INTERNATIONAL BOUNDARY DISPUTES IN THE 21ST CENTURY: VICTIMS, VILLAINS, AND THIRD STATE RESPONSIBILITY

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INTRODUCTION

Due to their potential for erupting into large-scale, long-term violence, international boundary disputes are among the most important international conflicts to resolve peacefully and legally. But international law, with its lack of centralized enforcement mechanisms, is plagued with problems (both theoretical and real) of noncompliance. One way to increase pressure to respect territorial rights would be to promote the widespread understanding that in boundary disputes third states are under an obligation to side with the state whose claim to ownership is legally more meritorious. Currently, third-party reactions to boundary disputes are not held to this standard: third states are not expected, even in principle, to make decisions about which party to support by reference to the legal merits of the competing positions.[1]

And so if I could nominate only one change in law to reform the international legal system's treatment of boundary disputes in the twenty-first century, it would be the adoption of the following:

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[1] For an assessment of the current state of the law on this issue, see generally, Lea Brilmayer & Isaias Yemane Tesfalidet, *Third State Obligations and the Enforcement of International Law*, 44 N.Y.U. J. INT'L L. & POL. 1 (2011).

Principle of Third State Responsibility: Conflicts over Territory

> Where two or more states both claim the same territory, third states should support the claimant with the best title, as a matter of international law.

This would be called "the principle of third state responsibility" for conflicts over territory, or the "responsibility" principle, for short.

Two other approaches are possible: what I will call the "adversarial model," which holds that all involved states are free to adopt whatever position they want, and what I will call the "neutrality model," in which states are not supposed to take sides at all. Under these two models, both of which I reject, the parties bear the whole responsibility for enforcing their own rights to territory, without any third state obligation to assist. Neither of these has the capacity of the third state responsibility model to compensate for the absence of centralized enforcement of international law.

Pressure is difficult to bring to bear without consensus and coordination by the international community. Treating third states as free of obligations to contribute undermines the status of international law altogether. If third states have no such obligation, international law is deprived of an important influence for increasing respect for international law in the community. States can *voluntarily* attempt to pressure other states to conform their conduct to international legal standards, but without norms *requiring* third states to contribute to the enforcement effort, there can be little rational expectation of reciprocity.

My object is to call into question three assumptions: first, the assumption that strong states need consider only their own political or strategic interests in their dealings with the parties to a dispute; second, the assumption that alliance with a great power is an adequate reason for one of two disputants to gain advantage over the other; and third, the assumption that domestic political expediency is sufficient excuse for a third state's support of "villains" over "victims."

Third states should act consistently with the merits of the competing legal positions in their involvement with boundary disputes. Given the choice between supporting the wronged party with the meritorious legal claim and supporting the wrongdoer, third states in territorial disputes should, wherever possible, side with the former and not the latter. Third states have more serious obligations in this context than is widely appreciated, and recognizing these obligations in principle and in practice could greatly contribute to the fair and rational resolution of international boundary conflicts in the twenty-first century. It is

precisely because of the lack of centralized government that the responsibility model is needed.

I. THREE MODELS OF THIRD STATE DECISION MAKING

The question of the proper role third states in territorial disputes could hardly be timelier. Examples, unfortunately, abound. If Russia (as the "villain") seizes territory that belongs to Ukraine (as the "victim"), do third-party observers such as China have any duty to support Ukraine? If the United States vetoes the U.N. Security Council's proposed denunciation of Israel's encroachment on West Bank land for building settlements, is its conduct to be judged by the compatibility of Israeli action with international legal standards, or are domestic political expediency and historic alliance reason enough? Similar questions also arise in other types of cases, such as violations of human rights and humanitarian law. U.N. Ambassador Samantha Power famously excoriated Russia and China for blocking US attempts at the Security Council to strengthen measures against Assad's Syria.[2] Did Russia or China do anything unlawful, or were they simply exercising their legitimate prerogatives as political actors?

A. THE RESPONSIBILITY MODEL

The model adopted here holds that third states should act consistently with the merits of the competing legal positions in their involvement with other states' boundary disputes. This model will be called the "third state responsibility" model, or the responsibility model for short. The basic underlying principle (the responsibility principle) is that the states composing the international community ought to make decisions in the manner most likely to result in an outcome that respects the legal rights of the parties, and that this is most likely to happen when the involved third states support the disputant with the better legal claim.

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[2] *See* Cara Anna, *US Ambassador: Russian Veto 'Extremely Disruptive' on Syria*, YAHOO! NEWS, Mar. 20, 2015, http://news.yahoo.com/us-ambassador-russian-veto-extremely-disruptive-syria-224029921.html (reporting on Ambassador Power's criticism of Russia and China's joint veto against a proposal for Security Council action in Syria); Ian Black, *Russia and China Veto UN Move to Refer Syria to International Criminal Court*, THE GUARDIAN, May 22, 2014, http://www.theguardian.com/world/2014/may/22/russia-china-veto-un-draft-resolution-refer-syria-international-criminal-court (reporting on Ambassador Power's criticism of Russia and China for their joint veto against a Security-Council backed resolution to refer the Syrian crisis to the International Criminal Court).

It is certainly the case that accurate boundaries can be difficult or impossible to determine, even for objective neutral experts with substantial resources (let alone for busy foreign ministry lawyers with little expertise or interest in the subject, many of whom are likely to be highly partisan). This is particularly so in territorial disputes, many of which depend on disputed historical occurrences provable only through obscure documents found in hard-to-access national archives. The problem is especially difficult, of course, when the parties have reason to withhold evidence for strategic reasons, or where important historical materials were lost or destroyed. But even in that small fraction of cases where the parties present their best evidence publicly (for example, in written pleadings before the International Court of Justice) it may be impossible for third states to determine which side is meritorious.

Where the merits are simply impossible to determine, however, third states have several options. One is to pressure the parties to submit their claim to adjudication (for example, by an international court or arbitral tribunal). This strategy has the effect of supporting the state with the better legal case. Another is to remain neutral because the disputants seem to have equally good legal arguments. Said in good faith (and not as an excuse where the evidence is clear but inconsistent with the result that the third state wants) this is a perfectly logical position to take. What would be inappropriate would be for a third state to say that it was impossible to know which side had the better legal claim, but then support one of the parties on some ground other than merit.

Determining which side has the better argument may be difficult for third states, but it is not always easy for the parties themselves, either. Nevertheless, we expect them to make this determination: difficulty in determination does not constitute an excuse for the party who violated international law. We impose strict liability, in effect, on the actor that violated international law, and we can do the same with third parties who are prone to error for closely analogous reasons. In any event, the difficulty of determining the merits of a territorial dispute in some cases does not require allowing third states to support the wrong side in those cases where the merits are clear. It is in cases where the merits are clear that the principle of third-states intervention is most important, because those are the cases in which the violation of international law is most egregious.

To date, international law has not adopted the responsibility model, either for boundary disputes or for disputes in general.[3] Even states that claim to respect international law do not necessarily feel legally bound to consult international law before deciding which other states to support. States that take sides in territorial disputes apparently consider themselves free to choose which territorial claims to support on the basis of any consideration whatsoever: shared history, ethnic prejudice, an enticing promise of bilateral aid, anticipation of commercial benefit, common language or religion, crass political advantage, or animus towards the other party to the dispute.

Some of the factors that states take into account are more appealing than "crass political advantage" or ethnic prejudice. For example, a state might choose to support meritless territorial claims because the claimant has a better human rights record than it opponent does, or because the claimant's president is facing a difficult electoral challenge from an unsavory neo-fascist demagogue. While such considerations can be appealing, the responsibility model would require them to take a back seat to the merits of the territorial dispute.

B. THE ADVERSARIAL AND NEUTRALITY MODELS

Here, we might consider an analogy to the "adversarial model" of the US legal system, in which partisanship is lauded as the method most likely to produce a sound and lawful result. The adversarial model of US litigation ethics gives the participants almost complete freedom to take whatever positions they find to their advantage.[4] The guiding

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[3] As Louis Henkin wrote in his classic treatment HOW NATIONS BEHAVE:

> For most international norms or obligations there is no judgment or reaction by the community to deter violation. The ordinary violation of law or treaty is not yet a "crime" against the society to be vindicated by the society. It is unusual for nations not directly involved to respond to a violation even of a widely accepted norm. . .[.]

LOUIS HENKIN, HOW NATIONS BEHAVE 58 (Columbia Univ. Press, 2d ed., 1979).

[4] *See, e.g.*, MONROE H. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 9 (1975) ("Let justice be done—that is, for my client let justice be done—though the heavens fall."); Robert J. Kutak, *The Adversary System and the Practice of Law*, *in* THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS 172, 173 (David Luban ed., 1983) ("Our legal system is not cooperative but . . . adversarial. The basic premise . . . is that open and relatively unrestrained competition among individuals produces the maximum collective good."); Carrie Menkel-Meadow, *The Limits of Adversarial Ethics*, *in* ETHICS IN PRACTICE: LAWYERS' ROLES, RESPONSIBILITIES, AND REGULATIONS 123, 129 (Deborah L. Rhode ed., 2003) ("[In] America's current adversary system . . . winning has become such a preeminent goal that it has obscured other values.").

principle, I submit, is that intense partisanship on both sides is the best way to generate the wide variety of factual and legal arguments needed to produce the best-informed conclusions. Within few limits, therefore, each side is supposed to present its own arguments in the strongest possible form, without any responsibility to provide any facts and law contradicting its claim. The parties and their lawyers are not expected to assume direct responsibility for a correct decision: they each do their part through a one-sided presentation designed entirely with the object of winning.

Of course, states do not always take sides. A second alternative to the responsibility model might be called the neutrality model. The neutrality model, as I envision it, holds that third states should not support one side over the other. Neutrality allows for an honest broker who, with the trust of both states, is in a better position to mediate and reach peaceful compromise solution. It is possible that more can be achieved towards the peaceful resolution of disputes if third states remain neutral: neutrality increases credibility and an honest broker may be more effective than a partisan at inducing the parties to accept compromise.

What differentiates the responsibility model from both the adversarial and neutrality models is that both of the two alternatives treat whether the state's chosen course of action respects international law as immaterial. When deciding upon a position, third states are not expected to factor into the equation how best to promote the legal outcome: either they treat both disputants equally (under the neutrality model), or they make self-interested arguments and then the chips fall where they may (the adversarial model).

Both the adversarial and the neutrality models work well enough when there is a centralized decision maker that can render authoritative judgments. In the domestic context, they operate in conjunction with a neutral judge or jury that is expected to sort out the parties' presentations to reach (as nearly as possible) the truth. The evidence and arguments are expected to be partisan, but the decision making process is not. But transposing either of these two models onto the international context removes these models' advantages. First, consider the adversarial model: absent an authoritative decision maker, when all states are entitled to support any position that they please there is simply no reason to think that the outcome will reflect anything other than the distribution of power, wealth, and diplomatic skill.

The neutrality model does not fare much better. Domestically, a centralized decision maker has responsibility for ensuring conformity with the law and the facts; as was the case for the adversarial model, however, no such decision maker exists in the international context. If the merits of the disputants' position are very closely balanced, so that it is impossible to predict which has the better case, then a posture of neutrality might be appropriate.[5] But not every case has equally good arguments on both sides. For the community to remain completely neutral in all cases, closely balanced or not, there is an air of false equivalence. This may make compromise more reachable, but compromise is not always desirable. In a case where the merits clearly point in one direction, compromise is the wrong solution: it only encourages the violator state to engage in further violations.

It is precisely because the international community lacks centralized enforcement capacity that the responsibility model is important. Whereas the responsibility model tilts the playing field in favor of the correct legal answer, the two alternative models leave the victim without any reliable source of support. The responsibility model moves in exactly the opposite direction. The responsibility model recognizes the role that third states play in supporting international law, in a context where law is at its most precarious. It is perhaps one of the best potential antidotes that we have to the cynicism of international power politics.

II. FOUNDATIONAL CONSIDERATIONS: REALISM VERSUS LEGALISM

The responsibility model is best situated to meet the foundational challenges raised by the realist school of thought. Because there is no centralized enforcement mechanism with the power to make and enforce decisions, it falls to the rest of the international community to take up the slack and to bear the associated costs. There is simply no other state or body of states available to do the job. Whether the international system qualifies to be called "law" boils down in large part to the kind and degree of influence exercised by third states.

Much of the theoretical literature about the foundations of international law assumes that third states will support the result

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[5] *See supra* Part I.A.

compelled by international law.[6] This is not wholly implausible, because in most cases, one state's treaty partners benefit from its behavior according to treaty and customary international law. But it enjoys a healthy measure of wishful thinking. Third states will not always find it in their interest to assume the costs of enforcement of international law. The result is that whether international law counts as law depends on the extent to which third states assume a role that can be costly. The alternative models make assistance to the victim state optional or even impermissible; the responsibility model makes it mandatory.

A. THE REALISM/LEGALISM DEBATE

The theoretical importance of an expectation that third states will take on a role as enforcer of international law stems from the role that third states potentially play in the argument over whether international norms are really law. Probably the most hotly debated theoretical issue in contemporary international law concerns whether the concept of law has any meaning in a decentralized system. Realists take the position that international norms cannot be characterized as "law" because the word "law" applies only to commands backed by force.[7] According to the realists, (also variously referred to also as neo-realists, neo-conservatives or neo-cons) only if the punishment is sufficiently strong and certain to punish past violations and deter future ones can the system can be characterized as a *legal* system.

According to this argument, no norms deserve that label in the decentralized world of international relations. Realists argue that with no centralized enforcement mechanism, adequate pressure to compel conformity to international law is lacking. Therefore, they downplay the importance of international norms and typically deny the existence of

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[6] For a particularly well developed account of international law that deals with the role of third states in enforcement, see generally Oona Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 YALE L.J. 252 (2011); *see also* Harold Koh, *The 1994 Roscoe Pound Lecture: Transnational Legal Process*, 75 NEB. L. REV. 181, 205 (1996).

[7] *See, e.g.*, Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law* (John M. Olin Law & Econ. Working Paper No. 63, 1998) [hereinafter *A Theory of Customary International Law*]; *see generally* JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 3 (2005); Tom Ginsburg & Richard H. Adams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 WM. & MARY L. REV. 1229, 1234–1235, 1252 (2004).

international legality altogether.[8] Regularities in international behavior are typically explained as manifestations of self-interested power seeking, which can be studied from an empirical but not a moral or legal viewpoint. In particular, realists deny that there is anything meeting the necessary conditions to be called "international law," on the grounds that (to be worthy of the name) international law would have to be supported by some centralized enforcement mechanism—a criterion that is not now, and in the future may never be, satisfied.

The opponents of realism (referred to as legalists, rationalists, or idealists) disagree with the empirical claim that there is no international enforcement mechanism adequate to compel obedience to international norms.[9] According to this legalist model, the domestic system of centralized enforcement of legal norms is not the only model of genuine law: international enforcement simply takes different shapes than domestic enforcement.[10] One way to dispute the realist claim has been to identify as many hitherto unappreciated forms of enforcement pressure as possible.[11] Every factor that contributes to rewarding lawful state conduct or that discourages unlawful state conduct must be included in the calculation. To overlook some factors that increase compliance with norms is to underestimate the orderliness of international relations, and to credit unnecessarily the realist argument that enforcement capacity is lacking.

For present purposes, therefore, the essential question is how much additional enforcement is contributed by including third parties' efforts (pressure, shaming, economic sanctions, and so forth). If third

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[8] *A Theory of Customary International Law*, *supra* note 7, at 3.

[9] This school of thought includes approaches such as conventional international law, international moral philosophy, and natural law. This is the tradition that gave rise to contemporary human rights and humanitarian law; although often called by other names (e.g., idealistic or rationalist) we will use the label "legalistic."

[10] *See, e.g.*, Hathaway & Shapiro, *supra* note 6 (describing "outcasting" – the new way to understand domestic and international law enforcement).

[11] Harold Koh describes the school of thought:

> Under this rationalistic account, pitched at the level of the international system, nations employ cooperative strategies to pursue a complex, multifaceted long-run national interest, in which compliance with negotiated legal norms serves as a winning long-term strategy in a reiterated "prisoner's dilemma" game.

Harold Koh, *How is International Human Rights Law Enforced?*, 74 IND. L.J. 1397, 1402 (1999) [hereinafter *How is International Human Rights Law Enforced?*] ("After participating in game-theoretic discussions, to avoid multi-party prisoners' dilemma, nations may decide to cooperate around certain rules, which lead them to establish what international relations theorists call 'regimes.'"). *See also* Harold Koh, *Why do Nations Obey International Law?*, 106 YALE L.J. 2599, 2632 (1997) [hereinafter *Why do Nations Obey International Law?*].

parties are relatively influential in pressuring other states to comply, the case for the existence of international law is strengthened. If third parties have little to contribute, however, the realist critique of international law gains momentum and threatens to derail the foundational argument for the existence of the international legal system altogether.

B. FREE RIDERS AND THE RESPONSIBILITY MODEL

Faced with the lack of governance that characterizes domestic legal systems, legal theorists have, in recent decades, embraced game theory and rational choice theory enthusiastically in order to identify and analyze the mechanisms that do, they claim, exist.[12] The academic literature explaining international law and relations in terms of game theory is vast, and two-by-two matrices litter the law reviews. Of particular interest has been the concept of reciprocity, which generated a wave of enthusiasm about Prisoners' Dilemma, Tit for Tat, and similar games and strategies.[13]

It is not difficult to understand the academics' enthusiasm.[14] The concept of reciprocity seems tailor-made to explain why (as Louis Henkin put it) "most" states feel compelled "most of the time"[15] to observe "most" international treaties and international customary law even in the absence of world government, world courts with compulsory jurisdiction, and a world police force. Harold Koh describes what he calls the "rationalist instrumentalist" line of reasoning, which "views international rules as instruments whereby states seek to attain their interests in wealth, power, and the like."[16]

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[12] *See, e.g.*, Francesco Parisi & Nita Ghei, *The Role of Reciprocity in International Law*, 36 CORNELL INT'L L.J. 93, 94 (2003); *see generally* George Norman & Joel P. Trachtman, *The Customary International Law Game*, 99 AM. J. INT'L L. 541, 544–545 (2005); Jens David Ohlin, *Nash Equilibrium and International Law*, 96 CORNELL L. REV. 869 (2011); John K. Setear, *Law in the Service of Politics: Moving Neo-Liberal Institutionalism from Metaphor to Theory by Using the International Treaty Process to Define "Iteration"*, 37 VA. J. INT'L L. 641 (1997).

[13] The enthusiasm for game theory models is evinced by, for example, Professor Axelrod's comment that "[t]he two-person iterated Prisoner's Dilemma is the E. Coli of the social sciences." *See* ROBERT AXELROD, THE COMPLEXITY OF COOPERATION, at xi (1997).

[14] Casting international law as a "game" played for selfish interests gets rid of the need to discuss the moral imperative for obeying international law—namely, that states must obey international law because it is *law* or because it is the right thing to do.

[15] LOUIS HENKIN, HOW NATIONS BEHAVE 15 (1968).

[16] *Why do Nations Obey International Law?*, *supra* note 11, at 2632; *see also How is International Human Rights Law Enforced?*, *supra* note 11, at 1402 ("After participating in game-theoretic discussions, to avoid multi-party prisoners' dilemma, nations may decide to cooperate around certain rules, which lead them to establish what international relations theorists call 'regimes.'").

> International relations scholars such as Robert Keohane, Duncan Snidal, and Oran Young, and legal scholars such as Kenneth Abbott and John Setear, have applied increasingly sophisticated techniques of rational choice theory to argue that nation-states obey international law when it serves their short or long term self-interest to do so. Under this rationalistic account, pitched at the level of the international system, nations employ cooperative strategies to pursue a complex, multifaceted long-run national interest, in which compliance with negotiated legal norms serves as a winning long-term strategy in a reiterated "prisoner's dilemma" game.[17]

The favored strategy is to link your choice of move to the move that your opponent made in a previous round of the game: tit for tat. That way, your opponent's best strategy will be to cooperate and both of you will benefit.

There are reasons to believe that the value of such analysis has been overrated;[18] but that is not our problem now. Suffice it to say that whatever the problems are with using reciprocity to model the decision making of the individual victim and individual villain, they are far less serious than the problems with trying to devise a strategy for dealing with third states. Third states have lower incentives (generally speaking) to take action in response to violations and there are many more of them. Bringing the collective authority of the entire international community to bear is a more difficult problem than engaging the energies of the immediate parties.

This is so for several interrelated reasons. First, the individual claimants have more at stake in the full enforcement of legal norms than the third states: they have a stake in the dispute that is more concrete and direct than any interests of the community at large. The claimants in a territorial dispute are fighting first and foremost for the land. The third states have a genuine but diffuse interest in the lawfulness of the community, and in the ability to rely on the enforceability of customary and treaty based international law. But the claimants have this diffuse interest as well as their immediate claims to the territory. Thus, whatever the stake of the third states, it is less than the claimants', because third states have general interest in the lawfulness of the community while the

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[17] *Why do Nations Obey International Law?*, *supra* note 11, at 2632; *see also How Is International Human Rights Law Enforced?*, at 1402 ("After participating in game-theoretic discussions, to avoid multi-party prisoners' dilemma, nations may decide to cooperate around certain rules, which lead them to establish what international relations theorists call 'regimes.'").

[18] *See generally*, Lea Brilmayer & Yunsieg Kim, *Modeling or Muddling? The Unholy Alliance of Law, Economics, and International Relations* (forthcoming 2015) (manuscript on file with authors).

individual claimants have not only that but also their distinctive individual claims.

Second, states often conclude that they can reap the benefits of a strong state's efforts at enforcing legal norms without paying the associated costs.[19] Taking action against the multitudinous villains of the international community can be an expensive proposition. Military action has obvious costs, economic sanctions are costly in terms of foregone trade opportunities, and often it is necessary to invest considerable resources in the project of convincing other states to maintain embargoes. Taking action against a co-religionist can make a government unpopular domestically. The value that an individual state may get out of assuming its share of the enforcement cost may be less than the cost of taking action. Let "the world's policemen" do the dirty work, spending time and resources organizing political coalitions and holding them together.

The calculations made by third states of the costs and benefits of enforcing the law are most likely done to systematically underestimate the benefits of enforcement. The state that voluntarily takes on the burden of enforcement does not capture the entire benefit itself. The community as a whole may benefit greatly from the increase in lawfulness, but most of this benefit goes to other states.

This is of course the familiar collective action problem of free riders. It is endemic to large group situations in which the benefit of some course of action can be obtained regardless of whether you make your contribution–that is to say, the benefits are non-excludable.[20] If the benefit is non-excludable, this costs them nothing in terms of the hoped-for advantages of action. If every state does the calculations, all may come to the conclusion that it is better to free ride and allow other states to bear the cost of action. The result may be that no one acts and the benefits are lost.

There are indeed some situations in which the collective action problem can be resolved, and such analyses can be practically valuable

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[19] Nathalie Colombier et al., *Global Security Policies against Terrorism and the Free Riding Problem: An Experimental Approach*, 13 J. OF PUB. ECON. THEORY 755, 755–56 (2011) ("collective actions against terrorism may suffer from the well known *free riding* problem . . . global security policies may be perceived as an international Global Public Good . . . characterized by an incentive for countries to defect by investing in alternative projects . . . while profiting from the protection policy implemented by others . . . .").

[20] *See* Katharina Holzinger, *Treaty Formation and Strategic Constellations, A Comment on Treaties: Strategic Considerations*, 2008 U. ILL. L. REV. 187, 195 ("the property of nonexcludability allows for free riding.").

and theoretically important. But it cannot be enough simply to say that individual third states have the *capacity* to help to pressure the violator, or that if they did cooperate to pressure the violator this effort would have the desired effect of deterring future violators. Treating the problem as some international legal theorists do—as solved because game theorists have shown how certain configurations of pay offs sometimes can provide a way for inducing cooperation—is simply wishful thinking. There may be circumstances in which the community does marshal the resources of enough of the individual third states to compel the violator to relinquish its ill-gotten territorial gains. Because of the costs of enforcement, however, and because of the problem of free riding, it is easy to see that this will not always happen. When the existence of international law is challenged, it is not enough to wave the game theory flag and cite the few examples where third states, NGOs, or the United Nations came to the rescue.

The problem with the usual discussions of general interests of third states is that they do not always sufficiently take into account the fact that for some or all of the third states the cost may outweigh the benefit, or that it might be possible to free ride on the enforcement activities of the other states. Left to their own devices, there will surely be some third states that choose to shirk. What is needed is a way to make third state assistance mandatory, not optional. Notice that when the United Nations Security Council is serious about imposing sanctions on a country that has violated some important international legal norm, it makes that norm mandatory.

It is extraordinarily difficult to imagine how this can be done without something akin to the responsibility principle. Neither the adversarial model nor the neutrality model moves things forward. The responsibility principle holds that third states have an obligation to support the disputant who is in the right. That by itself is certainly not sufficient, but it is, in my opinion, certainly necessary. Adopting this principle as a requirement would be a good first move toward truly marshaling the efforts of the community at large in order to promote the resolution that is based on international law.

III. CONCLUSION

Lacking a principle that third states' positions should reflect the legal merits, international law fails to harness all possible sources of support for peaceful resolution of international boundary disputes. A

model that makes support of international law by third states completely voluntary risks losing its claim to recognition as law altogether.

The first step towards a fully functioning system of third state enforcement would be to treat as mandatory the expectation that third states assert whatever influence they have in favor of the result compelled by international law. Over time, this would shift the relevant discourse to the important question of which state has the better case to the territory. Public discourse would focus on historical events and their legal consequences, in particular those that relate to the overall pattern of discovery, effective occupation, treaties, decolonization, and contiguity of territory.[21]

The parties themselves would be part of this discourse, both as speakers and as listeners; one hopes that over time the increasing reliance on international law of territorial acquisition would lead to internalization of the relevant legal standards. A state that was clearly in the wrong would be less able to continue on in the illusion that other states all probably agreed with it. A state that was in the right would be encouraged to stand up for its claim. The immediate benefit of the proposal is that the attempt to put it into practice would require an important shift in focus away from simple questions of strategic interest to questions about the merits of the controversy.

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[21] For a general discussion of these methods of acquiring territory, see generally SIR ROBERT Y. JENNINGS, THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW (1963).