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INTERNATIONAL LAW AND INTERNATIONAL RELATIONS

by

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BIOGRAPHICAL NOTE

Anne-Marie Slaughter, born in Charlottesville, Virginia, United States of America, 27 September 1958.

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PRINCIPAL PUBLICATIONS

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The European Courts and National Courts: Doctrine and Jurisprudence, Oxford, Hart Publishing, 1997 (co-editor with Alec Stone Sweet and Joseph H. H. Weiler).

"Plaintiff's Diplomacy", 79 *Foreign Affairs* 102 (2000) (co-author with David Bosco).

"Introduction: Legalization and World Politics", 54 *International Organization* 385 (2000) (co-author with Judith Goldstein, Miles Kahler and Robert O. Keohane).

"Legalized Dispute Resolution: Interstate and Transnational", 54 *International Organization* 457 (2000) (co-author with Robert O. Keohane and Andrew Moravcsik).

"The Concept of Legalization", 54 *International Organization* 401 (2000) (co-author with Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik and Duncan Snidal).

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"The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor", 83 *American Journal of International Law* 461 (1989).

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of the ideas about international law developed by political scientists and contributed to both disciplines. But far more important, his is the spirit of continual intellectual curiosity and adventure, pushing and redefining conventional boundaries. These lectures are dedicated to his memory.

CHAPTER I

THE TECHNOLOGY : PRINCIPAL THEORIES OF INTERNATIONAL RELATIONS

Introduction

Why have a course combining international law and international relations ? Surely the two are inextricably intertwined. Compliance with international commitments is a routine part of international relations, as Louis Henkin famously proclaimed [1]. Conversely, at least in the United States, it is virtually impossible to study law outside of its political context. Politics permeates law, even as law justifiably and necessarily holds itself apart. And in international law, perhaps even more than domestic law, the political, economic, and even cultural and social relations among States define what must be regulated and what can be regulated. As Hedley Bull puts it : "International law can contribute to international order by stating the basic rules of coexistence among States only if these rules have some basis in the actual dealings of states with one another." [2] Indeed, if

1. Louis Henkin, *How Nations Behave: Law and Foreign Policy* 253, 256-257 (1968). This is familiar ground for international lawyers, but 30 years after Henkin wrote they are still making the case to the larger public. See, e.g., Louis Henkin, "Conceptualizing Violence : Present and Future Developments in International Law", 60 *Albany Law Review* 571, 578 (1997) (suggesting that international law establishes a common denominator for State conduct) ; Steven R. Ratner, "International Law : The Trials of Global Norms", *Foreign Policy* 65 (1998) ("Most states comply with much, even most, international law almost continually — whether the law of the sea, diplomatic immunity, or civil aviation rules . . ."); Abram Chayes and Antonia Handler Chayes, *The New Sovereignty : Compliance with International Regulatory Agreements* 4 (1995) ("the enterprise [of international relations] makes sense only if the participants accept (presumably on the basis of experience) that as a general rule, states acknowledge an obligation to comply with [their] agreements"). Political scientists are finally beginning to heed this message and to focus more on law themselves. See Alec Stone, "What is a Supranational Constitution ? An Essay in International Relations Theory", 56 *Review of Politics* 441, 442 (1994) (expressing the belief that international relations might be "in the throes of an unacknowledged, perhaps unconscious, return to law") ; Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter and Duncan Snidal, "The Concept of Legalization", 54 *International Organization* 401 (2000) (offering an empirical demonstration of the influence of the phenomenon on legalization upon the process of inducing State compliance with international agreements).

2. Hedley Bull, *The Anarchical Society* 143 (1977).

this were a course only in international law, we would spend a great deal of time trying to figure out whether international legal rules are nothing or something more than the codified political will of State actors in international relations.

So why the dichotomy between international law (IL) and international relations (IR)? Why distinguish them only to reintegrate them? One answer is that the dichotomy reflects how far the academy has moved from the world it purports to study. One thing on which the various narratives of the evolution of international law and international relations as academic disciplines agree is the emergence of a great schism between them after the World War II. The self-styled "Realists" in political science challenged the international lawyers to prove their relevance to actual State behaviour[3]. George Kennan denounced the "legalist-moralist" tradition in American foreign policy[4]. Other Realists accused international lawyers of dreaming of world government while dictators re-armed and plotted global empire[5]. Such charges were unfair of course; Gerry Simpson reminds us that Woodrow Wilson originally launched his crusade for a new international legal order in response to the power politics and secret diplomacy that had launched World War I[6]. Nevertheless, notwithstanding periodic "bridge-building" efforts by individual scholars on both sides over the past four decades[7], the academic disci-

3. See Robert E. Osgood and Robert W. Tucker, *Force, Order and Justice* 269-270 (1967) (arguing that it is dogmatic to insist that certain legal restraints on State freedom-of-action in the issue-area of the use of force be observed without exception where States face the possibility of extinction by other States); Bart Landheer, *On the Sociology of International Law and International Society* 49 (1966) (contending that rational egoism is a principle far more compelling than co-operation or association with other States on the basis of legal rules, and "[i]f the major concern of statesmen of the world was to avoid conflict, we would already have a functioning international society").

4. George Kennan, *American Diplomacy 1900-1950* 95 (1951) (tracing the roots of the legalist-moralist approach to the "predominance of lawyers among American foreign-policy makers").

5. See generally E. H. Carr, *The Twenty Years' Crisis, 1919-1939* vii (1939) (contending that the neglect of the waxing power of Nazi Germany in favour of legal institutionalism was "glaring and dangerous").

6. Gerry Simpson, "The Situation on the International Legal Theory Front: The Power of Rules and the Rule of Power", 11 *European Journal of International Law* 439, 448 (2000); see also Lorna Lloyd, "The League of Nations and the Peaceful Settlement of Disputes", 157 *World Affairs* 160, 170 (1995) (noting that Wilson's objective for the Great War was to "cause power to disappear from international politics").

7. Efforts to integrate the disciplines of international law and international relations have occurred regularly over the past five decades. For more recent writing that takes account of these past efforts and seeks to build on them in a

plines of international law and international relations have pursued largely separate trajectories.

So perhaps the dichotomy signals a focus on intellectual history? A mapping of bodies of ideas by scholars who styled themselves "lawyers" and "political scientists"? If so, it need not detain us for long. As fascinating as such projects are to academics, they are essentially exercises in personal genealogy. The rest of the world, including students, will want to know something of law and politics "in practice". At this point, it is worth exploring several other dichotomies that often come to mind when international relations is juxtaposed against international law.

(a) *Realism versus idealism?*

This dichotomy is silly but peculiarly persistent. Morgenthau, Kennan and others charged international lawyers with privileging ideals of world order over the realities of power politics. "Realists" have been caricaturing "liberals", and particularly "liberal lawyers", under this label ever since[8]. But assuming that the dichotomy actually captures a distinction worth dwelling on, whether between optimists and pessimists, observers and dreamers, students of human nature and devotees of the divine, it is a dichotomy that recurs as

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more contemporary context, see Friedrich Kratochwil, *Rules, Norms, and Decisions* 187 (1989); Kenneth W. Abbott, "Modern International Relations Theory: A Prospectus for International Lawyers", 14 *Yale Journal of International Law* 335 (1989); Anne-Marie Slaughter Burley, "International Law and International Relations Theory: A Dual Agenda", 87 *American Journal of International Law* 205, 208 (1993).; Robert J. Beck, Anthony Clark Arend and Robert D. Vanderlugt, *International Rules: Approaches from International Law and International Relations* (1996); Harold Hongju Koh, "Why Do Nations Obey International Law?", 106 *Yale Law Journal* 2599 (1997); Anne-Marie Slaughter, Andrew S. Tulumello and Stepan Wood, "International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship", 92 *American Journal of International Law* 367 (1998); Kenneth W. Abbott, "International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts", 93 *American Journal of International Law* 361 (1999); David Kennedy, "The Disciplines of International Law and Policy", 12 *Leiden Journal of International Law* 9 (1999); Anthony Clark Arend, *Legal Rules and International Society* (1999); Michael Byers, *Custom, Power, and the Power of Rules: International Relations and Customary International Law* (1999). This is only a partial list: other important work can be found in the text and citations in these sources.

8. See Francis Anthony Boyle, *Foundations of World Order: The Legalist Approach to International Relations 1918-1922* (1999); Kenneth Waltz, *Theory of International Politics* 91 (1979) (drawing a sharp distinction between Realists and Idealists and suggesting that international relations is in fact a "realm in which anything goes").

frequently *within* disciplines as across them. Martti Koskenniemi assures us that the oscillation from "apology to utopia" has characterized all of international law[9]. And John Mearsheimer, a leading political scientist, does not hesitate to laugh at liberal opponents as hopeless romantics[10]. In both cases, it is unclear that the supposed divide between Realists and Idealists serves anything other than polemical purposes. But in any event, it maps very poorly onto IR/IL.

(b) *Instrumentalist versus normative*

Robert Keohane argues that the principal difference between international lawyers and international relations scholars is that they use different "optics" on the world: an "instrumentalist" versus a "normative" optic[11]. The instrumentalist optic sees the world in terms of the clash and complementarity of *interests*, whereas the normative optic prefers *obligation* — the force not of what States want but of what they think they should or must do according to the "rules of the game". In Keohane's words:

> "According to this 'normative optic', norms have causal impact. The impact of interests and power is by no means denied, but such explanations are not sufficient. Norms and rules exert a profound impact on how people think about state roles and obligations, and therefore on state behavior."[12]

As Abram and Antonia Chayes might put it, law is more about talk than about power — or rather about the powerful pull of talk[13].

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9. Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (1989).

10. John Mearsheimer, "The False Promise of International Institutions", 19 *International Security* 12-13 (1995) (suggesting that liberal opponents of realism ignore theoretical explanations which do not conform to their romantic impressions of "basic American values", such as the elimination of security competition and the construction of a more peaceful world).

11. Robert O. Keohane, "International Relations and International Law: Two Optics", 38 *Harvard International Law Journal* 487, 492 (1997).

12. *Id*. at 492.

13. Chayes and Chayes, *supra* footnote 1, at 25. See also Thomas M. Franck, *The Power of Legitimacy among Nations* 24 (1990) (claiming that in the international legal realm legitimacy "is a property of a rule or rule-making institution which itself exerts a pull toward compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process"); Friedrich Kratochwil, *supra* footnote 7, at 96 (suggesting that the "constraining force" of law may result from the "moral" character of rules which delimit the domain of acceptable choices).

We will return to this distinction between interests and norms. Again, however, the long-running debate between adherents of both schools is not confined to any one discipline. Law, for instance, is surely a blend of both power and persuasion; no practising international lawyer would ever think otherwise. Conversely, many prominent political scientists are deeply sceptical of a single-minded focus on interests.

(c) *Logic versus science?*

Hedley Bull offers another way to think about the IR/IL distinction. He describes rules — the basic stuff of international law — as

> "general imperative propositions that are linked logically to one another in such a way as to have a common structure. To assert the validity of a rule of international law . . . is to say that it meets some test that is laid down by another rule. Reasoning about international law, therefore, like reasoning about any other body of rules, is reasoning on a normative plane and not on an empirical or factual one."[14]

In this formulation, law involves normative reasoning, which requires a prescribed logic, whereas politics, or international relations, involves reasoning on an "empirical or factual" plane. Kenneth Abbott confirms this analysis from the other side. As a lawyer who has immersed himself in the literature and culture of political science, he is quick to tell international lawyers that "as a social science, IR does not purport to be . . . a true 'legal method' capable of asking doctrinal questions"[15]. IR theory can make a different contribution, performing the "intellectual tasks" of "description, explanation, and institutional design"[16]. In other words, IR can supply the *how* and the *why*; IL can then focus on the *what*, *where* and *when*.

Normative versus instrumental, normative versus empirical, idealist versus realist — these are just some of the ways that scholars have tried to define and distinguish IL and IR. The purpose here is to move beyond abstract definitions and to explore how integrating the

14. Bull, *supra* footnote 2, at 128.
15. Abbott, *supra* footnote 7, at 361.
16. *Id*. at 362.

two fields can make international lawyers better lawyers. To that end, the primary focus will be on different kinds of problems in current international life: humanitarian intervention, the role of non-governmental organizations in international law-making, and WTO dispute resolution. Each case study will illustrate different ways of applying the basic paradigms of IR theory set forth in the remainder of this chapter.

1. What IR Can Offer IL

Scholars of international relations, a sub-discipline of political science, generate a wide range of theories to solve the problems and puzzles of State behaviour. Each theory offers a causal account of a particular outcome or pattern of behaviour in inter-State relations in a form that isolates independent and dependent variables precisely enough to generate hypotheses (predictions) that can be empirically tested[17]. At a higher level of generality, these theories can be grouped into different families or approaches on the basis of their underlying analytical assumptions about the nature of States and the relative explanatory power of broad classes of causal factors, such as the distribution of power in the international system, international institutions, national ideology and domestic political structure.

This lecture will summarize the three main theoretical approaches used in contemporary American political science: Realism, Institutionalism and Liberalism[18]. Political scientists would find the

17. The theories described are all "positivist" theories, in the sense that they proceed from the premise that "every theory, to be worthwhile, must have implications about the observations we expect to find if the theory is correct". See Gary King, Robert O. Keohane and Sidney Verba, *Designing Social Inquiry* 28 (1994); also Richard K. Ashley, "The Poverty of Neorealism", in *Neorealism and Its Critics* 281 (Robert Keohane, 2nd ed., 1986) (summarizing four basic tenets of positivism as: (1) there are objective scientific causes of events; (2) science can produce technically useful knowledge that is (3) value neutral; and (4) the truth can be empirically tested). But see Donald P. Green and Ian Shapiro, *Pathologies of Rational Choice Theory* x (1994) (with respect to positivist theories "exceedingly little has been learned", and this failure of empiricism as it bears upon the study of political phenomena is "rooted in the aspiration of rational choice theorists to come up with universal theories of politics").

The precise meaning of "positivism"as it is used in international legal discourse, however, is somewhat distinct from the social science formulation of the term. See, e.g., Arend, *supra* footnote 7, at 89 (noting that "traditional positivists would define the very existence of a treaty as evidence of an authoritative rule").

18. Many political scientists would protest this selection of theoretical paradigms, arguing that it is too narrow and excludes such important theories as world systems theory, dependence theory, and structuration theory to name only

versions presented here overly simplified and distilled. Yet each approach gives rise to a distinct mental map of the international system, specifying the principal actors within it, the forces driving or motivating those actors, and the constraints imposed on those actors by the nature of the system itself. Anyone who thinks about foreign policy or international relations, from either a political or a legal standpoint, must have some such map to guide her thinking, whether consciously or subconsciously.

Beyond mental geography, however, the explicit role of theory differs for political scientists and lawyers. For political scientists, the purpose of uncovering this map and explicating its underlying assumptions is to test the positive validity of those assumptions. Do States in fact behave as they are assumed to? Does the mental map correspond to what observers actually see, or think they see? Does it permit accurate diagnosis of international problems and generate valid predictions and prescriptions for their resolution? Clarity about underlying premises is an indispensable foundation for accurate positive explanation.

For lawyers, the significance of underlying positive assumptions about the way the world works may be less immediately apparent, but no less important. Assume an instrumental view of international law, in which law-makers and commentators design legal rules to achieve specific ends based on positive reasoning about how those ends may be achieved. This is by no means the only or even the best perspective on the discipline and practice of international law; many might prefer a deontological quest for norms of international justice [19]. Even from this perspective, however, part of the international

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a few. The choice of these three approaches does not deny the existence of other bodies of theory or seek to discourage international lawyers from drawing on them. The approach here is intended to be illustrative rather than exhaustive.

For additional explications of these and other IR theories within political science, see generally Peter J. Katzenstein, Robert O. Keohane and Stephen D. Krasner, eds., "International Organization at Fifty: Exploration and Contestation in the Study of World Politics", 52 *International Organization* 1 (1998); Benjamin J. Cohen and Charles Lipson, *Issues and Agents in International Political Economy* (1999); Mearsheimer, *supra* footnote 10; Jeffrey W. Legro and Andrew Moravcsik, "Is Anybody Still a Realist?", 24 *International Security* (1999). For earlier versions of ongoing debates discussed in these sources, see *Neorealism and Neoliberalism: The Contemporary Debate* (David A. Baldwin, ed., 1993); *Controversies in International Relations Theory: Realism and the Neoliberal Challenge* (Charles W. Kegley, Jr., ed., 1995); Beck, Arend, and Vanderlugt, *supra* footnote 7.

19. See, e.g., Janna Thompson, *Justice and World Order: A Philosophical Inquiry* (1992).

lawyer's task will be to determine how these norms can be most effectively implemented. Thus at some stage, excavating and challenging assumptions about the nature and form of the international system emerges as an essential component of legal analysis, an effort to understand the realm of the possible and expand the realm of the probable.

To illustrate, imagine a set of agreed exogenous goals, such as peace, increasing international co-operation, resolving international conflict, preserving common resources, or advancing global prosperity. Altering positive assumptions about who the principal actors are in the international system and about the motives that drive them gives rise to different causal statements about the source of particular problems — war, conflict, or non-cooperation. These differing analyses will in turn suggest different political and legal strategies as to how to resolve those problems in the service of the posited affirmative goals[20].

The most prominent example of this type of reasoning is the differential diagnosis of the sources of war: an imbalance of power in the international system, misinformation and uncertainty, or inadequate representation of the individuals and groups most directly affected by war in the decision to go to war[21]. The first diagnosis gives rise to legal norms seeking to restrict or constrain State use of power. The second would suggest the creation of international institutions to facilitate communication and confidence-building measures among potentially warring parties. And the third would generate both rules and possibly institutions designed to expand political representation at the domestic level.

An equally important example concerns competing diagnoses of trade conflicts[22]. Here again, the problem can be identified as a

20. See Benedict Kingsbury, "The Concept of Compliance as a Function of Competing Conceptions of International Law", 19 *Michigan Journal of International Law* 345, 369-372 (1998) (explaining that the process of the selection of strategies to effect the attainment of affirmative goals such as compliance with transnational regulatory institutions, dependent as it is upon differing assumptions regarding the important actors and causal processes in international relations, is difficult to investigate through normative methods alone).

21. See, e.g., Evan Luard, *Conflict and Peace in the Modern International System* (1988) (providing an exposition of the broad domain of theoretical explanations and analyses of the causes of war).

22. See, e.g, Klaus Stegemann, "Policy Rivalry among Industrial States: What Can We Learn from Models of Strategic Trade Policy?", 41 *International Organization* 73 (1989) (illustrating the various explanations for international trade conflicts).

fundamental and inevitable conflict between States competing to gain a relative advantage over one another; a problem of institutional design affecting the ability of States to co-ordinate and co-operate to reach an optimal solution; or the misrepresentation of underlying individual and group interests such that conflicting State positions reflect the capture of domestic political processes by special interests. Each of these diagnoses would give rise to different political strategies and corresponding legal régimes: the facilitation of trade alliances to neutralize competition; an international régime designed to overcome co-ordination and information problems (the GATT); or strategies allowing domestic litigants to invoke international rules against domestic interest groups in court. This last strategy does not exclude an international institutional framework, but it would be intermeshed with domestic politics and law.

Some international lawyers might conclude that these differential diagnoses are the preliminary steps that must be taken to determine what category of law is appropriate to the solution of a particular policy problem — international or domestic. On this view, competing paradigms of international relations theory thus serve above all to delimit the boundaries of disciplinary jurisdiction. For present purposes, international lawyering is defined as seeking legal solutions to international problems, regardless of the labels attached to any particular body of law. From this perspective, international relations theory is an important part of any international lawyer's toolkit.

Others will argue that it is IR/IL scholars who are determined to attach political science labels to concepts and modes of analysis that international lawyers already engage in, but without fanfare. There is some merit in this claim, particularly with regard to the overlap between much of traditional international law and what political scientists call régime theory[23]. Even here, however, the political science account of the role that international rules and institutions play in international life yields valuable insights into the workings of current international institutions and suggests new possibilities for institutional design. More generally, explicating the connections between the two disciplines may make international lawyers more

23. For a description of this overlap, see Abbott, *supra* footnote 7; Slaughter Burley, *supra* footnote 7; Stephan Haggard and Beth A. Simmons, "Theories of International Regimes", 41 *International Organization* 491 (1987).

aware of the extent to which deeply entrenched international legal rules and principles reflect outmoded or discredited assumptions about the international system. Following the analytical course charted by different theories of international relations may encourage them to challenge these assumptions and formulate fresh solutions to old problems.

2. Principal Paradigms in International Relations Theory

The "theories" of international relations presented here are not precise theories of war or peace or economic relations among nations. They are rather families of theories, which can also be thought of as conceptual frameworks or paradigms. More specific theories can be grouped within these paradigms in terms of the fundamental assumptions that they share about the nature of the principal actors in the international system and the principal factors that determine the outcomes of interactions among these actors. With a basic grasp of these different sets of assumptions, it is possible to identify virtually any more specific theory as either belonging to or containing elements from one or more of these paradigms. More useful for international lawyers, it is also possible to analyse any current problem in international relations from several competing perspectives and quickly to generate a number of potential solutions. In this sense, knowledge of these paradigms and an understanding of the basic mindset that animates the political scientists who work within them is a valuable technology. It is a technology that international lawyers can use to suit their many purposes in the different kinds of projects they undertake, provided, as with any technology, that they understand both its strengths and its limits.

(a) *Realism*

The dominant approach in international relations theory for virtually the past two millennia, from Thucydides[24] to Machiavelli[25] to Morgenthau[26], has been Realism, also known as Political Realism. Realists come in many stripes. Most notably, they divide between

24. Thucydides, *History of the Peloponnesian War* (Rex Warner, trans., 1986).
25. Niccolo Machiavelli, *The Prince* (1946).
26. See Hans Morgenthau, *Politics among Nations: The Struggle for Power and Peace* 244 (1948).

Classical Realists and contemporary Structural Realists or Neorealists. Classical Realists, according to Professor Michael Smith, share the following assumptions:

(1) Human nature displays an "ineradicable tendency to evil"[27].
(2) The important unit of social life is the collectivity; in international politics the only really important collective actor is the State.
(3) Power and its pursuit by individuals and States is ubiquitous and inescapable. Thus the "important subjects for theoretical consideration are the permanent components of power"[28].
(4) International institutions, networks, or norms are epiphenomenal[29]. They are reflections of the prevailing power relations among States, rather than independent factors determining State behaviour.
(5) The "real issues of international politics can be understood by the rational analysis of competing interests defined in terms of power"[30].

These assumptions are linked. If human nature displays an ineradicable tendency toward evil, humans cannot live together without a powerful central authority to keep them in check. This is Hobbes' Leviathan, the domestic sovereign that must exercise absolute control within its territory[31]. When sovereigns encounter each other in the international system, they display the same characteristics that humans do in the state of nature. They seek power and dominion over one another, but can be held in check by countervailing power. In this context, rules and institutions can only endure to the extent that they reflect the interests of the most powerful States in the system[32].

In the 1970s Kenneth Waltz reformulated these assumptions in an

27. See Michael Joseph Smith, *Realist Thought from Weber to Kissinger* 219 (1986); see also *id*. at 1 (contending that "[e]vil is inevitably part of all of us which no social arrangement can eradicate: men and women are not perfectible").
28. *Id.* at 219-220.
29. F. S. Northedge, *The Use of Force in International Relations* 212-213 (1974) (noting that for Morgenthau the relative distribution of State military power determined whether legal, rather than political, attempts to regulate the use of inter-State force would trump the resort to self-help measures).
30. Smith, *supra* footnote 27, at 221.
31. Thomas Hobbes, *Leviathan* 107 (1651).
32. Smith, *supra* footnote 27, at 13. See also *International Incidents: The Law that Counts in World Politics* 5 (W. Michael Reisman and Andrew R. Willard, eds., 1988) (indicating that for Realists who think that it is a form of law, international law is the law of the lowest common denominator as it oper-

updated version of Realism that he called Structural Realism[33]. He insisted that a true theory of international relations must be formulated not in terms of human nature or the nature of national Governments, but rather only in terms of factors operating at the level of the international system. John Mearsheimer summarizes the assumptions of this approach as follows:

(1) The international system is anarchic; it has no central authority.
(2) "[S]tates inherently possess some offensive military capability, which gives them the wherewithal to hurt and possibly destroy each other."[34]
(3) "States can never be certain about the intentions of other states."[35]
(4) The "most basic motive driving states is survival. States want to maintain their sovereignty."[36]
(5) States think strategically about how to survive in the international system[37].

In this version, Realism is driven not by human nature but by the *structure* of the international system. The basic principle of anarchy means that States must protect themselves from other States. In a system in which all States possess the means to harm each other through offensive military capability and States can *never be certain* about what other States' intentions are, they must prepare for the worst. Their very survival is potentially at stake; assuring that survival must become the priority in all interactions with other States. Thus foreign policy becomes an exercise in figuring out how to amass and maintain sufficient power to defend against other States and conquer them if necessary. Instead of pursuing strategies of cooperation to secure common interests, States instead maximize their specific gains relative to other States[38].

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ates horizontally rather than vertically, proceeds via co-ordination rather than through subordination and superordination, and binds powerful States only to the degree that it is in their interest to be bound). Some Realists will not even go this far. Michael Smith, for distance, suggests that for classical realists, States would not "peacefully consent to the creation of [rules and institutions], even if [they] could be shown to be workable . . .". Smith, *supra* footnote 27, at 1.

33. Waltz, *supra* footnote 8.
34. Mearsheimer, *supra* footnote 10, at 11.
35. *Id.*
36. *Id.* at 12.
37. *Id.*
38. *Id.* at 14.

Differences in these variants of Realism can be important for specific applications of Realist theory. For present purposes, however, the various assumptions set forth above can be distilled into three. First, Realists believe that States are the primary actors in the international system, rational unitary actors who are functionally identical. Second, they assume that the organizing principle of the international system is anarchy, which cannot be mediated by international institutions. Without a central authority, power determines the outcomes of State interactions. Third, States can be treated as if their dominant preference were for power.

International lawyers assessing Realist theory must be careful to understand the internal logic of the Realist paradigm, if only to dispel any notion that Realists are somehow immoral or love power for its own sake. On the contrary, as the name suggests, Realists perceive that they are describing the realities of the international system, however unpleasant they may be. Stanley Hoffmann highlights the value that Realists place on prudence, leading them often to counsel against well-intentioned but potentially disastrous exercises of power that can erode the foundations of sovereignty and diminish the intellectual bases for the "protection of a society's individuals and groups from external control"[39].

Further, although Realism is probably best known among international lawyers for rejecting any causal role for international legal norms in the international system, much of both the structure and substance of traditional international law appears to be built on a Realist foundation[40]. Realists and traditional international lawyers overlap on all three core assumptions: concerning actors, preferences, and the constraints imposed by the international system. They do ultimately diverge, with international lawyers seeking to blunt or alter the implications of a pure Realist analysis, but less than either camp might suspect.

The clearest overlap concerns the relevant criteria for identifying participants in the international system. Both Realists and traditional international lawyers agree that the primary actors are States, and define States as monolithic units identifiable only by the functional

39. Stanley Hoffmann, "The Politics and Ethics of Military Intervention Survival", 37 *IISS Quarterly* 29, 33-34 (1995-1996).

40. Slaughter Burley, *supra* footnote 7, at 207. See also Koh, *supra* footnote 7, at 2607-2608 (underscoring the Realist, particularly the statist and sovereigntist, foundations of traditional international law).

characteristics that constitute them as States. Neither would take account of domestic political ideology or structure, or of the multiplicity of sub-state actors that determine State policy at the domestic level. Both would assume that rules governing State behaviour apply to all States *qua* States, without regard to their internal identity. The first-order international legal principles of sovereign equality and exclusive domestic jurisdiction are safeguards of the identity and opacity of the sovereign sphere. International legal rules governing recognition and State succession similarly ensure a complete divorce between Governments and States.

For post-Westphalian international lawyers, then, States are both the source and the subject of rules governing international relations. What motivates and constrains these States in their relations with one another? As will be discussed below with regard to Institutionalism, most international lawyers assume that States have at least some common ends and that they can arrange to achieve them by means other than power.

Nevertheless, many aspects of traditional international law tacitly acknowledge the extent to which international relations are power relations.

To take only one example, consider the centrality of the territoriality principle in both international law and politics. For Realists, territorial boundaries define the area from which resources necessary for military and economic power can be extracted, thereby circumscribing the extent of State power. It is this notion of territorially defined power that underpins Arnold Wolfers's classic Realist image of States as billiard balls: opaque, hard, clearly defined spheres interacting through collision with one another[41]. The circumference of each sphere is defined by territory. For international lawyers, control over a defined territory is the first criterion of statehood, an indispensable prerequisite for participation in the international system. It thus appears that the ante for participation in the international game is the capacity to wield power.

More generally, consider the many international lawyers who have sought to reconcile their discipline with the primacy of State power in the international system. The great positivists were all steeped in this tradition. Michael Reisman reminds us of Oppenheimer's

41. Arnold Wolfers, *Discord and Collaboration: Essays on International Politics* 19 (1962).

realism, his uncompromising recognition of the limits set by the balance of power[42]. David Kennedy similarly depicts Hans Kelsen as the progenitor of a line of international law scholars who "hoped to remain realistic about state power without becoming political scientists", who embraced "formalism and respect for sovereignty" as a realistic recognition of the limits of law and the persistence of power[43]. More sweepingly, Martti Koskenniemi dichotomizes all of international legal argumentation into a debate between the apologists and the utopians — those who accept that international law reflects whatever States do and those who would have international law transcend and constrain State behaviour[44]. The apologists are Realists.

(b) *Institutionalism*

To the extent that Institutionalism reflects the belief that "rules, norms, principles and decision-making procedures" can mitigate the effects of anarchy and allow States to co-operate in the pursuit of common ends, all international lawyers are Institutionalists. "Rules, norms, principles and decision-making procedures" is the definition of an international "régime", the much studied phenomenon that reintroduced international law to political scientists in the 1980s[45]. According to Robert Keohane's influential account in *After Hegemony*, international régimes:

> "enhance the likelihood of cooperation by reducing the costs of making transactions that are consistent with the principles of the regime. They create the conditions for orderly multilateral negotiations, legitimate and delegitimate different types of state

42. W. Michael Reisman, "Lassa Oppenheim's Nine Lives", 19 *Yale Journal of International Law* 255 (1994) (reviewing S. R. Jennings and S. A. Watts, *Oppenheim's International Law* (1992)).

43. David Kennedy, "The International Style in Postwar Law and Policy", 1994 *Utah Law Review* 7, 36 (1994).

44. Koskenniemi, *supra* footnote 9, 5 (contending that, by refusing to incorporate sufficient normative aspects into their scholarship, Realists "lack critical distance" from State behaviours that most would "refuse to accept at the moment of application" and consequently cannot overcome the status of apologists for such behaviours).

45. See *International Regimes* 2 (Stephen D. Krasner, ed., 1983) ("Regimes can be defined as sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations").

> action, and facilitate linkages among issues within regimes and between regimes. They increase the symmetry and improve the quality of the information that governments receive."[46]

International régimes also enhance compliance with international agreements in a variety of ways, from reducing incentives to cheat and enhancing the value of reputation to "establishing legitimate standards of behaviour for states to follow" and facilitating monitoring, thereby creating "the basis for decentralized enforcement founded on the principle of reciprocity"[47]. Moreover, régimes are important factors not only in international political economy but also in the security area[48]. As a group of international political economists and security scholars demonstrated in the 1980s, régime

46. Robert O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* 244 (1984) (hereinafter Keohane, *After Hegemony*). See also Robert O. Keohane, *International Institutions and State Power* (1989) (hereinafter Keohane, *International Institutions and State Power*). For slightly different versions of régimes and régime theories, see Oran Young, *International Cooperation: Building Regimes for Natural Resources and the Environment* (1989) (defining régimes as human artefacts whose distinguishing feature is the conjunction of "convergent expectations" and recognized patterns of behaviour or practice in a given issue-area of social relations); John G. Ruggie, "International Responses to Technology: Concepts and Trends," 29 *International Organization* 557, 570 (1975) (defining régimes as sets of "mutual expectations, rules and regulations, plans, organizational energies and financial commitments, which have been accepted by a group of states"); Robert O. Keohane and Joseph S. Nye, Jr., *Power and Interdependence: World Politics in Transition* 19 (1977) (treating régimes as simply "governing arrangements that affect relationships of interdependence"); *Regime Theory and International Relations*, 3-11 (Volker Rittenberger, ed., 1993) (explaining the German research on régime theory and its conceptualization of international régimes as, alternatively, either "a form of institutionalized collaboration distinct from governments, treaties, or international organizations", series of "routinized and institutionalized transactions between and among states", and "explicit sets of rules which achieve prescriptive status in the sense that actors refer regularly to the rules both in characterizing their own behavior and in commenting on the behavior of others").

47. Keohane, *After Hegemony*, *supra* footnote 46, at 245.

48. For elaboration on this point, see Kratochwil, *supra* footnote 7, at 187 (noting that realism does not *ipso facto* exclude security as an issue-area susceptible to régime development, as norms underpin and structure collective security even if they are more opaque and less robust than the norms that undergird other issue-areas); see also Robert Jervis, "Security Regimes", in Krasner, *supra* footnote 45, at 173-194 (insisting that security regimes, though theoretically possible even under conditions of anarchy, are more difficult to construct and maintain than régimes in other issue-areas for the following reasons: (1) security is more competitive than other issue-areas; (2) securing one's own interests harms or menaces other States; (3) stakes, which include survival, are higher in security than in other issue-areas; and (4) detection of the actions of other States is more difficult in security than in other issue-areas, which complicates evaluation of relative security relationships).

theory can be usefully applied to explaining co-operation under conditions of conflict[49].

Primarily through the work of Keohane and many of his students, régime theory evolved into Institutionalism, an alternative paradigm to Realism[50]. The basic assumptions of Institutionalism are the following:

(1) The primary actors in the international system are States.
(2) Absent institutions, States engage in pursuit of power, but in many areas their underlying interests are not necessarily conflictual.
(3) Institutions can modify anarchy sufficiently to allow States to co-operate over the long-term to achieve their common interests.
(4) In assessing the factors that determine international outcomes, institutions "are as fundamental as the distribution of capabilities among states"[51].

Here, then, is the divergence from Realism. Whereas Institutionalists would agree that States are the primary actors in the international system and that, absent institutions, States are engaged in the pursuit of power, they would contend that the presence of institutions modifies the organizing principle of anarchy. The uncertainty and ever-present possibility of conflict that lead States in a Realist world to expect and prepare for the worst is diffused by the information provided by and through institutions[52]. These institutions

49. See Jervis, *supra* footnote 48, at 173-194; see also *Cooperation under Anarchy* (Kenneth Oye, ed., 1986); Robert Axelrod, *The Evolution of Cooperation* (1984).

50. Keohane, *International Institutions and State Power*, *supra* footnote 46. This volume is a collection of Keohane's essays on institutions through the 1980s. For those seeking to find their way through the bewildering maze of theoretical labels, the introductory essay offers a useful overview of the distinctions between Neoliberal Institutionalism, Neorealism and Liberalism. However, Keohane's summation of the Liberal tradition differs considerably from the Liberal paradigm described in the second half of this article. On the contrary, Keohane's definition of Liberalism "as a set of guiding principles for contemporary social science" essentially equates it with Institutionalism. Thus, "Neoliberal institutionalists accept a version of liberal principles that . . . emphasizes the pervasive significance of international institutions without denigrating the role of state power." *Id.* at 11.

51. *Id.* at 8. See also *Exploration and Contestation in the Study of World Politics* 23 (Peter J. Katzenstein, Robert O. Keohane and Stephen D. Krasner, eds., 1998) (elaborating the basic assumptions of institutionalism).

52. Keohane, *International Institutions and State Power, supra* footnote 46, at 33. (describing how institutions reduce information costs and enhance incentives toward co-operation and the preclusion of conflict).

must thus be factored into systemic explanations of State behaviour independently of structure. Further, having ameliorated the conditions of conflict that force States to concentrate on the quest for power, institutions can facilitate the achievement of common ends.

How do institutions accomplish this function? In a wide variety of ways. In Keohane's account, they decrease the transaction costs of inter-State relations, increase information to reduce uncertainty, and facilitate communication. In addition, institutions can promote learning, create conditions for orderly negotiations, and facilitate linkages in complex negotiations. They can also legitimize or delegitimize different kinds of behaviour. Finally, they can enhance the value of a State's reputation for honouring commitments, facilitate monitoring of State behaviour, and make decentralized enforcement possible by creating conditions under which reciprocity can operate. Other theorists, explored in greater detail below, emphasize the ways in which institutions can create a particular normative environment that helps shape both State identity and interests.

A key point here is that Institutionalism depends on the existence of common interests among States, which will not necessarily obtain among all States or in all issue areas. Where State interests do not converge, power politics is likely to continue to rule. Thus a prerequisite for Institutionalist analysis is the identification of underlying common interests, even in apparently conflictual situations. The "game" in game theory, for instance, first involves identifying which of a number of games best fits a particular pattern of State interactions, a step that requires figuring out whether States have an interest in co-ordinating their behaviour or in co-operating more extensively in a variety of ways. To be more concrete, States may all have an interest simply in co-ordinating their behaviour around one common standard, such as an agreement on navigational rules on the high seas. Alternatively, they may face a situation as in international trade, in which all have collective interest in reducing tariffs, but absent an institution that can prevent defection and solve free-rider problems each State will have an interest in raising or maintaining tariffs.

In large degree the debate between Realists and Institutionalists recapitulates the ancient debate between Hobbes and Grotius[53]. Not

53. See the account of these different strands in international relations theory in Hedley Bull, "Martin Wight and the Theory of International Relations", 2 *British Journal of International Studies* 101, 104-105 (1972) (describing Wight's

surprisingly, international lawyers typically side with Grotius. If they did not believe that international institutions — defined so broadly as to include all international legal rules and doctrines, as well as formal international organizations — could modify State behaviour and in turn bring common goals within reach, they could not justify their own existence. In the process, however, they, like the Institutionalists, continue to accept a largely Realist foundation and framework as the point of departure for conceptualizing the international system.

To take one example, the United Nations Charter is an Institutionalist response to the fact of State power. Whereas Realists design political strategies to answer power with power, international lawyers search for rules to define and thus to restrain legitimate and illegitimate uses of power. Norms of sovereign identity and equality seek to create a fictional world in which power is equalized ; prohibitions on the use of force seek to shape reality to approximate this fiction. The United Nations Charter neatly blends both political and legal approaches, combining an absolute prohibition on the use of force in Article 2 (4) with a mechanism for the concentration of power by a designated group of powerful States against a transgressor against international peace [54].

(c) *Liberalism*

The principal alternative to Realism and Institutionalism among international relations theorists is Liberalism [55]. As in the domestic realm, Liberal international relations theories have been repeatedly

differentiation of Realists, "the blood and iron and immorality men" whose principal philosophical font was the work of Machiavelli and Hobbes, from Institutionalists, "the law and order and keep your word men" who took instruction from Grotius, and from Revolutionists, "the subversion and liberation and missionary men" for whom Kant was inspiration).

54. See Anne-Marie Slaughter, "The Liberal Agenda for Peace : International Relations Theory and the Future of the United Nations", 4 *Transnational Law and Contemporary Problems* 377 (1994).

55. I use "Liberalism" here and throughout this paper as a term of art to refer to Liberal international relations theory. As Andrew Moravcsik has argued, the elements of this theory do indeed flow out of the political theory and philosophy called "liberalism", in its broadest sense. But that link is not of concern here. See Andrew Moravcsik, "The Liberal Paradigm in International Relations Theory : A Scientific Assessment", in *Progress in International Relations Theory : Metrics and Measures of Scientific Change* (Colin and Miram Fendius Elman, eds., forthcoming 2001). See also Michael Doyle, *Ways of War and Peace : Realism, Liberalism, and Socialism* (1997).

characterized as normative rather than positive theories[56]. The best-known Liberal theory in this category is Wilsonian "liberal internationalism", popularly understood as a programme for world democracy. As used here, however, Liberalism denotes a family of positive theories about how States do behave rather than how they should behave.

A number of political scientists have sought to reduce Liberalism to a set of positive assumptions that can be stated as succinctly as the Realist counterparts[57]. I draw here primarily on one particular version developed by Andrew Moravcsik[58]. The fundamental premise of Moravcsik's account of Liberal theory is that

> "the relationship of states to the domestic and transnational social context in which they are embedded critically shapes state behaviour by influencing the social purposes underlying state preferences"[59].

He elaborates this premise in terms of three core assumptions:

(1) the primacy of societal actors: "The fundamental actors in international politics are individuals and private groups, who are on the average rational and risk-averse and who organize exchange and collective action to promote differentiated interests under constraints imposed by material scarcity, conflicting values, and variations in societal influence."
(2) Representation and State preferences: "States (or other political institutions) represent some subset of domestic society, on the basis of whose interests state officials define state preferences and act purposively in world politics."

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56. See Andrew Moravcsik, "Taking Preferences Seriously: A Liberal Theory of International Politics", 51 *International Organization* 513, 514 (1997) ("its lack of paradigmatic status has permitted critics to caricature liberal theory as a normative . . . ideology").
57. See, e.g., Doyle, *supra* footnote 55; David Fidler, "Caught between Traditions: The Security Council in Philosophical Conundrum", 17 *Michigan Journal of International Law* 411, 443-446 (1996) (parsing the nuances that distinguish the various strands of liberalism; Thomas Risse-Kappen, "Ideas Do Not Float Freely: Transnational Coalitions, Domestic Structures, and the End of the Cold War", 48 *International Organization* 185 (1994); Robert O. Keohane, "International Liberalism Reconsidered", in *The Economic Limits to Modern Politics* 155 (J. Dunn, ed., 1990). Joseph S. Nye, "Neorealism and Neoliberalism", 40 *World Politics* 235 (1988).
58. Moravcsik, *supra* footnote 56, at 516-521.
59. *Id.* at 516.

(3) Interdependence and the international system: The configuration of interdependent State preferences determines State behaviour — for example, "what states want is the primary determinant of what they do".

Thus specified, this theory, hereafter referred to as Liberal theory or Liberal international relations theory, offers a way of looking at the world that is radically different from the traditional assumptions underlying international law and international relations theory.

(1) It is a bottom-up view rather than a top-down view.
(2) It is an integrated view that does not separate the international and domestic spheres but rather assumes they are inextricably linked.
(3) It is a view that preserves an important role for States but deprives them of their traditional opacity by rendering State-society relations transparent. They bear no resemblance to billiard balls, but rather to atoms of varying composition, whose relations with one another, either co-operative or conflictual, depend on their internal structure.
(4) It is a view that transforms States into Governments. By requiring us to focus on the precise interactions between individuals and "States", it leads us quickly to identify and differentiate between different government institutions, each with distinct functions and interests.

To dichotomize Realism and Liberalism in more concrete terms, where Realists look for concentrations of State power, Liberals focus on the ways in which interdependence encourages and allows individuals and groups to exert different pressures on national Governments[60]. Where Realists assume "autonomous" national decision-makers, Liberals examine the nature of domestic representation as the decisive link between societal demands and State policy[61]. Where Realists model patterns of strategic interaction based on fixed State preferences, Liberals seek first to establish the nature and

60. Moravcsik, *supra* footnote 56, at 516-517. The phenomenon of "interdependence", defined as a situation in which two or more nations each depend on the other, whether symmetrically or not, by virtue of trade and investment patterns, population flows, or even cultural and other social exchanges, can be analysed from either a Realist or a Liberal perspective. Realists focus only on the impact of interdependence on the power differential between the nations concerned, whereas Liberals analyse it as an international social phenomenon.
61. *Id.* at 518.

strength of those preferences as a function of the interests and purposes of domestic and transnational actors.

An international legal system seeking to accomplish instrumental goals such as the reduction of conflict and the increase of co-operation through laws grounded on Liberal assumptions looks very different from traditional international law[62]. To begin with, it assumes that the primary source of conflict among States is not a clash or imbalance of power, but a conflict of State interests. Further, it assumes that these interests vary from State to State as a function of the individual preferences of individuals and groups operating in society; of the distribution of different preferences within a particular society; and of the degree to which a particular Government is representative of individuals and groups in its own society and in transnational society. Based on these assumptions, the best way to resolve conflict and to promote co-operation in the service of common ends is to find ways to align these underlying State interests, either by changing individual and group preferences or by ensuring that they are accurately represented. In the military context, prescriptive Liberal international relations theories thus seek to ensure that all sectors of a given society who are likely to be directly affected by a war are represented in the decision to go to war. In the economic context, Liberal international relations theorists seek to avoid trade wars by ensuring that special interest groups with trading interests that are not representative of the population as a whole do not capture the decision-making process.

Second, a Liberal conception of international law focuses on States as the agents of individual and group interests. This means that the law designed to achieve specific international outcomes does not have States as its objects, but rather the individuals and groups that States are assumed to represent[63]. It does not mean, however, that international legal rules and institutions would no longer have States as subjects. Traditional international law, after all, imposes a

62. For further elaboration of this point, see Anne-Marie Slaughter, "A Liberal Theory of International Law", 240 *Proceedings of the 94th Annual Meeting of the American Society of International Law*, 5-8 April 2000.

63. Note that the concept of State representation of individual and group interests need not imply fair, or equal, or accurate representation. A military dictatorship may represent the interests of only a very small portion of the State's population; nevertheless, it represents a particular "interest". See Moravcisk, *supra* footnote 56, at 518 ("No government rests on universal or unbiased political representation; every government represents some individuals and groups more fully than others").

duty of domestic implementation, requiring States to make whatever domestic legal changes are necessary to conform to their international obligations. The decision whether to achieve a particular policy solution by laws binding on States alone or by laws and institutions aimed directly at individuals and groups would depend on an empirical determination as to which strategy would be most effective in altering either the behaviour of individual and groups as represented by States, or the mode and scope of State representation.

3. Rationalism versus Constructivism

The families or paradigms of IR theories set forth above define themselves in terms of assumptions about who the principal actors in the international system are and what forces and factors determine the outcomes of interactions between them. Realism and Institutionalism both specify States as the primary actors, but then diverge to focus on the relative impact of State power versus international institutions in determining outcomes. Liberalism focuses on individuals and groups and the way in which their preferences are represented by State actors; it further regards the intensity of those represented preferences as the determinant of international outcomes.

What these paradigms do not specify is how the actors they identify behave, the internal or external mechanisms by which the stipulated factors actually generate or produce the stipulated outcomes. What actually happens? How do State leaders actually reason about and decide on a particular course of action?

To illustrate the point, assume that power is the most important factor determining outcomes in the international system. Do State leaders assess the balance of power, calculate their position relative to other States, and decide to increase military spending to improve their position? Or does a particular balance of power prevailing in either the system as a whole or a particular region create a culture of mistrust within States long used to being dominated, instilling an automatic defensiveness and suspicion in leaders of such States?

(a) *Calculation and socialization*

Two quite different causal mechanisms are at work in this example. In the case of leaders whom we imagine assessing the prevailing balance of power and determining their defence policies

accordingly, the behavioural mechanism at work is calculation. In the case of leaders whom we imagine acting, or rather reacting, reflexively, from an ingrained psychological or cultural impulse, the mechanism is socialization. Further, these two mechanisms are likely to operate through different thought processes, or logics.

Social scientists James March and Herbert Simon distinguish between a "logic of consequences" versus a "logic of appropriateness"[64]. The logic of consequences involves instrumental calculation concerning how best to advance a predetermined set of interests. If a particular course of action is selected, how will those interests be affected? Or even more bluntly, "how do I get what I want"[65]? This logic is quickly complicated by the prospect of strategic intervention, in which multiple actors are calculating consequences and attempting to factor in the consequences of each other's calculations.

The logic of appropriateness, by contrast, involves socialization, in the sense that the actor seeks to determine what is "the right thing to do" consistent with that actor's identity or sense of self. The presumed thought process that occurs is to ask: "What kind of a situation is this? And what am I supposed to do now?"[66] Further, "What would other people like me — members of the same social class, the same profession, the same moral community, the same nationality — do?" In this conception, interests can be neither fixed nor predetermined; rather, the perception of interests is likely to flow from a felt identity. Yet neither is identity itself fixed, as it often flows from a felt identity with others, suggesting that it could fluctuate either though different associations or through changing self-perception[67].

These are differences that make a difference. In thinking about norms, for instance, it is possible to imagine norms operating through both types of mechanisms, but with a different type of impact and for quite different purposes. If actors are calculating how best to advance their interests, they are quite likely to establish norms as a means of reducing informational uncertainty, providing a focal point for co-ordinated action, and decreasing transaction costs.

64. See James G. March and Johan P. Olsen, "The Institutional Dynamics of International Political Orders", in Katzenstein, Keohane and Krasner, *supra* footnote 51, at 309-312.

65. Martha Finnemore and Kathryn Sikkink, "International Norm Dynamics and Political Change", 52 *International Organization* 887 (1998), reprinted in Katzenstein, Keohane and Krasner, *supra* footnote 64, at 274-275.

66. *Id.*

67. March and Olsen, *supra* footnote 64, at 312.

If actors are asking instead what would be the appropriate course of action, then they might actively seek to identify a pre-existing norm as a behavioural guide. In the calculation scenario, interests come first and norms help advance those interests. In the socialization scenario, norms come first and shape both identity and interests.

As discussed at the outset of this lecture, Robert Keohane has distilled these differences into two "optics", an "instrumentalist optic" and a "normative optic"[68]. He initially advanced this distinction as a way of distinguishing between IR and IL. But again, that division is easy to dissolve. Within IL, consider the debate between positivists and natural lawyers, or functionalists and culturalists. Many international lawyers are entirely comfortable with an image of States as rational calculators, consenting to treaties or engaging in customary practices that they have determined will advance their individual and collective interests. Many others, however, will insist that States are profoundly shaped by the carapace of norms and institutions that they acquire when they gain and exercise their sovereignty[69].

The debate is, if anything, even more heated and partisan among IR scholars. It is framed in terms of Rationalists versus "Constructivists". Constructivists are so named, or rather so name themselves, because of their emphasis on the way interests and identities are constructed, rather than fixed or given. Constructed identities and interests, in turn, are contingent — on ideas, culture, norms, law — a host of factors that humans, including scholars, activists, leaders, can influence.

(b) *The elements of Constructivism*

As with the other paradigms set forth above, a number of scholars have sought to define Constructivism[70]. They generally agree that

68. Keohane, *supra* footnote 11.
69. Chayes and Chayes, *supra* footnote 1, at 27-28.
70. See, e.g., Peter J. Katzenstein, Robert O. Keohane and Stephen D. Krasner, "Preface: *International Organization* at Its Golden Anniversary", in Katzenstein, Keohane and Krasner, *supra* footnote 51, at 34-36 (describing constructivism as a sociological orientation that illuminates sources of conflict and co-operation while producing normative consequences); John Gerard Ruggie, "What Makes the World Hang Together? Neo-utilitarianism and the Social Constructivist Challenge", 52 *International Organization* 185 (1998) ("constructivism is about human consciousness and its role in international life . . . [N]ot only are identities and interests of actors socially constructed, but . . . they must share the stage with a whole host of other ideational factors that emanate from the human capacity and will . . ."); Finnemore and Sikkink, *supra* footnote 65,

Constructivism, like Rationalism, is an *ontology* rather than a theory, in the sense that it is a general conception of what exists rather than what causes what. According to Alexander Wendt, one of the pioneers of a constructivist approach to IR, Constructivism is both anti-materialist, in the sense that it focuses on ideas and ideals rather than material interests, and anti-rationalist, in the sense that it rejects the idea of instrumental calculation based on fixed preferences[71].

Beyond these general claims, Wendt specifies the elements of Constructivism as follows. He begins by accepting all five of the basic Realist assumptions set forth by Mearsheimer: the international system is anarchic; States possess offensive capabilities; they can never be certain of each other's intentions; they wish to ensure their own survival; and they are rational. He underlines two additional assumptions that Mearsheimer would accept: a commitment to States as the basic units of analysis in the international system and a commitment to "systemic theory", meaning theory that focuses on the interaction of States within the structure of the international system[72].

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at 272-273 (arguing that "notions of duty, responsibility, identity, and obligation" are all social constructions that may, just as does self-interest and personal gain, motivate behaviour); Alexander Wendt, "Constructing International Politics", 19 *Journal of International Security* 5 (1994-1995) (hereinafter Wendt, "Constructing International Politics") (describing constructivism as a "concern with how world politics is 'socially constructed', which involves two basic claims: that the fundamental structures of international politics are social rather than strictly material (a claim that opposes materialism), and that these structures shape actors' identities and interests, rather than just their behaviour (a claim that opposes rationalism)"); Alexander Wendt, "Anarchy Is What States Make of It", 46 *International Organization* 391 (1992), reprinted in *Theory and Structure in International Political Economy: An International Organization Reader* 79 (Charles Lipson and Benjamin Cohen, eds., 1999) (hereinafter Wendt, "Anarchy is What States Make of It") (defining constructivism as an approach which accepts that actors' identities and interests are constructed and transformed under anarchy "by the institution of sovereignty, by an evolution of cooperation, and by intentional efforts to transform egoistic identities into collective identities."); Alexander Wendt, *Social Theory of International Politics* 7 (1999) (hereinafter Wendt, *Social Theory of International Politics*) (identifying four "sociologies" involved in the debate over constructivism, namely individualism holism, materialism, and idealism); *The Culture of National Security* 46 (Peter J. Katzenstein, ed., 1996) (suggesting that for some scholars, foreign policy discourses are a process of production and reproduction of State identities and the primacy of the territorial boundaries in the calculus of the interests of States; *Security Communities* (Emanuel Adler and Michael Barnett, eds., 1998) (applying constructivism to the study of security communities); Michael N. Barnett, *Dialogues in Arab Politics: Negotiations in Regional Order* (1998) (applying constructivism to the analysis of the Arab regional system).

71. Wendt, *Social Theory of International Politics*, *supra* footnote 70, at 22, 34-35.

72. Wendt, "Constructing International Politics", *supra* footnote 70, at 8.

It is the definition of structure, however, that differentiates Constructivism from Realism, or rather constructivist Realism from rationalist Realism. As Wendt explains, Neorealists define the structure of the international system as consisting only of the distribution of material capabilities. For Constructivists, by contrast, that structure is also composed of social relationships. These social relationships, in turn, are composed of "shared knowledge, material resources, and social practices"[73].

To get a more concrete sense of what these differences actually mean, it is helpful to turn to John Ruggie's account of Constructivism. For Ruggie, the distinction between Constructivism and what he calls Neo-utilitarianism, or instrumental calculation, is straightforward. "[C]onstructivism is about human consciousness and its role in international life."[74] The realities of international politics are understood "inter-subjectively", meaning through the collective perception of States or any other actors in the international system. Collective perception, in turn, depends on ideas and principled beliefs as well as material interests, "social facts" as well as physical facts.

> "Social facts include money, property rights, sovereignty, marriage, football, and Valentine's Day, in contrast to such brute observational facts as rivers, mountains, population size, bombs, bullets, and gravity, which exist whether or not there is agreement that they do."[75]

In other words, much of the world is what we make of it[76].

Ruggie also emphasizes that ideas and principled beliefs have normative as well as instrumental dimensions. They affect behaviour through a process of felt obligation as well as instrumental calculation. This felt obligation is itself a part of the socialization mechanism, which can "lead states to redefine their interests or even their sense of self". Learning is a key part of this process, learning that is not simply instrumental, in the sense of problem solving, but transformative, in the sense of changing the definition of what the problem is and what it would mean to solve it. Finally, humans engage in deliberation and persuasion, which requires a concept of actors

73. Wendt, "Constructing International Politics", *supra* footnote 70, at 8.
74. Ruggie, *supra* footnote 70, at 216.
75. *Id.*
76. See Wendt, "Anarchy Is What States Make of It", *supra* footnote 70, at 79.

who are "not only strategically but also discursively competent"[77]. Talking matters as much as calculating.

Martha Finnemore and Kathryn Sikkink, on the other hand, reject the dichotomies of materialism versus ideational factors or norms versus rationality[78]. They insist that individuals whom they call "norm entrepreneurs" routinely engage in strategic calculation about how to advance their ends; conversely, calculation on the basis of fixed preferences can include ideas and normative commitments as well as material interests. They present the heart of Constructivism as an account of how norms work: how they emerge, how they influence behaviour, and how they are internalized to become part of the social structure that conditions actor choice[79]. The fights between Constructivists and non-Constructivists, in turn, involve the precise link

> "between rationality and norm-based behaviour, the particular logic that drives action, and the degree to which norms operate by constraining choice or by internalizing a different set of choices"[80].

At its most basic, this is the old debate about free will versus determinism dressed in new clothes.

Not surprisingly, many lawyers are drawn to Constructivism. Many lawyers are norm entrepreneurs; virtually all lawyers engage daily in deliberation and persuasion — a world of discourse. Many lawyers are intuitively uncomfortable with purely Rationalist instrumental accounts, believing deeply and verifying empirically through their practice the ways in which the rules that they shape in turn shape the identity and interests of the actors who operate within those rules. For these lawyers, Constructivism provides a deeply satisfying account of how and why what they do matters. For other lawyers, however, legal rules are indeed tools to enable clients — individuals, corporations, NGOs, Governments, or international organizations — pursue their interests and values. There is nothing wrong with "rules as tools"; instrumental rationality celebrates the human capacity to escape the constraints of structure and the weight of collective expectations. IR theory can never resolve these debates,

77. Finnemore and Sikkink, *supra* footnote 65, at 274-275.
78. *Id.*
79. *Id.* at 255-266.
80. *Id*. at 271.

any more than can law or philosophy, but lawyers can find Constructivist or Rationalist variants within all three of the major IR paradigms.

(c) *Marrying Constructivism with Realism, Institutionalism and Liberalism*

The major paradigms of Realism, Institutionalism and Liberalism each encompass more specific theories that rely on Constructivist as well as Rationalist causal mechanisms. However, it remains true that most standard overviews of IR theory privilege the Rationalist versions of each of the paradigms. Constructivist variants are thus most often found in the role of critique.

It often seems particularly difficult to square Realism with Constructivism, given Realism's uncompromising insistence on the role of power in determining State behaviour. However, as noted above, Wendt is willing to embrace the principal assumptions of Realism. He would also agree that at least in some parts of the international system, States behave according to Realist precepts. The difference is that Wendt insists that States pursue power because they have learned, or been taught, to pursue power. The need to amass power to ensure survival does not flow ineluctably from the fact that other States have power, but from the learned perception of that power as a threat. The structure of the international system comprises these perceptions and resulting practices, accreting over decades and centuries to determine behaviour. Rationalist Realists accept the enduring fact of some distribution of power across the system and insist that the implications of that distribution are unalterable absent a central coercive authority. Constructivist Realists believe that those implications can be changed as a result of learning to think about them differently.

The debates between Rationalists and Constructivists are most developed within Institutionalism. To take only one example, consider Andrew Hurrell's critique of Rationalist régime theory [81]. Hurrell claims that although the Rationalist account of international institutions develops the idea of self-interest and reciprocal benefits, it "downplays the traditional emphasis on the role of community and a

81. Andrew Hurrell, "International Society and the Study of Regimes: A Reflective Approach", in *International Rules: Approaches from International Law and International Relations* 206-224 (Robert J. Beck, Anthony Clark Arend and Robert D. Vander Lugt, eds., 1999).

sense of justice" [82]. A view of rules primarily as tools for reducing transactions costs, increasing information, and decreasing opportunities for cheating cannot account for a "sense of community" and the emergence of co-operation through the growing perception of common interests [83]. Nor can it address fundamental perceptions of justice and equity in the formation of State preferences. Finally, Rationalist approaches can neither integrate the importance of domestic politics in creating institutions and making them work, nor elaborate the relationship between legal rules and the broader structure of the international system. Constructivist approaches, however, which Hurrell embraces as part of the older tradition of sociological institutionalism, focus on all these factors [84].

Finally, Liberalism readily incorporates both Rationalist and Constructivist causal mechanisms. In Moravcsik's account of different types of Liberal theory, he includes "ideational liberalism" as well as commercial and republican liberalism [85]. Ideational liberalism "views the configuration of domestic social identities and values as a basic determinant of state preferences, and, therefore, of interstate conflict and cooperation" [86]. "Social identity", in turn, refers to the different ways individuals constitute themselves as a nation, as a particular type of political system, or as a particular type of economic order. How and why they constitute themselves this way is left open.

"Liberals take no distinctive position on the origins of social

82. Andrew Hurrell, *supra* footnot 81, at 210.
83. *Id.* at 214-215.
84. For another account of Constructivist Institutionalist theory, see Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* 56-67 (2000). Krasner describes rational choice institutionalism as an approach that conceives of norms and rules as the voluntary choices of calculating actors who perceive resulting institutions as stable equilibria that generate shared expectations and outcomes beneficial over a range of policy options. Similarly, neoliberal institutionalism is a rational and contractual response to externalities, collective goods problems, and informational imperfections that works to provide information, reduce transaction costs, and offer opportunities for issue linkages, thereby promoting more efficient institutional designs. Finally, sociological institutionalism functions to socialize relevant actors by embedding them in networks of intersubjectively shared cognitive constructs so as to define their interests and capabilities and thereby determine "the patterns of appropriate economic, political, and cultural activity engaged in" by individuals, organizations, interest groups, and ultimately States — for some sociological institutionalists, actors create the institutions, whereas for others it is the institution that generates the agents.
85. Moravcsik, *supra* footnote 56, at 524-533.
86. *Id.* at 525.

> identities, which may result from historical accretion or be constructed through conscious collective or state action, nor on the question of whether they ultimately reflect ideational or material factors."[87]

In practice, ideational liberal theories focus on the role of nationalism, ideology, and economic libertarianism versus social welfare economics in determining State preferences. Many of these theories are explicitly Constructivist in their explanations of how individuals and States come to identify themselves as part of a particular nation, as adherents of a particular political ideology, or as proponents of more or less economic regulation.

4. The Paradigms Applied

Before proceeding to various case studies applying IR theory to specific problems in international law, it may be helpful to offer a more general example. Consider the effort to outlaw aggressive war in Article 2 (4) of the United Nations Charter[88]. The refusal to use force to resolve disputes, for individuals or nations, can be a deontological or moral value; it can be justified on the ground that it is wrong to kill or inflict physical injury. But a prohibition on the use of force may also be an instrumental rule, adopted in the belief that creating both a legal rule and an accompanying social norm against war is the best means of assuring peace. It is equally possible to adopt a formal balance of power system, as in the Concert of Europe system, as the best hope of assuring peace. Or, following Immanuel Kant, the path to peace may be through the spread of liberal democracy, in which case the international legal rule adopted might be the right of democratic governance[89].

In each of these instrumental examples, peace is the desired end-

87. Moravcsik, *supra* footnote 56, at 525.

88. UN Charter, Art. 2 (4) ("All Members shall refrain in their 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").

89. Immanuel Kant, *Perpetual Peace* (Lewis W. Beck, ed., 1957) (1795); Michael W. Doyle, "Kant, Liberal Legacies, and Foreign Affairs, Part 1", 12 *Philosophy and Public Affairs* 205 (1983); Michael W. Doyle, "Kant, Liberal Legacies, and Foreign Affairs, Part 2", 12 *Philosophy and Public Affairs* 323 (1983); Thomas M. Franck, "The Emerging Right to Democratic Governance", 86 *American Journal of International Law* 46 (1992).

state; the rules or norms of non-use of force, balance of power, or democratic governance are deliberately chosen instruments to try to achieve that end-state. In this case, an express or implied causal relationship underlies the "choice", even if it in fact evolved incrementally over time. The paradigms of IR theory make these choices explicit and expose them to critique.

A choice to institutionalize a rule of non-use of force, particularly as a cornerstone of the international legal system, may reflect the assumption that war is a collective action problem. This view assumes that all or most States have a common interest in avoiding war, but must defend themselves if attacked or join in to protect their interests once a war is begun. If an institution could be created to assure each State of the non-belligerent intentions of its neighbour and to raise substantially the reputational and even material costs of using force, States are likely to co-operate in the quest for peace. This is Institutionalist logic[90].

A choice to institutionalize a balance of power system, on the other hand, reflects Realist logic. The underlying assumption is not that all States would co-operate to avoid war if they could, but rather that States ineluctably and unavoidably seek power. The only way to constrain power is through countervailing power; rules that do not align with the distribution of power will be swiftly swept away. As a personal matter, however, a Realist scholar or statesman could sincerely seek peace; he or she would simply believe that the only way to achieve it would be to ensure that a powerful State be deterred from using force by an equally powerful rival or coalition of rivals. Note also here that Realists are not opposed to institutions *per se*; they simply believe that institutions have no independent causal impact. But they can be useful tools to achieve the ends of the most powerful States in the system.

A third choice, to promote peace through the spread of liberal

90. This illustration does not assume, however, that all political scientists who would subscribe to Institutionalist theory necessarily take this view. Institutionalist theory always proceeds based on two questions: first, do States have convergent interests sufficient to enable a properly designed institution help them achieve collective goals. That is, are there joint gains coupled with problems of attaining such gains. Second, how can international institutions help overcome these problems? Regarding the first question, it is quite possible that many Institutionalists would conclude that many States still perceive aggressive war as a useful policy tool and thus that the use of force is not an appropriate problem for the application of Institutionalist theory. I am indebted to Robert Keohane for reminding me of this point.

democracy, reflects Liberal logic. The causal mechanism for producing peace involves individuals and groups in society and their representation by a particular form of government. Further, the democratic peace hypothesis comes in a Rationalist and a Constructivist variety. The Rationalist account assumes that a reluctance to use force will result, in Thomas Jefferson's formulation, from transferring the decision to go to war "from the Executive to the Legislative body, from those who are to spend to those who are to pay"[91]. Voters who know that they or their family members will be soldiers or who recognize that as taxpayers they will have to bear the costs of war are far less likely to vote for it. The Constructivist explanation, by contrast, assumes that polities that live by the rule of law at home will replicate their values and seek non-violent settlement of their disputes abroad[92].

IR theory thus first problematizes the existence of the norm against the use of force by posing the question whether it flows from a deontological or an instrumental choice. If it is adopted or justified as the most likely means to achieve the maximum measure of peace in the international system, IR theory can expose the Institutionalist logic underlying that causal claim. The next step is to critique that logic by advancing the alternatives embraced by competing paradigms, arguing that institutionalizing the norm is bound to fail because only power can deter power or because it can never deter leaders who do not need the consent of their peoples to wage war. A less contentious approach would be to develop supplementary strategies showing how Liberal and Institutionalist logic could fit together by coupling a norm of non-use of force with efforts to establish and promote a right of democratic governance[93].

5. Conclusion

The domain of IR theory is a rich and varied terrain. Realism, Institutionalism and Liberalism capture one set of basic dimensions along which different families of theories vary; Rationalism and Constructivism highlight ways in which specific theories differ

91. Letter from Thomas Jefferson to James Madison (1789), in *The Papers of Thomas Jefferson*, Vol. 15, 397 (Julian P. Boyd, ed., 1969).
92. Bruce Russett, *Grasping the Democratic Peace: Principles for a Post-Cold War World* (1993).
93. Franck, *supra* footnote 89.

within these broad paradigms. Much of the IR literature, perhaps too much, is consumed with debates between and within the paradigms, often at a relatively abstract level. For lawyers seeking not only to understand but to use IR theory, however, the best approach is to explore both the paradigms and many of the more specific theories within them in the context of specific legal and political problems. Working through these problems, drawing on literature from both political science and international law, allows lawyers to get a concrete sense of the kinds of arguments that each paradigm is likely to generate. Critiquing these arguments based on the assumptions of alternative paradigm sharpens the differences between them. The next three chapters thus focus on case studies, beginning with humanitarian intervention.

CHAPTER II

HUMANITARIAN INTERVENTION

Introduction

Humanitarian intervention is one of the most important and pressing issues currently facing the international community. In his Annual Report to the General Assembly in September 1999, Kofi Annan declared a vital need to reach a new accommodation of the twin imperatives of State sovereignty and "individual sovereignty". He framed the issue in terms of the dilemmas posed by Rwanda and Kosovo:

> "To those for whom the greatest threat to the future of international order is the use of force in the absence of a Security Council mandate, one might ask — not in the context of Kosovo — but in the context of Rwanda: If, in those dark days and hours leading up to the genocide, a coalition of States had been prepared to act in defence of the Tutsi population, but did not receive prompt Council authorization, should such a coalition have stood aside as the horror unfolded?
>
> To those for whom the Kosovo action heralded a new era when States and groups of States can take military action outside the established mechanisms for enforcing international law, one might ask: Is there not a danger of such interventions undermining the imperfect, yet resilient, security system created after the Second World War, and of setting dangerous precedents for future interventions without a clear criterion to decide who might invoke these precedents and in what circumstances?"[94]

Article 2 (4) of the United Nations Charter requires States to "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State"[95]. Article 2 (1) provides that "[t]he Organization is based

94. Secretary-General Presents His Annual Report to General Assembly, UN Press Release SG/SM7136, GA/9596, 20 September 1999.
95. UN Charter, Art. 2 (4).

on the principles of the sovereign equality of all its Members". Articles 1 (2) and 55 affirm the "principles of equal rights and self-determination of peoples"[96]. To continue from the Secretary-General's Report, he acknowledges the historical legacy and powerful policy reasons behind these provisions. But he also highlights the provision in the Charter's Preamble that '"armed force shall not be used in the common interest"'[97]. He asks: "But what is that common interest? Who shall define it? Who shall defend it? Under whose authority? And with what means of intervention?" He concludes: "These are the monumental questions facing us as we enter a new century."[98]

They are indeed. And the literature debating these questions is extensive[99]. To many participants in these debates, the issues raised may seem perennial and unresolvable, bound to come round and round at regular intervals. But as the Secretary-General insists, the policy dilemmas inherent in any effort to formulate a doctrine of humanitarian intervention within the security framework established by the United Nations Charter are acute and pressing. Significant changes in both international law and politics over the past half century have also altered the context of the debate. The evolution of human rights law makes it possible to speak of "individual sovereignty" as an international legal concept. Globalization and the end of the Cold War make it possible to imagine international institutions that can function more effectively, although inevitably imperfectly, to reflect the interests and values of a global community. These changes may yet lead policymakers, scholars, and concerned public citizens to weigh both the dangers and the benefits of humanitarian intervention quite differently than they have in the past.

The purpose of this chapter is not to formulate a new legal doctrine or set of policy recommendations concerning humanitarian intervention. It is rather to understand how IR theory can help inter-

96. UN Charter, Art. 2 (1); UN Charter, Art. 55.

97. Secretary-General Presents His Annual Report to General Assembly, *supra* footnote 94.

98. *Id.*

99. It is impossible to compile anything approaching a comprehensive review of this literature. Notable contributions, largely from the American literature, relied on here include: *Humanitarian Intervention and the United Nations* (Richard B. Lillich, ed., 1973); Fernando R. Teson, *Humanitarian Intervention: A Philosophy of International Law* (1988); *Emerging Norms of Justified Intervention* (Laura W. Reed and Carl Kaysen, eds., 1993); *Enforcing Restraint* (Lori Damrosch, ed., 1993); Sean Murphy, *Humanitarian Intervention: The United Nations in an Evolving World Order* (1996); Stanley Hoffmann, *The Ethics and Politics of Humanitarian Intervention* (1996).

national lawyers think their way through the present round of the debate. Section 1 offers a definition of humanitarian intervention and a brief discussion of the ways that the legal and policy debates have evolved since the 1970s. Section 2 turns specifically to the legal question, focusing on the current dispute over the legality of the NATO campaign in Kosovo as a means of demonstrating how deep assumptions about the nature of the international system can inform jurisprudential and hence doctrinal choices. Section 3 addresses the policy debate, using IR theory to "map" different arguments through the lens of the different paradigms presented in Chapter I. Section 4 seeks to read this map to uncover areas of consensus among analyses proceeding from quite different underlying assumptions. Section 5, concluding, highlights the limitations of IR theory and emphasizes the normative choices that international lawyers must make.

1. Setting the Stage

The first issue facing international lawyers is to define "humanitarian intervention" as a specific instance of the more general concept of "intervention", a concept that itself has generally been developed to inform the doctrine of non-intervention. Sean Murphy, whose magisterial historical study of humanitarian intervention was published in 1996, offers the following definition:

> "Humanitarian intervention is the threat or use of force by a state, group of states, or international organization primarily for the purpose of protecting the nationals of the target state from widespread deprivations of internationally recognized human rights."[100]

This definition is striking for its link between "humanitarian" purposes and the deprivation of "internationally recognized human rights".

In 1970, the United Nations General Assembly passed a resolution promulgating the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations[101]. One of the

100. Murphy, *supra* footnote 99, at 11-12.

101. Resolution 2625 (XXV), 1883rd Plenary Meeting, 24 October 1970. See UN doc. A/L600, at 7-17 ("Commemorative Session of the General Assembly on the Occasion of the Twenty-Fifth Anniversary of the United Nations").

principles set forth concerned the "Duty Not to Intervene in Matters within the Domestic Jurisdiction of Any State". According to the General Assembly:

> "No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law." [102]

In a volume published in 1972 by a group of Yugloslav scholars designed to explicate this resolution, Tomislav Mitrovic set forth a detailed history of the "concept of non-intervention in . . . traditional international law" [103]. He focused particularly on the link between the definition of intervention and the use of force, beginning with Oppenheim's insistence that intervention must mean "dictatorial interference" in the affairs of another State [104].

As Mitrovic explains:

> "Force had always meant armed force, and it was generally manifested in three basic cases: intervention in civil strife in other states (the most drastic form of intervention), armed intervention in a war in progress among other states, and the various forms of 'humanitarian' interventions." [105]

His insistence on putting "humanitarian" in quotations reveals a great deal. "Humanitarian" purposes were widely regarded simply as a cover for traditional power politics, a way of circumventing the restrictions on the aggressive use of force that the Charter sought to prohibit. This note sounds clearly in the proceedings of an American conference on humanitarian intervention also held in 1972, in which Ian Brownlie argued that a rule "allowing humanitarian intervention, as opposed to discretion in the United Nations to act through the

102. UN doc. A/L600, *supra* footnote 101.

103. Tomislav Mitrovic, "Non-Intervention in the Internal Affairs of States", in *Principles of International Law concerning Friendly Relations and Cooperation* 219-275, 224 (Milan Sahovic, ed., 1972).

104. *Id.* at 224 (citing Lassa Oppenheim and Hersch Lauterpacht, *International Law*, Vol. 1 (1937), at 305).

105. *Id.* at 225.

appropriate organs, is a general license to vigilantes and opportunists to resort to hegemonial intervention" [106].

Summarizing the views of the other participants at the American conference, Tom Farer could identify a consensus only regarding the "desirability of humanitarian intervention to prevent large-scale abuse", subject to a number of restrictive criteria concerning the exhaustion of multilateral remedies and the need to assess the relative "damage to the target society as well as to the imminent victims" [107]. No mention is made here of the international law of human rights as a countervailing or at least parallel legal régime to that governing the use of force. Moreover, even Michael Reisman, who expressed strong support for the ability to protect individuals from grave human rights abuses, spoke only of the future need to "fashion[] an instrument in international law for mitigating these horrors" [108].

The contrast between this discussion and Murphy's definition of humanitarian intervention highlights one of the major shifts in the debate between the 1970s and the 1990s: an increasingly dramatic tension between the law governing the use of force and the law governing the protection of human rights. As Lori Damrosch points out, the doctrine of non-intervention has always had a human rights component. She presents the "classical" doctrine of non-intervention as attempting to achieve two principal objectives: conflict prevention or containment and the autonomy or political independence of a State [109]. These objectives, in turn, "correlate" with two sets of underlying values: State system values and human rights values [110]. The human rights values she is referring to, however, involve "principles relating to the rights of individual human beings to exercise political freedoms and to participate in self-government" [111]. Murphy, by contrast, is concerned more with even more basic individual rights, such as rights to life and freedom from physical harm [112]. The

106. Ian Brownlie, "Thoughts on Kind-Hearted Gunmen", in *Humanitarian Intervention and the United Nations* 13-148, 148 (Richard B. Lillich, ed., 1973).
107. Tom J. Farer, "Humanitarian Intervention: The View from Charlottesville", in *Humanitarian Intervention and the United Nations* 149-164, 164 (Richard B. Lillich, ed., 1973).
108. W. Michael Reisman, "Transcript of Conference Proceedings", in *Humanitarian Intervention and the United Nations* 17-18 (Richard B. Lillich, ed., 1973).
109. *Id.*
110. *Id.*
111. Damrosch, *supra* footnote 99, at 93.
112. Murphy, *supra* footnote 99, at 17-18.

right to self-determination generally favours a norm of non-intervention; the right to be free from killing or torture is more likely to favour at least a limited norm of intervention.

A second major shift concerns the evolution of the use of force régime itself. In the same article, written in 1993, Damrosch wrote:

> "[Tom] Farer concludes, and I concur, that it is not possible to construct a persuasive argument to legitimize the use of force for humanitarian purposes while remaining within the idiom of classical international law."[113]

Yet other lawyers and policy commentators have sought to argue for an "emerging norm" of humanitarian intervention, based on changing State practice[114]. Both camps review the examples of Somalia, the Kurds in Iraq, Bosnia, Haiti and the handwringing over Rwanda, but draw quite different conclusions. Advocates of a cautious approach argue that the power and progress of international law are firmly grounded in incrementalism. Proponents of an emerging norm, or indeed a fully fledged doctrine of humanitarian intervention argue that this incremental approach ignores the significance of repeated State action on the part of some of the world's most powerful States, creating a shift in expectations on the part of States likely to intervene, of bystander States, of global public opinion, and of the States in which a humanitarian disaster is taking place.

The legal debate has been intertwined with an active and ongoing policy debate. As noted above, Kofi Annan has repeatedly insisted that defining a new policy and doctrine governing humanitarian intervention through multilateral and regional organizations is the cornerstone of a stable and effective world order in the twenty-first century[115]. In the *Kosovo Report*, the Independent Commission on

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113. Tom J. Farer, "An Inquiry into the Legitimacy of Humanitarian Internvention", in *Law and Force in the New International Order* 185 (Lori Fisler Damrosch and David J. Scheffer, eds., 1991), cited in Lori Fisler Damrosch, "Changing Conceptions of Intervention in International Law", in *Emerging Norms of Justified Intervention* 91 (Laura W. Reed and Carl Kaysen, eds., 1993).

114. See Reed and Kaysen, *supra* foortnote 99. See also Anthony D'Amato, "Humanitarian Intervention: Panama and Grenada", in *International Law and Political Reality, Collected Papers*, Vol. 1, 180-191 (1995); Anthony D'Amato, *International Law: Process and Prospect* 226-231 (1987), cited and countered extensively in Farer, *supra* footnote 113.

115. See Secretary-General Presents His Annual Report to General Assembly, *supra* footnote 94.; see also Kofi Annan, "Human Rights and Humanitarian Intervention in the Twenty-First Century", in *Realizing Human Rights: Moving from Inspiration to Impact* 309-320 (Samantha Power and Graham Allison, eds., 2000).

Kosovo writes that "the time is now ripe for the presentation of a principled framework for humanitarian intervention" which could be used "to guide future responses to imminent humanitarian catastrophes and . . . to assess claims for humanitarian intervention"[116]. The Commission hopes that such a framework could be adopted by the United Nations General Assembly as a Declaration[117]. Almost coincident with the publication of the *Kosovo Report*, the US Council on Foreign Relations issued a "Council Policy Initiative" setting forth three possible positions on humanitarian intervention to be adopted by a new US presidential administration[118].

From the perspective of international relations theory, both the renewed vigour and the changing elements of the legal and policy debates over humanitarian intervention are not surprising. Each of the three schools of theory set forth in Chapter I would point to a major underlying change. Realists would emphasize the end of the Cold War and the resulting emergence of a new geopolitical configuration, replacing a bipolar international system with an essentially unipolar one at least regarding military power. Institutionalists would point to a new awareness of the importance of international institutions in a globalized world and the wider range of functions that they are needed to perform. For Liberals, the most salient shift is the strengthening of the global human rights movement, operating through transnational networks of individuals and groups in domestic society who are increasingly able to publicize their concerns through the media and thus influence government policy. All three of these factors undoubtedly play an interrelated role. The task in the remainder of this chapter is to uses these different IR lenses not simply to explain the debate but to chart a way through it, for lawyers and policymakers alike.

2. Doctrinal and Jurisprudential Debates

Most IR/IL scholars would agree with Kenneth Abbott's assertion quoted above, that "as a social science, IR does not purport to be . . . a true 'legal method' capable of asking doctrinal questions"[119]. It is true

116. The Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned* 10 (2000).
117. *Id.*
118. *Humanitarian Intervention: Crafting a Workable Doctrine* (Alton Frye, Project Director, 2000).
119. Abbott, *supra* footnote 7, at 361.

that IR theory cannot guide an international lawyer through the review of the applicable texts and customary law sources necessary to allow her to formulate a view as to what the contemporary international legal rule governing humanitarian intervention actually is. It can offer a normative instrumental guide to interpretation, in the sense of supplying empirical data and a framework of analysis to help determine the presumed consequences of competing interpretations in the inevitable cases of ambiguity. In general, however, to the extent that the debate is among lawyers "seeking to say what the law is"[120], stylized accounts of how the world works are not likely to supplant treaties and treatises.

Saying "what the law is" is rarely so simple, however. Even a cursory review of debates within the legal community over humanitarian intervention in the 1990s quickly reveal deep divisions. These divisions appear to flow from differential conclusions as to whether a specific intervention was legal or not, or whether and to what extent the law is changing or not. Disagreements at this level quickly widen into disagreements about the nature and role of both international law and lawyers. At this level the debate often becomes a stand-off. Deeper still, however, are differing conceptions of the international system. Uncovering these conceptions, in terms of different syntheses of Realist, Institutionalist and Liberal logic, can help a lawyer choose a jurisprudential approach that will in turn help him or her actually determine how best to reason to a specific legal conclusion.

To demonstrate this proposition, it is necessary to examine contending legal arguments in a very concrete context. The NATO campaign in Kosovo provides the clearest example to date of an intervention carried out for explicitly humanitarian purposes, in the sense that NATO publicly listed humanitarian aims as the political, although not the legal, basis for NATO's action[121]. It is also the most controversial of recent interventions precisely because it involved the greatest sustained use of force and the clearest violation of the sovereignty of a nation with a functioning government. The Serbian displacement of ethnic Albanians in Kosovo both before and after

120. Cf. *Marbury* v. *Madison*, 5 US (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is").

121. See NATO, Washington Summit Communiqué, 24 April 1999, http://www.nato.int/docu/r/1999/p.99-051e.htm (the "military action against the FRY supports the political aims of the international community: a peaceful, multiethnic and democratic Kosovo in which all its people can live in security and enjoy universal human rights and freedoms on an equal basis").

the NATO bombing started and the NATO campaign itself also frames a direct conflict between the international legal régimes governing the use of force and the protection of human rights.

(a) *The Kosovo crisis*

In a collection of "comments" by various editors of the *American Journal of International Law*, opinions were sharply divided on the legality of the NATO action [122], The views of the various authors range along a spectrum not only in terms of their views regarding the legality or illegality of the intervention but also in terms of their positions concerning the sources of law relevant to making that determination. Focusing on their precise disagreements thus provides an ideal template for probing their underlying assumptions about how international law and lawyers can be most effective in contributing to world order and global justice.

Thomas Franck argues that the NATO action in Kosovo was illegal but conducted in "mitigating circumstances" [123]. He distinguishes sharply between "mitigation and justification", however, observing that neither the US State Department nor NATO seriously tried "to justify the war in international legal terms" [124]. To try to do so would have weakened the rule against intervention in dangerous ways. In sum, "Every nation has an interest in NATO's actions being classified as the exception, not the rule [125]." Franck essentially follows Oscar Schachter's classic position that it

> "is highly undesirable to have a new rule allowing humanitarian intervention, for that could provide a pretext for abusive intervention. . . . [B]etter to acquiesce in a violation that is considered necessary and desirable in the particular circumstances than to adopt a principle that would open a wide gap in the barrier against unilateral use of force." [126]

Jonathan Charney similarly concludes that the intervention was illegal. "Indisputably", he writes, "the NATO intervention through

122. "Editorial Comments : NATO's Kosovo Intervention", 93 *American Journal of International Law* 824 (1999).
123. Thomas M. Franck, "Lessons of Kosovo", 93 *American Journal of International Law* 857, 859 (1999).
124. *Id.*
125. *Id.*
126. Oscar Schachter, *International Law in Theory and Practice* 126 (1991).

its bombing campaign violated the United Nations Charter and international law"[127]. As a result, he worries, the intervention "risked destabilizing the international rule of law that prohibits a state or group of states from intervening by the use of force in another state"[128]. "As now conceived, the so-called doctrine of humanitarian intervention can lead to an escalation of international violence, discord and disorder, and diminish protection of human rights worldwide." If current rules and organizations "are inadequate to solve problems like the Kosovo situation", then it is up to international lawyers and policymakers to design "better rules of law" and "improved organizations"[129]. He proceeds to set forth a carefully worked out set of "procedural and factual requirements" as the "basis for an appropriately balanced regime"[130].

For Louis Henkin, the NATO action and the following Security Council proceedings "may reflect a step toward a change in the law, part of the quest for developing 'a form of collective intervention' beyond a veto-bound Security Council"[131]. He opined that such a change might be "desirable", perhaps even "inevitable", and that it might be accomplished by a " 'gentleman's agreement' " among the permanent members of the Security Council not to use the veto in cases of humanitarian intervention[132]. In contrast to the Franck/Schachter position, Henkin argues for incremental change, although he is not quite prepared to say that Kosovo was legal. He prefers to state "the argument for NATO", noting that the intervention was not unilateral, but collective; that it could be monitored and terminated by the Security Council; that 12 out of 15 Security Council member States supported it at the time; and that the entire Security Council, in the resolution approving the Kosovo settlement, "effectively ratified the NATO action and gave it the Council's support"[133]. He concludes that Kosovo "may" have "in fact achieved" "an exception to the veto, as regards humanitarian intervention, in practice if not in principle"[134].

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127. Jonathan Charney, "Anticipatory Humanitarian Intervention in Kosovo", 93 *American Journal of International Law* 834, 834 (1999).
128. *Id.*
129. *Id.* at 835.
130. *Id.* at 838.
131. Louis Henkin, "Kosovo and the Law of 'Humanitarian Intervention'", 93 *American Journal of International Law* 824, 828 (1999).
132. *Id.* at 828.
133. *Id.*
134. *Id.* at 827.

Ruth Wedgwood takes Henkin's argument several steps further. She finds that the Kosovo intervention

> "may . . . mark the emergence of a limited and conditional right of humanitarian intervention, permitting the use of force to protect the lives of a threatened population when the decision is taken by what most of the world would recognize as a responsible multilateral organization and the Security Council does not oppose the action" [135].

She draws support for this conclusion from many of the same sources Louis Henkin does: prior Security Council resolutions defining the Kosovo conflict "as an international crisis and a threat to regional peace and security" and authorizing the use of force under Chapter VII to protect OSCE personnel on the ground; the decision of the Security Council not to condemn NATO's action; and the Security Council's subsequent ratification of the Kosovo settlement [136]. She also notes the Secretary-General's statements during and after the crisis insisting on the importance of taking action in the face of a grave humanitarian crisis [137].

Wedgwood's analysis is most striking for her willingness to account of a reported remark by a top Russian foreign policy official, in a confidential communication, that using force against Yugoslav President Milosevic "'would not be unuseful'" [138]. "If international law is to be based on the consensus of States", she argues, "some weight must in practice be given to back-channel communications alongside public pronouncements." [139] This is "how diplomacy actually works" [140]. Although she recognizes all the dangers inherent in legitimizing the use of force without Security Council authorization, she insists on the need to "'never say never'" [141]. "Legitimacy — and legality — represent a complex cultural process not confined to the Council chamber." [142]

Michael Reisman, one of the leading contemporary disciples of

135. Ruth Wedgwood, "Nato's Campaign in Yugoslavia", 93 *American Journal of International Law* 828, 828 (1999).
136. *Id.* at 830.
137. *Id.* at 834.
138. *Id.* at 831.
139. *Id.*
140. *Id.* at 832.
141. *Id.* at 834.
142. *Id.*

the New Haven School, squarely rejects attempts to "weave strands from various resolutions and *ex cathedra* statements of UN official into a retrospective tapestry of authority" that would provide a legal basis for the Kosovo campaign[143]. He finds it undeniable that the Kosovo action "did not accord with the design of the United Nations Charter"[144]. That does not exhaust the question of legality, however. Reisman argues that the central question international lawyers must ask about Kosovo is whether it "comes under the 'suicide pact' rule, the *exceptio* for that very small group of events that warrant or even require unilateral action when the legally designated institution or procedure proves unable to operate"[145]. Did NATO face a situation in which the only way to serve the purposes of the United Nations was to violate its text and institutional process? He concludes that it did, and that the resulting intervention was in fact lawful under existing international law, even though it undermined the authority of the Charter and possibly imperilled the collective self-restraint that the Chapter VII process is designed to achieve.

How does Reisman reach such a result? First, he notes that the Charter provisions must now co-exist with the "installation in international law of the code of human rights"[146]. That code removes human rights violations from the sphere of domestic jurisdiction protected by Article 2 (7). It creates the "*legal* imperative" for the Kosovo action[147]. However, Chapter VII has not been adjusted to provide for collective decision on the much more contentious issues of using force to regulate a Government's treatment of its own citizens. So for the restraints usually imposed on the use of force by the Charter's insistence on mutual deliberation of Security Council members, including the threat of the veto, we must substitute the restraints of a much wider international legal process. "In addition to governments, the modern international legal process incorporates intergovernmental organizations, private entities, the mass media, nongovernmental organizations and individuals."[148] It is this process, Reisman argues, "that promoted and demanded the international human rights code and . . . demanded and appraised every

143. W. Michael Reisman, "Kosovo's Antinomies", 93 *American Journal of International Law* 860, 860 (1999).
144. *Id.*
145. *Id.*
146. *Id.* at 862.
147. *Id.* (emphasis in the original).
148. *Id.*

step of the Kosovo action as a necessary implementation of those rights" [149].

Richard Falk argues that an international lawyer's duty in the face of Kosovo is to highlight the tensions inherent in the policy dilemma and propose better solutions [150]. He refuses to declare the Kosovo intervention lawful, but he declines to hold it unlawful either. Instead, he insists on a "double condemnation", both of the Serbian campaign of ethnic cleansing in Kosovo and of the NATO bombing campaign [151]. Such a double condemnation, he argues, poses "the essential normative challenge for the future: *genocidal behaviour cannot be shielded by claims of sovereignty, but neither can these claims be overriden by unauthorized uses of force delivered in an excessive and inappropriate manner*" [152].

To respond to this challenge, he rejects positivist legalism focused on the text of the United Nations Charter and related documents. He offers instead "configurative jurisprudence", or the "closely related 'incidents jurisprudence'" developed by Michael Reisman [153]. This deeply contextual approach

> "includes an embrace of complementary norms, as well as an appraisal of what has been done in the name of law and an evaluation of whether preferable policy alternatives were available to those with the authority to make decisions" [154].

Applying this approach to the facts of Kosovo, including the earlier diplomatic negotiations at Rambouillet, he concludes that any departure from the United Nations framework governing the use of force places a heavy burden of persuasion on the nation or organization contemplating such departure, a burden that can only be met by demonstrating the likelihood of a "humanitarian catastrophe" absent intervention and that diplomatic alternatives to the use of force have been "fully explored in a sincere and convincing manner" [155]. Further, vindicating the "humanitarian rationale" for intervention

149. Reisman, *supra* footnote 143, at 862.
150. Richard Falk, "Kosovo, World Order, and the Future of International Law", 93 *American Journal of International Law* 847 (1999).
151. *Id*. at 848.
152. *Id*. (emphasis in the original).
153. *Id*. For an explanation of "incidents jurisprudence", see Reisman and Willard, *supra* footnote 32.
154. *Id*. at 848-849.
155. *Id*. at 856.

requires the intervenor to "exhibit sensitivity to civilian harm", avoid "unduly shifting the risks of war to the supposed beneficiaries of the action so as to avoid harm to themselves", and use the least destructive means to "protect the threatened population"[156]. The actual intervention in Kosovo met some of these criteria but clearly failed others, leaving open the possibility of a range of alternative policy options that should have been proposed and taken seriously.

Finally, Christine Chinkin offers an analysis of whether Kosovo can be considered "a good or a bad war", highlighting the damage done to Security Council authority, to NATO's credibility and legitimacy, and even to human rights principles[157]. She spotlights the many tensions and inconsistencies in the asserted justifications for the NATO campaign and its actual impact. Like Falk, her intent is not to determine the legality of the intervention *per se*, but rather to ask:

> "what are the implications of these events for international human rights, the emerging exercise of criminal jurisdiction, and the role of international institutions and legal arguments? Can any of these questions be separated from those of geopolitics, military strategy, and economic interests?"[158]

She concludes that the Kosovo case cannot provide a precedent for how to bridge "the continuing chasm between human rights rhetoric and reality"[159].

(b) *Finding the law*

Running through the Kosovo debate are two jurisprudential faultlines. The first and better recognized divide concerns "the question of how to identify any legal norm"[160]. This is a debate between formalists or textualists on the one hand and various types of "process" schools on the other. Is the law a more or less determinate body of rules or a complex and dynamic process of decision? Different answers give rise to different methodologies for determining the content of any particular legal proscription.

156. Falk, *supra* footnote 150, at 856.
157. Christine Chinkin, "Kosovo: A 'Good' or 'Bad' War?" 93 *American Journal of International Law* 841 (1999).
158. *Id.* at 842.
159. *Id.* at 847.
160. Farer, *supra* footnote 113, at 186.

Thomas Farer confronts this issue directly. In an article written in 1991, he described the debate over humanitarian intervention as one between "classicists" and "realists"[161]. In his account, classicists insist on the separation of law and politics to preserve the integrity and power of law. Rules can only constrain if their prescriptions are pristine, "autonom[ous] from ephemeral shifts in power and interest"[162]. Violations are to be regretted, but not accommodated. In trying to determine the existence of a rule or norm, classicists look to an explicit text and try to interpret that text in light of the intent of the parties. In the absence of a text, they seek to uncover implicit agreement through "formal, cumulative categories of proof which . . . deemphasize the relative power of states and imply a high threshold below which alleged norms are entirely without legal character"[163].

Those whom Farer describes as "realists", on the other hand, "want to save [international law] from irrelevance"[164]. They seek to uncover the "operational codes which at any given moment are the real ordering elements of international relations"[165]. The realist methodology is thus to look to what States actually do rather than what they say. Formal protests, General Assembly resolutions, solemn declarations in briefs or legal opinions — these are mere

161. Classicists, according to Farer, comprise "the great majority of British and Continental scholars"; Realists are adherents of the New Haven School. Farer, *supra* footnote 113, at 186. The reality is more complex. To the extent that the issue is the role of rules, meaning the ways in which legal rules shape government decisions, many American legal scholars who would not identify themselves as members of the New Haven School adopt a process perspective. For an overview of the different ways in which various American international lawyers turned to process as a response to the "Realist challenge" mounted by the political scientists, see Slaughter Burley, *supra* footnote 7, at 209-214. To offer only one example here, Abram Chayes sounds what Farer would call a very "realist" note in his study of the role of law in the US response to the Cuban Missile Crisis, observing that "often the [legal] rules have no authoritative formulation in words". Abram Chayes, *The Cuban Missile Crisis: International Crises and the Role of Law* 101 (1974). More generally, he argued:

> "Law cannot determine decision, and it is an essential point of this study that we should not expect it to. It takes its place as one of a complex of factors for sorting out available choices.
>
> In return for shedding its oracular pretensions, legal analysis gains a continuous relevance at every point along the spectrum of potential decision. If it cannot divide the universe into mutually exclusive blacks and whites, it can help in differentiating the infinite shades of grey that are the grist of the decision-process." *Id.* at 102-103.

162. Farer, *supra* footnote 113, at 187.
163. *Id.* at 186.
164. *Id.* at 187.
165. *Id.* at 188.

words. The law resides in evidence of action, evidence of what States regard as permissible behaviour. Conversely, failure on the part of some States to act to prevent or curtail the actions of other States may be interpreted as approval [166]. Further, and perhaps most offensive to classicists, realists "adopt a frankly hierarchical view" of the process of law-making [167]. More powerful countries have more weight in determining what the law is.

Consider this purported dichotomy in terms of the Kosovo debate. A significant difference between authors such as Franck and Charney, on the one hand, and Henkin and Wedgwood on the other, lies in their willingness to take account of Security Council inaction — in this case the failure to condemn the NATO action. Yet Farer would probably classify at least three of these scholars — Franck, Charney and Henkin — as classicists [168]. They all begin with texts, as indeed does Wedgwood, supplementing provisions of the Charter with Security Council resolutions and State declarations. Reisman, Falk and Chinkin, by contrast, largely forsake or even actively reject textual analysis to grapple instead with the implications of "what States do". Of this group, Reisman comes closest to Farer's description of a "realist", arguing that the textual use of force régime conflicts with "the code of human rights", which has been "install[ed]" in international law as much by the actions of States and non-State groups as it has been codified in texts [169]. Falk and Chinkin similarly frame the basic legal issue as a fundamental conflict between the imperatives of human rights law and the use of force régime, seeking more to probe the implications of policy choices than to assess compliance with formal rules.

What are the underlying assumptions here about the international system? Farer's "classicists" essentially adopt Institutionalist logic. They accept the fact of State power as a determining factor in international outcomes, but believe that even powerful States have convergent interests in a stable international order that can be best

166. D'Amato, *supra* footnote 114, at 229-231, cited in Farer, *supra* footnote 113. Farer is directly debating D'Amato, but many of the same divisions are equally apparent in the Kosovo debate.

167. Farer, *supra* footnote 113, at 186.

168. Wedgwood might prove the exception here, as she is willing to go so far as to take account of back-channel diplomatic communications, reasoning that "states say different things to different audiences". On Farer's continuum, she would probably fall squarely between the two camps.

169. Reisman, *supra* footnote 143, at 862.

assured by formal codification in international institutions. As Farer writes, classicist international lawyers insist on a degree of legal formalism because centuries of "practical statecraft" have confirmed the value of distinguishing between formal and informal rules as a way of strengthening State expectations about what other States will do[170]. In addition, the language and craft of law gives States an "economical and relatively unambiguous way for political leaders to communicate this intention to each other and to third parties"[171].

Disagreements among "classicists" arise over the significance to attribute to informal practices occurring alongside and even within a more formal framework. Henkin, for instance, discerns the basis for a possible "gentleman's agreement" among permanent members of the Security Council not to use the veto in cases of humanitarian intervention, drawing on an expanded definition of Security Council "authorization" that in turn rests on the Council's inaction in the face of the NATO campaign. For political scientist "régime theorists", it is relatively easy to identify an evolving use of force "régime" from this web of formal rules and informal practices and understandings. But here international lawyers such as Franck, Charney and Farer insist on the formal character of distinctively "legal" rules. They thereby "maintain the integrity of an idiom specially crafted for the communication of desire and intention to achieve an unusual degree of stability with respect to a particular set of issues"[172]. From an IR perspective, these lawyers are claiming that "legalized" international institutions better serve State interests than informal "régimes"[173].

A further disagreement among "classicists" concerns how to take account of changing State interests. A split on this question is most apparent between Franck, on the one hand, and Henkin, Charney and Wedgwood on the other. Franck prefers to acknowledge the Kosovo campaign as the exception that proves the rule, and the wisdom, of the existing Charter system. By contrast, Henkin, Charney and Wedgwood all propose different ways to accommodate what they

170. Farer, *supra* footnote 113, at 196-197.
171. *Id.*
172. *Id.*
173. Many political scientists are now interested in the question of what difference the formal legal character of some rules makes, through an enquiry into the impact of "legalization" of international régimes. For an early analysis of this question, see Kratochwil, *supra* footnote 7; also Stone, *supra* footnote 1. More recent studies include "Legalization and World Politics", 54 *International Organization* 385 (Judith Goldstein, Miles Kahler, Robert O. Keohane and Anne-Marie Slaughter, eds., 2000).

perceive as the changing interests of many States, including a group of powerful States, when confronted with humanitarian crises. Charney spells out this logic most clearly. Although he holds firm to his conclusion that the Kosovo intervention was illegal under existing law and suggests that the Charter framework may still represent the best compromise of conflicting State interests, he also acknowledges that "support for doctrine of humanitarian intervention may be growing"[174]. In light of this possibility, he formulates a new legal régime that would "attain the objectives that humanitarian intervention is supposed to serve"[175]. His carefully considered set of criteria would permit action by regional organizations even where the Security Council is paralysed[176].

This willingness to accept that changing State interests may ultimately result in a changed legal régime dovetails with the assumptions and logic of Rationalist Institutionalists. Rationalist Institutionalists ground their claims for the power of international rules and institutions on the congruence of these rules and institutions with collective State interests. Thus, although institutions have independent weight in determining international outcomes, they cannot endure indefinitely in the face of changing State interests at variance with a prevailing régime. A difficult question arises when the interests of one or more of the most powerful States in the system begin to diverge from the interests of weaker States. Whereas political Realists automatically assume such divergence and predict the resulting collapse or dissolution of institutions, Rationalist Institutionalists take a more cautious approach, seeking to identify situations in which a collective interest in co-operation trumps relative power considera-

174. Charney, *supra* footnote 127, at 838.

175. *Id.*

176. Charney argues that what States want is "clear law limiting the potential for abuse". *Id.* He then tries to balance the interests of attaining "the objectives that humanitarian intervention is supposed to serve, while also avoiding risks of abuse and excessive damage". *Id.* He consequently proposes a new legal régime that would include proof of "widespread and grave crimes" as defined in Rome Statute through "publicly available evidence"; notice from a regional intergovernmental organization in the same area to the offending State; exhaustion of remedies at the regional level; and formal presentation of the problem to the United Nations. If no approval but also no resolution expressly forbidding action is forthcoming, action by a regional organization would be authorized, but only based on a formal warning to the Government that would be the target of the intervention; ICJ jurisdiction over any resulting disputes, and a commitment to intervene for a limited purpose and with limited means followed by a speedy withdrawal. *Id.* at 838-839.

tions. The crucial issue, as in Charney's analysis, is to determine whether apparent evidence of divergent State interests reflects a temporary weighting of short-term interests in a particular policy choice over long-term interests in cooperation or a long-term secular trend.

Constructivist Institutionalists, on the other hand, attribute power to norms defined independently of underlying State interests. They argue that norms can constitute State identities and shape their interests rather than merely reflecting them. Translated into a legal framework, this approach fits better with Franck's analysis. Although Franck bases much of his analysis on an assessment of long-term State interests, he also argues that none of the cases in which States have intervened in violation of Charter provisions have "altered the Charter-based normative expectation that States should usually refrain from the self-judging deployment of force"[177]. As Franck has elaborated elsewhere, translating expectations into norms creates independent "compliance pull"[178]. Their normative expression becomes part of an edifice that, taken as a whole, reflects the collective hopes and aspirations of the international community. As custodians of this structure, international lawyers should resist surrendering the power of symbols and ideals to shifting State interests.

In sum, all the international lawyers whom Farer would label as "classicists" place their faith in the power of a formal legal régime, codified in treaty texts or accepted customary law, to constrain State behaviour. The role of international lawyers is thus to ascertain the content of those texts and to propose necessary changes. They can and do differ on the relative importance of formal and less formal sources of law and on whether and how to take account of changing State interests. All these arguments, however, have direct analogues within the Institutionalist framework used by IR scholars. It is thus possible to see Institutionalism as providing an account of the international system that supports the methodology chosen by classicist international lawyers. Conversely, international lawyers who find

177. Franck, *supra* footnote 123, at 859.

178. Franck elaborates the power of norms by identifying the factors that make some norms stronger, because "more legitimate", than others. He lists pedigree, determinacy, coherence, and adherence as the components of legitimacy, all of which contribute to a norm's "compliance pull". These different elements all tie a particular norm to the larger conceptual and normative framework of the international legal system, strengthening a particular rule by linking it more closely to the body of a rules that as a whole constitute and symbolize international order. It is this system, more than any of its parts, that determines "appropriate" behaviour for a law-abiding State. Franck, *supra* footnote 13.

Institutionalist logic compelling should prefer classicist approaches to determining and debating specific legal questions.

(c) *Identifying relevant legal actors*

Those scholars whom Farer calls "realists" operate on quite different assumptions about the workings of the international system. At first glance, Reisman, Falk and Chinkin do indeed appear to focus more on what States do than what they say, not simply as a guide to determining how legal texts should be interpreted or changed but rather as a method of establishing what the law actually is. Within this framework, the most powerful States most capable of action, particularly action involving the use of force, inevitably appear to have a disproportionate impact on shaping the law.

Here then, surely, is the abdication of law to power, and of Institutionalism to political Realism. Closer examination of Reisman, Falk and Chinkin's analyses, however, tells a different story. If all three refuse to place their faith in texts to constrain the naked exercise of State power, they nevertheless reject the contention of political Realists that power is the only determinant of international outcomes. Each accepts a substantial gap between State rhetoric and reality and assumes that the job of an international lawyer is not to accept the rhetoric and work to hold States to it, but rather to uncover and expose the real motives for State action. At the same time, however, they insist on a normative evaluation of those motives and of the resulting actions. This insistence harnesses the brute fact of State power to a Constructivist faith in the power of norms.

But where and how are those norms to operate? The response reveals the second jurisprudential faultline in the Kosovo debate. This is a deep divide concerning the relevant actors in the international system. It is a divide between scholars who focus on States and scholars who also focus on individuals and groups. But it is also a divide between scholars who see the international system as a separate and relatively closed sphere and scholars who focus first on domestic and transnational politics. A focus on States interacting with one another leads to a "top-down" approach to international law-making; a focus on the social actors within and across states leads to a "bottom-up" approach.

When Farer casts international law "realists" essentially as apologists for State action, sacrificing idealism for relevance, he slights

the normative dimension of their analysis in large part because he is handicapped by the constraints of a classicist-Institutionalist worldview. This mental universe assumes a world of sovereign States as essentially unitary actors, pursuing exogenously posited interests. Farer is capable of looking within States; indeed one of his arguments for "maintaining the . . . idiom" of classical international law is that it "functions to precipitate debate and reflection within the concerned societies about the consistency of the proposed arrangement with national interest"[179]. The emergence of a domestic constituency for a particular a set of rules after such debate can help to deter future government opportunism[180]. Charney's insistence on "publicly available proof" of grave and systematic human rights violations can also be understood in terms of encouraging public debate within and across States[181]. But these arguments are at best supplementary. They are quintessentially "top-down" arguments, beginning with a world of States and the rules and institutions agreed on by those States and only then investigating how and when those rules can be buttressed by support from groups within States.

Reisman, Falk and Chinkin have a broader and "bottom-up" conception of the relevant actors in the international system. Reisman is most explicit about his view of the "modern international legal process", insisting that it includes, "in addition to governments", "intergovernmental organizations, private entities, the mass media, nongovernmental organizations and individuals"[182]. He sees the activity of these various individuals and entities as independently developing rules and principles and monitoring States for compliance with them in a kind of parallel law-making process to that engaged in by States. Falk, on the other hand, focuses more on the policy-making process that occurs within States and that thus shapes their interests and motivates their actions.

The purpose of Falk's analysis of the fundamental tension between sovereignty and human rights in the Kosovo campaign is thus not to say what the law is or whether it has been violated, but rather to "engender constructive debate about policy choices and past decisions"[183]. More generally, "the role of international law and lawyers

179. Farer, *supra* footnote 113, at 197.
180. *Id*.
181. Charney, *supra* footnote 176.
182. Reisman, *supra* footnote 143, at 862.
183. Falk, *supra* footnote 150, at 854.

is to clarify decisional contexts, to recommend preferred options, and to engender useful societal debate on controversial issues of great public significance"[184]. Analysis of policy failures after the fact may recognize that interventions such as the Kosovo campaign offer "a badly flawed precedent for evaluating future claims to undertake humanitarian intervention without proper UN authorization"[185]. Nevertheless, illustration of alternatives may "build pressure in the future to view war as a last resort and to uphold the humanitarian character of humanitarian intervention"[186]. Chinkin is less explicit about the purposes of her analysis, but her explication of the different perspectives on whether different actors had a "good or a bad war" appears to target both publics and policy-makers.

Falk's framework of analysis most clearly corresponds to Liberal assumptions about the international system — that individuals and groups in domestic and transnational society determine State interests and that the intensity of those interests determines international outcomes. By articulating different and better policy options, he seeks to build pressure to change State interests from the bottom up. Reisman's model of international legal process can be similarly understood to emphasize the ways that individuals and groups in domestic and transnational society feed into policy decisions, although he does not assume that the views of these individuals and groups will ultimately be filtered through *State* policy-making processes. Thus within Reisman's framework, unlike the Liberal framework used here, it is thus possible that the decisions of non-State actors could outweigh or override State decisions, making it very difficult to determine what the resulting "rules" actually are.

In the end, the scholars that Farer disparages as "realists" actually proceed from a synthesis of Realist, Constructivist and Liberal assumptions about the international system. They accept a disproportionate role for the most powerful States in the system, even if they may deplore it. They are sceptical of the ability of formal institutions to exert an independent impact on international outcomes[187], but recognize a role for normative critique in shaping State identities

184. Falk, *supra* footnote 150, at 854.
185. *Id.*
186. *Id.*
187. Falk, for instance, declares outright that "reliance on legalistic analysis" "put international lawyers in the uncomfortable role that Immanuel Kant accused them of in *Perpetual Peace*, namely, that of being 'miserable consolers' ". Falk, *supra* footnote 150, at 852.

and interests. Most fundamentally, they embrace a broader conception of the relevant actors in the international system, focusing on the policy underpinnings of law and the individuals and groups who shape policy choices. The result is a different conception of what international law should be and hence what international lawyers should do. But it is a conception that emphatically does not abdicate law to power.

To review, even very lawyerly "doctrinal" debates depend on very deep assumptions about the international system. Exposure of these assumptions using some of the lenses provided by IR theory does not require international lawyers to identify only with one particular worldview. On the contrary, a number of the methodological approaches to "finding the law" or simply grappling with the legal issues in the Kosovo debate depend on a synthesis of various assumptions from different theoretical schools. It is also possible, indeed likely, that the choice of a particular synthesis may be influenced by the State or region in which a particular international lawyer sits. Falk, for instance, must take account not only of the particular power of the United States, but also of its democratic principles. He notes that "[e]nhancing debate is particularly important for a democratic society, whose essence arguably lies in the core societal commitment to resolve controversy by nonviolent communicate discourse" [188]. Legal scholars from weaker and/or non-democratic States, by contrast, may find that Institutionalism better describes the world they inhabit or is simply a better belief-system.

Overall, however, an international lawyer who is aware of different accounts of the international system and is able to link these accounts to different understandings of international law will find it easier to choose between these understandings. IR theory, particularly those branches of theory born of a positivist conception of social science, cannot dictate these choices. But it can illuminate them. And very concrete doctrinal results may follow.

3. The Policy Question: Mapping the Debates

As demonstrated in the preceding section, many legal analyses of humanitarian intervention involve underlying policy choices. Government officials, leaders of international organizations, and

188. Falk, *supra* footnote 150, at 849.

foreign policy commentators have also engaged in an extensive and explicit policy debate about the desirability of humanitarian intervention. This section will use the basic IR paradigms outlined in Chapter I to "map" as many policy arguments as possible, grouping them together in terms of their underlying assumptions and logic about how the international system works. The primary purpose here is to demonstrate the ways in which IR theory can provide international lawyers with a powerful analytical tool. The next section will demonstrate how the resulting map can be read to reveal some surprising areas of consensus.

The arguments for and against humanitarian intervention come in many shapes and sizes. What follows is not an exhaustive list, but draws on the writings of prominent political scientists and policy commentators as well international legal scholars. This section begins by reviewing the arguments advanced for maintaining a régime of non-intervention and then turns to the argument for modifying or liberalizing that régime to allow for humanitarian intervention.

(a) *Arguments for non-intervention*

A first set of arguments for non-intervention is deeply Realist. As Stanley Hoffmann puts it, "in a world of competing, self-interested actors, moderation or restraint provide the only chance for order"[189]. Realists are not optimistic about that chance, on the general ground that ceaseless State striving for power must be ultimately met by power. Indeed, Stephen Krasner would read the norm against intervention as simply another instance of "organized hypocrisy", a convenient device for the most powerful States in the international system to signal a set of good intentions without constraining their actual practice[190]. Nevertheless, Realists counsel prudence as our best hope[191]. In this context, prudence dictates a baseline norm of each State minding its own internal business[192].

189. Hoffmann, *supra* footnote 39, at 34.
190. Krasner, *supra* footnote 84.
191. See, e.g., George F. Kennan, "Diplomacy in the Modern World", in *Approaches from International Law and International Relations* 99 (Robert J. Beck, Anthony Clark Arend, and Robert D. Vander Lugt, eds., 1996).
192. As Bryan Hehir puts it,

> "expanding the frequency of intervention, cutting it off from a national-interest foundation and undertaking broadly defined tasks in unstable politi-

Beyond prudence, Realists value non-intervention as a safeguard of sovereignty, where sovereignty is the right of a State to protect the "individuals and groups [within it] from external control"[193]. From a classical Realist perspective, strong domestic Government is the only reliable counter-weight to the defects of human nature; to interfere with a Government's relations with its own citizens destroys any chance for domestic as well as international order[194]. Governments must basically be left alone to establish and maintain domestic order however they will[195].

Here lies a basic divergence from Liberal assumptions. Liberals similarly assume that domestic disorder breeds international disorder. However, classical Realists assume that the source of all conflict is likely to be man's evil nature, which can be best tamed by strong government. Liberals, on the other hand, insist that regardless of the essential evil or good of human nature, individual incentives can be aligned to produce co-operative and normatively desirable outcomes through the design of domestic institutions. However, both Liberals and classical Realists would agree that failed States — in the sense of the absence of any real domestic order — pose a major threat to international order.

Other Realist arguments raise the danger that manipulation of internal politics will become an additional weapon in the international quest for power, with the almost certain result that intervention will breed counter-intervention. If sovereigns are not allowed to take whatever measures are necessary to establish domestic order, domestic disorder will quickly become internationalized, offering a harvest of opportunities to enhance their own power by sponsoring protégés or simply supporting enemies of their enemies[196].

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cal settings will yield the combination of good intentions and bad consequences (for ourselves and for others) that have so often doomed Liberal policies". J. Bryan Hehir, "Expanding Military Intervention: Promise or Peril?", 62 *Social Research* 41, 49 (1995).

193. Hoffmann, *supra* footnote 39, at 33.

194. *Id.*; see also Smith, *supra* footnote 27.

195. A corollary of this argument is Bryan Hehir's claim that the "idea of intervention threatens an already fragile system by challenging the one principle of authority (the state) in the system". See J. Bryan Hehir, "Intervention: From Theories to Cases", 9 *Ethics and International Affairs* 1, 7 (1995). This is again a Realist view that is pessimistic in general, but seeks to hold on to and extend what little stability has been achieved.

196. James Turner Johnson, "Humanitarian Intervention, Christian Ethical Reasoning, and the Just-War Idea", in *Sovereignty at the Crossroads?* 127-143, 139 (Luis E. Lugo, ed., 1996).

Domestic civil wars will become just another battleground for great power politics. Many Realists opposed United States and Soviet interventions in various domestic conflicts around the world during the Cold War on just these grounds.

Rational Institutionalists largely come to the same conclusion, although with a deeper faith in the ability of institutionalized rules to maintain order. For Lori Damrosch, international legal rules about intervention aim to promote "objectives of conflict prevention or containment"[197]. Institutionalists believe that these rules have a reasonable chance of success, based on States' long-term calculations of reciprocity and mutual interest.

For this school of Institutionalists, sovereignty is not simply a vehicle of "organized hypocrisy", which States violate as necessary[198]. It is rather a durable norm (a stable equilibrium) resulting from "self-interested voluntary choices"[199]. Conversely, a rule of non-intervention is an institution that provides a focal point for expectations about State behaviour, a standard against which to monitor and evaluate behaviour and hence to develop and measure State reputation, and a vocabulary to facilitate efficient and effective communication about international order and to co-ordinate collective responses. On this account, all States have a long-term interest in protecting their ability to manage their own affairs; further, State intervention in the affairs of other states is a substantial threat to the order and stability of the system as a whole. States have thus institutionalized this norm to facilitate their long-term co-operation.

A distinctive Rationalist Institutionalist argument for adhering to a strict formal doctrine of non-intervention is the claim that formal norms allow nations better to signal their intent "to achieve an unusual degree of stability with respect to a particular set of issues"[200]. Consistent with this argument is the insistence that the text, structure, and background of the United Nations Charter clearly reveal "that the promotion of human rights ranked far below the protection of national sovereignty and the maintenance of peace as organizational goals"[201]. Rationalist Institutionalist logic insists that the scope of institutions cannot outrun the convergence of State interests. Thus

197. Damrosch, *supra* footnote 113, at 93.
198. Krasner, *supra* footnote 84 at 58.
199. *Id*. at 59.
200. Farer, *supra* footnote 113, at 196.
201. *Id*. at 190.

if an institution reflect a common commitment to peace and the protection of national sovereignty and a deliberate choice to privilege those goals over the promotion of human rights, changing the mission of that institution will quickly imperil its effectiveness and very existence.

For Sociological or Constructivist Institutionalists, the norm of sovereignty and hence of non-intervention is embedded deep in the very structure of the international system. It comprises a shared value that transforms the participants of the international system into an international society, albeit an anarchical one[202]. The norm of sovereignty helps define what a State *is*; the norm of non-intervention is hence a corollary of State identity. Violation of such a norm strikes at the core of international order and should be largely unthinkable — at least in ordinary circumstances.

A corollary of this view, one shared by both Rationalist and Constructivist Institutionalists, emphasizes the *legitimation* function of international institutions. Thomas Farer notes that

> "[e]ven liberal democratic states have seemed reluctant openly to impute legitimacy to humanitarian intervention. The concern they share with potential objects [of intervention] is abuse of any conceded expansion of legitimate force beyond the imperious necessity of self-defense."[203]

If State behaviour is shaped by a core prohibition and a penumbra of tolerated although formally impermissible violations, then the prohibition itself must be as clear and categorical as possible. Moreover, this argument assumes precisely the structure of a prisoner's dilemma game: all States would be better off if no State intervened in each other's affairs, but each individual state has an incentive to defect and hence to "abuse" a rule permitting intervention in humanitarian crises by distorting the trigger and terms of such a rule for its own purposes. Unilateral defection, in turn, would quickly cause the basic norm to unravel.

Constructivist Institutionalists also emphasize the deep value of symbolic politics. As noted above, Farer describes classicist international lawyers as "guardians of a symbol" of international order[204].

202. Bull, *supra* footnote 2; Hurrell, *supra* footnote 81.
203. Farer, *supra* footnote 113, at 198.
204. *Id*. at 187.

He continues, "Adulterate the symbol and anarchy slides toward chaos."[205] By upholding the idea and ideals of international law, international lawyers are playing a vital role in constructing more international order than would otherwise obtain.

Positive Liberal IR theorists offer yet another set of justifications for the non-intervention norm. They approach the conflict prevention question from a different perspective, asking whether the likelihood that international conflict and instability resulting from the spillover of domestic political problems to neighbouring States is outweighed by the danger of allowing States to meddle in each other's affairs. In an era of strong domestic sovereigns who are able to establish domestic order by whatever means they choose, the balance is likely to tip in favour of non-intervention. But in a era of weak domestic authorities, this calculus could change.

(b) *Arguments for humanitarian intervention*

We turn now to the arguments *for* humanitarian intervention. Realists have no arguments for humanitarian intervention *per se*. They cannot include humanitarian concerns in their security equation, however heart-wrenching they may be. Stopping massive human rights violations or feeding the hungry does not enhance national power. On the other hand, the Realist insistence on prudence is conditioned by a particular geopolitical perspective. In a bipolar or even multipolar world, the use of force by one State can be countered by another State or a coalition of States determined to maintain a balance of power. Mark Trachtenberg points out, for instance, that during the Concert of Europe, "the idea that national rights could be overridden in the name of European equilibrium" was at the heart of the European security system, legitimizing and even encouraging intervention[206]. It is thus possible in the post-Cold War world that many Realists could accept or even advocate interventions such as the NATO campaign of Kosovo in the name of defending a particular regional or global order. However, such a doctrine of intervention would be both broader and narrower than purely humanitarian intervention. The defence of order rationale would lead Realists to accept

205. Farer, *supra* footnote 113, at 187.
206. Marc Trachtenberg, "Intervention in Historical Perspective" in *Emerging Norms of Justified Intervention* 15-36, 17 (Laura W. Reed and Carl Kaysen, eds., 1993).

interventions in domestic conflicts that posed a threat to the current national government independent of the humanitarian consequences of such conflicts, but also to reject interventions to halt or alleviate grave and systematic human rights abuses if the national Government proved capable of maintaining domestic order, however ruthlessly.

It is also difficult to make a strong argument for humanitarian intervention based on Institutionalist logic. The Institutionalist focus on the important functions performed by international institutions in fostering State co-operation generally fits best with arguments for incremental change. Rationalist Institutionalists assume that well-functioning institutions depend on the convergence of the interests of a substantial majority of the States within any particular institution, including the most powerful States. Constructivist Institutionalists are willing to use institutions to change State interests but understand that it is a long slow process. Both camps are also likely to worry about the potential damage that legitimizing any form of intervention could do to existing institutions, in terms of exacerbating potentially conflicting interests. Both groups of scholars would argue strongly for multilateral over unilateral intervention, but are likely to find it difficult to resolve questions of how to resolve conflicts between a regional organization such as NATO and a global institution such as the United Nations.

The job of arguing for humanitarian intervention thus falls primarily to Liberals. Reviewing these arguments, however, offers an excellent opportunity to explicate the difference between "normative Liberals" and "positive Liberals", between those positions that are traditionally ascribed to Liberal political philosophers and those adopted by Liberal international relations theorists of the type described in Chapter I. To make the distinction as succinct and sharp as possible, consider again the two sets of values that Damrosch identifies as underlying the current doctrine of non-intervention. Traditionally, the "human rights values" of self-determination have buttressed the "state system values" of conflict prevention.

In light of the resurgence of nationalist and ethnic conflict over the past decade, a normative Liberal would now begin to feel strongly the tension between those two sets of values as the value of collective self-determination appears to conflict with the more fundamental individual goals of life, liberty and dignity. In other words, when allowing a people to determine its own fate means allowing one group to massacre or mutilate another, with the world standing

by, the value of allowing "polities" (often artificially constructed in the wake of colonialism and other forms of imperial interference) to determine their own fates seems increasingly dubious. Alternatively, such a posture appears merely to mask indifference to the suffering of fellow human beings in far-away places.

These are the arguments typically attributed to the "Liberal" position on intervention. Bryan Hehir identifies the fundamental premise driving these arguments: "[a]dherence to the absolute interpretation of nonintervention will paralyze the international community in the face of events that demand action"[207]. Stanley Hoffmann describes a 200-year-old debate among Liberal philosophers "about whether such Liberal goods as self-government and self-determination — two forms of emancipation from autocracy and arbitrariness — are to be exported"[208]. He characterizes the Liberal "case" for intervention in terms of a rejection of sovereignty as an "absolute good", on the ground that sovereign rights rest on assuring the individual rights of a sovereign's people[209]. A second Liberal argument, in Hoffmann's summary, focuses on conflicting moral imperatives: protecting a "people constituted as a state" from external interference versus vindicating the demands of "'global humanity'", protecting fellow human beings from annihilation or atrocious suffering[210].

These are important arguments, but they are normative arguments, resting on claims about the legitimacy of power and conflicting moral imperatives. For a positive Liberal, on the other hand, Damrosch's two sets of values fit together quite differently. Positive Liberals are not guided by any normative view concerning the value of the individual. Their animating assumption is rather that what individuals and groups in domestic and transnational society want, and how those wants are represented by State Governments, will dictate how States behave. From this perspective, the actual ability of individuals to determine their destiny may be one of the most important safeguards of international order. Repressing, oppressing, or otherwise blocking that ability, conversely, is likely to be a tripwire or major warning sign of looming danger for the region or the world. In this context *intervention* may be the most likely means of achieving

207. Hehir, *supra* footnote 195, at 6.
208. Hoffmann, *supra* footnote 39, at 34.
209. *Id.* at 34-35; for a fuller elaboration of this argument, see Teson, *supra* footnote 99.
210. Hoffmann, *supra* footnote 39, at 35.

both conflict prevention and individual human rights, or, in Kofi Annan's phrase, "individual sovereignty".

Positive Liberals thus argue most forcefully for the security implications of humanitarian crises. These arguments can come in many guises and degrees, but all insist that humanitarian intervention is not merely a moral issue, but equally a security issue. In its most basic form, the Liberal argument insists that States behave differently as a function of differences in domestic régime type and that how a Government treats its own people is a signal of how it is likely to behave toward its fellow nations. Ruthlessness at home may translate straightforwardly into ruthlessness abroad, or perhaps foreshadow an effort to manufacture external conflicts to mask internal troubles or suppress domestic dissent.

In a word, *Krystalnacht* was a warning that the world could not afford to ignore. In the terms of contemporary conflict, Saddam Hussein's willingness to use biological weapons on his own people revealed not only his willingness to go to any lengths to hold on to power, but also his ability and determination to twist his nation's intellectual and economic infrastructure to the manufacture of weapons of mass destruction[211]. Even Realists would take note here, but they would focus more on the weapons than the man. Liberals would claim that the weapons are but the manifestation of the man. If he is not stopped at home, he will have to be countered abroad.

It is important to note that this argument will not go far enough to satisfy many normative Liberals. Translated into doctrinal terms, it implies the necessity of a demonstrated link between internal atrocities and external aggression. As Sean Murphy points out, members of the Security Council have not always insisted on this link in authorizing interventions, most notably in the case of Haiti. There the Security Council was willing to authorize action

> "in a situation where the human rights values at stake were of a quite different order and magnitude than that seen in Liberia, Iraq, Bosnia, Somalia, or Rwanda, and where the capability (let alone the propensity) of the local government to inflict violence on its neighbors were hardly apparent"[212].

211. Hoffmann would describe Iraq as a "dangerous state", one "whose domestic policies create mortal threats for regional or global security". *Id*., at 35. He goes even further, calling the Iraq of 1991-1994 a "murderous state". *Id*. at 31.

212. Murphy, *supra* footnote 99, p. 392.

Kofi Annan, on the other hand, appears to construe the link between a Government's internal and external conduct more broadly, noting that "most 'internal' conflicts do not stay internal for very long. They soon spill over into neighbouring countries."[213] This idea of "spill-over" might include evidence of burdens on neighbouring States resulting from massive streams of refugees.

Even more basic is the Liberal point that many of the States that are currently members of the international system "are remote indeed from the model of unitary and rational players which Realists . . . [have historically] described as the basic units of the international system"[214]. Far from islands of order in an otherwise anarchic system, many of these States exercise sovereign powers only in name.

> "Many are wracked or wrecked by tribal, religious or ethnic conflicts; many never managed to erect stable and effective state structures and have become the theatre of battling gangs competing for power . . ."[215]

These "failed states", defined in terms of the complete breakdown of domestic order, can spread regional or even global chaos, spewing refugees and conflict across borders[216]. Where Realists insist on a rule of non-intervention as a rule of non-interference with Hobbes's Leviathan, Liberals point out that in many cases the Leviathan is long gone or never existed. It thus falls to neighbouring States or the global community acting collectively to create domestic order in the first place.

A corollary of this argument is a "moral contagion" argument. Michael Walzer insists that

> "grossly uncivilised behaviour . . . unchallenged, tends to spread, to be imitated or reiterated. Pay the moral price of silence and callousness, and you will soon have to pay the political price of turmoil and lawlessness nearer home . . ."[217]

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213. Annan, *supra* footnote 115, at 313.
214. Hoffmann, *supra* footnote 39, at 31.
215. *Id.* at 31.
216. Gerald B. Helman and Steven R. Ratner, "Saving Failed States", 89 *Foreign Policy* 3 (1992-1993).
217. Michael Walzer, "The Politics of Rescue", 62 *Social Research* 52, 59-60 (1995).

This proposition rests on an assumption about deterrence : that swift action in response to atrocities in one country will affect the calculations of potential criminals in other societies. But it also may invoke a Constructivist Liberal claim about the tacit *licensing* of atrocity that flows from a failure to act to vindicate basic human rights. Distinct from the rational calculations of potential perpetrators as to the likelihood of action against them, this argument fears the spread of a climate of chaos, an unleashing of the basest human instincts that pushes at our collective boundaries of what is permissible and hence possible. Deeper still is the point that failure to act in accordance with professed fundamental values exposes national hypocrisy in ways that can gradually spread and undermine trust in and commitment to domestic institutions [218].

A final positive Liberal argument, more elaborate and vulnerable in its logic, begins from the positive proposition that mature democratic Governments do not go to war with one another [219]. This empirical finding has proved remarkably robust, but must be carefully circumscribed in light of ongoing debates and studies [220]. It appears to translate into a policy prescription in favour of intervening to help or establish democratic Governments as a means of advancing international peace [221]. Would that the world were so simple. That established democracies enjoy substantially more peaceful relations with one another than do newly democratic States, democracies and non-democracies, or autocracies and theocracies, is unlikely to reduce to the simple equation that intervening to promote democracy will enhance peace and order in the international system. Nevertheless, the argument is made and is clearly Liberal in its assumptions and logic.

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218. Kenneth Roth, "Speech One : Endorse the International Criminal Court", in *Toward an International Criminal Court : Three Opinions Presented as Presidential Speeches* 19 (Council on Foreign Relations : Alton Frye, Project Director, 1999).

219. Doyle, *supra* footnote 89 ; Russett, *supra* footnote 92 ; Thomas Carothers, "The Democracy Nostrum", 11 *World Policy Journal* 47 (1994).

220. For instance, a sound and convincing study has confirmed the proposition of the likelihood of peace among established democracies, but has simultaneously shown that *democratizing* States are more likely to go to war both with each other and with non-democratic States. Edward D. Mansfield and Jack Snyder, "Democratization and the Danger of War", 20 *International Security* 5, 6 (1995).

221. James Crawford, *Democracy in International Law* 14, 20 (1993) ; Franck, *supra* footnote 13 ; Morton H. Halperin, "Guaranteeing Democracy", 91 *Foreign Policy* 105 (1993) ; Carothers, *supra* footnote 219.

(c) *Intervention at what cost ? Limits to the Liberal position*

These positive Liberal arguments for intervention, even if limited to "humanitarian" intervention, are ultimately limited by their own logic. To the extent that these arguments are grounded in claims about the inextricable interrelationship of domestic and international order, the purpose of intervention must be to restore or establish domestic order and to maintain it once established. The desirability of intervention will thus turn in large part on the feasibility of this mission : the potential intervenors must be ready, willing and able to engage as fully as possible with the problems besetting "failed, troubled, and murderous states" [222]. If the problem is gross moral turpitude of a national leader, compounded by utter ruthlessness in the pursuit of power, then the intervenors must be prepared to remove that leader and ensure his replacement by a more benign figure. If the problem is the complete breakdown or absence of effective domestic political authority, then the intervenors must engage in State-building from the ground up. If the problem is autocracy, then the intervenors must be prepared to institutionalize democracy.

These are daunting tasks. But they cannot be dodged, even when Liberals seek only to justify an apparently more limited doctrine of humanitarian intervention. Whereas Realists are prepared to see humanitarian crises as limited and even aberrational instances demanding a purely moral response, positive Liberals link even famine to the nature of government institutions [223]. Systematic and massive murder, torture, displacement, and starvation are not acts of nature ; they are acts of man. And they are acts that will ultimately translate into a threat to fellow human beings across borders. But if so, then humanitarian intervention is only justifiable if it is decisive, rather than merely palliative.

Liberal logic thus outlines the full scope of the task awaiting any would-be intervenors. Farer posits "a connection between the severity of violations and the irremediable character of the delinquent régime" [224]. This link means that the more pressing the case for intervention on humanitarian grounds, the harder the underlying problem is to solve. Limited measures may succeed only in "risk[ing] the lives of [the intervenors] to achieve a temporary cessation of a

222. Hoffmann, *supra* footnote 39, at 35.
223. Amartya Sen, *Collective Choice and Social Welfare* (1984).
224. Farer, *supra* footnote 113, at 198.

slaughter likely to be renewed"[225]. Alternatively, any intervention undertaken must be for the long haul, recognizing the necessity of reconstructing the political order of the repressive State. Only thus can the international community remove the root causes of the humanitarian crisis.

It follows that in many actual cases, positive Liberals are constrained by their own reasoning. The causal chain set in motion by their deep assumptions about the sources of international order leads them to insist on humanitarian intervention for more than merely palliative purposes. They justify such intervention as a political rather than a moral mission, but then must recognize its futility unless it can achieve its political goals. Those goals, in turn, may prove impossible to achieve. Dictators are not easily removed; institutions of order, much less of democracy, may take centuries to build. The cost of these ventures, in lives, treasure, and political capital, may be astronomical and ultimately unsupportable. Recognizing these obstacles, Liberals are likely often to be driven back to a position of non-intervention.

4. Reading the Map: Toward a Common Position on Humanitarian Intervention?

Reviewing the various arguments for and against humanitarian intervention, and intervention more generally, it is possible to identify areas of overlap that could bolster an emerging policy consensus. Realists, Institutionalists and positive Liberals, of both a Rationalist and Constructivist persuasion, can all support a carefully limited and circumscribed doctrine of humanitarian intervention, albeit for different reasons. This consensus, at least as developed below, would still fall well short of the position advocated by many normative Liberals. Nevertheless, the map of policy arguments developed above reveals that many of the participants in the current debate are fighting over relatively small policy differences, although the different ways in which a limited doctrine of humanitarian intervention can be understood could shape its evolution very differently. A good international lawyer should be able to draw on this potential policy consensus to formulate a rule or set of rules that is supported by more than the logic of compromise.

225. Farer, *supra* footnote 113, at 198.

First, the array of positive Liberal arguments for humanitarian intervention ultimately supports only a quite limited doctrine. Although positive Liberals insist on a fundamental link between domestic and international order and view humanitarian crises through the lens of what they reveal about the nature of a particular domestic Government, the link they posit will be evident to potential intervenors only in cases of serious, ongoing, and systematic human rights abuses. Alternatively, positive Liberal arguments concerning the complete breakdown of domestic order and thus the need to supplant domestic institutions with governance through regional or international organizations will apply only to a limited category of "failed" States[226]. In both these cases, positive Liberal arguments in favour of intervention are further limited by the embedded assumptions about what it would take actually to change the underlying political conditions giving rise to a humanitarian crisis or allowing it to continue. Palliative measures alone cannot be justified on this logic. Nor can interventions that threaten to inflict significant suffering on the population subject to the intervention, thereby creating a political and social backlash against the intervenors.

Realists would reject the positive Liberal claim of a fundamental link between domestic and international order or disorder, but would be inclined to accept actual evidence that a particular humanitarian crisis is likely to pose a threat to the balance of power in a particular region. The type of proof they would require, however, goes less to the motives of a particular domestic régime and more to the consequences of its action or inaction. Further, Realists would also factor in the danger of counter-intervention by another powerful State or group of States. Overall, the Realist framework cannot accommodate interventions actually motivated by humanitarian concerns, but would not necessarily oppose such interventions as long as they can meet independent security criteria. The application of these criteria in turn depends on the prevailing regional or global configuration of power.

Both the positive Liberal and the Realist analyses of underlying State interests would also factor in the necessity of a cost-benefit analysis on the part of potential intervenors. Realists would take account of the costs and benefits of a potential intervention in straight power terms, calculating the lives likely to be lost and the

226. Helman and Ratner, *supra* footnote 216.

military and economic resources expended in a proposed intervention against the security benefits likely to be achieved. Liberal cost-benefit analyses would supplement this calculation with an assessment of the influence of public opinion on government action in intervening States. The Liberal analysis thus leaves room for the possibility that strong normative Liberal arguments for humanitarian intervention on explicit moral grounds could sway public opinion in specific States sufficiently to allow or even encourage specific Governments to bear higher costs.

Institutionalists would not object on principle to either the Liberal or Realist lines of argument. The Institutionalist baseline is the demonstration of convergent State interests that can be served by long-term co-operation assured through the intervening mechanism of institutions. From this perspective, Institutionalism can subsume either Liberal or Realist logic regarding the nature of underlying State interests. However, in the context of humanitarian intervention, where recent State practice indicates changing and potentially diverging State interests, Institutionalists are likely to favour institutional mechanisms designed to assure the widest possible agreement on a proposed course of action, such as a clear statement of criteria by which to authorize and assess a proposed course of action, the transmission of as much information as possible concerning State ends and the means chosen to achieve those ends in a specific intervention, and the development of an independent monitoring capacity to help hold States to their word on behalf of a regional or global organization.

Translated into more concrete policy terms, the overlapping consensus outlined here would support humanitarian intervention only when a moral crisis can be linked in some way to a security threat and when the potential intervenors demonstrate the will and resources to go beyond the symptoms and treat the underlying disease. At the very least, these Governments must demonstrate that intervention will create a breathing space to allow a broader political settlement of the deeper problems infecting a particular society. At most, they must demonstrate a willingness to stay the course and help rebuild a polity, economy, and society from the ground up. Further, the proposed intervention should be conducted within an institutional framework designed to secure and retain the support of as many States as possible.

These conditions are most likely to be fulfilled in several types of

situations. The first is when the gravity of the humanitarian crisis is so great that a State is effectively imploding, creating both a power vacuum to tempt neighbouring States and streams of refugees to burden them. In cases like these, such as Rwanda, Cambodia, or possibly Somalia, intervention for the sole purpose of stopping the killing or the dying is likely at least to freeze a situation that is rapidly becoming irremediable. Domestic forces may or may not be able to regroup to isolate extremists or overthrow a tyrant, but absent some external action, they will otherwise cease to exist.

A second situation is when the Government responsible for a humanitarian disaster has shown itself to be a sufficiently clear security threat — through evidence in addition to its treatment of its own citizens — that action against it is likely mobilize a diverse coalition of States against it in any event. Examples might include the United States/United Nations intervention to protect the Shiites in Iraq and the NATO intervention in Kosovo. Such cases can never be pure cases of humanitarian intervention — humanitarian arguments will be mixed with more traditional security concerns. But a humanitarian crisis may well provide the trigger for such interventions, while the perception of a more traditional security threat is likely to strengthen intervening States' resolve to stay the course and try to fix rather than to freeze the longer-term problems.

The remaining arguments in favour of a broader general rule of humanitarian intervention, rather than a carefully limited exception to the prevailing rule of non-intervention, are those advanced by normative Liberals. These arguments, concerning the bases of State sovereignty and the demands of global justice and morality, cannot be answered by IR theory. They require collective normative judgments either by States in a global or regional position to intervene or by the international community as a whole. Positive Liberal IR theory offers a general account of how State preferences might be changed in this direction, but no positive account of how States behave can address moral arguments about how States should behave.

The prevailing alternative to defining a narrowly limited exception remains the current doctrine of non-intervention. Supporters of a more expansive definition of humanitarian intervention or of abolishing the general prohibition on intervention must argue for the merit of an international system that conditions full sovereignty on a Government's ability to provide a minimum level of order and

justice for its citizens. Alternatively, they must explain precisely why and when norms of justice should triumph over norms of order.

The mapping exercise conducted here does not fully resolve the debate over humanitarian intervention. But it does clarify positions and facilitate their critique. Further, it advances the debate by illuminating areas of unanticipated agreement between camps often thought to be in sharp contention. In redrawing the lines of support and opposition for a particular position, it also illuminates the different roles most appropriate for lawyers, policy-makers, philosophers and public intellectuals.

5. Conclusion

Lori Damrosch argues forcefully that lawyers have a distinctive contribution to make toward developing a legal framework for humanitarian intervention, that of ensuring that the international community treats "like cases alike"[227]. This role reflects general concepts of equity that should be a lawyer's stock in trade, while also performing a more instrumental function of "controlling, rather than unleashing, instruments of coercion"[228]. But on what criteria are cases to be deemed alike? On the gravity of human suffering involved? On the relative threat to the stability of a regional or global security order? On the effect of a proposed intervention on the strength and effectiveness of existing or emerging institutions? Lawyers seeking to answer these questions are likely to replay the debates made explicit by contending schools of IR theory.

This chapter has sought to explicate that underlying reasoning process. Section 2 illustrated the ways in which underlying assumptions about the international system inform jurisprudential choices that in turn shape doctrinal debates and conclusions. Section 3 and 4 used IR theory to map the arguments in ongoing policy debates and used the resulting map to chart a course toward potential convergence. These are important and useful functions. At the same time, however, it is equally important to understand what IR theory *cannot* do in this debate. Lawyers must still be prepared to make and defend fundamentally normative choices.

To return to the lessons of Chapter I, political science theory is

227. Lori Damrosch, "Concluding Reflections", in *Enforcing Restraint* 348-367, 360-361 (Lori Damrosch, ed., 1993).

228. Damrosch, *supra* footnote 113, at 92.

positive, or *causal*, theory. The paradigms set forth and the theories grouped within them are statements about what causes what in the international system. Those statements in turn rest upon deeper assumptions about who the relevant actors are in the international system, what their motives are, and the processes or causal pathways by which action is most likely to occur.

Thus, in the context of humanitarian intervention, IR theory cannot dictate either the objectives of international legal rules nor the underlying values they should serve. That is the job of policymakers, lawyers, moral philosophers and everyday citizens. To return a final time to the two sets of values that Damrosch describes as underpinning the traditional doctrine of non-intervention, she describes "state system values" as

> "the principles inherent in the international system of separate, sovereign states, including the principles of nonuse of force, political independence of states, and sovereign equality" [229].

To international lawyers, those "principles" may simply seem like the ground rules of the system, the pillars on which the entire edifice of international law is built. But they reflect choices, conscious or incremental, concerning the basic values the system is designed to achieve.

The individuals making these choices have been the participants in the great international parleys over the centuries at which powerful individuals — from popes to presidents — have surveyed a cataclysm just past and sought to prevent it in the future. The architects of the Treaty of Westphalia and the Charter of the United Nations, and of countless great summits and conferences in between, have been politicians, generals, diplomats, priests and peace activists, as well as the writers and thinkers on whom they have relied. They have chosen these values, either as ends in themselves or means to still other ends.

Alternatively, consider the second set of values that Damrosch discerns behind the current régime of non-intervention. These are "human rights values", including "among many others, principles relating to the rights of individual human beings to exercise political freedoms and to participate in self-government" [230]. From this vantage point,

229. Damrosch, *supra* footnote 113, at 93.
230. *Id.*

> "the international legal principle of nonintervention, . . . aims at ensuring that human beings may organize themselves into political communities and create their own institutions for the realization of human liberty and happiness, free from external domination or repression"[231].

These values could also be deontological or instrumental. To Western liberal ears, they are likely to sound deontological, in the sense that they seem to express fundamental moral or political truths. Yet the reflexiveness of that reaction could still reflect deep socialization for an ulterior purpose rather than a basic moral intuition. For instance, our hypothetical architects of the international legal system could believe that a free and happy people would be less likely to covet the territory or treasure of other nations, thereby reducing the likely causes of war. Alternatively, a Realist would assume that these values had simply been imposed by the dominant power in the international system. Here again, where a choice of values rests on an underlying causal logic, even if it is deeply embedded or hidden, IR theory can clarify that logic and critique it.

Fair enough, but the Universal Declaration of Human Rights assumes that goals such as human liberty and happiness are ends in themselves. It is for lawyers, as well as moral philosophers, political leaders, cultural critics and normative entrepreneurs, to accept or challenge these ends and the countervailing or complementary goals of international order. In the end, lawyers must accept this normative challenge, on behalf of themselves or their clients. If they shrink from it and see themselves only as instrumental reasoners, they will have failed their profession and the wider public they must serve. IR theory is thus a valuable professional tool, but lawyers who would use it must understand its limitations as well as its strengths. By understanding the role of political science from the perspective of political scientists, lawyers can be more confident in asserting a distinctive role for law.

231. Damrosch, *supra* footnote 113, at 93.

CHAPTER III

THE ROLE OF NGOs IN INTERNATIONAL LAW-MAKING

Introduction

The twenty-first century promises to be an age of networks and non-State actors[232]. Writing in the *European Journal of International Law* in 1993, Christoph Schreuer called for a "new paradigm" of international law that would accommodate a host of non-State actors[233]. In 1996 Jessica Tuchman Mathews declared a "power shift", away from the State and toward NGOs and corporations[234]. Countless writers on globalization have sounded the same themes, all observing an explosion of non-State actors linking up with one another around the globe and crowding States on the international stage[235]. In his Report to the Millennium Summit of the General Assembly, held in September 2000, the United Nations Secretary-General documented the astonishing growth of NGOs. He called for recognition of the role that NGOs play in achieving the goals of the

232. James N. Rosenau, "Governance in the Twenty-First Century", 1 *Global Governance* 13 (1995); Tom Farer, "New Players in the Old Game: The De Facto Expansion of Standing to Participate in Global Security Negotiations", 38 *American Behavioral Scientist* 842 (1995); Peter J. Spiro, "New Global Communities: Nongovernmental Organizations in International Decision-Making Institutions", 18 *The Washington Quarterly* 45 (1995).

233. Christoph Schreuer, "The Waning of the Sovereign State: Towards a New Paradigm for International Law?", 4 *European Journal of International Law* 447 (1993).

234. Jessica T. Mathews, "Power Shift", 76 *Foreign Affairs* 50 (1997).

235. Writings about networks and the role of non-State actors are extremely diverse. Some commentators are inclined to view the emergence of non-State actors as a separate source of power, co-existing with State power but independent of that State power. See, e.g., Paul K. Wapner, *Environmental Activism and World Civic Politics* (1996). Others see the relationship of States and NGOs as more interconnected, with non-State actors exercising some power of their own and perhaps eroding some of the State's traditional powers but not replacing the State as the predominant source of control. See, e.g., Rosenau, *supra* footnote 232; Kenneth A. Rodman, "Think Globally, Punish Locally", 12 *Ethics and International Affairs* 19 (1998). See also Daniel C. Esty, "Non-Governmental Organizations at the World Trade Organization: Cooperation, Competition, or Exclusion", 1 *Journal of International Economic Law* 123 (1998) (arguing for enhanced recognition and participation for NGOs in the World Trade Organization).

United Nations and encouraged efforts to ensure that these contributions continue [236].

But how ? NGOs, by definition, are not States. Defining what they are is more difficult. According to a 1994 United Nations document, an NGO is a

> "Non-profit entity whose members are citizens or associations of one or more countries and whose activities are determined by the collective will of its members in response to the needs of the members of one or more communities with which the NGO co-operates." [237]

Alexis de Tocqueville offered an alternative definition in his great work *Democracy in America*, describing the ubiquitous associations he found in the United States as "the art of pursuing in common the objects of common desires" [238]. He explicitly distinguished "intellectual and moral associations" from "political and industrial associations", arguing that these intellectual and moral associations were a great but often overlooked power in American democracy [239]. American civic mythology celebrates these associations as part of the fabric of American life, explicitly protected by the First Amendment to the Constitution. From a European perspective, NGOs would be more likely to be called "pressure groups", with less benign connotations [240].

It is certainly impossible to craft a definition of NGOs that would satisfy all the disparate organizations that consider *themselves* to be NGOs. Any abstract formulation such as the UN definition above will lump together organizations like Amnesty International and CARE with entities like the International Chamber of Commerce and transnational agricultural lobbies. All of these organizations might agree with their characterization, at least in part, as "advocacy groups", but advocacy for what and for whom ? NGOs such as

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236. Kofi A. Annan, *'We the Peoples' : The Role of the United Nations in the 21st Century,* 80 (2000) (hereinafter Millennium Report), available at http://www.un.org/millennium/sg/report/full.htm.

237. Quoted in P. J. Simmons, "Learning to Live with NGOs", 112 *Foreign Policy* 82 (1998).

238. Alexis De Tocqueville, *Democracy in America* 514 (J. P. Mayer, ed., George Lawrence, trans., 1969).

239. *Id.* at 517.

240. See, for example, Carol Harlow and Richard Rawlings, *Pressure through Law* (1992).

Human Rights Watch, Médecins Sans Frontières, or Greenpeace would like to define themselves as "public interest groups", dedicated to advancing the interests of the poor, the sick, the oppressed, or the earth itself — interests that are un-represented or under-represented[241]. They would despise any association with "interest groups", industry associations or political action groups that are funded by their members to advance their particular interests in a pluralist political process[242]. Conversely, however, many multinational corporations who are the target of NGO activities see NGOs precisely as "interest groups", ones that are simply advancing different interests.

However defined, NGOs are increasing dramatically in both numbers and importance. According to the Secretary-General's report, fewer than 3,000 international NGOs were in existence in 1955[243]. Forty years later, in 1995, this tally had risen to include more than 20,000 organizations[244]. In 1948, the United Nations listed 41 consultative groups that were formally accredited by the United Nations Economic and Social Council; by 1998 that number had increased to over 1,500[245]. They are also genuinely global, springing up in virtually all countries and often organizing with national Governments, international organizations and the private sector to form "global policy networks"[246].

NGOs play a wide range of roles and perform a remarkable array of functions. According to one expert,

> "NGOs affect national governments, multilateral institutions, and national and multinational corporations in four ways: setting agendas, negotiating outcomes, conferring legitimacy, and implementing solutions."[247]

Others see their functions in still more general terms as influencing

241. As Phillippe Sands wrote in 1989, NGOs have become the environment's moral, if not legal, guardians. Phillippe Sands, "The Environment, Community and International Law", 30 *Harvard International Law Journal* 393, 412 (1989).
242. P. J. Simmons argues that instead of searching for a common definition, it makes more sense to focus on goals, membership and personnel, funding, and activities. These categories yield a useful matrix that helps not only define but also differentiate NGOs. Simmons, *supra* footnote 237, at 85.
243. Millennium Report, *supra* footnote 236, at 70.
244. *Id.*
245. Simmons, *supra* footnote 237, at 83.
246. Millennium Report, *supra* footnote 236, at 70-71.
247. Simmons, *supra* footnote 237, at 84.

public opinion and public awareness through single issue politics[248]. Still others see NGOs as primarily focused on constraining corporate behaviour worldwide, either through government regulation or, increasingly, through consumer boycotts and other mechanisms designed to have a direct impact on global markets[249]. And yet from still another perspective they serve as government handmaidens, gathering information, developing technical expertise, and monitoring the behaviour of government actors in ways that Governments are no longer able or willing to do[250].

These conflicting perspectives are difficult to reconcile. Are NGOs "moral guardians" or "new global potentates"? They typically see themselves as enhancing government accountability and increasing the transparency and accessibility of global politics. Yet many question the accountability of NGOs themselves, asking whether they are not promoting themselves as much as their causes[251]. And as their effectiveness and impact increases, they help to achieve outcomes that inevitably displease constituencies directly represented in the political process — constituencies who argue that democracy has been distorted.

The leading example here is the successful Greenpeace campaign to force Shell Oil not to scuttle the Brent Spar oil platform at sea, but instead to tow it from the Outer Hebrides to a Norwegian fjord and to dismantle it in a way that ultimately cost more. Two months after Shell agreed to the new plan, Greenpeace publicly admitted that its campaign was based on mistaken scientific assessments of the amount of toxic sludge on board the rig and apologized to Shell[252]. Shell was willing to comply with applicable British

248. Crocker Snow, Jr., "NGO Overreach: Greenpeace Pours Oil on Troubled Waters but Can't Clean It Up", 21 *Fletcher Forum of World Affairs* 161 (1997). Farer also points out that these groups are issue, rather than interest oriented. Farer, *supra* footnote 232, at 851.

249. Peter J. Spiro, "New Global Potentates: Nongovernmental Organizations and the 'Unregulated' Marketplace", 18 *Cardozo Law Review* 957, 958 (1996).

250. Kal Raustiala, "The 'Participatory Revolution' in International Environmental Law", 21 *Harvard Environmental Law Review* 537, 538 (1997).

251. Snow, *supra* footnote 248, at 161.

252. Spiro, *supra* footnote 249, at 964. Spiro acknowledges that Greenpeace has continued to maintain its policy of opposing the scuttling of rigs at sea, regardless of the chemicals on the rigs. *Id.* at 964. Greenpeace has argued that it was this policy, and concern about the scuttling of the Brent Spar as a precedent for dumping other oil installations and wastes, that originally led to Greenpeace's opposition to the scuttling of the Brent Spar. Sarah J. Burton, Campaign and Legal Director of Greenpeace UK, "Letter: Greenpeace Reply on Brent Spar", *The Times* (London), 8 September 1995. For a history of Greenpeace's involve-

Government regulations; indeed, the British Government's studies had supported its own conclusions regarding the relative environmental impact of different demolition plans[253]. But instead of facing regulations adopted through an organized political process, Shell was forced to bow before the power of public opinion[254].

In many ways, the criticism and controversy surrounding NGOs' activity is a measure of their success. NGOs of many different stripes are here to stay — and to shape our world in many different ways. As P. J. Simmons writes:

> "The question facing national governments, multilateral institutions, and national and multinational corporations is not whether to include NGOs in their deliberations and activities. . . . [T]he real challenge is figuring out how to incorporate NGOs into the international system in a way that takes account of their diversity and scope, their various strengths and weaknesses, and their capacity to disrupt as well as to create."[255]

To answer this question, we need a more sophisticated framework of analysis, one that IR theory can help to provide.

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ment in the London Dumping Convention, see Kevin Stairs and Peter Taylor, "Non-Governmental Organizations and the Legal Protection of the Oceans: A Case Study", in *The International Politics of the Environment: Actors, Interests, and Institutions* 110 (Andrew Hurrell and Benedict Kingsbury, eds., 1992).

253. Scientific Group on Decomissioning Offshore Structures, "Report for the Environment Research Council for the Department of Trade and Industry", April 1996, http://www.nerc.ac.uk/oilrpt.htm. The British Environment Minister, John Gummer, had come under attack from North Sea States' Environment Ministers and the European Commission at the North Sea Protection Conference in June 1995 for allowing the Brent Spar to be dumped at sea. Only Norway, which had potential disposal problems of its own, supported Britain. Paul Brown, "Gummer Fends off Attacks over Dumping Oil Platform: Conference Ministers Round on Britain over Disposal of Brent Spar and Allowing Sewage Nitrates and Phosphates to Reach the North Sea", *The Guardian* (London), 9 June 1995, at 7. See also David Nicholson-Lord, "UK Still One of Main Polluters of North Sea", *The Independent* (London), 3 June 1995, at 8; Nicholas Schoon, "Gummer Refuses to Back End to North Sea Pollution", *The Independent* (London), 10 June 1995. Some scientists have also challenged the DTI and Shell's assertions about the safety of dumping the rig. Dr. John Gage and Dr. John Gordon, "Are Shell's Criteria for Dumping in the Atlantic Justified", *The Scotsman*, 10 September 1995, at 8 (the authors are scientists at the Scottish Association of Marine Science).

254. It can be argued that Shell's mistake was one of process, with Shell failing to anticipate likely public reaction. As Thomas Dunfee argues, the public chose to believe Greenpeace over Shell, influenced by a series of controversial incidents involving Shell and by the fact that Shell had a potential conflict of interest in the decision. Thomas W. Dunfee, "Corporate Governance in a Market with Morality", 62 *Law and Contemporary Problems* 129, 147-148 (1999).

255. Simmons, *supra* footnote 237, at 83.

1. Three Models of NGO Activity

From an IR perspective, the first question to ask is *how* NGOs actually influence outcomes in the international system — if at all. What are the causal mechanisms through which they work? Realists will dismiss them as irrelevant gadflies. Institutionalists will look for how they might affect the structure or enhance the power of international institutions in ways that can influence the type and degree of inter-State co-operation. And Liberals will explore their role in shaping and/or reflecting preferences in domestic and transnational society and influencing the representation of those preferences through government institutions.

Fortunately, it is not necessary to address this question through deduction from first principles. From the existing literature on NGOs, produced both by political scientists and legal scholars, it is possible to distil three quite distinct models of NGO activity. Each of these models describes a different type of activity in relation to the State: with the State, against the State, and ignoring the State. Two of these models correspond generally to the IR paradigms — an Institutionalist "enabling" model and a Liberal "adversarial activist" model. The third model — a "market power" model — does not appear to involve States at all and thus initially seems to challenge both IR and IL understandings of actors in the international system. This section describes each model in turn. Section 2 then complicates the picture with a case study of the actual role of NGOs in the campaign to save African elephants within the legal framework established by the Convention on International Trade in Endangered Species (CITES). Section 3 then returns to the models, as modified by the case study, to investigate the normative question of what formal role to accord NGOs in international environmental law-making and international law-making more generally.

(a) *With the State: NGOs as Institutionalist enablers*

Kal Raustiala, a legal scholar who is also a political scientist, has analysed the role of NGOs in international environmental law, describing them as the progenitors of a "participatory revolution"[256]. He argues that NGOs participate in international environmental law-

256. Raustiala, *supra* footnote 250.

making in ways that provide many different *benefits* to States — political, technical and informational benefits. More precisely, he summarizes the benefits of NGO participation as follows: policy research and development, monitoring performance by both States parties and government delegations, representing important domestic political constituencies, facilitating the negotiation process through providing an information clearinghouse, and ensuring the continuation of government policies[257].

(i) *Policy research and development*

Particularly in complex and fast-moving areas like international environmental policy, Governments often find it difficult to keep abreast of important technical and policy issues. NGOs can often fill the gap, conducting independent policy research and drafting policy proposals and even legal conventions for States to consider. Raustiala documents a number of instances in which NGOs such as the International Union for the Conservation of Nature (IUCN) have provided sufficient policy information and evaluation to enable States to "maximize their policy information and research and minimize their resource expenditures devoted to policy development"[258]. This function also includes the provision of lower level technical assistance.

(ii) *Monitoring*

In the case of virtually all international environmental treaties, NGOs participate as observers of the treaty-making and treaty-implementation process, including formal or quasi-formal monitoring of State performance of their treaty obligations. A growing number of international conventions, again particularly concentrated in the international environmental area, begin by imposing reporting requirements on States regarding their levels of compliance with the treaty's obligations. NGOs monitor the accuracy of such reports by providing their own assessments of State compliance, supported by independently collected data[259]. In addition, NGOs help inform

257. Raustiala, *supra* footnote 250.
258. *Id.* at 560.
259. *Id.* at 560-561.

domestic legislatures about the activities of their own international delegations, enhancing legislative oversight of international activity[260].

(iii) *Representing important domestic constituencies*

A third important NGO role is representing important political interests in the treaty-making process. Directly involving NGOs in the negotiating process "enhances the flow of information and may win the support of skeptics and opponents" in the subsequent domestic ratification process[261]. At the same time, Governments gain information about the preferences of important political constituencies[262].

(iv) *Providing information in the negotiation process*

NGOs have created an invaluable role for themselves in increasingly complex international treaty negotiations by informing all parties — government delegations as well as the broader public — as to what is actually happening day by day. NGOs issue daily bulletins reporting on formal statements, points of contention, proposals and decisions[263]. As Raustiala points out, no individual Government's reports could be regarded as sufficiently neutral; conversely, United Nations reports would have to be official documents approved by all the participating Governments[264]. So NGOs fill the niche.

260. Raustiala, *supra* footnote 250, at 562-563.
261. *Id.* at 563.
262. *Id.*
263. *Id.* at 564. The *Earth Negotiations Bulletin (ENB)*, which began as an NGO-published daily bulletin at the Stockholm Conference in 1972, is now an independent reporting service, sponsored by a range of donors, some of whom are States, and published by the International Institute for Sustainable Development. The Bulletin provides daily coverage of United Nations conferences and negotiations on environment and development and many delegates rely on it as an indispensable resource to find out what happened the previous day. *Earth Negotiations Bulletin*, at http://www.iisd.ca/linkages/. At the Meetings of the Ministers for the World Trade Organization meeting in November-December 1999, a group of NGOs (Earthjustice Legal Defense Fund, Public Citizen, International Forum on Globalization, the Institute for Agriculture and Trade Policy, and the Sea Turtle Protection Project) put out a similar bulletin, the *World Trade Observer*, and distributed it to delegates, observers, the press, and internationally via the internet. *World Trade Observer*, at http://www.earthjustice.org/observer/home.htm.
264. Raustiala, *supra* footnote 250, at 564.

(v) *Stabilizing government policies*

NGOs can help government policies stay put. "Policy drift", or even reversal, may occur as international régimes evolve over time. Raustiala argues that institutionalizing the role of NGOs by providing for their continued participation in a particular treaty structure can ensure that the policies underlying the initial bargain remain fixed[265].

(vi) *Enabling institutions*

What is striking about these various functions performed by NGOs is their almost complete overlap with the functions that Institutionalists expect international institutions to provide to facilitate international co-operation. Recall the list of benefits that States purportedly derive from institutions in cases of convergent long-term interests but divergent short-term interests. Institutions decrease transaction costs, provide information, facilitate monitoring of treaty obligations, enhance possibilities for linkages in international negotiations, and increase the salience of State negotiations.

If these functions are normally to be provided by international institutions themselves — secretariats or some other type of institutional entity — but are now being provided by NGOs, then we can think of NGOs as performing "privatized" institutional functions. In this sense, NGOs are "enablers" of increased State co-operation. At any given moment it may certainly appear that they stand in a somewhat adversarial posture toward at least some State officials — as when an NGO provides "technical information" that challenges a State's representations as to its own performance under a treaty. Yet the whole point of the rationalist Institutionalist theory is that States need help in overcoming short-term obstacles to the achievement of their long-term interests. They use institutions to tie themselves to the mast and to ensure that their fellow States are equally bound; they grant powers to the institution to the extent necessary to make this possible. Why not accord the same role to an NGO?

NGOs, of course, are far more difficult to control. They are, after all, *non*-governmental. In the guise Raustiala describes them, however, they may be non-governmental primarily in name. If they are

265. Raustiala, *supra* footnote 250, at 565.

performing functions that Governments would otherwise perform for themselves or delegate to an international institution established and controlled by Governments, in situations in which the NGO interests converge with acknowledged government long-term interests, they are Institutionalist enablers [266].

This picture is undoubtedly overdrawn. Even enabling NGOs obviously have differences that diverge from the States they help. Further, they must retain a substantial amount of independence from State control or they risk losing their own legitimacy and informational authority. Their *non*-governmental status is often a precious asset in a climate in which Governments are disliked or distrusted. Finally, enabling NGOs also perform important constructivist functions, helping to *change* State interests through symbolic politics, norm generation, and consciousness-raising. The difference with adversarial activist NGOs, discussed below, is that enabling NGOs are typically pushing States down a path they have already chosen, at least in some degree. The constructivist task is to widen and deepen their preferences for environmental preservation, or arms control, or economic integration — but not to create those preferences *ab initio*.

(b) *Against the State : NGOs as adversarial activists*

An alternative model of NGO activity emphasizes adversarial activism, activity directly primarily *against* the State. Developed by political scientists Margaret Keck and Kathryn Sikkink, this model is based on empirical observations of "transnational advocacy networks" [267].

> "A transnational advocacy network includes those relevant actors working internationally on an issue, who are bound together by shared values, a common discourse, and dense exchanges of information and service." [268]

266. An example of this kind of delegation is the use of the NGO, TRAFFIC, to manage CITES' Elephant Trade Information System (ETIS), an international monitoring system of illegal trade in elephant specimens. CITES parties are required to communicate information on elephant ivory and other elephant product seizures to TRAFFIC via the CITES Secretariat. "Trade in Elephant Specimens", CITES Resolution Conf. 10.10 (Rev.), Annex 1 (1997), available at http://www.cites.org/CITES/eng/resols/10/10_10.shtml.

267. Margaret E. Keck and Kathryn Sikkink, *Activists beyond Borders : Advocacy Networks in International Politics* (1998).

268. *Id.* at 2.

In practice, however, these activists are most frequently clustered in domestic and international NGOs, which are then linked to one another in networks[269]. They are an increasingly powerful force in fighting abuses of power at a national, regional and global level, revealing information that Governments seek to suppress and reframing debates that Governments seek to control.

To be more concrete, transnational advocacy networks are most prominent in the areas of human rights, the environment and women's rights. They have also formed to mount campaigns advancing indigenous rights, labour rights and prohibiting infant formula. Historic examples include networks against slavery and for women's suffrage. In addition to NGOs, they can include local social movements, foundations, the media, churches, trade unions, parts of regional and international intergovernmental organizations, and government officials such as regulators or legislators[270]. They organize according to the nature of the issue, not of the participating actors. But they embody a core mechanism of NGO action and influence on world politics.

(i) *What they do*

Keck and Sikkink describe five kinds of influence that transnational advocacy networks exercise. They create issues and set agendas; influence the discursive positions of States and international organizations; change institutional procedures; secure policy change in "target actors" such as States, international organizations and multinational corporations; and affect State behaviour[271]. In international environmental law, for instance, transnational advocacy networks have politicized the issues surrounding the exploitation of tropical forests, spotlighting the impact on global biodiversity and the destruction of the habitat of indigenous peoples. They have successfully insisted on the discourse of "sustainable development". They have made it illegitimate for Governments and corporations to claim a monopoly of expertise on tropical forest issues. They have created roles for "local people" and "NGOs" in international bargaining fora such as multilateral development banks. And they have

269. Keck and Sikkink, *supra* footnote 267, at 9.
270. *Id.*
271. *Id.* at 9-10.

forced some States, such as Malaysia, to take at least the first steps toward long-term change of their forestry practices[272].

(ii) *When they are most effective*

Armed with this typology of what transnational advocacy networks can do, the next question is under what conditions they are likely to be most effective. Keck and Sikkink divide these conditions into issue characteristics and actor characteristics. Transnational advocacy networks are most effective on issues that either involve bodily harm to vulnerable individuals, such as children, women, and non-violent political prisoners, or expose a denial of legal equality of opportunity[273]. In the case of alleged harm, it must be possible to establish a short and clear chain of causation assigning responsibility for the harm[274]. Formal legal inequality is a concrete and demonstrable issue that appears relatively easy to fix. In both these cases, transnational advocacy networks are able to mobilize broader publics to push for discreet and clearly definable action with clear benefits to an identifiable population.

Transnational advocacy networks are also most effective when the networks themselves are dense, meaning that the participants in them exchange information regularly and widely[275]. A further condition for success involves the identity of States that transnational advocacy networks seek to pressure: the Governments most susceptible to pressure are those that aspire to membership in a normative community of nations[276]. For instance, Keck and Sikkink note that Brazil has been trying to raise its prestige in the international community and thus has been particularly sensitive about stories and images concerning the destruction of the Amazonian rain forest[277].

(iii) *How they work*

How then do transnational advocacy networks do what they do? What are the mechanisms through which they exercise their

272. Keck and Sikkink, *supra* footnote 267, at 160-163.
273. *Id.* at 27.
274. *Id.* at 27-28.
275. *Id.* at 28-29.
276. *Id.* at 29.
277. *Id.*

influence? "Where the powerful impose forgetfulness, networks can provide alternative channels of communication."[278] These alternative channels are particularly important when they establish a "boomerang pattern": when they use transnational and international channels to publicize injustices that a domestic Government has tried to suppress, thereby creating pressure on the Government from abroad and above as well as below[279]. Communication of credible information to actors who can use it quickly and effectively is the key mechanism through which transnational advocacy networks establish and wield power — what Keck and Sikkink call "information politics"[280].

In addition, transnational advocacy networks also engage in symbolic politics, leverage politics, and accountability politics[281]. These modes of action are all connected to information politics, but represent distinct mechanisms for achieving desired outcomes. Symbolic politics are primarily useful for drawing attention to a previously ignored issue by heightening its moral resonance and emotional appeal. Choosing a particularly appealing animal, such as a panda, as the logo of an international environmental campaign[282], or

278. Keck and Sikkink, *supra* footnote 267, at x.

279. *Id.* at 12-13.

280. *Id.* at 18-22. In recent years, the internet has had an enormous impact on the ability of NGOs to organize transnational campaigns. Craig Warkentin and Karen Mingst, "International Institutions, the State, and Global Civil Society in the Age of the World Wide Web", 6 *Global Governance* 237 (2000).

281. Keck and Sikkink, *supra* footnote 267, at 22-25.

282. WWF's own history describes the choice of the famous panda logo as follows:

> "Meanwhile, Chi-Chi the panda had arrived at London Zoo. Aware of the need for a strong, recognizable symbol that would overcome all language barriers, the group agreed that the big, furry animal with her appealing, black-patched eyes, would make an excellent logo." World Wide Fund for Nature, *A History of WWF* (1996), at http://www.panda.org/wwf/history/history_60s.htm.

WWF emphasized the panda after its first "save-an-animal" campaign for the rhino received minimal response. Thomas Princen, "The Ivory Trade Ban: NGOs and International Conservation", in *Environmental NGOs in World Politics: Linking the Local and the Global* 150 (Thomas Princen and Matthias Finger, eds., 1994). See generally Arne Schiotz, "A Campaign Is Born", 14 (10-12) *IUCN Bulletin* 120-122 (1983) (describing the evolution of WWF campaigns). Warkentin and Mingst, writing about the campaign against the Multilateral Agreement on Investment (MAI) and the campaign to ban landmines, observe the importance of the ability of NGOs to change the way in which the issue is framed. In the case of the MAI, NGOs moved the issue from the realm of economics and development to the realm of environment, equity, labour and human rights. In the case of the landmines, the NGOs changed the debate

convincing the United Nations to designate a special "year" or even decade devoted to a particular cause are prominent examples[283].

Leverage politics and accountability politics are two additional mechanisms that have proved highly effective for transnational advocacy networks. Leverage politics involve using connections to more powerful actors, such as a national Government, an international organization, or even a movie star or princess, to connect a cause to the provision or withdrawal of material resources or to moral censure or approval[284]. Once an issue has become visible and important enough, largely through information and symbolic politics, more powerful actors are more easily motivated to use their moral and/or material power to address it.

Finally, accountability politics involve holding a target actor to standards of conduct that it has formally accepted or adopted. Here transnational advocacy networks often succeed in transforming talk into action. They work first to convince a Government, a regional or international organization, or a private corporation, to commit itself to a particular course of action, even if they are aware that the commitment is merely a paper promise. They then seek to close the gap between word and deed, monitoring the actor's behaviour and publicizing its deviation from its professed principles. Step by step, they highlight hypocrisy and "mobilize the politics of shame" to change actual behaviour in line with formal commitments[285].

(iv) *Liberal adversaries*

The adversarial activist model of NGOs is remarkably consistent with Liberal international relations theory[286]. In this model, virtually

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from one about security to one about human security and humanitarianism. NGOs in both campaigns used highly emotive images during their campaigns. Warkentin and Mingst, *supra* footnote 280, at 249.

283. Examples include the International Year for the World's Indigenous People, GA res. No. 45/164 of 18 December 1990; International Decade of the World's Indigenous People, GA res. 48/163, 21 December 1993; International Women's Year, GA res. 3010, 18 December 1972; International Day for the Elimination of Violence against Women, 17 December 1999, GA res 54/134.

284. Keck and Sikkink, *supra* footnote 267, at 23-24.

285. *Id.* at 24-25.

286. Keck and Sikkink resist this analogy, arguing that even liberal relations theories that recognize a two-way street of influence between the national and international and the role of NGOs are too limited to explain the phenomena they are describing. *Id.* at 4. They argue that the networks they describe

> "participate in domestic and international politics simultaneously, drawing upon a variety of resources, as if they were part of an international society.

all NGO activity begins in domestic and transnational society and is then oriented toward the State. Describing the boomerang pattern, for instance, Keck and Sikkink write: "domestic NGOs bypass their state and directly search out international allies to try to bring pressure on their states from outside"[287]. Even when they are emphasizing the role of NGOs in providing alternative channels of communication and alternative sources of information, they note that "clear, powerful messages that appeal to shared principles . . . have more impact on state policy than advice of technical experts"[288].

NGOs in this model are adversarial activists typically fighting the State for its abuse of power. They are themselves important actors in domestic society; they work by linking up to form transnational networks and then mobilizing public opinion to pressure State actors. Although their *target* is the State, it is also their focus. Further, an important part of their complaint is an absence of meaningful representation in State decision-making; the voices of the victims they represent and advocate for are typically silenced in State governance mechanisms. By exposing information that the Government seeks to suppress, transnational advocacy networks give these victims representation in unofficial channels to pressure official institutions. More generally, they use information politics and symbolic politics to raise the salience of an issue to the point that more powerful actors must do something about it — a standard political move in representative democracies.

Alternatively, the boomerang pattern can be understood as unrepresented individuals and groups in one country *borrowing* the government institutions — courts, regulators, legislators — of another country to achieve results that they cannot achieve directly at home[289]. For instance, US NGOs have recently helped a group of

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However, they use these resources strategically to affect a world of states and international organizations constructed by states."

However, in so far as Keck and Sikkink acknowledge that the activists they describe are playing in a world where decisions are predominantly made by States, the Liberal model is applicable. Even where activists seek to change meanings and employ the "boomerang" effect discussed below, they are operating within and against national and international institutional structures.

287. *Id*. at 12.

288. *Id*. at 19.

289. Anne-Marie Slaughter, "The Real New World Order", 76 *Foreign Affairs* 183, 194 (1997) (hereinafter Slaughter, "The Real New World Order"); Anne-Marie Slaughter, "Government Networks: The Heart of the Liberal Democratic Order", in *Democratic Governance and International Law* 229-231 (Gregory H. Fox and Brad R. Roth, eds., 2000).

Ecuadorian peasants sue Texaco for environmental damage to their rain forest home in Ecuador[290]. As it stands now, the suit will stay in the United States if plaintiffs can show that they cannot get justice through their own courts[291]. Similarly, when a transnational advocacy network's campaign succeeds in convincing the legislatures of foreign countries to adopt sanctions against a Government accused of violating human rights, they have found a foreign legislative mechanism to hear their voices and act when the domestic legislature is deaf to their appeals[292].

This is the Liberal model of international politics. Change occurs from the bottom up; different States behave differently according to the goals and purposes of the individuals who live within them and their ability to achieve those goals through the government institutions that purport to represent them. Note, however, that international institutions can play an important role in this model. The Liberal and Institutionalist models often fit closely together. Transnational advocacy networks may target international and regional institutions

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290. *Aguinda* v. *Texaco, Inc.*, 1994 WL 142006 (SDNY 11 April 1994); *Jota* v. *Texaco, Inc.*, 157 F. 3d 153 (2d Cir. 1998); *Aguinda* v. *Texaco, Inc.*, 2000 WL 122143 (SDNY 31 January 2000). Amicus Briefs in the Court of Appeals were filed by the Sierra Club and the Owen M. Kupferschmid Holocaust Human Rights Project.

291. The Court of Appeals for the Second District has ruled that *forum non conveniens* only allows dismissal of a suit where the court determines that the alternative forum is indeed available. *Jota* v. *Texaco, Inc.*, *supra* footnote 290, at 159-160.

> "Though extreme cases might be imagined where a foreign sovereign's interests were so legitimately affronted by the conduct of litigation in a United States forum that dismissal is warranted without regard to the defendant's amenability to suit in an adequate foreign forum, this case presents no such circumstances." *Id.* at 160.

On remand, the district court judge has now reopened the record for additional submissions regarding the question of whether

> "the courts of Ecuador and/or Peru might reasonably be expected to exercise a modicum of independence and impartiality if these cases were dismissed in contemplation of being refilled in one or both of those forums". *Aguinda* v. *Texaco, Inc.*, *supra* footnote 290.

See also David Bosco and Anne-Marie Slaughter, "Plaintiff's Diplomacy", 79 *Foreign Affairs* 102 (2000).

292. In 1996, for example, Massachusetts passed an act barring State entities from buying goods or services from any person (defined to include a business organization) identified on a "restricted purchase list" of those doing business with Burma. "An Act Regulating State Contracts with Companies Doing Business with or in Burma (Myanmar)", 1996 Mass. Acts 239, ch. 130 codified at Mass. Gen. Laws §§ 7:22G-7:22M, 40 F1/2 (1997)). See also Rodman, *supra* footnote 235 (describing the effect of municipal purchasing power on the success of anti-*apartheid* campaigns against South Africa).

directly to force changes in their behaviour, in which case they are likely to work at least in part through the State Governments that are members of these institutions. Alternatively, they urge international and regional institutions to pressure offending State Governments just as they urge other foreign Governments to do so.

A final point about this model is that it relies equally on constructivist and rationalist causal mechanisms. The NGOs who are networking across borders are in many ways constituting transnational society and giving it meaning and content. Further, all the different types of politics that Keck and Sikkink describe assume that State interests are not fixed, but rather are negotiable and malleable. They can thus be changed through a process of socialization and normative pressure[293]. Keck and Sikkink also emphasize the enhanced opportunities for change when a State seeks to be a member of a normative community. They describe and seek to theorize the long-term processes by which the unthinkable becomes thinkable or the thinkable becomes unthinkable. What was once an unthinkable intrusion into domestic sovereignty has become routine human rights monitoring; alternatively, what was once the routine torture of domestic political opponents is gradually becoming unthinkable in some countries.

At the same time, all these constructivist mechanisms of change co-exist with rationalist strategies of interest maximization. Keck and Sikkink do not deny the ability of both State and non-State actors to pursue their interests through a complex set of cost-benefit calculations; they simply insist that in many cases both interests and identities are either actively contested or subject to gradual change. The adversarial activist model of NGO activity thus draws on both rationalist and constructivist causal mechanisms within a general Liberal framework of society-state interaction.

(c) *Forget the State: NGOs as mobilizers of market power and autonomous law-makers*

A third model of NGO activity envisions NGOs as displacing States, at least for some purposes. In this view, the international sys-

293. Keck and Sikkink, *supra* footnote 267, at 4. Keck and Sikkink's language, following the *leitmotif* of constructivist literature, describes "the intersubjective construction of frames of meaning".

tem of sovereign States is giving way to a global marketplace dominated by powerful private corporations. The premise for this model is that State power is declining and that international institutions cannot fill the void, hence efforts to regulate corporate activity through national legislation or regulation are largely ineffective. As a result, NGOs, which writers following this model assume to be simply "interest groups" rather than "public interest groups", bypass national Governments and wage their battles against powerful corporations "in the extra institutional space of the market"[294].

(i) *Mobilizing market actors*

The principal weapon wielded by NGOs in these battles is consumer boycotts, or at least the threat of them. NGOs "mov[e] to advance their agendas by mobilizing or threatening to mobilize sympathetic consumer constituencies"[295]. The lodestar for such efforts is the "divestment" campaign to convince corporations to divest their holdings in South Africa as a protest against *apartheid.* More recent examples include boycotts of tuna netted in ways that killed dolphins as well, of French products such as Beaujolais in a protest against French nuclear testing, and of Shell Oil products in an effort to block plans to scuttle a decommissioned oil rig in the North Sea[296]. In all these cases NGOs disseminate information and use symbolic politics to mobilize consumers to take direct action against corporations to change corporate behaviour or to damage a national economy sufficiently to change government behaviour. The result, in the words of legal scholar Peter Spiro, is "regulation through the marketplace"[297].

(ii) *Regulation through "voluntary codes"*

But what of regulation through national legislators? Or national regulatory agencies? According to Spiro, "[w]here effective, the interest group secures much the same result as it would have with a regulatory victory"[298]. Formal state channels of regulation are likely to be unresponsive or ineffective; in either case, they are increas-

294. Spiro, *supra* footnote 249, at 959.
295. *Id.*
296. *Id.* at 959-960.
297. *Id.* at 963.
298. *Id.* at 959.

ingly unnecessary. Beyond boycotts, which can be targeted to stop a certain practice, NGOs are promulgating "voluntary" codes of conduct in areas such as labour rights and environmental practices for adoption by multinational corporations. These codes are comprised of rules and principles that are often far broader than the strictures of national regulations; they are designed to ensure that corporations are good global citizens.

In this model NGOs do not need to press for an increased role in international law-making; they are themselves the new international lawmakers. They develop and promulgate the codes of conduct and pressure corporations to adopt them; the next step is to secure an agreement with corporate chiefs to allow NGO monitoring of compliance with the codes [299].

> "If a voluntary code of conduct becomes an industry standard for, say, the use of 'sweatshop' labor, and that standard is monitored by nonstate actors who command sympathetic constituencies, then that standard might as well be the law — supranational law, to boot, because it is not applied on a territorial basis." [300]

Thus in this model NGOs are not helping States achieve long-term co-operation, nor opposing them to reform abuses of power, but replacing them as regulators and law-makers [301].

(iii) *The role of international institutions*

International institutions also have a role to play in this picture, but only at the end of the law-making process. Following its success against Shell, for instance, Greenpeace sought to have an intergovernmental commission comprised of North Sea States adopt the prohibition on oil rig disposals at sea, but Spiro dismisses these efforts as largely peripheral to the principal power of the boycott [302]. He notes that NGOs may find international institutions to be

299. Spiro, *supra* footnote 249, at 962.
300. *Id.*
301. Describing Greenpeace's successful campaign against the decommissioning of the Brent Spar oil rig by Shell, Spiro notes: "Greenpeace, in effect, has created and enforced a new norm of international environmental law." *Id.* at 965. Spiro argues that "NGOs may not enjoy lawmaking power in the Austinian sense, but they clearly are able in some cases to constrain private behavior as effectively as sovereign commands". *Id.* at 962, fn. 18.
302. *Id.* at 965.

valuable allies in their market campaigns, sharing monitoring costs and adding legitimacy to NGO activities[303]. The United Nations Secretary-General is apparently of a similar mind, as he has emphasized the role of the United Nations in both helping but also constraining corporate actors[304]. However, in the market power model the NGOs themselves remain the primary actors and rule-promulgators.

(iv) *Consumer mobilizers versus adversarial activists?*

How does the market power model of NGO activity differ from the adversarial activist model used to characterize the activity of transnational advocacy networks? The two models do overlap in places, but several important differences emerge. First, the adversarial activist model continues to accord a critical, even central, role for the State. Keck and Sikkink observe that "[i]t is no accident" that transnational advocacy networks so often focus their campaigns on "claims about rights". "Governments are the primary 'guarantors' of rights, but also their primary violators."[305] When Governments violate rights, they also control the domestic mechanisms for redress — through elections, lawsuits, or even media campaigns. Thus activists must move around and above the State through the formation of transnational networks[306].

Yet perhaps Keck and Sikkink are simply studying NGO activity in response to an older generation of problems — problems created largely by authoritarian Governments all too often allowed to do as they pleased during the Cold War. In this world the abuse of power was most likely to occur at the hands of those who wielded power, which was still most likely to be military or political authorities. In the post-Cold War global economy, however, "the nation-state surely is in decline"[307], elbowed aside by mighty corporations and civic organizations operating in global society. From this perspective, the State is no longer the source of most global problems, but neither is it likely to be the source of the solution. NGOs will thus do better targeting other private actors.

303. Spiro, *supra* footnote 249, at 968.
304. Millennium Report, *supra* footnote 236, at 68, 71.
305. Keck and Sikkink, *supra* footnote 267, at 12.
306. *Id.*
307. Spiro, *supra* footnote 249, at 957.

A second difference between the market power model and the adversarial activist model, however, concerns Keck and Sikkink's empirical results. Keck and Sikkink freely acknowledge that private entities such as corporations can be among the "target actors" that transnational advocacy networks seek to influence[308]. They observe that NGOs determined to reduce infant mortality and malnutrition in developing countries deliberately chose to target the Nestlé Corporation as a major exporter of infant formula[309]. These boycott tactics are a familiar part of the NGO arsenal. However, as discussed above, in surveying not only the transnational campaigns that worked but also many others that proved ineffective, Keck and Sikkink conclude that the issues most susceptible to successful NGO mobilization are those that involve bodily harm to vulnerable individuals with a clear assignment of responsibility and those that focus on formal legal equality. It is evident that only States can grant legal equality ; it may equally be true, although less evident initially, that States are more likely to be the villains in relatively uncomplicated stories of harm inflicted on vulnerable individuals.

As an illustration, consider that the Nestlé boycott and the associated negative publicity generated by NGOs convinced Nestlé to stop marketing infant formula directly to nursing mothers. It did not succeed, however, in changing Nestlé and other corporations' practice of donating formula free to hospitals. The public apparently perceived that corporate culpability was not so clear where doctors and nurses were the intervening decision-makers[310]. Similarly, tales of multinational corporations exploiting child labour are muddied by conflicting accounts of the needs and decisions of the parents in the context of extreme poverty. Such cases are more complicated than State torture and disappearance of political opponents or destruction of the habitat of indigenous peoples or denial of voting rights to half the population[311].

308. Keck and Sikkink, *supra* footnote 267, at 11.
309. *Id.* at 14.
310. *Id.* at 28.
311. On a related point, the NGOs in Keck and Sikkink's account still assume that State Governments are likely to be a large part of the solution. Multinational corporations are unlikely to be able to do very much about female genital mutilation, for instance. The process of norm change in these cases requires a process of interest change on the part of State actors as well as social leaders, much as states in the United States have gradually understood that the public costs of private smoking outweigh the benefits. See *id.* at 37.

The third difference concerns Keck and Sikkink's observations and predictions concerning the continued role of the State in global politics. They reject the claim that "a global civil society will inevitably emerge from economic globalization or from revolutions in communication and transportation technologies"[312]. They see transnational networking as the product of deliberate political choices by highly strategic actors dedicated to particular causes. Many of those choices focus on motivating State action either to stop an ongoing practice or to adopt regulations and other incentives to encourage private actors to adopt new practices. The State looks very different in this picture than in its depiction as a unitary actor in Realist and Institutionalist theories. It is disaggregated into its component parts, each of which interacts with a much wider set of non-State and supra-State actors[313]. Nevertheless, it is still there and still important.

(v) *A new medievalism?*

Here is the nub of a much wider disagreement between the market power model of NGO activity and the previous two models. Spiro joins the growing number of scholars and pundits who see global politics evolving toward a "new medievalism", in which States give way to multiple centres of commercial, moral and political authority operating at local, regional and global levels[314]. From this perspective, "NGO leaders have emerged as a class of modern day, nonterritorial potentates, a position rather like that commanded by medieval bishops"[315]. They demand tribute from corporate leaders, "[j]ust as the medieval church would exact its price for its blessings in both conduct and coin"[316].

But like the medieval church, NGOs must share the global stage with many other actors: princes, merchants, sects of all kinds, and

312. Keck and Sikkink, *supra* footnote 267, at 33.
313. *Id.* at 31-32. Slaughter, "The Real New World Order", *supra* footnote 289; Slaughter, *supra* footnote 62; Anne-Marie Slaughter, "Governing the Global Economy through Government Networks", in *The Role of Law in International Politics: Essays in International Relations and International Law* (Michael Byers, ed., 2000).
314. Hedley Bull, *supra* footnote 2; Stephen J. Kobrin, "Back to the Future: Neomedievalism and the Post Modern Digital World Economy", 51 *Journal of International Affairs* 361 (1998); Schreuer, *supra* footnote 233.
315. Spiro, *supra* footnote 249, at 963.
316. *Id.* at 966.

even peasants. In modern dress, these agents are multinational corporations, international institutions, and concerned consumer constituencies. National Governments continue to exist in this world, but exercise steadily diminishing power and influence. To the extent that the activities of "private" actors generate a demand for new "public" regulatory institutions, they are likely to be created at the international or supranational level[317]. But they will not comprise a nascent world government: their "institutional make-up . . . is likely to be decoupled by subject matter and by region, so that there will be no single locus of ultimate authority"[318].

Spiro claims further that the rise of NGOs as powerful international actors in their own right poses a deeper challenge to the entire project of these lectures: the claimed utility of IR theory to international law. He argues that all of the IR theories that we have reviewed — Realism, Institutionalism, and Liberalism, in both their rationalist and constructivist variants — remain State-centric and thus cannot encompass or make sense of a world in which States are becoming increasingly peripheral actors[319]. IR theorists, like many of their international law counterparts, are generals fighting the last war. Any project integrating international law and international relations that relies on these models of IR is therefore a waste of energy and obsolete[320].

Liberal international relations theorists have a ready response. New medievalists are isolating and abstracting a small part of a much more complicated sequence of events. They ignore or downplay the many ways in which NGOs are already finding that they must work hand in hand with State power to achieve their objectives. Equally important, new medievalists identify the present rise of NGO power as a secular trend, without predicting the likely response to that enhanced power on the part of target actors.

More specifically, Liberals point to the many cases in which an NGO campaign has ultimately resulted in national legislation, such

317. Spiro, *supra* footnote 249, at 968.
318. *Id.*
319. Peter J. Spiro, "Globalization, International Law, and the Academy", 32 *New York University Journal of International Law and Politics* 567, 582-585 (2000). Even as the role of non-State actors has been acknowledged, Spiro argues that the IR literature considers them significant "only to the extent that they are able to influence state action", a product of IR's traditional focus on State action. *Id.* at 582-583.
320. *Id.* at 585-586.

as the dolphin-safe legislation ultimately passed in the United States Congress[321]. If NGOs fighting to change tuna fishing practices were so certain of their victory through a consumer boycott, why did they think it necessary to secure the passage of legislation? Spiro himself recognizes the likelihood that "without the force of law, the thinness of consumer attention and NGO resources" will limit the reach and effectiveness of regulation through the marketplace[322]. The alternative to State law is the emergence of "state-like institutional structures and significant bureaucracies" with monitoring and "enforcement capacity"[323]. But even assuming these structures can develop the power to give their codes the force of law, how will they gain, and retain, the necessary legitimacy? It is far more likely that market power campaigns will serve as the forerunners of and triggers for national and international regulation through more traditional channels. In such cases the market power model of NGO activity is simply a subset of the adversarial activist model.

NGOs who use market power are also attracting a growing number of critics, many of whom focus on the alleged abuses of power perpetrated by Greenpeace in the Brent Spar episode[324]. The accumulation of power requires a corresponding demonstration of credibility and responsibility. If NGOs are to be the modern guardians of global morality, who will guard the guardians? Many NGOs are responding to these criticisms themselves by developing codes of conduct to regulate their own activities[325]. But IR Liberals would also predict that corporate targets of NGO boycott campaigns will also quickly turn to national legislatures to seek increased scrutiny of NGO activities. They may also turn to measures such as libel

321. Dolphin Protection Consumer Information Act 1990, 16 USCA § 1385, Pub. L. 101-627 (1990), Pub. L. 105-142 (1997).

322. Spiro, *supra* footnote 249, at 967.

323. *Id.*

324. *Id.* at 964-965; Snow, *supra* footnote 248. See *supra* footnotes 252-254.

325. The International Federation of the Red Cross and Red Crescent Societies have developed a code of conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Relief, developed and agreed upon by eight of the world's largest disaster response agencies in 1994. International Federation of Red Cross and Red Crescent Societies, "Code of Conduct" (1994), at http://www.ifrc.org/publicat/conduct/code.asp. Interestingly, this Code was drawn up by larger, more established NGOs and has since been urged on smaller NGOs. See Greg Neale, "Aid Agencies Act to Curb the Amateur Do-Gooders", *Sunday Telegraph*, 28 August 1994, at 6. Oxfam International's Mission Statement also resembles a Code of Conduct. Oxfam International, "Mission Statement", at http://www.oxfam.org/about/mission.htm (last modified 15 November 2000).

suits, which may backfire in terms of generating the very publicity that NGOs seek and corporations typically seek to avoid[326], but could nevertheless quickly impose severe financial constraints on NGO defendants[327].

Finally, to the extent that NGOs seek to mobilize consumer power against corporations on an increasingly complex set of issues — environmental damage competing with development concerns, labour practices competing with local custom — they are likely to lose their moral edge. If they are perceived, as Spiro and others depict them, as mere interest groups, then the public is likely to see them as replicating national interest group politics on a global scale. Yet creating political institutions to ensure that all interests are fairly represented in a legitimate and transparent process requires establishing world government. The nation State, as imperfect as it is, is likely to emerge as the worst possible alternative, except for all the others[328].

The debate between the new medievalists and adherents of various State-centric IR theories must at this point remain largely in the realm of prediction. All participants in the debate see the same events and apparent trends in global politics; they simply draw dif-

326. Keck and Sikkink describe Nestlé's disastrous decision to sue a German NGO for libel after a campaign accusing Nestlé of being a baby killer. Keck and Sikkink, *supra* footnote 267, at 21. McDonald's made a similar mistake in bringing a libel case in Britain against two unemployed people who had been distributing leaflets outside one of its restaurants. The case, the longest civil trial in British history, became known as the McLibel case and was followed by several newspapers around the world, and generated a book, a three-hour reconstruction on Channel 4 television and a BBC documentary. Danny Penman, "Judgment Day for McDonald's", *The Independent* (London), 19 June 1997, at 20.

327. US corporations have taken to using so-called SLAPPs (Strategic Lawsuits against Public Participation) against members of the public or groups who have petitioned a government entity. Corporations usually allege defamation, business interference or conspiracy and, even though the majority of these suits are dismissed, they can lead to huge litigation costs for the defendants, thus serving as chilling effect on public participation. George W. Pring and Penelope Canan, *SLAPPs: Getting Sued for Speaking Out* (1996). Although a number of states in the United States have now adopted anti-SLAPP legislation, SLAPPS, or their international equivalent, are increasingly being used internationally and transnationally. James A. Wells, "Exporting SLAPPS: International Use of the U.S. 'SLAPP' to Suppress Dissent and Critical Speech", 12 *Temple International & Comparative Law Journal* 457 (1998); George W. Pring and Penelope Canan, "World Is Getting SLAPP-Happy", *National Law Journal*, 20 May 1996, at A19.

328. "Democracy is the worst form of Government except all those other forms that have been tried from time to time." Winston Churchill, Speech in the House of Commons, 11 November 1947.

ferent conclusions. Time will tell; it may indeed be that IR scholars will have to formulate new models to analyse new types of politics. Many are already in the process of developing alternative frameworks focused on global civil society[329]. If so, the moral will not be that international lawyers should ignore international relations theory, but only that international relations theory must catch up with the world it purports to theorize. Alternatively, existing IR theory provides several accounts of NGO activity that remain directly useful to international lawyers.

2. The NGO Models Applied

(a) *Making the picture more complicated*

The next step in analysing the role of NGOs in international lawmaking is to turn to a case study to see whether and how these different models of NGO activity can illuminate the actual practice arising out of a specific incident or set of incidents. A discussion of the role of international environmental NGOs, working with the Secretariat of the Convention on International Trade in Endangered Species of Wild Fauna and Flora[330] and member States to save the African elephant, demonstrates the ways in which such case studies inevitably complicate the shining simplicity of deductive models. The following case study focuses on two key moments in the story of the African elephant and its relationship to CITES, and the activities of various NGOs involved in those moments.

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329. James N. Rosenau, *Turbulence in World Politics: A Theory of Change and Continuity* (1990); Ronnie Lipschutz, "Reconstructing World Politics: The Emergence of Global Civil Society", 21 *Millennium* 389 (1992); Wapner, *supra* footnote 235; Paul Wapner, "Politics beyond the State: Environmental Activism and World Civic Politics", 47 *World Politics* 311 (1995); *National Development and the World System* (John W. Meyer and Michael T. Hannan, eds., 1979); *Institutional Structure: Constituting State, Society and Individual* (G. Thomas, J. Slever, F. Ramirez, John Boli, eds., 1987); *Constructing World Culture: International Nongovernmental Organizations Since 1875* (John Boli and George M. Thomas, eds., 1999); *Boundaries in Question: New Directions in International Relations* (John MacMillan and Andrew Linklater, eds., 1995); Andrew Linklater, *The Transformation of Political Community: Ethical Foundations of the Post-Westphalian Era* (1998); Ronnie D. Lipschutz with Judith Mayer, *Global Civil Society and Global Environmental Governance: Politics of Nature from Place to Planet* (1996).

330. Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1973, 3 March 1973, 27 *UST* 1087, 993 *UNTS* 243 (entered into force 1 July 1975) (hereinafter CITES).

(b) *Saving the elephant*

Three major international environmental NGOs, the International Union for the Conservation of Nature (IUCN) [331], the World Wide Fund for Nature (WWF) [332], and the TRAFFIC Network [333], all play a critical role in making CITES work. Indeed, from its inception, CITES was connected to these NGOs. The Convention emerged from an initiative of the IUCN [334] and even used the IUCN as its first secretariat [335]. When WWF was founded, it was at least in part created to raise funds for the IUCN [336] and, although their paths have sometimes diverged over the years, the two organizations remain closely connected [337]. The TRAFFIC Network (Trade Records Analysis of Flora and Fauna in Commerce) was founded by the IUCN's Species Survival Commission to monitor international trade in

331. The IUCN, known as the World Conservation Union, is an unusual, hybrid NGO with a membership that includes States and government agencies, in addition to national and international NGOs. See Robert Boardman, *International Organization and the Conservation of Nature* 102-123 (1981); Leif E. Christoffersen, "IUCN: A Bridge-Builder for Nature Conservation", *Green Globe Yearbook* 59 (1997). At the IUCN's World Congress in Amman, Jordan, in 2000, voting rights were distributed according to category: State members had three votes (or two where there was also one or more government agency from that State), government agencies had one vote, international non-governmental organizations had two votes, and national non-governmental organizations had one vote. See http://www.iucn.org/amman/content/members/accreditation voting.html (last modified 2 August 2000).

332. See Jacob Park, "The World Wide Fund for Nature: Financing a New Noah's Ark", *Green Globe Yearbook* 71 (1997). In 1986, the World Wildlife Fund became the World Wide Fund for Nature, although the United States and Canadian national offices retained the old name. *Id.* at 77, fn. 1.

333. Although, technically, TRAFFIC is part of WWF and IUCN, it is almost invariably treated as a separate NGO. TRAFFIC (Trade Records Analysis of Flora and Fauna in Commerce) is the wildlife trade monitoring programme of WWF and IUCN, with operations in 20 countries and territories. The network conducts market surveys, analyses trade statistics, investigates illegal wildlife trade and smuggling, works in close co-operation with the CITES Secretariat and other international, regional and national bodies, and provides expertise. In 1999, TRAFFIC and the CITES Secretariat signed a Memorandum of Understanding, among other things designating TRAFFIC offices as CITES Capacity Building Collaboration Centers. Crawford Allan, "Building CITES Capacity through Collaboration", *TRAFFIC Bulletin* (April 2000), available at http://www.traffic.org/bulletin/news-collaboration.html.

334. P. van Heijnsbergen, "International Legal Protection of Wild Fauna and Flora, Amsterdam", *IOS Press* 27 (1997); Simon Lyster, *International Wildlife Law: An Analysis of International Treaties Concerned with the Conservation of Wildlife* 239 (1985).

335. Christoffersen, *supra* footnote 331, at 62.

336. Princen, *supra* footnote 282, at 138; Christoffersen, *supra* footnote 331, at 65.

337. Boardman, *supra* footnote 331.

endangered species[338]. The CITES Secretariat itself has singled out these three organizations in recognition of their "enormous help" to the Secretariat, through the conduct of scientific studies, legal analyses, information gathering, and active monitoring of State trading practices[339]. These groups also regularly provide experts to serve on special CITES working groups and subcommittees[340].

Scholar Thomas Princen argues that the CITES Secretariat relies on international environmental NGOs to perform a variety of functions that the States parties to CITES cannot or will not perform, in particular covering for the limited funding States are prepared to dedicate to the CITES Secretariat and to implementation at home[341]. NGOs have conducted training seminars for officials from the management authorities of less-developed countries, have paid for delegates to attend CITES meetings, without attempting to influence their votes, and have even printed export permits[342]. However, the history of the African elephant's progress through the CITES régime indicates that these NGOs are in fact involved in much wider range of activities. Nor are these three NGOs the only NGOs to have influenced the elephant's status within the CITES régime.

The CITES régime is a permitting system for the international trade of those species and their specimens that the parties to the Convention have listed on the CITES' appendices[343]. The significant difference between species listed on Appendix I and those listed on Appendix II is the provision in Article III (3) *(c)* that prohibits trade of Appendix I species for "primarily commercial purposes", a provision that amounts, therefore, to a ban on international trade in that

338. van Heijnsbergen, *supra* footnote 334, at 28.

339. CITES Secretariat, "Fourteenth Annual Report of the Secretariat (1 January-31 December, 1989)", Lausanne, 1989, at 16-17; Princen, *supra* footnote 282, at 140-141.

340. Princen, *supra* footnote 282, at 141.

341. *Id.* at 141.

342. *Id.*

343. For a brief overview of CITES, see Lyster, *supra* footnote 334, at 238-277. For a more detailed overview of CITES up to 1989, see David Favre, *International Trade in Endangered Species: A Guide to CITES* (1989); yearly updates of CITES, written by David Favre, are contained in volumes of *The Yearbook of International Environmental Law*; key documents of CITES are available at http://www.cites.org. For a comprehensive, up to date, resource, see Willem Wijnstekers, *The Evolution of CITES: A Reference to the Convention on International Trade in Endangered Species* (2000), available at http://www.wcmc.org/CITES/eng/common/docs/evolution.pdf. See also Peter H. Sand, "Commodity or Taboo? International Regulation of Trade in Endangered Species", *Green Globe Yearbook* 19 (1997).

species or specimens of that species[344]. Amendments to the appendices require a two-thirds majority of the parties present and voting, excluding abstentions[345]. In an effort to expand the vague instructions contained in the Convention for what should be listed where[346], the parties have twice voted on decisions that set out listing criteria, focusing predominantly on science, and supplementing that with the precautionary principle in 1994[347].

As a tool for the protection of endangered species, CITES can appear somewhat blunt: a stark choice between a ban on trade or no ban frequently fails to address major threats to species' survival[348]. In the case of the African elephant (Loxodonta africana), the CITES choice between a ban or trade has resulted in frequently rancorous debate[349]. The African elephant was first listed on Appendix II in 1978, allowing for continued trade in ivory with permits[350]. The 1980s witnessed increasing concern about massive slaughter by poachers and the drastically declining numbers of elephants in some range States[351], but action by the parties to CITES was limited

344. Species is defined to include a subspecies or geographically separate population, a provision that has often led to calls for separate treatment of the southern African elephants and the East African elephants. CITES, *supra* footnote 330, Art. I. Specimen is also defined in Article I.

345. CITES, *supra* footnote 330, Art. XV.

346. Appendix I is to include "all species threatened with extinction which are or or may be affected by trade". CITES, *supra* footnote 330, Art. II (1). Appendix II is to include "all species which although not necessarily now threatened with extinction may become so unless trade in specimens of such species is subject to strict regulation in order to avoid utilization incompatible with their survival" and "other species which must be subject to regulation in order that trade in specimens of certain species . . . may be brought under effective control", a reference to "look-alike" species and specimens. CITES, *supra* footnote 330, Art. II (2).

347. The Berne Criteria were adopted at the first Conference of the Parties, but have now been superseded by new criteria adopted at the Ninth Meeting of the Conference of the Parties in Fort Lauderdale, "Criteria for Amendment of Appendices I and II", CITES Conf.9.24 (1994). See David Favre, "Trade in Endangered Species", 5 *Yearbook of International Environmental Law* 258-259 (1994).

348. Princen, *supra* footnote 282, at 150.

349. See generally David J. Harland, *The Killing Game: International Law and the African Elephant* (1994); Michael J. Glennon, "Has International Law Failed the Elephant?", 84 *American Journal of International Law* 1 (1990). For the various decisions taken by the parties to CITES on the African elephant, see Wijnstekers, *supra* footnote 343, at 391-418. For a critical account of the role of NGOs and the trade ban, see Raymond Bonner, *At The Hand of Man: Peril and Hope for Africa's Wildlife* (1993).

350. Princen, *supra* footnote 282, at 125.

351. Glennon, *supra* footnote 349, at 3. See also the US findings on African elephant population decline in 1988, "Endangered Species Act Amendments of 1988-African Elephant Conservation Act", House Report No. 100-827, 5 August 1988 (hereinafter House Report).

to an ivory quota system effective in 1986, with the range States responsible for setting their own quotas[352]. In some African States, predominantly southern African States, numbers of elephants remained stable or increased during the 1980s[353]. In others, predominantly East African States, there were reports of 90-95 per cent declines in elephant populations[354].

1989 was the big year for CITES, the African elephant, and the NGOs. The United States had already experienced some domestic pressure to act. In 1988, Congress passed the African Elephant Conservation Act[355], which provided for a certification system of importing States' elephant management systems, with restrictions to be placed on imports from countries that failed to meet the requisite standards. However, with the exception of a representative from the Humane Society, the experts testifying before Congress that year did not express support for a complete ban on trade in ivory, some because they wanted to retain America's influence by not taking it out of the ivory trade altogether, others because they believed that the substantial difference between the management achievements of southern African States and East African States was relevant. WWF and the IUCN had consistently opposed a complete ban over previous decades[356]. In 1989, the position of some key players in the field was to change.

Alan Thornton, founder of the Environmental Investigation Agency (EIA) in 1987, began to have some successes from lobbying and publication of his meticulous research over the previous two years into the illegal ivory trade and elephant poaching[357]. One of the people he succeeded in convincing was an important member of WWF-US, Curtis Bohlen, who supported a complete ban on ivory trade even before WWF-US officially supported the ban and began work on a proposal for Appendix I listing of the African elephant for the coming CITES Conference of the Parties[358]. It was clear that an African elephant range State supporter for the proposal would be

352. Princen, *supra* footnote 282, at 125.
353. House Report, *supra* footnote 351.
354. House Report, *supra* footnote 351.
355. African Elephant Conservation Act 1988, 16 USCA §§ 4201 ff. (2000), Pub. L. 100-478 (1988).
356. Fred Pearce, *Green Warriors: The People and the Politics behind the Environmental Revolution* 71 (1991).
357. *Id.* at 68-72.
358. Bonner, *supra* footnote 349, at 127-128.

politically necessary. According to Raymond Bonner's account of events, Thornton wrote letters that the Conservation Society of Tanzania sent to conservation organizations around the world asking for their support. Letters came urging the Government of Tanzania to call for Appendix I listing and Tanzania agreed to support the proposal[359]. When Richard Leakey was appointed the Director of the Kenya Wildlife Service, Kenya also joined in supporting the proposal. Kenya had suffered terribly from poaching, in part at least because of its own endemic, institutionalized corruption, and now it wanted the slaughter stopped.

At the same time, several groups were stepping up publicity in the United States and the United Kingdom, with full-page newspaper advertisements picturing slaughtered elephants[360]. WWF-US was not only losing money to other groups, it was also losing members[361]. The African Wildlife Fund (AWF), a United States based organization, which had roots in the hunting days of the early part of the century, switched from its previous "Don't Buy Ivory" campaign to support for a complete ban on ivory trade[362]. When the Ivory Trade Review Group, one of many bodies established to investigate the elephant situation, released a summary of its report in June 1989, describing catastrophic decreases in elephant numbers and calling for Appendix I listing, WWF-US decided to endorse a complete ban[363], followed shortly afterward by WWF-International[364]. Many conservationists who had previously opposed a ban paid attention to the report and support for Appendix I listing with its corresponding ban on ivory trade picked up momentum. With huge domestic interest in the fate of the elephants, both President George Bush and Prime Minister Margaret Thatcher banned the import of ivory to their respective countries[365].

In October 1989, at the Seventh Meeting of the Conference of the Parties (COP 7) in Lausanne, the African elephant was moved from Appendix II to Appendix I. At a prior meeting of the CITES African Elephant Working Group in Gabarone in July, the CITES Secretariat

359. Bonner, *supra* footnote 349, at 130.
360. *Id.* at 117-119.
361. Pearce, *supra* footnote 356.
362. Bonner, *supra* footnote 349, at 117-124.
363. *Id.* at 141-142. Pearce, *supra* footnote, at 356, at 72-73. Princen, *supra* footnote 282, at 126-127.
364. Bonner, *supra* footnote 349, at 139.
365. *Id.* at 139-141.

had presented six options, itself favouring a split listing approach which would mean that ivory from elephants in southern African States could still be traded, while elephants in East African States would be listed on Appendix I[366]. No agreement had been reached. COP 7 was a gruelling two-week-long fight, in the shadow of an NGO-provided 100-foot-long inflatable elephant flying overhead outside the conference building[367]. The US delegation consisted of nineteen men and women, the State Department noting "the high-level political interest in the elephant ivory issue"[368]. The United States, the European Union, and several African countries came determined to see an Appendix I listing. The NGOs who had been behind the support for a ban continued their work, with reports and heavy lobbying, particularly on the part of animal rights groups. When arguments about legitimate expectations threatened to lead to an exemption of legally stockpiled ivory, representatives of WWF produced and circulated a legal brief arguing against the necessary connection between legitimate expectations and such an exemption[369].

Following debate about the procedures to be followed for the vote, including the order of voting on the proposals[370], and the rejection of all other proposals on the African elephant, a proposal resembling some kind of compromise, put forward by Somalia, was adopted by a vote of 74 in favour, 11 against and 4 abstentions. The proposal allowed for an application for downlisting to Appendix II of particular populations, to be approved on the fulfilment of certain strict criteria[371]. Although the southern African States wanted a secret ballot, so that States would not vote on the basis of fear of losing northern States' aid, this proposal was rejected by a vote of the parties[372]. The southern African States made reser-

366. Harland, *supra* footnote 349, at 93.
367. Bonner, *supra* footnote 349, at 153.
368. Cited in *id.* at 19.
369. Phillippe J. Sands and Albert P. Bedecarre, "Convention on International Trade in Endangered Species: The Role of Public Interest Non-Governmental Organizations in Ensuring the Effective Enforcement of the Ivory Trade Ban", 17 *Boston College Environmental Affairs Law Review* 799, 808-812 (2000).
370. Given the number of proposals, a decision had to be made about which proposal should be voted on first. The Chairman chose the strictest first, although Harland observes that this may have been informed by a desire to see the southern African amendment favoured. Harland, *supra* footnote 349, at 98.
371. The criteria are set out in Harland, *supra* footnote 349, at 200-202 (Appendix B).
372. *Id.* at 98.

vations to the listing, but a promised trade cartel was never carried through when demand States either chose not to make reservations or lifted their reservations soon after[373].

Even those opposed to the ban agreed that it was a success[374]. The price of ivory plummeted, demand dried up[375], and elephant populations have since begun to recover in East African States. But that was far from the end. After two attempts to reverse the ban on ivory trade at Meetings of the Conference of the Parties, the southern African States prevailed in 1997, gaining permission at the Tenth Conference of the Parties (COP 10), held in Harare, Zimbabwe, to sell some ivory under limited circumstances[376]. President Mugabe opened the Conference with the words, "We believe a species must pay its own way to survive"[377], reflecting increasing domestic pressure to sell off stockpiles of ivory that had been collected from culling. This time, the vote was taken by secret ballot.

COP 10 did impose some constraints on what States could do. States wishing to sell ivory were required to provide an inventory of their ivory stocks, none of which were to come from poaching seizures. All proceeds were to go into conservation trust funds, managed by Boards of Trustees, and these funds were to be used for positive rather than harmful influence on elephant conservation, thus aiming to provide resources for elephant protection as well as an incentive for locals to protect the source of these funds. A one-off

373. Japan's threatened reservation never came to fruition, in part because it risked not being able to host the next Conference of the Parties in Kyoto. *Id.* at 102-103 (listing three possible reasons for Japan's decision not to enter a reservation). The United Kingdom entered a reservation for Hong Kong for only six months, to allow it to deal with its stockpiles of ivory. China unexpectedly announced the withdrawal of its reservation at the end of 1990. David Favre, "Trade in Endangered Species", 1 *Yearbook of International Environmental Law* 193 (1990).

374. Even Bonner, who is otherwise critical of the ban, agrees that the ban was initially highly successful. Bonner, *supra* footnote 349, at 129.

375. Favre, *supra* footnote 373.

376. "Conditions for the Resumption of Trade in African Elephant Ivory from Populations Transferred to Appendix II at the 10th Meeting of the Conference of the Parties", CITES Conf.10.1 (1997) and "Conditions for the Disposal of Ivory Stocks and Generating Resources for Conservation of African Elephant Range States", CITES Conf.10.2 (1997) available at http://www.cites.org/CITES/eng/decs/10shtml#1. The vote was taken by secret ballot. David Favre, "Trade in Endangered Species", 8 *Yearbook of International Environmental Law* 292-294 (1997).

377. Quoted in Shawn M. Dansky, "The CITES 'Objective' Listing Criteria: Are They Objective Enough to Protect the African Elephant?", 73 *Tulane Law Review* 961, 971 (1999).

sale was to be held for non-commercial purposes. The precautionary undertakings to be complied with, as verified by the Secretariat, included requirements that the ivory come from the relevant range State population of elephants only, that it be marked, that the sale be conducted through a single centre, and that the ivory be shipped, as far as possible, direct to Japan[378]. When the sales went ahead in 1999, the auctions were closed to the public, with the credentials of all participants verified by the Secretariat[379]. The Secretariat monitored the auction, the packing of the ivory, the export permits, the export, the import permits, and the import[380]. Approximately 5 million US dollars were raised from the auctions in Botswana, Namibia and Zimbabwe[381].

The NGOs were active before, during and after COP 10 in 1997[382]. Debates between the two sides were on the Internet, the usual groups were out in force, and advertisements ran in the *New York Times*. The Environmental Investigation Agency and Save the Elephants, relying on the CITES Panel of Experts review of the de-listing proposals, argued that the monitoring system was not yet running smoothly and any resumption of trade should wait until adequate safeguards were in place[383]. The main argument of NGOs in favour of the complete ban, the East African range States, and many elephant experts has always been that it is impossible to control illegal trade in ivory where there is a legal trade. While the southern African States may feel as though they are being penalized for Kenya's corruption and poor management, the East African States feel that whenever trade is permitted, they will be the first ones to

378. "Verification of Compliance with the Precautionary Undertakings for the Sale and Shipment of Raw Ivory", Forty-Second Meeting of the Standing Committee, CITES Doc. SC.42.10.2.1., para. 10, available at http://www.wcmc.org.uk/CITES/eng/cttee/standing/42/42-10-2-1.pdf.

379. *Id.* at para. 12.

380. *Id.* at paras. 15-27.

381. *Id.* at para. 26.

382. A delegate from the Royal Botanic Gardens at Kew, in Britain, which is actively involved in the work of the CITES Plants Committee reports that while attending COP 7 in Harare, a friend asked: "I don't really understand why you are here . . . what has Kew Gardens got to do with elephants in Africa?" See *CITES News — Plants (A Newsletter for the European Region of the CITES Plants Committee)*, Royal Botanic Gardens, Kew, Issue 6, February 1998, available at http://WWW.RBGKEW.ORG.UK/herbarium/caps/cites/english/iss6e.htm.

383. See Barnabas Dickson, "CITES in Harare: A Review of the Tenth Conference of the Parties", *Colorado Journal of Environmental Law and Policy Yearbook* 55, 57, 58 (1997); See also "CITES and the Ivory Debate", http://www.savetheelephants.org/cites.htm (last modified 19 May 2000).

suffer. But in 1997, the effect of a split listing on listed populations of elephants elsewhere was still theoretical and the southern African States won the day[384].

By 2000, as the parties and the NGOs geared up for a repeat performance, figures were becoming available. This time all sides came armed with numbers. Before any votes on the status of the elephant, the CITES Secretariat reported on the results of the decision to allow experimental trade in raw ivory[385]. Relying on eight national reports, produced by States, the Secretariat concluded that illegal poaching had not increased in the three range States allowed to trade and that in States where poaching had increased, the relationship with authorized trade had not been established. The Secretariat's figures did not go unchallenged[386]: several NGOs provided alternative reports and figures, as discussed below. India and Kenya, both of whom were sponsoring a proposal to place all elephant species on Appendix I[387], disputed the Secretariat's figures and conclusions. TRAFFIC, by contrast, which is responsible for managing the CITES-established Elephant Trade Information System to which States report[388], contested NGO figures on poaching, arguing that they had double counted.

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384. TRAFFIC's post COP 10 report demonstrates decided neutrality on the question of whether the decisions at COP 10 were harmful or beneficial for protection of the African elephant, urging caution and a review of figures as they came in. "African Elephants and the June 1997 CITES Meeting", *TRAFFIC Network Briefing*, July 1997, at http://www.traffic.org/briefings/brf_elephants_cites.html.

385. "COP-11 Highlights: Monday 17 April, 2000", *Earth Negotiations Bulletin*, Vol. 21 (8), 18 April 2000, at http://www.iisd.ca/vol21/enb2108e.html. See also *Earth Negotiations Bulletin*, Photos and RealAudio of 17 April 2000, at http://www.iisd.ca/cites/cop11/17april.html.

386. The Secretariat recorded that 235 elephants were poached during 1998 and 1999, while a report from the Born Free Foundation, for example, estimated that 30,795 elephants were killed in Africa during 1998 and 1999. Born Free Foundation, "Stop the Clock", 4 April 2000, http://www.bornfree.org.uk/stopthe clock/poaching.htm. The report goes through the methodology the Foundation uses to achieve this result, calling into question reliance only on reported confiscations of ivory, and stating that it has discounted in order to avoid double-counting. The Born Free Foundation is based in the United Kingdom and addresses its report predominantly to the United Kingdom and the European Union:

> "The Born Free Foundation supports the joint proposal from Kenya and India to ban the international ivory trade and calls on the UK Government, the European Union and the Parties to CITES to consider the information in this Report and make the right decision." *Id.* (Executive Summary.)

387. India also suffers from poaching for ivory from its Appendix I listed Asian elephant populations.

388. See *supra* footnote 266.

Outside, at a press briefing sponsored by the IUCN's Species Survival Commission, these other NGOs released their own studies of levels of elephant poaching since the decision in 1997[389], contesting the figures of the Secretariat and TRAFFIC[390]. Save the Elephants, with the renowned elephant expert, Iain Douglas-Hamilton, as their spokesman, released a comprehensive study on the status of Kenya's elephant populations, "The Ivory Markets of Africa", which they said was "one of the few pieces of scientific evidence that was available to the delegates during CITES"[391]. In addition to reports, Save the Elephants brought a representative of the Samburu tribe of Kenya to participate in the Conference and advocate a total ban on ivory sale[392]. Although the press briefing was open only to the press, States were able to watch the proceedings live by video-link.

The authors of these reports were very careful to make clear the methodology and sources relied on for their conclusions. The NGOs producing them were apparently keenly aware that their success relied on the validity of the information they provided. When disputing the findings of bodies like the CITES Secretariat and TRAFFIC, they had to be absolutely clear as to how and why they come to different conclusions. Further, the predominant argument was not an animal rights-based argument about the killing of individual animals. It was, rather, an argument rooted in pragmatics: the legitimate concern that allowing the legal sale of some ivory would fuel illegal ivory trade and poaching.

In general, COP 11 was an opportunity for everyone to affirm the importance of NGO involvement in the CITES régime[393]. As the *Earth Negotiations Bulletin* declared:

> "The presence of the inflatable life-size Greenpeace whale

389. Environmental Investigation Agency, "Lethal Experiment" (2000), available at http://www.eia-international.org/Campaigns/Elephants/Reports/lethExp/index.html; The Born Free Foundation, "Stop the Clock", *supra* footnote 386.

390. Pictures and an overview of the briefing are available from the *Earth Negotiations Bulletin*, Photos and RealAudio of 11 April 2000, at http://www.iisd.ca/cites/cop11/11april.html.

391. See http://www.savetheelephants.org/cites.htm (last modified 19 May 2000).

392. *Id.*

393. The United States proposed a document that recognized the contribution of observers to meetings of the COP and made recommendations for their participation in meetings. The document was adopted. "Recognition of the important contribution made by observers to the CITES process at meetings of the Conference of the Parties", CITES Doc. 11.6. (2000), summarized at http://international.fws.gov/cop11/cop11des.html (last modified 25 October 2000).

> outside the UNEP reception area, distribution of NGO materials in delegates' mailboxes, although cleared by the Secetariat in advance, and campaign posters directed at specific Parties indicated for many that CITES fully incorporates many civil society perspectives."[394]

However, difficulties have also arisen. Some parties are critical of the concessions,

> "noting that the growing NGO participation corresponds to increased deference of crucial decisions to the Standing Committee, which is closed to observers, taking away NGOs' watchdog role in important matters, and with it accountability and transparency in its operations"[395].

In a press briefing on the role of civil society in CITES, most NGOs agreed that the diversity of opinion among NGOs was beneficial. But there were also comments about lack of accountability[396].

The listing and de-listing proposals for the African elephant never came to a vote. Instead, negotiations concluded in a kind of impasse: the parties agreed not to change the Appendix listing of the elephant, but also agreed to prohibit the sale of ivory between COP 11 and COP 12[397]. Both sides declared victory, but the battle may have been merely postponed. In the meantime, all sides are preparing their ammunition: monitoring and lobbying continues.

(c) *Modifying the models*

This particular case study complicates the models of NGO activity developed in Section 1. Before drawing some more general conclusions, however, it is important to note several distinctive aspects of the CITES régime that may not be applicable elsewhere. Beyond the close involvement of CITES with the IUCN, WWF and TRAFFIC, CITES itself is unusual in its express and fairly open

394. *Earth Negotations Bulletin*, "Summary of the Eleventh Conference of the Parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora, 10-20 April, 2000", Vol. 21 (11), 21 April 2000, at http://www.iisd.ca/linkages/vol21/enb2111e.html.

395. *Id.*

396. *Earth Negotiations Bulletin,* Photos and RealAudio of 13 April 2000, at http://www.iisd.ca/cites/cop11/13April.html/.

397. "COP-11 Highlights: Monday 17 April 2000", 21 (8) *Earth Negotiations Bulletin*, 18 April 2000, at http://www.iisd.ca/vol21/enb/2108e.html.

authorization of the participation of NGOs as observers in its Conferences of the Parties[398]. When Japan took the unusual step of challenging the participation of Greenpeace at COP 11, no doubt due to Greenpeace's active opposition to Japanese whaling, it was quickly reminded by the Secretariat that Greenpeace had fulfilled the requisite criteria, and it withdrew its objection[399].

Further, insofar as CITES is also a régime that relies predominantly on State action, the market model is less applicable here, although it is worth observing that NGOs have overwhelmingly adopted a strategy of stemming the availability of ivory rather than seeking to rely only on consumer boycotts. Although some consumer boycotting had begun in the United States in the late 1980s, spurred on by campaigns like AWF's "Don't Buy Ivory" campaign[400], the real drop in demand came when the ban was put in place. This sequence of events appears to reinforce the argument that, for some things at least, state regulation will be the more effective tool.

Even with these caveats, however, the case study suggests several modifications to the models that will help guide their application in a more normative context. First, although NGOs do engage in different kinds of activity of the types identified by the models, it is difficult if not impossible to use these categories of activity to define different types of NGOs. IUCN, WWF and TRAFFIC do facilitate the functioning of the Secretariat, funding its projects, undertaking some of the CITES' monitoring systems, and generally providing accepted, scientific information. They thus participate more in enabling activity than adversarial activist activity. NGOs such as EIA, the African Wildlife Fund, Save the Elephants, and Greenpeace, tend to use information quite differently, generally to mobilize public opinion for or against contemplated institutional action in ways consistent with the adversarial activist model. This use of information is particularly effective in a field such as environmental protection, where numbers are both highly significant and highly contested. The case study also supports the proposition that enablers will tend stick more closely to the institution they are enabling, while activists will remain opposed.

However, in the heat of a particular contest, NGOs can also

398. CITES, supra footnote 330, Art. XI (7).

399. "Admission of Observers", CITES Doc. 11.7 (2000), summarized at http://international.fws.gov/cop11/cop11des.html (last modified 25 October 2000).

400. See *supra* footnote 362 and accompanying text.

switch roles or ally with one another across the enabling-activist divide. Thus even the EIA, founded expressly to be an activist organization rather than an informational one, assists Governments. EIA also teamed up with WWF, the Conservation Society of Tanzania and then Kenya to push forward the Appendix I listing in 1989. In 2000, numerous NGOs were working with Kenya and India, opposing the Secretariat and certain other States, and working to persuade a potentially ambivalent European Union to join their side. Southern African States have worked with Japan and Iceland and indigenous groups, finding common cause in their preference of trade and Appendix II listing of elephants and whales.

Second, and relatedly, it is more helpful to look at the different types of activity identified by the models in terms of the choices NGOs make to help achieve their substantive goal at a particular time and in a particular context. To advance their agendas, NGOs must forge relationships with groups, States, sub-State entities, and individuals. Nurturing these relationships requires NGOs to adopt different techniques, at times enabling, at times adversarial, and to apply these different techniques against different targets: States, private entities, international organizations. As just noted, the choices of specific NGOs also affect the strategies adopted by other NGOs. Robert Boardman observes, for instance, that notwithstanding the IUCN's non-activist stance or perhaps because of it, "[t]he fact that such a body as IUCN exists has sometimes been a useful weapon in the hands of local groups endeavouring to bring pressure on governments"[401].

Third, the decision to participate in these different types of activity can affect the legitimacy and credibility of NGOs themselves. NGOs perceived as being too closely allied with Governments risk attack from other NGOs. The competition among NGOs to provide the most credible information creates costs for NGOs that are seen as too enabling or too adversarial. At the same time, NGOs inclined to rely more on market power strategies are likely to find themselves in competition with Governments and international organizations for the provision of credible information, as well as with other NGOs. These constraints suggest that all three of the different types of activity identified by the models are likely to be self-limiting, at least to some degree.

401. Boardman, *supra* footnote 331, at 181.

Overall, a focus on categorizing different types of activities and strategies rather than organizations has important implications for developing or changing legal régimes affecting NGOs. Efforts to limit NGOs to one type of activity or to grant specific NGOs special rights and privileges based on the type of activity they engage in are likely to be unworkable. At the same time, advocates of granting NGOS greater "participation rights" in international lawmaking processes generally must bear in mind both the range and the often conflicting nature of the different activities that NGOs engage in. Section 3 explores these issues in greater detail in reviewing how the models can be used to guide normative choices.

3. NGOs as Subjects of International Law

In 1989, Philippe Sands called on international lawyers to find a way to grant environmental NGOs a formal role in international law as "legal guardians" of a new generation of international environmental rights. In his words, "the political reality that nongovernmental organizations are important participants in international society ought to be given legal expression"[402]. As discussed at the outset of this chapter, other international legal scholars echoed his appeal in more general terms throughout the 1990s and continue today[403]. The question is still how precisely to recognize NGOs.

Sands reviewed various international environmental treaties that allowed NGOs, among others, to litigate breaches of the environmental standards imposed, as well as granting NGOs various types of consultative or observer status[404]. In any new treaties and institutions, he proposed, NGOs should be granted a "formal legal role" as "'guardians' of the environment", which must include "a wider consultative status, with the right to make representations and participate in the development of environmental standards"[405]. NGOs should further be able to provide information and submit petitions requesting any new international agency to investigate breaches of environmental standards. In short, NGOs must be given "standing under general international law", to make their voices heard and

402. Sands, *supra* footnote 241, at 394.
403. See, e.g., Schreuer, *supra* footnote 233; Esty, *supra* footnote 235; Farer, *supra* footnote 232.
404. Sands, *supra* footnote 241, at 413-415.
405. *Id.* at 417.

their actions felt, and thus to ensure a far more effective role for international law in international environmental protection[406].

In assessing these proposals, IR theory has several uses. First, the three different models of NGO activity developed by using IR theory as an analytical lens immediately challenge Sands' monolithic designation of "NGOs". Do his proposals take sufficient account of these different types of activity? Are some types of activity more compatible with his proposals than others? What difference does it make that the same NGO may well engage in all three types of activity at different times? Second, moving back to first principles, how would Institutionalist and Liberal theory predict that NGOs can be most effective in achieving specific international goals? How do these predictions intersect with Sands' proposals, and can they be used to generate any counter-proposals of their own? Third, how do Sands' proposals relate to another, still emerging body of IR theory, which can be generally described under the rubric of "global civil society theory"?

Addressing these questions once again requires navigating the tricky transition from positive models of State behaviour to the normative questions typically posed by lawyers. Each of the problem-oriented chapters in this course wrestles with these issues in a different way. Throughout this section, the emphasis will be on demonstrating how positive assumptions can reinforce or challenge specific normative proposals.

(a) *Conditioning NGO activity on State consent*

Institutionalist theory predicts that NGOs can be most effective in achieving specific international outcomes by helping States overcome barriers to co-operation in cases where they have convergent interests. From this perspective, States have an interest in encouraging NGOs to engage in enabling activities, performing functions such as information-gathering and monitoring that States would otherwise have to perform for themselves. Recall the contributions of the IUCN, WWF and the TRAFFIC Network to the effectiveness of CITES. To best fulfil these functions, NGOs must maintain a distinct but allied position relative to the member States in any particular régime.

More specifically, Institutionalist theory reinforces the wisdom of

406. Raustiala, *supra* footnote 250, at 567.

insisting on State consent to formalized NGO activity. If NGOs are to be most effective in overcoming barriers to inter-State co-operation, they must work at the nexus of convergent State interests. They can simultaneously work to clarify and expand the zone of convergence, but activities such as litigating against States or formally representing "global environmental interests" distinct from State interests are likely to backfire or be affirmatively counter-productive. In an Institutionalist world, States remain the primary actors; power also continues to determine international outcomes in many cases. NGOs working in areas such as environmental protection, in which all States do ultimately have a long-term common interest but often quite divergent interests in the short term, would do better to work with states rather than against them.

This view of the ideal NGO position assumes fixed State interests, as rationalist Institutionalists do; constructivist Institutionalists would also expect NGOs to play an important role in helping international institutions generate norms that will gradually change State interests toward enhanced environmental protection[407]. To this end, Princen observes that in return for the functions described above, NGOs get access, access they can use to affect norms of international behaviour and advance their moral interests internationally[408]. It is a relationship Princen describes as an

> "inter-organizational exchange . . . between the institutional imperative of the secretariat and the political needs of the NGOs, between resolving the coalition-maintenance/condemnation tension and ensuring a single-minded species protection focus"[409].

Here again, the ability of NGOs to perform any of their "enabling" functions depends on their being able to collaborate with national and international government officials on many issues while at the same time maintaining sufficient distance to preserve their own credibility with the wider public[410]. From this perspective, Sands'

407. Princen, *supra* footnote 282, at 143. As noted below, however, Institutionalist theory and Liberal theory can fit together here, by adopting a Liberal theory of interest formation and then determining from that the extent to which States have convergent interests or not and hence the particular bargain that can be struck and implemented with the help of NGOs.

408. *Id.* at 142.

409. *Id.*

410. *Id.* at 144.

proposal to grant NGOs "a wider consultative status, with the right to make representations and participate in the development of environmental standards", must be more clearly specified.

NGO representatives who found themselves directly opposed to some member State positions, and in a formal position to make their opposition matter, could undermine the heart of the "enabling" relationship. Similarly, NGOs actively involved in developing codes of conduct and trying to impose them on corporate actors could find themselves competing with international institutions engaged in the same type of activity but operating under much greater political constraints. On the other hand, NGOs who could actually vote within international institutions might easily become too closely identified with States, since they would then be part of any resulting political bargain. In addition, granting them the exercise of direct political power would immediately raise questions about why some organizations are empowered to act as "environmental guardians" and not others[411], as well as questions about why the interests represented by these organizations should not be confined to domestic political processes and then represented solely by States.

Peter Willetts has chronicled the evolution of NGO rights within the United Nations from a clearly secondary "consultative" status, meaning availability "to give advice" but not to be "part of the decisionmaking process", to "social partnership" with United Nations members[412]. This "partnership" is still something less than "observer" status, which refers to full "participation without vote" in deliberations and decision-making processes[413].

In practice, it has come to mean the ability to speak but not to vote, and, more subtly, not to negotiate[414]. As Willetts expresses the difference:

> "When NGOs speak they can comment on UN programs, propose new policy objectives, and respond to the general

411. Questions of accountability can cut both ways. WWF has been accused of "drifting in the wrong direction" for not supporting a complete ban on ivory for many years, thereby "deluding itself, the conservation community and the general public". Private Letter from Bill Clark to Simon Lyster, quoted in *id.* at 147.

412. Peter Willetts, "From 'Consultative Arrangements' to 'Partnership': The Changing Status of NGOs in Diplomacy at the UN", 6 *Global Governance* 191, 191-212 (2000).

413. *Id.*

414. *Id.* at 206.

> debate. However, they are not supposed to exercise direct influence on the precise texts for inclusion in a resolution, declaration, or convention that governments are going to adopt."[415]

In practice, of course, they exercise plenty of indirect influence. Formally, however, NGOs can witness the bargain struck by States and provide information and opinions that will help shape it, but they cannot make it themselves, nor vote on it. Further, all NGOs, both international and national, must ultimately depend on State recognition of their right to participate under general criteria specified in advance[416]. States can also go further in specific treaties, as in the Convention on the Rights of the Child, which grants NGOs a special role in providing "expert advice on the implementation of the Convention"[417].

This particular concept of "partnership" is entirely consistent with the Institutionalist emphasis on NGOs' "enabling" functions. States have maintained control over which NGOs can participate and how, although NGOs have repeatedly expanded their capacities to participate by demonstrating how helpful and indeed necessary they can be in the provision of information and expertise. And only States can exercise actual decision-making authority, through both negotiating and voting. Once the bargain is struck, NGOs can help implement it, but again in ways subject to State consent.

Institutionalist theory also acknowledges some circumstances in which States might choose to grant NGOs standing before international tribunals or specific régime dispute resolution mechanisms to hold them to a particular treaty bargain. Just as States value institutions generally due to their ability to reduce monitoring costs and

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415. Willets, *supra* footnot 412, at 206-207.

416. Willetts nevertheless distinguishes *international* NGOs, such as the International Committee of the Red Cross or IUCN, that have been recognized by the United Nations Economic and Social Council, from national NGOs. He argues that international NGOs that have been recognized by ECOSOC "may be considered to have a legal personality. [They] have become a third category of subjects in international law, alongside states and intergovernmental organizations". National NGOs, on the other hand, can still be shut down by Governments and have a much more contingent international status. But both categories, however, must be recognized by States either individually or through inter-governmental organizations before they can be said to have any international legal status. *Id*. at 206.

417. Convention on the Rights of the Child, Art. 45, cited in Willetts, *id.* at 204.

hence to increase the credibility of each participating State's commitment to the bargain struck, they could take a step further and allow outside actors not only to monitor but also to help enforce their compliance with their commitments. This is likely to be a fairly extraordinary circumstance, however, as Institutionalists also recognize States' desire to preserve their general autonomy, particularly with regard to pressures from different domestic constituencies[418].

Further, Institutionalist theory does not itself offer any account of the conditions under which States are likely to bind themselves so tightly to the mast. Liberal IR theory can help here, examining State interest formation from the bottom up. Under some circumstances political groups currently in power in a number of States may choose to "lock in" their interests even after they leave power by empowering NGOs to monitor and enforce Government compliance with international commitments furthering their interests. Thus, for instance, Andrew Moravcsik argues that the Governments of Western Europe who supported the Optional Protocol to the European Convention on Human Rights, allowing private individuals to sue for human rights violations before the newly established European Court of Human Rights, were newly democratic Governments who wanted to do everything possible to guarantee the continuation of liberal democratic rule[419].

These circumstances are unlikely to occur across the board, suggesting that it would be undesirable and quite possibly counterproductive from an Institutionalist perspective to try to grant general standing to NGOs even in one area of international law such as international environmental law. Institutionalist analysis highlights the importance of State consent concerning specific criteria for NGO participation in different international treaty régimes and organizations These criteria are likely to be tailored to fit NGOs that are

418. This issue is discussed extensively in Chapter IV with regard to John Ruggie's theory of "embedded liberalism" in international trade policy. See John G. Ruggie, "International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order", 36 *International Organization* 379 (1982).

419. Andrew Moravcsik, "Explaining International Human Rights Régimes: Liberal Theory and Western Europe", 1 *European Journal of International Relations* 157, 159 (1995). Similarly, Raustiala's "hard-wiring" argument, discussed above, suggests that Governments may wish to include NGOs in the policy process in order to increase NGO power, power which will then enable these NGOs to provide a check on "reversals or reinterpretations of previous policy positions". Raustiala, *supra* footnote 250, at 565.

more committed to enabling than adversarial or even market power activity. However, they should not be too restrictive, allowing the same NGO to move back and forth between enabling and at least periodic adversarial activity.

One of the lessons of the case study concerned the ways in which NGOs affect one another. When activist NGOs go too far, they can make the enablers look reasonable. When the enablers become too close to Governments or lose sight of their purpose and begin to operate like Governments, the activist NGOs provide an alternative source of help and information and a vital check on co-option. Similarly, as groups switch roles, they are unlikely to move either too close to States or too sharply against them by the need to keep both options open. Limiting even NGOs engaged in enabling activity to observer status means that any risk taken by letting the odd activist slip through the net is minimal. Ensuring that NGOs are rewarded for being truly helpful by having their information taken seriously, and their goals thereby furthered, limits the chance of activism that crosses the line and prevents rather than helps the States from achieving their goals.

In sum, a response to Sands' proposal grounded in Institutionalist theory would encourage NGOs to work with States rather than against them and would allow States themselves to determine the ways in which NGOs could most usefully advance States' long-term common interests. NGOs should indeed enjoy a "wider consultative status", where that means the ability to be at the negotiating table, or at least just behind it, to speak, to provide information and voice opinions — but not to circulate draft texts, at least directly, to bargain, or to vote. Further, NGOs must still meet specified criteria applied by an inter-governmental institution such as the UN Economic and Social Council or the CITES Secretariat to enjoy this status, although the criteria cannot be applied on an *ad hoc* basis.

This balance should help NGOs engaged in enabling activities to preserve their relative neutrality and resulting credibility. Further, they should retain the flexibility to adopt more than one strategy in advancing their cause, allowing them also to engage in adversarial activity where they deem it necessary. Finally, under certain circumstances it will serve State interests to grant expanded standing to NGOs before international tribunals, but States again should make such decisions in the context of specific State interests driving the development of particular régimes.

(b) *Harnessing NGO activism at home*

From the perspective of Liberal IR theory, the CITES case study teaches a different lesson. It highlights the role of national NGOs in mobilizing domestic public opinion both in favour of national legislation imposing trade restrictions on ivory, in the case of the United States, and later of a complete international ban on ivory trade. It emphasizes the sensitivity of participating Governments to shifts in domestic public opinion. And it reveals alliances and networks forged by NGOs, both with one another across State lines and with particular agencies within a State.

More generally, Liberal theory accepts that NGOs can play a very important role in affecting international outcomes, but assumes that NGOs will be most effective when they convince national Governments to change their preferences — either through adversarial or enabling tactics. To take only one example, regarding the successful NGO campaign to ban landmines, US Senator Patrick Leahy stated: "Never before have representatives of civil society collaborated with governments so closely, and so effectively, to produce a treaty to outlaw a weapon."[420] Further, in a number of key States, "relevant NGOs were highly influential in pushing the national government to stake a position that largely was consistent with the state's own political and social posture"[421]. Thus like Institutionalists, Liberals highlight the role of the State as the ultimate decision-maker in the international realm. Unlike Institutionalists, however, Liberal theorists look above all for evidence of the ways in which domestic and transnational actors were able to change State preferences and thus affect the outcome of international negotiations.

From a Liberal IR perspective, Sands' proposals are not objectionable in themselves, but are a bit beside the point. For NGOs to be maximally effective as "guardians of the environment", they must be in a position to affect the formation of State preferences from the bottom up. This is still most likely to occur through domestic political activism, such as lobbying, grass-roots mobilization, and public interest litigation in domestic courts. It is certainly possible that the

420. US Senator Patrick Leahy, "Oslo N.G.O. Forum on the Landmine Treaty", 8 September 1997, online at http://www.senate.gov/-leahy/s970908.html (24 November 1999), cited in Warkentin and Mingst, *supra* footnote 280, at 247.

421. *Id.*

voice of NGOs in domestic political processes may be strengthened through transnational alliances or possibly through the legitimating imprimatur of international institutions. These are the causal channels Liberal theorists would predict and expect to find. They are sceptical of the ability of NGOs working only at the inter-governmental level to have much impact on getting Governments to do anything other than what they have already recognized as in their long-term interest to do.

Liberal theorists would thus accept giving NGOs "partnership" status at international conferences and within international institutions more generally, but to a somewhat different end. Instead of enabling States to overcome collective action problems, Liberals would emphasize the value of allowing NGOs to participate in the production and dissemination of information at the international level that can have an impact at the domestic level[422]. NGOs who can claim an "international place at the table" may also gain enhanced domestic and transnational credibility. Such a link is not self-evident, however, as will be discussed further below. From a Liberal perspective, all these issues are matters for empirical investigation.

On the question of standing, a Liberal analysis would support expanding standing before international tribunals to NGOs, although it would also highlight the value of expanding NGO standing before domestic courts and creating close links between domestic and international courts wherever possible. Litigation is itself a formalized mechanism of adversarial activism; its procedures have been described as "the etiquette of ritualized battle"[423]. In the type of public interest litigation that domestic NGOs regularly undertake in the United States and increasingly in other countries, the point of the lawsuit is not only to win a specific judgment against a specific defendant, but to use the symbolic power of a court battle to raise the consciousness of watching publics and to highlight either a divergence between law and deep-felt moral intuitions or a widespread failure to enforce the law. Domestic courts have more power over national Governments than international tribunals; international

422. This is not to say that Liberals here would question the value of enabling functions *per se*. Liberal theory and Institutionalist theory fit together in this case, each addressing a different type and level of State activity. An Institutionalist could easily recognize a Liberal theory of interest formation that would recognize a different but complementary role for NGOs.

423. Stephen C. Yeazell, *Civil Procedure*, 1 (4th ed., 1996).

tribunals are more likely to be effective when they are directly linked to actors in domestic and transnational society[424].

It is also possible to design regional and international institutions in ways that allow NGOs to participate for the specific purpose of enhancing transparency and the provision of information back to domestic publics. The best example is the Commission on Environmental Co-operation (CEC), a body established in connection with the North American Free Trade Agreement (NAFTA), which has pioneered a remarkable and unique role for NGOs[425]. Under the terms of the North American Agreement on Environmental Co-operation, a side agreement to the NAFTA itself, Canada, the United States and Mexico granted private parties, including NGOs, the power to bring a complaint before the CEC charging one of the State parties with failure to enforce its environmental laws[426]. The Secretariat of the CEC decides whether the complaint is sufficiently credible to warrant the preparation of a "factual record"; if it decides in the affirmative, the Council of the CEC must vote whether to go forward[427].

If the Council of the CEC votes by a two-thirds majority to authorize preparation of a factual record, the Secretariat has considerable latitude not only to solicit information from both the plaintiffs and the State party defendant concerning the charges, but also to develop information from outside experts that is relevant to understanding the strength and nature of the allegations[428]. Neither the Secretariat nor the Council of the CEC can actually reach a legal conclusion as to whether the State party in question is failing to enforce its environmental laws; however, the Council of the CEC must vote whether to accept the factual record and make it public[429]. Making it public invites increased public participation in the enforcement process; the factual record and supporting documents become strong

424. Robert O. Keohane, Andrew Moravcsik and Anne-Marie Slaughter, "Legalized Dispute Resolution: Interstate and Transnational", 54 *International Organization* 457 (2000).

425. North American Free Trade Agreement, opened for signature 8 December 1992, US-Can.-Mex., 32 *International Legal Materials* 296 (1993).

426. North American Agreement on Environmental Cooperation, 14 September 1993, US-Can.-Mex., 32 *International Legal Materials* 1480 (1993), Arts. 14 and 15 (hereinafter NAAEC). Part III of the NAAEC establishes the Commission for Environmental Cooperation (CEC), comprising a Council, a Secretariat and a Joint Public Advisory Committee.

427. *Id.*, Art. 15 (1) and (2). The Council of the CEC is composed of the environmental ministers of each of the States parties.

428. *Id.*, Art. 15 (4).

429. *Id.*, Art. 15 (7).

weapons for NGOs to use in mobilizing domestic public opinion in favour of stronger domestic enforcement measures[430].

Overall, Liberal IR theory focuses on the ways in which NGOs can shape government preferences, thereby changing governmental bargaining positions and ultimately affecting the outcome both of international negotiations and possibly the implementation of international agreements. In theory, it is possible for NGOs to affect government preferences through enabling or adversarial activity, at the domestic, regional, or international level. Liberals insist that the causal mechanism will be "from the bottom up", in the sense that Governments respond to whatever domestic political factions are empowered within their particular societies. It is certainly possible, however, to try to influence domestic politics through international or regional institutions. All these causal pathways are subject to empirical investigation.

Also subject to empirical investigation is the possibility of reduced NGO effectiveness due to domestic backlash against the fact or even the appearance of international empowerment. In other words, it is possible that national NGOs that succeed in winning various privileges within international institutions, even as they pursue adversarial strategies at home and market power strategies against corporate actors in a global economy, will be subject to attack for leapfrogging domestic political processes. Why should a particular NGO have a seat at an international negotiating table alongside its Government? Even if Governments agree to such representation, other domestic groups are quite likely to object. The result could be reduced domestic effectiveness and even regulation. This concern is distinct from the worry that NGOs will seem "too close" to Governments and hence unable to perform their institutional functions effectively in terms of global public opinion. It results instead from the Liberal emphasis on the inevitable conflict and competition among contending forces in domestic politics.

(c) *Empowering actors in global civil society*

NGOs that are increasingly defining themselves as autonomous actors in the international system, working neither with the State nor

430. See David L. Markell, "The Commission for Environmental Cooperation's Citizen Submission Process", 12 *Georgetown International Law Review* 545, 571 (2000).

directly against it to change State preferences and policies, fit best with an emerging model of the international system that focuses not on States but on all the actors in "global civil society". According to Ronnie Lipschutz, global civil society is

> "a parallel arrangement of political interaction, one that does not take anarchy or self-help as central organizing principles but is focused on the self-conscious constructions of networks of knowledge and action, by decentred, local actors, that cross the reified boundaries of space as though they were not there"[431].

Building on this concept, Craig Warkentin and Karen Mingst note that a focus on global civil society "shifts the analytical focus from formal, state-based institutions to social and political actors", a shift that in turn "highlights the nature and political significance of NGOs", both in terms of their networks with one another and their interactions with other actors[432]. More generally, "within this conceptual scheme of a global civil society, NGOs become significant and effectual *[sic]* political actors"[433].

This conception of the international system dovetails nicely with an image of NGOs working to create new channels of power and political action, bypassing the State altogether. NGOs pursuing such strategies may need international institutions to adopt the codes of conduct they broker or to provide a legitimating roof for their monitoring activity, but their targets are private corporations and their principal tool is the manipulation of consumer demand. They are engaged precisely in "a parallel arrangement of political interaction".

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431. Lipschutz, *supra* footnote 329. For a discussion of the ways in which work on a global civil society has emerged out of scholarship focusing on the more general notion of "international society" and specifically the growing role of NGOs, see Warkentin and Mingst, *supra* footnote 280, at 238-240 and accompanying notes. James Rosenau has similarly emphasized the emergence of a

> "new form of anarchy . . . in the current period — one that involves not only the absence of a highest authority but that also encompasses such an extensive aggregation of authority as to allow for much greater flexibility, innovation, and experimentation in the development and application of new control mechanisms". Rosenau, *supra* footnote 232, at 17.

Rosenau's conception of governance assumes a much greater causal role for actors in global civil society than has previously been acknowledged. See also James N. Rosenau, *Along the Domestic-Foreign Frontier: Exploring Governance in a Turbulent World* (1997).

432. Warkentin and Mingst, *supra* footnote 280, at 239.

433. *Id.*

From a global civil society perspective, Sands' proposals should be read as broadly as possible to release NGOs from the constraints of government consent as much as possible and even to grant them a measure of decision-making authority. International lawyers convinced by the depiction of this emerging society, based on empirical case studies and corresponding theoretical insights in the IR literature, would read Sands' proposals not only as a set of normative instruments to help protect the global environment, but also as bringing international legal structures more in line with a changing global "reality"[434]. The decision, in turn, to advocate and help bring about changes in international law to give NGOs formal recognition alongside States, would be a reflexive move of the type so dear to constructivists — a decision by actors within the system to shape the future ontology of the system based on perceptions of current empirical trends mixed with normative desiderata.

Liberal IR theorists have a quite different response to the market power model, one that cautions against moving too quickly to empower NGOs. Through a Liberal lens, the principal question regarding NGOs pursuing market power and autonomous law-making strategies is which or whose interests they represent. They do not seek to enable States to achieve their long-term interests in the context of a régime born of a pre-existing convergence of those interests, although in many specific cases the interests of some market power NGOs are likely to coincide with the interests of some States. But neither do they place themselves in an automatically adversarial posture toward State policies; indeed, in many cases they may simply be impatient with the slowness or ineffectiveness of well-meaning State regulation. They have a political agenda, in the sense that they seek to promote goals such as environmental protection or labour rights or poverty reduction against what they see as the greed and immorality of entrenched powerful interests. But they seek to block or counter those interests outside of formal political channels, at least at the domestic level.

Liberal theorists would thus depict NGOs as competing interest groups in domestic and transnational politics, without challenging their self-conception of commitment to the public interest. The laws

434. Cf. Christoph Schreuer's more general proposal to develop a new paradigm of international law to take account of "the decentralized nature of the international community, a feature which is likely to persist in the foreseeable future". Schreuer, *supra* footnote 233, at 449.

of domestic politics predict that the corporate targets of these NGO strategies will fight back and that they are likely to fight back through the mechanisms of domestic public opinion and domestic legislation[435]. In the short and medium term, international entities such as the United Nations Secretariat are likely to benefit as the power brokers between these two groups of non-State actors. Secretary-General Kofi Annan has quickly recognized the ways in which his office and thus, in his view, the United Nations more generally, can offer a helping hand to both sides[436].

Over the longer term, however, corporations are likely to help fuel the debate about the accountability of NGOs and to press for the development of formal structures to regulate their activities, precisely on the premise that NGOs themselves have become powerful actors. They may also seek to constrain NGO-sponsored consumer boycotts through libel suits and other tort litigation brought in domestic courts. Finally, they are likely to press their home Governments, as well as the Governments of the countries they invest in, to assert their still dominant power in international institutions such as the United Nations by taking a close look at the actual content of the codes of conduct adopted and endorsed and possibly trying to limit the Secretary-General's autonomous activity.

If the Liberal prediction holds, scholars and policy-makers who

435. Cf. Kenneth Rodman's description of corporate lobbying campaigns against NGO efforts to persuade state governments and Congress in the United States to adopt unilateral trade sanctions against countries such as Nigeria. Corporations have mounted these campaigns by hiring well-respected lobbyists to propose legislation in Congress banning state and local sanctions. Overall, Rodman concludes: "state structures played an important role in the successes of nonstate actors, particularly in the greater success of activist groups in the United States". Rodman, *supra* footnote 235, at 40. See also *supra* footnote 327.

436. Millennium Report, *supra* footnote 236, at 13. In January 1999, Secretary-General Kofi Annan launched "The Global Compact", a new initiative that asks corporations to agree to a set of nine principles on human rights, labour and the environment, and offered the assistance of the United Nations agencies to assist corporations in incorporating these principles in their mission statements and corporate practices. The Secretary-General also indicated the readiness of the United Nations "to facilitate a dialogue between [corporations] and other social groups, to help find viable solutions to the genuine concerns that they have raised". There is a new "one-stop shopping" website for corporations, at http://www.un.org/partners. The Global Compact also has members among the NGO community. See http://www.unglobalcompact.org. Kofi A. Annan, "A Compact for the New Century", 31 January 1999, SG/SM/6881/Rev.1, available at http://www.un.org/partners/business/davos.htm. Spiro sees a similar dynamic between corporations and NGOs, although he expresses some concern that NGOs may be compromising their legitimacy if they accept too much assistance from corporations. Spiro, *supra* footnote 249, at 965-967.

seek to create a more powerful role for NGOs in international life are likely to find themselves on the defensive. Instead of arguing for enhanced legal status for NGOs, they will be beating back attempts to regulate and restrict NGO activity. In this scenario, it may be important to remind politicians and publics of all the ways in which many NGOs benefit States through their enabling and even their adversarial activist roles. If would-be regulators are mindful of the beneficial potential of NGOs, they will be more inclined to seek modes of regulation that nurture this potential while limiting the chance of damage. Imposing disclosure requirements, for instance, regarding sources of funding, helps address a perceived accountability problem. By contrast, seeking to place substantive limits on what NGOs can and cannot do risks chilling the very activity that gives them their legitimacy: the zealous pursuit of a single issue that would otherwise go unrepresented.

This difference over how to interpret NGO efforts to achieve their goals directly in the global marketplace, bypassing the traditional regulatory mechanisms of domestic and international law, neatly underlines the difference that a theoretical lens can make. The perception that the international system is changing fundamentally and evolving away from a State-centric system toward a system in which non-State actors take their place alongside States in an emerging global society reinforces a desire to change the fundamentals of the international legal system to keep pace with these changes. More narrowly, it underpins a belief that NGOs are sufficiently powerful to help achieve certain normatively desirable goals. In contrast, the Liberal perception that individuals and groups in domestic and transnational society are ultimately the primary actors in the international system but that their conflicting normative and policy preferences must ultimately be aggregated and respresented by states gives rise to a set of predictions that argue against giving NGOs more than an enabling role at the international level.

4. Causal Templates and Complex Phenomena

The IR approach to humanitarian intervention provided a framework for parsing and categorizing many different arguments in terms of their underlying assumptions about both the nature of the problem and the nature of the solution. Thus arrayed, many of the arguments either collapsed into one another or proved to be amenable to syn-

thesis. The result was to simplify the task of doctrinal analysis and innovation, making it possible for international lawyers to narrow the differences between positions that often seem very far apart and offer doctrinal changes that would both reflect the current positions and advance the interests of many important parties to the debate. At the same time, this mode of analysis illuminated much deeper underlying differences about the nature of international law itself, differences that might appear philosophical but are in fact often causal as well.

Turning to the role of NGOs in international law-making, with a particular focus on international environmental law-making, IR theory performs a different function. Its role here is primarily to provide frameworks for organizing and analysing complicated new empirical phenomena. Those international lawyers and many policy analysts who focus on NGOs typically treat them monolithically, even as they describe a wide range of NGO activities. Conversely, different analyses of the role and impact of NGOs in current political science and legal literature sometime seem to be describing quite different organizations. The application of the broad paradigms of IR theory permits us simultaneously to separate out different types of activity and to develop a spectrum along which to array the many different entities operating under the label "NGO".

This framework is more than simply a template or typology, however. Indeed, political scientists have long appreciated the legal gift for developing elaborate classification schemes but have at the same time dismissed them as lacking explanatory power. The purported power of the IR categories developed here lies in their reflection of an underlying *causal* theory of how agents in the international system actually bring about changes or determine outcomes. How NGOs actually achieve their objectives — through enabling States to co-operate in the service of convergent interests, through activist mobilization of populations against state policy, through the organization of private economic forces — should help inform both moral and legal judgments concerning whether and how to promote, legitimize, and/or regulate NGO activity. Further, any move to grant NGOs formal rights in international law-making processes should avoid reifying an "NGO" in the way international law has long reified "State". Causal lenses are one way, although not the only way, both to complicate and clarify the picture.

I conclude with a lovely paradox. Much of the political science

literature devoted to understanding NGOs and their impact on world politics emphasizes the power of principled activity. Keck and Sikkink insist that transnational advocacy networks both attract members and exercise influence through their commitment to a larger cause — a set of principles transcending the self-interest of any of the participants. They often engage in instrumental activity and strategic calculation, but in the service of what they perceive to be absolute moral ends. The lesson for lawyers is a causal account of a deeply felt intuition common to many if not most of us. The teaching from political science is that sometimes law works best by being defiantly non-instrumental, by standing instead for our deepest and most fundamental values.

CHAPTER IV

REFORMING DISPUTE RESOLUTION IN THE WORLD TRADE ORGANIZATION

The discussion of humanitarian intervention in Chapter II used IR theory to interrogate and clarify a complex doctrinal issue. The discussion of NGOs in international lawmaking in Chapter II used IR theory to develop different models of NGOs in ways that helped us begin to make sense of a complex new phenomenon in international life. This chapter draws on IR theory to help generate answers to an important current policy problem: what, if any, reforms are needed to improve the World Trade Organization (WTO) dispute resolution process? More specifically, how should an international lawyer evaluate the various proposals to make the dispute resolution process more inclusive, expanding standing or other types of participation rights to non-State actors? The answers to these questions depend at least in part on a positive analysis of both the need for and impact of the reforms proposed, an analysis that in turn varies based on underlying assumptions about the origins and purpose of the international trade régime.

In this arena Professor Richard Shell has provided a detailed and impressive starting point. Shell draws on IR theory, as well as economic and legal theory, to develop three models of WTO trade "legalism", conceptions of the purposes and functions of a "world trade governance system"[437]. He describes each of these models as "norma-

437. G. Richard Shell, "Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization", 44 *Duke Law Journal* 829, 834 (1995). This article and a follow-up piece, G. Richard Shell, "The Trade Stakeholders Model and Participation by Nonstate Parties in the World Trade Organization", 17 *University of Pennsylvania Journal of International Economic Law* 359 (1996), prompted a lively exchange with Philip Nichols over which school of IR theory supplies the best assumptions for the construction of the WTO. See Philip Nichols, "Realism, Liberalism, Values, and the World Trade Organization", 17 *University of Pennsylvania Journal of International Economic Law* 851 (1996); see also Philip M. Nichols, "Forgotten Linkages — Historical Institutionalism and Sociological Institutionalism and an Analysis of the World Trade Organization", 19 *University of Pennsylvania Journal of International Economic Law* 461 (1998). Nichols in turn draws on Kenneth W. Abbott, "The Trading Nation's Dilemma: The Functions of the Law of International Trade", 26 *Har-*

tive approaches", yet argues that each is "grounded in an international relations theory of trade policy"[438]. His purpose in developing these models is to investigate questions concerning the "normative visions" that inform and help make sense of WTO structures, as well as better to predict the evolution of the WTO dispute resolution system and the quality of justice it is likely to produce[439]. The discussion below summarizes his analysis and supplements it with empirical findings and theoretical claims from other scholars to develop a conceptual framework for assessing current reform proposals.

Shell begins from the proposition that the 1995 creation of the WTO as a result of the Uruguay Round negotiations marked a clear victory for trade "legalists" over "pragmatists" who favoured a more flexible and *ad hoc* dispute resolution process[440]. The raft of legalist reforms adopted in the Final Act of the Uruguay Round have been much heralded among international lawyers as a major step forward toward a global rule of law[441]. Yet already, barely five years later, WTO nations face widespread protests and a new set of proposed reforms to the dispute resolution process, particularly in the direction of increasing transparency and public participation. Any effort to assess the desirability of those reforms also requires a way of predicting their likely impact.

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vard International Law Journal 501 (1985), a much earlier and pioneering analysis applying Realist theory to the WTO.

More recent efforts building on Shell's analysis and applying still other bodies of IR theory to international trade issues include: Frank J. Garcia, "New Frontiers in International Trade: Decisionmaking and Dispute Resolution in the Free Trade Area of the Americas: An Essay in Trade Governance", 18 *Michigan Journal of International Law* 357 (1997); Andrea K. Schneider, "Democracy and Dispute Resolution: Individual Rights in International Trade Organizations", 19 *University of Pennsylvania Journal of International Economic Law* 587 (1998); Kenneth W. Abbott, "'Economic' Issues and Political Participation: The Evolving Boundaries of International Federalism", 18 *Cardozo Law Review* 971 (1996); Steve Charnovitz, "Participation of Nongovernmental Organizations in the World Trade Organization", 17 *University of Pennsylvania Journal of International Economic Law* 331 (1996).

438. Shell, *supra* footnote 437, at 835.

439. *Id*. at 839.

440. See generally Michael K. Young, "Dispute Resolution in the Uruguay Round: Lawyers' Triumph over Diplomats", 29 *International Lawyer* 389 (1995).

441. As Robert Hudec argues, many of these reforms simply codified changes that had been occurring in the GATT dispute resolution process for over a decade, resulting in the transformation from the "old GATT" to the "new GATT". Robert E. Hudec, "The New WTO Dispute Settlement Procedure: An Overview of the First Three Years", 8 *Minnesota Journal of Global Trade* 1, 17-21 (1999).

Section 2 of this chapter thus turns to that question, drawing on wider theories of compliance with international legal agreements that have been developed both by international lawyers and political scientists. As always with this type of scholarship, debates are heated and definitive conclusions are difficult to draw. However, it is possible to clarify and critique contending arguments in such a way as to make it easier for scholars and practitioners to decide which accounts they find most compelling and thus where and how to take their stand.

The conclusion returns to a distinctive feature of Shell's analysis: the mixing of positive IR theory with normative legal analysis. If lawyers are to remain true to their calling and often their deepest personal instincts and goals, they must engage in normative debate and advocacy. Yet political science proclaims itself to be only a positive discipline, concerned with "how things are" rather than "how they should be". Legions of philosophers have battered this distinction; nevertheless, it retains its disciplinary hold. Weaving positive analysis into normative work is thus a tricky but necessary endeavour for any lawyer with a long-term interest in integrating international relations and international law. Shell's work raises this issue directly and productively.

1. Shell's Models of WTO Legalism

WTO "legalism" is a commitment to make the governance of international trade as rule-oriented as possible, including dispute resolution based on the application of generally applicable and publicly available rules rather than power-based diplomatic solutions[442]. The move to legalize the GATT dispute resolution process began as early as the mid-1950s[443], with the shift from a "working

442. See John H. Jackson, *The World Trading System: Law and Policy of International Economic Relations* 85-88 (1989); Cf. Robert E. Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System* 137-138 (1993) (hereinafter Hudec, *Evolution*); Phillip R. Trimble, "Foreign Policy Frustrated-Dames and Moore, Claims Court Jurisdiction and a New Raid on the Treasury", 84 *Columbia Law Review* 317, 364-370 (1984); Robert E. Hudec, "The Judicialization of GATT Dispute Settlement", in *In Whose Interest? Due Process and Transparency in International Trade* 10 (Michael Hart and Debra Steger, eds., 1992) (hereinafter Hudec, "Judicialization").

443. According to John Jackson, the trade experts were supposed to act in their own capacities, rather than as the representatives of certain Governments. The result was a shift from a "negotiating" atmosphere to a more "judicial" procedure in addressing trade disputes. See John H. Jackson, *The World Trading System: Law and Policy of International Economic Relations* 115-116 (2nd ed., 1997).

party" of government representatives to "panels" of trade experts, and intensified in the late 1970s and throughout the 1980s with the creation of the Legal Affairs office of the GATT Secretariat[444]. Panel decisions grew longer and more carefully reasoned; proceedings were conducted according to more explicit and formal procedures and deadlines; panel members increasingly relied on the assistance of the Secretariat legal staff. Legally, however, GATT panel reports were only binding if formally adopted by consensus among all GATT members, including the losing party. In other words, the losing party could veto or block the adoption of the very panel decision that it lost.

The Uruguay Round negotiations ushered in a new era. The creation of the World Trade Organization (WTO), some 45 years after the US Senate defeat of the proposed International Trade Organization, formally approved a much more legalized dispute resolution system[445]. The WTO Treaty ratified all the various changes that had emerged in the 1980s, including the adoption of strict timetables for processing disputes, and added some striking new features. Most important, from the parties' perspective, was a reversal of the consensus adoption rule. Under the new system, panel decisions are automatically adopted by all GATT parties unless the losing party can muster a consensus to overrule the decision. This rule in effect means that instead of convincing the losing State to vote *for* adoption of the decision, it is now necessary to convince the winning State to vote *against* adoption[446]. In addition, the WTO treaty creates a permanent Appellate Body to hear all appeals from panel decisions. Appellate Body judges serve four-year terms; they must be demonstrably expert in law and international trade and be unaffiliated with any Government[447].

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444. Mainly due to the GATT's long-standing tradition favouring "pragmatic trade diplomacy", the position of "Director of Legal Affairs" was regarded as "temporary and experimental" when it was first created in January 1981. However, two years later, facing an inundation of cases, the title was upgraded to "Director, Office of Legal Affairs", becoming a permanent and official institution of the GATT Secretariat. Hudec, *Evolution, supra* footnote 442, at 137-138.

445. See generally Jackson, *supra* footnote 442.

446. This rule is formally called the "reverse-(counter)-consensus rule". Understanding on Rules and Procedures Governing the Settlement of Disputes, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Art. 17, para. 14 (hereinafter DSU), in "Results of the Uruguay Round of Multilateral Trade Negotiations", 1, 33 *International Legal Materials* 1125 (1994).

447. *Id.* at Art. 17 (Appellate Review).

Finally, the WTO can actively monitor a party's compliance with an adverse panel decision; if a party does not comply, the complaining party may ultimately gain the automatic right to withdraw trade concessions in an appropriate amount as a penalty.

Shell argues that once the legalists triumphed over the pragmatists, fissures among the legalists were bound to emerge. He thus develops different conceptions of legalism, which he terms models or normative approaches. His aim is to elaborate the assumptions underlying support for legalism among different individuals, groups, and Governments — the functions of a rule-oriented system and the purposes it is supposed to serve. Shell does not proceed inductively, deriving his models from interviews or other empirical data regarding the actual participants in the Uruguay Round negotiations. He instead adopts a deductive method, drawing on IR theory and economic theory, to elaborate models that he knows to be consistent both with specific features of the legalist system adopted in the Uruguay Round agreements and the reasoning and priorities of specific factions. By formulating these different positions in terms of these more general models, he is then able to predict the likely position of these factions on the next round of reforms.

Perhaps the most surprising and useful aspect of Shell's models is their application to the actual adjudication of trade disputes. Each model mandates a set of interpretive positions that apply to quite specific doctrinal questions. These positions flow from a more general posture that adjudicators are likely to adopt consistent with the underlying assumptions of their particular legalist model. Their view of the purposes a rule-oriented system is intended to achieve, which in turn flows in part from their conception of how the international system works, naturally influences their interpretation and elaboration of both substantive and procedural rules.

(a) *The Régime Management Model*

The first model of WTO legalism that Shell elaborates is the "régime management model". This model assumes that trade treaties are " 'contracts among sovereign states that help stabilize cooperative trade systems' "[448]. Consistent with Institutionalist régime theory, States have a long-term interest in promoting free trade to the

448. Shell, *supra* footnote 437, at 864.

extent that it makes all States better off. At the same time, each individual State faces domestic pressures to protect its economy from the often harsh impact of foreign competition. The result is an "iterated prisoner's dilemma", in which individual States would gain more in the short term from defection but all States will be worse off in the long term in the absence of co-operation[449].

An effective régime will therefore provide sufficient safeguards against defection to assure all participating States that they will gain more than they lose. At the same time, individual States must have sufficient flexibility to be able to respond to domestic political pressures resulting from the adverse distributional impact of freer trade. This is John Ruggie's celebrated formulation of "embedded liberalism", in which the international trade régime allows States to reap the absolute gains from trade predicted by classical economic liberal trade theory while at the same time tempering the domestic political effects by periodically defecting from strict régime rules[450].

Two foundational assumptions of Institutionalism underlie the Régime Management Model. First, States are the principal actors in the international system. Second, they act to protect their power, in terms both of domestic political control and international autonomy. Unlike Realism, Institutionalism assumes that States also have other interests, such as the promotion of stability and prosperity, that make long-term co-operation possible. But the pursuit of co-operation must be balanced with the preservation of power.

Shell next makes a critical move. Beginning from this positive model identifying the principal actors in the international system and their motivations, he develops a normative model of the purposes an international trade régime should serve. In other words, he reasons from assumptions about who the principal actors are and what they want to what they should logically want an international trade régime to do. The principal purpose of such a régime, from this perspective, is to "balance states' interests in free trade and autonomy"[451]. Several legal features of a trade régime can directly

449. Shell, *supra* footnote 437, at 864.

450. Ruggie, *supra* footnote 418. Ruggie argues that each State in a trade régime balances the interests of groups opposed to and in favour of free trade and is willing to participate in international economic institutions because free trade structures are embedded within an international framework recognizing the need for States to exercise political control over the distributional consequences of global economic change. *Id*., pp. 393-394.

451. Shell, *supra* footnote 437, at 866.

advance this goal. First is to limit participation in the régime to States themselves, by devices such as granting standing in dispute resolution processes only to States and ensuring that the disputes resolvers are individuals likely to be "sensitive to the diplomatic aspects of trade problems"[452]. Second is to guarantee the possibility of non-compliance with the rules of the régime when necessary for domestic political purposes. An effective way of accomplishing this goal is to ensure that the régime is governed by international rather than domestic law. "In a world without a formal central enforcement authority, trade regulation under international legal norms provides states with needed flexibility", flexibility that would disappear if international obligations automatically became enforceable in domestic courts[453].

The Régime Management Model of trade legalism thus seeks to ensure that a trade dispute resolution system has these and other features designed to give States the necessary room to balance co-operation and autonomy. Examining the new WTO dispute resolution system through this lens, Shell concludes that the Régime Management Model "provides the best description of the specific adjudication structures adopted by the WTO"[454]. States are the only parties with standing; the system is binding only under international law; panellists apply "the customary rules of interpretation of public international law" in reaching their decisions, rules that are strongly oriented toward the sovereign contract model of treaties[455].

Distinguished trade law scholar Robert Hudec agrees with this analysis, although he approaches the question from a slightly different perspective. He insists that prior to the WTO, the GATT dispute settlement system worked because Governments wanted it to work. The driving force behind the system was "the political will of governments", political will oriented toward the establishment of a "working legal order" in the trade arena. This political will, in turn, derives not from any love of law as such, but rather a series of pragmatic calculations about the relative value of a rule-based system. In Hudec's view, a rule-based system is the most efficient way to resolve inter-State conflicts; it is the most effective way to negotiate and implement incremental policy changes; it creates the most pre-

452. Shell, *supra* footnote 437, at 864.
453. *Id.* at 865.
454. *Id.* at 897.
455. *Id.*

dictable conditions for business; and it helps domestic government officials resist domestic political pressures for protectionism[456]. Rules thus compel their own compliance due to their evident advantages over an *ad hoc* system.

Hudec agrees, however, that these perceived advantages will not overcome the occasional need for non-compliance. He argues that the WTO reforms to make the dispute resolution process more "binding" are not likely to have much effect. Instead of reflecting an increase in political will of GATT member Governments toward increased compliance, the decision to make panel decisions automatically binding resulted from a United States threat to continue and intensify unilateral trade sanctions in the absence of a more rigorously binding GATT system. Yet giving in to this threat in a negotiating round is not likely to translate into increased will to comply with adverse panel decisions over the longer term. Hudec thus warns that "the new WTO legal system will have to learn how to cope with legal failure"[457]. In Shell's terms, from the perspective of the Régime Management Model, removing flexibility from the system will not remove the need for flexibility; it will instead generate conflict and non-compliance.

The Régime Management Model may seem cramped and disappointing to those who wish to see the WTO reforms as a step toward a genuine global rule of law, in the sense of actually backing legal rules with the coercive power of mandatory sanctions. On this view, the goal is to elevate law over power and consistency over compromise. Increasingly formal adjudication processes in an increasingly rule-bound system will generate a body of trade law that will govern State behaviour in increasing detail. In fact, however, the WTO members themselves, at least through the mouth of the WTO secretariat, describe the system quite differently. According to former Secretary General Renato Ruggiero, the dispute resolution system is a "means above all for conciliation and for encouraging resolution of disputes, rather than just for making judgements"[458]. The WTO website is even more blunt, announcing: "the point is not to make rulings. The priority is to settle disputes, through consultations if possible."[459]

456. Hudec, *supra* footnote 441, at 10.
457. *Id.* at 14.
458. http://www.wto.org//wto/about/dispute1.htm.
459. *Id.*

This understanding of the dispute resolution process also conditions the "basic jurisprudential approaches adopted by [WTO] panelists in deciding actual cases"[460]. Given the broad scope of many GATT provisions and the frequent ambiguities within them, interpreters have broad discretion. Shell argues that panellists who subscribe to the Régime Management Model of trade legalism are likely to resolve those ambiguities in two principal ways. First, in cases where the text imposes a clear obligation, adjudicators are likely to enforce that obligation notwithstanding contrary political pressures, as a way of building confidence in a long-term contractual régime. Second, and conversely, in cases of ambiguity adjudicators are likely to swing the other way and protect State sovereignty. This posture is consistent with considerations of "régime maintenance" and the "political 'management' of trade disputes"[461].

According to Hudec, writing four years after Shell and after three years of WTO jurisprudence, panellists are indeed following this script. Hudec focuses on the Appellate Body's approval on the principle of *in dubio mitius* in the *Hormones* case. The Appellate Body rejected a panel decision that would have held WTO States to a "more onerous" rather than a "less burdensome" obligation, arguing that such an inference was unwarranted[462].

The Appellate Body justified its position with reference to the following footnote:

> "The principle of *in dubio mitius* applies in interpreting treaties, in deference to the sovereignty of states. If the meaning of a term is ambiguous, that meaning is to be preferred which is less onerous to the part assuming an obligation, or which interferes less with the territorial and personal supremacy of a party, or involves less general restrictions upon the parties."[463]

In other words, to maintain the régime it is critical to leave member States plenty of room to manœuvre. It would be hard to find better confirmation of the power and persistence of the Régime Maintenance Model.

460. Shell, *supra* footnote 437, at 868.
461. *Id.* at 868.
462. Hudec, *supra* footnote 441, at 30.
463. *Id.*, citing Appellate Body Report, *EC Measures concerning Meat and Meat Products (Hormones)*, WTO Doc. WT/DS 26/AB/R at 41-42 (16 January 1998).

(b) *The Efficient Market Model*

Shell's second model is the Efficient Market Model. The Efficient Market Model is grounded not in Institutionalist theory, with a heavy dollop of Realism, but rather in Liberal theory. Shell accurately describes Liberal IR theory as assuming that individuals and groups, rather than States, are the primary actors in the international system. The State thus becomes an "agent for particular domestic constituencies' interests, not [a] self-motivated actor seeking power or political stability"[464].

From this point of departure, however, Shell moves from positive political science to law. He cites legal scholars such as Fernando Teson who argue that a Liberal conception of the international system requires a shift in the purpose of international law. "Under the liberal view, the proper purpose of international law is to enhance the welfare of individual citizens or groups, not the welfare, power, or stability of governments as political entities."[465] This claim transforms an ontological proposition into a normative aspiration. It insists that because individuals are the primary actors in the international system they must also be the primary beneficiaries of international law. It is important to understand here that the second claim is not necessarily entailed by the first[466]. Liberal IR theorists in political science do not feel bound by any particular vision of international law. However, the Teson view is appealingly isomorphic with Liberal IR theory. It is analytically helpful and intuitively sensible — in the literal sense of making sense — to unify ontology and ideology as the core of a way of looking at the world.

To say that the purpose of international law is to enhance the welfare of individual citizens or groups, however, still begs a very large question. This conception of international law is empty unless

464. Shell, *supra* footnote 437, at 877.

465. *Id*. at 877-878, citing Fernando R. Teson, "The Kantian Theory of International Law", 92 *Columbia Law Review* 53, 54 (1992).

466. This conception of international law does not *necessarily* follow from Liberal IR theory. Although Liberal IR theory posits that individuals and groups are the primary actors in international society, it also holds that how States behave is a function of individual and groups preferences and how those preferences are represented by different Governments. It is still possible to argue that international law should concern itself primarily with relations between States and the regulation of global commons. From a Liberal perspective, however, the most effective instruments for achieving desire outcomes at the inter-State level would involve recognition and manipulation of factors and forces in State-society relations.

coupled with a more specific and explicitly normative theory of how best to enhance individual welfare. For believers in the Efficient Market Model of trade legalism, that theory is neoclassical liberal economics. "The model relies heavily on a normative commitment to economic free trade theory and the doctrine of comparative advantage as descriptions of how trade creates wealth for both individual citizens and groups."[467] The freer the markets, the greater the wealth. The greater the power of international law and institutions, the freer the markets are likely to be.

That, in a nutshell, is the logic of the Efficient Market Model. Domestic interest groups, such as inefficient producers and labour unions, favour protectionism. They are seeking rents at the expense of the population as a whole, which will benefit from more open markets. Nevertheless, their interests are concentrated and hence they mobilize more easily to influence the political process. Adopting rules that favour free trade at the international or supranational level can effectively counter this influence by ensuring that the enforcement of these rules lies in the hands of free trade technocrats, the trade lawyers and former government administrators who typically sit on GATT and now WTO panels.

"In summary, the Efficient Market Model of international trade dispute resolution views international trade laws and tribunals as devices by which governments and businesses that favor free trade may circumvent domestic protectionist groups and increase the world's wealth."[468] Proponents of this model have recently begun to argue explicitly that the international trade régime enhances domestic democracy, by combating the distortions introduced into domestic political processes by powerful protectionist lobbies[469]. The assumption is that if consumers could only be effectively organized, they would all vote for opening markets to the maximum extent possible, on the theory that they would automatically vote their pocketbooks. What is untested, of course, is the extent to which consumers might heed the appeals of those social groups who are disproportionately disadvantaged by freer trade and vote for at least some protection on social solidarity grounds.

Shell argues that only the Efficient Market Model can explain the

467. Shell, *supra* footnote 437, at 878.
468. *Id.* at 885.
469. Cf. John O. McGinnis and Mark L. Movsesian "The World Trade Constitution", 114 *Harvard Law Review* 511 (2000).

adoption of the "consensus to overrule" requirement in the WTO Agreement. Both the Régime Management Model and the Efficient Market Model support the existence of a legally binding dispute resolution system and the creation of a standing Appellate Body. But the Régime Management Model requires that a trade régime be sufficiently flexible to allow individual States to accommodate conflicting domestic political interests. They must thus be free periodically not to comply with a panel decision or, more broadly, to convince other like-minded States to reject a developing line of jurisprudence favouring free trade interests when faced with strong domestic opposition. Any more stringent system risks destabilizing the régime. From this perspective, as Shell suggests, it would have made more sense to adopt a rule disqualifying the litigating parties from voting and otherwise requiring a two-thirds or even three-fourths majority to overrule a panel decision.

From the perspective of the Efficient Market Model, by contrast, only automatic adoption of a panel award would do. As Shell tells the story, dissatisfaction with the vagaries of the old GATT system led global business interests, particularly in the United States, to prod their Governments to take unilateral action against foreign "unfair traders". The result was initiatives like US Section 301, allowing domestic courts and administrative processes to trigger strong sanctions against foreign corporations deemed to be in violation of the GATT or otherwise engaged in unfair trading practices. The prospect of a patchwork of widely differing national laws and enforcement efforts, however, was deeply detrimental to "global business", particularly in light of the growing number of corporations engaged in genuinely global production, in which parts of the same good are manufactured in many different countries. The result was pressure for a uniform supranational dispute resolution system, but one that would be sufficiently "automatic" to avoid political manœuvring and the resulting arbitrariness and unpredictability.

"Politics" here is in the eye of the beholder. It can fairly be charged that the "political" dimension to international trade dispute resolution that global business interests sought to avoid simply meant Governments' consideration of any domestic interests other than their own. And indeed, Shell agrees that the Efficient Market Model "suggests that WTO defendants frequently prefer to lose cases"[470].

470. Shell, *supra* footnote 437, at 900.

The adoption of a "formally binding adjudication system with no exit" is an excellent way of tying Governments' hands in favour of pro-free trade outcomes, providing protection against the protectionists. Governments can assure domestic interest groups fighting for labour, environmental, or other interests that they are doing all they can to win a particular suit, but must in the end abide by the panel result. As long as the panels are stacked with free trade technocrats, defeat will be assured.

Here again, the Efficient Market Model combines positive and normative elements. Positively, it analyses the structure of the WTO and the negotiating process that created it in terms of the specific interests of individuals and groups and the ways in which those interests are represented by the Governments actually participating in the negotiations and party to the resulting agreement. Normatively, it is committed to a particular view of those interests. Thus for adherents of the model, understanding the ways in which an absolutely binding supranational trade dispute resolution process can "lock in" free trade against domestic opposition not only explains what did happen at the WTO negotiations but also justifies the resulting agreement as a "good thing". In fact, of course, both the positive explanation and the normative justification are contested, but the important point here is to see how one buttresses the other[471].

The Efficient Market Model generates a clear orientation in WTO jurisprudence.

> "In contrast with regime-oriented interpretation, which emphasizes the contractual nature of trade treaties and the need for 'regime maintenance', trade-oriented interpretation sees adjudi-

471. It is instructive to compare Hudec's analysis of the negotiations behind adoption of the consensus to overrule provision in the WTO Agreement with Shell's account of the Efficient Market Model. Hudec agrees that the provision is directly linked to unilateral action by the United States under Section 301, 19 USC § 2411. He also agrees that the WTO dispute resolution system overall helps Governments resist domestic protectionist pressures. However, he argues that the United States was "trapped by its own legalism" in the WTO negotiations and was forced to agree to the EU proposal to make panel decisions automatically binding for fear of being exposed as hypocritical in its calls for a more legalist system. If "legalism" is posited as a unitary State interest, reflecting underlying US values and domestic dispute resolution principles, then it is very difficult to explain why the United States has strongly opposed making other international régimes more binding, particularly in the areas of international criminal law and environmental protection. Further, even within the WTO, Hudec's analysis cannot explain why both the EU and the United States agreed to a provision that he argues is not in their long-term interests.

> cation as a utilitarian instrument for helping the world trading community to attain its goal of 'an open world trading system free of government restrictions'."[472]

Shell reviews the GATT panel's reasoning in the DISC case, as well as a number of precedents from the European Court of Justice, to illustrate examples of trade-oriented jurisprudence[473]. The job of a trade adjudicator, from this perspective, is to hold Governments to their word in terms of their expressed commitment to liberalize either a global or regional trading system, regardless of the political consequences.

2. The Next Round: Proposed Reforms

From the perspective of the Régime Management Model or the Efficient Market Model, the dispute resolution reforms embodied in the WTO Agreement either went too far or not far enough. Régime-oriented trade legallists will regret the adoption of the consensus to overrule provision on the ground that it unduly constrains Governments' political flexibility. Constraints so tight invite defection and hence potential destabilization of the entire régime. Governments need periodically to opt out of the régime rules to shore up their domestic support, as evidenced by President Clinton's quick shift of position in the face of strong US domestic protests at Seattle[474]. Forcing a situation in which a losing litigant is automatically forced to comply with the panel judgment and in which all panel judgments automatically become WTO law binding on other States is bound to make some States law-breakers.

The best hope, from this perspective, is that a growing number of cases settle or that Governments succeed in appointing primarily régime-oriented panellists.

Efficient Market adherents, on the other hand, will think that the WTO system still privileges politics over trade. States remain remark-

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472. Shell, *supra* footnote 437, at 890, citing Gilbert R. Winham, *International Trade and the Tokyo Round Negotiation* 404 (1986).

473. *Id*. at 890-893.

474. "A Global Disaster", *The Economist*, 11 December 1999 (detailing Clinton's move from the stated US position that "labour" should be discussed at the WTO to his assertion that a proposed WTO working party on trade and labour rights was a first step toward having the WTO enforce core labour standards with sanctions).

ably cautious about suing each other, even with vehement domestic interest groups demanding action[475]. They calculate the diplomatic costs of a suit across an entire array of other issues, as well as the benefits of having another State sue instead. If the United States is allegedly violating WTO rules, for instance, both the EU and Japan may feel pressure to sue, but each will benefit equally if the other sues. In addition, once the litigation has begun, States are more likely to settle than to fight until the end and force a panel to declare a clear rule[476]. To ensure maximally efficient markets, however, maximum enforcement efforts are needed. Shell thus predicts that "business interests will demand that the WTO permit participation in its adjudication system by commercial parties directly affected by disputes"[477].

Such participation would include the right to file *amicus curiae* briefs before the Appellate Body, access to WTO-sponsored mediation or conciliation processes; standing before WTO panels with power to bring suits; and ultimately the right to enforce at least some GATT rules directly in domestic courts[478].

(a) *Current reform proposals*

Five years later, a number of reforms have indeed been proposed, many of them accurately forecast by Shell. Space constraints permit only a partial review of current proposals, but enough to advance our analysis. First are a set of proposals designed further to streamline and professionalize the WTO dispute resolution process[479]. The existence of an Appellate Body places even greater pressure on panels to produce carefully and intelligently reasoned opinions, albeit within tight time limits. Experienced and highly qualified

475. Shell, *supra* footnote 437, at 901; see also Laurence R. Helfer and Anne-Marie Slaughter, "Toward a Theory of Effective Supranational Adjudication", 107 *Yale Law Journal* 273, 282, 285-286 (1997) (explaining why States are reluctant to sue each other); David A. Wirth, "Reexamining Decision-Making Processes in International Environmental Law", 79 *Iowa Law Review* 769, 779 (1997) (arguing that States hesitate to see each other for "fear of jeopardizing other strategic or economic bilateral relationships").

476. Shell, *supra* footnote 437, at 902.

477. *Id.* at 902-903.

478. *Id*.

479. Hudec, *supra* footnote 441, at pp. 31-45; Philip M. Nichols, "Extension of Standing in World Trade Organization Disputes to Nongovernment Parties", 17 *University of Pennsylvania Journal of International Economic Law* 295, 328-329 (1996).

panellists are thus at a premium. At the same time, the number of cases is increasing, while the pool of panellists is, if anything, shrinking in many cases[480]. The result is a call to replace the existing *ad hoc* panel system with a group of professional jurists, who would serve either alone or as the chair of a three-person panel. Other reform proposals in the same vein involve raising the standard of practice and abolishing the practice of having panels issue an interim report for comment by the litigants[481].

A second set of reform proposals are far more radical. They involve the difficult question of opening up WTO proceedings to increased public scrutiny and participation, largely in response to widespread accusations that the secrecy of the current proceedings recalls the justice of the "Star Chamber"[482]. Efforts in this direction have been ongoing since the creation of the WTO[483]. Beginning in the autumn of 1998 the WTO Secretariat has provided regular briefings for NGOs and established a special NGO Section on the WTO web site with specific information for civil society, for example announcements of registration deadlines for ministerial meetings and

480. Under the DSU, "[c]itizens of Members whose governments are parties to the dispute or third parties . . . shall not serve on a panel concerned with that dispute, unless the parties to the dispute agree otherwise". DSU, *supra* footnote 446, Art. 8, para. 3. This requirement is becoming increasingly difficult to meet for several reasons. First, given a huge scope and scale of economic interests that both the United States and the EU hold in a global sense, it is rare to find any case in which either party is *not* involved, at least as a third party. In other words, in many cases, panellists from either side cannot be picked. Second, the number of panellists is usually three, which tends to multiply the above-mentioned predicament by three. Third, given the upcoming EU enlargement, a potential range of panellists who cannot be served because of this requirement will be broadened.

481. Hudec, *supra* footnote 441, at 37.

482. *Id.* at 45.

483. Article V of the WTO Agreement provides that the General Council may make appropriate arrangements for consultation and co-operation with non-governmental organizations concerned with matters related to those of the WTO. Non Governmental Organizations (NGOs): Art. V, the WTO Official Website, http://www.wto.org/english/forums_e/ngo_e/estwto_e.htm. In 1996 the General Council adopted a set of guidelines for relations with NGOs, directing the Secretariat to "play a more active role in its direct contacts with NGOs who, as a valuable resource, can contribute to the accuracy and richness of the public debate". The modes of interaction suggested included "symposia on specific WTO-related issues, informal arrangements to receive the information NGOs may wish to make available for consultation by interested delegations and the continuation of past practice of responding to requests for general information and briefings about the WTO". Non Governmental Organizations (NGOs): Guidelines (WT/L/162, July 23, 1996), the WTO Official Web-Site, http://www.wto.org/english/forums_e/ngo_e/guide_e.htm.

symposia[484]. In addition, a monthly list of NGO position papers received by the Secretariat is compiled and circulated for the information of Members[485]. Nevertheless, the member States continue to hold the official view that given the inter-governmental nature of the WTO, it is not possible for NGOs "to be directly involved in the work of the WTO or its meetings"[486]. Member States are accordingly urged to engage in national-level consultations with all interested groups[487].

The United States and the European Union have also addressed the issue of increasing NGO participation in WTO business. In 1998 President Clinton proposed to his fellow WTO members that they abolish confidentiality restrictions on documents, hold public hearings, and permit private parties to submit briefs to panels and to the Appellate Body[488]. The EU has been more cautious, proposing public panel and Appellate Body hearings only to the extent that the panel procedure becomes more professionalized through the creation of a permanent tribunal[489]. It has also insisted that any new measure

484. Non Governmental Organizations (NGOs): Material Available on the WTO Website, the Official WTO Website, http://www.wto.org/english/forums_e/ngo_e/ngo_e.htm. It is also worth noting that 128 NGOs attended the Geneva Ministerial Conference at which these measures were announced.

485. Non Governmental organizations (NGOs): NGO Position Papers Received by the WTO Secretariat, the Official WTO Website, http://www.wto.org/english/forums_e/ngo_e/pospap_e.htm.

486. See WTO Guidelines for Relations with NGOs, *supra* footnote 483, Art. VI.

487. *Id*.

488. Hudec, *supra* footnote 441, at 43;

> "The WTO should take every feasible step to bring openness and accountability to its operations. Today, when one nation challenges the trade practices of another, the proceeding takes place behind closed doors. I propose that all hearings by the WTO be open to the public, and all briefs by the parties be made publicly available. To achieve this end, we must change the rules of this organization. But each of us can do our part — now. The United States today formally offers to open up every panel that we are a party to — and I challenge every other nation to join us in making this happen. Today, there is not mechanism for private citizens to provide input in these trade disputes. I propose that the WTO provide the opportunity for stakeholders to convey their views, such as the ability to file 'amicus briefs' to help inform the panels in their deliberations. Today, the public must wait weeks to read the reports of these panels. I propose that the decisions of these trade panels be made available to the public as soon as they are issued." William J. Clinton, Speech in the Geneva WTO Ministerial Meeting (18 May 1998), in WTO, Geneva WTO Ministerial 1998: Statement, http://www.wto.org/english/thewto_e/minist_e/min98_e/english/anniv_e/clinton.htm.

See also Preliminary Views of the United States Regarding Review of the DSU, the Official USTR Website, http://www.ustr.gov/pdf/uspaper1.pdf.

489. Discussion Paper from the European Communities: Review of the Dispute Settlement Understanding (DSU), Brussels, 21 October 1998, the Official EU Website, http://europa.eu.int/comm/trade/miti/dispute/0212dstl.htm.

to enhance the transparency of panel proceedings should ensure that "private parties should not be granted rights in the proceedings which go beyond those of non-participating WTO Member States", and that "any involvement of non-participating Member States or private parties in proceedings should neither hinder nor delay the expeditious conduct of business by panels and the Appellate Body"[490].

Regarding NGO submission of *amicus curiae* briefs, the Appellate Body has taken matters into its own hands, opening the door to such submissions in the well-known "Shrimp-Turtle" case[491]. Reversing the panel decision, it held that the provision in the WTO Dispute Settlement Understanding allowing a panel to "seek" information from any relevant source could include a decision "either to accept and consider or reject information and advice submitted to it, whether requested by a panel or not"[492]. In theory, the Appellate Body's holding placed no limitation or qualification on the types of NGOs or even individuals entitled to submit *amicus* briefs. In practice, a panel or the Appellate Body retains complete discretion whether to accept or reject particular submissions. In a recent decision, the panel selectively accepted *amicus curiae* briefs from NGOs based on its discretion and without further explanation[493].

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490. See *supra* footnote 489.

491. United States — Import Prohibition of Certain Shrimp and Shrimp Products, AB-1998-4, WT/DS58/AB/R, adopted on 6 November 1998.

492. *Id*. at para. 108.

493. See European Communities — Measures Affecting Asbestos and Products Containing Asbestos (DS135/R) and (DS135/R/Add.1), Panel Report issues on 18 September 2000, paras. 8.12-14:

> "8.12. In the course of the procedure, the Panel received written submissions or *'amicus curiae'* briefs from four sources other than Members of the WTO. Referring to the position taken by the Appellate Body in *United States — Import Prohibition of Certain Shrimp and Shrimp Products* on the interpretation of Article 13 of the Understanding concerning *amicus curiae* briefs, the Panel informed the parties accordingly and transmitted the submissions to them. The EC included two of these submissions in their own submission. Having examined each of the *amicus curiae* briefs, the Panel decided to take into account the submissions by the *Collegium Ramazzini* and the *American Federation of Labour and Congress of Industrial Organizations*, as they had been included by the EC in their own submissions on an equal footing. At the second meeting with the parties, Canada was given an opportunity to respond in writing and orally to the arguments in the two *amicus curiae* briefs.
>
> 8.13. On the other hand, the Panel decided not to take into account the *amicus curiae* briefs submitted respectively by the *Ban Asbestos Network* and by the *Instituto Mexicano de Fibro-Industrias A.C.* and informed

At the Third WTO Ministerial Meeting in Seattle in November 1999, NGOs were not only present in the streets, but also at a symposium specifically organized to provide them with an opportunity to engage in "an informal dialogue" with WTO members "on issues likely to affect the international trading system of the WTO in the next century" [494]. Participants included representatives of the more than 700 NGO organizations that had been accredited to the Third WTO Ministerial Conference. Ali Said Mchumo, Chair of the WTO General Council, concluded the Symposium with a summary of the discussion. He highlighted the ways in which the WTO had increased transparency and public participation, but also stressed that each member Government bears the responsibility for consulting with its public [495]. The protests in the streets outside suggested that the WTO itself, its member Governments, and many NGOs have reached an impasse on this issue.

Academic commentators have also debated a number of proposals concerning NGO participation. Some favour providing systematic participation rights for NGOs both in the policy-making process through WTO committees and in the dispute resolution process as plaintiffs, *amicus curiae*, witnesses, or observers [496]. Others strongly

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Canada and the EC accordingly at the second meeting with the parties held on 21 January 2000.

8.14. On 27 June 2000, the Panel received a written brief from the non-governmental organization *ONE ("Only Nature Endures")* situated in Mumbai, India. In view of the provisions in the Understanding on the interim review, the Panel considered that this brief had been submitted at a stage in the procedure when it could no longer be taken into account. It therefore decided not to accept the request of *ONE* and informed the organization accordingly. The Panel transmitted a copy of the documents received from *ONE* to the parties for information and notified them of the decision it had taken. At the same time, it also informed the parties that the same decision would apply to any briefs received from non-governmental organizations between that point and the end of the procedure."

494. The Seattle Symposium on International Trade Issues in the First Decades of the Next Century, the Official Website of the 3rd WTO Ministerial Meeting (Seattle, 30 November-3 December 1999), http://www.wto.org/english/thewto_e/minist_e/min99_e/english/ngo_e/sdvol34no1.pdf.

495. *Id.*

496. Charnovitz, *supra* footnote 437. See also Steve Charnovitz, "Two Centuries of Participation: NGOs and International Governance", 18 *Michigan Journal of International Law* 183 (1997); Glen T. Schleyer, "Power to the People: Allowing Private Parties to Raise Claims before the WTO Dispute Resolution System", 65 *Fordham Law Review* 2275 (1997) (arguing that "the only adequate way to ensure compliance and advance the WTO's goal of lending more stability and predictability to international trade is to let private parties, not just nations, initiate disputes); Schneider, *supra* footnote 437, at 589 (arguing that "increas-

contest this position, on the ground that it is both unrealistic and potentially damaging to the integrity and effectiveness of WTO rule-making and enforcement processes[497]. This debate can only intensify in the wake of the Seattle protests; thus the time is right for an assessment of the impact of some of the proposals on the table.

(b) *The Trade Stakeholders Model*

Shell anticipated many of these proposals for increased public participation; indeed, he went one step further and elaborated a third model of trade legalism that would automatically grant standing to all "stakeholders" in the outcomes of international trade decisions. The "Trade Stakeholders Model" of "global trade governance" emphasizes "direct participation in trade disputes not only by states

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ing individual involvement in dispute settlement resolution — by granting private actors rights and standing under these organizations — is an appropriate way to increase the legitimacy of international trade organizations"); Daniel C. Esty, "Linkages and Governance: NGOs at the World Trade Organization", 19 *University of Pennsylvania Journal of International Economic Law* 709, 729 (1998) (arguing that "a more open WTO decision-making process that includes non-governmental entities, operating both as intellectual competitors to and support mechanisms for governments, offers the promise of strengthening the international trading system, thereby enhancing the WTO's legitimacy, authority, and effectiveness"); Eric L. Richards and Martin A. McCrory, "The Sea Turtle Dispute: Implications for Sovereignty, the Environment, and International Trade Law", 71 *University of Colorado Law Review* 295, 334 (2000) (arguing that "allowing greater participation by a wider range of groups, would enhance the effectiveness and legitimacy of the WTO", and that in particular, "NGOs might sharpen WTO regulatory performance by providing competition to the government officials that currently carry out these responsibilities").

497. See, e.g., Nichols, *supra* footnote 479, at 327-328 (challenging Shell's argument for the expansion of standing as unrealistic and warning that "far from 'democratizing' the process, expanded standing could create a forum only for well-monied special interest groups"; proposing instead that an exception that will accommodate societal values be created and that the composition of panels be also changed to include non-trade experts to protect such values); Nichols, *supra* footnote 437, at 852-854 (criticizing both Shell's and Charnovitz's argument for expanding standing before the WTO dispute settlement system to include private (non-government) parties as slighting the importance of form and nature of the international trade régime); *The Economist*, "The Non-Governmental Order", http://www.economist.com/editorial/freeforall/current/sa5268.html, visited on 10 December 1999 (suggesting that NGOs may "represent a dangerous shift of power to unelected and unaccountable special-interest groups?"). John Jackson is also more sceptical even of some of the proposals simply to open more channels of communication between non-State actors and the WTO, noting that they have engendered fierce opposition, "partly due to fears of the impact of industrial-country-based well-financed special interest groups on the decision processes of the fragile trade and financial institutions". John H. Jackson, "International Economic Law in Times That Are Interesting", 3 *Journal of International Economic Law* 3, 13-14 (2000).

and businesses, but also by groups that are broadly representative of diverse citizen interests"[498]. The motivation behind the model is Shell's perception that both the Régime Management Model and the Efficient Market Model, which he describes as the "two dominant models of trade legalism", create or do not address critical problems of distributive justice and procedural fairness. The Achilles heel of the Efficient Market Model is the failure to recognize that while everyone in the aggregate may be better off from increased trade, some gain more than others and some actually lose. This problem is only exacerbated when those who lose are disproportionately located in particular countries. A key problem with the Régime Management Model is that it is a victim of its own success; as a particular régime becomes strong and stable enough actually to affect State behaviour substantially, citizens within States are likely to notice the régime and seek ways to influence its content and administration. Procedural justice dictates that those affected by a substantive decision have a chance to participate in the decision-making process.

Failure to address these problems, for Shell and many others, is likely to harm the WTO specifically and global trade governance in general over the long term[499]. The Trade Stakeholders Model thus proposes creating a global deliberative process that would allow all affected groups to balance interests in increasing trade against a host of other interests — labour, the environment, the poor, consumer groups, and private commercial interests that may oppose trade[500]. Like the Efficient Market Model, this model is grounded in Liberal international relations theory in that it focuses on individuals and groups rather than States. It also rests on the same normative move as the Efficient Market Model, assuming that the purpose of international law is to improve the welfare of individuals[501]. Instead of turning to neoclassical economic theory, however, Shell embraces a civic republican conception of democracy, in which "'government

498. Shell, *supra* footnote 437, at 910.

499. See sources cited *supra* footnote 496.

500. Cf. Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* 367 (William Rehg, trans., 1998.) ("The core of civil society comprises a network of associations that institutionalizes problem-solving discourses on questions of general interest inside the framework of organized public spheres. These 'discursive designs' have an egalitarian, open form of organization that mirrors essential features of the kind of communication around which they crystallize and to which they lend continuity and performance.")

501. Shell, *supra* footnote 437, at 911.

decisions are a product of deliberation that respects and reflects the values of all members of society' "[502]. Applied to the WTO, this normative vision dictates the adoption of a set of procedures designed to maximize participation and consensus among all groups affected by trade, without any effort "to define an objective 'good' for global society"[503].

(c) *Picking and choosing*

How to decide whether any of these reform proposals merit support? How to choose between them? The answer is relatively easy for international lawyers who are trade specialists and favour a particular economic or institutional theory. Similarly for lawyers championing the interests of a particular client. For such individuals, the principal contribution of the above analysis is likely to be clarification of the different lines of debate and possibly the deployment of additional arguments in support of a predetermined position.

Among international lawyers who are not trade specialists, however, a principal issue is likely to be a much more general one: how best to advance the international rule of law? This cohort will reflexively endorse a legalist position and thus are likely to regard the WTO Agreements as a major milestone in the history of international law. Proposals to enhance the role of professional jurists in the process and to reduce opportunities for political skirmishing at any point in the dispute resolution process are similarly likely to find favour. But bolder proposals, such as Shell's bid to throw open the dispute resolution process to all concerned "stakeholders", will be harder to evaluate.

In this context, additional information about the likely impact of these proposed reforms is likely to be helpful, even if it is necessarily speculative. Gathering such information, however, requires a further excursion into more general theories both of compliance with international obligations and of effective supranational adjudication. Much of this theory is already explicitly interdisciplinary, developed by political scientists studying the workings of domestic and international tribunals or by international legal scholars seeking a more

502. Shell, *supra* footnote 437, at 913, quoting Mark Seidenfeld, "A Civic Republican Justification for the Bureaucratic State", 105 *Harvard Law Review* 1512 (1992).

503. Shell, *supra* footnote 437, at 911.

sophisticated vocabulary and analytical framework to make sense of what they see. Insights from this additional literature cannot dictate a particular position on WTO reforms, but it can help generalist international lawyers reach a more informed judgment.

What is likely to be the impact of Shell's proposal, now widely adopted by a number of scholars and presumably shared by NGOs[504], to grant standing to a wide range of affected groups and allow them to participate alongside States in the dispute resolution process? Shell argues for such a reform on normative grounds, contending that it is required according to widely shared concepts of procedural justice. It is further likely, on his account, to contribute to a more equitable distribution of the gains and losses from trade, by allowing the voices of the current losers to be heard by the adjudicators charged with interpreting and applying GATT rules. Such effects, he claims, will in turn enhance the long-term legitimacy and hence effectiveness of the GATT.

Political scientists would immediately demand an account of the "causal mechanisms" whereby these desired effects will actually be brought about. Step by step, what will be the impact of opening up the process in terms of who brings suits, how many will be brought, what will be the likely motivations and actions of State defendants, and how are panellists and members of the Appellate Body likely to react? Predicted answers to these questions are theoretical constructs flowing from specified theoretical assumptions with empirical support. Yet a theory that cannot generate such predictions, allowing a policy-maker to evaluate their plausibility in light of the policy-maker's own intuitions and experience, is no use at all. The discussion below canvasses three different sets of causal mechanisms that would predict quite different trajectories for the proposed reforms. Each set relies on different underlying assumptions about the relevant actors and their motives.

(i) *Standing firm on exclusive government standing*

The Rational Institutionalist assumptions that give rise to the Régime Management Model support a scenario in which States are unlikely ever to expand standing beyond States themselves, but will

504. See, e.g., Schneider, *supra* footnote 437; Charnovitz, *supra* footnote 437; Schleyer, *supra* footnote 496; and Richards and McCrory, *supra* footnote 496.

take a number of other measures both to enhance the transparency of the process and to improve the representation of multiple interests at the domestic level. As Hudec recognizes, "a demand for a right to appear before an international tribunal is a partial repudiation of the role being performed by national governments in those proceedings"[505]. It is a Government's job to listen to all the competing domestic voices through domestic political processes and adopt a position in the international proceeding that represents "the national interest". Demands by commercial interests on the one side and various NGOs on the other for direct representation reflect perceptions of bias in that domestic process, or else simply an effort to win at the supranational level what a particular group is unable to win at the domestic level.

Hudec thus contends that a decision whether to grant demands for stakeholder standing "is an issue of normative politics and not just a question of process"[506]. In other words, Governments who favour the free trade position should want to allow direct participation by commercial interests; Governments who favour a fair trade position should want to allow direct participation by environmental, labour, and human rights NGOs. Yet from the perspective of the Régime Management Model and Rationalist Institutionalist theory more generally, this scenario does not make sense. To begin with, Governments must be able to see that whatever particular interests they may favour are likely to be stalemated by the competing interests favoured by other groups, resulting in a decision to grant standing to all groups or none. More fundamentally, however, the starting assumption of Institutionalist theory is that States seek to strike a balance between States' interests in free trade, however they define it, and their *autonomy* to manipulate domestic political forces so as to allow any particular Government to stay in power. Allowing different domestic interest groups potentially to determine the outcomes of international trade disputes could have severe domestic political ramifications that Governments would not be in a position to control[507].

505. Hudec, *supra* footnote 441, at 47.
506. *Id.* at 48.
507. Judith Goldstein and Lisa Martin extend this analysis in a recent article arguing, like Hudec, that WTO legalization may have gone too far for Governments' own good. They point out that the strengthened dispute resolution process increases the flow of information about the precise costs and benefits of trade rules to affected domestic constituencies, enabling protectionist consti-

The alternative is for Governments to improve the *domestic* process of interest-brokering, allowing a wider range of groups to participate in the decision regarding what cases to bring and what position to take on the substantive law. Such reforms would likely be coupled with additional international process reforms to make the WTO proceedings as open as possible to public scrutiny. This increased transparency would then assure domestic groups that Governments were in fact advancing the positions adopted as a result of reformed domestic processes. Hudec points out that the reasons Governments have always insisted on maintaining the secrecy of the process was to avoid the kind of uncompromising litigation tactics Governments are likely to adopt when they know they are playing to a domestic political audience as well as to their fellow WTO members[508]. However, as he concludes as well, a more adversarial atmosphere in the dispute resolution process is likely to be the necessary price of increased public legitimacy[509]. Overall, the results of this combination of reforms should preserve States' ability to secure the advantages of long-term co-operation without sacrificing domestic political control[510].

On the issue of third-party submission of *amicus curiae* briefs, the Appellate Body has already taken matters into its own hands. WTO member States have found it difficult to object. They agreed to estab-

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tuencies to mobilize more effectively against further trade liberalization. For Governments favouring further liberalization, the further legalization of the GATT embodied in the WTO Agreement will make it harder to manage these constituencies in trying to extend the scope and substance of WTO rules. Judith Goldstein and Lisa Martin, "Legalization, Trade Liberalization, and Domestic Politics: A Cautionary Note", 54 *International Organization* 603 (2000). For a more general overview of this argument and additional arguments about the constraints that legalization places on government autonomy, see Miles Kahler, "Conclusion: The Causes and Consequences of Legalization", 54 *International Organization* 661 (2000), see especially 675-676.

508. Hudec, *supra* footnote 441, at 45.

509. *Id*. at 46.

510. A further corollary of the Régime Management Model is that to the extent that Governments find that they have agreed to a dispute resolution process that they cannot control, they will begin restricting the jurisdiction of the Dispute Resolution Body in further WTO rounds of negotiation. Karen Alter argues that EU Governments responded this way to the unintended consequences of allowing the European Court of Justice (ECJ) to oversee implementation of the early EU agreements. As ECJ decisions, implemented through national courts, began to restrict the autonomy of EU Governments, they retaliated by taking various domestic measures designed to circumscribe the impact of these decisions and by refusing to extend ECJ jurisdiction to new areas of EU power. Karen Alter, "The European Union's Legal System and Domestic Policy: Spillover or Backlash?", 54 *International Organization* 489, 512-515 (2000).

lish the Appellate Body; to the extent that it decides the acceptance of *amicus* briefs is necessary to strengthen both its own legitimacy and the quality of the entire dispute resolution process through provision of more information and arguments, member States cannot say no without undermining their own credibility. The Régime Management Model supports the creation of a binding dispute resolution process with impartial and independent adjudicators to reduce the risk of defection from increasingly demanding common rules; States cannot easily establish such a process and then undermine the judges they have just empowered. The best Governments are likely to be able to do is to demand procedural changes either to force the consolidation of briefs by multiple parties or to give defendant Governments more time to respond to the arguments made[511].

One final note. As discussed repeatedly above, the Régime Management Model argues that the decision to make the adoption of panel awards automatic exceeded the political will of WTO member States and hence was likely to generate periodic non-compliance. This view is consistent with the likely rejection of demands for direct group participation in WTO proceedings. Governments will want to continue to control the process, even as they allow wider domestic participation in shaping their own litigation positions. That control is likely still to include the ability from time to time to denounce a panel decision as wrong or ill-advised and pay the price for non-compliance. If domestic interests opposed to the decision are strong enough, governments will decide that the support gained or the losses avoided are worth the price.

(ii) *The judicialization of global trade politics*

Alec Stone Sweet offers a very different prospective account of how the expansion of standing is likely to work, focusing on the ways in which legal discourse and the process of third-party dispute resolution can gradually take over political processes[512]. The result is the "judicialization" of politics, in this case global trade politics. The causal mechanisms in this process are both Rationalist and Constructivist, combining strategic behaviour and normative struc-

511. Hudec, *supra* footnote 441, at 69 (arguing that governmental objections to the burden of reading and responding to the increased volume of litigation material "may prove to be a fatal objection to the whole idea").

512. Alec Stone Sweet, "Judicialization and the Construction of Governance", 32 *Comparative Political Studies* 147 (1999).

ture. The Constructivist dimension emphasizes the ways in which legal processes gradually draw a growing number of actors into normative discourse, which in turn generates rules that increasingly structure their interactions. "Judicialization is socialization", Stone Sweet argues, socializing lawyers and politicians alike to accept a steady expansion of a legalized domain[513].

Stone Sweet offers a general theory of the emergence and evolution of systems of governance. "The theory holds that we can move, by virtue of a self-sustaining process from a single dispute about the terms of a dyadic contract to an elaborate governmental system."[514] The process divides into four discrete stages. It begins with a rudimentary normative structure, including at least the norm of reciprocity and probably also some established patterns of doing business. The existence of this structure makes it possible for two individuals to enter a simple contract, or a "dyad", both by helping prevent disputes and helping resolve them once they arise[515]. Step two is to delegate the task of dispute resolution to a third party, moving from "dyad" to "triad". This step is logical as long as the two parties have a greater interest in resolving the dispute than maintaining their conflict; if so, "the move to triadic governance is a means of overcoming low levels of trust and weak behavioural norms"[516]. Assuming the inevitability of disputes arising from contracts and the inability of the two parties to a contract to resolve their disputes on their own or to impose solutions on each other, the likelihood of delegation to a third party in many cases is high. Dyad is thus likely to lead to triad.

Step three of the model involves a shift in the adjudicator's function from simple dispute resolution to norm generation, or from triad to "triadic rule-making". The dynamic driving this shift is the inherent tension between a third-party decision-maker's need to appear neutral as between the two parties and the inevitable fact that she must ultimately decide in favour of one or the other. This tension spawns a "crisis of legitimacy" that she overcomes "by defending her behaviour normatively, as meaningfully enabled and constrained by rules embedded in normative structure"[517]. This move to norma-

513. Stone Sweet, *supra* footnote 512, at 172.
514. *Id.* at 152.
515. *Id.* at 153.
516. *Id.* at 154-155.
517. *Id.* at 155.

tive reasoning, however, typically requires at least a slight expansion or adaptation of existing rules to apply to the fact situation before her. She is thus "making rules", a process that she further seeks to legitimate by framing her decision as a record of deliberations "about the precise relationship of abstract rules to a concrete dispute"[518]. The rules she makes are likely to be regarded as precedent governing future disputes[519]. When they are, rule-making feeds back into normative structure — the fourth and final step of the model.

Through this sequence, third-party dispute resolution "organizes discourse about a community's normative structure"[520]. As that structure expands through the elaboration of additional rules and the refinement of existing ones, more and more potential contractors are drawn into the system, who in turn generate more and more disputes, repeating the cycle in what becomes a "virtuous circle"[521]. The result is the construction of a system of governance that has profound social and political effects. Although it is not automatic, under specified conditions third-party dispute resolution leads to the judicialization of dispute resolution and can lead to the "judicialization of politics": "the process by which triadic lawmaking progressively shapes the strategic behaviour of political actors engaged in interactions with one another"[522]. In both cases, third-party dispute resolution functions as a mechanism of systemic change, operating both through the rational pursuit of self-interest and the power of normative discourse.

Stone Sweet applies this model to explain the judicialization, or legalization, of GATT dispute resolution from the early GATT panel system to the WTO. From his perspective, as long as all parties continue to believe that they have more to gain than to lose from the existence of a third-party dispute resolution mechanism, and as long as the rules generated by third-party adjudicators are regarded as binding, the system will be self-perpetuating. Thus, he writes:

> "Once introduced by the Americans, lawyerly discourse per-

518. Stone Sweet, *supra* footnote 512, at 157.
519. *Id*. Stone regards precedent as likely to "follow[] naturally" from this process, because it "helps to legitimize TDR by simultaneously acknowledging rule-making behavior, while constraining that same behavior with a rule: that like cases shall be settled likewise".
520. *Id*. at 157.
521. *Id*. at 158.
522. *Id*. at 164.

> petuated itself. Lawyers filed detailed legal briefs, attacking or defending particular national policies; faced with detailed questions, panels gave detailed answers; lawyers then understood the reasoning supporting such answers as guidelines for future litigation strategies."[523]

In the process of resolving the growing number of disputes, GATT panels also came to exercise increasingly governmental authority, "altering the terms of global exchange"[524], "reinvent[ing] themselves as judges"[525], and, finally, "reconstruct[ing] how states understood the nature of their own régime"[526].

Stone Sweet concludes: "States reacted to the development of a rule-oriented mode of governance not by suppressing it but by adjusting to it."[527] The Final Act of the Uruguay Round, creating the WTO, was the natural next step. Far from exceeding States' political will, as in Hudec's account, the adoption of compulsory adjudication of disputes and acceptance of the resulting panel awards constitutes the constitution of the world trading system. States had been socialized through repeated legal interactions to accept it.

From this perspective, the expansion of standing before WTO panels to all stakeholders in international trade decisions, following Shell's proposal, would involve not only the judicialization of GATT/WTO dispute resolution, but the more general judicialization of world trade politics. All the actors in the political struggles over the direction and impact of trade flows would find their interactions to be increasingly shaped by WTO law-making processes. Battles currently waged in the political arena, at both the national and the international level, would increasingly end up in court. Combatants would increasingly deploy legal arguments and strategies. Trade adjudicators, at the panel but especially the Appellate Body level, would gain increasing power.

The question is whether such an expansion of standing is automatically bound to happen, whether it *is* now the natural next step. The Stone Sweet model suggests a strong pull in this direction. He acknowledges at various points in his analysis that the Constructivist

523. Stone Sweet, *supra* footnote 512, at 169.
524. *Id.*
525. *Id.* at 170.
526. *Id.* at 171.
527. *Id.*

mechanisms he describes must work alongside the convergence of rational State interests, recognizing, for instance, the desire of other GATT States to block United States unilateral sanctions as a prime force behind the tightening of GATT dispute resolution. Nevertheless, the power of third-party decision-makers to organize normative discourse and draw in an ever-increasing number of contractors indicates that the current WTO process contains an inherently expansionary dynamic. Demands for direct participation by non-state actors will thus be hard to stop.

(iii) *From one court to many*

As even Shell's analysis makes clear, no one "Liberal" theory of WTO dispute resolution exists. He elaborates two different models that each combine an element of positive Liberal theory with a different normative theory about the nature of individual welfare. The Efficient Market Model supports the expansion of standing to commercial interests. It assumes that the result of such an expansion will be the creation and protection of efficient markets. The Trade Stakeholders Model is the basis for the reform proposal considered here, to expand standing to all affected groups. It posits that the results of such a reform will be to enhance the democracy and hence the effectiveness of the WTO as a whole. Neither model, however, attempts to answer the more fine-grained questions posed above concerning the support for and impact of the expansion of standing.

Lawrence Helfer and Anne-Marie Slaughter have generated a tentative theory of effective supranational adjudication that also relies on a Liberal framework of analysis[528]. Based on a study of the European Court of Justice and the European Court of Human Rights, two very effective supranational tribunals, the theory focuses both on the active efforts of the tribunals themselves to establish and maintain their power and on the domestic and transnational emergence of what Miles Kahler has subsequently called "compliance constituencies"[529]. In the European experience, both these tribunals proved quite adroit at targeting and effectively recruiting not only potential

528. Helfer and Slaughter, *supra* footnote 474.

529. Kahler, *supra* footnote 507. Drawing on the contributions to the special issue of *International Organization* devoted to the study of "legalization" of international régimes, Kahler summarizes the ways in which domestic "compliance constituencies" have been able both to strengthen and extend the reach of these régimes in various issue areas.

litigants, but also domestic courts in the service of supranational law-making. At the same time, however, these litigants and national courts had independent interests that made them receptive to the tribunals' overtures. Slaughter and Helfer's account highlights the intersection and interaction of the interests of all these actors at the national and supranational level[530].

Transposed to the WTO context, this approach would begin with an analysis of the interests of the different parties who could exercise standing under Shell's proposal, as well as the interests of the WTO panels and the Appellate Body. It would also factor in the interests of the WTO member States, not as aggregate unitary interests but as the interests of distinct government institutions responding to the demands of various constituents. Nothing in the approach denies that all these various interests can be changed or constructed through participation in the WTO dispute resolution process, but the theory at least begins from assumed and predetermined interests.

The most striking result from thinking about the problem this way is that it becomes quickly apparent that if the proposition is to expand standing to all groups affected by the rules governing international trade, many if not most of those groups may not want it. They may want increased participation of various kinds in the dispute resolution process; Hudec identifies both NGOs and a corps of international trade lawyers in various world capitals as primary supporters of these type of reform proposals[531]. But standing for all could effectively mean standing for none, in the sense that the system would be quickly swamped by cases. Moreover, how on earth would the Dispute Resolution Body choose which cases to hear and which not? Would the Secretariat choose? The Appellate Body? The member States acting as a body? The only certain outcome would be charges on all sides of bias in the selection process.

Moreover, why would an environmental NGO necessarily want the right to sue directly if it simultaneously meant granting the same right to an industry association or a free trade NGO? Disparities in

530. See also Keohane, Moravcsik and Slaughter, *supra* footnote 424 (distinguishing between "interstate" and "transnational" dispute resolution based on the degree to which individuals and groups in domestic and transnational society have influence over selection of, access to, and compliance with international tribunals, and arguing that transnational dispute resolution mechanisms are more likely to foster compliance with decisions of international tribunals through the development of compliance constituencies).

531. Hudec, *supra* footnote 441, at 44.

funding and in the relative numbers of commercial versus other types of interest groups could skew the types of cases most likely to be brought and the intensity with which they are litigated. Equally important, litigants in such a system would have less control or even influence over outcomes than they would in any domestic system that permits forum-shopping. The likely increase in cases would strongly support a shift to a permanent panellist roster or a standing court of first instance, which would virtually eliminate party control over the identity of the dispute resolver. The result could easily be to make bad law worse, if an NGO were to bring a suit against a State or a large corporation, draw a panellist inclined to interpret the substantive law in the direction of maximizing trade, and lose.

In the domestic judicial system, by contrast, prospective litigants can often manipulate jurisdictional rules and even judicial rotation to "draw" certain judges. Such calculations are a standard element of public interest litigation in the United States and could be expected to influence the position of at least US-based NGOs regarding the prospect of direct WTO litigation. The prospect of litigating global trade law through domestic courts may thus seem far more attractive. At the same time, however, such parties will not want to give up the prospect of participation and influence at the WTO level. The optimal solution may thus be a system resembling that in the EU, whereby domestic courts are empowered to refer questions of EU law to the ECJ. Similarly, domestic courts could refer cases involving questions involving WTO law either to a permanent WTO court of first instance or to the Appellate Body. The resulting judgments would be handed back down to domestic courts, who would decide whether and how to enforce them as a matter of domestic law.

One of the major advantages of such a system would be that WTO law would be directly enforceable through domestic courts, making it much more difficult for States to resist compliance. However, such a system would only be feasible and desirable if a wide range of domestic interest groups felt empowered to participate in WTO law-making in the first instance, through participation in the shaping of State positions in the negotiating process or through subsequent domestic ratification processes. Similarly, the selection of panellists, whether *ad hoc* or as part of a standing roster, and of the Appellate Body itself would have to be carried out with an eye to expertise not only in trade law and policy but also in the intersection of these issues with environmental, labour, human rights, and other social

issues. In the same vein, litigants before national courts would have to have the chance to make their case at the WTO level as well as the domestic level, arguing specifically for a particular interpretation of WTO law. Finally, as in the EU, States would presumably still be able to sue each other in the WTO dispute resolution as well, making it possible for a range of different groups still to work through official channels if they preferred.

WTO panellists and members of the Appellate Body are likely also to favour a system in which they received cases from domestic courts. An expansion of standing to all stakeholders would vastly expand their docket, quickly rendering it unmanageable without a tremendous increase in material and human resources. They would need some sort of filter, some ability to choose the most important or the most pressing cases. One possibility would be to expand the panel system and then make the possibility of appeal contingent on selection of a case by the Appellate Body, as the United States Supreme Court does in granting the writ of *certiorari*. But filtering cases through domestic courts is likely to be more attractive, as it would allow all members of the WTO dispute resolution system to develop wider and more powerful domestic "compliance constituencies".

Drawing domestic courts into the system would educate them about WTO law and begin the process of integrating it with domestic law at a very practical level. It would create strong working relationships between domestic judges and supranational adjudicators, relationships that would begin on paper but would be likely to acquire a personal dimension over time[532]. Following the ECJ example, WTO adjudicators could also be expected to speak directly to domestic litigants and judges in their opinions, demonstrating an awareness of and responsiveness to the concerns of individuals and entities below the surface of the State[533]. The result would be the construction of a global community of trade law, linking litigants and judges in a complex and ongoing conversation at the national, transnational, and supranational levels.

The many groups currently opposed to the WTO would only accept a system in which WTO law was enforced through domestic

532. For an account of "face-to-face" judicial relationships at both a regional and global level, see Anne-Marie Slaughter, "Judicial Globalization", 40 *Virginia Journal of International Law* 1103 (2000).

533. Helfer and Slaughter, *supra* footnote 474, at 308-312.

courts if they were convinced not only that they would thereby gain more litigation opportunities but also that they would have more input into the substance of the law being enforced. Reform of the dispute resolution system in this direction would thus almost certainly have to be accompanied by opportunities for representation of a wider range of domestic interests in the WTO negotiating process. At the same time, the executive branch or "the Government" in many States might object to the loss of control over the dispute resolution process that would inevitably accompany the expansion of standing and an opportunity to bring cases first in domestic court. The exercise of political discretion in terms of what cases finally made it into the WTO system would be replaced by the exercise of judicial discretion. On the other hand, ceding control to domestic courts would probably be better than opening up the system at the WTO level to all affected groups. Further, the involvement of domestic judges in the system would provide additional political cover for government officials required to defend a particular substantive result against domestic interest groups.

It is not possible to predict precisely how these different interests would play out in an actual negotiation. The heart of a Rationalist Liberal approach, however, is to break down unitary States into a host of different actors — both governmental and non-governmental — who interact with each other. The next step is to try to determine what the interests of those actors are likely to be, where they are likely to be opposed, and where they might converge or coalesce. This analysis could be combined with a Constructivist Liberal variant, in which the process of interaction would be assumed to have an impact on the process of interest formation[534]. Overall, the advantages of this approach are that it forces the analyst to stand back from the normative imperatives highlighted by Shell and the unitary state framework assumed by the Régime Management Model and ask : what are all the different non-State actors and State institutions involved in this process likely to want ? The answers to this question will determine the limits of what is politically possible, but will also expand the range of possible institutional and procedural solutions.

534. This approach lies at the heart of the Stone Sweet analysis discussed above. He offers an extensive explanation of how tribunals shape individual interests, but focuses less on what those interests are independent of their intersection with the dispute resolution process.

3. Conclusion

This chapter has briefly reviewed the evolution of the GATT legal system as it evolved from a "pragmatic" dispute resolution system to an increasingly "legalist" one. The culmination of this evolution was the creation of the WTO and WTO Dispute Resolution Body in the Uruguay Round Final Act, formally approving a system of automatic panel creation, strict deadlines and carefully specified procedures, automatic adoption of the panel award, and the option of appellate review by a permanent appellate tribunal. The trade "legalists" had apparently won the day.

Against this backdrop, Professor Richard Shell has explored different types of "trade legalism", different conceptions of how a more legalized dispute resolution system should be used to advance the substantive goals of the global trading system. In the process, he developed three distinct models of legalism, each "grounded in" or "derived from" a theory of international relations but also combined with economic and political theory. The Régime Management Model featured Rationalist Institutionalist theory, assuming unitary State actors with a long-term interest in co-operation to liberalize trade but a periodic short-term interest in defecting from the régime for domestic political purposes. The Efficient Market Model, by contrast, combined Liberal IR theory with neoclassical economic theory, generating a conception of the dispute resolution system that required it to impose free trade norms on domestic protectionist groups.

Shell's own preferred model, the Trade Stakeholders Model, combined Liberal IR theory with democratic political theory to argue that the WTO system could only be legitimate, and hence more effective, if it were more democratic. To that end, all groups directly affected by decisions resolving trade disputes by interpreting and applying trade law should be granted an equal opportunity to participate in the system, including standing to bring cases before WTO panels. Shell justifies this proposal largely on normative grounds, with a practical pay-off in terms of enhanced legitimacy and effectiveness. Assessing the impact of such a proposal required an exploration of the assumptions animating Shell's different models, as well as of more general theories of supranational adjudication and the construction of governance. The Régime Management approach supported the view that Shell's proposal is unlikely ever to be accepted.

Alec Stone Sweet's analysis suggested that the expansion of standing beyond State actors is a likely if not inevitable next step in the gradual "judicialization" of global trade politics, at least as long as the major States continue to believe that they benefit from conflict resolution. The Helfer and Slaughter analysis supported an alternative set of reforms to expand standing but to direct trade cases initially to domestic courts, which would then refer them to WTO panels or the Appellate Body.

None of these three approaches is a blueprint for the future. Each includes a great deal of speculation and contingency. Yet each outlines a quite different scenario that will generate different types of outcomes. Lawyers trying to advise their clients or to develop their own institutional proposals can choose generally which scenario seems most plausible based on their knowledge, experience, and intuition. They can also combine scenarios, reasoning that each captures a different but equally valid "part of the elephant". Overall, the analysis engaged in here highlights a deeper point, raised repeatedly above and explored more fully in the final chapter. IR theory, or political science generally, provides primarily *analytical* help. It explicates assumptions and plays out their positive implications. To transform that analysis into a *normative* position, a doctrinal argument or a policy proposal, requires the lawyer to exercise her judgment and interrogate her values (or her client's values).

Consider, for instance, how Shell combines different frameworks of positive analysis with different normative theories to generate a particular doctrinal or policy position. The Régime Management Theory assumes that States are the primary actors in the international system and that they will act to pursue long-term interests in co-operation but also to enhance their autonomy of action and to maintain domestic political control. To move from those assumptions to a policy position against automatic adoption of panel awards or a doctrinal position in favour of interpreting GATT provisions so as to maximize State autonomy in the case of ambiguity requires an additional normative judgment. Lawyers must choose to be pragmatic, reasoning that because States act this way, maximizing State autonomy within a co-operative régime is the best hope. A different view of law as the repository of collective State or individual aspirations might nevertheless advocate a much more stringent régime, even if the chances of its destabilization were assumed to be much higher.

This shift from positive to normative reasoning, with the addition of the reasoner's own choices and values, is even easier to see in Shell's development of the Efficient Market model, in which Liberal IR theory combines with neoclassical economic theory. The advocate of this model must not only believe in the positive assumptions of Liberal IR theory and the theory of comparative advantage, but she must also conclude that the expansion of the allocative pie for all nations is more important than assuring distributional equity within or among them. This is a perfectly defensible normative position, but it must be chosen and defended in terms of beliefs about how the world *should* work, not just assumptions about the way that it does.

IR theory, economic theory, social theory — all can enhance the reach and range of a lawyer's analysis. Regarding WTO dispute resolution, they can elaborate the opaque concept of "legalism" into three different models that generate three quite different reform options and jurisprudential postures. They can further shed light on the impact of more specific reform proposals. But they cannot, in the end, tell a lawyer how to choose among them.

CHAPTER V

INTERNATIONAL LAW AND INTERNATIONAL RELATIONS SCHOLARSHIP: THE STATE OF THE ART

Introduction

To conclude, it is necessary to return to the beginning. Chapter I reviewed the basic elements of the three major paradigms of IR theory: Realism, Institutionalism and Liberalism. The discussion also explored Rationalist and Constructivist variants of theories within each paradigm. The next three chapters focused on the application of these different paradigms, as well as of specific theories within them, to three different case studies involving current problems in international law and politics.

The question whether and under what conditions to authorize humanitarian intervention is possibly the most important issue currently facing the international community. It is a subject that has generated a vast amount of debate among international lawyers, political scientists, policy experts, and national and international officials. Mapping this debate through an IR/IL lens not only clarified a complicated web of arguments, but also revealed a much greater degree of consensus among apparently competing positions than is generally apparent. Realists, Institutionalists and Liberals, albeit for different reasons, all support at most a sharply limited and carefully constrained doctrine of humanitarian intervention. For the lawyers whose task it is to flesh out the precise nature of those limits and constraints, each of these different strands of theory offers a different set of priorities and justifications.

The role of NGOs in international law-making presents an institutional more than a doctrinal problem, one that strikes at the foundation of the traditional international legal system. In this context the IR/IL analysis yielded insights into the very different types of roles that NGOs play in the international system. It highlighted three distinct models of NGO activity: the enabling model, the adversarial activist model, and the market power and private law-making model. Each of these models yields a different prescription for how, if at all,

to incorporate NGOs into international law-making processes. For the many NGOs that engage in activities that fit into more than one of these models, it is necessary that they confront many of the tensions and contradictions highlighted by the models as a prerequisite for participation in international law-making on anything more than a consultative basis.

Finally, proposed reforms of the WTO dispute resolution process directly engage different conceptions of how States behave in the international system. Professor Richard Shell has drawn on both Institutionalism and Liberalism in formulating WTO legalism. These different models, in turn, give rise to different reform proposals and different prescriptions for how WTO panellists and members of the Appellate Body should approach their task of interpreting provisions of the WTO agreements. Moving beyond these models, it is possible to apply more general theories of supranational adjudication to assess the likely impact of a proposal to expand WTO standing to private parties, including not only commercial interests but also NGOs.

It is impossible to draw one moral from these varied accounts, just as it is impossible to reduce the myriad ways in which IR and IL can be knit together to a few simple propositions. Different students and scholars will determine for themselves what they find most useful. In the end, IR/IL is as much a mode of thinking as a body of knowledge, a way of looking at both the world and the law.

Section 1 of this final chapter will summarize both the advantages and potential pitfalls of using this technology. Section 2 will turn to the road ahead. However, instead of offering yet another literature review based on a typology of IR or IL paradigms and methodologies, it sets forth five substantive propositions that can be drawn from current or recent work.

First, international lawyers can profit from an analysis of power. Second legalized rules and institutions operate differently from non-legalized rules and institutions. Third, soft law is as important as hard law in global governance but plays a different role. Fourth, régime design matters. Fifth, domestic politics are as important for international lawyers as international politics.

These five propositions define not only an agenda for future research, but also offer insights and potential guidance to practicing lawyers and policy-makers. They are the fruit of IR/IL research as much as the seed of further study.

In conclusion, Section 3 explores the continuing distinctive role of international lawyers. Even while collaborating with political scientists engaged in IR/IL research on their own, they must remain aware of the importance of both making and acting on normative choices. International lawyers cannot content themselves with saying what the law is or even working with political scientists to explain how it came to be that way and how it could be improved. They must hold to a vision of how the world could be, and help to make it so.

1. The Uses and Misuses of Models

International lawyers, and lawyers generally, often accuse political scientists with being in love with models. Perhaps rightly — as eminent a political scientist as Robert Keohane has warned his colleagues of the dangers of "model mania"[535]. Political scientists must measure their models against careful and extensive empirical work. Absent such empirical support, lawyers often mistrust the abstract certainty that models appear to afford. The parsimony characteristic of the most powerful models contrasts sharply with the mass of complex doctrinal and institutional detail that lawyers must master. Nevertheless, models serve important functions for lawyers and political scientists alike. How lawyers use them, however, depends ultimately on their underlying conception of what a model is — their mental model of models.

In one conception, models are like lenses. They are the prisms, conscious or unconscious, through which all individuals see and interpret the world. Change the lenses, and we change both what we see and how we see what we saw before. The advantage of developing different models is that it fosters the crystallization of different perspectives and permits analysts to shift between them quickly and systematically in examining any particular problem.

A second conception of models sees them as causal constructs, analogous to physical structures in which pressing a button or pulling a lever in one part of the model dictates a series of consequences in other parts. This is a more Newtonian image, older but

535. Robert Keohane, "Studying Co-operation and Conflict: Intra-Rationalistic and Extra-Rationalistic Research Programs", talk at a round-table on conflict and co-operation, American Political Science Association Annual Meeting, San Francisco, CA, August 1996.

not outdated. Causal constructs are inevitably imperfect approximations of physical or social reality, but they remain the foundation of much of our knowledge. If lawyers are to accord the social sciences any value at all, they must be prepared to accept or at least evaluate the merits of causal models based on theoretical propositions and backed by empirical testing of various kinds. They can then use these models not only to diagnose policy problems but also to generate a range of legal solutions.

(a) *Models as prisms: a rainbow of arguments*

The "prism conception" of models is one that is likely to come naturally to lawyers, who are trained to analyse complex problems from many different angles and advance and defend a wide range of positions. Indeed, seeing familiar terrain from an unfamiliar angle is often the key to unlocking legal creativity. Analysing any issue through a Realist, Institutionalist or Liberal lens is analogous to shifting intellectual gears, allowing the analyst to incorporate different sets of assumptions about what he or she is actually observing and what the likely outcome will be. The result is an immediate repertoire of arguments on virtually any question. Alternatively, if the analyst can learn to identify his or her own intuitive or reasoned position on a particular issue as flowing from one particular perspective, it is relatively easy to anticipate and respond to counterarguments generated by the other two. It is also possible to buttress a chosen position by integrating arguments from several complementary perspectives; Realism and Institutionalism or Institutionalism and Liberalism can often be harnessed together.

A closely related use of IR/IL thinking is facilitating critique of legal doctrines, institutional arguments, and policy positions. Identifying the conception of the international system underlying a claim or argument creates an opportunity to challenge the assumptions of that conception by substituting the assumptions of another paradigm. An argument may also reveal itself as internally contradictory to the extent it relies simultaneously on conflicting assumptions drawn from different paradigms. These skills are not only valuable as debating tools; they also help to sharpen a lawyer's personal and professional judgment.

To offer only one example of these critical faculties at work, consider the United States position opposing the establishment of a

permanent International Criminal Court. The most frequently heard argument advanced by opponents of the Court is that it will hamper the United States ability to project force around the world. This sounds like a Realist argument because it focuses on maintaining United States power. In fact, however, it reflects Institutionalist logic, in that it grants that the Court is likely to be effective enough actually to constrain State behaviour. From a Rationalist Institutionalist perspective, the Court can only work to the extent that it accurately implements a majority of States' interests in prosecuting perpetrators of genocide, war crimes, and crimes against humanity — an interest that the United States shares. A coherent Realist attack on the Court would have to accept either that the Court will be ineffective against the most powerful nation in the world, or that if the United States joins the Court, its power relative to other participating nations will allow it to ensure that the Court serves its interests.

Note that international lawyers can deploy these different arguments whether they believe them or not, meaning whether they think that the models actually predict different courses of events. An international lawyer could conclude that each of the paradigms simply reflects a different type of geopolitical logic, but one that exists primarily in the heads of political scientists. For lawyers and scholars who challenge any notion of actually grasping, much less explaining, an external "reality", the paradigms are more likely to be understood as useful mental maps to organize different types of arguments and discourses. Even if the world is all in our heads, it is useful to be able to systematize how different actors think about it.

(b) *Models as causal constructs: diagnosing problems and implementing policy solutions*

The "causal conception" of models is much more likely to appeal to international lawyers who understand their profession, at least in part, as solving problems and overcoming obstacles to the achievement of desirable international goals. As Jeffrey Dunoff points out: "Efforts to prescribe — to solve legal problems — are deeply dependent upon the particular definition of the problem to be solved."[536]

536. Jeffrey L. Dunoff, "International Legal Scholarship at the Millennium", 1 *Chicago Journal of International Law* 85, 86 (2000).

He focuses on the solution of specifically *legal* problems, but virtually every legal problem reflects a deeper policy failure or impasse. Hence "problem-driven" international lawyers are likely to draw on theories and concepts in IR theory to diagnose and reframe a variety of international problems and to formulate policy solutions that can then be translated into institutional responses. In addition to the very general paradigms explored here, lawyers can draw on many more specific theories within each IR paradigm, theories advancing clear causal claims about questions such as the origins of different types of armed conflict, the causes of protectionism, or the greater ability of international institutions to promote co-operation on transboundary pollution than global warming.

Trade and environmental problems have been a fertile source for work in this area. Eyal Benvenisti, for example, diagnoses freshwater resource management as a collective action problem, draws on the IR literature to specify principles for overcoming collective action problems, and then evaluates alternative procedural and substantive options for regulating water resource management at the international level in light of these principles[537]. Problems of ethnic conflict and international security also lend themselves to this approach. David Wippman draws on Arend Lijphart's theory of consociationalism to examine potential legal solutions to ethnic conflict and potential international legal objections to such arrangements[538]. Steven Ratner draws on both IR theory and negotiation theory to develop a fresh framework for addressing the problems of ethnic minorities[539]. International legal scholars have also applied IR theory as a diagnostic and policy-prescriptive tool to the problems of Israeli-Palestinian relations, international terrorism, and a range of

537. Eyal Benvenisti, "Collective Action in the Utilization of Shared Freshwater: The Challenges of International Water Resources Law", 90 *American Journal of International Law* 384 (1996). Similarly, Robert Schmidt employs Robert Putnam's theory of two-level games to explain the impasse in US-Canadian Pacific salmon negotiations and to propose a unilateral strategy the United States might pursue to bring about agreement. See also Robert J. Schmidt, "International Negotiations Paralyzed by Domestic Politics: Two-Level Game Theory and the Problem of the Pacific Salmon Commission", 26 *Northwestern Environmental Law Review* 95, 95 (1996).

538. See David Wippman, "Practical and Legal Constraints on Internal Power Sharing", in *International Law and Ethnic Conflict* 211 (David Wippman, ed., 1998).

539. Steven R. Ratner, "Does International Law Matter in Preventing Ethnic Conflict?", 32 *New York University Journal of International Law and Politics* 101 (2000).

other international problems from antitrust enforcement to trade wars[540].

A particular causal conception of international politics allows an international lawyer to move from a legal problem to an underlying policy problem and to frame various possible solutions. Conversely, thinking about IL in IR terms strengthens a lawyer's ability to begin with a set of policy considerations and reason forward to a set of legal rules that will effectively implement them. Working with Shell's models of WTO legalism, for instance, highlighted the ways in which institutional structure could be designed to achieve very different policies and normative visions.

It must be acknowledged, however, that the perceived value of connecting law to policy itself rests on a deeply embedded jurisprudential assumption. Lawyers are far more likely to use IR theory this way if they already believe that reasoning about legal rules inevitably involves policy choices. An alternative view of legal reasoning, of course, seeks to preserve the autonomy and purity of the legal realm, focusing on "the legal language itself: the language of reasoned interpretation, logical deduction, systemic and temporal coherence"[541]. Insisting on explicating policy choices as an inherent part of law flows directly from the Legal Realist tradition, which is much more deeply ingrained in American legal education than in most other countries. American law students and lawyers are thus conditioned to appreciate the policy dimension of IR/IL approaches more readily than lawyers from other legal traditions.

(c) *Choosing worlds? Or making them?*

Lawyers typically resist "having to choose" between competing paradigms, finding elements in each that resonate with their own

540. See generally Jonathan R. Macey, "Chicken Wars as a Prisoner's Dilemma: What's in a Game?", 64 *Notre Dame Law Review* 447 (1989); Enrico Colombatto and Jonathon R. Macey, "A Public Choice Model of International Economic Cooperation and the Decline of the Nation State", 18 *Cardozo Law Review* 926 (1996); Ayaz R. Shaikh, "A Game Theoretic Approach to Transnational Terrorism", 80 *Georgetown Law Journal* 2131 (1992) (student note); Moshe Hirsch, "The Future Negotiations over Jerusalem, Strategical Factors and Game Theory", 45 *Catholic University Law Review* 699 (1996); William B. T. Mock, "Game Theory, Signaling, and International Legal Relations", 26 *George Washington Journal of International Law and Economics* 33 (1992); Spencer W. Waller, "Neo-Realism and the International Harmonization of Law: Lessons from Antitrust", 42 *Kansas Law Review* 557 (1994).

541. Joseph H. H. Weiler, "A Quiet Revolution: The European Court of Justice and Its Interlocutors", 26 *Comparative Political Studies* 510, 521 (1994).

intuitions and experience. In many cases involving a specific problem or complex of issues, all three paradigms (and others not explored here) will seem relevant both to analysing the problem and designing a solution. Power, institutions, and domestic politics, as well as rational incentives and normative obligations, all play a role in the most complex situations. A good lawyer will bear them all in mind and attempt to develop rules or design institutions in such a way that they converge or at least reinforce each other as much as possible.

In some situations, however, the diplomatic or national policy-making process will generate decision nodes in which different paradigms point to very different policy positions. A Realist view of the world, for instance, argues that the best guarantee of international peace and security is preserving State sovereignty, leading to support for a strong norm of non-intervention. A Liberal view, on the other hand, argues that the sources of insecurity are domestic, and that humanitarian catastrophe is a kind of early warning for a region if not for the world. Humanitarian intervention can thus be justified on security grounds. Chapter II demonstrated that these two positions could be reconciled by crafting a narrowly limited doctrine of humanitarian intervention. Suppose, however, that a dictator who is closely allied to a great power systematically starves, displaces, and tortures large ethnic groups within his territory. A Realist would argue that the strategic value of the assets he controls should determine the great power's policy, arguing against any intervention. A Liberal, on the other hand, would argue that the dictator's conduct domestically not only reveals the absence of any effective check on his power but also his determination to hold or expand his power at all costs. Such a leader will ultimately cause trouble either in the region or further afield. The great power should intervene not only to help the victims but to take whatever steps are possible to change the domestic balance of power so as to prevent a recurrence.

The WTO offers another example of the need to choose. Assume that a lawyer has made a policy determination that the WTO is a desirable institution and should be strengthened and made as effective as possible. If, as a Realist would predict, power differentials among States dictate outcomes, then the WTO must develop long-term institutional mechanisms to accommodate, at least within limits, the preferences of the most powerful States. If, on the other hand, State interests are subject to change or modification through

constructivist practices of normative obligation and persuasion, then the WTO should foster gradual and sustained processes of multilateral engagement on key issues. Given a hypothetical pair of lawyers, both may share a commitment to free trade and both may favour advancing trade liberalization through the WTO, yet if each were committed to a different IR paradigm or variant of a paradigm, each would design a different WTO[542].

Where such choices are unavoidable, international lawyers who are prepared to believe in IR models as causal constructs, however imprecise, will choose a particular paradigm based on their own empirical observations and personal convictions. They will then chart a legal strategy or set of solutions accordingly. Prismatics, on the other hand, are likely to choose for the purpose of deploying a particular rhetorical strategy, such as exposing the logic of one side of the debate as deeply informed by Realist premises and countering it by developing a parallel set of arguments informed by Liberal premises.

Friedrich Kratochwil provides a fundamentally different way of understanding such a choice. His concern is to illustrate "how norms matter" in shaping international affairs[543]. He argues that the entire notion of causation used in most contemporary American political science is hopelessly Humean: "the provision of a causal explanation means having two independent observations of the state of affairs at different times, as well as a 'constant conjunction' between the observed phenomena"[544]. He would substitute a more subtle Weberian understanding of causation, in which causation means explanation for a particular purpose. In Kratochwil's account:

> "Showing the causal significance of one phenomenon for another demonstrates the existence of a connection. However, the nature of this connection need not be of mechanics. Thus a connection is established if we think along the lines of 'building a bridge' which allows us to get from 'here' to 'there'. This is what we do when we provide an account in terms of purposes or goals, or when we cite the relevant rule that pro-

542. I am indebted to one of my students, Thomas Lee, for outlining this example in his final exam.

543. Friedrich V. Kratochwil, "How Do Norms Matter?", in *The Role of Law in International Politics: Essays in International Relations and International Law* 35 (Michael Byers, ed., 2000).

544. *Id.* at 65.

> vides the missing element, showing us the reasons which motivated us to act in a certain way. No 'mechanism', no hammer hitting a lever, no springs, no billiard balls are involved here."[545]

From this vantage point, a conception of models as prisms can be as deeply causal as a more mechanical causal construct. If a model provides a framework within which a particular event or series of actor choices "make sense", the decision to choose this particular account and to build on it is a decision that helps construct a world as much as choose one.

2. Moving Forward

This part advances five basic propositions about the role of law in shaping international politics, the role of politics in shaping international law, the prospects for a new generation of international institutions, and the fate of the State. Each of these propositions draws on recent work in both international law and international relations scholarship, and often on work either done by joint teams of lawyers and political scientists or by single scholars with full training in both disciplines. Each is formulated as a definitive proposition of a kind likely to be helpful to practising lawyers and policy-makers. At the same time, however, each is advanced as a proposition under active debate. Following the lines of these debates, and projecting them into the future, is likely to prove the best guide to the most vigorous and fruitful interdisciplinary scholarship.

A final note. Many of the propositions advanced intersect or grow out of the rich and ongoing study of compliance with international rules. In Stephen Toope's view, "[t]he new emphasis upon compliance or implementation . . . is the intellectual shift that forced international lawyers to open up inquiry into the work of international relations scholars"[546]. The range of IR/IL literature on compliance is too extensive to review here; further, the questions that it poses are too broad for focused research. The debate over the impact of legalization, the choice between hard law and soft law, and the

545. Kratochwil, *supra* footnote 543, at 55.

546. Stephen J. Toope, "Emerging Patterns of Governance and International Law", in *The Role of Law in International Politics: Essays in International Relations and International Law* 91, 92-93 (Michael Byers, ed., 2000).

study of régime design are more tractable subjects addressing difference and distinct pieces of the compliance puzzle.

(a) *International lawyers can profit from an analysis of power*

Perhaps unsurprisingly, lest the global order crowd get too carried away, the Realists have raised their heads again to remind the legal and policy-making community of the critical role of power in determining international outcomes. This time, however, with a twist. Whereas the traditional Realist-Legalist debate has been conducted in terms of whether law could play any autonomous role in shaping international outcomes, this round focuses more on the role of power in shaping law. In other words, even if Realists remain uninterested in law as an independent variable, a number are suddenly interested in law as a dependent variable — perhaps from the recognition that for whatever reasons, the prevailing great powers at this historical moment are keen to use legal rules and institutions to advance their interests and institutionalize their power. Thus, as Richard Steinberg writes,

> "most realist explanations of international law focus on the distributive consequences of international negotiations — and how powerful states have advanced their interests. Realist predictions center on the kind of international legal developments that may be expected as power disperses or concentrates in particular international organizational or historical contexts, or as the interests of powerful States change" [547].

Yet how can international lawyers hold this view and continue to practise their craft ? Steinberg argues that a Realist perspective has both predictive and prescriptive value. To the extent that international lawyers seek to advise their clients concerning the likely outcomes of international negotiations, it is valuable to have a theory of why, for instance, environment friendly rules are developing more quickly and thoroughly in the European Union and the North American Free Trade Agreement than in the World Trade Organization [548].

547. Richard H. Steinberg, ed., *The Greening of Trade Law ? International Trade Organizations and Environmental Issues* 8 (2000).

548. Richard H. Steinberg, "Trade-Environment Negotiations in the EU, NAFTA, and WTO : Regional Trajectories of Rule Development", 91 *American Journal of International Law* 231 (1997).

According to Steinberg, the varying scope and rate of development of trade-environment rules within these organizations is attributable to the relative differences in power between the richer, greener States and the poorer, browner states among their members[549]. Other Realist-based explanations of the evolution of various international régimes include Gregory Shaffer's account of deadlock in the WTO's Committee on Trade and the Environment, examining not only the distribution of power between North and South but also the way in which domestic divisions within the United States have prevented it from exercising its power together with the EU[550]; an argument by Sanford Gaines concerning the likelihood that environmental rules in the Free Trade Agreement of the Americas will be weaker than those in the NAFTA due to reduced US power over Mexico in this broader forum and internal divisions within the United States[551]; and Lyuba Zarsky's explanation of "the lack of progress on environmental issues in the Asia Pacific Economic Cooperation forum (APEC) as due largely to wide differences in State interests and the dispersed structure of state power in the organization"[552].

Such predictions may still leave most international lawyers cold; they do not appear to offer much room for actually *changing* outcomes so much as simply watching them unfold. Here again, however, Realist international lawyers are more sanguine. Recognizing the realities of power, they claim, simply allows international lawyers to develop more effective strategies "that states may use to advance their interests"[553]. For instance, Steinberg argues that "the extent to which environment-friendly rules develop will depend in large part on which international organization is chosen as the forum for action"[554]. Based on his studies, he concludes that US policymakers

> "will be most successful at pursuing the development of environment-friendly trade rules through the NAFTA and its

549. Steinberg, *supra* footnote 548, at 232.
550. Gregory C. Shaffer, "The Law and Politics of the WTO's Treatment of the Trade-Environment Linkage: State-Based, Neoliberal, and Stakeholder Perspectives", in Steinberg, ed., *supra* footnote 547.
551. Sanford Gaines, "Environmental Protection and Free Trade in the Americas: Lessons from NAFTA", in Steinberg, ed., *supra* footnote 547.
552. Richard H. Steinberg, "The Greening of Trade Law", summarizing Lyuba Zarsky, "APEC and the 'Sustainable Development' Agenda', in Steinberg, ed., *supra* footnote 547, at 10.
553. *Id.* at 8.
554. Steinberg, *supra* footnote 548, at 266.

> planned enlargement in the Americas: the dominant market power of the United States in that forum will facilitate deeper and wider integration there, which will spread environment-friendly rules across those Latin American countries which accede to the NAFTA"[555].

By contrast, progress on environment-friendly rules is likely to be much slower in the WTO and in APEC, and slower still in proposed alternative international institutions focusing exclusively on the environment. The core Realist insight here is the value of linking concessions on environmental rules to the market power exercised by environmentally friendly States in trade organizations[556].

Michael Byers takes the analysis of State power in a different direction, but is equally adamant that international lawyers must be prepared to take account of the impact of "non-legal power", such as military, economic, and even moral power, on the structures and processes of international law[557]. By applying an IR/IL approach to the study of customary international law, he considers "the ways in which the interaction of power with normative structures affects how customary rules are developed, maintained and changed". Unlike most international lawyers, he is prepared openly to accept that "[I]nequalities among States and their relative abilities to apply power [should] . . . be expected to have some effect on the development, maintenance and change of rules of international law."[558] Specifically, "powerful States generally have large, well-financed diplomatic corps which are able to follow international developments globally across a wide spectrum of issues"[559]. They can thus object quickly and effectively to developments adverse to their interests.

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555. Steinberg, *supra* footnote 548, at 266.

556. *Id*. Steinberg offers several other policy recommendations based on the same Realist analysis. He claims, for instance, that "the development of environment-friendly rules in trade organizations will be facilitated by actions that enhance the will and capacity of richer, greener countries to compensate poorer, dirtier countries or coerce them into action", actions such as the adoption of a common position among richer, greener countries to overcome the obstacle of a "relatively dispersed power structure". *Id.* at 266-267. He also claims to show that trade liberalization is not bad for the environment, but rather that deepening integration through progressive trade liberalization encourages richer, greener countries to develop "environment-friendly solutions to trade-environment problems and use their market power in trade negotiations to yield those solutions". *Id*. at 267.

557. Byers, *supra* footnote 7, at 15.

558. *Id.* at 35.

559. *Id.* at 37.

> "If more than oral or written objection is required, powerful States also have greater military, economic and political strength which enables them to enforce jurisdictional claims, impose trade sanctions and dampen or divert international criticisms."[560]

The strength of Byers's analysis of customary international law is that he manages to reconcile these facts of international life with an empirical demonstration of the ways in which it is in the individual and collective interest of most if not all States to "apply power within the framework of an institution or legal system"[561]. Not simply because rules and institutions "create expectations and promote stability", but more fundamentally because the international legal system transforms "applications of power into legal obligation", thereby harnessing the specific power of rules[562]. That differential State power plays a role in determining the form and content of those rules does not deny them independent power flowing from their instantiation of an obligation. This special legal power can be understood in international relations terms by focusing on the ways in which the attributes of legal rules — the fact and trappings of obligation — help States define and promote their interests. Thus, Byers proposes that the process of making customary law be understood "as a régime or institution which determines the common interests of most, if not all, States, and then protects and promotes those common interests with rules"[563]. Within this process, *opinio juris* is "those shared understandings which enable States to distinguish between legally relevant and legally irrelevant State practice"[564].

Steinberg sounds more like a classical Realist; Byers more like an Institutionalist who combines rationalist and contructivist insights. But both converge on the conviction that international lawyers must embrace rather than ignore inequalities in State power, at least for analytical purposes. Moreover, both suggest the value of a Realist-Liberal synthesis by rejecting the structural Realist assumption that the logic of an anarchical international system drives all States to

560. Byers, *supra* footnote 7, at 37.
561. *Id.* at 6. For instance, he devotes four chapters of his book to showing how rules governing jurisdiction, personality, reciprocity, and legitimate expectation shape who can exercise non-legal power and how.
562. *Id.*
563. *Id.* at 163.
564. *Id.* at 166.

pursue the acquisition and preservation of maximum power relative to one another to assure survival. Steinberg openly acknowledges the challenge of defining State "interests" as a crucial one for "realist analysts of international law"[565]. He proposes joining a "realist international argument with a liberal domestic political model of national preference formation", resulting in a "'two-level' explanation of international law development"[566]. Many different factors could intervene in domestic politics to determine national preferences, including NGO activity. Steinberg thus notes, in his analysis of how best to secure environment-friendly trade rules, that "proenvironmental NGO activity in richer, greener countries can increase the will of those countries' governments to use their power to effect environment-friendly rule development in international trade organizations"[567]. Nevertheless, the "international story" would still focus on "how powerful States secure the adoption of international rules that reflect their interests"[568].

Byers approaches a Realist-Liberal synthesis from a quite different vantage point, but ends up in a very similar place. He observes that if the customary law-making process is understood as a set of shared beliefs and understandings among participating States about the significance of certain types of behaviour, then the practice of a particular State regarding a particular issue indicates "the degree to which States are interested in a particular legal outcome"[569]. This interpretation of State behaviour is consistent with the "'realist' assumption that States behave in accordance with their own interests"[570].

It does not follow, however, that State interests are predetermined; they could "involve much more than simply maximising a State's power in relation to other States"[571]. "Much would depend on the internal political system of the State concerned, its relative affluence and the existence or perception of external threats, be they of a military, economic, environmental or other character."[572] Further, how a State will actually behave will reflect not only the

565. Steinberg, *supra* footnote 547, at 8.
566. *Id.*, citing Moravcsik, *supra* footnote 56.
567. Steinberg, *supra* footnote 548, at 267.
568. Steinberg, *supra* footnote 547, at 9.
569. Byers, *supra* footnote 7, at 152.
570. *Id.*
571. *Id.*
572. *Id.*

existence of a particular interest, but a State's capacity to manifest it, a determination that will require an assessment of the "'cost' of that manifestation"[573]. A calculation of costs in turn depends on available military, economic, political, or human resources[574]. More powerful States will thus be more able and more likely to assert their interests and thus shape the content of international rules.

In sum, IR/IL approaches can help international lawyers explode the artificial "law/power" dichotomy while still retaining a meaningful distinction between the two concepts. They do not need to insist on a hermetically sealed world of rules, but nor must they necessarily subordinate "the power of rules", in Byers's phrase, to the rule of power. Sovereign equality is an important legal concept, but international lawyers need not ignore the political fact of sovereign inequality. Both Steinberg and Byers, albeit in different ways, offer the possibility of sophisticated analyses of the complicated interrelationship between legal rules and State power, analyses that may be of direct use to practising as well as academic international lawyers[575].

(b) *Legalized rules and institutions operate differently from non-legalized rules and institutions*

As political scientists discovered and embraced régime theory in the 1980s and 1990s, many international lawyers questioned the value of lumping "rules, norms, principles and decision-making procedures" together, thereby denying any difference between a legal obligation and an informal agreement[576]. Michael Byers, for instance, insists that "international relations scholars need to be

573. Byers, *supra* footnote 7, at 152.
574. *Id.*
575. Another very interesting approach to the law/power dichotomy is Shirley Scott's account of international law as ideology, and ideology as power. She argues that demonstrated acceptance of the ideology of international law is a *sine qua non* of membership in the international system, and that this ideology upholds the power structure of the system by presenting itself in a way that blocks the evidence of the power structure and of its own relationship to that structure. Shirley V. Scott, "International Law as Ideology: Theorizing the Relation between International Law and International Politics", 5 *European Journal of International Law* 313 (1994).
576. See, e.g., Farer, *supra* footnote 113, at 196. In addition to the various political scientists and international lawyers engaged in the legislation debate, see Anthony Arend, "Do Legal Rules Matter? International Law and International Politics", 38 *Virginia Journal of International Law* 107 (1998); also Arend, *supra* footnote 7.

told that international law is different from the other factors they study"[577]. A growing number of political scientists now accept this proposition (in addition to the many, particularly outside the United States, who never doubted it!). Translated into American political science jargon, the question then becomes how "legalized" régimes differ from "non-legalized régimes" in both their origins and impact on State behaviour. Alternatively, how does "law" differ from "norms"? Relatedly, when should policy-makers seek to legalize? And for what purposes?

Note that this debate is not over whether law matters relative to power, interest, geography, or a host of other factors in international life. It is conducted among scholars who take as a matter of empirical observation, logic or faith that rules and institutions affect State behaviour. The question is a narrower one — how do *legal* rules affect behaviour differently from non-legal rules, or, more broadly, norms? On the other hand, the debate in practice is actually broader than most international lawyers would likely assume. "Legalization" refers not only to the obligatory status of a rule as part of the system of international law, but also, in one formulation, to the rule's relative precision and the delegation of its interpretation and application to a third-party tribunal[578]. For other political scientists, as well as lawyers, the question involves the "judicialization" of international affairs as much as "legalization"[579]. But for present purposes, and in plain English, the issue of interest is the significance and impact of law and courts in the international system, as compared to less for-

577. Michael Byers, "Taking the Law out of International Law: A Critique of the Iterative Perspective", 38 *Harvard International Law Journal* 201, 205 (1997).

578. The special issue of *International Organization* devoted to the phenomenon of "legalization" distinguishes "legalized" institutions from non-legalized institutions along three dimensions: "the degree to which rules are obligatory, the precision of those rules, and the delegation of some functions of interpretation, monitoring, and implementation to a third party". Judith Goldstein, Miles Kahler, Robert O. Keohane and Anne-Marie Slaughter, "Introduction: Legalization and World Politics", 54 *International Organization* 385, 387 (2000). Compare Alec Stone Sweet's definition of legal norms as a "subset of social norms", a subset "distinguished by their higher degree of clarity, formalization, and binding authority". Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (2000), at 11. The IO volume thus defines the phenomenon of legalization more broadly than simply the increased appearance and influence of legal rules in international affairs.

579. Alec Stone Sweet is the most prominent scholar studying the "judicialization" of politics, both within specific countries, across countries, and in the international realm. See Alec Stone, *The Birth of Judicial Politics in France* (1992); Stone Sweet, *supra* footnote 512; Stone Sweet, *supra* footnote 578. His specific theory of judicialization is discussed extensively in Chapter IV.

mal and binding prescriptions and dispute resolution mechanisms. The answers to these questions, however tentative and incomplete, are of intrinsic interest to any international lawyer and may also prove very important to the larger field of régime design, discussed below.

Political scientists, often working with lawyers, have generated two broad categories of answers to these questions, although much work remains to be done. These categories roughly track rationalist and constructivist analyses, although both camps recognize the importance of a synthetic approach factoring in the effects of both rational incentives and normative structures and discourse. Indeed, Alec Stone Sweet has explicitly developed such a synthesis, as discussed in Chapter IV. The following discussion highlights only a few of the most prominent findings in this area, focusing particularly on those issues that are ripe for further research.

A special issue of the journal *International Organization* devoted to legalization poses two general questions: why do Governments choose legalized institutions over other forms of institutions, and what are the consequences of legalization? Miles Kahler distils a number of the "functionalist" reasons typically advanced to explain the choice of legal rules and a third-party mechanism to interpret and apply them:

> "Government commitments are more credible under precise agreements of high obligation; delegated authority to interpret those commitments may also strengthen compliance. Legalization may be particularly important in providing an institutional solution to commitments fulfilled over an extended period of time."[580]

Michael Byers makes a similar argument about the greater durability of legal rules. Unlike other factors studied by political scientists, he argues, legal rules "are not generally subject to change solely in response to fluctuations in the immediate interests of states"[581].

Other accounts of the demand for legalization emphasize the importance of power asymmetries among States establishing a new régime[582]. Although conventional wisdom assumes that more power-

580. Kahler, *supra* footnote 507, reviewing conclusions reached by Kenneth Abbott and Duncan Snidal, "Hard and Soft Law in International Governance", 54 *International Organization* 421 (2000).
581. Byers, *supra* footnote 577, at 204.
582. Kahler, *supra* footnote 507, at 665-666.

ful States will resist legalization on the grounds that third party dispute resolution, in particular, will dilute their ability to extract concessions from less powerful States, Kahler also notes that the United States and the European Union have been strong proponents of increased legalization in many issue areas[583]. Further, he highlights the importance of other measures of power, such as access to legal resources. Smaller European States, for instance, "are strong proponents of legalization, not only because they wish to constrain the behaviour of their more powerful neighbors, but also because they possess legal resources out of proportion to their other capabilities"[584]. Similarly, Asian Governments have resisted legalization with APEC largely due to the "imbalance of legal resources available to the United States within such a régime"[585].

A focus on asymmetries in legal resources has the great advantage of piercing the fiction of the unitary State, with power resources measured in aggregate military, economic, or demographic terms. An emphasis on the role of domestic legal culture and the number and sophistication of lawyers within a particular society opens the door to a much more fine-grained analysis of the impact of legalization on domestic and transnational actors. Similarly, many of the authors in the IO special issue detail the role of domestic actors in enhancing compliance with legalized régimes. As discussed in Chapter IV, domestic "compliance constituencies" can include lawyers, judges, and many members of the business community, particularly traders and investors[586]. In addition, national politicians may favour legalized agreements to tie their hands in dealing with domestic interest groups whose demands they seek to resist or to bind their successors to policies they favour[587].

An examination of the impact of legalized institutions on domestic actors is also a hallmark of more constructivist analyses of the impact of legalization, precisely because such analyses explore

583. Kahler, *supra* footnote 507, at 666.
584. *Id.*
585. *Id.*
586. *Id.* at 667-668.
587. See Judith Goldstein, "International Law and Domestic Institutions: Reconciling North American 'Unfair' Trade Laws", 50 *International Organization* 541 (1996) (detailing the ways in which the US-Canada Free Trade Agreement empowered the US executive against protectionist interest groups), and Moravcsik, *supra* footnote 419 (explaining support for the Optional Protocol of the European Convention on Human Rights in terms of the desire of weak democracies to constrain successor Governments).

the significance of engaging in legal discourse and framing disputes as legal issues for bureaucrats, litigants, and politicians. As Stone Sweet explains:

> "Constructivists tend to conceive of power constructively, as a dynamic field that enables individuals to define themselves, existentially and in community with others. Normative systems constitute and animate these fields, and therefore also constitute and animate individuals as political actors."[588]

Although constructivists tend to focus on how social and political structures affect individuals, and thus often seem to engage in a "top-down" rather than a "bottom-up" analysis[589], they are nevertheless exploring the relationship between international and domestic institutions and individual social actors.

As discussed in Chapter IV, Stone Sweet develops a theory of the construction of governance that depends on the incentives of individuals to bring disputes before a third-party tribunal, the incentive of judges to maintain and maximize their legitimacy, the resulting creation and expansion of law, and the resulting likelihood that still more disputes will be framed in legal terms and brought before a third-party tribunal. In his most recent work, he examines the rise of constitutional courts throughout Europe and describes the ways in which European policy-making has become judicialized and European law is becoming constitutionalized[590]. Although many of his insights derive from his observation of domestic legal systems, he demonstrates the same dynamic at work in the EU and the WTO.

Stone Sweet's analysis of the impact of courts dovetails with more general accounts of the consequences of legalization developed by Abram and Antonia Chayes and Harold Koh, respectively. These scholars did not set out to investigate "legalization", *per se,* but rather to develop theories of compliance with legal norms. Nevertheless, their accounts ultimately highlight the distinctiveness of legal over non-legal norms. Chayes and Chayes agree with Institutionalist IR theorists that treaties perform functions such as signalling, co-ordination, monitoring and enforcement for self-interested

588. Stone Sweet, *supra* footnote 578, at 10.
589. *Id.* at 4-5.
590. *Id.* at 1.

States, but assert that IR theory fails to appreciate the unique role that legal process plays in the performance of these functions. In their view, the most important influence on Governments' compliance choices is the engagement of individual bureaucrats in ongoing discursive practices of explanation, justification and persuasion [591]. These practices result from treaty commitments, requiring government officials to frame and defend their actions in terms of legal obligation. They are also strongly reinforced by the emergence of a network of interdependent, overlapping regulatory régimes in which States must participate to be full members of the international community [592].

Koh seeks to explain treaty compliance through a model of "transnational legal process", which focuses on processes of interaction involving not just States, but governmental and non-governmental actors and domestic and international legal institutions [593]. In addition to the patterns of interaction described by Chayes and Chayes, he adds the concept of "internalization", whereby international legal rules are absorbed in domestic legal cultures [594]. He describes the overall process of interaction and internalization as *constitutive*: each instance of interaction and norm-interpretation

> "generates a legal rule which will guide future transnational

591. See Chayes and Chayes, *supra* footnote 1, at 118-123. This discursive process has several distinctive characteristics: it is carried out on the basis of legal norms; actors must attempt to gain assent to their value judgments on reasoned rather than idiosyncratic grounds; and normative factors such as legitimacy (of both the process and substance of rule-making) play a large role in justification and persuasion. The model draws substantially on Thomas Franck's analysis of the roles of legitimacy and fairness in international law. See Franck, *supra* footnote 13; Thomas Franck, *Fairness in International Law and Institutions* (1995). See also Abram Chayes and Antonia H. Chayes, "On Compliance", 47 *International Organization* 175 (1993); Abram Chayes and Antonia H. Chayes, "Adjustment and Compliance Processes in International Regulatory Régimes", in *Preserving The Global Environment: The Challenge of Shared Leadership* 280 (Jessica T. Mathews, ed., 1991).

592. Chayes and Chayes define the "new sovereignty" as the capacity to participate in international régimes and institutions, a relational concept of sovereignty rather than the traditional concept of non-interference with national autonomy. Chayes and Chayes, *supra* footnote 1, at 27.

593. Koh, *supra* footnote 7; see also Koh, "Transnational Legal Process", 75 *Nebraska Law Review* 181 (1996).

594. This internalization occurs through a complex process of repeated interaction, norm-enunciation and interpretation that occurs in such varied contexts as transnational public law litigation in domestic courts, international commercial arbitration, and lobbying of legislatures by non-governmental organizations. Koh, *supra* footnote 7, at 2646.

> interactions between the parties; future transactions will further internalize those norms; and eventually, repeated participation in the process will help to reconstitute the interests and even the identities of the participants in the process"[595].

These participants will ultimately come to perceive compliance to be in their self-interest[596].

When read together with Stone Sweet's theory of judicialization as part of the larger phenomenon of legalization, these theories open the door to a distributional analysis of the impact of legalized régimes over non-legalized régimes, which in turn highlights potential resistance to such régimes. Stone Sweet notes that the constructivist insistence that "our very identities — who we are, and how we comprehend our goals and express ourselves — are socially constituted" opens the door to "the study of norms and their development as the study of social power"[597]. In his own study of constitutional judging in Europe, he concludes that "constitutional courts have drawn an ever-widening range of actors, public and private, into participating in, and perpetuating [normative] discourse"[598]. He makes the normative claim that this empirical observation supports the growing "social legitimacy" of constitutional review[599]. However, such social legitimacy is likely to be limited to those social actors with the capacity to participate in constitutional discourse or legal discourse more generally. Those who do not have such capacity, as Kahler points out on a global scale, are likely to resent and resist the expansion of law. At a time of rumbling opposition to "globalization" and many of the international legal institutions associated with it, such as the WTO, the World Bank, and the IMF, focusing on precisely who is empowered and disempowered by the growing hegemony of legal discourse is a useful frame of analysis.

Other scholars also challenge the benefits of legalization, arguing that legal constraints may prove undesirably tight. As discussed in

595. Koh, *supra* footnote 7, at 2646.

596. For a related argument, see Martti Koskenniemi, "The Place of Law in Collective Security", 17 *Michigan Journal of International Law* 455, 464 (1996) (challenging the law/power dichotomy by claiming that Realist approaches to collective security fail "to see to what extent their determining concepts such as 'interest', 'power', or 'security' are themselves defined and operative within a normative context" of international legal discourse).

597. Stone Sweet, *supra* footnote 578, at 6.

598. *Id.* at 149.

599. *Id.* at 149, 152.

Chapter IV, Robert Hudec, Judith Goldstein and Lisa Martin have all made this claim regarding the GATT Governments' decision to render panel decisions automatically binding under the WTO agreement. Karen Alter describes ways in which the progressive construction of the EU legal system has resulted in a greater ability for resistant national courts to block compliance with EU law[600]. As Kahler notes more generally:

> "National courts may thwart international compliance by compelling litigation over enforcement measures. Less legalized administrative and market-based strategies may provide more effective enforcement results in such circumstances."[601]

Beyond courts, Ellen Lutz and Kathryn Sikkink argue that prohibitions against torture and disappearance, as well as the right to democratic governance, were transmitted as much through social norms as through legal processes in Latin America[602].

The value of these findings is that they counter the deeply embedded and essentially reflexive orthodoxy among international lawyers about the value of international law. Unlike political scientists who are deeply sceptical about the impact of legal rules, or those who expend great energy proving what international lawyers already think they know, these scholars take law seriously but are also more able than many lawyers to see its drawbacks. In exploring variation in the sources and consequences of hard law versus soft law versus no law, they have no prior professional or normative commitments to the international legal system *per se.* Particularly to the extent that their analyses herald a backlash against international legal structures, lawyers would do well to take heed and integrate the resulting insights into their own work.

(c) *Soft law is as important as hard law in global governance but plays a different role*

An important corollary of the legalization debate is the relationship between soft law and hard law, or, in a parallel conception, low legalization and high legalization. The debate over soft law among

600. Alter, *supra* footnote 510.
601. Kahler, *supra* footnote 507, at 676.
602. Ellen L. Lutz and Kathryn Sikkink, "International Human Rights Law and Practice in Latin America", 54 *International Organization* 633 (2000).

international lawyers is extensive and growing, too extensive to chronicle here[603]. However, much if not most of this literature either seeks to respond to the gauntlet thrown down by Prosper Weil in 1983, arguing that soft law would ultimately destabilize and undermine the entire international legal system[604], or tries within a doctrinal framework to determine whether soft law is law at all[605]. Within IR/IL scholarship, however, two recent articles have sidestepped these questions and instead addressed the independent value of soft law to States seeking to forge an international agreement, as well as the ways in which soft law is likely to ripen into soft law. The first is by Kenneth Abbott and Duncan Snidal[606], an international lawyer teaming up with a political scientist; the second by Stephen Toope[607], an international lawyer who has contributed extensively to the IR/IL literature through his articles with his co-author Jutta Brunnee[608].

Abbott and Snidal emphasize that "international actors often deliberately choose softer forms of legalization as superior institutional arrangements"[609]. Soft law, in their definition, means "soft legaliza-

603. See, e.g., Dinah Shelton, ed., *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (2000). Of particular value within this important volume are: Naomi Roht-Arriaza, "'Soft Law' in a 'Hybrid' Organization: The International Organization for Standardization", 263; Laurence Boisson de Chazournes, "Policy Guidance and Compliance: The World Bank Operational Standards", 281; Lyuba Zarsky, "Environmental Norms in the Asia-Pacific Economic Cooperation Forum", 303. Other notable examples include: Abbott and Snidal, *supra* footnote 580; P. Dupuy, "Soft Law and the International Law of the Environment", 12 *Michigan Journal of International Law* 420 (1991); Antonio Cassese and Joseph H. H. Weiler, eds., *Change and Stability in International Law-Making* (1988); Oscar Schachter, "The Existence of Nonbinding International Agreements", 71 *American Journal of International Law* 296 (1977).

604. Prosper Weil, "Towards Relative Normativity in International Law?" 77 *American Journal of International Law* 413 (1983).

605. See, e.g., Dupuy, *supra* footnote 603; Ved P. Nanda, "Development as an Emerging Human Right under International Law", 13 *Denver Journal of International Law and Policy* 161 (1996).

606. Abbott and Snidal, *supra* footnote 580.

607. Toope, *supra* footnote 546.

608. Jutta Brunnee and Stephen Toope, "Environmental Security and Freshwater Resources: A Case for International Ecosystem Law", 5 *Yearbook of International Environmental Law* 41 (1994) 41; Jutta Brunnee and Stephen Toope, "Environmental Security and Freshwater Resources: Ecosystem Régime Building", 91 *American Journal of International Law* 6 (1997); Stephen Toope and Jutta Brunnee, "Freshwater Régimes: The Mandate of the International Joint Commission", 15 *Arizona Journal of International and Comparative Law* 273 (1998).

609. Abbott and Snidal, *supra* footnote 580.

tion", or any legal arrangement "weakened along one or more of the dimensions of obligation, precision, and delegation"[610]. Why would States choose such softer arrangements? In a word, "Soft law offers many of the advantages of hard law, avoids some of the costs of hard law, and has certain independent advantages of its own."[611] More specifically, a number of different factors condition States' choice of soft law, including "transactions costs, uncertainty, implications for national sovereignty, divergence of preferences, and power differentials"[612].

To illustrate these points, consider a number of the examples Abbott and Snidal offer. Two successive directors-general of the ILO urged the organization "to emphasize nonlegally binding instruments, such as recommendations and codes of conduct, at the expense of binding treaties in order to reduce the costs of national ratification"[613]. The rationale for this move was the observation that States had been ratifying ILO draft conventions "at a low and declining rate"; although labour representatives to the ILO have protested, the organization has begun framing some of its rules in "softer" forms[614]. Alternatively, States have often found ways to reduce the constraints on their sovereignty that an agreement would impose by creating softer alternatives within new or established institutions. The device of creating an optional protocol allowing States to accept the mandatory jurisdiction of a supranational tribunal is a time-honoured device to permit the conclusion of an agreement in which member States agree on the norms but not on the manner and degree of their enforcement[615]. A similar device is the creation of a task force or working group under the auspices of an organization like the OECD. With regard to the OECD Financial Action Task Force, Abbott and Snidal point out:

> "Its guidelines are not as tightly constraining as hard legal commitments and are more difficult to 'enforce'. Yet they pro-

610. Abbott and Snidal, *supra* footnote 580, at 422.
611. *Id.* at 423. As Abbott and Snidal acknowledge, they are building here on the pioneering work of Charles Lipson, "Why Are Some Agreements Informal?", 45 *International Organization* 495 (1991). Lipson's work presaged the current debate by almost a decade.
612. *Id.*
613. *Id.* at 434.
614. *Id.*
615. *Id.* at 439-440.

> vide a common basis for domestic behaviour, and create expectations that violations will bring political costs."[616]

In addition to making an international agreement more palatable by decreasing various kinds of costs associated with hard law, soft law is also specifically suited to a number of different bargaining situations. Given the frequent uncertainty associated with new and complex international issues, Abbott and Snidal note that soft legalization "provides a number of more attractive alternatives for dealing with uncertainty" than the frequent domestic solution of delegating interpretation and application of a relatively vague agreement to a court[617]. They also note the advantages of soft law as a "tool of compromise", whether to achieve compromise at a particular point in time, compromise over time, or compromise between the weak and the strong[618]. Examples here include the negotiation of the essentially hortatory labour and environmental side agreements to the NAFTA as a flexible means of incorporating concerns that otherwise threatened to derail the entire agreement; the non-binding Helsinki Accords as a way of drawing the Soviet Union into a human rights discourse and procedure that it strongly sought to resist, but that it agreed to on a soft basis in return for non-binding recognition by the West of its dominance in Central and Eastern Europe; and agreements such as the Law of the Sea Convention and the Nuclear Non-Proliferation Treaty that achieved agreement between both powerful and weak States by trading off relatively high precision and obligation against low delegation[619].

Toope offers a quite different account of at least one kind of soft law — what he calls "contextual régimes" — although one that does not contradict so much as complement the explanations put forward by Abbott and Snidal. Toope's starting point is the growing study of "informal mechanisms of governance within the international arena"[620]. He notes that most "governance writing" urges scholars to focus on informal sources of influence and power in the international system as well as formal sources, but that it cannot shed light on "changing patterns of formal law" without addressing the issue of

616. Abbott and Snidal, *supra* footnote 580, at 440.
617. *Id.* at 441.
618. *Id.* at 444-450.
619. *Id.*
620. Toope, *supra* footnote 546, at 94.

State identity and behaviour[621]. From his vantage point, the most fruitful analyses of State identity and behaviour are constructivist approaches, particularly work by Friedrich Kratochwil[622].

Specifically, Toope draws on Kratochwil's conception of law as an "exercise in practical reasoning", the result of "a continuing dialogue between norm and fact, and between means (process) and ends (substance)"[623]. Kratochwil is one of the early and most thoughtful constructivists, with an understanding of law that is deeply philosophically grounded"[624]. "Through the rhetoric of international law", rhetoric understood in its Aristotelian sense, "international politics are shaped and some common meanings or understandings emerge."[625] From the growth of common meanings, common values can coalesce, values that can in turn underpin "more far-reaching rules of international law[626]. Law works not as a direct cause of action, but rather as a factor influencing choice and shaping actor identities[627].

What does such a conception of law mean for soft law? Or, more specifically, for the "contextual régimes" that Toope and Brunee have identified? Toope argues that classical approaches to international law, "rooted in an unsophisticated command and enforcement paradigm", cannot promote genuine environmental security, by which he means "a stable or improving quality of life for inhabitants of the planet"[628]. States are simply too far apart on crucial issues to agree on the necessary measures. What is needed instead is build on "the modest common meanings" that are embedded in "principles and soft norms"[629]. Drawing on Kratochwil's version of régime

621. Toope, *supra* footnote 546, at 97.
622. *Id.*; see also, Kratochwil, *supra* footnote 7; Kratochwil, *supra* footnote 543.
623. Toope, *supra* footnote 546, at 97, citing Kratochwil, supra footnote 7, at 181-211, especially 197 and 240. *Id.*, note 21.
624. See Kratochwil, *supra* footnote 7; also Kratochwil, *supra* footnote 543, at 36 (noting that a true study of how norms matter would "necessitate the development of a new 'practical philosophy' ").
625. *Id.* at 97.
626. *Id.* at 98.
627. *Id.* This argument is similar in many ways to the theory of compliance developed by Chayes and Chayes, *supra* footnote 1. They emphasize the value of debate and dialogue in creating patterns of expectations and creating an atmosphere of collaborative problem-solving. Their focus is more on explaining how and why States comply with existing legal rules, rather than explaining the evolution of the rules themselves.
628. *Id.* at 104.
629. *Id.*

theory, Toope shows how contextual régimes create a crucial framework for conversation. Dialogue leads to improved mutual understandings; shared meanings "crystallize into norms"; "[s]tates participating in such régimes 'learn' "; their learning alters their conception of their interests and possibly even their sense of their own identity[630]. Ultimately agreement on harder rules becomes possible.

Toope then links this depiction of the relationship between soft and hard law to the argument that he and Jutta Brunnee have developed through a body of work on freshwater management, that régimes can "evolve along a continuum from dialogue and sharing of information, to more defined frameworks for co-operation, to binding rules in a precise, legal sense"[631]. Understanding this continuum is useful to counter "the professional instinct of lawyers . . . to negotiate seemingly 'binding' agreements as soon as possible"[632]. On the contrary, the "pre-legal or 'contextual' régime may actually be more effective in guiding the relations of international actors"[633].

Both Abbott and Snidal and Toope offer a valuable account of soft law that allows international lawyers to understand it on its own terms, as contributing to their larger professional goals in distinct ways. These understandings can expand the toolkit of negotiating options and reframe negotiating outcomes in ways that remove soft law agreements from the class of second-best outcomes. The two accounts are also complementary in many ways, demonstrating how both rationalist and constructivist narratives of the same phenomenon can comfortably co-exist. Where they differ, at least in emphasis, is in the relative teleology of the progression from soft to hard rules. Abbott and Snidal recognize that hard law is more likely to emerge from soft law than from an initial round of negotiations on a particular subject, but they emphasize that this evolution is by no means inevitable, that "contracting difficulties may never be resolved in some issue-areas"[634]. If so, soft law will remain the preferred option. Toope certainly understands that the hardening of "sociological norms into legal rules" is not inevitable[635], but the constructivist logic of his argument opens up many more endo-

630. Toope, *supra* footnote 546, at 104-105.
631. *Id.* at 105.
632. *Id.*
633. *Id.*
634. Abbott and Snidal, *supra* footnote 580, at 447.
635. Toope, *supra* footnote 546, at 97, note 20.

genous possibilities for contextual régimes to serve as "precursors to the crystallization of binding legal norms"[636].

Overall, the IR/IL contribution to the soft law literature takes the debate in a number of different and very fruitful directions. Soft law is neither the mark of a failed "hard law" negotiation; nor it is automatically the baby version of what will ultimately be a full-fledged legal régime. It serves its own distinct purposes in addition to its potential for evolution into hard law. Both as an instrument of desired international outcomes and as the expression of global values, "international law" should encompass both hard and soft rules and associated practices.

(d) *Régime design matters*

The broad legalization debate and the more focused study of the choice of hard versus soft law can both be understood as subsets of or perhaps precursors to the growing field of régime design. Much IR/IL scholarship through the 1990s drew on IR theory to help explain the structure and function of existing international institutions. These authors sought to catalogue and explain what particular international legal institutions *do* and why they are structured as they are. Kenneth Abbott pioneered this approach in legal scholarship by examining, through the lens of rationalist régime theory, the functions performed by international trade law[637] and by the "assurance" and "verification" provisions of major arms control agreements[638]. He also teamed up with political scientist Duncan Snidal to explore the functions performed by formal international organizations[639].

Although this type of analytical work is important in enhancing a general understanding of why the international institutional landscape looks the way it does, it is more important for most international lawyers and policy-makers to know how specific institutional features can enhance or detract from the performance of the institu-

636. Toope, *supra* footnote 546, at 93.
637. See Abbott, *supra* footnote 437.
638. See Kenneth W. Abbott, "'Trust but Verify': The Production of Information in Arms Control Treaties and Other International Agreements", 26 *Cornell International Law Journal* 1, 2 (1993).
639. Kenneth W. Abbott and Duncan Snidal, "Why States Act through Formal International Organizations", 42 *Journal of Conflict Resolution* 3 (1998). See Slaughter, Tulumello and Wood, *supra* footnote 7, at 376, for a review of other work in the same vein.

tion's designated function. This type of knowledge can then be directly incorporated into régime design, the architectural blueprints for reforming old institutions and creating new ones in response to the changing needs of the international community. As Ronald Mitchell frames the issue:

> "Why do states design regimes the way they do? How should they design them in the future? Why do some regimes appear to rely on tough sanctions, others on financial incentives, and others on what appear to be little more than exhortation? Should states strengthen the nuclear non-proliferation regime by tightening export controls, offering security guarantees, or developing clear and public bombing plans? Should the Convention on the Rights of the Child threaten countries that violate its terms or engage them in long-term normative dialogue?"[640]

Mitchell himself, who received his doctorate from a public policy school under the supervision of both a political scientist and an international lawyer, has developed a distinctive approach to the link between form and function. His analysis of régime design began with a thorough empirical study of compliance with the international oil pollution régime — which governs routine pollution resulting from tanker operations[641]. The oil pollution régime contained two distinct sub-régimes, one based on ship equipment standards and one on discharge standards at sea. Compliance with the ship equipment régime has been far higher than with the discharge standard régime.

Mitchell attributes this variation to the structure of the treaty provisions. In his terms, the equipment sub-régime ensured that actors with the incentives to comply with and enforce the treaty were provided with the ability and legal authority to do so — a legal authority that included detainment of non-compliant ships by port States[642]. This sanction, however, was rarely used in practice. Instead, shipbuilders and classification societies ensured that pollution-prevention equipment was integrated when a ship was commissioned

640. Ronald B. Mitchell, "Situation Structure and Regime Implementation Mechanisms", Paper presented at the American Political Science Association Conference, Atlanta, Georgia, September 1999.

641. Ronald B. Mitchell, *Intentional Oil Pollution at Sea: Environmental Policy and Treaty Compliance* (1994).

642. *Id.* at 327.

(lack of proper classification withheld necessary insurance, and made operation prohibitively costly). Thus use by non-State actors of the international norm as a benchmark for behaviour, in conjunction with the role these actors played in the industry, literally built in compliance by ship-owners[643]. The prospect of ship detainment mainly reinforced these pressures.

Perhaps most crucial to the comparative success of the equipment standard was that it involved a one-time, irreversible decision to comply rather than the continuous series of essentially unverifiable decisions associated with the discharge standard. By creating a structure of rules that made a non-compliance decision very costly and capitalized on the structure of the solution itself — the irreversible decision to build or not to build with new equipment — the régime prevented non-compliance rather than deterred it. Further, while State compliance with both régimes did not vary — it was low in both cases, compliance by non-State actors made all the difference[644].

Mitchell has also worked on the sources of transparency, observing that although almost everyone agrees on the value of transparency in promoting régime effectiveness at least under some conditions, little scholarship has investigated the reasons underlying variation in relative transparency across régimes[645]. He argues that "transparency is influenced by features of an issue area and/or features of the regime information itself"[646]. Specifically, he finds that "effectiveness-oriented systems" impose transparency requirements that are usually easier to satisfy than "compliance-oriented systems", in that an orientation on overall effectiveness of a régime requires aggregate information from member States, whereas a focus on compliance demands information that is sufficiently detailed and individualized to permit an evaluation of each State's performance[647].

643. These groups had little incentive not to follow international law and ensure compliance with the treaty rules; doing so was essentially costless for them. *Id.* at 288.

644. Port States played little role in the discharge régime, and did not in practice enforce the equipment régime — though the threat of detention may have acted as a potent deterrent. Flag States in turn played no role in the equipment régime, and did not enforce the discharge régime. Viewed in the aggregate, change in State compliance with régime rules was not dramatic. Mitchell concedes this: "Governments often did not change their behavior, but industry did." *Id*. at 300.

645. Ronald B. Mitchell, "Sources of Transparency: Information Systems in International Regimes", 42 *International Studies Quarterly* 109 (1998).

646. *Id.* at 112.

647. *Id*. at 114-115.

Further, of course, a compliance focus may require States to supply information that is against interest, in that it could lead to sanctions for non-compliance. On the other hand, to be truly effective over the long term, régimes are likely to evolve from an aggregate effectiveness focus to an individualized compliance focus[648].

After reviewing a number of factors affecting the supply of information by nations differentially disposed toward the régime norms, Mitchell concludes with four strategies for increasing transparency: (1) convincing the States committed to régime goals that the "information they provide will be processed, analyzed, and disseminated in ways that foster those goals"; (2) encouraging "leader states" to provide high-quality reports to create a context that "makes reporting appear important"; (3) developing approaches to reward reporting rather than sanctioning non-reporting; and (4) foregoing "adversarial responses to self-reported information"[649]. Finally, he highlights ways in which the framing of substantive rules in a régime — such as choosing a ban rather than a quota — can encourage accurate provision of information by external monitors such as NGOs[650].

Mitchell's approach to transparency presages a much larger project in which he seeks to examine the relationship between situation structure and differences in régime design. While early work in régime theory quickly categorized international problems in terms of whether they posed issues of symmetric externalities (co-ordination or collaboration problems), or asymmetric externalities (costs imposed by strong States on weak States or vice versa), Mitchell adds a fourth category of "positive externalities plagued by incapacity" (situations in which some States would benefit from the behaviour of other States, but the States in question lack the capacity to change their behaviour)[651]. He goes on to outline a range of different stra-

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648. Mitchell, *supra* footnote 645, at 116.
649. *Id*. at 124.
650. *Id*. at 125.
651. Mitchell, *supra* footnote 640, at 3. He builds on a substantial literature developing typologies of different types of obstacles to international co-operation. The beginning of this literature is Arthur Stein's article in the original régimes volume in 1983, distinguishing between problems of co-ordination and problems of collaboration. Arthur A. Stein, "Coordination and Collaboration: Regimes in an Anarchic World", in *International Regimes* 114 (Stephen D. Krasner, ed., 1983). More recent work includes the following sources, including a book and several important articles by a group of German political scientists who have been the primary exponents of régime theory in Europe. See Volker

tegies that states can adopt to address these different types of problems, with an accompanying assessment of which strategies are likely to be most successful in each case[652].

In still later work, as part of larger project on régime design bringing together papers by a number of political scientists who have worked on institutions for a decade or more, Mitchell and Patricia Keilbach analyse State responses to a slightly different typology of problems, focusing particularly on the role of powerful States in situations of asymmetric externalities[653]. They thus distinguish between problems involving externalities imposed on strong victims versus weak victims[654]. These different situation structures lead States to choose among three different institutional mechanisms designed to deter defection from the régime : issue-specific reciprocity, coercion (linking non-compliant behaviour to sanctions or other negative consequences) or exchange (linking compliant behaviour to rewards). The study also sheds light on a number of the hypotheses advanced in the project as a whole, involving the relationship between distribution problems and enforcement problems and régime scope, membership, centralization of enforcement mechanisms, and the degree of flexibility allowed participating States to alter the terms of the initial bargain[655].

Ritterberger and Michael Zuern, "Regime Theory : Findings from the Study of East-West Regimes", 26 *Cooperation and Conflict* 165 (1991) ; Lisa Martin, "Interests, Power, and Multilateralism", 46 *International Organization* 765 (1992) ; Andreas Hasenclever, Peter Mayer and Volker Rittberger, *Theories of International Regimes* (1997) ; Michael Zuern, "Assessing State Preferences and Explaining Institutional Choice : The Case of Intra-German Trade", 41 *International Studies Quarterly* 295 (1997) ; Arild Underdal, "One Question, Two Answers", in *Explaining Regime Effectiveness : Confronting Theory with Evidence* 1 (Edward L. Miles and Arild Underdal, eds.) (2000).

652. These strategies fall under the general headings of punitive, remunerative, preclusive, generative, cognitive, and normative. Mitchell, *supra* footnote 640, at 7-11. Mitchell presents this article as the precursor to a long-term empirical project designed to test his hypotheses "regarding how situation structure influences the choice of strategy and hypotheses regarding the relative effectiveness of available strategies at inducing behavioral change in different situations", through a data set of 120 treaties and a series of case studies. *Id*. at 2.

653. Ronald B. Mitchell and Patricia M. Keilbach, "Reciprocity, Coercion, or Exchange : Symmetry, Asymmetry, and Power in Institutional Design", 54 *International Organization* (2001) (forthcoming).

654. *Id.*

655. *Id*. For an explication of the overall design of the project and the hypotheses advanced by the editors and tested by the various authors, see "Introduction : Rational Designs : Explaining the Form of International Institutions", 54 *International Organization* (Barbara Koremenos, Charles Lipson and Duncan Snidal, eds., 2001) (forthcoming).

All of this work is designed to demonstrate theoretically and empirically that "when one observes differences in [institutional] design, one should look for differences in strategic structure"[656]. Yet how is this conclusion of any use to international lawyers, much less policy-makers? First, laying out the relationship between the different types of problems that States face and the different mechanisms they choose based on a study of existing institutions permits negotiators faced with a particular problem quickly to focus on the most promising strategies for achieving a feasible and effective bargain. Within this category, however, both case studies and quantitative work can help expand the repertoire of negotiating alternatives by cataloguing the different strategies that States have used for addressing a like problem. As noted above, international lawyers such as Kenneth Abbott, Eyal Benvenisti and Robert Schmidt are already using game theory, including "two-level" game theory, to identify current problems facing a pair or group of States as a more generic type of problem amenable to a particular set of solutions. The current and growing literature on régime design promises to expand the possibilities for this type of work substantially, allowing much more fine-grained analyses of a much wider range of negotiations[657].

Second, this literature will play an important role in advancing ongoing debates about compliance, particularly between the "managerial" approach developed by Chayes and Chayes and the sharply contrasting "enforcement" approach favoured by Downs, Rocke and Barsoom[658]. Each of these camps has drawn many adherents, but, as Mitchell argues, the categorical nature of each side's claims is automatically discrediting to policy-makers confronting a range of different régimes[659]. Surely "one size does not fit all"; thus researchers must be able to control "for the structure of the problem or situation that the régime sought to resolve"[660]. Such controls are part of a larger enquiry into the *relative* effectiveness of different strategies — whether managerial or coercive — adopted to address different prob-

656. Mitchell and Keilbach, *supra* footnote 653.
657. See, e.g., Garcia, *supra* footnote 437, at 368-369 (drawing on Abbott and Snidal's work on mesoinstitutions to make proposals concerning the governance structure of the Free Trade of the Americas Agreement).
658. Chayes and Chayes, *supra* footnote 1; George W. Downs, David M. Rocke and Peter N. Barsoom, "Is the Good News about Compliance Good News about Cooperation?", 50 *International Organization* 379 (1996).
659. Mitchell, *supra* footnote 640, at 1.
660. *Id.*

lems[661]. In addition, scholars will have a whole range of additional tools with which to contrast State compliance with a régime's obligations with the overall effectiveness of the régime in addressing the problem States set out to solve, in areas including environmental protection[662], trade[663], human rights[664] and armed conflict[665]. This is an important distinction, but one that political scientists are more likely to bring to the fore than lawyers.

In sum, international lawyers, particularly the proceduralists among them, immediately recognize that "régime design matters". They know that small legal innovations or solutions to what might appear to be subsidiary problems can make big differences in making a régime work. And if they are less accustomed to drawing a distinction between compliance and effectiveness, they nevertheless reflexively assume that increased compliance is likely to increase effectiveness most of the time. What they have lacked are typologies of problems linked to categories of solutions, backed by extensive data. The new political science literature on régime design is producing insights and information that is directly on point for the kinds of questions that policy-makers (and the lawyers advising them) are likely to ask, in a relatively user-friendly form. Such work can only draw the two fields closer together, teaming the lawyers' knowledge of the specific details of a particular knowledge with the

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661. Karen J. Alter, "Regime Design Matters: Designing International Legal Systems for Maximum or Minimum Effectiveness", paper presented at the Comparing Compliance at the National, European and International Levels Conference, European University Institute, Florence, Italy, 16 December 2000.

662. See, e.g., David G. Victor, Kal Raustiala and Eugene B. Skolnikoff, eds., *The Implementation and Effectiveness of International Environmental Commitments* (1998).

663. See, e.g., David G. Victor, "Risk Management and the World Trading System: Regulating International Trade Distortions Caused by National Sanitary and Phytosanitary Policies", paper presented at the National Research Council Conference on Incorporating Science, Economics, Sociology and Politics in Sanitary and Phytosanitary Standards in International Trade, Board on Agriculture and Natural Resources, Irvine, CA, 25-27 January 1999.

664. See Keohane, Moravcsik and Slaughter, *supra* footnote 424 (exploring different design options for supranational tribunals, including human rights tribunals).

665. For an example of political science research of this type that could be particularly valuable to international lawyers working in the area of armed conflict, see Barbara F. Walter, "The Critical Barrier to Civil War Settlement", 51 *International Organization* 335 (1997) (arguing, based on a review of all civil wars between 1940 and 1990, that the opposing sides are far more likely to settle if a third party capable of enforcing a settlement agreement agrees to guarantee the settlement, but that most peacemaking efforts fail because in trying to end the war they invariably eliminate self-enforcing strategies to maintain the peace).

political scientists' models and empirical conclusions, in pursuit of a practical agenda aimed at régime engineering.

(e) *Domestic politics are as important for international lawyers as international politics*

International lawyers and international relations scholars alike are paying increasing attention to domestic politics. Even a brief survey of recent work indicates the broad scope of this work and the range of opportunities for further research. Much of the literature discussed above, for instance, includes a strong domestic politics component. In Mitchell's work on compliance with the oil pollution régime, for instance, he emphasizes that while compliance by private actors varied considerably between the two régimes, State compliance did not. The equipment régime was markedly more *effective* than the discharge régime because it tapped into the power of private actors who had little reason not to follow the treaty rules but had significant influence over the ultimate targets of the régime[666].

Relatedly, the special IO issue on legalization spotlights the role of domestic actors and domestic politics more generally both in generating a demand for legalization, as discussed earlier in this chapter, and in determining its consequences. On the demand side, as Abbott and Snidal point out:

> "In many issue-areas, from trade and investment to human rights and the environment, individuals and private groups are the new actors most responsible for new international agreements — and for resisting new agreements in favor of the status quo."[667]

Regarding the consequences of legalization, Miles Kahler summarizes the many ways in which writers on legalization link compliance with legal rules to domestic politics, and particularly to specific configurations of domestic politics[668]. In her study of compliance with IMF regulations, for instance, Beth Simmons finds that "regimes that were based on clear principles of the rule of law

666. Mitchell, *supra* footnote 641, at 301.
667. Abbott and Snidal, *supra* footnote 580, at 450. See also Miles Kahler's extensive discussion of domestic politics and legalization, discussed above in the section on legalization. Kahler, *supra* footnote 507, at 667-670.
668. *Id.* at 674-677.

were far more likely to comply with their commitments"[669]. Yet these results do not flow from some magic incantation of "the rule of law". On the contrary, as Kahler notes, rule of law societies "construct" specific channels of compliance that connect international legal commitments to specific groups of domestic actors, denominated as "compliance constituencies"[670].

One of the most important means of constructing these channels comes from the interaction of supranational tribunals with domestic courts and litigants. As discussed in Chapter IV, Keohane, Moravcsik and Slaughter distinguish between "inter-State" and "transnational" dispute resolution in terms of the degree of access of individual litigants to the tribunal and the embeddedness of the tribunal in domestic legal and judicial processes[671]. These variables are designed to capture a supranational tribunal's ability to mobilize compliance constituencies on its behalf, as well as the ability of would-be litigants, national judges, and other supporters to make the tribunal a visible and effective presence in domestic politics[672]. Stone Sweet does not tailor his model specifically to domestic or inter-State litigation, in the sense that he does not require the "disputants" who begin the cyclical dynamic he describes to be either States or individuals. Nevertheless, the larger thrust of his accounts of judicialization concern the ways in which an "outsider" tribunal, either an international or a constitutional court, can radically change the landscape of domestic politics[673].

Turning to work not yet discussed here, Eyal Benvenisti has recently argued that "international law plays a crucial role in domestic politics"[674]. His work on international resources, particularly common pool resources such as rivers, has highlighted a number of ways in which international law can shape domestic politics as much as domestic politics can shape international law. Governments "that wish to prevent future domestic challenges to their policies" can

669. Beth A. Simmons, "The Legalization of International Monetary Affairs", 54 *International Organization* 573, 599 (2000).

670. Kahler, *supra* footnote 507, at 675.

671. Keohane, Moravcsik and Slaughter, *supra* footnote 424, at 457-458.

672. *Id*. at 481-485; see also Helfer and Slaughter, *supra* footnote 475, at 308-312.

673. Stone Sweet, *supra* footnote 578.

674. Eyal Benvenisti, "Domestic Politics and International Resources: What Role for International Law?", in *The Role of Law in International Politics: Essays in International Relations and International Law* 109, 109 (Michael Byers, ed., 2000).

embed a particular result in a treaty that can then be altered only by mobilizing domestic groups not only at home but also within the treaty partner[675]. "Treaties thus serve as trump cards in the domestic political game."[676] At the same time, of course, domestic political factions can enormously complicate the task of reaching a durable international agreement. Benvenisti seeks to target these issues directly through the development of "appropriate international and national norms that would influence domestic politics in ways that could provide a solid legal and political basis for cooperation"[677]. Developing such norms means understanding the domestic political game in any particular State or set of States and, as discussed further below, moving beyond any notion of the unitary State as the sole subject of international law.

In a stimulating and insightful essay on the "politics of representation" in human rights campaigns, Christine Chinkin notes the rise of new social movements along with mushrooming NGOs and other members of global civil society, all seeking to democratize the process and impact of globalization "from below"[678]. Her query is whether international law could or should actually regulate the participation of these myriad non-State actors in traditional international law-making processes, a much broader version of the question posed in Chapter III. However, unlike many writers on this theme, she frankly acknowledges the various ways in which NGOs frequently work with or through some States against other States, rejecting the simplistic dichotomy of State interests versus the interests of global civil society[679]. More generally, she chronicles the ways in which "states fight back", by insisting that NGO-sponsored initiatives remain in the realm of soft law, by successfully resisting NGO demands, and by relying on or even mobilizing domestic political opposition to treaties concluded with strong NGO support[680]. Very

675. Benvenisti, *supra* footnote 674. Note the similarity between this argument and Andrew Moravcsik's account of why Governments are willing to accept provisions of human rights treaties that grant mandatory jurisdiction over human rights disputes to a third-party tribunal and allow individual litigants to trigger that jurisdiction. Moravcsik, *supra* footnote 419.

676. *Id.*

677. *Id.* at 129.

678. Christine Chinkin, "Human Rights and the Politics of Representation: Is There a Role for International Law?", in *The Role of Law in International Politics: Essays in International Relations and International Law* 131, 132 (Michael Byers, ed., 2000).

679. *Id.* at 138.

680. *Id.* at 140-142.

often, as she documents, in controversial cases the real fight takes place in the domestic rather than the international arena[681].

In a related enquiry, although on a quite different subject, Gregory Shaffer examines WTO negotiations to determine "who is represented and how they are represented in determining law's contours through the political process at the international level"[682]. Shaffer focuses specifically on the controversial WTO Committee on Trade and Environment (CTE) in an effort to assess claims of a lack of legitimacy and democratic accountability on the part of those actually making decisions through the WTO. He describes his approach as "sociolegal", examining "the role of contending players within the WTO's institutional contexts and their relationship to domestic politics"[683]. The premise of this approach is that

> "larger 'macro' theoretical and public policy analyses and normative legal prescriptions about 'legitimacy', 'democracy' and 'accountability' offer little value without a 'micro' understanding of the underlying roles of power, access and interests in shaping legal outcomes"[684].

After a meticulous and remarkably detailed of CTE activity through the lens of several models drawn from IR theory, Shaffer concludes:

> "In short, the WTO's Committee on Trade and Environment served as a conduit for states responding to domestic pressures. In this sense, the World Trade Organization is a much more democratically accountable institution than its critics claim."[685]

Finally, Thomas Risse, Stephen Ropp and Kathryn Sikkink set out to investigate how and under what conditions international human rights norms matter, in the sense of ultimately changing the behaviour of domestic Governments[686]. Based on a series of country studies, they conclude, as does Benvenisti, that international rules

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681. Chinkin, *supra* footnote 678, at 142.

682. Gregory Shaffer, "The World Trade Organization under Challenge: Democracy and the Law and Politics of the WTO's Treatment of Trade and Environment Matters", 25 *Harvard Environmental Law Review* 1 (2001) (forthcoming), at 3 (all page cites are to manuscript on file with author).

683. *Id.* at 5.

684. *Id.*

685. *Id.* at 105. Shaffer's approach is strongly influenced by Shell's pioneering article discussed at length in Chapter IV. *Id.* at 10, note 19.

686. Thomas Risse, Stephen C. Ropp and Kathryn Sikkink, eds., *The Power of Human Rights: International Norms and Domestic Change* (1999).

and norms have an enormous impact on domestic politics[687]. At the same time, however, their analysis equally confirms the difference that domestic political structures make in creating the conditions for NGOs and other civil society groups to be effective in promoting compliance with international law[688]. They describe the resulting interactions between international rules and domestic politics in a five-step "spiral model", in which domestic groups reach out to foreign Governments and international institutions to target human rights violations at home; foreign pressure creates a different domestic climate; domestic Governments gradually ratify international human rights instruments; and continued domestic and international activism pushes those same Governments to begin complying with their international obligations[689].

This brief and necessarily selective survey of a much broader and growing literature highlights three cutting edge issues for both international lawyers and political scientists, each of which supports the claim that domestic politics are as important for international lawyers to understand and integrate into their work as international politics.

— First, one of the most promising pathways for enhancing the effectiveness of an international legal régime is by bolstering or even triggering domestic political activity.
— Second, international law is made by States, but State positions do not spring fully formed from chancelleries or foreign ministries. Different social and governmental actors who actually succeed in being represented at the State policy-making level are the real sources of international law. Thus international law-making is better understood as a "bottom up" than a "top down" process.
— Third, the State itself must be reconceptualized as a two-level entity, a set of interactions between actors in domestic and transnational society and a wide array of government institutions.

For the first proposition, consider two alternative views of the International Criminal Court. One view regards the Court as primarily the vehicle through which the global community punishes those offenders who have committed crimes so heinous that they have

687. Risse, Ropp and Sikkink, *supra* footnote 686, at 3-4.
688. *Id.*
689. *Id.* at 17-34.

shocked the world conscience. A second view takes a much more modest approach, presenting the Court as a tribunal of last resort in the hope of thereby bolstering domestic constituencies who would like to try the alleged defendants at home but who face stiff domestic opposition. Similarly, a growing number of doctrines regulating State responsibility find the cure not in requiring one State to pay compensation to another, or even to its own citizens, but rather to reform its domestic political processes so as to provide a meaningful remedy to future citizens injured in the same way. Risse, Ropp and Sikkink are bolder still, insisting that "the enduring implementation of human rights norms requires political systems to establish the rule of law"[690]. The theme running through all these developments and claims is that international law cannot be understood as a complex of rules, norms, and even practices applied to unitary States. Such prescriptions would be more effective if they were designed to penetrate the shell of traditional State sovereignty and contribute in various ways to processes of internal reform. At the very least, as Benvenisti argues, they could be chosen for their ability to foster a stable equilibrium among competing domestic actors[691].

The second proposition requires the tracing of domestic and transnational political processes leading to the formulation and adoption of specific legal rules. It requires identifying specific constituencies who are likely to favour legalization of a particular régime, as Kahler argues. It demands painstaking investigation into the positions of diverse domestic interest groups and an understanding of the often rough bureaucratic bargaining that filters and modifies these positions as part of developing a unified position for a formal State representative to take to an organization like the WTO, as detailed in Shaffer's analyses[692]. It means understanding how domestic opposition can be mobilized by government repression and then gain energy from linking to NGOs abroad in a transnational advocacy

690. Risse, Ropp and Sikkink, *supra* footnote 686, at 3.
691. Benvenisti, *supra* footnote 674, at 111 ff.
692. Shaffer, *supra* footnote 682; see also Gregory Shaffer, "The Law-in-Action of International Trade Litigation in the United States and Europe: The Melding of the Public and the Private" (unpublished manuscript on file with author) (extensive research demonstrating the formation of "public/private partnerships among law firms and government officials in mounting international trade litigation). A condensed version will be published as "The Blurring of the Intergovernmental: Public-Private Partnerships in the Bringing of U.S. and EC Trade Claims", in *Transatlantic Governance in a Global Economy* (Mark Pollack and Gregory Shaffer, eds., 2001) (forthcoming).

network, which is a key step in Risse, Ropp and Sikkink's spiral model of giving actual content to abstract human rights norms[693]. Finally, as Benvenisti argues, it mandates understanding how and when domestic opposition groups are likely to torpedo desired international agreements.

Third, the State should be reconceptualized such that discussion of "non-State actors" becomes increasingly nonsensical. The very designation "non-State" or "non-governmental" derives entirely from an understanding of the international system in which States are the only recognized actors other than international organizations. Analysts of domestic politics do not describe human rights organizations or environmental organizations as "non-governmental organizations", but rather as the sinews of domestic civil society. Indeed, they are the descendants of de Toqueville's vaunted "associations", of which he specially commended "intellectual and moral" associations[694]. If the State were understood as an entity that encapsulates a vast and complex array of Government-society relations, then NGOs would be not be so noteworthy as *independent* actors in the international system (except to the extent that they succeeded in actually influencing inter-Governmental organizations in ways that depart from State preferences based on an aggregation of social preferences). As both Shaffer and Chinkin conclude, although to different degrees and in different issue-areas, the autonomous impact of NGOs is considerably more limited than might appear; further, Governments are adept at ensuring the equal representation of powerful constituents potentially affected by NGO activity.

This is not to denigrate the importance of NGOs in international law-making and implementation, but only to question the conventional framework of analysis applied to them. Why not see them not as "non-State actors" but rather simply as "social" actors, interacting with their own Governments, foreign Governments, and international organizations? Thus conceived, they fit easily within a more sophisticated and realistic conception of the State. Benvenisti argues for conceiving the State in principal-agent terms, opening the traditional black box of the unitary State and recognizing the many different constituencies that Governments must represent both in nego-

693. Risse, Ropp and Sikkink rely heavily here on the work by Sikkink and Margaret Keck on transnational advocacy networks, discussed extensively in Chapter III. Keck and Sikkink, *supra* footnote 267.

694. De Tocqueville, *supra* footnote 238.

tiating an agreement and in the aftermath of an agreement[695]. This general conception of State as agent lies at the heart of Liberal international relations theory as presented throughout these chapters; drawing on this theory, I have highlighted a conception of the State as a representative actor as a key component of a Liberal theory of international law[696]. To complicate the picture still further, I use the Liberal emphasis on State-society relations to highlight the need for a disaggregated model of the Government, replacing the fiction of a unitary actor with a conception of distinct governmental institutions — national courts, government agencies, and legislators — acting quasi-autonomously in the international system[697]. Each of these government institutions has the capacity to interact with and represent various subsets of individual and group actors in domestic and transnational society.

Such conceptions of the State are easier to describe than to operationalize as subjects and objects of international law. From a political science perspective, as Abbott and Snidal point out, the assumption that "government actions reflect balances of domestic interests" does not answer the further question of precisely who is represented and how[698]. They consider three possible accounts of State-society relations: (1) pluralism, in which the Government serves essentially as an honest broker among all competing domestic interests groups; (2) public choice theory, "in which Government officials pursue private rewards"; and statism, in which the Government still exercises a degree of autonomous power and interest in interacting with social actors[699]. Benvenisti adopts a frankly public choice perspective,

695. Benvenisti, *supra* footnote 674, at 112-115. Benedict Kingsbury has also juxtaposed the traditional model of the State as principal, dominant in both IR and IL, with a Liberal model of the State as agent, responding to individuals and groups in domestic and transnational society. He assesses the advantages and disadvantages of both conceptions in terms of the likely doctrinal impact both on specific groups, such as indigenous peoples, and on the long-term proposals for stability and society in the international system. Benedict Kingsbury, "Sovereign or Agent? Globalization, Democratization, and the Place of the State in International Law" (unpublished manuscript on file with author).

696. See Anne-Marie Slaughter, "International Law in a World of Liberal States", 6 *European Journal of International Law* 503, 534-537 (1995); see also Slaughter, *supra* footnote 62.

697. Slaughter, "The Real New World Order", *supra* footnote 289; Slaughter, *supra* footnote 313; Anne-Marie Slaughter, "Agencies on the Loose? Holding Government Networks Accountable", in *Transatlantic Regulatory Cooperation* (George A. Bermann, Matthias Herdegen and Peter Lindseth, eds., 2000).

698. Abbott and Snidal, *supra* footnote 580, at 451.

699. *Id.*

arguing that the key problem for international lawyers is to recognize that "among the diverse domestic interest groups, governments are more likely to be influenced by those representing the interests of industry or agribusiness, namely, the potential polluters and heavy users" [700]. Given this starting point, it is the job of international law and lawyers to "counter these influences" by creating conditions under which Governments will hear other voices and take into account longer-term national interests that will in turn support enduring international co-operation [701].

In sum, international law can have a strong influence on domestic politics and on its own effectiveness through the mechanism of mobilizing domestic political actors or providing focal points for stable domestic equilibrium. At the same time, understanding and predicting the evolution of international law increasingly requires a thorough understanding of interactions among a mass of domestic political actors, as well as a deliberate effort to ensure that voices speaking for the long-term global public interest are heard. In this context, States can no longer be understood as the primary actors in the international system and under international law; they must instead be conceptualized in ways that render these domestic-international links as transparent as possible while maintaining the medium of State agency.

3. Conclusion: The Visible College of International Lawyers

International relations scholarship has much to offer international lawyers. For Andrew Hurrell, who cautions international lawyers against embracing IR approaches too fervently,

> "[t]he great contribution of international relations has been to develop a theoretically sophisticated account of norms and institutions and to be willing to face up to the difficult questions that lawyers have all too often skirted around: exactly how does law make a difference? under what conditions is it likely to prove effective? how might we explain variance in patterns of compliance?" [702]

700. Benvenisti, *supra* footnote 674, at 114.
701. *Id.*
702. Andrew Hurrell, "Conclusion: International Law and the Changing Constitution of International Society", in *The Role of Law in International Politics: Essays in International Relations and International Law* 327, 332 (Michael Byers, ed., 2000).

Equally important for international lawyers, most IR scholarship that has grappled with these questions has produced answers that confirm the importance of international law in fostering international co-operation, co-ordinating State expectations, expressing and gradually codifying the ideals and values of a nascent global community, and transforming "ought" into "is". Combating sceptics within their own discipline, these political scientists have developed theories and marshalled data that demonstrate as conclusively as possible the relevance and importance of international law.

The next step is for international lawyers and political scientists to work together on specific issues, as some are already doing[703]. For international lawyers, such collaboration is important to avoid the danger of engaging in "potted political science", just as historians often accuse lawyers of using "potted history" to advance a particular position. The essence of inter-disciplinary work is to understand the other discipline from the inside, particularly the constraints on its analysis resulting from efforts to enhance the rigor and coherence of disciplinary methodologies. Just as lawyers grow irritated at claims by non-lawyers that "it is possible to argue anything", without regard to the years of training that help lawyers distinguish good arguments from bad, political scientists can often accuse lawyers of ignoring the internal standards they use to assess the quality of their own work[704]. Another possibility, which sidesteps this problem, is for political scientists to test the implicit hypotheses that frequently follow from a lawyer's analysis of why a particular legal institution or rule emerged[705].

A critical question remains, however. Can international lawyers learn to look at the world through political science lenses and use the insights and conclusions generated by IR scholars while still retaining the distinctiveness of their craft and the traditional values of their profession? Hurrell charges that current IR/IL scholarship is

703. Abbott and Snidal, *supra* footnote 580; Edith Brown Weiss, ed., *International Compliance with Nonbinding Accords* (1997); Charlotte Ku and Thomas G. Weiss, *Toward Understanding Global Governance: The International Law and International Relations Toolbox* (1998); Charlotte Ku and Paul F. Diehl, eds., *International Law: Classic and Contemporay Readings* (1998).

704. For a thoughtful analysis of some of these problems, see Jack Goldsmith, "Sovereignty, International Relations Theory, and International Law", 52 *Stanford Law Review* 959, 982-985 (2000) (book review of Krasner, *supra* footnote 84).

705. See, e.g., Mark L. Busch, "Democracy, Consultation, and the Paneling of Disputes under GATT", 44 *Journal of Conflict Resolution* 425 (2000).

responsible for "a severe narrowing of the intellectual agenda"[706]. Among the issues that have allegedly been excluded are the non-instrumental role of norms, the many different functions that norms serve beyond regulating and constraining the choices of actors, and the evaluative dimension of norms[707]. Yet many of the political scientists and lawyers cited in these chapters — scholars such as Ruggie, Sikkink, Byers, Stone Sweet, Kratochwil, Toope — to name only a few — have explicitly concerned themselves with the ways in which rules and norms not only regulate the world but help constitute it. The logic of consequences and the logic of appropriateness not only co-exist, but are frequently intertwined.

Nevertheless, it is not enough for international lawyers to understand and expound the non-instrumental functions of rules and institutions. They are active participants in ongoing normative discourse and must be prepared themselves to make normative choices. Stephen Krasner writes: "The task of political scientists is primarily to explain what is and thereby to hint at what might be. The task of lawyers is more often to elucidate not what is, but what might be."[708] Yet whereas the political scientist "hints at what might be" based on what theory and empirical research suggest is possible or even likely, a lawyer's discussion of what might be involves direct and often highly personal evaluations of what should be.

International lawyers cannot shrink from this task. Nor can they take refuge in the apparent clarity and certainty of another discipline. They can use IR scholarship as a technology to assist them in normative debates, whether about how best to achieve a certain goal or about what goals are in fact achievable. They can also mix positive and normative elements in their models, as Shell's work illustrates. But as demonstrated repeatedly in these chapters, they cannot in the end escape the necessity of actually making normative choices, guided by their own values or whatever clients or constituencies they represent. What should be the trade-off between peace, order, and humanitarian goals? How far does a people's right to self-determination and self-governance extend? How to choose between increased environmental protection and the promise of lifting

706. Hurrell, *supra* footnote 702, at 332.
707. *Id.* at 332-333.
708. Stephen D. Krasner, "International Law and International Relations: Together, Apart, Together?", 1 *Chicago Journal of International Law* 93, 93 (2000).

millions out of poverty? Should the WTO institutionalize free trade or fair trade?

In making these choices and pursuing their desired ends, international lawyers are themselves part of the process of international lawmaking and implementation. As Stephen Toope argues: "lawyers can contribute to the construction of international regimes at every stage along the continuum of regime formation, in the early contextual days, and if and when the norms in a given regime are set to harden into legal rules"[709]. International lawyers are themselves "part of global governance networks", and both design procedural mechanisms to solve specific problems and shape the substantive content of relevant norms[710]. In other words, many of the insights generated by international relations scholars regarding the formation and implementation of international régimes also argue for making Oscar Schachter's "invisible college of international lawyers" visible, and self-consciously so[711].

In the end, the excursion into another discipline brings us back to our own. International lawyers should borrow from and work with political scientists on problems of common concern. They should be able to use different conceptions of how the international system works to generate ideas and arguments regarding specific substantive issues, design better institutions, and interrogate their own assumptions about what international law actually is and how it works. But even as a partner in this growing interdisciplinary practice, the international lawyer must hold fast to an independent conception of his or her vocation and avocation. Many if not most international lawyers choose to study international law rather than international relations because of the lure and promise of a better world. Law and politics will be intertwined in such a world, but the world itself must be imagined before it can be built. That is the international lawyer's professional licence. It can be shared but never forsaken.

709. Toope, *supra* footnote 546, at 106.
710. *Id*. at 105-106.
711. Oscar Schachter, "The Invisible College of International Lawyers", 72 *Northwestern Law Review* 217 (1977).

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