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Theories of Compliance with International Law

by

Markus Burgstaller

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For my parents

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PREFACE

I first got interested in the question of compliance with international law during a seminar at Vienna University School of Law in the Spring Term 1999. From then on, I started to research on contemporary theories of compliance with international law. First, as an Assistant Professor at the Institute of International Law and International Relations at the University of Vienna, then during my studies at New York University School of Law. The present work is based on my dissertation, which I submitted to Vienna University School of Law in October 2001. In early 2003, I decided to substantially revise my dissertation, not least because of recent international developments. By doing so, I incorporated insights I obtained through my work as an adviser on European and International Affairs to the Chancellor of Austria. I finished researching in September 2003; any material published thereafter is referred to only to a very limited extent.

I wish profoundly to thank Professor Hanspeter Neuhold of Vienna University School of Law and Professor Alexander Somek of University of Iowa College of Law for giving me invaluable comments on earlier versions. Special appreciation is owed to the anonymous Martinus Nijhoff Publishers reader.

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Markus Burgstaller

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ABBREVIATIONS

AJIL	American Journal of International Law
Am. Soc. Int'l L. Proc.	American Society International Law Proceedings
Am. U. J. Int'l L. & Pol'y	American University Journal of International Law and Policy
BYIL	British Yearbook of International Law
Chi. J. Int'l L.	Chicago Journal of International Law
Colum. J. Transnat'l L.	Columbia Journal of Transnational Law
Cornell ILJ	Cornell International Law Journal
ECHR	European Court of Human Rights
EJIL	European Journal of International Law
ESC	Economic and Social Council
Exec.	Executive
Fordham Int'l L. J.	Fordham International Law Journal
GA	General Assembly
GATT	General Agreement on Tariffs and Trade
GYIL	German Yearbook of International Law
Harv. Hum. R. J.	Harvard Human Rights Journal
Harvard ILJ	Harvard International Law Journal
ILM	International Legal Materials
IMF	International Monetary Fund
Ind. J. Glob. Legal Stud.	Indiana Journal of Global Legal Studies
J. Int'l Econ. L.	Journal of International Economic Law
Mich. J. Int'l L.	Michigan Journal of International Law
Nordic J. Int'l L.	Nordic Journal of International Law
NYU J. Int'l L. & Pol.	New York University Journal of International Law and Politics
RdC	Recueil des Cours
SC	Security Council
Stan. J. Int'l L.	Stanford Journal of International Law
U. Chi. L. Rev.	University of Chicago Law Review
UNTS	United Nations Treaty Series
U.S.C.	United States Code
Virginia J. Int'l L.	Virginia Journal of International Law
Yale J. Int'l L.	Yale Journal of International Law
Yale Stud. World. Pub. Ord.	Yale Studies on World Public Order
Yale LJ	Yale Law Journal
YBILC	Yearbook of the International Law Commission

INTRODUCTION

Compliance is one of the central concepts in current and proposed research projects using social science methods to study the effect and significance of international law.

Benedict Kingsbury

More than three decades ago, Louis Henkin asserted that "almost all nations observe almost all of their obligations almost all of the time".[1] Since there is no coercive power in the international system comparable to that which enforces the laws of a state, however, the question what motivates states to comply with international law remains among the most perplexing ones in international relations. In national legal systems, there are various rules establishing the authority of courts of law to adjudicate disputes arising between members of the community. While this is the rule, disputes may also be settled by way of arbitration whereby disputes on civil or commercial matters can be decided by a third party chosen by the litigants. At the international level, however, such enforcement mechanisms are only rudimentarily developed. Indeed, until the adoption of the United Nations (UN) Charter in 1945, states were authorized to resort to force to impose their terms of settlement, unless they had entered into treaties requiring self-restraint on the matter. Thus, states were authorized to enforce their rights militarily – without resorting to any sort of peaceful settlement. Even though states induced compliance with international rules considerably by way of strengthening institutional dispute settlement mechanisms as well as by preventing disputes, the enforcement mechanisms still happen to be rudimentary compared to those in developed national systems.[2] Given this lack of highly developed enforcement mechanisms, the question why states should or indeed do comply with international norms has to be addressed.

At first sight, contemporary philosophy of international normativity tends to appear as a fully developed theory intended to explain the dynamics of national legal phenomena. Granted, some basic notions seem applicable to an understanding of the nature, purposes, and workings of the international arena. Notions of basic human rights, limits on authority, distributive justice, and so forth developed in one society or culture, may have global application, but the transfer must be justified and its

1 Henkin, *How Nations Behave*, 47 (2nd ed., 1979).
2 Cf. Cassese, *International Law*, 212-3 (2001).

rationale cannot be simply assumed.[3] If Macchiavelli is right that the requisites for order are "good laws and good arms . . . [but] there cannot be good laws where there are not good arms",[4] the prospect for compliance with international law seems to be rather remote. However, most contemporary legal philosophers deem coercive power necessary but insufficient to secure habitual social assent to governance. Contrary to the Macchiavellian notion, these theorists rather focus on authority as a process identifying its necessary or desirable characteristics, such as consent, openness, and participation.[5] If therefore this line of inquiry holds true, opening to consider non-coercive factors in understanding the phenomenon of norm compliance, the prospect of compliance is considerably better than in a situation 'where there are not good arms'.

Looking closer, it shows that since Henkin's statement empirical work seems largely to have confirmed this hedged, but optimistic description. Nevertheless, scholars have generally avoided the causal question 'why states obey international law'. This failure to deal with the question of compliance is troubling because compliance is one of the most central questions in international law. Indeed, the very absence of an explanation for why states and other subjects of international law in some cases obey international law and do not do so in other cases threatens to undermine the foundations of the international legal system. In case international law matters, it has to influence in some way or other the actors' behavior. Without an understanding of the connection of law and behavior, an explanation for the very function of the international legal system is missing. We therefore remain ill-equipped to predict or explain the real impact of the over 50,000 international agreements now in force.[6]

Given this absence of a (coherent) theory of compliance with international law, during the past two decades, in particular within the last couple of years, research agendas in international law and international relations have converged around the issues of norm creation and norm compliance.[7] Scholars in both fields have been dissatisfied with approaches that focus entirely on formal state action and have been struck by the amount of co-operation that seems to arise by other means and from other sources. Today's debates go beyond measuring compliance with norms to asking why actors do or do not observe the law. The extent to which law has shaped behavior in different situations offers an appreciation of how and why states and other actors might pay attention to any international norms. Recent compliance literature

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3 Franck, *The Power of Legitimacy Among Nations*, 14-6 (1990).

4 Macchiavelli, *The Prince*, 78 (Marriott trans., 1981).

5 See generally e.g. Dworkin, *Law's Empire* (1986); Habermas, *Communication and the Evolution of Society* (McCarthy trans., 1970).

6 The United Nations Treaty Series currently contains over 50,000 treaties. United Nations Treaty Series Overview (2003), <http://untreaty.un.org/English/overview.asp>.

7 See, for example, the summary provided by Yasuaki, 'International Law in and with International Politics: The Functions of International Law in International Society', 14 *EJIL* 105 (2003).

addresses questions such as what drives relevant actors, including private multinational corporations, non-governmental organizations, and governments, to comply with international law. Some of the new compliance scholars ask whether the impact of law lies within the realm of internalized or managerial obedience rather than conscious self-interested obedience. At the same time, the new compliance scholarship has developed a new vocabulary, much of it drawn from law and economics.[8] Accordingly, the essential aim of this monograph is to analyze some of the most influential recent theories of compliance with international norms, to criticize them, and to show their strengths and weaknesses.

Before dealing with the question of compliance with international law, or more specifically, with the question why actors do or do not comply with international law, it is essential to briefly distinguish these questions from similar, though distinct questions. In order to do so, four concepts, namely, commitment, obligation, implementation, and effectiveness will have to be differentiated from the concept of compliance.

First, the question of compliance with international law should be differentiated from the question why states commit to an agreement in the first place. Even though the decision to commit to an agreement or not is interrelated to the question of compliance, the subject matter of discussion is different in many ways, mainly because the incentive structure of states differs.[9] Generally, it seems plausible to argue that states will join an agreement only in case they intend to comply. Nevertheless, a commitment to an agreement itself does not provide states with an incentive to obey the norms of the agreement.[10]

Second, the pertinent question may not be confused with the question of obligation.[11] Generally, the question of the source of obligation in international law is a fundamentally ethical question.[12] Conceptually, therefore, the question of the source of

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8 Alvarez, 'Foreword: Why Nations Behave', 19 *Mich. J. Int'l L.* 308-10 (1998).

9 See e.g. Hathaway, 'The Cost of Commitment', 55 *Stanford Law Review* 1821 (2003) (arguing that scholars have almost entirely ignored the questions of why treaties come into being and what motivates nations to join them). But see also Hathaway, 'Between Power and Principle: A Political Theory of International Law', *Yale Law School Working Paper* 5 (2004) (arguing that we find that compliance not only depends upon the decision to commit, but commitment also depends upon the decision to comply).

10 Guzman, 'A Compliance-Based Theory of International Law', 90 *California Law Review* 1833 (2002); Setear, 'An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law', 37 *Harvard ILJ* 156 (1996).

11 "A successful answer to the question of why people obey laws reveals nothing about whether or why they are obliged to do so." Peñalver, 'The Persistent Problem of Obligation in International Law', 36 *Stan. J. Int'l L.* 274 (2000). Cf. also Franck, 'Legitimacy in the International System', 82 *AJIL* 705 (1988).

12 "[T]he search for obligation in international law is the search for a theory of why states *should* act according to a given set of international norms." Peñalver, *supra* n. 11, at 275 (emphasis in original). See also Posner, 'Do States Have a Moral Obligation to Obey International Law?', 55 *Stanford Law Review* 1901 (2003) (concluding that "the reason for criticizing the view that international law creates moral obligations is that this view sows confusion and causes harm rather than good"; *id.* at 1919).

obligation is preliminary to the question of compliance: before answering the question why actors comply with norms, one may address the question how international law can become the source of any obligation. Technically, a state is under an obligation to comply with an agreement, once the state commits to it.[13] The legal obligation in itself, however, does not explain whether the state in fact complies. This notion certainly contradicts so-called consent-based theories.[14] The argument of these theories is rather simple: first, states are not subject to any restrictions unless they commit. Second, once states commit, they should obey the norms of the agreement. Accordingly, proponents of this approach assert that a state's consent generates a legal obligation, which leads to compliance. Nevertheless, consent-based theories do not contribute to an understanding of why states *do or do not* comply with international law. They merely state that states do have an obligation, but do not explain how states will actually behave.[15] The main reason for the lack of explanatory power of consent-based theories, as it turns out, is that a legal obligation in itself does not provide an incentive structure sufficient to comply.[16] Contrary to the question of obligation, the answer to the pertinent question in this monograph rather lies in the strategic or psychological domain of human behavior. Therefore, the issue of obligation is to be separated from the issue of compliance and only the latter is the focus of the following pages.

Third, implementation refers to measures that states undertake in order to put international agreements into domestic law. Whereas some agreements are self-executing and therefore do not require the enactment of national laws, others, and indeed arguably most treaties, require national laws or regulations. But ensuring that international agreements are transformed into national rules does not necessarily imply compliance, essentially because compliance goes beyond implementation. "It refers to whether countries *in fact adhere* to the provisions of the accord and to the implementing measures that they have instituted."[17] Therefore, compliance needs to assess the steps that governments undertake after or in addition to their formal step of implementing international law in general or international agreements in particular.

Fourth, the question of compliance is distinct from the question of effectiveness. Effectiveness may be defined as the degree to which a rule induces changes in behav-

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13 "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." See Art 26 Vienna Convention on the Law of Treaties, 1155 UNTS 331 (1969) (hereafter cited as Vienna Convention).

14 For a discussion of consent-based views, see Smith, 'Understanding Dynamic Obligations: Arms Control Agreements', 64 *Southern California Law Review* 1565-6 (1991).

15 Guzman, *supra* n. 10, at 1834.

16 See also Milner, *Interests, Institutions, and Information: Domestic Politics and International Relations* (1997).

17 Jacobson and Weiss, 'A Framework for Analysis' in *Engaging Countries: Strengthening Compliance with International Environmental Accords*, 4 (Weiss and Jacobson, eds., 1998) (emphasis added).

ior that further the rule's goals.[18] The connection between compliance and effectiveness is neither necessary nor sufficient:

> Rules or regimes can be effective in any of these senses even if compliance is low. And while high levels of compliance can indicate high levels of effectiveness, they can also indicate low, readily met and ineffective standards. From an effectiveness perspective more compliance is better, *ceteris paribus*. But regimes with significant non-compliance can still be effective if they induce changes in behavior. The key point is that the sheer existence (or lack) of compliance may indicate little about international law's impact on behavior.[19]

In his study on compliance with international public authority, Oran Young suggested that compliance can be said to occur when the actual behavior of a given subject conforms to prescribed behavior, and non-compliance or violation occurs when actual behavior significantly differs from prescribed behavior.[20] Some scholars, however, in particular social constructivists, argue that compliance cannot be objectively determined at all because any standards are socially constructed.[21] Contrarily, my approach assumes that it is at least possible to examine purposes that lead to compliance or non-compliance with the social phenomenon law, even though such an examination must, with respect to social science, remain a rather vague undertaking, as the definition or rather circumscription by Young indicates.

Accordingly, in the following, the question of compliance with international law will be addressed in six Chapters. In order to outline the setting in which addressees of international law act, a rough description of the changing economic, political, and social environment the actors are exposed to will be given. I will briefly discuss the processes of globalization. Thereby, I will put emphasis on the question how these processes influence the actors' (possible) actions. Chapter 1 will conclude by referring to the role of international law within this framework and to the special status which international law enjoys compared to national legal systems.

Chapter 2 provides the basis for an essential claim made in dealing with the pertinent question, namely, that any theory of compliance with international law draws from some underlying political philosophy. What is more, the argument is that political philosophy to a large extent structures the arguments of any compliance theory.

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18 Levy, Keohane, and Haas, 'The Effectiveness of International Environmental Institutions' in *Institutions for the Earth: Sources of Effective International Environmental Protection*, 7 (Haas, Keohane, and Levy, eds., 1993).

19 See Raustiala and Slaughter, 'International Law, International Relations and Compliance' in *Handbook of International Relations*, 539 (Carlsnaes, Risse, and Simmons, eds., 2002).

20 Young, *Compliance and Public Authority*, 2-3 (1979).

21 See Kratochwil and Ruggie, 'International Organization: A State of the Art on an Art of the State', 40 *International Organization* 768 (1986); see also Kingsbury, 'The Concept of Compliance as a Function of Competing Conceptions of International Law', 19 *Mich. J. Int'l L.* 356 (1998).

Therefore, Chapter 2 analyzes those contemporary political philosophies that are presumably most relevant for present purposes and tries to show in which respect they (might) influence the compliance theories to be discussed later on.

Any plausible account of a theory of compliance with international law needs to address the basic conceptualizations of what a norm is and why an actor might comply with a norm. Accordingly, Chapter 3 encompasses two distinct, but interrelated conceptualizations. First, an overview of what a norm is and what the main problems of international norms are will be given. The second conceptualization discusses in some detail the main theories that have been put forward with regard to the basic question why actors comply with norms.

The political philosophies discussed in Chapter 2 as well as the conceptualizations discussed in Chapter 3 historically led to various schools in international relations theory in general, and in compliance theory in particular. Certainly, there are different categorizations with regard to these schools and any such differentiation has to acknowledge the blurring between the different types. Nevertheless, Chapter 4 undertakes a typology and makes a differentiation of three basic types: realist, institutionalist, and normative theories.

Chapter 5 looks at some of the most important contemporary theories of compliance with international law. First, a variant of realist theory, namely, Hanspeter Neuhold's *The Foreign Policy Cost-Benefit Analysis Revisited* will be discussed.[22] Second, I discuss two academic works by Thomas Franck, namely, *The Power of Legitimacy among Nations* and *Fairness in International Law and Institutions*.[23] Third, the scholarly pieces of Abram and Antonia Chayes, especially their *The New Sovereignty: Compliance with International Regulatory Agreements* will be dealt with.[24] Fourth, the straightforward question Harold Koh attempts to answer in his essay *Why Do Nations Obey International Law?* will be addressed.[25] Finally, liberal theory, in particular the works of Anne-Marie Slaughter and Andrew Moravcsik, will be analyzed.[26]

The final Chapter 6 encompasses concluding remarks as well as an overall re-assessment of the explanatory power of the afore-mentioned theories with regard to the various fields of international law. By analyzing the theories in Chapter 5, the account preferred in this monograph will be developed and summed up in Chapter 6. The

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22 Neuhold, 'The Foreign Policy Cost-Benefit Analysis Revisited', 42 *GYIL* 84 (1999).

23 Franck, *supra* n. 3; Franck, *Fairness in International Law and Institutions* (1995). David Kennedy asserts that *The Power of Legitimacy* is "in many ways an extension of Louis Henkin's original *How Nations Behave*". Kennedy, 'Tom Franck and the Manhattan School', 35 *NYU J. Int'l L. & Pol.* 429 (2003).

24 Chayes and Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (1995).

25 Koh, 'Why Do Nations Obey International Law?', 106 *Yale LJ* 2599 (1997).

26 See, amongst others, Slaughter, 'International Law in a World of Liberal States', 6 *EJIL* 503 (1995); Moravcsik, 'Taking Preferences Seriously: A Liberal Theory of International Politics', 51 *International Organization* 513 (1997).

discussion in the first three parts will contribute substantially to an understanding of this argumentation. Finally, given this conclusion, some of the main implications for international law structuring international relations will also be briefly outlined.

Methodologically, therefore, this monograph approaches the question of compliance with international law by hypothesizing that the answer is largely determined by the political philosophy each of the authors relies upon.[27] It attempts to show how political philosophy structures the argument of these authors. Therefore, it discusses in some depth these contemporary philosophies and its explicit (or implicit) impact on the compliance theorists. This approach, however, does not exclude some of the other factors influencing compliance with international law. Other approaches tend to look at the question of compliance from a social, sociological, or psychological point of view. Nevertheless, it assumes that the perception of social reality, which is reflected by the authors' political philosophy, is arguably the most important factor determining the answer to the compliance question.[28]

Finally, it should be noted that I will put emphasis on international treaty law. Therefore, references to 'international law' are commonly intended to include mainly international treaty law and not customary international law, *jus cogens* norms, or private transnational legal interactions, unless explicitly referred to.

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27 Similarly, some social scientific literature suggests that one may often predict judicial decisions from the political philosophy of judges. This assertion is in contrast to the 'idealist' notion that holds that in case a judge decides strictly based on legal values, then the judge's political philosophy would not predict his decision. See, e.g., Segal and Cover, 'Ideological Values and the Votes of U.S. Supreme Court Justices', 83 *American Political Science Review* 557 (1989); Spiller and Spitzer, 'Judicial Choice of Legal Doctrines', 8 *Journal of Law, Economics and Organization* 8 (1992); Segal, Epstein, Cameron, and Spaeth, 'Ideological Values and the Votes of U.S. Supreme Court Justices Revisited', 57 *Journal of Politics* 812 (1995).

28 Compare this approach with the one taken by Benedict Kingsbury. Kingsbury criticizes that the discussion of compliance often proceeds as if the concept of compliance is largely shared; instead, he argues that 'the concept of compliance' with law does not have, and cannot have, any meaning except as a function of prior theories of the nature and operation of the law to which it pertains. 'Compliance' is thus not a free-standing concept, but derives meaning and utility from theories, so that different theories lead to significantly different notions of what is meant by 'compliance'. Thus, as a research concept, 'compliance' cannot stand on its own, but must depend on a stipulated or shared theory of law. Kingsbury, *supra* n. 21, at 347.

Chapter 1

THE CHANGING FRAMEWORK

> *The government of persons is replaced by the administration of things and by the conduct of processes of production. The State is not abolished. It withers away.*
>
> Friedrich Engels

In order to put the pertinent question of compliance with international law into the social context in which it takes place, it is necessary to outline the main pillars of this setting. The reason for doing so is that this setting influences the addressees of international law and thus their approach towards compliance with these norms. Therefore, discussing the (still) much-disputed phenomenon of globalization and its main impact on the international system will roughly draw a picture of this surrounding. Furthermore, the basic functions of international law within the framework of the international system will shortly be addressed. Given the subject matter of this monograph, these issues certainly cannot be dealt with in detail. However, they are discussed to an extent deemed necessary to set the background for the compliance theories to be addressed later on.

1. Globalization

Globalization is a much-contested word. On the one hand, there are those who claim that we live in an increasingly integrated global order. According to this view, social and economic processes operate predominantly at a global level and political communities are inevitably 'decision-takers'.[1] The argument put forward by proponents of this view is that this development represents a fundamental break in the organization of human affairs – a more or less radical shift in the organizational principle of social life. One possible result of this development may be the replacement

1 For this perspective see, among others, Ohmae, *The End of the Nation State: The Rise of Regional Economies* (1995); Reich, *The Work of Nations – Preparing Ourselves for 21st Century Capitalism* (1992).

of states by 'regional economies', communities unified by economic reasons rather than political or cultural reasons. These are 'natural business units in today's global economy' that either have or desire direct access to the global market. They do not only rely upon their respective national governments for economic assistance and in fact wish to be free from governmental control.[2]

Global capital markets are one common example to illustrate this phenomenon. In line with the argument of national political communities as 'decision-takers', financial economists usually think of financial regulation and supervision as imposing a set of 'taxes' and 'subsidies' on the operations of financial firms exposed to them.[3] On the one hand, the imposition of reverse requirements, capital adequacy rules, interest ceilings, and certain forms of financial disclosure requirements can be viewed as imposing implicit 'taxes' on a financial firm's activities in the sense that they increase costs. Whereas on the other hand, regulator-supplied deposit insurance, lender-of-last-resort facilities and institutional bailouts serve to stabilize financial markets and reduce the risk of systemic failure, thereby lowering the costs of financial intermediation. Therefore, they can be viewed as implicit 'subsidies' provided by taxpayers.

The difference between these 'tax' and 'subsidy' elements of regulation can be viewed as the net regulatory burden (NRB) faced by financial firms in any given jurisdiction. As a matter of economic reality, financial firms tend to migrate towards those financial environments where NRB is lowest (assuming that all other economic factors are the same). Barriers such as political risk, minimum transaction size, firm size, and credit quality help temper the migration of financial activity abroad. The rise of regulatory competition among states and the existence of offshore markets[4] underscore the fact that financial services firms often face a range of alternatives for executing transactions in any of several financial centers. Domestic regulators, however, usually want the transactions to be conducted within their financial centers – driven by the desire to maintain an adequate level of prudential regulation, sustain revenues from the taxation of financial services, support employment, and output in the financial services industry and linked economic activities, or simply maximize their regulatory domain. Thus, the market for financial regulation is 'contestable' in the sense that other national regulatory bodies or offshore opportunities offer (or threaten to offer) rules that may be more favorable than those of the domestic regulator.[5] As any fac-

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2 Ohmae, *supra* n. 1, at 5.

3 Cf. for the following arguments Smith and Walter, *Global Banking*, 153-60 (2nd ed., 2003).

4 Offshore markets for financial services are substantially beyond the reach of national authorities. They include Eurocurrency and Eurobond markets, and they are highly untaxed and unregulated. The term is mainly used in the United States for any financial organization with a headquarter outside the home country. See Smith and Walter, *supra* n. 3, at 157.

5 A market is said to be perfectly contestable when the costs of entry and exit by potential rivals are zero and when such an entry can be made rapidly. In such cases, new players may be attracted to

tor of production or economic activity gains mobility, it becomes increasingly difficult to subject it to regulation. Communication costs are low and capital mobility is high, so it becomes less and less feasible for a state to impose a NRB that stands too far apart from others. Hence, states, in order to sustain competitiveness, have to deregulate their financial markets.

Contrary to those who consider states as mere 'decision-takers', there are scholars who are very skeptical about the extent of globalization and who still think the national state is as integrated and robust as it ever was. Proponents of this view point out that contemporary forms of international economic interaction are not without precedent and that nation-states continue to be immensely powerful, with an impressive range of political options.[6]

It is reasonable to argue that both views are misleading in significant respects. True, we live in a world, which is changing due to processes of globalization. The interconnectedness of different peoples today is most likely more extensive than it has ever been (probably even after September 11). But globalization is not a new phenomenon starting in the last decade or so. Rather, societies have always been connected with one another to some degree.[7] Therefore, conceptions of globalization need to be sensitive to the historical variation in forms of globalization, as well as to their variable impact on politics.

Maybe globalization is best understood as a spatial phenomenon, lying on a continuum with 'the local' at one end and 'the global' at the other. It denotes a shift in the spatial form of human organization and activity to transcontinental or interregional patterns of activity, interaction, and the exercise of power. It involves a stretching and deepening of social relations and (international) institutions across space and

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enter. The theory argues that the threat of this happening will ensure that players already in the market will first keep 'prices' as low as possible so as to just make normal 'profits' and second, 'produce' as efficiently as possible taking advantages of economies of scale. If existing players did not do this, entry would take place and potential competition would become actual competition.

6 Cf. Hirst and Thompson, *Globalization in question: the international economy and the possibilities of governance* (2nd ed., 1999). In their 1997 – therefore, arguably close to the peak of the 'globalization wave' in the 1990s – analysis on firms based in Germany, Japan, and the United States Louis Pauly and Simon Reich conclude that: "First, since multinational firms are key actors in the development and diffusion of new technologies, their national rootedness appears to remain a vital determinant of where innovation takes place. . . . Second, the globalization template upon which much current theoretical and policy debate rests remains quite weak. German, Japanese, and U.S. corporations insert themselves into the home markets of their rivals, albeit with varying degrees of success. . . . Third, . . . power, as distinct from legitimate authority, may indeed be shifting within those societies, but it is not obviously shifting away from them and into the boardrooms of supranational business enterprises." Pauly and Reich, 'National Structures and Multinational Corporate Behavior: Enduring Differences in the Age of Globalization', 51 *International Organization* 33-4 (1997).

7 For a historico-philosophical account see Sloterdijk, *Sphären II – Globen*, 801-10 (1999). Peter Sloterdijk essentially shows that what might be referred to as 'globalization' is at least 2500 years old.

time. This process occurs in such a way that, on the one hand, day-to-day activities are increasingly influenced by events happening on the other side of the globe and, on the other, the practices and decisions of local groups or communities can have significant global reverberations.[8]

Globalization implies at least two distinct phenomena. First, it suggests that many chains of political, economic, and social activity are becoming interregional or intercontinental in scope. Second, it suggests that there has been an intensification of levels of interaction and interconnectedness within and between states and societies.[9] What is noteworthy about the modern global system is the stretching of social relations in and through new dimensions of activity and the chronic intensification of patterns of interconnectedness mediated by such phenomena as modern communication networks and information technology.[10] It is possible to distinguish different historical forms of globalization in terms of first, the extensiveness of networks of relations and connections; second, the intensity of flows and levels of enmeshment within networks; and third, the impact of these phenomena on particular communities.

For these reasons, it is suggested that globalization is neither considered a singular condition nor a linear process. Rather, it is best thought of as a multi-dimensional phenomenon involving diverse domains of activity and interaction, including the economic, political, technological, military, legal, cultural, and environmental domain. Nevertheless, the view that the events of September 11 would be the beginning of a new era commonly challenges this notion of globalization.[11] However, it seems that such an event can be seen as in line with the argument set out, rather than contradicting it. Even though economic interactions in general and the quantity of trade flows in particular have certainly been diminishing even before the events of September 11, globalization as a structural phenomenon can hardly be said to have come to an end.

This notion, to be sure, does not (necessarily) imply that globalization is irreversible. For example, it is reasonable to argue that the Great Depression and the political upheaval in the 1930s 'destroyed' the last great age of globalization. Evidence can be found for the two most common explanations for the collapse of at least eco-

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8 Cf. Giddens, *The Consequences of Modernity*, 10-6 (1991).

9 There have, however, always been visioners of a 'boundless' society; with respect to the often discussed 'knowledge economy', Thomas Jefferson may be quoted: "If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea. . . . No one possesses the less, because every other possesses the whole of it. He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me." (quoted from The Economist, April 8th, 2000).

10 See Mayer-Schönberger and Hurley, 'Globalization and Communication' in *Governance in a Globalizing World*, 135 (Nye and Donahue, eds., 2000).

11 "September 11 thus challenges the international community to mobilize this constructive force of globalization to overcome its most destructive face." Koh, 'The Spirit of the Laws', 43 *Harvard ILJ* 26 (2002). See also Hoffmann, 'Clash of Globalizations', 81/4 *Foreign Affairs* 104 (2002).

nomic globalization: rising volume and volatility of capital flows triggering unsustainable booms and busts, and widespread fear of globalization provoking a social and political backlash. However, even if one acknowledges today's widespread anti-globalization sentiment, an essential ingredient for 1930s-style economic nationalism is missing today: a respectable intellectual package of anti-globalist policy ideas and a successful national model, such as the Soviet Union or Hitler's Germany.[12]

Besides, it should be noted that the significance of globalization differs considerably for individuals, groups, and countries. The impact of various global flows on policy-making in the economic domain will alter to a large extent depending on whether the country in question is China, the United States, Ghana, the Czech Republic, or Argentina. It is important to realize that what differentiates people who live at the margins of some of the central power structures from the 'elites' is unequal and uneven access to the dominant organizations, institutions, and processes of the new emerging global order.

The core of this 'differential access' is power, which has to be conceptualized as the capacity to transform material circumstances – whether social, political, or economic – and to achieve goals based on the mobilization of resources, the creation of rule systems, and the control of infrastructures and institutions. The particular form of power of concern to a theory of globalization is characterized by hierarchy and unevenness. Hierarchy connotes the asymmetrical access to global networks and infrastructures, while unevenness refers to the asymmetrical effects of such networks on the life chances and the well-being of peoples, classes, ethnic groups, and sexes.[13]

2. Global Governance and the Relocation of Authority

In the present context, the main focus of the processes of globalization should be on their impact on the structure of the international system in general, and the subjects of international law in particular. In order to grasp the complexities that pervade world politics as a result of globalization, a nuanced set of distinctions among the numerous processes and structures that fall within the purview of global governance has to be drawn. Most importantly, it is necessary to clarify that global governance and international law do not only refer to the formal institutions and organizations through which the management of international affairs is or is not sustained.[14]

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12 See James, *The End of Globalization: Lessons from the Great Depression*, 34 (2001).

13 See Falk, *On Humane Governance: Toward a New Global Politics*, 65 (1995).

14 See Coglianese, 'Globalization and the Design of International Institutions' in *Governance in a Globalizing World, supra* n. 10, at 297.

National governments and – to a lesser degree – the United Nations system as such are surely central to the conduct of the international system, but they are only part of the whole system. Consequently, an analysis has to include systems of rule at all levels of human activity – from the family to the international organization – in which the pursuit of goals through the exercise of control has transnational repercussions. The reason for this broad formulation is that in an increasingly interdependent world what happens in one corner or at one level may have consequences for what occurs at every other corner and level. Therefore, it seems to be a mistake to adhere to a too narrow definition in which only formal institutions are considered relevant.

Given this (from a lawyer's point of view) rather broad formulation, the concept of governance comes into play. Governance may be defined as "the capacity to get things done without the legal competence to command that they be done".[15] Governance, in other words, encompasses the activities of governments, but it also includes the many other channels through which 'commands' flow in the form of goals framed, directives issued, and policies pursued. The evolution of inter-subjective consensuses based on shared fates and common histories, the possession of information and knowledge, the use of careful planning and hard bargaining can foster control mechanisms that sustain governance without government.[16]

In this respect, there is no single organizing principle on which governance rests, no emergent order around which communities and nations are likely to converge. Global governance can thus be seen as the sum of a myriad of control mechanisms driven by different histories, goals, structures, and processes.[17] This means that any attempt to assess the dynamics of global governance will necessarily have multiple dimensions. In terms of governance, the world is too disaggregated for grand logics that postulate a measure of global coherence.

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15 Czempiel, 'Governance and democratization' in *Governance without Government: Order and Change in World Politics*, 250 (Rosenau and Czempiel, eds., 1992). On the topic at issue see also Symposium, 'Globalization and Governance: The Prospects for Democracy', 10 Ind. J. Glob. Leg. Stud. 1 (2003).

16 Cf. for these and the following arguments especially Rosenau, 'Governance, order, and change in world politics' in *Governance without Government: Order and Change in World Politics, supra* n. 15, at 1-10; Mayer, Rittberger, and Zuern, 'Regime Theory: State of the Art and Perspectives' in *Regime Theory and International Relations*, 391-5 (Rittberger ed., 1993).

17 Elsewhere, it has been suggested to make a differentiation between *international* and *global* governance. According to this concept, "*[I]nternational* governance is the output of a non-hierarchical network of interlocking international (mostly, but not exclusively, governmental) institutions that regulate the behavior of states and other international actors in different issue areas of world politics. . . . *Global* Governance is the output of a non-hierarchical network of international *and transnational* institutions: not only IGOs and international regimes but also transnational regimes are regulating an actor's behavior. In contrast to international governance, global governance is characterized by the decreased salience of states and the increased involvement of non-state actors in norm- and rule-setting processes and compliance monitoring." Brühl and Rittberger, 'From international to global governance: Actors, collective decision-making, and the United Nations in the world of the twenty-first century' in *Global Governance and the United Nations System*, 2 (Rittberger ed., 2001) (emphasis in original).

Furthermore, it should be stressed that governance does not just suddenly happen. Circumstances have to be amenable to collective decisions being made, tendencies towards organization have to develop, habits of co-operation have to evolve, and a readiness not to impede the processes of emergence and evolution has to persist. The proliferation of organizations and their ever greater interdependence may stimulate needs for new forms of governance, but the transformation of all these needs into established and institutionalized control mechanisms is never automatic and can be marked by a volatility that consumes long stretches of time.

At each stage of the transformation, some form of governance can be said to exist, with a preponderance of the control mechanisms at any moment in time evolving somewhere in the middle of a continuum that runs from nascent to fully institutionalized mechanisms, from informal modes of framing goals, issuing directives and pursuing policies to formal instruments of decision-making, conflict resolution and resource allocation. In other words: no matter how institutionalized rule systems may be, governance is not a constant in these turbulent and disaggregated times. Rather, it is in a continuous process of evolution and as such fluctuates between order and disorder as conditions change and emergent properties consolidate and solidify.[18]

Notwithstanding the evolutionary dynamics of control mechanisms and the absence of an overall structural order, it is possible to identify pockets of coherence operating at different levels and in different parts of the world that can serve as bases for assessing the contours of global governance.[19] It might be that processes of governance at the global level are inherently more fragile, contingent and unevenly experienced than within most national political systems, but this certainly does not contradict the presence of central tendencies. One pervasive tendency can be identified in which major shifts in the location of authority and the site of control mechanisms are underway on every continent and in every country, shifts that are as pronounced in economic and social systems as they are in political systems. Indeed, in some cases the shifts have transferred authority away from the political realm and into the economic realm.

Partly, the end of the Cold War and the lifting of the constraints inherent in its bipolar global structure of superpower competition have facilitated these shifts. Partly, they have been driven by a search for new, more effective forms of political organization better suited for the environment that has evolved with the shrinking of the world by dynamic technologies. Partly, they have been stimulated and sustained by subgroupism – the fragmenting and coalescing of groups into new organizational entities – that has created new sites from which authority can emerge and towards which

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18 See for these arguments already Rosenau, *Along the Domestic-Foreign Frontier: Exploring Governance in a Turbulent World*, Chap. 21 (1997).

19 See, e.g., Schachter, 'Chapter 1 Question of Theory: The Decline of the Nation-State and its Implications for International Law', 36 *Colum. J. Transnat'l L.* 7 (1997).

it can gravitate. Partly, they have been driven by continuing globalization of national and local economies that has undermined long-established ways of sustaining commercial and financial relations.[20] Together, these shifts have been accelerated by the advent of interdependence issues – such as environmental pollution or monetary crises – that have fostered new and intensified forms of transnational collaboration as well as new social movements that are serving as transnational voices for change.[21]

In short, the numerous shifts stem from interactive tensions whereby processes of globalization and localization are simultaneously unfolding on a worldwide scale. In some situations, the foregoing dynamics are fostering control mechanisms that extend beyond national boundaries and in others the need is leading to the diminution of national entities and the formulation or extension of local mechanisms. The combined effect of the simultaneity of these contradictory trends is that of lessening the capacities for governance located at the level of sovereign states and national societies.[22] However, all forms of governance beyond states lack a central legitimate authority. Governance beyond the state takes place in form of governance *with* governments such as in international institutions, or governance *without* government such as in transnational institutions, or supranational governance. Furthermore, the interplay of these different forms of governance beyond the state may result in a multi-level governance system as experienced within the European Union (EU).[23]

Witnessing these processes, one may be tempted to think of the state as a mere historic unit.[24] Indeed, for over three hundred years, the aspirations of nation-states and their leaders have been the principal drivers in international relations.[25] Nation-states have claimed that their authority, their national sovereignty was a legal monopoly of power to be exercised within their geographic domain, free from interference from external actors. Throughout the whole period, the ability of those nation-states to achieve their goals has mainly rested on three pillars: economic, military, and political power. Economic power was derived from the resources that lay within the nation-state's borders and its ability to trade those resources or their by-products on favorable terms with the rest of the world. Similarly, military power derived also from available

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20 See, for example, Drucker, *Post-Capitalist Society* (1993).

21 Cf. for these arguments already Rosenau, *Turbulence in World Politics: a Theory of Change and Continuity*, 133-6 (1990). See also Brown, Khagram, Moore, and Frumkin, 'Globalization, NGOs, and Multisectoral Relations' in *Governance in a Globalizing World*, *supra* n. 10, at 271.

22 This notion seems to hold true even in the post-September 11-age. However, the real impact of these events might be seen clearly only some time later. Furthermore, it should be noted that this notion might be seriously challenged when it comes to developing countries.

23 See Zuern, 'Political systems in the post-national constellation: Societal denationalization and multilevel governance' in *Global Governance and the United Nations System*, *supra* n. 17, at 63. Pernice, 'Multilevel Constitutionalism in the European Union', 27 *European Law Review* 511 (2002).

24 See e.g. Ward, 'The End of Sovereignty and the New Humanism', 55 *Stanford Law Review* 2091 (2003).

25 See generally Hall and Biersteker, *The Emergence of Private Authority in Global Governance*, 8-13 (2003).

resources of people and material within a given territory. Without material resources, political power was drawn alternatively or in combination from the strength of leaders and institutions, the will of the people, and/or support that the nation-state could win from other nation-states.

Today, those pillars of power are being shaken by tectonic shifts that are transforming the very nature of – what is often referred to as – global society.[26] Nation-states are facing new rivals for power and influence on the global stage. Power itself is being re-distributed, taking new forms, and new characteristics. The rules of the game in international relations are changing and the origins of an extraordinary number of those changes can be traced to the 'information revolution'. These changes undermine "the notion that relations among states are determined by raw power and that the mighty will prevail".[27] Even if 'the mighty' will continue to prevail, it has to be considered that the sources, instruments, and measures of that might are changing dramatically. It has been suggested that the *realpolitik* of the new era is *cyberpolitik*, in which the actors are no longer just states, and raw power can be countered or fortified by information power.[28] One example for new ways of making politics in the international framework without relying on the state-based system is the International Corporation for Assigned Names and Numbers (ICANN).[29] ICANN, created in October 1998 as an unprecedented experiment in global self-governance, is the non-profit corporation that was formed to assume responsibility for the Internet Protocol (IP) address

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26 For example, Philipp Allott attributes the anomy of the state-structured society to the fact that the state dominates our consciousness, a consciousness leading to a new international society. The new international society of human beings transgresses state borders and "human societies and human beings everywhere at last begin to take moral and social responsibility for the survival and prospering of the whole of humanity". Allott, *Eunomia – New Order for a New World*, xxiii (1990). See also Allott, 'Reconstituting Humanity – New International Law', 3 *EJIL* 219 (1992).

27 Kissinger, *Diplomacy*, 104 (1994).

28 Cf. e.g. Rothkopf, 'Cyberpolitik: The Changing Nature of Power in the Information Age', 51/2 *Journal of International Affairs* 326 (1998). This sociological version, which explains that the state is on the way out because of factual developments in the international world, may be opposed to an ethical view that regards statehood as morally indefensible egotism. This version sees all people united in a Kantian community of independent individuals equally entitled to human rights and fundamental freedoms. For the ethical thesis, statehood appears as an essential, historical accident that should have no moral significance in measuring our duties to people in general. This critique may be either communitarian or individualistic, or even both. As a communitarian ideology, it states that all humankind is 'related', and that statehood creates artificial distinctions among members of the human community. As an individualistic ideology, it stresses the analytical and moral priority of the individual to the state and points to the frequent historical use of the state apparatus for oppression. Cf. Falk, Kim, and Mendlovitz, *Toward a Just World Order. Vol. I Studies on a Just World Order*, 55 (1982).

29 See also *Memorandum of Understanding on the Generic Top Level Domain Name Space of the Internet Domain Name System* (Agreement deposited with the International Telecommunications Union, signed by over 200 mostly non-governmental Internet-related corporations and organizations), <http://www.gtld-mou.org/gTLD-MoU.html>.

space allocation, protocol parameter assignment, domain name system management, and root server system management functions previously performed under a United States Government contract by the Internet Assigned Numbers Authority (IANA) and other entities.

The thinking behind ICANN was that the model through which global resources are usually managed – by international treaty organizations that grant every member country one vote – often leads to decades-long debates and negotiation. However, Internet time does not allow for such international sclerosis; a new kind of regulatory body that could make important changes in a hurry was needed.[30] Certainly, ICANN, despite its amount of power over who gets in and who stays out, nevertheless suffers from its still-fragile legitimacy. The same may be said of other norms generated by private standard-setters, such as the International Organization for Standardization (ISO) as well as *ad hoc* initiatives on the part of Non-Governmental Organizations (NGOs) to constrain the activities of corporate and state actors.[31] Furthermore, as the internet matures, the shortcomings of this sort of regulatory bodies are becoming more and more visible:

> Tensions have arisen over such issues as whether a country has jurisdiction over Internet activities originating in other countries, whether regulation of content such as hate speech and pornography is appropriate, how different privacy protections should apply, and who gets space on prime virtual real estate such as dot-com. In addition, post-September 11 concerns about security in a networked world call into question the wisdom of keeping government off to the shoulder of the information superhighway.[32]

Consequently, power will doubtlessly continue to be sustained by states and their governments initiating and implementing policies in the context of their legal frameworks. Early skeptics of this technological 'revolution' even argue that the state is a "key actor in the creation of dynamic comparative advantages . . . [and its] role includes the active promotion of technological change and its diffusion in the productive structure".[33]

In this respect, it is important to notice that indeed, especially from an international lawyer's perspective, an essential part of global governance is still vested in the power of states: for example, the system of the UN is essentially based on the sov-

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30 *Wired*, 'Mission impossible', 132 (Dec. 2000).

31 Nevertheless, these private standard-setting regimes "are effective in shaping behavior, and often constrain the regulatory possibilities effectively open to state and inter-state institutions". Kingsbury, 'Sovereignty and Inequality', 9 *EJIL* 612 (1998).

32 Baird, 'Governing the Internet: Engaging Government, Business, and Nonprofits', 81/6 *Foreign Affairs* 16 (2002).

33 Niosi and Faucher, 'The State and International Trade: Technology and Competitiveness' in *Technology and National Competitiveness: Oligopoly, Technological Innovation, and International Competition*, 119-21 (Niosi ed., 1991).

ereign equality of states.[34] Only states may be parties to international organizations such as the World Trade Organization (WTO)[35] or the North Atlantic Treaty Organization (NATO) and therefore heavily shape their norms and institutions that have direct impact on the new global players such as multinational corporations. New influential entities continue to be limited in their scope since not all agencies of intergovernmental co-operation are equally open to non-state actors. For example, the UN Security Council and the WTO are explicitly off-limits for NGO participation. Nevertheless, NGOs increasingly enjoy expanded formal rights of participation in intergovernmental processes and often perform delegated monitoring and enforcement functions. On the other hand, the state continues to be a central focus for NGOs, which are primarily concerned with influencing their own governments and, by fostering close relations with state officials, with increasing the domestic importance of their organization.[36]

Even financial economists, who are usually said to de-emphasize national borders and over-emphasize economic efficiency models, tend to think that the country level of analysis "remains paramount due to the importance of national monetary policies, financial regulation, and competition policies, all of which are imposed at the country level".[37] Another important aspect of state power is tax collection: for example, governments – at least within the Organization for Economic Co-operation and Development (OECD) – are now collecting slightly more in taxes – not just in absolute terms, but as a proportion of their bigger economies – than they did ten years ago.[38]

However, even if the state as a unit of social discourse has not 'withered' away so far, recent attempts to invoke the Kelsian version of statehood as the pure form to provide "that position of retreat in which we can reflect upon our sociological and ethical conceptions and their relations to the truth or acceptability of our preferred ways of life"[39] seem old-fashioned and inadequately placed in the light of recent developments. Since it is not (only) within the state, where "the various conceptions of economic or managerial effectiveness, individual rights, or just principles, meet and find

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34 Cf. instead of many Art. 2 para. 1 Charter of the United Nations: "The Organization is based on the principle of the sovereign equality of all its Members."

35 To give the exact wording full contribution, Article XII of the Agreement Establishing the World Trade Organization states that: "Any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement, on terms to be agreed between it and the WTO." See Article XII of the Agreement Establishing the World Trade Organization, 33 ILM 8 (1994).

36 See also Coleman and Maogoto, 'After the Party, is there a Cure for the Hangover? The Challenges of the Global Economy to Westphalian Sovereignty', 30 *Legal Issues of Economic Integration* 55 (2003).

37 Smith and Walter, *supra* n. 3, at 403.

38 See <http://www.oecd.org/oecd/pages/home/displaygeneral/0,3380,EN-document-615-3-no-27-17583-615,00.html>.

39 Koskenniemi, 'The Wonderful Artificiality of States', 88 *Am. Soc. Int'l L. Proc.* 29 (1994).

reconciliation".[40] Due to these developments, various *fora* of discourse have been established, and the discourse within states remains just one among many others.

Therefore, even though the power of states has weakened, it is most unlikely that states 'fade away' in the foreseeable future. Despite these recent trends challenging the sovereignty of nation-states, to a large extent, only states have provided the structures of authority to cope with claims of competing societal groups and to provide public justice essential to social order and responsibility. Thus, even (and maybe especially) in the era of globalization, a system of nation-states has advantages in terms of social solidarity. Nation-states may be an appropriate medium for necessary social cohesion within a given society.[41] Still, the territorial nexus has a profound significance. Notwithstanding the importance of the increasing influence of multinational corporations and some local groups, their aims are only partial, serving some particular interests. Therefore, these do not ensure what the territorial state ideally promises – a place in which everyone within the defined territory has access to common institutions and enjoys equal protection under the law. Paradoxically, for these reasons, sovereignty under the conditions of globalization might even be increasing rather than shrinking. In case sovereignty is defined as the measure of care by governments for its citizens, this care extends to the citizen's increasing interactions in the international arena.[42]

In addition, even if national sentiments in favor of sovereignty may be slowly fading away at least in the West, individuals still identify themselves with their nations. A nation's entire internal constitutive system is usually premised on the proposition that its own rulers are held accountable for the basic decisions of domestic policy. Such fundamental constitutional structures at least initially resist a wholesale trans-

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40 *Ibid.* "Statehood functions as precisely that decision-process which tackles the problems of multiplicity of ideas and interpretative controversy regarding their fulfillment. Its very formality intends to operate as a safeguard so that these different (theological) ideas are not transformed into a globally enforced tyranny." Koskenniemi, 'Theory: Implications for the Practitioner' in *Theory and International Law: An Introduction*, 14 (Allott, Carty, Koskenniemi, and Warbrick, eds., 1991).

41 Cf. Somek, 'How to Explain to Potential Migrants What We Owe to Our Fellow Citizens', Working Paper, to appear in *UNESCO Encyclopedia of Life Support Systems*. Somek argues that loyalty to the nation is the common ground for the realization of liberal ideals, mainly for three reasons. First, since people can make reasonable decisions to lead their life within the nation, it enables autonomy. Second, the nation is the imaginative place to realize concepts of social justice. Third, the nation enables mutual understanding and trust, both of which are inalienable components of successful political self-determination. *Ibid.*

42 See the concept of 'relational sovereignty' elaborated by Helen Stacy. "Relational sovereignty arises from three key developments in the citizen's relationship with the sovereign today. First, representative democracy provides a strong account of citizens' preferences, at least in principle. Second, the political assumption is that the citizen has full agency and exercises it. Third, the sovereign's obligations towards the citizen are expansive, incorporating more than just civil and political rights, but also social, economic, and cultural rights." Stacy, 'Relational Sovereignty', 55 *Stanford Law Review* 2048 (2003).

formation of power from nation-states to any other entities. Probably the most influential archetype of a *supra-national* entity is the EU. But even within this framework, the most far-reaching institutional project for divided sovereignty, the state continues to be a *locus* of authority:

> While there is clearly a possibility of the European Union evolving in ways that displace the sovereignty model of the place of the state and do not simply substitute the EU as a new sovereign, states have so far managed the institutional architecture to preserve major roles for themselves in taking the crucial decisions on governance forms, and the kinds of roles played by states in international relations are still played within the EU.[43]

Therefore, states still form an important part of the international system, which makes it worth examining their behavior.[44] This notion holds even truer in the aftermath of September 11, in a period in which the power of states has rather increased.[45] Inasmuch as the behavior of sovereign states is shaped and influenced by norms of international law remains among the most perplexing questions in international relations, as in the international system there is no coercive power comparable to that which enforces the laws of a nation. To approach this question, the main arguments, which have been raised against the understanding of international law as law, will be discussed in the following.

3. The Special Case of International Law

Alongside the developments just outlined, international law has to some extent 'matured' into a legal system covering all aspects of relations not only among states, but also aspects of relations between states and their federated units, between states and persons,

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43 Kingsbury, *supra* n. 31, at 614.

44 The arguments set out in this Chapter are essential for (still) favoring those approaches which do not away with the notion that states are (still) the primary actors in the international system. See in particular *infra* Chap. 5, par. 1. Compare Goodman and Jinks, 'Toward an Institutional Theory of Sovereignty', 55 *Stanford Law Review* 1762 (2003): "Global culture constitutes states as *bounded, rational, and purposive* actors systemically organized to formal rules." (emphasis in original).

45 On the other hand, it should be noted that in the aftermath of September 11 there has been an ongoing discussion on the principle of 'civilian inviolability' as an expression of the 'individualization of international law'. The President of the United States, George W. Bush, for example, has repeatedly condemned the terrorist attacks of September 11 as attacks on 'innocent civilians'. See e.g. President George W. Bush, 'Remarks at National Day of Prayer and Remembrance, the National Cathedral', Sept. 14, 2001, <http://www.whitehouse.gov/news/releases/2001/09/20010913-2.html>. However, it has also been observed that "[t]he principle of civilian inviolability also generally privileges states over non-state actors". See Slaughter and Burke-White, 'An International Constitutional Moment', 43 *Harvard ILJ* 19 (2002).

between persons of several states, between states and multinational corporations, and between international organizations and their state members.[46] New areas of international law are developing and much of this expansion is of recent origin. At a functional level, the expansion results from an immense increase in the number and diversity of organizations and conferences engaged in law-making. It is also a consequence of the greater potential for conflict between state interests, generated by the accelerated growth and reach of those interests that have resulted from new capabilities created by modern science and technology. Science, for example, has enabled a virtual leap of humanity into many new fields of activity that require regulation. When the consequences of these activities affect more than one state, they demand international regulation.[47]

This increasing demand for international regulation contrasts with widespread skepticism of the relevance of international law. Ever since Hugo Grotius wrote his *De iure belli ac pacis* in order to refute the views of those who held international law as non-existent or irrelevant it has been common for writers to comment on the comparison of municipal and international law and to discuss the specific nature (primitiveness and/or weakness) of the latter.[48] The point of such debate is to oppose critics who believe that international law is irrelevant because it lacks centralized legislative, judicial or enforcement procedures.[49] Martti Koskenniemi in his *From Apology to Utopia*[50] describes this 'dilemma' of international law as follows:

> To appreciate the value of these standard criticisms and responses we need to look closer into the assumptions behind them. Why should lack of certain procedures, present in municipal law, doubt that international law is law? An answer has to be based on a *theory about*

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46 Franck, *supra* Introduction, n. 23, at 5.

47 See, for example, Lachs, 'Science, Technology and World Law' 86 *AJIL* 673 (1992); Spiro, 'Globalization, International Law, and The Academy', 32 *NYU J. Int'l L. & Pol.* 568 (2000).

48 See in particular Sylvester, 'International Law as Sword or Shield? Early American Foreign Policy and the Law of Nations', 32 *NYU J. Int'l L. & Pol.* 1 (1999).

49 Given the lack of a central authority, the relations between states are said to remain largely *horizontal* rather than *vertical*. See e.g. Cassese, *supra* Introduction, n. 2, at 5. On the issue of horizontal and vertical enforcement see in particular the discussion *infra* Chap. 5, par. 6. The following arguments are mainly based on the rejection of a legal theory commonly known as 'pragmatism'. Pragmatism is a skeptical conception of law because it rejects legal rights. It does not, however, reject morality, or even moral and political rights. It says that judges should follow whichever method of deciding cases will produce what they believe to be the best community for the future. Pragmatism does not rule out any theory about what makes a community better. But it does not take rights seriously. It rejects what other conceptions of law accept: that people(s) can have distinctly legal rights as trumps over what would otherwise be the best future properly understood. According to pragmatism what we call legal rights are only servants of the best future: they are instruments we construct for that purpose and have no independent force of ground. For a detailed discussion of pragmatism see for example Dworkin, *supra* Introduction, n. 5, at 150-6.

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

> *the character of social life among States*. The criticism itself is based on a distinctly Hobbesian theory: there is no natural society among states just as there is none among individuals. Society is artificial and created by men (and States) themselves. Moreover, there is the psychological premise that men (and States) can maintain society only if they are forced to do so – by central legislative, judicial and enforcement procedures. The legal nature of municipal law rests on this. It is something other than (a speculative) morality as it is able to constrain. Lacking such procedures, international law can only be a hopelessly irrelevant utopia or an interminably flexible apology.[51]

According to Koskenniemi, modern lawyers have attacked this criticism from two perspectives both of which involve a certain interpretation of state behavior and a certain theory of social life among states.

> An *individualist strategy* accepts the critic's theory but not his analysis. It is true that individualism prevails and that relevant law can only exist in the presence of legislative, judicial and enforcement mechanisms, which force individuals into community. But such mechanisms do exist in international law, albeit in a modified, primitive way. On this view, custom and treaty appear as legislation, municipal and international bodies perform adjudication is performed by municipal and international bodies and reprisals work as mechanisms of enforcement.[52]

At first sight, this might seem plausible in respect of agreements and international judicial bodies. Nevertheless, this argument does not restrict itself to claiming that only treaties or adjudication are relevant as law. The problem is that the latter two constitute only a rather small amount of inter-state activity. If they were all that is distinctly legal in such activity, then the law could not seem very relevant. Furthermore, Koskenniemi asserts that it is uncertain to what extent treaties can really be called 'law'. In any case, they do not normally have effects for third states. So, the argument that international law is relevant because it contains the procedures allegedly lacking must refer beyond treaties and adjudication to many kinds of state activity, which are assumed to be 'legislative', 'judicial' or 'sanctioning' in character.[53]

> The soundness of this strategy hinges on the correctness of the interpretation it implies about the *meaning* of certain forms of state behavior. How do we know that in making treaties or adopting certain patterns of behavior a state in fact 'legislates' and not merely furthers its national interest in individual circumstances? When does a pattern of behavior amount to law?[54]

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51 Koskenniemi, *supra* n. 50, at 144 (emphasis in original).
52 *Ibid.* (emphasis in original).
53 *Id.* at 145.
54 *Ibid.* (emphasis in original).

It turns out that the essential problem is to determine what kind of actions undertaken by a state can be said to amount to law-creation and what kind of actions do not. Such a distinction, however, might be difficult to make. One possibility could be to consider the state's self-understanding of the character of its action. This strategy, however, is likely to be unsuccessful since the state (or rather officials of the state) may always articulate whatever it deems appropriate in a given circumstance. Another possibility could be to consider the intrinsic nature of the actions the state has performed. But this strategy is difficult as well, since it is hard to determine whether a state's action is merely 'political' or 'legal' as well. Koskenniemi concludes that the individualist strategy "fails as it cannot demonstrate the plausibility of explaining State behavior in those terms".[55] Left unsatisfied with the individualist strategy, he goes on to consider a second possibility, the essence of which is

> . . . to adopt a *communitarian strategy* and deny the well-foundedness of the critic's assumption of the unsocial character of international relations and hold that the existence of formal machineries is not at all necessary for a normative system to be legal and relevant.[56]

Indeed, as indicated in the Introduction, most contemporary legal philosophers deem coercive power insufficient to secure habitual social assent to governance.[57] They posit that stable governance and habitual obedience can be secured (perhaps can *only* be secured except in the short-run) if the quality of governance by the 'dominant elite' exhibits other characteristics besides dominant power. Ronald Dworkin identifies four such characteristics: fairness, justice, procedural due process, and integrity.[58] Others

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55 *Id.* at 149.

56 *Ibid.* (emphasis in original).

57 See also, e.g., Franck, *supra* Introduction, n. 3, at 15-7.

58 According to Dworkin, *fairness* in politics is a matter of finding political procedures that distribute political power in the right way. That is generally understood to mean procedures and practices that give all citizens more or less equal influence in the decisions that govern them. *Justice*, on the contrary, is concerned with the decisions that the standing political institutions, whether or not they have been chosen fairly, ought to make. If we accept justice as a political virtue, we want our legislators and other officials to distribute material resources and protect civil liberties so as to secure a morally defensible outcome. *Procedural due process* is a matter of the right procedures for judging whether some citizen has violated laws laid down by the political procedures. Courts and similar institutions should use procedures of evidence, discovery, and review that promise the right level of accuracy and otherwise treat people accused of violation as people in that position ought to be treated. If we accept integrity as a distinct political virtue beside fairness, justice, and procedural due process, then we have a general, non-strategic argument for recognizing legal rights. *Integrity* becomes a political ideal when we demand the state or the community to be a moral agent, when we insist that the state act on a single, coherent set of principles even when its citizens are divided about what the right principles of justice and fairness are. Dworkin, *supra* Introduction, n. 5, at 164-8.

focus on authority as process, identifying its necessary or desirable characteristics, such as consent, openness, and participation. Jürgen Habermas emphasizes the role of discursive validation.[59] Thus, these authors assume that the constraining nature of international law is independent from the existence of legislative procedures, widespread adjudication or public enforcement. They argue that in international law as well as in municipal law most legal subjects follow most rules most of the time.[60]

In fact, however, it is not enough to refer to what seems like a factual concordance between legal rules and state behavior to demonstrate the relevance of the former because it may be that conduct is concordant with rules only because the latter are infinitely flexible.[61] States find it regularly useful to refer to rules and principles of international law. Therefore, we have to ask whether, in order to answer the skeptical criticism, we have to demonstrate that international law has an effect on the motivations of states for adopting particular forms of behavior.

> But how can we receive information about motivations in order to find out which argument is correct? The easy way would be to go and ask the state itself: 'Why did you behave as you did?'[62]

Thus, external criteria to determine whether law influenced the state's motivations or not, should exist. In order to answer the skeptical criticism, Koskenniemi asserts, "we should demonstrate that international law has an effect on the *motivations* of States for adopting particular forms of behavior".[63] Whereas he concludes that "there is, however, a strong argument to the opposite effect",[64] the hypothesis in this monograph – to be corroborated in the following – is that there is a strong argument *in favor* of international law having an effect on the motivations of states.[65]

At this point, it is important to note the differentiation between 'hard' and 'soft law'. This differentiation is distinct, though interrelated with the notion of the flexibility

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59 Habermas, *supra* Introduction, n. 5, at 178.

60 Henkin, *supra* Introduction, n. 1, at 47.

61 Especially critical legal scholars in the United States sought to grasp precisely this aspect of international legal language – its simultaneously strict formalism and its substantive indeterminacy. As early examples see, for example, Kennedy, *International Legal Structures* (1987); Kennedy, 'Theses about International Law Discourse', 23 *GYIL* 353 (1980); Dalton, 'An Essay in the Deconstruction of Contract Doctrine', 94 *Yale LJ* 997 (1985).

62 Koskenniemi, *supra* n. 50, at 152.

63 *Id.* at 151 (emphasis in original).

64 *Ibid.*

65 Indeed, one characteristic of international law is the voluntary nature of the legal obligation it imposes. States are not bound by norms of international treaty law if they do not choose to become party to the treaty; and even in the case of customary international law it is generally accepted that states can – with some exceptions – avoid the application of customary international law by persistently objecting to it. See Brownlie, *Principles of Public International Law*, 10 (5th ed., 1999).

of legal rules. Antonio Cassese, for example, thinks of 'soft law' as "a body of standards, commitments, joint statements, or declarations of policy or intention . . ., resolutions adopted by the UN General Assembly (GA) or other multilateral bodies etc.".[66] Elsewhere, the concept of 'soft law' forms part of a concept of 'legalization' that refers to a "particular set of characteristics that institutions may (or may not) possess. These characteristics are defined along three dimensions: obligation, precision, and delegation."[67] According to this concept, obligation means a legally binding rule or commitment, precision means that rules "unambiguously define the conduct they require, authorize, or proscribe", and delegation means that "third parties have been granted authority to implement, interpret, and apply the rules; and (possibly) to make further rules".[68] These dimensions bifurcate into several types of 'legalization',

> . . . ranging from the 'ideal type' of legalization, where all three properties are maximized; to 'hard' legalization, where three (or at least obligation and delegation) are high; *through multiple forms of partial or 'soft' legalization* involving different combinations of attributes; and finally to the complete absence of legalization, another ideal type.[69]

In particular with regard to the question of compliance, political scientists have traditionally not distinguished legal from non-legal rules at all. By contrast, international lawyers have traditionally emphasized distinctions between various forms of 'legalization'. Tellingly, these two different approaches have converged in recent years as political scientists as well consider various levels of 'legalization', whereas international lawyers are increasingly interested in 'soft law'.[70] Indeed, the differentiation between various forms of 'legalization' of international relations[71] and its impact on theories of compliance is somewhat blurred:

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66 Cassese, *supra* Introduction, n. 2, at 160.

67 Abott, Keohane, Moravcsik, Slaughter, and Snidal, 'The Concept of Legalization', 54 *International Organization* 401 (2000).

68 *Ibid.*

69 *Id.* at 401-2 (emphasis added).

70 See Raustiala and Slaughter, *supra* Introduction, n. 19, at 539. Finnemore, 'Are Legal Norms Distinctive?', 32 *NYU J. Int'l L. & Pol.* 699 (2000).

71 Given the framework of this monograph, a thorough discussion of reasons for the widespread legalization of international relations and for the variety in the degrees and forms of legalization will also be foregone. For a discussion of these issues see, for example, Abbott and Snidal, 'Hard and Soft Law in International Governance', 54 *International Organization* 421 (2000). For an approach addressing the interrelationship between 'legalization' and compliance see Kahler, 'Conclusion: The Causes and Consequences of Legalization', 54 *International Organization* 673 (2000). See also Finnemore and Toope, 'Alternatives to "Legalization": Richer Views of Law and Politics', 55 *International Organization* 743 (2001); Goldstein, Kahler, Keohane, and Slaughter, 'Response to Finnemore and Toope', 55 *International Organization* 759 (2001).

> Treaty mechanisms are including more 'soft' obligations, such as undertakings to endeavor to strive to cooperate. Non-binding instruments in turn are incorporating supervisory mechanisms traditionally found in hard law texts. Both types of instrument may have compliance procedures that range from soft to hard. The result seems to be a dynamic interplay between soft and hard obligations.[72]

Putting aside the increasingly difficult problem of how to distinguish 'hard law' instruments from 'soft law' instruments,[73] Louis Henkin's statement that almost all nations observe almost all obligations almost all of the time (be they soft or hard, one may add at this point) remains and the striking questions why this is so. In order to approach the problem of compliance, it seems to be necessary to lay the philosophical groundwork on which the various theories of compliance with international law are built on, which will be done in the following.

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72 Shelton, 'Law, Non-Law and the Problem of Soft Law' in *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*, 10 (Shelton ed., 2000).

73 Some scholars have distinguished 'hard' and 'soft law' by stating that breach of law gives rise to legal consequences while breach of a political norm gives rise to political consequences. Such a distinction, however, is rather difficult to make. See Shelton, *supra* n. 72, at 11; Hillgenberg, 'A Fresh Look at Soft Law', 10 *EJIL* 499 (1999). See also Cassese, *supra* Introduction, n. 2, at 161 (stating that the distinction "depends on the *intention* of the authors of the specific document, as it may be inferred from the relevant elements: the drafters of the text may have intended to attach to it the legal value of a binding agreement, or they may have envisaged the document as a piece of 'soft law'.") (emphasis in original).

Chapter 2

PHILOSOPHICAL FOUNDATIONS

> *Philosophy may thus be called a kind of luxury insofar as luxury signifies those enjoyments and pursuits which do not belong to external necessity as such. Philosophy in this respect seems more capable of being dispensed with than anything else; but that depends on what is called indispensable. From the point of view of mind philosophy may even be said to be 'that which is most essential'.*
>
> Georg Wilhelm Friedrich Hegel

Each theory of why states obey international law is rooted in some concept of society. These concepts are reflected by the traditions that have structured thinking about political philosophy. In this Chapter, therefore, some of the most important of these concepts – which are usually (or at least more often) dealt with in a national context – will be discussed within an international framework. This discussion is done in some depth since the essential claim of this monograph is that these philosophical concepts of (international) society more than anything else determine the answer to the compliance question. It is argued that the structure of the argument of the different compliance theorists is largely influenced by the underlying perception of society, which evolves at the theoretical level to what might be called a political philosophy. To paraphrase the statement by Hegel, these political philosophies may be even said to be "that which is most essential".

With the ending of the Cold War, it seemed reasonable that governments, international organizations, and citizens of states would turn their attention to the solution of global problems, and that in doing so they would define the rights and responsibilities of world citizenship and develop political means of recognizing and carrying them out. However, instead of the triumph of cosmopolitanism, we are rather witnessing two main developments that appear to be taking us down a different path.

Broadly conceived, the first path is the ascendancy of neo-liberalism and its rejection of political measures for curbing or directing market forces. Contrarily, the second path is what might be called the 'return to community', that is to say the resurgence of nationalism, the assertion of cultural or religious identity, and the demands of indigenous peoples and ethnic minorities for autonomy and the right to preserve their own heritage and customs. Both of these developments challenge the

Kantian tradition, which rests on the existence of a universal moral law, and on the concept that it is possible to create, or move toward, a world society where this moral law provides the basis for international law and world political organizations, and govern relations between all individuals.[1]

The notion of the 'international community' – often used in official speeches – as well as that of 'the new world order', which today is discredited at least in its promise of peace and justice, relies on the highly debatable equation between world society, international organizations, the UN, the Security Council, and the permanent members of the latter. Certainly, in the gaps of interstate relations, a growing presence of the universal dimension does exist. But the last word, when it comes to butter or guns, to financial resources or to the use of force, belongs either to states or actors who are even less respectful of universal imperatives. At least this is one of the conclusions that can be inferred from the first line of thinking to be discussed here, namely, utilitarianism.

1. Utilitarianism

There are two fundamental ideas that underlie utilitarianism: the first is that the *results* of our actions are the key to their moral evaluation, and the second is that one should assess and compare these results in terms of the happiness or unhappiness they cause.[2] Accordingly, utilitarianism claims that the morally right act or policy is that which produces the greatest happiness for the members of society.[3] Ronald Dworkin defines the utilitarian argument as follows:

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1 See generally Kant, 'Perpetual Peace: A Philosophical Sketch' (1795) in *Kant: Political Writings* (Reiss ed., Nisbet trans., 1991). For a contemporary revision of Kant's positions see for example Doyle, 'Kant, Liberal Legacies, and Foreign Affairs', 12/3 *Philosophy and Public Affairs* 205 (1983); Held, *Democracy and the Global Order* (1995); Bartleson, 'The Trial of Judgement: A Note on Kant and the Paradoxes of International Law', 39 *International Studies Quarterly* 255 (1995); Tesón, *A Philosophy of International Law* (1998); Franceschet, 'Popular Sovereignty or Cosmopolitan Democracy? Liberalism, Kant and International Reform', 6 *European Journal of International Relations* 277 (2000); see also Capps, 'The Kantian Project in Modern International Legal Theory', 12 *EJIL* 1003 (2001).

2 Shaw, *Contemporary Ethics – Taking Account of Utilitarianism*, 2 (1999). Philosophically, utilitarianism has two components: *welfarism*, which is the value thesis that welfare or well-being is all that ultimately matters, and *consequentialism,* which is the thesis that the rightness or wrongness of an action is a function of its results or outcome. See *id.* at 12-4. At this point, one may add that a third component is *aggregation*, which is the view that the general good is the sum total of individual goods. See Sumner, *Welfare Happiness & Ethics*, 3 (1996).

3 Cf. Kymlicka, *Contemporary Political Philosophy*, 9 (1990). Jeremy Bentham, who coined the term *utilitarian*, is generally considered to be the founder or at least the first systematic expounder of utilitarianism. He put the utilitarian concept as follows: "By the principle of utility is meant that principle which approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question." Bentham, *An Introduction to the Principles of Morals and Legislation*, 2 (1789, reprinted in *The Utilitarians*, 1973).

> People have a moral duty to advance the good of the community as a whole in whatever they do and a corresponding moral right that others always act in that way.[4]

The concept of utilitarianism can be broken down into two structurally different parts: the first is an account of human welfare or utility, whereas the second part is an instruction to maximize utility, so defined, giving equal weight to each person's utility.

Traditionally, proponents of utilitarianism have defined utility in terms of "the greatest happiness of the greatest number".[5] According thereto, utilitarianism seems to favor setting the maximization of the total amount of happiness in the universe as the ethical goal. Since this goal seems attainable only by making lots of people miserable, proponents of utilitarianism need to look for ways to contract the boundary. Therefore, one immanent problem of utilitarians is that to look for these ways they have to go outside of utilitarianism.

Another problem of utilitarianism is the lack of a method for calculating the effect of a decision or policy on the total happiness of the relevant population.[6] Even within just the human population, there is no reliable technique for measuring a change in the level of satisfaction of one individual relative to a change in the level of satisfaction of another. The Pareto approach may seem to offer a solution to the problem of measuring satisfaction. Traditionally, a change is deemed to be Pareto superior if it makes at least one person better off and no person worse off. Such a change by definition increases the total amount of (human) happiness in the world. The main advantage of the Pareto approach is that it requires information only about marginal and not about total utilities. And there seems at hand an operational device for achieving Pareto superiority, the voluntary transaction, which by definition makes both parties better off than they were before. However, it shows that the condition that no one else be affected by a 'voluntary' transaction can only rarely be fulfilled.[7] Moreover,

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4 Dworkin, *supra* Introduction, n. 5, at 286.

5 Cf. Griffin, *Well-Being: Its Meaning, Measurement, and Moral Importance*, 151-5 (1986).

6 As Hayek puts it, the practice of utilitarianism presupposes omniscience. See v. Hayek, *Law, Legislation, and Liberty*, 17-8 (New publ. ed., 1982).

7 Dissatisfied with the Pareto criterion, economists developed the notion of a potential Pareto improvement (sometimes called Kaldor-Hicks efficiency). This condition is an attempt to surmount the restriction of the Pareto criterion that only those changes are recommended in which at least one person is made better off and no one is made worse off. That criterion requires that gainers explicitly compensate losers in any change. If there is not explicit compensation, losers can veto any change. By contrast, a potential Pareto improvement allows changes in which there are both gainers and losers but requires that the gainers gain more than the losers lose. If this condition is satisfied, the gainers can, in principle, compensate the losers and still have a surplus left for themselves. For a potential Pareto improvement, compensation does not actually have to be made, but it must be possible in principle. In essence, this is the technique of cost-benefit analysis. In cost-benefit analysis, a project is undertaken when its benefits exceed its costs, which implies that the gainers could compensate the losers. See Cooter and Ulen, *Law and Economics*, 44-7 (3rd ed., 2000).

the voluntary transaction for a free-market solution to the problem of measuring utility begs two essential critical questions: first, whether the goods exchanged were initially distributed so as to maximize happiness and second, whether a system of free markets creates more happiness than alternative systems of resource allocation would.

However, not every utilitarian has accepted such a 'hedonistic' account of welfare. In fact, there are at least two main identifiable positions taken:[8] the first position is divided into the view that the experience or sensation of pleasure is the chief human good and the even broader view that acknowledges that the things worth doing and having in life are not reducible to one mental state like happiness. Therefore, this position states that any different kinds of experiences are valuable, and that we should promote the entire range of valuable mental states. However, there is a strong argument against these positions since all these mental states might simply be reached by exogenous substances;[9] but what we want in life is something more than, or other than, the acquisition of any kind of mental state.

The second position is that increasing people's utility means satisfying their preferences, whatever they are. However, satisfying our preferences does not always contribute to our well-being for we can just lack adequate information or we have made mistakes in calculating the costs and benefits of a particular action. For that reason, utilitarians have put forward a view that aims at satisfying those preferences that are based on full information and correct judgments, while rejecting those that are mistaken and irrational.[10] At first sight, this account – namely, that the chief human good is the satisfaction of rational preferences – seems reasonable. But while this view seems unobjectionable, it is extremely vague since it puts no constraints on what might count as 'utility'. Nevertheless, once we view utility in terms of satisfying informed preferences, we have little guidance.[11] So, the question is how do we know what preferences people would have if they were informed and rational?

More puzzling yet is the fact that we have dropped the 'experience requirement' – that is to say that informed preferences can be satisfied – and therefore our utility increased on this account, without ever affecting our conscious experiences. The problem is that we need to accept the possibility that our lives can go worse even when our conscious experiences are unaffected, which leads to some strange results. Given these difficulties in determining which preferences increase welfare when satisfied, and the difficulties in measuring welfare when we know which preferences are rational, we may eventually find ourselves in a situation where it is impossible to know which act maximizes utility.

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8 For the following arguments see Kymlicka, *supra* n. 3, at 12-4.

9 Cf. the arguments put forward by Nozick, *Anarchy, State, and Utopia*, 42-5 (1974).

10 Griffin, *supra* n. 5, at 11; Parfit, *Reasons and Persons*, 493-5 (1984).

11 Kymlicka, *supra* n. 3, at 16.

Setting these problems aside, let us assume that there is an agreed account of utility. If there is such an account, the main question is *whose preferences should be satisfied.* In case a utilitarian agent acts morally responsible, he will decide how to spend time and resources by calculating the effects on overall utility of the various actions available.[12] Along this line, there are two main objections to utilitarian decision-making:[13] first, it assumes that each person stands in the same moral relationship to other persons. It supposes that we must always, in everything we do, treat the interests of others as equally important to our own. But this position does not allow for the possibility of special relationships. A special obligation between two people(s) may be induced by the existence of a promise. However, utilitarianism treats promises and contracts not as special ties, but as simply adding new factors into the calculations of overall utility.[14] A second problem with utilitarianism as a decision-procedure concerns its demand, not that each person be given equal weight in decision-making, but that each source of utility be given equal weight. For example, utility may be maximized if we kill people such as murderers so that they would not be drain on social resources in jail. However, such preferences are 'unreasonable', from the point of view of justice, but they are not necessarily 'irrational', from the point of view of an individual's utility.[15]

Nevertheless, there are two main arguments for viewing utility-maximization as the standard of moral rightness. On one interpretation, utilitarianism is a standard for aggregating individual interests and desires. Individuals have distinct and potentially conflicting preferences, and we need a standard that specifies which trade-offs amongst those preferences are morally acceptable. This standard is commonly seen as that each person's life matters equally, from the moral point of view, and hence their interests should be given equal consideration.[16] However, the idea of treating people with equal consideration is imprecise, and it needs to be stated in more detail if it is to provide a determinate standard of rightness.

According to another interpretation of utilitarianism, maximizing the good is primary, not derivative, and we count individuals equally not only because that is the way to maximize value. People are just viewed as locations of utilities, or as causal levers for the utility network. The "basic bearer of value for utilitarianism is the state

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12 Cf. Brink, 'Utilitarian Morality and the Personal Point of View', 83/8 *Journal of Philosophy* 425 (1986).

13 For the following see Kymlicka, *supra* n. 3, at 21-5.

14 But see the distinction between 'output filters' (which limit the set of choosable options given a set of preferences) and 'input filters' (which limit individual preferences given a set of choosable options) made by Robert Goodin. Goodin, 'Laundering Preferences' in *Foundations of Social Choice Theory*, 77-81 (Elster and Hylland, eds., 1986).

15 Rawls, 'Kantian Constructivism in Moral Theory', 77/9 *Journal of Philosophy* 528 (1980).

16 The argument is more explicitly affirmed by Hare, 'Rights, Utility, and Universalization: Reply to J.L. Mackie' in *Utility and Rights*, 106-10 (Frey ed., 1984); see also Haslett, *Equal Consideration: A Theory of Moral Justification*, 40-4 (1987).

of affairs".[17] John Rawls calls this a 'teleological' theory, which means that the right act is defined in terms of maximizing the good, rather than in terms of equal consideration for individuals.[18] But it is entirely unclear why maximizing utility, as a direct goal, should be considered a moral duty. It cannot be the maximally valuable state of affairs itself, for states of affairs do not have moral claims.

Therefore, for utilitarianism to be a plausible political theory, it has to be interpreted as a theory of equal consideration. Utilitarians assume that every source of happiness, or every kind of preference, should be given the same weight, if it yields equal utility. *But an adequate account of equal consideration must distinguish different kinds of preferences, only some of which have legitimate moral weight.* In order to determine which preferences could be deemed to be illegitimate, at a basic level a differentiation between 'external' and 'personal' preferences as put forward by Ronald Dworkin might be introduced.[19] According thereto, an external preference is an individual preference concerning another individual's assignment of goods and opportunities, rather than a preference concerning one's own assignment of goods and opportunities (which Dworkin calls a 'personal preference'). External preferences are sometimes prejudiced and thus illegitimate. Dworkin argues that utilitarianism

> . . . cannot accept at once a duty to defeat the false theory that some people's preferences should count for more than other people's and a duty to strive to fulfill the [external] preferences of those who passionately accept that false theory, as energetically as it strives for any other preferences.[20]

The second kind of illegitimate preference involves the desire for more than one's own fair share of resources. For utilitarians, a fair distribution is one that maximizes utility, and so no preference can be identified as selfish prior to utility calculation. But these 'selfish preferences' ignore the fact that other people need the resources, and what is more, that they have legitimate claims to them. As with inegalitarian external preferences, selfish preferences are often irrational and uninformed. Nevertheless, satisfying them will sometimes generate genuine utility.

Consequently, a plausible account of utilitarianism needs to be one of equal consideration that also rules out illegitimate preferences. In this context, it should be noted that utilitarianism is a concept that is distinct from the concept of normative economics. As just outlined, utilitarianism holds that the moral worth of an action, practice, institution, or law is to be judged by its effect in promoting *happiness* aggre-

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17 Williams, *Moral Luck*, 4 (1981).

18 Rawls, *A Theory of Justice*, 24 (1971).

19 Dworkin, *Taking Rights Seriously*, 234-8 (1977). Dworkin points out, however, that the distinction is often a murky one. Especially in zero-sum situations, one's external and personal preferences may turn out to be logically equivalent. *Ibid.* See also Kymlicka, *supra* n. 3, at 36-9.

20 Dworkin, *A Matter of Principle*, 363 (1985).

gated across all of the inhabitants of 'society', which might be a single (nation-)state or the whole world. Conversely, normative economics holds that an action is to be judged by its effect in promoting *social welfare*. This term is often defined so broadly as to be synonymous with the utilitarian concept of happiness, except that ordinarily the satisfactions of non-human beings are not included in the concept of social welfare. The (common) identification of economics with utilitarianism has been reinforced by the tendency in economics to use the term 'utility' as a synonym for welfare, as in the expression 'utility maximizing'; and, maybe more important, by the fact that many prominent utilitarian theorists, such as Bentham and John Stuart Mill, were also well-known economists.

However, even viewed as applied utilitarianism, economics is a distinct field of intellectual activity from philosophical utilitarianism. This thesis is supported by the history of utilitarianism and of economics in legal theory. Although the origins of utilitarianism, like those of economics, are earlier than Adam Smith's *The Wealth of Nations* – they are found in the writings of Hume, and others – utilitarianism did not reach a state of development comparable to economics until Bentham's work in the generation after Smith. But while legal theory began to feel the impact of utilitarianism in Bentham's time, economics had no real impact on legal theory until the 1960s. By that time, utilitarianism had achieved a strong hold over the legal imagination.[21] Until recently, utilitarianism held sway in legal theory, but overt economic analysis was rare. The position now is likely to be reversed. Today, most legal theorists who discuss utilitarianism reject it as a basis of normative legal theory.

Despite its philosophical shortcomings, utilitarianism shows substantial influence on theories of compliance with international law. Above all, so-called realist theories largely depend on the idea that states pursue their goals by satisfying those preferences, which are based on the information given, while rejecting those which are mistaken and irrational. Mostly, the actors will pursue their goals without full information, a situation similar to a Prisoner's Dilemma (PD).[22] One preliminary question for the evaluation of realism is what counts as national interest. At a basic level, realists have two different answers to this question. The first – utilitarian – answer is that national interest is the aggregate of present and future individual interests. Accordingly, the utilitarian approach defines interest as the aggregate maximization of interests, or preferences, of the citizens of the state over time. What the national interest is depends

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21 Posner, *The Economics of Justice*, 50 (2nd ed., 1983).

22 Cf. the discussion on the PD as the tool used by the concept of the (sociological) compliance theory that argues that compliance with norms is driven by an actor's self-interest *infra* Chap. 3, par. 2. It should be noted, however, that realism is tantamount to utilitarianism. As has been indicated, utilitarians assume that every source of preference should be given the same weight. Thus, it has to be interpreted as a theory of *equal* consideration. Contrarily, the central empirical prediction of realism is that over the long term the relative amount of material power resources countries possess will shape the magnitude and ambition of their foreign policies. Cf. *infra* Chap. 4, par. 1.

upon empirical laws and theories that compute actual preferences and interests of the people. In its normative form, this thesis holds that the satisfaction of the net aggregate interests of present and future citizens of the state justifies international acts. Contrarily, the second – communitarian – answer is that national interest is enduring interest held by the state or the nation over and above the interests of the individuals (present and future) that populate the state.[23]

An important consequence of utilitarian realism is that the justification of international acts is sensitive to empirical claims about individual preferences. As such, some claims are simply empirically false, such as appeals to the national interest when the interest that is served is that of a minority, say some government officials or some private corporations, to the detriment of the population at large. Utilitarian realist theories view the concept of 'utility' in some terms of a cost-benefit-analysis. As will be elaborated, the vagueness of those theories stems *inter alia* from the utilitarian dilemma they are based on for there are no exact constraints on what might count as 'cost' or as 'benefit'. Nevertheless, once we view 'utility' or 'cost' or 'benefit' in terms of satisfying informed preferences, we have little guidance. On the other hand, the question remains how we know what sort of preferences states would have if they were informed and rational. Furthermore, there may be situations where it is impossible to know which act maximizes utility. Another problem 'realist' theories have to solve may also be rooted in utilitarianism. Given the lack of a consistent utilitarian ethical theory, 'realist' theories face difficulties with regard to the challenge that states do not always act out of perceived self-interest.[24]

In spite of its theoretical failures, in our society utilitarianism is likely to operate as a kind of tacit background against which other theories have to assert and defend themselves. In any event, utilitarian realism has a role to play in the justification of foreign policy. When a government performs an international act (such as an act of intervention) that seriously harms the national interest even if the behavior serves worthy purposes, the citizens of the government's state have a claim against it for not doing its job properly.

2. Varieties of Liberalism

2.1. Social Liberalism

At a basic level, any account of international liberalism encompasses at least four elements: first, a conception of the moral foundations of principles of international con-

23 The communitarian path will be examined *infra* par. 3.

24 See *infra* Chap. 5, par. 1.

duct; second, an account of international political justice, including the prerogatives of the state, the authority of international law and institutions, and the minimum requirements of fair participation in international governance; third, an account of distributive justice, including the distributive responsibilities of states and the extent, if any, to which the institutional structure of international order should seek to influence the global distribution of wealth. Together these elements should, in turn, form the basis of, fourth, a doctrine of human rights, understood as universal minimum standards of legitimacy for social institutions.[25] Certainly, the various concepts put forward differ in several aspects.

One variant of liberalism, namely, 'social liberalism', which will be dealt with here, is motivated by a two-level conception of international society in which there is a division of moral labor between the domestic and international levels: state-level societies have the primary responsibility for the well-being of their people, while the international community serves mainly to establish and maintain background conditions in which just domestic societies can develop and flourish. The agents of international justice are states or societies, not individual persons (on the one hand) or international or transnational actors (on the other). Among others, John Vincent, David Miller, Yael Tamir, and, most prominently, John Rawls have set forth views of this kind.[26] Although these views differ in important respects, they have two central elements in common.

First, they hold that all societies should respect basic human rights, conceived as universal minimum standards for domestic social institutions that apply across variations in cultures and conceptions of social justice. However, there is some disagreement about which rights count as 'human rights'. Second, they contend that the primary responsibility for satisfying these rights rests with a society's own government and people. Outsiders have a responsibility to contribute only under special circumstances. As Miller puts it, this occurs when there are extreme levels of deprivation, which the local government is in no position to relieve and when foreign governments or other international actors can do so effectively without a morally significant sacrifice.[27]

In the following, the focus will be on the variant of social liberalism as set forth by John Rawls in his essay *The Law of Peoples*, because this is arguably the most carefully worked-out example of social liberalism – which expressly deals with the international system – to be found. It represents an elaboration of the brief remarks on international justice in Rawls' *A Theory of Justice*. Therefore, it seems reasonable to briefly discuss the main ideas of *A Theory of Justice* relevant in this context, in order to better understand the concept put forward in *The Law of Peoples*.

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25 See, e.g., Beitz, 'International Liberalism and Distributive Justice: A Survey of Recent Thought', 51 *World Politics* 270 (1999).

26 Vincent, *Human Rights and International Relations* (1986); Miller, *On Nationality* (1995); Tamir, *Liberal Nationalism* (1993); Rawls, *The Law of Peoples (with The idea of public reason revisited)* (1999).

27 Miller, *supra* n. 26, at 75-7 and 107-9.

John Rawls' theory of justice can be seen as attempting to refine, rather than reject, the basic intuitions that motivated utilitarianism, as a response to problems in the utilitarian conception of equality. Rawls' 'general conception of justice' consists of one central idea, namely that

> . . . all social primary goods – liberty and opportunity, income and wealth, and the bases of self-respect – are to be distributed equally unless an unequal distribution of any or all of these goods is to the advantage of the least favored.[28]

Accordingly, he establishes two principles of justice. The first, the so-called principle of liberty, states "each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others".[29] The second, the so-called principle of equality, states that

> . . . social and economic inequalities are to be arranged so that they are both (a) to the greatest benefit of the least advantaged and (b) attached to offices and positions open to all under conditions of fair equality of opportunity.[30]

The first argument in favor of his principles of justice is to contrast his theory with what he takes to be the prevailing ideology concerning distributive justice – namely, the ideal of equality of opportunity.[31] The prevailing justification for economic distribution in society is based on the idea of 'equality of opportunity'. Inequalities of income and prestige and the like are assumed to be justified only if there was fair competition in the awarding of the offices and positions that yield those benefits. This conflicts with Rawls' theory, for while Rawls does also require equality of opportunity in allotting positions, he denies that the people who fill the positions are thereby entitled to a greater share of society's resources. According to Rawls' concept, society may pay such people more than average, but only if it benefits all members of society to do so. Under the difference principle, people only have a claim to a greater share of resources if they can show that it benefits those who have lesser shares.

Rawls considers the first argument for his principles of justice less important than the second.[32] This assertion holds even truer with regard to international justice for he explicitly extends his positions to the 'law of nations'.[33] This second argument is a

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28 Rawls, *supra* n. 18, at 303.
29 *Id.* at 60.
30 *Id.* at 83.
31 Kymlicka, *supra* n. 3, at 55.
32 Rawls, *supra* n. 18, at 75.
33 *Id.* at 377-80. Note that Rawls in *The Law of Peoples* does explicitly concentrate neither on nations nor on states, but peoples for "if *rationality* excludes the *reasonable* (that is, if a state is moved by the aims it has and ignores the criterion of reciprocity in dealing with other societies); if a state's concern with

'social contract' argument, i.e. an argument about what sort of political morality people(s) would choose if they were setting up society from an 'original position'. Although he seems to reject utilitarianism because it "does not take seriously the distinction between persons",[34] he defines justice as the outcome of collective choice by individuals in the 'original position', that is, stripped of all their individual characteristics.

Rawls assumes that these shades choose principles of justice that enable us to lead a good life. Regardless of differences between individuals' plans of life, they all share one basic thing, namely, leading a life. In order to do so, certain things are needed. Rawls calls these things 'primary goods' and distinguishes between social primary goods – i.e. goods that are directly distributed by social institutions – and natural primary goods – i.e. goods that are affected by our social institutions, but are not directly distributed by them. In choosing principles of justice, people behind the 'veil of ignorance' seek to ensure that they will have the best possible access to those primary goods distributed by social institutions. This does not imply that egoism underlies the sense of justice for when combined with the 'veil of ignorance', the assumption of rational self-interest "achieves the same purpose as benevolence".[35]

With regard to international relations, not individuals, but representatives of states agree on international principles of justice under a 'veil of ignorance'. Therefore, in the international context, Rawls argues that

> [one may] think of the parties as representatives of different nations who must choose together the fundamental principles to adjudicate conflicting claims among states. Following out the conception of the initial situation, I assume that these representatives are deprived of various kinds of information. . . . They know nothing about the particular circumstances of their own society, its power and strength in comparison with other nations, nor do they know their place in their society. . . . This original position is fair between nations; it nullifies the contingencies and biases of historical fate. Justice between states is determined by the principles that would be chosen in the original position so interpreted. The basic principle of the law of nations is a principle of equality. Independent peoples organized as states have certain fundamental rights. . . . One consequence of this equality of nations is the principle of self-determination, the right of a people to settle its own affairs without the intervention of foreign powers. Another consequence is the right of self-defense against attack, including the right to form defensive alliances to protect this right. A further principle is that treaties are to be kept, provided they are consistent with the other principles governing the relations of states.[36]

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power is predominant; and if its interests include such things as converting other societies to the state's religion, enlarging its empire and winning territory, gaining dynastic or imperial or national prestige and glory, and increasing its relative economic strength – then the difference between states and peoples is enormous". Rawls, *supra* n. 26, at 28.

34 Rawls, *supra* n. 18, at 27.

35 *Id.* at 148.

36 *Id.* at 378. Especially referring to Brierly, *The Law of Nations* (6th ed., 1963). For the purposes pursued

Given this foundation, Rawls has more recently extended his acclaimed political theory to cover more extensively international relations.[37] Thereby, Rawls addresses a central problem of liberal theories with regard to international ethics: what is the moral status of non-liberal peoples?[38] According to Rawls, there are five types of domestic societies: 'reasonable liberal peoples', 'decent peoples' (in particular decent hierarchical peoples), 'outlaw states', 'societies burdened by unfavorable conditions', and 'benevolent absolutisms'.[39] Rawls refers to liberal peoples and decent peoples together as 'well-ordered peoples'.[40]

In his international theory, however, Rawls abandons the assumption of moral equality and freedom for all the parties in the original position. Paradoxically, the principles of international justice must be agreed upon from the liberal society outward. The principles that obtain among liberal states are guided by liberal conceptions of morality and by similar assumptions about equal citizenship and moral agency.[41] The second step is to extend the contractarian justification of international law beyond liberal societies in order to reach 'hierarchical' societies. Crucial to Rawls' argument is the existence of divergent, yet reasonable, possible kinds of moral-political intuitions. Citizens in liberal democracies start with the assumption that all persons are equal and free and proceed from there under the veil of ignorance to agree on the principles of justice suited to a liberal democracy. In contrast, citizens in hierarchical societies start with different moral intuitions, namely, those that obtain when the assumption is not freedom and equality of all individuals but rather the Hegelian idea that the primary unit is the community (or communities).[42] In these societies, whatever rights individuals have do not derive from them being equal and free persons, but from their membership in groups.

For Rawls, the social contract is a 'device for representation', the aim of which is to formulate principles of international law that all well-ordered peoples would agree to. Hierarchical societies are those informed by non-liberal, yet not unreasonable conceptions of the good. The crucial point in Rawls' international original position is that members of hierarchical societies would not be free and equal agents. By extension, representatives of those societies would not incorporate that assumption into their hypothetical rea-

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it is not necessary to examine in more detail Rawls' *Theory of Justice* as he himself states that except the notions above his theory does not aim at interstate relations, for "the conditions for the law of nations may require different principles arrived at in a somewhat different way". *Id.* at 8.

37 Rawls, *supra* n. 26, at 36.

38 *Id.* at 37.

39 *Id.* at 4 and 63.

40 *Ibid.*

41 This does not entail adherence to any particular comprehensive doctrine, especially to metaphysical conceptions of personhood (such as religious, utilitarian, or Kantian). Cf. Rawls, *Political Liberalism*, 29-32 (1993).

42 *Id.* at 58.

soning leading to the law of peoples. According to Rawls, for a hierarchical society to earn its rightful place in the 'Society of Peoples', it must fulfill two criteria:

> First, the society does not have aggressive aims, and it recognizes that it must gain its legitimate ends through diplomacy and trade and other ways of peace.[43]

The second criterion includes three parts.

> The first part is that a decent hierarchical people's system of law, in accordance with its common good idea of justice, secures for all members of the people what have come to be human rights.[44]

Among these human rights Rawls includes the right to life, to liberty, and to formal equality.[45]

> The second part is that a decent people's system of law must be such as to impose *bona fide* moral duties and obligations (distinct from human rights) on all persons within the people's territory. . . . Finally, the third part of the second criterion is that there must be a sincere and not unreasonable belief on the part of judges and other officials who administer the legal system that the law is indeed guided by a common idea of justice.[46]

According to this concept encompassing hierarchical societies, it follows that in order to formulate principles of international justice that all rational *representatives* in the world can agree to, Rawls has to rely on a far more general concept of rationality – namely, one that avoids asking the assumption of individual autonomy. Consequently, the main task is to devise principles that encompass both liberal and non-liberal societies, precisely decent hierarchical societies. Thus, in his international theory, Rawls abandons the individualist assumptions about human nature as elaborated in *A Theory of Justice*. In contrast, in *The Law of Peoples*, he indicates that this individualist assumption is biased in favor of liberalism. As a consequence, the law of nations must make considerable

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43 Rawls, *supra* n. 26, at 64.

44 *Id.* at 65.

45 *Ibid.* According to Rawls, Articles 3 to 18 of the Universal Declaration of Human Rights (and the derivative rights against genocide and apartheid) embody 'human rights proper'; but he excludes political and economic rights like freedom of expression as distinct from freedom of thought (Article 19), democratic government (Article 21) and – importantly for present purposes – the right to an adequate standard of living (Article 25); but Rawls also holds that all well-ordered regimes should aim to satisfy their people's basic needs and that therefore the rights to liberty and security imply rights to subsistence. *Id.* at 80. For a discussion in this respect see Tesón, 'The Rawlsian Theory of International Law', 9 *Ethics and International Affairs* 79 (1995); Jones, 'International Human Rights: Philosophical or Political?' in *National Rights, International Obligations* (Caney, George, and Jones, eds., 1996).

46 Rawls, *supra* n. 26, at 65-6.

room for non-individualistic (i.e. communitarian) normative conceptions. Rawls rejects a global contract among individuals and replaces it with one among peoples and their representatives, respectively:

> In the Law of Peoples we do somewhat the same: we view *peoples* as conceiving of themselves as free and equal *peoples* in the Society of Peoples (according to the political conception of that society). This is parallel to, but not the same as, how in the domestic case the political conception determines the way citizens are to see themselves according to their moral powers and higher-order interests.[47]

The conception of rationality that Rawls proposes for international law in *The Law of Peoples* is the capacity to uphold a comprehensive view of the good. Rawls believes that the extension of rationality is justified, for representatives of hierarchical societies are rational in two ways: first, they care about the good of the society they represent and thus, they would rationally agree on laws against aggression. Second, the representatives of hierarchical societies aim to protect basic human rights and the good of the people they represent. "Hence, we can say that the representatives of hierarchical societies are decent and rational."[48] In his defense of hierarchical societies, Rawls relies on the liberal commitment to tolerance: just as we ought to tolerate different conceptions of the good held by fellow citizens in a democratic society, we ought to tolerate other societies informed by different conceptions of the good. Tolerance of hierarchical societies is simply the natural extension of tolerance of persons with different views about the good life.[49]

Particularly for matters of compliance with international law it follows from this extension of rationality as put forward in *The Law of Peoples* that both liberal and hierarchical well-ordered societies have reason to accept the 'Law of Peoples'.[50] Hierarchical states need not fear interventions by liberal states. Liberal states should respect the sovereignty of certain non-liberal hierarchical societies, not only as a *modus vivendi*, but as consistent with liberalism itself. Thus, hierarchical societies would have nothing to fear from liberal states as long as they satisfy the 'Law of Peoples'. Indeed,

> . . . well-ordered peoples do not wage war against each other, but only against non-well-ordered states whose expansionist aims threaten the security and free institutions of well-ordered regimes and bring about war.[51]

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47 *Id.* at 33-4.

48 *Id.* at 69.

49 Rawls argues that: ". . . not all peoples can reasonably be required to be liberal. This follows, in fact, from the principle of toleration of a liberal Law of Peoples and its idea of public reason as worked out from a family of liberal conceptions". *Id.* at 122.

50 *Id.* at 89-90.

51 *Id.* at 94.

Rawls also departs from *A Theory of Justice* on the question of international distributive justice. He holds that the relatively egalitarian conception of distributive justice characteristic of liberal political theory – and found in one form (as the 'difference principle') in his other works – has no international parallel:[52] although he thinks that the duty of assistance would accomplish many identical results, there is no general requirement to reduce inequalities among individuals living in societies with different endowments of natural or human resources, different societies, or different cultures. Strictly speaking, there are no international obligations for distributive justice.[53]

According to Rawls, there are three main reasons which allow for this conclusion: first, the circumstances of international relations are different from those typical of the societies for which the difference principle was framed, and we have no reason to assume that a principle that would be appropriate in the one set of circumstances would also be appropriate in the other. Second, not all well-ordered societies would accept any particular liberal distributive principle for the international case; indeed, by hypothesis the decent, well-ordered hierarchical societies reject all such principles. Third, the main impediments to a society's economic and social development are more likely to lie in its public culture and religious traditions than in its resource endowments or its position in the international political economy. Consequently, the distributive responsibilities of outsiders to members of less favored societies have to be ancillary to the responsibilities of the members of those societies themselves for bringing about their own improvement.[54] If the difference principle were universally valid, then the international economic system should be arranged in a way that improves the situation of the poorest states. Nevertheless, the best way to secure international distributive justice is to get all societies to fulfill the conditions of legitimacy: fair treatment according to the comprehensive conception of justice and observance of 'basic human rights'. Rawls concludes that more progress will be made, especially in developing countries, if political legitimacy and stability are achieved before any scheme of global redistribution could work.[55]

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52 *Id.* at 113-6. Arguments for a global difference principle are worked out in Beitz, *Political Theory and International Relations* (1999); Pogge, *Realizing Rawls*, Chaps. 5-6 (1989); Pogge, 'An Egalitarian Law of Peoples', 23/3 *Philosophy and Public Affairs* 195 (1994).

53 Cf. Walzer, 'Response' in *Pluralism, Justice, and Equality*, 293 (Miller and Walzer, eds., 1995): "I am inclined to think that, for now at least, ordinary moral principles regarding humane treatment and mutual aid do more work than any specific account of [international] distributive justice." Compare Donelan, *Elements of International Political Theory*, 196-8 (1990).

54 Rawls, *supra* n. 26, at 114-5.

55 Rawls, *supra* n. 26, at 120. Thus, Rawls' international conceptualization is largely deprived of his 'social' component, which underlies his domestic 'theory of justice'. Strictly speaking, a global difference principle would require massive transfers of wealth from rich to poor countries. Rawls does not believe that there are such duties aimed at changing the global distribution of resources. Instead, he suggests that the best way to secure international distributive justice it to get all societies to maintain appropriate political and social institutions. The social dimension is thus reduced to a duty of assistance to provide these institutions.

The concept of Rawls – both the one put forward in *A Theory of Justice* and in *The Law of Peoples* – have been subject to an intense debate and fierce criticisms. One central general criticism has been that liberalism would violate the Pareto principle. Economists commonly assume that any reasonable notion of social welfare would conform to the Pareto principle, which holds that if each individual prefers one state of affairs to another, then social welfare must be higher in the first state than in the other state. Amartya Sen, in his influential article entitled *The Impossibility of a Paretian Liberal*, shows how liberal rights can produce outcomes that everyone would prefer to avoid, thereby violating the Pareto principle.[56] Sen infers that one cannot uphold both liberal values and the Pareto principle at the same time. Disturbed by the implication that "individual liberty may have to be revoked" under the Pareto principle, Sen concludes that the very conflict he exposes indicates "the unacceptability of the Pareto principle as a universal rule".[57]

In a similar vein, Louis Kaplow and Steven Shavell identify potential conflicts between the Pareto principle and notions of 'fairness', which give weight to considerations other than the overall utility level of each individual.[58] Indeed, Kaplow and Shavell claim that "any conceivable notion of social welfare that does not depend solely on individuals' utilities implies a 'social welfare function' that violates the Pareto principle".[59] The authors infer that as a matter of logical consistency, "a person who embraces a notion of fairness must on some occasions favor adopting legal rules that would make every person worse off", a conclusion that they view as "a serious challenge to proponents of notions of fairness who also care about the well-being of members of society".[60] Contrarily, it has been argued that

> . . . any plausible fairness theory includes multiple principles and that any such pluralistic theory must specify rules for when some principles take priority over others. There is nothing to prevent a pluralistic fairness theory from including the Pareto principle among its principles and giving the Pareto principle priority over other principles. Such a theory would never violate the Pareto principle but would still apply fairness principles when doing so would not create a conflict with the Pareto principle. This fairness theory would not stand in opposition to human welfare, because it would never make everyone worse off. Fairness principles would only come into play when they protect the interests of some per-

56 Sen, 'The Impossibility of a Paretian Liberal', 78 *Journal of Political Economy* 152 (1970).

57 Sen, 'Liberty, Unanimity and Rights', 43 *Economica* 235 (1976).

58 Kaplow and Shavell, 'The Conflict Between Notions of Fairness and the Pareto Principle', 1 *American Law and Economics Review* 65-7 (1999).

59 Kaplow and Shavell, 'Any Non-Welfarist Method of Policy Assessment Violates the Pareto Principle', 109 *Journal of Political Economy* 281 (2001); Kaplow and Shavell, 'Notions of Fairness Versus the Pareto Principle: On the Role of Logical Consistency', 110 *Yale LJ* 237 (2000). See also Kaplow and Shavell, *Fairness Versus Welfare* (2002).

60 Kaplow and Shavell, *supra* n. 58, at 76.

> son willing to invoke those principles when preferences conflict. To invoke fairness in these contexts does not reflect any lack of concern with human welfare. Rather, under such a theory, fairness notions would go to the question of how we trade off the welfare of some against the welfare of others. Fairness notions would help determine the appropriate distribution of benefits and burdens in society.[61]

One central criticism with regard to *The Law of Peoples* in particular has been the criteria Rawls sets for hierarchical societies in order to be recognized as a *bona fide* member of the 'Society of Peoples' and tolerated in that sense. His conception of human rights, which Rawls refers to as 'human rights proper', which can be accepted by an illiberal society and would not be rejected for being particularly Western or liberal, arguably seems somewhat arbitrary. But while this conception may be not completely convincing, the result of this conception may be – at least for some liberal cosmopolitan readers – even more disappointing: if the people of hierarchical societies were admitted into the 'Society of Peoples' and proclaimed to be a member in good standing, they would lack any motivation to try to become more liberal and eliminate possible injustices that citizens could bear. According to Rawls, these hierarchical societies would already be free from sanctions, and other members of the 'Society of Peoples' are not permitted to publicly criticize them so there is no compelling reason for those societies to become more liberal.

On the other hand, Rawls' account as elaborated in *The Law of Peoples* employs a conceptualization similar to the one that will be labeled 'cosmopolitan communitarianism' later on.[62] Rawls himself calls the 'Law of Peoples' a 'realistic utopia'.

> Political philosophy is realistically utopian when it extends what are ordinarily thought to be the limits of practicable political possibility and, in so doing, *reconciles us to our political and social condition*. . . . These historical conditions include, in a reasonably just domestic society, the fact of reasonable pluralism. In the Society of Peoples, the parallel to reasonable pluralism is the *diversity among reasonable peoples with their different cultures and traditions of thought*, both religious and nonreligious.[63]

As will be shown,[64] it is especially Thomas Franck who relies on social liberalism in his version of compliance theory: in both his scholarly pieces on the pertinent theme he explicitly relies on the arguably most influential thinkers of this philosophical strand, namely, John Rawls and Ronald Dworkin.

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61 Chang, 'A Liberal Theory of Social Welfare: Fairness, Utility, and the Pareto', 110 *Yale LJ* 178-9 (2000).

62 See *infra* par. 7.

63 Rawls, *supra* n. 26, at 11 (emphasis added).

64 See *infra* Chap. 5, pars. 2 and 3.

> John Rawls [has] characterized the phenomenon of social assent to law primarily in various illustrative or imaginative quasi-contractarian and bargaining metaphors which also might be of more than passing interest if applied to relations between states. This philosophical transference could be assayed without first having to satisfy the inquirer that the international system of law is like national legal systems. It could be done without empirical evidence that the rules of the international system are usually obeyed. . . . It is not necessary to the inquiry that all, or even most, rules are obeyed.[65]

I will attempt to show that Franck's elaboration on Rawls' concept of legitimacy suffers from similar deficiencies and that large parts of its assumptions stem from the transference he indicates in the quotation outlined. Nevertheless, Franck is unlikely to endorse the step Rawls makes when he departs in *The Law of Peoples* from the position he put forward in *A Theory of Justice*.

2.2. Laissez-faire Liberalism

Laissez-faire liberalism, sometimes identified with libertarianism, holds that distribution is just when it has been arrived at from a previous distribution that itself was just, through a series of transactions that have not violated anyone's rights.[66] Robert Nozick, arguably the best-known proponent of libertarianism, characterizes such views as 'historical' theories because they argue that the justice of a distribution depends on how it came about.[67] Such theories typically hold that considerations of liberty argue against most forms of political intervention in market processes except when required to remedy the effects of prior violations of liberty.[68] The theories I shall consider in the following apply this principle to the world at large. Their re-distributive potential arises from the prospect that intervention in markets may be required to rectify injustices in the prior global division of benefit from the earth's resources.

Much of the dispute within and about laissez-faire liberalism involves the definition and justification of the rights that market transactions should respect. Whether a distribution came about through a process that respected everyone's rights, however, is only one of the factors that determine whether the distribution is just. The other factor is the justice of the predecessor distribution. And of course the same can be said of that distribution, and of its predecessor, and so on, all the way back to the beginning, when unowned things – that is to say, resources in nature – were initially appropriated for private use.

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65 Franck, *supra* Introduction, n. 3, at 8-9.

66 See generally Barry, *On Classical Liberalism and Libertarianism* (1986); Bering, *Libertarianism: the economy of freedom* (1995); see also v. Hayek, *The Constitution of Liberty* (1960).

67 Nozick, *supra* n. 9, at 153.

68 Kymlicka, *supra* n. 3, at 96-9.

Laissez-faire liberals divide over the question whether injustice in initial appropriation justifies subsequent remedial intervention by the state. *Status quo* theorists hold that whatever injustices may have occurred in the first appropriation will have been rectified subsequently, perhaps as a result of many generations of economic growth and innovation. Consequently, there is no argument for re-distribution to rectify inequalities in benefits derived from resources.[69] *Laissez-faire re-distributivists*, by contrast, argue that it may be necessary for the state to intervene to rectify the effects of injustices in earlier appropriations of unowned things, either by re-distributing control over resources or by compensating those who have less with transfer payments from those who have more.

In the following excursive discussion of libertarian philosophy in the international context, the re-distributivist variant will be considered exclusively, mainly for three reasons. First, it seems to be the more plausible form of the laissez-faire theory.[70] Second, this variant is more thoroughly represented in the recent literature on international justice, principally in the work of Hillel Steiner.[71] Third, laissez-faire re-distributivism seems especially pertinent to questions of global environmental justice that have recently been raised.

When, if ever, is an injustice committed in the appropriation of an unowned thing? Most theorists hold that some sort of principle of equality should limit an initial appropriation.[72] Steiner argues that persons who appropriate more than an equal share "are imposing an unjust distribution on some or all of those who have appropriated a less than equal portion".[73] Therefore, there is a requirement of redress.[74] This carries over into a world in which there are no more unowned things: in a "fully appropriated world, each person's original right to an equal portion of initially unowned things amounts to a right to an equal share of their total *value*".[75] Of course, for any individual who appropriates more than a fair share, there is no specifically identifiable individual who suffers a resulting disadvantage. So Steiner proposes a 'redress fund' that works by 'overappropriators' paying into it and 'underappropria-

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69 Nozick is the best-known contemporary defender of this view.

70 For present purposes an explanation has to be forgone. For a discussion on this argument see, for example, Cohen, *Self-ownership, Freedom, and Equality*, Chaps. 3-4 (1995).

71 Steiner, *An Essay on Rights* (1994); Steiner, 'Territorial Justice' in *National Rights, International Obligations*, *supra* n. 45.

72 Why this should be so is controversial. The controversy is best approached in the literature on Locke's theory of property acquisition, particularly in commentary on his proviso that any appropriation of unowned things should leave "enough, and as good . . . in common for other"; see Locke, *Two Treatises of Government II*, Sec. 27 (Laslett ed., 2nd ed., 1967).

73 Steiner, *An Essay on Rights*, *supra* n. 71, at 268.

74 See also Cohen, *History, Labour, and Freedom: Themes from Marx*, 253 (1988).

75 Steiner, *An Essay on Rights*, *supra* n. 71, at 271 (emphasis in original).

tors' making claims against it, with the amounts due and payable calculated in relation to the value of an equal share.[76]

In an international context, the question is whether a historical theory of distributive justice should recognize state (or any other political) boundaries as having basic significance. If the initial rights belong equally to all human beings and apply to all resources, it is hard to see why political boundaries should affect the validity or strength of a person's claims. Boundaries might have *some* significance if they are understood as delimiting territorial aggregates composed of chunks of territory (and appurtenant natural resources) initially acquired in legitimate ways by individuals and joined by agreement.[77] This would be one way of justifying the state's authority over its territory. But the state's authority would be no more extensive than the rights of its individual founders. Therefore, if there were injustice at the stage of initial appropriation, it would cast its shadow over the rights of the state. Accordingly, at least in this respect, the significance of state boundaries would be derivative rather than basic, and the state's rights over territory would be limited in the same way as the rights of its members.

The general consequences for international justice are straightforward, at least in principle: if the equal right to previously unowned things applies globally, then the 'redress fund' should be conceived as a global fund, drawing its revenues and paying its claims to and from individuals wherever they are located, relying on states – if at all – only as agents for their people.[78] But if the consequences are direct in principle, their implementation is hardly easy to conceive. There are two central problems, namely, how to establish the value of an equal share of natural resources and how to administer the system of transfers required to redress inequalities. Steiner does not say much on either point, except to suggest that "states must pay rates".[79] The idea seems to be that a global authority would apportion and collect a resource tax from states consuming more than their fair share (conceived as the total of their people's individual shares) and pay the revenues out to states consuming less.[80]

Finally, a note should be made about human rights in Steiner's approach. For Steiner, human rights belong to human beings 'as such', and they support claims against other citizens and domestic institutions, as well as against individuals and groups beyond the boundaries of the state. This follows from the idea that rights represent natural rather than conventional entitlements. The scope of human rights would have to be considerably restricted, however; since Steiner says very little about constitutional or political structures, there is no clear basis in his libertarian theory for rights to political participation. More to the point for present purposes, within this concept, there is no human right to subsistence or to any particular minimum level

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76 *Ibid.*

77 Locke, *supra* n. 72, at Secs. 117, 120-1, may have held such a view.

78 Steiner, *An Essay on Rights*, *supra* n. 71, at 269-70.

79 *Ibid.*

80 See also Pogge, 'A Global Resource Dividend' in *Ethics of Consumption* (Crocker and Linden, eds., 1998).

of welfare, although of course the right to an equal share of the world's resources might make any such right superfluous. It therefore appears that the human rights acknowledged by laissez-faire liberalism only constitute a small subset of the rights of the Universal Declaration of Human Rights.

One kind of idealization in laissez-faire views is the assumption that an initial appropriation satisfies the applicable principles of justice. Additionally, there are other kinds of idealization, for example, that conditions of fair competition will prevail in labor as well as in capital markets, that individual choices in the economic realm will not be coerced, and that the transaction costs of establishing mutual benefit schemes will not be excessive.[81] The dispute about laissez-faire theories often reflects controversy about the measures that would be necessary if assumptions like these turn out false. The most common philosophical objections to laissez-faire can be understood as reflecting doubts that its commitment to a very wide scope of individual liberty can be reconciled with the accommodations required to carry out these measures. These objections to the general view apply *a fortiori* to its globalized variant. Accordingly, it is an interesting question how claims on the global fund should be calibrated. If claims are really for redress, then presumably they should be based on the same principle as contributions: they should be claims for the difference between the value of one's actual resource endowment and the global average.

It is important to recognize the difference between this concept and conceptions of distributive justice that distribute according to some overall measure of need or deprivation. For resource re-distributivists, the flow goes from the resource-rich to the resource-poor. For other kinds of re-distributivists, the flow more likely goes from the wealthy to the needy. These may not be the same because resource endowments and social wealth do not travel together – a society can be resource-poor but wealthy. The laissez-faire principle could require re-distribution in favor of a resource-poor society that is wealthy enough to provide adequately for its own people rather than a more resource-rich society, which for any number of reasons might be less wealthy all things considered. This may seem counterintuitive, but for the laissez-faire liberal it is also unavoidable: it is simply a reflection of the theory's indifference to considerations of need. The plausibility of laissez-faire re-distributivism at the global level may derive not from the plausibility of the laissez-faire principle itself, but instead from the distinct idea that it is not fair for some people (or societies) to do better than others simply because they find themselves more richly endowed with natural resources. After all, differences in resource endowments taken broadly (including differences in climate and geography as well as natural resources conventionally understood) seem as arbitrary as anything could possibly be.[82]

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81 See also the arguments by Gauthier, *Morals by Agreement* (1986); Kymlicka, *supra* n. 3, 126-30.

82 Cf. Beitz, *supra* n. 52, at 136-43; Barry, 'Humanity and Justice' in *Ethics, economics, and the law* (Pennock and Chapman, eds., 1982).

It follows that there is no unfairness in unequal resource endowments, for nothing about fairness follows from empirical observations about how resource-rich societies tend to squander their good fortune. If one shares the view that individuals are entitled to benefit equally from the world's resources, then the right conclusion seems to be that resource inequalities should be compensated. This compensation should encourage or at least do not obstruct the processes of economic and social transformation through which a society must pass in order to develop the capacity to satisfy its people's material needs. How this might occur is, however, a complicated question of development policy.

At first sight, there seems to be no real counterpart to the 'minimal state' libertarian philosophers. The reason may be twofold: first, given its shortcomings, libertarianism has never received widespread acceptance in the politico-philosophical discourse.[83] Second, the theory seems to address more the question of rule-making than rule-compliance. Yet, such minimalist concepts of what is justifiable governance ought to be highly suggestive to students of the international system, if only because they make rather a virtue of the necessity compelled by a world of national sovereigns. As a consequence, one would expect some philosophical inquiry into the proper limits of an international system of obligation. It is therefore all the more odd not to find any transference from nation-based to globally based libertarian theory.

Perhaps the reason for the lack of any libertarian theory of (compliance with) international law is that international lawyers are so busy making – or making up – international law and defending its authority that there appears to be too little time or inclination left for thinking systematically about areas of international activity which ought forever to be free from regulation. In spite of the absence of any systematic transference to the international system, libertarianism still has an impact on the international system: it fundamentally underlies the processes restructuring the world order, which has been described as globalization in Chapter 1. It therefore may be thought of as an underlying 'political' philosophy of the environment to which actors – who might or might not comply with international norms – are exposed. On the other hand, considering that the libertarian or laissez-faire approach suggests a world in which there are just a few norms to be complied with, it is quite straightforward that libertarian thinkers do not elaborate extensively on questions of compliance with (international) norms.

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83 Nozick seemed to distance himself from his earlier work when he stated that "[t]he libertarian position I once propounded now seems to me seriously inadequate, in part because it did not knit the humane considerations and joint cooperative activities it left room for more closely into its fabric. . . . There are some things we choose to do together through government in solemn marking of our human solidarity, served by the fact that we do them together in this official fashion." Nozick, *The Examined Life: Philosophical Meditations*, 286-7 (1989). Finally, it should be noted that a couple of years later Nozick stated that "[t]he political philosophy presented in *Anarchy, State, and Utopia* ignored the importance to us of joint and official symbolic statement and expression of our social ties and concern and hence . . . is inadequate". Nozick, *The Nature of Rationality*, 32 (1993).

2.3. Cosmopolitanism

The philosopher Diogenes, when asked where he came from, is reported to have replied "I am a citizen of the world".[84] The point of view suggested by this remark seeks to regard the whole world as a single entity and to see each part of the whole in its true relative proportion. If local viewpoints can be described as partial, then Diogenes' viewpoint is impartial. This view is the one commonly referred to as cosmopolitanism which – according to the Kantian tradition[85] – depends on the existence of a universal moral law, and on the idea that it is possible to create, or move towards, a world society where this moral law becomes the basis of international law and international organizations.[86] The Kantian thesis is that a morally legitimate international law is founded upon an alliance of separate free nations, united by their moral commitment to individual freedom, by their allegiance to the international rule of law, and by the mutual advantages derived from peaceful intercourse. It basically assumes that there are strong links between international peace and personal freedom and between arbitrary government at home and aggressive behavior abroad.

According to German philosopher Immanuel Kant, international law should be based upon a union of republican states. Kant asserts that adherence thereto will result in an alliance of free nations that will maintain itself, prevent wars and expand steadily. Thereby, a republican state is defined by a constitution based mainly upon three principles. First, the principle of freedom of all members of a given society requires mechanisms for guaranteeing traditional civil and political rights, which act as barriers against the abuse of state power: such mechanisms form the basis of a republican constitution because they implement the respect for autonomy and dignity of persons. Second, the principle of independence means that all legal acts must derive

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84 Diogenes Laertius, 'Diogenes' in *Lives of Eminent Philosophers* (Hicks trans., 1925).

85 Cf. Kant, *supra* n. 1. The roots of cosmopolitanism go back to Stoic philosophy of the 4th century BC. Thus, as might also be indicated from the introductory remark, much is left out in dealing with cosmopolitanism according to the Kantian tradition. For background information on cosmopolitanism and Stoic philosophy, see Spence, *Address to the Second International Conference of the Australian Institute of Computer Ethics* (Nov. 2000), transcript available at <http://www.geocities.com/stoicvoice/journal/0202/es0202a1.htm>. ("Cosmopolitanism is a central belief in Stoic philosophy.").

86 Barry, *supra* n. 82, at 450-5. See generally Thompson, *Justice and World Order* (1992); Held, *supra* n. 1, at 29-36. Koskenniemi identifies three types of legal cosmopolitanism. "First, a deep-structural cosmopolitanism maintains that, deep down, the world is already united, perhaps by a uniform human nature or an economic or environmental logic. . . . A second brand of cosmopolitanism claims to offer principles of reason that are valid for everyone – and thus applicable beyond civilizational limits. . . . A third cosmopolitanism is often theorized in multicultural hybrids, attachments to several localities, a situated and full-blooded set of actually existing diasporic practices." Koskenniemi, 'Legal Cosmopolitanism: Tom Franck's Messianic World', 35 *NYU J. Int'l L. & Pol.* 475-7 (2003). Koskenniemi asserts that at least Franck's *The Power of Legitimacy Among Nations* comes close to the second variant, being "distinctly rationalist" and employing "often references to Rawls". *Id.* at 480. Here, Franck's approach has been discussed in the context of 'social liberalism'. See *supra* par. 2.1.

from a single common legislation because only in the *Rechtsstaat*, i.e. under the rule of law, allegiance to the law is rational. Third, the principle of equality of all as citizens, i.e. equality before the law, does not allow for distinctions among citizens because of their sex, religion, or belief.[87]

Kant believed that an international order could be established only when governments freely abjured their right to make war against each other (despite his emphasis on the idea of coercion to sustain the law within a state). His central argument is that if the peoples are self-governed, then citizens on both sides of any dispute will be very cautious in bringing about a war whose consequences they would themselves bear.[88] Within this concept of government, Kant argues for the maintenance of separate nation-states as a balance between the dangers to freedom posed by centralized world government and the state of nature.[89] An alliance of liberal democracies subject to international law will provide the exact point of equilibrium for world order. Compliance with international law will be achieved gradually by operation of subtle decentralized systemic mechanisms.[90] Most importantly, because in the international arena there can be no courts backed by force, there can be no rational decision about the justice of a particular war.

Contemporary proponents of cosmopolitanism who are influenced by Kantian thinking assume that global justice consists not only of a catalogue of civil and democratic rights, but also the entitlement of each individual to an adequate share of the world's resources.[91] These entitlements are supposed to apply to individuals as individuals – regardless of their culture or national identity.[92] The political goal of cosmopolitanism is to bring about a world society in which principles and rights can be universally recognized.

According to cosmopolitanism, communitarianism is unable to explain how justice is possible in a pluralist modern society.[93] Most people probably identify much more closely with their family, their friends or their religious group than they do with their political society. Because their account of community does not fit relations in a

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87 Kant, *supra* n. 1, at 93-8.

88 It remains to be seen whether the Kantian thesis can be verified by an empirical examination, which is done *infra* Chap. 5, par. 6.

89 According to Kant, the state of nature exists when states are at war or a threat of war exists. Kant, *supra* n. 1, at 96-7.

90 Cf. D'Amato, *International Law: Process and Prospect*, 1-9 (1995); Reisman, 'Sanctions and Enforcement' in *International Law Essays*, 386 (McDougal and Reisman, eds., 1981).

91 See references *supra* n. 1.

92 Because Kantianism relies on universal traits of persons (their rationality), it is incompatible with relativism. It is not possible to defend at the same time Kant's theory of human nature and morality, and the view that liberal democracy and respect for persons is good only for certain societies. The categorical imperative is universal and holds for every civil society regardless of history and culture.

93 Communitarianism is discussed in more detail *infra* par. 3.

modern state, communitarians would tend to lapse into a reactionary position, expressed by a distaste for modern political complexities and uncertainties and a longing for a simpler political life.[94] A more adequate conception of political identity would have to allow that individuals' associations are not only of different kinds, but also exist on different levels. A person can be a family member, belong to a religious group, etc. and also be a citizen of a country that contains families and religious groups. In some circumstances one identity takes precedence; in other circumstances another becomes more important. The problem of those concerned with political legitimacy of states or cosmopolitan structures is to explain to individuals why (and when) they ought to subordinate their family, religious, or other group loyalties to the demands of political authority. Communitarianism would not solve this problem.

Cosmopolitanism tries to construct an international ethical theory that incorporates the assumption that all rational persons would rather be more than less free into the international contract as well, with the result that states that do not respect autonomy are out of compliance with the principles of international justice.[95] Consequently, cosmopolitanism depends on the notion that there are values (such as peace and security, self-determination of communities, freedom of individuals, or individual well-being), which everyone in the world ought to accept, whatever their personal interests or community loyalties are. To justify these values, a post-Kantian cosmopolitan philosopher would have to make a case for saying that all reasonable people would agree to accept them.[96]

One reason why widespread agreement (on these liberal individualist values) could be expected would be that these cosmopolitan ideals are often appealed to in political debates, not just by people in the Western world, but increasingly also by people in non-Western countries. They would also be recognized in one form or other by United Nations declarations.[97] However, these ideals cannot be regarded as moral or political principles because of the disagreement that exists among people(s) about what they mean and how they should be applied or made compatible with other values. Another shortcoming of cosmopolitanism is that its application depends on what political program cosmopolitans regard as realizable. Finally, it is at least unclear, given political realities, as well as community identities and conflicts of value, whether and

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94 This reaction is especially noticeable in Sandel, 'The procedural republic and the unencumbered self', 12 *Political Theory* 81 (1984).

95 It is exactly this global contract among individuals, which is abandoned by Rawls in *The Law of Peoples*. See *supra* par. 2.1.

96 See Habermas, 'Discourse ethics: notes on a program of philosophical justification' in *Communicative Ethics Controversy*, 60-8 (Benhabib and Dallmayr, eds., 1990).

97 Cosmopolitan values could thus be thought of as constituting what Rawls calls an 'overlapping consensus' among individuals who not only have different interests but also different, and sometimes contrary political philosophies. Cf. Rawls, *supra* n. 41, Chap. 4.

how individuals and communities can be held responsible for ensuring that these ideals are eventually realized. Cosmopolitans, however, insist that these ideals *do* serve as a standard for judging the political *status quo* and a motivation for cosmopolitan programs.

This standard and the motivation come twofold. Hence, one may argue that cosmopolitanism occurs in international thought in at least two different senses, which might be called institutional and moral cosmopolitanism. Institutional cosmopolitanism refers to the way the world's political structure should be reshaped so that states and other political units are brought under the authority of supranational agencies of some kind – a 'world government', for example, or perhaps a network of loosely associated regional bodies. Moral cosmopolitanism, on the other hand, concerns itself not with institutions themselves, but with the basis on which institutions should be justified or criticized. In Thomas Pogge's phrase, moral cosmopolitanism is the notion "that every human being has a global stature as the ultimate unit of moral concern".[98] Thus, this kind of cosmopolitanism applies to the whole world the maxim that choices about what we should do or what institutions we should establish should be based on an impartial consideration of the claims of each person who would be affected.

It should be noted that cosmopolitanism regarding ethics does not necessarily imply cosmopolitanism regarding institutions. For example, it is consistent with moral cosmopolitanism to hold that something like the state system is better than anything like a world government – perhaps because human interests are best served in a world partitioned into separate societies whose members recognize special responsibilities for one another's well-being. (Kant's cosmopolitanism was of this kind.) Moral cosmopolitanism is distinguished not by any particular view about world political organization, but rather by a view about the moral basis on which this question should be decided.[99] This applies as well to the question of international distributive justice since cosmopolitanism does not dictate any particular view so much as it states a condition that the justification of any acceptable view must satisfy. So it should not be surprising that there are many different cosmopolitan views about international distributive justice – human rights theories, globalized utilitarianism, various forms of global egalitarianism, and pluralistic theories of global scope.

If there is a major axis of differentiation among these theories, it is the extent to which a view treats the state or a national (or any other) community as an enclave of special distributive responsibilities which are fundamentally distinct and justified separately from general or global responsibilities. For example, some theories treat special (global) responsibilities, to the degree they may be said to exist at all. Such views express the idea that distributive justice at the domestic level is continuous with distributive justice at the global level. The argument is that once the requirements of

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98 Pogge, 'Cosmopolitanism and Sovereignty', 103 *Ethics* 49 (1992).

99 Cf. O'Neill, *Towards Justice and Virtue: A Constructive Account of Practical Reasoning*, 172 (1996).

international distributive justice are settled, there is no further, separate question about domestic justice. Such a view would be a contractualist or Rawlsian theory with a global difference principle.[100]

Other views hold that special responsibilities can arise from sources other than general duties – for example, from relationships that have value for their participants – but that these responsibilities are constrained by global distributive considerations. Such theories are discontinuous, meaning that they allow for distributive requirements within sectional units that are different from, and possibly more stringent than, those at the global level. Cosmopolitanism is insofar problematic as it tries to extend Kant's moral universalism to political morality as well.[101]

International law is concerned with incorporating those rules and principles that are deemed just on a global scale. In this respect, the idea that all states should implement a republican constitution proposed by Kant is, at least in part, generated by a desire to impose a system of values to groups in other parts of the world who have different constitutional traditions.[102] Hence, cosmopolitan theories are unrealistic in one (or both) of two senses: either they require more extensive international reform than seems politically likely or they require the establishment of international institutions with a degree of coercive power that states are not likely to concede. Certainly, cosmopolitans can reply that any reasonable theory must be constrained by what is possible. It might therefore establish incremental or reformist goals capable of being accomplished under prevailing conditions and seek ways to change these conditions so that further incremental improvements can eventually be brought about.

The other problem with cosmopolitanism is not that it is unrealistic in an empirical sense, but rather that it is unrealistic in a moral sense. In particular, it tends to misunderstand people's local affiliations – that is, attachments to various communities that are typically experienced as imposing responsibilities different in kind and degree from those imposed on us by our common humanity. In fact, the most characteristic philosophical weakness of cosmopolitan theories is a failure to take the relationships that individuals develop to live successful and rewarding lives seriously enough.[103]

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100 In *The Law of Peoples*, Rawls responds to claims that the arguments for a domestic difference principle are just as cogent in an international original position by equating such arguments with a cosmopolitan vision necessitating "global justice for all persons" rather than the "foreign policy of reasonably just liberal people" towards other societies of liberal and non-liberal but decent peoples. Such a move, Rawls argues, would result in a duty on the part of liberal principles to work to shape all non-liberal societies in a liberal direction, which assumes illegitimately that we know already that decent non-liberal societies are not acceptable. Thus, it would be better to proceed "from the international political world as we see it", and identify principles of toleration appropriate to a world including decent non-liberal states. *Id., supra* n. 26, at 82-3.

101 Cf. *infra* par. 7.

102 The problematic argument of Kantians is that a republican constitution is *objectively* right; this argument is not shared by communitarians. Cf. *infra* par. 3.

103 This is the sort of communitarian argument against cosmopolitan theory. Cf. *infra* par. 3.

However, this is not to say that the weakness cannot be overcome by any means, and a sophisticated cosmopolitanism may be able to explain how local affiliations might give rise to special responsibilities. Such a view would recognize the value to individuals of their associations with domestic or local communities and argue that ethically significant properties of these associations justify internal distributive arrangements that are different from, although not inconsistent with, what is required by global principles.[104]

A third challenge to cosmopolitan distributive theories emerges from the contrast with social liberalism concerning the apportionment of responsibility for improving material standards of living within a society. Social liberalism holds societies themselves primarily responsible for meeting the needs of their people, with the international community functioning mainly to keep peace, maintain orderly conditions of free trade, and perhaps relieve distress in times of emergency. An important way in which domestic societies provide for their own development is through savings and investments in both physical and human capital. By contrast, a cosmopolitan view amounts to a global sharing of responsibility, which, in the absence of a global culture strong enough to provide stability and motivate contribution, could generate an unending series of transfers from societies prudent enough to invest rather than consume to those imprudent enough to do the opposite. This, however, hardly seems fair.

Cosmopolitanism structures to a large extent the argument in liberal theory. For example, for Anne-Marie Slaughter Kantian cosmopolitanism forms a cornerstone of her approach to (compliance with) international law. She argues that "the 17th and 18th century fathers of classical international law internalized deep assumptions about the incidence of war and peace and the nature of States" and therefore "international lawyers must be more explicit about their underlying political science".[105] As I will show later in more detail, Slaughter and other proponents of liberal theory adopt a method whereby cosmopolitan liberalism is intentionally validated by way of empirical method. Their account relies on the pillars of cosmopolitan liberalism, both institutional and moral cosmopolitanism. Thus, it is argued that liberal states are institutionally best suited for judicial enforcement of international norms. Second, liberal theory argues that liberal states – which are states with some form of representative democracy, a market economy based on property rights, and constitutional protection of civil and political rights – are far less likely to go to war with one another than they are to go to war with non-liberal states, giving rise to what is commonly called the 'liberal peace'. For now, it remains to be seen whether this thesis put forward by

104 See, for example, Scheffler, 'Individual Responsibility in a Global Age', 12 *Social Philosophy and Policy* 219 (1995); Scheffler, 'Relationships and Responsibilities', 26/3 *Philosophy and Public Affairs* 189 (1997); Mason, 'Special Obligations to Compatriots', 107 *Ethics* 427 (1997).

105 Slaughter, *supra* Introduction, n. 26, at 537.

proponents of cosmopolitan liberalism withstands the application of its self-proclaimed empirical validation method. Whether this thesis can be empirically verified or not will be examined later on by way of discussing Slaughers's and others' theories in more detail.[106]

3. Communitarianism

Communitarians present themselves as political and philosophical opponents of liberalism. They oppose liberalism not by attacking the existence of universal moral principles. Instead, they argue that liberals have a mistaken or inadequate conception of the self. Michael Sandel, for example, takes Rawls as a representative for all liberals and attacks him for treating the self as independent of its ends.[107] According to Sandel, it is this assumption that Rawls relies on when he imagines individuals choosing principles of justice independent of their knowledge of their race, class, gender, associations, and idea of the good. Communitarians insist that the identity of an individual is constituted by his or her relation to others and to shared values and ideals of a community.[108] In their view, the community and its good are central to the ethical and political life of an individual,[109] and they argue that the priority liberals give to principles of right over conceptions of the good has to be reversed. In a politics of the common good, 'the nation' would serve as 'formative community' for a common life, and not as in a politics of rights, "as a neutral framework for the play of competing interests".[110] Only in such a community of common purposes we could find 'moral ties antecedent to choice', and only with such antecedent moral ties could we make sense of our moral and political lives.[111]

But communitarians are not primarily interested in making moral or political recommendations. Their main focus is a metaphysical one. They think that liberals have never sufficiently come to terms with the implications of denying the existence of the

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106 See *infra* Chap. 5, par. 6.

107 Sandel, *Liberalism and the Limits of Justice*, 15-8 (2nd ed., 1998). Note that Sandels' critique of the Rawlsian account refers to the sort of arguments Rawls put forward in *A Theory of Justice*, rather than the ones in *The Law of Peoples*.

108 Cf. Walzer, 'The moral standing of states: a response to four critics', 9/3 *Philosophy and Public Affairs* 209 (1980); Walzer, 'The communitarian critique of liberalism', 18 *Political Theory* 6 (1990).

109 According to that view, the primary moral community is the political community. As Michael Walzer observes "the political community is probably the closest we can come to a world of common meanings". The political community is also a historical community with a common language and culture, and shared "sensibilities and intuitions". The common understandings of this political-historical community shape all our categories and commitments. See Walzer, *Spheres of Justice: A Defense of Pluralism and Equality*, 28-9 (1983).

110 Sandel, *supra* n. 94, at 93.

111 *Id.* at 87.

Kantian noumenal self – the transcendent, rational will which is constituted independently of empirical conditions – and therefore never faced the implications for political theory of a self that is merely an empirical creation, a creature of its cultural environment and social relations. On the liberal view of the self, individuals are considered free to question their participation in existing social practices, and opt out of them. As a result, individuals are not defined by their membership in any particular economic, religious, sexual, or recreational relationship, since they are free to question and reject any particular relationship. Rawls summarizes this liberal view by stating that "the self is prior to the ends which are affirmed by it".[112]

Communitarians believe that this is a false view of the self. It ignores the fact that the self is 'embedded' or 'situated' in existing social practices, that we cannot always stand back and opt out of them. Our social roles and relationships must be taken as givens for the purposes of personal distribution. Accordingly, Sandel argues that the self is not prior to, but rather constituted by, its ends – we cannot distinguish 'me' from 'my ends'. Our selves are at least partly constituted by ends that we do not choose, but rather discover by virtue of our being embedded in some shared social context. According to Sandel, Rawls' view of the 'unencumbered self' does not correspond with our 'deepest self-understanding' in the sense of our deepest self-perception. If the self is prior to its ends, then we should be able to see through our particular ends to an unencumbered self. On Rawls' view, "to identify any characteristics as *my* aims, ambitions, desires, and so on, is always to imply some subject 'me' standing behind them, at a certain distance".[113] There would have to be this thing, a self, which has some shape, standing at some distance behind our ends. Therefore, in order to accept Rawls' view, one would have to see oneself as some sort of propertyless thing, a disembodied object in space, or as Richard Rorty puts it, as a kind of 'substrate' lying 'behind' my ends.[114]

Liberals commonly deny that they depend on any metaphysical view about the nature of the self. Instead, they argue that many communitarian criticisms misrepresent the positions they are attacking. Rawls' attempt to imagine what principles of justice individuals would choose behind a 'veil of ignorance' does not presuppose a pre-social identity, but rather a historical one:

> And the reason why the original position must abstract from and not be affected by the contingencies of the social world is that the conditions for a fair agreement on the principles of political justice between free and equal persons must eliminate the bargaining advantages which inevitably arise within background institutions of any society as the result of cumulative social, historical, and natural tendencies.[115]

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112 Rawls, *supra* n. 18, at 560.
113 Sandel, *supra* n. 94, at 86 (emphasis in original).
114 Rorty, 'Postmodernist Bourgeois Liberalism' in *Hermeneutics and Praxis*, 217 (Hollinger ed., 1985).
115 Rawls, 'Justice as fairness: political not metaphysical', 14/3 *Philosophy and Public Affairs* 236 (1985).

Accordingly, the original position has best to be seen as a device of representation, i.e. it describes the parties as fairly situated and as reaching an agreement subject to appropriate restrictions.[116] Therefore, Rawls' writings subsequent to *A Theory of Justice* would clarify that

> . . . what justifies a conception of justice is not its being true to an order antecedent to and given to us, but its congruence with our deeper understanding of ourselves and our aspirations, and our realization that, *given our history and the traditions embedded in our public life*, it is the most reasonable doctrine *for us*.[117]

Based on the ontological argument communitarians conclude that, in order to justify the special obligations that we hold to members of our communities – families, nations, and so forth – one must attach some intrinsic (i.e. non-instrumental) value to the community itself and to our relations with other members of the community. That these obligations are not always voluntary does not detract from the fact that they are taken for granted by most people. Therefore, many communitarians criticize liberalism not for its account of the self, but rather for neglecting the social conditions required for the effective fulfillment of those interests. Accordingly, Charles Taylor, for example, thinks that liberals have an 'atomistic' conception of the individual, that they wrongly regard individuals as self-sufficient beings, and treat social relations as mere means to individual ends.[118]

Instead, Taylor argues for what he calls the 'social thesis', which means that the capacity for self-determination can only be exercised in a certain kind of society, with a certain kind of social environment.[119] While liberals recognize that individual autonomy cannot exist outside a social environment,[120] Taylor believes that the social thesis requires us to abandon liberal neutrality, for a neutral liberal state cannot adequately protect the social environment necessary for self-determination.[121] Liberal neutrality is incapable of ensuring the existence of a rich and diverse culture. Taylor states that

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116 *Id.* at 237.

117 Rawls, *supra* n. 15, at 519 (emphasis added).

118 Taylor, 'Politics of recognition' in *Multiculturalism: Examining the Politics of Recognition*, 32-6 (Gutmann ed., 1994).

119 Taylor, *Philosophy and the Human Sciences: Philosophical Papers*, 190-1 (1985); see also Wolgast, *The Grammar of Justice*, 10-6 (1987).

120 Cf. Rawls, *supra* n. 18, at 563; Dworkin, *supra* n. 20, at 230-3.

121 Instead of some sort of overarching social order, liberalism commonly denotes a neutral grid that allows self-governing individuals to co-ordinate their reciprocal relations in ways that maximize the attainment of their own individual purposes. However, at this point, it should be noted that not all contemporary liberals are 'neutralist' liberals; indeed, the axiom of 'neutralism' has been strongly contested by a group of authors who have come to be called 'perfectionist' liberals. Among the important works in this category see Raz, *The Morality of Freedom* (1986); Macedo, *Liberal Virtues: Citizenship, Virtue, and Community in Liberal Constitutionalism* (1991); Galston, *Liberal Purposes: Goods, Virtues, and Diversity in the Liberal State* (1991).

political institutions governed by the principle of neutrality will be incapable of sustaining legitimacy, because generally, citizens will only identify themselves with their state, and accept its demands as legitimate, when there is a 'common form of life' which

> . . . is seen as a supremely important good, so that its continuance and flourishing matters to the citizens for its own sake and not just instrumentally to their several individual goods or as the sum total of these individual goods.[122]

The liberal 'distancing' from the community's shared form of life means we become unwilling to shoulder the burdens of liberal justice. As a result, liberal democracies undergo some sort of 'legitimation crisis' – for there is no shared form of life underlying the demands of the neutral liberal state.

To illustrate this crucial difference of communitarian and liberal thinking, it might be pointed out that according to the Rawlsian (liberal) position a person should be free to choose any conception of the good life that does not violate the principles of justice, no matter how much it differs from other ways of life in the community. Such conflicting conceptions can be tolerated because the public recognition of principles of justice is sufficient to ensure stability even in the face of such conflicts.[123] Consequently, the basis for legitimacy is not a shared conception of the good, but a shared sense of justice.

According to communitarians, it is within a specific community that individuals learn which goods are valued and which norms are to be respected. It is important to note that the way of acquiring norms and values is independent from their validity. But even though individuals in different communities may be introduced to similar values and norms and may be socialized, at a very abstract level, into a single world community, it still remains a *specific* community, which is valued by its citizens because it is essentially within this community that they have become the moral beings they are. Because of the function a community performs in socializing the individual, the community's persistence is desirable and deserves respect, if not protection, by outsiders.

Consequently, communitarians argue that the limits of community are thereby also the limits of justice and democracy. In this respect, they suggest that attempts to expand democracy and distributive justice across the borders of states is not something that can be accomplished by an appeal to morality or reason, or even the establishment of appropriate institutions. Therefore, if the communitarian argument is right, then ideas of international justice and international declarations of rights are always going to lack legitimacy. Universal moral requirements, so far as they exist, cannot claim ultimate authority over the claims of our particular political and social relations.

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122 Cf. Taylor, 'Alternative Futures: Legitimacy, Identity and Alienation' in *Late Twentieth Century Canada in Constitutionalism, Citizenship and Society in Canada*, 213 (Cairns and Williams, eds., 1986).

123 Rawls, *supra* n. 115, at 245.

In accordance with this communitarian view, the UN and other international institutions could merely become more democratic in structure, but organizational forms by themselves cannot induce a democratic (global) society. The kind of commitment to community, which democratic citizenship requires, simply does not exist outside the borders of states. The communitarian position suggests that even cautious, conservative views of international justice – i.e. opinions which take for granted the political *status quo* and commonly accepted moral ideas – are inadequately founded. These concepts are not properly grounded in community and therefore cannot serve as the first virtue of international society. But the problem is not simply that there is no government or other power capable of enforcing international rights or principles in a reliable way. It is not merely that universal moral agreement is unlikely to be obtained in international society. The more fundamental and relevant problem is that without community these rights lack the overriding authority, which justice is supposed to possess.

However, communitarians do not endow the state with a special Hegelian dignity.[124] Instead, the state's rights are derived from the needs of individuals. Not to respect the peculiarities of a specific community means to ignore basic human needs and to eliminate peculiarities means to endanger the development of individuals as moral human beings. In the communitarian perspective, there is a general principle, which we can think of as the expression of democracy in international politics. Accordingly, Michael Walzer, for example, observes

> . . . what is at stake are the value of a historical or cultural or religious community and the political liberty of its members. . . . They ought to be allowed to govern themselves – insofar as they can do that given their local entanglements.[125]

Communitarianism influences one path of realism. For communitarian realists, national interest is not reducible to the aggregate interests of the citizens of the state. They reject the utilitarian claim that the national interest should be determined with reference to the current and future preferences of the people. Instead, these (communitarian) realists advance a rather holistic definition of national interest as it is ascribed to the state or nation as a whole. The national interest is held by the nation or the state as a corporate entity that endures over time. This interest survives changes in internal sociopolitical arrangements and in governments. Instead of emphasizing actual preferences or interests, this view recognizes that there may be higher principles that are not honored or appreciated by the majority of members of the community at a given historical moment such as national tradition and ethnic or religious considerations.

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124 Given the focus of this work, a discussion on the relationship of Hegelian thinking and liberalism on the one hand, and communitarianism on the other hand will be forgone. For a detailed account of this relationship see, for example, Williams (ed.), *Beyond Liberalism and Communitarianism – Studies in Hegel's Philosophy of Right* (2001).

125 Walzer, 'The new tribalism', 39 *Dissent* 165 (1992).

4. Marxist Materialism and Critical Theory

Any liberal theory is also challenged by materialist theories as (historically) most prominently put forward by Karl Marx. By contrast to liberal theory, historical materialism is constructed from a generalized version of the conceptual apparatus of Marx's materialism of productive forces and relations. The arguments, generally known as 'historical materialism', are summarized in the preface to his *Contribution to the Critique of Political Economy*,[126] the key concepts of which are the following:[127]

First, there is Marx's philosophical anthropology, his assumptions about human nature or species being. This anthropological genesis is rather simple and economistic, namely, that man is first and foremost a producing and consuming being. However, according to this view, human beings are not simply more sophisticated animals, because they engage in *praxis*, in an active, consciously purposive and intrinsically social practical activity. Focused on economics, Marx identifies the *forces of production* as the ultimately decisive material reality of human life. Composed of nature and technology embodied as productive capability, the forces of production were originally very primitive, but have been successively developed as embodiments of human labor and as means to satisfy human wants. Marx insists upon the ultimate primacy of material conditions, and claims that his theory of socialism was the first truly scientific one.[128]

The second main component of Marx's model is the *mode of production*, whose viability is conditioned by the material context, and whose operation generates and depends upon distinct social and political arrangements. A productive mode is seen as a cluster of interrelated productive practices. For Marx, capitalism as a mode of production is characterized by the practices of production for the market and exchange. He basically identifies slave, asiatic, feudal, capitalist, and socialist modes of production, and seems to argue that each fits a particular stage in the development of the forces of production. Consequently, the central nexus of Marx's historical materialism is the relationship between productive forces and modes.

Taken together, the forces and modes of production constitute what Marx called the base or infrastructure, which he contrasted with the *superstructure* of political, social, and cultural relations. Thus, different modes of producing generate, and in turn depend upon, different institutional structures, ideologies and related ideational phenomena, an insight known as 'structuration'.[129] In the capitalist mode of production, buying and selling generates and depends upon economic structures such as money and banks,

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126 Marx, *A Contribution to the Critique of Political Economy* (1859).

127 Cf. for the following arguments Deudney, 'Geopolitics as Theory: Historical Security Materialism', 6 *European Journal of International Relations* 80-6 (2000).

128 *Id.* at 81.

129 Giddens, *Central Problems in Social Theory: Action, Structure, and Contradiction in Social Analysis*, 23-6 (1979).

property laws and courts, as well as corporations, and generates and depends upon individualistic ideologies and acquisitive 'selfish' identities. In Marxism, insights of materialism and human nature are combined with a structuralist image of human agency as a free, but contextually constrained force in history, and with the constructivist claim that political practices generate political structures.[130] Marx seems to see the state as 'the committee of the ruling class' and liberal individualist democracy as essentially derivative of the rise of the capitalist class in the context of the emergence of the capitalist mode of production.

Historicist material theories such as the one put forward by Karl Marx are as much about technology as geography. Accordingly, a combination of particular geographies and technologies together constitutes the material context. Furthermore, communication and transportation are seen as integral to the forces of destruction, as are specifically destructive technologies, in shaping both the velocity and volume of violence available in particular material contexts. Nevertheless, the prominence, overall conceptual richness and theoretical sophistication of materialist argument in contemporary theory has steadily declined due to a combination of mainly political, but also intellectual developments. In particular, the association between Marxism and the Soviet Union made materialism suspect in the post-war 'American social science of international relations'. Thus, the main thrust of the post-World War II 'behavioral revolution' was away from materialist approaches, and the recent surge in say, institutionalist, constructivist, liberal, or postmodern theory has drawn the attention of theorists even further away from materialist lines of argument. The phrase 'geopolitical realism', for example, has become vaguely redundant, while the expression 'geopolitical liberalism' seems largely oxymoronic. However, it is fair to argue that the lines of debate between liberal and realist theory have assumed the *adequacy of realist materialism and the absence of a liberal materialist line of argument.*[131]

Notwithstanding this decline of materialist thought, a progressivist, Marxian interpretation conceived by the 'Frankfurt School of Social Research' and, in particular, by Jürgen Habermas, explored this line of argument. This Marxian interpretation is commonly labeled as 'Critical Theory'.[132] Critical theorists generally take the view that the state, under capitalism, is the expression of a ruling class such that the vast majority of the world's people suffer structural domination. Therefore, the main thrust of

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130 Proponents of constructivism distinguish themselves from postmodernism and acknowledge that the material world exists and matters, but they advance no specific materialist propositions. Cf. Wendt, 'Anarchy Is What States Make of It', 46 *International Organization* 391 (1993); Adler, 'Seizing the Middle Ground: Constructivism in World Politics', 3 *European Journal of International Relations* 319 (1997).

131 Deudney, *supra* n. 127, at 88-9. As such, the (Marxist materialist) arguments stated here need to be taken into account when so-called 'realist' theories will be addressed in somewhat more detail later on. See *infra* Chap. 4, par. 1.

132 The term dates back to Max Horkheimer's essay published in 1937 titled *Traditional and Critical Theory*.

critical theory is to maintain a classical Marxian concern to analyze the state as a class-based apparatus while searching for mechanisms for transforming that apparatus from a condition of social inequality to social equality.[133] Although critical theorists are prepared to accept the idea that certain features of classical Marxism's aspirations for human emancipation are utopian, they nonetheless adhere to some version of historical materialism, a version which contains the claim that a just and harmonious international community is not a utopian, unrealizable, or impractical goal.

According to Habermas, bourgeois ideologies of 'possessive' individualism, however, fail to provide the amount of legitimation and motivation, which the system needs to function.[134] He thus draws a picture of an ideological crisis that may threaten the continued reproduction of the capitalist system. However, to talk of a 'crisis' makes sense only from the standpoint of the participants. If there is a crisis of the political state, its analysis must start at the society, which finds that its needs, interests, or problems cannot get a 'hearing' in the established system. Society expresses itself, in its plurality, in what Habermas calls 'the public sphere'. This public sphere reproduces itself by means of communicative action. Because it is not a (closed) system, public space remains open to the exterior; it does not seek solutions to specific problems, since these problems can emerge only within an already existing public space. Certainly, actors can try to use the public sphere to achieve their own goals strategically, by the application of organizational power or through the expenditure of money. This manipulation may succeed, but it will ultimately have to use arguments to justify its cause – and these arguments can always, in principle, be reopened to criticism. In this way, everybody becomes a participant in this public sphere and in its reproduction through communication. However, concludes Habermas, this participatory structure remains latent most of the time, its presence felt only at moments of mobilization.[135]

In recent years, Habermasian discourse theory contributed to a large extent to the politico-philosophical debate, especially in continental Europe. Although none of the compliance theories to be elaborated later on explicitly refers to his conceptualization of discourse, the approaches of the Chayeses, Koh, and Franck (in *Fairness in International Law and Institutions*) at least to some extent rely on Habermasian communication theory, which they transfer to the international arena. First, as will be shown in more detail, the Chayeses' 'management model' seeks to explain compliance with international law not through coercion, but rather through a co-operative model of compliance "through interactive processes of justification, discourse, and persuasion".[136]

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133 Habermas, his colleagues, and his students, might be said to form the second and third generations of Critical theorists. There are, to be sure, several differences within and between the various phases of Critical Theory. See Kellner, *Critical Theory, Marxism and Modernity*, 7 (1989).

134 Habermas, *Legitimation Crisis*, 68-73 (McCarthy trans., 1976).

135 Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, 145-9 (Rehg trans., 1996).

136 Chayes and Chayes, *supra* Introduction, n. 24, at 105.

According to the managerial approach, a process of interaction among the parties concerned ensures compliance.

Second, according to Koh's compliance model, the actors who express themselves are not only private individuals, but also states. These actors articulate themselves in an 'international public sphere' which produces itself by means of communicative action. This process generates a situation in which the actors create norms and, by repeated interaction, comply with these norms. In Koh's own terms,

> [the project I attempt to undertake, the study of *transnational legal process*, may be described as follows]: the theory and practice of how public and private actors including nation-states, international organizations, multinational enterprises, nongovernmental organizations, and private individuals, interact in a variety of public and private, domestic and international *fora* to make, interpret, internalize, and enforce rules of transnational law.[137]

Koh thinks that his compliance theory is filling the gap because what is missing, in brief, is a modern version of [one] strand of compliance theory – the strand based on *transnational legal process*.[138]

Third, according to Franck's 'fairness' approach, fairness is a feeling, the result of participation in a discourse, where fairness is generated in the management of antimony. In the course of this 'fairness discourse', the actors advance their claims and test them against rival claims of other actors. Franck states that

> [t]hese two aspects of fairness – the substantive (distributive justice) and the procedural (right process) – may not always pull in the same direction . . . Fairness is the rubric under which this tension is discursively managed.[139]

5. Neo-Conservatism

> *You are some of the best brains in the country . . . my government employs twenty of you.*
>
> George W. Bush

From the moment George W. Bush became President of the United States, there have been ongoing discussions that some sort of neo-conservatism would lead the way in contemporary political philosophy. Most commonly, Leo Strauss was or is viewed as

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137 Koh, *supra* Introduction, n. 25, at 2599-600.

138 *Id.* at 2634.

139 Franck, *supra* Introduction, n. 23, at 7 and *infra* Chap. 5, par. 3.1. See also Kennedy, *supra* Introduction, n. 23, at 433.

the 'master thinker' of the neo-conservatives, particularly in the media.[140] Even though Strauss has virtually never written about international relations, his political philosophy has come to serve as the neo-conservative basis in the international arena.[141] However, it is clear that Strauss' teachings cannot be reduced to a mere set of neo-conservative principles. For this reason, only those parts of his thinking that are deemed relevant to the pertinent discussion of political philosophy in the international context, particularly with regard to the concepts outlined, will be considered in the following.[142]

In short, for Strauss, political philosophy is substantially reformulated at the beginning of modernity. According to Strauss, this change comes along in 'three waves of modernity':[143] the first wave goes back to Nicolo Macchiavelli, only to be modified by Thomas Hobbes and John Locke to produce the modern doctrine of natural right. This conceptualization has its contemporary correlate in (capitalist) liberalism. The second wave, initiated by Jean-Jacques Rousseau, absorbed nature as a standard by way of taking it into human history, which then serves as the main source of moral and political guidance. Freed from notions of natural necessity, this conceptualization has its correlate in communism. The third wave began with Friedrich Nietzsche questioning the rationality of both history and nature. Modernity as such internalizes the

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140 See, for example, Frachon and Vernet, 'The Strategist and the Philosopher', *Le Monde*, April 15, 2003; Lexington, 'Philosophers and kings', *The Economist*, June 19, 2003; Spörl, 'The Leo-conservatives', *The New York Times*, August 4, 2003; Wenzel, 'Philosophenkönige? Ein Nachtrag zur Debatte um Leo Strauss', *Neue Zürcher Zeitung*, August 16, 2003. Since the manuscript for this monograph was finished prior to the United States presidential election on November 2, 2004, the following discussion on neo-conservatism may – literally – be more or less important for contemporary international political debates. However, it seems reasonable to argue that the notion of neo-conservatism serving as an intellectual basis for United States (foreign) policy has sometimes been overstretched. In a post-September 11 world, the reason for action might also be found in other domains, for example in the psychological domain.

141 See for example Drury, *Leo Strauss and the American Right* (1997). One of the most prominent neo-conservatives, Irving Kristol, states: "[E]ncountering Strauss's work produced the kind of intellectual shock that is a once-in-a-lifetime experience. He turned one's intellectual universe upside down. Suddenly, one realized that one had been looking at the history of Western political thought through the wrong end of the telescope. Instead of our looking down at them from the high vantage point of our more 'advanced' era, he trained his students to look at modernity through the eyes of 'the ancients' and the pre-moderns, accepting the premise that they were wiser and more insightful than we are." Kristol, *NeoConservatism – The Autobiography of an Idea*, 7-8 (1995). But see also Lenzner, 'Leo Strauss and the Conservatives', 118 *Policy Review* (April/May 2003) (arguing that Strauss, never identifying himself as a conservative, would indicate in his writings that he preferred liberalism to conservatism).

142 Indeed, according to Strauss, philosophy must understand enough about politics to defend its own autonomy, without falling into the error of thinking that philosophy can shape the political world according to its own lights. The tension between philosophy and politics can be managed, but can never be abolished, and therefore must remain a primary concern of all philosophers. See generally Strauss and Kojève, *On Tyranny* (Gourevitch and Roth, eds., 2000). See also Lilla, *The Reckless Mind – Intellectuals in Politics*, 133-4 (2001).

143 See Strauss, 'The Three Waves of Modernity' in *An Introduction to Political Philosophy*, Chap. 3 (Gildin ed., 1989); Robertson, 'The Closing of the Early Modern Mind: Leo Strauss and Early Modern Political Thought', 3 *Animus* 157-60 (1998).

sources of morality within human subjectivity and consequently, the oblivion of nature as well as the historicization of moral and political standards, thereby leading to the 'crisis of our time', i.e. "the fact that the West has become uncertain in its purpose".[144] In order to better understand this crisis, modern political philosophy needs to be contrasted to classical political philosophy.[145] In doing so, for Strauss, 'nature' is the central term in political philosophy. In terms of classical political philosophy, nature has two distinctive, but connected aspects: first, nature functions as the standards and types available to natural (and pre-philosophical) understanding and second, nature is the eternal order that only philosophy can get to know. Given that understanding, it follows that any types, in particular moral and political ones, cannot merely be dependent on a social construct or convention. Rather, natural right comes into appearance through the structures inherent in social life and human beings induce their conceptualization of their selves by way of their socialization, in particular their political socialization.[146]

Clearly, at this point Strauss' approach comes close to the communitarian notion of the 'social thesis', i.e. the assertion that the capacity for self-determination can only be exercised in a certain kind of society, with a certain kind of social environment.[147] Nevertheless, one can identify one main difference between the communitarian and the 'Straussian' position: whereas the former asserts that the socialization is tantamount to the socio-historical environment in which it takes place, the latter asserts that beyond that there also is the context of 'nature', that is the requirements inherent in the very being of moral and political life in which it takes place. The main political consequence for Strauss is not to rely merely on the randomness of human communality, but to stress the importance of legislators who (should) have the wisdom to bring forth human sociality.[148] Thus, for Strauss the central category for the analysis of the human condition is the 'regime'.[149]

With regard to the constitution of a 'regime' it is important to also refer to a short biographical note: Strauss, influenced by his own German roots as well as by German philosopher Martin Heidegger, drew a radical consequence from the dissolution of the Weimar Republic, namely, that liberal democracies had no ability to impose themselves if they stayed weak, and refused to stand up to tyranny, even if that meant resorting to force.[150] Nevertheless, Strauss is often deemed to be the 'godfather' of neo-conservative anti-liberalism. In particular, one of his fiercest contemporary

144 Strauss, 'The Crisis of our Time' in *The Predicament of Modern Politics*, 42 (Spaeth ed., 1964).
145 Strauss, *What is Political Philosophy?*, 75 (1959); Strauss, *Natural Right and History*, 78-82 (1953).
146 Strauss, *Natural Right and History, supra* n. 145, at 120-4.
147 See *supra* par. 3.
148 *Id.* at 133.
149 *Id.* at 136-9.
150 Strauss asserts that: "The Weimar Republic was weak. . . . On the whole, it presented the sorry spectacle of justice without a sword or of justice unable to use the sword. . . . The weakness of the Weimar Republic made certain its speedy destruction." Strauss, *Spinoza's Critique of Religion*, iii (Sinclair trans., 1965).

critics, Shadia Drury, asserts that Strauss' antipathy to liberalism would be principled as he would oppose its fundamental ideals "secular politics, human rights, equal dignity, and individual freedom, and not simply its faults".[151] Given this reception of Strauss, it is important to point out that Strauss actually defends liberal democracy against its critics, which only some of his critics acknowledge.[152] Indeed, it has been argued that the reception of Strauss compared to the one of Rawls is one of the greatest paradoxes in twentieth century political philosophy since Rawls' moral philosophy is as Socratic as Strauss'. Thus, it would be surprising that liberals in the United States would oppose Strauss because of his Socratic-anti-liberal position without realizing that their own Rawlsian liberalism goes back to Socrates.[153]

This active defense of liberal democracy reappears as one of the neo-conservatives' favorite themes. As such, the nature of political regimes is much more important than all the international institutions and arrangements for the maintenance of peace in the world.[154] Rather, the focus is on the progress of democratic values, and if necessary, resorting to force regime changes. As one neo-conservative, Francis Fukuyama, put it: "Behind the emphasis on power, sovereignty and self-help, the Bush administration has articulated a not-so-hidden idealist agenda that is encapsulated in the term 'regime change'."[155]

Robert Kagan has recently made the neo-conservative case with regard to international relations.[156] In short, his arguments, particularly those relevant to the pertinent question of compliance with international law may be summarized as follows: whereas Europe – with the (military) help of the United States – entered into a paradise of peace and relative prosperity, the realization of Kant's 'Perpetual Peace', the United States remains in the anarchic Hobbesian world where international law is unreliable and where true security and the defense and promotion of a liberal order still depend on the possession and use of military might. The main feature therefore is the relative European weakness, especially in military terms, leaving the United States as the only power to engage in international crises.[157] This European weakness is inherent

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151 Drury, *supra* n. 141, at 10.

152 "Strauss's message once again is that liberal democracy should be defended, but that it is, or has become, internally defective." Gunnell, 'Political Theory and Politics: The Case of Leo Strauss', 13 *Political Theory* 359 (1985). "Despite his critique of modern political philosophy, he endorsed liberal democracy as the best among contemporary alternatives." Stoner, 'Leo Strauss' in *American Political Scientists: A Dictionary*, 295 (Utter and Lockhart, eds., 1993).

153 Kauffmann, *Strauss und Rawls*, 6 (2000). At this point, Bruce Ackerman's notion that "nobody can pretend to be the perfect liberal Socrates" might be recalled. Ackerman, *Social Justice in the Liberal State*, 360 (1980).

154 Franchon and Vernet, *supra* n. 140.

155 Fukuyama, 'Beyond Our Shores', *The Wall Street Journal*, December 24, 2002. For Fukuyama's account see also *infra* par. 6.

156 Kagan, 'Power and Weakness', 113 *Policy Review* (June/July 2002); Kagan, *Of Paradise and Power – America and Europe in the New World Order* (2003).

157 But see also, for example, Nye, *The Paradox of American Power – Why the World's Only Superpower Can't Go It Alone* (2003).

in the 'postmodern' European project, which encompasses the view that Europe does not acknowledge a mission for itself that requires power since its mission is to oppose power. Crucially, according to Kagan, this increased transatlantic tension is not so much resulting from the policies of the current Bush administration, but it is rather systemic. The main consequence for the question of compliance with international law is that the United States are less inclined to act through international institutions and remain more skeptical about international law in general. Thus, the United States are more willing to operate in breach of international law when they deem it necessary or even merely useful.[158] Europe, on the other hand, is more likely to resort to international institutions and international law to adjudicate disputes, emphasizing process over result and believing that ultimately process can become substance.

Though Kagan's thesis almost exclusively deals with the relationship of the United States to Europe, it turns out that according to his account compliance with international law is a matter of mere interest calculations and the frequency or infrequency of compliance depends on the power or weakness respectively of the states: powerful states are less likely to comply with international law than are weaker ones. Even though Kagan's approach undoubtedly shows important insights into the current debate on international law compliance, it is submitted that it is too simplistic to serve as a fundament for a more sophisticated compliance model. Amongst others, the neo-conservative account does not counter the arguments put forward by (Lyotardian) postmodernism adequately, as will be elaborated in the following.

6. Lyotardian Postmodernism

Postmodern theory criticizes the neo-conservative as well as the traditionally conceptualized liberal account.[159] In the following, the focus will be on one postmodern theorist, namely, Jean-Francois Lyotard. To start with, it will be clarified what 'postmodernism' in the sense of Lyotard is supposed to mean. Basically, modernism is often used to

158 See, for example, Koh, 'Foreword – On American Exceptionalism', 55 *Stanford Law Review* 1497-501 (2003) (criticizing the 'Emerging Bush Doctrine' which opted for 'strategic unilateralism and tactical multilateralism' because it would make double standards not just the exception, but the rule: "By its nature, such a strategy resists enforced obedience with international treaties and institutions as dangerously constraining on U.S. national sovereignty. But . . . to win the illusion of unfettered sovereignty, the United States surrenders its reputation for being law-abiding. This loss of rectitude diminishes America's moral authority and reduces the soft power America needs to mobilize multilateral responses in a post-September 11 world." *Id.* at 1499-500. See also Koh, 'A United States Human Rights Policy for the 21st Century', 46 *St. Louis University Law Journal* 293 (2002).

159 Or to put it differently, "[v]iewed from the perspective of international law, liberalism and postmodernism appear almost as mirror images of each other. Each one possesses an insight the other lacks, but each one also suffers from an inability fully to explain intuitively important aspects of international law." Peñalver, *supra* Introduction, n. 11, at 286.

refer to the cultural forms and practices associated with a specific regime of economic production, i.e. industrial capitalism. In much the same way, postmodernism can be seen as the whole mode of cultural expression – constituting a kind of cultural *Weltanschauung* – that emerges concurrently with the material developments of advanced capitalism. Indeed, Frederic Jameson defines postmodernism as "the cultural logic of late capitalism".[160] Jean-Francois Lyotard thinks of postmodernism as "incredulity towards meta-narratives".[161] According to Lyotard, the meta-narratives (*grand récits*) of modernism have failed. Neither the dialectic of the Spirit, nor the march of rational progress, nor even the emancipation of humanity are sufficient for our purposes. What we are left with is the infinite play of language games, of incommensurable little narratives (i.e. *petit récits*). The broadly conceived struggles of former ages no longer speak to the fragmented and heterogeneous realities of the postmodern epoch, where scrupulous attention to the local and finite are the only methods to (partial and limited) understanding. The emphasis on difference and skepticism of the general is characteristic of postmodernism; however, these doctrines do not come without consequences. Lyotard insists that the field of the social is heterogeneous and non-totalize-able.

According to Lyotard, the rejection of utopianism, and the human emancipation bound up with it, is an obvious feature of the world in which we live; we should accept it as a self-description of 'how things are'. In rejecting the use of meta-narratives to legitimate universal emancipation, a partial basis for rejecting liberal cosmopolitanism and sustaining realist anti-utopianism is provided. In essence, therefore, Lyotard asks:

> Can we continue to organize the events that crowd in upon us from the human and non-human worlds with the help of the Idea of a universal history of humanity?[162]

To be sure, Lyotard answers the question in the negative. Contrarily, Francis Fukuyama, answers the question in the affirmative. Fukuyama argues that society has entered a new and lasting phase. He claims that the change was so dramatic that it might be accurately depicted as representing the 'end of history':

> What we may be witnessing is not just the end of the Cold War, or the passing of a particular period of postwar history, but the end of history as such; that is, the end point of mankind's ideological evolution and the universalisation of Western liberal democracy as the final form of human government.[163]

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160 Jameson, *The Cultural Logic of Late Capitalism in Postmodernism or The Cultural Logic of Late Capitalism*, 1 (1991).

161 Lyotard, *The Postmodern Condition – A Report on Knowledge*, xxiv (1979).

162 Lyotard, 'Histoire universelle et differences culturelles', 41 *Critique* 559 (May 1985).

163 Fukuyama, 'The End of History', 16 *The National Interest* 3 (Summer 1989). Fukuyama elaborated his

Fukuyama derives his argument from the writings of Kant, Hegel,[164] and a critical reading of Marx. According to Fukuyama, this new phase represents the worldwide triumph of liberal democracy with the collapse of communism. History has ended in the sense that there is no more room for large ideological battles. Accordingly, there is not only a universal history of humanity, but what is more, history unifies or is just about to unify in the concept of liberal democracy.[165]

However, Fukuyama's argument is not convincing for acceptance of democracy is by no means univocal and democracy itself appears in different historical forms.[166] Over a third of the world's population is still governed by autocratic regimes, while in countries with more consolidated democratic traditions many social and economic demands remain unmet. Over the last decade, democracy has, admittedly, won many proselytes, but it has also disappointed the expectations of some. So it cannot be said that democracy is destined to enjoy an irreversible success. It may develop, but different forms of power management may also replace it. It too presents itself as an opportunity, which may or may not be pursued. Even though democracy has achieved significant results in the process of state governance, it still fails to be applied to the

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thesis further in Fukuyama, 'A Reply to My Critics', 18 *The National Interest* 18 (Winter 1989/90) and Fukuyama, *The End of History and the Last Man* (1992); see also Fukuyama, 'Second thoughts: the Last Man in a Bottle', 56 *The National Interest* 16 (Summer 1999); Fukuyama, 'Ich oder die Gemeinschaft', Die Zeit, November 11, 1999, at 3 (stating that "however, in the long run there is a strong tendency that liberal democracies will spread all over the world. Finally, the development of the history of humankind, in the sense of Hegel and Marx depends on modern natural sciences that promote technical progress. This progress provides a plurality of production possibilities and leads to dynamic economical modernization processes. In a system of competition of nation-states, it is extremely difficult to escape from this process." Translated by M.B.).

164 According to Alexandre Kojève, Hegel's discovery of the human struggle for recognition is the motor of all history. This struggle takes place among individuals, classes and nations, aiming at the satisfaction of our desire for equal recognition. With the development of the modern state and economy, human beings reached the final frontier, where they were about to become equal, satisfied citizens and consumers in what Kojève called the "universal and homogenous state". See Kojève, *Introduction to the Reading of Hegel* (Bloom ed., Nichols, Jr. trans., 1969). Allan Bloom, commonly known for his book *The Closing of the American Mind* (1987), a student of Leo Strauss, in turn was among Fukuyama's teachers. Not least for biographical reasons it should be again referred to Kojève's correspondence with Leo Strauss published in *On Tyranny*, *supra* n. 142. This confrontation between Strauss and Kojève is structured between the insurmountable difference between Plato and Hegel or 'nature' and 'history'. As the title of Fukuyama's book suggests, he tries to overcome this difference: "His project is therefore perhaps best described as an effort to reconcile Plato's understanding of the soul and of the just city with Hegel's understanding of history as the actualization of man's humanity, culminating in 'the modern state' – Fukuyama's 'liberal democracy'." See Gourevitch, 'The End of History?', 21 *Interpretation* 215-6 (1993).

165 Fukuyama, 'Second thoughts: the Last Man in a Bottle', *supra* n. 163, at 16-9.

166 For critiques see Huntington, 'No Exit: The Errors of Endism', 17 *The National Interest* 3 (Fall 1989); Macey and Miller, 'The End of History and the New World Order: The Triumph of Capitalism and the Competition between Liberalism and Democracy', 25 *Cornell ILJ* 277 (1992); Marks, 'The End of History? Reflections on Some International Legal Theses', 8 *EJIL* 449 (1997).

management of interstate relations over regional or global problems (the EU might be called some kind of exception to that rule).

Additionally, Lyotard's ideas provide a somewhat different ground for supporting pluralism, a traditional feature of political realism.[167] The main instrument for this is Lyotard's understanding of language games as activities or 'moves' with or against players speaking one's own or another language.[168] According to this view, the world always contains a multiplicity of language games, which cannot be transcribed into terms of any totalizing meta-discourse. In Lyotard's own terms,

> . . . it seems neither possible, nor even prudent, to follow Habermas in orienting our treatment of the problem of legitimation in the direction of a search for universal consensus through what he calls *Diskurs*, in other words, a dialogue of argumentation. This would be to make [the assumption] that it is possible for all speakers to come to agreement on which rules or meta-prescriptions are universally valid for language games, when it is clear that language games are heteromorphous, subject to heterogeneous sets of pragmatic rules.[169]

If one applies this concept of language games to the theory of liberal cosmopolitanism, it turns out that liberal theory is determined to uncover and impose the so-called common elements in different foreign policy language games that culturally diverse nation-states use in their ongoing struggle to satisfy their needs and interests against others using their own or a different language.

But Lyotard's pluralism goes beyond claims concerning the diversity of language games. In *The Differend* Lyotard conceives language as made up of *phrases* – 'the only givens'. Phrases are vehicles for grasping the world: "a phrase presents what it is about, the case, *ta pragmata*, which is its referent".[170] But phrases cannot belong to a single universe since this would entail the existence of a world 'prior to the phrases'. Lyotard states that

> I am not claiming that the *entirety* of social relations is of this nature. . . . But there is no need to resort to some fiction of social origins to establish that language games are the minimum relation required for society to exist: even before he is born . . . the human child is already positioned as the referent in the story recounted by those around him, in relation to which he will inevitably chart his course.[171]

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167 See the communitarian arguments *supra* par. 3.

168 Lyotard borrows the concept of language games from Ludwig Wittgenstein who means by this term that each of the various categories of utterance can be defined in terms of rules specifying their properties and the uses to which they can be put. Lyotard, *supra* n. 161, at 10-4.

169 *Id.* at 65.

170 Lyotard, *The Differend: Phrases in Dispute*, 14 (1991).

171 Lyotard, *supra* n. 161, at 15.

Phrases are linked together by genres or regimens of discourse, which are always local; discourse sets down rules for the linking of phrases within a non-universal context. Given the heterogeneity of phrase regimens, Lyotard's pluralism may be expressed by doubting the very coherence of "common subordination to a single end".[172]

Lyotard recognizes that alternatives to heterogeneity have been offered in the form of 'some metaphysical will' or in 'a phenomenology of intention', but these alternatives fail to resolve Kant's problem (in the *Introduction to the Third Critique*) of how to bridge the gaps between dispersive discourses.[173] He concludes that the order of the philosophical day is: "Incommensurability, heterogeneity, the differend, the persistence of proper names, the absence of a supreme tribunal."[174] As a result of apprehending this assertion, a distinction can be made between non-ideological and ideological language games. Non-ideological language games may be understood as local, context-laden ones. By contrast, ideological language games are those which, in presupposing universal truth, demand their general adoption and, therefore, the exclusion and repression of every other *particular* language game.

However, understanding non-ideological language games as local, context-laden ones might not only be advantageous, as Michel Foucault points out. Foucault refers to the arbitrariness of categorization by which every culture seeks to impose order – to, as he puts it, "tame the wild profusion of existing things". He rejoices in the shattering of "the thought that bears the stamp of our age and our geography" and relishes "breaking up all the ordered surfaces and all the planes" that support familiar definitions. Foucault wants to "disturb and threaten with collapse our age-old distinction between the 'Same and the Other' ".[175] So, the presumably context-laden non-ideological language games might turn out to be ideological ones. Similarly, the supposedly ideological language games might not only demand the exclusion and repression of every other particular language game, but may also be approaching each other and find themselves in epistemic communities as the reflection of their similarities.

Furthermore, Lyotard strongly endorses replacing the theoretical apparatus of a scientific understanding of politics with a new conception of practice. He questions the role 'theory' would play once we give up, as presumably we must, the idea that there is a universally or globally just society.[176] Since theories of justice (and especially world justice) are always riddled with indeterminacies, a theory of justice cannot prove its truth. Any conception of the unison of theory and practice cannot be sufficiently determinate to obtain the massive, un-coerced consent required for it to become a

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172 Lyotard, *supra* n. 170, at 129.
173 *Id.* at 130.
174 *Id.* at 135.
175 Foucault, *The Order of Things: An Archaeology of the Human Sciences*, xv (1970).
176 Lyotard and Thébaud, *Just Gaming*, 25 (1985).

global revolutionary praxis, the acting on which proves the theory's truth. If this is so, the gap between theory and practice becomes conceptually unbridgeable.

This means, for example, that justice "cannot be thought from the theoretical and the apophantic".[177] Justice, on this view, is more a matter of the making of practical judgments by judges "worthy of the name".[178] Lyotard goes on to say that judgments are statements about *doxa*, that is, of opinion or dialectics; what they cannot be are statements of truth or theoretical statements articulated in a science of justice.[179] If this view, however, is correct, there are some rather devastating consequences for liberal cosmopolitanism. Without a theoretically persuasive account of how theory and practice link up to yield a rationally grounded route to universal justice, liberal cosmopolitanism is caught in a dilemma. It can either renew the claim it articulates a valid understanding of the unity of theory and practice, showing why this is so notwithstanding the sort of criticisms brought against it by Lyotard (among others), or it can give up the claim to possess a theoretical conception of the unison of theory and practice.

Being impaled on either of these solutions would be difficult. In choosing the first one, liberal cosmopolitan theorists would be obliged to do what has never been accomplished before, namely, find a conception of the unity of theory and practice, which is coherent, non-utopian and acceptable. But if they choose the second, they would have to give up what Marx, and presumably liberal cosmopolitan theorists as well, considered the *raison d'etre* of this conception of people and society: to bring human emancipation. Like Lyotard, Richard Rorty denies narratives of emancipation, however, but his conclusion is a different one:

> We see no reason why either recent social and political developments or recent philosophical thought should deter us from our attempt to build a cosmopolitan world society – one which embodies the same sort of utopia with which the Christian, Enlightenment, and Marxist meta-narratives of emancipation ended.[180]

The Lyotardian argument that attempts to discover and justify a theory of the unity of theory and practice are futile and that hence, any theory of justice cannot prove its truth seems convincing, at least if one is inclined to think that the fact that notions like representation or truth are internal to a language or a theory is a reason to drop them. Thomas Nagel, for example, does not think this is the case. Nagel argues that to deprive us of such notions as 'representation' would be to stop "trying to climb

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177 *Ibid.*

178 *Id.* at 26.

179 *Ibid.*

180 Rorty, 'Habermas and Lyotard on Postmodernity' in *Habermas and Modernity*, 168 (Bernstein ed., 1985); see also Watson, 'Jürgen Habermas and Jean-Francois Lyotard: Post-Modernism and the Crisis of Rationality', 10 *Philosophy and Social Criticism* 1 (1984).

outside of our minds, an effort some would regard as insane and that I regard as philosophically fundamental".[181] Contrarily, on the view suggested here, the loss of this theoretical goal merely shows that metaphysics is in the process of closing down. However, this failure to find a single grand discourse does nothing to cast doubt on the possibility of peaceful social progress, as suggested by Rorty.

Summing up, certain ideas of Jean-Francois Lyotard may be deployed to challenge the liberal cosmopolitan position. Lyotard's contribution to a postmodern understanding of realist (anti-utopian) theory may assert the following points:[182] first, the goal of liberal cosmopolitanism is essentially a demand to privilege the Western liberal system over other possible sorts of systems. The ideal of universal humanity denies differences among communities and (nation-) states. To ignore differences may encourage some sort of cultural imperialism. In liberal cosmopolitan theory, a system that expresses the point of view of certain privileged (Western) groups, may appear neutral, impersonal, and universal. Liberal cosmopolitanism presumes that there is 'a place from nowhere' from which one can view individuals and nation-state collectivities, and that this unsituated 'place' will allow to judge entire nation-states in terms that are nation-state neutral. But, for Lyotardian postmodernists and realists, there is no such nation-state neutral point of view since the place from nowhere, which would legitimate it, does not exist. Human beings, societies and nation-states are always situated and embedded in a certain context and environment.

From the transformational perspective of liberal cosmopolitanism, any conception of international politics that asserted the positivity of (nation-) state difference might be regarded as reactionary and anachronistic. Contrarily, from a Lyotardian point of view, (nation-) state difference, recalcitrant to universal emancipation, might well be considered liberating and empowering for particular peoples.[183] Nevertheless, to acknowledge (nation-) state difference does not necessarily foreclose the possibility of peaceful social (democratic) progress and the development towards the common basic values and interests of a some time developing 'international community'. In this respect, international legal concepts such as *jus cogens* or obligations *erga omnes*, despite their shortcomings,[184] might be seen as the legal expressions of a 'thin' layer of universal human rights.

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181 Nagel, *The View from Nowhere*, 11 (1986).

182 Some of the following conclusions are also found in the communitarian critique of liberalism, see *supra* par. 3. The Lyotardian critique, however, rests on different intellectual premises, mostly on structural, i.e. linguistic ones. These structural arguments can at least partly be seen to reinforce several of the communitarian arguments against a pure liberal cosmopolitanism.

183 In Michael Walzer's words, "the idea of communal integrity derives its moral and political force from the rights of [individual] contemporary men and women to live as members of a historic community and to express their inherited culture through political forms worked out among themselves". Walzer, 'The moral standing of states: a response to four critics', *supra* n. 108, at 211.

184 For details see *infra* Chap. 5, par. 1.

This position might be labeled a 'cosmopolitan communitarianism' and will be outlined in more detail soon.[185] Cosmopolitan communitarianism acknowledges that a pure cosmopolitanism cannot generate the full range of obligations its advocates generally want to ascribe to it. Instead, it also recognizes feelings of social solidarity, which have historically risen in societies. Similarly to Rorty's arguments, it denies 'narratives of emancipation' and thus, argues in favor of a de-theoreticized sense of community. Accordingly, this position acknowledges 'thin' rights, which might be specified and overlaid by a 'thicker' web of particular obligations in certain societies at a certain time. The essential argument is that a cosmopolitan communitarianism enables us to *descriptively* analyze the question of compliance with international law adequately and to infer from this analysis a *prescriptively* less ambitious agenda for international law than do advocates of a pure cosmopolitanism.

7. Interim Conclusion: A Cosmopolitan Communitarianism

> *Political knowing is particular and pluralist in character, while philosophical knowing is universalist and singular.*
>
> Michael Walzer

In the following, it will be argued that one would be mistaken to regard the liberal cosmopolitan and the communitarian argument as totally at odds with each other, with the latter being anti-liberal, anti-rights and anti-individualist, as certain commentators have claimed.[186] Rather, they can and maybe should be viewed as to offer contrasting but, to at least some degree, compatible accounts of how we should think about individuality, rights, and their relationship to the societies that embody them. In order to avoid its utopian assumptions, it is argued that cosmopolitan theory only makes sense to the extent that it is embedded within a communitarian framework: a view that might be called cosmopolitan communitarianism.[187]

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185 See *infra* par. 7.

186 See generally Holmes, *The Anatomy of Antiliberalism* (1993). To be sure, community and individualism as two poles are contained in all legal systems and international law is no exception: "The altruistic and individualistic premises pre-empt in international law the dichotomy between national egoism and communitarian morality." Tsagourias, *Jurisprudence of International Law: The Humanitarian Intervention*, 58 (2000). But these poles need not be totally at odds with each other, but can rather induce a procreative tension. Compare Kennedy, 'Theses about International Law Discourse', *supra* Chap. 1, n. 61, at 361-6; Kennedy, 'Form and Substance in Private Law Adjudication', 89 *Harvard Law Review* 1766-70 (1976).

187 For a discussion of 'cosmopolitan communitarianism', Michael Walzer's arguments provide an insight-

According to Michael Walzer, universal principles have the effect of "enforcing a singular over a pluralist truth, that is, of reiterating the structure of the ideal commonwealth in every previously particularist community",[188] and their establishment involves "repressing internal political processes".[189] Hence, Walzer's essential position argues against the political validity of universal values, and the sort of communitarianism of Sandel or Taylor is – ironically – fundamentally the expression of such a value for they argue in favor of the 'community' as a universal value.

Walzer has explored the difference between cosmopolitanism and communitarianism in terms of a distinction between 'thick' and 'thin' moralities.[190] He argues that certain universal human rights represent a 'thin', 'minimal' morality that all societies ought to uphold. However, they do so in numerous 'thick', 'maximal' ways. Moreover, the bearers of individual rights are similarly contextually defined. That is not to deny value individualism, as is sometimes implied, but to reject those versions of methodological individualism that ignore the social dimension of personal identity and the development of autonomy.[191] According to this thicker, more communitarian view of rights and the individual, a pure cosmopolitanism offers an inadequate account of moral agency.

As stated, for the cosmopolitan universalist, agents are supposed to act on the basis of rational considerations of pure principle that abstract from their sense of identity as persons holding certain convictions and possessing particular attachments to, say, society. Contrarily, according to the cosmopolitan communitarian position, any universal conception of reason will be too 'thin' for arbitrating conflicts between different conceptions of the good or between antagonistic cultures. Instead,

> we must inevitably refer to values on which there may perhaps be a consensus within a particular community, but about which there is no prospect of achieving universal agreement by appeal to considerations of rationality alone.[192]

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ful approach. There are several other authors, who, albeit in different versions, attempt to construct coherent versions of liberalism on a communitarian basis. The general argument is that just as liberalism does not require the truth of atomism, neither does it require the truth of either universalism or subjectivism. Examples include Richard Rorty or Ronald Dworkin. For Rorty's arguments see Rorty, *Philosophy and the Mirror of Nature* (1979); for a more recent approach see Rorty, *Truth and Progress – Philosophical Papers Volume III* (1998). For Dworkin's arguments see especially Dworkin, *supra* Introduction, n. 5. Elsewhere, Dworkin also develops a variant of this approach, when he distinguishes four different concepts of community which have been used in this debate, namely, majority, paternalism, self-interest, and integration. See Dworkin, *Sovereign Virtue*, 211-20 (2000). See for the following arguments also Gardbaum, 'Law, Politics, and the claims of community', 90 *Michigan Law Review* 685 (1991); Bellamy and Castiglione, 'Between Cosmopolis and Community' in *Re-imaging Political Community*, 152-4 (Archibugi, Held, and Köhler, eds., 1998).

188 Walzer, 'Philosophy and Democracy', 9 *Political Theory* 393 (1981).

189 *Id.* at 395.

190 See Walzer, *Thick and Thin: Moral Argument at Home and Abroad* (1994).

191 For criticism of such views see, for example, Tamir, *supra* n. 26, at 10.

192 Beitz, 'Sovereignty and Morality in International Affairs' in *Political Theory Today*, 250-1 (Held ed., 1991).

Thus, universal rationality itself is based on local values. Consequently, the notion of universal reason is incoherent because it depends on local attitudes and therefore cannot be used to evaluate these attitudes.

In contrast, the cosmopolitan communitarian position holds that both the principles and the moral motivations and character of those who follow them need to be fleshed out with natural sentiments and 'thick' concepts such as courage, honesty, gratitude, and benevolence that arise out of specific ways of life. For the proper acknowledgment of 'thin' basic rights rests on their being specified and overlaid by a 'thicker' web of special obligations, which in turn stem from local values.[193]

Welfare states, for example, have typically been established in societies in which there are strong feelings of social solidarity. These reinforce formal obligations that emerge from being members of an institutionalized scheme of political co-operation as citizens of the same state. Essentially, they induce a sense of identification among a given group of people. However, that sense of commonness does not determine what its precise implications or content should be, but it does provide the basis on which such determination takes place. It defines a people for whom a form of democratic rule appears appropriate and plausible. Traditionally, states provided the tool necessary to define a relatively circumscribed group of people and unify them around a set of shared institutions and practices that were sovereign over a given territory. Political loyalty, accountability, and legitimacy were tied in this way to state power and authority. Cosmopolitans deny the necessity and desirability of such attachments. They may grant them a certain empirical weight, but not moral significance.

By contrast, the communitarian argument tries to suggest that largely unchosen commonalties of history, belief, geography, and civic culture *do* have an ethical relevance. For they supply the feelings of reciprocity, trust, and commitment needed to supplement the ties of mere mutual advantage that result from individuals acting on the basis of rational self-interest alone. Such moral qualities have an important influence on the character of political life, since they increase people's willingness to engage in co-operative behavior by raising their expectations and confidence in others. Far from encouraging self-interested and partial behavior, the lessening of the tension between personal and collective goals within a group is likely to make an impartial stance more acceptable.[194]

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193 Compare Rawls, *supra* n. 26, at 122: "But this [liberal cosmopolitan] answer overlooks the great importance of maintaining mutual respect between peoples and of each people maintaining its self-respect, not lapsing into contempt for the other, on one side, and bitterness and resentment, on the other. These relations are not a matter of the internal (liberal or decent) basic structure of each people viewed separately. Rather they concern relations of *mutual respect* among peoples, and so constitute an essential part of the basic structure and political climate of the Society of Peoples."

194 Gardbaum, *supra* n. 187, at 690-1; Bellamy and Castiglione, *supra* n. 187, at 163-4.

But one may object that political communities "have rarely – if ever – existed in isolation as bounded geographical totalities, and that they are better thought of as multiple overlapping networks of integration".[195] To give cosmopolitan argument some credit: the homogeneity of national communities may sometimes have been exaggerated.[196] But the fact that our identities and allegiances are multiple does not alter the basic communitarian point: namely, that political legitimacy has to be constructed from the bottom up. It cannot be provided from on high. The resolution of potential conflicts between ties of different kinds and degrees of intensity cannot be decided *a priori*, as cosmopolitans contend.

In this context, Jack Goldsmith has made the case for a 'more realistic cosmopolitanism'.[197] Goldsmith outlines the necessity to impose 'plausibility constraints' on the cosmopolitan idea. In short, there are five main types of limitations on individual capacities as a basis for ascribing duties to institutions. First, the author refers to conceptions of human agency that are informed by ordinary practices and intuitions. Second, he observes limits based in human biology or psychology. Third, he claims that certain cosmopolitan duties are inconsistent with any reasonable conception of a good life, since cosmopolitanism would, at least partly, make overstretching moral claims. Fourth, he deals with the particular problem of non-compliance, since some duties on individuals need to be conceptualized in respect of the fact that others will not do their fair share. Finally, Goldsmith notes that individuals often have to deal with severe collective action hurdles.[198] As a consequence, we need to

> . . . accept the basic plausibility constraints on the ability of liberal democracies to engage in strong cosmopolitan action, and to work within these limits to better achieve the cosmopolitan end of assisting the less fortunate.[199]

Most importantly, Goldsmith asserts that "*a cosmopolitanism that takes institutions seriously is a cosmopolitanism that does serious cost-benefit analysis*".[200]

Summing up, it is argued that the very multiplicity of our community affiliations suggests a simple communitarianism is unsatisfactory. Instead, we need a cosmopolitan communitarian approach that encourages us to actively negotiate between different communal attachments in ways that do justice to their varying degrees of importance for those concerned. Again, in Michael Walzer's terms, ". . . difference exists alongside

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195 Held, *supra* n. 1, at 225.

196 The heterogeneity of (nation-) states is the central argument of Thomas Franck's latest main publication. See Franck, *The Empowered Self: Law and Society in the Age of Individualism*, 6-10 (1999).

197 Goldsmith, 'Liberal Democracy and Cosmopolitan Duty', 55 *Stanford Law Review* 1667 (2003).

198 *Id.* at 1673.

199 *Id.* at 1693.

200 *Id.* at 1694 (emphasis added).

peace, equality and autonomy; it doesn't supersede them".[201] The normativity of cosmopolitan communitarianism is derived from an analysis of the 'human condition'. Given the very 'plausibility constraints' we are exposed to a pure cosmopolitan approach seems to be untenable. The communitarian objections to liberal theories indicate persuasively that political theories derive from the very perception of the self.

In turn, the compliance theories discussed in this monograph have the same starting point. Theorists perceive their picture of 'reality' and construct their conceptualizations out of it. By doing so, they draw from insights which the philosophical tradition can offer and go on to incorporate them. Some do so more explicitly, like Thomas Franck or Anne-Marie Slaughter, others implicitly like Neuhold in his cost-benefit analysis. As it turns out, these compliance theories employ to some extent a *prescriptive* agenda when they attempt to *descriptively* explain why states comply with international law. Arguably, it is sometimes difficult to differentiate between the two. Chapter 2, therefore, attempted to show the philosophical background that leads them to do so. At this point, it is submitted that perceiving social reality in a cosmopolitan communitarian fashion allows us to construct a 'more realistic' account than a mere cosmopolitanism could do, or, as Rawls put it, "reconciles us to our political and social condition"[202] than a mere cosmopolitanism could do. Therefore, it is a cosmopolitan communitarian thinking on which a compliance theory may and maybe should be built on and against which any compliance theory will be tested.

Just as cosmopolitanism and communitarianism are not totally at odds with each other, it will now be discussed whether two other concepts – which are essential to the pertinent question of compliance with international law – can be considered as being compatible with each other. In the course of discussing the concepts of norms and norm compliance, the essential question therefore will be whether rationalism and constructivism, often or maybe too often said to be contradictory to each other, can be thought of as being complementary.[203]

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201 Walzer, 'International Society: What is the Best That We Can Do?', Unpublished Working Paper 9, June 2000, <http://www.sss.ias.edu/home/papers.html>.

202 Rawls, *supra* n. 26, at 11.

203 Katzenstein, Keohane, and Krasner suggest that the main axis of debate in the field of international relations in the coming years is likely to be rationalism versus constructivism. See Katzenstein, Keohane, and Krasner, 'International Organization and the Study of World Politics', 52 *International Organization* 645-9 (1998).

Chapter 3

NORMS AND NORM COMPLIANCE

> *It is manifest that during the time that men live without a common power to keep them in awe, they are in that condition which is called war, and such is a war of every man against every man.*
>
> Thomas Hobbes

1. Phenomenology of Norms

How do we know a norm when we see one? Just as there is only indirect evidence of any political action, there is only indirect evidence of norms. Norms embody a shared moral assessment and as such raise the question of how many actors must share the assessment before we call it a norm.[1] To a large extent, this question refers to the empirical domain, which cannot be undertaken at this place. However, what can be done is to try to conceptualize the notion of norms. At a basic level, norms may be differentiated into local, regional, or global norms. Within any of these communities, norms are seen as continuous, rather than dichotomous, entities: they do not just exist or not exist, but instead come in varying strengths. Against this background, there is also general agreement on the definition of a norm, namely, as a standard of appropriate behavior for actors with a given identity. Nevertheless, there are many concepts varying in their actual conceptualization of norms.[2] At a basic level, a distinction may be made between regulative norms, which order and constrain behavior, and constitutive norms, which create new actors, interests, or categories of action.[3]

Because norms embody a quality of 'oughtness' and shared moral assessment, norms prompt justification for action. Indeed, Joseph Raz argues that the key concept for the explanation of norms is that they are reasons for action. This is because

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1 Finnemore and Sikkink, 'International Norm Dynamics and Political Change', 52 *International Organization* 892 (1998).

2 See, for example, Kratochwil, 'The force of prescriptions', 38 *International Organization* 685 (1984); Legro, 'Which norms matter? Revisiting the 'failure' of internationalism', 51 *International Organization* 31 (1997); Finnemore and Sikkink, *supra* n. 1, at 887.

3 Finnemore and Sikkink, *supra* n. 1, at 891; Kratochwil, *Rules, norms, and decisions*, 26 (1989); Dessler, 'What's at stake in the agent-structure debate?', 43 *International Organization* 454 (1989).

any entity may give the fact that its action is required by a norm as its reason for performing it, and an action may be justified because it conforms to a norm.[4] Raz distinguishes between 'mandatory' norms, which consist of four elements (the de-ontic operator, the norm subjects, the norm act, and the conditions of application) and 'non-mandatory' norms, i.e. 'permissive' and 'power-conferring' norms.[5]

A mandatory norm is either an exclusionary reason or, more commonly, both a first-order reason to perform the norm act and an exclusionary reason not to act for certain conflicting reasons. Exclusionary reasons are, for example, norms justified as labor- and time-saving devices, those justified as error-minimizing devices, and those issued by authority and justified by the wisdom of the authority or by the need to secure co-ordination.[6] According to Raz, the very same considerations which make it possible to talk of mandatory norms, and on which the need for this mode of expression is based, apply to permissive norms as the basis of many exclusionary permissions. Since it is often referred to the content of an exclusionary permission abstracted from the circumstances, which establish the permission, there is a need to refer to permissive norms as abstract entities.[7] Power-conferring norms stipulate that the performance of the norm act by the norm subject has certain normative consequences. These norms resemble permissive norms and differ from mandatory norms in having a normative force without being themselves complete for action. Their normative force is manifested by the fact that statements of such norms are premises of practical inferences that affect the conclusion of the inference.[8]

In order to address the question whether a norm of whatever type itself influences behavior of actors, or, put another way, what reasons for taking actions actors may have, at a basic level three concepts may be distinguished: first, the realist notion that a norm does only influence actors if the norm is in their interest and gain. Second, the notion that it is the formulation of a norm that matters, and third, that it is the substance of a norm that matters.

According to the realist concept of norms, norms may be a useful means to maintain the stability of the system and to solve co-ordination problems where an agreed-upon rule becomes a focal point for behavior and is virtually self-enforcing. Given that understanding, it seems fair to argue that the failure of the realist notion of norms may be to conceptualize norm robustness independent of the very effects attributed to norms, thus leading to tautology. The reason for a possible or maybe even inevitable tautology is that one can almost always identify a norm to 'explain' or 'allow' a particular effect. Therefore, this model may be unable or at least unsuitable to explain

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4 See Raz, *Practical Reason and Norms*, 9-19 (1990).
5 *Id.* at 50-5.
6 *Id.* at 74.
7 *Id.* at 95.
8 *Id.* at 104-8.

why some norms are more influential than others in particular situations. It also cannot provide for an appropriate explanation why certain norms did or did not emerge and why they were consequential or not. Another problem is a neglect of alternative explanations regarding the effects attributed to norms. However, by doing so, one risks crediting international norms with consequences (e.g. the shaping or enabling of particular identities, interests, beliefs, or actions) that are better explained by other types of factors. Such other factors may – amongst others – include social and political interaction.[9] In order to avoid the shortcomings of this rather circular model, Alexander Wendt suggests that social structures vary in the degree to which they can be transformed to norms.[10] In different ways, both Robert Keohane and Friedrich Kratochwil link a norm's potency to its institutionalization.[11] Nevertheless, these concepts merely seem to push the problem back to one of theorizing the robustness of institutions and thus cannot avoid the tautological shortcomings of this concept.

Contrary to this realist notion of norms, the second model is the notion that the formulation of the norm is essential. The main feature of these concepts is their attempt to establish certain factors to determine the robustness of norms. In order to do so, commonly a conceptualization based on three criteria, namely, 'specificity', 'durability', and 'concordance' may be used.[12] 'Specificity' refers to how well the guidelines for restraint and use are defined and understood. Is there a code that is overly complex or ill defined or is it relatively simple and precise? Do countries argue about what the restraints entail or how to implement them? Along these guidelines, examining the actors' understandings of the simplicity and clarity of the prohibition or prescription may thus help assessing 'specificity'.[13] On the other hand, 'durability' denotes how long the rules have been in effect and how they weather challenges to their prohibitions. Have the norms had long-standing legitimacy? Are violators or violations penalized, thus reinforcing and reproducing the norm? It should be noted that violations of a norm do not necessarily invalidate it. This is because the real issue is whether actors are socially or self-sanctioned for doing so. Consequently, an examination of the history of a prohibition and agents' related understanding of and reaction to violations may assess these questions. Finally, 'concordance' means how widely accepted the rules are in diplomatic discussions and agreements. Do states, respectively their representatives, seem to concur on the acceptability of the rules? Do they affirm their

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9 See Legro, *supra* n. 2, at 33. Koh essentially argues that these forms of interaction lead to an 'internalization' of international norms; a process through which international law acquires its 'stickiness' that nations come to obey. See Koh, *supra* Introduction, n. 25, at 2655. See also *infra* Chap. 5, par. 5.

10 Wendt, 'Constructing international politics', 20/1 *International Security* 80 (1995).

11 Keohane, *International Institutions and State Power: Essays in International Relations Theory*, 4-5 (1989); Kratochwil, *supra* n. 3, at 62.

12 Legro, *supra* n. 2, at 34; Keohane, *supra* n. 11, at 5-8; Young, *International cooperation: Building regimes for natural resources and the environment*, 23 (1989).

13 Cf. the concept of 'determinacy' in Franck's *The Power of Legitimacy Among Nations*. See *infra* Chap. 5, par. 2.

approval by committing reputations to public ratification? Do states furthermore put special conditions on their acceptance of prohibitions, thus diminishing 'concordance'? Or do they rather take the rules for granted, never even considering violating their prescriptions?[14] By assessing these criteria, the expectation of this approach is that the clearer, more durable, and more widely endorsed a prescription is, the greater its impact will be. This expectation suggests that states' adherence to norms is most likely in areas where norms are most robust in terms of 'specificity', 'durability', and 'concordance'.[15] Alternatively, the norm may be so robust that violation of it is not even considered. This may be simply because the costs of violation will be seen as non-prohibitive and consequently, the related norms will not be identified with self-interest or identity. In short, the effect of prohibitions on actors, decision-making, and practices will be minimal. The problem with this approach is that it remains a rather vague concept. The question needs to be asked when, in practice, a norm is, for example, specific. As has become recently evident, even supposedly very clear and specific norms turn out to be subject to very different interpretations.[16] Similarly, there are no adapted measurements of durability and concordance, which could provide the basis for an explanatory theory of norms.[17]

Third, a norm may influence actors because of the substance of the norm and the issues it addresses.[18] Theories stressing the substance of a norm may either functionally imply that norms have a clear direction, if not a final end-point.[19] Alternatively, one might maintain that norms are best investigated by tracing their origin to a collective experience. This claim follows a conceptualization of norms, which is rooted in the experience of the sacred and/or the moral.[20] The relationship of new normative claims to existing norms may also influence the likeliness of their influence. This is especially important for norms within international law, "since the power of persuasiveness of a normative claim in law is explicitly tied to the 'fit' of that claim within existing normative frameworks".[21] In short, arguments about which particular

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14 Legro, *supra* n. 2, at 35-6; Finnemore and Sikkink, *supra* n. 1, at 893-4.

15 It should be noted that these notions of norm-robustness in one way or another influence otherwise distinct compliance theories. For example, as indicated, Thomas Franck's approach has norm-robustness for theme, as well as Hanspeter Neuhold's 'cost-benefit analysis'. See *infra* Chap. 5, pars. 2 and 1, respectively.

16 Compare already the discussion on the international legal basis of the 'Operation Desert Storm' led by the United States against the invasion of Kuwait by Iraq in 1991. See, for example, Zemanek, 'The Legal Foundations of the International System: General Course on Public International Law', 266 *RdC* 299-300 (1997).

17 The shortcomings of this approach are discussed in more detail in the analysis of Franck's *The Power of Legitimacy Among Nations*, *infra* Chap. 5, par. 2.2.

18 This pattern of argument is followed by Franck's *Fairness in International Law and Institutions* as well as by liberal theory. See *infra* Chap. 5, pars. 3 and 6, respectively.

19 Finnemore and Sikkink, *supra* n. 1, at 907.

20 Durkheim, *Sociology and Philosophy*, 42-8 (Pocock trans., 1974). See also Kratochwil, *supra* n. 2, at 699.

21 Finnemore and Sikkink, *supra* n. 1, at 908.

substantive claims will be more influential in international law have varied to a large extent. Rather common suggestions in this respect are that norms, which are underpinned by principles such as individualism, capitalism, or rational progress will be more successful at an international level.[22] Without going into detail at this point, the shortcomings of this account are, among others, its universalism and its ignorance of particularities and differences.[23]

2. Compliance with Norms

> Concepts of compliance depend upon understandings of the relations of law, behavior, objectives, and justice. These relations are of central importance to the real-world problems with which international lawyers are habitually concerned, and must be theorized before there can be any true theory of compliance.[24]

Along this outline, the essential question is: What motivates states to follow international norms, rules, and commitments? Generally, social systems must confront the problem of social control – that is, how to get actors to comply with society's rules – but the problem is particularly important for international relations, because the international social system does not possess a central agency to enforce international law. The paradigm of social control uses the mechanisms of reward and punishment in a sense that pro-social behavior is rewarded, ordinary social behavior is treated neutrally, whereas anti-social behavior is punished.[25] At a basic level, three reasons why a given actor might obey a rule may be considered:[26] first, because the actor fears the punishment of rule enforcers; second, because the actor sees the rule as in its own self-interest; and third, because the actor feels the rule is legitimate and ought to be obeyed.

The first reason why compliance may take place is based on the notion of coercion. Coercion refers to a relation of asymmetrical power among agents, where this asymmetry is applied to changing the behavior of the weaker agent. An actor who

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22 For an examination of these accounts see Finnemore and Sikkink, *supra* n. 1, at 907.

23 See already *supra* Chap. 2, par. 7; see also *infra* Chap. 5, par. 6.

24 Kingsbury, *supra* Introduction, n. 21, at 346.

25 Ellickson, *Order Without Law*, 124 (1991).

26 Koh distinguishes among five types: coercion, self-interest, legitimacy, communitarianism, and discursive legal processes. Koh, 'Bringing International Law Home', 35 *Houston Law Review* 633-4 (1998); Koh, 'How is International Human Rights Law Enforced?', 74 *Indiana Law Journal* 1397 (1998). For the purposes of a discussion of social control, however, a typology of three models my be more suitable. See Hurd, 'Legitimacy and Authority in International Politics', 53 *International Organization* 379 (1999). Elsewhere, a typology of only two models is suggested, one 'rationalist' (emphasizing coercion, cost/benefit calculations, and material incentives) and one 'constructivist' (emphasizing social learning, socialization, and social norms). Checkel, 'Why Comply? Social Learning and European Identity Change', 55 *International Organization* 553 (2001).

obeys a rule because of coercion is motivated by the fear of punishment from a stronger power. Within this framework, the rule itself is irrelevant except as a signal for what kinds of behavior will and will not incur the penalty. If a social system relies at base on coercion to motivate compliance with its rules, it expects to see enormous resources devoted to enforcement and surveillance and low levels of compliance when the enforcing agent is not looking.[27]

Thomas Hobbes presents a classic argument for why society must be based on the centralization of coercive power.[28] In order to escape the state of nature, in which

> . . . it is manifest that during the time that men live without a common power to keep them in awe, they are in that condition which is called war, and such is a war of every man against every man . . .[29]

towards a human society, individuals concede to a central agent almost all powers of self-defense and retribution. However, individuals do not simply alienate their 'right to everything' to a political authority. Rather, what is granted to that authority is also the right to decide among irresolvably contested truths: to provide the authoritative criteria for what is, and thus to remove people from the state of epistemic and ethical anarchy that form the basis of the state of nature.[30] Nevertheless, the Hobbesian model in essence advances coercion as the mechanism of social control. Its emphasis on threats and force in generating compliance comes at the expense of attention to either the normative content of rules or more complicated calculations of self-interest by actors. In this context, it is important to note that the classification of a society as 'anarchy' does not (necessarily) imply the absence of norms in social interactions. Even though social systems that entrust no central formal organization with the enforcement of public order (such as the international system) might demonstrate some organizational weakness, these systems do not inevitably show the unimportance of norms and rules.[31]

Basically, coercion is a relatively simple form of social control, and it is inefficient from the point of view of the central power. Coercion and repression tend to generate resentment and resistance, even as they produce compliance, because they operate the normative impulses of the subordinate individual or group. As a result, each application of coercion involves an expenditure of limited social capital and reduces the likelihood that the subject will comply without coercion in the future. For this reason, few complex social orders are primarily based on coercion, although all social

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27 Hurd, *supra* n. 26, at 383.

28 Hobbes, *Leviathan* (Macpherson ed., 1968).

29 *Id.* at 76.

30 Williams, 'Hobbes and international relations: a reconsideration', 50 *International Organization* 219 (1996).

31 See also the social-choice perspective developed by Young, 'Anarchy and Social Choice', 30 *World Politics* 242 (1978).

orders are likely to resort to force at some point. Generally, coercion and sanction are costly mechanisms of control, and quite unsuited for regulating activities that require any measure of creativity in subordinates. To anticipate, social orders based on coercion over time tend to either collapse from their own instability or reduce their coercive component by legitimating certain practices and creating stable expectations among actors.[32] Compared with domestic systems, the international system exposes relatively weak coercion and sanction functionalities.[33] Therefore, unless these mechanisms do either severely increase the costs of non-compliance for actors or are 'internalized' by actors, it might – at first sight – be assumed that they are not the central tool to exert social control within the international system.

A second possible motivation for compliance with rules is the belief that compliance in fact promotes an actor's self-interest. It is not uncommon in the social sciences to presume that such calculations of self-interest are the foundation of most social action.[34] This view suggests that any rule following by individuals is the result of an instrumental and calculated assessment of the net benefits of compliance versus non-compliance, with an instrumental attitude toward social structures and other people. Although some proponents of this approach stress the benefits of co-operative action through institutions, they also argue that the interests of the actors remain paramount. Despite the advantages of participation in an institution, an actor who believes his interests are no longer served by the institution will act contrary to the institutional rules.[35] The task of the governing agent becomes to structure incentives so that community members find compliance the most rationally attractive option. If the constitution of the system correctly manages incentives, self-interest should allow a peaceful society.

The tool that writers have used for this analysis is game theory.[36] Game theory is particularly well suited to international relations because the lack of higher authority places international actors in a situation of pure strategic interaction, where they are solely concerned about the limits that the behavior of others places in their pursuit of self-interest. Unlike in domestic scenarios,[37] in most international situations the

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32 Kratochwil, *supra* n. 2, at 690-2; Hurd, *supra* n. 26, at 384-5.

33 For the purposes of the present analysis, it might be assumed that sanctions in the international system are weak at least when compared to domestic systems. Looked closely, the effectiveness of sanctions in the international arena varies depending on several factors, such as the economic and military power of the state(s) implementing the sanctions and the target state(s) as well as the dependency on foreign trade and investment.

34 Chapman, 'The Rational and the Reasonable: Social Choice Theory and Adjudication', 61 *U. Chi. L. Rev.* 41 (1994); Chong, 'Rational Choice Theory's Mysterious Rivals', 9 *Critical Review* 37 (1995); Ferejohn and Satz, 'Unification, Universalism, and Rational Choice Theory', 9 *Critical Review* 71 (1995).

35 Krasner, 'Structural Causes and Regime Consequences: Regimes as Intervening Variables', 36 *International Organization* 191-2 (1982).

36 See, for example, Snidal, 'The Game Theory of International Politics', 38 *World Politics* 25 (1985/86).

37 For a study on game theory in domestic law see Baird, Gertner, and Picker, *Game Theory and the Law* (1994).

expected payoffs to states are not altered by the threat of sanctions, because sanctions are weak or non-existent. For that reason, from this 'rationalist' perspective, pure strategic incentives are central to the conduct of foreign policy.

Game theory teaches that international co-operation is difficult, even when it is desirable, because many international situations take the form of the PD.[38] This analysis of international relations explains why states which operate in a semi-anarchical situation and would be better off co-operating, nevertheless often refuse to do so. States often refuse to co-operate because they are afraid of being exploited by other states. The dominant strategy is for each to defect; and because all states reason in the same way, the frequent result is mutual defection. With no higher power to curb defections, nations are thus caught in the corrosive logic of the PD.

This analysis, however, calls for a number of cautionary observations. Especially, it should be pointed out that not all international situations take a PD form because states may face each other in many different (other) kinds of situations.[39] First, they may encounter situations of conflict. A situation of (pure) conflict is one in which (every) change in outcome leaves one player better off and the other worse off. This situation is commonly called a zero-sum game. Second, they may face situations of co-operation. A situation of (pure) co-operation is one in which (every) change that makes one player better off makes all players better off. If two states fully converge in their interests, their rational behavior is always to co-operate as they do not need to bargain or communicate because they are guided by an 'invisible hand'. This situation is commonly called 'Harmony'.[40] Third, in some situations states will never achieve mutual benefit from co-operation because there are no mutual interests; this situation is referred to as one of 'Deadlock' or 'Discord'.[41] Fourth, international situations may also take the form of the 'Co-ordination Dilemma'.[42] In this matrix,

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38 The name may be traced back to a story that was first told in the 1950s to illustrate the following interaction: two criminals are arrested. They both have committed a serious crime, but the district attorney cannot convict them both on a lesser offense with the co-operation of either. The district attorney can, however, convict them both on a lesser offense without the co-operation of either. The district attorney tells each prisoner that if neither confesses, they will both be convicted of the lesser defense. Each will go to prison for two years. If, however, one of the prisoners confesses and the other does not, the former will go free and the latter will be tried for the serious crime and given the maximum penalty of ten years in prison. If both confess, the district attorney will prosecute them for the serious crime but will not ask for the maximum penalty. They will both go to prison for six years. Each prisoner wants only to minimize time spent behind bars and has no other goal. Moreover, each is indifferent to how much time the other spends in prison. Finally, the two prisoners have no way of reaching an agreement with each other. See, for example, Baird, Gertner, and Picker, *supra* n. 37, at 33.

39 Cf. Oye, 'Explaining Cooperation Under Anarchy: Hypotheses and Strategies' in *Cooperation Under Anarchy*, 6 (Oye ed., 1986).

40 Oye, *supra* n. 39, at 6; Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy*, 51-5 (1984).

41 Oye, *supra* n. 39, at 6; Keohane, *supra* n. 40, 51-5.

42 See Ullman-Margalit, *The Emergence of Norms*, 77-81 (1977).

co-operation is the preferred outcome, but there are several co-operating options and the parties cannot easily identify which one the other party will eventually choose. In these situations, mutual co-operation arises when one party identifies a co-operative alternative and signals its intent to the other parties to behave accordingly. The co-operating choice becomes the salient feature of the interaction, and the likelihood of co-operation increases with repeated play.[43]

Even though some international situations may take any of these other forms, it should not be neglected that many situations take the form of a PD. This notion makes it worthwhile considering this situation, in particular when the PD is repeated, because in that case, co-operation can emerge as a long-term strategy contrary to the weak likelihood of co-operating in the short term: if the PD is extended for an indefinite number of interactions, co-operation is more likely to emerge between two players. Robert Axelrod discovered that a strategy of reciprocity (commonly referred to as 'Tit-for-Tat') could promote co-operation in an iterated PD. The 'Tit-for-Tat' strategy requires an individual to co-operate in the first round of interaction and match an opponent's moves in subsequent rounds. If an opponent co-operates, 'Tit-for-Tat' strategy rewards the action by co-operating in the next round. If the opponent defects, however, 'Tit-for-Tat' strategy punishes the defection in the next round. In the iterated PD, therefore, the long-term benefits of co-operation outweigh the short-term benefits of defection. According to Axelrod,

> . . . as long as the interaction is not iterated, co-operation is very difficult. That is why an important way to promote co-operation is to arrange that the same two individuals will meet each other again, be able to recognize each other from the past, and to recall how the other has behaved until now. This continuing interaction is what makes it possible for co-operation based on reciprocity to be stable.[44]

In the case of continuing interaction, reputation becomes important: in potentially unlimited rounds of a PD situation, a player facing the same player(s) not only trusts the other player(s) to follow a co-operative strategy but also chooses it himself, since the other player(s) will trust him only if he has the reputation of being a *bona fide* co-operative player.

Thus, players may depart from the dominant strategy of mutual defection and decide to co-operate when they have an expectation to interact again – this is called iteration. If the actors have an expectation of interacting frequently in the future, their best long-term strategy may indeed be to co-operate.[45] It should be noted, however, that the strategy to co-operate works best when the number of players in a game is

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43 See Hollis, *The Cunning of Reason*, 32 (1987).

44 Axelrod, *The Evolution of Cooperation*, 125-32 (1984).

45 Axelrod, *supra* n. 44, at 12-4; Keohane, *supra* n. 40, at 75-8.

small. When the number of players is large, however, it is easy for one or a few players to adopt a non-co-operative strategy and either not be detected, since the impact on the other players is rather small, or not be punished, since they cannot be discovered or the costs for the co-operating players to punish them are too high. Thus, voluntary compliance is more likely in small communities than in large and reliance on voluntary compliance in large communities leads to free riding.[46] Generally, therefore, in case of high social cohesiveness, defection is expensive, for the defector will be punished in future interactions with the same players.

From a game-theoretical perspective, the binding force of international law is merely the expectation that other states will abide by the rules out of perceived self-interest. If, for example, the parties to a treaty are motivated by self-interest, they can hardly have a reason to honor the treaty when doing so is not in their interest. Even if they enter into an agreement in order to reach the collective optimal solution, there is no incentive for a party to comply with the agreement after the treaty has entered into force if that party can exploit the other with impunity. It may be rational for one of the parties to violate the treaty if breach is in that party's interest. Thus, the treaty cannot create an obligation because game theory's assumption is that parties act out of interest, not out of a sense of obligation. Because the treaty process is both time-consuming and resource-intensive, states will be less inclined to violate an agreement and risk losing their underlying investment. These sunk costs contribute to the maintenance of the agreement.[47]

This second notion of compliance with norms out of self-interest of the actor(s) is related to the previously outlined concept of coercion in that both are forms of utilitarianism.[48] When an actor is presented with a situation of choice that involves threats of reprisals or where the available choices have been manipulated by others, the self-interest and coercion models will follow the same logic and predict the same outcome: a risk-neutral agent should compare the benefit to be had by going forward against the costs of the punishment multiplied by the probability of the sanction being applied.

One potential problem with this model is that it assumes that all actors are rational utility-maximizers. While it might be questioned that individuals always act 'rationally', an assumption of rationality may be even less acceptable as applied to states. In this respect, Kenneth Arrow convincingly argues that organizations have no rationality of their own, but rather that they imperfectly intermediate for individuals.[49] An additional problem may be that this model takes the actors' preferences as exogenous.

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46 See also Mueller, *Public Choice III*, 12-3 (2003).

47 Aceves, 'Institutionalist Theory and International Legal Scholarship', 12 *Am. U. J. Int'l L. & Pol'y* 257 (1997).

48 Cf. in this respect the discussion on utilitarianism, *supra* Chap. 2, par. 1.

49 Arrow, *Social Choice and Individual Values*, 21 (1951). Cf. Dunoff and Trachtman, 'Economic Analysis of International Law', 24 *Yale J. Int'l L.* 21 (1999).

This means that it assumes that certain preferences are given, and that actors simply tend to maximize their preferences. For that reason the model tends to ignore that preferences are always situated in some context – be it legal, political, institutional, social or whatsoever.[50]

As will be shown in more detail in Chapters 4 and 5, the assumption that compliance in fact promotes an actor's self-interest is underlying various forms of 'rationalist' theories. By applying the game-theoretical approach as just outlined, these theories essentially assume that some sort of cost-benefit analysis reveals whether it is in a state's (self-) interest to comply with international norms or not. In short, compliance will thus take place in case the benefits outweigh the costs.[51]

Finally, compliance with norms may take place because the actor is motivated by a belief in the normative legitimacy of the rule. Alternatively, he may be motivated by the legitimacy of the institution that generated the norm.[52] The concept of legitimacy contributes to norm compliance by providing an 'internal' reason for an actor to follow a norm. When an actor believes a norm to be legitimate, compliance is neither motivated by fear of retribution or coercion, nor by self-interest, but instead by an internal sense of obligation. Thus, the legitimacy-oriented approach is rooted in the analysis of obligation and for an actor control is perceived to be legitimate to the extent that it is approved or regarded as 'right'.[53] Legitimacy denotes accordance with basic *principles* of law, but it does not do so with all specific rules of law. Thereby, legitimacy has also a connotation of contestability.[54] It should be noted that this approach, more exactly, the notion that norm compliance takes place out of the *subjective* perception by an actor, does not say anything about its justice in the eyes of an outside observer.[55]

The process in legitimation may be the internalization by the actor of an external standard. Internalization takes place when the actor's sense of its own interests is partly constituted by a force outside itself, that is, by the standards, laws, rules, and norms present in the given community. Therefore, a rule will become legitimate to

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50 Arrow, *supra* n. 49, at 21.

51 Cf. the discussion of Hanspeter Neuhold's approach *infra* Chap. 5, par. 1.

52 The concept of 'legitimacy' as introduced here is a broader one than the concept used by Thomas Franck in his *The Power of Legitimacy Among Nations* because it encompasses all forms of – what will be called 'normative' – compliance theories. Hurd, *supra* n. 26, at 387-9; Franck, *supra* Introduction, n. 11, at 709-11.

53 Dahl and Lindblom, *Politics, Markets, and Welfare: planning and politico-economic systems resolved into basic social processes*, 114 (2nd ed., 1992). Obviously, the overall concept of legitimacy is central to Thomas Franck's *The Power of Legitimacy Among Nations*. See *infra* Chap. 5, par. 2.

54 "Legitimacy means that there are good arguments for the entitlement connected with a political order to be perceived as right and justified; a legitimate order deserves approval. *Legitimacy means that a political order deserves approval.* This definition emphasizes that legitimacy is a contestable concept." Habermas, *Zur Rekonstruktion des Historischen Materialismus*, 271 (1976; translated from German by M.B.).

55 See the discussion of Franck's conception of legitimacy *infra* Chap. 5, par. 2.

a specific actor, when the actor internalizes its content and reconceives his interests according to the rule.[56] By doing so, the norm and thereby compliance with that norm becomes behaviorally significant. As such, compliance becomes habitual, and non-compliance requires of the individual special consideration as well as psychic costs. It is often argued that legitimacy as a device of social control would have efficiency advantages over coercion in the long run by reducing enforcement costs and by increasing the apparent 'freedom' of subordinates, although it would be more expensive in the short run.[57] Proponents of the legitimacy approach argue that efficiency advantages of authority would motivate the commonly observed impulse of the powerful to try to legitimate their power. In this context, Max Weber noted "the generally observable need of any power, or even advantage of life, to justify itself".[58]

Legitimacy-oriented theorists believe that the more an actor perceives a norm to be legitimate, the more likely he is to comply with that norm. Any theory based on legitimacy has to define various factors said to comprise legitimacy, aggregate those factors to arrive at a single evaluation of legitimacy, and clarify that legitimacy is in fact the desired metric. By doing so, the concept of legitimacy has to face several difficulties, which will be dealt with later on in the course of the discussion of Franck's concept of legitimacy.

Generally, it can be observed that these three devices of social control, namely, coercion, self-interest, and legitimacy recur either alone or in combination across all social systems in which rules exist to influence behavior, ranging from the governing of children in the classroom, to the internal structure of organized crime syndicates, and to the international system of states. Where rules or norms exist, one or a combination of these devices may achieve compliance. Indeed, the relation of coercion, self-interest, and legitimacy to each other is rather complex, and each is rarely found in its pure form:

> There is little reason to think that human behavior toward norms is either always self-interested or always a function of perceived legitimacy. Different people may vary in the

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56 The process of 'internalization' is the crucial point in Harold Hongju Koh's approach as elaborated *inter alia* in his essay *Why Do Nations Obey International Law?*. It should be noted, however, that the process of internalization, as Koh understands it, is not primarily induced by legitimacy-based considerations. Koh, *supra* Introduction n. 25, at 2599-608. See also *infra* Chap. 5, par. 5.

57 This argument is central to the compliance theory of Abram and Antonia Chayes. See *infra* Chap. 5, par. 4. Dahl and Lindblom, *supra* n. 53, at 115 observe that "legitimacy is not indispensable to all control. Nevertheless, lack of legitimacy imposes heavy costs on the controllers. For legitimacy facilitates the operation of organizations requiring enthusiasm, loyalty, discretion, decentralization, and careful judgment."

58 Weber, *Economy and Society: An Outline of Interpretive Sociology*, 953 (Roth and Wittich, eds., 1978). See also David Beetham who states that "because it is so problematical, societies will seek to subject it to justifiable rules, and the powerful themselves will seek to secure consent to their power from at least the most important among their subordinates". Beetham, *The Legitimation of Power*, 3 (1991).

> extent to which they have internalized a given norm, and the same person may vary in the extent to which she has internalized different norms. The theoretical challenge is therefore one of identifying the conditions under which each hypothesis holds, rather than showing that one is always right or wrong.[59]

Studies of domestic political sociology rotate around these devices, with scholars arguing variously for making one of the three devices foundational or combing them in assorted ways. It is generally deemed to be natural that a social system may exhibit each account at different moments or locations. Accordingly, it has been – persuasively – suggested that social structures first emerge from relations of coercion or from individual self-interest respectively. Nevertheless, once these relations are established and to some extent deemed necessary, they may well develop into legitimacy-based structures.[60] Given the developing stages of social structures, it turns out that the pertinent question of compliance with international law is also, maybe even primarily, one in the course of which one needs to address the developmental 'location' of the international system.

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59 Fearon and Wendt, 'Rationalism v. Constructivism: A Skeptical View' in *Handbook of International Relations*, *supra* Introduction, n. 19, at 53.

60 See, for example, Tilly, *Coercion, Capital, and European States, A.D. 990-1992* (1990).

Chapter 4

THEORIES OF COMPLIANCE WITH INTERNATIONAL LAW: A TYPOLOGY

> *A theory of international politics bears on the foreign policies of nations while claiming to explain only certain aspects of them.*
>
> Kenneth N. Waltz

The political philosophies outlined in Chapter 2 are the essential background of any theory of compliance. Indeed, each compliance theory borrows elements from various philosophical backgrounds. Naturally, there are several other factors or disciplines – such as International Relations (IR) theory or sociology – which influence authors writing on compliance. But IR theory in turn can be traced back to the political backgrounds. Nevertheless, in the following, a short overview of IR scholarship as it structures compliance theories will be provided. Organizing and categorizing theories of compliance itself produces various possible outcomes.[1] For the sake of simplicity, I will briefly differentiate between three basic models, namely, realist, institutionalist, and normative approaches. Before doing so, it should be noted that realist perspectives remain dominant in current scholarship.[2] Daniel Deudney summarizes the status of IR scholarship in the following:

> The contemporary study of international politics exhibits unprecedented diversity, but there is widespread agreement that the realist tradition remains the most intellectually hegemonic, and that, within realism, anarchy remains the core theoretical variable.[3]

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1 Compare Keohane, 'International Relations and International Law: Two Optics', 38 *Harvard ILJ* 487 (1997) (two general approaches), with Koh, 'Bringing International Law Home', *supra* Chap. 3, n. 26, at 634-5 (five approaches), and Kingsbury, *supra* Introduction, n. 21, at 350-60 (four approaches).

2 See, for example, Jervis, 'Realism in the Study of World Politics', 52 *International Organization* 971 (1998); Waltz, 'Structural Realism After the Cold War', 25/1 *International Security* 5 (2000); Greenberg, 'Does Power Trump Law?', 55 *Stanford Law Review* 1803-9 (2003).

3 Deudney, 'Regrounding Realism: Anarchy, Security, and Changing Material Contexts', 10 *Security Studies* 1 (2000).

For this reason, in the following, slightly more attention will be given to variants of realist theory.

1. Realist Theories

First, the philosophical tradition bifurcated into a Hobbesian, utilitarian, rationalistic strand, which acknowledged that states sometimes follow international law, but only when it serves their self-interest to do so. The realist analysis of state behavior focuses on strategic incentives – those faced by rational self-interested governments in light of the expected behavior of others. The realist explanation of international behavior relies on a perceived structure of costs and benefits, or payoffs, generated by strategic interaction. Under this rationalistic account, pitched at the level of the international system, states employ co-operative strategies to pursue a complex, multi-faceted long-run national interest, in which compliance with negotiated legal norms serves as a winning long-term strategy in a reiterated PD.

Realists generally tend to embrace some variant of Henkin's 'cynic's formula'.[4] The extent to which a state's behavior in fact conforms to international norms concerning a certain issue depends on factors such as a state's power, political, economic, and military, vis-à-vis its neighbors, not mainly on norms. Most realists see rules *per se* as not affecting state behavior, but as reflections of the interests of states exogenously determined.[5] Thus, realists maintain that international behavior can be explained by postulating an overriding motivation, one that is the same for all states: the national interest. Realists see the task of the science of international relations as the study of the interactions of different national interests and the co-operative or confrontational situations those interactions generate.[6]

Because realism tries to explain the outcomes of state interactions, it is a theory of international politics; it includes some general assumptions about the motivations of individual states but does not purport to explain their behavior in great detail or in all cases. As Kenneth Waltz put it:

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4 This formula suggests that "since there is no body to enforce the law, nations will comply with international law only if it is in their interest to do so; they will disregard law or obligation if the advantages of violation outweigh the advantages of observance". Henkin, *supra* Introduction, n. 1, at 49.

5 IR traditionally embraces this approach: "International Relations scholars have traditionally had little time for such questions [i.e. of international law]. Instead, they have regarded international law as something of an epiphenomenon, with rules of international law being dependent on power, subject to short-term alteration by power-applying states, and therefore of little relevance to how states actually behave." Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law*, 8 (1999).

6 Cf. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* (3rd ed., 1960); Waltz, *Man, the State, and War: A Theoretical Analysis* (2001); Bull, *The Anarchical Society* (2nd ed., 1998).

> [A] theory of international politics . . . can describe the range of likely outcomes of the actions and interactions of states within a given system and show how the range of expectations varies as systems change. It can tell us what pressures are exerted and what possibilities are posed by systems of different structure, but it cannot tell us just how effectively, the units of a system will respond to those pressures and possibilities. . . . To the extent that dynamics of a system limit the freedom of its units, their behavior and the outcomes of their behavior become predictable [but in general] a theory of international politics bears on the foreign policies of nations while claiming to explain only certain aspects of them.[7]

Traditionally, realism claims that a state commits an action because it advances its national interest but it does not need to claim that the national interest itself serves to justify international acts. Conversely, a variant of this traditional form of realism, namely normative realism, is the view that national interest justifies international behavior. In this respect, one may distinguish between 'offensive' and 'defensive' realism and 'neoclassical realism'.[8]

Offensive realism assumes that international anarchy is generally Hobbesian – that apart from situations of bipolarity or nuclear deterrence, security is scarce and states try to achieve it by maximizing their relative advantage.[9] In the offensive realist world, rational states pursuing security are prone to take actions that can lead to conflict with others – and usually do: "States begin with a defensive motive, but are forced to think and sometimes act offensively because of the structure of the international system."[10] This version of realism essentially argues that domestic differences between nation-states are relatively unimportant, mainly because pressures from the international system are strong and straightforward enough to make similarly situated states behave alike, regardless of their internal characteristic and structures. According to this view, foreign policy activity is the record of states jockeying for their position within the framework of a given systemic power configuration. To understand why a state is behaving in a certain way, in particular why it complies with international law in some cases and why it does not in other cases, offensive realists suggest, one should examine its relative capabilities and its external environment, because those factors will be translated smoothly into foreign policy and shape how the state chooses to advance its interests. Therefore, the only rule applicable to the state is one of rationality as there is no such thing as justice or morality across borders.

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7 Waltz, *Theory of International Politics*, 71 (1979); see also the discussion of this point in Christensen and Snyder, 'Chain Gangs and Passed Bucks: Predicting Alliance Patterns in Multipolarity', 44 *International Organization* 137 (1990).

8 The distinction between 'offensive' and 'defensive' realism was first made by Snyder, *Myths of Empire: Domestic Politics and International Ambition*, 11 (1991), and has been widely adopted since then.

9 Cf. generally Nardin, *Law, Morality, and the Relations of States* (1983); Mearsheimer, 'Back to the Future: Instability in Europe after the Cold War' in *The Perils of Anarchy: Contemporary Realism and International Security* (Brown ed., 1995) (hereafter cited as *The Perils*).

10 Mearsheimer, 'The False Promise of International Institutions' in *The Perils*, *supra* n. 9, at 337.

Defensive realism, in contrast, assumes that international anarchy is often more benign – that is, that security is often plentiful rather than scarce – and that 'normal' states can understand this or learn it over time from experience.[11] In the defensive realist world, rational states pursuing security can often afford to be relaxed, bestirring themselves only to respond to external threats, which are rare. Even then, such states generally respond to these threats in a timely manner by

> . . . balancing against them, which deters the threatener and obviates the need for actual conflict. The chief exception to this rule is when certain situations lead security-seeking states to fear each other, such as when prevailing modes of warfare favor the offensive.[12]

Foreign policy activity, according to this view, is the record of rational states reacting properly to clear systemic incentives, coming into conflict only in those circumstances when the security dilemma is heightened. This is repeatedly interrupted, according to defensive realists, by rogue states that misread or ignore the true security-related incentives offered by their environment.

Finally, proponents of neoclassical realism assume that states respond to the uncertainties of international anarchy by seeking to control and shape their external environment. Regardless of the myriad ways that states may define their interests, this school argues, they are likely to want more rather than less external influence, and pursue such influence to the extent that they are able to do so. The central empirical prediction of neoclassical realism is thus that over the long term the relative amount of material power resources countries possess will shape the magnitude and ambition of their foreign policies: as their relative power rises, states will seek more influence abroad, and as it falls, their actions and ambitions will be scaled back accordingly.[13]

Yet, a theory of foreign policy limited to systemic factors alone is bound to be inaccurate, the neoclassical realists argue, which is why offensive realism is also misguided. To understand the way states interpret and respond to their external environment one must thoroughly analyze how systemic pressures are translated through unit-level intervening variables such as decision-makers' perceptions and domestic state structure. In the neoclassical world, leaders can be constrained by both international and domestic politics. International anarchy, moreover, is neither Hobbesian nor

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11 Glaser, 'Realists as Optimists: Cooperation as Self-Help' in *The Perils, supra* n. 9; Walt, 'International Relations: One World, Many Theories', 110 *Foreign Policy* 29 (1998).

12 Cf. Van Evera, 'Offense, Defense, and the Causes of War', 22/4 *International Security* 5 (1998); Glaser and Kaufmann, 'What Is the Offense/Defense Balance and Can We Measure It?', 22/4 *International Security* 44 (1998).

13 Rose, 'Neoclassical Realism and Theories of Foreign Policy', 51 *World Politics* 152 (1998). See also Grieco, 'Anarchy and the Limits of Cooperation: A Realist Critique of Newest Liberal Institutionalism', 42 *International Organization* 485 (1988).

benign, but rather murky and difficult to read. States existing within it have a hard time seeing clearly whether security is plentiful or scarce and must grope their way forward in twilight, interpreting partial and problematic evidence according to subjective rules of thumb. In this respect, neoclassical realists occupy a middle ground between pure structural theorists and constructivists. Structural theorists implicitly accept a clear and direct link between systemic constraints and unit-level behavior. Constructivists deny that any objective systemic constraints exist at all. Instead, they argue that international reality is socially constructed and that "anarchy is what states make of it".[14]

In the course of the discussion of contemporary theories of compliance with international law in Chapter 5, one version of neorealist theory will be analyzed, namely, the approach taken by Hanspeter Neuhold in *The Foreign Cost-Benefit Analysis Revisited*.[15]

2. Institutionalist Theories

Like neorealist theories, institutionalist theories view states as the primary international actors and treat them as rational actors interacting in a somewhat anarchical world. Like neorealism, institutionalism takes a game theoretic approach to the study of the international system. But, unlike realists, institutionalists believe that states can combine to create institutions that can make rules that in turn affect the behavior of states. These norms, however, do not influence states because of their being norms, but because they form part of an entire regime, including the institutions creating and implementing them; these institutions, in turn, can alter incentives of states to comply or not comply.[16]

Drawing upon the work done by Ronald Coase, Oliver Williamson, and others in the 'new institutionalism' in economics,[17] institutionalists assert that international institutions enhance compliance with international agreements in a variety of ways,

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14 Wendt, *supra* Chap. 2, n. 130, at 394-7; Wendt, 'Constructing International Politics', 20/1 *International Security* 71 (1995).

15 See *infra* Chap. 5, par. 1.

16 See Keohane, *supra* n. 1, at 490 and Keohane, *supra* Chap. 3, n. 40, at 26 ("What distinguishes my argument from structural realism is my emphasis on the effect of international institutions and practices on state behavior.").

17 According to this literature, markets can be inefficient because the costs of gathering information and bargaining over contracts in order to undertake a transaction can be prohibitively high. 'Governance structures', such as the firm, substitute hierarchal relations for markets. When the costs of transactions within these structures are cheaper than the market, these institutional structures enhance the efficiency of transactions. See generally Coase, *The Firm, The Market and the Law* (1988); Williamson, *The Economic Institutions of Capitalism: Firms, Markets, Relational Contracting* (1985); North, *Institutions, Institutional Change, and Economic Performance* (1990).

from reducing incentives to cheat and enhancing the value of reputation, to "establishing legitimate standards of behavior for states to follow" and facilitating monitoring, which creates "the basis for decentralized enforcement founded on the principle of reciprocity".[18] They do this through their ability to condition the benefits of the regime on compliance (reciprocity), to link compliance to co-operation on other issues, and to put pressure on domestic actors to comply with norms.[19]

Institutionalism recognizes "the fact that world politics at any given time is to some extent institutionalized", both through "[f]ormal international organizations and codified rules and norms ('international regimes')" and through less-formalized patterns of behavior "recognized by participants as reflecting established rules, norms, and conventions".[20] It holds that nations facing a PD may benefit from mutually co-operative behavior. International institutions or regimes may increase the likelihood or depth of such co-operation by lowering information costs or transaction costs.[21] In this respect, one influential version of institutionalism, the so-called New Haven School, consistently argued that international law should not be thought of as a body of rules, but of a process of authoritative decision-making.[22] Eisuke Suzuki, one New Haven scholar, puts this argument in the following:

> The New Haven school does not describe the world's different community decision processes through a dichotomy of national and international law, in terms of the relative supremacy of one system of rules or other interrelations of rules. Instead, it describes them in terms of *the interpenetration of multiple processes of authoritative decision* of varying territorial compass. . . . International law is most realistically observed, not as a mere rigid set of rules but as the whole *process* of authoritative decision in which patterns of authority and patterns of control are appropriately conjoined.[23]

The policy approach of the New Haven School in essence supports the notion that a clear and specific rule of law or treaty obligation may be disregarded if it is not in accord with a fundamental goal of a powerful state's interest.[24] Whether conver-

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18 Keohane, *supra* Chap. 3, n. 40, at 244-5.

19 See Nollkaemper, 'On the Effectiveness of International Rules', 27 *Acta Politica* 55-8 (1992).

20 Keohane, *supra* Chap. 3, n. 11, at vii.

21 Setear, *supra* Introduction, n. 10, at 174.

22 Falk, 'Casting the Spell: The New Haven School of International Law', 104 *Yale LJ* 1997 (1995). Cf. also Kennedy, 'When Renewal Repeats: Thinking Against the Box', 32 *NYU J. Int'l L. & Pol.* 380-5 (2000).

23 Suzuki, 'The New Haven School of International Law: An Invitation to a Policy-Oriented Jurisprudence', 1 *Yale Stud. World. Pub. Ord.* 30 (1974).

24 See Symposium, 'McDougal's Jurisprudence: Utility, Influence, Controversy', 79 *Am. Soc. Int'l L. Proc.* 271 (1985) Oscar Schachter noted that "if applied with a nationalist bias, [the New Haven approach] becomes an ideological instrument to override specific restraints of law . . . a unilateralist vision of policy jurisprudence in which law plays a secondary role and policy is determined by the perception of self-interest of a particular state". *Ibid.*

gent or divergent on the relevance and function of international law and institutions, both realism and institutionalism essentially assume that, unlike entities, states can be treated as like for analytical purposes, by virtue of the constraints and incentives imposed by the international system. However, whether that system includes patterns of institutionalized behavior, shaped by law and international organizations, is a secondary question.

As will be shown in some detail later on, certain patterns of the institutionalist argument can be found in the compliance theory of Abram and Antonia Chayes put forward in their *The New Sovereignty: Compliance with International Regulatory Agreements* as well as in Harold Hongju Koh's *Why Do Nations Obey International Law?* [25]

3. Normative Theories

Third, the philosophical tradition bifurcated into normative theories that basically argue that norms *qua* norms influence and induce states' behavior. These theories assume that states generally obey international law, guided by a sense of moral and ethical obligation derived from considerations of natural law and justice.[26] Within these normative approaches, several different variants have been developed, the most important of which will be discussed in this monograph.

First come views arguing that norms affect the behavior of states due to their internal normative 'nature'. That is, the norm itself has certain qualities based on its origin, content, and operation in practice that are likely to lead states to treat it seriously. In his book *The Power of Legitimacy Among Nations*, Thomas Franck has developed one version of these norm-focused compliance theories. Drawing upon the work of *inter alia* John Rawls and Ronald Dworkin, Franck argues that the key to law observance is the norm's 'compliance pull', which results from its legitimacy, as measured by certain factors. Franck's later approach, *Fairness in International Law and Institutions* is best seen as an extension of his former work, although it encompasses some additional considerations.[27]

Abram and Antonia Chayes have posited another, quite different variant of a normative approach. Although they also – to a limited extent – regard legal norms as having some special traits that cause states to take them more seriously, they additionally,

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25 See *infra* Chap. 5, pars. 4 and 5, respectively.

26 These theories, essentially assuming that rules of human behavior ultimately derive from sources outside the will of mankind, are usually called 'naturalist theories', at least in the jurisprudential jargon. In classical writings, it is argued that the 'nature' that creates or induces those rules actually derives from at least three different sources: namely, physical nature; value based 'morality' or 'ethics', and 'divine law'. See Rubin, *Ethics and Authority in International Law*, 6-8 (1997).

27 See *infra* Chap. 5, pars. 2 and 3, respectively.

unlike Franck, borrow some ideas from institutionalist theory and explain compliance as due to the interactions of states within institutions. Therefore, their approach is better viewed as an institutionalist-process based one, limiting the 'normative' component of their theory.[28]

Harold Hongju Koh is developing yet another variant, which focuses on the state's participation in the 'transnational legal process' and, in particular, the 'internalization' of the norm through domestic institutions. Koh categorizes his approach a process-based one, which derives a nation's incentive to obey from the encouragement and prodding of other nations with whom it is engaged in a discursive legal process. Although he tries to position his theory as one which focuses less on particular substantive issues than on the 'trans-substantive' continuities of process, he elsewhere states that: "The approach emphasize[s] law's normativity: how legal rules generated by interactions among transnational actors shape and guide future transnational interactions."[29]

Somewhat straddling the instrumentalist and normative approaches as well is the renewed interest in domestic structures for explaining state reaction to international norms. Scholars such as Anne-Marie Slaughter or Andrew Moravcsik build upon a strand of international relations linking state behavior to domestic regime type and state-society relations generally. They shift the focus of inquiry from the instrumentalists' attention to the international system and the normativists' attention to the characteristics of norms to the traits of a particular state that make it more or less willing and able to accept international obligations. These authors adopt an instrumentalist outlook in looking beyond the law itself to the makeup of governments and other domestic actors as critical to inducing compliance, but they also see the *law qua law* as affecting the behavior of those particular actors.[30]

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28 See *infra* Chap. 5, par. 4.

29 Koh, *supra* Introduction, n. 25, at 2627. See also *infra* Chap. 5, par. 5.

30 Given that both the Chayeses' in their 'managerial model' and Slaughter and Moravcsik in their liberal theory combine elements of norm-driven and institutionalist theories, they need not be contradictory in application. Compliance with international norms may result from the 'soft' pressures asserted by market participants just as easily as through Slauhter's favored methods (transnational networks and vertically enforced treaties). See Raustiala, 'Compliance and Effectiveness in International Regulatory Cooperation', 32 *Case Western Reserve Journal of International Law* 387 (2000). Nevertheless, Slaughter, unlike Franck, does not consider whether or to what extent the qualities of an institution or a rule or even the process of creating a rule may heighten the likelihood of compliance. See Simmons, 'Compliance with International Agreements', 1 *Annual Review of Political Science* 85-8 (1998).

Chapter 5

THEORIES OF COMPLIANCE WITH INTERNATIONAL LAW: APPROACHES

The compliance theories discussed here should be tested on the notion that any compliance theory should aim to fulfill two central functions. First, a meaningful theory should not only explain compliance with international law, but also breaches of international law. Second, it should also be able to explain if and how international law can act as an independent force toward compliance. A model of compliance in which international law matters, therefore, has to explain how national behavior is changed by the existence of the law.[1] Given that background, contemporary theories of compliance with international law put forward by five scholars will be discussed. Each theory will first be introduced by positing its main thesis. Subsequently, focusing *inter alia* on the foregoing arguments as well as additional literature on the relevant aspects, the theories will be analyzed.

One methodological caution should be mentioned at this point. As it turns out, the question of compliance is to a large extent an empirical debate, which is evidenced by the vast amount of empirical literature on compliance.[2] However, this monograph is not intended to add another empirical study of compliance with (a particular field of) international law. Rather, it intends to structure the main arguments of theories of compliance with international law and to analyze them. By doing so, it will partly

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1 Cf. Guzman, *supra* Introduction, n. 10, at 1827.

2 With regard to international environmental law, see, for example, Cameron, Roderick, and Werksman, (eds.), *Improving Compliance with International Environmental Law* (1996); Weiss and Jacobson, *supra* Introduction, n. 17; Young, *International Governance: Protecting the Environment in a Stateless Society* (1994); with regard to international human rights law, see, for example, Hathaway, 'Do Human Rights Treaties Make a Difference?', 111 *Yale LJ* 1935 (2002); McCormick and Mitchell, 'Human Rights Violations, Umbrella Concepts, and Empirical Analysis', 49 *World Politics* 510 (1997); with regard to international trade law, see, for example, Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System* (1993); Petersman, *The GATT/WTO dispute settlement system: international law, international organizations, and dispute settlement* (1997); with regard to international security law, see, for example, Duffy, *Compliance and the Future of Arms Control* (1988); Angelova, 'Compelling Compliance with International Regimes: China and the Missile Technology Control Regime', 38 *Colum. J. Transnat'l L.* 419 (1999); with regard to international financial law, see, for example, Simmons, 'Money and the Law: Why Comply with the Public International Law of Money?', 25 *Yale J. Int'l L.* 323 (2000).

draw on some of the empirical work done, but it will mainly rely on dealing with the persuasiveness of the arguments put forward in general. This approach does not underestimate the importance of empirical studies, it nevertheless implies that the pertinent question cannot be dealt with by merely comparing evidence and counterevidence. Additionally, it should be noted that the theories discussed regularly refer to recent international legal developments. Partly, therefore, they bear on legal situations that might later on have undergone some change.[3] In case these are major changes, they will briefly be mentioned. These legal modifications, however, typically do not alter the explanatory power of the individual theory for the reason of which a discussion of minor changes will be forgone.

1. Neuhold: The Foreign Policy Cost-Benefit Analysis Revisited

1.1. Thesis

> *The world is everything that is the case.*
>
> Ludwig Wittgenstein

Hanspeter Neuhold's approach is a variant of rationalist, neorealist compliance theory. His analysis of state behavior focuses on strategic incentives – those faced by rational self-interested governments in light of the expected behavior of others.[4] As the title suggests, Neuhold's thesis is that a cost-benefit analysis lets states conclude to either comply with international law or not. He essentially argues that due to recent developments costs of non-compliance are steadily increasing. In particular, he argues that since there are no central agencies endowed with a quasi-monopoly of force to enforce international law, it may be surprising that compliance with it extends to situations in which violations seem to result in tangible gains. Examples of cases where such breaches pay off include the refusal to pay debts to other states or an international organization or the annexation of another state's territory by force resulting in the control over additional resources there.[5] Neuhold therefore suggests that decision-makers, when attempting a calculation of the 'costs' of a deliberate breach of international law, are likely to take three variables into account: first, the magnitude and consequences of possible sanctions; second, the probability of those sanctions being imposed on them, and third, the likelihood of the detection of the violation.[6]

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3 The main scholarly pieces discussed have been written and published in the late 1990s.

4 Cf. *supra* Chap. 4, par. 1.

5 Neuhold, *supra* Introduction, n. 22, at 85.

6 *Id.* at 88; similarly Axelrod and Keohane, 'Achieving Cooperation Under Anarchy: Strategies and

Costs of non-compliance encompass both international and domestic ones. International costs have a bilateral as well as a multilateral dimension. With regard to the former, Neuhold assumes that a potential lawbreaker will first try to gauge the response of the direct victim of its breach. The victim of the breach may either resort to a reprisal, i.e. a retaliation in (legal) kind in the sense that the injured state's reaction also consists in a wrongful act, or a retorsion, i.e. 'unfriendly' acts, which are not contrary to international law. However, several restrictions on reprisals, such as the principle of proportionality, accordance with *jus cogens* and the like have made them an increasingly blunt political weapon. For these reasons, the achievement of their objectives appears more and more problematic.[7] Contrarily, retorsions may hurt more than reprisals, since they are not subject to the prerequisites of proportionality and reversibility. Nevertheless, the most fundamental problem with responses to breaches of international legal obligations at the bilateral level does not stem from legal technicalities, but from the power relationship between the parties concerned:

> Great powers that have the necessary resources for taking effective action usually do not need to resort to countermeasures or retorsions, because weak countries generally think twice before committing an internationally wrongful act in their relations with stronger states. It is the latter that usually violate their obligations vis-à-vis the former, and with impunity.[8]

On the other hand, international costs of violation of international law with a multilateral dimension have increased after the end of the bipolar East-West system with its heavy reliance on nuclear deterrence. One reason for that assertion is that the Security Council may qualify intra-state conflicts as threats to peace and security under Chapter VII of the UN Charter, even if there is no evident danger of their internationalization.[9] Economic sanctions, however, are slow in producing their desired effects and their impact varies according to the degree of economic development and the dependence on international economic co-operation as well as on the political system of the target country. States with a high level of autarky and with an authoritarian regime are less vulnerable than democracies that are highly dependent on foreign trade and investment.[10]

Furthermore, developments such as the establishment of the *ad hoc* international tribunals for the prosecution of persons responsible for serious violations of international humanitarian law such as the one in the former Yugoslavia 1993 and in Rwanda

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Institutions', 38 *World Politics* 234 (1985/86) (noting that the ability of governments to co-operate in a mixed-motive game is affected not only by the payoff structure and the shadow of the future, but also by the number of players in the game and by how their relationships are structured).

7 Neuhold, *supra* Introduction, n. 22, at 92-3.

8 *Id.* at 95.

9 *Id.* at 98.

10 *Ibid.*

1994 or the International Criminal Court should be a warning to political leaders that they may face severe personal consequences for major breaches of international law.[11] In addition, internationally wrongful acts may entail the loss of 'international good-will':

> For instance, if a state fails to pay back a credit or a loan, it is unlikely to receive funds in the future not only from the creditor concerned, but from other sources as well.[12]

Similarly, the loss of 'international prestige' may also enlarge the costs of violating international law. Since governments want to be perceived as law-abiding members of the international community, states try to avoid being denounced for violating their international legal obligations: "Even great powers do not simply ignore such accusations."[13]

Neuhold goes on to outline the emerging community dimension in international law. He supposes that although the actual enforcement of an award or judgment remains one of the principal weaknesses of the international legal system, this recent development of the community dimension should also have an impact on the effectiveness of international law, since it aimed at strengthening the sanctions for violations of certain key norms and extends the right to invoke the breach beyond the direct victims. In this respect, the three interrelated concepts of *jus cogens*, obligations *erga omnes*, and international crimes, despite their shortcomings, are the legal expressions of the common basic values and interests of the international community. According to the concept of *jus cogens*, a treaty that conflicts with a peremptory norm like the prohibition of genocide, is void. All *jus cogens* rules are widely regarded as having *erga omnes* effects, which means that they are of concern to all states so that all states have a legal interest in their protection.[14] Violation of such 'community rules' tend to further raise the costs because a state that acts contrary to these values and interests must reckon not only with the response of its victim, but also of some, if not all, other states.[15]

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11 *Id.* at 100-1 (noting that the negative effect of this prospect could be a senseless continuation of wrongful acts, especially military hostilities, in order to delay personal punishment as long as possible).

12 *Id.* at 103.

13 *Id.* at 104-5.

14 The existence of such *erga omnes* obligations was first recognized by the International Court of Justice in *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Second Phase*, Judgment, ICJ Reports 1970, 1-51, at 32. However, the Court felt bound to observe that "on the universal level, the instruments which embody human rights do not confer on States the capacity to protect the infringements of such rights irrespective of nationality". *Id.* at 47.

15 Neuhold, *supra* Introduction, n. 22, at 109 (noting that these negative consequences could include more substantive collective countermeasures and sanctions by international organizations if the International Law Commission's (ILC) concept of international crimes were eventually adopted). At this point, it should be noted that the characterization and consequences of 'international crimes' of States were dealt with on first reading by Article 19 of the ILC's (Draft) Articles on Responsibility of States for Internationally Wrongful Acts. After the submission of Neuhold's article, "the Commission in 1998 set Article 19 temporarily to one side while it sought to resolve the questions of responsibility raised by

Additionally, due to the work of committees of independent experts or NGOs, the probability of the eventual detection of the violation is steadily increasing. For instance, many governments realize that they cannot afford to simply shrug off their negative human rights records as regularly reported by Amnesty International:

> What counts here, first and foremost, is the degree of intrusiveness allowed to a third (or second) party which scrutinizes the implementation of a state's human rights commitments, as well as the publicity third party statements on compliance with these commitments receive.[16]

In addition to international costs, a breach of international law may also entail domestic costs. A violation of an international legal obligation by the government becomes a particularly useful political weapon in the hands of the opponents if the breach fails to produce the gains hoped for, or because the results have not been achieved at all. In this respect, pluralistic democracy is the legal and political system, which constitutes the safest guarantee for the respect of a state's international obligations.[17] Similar to liberal theory, Neuhold here stresses the importance of free media in detecting internationally wrongful acts.[18]

Finally, there is a psychological barrier to conscious violations of international law. Individuals involved in foreign policy decision-making have internalized international legal norms.[19] However, it is difficult to show that one and the same person observes

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such breaches in other ways. . . . In 2000, the Special Rapporteur proposed and the Commission accepted a compromise whereby the concept of international crimes of States would be deleted, and with it Article 19, but that certain special consequences would be specified as applicable to a serious breach of an obligation owed to the international community as a whole. These consequences included the possibility of 'aggravated' damages, as well as certain obligations on the part of third States not to recognize such a breach or its consequences as lawful and to cooperate in its suppression. . . . A second element of the compromise involved the formulation of 'serious breach of an obligation owed to the international community as a whole and essential for the protection of its fundamental interests' in Article 41 (1)." Crawford, Peel, and Olleson, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: Completion of the Second Reading', 12 *EJIL* 978-79 (2001). See also Symposium, 'Assessing the Work of the International Law Commission on State Responsibility', 13 *EJIL* 1053 (2002); particularly Sicilianos, 'The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility', 13 *EJIL* 1127 (2002); Wyler, 'From "State Crime" to Responsibility for "Serious Breaches of Obligations Under Peremptory Norms of General International Law' ", 13 *EJIL* 1147 (2002); Tams, 'Do Serious Breaches Give Rise To Any Specific Obligations of the Responsible State?', 13 *EJIL* 1161 (2002).

16 Neuhold, *supra* Introduction, n. 22, at 111 (explicitly referring to the role of NGOs in the Chayeses' theory). See also *infra* par. 4.

17 *Id.* at 113 (referring to the notion of liberal theory that democracies do not wage offensive wars, at least not against other democracies). See also Mansfield, Milnter, and Rosendorff, 'Why Democracies Cooperate More: Electoral Control and International Trade Agreements', 56 *International Organization* 477 (2002).

18 Neuhold, *supra* Introduction, n. 22, at 114.

19 *Id.* at 116 (explicitly referring to Koh's concept of internalization).

all other norms including those of domestic law, but, as a practitioner of foreign policy, disregards the rules of international law. This is all the more unlikely because international agreements may be published alongside national law.

Despite all these (steadily increasing) costs of internationally wrongful acts, a cost-benefit analysis may lead decision-makers to the conclusion that the expected advantages of a breach of international law exceed the calculated drawbacks. The reason for this conclusion may be that the costs of violation appear negligible, or decision-makers assume that the international community as a whole or the other parties to a multilateral treaty will not be able to agree on the sanctions to be taken against their decision to commit an internationally wrongful act.[20]

In his conclusion, the author acknowledges the shortcomings of the cost-benefit approach:

> The various items enumerated in the previously mentioned balance sheet are hard to evaluate correctly, above all in quantitative terms. No hard and fast rules can be offered, since national interests and priorities – which are elusive concepts anyway – are defined differently by different governments and compare against likely losses, especially since the probability variable further complicates the assessment.[21]

It may also be assumed that policy makers overrate the short-term benefits whereas they underestimate long-term disadvantages.

1.2. Critique

Theories, such as Neuhold's cost-benefit analysis of foreign policy, which rely on the 'self-interest' of the actor(s)[22] have one main problem that is shortly expressed by Bruce Russett, Harvey Starr, and David Kinsella in a popular textbook of inter-national relations:

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20 *Id.* at 117-8 (noting that it is conceivable that the state which violates a norm of international law does not mind setting in motion a process of further breaches of the same norm by other states, since it may want its derogation).

21 *Id.* at 123-4.

22 According to the traditional model of state interest the government pursues the public interest. By contrast, public-choice theory argues that government decisions are the product of interventions by interest groups for the reason of which these decisions are unlikely to be consistent with the national interest. Rather, decision-makers are individuals pursuing their own objectives rather than as faithful agents of their constituencies. See e.g. Mueller, *supra* Chap. 3, n. 46, at 9-11. For the purposes of the discussion here, it is not necessary to go into details of this differentiation because the emphasis is not on determining states' goals but on explaining the conditions under which the pursuit of these goals leads to compliance with international law.

> A good theory is one that can be supported or rejected through explicit analysis and systematic use of data. A theory that cannot be tested – and for which there is no conceivable way that it might be tested – cannot get us very far. . . . Think, for example, of the proposition 'People always act to advance their own self-interest, no matter how much they delude themselves or others into thinking they are acting in someone else's interest'. Since the proponent of such an argument can always suggest new reasons to support the argument (the person in question is deluding himself about his motives), and that statement cannot be checked with evidence (*we cannot get inside the person's mind to look*), the self-interest proposition cannot be disproved. It is not a scientific statement, because any evidence can somehow be interpreted to 'fit'. It is also a useless statement, because it doesn't tell us what the person's specific behavior will in fact be.[23]

This challenge implies that in order to avoid making scientifically useless statements, we must avoid making statements that go beyond possible evidence; and since presumably, all statements about 'what's going on in the mind' fall into the proscribed category – the mind being inaccessible to observation – we must eliminate altogether putative explanations that attribute mental states to human beings. This challenge thereby implicitly presumes that the perception of the mental state of others is a matter of inference from behavioral data. Nevertheless, in case this data cannot provide a proper basis for reliable inference, there is no reason for providing attributions to others.

However persuasive this argument may seem to its proponents, it is not completely convincing. The main reason for this conclusion is that the argument violates Ludwig Wittgenstein's strictures against 'private languages'.[24] According to Wittgenstein, a private language is one in which words refer to a speaker's inner experiences and since these experiences can be apprehended only by the person whose experiences they are, it follows that someone else is incapable of understanding the language which gives them expression. The private linguist is claiming to be able to understand and utilize the words of his private language because he confers meaning on them. This is exactly the capacity that the cited criticism attributes to the person who says that people act to advance their self-interest. But this attribution is not possible since the private linguist would not be able to distinguish incorrect from correct uses of sign 'X' to refer to the signified in question.[25]

The key issue is whether there are any criteria available to the private linguist to determine whether he is using the same sign 'X' correctly each time he uses it. The problem for him may be expressed this way: before he can use his memory of the sign 'X' to refer to the same signified as on a previous occasion, he must be able to

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23 Russett, Starr, and Kinsella, *World Politics: Menu for Choice*, 33 (6th ed., 2000) (emphasis in original).

24 Wittgenstein, *Remarks on the Philosophy of Psychology I*, 397 (Anscombe and Wright, eds., 1980).

25 Cf. for these and the following arguments Spegele, *Political Realism in International Theory*, 40 (1996).

show that his memory is correctly describable as a memory of sign 'X'; but the difficulty here is that the only standard available for distinguishing between correct and incorrect uses of 'X' is the memory of the sample itself. Before the private linguist can intelligibly use his memory of 'X' as a standard of correctness, he must first employ it as a standard of correctness in order to check upon its suitability for that role. According to this diagnosis, the private linguist is pushed into circular argument from which there is no escape.

Even though it is arguably difficult to overcome this skepticism, it might be done by claiming that there are certain kinds of self-authenticating entities that enable to accumulate genuine knowledge about the subject. Neuhold seems to go this way, which is indicated by his allegation that "not all decision-makers consider all the items listed above every time they envisage a breach of international law".[26] Certainly, the cited objection can hardly be convincingly rejected, but then, at the end, the pertinent question of compliance with international law cannot adequately be dealt with by using solely empiricist approaches either.[27]

Generally, Neuhold's approach is a variation of instrumentalist interest theory. By specifying variables such as payoffs and costs of compliance, it seeks to reduce habits and patterns of compliance into a model, in which all societies are quite the same and decision-makers respond primarily to sanctions, as opposed to norms.[28] States comply with international law not because governments have an inherent respect for legal institutions, but rather they are aware of the impact of non-compliance, in particular on their reputation.[29] Given this approach, it is likely to suffer from some of the shortcomings of philosophical underpinnings it draws on, in particular those of utilitarian thinking.[30] In particular, cost-benefit analysis seeks to reduce all costs and benefits to monetary terms in order to compare the result of the calculation mathematically. In the context at issue, namely, compliance or non-compliance with international regulatory norms,[31] this process involves the comparison of several denominated

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26 Neuhold, *supra* Introduction, n. 22, at 124.

27 At least this is the methodological approach favoured here.

28 For limitations of rational choice theory see, for example, Green and Shapiro, *Pathologies of Rational Choice Theory: A Critique of Applications in Political Science* (1994).

29 Similarly, for example, Simmons, *supra* n. 2, at 361; Guzman, *supra* Introduction, n. 10, at 1883-4 differentiates by stating that "[w]hen the costs and benefits of a particular action are small, there is a good chance that reputational consequences will tip the balance in favor of compliance with international law. Where the costs and benefits other than reputation are relatively large, however, it is less likely that reputational costs will be enough to alter the outcome."

30 See the discussion on utilitarianism *supra* Chap. 2, par. 1. See additionally Kelman, 'Cost-Benefit Analysis – An Ethical Critique', 10 *Regulation* 33 (1981); Cooter, 'The Best Right Laws: Value Foundations of the Economic Analysis of Law', 64 *Notre Dame Law Review* 817 (1989); Hubin, 'The Moral Justification of Benefit/Cost analysis', 10 *Economics and Philosophy* 169 (1994).

31 To the extent that a simple differentiation between compliance and non-compliance is feasible, the cost-benefit analysis applied is static, i.e. considering the costs and benefits of a single alternative and considering whether the benefits exceed the costs. On the other hand, cost-benefit analysis may be

outcomes, none of which are easily monetized.[32] Nevertheless, even though such a comparison in mathematical terms may be difficult, it does not necessarily imply that they cannot be compared at all.

Unlike most other compliance theories, the cost-benefit model does not stick closely to one paradigma, but implies a number of variables that have to be considered. As Neuhold puts it,

> . . . an adequate cost-benefit analysis of the consequences of an internationally wrongful act includes numerous other aspects [than the response of the direct victim of the breach in a short-term perspective] that are often hard to measure and take a longer time to materialize.[33]

In this respect, it turns out that the model is and maybe even has to be rather vague. Besides, the flexibility as well as the vagueness of the theory increases as the 'rationality' of national decision-makers may be completely different, which in the end makes it even more difficult to 'predict' future decisions.

On the other hand, it should be noted that cost-benefit analysis is widely used among agencies in governments.[34] Particularly in the United States, cost-benefit analysis is routinely used in legislation[35] and regulation and through executive order.[36] Predictably, there are no sources indicating that governments used cost-benefit analysis in respect of international norms.[37] It furthermore does not necessarily imply that governments use cost-benefit analysis in the international arena. However, it clearly shows that in the modern age, cost-benefit analysis has developed as a very important decision procedure routinely used by governments. It enables governments to evaluate international norms to the extent that they contribute to a state's overall well-being and allows governments to take into account all relevant influences on a state's overall well-being. Cost-benefit analysis does not presume that it is the only method states use in complying with international regulatory norms. Indeed, it is best

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comparative or dynamic, i.e. identifying a series of alternatives and choosing the one that provides the greatest net benefits or the smallest net costs.

32 On this problem see also Sunstein, 'Incommensurability and Valuation in Law', 92 *Michigan Law Review* 779 (1994).

33 Neuhold, *supra* Introduction, n. 22, at 85.

34 For general and technical treatment of cost-benefit analysis see, for example, Adler and Posner (eds.), *Cost-Benefit Analysis: Legal, Economic and Philosophical Perspectives* (2001); Layard and Glaister (eds.), *Cost-Benefit Analysis* (2nd ed., 1994).

35 See, for example, the Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, 109 Stat. 48 (2 USC. § 1501).

36 See, for example, Exec. Order No. 12,866, 3 C.F.R. 638, 639 (1993); Exec. Order No. 12,291, 3 C.F.R. 127 (1981). See also Morrison, 'Judicial Review of Discount Rates Used in Regulatory Cost-Benefit Analysis', 65 *U. Chi. L. Rev.* 4 (1998) (citing statutes requiring cost-benefit analyses).

37 In the United States, for example, where cost-benefit analysis has been formally implemented at least in 1981, and modified in 1993, costs and benefits cannot be limited to those that may be monetized. A 'global' cost-benefit analysis would simply add international concerns to the domestic evaluation. See Trachtman, 'Trade and . . . Problems, Cost-Benefit Analysis and Subsidiarity', 9 *EJIL* 40-1 (1998).

described as a technique. However, it assumes that it is an appropriate and useful component, though not conclusive consideration of governments. A state's behavior has to be seen in a historical context and must not, as opponents of realist theory claim it does, be deprived thereof. Within this context, governments act and interact with their people, other states, and non-governmental actors and thereby take numerous factors into account.

It is particularly important to point out that interest theories in general and Neuhold's approach in particular work best regarding global issue areas such as trade and arms control law, where nation-states remain the primary players.[38] Especially with regard to international security, the calculation is rather easy as the variables are usually fewer than in other areas. However, it has less explanatory power in such areas as human rights or environmental law, where international law imposes costs in return for little or no directly apparent benefit and where non-state actors pursue multiple goals in complex non-zero-sum games, and interact repeatedly within informal regimes.[39]

In addition, the considerations outlined in Chapter 1 at least challenge any realist theory and thus, by implication Neuhold's approach: realist theories focus on states as (rather monolithic) entities in their interaction with other states within a (rather anarchic) international system. As has been shown earlier, the focus on states as the primary actor in the international arena needs at least to be re-considered.[40] Thus, liberal theorists such as Anne-Marie Slaughter or Andrew Moravcsik assert that contrary to the realist notion that states are the primary actors in the international system, individuals and groups acting in domestic and transnational society are the primary actors in the international system.[41] Nevertheless, as stated,[42] states still form an important part of the international system, to say the least, for the reason of which it does not seem to be inappropriate to stick to a state-centered model.

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38 Cf. Abbott, 'The Trading Nation's Dilemma: The Functions of the Law of International Trade', 26 *Harvard ILJ* 501 (1985); Abbott, 'Trust but Verify: The Production of Information in Arms Control Treaties and Other International Agreements', 26 *Cornell ILJ* 1 (1993). But see Gelpi, *The Power of Legitimacy: Assessing the Role of Norms in Crisis Bargaining* (2002) (arguing that international security norms have helped to stabilize peace and co-operation even between states that represent substantial security risks to one another; according to Gelpi, the fact that security norms have not been as formalized as, say, international economic norms does not imply that they have not affected behavior. *Id.* at 6-9).

39 See Chayes and Chayes, *supra* Introduction, n. 24, at 123 (noting that the new prominence on the international agenda of "the environment and human rights – 'third wave' issues that do not yield so readily to the calculus of power and interest, in contrast to 'first and second wave' preoccupation with physical and economic security"). Koh, *supra* Introduction, n. 25, at 2649 (noting that "the theory [. . .] essentially misses the transnational revolution").

40 See in particular *supra* Chap. 1, par. 3.

41 Further details are discussed *infra* par. 6.

42 See *supra* Chap. 1, par. 3.

Finally, it should be noted that Neuhold's *Foreign Policy Cost-Benefit Analysis Revisited* employs a rather static conceptualization that mainly asserts that due to recent developments in international law costs of non-compliance have increased. At least to a certain extent, however, the approach lacks an analysis how and when international law may induce a change of an actor's preferences. Given these shortcomings, it will now be discussed whether other compliance theories offer 'better' explanations of compliance or non-compliance with international law, in particular with regard to those fields of international law in which the cost-benefit analysis has little explanatory power.

2. Franck: The Power of Legitimacy among Nations

2.1. Thesis

> *A state that accepts integrity as a political ideal has a better case for legitimacy than one that does not.*
>
> Ronald Dworkin

The basis for Thomas Franck's theory of legitimacy in international law is how the non-coercive properties of a rule, which are pulling towards compliance, are perceived by the addressees. Accordingly, he states that

> [l]egitimacy 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.[43]

Nevertheless, Franck does not limit the definition of legitimacy to a process or a more complex procedural-substantive term, but includes four elements – properties of a rule which 'exert pressure on states to comply' in the notion of legitimacy.

> The hypothesis asserts that, to the extent a rule, or rule process, exhibits these four properties it will exert a strong pull on states to comply. To the extent these properties are not present, the institution will be easier to ignore and the rule easier to avoid by a state tempted to pursue its short-term self-interest.[44]

As legitimacy basically is a matter of degree, some rules are more legitimate than others.[45] Likewise, compliance with rules is a matter of degree. According to Franck's

43 Franck, *supra* Introduction, n. 3, at 24.
44 *Id.* at 49.
45 *Id.* at 41-2.

concept, these four indicators are first, determinacy, second, symbolic validation, third, coherence, and fourth, adherence.

Franck defines determinacy as the ability of a rule to convey a clear message, to appear transparent in the sense that one can see through the language to the meaning. The better a rule can communicate its contents, the easier it is to know what conduct is expected and thus, the stronger is its perceived legitimacy. However, textual determinacy is not synonymous with clarity, but it is most often achieved by textual clarity.[46] Examples for determinate rules, which are able to make their message clear, are rules pertaining to copyrights or trademarks. In other instances, rules are rather complex and unclear, e.g. in the area of the right to self-determination. The lack of *textual* determinacy may be redressed by *process* determinacy.

> If it is not, then the text will be seen to lack the ability to describe, predict, and prescribe actual state conduct. It will have minimal compliance pull.[47]

If rules are not opened for any exceptions, they seem to have the highest degree of determinacy. Franck refers to these rules as 'idiot rules'. While an 'idiot rule' measures quantitatively the 'what' and does not consider, or include exceptions for, the 'why' and the special circumstances, a 'sophist rule' has a complex texture with flexibility containing standards and exceptions and applies these standards. Indeed, the clear and transparent message of an 'idiot rule' can be illegitimate despite its high degree of determinacy. It

> . . . may actually appear illegitimate by producing results that appear so extraordinarily unjust, cavalier, unfair, even absurd, as to undermine the rule's ability to exert a strong compliance pull.[48]

Vice versa, a rule of complex and elastic structure, which presumably has less textual determinacy than 'idiot rules', might exert a stronger compliance pull. Nevertheless, Franck's basic argument is that greater clarity conduces to compliance and, somehow fortunately, most international rules are 'idiot rules': "Most national legislation is *what*-oriented, just as are most of the rules in the international system. This is meant to promote determinacy, and it succeeds."[49] This argument, however, tends to ignore the distinction between factual compliance and possibilities to argue that a certain behavior was in accordance with the law. Moreover, unclear rules can under some circumstances offer many more possibilities to act without disobeying the rule, whereas clear rules arguably demand a certain act and manner to comply.

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46 *Id.* at 51-2.
47 *Id.* at 80.
48 *Id.* at 73.
49 *Id.* at 74.

As determinacy is the linguistic component of legitimacy, symbolic validation and the two subsets, namely, ritual and pedigree, provide legitimacy's cultural and anthropological dimension. According to Franck, the symbolic validation of a rule, or similarly of a rule-making process or institution, occurs when a signal is used as cue to elicit compliance with a command.[50] Symbolic validation may use either ritual or pedigree, or the two together, as cues to secure compliance.

> Ritual is a specialized form of symbolic validation marked by ceremonies, often mystical, which provides unenunciated reasons for compliance with the commands of persons or institutions.[51]

"Operating primarily on the symbolic level, ritual serves to communicate and ratify the beliefs and values of a system."[52] It is not mainly directed at legitimizing a particular rule, but rather an entire set of rules and the distribution of roles and authority.

"Pedigree, also signaled by cues, pulls toward rule compliance by emphasizing the deep rootedness of the rule or the rule-making authority."[53] For example, when a new state or government is recognized by existing ones, the act of extending formal recognition symbolizes authentication: the conferral of rights and obligations as concomitants of induction into a time-honored national or governmental status in accordance with international standards of inclusion and exclusion. A new state's election to membership in the UN is an example of corporate pedigreeing by the international community.[54]

Franck's thesis is that symbolic cues exert a strong compliance pull, and are effective in conferring legitimacy, as long as they are true. When the cues are false, their capacity to exert such compliance pull is diminished. When cues habitually are used to symbolize a false reality, the cues begin to lose their potency as instruments for conferring legitimacy. Conversely, the withholding of symbolic validation can have a negative effect on the legitimacy of an entity, but not if that withholding is patently in conflict with the perceived reality.[55]

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50 *Id.* at 92 (noting that such symbolic cues may be objects, songs – for example, the singing of the national anthem is a vocal and visual signal symbolically reinforcing the citizen's relationship to the state, a relationship of rights and duties – as wells as acts or spoken words).

51 *Ibid.* (for example, the swearing in of a new President of the United States in order to validate a community).

52 *Id.* at 93.

53 *Id.* at 94.

54 *Id.* at 94-5.

55 In order to exemplify this thesis, Franck argues that it would be widely acknowledged even among African delegates that the General Assembly's rejection of the South African delegation's credentials was both a tactical and conceptual mistake since South Africa still maintained a highly effective mission at the UN. *Id.* at 133.

Third, coherence involves that a rule is internally consistent and laterally connected to the principles underlying other rules. Rules, to pull towards compliance, have to first correspond 'internally', that is to be in accordance with the general purpose set forth; second, rules have to correspond with rules applied hitherto for the solution of similar problems; and third, a rule has to be embedded in a "lattice of principles in use to resolve different problems".[56] It is important to note that the notion of coherence is understood as going beyond the consistent application of a rule in similar cases because it also requires an appropriate differentiation in the solution of different cases as well as the reasonable distinction when solving 'alike' cases.

Ronald Dworkin uses the term 'integrity' similarly to what Franck labels 'coherence'. Dworkin advocates two branches of integrity: integrity in legislation and integrity in adjudication.[57] Integrity in legislation restricts what legislators and other lawmakers may properly do in expanding or changing public standards. Integrity in adjudication requires judges to treat the present system of public standards as expressing and respecting a coherent set of principles and to interpret these standards to find implicit standards between the explicit ones. A central aim of Dworkin's project is to argue that this mode of adjudication yields right answers to questions of law. Dworkin – in a national political context – states that

> . . . a state that accepts integrity as a political ideal has a better case for legitimacy than one that does not. If that is so, it provides a strong reason . . . why we should do well to see our political practices as grounded in that virtue. It provides, in particular, a strong argument for a conception of law that takes integrity to be fundamental, because any conception must explain why law is legitimate authority for coercion.[58]

Franck attempts to transform Dworkin's concept into the international context by arguing that

> . . . an international community that accepts rule-coherence as an ideal has a better case for legitimacy than one that does not. A rule purporting to govern state behavior is more likely to be perceived as legitimate if it is grounded in a coherent principle than if it is not, and therefore will exert a stronger pull to compliance.[59]

Dworkin calls deviations from the principle that like cases should be treated alike 'checkerboarding'.[60] Checkerboarding means that incoherent applications of rules

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56 *Id.* at 148.

57 Dworkin, *supra* Introduction, n. 5, at 217.

58 *Id.* at 191-2.

59 Franck, *supra* Introduction, n. 3, at 175.

60 Dworkin, *supra* Introduction, n. 5, at 176-224; Dworkin argues that "we have no reason of justice for rejecting the checkerboard strategy in advance, and strong reasons of fairness for endorsing it. Yet

weaken a rule's legitimacy by violating rationally and logically credible distinctions, thus leading to – in Franck's words – a weaker compliance pull:

> Blatant checkerboarding in the application of a rule or standard undermines legitimacy in three related, but different, senses. *First*, it clouds the legitimacy of a particular instance in which the status-endorsing process of symbolic validation has been misapplied. . . . *Second*, checkerboarding undermines the . . . rules or standards by showing that they apply to some but not all. . . . *Third*, feckless application of a standard to various parties derogates from the legitimacy of the process or institution by which the rules are applied or pedigree is conferred.[61]

Finally, the forth indicator of a rule's legitimacy is adherence. Franck defines adherence as the

> . . . vertical nexus between a *primary rule of obligation*, which is the system's workhouse, and a hierarchy of secondary rules identifying the sources of rules and establishing normative standards that define how rules are to be made, interpreted and applied.[62]

The international system consists of many primary rules such as rules and duties enumerated in treaties or specified by the pedigree of customary usage. Secondary rules of process are not found in primitive societies whose simple social structures are lacking either any or any sophisticated institutional framework. It is therefore to be asked whether the international system can be seen as a developed community or rather as a small association with few members and no effective enforcement of the primary rules of obligations.

Because it lacks those crucial procedural secondary rules which permit a rule to change and adapt through legislation and the decision of courts, H.L.A. Hart compares the international community of states with a community that lacks a developed legal system, the rules of which mainly consist of primary rules of obligation.[63]

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our instincts condemn it. Indeed many of us, to different degrees in different situations, would reject the checkerboard solution not only in general and in advance, but even in particular cases if it were available as a possibility." *Id.* at 182. Compare Franck, *supra* Introduction, n. 11, at 709 and at 741.

61 Franck, *supra* Introduction, n. 3, at 138 (emphasis in original).

62 *Id.* at 184 (emphasis in original). This conceptualization relies on H.L.A. Hart's *The Concept of Law*. Hart defined a legal system as the conjunction of primary and secondary rules. According to Hart, primary rules are rules of obligation bearing directly on individuals or entities requiring them 'to do or abstain from certain actions'. Secondary rules, by contrast are 'rules about rules' – that is, rules that do not 'impose obligations', but instead 'confer powers' to create, extinguish, modify, and apply primary rules. Hart, *The Concept of Law*, 79 (2nd ed., 1994). For an application of Hart's concept in international relations see also Abott, Keohane, Moravcsik, Slaughter, and Snidal, *supra* Chap. 1, n. 67, at 403.

63 Hart, *supra* n. 62, at 209.

Furthermore, Hart alleges that the international system lacks "a unifying rule of recognition specifying 'sources' of law and providing general criteria for the identification of its rules".[64]

To the contrary, Franck who relies on Hart's concept, detects secondary rules within the international system:

> Of course, there *are* rule-making institutions in the system. . . . The Security Council, the decision-making bodies of the World Bank, and perhaps, the U.N. General Assembly and the International Law Commission. . . . There *are* courts functioning in the international system: not only the International Court of Justice, the European Community Court, and the regional Human Rights tribunals, but a very active network of quasi-judicial committees and commissions as well as arbitral tribunals. . . .[65]

In a *postlude*, Franck asserts two main reasons why justice is not a component of legitimacy. First, there is an operational problem as justice "can only be said to be done to persons, not to such collective entities as states".[66] Therefore, it is difficult to say anything meaningful or true about the justice of the international system. At its present stage of development, most systemic rules command not persons, but states. To say that the rules operate justly among states, does not actually influence on those who matter: "the individuals who, unlike states, are capable of pleasure and pain".[67] Second, there is a theoretical reason for refusing to include justice among the indicators of a rule's legitimacy as the concepts of justice and legitimacy are related to each other but conceptually distinct.

> Justice and legitimacy do have something in common. Both tend to pull toward non-coerced compliance. They frequently interact synergistically. Nevertheless, they are distinct phenomena; neither is a dependent variable of the other.[68]

Finally, Franck argues that it is not the sole or ultimate goal of any social structure to achieve compliance with rules. In case the rules are unjust, there may be even a good case for non-compliance.

> In the international system, however, the first task for now, is to build a rule system of such manifest legitimacy as to engender a broad base of uncoerced habitual *compliance*.[69]

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64 *Ibid.*
65 Franck, *supra* Introduction, n. 3, at 184-5 (emphasis in original).
66 *Id.* at 208.
67 *Id.* at 209.
68 *Ibid.*
69 *Id.* at 210 (emphasis in original).

2.2. Critique

Under some domestic conditions, legitimate authority is a naturally evolving, efficient mode of social control. It has been submitted that social structures first emerge from relations of coercion or from individual self-interest and that they may develop into legitimacy-based structures.[70] The precondition for this development, however, is that control is exercised over or within a society. Only to the extent that the international system is a 'society', we therefore have reason to expect a similar process of legitimation to occur with international rules. It might reasonably be argued that there are certain patterns of an emerging international society; nevertheless, it seems that for the time being the fragmentation of the international system does not allow for Franck's conclusion.

Both the concept of coherence and adherence have to start with the notion of a 'community' of nations. The concepts have to assume that in fact there is a political community with a system of principles, rules, and decision-making processes. If this assumption, however, is false, the quest for coherence as well as adherence becomes irrelevant. Put aside, whether one concludes that there is such a community or not, the mere quest of states for coherence in the rules governing their conduct is – contrary to Franck's arguments[71] – hardly evidence that states share a sense of membership in such a rule community. Franck himself has to acknowledge that the international rule-making institutions lack the quality commonly ascribed to national institutions by stating that ". . . even if the international organs are not as disciplined or highly empowered as their national counterparts".[72]

Besides, there has always been something rather circular about legitimacy theory.[73] A central argument of this theory is that rules possess legitimacy when they are complied with regularly, and that legitimate rules elicit high levels of compliance. In this respect, it should be noted that the main ambition of Franck's book is to provide a taxonomy of factors that contribute to rule legitimacy. Such taxonomy may be useful, particularly as it points the way to better rule making. But a theory about the factors inducing legitimacy also has to generalize about them and to oversimplify.

Another difficulty, inherent in the ambiguity of 'legitimacy' itself is that we do not know whether it exists as a property of rules, psychology, or behavior. Symbolic

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70 See *supra* Chap. 3, par. 2.

71 Franck, *supra* Introduction, n. 3, at 181.

72 *Id.* at 185.

73 Keohane, *supra* Chap. 4, n. 1, at 487-90. For a discussion of Franck's book see, for example, Koskenniemi, 'The Power of Legitimacy Among Nations by Thomas M. Franck, Book Reviews and Notes', 86 *AJIL* 175 (1992); Brunee and Toope, 'International Law and Constructivism: Elements of an Interactional Theory of International Law', 39 *Colum. J. Transnat'l L.* 19 (2000); Alvarez, 'The Quest for Legitimacy – Review Essay of Thomas Franck's The Power of Legitimacy Among Nations', 24 *NYU J. Int'l L. & Pol.* 199 (1991). See also Gelpi, *supra* n. 38.

validation, for example, is not anything that attaches to a rule independently of the perceptions of those addressed by it. In this sense, legitimacy is less a set of on/off properties in a rule than it is a psychological predisposition, a 'feeling of legitimacy'. Studying states' feelings, however, is difficult, for it is impossible to enter into an actor's head and conclusively know its motivations. Since there is hardly a way to differentiate among motivations, it is also difficult to differentiate between compliance based on, say, self-interest or legitimacy. To do so requires some attention to the kinds of evidence that might count for or against each kind of argument.[74]

But there are also more fundamental reasons why Franck's theory of 'rule-legitimacy' is inadequate as an explanatory social science theory.[75] It is not presented in a way that allows for any type of 'truth test' on the issue of whether legitimacy is the causal agent in state compliance with international law. In order to put forward an explanatory theory, Franck would have to: first, identify the features of a particular rule before he knew whether it had been complied with; second, determine how much 'legitimacy' the rule has according to the four specified indicators; third, determine how much compliance with the rule there is among states, and fourth, identify the features of the rule that are correlated with and in fact cause state compliance.

Instead, the theory is rather loose so that it is not capable of falsification in the social scientific sense. Therefore, Franck's concept of legitimacy seems to be a mere *prescriptive* work advocating that rule of law principles *should* play a central role in the conduct of international relations rather than an attempt to *descriptively* analyze why states *do* comply with international norms.[76] This notion, however, would somehow contradict Franck's own understanding of legitimacy because according to Franck, legitimacy pulls toward voluntary compliance and is thus understood to be a *description* of norm compliance.[77]

The second part of Frank's book attempts to make a distinction between legitimacy and justice. The author is likely to achieve this distinction by taking a narrow, maybe too narrow, view of justice. While the book's first part opposes positivist for-

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74 Koskenniemi, *supra* n. 73, at 175-6. Attention to this notion will also be given later on, see particularly *infra* par. 5 and Chap. 6.

75 Hollis and Smith, *Explaining and Understanding International Relations*, 51-4 (1990); Abbott, 'Modern International Relations Theory: A Prospectus for International Lawyers', 14 *Yale J. Int'l L.* 353 (1989). Employing positivist social scientific precepts, these works discuss what it means to 'think like a social scientist' as opposed to 'thinking like a lawyer' in developing causal explanations in international relations. Chief among the criteria cited by these authors is whether a theory allows for a 'truth test', that is whether it is capable of being falsified by new information. If the asserted explanatory theory is not amenable to falsification, the concern arises that the theory's conclusions rest on the personal assertions and beliefs of the theorist, rather than on observable data.

76 Similarly Georgiev, 'Politics or Rule of Law: Deconstruction and Legitimacy in International Law', 4 *EJIL* 14 (1993) (stating that "[t]he concept of legitimacy addresses a possibility of changing and developing law").

77 Franck puts the concept of legitimacy into a larger framework in *Fairness in International Law and Institutions*. See *infra* par. 3.

malism from the perspective of contextual justice, this second part opposes principles of justice from the perspective of contextually effective power: legitimacy takes the place of positivist validity – whereas justice becomes "a moral community's response to perceptions of distributive unfairness, inequality, or lack of compassionate grace".[78] Thus, whereas Franck convincingly argues that legal validity can be different from the positivist's on/off matter, justice is not necessarily a set of immutable principles.[79]

Another problem with legitimacy, though, is that it cannot account for the dynamic elements within a system or the influence of justice in that system. In his concept of justice, Franck – to a large extent – relies on the principles of justice elaborated by John Rawls in his book *A Theory of Justice*.[80] However, Rawls himself conceded that his justice principles "apply only within the borders of a nation-state".[81] Similarly, Franck concludes

> . . . the rules applicable among states cannot be expected to embody principles of justice because the notion of *states*, itself, is an arbitrary and unfair suspension of personal equality. It embodies a difference principle no student of justice would accept.[82]

Thus, the main reason for not including justice among the factors to exert a 'compliance pull' is that the international system is built on a system of states. Even though both legitimacy and justice may pull towards compliance, they have a different basis: whereas the legitimacy-based claim is rooted in a secular political community, the justice-based claim derives from the belief of a community of shared moral values. The problem is that the justice of even the most basic secular rules will be assessed differently by the various moral value systems that coexist. This notion contradicts Franck's assertion that "the principles of justice and legitimacy, in most nations, of course do bleed into each other".[83] Franck's concept is also difficult to maintain since the differentiation of legitimacy and justice is not as clear-cut as he suggests. In practice, to elaborate on the difference between these two concepts might present serious difficulties. And if the optimism that justice and legitimacy in most nations coincide were to be the case, it is hard to see why the strict differentiation should be upheld in the first place.[84]

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78 Franck, *supra* Introduction, n. 3, at 239.

79 Koskenniemi, *supra* n. 73, at 178.

80 See *supra* Chap. 2, par. 2.1. Rawls, *supra* Chap. 2, n. 18, at 60. Note that Franck's book discussed here was published before Rawls' *The Law of Peoples*.

81 Franck, *supra* Introduction, n. 3, at 3.

82 *Id.* at 232-3.

83 *Id.* at 239.

84 Franck's reluctance to embrace justice within his concept aroused criticism particularly from other Kantian writers "who charged that he had privileged barren process values and the appearance of legitimacy over Rawls' own idea of justice as fairness". Koh, *supra* Introduction, n. 25, at 2643. One of these criticisms is worked out by Tesón, *supra* Chap. 2, n. 45, at 93-9.

For these reasons, the conceptualization of legitimacy on the one hand and of justice on the other is not entirely convincing. Another reason for Franck to extend his theory of legitimacy has already been indicated towards the end of the book when he asserted that "many secular rules in the international system neither claim nor display attributes of fairness or justice".[85] In this manner, Franck went on to re-consider the relationship of legitimacy, justice, and in particular fairness. At least, the concept of legitimacy, built on the factors determinacy, symbolic validation, coherence, and adherence alone cannot ensure that standards of fairness in international relations are met. Accordingly, the concept of fairness is central to Franck's subsequent book *Fairness in International Law and Institutions*. Notwithstanding his cautionary international application of fairness in *The Power of Legitimacy Among Nations*, here Franck endorses this concept.

3. Franck: Fairness in International Law and Institutions

3.1. Thesis

> *Men have judged that a king can make rain; we say this contradicts all experience. Today they judge that aeroplanes and the radio etc. are means for the closer contact of peoples and the spread of culture.*
>
> Ludwig Wittgenstein

In his *opus magnum Fairness in International Law and Institutions* Franck broadens his theory of (voluntary) compliance with international law. According to Franck, the perception that a rule or system is fair encourages voluntary compliance.[86] The fairness of international law, as of any other legal system, will be judged first, by the degree to which the rules satisfy the participants' expectations of justifiable distribution of costs and benefits, and second, by the extent to which the rules are made and applied in accordance with what the participants perceive as right process.

These two aspects of fairness – the substantive (distributive justice) and the procedural (right process) – may not always pull in the same direction, because the former favors change and the latter stability and order. The tension between stability and change can disorder the system. Fairness is the rubric under which this tension is discursively managed. Therefore, legitimacy expresses the preference for order, which may or may not be conducive to change. Nevertheless, it is a key factor in fairness, for legitimacy accommodates a deeply felt popular belief that a system of rules can

85 Franck, *supra* Introduction, n. 3, at 241.
86 Franck, *supra* Introduction, n. 23, at 8.

only be fair, if it is firmly rooted in a framework of formal requirements about how rules are made, interpreted, and applied.[87]

At a second level of inquiry, any analysis of fairness includes consideration of the consequential effects of the law: its distributive justice. An unfair law, i.e. one that distributes burdens unfairly, is likely to provoke resistance, even from some of those who benefit. Thus, the perception that a rule or system of rules is distributively fair, like the perception of its legitimacy, also encourages voluntary compliance. Unlike legitimacy, however, distributive justice is rooted in the moral values of the community in which the legal system operates. The law promotes distributive justice not merely to secure greater compliance, but primarily because most people think it is right to act justly. Franck asserts, "there is much evidence of a global community, emerging out of a growing awareness of irrefutable interdependence, its imperatives and exigencies".[88] The search for fairness begins with a search for agreement on a few basic values that take the form of shared perceptions as to what is unconditionally unfair. One of them is the 'maximin' principle which states "[in]equalities are permissible when they maximize, or at least contribute to, the long-term expectations of the least fortunate group in society".[89]

Franck's analysis tries to establish a way of thinking about fairness in international law and to apply those insights to the process by which law is made in the international community, stressing first, the participation of people and peoples and second, the burgeoning role of international institutions in conflict resolution. He puts particular emphasis on the notion that fairness discourse is not solely about process but that the importance of process lies in its effect on outcomes. Outcomes would be 'cardinal indicators of fairness' and would also "provide a measure of the fairness of the process by which they are fashioned".[90]

At a basic level, Franck goes on to examine three 'clusters' in which questions of distributive justice may readily be identified. Nevertheless, he asserts that the answers to these questions are elusive and often merely refer back to process. The first of these clusters, concerned with the environment, is entitled *Law, Moral Philosophy, and Economics in Environmental Discourse*. The second, dealing with trade and development, is *Economic Fairness: Terms of Development and Trade*. Finally, the topic of the third of the clusters identified by Franck is international investment and labeled *Fairness in International Investment Law*. For matters of clearness, Franck's arguments with regard to these three clusters will be briefly summarized in the following, whereas reference to changes and developments in the law will only be made when deemed appropriate.

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87 *Id.* at 9-10.

88 *Id.* at 12.

89 *Id.* at 18. Whereas Rawls is reluctant to extend the 'maximin' principle to global distributive discourse among nations, Franck believes that it is applicable to the emergent global community.

90 *Id.* at 351.

The Chapter on *Law, Moral Philosophy, and Economics in Environmental Discourse* discusses the central question whether persons – those alive and those yet to be born – are legally entitled to a quality of life that is globally applicable and, where necessary, globally implemented and enforced. Action at the national level is invariably a prerequisite of change, because national government and regional action continue to be efficient means for remedial innovation. Nevertheless, it has also become obvious that a reversal of biospheric degradation and depletion requires concerted action by all states. Action by one state alone or even by one region is unlikely to be decisive in reversing environmental problems, or those aspects of environmental problems which are global in cause or in effect.

Wherever one starts a survey of recent international environmental law, one discovers that issues of fairness have become central. The International Law Commission's (ILC) draft on Responsibility is but one example.[91] Its most obvious function is "to shift the loss from an innocent victim to the responsible causal agent", whether the agent acted wittingly, imprudently or neither; such a shift is a "matter of equity or corrective justice".[92] Notions of strict or even of absolute liability are becoming as germane to international as to national fairness discourse.[93] A few international treaties explicitly impose strict liability for certain kinds of hazardous activities.[94] The effect of these liability rules is to 'internalize' the costs of engaging in hazardous activities, passing them on to those who engage in, and benefit from, that enterprise. According to Franck, this seems commendable to the moral philosopher because of its apparent justice, and also to the economist who sees the merit in letting the market determine the utility of engaging in the hazardous activity on the basis of its actual cost, including that of indemnifying innocent victims.[95]

The question 'who pays' is obscured by the difficulty of defining 'costs' and 'benefits' of various strategies to deal with environmental issues and the resolution of the value-preferences which underlie persons' and nations' individual and collective strategic choices. Economists can clarify the concept of 'costs', which is a necessary prelude to informed choice. They help to redefine the terminology of fairness discourse by alerting participants to disguised costs.[96]

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91 See text and accompanying notes *supra* n. 15.

92 Schachter, *International Law in Theory and Practice*, 376 (1991).

93 Quentin-Baxter, 'Third Report on International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law', UN Doc. A/CN.4/360, 2 *YBILC* 51 (1982), UN Doc. A/CN.4/Ser.A/1982/Add.I (Pt.I).

94 Convention on International Liability for Damage Caused by Objects Launched into Outer Space, 10 ILM 250 (1971); Vienna Convention on Civil Liability for Nuclear Damage, 2 ILM 727 (1963); International Convention for Civil Liability for Oil Pollution Damage, 9 ILM 45 (1970).

95 Franck, *supra* Introduction, n. 23, at 363.

96 *Id.* at 364.

As many economists have pointed out, numerous government policies not only fail to reflect the true opportunity costs of use of resources, they even encourage more rapid and extensive degradation of soils, water, and biota than market forces alone would. Many current policies, including subsidies, taxes, and market interventions, artificially increase the profitability that results in serious resource degradation. Economics also provides to lawyers concerned with fairness a useful tool for pursuing the Rawlsian maximin goal: that is, to re-distribute costs and benefits in such a way as to close the gap between the rich and the poor without damaging the system's capacity to increase the sum of the goods available for distribution. The role of economics here is to point to these options that can achieve more than only one goal without undermining the chances of achieving another. Furthermore, global environmental discourse is already addressing the contentious question of whether an 'economic incentives' approach – one, which does not prescribe actions, but instead defines targets or quotas, leaving individual actors to choose from a range of options available to achieve the mandated target – should be tested in the international arena.[97]

However, not all questions of moral choice can be dissolved by redefinition of economic costs and by reference to the 'unseen hand of the market'. Whereas economics is central to the problem of who pays – in terms of direct monetary costs and indirect limits of growth – it is only part of the whole matrix as economists cannot say what the 'good' is which is being sought. According to Franck, there may be no *objectively* fair answers. In this sense, all one can do is to refer the choices to a process of convergence.[98] In such a process, it is unlikely that fairness issues can be settled by any one rule which meets the test of legitimacy requiring likes to be treated alike. Since the question of 'likeness' is so fraught with complexity, other mitigating elements need to be introduced: exemptions, compensatory mechanisms, and trade-offs. To this end, however, each individual needs to be approached in the context of *communitas*, i.e. an ongoing commitment to ongoing, mutual, and shared responsibility.[99]

Nevertheless, it has to be questioned whether international norms and institutions play any realistic role: hence, it is idealistic to leave it all up to national governments to act induced merely by their choice and/or by enthusiasm for international co-ordination on environmental issues.[100] On the other hand, the need for an international normative and institutional ingredient is made evident not only by the 'free rider' problem – that non-compliance by some would frustrate and obviate the compliance of any – but also by the reality of vast disparities in national interest, national responsibility, and national capacity to effect change. Fortunately, there is a process by which

97 *Id.* at 365-6.
98 *Id.* at 367-8.
99 *Id.* at 370-1.
100 Cf. Robertson, 'The Global Environment: Are International Treaties a Distraction?', 13 *The World Economy* 126 (1990).

trade and environmental rules are negotiated and can also be altered, as well as a process for applying those rules, case by case, in a principled fashion.[101] Franck asserts that 'unilateralism', which defines this carefully nurtured process, is thus "a high-cost recourse of last resort and places a heavy burden on those who advocate it".[102]

The Chapter on *Economic Fairness: Terms of Development and Trade* starts with the assertion that the income disparity between rich and poor nations is the most obvious problematic of distributive justice. In all developed states, the gap between rich and poor is addressed through more or less extensive remedial programs, which are mostly accepted as a necessary part of the social contract. However, the international community provides little of these rudiments of economic and social fairness. According to Franck, two main factors can be distinguished. First, the magnitude of the global gap between rich and poor is far more daunting than its counterpart in any developed state. Second, the number of rich persons, as a proportion of total population, is far smaller in the international community than in developed states. Internationally, therefore, even radical redistribution from rich to poor would have a quite limited remedial effect.[103]

What is needed, therefore, is a systematic approach to egregious global poverty that acknowledges the claim to economic fairness but that also recognizes the impossibility of satisfying that claim primarily by redistributive means. Principles of fairness urge to develop a global system in which distributive justice plays a larger part than at present in meeting the basic needs of the disadvantaged but, especially, in augmenting their capacity to enlarge significantly their contribution to the growth of a global economy. Aid programs aimed at reducing the gap between the economic powers of developed and developing countries often disappointed the expectations of donors and recipients. In this respect, the primary multilateral lending institutions include the International Bank for Reconstruction and Development (IBRD) and the International Monetary Fund (IMF).[104]

The IBRD is responsible for the transfer of funds to developing countries to support economic growth and to help eradicate poverty. It is required to base its lending decisions on purely economic considerations.[105] The IMF is charged with ensuring a stable and growing world economy through alleviating such international problems as imbalances in international payments and exchange rates. It has created Special Drawing Rights (SDRs) as a distributable international reserve. While SDRs are not foreign aid programs, they are lent to countries on a short-term basis at market rates

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101 See Koskenniemi, 'Peaceful Settlement of Environmental Disputes', 10 *Nordic J. Int. L.* 73 (1992).
102 Franck, *supra* Introduction, n. 23, at 379.
103 *Id.* at 414.
104 *Id.* at 418-9.
105 See Articles I and III of the Agreement of the International Bank for Reconstruction and Development, 2 UNTS 134 (1945).

to correct balance of payment deficits and promote liquidity. The IMF also has a Structural Adjustment Facility (SAF) and an Extended Structural Adjustment Facility (ESAF), designed to provide concessional financial assistance to low-income IMF members experiencing grave balance of payment problems.[106] In addition to these various fiscal supplements and monetary entitlements, other schemes have been devised to improve the terms of trade between developed and developing countries. In various ways, these seek to intervene in the market to prevent extreme price fluctuations by promoting a balance between supply and demand.[107]

Beside the work of the international financial organizations, international economic law has sought to help developing countries' economies by way of creating concessionary or preferential tariffs to encourage trade flows from them to the industrialized nations. Thereby, the Final Act of the General Agreement on Tariffs and Trade (GATT) included a system of most favored nation (MFN) treatment to achieve greater fairness in the global trading system.[108] This system of reciprocal non-discrimination worked increasingly against the interests of developing countries, for their products were at a competitive disadvantage in market competition with those of developed countries, which enjoyed economies of scale, market proximity, and in some instances

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106 The politics of IMF lending has been heavily criticized. A recent analysis comes to the conclusion that "... movement toward the United States within a defined international political space (like that measured by UN voting patterns) can significantly increase a country's chances of receiving a loan from the IMF. This suggests that the U.S. has been more concerned with attracting new allies and punishing defectors than rewarding loyal friends. It has been able to do so through multilateral channels like the IMF. The evidence presented here also suggests that changes in the structure of the international system may have altered U.S. and IMF behavior but not in the predicted manner. In fact, these initial results suggest that the end of the cold war has been associated with the increasing politicization of the IMF by the U.S. ... If high politics affects IMF lending, then it should have an even stronger impact on national policies. A confirmation of the impact of political realignment on IMF lending therefore provides stronger corroboration of this theory than that which could be obtained in a study of bilateral capital flows and suggests that such ideas may be fruitfully applied to other areas of international finance and international relations more generally." Thacker, 'The High Politics of IMF Lending', 52 *World Politics* 67-70 (1999). Randall Stone presents further evidence of the influence of the United States over the IMF. He argues that conditions are unlikely to be strictly enforced in countries preferred by the United States. Because such countries do not expect to be punished severely, they tend not to comply. In these cases, however, punishment is short whereas countries that are not preferred by the United States can expect more severe punishment, so they are more likely to comply. Stone, *Lending Credibility: The International Monetary Fund and the Post-Communist Transition* (2002). Elsewhere, it has been argued that by bringing in the IMF, governments gain political leverage – via conditionality – to push through unpopular policies that dampen the effects of bad economic performance by redistributing income upward. See Vreeland, *The IMF and Economic Development* (2003).

107 See, for example, Agreement Establishing the Common Fund for Commodities, UN Doc. TD/IPC/CF/CONF/25 (1980).

108 MFN requires that any tariff "advantage, favor, privilege, or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties". Art I, para. 1 General Agreement on Tariffs and Trade (GATT), 55 UNTS 188 (1950).

MFN-exempt preferential, reciprocal tariff relations with partners. In order to remedy this fairness deficit, the GATT members introduced the Generalized System of Preferences (GSP) in 1971 as an exception to MFN.[109] Whereas the waiver was initially for a period of ten years, in 1979 the GSP was made permanent through an amendment known as the Enabling Clause.[110] The GSP consists of various preferences schemes with common characteristics. The preference-giving country has the right to choose the countries entitled to preferential treatment and the products to be covered; it may also set import target levels. Tariff preferences are granted unilaterally and may be withdrawn or altered, giving the importer considerable leverage, not immune to improprieties.[111] Additionally, the WTO administers the rules and, in an accompanying Understanding, mandates a third-party conflict resolution procedure involving arbitration panels and a permanent Appellate Body[112] in order to substitute enforceable multilateral rules and remedies for – particularly – United States practice of 'aggressive unilateralism' that has often taken enforcement of GATT rules into its own hands. The Understanding obligates members to have recourse to its dispute settlement rather than act unilaterally.[113]

Franck goes on to mention that the United Nations Conference on Trade and Development (UNCTAD) issued a Programme of Action for the New International Economic Order.[114] One of the Draft Code's primary objectives is to formulate "general and equitable standards on which to base the relationships among parties to transfer of technology" with special recognition being given to the less developed countries' economic and social development objectives and their need for special treatment to ensure their access to the technology and research training in their development assistance programs. However, one may have the impression that major technological advances made by the industrialized countries in the realms of informatics, telecommunications, biotechnology, and the invention of new materials, have left many of the less-developed countries even farther behind. The consequences may be compounded

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109 GSP, Decision of June 25, 1971, L/3545 in GATT: Basic Documents and Selected Documents, 18th Supp. 24 (1972).

110 Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries, Decision of Nov. 28, L/4903 in GATT: Basic Documents and Selected Documents, 26th Supp. 203 (1980).

111 Hudec, *Developing Countries in the GATT Legal System*, 112 (1987). For current problems in this respect see, for example, Hart and Dymond, "Special and Differential Treatment and the Doha 'Development' Round", 37 *Journal of World Trade* 395 (2003).

112 See Agreement Establishing the WTO, 33 ILM 13 (1994); Understanding on Rules and Procedures Governing the Settlement of Disputes, 33 ILM 112 (1994).

113 Franck, *supra* Introduction, n. 23, at 433. On unilateralism within the framework of the GATT/WTO see particularly *infra* par. 4, at n. 209.

114 Programme of Action on the Establishment of a New International Economic Order, GA Res. 3202 (S-IV), UN GAOR, 6th Special Sess., Supp. No. 1, Art. IV(a).

by what is seen by less-developed countries as the current tendency of governments to grant stronger intellectual property protection to technological innovations.[115] According to Franck, the majority formed by the less-developed countries can usually start a discourse and it can also block an agreement, but it can rarely compel, for only mutuality of interest and clarity of discourse can do that.[116] In the discursive search for mutuality, for areas of overlapping self-interest, the element of fairness can play an important role because everyone has an interest in being seen to act fairly. Franck asserts that the search for fairness in investment law would further illustrate this.

In the Chapter on *Fairness in International Investment Law* Franck asserts that the management of societal tensions between the pull to political change and the desire for stable expectations is not unique to relationships between the overseas investors of the developed nations and the political leaders of the poor nations which receive the investments. Transnational investment differs from entrepreneurial activities within one nation, however, in one fundamental respect: the political system, within which the rules applicable to an enterprise are shaped by, *inter alia*, political considerations of social policy and fairness is not co-extant with the economic market within which the (international) investment decisions are made. According to Franck, it is for international law not to resolve the fairness discourse, but to promote discourse as an end in itself with the object of creating a high degree of mutuality of expectations between the participants in an international investment transaction. Furthermore, international law should create a legitimate framework within which future, unanticipated disputes can be addressed through further discourse or institutions and rules of process-legitimacy. As such, creating a framework like this is the optimal institutionalized manifestation of fairness itself.[117]

It is by no means clear that international law has been designated to intervene to protect the government of a sovereign state against its own deliberate decision to act in a way which may well be unfair or imprudent, for being unfair is not always imprudent. As the *Aminoil* arbitral tribunal stated,

> . . . the opposition manifested by some States to any but the most incomplete compensation may be explicable on the basis that their object is to do away with foreign investment entirely, because they do not welcome foreign capital and are even less favorable to investing abroad themselves. What they want is to break loose from the round of foreign investment.[118]

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115 See, for example, Sun, 'Reshaping the TRIPs Agreement Concerning Public Health: Two Critical Issues', 37 *Journal of World Trade* 163 (2003).

116 Franck, *supra* Introduction, n. 23, at 436-7.

117 *Id.* at 439-40.

118 *Kuwait v. American Independent Oil Co. (Aminoil)*, Decision of Mar. 24, 1982, 21 ILM 1033, para. 145 (1982).

Indeed, the investor must be presumed to know that, within certain limits, sovereignty means never being truly bound by private expectations.[119] However, this does not necessarily indicate that sovereign power is boundless. Franck states that

> . . . if international law had nothing to say about the relationship between the governments of poor states and the citizens of richer states that contemplate providing the former with capital and services, then it would have turned a blind eye to one aspect of the complex question of fairness and a deaf ear to the counsels of prudence. The probable consequence would be that the economic lot of the poor became even harder. It would discourage transnational capital investment and technology transfers by depriving investors of the protection of an impartial system and process of law.[120]

According to Franck, international treaty and custom establish the framework for fairness dialogue. International law leaves each state's political process partially free to regulate property for the well-being of the national community, but subject to basic procedural and substantive legal protection for the acquired rights of persons. These protections exist in international customary law, but are specified and made applicable to foreign investments in various kinds of treaties. The essence of these treaties is the transformation of a relationship from one of disequilibrium (private investor – sovereign) to equilibrium (sovereign – sovereign).[121] Bilateral treaties between individual states recognize the special need to promote international capital and technology transfer by providing a legitimate international system of rules and processes capable of balancing demands for political accountability against those for a stable investment climate. Multilateral instruments similarly seek to institutionalize such balancing on a more comprehensive scale. The leading instance is the World Bank's Convention on the Settlement of Investment Disputes between States and Nationals of Other States.[122] While this Convention does not elucidate standards, it does establish a legitimate transnational process for disputing parties by means of The International Centre for Settlement of Investment Disputes (ICSID) established by Article 1 of the Convention and located at the World Bank.

Multilateral conventions may also play a role in establishing norms and processes for preventing or resolving other kinds of problems arising out of transnational invest-

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119 The same point about sovereignty is made by the United Nations General Assembly's non-binding but influential 1974 Charter of Economic Rights and Duties of States, which declares that: "Every state has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities." See GA Res. 3281 (XXIX), 1974, Art. 2, para. 1.

120 Franck, *supra* Introduction, n. 23, at 446.

121 *Id.* at 447.

122 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 575 UNTS 160 (1966).

ments. Among the problems addressed are those arising out of the conflict between the rules applicable in the jurisdiction of the investor and those of the host country. Harmonization is thus a major part of law's contribution to greater fairness. For example, the United Nations Commission on International Trade Law (UNCITRAL) has prepared a Convention on Contracts for the International Sale of Goods[123] and a Convention on International Bills of Exchange and International Promissory Notes,[124] both of which seek to clarify and unify those technical aspects of international commercial law. According to Franck, the two agreements point the way to more usage of multilateral treaties to create a common system of legitimate legal standards which will promote confidence in governments, enterprises, and persons engaged in activities conducive to international economic growth and development.[125]

Besides, although it is not their primary purpose, human rights law should protect the rights of foreign investors. It is necessary to balance the realization of human rights, which would be achieved by redistributing wealth, against the costs to human rights incurred by taking property. The law is the scale on which this weighing takes place. The actual process of weighing involves the fairness discourse. Although already manifest in John Locke's *Second Treatise*,[126] the human right to property has received rare attention in international law. Article 17 of the The Universal Declaration of Human Rights states that: "Everyone has the right to own property" and that "No one shall be arbitrarily deprived of his property". Nothing comparable, however, is found in the Covenant on Economic, Social and Cultural Rights[127] and the Covenant on Civil and Political Rights.[128] In each, the first article recognizes a collective right of "all peoples" to "freely dispose of their natural wealth and resources". There is no acknowledgment, however, of any right of persons to enjoy quiet title or to dispose of their private possessions. Conventions on genocide, torture, slavery, refugees, stateless persons, women, children, and religious tolerance have all captured the attention of the community of states, while the right to property has not.[129] The lack of property protection may be due to the long-time priorities of communist, socialist, and some developing states. Only in Europe and North America there is substantive legal property protection on the human rights agenda. However, even the Convention of

123 Convention on Contracts for the International Sale of Goods, Final Act, UN Conference on Contracts for the International Sale of Goods, 19 ILM 170 (1989).

124 Convention on International Bills of Exchange and International Promissory Notes, adopted by the General Assembly, 28 ILM 170 (1989).

125 Franck, *supra* Introduction, n. 23, at 453.

126 Locke, *supra* Chap. 2, n. 72, Secs. 27, 87, 123, 173.

127 International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3 (1966), reprinted in 6 ILM 360 (1967).

128 International Covenant on Civil and Political Rights, 999 UNTS 171 (1966), reprinted in 6 ILM 368 (1967).

129 Franck, *supra* Introduction, n. 23, at 455.

the Council of Europe did not contain a property clause until the adoption of Protocol I.[130] In this context, Franck asserts that the European Court of Human Rights (ECHR) seems to be inclined to a rather narrow interpretation of the Protocol.[131]

Franck concludes the excursion with regard to the third identified cluster by way of stating that

> . . . fairness, in the law to foreign investments, is important not merely because it is a moral requisite, but because in its absence a major source of development capital would dry up, magnifying and perpetuating the unfairness of the existing inequalities between rich and poor. Thus a double imperative drives the search for a fairness consensus.[132]

Since legitimacy and justice together constitute fairness, it is inevitable that fairness discourse will take the form of attempts to reconcile claims of legitimacy with those of distributive justice. The discourse consists primarily of advancing claims and testing them against rival claims based on alternative values: national security, self-interest, economic efficiency, and others. Fairness discourse, which is central to the concept of fairness in international law and institutions, is mainly organized by two characteristics: first, the discourse tends to give each state an equal voice. Second, it tends to give a voice only to representatives of governments.

The notion that each state has an equal voice in the global discourse is formally embodied in Article 2 para. 1 of the UN Charter, which states that the "Organization is based on the principle of the sovereign equality of all its Members". Given the widely varying populations of the different member states of the UN, however, this principle raises some basic problems of fairness. The centripetal trend in tackling international problems is generating a centrifugal reaction, which threatens to make discourse difficult, if not impossible. Franck states that

> . . . the principle of state equality . . . must be seen as wrong, first because it encourages secessionism which, in turn, makes fairness discourse more cacophonous, and secondly because it is an unfair organizing principle which infects the fairness discourse with a fundamental flaw of unfairness.[133]

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130 Protocol I states: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided by law and the general principles of international law. The preceding section shall not, however, in any way impair the right of the State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties." European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 222 (1950), Protocol No. I, 213 UNTS 262 (1952).

131 Referring to the decision of the Court in *Lithgow v. UK*, 102 ECHR (Ser. A), 8 Eur. HR Rep. 329 (1986).

132 Franck, *supra* Introduction, n. 23, at 472.

133 *Id.* at 480.

A second characteristic of the predominant modality in the organization of global discourse is that voice and vote are reserved exclusively for governments. According to Franck, "this is both manifestly unfair and, ultimately, destructive of discourse".[134] The reason for this not being fair is that there would be some fifty nations in which an indigenous minority has identified itself; however, nowhere do these peoples form a majority. Therefore, if the international system is to survive a serious fairness deficit, it must try to establish a forum in which people rather than governments are directly represented. Such a democratically representative forum would alleviate the problems of both formal state equality and minority voicelessness. Hence, Franck suggests that the General Assembly of the UN could be transformed into a two-chamber forum in which the one is constituted as at present, retaining the Westphalian 'one state, one voice' principle, while the other is directly elected in accordance with universal suffrage and on the basis of a negotiated allocation of seats corresponding generally, if not absolutely, to population size.[135] From an international legal point of view, therefore, at present, the term 'global discourse' suggests at least primarily a conversation between states. According to Franck, that limited view, however, would be wrong for it is overlooking many actors such as multinational corporations or NGOs. Consequently,

> . . . a discourse solely and exclusively reflecting the views of those who govern nations cannot be expected to produce rules which are fair, or can only be expected to do so haphazardly.[136]

3.2. Critique

In the following, I will focus on some of the main criticisms, which have been put forward against Franck's account as developed in *Fairness in International Law and Institutions*.[137] In this respect, one central issue is the problem of finding common values

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134 *Id.* at 481.

135 *Id.* at 483.

136 *Id.* at 484.

137 See, for example, Trimble, 'Survey of Books Relating to the Law: Globalization, International Institutions, and the Erosion of National Sovereignty and Democracy', 95 *Michigan Law Review* 1944 (1997); Simpson, "Book Review: Is International Law Fair?', 17 *Mich. J. Int'l L.* 615 (1996); Zoller, 'Book Review: Fairness in International Law and Institutions. By Thomas M. Franck', 36 *Virginia. J. Int'l L.* 1079 (1996); 'Symposium on Thomas M. Franck's Fairness in International Law and Institutions', 13 *EJIL* 902 (2002): in particular Scobbie, 'Tom Franck's Fairness', 13 *EJIL* 907 (2002); Cullen, 'The Role of History in Thomas Franck's Fairness in International Law and Institutions', 13 *EJIL* 927 (2002); Tierney, 'The Search for a New Normativity: Thomas Franck, Post-modern Neo-tribalism and the Law of Self-determination', 13 *EJIL* 941 (2002); Kritsiotis, 'Imagining the International Community', 13 *EJIL* 961 (2002); Tasioulas, 'International Law and the Limits of Fairness', 13 *EJIL* 993 (2002); And Franck, briefly responding to these criticisms: Franck, 'Epistemology at a Time of Perplexity', 13 *EJIL* 1025 (2002).

or notions of justice in the global community.[138] Franck notes that many different formulas could be advanced, such as 'to each according to ability' or 'to each according to need' or 'to each according to just deserts'. Finally, he concludes that no single formula will command universal acceptance; there is no objective concept of fairness. Because particular notions of fairness vary with history and culture, he convincingly concludes that it will not be possible to find a consensus on substantive notions of justice.[139]

However, whatever allocational criterion is chosen, it must meet the test of perceived fairness if it is to succeed. In order to do so, Franck draws on John Rawls and other writers in the Western liberal tradition.[140] Franck essentially believes that everyone can agree on the need for fairness as the basis for allocating resources. Therefore, "the pursuit of a shared perception of fairness is the necessary starting point for devising any lasting allocational rules".[141] Although personal notions of fairness depend on history and culture, everyone agrees that fairness includes a "*process of discourse, reasoning, and negotiation*".[142]

> Put another way, the pursuit of a shared perception of fairness is the necessary starting point for devising any lasting allocational rules: rules, which are likely to command respect and *pull towards voluntary compliance.*[143]

Thus, Franck does not suggest a need for consensus on particular moral values. According to his Western liberal reasoning he assumes and promotes tolerance of different views and respect for cultural difference. Indeed, the core value of liberalism is that there are no ultimate values or fundamental truths. Instead, the required consensus would require agreement on the principles or process for co-operation. However, Franck's attempt to rely on a Rawlsian discourse among equals is vulnerable to the same problem as finding agreement on a single 'formula' for assessing fairness. Thus, Franck fails to put forward a consistent argument in this respect: whereas he (convincingly) assumes that it will be impossible to find consensus on notions of substantive justice, he merely – without giving an explanation – assumes that it will be possible to find consensus on the notion of fairness discourse: according to Franck, if fairness is not rationally detectable, it does not follow that all judgments about it are arbitrary expressions of individual or collective preferences and prejudices.[144] Instead, Franck asserts that

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138 Franck, *supra* Introduction, n. 23, at 13.
139 *Id.* at 14.
140 See *supra* Chap. 2, par. 2.1.
141 Franck, *supra* Introduction, n. 23, at 13.
142 *Id.* at 14 (emphasis in original).
143 *Id.* at 13 (emphasis added).
144 Tasioulas, *supra* n. 137, at 997-8.

> [fairness] is a human, subjective, contingent quality, which merely captures in one word a *process of discourse, reasoning, and negotiation* leading, if successful, to an agreed formula located at a conceptual intersection between various plausible formulas for allocation.[145]

Franck suggests that for such discourse to start there needs to be a background of agreement, a "shared irreducible core of beliefs as to what the search for fairness itself entails".[146]

However, other cultures may construct fairness discourses in different terms than the Western liberal philosophical tradition. The philosophical departure point for discourse about politics and government in the West is that 'all men are created equal' and that autonomous individuals act out of self-interest to achieve their goals. Contrarily, the foundation of Buddhism, for example, is that all sentient beings are suffering and that the object of life is not pursuing self-interest, but extending compassion. Both Buddhism as well as Hinduism, depart from the notion of human equality in the doctrine of karma and reincarnation – namely, the belief that a prior life of merit or demerit accounts for our station in the present life. This account suggests that the karma of our prior lives explains the rampant inequality that we observe all around us.[147] Elsewhere, the Confucian tradition holds that people are born into and take meaning from family and community, which are accorded priority over individual preferences. In China, one becomes a human being by virtue of participation in society, and ideally the interests of the state and the individual are harmonious.

> Chinese thinking to this day is dominated by this pre-Hobbesian worldview. State interests override the interests and rights of any given individual. The apparent one-sidedness of this relationship is diminished to some extent, however, by a second basic assumption in Chinese thought: that the interests of the state and individual are in, or at least can be brought into, harmony.[148]

In those contexts, Franck's discourse seems odd and unlikely to gain acceptance. Even his adoption of acceptance as the hallmark of legitimacy is another Western liberal idea raising the same cultural problems. Another anomaly in Franck's analysis is that liberalism respects cultural difference, but he privileges the Western approach.[149] Samuel Huntington argues that it is false to believe that Asian and Middle Eastern governments will become westernized as a result of modernization. To the contrary, "modernization,

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145 Franck, *supra* Introduction, n. 23, at 14 (emphasis in original).

146 *Id.* at 14.

147 Fletcher, 'In God's Image: The Religious Imperative of Equality under Law', 99 *Columbia Law Review* 1617 (1999).

148 Peerenboom, 'What's Wrong with Chinese Rights: Toward a Theory of Rights with Chinese Characteristics', 6 *Harv. Hum. R. J.* 37 (1993).

149 Trimble, *supra* n. 137, at 1948-9.

instead, strengthens those cultures and reduces the relative power of the West. In fundamental ways, the world is becoming more modern and less Western."[150] Each of these political orders has many different currents responding to perceptions of sameness and difference with the West. Nevertheless we should not, as Huntington does, ignore internal differences or think that the future is closed to change. Neither, however, should we, as Franck does, ignore the reality of a reciprocal sense of opposition and potentially unbridgeable difference. Conflict does not necessarily follow from difference, yet many perceive these differences as 'unbridgeable' precisely because there is a sense that something of ultimate seriousness is at issue. To bridge the difference might be to give up something central to the idea of the self.[151] Finally, there are also political problems with Franck's approach. A Western process-like approach to determining what is fair will seem to some people as another version of Western cultural imperialism. It will be opposed simply because it is Western. Likely opponents include, for example, Asian governments promoting Asian values.[152]

Franck then posits two 'gatekeeping principles' as prerequisites to participating in the discourse. Participants must accept these two principles to assure that the requisite community actually exists, that the discourse is focused and serious, and that it will likely lead to agreement. The first principle is the 'no trumping' principle, which states that "a global community of fairness could not include any group which believes in an automatic trumping entitlement".[153] Such a trumping entitlement (such as by reference to market value or the 'unseen hand' of economics) does not preclude agreement, but does render impossible negotiated agreement among a community of states and persons.[154] The second principle is the 'maximin principle', which states that

> . . . inequalities in the access to, or the distribution of, goods must be justifiable on the basis that the inequality has advantages not only for beneficiaries but also, to a proportionate or greater degree, for everyone else. In other words, unequal distribution is justifiable only if it narrows, or does not widen, the existing inequality of persons' and/or states' entitlements.[155]

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150 Huntington, *The Clash of Civilizations and the Remaking of World Order*, 78 (1996).

151 Franck's idea of the self is obviously grounded in liberal thinking. See also the discussion *supra* Chap. 2, par. 2.1. Elsewhere, Franck contends that his version of liberalism can sufficiently accommodate collective identities on the basis of choice. He also suggests that the idea of individualism "is not necessarily incompatible with chosen affiliations with community, group, nation or state. It does not necessarily even preclude individuals choosing to be quite ethnic or nationalistic." Franck, *supra* Chap. 2, n. 196, at 2. See also Tierney, *supra* n. 137, at 957. This way is the one Rorty, for example, wants to go: "If we Westerners could get rid of the notion of universal moral obligations created by membership in the species, and substitute the idea of building a community of trust between ourselves and others, we might be in a better position to persuade non-Westerners of the advantages of joining in that community." Rorty, 'Justice as a Larger Loyalty' in *Cosmopolitics: Thinking and Feeling beyond the Nation*, 56-7 (Cheah and Robbins, eds., 1998). See also *supra* chap. 2, par. 7.

152 Trimble, *supra* n. 137, at 1950-1; see also Rashid (ed.), *The clash of civilizations?: Asian responses* (1997).

153 Franck, *supra* Introduction, n. 23, at 16.

154 *Ibid.*

155 *Id.* at 18.

It is a 'neo-egalitarian principle of distributive fairness' and "manifests a moral preference . . . for equal liberty for all including equality of opportunity, as well as equal distribution of income and wealth".[156]

Franck's view as to both the appropriateness and value of a framework for 'optimal' fairness discourse and its necessity to the success of his approach is not entirely convincing. The framework is problematic, mainly for two reasons: first, since there is no(t yet a) global community of people in the sense envisioned by Franck, the first gatekeeping principle will exclude most people and most governments from the discourse on many issues. Second, the second gatekeeping principle, like Franck's entire framework, rests on Western liberal ideas and philosophical principles that do not command general acceptance among many governments and people.

Although Franck's framework might fit the way international law is made today, the *status quo* is not a very good model for determining fairness, and Franck acknowledges that the current system is inadequate.[157] Additionally, it seems impossible to find general agreement on a basic principle of distributive justice, in particular of a global application of this principle. The main reasons for this assertion are the following: according to Rawls, a person should be free to choose any conception of the good life that does not violate the principles of justice, no matter how much it differs from other ways of life in the community. Conflicting conceptions can be tolerated because the public recognition of principles of justice is sufficient to ensure stability even in the face of such conflicts.[158] Therefore, the basis for legitimacy is not a shared conception of the good, but a shared sense of justice. The asymmetry between the right and the good is "the fact of reasonable pluralism".[159] Given that, the problem is to find principles of justice that free and equal citizens can affirm despite their moral and religious differences. The solution to this problem must be one that upholds the priority of the right over the good. However, this solution has to assume that, despite disagreements about morality and religion, we do not have similar disagreements about justice. It has to assume that human reason under conditions of freedom will not produce disagreements about justice. Thus, the 'fact of reasonable pluralism' about morality and religion only induces an asymmetry between the right and the good when coupled with the further assumption that there is no comparable 'fact of reasonable pluralism' about justice. Disagreement about the correct principle of distributive justice would hinder the asymmetry between the right and the good if it were reasonable pluralism. Thus, Rawls does not only have to show that his difference principle is more reasonable than the alternative offered by libertarians, but also that the contrary

156 *Id.* at 18 (quoting John Rawls, *supra* Chap. 2, n. 18, at 151). Indeed, the conceptualization of Franck's 'maximin principle' resembles the one of Rawls' difference principle. However, Rawls resists its extension to the regulation between societies. See *supra* Chap. 2, par. 2.1.

157 See also *supra* par. 2.1.

158 Rawls, *supra* Chap. 2, n. 18, at 245.

159 Rawls, *supra* Chap. 2, n. 41, at xvii.

arguments by Robert Nozick or Milton Friedman amount to an unreasonable pluralism. It is hard to see why this should be the case. Even if Rawls is considered to be convincing in this respect, it remains unclear why we cannot reason in the same way about conceptions of the good as we can reason about controversial principles of distributive justice. But if it is possible to reason about the good as well as the right, then Rawls' claim for the asymmetry between the right and the good is undermined.[160]

Just as it seems impossible to find general agreement on a basic principle of distributive justice, it seems also not possible to find agreement – especially among peoples as opposed to governments – on the fairness of a Rawlsian discourse or on how otherwise to think about fairness. To the extent that peoples' thinking changes as a result of modernization, those peoples may come to adopt the liberal framework. In that case they will again object to the current lawmaking system – for different reasons – because it can be fair only if their governments also change to reflect the peoples' new preferences. However, such changes on a worldwide scale seem implausible. The quest for a universal philosophical explanation of international law's legitimacy is misplaced for a simple reason: it does not exist.[161]

Franck's model of fairness is based on the notion that the 'global community' must have 'shared values' that will support widely accepted conclusions about right process and distributive justice.[162] *Within* the global community, Franck detects various communities "of trade, of environmental concerns, of security, of health measures".[163] As such, "*communitas* can be concentric and overlapping. Society is starting to perceive a community of states and, simultaneously, a community of persons."[164] However, today's world seems too politically and culturally diverse to sustain any consensus of that kind.[165] The debate about cultural relativism and human rights pro-

160 See Sandel, 'Book Review: Political Liberalism. By John Rawls', 107 *Harvard Law Review* 1765-6 (1994). But see Kymlicka, 'Liberal Individualism and Liberal Neutrality', 99 *Ethics* 883 (1989). For a specific discussion of Franck's global application of the distributive principle see, for example, Tasioulas, *supra* n. 137, at 1014-20.

161 Trimble, *supra* n. 137, at 1952-3.

162 Franck, *supra* Introduction, n. 23, at 10.

163 *Id.* at 12. See also the arguments developed by Abi-Saab, 'Whither the International Community?', 9 *EJIL* 248 (1998).

164 Franck, *supra* Introduction, n. 23, at 13. See also Kritsiotis, *supra* n. 137, at 972.

165 It should not, however, be overlooked that the terms 'global community' or 'international community' have become a strategic part of the lexicon of international law and politics. Consequently, it has been argued that "words help to form conceptual horizons, and phrases [such as 'international community'], with their unavoidable universalist overtones, may be the outward signs of a real change in the axiomatic foundations of intergovernmental relations as understood by the governments themselves." Allott, *supra* Chap. 1, n. 26, at xiii. See also Allott, 'Kosovo and the Responsibility of Power', 13 *Leiden Journal of International Law* 85 (2000) (noting that the Kosovo crisis illustrated "[o]nce again, the reality of international society has overwhelmed the capacity of international law to respond coherently and convincingly to that reality [and that] [o]nce again, international law has revealed itself as the dysfunctional law of a dysfunctional society").

vides an obvious demonstration of the problem with Franck's premise. Franck's premise is too utopian an account of Rawls' concept of 'overlapping consensus'.[166] According to Rawls, moral commitments in the private sphere do not hinder agreement on public conceptions of justice. In his discussion of trumping, Franck endorses this view.[167] But since it is unlikely that all, or even some states subordinate their principles under the notions of the first 'gatekeeping' principle, this principle would exclude almost everyone on one issue or another. These differences are much more severe among people than governments, but if, as Franck acknowledges, rules or institutions are to succeed in the new era of globalization, they must appear to be fair to the world's people as well as to their governments.

With regard to the Chapter on environmental discourse, the Rawlsian analysis introduced at the beginning of the book seems to be not particularly connected with the new developments in environmental law, except to the extent that international treaty negotiations are obviously a form of discourse and the compromises reached in recent negotiations do incorporate responses to the fairness-based claims of less-developed countries. Additionally, with respect to the procedural part of Franck's fairness model, he ignores the partly institutionalized right of NGOs to participate in treaty negotiations. The importance of their (though at least partly problematic) participation, however, should be taken into account.[168]

As far as economic fairness is concerned, even Franck admits that "it is the most obvious problematic of distributive justice".[169] Indeed, he seems to be forced to take recourse to realist thinking when he acknowledges, "in the discursive search for mutuality, for areas of overlapping self-interest, the element of fairness can play a role".[170] Franck seems to simply suggest that everyone has an interest in being seen to act fairly. Certainly, states that act fairly, or at least are perceived by other actors to act fairly, may incur reputational benefits. However, this notion does not necessarily imply that all states have an interest in being seen so as to act fairly; rather, this assertion seems to be too optimistic. Even if it were the case that states in general want to be seen as to act fairly, there will almost for sure be exceptions to the rule.

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166 Rawls, *supra* Chap. 2, n. 41, at 133-6.

167 See Simpson, *supra* n. 137, at 622-3.

168 Given their organizational structure, the democratic credentials of NGOs need to be questioned. See particularly *infra* par. 4. The participation of NGOs in these discourses, however, also poses some additional questions to Franck's fairness concept: Given their uncertain status, could they be easily encompassed within Franck's contractarian assumption? Can it be assumed that they all subscribe to the "basic rules of the community and . . . [the] legitimate exercise of community authority"? See Scobbie, *supra* n. 137, at 913.

169 Franck, *supra* Introduction, n. 23, at 413.

170 *Id.* at 436.

When it comes to the Chapter on forums of fairness, the author's emphasis on democracy is critically important.[171] As Franck points out, the term democracy etymologically simply refers to the role of people in governance.

> The right to democracy is the right of people to be consulted and to participate in the process by which political values are reconciled and choices made.[172]

As to participation, the International Labor Organization (ILO), for example, offers one model for institutional reform since representatives from government and businesses may participate in law-making conferences. On the other hand, a corollary to more open participation at the law-making stage, and a key to accountability, is that the decision-making process needs to be more transparent. In addition to transparency, accountability itself requires popular review of decisions that are reached. Popular review in turn means that the people affected by an international decision, or their democratically elected governments, must have the right to reject the decision and be able to do so without being punished for their decision. This type of popular review already exists in some organizations, such as the International Civil Aviation Organization's (ICAO) procedure under which a state may decline to be bound by a new annex adopted by the ICAO Council. Such an 'opting-out' mechanism, at least to some extent, may be seen as threatening to the international nature of the system and represents a sort of unilateralist concession that may not fit well with Franck's approach. Nevertheless, it is a significant element of democracy and a significant protection of national sovereignty.[173]

Summing up, Franck's book is a voluminous account of the concept of fairness in international law. Discussing a wide variety of international legal topics, it represents an important contribution to the defense of Rawls' liberal theory (as primarily developed in *A Theory of Justice*) in international legal thought. Given this intellectual background, it is likely to feature some of liberalism's shortcomings. Some of its suggestions for compliance with and fairness in international law, such as transparency or review are one core part of the theory of compliance with international law I will discuss in the following.

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171 In *Fairness in International Law and Institutions*, Franck largely avoids using the term 'right' to describe the 'democratic entitlement', though he clearly argues that democracy is becoming a rule of the international system. Franck, *supra* Introduction, n. 23, at 84. In *The Empowered Self*, Franck removes the ambiguity and advocates a human right to democratic governance. Franck, *supra* Chap. 2, n. 196, at 262, 267 and 284. See also Cullen, *supra* n. 137, at 929.

172 Franck, *supra* Introduction, n. 23, at 83.

173 See Trimble, *supra* n. 137, at 1968.

4. Chayes and Chayes: The New Sovereignty: Compliance with International Regulatory Agreements

4.1. Thesis

> *Coordination games thus have an inherent stability to them that is absent in many other social-dilemma games, like the prisoner's dilemma.*
>
> Dennis C. Mueller

The Chayeses explain non-compliance as stemming from the ambiguity and indeterminacy of treaty language,[174] limitations on the capacity of parties to carry out their treaty undertakings, and what they call 'the temporal dimension': avoidable and unavoidable time lags between a state's undertaking and its performance.[175] In order to address these sources of non-compliance, they first develop an 'enforcement model', and after reviewing the various coercive devices available – i.e. treaty-based military and economic sanctions, membership, and unilateral sanctions – conclude that it is usually doomed to failure.[176] They argue that "sanctioning authority is rarely granted by treaty, rarely used when granted, and likely to be ineffective when used".[177] Repeated use of sanctions entails high costs to the sanctioner and can raise serious problems of legitimacy.[178] Consequently, what ensures compliance is not the threat of punishment, but a process of interaction among the parties concerned in which the effort is to re-establish, in the context of the particular dispute, the balance of advantages that brought the agreement into existence. Therefore, the 'enforcement model' should be replaced with a 'managerial model'.

The 'managerial model' seeks to explain compliance not through coercion, but rather through a co-operative model of compliance through interactive processes of justification, discourse, and persuasion.[179] As such, sovereignty no longer means freedom from external interference, but freedom to engage in international relations as

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174 This aspect of their theory is similar to the 'determinacy' part of Franck's theory and part of their essential normative approach.

175 Chayes and Chayes, *supra* Introduction, n. 24, at 15. See also Chayes and Chayes, 'On Compliance', 47 *International Organization* 175 (1993).

176 Chayes and Chayes, *supra* Introduction, n. 24, at 2-3.

177 *Id.* at 32-3.

178 *Id.* at 54 (noting the difficulty "of assembling and maintaining a coalition capable of and willing to apply forceful economic and military sanctions when costs and risks of intervention are high, results are uncertain, and impetus of American or other great-power leadership is lacking").

179 *Id.* at 109-11. This 'managerial model' is the institutionalist part of the Chayeses approach. Hence, their theory could be categorized under the institutionalist 'label' as well.

members of international regimes.[180] The impetus for compliance is not so much a nation's fear of diminution of status through loss of reputation. Rather, the Chayeses suggest that an 'iterative process' of 'justificatory discourse' among regime members is the principal method for inducing compliance with regime norms.[181]

The authors go on to elaborate on the 'instruments of active management', which are designed to foster greater compliance with regime norms, namely, transparency, reporting and data collection, verification and monitoring, dispute settlement, and strategic reviews and assessment. Transparency is the availability and accessibility of knowledge and information about the meaning of norms, rules, and procedures established by the treaty and practice of the regime as well as the policies and activities of parties to the treaty and of any central organs of the regime as to matters relevant to treaty compliance and regime efficacy.[182] Reporting is central to compliance systems in international regulatory regimes. The purpose of reporting is to basically generate information about the policies and activities of parties to the treaty. Reporting can be a kind of early warning system for substantive compliance problems.[183] Verification is "the most demanding aspect of achieving transparency".[184] It may begin with self-reporting; however, it can become far more costly and intrusive. Basically, the concepts and requirements were developed for cold war arms control agreements.[185] An alternative model for assuring compliance relies on verification and inspection by an international organization, rather than by the treaty parties themselves. For example, in the Nuclear Non-Proliferation Treaty,[186] the non-nuclear parties agreed not to acquire nuclear weapons, and to verify compliance with that obligation, they also agreed to accept safeguards on all their peaceful nuclear facilities.[187] Although the treaty does not directly confer inspection rights on the International Atomic Energy Agency (IAEA),[188] the agency has assumed the safeguards function.

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180 *Id.* at 123; see Hart, *supra* n. 62, at 305 ("Sovereignty is only a name given to so much of the international field as is left by law to the individual action of states.").

181 Chayes and Chayes, *supra* Introduction, n. 24, at 25.

182 *Id.* at 135.

183 *Id.* at 154-5.

184 *Id.* at 174.

185 See, for example, Treaty between the USA and the USSR on the Limitation of Anti-Ballistic Missile Systems, 23 UST 3435 (1972) (ABM Treaty); Strategic Arms Limitation Talks (SALT I); Treaty between the USA and the USSR on the Limitation of Strategic Offensive Arms, 18 ILM 1112 (1979) (SALT II); Treaty between the USA and USSR on the Elimination of Their Intermediate-Range and Shorter-Range Missiles, with Memorandum of Understanding and Protocols, 27 ILM 90 (1987) (INF Treaty); and later on Treaty between the USA and the USSR on the Reduction and Limitation of Strategic Offensive Arms, Washington, D.C.: U.S. Arms Control and Disarmament Agency (1992) (START I); Treaty between the USA and the Russian Federation on General Reduction and Limitation of Strategic Offensive Arms, 103 UST 1 (1993) (START II).

186 Treaty on the Non-Proliferation of Nuclear Weapons, 21 UST 483 (1968) (NPT).

187 Art. III para. 7 NPT.

188 The IAEA is due to promote the peaceful use of atomic energy while safeguarding against the diver-

With regard to dispute settlement, the sequence of methods recognized by international law is found in Article 33 of the UN Charter: "Negotiation, inquiry, mediation, conciliation, arbitration, and judicial settlement". Treaties commonly provide for consultation and negotiation between the parties to the dispute as a prerequisite to other dispute settlement mechanisms.[189] The essential question to be addressed is what the consequences of failed negotiations are. The dilemma is how to achieve effective resolution of issues of interpretation and application that would undermine the treaty regime, while not forcing unwilling parties into dispositive processes that will be either avoided or unenforceable, thus also undermining the treaty. The philosophical divide is between those who press for a process of formal adjudication and those who believe that disputes will be settled better through a more flexible, non-binding, mediative process.[190]

Data for review and assessment come from country reports as well as other available sources: for example, independent analysis by secretariats, NGOs and scholarly studies. When questions about performance emerge, the review explores the shortfalls and problems, works with parties to understand the reasons, and develops a program for improvement. The approach accepts that all states are engaged in a common enterprise and that the objective of the assessment is to discover how individual and system performance can be improved. The dynamics of dialogue and accountability are central and states are given opportunity to explain and justify their conduct. Although in comparison with sanctions these procedures are non-coercive, according to the Chayeses, they would exert strong pressures on parties to comply with their obligations. For the most part they rely on persuasion.[191]

In addition, NGOs perform parallel and supplementary functions at almost every step of the strategy for regime management. They are independent sources of information and data that can be used by the regime. In many cases, they provide the basic evaluation and assessment of party performance that is the core of the compliance process. They have provided technical assistance to enable developing-country parties to participate in treaty negotiation and administration and to comply with the reporting and sometimes the substantive requirements of the treaty. Where there is non-compliance, they are the key to public exposure, shaming, and popular response. Although NGOs work directly with national governments and international organizations in an attempt to shape their policies and actions, they exert their major influence through the domestic political process.[192]

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sion of nuclear materials and technology to weapons development. See Statute of the International Atomic Energy Agency, 8 UST 1093 (1957).

189 See, for example, Arts. XXII, XXIII para. 1 GATT, *supra* n. 108.

190 Chayes and Chayes, *supra* Introduction, n. 24, at 201-5.

191 *Id.* at 230.

192 *Id.* at 251-3.

International organizations, on the other hand, typically consist of decision-making organs made up of representatives of member states, a secretariat with a seat, specific locations in time and space, identifiable resources, and personnel with defined roles and power relationships. They are entities apart from the sum of its members and with a degree of autonomy for them. International organizations operate primarily from the top down, through their interaction with national bureaucracies, rather than (like NGOs) as actual participants in national politics. The governments that are members of the organization typically assign responsibility for matters concerning the treaty to appropriate components of their own bureaucratic establishments. According to the approach taken by the Chayeses, the relationships and interactions between these international and domestic bureaucracies are major factors in implementing compliance strategies.[193]

Finally, referring to the title of the Chayeses' book, since compliance with international law is ensured in the course of a process of interaction among the parties concerned rather than as a result of a threat of punishment or another form of enforcement, their claim is that what matters for states is their 'status' in the international system. This 'status' essentially is their 'new sovereignty': "Sovereignty, in the end, is status – the vindication of the state's existence as a member of the international system."[194]

4.2. Critique

According to the managerial approach, non-compliance is not the result of deliberate decisions, but rather (mainly) an effect of capacity limitations and rule ambiguity.[195] Therefore, enforcement is an inappropriate tool to foster compliance. In turn, this notion indicates that if the managerial school is correct, the absence of strong enforcement provisions or the informal threat of enforcement should have no bearing on the depth of co-operation. However, a logical connection between the depth of co-operation represented by a given treaty and the amount of enforcement that is needed in mixed-motive games can be identified. Furthermore, I will show that the comparatively rare use of sanctions is not due to their ineffectiveness but rather due to the fact that there are relatively few deeply co-operative agreements.[196]

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193 *Id.* at 272.

194 *Id.* at 27.

195 See also Chayes, Chayes, and Mitchell, 'Managing Compliance: A Comparative Perspective' in *Engaging Countries: Strengthening Compliance with International Environmental Accords*, *supra* Introduction, n. 17, at 39; Young, 'The effectiveness of international institutions: hard cases and critical variables' in *Governance without Government: Order and Change in World Politics*, *supra* Chap. 1, n. 15, at 160; Levy, Keohane, and Haas, 'Improving the Effectiveness of International Environmental Institutions' in *Institutions for the Earth: Sources of Effective International Environmental Protection*, 397 (Haas, Keohane, and Levy, eds., 1993).

196 Downs, Rocke, and Barsoom, 'Is the good news about compliance good news about cooperation?', 50 *International Organization* 379 (1996).

The best examples of steadily increasing depth of co-operation are to be found in the areas of international trade agreements and European integration. It shows that in both cases the role of enforcement has increased accordingly. Thomas Bayard and Kimberly Elliott, for example, conclude that the Uruguay Round has

> . . . substantially reduced many of the most egregious trade barriers around the world, but they also emphasize the enhanced ability of the WTO to respond to and punish trade violations.[197]

The deepening of European integration exhibits a similar pattern. Simultaneous with the increased co-operation embodied in the Maastricht Treaty, a study – already back in 1993 – with regard to the European Court of Justice points out that "the member states chose to strengthen the Court's power to monitor and punish defections".[198] Enforcement took the form of penetration of European Community (EC) law into the domestic law of its member states.[199] Since then, it is reasonable to argue that this tendency has been confirmed. It is therefore difficult to believe that this increased enforcement represents anything more than an attempt to pacify the few realists who remain influential in member states.

Besides, by emphasizing the power of the 'managerial model' and the weakness of the 'enforcement model', the Chayeses create the impression that the two models are alternatives. In fact, they strongly complement one another.[200] The 'managerial model' does not succeed just because of the power of discourse, but also because of the possibility of or the shadow of sanctions, however remote that prospect might be. With regard to compliance within the European Union (EU) context, Jonas Tallberg asserts that:

> The design and operation of the EU's system for inducing compliance challenges the antithetical positioning of enforcement and management strategies in the contemporary debate. In the EU, monitoring, sanctions, capacity building, rule interpretation, and social pressure coexist as means for making states comply. In the daily practice of the EU compliance system, these instruments are mutually reinforcing, demonstrating the merits of combining coercive and problem-solving strategies.[201]

Furthermore, it is doubtful whether compliance problems are caused by the ambiguity of treaties, the capacity limitations of states, and uncontrollable social and economic

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197 Bayard and Elliott, *Reciprocity and retaliation in U.S. trade policy*, 336 (1994).

198 Burley and Mattli, 'Europe before the court: A political theory of legal integration', 47 *International Organization* 74 (1993).

199 *Id.* at 43.

200 Koh, *supra* Introduction, n. 25, at 2639.

201 Tallberg, 'Paths to Compliance: Enforcement, Management, and the European Union', 56 *International Organization* 614 (2002).

changes, as the 'managerial model' alleges, and whether these problems may be solved by improving dispute resolution procedures, technical and financial assistance, and transparency without any attention to increased enforcement. Rather, it shows that the 'managerial model' works best in co-ordination games, in which case the sort of managerial issues the Chayeses advance assist co-ordination efforts. The reason for this is that

> . . . in the case of coordination problems, once the parties have agreed on a certain set of behaviors, neither party has an incentive to deviate from the agreement, and compliance is the expected outcome even in the absence of enforcement. Because there is no incentive to cheat, there is no need to focus on enforcement. Resources are better directed at managerial issues.[202]

However, the model is less useful when considering the use of international law beyond co-ordination games.[203] In collaboration situations, there are greater incentives to defect than in co-ordination situations.

> In collaboration situations, states have an incentive to renege on their commitments, since they gain more from an agreement if they reap all the benefits without putting in their own fair share.[204]

In such situations, enforcement mechanisms such as sanctions are required to deter states from shirking, as they raise the costs to defect and make non-compliance a less attractive option.

> A punishment strategy is sufficient to enforce a treaty when each side knows that if it cheats it will suffer enough from the punishment that the net benefit will not be positive.[205]

To illustrate this assertion, take the centerpiece of the post-war trade regime, namely, the GATT, which provides a wealth of material about the sources of non-compliance and the ability of its parties to deal with them. Ambiguity about what constitutes non-compliance is a source of problems, but no one denies a considerable number of violations indeed have occurred. The framers of the GATT were careful not to limit

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202 Guzman, *supra* Introduction, n. 10, at 1831.

203 *Id.* at 1832-3: "The managerial model, then is a useful but incomplete model of compliance. As long as one is only interested in coordination games, it provides a good guidance to compliance and national behavior. If one seeks to understand situations where states make agreements that call upon them to act against their own interests in exchange for concessions from other states, a different model is needed." See also Hathaway, *supra* n. 2, at 1950.

204 Tallberg, *supra* n. 201, at 612.

205 Downs, Rocke, and Barsoom, *supra* n. 196, at 385.

its policing or dispute settlement procedures to actions that were prohibited explicitly. Instead, they based enforcement provisions on the nullification or impairment of benefits that countries might expect. Article XXIII permits that a settlement procedure be initiated

> If any contracting party should consider that any benefit accruing to it directly or indirectly under this agreement is being nullified or impaired or that the attainment of any objective of the agreement is being impeded as the result of (a) the failure of another contracting party to carry out its obligations under this Agreement, or (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or (c) the existence of any other situation.[206]

Capacity limitations and uncontrollable social and economic changes are rarely cited as major determinants of violations. This is not so much because they are never present, but because their effect is dwarfed by the most conspicuous cause of GATT non-compliance: the demands of domestic interest groups and the significant political benefits often associated with protection. Though GATT supporters would argue that any ill effects have been overshadowed by the GATT's positive achievement of reducing tariffs, the demand for protection is not being entirely ignored.

Dispute resolution in the form of GATT/WTO panels undoubtedly has played some role, but certainly not an overwhelming one.[207] Until recently, the panels moved at a ponderous pace and could easily be frustrated, especially by large states. Far more successful have been the rounds of multilateral negotiations that have operated over time to ensure that certain categories of disputes would reappear less often and that have extended the boundaries of the regime. Nevertheless, enforcement also has played an important role in the operation and evolution of the GATT. For example, between 1974 and 1994, the United States imposed or publicly threatened retaliation in 50 percent of the cases that it took to the GATT, independent of any GATT action.[208]

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206 Art. XXIII GATT, *supra* n. 108.

207 Studies on the GATT/WTO dispute settlement procedure commonly state that that it has been a quite successful international legal institution. However, an analysis of individual country performance makes it clear that the GATT/WTO dispute settlement is more responsive to the interests of the strong than to the interests of the weak. The evidence for this hypothesis occurs in all phases of performance – in the rates of success as complaints, in the rates of noncompliance as defendants, in the quality of outcomes achieved, and in the extent to which complaints are able to carry complaints forward to a decision. See, for example, Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System*, 353 (1993). See also Park and Umbricht, 'WTO Dispute Settlement 1995-2000: A Statistical Analysis', 4 *J. Int'l Econ. L.* 213 (2001); Busch and Reinhardt, 'Bargaining in the Shadow of the Law: Early Settlement in GATT/WTO Disputes', 24 *Fordham Int'l L. J.* 158 (2000). But see also Princen, 'EC Compliance with WTO Law: The Interplay of Law and Politics', 15 *EJIL* 572 (2004).

208 Downs, Rocke, and Barsoom, *supra* n. 196, at 395. It is a stunning fact that two-thirds of the world's population is subject to one type or another of American sanctions, with more than half of the 115 sanctions schemes implemented by the United States since World War I initiated since 1994. See Dunne, 'Sanctions Overload', Financial Times, July 21, 1998, at 13.

As the United States increasingly turn to unilateral remedies for perceived violations of international trade law,[209] other members grew increasingly concerned that the GATT/WTO was powerless in preventing unilateralism and not strong enough to provide effective enforcement.[210] On the other hand, increased enforcement and such 'justified disobedience' of the GATT/WTO dispute resolution process may be an important element in the process of GATT/WTO legal reform. As such, unilateral remedies such as Section 301 may have inspired the enhanced dispute settlement procedures of the WTO. Indeed, it has been argued that the United States Trade Representative (USTR)

> . . . generally wielded the section 301 crowbar deftly and constructively, employing an aggressive unilateral strategy to induce support abroad for strengthening of the multilateral trade system.[211]

Finally, the Chayeses do not focus on the substance of the rules being enforced by the managerial process. Securing greater compliance with treaties is not always good

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209 Section 301 of the Trade Act of 1974 is the principal United States statute for addressing foreign government practices affecting United States exports of goods or services. Section 301 may be used to enforce 'United States rights under international trade agreements' and may also be used to respond to 'unreasonable, unjustifiable, or discriminatory foreign government practices that burden or restrict United States commerce'. Section 182 of the Trade Act of 1974 (commonly known as 'Special 301') requires the USTR to identify annually those countries that deny 'adequate and effective intellectual property (IP) protection' or that deny 'fair and equitable market access' to United States IP products. 'Super 301' provides a mechanism for the USTR annually to review United States trade expansion priorities and focus United States resources on 'eliminating significant trade impediments to United States exports'. See also <http://www.ustr.gov/enforcement/tradelaw.shtml>.

210 Goldstein and Martin, 'Legalization, Trade Liberalization, and Domestic Politics: A Cautionary Note', 54 *International Organization* 623 (2000).

211 Bayard and Elliott, *supra* n. 197, at 350. For the present purposes it is also interesting to look at the political economy of United States trade policy. One examination on this subject suggests that: "The most obvious hypothesis is that the degree of trade conflict is positively related to barriers of trade. . . . Trade conflict may be positively associated with market size for two reasons. First, aggregate market size (measured as gross domestic product, GDP) is presumably correlated with market power, and countries with market power could be expected to bargain strategically, generating conflict. Second, the payoff to removing a barrier is greater the larger the market is and should attract the attention of trade policy makers. . . . If policymakers are maximizing the present discounted value of benefits, as a corollary to the arguments regarding market size, a positive correlation will exist between market growth and conflict . . . and a positive partial correlation between growth and conflict, holding the level of trade barriers constant. . . . Casual observation of U.S. political discourse suggests that an inverse relationship exists between bilateral trade balances and trade conflict, although in strictly economic terms one can make only a very limited case for linking national welfare to *bilateral* balances *per se*. . . . Although it might seem logical that if exports and investments are high there should not be much trade conflict, some argue that greater exports or investment might enlarge the potential number of domestic firms that might demand further market access. As a consequence, the expected sign is ambiguous. . . . Some have argued that U.S. trade policy may be subject to regional effects in which the United States develops usually serene or acrimonious relations with particular parts of the world. The argument is sometimes made that the United States singles out Japan for special scrutiny." Noland, 'Chasing Phantoms: The Political Economy of USTR', 51 *International Organization* 370-3 (1997).

per se. Indeed, securing compliance with treaties may in certain cases even be undesirable if the treaties themselves are unfair or perpetuate compulsory bargains. They concede that the 'legitimacy' of their managerial approach depends on the procedural fairness, equal and non-discriminatory application, and substantive fairness and equity of the rules being applied. But what remains unspecified in their approach is precisely how the process should account for such fairness considerations.

This is an especially crucial aspect because their approach considerably relies on the work undertaken by NGOs. NGOs are commonly referred to as intermediary organizations important as alternate political power whose presence helps neutralize the danger of excessive authority. Thus, they are necessary instruments in a civil society.[212] They are vehicles for private intervention in all kinds of policies and as such fulfill the market criteria of competitiveness, which ensures that they are efficient and innovative while remaining free from the distortions of patronage. By bypassing domestic boundaries, NGOs surely can be employed in assisting to induce states to comply with international norms, however they tend to be illegitimate from a democratic viewpoint: NGOs exercise influence and often power in our society in ways which sometimes seem disproportionate to their memberships and the weight of their arguments, and which often run counter to the wishes of the majority.

In order to analyze the patterns of influence of NGOs on decision-making within international organizations, the latter are traditionally grouped into two broad categories, namely, service organization and forum organization.[213] Service organizations such as the international financial institutions provide specific in-country services and disburse funds to 'clients'. Forum organizations such as the WTO or the UN provide a framework for negotiations and collective decision-making, ranging from consultation to binding commitments.[214] At a basic level, service organizations, particularly the IBRD, appear to promote a strategy of intensive NGO participation. Unlike them, however, the IMF does not have participatory operations. Rather, the IMF mainly favors business associations that roughly share its approach to solve problems. In contrast to service organizations, the influence of NGOs within forum organizations seems to be less developed, even though there are increasingly efforts to broaden their participation as the WTO's *Guidelines for Arrangements on Relations with Non-Governmental Organizations* exemplify.[215]

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212 Already Locke noted that civil society was necessary to keep government accountable to the people. Locke, *supra* Chap. 2, n. 72.

213 See generally Cox and Jacobson, (eds.), *The Anatomy of Influence. Decision-Making in International Organizations* (1973).

214 Tussie and Riggirozzi, 'Pressing ahead with new procedures for old machinery: Global governance and civil society' in *Global Governance and the United Nations System, supra* Chap. 1, n. 17, at 164.

215 Guidelines for Arrangements on Relations with Non-Governmental Organizations, adopted on July 18, 1996 (WT/L/162, July 23, 1996). Para. 4 of these Guidelines calls for the Secretariat to play "a more active role in its direct contacts with NGOs. . . . [T]his interaction . . . should be developed

However, even though the participation of NGOs may have enhancing effects on compliance, it should also be noted that very little is known about how many of these organizations are funded, whom they represent, how they reach their decisions, and to whom they are accountable.[216] Voting membership is usually tightly controlled, with regular contributors and donors rarely consulted about policy, strategy, or tactics. Contributors always have the right to withhold further support if they disapprove of the actions of particular NGOs, but their contributions enable such organizations to claim a mandate to speak and act on behalf of a larger number of people than their actual membership. These factors all combine to leave such organizations with a growing credibility problem. Governments are less inclined to take those NGOs seriously that misunderstand science or fabricate data in efforts to support their case. The public is less inclined to give money and other forms of support to organizations that prove to have many of the same failings that they accuse their opponents of having. These concerns can be expected to intensify as NGOs, like other special interest groups, seek to become more and more involved in the political and decision-making processes which determine the outcome of development applications, business investment, environmental, health and safety standards, and other matters that are of public importance. It is for this reason alone that society should demand higher standards of behavior and governance from those NGOs with whom they deal.

One way to meet public expectations would be for NGOs to adopt their own voluntary Codes of Conduct.[217] Another way would be for governments to impose such Codes, as has happened in several African countries such as Gambia, where an NGO Code of Conduct sets out standards of corporate governance and behavior for local and international NGOs. In South Africa, legislation was passed in 1998 to facilitate the establishment of non-profit organizations in the post-apartheid era. The legislation provides for a voluntary register of non-profit organizations, and sets out standards of governance, accountability, and public access to information.

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through various means such as *inter alia* the organization on an *ad hoc* basis of 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."

216 On this topic see particularly Symposium on the Democratic Accountability of Non-governmental Organizations, 3 *Chi. J. Int'l L.* 155 (2002): Wapner, 'Introductory Essay: Paradise Lost? NGOs and Global Accountability', 3 *Chi. J. Int'l L.* 155 (2002); Spiro, 'Accounting for NGOs', 3 *Chi. J. Int'l L.* 161 (2002); Spar and Dail, 'Of Measurement and Mission: Accounting for Performance in Non-Governmental Organizations', 3 *Chi. J. Int'l L.* 171 (2002); Kingsbury, 'First Amendment Liberalism as Global Legal Architecture: Ascriptive Groups and the Problems of the Liberal NGO Model of International Civil Society', 3 *Chi. J. Int'l L.* 183 (2002); Wapner, 'Defending Accountability in NGOs', 3 *Chi. J. Int'l L.* 197 (2002).

217 Cf. Nowrot, 'The Rule of Law in the Era of Globalization: Legal Consequences of Globalization: The Status of Non-Governmental Organizations under International Law', 6 *Ind. J. Glob. Leg. Stud.* 579-82 (1999).

In 1996, the Commonwealth Foundation published a comprehensive report called *Non-Governmental Organizations: Guidelines for Good Policy and Practice*. The report was commissioned in response to proposals made at the first Commonwealth NGO Forum in Zimbabwe in 1991, and was, at least in part, a response to proposals by some developing countries to impose guidelines on NGOs wishing to operate in those countries. A four-year research and consultation program culminated in the report's presentation to and endorsement by the Second Commonwealth NGO Forum. The Report recommended that governments provide a supportive legal and institutional framework for NGOs, that they should endeavor to work in partnership with NGOs, and that governments should assist NGOs by granting them tax relief, exemption from or reductions in taxes and duties, as well as a range of other support mechanisms. So far, however, the rules of conduct have not resulted in a binding international agreement.[218]

If such rules of conduct were implemented, participation of NGOs would also be more likely to be embraced to a larger extent in the work of international organizations. For example, then WTO Director-General Mike Moore called for an NGO Code of Conduct and suggested that governments and their institutions give those who follow such rules "a stake in the process".[219] Moore continued to argue that

> . . . we need to accept that there is a fundamental difference between transparency and participation on the one hand and negotiations on the other – which in the end only Governments can do.[220]

Elsewhere, in June 2003, the American Enterprise Institute in a collaborative project with the Federalist Society for Law and Public Policy Studies set up a web site – called NGOWatch – "in an effort to bring clarity and accountability to the burgeoning world of NGOs".[221] But these efforts to increase the accountability and transparency of NGOs have not matured into a widely accepted Code of Conduct for

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218 See *id.* at 635.

219 Moore, 'Address to WTO Symposium on Issues Confronting the World Trading System on Open Societies, Freedom, Development and Trade', July 6, 2001, transcript available at <http://www.wto.org/english/news_e/spmm_e/spmm67_e.htm>. See also Marceau and Pedersen, 'Is the WTO Open and Transparent? A Discussion of the Relationship of the WTO with Non-Governmental Organizations and Civil Society's Claims for more Transparency and Public Participation', 33 *Journal of World Trade* 5 (1999); Scholte, O'Brien, and Williams, 'The WTO and Civil Society', 33 *Journal of World Trade* 107 (1999); Hernández-López, 'Recent Trends and Perspectives for Non-State Actor Participation in World Trade Organization Disputes', 35 *Journal of World Trade* 469 (2001); Benedek, 'Developing the Constitutional Order of the WTO – The Role of NGOs' in *Development and Developing International and European Law*, 228 (Benedek, Isak, and Kicker, eds., 1999).

220 Moore, *supra* n. 219. See also Charnovitz, 'WTO Cosmopolitics', 34 *NYU J. Int'l L. & Pol.* 299 (2002); Porter, Sauve, Subramanian, and Zampetti, (eds.), *Efficiency, Equity, and Legitimacy: The Multilateral Trading System at the Millennium* (2001).

221 <http://www.ngowatch.org>. NGO activists such as Naomi Klein, author of *No Logo* (2002) do not seem to like the idea: she called the project 'bizarre'. See *The Economist*, August 9th, 2003, at 50.

NGOs. Nevertheless, if rules of conduct for NGOs were implemented, the Chayeses' approach would benefit since they rely to a considerable extent on the work of NGOs. So far, the work of many NGOs employs some illegitimate processes.

In the end, even though the managerial approach has several flaws, the model is not ineffective in all contexts, particularly in case of co-ordination situations.[222] Combining elements of norm-driven and institutionalist theories, the managerial model appears to have worked fairly well in some contexts, as for example in regulating international civil aviation. There, the regime established under the Chicago Convention on Civil Aviation, the constitutive instrument of the ICAO, works fairly close to what the 'managerial model' suggests.[223] However, it has explanatory power in collaboration situations where there are greater incentives to defect than in co-ordination situations.

5. Koh: Why Do Nations Obey International Law?

5.1. Thesis

> *Primitive law and international law are the foremost of such doubtful cases, and it is notorious that many find that there are reasons, though usually not conclusive ones, for denying the propriety of the now conventional use of the word 'law' in these cases.*
>
> Herbert Lionel Adolphus Hart

According to Harold Koh, it is transnational law litigation, which brings together two distinct modes of litigation: domestic and international.[224] Domestic litigation typically involves actions brought by private individuals seeking compensation for past wrongs based upon domestic rights. By contrast, international litigation typically involves actions brought by sovereign states seeking compensation for past wrongs based upon international rights. In combination, transnational law litigation seeks to vindicate public rights and values based upon international norms through the domestic legal process.[225] Koh characterizes transnational law litigation by the following five main characteristics: (1) a transnational party structure, in which states and non-state enti-

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222 Downs, Danish, and Barsoom, 'The Transformative Model of International Regime Design: Triumph of Hope or Experience?', 38 *Colum. J. Transnat'l. L.* 507 (2000).

223 See generally Buergenthal, *The International Civil Aviation Organization* (1969). But see also Alvarez, 'Do Liberal States Behave Better? A Critique of Slaughter's Liberal Theory', 12 *EJIL* 212-4 (2001) (arguing that the ICAO example should not be dismissed on the basis that it constitutes a mere technocratic 'co-ordination' game that falls short of 'deep' co-operation).

224 Koh, 'Transnational Public Law Litigation', 100 *Yale LJ* 2348 (1991).

225 *Id.* at 2348-9.

ties equally participate; (2) a transnational claim structure, in which violations of domestic and international, private and public law are all alleged in a single action; (3) a prospective focus, fixed as much upon obtaining judicial declaration of transnational norms as upon resolving past disputes; (4) the litigants' strategic awareness of the transportability of those norms to other domestic and international *fora* for use in judicial interpretation or political bargaining; and (5) a subsequent process of institutional dialogue among various domestic and international, judicial and political *fora* to achieve ultimate settlement.[226]

Essentially, Koh suggests that through transnational law litigation, states can internalize international norms, thereby promoting compliance: instead of focusing exclusively on the issues of 'horizontal jawboning' at the state-to-state level as traditional international legal process theories do, a transnational legal process approach focuses more broadly upon the mechanisms of 'vertical domestication', whereby international law norms 'trickle down' and become incorporated into domestic legal systems.[227]

According to Koh's latest approach to the compliance question in his essay *Why Do Nations Obey International Law?*[228]

> . . . both the managerial and the fairness accounts of the compliance story omit . . . a thoroughgoing account of *transnational legal process*: the complex process of institutional *interaction* whereby global norms are not just debated and *interpreted*, but ultimately *internalized* by domestic legal systems.[229]

Koh asserts that Franck's description of why a discursive process adds to the obligatory force of norms is even less well-specified than the Chayeses' account, because Franck says "little about the various modes of institutional *interaction* that lead to *interpretation* of norms".[230] He believes that despite their methodological differences, both Franck and the Chayeses finally give the same answer to why nations comply. Koh thinks that both analyses suggest that the key to better compliance has to be the preferred enforcement mechanism.

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226 *Id.* at 2371.

227 Koh, 'Bringing International Law Home', *supra* Chap. 3, n. 26, at 626-7; see also Keohane, 'Compliance with International Commitments: Politics Within a Framework of Law', 86 *Am. Soc. Int'l L. Proc.* 179 (1992); but see Franck, 'Dr. Pangloss Meets the Grinch: A Pessimistic Comment on Harold Koh's Optimism', 35 *Houston Law Review* 683 (1998); Keohane, 'When Does International Law Come Home?', 35 *Houston Law Review* 707 (1998).

228 In the introductory footnote, Koh announces that the arguments will be fleshed out in a forthcoming book, tentatively entitled *Why Nations Obey: A Theory of Compliance with International Law*. However, up until September 2004, the book has not been published.

229 Koh, *supra* Introduction, n. 25, at 2602 (emphasis in original).

230 *Id.* at 2645 (emphasis in original).

> If nations internally 'perceive' a rule to be fair, says Franck, they are more likely to obey it. If nations must regularly justify their actions to treaty partners in terms of treaty norms, suggest the Chayeses, it is more likely that those nations will 'voluntarily' comply with those norms.[231]

But both approaches would not address the crucial question by what process norm-internalization occurs and how occasional or grudging compliance with global norms can be transformed into habitual obedience.[232] According to Koh, such a process can be viewed as having three phases, occurring as follows:

> One or more transnational actors provoke an interaction (or series of interactions) with another, which forces an interpretation or enunciation of the global norm applicable to the situation. By so doing, the moving party seeks not simply to coerce the other party, but to internalize the new interpretation of the international norm into the other party's internal normative system. The aim is to bind that other party to obey the interpretation as part of its internal value set. Such a transnational legal process is normative, dynamic, and constitutive. The transaction generates a legal rule which will guide future transnational 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.[233]

As governmental and non-governmental transnational actors repeatedly interact within the transnational legal process, they generate and interpret international norms and then seek to internalize those norms domestically. Consequently, to the extent that those norms are successfully internalized, they become future determinants of why nations obey international norms.[234]

> It is through this transnational legal process, this repeated cycle of interaction, interpretation, and internalization, that international law acquires its 'stickiness', that nation-states

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231 *Ibid.*

232 *Id.* at 2646.

233 *Ibid.* According to Koh, this process explanation comports with both the Chayeses' managerial approach and Franck's fairness approach. The 'discursive process' to which the Chayeses refer is simply a multiply iterated version of the transnational approach. The parties to the transaction will typically view an internalized rule that emerges from such a process with the 'internal' sense of fairness and legitimacy that Franck deems necessary for that rule to have 'compliance pull'.

234 *Id.* at 2651. Koh exemplifies his thesis by analyzing the 'Oslo process'. After Israel had originally opposed the Oslo accords, it eventually chose to obey the accords in 1997. Koh argues that Israel's entry into an 'international society', not just with the Palestinians, but also with the United States, Jordan, and Egypt helped to reshape and reconstitute its national interests. The repeated interaction of the parties against the shadow of the future interpreted the core norms of the Oslo accords, which came to frame the relationship between the parties. By formally approving the accords, the Israeli Parliament legislatively internalized its norms. This legal internalization had the effect of making Oslo a *fait accompli*. *Id.* at 2651-8. However, as it turned out, this internalization did not last for very long. See, for example, Greenberg, *supra* Chap. 4, n. 2, at 1798, n. 46.

> acquire their identity, and that nations come to obey international law out of perceived self-interest. In tracing the move from the external to the internal, from one-time grudging compliance with an external norm to habitual internalized obedience, the key factor is repeated participation in the transnational legal process. That participation helps to reconstitute national interests, to establish the identity of actors as ones who obey the law, and to develop the norms that become part of the fabric of emerging international society.[235]

In cases in which enforcement mechanisms are weak, the best compliance strategies may not be 'horizontal' regime management strategies, but rather, vertical strategies of interaction, interpretation, and internalization.[236] Thus, if compliance is a result of repeated interaction in the transnational legal process, the aim should be to empower more actors such as intergovernmental organizations, NGOs, or private businesses to participate in that process. At the level of interpretation, the participation of experts and existing institutions is crucial. Finally, at the level of internalization, Koh distinguishes three types of internalizing an international legal norm into a state's domestic structure: social, political, and legal internalization.

> Social internalization occurs when a norm acquires so much public legitimacy that there is widespread general obedience to it. Political internalization occurs when political elites accept an international norm, and adopt it as a matter of government policy. Legal internalization occurs when an international norm is incorporated into the domestic legal system through executive action, judicial interpretation, legislative action, or some combination of the three. . . . [J]udicial internalization can occur when domestic litigation provokes judicial incorporation of human rights norms either implicitly, by constructing existing statutes consistently with international human rights norms, or explicitly, through . . . 'transnational public law litigation'. Legislative internalization occurs when domestic lobbying embeds international law norms into binding domestic legislation or even constitutional law that officials of a noncomplying government must then obey as part of the domestic legal fabric.[237]

It was precisely this 'internal acceptance' that H.L.A. Hart found to be missing when he denied that international law satisfied the concept of law. Yet, in Hart's own terms, a transnational legal process of interaction, interpretation, and internalization of global norms can provide both the 'secondary rules' and the 'rules of recognition' that Hart found missing from the international legal order.[238] By contrast, Koh asserts that domestic obedience to internalized global norms has venerable historical roots and sound theoretical footing. Participation in the transnational legal process creates a normative and constitutive dynamic.[239] Since this participation in the transnational process

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235 *Id.* at 2655.
236 *Ibid.*
237 *Id.* at 2656-7.
238 Hart, *supra* n. 62, at 214.
239 Koh, *supra* Introduction, n. 25, at 2659.

depends *inter alia* on the structure of the domestic legal and political system, Koh's account in this respect shows certain similarities to the liberal thesis, which emphasizes the role of domestic institutions in enforcing national and international obligations.[240] In Koh's own terms, "[by] domesticating international rules, transnational legal process thereby spurs internal acceptance of international human rights principles".[241]

Recently, Koh illustrated his transnational legal process with respect to three examples from the September 11 context: "first, America and the global justice system; second, the rights of 9/11 detainees; and third America's use of force in Iraq".[242] To provide an example, at this point, his arguments regarding the latter application will be summarized. In this context, Koh suggests that when the United States 'bluffed down the unilateralist path', it did not embrace a transnational legal process solution, i.e. the exercise of multilateral coercive power, led by the United States through the UN mechanism.[243] He asserts that a solution based on transnational legal process, which basically would have employed a multilateral strategy to disarm Iraq without a military intervention together with enhanced containment and more aggressive human rights intervention, would have been considerably advantageous:

> It would have avoided a bloody war, the financial and symbolic costs of that war, and the thousands of combatant and civilian deaths that war has entailed. More fundamentally, it would have secured Iraq's compliance with international law at no cost to the United States's own appearance of compliance.[244]

Regardless of the fact that the government of the United States did not choose to engage in transnational legal process as understood by Koh, he nevertheless remains optimistic that opponents of that strategy may henceforth do so in case they "provoke myriad interactions, and generate multiple interpretations that can continue to promote U.S. respect for universal human rights standards and the rule of law".[245] On the other hand, what has to be feared is

> . . . the norm that will be internalized throughout the Middle East because of the war against Iraq [and] that that norm will not be a commitment to American-style democracy or the Bush Doctrine, but rather, to a regional ethos of anti-Americanism.[246]

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240 Liberal Theory is discussed in more detail *infra* par. 6.
241 Koh, *How is International Human Rights Law Enforced?, supra* Chap. 3, n. 26, at 1414. Overall, however, Koh does not (completely) agree with the entire liberal approach. See *id.* at 1404-8.
242 Koh, *supra* Chap. 2, n. 158, at 1503.
243 *Id.* at 1518.
244 *Id.* at 1520.
245 *Id.* at 1526.
246 *Ibid.*

5.2. Critique

One central element of Koh's transnational legal process theory is the concept of internalization of international norms. However, the theory does not offer a sound explanation of *why* certain legal norms are internalized and how this internalization takes place. To illustrate this, assume that – as Koh does – international legal norms are internalized by transnational actors. Given this assumption, one would also have to expect domestic legal norms to be internalized, in particular if any such norm is in the interest of domestic policy makers. The internalization of both international and domestic norms raises the question which norm is to trump the other in case of conflict. In case international legal norms are at odds with the self-interest of the state, it is at least doubtful that the international norm would triumph. Nevertheless, if domestic concerns triumph, the internalization of international legal norms does not have any impact on the outcome.[247] It shows that in this case, Koh's 'transnational legal process' cannot satisfactorily explain the behavior of states. Therefore, without an understanding of why domestic policy makers internalize norms in the international arena, and a theory of why this internalization tends towards compliance, the theory lacks an essential element of explaining a state's behavior.

Koh criticizes that

> . . . by focusing so intensively on process, the Chayeses pass too lightly over the substance of the rules being enforced by the managerial process. Yet all treaties are not created equal. . . . securing greater compliance may even be undesirable if the treaties are themselves unfair or enshrine disingenuous or coercive bargains.[248]

However, Koh himself does not indicate any factors about the quality of rules either. Like the Chayeses' approach, his 'transnational legal process' also primarily, if not exclusively, focuses on process rather than on substance. Thus, he does not evade the criticism he addresses to the Chayeses: "But what remains unspecified is precisely how the process should account for such fairness considerations."[249]

According to Koh, the key factor is repeated participation, an opinion he shares with John Setear.[250] At a basic level, Setear's 'iterative perspective' holds that

> . . . the law of treaties, as well as the provisions of particular treaties, should encourage repeated interactions among nations and the adoption of certain strategies tending to lead to international cooperation.[251]

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247 Guzman, *supra* Introduction, n. 10, at 1836.
248 *Id.* at 2641.
249 *Ibid.*
250 Setear, *supra* Introduction, n. 10, at 139.
251 *Id.* at 140.

Setear essentially proposes linkages between game theory and institutionalism, and, through institutionalism, linkages between game theory and international law. He specifically suggests that the progressively increasing degrees of interaction and obligation, which are sometimes apparent in the different phases of treaty making, may indeed be explained on the basis of a 'game'. Setear starts his approach by assuming that the most common view on the law of treaties would be a consent-oriented one as expressed for example in the Vienna Convention on the Law of Treaties. This view, however, has an important inconsistency: the reliance upon sovereign consent to validate treaties, combined with an implicit unwillingness to carry through with that reliance once a treaty has been concluded.[252] An examination of another view on the law of treaties, namely, the legitimacy-oriented view (by relying on Franck's *The Power of Legitimacy Among Nations*) leads him to the conclusion that "there is a rough correspondence between Franck's assertion about 'compliance pull' and the reality of behavior with respect to the law of treaties".[253] According to Setear, the vagueness of this assertion stems – briefly – from three factors. First, the four factors (determinacy, symbolic validation, coherence, and adherence) elaborated by Franck would be rather difficult to define. Second, the legitimacy-oriented view would provide only little guidance for determining how to aggregate the four factors into a single judgment about legitimacy. And third, Franck would be unsure himself that 'legitimacy' is truly the determinant of compliance pull. Setear asserts that perhaps the notion of justice – which Franck excludes – would exert a similar effect.[254]

In developing his own approach, Setear starts by setting his institutionalist agenda: International co-operation is analogous to a 'pure public good'[255] and thereby, considering the ongoing interactions among states, also analogous to the 'iterated Prisoner's Dilemma'.[256] Given that situation, states may benefit from mutually co-operative behavior evolved over a number of iterations. International institutions may increase the likelihood or depth of such co-operation by lowering information costs or transactions costs. Setear asserts that treaties, and by implication all rules of international law, are based on the calculations of states that their long-term interests are best served through

252 *Id.* at 156-60.

253 *Id.* at 171.

254 *Id.* at 171-3.

255 Paul Samuelson traditionally defined a public good in that "each individual's consumption leads to no substraction from any other individual's consumption of that good". Samuelson, 'The Pure Theory of Public Expenditure', 36 *Review of Economics and Statistics* 387 (1954). Alternatively, a pure public good may be defined as "one that must be provided in equal quantities to all members of the community". Mueller, *supra* Chap. 3, n. 46, at 10. "A pure public good has two salient characteristics: jointness of supply and the impossibility or inefficiency of excluding others from its consumption, once it has been supplied to some members of the community." *Id.* at 11.

256 See also for example Young, *supra* Introduction, n. 20, at 26. Young suggested that the international legal system might best be thought of as a public good, in which many polities may have an interest, but for which few are willing to pay the costs.

the co-operative creation of such normative structures.[257] Repeated participation in this process is essential to his 'iterative perspective', which holds that

> . . . the law of treaties reflects a deep and pervasive concern with the promotion of iteration, predicts a wide range of rules in the law of treaties: its overall structure, its graduated increase in national obligations as the treaty process progresses.[258]

The law of treaties expressly sets forth two essential iterations, namely, signature and ratification, each of which implies another phase. Whereas the former implies negotiations, the latter implies compliance. At each iteration, nations make the decision either to co-operate or to defect.[259] Most importantly, the *degree* of co-operation required by the law of treaties increases with each iteration.[260] Additionally, the default dispute resolution mechanism set forth in the Vienna Convention on the Law of Treaties has an iterative cast. A party that wants to invoke a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify other parties of its claim.[261] If no other party objects within three months, then the party may pursue its intention unilaterally.[262] In case of an objection, the parties are to "seek a solution through the means indicated in Article 33 of the Charter of the United Nations".[263] In case the parties may not settle the dispute by means of "negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice",[264] the parties may resort to a conciliation commission,[265] or to the International Court of Justice or an arbitration commission.[266] Consequently, these rules of dispute resolution would add several iterations before states parties may lawfully abandon their legal obligations.[267]

Setear acknowledges, however, that this 'iterative perspective' on the law of treaties has one important shortcoming: "Like many rational choice theories, the iterative perspective suffers from a poverty of interpretation, especially the interpretation of the rich history of international relations."[268] An additional caution to such an approach has already been mentioned, namely, that not all international situations take a PD

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257 Setear, *supra* Introduction, n. 10, at 174-6.
258 *Id.* at 190.
259 *Id.* at 191.
260 *Id.* at 193-4.
261 Art. 65 para. 1 Vienna Convention.
262 Art. 65 para. 2 Vienna Convention.
263 Art. 65 para. 3 Vienna Convention.
264 Art. 33 Charter of the United Nations.
265 See Art. 66 Vienna Convention.
266 See Art. 66a Vienna Convention.
267 Setear, *supra* Introduction, n. 10, at 193.
268 *Id.* at 205.

form, for nations may face each other in many different (other) kinds of situations.[269] Addressing these criticisms, Setear nevertheless asserts, "the vast majority of works with a rational-choice flavor do employ the Prisoner's Dilemma as the central metaphor for international cooperation".[270]

It turns out that the approaches of both Koh and Setear are likely to reduce the complex question of compliance with international law, and with norms in general, to the simple fact of repeated interaction. This reductionism is especially visible in Setear's concept, whereas Koh's concept of internalization attempts to encompass a somewhat more sophisticated compliance theory. Several criticisms against this iterative perspective have been put forward. One significant criticism has been articulated by Michael Byers.[271] Byers criticizes this iterative perspective for it would ignore the entire issue of state responsibility (i.e. liability for the breach of obligations in international law) and, perhaps more importantly, the consequential and corresponding right to engage in countermeasures that is vested in those states whose rights have been violated. He asserts that the possibility of countermeasures, that is the reciprocal imposition of detrimental effects upon a violating state's interests, almost certainly conditions how nation-states behave with respect to their international obligations.[272] Additionally, Byers fears that an iterative perspective fails to communicate the subtle fact of legal specificity and the unique effects of obligation, and thus risks losing the very essence of law.[273]

Essentially, it turns out that the iterative perspective is embedded in institutionalist theory, which takes law seriously, but only as part of a network of norms, institutions, expectations, and the like. As such, law is integrated with all the phenomena that might influence state behavior, but is not seen as having exceptional significance in this regard.[274] According to institutionalists, the form, direction, or shape of an international regime and by that, its attendant legal norms are susceptible to shifts in power differentials between states and defections by powerful states. Whereas on the other hand, at least according to most institutionalists, national interests were unlikely to be modified or relegated given the institutional architecture.[275] Byers, on the other

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269 See *supra* Chap. 3, par. 2. See also Snidal, 'Coordination Versus Prisoner's Dilemma: Implications for International Cooperation and Regimes', 79 *American Political Science Review* 923 (1985); Snidal, 'Rational Choice and International Relations' in *Handbook of International Relations*, *supra* Introduction, n. 19, at 73.

270 Setear, *supra* Introduction, n. 10, at 183.

271 Byers, 'Taking the Law out of International Law: A Critique of the 'Iterative Perspective'', 38 *Harvard ILJ* 203 (1997).

272 *Id.* at 203.

273 *Id.* at 205.

274 See Simpson, 'The Situation on the International Legal Theory Front: The Power of Rules and the Rule of Power', 11 *EJIL* 452-3 (2000).

275 Keohane, *supra* Chap. 3, n. 11, at 11. But see also Hurrell, 'International Society and the Study of Regimes: A Reflective Approach' in *Regime Theory and International Relations*, *supra* Chap. 1, n. 16, at 49.

hand, attributes some autonomous, constraining effect on states' behavior. He argues that institutionalists have refused to

> . . . take the additional necessary step of recognizing that the obligatory character of rules of international law render these rules less vulnerable to short-term political change than the other, non-legal factors they study.[276]

In turn, this indicates one problem with Byers' account, namely, that it has to acknowledge that international law "carries with it a unique ability to qualify the *short-term* behavior of those some states".[277]

Elsewhere, Robert Cooter attempts to address the impact of internalization on a cost-benefit analysis of norm compliance.[278] Cooter argues that obeying a norm imposes direct costs and conveys the reputational benefits as well as the benefit of avoiding a sanction. "Combining these elements yields this formula for the net cost of obeying a social norm: *net cost = direct cost – reputational benefit – avoided sanction.*"[279] Since an actor will pay a net price to uphold an internal obligation, whereas an actor will not pay a net price to uphold an external obligation, "more internalization causes either a small increase in conformity for certain, or a large jump in conformity with higher probability".[280] Internalizing a norm is a commitment that attaches a psychological barrier. A rational actor internalizes a norm when commitment conveys an advantage relative to the original preferences and the changed preferences; a change Cooter calls 'Pareto self-improvement'.[281] Most importantly, "by creating opportunities for Pareto self-improvements, *law induces rational people to change their preferences*".[282] If this thesis is correct, the essential question is whether international law *is law* in the sense of the thesis – or whether law rather is an obligation backed by coercive state action? More specifically, therefore, in this context, it has to be asked what kind of sanction the law has to provide in order to uphold the thesis.

First, Cooter attempts to prove the thesis by focusing on the typical law enforcement by the state through courts.[283] However, for present purposes, it is important to

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276 Byers, *supra* Chap. 4, n. 5, at 9.

277 Byers, *supra* n. 271, at 205 (emphasis added).

278 Cooter, 'Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms', 86 *Virginia Law Review* 1577 (2000). Notice that Cooter's arguments are developed as he focuses on national legal systems. It remains to be shown here and elsewhere whether these arguments may as well be applied to the international legal system. See also Cooter, 'Normative Failure Theory of Law', 82 *Cornell Law Review* 947 (1997).

279 Cooter, 'Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms', *supra* n. 278, at 1584. See also Cooter, 'Three Effects of Social Norms on Law: Expression, Deterrence, and Internalization', 79 *Oregon Law Review* 7-8 (2000).

280 Cooter, 'Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms', *supra* n. 278, at 1589.

281 Cooter, 'Expressive Law and Economics', 27 *Journal of Legal Studies* 586 (1998).

282 *Ibid.* (emphasis added).

283 *Id.* at 604-5.

recall that the essential 'shortcoming' of the international system is the very absence of a coercive power comparable to that, which enforces the laws of a state. Indeed, as indicated, for example, by Neuhold[284] and the Chayeses,[285] the effectiveness of sanctions in the international system is rather limited.[286] In particular, imposing sanctions in a multilateral context is difficult. The main reason for this is that a state which imposes a sanction in such a setting merely gains some portion of the intended benefits from that act as other non-sanctioning countries, having an incentive to free ride, may gain other portions of the intended benefit. By contrast, sanctions in a bilateral setting might be more effective.[287] An additional shortcoming of sanctions in the international system is that their effectiveness is steadily decreasing as the number of interactions among the actors involved is increasing. Despite their shortcomings, sanctions in the international system should not be dismissed completely for in some situations it is possible to impose sanctions and thus, provide more efficient incentives to states to comply.[288] Nevertheless, given the limited effectiveness of sanctions, in order to uphold the thesis stated above, the use sanctions alone – as they may and are currently applied – does not suffice.

Therefore, another kind of sanction needs to be at hand to make actors refrain from non-complying, or to put it another way, to further compliance. Indeed, Cooter suggests that another type of sanction might be successful as well: if people who do not comply with the law were shamed by the state, this sanction would trigger an effect comparable to typical law enforcement.[289] Put differently, in case an actor's reputation is at stake, the rational actor will internalize the norm in order to achieve 'Pareto self-improvement'. Thereby, international law will also induce rational states, or rather their representatives, to change their preferences. Compliance with international law will therefore occur, when governments conclude that their reputation is at risk. Whereas direct sanctions (alone) are insufficient in this respect, reputational sanctions may add decisively to incentivize states to comply.[290] In this vein, Beth Simmons argues that

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284 See *supra* par. 1 and Neuhold, *supra* Introduction, n. 22, at 98.

285 See *supra* par. 4 and Chayes and Chayes, *supra* Introduction, n. 24, at 2-3.

286 But see the arguments developed *supra* par. 4. See also Pape, 'Why Economic Sanctions Do Not Work', 22/2 *International Security* 90 (1997); Pape, 'Why Economic Sanctions Still Do Not Work', 23/1 *International Security* 66 (1998); Elliott, 'The Sanctions Glass: Half Full or Completely Empty?', 23/1 *International Security* 50 (1998); Baldwin, 'The Sanctions Debate and the Logic of Choice', 24/3 *International Security* 80 (1999/2000); Drezner, 'Bargaining, Enforcement, and Multilateral Sanctions', 54 *International Organization* 73 (2000).

287 Guzman, *supra* Introduction, n. 10, at 1869.

288 *Id.* at 1868.

289 Cooter, *supra* n. 281, at 605-6.

290 But see Downs and Jones, 'Reputation, Compliance and International Law', 31 *Journal of Legal Studies* 95 (2002) (arguing that there are a number of empirical and theoretical reasons for believing that the actual effects of reputation are both weaker and more complicated than sometimes suggested; while

> [g]overnments comply with their legal commitments largely to preserve their reputation for providing a stable framework for the protection of property rights and to enjoy future economic benefits on favorable terms.[291]

Andrew Guzman, who made the case for a 'reputational' theory of compliance with international law, suggests a list of four factors that influence the reputational impact of a violation.[292] First, the reputational consequence is affected by the severity of the violation and the magnitude of harm suffered by other states.[293] Second, the reason for a violation of international law needs to be considered, since under certain conditions it is more acceptable for other states that a state will choose not to comply.[294] Third, the extent to which a violation is known by the relevant players affects the reputational consequences of the violation.[295] Fourth, the clarity of the international obligation and its violation need to be taken into account.[296]

According to Guzman, two additional considerations have to be kept in mind. First, states need to consider the possibility that they may incur a reputational loss even if their actions are consistent with international law. For example, even though any state party to the North American Free Trade Association (NAFTA) may withdraw from the agreement within a given notice period, in case that, say, the United States do in fact do so, such a withdrawal "could impose reputational costs on the United States that resemble (though perhaps on a smaller scale) those imposed by a violation of the treaty".[297] Second, it needs to be taken into account that, as time passes on, the reputational consequences of a violation are reducing and a change of leadership within a state may neutralize these consequences.[298]

Put together, in order for states to achieve 'Pareto-self-improvement', sanctions need to be conceptualized so as to include all costs associated, be it sanctions according to a traditional understanding as well as reputational costs. Essentially, the argument is that competitive market forces induce governments to consider reputational costs of a possible violation of international law. These market forces need to be considered particularly in the context of international economic law. It remains to be

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> states may have reason to revise their estimates of a state's reputation following a defection or pattern of defections, they may have reason to do so only in connection with those agreements that they believe are first, affected by the same or similar sources of fluctuating compliance costs and second, valued the same or less by the defecting state).

291 Simmons, *supra* n. 2, at 325.

292 Guzman, *supra* Introduction, n. 10, at 1861.

293 *Ibid.*

294 *Id.* at 1862.

295 *Ibid.*

296 *Id.* at 1863. In this context see already the concept of 'determinacy' developed by Thomas Franck, *supra* par. 2.1. as well as its shortcomings *supra* par. 2.2.

297 Guzman, *supra* Introduction, n. 10, at 1864.

298 *Ibid.*

seen whether this approach might also be extended to other areas of international law; a path that will be explored later on.[299]

On the other hand, several cautions need to be taken with regard to a mere reputational model. Briefly, the most important seem to be the following: first, since a reputational model is itself subject to a cost-benefit analysis by states, it employs the shortcomings of such calculations.[300] Second, it cannot adequately explain the behavior of 'rogue' states, which – to put it bluntly – do not care about their reputation. Third, reputation does not pull towards compliance with international law in all situations. The reason for this is that states

> . . . prefer a reputation for compliance with international law so that they are able to make credible commitments in the future, but they are also concerned about other aspects of their reputation.[301]

As a consequence, Guzman suggests that one main implication of the reputational compliance model is that scholars should pay more attention to areas in which international law matters significantly, such as international economic or environmental law, whereas they should pay less attention to areas in which international law is likely to have a rather limited scope of application such as international security law.[302]

At this point, it may also be referred to the beginning of this critique. There, I have argued that the essential shortcoming of Koh's approach is that it does not offer a sound explanation of *why* certain legal norms are internalized. It is submitted that norms are internalized when commitment conveys an advantage relative to the original preferences and the changed preferences. In short, international law matters because it alters the preferences of the actors involved. "International law matters because legal obligations systemically raise and focus public and private actors' expectations about governmental behavior."[303] Addressing Byers' critique, it might be added that international law is a particularly well-recognized and suitable tool that renders "these rules less vulnerable to short-term political change than the other, non-legal factors".[304] Enriching Koh's concept – which draws on institutionalist and Habermasian discourse theory[305] – as indicated, it might be able to offer an understanding *why* internalization occurs. Koh asserts that internalization takes place by way of social, political, and legal internalization. Therefore, it should be asked whether any particular sort of regime is better suited for internalization to result from. Liberal theory

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299 See *infra* Chap. 6.
300 See *supra* par. 1.1.
301 Guzman, *supra* Introduction, n. 10, at 1850.
302 *Id.* at 1825 and 1883-6.
303 Simmons, *supra* n. 2, at 361.
304 Byers, *supra* n. 271, at 203.
305 See *supra* Chap. 2, par. 4.

essentially argues that liberal democracies 'do better', i.e. that they are more likely to comply. In order to address this assertion, the arguments of proponents of liberal theory will be discussed in more detail in the following.

6. Slaughter and Moravcsik: Liberal Theory

6.1. Thesis

Slaughter's liberal theory is millenist, triumphalist, upbeat.

José E. Alvarez

Liberal theorists like Anne-Marie Slaughter and Andrew Moravcsik draw on (classical) liberal political philosophy in order to put forward their international liberal theory. As Moravcsik has argued, the elements of this theory do indeed flow out of the political theory and philosophy that is commonly referred to as 'liberalism'. However, since the transposition of liberal analytical assumptions from the domestic to the international realm is complicated, international liberal theory should also be seen as a self-contained alternative to realism in particular.[306] Liberal theorists try to establish a framework that takes account of increasing evidence of the importance and impact of so many factors (at least to some extent) excluded from other models: individual, corporations, non-governmental organizations of every stripe, political and economic ideology, ideas, interests, identities, and interdependence. These factors influence state preferences, that is, the fundamental social purposes underlying the strategic calculations of governments. For liberals, the configuration of state preferences matters most in world politics – not as realists argue, the configuration of capabilities and not, as institutionalists maintain, the configuration of information and institutions.[307] Three fundamental assumptions shared by all liberal theories are the following:[308]

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306 Moravcsik, 'Liberalism and International Relations Theory', *Center for International Affairs, Harvard University, Working Paper No. 92-6* (1992).

307 Slaughter, *supra* Introduction, n. 26, at 509. Liberal democracies share similar values of both substance and procedure. Liberal theory recognizes liberal democracies as the strongest defenders of civil liberties and free market principles. It does not suggest, however, that liberal democracies necessarily represent the 'end of history'. However, in a multicultural world, variation in these core elements is inevitable. See Dahrendorf, 'The Third Way and Liberty', 78/5 *Foreign Affairs* 13 (1999); Zakaria, 'The Rise of Illiberal Democracy', 76/6 *Foreign Affairs* 22 (1997).

308 For the following see, for example, Slaughter, *supra* Introduction, n. 26, at 507-10; Burley, 'Law and the Liberal Paradigm in International Relations Theory', 1992 *Am. Soc. Int'l L Proc.* 180-6 (1992); Slaughter Burley, 'International Law and International Relations Theory: A Dual Agenda', 87 *AJIL*

(1) The fundamental factors in politics are members of domestic society, understood as individuals and privately constituted groups, seeking to promote their independent interests. Under specified conditions, individual incentives may promote social order and the progressive improvement of individual welfare.[309] Thus, liberal theory rejects a fundamental premise of both realist and institutionalist theory: that the structure of the international system, whether defined to take account of institutionalized state practices or not, is primarily determining state behavior. Liberals do not necessarily seek to rule out the state as the primary agent of international action; once state interests are determined, governments do pursue them in a rational unitary fashion. But the underlying source of those interests is social rather than systemic.[310]

(2) All governments represent some segment of domestic society, whose interests are reflected in state policy. Here is the link between the individual and group actors in domestic and transnational society and states' behavior. Liberals begin by identifying patterns of interests that are determined by the purposive actions of individuals and groups. The next step is to determine a particular state a government represents. The answer depends on the type of government in question, ranging from military dictatorship or oligarchies to democracies.[311]

(3) The behavior of states – and hence levels of international conflict and co-operation – reflects the nature and configuration of state preferences. The determination of the precise social interest represented by a particular government permits the specification of that government's preferences – the agenda that it will seek to promote in international bargaining. It is about the bargaining process that liberalism makes its third fundamental assumption. Where realists claim that power will determine bargaining outcomes, and institutionalists argue that it is power as conditioned by institutionalized practices, liberals claim that "what states do is determined by what they want".[312] The strength and intensity of a particular preference will determine how much the state is willing to concede to obtain that preference, which in turn will determine its likelihood of success in achieving the bargaining outcomes it desires.

In more detail, the first assumption clarifies that liberal theory rests on a 'bottom-up' view of politics in which the demands of individuals and societal groups are treated as analytically prior to politics. Political action is embedded in domestic and transnational civil society, understood as an aggregation of rational individuals with differentiated tastes, social commitments, and resource endowments. Socially differentiated

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227 (1993); Slaughter, Tulumello, and Wood, 'International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship', 92 *AJIL* 367 (1998); Moravcsik, *supra* Introduction, n. 26, at 513; Moravcsik, 'Liberal International Relations Theory – A Social Scientific Assessment', *Weatherhead Center Working Paper Series No. 01* (2001).

309 Slaughter Burley, *supra* n. 308, at 227.

310 *Ibid.*

311 *Id.* at 228.

312 *Ibid.*

individuals define their material and ideational interests independently of politics and then advance those interests through political exchange and collective action. Liberal theory seeks to generalize about the social conditions under which the behavior of self-interested actors converges toward co-operation or conflict. Conflictual societal demands and the willingness to employ coercion in pursuit of them are associated with a number of factors, three of which are relevant to this discussion: divergent fundamental beliefs, conflict over scarce material goods, and inequalities in political power.[313] Deep, irreconcilable differences in beliefs about the provision of public goods, such as borders, culture, fundamental political institutions, and local social practices, promote conflict, whereas complementary beliefs promote harmony and co-operation. Extreme scarcity tends to exacerbate conflict over resources by increasing the willingness of social actors to assume cost and risk to obtain them. Relative abundance, by contrast, lowers the propensity for conflict by providing the opportunity to satisfy wants without inevitable conflict and giving certain individuals and groups more to defend. Finally, where inequalities in societal influence are large, conflict is more likely. Where social power is equitably distributed, the costs and benefits of actions are more likely to be internalized to individuals – for example, through the existence of complex patterns of mutually beneficial interaction or strong and legitimate political institutions – and the incentive for selective or arbitrary coercion is dampened. By contrast, where power asymmetries permit groups to evade the costs of redistributing goods, incentives arise for exploitative, rent-seeking behavior, even if the result is inefficient for society as a whole.[314]

The second assumption deals with the liberal conception of domestic politics, according to which the state is not an actor but a representative institution constantly subject to capture and recapture construction and reconstruction by coalitions of social actors. This is not to adopt a narrowly pluralist view of domestic politics in which the individuals and groups have equal influence on state policy, nor one in which the structure of state institutions is irrelevant. No government rests on universal or unbiased political representation; every government represents some individuals and groups more fully than others.[315] Even where government institutions are formally fair and open, a relatively inegalitarian distribution of property, risk, information, or organizational capabilities may create social or economic monopolies able to dominate policy. Similarly, the way in which a state recognizes individual rights may shape opportunities for voice.[316] Representative institutions and practices determine not merely which social coalitions are represented in foreign policy, but how they are represented.

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313 Moravcsik, *supra* Introduction, n. 26, at 17.

314 See also Milgrom and Roberts, 'Bargaining, Influence Costs, and Organization' in *Perspectives on Positive Political Economy*, 57 (Alt and Schepsle, eds., 1990).

315 Moravcsik, *supra* Introduction, n. 26, at 518.

316 Doyle, *Ways of War and Peace: Realism, Liberalism, and Socialism*, 251-6 (1997).

In this respect, two distinctions are critical.[317] First, states may act in either a unitary or 'disaggregated' way. In many traditional areas of foreign policy, there is a strong co-ordination among national officials and politicians. In other areas, the state may be 'disaggregated', with different elements – executives, courts, central banks, and ruling parties, for example – conducting semiautonomous foreign policies in the service of disparate societal interests.[318] Second, domestic decision making may be structured so as to generate state preferences that satisfy a strong rationality condition, such as transitivity or strict expected utility maximization, or so as to satisfy only the weaker rationality criterion of seeking efficient means.[319] As a consequence, states do not automatically maximize fixed, homogenous conceptions of security, sovereignty, or wealth *per se*, but instead they pursue particular interpretations and combinations of security, welfare, and sovereignty preferred by powerful domestic groups enfranchised by representative institutions and practices.[320] The nature and intensity of national support for any state purpose – even apparently fundamental concerns like the defense of political and legal sovereignty, territorial integrity, national security, or economic welfare – varies decisively with the social context. It is not uncommon for states to knowingly surrender sovereignty, compromise security, or reduce aggregate economic welfare. In the liberal view, trade-offs among such goals, as well as cross-national differences in their definition, are inevitable, highly varied, and causally consequential.

Finally, according to the third assumption, for liberals, state behavior reflects varying patterns of state preferences. States require a 'purpose', a perceived underlying stake in the matter at hand, in order to provoke conflict, to propose co-operation, or to take any other significant foreign policy action. The precise nature of these stakes drives policy. This is not to assert that each state simply pursues its ideal policy, oblivious of others; instead, each state seeks to realize its distinctive preferences under varying constraints imposed by the preferences of other states. The critical theoretical link between state preferences, on the one hand, and the behavior of one or more states, on the other, is provided by the concept of policy interdependence. Policy interdependence is the

> . . . set of costs and benefits created for foreign societies when dominant social groups in a society seek to realize their preferences, that is, the pattern of transnational externalities resulting from attempts to pursue national distinctive purposes.[321]

317 Moravcsik, *supra* Introduction, n. 26, at 519.
318 Slaughter, *supra* Introduction, n. 26, at 512-4.
319 Moravcsik, *supra* Introduction, n. 26, at 519.
320 See also Ruggie, 'Continuity and Transformation in the World Polity: Toward a Neorealist Synthesis', 35 *World Politics* 265 (1983).
321 Moravcsik, *supra* Introduction, n. 26, at 520.

Liberal theory assumes that the pattern of interdependent state preferences imposes a binding constraint on state behavior. Patterns of interdependence can be divided into three broad categories, corresponding to the strategic situation that results.[322] First, where preferences are naturally compatible or harmonious, there are strong incentives for coexistence with low conflict. Second, where, by contrast, underlying state preferences are zero-sum or deadlocked, that is, where an attempt by dominant social groups in one country to realize their preferences through state action necessarily imposes costs on dominant social groups in other countries, governments face a bargaining game with few mutual gains and a high potential for interstate tension and conflict. The decisive precondition for costly attempts at coercion, for example, is neither a particular configuration of power, as realists assert, nor of uncertainty, as institutionalists maintain, but a configuration of preferences conflictual enough to motivate willingness to accept high cost and risk.[323] Third, where motives are mixed in such a way that an exchange of policy concessions through co-ordination or pre-commitment can improve the welfare of both parties relative to unilateral policy adjustment, states have an incentive to negotiate policy co-ordination. Games like co-ordination, assurance, and prisoner's dilemma have distinctive dynamics, as well as impose precise costs, benefits, and risks on the parties. For liberals, the form, substance, and depth of co-operation depend directly on the nature of these patterns of preferences. Hence, where Pareto-inefficient outcomes are observed, liberals turn first to countervailing social preferences and unresolved domestic and transnational distributional conflicts, whereas institutionalists and realists, respectively, turn to uncertainty and particular configurations of interstate power.[324]

As Moravcsik notes, these three core assumptions are "relatively thin and content-free", and he goes on to identify three variants of liberal theory, namely, (1) ideational, (2) commercial, and (3) republican liberalism.[325]

Ideational liberalism views the configuration of domestic social identities and values as a basic determinant of state preferences and, therefore, of interstate conflict and co-operation. 'Social identity' is defined as

> . . . the set of preferences shared by individuals concerning the proper scope and nature of public goods provision, which in turn specifies the nature of legitimate domestic order by stipulating which social actors belong to the polity and what is owed them.[326]

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322 See also Stein, 'Coordination and Collaboration: Regimes in an Anarchic World', 36 *International Organization* 299 (1982).

323 Moravcsik, *supra* Introduction, n. 26, at 521.

324 *Id.* at 522-3.

325 *Id.* at 524.

326 *Id.* at 525; similarly Ruggie, *supra* n. 320, at 269-70.

Three essential elements of domestic public order often shaped by social identities are geographical borders, political decision-making processes, and socio-economic regulation. Each can be thought of as a public good and the effectiveness of each typically requires that it be legislated universally across a jurisdiction.[327] Social actors provide support to the government in exchange for institutions that accord with their identity-based preferences; such institutions are thereby 'legitimate'. Foreign policy will thus be motivated in part by an effort to realize social views about legitimate borders, political institutions, and modes of socio-economic regulation.

The first fundamental type of social identity central to the domestic legitimacy of foreign policy comprises the set of "fundamental societal preferences concerning the scope of the 'nation', which in turn suggest the legitimate location of national borders and the allocation of citizenship rights".[328] The roots of national identity may reflect a shared set of historical experiences – often interpreted and encouraged by both private groups and state policy. Where borders coincide with underlying patterns of identity, coexistence and even mutual recognition are more likely. Where, to the contrary, inconsistencies between borders and underlying patterns of identity exist, a greater potential for interstate conflict exists.

A second fundamental type of social identity central to foreign policymaking is "the commitment of individuals and groups to particular political institutions".[329] As a consequence, ideational liberalism maintains that differences in perceptions of domestic political legitimacy translate into patterns of underlying preferences and thus variation in international conflict and co-operation. Where the realization of legitimate domestic political order in one jurisdiction threatens its realization in others, conflict is more likely. Where the realization of national conceptions of legitimate decision-making reinforce or can be adjusted to reinforce one another, co-existence or co-operation is more likely.[330]

A third fundamental type of social identity central to foreign policy is "the nature of legitimate socio-economic regulation and redistribution".[331] Modern liberal theory recognizes that societal preferences concerning the nature, appropriateness, and level of any kind of regulation impose legitimate limits on markets since domestic as well as international markets are embedded in local social compromises concerning the provision of regulatory public goods. In the liberal view, state preferences concerning legitimate socio-economic practices shape interstate behavior when their realization

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327 See also Fearon, 'Rationalist Explanations of War', 49 *International Organization* 385 (1995).

328 Moravcsik, *supra* Introduction, n. 26, at 526.

329 *Id.* at 527.

330 The optimistic view states that governments may actually have altruistic preferences, whereas it seems more plausible to state that they may seek to 'create' an international environment to the realization of domestic values. See Moravcsik, 'Explaining International Human Rights Regimes: Liberal Theory and Western Europe', 1 *European Journal of International Relations* 157 (1995).

331 Moravcsik, *supra* Introduction, n. 26, at 527.

imposes significant transborder externalities. For example, evidence from regional organizations such as the EC suggests that substantial prior convergence of underlying values is a necessary prerequisite for co-operation in regulatory issue areas like environmental and consumer protection, tax and social policies, immigration, and foreign policy, as well as for significant surrenders of sovereign decision-making to supranational courts and bureaucracies. Regulatory pluralism limits international co-operation, in particular economic liberalization. Courts, executives, and parliaments mutually recognize legitimate differences in foreign jurisdictions.[332] Concerns about the proper balance between policy co-ordination and legitimate domestic regulation are giving rise to even more complex forms of co-operation. For that reason regulatory issues play an increasingly important role in international economic negotiations such as the Uruguay Round of GATT, NAFTA, or, to give a bilateral example, the United States-Japan Structural Impediments Initiative.[333]

Commercial liberalism, on the other hand, explains the individual and collective behavior of states based on the patterns of market incentives facing domestic and transnational economic actors. It argues that changes in the structure of the domestic and global economy alter the costs and benefits of transnational economic change, creating pressure on domestic governments to facilitate or block such exchanges through appropriate foreign economic and security policies.[334] Commercial liberalism does not predict that economic incentives automatically generate universal free trade and peace, but instead stresses the interaction between aggregate incentives for certain policies and obstacles posed by domestic and transnational distributional conflict. The greater the economic benefits for powerful private actors, the greater their incentive to press governments to facilitate such transactions; the more costly the adjustment imposed by economic interchange, the more opposition is likely to arise. Accordingly, commercial liberal analyses start with aggregate welfare gains from trade resulting from specialization and functional differentiation, then seek to explain divergences from foreign economic and security policies that would maximize those gains. To explain the rejection of aggregate gains, commercial liberals from Adam Smith to contemporary theorists look to domestic and international distributional conflicts.

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332 Burley, 'Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine', 92 *Columbia Law Review* 1907 (1992).

333 Japan-United States: Joint Statement On the Framework For a New Economic Partnership, 32 ILM 1414 (1993). The basic objectives are defined as follows: "The Framework is a mechanism for biannual head-of-state consultations on US-Japan economic relations; the goal is to increase investment, increase access and sales of goods and services, promote competitiveness and increase economic cooperation; Japan and the US will pursue specified medium-term objectives to reduce external trade imbalances; the most-favored-nation principle applies to Framework benefits; dispute settlement through consultations". *Id.* at 1415.

334 Moravcsik, *supra* Introduction, n. 26, at 528.

Commercial liberalism is said to have important implications for security affairs as well. Trade is generally a less costly means of accumulating wealth than war, sanctions, or other coercive means, not least due to the minimization of collateral damage. Yet, governments sometimes have an incentive to employ coercive means to induce and control international markets. To explain this variation, domestic distributional issues and the structure of global markets are again critical. In this respect, commercial liberals argue that the more diversified and complex the existing transnational commercial ties and protection structures, the less cost-effective coercion is likely to be.[335] Cost-effective coercion was most profitable in an era where the main sources of economic profit, such as farmland, slave labor, or raw materials could be easily controlled in conquered or colonial economies. As production becomes more specialized and efficient and trading networks more diverse and complex, war and embargoes become more disruptive, and profitable monopolies over commercial opportunities become more difficult to establish.

The shift toward knowledge-based forms of production in advanced industrial economies since 1945 has reduced the ability of conquerors to extract resources from conquered territories. This change diminishes the risk of war in Europe by making conquest more difficult and less rewarding. As a result of these changes, states can afford to compete less aggressively for control of industrial areas, since control adds little to national power, and control by others would give them little power gain. Hence, it poses little threat. This change undercuts the geopolitical motives that produced past European balance-of-power wars. It is now far harder to conquer Europe piecemeal, using each conquest to gain strength for the next, since incremental conquests would provide little gain in power, and might even produce a net loss. For these reasons, would-be aggressors are said to have less motivation to expand in whichever direction, and defenders less reason to compete fiercely to prevent others' gain.[336]

While ideational and commercial liberal theory stress demands resulting from particular patterns of underlying societal identities and economic interests, republican liberal theory emphasizes the ways in which domestic institutions and practices aggregate those demands, and transform them into state policy.[337] The key variable in republican liberalism is the mode of domestic political representation, which determines whose social preferences are institutionally privileged. When political representation is biased in favor of particularistic groups, they tend to 'capture' government institutions and employ them for their ends alone, systematically passing on the costs and risks to others. Since most individuals and groups in society tend to be risk-averse, the more unbiased the range of domestic groups represented, the less likely they will support policies that impose high net costs or risks on a broad range of social actors. Therefore,

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335 See also Van Evera, 'Primed for Peace: Europe After the Cold War', 15/3 *International Security* 5 (1990).
336 *Id.* at 14-6; See also Kaysen, 'Is War Obsolete? A Review Essay', 14/4 *International Security* 53 (1990).
337 Moravcsik, *supra* Introduction, n. 26, at 530.

aggressive behavior – the voluntary recourse to costly or risky foreign policy – is most likely in undemocratic or in-egalitarian polities where privileged individuals can easily pass costs on to others. Nevertheless, this does not imply the existence of a direct correspondence between the breadth of domestic representation and international political or economic co-operation, for the extent of bias in representation, not democratic participation *per se*, is the theoretically critical point. Direct representation may over-represent concentrated, short-term or otherwise arbitrarily salient interests. There do exist predictable conditions under which governing elites may have an incentive to represent long-term social preferences less biased than does broad opinion.[338]

In this way, republican liberal theory claims to have helped explaining phenomena such as the 'democratic peace' or 'liberal peace', international trade, and monetary co-operation. The republican theory of war states that the aggressors who have provoked modern great power wars tend either to be risk-acceptant individuals in the extreme or individuals well able to insulate themselves from the costs of war or both. Most leaders initiating twentieth-century great power wars lost them: Adolf Hitler and Saddam Hussein, for example, initiated conflicts against coalitions far more powerful than their own.[339] The link between great-power military aggression and small-group interests in non-representative states does not imply an unquestioning pacifism by democratic states. Liberal theory predicts that democratic states may provoke preventive wars in response to direct or indirect threats, against very weak states with no great power allies, or in peripheral areas where the legal and political precondition for trade and other forms of profitable transnational relations are not yet in place.[340] In the liberal view, the 'creation' and maintenance of regimes assuring free trade and monetary stability result not primarily from common threats to national security or appropriate international institutions, but from the ability of states to overcome domestic distributional conflicts in a way supportive of international co-operation. Where policymakers are insulated from such pressures, which may involve less democratic but more representative institutions, or where free trade interests dominate policy, open policies are more viable.[341]

Consequently, one central liberal assumption is that liberal states – these are deemed to be states with some form of representative democracy, a market economy based on private property rights, and constitutional protection of civil and political rights – are far less likely to go to war with one another than they are to go to war with non-liberal states; some scholars have termed this assertion the 'liberal peace'.[342]

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338 *Id.* at 531.

339 Kaysen, *supra* n. 336, at 59.

340 Moravcsik, *supra* Introduction, n. 26, at 532.

341 See also Bailey, Goldstein, and Weingast, 'The Institutional Roots of American Trade Policy', 49 *World Politics* 309 (1997).

342 This is the definition used by Doyle, *supra* Chap. 2, n. 1, at 207-8. The assertion goes back to Kant

The claim is not that liberal states are more pacific by nature, but rather that a variety of factors converge to reduce the likelihood of military conflict between them.[343] Nevertheless, Slaughter does not provide for a sophisticated argument with regard to the correlation between liberal governments and the likelihood of war: "For the present purposes, however, the precise mapping of cause and effect does not matter."[344] Rather, she provides a list of six correlative attributes that characterize the world of liberal states. These attributes are mutual assurance of peaceful relations, liberal democratic government, a dense network of transnational transactions by social and economic actors,

> . . . multiple channels of communication and action that are both transnational and transgovernmental rather than formally inter-State, and a blurring of the distinction between domestic and foreign issues.[345]

Liberal theorists argue that liberal states are ideologically and institutionally best suited for judicial enforcement of international norms.[346] Agreements concluded among liberal states are more likely to be concluded in an atmosphere of mutual trust, a precondition that will facilitate any kind of enforcement. In particular, the assumption that these are agreements reached with the participation of a network of individuals and groups in the participating states, and that these states are committed to the rule of law enforced by national judiciaries should lead to more 'vertical' enforcement through domestic courts.[347] This mode of enforcement contrasts with the traditional 'horizontal' mode involving state responsibility, reciprocity, and countermeasures. According to the liberal model, enforcement through the mechanism of a neutral tribunal backed by coercive force is an optimal way to ensure compliance with any agreement. A system of horizontal countermeasures, by contrast, inevitably entails each party being judge in its own case. However, 'horizontal' enforcement remains

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who held that 'perpetual peace' would depend on three things: every state having a 'republican' constitution, a 'pacific federation' being established among states, in the shape of an agreement to refrain from war against one another, and extensive international commerce, underpinned by a 'cosmopolitan law'. See *supra* Chap. 2, par. 2.3. and Chap. 2, n. 1. Whereas the points about the pacific federation and extensive international commerce have long been at the focus of the international agenda, Slaughter asserts that the insight about republican government has not received sufficient attention. Slaughter, *supra* Introduction, n. 26, at 509.

343 Slaughter, *supra* Introduction, n. 26, at 509 (noting that the phenomenon of the liberal peace is better documented than explained).

344 *Id.* at 510.

345 *Ibid.* These networks are also the core of Slaughter's latest work in which she essentially argues that governments are increasingly working together through transnational networks to respond to the challenges of interdependence. According to Slaughter, the challenge is to make these networks accountable without ceding authority to potentially coercive centralized multinational organizations. See Slaughter, *A New World Order* (2004).

346 Burley, *supra* n. 308, at 184.

347 Slaughter, *supra* Introduction, n. 26 at 532.

prevalent.[348] One reason for this notion is that absent a minimum homogeneity of states, states cannot be certain that a treaty partner has the kind of domestic judicial system capable of or willing to enforce an international agreement. Indeed, the risk adverse position for all states in such a system is to assume that its treaty partners are subject to no domestic constraints whatsoever.[349]

Liberal theory suggests that the assumptions of liberal states ameliorate these concerns in a number of ways. First, liberal states are states with governments of limited powers, powers limited by law enforced by courts. Such governments are thus accustomed to the application of a legal instrument to curtail asserted political power. Second, the governments of liberal states are governments structured around a separation of powers. The courts are therefore governed by a constitution that specifies that they sit as a branch independent of the Executive. Democratically elected parliaments are mandated to oversee the constitutional restraints on governments and are given the possibility to invoke their rights before a Constitutional Court. Third, liberal states guarantee a host of individual rights against the government to be enforced through legal action. Thus, it is possible to imagine individuals as monitors of government compliance with agreed rules, whether arrived at through a domestic or an international legislative process. Fourth, commitment to transparency is a key in the mechanism of liberal government. Treaty partners can thus be re-assured that it will be relatively easy to monitor each other's political decisions and actions. Fifth, liberal states are more likely to be monist than dualist, as evidenced by international 'override' provisions in domestic constitutions that mandate the supremacy of international over domestic law. These provisions are much more common in the constitutions of liberal states.[350]

More or less diversified media companies, which provide the incentives for a public discourse on the actions taken by the governments, are another domestic constraint on liberal governments. In a truly liberal system, media should be independent from any governmental influence in order to pursue the 'watching function'. Given the practical restraints of parliamentary control, it can reasonably be argued that media companies more effectively promote liberal systems than the institution originally (i.e. constitutionally) intended for that purpose. Similarly, NGOs become an ever-increasing part of the restraints on the powers of liberal governments, both on the national and international level. Specializing in areas such as human rights, international trade or

348 *Ibid.*

349 *Ibid.* (noting that we should therefore expect to find that treaties specifically negotiated on a bilateral basis are much more likely to be judicially enforceable than multilateral treaties).

350 *Id.* at 533. There are two principal approaches regarding the relationship of international law to municipal, namely, *monist* and *dualist*. The monist approach regards international law and municipal law as parts of a single legal system. According to this theory, municipal law is subservient to international law. The dualist approach, on the other hand, regards international law and municipal law as separate. Municipal law can apply international law only when it has been incorporated into municipal law. Incorporation can result from an act of parliament or other political act, or given effect by the courts.

environmental protection, the reports published by NGOs usually are discussed in several media and thus influence public opinion.[351]

In short, the domestic constraints on liberal governments are more likely to create the conditions in which states entering into an international agreement have reason to believe that their co-parties are equally constrained by domestic courts. Vertical enforcement through domestic courts is not the only effective means of ensuring compliance with international agreements. Nevertheless, Slaughter's proposition here is that where available, vertical enforcement is the most secure means of assuring compliance with international agreements. And that means is most likely to be available in a community of liberal states.[352]

Similarly, the 'transnational law litigation model' as stated by William Aceves, contrasts the existing traditional state-centric model which "relies excessively on international solutions" with a (presumably better suited) enforcement model of international human rights law which is supposed to occur at national level, "where vibrant enforcement models are already in place".[353] Aceves' 'transnational law litigation model' consists mainly of three components:[354] first, a network of liberal democracies; second, these democracies apply the principle of universal jurisdiction, and they third, enforce common international standards. A universal system of transnational law litigation requires liberal democracies to establish universal jurisdiction over specified violations of international law. While liberal democracies provide the necessary structure and appropriate institutions, universal jurisdiction provides the critical mechanisms that allow enforcement of international norms.

Under current international law, states may acquire jurisdiction over individuals in many ways. Perhaps the most common form is territorial jurisdiction, which recognizes state jurisdiction for any acts committed within the territory of the nation-state.[355] Another common form of jurisdiction is the nationality principle, which recognizes state jurisdiction for any acts committed by the nationals of the nation-state. In addition, the passive personality principle recognizes state jurisdiction for any acts committed against a state's own nationals. Each of these principles of jurisdiction is premised upon an explicit relationship between the nation-state and a particular individual.[356]

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351 The impact and the problems of NGOs on compliance theory has also been discussed in more detail in the context of the approach put forward by Chayes and Chayes. See *supra* par. 4.

352 Slaughter, *supra* Introduction, n. 26, at 534.

353 Aceves, 'Liberalism and International Legal Scholarship: The Pinochet Case and the Move Toward a Universal System of Transnational Law Litigation', 41 *Harvard ILJ* 150 (2000).

354 *Id.* at 151-4.

355 According to Ian Brownlie, "the principle that the courts of the place where the crime is committed may exercise jurisdiction has received universal recognition, and is but a single application of the essential territoriality of the sovereignty, the sum of legal competences, which a state has". Brownlie, *supra* Chap. 1, n. 65, at 306.

356 See Malanczuk, *Akehurst's Modern Introduction to International Law*, 109-12 (7th ed. 1997).

This relationship justifies the imposition of state jurisdiction. The absence of such a relationship presumably undermines the legitimacy of state jurisdiction. By contrast, the principle of universal jurisdiction recognizes state jurisdiction even in the absence of such an explicit relationship with the perpetrator or the victim. Rather, jurisdiction is premised upon the notion that certain violations of international law are condemned by all states.[357] Accordingly, all states have the authority to prosecute such actions regardless of where they took place.[358] Universal jurisdiction is recognized for such crimes as genocide, piracy, slavery, torture, and war crimes.[359]

A universal system of transnational law litigation requires the existence of common standards. A common core of international norms and rules would provide needed uniformity and legitimacy to the system. There are several agreements providing common standards, including the Genocide Convention,[360] the International Covenant on Civil and Political Rights,[361] or the Torture Convention.[362] However, so far only the Torture Convention explicitly authorizes universal jurisdiction. On the other hand, it is important to note that states would at least increasingly incorporate these international obligations into their domestic legal systems.[363] The argument of proponents of universal jurisdiction is that by reference to such common international standards applied through the principle of universal jurisdiction, a group of liberal democracies can protect human rights more effectively than international mechanisms functioning under the realist state-centric model.[364]

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357 The importance of establishing universal jurisdiction for certain violations of international law was indicated in the final report *Questions of the Impunity of Perpetrators of Human Rights Violations*, submitted to the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the U.N. Commission on Human Rights by Special Rapporteur Louis Joinet. See Questions of the Impunity of Perpetrators of Human Rights Violations, U.N. ESCOR, U.N. Doc.E/CN.4/Sub.2/1997/20 (1997). The report identified two ways of establishing universal jurisdiction. First, "a provision on universal jurisdiction applicable to serious crimes under international law should be included in all international human rights instruments dealing with such crimes". *Id.* at Principle 24(a). By ratifying such instruments, states would be obligated to seek and prosecute individuals who have violated these human rights agreements. Second, in the absence of an international agreement, "states may for efficiency's sake take measures in their internal legislation to establish extraterritorial jurisdiction over serious crimes under international law". *Id.* at Principle 25.

358 See Brownlie, *supra* Chap. 1, n. 65, at 304; Akehurst, 'Jurisdiction in International Law', 46 *BYIL* 145 (1972-73).

359 Restatement (Third) of the Foreign Relations of the United States § 404 (1987).

360 Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277 (1948).

361 International Covenant on Civil and Political Rights, *supra* n. 128.

362 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85 (1984).

363 See generally Simma and Paulus, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positive View', 93 *AJIL* 308-13 (1999).

364 See also Slaughter, 'A Liberal Theory of International Law', 94 *Am. Soc. Int'l L Proc.* 247 (2000) (discussing the 'Shift from International to Universal Jurisdiction').

Keohane, Moravcsik, and Slaughter distinguish between two ideal types: interstate dispute resolution and transnational dispute resolution.[365] In interstate dispute resolution, adjudicators, agenda, and enforcement are subject to veto by individual governments. Individual states decide who judges, what they judge, and how the judgment is enforced. In contrast, in transnational dispute resolution adjudicators, agenda, and enforcement are all substantially independent of individual and collective pressure from national governments. Judges are insulated from national governments; individuals and groups control the agenda and the results are implemented by an independent national judiciary.[366] The authors state that

> . . . the discussion of the politics of interstate and transnational dispute resolution suggests that the following two conjectures deserve more intensive study: (1) Other things being equal, the more firmly embedded an international commitment is in domestic law, the more likely is compliance with judgments to enforce it and (2) Liberal democracies are particularly respectful of the rule of law and most open to individual access to judicial systems; hence attempts to embed international law in domestic legal systems should be most effective among such regimes. In relations involving nondemocracies, we should observe near total reliance on interstate dispute resolution. Even among liberal democracies, the trust placed in transnational dispute resolution may vary with the political independence of the domestic judiciary.[367]

The concluding thesis of Keohane, Moravcsik, and Slaughter is that a move towards transnational dispute resolution would make it harder to "trace individual judicial decisions and states' responses to them back to any simple, short-term matrix of state or social preferences, power capabilities, and cross-issues".[368] Consequently, liberal theorists central assertion is that their model leads to a disaggregation of sovereignty.

> The result . . . is a 'negarchy', a liberal political order between anarchy and hierarchy in which power is checked horizontally rather than vertically. These divisions and deliberately created frictions are further designed to create space for individuals and groups to interact with and influence State institutions, rather than being subjects of their rule.[369]

Referring to the Chayeses' book *The New Sovereignty*, Slaughter wants to push the redefinition one step further,

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365 Keohane, Moravcsik, and Slaughter, 'Legalized Dispute Resolution: Interstate and Transnational', 54 *International Organization* 468 (2000).

366 *Ibid.* (highlighting the EU and the ECHR as the 'most striking examples').

367 *Id.* at 478-79.

368 *Id.* at 488.

369 Slaughter, *supra* Introduction, n. 26 at 535.

> . . . devolving it onto the component institutions of individual States and giving it substantive content with regard to the relationship between these institutions and individuals and groups in transnational society.[370]

6.2. Critique

Liberal theorists essentially distinguish between liberal and non-liberal states and suggest that – to put it simply – liberal states are more likely to comply with international legal norms than non-liberal states. Even though it seems as if Slaughter has given up her sharpest dichotomy between liberal and non-liberal states,[371] she still maintains, "the emerging transgovernmental order is concentrated among liberal democracies".[372] Relying on this distinction, however, is problematic. For one thing, this distinction implies that liberal theory treats a state's identity as somehow exogenously or permanently given. However, national identities, like national interests, are socially constructed products of learning, knowledge, cultural practices, and ideology. States such as South Africa, Argentina, Chile, or Slovakia are neither permanently liberal nor illiberal, but make transitions back and forth from dictatorship to democracy, prodded by norms and regimes of international law.[373] Liberal theory leaves the critical, constructivist question unanswered: to what extent does compliance with international law itself help constitute the identity of a state as a law-abiding state, and hence, as a 'liberal' state?[374]

For another thing, a number of empirical works manage to falsify the liberal thesis that liberal states 'do better'.[375] At this point, the conclusions drawn in two studies will briefly be referred to. The first study deals with international environmental law. Here, Harold Jacobson and Edith Weiss examine implementation, compliance, and effectiveness issues with regard to international environmental agreements. The

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370 *Id.* at 537. See also *supra* par. 4.

371 The sharpest dichotomy appears in Burley, *supra* n. 332, at 1990. In this article, Slaughter (then Burley) essentially argued that since only liberal states would operate in a 'zone of law', courts in those states should use the act of state doctrine to repudiate the laws and legal systems of non-liberal states.

372 Slaughter, 'Government Networks: The Heart of the Liberal Democratic Order' in *Democratic Governance and International Law*, 201 (Fox and Roth, eds., 2000). But see Slaughter, *supra* n. 364, at 249: "We should not explicitly limit global institutions to liberal states or develop domestic and international doctrines that explicitly categorize or label entire states as such." On the other hand, she asserts that "I do subscribe to a distinction between liberal and non-liberal states as a positive predictor of how states are likely to behave in a variety of circumstances, including within or toward international institutions". *Ibid.*

373 See, for example, Whitehead (ed.), *The International Dimensions of Democratization: Europe and the Americas* (1996).

374 Koh, *supra* Introduction, n. 25, at 2650.

375 See in particular the summary provided by Alvarez, *supra* n. 223, at 198-208.

authors conclude that liberal democratic countries in general comply better with respect to the treaties examined over the period covered. However, they also state that the liberal democratic character is only one of many factors that matters, with others including the characteristic of the activity and the agreement, the international environment and factors involving the country. With regard to these country-specific factors, it is not simply the nature of the regime at question that matters, but also other components such as history and culture, physical size, economy, role and impact of NGOs, and many more.[376]

The second study deals with the public international law of money. Here, Beth Simmons examines compliance with Art VIII of the IMF Agreement, according to which members are required to keep their current account free from restriction and to maintain unified exchange rate systems.[377] In addressing Slaughter's claim that liberal democracies 'do better', Simmons concludes that

> [t]here is no reason to expect that democracy alone provides the stability that economic agents desire. On the contrary, popular participation along with weak guarantees for fair enforcement of property rights can endanger these rights. It is true that these two variables are positively correlated, but they are certainly conceptually distinct, and many have very different impacts on the decision to comply with article VIII obligations . . ., the evidence presented here suggests that the quality of being democratic actually contributes little or nothing when other factors are held constant.[378]

Consequently, the assertion of liberal theorists that liberal democracies are more likely to comply with international legal norms does not seem to withstand empiric analysis – at least with regard to some fields as the ones just mentioned. Interestingly, Slaughter appears to give up earlier claims that liberal states are more apt to comply with international norms. She

> . . . leaves us with the following paradox: On the one hand, tribunals that do have access to individuals with strong domestic legal systems and liberal rule-of-law cultures have found it easier to become established and expand their power. On the other hand, *it is precisely those states with the strongest domestic legal systems and rights traditions that are likely most strenuously to resist strong enforcement mechanisms*.[379]

Maybe the central claim of liberal theorists is the (Kantian) thesis that 'republican constitutions', a 'commercial spirit' of international trade, and a federation of inter-

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376 Jacobson and Weiss, *supra* Introduction, n. 17, at 529-35.

377 Articles of Agreement of the International Monetary Fund, as amended, 31 ILM 1307 (1990).

378 Simmons, *supra* n. 2, at 355-7. On this topic see also generally Saiegh, *Is there a 'Democratic Advantage': Assessing the Role of Political Institutions in Sovereign Borrowing* (2001).

379 Slaughter, *supra* n. 364, at 249 (emphasis added).

dependent republics would provide the basis for perpetual peace. As indicated,[380] liberal theory rather speculates about what causes the 'democratic' or 'liberal' peace without drawing definitive conclusions about it.[381] As such, what is also missing in Slaughter's approach, is empiric evidence for the proclaimed 'liberal' peace. Therefore, it is worth addressing some of the recent analyses on the question whether democracy contributes to peace among states. One analysis undertaken by John Oneal and Bruce Russett confirms Slaughter's assumption. The authors conclude their study by stating that

> Kant was substantially correct: democracy, economic interdependence, and involvement in international organizations reduce the incidence of militarized interstate disputes. The pacific benefits of the Kantian influences, especially of democracy and trade, were not confined to the cold war era but extend both forward from that era and back many decades. Moreover, these benefits are substantial. When the democracy score of the less democratic state in a dyad is higher by a standard deviation, the likelihood of conflict is more than one-third below the baseline rate among all dyads in the system; a higher bilateral trade-to-GDP ratio means that the risk of conflict is lower by half. The pacific benefits of democracy in the twentieth century are clear, and the change from the nineteenth century is consistent with an evolutionary view: democratic institutions matured, and the suffrage was extended.[382]

Additionally, it should be mentioned that overall only a small number of studies have called the liberal peace into question,[383] whereas most analyses find support for the pacifying influences of both democracy and interdependence.[384] Recent studies, nevertheless, have challenged direct and unconditional effects of interdependence and

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380 See *supra* at notes 343 and 344.

381 In this respect, Rawls is more concrete when setting out the idea of democratic peace. According to Rawls, the two hypotheses to express its meaning are: "(1) To the extent that each of the reasonably just constitutional democratic societies fully satisfies the five features [i.e. fair equality of opportunity, decent distribution of income and wealth, society as employer of last resort through general or local government, basic health care assured for all citizens and public financing of elections, and ways of assuring the availability of public information on matters of policy; M.B.] of such a regime – and its citizens understand and accept its political institutions with their history and achievements – the peace among them is made more secure. (2) To the extent that each of the liberal societies fully satisfies the conditions described in (1) above, all are less likely to engage in war with nonliberal outlaw states, except on grounds of legitimate self-defense (or in the defense of their legitimate allies), or intervention in severe cases to protect human rights." Rawls, *supra* Chap. 2, n. 26, at 49.

382 Oneal and Russett, 'The Kantian Peace: The Pacific Benefits of Democracy, Interdependence, and International Organizations, 1885-1992', 52 *World Politics* 9 (1999). See also King and Zeng, 'Explaining Rare Events in International Relations', 55 *International Organization* 693 (2001).

383 See, for example, Farber and Gowa, 'Politics and Peace', 20/2 *International Security* 123 (1995); Green, Kim, and Yoon, 'Dirty Pool', 55 *International Organization* 441 (2001). For a criticism of their account see Beck and Katz, 'Throwing out the Baby with the Bath Water: A Comment on Green, Kim, and Yoon', 55 *International Organization* 487 (2001).

384 Gartzke, Li, and Boehmer, 'Investing in the Peace: Economic Interdependence and International Conflict', 55 *International Organization* 391 (2001); Oneal and Russett, 'Clear and Clean: The Fixed Effects of the Liberal Peace', 55 *International Organization* 469 (2001).

democracy. Rather, the research suggests that the strength of the democratic peace is conditional on economic development.[385] To the extent one can observe an interactive effect of democracy and development – a developed market economy can give rise to liberal values, and these values in turn stabilize democracy and promote peace among developed democracies – these findings nevertheless

> . . . indicate that the vast majority of past studies of the democratic peace are underspecified. . . . Apparently the classical liberals were only partly right – interdependence does indeed have direct pacifying effects, but the benefits of democracy and development are mutually conditioned.[386]

Consequently, it seems as if democracy alone were insufficient to lead the way to the liberal peace and simply encouraging democracies in poor countries will fail to secure the peace; instead, efforts must also be undertaken to promote economic development.[387] Additionally, one more caution with regard to the empiric evidence for the liberal peace should be mentioned. Even though there is empiric data that support the proposition that democracies – if economically developed to some extent – are unlikely to go to war with one another, it also appears that *democratizing* countries are more likely to go to war with one another.[388]

Another claim proponents of liberal theory make is that liberal states are committed to the rule of law enforced by national judiciaries, which in turn should lead to more 'vertical' enforcement through domestic courts. Vertical enforcement is the most secure means of assuring compliance with international agreements and that means is most likely to be available in a community of liberal states. In extension thereof, the 'transnational law litigation model' requires liberal democracies to establish universal jurisdiction over specified violations of international law in their domestic courts.[389]

Eyal Benvenisti challenges the liberal thesis by identifying the tendency of national courts to narrowly interpret constitutional demands requiring the transformation of international law, to interpret international norms so as not to oppose government's interests, and to deploy some 'avoidance' techniques, including act of state, standing,

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385 Hegre, 'Development and the Liberal Peace: What Does it Take to Be a Trading State?', 37/1 *Journal of Peace Research* 5 (2000); Mousseau, 'Market Prosperity, Democratic Consolidation, and Democratic Peace', 44 *Journal of Conflict Resolution* 472 (2000).

386 Mousseau, Hegre, and Oneal, 'How the Wealth of Nations Conditions the Liberal Peace', 9 *European Journal of International Relations* 300 (2003).

387 *Id.* at 278.

388 Mansfield and Snyder, 'Democratization and the Danger of War', 20/1 *International Security* 5 (1995). Slaughter acknowledges this assertion, see *supra* n. 364, at 249.

389 In essence, this 'transnational law litigation model' is an outflow of the moral as well as institutional cosmopolitanism, which arguably serves as the main philosophical background of liberal theory. See *supra* Chap. 2, par. 2.3.

and justiciability to avoid engaging in judicial review under international law.[390] According to Benvenisti, liberal courts are likely to distinguish between cases in which they are to review governmental actions within the state from cases in which they are to review actions outside the state. Many liberal courts refuse to engage in judicial review when it comes to foreign affairs. The main reason for this is that judges of the court are caught in a Prisoner's Dilemma:

> National courts are the prisoners in the classic prisoner's dilemma. If they could have been assured that courts in other jurisdictions would similarly enforce international law, they would have been more willing to cooperate. They might have been ready to restrict their Government's free hand, had they been reassured that other governments would be likewise restrained. But in the current status of international politics, such co-operation is difficult to achieve, and rational judges act like the prisoner who cannot be sure that his or her fellow prisoner will cooperate.[391]

Benvenisti convincingly argues that a precondition to increasing application of international law is a community-wide commitment to co-operation.

> The model of the European Communities is the best evidence for the effect that changing commitments can have on judges' willingness to cooperate. . . . Judges cannot alone bring about this new understanding, but once such a new understanding takes place, the courts will surely follow suit and then their decisions will enhance the inclination to cooperate.[392]

Given the absence of a community-wide commitment to co-operation, Slaughter cannot explain, why courts in the United States such as the United States Supreme Court, for example, rarely resort to vertical or horizontal 'communication' despite her claim that liberal states engage in ever-increasing levels of such communication.[393]

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390 Benvenisti, 'Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts', 4 *EJIL* 160-2 (1993) (hereafter cited as Judicial Misgivings); see also Benvenisti, 'Judges and Foreign Affairs: A Comment on the Institut de Droit International's Resolution on "The Activities of National Courts and the International Relations of Their State"', 5 *EJIL* 423 (1994); Knop, 'Here and There: International Law in Domestic Courts', 32 *NYU J. Int'l L. & Pol.* 501 (1999).

391 Benvenisti, "Judicial Misgivings", *supra* n. 390, at 175.

392 *Ibid.*

393 Alvarez, *supra* n. 223, at 216, quoting Ruth Bader Ginsburg, "one of the few US Justices openly sympathetic to transjudicial communication in the sense used by Slaughter": "Readiness to look beyond one's shore has not marked the decisions of the court on which I serve. The United States Supreme Court has mentioned the Universal Declaration of Human Rights a spare five times, and only twice in a majority opinion. Nor does the US Supreme Court invoke the laws or decisions of other nations with any frequency. When Justice Breyer referred in 1997 to federal systems in Europe, dissenting from a decision in which I also dissented, the majority responded: 'We think such comparative analysis inappropriate to the task of interpreting a constitution'." Ginsburg and Merritt, 'Affirmative Action: An International Human Rights Dialogue', 21 *Cardozo Law Review* 280 (1999).

Furthermore, Slaughter's preference for international regulation by groups such as the Basle Committee over international regulation via horizontally enforced treaty or traditional international organization triggers some legitimacy concerns even if she relies on transnational networks.[394] As Slaughter's own answers to these concerns seem to acknowledge, it is too early to conclude that transgovernmental regulation is invariably more flexible, faster, or more amenable to domestic implementation and forms of 'deep' co-operation than is the traditional international treaty regime.[395] In addition, Margaret Keck and Kathryn Sikkink contend that the states that are most susceptible to transnational network pressures are rather those states that are "actively trying to raise their status in the international system".[396] Since fragile democracies or states in transition may be more likely amenable to the impact of transnational networking than are established democracies, their findings are at odds with those suggested by liberal theorists.[397] According to Keck and Sikkink, "modern networks are not conveyor belts of liberal ideals but vehicles for communicative and political exchange, with the potential for mutual transformation of participants".[398]

Additionally, several criticisms have been raised against the development of a universal system of transnational law litigation. One criticism is that domestic tribunals should not be used to address human rights violations that occurred in other countries. Rather, any violations of international law should be addressed at the international level.[399] Indeed, under current international law there is preference to resolve human rights violations at the international level.[400] This preference is evident from the efforts of the United Nations to establish the International Criminal Tribunals for

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394 Cf. the arguments by Alvarez, *supra* n. 223, at 217-22.

395 Slaughter, 'The Real New World Order', 76/5 *Foreign Affairs* 183 (1997); see Alvarez, *supra* n. 223, at 220-1.

396 Keck and Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics*, 29 (1998).

397 *Id.* at 208.

398 *Id.* at 214.

399 See, for example, Chibundu, 'Making Customary International Law through Municipal Adjudication: A Structural Inquiry', 39 *Virginia J. Int'l L.* 1131 (1999).

400 But see the critical account of this tendency by Eric Posner and John Yoo who conclude their study by stating that "we believe that the thesis [that expanding the use of independent international tribunals enhances their effectiveness and the spread of the rule of law in international affairs] is exaggerated and dangerously optimistic. We have found no evidence that independent tribunals are more effective than dependent tribunals, and some evidence that the reverse is true: that independent tribunals are less effective than dependent tribunals. The primary difference between our view and the conventional wisdom can be summarized as a dispute about direction of causation. The conventional wisdom holds that independent tribunals lead to political unification. We argue that political unification makes independent tribunals possible. In the international realm, where there is no political unification, international tribunals cannot be both independent and effective." Posner and Yoo, 'A Theory of International Adjudication', *University of School Law School John M. Olin Law & Economics Research Paper Series Working Paper No. 206 (= University of California at Berkeley Law School Public Law and Legal Theory Research Paper Series Research Paper No. 146)* 63 (2004), <http://www.law.uchicago.edu/Law econ.index.html>.

the Former Yugoslavia and Rwanda[401] as well as in the Rome Statute of the International Criminal Court.[402] Alternatively, these violations can be prosecuted in the country in which they occurred.[403] A second criticism is that a proliferation of transnational law litigation may upset the delicate balance within emerging democracies and deter the peaceful democratic transition of authoritarian regimes, the leaders of which might be offended if they are prosecuted by other states.[404] A third criticism is that the judiciary may be hesitant to participate in the politically charged atmosphere of human rights litigation. As a result, courts may decline to hear these cases for prudential reasons. Examples of such prudential doctrines include the political question doctrine, the act of state doctrine, and the doctrine of *forum non conveniens*.[405] A final concern involves the possibility of conflicting decisions by national courts. While transnational law litigation is based upon common international norms, national courts may interpret these norms differently. National courts may also have different procedural rules that can have a profound impact on the outcome of the litigation. Alternatively, they may have different political agendas. Conflicting rulings would undermine the legitimacy of transnational law litigation.

Additionally, one paradox may be mentioned: consistent with liberal theory, a universal system of transnational law litigation seeks to facilitate respect for human rights within the existing structure of the international system. Applying common standards derived from international agreements, liberal democracies establish sanctions for human rights violations and pursue perpetrators through domestic institutions. Ironically, transnational law litigation gains its very legitimacy by functioning within the state-centric world even as it seeks to undermine the prominence and preeminence of the nation-state. According to Maxwell Chibundu,

> if the international community of jurists is to create an enduring jurisprudence of international human rights law, it will be because those norms converge from adjudications in

401 Statute of the International Criminal Tribunal for the Former Yugoslavia, U.N. SCOR, Annex, U.N. Doc. S/25704 (1993); Statute of the International Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, Annex, U.N. Doc. S/RES/955 (1994).

402 Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (1998). However, the Rome Statute evinces a preference for the use of domestic institutions to prosecute human rights violations if these institutions are functioning and effective. See Article 17 of the Statute which provides that the court shall determine that a case is inadmissible, *inter alia*, where the case is being investigated or prosecuted by a state that has jurisdiction over it. For a commentary on the relationship between national and international tribunals, see, for example Arsanjani, 'The Rome Statute of the International Criminal Court', 92 *AJIL* 22 (1999).

403 The sole basis for extraterritorial jurisdiction is the 'universality' doctrine, which is applicable only to *jus cogens* norms. For the concept of *jus cogens* in international law see also *supra* par. 1.

404 See, for example, Teitel, 'Transitional Jurisprudence', 106 *Yale LJ* 2009 (1997).

405 See generally Boyd, 'The Inconvenience of Victims: Abolishing Forum Non Conveniens in U.S. Human Rights Litigation', 39 *Virginia J. Int'l L.* 41 (1998).

> multiple jurisdictions each reflecting the socio-political structures of its constitution, while seeking to conform local practices to evolving international standards.[406]

However, he adds a word of caution with regard to domestic courts by stating that

> when domestic courts insist that all disputes must be resolved under our laws and in our courts, they do not only evince morally deplorable parochialism, but consequentially, they retard the cross-cultural convergence and internalization of the very human rights norms that they assert as uniformly applicable to the global community.[407]

On the other hand, liberal theory provides for important and useful insights, especially with regard to the notion that states are by no means the predominant actors. The state-centric paradigm has long dominated the study and practice of international law.[408] In the words of one commentator, "[i]nternational law has been the minimal law necessary to enable state-societies to act as closed systems internally and to act as territory-owners to each other".[409] This is not surprising, given that international law, by definition, refers to the law between states. Treaties and other international pronouncements still display a marked emphasis on states. With few exceptions, only states may enter treaties and participate in international organizations. While many treaties now address the rights and duties of individuals, only few agreements actually establish rights and obligations that may be directly enforced by individuals.

In recent decades, the emergence of issues of global concern has had a profound impact on interstate-relations. The fact that global respect for human rights, sustainable use of the environment, or a solution to the economic development problems of developing countries cannot be brought about through bilateral arrangements only has deeply influenced the nature of international law.[410] Common interests have been given increasing prominence in recent decades with the progressive internationalization of the world economy and the realization that there exist environmental problems of global reach. In turn, globalization in all its forms has meant that states have become more interdependent. In recent years, this has been most clearly marked by the consolidation of a unified 'world economy' and by technological developments such as the 'information technology revolution'.[411]

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406 Chibundu, *supra* n. 399, at 1148.

407 *Ibid.*

408 See generally Shaw, *International Law*, 1 (4th ed., 1991); Janis, 'Individuals as Subjects of International Law', 17 *Cornell ILJ* 61 (1984); but see also Schreuer, 'The Waning of the Sovereign State: Towards A New Paradigm for International Law?', 4 *EJIL* 447 (1993); Koskenniemi, 'The Future of Statehood', 32 *Harvard ILJ* 397 (1991).

409 Allott, *Eunomia – New Order for a New World*, *supra* Chap. 1, n. 26, at 324.

410 See, for example, Simma, 'From Bilateralism to Community Interest in International Law', 250 *RdC* 217 (1994).

411 See, for example, Gelber, *Sovereignty through Interdependence* (1997) and *supra* Chap. 1, par. 1.

For the time being, the tension between the recognition of interdependence and the current organizational structure of the 'international society' which remains based on the principle of decentralization through reliance on separate sovereign entities has not been resolved.[412] While the phenomenon of sovereignty is blocking the emergence of stronger relations of solidarity, there is little doubt that most states understand more and more clearly the necessity to co-operate at the international level to put an end to an array of problems whose solution cannot be found domestically. In this respect, liberalism clearly makes a point to challenge the state-centric paradigm that is encapsulated in the variant forms of realism. What remains to be seen, however, is whether liberalism itself can provide arguments for a better understanding of the current international system and the question why compliance with international law is or is not achieved.

Finally, it should be noted that liberal theory has often been criticized for being too unrealistic and optimistic a theory. Indeed, even liberal theorists acknowledge, "its lack of paradigmatic status [which] has permitted critics to caricature liberal theory as a normative, even utopian, ideology".[413] Early realist critics such as Hans Morgenthau emphasized liberalism's historical role as an ideology to contrast its purported altruism ('idealism', 'legalism', 'moralism', or 'utopianism') with realism's "theoretical concern with human nature as it actually is [and] historical processes as they actually take place".[414] Kenneth Waltz asserts that

> . . . if the aims . . . of states become matters of . . . central concern, then we are forced back to the descriptive level; and from simple descriptions no valid generalizations can be drawn.[415]

Addressing this realist criticism, liberal (international) theory as understood by Slaughter denotes "a family of positive theories about how States do behave rather than how they should behave".[416] But then, a mere positive liberal theory compared to a positive *and* normative liberal theory deprives liberal theory from its essential normative core from which it historically draws from:

> The pursuit of a 'non-ideological' and 'non-utopian' liberal international theory has sapped liberalism of its characteristic identity and essence. Interestingly, though not surprisingly, both Moravcsik and Slaughter seem ready to abandon the label 'liberal' if pushed – calling it 'societal', 'social purpose', 'state-society', or 'preference-based' theory would, they argue, leave their theory 'intact'.[417]

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412 Carillo-Salcedo, 'Droit International et souveraineté des Etats', 257 *RdC* 35 (1996).
413 Moravcsik, *supra* Introduction, n. 26, at 514.
414 Morgenthau, *supra* Chap. 4, n. 6, at 4.
415 Waltz, *supra* Chap. 4, n. 7, at 65.
416 Slaughter, *supra* Introduction, n. 26, at 508.
417 Reus-Smit, 'The Strange Death of Liberal International Theory', 12 *EJIL* 592-3 (2001).

Nevertheless, even though Slaughter attempts to avoid normative claims, she undoubtedly sympathizes with liberal democracies of the West. Slaughter, to be sure, does not engage in such strictly normative claims as other neo-Kantians do in order to bring about Kant's perpetual peace: Fernando Tesón, for example, states that

> in such cases (i.e. when the targeted state is legitimate but its government is not), assuming that all other necessary conditions are met, acts of intervention are *legitimate only if they are directed against the government itself and its instrumentalities*. . . . I already indicated that a legitimate government's assistance to an insurgency of Iraqi citizens aimed at ousting the Iraqi dictator would be justified.[418]

Instead, Slaughter argues in favor of transmitting liberal values over time (through the expansion of a 'liberal zone of law') as the more effective way to liberal peace.[419] Martti Koskenniemi warns that a universal norm of democracy will "always be suspect as a neocolonialist strategy" because

> [t]he nation-state and its democratic forms may not be for export as pure form. They may equally well constitute a specific product of Western history, culture and, especially economy.[420]

Koskenniemi states that a universal norm of democracy is

> [t]oo easily used against revolutionary politics that aim at the roots of the existing distributional system and its domesticated cultural and political specificity in an overall (Western) culture of moral agnosticism and rule by the market.[421]

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418 Tesón, *supra* Chap. 2, n. 1, at 62 (emphasis added; note that Tesón's piece is from 1998). Tesón critises Slaughter's and Moravcsik's liberal theory by stating that "it says nothing about legitimacy in the international system (or the domestic, for that matter). For that reason, the theory seems to be a misnomer: the link between neoliberalism and liberalism in the tradition, say, of Kant, Locke and Rawls, seems quite weak." *Id.* at 66-7. But see also Capps, *supra* Chap. 2, n. 1, at 1026 (reviewing Tesón's book and concluding that "Tesón appears to side-step or trivialize the central core of Kant's legal philosophy which concerns the move from the state of nature to international legal order. Without this, Tesón appears at times to be an apologist for the unilateral activities of states and this is something that Kant would firmly reject.").

419 Burley, 'Toward an Age of Liberal Nations', 33 *Harvard ILJ* 393-4 (1992). Compare Franck who – already in 1992 – argues that a 'norm of democratic governance' or 'global democratic entitlement' is emerging. According to Franck, such a norm has at least three implications. First, it entails that the legitimacy of governments is judged by international, rather than purely national, rules and processes. Second, it connotes that international rules and processes stipulate democracy, which in turn implies that only democratic governments are legitimate. Third, it shows that democracy is an internationally human right, in respect of which international procedures of monitoring and enforcement are justified and, indeed, required. See Franck, 'The Emerging Right to Democratic Governance', 86 *AJIL* 46 (1992).

420 Koskenniemi, 'Intolerant Democracies: A Reaction', 37 *Harvard ILJ* 234 (1996); see also Roth, 'Democratic Intolerance: Observations on Fox and Nolte', 37 *Harvard ILJ* 235 (1996) and the summary of criticisms provided by Marks, *supra* Chap. 2, n. 166, particularly at 470-5.

421 Koskenniemi, *supra* n. 420, at 234.

I have argued that these seemingly opposed views need not be completely at odds with each other, but that they can rather be taken together into the view labeled 'cosmopolitan communitarianism'.[422] And it is this philosophical underpinning the theory of compliance with international law put forward here is based on. In the concluding remarks, I will summarize these arguments and outline some implications for the international legal system from this point of view.

422 See particularly *supra* Chap. 2, par. 7.

Chapter 6

CONCLUSION AND IMPLICATIONS FOR INTERNATIONAL LAW

I have endeavored rather to show exactly what is the meaning of the question and what difficulties must be faced in answering it, than to prove that any particular answers are true.

George E. Moore

These theories of why states obey international law have to be seen as what they in fact are: theories. Theories seek to provide causal explanations of observable phenomena and to provide a basis for predicting future behavior or, put another way, theories are models, which try to explain certain aspects of reality.[1] Therefore, it is important how one perceives reality, in this case international law and politics. Each of the theorists discussed in this monograph has a different view of reality. Indeed, these views provide a rather wide range, partly because their focus is on different subject areas of international law. Consequently, the models, at least to a certain extent, try to explain different aspects of reality. This is the reason why it is difficult, maybe even impossible, to compare them. The task of comparison may get easier, if one explicitly tries to focus on specific matters of international reality. A comparison of such theories with a more specific focus may be said to be more useful, but certainly will be less challenging than the approach employed here.

In general, most of the extant theories focus upon various structures of the international system. Realists as well as institutionalists examine structural elements of a particular regime, such as its ability to induce compliance with its rules through incentives, reciprocity, and linkages to other issues or sanctions. This approach, however, does not *necessarily* explain why sometimes, in seemingly similar cases regarding the factors that are likely to make regimes effective in terms of their ability to alter state incentives, states choose to ignore norms.[2] As for normativists, with their claims about

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1 See, for example, Dougherty and Pfaltzgraff, *Contending Theories of International Relations: A Comprehensive Study*, 18-9 (5th ed., 2001).

2 See, for example, Byers, *supra* Chap. 4, n. 5, at 31.

the special power of legal rules, structure lies again at the center of their attention, in their case structures involved in norm creation or managerial issues rather than structures of political power.

Accordingly, an overall weakness of each of these theories may be that they are built around grand structures of the international system, organizational dynamics, or normative pulls. They put an explicitly impersonal, procedure-oriented emphasis on the issue of causation. The failure may be to sufficiently view law as ultimately a process of communication among relevant decision-makers, a transmission of norms from prescriber to target. As a result, they generally neglect to take account of the direct synapses between those invoking the norm and those who must decide whether to comply with it. To put it another way, there is a lack of explicit treatment of the individual or individuals who act as messengers or transmitters of norms. Koh at least seems to rely upon these ideas by talking of 'agents of internalization' as critical to a state's decision to comply, to include both non-governmental 'norm entrepreneurs', individuals who can mobilize popular support for norms, and governmental 'norm sponsors' who work in governmental channels.[3] Certainly, all these ideas echo somewhat liberal theory's concern with transnational linkages among various governmental and non-governmental sectors, but their concretization of these linkages, individuals in particular, is a critical advance in thinking.

Accordingly, one needs to understand that studying why states comply with international law and studying how outside actors can induce compliance are two sides of one coin. Theories attempting to derive the former without the latter are sterile and miss this point. A fundamental insight of the New Haven School of international law has been its emphasis on what it calls operations, as merely opposed to rules.[4] In a sense, operations concern how the target of a particular rule actually implements it – whether its 'operational code' – the target's own internal system for addressing the issue governed by the rule – is consistent with the rule. But operations also concern the policies and practices of those actors in the international arena who seek to ensure that the targets comply.

Furthermore, in order to make an overall assessment of the mentioned compliance theories, it should be noted that overall, the international system remains highly fragmented, there are relatively few deeply co-operative agreements, and international co-operation is all in all far from intensive.[5] Therefore, it seems to be illusionary to ignore materialist arguments and to state that military, economic, or political pressure exerted by, say, the United States, has no implications on compliance with international law. It may be unfortunate that there is no 'international community' or

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3 Koh, 'Bringing International Law Home', *supra* Chap. 3, n. 26, at 646-7.

4 See *supra* Chap. 4, par. 2.

5 See particularly *supra* Chap. 5, par. 4.2.

something like 'global ethics' – and probably or maybe there will never be, at least in the near future – but if one 'realistically' looks at international law and politics, one has to be at least very skeptical of such an idealistic view. Founded on this idealistic cosmopolitan political philosophy, liberal theories in this respect are rather attempts to describe how a 'perfect' liberal world could be like than an explanation of today's international politics. Indeed, at one point Slaughter states that

> [t]he project is a thought experiment . . . designed to generate a hypothetical model of international law based on a set of assumptions about the compositions and behavior of specific states.[6]

Furthermore, it is to be doubted whether the 'End of History' proclaimed by Francis Fukuyama[7] and others, i.e. that liberal democracies will be the one and only regime on a worldwide scale, is or will come true. Even if that were the case, there is, contrary to the assumption of the Kantian thesis, no guarantee of a peaceful world. Conflicts among liberal states with market-based economies might be less intensive than among illiberal states, however they occur in many cases.[8] Recently, for example, the relationship between the United States and Europe have been and are tense due to discrepancies on several issues such as the war and its aftermath in Iraq, the Anti-Ballistic-Missile Treaty (ABM-Treaty), the Kyoto Protocol, the International Criminal Court, or transatlantic trade disputes which have spread from beef and bananas to genetically modified organisms and other regulatory matters that touch on different cultural assumptions and/or divergent power interests. Furthermore, liberal theory's 'vertical' enforcement models such as the 'transnational law litigation' model are not supported by current international law. What is more, these models have several shortcomings and are inconsistent with liberal theory's attempt to overcome the realist state-centric model of enforcement.

Social structures emerge from relations of coercion or from individual self-interest and, once established, may develop into legitimacy-based structures. That said, the 'legitimacy' as well as the 'fairness' approach developed by Thomas Franck needs to assume that the 'international social structure' is fairly well developed. Put differently, he needs to build on the notion of some sort of 'international community'.[9] While it might reasonably be argued that there are certain patterns of an emerging 'international society', it seems nevertheless that for the present – particularly in the post-September 11 age – the fragmentation of the international system does not allow

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6 Slaughter, *supra* Introduction, n. 26, at 505.
7 See *supra* Chap. 2, par. 6.
8 See *supra* Chap. 5, par. 6.2.
9 See in particular *supra* Chap. 5, par. 3.

for Franck's conclusion. Additionally, contrary to Franck's notion, it seems impossible to find agreement on the notion of a 'fairness discourse' or on how otherwise to think about fairness. The feasibility of such a discourse rests on the liberal (cosmopolitan) notion that all governments, or even all peoples come to adopt the liberal framework. However, such changes on a worldwide scale seem implausible. Therefore, the quest for a universal philosophical explanation of international law's legitimacy – at least for the time being – seems to be misplaced.

Accordingly, it has been argued in this monograph that an approach built on a cosmopolitan communitarianism is to be preferred to the liberal (cosmopolitan) thinking on which these two approaches are based.[10] Cosmopolitan communitarianism suggests that the current legal situation is adequate from a normative point of view for international tribunals best enforce international law. Consistent with the notion of a 'thin' web of obligation, in exceptional cases such as the violation of *jus cogens* an extraterritorial prosecution should be possible. Consistent with the notion of a 'thick' web of obligations, states should not be able to prosecute any violations of international law they conceive in their interest in their domestic courts. In this respect, the cosmopolitan communitarian model is likely to gain widespread acceptance among peoples and states. Therefore, it is reasonable to predict that this model might achieve a higher level of compliance with international norms than any sort of liberal transnational models.

Given that framework, it becomes less difficult to briefly (re-)assess the other three theories of compliance with international law. Realist interest theories such as Neuhold's approach work best in areas where nation-states remain the primary players, such as trade and arms control law. The reason for this is that in particular with regard to international security, the calculation is rather easy as the variables are usually fewer than in other areas. However, it has less explanatory power in such areas as human rights, environmental law, or international commercial transactions, where non-state actors pursue multiple goals in complex non-zero-sum games, and interact repeatedly within informal regimes.[11]

On the other hand, the 'managerial model' as suggested by the Chayeses works best for co-ordination games. In these cases, once the parties have agreed on a certain set of behaviors, neither party has an incentive to deviate from the agreement, and compliance is the expected outcome even in the absence of enforcement. Since there is no incentive to cheat, there is no need to focus on enforcement. However, the model is less useful in other situations such as in collaboration situations in which there are greater incentives to defect than in co-ordination situations. In such situations, enforcement mechanisms are required to deter states from shirking as they raise

10 See *supra* Chap. 2, par. 7.
11 See *supra* Chap. 5, par. 1.2.

the costs to defect and make non-compliance a less attractive option. As such, the Chayeses' 'managerial model' cannot explain situations in which a state intentionally violates international law because it is contrary to its interests. Since the number of international agreements that involve co-ordination games is rather small, the 'managerial model' has a rather limited scope of application.[12]

Finally, Koh's approach does not offer a completely sound explanation of why certain legal norms are internalized. In the discussion of his 'transnational legal process' model, I have argued that norms are internalized when commitment conveys an advantage relative to the original preferences and the changed preferences. International law matters because it alters the preferences of the actors involved. It matters, particularly because it is a well-recognized and suitable tool that renders these rules less vulnerable to short-term political change than the other, non-legal factors. The making of legal commitments may not be the only way to influence and shape state behavior, but it is a broadly recognized effort to signal a government's intentions. Once made, such commitments are commonly complied with, but not because governments have an inherent respect for international institutions or norms. Rather, states comply with international norms mainly because of the impact that non-compliance will have on their reputation, their interests, or their position within the international system. Put differently, international law matters in particular because states are concerned about the reputational (and direct) sanctions that may result from its violation. Put in economic terms, reputational (and direct) sanctions can alter the equilibrium. Enriching Koh's concept in this way, one may get a tool at hand to better understand *why* internalization occurs.[13]

Reputation takes place within a given social context, it does not have any meaning without a social context. In as much as processes of globalization may induce states to enter into competition with each other, they may increasingly have incentives to pay attention to their reputation as humans in general and investors in particular may become more likely to choose the place at which they pursue their goals. Furthermore, in the process of continuing interaction between states, reputation becomes increasingly important: in potentially unlimited rounds of a PD situation, states not only trust other actors to follow a co-operative strategy, but also choose this strategy themselves, since the other actors will trust them only if they have the reputation of being *bona fide* co-operative players.[14]

Given this scenario, we may observe the institutionalization of these processes as well the impact of surveillance mechanisms that are likely to once again alter the actor's original preferences. But these processes are slow and one should not take for

12 See *supra* Chap. 5, par. 4.2.
13 See *supra* Chap. 5, par. 5.2.
14 See *supra* Chap. 3, par. 2.

granted that they are a one-way-street. Internationalization in general and legalization of international relations in particular are rather mechanisms along which humankind makes two steps forward, one step back and so forth. September 11 and its aftermath have once more shown that a less ambitious agenda than the one proposed by cosmopolitans might eventually lead to more positive results. For several reasons, a cosmopolitan communitarianism or a realist cosmopolitanism might be an advantageous framework in which any theory of compliance with international law gaining widespread support may be built in.

Certainly, a reputational model cannot explain compliance with each and every field of international law either. It is particularly well suited for areas such as international financial or economic law, i.e. for situations in which competitive market forces – obviously and empirically verified – induce compliance with international law because enforcement and monitoring are strong. Beth Simmons, nevertheless, suggests that there may as well be market-related costs in less obvious fields of international law such as human rights, in case information on governmental activities is available and in case a 'public norm' is in place that does not tolerate clear abuses.[15]

It is here where cosmopolitan communitarianism comes in. Cosmopolitan communitarianism makes the case for a 'thin' layer of obligations that generate a sort of 'global public norm'. A state not complying with this norm is likely to be exposed to sanctions, which ought not be neglected. While the international system does not adequately provide for instruments of direct sanctions, non-compliance with this norm is likely to lead to substantial reputational sanctions. In case a state's reputation is at stake, a rational state (more specifically, its representatives) will come to internalize the norm in order to achieve 'Pareto-self-improvement'. In case one subscribes to this notion, it turns out that the issue of compliance with international law – at least to some extent – is also a question of the 'thinness' or 'thickness' of the 'obligations' a state is exposed to.

For example, with regard to democratic government, there are those who advocate the 'End of History' such as Fukuyama, others who advocate an 'active defense of liberal democracy' (whatever this notion implies) such as neo-conservatives, still others who advocate a 'right to democratic governance' such as Franck,[16] or finally those who do not consider a right to democratic government a 'human right proper' such as Rawls.[17] In this respect, the conceptualization proposed here favors Rawls' view. The reason for this is that at the current stage of the international system there does

15 Simmons, *supra* Chap. 5, n. 2, at 361 (adding that there are many regulatory areas in which market forces are the problem rather than the solution, as is the case in international drug trafficking and money laundering). See also Simmons, 'International Efforts against Money Laundering' in *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*, *supra* Chap. 1, n. 72, at 244.

16 Franck, *supra* Chap. 5, n. 419.

17 Rawls, *supra* Chap. 2, n. 26. See Chap. 2, n. 45.

not seem to be any 'thick' obligation for states to install a democratic government. In Rawls' terms, people (living in those states) do not enjoy a *right* to democratic government. Certainly, such a right may emerge in the near future, but for now, a right to democratic government is unlikely to form part of 'human rights proper'. Even though such a right – or, on the other view, a 'thick' obligation – is not in place in the present, cosmopolitan communitarianism suggests that we should encourage democratic developments in those states with peaceful means. Democratic institutions, however, do not suffice to guarantee stability because the benefits of democracy and economic development are mutually conditioned.[18] Therefore, the cosmopolitan communitarian approach also calls for an increased effort to foster economic development in less developed states.

In turn, this view suggests that we should refrain from imposing our views on others, particularly from using (military) force in order to reach these aims. Thus, the approach outlined here also attempts to set a less ambitious agenda for international law prescriptively.[19] It calls for caution and respect for different ways of living. Put differently, within this 'thin' cosmopolitan framework, nation-state difference, recalcitrant to universal emancipation, might well be considered liberating and empowering for particular peoples.

Accordingly, putting the question of compliance with international law into the framework of a cosmopolitan communitarianism does not only help to *descriptively* construct a more plausible theory and to *prescriptively* favor a cautious approach, but also calls for a functional, rather than doctrinal approach to international law. If international law matters because it alters the preferences of the actors' involved, the traditional separation of international law and 'soft law' seems difficult to maintain because this approach does not recognize a clear distinction between treaties and other promises. Indeed, in recent years, this differentiation has got somewhat blurred because both types of instrument have compliance procedures ranging from 'soft' to 'hard'. We are witnessing various levels of 'legalization', rather than a clear distinction between binding and non-binding agreements.[20] The traditional definition seems even more problematic when the focus is on international customary law:

> The reputational capital at stake with respect to many rules of [customary international law] is almost certainly less than what is at stake with some soft law agreements. . . . The classical definition of international law, therefore, identifies the relatively weak instrument of treaties and the relatively weak instrument of [customary international law], but does not recognize obligations whose force often lies between the two extremes. In other words, tension exists between the classical theory of international law and practice.[21]

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18 See *supra* Chap. 5, par. 6.2.

19 See Burgstaller, 'United We Stand vs Divided We Fall', *Juridikum* 9 (2002).

20 See *supra* Chap. 1, par. 3.

21 Guzman, *supra* Introduction, n. 10, at 1881-2.

Conclusively, the approach based on a cosmopolitan communitarianism does also remind us of the limited, but not irrelevant character of international law in general. Rejecting theories with extreme positions, Louis Henkin stated:

> Law, I sum up, is a major force in international relations and a major determinant in national policy. Its influence is diluted, however, and sometimes outweighed by other forces in a 'developing' international society. Failure to appreciate the strengths and weaknesses of the law underlies much misunderstanding about it and many of the controversies about its significance. 'Realists' who do not recognize the uses and the force of law are not realistic. 'Idealists' who do not recognize the law's limitations are largely irrelevant to the world that is.[22]

Some decades later on, 'international society' still has not developed to an extent necessary to ascribe full credit to the term. But we may hope that it will do so. In the meantime, it may – at least sometimes – be advisable to rely on competitive market forces that incentivize states to comply with international law even though "politics has not been completely displaced by markets".[23]

22 Henkin, *supra* Introduction, n. 1, at 337.

23 Kahn, 'Speaking Law to Power: Popular Sovereignty, Human Rights, and the New International Order', 1 *Chi. J. Int'l L.* 9 (2000).

BIBLIOGRAPHY

Books and Articles

Abbott, Kenneth W. 'Modern International Relations Theory: A Prospectus for International Lawyers.' 14 *Yale J. Int'l L.* 335-411 (1989).

——. 'The Trading Nation's Dilemma: The Functions of the Law of International Trade.' 26 *Harvard ILJ* 501-32 (1985).

——. 'Trust but Verify: The Production of Information in Arms Control Treaties and Other International Agreements.' 26 *Cornell ILJ* 1-38 (1993).

Abbott, Kenneth W., and Duncan Snidal. 'Hard and Soft Law in International Governance.' 54 *International Organization* 421-56 (2000).

Abbott, Kenneth W., Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter, and Duncan Snidal. 'The Concept of Legalization.' 54 *International Organization* 401-19 (2000).

Abi-Saab, Georges. 'Whither the International Community?' 9 *EJIL* 248-54 (1998).

Aceves, William J. 'Institutionalist Theory and International Legal Scholarship.' 12 *Am. U. J. Int'l L. & Pol'y* 227-56 (1997).

——. 'Liberalism and International Legal Scholarship: The Pinochet Case and the Move Toward a Universal System of Transnational Law Litigation.' 41 *Harvard ILJ* 129-84 (2000).

Ackerman, Bruce A. *Social Justice in the Liberal State*. New Haven, CT: Yale University Press, 1980.

Adler, Emanuel. 'Seizing the Middle Ground: Constructivism in World Politics', 3 *European Journal International Relations* 319-63 (1997).

Adler, Matthew D., and Eric A. Posner, eds. *Cost-Benefit Analysis: Legal, Economic and Philosophical Perspectives*. Chicago: University of Chicago Press, 2001.

Akehurst, Michael. 'Jurisdiction in International Law.' 46 *BYIL* 145-217 (1972-73).

Allott, Philipp. *Eunomia – New Order for a New World*. Oxford: Oxford University Press, 1990.

——. 'Kosovo and the Responsibility of Power.' 13 *Leiden Journal of International Law* 83-89 (2000).

——. 'Reconstituting Humanity – New International Law.' 3 *EJIL* 219-52 (1992).

Allott, Philipp, Anthony Carty, Martti Koskenniemi, and Colin Warbrick, eds. *Theory and International Law: An Introduction*. London: British Institute of International and Comparative Law, 1991.

Alt, James E., and Kenneth A. Schepsle, eds. *Perspectives on Positive Political Economy*. Cambridge: Cambridge University Press, 1990.

Alvarez, José E. 'Do Liberal States Behave Better? A Critique of Slaughter's Liberal Theory.' 12 *EJIL* 183-246 (2001).

——. 'Foreword: Why Nations Behave.' 19 *Mich. J. Int'l L.* 303-17 (1998).

——. 'The Quest for Legitimacy – Review Essay of Thomas Franck's The Power of Legitimacy Among Nations.' 24 *NYU J. Int'l L. & Pol.* 199-267 (1991).

Angelova, Anastasia A. 'Compelling Compliance with International Regimes: China and the Missile Technology Control Regime.' 38 *Colum. J. Transnat'l L.* 419-49 (1999).

Archibugi, Daniele, David Held, and Martin Köhler, eds. *Re-imaging Political Community*. Stanford, CA: Stanford University Press, 1998.

Arrow, Kenneth J. *Social Choice and Individual Values*. New York: Wiley, 1951.

Arsanjani, Mahnoush. 'The Rome Statute of the International Criminal Court.' 92 *AJIL* 22-43 (1999).

Axelrod, Robert M. *The Evolution of Cooperation*. New York: Basic Books, 1984.

Axelrod, Robert M., and Robert O. Keohane. 'Achieving Cooperation Under Anarchy: Strategies and Institutions.' 38 *World Politics* 226-54 (1985/86).

Bailey, Michael, Judith Goldstein, and Barry Weingast. 'The Institutional Roots of American Trade Policy.' 49 *World Politics* 309-38 (1997).

Baird, Douglas G., Robert H. Gertner, and Randal C. Picker. *Game Theory and the Law*. Cambridge, MA: Harvard University Press, 1994.

Baird, Zoe. 'Governing the Internet: Engaging Government, Business, and Nonprofits.' 81/6 *Foreign Affairs* 15-20 (2002).

Baldwin, David A. 'The Sanctions Debate and the Logic of Choice.' 24/3 *International Security* 80-107 (1999/2000).

Barry, Norman. *On Classical Liberalism and Libertarianism*. London: Macmillan, 1986.

Bartleson, James. 'The Trial of Judgement: A Note on Kant and the Paradoxes of International Law.' 39 *International Studies Quarterly* 255-67 (1995).

Bayard, Thomas O., and Kimberly A. Elliott. *Reciprocity and retaliation in U.S. trade policy*. Washington, DC: Institute for International Economics, 1994.

Beck, Nathaniel, and Jonathan N. Katz. 'Throwing out the Baby with the Bath Water: A Comment on Green, Kim, and Yoon.' 55 *International Organization* 487-96 (2001).

Beetham, David. *The Legitimation of Power*. Atlantic Highlands, NJ: Humanities Press International, 1991.

Beitz, Charles R. 'International Liberalism and Distributive Justice: A Survey of Recent Thought.' 51 *World Politics* 269-96 (1999).

——. *Political Theory and International Relations*. Princeton, NJ: Princeton University Press, 1999.

Benedek, Wolfgang, Hubert Isak, and Renate Kicker, eds. *Development and Developing International and European Law*. Frankfurt a.M.: Peter Lang, 1999.

Benhabib, Seyla, and Fred R. Dallmayr, eds. *Communicative Ethics Controversy*. Cambridge, MA: MIT Press, 1990.

Bentham, Jeremy. *An Introduction to the Principles of Morals and Legislation*. 1789. Reprinted in *The Utilitarians*. Garden City, NY: Anchor Press, 1973.

Benvenisti, Eyal. 'Judges and Foreign Affairs: A Comment on the Institut de Droit International's Resolution on "The Activities of National Courts and the International Relations of Their State".' 5 *EJIL* 423-39 (1994).

——. 'Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts.' 4 *EJIL* 159-83 (1993).

Bering, Peter H. *Libertarianism: the economy of freedom*. Berne: Peter Lang, 1995.

Bernstein, Richard J., ed. *Habermas and Modernity*. Cambridge, MA: MIT Press, 1985.

Bloom, Allan. *The Closing of the American Mind*. New York: Simon & Schuster, 1987.

Boyd, Kathryn L. 'The Inconvenience of Victims: Abolishing Forum Non Conveniens in U.S. Human Rights Litigation.' 39 *Virginia J. Int'l L.* 41-87 (1998).

Brierly, James L. *The Law of Nations*. 6th ed. Oxford: Oxford University Press, 1963.

Brink, David O. 'Utilitarian Morality and the Personal Point of View.' 83/8 *Journal of Philosophy* 417-38 (1986).

Brown, Michael E., Sean M. Lynn-Jones, and Steven E. Miller, eds. *The Perils of Anarchy: Contemporary Realism and International Security*. Cambridge, MA: MIT Press, 1995.

Brownlie, Ian. *Principles of Public International Law*. 5th ed. Oxford: Oxford University Press, 1999.

Brunee, Jutta, and Stephen J. Toope. 'International Law and Constructivism: Elements of an Interactional Theory of International Law.' 39 *Colum. J. Transnat'l L.* 19-74 (2000).

Buergenthal, Thomas. *The International Civil Aviation Organization*. New York: Syracuse University Press, 1969.

Bull, Hedley. *The Anarchical Society*. 2nd ed. Basingstoke: Macmillan, 1998.

Burgstaller, Markus. 'United We Stand vs Divided We Fall.' *Juridikum* 9-13 (2002).

Burley, Anne-Marie. 'Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine.' 92 *Columbia Law Review* 1907-46 (1992).

——. 'Law and the Liberal Paradigm in International Relations Theory.' 86 *Am. Soc. Int'l L. Proc.* 180-96 (1992).

Burley, Anne-Marie, and Walter Mattli. 'Europe before the court: A political theory of legal integration.' 47 *International Organization* 41-76 (1993).

Busch, Marc L., and Eric Reinhardt. 'Bargaining in the Shadow of the Law: Early Settlement in GATT/WTO Disputes.' 24 *Fordham Int'l L. J.* 158-72 (2000).

Byers, Michael. *Custom, Power and the Power of Rules: International Relations and Customary International Law*. Cambridge: Cambridge University Press, 1999.

——. 'Taking the Law out of International Law: A Critique of the Iterative Perspective.' 38 *Harvard ILJ* 201-05 (1997).

Cairns, Alan, and Cynthia Williams, eds. *Late Twentieth Century Canada in Constitutionalism, Citizenship and Society in Canada*. Toronto: University of Toronto Press, 1986.

Cameron, James, Peter Roderick, and Jacob Werksman, eds. *Improving Compliance with International Environmental Law*. London: Earthscan, 1996.

Caney, Simon, David George, and Peter Jones, eds. *National Rights, International Obligations*. Boulder, CO: Westview Press, 1996.

Capps, Patrick. 'The Kantian Project in Modern International Legal Theory.' 12 *EJIL* 1003-25 (2001).

Carillo-Salcedo, Juan A. 'Droit International et souveraineté des Etats.' 257 *RdC* 23-28 (1996).

Carlsnaes, Walter, Thomas Risse, and Beth A. Simmons, eds. *Handbook of International Relations*. London: Thousand Oaks, 2002.

Cassese, Antonio. *International Law*. Oxford: Oxford University Press, 2001.

Chang, Howard F. 'A Liberal Theory of Social Welfare: Fairness, Utility, and the Pareto.' 110 *Yale LJ* 173-235 (2000).

Chapman, Bruce. 'The Rational and the Reasonable.' 61 *U. Chi. L. Rev.* 41-122 (1994).

Charnovitz, Steve. 'WTO Cosmopolitics.' 34 *NYU J. Int'l L. & Pol.* 299-354 (2002).

Chayes, Abram, and Antonia H. Chayes. *The New Sovereignty: Compliance with International Regulatory Agreements*. Cambridge, MA: Harvard University Press, 1995.

——. 'On Compliance.' 47 *International Organization* 175-205 (1993).

Cheah, Pheng, and Bruce Robbins, eds. *Cosmopolitics: Thinking and Feeling beyond the Nation*. Minneapolis: University of Minnesota Press, 1998.

Checkel, Jeffrey T. 'Why Comply? Social Learning and European Identity Change.' 55 *International Organization* 553-88 (2001).

Chibundu, Maxwell O. 'Making Customary International Law through Municipal Adjudication: A Structural Inquiry.' 39 *Virginia J. Int'l L.* 1069-1149 (1999).

Chong, Dennis. 'Rational Choice Theory's Mysterious Rivals.' 9 *Critical Review* 37-58 (1995).

Christensen, Thomas J., and Jack Snyder. 'Chain Gangs and Passed Bucks: Predicting Alliance Patterns in Multipolarity.' 44 *International Organization* 137-68 (1990).

Coase, Ronald H. *The Firm, the Market and the Law*. Chicago: University of Chicago Press, 1988.

Cohen, Gerald A. *History, Labour, and Freedom: Themes from Marx*. Oxford: Oxford University Press, 1988.

——. *Self-ownership, Freedom, and Equality*. Cambridge: Cambridge University Press, 1995.

Coleman, Andrew, and Jackson Maogoto. 'After the Party, is there a Cure for the Hangover? The Challenges of the Global Economy to Westphalian Sovereignty.' 30 *Legal Issues of Economic Integration* 35-60 (2003).

Cooter, Robert D., 'The Best Right Laws: Value Foundations of the Economic Analysis of Law.' 64 *Notre Dame Law Review* 817-35 (1989).

——. 'Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms.' 86 *Virginia Law Review* 1577-601 (2000).

——. 'Expressive Law and Economics.' 27 *Journal of Legal Studies* 585-608 (1998).

——. 'Normative Failure Theory of Law.' 82 *Cornell Law Review* 947-79 (1997).

——. 'Three Effects of Social Norms on Law: Expression, Deterrence, and Internalization.' 79 *Oregon Law Review* 1-22 (2000).

Cooter, Robert D., and Thomas S. Ulen. *Law and Economics*. 3rd ed. Reading, MA: Addison-Wesley, 2000.

Cox, Robert W., and Harold K. Jacobson, eds. *The Anatomy of Influence. Decision-Making in International Organizations*. New Haven, CT: Yale University Press, 1973.

Crawford, James, Jacqueline Peel, and Simon Olleson. 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: Completion of the Second Reading.' 12 *EJIL* 963-92 (2001).

Crocker, David A., and Toby T. Linden, eds. *Ethics of Consumption*. Lanham, MD: Rowman & Littlefield, 1998.

Cullen, Holly. 'The Role of History in Thomas Franck's Fairness in International Law and Institutions.' 13 *EJIL* 927-40 (2002).

D'Amato, Anthony. *International Law: Process and Prospect*. Irvington, NY: Transnational Publishers, 1995.

Dahl, Robert A., and Charles E. Lindblom. *Politics, Markets, and Welfare: planning and politico-economic systems resolved into basic social processes*. 2nd ed. New Brunswick: Transaction Publishers, 1992.

Dahrendorf, Ralf. 'The Third Way and Liberty.' 78/5 *Foreign Affairs* 13-17 (1999).

Dalton, Clare. 'An Essay in the Deconstruction of Contract Doctrine.' 94 *Yale LJ* 997-1114 (1985).

Dessler, David. 'What's at stake in the agent-structure debate?' 43 *International Organization* 441-74 (1989).

Deudney, Daniel H. 'Geopolitics as Theory: Historical Security Materialism.' 6 *European Journal of International Relations* 77-107 (2000).

——. 'Regrounding Realism: Anarchy, Security, and Changing Material Contexts.' 10 *Security Studies* 1-42 (2000).

Donelan, Michael. *Elements of International Political Theory*. Oxford: Oxford University Press, 1990.

Dougherty, James, and Robert L. Pfaltzgraff. *Contending Theories of International Relations: A Comprehensive Study*. 5th ed. New York: Longman, 2001.

Downs, George W., and Michael A. Jones. 'Reputation, Compliance and International Law.' 31 *Journal of Legal Studies* 95-114 (2002).

Downs, George W., Kenneth Danish, and Peter N. Barsoom. 'The Transformative Model of International Regime Design: Triumph of Hope or Experience?' 38 *Colum. J. Transnat'l L.* 465-84 (2000).

Downs, George W., David M. Rocke, and Peter N. Barsoom. 'Is the good news about compliance good news about cooperation?' 50 *International Organization* 379-406 (1996).

Doyle, Michael W. 'Kant, liberal legacies and foreign affairs.' 12/3 *Philosophy and Public Affairs* 205-235 (1983).

——. *Ways of War and Peace: Realism, Liberalism, and Socialism*. New York: W.W. Norton & Company, 1997.

Drezner, Daniel W. 'Bargaining, Enforcement, and Multilateral Sanctions.' 54 *International Organization* 73-102 (2000).

Drucker, Peter F. *Post-Capitalist Society*. New York: HarperBusiness, 1993.

Drury, Shadia B. *Leo Strauss and the American Right*. New York: St. Martin's Press, 1997.

Duffy, Goria. *Compliance and the Future of Arms Control*. Cambridge, MA: Ballinger, 1988.

Dunoff, Jeffrey L., and Joel P. Trachtman. 'Economic Analysis of International Law.' 24 *Yale J. Int'l L.* 1-48 (1999).

Durkheim, Emile. *Sociology and Philosophy*. New York: Free Press, 1974.

Dworkin, Ronald. *Law's Empire*. Cambridge, MA: Harvard University Press, 1986.

——. *A Matter of Principle*. Cambridge, MA: Harvard University Press, 1985.

——. *Sovereign Virtue*. Cambridge, MA: Harvard University Press, 2000.

——. *Taking Rights Seriously*. Cambridge, MA: Harvard University Press, 1977.

Ellickson, Robert C. *Order Without Law*. Cambridge, MA: Harvard University Press, 1991.

Elliott, Kimberley A. 'The Sanctions Glass: Half Full or Completely Empty?' 23/1 *International Security* 50-65 (1998).

Elster, Jon, and Aanund Hylland, eds. *Foundations of Social Choice Theory*. Cambridge: Cambridge University Press, 1986.

Falk, Richard A. 'Casting the Spell: The New Haven School of International Law.' 104 *Yale LJ* 1991-2008 (1995).

——. *On Humane Governance: Toward a New Global Politics*. University Park, PA: Pennsylvania State University Press, 1995.

Falk, Richard A., Samuel S. Kim, and Saul H. Mendlovitz. *Toward a Just World Order. Vol. I Studies on a Just World Order*. Boulder, CO: Westview Press, 1982.

Farber, Henry, and Joanne Gowa. 'Politics and Peace.' 20/2 *International Security* 123-46 (1995).

Fearon, James. 'Rationalist Explanations of War.' 49 *International Organization* 379-414 (1995).

Ferejohn, John, and Debra Satz. 'Unification, Universalism, and Rational Choice Theory.' 9 *Critical Review* 71-84 (1995).

Finnemore, Martha. 'Are Legal Norms Distinctive?' 32 *NYU J. Int'l L. & Pol.* 699-705 (2000).

Finnemore, Martha, and Kathryn Sikkink. 'International Norm Dynamics and Political Change.' 52 *International Organization* 887-917 (1998).

Finnemore, Martha, and Stephen J. Toope. 'Alternatives to 'Legalization': Richer Views of Law and Politics.' 55 *International Organization* 743-58 (2001).

Fletcher, George P. 'In God's Image: The Religious Imperative of Equality under Law.' 99 *Columbia Law Review* 1608-29 (1999).

Foucault, Michel. *The Order of Things: An Archaeology of the Human Sciences*. New York: Pantheon Books, 1970.

Fox, Gregory H., and Brad R. Roth, eds. *Democratic Governance and International Law*. Cambridge: Cambridge University Press, 2000.

Franceschet, Antonio. 'Popular Sovereignty or Cosmopolitan Democracy? Liberalism, Kant and International Reform.' 6 *European Journal of International Relations* 277-302 (2000).

Franck, Thomas M. 'Dr. Pangloss Meets the Grinch: A Pessimistic Comment on Harold Koh's Optimism.' 35 *Houston Law Review* 683-95 (1998).

——. 'The Emerging Right to Democratic Governance.' 86 *AJIL* 46-91 (1992).

——. *The Empowered Self: Law and Society in the Age of Individualism*. Oxford: Oxford University Press, 1999.

——. 'Epistemology at a Time of Perplexity.' 13 *EJIL* 1025-30 (2002).

——. *Fairness in International Law and Institutions*. Oxford: Oxford University Press, 1995.

——. 'Legitimacy in the International System.' 82 *AJIL* 705-59 (1988).

——. *The Power of Legitimacy Among Nations*. New York: Oxford University Press, 1990.

Frey, Raymond G., ed. *Utility and Rights*. Minneapolis: University of Minnesota Press, 1984.

Fukuyama, Francis. *The End of History and the Last Man*. New York: Free Press, 1992.

Galston, William A. *Liberal Purposes: Goods, Virtues, and Diversity in the Liberal State*. Cambridge: Cambridge University Press, 1991.

Gartzke, Erik, Quan Li, and Charles Boehmer. 'Investing in the Peace: Economic Interdependence and International Conflict.' 55 *International Organization* 391-438 (2001).

Gauthier, David. *Morals by Agreement*. Oxford: Oxford University Press, 1986.

Gelber, Harry G. *Sovereignty through Interdependence*. London: Kluwer Law International, 1997.

Gelpi, Christopher. *The Power of Legitimacy: Assessing the Role of Norms in Crisis Bargaining*. Princeton, NJ: Princeton University Press, 2002.

Georgiev, Dencho. 'Politics or Rule of Law: Deconstruction and Legitimacy in International Law.' 4 *EJIL* 1-14 (1993).

Giddens, Anthony. *Central Problems in Social Theory: Action, Structure, and Contradiction in Social Analysis*. Berkeley, CA: University of California Press, 1979.

——. *The Consequences of Modernity*. Cambridge: Polity Press, 1990.

Gildin, Hilail, ed. *An Introduction to Political Philosophy*. Detroit: Wayne State University Press, 1989.

Ginsburg, Ruth B., and Deborah J. Merritt. 'Affirmative Action: An International Human Rights Dialogue.' 21 *Cardozo Law Review* 253-82 (1999).

Glaser, Charles, and Chaim Kaufmann. 'What Is the Offense-Defense Balance and Can We Measure It?' 22/4 *International Security* 44-82 (1998).

Goldsmith, Jack L. 'Liberal Democracy and Cosmopolitan Duty.' 55 *Stanford Law Review* 1667-96 (2003).

Goldstein, Judith, and Lisa L. Martin. 'Legalization, Trade Liberalization, and Domestic Politics: A Cautionary Note.' 54 *International Organization* 603-32 (2000).

Goldstein, Judith, Miles Kahler, Robert O. Keohane, and Anne-Marie Slaughter. 'Response to Finnemore and Toope.' 55 *International Organization* 759-60 (2001).

Goodman, Ryan, and Derek Jinks. 'Toward an Institutional Theory of Sovereignty.' 55 *Stanford Law Review* 1749-88 (2003).

Gourevitch, Victor. 'The End of History?' 21 *Interpretation* 215-33 (1993).

Green, Donald P., and Ian Shapiro. *Pathologies of Rational Choice Theory: A Critique of Applications in Political Science*. New Haven, CT: Yale University Press, 1994.

Green, Donald P., Soo Y. Kim, and David H. Yoon. 'Dirty Pool.' 55 *International Organization* 441-68 (2001).

Greenberg, Jonathan D. 'Does Power Trump Law?' 55 *Stanford Law Review* 1789-1820 (2003).

Grieco, Joseph M. 'Anarchy and the Limits of Cooperation: A Realist Critique of Newest Liberal Institutionalism.' 42 *International Organization* 485-507 (1988).

Griffin, James. *Well-Being: Its Meaning, Measurement, and Moral Importance*. Oxford: Oxford University Press, 1986.

Gunnell, John. 'Political Theory and Politics: The Case of Leo Strauss.' 13 *Political Theory* 339-61 (1985).

Gutmann, Amy, ed. *Multiculturalism: Examining the Politics of Recognition*. Princeton, NJ: Princeton University Press, 1994.

Guzman, Andrew T. 'A Compliance-Based Theory of International Law.' 90 *California Law Review* 1823-87 (2002).

Haas, Peter M., Robert O. Keohane, and Marc A. Levy, eds. *Institutions for the Earth: Sources of Effective International Environmental Protection*. Cambridge, MA: MIT Press, 1993.

Habermas, Jürgen. *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*. Translated by Walter Rehg. Cambridge, MA: MIT Press, 1996.

——. *Communication and the Evolution of Society*. Translated by Thomas McCarthy. Boston, MA: Beacon Press, 1970.

——. *Legitimation Crisis*. Translated by Thomas McCarthy. Cambridge: Polity Press, 1976.

——. *Zur Rekonstruktion des Historischen Materialismus*. Frankfurt a.M.: Suhrkamp, 1976.

Hall, Rodney, B., and Thomas K. Biersteker. *The Emergence of Private Authority in Global Governance*. Cambridge: Cambridge University Press, 2003.

Hart, Herbert L.A. *The Concept of Law*. 2nd ed. Oxford: Oxford University Press; 1994.

Hart, Michael, and Bill Dymond. 'Special and Differential Treatment and the Doha "Development" Round.' 37 *Journal of World Trade* 395-415 (2003).

Haslett, David W. *Equal Consideration: A Theory of Moral Justification*. Newark, NJ: University of Delaware Press, 1987.

Hathaway, Oona A. 'The Cost of Commitment.' 55 *Stanford Law Review* 1821-62 (2003).

——. 'Do Human Rights Treaties Make a Difference?' 111 *Yale LJ* 1932-2042 (2002).

Hegre, Havard. 'Development and the Liberal Peace: What Does it Take to Be a Trading State?' 37/1 *Journal of Peace Research* 5-30 (2000).

Held, David. *Democracy and the Global Order*. Stanford, CA: Stanford University Press, 1995.

Henkin, Louis. *How Nations Behave*. 2nd ed. New York: Columbia University Press, 1979.

Hernández-López, Ernesto. 'Recent Trends and Perspectives for Non-State Actor Participation in World Trade Organization Disputes.' 35 *Journal of World Trade* 469-98 (2001).

Hicks, Robert D., trans. *Lives of Eminent Philosophers*. London: W. Heinemann, 1925.

Hillgenberg, Hartmut. 'A Fresh Look at Soft Law.' 10 *EJIL* 499-515 (1999).

Hirst, Paul, and Grahame Thompson. *Globalization in question: the international economy and the possibilities of governance*. 2nd ed. Cambridge: Polity Press, 1999.

Hobbes, Thomas. *Leviathan*. Edited by Crawford B. Macpherson. Baltimore: Penguin Books, 1968.

Hoffmann, Stanley. 'Clash of Globalizations.' 81/4 *Foreign Affairs* 104-08 (2002).

Hollinger, Richard, ed. *Hermeneutics and Praxis*. Notre Dame, ID: University of Notre Dame Press, 1985.

Hollis, Martin. *The Cunning of Reason*. Cambridge: Cambridge University Press, 1987.

Hollis, Martin, and Steve Smith. *Explaining and Understanding International Relations*. Oxford: Oxford University Press, 1990.

Holmes, Stephen. *The Anatomy of Antiliberalism*. Cambridge, MA: Harvard University Press, 1993.

Hubin, Donald C. 'The Moral Justification of Benefit/Cost Analysis.' 10 *Economics and Philosophy* 169-94 (1994).

Hudec, Robert E. *Developing Countries in the GATT Legal System*. Aldershot, UK: Trade Policy Research Center, 1987.

——. *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System*. Salem, NH: Butterworth Legal Publishers, 1993.

Huntington, Samuel P. *The Clash of Civilizations and the Remaking of World Order*. New York: Simon & Schuster, 1996.

Hurd, Ian. 'Legitimacy and Authority in International Politics.' 53 *International Organization* 379-408 (1999).

James, Harold. *The End of Globalization: Lessons from the Great Depression*. Cambridge, MA: Harvard University Press, 2001.

Jameson, Frederic. *The Cultural Logic of Late Capitalism in Postmodernism or The Cultural Logic of Late Capitalism*. London: Verso Books, 1991.

Janis, M.W. 'Individuals as Subjects of International Law.' 17 *Cornell ILJ* 61-84 (1984).

Jervis, Robert. 'Realism in the Study of World Politics.' 52 *International Organization* 971-92 (1998).

Kagan, Robert. *Of Paradise and Power – America and Europe in the New World Order*. New York: Knopf, 2003.

Kahler, Miles. 'Conclusion: The Causes and Consequences of Legalization.' 54 *International Organization* 661-83 (2000).

Kahn, Paul W. 'Speaking Law to Power: Popular Sovereignty, Human Rights, and the New International Order.' 1 *Chi. J. Int'l L.* 1-18 (2000).

Kant, Immanuel. *Political Writings*. Edited by Hans Reiss. Translated by H.B. Nisbet. Cambridge: Cambridge University Press, 1991.

Kaplow, Louis, and Steven Shavell. 'Any Non-Welfarist Method of Policy Assessment Violates the Pareto Principle.' 109 *Journal of Political Economy* 281-86 (2001).

——. 'The Conflict Between Notions of Fairness and the Pareto Principle.' 1 *American Law and Economics Review* 63-77 (1999).

——. *Fairness Versus Welfare*. Cambridge, MA: Harvard University Press, 2002.

——. 'Notions of Fairness Versus the Pareto Principle. On the Role of Logical Consistency.' 110 *Yale LJ* 237-49 (2000).

Katzenstein, Peter J., Robert O. Keohane, and Stephen D. Krasner. 'International Organization and the Study of World Politics.' 52 *International Organization* 645-85 (1998).

Kauffmann, Clemens. *Strauss und Rawls*. Berlin: Duncker & Humblot, 2000.

Kaysen, Karl. 'Is War Obsolete? A Review Essay.' 14/4 *International Security* 42-64 (1990).

Keck, Margaret E., and Kathryn Sikkink. *Activists Beyond Borders: Advocacy Networks in International Politics*. Itahaca, NY: Cornell University Press, 1998.
Kellner, Douglas. *Critical Theory, Marxism and Modernity*. Cambridge: Polity Press, 1989.
Kelman, Steven. 'Cost-Benefit Analysis – An Ethical Critique.' 10/1 *Regulation* 33-40 (1981).
Kennedy, David. *International Legal Structures*. Baden-Baden: Nomos, 1987.
——. 'Theses about International Law Discourse.' 23 *GYIL* 353-391 (1980).
——. 'Tom Franck and the Manhattan School.' 35 *NYU J. Int'l L. & Pol.* 397-435 (2003).
——. 'When Renewal Repeats: Thinking Against the Box.' 32 *NYU J. Int'l L. & Pol.* 335-500 (2000).
Kennedy, Duncan. 'Form and Substance in Private Law Adjudication.' 89 *Harvard Law Review* 1685-1725 (1976).
Keohane, Robert O. *After Hegemony: Cooperation and Discord in the World Political Economy*. Princeton, NJ: Princeton University Press, 1984.
——. 'Compliance with International Commitments: Politics Within a Framework of Law.' 86 *Am. Soc. Int'l L. Proc.* 176-82 (1992).
——. *International Institutions and State Power: Essays in International Relations Theory*. Boulder, CO: Westview Press, 1989.
——. 'International Relations and International Law: Two Optics.' 38 *Harvard ILJ* 487-502 (1997).
——. 'When Does International Law Come Home?' 35 *Houston Law Review* 699-712 (1998).
Keohane Robert O., Andrew Moravcsik, and Anne-Marie Slaughter. 'Legalized Dispute Resolution: Interstate and Transnational.' 54 *International Organization* 457-88 (2000).
King, Gary, and Langche Zeng. 'Explaining Rare Events in International Relations.' 55 *International Organization* 693-715 (2001).
Kingsbury, Benedict. 'The Concept of Compliance as a Function of Competing Conceptions of International Law.' 19 *Mich. J. Int'l L.* 345-72 (1998).
——. 'First Amendment Liberalism as Global Legal Architecture: Ascriptive Groups and the Problems of the Liberal NGO Model of International Civil Society.' 3 *Chi. J. Int'l L.* 183-96 (2002).
——. 'Sovereignty and Inequality.' 9 *EJIL* 599-625 (1998).
Kissinger, Henry. *Diplomacy*. New York: Simon & Schuster, 1994.
Knop, Karen. 'Here and There: International Law in Domestic Courts.' 32 *NYU J. Int'l L. & Pol.* 501-35 (1999).
Koh, Harold H. 'Bringing International Law Home.' 35 *Houston Law Review* 623-81 (1998).
——. 'Foreword – On American Exceptionalism.' 55 *Stanford Law Review* 1479-1528 (2003).
——. 'How is International Human Rights Law Enforced?' 74 *Indiana Law Journal* 1397-1417 (1999).
——. 'The Spirit of the Laws.' 43 *Harvard ILJ* 23-40 (2002).
——. 'Transnational Public Law Litigation.' 100 *Yale LJ* 2347-79 (1991).
——. 'A United States Human Rights Policy for the 21st Century.' 46 *St. Louis University Law Journal* 293-344 (2002).
——. 'Why Do Nations Obey International Law?' 106 *Yale LJ* 2599-2659 (1997).
Kojève, Alexandre. *Introduction to the Reading of Hegel*. Edited by Allan Bloom. Translated by James H. Nichols, Jr. New York: Basic Books, 1969.
Koskenniemi, Martti. *From Apology to Utopia: The Structure of International Legal Argument*. Helsinki: Lakimiesliiton kustannus, 1989.
——. 'The Future of Statehood.' 32 *Harvard ILJ* 397-410 (1991).

——. 'Intolerant Democracies: A Reaction.' 37 *Harvard ILJ* 231-39 (1996).
——. 'Legal Cosmopolitanism: Tom Franck's Messianic World.' 35 *NYU J. Int'l L. & Pol.* 471-86 (2003).
——. 'Peaceful Settlement of Environmental Disputes.' 60 *Nordic J. Int'l L.* 73-92 (1992).
——. 'The Power of Legitimacy Among Nations by Thomas M. Franck, Book Reviews and Notes.' 86 *AJIL* 175-78 (1992).
——. 'The Wonderful Artificiality of States.' 88 *Am. Soc. Int'l L. Proc.* 22-29 (1994).
Krasner, Steven. 'Structural Causes and Regime Consequences: Regimes as Intervening Variables.' 36 *International Organization* 185-205 (1982).
Kratochwil, Friedrich. 'The force of prescriptions.' 38 *International Organization* 685-708 (1984).
——. *Rules, norms, and decisions*. Cambridge: Cambridge University Press, 1989.
Kratochwil, Friedrich, and John G. Ruggie. 'International Organization: A State of the Art on an Art of the State.' 40 *International Organization* 753-75 (1986).
Kristol, Irving. *NeoConservatism – The Autobiography of an Idea*. New York: Free Press, 1995.
Kritsiotis, Dino. 'Imagining the International Community.' 13 *EJIL* 961-92 (2002).
Kymlicka, Will. *Contemporary Political Philosophy*. Oxford: Oxford University Press, 1990.
——. 'Liberal Individualism and Liberal Neutrality.' 99 *Ethics* 883-905 (1989).
Lachs, Manfred. 'Science, Technology and World Law.' 86 *AJIL* 673-99 (1992).
Layard, Richard, and Stephen Glaister, eds. *Cost-Benefit Analysis*. 2nd ed. Cambridge: Cambridge University Press, 1994.
Legro, Jeffrey W. 'Which norms matter? Revisiting the "failure" of internationalism.' 51 *International Organization* 31-63 (1997).
Lilla, Mark. *The Reckless Mind – Intellectuals in Politics*. New York: New York Review Books, 2001.
Locke, John. *Two Treatises of Government II*. 2nd ed. London: Cambridge University Press, 1967.
Lyotard, Jean-Francois. *The Differend: Phrases in Dispute*. Minneapolis: University of Minnesota Press, 1991.
——. 'Histoire universelle et differences culturelles.' 41 *Critique* 559-68 (1985).
——. *The Postmodern Condition – A Report on Knowledge*. Manchester: Manchester University Press, 1979.
Lyotard, Jean-Francois, and Jean-Loup Thébaud. *Just Gaming*. Minneapolis: University of Minneapolis Press, 1985.
Macchiavelli, Nicolo. *The Prince*. Translated by Walter K. Marriott. New York: Knopf Publishing, 1981.
Macedo, Stephen. *Liberal Virtues: Citizenship, Virtue, and Community in Liberal Constitutionalism*. Oxford: Oxford University Press, 1991.
Macey, Jonathan R., and Geoffrey P. Miller. 'The End of History and the New World Order: The Triumph of Capitalism and the Competition between Liberalism and Democracy.' 25 *Cornell ILJ* 277-303 (1992).
Malanczuk, Peter. *Akehurst's Modern Introduction to International Law*. 7th ed. London: Routledge, 1997.
Mansfield, Edward D., and Jack Snyder. 'Democratization and the Danger of War.' 20/1 *International Security* 5-38 (1995).
Mansfield, Edward D., Helen V. Milnter, and B. Peter Rosendorff. 'Why Democracies Cooperate More: Electoral Control and International Trade Agreements.' 56 *International Organization* 477-513 (2002).

Marceau, Gabrielle, and Peter N. Pedersen. 'Is the WTO Open and Transparent? A Discussion of the Relationship of the WTO with Non-Governmental Organizations and Civil Society's Claims for more Transparency and Public Participation.' 33 *Journal of World Trade* 5-49 (1999).

Marks, Susan. 'The End of History? Reflections on Some International Legal Theses.' 8 *EJIL* 449-68 (1997).

Marx, Karl. *A Contribution to the Critique of Political Economy*. Moscow: Progress Publishers, 1859.

Mason, Andrew. 'Special Obligations to Compatriots.' 107 *Ethics* 427-47 (1997).

McCormick, James M., and Neil J. Mitchell. 'Human Rights Violations, Umbrella Concepts, and Empirical Analysis.' 49 *World Politics* 510-25 (1997).

McDougal, Myers S., and Michael W. Reisman, eds. *International Law Essays*. Mineola, NY: Foundation Press 1981.

Miller, David. *On Nationality*. Oxford: Oxford University Press, 1995.

Miller David, and Michael Walzer, eds. *Pluralism, Justice, and Equality*. Oxford: Oxford University Press, 1995.

Milner, Helen V. *Interests, Institutions, and Information: Domestic Politics and International Relations*. Princeton, NJ: Princeton University Press, 1997.

Moravcsik, Andrew. 'Explaining International Human Rights Regimes: Liberal Theory and Western Europe.' 1 *European Journal of International Relations* 157-89 (1995).

——. 'Taking Preferences Seriously: A Liberal Theory of International Politics.' 51 *International Organization* 513-53 (1997).

Morgenthau, Hans J. *Politics Among Nations: The Struggle for Power and Peace*. 3rd ed. New York: Knopf, 1960.

Morrison, Edward R. 'Judicial Review of Discount Rates Used in Regulatory Cost-Benefit Analysis.' 65 *U. Chi. L. Rev.* 1333-58 (1998).

Mousseau, Michael. 'Market Prosperity, Democratic Consolidation, and Democratic Peace.' 44 *Journal of Conflict Resolution* 472-507 (2000).

Mousseau, Michael, Havard Hegre, and John R. Oneal. 'How the Wealth of Nations Conditions the Liberal Peace.' 9 *European Journal of International Relations* 277-314 (2003).

Mueller, Dennis C. *Public Choice III*. Cambridge: Cambridge University Press, 2003.

Nagel, Thomas. *The View from Nowhere*. Oxford: Oxford University Press, 1986.

Nardin, Terry. *Law, Morality, and the Relations of States*. Princeton, NJ: Princeton University Press, 1983.

Neuhold, Hanspeter. 'The Foreign Policy Cost-Benefit Analysis Revisited.' 42 *GYIL* 84-124 (1999).

Niosi, Jorge, ed. *Technology and National Competitiveness: Oligopoly, Technological Innovation, and International Competition*. Montreal: McGill-Queen's University Press, 1991.

Noland, Marcus. 'Chasing Phantoms: The Political Economy of USTR.' 51 *International Organization* 365-87 (1997).

Nollkaemper, André. 'On the Effectiveness of International Rules.' 27 *Acta Politica* 49-70 (1992).

North, Douglas C. *Institutions, Institutional Change, and Economic Performance*. Cambridge: Cambridge University Press, 1990.

Nowrot, Karsten. 'The Rule of Law in the Era of Globalization: Legal Consequences of Globalization: The Status of Non-Governmental Organizations under International Law.' 6 *Ind. J. Glob. Leg. Stud.* 579-608 (1999).

Nozick, Robert. *Anarchy, State, and Utopia*. New York: Basic Books, 1974.

——. *The Examined Life: Philosophical Meditations*. New York: Simon & Schuster, 1989.
——. *The Nature of Rationality*. Princeton, NJ: Princeton University Press, 1993.
Nye, Joseph S. *The Paradox of American Power – Why the World's Only Superpower Can't Go It Alone*. Oxford: Oxford University Press, 2003.
Nye, Joseph S., and John D. Donahue, eds. *Governance in a Globalizing World*. Cambridge, MA: Brookings Institution Press, 2000.
Ohmae, Kenichi. *The End of the Nation State: The Rise of Regional Economies*. New York: The Free Press, 1995.
Oneal John R., and Bruce Russett. 'Clear and Clean: The Fixed Effects of the Liberal Peace.' 55 *International Organization* 469-86 (2001).
——. 'The Kantian Peace: The Pacific Benefits of Democracy, Interdependence, and International Organizations, 1885-1992.' 52 *World Politics* 1-37 (1996).
O'Neill, Onora. *Towards Justice and Virtue: A Constructive Account of Practical Reasoning*. Cambridge: Cambridge University Press, 1996.
Oye, Kenneth A., ed. *Cooperation Under Anarchy*. Princeton, NJ: Princeton University Press, 1986.
Pape, Robert A. 'Why Economic Sanctions Do Not Work.' 22/2 *International Security* 90-136 (1997).
——. 'Why Economic Sanctions Still Do Not Work.' 23/1 *International Security* 66-77 (1998).
Parfit, Derek. *Reasons and Persons*. Oxford: Oxford University Press, 1984.
Park, Young D., and Georg C. Umbricht. 'WTO Dispute Settlement 1995-2000: A Statistical Analysis.' 4 *J. Int'l Econ. L.* 213-230 (2001).
Pauly, Louis W., and Simon Reich. 'National Structures and Multinational Corporate Behavior.' 51 *International Organization* 1-30 (1997).
Peerenboom, Randall P. 'What's Wrong with Chinese Rights: Toward a Theory of Rights with Chinese Characteristics.' 6 *Harv. Hum. R. J.* 29-58 (1993).
Peñalver, Eduardo M. 'The Persistent Problem of Obligation in International Law.' 36 *Stan. J. Int'l L.* 271-302 (2000).
Pernice, Ingolf. 'Multilevel Constitutionalism in the European Union.' 27 *European Law Review* 511-29 (2002).
Petersman, Ernst-Ulrich. *GATT/WTO dispute settlement system: international law, international organizations, and dispute settlement*. London: Kluwer Law International, 1997.
Pogge, Thomas W. 'Cosmopolitanism and Sovereignty.' 103 *Ethics* 48-75 (1992).
——. 'An Egalitarian Law of Peoples.' 23/3 *Philosophy and Public Affairs* 195-224 (1994).
——. *Realizing Rawls*. Ithaca, NY: Cornell University Press, 1989.
Porter, Robert B., Pierre Sauve, Arvind Subramanian, and Americo Beviglia Zampetti, eds. *Efficiency, Equity, and Legitimacy: The Multilateral Trading System at the Millennium*. Washington, DC: Brookings Institution Press, 2001.
Posner, Eric A. 'Do States Have a Moral Obligation to Obey International Law?' 55 *Stanford Law Review* 1901-20 (2003).
Posner, Richard A. *The Economics of Justice*. 2nd ed. Cambridge, MA: Harvard University Press, 1983.
Princen, Sebastiaan. 'EC Compliance with WTO Law: The Interplay of Law and Politics.' 15 *EJIL* 555-74 (2004).
Rashid, Salim, ed. *The clash of civilizations?: Asian responses*. Karachi: Oxford University Press, 1997.
Raustiala, Kal. 'Compliance and Effectiveness in International Regulatory Cooperation.' 32 *Case Western Reserve J. Int'l L.* 387-440 (2000).

Rawls, John. 'Justice as fairness: political not metaphysical.' 14/3 *Philosophy and Public Affairs* 223-251 (1985).

——. 'Kantian Constructivism in Moral Theory.' 77/9 *Journal of Philosophy* 515-72 (1980).

——. *The Law of Peoples (with The idea of public reason revisited)*. Cambridge, MA: Harvard University Press, 1999.

——. *Political Liberalism*. New York: Columbia University Press, 1993.

——. *A Theory of Justice*. Cambridge, MA: Harvard University Press, 1971.

Raz, Joseph. *The Morality of Freedom*. Oxford: Oxford University Press, 1986.

——. *Practical Reason and Norms*. Princeton, NJ: Princeton University Press, 1990.

Reich, Robert. *The Work of Nations – Preparing Ourselves for 21st Century Capitalism*. New York: Vintage Books, 1992.

Reus-Smit, Christian. 'The Strange Death of Liberal International Theory.' 12 *EJIL* 573-94 (2001).

Rittberger, Volker, ed. *Global Governance and the United Nations System*. Tokyo: United Nations University Press, 2001.

——. *Regime Theory and International Relations*. Oxford: Oxford University Press, 1993.

Robertson, David. 'The Global Environment: Are International Treaties a Distraction?' 13 *The World Economy* 111-27 (1990).

Robertson, Neil G. 'The Closing of the Early Modern Mind: Leo Strauss and Early Modern Political Thought.' 3 *Animus* 157-170 (1998).

Rorty, Richard. *Philosophy and the Mirror of Nature*. Princeton, NJ: Princeton University Press, 1979.

——. *Truth and Progress – Philosophical Papers Volume III*. Cambridge: Cambridge University Press, 1998.

Rose, Gideon. 'Neoclassical Realism and Theories of Foreign Policy.' 51 *World Politics* 144-72 (1998).

Rosenau, James N. *Along the Domestic-Foreign Frontier: Exploring Governance in a Turbulent World*. Cambridge: Cambridge University Press, 1997.

——. *Turbulence in World Politics: a Theory of Change and Continuity*. Princeton, NJ: Princeton University Press, 1990.

Rosenau, James N., and Ernst-Otto Czempiel, eds. *Governance without Government: Order and Change in World Politics*. Cambridge: Cambridge University Press, 1992.

Roth, Brad R. 'Democratic Intolerance: Observations on Fox and Nolte.' 37 *Harvard ILJ* 235-38 (1996).

Rothkopf, David J. 'Cyberpolitik: The Changing Nature of Power in the Information Age.' 51/2 *Journal of International Affairs* 325-59 (1998).

Rubin, Alfred P. *Ethics and authority in international law*. Cambridge: Cambridge University Press, 1997.

Ruggie, John G. 'Continuity and Transformation in the World Polity: Toward a Neorealist Synthesis.' 35 *World Politics* 261-85 (1983).

Russett, Bruce, Harvey Starr, and David Kinsella. *World Politics: Menu for Choice*. 6th ed. Boston: Bedford/St. Martin's, 2000.

Saiegh, Sebastian M. *Is there a 'Democratic Advantage': Assessing the Role of Political Institutions in Sovereign Borrowing*. New York: New York University Press, 2001.

Samuelson, Paul A. 'The Pure Theory of Public Expenditure.' 36 *Review of Economics and Statistics* 387-89 (1954).

Sandel, Michael. 'Book Review: Political Liberalism. By John Rawls.' 107 *Harvard Law Review* 1765-95 (1994).

——. *Liberalism and the Limits of Justice*. 2nd ed. Cambridge: Cambridge University Press, 1998.
——. 'The Procedural Republic and the Unencumbered Self.' 12 *Political Theory* 81-96 (1984).
Schachter, Oscar. 'Chapter 1 Question of Theory: The Decline of the Nation-State and its Implications for International Law.' 36. *Colum. J. Transnat'l L.* 7-31 (1997).
——. *International Law in Theory and Practice*. Dordrecht: Martinus Nijhoff Publishers, 1991.
Scheffler, Samuel. 'Individual Responsibility in a Global Age.' 12 *Social Philosophy and Policy* 219-36 (1995).
——. 'Relationships and Responsibilities.' 26/3 *Philosophy and Public Affairs* 189-209 (1997).
Scholte, Jan A., Robert O'Brien, and Marc Williams. 'The WTO and Civil Society.' 33 *Journal of World Trade* 107-24 (1999).
Schreuer, Christoph. 'The Waning of the Sovereign State: Towards A New Paradigm for International Law?' 4 *EJIL* 447-71 (1993).
Scobbie, Iain. 'Tom Franck's Fairness.' 13 *EJIL* 907-26 (2002).
Segal, Jeffrey A., and Albert D. Cove. 'Ideological Values and the Votes of U.S. Supreme Court Justices.' 83 *American Political Science Review* 557-65 (1989).
Segal, Jeffrey A., Lee Epstein, Charles M. Cameron, and Harold J. Spaeth. 'Ideological Values and the Votes of U.S. Supreme Court Justices Revisited.' 57 *Journal of Politics* 812-23 (1995).
Sen, Amartya K. 'The Impossibility of a Paretian Liberal.' 78 *Journal of Political Economy* 152-57 (1970).
——. 'Liberty, Unanimity and Rights.' 43 *Economica* 217-45 (1976).
Setear, John K. 'An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law.' 37 *Harvard ILJ* 139-228 (1996).
Shaw, Malcolm N. *International Law*. 4th ed. Cambridge: Cambridge University Press, 1997.
Shaw, William H. *Contemporary Ethics – Taking Account of Utilitarianism*. Malden, MA: Blackwell, 1999.
Shelton, Dinah, ed. *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*. Oxford: Oxford University Press, 2000.
Sicilianos, Linos-Alexandre. 'The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility.' 13 *EJIL* 1127-46 (2002).
Simma, Bruno. 'From Bilateralism to Community Interest in International Law.' 250 *RdC* 217-384 (1994).
Simma, Bruno, and Andreas L. Paulus. 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positive View.' 93 *AJIL* 302-16 (1999).
Simmons, Beth A. 'Compliance with International Agreements.' 1 *Annual Review of Political Science* 75-94 (1998).
——. 'Money and the Law: Why Comply with the Public International Law of Money?' 25 *Yale J. Int'l L.* 323-62 (2000).
Simpson, Gerry. 'The Situation on the International Legal Theory Front: The Power of Rules and the Rule of Power.' 11 *EJIL* 439-64 (2000).
Simpson, Bruce. 'Book Review: Is International Law Fair?' 17 *Mich. J. Int'l L.* 615-42 (1996).
Slaughter, Anne-Marie. 'International Law in a World of Liberal States.' 6 *EJIL* 503-38 (1995).
——. 'A Liberal Theory of International Law.' 94 *Am. Soc. Int'l L. Proc.* 240-252 (2000).
——. *A New World Order*. Princeton, NJ: Princeton University Press, 2004.
——. 'The Real New World Order.' 76/5 *Foreign Affairs* 183-197 (1997).

Slaughter Burley, Anne-Marie. 'International Law and International Relations Theory: A Dual Agenda.' 87 *AJIL* 205-239 (1993).

Slaughter, Anne-Marie, and William Burke-White. 'An International Constitutional Moment.' 43 *Harvard ILJ* 1-22 (2002).

Slaughter, Anne-Marie, Andrew S. Tulumello, and Stepan Wood. 'International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship.' 92 *AJIL* 367-97 (1998).

Sloterdijk, Peter. *Sphären II – Globen*. Frankfurt a.M.: Suhrkamp, 1999.

Smith, Edwin M. 'Understanding Dynamic Obligations: Arms Control Agreements.' 64 *Southern California Law Review* 1549-66 (1991).

Smith, Roy C., and Ingo Walter. *Global Banking*. 2nd ed. Oxford: Oxford University Press, 2003.

Snidal, Duncan. 'Coordination Versus Prisoner's Dilemma: Implications for International Cooperation and Regimes.' 79 *American Political Science Review* 923-42 (1985).

——. 'The Game Theory of International Politics.' 38 *World Politics* 25-57 (1985/86).

Snyder, Jack. *Myths of Empire: Domestic Politics and International Ambition*. Ithaca, NY: Cornell University Press, 1991.

Spaeth, Harold J., ed. *The Predicament of Modern Politics*. Detroit: University of Detroit Press, 1964.

Spar, Debora, and James Dail. 'Of Measurement and Mission: Accounting for Performance in Non-Governmental Organizations.' 3 *Chi. J. Int'l L.* 171-82 (2002).

Spegele, Roger D. *Political Realism in International Theory*. Cambridge: Cambridge University Press, 1996.

Spiller, Pablo T., and Matthew Spitzer. 'Judicial Choice of Legal Doctrines.' 8 *Journal of Law, Economics and Organization* 8-46 (1992).

Spiro, Peter J. 'Accounting for NGOs.' 3 *Chi. J. Int'l L.* 161-70 (2002).

——. 'Globalization, International Law, and The Academy.' 32 *NYU J. Int'l L. & Pol.* 567-90 (2000).

Stacy, Helen. 'Relational Sovereignty.' 55 *Stanford Law Review* 2029-60 (2003).

Stein, Arthur A. 'Coordination and Collaboration: Regimes in an Anarchic World.' 36 *International Organization* 299-324 (1982).

Steiner, Hillel. *An Essay on Rights*. Cambridge, MA: Blackwell, 1994.

Stone, Randall W. *Lending Credibility: The International Monetary Fund and the Post-Communist Transition*. Princeton, NJ: Princeton University Press, 2002.

Strauss, Leo. *Natural Right and History*. Chicago: University of Chicago Press, 1953.

——. *Spinoza's Critique of Religion*. Translated by Elsa M. Sinclair. New York: Schocken Books, 1965.

——. *What is Political Philosophy?* Glencoe, IL: Free Press, 1959.

Strauss, Leo, and Alexandre Kojève. *On Tyranny*. Edited by Victor Gourevitch and Michael S. Roth. Chicago: University of Chicago Press, 2000.

Sumner, Lawrence W. *Welfare Happiness & Ethics*. Oxford: Oxford University Press, 1996.

Sun, Haochen. 'Reshaping the TRIPs Agreement Concerning Public Health: Two Critical Issues.' 37 *Journal of World Trade* 163-97 (2003).

Sunstein, Cass R. 'Incommensurability and Valuation in Law.' 92 *Michigan Law Review* 779-861 (1994).

Suzuki, Eisuke. 'The New Haven School of International Law: An Invitation to a Policy-Oriented Jurisprudence.' 1 *Yale Stud. World. Pub. Order* 1-34 (1974).

Sylvester, Douglas J. 'International Law as Sword or Shield? Early American Foreign Policy and the Law of Nations.' 32 *NYU J. Int'l L. & Pol.* 1-88 (1999).

Tallberg, Jonas. 'Paths to Compliance: Enforcement, Management, and the European Union.' 56 *International Organization* 609-43 (2002).

Tamir, Yael. *Liberal Nationalism*. Princeton, NJ: Princeton University Press, 1993.

Tams, Christian J. 'Do Serious Breaches Give Rise To Any Specific Obligations of the Responsible State?' 13 *EJIL* 1161-80 (2002).

Tasioulas, John. 'International Law and the Limits of Fairness.' 13 *EJIL* 993-1023 (2002).

Taylor, Charles. *Philosophy and the Human Sciences: Philosophical Papers*. Cambridge: Cambridge University Press, 1985.

Teitel, Ruti. 'Transitional Jurisprudence.' 106 *Yale LJ* 2009-80 (1997).

Tesón, Fernando R. *A Philosophy of International Law*. Boulder, CO: Westview Press, 1998.

——. 'The Rawlsian Theory of International Law.' 9 *Ethics and International Affairs* 79-99 (1995).

Thacker, Strom C. 'The High Politics of IMF Lending.' 52 *World Politics* 38-75 (1999).

Thompson, Janna. *Justice and World Order*. London: Routledge, 1992.

Tierney, Stephen. 'The Search for a New Normativity: Thomas Franck, Post-modern Neo-tribalism and the Law of Self-determination.' 13 *EJIL* 941-60 (2002).

Tilly, Charles. *Coercion, Capital, and European States, A.D. 990-1992*. Cambridge, MA: Blackwell, 1990.

Trachtman, Joel P. 'Trade and . . . Problems, Cost-Benefit Analysis and Subsidiarity.' 9 *EJIL* 32-85 (1998).

Trimble, Philipp R. 'Survey of Books Relating to the Law: Globalization, International Institutions, and the Erosion of National Sovereignty and Democracy.' 95 *Michigan Law Review* 1944-89 (1997).

Tsagourias, Nikolaos, K. *Jurisprudence of International Law: The Humanitarian Intervention*. Manchester: Manchester University Press, 2000.

Ullman-Margalit, Edna. *The Emergence of Norms*. Oxford: Oxford University Press, 1977.

Utter, Glenn H., and Charles Lockhart, eds. *American Political Scientists: A Dictionary*. Westport, CT: Greenwood Press, 1993.

Van Evera, Stephen. 'Offense, Defense, and the Causes of War.' 22/4 *International Security* 5-43 (1998).

——. 'Primed for Peace: Europe After the Cold War.' 15/3 *International Security* 5-57 (1990).

v. Hayek, Friedrich A. *The Constitution of Liberty*. London: Routledge 1960.

——. *Law, Legislation, and Liberty*. London: Routledge, 1982.

Vincent, Richard J. *Human Rights and International Relations*. Cambridge: Cambridge University Press, 1986.

Vreeland, James R. *The IMF and Economic Development*. New York: Cambridge University Press, 2003.

Waltz, Kenneth N. *Man, the State, and War: A Theoretical Analysis*. New York: Columbia University Press, 2001.

——. 'Structural Realism After the Cold War.' 25/1 *International Security* 5-41 (2000).

——. *Theory of International Politics*. Reading, MA: Addison-Wesley, 1979.

Walzer, Michael. 'The communitarian critique of liberalism.' 18 *Political Theory* 6-23 (1990).

——. 'The moral standing of states: a response to four critics.' 9/3 *Philosophy and Public Affairs* 209-29 (1980).

——. 'The new tribalism.' 39 *Dissent* 164-71 (1992).
——. 'Philosophy and Democracy.' 9 *Political Theory* 379-99 (1981).
——. *Spheres of Justice: A Defense of Pluralism and Equality*. New York: Basic Books, 1983.
——. *Thick and Thin: Moral Argument at Home and Abroad*. Notre Dame, ID: University of Notre Dame Press, 1994.
Wapner, Paul. 'Defending Accountability in NGOs.' 3 *Chi. J. Int'l L.* 197-205 (2002).
——. 'Introductory Essay: Paradise Lost? NGOs and Global Accountability.' 3 *Chi. J. Int'l L.* 155-60 (2002).
Ward, Ian. 'The End of Sovereignty and the New Humanism.' 55 *Stanford Law Review* 2091-2112 (2003).
Watson, Stephen. 'Jürgen Habermas and Jean-Francois Lyotard: Post-Modernism and the Crisis of Rationality.' 10 *Philosophy and Social Criticism* 1-24 (1984).
Weber, Max. *Economy and Society: An Outline of Interpretive Sociology*. Edited by Guenther Roth and Claus Wittich. Berkeley, CA: University of California Press, 1978.
Weiss, Edith B., and Harold K. Jacobson, eds. *Engaging Countries: Strengthening Compliance with International Environmental Accords*. Cambridge, MA: MIT Press, 1998.
Wendt, Alexander. 'Anarchy Is What States Make of It.' 46 *International Organization* 391-425 (1993).
——. 'Constructing international politics.' 20/1 *International Security* 71-81 (1995).
Whitehead, Laurence, ed. *The International Dimensions of Democratization: Europe and the Americas*. Oxford: Oxford University Press, 1996.
Williams, Bernard A.O. *Moral Luck*. Cambridge: Cambridge University Press, 1981.
Williams, Michael C. 'Hobbes and international relations: a reconsideration.' 50 *International Organization* 213-36 (1996).
Williams, Robert R., ed. *Beyond Liberalism and Communitarianism – Studies in Hegel's Philosophy of Right*. Albany, NY: State University of New York Press, 2001.
Williamson, Oliver E. *The Economic Institutions of Capitalism: Firms, Markets, Relational Contracting*. New York: Free Press, 1985.
Wittgenstein, Ludwig. *Remarks on the Philosophy of Psychology I*. Edited by G.E.M. Anscombe and G.H. Wright. Chicago: University of Chicago Press, 1980.
Wolgast, Elizabeth. *The Grammar of Justice*. Ithaca, NY: Cornell University Press, 1987.
Wyler, Eric. 'From "State Crime" to Responsibility for "Serious Breaches of Obligations Under Peremptory Norms of General International Law".' 13 *EJIL* 1147-60 (2002).
Yasuaki, Onuma. 'International Law in and with International Politics: The Functions of International Law in International Society.' 14 *EJIL* 105-39 (2003).
Young, Oran R. 'Anarchy and Social Choice.' 30 *World Politics* 242-59 (1978).
——. *Compliance and Public Authority*. Baltimore: Johns Hopkins University Press, 1979.
——. *International Cooperation: Building regimes for natural resources and the environment*. Ithaca, NY: Cornell University Press, 1989.
——. *International Governance: Protecting the Environment in a Stateless Society*. Ithaca, NY: Cornell University Press, 1994.
Zakaria, Fareed. 'The Rise of Illiberal Democracy.' 76/6 *Foreign Affairs* 22-43 (1997).
Zemanek, Karl. 'The Legal Foundations of the International System: General Course on Public International Law.' 266 *RdC* 9-336 (1997).
Zoller, Elisabeth. 'Book Review: Fairness in International Law and Institutions. By Thomas M. Franck.' 36 *Virginia J. Int'l L.* 1079-1086 (1996).

Documents

Agreement Establishing the Common Fund for Commodities, 19 ILM 896 (1980).
Agreement Establishing the World Trade Organization, 33 ILM 8 (1994).
Agreement of the International Bank for Reconstruction and Development, 2 UNTS 134 (1945).
Articles of Agreement of the International Monetary Fund, as amended, 31 ILM 1307 (1990).
Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85 (1984).
Convention on Contracts for the International Sale of Goods, 19 ILM 170 (1989).
Convention on International Bills of Exchange and International Promissory Notes, 28 ILM 170 (1989).
Convention on International Liability for Damage Caused by Objects Launched into Outer Space, 10 ILM 250 (1971).
Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277 (1948).
Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 575 UNTS 160 (1966).
European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 222 (1950), Protocol No. I, 213 UNTS 262 (1952).
Exec. Order No. 12,866, 3 C.F.R. 638 (1993).
Exec. Order No. 12,291, 3 C.F.R. 127 (1981).
General Agreement on Tariffs and Trade (GATT), 55 UNTS 188 (1950).
Guidelines for Arrangements on Relations with Non-Governmental Organizations, WT/L/162 (1996).
International Convention for Civil Liability for Oil Pollution Damage, 9 ILM 45 (1970).
International Covenant on Civil and Political Rights, 999 UNTS 171 (1966), 6 ILM 368 (1967).
International Covenant on Economic, Social and Cultural Rights, 999 UNTS 3 (1966), 6 ILM 360 (1967).
Japan-United States: Joint Statement On the Framework For a New Economic Partnership, 32 ILM 1414 (1993).
Programme of Action on the Establishment of a New International Economic Order, GA Res. 3202 (S-IV), UN GAOR, 6th Special Sess., Supp. No. 1.
Questions of the Impunity of Perpetrators of Human Rights Violations, UN ESCOR, UN Doc.E/CN.4/Sub.2/1997/20 (1997).
Restatement (Third) of the Foreign Relations of the United States (1987).
Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9 (1998), as corrected.
Statute of the International Atomic Energy Agency, 8 UNTS 1093 (1957).
Statute of the International Criminal Tribunal for the Former Yugoslavia, UN SCOR, Annex, UN Doc. S/25704 (1993).
Statute of the International Tribunal for Rwanda, SC Res. 955, UN SCOR, Annex, UN Doc. S/RES/955 (1994).
Treaty between the USA and the Russian Federation on General Reduction and Limitation of Strategic Offensive Arms, 103 UTS 1 (1993).
Treaty between the USA and the USSR on the Limitation of Anti-Ballistic Missile Systems, 23 UTS 3435 (1972).

Treaty between the USA and the USSR on the Limitation of Strategic Offensive Arms, 18 ILM 1112 (1979).
Treaty between the USA and USSR on the Elimination of Their Intermediate-Range and Shorter-Range Missiles, with Memorandum of Understanding and Protocols, 27 ILM 90 (1987).
Treaty between the USA and the USSR on the Reduction and Limitation of Strategic Offensive Arms, 31 ILM 246 (1992).
Treaty on the Non-Proliferation of Nuclear Weapons, 21 UNTS 483 (1970).
Understanding on Rules and Procedures Governing the Settlement of Disputes, 33 ILM 112 (1994).
Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, 109 Stat. 48 (2 USC. § 1501).
Vienna Convention on Civil Liability for Nuclear Damage, 2 ILM 727 (1963).
Vienna Convention on the Law of Treaties, 1155 UNTS 331 (1969).

Cases

Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Second Phase, Judgment, ICJ Reports 1970, 1.
Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries, Decision of Nov. 28, L/4903 in GATT: Basic Documents and Selected Documents, 26th Supp. 203 (1980).
GSP, Decision of June 25, 1971, L/3545 in GATT: Basic Documents and Selected Documents, 18th Supp. 24 (1972).
Kuwait v. American Independent Oil Co. (Aminoil), Decision of Mar. 24, 1982, 21 ILM 1033 1982).
Lithgow v. UK, 102 ECHR (Ser. A), 8 Eur. HR Rep. 329 (1986).

Miscellaneous

Dunne, Nancy. 'Sanctions Overload.' *Financial Times*, July 21, 1998.
The Economist, April 8, 2000.
The Economist, June 19, 2003.
The Economist, August 9, 2003.
Frachon, Alain, and Daniel Vernet. 'The Strategist and the Philosopher.' *Le Monde*, April 15, 2003.
Fukuyama, Francis. 'Beyond Our Shores.' *The Wall Street Journal*, December 24, 2002.
——. 'The End of History?' 16 *The National Interest* 3-18 (Summer 1989).
——. 'Ich oder die Gemeinschaft.' *Die Zeit*, November 11, 1999.
——. 'A Reply to My Critics.' 18 *The National Interest* 21-28, 99-103 (Winter 1989/90).
——. 'Second thoughts: the Last Man in a Bottle.' 56 *The National Interest* 16-33 (Summer 1999).
Hathaway, Oona A. 'Between Power and Principle: A Political Theory of International Law.' Yale Law School Working Paper 2004, <http://www.usc.edu/dept/LAS/ir/cis/Compliance/Hathaway.pdf>.
Huntington, Samuel P. 'No Exit: The Errors of Endism.' 17 *The National Interest* 3-11 (Fall 1989).

<http://www.ngowatch.org>.

<http://www.oecd.org>.

<http://untreaty.un.org/English/overview.asp>.

Internet Assigned Numbers Authority and Internet Society. 'Memorandum of Understanding on the Generic Top Level Domain Name Space of the Internet Domain Name System.' <http://www.gtld-mou.org/gTLD-MoU.html>.

Kagan, Robert. 'Power and Weakness.' 113 *Policy Review* (June/July 2002), <http://www.policyreview.org/JUN02/kagan.html>.

Lenzner, Steven. 'Leo Strauss and the Conservatives.' 118 *Policy Review* (April/May 2003), <http://www.policyreview.org/apr03/lenzner.html>.

Moore, Mike. 'Address to WTO Symposium on Issues Confronting the World Trading System on Open Societies, Freedom, Development and Trade'. July 6, 2001, <http://www.wto.org/english/news_e/spmm_e/spmm67_e.htm>.

Moravcsik, Andrew. 'Liberal International Relations Theory – A Social Scientific Assessment.' *Weatherhead Center Working Paper Series* No. 01-02, April 2001, <http://www.wcfia.harvard.edu/papers/607__Moravscik.pdf>.

——. 'Liberalism and International Relations Theory.' *Center for International Affairs, Harvard University, Working Paper* No. 92-6, 1992.

Posner, Eric A., and John C. Yoo. 'A Theory of International Adjudication.' *University of School Law School John M. Olin Law & Economics Research Paper Series Working Paper* No. 206 (= *University of California at Berkeley Law School Public Law and Legal Theory Research Paper Series Research Paper* No. 146), 2004, <http://www.law.uchicago.edu/Law econ.index.html>.

President George W. Bush. 'Remarks at National Day of Prayer and Remembrance, the National Cathedral.' Sept. 14, 2001, <http://www.whitehouse.gov/news/releases/2001/09/20010913-2.html>.

Quentin-Baxter, Robert Q. 'Third Report on International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law.' 2 *YBILC* 51 (1982).

Somek, Alexander. 'How to Explain to Potential Migrants What We Owe to Our Fellow Citizens.' Working Paper, to appear in *UNESCO Encyclopedia of Life Support Systems*.

Spence, Edward. 'Address to the Second International Conference of the Australian Institute of Computer Ethics.' <http://www.geocities.com/stoicvoice/journal/0202/es0202a1.htm>.

Spörl, Gerhard. 'The Leo-conservatives.' *The New York Times*, August 4, 2003.

Symposium. 'Globalization and Governance: The Prospects for Democracy.' 10/1 *Ind. J. Global Legal Stud.* (2003).

Symposium. 'McDougal's Jurisprudence: Utility, Influence, Controversy.' 79 *Am. Soc. Int'l L. Proc.* 271 (1985).

Walzer, Michael. 'International Society: What is the Best That We Can Do?' *Unpublished Working Paper* 9, June 2000, <http://www.sss.ias.edu/home/papers.html>.

Wired. 'Mission impossible.' Dec. 2000.

Wenzel, Uwe J. 'Philosophenkönige? Ein Nachtrag zur Debatte um Leo Strauss.' *Neue Zürcher Zeitung*, August 16, 2003.

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