Introduction

On 17 July 2012, the Judicial Committee of the Privy Council (JCPC), also known as the Privy Council, one of the apex courts of the British judicial system and former appeals court of the British Empire, gave a decision that shifted the power balance in a long-standing judicial struggle between FG Hemisphere Associates LLC and the Democratic Republic of the Congo (DRC or Congo).[1]

FG Hemisphere is a vulture fund incorporated in the state of Delaware, a tax haven in the United States. Like other vulture funds, it specialises in the purchase of distressed assets (the debt of poor countries or corporations facing bankruptcy) at a cheap rate, and wages multi-front legal wars to recover the debts with an expected 'profit of 3 to 20 times the investment' (Sookun 2010: 8).

The FG Hemisphere case relates to a complex series of post-award legal proceedings over the course of the past twenty years (see Smis et al. 2021). In the 1980s, what was then Zaire (current Congo) entered into a construction agreement with Energoinvest, a then Yugoslav corporation. Energoinvest was to build a hydroelectric facility and high-tension transmission lines. According to the credit agreement, Energoinvest was to finance the project through a Congolese state-owned intermediary, the *Société nationale d'électricité*. When the DRC defaulted, Energoinvest invoked the arbitral clauses included in the agreement and successfully obtained two arbitral awards in 2003, in Switzerland and France respectively, rendered under the aegis of the International Court of Arbitration of the Paris International Chamber of Commerce (ICC in Paris).

FG Hemisphere allegedly paid US$ 3.3 million to redeem the debt. While the original debt totalled around US$ 34 million minus interests, FG Hemisphere claimed over US$ 100 million including interests and the costs of the two ICC in Paris arbitral proceedings. It deployed an

[1] La Générale des Carrières et des Mines (Appellant) *v.* FG Hemisphere Associates LLC (Respondent), Privy Council Appeal No 0061 of 2011 [2012] UKPC 27.

aggressive multi-front legal war to enforce the awards against assets (real estate and bank accounts) owned by the *Générale des Carrières et des Mines*, often called simply Gécamines, the main Congolese metals and mineral trading company. This included proceedings in Jersey, where Gécamines owned shareholdings in a joint venture company called Groupement du Terril du Lubumbashi Ltd that processes the cobalt-rich Lubumbashi tailings, and in Hong Kong, where China Railway Group Ltd, a Chinese state-owned enterprise which had concluded a joint-venture agreement with the Congo, was listed on the Hong Kong Stock Exchange and where its subsidiaries were incorporated.

In the Jersey lawsuit, FG Hemisphere sought to claim Gécamines' shares in the Groupement du Terril de Lumbumbashi and the Groupement's payments to Gécamines for the tailings, worth tens of millions of dollars a year. In Hong Kong, FG Hemisphere was trying to block the second half of a US$ 350 million signing bonus the Chinese investor owed for Sicomines, the large minerals-for-infrastructure project set up as part of the 2007 'deal of the century' between China and the DRC (Carter Centre 2017: 39).

The substantive content of the Privy Council decision is interesting. Contrary to courts in Belgium, Bermuda, South Africa and the United States where FG Hemisphere managed to recover some of the debt, the British court found that Gécamines was an entity distinct from the state, and, as such, FG Hemisphere was unable to enforce DRC debts against Gécamines' assets.

The judicial process that led to the Privy Council as an appeals court is the puzzling part. The Privy Council was seized to appeal a 2011 Jersey Court of Appeal decision which found that Gécamines was an organ of the state. In its rationale, the Privy Council espoused a 2010 decision by the Hong Kong Court of Final Appeal which concluded the opposite.

Both Jersey and Hong Kong are at once part and not part of Britain. Jersey is a self-governing parliamentary democracy under a constitutional monarchy, with its own financial, legal and judicial systems. But Jersey has retained the jurisdiction of the Privy Council in London as its apex court. As part of Hong Kong's 1997 handover to China, the Common Law system continues to be practiced as constitutionally guaranteed, making the city the only Common Law jurisdiction within China. Nevertheless, the Hong Court of Final Appeal was pressured into submitting the matter for constitutional interpretation to the Chinese Central Authorities which found that it related to China's foreign relations, must be interpreted by (mainland) Chinese courts and that absolute immunity of the Congolese state must be upheld.

Thus, a fund incorporated in a tax haven, Delaware, sought to recover assets from a corporation, Gécamines, formally incorporated into a commercial company under private law in 2010 but which is widely known to be a state within the Congolese state (Carter Centre 2017) in a tax haven, Jersey, that is at once part and not part of Britain, and Hong Kong, a former British colony that is at once autonomous and part of the Commonwealth and Mainland China.

I.1 Tracking Symbolic Value between Law, GVCs and Finance

Lawyering Imperial Encounters argues that the example of the *FG Hemisphere* v. *DRC* dispute is *not* an exceptional case. The British Privy Council decision goes well beyond national jurisdictional divides. It harks back in complex ways to the blurry divisions between state/non-state entities and between offshore and onshore capitalism that are shaping divisions between states and societies and capitalism's so-called cores and its peripheries.

The exceptionality of this example, rather, relates to the visibility of the parties involved, and foremost its financial stakes. The *FG Hemisphere* v. *DRC* dispute brings together remote actors, institutions and processes – mineral value chains on the one hand, 'offshore' financial flows on the other – in a way that appears natural only due to the 'reforming common sense' (to use Topalov's (1999) expression) that shapes the understanding of what the Congolese *state* is and how it should be reformed.

If the DRC had not been the target of a myriad of advocacy campaigns and policy moves since the 1990s from the United States, the Organisation for Economic Cooperation and Development (OECD), the European Union (EU) and non-governmental organisations (NGOs) drawing a direct link between the 'digital minerals' of Congo (cobalt, coltan, copper), the exceptional violence of conflicts in the Great Lakes region and the phones and other 'smart' devices of our everyday lives (Vogel 2022), the judicial saga that brought FG Hemisphere to the Privy Council based on two ICC in Paris awards would have remained invisible. Arbitration, by definition, is rendered behind closed doors. Awards are rarely public.

The hyper-visibility of the DRC as both a high-risk site for foreign investors and a magnet of geopolitical rivalries as the main reservoir of one of the critical minerals required for the 'digital' revolution and the post-carbon transition – cobalt – enabled the reconstruction of the FG

Hemisphere judicial saga into a *legal dispute* across jurisdictional divides, to use Felstiner et al.'s (1980–1981) terminology.

It is precisely because this case involves apparently disconnected geographical sites and legal institutions that the FG Hemisphere saga provides a startling starting point to the puzzle that is at the core of *Lawyering Imperial Encounters*.

How can we make sense of the entanglement between the imperial past imprinted in this case (illustrated by the core role played by the Privy Council), the articulation between financial markets, tax havens and states and the roles played by inter/national law and dispute settlement institutions (national courts and international arbitration forums) across the various local nodes of the economic, political and legal components of the dispute?

Lawyering Imperial Encounters argues that *seeing* these links matters. Looking at the raw materials that shape our daily lives – cobalt and rare earths as the critical minerals of the digital revolution and the energy transition, coffee, cocoa and beer, but also the toxic residues generated by the extraction of raw commodities and the 'reverse' value chains leading to their disposal in countries of the African South – *Lawyering Imperial Encounters* revisits the long history of extraction between Africa and the world economy as *a history of the present*.

It does so by tracking *legal and judicial chains* like the FG Hemisphere saga as Petri dishes of the social and professional networks, the norms and the institutions that shape, justify and transform the uneven and unequal relationship between the African South and the world economy.

Identifying the combination of variables (social, professional, normative and institutional) that contribute to the production of the legal categories that shape the relationship between the African South and globalisation provides us with a history of the present because it uncovers how boundaries between what is perceived as *public* (like the state) and *private* (like business interests), *legal* and *illegal*, between the so-called *core(s)* of the world economy and its *peripheries* are transformed, and foremost justified.

Due to the hyper-visibility of the parties and financial stakes involved in the example of the FG Hemisphere judicial saga, law seems to be an apparently obvious entry point to draw this history. It can also be a siren's call due to three sets of *black boxes* that usually characterise the relationship between law, global value chains (GVCs), symbolic power and historical change.

I.1.1 Using Law Not Wisely, but Too Well

In a global economy shaped by GVCs, law is everywhere: from the informal transactions between artisanal miners and the individuals holding the '*comptoirs*' at Kolwezi in the mineral-rich eastern region of the DRC, to the concession agreements negotiated between Gécamines and transnational corporations operating in the country; from the procurement contract between the (primarily) Chinese state-owned companies that manufacture lithium-ion (Li-ion) batteries and the corporate intermediaries in the United States and Europe which assemble them for use in the automobile industry or by tech giants. Law is also a core driver in the financialisation of minerals, including cobalt.

Law is what is going to make a tech giant like Apple cringe if consumers are alerted to the reliance on 'blood minerals' or child labour in the supply chain that produces their smartphones. Law is also the cutting edge of the DRC's relationship with the world economy. Congo has 'historically been constructed in global public imaginaries [as a] type of weak, permeable underbelly of global extraction that is both backwards and in need of civilisation, but also savage and dangerous'.[2] Proceedings against individuals involved as politicians, militiamen and former child soldiers in the Congolese wars of the 1990s have fuelled the docket of the International Criminal Court (ICC) since it became operational in 2003, all the while enabling the contested court to continue existing (Dezalay S 2020a). Just in the past decade, dozens of lawsuits and arbitration disputes involving mining contracts and violence in and around extractive sites in the DRC have been introduced across the world, ranging from a federal action lawsuit in 2019 against Apple, Google and other tech giants in the US filed by the NGO IRAdvocates, a criminal complaint in 2012 by the NGO Avocats sans frontières (ASF) in the DRC against militaries operating at the service of a subsidiary of the Swiss and German timber manufacturer Danzer, to a criminal complaint in 2013 by the European Centre for Constitutional and Human Rights (ECCHR) and Global Witness in Germany, this time against a senior manager of Danzer, to the legal saga pitting FG Hemisphere against the Congolese state.

Global scrutiny over Congo's mineral wealth has also been high on the map of international non-governmental organisations' (INGOs)

[2] E-International Relations, 'Interview – Christoph Vogel' 21 July 2023, www.e-ir.info/2023/07/21/interview-christoph-vogel/ (accessed 22 November 2023).

campaigns, like Global Witness, since the 1990s. The exceptional violence of the Far West-like rush for minerals during that decade, unleashed by the privatisation of state-owned extraction companies fostered by structural adjustment programs, was fuelled by, as much as it exacerbated, what has been dubbed Africa's World War.

But these advocacy campaigns and regulatory initiatives were deployed 'in a game of catch-up where the damage of the initial regulatory gaps has never fully been assessed' (Rosenblum 2016). Ongoing media and judicial battles on the detrimental societal and environmental effects of extractive deals between transnational corporations and resource-rich African states continue to stress the acuteness of contests over the distribution of natural resources and benefits derived from them. They also pinpoint loopholes in the reach of global regulations (Cutler and Dietz 2017) and the difficulty (if not total lack) of judicial remedies available to disenfranchised communities at the national and international levels (Muir Watt et al. 2019).

This framing justifies new forms of regulation aimed at cutting the link between violence, finance and GVCs. Yet law also mediates contradictory geopolitical, social and economic interests when it helps ascertain, depending on the context and shareholders, that the Congolese state is a sound partner for foreign investors, or, on the contrary, a failed state, or that Gécamines is part of the private sphere – that of business – rather than an incarnation of the Congolese state.

Likewise, the financialisation of primary commodities, enabled by future derivatives, can lead to extremely low or high prices for raw materials. Both extremes have proven catastrophic. Here too the role of law could seem obvious: '[w]ith the support of a regulator that requires transparency [. . .] it is claimed that investors will be in the position to account for the present and future externalities produced by actors in the value chains and make informed sustainable decisions that sanction unsustainable models and will result in a victory for the people and the planet while rewarding virtuous capital' (Ferrando 2020).

However, due to the 'endogenous nature of law in the definition of sustainable and unsustainable practices, and of the notion of sustainability itself', law 'becomes completely irrelevant, and with it the redistributive implications of a system of "sustainable" rent-seeking' (Ferrando 2020).

I.1.2 Symbolic Value: GVCs' Missing Link

The second problem relates to the perception of GVCs. Broadly speaking, GVCs refer to international production sharing, a phenomenon where

production is broken into activities and tasks carried out in different countries. Cross-border production is largely seen to have been made possible by the liberalisation of trade and investment, lower transport costs, advances in information and communication technology, and logistical innovations (e.g. containerisation).

GVCs are also usually understood to be driven by the expansion of transnational corporations (TNCs) primarily headquartered in advanced economies, which consolidate their international operations by controlling and coordinating international production networks consisting of multiple firms – including third parties with no equity links to them (what is otherwise known as international outsourcing) headquartered or operating in other national jurisdictions.

According to some estimates, GVCs 'governed' by TNCs account for 80 per cent of world trade each year (UNCTAD 2018). 'The underlying assumption is that because GVCs allow developing countries to focus on individual links in the chain, their firms can integrate with the world economy "on a shoestring" without facing the large risks (and costs) incurred by investing in all the tasks required for producing the finished product or services' (UNCTAD 2018: 50).

Africa remains predominantly integrated to GVCs through what are called *forward* linkages in the sense that resource-rich African countries and/or raw commodity producers supply these commodities as inputs that are used for production in other countries. Emblematically, in 2018, mining contracts between African states and transnational corporations were worth a total of US$ 47 billion[3] – just a little under the total flow of Official Development Assistance (ODA) that same year to sub-Saharan Africa which constitutes – by far – the biggest recipient of ODA (OECD 2018).

For exporting African states, the *value* of minerals and raw commodities, in economic terms, is supposed to be mainly accrued through tax returns – that is, the royalties paid by foreign investors to host states on exported raw commodities and unrefined minerals.

But where does Gécamines – and for that matter, FG Hemisphere – feature in the celebratory pitch about the inclusive growth and shared prosperity fostered by GVCs in an era of hyper-globalisation?

The nickname 'vulture fund' labels FG Hemisphere as a profiteer. Yet, by definition, vulture funds are *risk* investors – the rationale behind the

[3] Investing in African mining Indaba, 'The largest mineral industry in the world' 19 December 2019, www.miningindaba.com/Articles/infographic-the-african-mining-sector-in-numb (accessed 22 November 2023).

risk taken by private investment firms and hedge funds in suing sovereign award-debtors, who, depending on national jurisdictions, may benefit from sovereign immunity and are therefore likely to default, is the high profit margin between the actual investment and the expected returns. In a 2013 Resolution, the UN Human Rights Council 'condemn[ed] the activities of vulture funds for the direct negative effect that the debt repayment to those funds, under predatory conditions, has on the capacity of Governments to fulfil their human rights obligations'.[4] The 'problem' of vulture funds, therefore, harks back to the 'morally outrageous outcome' of their venture (Sookun 2010: 7).

But this moral critique masks the financialisation of sovereign debt. It also overlooks the entanglement between states, GVCs and financial markets. Gécamines constitutes an anomaly for the common understanding of GVCs. One of the largest mining companies on the African continent, the biggest in the DRC, Gécamines is headquartered in Lubumbashi, in the Katanga region, and sits on the world's greatest deposit of cobalt. Transformed into a commercial company in 2010 – with the state as sole shareholder – it formally engages in the exploration, research, exploitation and production of mineral deposits, including copper and cobalt. But, in practice, it does not directly conduct extraction activities.

The adoption of a new mining code in 2003, under the pressure of the World Bank, aimed at liberalising the DRC's mining sector and attracting foreign investors. Yet a subtle transitional clause enabled Gécamines to retain ownership over the exploitation rights of its most valuable concessions. 'Using these provisions, Gécamines conceded some of its titles to fully private companies. More often, however, Gécamines would only partially privatize its titles. In such cases, it would concede one or several titles to a joint venture in which it would get a minority stake' (Carter Centre 2017: 21). Gécamines therefore acts as the de facto gatekeeper to Congo's mineral wealth.

Thus, in the framework of the so-called 2007 'deal of the century' between China and the DRC, Gécamines got into a joint venture with China Railway Group Ltd. Under the joint venture agreement, Congo was to be paid US$ 221 million by the China Railway's subsidiaries, as

[4] Human Rights Council, Resolution 27/30 Effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights: the activities of vulture funds' United Nations General Assembly, A/HR/RES/27/30, 3 October 2014.

part of the entry fees for a mining project (Smis et al. 2021: 13). On the other hand, Gécamines held shares in the Jersey venture company called *Groupement pour le traitement du Terril de Lumumbashi*.

It is precisely this regulatory framework and financial trail that position Gécamines as a *transnational* corporation with the ability to wage either the 'corporate veil'[5] or state immunity to protect its assets in other jurisdictions. But this significantly complexifies the common understanding of the Li-ion battery value chain from cobalt extraction in the DRC, refining and manufacturing in China, to assembly into final products (be they electric cars or smartphones) in Europe and the United States.

Where and how does the *value-adding* process of the cobalt component of this GVC start? Should it reflect solely, on the one hand, the rate of cobalt on the London Metal Exchange (LME), the world centre for industrial metals trading, and on the other the royalties, bonuses, rents and other contractual fees received by Gécamines in exchange for concession permits?

While this raises the acute problem of accounting, in economic terms, for the value share that *escapes* the cobalt GVC, through bribes, corruption and tax evasion in secrecy jurisdictions and tax havens, it obfuscates the fact that '[a]s the GVC has transformed from business strategy into development strategy, value is regularly invoked in two ways and in two ways at the same time – as an adjective to modify a product that can be measured in price and captured based on one's position in a chain *and* as a social and moral hierarchy' (Cohen 2019).

Capitalism, Pistor (2019) argues, 'is more than just the exchange of goods in a market economy; it is a market economy in which some assets are placed on legal steroids' (11), because they are backed up by the US dollar, and the Common Law system that dominates global trade *and* financial transactions. Capitalism, in other words, is made up of transactions in value, including symbolic value.

Thus, while the UK Privy Council ruled that a state-owned company could only be assimilated to the state in 'quite extreme circumstances',[6] which it found had not been met in the case of Gécamines, it is precisely in the City that the price of refined cobalt is rated: at the LME, based on an expanding array of intermediaries and increasingly sophisticated financial tools. It is also in London's backyard, Jersey, as a tax haven,

[5] The 'corporate veil' refers to the limited liability of a corporation's shareholders or directors.

[6] Gécamines *v.* FG Hemisphere, 2012: 29.

that part of the value of the cobalt GVC can *at once* escape the formal economy (including as taxes to the DRC state) *and* be converted as legitimate investments in the onshore economy.

Following its two legal victories, before the Privy Council and the Hong Kong Court of Final Appeal, Gécamines chairman Albert Yuma Mulimbi 'announced that Gécamines expected to receive a total of US$ 269 million – US$ 175 million from the Sicomines signing bonus and an initial payment of about US$ 94 million from the Groupement du Terril du Lubumbashi Ltd slag heap payments, both of which had been held in escrow accounts during the course of litigation. This amount is roughly equivalent to Congo's annual health budget' (Carter Centre 2017: 39).

I.1.3 Confronting the Disconnection between Historical Change in the Global North vs the Global South

The third problem hinges on the common understanding of historical change in the Global North compared to the African South. Saying that the past matters is scientifically trendy. Especially since the Brexit and the Russian aggression of Ukraine. But it is a truism: which past and according to what articulation to the present?

Congo continues to loom large in the overwhelming tendency to point to colonial legacies to account for the crumbling of the state in the present. On the sixtieth anniversary of the first wave of independence on the African continent, to the question 'what did independence achieve for African states and societies?' Algerian-French philosopher Seloua Luste Boulbina responded: decolonisation is not over. 'The problem of the present', she pondered, 'is that it inherits, objectively and subjectively, from the past'.[7]

But which past, which present and for that matter, how do we extract the objective from the subjective tracks of this inheritance?

The weakness of the Congolese state induced by the perceived failure of colonial transplants is seen to breed 'loot-seeking' warfare. But the sophistication of the legal and financial tools used by Gécamines also positions the DRC as a Petri dish of capitalism in the present era of hyper-globalisation.

In advanced economies, the 2008 financial crisis spurred growing anxieties over the incapacity of the post-neoliberal turn 'regulatory' state

[7] O Caslin, 'Indépendances africaines – Seloua Luste Boulbina: "le problème du présent c'est qu'il hérite du passé"' *Jeune Afrique* 7 September 2020, my translation from French.

to curb the 'financial curse' (Christensen et al. 2016). Until then, 'tax havens were generally seen as exotic sideshows to the global economy. [The world has since] woken up to two sobering facts: first, the phenomenon is far bigger and more central to the global economy [. . .]; and second, the biggest havens aren't where we thought they were.'

Most major tax havens are located in advanced economies and their territories: the British Virgin Islands (BVI), Bermuda and the Cayman Islands – all British Overseas Territories – while Switzerland, the United States and the Cayman Islands are the top three jurisdictions for private wealth (Shaxson 2019: 7).

As an old margin of the capitalist system – construed as a foil for arguments about European capitalist history due to the resilience of kinship ties, and the tendency towards personal, anti-entrepreneurial governance (see Cooper 2014) – the DRC is not only emerging as a 'new frontie[r], [a] plac[e] where mobile, globally competitive capital [. . .] finds minimally regulated zones in which to vest its operations' (Comaroff and Comaroff 2012: 13); it is also part and parcel of the wider trend towards the *onshoring* of offshore capitalism.

I.2 Bringing the Past Back In, in an *Interconnected* Way

Thus, the *FG Hemisphere* v. *DRC* example raises an acute problem for international law – and more generally for the social sciences. The contradictory position of the DRC as at once backwater and vanguard of capitalism pushes against common tropes about historical change as a series of sharp caesuras and breaks – independence, the neoliberal turn or financialisation – when they are understood in isolation. It also underscores that as both a fix and an enabler, law is like a *Möbius ribbon*. Where do we put the cursor of law's *empowering* potential as opposed to its *enabling* role in maintaining the *status quo* of the African South's subsidiary position in the world economy?

That Gécamines, the former jewel of the Belgian Empire, as the successor of the Union Minière du Haut-Katanga, should be involved in judicial battles across the world ultimately arbitrated by the Privy Council is in and of itself a puzzle that rubs against the current historiographic obsession either with the end of formal empires across Africa at the turn of the 1960s, or the expansion of neoliberalism in the 1970s as moments of discontinuities and sharp ruptures.

Overcoming this double obsession does not deny that developing countries are the 'prime losers' from global profit shifting (Albertin

et al. 2021: 13). But it underscores that though uneven and unequal, the African South's relationship with global markets is also *reciprocal*.

The central role played by the African continent in the emergence and expansion of contemporary capitalism has been established in a rich body of scholarship in political economy (drawing on Rodney 1972) and anthropological and ethnographic work (see Ellis 2012; Ferguson 2006). These studies have long underscored that successive scrambles over the continent, in the nineteenth century, during the Cold War, through to the ongoing scramble for 'critical' minerals, have produced a symbiotic relationship between the continent and the world economy. This symbiotic relationship has durably entrenched Africa's uneven and unequal relationship with globalisation.

The position of Gécamines as a *transnational* corporation also reflects the relationship between the re-deployment of the state and the financialisation of the economy in the post-neoliberal turn. The reorganisation of the mining industry since the turn of the 2000s fostered by expansive technological transformations (robotisation, geo-exploration, etc.) and the globalisation and financialisation of supply chains is also embedded in wider structural transformations beyond the traditional focus on extractive sites as the nodal points of contact between '*l'Afrique utile*' and global markets. The structuration of GVCs around vastly dispersed networks of logistical infrastructures, transoceanic corridors, financial intermediation and geographies of labour 'cannot be fully elucidated by the *loci classici* of state-centric concepts of political economy, such as resource curse, dependency, imperialism, and so forth' (Arboleda 2010: 5).

Yet '[t]he political authority that underpins the international movement of capital continues to be mediated *nationally*' (Arboleda 2010: 6, emphasis added). As illustrated by the FG Hemisphere judicial saga, the *state* is not simply a handmaiden of global business interests. Sovereignty is both a flexible symbolic device and a territorially entrenched reality.

It is precisely the dual position of Jersey as at once part and not part of Britain that enables the city to be simultaneously part of Britain, yet a deterritorialised global financial capital. What matters, therefore, is the *symbolic mediation* of value – as a price captured based on one's position in a GVC *and* as a social and moral hierarchy that both enables and categorises the international movement of capital *as* offshore or onshore, as illegal or legal, as profit sharing or predatory. Looking at the *structurally* dual role of law, in the *longue durée*, as both an enabler for the expansion of power – through its symbolic function of codification – and as a check on petty arbitrariness, dependent on lawyers' relative success at asserting

the autonomy of their professional space (Kantorowicz 1989) is a powerful entry point to track this mediation process.

To escape the trope of determination – law's siren calls – law's relationship to power must be assessed *empirically* and *historically*. The FG Hemisphere saga marshals multiple scales and historical periodisation, from the British imperial realm, to the post-1960s reconversion of the City of London as the world's financial capital and the expansion of the Eurodollar market, and from the globalisation and financialisation of GVCs to the expansion of the geographical, technological and infrastructural landscapes of extraction *beneath* and *beyond* nation states. It brings together, in other words, different localities and time periods, whose *interconnectedness* in the present requires unpacking.

I.3 'Tracking' *Legal Intermediation* and *Imperial Encounters*

Lawyering Imperial Encounters tracks the patterns of symbolic valuation that shape and justify the relationship between the African South and the global economy and, more broadly, relations between law, political power, finance and historical change.

I do so by building on Tilly's analogy between organised crime and war-making/state-making, which he argues are 'quintessential protection rackets with the advantage of legitimacy' (Tilly 1985: 169), by reading it in light of the *global* turn in sociology and history (Go 2009). This turn channels attention towards 'the *relations* between non-Western or southern societies and other spaces' (Go 2013: 39, emphasis added) beyond the unidirectional relationship from cores to peripheries. It also underscores the historical contingency of the modern nation state as a modality for the expansion of power.

I reposition Tilly's nexus between *war-making/state-making* (as the coercive monopolisation of violence internally and in relation to external competitors), *protection* (as the elimination or neutralisation of the competitors of capital accumulating forces within the state) and *extraction* (as the acquisition of the means of carrying out the first three activities) within the context of the successive imperial scrambles over the African continent, from the nineteenth-century Scramble for Africa, the Cold War partition of the continent, through to the ongoing rush for Africa's 'green' minerals.

Lawyering Imperial Encounters tracks *imperial hangovers* in the present (to use Puri's (2021) expression) in Britain, France and the United States; in former British, French and Belgian colonies; in tax havens and

secrecy jurisdictions; as well as in the circulation of norms, institutionalisation patterns and the structuration of professional spaces of international and national justice (interstate adjudication, arbitration, international criminal justice, strategic litigation against corporate crimes, asylum justice). The aim is to uncover the *interconnectedness* between these sites as local nodes in the reproduction and justification of the relationship between law, political power, finance and historical change. Espousing an interconnected approach to historical change is a way of shifting from a functionalist understanding of the relationship between law and GVCs towards a sociology of *value* and of *valuation* (Lamont 2012; Levi et al. 2017).

Empirically, *Lawyering Imperial Encounters* focuses on legal intermediation dynamics within spaces of 'imperial encounter' (an expression I borrow from Bertrand 2007) between the African South and the world economy. What I call *imperial encounters* refers to normative, institutional and professional spaces of *real* connections. These spaces offer a vista into histories that are connected due to their reciprocal embeddedness in imperial legacies. They also echo transformations of state power and relations between political power, knowledge, business and finance in the African South and in the Global North.

These spaces are imperial because they reflect processes produced by, as much as they transform, concurrent geographies of power expansion and capital accumulation. Because they take place simultaneously within different scales and in distinct social spaces, imperial encounters also provide us with a history of the present relationship between capitalism's cores and its so-called peripheries, and, more broadly, between states, private interests and societies.

Methodologically, I unpack *legal intermediation* dynamics within and across these sites. Focusing on sites of imperial encounter helps capture the 'exceptional normal' (to use Bertrand and Calafat's (2018: 12) expression, my translation from French) of the conditions of possibility of circulation of norms and individuals, and, with them, of processes of professionalisation and institutionalisation across geographical scales and over time. This involves 'tracking individuals, things, objects, even emotions, outside of a strictly European focus' (Bertrand and Calafat 2018: 12, my translation from French). I track legal intermediation based on the family history, professional trajectory and strategies, and the assets of legal intermediaries – a term which I use to refer to agents, lawyers and non-lawyers, for whom law is a key resource for political access, and social, professional and geographical mobility. This is a way to observe

and narrate lived connections and their structural, social and cultural imprint in the present. Foremost, it is a way to track the symbolic valuation processes that enable law's deployment as a Möbius ribbon – at once as an enabler of the consolidation of the *status quo* of Africa's subaltern position in the world economy, and law's empowering potential to disrupt entrenched relations of domination.

Lawyering Imperial Encounters' empirical focus is predominantly on local sites and bundles of relations that were located formally *outside* Britain's imperial realm and the US sphere of military and cultural interests in the context of the Cold War: a former French colony of West Africa (Côte d'Ivoire) and two former Belgian colonies of the Great Lakes region (Burundi and the Congo), which were incorporated within France's areas of political, military and cultural influence during the Cold War.[8]

Lawyering Imperial Encounters is *not* a comparative overview between these African national sites and their uneven and unequal relationship with the world economy. It is a story in which imperial legacies in the present intersect with inter-imperial struggles for hegemony that are also contests over the framing of *global legal orderings*. In their account of Britain's expansion as world hegemon based on the extension of British juridical power *within* and *outside* the British imperial realm, Benton and Ford (2016) 'find active analogies at work between imperial and global order' (193). As they put it, '[n]ot unlike the unstable and merely aspirational dominance of British legal authority in many of the corners of the empire, the contemporary global order takes its shape from largely hidden hierarchies' (Benton and Ford 2016: 194).

Hidden hierarchies were fostered by the circulation of norms, individuals and institutions across empires through to the 1940s. They also shape the institutionalisation of an international legal order since, along with the extraterritorial waging of the City's and New York's law as the law codifying and sanctifying the international movement of capital. Hidden hierarchies therefore connect these sites to some of Britain's former colonial peripheries like Ghana and South Africa, to Paris as a former metropolitan capital and world arbitration centre and The Hague as the global justice capital.

[8] What I refer to as France's '*pré carré*' throughout the book. The metaphor '*pré carré*' refers to the exclusive domain of the public sphere. Applied to French foreign relations, it has been endowed with a negative connotation from the 1980s to underscore the symbiotic ties of the *métropole* with its former African colonies.

Hidden hierarchies can help question and track the dynamics of expansion of China as the world twenty-first century hegemon precisely because, as Benton and Ford (2016) put it, 'focusing anew on the disorganized legal routines that other, aspiring hegemons have deployed in their flawed attempts to project power' can help account for the continuous patchiness, in the present, of the global legal order (181).

Exposing these hidden hierarchies requires confronting ourselves to the 'imperial entanglement' (to use Steinmetz' (2013) expression) of scientific knowledge on legal change, politics and capitalism in former African colonies. I do this by espousing a research strategy that *zooms in and out* across scalar units and analytical lenses (Cooper 2014). Zooming *in* to track legal intermediation at the micro level of individual trajectories, institutions or localities and *out* onto structural geopolitical changes helps to get grips with at least one aspect of the 'grand' narrative of historical *longue durée* by identifying the connections, in the present, between the legacies of formal colonisation and the longer term of trade interests.

Lawyering Imperial Encounters is therefore a plea for what Lonsdale (1981) called 'epistemological impurity' (140). I invite researchers, teachers – readers – to embrace *messiness* to capture the present. *Lawyering Imperial Encounters* is an invitation, in other words, as the historian Marc Lazar puts it so well, for us as researchers and as teachers, to be seismologists,[9] and to convey the curiosity and desire to question boundaries. This, I argue, is a way to respond to the challenge of allowing for the possibility of studying the imperial factor over an extended period.

I.4 Structure of the Book

Chapter 1 lays out the book's research strategy. Deploying a post-colonial critique of the terms of the relationship between the African South and the global economy requires questioning law's *double bind* – as both enabler and bulwark against domination – and confronting ourselves to the imperial entanglement of scholarship (Steinmetz 2013). Building on Tilly's (1985) trilogy of coercion-extraction-protection, the chapter identifies two sets of variables deployed throughout the book to track the articulation between law, politics and capitalist expansion over time: the 'double-edged protection' produced by legal imperialism and the 'middle power' used by the British hegemon and competing imperial *métropoles*

[9] M Semo, 'Marc Lazar: La "peuplecratie" est un défi pour la démocratie libérale et représentative' *Le Monde* 2 May 2019.

to justify colonialism and lessen social disruption and inter-imperial rivalries. Lastly, the chapter explains the book's methodology. Zooming in and out to track imperial encounters at the scale of localities, institutions and global structures exposes pre-existing conflicts and contradictions that help understand ongoing conflicts and contradictions in late capitalism.

Chapter 2 argues that imperial powers (Britain, France and Belgium) deployed a similar strategy of legal imperialism during the nineteenth-century Scramble for Africa. Indirect rule operationalised the contradiction that colonial power was weak in its effective reach, yet strong in the systemic upheavals it engendered. It also fostered legal and capitalist unevenness, what Benton and Ford (2016) call 'lumpiness'. The chapter focuses on three crisis situations that were ostensibly solved through juridical means: 1920s Gold Coast conflicts before the Privy Council; the 1895 Stokes-Lothaire incident before the High Council of the Congo Free State; and pre-independence military trials in French and British colonies. Together, these judicial crises help account for structural commonalities in the articulation of post-independence African states with the world economy: the deployment of merchant law *with* and *without* state sovereignty and *middling* as a durable, though variable, sovereign resource of the post-colonial state.

Chapter 3 revisits the Cold War Scramble for Africa. Throughout the continent, the 'concession model of extraction' – the renting out of land to foreign corporations in exchange for royalties – was based on the early emergence of mining giants in South Africa. The concession model was not dismantled following independence. Gatekeeping politics were consolidated through the alternate paths taken by London and Paris. France incorporated its former colonies within a 'postcolonial block' (Bayart 1993). Britain reconverted as a dual middle power – with London as jurisdictional apex and the City as financial powerhouse. The Cold War sidelining of The Hague justice institutions enabled the deployment of the US Cultural Cold War, based on the formidable sway of the alliance of Wall Street resources – finance, arbitration and corporate law firms – which contributed to the insulation of foreign corporate rights in property in resource-rich African states from national and international oversight.

Chapter 4 examines the ongoing rush for Africa, characterised by the global competition for the critical minerals of the 'energy transition'. I argue that the ongoing Scramble is embedded in previous imperial imprints. The 1980s debt crisis positioned international financial institutions (IFIs) as the vehicles of the neoliberal turn on the continent. But

this did not displace gatekeeping politics. Rather, the concurrent *onshoring* of *offshore* capitalism fostered the power of global traders like Glencore or Trafigura as the prime interface between resource-rich African states and global markets and as the core engineers of the transformation of the *geography* of extraction, based on technological and infrastructural innovations and financial deregulation. The onshoring of swashbuckler capitalism is deeply connected to a codification of capital (Pistor 2019) based on Common Law and the law of the state of New York, which is enabled by the globalisation of the 'Wall Street model of the corporate law firm'.

Chapter 5 examines the ongoing rush for Burundi's rare earths twenty-five years after the Arusha agreement that put an end to the violent conflict that tore the country apart from 1993. I argue that Burundi's transition into an origination site leans on the legacy of colonial, post-independence and post-1993 rule of law reforms, which together have fostered what Mamdani (1996) calls 'decentralized despotism'. The conflicting position of legal intermediaries as either representatives of authoritarian power or champions of the rule of law is embedded in a structural *bifurcation* of the Burundian legal field that enables corporate predation, like that of beer giants. According to their political and social resources, lawyers are positioned alternately as gatekeepers of the rent of exported commodities, or vulnerable to another type of extraversion: aid dependency. This bifurcation makes Burundi a Petri dish of the hyper-violence generated by the hyper-legality of late capitalism.

Chapter 6 examines the Probo Koala environmental catastrophe which involved the dumping of toxic oil residue by the global trader Trafigura in the port of Abidjan in 2005. The development of the scandal into transnational litigation strategies in Britain and European capitals exposes the legal lumpiness fostered by the financialisation of GVCs. The 'Ivorian miracle' relied on protected economic integration within the global markets of coffee and cocoa. The dismantling of the 'post-colonial block' fostered a displacement of the terms of Côte d'Ivoire's relationship with global markets. This contributed to reinforcing the prominence of global traders as intermediaries between states, financial markets and corporate power. It also consolidated the symbiotic relationship between the *onshoring* of offshore capitalism and the *offshoring* of *onshore* justice. The case demonstrates that corporate accountability gaps along GVCs are an outcome of the bifurcation of state sovereignty enabled by financial deregulation.

Chapter 7 tracks the transformation of the position of Paris induced by the neoliberal turn. The marketplace of legal intermediaries between

resource-rich African states and French businesses has long been derided as an outgrowth of the *Françafrique*, the interpersonal shadow networks linking France to its African '*pré carré*'. The neoliberal turn fostered the prominence of corporate lawyers as key intermediaries between the state and the market. It was also deployed within the *system* of the *Françafrique*. Due to the historical distancing of the Paris Bar from corporate interests, French corporate law pioneers contributed to the expansion of a French corporate bar under the double thrust of the European Common Market and the model of the Wall Street corporate law firm. It is also as intermediaries of US multinational corporate law firms that they entered the former French '*pré carré*' in Africa qua a legal market.

Chapter 8 examines how social hierarchies are reproduced through the operations of justice. I argue that justice institutions, whether national or supranational, are systematically characterised by the structuration of restricted professional markets of 'repeat players' (Galanter 1974) who act as gatekeepers of the relationship with justice users (individuals, corporations or states). The globalisation and financialisation of GVCs is reinforcing rather than weakening the post-Cold War competition between global legal ordering claims. The contrasted development of justice institutions (from the US Supreme Court; asylum justice; interstate adjudication; investment arbitration to international criminal justice) demonstrates that it is fostering the global diffusion of the Wall Street model of the corporate law firm as an engine of legal globalisation and for the reproduction of legal and social hierarchies. This positions justice institutions as practical and symbolic boundary-making sites between capitalism's so-called cores and its peripheries.