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SYMPOSIUM ON KRISTINA DAUGIRDAS, "REPUTATION AS A DISCIPLINARIAN OF INTERNATIONAL ORGANIZATIONS"

WHAT SHOULD WE ASK REPUTATION TO DO?

*Paul B. Stephan**

Kristina Daugirdas's important new article prompts two kinds of responses. By providing a sophisticated analysis of the role of reputation in influencing the behavior of international actors, it invites further thoughts about what we might think reputation is and does. By taking a moral position—the UN should do more to reduce sexual abuse by UN-sponsored peacekeepers in conflict zones—she provokes us to consider how to optimize institutional design in light of particular goals. In this essay, I don't quarrel with anything she says. Rather, I will respond to her prompting. I will discuss methodological issues first, then normative ones.

Reputation as an Explanation of Behavior

Scholars, needing to explain how international law works in the absence of formal legal interventions of the sort associated with municipal law enforcement, have taken two paths. Simplifying greatly, a constructivist position envisions law as a shaper of values and interests. Actors abide by rules because they are drawn to compliance, either because of moral pull or because they want to fit in. To put the point more formally, they believe that they will be better off (both in how they see themselves and how they believe others will see them) if they adhere to the announced rules. A rational-actor position envisions law's audience as comprising persons who wish to optimize some set of interests that exist prior to law's announcement. Because there are costs to being a law-violator, law provides information that actors can consider in pursuing their goals. Reputation is one such interest.

The clearest distinction between the two approaches is that constructivism sees law as endogenous to the motivation of an actor (law shapes desires), while rational-interest analysis sees law as an exogenous factor that affects decision-making, such as choosing to follow the law so as to enhance reputation interests (law affects how one satisfies desires). Daugirdas writes in a tradition that regards law-abiding acts, as well as cooperative behavior generally, as a means to an end. Strengthening a reputation increases the opportunities an actor has to get what the actor wants, because that reputation will induce others to behave in a way that will ease the path toward achieving goals that the actor desires.

Daugirdas asks, what do we mean by reputation? Her article demonstrates how difficult a question this is to answer. She writes about complexity as to the qualities to which a reputation attaches, the identity of the persons who make up a reputation-forming audience, and the specific actors within an entity who contribute to the formation of reputation.[1] One can add to the mix reputational intermediaries—that is, persons or entities who report or assess the acts of others. Journalists, NGOs, and judicial tribunals all affect reputation by providing additional

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[1] Kristina Daugirdas, *Reputation as a Disciplinarian of International Organizations*, 113 AJIL 221 (2019).

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information that might either enhance (well-regarded source or tribunal) or dampen (fake news, kangaroo court) the impact on others of information about an actor's reputation. How audiences view the intermediary depends ultimately on the intermediary's reputation.

All this might seem like a mess, but we should not lose sight of what we are trying to assess, namely the influence of a social phenomenon on an actor's behavior. To recenter the inquiry, I would propose defining an act's reputational consequences as what the actor, at the time of acting, believes to be the likely effect on others with whom the actor expects to interact at some point in the future of information others receive about the act. The effect can be direct or indirect, but often depends on a reputation intermediary. The results are likely to be as diverse as the relevant recipients of the information. Some audiences may be splitters (the information is relevant as to the actor's values but not its propensity to follow rules; the information is about people in the field but not their supervisors in headquarters; the information comes from a reliable source or a discredited one), others lumpers (the information shows the actor is great or awful). What the actor believes the effects will be is constantly updated in light of what the actor learns about the reactions of others to its prior behavior (in formal terms, the actor is a Bayesian). Reputation matters to the extent an actor can take account of likely effects of its acts on others as well as predict which others will matter in the future.

Calculating the effect of information on others involves both predicting how intermediaries will convey the information and how audiences will react. Daugirdas identifies a salient factor that ties intermediaries to audiences, something that others have called the "CNN effect."[2] Information that reaches a mass audience (cable news viewers) in a manner chosen by the broadcaster (say, MSNBC or Fox) will have some effect on broad constituencies (voters) who in turn can influence choices of official actors (political leaders of governments) with the capacity to respond to the acts in question. Thus the publication of a story in *The Guardian* induced French President Hollande to declare that France would not tolerate misconduct by its troops. What followed, in Daugirdas's account, was a slow-walked investigation that resulted in no prosecutions, allowing the honor of France to be persevered without producing any consequences to soldiers that might enrage French patriots.[3]

One should not read too much into this anecdote, but it at least suggests that certain kinds of information are more likely to be mediated in a way that affects a broad audience than are others. Stories about repulsive acts and an official cover-up have legs. Stories about pro forma support for popular norms while taking advantage of obscure legal processes to cushion against consequences do not. The UN Secretariat can take note. It can afford to be seen as a bad actor as long as no actual harm comes to soldiers in a great power's forces. And to some extent it can count on a great power to stave off those harms.

One might compare this episode to a phenomenon explored in Oona Hathaway's groundbreaking study on the signing of and compliance with human rights treaties.[4] Her research uncovered an inverse correlation between a state's propensity to sign human rights treaties and its adherence to human rights rules. She suggested that a possible explanation for this finding is that states get a significant reputational benefit from signing these treaties, which are discrete and unambiguous events. Adherence to the rules, by contrast, is more difficult to assess, and audiences are less sensitive to information about performance. As a result, the reputational boost from signing is disproportionately larger than the reputational hit from noncompliance. Some actions, by their nature and through the filtering provided by information intermediaries, produce significant reputation effects, while others, by their nature, do not. Or so one might conclude from Hathaway's research.[5]

[2] Ralph Begleiter, *Media and International Affairs in the Satellite Age*, 89 ASIL Proc. 119, 120–21 (1995).

[3] Daugirdas, *supra* note 1, at 243, 246.

[4] Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 Yale L.J. 1935 (2002).

[5] Others, especially constructivists, do not accept her premises and thus reject her conclusions. *See, e.g.*, Ryan Goodman & Derek Jinks, *Measuring the Effects of Human Rights Treaties*, 14 EJIL 171 (2003). Later work indicates that the links between signing and complying with

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This observation reinforces one of Daugirdas's principal theses: Reputation does not necessarily contribute to a happy story about more and better international law compliance.[6] An important and long discussed exception to the happy story involves actors who benefit from a reputation for dangerous irrationality.[7] Even where a reputation for compliance or cooperativeness is desirable, actors can manipulate disclosures or exploit the known prejudices of reputation intermediaries and salient audiences to shift the reputational stakes. As Daugirdas's case study demonstrates, the reputational harm from tolerating war crimes has not by itself sufficiently deterred the UN Secretariat from exercising lax oversight and covering up bad news.

The Toolbox for Making International Organizations Better

Daugirdas is not content to leave the matter there. As Karen Alter observes, she, like most lawyers, sees her mission as not simply advancing our understanding of the world, but of striving to make it a better place.[8] She wants to discipline international organizations, by identifying tools that will increase the odds of their doing their jobs well. If reputation doesn't do enough, then what else might?

What frames this inquiry is a matter of long interest to Daugirdas: traditional legal remedies are not on the table due to conventional international organization immunities from municipal legal process.[9] States that provide military forces for peacekeeping mission retain the power to discipline those forces, including through criminal prosecutions for war crimes. But neither the UN nor any other state can resort to a legal process to supervise peacekeepers.[10] What remains to deter outrageous behavior in these operations, if normal law enforcement plays no role?

Not surprisingly, I think institutional economics in general and contract theory in particular might have something to say about redressing the shortcoming of reputational incentives.[11] First, one might consider the boundaries of an international organization, informed by what analysts call the make-or-buy question.[12] An organization "makes" a "product" when it chooses to carry it out using its own resources. It "buys" that "product" when it contracts with another actor to deliver the service in question. Second, how might one design accountability mechanisms that make it more likely that an international organization will internalize the consequences of its actions?

human rights treaties are complex, even from a rational-interest perspective. BETH A. SIMMONS, MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS (2009); Ingrid B. Wuerth, *International Law in the Post-Human Rights Era*, 96 TEX. L. REV. 279 (2017).

[6] Daugirdas, *supra* note 1, at 254–58. The most prominent rendition of the happy story is ANDREW T. GUZMAN, HOW INTERNATIONAL LAW WORKS (2008).

[7] A well analyzed instance in the economics literature is predatory pricing under conditions of uncertainty about the predator's welfare curve. Predators with a reputation for valuing market share at levels that others might find irrational have an advantage. Peter H. Huang, *Still Preying on Strategic Reputation Models of Predation*, 3 GREEN BAG 437, 439 (2000) (citing Paul Milgrom & John Roberts, *Predation, Reputation and Entry Deterrence*, 27 J. ECON. THEORY 280, 284 fn.4 (1982)); Richard A. Posner, *Some Economics of International Law: Comment on Conference Papers*, 31 J. LEG. STUD. 321, 325 (2002) (value of reputation for ruthlessness).

[8] Karen J. Alter, *Introduction to the Symposium on Kristina Daugirdas, Reputation as a Disciplinarian of International Organizations*, 113 AJIL UNBOUND __ (2019).

[9] Daugirdas, *supra* note 1, at 222.

[10] It may be possible for the Security Council to refer such crimes to the International Criminal Court, or for a domestic court itself to prosecute crimes committed by nationals of or on the territory of a state party to the Rome Statute. Service under UN command, however, may affect the jurisdictional analysis. I do not consider those issues here.

[11] ROBERT E. SCOTT & PAUL B. STEPHAN, THE LIMITS OF LEVIATHAN: CONTRACT THEORY AND THE ENFORCEMENT OF INTERNATIONAL LAW (2006).

[12] R.H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937).

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First, consider make-or-buy. When contemplating a peacekeeping venture, should the Security Council contract with a state for services (buy), or should it undertake the operation under its own authority (make)? Does choosing among possible contractors make it easier to screen for qualities such as propensity to commit war crimes, or do other factors (availability and military competence) dominate the contracting decision? If the UN were to undertake the mission directly, does the organization have the ability to manage the troops so as to increase incentives for compliance with international humanitarian law (IHL)? Does UN command lead to greater control, or do national forces remain principally interested in what the municipal masters want (and more importantly, don't care about)?

To answer these questions, one would want to know whether a market for peacekeeper services exists and the price elasticity of supply. To translate into English, would an increase in payments by the UN lead to higher-quality services, especially if the contract contained terms tying compensation to quality? Or would potential suppliers of these services withdraw from the market if they were required to warrant compliance with IHL as a condition of payment? We won't know the answers to these questions until we try.

Secondly, consider how to improve the organization of UN-commanded peacekeeping to increase compliance with IHL. Daugirdas describes a number of steps already taken to address the sexual violence issue. Some of these seem more promising than others. Adding an additional layer of oversight through the Circle of Leadership described in Daugirdas's article, for example, invites skepticism: What resources will the Circle have to investigate home-state indifference to possible outrages, even war crimes? What steps will be taken to link membership in the Circle to a propensity to speak truth to power, rather than engage in self-protection? What reputational qualities will attach to the Circle and its actions? History does not give us cause to expect much from this move.

A more promising approach to deterring misconduct ex ante and obtaining domestic prosecutions ex post might be to link payments for peacekeeping services provided to UN-commanded operations to IHL compliance. One can imagine agreements between the Secretariat and states that will supply services that include a contingent payment term. States also would commit to a package of IHL training in advance of deployment, implementation of a monitoring mechanism that included facilities for interviewing victims, and reporting to the Secretariat on compliance as well as domestic legal enforcement. The Secretariat or some other body would have the authority to pay or withhold a bonus to suppliers of services that comply with these requirements and would have to disclose its decision either way.

Lest this seem an outrageous burden to impose on peacekeeping service providers, one might note that essentially the same procedures apply to parties to the Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.[13] That instrument requires standardized reporting of enforcement efforts accompanied by periodic peer reviews that audit a party's enforcement of prohibitions of bribery, not just their enactments. The UN Secretariat might take a page from the OECD's book to build IHL reporting and peer review into the peacekeeping project.

Other approaches can supplement this strategy. One of the advantages of building reporting and review into the UN Secretariat's organization and management of peacekeeping missions is that such mechanisms may help to identify those UN officials who bear responsibility for making detection and sanctioning of abuses work. The "make" choice enables the organization to link employees to particular tasks. To the extent an organization values compliance with particular goals, such as curbing sexual exploitation of persons caught up in conflicts, it can create jobs where retention and promotion turns on effective pursuit of those goals.

[13] OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, art. 12, Dec. 12, 1997, 2802 UNTS 49274.

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The general point is that one can take what one wants from this toolbox. If one considers promotion of IHL compliance to be a goal, the law and economics of institutional organization can show how to design structures that advance the pursuit of that goal.

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In positing a toolbox, my analysis begs the question of what motivates the actor to pick a particular goal and to assign it preeminence in the face of competing considerations. This is a difficulty with rational-interest approaches generally. Institutional economics and contract theory help us to understand how interests affect behavior, but in most cases are agnostic as to how humans come to have interests. This limitation also applies to reputation: We may accept that people care about their reputation without explaining why particular acts produce particular responses in audiences such as admiration or repulsion.

Still, in a world where goals can conflict and limited resources ensure that we can't do everything we want, knowing how to fulfill values that we cherish remains immensely important. Daugirdas looks at a critical shortcoming in a central international institution and shows that a concern about reputation can impede fulfillment. She urges us not simply to try harder, but to try smarter. Who could disagree?

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