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ADDRESS

THE 1998 FRANKEL LECTURE: BRINGING INTERNATIONAL LAW HOME

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This Address represents a piece of a forthcoming book, tentatively entitled *Why Nations Obey: A Theory of Compliance With International Law*. The general outlines of that book have been sketched out in Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997). Some of these ideas were first developed in the 1997 Waynflete Lectures at Oxford University, which I delivered while on a sabbatical supported by the John Simon Guggenheim Fellowship and The Century Foundation (formerly the Twentieth Century Fund). The lecture also shares thoughts with a presentation given on the panel on "Contemporary Conceptions of Customary International Law," delivered at the American Society of International Law Annual Meeting on April 2, 1998. I am grateful to Dean Stephen Zamora, Professor Jordan Paust, and Professor Sandy Guerra of the University of Houston Law Center, and the editors of the *Houston Law Review* for making this project the subject of their Frankel Lecture, and to Professors Tom Franck and Bob Keohane for their friendship and thoughtful commentary at the symposium itself. I owe special debts to Mark Templeton of Yale Law School for his outstanding research assistance and to Bruce Ackerman, Bob Ellickson, Anthony Lester, Katya Lester, Gustaf Lind, Jerry Mashaw, Jean Koh Peters, Stephen Toope, and the members of the Yale Law School Faculty Workshop for their most helpful commentary.

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I. INTRODUCTION

It is an honor to deliver this Frankel Lecture, particularly in the company of two of my intellectual polestars: Thomas Franck of New York University School of Law and Robert Keohane of Duke University. These two scholars, and the academies they lead, represent the yin and the yang of my own education in international affairs. I first began studying international relations in 1972 as an undergraduate in the Harvard Government Department, in which Bob Keohane reigned for years as the benevolent hegemon. As a Justice Department lawyer in the 1980's, I cut my teeth on the very issues of public international law and the Constitution and foreign affairs upon which Tom Franck has been a leading commentator for decades.

These experiences have led me repeatedly to ask the question that has occupied my energies ever since: namely, "why do nations obey international law, and why do they sometimes disobey

it?" This question has consumed my attention as both an academic and as an advocate. I began my career as a private and government lawyer, working primarily on questions of international business and trade law that have traditionally been viewed as "private international law." Starting about seven years ago, I shifted both my theoretical and academic focus toward questions of public international law and international human rights, particularly through domestic lawsuits that my students and I brought against both the United States and foreign governments on behalf of victims of human rights abuses.¹

In each of these legal lives, I have been struck by how this question—why do nations obey?—has undergone parallel, but rarely overlapping, inquiry by the sibling fields of international law and international relations, represented here by Professors Franck and Keohane. George Bernard Shaw once called Britain and America "two countries divided by a common language."² In the same way, international law and international relations have traditionally been two academic fields divided by a common subject: the study of international cooperation.³ In the great universities around the globe, these subjects transpire in different departments, taught by separate faculties, and attended by different students. Although these two fields cover much the same ground, over the last four decades they have evolved independently, pursuing different analytic missions, and reaching different normative conclusions about the influence of law in international affairs.

In their respective academies, Professors Keohane and Franck have led the way in forcing these sister disciplines into dialogue. Bob Keohane has led an entire generation of international relations scholars to consider anew the importance of international law in international affairs.⁴ At the same time, Tom

1. See generally Harold Hongju Koh, *The "Haiti Paradigm" in United States Human Rights Policy*, 103 YALE L.J. 2391, 2391-92 (1994) [hereinafter Koh, *The "Haiti Paradigm"*] (examining *Sale v. Haitian Centers Council*, 509 U.S. 155 (1993), and *Haitian Centers Council v. Sale*, 823 F. Supp. 1028 (E.D.N.Y. 1993), as a case study in "transnational public law litigation"); Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2358-75 (1991) [hereinafter Koh, *Transnational Litigation*] (describing the history of human rights litigation in U.S. courts and the strategy underlying many of these cases).

2. THE OXFORD DICTIONARY OF POLITICAL QUOTATIONS 337 (Anthony Jay ed., 1996).

3. See Robert O. Keohane, *International Relations and International Law: Two Optics*, 38 HARV. INT'L L.J. 487, 488 (noting how the realization that "rules structure politics" has led to a convergent research path among international lawyers and political scientists).

4. See generally ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* (1984) (discussing "international regimes" and their effect on foreign policy); Robert O. Keohane, *Compliance with In-*

Franck's 1990 book, *The Power of Legitimacy Among Nations*, forced international lawyers to address the fundamental question: "Why do powerful nations obey powerless rules?"⁵

In my own work, I have argued that "transnational legal process" provides a key to understanding why nations obey international law.⁶ By transnational legal process, I mean the process whereby an international law rule is interpreted through the interaction of transnational actors in a variety of law-declaring fora, then internalized into a nation's domestic legal system.⁷ Through this three-part process of *interaction*, *interpretation*, and *internalization*, international legal rules become integrated into national law and assume the status of internally binding domestic legal obligations.⁸ So if the question is "why do nations obey?," my short answer is: because of a transnational legal process of interaction, interpretation, and internalization. Instead of focusing exclusively on the issues of "horizontal jawboning" at the state-to-state level as traditional international legal process

International Commitments: Politics Within a Framework of Law, in THE AMERICAN SOCIETY OF INTERNATIONAL LAW: PROCEEDINGS OF THE 86TH ANNUAL MEETING 176, at 176-77 (1992) [hereinafter *Compliance with Commitments*] (explaining research that required the integration of the two disciplines and the differences between the two fields); Robert O. Keohane, *International Institutions: Two Approaches*, 32 INT'L STUD. Q. 379 (1988) (emphasizing the need to examine international institutions to understand the conditions under which international cooperation can take place); Keohane, *supra* note 3 (examining different perspectives on international law).

5. THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 3 (1990) [hereinafter FRANCK, LEGITIMACY] (examining the power rules exert on both weak and strong states); see also THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS (1995) [hereinafter FRANCK, FAIRNESS] (arguing that international rules which are "fair" are more legitimate). For a discussion of the contributions of both Professors Keohane and Franck to this interdisciplinary debate, see Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2625, 2642-45 (1997).

6. See Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 183-84 (1996) [hereinafter Koh, *Transnational Process*] (explaining "transnational legal process" and the distinctive features of this theory); see also Koh, *The "Haiti Paradigm"*, *supra* note 1, at 2405-09 (arguing that the transnational legal process forces compliance with international law through interaction between nations, forcing nations to obey through process of norm internalization); Harold Hongju Koh, *Refugees, the Courts and the New World Order*, 1994 UTAH L. REV. 999, 1014-18 [hereinafter Koh, *Refugees*] (explaining how transnational legal process drives international relations); Koh, *Transnational Litigation*, *supra* note 1, at 2398-402; Koh, *supra* note 5, at 2655-59 (providing examples of the transnational legal process at work and arguing that the theory can provide both an "explanation of why nations obey and a plan of strategic action for prodding nations to obey").

7. See Koh, *Refugees*, *supra* note 6, at 1014; Koh, *Transnational Process*, *supra* note 6, at 183-84.

8. See Koh, *Transnational Process*, *supra* note 6, at 203-05 (discussing the concepts of interaction and internalization and explaining, through examples, how interaction leads to internalization).

theories do,⁹ 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.¹⁰

Such a broad claim calls for substantial justification, which explains why this subject is the topic not only of this lecture, but of a larger book that is currently in progress. While awaiting trial, Oscar Wilde reportedly said, “One can live for years sometimes without living at all, and then all life comes crowding into one single hour.”¹¹ Having less than that time to present an argument that has taken me years to formulate, I can well understand Wilde’s anxiety. For simplicity’s sake, let me break my argument into three parts. First, what does it mean to ask “why do nations obey—as opposed to merely comply—with international law?” Second, how, precisely, do nations “internalize” or “domesticate” international law—what I will call in this lecture “bringing international law home”? And third, how does understanding this process of internalization help us to understand and promote national obedience to international norms?

II. WHAT DOES “OBEDIENCE” MEAN?

A. *From Coincidence to Obedience*

Let me begin with the *definitional* question: what does it mean for a nation to “obey” rules of international law or, for that matter, any kind of law? Let me distinguish among four kinds of relationships between stated norms and observed conduct, which for shorthand purposes I will call: coincidence, conformity, compliance, and obedience.

Suppose that after living all my life in the United States, I arrive in England on sabbatical and notice that both the law and the practice seem to be that everyone drives on the left-hand side of the road. One could imagine at least four possible relationships between the legal rule and the observed conduct.

The first is that no causal relationship exists: it is simply a massive *coincidence* that everyone appears to “follow” the same rule. Coincidence might explain, for example, why two or three

9. See, e.g., ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY* 1-3 (1995) (arguing that modern times have witnessed a move to horizontal regulation via various treaty regimes).

10. See Koh, *Transnational Process*, *supra* note 6, at 183-84 (explaining the transnational legal process perspective and its features).

11. *THE WIT AND HUMOR OF OSCAR WILDE* 70 (Alvin Redman ed., 1959).

consecutive cars driving off the ferry into England from France, where cars drive on the right side, might all choose to swerve to the left side of the road. But, coincidence cannot explain convincingly why millions of people disembarking should all choose to do the same.

This example suggests a second, alternative explanation: *conformity*. People might loosely conform their conduct to the left-hand drive rule when they find it convenient to do so, but feel little or no internal obligation—legal or moral—to follow the rule.

A third possibility is *compliance*, namely, that people are both aware of the rule *and* consciously accept its influence, but do so in order to gain specific rewards (e.g., insurance benefits) or to avoid specific punishments (e.g., traffic tickets).

The fourth possibility, *obedience*, occurs when a person or organization adopts rule-induced behavior because the party has *internalized* the norm and incorporated it into its own internal value system.

Notice that as we move down the scale from coincidence to conformity to compliance to obedience, three shifts occur. First, there is a shift from the external to the internal. We witness an increase in the degree of *norm-internalization*, or the actor's internal acceptance of the rule as a guide for behavior. As one moves from grudging, one-time acceptance to habitual obedience, the rule transforms from external sanction to internal imperative. We repeatedly observe this evolutionary process in everyday life—whenever we put on bicycle helmets, snap seat belts, recycle cans, or refrain from smoking. In each case, grudging compliance with an external rule gradually becomes habitual obedience. Over time, the norm becomes *internalized* into the regulated actor's value set.

A second shift is from the instrumental to the normative. As we move down the scale from coincidence to obedience, we see an increase in *normatively driven conduct*. When a car careening along the highway temporarily slows to sixty miles per hour to pass a parked police car, then speeds up again, we can conclude that the driver is complying, but not necessarily obeying. We think of compliance as a calculated, *instrumental* form of behavior that occurs in response to specific *external* factors, here to avoid the sanction of a ticket. But when we observe a driver routinely driving sixty miles per hour, without regard for the police, we can conclude that we are witnessing an *internalized normative form of behavior* deriving from norms of legitimacy, fairness, or obligation that have become integral to that person's value set.

A third shift is from the coercive to the constitutive. We intuitively understand that the best way to get people to worship,

to stop smoking, to start jogging, or to pay their taxes is not to coerce them, but to convince them to think of themselves as religious, non-smokers, joggers, or taxpayers. The most effective legal regulation thus aims to be *constitutive*, in the sense of seeking to shape and *transform personal identity*. As my colleague Bob Ellickson has noted, self-enforcement is widely recognized as both more effective and more efficient than third-party controls.¹² Thus, whether the slogan is “Just say no,” “Let’s recycle,” “Don’t be a litterbug,” or “Don’t drive drunk,” we intuitively recognize that an internalized system of self-enforcement is a better way to ensure widespread compliance with the law than such external sanctions as “three strikes and you’re out.”¹³ So, as we move down the scale of internalization and normativity toward greater obedience, we observe not just increasing social conformity with declared rules, but also the gradual *transformation and reconstitution* of a person’s identity from lawless to law-abiding.

Indeed, thinking in terms of obedience has significant policy implications for all legal regulators. For if our goal is more compliance with prescribed rules, our preferred regulatory strategy is not so much coerced compliance, as it is more *obedience*, or what may be thought of as *internalized compliance*. Twenty years ago, for example, virtually no American automobile drivers or passengers buckled their seat belt.¹⁴ Today, the majority of drivers

12. See ROBERT C. ELICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 132 (1991) (“A person who has ‘internalized’ a social norm is by definition committed to self-enforcement of a rule . . .”). Ellickson adds that “[w]hatever the origin of self-enforced moral rules, there is broad agreement that the overall system of social control must depend vitally on achieving cooperation through self-enforcement.” *Id.* at 126 n.8. See also Robert C. Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 CHI.-KENT L. REV. 23, 44 (1989) (arguing that a primary control system is “a *first-party* system of social control that would operate without external enforcers”). Social psychologists who study why individuals obey the law have reached the same conclusion. See, e.g., TOM R. TYLER, WHY PEOPLE OBEY THE LAW 178 (1990) (concluding, after extensive empirical research, that people comply with law not so much because they fear punishment but because they feel legal authorities are legitimate, moral, and fair). Tyler also suggests that urging authorities who seek to promote voluntary compliance with laws should apply “[a] normative perspective [which] leads to a focus on people’s internalized norms of justice and obligation” rather than “an instrumental perspective [which] regards compliance as a form of behavior occurring in response to external factors.” *Id.* at 4.

13. See TYLER, *supra* note 12, at 178 (arguing that if people believe a decision to be legitimate, moral, and fair, they will obey and that if authorities recognize these normative concerns, their rules and decisions will be accepted voluntarily). “Three strikes and you’re out” is a legal initiative which mandates life in prison for anyone convicted of three felonies. See Tom R. Tyler & Robert J. Boeckmann, *Three Strikes and You Are Out, But Why? The Psychology of Public Support for Punishing Rule Breakers*, 31 L. & SOC’Y REV. 237, 237-38 (1997).

14. See JERRY L. MASHAW & DAVID L. HARFST, THE STRUGGLE FOR AUTO SAFETY 112 (1990) (reporting that in the mid-1970s, somewhere between 10 and 20%

utilize seat belts.¹⁵ What compliance strategies did domestic regulators employ to bring about this result?

After evaluating the evidence, social scientists would probably conclude that American drivers began buckling their seat belts for a variety of reasons, ranging from external to internal, from the instrumental to normative, from the coercive to constitutive.¹⁶ Regulators enforced the new seat belt norm by combining at

of motorists used their seat belts).

15. See Arsa Q. Nomani, *How Aggressive Tactics are Getting Drivers to Buckle Up*, WALL. ST. J., Dec. 11, 1997, at B1 (reporting that 68% of drivers use seat belts).

16. In the domestic sphere, the issue of how individuals internalize norms and obey law has been a broad interdisciplinary enterprise that has occupied sociologists, psychologists, anthropologists, regulatory experts, and legal and moral philosophers. In recent years, the topic has attracted the attention of criminologists. See generally H. LAURENCE ROSS, *DETERRING THE DRINKING DRIVER: LEGAL POLICY AND SOCIAL CONTROL* (rev. & updated ed. 1984) (examining, in the context of drunken driving, how short-term threats can lead to internalization); MALCOLM K. SPARROW, *IMPOSING DUTIES: GOVERNMENT'S CHANGING APPROACH TO COMPLIANCE* (1994) (examining the purposes and methods government agencies use to encourage, or force, citizens to obey societal rules); Harold G. Grasmick & Donald E. Green, *Legal Punishment, Social Disapproval and Internalization as Inhibitors of Illegal Behavior*, 71 J. CRIM. L. & CRIMINOLOGY 325 (1980) (incorporating and examining all the statistical research concerning how the internalization of legal norms, the fear of informal sanctions from peers, and the fear of physical and material deprivation due to legally imposed sanctions act as a deterrent to disobedience). Students of corporate compliance have also written on the subject. See generally Marc I. Steinberg & John Fletcher, *Compliance Programs for Insider Trading*, 47 SMU L. REV. 1783 (1994) (noting the role of corporate compliance programs in mandating employee compliance with securities laws); Charles J. Walsh & Alissa Pyrich, *Corporate Compliance Programs as a Defense to Criminal Liability: Can a Corporation Save its Soul?*, 47 RUTGERS L. REV. 605 (1995) (examining the growing use of corporate compliance programs as a means of ensuring obedience to legal rules); Kevin B. Huff, Note, *The Role of Corporate Compliance Programs in Determining Corporate Criminal Liability: A Suggested Approach*, 96 COLUM. L. REV. 1252 (1996) (clarifying the role of corporate compliance programs on sentencing). Advocates of regulatory reform have considered the subject. See generally, IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* (1992) (arguing that a range of sanctions is necessary so as to incapacitate an irrational actor and deter a rational actor); MICHAEL BARKUN, *LAW WITHOUT SANCTIONS: ORDER IN PRIMITIVE SOCIETIES AND THE WORLD COMMUNITY* (1968) (observing that people are subject to a hierarchy of norms from the Constitution to the lowliest ordinance and these layers create some universally accepted norms). Psychologists have also discussed the issue. See generally STANLEY MILGRAM, *OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW* (1974) (urging the theory that obedience binds people to systems of authority and is often so deeply ingrained that it overrides ethics and sympathy); TYLER, *supra* note 12 (exploring why people either choose to obey or disobey law); Martha M. Eining & Anne L. Christensen, *A Psycho-Social Model of Software Piracy: The Development and Test of a Model*, in *ETHICAL ISSUES IN INFORMATION SYSTEMS* 182 (Roy Dejoie et al. eds., 1991) (examining, as a factor leading to software piracy, normative expectations that include the individual's internalized norms as well as other's opinions of the behavior); Tom R. Tyler, *Compliance with Intellectual Property Laws: A Psychological Perspective*, 29 N.Y.U. J. INT'L L. & POL. 219 (1997) (addressing the issue of obedience to law in the context of intellectual property law by focusing on empirical research based on interviews with consumers). An-

least four different compliance strategies. First and most obvious, *coercion*: state and local governments passed laws, which the police enforced by passing out tickets.¹⁷ A second approach focused less on sanctioning drivers than on engaging their *self-interest*: the government sought to encourage drivers to recalculate their self-interest, to view noncompliance as costly, and to encourage them to make a new internal calculation concluding that it was more rational to buckle their seat belts regularly.¹⁸ Third, the strategy drew upon *communitarian impulses* and what Tom Franck has called the “compliance pull” of particular rules.¹⁹ In the seat belt campaign, government authorities used communitarian

thropologists and philosophers have also considered internalization of norms. See generally SALLY FALK MOORE, *LAW AS PROCESS: AN ANTHROPOLOGICAL APPROACH* (1978) (attempting to explain law as a constantly changing process whereby “[t]he making of rules and social and symbolic order is a human industry matched only by the manipulation, circumvention, remaking, replacing and unmaking of rules and symbols in which people seem almost equally engaged”); FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* (1991) (examining different types of social rules and their general effect on behavior); Paul Harris, *The Moral Obligation to Obey the Law*, in *ON POLITICAL OBLIGATION* 151 (Paul Harris ed., 1990) (focusing on an individual’s moral obligation to obey the law); Roscoe E. Hill, *Legal Validity and Legal Obligation*, 80 *YALE L.J.* 47 (1970) (analyzing the debate between positivists and naturalists regarding an individual’s duty to obey a valid, versus unjust, law); M.B.E. Smith, *Is there a Prima Facie Obligation to Obey the Law?*, 82 *YALE L. J.* 950 (1973) (arguing that citizens have an obligation to follow some, but not all, laws). Finally, sociologists and law and society scholars have debated the issue. See generally Lauren B. Edelman et al., *Legal Ambiguity and the Politics of Compliance: Affirmative Action Officers’ Dilemma*, 13 *L. & POL’Y* 73 (1991) (arguing that an affirmative action officer’s legal interpretations can affect the organization’s compliance with the law); Robert S. Gerstein, *The Practice of Fidelity to Law*, 4 *L. & SOC’Y REV.* 479 (1970) (observing that self-regulation is fundamental to a properly ordered society); Harold G. Grasmick & Robert J. Bursik, Jr., *Conscience, Significant Others, and Rational Choice: Extending the Deterrence Model*, 24 *L. & SOC’Y REV.* 837 (1990) (contending that evaluation of deterrence theory and threat of punishment provides a unique perspective on norm-internalization); Robert F. Meier & Weldon T. Johnson, *Deterrence as Social Control: The Legal and Extralegal Production of Conformity*, 42 *AM. SOC. REV.* 292 (1977) (proposing a construct of deterrence theory in which legal threats constitute one control method out of many in the social context); Raymond Paternoster et al., *Perceived Risk and Social Control: Do Sanctions Really Deter?*, 17 *L. & SOC’Y REV.* 457 (1983) (analyzing prior deterrence statistics in an effort to determine whether legal threats have an effect on social control); John T. Scholz, *Voluntary Compliance and Regulatory Enforcement*, 6 *L. & POL’Y* 385 (1984) (outlining a theory of cooperation, rather than confrontation, as a means of internalizing norms); Richard D. Schwartz & Sonya Orleans, *On Legal Sanctions*, 34 *U. CHI. L. REV.* 274 (1967) (examining sanctions as a means of enforcing legal obligations from a social scientist’s point of view).

17. See Nomani, *supra* note 15, at B1 (relating the story of a North Carolina trooper who distributed 1,000 seat belt tickets in a year).

18. See *id.* (indicating that enforcement combined with education and stigmatization of offenders is the most effective way to alter driver incentives).

19. See FRANCK, *LEGITIMACY*, *supra* note 5, at 49 (identifying different properties of rules that can determine the strength of the rule’s pull on nations to comply).

messages that urged drivers to buckle up in the public interest and appealed to their community values through slogans like "Seat Belts Save Lives."²⁰ Citizens who viewed the seat belt law as legitimate and themselves as law-abiding, felt an internal pull toward compliance with the new law based on both the perceived legitimacy of the rule and their own sense of self-identity.²¹

Fourth and finally, the enforcement strategy rested on *norm-internalization* through *legal process*. Activist groups lobbied for legislation that politically internalized the seat belt rule;²² lawsuits were brought that promoted judicial internalization of the rule;²³ and auto safety standards were developed by agency regulators at the federal, state, and local levels.²⁴ Through a series of *interactions* among an array of governmental and nongovernmental actors, the seat belt rule was *interpreted* and embedded into a web of formal and informal legal rules and institutions.²⁵ For example, over time the seat belt law was incorporated into federal and state auto safety codes,²⁶ state auto license and registration renewals,²⁷ private insurance contracts and premium rates,²⁸ and the like. These rules shifted the path of least resistance, and dramatically raised the costs of not buckling one's seat belt. This change in costs made it far easier for individuals to buckle their seat belts than not. For many, buckling one's seat belt became a new default rule (like wearing bicycle

20. Manhattan taxicab riders, for example, have long tired of hearing such taped exhortations from the likes of such prominent New Yorkers as Joan Rivers, Eartha Kitt, N.Y. Yankee manager Joe Torre and Dr. Ruth Westheimer. See Tony Kushner, *The Art Community Remains Complacent Even as Barbarians Approach*, L.A. TIMES, Oct. 19, 1997, at M1.

21. Cf. TYLER, *supra* note 12, at 178 (concluding that people obey laws because they generally believe it is proper to do so, especially when they perceive the law to be legitimate).

22. See Betsy Wade, *Safer Riding for Children*, N.Y. TIMES, May 10, 1998, § 5, at 4 (detailing efforts to make seat belt use mandatory and efforts to strengthen enforcement).

23. See, e.g., John R. Emshwiller, *Car Makers Face Lawsuits Alleging Rear Seat Belts Aren't Safe Enough*, WALL ST. J., Jan. 6, 1988, § 2, at 1 (reporting on rear-seat, lap belt litigation).

24. See generally MASHAW & HARFST, *supra* note 14 (chronicling the history of auto safety regulation in the United States).

25. See *id.* at 206-14 (describing mandatory seat belt use laws and detailing how automobile airbags evolved from being despised devices to ones that many consumers require before purchasing a new car).

26. See, e.g., 23 U.S.C.S. § 402 (Law. Co-op. 1995); FLA. STAT. ANN. § 316.614 (WEST 1990 & SUPP. 1998); N.Y. VEH. & TRAF. LAW § 1229-c (McKinney 1996); TEX. TRANSP. CODE ANN. § 545.413 (Vernon 1998).

27. See, e.g., 625 ILL. COMP. STAT ANN. 5/6-107 (Michie 1998) (conditioning "graduated" drivers' licenses, issued to those under 18, on the use of seat belts).

28. See, e.g., MASS. GE. LAWS ANN. Ch. 175, § 113B (West Supp. 1998) (providing for insurance premium reductions for the use of restraint devices); PA. STAT. ANN. Tit. 75 § 1799 (West 1996) (same).

helmets, using child safety seats, or wearing sunscreen) which they came, by habit, to *internalize*.²⁹ As the norm has passed on to succeeding generations that know no other way of life, it has become broadly “socialized.”³⁰ In short, the seat belt rule came to be enforced through a complex process that wove together compliance strategies based on coercion, self-interest, communitarian appeals, the perceived legitimacy of the rule, and the internalization of that rule through legal process, political action, and socialization.

B. *The Relevance to International Law*

What relevance does this analysis have to national obedience of international law? Virtually all nations of the world routinely abide by legal rules such as the twelve-mile territorial limit,³¹ diplomatic and consular immunity,³² enforcement of transborder letters of credit,³³ and the like. In Professor Henkin’s famous phrase, “almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.”³⁴ But if this is so, *why* do they obey? I would argue that particular instances of national compliance with international law can be explained as a complex combination of the same five

29. See Nomani, *supra* note 15, at B1 (indicating that the national average for seat belt use has risen to 68% and many states are well ahead of this mark).

30. See, e.g., Pat Clawson, *Police Rewards Suit Students to a T*, CHI. TRIB., April 8, 1998, § 2, at 3 (quoting a high school student as saying seat belts are “cool” and announcing: “I feel like I’m lost without wearing a seat belt. It’s habit. I’ve worn it forever and a day.”).

31. See *Draft Final Act of the Third United Nations Conference on the Law of the Sea*, Third U.N. Conference on the Law of the Sea, U.N. Doc. A/CONF.62/121 (1982), reprinted in 21 I.L.M. 1245, 1272 (1982) (agreeing that every state may establish a territorial sea limit not to exceed twelve nautical miles). This draft was approved on December 10, 1982. See *id.* at 1245. However, the United States chose not to sign the agreement. See CLYDE SANGER, ORDERING THE OCEANS: THE MAKING OF THE LAW OF THE SEA 4 (1987) (indicating that the Reagan Administration objected to a provision regarding seabed mining and refused to sign); see also SAYRE A. SWARZTRAUER, THE THREE MILE LIMIT OF TERRITORIAL SEAS 251 (1972).

32. See generally Vienna Convention on Consular Relations, done Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261. As of December 31, 1995, 157 countries have ratified this convention. See MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL: STATUS AS OF 31 DECEMBER 1995, at 71, U.N. Doc. ST/LEG/SER.E/14, U.N. Sales No. E.96.V.5 (1996) [hereinafter MULTILATERAL TREATIES].

33. See Harold J. Berman, *World Law*, 18 FORDHAM INT’L L.J. 1617, 1620 (1995) (explaining that letter-of-credit transactions are “subject to the same rules as those that govern [those] transactions throughout the world”).

34. LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 47 (2d ed. 1979) (emphasis omitted). For essays discussing this phenomenon, see, for example, INTERNATIONAL COMPLIANCE WITH NONBINDING ACCORDS (Edith Brown Weiss ed., 1997).

factors present in the seat belt example: coercion, self-interest, rule-legitimacy, communitarianism, and internalization of rules through socialization, political action, and legal process. Recently, in the *Yale Law Journal*, I argued that these factors roughly correspond to five historical strands of theoretical thinking applied by international lawyers and international relations theorists seeking to explain national compliance with international law.³⁵

The first school of thought, the “*realist*” strand, suggests that nations never truly *obey* international law, but only conform their conduct to it when sufficiently coerced.³⁶ Iraq, for example, “obeyed” international law when it withdrew from Kuwait³⁷ and when it recently permitted United Nations weapons inspections.³⁸ But in both cases, Iraq plainly acted in response to external sanctions, not internal compulsion.³⁹ The second strand, *rationalism*—of which Bob Keohane has been a prominent pioneer⁴⁰—acknowledges that nations follow international law when it serves their self-interest to do so and sees such rationality as becoming embedded into institutions and regimes, such as the World Trade Organization or the international debt regime.⁴¹ Third, a *liberal*

35. See generally Koh, *supra* note 5, at 2608-13.

36. See, e.g., CHRIS BROWN, UNDERSTANDING INTERNATIONAL RELATIONS 97-98 (1997). One aspect of the realist accounts of international relations is that states pursue their interests by attempting to exercise power in the world, by means of threats and offer of rewards. See *id.* Coercion is a part of the repertoire of positive and negative sanctions at the disposal of states in their conduct of foreign affairs. See *id.* Because of this, realists believe, “insecurity and fear are permanent features of international relations.” *Id.*

37. See generally Paul W. Kahn, *Lessons for International Law from the Gulf War*, 45 STAN. L. REV. 425 (1993) (noting the difficulties inherent in using military force to expel the Iraqis from Kuwait).

38. See Robert S. Greenberger et al., *Clinton Says Iraq Agreed to U.N. Terms*, WALL ST. J., Feb. 24, 1998, at A3 (explaining that Iraq agreed to “a broad, unconditional commitment to permit the inspection [of weapons]”). At this writing, the United Nations has declined to press for several inspections and Iraq has therefore not allowed them. See Barton Gellman, *Inspector Quits U.N. Team, Says Council Bowing to Defiant Iraq*, WASH. POST, Aug. 27, 1998, at A1 (explaining that a leader of the U.N. special disarmament panel resigned due to the lack of U.N. and U.S. to Iraq’s decision to halt inspections).

39. See L. Kirk Wolcott, *Seeking Effective Sanctions*, 11 EMORY INT’L L. REV. 351, 358 (1997) (noting that the United States has passed over 25 resolutions to force Iraq to comply with several international norms); Greenberger, *supra* note 38, at A3 (indicating that Iraq agreed to weapons inspections because of “the ‘tough’ U.S. threat of force”).

40. By so saying, I hardly mean to pigeonhole Professor Keohane’s contributions as limited to rationalism. To the contrary, as the acknowledged leader of the neoliberal institutional school of international relations, Professor Keohane has contributed a broad array of what he himself has termed “rationalistic” and “reflectivist,” “instrumentalist” and “normative” insights into the compliance debate. Refer to notes 3-4 *supra* (providing relevant references to Professor Keohane’s scholarship).

41. See Anne-Marie Slaughter Burley, *International Law and International Re-*

Kantian strand—of which Tom Franck is a leading proponent⁴²—assumes that nations obey international law, guided by a sense of moral obligation derived from considerations of fairness, democracy, and legitimacy that are embedded in their “liberal,” domestic legal structures.⁴³ Fourth, a *communitarian* Grotian strand—most often identified with the work of such British international relations theorists as Hedley Bull and Martin Wight—has identified, as a key causal factor, the commonality of values within “international society:” a *community that constructs* national interests and identities.⁴⁴ Fifth and finally, the legal process strand derives a nation’s incentive to obey from the encouragement and prodding of other nations with which it is engaged in a discursive legal process.⁴⁵ The traditional focus of international legal process theorists, of whom Harvard’s Abram Chayes and Antonia Chayes are the leading exemplars, has been on the *horizontal* legal process that occurs among nation-states while interacting within treaty regimes that operate on a global plane.⁴⁶

None of these theories has the monopoly on wisdom. Each theory has significant explanatory power, but together they operate like the fable of the blind men and the elephant—each theory gets a piece of the puzzle right, but none alone accurately captures the entire picture. In tracing the move from external coercion to internalized obedience, I believe a key overlooked factor has been a *nation’s repeated participation in the transnational legal process*. Transnational process theories extend beyond the horizontal focus of traditional process theories to study the

lations Theory: A Dual Agenda, 87 AM. J. INT’L L. 205, 218-19 (1993) (explaining rationalism and Professor Keohane’s role in developing a “functional” theory of regimes that explains their pervasiveness and persistence in international politics as a result of rational calculations by participating states”).

42. See, e.g., FRANCK, FAIRNESS, *supra* note 5, at 28 (1995) (discussing Kantian contributions to contractarian theory and the application of this theory to help explain the relations between states); FRANCK, LEGITIMACY, *supra* note 5, at 213 (noting the Kantian observation that individual wills exist together according to mutually recognized coherent principles).

43. See Thomas M. Franck, *Community Based on Autonomy*, 36 COLUM. J. TRANSNAT’L L. 41, 41 (1997) (explaining the Kantian concept of community as “organizing and conditioning the identity, loyalty, and industry of free and equal citizens around notions of ‘republican’ governance” (citations omitted)).

44. See generally Benedict Kingsbury, *A Grotian Tradition of Theory and Practice?: Grotius, Law, and Moral Skepticism in the Thought of Hedley Bull*, 17 Q.L.R. 3, 24 (1997) (explaining Grotian theory as “basing international law on some conception of right or on the solidarity or consensus of international society”).

45. See Koh, *supra* note 5, at 2611.

46. See generally CHAYES & CHAYES, *supra* note 9 (analyzing the treaty making process and a nation’s actions in that process).

vertical process of interaction and interpretation whereby international norms become domesticated and internalized into domestic law.⁴⁷

Take, for example, the case of the United States adoption of the twelve-mile limit on the territorial sea.⁴⁸ From the seventeenth century onward, nations generally recognized a territorial sea extending three miles from a nation's coast, a distance first chosen, quaintly enough, based upon the distance that a cannonball could fly from shore.⁴⁹ The modern three-mile limit emerged in 1793, when, acting out of an apparent combination of coercion and self-interest, the United States adopted the rule for purposes of maintaining neutrality between England and France.⁵⁰ By

47. Let me make clear that by arguing that transnational legal process fosters the interaction, interpretation and internalization of international legal norms into domestic law, I am claiming only that process is a key overlooked determinant—not the only determinant—of state conduct. Thus, most theoretical analyses of the compliance question, I would argue, have been looking for law at only one level. Theorists have sought explanations for compliance primarily at the level of systemic, “horizontal” interaction among nation-states on the global plane. But by so doing, they have too often overlooked the simultaneous “vertical” process of institutional interaction, whereby global norms are debated, interpreted, and ultimately internalized into domestic legal systems. Even those theorists who have focused upon the interpenetration of international and domestic politics have tended to overlook the interpenetration of international and domestic legal systems, the two-level *legal game*, if you will. See, e.g., Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427, 427 (1988) (focusing on domestic politics and international relations interrelationship but not interchange between domestic and international legal systems); see also DOUBLE-EDGED DIPLOMACY: INTERNATIONAL BARGAINING AND DOMESTIC POLITICS (Peter B. Evans et al. eds., 1993).

48. Refer to note 31 *supra* (discussing the twelve-mile limit and noting the United States previous refusal to adopt the limit). The United States adopted this limit in December 1988. See Proclamation No. 5928, 3 C.F.R. 547 (1988), *reprinted in* 43 U.S.C. § 1331 (1989).

49. The so-called “cannon-shot rule,” first noted in a Dutch document of 1610, defined the jurisdiction of a state's territorial sea as extending to the furthest reach of a cannon shot. See Robert Jay Wilder, *The Three-Mile Territorial Sea: Its Origins and Implications for Contemporary Offshore Federalism*, 32 VA. J. INT'L L. 681, 699-700 (1992) (noting that the cannon-shot rule alone did not give rise to the three-mile limit, but rather it was merely one of several jurisdictional rules that helped create the rule). The rule was apparently designed to prevent warlike interactions between shore-based cannons and offshore ships. See *id.* at 700.

50. Then-Secretary of State Thomas Jefferson invoked the limit in diplomatic notes to England and France in furtherance of America's Proclamation of Neutrality. See THE EXTENT OF THE MARGINAL SEA 636 (Henry G. Crocker ed., 1919). Jefferson's letter to the British Minister stated:

[T]he President gives instructions to the officers acting under his authority to consider those heretofore given them as restrained for the present to the distance of *one sea league*, or *three geographical miles*, from the seashores. This distance can admit of no opposition, as it is recognized by treaties between some of the powers with whom we are connected in commerce and navigation and is as little, or less, than is claimed by any of them on their own coasts. . . .

statute passed in 1794, the fledgling United States became the first nation to internalize the three-mile limit as domestic law by legislation.⁵¹ Great Britain, the supreme naval power of the time, came to see the rule as promoting its interests by allowing the narrowest feasible territorial sea, consistent with a general openness of the seas. Germany and Japan, the other major maritime powers, also came to accept this conclusion.⁵² Even nations who had initially resisted the three-mile limit gradually came to accept it for certain purposes.⁵³ Possibly before, and certainly by, 1945, the three-mile rule had acquired such broad communal legitimacy that some seventy-seven percent of the total number of coastal or island nations in the world openly claimed a three-mile territorial limit.⁵⁴

Following World War II, the three-mile rule began to lose international adherents.⁵⁵ Numerous factors contributed to the growing community sentiment that the three-mile limit was proving overly narrow: including increased foreign exploitation of fishery resources off Latin America and other regions,⁵⁶ the U.S. unilateral claim in 1945 to jurisdiction over the natural resources of its continental shelf,⁵⁷ and the efforts of a host of newly emerging

Id. (ellipse in original).

The Jefferson notes sought to create a zone of neutrality against French and British privateers, and, at the same time, to mandate "the narrowest feasible breadth so as to not engender opposition" from those nations. Wilder, *supra* note 49, at 709; see also SWARZTRAUBER, *supra* note 31, at 57-58.

51. See Act of June 5, 1794, ch. 50, 1 Stat. 381 (1794) (prohibiting "captures made within the waters of the United States, or within a marine league of the coasts or shores thereof." (e.g., three geographical miles)).

52. See SWARZTRAUBER, *supra* note 31, at 73, 76.

53. Italy, Spain, and Russia, for example, all ratified the Suez Canal Convention of 1888, which provided for free passage through the Canal and within three nautical miles of canal ports. SWARZTRAUBER, *supra* note 31, at 86.

54. See Wilder, *supra* note 49, at 685. In 1864, the United States Ambassador to France opined that "no other rule than the three-mile rule was known or recognized as a principle of international law." J.R.V. PRESCOTT, *THE POLITICAL GEOGRAPHY OF THE OCEANS* 42 (1975); see also SWARZTRAUBER, *supra* note 31, at 130 ("If domestic legislation, international instruments, court decisions, and the writings of publicists are a fair measure, then by 1926, the three-mile limit was in every sense a rule of international law.").

55. See SWARZTRAUBER, *supra* note 31, at 152-70 (exploring how events such as the discovery of oil on the continental shelf led to a desire to scrap the three-mile rule).

56. See *id.* at 169 (explaining that Latin Americans had become concerned about the possibility of overfishing by U.S. fishing vessels which could be spotted off of Latin American shores).

57. See *id.* at 160-61 (quoting the proclamation the U.S. executive branch issued in an attempt to secure for the United States the natural resources of the sub-soil or seabed of the U.S. continental shelf).

nations to extend their own territorial claims seaward.⁵⁸ However, two United Nations Conferences, held in 1958 and 1960, failed to reach international agreement on the delimitation of the territorial sea, severely undercutting the communal legitimacy of the three-mile rule.⁵⁹

In the early 1970s, the Third United Nations Convention on the Law of the Sea ("UNCLOS III") reopened the question of a universally agreeable territorial limit.⁶⁰ Although a broader territorial sea began to develop wide support,⁶¹ for self-interested reasons American negotiators continued to favor the narrower three-mile limit, which provided the U. S. Navy and American mercantile fleet with the greatest freedom of navigation.⁶² UNCLOS III explicitly allowed claims up to twelve miles,⁶³ but the United States refused to sign the agreement, objecting to its deep seabed mining provisions as "contrary to the interests and principles of industrialized nations."⁶⁴

However, UNCLOS III had created a new forum within which global norms of sea law could be debated and interpreted by nation-states.⁶⁵ The United States found that remaining outside this evolving legal process carried considerable disadvantages.⁶⁶ Although the United States continued to adhere to a three-mile sea, the rule provided the Soviet Union with a new strategic advantage—Soviet spy ships could venture as close as three miles off U.S. shores, while U.S. spy ships were forced to remain outside the Soviet twelve-mile territorial sea.⁶⁷ At the same time, other nations continued to *interact* at the UNCLOS III

58. See *id.* at 164 (noting that five Latin American countries declared exclusive fishing rights to 200-mile zones off of their respective shores).

59. See *id.* at 228.

60. For historical background on UNCLOS III, see generally ROBERT L. FRIEDHEIM, *NEGOTIATING THE NEW OCEAN REGIME* 27-40 (1993) (analyzing the time period leading up to UNCLOS III); SANGER, *supra* note 31, at 1-9 (identifying the problems which prompted a need for a uniform territorial boundary).

61. By 1979, 76 nations, or 58% of all coastal nations were claiming a twelve-mile sea. Wilder, *supra* note 49, at 687.

62. See Rear Admiral W. L. William Schachte, Jr., *The History of the Territorial Sea from a National Security Perspective*, 1 *TERRITORIAL SEA J.* 143, 160 (1990) (discussing navigation advantages enjoyed under the three-mile limit).

63. Refer to note 31 *supra*.

64. President's Statement on United States Oceans Policy, 1983 *PUB. PAPERS* 378, 378 (Mar. 10, 1983); see also SANGER, *supra* note 31, at 4.

65. See FRIEDHEIM, *supra* note 60, at 343 (explaining the process and politicking of the convention).

66. See CHAYES & CHAYES, *supra* note 9, at 230 (observing that "in the last analysis, the ability of a state to remain a participant in the international policy-making process . . . depends in some degree on its demonstrated willingness to accept and engage the regime's compliance procedures").

67. See Schachte, *supra* note 62, at 166 (observing that foreign intelligence ships were a fixture three miles off major naval ports).

Conference and reached broad consensus on another *interpretation* of international law, confirming as customary the universal right of transit through international straits.⁶⁸ This interpretation removed one of the United States major objections to territorial sea claims in excess of three miles: the fear that broader territorial zones would serve to impede passage by American ships through narrow straits.⁶⁹ Moreover, UNCLOS III provided a forum in which more than one hundred nation-states would eventually make formal claims of a territorial sea in excess of three nautical miles.⁷⁰

In March 1983, President Reagan announced that the United States would respect the claims of coastal states made in conformity with international law as reflected in UNCLOS III.⁷¹ The customary norms in UNCLOS III were soon internalized into the U.S. Navy's standard operating procedures.⁷² By the end of 1988, 106 nations, or seventy-five percent of all nations, formally adhered to the twelve-mile limit.⁷³ While the U.S. government granted deference to those claims, it did not formally adopt the new rule itself.⁷⁴ United States naval officials then requested that the Joint Chiefs of Staff assess a proposal to extend the U.S. territorial sea to twelve miles.⁷⁵ The U.S. military establishment as a whole agreed that the extension to twelve miles would now

68. See *id.* at 162-63 (stating that the UNCLOS III removed any doubt that transit passage through, over, and under international straits is a rule of international law).

69. See *id.* at 163-64 (noting that "[t]he U.S. Air Force Operations Staff has estimated . . . that U.S. military aircraft overfly an average of one international strait less than twenty-four miles wide on a daily basis").

70. See *id.* at 164 & n.102 (noting that the Convention's unprecedented role in shaping the behavior of states constituted a primary and novel impact on the law of the sea).

71. See President's Statement on United States Oceans Policy, 1983 PUB. PAPERS 378, 378 (Mar. 10, 1983) (stating that the Convention contained "provisions with respect to the traditional uses of the oceans which generally confirm existing maritime law and practice and fairly balance the interest of all states").

72. See Commander John Astley III & Lieutenant Colonel Michael N. Schmitt, *The Law of the Sea and Naval Operations*, 42 AIR FORCE L. REV. 119, 121 (1997) (observing that "[a]lthough the Senate has failed to provide its advice and consent [of the treaty], the [UNC]LOS Convention is the primary de facto 'source' of law for maritime operations"); THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS 1.1 (1989) ("Although not signed by the United States and not yet in formal effect, the provisions of the 1982 [UNC]LOS Convention relating to navigation and overflight codified existing law and practice and are considered by the United States to reflect customary international law.")

73. See Schachte, *supra* note 62, at 164 (discussing the post-1982 U.S. sea policy).

74. See *id.*

75. See *id.* at 165 (documenting the navy's involvement in the executive branch debate on the expansion of the U.S. territorial sea in the 1980s).

serve the national interest, and the Secretary of Defense agreed.⁷⁶ At the Defense Department's request, the State Department convened a meeting of the Interagency Group on Ocean Policy and the Law of the Sea to consider the Defense Department's recommendation to extend the territorial sea by presidential proclamation.⁷⁷ At the State Department's request, the Assistant Attorney General for the Office of Legal Counsel released an opinion stating the President had legal authority to issue a proclamation extending the territorial sea from three to twelve miles.⁷⁸ Based upon these internal recommendations, in December 1988, President Reagan finally issued Presidential Proclamation 5928, which extended the U.S. territorial sea from three to twelve miles in breadth, and internalized the new international rule through *executive branch action*.⁷⁹ The executive branch has since followed the new rule as if it were internal law, and the rule has become the basis for binding, internal Coast Guard standard operating procedures.⁸⁰

As of February 1998, 123 nations have adopted the twelve-mile limit through UNCLOS III, with the United States still the Convention's leading nonsignatory.⁸¹ But in a major policy turnaround, the U.S. Defense Department, led by the Navy, has begun aggressively pushing for Senate ratification of UNCLOS III.⁸²

76. *See id.*

77. *See id.*

78. *See generally* Douglas W. Kmiec, *Legal Issues Raised by the Proposed Presidential Proclamation to Extend the Territorial Sea*, 1 TERRITORIAL SEA J. 1 (1990) (documenting the opinion of the Office of Legal Counsel regarding the proposed presidential proclamation which considered both constitutional and statutory issues).

79. *See* Proclamation No. 5928, 3 C.F.R. 547 (1988), *reprinted in* 43 U.S.C. § 1331 (1994) (asserting that the U.S. territorial sea is "a maritime zone extending beyond the land territory and internal waters" over which the United States has sovereignty and jurisdiction). Although the Administration purported to claim the limit for international purposes only, it has also been widely viewed as affecting that change for other parts of domestic law.

80. For example, in May 1992, the United States adopted a policy of interdicting fleeing Haitians on the high seas and summarily repatriating them to Haiti, while bringing into the United States for exclusion proceedings those Haitians who had "entered" U.S. territorial waters. *See* Harold Hongju Koh, *Protecting the Office of Legal Counsel from Itself*, 15 CARDOZO L. REV. 513, 517 (1993) (noting the U.S. policy established by President Bush). In November 1992, the U.S. Coast Guard interdicted a boat containing fleeing Haitian refugees 10 miles off the coast of Florida, and began making plans to repatriate the occupants. When the 1988 opinion of the Justice Department's Office of Legal Counsel was drawn to the attention of Deputy Associate Attorney General, the Coast Guard brought the boat into shore, rather than repatriating the occupants. *See id.* at 517-18.

81. *See* Robert Holzer, *U.S. Navy Blesses Law of the Sea Treaty*, DEF. NEWS, Feb. 16-22, 1998, at 4 (indicating that the United States will be left out of a leadership role in the convention until the treaty is ratified).

82. *See id.* (quoting Walter Slocombe, Undersecretary of Defense for Policy,

The ratification movement has found champions among such “governmental norm entrepreneurs”⁸³ as the Chair of the Joint Chiefs of Staff⁸⁴ and the Secretary of State.⁸⁵ Less than two decades after the United States first declined to ratify UNCLOS III, formal ratification and legislative internalization of the Convention’s norms now seems nearly assured.⁸⁶

The UNCLOS III example demonstrates that a nation’s repeated participation in *transnational legal process* is internalizing, normative, and constitutive-of-identity. In the same way as domestic legal process fostered internalization of the seat belt law in individuals, transnational legal process has fostered internalization of a new norm regarding the twelve-mile territorial sea within the United States. The twelve-mile limit episode demonstrates that legal transactions within the context of international regimes are, in the late Robert Cover’s term, “jurisgenerative,” or law-creating.⁸⁷ If nations regularly participate in transnational legal interactions in a particular issue area, even

stating that “[t]he convention is of tremendous importance to the United States, especially from a defense and security point of view”). U.S. military officials have now apparently concluded that the U.S. failure to ratify the Law of the Sea Treaty impinges on U.S. naval operations by barring American officials from full participation in deliberations over worldwide ocean policies, fishery management issues and sea transit talks. *See id.* (reporting one Navy source as stating that the United States is “rapidly becoming very isolated in talks and that is what worries me”).

83. Refer to Part III.B.2 *infra* for a discussion of the role that governmental norm sponsors play in the transnational legal process.

84. *See* Testimony of Henry H. Shelton, Chair, Joint Chiefs of Staff, before the 105th Cong. (Feb. 5, 1998), *available in* 1998 WL 47043 (“The treaty . . . provides the assurance that key sea and air lines of communication will remain open as a matter of international legal right, which is necessary for the mobility of today’s down-sized, less forward-deployed force. I encourage the Senate to approve the treaty expeditiously.”).

85. *See* Testimony of Madeleine K. Albright, Secretary of State, before the 105th Cong. (Feb. 12, 1998), *reprinted in* 1998 WL 58218 (urging ratification of the LOS Treaty).

86. The recent plea for formal ratification by the U.S. Defense and State Department officials Henry H. Shelton and Madeleine K. Albright may encourage legislative action in the near future. Refer to notes 84-85 *supra*. *But see* Holzer, *supra*, note 81, at 42 (expressing doubt that the treaty will be ratified this year despite its importance to U.S. operations).

87. *See* Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 40 (1983) (describing the “jurisgenerative process” as one in which real interpretive “communities do create law and do give meaning to law through their narratives and precepts . . .”); *see also* Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1602 n.2 (1986) (arguing that legal interpretation or “the creation of legal meaning is an essentially cultural activity which takes place (or *best* takes place) among small-ish groups”); *cf.* Albert S. Yee, *The Causal Effects of Ideas on Policies*, 50 INT’L ORG. 69, 94-101 (1996) (making the similar point that cultural perception is nothing more than a response to intersubjective meanings of language among members of a community).

resisting nations cannot insulate themselves forever from complying with the particular rules of international law that govern that area. Thus, repeated transactions among nations within the law of the sea regime generated interpretations of a legal rule that affected future interactions, not just among the parties to the UNCLOS III, but also interactions with nonparties, such as the United States. Repeated participation in the transnational legal process is thus a *constructivist* activity, which helps to reconstruct the national interests of the participating nations.⁸⁸

In short, if the goal is to create greater *obedience* to international norms, then the challenge is to bring international law home. But how, precisely, is this done? How does the process of internalization work, and who are its agents?

III. HOW "INTERNALIZATION" WORKS

A. *Forms of Internalization*

In earlier work, I have sought to distinguish among three forms of internalization: social, political, and legal.⁸⁹

- *Social internalization* occurs when a norm acquires so much public legitimacy that there is widespread general adherence to it.
- *Political internalization* occurs when the political elites accept an international norm and advocate its adoption as a matter of government policy.
- *Legal internalization* occurs when an international norm is incorporated into the domestic legal system and becomes domestic law through executive action, legislative action, judicial interpretation, or some combination of the three.

Virtually all legal systems identify one or more mechanisms through which executive, legislative, and judicial institutions

88. In the same way, constructivist international relations scholar Audie Klotz has recently demonstrated how transnational norms and anti-apartheid activists used transnational process—without significant material resources—to reconstitute U.S. interests and generate great-power sanctions against South Africa in the mid 1980s. See, e.g., AUDIE KLOTZ, NORMS IN INTERNATIONAL RELATIONS: THE STRUGGLE AGAINST APARTHEID 93-94 (1997) (noting the importance of norms, independent of strategic and economic considerations, in policy determinations); Audie Klotz, *Norms Reconstituting Interests: Global Racial Equality and U.S. Sanctions Against South Africa*, 49 INT'L ORG. 451, 451-53 (1995) (adding that state interest formation should be thought of as a global, rather than an insulated domestic process).

89. See, e.g., Koh, *supra* note 5, at 2656-57 (analyzing strategies for internalization of international human rights norms).

may domesticate international norms.⁹⁰ Thus, the twelve-mile limit case exemplified the incorporation of a norm into U.S. law and policy, largely through the *executive action* of the President and his agencies.⁹¹ *Legislative internalization*, by contrast, occurs when international law norms become embedded into binding domestic legislation or even constitutional law that officials of a noncomplying government must obey as part of the domestic legal fabric. Finally, *judicial internalization* occurs when litigation in domestic courts provokes judicial incorporation of international law norms into domestic law, statutes, or constitutional norms.⁹²

The precise sequencing among political, legal, and social internalization, and among the different forms of legal internalization, will vary from case to case. Sometimes an international norm is socially internalized long before it is politically or legally internalized.⁹³ In other cases, *legal* norm-internalization, prompted by a transnational legal process of interaction and internalization, helps to trigger the processes of political and social internalization of global norms. By domesticating international rules, transnational legal process can spur internal acceptance even of previously taboo political principles.

90. Some legal systems establish their receptivity to internalization of international norms through constitutional law rules that determine whether treaties are self-executing and whether rules of customary international law are incorporated into domestic law. For example, the national constitutions of Ireland, the Netherlands, and Italy refer to the recognition of international legal principles as a broad policy goal, thereby requiring policymakers to take account of foreign policy guidelines deriving from international law. *See* IR. CONST. art. 29, § 3, *reprinted in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 55 (Albert P. Blaustein & Gilbert H. Flanz eds., 1990) ("Ireland accepts the generally recognized principles of international law as its rule of conduct in its relations with other States."); GRONDWET [Const. of the Kingdom] (Grw. Ned.) art. 90 (Netherlands), *reprinted in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra*, at 26 ("The Government shall promote the development of the international rule of law."); COST. [Constitution] art. 10 (Italy), *reprinted in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra*, at 49 ("Italy's legal system conforms with the generally recognized principles of international law.").

91. Refer to notes 71-86 *supra* and accompanying text (discussing the President's role in incorporating international coastal norms into U.S. law and policy).

92. For a cross-cultural study of how judicial enforcement of human rights norms is accomplished in a range of countries, see generally ENFORCING INTERNATIONAL HUMAN RIGHTS IN DOMESTIC COURTS (Benedetto Conforti & Francesco Francioni eds., 1997).

93. For example, the United States was the moving force behind the drafting and signing of the Genocide Convention in 1948, but the U.S. Senate did not formally ratify the Convention and implement it as U.S. domestic law until November 1988, long after the norm against genocide had acquired widespread social legitimacy inside the United States. *See* Genocide Convention Implementation Act of 1987, 18 U.S.C. § 1091 (1994).

The process usually occurs in four phases: interaction, interpretation, internalization, and obedience. Normally, one or more transnational actors provokes an *interaction*, or series of interactions, with another in a law-declaring forum. This 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 force the other party to *internalize* the new interpretation of the international norm into its normative system. The provoking actor's aim is to "bind" the other party to obey the new interpretation as part of its internal value set. The coerced party's perception that it now has an internal obligation to follow the international norm leads it to step four: *obedience* to the newly interpreted norm.⁹⁴

To illustrate, in the early 1980s, it came to light that the Reagan Administration was supporting the *Contras* in their struggle against the Sandinista Government in Nicaragua, by secretly mining the harbors of the Port of Corinto.⁹⁵ In April 1984, the Nicaraguan Government filed suit against the U.S. government before the International Court of Justice ("ICJ" or "World Court").⁹⁶ At the time, many in the U.S. government viewed the suit as a mere publicity stunt, which could have no conceivable impact on the United States.⁹⁷ Under the ICJ's statute and the U.N. Charter, the United States could veto any judgment the ICJ might enter, and hence, any contrary judgment seemed unenforceable.⁹⁸

But what the United States misunderstood was that Nicaragua—represented by Abram Chayes, a prominent proponent of international legal process—was not so much

94. Refer to Part II.A-B *supra* for a discussion of obedience in international law.

95. President Reagan's authorization of the mining was revealed on the Senate floor by Senator Barry Goldwater. See 130 CONG. REC. 8537 (1984); see also Paul Gumina, *Title VI of the Intelligence Authorization Act, Fiscal Year 1991: Effective Covert Action Reform or "Business as Usual"?*, 20 HASTINGS CONST. L.Q. 149, 168-69 (1992) (providing a historical background of the Iran-Contra affair).

96. See Richard B. Bilder, *The United States and the World Court in the Post-"Cold War" Era*, 40 CATH. U. L. REV. 251, 253 (1991) (describing the Nicaragua-U.S. case).

97. See *id.* at 253-54 (noting that the United States did not believe that the court had jurisdiction and challenged the suit on those grounds).

98. Under the U.N. Charter, any decision by the ICJ may be enforced by the Security Council. See U.N. CHARTER art. 94, para. 2. For the Security Council to act, however, all permanent members must vote affirmatively. See *id.* at art. 27, para. 3. Because the United States is a permanent member, it could refuse to approve the action and the judgment would go unenforced. See *id.* at art. 23, para. 1. This process is, in fact, exactly what happened regarding the Nicaragua case. See Bilder, *supra* note 96, at 255 (explaining that the United States eventually vetoed the Security Council resolution calling upon it to comply with the judgment).

seeking an international judgment, as it was seeking to invoke transnational legal process against its more powerful adversary.⁹⁹ By suing at the World Court, Nicaragua provoked a *legal interaction* with the U.S. government before a standing *intergovernmental forum*, with the aim of triggering a judicial *interpretation* that the United States was in violation of international law.¹⁰⁰ Nicaragua asked the Court to indicate “provisional measures” of interim protection and declare that the parties should preserve the status quo pending the Court’s resolution of the merits.¹⁰¹

Within weeks, the Court issued an *interpretation*, which directed the United States to cease mining the harbors immediately.¹⁰² At that point, the Nicaraguans shifted from an international interpretive forum—the World Court—to a *domestic enforcement* forum: the U.S. Congress, where resolutions were introduced terminating future aid to the *Contras* for activities that violated the World Court’s ruling.¹⁰³ In other words, Congress *internalized* the World Court’s ruling into U.S. law. Almost immediately thereafter, the Reagan Administration stopped mining the harbors.¹⁰⁴ In short, an interaction, interpretation, and internalization of an international norm into domestic law helped force the United States into obedience. The legal transaction—an interaction among transnational actors in various law-declaring fora—generated an interpretation of a legal rule that, through prospective internalization into U.S. domestic law, came to guide future interactions between the parties.¹⁰⁵

99. For a complete discussion of this incident, see generally Abram Chayes, *Nicaragua, the United States, and the World Court*, 85 COLUM. L. REV. 1445 (1985). For a discussion of Chayes’ view of international legal process, see Koh, *supra* note 5, at 2619 (noting that Chayes believes that the “legal process allocates decision making competence between national and international decision makers, specifies particular regulatory arrangements for particular subject matters, restrains and organizes national and individual behavior, and interacts with the political, economic, and cultural setting”).

100. See Bilder, *supra* note 96, at 253 (examining the basis for Nicaragua’s suit against the United States).

101. See *Ex rel. Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 16 (June 27), reprinted in 25 I.L.M. 1023, 1024 (1986).

102. See *id.* at 1090-91 (announcing the judgment of the Court that the United States should cease all activities which constitute a breach of their obligations, including mining).

103. See generally Gumina, *supra* note 95, at 170.

104. See David Rogers, *House Adopts Resolution to End U.S. Role in Mining of Nicaraguan Ports, Waters*, WALL ST. J., April 13, 1984, at 62. Reportedly, upon being told of the aid cutoff, Professor Chayes said, “We just got our provisional measures from Congress.”

105. Professor Franck’s comment on this lecture notes the more recent case of *Breard v. Greene*, 118 S. Ct. 1352 (1998) (per curiam), in which the Supreme Court refused, at the eleventh hour, to defer to an ICJ indication of provisional measures. See Thomas M. Franck, *Dr. Pangloss Meets the Grinch: A Pessimistic Comment on*

B. Agents of Internalization

The previous section set out how internalization occurs through social, political, and legal processes. But, internalization does not occur in a vacuum: Who are the actors involved? What, precisely, does it take to “bring international law home?” Let me

Harold Koh's Optimism, 35 HOUS. L. REV. 683, 687 (1998). The Court thereby declined to stay the execution of a Paraguayan national on death row in Virginia who claimed that Paraguayan consular authorities in the United States had not been informed of his arrest and trial as was required by the Vienna Convention on Consular Relations. See *Breard*, 118 S. Ct. at 1353-54 (noting the ICJ order requesting that the United States “take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings”). Although Professor Franck treats the Supreme Court’s decision in *Breard* as evidence that the American legal system is not permeable, see Franck, *supra* at 689, that conclusion strikes me as overly pessimistic. The *Breard* case arose in an extremely disadvantageous procedural posture for the petitioner, on a petition for habeas corpus that was filed six years after the crime was committed and five years after the conviction became final. See *Breard*, 118 S. Ct. at 1354. Calling it “unfortunate that this matter comes before us while proceedings are pending before the ICJ that might have been brought to that court earlier,” the Supreme Court majority concluded that any claimed violation of the Vienna Convention was procedurally barred on habeas corpus review. See *id.* at 1356. Justice Souter agreed with the decision, on the ground that “the lack of any reasonably arguable causal connection between the alleged treaty violations and Breard’s conviction and sentence disentitle him to relief on any theory offered.” *Id.* (Souter, J., statement). Even so, three other Justices dissented from the ruling (only one vote shy of the number necessary to grant certiorari). See *id.* at 1356-57 (Stevens, Breyer, and Ginsburg, JJ., dissenting). Additionally, Secretary of State Madeleine Albright urged the Governor of Virginia to stay the execution, warning that “Mr. Breard’s immediate execution ‘could be seen as a denial by the United States of the significance of international law and the [World] Court’s processes in its international relations” Linda Greenhouse, *Court Weighs Execution of Foreigner*, N.Y. TIMES, Apr. 14, 1998, at A14. The Governor of Virginia chose to reject the Secretary’s request and to let the execution proceed. See Norman Kempster, *Despite Warnings, Virginia Executes Paraguayan Citizen*, L.A. TIMES, Apr. 15, 1998, at A6. On their face, these facts hardly suggest that the American legal system is impermeable to international norms, as Professor Franck argues. See Franck, *supra* at 687-91. Rather, I would suggest, *Breard* should be remembered as a case in which internalization of international norms into U.S. law through executive and judicial action was attempted, but not completed, due to severe time pressures and the peculiar procedural posture of the case.

Similarly, Professor Franck cites, as another example of U.S. “impermeability,” the famous case of *United States v. Alvarez-Machain*, 504 U.S. 655 (1992), in which the Court refused to dismiss a criminal case brought against a Mexican defendant who had been abducted from Mexico to stand trial in a U.S. court. See *id.* at 657; Franck, *supra*, at 687-88. As I have argued elsewhere, although the Court declined to internalize the anti-kidnapping rule *judicially*, the U.S. Executive Branch eventually agreed to amend the U.S.-Mexico extradition treaty to prohibit transborder kidnapping, *U.S. and Mexico Sign Treaty to Ban Kidnapping of Suspects*, DALLAS MORNING NEWS, Nov. 24, 1994, at 78A, thus ultimately internalizing the rule through executive branch action. See Koh, *Haiti Paradigm*, *supra* note 1, at 2405-09 (recognizing that “adverse Supreme Court decisions are no longer final stops, but only way stations, in the process of ‘complex enforcement’ triggered by transnational public law litigation”).

suggest six key agents in the transnational legal process: (1) transnational norm entrepreneurs; (2) governmental norm sponsors; (3) transnational issue networks; (4) interpretive communities and law-declaring fora; (5) bureaucratic compliance procedures; and (6) issue linkages.

1. *Transnational Norm Entrepreneurs.* Transnational legal process is not self-activating. Most successful internalization efforts are begun by “transnational norm entrepreneurs.”¹⁰⁶ These are either nongovernmental transnational organizations or individuals who, in Ethan Nadelmann’s words, (1) “mobilize popular opinion and political support both within their host country and abroad”; (2) “stimulate and assist in the creation of like-minded organizations in other countries”; (3) “play a significant role in elevating their objective beyond its identification with the national interests of their government”; and (4) often direct their efforts “toward persuading foreign audiences, especially foreign elites, that a particular [normative] regime reflects a widely shared or even universal moral sense, rather than the particular moral code of one society.”¹⁰⁷ Such norm entrepreneurs became prominent in the nineteenth century, when activists such as Lord William Wilberforce and the British and Foreign Anti-Slavery Society pressed for treaties prohibiting the slave trade,¹⁰⁸ Henry Dunant founded the International Committee of the Red Cross (“ICRC”),¹⁰⁹ and Christian peace activists such as America’s William Ladd and Elihu Burritt promoted public international arbitration and

106. Cf. Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 929 (1996) (describing the similar concept of domestic “norm entrepreneurs” as people who “can alert people to the existence of a shared complaint and can suggest a collective solution . . . (a) signaling their own commitment to change, (b) creating coalitions, (c) making defiance of the norms seem or be less costly, and (d) making compliance with new norms seem or be more beneficial”).

107. Ethan A. Nadelmann, *Global Prohibition Regimes: The Evolution of Norms in International Society*, 44 INT’L ORG. 479, 482 (1990).

108. On the transnational work of Wilberforce and the British anti-slavery movement, see, for example, Nadelmann, *supra* note 107, at 495 (suggesting that the British and Foreign Anti-Slavery Society represented “the first transnational moral entrepreneur . . . to play a significant role in world politics generally and in the evolution of a global prohibition regime specifically”); see generally BETTY FLADELAND, *MEN AND BROTHERS: ANGLO-AMERICAN ANTI-SLAVERY COOPERATION* (1972).

109. The work of Dunant and the ICRC spurred the Geneva Convention of 1864, the Hague Convention of 1899, and the movement toward codified rules of conduct in warfare. See generally PIERRE BOISSIER, *FROM SOLFERINO TO TSUSHIMA: HISTORY OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS* (1985) (chronicling the creation and history of the ICRC); MARTHA FINNEMORE, *NATIONAL INTERESTS IN INTERNATIONAL SOCIETY* 69-88 (1996) (elucidating the role Dunant and others played in building the ICRC and thereby promulgating and transmitting humanitarian norms).

permanent international criminal courts.¹¹⁰ Modern-day entrepreneurs have included such diverse individuals as Eleanor Roosevelt, Jesse Jackson, the Dalai Lama, Daw Aung San Suu Kyi, and Princess Diana. The stories of these individuals demonstrate what “a few morally committed private individuals—individuals without government positions or political power—and the elite networks they use to build an international organization” can do to trigger internalization by drawing worldwide attention to a particular issue.¹¹¹

2. *Governmental Norm Sponsors.* Nongovernmental actors do not work alone. Rather, they invariably push governmental agencies from the outside and seek to enlist them to take proactive stances on emerging issues such as global warming¹¹² or outlawing female genital mutilation.¹¹³ In so doing, they invariably seek governmental officials who will act as allies and sponsors for the norms they are promoting. Once engaged, these governmental norm sponsors work inside bureaucracies and governmental structures to promote the same changes inside organized government that nongovernmental norm entrepreneurs are urging from the outside. Not infrequently, officials within governments or intergovernmental organizations become so committed to using their official positions to promote normative positions that they become far more than passive sponsors but, rather, complementary “governmental norm entrepreneurs” in their own right. Recent prominent examples include, for instance, U.N. Human Rights Commissioner and former Irish President Mary Robinson, Oscar Arias Sanchez of Costa Rica, former President Jimmy Carter of the United States, and Pope John Paul II.

110. For a discussion of the work of Ladd and Burritt, see Mark W. Janis, *Protestants, Progress and Peace: Enthusiasm for an International Court in Early Nineteenth-Century America*, in *THE INFLUENCE OF RELIGION ON THE DEVELOPMENT OF INTERNATIONAL LAW* 225, 229-38 (Mark W. Janis ed., 1991).

111. See FINNEMORE, *supra* note 109, at 86.

112. For several fascinating case studies from the international environmental area, see generally *THE IMPLEMENTATION AND EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL COMMITMENTS: THEORY AND PRACTICE* (David G. Victor et al. eds., 1998).

113. See generally FAUZIYA KASSINDJA & LAYLI MILLER BASHIR, *DO THEY HEAR YOU WHEN YOU CRY* (1998) (describing how transnational norm entrepreneurs secured not only an asylum ruling barring the return of a Togolese woman who faced female genital mutilation, but also congressional legislation recognizing female genital mutilation as a felony); Seble Dawit & Salem Mekuria, *The West Just Doesn't Get It*, *N.Y. TIMES*, Dec. 7, 1993, at A27 (noting that Sudan, Kenya, Egypt, Ivory Coast, and Burkina Faso have all similarly internalized legal or policy measures against the practice of female genital mutilation).

3. *Transnational Issue Networks.* Working together, transnational norm entrepreneurs and governmental norm sponsors help to develop transnational issue networks¹¹⁴—what political scientists call “epistemic communities.” Epistemic communities are “network[s] of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area.”¹¹⁵ These transnational issue networks discuss and generate political solutions among concerned individuals on the same issues at the global and regional levels, among government agencies, intergovernmental organizations, international nongovernmental organizations (“NGOs”), domestic NGOs, academics, and private foundations.¹¹⁶ Such issue networks may, over time, ripen into full-fledged global NGOs, such as Amnesty International or Greenpeace. Increasingly these days, they are literally “networked” through the Internet, the World Wide Web, fax machines, and other modern communications technologies, which allow them to transmit information across borders within moments of critical events, notwithstanding governmental efforts to cabin news within particular national borders.¹¹⁷

4. *Interpretive Communities and Law-Declaring Fora.* These transnational actors need both public and private stages upon which to *interact*. Available stages encompass governmental and nongovernmental fora competent to declare both general norms of international law (e.g., treaties) and *specific interpretation* of those norms in particular circumstances (e.g., particular interpretations of treaties and customary international law rules, such as the ICJ ruling in the Nicaraguan case).¹¹⁸ Such

114. See, e.g., Kathryn Sikkink, *Human Rights, Principled Issue-Networks, and Sovereignty in Latin America*, 47 INT'L ORG. 411, 411 (1993) (providing an example of a transnational issue network in the area of human rights and explaining the interactions of different entities making up the network).

115. Peter M. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 INT'L ORG. 1, 3 (1992).

116. See Sikkink, *supra* note 114, at 415-16 (describing the diverse entities that make up an international issue network).

117. Human rights abuses in China, for example, were largely invisible to external examination during the Cultural Revolution, were reported by fax during Tiananmen Square, and are now reported globally via the Internet. See Michael Laris, *Beijing Launches a New Offensive to Squelch Dissent on Internet*, WASH. POST, Dec. 31, 1997, at A16 (explaining Chinese government efforts to prevent the use of technology to discuss human rights issues); see also Dana Priest, *U.S. Activist Receives Nobel Peace Prize for Land Mine Campaign*, WASH. POST, Oct. 11, 1997, at A1 (reporting the success of American activist Jody Williams' movement, via e-mail, to ban land mines around the world).

118. Refer to notes 95-105 *supra* and accompanying text (discussing the IJC

law-declaring fora thus include treaty regimes; domestic, regional, and international courts; ad hoc tribunals; domestic and regional legislatures; executive entities; commissions of international publicists; and nongovernmental organizations. Together, these law-declaring fora create an “interpretive community” capable of receiving a challenge to a nation’s international conduct, then defining, elaborating, and testing the definition of particular norms and opining about their violation.¹¹⁹

Take for example, the norm against genocide, which is formally set forth in a multilateral treaty, the Convention on the Prevention and Punishment of the Crime of Genocide.¹²⁰ Although the treaty stands at the center of a regime to construe the norm, that regime embraces a wide array of law-declaring fora. For example, the fora that have construed that norm with respect to the recent genocide in Bosnia include the U.N. General Assembly,¹²¹ the U.N. Security Council,¹²² the World Court,¹²³ the International Criminal Tribunal for the Former Yugoslavia and Rwanda,¹²⁴ numerous scholarly groups,¹²⁵ human rights organizations, as

ruling in the Nicaragua case).

119. See Cover, *supra* note 87, at 40 (describing the “jurisgenerative process” as one in which real interpretive “communities do create law and do give meaning to law through their narratives and precepts”).

120. See Genocide Convention Implementation Act of 1987, 18 U.S.C. § 1091 (1994) (incorporating this treaty into U.S. domestic law).

121. See G.A. Res. 135, U.N. GAOR, 47th Sess., U.N. Doc. A/47/678/Add.2 (1992), *reprinted in* 32 I.L.M. 911, 914 (passing a resolution in response to the Bosnian situation that proclaimed that “States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity”).

122. See S.C. Res. 827, U.N. SCOR, 47th 3217th mtg. at 1, U.N. Doc. S/RES/827 (1993), *reprinted in* 32 I.L.M. 1203 (1993) (establishing an international tribunal for the sole purpose of prosecuting human rights violations in the former Yugoslavia).

123. See *Ex rel.* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo. (Serbia & Montenegro)), 1993 I.C.J. 3, 5 (Order of Sept. 13) (reaffirming an earlier order that required Yugoslavia to take all necessary steps to end the commission of genocide); *ex rel.* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo. (Serbia & Montenegro)), 1993 I.C.J. 3, 24 (Order of Apr. 8) (declaring that Yugoslavian military units should immediately cease committing genocide against Muslims or other groups).

124. See International Criminal Tribunal for the Former Yugoslavia: International Arrest Warrants and Orders for Surrender for Radovan Karadžić and Ratko Mladić (July 11, 1996), *reprinted in* 36 I.L.M. 92 (1997) (reprinting the indictments and arrest warrants against Bosnian-Serb officials for genocide, violations of the laws of war, and crimes against humanity).

125. See, e.g., *Report of the International Law Commission on the Work of its Thirty-Second Session* [1980] 2 Y.B. Int’l L. Comm’n 32, U.N. DOC. A/35/10 (edited text) (setting forth the draft of Article 19 dealing with international crimes and international delicts); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE

well as both the Congress of the United States¹²⁶ and a U.S. federal appellate court.¹²⁷ By interpreting the norms of genocide in an interactive dialogue with one another, these law-declaring fora have acted as the stage upon which norm entrepreneurs have been able to create a shared meaning of the global norms of genocide, against which particular acts of governments and non-state actors can be tested.¹²⁸

5. *Bureaucratic Compliance Procedures.* Once an international norm has been construed by the interpretive community, and a nation found in violation, the question becomes: how will national governments internalize those community interpretations into their own domestic bureaucratic and political structures? For example, corporate lawyers well understand how domestic and multinational corporations develop corporate compliance programs—standard operating procedures, training programs, and the like—to address new domestic mandates regarding such diverse matters as criminal sentencing guidelines, environmental standards, occupational health and safety, and sexual harassment.¹²⁹ In the same way, in response to

UNITED STATES, § 702 reporter's note 3 (1987) (commenting on the history of the crime of genocide).

126. See, e.g., Genocide Convention Implementation Act of 1987, 18 U.S.C. § 1091 (1994).

127. See *Kadic v. Karadžić*, 70 F.3d 232, 236 (2d Cir. 1995) (holding that subject matter jurisdiction existed over Karadžić, a war criminal, and therefore he could be found liable for genocide and war crimes, both as a private individual and as a state actor). For a recent discussion of this case, see Jordan J. Paust, *Suing Karadžić*, 10 LEIDEN J. INT'L L. 91 (1997).

128. The current controversy between Holocaust survivors and Swiss banks regarding money taken by the Nazi regime provides another example of this process, whereby the actions of Swiss banks will be judged under the new global norms. See Stephanie A. Bilenker, Comment, *In re Holocaust Victims' Assets Litigation: Do the U.S. Courts have Jurisdiction Over the Lawsuits Filed by Holocaust Survivors Against the Swiss Banks?*, 21 MD. J. INT'L L. & TRADE 251, 266-70 (1997) (indicating that Swiss banks have been accused of violating treaties, international laws, and fundamental human rights prohibiting genocide). The Swiss banks recently settled these claims, agreeing to pay \$1.25 billion to Holocaust survivors and their families. See *Eagleberger Expected to Head Insurer Panel on Holocaust Claims*, WALL ST. J., Sept. 14, 1998, at B10 (discussing the many claims and settlements relating to Holocaust survivors).

129. See generally Norwood P. Beveridge, *Does the Corporate Director have a Duty Always to Obey the Law?*, 45 DEPAUL L. REV. 729 (1996); Robert J. Fowler, *International Environmental Standards for Transnational Corporations*, 25 ENVTL. L. 1 (1995) (discussing attempts to regulate transnational corporations' effect on the environment); Harvey L. Pitt & Karl A. Groskaufmanis, *Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct*, 78 GEO. L.J. 1559 (1990) (reviewing corporate codes of conduct in response to a series of recent corporate crises); Steinberg & Fletcher, *supra* note 16 (examining the compliance programs that different organizations have implemented in response to the Insider

rulings of international law by competent law-declaring fora, domestic governmental institutions adopt symbolic structures, standard operating procedures, and other internal mechanisms to help maintain their habitual compliance with internalized international norms.¹³⁰ Within national governments and intergovernmental organizations, in-house legal advisers exercise institutional mandates to ensure that the government's policies conform to international legal standards that have become embedded in domestic law.¹³¹ Institutional mandates that justify noncompliance with international legal norms may be found, for example, within such legal advising apparatuses of the U.S. government as the Legal Adviser's office at the State Department,¹³² the Office of Legal Counsel at the U.S. Department of Justice,¹³³ or the Legal Adviser to the National Security Council.¹³⁴ These legal advisers often operate within an internalized system of bureaucratic precedent, which may have a

Trading and Securities Fraud Enforcement Act); Walsh & Pyrich, *supra* note 16 (discussing the history of corporate compliance programs and how they can be used as a defense to criminal liability); Note, *Growing the Carrot: Encouraging Effective Corporate Compliance*, 109 HARV. L. REV. 1783 (1996) (addressing alternative policies to encourage proper corporate compliance with the law). Indeed, the Supreme Court recently suggested guidelines for compliance with sexual harassment rules at the end of the latest Supreme Court Term in *Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2257, 2270 (1998) and *Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 2293 (1998) (recognizing, in these two companion cases, an employer defense to sexual harassment claims if the employer can prove it used "reasonable care" to adopt compliance programs that would prevent and correct behavior and that the plaintiff did not avail themselves of the protective measures).

130. See, e.g., Sanford J. Fox, *Beyond the American Legal System for the Protection of Children's Rights*, 31 FAM. L.Q. 237, 247-48 (1997) (explaining, in the context of children's rights, that domestic governments struggle to comply with international law to avoid political disapproval and international dispute, a process termed "enforcement by shame").

131. See, e.g., Richard B. Bilder, *The Office of the Legal Adviser: The State Department Lawyer and Foreign Affairs*, 56 AM. J. INT'L L. 633, 643-44 (1962) (discussing how the in-house legal counsel to the Department of State acts to achieve a general policy objective that is consistent with both domestic and international law).

132. See *id.* (explaining that the Office of Legal Advisor is involved in "the examination of various legal means of reaching the desired result").

133. See Douglas W. Kmiec, *OLC's Opinion Writing Function: The Legal Adhesive for the Unitary Executive*, 15 CARDOZO L. REV. 337, 338 (1993) (explaining the role of the Office of Legal Counsel in advising on the legality of executive actions and pending legislation).

134. See Antonio Cassese, *The Role of Legal Advisers in Ensuring that Foreign Policy Conforms to International Legal Standards*, 14 MICH. J. INT'L L. 139, 140 (1992) (examining the role of legal advisers in accepting or rejecting international law on behalf of national governments); see generally LEGAL ADVISERS AND FOREIGN AFFAIRS (H.C.L. Merrillat ed., 1964) (compiling papers and discussions on the role of government international legal advisers and exploring methods governments employ to provide legal advice on the conduct of international relations).

considerable measure of stare decisis effect.¹³⁵ Through such internalized law, these institutions become, in Paul David's felicitous phrase, "carriers of history," and evolve in path-dependent routes that avoid conflict with the internalized norms of international law.¹³⁶

In making decisions, governmental leaders consult these internal legal standards.¹³⁷ Over time, legal ideologies come to prevail among domestic decision-makers so that they become personally affected by public perceptions that their actions are or will be perceived as unlawful, even in crisis situations.¹³⁸ In Bob Keohane's phrase, domestic decision-making thereby becomes "enmeshed" with international legal norms, because institutional arrangements for the making and maintenance of an international law norm become entrenched in domestic legal and political processes.¹³⁹

6. *Issue Linkages.* Finally, internalization is promoted when strong process linkages exist across issue areas. Thus, for

135. See Walter Dellinger, *After the Cold War: Presidential Power and the Use of Military Force*, 50 U. MIAMI L. REV. 107, 109-10 (1995).

[A]n executive branch attorney may have an obligation to work within a tradition of reasoned, executive branch precedent, memorialized in formal written opinions. . . . When lawyers who are now at the Office of Legal Counsel begin to research an issue, they . . . are expected to look to previous opinions of the Attorneys General and of heads of [the Office of Legal Counsel] to develop and refine the executive branch's legal positions.

Id.

136. See generally Paul A. David, *Why are Institutions the 'Carriers of History'?: Path Dependence and the Evolution of Conventions, Organizations and Institutions*, 5 STRUCTURAL CHANGE AND ECON. DYNAMICS 205 (1994); Mark J. Roe, *Chaos and Evolution in Law and Economics*, 109 HARV. L. REV. 641, 643-44 (1996) (explaining the evolution of path dependence).

137. See, e.g., ABRAM CHAYES, *THE CUBAN MISSILE CRISIS: INTERNATIONAL CRISES AND THE ROLE OF LAW 17-24* (1974) (discussing the role of legal advisers during the Cuban Missile Crisis).

138. See *Living History Interview with Abram Chayes*, 7 TRANSNAT'L L. & CONTEMP. PROBS. 459, 469 (1997). Former Secretary of State Dean Acheson argued during the Cuban Missile Crisis that international law was irrelevant, but

[D]espite Acheson's great reputation as a lawyer and former secretary of state, this argument wasn't seriously considered. . . . I don't think anybody believed Acheson's position was tenable as a political or public position. Most of the Ex[ecutive] Comm[ittee] members believed that the United States could not say, "We don't give a damn what international law says, we're going to do it."

Id.; see also CHAYES, *supra* note 137, at 17 (indicating that one concern leading up to the Cuban Missile Crisis was whether the United States could, as a matter of international law, prevent Soviet missiles in Cuba).

139. See Keohane, *Compliance with Commitments*, *supra* note 2, at 179 (discussing "institutional enmeshment," which "occurs when domestic decision making with respect to an international commitment is affected by the institutional arrangements established in the course of making or maintaining the commitment").

example, when the United States adopts a twelve-mile limit to serve one national end in the ocean law area, it is likely to find itself bound by that limit in the refugee area.¹⁴⁰ When a government refuses to recognize the jurisdiction of the ICJ in a suit in which it is a defendant, as the United States did in the Nicaraguan case, that decision later impairs its ability to invoke the Court's jurisdiction as a plaintiff. Because international legal obligations tend to be closely interconnected, deviation from international commitments in one area tends to lead noncompliant nations into vicious cycles of treaty violations.¹⁴¹

To avoid such cascading violations, domestic bureaucracies develop "institutional habits" that lead them into default patterns of compliance.¹⁴² These patterns act like riverbeds that channel routine governmental conduct along law-compliant pathways.¹⁴³ When a nation deviates from that pattern of presumptive compliance, frictions are created, not just in the particular issue area in which the first deviation occurs, but in the whole spectrum of interlinked issue areas. To avoid such frictions in its continuing interactions, a nation's bureaucracies gain powerful institutional incentives to press their governmental leaders to adhere generally to policies of compliance over policies of

140. Refer to notes 55-59 *supra* and accompanying text (describing the motivating factors leading to the extension of a twelve-mile territorial sea, which did not include consideration of a refugee policy).

141. In the Nicaraguan case against the United States in the World Court, for example, the Reagan administration, once sued by Nicaragua, hastily modified its declaration accepting the Court's compulsory jurisdiction in an effort to divest the Court of jurisdiction over the case. *See Chayes, supra* note 99, at 1445. That decision not only was later held to be legally ineffective, *see Ex rel. Military and Paramilitary Activities (Nicar. v. U.S.)*, 1984 I.C.J. 392, 442 (November 26) (holding that the Court had jurisdiction to hear the case), but also weakened the U.S. position on the merits. *See Ex rel. Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.J.C. 4, 146-50 (June 27) (finding the United States in breach of various international obligations). The Court then rejected the U.S. position at the jurisdictional phase of the case, which prompted the United States to withdraw from the Court's compulsory jurisdiction altogether, thereby breaking an acceptance filed nearly four decades earlier. *See Chayes, supra* note 99, at 1445-46. That decision was then predictably followed by the World Court's adverse judgment on the merits. *See Military and Paramilitary Activities*, 1986 I.C.J. at 146-50. This judgment created the basis for a new claim, brought in a U.S. court by U.S. citizens living in Nicaragua, alleging that the United States had breached its obligations to respect World Court judgments. *See Committee of United States Citizens Living in Nicar. v. Reagan*, 859 F.2d 929, 932 (D.C. Cir. 1988). The resulting image of lawlessness impaired Reagan Administration efforts to mobilize the same treaty partners to address linked policy issues such as the Central American peace process, debt and trade issues, and the like. *See generally Koh, Transnational Litigation, supra* note 1, at 203-04 (expounding on how "[a] state's violation of international law creates inevitable frictions and contradictions that hinder its ongoing participation within the transnational legal process).

142. Refer to note 136 *supra* and accompanying text (discussing the process of institutionalized habits).

143. *See David, supra* note 136.

violation.¹⁴⁴ As demonstrated above, precisely this pattern transpired with regard to the twelve-mile limit.¹⁴⁵

By so saying, I hardly mean to suggest that violations of international law never occur. I merely suggest that in tracing the move from external coercion to internalized obedience, a key factor is repeated participation in the transnational legal process. Through this repeated cycle of interaction, interpretation, and internalization—the transnational legal process—international law acquires its “stickiness,” and nations come to “obey” out of a perceived self-interest that becomes institutional habit. Because compliance becomes the norm, and violation the exception, “almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.”¹⁴⁶

C. *Internalization Illustrated: The Landmines Convention*

The social, political, and legal internalization process described above was recently illustrated by the recent international drive to limit the use of antipersonnel landmines. The movement began with the United Nations sponsored 1973-1977 Geneva Diplomatic Conference on Humanitarian Law, which led, in 1980, to Protocol II to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (“Protocol II”).¹⁴⁷ Although Article 3 of Protocol II prohibited the direct and indiscriminate uses of landmines against civilian populations and required signatories to take “[a]ll feasible precautions” to protect civilians by “taking into account all circumstances ruling at the time, including humanitarian and military considerations,”¹⁴⁸ the treaty was widely viewed as toothless.¹⁴⁹

144. Refer to notes 137-38 *supra* (discussing the United States continued insistence on complying with international law, even while being threatened during the Cuban Missile Crisis).

145. Refer to notes 48-86 *supra* and accompanying text (detailing the twelve-mile limit expansion in the United States).

146. HENKIN, *supra* note 34, at 47 (emphasis omitted).

147. Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, Multilateral, 1342 U.N.T.S. 137 [hereinafter Protocol II] (outlawing, in Protocol II, the use of mines near domestic areas and calling for restrictions to protect civilians). The United States signed Protocol II in 1982, see MULTILATERAL TREATIES, *supra* note 32, at 866, and the Senate ratified it in 1995. See 141 CONG. REC. S4568-01 (daily ed. March 24, 1995). As of December 31, 1995, over 50 countries had ratified or acceded to the underlying treaty, of which most had accepted Protocol II. See MULTILATERAL TREATIES, *supra* note 32, at 865-66.

148. Protocol II, *supra* note 147.

149. See *Ban the Mine*, ECONOMIST, Dec. 25, 1993-Jan. 7, 1994, at 15 (arguing

At the end of 1991, transnational norm entrepreneurs entered the scene. A group of activists—led by Americans Jody Williams and leader of the Vietnam Veterans Foundation of America Bobby Muller—met in Washington, D.C. and decided to create the International Campaign to Ban Landmines, organized to promote the elimination of antipersonnel landmines.¹⁵⁰ The organization, officially formed in October 1992, was an explicit transnational issue network comprising Vietnam Veterans of America Foundation, Human Rights Watch, Medico International of Germany, Handicap International of France, and the Mines Advisory Group of England.¹⁵¹ The organization quickly enlisted the support of an American governmental norm sponsor, Senator Patrick J. Leahy of Vermont.¹⁵² Senator Leahy introduced domestic legislation, that Congress passed and President Bush signed in 1992, which prohibited the export of landmines from the United States for one year and began the legal internalization of the anti-landmine norm into U.S. law.¹⁵³

In an effort to build a worldwide mass movement and spur widespread social internalization of a norm against landmines, the network enlisted the support of numerous prominent individuals, including former President Jimmy Carter,¹⁵⁴ Pope John Paul II,¹⁵⁵ Princess Diana,¹⁵⁶ and even the comic-strip character,

that landmines are easy to obtain and thus anything short of a complete ban is worthless); *Mass Murder in Slow Motion*, *ECONOMIST*, Nov. 27-Dec. 3, 1993, at 42 (stating that the landmines protocol, as originally conceived, was “riddled with loopholes”). Similarly, Article 7 of Protocol II stated that parties to a conflict would record the location of pre-planned minefields they had laid and would “take all necessary and appropriate measures . . . to protect civilians from the effects of minefields [and] mines . . .” after the cessation of hostilities. Protocol II, *supra* note 147.

150. See Raymond Bonner, *How a Group of Outsiders Moved Nations to Ban Land Mines*, *N.Y. TIMES*, Sept. 20, 1997, at A5.

151. See *id.*

152. See *id.*

153. See *id.*; see also Francis X. Clines, *28-Year Quest to Abolish Land Mines Pays off for Veteran, Who Fights On*, *N.Y. TIMES*, Dec. 3, 1997, at A10 (stating that Senator Leahy’s initiative placed the United States in the forefront of the landmine debate).

154. See Priest, *supra* note 117, at A1 (stating that President Carter’s endorsement was the first “major” endorsement that the network received).

155. See *id.* (observing that after President Carter’s endorsement, the Pope quickly embraced the movement).

156. See Roxanne Roberts, *From London, a Blitz with Glitz: Princess Diana Dazzles a Red Cross Benefit for Land Mine Victims*, *WASH. POST*, June 18, 1997, at D1 (detailing the spectacle surrounding Princess Diana’s 1997 visit to Washington, D.C., where she called for an international ban on landmines while lecturing to the American Red Cross Gala). Princess Diana visited landmine victims in Angola and Bosnia in early 1997. See Bonner, *supra* note 150, at A5.

Batman.¹⁵⁷ Prominent nongovernmental organizations were enticed into the network. Even the International Committee of the Red Cross (“ICRC”), the non-partisan humanitarian organization which had only once before taken a public stance on such an issue, joined the landmines campaign.¹⁵⁸

At the outset, the focus of the transnational campaign was the U.S. government, which initially took a leadership position in calling for further limitations on the use of landmines. In 1993, President Clinton extended for three years the ban that former President Bush had signed into law, thus deepening the internalization of the anti-landmine norm.¹⁵⁹ The Clinton Administration became a governmental norm advocate when it wrote more than forty countries to ask them to stop the mine trade for at least three years.¹⁶⁰ In 1994, President Clinton addressed the United Nations and called for the “eventual elimination” of landmines, an appeal he renewed two years later.¹⁶¹ The Pentagon also began a review of its land mine policy after it received a “blistering” letter from another governmental norm sponsor, the then-U.S. ambassador to the United Nations, Madeleine Albright.¹⁶² In 1997, the Clinton Administration expanded the executive internalization of the norm by announcing that it would

157. In December 1996, DC Comics issued a special edition of the Batman comic book depicting the effects of landmines on families. See Guy Gugliotta, *Caped Crusader and Anti-Mine Crusader Join Forces*, WASH. POST, Nov. 26, 1996, at A13 (explaining the goal of the special issue is to “teach Americans something about a world scourge that has never touched them . . .”). Besides prominent spokesmen, the International Campaign to Ban Landmines used modern technology to disseminate information to the public at large through the World Wide Web and to direct the efforts of its thousand-strong coalition of organizations through electronic mail. See Linton Weeks, *Making a Difference*, WASH. POST, Nov. 20, 1997, at B5.

158. The ICRC previously supported the ban on the use of poisoned gas. See Raymond Bonner, *Pentagon Weighs Ending Opposition to a Ban on Mines*, N.Y. TIMES, March 17, 1996, at A1 (reporting that the Red Cross supported a ban because the organization had simply seen too much destruction caused by mines). During the discussions regarding banning landmines, the ICRC noted that the international community had banned a particular class of weapons only four times since 1850: exploding bullets in 1863, fragmenting “dum-dum” bullets in 1899, poison gas in 1925, and blinding lasers in 1995. See Raymond Bonner, *Land Mine Treaty Takes Final Form Over U.S. Dissent*, N.Y. TIMES, Sept. 18, 1997, at A1.

159. See Pub. L. No. 103-160 § 1423(c), 107 Stat. 1830, 1832 (1993).

160. See *Ban the Mine*, *supra* note 149, at 15.

161. See Bonner, *supra* note 150, at A5; *Fact Sheet: U.S. Policy on a Landmine Control Regime*, 5 U.S. DEP’T STATE DISPATCH 637 (1994). In a speech before the U.N. General Assembly in 1996, President Clinton “renew[ed his] appeal for the swift negotiation of a worldwide ban on the use, stockpiling, production, and transfer of antipersonnel land mines.” President Clinton, *Addressing Security Threats Through International Cooperation*, 7 U.S. DEP’T STATE DISPATCH 469, 470 (1996).

162. See John Mintz, *U.S. Aides See China Impeding Pact on Restricting Land Mines*, WASH. POST, Mar. 22, 1996, at A31.

make permanent the ban on the export of anti-personnel mines and by placing a cap on the number of existing mines.¹⁶³

At the same time, the transnational issue network was searching for a law-declaring forum. Initially, the U.S. government chose to pursue its multilateral objectives through U.N.-sponsored efforts conducted via the so-called "Geneva Process."¹⁶⁴ In May 1996, the Review Conference for the United Nations Convention on Conventional Weapons ("Conventional Weapons Conference") developed a revised Protocol II to the 1980 Convention.¹⁶⁵ In December 1996, the General Assembly passed a U.S.-initiated resolution by a unanimous vote that called for an end of the use of landmines.¹⁶⁶ The sixty-one-member U.N. Conference on Disarmament, based in Geneva, then began to consider limitations on the use of landmines in late 1996 and early 1997.¹⁶⁷ The U.S. government indicated it preferred the Geneva Approach to others because major exporters and users of mines, such as Russia and China, were participants in this process and would be bound by the outcome of the Conventional Weapons Conference.¹⁶⁸ But the Conventional Weapons Conference, run on a consensus model, broke down when the Mexican government objected to the consideration of the landmine issue in the Geneva forum.¹⁶⁹

Frustrated with what they perceived to be a lack of progress toward a total ban through the U.N.-sponsored efforts, NGOs and a number of mid-sized countries switched course and created a new law-declaring forum.¹⁷⁰ They stepped outside established

163. See *Landmines: Dual Track*, ECONOMIST, Jan. 25-31, 1997, at 42, 43.

164. See *id.* at 42.

165. See Michael J. Matheson, *The Revision of the Mines Protocol*, 91 AM. J. INT'L L. 158, 158 (1997) (opining that the new restrictions constituted an important development in the humanitarian law of armed conflict). The Conventional Weapons Conference agreed to ban plastic and other non-detectable mines and to use only self-destructing mines outside marked areas. See *Landmines: Dual Track*, *supra* note 163, at 42. The Acting Legal Adviser to the U.S. State Department wrote that he believed this arrangement was the best possible, given that "it may well take a very long time to convince states like Russia, China, India and Pakistan to give up the use of [anti-personnel landmines] ("APL")." Matheson, *supra*, at 165; see generally Barbara Crossette, *Pact on Land Mines Stops Short of Total Ban*, N.Y. TIMES, May 4, 1996, at A4 (pointing to some of the weakness in the agreement).

166. See *Landmines: Dual Track*, *supra* note 163, at 42; *US Leads UN Move to Ban Land Mines*, FIN. TIMES (London), Nov. 5, 1996, at 9.

167. See *id.*

168. Other major powers, such as France and Great Britain, initially indicated that they, too, favored this forum over others. See Frances Williams, *Momentum Grows for UN Landmine Ban Talks*, FIN. TIMES (London), Jan. 22, 1997, at 4.

169. See *Mexico Blocks Conclave on World Land-Mine Ban*, WASH. POST, June 13, 1997, at A33 (reporting the position of Mexico as supportive of a ban, but desirous of the Ottawa forum).

170. See Jessica Mathews, *The New, Private Order*, WASH. POST, Jan. 21, 1997,

organizational structures and adopted an alternative framework for generating a convention, which has come to be known as the "Ottawa Process."¹⁷¹ More than seventy nations attended the meeting, sponsored by the Canadian government, on the topic in October 1996,¹⁷² and Canadian Foreign Minister Lloyd Axworthy was enlisted as the leading cooperating governmental norm entrepreneur.¹⁷³ The NGOs and governments involved in the Ottawa Process stated that they hoped to create a flat ban on all mines, a moral standard that other countries would feel compelled to follow, and to hold a signing ceremony regarding that standard by the end of 1997.¹⁷⁴

Powerful constituencies began to develop within the United States in support of a complete ban.¹⁷⁵ Prompted by Senator Leahy and the NGOs, fifty-six U.S. senators went on record as indicating their support for a ban.¹⁷⁶ At the same time, fifteen former high-ranking military officers signed a letter opining that these mines were no longer necessary,¹⁷⁷ and a military-produced report found that landmines were responsible for more than fifty percent of the U.S. casualties during the Korean and Vietnam conflicts.¹⁷⁸

at A11 (detailing the growth of the new conference).

171. See Dana Priest, *Mine Decision Boosts Clinton-Military Relations*, WASH. POST, Sept. 21, 1997, at A22 (explaining how the "Ottawa Process" earned its name).

172. See Mathews, *supra* note 170, at A11 (noting that organizers had hoped for 25 to 30 governments to participate). Of the countries in attendance, 28 had already ended the use of antipersonnel landmines by their militaries, and more than 40 refused to trade in them. See *Landmines: Dual Track*, *supra* note 163, at 43.

173. See Priest, *supra* note 171, at A22 (indicating that Axworthy helped Canada take the lead in the campaign to ban land mines).

174. See Dana Priest, *White House to Take U.N. Route Toward Global Land Mine Ban*, WASH. POST, Jan. 18, 1997, at A2; see also *The New Convert*, ECONOMIST, Aug. 23-29, 1997, at 14 ("The strength of the Ottawa approach lies in stigmatising anti-personnel mines as abominable, not to be used ever, on any account, by anybody. No exceptions.")

175. See, e.g., *The New Convert*, *supra* note 174, at 14 (noting the impact of a publication from the Human Rights Watch and Vietnam Veterans of America on public opinion and indicating that Americans in the Korean War were more likely to be killed by their own mines than the enemy's).

176. See Dana Priest, *56 in Senate to Press for Law Banning Use of Land Mines by U.S.*, WASH. POST, June 12, 1997, at A12 (recording the lengths Senator Leahy went in lobbying for the anti-landmine legislation). The NGOs spent approximately \$2 million in the first six months of 1997 to produce and air television spots—designed to enlist congressional support for their position—in the Washington, D.C. area. See Priest, *supra* note 171, at A22.

177. See Crossette, *supra* note 165, at A4 ("During the debate, 15 former high-ranking American military officers—among them Gen. Norman Schwarzkopf, the commander of the war against Iraq, and Gen. David Jones, a former chairman of the Joint Chiefs of Staff—signed an open letter to President Clinton that described anti-personnel mines as weapons 'in a category with poison gas.'")

178. See *Banishing Land Mines*, N.Y. TIMES, Aug. 12, 1997, at A18 (indicating that mines killed or maimed nearly 65,000 Americans in Vietnam); Phillip Shenon,

Nevertheless, although the Clinton administration had sought limits on the sale and use of mines, it came to oppose a complete and immediate ban.¹⁷⁹ Administration officials expressed concerns about participating in a regime that other major countries, such as Russia, China, and India, had not committed to join.¹⁸⁰ The United States also desired a longer period in which to implement the proposed provisions¹⁸¹ and sought the freedom to withdraw from the accord if it became a victim of aggression.¹⁸² Apparently out of deference to his military advisers, who had persuaded him that a total ban on anti-personnel landmines would cost American lives, President Clinton declined to assume a continuing role as a governmental norm entrepreneur favoring immediate adoption of the landmines treaty.¹⁸³

Yet, having encouraged the initial effort to “eventually eliminate” landmines, the United States found that the norm entrepreneurs, issue networks, and the newly minted law-declaring fora had acquired powerful lives of their own. After the Geneva-based U.N. process stalled, a number of U.S. allies joined the Ottawa Process, which the United States also sought belatedly to join.¹⁸⁴ The United States then sought a compromise which would

U.S.-Made Land Mines Killed Many Americans, Report Says, N.Y. TIMES, July 29, 1997, at A15 (detailing a report that indicated American mines were as great a threat to Americans as the enemy).

179. See David E. Sanger, *U.S., in Shift, Says It May Sign Treaty to Ban Land Mines*, N.Y. TIMES, Sept. 15, 1997, at A1 (explaining that the United States wanted to continue using landmines to defend South Korea).

180. See *id.* (observing that, due to this defect, 10 retired four-star generals and former Secretary of State Alexander M. Haig, Jr. wrote an open letter to President Clinton encouraging rejection of the treaty).

181. See Philip Shenon, *Clinton Still Firmly Against Land-Mine Treaty*, N.Y. TIMES, Oct. 11, 1997, at A6 (noting that the United States requested almost twice as much time for landmine removal in Korea as originally provided for in the treaty).

182. See Sanger, *supra* note 179, at A10.

183. See Mary McGrory, *The Kids Aren't All Right*, WASH. POST, June 2, 1996, at C1 (opining that the President took his stance to avoid tangling with the Joint Chiefs of Staff); Steven Lee Myers, *Clinton Says Ban on Mines Would Put U.S. Troops at Risk*, N.Y. TIMES, Sept. 18, 1997, at A8 (stating that “in the end [Mr. Clinton] bowed to military commanders and strategists at the Pentagon” on the landmine issue); Dana Priest, *Shalikhvili Defends Use of “Smart” Mines: Joint Chiefs Chairman Says U.S. Unfairly Cast as “Bad Guys” in Debate*, WASH. POST, Aug. 29, 1997, at A33 (explaining the military position regarding land mines and defending the United States refusal to sign the treaty). The U.S. military maintained that it needed to be able to use both “dumb” and “smart” mines—*e.g.*, mines designed to self-destruct after a certain period of time—in order to protect anti-tank minefields in the Korean peninsula. See Priest, *supra* note 171, at A22. One of President Clinton’s former senior civilian advisers, George Stephanopoulos, called the decision “a surrender to the military.” See Sanger, *supra* note 179, at A1.

184. See, *e.g.*, *Japan Hints It Will Sign Pact to Ban Land Mines*, N.Y. TIMES, Oct. 16, 1997, at A9 (“Mr. Hashimoto also seems to have concluded that so many allies of the United States are abandoning Washington on this issue that President

have delayed implementation of the treaty, allowed the deployment of anti-personnel mines in connection with anti-tank mines, and allowed a country to respond with mines if attacked.¹⁸⁵ But it soon became clear that the anti-landmine train had already left the station. After other potential signatories rejected the proposed U.S. compromise, the United States withdrew its proposals and agreement was reached on the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction.¹⁸⁶

In December, 1997, one hundred twenty-two states plus two Pacific Island dependencies and the Holy Sea signed the Ottawa treaty.¹⁸⁷ At the time of signing, the Russians indicated that they would eventually join the regime, and even the Chinese, who continued to insist that mines were necessary for their self-defense, sent observers to witness the event.¹⁸⁸ As the final signature date approached, one NGO—the Nobel Peace Prize Committee—anointed another—the Landmines Coalition

Clinton will not be offended if he is deserted by Japan as well.”); George Parker, *Cook Orders Scrapping of Landmines*, FIN. TIMES (London), May 22, 1997, at 12 (“Britain will take part in the ‘fast track’ Ottawa process, which could result in Britain being in the first wave of leading powers to scrap landmines . . .”); *South Africa Outlaws Antipersonnel Mines*, N.Y. TIMES, Feb. 21, 1997, at A13 (relating that South Africa’s shift in policy was unexpected).

185. See Raymond Bonner, *U.S. Seeks Compromise to Save Treaty Banning Land Mines*, N.Y. TIMES, Sept. 17, 1997, at A6 (noting that the attempted amendments were “a tacit acknowledgment that the Clinton Administration is in a weak position internationally . . . The Clinton Administration is determined to have a treaty that it can sign, lest it be castigated as a pariah state, along with Russia, China and Libya, which are not part of the treaty process”).

186. The Convention opened for signature on Dec. 3, 1997. See *United Nations: Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personal Mines and on Their Destruction*, 36 I.L.M. 1507 (1997); see also Raymond Bonner, *Other Nations Call New U.S. Terms for Mine Ban Unacceptable*, N.Y. TIMES, Sept. 16, 1997, at A11; Bonner, *supra* note 185, at A6 (“Mr. Mandela told Mr. Clinton ‘no exceptions’ . . . Ms. Doswald-Beck, a lawyer with the International Committee of the Red Cross, which has a mandate to oversee international treaties relating to the conduct of war, said ‘there is no precedent in international humanitarian law’ for a deferred effective date.”); Tim Burt, *US Concession on Landmines Attacked*, FIN. TIMES (London), Sept. 16, 1997, at 5 (reciting the statement of Jody Williams, coordinator for the International Campaign to Ban Landmines: “New formulas to accommodate US policy—no matter how elegantly camouflaged—mean gutting this treaty. Such accommodation would make a mockery of the Ottawa Process.”); Tim Burt, *US Wins More Time for Landmines Pact*, FIN. TIMES (London); Sept. 17, 1997, at 5 (reporting that those opposed to the United States “are not willing to compromise on the substance of the treaty—there must be a total ban without reservations or exemptions”).

187. See Anthony DePalma, *As U.S. Looks on, 120 Nations Sign Treaty Banning Land Mines*, N.Y. TIMES, Dec. 4, 1997, at A1.

188. See *id.* Although China is one of the largest producers of landmines, representatives of NGOs stated that China had not exported mines for the last three years. See Bonner, *supra* note 158, at A1.

and Jody Williams—with the Nobel Peace Prize in an open effort to influence the great powers that were hesitating over signing.¹⁸⁹ Finally, the untimely death of Princess Diana, a well-known public supporter of the campaign to ban landmines, brought the proposed ban into the worldwide social consciousness.¹⁹⁰ The process thus revealed that elaborate ad hoc nongovernmental networks, working with smaller governmental powers, can create a treaty norm that pulls through various forms of internalization even the most powerful abstaining nations toward compliance.

The United States now stands in roughly the same position vis-à-vis the Landmines Convention as it stood with regard to the UNCLOS III in the mid-1980s. Although the United States has not ratified the landmines convention, the U.S. government has indicated that it will continue its legislative moratorium on the sale of landmines and will devote considerable resources to achieving many of the Convention's objectives, thus confirming the legislative and political internalization of the norm.¹⁹¹ The U.S. Ambassador to the Ottawa Process has stated publicly that the United States will stop using all antipersonnel mines, except in Korea, by 2003, and that President Clinton has directed the Pentagon to develop an alternative arrangement for the Korean peninsula by 2006.¹⁹² Karl F. Inderfurth, head of the U.S. delegation to the signing ceremony, has stated that "[i]f the Pentagon is successful . . . the United States would be able to sign this treaty, *this treaty*, after 2006."¹⁹³ Thus, despite the U.S. refusal to ratify

189. See Carey Goldberg, *Peace Prize Goes to Land-Mine Opponents*, N.Y. TIMES, Oct. 11, 1997, at A1 ("In awarding the prize to the group and to Ms. Williams, the Nobel committee said it was openly trying to influence the treaty process."). Francis Sejersted, the committee chairman, stated: "This could be interpreted as a message to the great powers that we hope they also will eventually choose to sign the treaty." *Id.*

190. See Sanger, *supra* note 179, at A1 (noting that pictures of Diana with Bosnian land-mine victims were regularly shown as people mourned her death).

191. The U.S. Army and its suppliers are developing new technologies to aid in the detection of mines, and the Army is training local workers on how to remove the mines. See Warren E. Leary, *Better Weapons Emerge for War Against Mines*, N.Y. TIMES, Dec. 16, 1997, at F1. Karl F. Inderfurth, the head of the American delegation to the signing ceremony for the Convention, stated that the U.S. government would increase the amount of money it spends on these programs to at least \$100 million per year and attempt to raise two to three times as much additional support from private organizations and individuals. See DePalma, *supra* note 187, at A14. Meanwhile, the United States continues to seek agreement through the Geneva-based Conference on Disarmament. See *Clinton Urges Export Ban*, FIN. TIMES (London), Jan. 21, 1998, at 4 ("President Bill Clinton yesterday urged the United Nations conference on disarmament to negotiate a global ban on the export of landmines, as a first step towards a comprehensive UN treaty to outlaw the weapons.").

192. See DePalma, *supra* note 187, at A14.

193. *Id.*

the Landmines Convention, a result similar to that reached in the twelve-mile episode may yet ensue.¹⁹⁴ There may soon be no meaningful differences between the current U.S. government practices and the behavior that the Convention requires. If so, the U.S. government may, even without ratification, come to *obey* the Convention *through executive internalization* in much the same way as it has come over time to obey the twelve-mile limit.

IV. A TALE OF TWO INTERNALIZATIONS

As the discussion of the landmines case illustrates, internalization battles transpire in multiple domestic fora, and frequently shift ground from one arena to the other. Let me further illustrate these shifts by briefly describing two internalization battles that are currently unfolding in the field of international human rights: the internalization of the norm against torture in U.S. law and the pending internalization of the European Convention on Human Rights in the United Kingdom.

A. *The Norm Against Torture in U.S. Law*

Although the Eighth Amendment to the Constitution forbids the infliction of "cruel and unusual punishments,"¹⁹⁵ it does not expressly incorporate a norm against governmental torture, which has emerged as a *jus cogens* norm in international human rights law.¹⁹⁶ Since the Bricker Amendment¹⁹⁷ debate of the 1950s, the U.S. government has been reluctant to ratify human rights treaties even though it was one of the primary drafters of

194. Refer to notes 18-36 *supra* and accompanying text (describing an analogous process).

195. U.S. CONST. amend. VIII.

196. See RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987). That section states:

A state violates international law if, as a matter of state policy, it practices, encourages, or condones

- (a) genocide,
- (b) slavery or slave trade,
- (c) the murder or causing the disappearance of individuals,
- (d) torture or other cruel, inhuman, or degrading treatment or punishment,
- (e) prolonged arbitrary detention,
- (f) systematic racial discrimination, or
- (g) a consistent pattern of gross violations of internationally recognized human rights

Id. Section 703 allows any state to pursue violations of the above provision. See *id.* at § 703 ("Any state may pursue international remedies against any other state for a violation of the customary international law of human rights (§ 702).").

197. 99 CONG. REC. 6777-78 (1953) (proposing an amendment to the Constitution which would have limited the effect of treaties on internal law).

these treaties in the postwar era.¹⁹⁸ Until recently, the Torture Convention, the Genocide Convention, and many others lay unratified by the U.S. government.¹⁹⁹

In 1980, beginning with a landmark case, *Filartiga v. Pena-Irala*,²⁰⁰ private U.S. human rights lawyers shifted to a different law-declaring forum.²⁰¹ They began to bring a series of domestic lawsuits against foreign human rights violators in U.S. federal courts to promote domestic judicial incorporation of the norm against torture.²⁰² In *Filartiga*, two Paraguayan citizens sued a Paraguayan government official for an act of torture that occurred in Paraguay and ultimately received a judgment of \$10.3 million.²⁰³ Human rights NGOs, led by New York's Center for Constitutional Rights, not only initiated the action against the Paraguayan tortfeasor, who was found in the United States, but brought the matter under a little-used 1789 statute, the Alien Tort Claims Act ("ATCA").²⁰⁴ The ATCA authorizes federal court suits by an "alien for a tort only, committed in violation of the law of nations or a treaty of the United States."²⁰⁵ In so doing, the domestic litigators relied on the long-standing assumption that the law of nations had become incorporated into English common law, migrated to the American colonies, and had subsequently come to be incorporated into U.S. federal law.²⁰⁶ Over the past

198. See Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341, 341 (1995) (explaining that, despite its participation in treaty formation, "the United States has attached to each of its ratifications a 'package' of reservations, understandings and declarations").

199. See *id.* at 341 n.1, 347.

200. 630 F.2d 876 (2d Cir. 1980).

201. See Anne Bayefsky & Joan Fitzpatrick, *International Human Rights Law in United States Courts: A Comparative Perspective*, 14 MICH. J. INT'L L. 1, 1, 6 (1992) ("*Filartiga* inspired public interest lawyers to raise similar claims, seeking to develop human rights doctrine, document violations, instill a fear in human rights abusers of eventual accountability, and provide at least symbolic relief to individual victims to assist them in their mourning or healing process.>").

202. See *id.* at 6-7.

203. See *Filartiga*, 630 F.2d at 879.

204. See *id.* (basing jurisdiction on the ATCA, 28 U.S.C. § 1350 (1994)).

205. 28 U.S.C. § 1350 (1994).

206. Until recently, there had been little debate over whether customary international law is federal law. See generally Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555 (1984). The Declaration of Independence had announced that the new United States was declaring the causes of its separation out of a "decent respect to the opinions of mankind." THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776); see also Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 YALE L.J. 39, 39 (1994); G. Edward White, *The Marshall Court and International Law: The Piracy Cases*, 83 AM. J. INT'L L. 727, 727-28 (1989) (recounting Chief Justice Marshall's familiarity with the law of nations). For accounts of how international law became U.S. law, see, for example, JORDAN J. PAUST, *INTERNATIONAL LAW AS LAW OF THE UNITED STATES* (1996); Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819

two decades, a string of U.S. courts has applied this principle to create a federal common law of civil remedies for international crimes.²⁰⁷ This body of jurisprudence explicitly recognizes that official torture and comparable universal offenses constitute violations not only of international law, but also of U.S. federal common law.²⁰⁸

By the late 1980s, these judicial internalizations had sufficiently legitimized the norm against torture in U.S. law to the point that NGOs could begin lobbying President Bush to ratify the U.N. Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment.²⁰⁹ The key argument made in support of ratification was that the Convention would work no significant changes in U.S. law, which had now significantly internalized the norm against torture. In 1990, the Senate advised and consented to ratification of the treaty, but with several reservations, understandings, and declarations, which purported to announce that the treaty was not self-executing as internal U.S. law.²¹⁰

This prompted the transnational issue network supporting the norm against torture to shift focus to the domestic legislative arena.²¹¹ In 1992, after extensive lobbying by human rights groups,²¹² Congress finally passed the Torture Victim Protection

(1989); Harold H. Sprout, *Theories as to the Applicability of International Law in the Federal Courts of the United States*, 26 AM. J. INT'L L. 280 (1932).

207. See, e.g., *Kadic v. Karadžić*, 74 F.3d 377 (2d Cir. 1996) (reaffirming *Filar-tiga* by stating that the court "ha[s] neither the authority nor the inclination to retreat from that ruling").

208. In *Filartiga* and its progeny, numerous federal courts construed the ATCA to permit aliens to sue foreign officials for acts of torture, summary execution, disappearance, and similar universal crimes committed under color of state law. For analysis and discussion of the leading cases, see Koh, *Transnational Litigation*, *supra* note 1 (tracing the history of transnational litigation) and Honorable John M. Walker, Jr., *Domestic Adjudication of International Human Rights Violations Under the Alien Tort Statute*, 41 ST. LOUIS U. L.J. 539 (1997) (analyzing ATCA decisions).

209. See *Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*, GA Res. 46, U.N. GAOR, 39th Sess., 93rd plen. Mtg., U.N. Doc. A/RES/39/46 (1994), reprinted in 1994 U.N.Y.B. 813.

210. See 136 CONG. REC. S17,486 (daily ed., Oct. 27, 1990).

211. The legislative internalization effort relied upon Article I, Section 8, Clause 10 of the U.S. Constitution, which grants Congress express authority to define and punish offenses against the law of nations. See U.S. CONST. art. I, § 8, cl. 10.

212. Numerous groups, including the American Bar Association, the Association of the Bar of the City of New York, and the Lawyers Committee for Human Rights, all testified before the House of Representatives, seeking to ensure that enactment of the Torture Victim Protection Act ("TVPA") would not be interpreted as undercutting the legitimacy of human rights litigation under the ATCA. See generally *The Torture Victim Protection Act: Hearings on H.R. 1417 Before the Subcomm. on Human Rights and International Organizations of the House Comm. on Foreign Affairs*, 100th Cong. (1988) (explaining the need to maintain both the TVPA and ATCA

Act (“TVPA”),²¹³ which was designed specifically to supplement and complement the pre-existing scope of the ATCA.²¹⁴ The TVPA codified and extended statutory causes of action to U.S. citizens for torture and summary execution suffered under the actual or apparent authority, or color of law, of any foreign nation.²¹⁵ In enacting the TVPA, Congress expressly intended both to codify and extend to citizens the Second Circuit’s holding in *Filartiga*.²¹⁶ In so doing, Congress recognized and approved the federal courts’ traditional authority under federal common law to determine whether particular domestic rules have ripened into customary international law.²¹⁷ Thus, the TVPA represents an act of legislative internalization of the norm against torture into U.S. law—spurred by prior judicial internalization of that norm²¹⁸—which in turn envisions future judicial decisions that will clarify the contours of the norm as internal U.S. statutory law.

Given this history, one would think that the norm against torture is now firmly internalized into U.S. law, through various acts of judicial, executive, and legislative internalization. Yet in recent years, surprisingly, several legal academics have begun to challenge the “ascendancy of [customary international law] to the status of federal common law.”²¹⁹ The federalization of norms of

because they serve different purposes).

213. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (reprinted at 28 U.S.C. § 1350 (1994)).

214. See *Lafontant v. Aristide*, 844 F. Supp. 128, 131-38 (E.D.N.Y. 1994) (“The TVPA codifies the holding in *Filartiga* . . .”); 137 CONG. REC. S1378, S1378 (daily ed. Jan. 31, 1991) (quoting the principal Senate sponsor, that “[t]his bill would extend protection to U.S. citizens while retaining the current law’s protection of aliens”).

215. See S. REP. NO. 102-249, at 3 (1991), reprinted in 1992 U.S.C.C.A.N. 84, 85; see also Russell J. Weintraub, *Establishing Incredible Events by Credible Evidence: Civil Suits for Atrocities that Violate International Law*, 62 BROOK. L. REV. 753, 766-67 (1996).

216. S. REP. NO. 102-249, at 4, reprinted in 1992 U.S.C.C.A.N. 84, 86 (explaining that the statute codified *Filartiga* and expanded it to cover both aliens and citizens).

217. The TVPA’s legislative history expressly declared that “[i]nternational human rights cases predictably raise legal issues—such as interpretations of international law—that are matters of *Federal common law* and within the particular expertise of Federal courts.” S. REP. NO. 102-249, at 6 n.6 (1991) (emphasis added).

218. See, e.g., *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189, 1196 (S.D.N.Y. 1996) (analyzing whether the TVPA applies retroactively); *Xuncax v. Gramajo*, 886 F. Supp. 162, 178 (D. Mass. 1995) (clarifying that the exhaustion requirement of the TVPA must be interpreted in light of existing judicial doctrines); *Lafontant*, 844 F. Supp. at 138 (analyzing the interaction between the TVPA and the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605 (1994)).

219. Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 821 (1997) (arguing against the incorporation of international law into federal law); see also A. M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20

customary international law, they claim, derives no support from traditional constitutional concerns regarding supremacy, uniformity, and the federal interest in international affairs, but rather, “depart[s] from well-accepted notions of American representative democracy, federal common law, separation of powers, and federalism.”²²⁰

These surprising revisionist arguments have been almost universally criticized.²²¹ But for present purposes, the key point is that the revisionist position represents a full-scale assault on the centuries-old practice of *judicial internalization* of customary international law by U.S. federal courts. But even brief reflection tells us that this revisionist claim must be wrong.²²² For if, as the

YALE J. INT'L L. 1, 8-12 (1995) (discussing the harmful consequences of incorporating international law into federal common law).

220. Bradley & Goldsmith, *supra* note 219, at 821. In more recent writing, some of these revisionists have extended their challenge into a broader assault upon “The Current Illegitimacy of International Human Rights Litigation” in U.S. courts. See Curtis A. Bradley & Jack L. Goldsmith, III, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319, 320 (1997) [hereinafter *Current Illegitimacy*] (concluding that judicial treatment of international human rights law as federal law is not justifiable); see also Curtis A. Bradley & Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, 111 HARV. L. REV. 2260 (1998) [hereinafter *Federal Courts and Incorporation*]. Initially, Bradley & Goldsmith conceded that Congress not only had the constitutional power to legislate human rights norms into federal law, but “did precisely this with respect to torture cases when it enacted the Torture Victim Protection Act.” Bradley & Goldsmith, *supra* note 219, at 873. But more recently, Bradley and Goldsmith have come to read the TVPA to “reflect a broader and unambiguous pattern of political branch resistance to open-ended incorporation of international human rights norms . . .” into federal law. Bradley & Goldsmith, *Current Illegitimacy, supra*, at 367 (emphasis added).

221. See, e.g., F. Giba-Matthews, *Customary International Law Acts As Federal Common Law in U.S. Courts*, 20 FORDHAM INT'L L.J. 1839, 1845 (1997) (asserting that the functioning of customary international law as federal common law is well settled in American jurisprudence); Michael J. Glennon, *Process Versus Policy in Foreign Relations: Foreign Affairs and the United States Constitution*, 95 MICH. L. REV. 1542, 1551-53 (1997) (criticizing Bradley and Goldsmith for missing the mark); Ryan Goodman & Derek P. Jinks, *Filartiga's Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463, 468-69 (1997) (arguing that the three coordinate branches of government have endorsed the view that universally-recognized human rights are a component of federal common law); Andreas F. Lowenfeld, *Nationalizing International Law: Essay in Honor of Louis Henkin*, 36 COLUM. J. TRANSNAT'L L. 121, 126 n.23 (1997) (calling Bradley and Goldsmith's position “wholly unpersuasive”); Gerald L. Neuman, *Sense and Nonsense about Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371, 371-73 (1997); Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After Erie*, 66 FORDHAM L. REV. 393, 396-97 (1997) (contending that Bradley and Goldsmith's perspective overlooks the significant role that international law has played in the American legal system over the past two centuries).

222. In a recent issue of the *Harvard Law Review*, I have presented my own detailed rebuttal of these revisionist claims. See Harold Hongju Koh, *Is International*

revisionists claim, international law is neither constitutional nor federal law, then given our three-tiered hierarchy of constitutional, federal, and state law, it must be *state law* (i.e., rules of customary international law may be internalized into U.S. law only by actions of the courts and legislatures of the fifty states). But surely, this cannot be. For if the revisionists are right, a state court or legislature could simply refuse, for example, to incorporate into state law the customary international law rule regarding the immunity of visiting heads of state or could adopt its own parochial interpretation of sovereign immunity.²²³ Thus, under revisionist theory, Massachusetts, for example, could decide to deny customary head-of-state immunity to Queen Elizabeth on tort claims arising out of events in Northern Ireland, while the forty-nine other states could instead choose to grant the Queen every conceivable variant of full or partial immunity. It was precisely to avoid such chaos that the Supreme Court held more than three decades ago that “a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated *exclusively as an aspect of federal law*.”²²⁴

In response to this challenge, the revisionists now claim that they do not oppose internalization per se, but merely the unauthorized internalization of customary international law *by federal*

Law Really State Law?, 111 HARV. L. REV. 1824 (1998). This section draws heavily from that much longer treatment. In a recent rejoinder, Bradley and Goldsmith claim that my argument is “problematic” because it “assumes a sharp distinction between domestic and foreign relations, and between the constitutional law that governs each.” Bradley & Goldsmith, *Federal Courts and Incorporation*, *supra* note 220, at 2275. I find this charge both curious and ironic, given that some time ago I devoted an entire book to the argument that “however different foreign affairs might be from domestic affairs, that difference does not exempt them from our constitutional system of checks and balances, particularly the check of judicial review.” HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 223 (1990).

223. In the United States, head-of-state immunity is a customary international law defense that has been incorporated into federal common law. *See, e.g.,* *Domingo v. Marcos*, No. C82-1055-V (W.D. Wash. 1982), *reprinted in* 2 CUMULATIVE DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1981-1988, § 7 (Marian Nash (Leich) ed., 1994) (reprinting the suggestion of immunity submitted by the United States which successfully urged that the civil suit against then-Philippine President Ferdinand Marcos be dismissed, because “[u]nder customary rules of international law, recognized and applied in the United States, the head of a foreign government, its foreign ministers, and those designated by the head of state as members of his official party are immune from the jurisdiction of the U.S. Federal and State courts”).

224. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964) (emphasis added).

*courts.*²²⁵ As two revisionists put it, “federal courts should not apply [customary international law, “CIL”] as federal law without some authorization to do so by the federal political branches. . . . We suspect that in most cases, states would rarely incorporate CIL into state law [and thus i]n this circumstance, CIL *simply would not be a rule of decision in federal court.*”²²⁶ Yet so elaborated, the revisionist position emerges as even more radical than it first appears. For if customary international law is neither federal nor state law (unless specifically incorporated by the state or federal political branches), then in most cases, international law is not U.S. law at all! In effect, the revisionists argue for the near-complete ouster of customary international law rules from federal judicial interpretation, a position that would utterly violate the Supreme Court’s century-old pronouncement: “*International law is part of our law*, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.”²²⁷

In arguing that international law may only be incorporated into U.S. law through executive or legislative action, the revisionists simply overlook the many subtle ways in which U.S. federal courts have historically incorporated customary international law into domestic federal law. Under statutes such as the ATCA and the TVPA, Congress explicitly authorizes federal courts to internalize international law.²²⁸ Federal courts also “bring international law home” in countless other situations: when they weigh international law concerns in determining the extraterritorial reach of federal legislation,²²⁹ when they apply the Supreme Court’s well-known directive that “an act of Congress ought never to be construed to violate the law of nations if

225. See Bradley & Goldsmith, *Current Illegitimacy*, *supra* note 220, at 335 (explaining their belief that Congress, but not the federal judiciary, has the power to incorporate selected rules of international human rights law).

226. *Id.* at 349-50 (emphasis added).

227. *The Paquete Habana*, 175 U.S. 677, 700 (1900) (emphasis added); *accord* *Hilton v. Guyot*, 159 U.S. 113, 163 (1895) (using virtually identical language).

228. Specific federal statutes, such as the ATCA and the Foreign Sovereign Immunities Act, expressly delegate to the federal courts authority to derive federal common law rules from established norms of customary international law. See, e.g., Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(3) (1994) (abrogating foreign sovereign immunity in any case in which, inter alia, “rights in property taken in violation of international law are in issue . . .”); Alien Tort Claims Act, 28 U.S.C. § 1350 (giving original jurisdiction to district courts for actions brought by aliens for violations of “the law of nations or a treaty of the United States”).

229. See, e.g., *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 818 (1993) (Scalia, J., dissenting) (noting that “the practice of using international law to limit the extraterritorial reach of statutes is firmly established in our jurisprudence” and thus should have barred the assertion of extraterritorial jurisdiction in that case).

any other possible construction remains . . . ,”²³⁰ and when they choose to construe the Eighth Amendment’s cruel and unusual punishments clause in light of evolving international standards of decency.²³¹ In short, the revisionist denial of U.S. judicial authority to incorporate the norm against torture simply misses the many subtle forms through which judicial internalization has traditionally embedded international law norms into the fabric of American domestic law.

B. The European Human Rights Convention in British Law

The well-publicized debate over incorporation of the European Human Rights Convention into British law illustrates that

230. *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); see also Ralph G. Steinhardt, *The Role of International Law As a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103, 1135 (1990). Both the Supreme Court and the lower federal courts have widely applied this canon to avoid conflicts between congressionally enacted statutes and rules of customary international law. See, e.g., *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22 (1963) (holding that the proposed construction of National Labor Relations Act would have been contrary to a “well-established rule of international law”); *Lauritzen v. Larsen*, 345 U.S. 571, 578, 593 (1953) (ruling that the Jones Act should not be construed to apply to extraterritorial wrongful acts of foreigners on foreign ships); *Finzer v. Barry*, 798 F.2d 1450, 1459 (D.C. Cir. 1986) (reviewing “a statute which both Congress and successive Presidents have declared to be necessary to fulfill our obligations under both customary international law and a treaty which we have signed”), *aff’d in part, rev’d in part sub nom.* *Boos v. Barry*, 458 U.S. 312 (1988); *Commodity Futures Trading Comm’n v. Nahas*, 738 F.2d 487, 493 n.12 (D.C. Cir. 1984) (refusing to enforce extraterritorial service of agency subpoena on grounds that a broad reading of statute would violate customary rules regarding extraterritorial application of enforcement jurisdiction); *United States v. Marino-Garcia*, 679 F.2d 1373, 1380 (11th Cir. 1982) (noting that statutory interpretation must be consistent with international law); *FTC v. Compagnie de Saint-Gobain-Pont-À-Mousson*, 636 F.2d 1300, 1323 n.130 (D.C. Cir. 1980) (noting that the D.C. Circuit Court of Appeals has adopted the “Charming Betsy” doctrine); *United States v. James-Robinson*, 515 F. Supp. 1340, 1345 (S.D. Fla. 1981) (declining to apply an anti-smuggling statute extraterritorially because doing so would have violated the “Charming Betsy” doctrine); see also *INS v. Cardoza-Fonseca*, 480 U.S. 421, 439 n.22 (1987) (suggesting that U.N. procedures regarding refugee status “provid[e] significant guidance in construing the [1967 U.N. Refugee] Protocol, to which Congress sought to conform” in passing the Refugee Act of 1980). Not surprisingly, one revisionist has recently argued that even this firmly-entrenched statutory canon ought to be rethought. See Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 484 (1998).

231. See *Thompson v. Oklahoma*, 487 U.S. 815, 829-30, 831 n.34 (1988) (plurality opinion) (Stevens, J., opinion) (contending that executing a minor would offend civilized standards of decency established by the international community); *id.* at 851 (O’Connor, J., concurring) (noting that the United States has agreed to treaties to set a minimum age of 18 for executions). *But see* *Stanford v. Kentucky*, 492 U.S. 361, 369 n.1 (1989) (emphasizing that, in this area, “it is American conceptions of decency that are dispositive”). See also *Printz v. United States*, 117 S. Ct. 2365 (1997) (discussing the similar debate between Justices Breyer and Scalia regarding the empirical value of federalist solutions applied in other federalist systems).

even persistent efforts to resist domestic internalization of international law may be overcome by a well-orchestrated campaign by human rights advocates. Since the Council of Europe first promulgated the European Human Rights Convention, efforts have been made to incorporate the norms of the convention into the domestic law of member states.²³² The incorporation question has been a major human rights issue in British politics since the Clement Attlee government first ratified the Convention in the early 1950s.²³³

Since 1968, British lawyers, transnational norm entrepreneurs, and government officials have launched persistent efforts to win legal internalization of the Convention. A well-known barrister, Anthony Lester (now Lord Lester of Herne Hill, Q.C.), first wrote about the question in 1968.²³⁴ Judicial internalization efforts then began in earnest in Britain's domestic courts through lawsuits brought by an able and creative public law bar.²³⁵ Individuals who had exhausted their rights under British domestic law were able to bring proceedings against the United Kingdom's government before both the European Commission and Court of Human Rights.²³⁶ Domestic judicial incorporation proceeded to a point through judicial construction in *Derbyshire County Council v. Times Newspaper Ltd.*,²³⁷ which authorized use of the European

232. For a comparative study of the various incorporation efforts, see generally ASPECTS OF INCORPORATION OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS INTO DOMESTIC LAW (J.P. Gardner ed., 1993) (gathering papers discussing the incorporation efforts of member states); ANDREW Z. DRZEMCZEWSKI, EUROPEAN HUMAN RIGHTS CONVENTION IN DOMESTIC LAW: A COMPARATIVE STUDY (1983) (analyzing efforts of each country); Jörg Polakiewicz & Valérie Jacob-Foltzer, *The European Human Rights Convention in Domestic Law: The Impact of Strasbourg Case-Law in States Where Direct Effect is Given to the Convention*, 12 HUM. RTS. L.J. 65 (1991) (surveying the impact of the European Human Rights Convention on European Nations).

233. For a political history of the incorporation effort, see generally MICHAEL ZANDER, A BILL OF RIGHTS? (4th ed. 1997) (considering whether the Convention should be incorporated and made available to British citizens through their courts).

234. For Lord Lester's modern position, see generally Lord Lester, *Taking Human Rights Seriously*, in HUMAN RIGHTS IN THE UNITED KINGDOM 99 (Richard Gordon & Richard Wilmot-Smith eds., 1996) (examining efforts by Parliament, the government, and the courts to abide by the European Human Rights Convention); Anthony Lester, *Fundamental Rights: The United Kingdom Isolated?*, 1984 PUB. L. 46; Lord Lester of Herne Hill, Q.C., *The Mouse that Roared: The Human Rights Bill 1995*, 1995 PUB. L. 198 (advocating the incorporation of the European Human Rights Convention into the "law of the land" in Britain).

235. See Lester, *Taking Human Rights Seriously*, *supra* note 234, at 103 (analyzing cases in which "the Convention has undoubtedly affected existing law and private rights whether by means of judicial interpretation or judicial law-making").

236. See *id.* at 100 (calling this allowance by the British government the "most momentous decision of all").

237. 1 All ER 1011 (H.L. 1993).

Convention to help resolve ambiguity in municipal law.²³⁸ Over time, the British jurisprudence citing the Convention became so extensive that a number of commentators began to argue that the United Kingdom had adopted a de facto policy of “compliance without incorporation.”²³⁹ Through such rulings, the international norms became deeply intertwined into the fabric of British constitutional law.²⁴⁰ However, in the famous case of *Brind v. Secretary of State for the Home Department*,²⁴¹ the House of Lords placed a limit on the extent to which judges could incorporate European human rights norms into law in cases in which there was no real ambiguity as to the meaning of domestic law.²⁴² Yet the incremental judicial incorporation efforts were not in vain; instead, they gave new impetus to a political internalization movement.²⁴³

By 1970, the incorporation issue had become linked to the domestic issue of a British Bill of Rights, and a large network of NGOs had gone on record as favoring internalization of the Convention into British law.²⁴⁴ The nongovernmental network soon linked to potential governmental sponsors and enlisted as politi-

238. See *id.* at 1021 (explaining that, since the prior case law was in conflict, it was appropriate for the domestic court to consider the Convention).

239. See generally DAVID KINLEY, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS: COMPLIANCE WITHOUT INCORPORATION* (1993) (explaining that even though the Convention’s provisions are not justiciable in British courts, the Convention has served the judiciary “as a source of guidance as to the interpretation of both common law principles and statutory provisions is now firmly established”).

240. See Rt. Hon. Lord Browne-Wilkinson, *The Infiltration of a Bill of Rights*, 1992 PUB. L. 397, 398 (noting that the European Human Rights Convention is superimposed on the domestic laws providing for the protection of individual liberty); see generally 8 HALSBURY’S LAWS OF ENGLAND (Lord Halsbury of St. Marylebone, 4th ed. 1996) (discussing human rights law as part of British constitutional law).

241. 1 All ER 720 (H.L. 1991).

242. See *id.* at 723 (explaining the limits on the Convention’s influence as a “mere canon of construction which involves no importation of international law into the domestic field”). In Lord Browne-Wilkinson’s words, the House of Lords’ reasoning was based on the view that “it was not for the judges to incorporate by the back door a convention which Parliament had so far declined to incorporate into [British] domestic law.” Browne-Wilkinson, *supra* note 240, at 404.

243. For one of a long line of bills urging incorporation see *Human Rights Bill*, 577 PARL. DEB., H.L. (5th Ser.) 1726, 1726 (1997) (“The main object of the present Bill is to give effect in our domestic law to the rights, freedoms and duties set out in the convention and its first protocol . . .”). See also Lester, *Mouse that Roared*, *supra* note 234 (announcing that the goal of his proposed bill was to incorporate the convention into the law of the land).

244. See Michael Zander, *A Bill of Rights for the United Kingdom—Now*, 32 TEX. INT’L L.J. 441, 443 (1997) (indicating that the issue of a British Bill of Rights was heavily discussed and supported by many influential people). For example, the supporting NGOs came to include such groups as the British Institute of Human Rights, Interights, the Constitutional Human Rights Center, Charter88, Liberty, JUSTICE, the British section of the International Commission of Jurists, The Institute for Public Policy Research, and the National Council for National Liberties.

cal allies opposing political parties such as the Scottish National Party and the Liberal Democratic Party.²⁴⁵ At the same time, the nongovernmental network sought the support of numerous prominent lawyers and judges, who became governmental sponsors of the incorporation effort.²⁴⁶ Finally, in early 1993, a political breakthrough was achieved when then-Labour leader John Smith brought the program onto the Labour Party's agenda.²⁴⁷ His successor, Tony Blair, embraced that position and made it a central plank of his "New Labour" agenda.²⁴⁸ By the beginning of 1997, two of the three main British political parties supported incorporation,²⁴⁹ a fact strongly signaling "political internalization," as I have defined it above. Equally important, public opinion polls demonstrated that an astonishing three-quarters of the British public supported incorporation,²⁵⁰ strongly indicating not just judicial and political, but also social internalization. When New Labour finally ousted the Conservative Party in May of 1997, the new Blair government placed incorporation squarely into its legislative platform,²⁵¹ leading to a simple, unadorned line in the Queen's speech that opened Parliament. The Queen announced that a bill will be introduced to incorporate into United Kingdom law the "main provisions" of the European Convention of Human Rights.²⁵²

245. See generally Lord Irvine, *My Pivotal Role in the Constitutional Revolution*, THE TIMES (London), July 12, 1997, at 7 (discussing the political process behind the bill of rights movement).

246. The supporters came to include such British legal and political notables as Lord Scarman, Lord Taylor of Gosforth (then-Lord Chief Justice), Lord Woolf (the current Master of the Rolls), Lord Bingham, and Lord Browne-Wilkinson. See Zander, *supra* note 244, at 448.

247. See *British Rights*, THE TIMES (London), Aug. 15, 1992, at 11 (explaining that "establishment opinion is moving towards the incorporation of the [Convention] into British law").

248. See *Labour's New Britain*, THE TIMES (London), Dec. 12, 1994, at 7 (quoting Tony Blair as saying that "Parliament should pass a Human Rights Act that . . . gives the citizens the right to enforce those rules in the courts" (alteration in original)).

249. See Lord Irvine, *My Pivotal Role in the Constitutional Revolution*, THE TIMES (London), July 12, 1997, at 22 (discussing a program of constitutional reform published jointly by the Labour Party and the Liberal Democrats, which includes a provision for incorporation of the Convention); *British Rights*, *supra* note 247, at 11 (noting that the Liberal Democrats have always been in favor of incorporation). In addition, polls have shown that nearly two-thirds of Tory voters support incorporation of a Bill of Rights. See Peter Riddell, *Voters Increasing Support for Changing the Constitution*, THE TIMES (London), Jan. 27, 1995, at 9.

250. See Riddell, *supra* note 249, at 9 (documenting a poll taken by *The Times* that shows widespread support for constitutional reform across party lines).

251. See Fred Barbash, *Labour Party Proposes British 'Bill of Rights'*, WASH. POST, May 15, 1997, at A26.

252. See Marcel Berling, *Law: Writ Large*, THE GUARDIAN (London), May 20, 1997, at 17 (commenting on the speech and questioning what was meant by "main provisions").

Thus, years of partially successful internalization efforts now seem certain to bring about the legal internalization of the European Convention into British law by an act of Parliament.²⁵³ In short, this episode illustrates how even repeated unsuccessful efforts at legal internalization can nevertheless serve as a lightning rod for an eventually successful effort at social and political internalization.

V. PROMOTING OBEDIENCE TO INTERNATIONAL NORMS

Perhaps the most obvious objection to the internalization hypothesis is the claim that the process of "vertical internalization" will be more effective in liberal western countries than in illiberal "third-world states," that generally possess weaker legal traditions, where fewer citizens can start the debates or litigation that can lead to internalization, and where judicial institutions tend to be weak and governmental openness limited.²⁵⁴

Yet in my view, this objection is less than compelling for at least three reasons. First, whether the process of vertical internalization will be equally effective worldwide depends far less on the particular domestic legal system in question, than on the particular rule for which internalization is sought. There are many international law rules that third-world states do internalize. For example, international commercial rules regarding letters of credit and transnational contracts are obeyed virtually without question by banks in liberal as well as illiberal states.²⁵⁵ Similarly, rules regarding the law of the sea and diplomatic immunity are routinely internalized, as are various other rules of what was previously called "private international law," as a result of the accelerating globalization of international commerce.²⁵⁶ Indeed, illiberal systems internalize some rules of international human

253. As of July 1998, the Human Rights Bill has passed through the House of Lords and is awaiting passage in the House of Commons. See Hugo Young, *Commentary: Press Barons put Pressure on Blair*, THE GUARDIAN (London), Feb. 12, 1998, at 19. The Bill is expected to come into force in 2000, or perhaps even earlier. See Clare Dyer, *Art Scam Leads Widow to Test of Privacy*, THE GUARDIAN (London), Feb. 17, 1998, at 3 (discussing a current privacy case and predicting that the Bill of Rights will be law in 1999).

254. Cf. Anne-Marie Burley, *Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine*, 92 COLUM. L. REV. 1907, 1910 (1992) (suggesting that receptivity to international law varies markedly between liberal and illiberal states).

255. See Berman, *supra* note 33, at 1620 (explaining that international businesses, banks, and lawyers have created a world economic law which governs all international transactions without regard to political character of participating states).

256. See *id.* at 1621 (noting that routinely accepted international economic rules have helped ease the way for internalization of other international norms).

rights law, while liberal systems do not internalize others.²⁵⁷ Thus, in my view, the key determinant of whether nations obey particular rules is not so much the nature and permeability of the domestic legal system as a whole, but rather the degree to which particular rules are or are not internalized into the domestic legal structure.²⁵⁸

Second, my analysis does not take domestic regime structures as fixed or given. Rather, it seeks to offer a dynamic explanation for how internalization of international rules can help to promote domestic regime change. As the above argument illustrates, participation in the transnational legal process is a constructivist process, which in some cases serves to reorder not just national interests, but even national identity. For example, over time, the change in the interests of South Africa's trading partners helped promote a revolutionary transition within South Africa, which is now proceeding through new processes of internalization spurred by the new South African Constitution (which explicitly incorporates international norms),²⁵⁹ a new constitutional court,²⁶⁰ and a challenging Truth and Reconciliation process.²⁶¹ Similarly, the efforts of the new Eastern European republics to integrate themselves into the legal structures of the European Union, NATO, and the Council of Europe have all

257. For example, I do not think of the Egyptian political system as particularly liberal, but the rule against female genital mutilation has recently become entrenched there through a combination of executive and judicial action. See Dawit & Mekuria, *supra* note 113, at A27. At the same time, the supposedly liberal U.S. system has not internalized the rule against the execution of minors, despite a high degree of permeability of our system. Refer to note 231 *supra* (discussing the opposing views of Thompson and Stanford regarding execution of persons under 18) and note 105 *supra* (discussing Professor Franck's examples of other instances of nonpermeability of the U.S. system). My point is that the key level of analysis is not the liberality of the domestic legal system but, rather, the level of the *particular transaction*, which determines whether a particular international legal rule is or is not internalized.

258. Indeed, I would argue that the liberality or illiberality of a domestic legal system is itself merely a proxy measure for the extent to which particular kinds of rules are or are not routinely internalized. See generally Koh, *supra* note 5, at 2650 (discussing the extent to which compliance and internalization can constitute the identity of a state).

259. See Brice Dickson, *Protecting Human Rights Through a Constitutional Court: The Case of South Africa*, 66 FORDHAM L. REV. 531, 537 (1997) (noting that the South African Constitution includes many protections of human rights and is "comparable in many respects to the standard international documents on human rights").

260. See *id.* at 531 (examining the constitutional court and its effect on human rights internalization).

261. See Dickson, *supra* note 259, at 539-40 (explaining how the Truth and Reconciliation Commission hears evidence and grants amnesties for human rights abuses and other crimes that occurred before the inauguration of President Nelson Mandela on May 10, 1994).

promoted interpenetration between domestic and international law, which has helped to play a critical, “constructivist” function of reconstituting these countries’ national interests and identities as nations who seek generally to obey international law.²⁶² In the same way, I would argue, once even rogue states such as Iran, North Korea, or the Peoples’ Republic of China begin repeatedly interacting in various public and private fora and interpreting global norms, they will experience significant pressure to internalize those norms. In time, this internalization process will gradually reconstruct their national identities from rogue states to law-abiding states.

While the structural attributes of liberal systems undeniably make them more open to some of the kinds of internalization discussed above, illiberal states may also internalize through a variety of means. For example, strong executives may internalize international rules for an illiberal country, even without judicial or legislative involvement. Yet once these rules are accepted as domestic law, they begin to trickle into the system and force domestic change, even within illiberal systems. Take for example, China’s recent announcement that it will sign the International Covenant on Civil and Political Rights in the fall of 1998.²⁶³ Once Chinese executive officials have agreed to accept those norms, however grudgingly, the transnational process forces described earlier will begin to put pressure upon China—with the assistance of both governmental and nongovernmental actors—in various international fora to comply with various norms associated with that treaty. As international sanctions begin to attach to those norms, a process of vertical internalization will predictably commence, however slowly.²⁶⁴ China’s domestic institutions will have an incentive to adopt default rules that avoid routine noncompliance with the international rule. Thus, over time, acceptance of the international rule should have a liberalizing impact, even upon states that have proven relatively impervious to external influence.

262. See Andrew Hurrell, *International Society and the Study of Regimes: A Reflective Approach*, in INTERNATIONAL RULES 206, 215 (Robert J. Beck et al. eds., 1996) (explaining that once countries commit to “some kind of moral community (however minimalist in character) within which perceptions of potential common interest can emerge, then there may indeed be prudential reasons for the players collectively to cooperate”).

263. *We are Building a Friendship that will Serve our Descendants Well*, WASH. POST, June 28, 1998, at A22 (quoting President Clinton’s recognition of China’s decision to sign the International Covenant on Civil and Political Rights).

264. As an example of this nascent process at work, see the U.S. Rule of Law Initiative recently announced during President Clinton’s 1998 trip to China. See Anthony Lewis, *Working With Chinese to Install the Rule of Law*, INT’L HERALD TRIB., July 7, 1998, at 8.

Thus, my theory of norm-internalization—or “bringing international law home”—explains how internalization can promote the domestic transformation of polities from illiberal to liberal. While inclusion of Russia and Turkey within the Council of Europe will no doubt help water down certain European human rights standards, the process will likely run in the other direction as well, elevating domestic human rights standards in these countries and promoting democratization.

Third, and most obviously, my norm-internalization argument helps explain not only why nations obey, but also why nations do *not* obey. If nations that persistently flout international norms lack effective processes of vertical norm-internalization, that conclusion does not undercut my claim that norm-internalization helps explain why nations exhibiting effective internalization processes do obey particular rules. If those “third-world states” whose domestic institutions lack or actively obstruct this transnational legal process prove relatively impermeable to international law, that finding would tend to prove my point, not undermine it.

If nations do come to “obey” international law, even if only out of a perceived self-interest that becomes institutional habit, how do we transform grudging compliance into habitual obedience? I have suggested that if our goal is more *internalized compliance*, or what I have called “obedience,” then attempted internalization, not coercion, must be the preferred enforcement mechanism. This suggests that the best compliance strategies may not be “horizontal” regime management strategies among nation-states but, rather, vertical strategies of interaction, interpretation, and norm-internalization. For human rights activists, this suggests a simple three-pronged strategy: first, provoking interactions; second, provoking norm interpretations; and third, provoking norm-internalizations.

First, if transnational actors obey international law as a result of repeated *interaction* with other actors in the transnational legal process, one progressive step would be to empower more actors to participate in the process. The goal, therefore, should be to expand the participation of intergovernmental organizations, NGOs, private business entities, and transnational norm entrepreneurs as process-activators. The process surrounding the worldwide ban on landmines is a graphic example of how norm entrepreneurs were able to build a public-private transnational network of individuals and groups dedicated to pressing their norm, while enlisting governmental allies and building popular global support.²⁶⁵

265. Refer to Part III.C *supra* (exemplifying the process of norm-internalization

Second, if the goal of interaction is to produce *interpretation* of human rights norms that may be applied against violators, activists must seek new fora for the enunciation and elaboration of norms. Once again, the landmines case shows how a transnational issue network, stymied in the existing Geneva Process, first enlisted the aid of the smaller governmental players, then created a new intergovernmental forum—the Ottawa Process—in which to promote development of the norm.²⁶⁶ Intergovernmental organizations play key roles not just as instigators of interaction, but also as creators of new interpretive fora. For example, existing intergovernmental organizations have created new law-declaring arenas, as the U.N. Security Council did by creating international criminal tribunals for Rwanda and the former Yugoslavia²⁶⁷ or as the United Nations has recently done by laying the foundations for a new International Criminal Court.²⁶⁸ In other cases in which dedicated fora do not already exist, intergovernmental organizations have sought to adapt existing fora so that international human rights issues can be raised before the European Court of Justice,²⁶⁹ or international environmental issues raised before GATT Panels.²⁷⁰ By promoting development of these fora, human rights activists can also seek to expand the interpretive community that determines the contours of a legal norm and whether that norm has been violated in particular instances.²⁷¹

in the landmine debate).

266. Refer to Part III.C *supra*.

267. See S.C. Res. 955 U.N. SCOR, 49th Sess., 3453rd mtg., U.N. Doc. S/Res/955 (1994), *reprinted in* 33 I.L.M. 1598, 1601 (1994) (establishing an international tribunal to prosecute violators of international humanitarian law committed in Rwanda); S.C. Res. 827, 48th Sess., 3217th mtg., U.N. Doc. S/Res/827 (1993), *reprinted in* 32 I.L.M. 1203, 1204 (1993) (establishing an international tribunal to prosecute violators of international humanitarian law committed in the former Yugoslavia). As we have recently seen with the 1998 Rome Conference to create a charter for a permanent international criminal court, such fora not only acquire a life of their own, but also may create the political impetus for other adjudicatory fora with even broader jurisdictional mandates.

268. See Thomas W. Lippman, *Worldwide War Crimes High Court is Approved*, WASH. POST, July 18, 1998, at A1 (“Delegates from more than 100 countries voted overwhelmingly yesterday to create a permanent international court to try suspected war criminals and perpetrators of genocide.”). However, the United States is unlikely at present to participate in the creation or operation of this court. See *id.*

269. See, e.g., J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2417-19 (1991) (explaining the process by which the ECJ took jurisdiction of these issues).

270. See, e.g., Don Mayer & David Hoch, *International Environmental Protection and the GATT: The Tuna/Dolphin Controversy*, 31 AM. BUS. L.J. 187, 188-89 (1993) (explaining a trade dispute Mexico brought against the United States regarding limits on tuna imports).

271. Thus, in recent years, the creation of the new War Crimes Tribunals, the U.N. Commission of Experts that led up to that event, and now perhaps the new in-

Third and finally, human rights activists need to develop techniques to provoke legal norm-internalization as a starting point for political and social internalization. As the Torture and European Human Rights Convention case studies in Part IV show, persistent activists can combine strategies of judicial internalization with strategies of political, social, and legislative internalization, with an eye toward making international norms “feel familiar” to political actors. Even when explicit ratification efforts fail, as in the landmines and UNCLOS III episodes, activists inside and outside of participating governments can act to conform governmental conduct to unratified treaties. Such action sets the stage for eventual ratification of these treaties by the abstaining nations on the ground that *de facto* internalization has already become a *fait accompli*.

In sum, the constructive role of international law in the post-Cold War era will be greatly enhanced if NGOs self-consciously seek to participate in, influence, and ultimately enforce, transnational legal process by promoting the internalization of international norms into domestic law. In this lecture, I have argued that we can better understand the roots of national compliance or noncompliance with international law if we redirect our attention to the concept of *obedience*. The idea of obedience can be integrated with other theories of explaining norm-internalization to create a broader working theory of compliance with international law.²⁷²

VI. CONCLUSION

In *The Concept of Law*, H.L.A. Hart argued that international law lacks two features he deemed central to the very concept of law: first, “the secondary rules of change and adjudication which provide for legislature and courts” and second, “a unifying rule of recognition, specifying ‘sources’ of law and providing general criteria for the identification of its rules.”²⁷³ Until actors

international criminal court have all dramatically expanded the interpretive community for genocide—those entities capable of interpreting and elaborating upon the meaning of the norm, and applying it to particular sets of facts. Refer to Part III.B.4 (discussing the “interpretative community” and the incorporation of genocide norms).

272. There is neither time nor space here to offer a general theory of compliance with international law. But such a theory, which I sketch in my forthcoming book, seeks to perform four tasks: specifying compliance levels, identifying causal factors, describing a causal mechanism, and predicting results. See generally Koh, *supra* note 5. This lecture has focused upon the second and third tasks.

273. H.L.A. HART, *THE CONCEPT OF LAW* 214 (2d ed. 1994); see also NEIL MACCORMICK, *LEGAL REASONING AND LEGAL THEORY* 284 (1978) (observing how

within the international system internalize both a rule of recognition and secondary rules for orderly change and interpretation, Hart argued, international law will consist only of a set of primary rules with which nations will comply out of a sense of moral, not legal, obligation.²⁷⁴ In effect, Hart defined the very notion of “obedience” out of international law. Indeed, under his description, international rules are ones with which nations may conform or comply, but never “obey” in the sense of internally accepting those rules into national law.²⁷⁵

Whether Hart’s description was ever true, it certainly is not now. What Hart misunderstood is that participation in transnational legal process creates an internalizing, normative and constitutive dynamic, which closely integrates international and domestic law. Nation-states are far more likely to comply with international law when they have accepted its legitimacy through some internal process. Were Hart lecturing today, current realities would require him to rethink his claim that international rules fall outside his jurisprudential definition of the concept of law because such rules are not “internally accepted.”²⁷⁶

I have argued that transnational legal process is not self-activating. Our action influences that process; our inaction ratifies the status quo. By this reasoning, those who favor application of international norms to state behavior cannot afford to be passive observers. To the contrary, they must seek self-consciously to participate in, influence, and ultimately enforce transnational legal process, by promoting the interaction, interpretation, and internalization of international norms into domestic law. If our aim is to promote obedience to international law, we have a duty not simply to observe transnational legal process, but to try to influence it. For inspiration, we need look no further than the transnational norm entrepreneurs, such as Jody Williams, Nelson Mandela, or Aung San Suu Kyi, who have triggered these legal processes in our own time. So if the question is “why do nations obey international law?”, my answer would be: Nations obey because of people like us—lawyers and citizens who

Hart’s normative terminology focused on notions of ought and should, good and bad); J.M. Balkin, *Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence*, 103 YALE L.J. 105, 110 (1993) (“Since H.L.A. Hart, jurisprudence has been grounded on the so-called ‘internal point of view,’ the perspective of a participant in the legal system who regards its laws as norms for her behavior.”).

274. See HART, *supra* note 273, at 231-32 (arguing the primary justification for international law is that “there is a moral obligation to obey”).

275. See *id.* at 231 (observing that if there are no sanctions, there is no real reason to accept international law).

276. See *id.* at 215 (posing the question, “Is international law really law?”).

care about international law, who choose not to leave the law at the water's edge, who do their utmost to "bring international law home."