, and the normative limits proposed by its practitioners, the second technique also has many weaknesses. For example, the unwilling or unable standard, and the principles that guide its application, have the effect of entrenching existing power disparities.

The third technique went much farther than the preceding two. It shed the received understandings of international law and attempted to radically reimagine the discipline to match the realities of ungoverned space. This involved tearing apart and reconstructing the law into what it should be (*de lege ferenda*) so that it could capture the true power and responsibility dynamics that exist. The result was a new "international law of ungoverned space" with the following set of principles for determining *how the law is made* and *to whom it applies*:

1. **The international law of ungoverned space arises out of interactions between the different actors who exercise power in that space; it is a *diffuse* law-making process that cannot be co-opted by any single actor.**

2. **The determination of who qualifies as a subject of international law in ungoverned space shall be made according to factual circumstances rather than formal categories.**

3. **All actors who exercise a non-arbitrary amount of power in ungoverned space are subject to the international law of ungoverned space.**

4. **All subjects of the international law of ungoverned space are responsible for their actions and omissions in ungoverned space.**

5. **The responsibility of subjects is determined by the amount of power that they factually exercise; with more power comes more responsibility.**

6. **There is no *unilateralism* in ungoverned space; each act or omission takes place against the backdrop of the international law of ungoverned space; it is informed by the existing legal rules and impacts but does not determine the future of the legal order applicable to the space.**

In addition, the following definition and "overarching considerations" were proposed:

> **The *international law of ungoverned space* encompasses the legal norms needed to create the conditions to attain the highest possible level of security, economic stability, human rights and development for actors operating within ungoverned spaces. It seeks to facilitate cooperative and mutually-respectful behavior among the key actors that significantly influence conditions within ungoverned spaces, including states, international organizations, informal governance actors, corporations and individuals. The law of ungoverned space should promote accountability and responsibility, coordinate activities, facilitate communication, monitor progress, provide clarity and guide behavior. In formulating the law actors should be led by the overarching considerations of effectiveness, respect for diversity, equality, justice, the persistence of international obligations, the maxim *ex injuria non oritur jus* and the imperative to *do no harm.***

The central challenge of the third technique was to innovate *within* the discipline; to stay *inside* the reasonable limits of the doctrine and to resist a slip into the domain of politics and social commentary. As Akpinarli has written with regard to her project, the difficulty is to respect "the parameters of international law while taking a fresh approach from that of

the mainstream."[387] In short, the hardest part of the radical technique was determining how to drastically alter the conversation while continuing to speak in the vernacular of international law.

In addition, eight additional challenges must be overcome if the technique is to be effective. These are:

1. **Identifying and understanding power relations in ungoverned space.**

2. **Bringing informal actors into the orbit of international law.**

3. **Innovating without the benefit of a crisis.**

4. **Preventing the legitimization of actors who have come to exercise power through illegal, unjust or illegitimate means.**

5. **Balancing self-determination with international responsibility.**

6. **Mitigating the use of force.**

7. **Avoiding trade-offs or worsening the situation.**

8. **Creating order out of uncertainty.**

Section III applied each of the three techniques to the real-world example of Somalia. It tested the underlying assumptions and analyzed each technique's application. The results were predictable. The state responsibility technique failed because it relied upon the fiction of an effective government. Without a foil for its assignment of responsibility, it lacked supplementary mechanisms to account for the various issues raised by ungoverned space. The second technique was also deficient, although it showed some positive signs. The invocation of progressive standards, for example, had the potential of increasing the power of the deliberative process and pulling it in the direction of principled engagement. Instead of making decisions based on individual prerogatives, actors participating in the constitutive law-making endeavor must make some effort to justify their acts against a set of "normative" criteria. However, the drawbacks were also apparent. First, no criteria are truly normative. Every test, including the unwilling or unable standard, and principled frameworks of the type that Deeks and Giorgetti propose, are open to subjective manipulation. Second, the technique repeats the mistake of the state responsibility doctrine by focusing almost exclusively on a presumptively effective government. The end result of the technique's application was to justify intervention in all instances. The only mitigating effect was to frame *how* the intervention will occur. On that point as well, the technique favors

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[387] AKPINARLI, *supra* note 54, at 3.

powerful external actors. Because they apply the standard, intervention takes place on their terms and serves their interests.

The innovative technique showed the most promise; however, substantial work remains. The two central innovations of the technique consist of applying the law to informal actors who exercise factual power in ungoverned space, and deriving a collaborative *law-making* process that incorporates these new actors. As applied to Somalia, the innovative technique achieved varying levels of success in overcoming the challenges to its application. The actual process of law-making remained a work-in-progress, and the vagaries of the theory will have to be resolved through practice. The endeavor to reduce *uncertainty* is also incomplete. Despite this shortcoming, the third technique represents an improvement over the preceding techniques because the on-going effort to develop the law-making process and reduce uncertainty will be guided by a devotion to the practical realities of the space. Rather than abdicate the challenge through a retreat to abstraction and fictionalization, the technique will confront these challenges at the roots.

Section IV examined the possible alternative futures that may result from the application of each of the techniques. The thesis is that the issue of ungoverned space necessitates a radical change in the way in which international law relates to its subjects, and that the third technique is the most effective response. However, in order for such a move to be taken seriously it must not disregard existing international legal structures and doctrine. If it eviscerates the distinction between law and politics it will be cast aside as heretical, and it will not be regarded as a serious attempt to solve the problem from the perspective of law. The lesser departures from existing doctrine offer fewer risks of dismissal, but they are also limited in rather obvious ways, which weakens their transformational power. Whether this innovative technique will gain widespread adherence depends on the outcome of four "battlegrounds," which are: *accuracy*; *fit*; *effectiveness*; and *projectability*. The result of these contests and the emergence of one technique over the others will have profound and lasting effects for international relations, international legal subjectivity and the general practice of international law. In particular, if applied with hope and optimism, the technique has the power to change the way law is practiced by international jurists. Rather than keeping themselves at an ironic distance from their doctrines, jurists have an opportunity to engage directly with the material and create a new future for the profession and for the discipline.