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 derives a nuanced understanding of the issue from both the security and legal literatures and then formulates three techniques—state responsibility, principled engagement and radical reimagination—for dealing with the issue through the application of international law. 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 to Ungoverned Space** ................................................... 1

**International Law and Ungoverned Space** ................................. 9

A. Preliminary note ............................................................................. 9

B. International law’s comparative advantages ................................ 11

C. Three techniques ........................................................................... 12

1. State responsibility (*de lege lata*) ......................................... 14

2. Principled engagement (*de lege in statu nascendi*) ........... 17

3. Radical reimagination (*de lege ferenda*) ................................. 20

**Conclusion** ..................................................................................... 27
INTRODUCTION TO UNGOVERNED SPACE

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. In an effort to further organize relations between themselves, these political communities have also concluded hundreds of thousands of agreements, commonly referred to as treaties, accords, compacts and conventions. “Controversial candidatures” 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 universal international agreements address the international law of outer space.

Inter-governmental or international organizations often arise out of, or are also parties to, such agreements. By one count 64,000 inter-governmental or international organizations currently exist. These organizations range widely in size, geographical representation, complexity and competence. The United Nations (U.N.), for instance, includes 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. 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.” It appears that international law, even in fragmented or imagined form, does go “boldly where no man has gone before.”

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

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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).
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.  

Historically such “lawless anomalies” 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. The most famous of these was Alsatia, “a small area west of Temple, between Fleet Street and the Thames on the site of a former Whitefriars monastery” in downtown London. It has been the subject of lore, 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.”

Despite the seemingly inexorable march toward the eradication of “refuges, sanctuaries, freetowns [and] zones of no control” the latest World Bank governance indicator dataset provides empirical evidence of the extent to which ungoverned space within states continues to constitute a “chronic international problem.” 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 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 externalities isolate the receiving state and exacerbate the negative effects of ungoverned space.

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6 Jacobs, supra note 5.
7 Id.
8 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.
9 R v. (UMBS Online Ltd) v. SOCA (May 2, 2007) EWCA Civ. 406, ¶58 (emphasis in original).
10 Jacobs, supra note 5.
13 See Robert Rotberg, Failed States in a World of Terror, 81 FOREIGN AFFAIRS 127, 128 (JUL./AUG. 2002).
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. 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. 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 rights and contravene state sovereignty. 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,” 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.

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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).


The check provided by formal law and governance is either absent or ineffective. Acts are neither strictly outlawed, nor explicitly authorized.\textsuperscript{19}

Ungoverned spaces therefore create a freedom of action that is both ripe with potential \textit{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 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.

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.\textsuperscript{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.”\textsuperscript{21} The Council on Foreign Relations (CFR) reiterated this position when it created a new \textit{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.’”\textsuperscript{22} The attention paid to ungoverned space by the policy-making community extends beyond mere rhetoric; it has become an important aspect of policy implementation. The covert use of drones to carry out targeted killing operations in Yemen, Somalia, Pakistan, Afghanistan and elsewhere, which began under the Bush administration

\textsuperscript{19} For international lawyers, this type of situation will of course bring to mind the famous \textit{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. \textit{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).


and have been increased by the Obama administration should also be seen as part of the larger commitment to counteracting the use of ungoverned space within these territories by illicit groups.

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), and the United Nations Development Program (UNDP). The U.N. Millennium Declaration directly linked human rights and good governance, and other commentators have speculated on the existence of an emerging right in international law to democratic governance. 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, 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. 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.”

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” and “order without law.” Simmering theories on multilevel, consociational and decentralized arrangements have also come to the fore. Whether the lack of an effective government represents a hindrance to effective governance is, for some, an open question. Creative

23 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 forth ten principles to maximize the impact of international engagement while minimizing unintentional harm).
26 See Samuli Seppänen, Good Governance in International Law (2003) 123.
conceptions of statehood, international legal personality and sovereignty have further altered the parameters of the debate.

For their part, international law scholars have added juridical 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 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. Importantly, Giorgetti maintains that these principles do not violate international norms on non-intervention, because to hold as much is “based on a wrong understanding of the meaning of sovereignty.” In her view, the non-intervention norm must be “assessed against the interests of other states in reducing threats to security” as well as the “existing duty of cooperation and right of interaction that exists in the international community.”

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.” 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 and the poor. 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.”

Writing at the intersection of law, security and governance, Michael Crawford and Jami Miscik posit in a 2010 Foreign Affairs article titled The Rise of the Mezzanine Rulers: The New Frontier for

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31 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).


35 Georgetti, supra note 33, at 185.

36 Id. at 188.


38 Id. at 235.
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.”\textsuperscript{39} 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”\textsuperscript{40} 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.”\textsuperscript{41} For them the “gulf between international law and local realities frustrates efforts to tackle the problems posed by mezzanine rulers.”\textsuperscript{42} 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.”\textsuperscript{43}

Sadly, 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 norm on non-intervention as it applies to “areas outside of sovereign control” (e.g. 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;”\textsuperscript{44} however, their analysis remains superficial. They call on states “to modernize international law so that it addresses the problem of ungoverned spaces,”\textsuperscript{45} 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.\textsuperscript{46}

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”\textsuperscript{47} can be expounded and put to good use. At its core the discipline is concerned with the governance of sovereign equals; but, 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, including [insert] 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

\textsuperscript{39} Crawford and Miscik, supra note 49, at 123 .
\textsuperscript{40} Id.
\textsuperscript{41} Id. at 124.
\textsuperscript{42} Id.
\textsuperscript{43} Id.
\textsuperscript{44} Id. at 130.
\textsuperscript{45} Id. at 132.
\textsuperscript{46} Id. at 130-132.
\textsuperscript{47} 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).
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 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 addresses the applicability of international law to the issue and 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 radical reimagination. 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.” 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. The conclusion 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.

48 Akpinarli, supra note 37, at 3.
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 un gover ned 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, and un governed space lacks an effective state to uphold its commitments.\(^4\)

Second, international law has as its sources: treaties, custom and general principles of law. Creating an international law applicable to un governed space would require mobilizing that architecture and applying it to a novel issue. This represents a formalistic, not to mention time-consuming process.\(^5\)

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”\(^6\) not a weapon of policy formation and change. Therefore, it might rightly be asked: Why does international law matter?

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 2002 National Security Strategy of the United States. Even that great specter of modern international law’s creation, the Treaty of Westphalia, came into being not because the various politicians convened to address prospective problems, but because they 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

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\(^4\) For the purposes of this article un governed space is defined as “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. 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 un governed 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.

\(^5\) 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 un governed space.

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 short illustration 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 range of action. Jurists 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, 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. The next step is to develop a complex international legal argument to address it. The only way for this to occur is to


53 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.
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 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. 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” consisting of a uniquely powerful vocabulary and the vernacular. Even critical international legal scholars, such as David Kennedy and Martti Koskenniemi, 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. 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.” While international law may not be the sole determinant of world order, the claim that it is an important factor cannot be denied. Second, international law lends itself to rejuvenation. It does not remain static. In the words of

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56 See David Kennedy, International Legal Structures (1986).
59 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).
60 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.
Roberto Unger: “We made it, so we can remake it.” And since “we are more than them” 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. 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.” 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” remains as powerful and true today as it did when he first made it in 1968.

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. The wide array of issue areas, to which international law has been applied form part of an emerging universal legal order. 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. As Phillip Allot has stated: “International law is the law of international society embodying the common interest of all humanity.”

C. 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 is often used. While method lines-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: orthodoxy (de lege lata); progressive development (de lege in statu nascendi); and innovation (de lege ferenda). Each refers to how far it breaks

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62 Id.
63 Id.
64 Id.
68 See id. at xxxv. This assertion forms the text of Article 2 of Allot’s proposed “Treaty on the Constituting of International Society.”
from existing practice. The first is the most conservative, representing the mainstream orthodoxy. 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 go 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.\footnote{Statute of the International Court of Justice, art. 38.}

The second technique focuses on the progressive 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.\footnote{On the issue of legislation see generally Jeremy Waldron, The Dignity of Legislation (1999).} 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 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. Practitioners of the second technique look for ideas that are sensible and useful; if they satisfy those 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.” If they are not useful, or if they venture too far, they will be “left to one side.” On the other hand, practitioners of the third technique look for more radical 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 on 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 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 radical reimagination. The state responsibility argument is the least creative. It represents the orthodoxy (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 progressively develop 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.” 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.” 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

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72 Thinking against the Box, supra note 55, at 398.
73 Id.
74 Brownlie, supra note 1, at 434.
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. \((\text{e.g. U.N. Charter, Art. } 2(7))\);
- States shall not intervene in matter within the domestic jurisdiction of any state, in accordance with the U.N. Charter \((\text{e.g. U.N. Charter, Art. } 2(4))\);
- 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 \textit{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, for instance, have been interpreted as \textit{jus cogens}, as has the principle on self-determination. Other \textit{jus cogens} obligations that might be relevant to ungoverned space are:

- 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 \textit{Convention on Long-Range Transboundary Air Pollution},\(^{78}\) 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 \textit{Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others}.\(^{79}\) 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).\(^{80}\) While not formally binding,

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\(^{76}\) See \textit{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 34.

\(^{77}\) See Brownlie, supra note 1, at 511.


\(^{79}\) 96 U.N.T.S. 271 (July 25, 1951).

the ILC Articles mirror customary international law in most respects.\textsuperscript{81} 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 (\textit{Force Majeure}) of the ILC Articles, which states:

\begin{quote}
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 \textit{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.
\end{quote}

According to Article 23, paragraph 2 of the ILC Articles, this shall not apply where “the situation of \textit{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:

\begin{quote}
Material impossibility of performance giving rise to \textit{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.\textsuperscript{82}
\end{quote}

This provision has clear relevance to ungoverned space; however, the problem with state responsibility rules is that they either exist or they do not—there is no variegation. In the case of \textit{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.

Another major issue is that in most cases, state responsibility rules persist even in the event of state failure. \textit{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:

\begin{quote}
\textit{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.\textsuperscript{83}
\end{quote}

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.\textsuperscript{84} 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

\textsuperscript{81} See generally Brownlie, \textit{supra} note 1, at 433-474.
\textsuperscript{82} ILC Articles, \textit{supra} note 80, at 76.
\textsuperscript{83} ILC Articles, \textit{supra} note 80, at 76-77.
\textsuperscript{84} See Akpinarli, \textit{supra} note 37, at 145.
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.\(^85\) While the test finds its origins in neutrality law and early writings on the law of belligerency, it lacks determinacy.\(^86\) 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.\(^87\) 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.\(^88\)

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 recently proposed a set of normative principles that would require the victim state to: prioritize consent or cooperation with the territorial state over unilateral uses of force; ask the territorial state to address the threat and provide adequate time for the latter to respond; reasonably assess the territorial state’s control and capacity in the relevant region; reasonably assess the territorial state’s proposed means to suppress the threat; and evaluate its prior interactions with the territorial state.\(^89\) 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.\(^90\)

Similar to Deeks, Theresa 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


\(^{86}\) See generally id. at 496-506.

\(^{87}\) See Rome Statute of the International Criminal Court, art. 17, 18.

\(^{88}\) See Deeks, supra note 85, at 486.

\(^{89}\) See id. at 490, 506-533.

\(^{90}\) 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.
discharge this obligation legitimates a military response.” The enforcement action taken against the Afghan Taliban, which had neither 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.” 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.”

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,” which are the following:

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.

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

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91 Reinold, supra note 32, at 245.
93 See Reinold, supra note 32, at 284-85.
94 See Giorgetti, supra note 33, at 184-85.
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.” 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.” 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.” 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 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 second technique, John Yoo asserts that international law needs to be “reworked.” 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.” 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.”

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 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 takes on the second technique 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. Each approach requires an “emergency” in order to activate itself. In many ways, the justifications read like a eulogy for non-intervention. But what have they killed? 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 for redevelopment of international law from the top-down, rather than from the bottom-up, where the real issues lay.

3. Radical reimagining (de lege ferenda)

In some ways, the radical (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. 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 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 radical 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 fiercer 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. Because the ends are practical, the means must be as well. In order to heighten security, for instance, the theory must address the security threats directly. The same can be said for other issues, such as 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.

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101 On the hypocrisy of intervention by the powerful north in the developing south see generally Akpinarli, supra note 37, at 149-228.
103 For interesting insights into the role of deviationist doctrines see generally Roberto Mangabiera Unger, The Critical Legal Studies Movement (1983).
Instead of relying on formal indicators to determine subjectivity, the radical approach subjectifies those actors that exercise actual influence based on a factual determination. The prerequisite for responsibilization is power. Rather than artificially apportioning power, the radical 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 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 radical 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, radical 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. 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 enumerated through the radical technique 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 radical 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 a new “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

104 See The Mystery of Global Governance, supra note 55, at 835.
The definition serves multiple aims. First, it clarifies the scope of the international law of ungoverned space provided by the radical technique. 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 provided by the radical reimagining of international law 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 third technique deviates so aggressively 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 new 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 radical 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**. 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 radical 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 radical 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.

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

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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 radical 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 prohibiting the use of force 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 arrangements. To deal with this issue, the international law of ungoverned space provided by the third technique 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. This is reflected in the principles. Moreover, the overarching considerations apply to any and all action taken in ungoverned space. Specifically, every

106 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.
legitimate actor is entitled to recognition and mutual respect. With more power comes more responsibility to obey the resulting rules. Engagement 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 radical 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 provided by the third technique 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, readymade 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 radical 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.107

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. Uncertainty inheres in the system, and the discipline exists in a state of perpetual development. Dissident thought of the type presented by the radical 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

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struggle for freedom.” Mobilizing these insights, we must build, construct, critique and innovate that which is lacking in our discipline. Where darkness exists, we must bring it to light.

**CONCLUSION**

The future international legal order applicable to ungoverned space is yet to be determined. 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 radical 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. 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 means to solve the dilemmas posed by ungoverned space. To be accepted, each technique must respond to this demand. 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, then it is possible for it to displace the entrenched incumbents.

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. 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. The second way takes the established orthodoxy and attempts to reform and progressively develop it in a particular direction. 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 deviation, innovation and radical reimaginaion. 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.

Imagine, for a moment, that the third technique for addressing ungoverned space is able to gain 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 situations.

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108 See id. at 414.
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.

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. If applied with hope and optimism, the radical technique has the power to change the way law is practiced by international jurists. Rather than keeping themselves at an abstract distance from their doctrines, jurists will have an opportunity to engage directly with the material and create a new future for the world and for the discipline.