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GLOBAL POLITICS REVIEW

Open Access

Journal of International Studies


Association for Research, Innovation and Social Science

Global Politics Review

Open Access Journal of International Studies

Volume 4, Issue 2, October 2018

ISSN 2464-9929

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Mazu Nation: Pilgrimages, Political Practice, and the Ritual Construction of National Space in Taiwan

*Jacob Friedemann Tischer**

Abstract: In this article, I argue that folk ritual provides a privileged site for the creation of cultural intimacy in Taiwan, specifically during pilgrimages in honor of the folk goddess Mazu. Sharing cultural intimacy allows the participants to develop a framework of meaning with which they imagine – and put into practice – a community based on the geographical contours of the island. Following Sandria Freitag’s work on colonial India, I interpret pilgrimages as public arenas in which the participants experience a sense of their collective belonging and cooperate to sketch a vision of the national imaginary. Annual Mazu pilgrimages constitute the biggest and most popular of such spaces, which is one of the reasons for why they have become stages for political representation and contestation. After situating the Mazu pilgrimages in the trajectory of Taiwanese history, I will trace their progressive integration into political processes and community imagination on the island. Finally, I will draw theoretical conclusions regarding the production of the spatially imagined community through shared ritual experience.

Keywords: Taiwan, Pilgrimage, Nationalism, Cultural Intimacy, Public Space, Practice Theory.

Received: August 18, 2018. **Accepted:** October 2, 2018. **Published:** October 31, 2018.

One pleasant afternoon, upon passing the gate leading up to one of Southern Taiwan’s major temples dedicated to the popular folk deity Mazu, Shengmumiao in Luermen close to Tainan, I caught sight of a large rock prominently placed by the temple gate. In bright red letters, this rock informed visitors that they were about to enter “Mazu’s new home” (*Mazu xin guxiang*; see photo). At the time, I innocently believed this to be a mere promotional strategy in the highly competitive field of Taiwanese popular religion, intended to attract pilgrims and donators. But the phrase also mirrors something larger, namely the Taiwanese experience itself, which for most families contains a (hi)story of making a “new home” on the island.

This paper intends to make a theoretical contribution to the literature on culture, popular religion, and politics, with particular regard to the spatial construction of a Taiwanese nation through ritual. My account synthesizes a social constructionist approach with attention to the embodiment of space in ritual.¹ With Benedict Anderson and Ernest

1 Setha Low, *Spatializing Culture: The Ethnography of Space and Place* (New York, NY: Routledge, 2016).

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Gellner,² I understand nations as socially imagined cultural projects. However, Anderson's and Gellner's theories remain vague on at least two fronts: For one, it is not entirely clear how different individuals come to develop a shared framework of national proportions. Second, the very basis of the process of imagination has been complicated by contemporary processes of migration and globalization, as well as the politics of the (post-)cold war world, which tend to de-territorialize the notion of (national) culture.³ By the same token, these processes can lead to the creation of new nationalisms, as happened in the case of Taiwanese nationalism, which is largely a product of the 1970s and after. Ultimately, focus on transnational connections raised questions concerning the durability of the "territorial nation-state as a preconstituted geographical unit of analysis for social research."⁴

But nation-states and nationalisms new and old have withstood the relativizing presence of centrifugal and global forces, in part by relying on their citizenry to create a shared sense of "cultural intimacy" that ideally links individual experience with the state project.⁵ In other words, contemporary states increasingly turn towards cultural sources of representation and identification, that is, to what Michael Billig has termed everyday or "banal" forms of nationalism.⁶ Especially in East Asia, culture has – through the selective process of recognition as cultural heritage – become an important resource for state power.⁷



"Mazu's new home." © by the author.

The trend toward cultural governance affects Taiwan as well. Though officially a secular democracy, I argue that folk ritual provides a privileged site for the creation of cultural intimacy in Taiwan, specifically during pilgrimages in honor of the deity Mazu.

2 Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, Revised Edition (London; New York: Verso, 2006); Ernest Gellner, *Nations and Nationalism*, Updated Edition (Ithaca, NY: Cornell University Press, 2009).

3 Arjun Appadurai, *Modernity at Large* (Minneapolis, MN: University of Minnesota Press, 1996).

4 Neil Brenner, "Beyond State-Centrism? Space, Territoriality, and Geographical Scale in Globalization Studies," *Theory and Society* 28, no. 1 (1999): 40.

5 Michael Herzfeld, *Cultural Intimacy: Social Poetics and the Real Life of States, Societies, and Institutions*, Third Edition (London; New York: Routledge, 2016).

6 Michael Billig, *Banal Nationalism* (London: Sage, 1995).

7 Tami Blumenfield and Helaine Silverman, eds., *Cultural Heritage Politics in China* (New York, NY: Springer New York, 2013); Akira Matsuda and Luisa E. Mengoni, eds., *Reconsidering Cultural Heritage in East Asia* (London: Ubiquity Press, 2016).

Cultural intimacy allows the participants to develop a shared framework of meaning that imagines – and puts into practice – a community based on the geographical contours of the island. Following Sandria Freitag’s work on colonial India,⁸ I interpret pilgrimages as public arenas in which the participants experience a sense of their collective belonging and cooperate to sketch a vision of the national imaginary.⁹ To this end, I will first situate Mazu pilgrimages in the trajectory of Taiwanese history. Then, I will look into their progressive integration into political processes and community imagination on the island.¹⁰ Finally, I will draw theoretical conclusions regarding the production of the spatially imagined community in practice.

Following Pierre Bourdieu,¹¹ mass participation in the Mazu pilgrimages creates an enormous reservoir of symbolic capital, which in Taiwan’s democratic society can be tapped to generate and justify political authority. But his focus on the aspects of distinction and symbolic domination renders the integrative force of collective participation in the pilgrimage illusory or, at best, epiphenomenal. This may not be the best way to capture the socially productive power of ritual. In this paper, I follow Michael Herzfeld’s proposition that people and state create cultural intimacy even in the face of contradictory or multivocal experiences. Contradictions often concern formal aspects of ritual, but they also tie worshipers together when these worshipers recognize different experiences as a cause for external embarrassment. Participation in public ritual necessarily fosters an interpretive tension in the individual between personal experience and collective meaning. The point is, however, that the experience and its interpretation are framed in a bounded, spatial and temporal context. Said context determines the reference points for “imagining” and narrating one’s experience. Thus, the notion of cultural intimacy offers to integrate the Durkheimian notion of social reproduction with a postmodern recognition

8 Sandria B. Freitag, *Collective Action and Community: Public Arenas and the Emergence of Communalism in North India* (Berkeley, CA: University of California Press, 1989).

9 Regarding the notion of public space, see Setha M. Low, *On the Plaza: The Politics of Public Space and Culture*, 1st ed (Austin, TX: University of Texas Press, 2000); Setha M. Low and Neil Smith, eds., *The Politics of Public Space* (New York, NY: Routledge, 2006); Anthony M. Orum and Zachary P. Neal, eds., *Common Ground? Readings and Reflections on Public Space, Metropolis and Modern Life* (New York, NY: Routledge, 2010).

10 In their ability to transcend ethnic and religious cleavages, Mazu pilgrimages differ from the Indian processions studied by Freitag and further elaborated by Peter van der Veer, which highlight an exclusive-communitarian and confrontational mode of political interaction, cf. Peter van der Veer, *Religious Nationalism: Hindus and Muslims in India* (Berkeley, CA: University of California Press, 1994).

11 Pierre Bourdieu, *Outline of a Theory of Practice* (London: Cambridge University Press, 1977); *Distinction: A Social Critique of the Judgement of Taste* (Cambridge, MA: Harvard University Press, 1984); “The Forms of Capital,” in *Handbook of Theory and Research for the Sociology of Education*, ed. John G. Richardson (Westport, CT: Greenwood, 1986), 241–58; *Language and Symbolic Power* (Cambridge, MA: Harvard University Press, 1991).

of diversity and agonistic pluralism.

To be sure, pilgrimage ritual does not create uniform behavior or thought. In its saturated form,¹² ritual leaves room for a panoply of different interpretations, that is, it may serve to uphold or undermine social order.¹³ In my case, Dajia Zhenlangong allows the political representatives of the Taiwanese state a central role in pilgrimage ritual, but it also uses the pilgrimage arena to challenge the government's policies. Notwithstanding differences of opinion, the arena nevertheless integrates both tendencies in one larger framework of meaning that validates the experiences of individual participants. Not all Taiwanese participate in the pilgrimage – even if many additional spectators can be said to participate virtually by watching it on television. But they all recognize the pilgrimage as something *specifically Taiwanese* which every Taiwanese is familiar with and, whether positively or negatively, identifies with Taiwan. In other words, this mutual recognition creates cultural intimacy.

Taiwan – Mazu's New Home

Mazu, which literally means “maternal ancestor,” is a more colloquial term for a deity otherwise known by her official titles as *Tianhou* (Empress of Heaven) or *Tianshang shengmu* (Holy Mother up in the Heavens). According to legend, she lived during the late 10th century in Fujian on China's south-eastern coast. As a young girl, she developed mediumic abilities to detect and save people at sea. Even though she died at age 28 in a rescue attempt, she continued, now as a spirit, to help sailors in need. People started worshipping her locally, but when an official was saved from a storm by a wondrous female figure in the sky, he petitioned the imperial court to recognize the spirit, which started the procedure for adding a deity to the officially sanctioned pantheon. Subsequently, she became well-known for her extraordinary abilities, and the court bestowed ever-longer titles on her, *Tianhou* being the highest one awarded to any female (and hence non-bureaucratic) Chinese deity. In south-east China, Hong Kong, and south-east Asia, where Mazu worship is widespread, people usually know her under the more respectful official title, but in Taiwan everyone addresses her as Mazu, expressing an intimacy otherwise rivalled only by one's enatic grandmother.¹⁴

Like the Taiwanese people of Chinese descent, Mazu has a migration background. She

12 Robert P. Weller, *Resistance, Chaos and Control in China: Taiping Rebels, Taiwanese Ghosts and Tiananmen* (London: Palgrave Macmillan, 1994).

13 David I. Kertzer, *Ritual, Politics, and Power* (New Haven, CT: Yale University Press, 1988).

14 For historical introductions to Mazu, cf. Judith Magee Boltz, “In Homage to T'ien-Fei,” *Journal of the American Oriental Society* 106, no. 1 (1986): 211–32; James L. Watson, “Standardizing the Gods: The Promotion of T'ien Hou (‘Empress of Heaven’) along the South China Coast, 960-1960,” in *Popular Culture in Late Imperial China*, ed. David Johnson, Andrew James Nathan, and Evelyn Sakakida Rawski (Berkeley; London: University of California Press, 1985), 292–324; Bodo Wiethoff, “Der Staatliche Ma-Tsu Kult,” *Zeitschrift Der Deutschen Morgenländischen Gesellschaft* 116, no. 2 (1966): 311–57.

first arrived in Taiwan with fishermen and settlers from Fujian. While the first temporary sojourners came as early as the Song or Ming dynasties, greater numbers started to immigrate in the 17th century.¹⁵ Most migrants came from the areas around Quanzhou and Zhangzhou on Fujian's southeastern coast. On their journey, the seafarers carried images of the sea goddess for protection against the dangers of the wild waters. The more famous Mazu temples in Taiwan thus claim that their oldest deity image, the "Mazu that opened Taiwan" (*Kai Tai Mazu*), was brought to Taiwan during those early days. This claim is significant insofar as it substantiates a temple's entitlement to a certain position in the contemporary hierarchy of temples, most of which compete for the same pool of pilgrims and visitors.

Temples are founded around a deity statue whose spiritual efficacy has been "divided" (*fen ling*) from a mother temple. Most of the one thousand Mazu temples in Taiwan stem from mother temples on the island, but the oldest dozen or so claim that they were directly divided from a temple in China. To recharge her power, the statue needs to return to her mother temple regularly. Local worshipers accompany her on this pilgrimage. Seniority in the logic of the Mazu cult implies more direct descent from the Ancestral Temple (*Zumiao*) in Meizhou, China, which is said to offer the best access to Mazu's divine power (*ling*). Temples considered older thus have a higher standing in the hierarchy of temples on the island and draw more visitors and their donations. At the same time, worshipers interpret the contemporary (social) success of a temple as a response to the efficacy of the temple's deity statue, which itself stands as proof of historical authenticity. Claims to precedence thus owe more to present-day popular lore (and circular reasoning) than historical record. In fact, pilgrimage is an important folk technique to justify contemporary relationships between temples in a historical jargon.¹⁶ Throughout the 20th century, several famous temples in Taiwan engaged in disputes over historic primacy.¹⁷ It is impossible to trace the truth value of these claims by modern historical method, but for the intended audience this is beside the point: What matters is the self-revealing evidence of large crowds attesting to the status of a given temple.

Folk ritual in Taiwanese society has spatial ramifications and thereby defines the identities of those who participate and those who do not. These identities are modelled on the ideal of the rural village. Household rites mark the boundaries of the domestic realm.¹⁸

15 John Robert Shepherd, *Statecraft and Political Economy on the Taiwan Frontier, 1600-1800* (Stanford, CA: Stanford University Press, 1993).

16 Hsun Chang, *Wen Hua Ma-Zu: Tai-Wan Ma-Zu Xin Yang Yan Jiu Lun Wen Ji*, Chu ban (Taipei Shi: Zhong yang yan jiu yuan min zu xue yan jiu suo, 2003).

17 Xianghui Cai, *Mazu Xin Yang Yan Jiu*, Zhe Xue Zong Jiao (Taipei Shi: Xiu wei zi xun ke ji gu fen you xian gong si, 2006); P. Steven Sangren, "History and the Rhetoric of Legitimacy: The Ma Tsu Cult of Taiwan," *Comparative Studies in Society and History* 30, no. 04 (October 1988): 674.

18 Stephan Feuchtwang, "Domestic and Communal Worship in Taiwan," in *Religion and Ritual in Chinese Society*, ed. Arthur P. Wolf (Stanford, CA: Stanford University Press, 1974), 105–29.

They are also meant to uphold a hierarchical social order within the family. Theoretically, not being involved in domestic ritual marks one as an outsider to the family. One level up, communal ritual integrates the families of a settlement, that is, people in personal contact with one another. For example, birthday processions of the patron deity of a village or neighborhood delineate the territorial boundaries of a settlement.¹⁹ The community temple is located in the center of the village, while shrines dedicated to the earth god and the five camps of spirit soldiers guard the borders against intruders.

Pilgrimages, on the other hand, differ from purely communal rites in that they connect and familiarize strangers.²⁰ Historically, the social and cultural integration achieved through pilgrimage resulted from the specific political liminality that marked Taiwanese society in the 18th and 19th centuries. In the absence of a strong state managing intercommunal affairs, different communities generated links with each other through ritual exchange relationships. As intercommunal strife and resource competition played out in the religious arena,²¹ so did social cooperation. Pilgrimages started out between allied communities to strengthen their political ties; eventually, they also aligned with marriage patterns²² and economic relations. In its early days, the famous Dajia pilgrimage – Taiwan’s biggest pilgrimage today – connected the farmers of the Taichung area with Beigang, the major cattle market in southwestern Taiwan.²³ Because people of different ethnic provenance worshiped her, the goddess Mazu was especially well-equipped for the integrative workings of pilgrimage. She thus became the focus of many intercommunal cults.²⁴ But Mazu not only transcended ethnic boundaries, she was also officially sanctioned and hence a safe choice for more exposed, supra-local cults.

As public arenas, pilgrimages facilitated between face-to-face relational communities and the ideological construction of a wider Taiwanese identity. Taiwan’s colonial integration into the Japanese empire (1895-1945) provided the historic occasion against which a pan-Taiwanese identity could first be conceived,²⁵ although the imagination of a

19 Meirong Lin, *Mazu Xin Yang Yu Taiwan She Hui*, Chu ban, Ren Wen 15 (Taipei Xian Luzhou Shi: Bo yang wen hua shi ye you xian gong si, 2006), 27–56; P. Steven Sangren, *History and Magical Power in a Chinese Community* (Stanford, CA: Stanford University Press, 1987), 55–60.

20 Sangren, *History and Magical Power in a Chinese Community*, 61–90.

21 Harry J. Lamley, “Subethnic Rivalry in the Ch’ing Period,” in *The Anthropology of Taiwanese Society*, ed. Emily Martin Ahern and Hill Gates (Stanford, CA: Stanford University Press, 1981), 282–318.

22 Lin, *Mazu Xin Yang Yu Taiwan She Hui*, 15.

23 Ying-fa Hung, *Jie du Dajia Ma: Zhan hou Ma zu xin yang de fa zhan* (Taipei Shi: Lan Tai, 2010), 38.

24 Lin, *Mazu Xin Yang Yu Taiwan She Hui*; Fang-long Shih, “From Regulation and Rationalisation, to Production: Government Policy on Religion in Taiwan,” in *What Has Changed?: Taiwan before and after the Change in Ruling Parties*, ed. Dafydd Fell, Bi-yu Chang, and Henning Klöter, vol. 4, *Studia Formosiana* (Wiesbaden: Harrassowitz, 2006), 278; Jian-chuan Wang and Shi-wei Li, *Taiwan Mazu miao yue lan*, Chu ban edition (Taipei Xian Luzhou Shi: Bo yang wen hua shi ye you xian gong si, 2000), 67–69.

25 Harry J. Lamley, “Taiwan under Japanese Rule, 1895-1945: The Vicissitudes of Colonialism.,” in

national identity did not spread widely until the 1970s. Helped by a growing network of railroads which facilitated travel between different parts of Taiwan, Beigang Chaotiangong adopted the position of an island-wide center of pilgrimage for the faithful.²⁶ While travel across the Taiwan Strait to China was technically still possible, it was more difficult and much less desirable politically. Religious activity thus began to take the physical borders of the island of Taiwan as its frame of reference. Mazu, for example, took on a role of guardian spirit for the island, as evinced by popular stories after World War II according to which she had caught US American bombs in her gown.²⁷

The Political Lives of Mazu Temples Under the KMT

Taiwan's occupation in 1945 by the Chinese Nationalist Party Kuomintang (KMT), a party devoted to secularist ideology, forced local folk customs into opposition. Since communal ritual demarcates interior from exterior realms of the community, it offered a position to challenge the colonizing force of the KMT. The party sought to break the power of the old, landed elites and land-holding temples with land reforms and restrictive legislation.²⁸ For instance, the "Measures to improve popular custom in Taiwan province" (*Taiwan sheng gaishan minjian xisu banfa*) of 1963 reduced the number of annual festivals to one per temple, which seriously undermined the subsistence of religious specialists, such as performance and opera troupes. The new regulations also encouraged temples to register as professionally managed legal corporations.²⁹ In many cases, this ended the previous practice of rotating responsibility for the temple among the local community's elites. Contrary to the KMT's intentions, however, local communities found creative ways around these strictures and continued to participate in temple ritual.³⁰

Nonetheless, KMT rule had profound effects on popular temples. As an outside force, the KMT could not rely on popular appeal but maintained its grip on local politics through creating factions which it managed in a divide-and-rule style.³¹ Through distributing favours and resources, factions were (and to some extent still are) able to control the

Taiwan: A New History, ed. Murray A. Rubinstein, Second, expanded edition (New York: Routledge, 2006), 201–60.

26 Elana Chipman, "Our Beigang: Culture Work, Ritual, and Community in a Taiwanese Town" (Ph.D. Thesis, Cornell University, 2007), 72–105.

27 Lin, *Mazu Xin Yang Yu Taiwan She Hui*, 45–46.

28 David K. Jordan, "Changes in Postwar Taiwan and Their Impact on the Popular Practice of Religion," in *Cultural Change in Postwar Taiwan*, ed. Stevan Harrell and Chun-chieh Huang (Boulder, CO: Westview Press, 1994), 137–60; Gary Seaman, *Temple Organization in a Chinese Village* (Taipei: Oriental Cultural Service, 1978).

29 Wang and Li, *Taiwan Mazu miao yue lan*, 55–57.

30 Emily Martin Ahern, "The Thai Ti Kong Festival," in *The Anthropology of Taiwanese Society*, ed. Emily Martin Ahern and Hill Gates (Stanford, CA: Stanford University Press, 1981), 397–425.

31 Joseph Bosco, "Taiwan Factions: Guanxi, Patronage, and the State in Local Politics," *Ethnology* 31, no. 2 (April 1992): 157–83.

voting behaviour of the rural electorate on behalf of the party in power. On their end, these local factions depended on local sources of legitimation and wealth to increase their political clout. In many places, factions took over the leadership of communal temples, especially after the 1963 legislation had opened them for professionalized management.³² As temple managers, faction politicians were more invested in maximizing the resources of the institution than in following the government's secularizing provisions.

Taiwan's economic take-off in the 1970s and 1980s further transformed society and endowed a middle class with the means and motivation to invest in their spiritual advancement. Professional temple managers were in some cases now able to expand a temple's sphere of influence to include networks of individual *believers* who came from all over Taiwan. It effectively turned temples into cultural-economic enterprises, often at the expense of the temple's communal integrity.³³ On the other hand, the increasing importance of temples at the top of the religious hierarchy went hand in hand with the growth of pilgrimage activities, which bring people from outside the community to a temple, the focal point of the ritual. Participation in pilgrimage allows believers to express their individual devotion; as such, these ritual complexes are particularly well-suited to Taiwan's mobile industrial society.³⁴ Especially the weeks around Mazu's birthday on the 23rd day of the third lunar month, a time known in Taiwan as "Mazu craze" (*feng Mazu*), are packed with ritual events. In line with this, pilgrimage centers came to play a much bigger representational role in Taiwan's politics, a role which the central government soon started to recognize.

The 1970s saw a shift in the KMT government's appreciation of local culture as part of a larger "indigenization" (*bentuhua*) of national culture. Then-Premier Chiang Ching-kuo, son of President Chiang Kai-shek, developed an especial affinity for Chaotiangong and its "Nail of the Filial Son."³⁵ The later President (1978-1988) visited Beigang Chaotiangong for a total eleven times throughout the 1970s until 1981. In addition to showcasing his extraordinary filial piety, the visits also attested to his image as a "man of the people."³⁶ For the temple, and by extension the entire Mazu cult, the visits entailed an implicit recognition by the government. The annual Dajia pilgrimage to Beigang, which had been opened to the general public in 1974, then quickly developed into Taiwan's most popular

32 Chipman, "Our Beigang"; Hung, *Jie du Dajia Ma*; Seaman, *Temple Organization in a Chinese Village*.

33 Chipman, "Our Beigang"; Johanna Pennarz, *Mazu, Macht und Marktwirtschaft: die religiöse Organisation im sozialen und ökonomischen Wandlungsprozess der ländlichen Gesellschaft Taiwans* (München: Akademischer Verlag, 1992).

34 Pennarz, *Mazu, Macht und Marktwirtschaft*, 58–83.

35 D.J.W. Hatfield, *Taiwanese Pilgrimage to China: Ritual, Complicity, Community* (New York, NY: Palgrave Macmillan, 2010), 47–80.

36 Ching-kuo Chiang, *President C. K. Chiang: Man of the People. Dedicated to Mr. Chiang Ching-Kuo on the Occasion of His Inauguration as the Sixth President of the Republic of China May 20, 1978*. (Taipei: China Publishing Company, 1978).

ritual complex. Today, it attracts more than 100,000 participants per year.³⁷

In democratic Taiwan, high officials such as mayors, party leaders, and even the President participate in the mediatized rituals of Taiwanese temple religion. Before elections, temples like Zhenlangong in Dajia double as crucial campaigning battlegrounds for presidential candidates. The participation of office-seekers and holders has become part of established political procedure. In 1999, all four presidential candidates participated in the live-broadcast opening rituals of the Dajia pilgrimage.³⁸ Before the Presidential elections 2004, President Chen Shui-bian (Democratic Progressive Party, DPP), Soong Chu-yu (People First Party, PFP), and Wang Jin-pyng (KMT), speaker of the Legislative Yuan, attended the Dajia pilgrimage.³⁹ In 2007, KMT presidential candidate Ma Ying-jeou carried the palanquin together with DPP heavyweights Lu Hsiu-lien and Su Tseng-chang.⁴⁰ Fighting for the DPP bid, Su unsuccessfully tried to enlist the support of the Dajia-led Mazu Fellowship organization (*Mazu lianyi hui*).⁴¹ Instead, the Mazu Fellowship publicly endorsed Ma Ying-jeou, the clear favorite and later winner of the elections. To thank for her assistance, Ma helped lift Mazu's palanquin on the start of the Dajia pilgrimage on 5 April 2008.⁴² Since the pilgrimage occurred just days before Ma assumed office on 20 May, this act also served as an informal but popularly resonant means to "inaugurate" his presidency.⁴³

As these examples show, the pilgrimage also figures as a public arena in which different ideas of the community of believers are presented and negotiated. Chen Shui-bian, for example, stood for a more Taiwan-centric politics that reflected the ongoing process of identity formation on the island. Ma Ying-jeou, on the other hand, ran on a platform of increasing economic cooperation with neighboring China. Yet, irrespective

37 Hsun Chang, "Between Religion and State: The Dajia Pilgrimage in Taiwan," *Social Compass* 59, no. 3 (September 1, 2012): 305.

38 Hung, *Jie du Dajia Ma*, 263–67.

39 Cheng-tian Kuo, *Religion and Democracy in Taiwan* (Albany, NY: State University of New York Press, 2008), 55. Chen later won the election against the combined ticket of Lien Chan (KMT) and Soong Chu-yu (vice-presidential candidate).

40 Jie-fan Chang, "Mazu Raojing. Dajia Ma Raojing Qijia Lü Su Ma Tong Tai Fujiao," *TVBS News*, April 22, 2007, <http://news.tvbs.com.tw/entry/327227>.

41 Hung, *Jie du Dajia Ma*, 273.

42 Xie-bing Chuang, "Mazu Raojing. Ma Qin Lin Shangjiao Dianli Zhenlangong Jin Fang Bianpao," *TVBS News*, April 5, 2008, <http://news.tvbs.com.tw/entry/165323>.

43 The prominence and media visibility of the Dajia pilgrimage affords the temple chairman, Yen Ching-piao, with enormous political influence as a power broker. Yen, a local faction politician with business interests in China and ties to organized crime, has his own agenda and uses Zhenlangong as his power base. Limitations of space do not allow me to go into detail here. For more on this issue, see Hung, *Jie du Dajia Ma*; Percival Santos, "Inventing the Public Enemy: The Gangster in Taiwanese Society, 1991–2006." (Ph.D. Thesis, London School of Economics and Political Science, 2007), <http://etheses.lse.ac.uk/965/>; Jacob Friedemann Tischer, "The Invisible Hand of the Temple (Manager): Spiritual Capital, Corruption, and Political Power in Taiwan's Mazu Pilgrimages" (Article under peer review, 2018).

of their particular political message, both relied on the ostensibly neutral arena offered by temple ritual to sustain their popular appeal. The pilgrimage provides a condensed social space that enjoins political representatives and worshipers in the same symbolic realm, the house of the goddess Mazu. The ritual space of the temple provides political representatives with an opportunity to present themselves to the goddess – and to the wider audience, the people. In contemporary Taiwan, public expressions of one’s “love for Taiwan” and their practical implementation are expected of any candidate hoping to get elected.⁴⁴ What better way to show one’s identification with Taiwan than joining the common people in a public ritual dedicated to a deity who is popularly viewed as Taiwan’s guardian?

Producing Space and Spectacle in the Mazu Pilgrimage

Mazu pilgrimages are annually repeated events of about one week’s duration. On their path, the pilgrims map out a particular, sacred spatial area. They visit temples along the way, where the local faithful welcome the palanquin of the goddess with fireworks and performance troupes. Each visit is inaugurated, celebrated, and ended with an elaborate set of ceremonial rites. Most participants of the massive eight-day Dajia pilgrimage nowadays take part only in a small portion of the whole ritual journey and travel by car or bus in between events. Many casual visitors come for the carnival-like atmosphere, for sightseeing, entertainment, and the night markets that inevitably spring up in front of temples. Others take the pilgrimage more personal and serious; they make the pilgrimage on foot, with only short bits of rest inside whichever temple Mazu stays at for a few hours that night. For participants in another large, annual pilgrimage, walking the entire distance of 350 km from Baishatun to Beigang and back becomes a source of pride. For nine or ten days, they walk for up to 16 hours per day. As I can attest from personal experience, the entailing fireworks and festivities do not permit much sleep during the time of rest, either. Sacrifice and transcending one’s physical limitations here become important validating factors for individual spiritual experience,⁴⁵ but they also let one join a larger community of participants.

Furthermore, the spatial orientation of Mazu pilgrimages in Taiwan reveals another peculiarity: The important pilgrimages all lead to the south. Of course, there are historic reasons for that; after all, the first Chinese settlements were established on the Chianan Plain in southwest Taiwan. Today, however, going on pilgrimage to Mazu temples in the

44 Dafydd Fell, “Inter-Party Competition in Taiwan since the 1990s: Despite the Change in Ruling Party in 2000, Most of the Salient Issues of the 1990s Remain on the Political Agenda,” *China Perspectives*, no. 56 (2004): 3–13.

45 Mei-Huan Lu, “Ritual Construction of the ‘Community’ and the Arena: Multiple Identities of a Mazu Pilgrimage in Taiwan” (Ph.D. Thesis, Bielefeld University, 2005), 130–39, <http://bieson.ub.uni-bielefeld.de/volltexte/2005/696/container.tgz>.

south has the additional symbolic layer of paying homage to the roots of the Taiwanese experience of colonization and emancipation from it. The area around Chiayi, Yunlin, and Tainan is the “holy land” of the cult (*Mazu shengyu*) but is also associated most strongly with Taiwanese local culture and the quest for independence. The pilgrimage pattern thus reveals a postcolonial ritual geography whose central places lie on the periphery of the political geography with its metropolis in the north, Taipei, which in the south is mockingly called “Land of the Heavenly Dragon” (*Tianlongguo*), a reference to the Chinese imperial court in Beijing.⁴⁶

That people from this “Chinese” north go on pilgrimage to the “Taiwanese” south reverses the established hierarchies of power on the island. But it also carries strong symbolic implications of national integration and reconciliation, especially since the civic Taiwanese nationalism of President Lee Teng-hui (1988-2000) included the “Mainlanders” (*Waishengren*) of old as “New Taiwanese” (*Xin Taiwanren*).⁴⁷ Ma Ying-jeou, for example, who had won the 1998 mayoral election in Taipei on his claim to be a “New Taiwanese,” also pushed his association with Mazu when he ran for president in 2008. Like him, the goddess had been born outside of Taiwan, and yet the Taiwanese had embraced her – much to their benefit, of course. He vowed to take care of every individual citizen, just like the goddess.⁴⁸ His opponent in the next elections, Tsai Ing-wen (DPP) used very similar language in 2011.⁴⁹ Both clearly appealed to Mazu as a forceful symbol to represent Taiwanese-ness.

For many younger people who were subjected to a China-centric curriculum in school, walking on pilgrimage is one form of exploring the notion of “homeland” and filling it with concrete, experiential content. Many urban youths identify with Taiwan but feel alienated from its past and rural culture. Pilgrimages are appealing in that they promise to connect individualized, cosmopolitan urbanites with Taiwan’s historic experience and traditional culture. The pilgrimage conjoins various forms of popular culture. Here, the rural cultural stereotypes collectively assembled in the term *Taike* routinely meet the educated attitude of believers who seek spiritual reflection and moral attainment. *Taike* culture refers to such activities as the lighting of vast amounts of firecrackers, enjoying shows of self-immolating spirit mediums and Techno-dancing gods, and displays of strippers for the

46 Hsin-I Sydney Yueh, *Identity Politics and Popular Culture in Taiwan: A Sajian Generation* (Lanham, MD: Lexington Books, 2016), 224.

47 Shih-shan Henry Tsai, *Lee Teng-Hui and Taiwan’s Quest for Identity* (New York, NY: Palgrave Macmillan, 2005), xii–xiii, 90.

48 Zhong guo ping lun xin wen wang, “Dao jiao zong hui, Zhen lan gong chu mian ting Ma Chang mian shi fen sheng da,” China Review News, January 28, 2008, <http://hk.crntt.com/doc/1005/5/6/5/100556544.html?coluid=7&kindid=0&docid=100556544>.

49 Zi you shi bao, “Xiao Ying: Zheng fu yao xiang Mazu zhao gu ren min,” Liberty Times Net, December 6, 2011, <http://news.ltn.com.tw/news/politics/breakingnews/576394>.

gods – in short, *renao* or “hot-and-noisy” spectacle.⁵⁰ For locals as well as visitors, this situation creates an ambiguous mix of embarrassed awareness of the “crudeness” of the cultural performances in light of Taiwan’s “modern” high culture in the north, but it also fosters the “assurance of common sociality” characteristic of cultural intimacy.⁵¹

Occasionally, the government directly sponsors pilgrimages to accompany and reinforce specific political occasions. In 1987, the central government enlisted the Beigang Mazu to conduct an official tour of inspection (*raojing*) around the island to celebrate the millennial anniversary of Mazu’s apotheosis.⁵² This marked the first time that a pilgrimage mapped out the spatial borders of the island in the context of a national celebration – an early attempt to reconcile the contradiction between the government’s ideology as representing China, where Mazu was born, and the reality of its effective restriction to Taiwan. Coincidentally or not, 1987 also saw the end of martial law and the transition to the first Taiwan-born president, Lee Teng-hui (KMT). Again in 2011, the government sponsored an island pilgrimage for the centennial birthday of the Republic of China, the official regime on the island. Locally organized by Lin Bo-qi, a teacher from my field site, Hsinkang village in Chiayi County, a few hundred people walked the along the entire coast line for a total of 25 days.⁵³

The changing organizational context of these two nation-wide pilgrimages reflect a broader shift in Taiwanese politics. Since the democratization and indigenization of Taiwan’s polity in the 1990s, the government has been reinventing the island as a nation of communities and their particular local cultures.⁵⁴ This model is intended to emphasize Taiwan’s difference from the PRC’s claim on the island, which is itself based on the assertion of cultural uniformity between China and Taiwan. Within the domestic context, however, acknowledging the importance of local traditions increases the visibility of localities in the government’s legitimation structure, while it simultaneously enhances competition among them for public funding. This incentivizes local actors to commodify cultural resources. Taichung county is a good example for heavily promoting its Mazu

50 For a discussion of the term *Taike* see also Tung-hung Ho, “*Taike* Rock and Its Discontent,” *Inter-Asia Cultural Studies* 10, no. 4 (2009): 565–84; Jacob Friedemann Tischer, “Guest in One’s Own Home: The *Taike* as the Significant Other of Taiwanese Modernity” (2017), https://www.academia.edu/35706101/Guest_in_one_s_own_home_The_Taike_as_the_Significant_Other_of_Taiwanese_Modernity; Hsin-I Sydney Yueh, “When Localism Meets Racism: The Controversy Caused by the Music Video *Foreigner*,” *East Asian Journal of Popular Culture* 3, no. 2 (August 1, 2017): 215–30, https://doi.org/10.1386/eapc.3.2.215_1; Yueh, *Identity Politics and Popular Culture in Taiwan*.

51 Herzfeld, *Cultural Intimacy*, 3.

52 Wang and Li, *Taiwan Mazu miao yue lan*, 163.

53 Pilgrims usually only walk on the island’s Western side, where most of the population lives and the historically significant temples are located. There are much less people and famous temples on the East coast. Lin claimed that, in total, about 100,000 people had participated in the event.

54 Hsin-yi Lu, *The Politics of Locality: Making a Nation of Communities in Taiwan* (London: Routledge, 2002).

tradition, especially the annual Dajia pilgrimage.⁵⁵ Mazu has reached a level of popularity such that the DPP-led central government chose her pilgrimages as one of twelve religious events representing Taiwanese culture, designed in 2001 to increase domestic tourism.⁵⁶ Clearly, the goddess Mazu has become important symbolic currency in the local and national redefinition of Taiwanese culture.

To be sure, invoking a national community does not exhaust the range of interpretations borne in Mazu pilgrimages. Being claimed by the Chinese government makes Mazu a dubious ally for the Taiwanese national case, after all.⁵⁷ Indeed, that Dajia Zhenlangong lobbied intensely for the Taiwanese government to open direct travel and business links to China in 2000 points to Mazu lending her support for approaches to meaning-making beyond Taiwan.⁵⁸ Taiwanese pilgrimage to China has thus been variously interpreted as creating a pan-Minnan cultural identity or a transnational matrifocal space, both of which would transcend a purely Taiwanese national identity.⁵⁹ These approaches are problematic because the overseas activity of Taiwanese temples cannot simply be reduced to China: Beigang Chaotiangong, for instance, has established branch temples among overseas Taiwanese communities in South Africa, Brazil, and San Francisco in the United States.⁶⁰ What is more, Xingang Fengtiangong held a Mazu parade in New York in 2007, which aimed at generating support for Taiwan's then-application to become a member of the United Nations.⁶¹

Taiwanese Mazu temples are active beyond the confines of the national community. Still, the relevance of pilgrimages remains largely domestic, as by far most of the pilgrims travel only *within* Taiwan. And when temples create branch temples in other countries, they take on the proud role of harbingers exporting *Taiwanese* Mazu culture. After all, the Taiwanese temples introduce Taiwanese ways of worship and religious aesthetics even

55 Hung, *Jie du Dajia Ma*.

56 Shih, "From Regulation and Rationalisation, to Production," 277.

57 Hsun Chang, "Multiple Religious and National Identities: Mazu Pilgrimages across the Taiwan Strait after 1987," in *Religion and Nationalism in Chinese Societies*, ed. Cheng-tian Kuo (Amsterdam: Amsterdam University Press, 2017), 373–96.

58 Mayfair Mei-hui Yang, "Goddess across the Taiwan Strait: Matrifocal Ritual Space, Nation-State, and Satellite Television Footprints," *Public Culture* 16, no. 2 (April 1, 2004): 209–38.

59 Murray A Rubinstein, *The Revival of the Mazu Cult and of Taiwanese Pilgrimage to Fujian* (Cambridge, MA: Harvard University, Fairbank Center for East Asian Research, 1994); P. Steven Sangren, "Anthropology and Identity Politics in Taiwan: The Relevance of Local Religion," in *Religion and the Formation of Taiwanese Identities*, ed. Paul R. Katz and Murray A. Rubinstein (New York, NY; Basingstoke: Palgrave Macmillan, 2003), 253–87; Yang, "Goddess across the Taiwan Strait."

60 Jonathan H. X. Lee, "Transnational Goddess on the Move: Meiguo Mazu's Celestial Inspection Tour and Pilgrimage as Chinese American Culture Work and Vernacular Chinese Religion" (Ph.D. Thesis, University of California, Santa Barbara, 2009).

61 Chang, "Multiple Religious and National Identities: Mazu Pilgrimages across the Taiwan Strait after 1987," 386–90.

when they build shrines in China. Taiwanese abroad recognize Mazu as a symbol linking them back to their home. The matrifocal space created around the goddess is thus more aptly described as generating the image of a Taiwanese “motherland.” Annual pilgrimages in Taiwan map out this space and endow it with recurring factuality. Mazu shrines abroad remind one of Taiwan.

The Ritual Production of Symbolic Space

Pilgrimage ritual in Taiwan connects an individual with a collective experience. Insofar as participation alludes to the autobiographical, spiritual work of the participant to produce meaning, it is an act of making the self, whether reflexive or predisposed, to the extent that it relies on symbols being reified into concrete, possessable entities, such as symbolic capital.⁶² At the same time, this individual experience can only be realized in the presence of others – it is a product of social interaction – and is hence restricted by social structures, i.e., Bourdieu’s “structured structures predisposed to function as structuring structures.”⁶³ In this vein, pilgrimage creates a community and social structure of pilgrims even though they each may be motivated by individual spiritual gains more than by the expectation of social conjunction. Both are intricately connected; the individual transformation achieved in pilgrimage is built on the capacity of a group of pilgrims to incorporate as well as transcend the individual pilgrim. Pilgrimages bring into close contact people who did not previously know each other. Their communally fashioned “social intimacy”⁶⁴ pervades the formation of roles or habitū as mediators between structures and individual practices.

Social intimacy does not automatically lead to the streamlining of individual experiences envisioned by Victor Turner when he coined the notion of *communitas* to describe the unifying effects of pilgrimage.⁶⁵ The Taiwanese pilgrims do not simply take a break from their ordinary selves; they do not even create a consensus of meaning concerning their religious experience. For example, pilgrimage ritual is conducted in the local dialect of Taiwanese Minnan and thus clearly separates its participants by dialect group, privileging Minnan speakers over non-speakers. Rather than bracketing the politics of social life, the pilgrimage provides a public arena of condensed social space and time in which the participants continue to pay attention to the structures, identities, and conflicting interests that pervade civil society in everyday life.⁶⁶ Consequently, the Mazu pilgrimage does not

62 Beverley Skeggs, “Exchange, Value and Affect: Bourdieu and ‘The Self,’” *The Sociological Review* 52, no. 2 (2004): 75–95.

63 Bourdieu, *Outline of a Theory of Practice*, 72.

64 Herzfeld, *Cultural Intimacy*.

65 Victor Turner, *The Ritual Process: Structure and Anti-Structure*, Lewis Henry Morgan Lectures, 1966 (Chicago, IL: Aldine, 1969).

66 John Eade and Michael J. Sallnow, eds., *Contesting the Sacred: The Anthropology of Pilgrimage* (London; New York, NY: Routledge, 1991); Lu, “Ritual Construction of the ‘Community’ and the Arena.”

create a state of anti-structure outside everyday social experience, as Turner suggested; instead, it figures as an *extension* of social structures under particular circumstances, that is, in a sacred or festive spirit. Social structures and identities inform the different meanings the pilgrimage takes on for individuals. Of course, ritual events set serious pilgrims apart in time and space from everyday life. Pilgrimage for them becomes a transformative physical experience, indexed by blistered feet and collections of temple flags adorning the pilgrims' backpacks. Even so, the pilgrims continue to experience differences in status and identity that inform the meaning they give to their embodied experience.⁶⁷ Occasional visitors, while perhaps not as deeply immersed, engage pilgrimages as spectacular and fun (*hao wan*) events that promise a quick break from everyday routine. For local vendors, pilgrimages signal important economic opportunities. For politicians, they present occasions to take on a visible, representative role.

Precisely because all these interests and experiences coalesce in a single multivocal event (or series of events), ritual has world-building powers.⁶⁸ In the words of Clifford Geertz, it infuses symbols with such authority and actuality that they appear "uniquely realistic."⁶⁹ This creative, reality-shaping tendency of ritual has important spatial ramifications, for space as a conceptual entity depends on the experience of boundedness translated into symbolic metaphors. These metaphors appear real to the individual to the extent to which they are affirmed by a reference group or institution. As mentioned earlier, identities in Taiwan extended progressively from family to settlement and ethnic community, as determined by shared language and cultural symbols, such as those that mark the differences between speakers of Minnan or Hakka. When these different communities jointly participate in ritual events, they create an additional layer of identification above the linguistic community, a layer which coincides with the territorial (or national) boundaries of Taiwan and which is symbolized by the unifying goddess Mazu.⁷⁰ Worshiping together has a long history of defusing longstanding ethnic antagonisms in Taiwan.⁷¹ The symbol, Mazu, thus gained increasing authenticity through historic events being translated into "mythic" form: For example, Mazu protected Taiwanese soldiers fighting in the Japanese army – but not their Japanese combatants – and the entire island population during the Second World War when she caught bombs in her gown.⁷²

The democratization of the political system since the 1990s has established a new

67 Hsun Chang, "Incense-Offering and Obtaining the Magical Power of Qi: The Mazu (Heavenly Mother) Pilgrimage in Taiwan" (Ph.D. Thesis, University of California, Berkeley, 1993).

68 Adam B. Seligman et al., *Ritual and Its Consequences: An Essay on the Limits of Sincerity* (Oxford; New York, NY: Oxford University Press, 2008).

69 Clifford Geertz, *The Interpretation of Cultures: Selected Essays* (New York, NY: Basic Books, 1973), 90, 118–23.

70 Lin, *Mazu Xin Yang Yu Taiwan She Hui*.

71 Shih, "From Regulation and Rationalisation, to Production," 278–79.

72 Lin, *Mazu Xin Yang Yu Taiwan She Hui*, 45–46.

political framework and allowed a more Taiwan-centered reading of Taiwanese history, one of emancipation from colonial domination. This localization of history, by affecting the cultural and political imagination of the island, is also a way of appropriating space: No longer a colony or province of an outside power, Taiwan is now claimed by a sovereign, liberal-democratic nation-state characterized by internal ethnic, cultural, and linguistic diversity. In the face of mounting Chinese pressure, democracy has become one of the key legitimizing factors for Taiwan's continued independence internally and externally. Political power gains legitimacy by association with popular cultural symbols; in Taiwan, politicians try to connect their image with Mazu. This can be read as an act of appropriation, but in a democratic space where election to office depends on popular attitudes the goddess is not easily dominated by any single interpretation. In fact, in return for a prominent role on the ritual stage at the start of the Mazu pilgrimage, the state officials or election candidates must submit to the authority of the goddess – they have to ask for her permission to enter the temple and help in lifting her palanquin. And the audience-at-large of pilgrims certainly develop their own interpretation of the events that unfold before their eyes.⁷³

But official endorsement and participation in the pilgrimage elevates the symbolic standing of the Mazu pilgrimage and ties it to political legitimation and the spatial reproduction of the state through democratic elections. Moreover, the state's promotion of culture creates an outward reflection of Taiwanese culture to the Taiwanese themselves, an image which centrally features the pilgrimages as one of twelve representative calendar events. That is, Mazu pilgrimages affect what it officially means to *be* Taiwanese. Furthermore, during election campaigning the main agents of Taiwan's representative democracy rely heavily on the visibility and popular appeal of temple ritual. In a democratic state that reproduces itself spatially and symbolically through national elections, temples as campaign stages and ballot-casting locations have a crucial part in the process. On the other hand, this inclusion in the democratic apparatus enables Mazu temples and their managers to carve out a space of sovereignty vis-à-vis the state. The managers of powerful temples become themselves highly influential political actors who take part in the negotiation processes of power and individual political distinction. The examples of Chiang Ching-kuo's visits to Beigang, presidential candidates' participation in pilgrimage ritual, and the temple manager's cooptation of Zhenlangong as his personal power base suggest that pilgrimages are multivocal stages for several competing interests and their renditions of space.

73 Chang, *Wen Hua Ma-Zu*; Hung, *Jie du Dajia Ma*. For instance, some visitors voice criticism of the overt political instrumentalization of the temple by its manager, Yen Ching-piao, while downplaying their own political role in the ritual event.

Conclusion

Despite their parochial interests, the political activities of the actors mentioned above have contributed to the proliferation of a national culture.⁷⁴ This national culture now includes the popular identification of Mazu pilgrimages with a spatial imagination of Taiwan as one ritually bounded community. In Michael Herzfeld's words, pilgrimages provide the common ground that dissolves the notion of power in modernity and lies at the heart of cultural intimacy.⁷⁵ At the same time, pilgrimages clearly play out in a spatial frame of reference that creates an arena for social interaction. The metaphor of the public arena as suggested by Sandria Freitag implies a space open for interpretive multivocality.⁷⁶ In Taiwan, the pilgrims may assign different meanings to their personal experience and role in the arena. But they all engage it as a space to negotiate the relationship of the self within the wider community of believers. Political arenas such as pilgrimages allow face-to-face interaction to cumulate into a larger, imagined community even when they do not create outright *communitas*. What is more, this conceptual openness for multiple meanings reflects in the setup of the nation itself, which consists of multiple local communities and their cultural manifestations.⁷⁷ That is, relying on a cultural form of nationalism shapes the ways in which the national community is imagined in democratic Taiwan.

In all this diversity, even a disaggregated form of nationalism necessarily relies on the unifying power of certain cultural symbols. I suggest that in democratic Taiwan the very institutionalization of multivocality in an arena like the pilgrimage is such a symbol of unity. The participation of democratically elected political representatives in ritual directly links the pilgrimage with other, secular rituals that contribute to making the nation, the most crucial of which in democratic Taiwan is casting the election ballot. In this context, it should not come as a surprise that temples often *are* the places where votes are cast. Institutionally as well as symbolically, Mazu temples and pilgrimages are among the most significant spaces in which the Taiwanese imagine and (re-)produce the nation-space.

In light of the theoretical literature on nationalism and public space, my discussion of the Mazu pilgrimages of Taiwan highlights three interrelated aspects. To begin with, it suggests the continuing governmental appeal of the power of widely recognized symbols to rally perceptions of cultural intimacy, perceptions which lay the common ground for imagining collective belonging in the nation-space. Secondly, and importantly, this spatial and symbolic production of national community is not purely ideational, that is, imagined, but requires to be actualized in practice, to be physically performed in public spaces which I here, following Freitag, call arenas.⁷⁸ This holds especially true in a lively

74 Gellner, *Nations and Nationalism*.

75 Herzfeld, *Cultural Intimacy*, 3.

76 Freitag, *Collective Action and Community*.

77 Lu, *The Politics of Locality*.

78 John Parkinson, *Democracy and Public Space: The Physical Sites of Democratic Performance* (Oxford:

democracy such as Taiwan's, in which autonomous selves assert their sovereignty over a postcolonial, collective political body.⁷⁹ Thirdly, much of the scholarship on public space tends to emphasize urban, and even metropolitan, contexts,⁸⁰ and loses sight of rural and non-urban spaces. In Taiwan, though, a highly industrialized and urbanized nation, Mazu pilgrimages fill out the role of public spaces in which cultural intimacy and social imaginary are produced. Not only is this space not strictly secular, but neither is it based in urban areas. Mazu pilgrimages take place in rural environments and lead people from north to south, from the center of economic, cultural, and political power to the margins. This move pays homage to the origins of Han settler culture in Taiwan while adding a historical dimension to the spatial imagination of the nation. The modern democratic nation does not only manifest in the cosmopolitan metropolis, Taipei; symbolically and practically, it needs to reconnect with its historic root in rural Taiwan to become authentically Taiwanese.

Oxford University Press, 2012).

79 David Gilmartin, "Rethinking the Public through the Lens of Sovereignty," *South Asia: Journal of South Asian Studies* 38, no. 3 (July 3, 2015): 371–86.

80 See, for example, Low, *On the Plaza*; Orum and Neal, *Common Ground?*; Parkinson, *Democracy and Public Space*.

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Make Live and Let Die: Why Creative People are not so Creative to Solve Social Problems?

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Abstract: This paper aims to discuss the idea of creative city that has been used in the city of Rio de Janeiro, Brazil, and how the so-called creative class seems to be not able to propose alternatives for solving urban and housing problems. This research uses the Foucauldian genealogical method to demystify the discursive formations that validate ritualized utterances, as in the case of the use of creativity, and is based on the literature on economy, cities and creative people as well as newspaper articles and magazines from approximately 2010 up to now combining theoretical research and analysis of social events just as the way they are reported and disseminated in the media. We hope to highlight how creativity is increasingly used as a biopolitical strategy applied in cities, populations and urban plans, economics and subjectivities in a globalized context. The hypothesis is that the creative class, which is supposed to revitalize and transform the urban centers didn't prove until now that your creativity can be applied in a direction of an urban revolution. In contrast, we intend to show as the main result of the research the growth of a movement that is becoming more and more strategic and coordinated to handle with urban questions, which we are going to call counter-dromologic, alluding to Paul Virilio (1996). They are trying to deal with the very mismatch between the economic changes and the speed of urban operations to countering their advance.

Key words: Creative Cities, Creative Economy, Post-Fordism, Biopolitics, Heritage, Dromology.

Received: August 12, 2018. **Accepted:** October 13, 2018. **Published:** October 31, 2018.

Introduction

This paper aims to discuss the uses of the term *creative* and *creativity* in the so-called creative cities¹ and how the seemingly subtle shift of names and expressions, for example, from local commerce to mall, from building to tower² exposes not only

- 1 Creative territories are defined in the Brazilian Creative Economy Plan as: neighborhoods, cities or regions with creative cultural potentials capable of promoting integral and sustainable development, combining preservation and promotion of their cultural and environmental values. "As metas do Plano Nacional de Cultura", Ministério da Cultura, accessed July 12, 2012, <http://www2.cultura.gov.br/site/wp-content/uploads/2012/06/As-Metas-do-Plano-Nacional-de-Cultura.pdf>.
- 2 This comment refers to a speech given by the mayor of São Paulo about the construction of two towers of 100 meters high and of an open commercial area, designated by him of "open mall", in a region of the city that is in dispute for nearly 40 years between public power, real estate sector and society. This is an important region for gathering several built heritage assets, among them, the *Teatro Oficina (Garage Theater)*, one of the most important theaters in the city. Maria Carolina Maia, "Teatro Oficina: the tycoon v the theatre", *The Guardian*, November 29, 2017, <https://www.theguardian.com/cities/2017/nov/29/teatro-oficina-theatre-sao-paulo-counterculture-silvio-santos>.

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a profound change of meaning, but the consolidation of new urban planning strategies involving the concept of creative city. In this process of changing terms, protection agencies to the historical, artistic and cultural heritage, traditionally strong in Brazil are changing their direction on behalf of the construction of tourist centers by weakening the asset protection laws especially in urban reforms marked by the principle of diffusion.³

In particular, the paper will focus on how urban planning in Brazil has linked a discourse of creativity, in no way creative – once the projects assume a hygienist and standardized aesthetics of international requirements, excluding aspects of the mestizo culture, typical of Brazil – with a program of extermination of the black population living in slums. I would like to deepen the gap between the so-called “creative” projects and the public interests, especially the interests of the low-income and poor populations as well.

Like many countries in the world, which in recent years have been taken over by the idea of *creative city*, Brazil has not lagged behind in this movement. Inspired by the Australian mappings⁴ and British on creative industries,⁵ an attempt was made in the early 2010s to develop a Brazilian creative economy with similar premises addressed specifically in the Australian policy. Fortunately, issues related to copyright and sharing network were relativized in Brazil, given the strength that the debate on free and creative commons culture had in the country. The creative industries, especially in the areas of audiovisual, games and fashion were driven by the Ministry of Culture. Creative cities also gained prominence, resulting in at least two forms of urban planning, such as the revitalization process initiated in Paraty, which focuses on the growth of tourism associated with cultural events, that is the case of the International Literary Festival of Paraty (FLIP)⁶ which boosted tourism in the city since 2003.

Another way of urban planning that took shape under the sign of creative city are the urban diffusional reforms carried out in the port area in the capital city of Rio de Janeiro, which specifically have begun a process of urban and social sanitation and galloping gentrification. The construction of the *Museu do Amanhã* (Museum of Tomorrow) has become the symbol of this reform. In the case of the capital of Rio de Janeiro, specifically, the government program *Minha Casa Minha Vida* (*My Home My Life*), facing social housing, was associated with another historical process of removing slums and the populations living in them. The program aims to build sets of apartments financed at low cost and buyers are prevented from selling or leaving the property before the end of the payment. Strategic plans in the urban area define risk areas and areas of social

3 Paola Jacques Berenstein (org.), *Territórios Urbanos e Políticas Culturais* (Salvador: NAPE/PPG-AU/FAUFBA, 2004).

4 “Creative Nation: Commonwealth Cultural Policy, October 1994”, Pandora Australia’s Web Archive, accessed August 11, 2016, <http://pandora.nla.gov.au/pan/21336/20031011-0000/www.nla.gov.au/creative.nation/contents.html>.

5 “Creative Industries Mapping Documents 1998”, Gov UK, accessed August 11, 2018. <https://www.gov.uk/government/publications/creative-industries-mapping-documents-1998>.

6 “Festa Literária Internacional de Paraty (FLIP)”, accessed August 11, 2018, <http://flip.org.br>.

interest, where the favelas are, in order to legally justify the removal actions that consist of transferring the families in garbage trucks to the blocks of *Minha Casa Minha Vida*.

In contrast, activist groups, movements pro-affordable housing and artists have mobilized the population of the great Brazilian metropolises to claim what should be public in the empty and underused spaces in the city, fighting the advance of interests related to public and private initiative for construction of buildings and shopping centers. This leads us to strongly consider the advance of coordinated actions and resistance. The complexity of these two antagonistic movements, *tanato* and *biopolitics*,⁷ demonstrates the growing interest in urban issues as a part of sustainability itself and of the so-called urban revolution,⁸ since this concerns not only to economic, natural or physical resources but forms of life in the cities as well.

The article is organized in three parts: (1) an analysis of how the term creativity was being associated with urban reforms in an attempt to create tourist poles, for instance, in the case of increasing investments in areas protected by historical and cultural heritage as well as of aggressive urban reforms driven by real estate industry and public power that through Public-Private Partnerships (PPPs) and Urban Operation Consortium (UOC) privatize areas clearly defined as Special Zones of Social Interest (ZEIS).⁹ Rio de Janeiro is the Brazilian city that most illustrates both cases, since it has in its town center reminiscences of the Portuguese colonization, as it was the capital of the empire. In this article, I will discuss the case of the redevelopment project of the port region called *Porto Maravilha*. With regard to the urban reforms that do not fulfill the social function of property or patrimonial protection policies, we will analyze the case of the Silvio Santos Group (SS) onslaught for the construction of two residential towers with twenty-story each building in front of the *Teatro Oficina* (Garage Theater). The Theater is listed as a historical, cultural, artistic and architectural heritage of the state of São Paulo and is located in an area that should be protected from this kind of building type.

(2) starting from the hypothesis that the creative economy, understood as a concept and cultural policy, created in the Australian (1994) and British (1998) departments of culture - after that spread around the world - as a political-economic strategy to save capitalism from its irreversible economic crisis, namely post-Fordist and post-industrial,¹⁰

7 Biopolitics refers to the book *The Birth of Biopolitics* (2008b), in which Foucault exposes the paradigm shift in the political management of populations, in the sense of making them economically more efficient and politically more docile and *tanatopolitics*, a perspective defended by Agamben (1998, 2002, 2004, 2017) in dialogue with Foucault on the prevalence of death policies and the consolidation of the state of exception as an inherent key factor in politics.

8 Henri Lefebvre, *A Revolução Urbana* (Belo Horizonte: Ed. UFMG, 1999).

9 Delimited areas in the city for the housing of low-income populations.

10 By that we mean, the increasingly brutal split between the activity of the factory and the enterprise, that is, the idealization of brand, the strategies of communication, marketing, design, in a nutshell, the immaterial and intellectual work that, when overvalued in relation to the productive system, supports the precariousness of the service sector, the forms of independent art and work, and a whole range of professional activities which are not included in creative industries - the great contradiction of creative economy -, nor in the industry of tangible goods.

operates in the specific case of cities under the dromological key¹¹ and thanatopolitics.¹² That means, by force and speed, by privatizing areas of social interest. These market forces driven by governments and real estate capital also excludes and kills ceaselessly the black, indigenous and historically marginalized populations in Brazil. It is important to emphasize that these two operators are not exclusive to the Brazilian context, being the dispositif of power par excellence of urban reforms enshrined under the sign of creativity.

(3) A discussion on how different groups are gathering together to think inside out creative cities and to create strategies. Is it possible to establish social policies that favors social interests? Which groups are interested and are fighting for it? I mean by that, groups that are proposing another way of planning and governing the city space from other practices and utterances, for example, projects that give priority to housing policies and the production of communal areas. In utterances, the terms social and collective demonstrate the intention that inclusion would be the rudder that guides human and urban development. In other words, is it possible to think outside the current market logic?

With this paper I hope to clarify that the use of the term *creative* in urban reforms and cultural government plans serve to deepen the logic of financial capitalism, which operates through processes of exclusion, gentrification and adaptation to international standards that do not privilege diversity or different forms of insertion in the labor market (actions that could be considered creative), especially in the cultural sector, but also inclusion in a broadly way, being thus the great paradox of the acclaimed creative economy in the present day.

The Semiotics of Urban Planning

In order to draw attention to the transformation of words and utterances used through the meaning of creativity, we want to highlight that, without referring directly to its almost immediate sense - of capacity or human ability to create - the term carries within not so explicitly the paradox of sense that Deleuze spoke about.¹³ When utterances embrace different meanings, in the case of creative uses, when the predominance of one aspect almost excludes its reverse side. At the same time as it refers to the sense of creation and as long as the term is being repeated - creative city, creative economy, creative class - it becomes an empty signifier.

The strength of paradoxes is that they are not contradictory, but they make us witness the genesis of contradiction. The principle of contradiction applies to the real and the possible, but not to the impossible from which it derives, that is, to the paradoxes or rather to what the paradoxes represent.¹⁴

11 Paul Virilio, *Velocidade e Política* (São Paulo: Estação Liberdade, 1996).

12 Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (California: Stanford University Press-Stanford, 1998).

13 Gilles Deleuze, *Lógica do Sentido* (São Paulo: Perspectiva, 1974).

14 *Ibid.*, 45.

Unlike (*post*) colonialism, queer, gender studies, biopolitics, among other buzzwords, creativity is something that has its meaning completely depleted by repetition. It no longer assumes the sense of creation, on the contrary, it is constantly associated with the neoliberal discourse in order to become an integral part of it. We can no longer see, except those who have already paid attention to the paradox, to its function and use. The risk of increasing invisibility that emerges in the affirmative discourse of the creativity of everything is no longer to perceive the dispositive of power and language tangled in the neoliberal conception of creativity.

UNESCO, an arm of the United Nations (ONU), which focuses on promoting education, science and culture in the world, is the institution that has been defining and leading strategies, plans and cultural policies in the field of creative economics. Officially, it can be said that UNESCO presents statements and new definitions, which are being incorporated into cultural and political agendas, such as the gradual replacement of culture by creativity. The UNESCO network of creative cities, established in 2004 with the purpose “to promote cooperation with and among cities that have identified creativity as a strategic factor for sustainable urban development” (UNESCO),¹⁵ strengthening the usage of the new meaning given to creativity instead of culture. Creative cities being understood as also defined by Charles Landry, that is, the way in which: “cities can create the enabling conditions for people and organizations to think, plan and act with imagination to solve problems and develop opportunities.”¹⁶

The institution emerged in the post-war period in 1946 to ensure peace and security in the world through the protection of the cultural heritage of humanity, that is, through protection policies of local cultural heritage, oral and written cultural traditions, popular festivals, environmental parks, archeological sites, river basins, neighborhoods, cities and regions expanded globally. Over the years, the notion of cultural heritage has been transformed into universal heritage or human heritage, that is, any manifestation or event considered as asset protection area or intangible heritage, whether architectural, material or immaterial, must be related to a network that raises it into the category of “universal heritage of humanity”. Progressively, tangible and intangible heritage are merged into the notion of creative territory and creative industries become more and more integrated into urban planning and reforms.

Specifically in urban centers, the so-called creative class, a type of human capital involved in creating “meaningful new forms,”¹⁷ that is, a kind of immaterial labor that goes

15 The cities inscribed on the UNESCO network of creative cities, according to the institution, have the common objective of “placing creativity and cultural industries at the heart of their development plans at the local level and cooperating actively at the international level”. “Creative Cities Network”, UNESCO, accessed August 11, 2018, <https://en.unesco.org/creative-cities/home>.

16 “Biography”, Charles Landry, accessed March 23, 2017, <http://charleslandry.com/about-charles-landry/biography/>.

17 Richard Florida, “Cities and the Creative Class”, *City & Community* 2, no.1 (March 2003): 6, [https://creativeclass.com/rfcgdb/articles/4 Cities and the Creative Class.pdf](https://creativeclass.com/rfcgdb/articles/4%20Cities%20and%20the%20Creative%20Class.pdf).

from the production of contents and communication to the production of technologies, design and architecture and that cluster in the great urban centers of the main capitals of the world. What justifies such agglomeration, according to the author, are the attractions that these urban centers offer, which are based on the *3Ts* principle: such cities would be tolerant, with respect to cultural and gender differences; they would concentrate talented people with a high level of university degrees and, as a consequence, technological hubs focused on innovation and creation of startups. The incoherence of this theory - although Florida has tried to redeem himself in his most recent book¹⁸ - lies in not considering cities and countries always marked by high levels of social inequality and public power negligence in the city management, as well as by only including people inserted in the “creative market”, excluding independent artists and the service sector.

It is expected from the creative class that it has the creative power to transform the cities. The concept of creative city, before to be related to the idea of boosting the capacity of innovating or creating new meaningful forms, as Florida says, it is related to three key factors. The first is the context of economic, social and political crisis triggered by a set of changes in the way the productive system operates, from a model based on homogeneous and large-scale production of goods to a model whose core is the immaterial labor, industrial automation, the shrinkage of industrial parks or even their complete migration to other countries with cheap workforce – as a consequence, precarious work grows alarmingly. The second point is that the space left by industries not only transformed the space itself, with the increasing number of abandoned factories, industrial sheds, warehouses and working-class villages available for new uses, but also reshaped work relations. The third aspect concerns the change of perspective centered from a way of urban planning based on constructing physical infrastructures - buildings, hospitals, schools, transport systems - to a more comprehensive model that involves the idea of “living well”.

[...] the focus on the physical has gone as far as it can. For example, we know that a road or telecom network on its own will not create the kinds of innovative milieux that encourage people to interact and participate, but rather that this depends on the capacity to build partnerships by bringing institutions like universities together with local firms to develop new products. We know that crime will be solved less by physical control and more by establishing a sense of place and mutual responsibilities in communities and neighbourhoods. We know that more sustainable environments will not be created if we only look at the environmental dimension; we also have to address how people mix and connect, their motivations and whether they take responsibility and ‘own’ where they live and change their lifestyles appropriately. To make cities respond to change we need to assess how ‘feel’, ambiance, atmosphere and ‘soft’ infrastructures are created, something which requires different skills from

18 Richard Florida, *The New Urban Crisis: how our cities are increasing inequality, deepening segregation, and failing the middle class - and what we can do about it* (London: Oneworld Publications, 2017), Kindle.

those of planners brought up to think in terms of physical solutions.¹⁹

These soft infrastructures which Landry and Bianchini are talking about are highly connected with the 3Ts principle, but especially with the technology sector and especially the development of startups and clusters. In Brazil, the idea of class or creative cluster is less tied to the technological and innovation sector than to the urban reforms themselves, with more or less protection of tangible or intangible heritage. The great example of a creative city project in Brazil started with the social hygiene program at the port area of Rio de Janeiro and, more recently, the revocation of the heritage-listed area surrounding Teatro Oficina (Garage Theater) in São Paulo are cases that illustrate the controversial relationship between patrimonial policies that are increasingly becoming obsolete, infringed, and the proliferation of creative territories. Successive barriers to the deployment of public parks, a recurring fact in Brazilian cities, is another important aspect of the discussion, since public space has been progressively privatized or modified in Public-Private Partnerships (PPP) and Urban Operation Consortium (UOC). Laws protecting areas of social interest have been strategically changed as in the case of the resolution that bars new asset protection area in the waterfront known as Porto Maravilha.

Porto Maravilha was reformed through an Urban Operation Consortium (UOC), an urban law instrument that allows the municipal government to grant private companies the right to build, renovate or re-urbanize particular areas in the city restricted to regular legislation of use and occupation of the soil. In other words, the right to build is extended to companies, giving them more and more power to intervene in the city, in the same measure that limits social interests and neglects Special Zones of Social Interest (ZEIS), undoes heritage-listed protection and reduces the capacity of social movements to act in time, slowing down the speed whereby such operations are carried out in the territory. Added to this the favelas removal program that strategically takes away families living in favelas near to the center, taken in garbage trucks, replace the implementation of urbanization projects focused on improving housing complexes and neighborhoods, infrastructure and so on by removals and social cleansing.

Inheritance of the Olympic Games, that took place in 2016 in Rio, the acclaimed revitalization of the port area became a land of abandoned construction works such as the popular housing project *Porto Vida Residencial (Port Residential Life)*, which would be destined to municipal civil servants and which is only possible currently to see its bones structure.

In other words, the Urban Operation Consortium (UOC) favours the construction of a creative pole in the region with the installation of the *Museu do Amanhã* (Museum of Tomorrow), a monumental architectural work designed by the Spanish architect Santiago Calatrava and the MAR (Rio Art Museum), aside from the supposed recovering

¹⁹ Charles Landry and Franco Bianchini, *The Creative City* (London: Demos, 1995), 13-14.

and protection of historical heritage and buildings constructed during the Portuguese colonization. While the ZEIS are being strategically disregarded and the laws governing land use, planning and housing policies are constantly unauthorized.

The project to reform the port area of Rio de Janeiro was based on the necessity to create a city-brand able to be presented to the World Cup (2014) and Olympic Games (2016). The recovering of urban infrastructure comprising a new system for drinking water supply, sewage plant, drainage system of rainwater, public lighting, energy, telephony, piped gas and the implementation of the Light Rail Vehicle System (VLT) seems to be the best reform plan.

At first there seems to be nothing wrong with the redevelopment plan for the area, unless we don't look at how reforms are implemented. When they are taken as "creative reforms", the positive aspect that the term carries would lead to invisibility the problem of favelas removals and forced displacement of former residents, as well as the overshadowed social cleansing and urban gentrification program - if it were not for the work of associations and non-governmental organizations to struggle for the survival of populations living in there. Added to this, the erasing process of historical and immaterial heritage with the implementation of monumental architectural projects as in the case of museums and restoration of facades.

A similar case arises in São Paulo capital. In this case, there is no sea, no port, but the attempt to requalify the city center, as shown by the projects *Nova Luz* (New Light), *Arco do Futuro* (Arc of Future) and most recently, in full dispute between public power, companies and society, the region of Bixiga where the *Teatro Oficina* is located. The Bixiga neighborhood, hitherto known as the Italian neighborhood of São Paulo circumscribes a striking class division in the district of Bela Vista. The famous Bixiga is actually an Afro-Italian neighborhood,²⁰ marked by the presence of black population and Italian immigrants who came to Brazil between the 19th and 20th centuries, a typical Brazilian amalgam, despite the great attempt to erase the black roots of the neighborhood and now its past and historical, artistic and cultural present.

On May 25th 2018, the Institute of Historical and Artistic Heritage (IPHAN) together with the Council for Defense of Historical, Archaeological, Artistic and Tourist Heritage (CONDEPHAAT), took another measure of revocation of immaterial and historical heritage. The possibility of revoking a historical asset heritage-listed - despite the contradiction of this phrase - is a political measure usually carried out by decree, with the purpose of building in some part of the city considered area of patrimonial preservation. This juridical-political resource was established by the former President Getúlio Vargas (1883-1954) through the Decree-Law 3.866 of 1941 in order to build one of the largest avenues in Rio de Janeiro, *Avenida Presidente Vargas*, constructed at the time as a reurbanization project on the northern side of the city and to receive civic and military

20 Márcio Sampaio de Castro, *Bexiga: um bairro afro-italiano* (São Paulo: Annablume, 2008).

parades. The urban reform could only be done as *Campo de Santana*, a garden opened in 1873 was taken out of the heritage list, as well as the Baroque church of *São Pedro dos Clérigos* (St. Peter of Clerics), built in 1733.

What does this mean? In some cases, the decrease of part of the territory to accommodate other construction works, as in the case of the revocation of the heritage-listed area of *Campo de Santana* or the complete breakdown of the building, as in the case of the *São Pedro dos Clérigos* Church, which was completely destroyed. There is also a third case, that is, the revocation of a patrimonial area inscribed on the historical heritage list, to be carried out a new construction work that clearly de-characterizes regions protected by a “cone of protection”. In general, this type of invalidation is the result of a negotiation between public power and private interests, in which the private interest overcomes the public interest. This is the case of *Teatro Oficina*, one of the most important theaters in São Paulo, whose architectural design was made by Lina Bo Bardi, who also planned the *Museu de Arte de São Paulo* (MASP) and the *Sesc Pompeia* building, was conceived to compose with the landscape and its surroundings. That means, interior and exterior are in permanent state of communication.

Zé Celso, the main figure and members of the theater launched on October 26th, 2017 the *#VETAasTORRES Manifesto* (vetting the towers) together with friends of the theater, not only for its captive audience, but for the surroundings, for the neighborhood and for the city. For this city that still has a few hollow spaces and still accommodates some emptiness in its center. The manifest says:

We do not want to build buildings, we desire the poetics of emptiness as a construction, in an exercise of imagination, creating pockets of breath in the urban fabric of São Paulo, allowing the land to remain green, permeable to light, rain and time. A space for circuses; shows; outdoor shows performed by different theater companies; music; visual arts; cinema in temporary, ephemeral installations in direct contact with nature.²¹

The proposal of the SS Group, which won the right to build along with the city hall of São Paulo, was to build an “open-air mall” with mixed buildings, commercial and residential towers. Finally, the Group, whose owner is a television presenter of one of the largest communication companies in Brazil, who also holds the ownership of the vacant land next to the theater, opted to build up two residential towers with over a hundred meters high, with the endorsement of the National Historical and Artistic Heritage Institute (IPHAN).

These cases illustrate the imminent risk to the cities when governing authorities and enterprises settle to lead megalomaniac projects, such as this one presented by the SS Group, but also urban reforms that, at first, claim the necessity of structural reform or

²¹ “MOVIMENTO #VETAASSTORRES”, Teatro Oficina, accessed August 11, 2018, <http://teatrooficina.com.br/movimento-vetaastorres-ficaoficina/>.

revitalization, but which end up de-characterizing the city, erasing its history, removing low-income populations from the center, all this in the name of raising creative poles and a strong center that represents a city-brand. We need to ask ourselves about this discourse and practice, which are advancing around the world and which effects they entail in the long term.

The Creative Dromological City and its Topology

Milton Santos considered space an instance of society, in the sense of being a set of factors, values and functions that constitute a certain social scope, such as culture and economy. In the words of Santos: space “*contains and is contained* by other instances, just as each of them contains and is contained by it. The economy *is* in the space, just as space *is* in the economy.”²² Space is not formed only by things and objects, there are the geographical and spatial domain and a certain arrangement of objects in the landscape being activated by social processes which are materialized in forms. “That’s why space contains the other instances. It is also contained in them, insofar as specific processes include space, whether the economic process, the institutional process or the ideological process.”²³

According to Santos, space is also a totality that can be analyzed from the composition of its parts: men, firms, institutions, infrastructures and ecological environment. Each of the space elements is interchangeable: “men can also be taken as firms or as institutions (in the case of citizens, for example), in the same way as institutions act as firms and these as institutions.”²⁴ In the latter case, Santos gives the example of transnationals and large corporations, when they create certain social norms by extrapolating their internal limits and competing with the state, as it happens with the establishment of commodity prices by big monopolies. Given the interaction between the elements of space, it can only be understood as a complex system of structures, as a network of relations.²⁵

In this network, some specific areas are particularly developed in creative cities. Tourism is one of them as well as many types of re-urbanization reforms. The creative city, understood as a new planning paradigm for cities, embrace and refine the logic of stimulating insofar it retains people flows by, at the same time, boosting tourism or improving the transport system in specific areas and hampering the circulation of certain populations. The logistic production of space, effectively produced by engineers or architects, but actually thought and planned by governing authorities and businessmen match with the birth of biopolitics, with the art of calculating and measuring space by relating these data to the production of statistics on populations as well as to dromology.

22 Milton Santos, *Espaço e Método* (São Paulo: Edusp, 2008), 12.

23 Ibid.

24 Ibid., 17.

25 Ibid., 28.

According to Berenstein,²⁶ there are two dominant tendencies today, a predisposition to set “freezing policies”, which combine patrimonial policies and tourism boost that transforms urban centers into “city-museums” and “theme-park-cities” and a tendency that goes in the opposite direction, which is focused on “diffusion policies”, that means, rampant building in areas already highly populated or the rapid expansion of the urban fringes. Both inclinations lead to what she calls the spectacularization of cities, but they are also related to the logic of speed. The executors of these projects, whether of freezing or diffusion are generally the same and they are used to promote the same market dynamics.

To better explore the logic of speed, Virilio suggests a shift from topology to what he calls dromology or the government of mobility to the analysis of how cities are planned. According to Paul Virilio:

The whole world is aware that there is a political economy of wealth. Power is linked to wealth. But people forget to say that wealth is linked to speed. In the Greco-Latin era, the bankers were knights or navigators. The surplus value was linked to the speed of ships in the Mediterranean - reread Fernand Braudel - or to the speed of the knights, those who carried the messages by carrying orders. When one says that time is money, it is meant to say that speed is power. Since the 1960s, I have been interested in this science - it is not science yet, but it might become one -, which I would call dromology.²⁷

Dromology is also an epistemology that walks along with the urban revolution²⁸ as a counter-speed. Virilio suggests that this “science” has not been sufficiently developed, the same is possible to say about the urban counter-speed revolution. Dromology, that is to say, the study of speed or the logic of race,²⁹ of the political meaning of dromos, the Greek word for race in the constitution of cities also pervades the idea of creative city, but that perspective must also be developed in the sense of connecting a technique of power, as old as the speed, with the reality of the cities in transformation nowadays. Speed, understood here at the same time as a category of analysis of the society modernization process and technique of controlling the movement of things, people and information.

Speed made history in the same way as wealth. It is not possible to separate them. Of course, there is also the speed of transmission: the telegraph, telephone, the wireless telegraphy, the radio, television and now the Internet. The speed of transport has been overtaken by an absolute speed of electromagnetic waves, which enable telecommunications, telework, the teleactivity and also the strategy.³⁰

26 Paola Jacques Berenstein (org.), *Territórios Urbanos e Políticas Culturais* (Salvador: NAPE/PPG-AU/FAUFBA, 2004).

27 Paul Virilio, “Velocidade e Acidente Integral – entrevista de Paul Virilio”, interview by Fernando Eichenberg, *Acervo Claudio Ulpiano*, April 24, 2018, <https://acervoclaudioulpiano.com/2018/04/24/velocidade-e-acidente-integral-entrevista-de-paul-virilio/>.

28 Henri Lefebvre, *A Revolução Urbana* (Belo Horizonte: Ed. UFMG, 1999).

29 Virilio, *Velocidade e Política*, 53.

30 Paul Virilio, “Velocidade e Acidente Integral – entrevista de Paul Virilio”, interview by Fernando Eichenberg, *Acervo Claudio Ulpiano*, April 24, 2018, <https://acervoclaudioulpiano.com/2018/04/24/>

This strategy to which the author refers is exactly the political strategy of domination by land tenure. Peter Hall³¹ defends a similar thesis as Lefebvre's and very close to Virilio's, apparently quite widespread among architects and urbanists, that the urban planning of the twentieth century would be a reaction to the problems that emerged in the nineteenth-century cities, and therefore we handle now the heritage of the industrial mode of planning from the twentieth's.

According to Lefebvre, each city is constituted and differentiated by its social and production relations. The urban society would be the result of an expansion of urbanization, as a process that stems from industrialization, from the industrial city, as far as it dominates and absorbs agricultural production until it reaches the point of its almost dissolution. This occurs when agriculture becomes a specific sector among industrial sectors and as a final result "of a process in the course of which old urban forms explode, inherited from discontinuous transformations."³² These old forms, characteristic of former city models, need to undermine themselves to give rise to new arrangements. Urban society, in that it is born of industrialization and succeeds it, leads off the post-industrial society. This means that the post-industrial creative city, in an attempt to handle the problems of the industrial city would also involve the capacity of transforming it through another regime of utterances and practices. Lefebvre named that urban revolution, this process whereby the knowledge about urbanization would culminate in an urban practice to be "re-learn", apart from urbanism as a science of the urban, that is, this transformation would be made less by experts and more by the need to create common spaces and new forms of social interaction.

Virilio, in *Speed and Politics*, referred to circulation as something paradoxical in any revolution. Revolution as a univocal idea, at the same time, in a sense close to Lefebvre's, when considering the urban revolution, a virtual and possible stage of the development of cities (and subjectivities), demonstration, disorder, conquest of the street. And revolution in the sense of "assault machine", when certain social or political class "changes the rules of the game", stands out, turns the current reality by force or, as Virilio would say, by speed, by time gained – as in the French Revolution. The city simultaneously ideal fixed point, place to stop for the migratory flows and surveillance platform with its tollgates and customs office surrounded by inaccurate places that control movement:

The ancient swampy and unhealthy beaches surrounding the fortified city, the *congo-plains* of the American slave, the old fortifications, the poor peripheries and slums, but also the mental hospital, the barracks and the prison, solve more a problem of flow than of enclosure or exclusion. They are all inaccurate places because, between two transit of speeds, they act as brakes of penetration, of its acceleration. Located

velocidade-e-acidente-integral-entrevista-de-paul-virilio/.

31 Peter Hall, *Cidades do Amanhã: uma história intelectual do planejamento e do projeto urbanos do século XX* (São Paulo: Perspectiva, 2013).

32 Lefebvre, *A Revolução Urbana*, 13.

from the origin in the terrestrial or fluvial communication routes, they are later compared to sewers, to standing water. The interruption of the flow (of progress), the sudden absence of motricity creates, ineluctably, an almost organic corruption of the masses.³³

These inaccurate places that give rise to the suburbs and lodgings, not to the right to the city, are encapsulated in a great dispositive of power, as Foucault also referred to,³⁴ which includes strategies of movement control, daily security practices at borders and customs, monitoring by surveillance cameras and, last but not least, by the real estate power. According to Virilio, the bourgeoisie exercised its power much more by the property of a “fixed abode” with a monetary and social value that guaranteed a place inside the protected city, than by trade or infant industry.³⁵

In the post-industrial reality which we are living in, another way of planning needs to be reconsidered especially by redirecting investments in social housing and communal areas such as parks, public squares, cultural facilities, open-air cinema; in protecting informal trade, in the case of Brazilian reality, all this in association with a welcome program for families living in social exclusion. That would not only be a way of protecting urban centers from degradation processes that afterward justify “revitalization” programs and reforms, but a follow-up work of dealing with the reality of the city. A starting point to an urban revolution in the sense given by Lefebvre and Virilio – as a virtual and possible stage to the development of cities. To revitalize, in this perspective, it means generating investments that might be conducted by the inhabitants, facilitating their integration, circulation and the right to the city. This perspective I am appointing here as counter-speed.

Inside out Creative Cities

On the other side of this creative-city-friendly tendency there are a range of counter-actions that challenge this hegemonic tendency of the market, I dare say, in a creative and creating way, insofar as they depart from a broader and more complex notion of city, social and intercultural coexistence, they act in favor of creating green areas and in protection of poor and endangered populations, among other initiatives. However, because they do not have the support of the public power, but rather of part of the engaged population, their actions do not constitute themselves as real government plans or public policies, nor do they have their demands taken into account. Proposals are treated with mockery and disdain.

Besides that, socially active groups have been reinforcing each other in an attempt to consolidate their proposals and bringing it to the public management. They fight, inter

33 Virilio, *Velocidade e Política*, 23.

34 Michel Foucault, *Segurança, Território, População* (São Paulo: Martins Fontes, 2008a).

35 Virilio, *Velocidade e Política*, 24.

alia, against the daily *let them die* or to the zones of production of death. This topic is essential in the analytic of creative cities, because albeit being old in the philosophical and political debate crossing the concepts and the theories of state, of power, totalitarianism and sovereignty, we are still in search of extending the relation between something contemporary as the concept of creativity, as it is used in politics, and that of biopolitics. By deepening this gap and returning centuries back, we know that the ground of the Greek polis was already conceived from its original crack between those who have the right to expression and to the city and those who do not. The point on biopolitical theory remains in the blind spot that Agamben referred to:

The present inquiry concerns precisely this hidden point of intersection between the juridico- institutional and the biopolitical models of power. What this work has had to record among its likely conclusions is precisely that the two analyses cannot be separated, and that the inclusion of bare life in the political realm constitutes the original – if concealed – nucleus of sovereign power. *It can even be said that the production of a biopolitical body is the original activity of sovereign power.* In this sense, biopolitics is at least as old as the sovereign exception. Placing biological life at the center of its calculations, the modern State therefore does nothing other than bring to light the secret tie uniting power and bare life, thereby reaffirming the bond (derived from a tenacious correspondence between the modern and the archaic which one encounters in the most diverse spheres) between modern power and the most immemorial of the *arcana imperii*.³⁶

This perspective is clearly different from the Foucauldian point of view as far as for him biopolitics is a modern advent whereby life has begun to be included in the calculations of state. Agamben, in turn, by seeing this inclusion of natural life - or bare life - at the core of politics as a continuation since the Greek polis shed light on this key aspect of how exclusion and state of exception pervade the life in cities hitherto and I would add as well as the logic of speed. Several people have already paid attention to both paradoxes and they are acting coordinated in order to stem the ravenous appetite by which the estate capital market tries to deepen the crack.

he counter-dromologic movement being understood here not necessarily as a deceleration movement, although it involves this category, but as an “act in time” to prevent urban reforms and the revocation agreements of asset areas, among other interventions, is growing increasingly up, albeit in another time of acting in comparison with the real estate market, but enough sufficiently for the moment to create a subjective impact on social movements. To act in due time involves a strategic plan that encompasses several aspects like mapping the zones of social interests where populations are being constantly attacked, encouraging mobilizations and gathering together, creating new technologies of communication, among others. This movement operates differently to the engine of

36 Agamben, *Homo Sacer: Sovereign Power and Bare Life*, 11.

the rise of the creative class especially for having as main driving force the struggle for common and democratized spaces - the opposite of creative clustering.

In general, these counter-hegemonic movements consist of collectives - institutions, individuals, theater groups, non-governmental organizations, academic research groups - that seek to organize themselves in coordinated actions with other collectives acting on similar fronts. A good example is the *Fórum Aberto Mundaréu da Luz*,³⁷ which defines itself as a “collective that proposes alternatives with the population” and that has been proposing alternatives to stop another unilateral process of real estate expansion in the region of Luz, São Paulo’s downtown, which has been in dispute for years. Expansion, in this sense, means the “expansion of real estate capital and its products: cultural centers, residential middle-class condominiums, corporate towers.”³⁸

They are proposing alternative projects to the city hall in two strategic areas defined as Special Zones of Social Interest in the center of São Paulo that harbors *Cracolândia*, the homeless population with highly index of drugs consumption inhabiting the region of *Luz* and *Campos Elíseos*. Architects and designers, one of the different tasks of the group members, are planning and presenting solid projects of how a policy of welcoming this populations combined with investments in affordable housing scheme, communal areas and cultural activities can transform São Paulo’s downtown.

Coming back to the initial problem of this article on the uses of the terms *creative* and *creativity*: why still cultural has a different meaning compared to creative and why the uses of “social”, “communal spaces”, “social rent”, “accessible restaurant”, among other expressions, are more inclusive than saying “creative”? The foreword of the revised text of the Creative Industries Mapping Document published in 2001 by the British Department of Digital, Culture, Media & Sport (DCMS) answers the question:

In revisiting the *Creative Industries Mapping Document* we have retained the original definition of the creative industries as “those industries which have their origin in individual creativity, skill and talent and which have a potential for wealth and job creation through the generation and exploitation of intellectual property.”³⁹

37 The *Mundaréu da Luz Open Forum* is a collective that brings together institutions, groups and people committed to proposing alternatives to the Luz region, such as the Citizenship Action; Mungunzá Theater Company; Craco Resists; Citizenship and Human Rights (NECDH), Rights of the Elderly and the Person with Disabilities (Nediped); FLM - Fight Front for Housing; State Front of Antimanicomial Fight (Feasp-SP); IAB-SP - Institute of Architects of Brazil/São Paulo; INNPD - Black Initiative for New Drug Policy; Pólis Institute; LabCidade - Public Space Laboratory and Right to the City/FAUUSP; LabJUTA - Territorial Justice Laboratory/UFABC; LEVV - Laboratory of Violence and Social Vulnerability Studies/Mackenzie University; Residents and merchants of blocks 36, 37 and 38 of Campos Elíseos district; Observatory of Removals; REPEP - Patrimonial Educational Paulista Network; UHM - Union of Housing Movements, among others. “Sobre o Fórum”, Fórum Aberto Mundaréu da Luz, accessed August 11, 2018, <https://mundareudaluz.org/sobre-o-forum/>.

38 “Dossiê Luz”, Fórum Aberto Mundaréu da Luz, accessed August 11, 2018, <https://mundareudaluz.org/2018/03/14/sobre-o-processo/>.

39 “Secretary of State’s Foreword”, GOV. UK, accessed January 15, 2002, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/183544/2001part1-foreword2001.pdf.

To think inside out the creative city requires a perspective shift from cultural policies focused only in developing creative industries poles and regional city-brands as well as revitalization processes anchored in tourism development to affordable housing policies, which are much more interesting for cities from the point of view of the maintenance of its historical center, commercial zones and populations. A strategy based on recovering damaged buildings, including the preservation of tangible heritage so that it serves on the conservation of public spaces, leisure areas and social inclusion is much more effective in the long term than development policies based on creation of tourist centers or creative poles. Tourism is contingent, it floats and oscillates in waves of interest that are directed and redirected to different cities and contexts all the time, it is neither by far nor nearly the smartest strategy of thinking the natural advance of social transformations in space.

In conclusion, to think outside the creative city within the dromological key means to become aware and to counteract by improving strategies that go in the opposite path. Like Virilio said: [...] “Policy of progress and change are empty words if one does not see behind the electric megalopolis, behind the city that doesn’t stop, the dark silhouette of the old fortress fighting against its inertia and for those who stop means to die”.⁴⁰ Not being able to stop is the logic that guides the suffocation of *Teatro Oficina* and the denial of the right to preserve empty lots and to transform them into parks. Park for what?

To stop.

Final Considerations

Creative city is a concept difficult to define, as well as creative economy. Both were formulated differently in the countries that originated them and in the countries that absorbed them. That was not different in Brazil, where the necessity to say that we would produce not only a different concept, but the creation of policies that would promote the Brazilian culture in its various aspects and cultural features born with the indigenous and African people were especially strong. But the ordinary conception of culture as a distinctive element of a people or country was confused with the idea of creativity, giving to it a simple economic sense and to culture something related to the promotion of cultural diversity, sustainability and social inclusion. Creativity seemed to correspond to the GDP and culture to something that improves life in general and that needs to be somehow fostered. The idea of a creative city was conceived in Brazil within this ambiguity.

Creative city is nothing less than a concept, one can say that this concept doesn’t matter, that no one lives the reality of the city as a creative city, but this is a concept whose meaning becomes effective every time that the creative class are glorified by transforming neighborhoods and local economy through their own bodies. A body that is the capital itself. A body that is clustered in certain urban centers and precisely because of that triggers gentrification, exclusion and sanitation processes. If power relations pass through

40 Virilio, *Velocidade e Política*, 28.

the body and are produced by it, how could this process be stopped? Who has this power?

I raised the problem of changing names to underline that to change the city is also to change their utterances, by substituting terms that affects and are affected by the urban planning in order to strengthen the construction of city brands based on this idea of creative city that comes stimulating at least two decades after the so-called urban revitalizations in a very questionable way, mainly in the developing countries, as is the case of Brazil. The urban centers are sold out, drained by urban reforms without planning them with people living in its centers where and how they want to live. No one knows where to put the refugees and the huge mass of precarious workers growing every day, just to point out emerging and urgent problems that require a creative skill. Interestingly, the creative class cannot find a solution to this type of problem. The creative class is nothing more than a variation of human capital, a capital that calls itself creative but cannot “think, plan and act with imagination to solve problems and develop opportunities”, reversing Landry’s words.

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Maritime Dispute Settlement in the South China Sea: The Case of the Philippines – China Arbitral Awards and Implications

*Giang Nguyen Truong**

Abstract: Regardless of tremendous efforts from the involving countries, up to the present, the South China Sea (SCS) dispute between China and Philippines is regarded as the most complex and challenging maritime regional conflict in Asia. It has been two years since the date of arbitral awards for the case between Philippines and China, but the issue still raised the question of whether the award has set a good precedent for the dispute settlement mechanism under the UNCLOS 1982. And the award's impact on the dispute settlement and state relations in the region is also debated. After the award was made, many scholars criticized that the case exhibits various shortcomings of the UNCLOS 1982 and the consequences thereof deteriorates the main function of international law. This study discusses the dispute settlement mechanism of UNCLOS 1982 and its application in the case of the Philippines – China. The study is important for two specific reasons: (i) the use of negotiation among nations in the region has become a deadlock, the demand to use legal regime in international relations is increasingly supported by many scholars, and (ii) shortcomings of the UNCLOS 1982 will be discussed for future improvement. This study finds that the tenacious dispute in the South China Sea is due to two reasons. Firstly, it is the risk the inconsistent interpretation among state parties, especially the historical approach adopted by China despite the existence of UNCLOS 1982. Secondly, it is the lack in mechanism of the Convention to ensure the parties' compliance to the award, when China explicitly declared that it would unilaterally reject the arbitral awards. These two reasons are inarguably critical since it may degenerate the almighty goal of an international legal regime in maintaining the “internationality” and “unity” and become a chronic problem for all countries of the region. However, the situation after one year since the award was made has proved that the rule-of-law can be used as an effective tool to improve interstate co-operation.

Keywords: Conflict Resolution, International Law, South China Sea, Maritime Dispute, UNCLOS 1982.

Received: July 16, 2018. **Accepted:** October 13, 2018. **Published:** October 31, 2018.

Introduction

Territorial disputes have become one of the most heated issues that demand for common legal edge such as the United National Convention on the Law of the Sea (the UNCLOS) 1982 has been extremely necessary. On July 12, 2016, under provisions of the UNCLOS 1982, the arbitration tribunal of the Permanent Court of Arbitration (PCA) in The Hague issued its award for the claim by the Philippines made against China concerning the dispute between the two countries over maritime jurisdictions

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in the SCS. This award is historically regarded by many scholars of international law and relations and is expected to shape a practice of dispute settlement in the future.

Hence, the first two sections of this study concentrate on how UNCLOS 1982 is implemented to settle maritime dispute by scrutinizing the dispute mechanism of the UNCLOS 1982 together with its relevance of application in the SCS. The next section deals with the analysis of the typical arbitral case between Philippines and China to argue its impact on the dispute settlement of nations in the region to suggest upcoming issues to this region.

The analysis of the dispute settlement of UNCLOS 1982 not only improves the awareness among states in this region for an enhancement in international relations, but also provides discussion for future development of UNCLOS 1982 as a basic legal regime in the South China Sea.

Firstly, an insightful research into the dispute settlement mechanisms of UNCLOS 1982 helps to improve the regional cooperation. In international relations, disputes serve as an inexorable part of interstate behavior¹ and it is widely accepted that, among various international disputes, territorial-related disputes are considered to be the most perplexing issues that are incredibly difficult to manage.² These disputes become further complicated by historical, cultural, political, military and economic status. Unfortunately, until now, efforts made from diplomatic negotiation and mutual development seem to be politically deadlocked.³ Nonetheless, experts in international relations now realize the relevance of legal rules in the construction and operation of international problem-solving.⁴ International law provides innovative and helpful mechanism of co-operation and gives means for asserting a country's interest while arriving at a common position that serves all participants⁵. Under international law, states are obligated to settle their disputes through peaceful means and in conformity with the principles of justice, so that they will not infringe on international peace, security, and justice.⁶ It is also important to emphasize that ninety-seven territorial disputes have been settled through bilateral negotiations, third-party mediation, arbitration, or adjudication at the International Court of Justice since 1953⁷. At present, UNCLOS 1982, designated by the United Nations (UN), is among the most comprehensive legal frameworks that govern territorial issues in the Region thanks to a built-in dispute settlement mechanism specializing in sea-related

1 Merrills, *International Dispute Settlement* (Cambridge: Cambridge University Press, 2005), 103-105.

2 Brandon Prins, Aaron Gold and Sam Ghatak, "What's So Important About Territorial Disputes in International Relations?", accessed on 5 October 2018.

3 Nong Hong, *UNCLOS and Ocean Dispute Settlement* (New York: Routledge, 2012), 24-25.

4 Schoenbaum, Thomas J, *International Relations: The Path Not Taken* (Cambridge: Cambridge University Press, 2006), 17.

5 Ibid, 18.

6 "Charter of the United Nations", the United Nations, accessed on 1 October 2018, <http://www.un.org/en/charter-united-nations/>.

7 Wiegand, Krista E., *Enduring Territorial Disputes: Strategies of Bargaining, Coercive Diplomacy, and Settlement*, (Athens: University of Georgia Press, 2011).

issues. Therefore, it is necessary for states to be aware of how this mechanism works for a better enhancement of international relations in the Region.

Secondly, the analysis in the dispute settlement mechanism of the Convention provides useful contributions to the supplementation and improvement in the international sea legal regime. On the one hand, the UNCLOS 1982 has become a comprehensive linchpin of the international law of sea legal regime.⁸ The Convention was also considered as one of the most successful of the codifications and progressive developments of international law made by the United Nations since the end of World War II.⁹ Moreover, its dispute settlement mechanism, elucidated by Part XV of the Convention, which is conceptualized by the mandatory procedures, has made the Convention unique among various treaties and become one of an extremely small number of global treaties that prescribe mandatory jurisdiction for disputes arising from interpretation and application of its terms.¹⁰ The case of the South China Sea is a typical case study for UNCLOS 1982 since it covers almost every aspect of UNCLOS 1982: maritime delimitation, historic title, territorial sovereignty, use of force, fishing, maritime scientific research, freedom of navigation, etc. On the other hand, the compulsory provisions for dispute settlement of Part XV have been heavily criticized owing to its potential fragmentation, both procedurally and substantively in essence, of international law in general.¹¹ From some experts' perspectives, this makes it difficult for the states in the Region to fully recognize the connection and relevance of UNCLOS and utilize its regime to settle their disputes.¹² In this sense, the assessment on essence as well as the flexibility of the dispute settlement mechanism will contribute to the proposal of further modifications and supplementations for the UNCLOS 1982 in the future.

Research question

Due to the significance of the study, the following questions to be answered are stipulated as follows:

1. What dispute settlement regime does the UNCLOS 1982 provide to settle maritime dispute in the South China Sea?
2. Through the awards made by tribunal in the Philippines – China case, is UNCLOS 1982 a successful legal regime to settle dispute in the South China Sea?

8 Romano, Cesare P.R., "Courts and Tribunal: Price, Financing, and Output", in *International Conflict Resolution*, ed. Voigt, Stefan; Albert, Max; Schmidtchen, Dieter, (Germany: JCB Mohr, 2006), 50-54.

9 Nguyen, Dong Manh, "Settlement of disputes under the 1982 United Nations Convention on the Law of the Sea The case of the South China Sea dispute", *University of Queensland Law Journal*, 25, no. 1 (2006): 145-180.

10 Klein, Natalie, *Dispute Settlement in the UN Convention on the Law of the Sea*, (Cambridge: Cambridge University Press, 2005), 32-36.

11 Rayfuse, Rosemary, "The Future of Compulsory Dispute Settlement Under The Law of the Sea Convention", *Victoria University of Wellington Law Review*, 36, no.4 (2005): 89-98.

12 Nong Hong, *UNCLOS and Ocean Dispute Settlement* (New York: Routledge, 2012), 24-25.

3. What implications the international community may learn from the case of Philippines – China arbitral awards?

Literature review

There are several articles that discuss the problems of UNCLOS, among which two different opinions have been raised. Now, this essay discusses the two arguments to provide possible answers for the question of whether UNCLOS 1982 provides peaceful dispute settlement to countries.

On the one hand, the mechanism of UNCLOS has undeniable shortcomings and limitations with the risk of fragmentation. Firstly, it is stipulated in Part XV of the UNCLOS that states generally have the duty to peacefully settle disputes with regard to the application of the convention (UNCLOS). It means the selection from negotiations or judicial settlements are at their own discretion (UNCLOS). Nevertheless, provided that settlement is not reached between the parties and no other procedures are clearly and explicitly excluded by the parties, then one party may prompt to compulsory dispute settlement. This means that there may be an insurmountable risk with the establishment of International Tribunal for the Law of the Sea (ITLOS) that harms the international unity in interpreting and applying UNCLOS.¹³ Secondly, UNCLOS 1982, in general, provides the availability of compulsory procedures with binding decisions where no settlement has been reached.¹⁴ The jurisdiction of any court or tribunal constituted under UNCLOS is stated in Article 288(1) as existing “over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part.” There are thus two important threshold jurisdictional issues which rise on the subject matter. These issues are: (i) whether the dispute concerns the interpretation or application of UNCLOS; and (ii) whether the dispute falls within one of the exceptions or limitations under Section 3 of Part XV. Lastly, the lack of specific definitions within UNCLOS, such as “historic water” or the ambiguous status of “rock”, “island” or military activities make it difficult to settle many disputes in a timely manner. This vagueness results in different means of interpreting the application and endangers its “internationality.”

The other opinions of scholars are for the effectiveness of UNCLOS’ positive role in maintaining the ocean order in the SCS. Firstly, the fear that UNCLOS, especially the tribunal would endanger the unity of general international law seems equally unjustified.¹⁵ It is provided that the tribunal is virtually the only form in international law which has decided anything relevant concerning the protection of the marine environment, and this has ultimately protected depleted fish stocks, hindered adverse effects of land

¹³ Vereycken Sofie, Eduard Somers, and Klaas Willaert, *Dispute settlement under UNCLOS - Position of the International Tribunal for the Law of the Sea* (Master thesis, University of Gent, 2016), 56-57.

¹⁴ Klein, Natalie, *Dispute Settlement in the UN Convention on the Law of the Sea*, (Cambridge: Cambridge University Press, 2005), 46-48.

¹⁵ Vereycken Sofie, Eduard Somers, and Klaas Willaert, *Dispute settlement under UNCLOS - Position of the International Tribunal for the Law of the Sea* (Master thesis, University of Gent, 2016), 56-57.

reclamation activities on the marine environment and so on. Secondly, regarding the question of vagueness, breaking different categories of SCS disputes into scopes that the regime is applied accordingly¹⁶ and using case law for each issue would help achieve clearer definition. Thirdly, the role of the third-party is considerably important in seeking tribunal measures such as “prompt release” or environmental protection. With these provisional yet innovative measures, prompt release requests for some vessel, crew, and uniform protection for tribunal fill the void that cannot be addressed by any other existing international court, tribunal, or complements that already exists under the jurisprudence in respect to UNCLOS.¹⁷ In short, despite the specific shortcomings due to in theoretical limitation in “black letter”, the UNCLOS does stay open for a wider and more flexible interpretation in which the role of the tribunal to extend and interpret the Convention is certainly indispensable.

The above research provides past studies as references that support the argument of the research question. However, there are issues that those studies have not addressed, especially the fact that how countries may face up against the dilemma between rule-of-law or power (political or economic) impacts in settling their dispute, and does this dilemma badly break the expectation of legal regime makers to ensure peace and fair play among nations? These issues shall be discussed in this essay.

Methodology

Pursuant to answer research questions of how effective the UNCLOS 1982 is in settling dispute in the South China Sea, the author uses two main methods in this study: qualitative approach and case study.

Qualitative approach via methodological design of documentary research

Documentary research is the use of external sources of information or documents to discuss or argue a point of view or argument in a specific academic context.¹⁸ The process of documentary research includes work of conceptualizing, citing and evaluating documents under both qualitative and quantitative approaches.¹⁹

For this study, the author uses qualitative approach of documentary research to solve the research question because of two reasons. Firstly, it enables the author to label the research object from a complete examination of diverse documents that have discussed the issues.²⁰ The research topic deals with the heavily technical concepts in international

16 Nong Hong, *UNCLOS and Ocean Dispute Settlement* (New York: Routledge, 2012), 13-17.

17 Verbeek Bertjan, “Regime theory in International Relations”, in *Encyclopedia of Power*, ed. Keith Dowding, (SAGE Publications, 2011), 37-40.

18 Balihar Sanghera, “Qualitative research methods: documentary research”, accessed 3 October 2018, https://web.archive.org/web/20071113125309/http://uk.geocities.com/balihar_sanghera/qmdocumentaryresearch.html.

19 Ibid.

20 Sánchez Jorge and Tafur Paola, “Fragmentation of International Legal System Established for the Governance of the Oceans”, *Social Sciences*, 4, no. 4, (2015): 86-89.

law, international relations and political science. But for the strong and widely-accepted theoretical framework from other scholars, it is considerably difficult to accurately conceptualize and define the issue. Secondly, acquiring direct data necessary to answer the research questions would practically take an enormous amount of time and many verbal arguments from officials, policymakers and experts. This is not an efficient and appropriate method of extrapolating the required data.

Case study

There are various understandings of case study methodologies. But the most original and widely-accepted term was defined by Bromley states that the case study is a “systematic inquiry into an event or a set of related events which aims to describe and explain the phenomenon of interest.”²¹ Case study enables the author to closely explore and understand complex issues in a particular context gathered through past studies even with little or no explicit data reported. It has been regarded as a strong method when an in-depth diagnose is demanded.²²

In this study, the author uses case study method for two reasons regarding its ability to fit the legal research question and unavailability of data. Firstly, the case studies are one of the most reliable and important methods in legal research. It offers the scholars and other legal practitioners the chance to approach the reality of applying the black-letter in the regime to see how the courts or parties interpret and use it. Besides, in some jurisdictions, such as the Common Law system, a past case law also acts as a *stare decisis* to provide some “answer” in other future similar case. Secondly, in this study context, the case of Philippines – China is the very first case in which an arbitral award was rendered. This case paved an avenue in the application of the UNCLOS 1982 to settle the dispute in the region. The lack of practical data or non-binding precedent makes this case study invaluable in providing lessons or speculating the future situation for other countries in the region.

For this method, the author uses the FIRAC model to present the case, in which:

- F (Facts): the author describes the background and details of facts on the case to discuss the reasons for dispute, to study the two parties’ claim or arguments as well as the interpretation of UNCLOS 1982 from their points of views.
- I (Issue): the author identifies what legal issue under the UNCLOS 1982 that is involved in the case to decide on this UNCLOS 1982’s application to the case and to provide a logical base for the next step.
- R (Rules): the author finds out which rule or stipulations that the tribunal applied for this case. The purpose of this step is to study the interpretation of UNCLOS 1982

21 Bromley D.B., “A philosophy of science for the study of individual cases”, *Counselling Psychology Quarterly*, 4, no. 4, (1990): 297-303.

22 Zaidah Z., Case Study as a Research Method. *Jurnal Kemanusiaan*, 9 (2007): 1-6.

from the tribunal's point of view.

- A (Application): the author seeks the way the tribunal made their decisions. The purpose is to study how the application of UNCLOS 1982 is applied by the tribunal.
- C (Conclusion): the author restates the tribunal's final award. In this part, the author also extends to discuss on the implementation of the award as well as the situation of compliance or non-compliance of the parties after the award is rendered. This analysis is crucial to evaluate on the game between political power and legal regime co-operation.

At the end of the case study, the author discusses the impact and consequences to argue why this case is served as the leading case that has phenomenal influences to the region. The impact magnitude shall be made from smaller scale (country) to medium (region) and large-scale (world) within the theoretical framework that has been introduced in the previous section.

Maritime Dispute Settlement Under The Unclos 1982

Maritime dispute: overview and methods for settlement

Maritime dispute

In the first approach, in order to define the concept of maritime dispute settlement, it is vital to identify what is a maritime dispute. According to the Permanent Court of International Justice (PCIJ), a dispute is a disagreement over a point of law or fact, a conflict of legal view of interests between two persons, and by the International Court of Justice (ICJ), for a dispute to come into existence, it must be shown that the claim of one party is positively opposed by the other. This definition was approved by the International Tribunal for the Law of the Sea (ITLOS).

In the field of maritime transportation, the term "maritime dispute" is frequently used. Transportation involves the "physical" movement of goods by sea, which can result in conflict and dispute between the parties in terms of the delay, damage or loss of goods. The involved parties in this case normally include individuals or legal persons that conduct trade transactions based on a mutually-agreed commitment. Maritime dispute can also be described as a conflicting claim by two or more states over the ownership or sovereignty of land in the sea.²³ This definition can be illustrated by disputes over sea boundaries or offshore islands, such as the Spratly Islands in the South China Sea, or the disputes over boundary delimitations between Peru and Chile for an area at sea in the Pacific Ocean. For the purpose of this study, the term "maritime dispute" will refer to conflict between two or more states over the ownership or sovereignty of land in the sea with relevance to

²³ Fravel, M. Taylor, "The PLA and National Security Decision-making: Insights from China's Territorial and Maritime Disputes", in *The PLA's Role in National Security Policy-Making*, ed. Philips Saunder and Adrew Scobell, (Stanford: Stanford University Press), 2014.

interstate relations and international public law.

Maritime dispute settlement

“Dispute settlement,” notwithstanding via judicial or diplomatic means, shall be conceptualized by the settlement through peaceful means provided by international law and conventions (i.e. the UNCLOS 1982). Territorial disputes exhibit some key characteristics of an ordinary dispute, even in its sense of handling and settling. It is recognizable that many people refer “dispute” or “conflict” to physical clash, or in other words, war. Actually, wars are resulted from disputes and considered as non-peaceful means of dispute resolution. Nonetheless, it is crucial to emphasize that logically, not all territorial disputes lead to wars²⁴ as there are other alternative dispute resolutions, among which are means provided as mechanisms under multilateral conventions. In other words, the defining characteristic of a peaceful means of settling disputes is that peaceful conflict resolution avoid the use of threat or force that are found contrary to the Charter of the United Nations.²⁵ For the purpose of this study, maritime dispute settlement shall refer to peaceful dispute settlement and non-peaceful dispute settlement will not be discussed.

Peaceful dispute settlement by means of the parties’ own choice is provided by Article 33 of the United Nations (UN) Charter. The following section shall provide more insightful research on these settlement mechanisms. In general, maritime boundaries need to be established by agreement in accordance with international law, and disputes and differences about sovereignty will be resolved by examining which State has more activity on the disputed territory.²⁶

Dispute settlement mechanisms under The United Nations Convention on the Law of the Sea 1982 (UNCLOS 1982)

The development of the dispute settlement mechanism in the UNCLOS 1982

The previous section conceptualizes what is peaceful maritime dispute settlement under international public law. Now, the study analyses the mechanism of dispute settlement under an exemplary legal regime, i.e. the UNCLOS 1982. Before going into its mechanism, it is important to have a brief study on the legislative development of the UNCLOS 1982.

It is undeniable that the provisions for dispute settlement in the UNCLOS 1982 are a unique section of the process of codification and development of the UNCLOS 1982. The League of Nations convened in 1930 for the formulation of rules in international law and there were 48 countries identified with the question of the territorial sea and relevant issues on the contiguous zone. In regards to the settlement of disputes at the

24 Mancini, Francesco, “Uncertain Borders: Territorial Disputes in Asia”, *ISPI Analysis* No. 180. (2013): 16-19.

25 Proelß Alexander, *The United Nations Convention on the Law of the Sea - A Commentary*, (Hart Publishing, 2017), 45-48.

26 Anderson David, interview.

Conference, although the topic of the delimitation of territorial sea was hardly addressed at the conference, it seemed that the preference for the adoption of a median line rule was obvious.²⁷

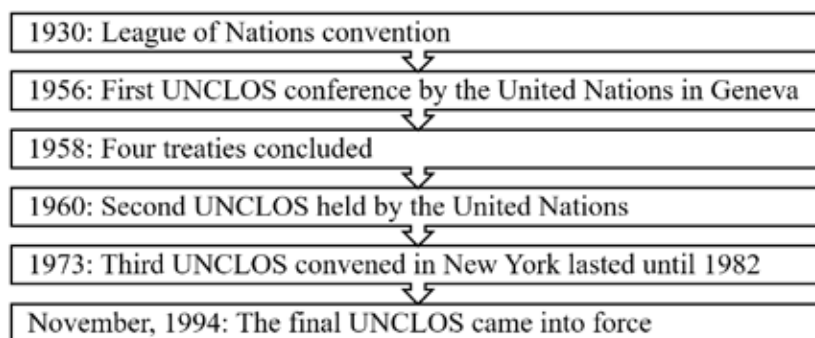


Figure 1. Chronology of the UNCLOS 1982's establishment and development

Consequently, the first UNCLOS conference for the codification of the law of the sea was held in 1956 in Geneva by the United Nations. The Geneva Conventions had tremendously contributed to maritime dispute settlements with 04 (four) treaties on the Law of the Sea and an Optional Protocol on the Settlement of Dispute were adopted in 1958. These legal instruments, at that time, became a legal framework governing the uses of the seas and oceans as well as other related issues.

However, the Law of the Sea consolidated by the Geneva Conventions demonstrated high level of uncertainties, such as the breadth of the territorial sea and definition of the continental shelf. The definition of the continental shelf had created confusion in states practice and encouraged States to take the advantage of the language of the convention to claim their continental shelf to the fullest possible extent. In 1960, the Second UNCLOS failed to solve the issues that had not been achieved at the First UNCLOS. At the suggestion of the Seabed Committee in 1970 the General Assembly adopted the Declaration of Principles governing the Deep Ocean Floor and the Resolution on the Convening of the Third Law of the Sea Conference.

The final UNCLOS was agreed upon more than 160 countries in 1994. The result was a deliberate attempt to obtain “a new and generally acceptable convention on the Law of the sea” made by the signatory states in the Third United Nations Conference on the Law of the Sea. It contained a comprehensive legal framework governing the status of the ocean and legal regime of the use of the sea and its natural resources.

The dispute settlement mechanism in the UNCLOS 1982

There are two core mechanisms for dispute settlements stated by the UNCLOS 1982 that argues which mechanism must be discussed in this essay. Generally speaking, comprised of hundreds of articles and provisions, the UNCLOS 1982 devotes its gigantic part

²⁷ G. J. Tanja, “The Legal Determination of International Maritime Boundaries”, *International and Comparative Law*, 40, no. 2 (1991): 500–501.

for maritime dispute settlement. Compared to the other branches of international law, UNCLOS 1982 comprises a full set of guidelines for dispute settlement.²⁸ Nevertheless, the dispute settlement mechanism in the UNCLOS is recognized as being both simple and complex,²⁹ because it incorporates only two simple settlement methods but diverse bodies to settle the disputes. A system of the dispute settlement vis-à-vis interpretation and application of the Convention was encompassed in Part XV of the Convention. Firstly, this requires state parties to settle their disputes by peaceful means stipulated in the Charter of the UN. Section 1 of part XV of UNCLOS sets out the fundamental principles concerning dispute settlement. Secondly, if the disputing parties fail to reach a settlement by peaceful means as they have agreed at their own discretion, they are obliged to recourse to the compulsory dispute settlement procedure under Section 2 therein.

a) Dispute settlement by peaceful means

Under Article 279 of the UNCLOS 1982, provided a dispute regarding the interpretation or application of the UNCLOS arises, parties are obliged to settle the dispute by peaceful means in line with the UN Charter. Article 279 provides that peaceful means are methods of settlement stated in Article 33(1) of the UN Charter: “negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice”. This provision establishes the obligation for the disputing parties to resolve their dispute by peaceful means, and at their own option prior to the compulsory procedures (Louis, 1975). In other words, parties must attempt to settle the dispute as provided by Section 1, part XV of the UNCLOS 1982, and only under the circumstances that the settlement has not been reached by the means under Section 1, can a party bring the dispute to the court or tribunal under Section 2.

b) Compulsory settlement mechanism

As discussed above, in the case where no settlement is reached by negotiation or methods contemplated by Section 1, under Section 2, the dispute shall be brought upon the request of any of the parties to the court or tribunal. Under this scheme, this means any state parties of the Convention are subject to this compulsory mechanism under Part XV of it, and they are inevitably obliged to settle the dispute by a third party, i.e. the court or tribunal. Notwithstanding its essence as “compulsory” scheme, this mechanism allows party to a freedom of choice in “selecting one or more of these four alternative forums to settle the dispute, when signing, ratifying, or acceding to UNCLOS or at any time thereafter”:

²⁸ Nong Hong, *UNCLOS and Ocean Dispute Settlement* (New York: Routledge, 2012), 24-25.

²⁹ Sohn, Louis B., “Peaceful Settlement of Disputes in Ocean Conflicts: Does UNCLOS III Point the Way?”, *46 Law and Contemporary Problems*, (1983): 195-200.

1. The International Tribunal for the Law of the Sea (ITLOS);
2. The International Court of Justice (ICJ);
3. An arbitration tribunal constituted in accordance with Annex vii to UNCLOS;
4. A special arbitral tribunal constituted in accordance with Annex VIII to UNCLOS.

This compulsory mechanism was regarded a breakthrough of UNCLOS since it involved both developed and developing countries to codify a dispute settlement mechanism (Noyes, 1975). However, there have been exceptions and limitations contemplated by Section 3 of Part XV which may hinder the states' application of compulsory procedure under the Convention. Whereas Section 2 of Part XV allows parties to bring the case unilaterally to one of the aforementioned third-party procedures, Section 3 limits the types of cases or disputes that are not necessarily subject to compulsory settlement. Accordingly, there are two categories of exception: "automatic and optional".

	Automatic exception	Optional exception
Legal base	Article 297, UNCLOS 1982	Article 298, UNCLOS 1982
Disputes to be excluded	Disputes involving rights of navigation, overflying, lying submarine cable and the protection and preservation of marine environment, etc.	Certain disputes in terms of sea boundary delimitations, historic bays or titles declared not to be used with compulsory procedure by one party.

This compulsory mechanism is the most interesting but complicated point that this study will concentrate on. Firstly, it is obvious that Article 287 reflects the demand to establish a balance between: (i) the freedom of choice in choosing the procedure of settlement; and (ii) the attempt to obtain a binding award or settlement for the dispute. Secondly, the substance of compulsory dispute settlement of Part XV, UNCLOS 1982 was deemed to be flexible owing to the states' inability during the Third Convention of the UNCLOS in 1973. For example, it is regarded as an agreement on a single third-party forum to which recourse should be had when informal mechanisms failed to resolve a dispute.³⁰ Or, in the game of political interest, maintains that this compulsory scheme may also have a great impact on the political dynamic of the dispute.³¹

Developing countries hold the belief on the ability of binding regime to restrain other powerful countries from applying non-stop pressure in terms of politics, economics, as well as military on them. Moreover, the involvement of a third-party in maritime dispute settlement can be used as a tool to abate economic, political or military power in order to protect territorial interests and ameliorate interstate relations. Thirdly, thanks to the

30 Noyes, John E., "The International Tribunal for the Law of the Sea", *Cornell International Law Journal*, 32, No. 1 (1998): Art. 3.

31 Klein, Natalie, *Dispute Settlement in the UN Convention on the Law of the Sea*, (Cambridge: Cambridge University Press, 2005), 26.

binding regime, less powerful states can be treated equally before the law.³² This was probably the main reasons why the majority of Southeast Asian countries are getting involved more in the Convention for fear of China's advantageous economic and military pressure in the SCS. Therefore, this study argues the implementation of UNCLOS 1982 by focusing on a case study where a compulsory dispute settlement mechanism is mainly used to gain a practical benefit in support of international relations in the SCS.

This paper has analyzed the dispute settlement mechanism under UNCLOS 1982 as well as affirmed the importance of its compulsory procedure on the political practice among nations. The next section examines a case study for the dispute situation in the SCS and the relevant application of the UNCLOS 1982.

Case Study: The Philippines – China Arbitral Award

Case analysis

Now the essay analyses the case of the Philippines – China dispute whose award was rendered on 12, July, 2016 by the arbitration tribunal constituted in accordance with Annex vii of the UNCLOS (the Tribunal) to provide discussion and perspective on how this legal regime resolves the parties' dispute. In order to approach this case, the author uses the FIRAC model which is widely applied in legal study.

Facts

The Philippines initiated the arbitration proceedings on 22 January, 2013. Though China announced that it would not present and join as the other party in the proceedings, under the provision of the UNCLOS 1982, the arbitration procedure by ITLOS was carried out regardless of China's non-appearance.

Issue

In general, regardless of Philippines and China being state parties of the UNCLOS and their commitment to act in good faith, China's conducts in the SCS were going against what is stipulated by the UNCLOS, and, to some extent, the rights of the Philippines were infringed.

The Philippines claims that these issues concerning the interpretation and application procedure of the UNCLOS 1982 and that the maritime delimitation and sovereignty dispute are two separate issues that do not overlap with each other.

However, China argues that the tribunal has no jurisdiction over the dispute because the dispute's substance is about sovereignty, and the maritime disputes cannot be separated from the sovereignty disputes. And in the Declaration of Conduct 2002, China has agreed to resolve the dispute by way of negotiation instead of bringing the matter to any court

32 Adede, A. O., *The system for settlement of disputes under the United Nations convention on the law of the sea : a drafting history and a commentary*, (USA : Distributors for the U.S. and Canada, Kluwer Academic Publishers: 1989), 45.

or arbitration. Lastly, in accordance with Article 298 of the UNCLOS, China itself has declared to exclude the dispute on maritime boundary delimitation and hence, the claim by the Philippines are not separated from boundary delimitation.

Rules

From the tribunal's perspective, the origin of these disputes stems from the discrepancy in the understandings of both Philippines and China's rights provided by the UNCLOS and that no infringement intention by any of the parties against the other. In particular, for the purpose of this study, there are three main issues in regards to the disputes: (i) historic rights and the nine-dash line, and (ii) territorial sovereignty (Beckman, 2016).

This appeared to be the major claim made by the Philippines owing to China's affirmation of its historic rights over the nine-dash line.

It is important to note that, as the arbitral tribunal was initiated through the UNCLOS can only examine state disputes in regard to the interpretation or application of the Convention, any disputes arising from other issues such as defining the territorial sovereignty shall not be under the jurisprudence of the tribunal. In particular, to settle the disputes, the tribunal argued on the principles of interpretation and application in the form of the automatic substance that all state parties should clearly be governed upon their completed ratification of the Convention. Each of the above-stated issues shall be clearly solved in the below Application section.

Application

Despite its 13 years of being a party of UNCLOS, China was getting used to interpreting the Convention in light of its own historical and cultural traditions (Beckman, 2016). This means that China seemed to "miss" the goal to achieve internationality in interpretation and application of a multicultural convention, which means UNCLOS should be interpreted and applied in identical manners by all of its state parties, regardless of their historical or traditional backgrounds. In particular:

- For the historic rights and the nine-dash line: Tribunal stated that historical rights that China insisted on were automatically "eradicated" when China ratified the UNCLOS which only the EEZ of other coastal states are recognized rather than any past or historical entitlements.
- For the territorial sovereignty: The tribunal stated that China should be aware of how the UNCLOS specified for the sovereign rights to "explore and explore all of the living and non-living resources in the 200-nautical-mile exclusive economic zone (EEZ) measure from their mainland coast."

Conclusion

After 12 July 2016, it has been two years of proceedings since the final award was finally made by the Tribunal. The tribunal first held that both the Philippines and China are state parties to UNCLOS 1982, and thus they are bound to adhere to its stipulation on dispute settlement. More importantly, China's non-appearance in the procedure does not release or exempt it from the final award. The award stated three main points (Bautista and Arugay 2017) that:

1. there is "no legal basis for China to claim historic rights to resources within the sea areas falling within the 'nine-dash line.'"
2. specific sea areas in the SCS stay inside the EEX of the Philippines and
3. China has caused serious damage to the marine environment and "violated its obligation to preserve and protect fragile ecosystems and the habitat of depleted, threatened, or endangered species.

Discussion

Now this essay provides discussion based on the previous case analysis. There are three main discussions in regards to this case: (i) its impact and consequences on regional and international community; (ii) the widespread non-compliance with the Convention; and (iii) the implied function of the rules-based order of UNCLOS in support of the regime theory arguing that international law and institutions affect behavior of states.

a) Impacts on the dispute parties: non-compliance or uncertainty?

As discussed above, the award has set a precedent of clarifying the way of UNCLOS' interpretation and application of settling complicated disputes in the regions. Now, the essay discusses the impact of this case on foreign policy of China and Philippines.

At first, it is widely agreed that China's unilateral rejection of the award and regarding it as null-and-void is unexpected. As previously stated, state compliance with international law serves as an indispensable part in maintaining the goal of international law. However, according to some scholars, the word "compliance" should be taken with more careful consideration. Initially, upon the final tribunal decision, China appears to be evasive in the appearance in front of an international judicial body to fulfill its obligation to clarify its ambiguous policy and strategy in the South China Sea. This attitude from China once again affirms its perspective to settle all disputes by mutual negotiation, in exclusion of the help from any third party. Nevertheless, China's declaration to ignore the award does not necessarily mean it will never comply with it. It has been reported that China has specific actions that demonstrate partial compliance towards to decisions made by the tribunal. Scholars hence suggest that the assessment of "noncompliant" can sometimes be mistaken by the level of "uncertainty" – the state of no explicit reports that China had taken actions that plainly infringes or violates in whole or in part of the tribunal

award.³³ Moreover, it was reported by President Rodrigo Duterte of the Philippines four months after the award was made on November 2016 that China appeared to comply with the arbitration arbitral by letting fishermen from the Philippines return to the disputed Scarborough Shoal. China has committed that it would not make any claim to the shoal by forbidding Chinese fishermen to go inside the lagoon.³⁴ Beijing's decision as such, became a sudden but clean horizon for the Philippines, leading to a re-establishment of co-operation of fishing and trade for the two countries.³⁵ Therefore, from the side of disputing parties, it may take time to conclude their compliance or non-compliance to a judicial award. The lack of compliance mechanism of the UNCLOS 1982, on the one hand, may become a serious matter to protect the goal of international law,³⁶ on the other hand, it allows countries to move on to further negotiation or be more flexible in their foreign treatment and policy.

Stated briefly, the recent widespread non-compliance vis-à-vis various provisions of the UNCLOS becomes continuously serious as it may inhibit the integrity and "internationality" substance as this legal regime. However, it is important to emphasize that the case does not degrade the goal of international regime in terms of maintaining the power between big and small countries in promoting co-operation among them.

b) Impacts of the award on regional and international community

The first and foremost consequence is ability of the tribunal to interpret and apply the UNCLOS in settling the dispute. This has provided clarity and means of how provisions in the Convention are utilized as well as the capability to adapt these rules to future circumstances and contingencies. As Tara Davenport argues that "these interpretations of the tribunal are perceived as more impartial than the inevitably self-serving arguments that disputing states can put across."³⁷ Thanks to such monumental contributions to international law interpretation, this award has synergy effects not only to the region, but also on a global scale.

Firstly, countries bordering in the SCS may, to some extent, be affected by consequences made by this award. In practice, the award has been consented and supported by other ASEAN countries such as Indonesia, Malaysia, Brunei and Vietnam in regards to the equality in EEZ claim rights over the sea to 200 nautical miles from their coasts. This

33 Mirasola Christopher and Ku Julian, "Tracking Compliance With the South China Sea Arbitral Award", *Praxis: A Review of Policy Practice*, 2016.

34 Motago Manuel, "New Philippine ambassador says China is complying with arbitration ruling", REUTERS, accessed 3 October, 2018, <https://www.reuters.com/article/us-southchinasea-philippines-china/new-philippine-ambassador-says-china-is-complying-with-arbitration-ruling-idUSKBN13316Q>

35 David Welch, "Philippines v. China one year later: A surprising compliance from Beijing, The Globe and Mail", accessed 3 October 2018, <https://www.theglobeandmail.com/opinion/philippines-v-china-one-year-later-a-surprising-compliance-from-beijing/article35660244/>.

36 Robin Churchill, "The Persisting Problem of Non-compliance with the Law of the Sea Convention: Disorder in the Oceans", *The International Journal of Marine and Coastal Law*, 2012, 139-146.

37 Tara Davenport, "Why China shouldn't denounce the UNCLOS", The Diplomat, access 3 October 2018, <https://thediplomat.com/2016/03/why-china-shouldnt-denounce-unclos/>.

means that the attempt of China to affirm its historical right in the nine-dash line will be strongly opposed. Secondly, this award also has consequences to the international community. One of the key points that the tribunal made was about the 12-nautical-mile territorial sea from the islands freedom of rights of the sea, including overflight and military activities shall be entitled to all state parties.³⁸ The award may also place emphasis on the practice of claiming an EEZ from other states around the world. For example, this shall be embraced particularly by the United States and its alliance in the Pacific region. Furthermore, other countries concerned with the rules-based order for the ocean will put more emphasis on the binding essence of this award and entreat China to comply with the award. Beyond the SCS sight, there are also other nations closely observing this case, because this case may raise the specter of other maritime disputes that involve contested territory making their way to compulsory procedures entailing binding decisions under UNCLOS 1982.

c) UNCLOS: “dilemma” between realistic and liberal hampers its goal

As discussed above, the UNCLOS 1982 was formed with the purpose of building a comprehensive set of norms and regulations, ruling the oceans. The Convention encourages state parties to coordinate and cooperate from a regional to global basis to set out regimes and standards or take measures for the same purpose. In other words, the UNCLOS 1982 speaks for the mutual words and understanding of countries, notwithstanding the disparity in economics or politics of many nations.³⁹ The case of Philippines – China is one of the leading case in the region in which the issue was brought to judicial body. When the awards were made, the lack of a clear compliance mechanism of the UNCLOS 1982 leads to heavy criticism for the Convention. Up to the present, after roughly 30 years from the date of official formation, the UNCLOS 1982 has been criticized for various shortcomings such as the characteristics of fragmentation in interpretation and application among state parties. The risk of fragmentation, under legal practitioners’ perspective, exists due to the lack of a united forum for disputes arising under the Convention and no mechanism to ensure the consistency in resolving similar cases by different tribunals.⁴⁰ This deteriorates the way state parties consistently apprehend and interpret the Convention and limits the effect of cooperation to achieve mutual gains or benefits that state parties aim at upon the ratification of UNCLOS 1982. This was clearly portrayed through the case of Philippines and China as the involving parties face difficulty in maintaining a unite interpretation

38 Robert C. Beckman, “The Philippines v China Case and the South China Sea Disputes”, in *Territorial Disputes in the South China Sea*, ed. Territorial Disputes in the South China Sea, (London: Palgrave Macmillan, 2015), 54-65.

39 “The United Nations Convention on the Law of the Sea (A historical perspective)”, Oceans and The Law of The Sea, The United Nations, accessed 3 October, 2018, http://www.un.org/depts/los/convention_agreements/convention_historical_perspective.htm.

40 Alan E. Boyle, “Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction”, *International & Comparative Law Quarterly*, 46, No.1, (1997): 37-54.

towards the legal regime.

Although it is agreed that UNCLOS 1982 has proved to fit and succeed in dealing with this dispute in the region, it is widely accepted that countries need to take further steps to build and supplementing the Convention. This may go in line with liberalism approach that states can lead to the further step in their co-operation and improvement of this legal regime. However, due to the effect provided by neo-realistic theory, it may be difficult to get all other countries have this united mindset as it may affect their own interests. Hence, the study suggested that the case of Philippines and China can be a paradigm since both countries can enjoy the flexibility of a “lacking” compliance mechanism in the UNCLOS 1982 and tried not to worsen their reciprocal relations by negotiating on the basis of adherence to the arbitral award.

d) Lesson learned for other countries in the region: power or the rule-of-law governs the use of the oceans?

In previous parts, the paper has argued the role of UNCLOS 1982 as international legal regime in settling dispute among countries and affirmed that the risk of non-compliance might be a matter of time and it shall not make it go against the goal of co-operation promotion of countries.

Besides some implications from the case, there are also lessons for other state parties who are suffering from pressure of big countries over issues of sovereignty. First and foremost, it is obvious that the UNCLOS will continue to challenge nations in regard to the compliance and harmonization with their national law. All states should be aware that any interests in exercising their rights provided by the Convention always require fulfilling the obligations. It is clear that issues brought by the Philippines are somehow similar to issues that other countries in the region are encountering.

In principle, most countries in the region (except Taiwan) are state parties of the Convention. Like in the case of the Philippines, they can completely recourse to the Convention to bring any disputes to the settlement body in accordance with Appendix VII of the Convention. Nevertheless, from the legal perspective, making a claim against any countries, especially countries with great influence like China, is not easy. The declaration to exclude the disputes regarding maritime delimitation can illustrate this point. Second, the tribunal shall not have jurisdiction over the disputes in regard to sovereignty, as this is not the issue which is governed by the UNCLOS 1982. This implies that any countries wishing to make claims should be extremely careful so as not to make the disputing issue fall under the exclusion declared by the other party (e.g. China in this case). In this case, the Philippines were fully aware of this issue and have proactively declared in its submission that it did not intend to claim for sovereignty or maritime delimitations in front of the arbitration, as well as it knew how to cleverly raise questions that avoid such “legal barriers” built by China. Hence, this is a good strategy that countries may

learn from the case. Lastly, it is critical to note that this is the first time the Philippines has appeared in front of an international judicial body, and the defendant was a country with great influence and advantage in all aspects. Thus, the government of the Philippines has certainly been well-prepared by careful consideration and has made meticulous estimations and speculations for all contingencies. One of the advantageous factors may be support from the U.S. not only for this claim submission but also in other fields such as military and politics on behalf of a strategic alliance in Southeast Asia.

To recapitulate, the Philippines – China case has shown that the rule-of-law in dispute settlement offered by the UNCLOS 1982 is a useful tool that any state party may take advantage of in dealing with any infringement placed by pressure from other “big” countries. In front of the international judicial body, all countries, notwithstanding its size or worldwide influence, are treated equitably with identical chances to be the “winner”. Nevertheless, this is not merely the legal battle between the two parties in front of the tribunal. There will be more complicated other issues associated behind, which may imply so many further corollaries that careful consideration should be taken into account. In case other negotiation or foreign affairs treatment has come into a deadlock and cannot produce expected results, the recourse to international law for legal protection is arguably necessary.

Conclusion

Being home to the most boiling territorial issue of the region, the South China Sea, including the dispute between the Philippines and China raises, the concern of its effectiveness of the UNCLOS 1982. Upon the reward, regardless of criticism to the lack of implementation mechanism in the Convention, the study argues that the UNCLOS 1982 has been successful in settling dispute of region due to the two reasons. Firstly, the tribunal has interpreted the Convention in the way that ensures its internationality and not for any interest of any states. This supports the goal of international legal regime to maintain peace and equitability among nations. Secondly, the non-compliance of China is not certain because it takes time for the country to deliver positive step towards it. Although, initially it seemed that China might use its power in economy to retaliate the Philippines, but after one year, China seemed to adhere to the Convention. The lack of such mechanism, in this case, may provide parties the flexibility for their compliance, as well as open to further negotiation and co-operation among them. It is hence suggested that UNCLOS 1982 needs to have provisions governing the compliance of countries to improve its rule-of-law function as an international regime. Therefore, the dispute settlement mechanism offered by UNCLOS 1982 succeeds in creating an exemplary case that other countries in the region can learn from in regard to using international law as a tool to balance the power in their relations. Due to the limited case analysis, other issues may have not been addressed in the study that can be left for future research. It is

necessary to study other cases of the UNCLOS 1982 to deal with maritime issues in other regions or countries. By doing so, the UNCLOS can also again be utilized by states or be refused to settle their dispute. This is again a co-operative game that may involve strategic juncture of every nation.

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The Future of the Outer Space Treaty – Peace and Security in the 21st Century

*Jonathan Lim**

Abstract: This paper analyses the ongoing debate surrounding proposed amendments to the 1967 Outer Space Treaty. The paper aims to outline the multiplicity of suggested amendments and practically reconcile them with the developing geopolitical climate and international legal principles. It assesses the several key aspects of the OST which remain in contention; addressing the economic, national security, and environmental concerns through a holistic approach, considering the relevant articles of the OST and how these articles have been interpreted. It finds that growing access to resources and militarization makes cooperation on certain issues impractical, and that the adoption of transparency and confidence-building measures, coupled with the independent development of opinion juris by subordinate IGOs, represents the most viable opportunity for amendments to be incrementally instituted by consensus. The adoption of transparency and confidence-building measures will facilitate mutual trust and understanding between UN members, reinforce the rule of law, and preclude the possibility of competition and conflict in outer space. This analysis provides an updated insight into developments within international law jurisprudence, and represents an exhaustive record of proposed OST amendments.

Keywords: Space Law, Outer Space Treaty, Arms Race, Space Mining, Space Environment, Diplomacy.

Received: August 12, 2018. **Accepted:** October 13, 2018. **Published:** October 31, 2018.

Introduction

The emergent pattern of disregard for established rules of international law precludes the development of an anarchist order in outer space, one which must be anticipated by continued multilateral cooperation under the OST as the primary instrument for international space affairs. Acknowledging the dynamic nature of the current geopolitical landscape, and exponential proliferation of space technology and activity over the past fifty-years, member states must affirm the stability of the rules-based order in outer space affairs by implementing amendments to the 1967 Outer Space Treaty (OST).¹

The existing international framework on outer space, codified within the OST, has

¹ *1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (Outer Space Treaty)*, adopted 27 January 1967, 610 UNTS 205 (entered into force 10 October 1967).

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proven an increasing inconvenience to governments and private entities.² While the OST appeared suited to the issues and concerns of the Cold War, the instrument is inadequate to address the mass commercialization and use of outer space within the context of the twenty-first century.³ A growing number of state parties invested in outer space, mindful of geopolitical opportunities and anxious to meet national security challenges, have adopted unilateral measures which run contrary to the principal spirit of the OST to preserve outer space for all nations as the “province of all mankind”.⁴ Further, private space companies have exhibited their frustration with government authority and regulations in outer space, and have demonstrated a reckless disregard for the rule of law.⁵

Consequently, the open-ended definitions employed within the language of the OST, and development of a body of precedent within international customary law, has also contributed to the flagrant exploitation of the OSTs deficiencies, ambiguities and loopholes by opportunistic actors to the detriment of others.⁶ States have enacted unilateral efforts to expedite the private exportation and exploitation of natural resources in outer space.⁷ This is combined with the broader State efforts to push at the boundaries of the OST in anticipating their future capabilities in outer space and safeguarding national security.

Where the OST faces challenges on multiple fronts, support for amendments to the OST by UN member States has also increased significantly over the past decade,⁸ and the challenge falls upon the UN and associated International Governmental Organizations (IGOs)⁹ to balance between the cardinal principles of freedom of exploration, freedom of navigation and access, and freedom of scientific investigation; versus traditional concerns of State sovereignty, national security priorities and economic imperatives. Hanging in the balance is the risk of outer space transforming into a conflict zone, and deteriorating into an unparalleled tragedy of the commons.

The criticism levelled, and reforms proposed, upon the OST are concentrated upon its

2 United Nations, ‘Concluding General Debate on Peaceful Uses of Outer Space, Fourth Committee Approves 3 Draft Resolutions, 1 Decision’ on United Nations (17 October 2017) <https://www.un.org/press/en/2017/gaspd642.doc.htm>.

3 Mark J. Sundahl, ‘The Cape Town Convention and the Law of Outer Space: Five Scenarios’ (2014) 3(1) *Cape Town Convention Journal* 111; Ram Jakhu and Tanveer Ahmad, ‘World needs strong space governance system’ (2017) 1(11) *Room – The Space Journal* 31.

4 Taunton Paine, ‘Bombs in orbit? Verification and violation under the Outer Space Treaty’ on *The Space Review* (19 March 2018) <http://thespacereview.com/article/3454/1>.

5 Marina Koren, “Launching Rogue Satellites Into Space Was a ‘Mistake’” on *The Atlantic* (7 September 2018) <https://www.theatlantic.com/technology/archive/2018/09/spacebees-swarm-unauthorized-satellite-launch/569395/>.

6 Joan Johnson-Freese, ‘Build on the outer space treaty’ (2017) 550(7675) *Nature* 182.

7 Jacob A. Reed, ‘Cold War Treaties in a New World: The Inevitable End of the Outer Space and Antarctic Treaty Systems’ (2017) 42(4/5) *Air & Space Law* 465.

8 United Nations, ‘Stronger Rules Must Guarantee Outer Space Remains Conflict-Free, First Committee Delegates Stress, Calling for New Laws to Hold Perpetrators Accountable’ on the United Nations (17 October 2017) <https://www.un.org/press/en/2017/gadis3583.doc.htm>.

9 i.e. the International Telecommunications Union, the UN Committee on the Peaceful Uses of Outer Space, etc.

following key principles that:¹⁰

1. The exploration and use of outer space should be carried out for the benefit of all mankind;¹¹
2. Outer space should be free for exploration and use by all States;¹²
3. State parties are prohibited from placing nuclear weapons or any WMDs in space;¹³
4. Outer space should not be subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means; and¹⁴
5. States shall avoid harmful contamination of space and celestial bodies.¹⁵

Consequently, it has been advanced that the OST and the international community may benefit more by the supplementation and augmentation - rather than outright replacement - of established codified principles within the legally binding agreement. This has been explored through the proposed codification of existing customary law principles, and the inclusion of amendments which anticipate issues of shared concern.

However, determining the feasibility of amendments versus augmentation to the OST requires first interpreting the developing geopolitical climate motivating reform efforts, examining broad proposals for changes to the OST, consideration of nascent legal rights, and analysis of how parties might balance their diverging interpretations and interests.

Accordingly, this shall be addressed via an analysis of recent initiatives to further the OST and its objectives, upon the several core aspects of the OST; economic imperatives, national security motivations, and environmental incentives for reform.

Context

Background of the Outer Space Treaty

The 1967 OST was the second of the “non-armament” international treaties, with its concepts modeled upon its predecessor, the 1959 Antarctic Treaty.¹⁶ The OST sought to prevent “a new form of colonial competition” and the possible damages that self-seeking exploitation might incur. The prevailing intention was to ensure the peaceful exploration and use of outer space and celestial bodies, and to preclude the possibility of military

10 J. Scott Hamilton, *Practical Aviation & Aerospace law* (Aviation Supplies & Academics, 2015) 395; United Nations Office for Outer Space Affairs, ‘Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies’ on United Nations Office for Outer Space Affairs (2018) www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/introouterspacetreaty.html.

11 Outer Space Treaty, above n1, Art I.

12 Ibid.

13 Ibid, Art Iv.

14 Ibid, Art II.

15 Ibid, Art IX.

16 *The Antarctic Treaty*, adopted 1 December 1959, 402 UNTS 71 (entered into force 23 June 1961).

conflict.¹⁷

To supplement the OST, four additional international treaties arose among and between UN member States, seeking to support the principal objectives of the OST; *The Rescue Agreement* (1968),¹⁸ *The Liability Convention* (1972),¹⁹ *The Registration Convention* (1975),²⁰ and *The Moon Agreement* (1979).²¹

Among these instruments, the Moon Treaty/Agreement represents the most recent UN treaty addressing the issues of property and the exploitation of resources in outer space. The Moon Treaty encompasses eighteen parties out of the existing 193 UN member States,²² providing that the lunar environment should not be disrupted and be used only for peaceful purposes and for common benefit.

Accordingly, no part of the lunar surface can be owned by any entity apart from international organizations,²³ with resources on the Moon being considered as the common heritage of mankind (CHM).²⁴ The Treaty also makes provisions for the creation of a forum to negotiate the rules and process governing the exploitation of natural resources in outer space.

Irrespective of its utility, the principal space powers (i.e. US, Russia, China) decision to neither sign, accede to, nor ratify the Moon Treaty damages its capacity to act as a viable successor to the OST. Where the inclusion of CHM within the treaty was the primary cause of concern, this highlighted the foresight of States to safeguard private industry and resource exploitation.²⁵

International Code of Conduct for Outer Space Activities

The International Code of Conduct for Outer Space Activities (ICOC) represents the most promising spiritual successor to the OST to-date within international soft law.²⁶ The ICOC encourages international cooperation concerning security and engagement in outer space

17 US Department of State, 'Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies' on US Department of State (1 February 2001) <https://www.state.gov/t/isn/5181.htm>.

18 *Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Space*, adopted 22 April 1968, 672 UNTS 119 (entered into force 3 December 1968).

19 *Convention on International Liability for Damage Caused by Space Objects*, opened for signature 29 March 1972, 961 UNTS 187 (entered into force 1 September 1972).

20 *Convention on Registration of Objects Launched into Outer Space*, opened for signature 14 January 1975, 1023 UNTS 15 (entered into force 15 September 1976).

21 *Agreement governing the Activities of States on the Moon and Other Celestial Bodies* (Moon Treaty), opened for signature 18 December 1979, 1363 UNTS 3 (entered into force 11 July 1984).

22 United Nations, '2. Agreement governing the Activities of States on the Moon and Other Celestial Bodies' on United Nations Treaty Collection (2018) https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXIV-2&chapter=24&clang=_en.

23 Erik Seedhouse, *Mars via the Moon: The Next Giant Leap* (Springer, 2015) 127.

24 Moon Treaty, above n25, Art 11.

25 Vidvuds Beldavs, 'Simply fix the Moon Treaty' on *The Space Review* (15 January 2018) <http://www.thespacereview.com/article/3408/1>.

26 European Union, 'Security and sustainability in Outer Space' on European Union (14 January 2015) https://eeas.europa.eu/headquarters/headquarters-homepage/8466/security-and-sustainability-outer-space_en.

between European Union (EU) members – originating in 2008 and having undergone revisions in 2010, 2012, 2013 and 2014 respectively.²⁷

The ICOC addresses military and civilian use of outer space and presents voluntary principles for responsible behavior which prioritizes long-term sustainability through safety and security within States' conduct of operations, the pursuit of transparency and confidence-building measures (TCBM) related to their policies and activities in outer space, and which limits the creation of space debris.²⁸

As an international soft law instrument, being non-legally binding, the ICOC has been criticized as being highly unsuited to the nature of disarmament treaties and being manifestly ineffective in stimulating a sense of obligation and legitimacy.²⁹ However, this soft law approach adopted by the ICOC – furthered by the contents of its 2012 revision - has merits in avoiding lengthy time-consuming negotiations associated with treaty agreements, while achieving immediate limited implementation with a high-degree of flexibility in responding to developing international trends.³⁰

Regardless, efforts to replace the OST with the ICOC has suffered from consistent diplomatic “failures to launch” following its presentation before the UN in July 2015.³¹ The proposal was rejected in October 2016 by a considerable number of States who outlined that the Code could not replace the need for a legally binding multilateral instrument which needed to be developed under a mandate authorized by the UN General Assembly.³² While the ICOC provides a platform outside the UN for States and stakeholders to discuss space security issues, the Code remains in a state of suspended animation and its future is uncertain.

Existing Climate

The emergent reluctance of spacefaring States to neither cooperate nor reconcile technical and economic inequalities vis-à-vis other UN member states, and prioritize individual national security interests, has fostered an atmosphere of competition and contributed to the lack of initiative to amend the OST.³³

27 Nikhil Balan, 'EU Initiative for a Code of Conduct in Outer Space: A Critical Analysis' on Skylega (1 July 2017) skylega.com/wp-content/uploads/2017/06/European-Aerospace-Law.pdf 5.

28 Massimo Pellegrino and Gerald Stang, Security Study for Europe – Report No.29 (European Union Institute for Security Studies, 2016) 10.

29 Jack M. Beard, 'Soft Law's Failure on the Horizon: The International Code of Conduct for Outer Space Activities' (2017) 38(2) *University of Pennsylvania Journal of International Law* 335-424.

30 Balan, above n31, 7.

31 Michael J. Listner, 'The International Code of Conduct: Comments on changes in the latest draft and post-mortem thoughts' on The Space Review (26 October 2015) www.thespacereview.com/article/2851/1.

32 United Nations, 'Debating Proposals on Common Principles to Ensure Outer Space Security, First Committee Delegates Call for Adoption of Legally Binding Treaty' on United Nations (19 October 2016) <https://www.un.org/press/en/2016/gadis3557.doc.htm>.

33 Rajeswari Pillai Rajagopalan, 'A new space race in Asia' on East Asia Forum (18 May 2018) <http://www.eastasiaforum.org/2018/05/18/a-new-space-race-in-asia/>; Liu Zhun, 'NASA's China exclusion policy short-sighted' on Global Times (8 October 2013) <http://www.globaltimes.cn/content/816381.shtml>.

As disagreements persist, the capacity for State parties to the OST to negotiate amendments diminishes, and a system of anarchy within international affairs becomes entrenched as more technically capable States move to consolidate and safeguard their resources and economic positions.

During the 40th anniversary of the OST in 2007, the UN apprehended the challenges to security in outer space, regarding the inadequacy of institutional mechanisms to manage geopolitical developments, and in preventing weaponization – seeking to promote security through confidence-building measures. This was compounded by the “lack of a consensus: on reopening the OST or in designing a new international convention to supersede the OST.”³⁴

Following the 50th anniversary of the OST in 2017 there has been minor progress by the UN General Assembly³⁵ on enacting amendments to the OST, as State parties appeared complacent and accepted of the present state of the OST; which is complemented by customary law via the decisions of subsidiary bodies including the UN Committee on the Peaceful Uses of Outer Space (UNCOPUOS).

The UN Fourth Committee called upon UNCOPUOS to continue to promote “the widest adherence” to the OST and of its application by States, seemingly fixated on urging all UN member States to incorporate the OST and continuing to promote confidence-building measures between State parties. Doubts also persisted on whether the OST could adequately safeguard the equal and universal access to space technology and outer space for all countries, without regard to size or developmental level.³⁶

Economic Aspects

Articles to Consider

Article I – *“The exploration and use of outer space...shall be the province of all mankind”.*

Under a prima facie interpretation, the exploration of resources in outer space for “private use” by any actor appears impermissible. However, questions persist whether space resources prospected and mined by a private non-State entity from a celestial body and transported to Earth for sale on the international commodities market falls within the ambit of this article, and if so how could resources be apportioned to benefit “all mankind”.

Article II – *“Outer space...is not subject to national appropriation by claim of sov-*

34 United Nations, ‘United States says discussing merits of treaties to prevent “weaponization” of outer space “pointless”. As first committee continues thematic debates’ on United Nations (22 October 2007) <https://www.un.org/press/en/2007/gadis3349.doc.htm>.

35 United Nations, ‘General Assembly Adopts 38 Resolutions, 2 Decisions from Fourth Committee, Including Texts on Decolonization, Israeli-Palestinian Issues’ on United Nations (7 December 2017) <https://www.un.org/press/en/2017/ga11987.doc.htm>.

36 United Nations, above n2.

ereignty, by means or use or occupation, or by any other means.”

This article has been long interpreted as a declaration of *res extra commercium* in outer space and celestial bodies, thus precluding the possibility of *res nullius* or *terra nullius* being applied by a State to seize unclaimed land in outer space to the exclusion of all other parties.³⁷

Drafters of the OST chose to limit this prohibition on appropriation to States, despite advisement that the OST should prohibit “national and private appropriation.”³⁸ However, international customary law has resulted in two distinct interpretations; one where resources cannot be lawfully appropriated outright because they belong to all mankind, and another where the clause solely refers to permanent appropriation by sovereign nations and not the consumption of resources by private actors.³⁹

Two issues must be clarified. Firstly, whether “national” applies to business enterprises with State connections, and whether there exists a legal distinction between these classifications under the OST. Secondly, whether the definition behind “by any other means” covers the exercise of sovereign rights by States through private use, private occupation, and assertions of private exclusive rights to a defined territory in outer space.⁴⁰

There exists ambivalence whether Article 1 para 2 (free exploration and use of celestial bodies) includes the right to take and consume non-renewable natural resources. Objectively, the assertion of private property rights is presently prohibited under Article II, as supported by the existence of sufficient *opinion juris* that a prohibition of private property rights constitutes a principle of customary international law.⁴¹ Conversely, in the absence of a clear prohibition of the taking of resources the use of space resources is de-facto permitted,⁴² a contention established in relation to the scientific use of acquired celestial resources.⁴³

Article VI – “*State parties to the treaty shall bear international responsibility for national activities in outer space...whether such activities are carried on by governmental agencies or by non-governmental entities.*”

States are responsible for the activities of nongovernmental entities, requiring the

37 Han Taek Kim, ‘Fifty Years of Outer Space Treaty: Its retrospect and prospect’ (2017) 50 *Kangwon National University – Kangwon Law Review* 565-566.

38 Austin C. Murnane, ‘The Prospector’s Guide to the Galaxy (2013) 37(1) *Fordham International Law Journal* 262.

39 Adam G. Quinn, ‘The New Age of Space Law: The Outer Space Treaty and the Weaponization of Space’ (2008) 17 *Minnesota Journal of International Law* 481.

40 Ricky J. Lee, ‘Article II of the Outer Space Treaty: Prohibition of State Sovereignty, Private Property Rights, or Both?’ (2004) 11 *Australian Journal of International Law* 136.

41 *Ibid*, 141.

42 International Institute of Space Law, ‘Position Paper on Space Resource Mining’ on International Institute of Space Law (20 December 2015) <http://www.iislweb.org/docs/SpaceResourceMining.pdf> 2.

43 NASA, ‘Lunar Rocks and Souls from Apollo Missions’ on NASA (2018) <https://curator.jsc.nasa.gov/lunar/>.

“authorization and continuing supervision” of space activities by commercial enterprises.⁴⁴ Direct attribution is an exclusive characteristic of space law, as private actors are considered as acting on behalf of the home nation. This inherently makes States more restrictive of commercial space activities owing to the financial liabilities; particularly where the obligation to indemnify can certainly exceed the financial capabilities of the liable space operator and that of any insurer, resulting in national governments often footing the bill.⁴⁵ Accordingly, developing states are unable or reluctant to participate or compete within space activities.⁴⁶

The US⁴⁷ and Luxembourg⁴⁸ have independently adopted space resource laws which provide national frameworks to outline the legal rights and responsibilities for independent entities to extract resources from celestial bodies. It is recognized that there exists a clear dichotomy between claiming ownership of property and recognizing mining and resource rights.

Property and Resource Exploitation

Governments and private entities will inevitably engage in resource exploitation in outer space given its overwhelming economic benefits. A proactive response requires the sustainable regulation of these activities to preempt the emergence of adverse environmental and political consequences. Failure to arrive at an agreement which nominally recognizes States’ rights to accumulate resources jeopardizes the rule of law - where it leads States to deem it more economically beneficial to support their national interests and disregard the OST rather than limit the scope of their activities.⁴⁹ This is alluring as the international community’s scope for enforcement of international instruments - including the OST - are limited vis-à-vis the notion of state sovereignty.

There exist two interpretations of “the province of all mankind” phrase within Article 1, language which alludes to the notion of “common heritage” under international law. The first interpretation sees actors consider that outer space and its resources and benefits should be equitably distributed. The second interpretation sees actors interpret the phrase as aspirational language absent of any limitations.⁵⁰ This duality has facilitated a loophole through distinguishing the rights to mine versus the appropriation of property on celestial bodies, opening the prospect for the unregulated extraction of resources by space actors.

44 Jason Krause, ‘The Outer Space Treaty turns 50. Can it survive a new space race?’ (2017) 103(4) *American Bar Association* 44.

45 Dimitri Linden, ‘The Impact of National Space Legislation on Private Space Undertakings: Regulatory Competition vs. Harmonization’ (2016) 8(1) *Journal of Science Policy & Governance* 5.

46 Priyank D. Doshi, ‘Regulating The Final Frontier: Asteroid Mining and The Need For A New Regulatory Regime’ (2016) 6(1) *Notre Dame Journal of International & Comparative Law* 210.

47 US Congress, H.R.2262 – *US Commercial Space Launch Competitiveness Act*, Sec.51303 (2015).

48 Loi du 20 juillet 2017 sur l’exploration et l’utilisation des ressources de l’espace (Luxembourg) signature 20 July 2017.

49 Linda Dawson, *The Politics and Perils of Space Exploration: Who Will Compete, Who Will Dominate* (Springer 2016) 10.

50 G. Quinn, above n44,480.

Incidentally, China has exploited this loophole by proclaiming mining rights on the moon rather than appropriating property in outer space; announcing plans to establish a base to mine helium-3, despite its present inability to establish a physical lunar presence.⁵¹

A significant roadblock to any amendments on appropriating resources resides within ensuring that less technologically advanced nations are not disadvantaged. The Moon Agreement⁵² stands as the only other authority on the issue, and is one option to incorporate into OST amendments. Herein, any resources acquired from celestial bodies are considered as CMH, *prima facie* requiring its use for the benefit of “all humanity”. However, these onerous burdens and limitations remain a cause for concern for technologically capable nations, its adoption remains highly-improbable.⁵³

An alternative approach exists in amending the non-appropriation principle of the OST.⁵⁴ The phrase “province of all mankind” establishes that no State may establish its sovereignty on a celestial body, yet may peacefully use it for construction, habitation, resource extraction and other peaceful, non-military purposes.⁵⁵ Ideally, this should be revised to the phrase “common property” while maintaining Article II provisions, facilitating the possibility of resource exploitation and property ownership by non-governmental entities while maintaining the existing prohibition on national claims to celestial objects.⁵⁶

While the notion of common property resources places the high-costs of maintaining exclusive rights to a resource upon technologically able states - encouraging free riders – this must be interpreted as a transitive step.⁵⁷ While acquired natural resources are appropriated and distributed to states without access to space this also concentrates access to space among select advanced nations, a position of reliance which will prove increasingly untenable to the national security of less capable states and drive independent development.

Regardless, incremental steps are instrumental in encouraging less capable UN member states towards developing commercial space infrastructure and participating

51 Zhang Huan, ‘China in talks with Europe to collaborate on moon village construction’ on People’s Daily (25 April 2017) <http://en.people.cn/n3/2017/0425/c90000-9207497.html>; Vidya Sagar Reddy, ‘China’s Pursuit of a “Space First”’ on Georgetown Journal of International Affairs (13 September 2016) <http://journal.georgetown.edu/chinas-pursuit-of-a-space-first/>.

52 *1979 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (The Moon Treaty)*, adopted 5 December 1979, 1363 UNTS 3 (entered into force 11 July 1984).

53 Timothy G. Nelson, ‘The Moon Agreement and Private Enterprise: Lessons from Investment Law’ (2011) 17(2) *ILSA Journal of International & Comparative Law* 396.

54 Fabio Tronchetti, ‘The Non-Appropriation Principle as a Structural Norm of International Law: A New Way of Interpreting Article II of the Outer Space Treaty’ (2008) 23(3) *Air & Space Law* 305.

55 Sara Bruhns, ‘A pragmatic approach to sovereignty on mars’ (2016) 38 *Space Policy* 58; A. Reed, above n9, 465.

56 Ricky J. Lee, ‘Exploitation Rights: Evolving from the “Province of Mankind” to the “Common Heritage of Mankind”’ in Ricky J. Lee, *Law and Regulation of Commercial Mining of Minerals in Outer Space* (Springer, 2012) 270.

57 Chika B. Onwuekwe, ‘The Commons Concept and Intellectual Property Rights Regime: Whither Plant Genetic Resources and Traditional Knowledge?’ (2004) 2(1) *Pierce Law Review* 75.

in space exploration. The prospect of less technologically capable nations participating within space activities has been enabled the ever-lowering barriers of entry resulting from decreasing costs of electronics, and constant miniaturisation of technology⁵⁸ under Space 2.0, and will facilitate the mass proliferation of commercial activities in the following decades.

Progress within the codification of legal principles on space assets within a multilateral form is already evident within the Cape Town Convention and the 2012 Space Assets Protocol;⁵⁹ producing the first space treaty regarding private international law. The treaty addressed the rights and obligations of both state and non-state parties engaged within business transactions, harmonizing and unifying the rules on asset-backed finance for mobile equipment in outer space encompassing spacecraft and payloads (i.e. satellites).⁶⁰ This addressed the needs of private financiers, including the priority of secured parties, title to purchased assets, and remedies upon default.⁶¹

However, the treaty only possesses four signatories and is thus not presently in force.⁶² This may be explained by concerns by the US and other prominent space States that the Space Assets Protocol would upset the existing system of international space law, concerning its registry of international interests and possible conflicts with the UN register of space objects.⁶³

Analysis

The codification of international principles advocating sustainability in outer space under the OST must be advanced through TCBMs. There exists active UN movement towards codifying the shared utilization and exploitation of resources. Recent history concerning TCBMs and trust within space sustainability can be traced from the EU ICOC in 2008, and to the 2010 Scientific and Technical Subcommittee of COPUOS and its foundation of a Long-term Sustainability of Outer Space Activities working group (LSOSAWG).⁶⁴

Since its formal establishment in 2010, LSOSAWG has been consistently hindered

58 Gabriele Lania, 'An International Comparison of Space History, Policy and Industrial Capability' on Space Industry Association of Australia (June 2016) <https://www.spaceindustry.com.au/Documents/Paper%20FINAL-5.pdf> 13-14.

59 *Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Space Assets*, opened for signature 9 March 2012, UNIDROIT.

60 Pai Zheng, 'Space Asset Under the Space Protocol of the Cape Town Convention' on New York University School of Law (November/December 2014) http://www.nyulawglobal.org/globalex/Space_Asset_Protocol_Cape_Town_Convention.html#_edn3.

61 J. Sundahl, above n3, 109-110.

62 UNIDROIT, 'Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Space Assets (Berlin 2012) – Status' on UNIDROIT (9 March 2012) <https://www.unidroit.org/status-2012-space>.

63 Du Rong, *Unifying Space Financing Through Space Assets Protocol to the Cape Town Convention: A desirable effort for the space sector?* (Doctoral Thesis – University of Hong Kong, 2017) 264.

64 *Long-term sustainability of outer space activities – Preliminary reflections*, adopted 8 February 2010, A/AC.105/C.1/2010/CRP.3.

by the rule of decision by consensus.⁶⁵ The issues dealt with by the LSOSAWG include identifying areas of concern for long-term sustainability, proposing measures to enhance sustainability, and formulating voluntary guidelines to reduce sustainability risks.⁶⁶ The LSOSAWG issued its first set of guidelines in June 2016 and additional guidelines in February 2018 addressing the registration and information on space objects, conducting of conjunction assessments for maneuverable space debris, addressing risks of uncontrolled reentry of space objects, and on the use of lasers in outer space.⁶⁷ Contrasted by the ICOC, LSOSAWG presents the broadest participatory forum for engaging all concerned international actors within a multilateral setting, to better incorporate their contentions and consider cogent background information.

The inclusion of CHM within the OST, to facilitate the equitable and sustainable sharing of resources, should be pursued within subsequent TCBMs. The successful implementation of CHM as a legal regime to control mineral resource protection under an international instrument was demonstrated by its presence within the United Nations Convention on the Law of the Sea.⁶⁸ Where outer space contains an abundance of natural resources, this anticipates the growing possibility of a reckless resource race between nations vying for power. The strongest support has emerged from underdeveloped states, who seek greater cooperation in ensuring the primacy of the rule of law and peaceful use of outer space for the benefit of all.⁶⁹ However, the adoption of CHM within the OST or any other substantive treaty continues to face significant opposition from the leading space states.⁷⁰

Finally, the UN must call-out countries seeking to erode longstanding OST *opinio juris*. This includes considering punitive measures against the US and Luxembourg - given their unilateral initiatives to recognize the ownership and alienation of resources in outer space – and as a means to discourage other countries from adopting similar measures. While commentators declare Title IV of the 2015 US Space Act to be a violation of Article II OST and contrary to international space law, little direct action has been taken by the UN to address this matter. This is further complicated by the legalist interpretation that US law does not grant ownership rights in any celestial body (e.g. a real property interest), but rather only recognizes rights to resources extracted from an asteroid (a personal

65 Gerard Brachet, 'The origins of the "Long-term Sustainability of Outer Space Activities" initiative at UN COPUOS' (2012) 28 *Space Policy* 165.

66 United Nations Office for Outer Space Affairs, 'Long-term Sustainability of Outer Space Activities' on United Nations Office for Outer Space Affairs (2018) <http://www.unoosa.org/oosa/en/ourwork/topics/long-term-sustainability-of-outer-space-activities.html>.

67 Guidelines for the long-term sustainability of outer space activities, adopted 23 February 2018, A/AC.105/L.315.

68 *Convention on the Law of the Sea*, adopted 10 December 1982, 1833 UNTS 397 (entered into force 1 November 1994) Article 136; Edward Guntrip, 'The Common Heritage of Mankind: An Adequate Regime for Managing the Deep Seabed' (2003) 4(2) *Melbourne Journal of International Law* IIE.

69 United Nations, above n2.

70 Beldavs, above n29.

property interest). Whilst this conception of personal property interests is consistent with the articles of the OST,⁷¹ the UN and COPUOS must endeavor to apply a more purposeful interpretation of the OST, and assume a proactive stance in preserving the rule of law and international peace and security in outer space.⁷²

National Security

Articles to Consider

Article II – *“Outer space...is not subject to national appropriation by claim of sovereignty”*.

Conflict arises vis-a-vis Article VI as to scope of activities which can be attributed to the State, versus attribution to a private entity. Article VI provides that States bear responsibility for national activities in outer space – including by non-governmental entities under its jurisdiction – mandating a degree of direct government involvement within the activities of private space companies. However, the acceptable degree of state involvement - which does not alter the classification of a private entity into a government entity - remains unspecified, and gives rise to additional uncertainty under Article II where a “supposed” private company explicitly engages in resource acquisition in outer space.

Indeed, ambivalence as to the line between government and private entities has been a longstanding issue among authoritarian and East Asian States. Within China, supposedly private space entities such as ExPace have connections to foundations within state-owned enterprises.⁷³ If left unaddressed, States may consolidate their strategic position by encouraging the appropriation of resources and territory through non-governmental activities; thus establishing State practice and international customary law.

Any amendments must address the scope of Article II's existing prohibition. A lack of clarification here may embolden States to circumvent the article by simply privatizing the contravening activity on the surface, while covertly exerting undue influence.⁷⁴

Article IV – *Parties “undertake not to place in orbit around the Earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction.”*

When read in conjunction with Article 3 of the Moon Treaty, Article IV results in two distinct categories of demilitarization; one total and one partial. As “weapon of mass destruction” is not defined within the OST, its meaning is derived primarily from

71 Cristin Finnigan, ‘Why the Outer Space Treaty remains valid and relevant in the modern world’ on The Space Review (12 March 2018) <http://thespacereview.com/article/3448/1>.

72 James E. Dunstan, ‘Mining outer space may be cool but is it legal?’ (2016) 1(7) *Room – The Space Journal* 43.

73 Andrew Jones, ‘Chinese commercial company Expace dispatches second Kuaizhou-1A rocket to launch site’ on gbtimes (11 September 2018) <https://gbtimes.com/chinese-commercial-company-expace-dispatches-second-kuaizhou-1a-rocket-to-launch-site>.

74 J. Lee, above n63, 130.

international jurisprudence which follows the traditional classification of nuclear, biological, toxic and chemical weapons as WMDs, and prohibits their stationing in outer space.

This prohibition does not apply to conventional weapons which have a nuclear power source, nor to nuclear weapons or WMDs which enter outer space as part of the trajectory of an intercontinental ballistic missile.⁷⁵

International Climate

International consensus has emerged that an arms race in outer space should be prevented.⁷⁶ However, the existing legal regime still does not guarantee the prevention of conventional weapons, nor an arms race.⁷⁷ The US has consistently argued that any preemptive resolution addressing the weaponization of outer space would jeopardize its national security interests⁷⁸ and that resolutions to this effect provide the opportunity for rival nations to impose their national view on multilateral politics,⁷⁹ a contention which distinctly conflicts with the majority opinion of the international community.⁸⁰

Every year following 1982 in the UN First Committee and UN General Assembly, resolutions affirming the commitment of the international community to the prevention of an arms race in outer space (PAROS) is introduced and adopted by an overwhelming majority of UN member States.⁸¹ By incorporating subsequent developments in international space law under the ambit of PAROS, this framework affords Articles III and IV of the OST the status of customary law and maintains its relevance amid the dynamic nature of developments in outer space.

Most notably and recently in December 2014 the Russian proposed resolution 70/27 originating from the UN First Committee,⁸² committing member States to preventing an arms race in outer space and codifying the no first placement of weapons (NFP) in outer space, was passed during the UN General Assembly's 70th session with 129 votes

75 Bill Boothby, 'Space Weapons and the Law' (2017) 93 *International Law Studies* 202-203.

76 Nuclear Threat Initiative, 'Proposed Prevention of an Arms Race in Space (PAROS) Treaty' on Nuclear Threat Initiative (2018) <http://www.nti.org/learn/treaties-and-regimes/proposed-prevention-arms-race-space-paros-treaty/>.

77 UNDIR, *UNDIR Space Security Conference 2017* (UNDIR, 2017) 9.

78 United Nations, 'Preventing Outer Space Arms Race would avert grave danger; Possible new verifiable bilateral, multilateral agreements needed, says draft text in first committee' on United Nations (20 October 2008) <https://www.un.org/press/en/2008/gadis3371.doc.htm>.

79 United Nations, 'First Committee Submits Six Drafts to General Assembly, One Calling for Immediate Start of Negotiations on Treaty Preventing Outer Space Arms Race' on United Nations (30 October 2017) <https://www.un.org/press/en/2017/gadis3591.doc.htm>.

80 Reaching Critical Will, 'Outer Space' on Reaching Critical Will (2017) <http://www.reachingcriticalwill.org/resources/fact-sheets/critical-issues/5448-outer-space>.

81 United Nations Office for Outer Space Affairs, Meeting International Responsibilities and Addressing Domestic Needs: Proceedings (United Nations, 2006) 40.

82 United Nations, 'Disarmament Committee Approves Drafts on No First Placement of Arms in Outer Space, Ban on New Types of Mass Destruction Weapons' on United Nations (30 October 2014) <https://www.un.org/press/en/2014/gadis3514.doc.htm>.

in favor and 4 votes against. While the US opposed the draft resolution,⁸³ the support of other major space players (i.e. China and Russia) indicated a growing recognition of TCBMs in forestalling an arms race in outer space.⁸⁴

Another multilateral initiative concerns the attempts by the UN Conference on Disarmament to negotiate a draft Treaty on Prevention of the Placement of Weapons in Outer Space and of the Threat or Use of Force against Outer Space Objects (PPWT). On 12 February 2008 China and Russia introduced a joint draft treaty⁸⁵ to the Conference on Disarmament, a move which was skeptically denounced by the US as diplomatic ploy by these nations to gain a military advantage.⁸⁶ The opposition of the US to the proposed draft treaty has its foundation within the Bush administration's US National Space Policy document NSPD-49 of 31 August 2006.⁸⁷

“Proposed arms control agreements or restrictions must not impair the rights of the United States to conduct research, development, testing, and operations or other activities in space for US national interests.”

Similar sentiments were evident following updates to the draft treaty on 10 June 2014 by Russia and China, who sought to bind states to the treaty first before facilitating discussions on its scope and enforcement.⁸⁸ Opposition to the revised PPWT was indicated by Australia, Canada, France, and the US; who posit that the lack of a verification mechanism within the draft resolution is concerning, and that the primary motive is not to prevent the weaponization of outer space but limit the capabilities of developed space nations.⁸⁹ Since 2014, the PPWT remains in the drafting stage.

Similar to the EU ICOC, the development of an independent code of conduct

83 United Nations, ‘Item 95(b) Prevention of an arms race in outer space: no first placement of weapons in outer space’ on United Nations (7 December 2015) <https://gafc-vote.un.org/UNODA/vote.nsf/91a5e1195dc97a630525656f005b8adf/573ff9e5cfdb04c085257f16005e84ec?OpenDocument>.

84 Hao Liu and Fabio Tronchetti, ‘United Nations Resolution 69/32 on the ‘No first placement of weapons in space’: A step forward in the prevention of an arms race in outer space?’ (2016) 38 *Space Policy* 64.

85 United Nations, ‘Treaty on the Prevention of the Placement of Weapons in Outer Space, The Threat or Use of Force Against Outer Space Objects’ on Reaching Critical Will (12 February 2008) www.reachingcriticalwill.org/images/documents/Disarmament-fora/cd/2008/documents/Draft%20PPWT.pdf.

86 Alice Slater, ‘Nuclear Disarmament: The Path Forward, Obstacles, and Opportunities’ on Marc Pilisuk and Michael N. Nagler, *Peace Movements Worldwide – History and Vitality of Peace Movements* (Praeger, 2011) 25.

87 John M. Logsdon, ‘Book Review: Achieving space security’ (2008) 24(40) *Issues in Science and Technology* http://issues.org/24-4/br_logsdon/; Office of the President of the United States, ‘Unclassified – US National Space Policy’ on Federation of American Scientists (31 August 2006) <https://fas.org/irp/offdocs/nspd/space.html>.

88 United Nations, ‘Treaty on the Prevention of the Placement of Weapons in Outer Space, The Threat or Use of Force Against Outer Space Objects’ on Reaching Critical Will (10 June 2014) [reachingcriticalwill.org/images/documents/Disarmament-fora/cd/2014/documents/PPWT2014.pdf](http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/cd/2014/documents/PPWT2014.pdf)

89 Cassandra Steer, ‘Global Commons, Cosmic Commons: Implications of Military and Security Uses of Outer Space’ (2017) 18(1) *Georgetown Journal of International Affairs* 14; Michael Listner and Rajeswari Pillai Rajagopalan, ‘The 2014 PPWT: a new draft but with the same and different problems’ on *The Space Review* (11 August 2014) <http://www.thespacereview.com/article/2575/1>.

governing military affairs by academic institutions has been in progress since May 2016. The creation of the Manual of International Law Applicable to Military Uses of Outer Space (MILAMOS) is being overseen by academics and seeks to clarify the limitations which international law places on the threat or use of force in outer space, and the rules of engagement for hostilities in outer space.⁹⁰

International operational law manuals have had a tangible effect upon the development of *opinion juris*. Illustrated by the *San Remo Manual* to the UK's Manual of the Law of Armed Conflict,⁹¹ international manuals are becoming increasingly prevalent in courts, tribunals and other administrative bodies as references to assist within deliberative and advocacy projects. This is explained by the fact that international manuals are concise and accessible, they capture more nuanced government positions on legal issues, and present an impartial position from which various jurisdictions can seek to establish norms around.⁹²

State Sovereignty

While OST Articles clarify that space and celestial bodies cannot be claimed by nations, it remains uncertain how this applies to private corporations. This unknown has emboldened technologically and economically developed States to undertake unilateral action and endanger the existing multilateral TCBM framework. The passage of unilateral initiatives by governments within the US and Luxembourg have drawn concerns over the conflict between national laws and OST provisions.

The US 2015 Space Act,⁹³ was a legislative instrument adopted by the US government, outlining that any asteroid resources obtained in Outer Space were recognized by the government as the property of the entity that obtained them; provided that the entity is considered a “citizen of the United States.”⁹⁴ This was accompanied by the misnomer that “the United States does not thereby assert sovereignty or sovereign or exclusive rights or jurisdiction over, or the ownership of, any celestial body.”⁹⁵ The US government became one of the first states to recognize the rights of its citizens to the extraction, possession and sale of natural resources from celestial bodies.

In July 2017, Luxembourg's legislative assembly also independently adopted space resource laws which provide national frameworks to recognize the rights of independent

90 McGill University, ‘manual on International Law Applicable to Military uses of Outer Space’ on McGill University (29 May 2016) <https://www.mcgill.ca/milamos/>; Dale Stephens and Melissa De Zwart, ‘*The Manual of International Law Applicable to Military Uses of Outer Space (MILAMOS)*’ (RUMLAE Research Paper No. 17-12, 2017) 1.

91 Ministry of Defence, JSP 383 – The Joint Service Manual of the Law of Armed Conflict (Ministry of Defence, 2004) vii.

92 Dale Stephens and Melissa de Zwart, *The Manual of International Law Applicable to Military Uses of Outer Space (MILAMOS)* (University of Adelaide RUMLAE Research Paper No. 17-12, 2017) 3-4.

93 *US Commercial Space Launch Competitiveness Act*, above n52.

94 R. Venkata Rao and V. Goplakrishnan, Kumar Abhijeet, *Recent Developments in Space Law: Opportunities & Challenges* (Springer, 2017) 33.

95 *US Commercial Space Launch Competitiveness Act*, above n52, §403.

non-governmental entities to extract resources from asteroids or other celestial bodies. Its articles recognize that the resources of outer space are susceptible to appropriation, which is subject to the written assignment of the government.⁹⁶ This serves to make Luxembourg an attractive place for space mining companies to settle and distribute acquired space resources.⁹⁷ The legislation also created a governing body called the Space Resources Initiative to supervise the harvesting of these asteroids, and to serve as a critical component of Luxembourg's space mining ambitions. The body has signed a MOU with the China National Space Administration, and seeks to provide a bilateral framework for economic, technical and political cooperation with China.⁹⁸

As an increasing number of states resort to unilateral legislative acts to capitalize on the growing space industry, the international order becomes increasingly anarchic as the authority of the UN and the international rule of law diminishes. In 2013 the UN General Assembly adopted a resolution⁹⁹ outlining how national legislation may reconcile with international law. The resolution contains a set of recommendations on national legislation relevant to the peaceful exploration and use of outer space, emphasizing 'sustainable use' of outer space resources, and reminding States of their responsibility for supervising space activity originating from their territories.¹⁰⁰ Incorporating these recommendations into the OST would reinforce their authority among member States, while encouraging the supervision and regulation of private space activities in compliance with international agreements.

Pertaining to issues of national sovereignty, there exists the option of redefining the international customary agreement on the 100-kilometer Karman line as the boundary for outer space and codifying the territorial limits of a state with respect to outer space.¹⁰¹ As the OST did not contemplate the delimitation of outer space, an amendment may reconsider the utility of the 1976 Bogota Declaration.¹⁰² The declaration characterized the geostationary orbit (GEO) as a natural resource, not a region of space given that the unique properties of GEO are created by earth itself. States aimed to draw upon *jus*

96 Loi du 20 juillet 2017 sur l'exploration et l'utilisation des ressources de l'espace, above n53, Art 1, Art 2.
97 Grand Duchy of Luxembourg, 'A Legal Framework for Space Exploration' on Grand Duchy of Luxembourg (13 July 2017) <http://www.luxembourg.public.lu/en/actualites/2017/07/21-spaceresources/index.html>.

98 Grand Duchy of Luxembourg, 'Luxembourg to open a Research laboratory' on Grand Duchy of Luxembourg (17 January 2018) <http://www.luxembourg.public.lu/en/actualites/2018/01/17-centre-spatial/index.html>; Grand Duchy of Luxembourg, 'SpaceResources.lu: First-time FNR investment in space exploration projects' on Grand Duchy of Luxembourg (27 November 2017) <http://www.luxembourg.public.lu/en/actualites/2017/11/23-space/index.html>.

99 *Recommendations on national legislation relevant to the peaceful exploration and use of outer space*, adopted 11 December 2013, A/RES/68/74 (Adopted without vote 11 December 2013).

100 Simonetta Di Pippo, 'The peaceful use of space' (2014) 1(1) *Room – The Space Journal*.

101 Olavo De Oliveira Bittencourt Neto, *Defining the Limits of Outer Space for Regulatory Purposes* (Springer, 2015) 69.

102 *The Bogotá Declaration*, signed 3 December 1976 (Adopted 3 December 1976) http://www.jaxa.jp/library/space_law/chapter_2/2-2-1-2_e.html.

cogens principle that States have absolute control over their natural resources.¹⁰³

However, the Declaration is precluded by public international law. As Article II of the OST has passed into customary international law, adopting the Declaration's view on GEO runs contrary to well established limits in international customary law on State sovereignty.¹⁰⁴ This was compounded by the fact that only eight States contributed to the declaration, and further multilateral debate and consultation with OST member states is required before its provisions are to be seriously considered.

Inevitable Militarization

While the term "peaceful" makes multiple appearances throughout the OST, its interpretation under international legal customs and principles has been understood to mean "nonaggressive, but military-friendly".¹⁰⁵ Accordingly, the growing perception of space as the new warfighting domain further erodes this definition of "peaceful," with intensifying geopolitical competition causing numerous states to establish dedicated space-focused military branches and organizations. This was illustrated by China in 2015 through the People's Liberation Army Strategic Support Force,¹⁰⁶ and by the US in 2018 through Space Policy Directive-3 and the establishment of a Space Force as a branch of the military.¹⁰⁷

The benefits of military space-based infrastructure are well documented and have provided developed nations with significant increases in the accuracy, agility, range, and effectiveness of their military forces. Space infrastructure has become a significant tool for information dominance and therefore deterrence.¹⁰⁸ Paradoxically, the notion of space deterrence has only contributed to the cascading militarization of outer space, as States continuously seek to dissuade the use of counter-space capabilities by adversaries.¹⁰⁹

Given increasing military dependency on space-based assets, there has arisen the development of a cascading array of specialized weapon systems that can target space-based assets, including kinetic anti-satellite missiles (ASATs), co-orbital ASATs, directed

103 Hamilton, above n12, 396.

104 Dan St. John, 'The Bogotá Declaration and the Curious Case of Geostationary Orbit' on Denver Journal of International Law and Policy (31 January 2013) <http://djilp.org/3494/the-bogota-declaration-and-the-curious-case-of-geostationary-orbit/>.

105 Ann Deslandes, 'The Bold Future of the Outer Space Treaty' on JSTOR Daily (1 August 2018) <https://daily.jstor.org/the-bold-future-of-the-outer-space-treaty/>.

106 Rachel Burton, 'The People's Liberation Army Strategic Support Force: Leadership and Structure' on Project 2049 Institute (25 September 2018) <https://project2049.net/2018/09/25/the-peoples-liberation-army-strategic-support-force-leadership-and-structure/>.

107 The White House, 'Remarks by President Trump at a Meeting with the National Space Council and Signing of Space Policy Directive-3' on The White House (18 June 2018) <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-meeting-national-space-council-signing-space-policy-directive-3/>.

108 Michael L. Howard, 'Rendezvous in Space – Looking in on military space power' (2010) Summer Edition *Army Space Journal* 23.

109 Malcolm Davis, 'Avoiding a free-for-all: the Outer Space Treaty revisited' on ASPI (16 July 2018) <https://www.aspistrategist.org.au/avoiding-a-free-for-all-the-outer-space-treaty-revisited/>.

energy weapons, cyber weapons and electromagnetic pulse weapons.

Assuming armed conflict involving space-based assets, the central principles of distinction, proportionality and precaution that underpin International Humanitarian Law (IHL) naturally applies to regulate armed conflict in space. These principles ostensibly provide for protection of civilians and civilian uses of space-based assets on the limits of their application.¹¹⁰

However, outer space warfare raises specific challenges for the interpretation of IHL, revolving around the notions of “attack” and the implications for dual-use characteristics of satellites, and the consequences of orbital debris. While parties to a conflict have a general duty to take constant care with respect to civilians, most of the specific obligations concerning the conduct of hostilities apply to attacks rather than defensive actions. More so, as many satellites are dual-use, the impact of attacks on multi-national satellites could be devastating to the industrial control systems of more than just the target nation. Finally, the impact of space debris from civilian activities or kinetic attacks poses a long-term risk to freedom of navigation and access to space.¹¹¹

Concerns persist over Article IV's definition of WMDs. The language of the OST does not prohibit the actual use of nuclear weapons terrestrially, only their permanent placement or installation in outer space or on another celestial body.¹¹² Greater utility exists in modifying the OST to align with international norms and subordinate international instruments pertaining to the definition over what constitutes a WMD, in accord with the customary IHL principle of avoiding indiscriminate damage.¹¹³

This would account for destructive kinetic weaponry (i.e. ASAT missiles) of which the resulting debris from an attack can pose an indiscriminate risk to personnel and property in earth orbit and beyond. This was demonstrated by China's ASAT missile destruction of a redundant weather satellite in January 2007, creating in-excess of 3,000 pieces of orbital debris which have since then posed a threat to access space.¹¹⁴ OST amendments may further recognize and prohibit the use of debris and non-explosive projectiles as WMDs. Indeed, the prospect of orbital weaponry (i.e. kinetic bombardment) has the potential to

110 Dale Stephens, 'Why Outer Space Matters: Dr Dale Stephens Gives a Brief Introduction to International Humanitarian Law' on International Committee of the Red Cross – Intercross Blog (7 November 2016) <http://intercrossblog.icrc.org/blog/twmzia1cp84kv2c29bi4iz6q4u03in>.

111 Richard Desgagne, 'International Humanitarian Law in Outer Space' on United Nations Institute for Disarmament Research (2 December 2015) <http://www.unidir.ch/files/conferences/pdfs/international-humanitarian-law-in-outer-space-en-1-1099.pdf>.

112 Thomas J. Herron, 'Deep Space Thinking: What Elon Musk's Idea to Nuke Mars Teaches us about Regulating the Visionaries and Daredevils of Outer Space' (2016) 41(3) *Columbia Journal of Environmental Law* 563.

113 Mihai-Cladiu Dragomirescu, 'Legal means of preventing war in the Outer Space' on Space Law Resource (27 November 2016) <https://www.spacelawresource.com/single-post/2016/11/30/Legal-means-of-preventing-war-in-the-Outer-Space>.

114 Jaganath Sankaran, 'Limits of the Chinese Antisatellite Threat to the United States' (2014) 8(4) *Strategic Studies Quarterly* 25.

effect destruction comparable to nuclear weapons.¹¹⁵

Additionally, the OST may consider the industrial application of nuclear material and weaponry in space technologies/applications. This is illustrated through its use in nuclear propulsion, within planetary defense for near-earth object collisional mitigation, and with regard to resource mining activities.¹¹⁶

Regardless, proposed amendments to the OST relating to military activities must be predicated upon the existing prohibitions on weaponry outlined under IHL. This is necessary in considering prohibitions on the use of force, and destructive conventional and unconventional weaponry in outer space, while recognizing the outdated prohibition on the use of nuclear material.

Analysis

The UN must maintain the momentum of its achievements - within the 2010 creation of a Group of Governmental Experts on TCBMs,¹¹⁷ and the 2014 PAROS NFP Resolution 69/32 – in promoting the consolidation of these multilateral agreements and their principles under amendments to the OST.

Resolution 69/32 represented a renewed international initiative to limit the weaponization of outer space and hints at the possibility for similar achievements to be made in restricting military actions and weapons in outer space.¹¹⁸ Since the 1980s, the adoption by the UN General Assembly of PAROS and TCBM resolutions have taken place without constructive debate among delegations, which lacked the open exchange of opinions and views which form the basis of TCBMs.¹¹⁹ Resolution 69/32 introduced a step-by-step approach to PAROS which may enable future initiatives, involving clarifying its relationship with the Draft PPWT, inclusion of a definition of “space weapons” into future PAROS agreements, and the suggestion that States make additional pledge of “no first attack” in space.

Secondly, the international legal framework underlying PAROS would benefit from the accountability and responsibility resulting from the inclusion of enforcement mechanisms. The possibility of a binding mechanism to ban weapons in outer space has been raised by nascent space countries including Yemen, Kazakhstan, and Indonesia.¹²⁰

While enforcement within international law is a tedious affair, multiple international

115 M.N. Sirohi, *Military Space Force and Modern Defence* (Vij Books India, 2016) 25; Alex B. Englehart, ‘Common Ground in the Sky: Extending the 1967 Outer Space Treaty to Reconcile US and Chinese Security Interests’ (2008) 17(1) *Pacific Rim Law & Policy Journal* 136.

116 G.R Schmidt., ‘Nuclear Pulse Propulsion – Orion and Beyond’ on Stanford University (19 July 2000) <http://large.stanford.edu/courses/2013/ph241/micks1/docs/aiaa-2000-3856.pdf>.

117 *Resolution Adopted by the General Assembly on 8 December 2010*, adopted 8 December 2010, A/RES/65/68.

118 Liu and Tronchetti, above n93, 67.

119 United Nations Office for Disarmament Affairs, ‘Outer Space’ on United Nations (2018) <https://www.un.org/disarmament/topics/outerspace/>.

120 United Nations, above n10.

regulatory regimes (i.e. the Convention on Cluster Munitions) and organizations (i.e. the Organization for the Prohibition of Chemical Weapons) demonstrate the capacity of the international community to recognize and respond to weapons which present a clear and present danger to international peace and security. TCBMs in space security constitutes a first step in the progressive development of international space law towards this conclusion by reducing mishaps, misinterpretations and miscalculations, while creating greater predictability and consensus on critical matters.¹²¹

Finally, the two key areas within which the UN should seek to direct its subsequent efforts to involve the improvement in inspection and mechanisms and broadening the category of weapons which fall under its purview.

A precedent has been established in international customary law since the Cold War by the US that the placement of ground-based systems that temporarily place prohibited weapons into orbit would not be considered a violation of the OST, while space-based nuclear weapons would be considered a violation.¹²² Accordingly, inclusion of an explicit positive clause allowing for the inspection of spacecraft to ensure compliance with PAROS agreements should be considered in furthering TCBMs between UN member states and safeguarding the rule of law in outer space.

Furthermore, Article IV should be amended in a targeted manner to address kinetic kill vehicles, lasers and ASATs weaponry alone. This would be sufficient to have a comparable effect on peace and security in outer space and carries the highest probability of being accepted by China and the US, by providing sufficient certainty for areas in which the US can pursue its military and strategic interests in outer space.¹²³

Environment

Articles to Consider

Article VII – “Each State Party to the Treaty that launches or procures the launching of an object into outer space...is internationally liable for damage to another State Party to the Treaty”.

The article places an overly-onerous burden on governments to be responsible in perpetuity for all actions conducted in space; with no explicitly specified statute of limitations, nor limits on causation. This implies that the “State-of-launch” bears unlimited legal responsibility for damage caused to others, which has resulted in many governments passing down the costs of risks to businesses.¹²⁴

¹²¹ United Nations, ‘Amid Commemoration of Landmark Treaty’s Fiftieth Anniversary, Joint Meeting of First, Fourth Committees Discusses Keeping Weapons Away from Outer Space’ on United Nations Press (12 October 2017) <https://www.un.org/press/en/2017/gaspd640.doc.htm>.

¹²² Paine, above n5.

¹²³ B. Englehart, above n129, 151.

¹²⁴ *Space Activities Act 1998* (Cth), s.48.

Article V – “*States Parties to the Treaty shall immediately inform the other State Parties...of any phenomena they discover in outer space...which could constitute a danger to the life or health of astronauts.*”

The OST outlines a foundational framework for the reporting of dangers posed by space debris, one further refined by the 2010 UN Space Debris Mitigation Guidelines.¹²⁵ However, beyond Article VII holding states responsible for any potential damages caused by debris generated by their entities, the OST is notably absent of any preceding duty or obligation for responsible entities to adopt immediate or prolonged measures to remove or mitigate debris related to their activities. Further, in practice the duty to report “immediately” is often ignored by state parties.¹²⁶

Article IX – “*States Parties to the Treaty shall pursue studies of outer space... so as to avoid their harmful contamination and also adverse changes...*”

This article addresses the environmental considerations of outer space activities and seeks to protect outer space and other celestial bodies from contamination and environmental damage. This requires State parties to consider the adverse effects of their activities upon other states and requires them to seek consultation prior to assuming a course of action. However, international customary law has established that the consultation requirement is not interpreted in a standardized manner, nor possesses a strong enforcement infrastructure; meaning that while a State is required to request an opinion or examination of a specific problem little else is required beyond that.¹²⁷

Space Debris Remediation

The OST must be amended to promote sustainable mining practices in outer space, and the responsible use of technologies in outer space. The allure of asteroid mining has raised concerns that mining minerals could damage the environment around earth. This is alluded to by the existing extensive list of environmental considerations involved with mining on earth, and the added dangers of space debris and hazardous materials when mining in space.¹²⁸

Consequently, the threats posed by accidents caused by falling space craft upon the terrestrial environment is a cause for great concern, one whose framework may serve

¹²⁵ Peter Stubbe, *State Accountability for Space Debris: A Legal Study of Responsibility for Polluting the Space Environment and Liability for Damage Caused by Space Debris* (Brill, 2017) 232.

¹²⁶ Jonathan Lim, ‘Written in the Stars: China’s Space Ambitions’ on Young Australians in International Affairs (16 April 2018) <https://www.youngausint.org.au/single-post/2018/04/16/Written-in-the-Stars-Chinas-Space-Ambitions>.

¹²⁷ D. Doshi, above n51, 204.

¹²⁸ Tony Milligan, ‘Asteroid Mining, Integrity and Containment’ on Jai Galliot, *Commercial Space Exploration: Ethics, Policy and Governance* (Routledge, 2016) 124.

as an example for environmental regulations in outer space. This was illustrated by the Cosmos 954 satellite on 24th January 1978, whose crash spread radioactive materials over 124,000 km² of Canada.¹²⁹ A similar incident also occurred on 11th July 1979 when the US space station Skylab landed within a populated area in Western Australia upon re-entry; resulting in the first instance of the *Liability Convention* being activated.

The OST lacks any binding international agreement which specifies meaningful environmental protection in outer space and space debris control mechanisms. While difficult to compel actors to cease pollutive activities, the devastating prospect of a Kessler syndrome limiting access to space for generations must be addressed through a binding agreement. This will take steps towards defining what constitutes “space” and “space debris,” provide economic means for member States to remove space debris, and establish data-sharing responsibilities necessary to effectively monitor and mitigate the threat of space debris throughout the international community.¹³⁰

However, any mandatory measures to mitigate space debris must avoid unjustly disadvantaging developing states, as it is likely to lead to an increase in the cost of space activities and access. Rationally, a multilateral solution to space debris can only be implemented after appropriate national and regional regulations are developed and harmonized internationally. A level playing field is key to an effective regulatory system.¹³¹

Consequently, progress has been made in creating a separate instrument which addresses sustainability in outer space. As aforementioned, the February 2018 meeting of LSOSAWG under COPUOS facilitated the creation of nine guidelines for sustainable development by reducing the risks of collisions and other harmful activities.

Focus must henceforth be directed upon the early agreement on the next set of proposed guidelines and facilitating the broader participation of leading space powers (i.e. US, Russia, China)¹³² which will generate positive momentum during a period of heightened tensions for terrestrial geopolitics and outer space diplomacy.¹³³

Analysis

To facilitate the long-term sustainability of outer space activities, the term “outer void space” may be introduced within the OST. The inclusion of this phrase is precipitated by shifting interpretations regarding the UNs use of the term “outer space”. Where the substance of the OST speaks consistently of “outer space, including the moon and celestial

129 Francis Lyall and Paul B. Larsen, *Space Law – A Treatise* (Routledge, 2016) Ch 4.

130 Joseph S. Imburgia, ‘Space Debris and Its Threat to National Security: A Proposal for a Binding International Agreement to Clean Up the Junk’ (2011) 44 *Vanderbilt Journal of Transnational Law* 634.

131 Joanne Wheeler, ‘Managing Space - International Space Law and Prospective Reforms’ on Harvard International Review (30 March 2012) <http://hir.harvard.edu/article/?a=2929>.

132 United Nations, ‘Do Not Let Political Differences Distract You, General Assembly President Urges Member States, as Fourth Committee Continues Outer Space Debate’ on United Nations Press (13 October 2017) <https://www.un.org/press/en/2017/gaspd641.doc.htm>.

133 Paul Meyer, ‘The Outer Space Treaty at 50: An enduring basis for cooperative security’ on The Space Review (25 September 2017) <http://www.thespacereview.com/article/3335/1>.

bodies,” an obtuse interpretation permits that “outer space” does not designate the space in-between celestial bodies. The definition of the terminology surrounding this manner of physically discrete phenomena retains an ostensible relevance, despite the functional focus of international space law.¹³⁴

The introduction of this phrase will firstly fill a terminological gap in space law, and should not be construed as an attempt to change the long-established meaning of outer space established in space law jurisprudence. Furthermore, the term is specifically meant for use in legal discussions meant for outer space, and will provide greater clarity, purpose, and scope within space law.¹³⁵

Secondly, a broadly worded provision within the OST, mandating the obligation to facilitate debris removal, would represent a tangible step towards an established legal framework and mechanism. The existing treaties do not mention the term ‘space debris’ anywhere, and their use of the term ‘space object’ does not provide sufficient definition which would enable the application of legal consequences to it.¹³⁶

In addressing this issue, inspiration may be drawn from the scope of Maritime Tradition and its provisions for sailors. This would ideally encourage States to cooperate with each other, and with private Active Debris Removal entities, to remove space debris under a rewards system; while establishing a customary practice which can later be codified under an international agreement. In considering the legality of ownership over the multitude of space debris objects and Article VI OST, this process may be envisaged under a framework similar to the International Space Station Intergovernmental Agreement, which stands as a working example of States changing the nature of their liability to one another under specified circumstances.¹³⁷

Another suggestion involves inclusion of a requirement for States to restrict the orbital lifetimes of spacecraft through the inclusion of built-in de-orbiting measures within space vehicles as an international norm.¹³⁸

Finally, the notion of *res communis* hinders responsible commercial mining by promoting the tragedy of the commons.¹³⁹ Attention should be turned to Article 11 – Moon

134 Philip De Man, *Exclusive Use in an Inclusive Environment: The Meaning of the Non-Appropriation Principle for Space Resource Exploitation* (Springer, 2016) 104.

135 Bin Cheng, “Outer Void Space – The Reason for this Neologism in Space Law” (1999) *Australian Journal of International Law* 1.

136 Ward Munters, ‘Space debris conundrum for international law makers’ (2016) 1(7) *Room – The Space Journal* 60-64.

137 Al Anzaldua and Michelle Hanlon, ‘Maritime tradition can inform policy and law for commercial active debris removal’ on *The Space Review* (19 February 2018) <http://www.thespacereview.com/article/3434/1>.

138 Joshua Hampson, ‘Space to Breathe: The Argument for a New Outer Space Treaty’ on *The Potomac Institute for Policy Studies* (15 October 2015) <http://www.potomacinstitute.org/steps/views-in-brief/46-space-to-breathe-the-argument-for-a-new-outer-space-treaty>.

139 Christy Collins, ‘Res Communis?: A Critical Legal Geography of Outer Space, Antarctica, and the Deep Seabed’ on James S. Ormrod and Peter Dickens, *The Palgrave Handbook of Society, Culture and Outer Space* (Springer, 2017) Part 2 – Chapter 9.

Treaty, wherein no natural resources ‘in place’ shall become property of any entity. To clarify the OST’s effect on property rights within extracted resources, States could build upon the substance of the Moon treaty to provide that natural resources which are not ‘in place’ may become property of any entity.¹⁴⁰ This would codify existing customary law as it applies to the collection of scientific samples observed within the Apollo Program and Hayabusa mission.¹⁴¹

Concluding Remarks

Summary

Where common concerns pertaining to business and the economic issues, national security, and the environment have resulted in a multiplicity of proposed OST amendments, the successful maintenance of peace and security for future generations mandates the broad acceptance and adoption of specific amendments which provide for property and ownership, regulate space-based weaponry, and safeguard the environment in outer space.

The achievement of broad acceptance to these amendments requires the promotion of TCBMs, which calls upon UN member States to rectify the growing inequality and balance between technologically advanced and developing States. This should be addressed through the proliferation of joint-space initiatives akin to the International Space Station, the removal of political barriers, and increased technology and research sharing.

Promoting economic prosperity while simultaneously harmonizing multilateral cooperation is also manageable through increased operational coordination, and the codification of existing international customary norms and principles into separate instruments.

Operational coordination should be sought to avoid a tragedy of the commons. The diminishing amount of space in low earth orbit, and growing volume of orbital debris, will increasingly threaten the military, economic and scientific use of space for all nations. The UN must coordinate a framework for public-private sector utilization of space and create comprehensible measures of liability for incidents in space. One solution exists for UN member states to address sustainability issues by either adopting the ICOC or forging a new space code of conduct.

The codification of existing soft-law instruments also provides an alternative means of facilitating mutual trust amongst the international community. The establishment of unmistakable boundaries illustrating when a clear breach of international law has occurred, and uniform application of sanctions and enforcement procedures following a breach, reinforce the rule of law and enable the establishment of a viable trust-based

140 Nicole Ng, ‘Fences in Outer Space: Recognizing Property Rights in Celestial Bodies and Natural Resources’ (2016) 7 *The West Australian Jurist* 168.

141 NASA, ‘Hayabusa Asteroid Itokawa Samples’ on NASA (1 September 2016) <https://curator.jsc.nasa.gov/hayabusa/>.

framework.¹⁴²

Codifying an international response to violations of the OST reinforces international norms and encourages multilateral cooperation and unity. The achievements of the 2014 NFP resolution and the 2012 Space Assets Protocol has demonstrated that tangible progress can be made in codifying developing norms within international space law. It is anticipated that the progress of TCBMs between UN member States will pave the way to effective enforcement measures being instituted into the OST. Indeed, the OST is in desperate need of traditional sanctions, the payment of restitution, and restrictions on an offending State's access to space - in response to the sabotage of another country's space assets.

A multilateral response reinforces the rule of law, promotes inclusivity, precludes the notion of "might makes right", and prevents the emergence of an anarchic international order. Should the damaging of space assets result in coordinated punishment, the international community may also confidently rely upon its authority and the notion of deterrence as a means of enforcement.

Limitations

Considerations that arise when overcoming institutional inertia opposing the regulation of outer space activities under an amended OST encompass; the differing political objectives and perceptions of national security and interests, the diversion of attention from what actors regard as their remits, incremental approaches versus comprehensive approaches, the institution for the negotiations on these issues, and questions of timing and sense of urgency.¹⁴³

There also exists the issue of balancing equitability and fairness (Article I – OST) against the notions of effectiveness and efficiency mentioned by developed states advocating regulatory liberalism and the merits of private enterprise and free market capitalism. The successful implementation of benefit sharing would reduce inequality and promote the notion of common but differentiated responsibilities among OST member States.¹⁴⁴

Furthermore, several of the suggestions explored in advocating a return to form within the OST – by considering space as a global commons - appear impractical in the current geopolitical climate and presence of mounting commercial activities in outer space. Indeed, it appears highly improbable that both the notion of common property or common heritage of mankind would be adopted without significant concessions offered

142 Timothy Meyer, 'How Different are Treaties and Modern Customary International Law? A Response to Verdier and Voeten' on American Society of International Law (5 April 2015) <https://www.asil.org/blogs/how-different-are-treaties-and-modern-customary-international-law-response-verdier-and-voeten>.

143 United Nations Institute for Disarmament Research, *Celebrating the Space Age: 50 Years of Space Technology, 40 Years of the Outer Space Treaty - Conference Report, 2-3 April 2007* (United Nations Publications, 2007) 33.

144 Elisa Morgera, 'The Need for an International Legal Concept of Fair and Equitable Benefit Sharing' (2016) 27(2) *European Journal of International Law* 355.

to the leading space powers of US, Russia and China.

Areas for Further Study

First, OST Articles enable different space-faring countries to interpret the terms with great fluidity. One area of concern is where the Article IV explicitly forbids WMDs in space, but falls silent on the use of conventional weaponry. The opportunity exists for the international community to revise the scope of WMDs to encompass kinetic ASAT weaponry and kinetic bombardment.

Second, the rule of law may be reinforced through the removal of the treaty denunciation article of OST under Article XVI, to prevent states from withdrawing from the OST. The Vienna Convention on the Law of Treaties¹⁴⁵ outlines that a treaty that contains no provisions for denunciation is not subject to denunciation, unless the parties intended to admit the possibility of denunciation, or a right of denunciation was implied by its nature.

Third, promotion of space debris remediation practices may be advanced through proposed amendments to Article IX of the OST, changing the phrase “adopt appropriate measures” to “adopt proactive measures.”¹⁴⁶ This clause would compel States to explore space debris remediation options the moment it becomes aware of issues with its object, to actively track the location of its objects, and advocate for the compulsory inclusion of de-orbiting technology within satellites - among other proactive measures.

Fourth, the explicit limitation of national appropriation and exploitation of resources in outer space to specific celestial objects (i.e. asteroids) alone bears consideration. This would limit the scope for environmental damage in the immediate term, while regulating economic development and preventing adverse market conditions caused by the oversupply of resources.

Conclusion

Despite increasing militarization and competition in outer space, the possibility of amendments to the OST being adopted by the international community remains uncertain. Accordingly, cooperation within international diplomacy requires on patience and communication as adversaries seek to build mutual trust through common ground. The successful implementation amendments to the OST must be interpreted as an iterative process, contingent upon common interests in maintaining the rule of law by strengthening the existing international rules-based order, incentivizing state and private actors to use outer space responsibly, and the flexibility to adapt to the dynamic climate of terrestrial geopolitics.¹⁴⁷

145 Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) Article 65.

146 Ram S Jakhu and Md Tanveer Ahmad, ‘The Outer Space Treaty and states’ obligation to remove space debris: a US perspective’ on *The Space Review* (13 November 2017) <http://www.thespacereview.com/article/3370/1>.

147 G. Quinn, above n44, 497-502.

Where it appears that any proposed changes to the OST must be minor and incremental to account for inequalities and obtain wide acceptance, the use of soft law and TCBMs remains the most viable and effective immediate option. The politicization of any guiding principles should also be avoided by releasing draft materials to the public only when all parties agree, and by working through sub-committees operating from a technical perspective.¹⁴⁸ This would recognize the growing needs of nations and businesses in outer space and contribute most to international peace and stability. Incremental change is better than ambitious failure, for success feeds on itself.

¹⁴⁸ Johnson-Freese, above n8, 184.

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Utilisation of Drones and Resulting Strain: Evidence from Pakistan's Case

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Abstract: Introduction of Unmanned Aerial Vehicles, also called drones, by the United States to target militants and terrorists in order to eliminate threat posed to the US interests, resulted in criticism by various actors. The main hurdle that results in such response is the absence of clarity regarding the legitimacy, legality and efficacy of the use of automated weapons. Due to an exhaustive spree of strikes since 2004, highest in any zone so far, Pakistan assumed position as an essential case that confronted the issues emerging as a result. The paper attempts to highlight those issues and to identify the causes, understanding of which can encourage appropriate shifts in strategies, rules and norms governing neutralisation of militants with the help of unmanned weapons.

Keywords: Drones, Legitimacy, Efficacy, Criticism, Latent Irritants.

Received: March 12, 2018. **Accepted:** July 10, 2018. **Published:** October 31, 2018.

Ever step on ants and never give it another thought? That's what you are made to think of the targets – as just black blobs on a screen. You start to do these psychological gymnastics to make it easier to do what you have to do – they deserved it, they chose their side. You had to kill part of your conscience to keep doing your job every day – and ignore those voices telling you this wasn't right.

Michael Haas, Life as a Drone Operator, The Guardian, November 2015

Introduction

Increasing use of drones as a preferred military option in several conflict-ridden areas is indicative of improved military options by the United States in fighting terrorism and militancy. Various benefits emerge due to increasing reliance on drones to combat threats, including less costly development and placement, safety of soldiers and military personnel, acquisition of continuous voluminous data, swiftness and agility of response, stealth and precision, as well as ability to transgress areas difficult to reach. With drone operators sitting in remote locations, the combat zones have become easily accessible as well as borderless, a situation that is preferable for the intelligence and military men.

Although, use of drones dates back to World War I when the remote control of aircraft for single mission translated into multi-tasked drones in World War II, the current use and understanding of the term 'drone' traces back its origin to the first strike in Kandahar,

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Afghanistan on October 7, 2001.¹ Sending tremors in the fabric of international canons, this preferred strike option raises monumental challenges that demand greater attention of researchers and scholars. Pakistan presents a useful case as a country where strikes through drones or signature strikes (strikes in the combat zones as a result of identifiable patterns of militant presence among other individuals) have been highest, continuing from 2004 onwards.

Challenges that emanate from automation of warfare cannot be relegated merely as threat oscillations between targets and operators. Regardless of the acute conspicuous asymmetry between both,² there are a number of actors that are confronted with and regulated by dilemmas posed by drone strikes.³ In the absence of confrontationist activity, the nebulous cocoon of anonymity shelters the drone operators from precarious immediacy of judgments on the ground or in proximate hostile arena. In sterilizing retaliatory capability of enemy, the haze surrounding the remote drone operators generates generalized fear as well condemnation of the United States as a perpetrator of violence. Consequently, the ensuing legal, ethical, psychological, political and security issues are confounded by established norms of use of force and warfare.⁴

The main themes that can be traced in current literature on the use of drones in warfare revolve around a few major issues. Firstly, the replacement of a tangible, identifiable and quantifiable individual by virtual patterns of information and data, in a pronounced dehumanized context, where violence guided by alleged apathy dictates the rules of asymmetric warfare. Secondly, the absence of human judgment resulting from ease, economy and pervasive appeal of drones is indiscriminately unethical, especially when Artificial Intelligence (now or in future) decides when a strike is triggered. Finally, tactical and strategic issues intertwined with political and operational priorities are desiccating the essential role of foreign policy objectives, relegating primacy to data interpretation and decision-making. As a result, projections of distant targets are judged in the light of immediate cartographical points and inflections. It is, therefore, essential to discuss major issues and arguments prevalent in the current discourse, expose the assumptions that seem to discredit the rational basis, and understand how these issues need to be grasped by examining the case of drone strikes in Pakistan.

Fallout of Drone Use in Warfare

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- 1 Plow, Avery, Matthew S Fricker, and Carlos S Colon, *The Drone Debate* (Rowman & Littlefield, 2015), 345.
 - 2 As opposed to confrontation or artillery exchange on ground, the enemy is exposed while the drones are invisible with no one identifiable as target of militants.
 - 3 The emergency service providers, for example, fail to provide timely services in many of the tribal areas in Pakistan where signature strike is carried out because of the uncertainty of repeated attack (which is largely based on the activity patterns than identity of individuals).
 - 4 Christine Agius, "Ordering without Bordering: Drones, the Unbordering of Late Modern Warfare and Ontological Insecurity," *Postcolonial Studies* 20 (3) (2017): 370–86.

Changed methods of conducting warfare have also affected the traditional delegation of responsibilities within the state structure. Aerial attacks have remained the sole domain of air force in conventional wars. With the proliferation of drone as a preferred tool for neutralization of threat actors, a significant deviation from the established competence is evident in the emergence of newly militarised actors.⁵ The CIA, instead of the US Air Force, primarily has been responsible for carrying out signature strikes in Pakistan's tribal areas, taking in loop the Department of Defence from 2016 onwards. Expected risk of such dispersion of command bemoans likely utilization of similar technology by the threat actors, who may not have adopted reliance on drones parallel to the states so far but remain keen to overcome such disproportionate handicap. Concerns have already been expressed for greater transparency in the use of the Internet and IT platforms by intelligence and military services of the states. This is evident in an increasing momentum for building consensus to check digitized communication revolution in warfare by declaring Internet as a public utility, and subject to public regulation and control, so that the ease of targeting from remote and indirect apathy is checked.⁶

Side by side, increasing reliance on drones as a preferred tool of warfare has established a precedent that emanates risk of emulative proliferation by other states, and warrants greater attention. It is naïve to assume that the US shall continue to maintain its monopoly over the signature strikes. There is sufficient evidence that other states are mounting their expertise and arsenal, aspiring to gain the efficacious supplementation of traditional conflict management tools with drones and other practices adopted by the US and allies.⁷ Several states are already engaged in chalking out possibilities of future use of drones, thanks to the United States acting as a catalyst.⁸ Justification of use of drones through discourse moralization does not seem to offer the US any exclusive ethical advantage. Use of drones as weapons for protection of innocent lives and ensuring peace, as touted by the US, is in the contemporary securitized world a euphemism for a license to kill, which has a lure for both China and Russia, for example. By blurring the distinction between the state of war and state of peace, the legitimacy of drone-use seems to be juggling between legality and illegality. Apart from the complexity in labeling use of drones as a mode of warfare, the apparently lax and foggy criteria for attacking threat actors seems to have evoked condemnation of unfettered aggression and extravagant use of force with negligible politico-moral constraints. In addition, a conniving definitional

5 It is immaterial whether there is discontent among the CIA operatives in manning drones, which is often highlighted in the wake of whistle-blowers' rejection of unmanned targeting.

6 Vincent Mosco, "Weaponized Drones in the Military Information Society," *Science as Culture* 26 (02) (2017): 276–81.

7 Already, Russia has been using contractors to carry out action on behalf of the state in Crimea or Georgia, for example, as does the US (Black Water etc.).

8 Sarah Kreps, "The Democratic Deficit on Drones," *Intelligence and National Security* (May 9, 2017). UK, Pakistan and Israel among others have already used drones. Iran and China, while they may not have used them, do possess them. States that are likely to be gearing up their drone arsenal include Russia, India and South Korea, among others.

laxity undermines casual categorization of a militant or threat actor, encouraging action without remorse.

Complex Case of Pakistan

Having borne the highest number of signature strikes, Pakistan emerges as a useful state to identify and assess the impact of drone strikes and the issues emerging as a consequence. Though, it is logical to take into account measures taken by the US and Pakistani state after September 11, 2001 attacks; meaningful trajectory can only be traced from the year 2004 when regular intense signature strikes in tribal areas of Pakistan became a regular feature for targeting militants seeking refuge from Afghanistan. It may, however, be noted that major difficulty that exhibits the complexity of drone use in Pakistan results from diversified nature of conflicts that continue to intersect. The resultant disorder and violence cannot be simplified as a single insurgency with distinct and identifiable goals.

Any Counter Insurgency (COIN) strategy, adhering to globally recognized principles of eliminating a specific group or a set of actors, cannot produce meaningful outcomes in a theatre marked by a plethora of conflicts. Diverse political and ideological motives of non-state actors, cooperating with each other for mutual advantages, continue to strive for materialisation of their separate goals in Pakistan. En bloc singular categorisation cannot take into account the dynamics of sectarian, religious, political, ideological, regional and global interests at play. Consequently, measures adopted by the Pakistani state, much to the chagrin of the West and the US, remain cognisant and accommodative of the complex array of interests.

Dismissing smaller conflicts, in a bid to cater to the urgency of resource prioritization, still leaves Pakistan with formidable major conflicts that have deep foundational ingress.⁹ Adding to this complexity is a latent disconnect between the military strategy and political imperatives. The third element of Clausewitzian Trinity, politics, seems to be a degree detached from the military and citizenry nodes. COIN doctrine applicable in Pakistan, on closer examination, exhibits historical paranoia, resulting from repeated usurpation of governmental authority by the military. Such civil-military imbalance, punctuated by internal and external factors, results in disparate preferences for intelligence agencies

⁹ The US action against Afghanistan post-9/11 resulted in a number of high value militants crossing the border to move to Pakistan's tribal areas. These areas do not only prove to be militant sanctuaries due to the nature of terrain but also pose less challenges to the militants due to the almost non-existent writ of the state (as the tribes continued to preserve their preferred form of governance under a separate set of regulations, as was the practice in colonial times.). The second front is Balochistan where the nationalist movements seek separation of the province from the state on the grounds that their natural resources are allegedly exploited by other provinces while little attention is paid to development of the region. The third major front for conflict revolves around the unresolved Kashmir dispute between Pakistan and India. Various organisations that had previously been engaged in helping Muslims there also turned against the state, particularly after the Red Mosque operation by the state against militants in 2007. This resulted in formal formation of Tehrik-e-Taliban Pakistan, with diverse actors belonging to different organisations, swearing allegiance against the Pakistani state.

and the military (who continue to identify and neutralize militants) and the political representatives (who are dictated by local, regional and global policy imperatives).

Criticised by the US for duplicity in accommodation of the unfavourable organisations, the misunderstood but prudent Counter Terrorism (CT) policy (not based on singularly focused global best practices largely derived from the US), is, in essence, a combination of strategies catering to the aforementioned complexity of conflicts, maintaining elasticity within the prioritization margin available to Pakistan.¹⁰ This explains why the government of Pakistan has openly condemned the drone strikes carried out by the US in Pakistani territory while tacit approval by the government through military and intelligence agencies is accorded.¹¹ This also explains why sovereignty issue makes it difficult for the Pakistani state to own such action, unlike Syria.¹² As long as the request of Pakistani authorities to transfer the burden of drone strikes to the state is not accorded to, such tacit operational acquiescence of signature strikes is likely to coincide with public condemnation of sovereignty denigration caused by strikes within Pakistani territory.¹³ This precarious balance of acceptance and denial shall be even more difficult to maintain if the drone warfare theatre is changed or expanded geographically from combat to non-combat zones (like towards Balochistan or Kashmir), even if the US intention is altruistic in assisting Pakistani state to strengthen its multipronged COIN effort.

Political Strain and Ethical Hindrances

Will of the people experiences socio-political strain in a democracy when the internal task of elimination of indigenous threats is undertaken by external and global interests instead, especially when the tacit cooperation of the target state cannot be acknowledged. Negative assessment of foreign action is a natural outcome in such circumstances when militants are targeted by ally states, even without being at war or the state not being a failed one. It is even more difficult when US-driven drone strikes inside Pakistani territory result in collateral damage, in the name of neutralization of militants and insurgents for peace. Recent developments regarding assessments of Pakistan's contribution in eliminating militants in Afghanistan and tribal areas seem to indicate that future signature strikes will find resistance not only from the locals but also from the state as a result of pressure, and non-cooperation by the US despite military operations by Pakistan may force the state to lodge formal protest in the United Nations for illegality of such strikes, especially in the absence of any clear permission of the Pakistani state.

10 Samir Puri, "Brinkmanship, not COIN, in Pakistan's post-9/11 Internal War," *Small Wars & Insurgencies* 28, No. 1 (February 17, 2017), accessed November 30, 2017.

11 Brian Glyn Williams, "Private Approval, Public Condemnation: Drone Warfare's Implications for Pakistani Sovereignty," Jamestown Foundation (April 4, 2013). <https://jamestown.org/program/private-approval-public-condemnation-drone-warfares-implications-for-pakistani-sovereignty/>.

12 Pakistan has so far not lodged a formal complaint against the US for breach of sovereignty.

13 Christine Agius, "Ordering without Bordering: Drones, the Unbordering of Late Modern Warfare and Ontological Insecurity," *Postcolonial Studies* 20 (3) (2017): 370–86.

Missing tactful interaction with Pakistani state is likely to pose greater challenges for Pakistan if the drone warfare in the tribal areas continued. Even though most democratic states prefer inertial continuity of policies, the changing political and foreign policy imperatives may result in taking paths less traveled by and different from accommodation in the past. However, leaving aside speculation, any futuristic analysis demands an examination of the current concerns and apprehension of the past. At the same time, it is worthwhile to point out that policymakers, on the other hand, favor short-term goals to retain political legitimacy throughout their limited tenures and may undermine future strategic cooperation with other states for gaining immediate political scores.

In Pakistan's case, policymakers may find it hard to sustain short-term non-strategic options to combat militants due to military activism, whereas in the US, on the other hand, strategic investment spanning decades are no less inimical to political representatives. The need for quick results, therefore, justifies swift result-oriented drones to attack all threats posed to the integrity and security of the US.¹⁴ President Bush remained hasty in international military operations in Afghanistan and Iraq, President Obama remained keen to exterminate al-Qaeda (including Osama bin Laden) and increase drone strikes in Pakistan manifold, regardless of non-combatant casualties, and President Trump expected quick results by increasing signature strikes while revoking aid guarantees for fighting terrorists.¹⁵ The necessity for the spectacular within the elected tenures is a shortcut to justification before the global public. For the US citizens, saving lives of the Americans as well as of the foot soldiers (who are expensive assets for the US and allies) is a naturally preferred outcome. Citizens of the drone-warfare areas in Pakistan, on the other hand, find it hard to justify selective airstrikes if not carried out in aid of boots on the ground, even if they are American. The resultant political strain in such circumstances undermines the efficacy of drone warfare.

In Pakistan's case, therefore, despite the short-term killing of certain militants, it cannot be denied that increased reliance on drones has in general exacerbated anti-US sentiment. In areas where radicalization potential of the militant groups was high, such unwelcome increase could be quantified simply as an amplified number of militants in the long-run. Failing to distinguish between the hierarchical positions of the militants, most of the strikes have resulted in elimination merely of low tier militants.¹⁶

14 The only justification available to the US to take any action.

15 Bill Roggio and Alexandra Gutowski, "2017: A Record Year for US Counterterrorism Strike," *Long War Journal* (2018) <https://www.longwarjournal.org/archives/2018/01/2017-a-record-year-for-us-counterterrorism-strikes.php>.

16 Peter Bergen and Jennifer Rowland, "Drone Wars," *The Washington Quarterly* 36 (03) (2013): 07–26.

Legitimacy and Sovereignty Issue

While the use of drones may have given certain edge and satisfaction to the US, it is likely to cause problems in future as use of drones for airstrikes increases in various militancy theatres.¹⁷ Mere analysis of the huge data being collected through drone surveillance is posing a challenge to the interpreters and analysts for distillation of targets. The potential for inaccuracy due to voluminous raw information is evident from the fact that laborers, guests at weddings and vehicles in troubled areas, entirely innocent, were killed on the basis of patterns generated through drone surveillance data.¹⁸ In supplementing the previous question of whether drone strikes render the US and militants to be considered in a state of war (in the absence of boots on the ground), another question that seeks answer is how drone strikes can be seen as legitimate acts. Such legitimacy ought to require clear identification of combatants, in a defined arena, during war, against whom violence inflicted through the skies is justifiable, in a territory willingly extended by the state. This issue of regularisation of violence is not *ultra vires* when placed in the conventional context of international law norms between belligerents.

In such circumstances, it seems difficult to ignore the innocent individuals killed merely as an unintended consequence of war. Seeking refuge in use of force being not directed against those who happen to get killed collaterally is a debatable issue. Many critics have overgeneralised the number of non-combatant civilians to have been killed to be equal, if not more than the actual targets.¹⁹ There is a discrepancy in the number of innocent civilians killed as a result of drone strikes, partly emerging from how you define your targets, but there is sufficient data to establish that technological precision may, after all, not be a useful tool to reduce collateral damage.²⁰ Perhaps, the fact that civilians who come to aid the militants or assist them in combatant or non-combatant zones are equally liable to be targeted under the laws of the armed conflict needs crystallisation as a strategic rule.²¹ Nevertheless, there is a need for greater clarity for engagement rules on this front, especially when targeting civilian in a non-combat zone. In Pakistan's case, the hatred and radical behaviour against the US when they rely on drone strikes is dictated by the non-combatant civilians killed, rather than actual militants.

17 Somalia, Iraq, Afghanistan, Syria, Libya and Pakistan.

18 Ahmed Rashid, John Kael Weston, Dennis Blair, and Norton Schwartz, "The U.S. Drone Program is Fatally Flawed," *Intelligence Squared* (2013) <https://www.intelligencesquaredus.org/debates/us-drone-program-fatally-flawed>.

19 Mahmood Ahmad, "The Legality of Unmanned Aerial Vehicles Outside the Combat Zone: a Case Study of the Federally Administered Tribal Areas of Pakistan," *Defense & Security Analysis* 30 (3) (2014): 245–53. <https://doi.org/10.1080/14751798.2014.921448>.

20 The Bureau of Investigative Journalism has compiled data online, according to the year of strikes, up to 2017. 969 civilians have been reported killed in 429 strikes. Children reported killed so far in Pakistan in 207 while range of militants killed is 2500 to 4000. <https://www.thebureauinvestigates.com/projects/drone-war/pakistan>.

21 Thomas Gregory, "Targeted Killings: Drones, Noncombatant Immunity, and the Politics of Killing," *Contemporary Security Policy* 38 (02) (2017): 212–36. This is more pronounced in case of second and third strikes repeated to isolate non-combatants from combatants.

Limitations of Drone Use

While the pundits of technological effectiveness in warfare may have reasons to remain hopeful for efficient management of war through drones, there are serious limitations that question the effectiveness of drones as a tool to complement COIN efforts, especially in states like Pakistan. The requirement of identification of the target within well-known terrorist organizations is gradually replaced by suspicious behavior and acts of individuals in the areas under surveillance. Those who continue to emanate risky indicators as a result of estimated action are effectively the targets, which explains why the number of innocent casualties is greater than expected. Since there is greater reliance on standardization and patent formation, the narrow and rigid measures to categorize individuals as risky, and then elimination of risky behavior rather than the precise, actual or potential militants and threats, highlights dispassionate detachment from the war obligations and pursuit of accepted norms. If the militants and terrorist do not confront forces of a state in conventional way, and resort to deceit and surprise, the drone strike are in no way superior to the tactics of the former.

Weapons are neither ethical nor subjective. The use of weapon determines what is to be achieved and how that may be achieved. The contemporary reliance by the United States on signature strikes is a manifestation of hard power, as opposed to what Joseph Nye calls the smart power, who advocated that hard military force ought to be used in conjunction with soft power for persuasive foreign policy dividends. His criticism of Obama administration's excessive reliance on drone in an indiscriminate manner raises the need to target those who perpetrate acts against the United States or allies.²² It is obvious then that the goals and methods of drone war are out of sync. The goal of global peace through prevention of terrorist acts seems to be in fact resulting in expansion of the war arena, signifying gradual loss of control over clarity and focus. In other words, while military successes (through quantification of militants and terrorists killed) may give the impression that effort against militancy and terrorism is proving useful, the strategic goal of persuasion as indicated by Nye, nevertheless, falls short of being in grasp so far. This is further complicated by the absence of any positive development towards jurisprudence related to drones. The secret deals for use of drones while publicly condemning them also highlight that definitions of consent and sovereignty differ for Pakistan and the US.²³

22 John Nye, *Too Much Use of Drones*, BBC (2013). <https://www.bbc.com/news/av/world-radio-and-tv-22481585/joseph-nye-too-much-use-of-drones>.

23 Robert P Barnidge, "International Law and Drone Strikes in Pakistan: The Legal and Socio-Political Aspects," *Journal on the Use of Force and International Law* 03 (01) (2016): 171–77.

Conclusion

Although there has been an incessant growth in the evolution of autonomous weaponry, it has not been matched with corresponding ease and confidence in their use. Some of the hesitations can be understood because blindfolded nature of objective data does not take into account the subtleties emerging around broad virtual parameters. Technical intelligence is considered subjugated to the human intelligence, if only because eliminating conflict, particularly by elimination of unidentified enemy within populations, requires human control and judgment to take into account the unforeseeable nuances. The issue revolving around the use of drones at this stage is not merely about a human being pulling a trigger in some remote and safe locations to strike.²⁴ It relates to higher issues about sovereignty, legitimacy, *jus cogens* and justifiable environment. A corollary issue is a deliberate secrecy maintained in revealing details of doctrine that guide the US military and the CIA in drone strikes. Greater details of actual casualties with objective categorization of targets neutralized and innocent civilians killed is likely to garner acceptance of drones as a logical extension of military revolution, a process that cannot be halted. Future of the globe is increasingly dictated by technology. The autonomous cars introduced in the market, run completely with the help of artificial intelligence, is an indication of the general trajectory humans are defining for themselves in self-regulation. It is impossible not to envision corresponding changes in the warfare arena. The dilemma in such a scenario emanates from the ethical question of who should decide when to kill another person? Should it be left to systems run on artificial intelligence or whether continuity of human control, no matter how autonomous, should be retained as an essential requirement for warfare? James Wirtz believes that future use of drones shall see new forms and venues of warfare, which shall ultimately encourage competitors to adopt the trend.²⁵

The role of the international community cannot be undermined in ensuring that zones which are now confronted with conflicts are made stable and peaceful. This requires a common understanding and collective effort to neutralize threats. Greater engagement by the US with states that are allies, like Pakistan, should not only restore respect for their sovereignty but should also result in sharing the responsibility of fight against militants. Putting an end to unilateral action can encourage a healthy trend of paying heed to the concerns of different states. Not only is it likely to result in a reduction of anti-US sentiment quantum but shall also avoid setting a precedent where any state can use such autonomous weapons in order to protect their interests. Moreover, there is a need for the US to protect the moral integrity of drone usage through restriction of parameters that justify a strike so that the ultimate goal of the US is not undermined but guided in a precise

²⁴ It is possible that evolution of hostile environments and denial of access may in future lead to reliance on completely autonomous drones.

²⁵ James J. Wirtz, "The 'Terminator Conundrum' and the Future of Drone Warfare," *Intelligence and National Security* 32 (04) (2017): 434–35.

manner, understood by the global community, to cause minimum collateral damage.

Pakistan, on the other hand, needs to continue to maintain the momentum of military operations that have proved successful in eliminating tribal areas from militants. There are a number of people who believe drone strikes are useful and have helped the cause of war against militants and terrorists.²⁶ Recent steps to fence Durand Line and to build effective intelligence liaison between neighboring and ally states should result in accelerated reduction of militants. Moreover, the establishment of military courts for handling apprehended terrorists in Pakistan has plugged the loopholes in the criminal justice system that militants used in the past to escape penalty. Long-term strategies to deal with other conflicts should result in waning need for drone strikes.

²⁶ Christine Fair and Ali Hamza, "From Elite Consumption to Popular Opinion: Framing of the US Drone Program in Pakistani Newspapers," *Small Wars & Insurgencies* 27 (04) (2017): 578–607.

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