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**The Liberal Border Script and its Contestations.
An Attempt of Definition and Systematization**

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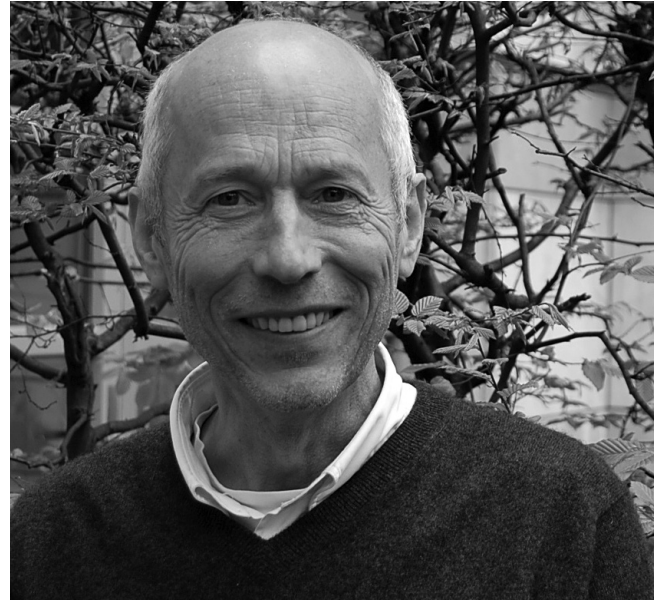
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ABSTRACT

This paper attempts to define what we call the liberal script of borders, i.e. normative ideas that arise from liberalism and regulate cross-border interactions. We divide cross-border interactions into four categories: communication and the exchange of information, economic transactions in the form of trade and investments, the movement of people in the form of emigration and immigration, and finally, the cross-border use of force in the form of military intervention. We argue that the liberal border script is characterized by an inherent tension between individual and collective self-determination. However, as the right to collective self-determination is based on the principle of individual self-determination (as the normative core of liberalism), liberal thought gives priority to the right to individual self-determination. Thus, the main thrust of the liberal border script is to limit state discretion regarding border control in light of the universal right of individuals to cross-border interactions. International law provides a reasonable point of reference to determine the specific institutionalized content of the contemporary border script, although not everything that is enshrined in international law can be interpreted to be liberal. We analyze how international law regulates the four kinds of cross-border interactions identified above. This yields the following conclusions: (1) The right of the state to interfere with the communication and exchange of information across national borders is very limited. (2) Most states of the world have agreed to substantially limit their ability to interfere with the flow of trade and capital across their borders. (3) States retain the right to control immigration, but under international human rights law they are required to open their borders to emigrants as well as to refugees and asylum seekers who flee from persecution. (4) Nation states monopolize the use of force on their territory; the possibility for other states to intervene militarily remains extremely limited. In addition, we point out for each of the four domains how

the liberal elements of the border script are currently being enforced by strengthening the principle of individual self-determination, and how they are contested by emphasizing collective self-determination.

1 INTRODUCTION¹

For many years, China has blocked citizens' access to many foreign online sources through what is called "The Great Firewall of China." This violates Article 19 of the Universal Declaration of Human Rights, which states that everyone has the right to receive information through any media and regardless of borders.

In 2018, US President Donald Trump began a "trade war" against China by raising tariffs on Chinese goods, even though the US is a member of the World Trade Organization, which forbids discriminating between trading partners.

In 2015, the Hungarian government headed by Viktor Orbán decided to close Hungarian borders for refugees from the Middle East. This contradicts international refugee law, which entitles refugees to seek protection from persecution in another country.

In 2014, the Russian Federation annexed the Crimean Peninsula belonging to Ukrainian territory, although international law guarantees the territorial integrity of sovereign nation states.

¹ We would like to thank Stefan Gosepath, Tanja Börzel and Michael Zürn for their written comments as well as the participants of the Cluster Jour Fixe for their helpful comments on this manuscript.

All four examples above deal with the legitimacy of controlling nation states' borders. Should national borders be open to communicate, to move, and to trade across them? And should a country be allowed to cross the borders of a neighboring country to intervene militarily? Or do nation states have the right to control and close their borders against outside interference? With reference to international law, the examples show how contested these questions presently are. In this paper, we would like to systematize what is at stake in these contestations by making use of the concept of the "liberal script."

The Cluster of Excellence "Contestations of the Liberal Script" attempts to describe current contestations of the normative self-definition of liberal societies, i.e. the "liberal script." A script consists of normative ideas and institutional prescriptions regarding the organization of a society (Börzel/Zürn 2020: 9). It gives answers to four basic problems of social organization that all societies have to resolve in one way or another: (1) drawing borders by defining who or what belongs to a society and who or what does not; (2) constituting an order by defining the internal structure of a society; (3) allocating and reallocating resources by defining who gets what; (4) and finally, defining a society's understanding of temporality and how to manage the future (Börzel/Zürn 2020: 11). This paper focuses on one of the four dimensions, namely on *borders*.

Any attempt to analyze current contestations, its causes and its consequences, logically requires defining the content of the liberal script regarding the organization of borders. Hence, the aim of this paper is simple and straightforward. We attempt to develop a definition of the "liberal border script" and to map how the liberal border script is currently being contested.² Our line of argumentation is structured along three sections.

We start this paper by clarifying our understanding of the term "society" and what we mean by a "border script." We argue that contemporary societies are mostly organized as nation states; and that the idea to organize societies as nation state societies constitutes the hegemonic societal script. In consequence, the boundaries of a society are often regulated by national borders – the territorial line that separates two countries from each other. National borders can be more or less open to all kinds of social interactions. We understand a society's "border script" to contain the normative ideas and prescriptions that regulate these kinds of cross-border interactions. It prescribes to what extent nation state societies are legitimized to allow, control or prohibit them. For the sake of systematization, we divide cross-border interactions into the following four categories: (1) communication and the exchange of information, (2) economic transactions in the form of trade and investments, (3) the movement of people in the form of emigration and immigration, and finally, (4) the cross-border use of force in the form of military intervention.

In section 2, we specify the core characteristics of a *liberal* border script. We propose a very parsimonious definition. In our view, a liberal border script is characterized by an inherent tension between the principle of individual self-determination (each and every one should have the right

2 The cluster further distinguishes between four dimensions of a script (Börzel/Zürn 2020: 10): (a) The plot of a script consists of its central ideas; (b) actorhood refers to the types of actors who are legitimate to act as actors; (c) scenery denotes the institutions that implement a script and (d) decoupling means the degree of discrepancy between the script and its implementation. We do not make use of this terminology in our paper and use simpler language instead. But our terminology could be easily translated into the four dimensions. (a) The plot of the liberal border script consists of the core ideas "individual self-determination" and "collective self-determination". (b) Nation states and individuals are defined as the core actors. (c) International law at least partially constitutes the scenery that institutionalizes the script. (d) The degree by which states deviate from the script can be called "decoupling".

to decide on his or her own life) and the principle of collective self-determination (a community has the right to be independent from outside interference). Applied to the question of borders, this generates a tension between the individual right to engage in cross-border interactions, and the right of the state to interfere with these interactions. However, given that in liberal thought the right to collective self-determination is only derivative of the individual right to associate, restrictions on individual freedoms caused by state interference bear a heavier burden of justification. It follows that the liberal border script develops a dynamic to limit state discretion regarding border control in light of the universal right of individuals to move across borders and to engage in cross-border interactions (Charvet/Kaczynska-Nay 2008).

In section 3, we argue that international law provides a reasonable point of reference to determine the specific content of the contemporary border script, as international law has been drafted and signed by nation state governments and hence is legitimized by those units of the world that constitute the societies of the world. International law as it developed after World War II and deepened after the collapse of the Soviet Union is based on the principle of national self-determination, but states have signed up for a number of international treaties which oblige them to open their borders (at least to a certain degree) to international economic exchange, migration, and communication flows. In this section, we will scrutinize how international law regulates the four categories of cross-border interactions identified above. As not everything that is enshrined in international law can be interpreted to be liberal, we will discuss how international law can be interpreted in light of the tension between collective and individual self-determination. We come to the following conclusions:

First, the right of the state to interfere with the communication and exchange of information across national borders is very limited by international human rights norms that protect the individuals' freedom of communication and right to privacy. Second, most states of the world have agreed to substantially limit their ability to interfere with the flow of trade and capital across their borders by becoming members of the WTO and signing a multiplicity of international investment treaties. Third, states retain the right to control immigration, but under international human rights law they are required to open their borders to emigrants as well as to refugees and asylum seekers who flee from persecution. Finally, nation states monopolize the use of force on their territory; the possibilities for other states to intervene militarily remain extremely limited under international law.

Additionally, in section 3, we will point out how the liberal elements of the border script are currently being enforced by strengthening the principle of individual self-determination on the one hand, and how they are contested by emphasizing collective self-determination on the other.

We consider a definition of the "liberal border script" to be crucial for the preparation of empirical projects within the Cluster. There are two projects we are involved in; both of them focus, at least partially, on borders. (1) In the project *"Debating the legitimacy of borders: How the admission and exclusion of migrants and refugees is justified across the world"*, we analyze how the legitimacy of borders is publicly debated in different countries around the world. For this project, it is crucial to determine how the liberal border script prescribes the exclusion or admission of migrants and refugees, and where it is challenged. (2) The Cluster attempts to conduct a comparative survey in order to measure peoples' attitudes towards the liberal script; the border script is one part of the broader liberal script.

Developing a survey requires a very precise definition of theoretical concepts, because its different dimensions have to be translated into specific interview questions. In the last section and in the appendix of this paper, we will try to translate our theoretical considerations into specific questions that can be asked in a survey in order to illustrate how the liberal border script and its contestations could be measured.

In addition, a clear definition of the liberal border script may also be helpful in selecting future projects within the Cluster. In order to avoid that projects in a research unit are only loosely connected to each other, a coherent framework might be helpful. Therefore, it may also make sense for the other research units in the Cluster to try to define the core elements of their respective script. Accordingly, one could try to determine the “liberal order / reallocation / and temporality script” and map their specific contestations.

2 SOCIETY AND THE BORDER SCRIPT

2.1 SOCIETY AS A NATION STATE SOCIETY

Even though “society” is the central object of sociological analysis, there is little consensus on what is meant by the term. The concept is rather vague as it must encompass all kinds of historical and contemporary types of societies, such as hunter-gatherer societies, city states, empires etc., to name just a few (Diener/Hagen 2012). However, when social scientists and lay people talk about *contemporary societies*, they usually think of societies organized as *nation states*, for example the US, Ghana, France or Peru. They think of an entity characterized by the congruence of a territory, of people permanently living on it, and an organization that has monopolized the use of force on that territory (Jellinek 1905).³ We argue that, despite all processes

of globalization, and regional integration, the nation state remains the hegemonic “script” of social organization of the contemporary global order.

The ongoing hegemony of the script of organizing societies as nation states can be illustrated with many different examples. First of all, it is reflected in international law and the Charter of the United Nations. Nation states are considered to be the most important legal entities of the world polity; in international law, a state constitutes a juridical person. The world is currently divided into 193 nation states recognized by the United Nations, and they enjoy “sovereign equality” (Article 2(2) UN Charter). This means that, independently of their size and power, each state is recognized as equal in the international realm and has full authority over its territory and its domestic affairs. This principle of sovereign equality is mirrored in the fact that each country has one vote in the United Nations General Assembly.

Second, the hegemony of the nation state form is reflected in the fact that, until today, societies strive to become internationally recognized nation states. One of the most prominent examples is that of the Palestinians, who seek to attain territorial sovereignty and become a recognized member state of the United Nations. Similarly, when societies are threatened or collapsing, as in Afghanistan or in Libya, this is discussed with reference to the nation state and scholars speak of “failed states” (Risse/Lehmkuhl 2007). John

3 When we speak of “nation states”, our emphasis lies more on the concept of “state” as a form of social organization endowed with sovereignty, and less on the concept of “nation.” With the term “nation” we simply refer to some form of “imagined community” (Anderson 2006) of the people living on a territory and striving for statehood, and do not specify whether they are organized around civic, ethnic, multicultural or other philosophies.

Meyer and his colleagues illustrate this hegemony of the nation state script with a fictitious example. If a hitherto unknown but inhabited island were discovered today, most people and institutions in the world would have a clear idea of how this island society should be organized in the future:

A government would soon form, looking something like a modern state with many of the usual ministries and agencies. Official recognition by other states and admission to the United Nations would ensue. The society would be analyzed as an economy, with standard types of data, organizations, and policies for domestic and international transactions. Its people would be formally reorganized as citizens with many familiar rights (Meyer et al. 1997: 145).

However, organizing societies as nation states is not just a mere idea or a script, it is an idea that has become reality.⁴ From a historical point of view, the organization of societies as nation states is a relatively recent development (Rokkan 1999; Hobsbawm 1992; Maier 2016). Historians interpret the Peace of Augsburg (1555) and the Peace of Westphalia (1648) as the beginning of the emergence of a world order consisting of nation states. The European states agreed to mutually recognize each other as sovereign entities that rule over a territory and the people living inside the borders of that territory. They agreed to respect each other's national borders and to not intervene in the internal affairs of other states. The process of nation state building accelerated in Europe in the 18th and 19th centuries. However, even if the script organizing societies as

nation states originated in Europe, it has spread worldwide. The independence movements in Latin America in the 19th century and the collapse of European colonial empires in Africa and Asia in the 20th century led to the proliferation of the number of nation states across the world.

Over time, the state has increasingly permeated social life on its territory. According to Max Weber, the modern state has developed an "Anstaltscharakter" (Weber 1985: 516). It consists of institutions – including laws and regulations – that are confined to the territory of a specific nation state. This includes the creation of a nationwide administration – whose writ runs to every corner of the nation – the introduction of a comprehensive system of registration (births, deaths, etc.), as well as a national currency, legal system, tax system, the creation and maintenance of a nationwide transport system (roads and rail), and a countrywide system of schools and universities.⁵ The extent to which the state shapes the lives of the people living on its territory can be deduced from a variety of indicators, such as the different life chances – poverty rates, educational levels, health care etc. – between countries.⁶ Most important in the context of this paper, the state also secures the borders of a territory and attempts to control all incoming and outgoing goods, people and interactions (Rokkan 1999). This is symbolized by toll barriers, passport controls and customs; and reflected, for instance, in the fact that

4 At this point, we ignore the question of causality, i.e. whether societies were first constituted as nation states and then the script was created, or whether an existing script contributed to the constitution and emergence of societies as nation states. John Meyer and colleagues distinguish between two phases: First, nation states emerged and then the script to organize societies as nation states. But once the script was institutionalized, it influenced all of the following processes of constituting societies as nation states (Meyer et al. 1992; Boli-Bennet/Meyer 1978).

5 To avoid any misunderstanding: Not all states have developed fully fledged national institutions. In some African countries, especially in the sub-Saharan region, we find a dual structure consisting of central state institutions on the one hand, and institutions of traditional governance based on different ethnic groups on the other (Holzinger et al. 2017). And of course, nation states differ in the type of institutions they have developed.

6 For the purpose of illustration, we only name one indicator. People's incomes differ dramatically depending on the country in which they were born. For instance, Branko Milanovic (2012) has shown that more than 80 percent of global income differences are due to between-country inequalities (in the mid-19th century, mean incomes were still quite similar across countries).

the vast majority of people worldwide move within rather than across national borders.⁷

To sum up: It seems to be safe to say that contemporary societies are mostly organized as nation states. In addition, the idea to organize societies as nation state societies constitutes the hegemonic societal script (Meyer et al. 1997; Meyer 2010). This script has been largely implemented so that the script has become reality. To avoid any misunderstandings, one clarification seems to be necessary at this point. The fact that nation states currently constitute the hegemonic script of organizing societies does not automatically mean that nation states are legitimized from a liberal perspective. As we will see in more detail below, one typical liberal justification of statehood consists in contract theories, by which individuals agree to pool and delegate authority to a state. However, this authority must not be necessarily organized as a nation state but can also be organized at a lower level of aggregation such as in the form of local communities. From a liberal perspective, all types of authorities are legitimate as long as they rest on the free and equal consent of the members of a community.

2.2 BOUNDARIES OF SOCIETY AS NATIONAL BORDERS

A border is a line dividing two territories from each other. A border can delimit private properties or entire countries. In this paper, we focus only on the macro level and on borders between countries. As we start from the assumption that most societies are constituted as nation states, it follows that social interactions tend to be delimited by the territorial border of a nation-state.

⁷ Despite processes of globalization, most people continue to stay within their country, rather than moving between countries. In 2015, 244 million people migrated across borders. These so-called international migrants make up 3.3 % of the global population, which means that 96.7 % of the global population remain within their country of birth (IOM 2017).

This means that exchanges and interactions between people *across* borders are controlled and can be interrupted, while interactions *within* the nation state are more open and less regulated. As a result, interactions within a nation state are typically much denser than interactions across nation states.⁸ The idea to conceptualize a society as a condensation of interactions inside a specific territorial space goes back to Georg Simmel (1989: 129). He defines society as a specific pattern of interaction within a group of individuals who share institutions and often similar values that shape the interactions of the group. A society distinguishes itself from another society in that the members of one society interact more closely with each other than with the members of another society, due to the fact that they are subject to different institutions and different values.

The boundaries of a society can be more or less bright or blurred, depending on the extent to which a state regulates and interferes with the interactions occurring across its borders (Eigmüller 2006). This relates to *exports* (in a broader, not only economic sense) on the one hand, that is, to interactions that originate within a nation state and cross the border into another nation state; and to *imports* on the other, i.e. interactions that come from the outside in order to cross the border into a nation state. Due to processes of globalization and/or denationalization, cross-border interactions have intensified and the boundaries between societies have become increasingly blurred over time (e.g. Beisheim et al. 1999). States have decided to open their borders for cross-border interactions in some domains (e.g. the economy) more than others (e.g. migration). This is empirically reflected in empirical indices such as the KOF Globalization Index. Furthermore, some states have agreed to abolish

⁸ Karl Deutsch's theory of integration conceptualizes society in a very similar way, as he puts a strong emphasis on interaction, exchange and communication (Deutsch 1966; Roose 2010).

border controls and to delegate authority over borders to supranational institutions, such as in the case of the EU; as a result, intra-European interactions have increased.

The term “interaction across borders” is a very general term and should be specified more precisely regarding the types or domains of cross border interactions. For the sake of systematization, but without claiming completeness, we think that the following four types of cross border interactions are particularly significant.

(1) First, *communication and the exchange of information* across borders: These can be private forms of communication (such as exchanging letters, phone calls, e-mails or chats), as well as public forms (such as radio, television and the internet).

(2) The second kind of cross-border interaction are *economic transactions*: trading (i.e. buying and selling goods and services) and investing (i.e. acquiring capital) across national borders.

(3) Third, the *movement of people* across national borders, i.e. international migration: People can move out of a country (emigration) and into a country (immigration); they can do so voluntarily or because they are forced to flee.

(4) The final type of cross-border interaction is *intervention by military force* in the domestic affairs of another state. Note that, in contrast to the previous three forms of cross-border interactions, the agents of this cross-border interaction are not individual but collective actors. We nevertheless include it in our typology, given that the point of reference of military interventions are individuals, either as executors or as targets.

We define the normative ideas about the extent to which the state is legitimized to allow, control or interrupt these four kinds of interactions as a

“border script”. Note that we focus on the *normative* dimension. We are not interested in the extent to which states are *effectively* controlling interactions across their borders, but in beliefs about the extent to which they *should*. Furthermore, we do not focus here on the extent to which the actual practices of border control have become decoupled from the territorial border itself. For instance, border controls can be effected *inside* a country’s territory (e.g. by border patrols checking immigrants’ visa status inside a territory), or they can be *externalized* (e.g. before passengers board a plane) (see Mau et al. 2008; Basaran 2011). In Chapter 3, we will further specify the four types of cross border interaction, and we will try to determine what the liberal border script prescribes for each of these four categories.

Of course, there are many other things that can cross national borders, such as pollutants or diseases, as the current coronavirus pandemic shows. We must specify that we focus on social interactions that emanate from individual or collective actors. We understand the cross-border diffusion of diseases, for example, to be related to the movement of people across national borders who transport the disease. Thus, in our understanding, attempts to control the worldwide diffusion of diseases would fall within the remit of the border script regulating international migration.

To sum up: We argue that the territorial borders of a nation state regulate the boundaries of a society. The “border script” refers to the extent to which states should control cross border interactions. This includes interrupting interactions across borders, as well as allowing these interactions to happen. A “border script” does not determine to what extent the nation state is actually able to control its borders – the ability to control borders varies considerably between countries –, but it refers to the extent to which it is legitimized to do so.

3 THE NORMATIVE CORE OF THE LIBERAL BORDER SCRIPT

As noted above, a script is an idea of how a society *should be* organized and not a description of how a society *is* organized. If the world consists of different nation states, then a “border script” consists of specific normative ideas about the extent to which states are legitimized to control cross-border interactions. But how can we determine the specific characteristics of the “liberal” border script? And how can we analyze its contestations? Answering these questions requires clarifying what is meant by “liberal.”

The core elements of liberalism are not easy to determine. There are at least two reasons for this. First, as Helena Rosenblatt (2018) and many others (e.g. Bell 2014) have shown, the meaning of liberalism has differed tremendously over time. Depending on the historical phase, liberalism has meant very different things, from the “classical liberalism” in the 19th century, to “neo-liberalism” and “social liberalism” in the 20th. Second, the term “liberal” belongs to the repertoire of general values of a society. As Niklas Luhmann has emphasized, general values are intentionally vague. Metaphorically speaking, they do not have the function of fixed stars that give hikers a clear orientation by precisely fixing a certain meaning and thus excluding other meanings. Instead, Luhmann compares values with air balloons: “Values are not like fixed stars, but rather like balloons, whose covers are kept for blowing them up on occasion, especially at festivities” (Luhmann 1997: 342).

Given these problems to determine the meaning of the term liberal, it seems reasonable to specify the following. First, we do not intend to define the meaning of the term liberal in general, but we are interested in defining one dimension of the liberal script only, namely the liberal border script.

Accordingly, we focus only on those liberal ideas that are relevant to the question of borders. Second, we follow “Ockham’s razor” principle (“other things being equal, simpler explanations are generally better than more complex ones”) by adopting a very parsimonious approach and limiting ourselves to only a few core ideas. We thus leave aside many values that belong to the idea of liberalism and are discussed in the literature. Finally, we only take into account deontological liberal arguments related to the legitimacy of a border script – i.e. which derive from certain norms and principles – and not consequentialist ones – i.e. which evaluate border control in terms of its consequences, e.g. for welfare, culture, politics etc.

In our view, the liberal border script is characterized by a tension between the principles of *individual* and *collective self-determination*, that is, the right of individuals to interact across national borders in the name of individual self-determination, and the right of the state to control its borders – in so far as this rests on the equal consent of the state’s citizens (i.e. collective self-determination). In the following two sections, we will first describe the idea of individual self-determination and then the idea of collective self-determination. We will briefly summarize what is meant by the two terms, but without the intention of reconstructing the arguments that are discussed in the philosophical literature to justify the two values. We will then discuss the tension that arises between the two principles.

3.1 INDIVIDUAL SELF-DETERMINATION

(1) As we see it, the normative core of the liberal script is the principle of individual self-determination (frequently also referred to as individual autonomy, freedom or liberty) (e.g. Gaus et al. 2018; Fisch 2015). Liberalism imagines the individual as an autonomous actor endowed with the volitional capacity to decide on its own life

and destiny.⁹ *Self-determination* means that the subject of determination is identical to the object of determination. This means that no one else is legitimized to determine an individual's destiny – unless it authorizes someone else. The individual is not the property of any collectivity, neither the state nor of any other association. Rather, as we will see further below, the legitimacy of collectives always rests on the consent of the individual.

(2) Furthermore, the liberal script supports the equality of rights. Liberalism assumes that every individual has the right to individual self-determination by virtue of their nature as human beings. In this respect, all human beings are equal; no arbitrary differentiation can be made between them, for example on the basis of race, ethnicity, national origin, sex etc. The idea of equal rights has found its way into the Declaration of Human Rights. Article 1 states: “All human beings are born free and equal in dignity and rights.” Evidently, this does not mean that liberalism supports equality between humans pure and simple. Given that every individual has the right to decide on his or her own life, liberalism considers those inequalities justified that are based on what they have freely chosen to do with their life, for example their skills and qualifications. Furthermore, the fact that everyone has the right to self-determination means that individual self-determination is limited by the self-determination of others.

(3) The principle of equal individual self-determination can relate to different dimensions of peoples' behavior: e.g. to their choice of religion, their sexual orientation and partner choice, the expression of a political opinion etc. Much of the debate on what liberalism means rests on the

question of which rights are necessary to satisfy individual self-determination: is it enough to grant “negative freedoms” like property rights, freedom of expression and opinion etc.; or are “positive freedoms” necessary as well, such as social rights (housing, minimum wage etc.) (see Berlin 1969)? We will elide this discussion at this point and limit ourselves to those freedoms related to the cross-border interactions identified above, i.e. communication, economic exchange, migration and use of force across national borders. The individual rights that are at stake in cross-border interactions can be specified in the following ways.

(3.1) Freedom of communication and information: An essential component of the liberal principle of individual self-determination is the freedom to hold and express opinions. This is emphasized by liberal philosophers from Mills to Rawls. It enables the development of one's personality and provides a safeguard against ignorance and oppression. The freedom of opinion and expression, in turn, rests on the right to receive and convey information and ideas, without arbitrary interference. This includes the right to privacy and the secrecy of correspondence in the case of personal communications. In principle, there is no reason why this freedom should not apply to communication and the exchange of information across national borders.

(3.2) Freedom of contract: The principle of individual self-determination also implies that people can enter into an economic exchange with whom they want to, i.e. they can freely buy and sell goods and services and acquire and sell property. The freedom of contract – as well as the related right to private property – are key to “classical liberalism,” which stresses that these are necessary freedoms to make individual self-determination possible (Gaus et al. 2018). Again, in principle this could apply to cross-border economic transactions as well. For instance, referring to the

⁹ At this point, we do not discuss that some people are denied the ability of individual self-determination, e.g. children or people who are mentally ill.

libertarian philosopher Robert Nozick, Joseph Carens¹⁰ argues:

Suppose a farmer from the United States wanted to hire workers from Mexico. The government would have no right to prohibit him from doing this. To prevent the Mexicans from coming would violate the rights of both the American farmer and the Mexican workers to engage in voluntary transactions (Carens 1987: 253).

(3.3) Freedom of movement: The freedom to move and to choose one's place of residence is an essential element of individual self-determination. As Alan Dowty reminds us, "the origin of one Greek term for freedom (*eleutheria*) is from a phrase meaning 'to go where one wills'" (Dowty 1989: 13). The freedom of movement implies the freedom to leave a particular place and not to be forced stay, and the freedom to go somewhere else without arbitrary interference. In principle, this applies to movement across national borders as well. As Carens argues:

Every reason why one might want to move within a state may also be a reason for moving between states. One might want a job; one might fall in love with someone from another country; one might belong to a religion that has few adherents in one's native state and many in another; one might wish to pursue cultural opportunities that are only available in another land (Carens 2013: 239).

This freedom to move is particularly important if one's other freedoms or even one's bodily integrity are at risk, for example under an oppressive regime.

(3.4) Freedom from (arbitrary) coercion: A core prerequisite of individual self-determination is

being free from (arbitrary) coercion by any other agent, be it by another individual or by organs of the state. As we will see further below, this principle raises complicated questions regarding the use of force across national borders. On the one hand, this principle would seem to prohibit the use of coercion across national borders in order to subjugate people to a foreign power. But on the other hand, freedom from arbitrary coercion could also serve to justify forcible interventions across national borders to liberate people from an oppressive regime.

Up to this point, the liberal principle of individual self-determination seems to result in a plea for open borders and against state regulation. However, as we have stated above, the liberal script is characterized by a tension between the principle of individual self-determination and the related rights to cross borders, and the right of a political community (such as the nation state) to control and to interfere with cross-border interactions. This right derives from the notion of collective self-determination. As we will see in the next section, liberalism stands in an uneasy relationship to the principle of collective self-determination.

3.2 COLLECTIVE SELF-DETERMINATION

(1) The second core principle of the liberal script is the idea of collective self-determination. If self-determination means that the subject that determines is at the same time the object of determination, then *collective* self-determination means that a collective should be self-governing and decide on its own destiny; neither another collective nor a subgroup of a collective is legitimized to control its fate – unless it receives authorization (Miller 2007, 2016). Collective self-determination can be claimed by any kind of collective: a family, an ethnic group, a club, or a nation state. The kinds of collective we are interested in here are nation states. While nation

¹⁰ We particularly use telling examples from normative political theory, such as Joseph Carens, to clarify liberal arguments in a descriptive manner. However, we do not intend to develop a normative theory.

states can claim the right to collective self-determination, this, however, does not mean that liberalism entitles only nation states to collective self-determination; other forms of political organizations could, in principle, claim this right as well.

(2) From a liberal perspective, the right to collective self-determination derives from the right to individual self-determination. Individual self-determination typically also includes the freedom to associate with others and to constitute a community. Its members are, in principle, free to determine the character of that community and to determine its membership. This thought can be applied to nation states as well; citizens should be able to decide on their own affairs without outside interference. As we will see in the next section, the principle that every nation state enjoys an equal right to collective self-determination is the cornerstone of international law and enshrined in the UN Charter.

(3) It follows that collective forms of self-determination are only legitimate if they rest on the free and equal consent of the members of a community (Abizadeh 2008). In other words, those who are subject to collectively binding decisions must, at the same time, be the authors of these decisions; this is the substance of most liberal contract theories from Locke to Rawls. This argument also applies to nation states. A state monopolizes the use of force and constrains individual freedoms by forcing those who are living on its territory to comply with its laws. Broadly speaking, this means that authoritarian states (where power lies with an unauthorized subgroup of society) cannot legitimately claim collective self-determination, while democratic states can, where all persons have the opportunity to participate in the political processes that determine how power is exercised (e.g. through elections). Claims to collective self-determination that do not derive from the individual but, for instance, from the

notion of a homogeneous racial community are not in line with liberal principles.

(4) Again, this is a very crude characterization of liberal ideas, and we will abstain from discussing what kind of collectives can claim legitimacy and which ones cannot. What we are interested in here is what this means for borders, and state control of cross-border interactions. This requires making two complementary considerations.

(4.1) On the one hand, the right to collective self-determination by definition implies being independent from outside interference. A collective that is based on the individual decision to associate, must have the right to refuse to associate with others. As Christopher Wellman puts it:

Just as an individual has a right to determine whom (if anyone) he or she would like to marry, a group of fellow-citizens has a right to determine whom (if anyone) it would like to invite into its political community. And just as an individual's freedom of association entitles one to remain single, a state's freedom of association entitles it to exclude all foreigners from its political community (Wellman 2008: 110-111).

A similar argument is put forward by Michael Walzer, who compares nation states to clubs that can define who can become a member (Walzer 1983: ch. 2).

(4.2) On the other hand, however, interactions across borders imply crossing from one *territory* to another. But why should the freedom to associate entail the right to exclude someone not just from becoming member of a community, but also from accessing a certain territory? Taking up Michael Walzer's club analogy, a club may invoke the freedom of association to refuse non-members to join, but it may not refuse access to a certain territory as long as it does not own this territory. Here, a complementary principle has to come into effect, namely the principle of private

property (for private actors) and the principle of territorial sovereignty (for states). It could be argued that, without these, collective self-determination remains meaningless. Neither a club nor a state could fully exercise their right to collective self-determination if they cannot restrict access to the territory where they act out this right.

In consequence, the principle of collective self-determination (complemented by the principle of territorial sovereignty) suggests that the state has the right to control cross-border interactions. This is most evident in the case of the *use of force* across national borders. Any forcible interference by a foreign power on the territory of a state would threaten to dissociate the object from the subject of political determination and violate the right to collective self-determination. But the right to collective self-determination and the complementary territorial sovereignty could also justify controlling the flow of *communication, economic transactions* and *migration* across national borders. As soon as these interactions occur, they affect the collective self-determination of a community on a particular territory.

Before we move on, it must be pointed out that the argument, that the right to collective self-determination automatically implies the right to exclude non-members of a collective, is questioned by other scholars. The counterargument, that we at least want to mention, reads as follows (Benhabib 2004; Abizadeh 2008): The core idea of democratic self-determination means that all persons who are affected by political decisions must have the opportunity to participate in the process of decision making e.g. by electing those who make the decisions. If members of a community like citizens of a state decide democratically to close the borders, then this decision will not only affect members, but also non-members of a community like immigrants and refugees, as they are no longer allowed to enter the specific country. This, however, contradicts the idea that

everyone affected by a decision should also have a say in it, which in turn leads to the conclusion that “according to democratic theory, the democratic justification for a regime of border control is ultimately owed to both members and non-members” (Abizadeh 2008: 44). However, here we stress the principle of free association (which implies the right to dissociate) over that of democratic unboundedness as an element of the liberal border script.

3.3 TENSION BETWEEN INDIVIDUAL AND COLLECTIVE SELF-DETERMINATION

Drawing together the previous discussions, we see a potential tension between the principles of individual and collective self-determination. Both principles can lead to conflicting conclusions regarding the question of borders. The principle of individual self-determination provides support for open borders and implies that the nation state has no right to prevent cross-border interactions. However, this conflicts with the principle of collective self-determination, which implies that the nation state has the right to control its borders and to prevent cross-border interactions (provided that it is based on the free and equal association of individuals). In consequence, the liberal border script cannot be characterized as prescribing open borders per se. It must balance the individual right to interact across borders with the state’s right to control its borders – if this rests on the equal consent of its citizens.

The crucial question is how to weigh up the principles of individual and collective self-determination against each other. Given that (as we have seen) collective self-determination is only derivative of the principle of individual self-determination, we would argue that the liberal script tends to emphasize individuals rights, while collective rights must bear a heavier burden of justification if they come into conflict with individual freedoms and universal rights (Charvet/

Kaczynska-Nay 2008). For example, it would have to be justified why legitimate forms of national self-determination should be allowed to infringe on the freedom to communicate and to exchange information across national borders, and not vice versa. Why should democratic associations be allowed to restrict the freedom of communication, contract and movement of those who are not members of the association? As we will see empirically in the next section, this is mostly only the case when the security and integrity of the community is at risk. It follows that the liberal border script is characterized by an internal dynamic towards the emphasis of individual rights.

Based on these considerations, we speak of an “enforcement of the liberal border script” when actors emphasize individual rights to interact across national borders over the right of the state to interfere with these interactions. On the other hand, we speak of “contestations of the liberal border script” when actors highlight the principle of collective self-determination to restrict individual rights to engage in cross-border interactions. Following the terminology of the Cluster (Börzel/Zürn 2020), these contestations can be classified into “external” and “internal” contestations, or contestations *of* and *within* the liberal border script. External contestations of the liberal border script challenge its normative core of individual self-determination as such and mobilize illiberal principles of collective self-determination against it. For example, selecting migrants based on their religion or race would be an illiberal policy. In turn, internal contestations draw on elements of the liberal border script and turn them against it. For example, protecting the security of the community – a goal that can be derived from a liberal understanding of collective self-determination – could increasingly serve to restrict individual rights. These internal contestations can have an inherent tendency to become illiberal the more they infringe on individual rights. The “tipping point,” however, is hard

to pin down; the extension of the liberal border script cannot be precisely determined.

4 THE BORDER SCRIPT AS ENSHRINED IN INTERNATIONAL LAW

In the last section, we tried to identify the key features of liberalism that are important to interpret a specific border script as liberal. In this chapter, for each of the domains of cross-border interaction identified above, we will in the first step specify the contents of the border script that the states of the world subscribe to, as it is enshrined in international law. However, as not everything that is enshrined in international law can be interpreted to be liberal, we will in the second step discuss for each of these domains to what extent international law can be interpreted as liberal in light of the normative principles of liberalism. Finally, we will attempt to map how the liberal elements of the border script are being enforced and contested. But before we move on, we would like to justify why we chose international law as a point of reference to define the contemporary border script.

Scripts in general, and the border script in particular, are not naturally given. They are the result of complex processes of social construction, involving power struggles, persuasion or mere chance. Attempts to define the border script can take place in very different social fields of society, for example in the arts, in science, in the field of religion, or in politics and law. The notion of social fields derives from the work of Pierre Bourdieu. He argues that fields differ in terms of their power to shape society (Bourdieu 1994). John Meyer and the Stanford School argue in much the same way. States, international institutions (such as the United Nations (UN), the United Nations High Commissioner for Refugees (UNHCR), the WTO or the World Health Organization (WHO)) and international civil society organizations (e.g.

Amnesty International, Fair Trade etc.) constitute the “world polity” and have been quite successful in defining the dominant worldwide script. The result of this process is manifested in international law.¹¹ We propose to take the border script as enshrined in international law as a point of reference for the following reasons:

First, international law has been drafted and signed by nation state governments and hence is legitimized by those units of the world that constitute the societies of the world. Most states have agreed at some point or the other to join international organizations such as the UN or the WTO, and to sign binding international treaties like the international human rights instruments. For instance, the International Covenant on Civil and Political Rights (ICCPR), a core human rights treaty, has been ratified by 172 countries, and 164 states are members of the WTO, which regulates international trade relations. Treaties such as these involve more or less clear prescriptions on how states should regulate the cross-border interactions referenced above (communication, trade and investment, migration, and use of force), and thus serve as a good point of departure to define a border script.

Second, international law is not just a discourse. Its rules and norms are binding and therefore have an influence on the behavior of individual and collective actors, although – and in contrast to domestic law – the possibilities of enforcing the law are far less developed, as there is no supranational state that has the monopoly on the use of force. In this respect, the likelihood that reality is decoupled from the script is of course much higher. And indeed, international law is often interpreted very differently, with the

interpretation mostly following the interests of the respective state. However, one indicator that demonstrates that international law does have a high degree of legitimacy and is binding, even if it cannot be directly enforced, is that contestants very often do not simply violate the law, but try to legitimize their behavior and acts of violation by referring to and interpreting international law in a specific way. This applies to many contemporary disputes, such as humanitarian interventions, raising tariffs on foreign goods or the surveillance of international communication. We will specify this in more detail in the following sections.

Additionally, contemporary international law does not just enshrine any kind of border script. We argue that at least some of its norms and principles can be interpreted in terms of the liberal principles of individual and collective self-determination described above. The international order that was created under the leadership of the US and the allied states, and deepened after the collapse of the Soviet Union, is frequently referred to as a “liberal” international order (Börzel/Zürn: forthcoming). It is based on the principle of sovereign equality of nation states, but promotes multilateralism, free trade, human rights and the spread of democracy. Under international law, states have bound themselves to open their borders to a certain degree with regard to, e.g. economic transactions, migration, communication flows etc. Most certainly, not all aspects of this order are “liberal,” as it is the result of a compromise between states. And not infrequently has the language of liberalism served to cover up strategic interests. Nevertheless, we found it useful to refer to the norms and principles enshrined in international law in order to frame our reconstruction of the liberal elements of the contemporary border script.

Above, we have distinguished between four different forms of cross-border interactions:

¹¹ We will not reconstruct how the script was created and how it emerged. Instead, we will only describe the result of the process. International law is, so to speak, the objectification of a world culture.

Type of cross-border interaction	Rights deriving from collective self-determination	Rights deriving from individual self-determination	Enforcement of the liberal border script	Contestations of the liberal border script
Communication	Weak 1. Protection of national security and public order 2. Prohibition of propaganda and incitement	Strong 1. Freedom of information and communication 2. Secrecy of correspondence	Protection of digital rights and unregulated online communication	1. Filtering and censoring telecommunication 2. Surveillance of private telecommunication

Table 1: National Borders and Communication

communication, economic transaction, migration, and the use of force across borders. In the following sections, we will (1) describe how international law regulates these forms of cross-border interactions, and (2) discuss how this can be interpreted in light of liberal principles. We will then (3) describe how the liberal elements of the border script are currently being enforced, and (4) how they are contested by different actors. Despite having introduced the distinction between internal and external contestations above, we will not make use of it at this point. Providing a clear distinction would be the subject of another paper.

4.1 COMMUNICATION ACROSS NATIONAL BORDERS

The first kind of cross-border transactions we deal with are communication flows, which are at the same time those that can cross national borders most easily. On the one hand, this concerns individual or private forms of communication, such as people exchanging messages in the form of letters, by phone, electronic mail or web-based chats. On the other hand, this concerns public or mass communications, such as radio broadcasts, television or publications on the internet. How does international law balance the right of persons in different countries to communicate with each other, and the right of the state to restrict

communication flows across its borders? While no unitary international law on communication has emerged over time, and information and communication technologies constantly develop,¹² the individual freedom of information and communication as enshrined in the fundamental human rights instruments (subject only to a few lawful restrictions) constitutes a strong normative point of reference protecting individual rights against state interference (table 1). In this section, we are going to outline the principles and norms governing the communication between people across national borders, ask to what extent this reflects liberal principles, and map some contestations.

As we have argued above, international law is a legitimate point of reference to determine the border script as the different treaties were signed by the vast majority of existing nation states. The freedom to communicate and to exchange information across national borders is firmly enshrined in international law (Malanczuk 2011). Building on a similar provision in the Universal Declaration of Human Rights (UDHR), Article 19 of the International Covenant of Civil and Political

¹² The development of regulatory frameworks often lags behind technological advances, so that, in particular with regards to the internet, it remains questionable whether a coherent “script” enshrined in international law has already emerged.

Rights (ICCPR) guarantees the freedom of expression as a fundamental human right. In particular, this includes the “freedom to seek, receive and impart information and ideas of all kinds, *regardless of frontiers*, either orally, in writing or in print, in the form of art, or through any other media of his choice” (ICCPR Article 19(2); emphasis added).¹³ A crucial principle that supports the right to communicate and to exchange information is the secrecy of private correspondence. It is part and parcel of the right to privacy, acknowledged in Article 17 of the ICCPR: “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or *correspondence*” (emphasis added).

Almost all states of the world are members of the two UN agencies that regulate many of the institutional and technical aspects of international communication (Lyll 2016). As we have argued above, international law is a legitimate point of reference to determine the border script as the different treaties were signed by the vast majority of existing nation states. The Universal Postal Union (UPU) regulates the exchange of letters, while the International Telecommunications Union (ITU) regulates information and communication technologies such as telephony, television and radio, as well as internet access. In line with the right to communicate and to exchange information, the UPU requires from its members to ensure the “right to a universal postal service” (Article 3 UPU Convention), and the ITU guarantees “the right of the public to correspond by means of the international service of public correspondence” (Article 34 ITU Constitution). The ITU further protects the secrecy of private forms of telecommunication (Article 37 ITU Constitution).

13 The implementation of this right is supported by the United Nations Educational, Scientific and Cultural Organization (UNESCO), a specialized agency of the UN with currently 193 member states. It is mandated “to promote the free flow of ideas by word and image” in order to advance mutual understanding between different nations (UNESCO Constitution Article I(2)(a)).

However, articles 19 and 20 of the ICCPR also acknowledge some restrictions to the freedom of communication and information across national borders, which grant the state the right to interfere. They are limited to lawful restrictions in order to protect national security and public order, or the rights and reputation of others. Additionally, the flow of ideas and information can be restricted if they lead to propaganda of war or incitement to discrimination, hostility or violence. Similar principles are reflected in the ITU Constitution. For instance, the ITU allows member states to stop the transmission of private communications which are not in line with its laws, national security and public order (Article 34 ITU Constitution). These restrictions are vaguely defined, giving states some scope to restrict communication flows. As we will see below, states often invoke such exceptions without rejecting the freedom of information and communication as such. This shows that national policies can “decouple” from the principles enshrined in international law (Meyer et al. 1997).

The need to regulate cross-border communication at the international level has already emerged with the increasing interconnectedness of the world and the technological advances of the means of communication at the end of the 19th century. At that time, the UPU and the ITU were established and incorporated into the institutional system of the UN as specialized agencies after World War II. Freedom of communication and information across national borders became a major bone of contention during the Cold War, in particular with the use of radio and satellite broadcasts to send messages to other countries (Metzl 1997). The US and Western states championed an almost unlimited freedom of communication and information – thereby seeking to protect their own broadcasts in the Soviet Union against interference. In turn, the Soviet Union, supported by many developing countries, insisted on the “prior consent” of the receiving

country, based on the principle of non-interference in internal affairs.

With the revolution in information and communication technologies and the advent of the internet in the last decades, contestations surrounding the freedom of communication and information across national borders have intensified. New digital technologies enable high volume communication flows without restrictions to time and space across the world. While new worldwide networks of communication have emerged, no international regulatory framework has yet been created (Woltag 2010). It remains disputed to what extent traditional precepts of international law – applying to analogue forms of communication – suffice to regulate communication on the internet. There is an ongoing struggle in the field of internet governance, such as between the US and the EU, not to mention between liberal democratic states and autocratic regimes like China.

To what extent does international law’s emphasis on the free flow of information and communication across national borders reflect liberal principles? It clearly resolves the tension between collective self-determination and individual rights in favor of the latter, considering the individual freedom of communication and the exchange of information more important than the right of the state to interfere with the flow of communication across national borders. Freedom of communication and information are closely related to the freedom of opinion and expression. These are core liberal values, considered necessary components of individual autonomy and essential to act out one’s personality (Wenzel 2014). Furthermore, these values are also considered a prerequisite for democracy. Citizens can only participate in democratic self-determination if they are informed about public affairs and are free to openly criticize their elected leadership. Freedom of communication and information is supported by the secrecy of correspondence, i.e. the ability to

exchange messages without disclosing their content to the state. It derives from the right to privacy, another liberal principle that prevents state organs from encroaching on individual autonomy and contributes to the functioning of democracy.

What kinds of contestations surrounding the free flow of communication and information across national borders can we currently observe? As already mentioned, the domain of most current contestations is the internet, given that it remains relatively unregulated by international law and a governance regime has yet to be created. In the following paragraphs, we identify attempts to enforce the liberal script that emphasize individual rights vis-à-vis state control of international communication flows, and contestations that seek to strengthen collective self-determination.

Enforcements of the liberal script mainly emanate from “digital rights” movements that advocate for the freedom of communication and information on the internet, as well as the right to privacy online. Current debates evolve around issues such as internet access, net neutrality, upload filters, or online data protection. For instance, the EU copyright directive has recently provoked a large wave of protests. It requires digital platforms (such as Facebook or YouTube) to control user uploads for infringement of intellectual property rights in order not to be held liable. Critics fear that this legitimizes the use of automated upload filters, which could amount to pre-publication censorship without prior judicial review.¹⁴ They argue that this would restrict the individual freedom of expression on the internet. However, enforcing the liberal script regarding internet communication can create a “paradoxical” situation as well. Given the hegemony of large internet companies such as google, Facebook and

¹⁴ Mandate of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, OL OTH 41/2018.

Amazon, states may have to expand their regulatory powers in order to protect and not to restrict – as this was traditionally the case – the individual freedom of communication and the right to privacy.

The freedom of communication and information across national borders also faces contestations that seek to expand the power of the state to restrict international communication flows and to interfere with the secrecy of correspondence, in particular on the internet. For instance, authoritarian states like China filter content and block access to many foreign websites such as Google, Facebook or WhatsApp entirely – a practice of censorship dubbed the “Great Firewall of China.” China does not openly dispute freedom of communication on the internet, but “it argues that it acts like many other countries in the interest of protecting citizens against harmful material, crime, fraud, pornography, and treasonous propaganda” (Malanczuk 2011). Other contestations infringe on the right to privacy online. The intelligence agencies of many states have stepped up their technical capabilities and legal authority regarding the surveillance of international telecommunications, often citing terrorist and other security threats. The most well-known case is the global surveillance of telecommunications practiced by the US National Security Agency (NSA), as revealed by the whistle-blower Edward Snowden in 2013. In cooperation with the intelligence agencies of many countries as well as private telecommunications companies, the NSA routinely taps phone and internet communications of billions of users across the world.

In sum, while there is no unitary body of law on international communications, the freedom of communication and information enshrined in international human rights instruments serves as a powerful normative point of reference. Overall, national sovereignty to control international communication remains very limited under

the liberal border script as it is defined in international law. However, states retain the right to restrict international communication, e.g. if national security and public order is threatened. As these exceptions are only vaguely codified, nation states retain some margin of appreciation to restrict free communication and the secrecy of correspondence across borders. The domain of most contemporary contestations is the internet, which has emerged with the revolution of information and communication technologies in recent decades.

4.2 MOVEMENT OF GOODS, SERVICES AND INVESTMENTS ACROSS NATIONAL BORDERS

A second kind of cross-border transaction we can observe are economic transactions in the form of trade (movement of goods and services) and investments (movement of capital). To what extent does international law regulate economic transactions across the borders of the nation state, and how can we interpret this in light of the liberal script? Again, we argue that international law is a legitimate point of reference to determine the border script as it was signed by the existing nation states and as it structures the behavior of collective and individual actors. As regards trade relations, most states of the world are now members of the WTO. Its member states have committed to a substantial limitation of their ability to control the movement of goods and services across their borders through the erection of trade barriers such as tariffs and other non-tariff barriers like quotas and licenses. In contrast, no similar multilateral agreement exists concerning the movement of capital for the purpose of investments across national borders. From the perspective of international law, the regulation of foreign investment falls fully under the domestic jurisdiction of each state. However, the practice of states and an increasing number of bilateral and regional investment treaties since the 1990s have contributed to a substantial liberalization of capital

flows across national borders as well. Most countries of the world are now subject to treaties with a similar content and have submitted themselves to international arbitration in matters of foreign investments. Therefore, even though no consistent body of rules exist, a more or less coherent “script” does seem to emerge concerning the

flow of foreign investments across the borders of a state (table 2). In this chapter, we are first going to describe the principles that govern international trade (1) and investments (2) separately. For each, we go on to ask to what extent these reflect the tenets of the liberal script, before mapping how they are contested from different sides.

Type of cross-border transaction	Rights deriving from collective self-determination	Rights deriving from individual self-determination	Enforcement of the liberal border script	Contestations of the liberal border script
Trade (goods and services)	Medium/Weak 1. Protection of national security, environment etc. 2. Countervailing measures 3. Escape clauses 4. Special and differential treatment	Medium/Strong 1. Reduction of trade barriers, tariffs only 2. Non-discrimination (most favored nation and national treatment)	Creation of free trade areas or common markets	Protectionist measures invoking national security or other escape clauses
Investments (capital)	Medium/Strong Permanent sovereignty over natural resources, economic activities and wealth	Medium/Weak 1. Pre-entry national treatment agreed in bilateral treaties 2. International minimum standard of protection of foreign investors	Bilateral and regional investment treaties	1. Investment restrictions invoking national security 2. National treatment of foreign investments (e.g. expropriations)

Table 2: National Borders, Trade and Investments

4.2.1 INTERNATIONAL TRADE

The main principles governing the international trade of goods have been agreed upon by the allied states after World War II, with the signing of the General Agreement on Tariffs and Trade (GATT) in 1947. Pioneered by the US and the UK, this agreement reflects the attempts to reconstruct a rules-based order for international trade, after it had collapsed in the interwar period due

to the rise of protectionist measures (Lowenfeld 2008: 23-28). The main argument was that open trade contributes to economic prosperity for everyone. Under GATT, several multilateral negotiation rounds to reduce trade barriers for goods took place in the following decades. In 1994, at the Uruguay negotiation round, the members of GATT founded the WTO, extending its scope to include

regulations concerning services and intellectual property, and providing a forum for dispute settlement. The WTO currently has 164 member states.

The members of the WTO commit themselves to the reduction of barriers to trade in goods and to open markets for services. First, they have agreed to limit trade barriers in the form of tariffs (quantifiable as a percentage of trade value) and to refrain from other trade barriers such as quotas, and they have agreed to decrease, and not increase trade barriers through regular rounds of negotiation (Lowenfeld 2008: 30-32). Second, WTO members subscribe to the principle of non-discrimination, in the forms of the “most-favored nation” principle and the principle of “national treatment.” The “most-favored nation” principle reads as follows: “any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties” (GATT Article 1(1)). In other words, states may not only grant trade privileges to one trading partner alone; if they grant trade privileges, they must grant them to all other members of the WTO as well. The principle of “national treatment” means that, once foreign products enter the domestic market, they have to be treated just like domestic products (for example in terms of taxation).¹⁵

However, the WTO grants numerous exceptions to these principles. It is not possible to list all of them in detail, but they all acknowledge the right of the nation state to regulate international

trade if special conditions apply. First of all, there are exceptions pertaining to national security and their natural and cultural heritage. States may restrict imports to protect national security interests as a matter of self-judgment (Article XXI). States may also restrict trade in order to protect the environment or the national cultural heritage (Article XX). For example, exceptions may apply which are “necessary for the protection of human, animal or plant life or health.” Second, there are so-called countervailing measures. States may react against trading practices considered unfair, such as subsidies and dumping, by raising tariffs (Article VI). Third, states may temporarily appeal to escape clauses when domestic industries are threatened in an unforeseen manner by a surge in imports (Article XIX). Finally, developing countries are granted “special and differential” treatment. This means that, amongst other things, they get more time to adapt to WTO commitments.

To what extent do these principles governing international trade reflect the premises of the liberal script? As discussed before, we argue that the liberal script is characterized by the tension between self-determination of nation states and the rights of individuals. Concerning trade, this translates into a tension between the right of the state to protect its internal market and other sensitive domains from the inflow of foreign goods and services, and the individual freedom of trade and commerce, i.e. to enter into an economic exchange and buy and sell goods with anyone regardless of borders. In practice, however, international trade law does not grant an individual right to trade across borders; there is no “human right to trade” (Petersmann 2000). It merely seeks to ensure that trade becomes more open and that trading partners are not arbitrarily discriminated against depending on their country of origin; an indirect liberal “fix.”

It must be noted, however, that the “official” justification for opening up national borders

¹⁵ The architecture of the GATT and WTO is flanked by the International Monetary Fund (IMF), an international organization that helps to manage the international balance of payments to support free trade. According to Article VIII of the IMF agreement, no restrictions on payments in international transactions may be imposed, and discriminatory currency practices are to be avoided, lest they disturb international trade.

to international trade given by the WTO is less rights- and more outcome-based. It emphasizes the supposed benefits that follow from guaranteeing individual freedom of trade and commerce. According to the theory of comparative advantage first formulated by David Ricardo, the freedom to freely buy and sell goods and services across the borders of the nation state contributes to an increase in general economic prosperity (Lowenfeld 2008: 3-8). It states that countries should specialize on the production of those goods they can produce at comparatively lower costs and import those they would have to produce at a higher cost. This theory appeals to universality, as does the liberal script: Open trade is justified because it allegedly benefits *everyone*, regardless of nationality or residence.

Opening up national borders to international trade faces many contestations. As before, we distinguish between enforcements of the liberal script, and contestations of the liberal script. The first one campaigns for strengthening and expanding the freedom of trade and commerce by emphasizing individual rights. The GATT and WTO agreements grant nations the possibility to breach the most-favored nation principle in order to deepen trade relations between them by reducing trade barriers and to advance towards the creation of regional free trade areas and common markets (as long as trade barriers to non-members are not raised in consequence). The most advanced common market is that of the EU, which not only seeks to eliminate all tariff and non-tariff barriers to trade in goods and services between its member states. By guaranteeing the so-called “four freedoms” – the free movement of labor, capital, goods and services – it effectively grants a right to free trade and to provide services across national borders within the EU. This even has the status of an individual right: EU companies can file a suit against member states for an infringement of this right at the European Court of Justice. Despite breaching the most-favored nation

principle, we interpret this as an enforcement of the liberal border script, as it strengthens individual rights to engage in international trade.

In turn, contestations of the liberal script advocate the right of the state to adopt protectionist trade measures, and to limit the individual freedom of commerce and trade in order to protect national industries from international competition. This is typically done by breaching the WTO commitment to reduce trade barriers and tariffs and thereby discriminating against market participants from other countries. As most states fall under the rules of the WTO, states can exploit the exceptions contained in the agreements to do so. For example, the Trump administration recently invoked national security threats to raise tariffs on steel and aluminum imports to the US,¹⁶ a move disputed by the affected states.

4.2.2 INTERNATIONAL INVESTMENTS

In contrast to the international law on trade in goods and services, no multilateral agreement on international investment has been reached over the past decades. Cross-border movements of capital in the form of foreign investments are neither covered by the WTO nor by any other international organization.¹⁷ This reflects the lack of consensus surrounding the principles that were to govern foreign investment between the capital exporting states (the US and Western Europe), developing countries (mainly in Latin America), and the Soviet Union and its allied states (Lowenfeld 2008: 470-494). The climate became more

16 U.S. Department of Commerce, Press Release, 16th February 2018, <https://www.commerce.gov/news/press-releases/2018/02/secretary-ross-releases-steel-and-aluminum-232-reports-coordination> (accessed 22 May 2020).

17 It must be noted that the General Agreement on Trade on Services (GATS), which is part of the WTO agreement, does regulate the field of financial services. It liberalizes the trade in financial services, e.g. the activity of foreign banks and insurance companies across national borders.

“favorable” to international investments with the collapse of the Soviet Union and the establishment of neoliberal regimes in Latin America, which increasingly sought to attract foreign investment. Since the 1990s, the number of bilateral and regional investment treaties (pioneered in 1959 by Germany and Pakistan) increased to several thousand, creating a patchwork of regulations involving most states of the world.

In principle, every state can decide whether it accepts investments from abroad; it can claim “permanent sovereignty over natural resources, economic activities and wealth” (Sornarajah 2010: 119). Under international law, limitations remain weak. The only limitation to the treatment of foreign investors derives from states’ responsibility to protect the property of aliens. This implies that states have the duty to compensate the expropriation of foreign-owned property. The interpretation of this principle has raised considerable controversy, in particular regarding the question whether there is an international minimum standard to be adhered to, or whether compensations are affected by domestic jurisdiction. However, most states of the world have chosen to open up further to foreign investments by signing bilateral and regional investment treaties with broadly comparable provisions. Under these treaties, limitations on national sovereignty are more substantial. States typically agree to open up their borders to foreign investors (i.e. to grant “pre-entry national treatment”) and to guarantee an international minimum standard regarding the treatment of foreign property. They also agree to submit disputes to an international arbitration tribunal, and many states of the world have joined the International Centre for Settlement of Investment Disputes (ICSID) at the World Bank. But these treaties may contain many restrictions regarding foreign investments, such as the protection of certain sectors of the economy, reservations relating to national security, or so-called performance requirements (e.g. requiring

foreign investors to employ local labor or buy local products). Taken together, the patchwork of investment treaties across the world does not seem to impose strong limitations on national sovereignty.

To what extent do these principles governing cross-national investment reflect the premises of the liberal script? Here, national sovereignty over natural resources, wealth and economic activities on its territory stands in contrast to the individual freedom of contract and property rights. Much like in the case of trade, international law does not guarantee a specific “individual right to invest.” However, the freedom to invest and the private property of investors is often protected under bilateral investment treaties. Again, as in the case of trade, the dominant justifications for international investment treaties are outcome-based. They invoke the benefits of free markets for achieving economic prosperity. Permitting the entry of foreign capital and protecting the property rights of foreign investors is said to contribute to economic development by ensuring a more efficient allocation of resources (Sornarajah 2010: 51-57). This suggests that individual rights such as the freedom of contract and the right to private property have to be protected across national borders against the grasp of the state.

Opening up national borders to international trade and investment faces many contestations. As before, we distinguish between the enforcement and the contestation of the liberal script. On the enforcement side we find advocates seeking to strengthen the rights of investors across national borders. They typically consist in the signing of bilateral or regional investment treaties, sometimes as part of efforts to create a common market, to encourage foreign investments and to protect the property rights of investors. For example, after the breakdown of the multilateral Doha negotiation rounds under the auspices of the WTO, the world’s two largest economic blocs,

the US and the EU, have turned to negotiate the “Transatlantic Trade and Investment Partnership” (TTIP), the largest bilateral economic agreement worldwide, with the hope of creating a blueprint for worldwide investment standards. However, negotiations on this treaty have stalled, following criticism targeting its effects on labor, health and environmental standards, and the investor-state dispute settlement mechanism, which would have granted private investors the right to sue states if they violate treaty provisions. In general, the liberal push for economic integration across national borders seems to have come to a halt across the world.

In turn, contestations of the liberal script seek to strengthen national sovereignty. They consist in adopting protectionist measures in matters of investment. Until the 1990s, such contestations were often seen in Latin American states. Based on dependency theory, they argued that foreign investment kept their economies dependent from capital exporting countries, thus limiting their capacity to develop their own national industries (Sornarajah 2010: 57-59). In consequence, they closed their borders to foreign investments, and frequently nationalized foreign businesses. Today, such contestations to foreign investments seem to experience a “revival,” not only in developing countries, but also in developed countries. For example, citing national security concerns, the German government is currently debating whether to allow the Chinese telecommunications company Huawei to invest in the expansion of the 5G network in Germany.

Overall, regarding international trade and investment, the border script as enshrined in international law, as well as a high number of bilateral and regional economic treaties, impose substantial limitations on the state to control the flow of goods, services and capital across its borders. These limitations seem to be stronger in the case of trade than in the case of investments.

Furthermore, the realities of economic globalization have contributed to substantial limitations of state capacity for autonomous action, even without the constraints imposed by international law. It is important to highlight that, in contrast to the other types of cross-border movements discussed in the other chapters of this paper (i.e. of people, force and communication), the point of reference for international agreements governing cross-border trade and investment is not rights-based, but outcome-based. They invoke the alleged benefits of economic integration for everyone involved. Nevertheless, they can be interpreted to strengthen the freedom of trade and contract in an indirect manner by prohibiting arbitrary discrimination between trading partners.

4.3 MOVEMENT OF PEOPLE ACROSS NATIONAL BORDERS

A third type of cross-border transaction is the movement of people (i.e. migration). As with the issues discussed in other sections of this paper, international law on migration is characterized by a normative tension between collective self-determination and individual rights. On the one hand, migration policy falls within the domestic jurisdiction of each state. The state’s right to decide who can get access to its territory complies with the principle of collective self-determination and territorial sovereignty. On the other hand, however, after World War II and the establishment of international human rights law, a considerable body of law emerged that strengthened the individual freedom to move across borders and to limit state sovereignty over migration policy. As we will see in the following, the emphasis on individual rights versus national sovereignty differs depending on the type of migrants addressed (table 3). These are (1) emigrants, i.e. those crossing a border to leave their country of residence, (2) forced migrants (refugees and asylum seekers), i.e. those fleeing from persecution and serious human rights violations, and (3) “voluntary”

Type of cross-border transaction	Rights deriving from collective self-determination	Rights deriving from individual self-determination	Enforcement of the liberal border script	Contestations of the liberal border script
Emigration	Weak Protection of national security	Strong Freedom to leave any country and to enter one's own country	---	Invoking national security to impose exit bans on dissidents
Forced Migration	Medium/Weak The state has the right to grant asylum	Medium/Strong Right to seek asylum and principle of non-refoulement	Extension of the scope of the refugee definition	1. Citing threats to national security and public order 2. Categorizing refugees as economic migrants
"Voluntary" Migration	Strong Immigration policy falls under national jurisdiction	Weak 1. Right of family re-unification 2. Prohibition of racial discrimination	Global freedom of movement and equal opportunities	1. Limitations to family re-unification 2. Indirect exclusion along ethnic, racial or religious lines

Table 3: National Borders and the Movement of People

migrants, i.e. those moving in search of better opportunities or other reasons.¹⁸ We are going to discuss the principles and norms that govern these forms of migration under international law in turn, ask to what extent they reflect the ideas of the liberal script, and map some contestations

4.3.1 EMIGRATION

The first group of migrants defined by international law are emigrants, i.e. those that cross a border to leave their country of residence. International law clearly emphasizes the individual right to emigrate and strongly limits national

sovereignty in matters of emigration control (Chetail 2019: 77-92). Fundamental human rights instruments such as the UDHR and the ICCPR guarantee the right to leave any country and to (re-) enter one's own country. For example, Article 12 of the ICCPR states that "Everyone shall be free to leave any country, including his own" (Article 12(2)), and "No one shall be arbitrarily deprived of the right to enter his own country" (Article 12(4)). Emigration control is strictly limited to lawful restrictions in order to safeguard national security and public order. In particular, the right to emigrate cannot be invoked to escape prosecution or other civic obligations (such as paying taxes).

The right to emigrate has emerged after World War II, having no legal precedent (Whelan 1981). Its incorporation into the UDHR seems to have been a reaction to totalitarian states' exit bans

¹⁸ As we will discuss further below, particularly the distinction between "voluntary" and "forced" migration is a legal construction that contains some degree of arbitrariness, reflecting the reluctance of states to accept limitations to their migration policy.

on dissidents, and their widespread practice of stripping exiles of their citizenship. In fact, the Soviet Union contested the incorporation of a right to leave in the Human Rights Declaration and abstained from the final vote. Various socialist states – in particular the GDR – imposed broad travel restrictions on its citizens. In consequence, the freedom to leave any country constituted an important ideological dispute during the East-West conflict.

To what extent does the right to emigrate reflect the tenets of the liberal script? As we have seen, the liberal script is marked by a tension between collective self-determination and national sovereignty on the one hand, and individual self-determination on the other. Regarding emigration, current international migration law clearly considers the individual freedom of movement rights more important than the sovereign control of borders. This means that no one can be forced to stay in a particular country against his or her will. The right to emigrate and not to be forced to stay in any country can be considered essential to personal self-determination. It is also considered an important prerequisite for the realization of other liberties. Even political philosophers who argue that the state has every right to unilaterally control its borders in the case of immigration, take a different position with regard to emigration. For example, Michael Walzer (1983: 39) argues that the state has no right to prevent the emigration of its citizens.

We currently do not observe widespread contestations of the right to leave a country, neither from an individual rights perspective, seeking to expand individual rights, nor from a state's rights perspective, seeking to expand national sovereignty rights. On the one hand, we currently do not observe reinforcements of the right to leave a country, given that it is defined so broadly and enjoys the status of a basic right. On the other hand, contestations targeting the right to leave a

country have subsided after the fall of the Soviet Union and socialist regimes in Eastern Europe. Nowadays, only very few authoritarian states like North Korea contest this right as a matter of principle. In contrast, less open contestations that invoke the exceptions to the right to emigrate may occur. For example, China imposes exit bans on dissidents, or reportedly confiscates the passports of the Uighur minority of Xinjiang as a measure against "terrorism."¹⁹ These contestations invoke the right of the state to prevent persons from leaving the country when they are prosecuted and when national security is at risk.

4.3.2 FORCED MIGRATION

The second group of migrants addressed by international law are forced migrants, or refugees and asylum seekers, who cross a border in order to flee from persecution and serious human rights violations (Chetail 2019: 169-199). Here, international refugee and human rights law considers the right of individuals more important than that of states. The UDHR grants every person the right to seek and enjoy asylum from persecution (Article 14(1)). Based on this provision, the Geneva Convention on Refugees (1951) defines a refugee as someone who, "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality" (Article 1(A)). By signing the Geneva Convention, states have committed themselves not to penalize the irregular entry of refugees and asylum seekers, and not to return or "refouler" them "to the frontiers of territories where his life or freedom would be threatened" on the accounts defined above (Article 33(1)). These principles imply that, in the case of serious human

¹⁹ Kellogg, Thomas, Sile, Zhao 2019: China's Dissidents Can't Leave. Foreign Policy online, <https://foreignpolicy.com/2019/07/23/chinas-dissidents-cant-leave/> (accessed 22 May 2020).

rights violations that threaten the life and dignity of individuals, states have the duty to open their borders to those seeking refuge. However, neither the UDHR nor the Geneva Convention contain the individual right to be granted asylum. Each state retains the right to grant asylum, and therefore has some flexibility concerning the assessment of the refugee status.

Modern refugee law emerged during the interwar period (Hathaway 2005: 83-92). At that time, European countries had to deal with forced displacements caused by the disintegration of multi-ethnic empires and the emergence of totalitarian states. A permanent international solution was only achieved in 1951 with the signing of the Geneva Convention, in reaction to the refugee and migration movements caused by the Second World War. The absence of an individual right to asylum and the narrow definition of the refugee status in the Geneva Convention reflect the reluctance of states (in particular immigration receiving states like the US) to commit to further limitations of their sovereignty concerning matters of migration. It also has to be placed within the historical context of the Cold War, as the refugees initially addressed by the Geneva Convention were mostly those fleeing from the Soviet Union and its allied states (Hathaway 1990). The temporal and geographic restrictions of the Geneva Convention to the “events occurring in Europe before 1951” was lifted by the 1967 Protocol. In recent decades, refugee law has been significantly shaped by the emerging international human rights law.

To what extent does the admission of refugees and asylum seekers reflect the liberal script? Here, the tension between self-determination of the nation state and individual rights is resolved in favor of the individuals whose lives are threatened. The individual right to be protected from persecution and serious human rights violations trumps any state’s right to control access

to its territory. The normative point of reference is the individual’s right to life and human dignity, which the international community of states has the duty to protect. This minimal notion is shared across the spectrum of liberal political philosophers dealing with the ethics of migration (Gibney 2018). However, the refugee definition contained in the Geneva Convention remains limited in two respects, which reflects the reluctance of states to accept further limitations on their sovereign right to control their borders. First, it does not grant the right to asylum, which remains a prerogative of the state; it merely requires states not to push back refugees and asylum seekers to where their lives may be at risk. Second, it includes only those in the refugee definition who flee from political persecution but excludes those whose life is threatened by other circumstances, such as famine, extreme poverty or natural disasters. In consequence, international refugee law reflects only a “minimalist” liberal compromise between national sovereignty and individual rights.

To what extent are the principles governing the admission of refugees and asylum seekers contested? Enforcements of the liberal script that refer to the principle of individual self-determination attempt to expand the rights of individuals to seek refuge. The most obvious enforcement puts in doubt the limited scope of the refugee protection contained in the Geneva Convention – which defines refugees as those fleeing from persecution – as a normatively arbitrary definition. It seeks to include other types of forced migration into the refugee definition. From this perspective, there is no reason to grant admission only to those who are politically persecuted, as persons fleeing from hunger, civil war and natural disasters find themselves in equally life-threatening situations. Adopting a more inclusive refugee definition would impose on states an expanded duty to admit forced migrants (Chetail 2019: 175-177). The first organization to do so was the Organization of African Unity (OAU) with their

1969 Refugee Convention, followed by the Cartagena Declaration of Latin American states. The OAU Refugee Convention extends the refugee definition to cover those who flee from “external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality” (OAU Refugee Convention Article 1(2)). The EU, in turn, has introduced the notion of “subsidiary protection,” which grants protection to those who face death penalty, torture or degrading treatment, or life-threatening indiscriminate violence in their countries of origin (Directive 2011/95/EU Article 15).²⁰

In contrast, contestations that refer to the right of the state seek to limit the duty of states to admit refugees and asylum seekers. We observe two main strategies, which are often interrelated. The first one seeks to apply a restricted definition of refugees, and thereby to strengthen the right of the state to reject asylum seekers. It puts in doubt the good intentions of asylum seekers by re-categorizing them as “economic migrants,” that is, as persons who are not forced to move, but who move voluntarily. This puts them in another legal category, that of “voluntary” migrants (see below). They can be denied admission without breaching the norm of non-refoulement. The second strategy of contestation consists in citing threats to national security or limited resources to avoid the admission of refugees and asylum seekers. The Geneva Convention on Refugees acknowledges that considerations related to national security and public order may qualify for not admitting refugees, but on a strictly individual basis. For instance, citing threats to public order, the Hungarian government passed a legislative amendment in the wake of the 2015 refugee

crisis in Europe that allows to declare a “state of crisis due to mass migration” involving pushbacks and border militarization, when the number of asylum seekers exceeds a certain number.²¹

In terms of policies, states have been immensely creative in avoiding their obligations to admit refugees. Due to space limits, it is not possible to provide an exhaustive list. A common practice is “safe-third country” agreements. Many countries make use of the concept of “safe-third countries” to reduce the number of asylum applications in their country. It stipulates that asylum seekers can be returned to those countries where they do not risk persecution and serious human rights violation. For example, the EU has made use of this principle in the Dublin Regulations, as well as in the “re-admission deal” with Turkey in 2016. According to the Dublin Regulations, asylum seekers have to lodge their asylum applications in the member state of first entry to the EU. This has effectively shielded North-Western European countries from asylum applications of refugees entering the EU over its Southern and South Eastern border. The EU-Turkey deal operates on a similar premise. Another practice consists in “pushback” operations at the border. These are measures that undermine the principle of non-refoulement, stipulating that refugees at the border shall not be returned to where their lives are at risk. Pushbacks prevent refugees from exercising their right to seek asylum. The EU’s border control agency Frontex, as well as Australia’s “Pacific Solution,” where asylum seekers are transported to offshore detention centers, have been accused of practicing such pushbacks.

20 As before, we must emphasize that we concentrate on normative contestations, i.e. they occur at the level of principles and norms. It is perfectly possible that practices of border control are “decoupled” from the script.

21 Gulyás, Gergely 2015, Minister of Prime Minister’s Office, “Government declares state of crisis due to mass migration in two counties”, <https://www.kormany.hu/en/prime-minister-s-office/news/government-declares-state-of-crisis-due-to-mass-migration-in-two-counties> (accessed 22 May 2020).

4.3.3 “VOLUNTARY” MIGRANTS

The third group of migrants under international law are “voluntary” migrants, in particular migrant workers who cross the border in search of employment or economic opportunities.²² The state retains the right to grant or reject admission of voluntary migrants. Conversely, this means that international law acknowledges the right to move deriving from the principle of individual self-determination only to a very limited extent. In consequence, immigration policy often follows the requirements of the national economy, and migrants are selected based on their skills and qualifications.

There are two main limitations to state discretion regarding the selection of voluntary migrants that derive from individual rights. The first limitation stems from the right to the respect for family life, enshrined in international human rights instruments (e.g. UDHR Article 16(1) and ICCPR Article 23). This generally entails the right of family re-unification across borders, when there is no reasonable alternative to do so elsewhere (Chetail 2019: 124-132). The second limitation on the selection of immigrants derives from the prohibition of racial discrimination enshrined in international human rights law, which prohibits any “distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin” (ICERD Article 1(1)). While it remains unclear to what extent this provision is actually applicable to immigration policy, international case law and state’s practice suggests that this principle has been largely accepted (Joppke 2005).

22 We would like to point out that the term “voluntary” migrants – as opposed to *forced* migrants – is somewhat misleading. First, people who move to escape poverty and hunger are considered “voluntary” migrants as well, because they do not qualify as refugees under international law. Second, the motivations to migrate are often manifold, and may include both “forced” and “voluntary” elements. Sociologically speaking, forced and voluntary migration may overlap in practice.

The view that the state has the right to control immigration emerged in Europe and North America towards the end of the 19th century, with the tightening of the nexus between the monopoly of force, territory and population as the fundamental components of the nation state. As the historian John Torpey puts it, the state progressively monopolized the authority over the “means of movement” just as it monopolized the use of force (Torpey 2000). Since the First World War, immigration policy has fully fallen under the domestic jurisdiction of each state, which has remained the status quo until today. In an initial phase of immigration control, many countries enacted discriminatory policies targeting specific racial and ethnic groups, such as the “Chinese Exclusion Act” in the United States or the “White Australia Policy” (Chetail 2019: 46-51). These laws were mostly repealed until the 1960s, mirroring the establishment of human rights law and the success of the civil rights movement.

To what extent does the principle governing the admission of voluntary migrants reflect the liberal script? When it comes to voluntary migration, the sovereign right to control access to a particular territory trumps the individual freedom to move (Miller 2007, 2016). The individual choice to migrate to another country – e.g. to look for a job – is not considered to impose any relevant normative obligations on a state to grant access to its territory. Seen from a radical-liberal perspective that puts individual self-determination above all, the right of the state to limit immigration does not seem justified, since it restricts individual freedom, a right that all people in the world are equally entitled to (e.g. Carens 2013). So called “communitarians,” in turn, argue that states have the right to close their borders to immigrants. To substantiate their position, they refer to another liberal value, namely the value of collective self-determination, which derives from the individual right to associate. However, both camps agree that immigration policies at least

have to respect the human rights and dignity of migrants. According to Christian Joppke, migrants may only be selected for what they “do,” and not for what they “are” (Joppke 2005: 2-3). This means that migrants cannot be selected on racial or ethnic grounds, but only in terms of such individual characteristics as their skills, qualifications or family ties.

Enforcements of the liberal script seek to strengthen the rights of the individual to cross borders. The main argument put forward by advocates of global freedom of movement claims that the way the world is organized is fundamentally unjust (for many others see Shachar 2009; Carens 2013). Citizens who were born in a poor country in Africa or Asia have significantly less life chances than citizens who were born in a rich country in Europe or North America; the former group will most likely have a lower income, less education, less health care, and a higher mortality rate. One’s country of birth, however, is completely determined by luck, and not by choice, personal effort or achievements. This, in turn, violates the principle that all human beings are born equal and should enjoy the same opportunities. Restrictions on international mobility stabilize the unjust world order, as they privilege and protect those who were lucky enough to be born in a wealthy country, while hindering people from poor countries to escape their fate and look for better life chances in richer countries. Hence, the right to migrate to another country should be guaranteed in order to realize the idea of equal opportunities.²³

There are also contestations of the principles governing the admission of voluntary migrants that attempt to strengthen the rights of the state to control its borders. Some strategies limit the right to family re-unification. For instance, many countries have introduced income and language requirements for the admission of family members of citizens and residents (Ellermann/Goenaga 2019). Other strategies undermine the principle of non-discrimination between immigrants along racial, ethnic or religious lines. We currently do not observe the comeback of immigration policies with explicit discriminatory intent, but rather policies that operate on “pretextual” grounds, as observed by Ellermann and Goenaga (2019). An infamous example is Executive Order 13769 of the Trump Administration. Citing security concerns, it sought to block the entry of citizens from seven majority-Muslim countries to the United States. Accordingly, it was referred to as the “Muslim ban.” Less obvious contestations of the principle of non-discrimination can be found in the visa policies of many countries. For instance, visa waiver programs for international travel are highly stratified along countries of origin, reflecting their levels of socio-economic development and democratic standards (Mau et al. 2015). These visa regimes put heavier burdens on immigrants from less developed countries.

Overall, we see that international migration law has imposed considerable limitations on national migration policies. These differ depending on the type of migration. The strongest limitations to state sovereignty concern emigration, followed by forced migration. When it comes to so-called

23 There is another argument in favor of opening borders for voluntary migrants that follows a more consequentialist ethical argument. It reads as follows: Closed borders lead to a suboptimal use of human capital whereas introducing individual freedom of movement rights encourages labor mobility every country will benefit from. Correspondingly, economic free movement regimes, particularly for workers, have been introduced at the regional level across the world, with varying degrees of openness (Chetail 2019: 97-119). The most advanced is certainly the free movement regime of the

EU, which allows EU citizens to freely travel across the EU’s internal borders and seek employment and residence in all member states as an individual right. However, it must be highlighted that such free movement regimes remain limited to the regional level and to states with similar levels of socio-economic development, and entail the fortification of external borders, such as in the case of the EU. Nevertheless, even such regional free movement regimes have been contested in order to “take back control” over immigration policy, as was the case with Brexit.

voluntary migration, the state retains much of its sovereign rights. We have argued that these limitations reflect a “minimalist” liberal notion. Nevertheless, even these principles are strongly contested across the world. As we have seen, these contestations exploit the fragmentary nature and many ambiguities of international migration law to reassert national sovereignty over immigration policy.

4.4 FORCIBLE INTERVENTIONS ACROSS NATIONAL BORDERS

Finally, we take forcible interventions to be another form of cross-border transactions that can be interpreted in light of the liberal border script, apart from trade, investments, migration and communication. In contrast to these forms, however, the agents intervening across national borders are not individuals or organizations, but other states and their military forces. Nevertheless, we include the use of force in our typology of cross-border interactions, because, as we will see, it targets individuals and their rights to self-determination as well.

To what extent does international law authorize states to penetrate the borders of another state by force? Here, the principle of national sovereignty and the state’s monopoly of force over its territory reigns supreme, strictly prohibiting forcible interventions across national borders (see table 4). National sovereignty is barely limited by opposing principles. As we will see below, only recently have limitations been discussed that derive from the responsibility of the international community to protect individual rights in the case of mass atrocities – but these are very weakly developed and contested (Byers 2005). As in other chapters, we are first going to describe the norms and principles governing forcible interventions across national borders, then we ask to what extent they reflect the liberal script, and finally, we map some of their contestations.

The strict prohibition to use force across national borders rests on two interrelated general principles: Non-intervention and the prohibition to use force in international relations (Gray 2018). These principles derive from the UN Charter, the founding treaty of the United Nations, of which 193 states are now members. In particular, Article 2(4) states that: “All Members shall refrain in their

Type of Cross-Border Transaction	Rights deriving from collective self-determination	Rights deriving from individual self-determination	Enforcement of the liberal border script	Contestations of the liberal border script
Use of Force	Very strong 1. Principle of non-intervention 2. Prohibition of the use of force	Very weak Protection against atrocity crimes authorized by the UN Security Council	1. Humanitarian intervention 2. Pro-democratic intervention	1. Protection of nationals abroad 2. Self-defense against non-state actors 3. Pre-emptive self-defense

Table 4: National Borders and the Use of Force

international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” In a landmark decision on the US intervention against the Sandinista government of Nicaragua, the International Court of Justice spelled out the principle of non-intervention further. It prohibited any coercion against a state’s internal and external affairs, i.e. the freedom to choose its own “political, economic, and cultural system, and the formulation of foreign policy” (Nicaragua case, para 205). This prohibition covers direct military action in another territory or providing support to subversive groups and terrorists.

The UN Charter’s emphasis on the strict prohibition of forcible intervention in another state is a consequence of the experience of two devastating World Wars. Even though the notion of national sovereignty and the equality of states can be traced back to the Peace of Westphalia, forcible intervention by powerful states continued to be a frequently used measure in international relations. With the establishment of the UN after the Second World War, the world attempted to rebuild an international order premised on peaceful relations between states and the respect of human rights. In particular, it sought to shield smaller nations from the aggression of more powerful states, as had occurred with the German invasion of Poland in 1939. The principle of non-intervention was further invigorated in the context of decolonization and the emergence of the Non-Aligned Movement. These countries feared interference in their domestic affairs by the world’s superpowers. They frequently continue to insist on the principle of non-intervention as a cornerstone of international relations.

The strict prohibition to forcibly intervene in another state is limited by two principles laid out in the UN Charter. The first principle is self-defense in the case of an armed attack and until

the Security Council has taken the appropriate measures to restore peace, as suggested in Article 51. The second principle is laid out in Chapter VII and concerns collective action by the Security Council. The Security Council consists of fifteen member states of the UN. Its permanent members – Great Britain, China, France, Russia, and the United States – hold a veto power. Ten non-permanent members represent different regions of the world and are elected for a term of two years. The Security Council can decide to use force against a state as a last resort to restore international peace and security (Article 42). However, given the ability of the permanent members of the Security Council to veto decisions, it has rarely invoked Chapter VII of the UN Charter. One of the few exceptions include the First Gulf War in 1990/1991, following the Iraqi invasion of Kuwait. The Security Council authorized UN member states to use “all necessary means” to ensure the withdrawal of Iraqi forces, which was followed by the invasion through an US-led coalition (Gray 2018: 272-274).

More recently, and in particular after the experience of genocides in former Yugoslavia and Rwanda in the 1990s, there have been attempts to re-interpret the Chapter VII powers of the Security Council in light of the “Responsibility to Protect” (R2P) doctrine (Gray 2018: 58-64). The Responsibility to Protect is a doctrine that suggests that states have the duty to protect their populations from humanitarian disaster, and, if they fail to fulfil this duty, the international community is entitled to take action, if necessary, by force. The grounds for intervention cover ethnic cleansing, war crimes, genocide, and crimes against humanity. The UN General Assembly endorsed this doctrine in 2005, and it was invoked by the Security Council resolution to impose a no-fly zone in Libya in 2011. However, the R2P remains a vague and controversial concept. In particular with reference to the NATO intervention in Libya, R2P was criticized for providing a pretext to oust

Muammar al-Gaddafi. International law in this regard remains under development.

To what extent does the almost unlimited prohibition to force the borders of another state reflect the tenets of a liberal script? As we have argued above, the liberal script is marked by an inherent tension between national sovereignty and individual rights. On the one hand, the principle of non-intervention and the prohibition to use force clearly put national sovereignty and hence the idea of collective self-determination first. Nation states are protected from being coerced by foreign imperial or colonial powers against their will. This is clearly the intention of the UN Charter, which asserts peoples' right to self-determination and the equality of states in Article 2(2) as a pillar of the postwar international order. On the other hand, however, the prohibition of forcible intervention equally protects autocratic regimes that repress their citizens' individual rights. As we have discussed in section 2, this is hardly in line with liberal principles, according to which only those political regimes are legitimate that ultimately rest on the equal consent of individuals. International law only leaves a very small opening to collective intervention by the international community when a state violates the individual right to life on a massive scale as in the case of atrocity crimes. This reflects the reality of an international order built on the principle of national sovereignty and less on liberal principles.

The prohibition of forcible intervention faces contestations from two different perspectives, both advocating to expand the possibilities of military intervention, but for very different reasons. Enforcements of the liberal script seek to limit national sovereignty and to expand options for an intervention in the light of individual rights and democracy. Contestations of the liberal script seeks to expand military interventions by referring to the right of self-defense that includes the protection of nationals abroad, self-defense

against non-state actors such as terrorists, and pre-emptive self-defense, all of which imply forcible interventions in another state. All of these actions are based on controversial interpretations surrounding the principle of non-intervention by force, and they have been invoked by various states in recent conflicts. We must emphasize again that we classify these contestations based on the principles and norms they invoke. It is perfectly possible that these do not reflect the underlying motivations of state action. For example, states may pay lip service to the doctrine of "humanitarian intervention," but instead of primarily seeking to protect civilians against mass atrocities, they force a regime change out of strategic self-interest. In the language of John W. Meyer and the Stanford School, we would interpret this as a "decoupling" of state practice from the script.

A typical enforcement of the liberal script contesting the principle of non-intervention is the doctrine of humanitarian intervention. Under the doctrine of humanitarian intervention, individual states or a group of states are entitled to intervene in another country in the case of a humanitarian crisis, if the Security Council fails to react. The normative point of reference for humanitarian interventions is the protection of universal individual rights against serious human rights abuses, in particular the right to life. If a state is not capable of protecting the individual right to life or actively violates it on a massive scale by committing genocide, war crimes or crimes against humanity, it rescinds its right to national self-determination and other states are entitled to intervene by force. This doctrine was most famously invoked in the context of NATO's intervention in Kosovo in 1999, after the Security Council failed to act on its Chapter VII powers due to the veto of Russia and China (Gray 2018: 40-58). However, it is opposed by many states because they fear that it may be used as a pretext for strategic intervention.

Even more controversial than the doctrine of humanitarian intervention is that of a pro-democratic intervention that seeks to alter the political system of another country (Gray 2018: 64-68). Its stated aim is to liberate people from authoritarian regimes and to introduce democracy in another country. In our interpretation, this constitutes an enforcement of the liberal script, because it refers to the individual right to freely associate and (allegedly) seeks to install a form of government that rests on the consent of the governed, i.e. ultimately on individual self-determination. It argues that interventions are justified in order to help the individuals of another state to choose their form of government in free and equal terms. Pro-democratic regime change was sometimes evoked in the context of the US intervention in Iraq in 2003 and continues to be discussed in relation to Iran and North Korea. However, states have not attempted to provide any legal justifications for pro-democratic interventions and attempts to “import” democracy to another country have repeatedly failed in practice.

Contestations of the liberal script also advocate to expand the possibilities of military intervention, but not to prevent human rights abuses or repressive regimes. Instead, the intention is to reassert national sovereignty against its infringement. A typical contestation that invokes the right to self-defense enshrined in Article 51 of the UN Charter in order to justify intervention is the protection of nationals abroad. It was most recently claimed by Russia in its military occupation of Abkhazia and South Ossetia in 2008 and the annexation of the Crimean Peninsula in 2014 (Gray 2018: 168-169). A second kind of intervention based on the right of self-defense are actions against non-state actors such as terrorists. This right has been invoked mainly by the United States after the September 11th attacks and its global “war on terror,” for example in the case of targeted killings such as the killing of Osama bin Laden in Pakistan (Gray 2018: 233-237). Finally,

the right to self-defense is also invoked to justify preemptive strikes against actors identified as an imminent threat to national security. George W. Bush mainly supported the doctrine of a preemptive strike against terrorists in his global “war on terror”; more recently, it has also been considered in relation to the nuclear capabilities built by Iran and North Korea in breach of international agreements (Gray 2018: 248-261). Needless to say, all of these claims are subject to contestations by the international community.

Overall, we see that international law imposes only very weak limitations on the principle of non-intervention and the prohibition to use force. Self-determination of nation states and national sovereignty are principles that are sacrosanct and barely limited by opposing principles like the protection of human rights of people living in other countries. Most attempts to change these limitations in light of other norms remain hotly contested out of concern that doctrines such as humanitarian intervention are being used as a pretext by powerful states to intervene in less powerful countries following strategic intentions. Thus, when it comes to the use of force across national borders, the current border script asserts national sovereignty except for cases of serious human rights violations.

5 CONCLUSION

The Cluster attempts to analyze current contestations of the liberal script, its causes and its consequences. This logically requires defining the content of the liberal script. In this paper, we tried to define one aspect of the liberal script, namely the liberal border script, and to map some key contestations. We argued that the idea to organize societies as nation state societies constitutes the hegemonic societal script, and that a “border script” contains normative ideas about the extent to which the state is allowed to regulate social

interactions across its territorial borders. In our view, four types of interactions are particularly relevant: personal and public communication, migration (emigration, immigration and forced migration), economic transactions (trade and investment), and military interventions. The *liberal* border script is characterized by an inherent tension between the individual right to engage in interactions across national borders, and the right of the state to interfere with these interactions. We have tried to trace the specific contents of the contemporary border script in postwar international law, and to interpret it in light of liberal principles. National sovereignty over questions of border control is most limited by the personal freedom to communicate and to exchange information, and it is most strongly protected in the case of forcible interventions by foreign powers. For each of these domains, we have pointed out how the liberal elements of the border script are being enforced (e.g. through humanitarian interventions or extensions of the refugee definition), and how they are being contested (e.g. by raising tariffs on foreign goods or blocking access to foreign news sources).

Overall, we come to the conclusion that the precise extension of the concept of the liberal border script is hard to determine, given that it is characterized by an inherent tension between the principles of individual and collective self-determination. The liberal border script does not just equal open borders; it must acknowledge the state's right to control its borders if this rests on the equal consent of its citizens. However, given that individual self-determination is the normative core of the liberal script, and that collective self-determination has to be justified in light of this principle, we argue that the main thrust of the liberal border script is to emphasize individual freedoms and the corresponding universal rights (like the freedom of communication or of commerce and trade) vis-à-vis the state. In practice, as we have seen, restrictions of these rights

typically make reference to national security concerns and threats to the integrity of the political community. While it is hard to determine an exact tipping point, contestations that emphasize collective rights have a tendency towards illiberalism the stronger they interfere with individual rights.

The primary goal of this paper was to develop a scheme of classification in order to grasp the liberal border script and its contestations. A clear definition of the liberal border script may be helpful to structure empirical projects and to select future projects within the Cluster in order to avoid that projects in a research unit are only loosely connected to each other. In addition, it might stimulate further research. We can think of three further avenues of research in particular. First, why do the four types of cross-border interactions differ in the extent to which they highlight individual or collective self-determination? For example, economic transactions across borders are much more open than political interventions. What does this reveal about the nature of liberalism and its influence on the contemporary international order? Secondly, it could be fruitful to map varieties of the liberal border script across time and space. On the one hand, the principles of individual and collective self-determination may be balanced out in different ways across the history of the liberal script. On the other hand, other actors than nation states controlling their borders might appear on the "scenery," such as subnational or supranational actors. Finally, as we have already mentioned, a future research project will have to determine precisely what constitutes "internal" and what constitutes "external" contestations, i.e. challenges from "within" or "of" the liberal principles of the contemporary border script.

A further goal of this paper was to prepare the theoretical groundwork for an operationalization of the liberal border script for future

empirical projects of the Cluster. One of those projects we are involved in is a comparative survey that aims to measure the level of support for core tenets of the liberal script by the populations of different countries of the world. We propose to formulate survey questions for each of the categories of cross-border interactions we have identified in this paper (communication, economic transactions, migration and use of force), and ask to what extent respondents either support individual rights or the rights of the nation state to control borders. A preliminary attempt to formulate such survey questions can be found in the appendix.

To wrap up, it is also necessary to point out two caveats. First, we have tried to approach the definition of the liberal border script in a *descriptive* manner. It must be emphasized that a description of a script and its normative content is something different than providing justifications for it. We understand the liberal script as an empirical phenomenon: a set of normative ideas and institutional prescriptions that can be described and analyzed independently of whether one agrees with each and every one of them.

Second, we must point out that a script is a set of norms and principles; actors may adhere to them or not, they may interpret them in different ways, or they may even claim to adhere to them while practicing something else. While the script of international law may increasingly emphasize individual rights, the reality of state practice may look quite different, given that it is the state that has control over the crucial resources to enforce its will. In this paper, we have focused on what states *profess to do* when they follow the liberal script, and not what they *actually do*. The extent to which state practice is decoupled from the script (to use a concept from sociological neo-institutionalism) is an empirical question that cannot be answered within the remits of this paper. Nevertheless, we have good reasons to

believe that the liberal script exerts some normative force on states. As we have seen, state actors often justify their actions or criticize those of other states with reference to the tenets of the script.

APPENDIX

OPERATIONALIZATION OF THE LIBERAL BORDER SCRIPT AND ITS CONTESTATIONS
IN A GLOBAL SURVEY²⁴

Dimensions of the Liberal Border Script	Questions measuring the different dimensions of the liberal border script
Intro	<p>People have different opinions on various issues. We are interested in your personal view on the following topics. How would you rate your view on this scale?</p> <p>(Respondents see a scale running from 1-10 defined by two poles). “1” means that you agree completely with the statement on the left. “10” means that you agree completely with the statement on the right. If your view falls in between, you can choose any number in between.</p>
Core Liberal Values	
Individual Self-Determination versus Collective Self-Determination	<p>1) Some say every person should be free to determine his / her own destiny. 10) Others argue that society can limit the freedom of individuals if this is better for the society.</p>
Human (Individual) Rights versus Collective Self-Determination	<p>1) Some say every human being has inalienable basic rights that under no circumstances can be restricted by a state. 10) Others argue that the nation state is allowed to restrict human rights under certain circumstances.</p>
Liberal Border Script	
Communication	
Personal Communication	<p>1) Everyone has the right to communicate (via internet or using traditional channels) freely across borders with everyone in the world. 10) The state has the right to restrict its citizens’ communication with people abroad when the country’s security is threatened.</p>
Public Communication	<p>1) Everyone should be able to receive all political information from foreign media, even if some of the content is incorrect. 10) A state has the right to ban access to foreign media and websites if it believes the information is harmful to the country.</p>

24 Some of the questions can certainly be formulated differently and / or more simply. However, this is not important at this point. Our intention is to give a first idea of how to operationalize the border script in a survey with a battery of questions. There are alternative ways to measure the liberal border script. One consists

of a vignette design. Different scenarios will be randomly assigned to the respondents. We do not discuss this somewhat more complex version to measure the border script at this point, as the explanations have an illustrative function only.

People	
Emigration	<p>1) Under no circumstances is my country allowed to prevent people from leaving the country in order to live in another country.</p> <p>...</p> <p>10) If it is in my country's interest, the state has the right to hinder citizens to leave the country.</p>
Refugees: Access	<p>1) People from other countries who are persecuted and apply for refugee status should be allowed to come and stay in my country until the situation in the refugees' country of origin has improved.</p> <p>....</p> <p>10) My country has always the right to reject people from other countries even if they are persecuted.</p>
Migrants: Access	<p>1) All people from other countries who want to come and work in my country should be allowed to do so.</p> <p>.....</p> <p>10) My country has the right to accept only those migrants our economy needs.</p>
Migrants: Access of Family Members	<p>Should the spouses and children of those migrants who have been living in my country for a little longer also have the right to immigrate to my country?</p> <p>1) Yes, definitely</p> <p>...</p> <p>10) No, definitely not</p>
Migrants: Discrimination of Specific Groups of Migrants	<p>Assuming that the labor market in your country absolutely needs workers from abroad. How should immigrants be selected?</p> <p>1) Only people with the best skills should be let in.</p> <p>...</p> <p>10) In addition to skills, only people who match our culture / religion should be considered</p>
Economic Transactions	
Trade	<p>1) Foreign companies should be allowed to sell their products in my country even if this leads to more competition for local companies.</p> <p>...</p> <p>10) My country has the right to restrict foreign companies to sell their products in my country in order to protect local companies.</p>
Investments	<p>1) Foreign companies should be allowed to invest their money in my country and to buy (German) companies.</p> <p>...</p> <p>10) My country has the right to restrict foreign companies to invest their money in my country and to buy (German) companies.</p>

Forcible Intervention

Humanitarian Intervention 1) Under no circumstances do states have the right to intervene militarily in another country, even if human rights are massively violated in the respective country.

....

10) States have the right and the duty to intervene militarily in another country in order protect civilians against mass atrocities.

Pro-Democratic Intervention 1) Under no circumstances do states have the right to intervene militarily in another country, even if the country is ruled by a dictator.

....

10) States have the right and the duty to intervene militarily in another country in order to free the people from a dictator and to establish a democracy.

Protection of Nationals Abroad Suppose that people who live in a neighboring county and belong to your ethnicity /to your nationality are oppressed by the government in that country. Do you think that your country has the right to intervene militarily in order to protect your nationals?

1) Yes, definitely...

10) No, definitely not

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