

To seminar participants,

Attached are chapters 1, 5, 6, and 7 of a book manuscript on international law.
The other chapters are available to anyone who is interested in reading them.

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A Theory of International Law

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Chapter 1. Introduction

International law has long been burdened with the charge that it is not really “law.” This misleading claim is premised on some undeniable but misunderstood facts about international law: that it lacks a centralized legislature, executive, or judiciary; that it frequently ratifies existing international behavior rather than compelling change; and that is sometimes, though by no means always or usually, violated with impunity. International law scholarship, dominated for decades by an improbable combination of sterile doctrinalism and hopeless idealism, has done little to correct this impression. Neither strand of international law scholarship has made much progress in explaining how a decentralized international law affects behavior among very differently endowed states. Nor has it helped us understand other elements of how international law works in practice – how international law originates and changes, whether international law has normative force, why international law’s content usually reflects the interests of powerful states, and why international law plays such an important role in the rhetoric of international relations.

This book seeks to answer these and related questions. It seeks to understand how international law works by integrating the study of international law with the realities of international politics. Our theory gives pride of place to two elements of international politics usually neglected or discounted by international law scholars – state power, and state interest. And it uses a methodological tool infrequently used in international law scholarship, rational choice theory, to analyze these factors. Put briefly, our theory is that international law emerges from states acting rationally to maximize their interests, given their perceptions of the interests of other states and the relevant distribution of national power. Using this theory, we seek to explain how international law works in practice, and to draw normative lessons from the analysis.

This Introduction discusses the assumptions of our analysis, sketches our theory in very general terms, and locates our position among the various schools of international law and international relations.

ASSUMPTIONS

The assumption that states act rationally to further their interests is not a self-evident truth. All components of this assumption – that the state is the relevant agent, that a state has an identifiable interest, and that states act rationally to further these interests – are open to question. Nonetheless, we believe state-centered rational choice theory, used properly, is a valuable method for understanding international law. What follows is a brief discussion of our use of the concepts of state, state interest, and rationality. Further detail will be provided in subsequent chapters.

1. State.

The existence of a state depends on the psychology of its inhabitants. If all U.S. citizens stopped believing that the United States were a state, and instead began to believe that they were citizens of Indiana or Texas, then the United States would cease to exist, and numerous new states would come into existence. (This is in effect what happened when the Soviet Union and Yugoslavia disintegrated in the early 1990s.) Moreover, the “state” is an abstraction. Although the identity of the State is intuitively clear, the distinction between the State and the influences on it sometimes blurs. Relatedly, the State itself does not act except in a metaphorical sense. Individual leaders and diplomats negotiate treaties and decide whether to comply with them or breach them. Because the existence of a state and state action ultimately depend on individuals’ beliefs and actions, one could reject the assumption that states have agency, and insist that any theory about the behavior of states must have microfoundations in a theory of individual choice.

Although we will often examine the motivations of actors within the state, we nonetheless give the state the starring role in our drama. The main reason for doing so is that international law is addressed to states and, for the most part, not to individuals or other entities such as governments. NAFTA did not confer international legal obligations on President Clinton or the Clinton administration, but on the United States. The United States remains bound by these obligations until a future government withdraws the United States from the treaty. Moreover, although states are collectivities, they arrange themselves to act like agents, just as corporations do. Corporations are, to be sure, easier to understand than states. Corporate interests – to make money for the shareholders, subject to agency costs resulting from the delegation of authority individuals who run the firm – are (usually) easier to identify. And it is easier to assume that corporate obligations remain in force despite the turnover of managers, directors, and shareholders, because the obligations are enforced by domestic courts regardless of who happens to be in control of the corporation. Still, State interests can be identified (as we explain below), and through various domestic institutions States can and do maintain their corporate identity. Both ordinary language and history validate the assumption that states have agency and thus can be said to make decisions, bear obligations, and act.

The placement of the state at the center of analysis necessarily limits its scope. We cannot discuss, except in passing, difficult and important topics at the margins of international law about how states form, devolve, and disintegrate. Many scholars view European Union integration as a possible model for a public international law that would be more ambitious than the one we currently have. Although the EU project is in some respects constituted by international law, we

think it is more usefully viewed as an effort in multistate unification akin to pre-20th century unification efforts in the United States (which during its Articles of Confederation period was viewed as a federation governed by international law), Germany, and Italy. In any event, we offer no theory of State unification or integration. Nor do we have much to say about the opposite claim that the state is losing power downwards – to smaller state units (the disintegration of the Soviet Union and the former Yugoslavia), to sub-state units (the devolution movements throughout Europe), and to multinational corporations and transnational NGOs. We touch on devolution and disintegration in our discussion of sovereignty in Part I. And we briefly analyze NGOs in chapter 6's discussion of human rights.

2. State Interest.

By “state interest,” we mean the state's preferences about outcomes. These interests can be described in a general way as security, prosperity, and values. At this level of generality, the concept of “state interest” is nearly empty. A theory of international law can only be given content at a lower level of abstraction, and as we discuss various legal regimes, we will identify the preferences of states more concretely. We identify these preferences by looking to the preferences of the state's political leadership. This assumption is far from perfect, but it is parsimonious, and it is appropriate because a state's political leadership determines state actions related to international law.

Three points about this concept of “state interest” bear emphasis. First, the concept must not be confused with the policy that promotes national welfare. In every state certain individuals or groups – elites, corporations, the military, relatives of dictators – have disproportionate influence on state leaders' conduct of national policy. Even in democratic states, the institutions that translate individual preferences into particular policies are always imperfect, vulnerable to cycling and related phenomena, potentially derailed by corruption, incompetence, or purposeful hurdles (like separation of powers), and sometimes captured by interest groups. The inevitable presence of these distorting mechanisms means that the “state interest” as we use the term is not necessarily, or even usually, the policy that would maximize the public good. Any descriptive theory of international law must account for the agency slack of domestic politics, and we do so primarily by focusing on what leaders maximize. One consequence of this approach is that our use of the term “state interest” is merely descriptive of leaders' perceived preferences, and is morally neutral. To take an extreme example, when we analyze a leader's interest in committing human rights abuses, we refer only to what the leader perceives as the best policy to maintain his authority, and do not suggest that human rights abuses are ever morally justifiable.

Second, interests and preferences are not easy to determine. As a general matter we infer leaders' interests with respect to some area of international relations from empirical data concerning the conduct of the state and the motivations of leaders and pertinent constituents. Sometimes, as when we conclude that a state has an interest in winning a war, the inference will be obvious. Other times, such as when trying to assess why a state ratifies a human rights treaty, the inference will be more controversial. We are aware that to the extent that our identification of state interests is controversial or tendentious, our theory is open to the charge of asserting whatever needs to be explained.

Third, although for the most part we assume a unitary state interest, in some contexts in the book – for example, in explaining the significance of the ratification process for treaties, or in analyzing the domestic interest groups that influence a state's international trade policy – we will unpack the idea of a unitary state interest and consider the impact that various domestic groups and institutions have on political leadership's preferences and decisions related to international law.

3. Rational Choice.

There are three basic reasons why we use the tools of rational choice in this book. First, it is uncontroversial that state action on the international plane has a large instrumental component; and that rational choice theory provides the best models for understanding instrumental behavior. Political scientists' use of rational choice tools has brought considerable insight to many general trends in international relations, and has opened many fruitful research agendas. We believe rational choice can shed similar light on international law. Second, rational choice is simpler and more powerful (in the sense of explaining more with fewer assumptions) than its rivals. And third, the weight of our argument is empirical. We claim that rational choice theory explains the evidence of international behaviors related to international law better than dominant understandings of international law in international legal scholarship.

Our theory assumes that states act rationally to maximize their interests. This assumption incorporates standard premises of rational choice theory: The preferences about outcomes embedded in the state interest are consistent, complete, and transitive. But we do not claim that the axioms of rational choice accurately represent the decisionmaking process of a "state" in all its complexity, or that rational choice theory can provide the basis for fine-grained predictions about international behavior. Rather, we use rational choice theory as a tool to organize our ideas and intuitions, and to clarify assumptions. No theory predicts all phenomena with perfect accuracy, and we do not deny that states sometimes act irrationally – because their leaders make mistakes, because of collective

choice problems, and so forth. Our claim is only that our assumptions provide better explanations of state behavior than other theories do.

There is a massive literature critical of rational choice, three components of which we address here. First, a word on collective rationality. As understood by economics, “rationality” is primarily an attribute of individuals, and even then only as an approximation. The term’s application to collectivities such as corporations, governments, and states must be performed with care. For some of the reasons mentioned above, social choice theory casts doubt on the claim that collectivities can have coherent preferences. But if this critique were taken seriously, any explanation of international law, or for that matter even domestic law, would be suspect. Cycling is probably most prevalent not in states but in pre- or non-states, that is, in aggregations of people who cannot develop stable institutions. As explained above, when states exist, people have adopted institutions that ensure that governments choose generally consistent policies over time, policies that at a broad level can be said to reflect the state’s “interest” as we understand the term.

Another challenge to rational choice comes from cognitive psychologists, who have shown that individuals make cognitive errors, sometimes systematically. We do not deny the empirical claims of this literature. History is full of examples of national leaders committing errors while acting on the international stage, and it is conceivable that these errors can be traced to the standard list of cognitive biases (McDermott 1998). The problem is that the cognitive psychology literature has not produced a comprehensive theory of human (or state) behavior that can guide research in international law and relations. (Levy 1997). Such a theory, if it existed, might well result in a more refined understanding of international law and relations. But it might not; individual cognitive errors may have few if any macro-effects on international relations. Economic theory has produced enormous insights based on its simplifying assumptions of rationality. Our theory must be judged not on the ontological accuracy of its methodological assumptions, but rather on the extent to which it sheds light on problems of international law.

Finally there is the “constructivist” challenge from international relations scholarship. (See Wendt, 2000). To the extent that constructivism shares similarities with traditional international law scholarship – for example, its commitment to noninstrumental explanations of State behavior – we address its claims throughout the book. Here we address its critique of State preferences. As is usual (but not necessary) in rational choice theory, we takes state interests at any particular time to be an unexplained given. Constructivists challenge this assumption, and seek to show that the preferences of individuals, and therefore state interests, can be influenced by international law and institutions. (See

Wendt 1992). To the extent this is true, it would call question our theory's ability to explain international law in terms of a State's interest. We doubt it is true to any important degree, but we cannot prove the point. On the other hand, constructivists have not shown that international law transforms individual and state interests. Case studies that we examine in chapter 6 do not provide evidence of such an effect. The relevant question is whether the endogenization of the state's interest, assuming it could be done in a coherent fashion, would lead to a more powerful understanding of how states behave with respect to international law. We provide our theory in the pages that follow, and we leave it to critics to decide whether constructivism provides a more powerful theory of international law.

There is a related point. We consistently exclude one preference from the State's interest calculation: A preference for complying with international law. A rational choice theory could incorporate this preference into the State's utility function, and indeed, such a preference would be akin to international law scholarship's standard assumption, discussed below, that State's are compelled to comply with international law by its "normative pull." Although some individuals in a State may possess this preference, we reject it as a basis for State interests and State action on the international plane. It is unenlightening to explain international law compliance in terms of a disposition to comply with international law. Such an assumption would say nothing interesting about when and why states comply with international law, and would provide no basis for understanding variation in, and violation of, international law. We return to this point below.

THEORY

With these preliminaries in mind, we now provide a skeleton of our theory of international law. We put flesh on these bones in subsequent chapters.

Consider two states, A and B. At time 1, the two states have certain capacities and interests. The capacities include military forces, economic institutions, natural resources, and human capital. The interests are determined by leaders, who presumably take account in some way of the preferences of citizens and groups. At time 1, the states divide available resources in some stable fashion. They divide territory along a border, and they divide collective goods such as airwaves, fisheries, and mineral deposits in ways that might or might not prevent overexploitation. At time 2, something changes. One state, say state A, becomes wealthier as a result of more efficient domestic economic arrangements, or valuable resources are discovered on its territory, or a technological invention alters the distribution of power, or a change in domestic institutions in one state results in a new aggregation of citizen preferences.

As a result of the shock, the time 1 status quo is no longer stable. In the simplest case, the power relation between A and B changes, as A's power increases relative to B's. State A then demands a greater share of resources from state B. In the past, this demand might have been for territory or tribute; but in the modern world, A will usually demand something more intangible, like access to markets, greater protection for intellectual property, military assistance or base rights, foreign aid, and diplomatic assistance. State A might also threaten to close its own markets, violate B's intellectual property rights, reduce the military assistance it had been rendering B, reduce the foreign aid it had been giving to B, cut back on diplomatic assistance to B, and so forth. Any of these things might happen because A had provided these benefits to B in return for benefits that it no longer wants (because of a change in interest) or needs (because of a change in relative power).

If A and B had perfect information about the other (if, that is, each knew the others' interests and capacities completely), their relations would adjust smoothly and quickly to the shock, and at time 3 there would be a new division of resources: a new border, new diplomatic activities, a new level of military assistance in one direction or the other, a new level of foreign aid, or new trade patterns. In the real world of imperfect information, their adjustments will be slow and usually suboptimal. There might be significant conflict, including war, as states learn about one another and bluff and bargain over the new order, exaggerating their strengths and concealing their weaknesses. Eventually the situation between the two states will stabilize.

The relations between the two states at any time can be described as a set of rules. But here care must be used, for several very different things might be going on. Consider a border between A and B. The border is a rule that delineates the territory of each state, where it is understood that neither state can send individuals or objects across the border without the permission of the other state. Territorial borders are generally thought to be constituted and governed by international law. Assume that States A and B respect the border. What explains their apparent compliance with international law? Our theory of international law posits that one of four things might explain such compliance.

First, it is possible that neither of the two states has an interest in projecting power across the border. State A does not seek resources in state B's territory, and would not seek them even if B were unable to resist encroachment. It is barely able to control its own territory, and wants to have nothing to do with B's. State B has the same attitude to State A. When a pattern of behavior – here, not violating the border – results from each state acting in its self-interest without any regard to the action of the other state, we call it a *coincidence of interest*. As we will show in subsequent chapters, international law scholars often err in

inferring self-conscious compliance with international law from a situation that is in fact a coincidence of interest in which international law and other states' interests played no role in state behavior.

There is a second possible explanation for the border. State A might be indifferent between one border and another border deeper in what is now state B's territory. The additional territory might benefit state A, but it would also bring with it costs. The main concern for the states is that of clarifying the point at which state A's control ends and state B's begins, so that the two states can plan accordingly and avoid conflict. State B has the same set of interests and capacities. Once the two states settle on a border, neither violates the border because if either did conflict would result. We call this state of affairs *coordination*. In cases of coordination, states receive higher payoffs if they engage in identical or symmetrical actions than if they did not. A classic coordination game from domestic life is driving: all parties do better if they coordinate on driving on the right, or driving on the left, than if they choose different actions.

A third possible explanation for the border is *cooperation*. States A and B would each benefit by having some of the other's territory, all things equal. But each knows that if it tried to obtain more territory, the other state would resist, and a costly breakdown in relations, and possibly war, would result. Thus, the States agree (implicitly or explicitly) on a border that reflects their interests and capacities, and the border is maintained by mutual threats to retaliate if the other state violates the border. In such cases of cooperation, states reciprocally refrain from activities (here, invasion or incursion) that would otherwise be in their immediate or short-term self-interest in order to reap larger medium- or long-term benefits.

The final possibility is *coercion*. State A is satisfied with the existing border but state B seeks to expand its territory at A's expense. If B is sufficiently powerful, it can dictate the new border. Because state A is weaker, and state B benefits from the extra territory whether or not state B resists, state A yields (either before or after military conflict) and a new border is created. Other states might or might not object: they also might benefit from the new border or be powerless to resist it. Coercion results when a powerful state (or coalition of states with convergent interests) forces or threatens to force weaker states to engage in acts that are contrary to their interests (defined independently of the coercion).

We argue that some combination of these four models of strategic behavior explain the behaviors associated with international law. These models do not exhaust the possibilities of international interaction. But they provide a useful framework for evaluating a range of international legal regimes. As we

explain throughout the book, each type of behavior has different characteristics that make it more or less stable and effective, depending on the circumstances. The behavioral regularity that results from coincidence of interest differs from the other three in an important respect: It involves no other-regarding element. By contrast, behavioral regularities arising from coordination, cooperation, and coercion all result from States adjusting their actions in response to other States' actions, or expectations about how other states will act. In this sense, only these latter three models could be the basis for what we would properly call a rule of *inter-national* law.

The "rules" of international law reflected in these three logics differs in a crucial respect from how international law rules are usually understood in international law scholarship. The usual view is that international law is a check on State interests, causing a State to behave in a way contrary to its interests. In our story, the causal relationship between international law and state interests runs in the opposite direction: International law emerges from nations' pursuit of self-interested policies on the international stage. It is not a check on national self-interest; it is a product of national self-interest.

The bulk of the book is devoted to applying this framework to various regimes of international law. The argument unfolds in three parts. Part I analyzes customary international law. We argue in this Part that much of what is called CIL is actually coincidence of interest, and that CIL that reflects cooperation, coercion, or coordination can occur in bilateral contexts but rarely in multilateral contexts. CIL's well known theoretical incoherence has resulted from international lawyers' characteristic method of inducing from a few isolated instances of seemingly compliant behavior a universal norm applicable to all states, ignoring all the evidence to the contrary. We examine five areas of CIL: wartime restrictions on seizure, ambassadorial immunity, the territorial sea, and the coastal fishing vessel rule of *The Paquete Habana* (1900), and several rules of CIL related to sovereignty and recognition.

Part II analyzes treaties, the second form of international law. The main puzzle here is: why do States use treaties instead of CIL? We argue that treaties specify the focal points for coordination or self-enforcing cooperation, and that domestic processes that are often required for treaty formation can reveal useful information about a state's interests. In addition, we explain how nonlegal agreements work, why states increasingly use multilateral treaties, why these treaties nonetheless depend on the logic of bilateral monitoring and enforcement, and why states enter into treaties with vague or hortatory commitments. Finally, we argue that many scholars fall into the trap of treating treaties as though they were domestically enforced laws or contracts; we argue to the contrary that concepts like "enforcement," "breach," "remedy," and "damages" cannot be

imported to the international sphere without violence. Treaties can succeed only if they are self-enforcing, and this constraint places limits on how they are designed, and what they can accomplish. We discuss treaty regimes related to the laws of war, human rights, and trade.

Part III addresses several external challenges to our instrumental theory of international law. Some scholars claim that the pervasive use of international moral and legal rhetoric demonstrates the efficacy of international norms and cannot be explained in instrumental terms. We argue that this claim is wrong, and show why it would be rational for states to talk to each other in the language of international law and morality even if they were not motivated by a desire to comply with morality or law. Another challenge to our thesis comes from those who claim that, even if states comply with international law only when it is in their interest to do so, they nonetheless have a moral obligation to comply with it even when doing so is not in their interest. We argue, to the contrary, that states have such no moral obligation. We also address a related challenge from cosmopolitan theory, which argues that states have a duty to act on the basis of global rather than national welfare. Such duties cannot, we think, be reconciled with cosmopolitans' commitment to liberal democracy, a form of government designed to ensure that foreign policy, including engagement with international law, serves the interests of citizens rather than elites or rulers, and almost always produces a self-interested foreign policy. The final chapter examines the role of modern international idealism in debate about such institutions and practices as universal jurisdiction, the International Criminal Court, and humanitarian intervention, and argues that idealists are repeating the mistakes of the 1920s and 1930s.

INTERNATIONAL LAW SCHOLARSHIP

Most scholarship on international law has been written by law professors. Although these scholars have proposed many different theories, almost all of the theories share an assumption that we reject: that states comply with international law for non-instrumental reasons. (We exclude here the jurisprudential literature (for example, Hart __), which has different concerns). Doctrinally, this assumption is reflected in the international law rules of *opinio juris* (the "sense of legal obligation" that makes CIL binding) and *pacta sunt servanda* (the rule that treaties must be obeyed). Theoretically, the assumption is expressed in various ways, but they all reduce to the basic idea that states comply with CIL or a treaty because it is the morally right or legitimate thing to do. Although states violate their obligations, they try not to, and do so only under unusual conditions, when the gains from violation are great. Thus, mainstream international law scholarship does not deny that states have interests and try to pursue them. But it claims that international law puts a break on these interests.

Many international law scholars do not question the assumption that states follow international law for noninstrumental reasons. For them, the premise is enough to justify the research agenda, which is that of doctrinalism – identifying the “black letter law” of international law, in any given domain, independent of actual behaviors. Other scholars are self-conscious about the assumption and seek to explain the conditions under which international law “exerts a pull toward compliance” – that is, exercises normative influence on state behavior (Franck 1990, 24-25). Brierly (1963) says nations obey international law because they have consented to it. Franck (1990, 24) says they do so because international law rules came into existence through a legitimate (transparent, fair, inclusive) process. Koh (1997, 2603) says that international law becomes part of a nation’s “internal value set.” This theorizing often fuels, and is overtaken by, normative speculation about improving international law. If only international law were clearer and more detailed, imposed stricter obligations, were based on the decisions of international tribunals, emanated from multilateral institutions, were incorporated more thoroughly into domestic law, or reflected the needs and interests of more states, or more diverse states, then international law would be violated even less than it already is.

This research agenda is a dead end. The assumption of a tendency toward compliance has little if any explanatory value, and is in tension with states’ frequent violation of international law. The narrower view – that states comply with international law that reflects morally valid procedures, or consent, or internal value sets – is not supported by the evidence, as we will show in subsequent chapters. Noninstrumental accounts of international law also mask many different reasons why states act consistently with international law, and result in an impoverished theory of compliance. Finally, they do not provide good explanations for important aspects of international law unrelated to compliance, including the content of international law – why states agree to some rules rather than others – and the structure of multilateral institutions such as tribunals and commissions.

There is, to be sure, a more sophisticated international law literature in the international relations (IR) subfield of political science. The methodological commitments of international relations theorists in political science are different from those of most international lawyers. Positive analysis is the hallmark of IR literature; IR scholars seek primarily to explain, rather than interpret or prescribe, international behaviors. For this reason among others, IR scholars take theoretical, methodological, and empirical issues more seriously than international lawyers do, and they draw more generously on economics, sociology, and history.

Until recently, IR theorists did not study international law as a category apart from the institutions embodied by international law. The dominant

American theory of international relations – realism – treated international law as inconsequential or as outside its research agenda. Although one of the founders of modern realism, Hans Morgenthau, wrote a great deal about international law, he never reconciled his (limited) optimism about international law with his austere views about international power relations, and perhaps for this reason no realist followed his lead. Other theories, such as Hedley Bull's () theory of international society, were more optimistic about international cooperation, but did not focus on international law as a distinctive institution.

This has changed in recent years with a turn toward the study of “legalization” in its own right (Goldstein et al., 2000). A related development is a growing interest among some international law scholars in the tools of IR theory (Slaughter, Tulumello, and Wood 1998; Burley 1993; Setear 1996; Abbott 1989). There is also a small and growing rational choice literature in international law being developed by economists and economically minded lawyers. (Dunhoff and Trachtman 1999; Setear 1996; Sykes ; Guzman 2002).

Our approach falls much closer to this tradition than to the mainstream international law scholarship tradition. But, as will become clear, our views differ in many respects. Ours is a comprehensive analysis of international law. The greatest overlap between extant IR and rational choice IL scholarship and our book comes in Part II on treaties. But this tradition has ignored CIL (the topic of Part I) altogether, and it has said relatively little about the rhetorical and normative issues discussed in Part III. In addition, we are more skeptical about the role of international law in advancing international cooperation than IR institutionalists and most rational choice-minded lawyers. And our methodological assumptions are more consistently instrumental than is found in this literature, which frequently mixes instrumental and noninstrumental explanations. (Abbott et al. 2000). Finally, unlike the political scientists, our concerns are the traditional ones of international law scholarship and lawyers generally. We are interested in the nuts and bolts of international law, unlike the IR scholars, whose primary focus remains the realm of international politics.

Chapter 5. The Laws of War

[This chapter is preliminary and incomplete.]

The laws of war comprise two topics: *jus in bello*, the rules that govern the weapons and tactics that may be used during a war; and *jus ad bellum* (use of force), the rules that govern the circumstances under which states may go to war. Simplifying, *jus in bello* prohibits states from using weapons and tactics that are too awful or destructive, and that disproportionately harm civilians. *Jus ad bellum* currently permits states to make war only when acting in self-defense or in obedience to a command of the U.N. security council.

USE OF FORCE

Grotius () believed that a war could be legal or illegal but by the nineteenth century the conventional wisdom was that war was an instrument of politics. Positivist international law scholars looked around at the practices of states and concluded the decision to go to war was no more subject to international law than the decision to raise or lower tariffs. Mutual defense pacts, to be sure, were common, and some of them may have worked. And the great powers after the Napoleonic Wars were able to agree on some general rules intended to preserve the status quo from a revanchist France or revolutionary governments, and to keep conflicts in the Balkans and colonial areas from spinning out of control. But these general agreements, though intended to keep the peace, were never thought to be a part of international law.

All of this changed in the twentieth century. The League of Nations was the first effort to institutionalize collective security. The conventional story is that a naive Wilson believed that international law and arbitration could replace war, but his efforts were undermined by cynical Europeans and his own government, which had no interest in entangling the United States in the affairs of the dying empires. Whatever the truth in this story, the idea of collective security was popular among many people, as it could be seen as a vindication of the sacrifices made during World War I and (in the United States) as a justification for American involvement in that war. But the League of Nations was a failure, as was the Kellogg Briand pact, which outlawed aggressive war and required arbitration.

Why did collective security fail? The problem is that whenever two states have a conflict over resources, one of the states is more powerful. The two states will not always know which state is more powerful, and often each state will believe itself more powerful than the other, but in any event a state that believes itself more powerful will always be tempted to threaten war in order to get what it

wants. War is costly and risky, but it is attractive whenever the expected gains are high enough. Since the power of the each state is constantly waxing and waning, there are always opportunities for a newly powerful state to exert its will over a newly weak state and upset the status quo.

It is conceivable that a state might, in the abstract, think that outlawing war would be desirable, as it could, in the future, just as likely find itself in a weak position as in a strong position. This is perhaps why the Kellogg-Briand pact could obtain so many signatures. But most of the time some states will covet the territory of weak neighbors, and so refuse to sign such agreements unless compelled. And, in any event, without an enforcement mechanism, nothing can prevent states from violating a legal prohibition of war when they discover, in the future, that war is in their interest.¹ The evidence is overwhelming that concerns about reputation are not strong enough to deter states from going to war – one of the reasons why we have been reluctant to attribute other forms of international cooperation, such as trade, to states' concern for their reputation.

Of course, collective security is supposed to supply the enforcement mechanism. But collective security is vulnerable to free riding. In theory, a state can benefit from collective security. If it contributes troops to a peacekeeping action involving other states, then it can also expect to obtain contributions from other states when it is being illegally threatened. In practice, states are never willing to contribute significant military forces to a conflict in which their own interests are not at stake. The immediate cost is not outweighed by future benefits because the state expects that other states would similarly free ride when it is in need. And, finally, there are massive asymmetries in the costs and benefits of world security. The United States could not possibly, in 1919, have expected a foreign power to pose a threat to its security, and so could not have seen any net benefit from committing itself to intervene in foreign wars.

History repeated itself with the United Nations. Under the U.N. charter, states were supposed to contribute troops to an army under U.N. authority. This did not happen because no state could trust its troops with an authority over which it did not have unilateral control. Under the U.N. charter, war was permitted only for self-defense and for executing an order of the security council. But there was no reason to expect the states in the security council to cooperate, and they did not during the Cold War. The problem was that the United States and the Soviet Union were rivals: each saw gain in the other's loss. So with the anomalous exception of the Korean War – caused by Soviet refusal to participate because of

¹ Technically, we should say when territorial expansion is in their interest. War will not occur when information is complete: the weak state will simply yield. War occurs because of imperfect information. See Zagare and Kilgour 1993; Morrow 1989; Powell 1993; Koubi 1994; Lemke and Werner (1996); and Brito and Intriligator 1985.

the conflict over China's participation in the U.N. – the security council authorized no collective security actions for the first 45 years of its existence. During this period, there were more than 100 wars, depending on how one counts the various conflicts that occurred (Balint 1996, Weisburd 1997, Glennon 2001) – not one of them in compliance with the UN charter because, of course, not all states could have been acting in their self-defense. Although during this time the U.N. did serve numerous useful functions – as a diplomatic forum, as an umbrella for various aid institutions – its use of force rules were a dead letter.

With the end of the Cold War, observers hoped that the U.N. would finally serve its original functions. The security council authorized the first Gulf War, and the various American led efforts to maintain pressure on Saddam Hussein's government up until 2003. But it has become increasingly clear that the early 1990s were an anomaly in the modern history of international relations. At the end of the Cold War, American power and prestige were at their zenith. Other states, at least temporarily, were willing to follow American leadership and endorse American actions. It has since become clear to those other states that American ascendance threatens their own influence over international affairs, and in a reenactment of the classic balance of power mechanism, sometime friends as well as traditional enemies are coalescing into an opposing force. Having seen that the U.S. has used the original U.N. authorization to attack Iraq in 1991 as an excuse for maintaining a large military presence in the Persian Gulf, in the future states like China and Russia, and possibly France, will veto resolutions sponsored by the U.S. unless given significant concessions. The failure to obtain U.N. authorization for the intervention in Kosovo will likely be remembered as an early indication of the second failure of the U.N. charter to establish an effective mechanism for collective security.

With the failure of the U.N., international law scholars have sought to construct a CIL regulating use of force. Weisburd (1997) believes that UN authorization is no longer a legal obligation, if it ever was, but, generalizing from the conduct of states between 1945 and 1991, argues that ordinary invasions are illegal, but that certain wars are legal even without UN authorization. These include wars by colonial dependents against their imperial masters, and third party interventions in civil wars. Franck (2002) splits hairs, arguing that states that engage in humanitarian intervention violate the law but will not be punished. [ASIL symposium.] By contrast, Glennon (2001) argues that recent history shows that states do not, in practice, acknowledge legal restrictions on their ability to go to war.

The one seed of hope that international lawyers have extracted from the depressing history of warfare comes from the Kosovo intervention, even though they have also been troubled by its flagrant violation of the U.N. charter. But a

number of scholars have argued that humanitarian intervention – and Kosovo was taken to be an example of humanitarian intervention, though the truth is more complex – may be a permissible exception to the prohibition on non-authorized war or even an obligation. But these claims do not bear the most casual scrutiny (see Table 1). There have been hundreds of humanitarian crises during, say, the twentieth century, and it is nearly impossible to find an unambiguous example of humanitarian intervention, and there is none involving a major military commitment. Because leaders have always clothed their invasions in idealistic language, a determined scholar can always build a case for humanitarian intervention by taking this language at face value, and ignoring the actual conduct of states. But if we did take the language at face value, then we would have to conclude that the nineteenth century lawyers were wrong – there were plenty of interventions that were justified on humanitarian grounds. The truth is that states rarely spend blood and treasure to resolve humanitarian crises in other states, and the few ambiguous cases that can be mustered as weak counterexamples – the intervention in Somalia, for example, which ended after 18 American soldiers were killed; the intervention in Kosovo, where the use of low-risk (for pilots) but dangerous (for civilians) high-altitude bombing compromised the humanitarian ideals that supposedly motivated the intervention (Kahn 1999) – are swamped by the hundreds of invasions where the humanitarian justification was not remotely plausible. (See also Stowell 1921.)

Table 1

<u>Year</u>	<u>Intervenor</u>	<u>Target</u>	<u>Dominant Motive</u>	<u>Legal?</u>
2003	US, UK	Iraq	Mixed	
1999	NATO	Kosovo	Mixed Humanitarian-Strategic	
1998	UN	Iraq	[Weapons inspections]	
1996	UN	Zaire		
1994	France	Rwanda	Humanitarian	Yes
1993-1994	US	Haiti	Mixed Humanitarian\ Democracy-Strategic	Yes
1992	US (initially), then UN	Somalia	Primarily Humanitarian – Strategic rationale as well	Yes
1992	NATO (and UN)	Bosnia-Herzegovina	Primarily humanitarian	Unclear
1991-1992	UN	Iraq	Mixed Humanitarian-Strategic	Unclear

1990	ECOWAS	Liberia	Humanitarian	Yes
1989-1990	US	Panama	National Interest (Self-Defense/Protect American Lives)	Most say no.
1983	US	Grenada	Mixed	Unclear
1979	France	Central Africa	Humanitarian	Unclear
1979	Tanzania	Uganda	National Interest (Self-Defense)	Unclear
1978	Vietnam	Cambodia	National Interest (Self-Defense)	Unclear – action widely condemned
1976	Syria	Lebanon	National Interest (National Security)	Unclear
1971	India	East Pakistan	National Interest (National Security)	Unclear – action widely condemned
1968	Soviet Union	Czechoslovakia	National Interest (Strengthen Warsaw Pact)	No – widely condemned
1965	US	Dominican Republic	National Interest (Rescue Nationals)	Unclear – widely condemned
1964	US, Belgium	Congo	National Interest (Rescue Nationals)	Unclear
1956	Soviet Union	Hungary	National Interest (Strengthen Warsaw Pact)	No – widely condemned
1939	Germany	Czechoslovakia	National Interest (Occupation)	No
1935	Italy	Ethiopia	National Interest (Occupation)	No
1931	Japan	Manchuria	National Interest (Occupation)	No
1913	Greece, Bulgaria, and Serbia	Macedonia	National Interest (Territorial Gain)	Probably (justified by authority of Concert)
1898	US	Cuba	Mixed strategic/humanitarian	
1877-1878	Russia	Bosnia, Herzegovina, and Bulgaria	National Interest (Territorial Gain)	Probably not (under Concert)
1860-1861	France	Syria	Humanitarian	Yes (Turkish “consent”)

1827- 1830	UK, France, Greece Russia	Mixed	Probably (treaty concessions)
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JUS IN BELLO

Conventions governing the conduct of war are as old as war itself. There is, however, persistent confusion about whether these conventions are authentic or not. Consider, for example, Josiah Ober's (1994) claim that the ancient Greeks recognized rules against summary execution of prisoners, attack on noncombatants, the pursuit of defeated opponents beyond a limited duration, and many other forms of warfare that are condemned to the present day. But where Ober sees rules of war, others might offer another interpretation: that these practices were not the result of rule-following but of interest-following. Prisoners are not executed but only because they have value as hostages and can be held for ransom, or used for labor. Armies spare noncombatants because they pose no immediate threat, they can provide supplies, information, and other services, and armies do not wish to give other civilians a reason for resistance. And any army that pursues a defeated opponent risks outrunning its supply lines and falling into disorder. A militarily sound tactic might incidentally spare the lives of more people than an alternative tactic that might suggest itself as appropriate. The fact that militaries choose the sound tactic over the alternative tactic does not mean that they acknowledge legal restraints on their choice of tactics. In the absence of information about what counts as militarily sound, and such information is rarely available, it is hard to know whether supposed conventions of *jus in bello* have been, in our terms, a matter of coincidence of interest or real cooperation.

Interpretation is especially difficult for war rules that emanate from customary international law. The ancient Greek rules described by Ober resemble what Europeans in the modern period called CIL; by the nineteenth century these rules filled volumes of treatises. We saw two such examples in chapter 3: the free-ships-free goods rule, and the rule that prohibited navies from seizing small coastal fishing vessels as prizes. The first of these rules was a part of the law of neutrality, which governed the relations between belligerents and neutrals, and especially the treatment of neutral merchant ships, which would ply their trade with belligerents. The second rule was a part of the law of prize, which governed the taking of prizes, the treatment of the crews of vessels taken as prizes, and the disposition of the vessels. There were also rules governing truce and surrender, the use of weapons and tactics, and the treatment of civilians.

When we say that such rules existed, we take the scholars at their word, but of course the truth was more complex. Where scholars saw behavioral regularities that seemed to be consistent with humanitarian impulses, and found

some state rhetoric, even if obvious propaganda, that claimed that states were acting with constraint, the scholars would declare that a law existed, and was constraining behavior. As our earlier discussion indicated, it is theoretically possible that the CIL norms of war were, as we call them, cooperative equilibria, but it is more likely that they reflected sound unilateral policy. Rather than repeat this discussion, we leap forward to the modern era of *jus in bello*.

The modern – treaty-based – laws of war began at the end of the nineteenth century. The highlights of its development were the Hague Conventions of 1899, 1907, 1923, 1954, and 1999, which progressively restricted the use of weapons and tactics during war, and the Geneva Conventions of 1864, 1906, 1929, 1949, and 1977, which governed the treatment of POWs and wounded soldiers.² The UN has also played a role in sponsoring conventions; and one must also keep in mind the development of international human rights law, which overlaps with the requirements of *jus in bello*, though applying to the conduct of nations during peace as well as during war.

The laws of war create a puzzle: why would states that want to win wars impose rules on themselves? Our answer is that states would rather win a less destructive war than a more destructive war, and that states would rather lose a less destructive war than a more destructive war. However, self-enforcing limitations on destructive weapons and tactics are difficult to create, and only minimal limitations appear to be stable.

Theory. One hypothesis is that the laws of war reflect the coordination/cooperation pattern that we have seen in other international legal regimes. Consider a two-stage game, in which at stage one multiple nations negotiate and sign a treaty that contains laws of war, and at stage two, two nations from this initial group go to war.³ During the war, the two belligerents have an interest in limiting the amount of mutual destruction, and are jointly better off if they cooperate along certain dimensions than if they do not. The optimal outcome would be a peace settlement that would reflect the outcome of the war but save the cost of the war; barring this, limitations on the war that reflect relative power would not, in expected terms, affect the ultimate peace settlement but would partly reduce the war cost. But during war, as during peace, it is difficult to coordinate on actions that are jointly beneficial: there may be no natural focal points, or possible focal points would, if used, result in asymmetrical gains. In addition, during war, more so than during peace, it is difficult for states to

² The divide is not perfect but is a useful shorthand; there were also other conferences in other cities on one topic or the other.

³ In theory, three or more nations could be at war; but even during the world wars, enforcement of the rules of war took place in bilateral relationships, as we talk above; so bilateralism is a useful shorthand assumption.

negotiate rules governing their conduct: any attempt to suggest limitations may be interpreted as a sign of weakness. For these reasons, clear examples of spontaneous cooperation during war are difficult to discover.⁴

To avoid these problems, states send delegates to conferences that attempt to state the laws of war in advance. States hope that if they cannot negotiate about rules of war during a war, they may be able to use existing conventions as focal points. The conventions say that X is prohibited, and the states adopt the strategy, “I will not do X if you do not do X.” This agreement does not preclude additional forms of cooperation during war; but it also does not guarantee the kind of cooperation specified in the convention. If it is not in a state’s interest during a war to comply with X, because it gains more by violating X than it loses by its enemy’s violating X, then it will not. Although it is possible that the states can agree on some rules, and that these rules will be self-enforcing during a war, several difficulties plague all efforts to negotiate laws of war:

1. Asymmetrical interests, capabilities, and resources. Some states have advantages in weapons technologies and will resist efforts by other states to restrict them, and will support efforts to resist competing technologies. Thus, Britain during the Hague conventions opposed submarines, which were a threat to Britain’s dominant navy. If states are sufficiently sensitive to relative advantage, then minor differences in military capability will frustrate all efforts at agreement.

2. Numbers. As the number of participants increases, it becomes more likely that the resulting convention will apply to signatories when a war begins. But as the number of participants grows, the zone of mutually beneficial bargains shrinks.

3. Uncertainty. Just as generals fight the last war (as it is said), so do diplomats negotiate rules for the last war. But weapons and tactics evolve quickly, and rules appropriate for the last war are likely to be inappropriate for the next war.

4. Agency problems. Negotiators must respect the interests of militaries, politicians, and the general public. At the same time, they have a strong interest in producing an agreement. If they compromise the interests of their constituents, there may not be political support for the laws when a war begins.

5. Monitoring and enforcement. For rules to be enforceable, militaries must believe that their violations will be observed and punished. However, states have little incentive to punish their own soldiers – except when the soldiers

⁴ The most famous example is the live-and-let-live attitude of soldiers facing each other in their trenches during World War I; see Axelrod. But this was really an agency problem on both sides, not a reflection of state interest.

violate the states' own policy – and the pressure to win a war is always greater than the incentive to avoid sanctions imposed by victors for war crimes should the war be lost.

Because of these problems, the laws of war have rarely advanced beyond general principles, and when they do, they often ban outdated technologies (like dum-dum bullets) or provide vague loopholes. Many laws of war do nothing more than ratify existing practices and ban practices in which states have no interest, or they ban important practices but then obtain the signatures only of those states that do not use them. We discuss examples below.

POWs. Under the Geneva conventions, POWs must be treated humanely. They must be fed, housed, and clothed, and given access to mail. They must not be tortured or interrogated beyond a minimal limit. They must be released at the conclusion of hostilities.

Did the Geneva rules affect behavior in a significant way? Historians point to instances where soldiers show restraint, and treat enemy soldiers and civilians decently rather than brutally, as though this were evidence of a desire to comply with the laws of war. The problem is that such behavior is susceptible to multiple interpretations. Soldiers might treat civilians and enemy soldiers with restraint for any number of moral and strategic reasons. Good treatment of enemy civilians encourages them to cooperate with occupying forces. Good treatment of POWs encourages surrender of enemy soldiers, discourages them from trying to escape prison camps, allows the army to exploit their labor, and also appeases citizens who care about the well-being of prisoners. Soldiers also sometimes resist orders to act brutally, and rebel against the demands placed on them by officers: the soldiers who fraternized with enemies during World War I were obviously not acting out of a sense of legal obligation. Soldiers treat citizens and enemy soldiers with restraint because of sympathy or ideology or morality, of course; but these motivations are different from the desire to comply with international law. To understand the role of the law, one must separate out its influence from that of strategic consideration and moral or ideological commitments. No one has done this in a systematic empirical study, and the anecdotal evidence is ambiguous.

During World War II, treatment of POWs varied widely. Russian POWs in German hands and German POWs in Russian hands experienced very high casualty rates, as did American and British POWs held by the Japanese. The United States and Britain treated POWs well, and Germany treated American and British POWs relatively well. But the law was uniform and applied equally to all powers. To account for variation, one must look beyond the law. The Germans' racist ideology might explain their treatment of Russians; also the sheer quantity of POWs must have placed strains on logistics during a highly mobile phase of

the war. The Japanese discouraged their soldiers from surrendering by treating it as shameful, and this might have made Japanese soldiers contemptuous of allied soldiers who surrendered. After World War II, the experience has also been mixed. The pattern is that major powers such as the United States comply with the Geneva conventions, whereas smaller powers – North Korea, North Vietnam – have not. (Morrow, JLS, IO) In countless smaller wars, the conventions are frequently ignored.

Still, in many cases we find a rough pattern consistent with our theory. During World War II, when decent treatment of POWs occurred, it frequently followed the Geneva rules; so if the behavior was motivated by humanitarian instincts or ideology or just a desire to encourage surrender, the rules guided these impulses so that they produced roughly uniform results. Morrow () also discusses several examples of reciprocal treatment: when Germans discovered that Canadian soldiers had bound Germany POWs in an illegal fashion, the Germans bound Canadian POWs in the same way. Finally, when compliance with the laws was too costly, states freely violated them. We mentioned the slaughter or mistreatment of POWs in large mobile campaigns; there were also frequent cases on both sides when soldiers killed prisoners out of rage – something that could not easily be controlled by officers.

Weapons. The Hague rules, as we have argued, reflect periodic efforts by nations to identify in advance of war, weapons and tactics that are particularly destructive or objectionable, and that states can refrain from using in a cooperative equilibrium after a war begins. Asymmetries among states, however, ensure that very few weapons and tactics can be clearly proscribed, and uncertainty about their uses in future wars compounds the difficulty. The result is a series of rules that end up being vague; more definite rules do not obtain widespread acceptance unless they prohibit outmoded weapons and tactics.

Let us consider two extremes. The Paris Declaration of 1856 prohibited privateering, but by then few major states saw any advantage in relying on privateers rather than their own navies. The 1899 Hague Declaration outlawed the use of dum dum bullets, another outmoded technology. States complied with the privateering and dum dum bullet rules but in the trivial, coincidence-of-interest sense. They would not have gained by violating the rules even if enemies violated them: the incentives to “comply” were entirely unilateral. At the other extreme, rules restricting untethered water mines, aerial and naval bombardment of cities, and the abandonment of survivors of sunk merchant vessels were widely flouted during the first or second world wars, or both. States did not comply with these rules because they had asymmetrical effects, harming disproportionately the state that had the advantage in that technology. The Nazis, for example, had an advantage in aerial warfare during the first years of the war, but all this changed

when the United States began giving substantial aid to Britain and Russia, and then entered the war and brought with it its massive resources. The only puzzle is why states would have agreed to these rules in the first place, and the answer is that the significance of the technologies were not fully foreseen, and asymmetries in development and exploitation of the technologies had not yet occurred. States negotiated under a veil of ignorance about their own future capacities, but once the asymmetries came into existence, there was no mechanism to ensure that the rules were self-enforcing. Where it is clear that rules have disproportionate impact, the states that are harmed do not agree to the rules. The rejection by the United States, India, China, and Russia of the 1997 convention against the use of anti-personnel mines is a recent example.

The case of poison gas has received special attention. It is frequently said that states refrained (for the most part) from using poison gas during World War II because of the legal prohibition against it. The contrast with experience during World War I, where the widespread use of poison gas suggests that it had military value, lends credence to this argument. The evidence is mixed. On the one hand, there were serious doubts about the military effectiveness of poison gas; it could blow back on one's own troops while enemy troops could protect themselves with gas masks and suitable clothing. This suggests the coincidence of interest explanation: states did not use poison gas because it had little or no value. On the other hand, some states have used poison gas since World War I – for example, Japan against China during World War II, Italy against Ethiopia prior to the war, and then Egypt in Yemen and Iraq against Iran many years later. The United States and the Soviet Union built up stockpiles of chemical and biological arms: why did they bother if these arms were useless? Even their declared intent to use them only to deter the other state's use assumes that these arms had military value. And anecdotal evidence suggests that during World War II, many leaders – including Churchill and Marshall – considered using poison gas and may have been prepared to use it in the right conditions; and all of the major belligerents were armed with chemical weapons.

The reason that the major belligerents did not use poison gas against each other is probably that they feared retaliation in kind, and not that they thought there was anything special about violating international law. After all, all the major belligerents did violate international law during World War II, just not the international law against the use of poison gas. So it is hard to believe that international law, qua international law, played an important role in their decision not to use poison gas. If international law played any role, it may have clarified the expectations of the states – expectations that in this case were sustainable in their various pairwise relationships because in each such relationship both sides had the arms and could use them, but were uncertain about their value. The one

major use of chemical weapons conforms with this argument: it was Japan's use against China, which had no chemical weapons capacity. In a similar way, the United States and the Soviet Union never used nuclear weapons against each other even though there was no international law barring the use of nuclear weapons. The main reason – putting aside reasons having to do with morality or interest – was the fear of retaliation, not international law, which by its own terms did not apply.

A related phenomenon is nuclear proliferation. Nuclear weapons are more effective than biological and chemical weapons, but also more expensive. Here, the wealthy nuclear states want to maintain their oligopoly, and threaten sanctions against smaller states that attempt to acquire nuclear weapons. Note that the nuclear states have not attempted to outlaw nuclear weapons. Such conformity to the pattern established by the earlier laws of war would require the nuclear powers to abandon their weapons, or at least disclaim their use, but they want to do neither: they need nuclear weapons, they don't need chemical or biological weapons; and they have always maintain an open official policy of using nuclear weapons as a deterrent. For these reasons, the laws of war are not used. Instead, the coercive tactic takes the form of a general nuclear nonproliferation policy, with accompanying agreements, all of them designed to keep the weaker states weak. But note that a "law" against the use of chemical weapons, and a "policy" of preventing non-nuclear states from acquiring nuclear weapons serve exactly the same strategic interest, the only difference being that the general law can be used when the large states have no unilateral interest in the proscribed conduct.

Occupation. Our next example is taken from the law of occupation. We largely rely on Benvenisti's (1993) discussion.

The first effort to codify a law of occupation took place during the 1907 Hague Conference. Under article 43, the occupying power "shall take all the measures in [its] power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country" (Hague 1907). Although the language is vague, the nineteenth century background provides it with content. It was understood that occupying powers would disarm the population and take other steps to protect their own soldiers; international law required them to enforce the criminal and civil laws of the occupied territory, respect private property, and refrain from killing or harming civilians who conduct themselves peacefully. The occupying power was, in short, supposed to leave political, economic, and legal institutions undisturbed except when security required otherwise, and not to plunder the territory. Commentators insisted that after the war was over the territory would be returned to the original sovereign; in the meantime it was held only "in trust." This view was never

reconciled with nineteenth century annexations such as Germany's annexation of Alsace-Lorraine after the Franco-Prussian War.

The rules were tested during World War I. During the German occupation of Belgium from 1914 to 1918, the German occupying forces, facing a British blockade, resolved to exploit Belgium's economy and natural resources. German military authorities regulated agricultural production and the distribution of food; controlled the mining, distribution, and use of coal; regulated the distribution and use of oil; seized the banks; abolished the Belgian currency; raised and collected taxes; regulated labor; dissolved the court system; divided the country into two territories, Flanders and Wallonia; reorganized the bureaucracy; and imposed language restrictions (Benvenisti 1993, 32-44). After the war ended, Britain, France, Belgium, and the United States occupied the Rhineland. This occupation was less harsh than Germany's occupation of Belgium, but the occupying powers, unlike Germany, did not face war conditions. Even then, France clearly used its occupation as an opportunity to strengthen its economic and political goals at the expense of the local population.

The laws of occupation fared no better during the interwar period and World War II. Japan reorganized the governments and bureaucracies of the states whose territories it occupied (including Manchuria, China, the Philippines, Cambodia and Vietnam), and exploited the natural resources and infrastructure of these states, as Germany did in Belgium during World War I. Italy did the same to the territories of Ethiopia and Albania; Germany did the same to parts of or all of the territories of France, Luxemburg, Belgium, Poland, Ukraine, Romania, Slovakia, Croatia, Norway, Greece, the Netherlands, Greece, and the Soviet Union. Germany did not treat all these states the same; it annexed some; created puppet governments for some; and occupied others. But in all cases it disregarded the law of occupation, did not even make a pretense of respecting it, and, with a few exceptions (Denmark, for example), exerted massive control over the daily life of the subject populations. The Soviet Union annexed the Baltic Republics, part of Poland, Moldavia, and the Karelo-Finnish Republic; and it disregarded German laws during its occupation of Germany. British occupation of various African states (mostly former colonies of Italy) was generally benign but substantially consistent with the Hague rules only when Britain had no interest in the particular territory, such as Tripolitania (Benvenisti 1993, p. 80). The allies set up a puppet government in Italy, disregarded Italian laws, and regulated all aspects of domestic life. The allies completely reorganized the governments, institutions, and laws of occupied Germany (Benvenisti 1993, 60-96). The Soviet Union carted away capital stock as reparations; the United States contented itself by expropriating vast quantities of German intellectual property (Gimbel 1990).

In Japan the United States established a new form of government and reorganized the economy.

The laws of occupation had been flagrantly violated since their codification. The general practice was succinctly described by a German occupation official during World War I: “I am of the opinion that a lemon squeezed dry has no value and that a dead cow no longer gives milk” (quoted in Benvenisti 1993, 37). Belligerents used occupied territories in order to advance war aims. If the occupant needed economic resources, then it exploited the economic resources of the occupied territory. If certain laws or institutions were respected, this was because a compliant population would be more productive than a miserable (or dead) population. Occupied populations were allowed to maintain their own laws and institutions when they did not have any value, and did not pose a threat. In these (rare) cases, the business could be dignified with our “coincidence of interest” label, but it is simpler to say that occupying powers did what they wanted to do. The United States and its allies did much good by launching West Germany, Italy, and Japan in the direction of democracy, but they flouted international law in the process.

The Fourth Geneva Convention of 1949 contributed 159 more articles to the law of occupation. There is some debate whether these articles changed the Hague law, which was never formally withdrawn, or merely made it more precise. Among other things, the Geneva Convention obliged the occupying power to enforce the occupied territory’s penal laws; provide food and medical care for the population; respect customs and religious commitments; ensure that children receive support and education; refrain from engaging in discrimination on the basis of religion, race, nationality, or political opinion; protect the honor and dignity of individuals; and respect property rights (Geneva Convention 1949). One cannot help noticing that, in many cases, governments that complied with this liberal charter would end up treating enemy populations a great deal better than they treated their own.

After the Six Day War of 1967, Israel occupied the Golan Heights, the Sinai peninsula, the Gaza Strip, and the West Bank. The Israeli government denied that the Geneva Convention applied by its own terms to its occupation of any of these areas. Israeli did purport to apply the principles of the Hague rule and the “humanitarian principles” (never explained) of the Geneva Convention. Although the Israeli Supreme Court on a few occasions struck down actions as violations of customary international law (as reflected in the Hague rule), for the most part it deferred to the Israeli military authorities and refused to enforce the Geneva Convention because under the Israeli constitution the Convention did not have the force of domestic law (like non-self-executing treaties in American law).

Israeli domestic law was extended to East Jerusalem and the Golan Heights; in effect, they were annexed though Israel has not formally admitted this. The other territories were governed by military authorities as well as civilian institutions set up by Israel. Preoccupation law was respected but only to the extent that it did not conflict with subsequent military orders or regulations. In an effort to create a common market that would bring the territories within the Israeli economy, Israel imposed taxes on the population of the territories, introduced Israeli currency, regulated the banks, issued labor regulations, and exerted control over natural resources such as aquifers. Israel also established settlements for Israeli citizens in the occupied territories. (Benvenisti 1993, 107-44)

There have been many other occupations since World War II. These include Iraq's occupation of Kuwait, Morocco's occupation of Western Sahara, Indonesia's occupation of East Timor, the Soviet Union's occupation of Afghanistan, Vietnam's occupation of Cambodia, the U.S. occupation of Grenada, Panama, and (with allies) Iraq, India's occupation of East Pakistan, and Turkey's occupation of Cyprus. In each case the occupying power denied the applicability of the Hague and Geneva conventions on occupation, relying on more or less transparent pretexts. Foreign states objected to some of these objections and not to others, but none of these occupations led to sustained foreign pressure to apply the law of occupation. Benvenisti (1993, 189-90) concludes "in all of the recent cases of occupation, except for the Israel control over the West Bank (not including East Jerusalem) and Gaza, the framework of the law of occupation was not followed even on a de facto basis."

What should we make of this sorry history? One could imagine, in theory, how a law of occupation would seem attractive, and within the realm of possibility. States in 1907 might have seen themselves as benefiting from a self-enforcing mutual agreement to treat populations in occupied territories humanely. The logic is the simple prisoner's dilemma, the same logic that we applied to weapons. If state X and state Y enter an enforceable agreement to treat each other's populations humanely, then a war between them will be less destructive than it would be otherwise. Since such agreements are difficult to make during wars, a general code established prior to war might serve as a focal point for implicit cooperation during a war. Just as states could in this way agree to restrict the use of poison gas or the mistreatment of POWs, they could agree to restrict exploitation of occupied territories.

As we saw, laws of war, understood in this way, could stimulate some weak cooperation within a bilateral relationship, but it was necessarily limited by problems of asymmetry: states with superior weapons or weak logistics will not engage in self-restraint that puts them at a disadvantage in a war. The problem with a law of occupation is that because it necessarily favors one state –

whichever state has lost territory – the other state has no incentive to comply with it. In nearly every recent war, the occupation of territory is asymmetrical: one state occupies some of the territory of the other state, rather than each state occupying some of the territory of the other state. If states did engage in symmetrical occupation, one could imagine some pattern of cooperation – similar to bilateral cooperation in the treatment of POWs, where one state can retaliate for mistreatment of its soldiers by mistreating the enemy's soldiers. But in war a state that has turned the tide always starts by regaining home territory that it has lost, and only later invades the enemy's territory. It is easier to gain and hold territory inhabited by one's own population, which will cooperate rather than resist, than to seize enemy territory. As a result, it has never happened (as far as we know) that during a war two belligerents, at the same time, both occupied a substantial portion of the territory of the other belligerent. It is unlikely that an invading state will comply with the laws of occupation in the hope that the victim state will reciprocate should it ever repel the invader and its territory, because it knows that the victim state will no longer have an incentive to comply with the laws of war when it is its turn to occupy. Germany did not exercise restraint in the occupation of France because it hoped that its enemies would subsequently exercise restraint in the occupation of Germany; it exercised restraint (such as it was) in order to maximize the economic productivity of the occupied territory while minimizing the cost of controlling it.

If states did not comply with the laws of war, indeed denied their applicability in case after case, what explains their behavior? The pattern is simple. When the occupying power was mobilized for total war, and it needed to exploit the territory for its economic resources, or had purely military aims, the population was treated badly. When the occupying power had mainly political objectives, and sought to convert an unfriendly neighbor into a friendly neighbor, the population was treated more benignly. In nearly every case of occupation, the occupying power effected massive legal and institutional change – to mobilize economic resources, in the first case; to create a democracy or at least a less repressive authoritarian regime, in the second case. Liberal democracies like the United States treated subject populations more humanely than autocratic regimes such as the Soviet Union and Iraq, but paid no more attention to international law.

The last point deserves emphasis. International law generally takes the domestic order of a state as given; it follows from this that if the law of occupation requires minimal interference with domestic legal institutions, this requirement applies equally to occupation of a democracy and a dictatorship. But public and elite opinion in liberal democracies favors the spread of democracy, so there is no natural constituency – unlike the case of human rights laws – for the enforcement of the laws of occupation against a liberal state that abolishes

authoritarian institutions in an occupied territory. In light of these considerations, the standard international law rejoinder to the record of failure – the problem “is not one of a deficiency in the law but rather of the refusal of States actually to apply that law,” which can be remedied only through “better enforcement of the law” (Greenwood 2000, 219) – rings especially hollow.

The question remains why states bothered to negotiate occupation regulations in 1907 and 1949. The answer is probably that states did not know in advance that occupation law would be unenforceable. As we have discussed, some of the laws of war – such as the laws governing POWs – might have played a role in facilitating bilateral cooperation between belligerents during World War II, and it would not have been unreasonable for states to use a small amount of diplomatic resources for occupation law as well. The failure of the law is due to the absence in the twentieth century of wars in which symmetrical occupation of territory could provide the conditions under which some cooperation would be possible.

To sum up, the laws of war are stabs at identifying weapons and tactics that states believe can be avoided during a war, because their joint nonuse gives no advantage to either side, and very simple forms of retaliation can be used to deter their use. Because laws of war must be determined in advance of war, and because they are most useful only when many states sign on to them, they end up having a lowest common denominator feel, and can be only vague guides except for conduct, such as the treatment of POWs, that does not vary much from war to war. One point worth emphasizing is the ghostlike role of formal legality. Because the laws serve only as focal point for future cooperation between belligerents, they can still serve this role even for states that have not ratified them. At the same time, even when the laws are formally ratified, they will be ignored when they are not consistent with strategic realities.

Chapter 6. Human Rights

International human rights law (IHL) regulates the way states treat individuals under their control. The modern multilateral IHL regime consists primarily of treaties regulating genocide (1948), racial discrimination (1969), civil and political rights (1976), economic, social and cultural rights (1976), discrimination against women (1981), torture (1987), and the rights of children (1990). (There are also various regional human rights treaties.) Each party to these treaties promises other treaty parties to protect the human rights of individuals under its control. The treaties also create various monitoring mechanisms that aim to promote compliance. As the chart below shows, the vast majority of nations have ratified most of these important human rights treaties.

Table 1: Participation of States in IHL

Treaty	Entry into Force	Percent ratified by U.N. Members
Convention on the Prevention and Punishment of the Crime of Genocide	1951	70
International Covenant on the Elimination of All Forms of Racial Discrimination	1969	88
International Covenant on Civil and Political Rights	1976	78
International Covenant on Economic, Social, and Cultural Rights	1976	77
Convention on the Elimination of All Forms of Discrimination Against Women	1981	91
Convention Against Torture and Other Forms of Cruel, Inhuman, and Degrading Treatment	1987	70
Convention on the Rights of the Child	1990	99

Source: Office of the High Commissioner for Human Rights, data available at <http://www.unhchr.ch/pdf/report.pdf>. (as of July 7, 2003).

Many believe these treaties are novel post-World War II developments. This view is misleading. International law regulation of “internal” state action is obviously not new. Bilateral investment treaties have long prevented a state from expropriating private property within its territory, and extradition treaties have long prevented a state from prosecuting criminals in its domestic courts. Similarly, individual rights protection is an old concern for international law. Treaties dating back to the Peace of Westphalia (1648) protected religious freedoms. The nineteenth century saw the rise of an international law prohibition

on the slave trade. And international law has long protected individual aliens from denials of justice. Finally, concerns about human rights affected states' decisions whether to recognize foreign states and governments in the nineteenth century (Grewe 2000).

What was new in the postwar period was the effort to institutionalize an international human rights regime in a series of multilateral treaties. The novelty lay in the scale of the undertaking and the creation of international institutions to monitor compliance. But if this is new, it is of a piece with all the other modern developments in international law. The use of multilateral treaties and the creation of multilateral international institutions are found in many other areas of international law as well. Modern IHL, like modern security and trade law, addresses concerns that date back centuries, but in a new way.

This chapter shows how our theory of international law accounts for IHL. We begin with a general account of state interests related to human rights. We then show how the three basic ideas that form the core of our theory—coincidence of interest, cooperation, and coercion—explain the human rights practices of states. Against this background, we argue that modern multilateral IHL treaties have little influence on national behavior, and examine why nations nonetheless devote resources to such relatively inefficacious treaties. We close by considering how the CIL of human rights operates.

STATE INTERESTS

In every state, the government balances a concern for the well-being of persons under its control with concern for security (internal and external) and the government's own perpetuation. Different governments accommodate these values in different ways. At one end of the spectrum, liberal democracies embrace democratic governmental change and judicially enforceable individual rights protections (usually on the basis of constitutional or other "higher law" principles not subject to democratic derogation). At the other end, authoritarian regimes do not permit democratic regime change and deny legally enforceable fundamental freedoms to the people under their control. But although authoritarian governments often deny citizens *legal* recourse against the state for violating their freedoms, they often permit many citizens (and sometimes a majority) various freedoms for the sake of internal peace and stability.

The degree of reconciliation of governmental authority with individual rights depends on a number of factors, including economic development, social, religious, and political culture, and the presence or absence of internal or external armed conflict (Poe 2004). For our purposes, we need only assume that liberal democratic states have a greater interest in respecting the human rights of those under its control than authoritarian states do. This means that, as a matter of fact,

liberal democratic governments value constituent liberties – either intrinsically, instrumentally, or both – more than authoritarian governments. (In this context as in the trade context, our identification of the state “interest” obviously does not refer to the policy that would best enhance the welfare of persons under the control of the State.)

In addition to having an interest in the well-being of persons under their control, governments also have a weaker interest in the well-being of persons in other states. Hathaway (2003,1823) claims that rational states should not care about how other states treat their citizens. This is untrue. People in states care about people in other states, and sometimes, especially in democracies where voter preferences matter, these cares can translate into government action. Three aspects of this state interest may be distinguished.

First, people who live in one state care about the well-being of co-religionists, co-ethnics, and co-citizens living in other states, and this concern can translate into governmental interest and action. The United States has been involved in foreign conflicts over 200 times in its history; the vast majority of these interventions were designed to protect the interests of U.S. persons in foreign lands. Similarly, in the nineteenth century Great Britain, France, and Russia frequently intervened in Ottoman lands as a result of outrage at massacres of Christians (Murphy 1996, 52-55). Interwar German pressure on states with German speaking populations had warm popular support.

Second, people are sometimes concerned about the well-being of persons in other states with whom they lack ties of religion, ethnicity, or citizenship. Important segments of the British public opposed the slave trade and Belgian atrocities in the Congo in the nineteenth century. Suffering in Somalia and Kosovo influenced American policy in the 1990s. Nations frequently give small amounts of aid, some of it untied, to poor and developing countries (Lumsdaine ____). And individuals donate to private charities that provide aid to poor people in other countries, as well as to religious organizations that do missionary work.

Third, an important school of thought holds that liberal democracies do not go to war with one another, make better trading partners, and in general are more stable (Lipson, 2003.) Some states therefore have an interest in improving the way other states treat their citizens in order to expand trade, minimize war, and promote international stability. This was the primary impetus for the human rights movement following World War II. And as we saw in chapter 5, it is a primary motivation for humanitarian intervention. In this third case, the concern for human rights is instrumental, not (as in the first two cases) intrinsic.

While it is clear that states (and citizens within states) often take an intrinsic interest in the well-being of persons in other states (as in the first two

categories above), this interest has historically been very weak, much weaker than the state's interest in trade and security. We discuss the reasons for this in chapters 10 and 11. For now, it suffices to note that most states' foreign aid reflects mixed humanitarian/economic/strategic concerns, and, with a few exceptions like the American intervention in Somalia, a concern for people in other states tends to translate into humanitarian intervention only when it dovetails with a state's security or trade interests.

THE LOGIC OF IHL COMPLIANCE

Given this understanding of state interests related to human rights, this section analyzes why states might act consistent with IHL.

1. Coincidence of interest

Nations rarely commit genocide or crimes against humanity. (Chalk and Jonassohn, 1990). An international lawyer might view this fact as evidence that nations comply with the Genocide Convention and the CIL prohibition on crimes against humanity. A better explanation is that the relative absence of genocide and crimes against humanity reflects a "coincidence of interest." Both before and after the 20th century development of international law prohibitions on these crimes, nations have had many good reasons, independent of IHL, for refraining from committing these crimes against local populations. There are almost always insufficient animosities among citizens to provoke such crimes; it is morally abhorrent to kill large groups of people; and such acts radically disrupts society and the economy (and thus threaten even autocratic leaders). It is misleading to call the resulting behavioral regularity among states "compliance" with IHL, however, for there is no cooperation or conformity to a norm.

Genocide and crimes against humanity are not the only human rights crimes that most states most of the time have no interest in committing. As just noted, if for no other reason than internal stability, all but the most authoritarian of states usually have no interest in treating large groups under their control badly. More generally, domestic political exigencies had generated increasingly liberal toleration in states long before the modern IHL movement sprung into existence. The Ottoman Empire tolerated religious diversity. Most Western European governments stopped using torture as a routine investigative tool in the nineteenth century; political freedom advanced throughout that century as well. The rise of women's and children's rights in the nineteenth and twentieth century was a phenomenon unrelated to international law. So was the decline of racial discrimination. By the second half of the twentieth century, most liberal democracies outside the communist bloc could comply with most aspects of the modern human rights treaties without changing their behavior. And the few aspects of these treaties that would have required liberal democracies to change

behavior were easily circumvented by reservations (formal acts of non-consent to particular treaty terms) and understandings (interpretive statements that “clarify” the meaning of the terms to which a nation consents).

Consider the most comprehensive modern human rights treaty, the International Covenant on Civil and Political Rights (ICCPR). Over one third of the parties to the ICCPR have qualified their consent to the ICCPR through reservations or understandings that deflect the impact of over a dozen substantive provisions. The United States declined consent to the ICCPR’s capital punishment limitations, hate speech prohibitions, postconviction sentence reduction rules, and its ban on treating juveniles as adults, and interpreted several other ICCPR provisions to be no more restrictive than domestic law. The United Kingdom opted out of certain ICCPR immigration restrictions contrary to UK domestic law, and reserved the right not to comply with some of the ICCPR rules concerning hate speech and war propaganda, mandatory free legal assistance, equality of marriage rights, voting, segregation of juvenile and adult prisoners, and more. France declined consent to the ICCPR’s limitations on emergency powers, and entered reservations and declarations to ensure that its ICCPR obligations concerning military discipline, immigration, appellate criminal review, and certain minority rights were no more stringent than French law. Sweden declined to consent to the ICCPR’s prohibition on double jeopardy, or its requirement that juvenile and adult defendants be segregated. Belgium conditioned consent to the ICCPR in order to protect its practices concerning discrimination in the exercise of royal powers, juvenile criminal offenders, criminal procedure, and marriage. And so on. (See generally Human Rights Internet 2002). Reservations and understandings permit liberal democracies to conform ICCPR obligations to the contours of extant domestic law, permitting “compliance” without any change of behavior.

In sum, most states do not curtail their interests by complying with treaties that prevent gross atrocities such as genocide and crimes against humanity, and many states (because of prior behavior under domestic law, reservations and understandings, or both) do not curtail their interests by ratifying and acting in accord with treaties like the ICCPR. To the extent that IHL treaties reflect a coincidence of interest, they raise a puzzle, analyzed below, about why states expend resources to create the treaties in the first place. The point for now is simply that the consistency of much state action with IHL reflects mere coincidence of interest.

2. Cooperation

While genocide and crimes against humanity are relatively rare, many governments perceive the need to commit less extreme human rights abuses, and often do commit them, especially during times of civil unrest or war. Many

governments find it expedient to discriminate against women, to torture criminals, to jail political opponents, and to deny citizens civil rights such as freedom of speech; in many cases, such as discrimination against women, policy reflects the traditional values or perceived needs of the population.

At first glance, human rights cooperation seems impossible. If states A and B both abuse their citizens, they appear to gain nothing, based on their self-assessment of interests, from a mutual agreement to withhold abuse. If state A abuses its citizens and state B does not, then state A gains nothing but loses something if both nations agree to stop abusing citizens, while state B loses nothing but also gains nothing from such an agreement. If states A and B both protect human rights, an agreement to protect human rights seems to add nothing. Cooperation is obviously no more likely among multiple nations. Under these assumptions, cooperation-based IHL will not exist.

This analysis is flawed, however, because it overlooks a point made above: some states (and persons in these states) care about human rights abuses committed in other states. Once this possibility is acknowledged, human rights cooperation becomes possible in two circumstances.

The first can be called *symmetric* cooperative IHL. In this case, each state contains a different ethnic or religious majority that cares about the well-being of co-ethnics or co-religionists who form a minority in the other state. The states enter a treaty that requires each state to grant rights to the minority living within its territory. The resulting cooperation is roughly the pattern in Europe after the two treaties of Westphalia (1648) that ended the Thirty Years War. These bilateral treaties – one between the Holy Roman Emperor and the King of France (who represented his allies), and one between the Holy Roman Emperor and the King of Sweden (who represented his allies) – are famous for establishing the principle that the prince determines the religion of his territory. But they also contained significant restrictions on the prince's ability to regulate religious practices within his state, akin to modern human rights treaties. For example, they gave minority religious practitioners the right to practice religion and educate their children at home, prohibited religious discrimination in employment and burial, and guaranteed proportional religious representation in certain cities and certain Holy Roman Empire assemblies.

These provisions were largely effective. Against the background of the brutally destructive Thirty Years war, Protestant and Catholic countries both agreed to forego persecuting religious minorities for the sake of co-religionist minorities in other countries. The treaties of Westphalia clarified the precise terms of such cooperation, enhancing monitoring capabilities and minimizing "mistakes" that might jeopardize cooperation. And enforcement for violations was provided by a clear and easy-to-implement threat of retaliation: Protestant

states would conduct reprisals against their own minority Catholic populations, and vice versa (Krasner 1999, 81-84). Henkin (1995, 206) has claimed that “the threat that ‘if you violate the human rights of your inhabitants, we will violate the human rights of our inhabitants’ hardly serves as a deterrent.” But this claim is too broad, as the treaties of Westphalia show. In these cases of symmetric cooperative IHL – IHL in which states benefit each other by taking the same actions – the normal cooperation story holds.

Asymmetric cooperative IHL is also possible. In this situation, state A abuses its citizens, and state B does not abuse its citizens but cares about the well-being of state A’s citizens. The possible reasons for B’s concern were mentioned earlier: (1) sympathy for co-ethnics and co-religionists; (2) weak altruism provoked by atrocities; and (3) an instrumental interest in human rights based on the belief that human rights violations will destabilize A when B has an interest in maintaining A as a viable state. In the case of asymmetric IHL, cooperation is achieved by a payment – in the form of recognition, cash, aid, credit, military assistance, and so forth – from B to A, in return for A’s commitment to refrain from abusing people under its control.

Cooperation of this sort was an important part of Great Britain’s 19th century strategy to end the slave trade worldwide. Britain had an interest in ending the slave trade after it unilaterally ceased the practice in 1807, and was willing to pay a lot to achieve this end. (Whether this interest was attributable primarily to the influence of religious dissenters (Kauffman and Pape, 1999) or to material economic concerns (Grewe 2000, 554-58), is still debated, but of no relevance to our argument.) In early nineteenth century treaties, Spain and Portugal agreed to prohibit the slave trade (in certain areas) and to confer peacetime visitation rights on the British in exchange for millions of pounds of loans, debt forgiveness, and outright payments. (Grewe, at 560-61; Redman, at 772-74). In addition, Brazil in 1826 agreed to abolish the slave trade, and authorized British visitation rights, in exchange for recognition by the British government – a benefit that consisted of trading and treaty rights, immunity, and other cash substitutes. In both cases, the economic benefits offered by Britain were presumably more valuable to the slave-trading nations than continuing the slave trade.

This kind of cooperation is easy to understand. Britain’s treaty partners agreed to a continuing obligation to refrain from the slave trade, and if Britain had refused to keep its promises, they could have brought the slave trade back into existence. Britain’s obligations were in form not long-term and continuous; payment, forgiveness, and recognition are discrete acts, or a series of acts with an identifiable end. But Britain’s real promise was not to use force against the treaty partners, and this promise was open-ended. Indeed, Britain did use force against

them when it felt that they were not living up to their side of the bargain, as we discuss below. Repeated interaction with the threat of retaliation sufficed to maintain cooperation for a lengthy period of time; and then as planters deprived of their labor source switched to substitutes, the demand for slaves declined, and any incentive for the slave trading nations to cheat and resurrect the slave trade must have fallen to zero (Thomas ___).

Our examples thus far have concerned legal agreements. But human rights cooperation can take nonlegal forms as well. When it works, U.S. foreign aid conditioned on improved human rights practices in recipient states can plausibly be viewed as an example of nonlegalized asymmetric cooperation. (Steiner and Alston, 2000, at 1089-1108). The Helsinki Accords, an explicitly nonlegal document, can also be viewed this way. In the Helsinki Accords, Western states agreed to recognize the Soviet sphere of influence in Eastern Europe (and, implicitly, to expand economic contacts with the East), and the Soviet Union agreed to respect human rights and fundamental freedoms. This exchange was an example of genuine cooperation, though of the shallowest kind, since the West was not positioned to challenge Soviet domination in Eastern Europe, and the Soviet Union knew that its commitment to human rights was externally unenforceable. Such thin cooperation is the type one expects between enemies whose primary common interest was avoiding mutual extinction in a nuclear war. But the agreement did reduce tensions between the Western and Soviet blocks at the height of the Cold War. And it may have given a significant boost to dissident groups in some states under Soviet influence (Thomas 1999), though this would have been an unintended consequence.

3. Coercion

The analysis thus far suggests that, absent special circumstances giving rise to human rights cooperation, nations not inclined to protect human rights for domestic political reasons will not act in accordance with IHL. There is another possibility, however, that has played a prominent role in the history of IHL: coercion. For example, weak state X would, in the absence of external pressure, use torture in order to quell political dissent. Powerful state Y threatens to cut off military and economic aid if X goes down this path, an outcome that X prefers less to torture. If Y is not otherwise inclined to use torture itself, the result is a behavioral regularity across two states – an absence of torture. But the regularity is the result of Y's independent interest in X not torturing its citizens followed by its coercion of X, not the result of both countries trying to adhere to a norm.

There are many examples of coercion in the IHL context. We discussed one prominent example, humanitarian intervention, in Chapter 5. Another example is the International Criminal Tribunal for the Former Yugoslavia (ICTY) in The Hague. The Tribunal has had modest success in trying war criminals,

including Slobodan Milosevic. But it was not the gravitational pull of the ICTY Charter that lured these defendants to The Hague. Rather, it was NATO's (and primarily the United States') military, diplomatic, and financial might. U.S. military and diplomatic power ousted Milosevic's and other unattractive regimes in the Balkans, making a trial of Balkan leaders a possibility. And the United States has consistently threatened to withhold hundreds of millions of dollars in U.S. and International Monetary Fund (IMF) unless the successor regime in Yugoslavia continues to send war criminals to the ICTY (Goldsmith 2003).

Coercion was also a part of Britain's strategy to eliminate the slave trade in the 19th century. Britain had the military force, and especially the naval power, to see its abolitionist wishes carried out. In addition to the cooperative agreements outlined above, Britain used military force (or threatened military force) to end the slave trade. The 1815 treaty with Portugal did not apply to slave trading south of the equator. When Britain was unable, by 1839, to reach agreement with Portugal on its south-of-the-equator activities, it ordered its navy to board and seize Portuguese ships in this area, in technical violation of international law. These acts successfully coerced Portugal into ending its slave trade later in the century. Similarly, when Brazil failed to live up to its agreement to abolish the slave trade following British recognition, British warships entered British ports and burned ships thought to be involved in slave trading. These actions yielded results. As the Brazilian foreign minister said when he proposed to end the slave trade in the Brazilian Chamber of Deputies in 1850: "With the whole of the civilized world now opposed to the slave trade, and with a powerful nation like Britain intent on ending it once and for all, can we resist the torrent? I think not." (Thomas __, 726). These and similar events resulted in the legal prohibition, and effective elimination, of the slave trade by the end of the nineteenth century. British coercion, often in violation of international law, made possible compliance with this new rule of international law.

Modern human rights enforcement need not, and usually does not, take place on the scale suggested by the last two examples. Along many points of diplomatic and economic interaction, more subtle low level coercive sanctions can be brought to bear on nations that abuse their citizens. While coercion of various sorts no doubt explains some state activities consistent with IHL, costly coercive enforcement of IHL rarely occurs, and when it does, it usually dovetails with a powerful security or economic interest of the coercing state. States certainly do not exercise coercion out of obedience to international law. If they did, force would be applied systematically and uniformly in the face of IHL violations. But of course this does not happen. Rather, consistent with states' generally weak interests in persons in other states, coercion is applied episodically

and inconsistently, depending on the economic and political interests of the enforcing state and the costs of enforcement.

Consider the United States' patterns of human rights enforcement. It committed significant military and economic resources to redress human rights violations in Yugoslavia (where it had a strategic interest in preventing central European conflict and resolving NATO's crisis of credibility and purpose); Haiti (where turmoil was threatening a domestic crisis in Florida); and Iraq (where it had obvious strategic interests). But the U.S. has done relatively little in the face of human rights abuses in Africa, where it lacks a strong strategic interest, or in Saudi Arabia, China, and Russia, where its strategic interests conflict with enforcement of a human rights agenda, and where in any event the costs of enforcement are significantly higher. (We return to the themes in this paragraph in chapters 10 and 11.)

4. Cooperation v. Coercion

The above analysis highlights an ambiguity in our use of the terms "cooperation" and "coercion." We described Britain paying a state to end the slave trade as cooperation, and its use of force to end the slave trade as coercion. But cash payment is merely a substitute for the threatened use of force. Indeed, Great Britain's decision in each case to pay cash or threaten force probably turned in part on a comparative cost analysis. Similarly, we described the United States' threat to withhold aid to the former Yugoslavia as coercion. But if the United States had simply paid the former Yugoslavia to turn over its abusers, the example would have better fit our description of cooperation. And yet the threat to withhold payment unless Milosevic is sent to The Hague is identical to the payment of the aid when Milosevic is sent to The Hague. Economic sanctions designed to induce human rights compliance (think of South Africa) share this ambiguity.

For these reasons, cooperation and coercion are in many respects functionally identical. They both consist of (i) acts, threatened acts, or offers of action on the part of state A, that (ii) induce state B to change its behavior based on B's conclusion that doing so would make it better off in the face of A's acts, threatened acts, or offered acts. In both cases, state A changes the *status quo* baseline through acts or threatened acts, and B seeks to maximize its interests in the face of this changed *status quo*. (Compare Gruber 2000.) The key analytic difference between coercion and cooperation is that when the weaker party cooperates, it is better off from the baseline of the status quo ante, but when it is coerced, it is worse off from this baseline. If Britain is willing to pay a million pounds to end Spain's slave trade, and if Spain values this money more than continuing the slave trade, both parties are made better off by such a cooperative deal. If Spain valued the slave trade more than the money, considered alone, but

took the money anyway because it was the least bad option in light of the British Navy's additional credible threat to coerce it into submission, this would be an example of coercion.

Although this analytical difference is clear, it is often difficult to determine from the evidence whether cooperation or coercion best describes events. Consider again the UK-Spanish bilateral treaty. Although we described the treaty as an example of cooperation, Spain's agreement to accept this treaty was no doubt influenced its assessments of the costs posed by Britain's sporadic interference with the Spanish slave trade prior to the treaty. If these threatened costs, plus the lost value of the slave trade, were not made up for by Britain's cash payment, the Spanish example is best viewed as coercion. The problem is that it is very hard to tell from the evidence which story is correct.

An analogy from contract law may be helpful here. In ordinary speech we distinguish voluntary and coerced agreements according to whether both parties are better off (voluntary), or one party is better off and the other is worse off. This distinction assumes a baseline set of entitlements. The person who gives his wallet to a robber in order to avoid being shot is coerced because the robber has no entitlement to shoot the victim. The person who pays cash for a good, by contrast, has an entitlement not to pay, and thus is not coerced when he does. In the international law context, the baseline set of entitlements is not always clear: for example, a threat to withdraw aid would seem to be a violation of an entitlement if that aid was tied to some prior deal, such as base rights, but not if the aid was purely humanitarian. Despite these difficulties, and in part because of them, we follow ordinary usage whenever possible. We call "cooperation" changed behaviors that result primarily from an exchange of cash and in kind payments. And we call "coercion" changed behavior that results primarily from threats or use of military force, or threatened withdrawal of economic support.

MODERN MULTILATERAL HUMAN RIGHTS TREATIES

The analysis thus far has touched only briefly on the post-World War II multilateral human rights treaties at the heart of the modern IHL movement. We now consider these treaties more fully.

The modern IHL treaties do not reflect asymmetric IHL akin to the British slave treaties described above, for they do not involve human rights-abiding states offering anything of substance in return for better human rights practices in other states. Rather, the treaties require all states, regardless of their domestic orientation, to do the same thing: treat people under their control well. The treaties also do not reflect symmetric IHL cooperation. Unlike in the treaties of Westphalia, the parties' symmetrical actions do not involve meaningful reciprocity. Rather, a state that treats its citizens well receives nothing in return

from treaty parties. For these reasons, we are skeptical about whether modern IHL treaties accomplish robust cooperation. Although we later discuss ways that modern IHL might facilitate cooperation in a thin sense, the point for now is that however these treaties might work, they do not work in the same way as the treaties of Westphalia or the British bilateral slave trade treaties.

Nor do the modern IHL treaties have an effective or reliable coercive enforcement mechanism. The treaties' reporting obligations mandate no change in behavior. And in any event, states do not appear to take seriously their obligation to submit reports. More than 70 percent of parties have overdue reports; at least 110 states have five or more overdue reports; about 25 percent have initial overdue reports; the mean length of time for an overdue report is 5 years; and most of these reports are *pro forma* descriptions of domestic law, and thus not genuine examples of compliance (which would involve the description of human rights violations). (Bayefski 2001, 7-8) The treaties do set up committees that can entertain and respond to petitions by individuals. But the "recommendations" of these committees have no legal force. Perhaps the best indication of the failure of this system is that although 1.4 billion people have the formal right under these treaties to file complaints against their governments, there are only about 60 complaints per year. (Bayefski 2001) Beyond these enforcement mechanisms "internal" to the treaty, states do not coerce other states into complying with the modern multilateral IHL treaties. As described above, and in greater detail in chapter 5, states do occasionally coerce other state to improve their human rights practices. But this enforcement is episodic and correlates with the coercing state's strategic interest. Violation of an IHL treaty is neither a necessary nor sufficient condition for being the target of sanctions motivated by concern about human rights violations.

Two conclusions appear to follow. First, a state incurs little if any cost from violating the treaties. Human rights-abusing states can ratify the treaties with little fear of adverse consequences. Second, for other states the human rights treaties do not require changes in behavior: states "comply" with the treaties for reasons having to do with domestic law and culture independent of the terms of the treaty. For these reasons, we would expect modern IHL treaties to have little if any independent impact on state behavior.

The scant available empirical evidence is consistent with this conclusion. In addition to the treaty reporting statistics described above, annual human rights reports make clear that human rights abuses in violation of the ICCPR are widespread. (See State Department; Amnesty International; Human Rights Watch.) These reports suggest that the IHL treaties have not had a large impact, but they say nothing about IHL's possible marginal influence on human rights practices. Two quantitative studies address this latter issue. Linda Camp Keith

() examined the relationship between accession to the ICCPR and the degree of respect for human rights. Oona Hathaway (2002) examines the relationship between accession to the entire array of modern human rights treaties and the degree of respect for human rights covered by these treaties. Both studies find no statistically significant relationship. To be sure, one reason for these results might be the difficulty of measuring human rights violations, which are hard to detect and to code. (See Hathaway 2003, Goodman and Jinks 2003.) Another reason is that liberal states that object to human rights abuses and are willing to devote resources toward ending them do not distinguish between human rights abusers that have ratified IHL treaties and those that have not – a point that we will develop below. The bottom line remains, however, that there is no evidence that ratification of human rights treaties affect human rights practices. By contrast, empirical studies do find statistical relationships between democracy, peace, and developed economies, on the one hand, and protection of human rights. (Poe and Tate 1994; Poe 2003).

The conclusion that the modern IHL treaties have had no discernible impact on human rights protection is entirely consistent with human rights being more salient today than sixty years ago, with states enforcing human rights violations in ways they might not have 60 years ago, and with a general improvement of human rights since World War II. Increases in international trade and democratization clearly have had an impact on human rights protection during this period. The end of the Cold War was probably the event that had the greatest impact on human rights in the last quarter century. The defeat of the Soviet Union enabled long-oppressed domestic polities throughout Eastern Europe and elsewhere to recognize individual freedoms. In addition, changes in technology have affected human rights enforcement. Nations have always been willing to pay, but not willing to pay much, to relieve visible suffering in other countries, regardless of what IHL required. Developments since World War II have increased the benefits and lowered the costs of such enforcement. The rise of television and the Internet means that suffering in other countries has become more visible. Ordinary altruists thus gain more by relieving such suffering than in the past, when relief as well as suffering could (at best) be described only in print. Advances in military technology have reduced the cost of intervening when human rights abuses occur in poor nations. So too have international institutions that were created to facilitate coordination of security issues, which are also available to coordinate responses to human rights abuse. For example, NATO, a security organization constituted by treaty, lowered the coordination and response costs of intervening to stop human rights abuses in the former Yugoslavia in the summer of 1999.

Additional support for these arguments comes from case studies that provide detailed information about the relationship between international human rights law and the human rights practices of specific nations.

One prominent study – Lutz and Sikkink (2000) – examines three cases from Latin America from the 1970s through the early 1990s. The first two cases involved torture in Uruguay and Paraguay, and disappearances in Honduras and Argentina. For each pair, the first state had signed a relevant human rights treaty (the ICCPR and the American Convention on Human Rights, respectively) prior to the human rights violations in question, and the second state had not. For each pair, background conditions were relatively similar, and each state was governed by a dictatorship when the human rights violations occurred. One might have expected Lutz and Sikkink to find that the signatory state engaged in fewer human rights violations than the non-signatory state did. In fact, human rights violations declined in both states in each pair at roughly the same time, for roughly the same reason – increased international attention on the human rights practices of the two states, followed by a new U.S. policy under the Carter administration, supported by Congress, to withdraw aid from governments that violated human rights. Neither the activists and journalists who highlighted the human rights abuses, nor the Carter administration, distinguished signatories and non-signatories. And the Carter administration's pressure against all four countries was sufficient to reduce human rights violations where they occurred. Coercion, and not compliance with the IHL treaties, is the explanatory factor here.

The third case study concerns democratization, and compares international responses to a coup in Uruguay in 1973 and a coup in Guatemala in 1993. The international community did not respond vigorously to the Uruguay coup; it did to the Guatemala coup. However, this difference cannot be attributed to international law, for the international legal obligations of each country with respect to democracy were the same at the time of its coup. The closest thing to new law was an amendment to the OAS charter that permitted the General Assembly to revoke the membership of a government that came to power through a coup, but this amendment had not been ratified by Guatemala in 1993 and indeed by its own terms would not be effective until 1997. For Lutz and Sikkink, all of this is evidence that the law can strengthen an international "norm cascade" in favor of human rights and democracy. But the cases just show that international factors other than international law account for the decline of human rights abuses and the strengthening of democracy in Latin America.

The same conclusion—about the lack of a role for international law in human rights progress—applies to Schmitz's (1999) discussion of human rights abuses in Kenya and Uganda during the last three decades. In Uganda, Idi Amin came to power in a coup and then consolidated his power through a campaign of

terror. NGOs protested, and eventually the U.S. and Britain joined in the chorus, but Idi Amin's real problem was his own people, who did not like his rule, and Tanzania, which he foolishly attacked and by which he was ousted. After a civil war and much turmoil, during which respect for human rights did not improve, victory was achieved by rebels who obtained popular support by treating civilians relatively well. When their leader, Museveni, obtained power, he declared that his government would respect the human rights of citizens, and created some laws and institutions for this purpose. Human rights abuses thus declined below the level of the Amin era, though they continued.

In Kenya, arap Moi came to power under constitutional procedures in 1978 but over the next several years he consolidated and then expanded his power by cracking down on political opponents and violating human rights. NGOs complained, and the United States exerted diplomatic pressure on Kenya as the human rights abuses there received public attention. This continued for many years. Foreign countries criticized human rights violations in Kenya, and the U.S. Congress threatened to cut off aid. Further pressure through the 1990s led to multiparty elections (though not entirely fair) and some liberalization, as well as accession to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment in 1997. Human rights abuses, however, continued.

IHL did not play a discernible role in the reduction of human rights abuses in either country. In Uganda, the atrocities ended before the state signed an IHL treaty. In Kenya, to the extent that human rights practices improved, this occurred before the state signed the treaty; after it signed the treaty, human rights abuses have continued. Improvements in both states were mainly due to internal resistance to authoritarian rule. Foreign pressure had diverse motivations, mainly tied to concerns about security and economic disruption. In response to these kinds of realist arguments, Schmitz says (1999, 73) that the pressures of the US and other countries were marginal and in any event caused by the NGOs' consciousness-raising. However, there is no real evidence for the NGO hypothesis, either. Probably, the pressures of foreign countries were marginal, and the main pressure for change came from the citizens whose rights were being abused. But, in any event, even in Schmitz's interpretation the law – as opposed to NGOs' moral commitments – plays no role: NGOs were not objecting to violation of a treaty; they were objecting to violation of human rights. It was a moral/political, not legal claim, that had influence, if anything did.

These case studies reveal a pattern. Powerful liberal democracies – usually, the United States – take some interest in human rights practices in small states, but usually not much. Atrocities give rise to protests and expressions of concerns without close attention being paid to the state's legal obligations.

Liberal democratic governments complain about civil and political rights practices in places like Cuba, Indonesia, Myanmar, Pakistan, Saudi Arabia, and Singapore, even though these States have not ratified the ICCPR. The protests rarely lead to concrete action, and when they do, the patterns of action do not correlate with the requirements of international law. Lower level human rights abuses also give rise to protests and expressions of concerns, but usually to nothing more unless the abuses are tied to governmental instability, regional security concerns, or the disruption of trade. When the abuses are tied up with these concerns, powerful liberal democracies either promise goods to states that improve human rights practices, or threaten states that do not. The case studies always focus on human rights change in small or weak states that are most acceptable to coercion or economic bribes; it doesn't focus on larger states like China, Saudi Arabia, or Russia, where coercion human rights progress has been slow, and where coercion and bribes are less efficacious.

The rise of transnational NGOs concerned with human rights – a phenomenon greatly assisted by the communications revolutions discussed above – does not affect this analysis. Risse and Sikkink (1999) argue (based on some of the case studies described above) that NGOs such as Amnesty International can aid in the development and spread of human rights norms throughout the world. This is true but unremarkable. At least since the Reformation, NGO activists have transmitted ideas across borders, and engaged in transnationally coordinated political activism, with important implications for domestic governance. Formal NGOs devoted to eliminating the slave trade, to the peace and labor movements, and to free trade flourished, and had both domestic and transborder impacts, in the 19th and early 20th centuries (Charnovitz 1997). Relatedly, journalists and activists throughout history have reported on human rights atrocities, provoking domestic audiences to pressure their governments into acting to stop the abuses. In a famous example, Edmund Morel reported on atrocities in the Belgian Congo in the late 19th century and engaged in transnational activism, sparking successful worldwide pressure on Belgium to curtail its brutal activities (Hochschild 1999).

Neither these earlier NGO activities, nor the ones analyzed by Risse and Sikkink, depended in any special way on international law; nor did they have any clear influence on states' decisions whether to comply with international law. In modern times as in former times, NGOs, like states, protest atrocities and other objectionable behavior regardless of whether the behavior violates international law. The complaints are sometimes dressed up in the language of illegality (a topic to which we return in Chapter 8). But this rhetoric never depends on careful attention to what international law actually requires, or which IHL treaties actually bind on which states. NGOs and other human right monitors (like the U.S. State Department) simply do not distinguish human rights abuses that do and

don't violate a ratified IHL treaty. It is the moral quality of the abusive acts to the complaining party, not their legal quality, that leads to human rights criticism.

Sometimes (but usually not) the rhetoric is followed by changes in the behavior of states. The intervening causal factor is not international law, but rather domestic political pressure (the people who are being tortured support rebels or foreign armies) or pressure imposed by powerful foreign states. As NGOs complain regardless of whether the nation has formally acceded to an IHL treaty, and as the nation's response to NGOs' complaints is highly variable in any event, there is no evidence that IHL plays any special role. The most important NGO contribution is to publicize human rights abuses, which in turn (sometimes) provokes domestic audiences states who pressure governmental officials to take action. As the case studies show, the NGO criticisms tend to lead to human rights improvement only when tied to coercive measures that themselves do not depend on the IHL treaties.

Before closing our analysis of multilateral human rights treaties, we must mention an important counterexample to our theory: The European Convention for the Protection of Human Rights and Fundamental Freedoms. The states of Europe agreed by treaty to adhere to certain now-standard human rights norms, and established a court – the European Court of Human Rights – to interpret the treaty, the decisions of which have been followed by domestic courts and political bodies in hundreds of cases throughout the EU. The most thorough explanation of why this treaty regime works is by Moravcek (1999), who argues that the states of Europe delegated human rights control to an international organization for the self-interested reasons of “locking in” and consolidating domestic democratic institutions.

While this “national interest” explanation starts from similar premises as our theory, it fails to explain how an international organization can “lock in” subsequent national governments who do not share the same starting assumptions about human rights. To the extent that the EU human rights regime is a genuine example of multilateral human rights cooperation, however, it is one that would not have been predicted by our theory. The remarkable EU human rights phenomenon is best seen as part of political and economic cooperation among states that are unifying into a larger state, akin to pre-20th century unification efforts in the United States, Germany, and Italy. The EU is no more a model for international law than was the United States during the Articles of Confederation period, when it was viewed by many as a “mere” federation governed by international law (Marshall 1969; Yoo 1996). When disparate states integrate into a single state or quasi-state, the influence of international law on their relationship declines, and some kind of federal or regional law (such as European law) takes its place. This new law will reflect the values and interests that are already shared

by the states and are the source of the drive to integrate. This is why international human rights laws have not produced the same level of compliance in South America and Africa, where the human rights regimes are not part of a larger project of economic and political integration, as European human rights law has in Europe (compare Moravcsik 1995).

WHY RATIFY HUMAN RIGHTS TREATIES?

Our analysis raises one major puzzle. If modern multilateral IHL treaties do not influence human rights behavior, why do states spend the time, effort, and resources to negotiate and create multilateral IHL treaties and related institutions? Why do liberal democracies like the United States and France ratify human rights treaties that don't require any change in behavior? Why don't powerful liberal democracies simply announce a policy of using carrots and sticks to improve human rights in other countries, and apply these incentives to weak states whose human rights abuses are especially offensive to world audiences? Why do some authoritarian states ratify the ICCPR when they have no intention of complying, and yet others do not?

There are no precise answers to these questions, and what general answers there are differ based on the type of state and type of treaty in issue. We focus our analysis once again on the ICCPR, the most prominent and important modern IHL treaty. Since we believe that states ratify treaties when the benefits of doing so outweigh the costs, we begin by assessing these costs and benefits of ICCPR ratification.

For most states, the costs of ratifying the ICCPR are very low because, as explained above, the treaty has no self-enforcement or external enforcement mechanism. This means that authoritarian states like China, Saudi Arabia, and Iraq that do not generally act in accordance with the treaty can nonetheless join the treaty at little cost, as they have done. Some maintain that ratification of the ICCPR entails a nontrivial cost of close monitoring of domestic practices by the Human Rights Committee and its special rapporteurs. But governments, NGOs, and the media closely monitor and criticize human rights practices in every state, regardless of whether they have ratified certain IHL treaties. Against this background, the notoriously weak and all-but-ignored ICCPR monitoring mechanisms add trivial costs at best.

The lack of ICCPR enforcement means that liberal democracies can ratify the treaty with little cost. A more important explanation for ratifications by liberal democracies is that their practices already conform to the treaty. And when at the margins they do not, the incongruence can easily be resolved by reservations and understandings. It is no accident that liberal democracies that take civil and political rights seriously have as a group attached many reservations

and understandings to the ICCPR, while most non-liberal democracies attach few if reservations or understandings, and most take out none whatsoever (see Appendix). This pattern of reservations and understandings is consistent with our hypothesized reasons why nations join the ICCPR: Authoritarian states do so because they suffer little cost from their non-compliance, and liberal democracies do so because, after reservations and understandings, they can perfectly comply simply by following their prior domestic practices. (Compare Hathaway 2003, who reaches a similar conclusion without analyzing reservations and understandings.)

We have focused on the low costs to ratifying the ICCPR. What about the benefit side? Why do the ICCPR and treaties like it would exist in the first place, and why do states ratify it? There must be at least some small benefit to drafting and ratification to justify the expense of the enterprise. As for drafting: the states and groups that created the ICCPR thought that its report and comment procedures might enhance human rights protections in states that did not otherwise respect human rights. The fact that the treaty has not worked as planned does not undercut this motivation. Nor does it show that the treaty plays no beneficial role. For in some sense, the ICCPR and related treaties inform the world of a “code of conduct” that powerful liberal democracies deem important to establish. Smaller states that comply with this code know that they are more likely to receive aid, and less likely to be subject to threats and other forms of pressure, than states that do not comply with the code. Thus, the treatment of human rights may improve as a result of cooperation or coercion with a bilateral relationship; the multilateral treaty provides a rough guide as to the kinds of behavior that are deemed acceptable and not.

This system of thin bilateral cooperation or coercion on the basis of a “multilateral code” solves a coordination problem in much the same way that the “standard of civilization” did in the 19th century. As European and American influence expanded around the globe in the 19th century, especially into Asia and Africa, the western powers confronted with relations with states that were politically, economically, legally, and culturally much different. In many contexts, the western powers used a “standard of civilization” to determine whether and to what extent to have relations with non-western states. The standard consisted of basic rights for foreign nationals, a well-organized government with the capacity for international relations, a western-style legal system, and conformity to international law (i.e. the Euro-American version) and to Euro-American customs and norms. (Fidler, 2001). The standard was designed to determine whether a State was “sufficiently stable to undertake binding commitments under international law and whether it was able and able to protect adequately the life, liberty, and property of foreigners.” (Schwarzenberger

1953, at 220). In short, it was a standard that communicated to non-western states what criteria they had to satisfy to reap the benefits of relations with western states.

Because the “standard of civilization” emerged in a decentralized fashion, and its interpretation could thus vary from state to state, small and weak states that sought to obtain the benefits of international cooperation might have had trouble figuring out just what the rest of the world expected them to do. This is a standard coordination problem. Given that wealthier states are willing to provide some benefits to, or refrain from some coercive actions against, other states that meet a certain standard of conduct, it is to the benefit of all the wealthier states to agree with some specificity on the actions that are permitted under that standard (say, the death penalty) and actions that are not permitted (confiscation of property). Modern human rights treaties solve this coordination problem. Although the wealthier states’ liberal use of reservations and understandings muddy the standard a bit, there is a clear core of agreement that the poorer states can use as a guide. States know that when they comply with this guide or code, they are more likely to receive foreign aid (even if low) and to avoid diplomatic, military, and economic pressure (even if minor).

Turning to ratification, all states receive at least this small benefit from ratification: They can no longer be criticized or viewed as non-rights-respecting *because* they failed to ratify the treaty. If there is uncertainty about a state’s commitment to treating its own citizens well, failure to ratify a major human rights treaty sends an unambiguous and believable signal that it is not committed to human rights, and thus (perhaps) is not capable or deserving of collateral benefits that might flow to a human rights-respecting nation, such as recognition and trade. Ratification is thus especially important for a state making the transition from authoritarianism to liberal democracy, for although human rights treaty ratifications by themselves might not send much information about human rights practices, the failure to ratify the treaties in this context is conclusively viewed as evidence of unreliability on the issue. (Compare Hathaway 2003; Moravcsik 2001.) Even liberal democracies benefit from ratification. No liberal democracy is beyond human rights reproach, and thus all can benefit from eliminating the uncertainty about the significance of non-ratification. As for authoritarian states, they too are subject to an adverse inference from non-ratification, and since ratification is practically costless, there is little reason not to do so. Eventually, however, a cascade of ratification would empty the act of meaning; if all states ratify because it is costless to do so, then ratification does not distinguish states that respect human rights and those that do not. The phenomenon is similar to the process by which clothing or some other expensive item reveals the wealth of its owner until changes in the technology of production

reduces its cost and brings its price within the range of the poor. (We return to many of these themes when we discuss international law rhetoric in chapter 8.)

While these tenets provide general guidance in explaining the pattern of human rights treaty ratifications, they cannot explain the minute details of ratification patterns. Why is the United States one of two nations (the other is Somalia) not to ratify the Rights of the Child Convention, a treaty that has no enforcement mechanism and that is ignored by the states that did ratify it? Why have more states ratified the Rights of the Child Convention than the Genocide Convention? Why have authoritarian regimes in China, Egypt, Russia (in 1976, as the Soviet Union), Iraq, and Iran ratified the ICCPR, while authoritarian regimes in Afghanistan, Myanmar, Pakistan, and Cuba have not? Why do Bahrain and Kazakhstan ratify one IHL treaty that have no intention of complying with (the Convention on the Elimination of Discrimination Against Women), yet decline to ratify another (such as the ICCPR) that they have no intention of complying with? We (like everyone else) have a hard time explaining the details of IHL treaty ratification patterns. The reason for the absence of any discernible pattern of ratification is that both the costs of ratification of these treaties, and the benefits, are very small. Because ratification matters little on the international plane, one way or the other, ratification patterns are unlikely to correlate to systemic international factors, but rather to the vagaries of domestic politics and institutions, which are lost in noise.

CIL OF HUMAN RIGHTS

In addition to IHL treaties, there is said to be a large body of human rights CIL. We say “said to be” because the CIL of human rights, unlike the traditional CIL analyzed in Part I, does not reflect a general and consistent state practice followed from a sense of legal obligation. Rather, the CIL of human rights is based less on actual state practice, and more on a human rights consensus found in General Assembly resolutions, multilateral treaties, the writings of scholars, and related sources (Bradley and Goldsmith 1997).

Consider the famous *Filartiga* decision (1980), which initiated the human rights litigation revolution in US courts. *Filartiga* held, among other things, that CIL prohibited state-sponsored torture. The court acknowledged that this holding was not based on state practice, because many nations of the world torture their citizens. It instead based its holding on the U.N. Charter, the U.N. General Assembly's Universal and Torture Declarations, several human rights treaties, and the writings of jurists. *Filartiga* was thought to alter the traditional positivist approach by eschewing close reliance on state practice, and by looking to technically nonlegal sources of law (such as unratified treaties and U.N. General Assembly Resolutions) in identifying CIL. Also, the court relied heavily on moral disapproval of torture. Other national and international courts have in

recent years embraced a similar approach to the CIL of human rights. (*Nicaragua* Case 1986; *Pinochet* Case 1999).

In our view, the CIL of human rights, like modern IHL treaties, has little influence on national behaviors, and for the same reasons: The practices associated with the CIL of human rights do not reflect cooperation, coordination, or reliable coercion. To the extent that we see behaviors consistent with the CIL of human rights, they reflect coincidence of interest or coercion in accordance with the interests of the coercing state. In this respect, the CIL of human rights is, despite conventional wisdom, very much like many of the traditional CIL rules analyzed in Part I. It does not generally solve coordination or cooperation problems, but instead is a rhetorical validation of practices that have little if any cooperative element.

Indeed, the CIL analysis in *Filartiga* has many similarities to the CIL analysis in the paradigmatic traditional CIL decision examined in Part I, *The Paquete Habana*. The essential difference is content: traditional CIL focused on commercial, military, and diplomatic relationships between states; modern CIL focuses on human rights. But similarities overwhelm this difference. The fishing vessel exemption rule in *The Paquete Habana* did not reflect universal state practice. The rule lacked a pedigree in the consent of states. In reality it was based on unrelated bilateral agreements scattered over centuries, the writings of scholars, pronouncements of international bodies, and the conclusory assertions of a U.S. court. The fishing vessel exemption was also vague; the line between the rule and its exception for fishing vessels of military or economic value was always unclear. Also like the new CIL of human rights, the fishing vessel exemption was invoked opportunistically in accordance with nations' different interests. The rule was even justified moralistically. Over a dozen times, the Court in *The Paquete Habana* claimed that the rule is a humanitarian measure designed to protect poor, industrious fishermen.

In short, the modern CIL of human rights has a deep structure very much like traditional CIL. Modern CIL does not constrain nations any more or less than traditional CIL did. When a state declines to violate CIL, this is usually because it has no reason to violate it. When modern CIL does not reflect bilateral cooperation or coordination (as is the case in the human rights context), it is mostly aspirational, just as much of traditional CIL was.

Conclusion

Liberal states that care about human rights in other countries do not make a fetish of international law. When conditions are right, they will pressure human rights abusers regardless of whether they are signatories to a treaty or have violated CIL. When conditions are not right, they will tolerate human rights

abuses in other states regardless of whether they are signatories to a treaty or have violated CIL. Thus, IHL fades into the background. Some political scientists claim that IHL has contributed to the formation and enforcement of transnational norms. But these claims obscure the reality, which consists of powerful states enforcing interests, including altruistic interests to be sure, and weak states yielding when sufficient pressure is brought to bear against them. The relationships are bilateral, and the degree of enforcement depends on the bargaining positions of the two states in each relationship. To be sure, there can be genuine bilateral cooperation in the human rights context, as the Peace of Westphalia and the slave trade treaties show. And multilateral treaties can clarify the expectations of those states willing to improve relations with states that respect human rights. But the majority of compliance in modern IHL is explained by coincidence of interest.

Chapter 7. International Trade

Nations have traded with one another for thousands of years. During most of this period, international trade relations were thought to be regulated by CIL. When Supreme Court Justice Joseph Story stated in 1842 that “[t]he law respecting negotiable instruments may be truly declared in the language of Cicero . . . to be in a great measure, not the law of a single country only, but of the commercial world,” he was referring to the “law merchant” that was considered to be an element of CIL (or the law of nations) dating back many centuries. Also, as we saw in Part I’s discussion of *The Paquete Habana* and the “free ships, free goods” rule, CIL was thought to regulate commercial trade during wartime as well.

This chapter analyzes prominent treaty regimes governing international trade. We begin with the bilateral treaty regime that arose in the 19th century. We explain how this regime’s distinctive features are best explained by our theory of international law, and how its failures influenced the design of the great 20th century multilateral treaty regime, GATT/WTO. GATT/WTO poses a challenge to our account of international law, for, according to conventional wisdom, GATT/WTO provides the basis for multilateral trade cooperation. As we shall see, however, the elements of GATT/WTO that have flourished generally solve coordination problems, not multilateral prisoner’s dilemmas. The international trade law regime does not solve a multilateral prisoner’s dilemmas; the rules that were designed for that purpose have failed. GATT/WTO might be best described as an effort to use bilateral means to solve a multilateral problem; its limitations can be traced to this mismatch between means and ends.

THE NINETEENTH CENTURY TRADE REGIME – BACKGROUND

International trade has always been an important element of states’ foreign policy. Before analyzing modern international trade law, we provide a little historical background. The reason for doing this is that one cannot understand the modern system without understanding how states would act in the absence of this international legal regime. Such a hypothetical trade regime would *not* be one of maximally high trade barriers, and economic autarky.

At the end of the Napoleonic Wars, the major trading nations all had erected formidable trade barriers. Though Adam Smith had undermined the standard philosophical case for mercantilism, protectionism made sense on relative security grounds, and beyond this, tariffs were a major source of revenue for states. As peace took hold, and the prospect of further war receded, relative security concerns diminished but did not disappear. In Britain, the decline in trade barriers, which began in the 1820s and 1830s but were marked most famously by the repeal of the Corn Laws in 1846, can be traced to diverse factors.

The usual story is that manufacturers had obtained power relative to landowners, in part because of the economic changes brought on by the industrial revolution and in part because of political changes such as the Reform Bill of 1832. Manufacturers wanted to pay lower duties on imports of raw materials, and perhaps they also wanted their workers to have access to cheaper food. Landowners, of course, preferred to avoid foreign competition but in the end they might not have been injured much by it because of subsequent developments in farming technology in England. Agriculture flourished even after the Repeal. Ideology, spiced with religion, also played a role in the decline of protectionism, as elites increasingly adopted Smith's position on the relationship between international trade and national wealth. The extreme view, which was by no means uncommon, was personified by Cobden, who believed that free trade would, by making nations mutually dependent, promote international peace. The Repeal of the Corn Laws was also made possible by legal and financial innovation that began the shift from reliance on duties to other forms of taxation. Finally, some British believed that by opening the British market for farm products, the repeal of the Corn Laws would divert the Continental economies from manufacturing to agriculture, thus keeping them weak relative to Britain. (Kindleberger __, 27-36; Howe 1997)

However these factors may have combined against protectionism, the point is that Britain saw itself as having a unilateral interest in the reduction of trade barriers. Although many officials hoped that other nations would follow Britain's lead and reduce their own trade barriers, few believed that reduction of trade barriers would be desirable only if other nations followed suit. And indeed unilateralism was borne out by subsequent events. Other nations did not immediately follow Britain's example, at least not to as great a degree; but this failure did not lead to the reinvigoration of protectionism in Britain. On the contrary, protectionism was dead in mainstream politics for the next several decades. In early nineteenth century Britain, then, we find evidence that the reduction of trade barriers is not necessarily a matter of international cooperation; it can occur as unilateral policy, just as in standard international trade economics, although the story was more complex.

Britain was the foremost commercial nation during this period, but it was not the only nation that was reducing trade barriers. Trade barriers in Prussia, and subsequently in the entire Prussia-dominated German customs union, were low at the beginning of the century, rose in the first half, and then declined in the second half.⁵ Tariffs in France were high, but gradually declined, only to rise again after the Franco-Prussian War in 1872. The other major European countries

⁵ Measurement of nineteenth century trade barriers founders on data limitations; in some cases, figures for trade openness are used as a proxy for trade barriers (see Pahre 2001, 32-35).

participated in the expansion of free trade after 1850, with some retrenchment in the 1870s, and then in another trend in favor of free trade in the 1890s, which petered out in the years leading up to World War I. Many of these movements can be explained by shifts in the balance of power between import-competing firms and farmers, and manufacturers that used imported supplies; shifting military alliances (for example, France lowering tariffs against British imports when it needed British support in Italy); and liberal ideology, sometimes disrupted by economic downturns. (Kindleberger 1975; C. Trebilcock 1981; Pahre 2001; Rogowski 1989)

Most interesting, for our purposes, is the increasing resort to trade treaties in the second half of the nineteenth century. Before then, trade barriers were mostly the result of unilateral action, and few trade treaties were in existence. This changed mid-century. France and Italy belonged to about a dozen trade treaties by the late 1860s. Britain entered fewer treaties, but these included important treaties with major trading partners such as France. Prussia was the one major nation that entered a significant number of trade treaties in the first half of the century, but these were mainly with other Germanic countries that joined the customs union; after 1865, and increasing significantly in the 1890s, Prussia and the customs union (which was unified into the single German state in 1870) entered numerous trade treaties with other powers (Pahre 2001, 35-37).

NINETEENTH CENTURY TRADE TREATIES

1. State interest.

What interest is served by a treaty that reduces trade barriers? There are two conventional answers. First, the interest is national welfare. When state A enters a trade treaty with state B, state A's workers and investors benefit from access to state B's markets. Second, the interest is the welfare of export-oriented interest groups. When state A enters a trade treaty, state A's export industry benefits from access to state B's markets.

The first answer may contain some truth, but it does not provide good predictions of the behavior of states. If a state cares only about maximizing national welfare, then in most cases it can achieve that aim by unilaterally eliminating trade barriers. States would not enter trade treaties because they would not have trade barriers to eliminate. An exception might be made for large states that dominate the world market for some goods; with respect to those goods, a state might have no incentive to eliminate trade barriers unilaterally (Bagwell and Staiger ___). It can use its monopsony power to extract some consumer's surplus from foreign citizens. Trade treaties, then, would occur only between large states that dominate the world market in different goods: each state would reduce the barriers with respect to the goods in which they have an

advantage as long as the other state did the same thing. Wealth is gained from the elimination of what are called “terms-of-trade” externalities. However, this is not an accurate description of the history of trade treaties; they are used much more common than the theory predicts. Accordingly, we will focus, through this chapter, on the second answer.

The second answer is the conventional wisdom, but it has problems of its own. A state’s interest with respect to international trade will vary from good to good, depending on the relative political strength of exporters and import-competers. If the domestic manufacturers of some good are weak, then the state will not be harmed by a reduction in trade barriers against that good. Indeed, a state might benefit from unilaterally reducing trade barriers, as it would if consumers or firms that use imports as inputs have a great deal of power. If the domestic industry is strong, then it will be harmed by a reduction in trade barriers against the good. If a state has a powerful export industry, then it will benefit from other countries reducing their trade barriers; otherwise, it will not. (Schwartz and Sykes __)

On this view, states will unilaterally set zero, low, intermediate, or high trade barriers for different goods, depending on its internal political economy. Each state will sometimes benefit from other states reducing their trade barriers from the unilateral level, but sometimes not. When a state does benefit from other states reducing their trade barriers, then a trade treaty may be possible.

2. Cooperation through bilateral treaties.

If all this is true, then states can sometimes produce mutual gains through bilateral treaties. The logic is familiar. At time 0, each state has, say, intermediate tariffs for all goods. State A and state B both produce two goods: iron and rye. In state A, the iron industry has a great deal of political power; in state B, the rye farmers have dominant political power. A’s iron industry would like greater access to B’s market, and B’s rye farmers would like greater access to A’s market. The interest of each state reflects the relative influence of interest groups in that state: so in A, the state gains from a trade treaty only to the extent that the iron industry’s gain exceeds, according to some political calculus, the rye industry’s loss. If the same is true for B, then mutual reduction of tariff barriers could produce joint gains. Therefore, the states agree to reduce trade barriers.

The logic is that of the prisoner’s dilemma; gains can be obtained as long as each state cares sufficiently about future payoffs, and adopts an appropriate retaliatory strategy. Retaliation here is straightforward. If one state raises its trade barriers in violation of the agreement, then the other state responds by raising its trade barriers. We don’t need to rely on our other explanations of international law – coincidence of interest, coordination, and coercion – because

the nineteenth century treaties were, for the most part, straightforward exercises in cooperation. As mentioned in chapter 4, bilateral treaties do not usually reflect coincidence of interest because two states do not need a treaty to ratify unilaterally motivated behavior; coincidence of interest plays a role mainly in the explanation of compliance with multilateral treaties. Coercion did occur; but this usually involved relations between major states and undeveloped states that would become colonies. Trade treaties were mainly between major states, more-or-less equals, except when used for the purpose of unification – the German case, discussed below.

One example will need to suffice (Conybeare 1987, 183-88), though the history is complex. In 1881, Italy and France entered a trade treaty that reduced Italian trade barriers against French manufactured goods and French barriers against certain Italian agricultural products. The treaty was concluded during a period of rising protectionist agitation in both countries and throughout Europe, apparently caused by farmers who had lost markets to cheap grain imports from Russia. In 1886 Italy denounced the treaty, and in 1887 it raised tariffs on French goods. At the same time, Italy denounced treaties with other trading partners. Italy apparently believed that because its trading partners were dependent on its agricultural exports, it could obtain better terms, and indeed it renegotiated trade treaties with many of its partners. But France refused to budge, and insisted that the terms of the 1881 treaty be preserved in any new treaty. In 1889 Italy finally agreed to these terms, but France would not normalize trading relations until 1898. During this period, both Italy and France suffered economically from lack of bilateral trade, but Italy, the smaller and poorer country, suffered a great deal more.

A few observations are in order. First, France and Italy initially saw themselves in a prisoner's dilemma: it was in each state's interest to raise trade barriers in the absence of an agreement to fix them, but both states would do better off through mutual restraint. The treaty provided for such mutual restraint. The legalization of the agreement, however, was not the source of restraint; although nineteenth century trade treaties frequently had fixed terms, states often denounced them and then sought to renegotiate them. The treaty was just a device by which the states exchanged expectations about their joint conduct. (See Pahre __, for some of the history.)

Second, Italy's denunciation of the treaty with France might have been a mistake, but might have reflected domestic political changes. Evidence that the denunciation was a mistake is that France, unlike other treaty partners, refused to renegotiate the trade relationship on more favorable terms to Italy, and that some contemporary observers believed that the Italians thought that France was more dependent on Italian agriculture than in fact it was. This is possible, but it is also

possible that Italian import-competers obtained more power during the 1880s, and they drove the Italian government's trade policy. If so, Italy did not "cheat"; it just experienced higher costs from complying with the 1881 agreement and rationally ended it.

Third, France's response looks like classic albeit harsh retaliation. It would be useful to understand why France did not agree to the 1881 terms when Italy gave up its demands. Theory does not tell us: mild and extreme retaliation strategies can both be used to solve a prisoner's dilemma. If France was farsighted enough, it might have incurred the high short-term losses of harsh retaliation in the expectation that this would deter Italy and other trading partners from denouncing treaties far into the future. Another possibility is that France's import-competers obtained greater political power at the same time that Italy's did. On this view, neither state after 1886 would have benefited from a new trade agreement because in both states the import-competers had political power and thus no interest in cooperating over trade.

Fourth, France's response to Italy's move might also have been constrained by most-favored nation (MFN) terms in its treaties with other states. In the nineteenth century, many but not all trade treaties contained MFN clauses, which held that if one of the treaty parties enters a subsequent trade agreement with a third country, any more favorable trade terms granted to the third country would apply to the other treaty partner as well. Although MFNs are not well understood, the idea appears to have been to prevent the following situation from occurring (Bagwell and Staiger 2001). Suppose that Britain and France enter a trade agreement that reduces the tariffs on Britain's textiles to five percent, and France's wine to five percent. France then enters an agreement with Italy, under which France, in return for some concession from Italy, agrees to reduce tariffs on Italian textiles to two percent. Assuming that British and Italian textiles are of equal cost and quality, France will end up importing all its textiles from Italy and none from Britain, while Britain will be required to continue charging the low five percent tariff on French wine. In this way, Britain loses the benefit of its bargain as a result of France's subsequent action. The MFN prevents this from happening by requiring France to reduce the tariff on British textiles to two percent once it agrees to the two percent tariff on Italian textiles.

Returning to the Franco-Italian trade dispute, France's MFN treaties with other states implied that if France agreed to place low tariffs on Italian agricultural goods, then France would also have to lower tariffs on similar goods imported from other trading partners protected by MFN clauses. To be sure, France could have denounced or violated these treaties; but presumably if it had, it would have risked retaliation from these other countries, and it was more dependent on these other countries for imports than it was on Italy (Conybeare

1987, 187). Here we see that although trade relations were usually conducted on a bilateral basis, they frequently had third party effects. If a state has an MFN treaty with a third party, then its ability to make concessions is constrained by that treaty. Even if a state does not have a related MFN treaty with a third party, its granting of concessions to one state may cause trade diversion from an earlier partner, leading that earlier partner to protest and threaten to denounce the earlier treaty. For this reason, every major bilateral trading relationship had important third party effects. States understood this, and when they negotiated with each other, they paid attention to the effect of the negotiations on the attitudes of other states. As a result, bilateral trade negotiations involving multiple states often clustered – during 1881-1884, 1890-1891, and 1904-1906, for example (Pahre 2003, ch. 12) – and in this way a system that was bilateral at its core created pressure in the direction of multilateralism.

A final point concerns why international trade expanded so rapidly during the second half of the nineteenth century. It is tempting to credit the increasing legalization of international relations during this period. With a more robust international legal order, firms had the confidence to invest abroad. However, there is no evidence that international law played such an important causal role. There was no international law that required states to liberalize trade policy, of course; and the treaties, including their MFN terms, merely ratified political arrangements that states believed was in their (temporary) interest. Pahre (2003) argues that MFN terms became a “norm,” that is, a constraint on states’ behavior, but he musters no more than a few pieces of anecdotal evidence for this argument. As we have seen, the most plausible explanation for MFN terms is that they enabled parties to a treaty to protect their gains from subsequent trade treaties between one of the original parties and a third party. MFN terms served the interests of the state parties, and that is all.

Technology, politics, and economics explain the growth of international trade in nineteenth century. Industrialization, the revolution in transportation and communication, developments in international finance, and similar technological and economic factors, significantly reduced the cost of shipping goods from one state to another, and also reduced the cost of entering contracts and financing investments. Manufacturers thus saw new opportunities in foreign markets, and lobbied their governments to negotiate reductions in foreign tariffs. Some governments also believed that cheap food imports would pacify hungry laborers. Peace and political stability were also important: when relative security concerns are low, states will focus on absolute gains. Although Kindleberger (1975) and others give credit to British power, and the British interest in opening foreign markets, credit should probably be given to the balance of power system as a whole.

WORD WAR I THROUGH GATT

The golden age of international trade ended with World War I. Trade barriers erected during World War I persisted long after the war ended. There are many theories for the interwar breakdown of international trade, but we will focus on a single strand of the complex explanation. After World War I, there were many more major trading states than before World War I, when Germany, France, and Britain were the dominant trading powers, and a handful of smaller European countries such as Italy played a minor role. Conybeare (1987) argues that the MFN “norm” – by which he seems to have meant a moral commitment of states – led to free riding that was less manageable in a large group of states than it had been among a small group of states prior to the war. As we noted above, if state A and state B are parties to an MFN treaty, then state A (or B) benefits when state B (or A) negotiates lower tariffs with state C, and the state obtains this benefit without having to make any new concessions itself. But that means that each state will wait for the other state, holding back rather than aggressively seeking lower barriers with new or existing trading partners.

But the blame should not be put on an MFN “norm” so much as on the intrinsic third party effects of international trade, to which the use of MFN terms in bilateral treaties was an imperfect response. If the states had solved the MFN problem by repudiating all MFN treaties and abandoning the use of that term, the problem would have remained that every bilateral agreement would be vulnerable to trade diversion caused by a subsequent trade deal between one of the original parties and a third party – indeed, this was the problem that the MFN term was intended to solve. As new states were created, and old economies matured, the temptation to engage in trade diversion became extreme and unmanageable. To this must be added the usual factors: political instability, nationalist extremism, the threat of military conflict, the worldwide economic downturn starting in 1929, and perhaps American trade policy, which, while traditionally protectionist, hit new levels of protectionism in the 1930s, which produced retaliation by other countries.

By World War II, it was conventional wisdom, especially in the US government, that the trade wars of the 1930s deepened the depression, and contributed to the rise of fascism and the outbreak of a second war. The conviction that this should not happen again led to the GATT. Thus, from the start GATT was colored by concerns about security. By 1947, international trade had become a field of battle in the Cold War.

THEORY OF GATT

The original 1947 GATT agreement set out a number of principles that reflected the practices of the nineteenth century regime. Here we discuss five of

these principles: that there would be periodic multinational trade negotiations; that protectionism would be embodied in tariffs rather than non-tariff barriers; that states would not discriminate against other GATT members; that barriers would be reduced through a process of reciprocity; and that international panels would adjudicate GATT disputes although enforcement would be left to the affected parties. We argue that all of these principles have straightforward explanations. Many of the principles were designed to solve simple coordination problems. States benefited from a framework within which bilateral trade negotiations and enforcement could occur. The framework was like a language or set of standards – like the rules governing the use of the radio spectrum – that facilitate communication; it was self-enforcing because once the framework was agreed on, no state had an incentive to deviate from it, lest it be misunderstood in a bilateral relationship and provoke retaliation against policy intended to be cooperative. But there were two complications. The coordination game, as is almost always the case, had asymmetric payoffs, and in such a repeated Battle of the Sexes game, some deviation will occur. More important, many of the designers of GATT aspired to do more than solve coordination problems, but also to solve multilateral cooperation problems (the n-player prisoner's dilemma). As we will see, the rules that reflected these aspirations were not obeyed.

1. Periodic multinational trade negotiations

Article XXVIII bis of GATT provides that contracting parties may sponsor periodic multilateral rounds of tariff negotiations. The article was an amendment of the initial GATT agreement but reflected understandings that developed earlier. There have been eight rounds since 1947: Geneva (1947); Annecy (1948); Torquay (1950); Geneva (1956); Dillon (1960-61); Kennedy (1964-67); Tokyo (1973-79); and Uruguay (1986-94) (the declaration launching the current Doha round was adopted by the WTO on November 14, 2001) – with the number of states involved rising from 23 in the first round, to 125 by the end of the eighth.

Article XXVIII bis raises two questions: Why did states believe that multilateral bargaining would be superior to bilateral bargaining; and why was this system self-enforcing? The answer to the first question is clear from the nineteenth century history. Because states gain from trade agreements only if they obtain concessions in return for their concessions, every trade deal is vulnerable to a subsequent trade agreement that results in trade diversion. To prevent this from happening, states need to negotiate together. Thus, our assumptions about the interests of states – that they seek to promote the welfare of domestic import-competers and exporters – leads to the conclusion that international trade is not a bilateral prisoner's dilemma between multiple states, but a public good that benefits all states but is also subject to free riding. Bilateral

trade agreements, then, cannot exploit the entire potential surplus from international trade.

There are two parts of this problem. The first is that of arranging multilateral negotiating rounds; the second is that of enforcing the agreements that are obtained during the rounds. Article XXVIII bis addresses only the first part, and we will discuss the second part later. As to the problem of arranging multilateral negotiating rounds, this is a problem of asymmetric coordination, or a multiplayer Battles of the Sexes game. Every state benefits from meeting with all other states during a specific time, at a specific place, rather than having to arrange a meeting with each of its dozens of trading partners. But each state will have a private optimum – a meeting next year rather than this year, in a convenient city rather than a faraway city. Still, these considerations – the time and place – are trivial compared to the amounts at stake, and it is no surprise that the GATT members could reach agreement, no doubt under the leadership of the major powers, time and again. The logic is familiar: once all states agree that a trading round will occur in Geneva on a certain date, no single state can benefit by sending a delegate to New York City; and although coalitions might form and cause trouble, the gains from doing so seem low. Indeed, the mutual benefits from multilateral negotiation are high enough that it can occur in a decentralized fashion. Thus did clustering occurred with increasing frequency in the second half of the nineteenth century, and did so in the absence of any formal legal obligation. Clustering was endogenous, driven by concerns about the third party effects of bilateral treaties.

There is a further point, which is that multilateral negotiations are not exclusive of bilateral negotiations, and bilateral negotiations occur both outside rounds and within rounds. During the rounds, states usually bargain over concessions in a bilateral exchange with each major trading partner (Finger 1979). During another period of bargaining, the states adjust their concessions using the results of the bilateral negotiations as a baseline. In addition, much trade negotiation occurs outside the formal multilateral rounds, indeed occur nearly continuously. And side agreements may be made during the rounds. (See Dam 1970, 56-68; Long 1985, 21-28) These strategic considerations led to behavior different from what the GATT legal system technically required. The GATT charter did not require a consensus for the launching of a round; only a majority was necessary. But it became clear that this majority rule meant nothing. If a majority of small states sought to launch a round with an agenda unfavorable to the powerful states, the latter would simply have refused to participate. The large states never tried to launch a round without the participation of the small states because the large states wanted to trade with small states just as they wanted to trade with other large states. Thus, in practice trade rounds have not been

launched without the support of a consensus, but not because there is a consensus “rule.” For similar reasons, final acts emerging from the trading rounds have been supported by consensus.

In sum, all states have an interest in multilateral bargaining, and the only strategic problem is that of coordinating the time and place of bargaining. To the extent that states also have an interest in engaging in bilateral negotiations or other negotiations outside the formal trading rounds, they do so. Any effort to restrict such bargaining would be unenforceable.

2. Ban on non-tariff barriers.

Article XI bans quantitative restrictions, and Article III as well as other provisions in GATT and supplementary agreements require that foreign products be regulated in the same way that domestic products are. (There are numerous exceptions.) (Pescatore et al. 2002, v. 1, 41-50) The purpose of these rules was to channel protectionism into tariffs. Although tariffs are generally superior to non-tariff barriers – beyond the effect on trade they raise revenue as well – this would not be a reason for an international agreement. Protectionist states ought to choose to rely on tariffs even if no international agreement tells them to. Indeed, foreign firms that export into protectionist states would often prefer protectionism to take the form of quotas rather than tariffs, for the quotas allow them to restrict supply and obtain consumer’s surplus, whereas tariffs convert this surplus, or some of it, to revenue for the importing country.⁶ But presumably there are domestic political reasons for choosing quotas over tariffs, and many non-tariff barriers are harder to detect than tariffs are.

The general GATT structure – to tolerate tariffs rather than to require their elimination – reflects the political economy assumption that states will often benefit from trade barriers regardless of how other states respond, as they will when import-competers have dominant political power. The puzzle, then, is why GATT demands that protectionism occur through tariffs and prohibits the use of non-tariff barriers. Why not permit states to achieve their ideal level of protectionism through any policy instrument?

The ban on non-tariff barriers was probably designed to narrow the bargaining range, and clarify what moves counted as cooperation and what moves counted as defection in a repeated PD.⁷ Tariff barriers are more easily measured

⁶ Voluntary export quotas probably show these forces at work. When import-competers put irresistible pressure on the government to raise trade barriers, the government and the exporting state might agree on quotas rather than tariffs, with the quotas an inefficient bribe going from domestic consumers to the foreign exporters.

⁷ According to Gardner (1956, 20), American policy opposed non-tariff barriers because they lent themselves to discrimination; discrimination was regarded as the real evil, on which see below.

and compared than nontariff barriers. If all states can agree not to use non-tariff barriers, then it will be easier for them to determine (i) whether the other state's concessions compensates them for the cost of their own concessions; and (ii) whether the other state has complied with its agreement. By contrast, some non-tariff barriers – although not all – are opaque: a rule that regulates the processing of meat can have both health and trade protection benefits if domestic processors happen to use the approved system more frequently than foreign processors do. Scientific studies can help sort out the effects, but these are time-consuming and imperfect. Negotiation is easier if states need to think only about tariffs, which are relatively commensurable, and not about diverse, incommensurable non-tariff barriers (Jackson 1969, 312). Monitoring tariffs is easier than monitoring some non-tariff barriers (such as regulatory discrimination), although other tariff barriers like quotas are just as easy to monitor, though there may be some doubt on this (Jackson 1969, 248, 312-13). By limiting the set of instruments that states can use to create and divide trade surpluses, the ban on non-tariff barriers serves a coordinating function.

The problem with the ban on nontariff barriers is that hard-to-monitor behavior cannot easily be banned precisely because it is hard to monitor. Consider this example. A state agrees to tariff T, but also can implement nontariff barrier R. R will eventually be discovered but in the meantime the state enjoys its first best outcome: an open market for its exporters and protection for its import-competers. The affected state will retaliate after R is discovered, but delayed retaliation is not as effective as immediate retaliation, which can (more or less) occur if a state violates the tariff binding instead. Indeed, the incentive of each state is to cheat on the deal by inventing a nontariff barrier that is fiendishly obscure. These barriers might not be perfect substitutes for the ideal level of protection, but they become more and more attractive by a kind of hydraulic pressure as bound tariffs decline. As nontariff barriers rise, they eat away at the gains from trade both directly and by resulting in domestically inefficient regulation whose value is mainly the result of trade externalities.

Empirical evidence about the effect of the ban on non-tariff barriers is ambiguous. States have removed explicit quotas, but there has been much backsliding and evasion. In the 1960s and 1970s, for example, the United States imposed quotas on steel, textiles, and meat – albeit in the form of “voluntary quotas” extracted from states that the U.S. threatened with (illegal) trade barriers. More significant is the phenomenon of discriminatory regulation. States engage in discriminatory regulation when they adopt laws that have apparent health or safety rationales but that mainly keep out products from other countries. Europe's rules against genetically modified crops, for example, disproportionately harms American farmers, while having no substantial scientific support. Some

commentators believe that regulatory discrimination had, by the 1970s, erased the gains in trade openness achieved by the reduction of tariffs (Jackson 1969).

3. *Nondiscrimination.*

Article I (and provisions scattered elsewhere) prohibits states from granting concessions in a discriminatory manner. For example, if a state reduces its tariffs to T for certain goods originating from state X, then it also must reduce to T tariffs for such goods originating from all other GATT members. The nondiscrimination provision derives from the use of MFN terms in bilateral trade treaties. There are numerous exceptions to Article I, including the escape clause; another notable exception is for preferential trading areas (Article XXIV).

The nondiscrimination rule is a second-best rule that in trying to solve one collective action problem, creates another one. As we have seen, two states that enter a trade deal have an incentive to externalize costs on a third state that was a party to an earlier trade treaty with one of the two current parties. States protected themselves with MFN terms, but MFN terms give states an incentive to delay entering negotiations to lower existing tariffs in the hope that the current treaty partner will first enter a treaty with a third party that results in unilateral reduction in tariffs vis-à-vis the original partner. In the nineteenth century, some treaties had MFNs but other treaties did not, presumably the choice from treaty to treaty reflected each state's assumptions about the how the tradeoff described above worked in any particular case. The decision to create a general MNF rule in GATT may have reflected the judgment that delay caused by the nondiscrimination rule was less harmful than the uncertainty and economic distortion that occurs in a system that allows discrimination; it also was driven by American fears that trade discrimination would weaken the Western military alliance against the Soviet Union.⁸

In any event, the nondiscrimination rule can be understood only as an effort to solve a multilateral PD – each state making a deal that diverts trade from a third state – and so our prediction is that it would likely fail. This prediction appears to be correct. Although states do not explicitly violate the rule, they circumvent it easily by creating preferential trading areas under Article XXIV, of which there are hundreds.⁹ NAFTA is just one example. Although Article I prevents the United States from discriminating in favor of Canada and Mexico by lowering tariffs on goods originating from those countries, Article XXIV permits

⁸ Schwartz and Sykes (1997) argue that the nondiscrimination rules reflect the desire to protect the gains from bargaining while the various loopholes allow discrimination when the political power of domestic constituents make it unavoidable. But, as they acknowledge, there is little reason to think the GATT rules strike the right balance between the multiple considerations.

⁹ There have been a little more than a hundred PTAs that were “notified” under Article XXIV, but there are many other bilateral agreements that arguably create a PTA but have not been notified.

the United States to enter a preferential trading agreement with those countries that has a similar effect.¹⁰ Another example is the Treaty of Rome of 1957, which created the EEC. The problem was not just that the major trading nations within the EEC discriminated against the rest of the world by creating a free trade zone in Europe. The problem was that the EEC insisted on maintaining France's colonial preferences, and then on negotiating new preferential agreements with numerous countries all over the world (Hudec 2d ed. 1990, 220-26). (See also Srinivasan 1998, for a general discussion.)

GATT provides specific rules regulating the conditions under which PTAs may be created, and it creates a body that evaluates PTAs; however, this body has rarely agreed that a particular PTA complies with or violates the rules, and thus has not been able to prevent the formation of PTAs. Mansfield and Reinhardt (2003) show that PTAs routinely violate the GATT rules, and that their formation reflect simple strategic priorities. States enter PTAs so that they can obtain trade concessions from important trading partners without having to wait for GATT rounds, and without having to make return concessions that will benefit all GATT members. This also increases their bargaining power when the GATT rounds occur.

In sum, the nondiscrimination rule was supposed to solve a collective action problem but it failed. A large group of nations cannot easily force all its member to refrain from discrimination.

4. Reciprocation.

Article XVIII bis says that negotiations will be held on a "reciprocal" basis but this provision is clearly not a rule in the conventional sense, and could easily have been regarded as merely an aspiration. Nonetheless, many commentators assert that a reciprocity principle exists at the heart of GATT. According to this principle, when state X makes trade concessions, then other states should reciprocate by making equivalent trade concessions (Jackson 1969, 241). A state that refuses to do this violates the spirit, and possibly the letter, of GATT.

However, the idea of reciprocity is hard to understand in a political economy framework. State X is willing to lower tariffs only if exporters have gained influence at the expense of import-competers. If the same thing has

¹⁰ As is well known, preferential trading areas cause trade diversion. State X imports goods from fellow PTA state Y rather than lower cost goods from non-PTA state Z. The gains in trade among PTA members can in theory be less than the efficiency loss (Viner 1950). And as each PTA is created, the states that are excluded from the market have a stronger incentive to create their own PTAs, resulting in the discriminatory regime that the MFN provision of the GATT was intended to prohibit (Bhagwati 2002, 106-20).

happened in State Y, a deal is possible. But there is no reason to think that the amount gained by X's exporters (or this amount minus the loss to X's import-competers?) should equal the amount gained by Y's exporters. For one thing, the monetary gain to each group must be translated into political currency, and the political exchange rate will depend on domestic political institutions. Politicians in X might not bestir themselves for less than a \$100 gain for their exporters, while politicians in Y will act if as little as \$10 is at stake. In addition, politicians will take account of the losses to import competers, which may be asymmetrical, and to consumers and others – not to mention other international political considerations. Deals might be possible and attractive even though the gains and losses on each side (however measured) are not equivalent, and an equivalence constraint (if equivalence could be measured) would not improve outcomes.

Bagwell and Staiger (2002, 64-68) latch on the “equivalent concessions” language of Article XXVIII, as another example of the reciprocation “norm” at work. This article provides that if, during a round of negotiations, a party withdraws previously granted concessions, an affected party may respond by withdrawing equivalent concessions. According to Bagwell and Staiger, this rule is a constraint, and indeed it favors small countries by preventing large countries from using their bargaining power in order to obtain gains in the terms of trade.

But this is doubtful. The more plausible explanation of the reciprocity “norm” – both as it appears in initial negotiations and renegotiations – is that it is endogenous, albeit “equivalence” must be understood in the loosest possible sense. In every bargain, each side seeks to gain, and will not come to agreement unless it gains. Thus, every bargain results in a gain on both sides. Gains are rarely equivalent; they reflect the relative bargaining power of the parties. But our intuitions about equivalence are extremely rough: we don't call bargains unfair if in a domestic sale the consumer and the seller fail to divide the surplus equally; on the contrary, in a competitive market we expect the seller to gain just enough to cover costs. Between states, each trade will result in greater or lesser gains on either side, and in this loose and banal sense there is reciprocation, but equivalence is far too strong a description.

In sum, the simplest explanation of reciprocity is that it reflects the commonplace that in trade negotiations every state that consents to a deal will gain from it. For rhetorical purposes, states frequently argue that all gains should be equal, but there is no mechanism in GATT for ensuring that gains will be equal, if indeed equality could ever be determined, and one would normally expect gains to be divided according to bargaining power (Steinberg 2002).

5. *Adjudication and enforcement.*

GATT contains many clauses that urge violators and victims to engage in “consultations” in order to resolve disputes. But the prospect of consultation will not deter a state from violating a provision that is against its interest. The heart of the GATT enforcement regime is Article XXIII, which provides, in essence, that a party whose GATT benefits are “nullified or impaired” has the right to retaliate by withdrawing concessions.¹¹ As it evolved, the enforcement regime was understood to provide victims of trade violations the right to ask that a tribunal hear its complaint; if the tribunal found in favor of the complainant, it could retaliate. However, GATT’s procedures require consensus among all members, including any member in the role of defendant in a particular case. Therefore, a defendant could always refuse to consent to the creation of the tribunal, or adoption of its judgment. The veto power raises a puzzle: how can an enforcement regime succeed, if violators can block enforcement?

There are two possible answers. The first, which is conventional wisdom among lawyers, economists, and political scientists, is that states complied with the spirit of GATT even if they could have undermined its goals by blocking all enforcement actions against them. The second, which we will advance, is that GATT provided some useful administrative infrastructure for handling trade disputes between states; and that tribunals could in theory provide a neutral resolution of a dispute. GATT’s achievement was the replacement of regular diplomatic channels and ad hoc arbitration decisions¹² with a relatively continuously developing jurisprudence, though this replacement would not be complete until the creation of the WTO. As we will explain, the creation of such a system was a matter of multilateral coordination, not the solving of a prisoner’s dilemma or collective action problem.

The GATT adjudication system is a puzzle for the traditional international lawyers’ thinking because states that complied with GATT law to the letter could easily undermine the system. A rational state that has “complying with international law” in its utility function, but not any other reputational concerns, would always block a tribunal (or sanction) rather than permitting a judgment against it that it would not otherwise be willing to pay. Thus, the system would not work. The question, then, is why bother creating the enforcement system, or why bother creating it with vetoes. The veto was surely necessary because states would not risk being declared in violation of international law by a tribunal that

¹¹ At least, as originally conceived. Subsequently, states would unilaterally retaliate for violations of specific clauses (Hudec 2d ed. 1990, 199).

¹² According to Robert Pahre’s database on trade treaties, these treaties rarely included arbitration clauses, and it appears that the usual practice in the nineteenth century was not to arbitrate treaty violations but to renegotiate treaties through diplomatic channels. We thank him for letting us see his data, which are available at: <http://www.staff.uiuc.edu/~pahre>.

they could not control, but it was hoped that states would avoid using the veto or would use it only in unusual circumstances. But at this point we need a theory about why states would use their veto only in this way; and, if states could be expected to act in good faith in their use of the veto, why they couldn't be expected to trust other states to operate the tribunal in good faith. We have not found an answer to these questions in the literature.

To understand the GATT adjudication system, one can usefully begin by conceiving of the trade system as a large number of bilateral relationships: US-EU, US-Japan, EU-Japan, Japan-Thailand, and so forth. Each state pays attention to the behavior of a trading partner, and complains and threatens retaliation if the partner violates its commitments. So far, this description could apply as well to the nineteenth century as it does today. What did the GATT adjudication system add? Nothing more than this: it created a protocol for requesting a tribunal that would have an institutional relationship with prior tribunals, including a collective memory or jurisprudence. If the tribunal is neutral, then it can provide information about the extent of the violation (if any); or it can choose an outcome that would serve as a focal point for coordination of the states. If both parties adopt a cooperative strategy – comply with my commitments unless a neutral tribunal says that the other party violated its commitments – then the tribunal will contribute to bilateral cooperation. In the absence of a neutral tribunal, the states might mistakenly interpret a cooperative move as a violation, resulting in the breakdown of a trading relationship. But there are two limits on the extent of cooperation. First, cooperation can occur only if the tribunal makes decisions that consistently divide the surplus rather than favoring one state to the extent that the other state receives higher payoffs by failing to cooperate. Second, cooperation can occur only as long as future payoffs and discount factors are high enough: a perfectly competent and neutral GATT tribunal cannot ensure compliance of a state that no longer values cooperation with a particular partner on existing terms.¹³ If either of these limits is crossed, then one state or the other will refuse to consent to tribunals or will ignore their judgments.

Understanding the achievement of GATT compared to the nineteenth century system, then, requires a theory of how international tribunals function, and how neutral tribunals can be possible. We have already discussed various theories in chapter 4, and will not repeat that discussion here. Briefly, all that is required is for two states involved in a dispute to think that following the established GATT procedures for creating a tribunal is usually superior to normal diplomatic channels, the creation of an ad hoc tribunal, or termination of the relationship. These possibilities, except for the last, are alternative methods for achieving the same aim: the discovery of information, or the choosing of a focal

¹³ We discuss international tribunals in more detail in Chapter ____.

point, such that a breakdown of bilateral cooperation is avoided, when the parties otherwise have the right incentives for continuing such cooperation. This is essentially a problem of coordination, and initial U.S. leadership plus the relatively high quality of GATT decisions, seems to have provided the focal point for resolution of trade disputes. But nothing could force states to use this system if they preferred not to cooperate over certain trade issues – as happened when payoffs changed as a result of shocks. European countries ignored the GATT adjudication system in the decade after the creation of the EC; the U.S. circumvented the system in the 1980s, when it preferred to use unilateral methods of enforcement. The continued recourse to the GATT adjudication system occurs when the states genuinely seek to cooperate over the trade issue at stake, and believe that the GATT system provides higher quality decisions than alternative forums or institutions. The GATT adjudication system is less like a government than like the private arbitration systems that obtain business from firms by developing a reputation for impartiality, so that disputes between parties that seek to continue to cooperate can be resolved in a neutral fashion.

If our theory is correct, a defendant that loses a GATT adjudication will not necessarily bring its trade policy into compliance with GATT rules. It depends on the reason why the defendant violated GATT. If the reason was that it “cheated” – in the sense of gaining from the complainant’s unreciprocated cooperation – then it will obey the GATT judgment – assuming that the judgment is roughly correct – for otherwise the state will find itself in the lower-payoff noncooperative equilibrium, as the complainant would “cheat” in response rather than endure the “sucker” payoff. If the reason the defendant violated GATT was that circumstances changed, or otherwise the domestic political gains from noncompliance exceed the costs even if the complainant retaliates and cheats as well, then the defendant will not bring its behavior into compliance, though in the latter case the two states can be expected eventually to renegotiate their obligations toward each other.

Our first hypothesis, then, is that states will comply with GATT judgments when the joint gain from compliance exceeds the joint cost. (When new conditions create asymmetries in the gains, renegotiation or side payments may be necessary.) “Compliance” here means (a) not blocking an adjudication and (b) obeying the judgment once issued.¹⁴ Thus, compliance means more than technical legal compliance; it means compliance with the general purposes of the GATT system. Unfortunately, this hypothesis cannot be easily tested: the gains

¹⁴ There is a further question why a state would allow a tribunal to be created but then block enforcement. The most likely answer is that the tribunal’s decision was significantly more adverse than what the state predicted, or else that protectionist pressures increased between the creation of the panel and the rendering of its judgment.

and losses are political, not economic, and so cannot be straightforwardly measured. An extremely crude test looks at the stakes: one might think that cases involving large amounts of money (such as the dispute over U.S. tax subsidies for exporters), or political controversies (such as the beef hormones dispute), would more likely result in noncompliance with adverse judgments. There is indeed evidence from a study of U.S.-Europe disputes that noncompliance rises with the stakes of the dispute (Busch and Reinhardt, *Transatlantic* [], 2003). However, this evidence is not very strong, as high stakes for the complainant may mean high stakes for the defendant as well, in which case it is ambiguous whether the joint costs of compliance exceed the joint gains from compliance.

The first hypothesis seems most plausible when the trading partners are roughly the same size. What happens when a large state's violation of trade concessions harms a small state? If the large state is a monopsonist of the small state's goods, then it will declare the terms of trade that gives it (the large state) the surplus from trade. Thus, when the large state violates a GATT concession or rule, it is, in essence, unilaterally renegotiating the exchange of concessions between the two states. The small state has no alternative but to yield, and so will not bother to bring a GATT case against the large state. The evidence indicates that small states are less likely to file complaints against large states than other large states are, and that large states are more likely to fail to comply with GATT judgments than small states are (Hudec 1993, Busch and Reinhardt 2002). Evidence also suggests the best predictor of compliance is the economic power of the complainant (Bown 2003).

We have found only one rigorous argument that states comply with GATT panel judgments just because they are legal obligations – that is, that GATT panel judgments are a factor in the utility functions of states. Reinhardt (*Adjudication* [], 2001) observes that defendants are more likely to make concessions prior to a panel ruling than after a panel ruling. From 1948 to 1994, defendants made full concessions in 19 of 30 cases (63.3 percent) after a panel was established but before a ruling, but made full concessions in only 38 of 91 cases (41.8 percent) after a ruling in favor of the complainant. As we have seen, the compliance itself is not a puzzle for the rational choice assumption; Reinhardt claims that the fact that compliance is more likely before the judgment than after the judgment is a puzzle.

Reinhardt argues that the data show that in fact states, or some states, care about complying with GATT rulings. But his argument depends on some tricky premises. He makes two main assumptions about private information: (1) that the complainant has private information about its toughness, its willingness to retaliate against a defendant that does not bring its trade practices into compliance; and (2) that the defendant has private information about the utility

cost it incurs when it violates a ruling (we will call defendants who care about the law “law-abiders”). At the same time, he claims that the adjudication does not reveal this information or any other kind of information. All that the adjudication does is generate a decision that causes disutility to law-abiders who violate it. To avoid this disutility, law-abiders will settle prior to the adjudication. In addition, some non-law-abiders will settle prior to adjudication in order to avoid the risk of retaliation coming after an adverse decision. These non-law-abiders will have to offer a generous settlement because the complainant thinks that with some probability they are actually law-abiders. Thus, there will be a relatively high rate of settlement in which the defendant agrees to bring its policy into full compliance. After adjudication, however, no new information is revealed. The remaining non-law-abiders have no reason to comply, and so the degree of compliance with rulings will be lower.

There are several problems with this argument. First, it does not explain the role of the veto. If a defendant cares about avoiding an adverse GATT ruling, it can simply prevent such a ruling by blocking the panel or the implementation of the sanction. Reinhardt implicitly assumes that a law-abiding defendant incurs disutility by exercising the veto, but he does not justify this assumption. As we have seen, such an assumption is hard to reconcile with the establishment of the veto right in the first place. Second, Reinhardt’s data show that the settlement rate is quite low prior to establishment of the panel. Full compliance occurs in 38 of 125 cases (30 percent); it then rises after the panel is established; and then falls again after the ruling. Reinhardt does not explain why establishment of a panel, a largely formal procedure, should make so much of a difference. Settlement, and therefore compliance, could occur before a panel is established, indeed before a complaint is filed. The relevant comparison is not the post-panel-pre-judgment settlement rate, and the post-judgment settlement rate, but the pre-judgment and post-judgment settlement rates. These numbers are 57 out of 155 (37 percent) versus 38 out of 91 (41.8 percent). Compliance is higher after judgment, not before: the empirical puzzle that provides the basis of Reinhardt’s argument does not exist.¹⁵ Third, it is implausible to think that major trading states have significant private information about their propensity to retaliate and their propensity to comply with GATT rulings. These variables reflect political culture, institutional structure, current politics, economic conditions, and so forth – all highly visible in democracies, and easily inferred from prior trade behavior.

¹⁵ Indeed, his own regressions show no such anomaly once controls are introduced (his model II). Our own manipulations of the data, which he helpfully provides at his website (<http://userwww.service.emory.edu/~erein/data/index.html>), show that not all of his controls are necessary in order to make the anomaly disappear.

The data are too crude to provide much support for any theory of GATT adjudication that depends on predictions about compliance rates at different stages of litigation. The data just show that states that violate their GATT obligations and are subsequently dragged before a tribunal are willing to return to compliance some of the time but not always. States return to compliance either because the temporary violation was sufficient to pay off import competitors or there was a genuine ambiguity in law or fact that was resolved by the tribunal; they fail to return to compliance either because they believe that the tribunal made a bad decision or continuing violation is necessary to pay off import competitors. There is no strong evidence that states comply with tribunals because of a sense of legal obligation (Bown 2003).

6. *Summary*

GATT is a solution to a series of coordination problems – when to meet, with whom to negotiate, whom to hire as arbitrator – that states partially obey. Within the GATT framework, states make, break, and enforce trade deals in the same ways that they always have: bilaterally. Rules or aspirations within the GATT framework that were designed to generate collective goods – the ban on discrimination, for example, or multilateral punishment of states that break the rules – have failed. The successes and failures of GATT, in short, track our claim that international law can solve coordination problems and bilateral prisoner's dilemmas, but not collective action problems.

Then why did GATT's drafters include rules designed to solve collective action problems? They might have erred, or they might have thought that the United States could unilaterally enforce the entire system. But the more plausible explanation is that the GATT drafters did not have a clear idea of what GATT would and could accomplish. Indeed, the GATT was intended as a provisional statement of general principles that would guide trade negotiations only until the International Trade Organization came into existence. The ITO would then have the power to address problems of international trade as they arose, in the flexible way that the International Monetary Fund and the World Bank address problems of international finance and development. When the ITO was rejected by the U.S. Congress, GATT remained the framework within which international trade negotiations took place, and, as one would expect, states pragmatically ignored or violated those aspects of the GATT that were not sustainable, while building upon those aspects that were robust.

WTO INNOVATIONS

Many scholars who might accept our claim about the limited role of GATT in international trade will insist that all this changed with the creation of the WTO. The claims in the legal literature are optimistic. Critics and supporters

alike believe that the WTO will force states to adopt policies that are against their interests. No longer a “framework” within which states negotiate for trade concessions, the GATT/WTO is a “constitution” that authorizes an independent body to dictate trade policy to states. (Representative articles include Stephan 2002, McGinnis and Movsesian 2000, and Guzman 2002.) The concern now is to prevent the WTO from overreaching; what are needed are legalistic procedural protections modeled on the political constitutions that constrain governments. If the WTO is a government, rather than a forum in which trading partners hash out trading policy, then its watchwords are transparency, representativeness, fairness, and process (McGinnis and Movsesian 2000, Weiss 2000, Charnovitz 2001). The ineluctable scholarly process by which a useful device for diplomacy is transformed into an international legal regime has begun.

However, a look at the Dispute Settlement Understanding – the agreement that created the WTO – reveals that it introduced only modest procedural reforms.¹⁶ The main procedural innovation of the WTO was its elimination of the veto power and the creation of a continuous appellate body. Under GATT rules, a defendant could block the formation of a panel, and the implementation of its judgment. Under WTO rules, a defendant can do neither of these two things. Note what this says about the earlier practice of blocking. If blocking a panel or sanction incurred the same kind of reputational cost that violation of the law did, then there would be no point in outlawing the veto. The state that refused to comply with any WTO ruling would incur the same sanction as the state that blocked a GATT ruling – the reputational cost.

In the GATT era, when a powerful state’s effort to obtain a remedy was frustrated by blocking, the state would sometimes unilaterally retaliate by raising trade barriers against the offending party. This the US did several times against Europe. Under WTO, this behavior is brought within international law. A defendant state that loses its case in the WTO system can still refuse to stop its offending behavior. WTO, under Article 22(1) of the Dispute Settlement Understanding, now grants the complainant the right to “compensation.” What is compensation? The right to raise its own trade barriers by an amount equal to the cost generated by the illegal behavior. In other words, WTO authorizes the retaliation that occurred illegally under GATT, but in addition it sought to ensure that a panel would determine the extent of retaliation rather than leaving it up to the victim of the trade violation.

This raises the following question. If GATT could not prevent states from unilaterally retaliating against states that engage in trade violations, why should

¹⁶ The agreement creating the WTO also greatly expanded substantive trade law to include intellectual property and certain services, but we are focusing on procedural innovations.

we expect the DSU to prevent states from retaliating at a level beyond whatever is authorized by a WTO panel? If states follow the law just because it is the law, then the DSU would not be necessary. If they do not, then it is hard to see why the DSU would change their behavior.

The evidence provide few clues. Although there are more disputes per year than under GATT, the increase is mainly due to the increase in the number of members and the greater scope of substantive trade law, which absorbed services and intellectual property, not the procedural reforms of WTO (Bush and Reinhardt, 2002). In addition, there is not yet any evidence that the WTO procedures have enhanced compliance with international trade law. Although one can point to some clear cases where states changed their laws in response to a WTO ruling, the Busch and Reinhardt (2002) study finds that although the “full compliance” rate increased from 40 percent under GATT, to 66 percent under WTO, this difference is due to the expansion of trade law to include intellectual property and services – where, one might assume, more tractable disputes are still being addressed. When these disputes are excluded, the WTO produces compliance no more often than GATT panels did. Bown (2003) similarly finds no evidence that WTO procedures have improved compliance; instead, he finds that compliance is a function of the power of the victim state to retaliate against the violator. If future data confirm these results, then it will be clear that the effect of GATT and WTO has not been to force states to adjudicate their disputes – that appears to be impossible – but to make available to them a continuous adjudicatory body that they will jointly prefer to alternatives. The elimination of the veto will turn out to have been of little importance.

But all of this is of little relevance to the question whether the elimination of the veto matters. If compliance with WTO decisions turns out to be higher than compliance with GATT decisions, that could be due to the innovations in adjudicatory procedures rather than the elimination of the veto. The creation of the continuous appellate body, for example, might improve trade jurisprudence and thus produce better and more consistent decisions. On this view, states would comply with WTO decisions more enthusiastically than they comply with GATT decisions because the WTO decisions are better: they provide more information, or they are more likely to result in outcomes that are within the tolerance of both sides. Unfortunately, we see no way to discriminate between these hypotheses using an empirical test.

Schwartz and Sykes (2002) put a different emphasis on the WTO dispute resolution procedures. Against Jackson (2000), who argues that states have a legal obligation to comply with their trade commitments, Schwartz and Sykes argue that states do not violate international law as long as they pay “compensation.” On their view, states rationally enter a trade agreement that

gives each state the right to raise trade barriers whenever the political costs of the agreement rise above the gains. As long as such periods of inefficient compliance are sufficiently rare, a deal makes sense. An optimal contract would explicitly set out the contingencies under which the parties are permitted to raise trade barriers (for example, during an economic shock), but because of transaction costs an actual contract would most likely not contain such contingencies. A compensation requirement in essence gives a state the option to raise barriers and pay “compensation” so that it will raise barriers only when its political benefits exceed the other state’s political costs. On Jackson’s view, such behavior would be illegal: states must not raise barriers and if they do anyway, then “compensation” is punishment.

This debate is all about form and has nothing of substance. A property rule has little meaning in international law. In domestic law, an individual who violates an entitlement protected by a property rule can go to jail, whereas if he violates an entitlement protected by a liability rule he merely pays money. It therefore makes a difference whether an entitlement is protected by one rule or the other. In international law, a state that violates an entitlement protected by a property rule and a state that violates an entitlement protected by a liability rule face the identical risk: that the victim of the violation will retaliate. If the proffered compensation is satisfactory, then it will make no difference whether the legal protection takes the form of a property or liability rule: the victim will not retaliate. If the proffered compensation is not satisfactory, then the victim will retaliate, regardless of the form of the protection. The alternatives could only matter if third parties cared: if they either collectively punish or individually stigmatize states that violate property rules even while offering compensation or that retaliate against states that violate liability rules while offering compensation. We find it hard to believe that states are so public spirited or form such delicate judgments; in any event, proponents of this view have not provided evidence for it.

LEGALISM AND INTERNATIONAL TRADE

GATT inspired a debate about the proper level of legalization of international trade law. The “legalists” pressed for more detailed substantive rules, more reliance on judicial procedures and decisions, and clear sanctions (Davey 1987). The “pragmatists” argued that GATT should remain a loose framework within which states could negotiate over trade policy. Where the legalists argued that legalism would strengthen the international trade system and limit the influence of protectionism, the pragmatists argued that legalism encourages advocacy, which leads to conflict rather than order.

The debate confuses separate issues. The first is the question of the proper level of detail at which international trade obligations should be negotiated.

GATT's provisions are vague; the new WTO provisions are only slightly less so. By contrast, the tariff schedules are immensely detailed, going on for thousands of pages. We see no reason for thinking that the general procedural rules and substantive obligations are too vague (or that the tariff schedules are too specific). When states are coordinating policies but do not know what the future will bring, they will not agree to specific rules. It does not matter that, in the abstract, clear rules are better than vague aspirations because rules provide clearer guidance (Jackson 2000, 121; see also Trebilcock and Howse 1999). The GATT/WTO rules are vague because states will not agree to anything more specific; indeed, the greater specificity of the International Trade Organization – the trade institution that was designed to come into existence shortly after GATT – may have doomed it (Gardner 1965, 383).

The second issue is the degree to which dispute resolution should be “judicialized” – that is, subject to formal rules of evidence and procedure, and administered by independent judges who employ the conventional tools of legal reasoning – rather than left to negotiations among the affected parties. Reliance on judges makes sense when issues are complex and require expertise, independence can be guaranteed, and states anticipate a continuing interest in the maintenance of the regime. The first and last conditions are met for trade; the second may be. But the point here is that the difference between a “legal” and “negotiated” outcome in international law is subtle and often invisible. The violator of a trade commitment in a legalized regime does not have to submit to a legal outcome and can choose to incur the reputational cost (if any) instead. The violator in a nonlegalized regime can choose to pay compensation because it seeks to maintain a reputation for cooperativeness. The main difference is not in the nature of the reputational cost but in the involvement of third parties in resolution of the dispute. The involvement of third parties is justified if states can agree to and comply with procedures that ensure that individuals chosen as judges bring information and judgment but not bias to dispute resolution.

The third issue is the question of whether the GATT/WTO system should have the power to sanction states that break the rules. Of course, there is no “system” that has the power of agency: either states, individually or collectively, sanction other states that break the rules or they do not. Collective action problems put a limit on whether sanctions can work. Our view is that multilateral sanctions do not work. Rules, such as those governing preferential trade agreements, that depend on multilateral enforcement have gone unenforced. GATT/WTO has worked as well as it has because states are willing to retaliate, even risking a trade war, if trading partners violate their obligations. The bilateralism of trade sanctions implies that weak states cannot credibly commit to sanction powerful states, and that powerful states will in general have more

freedom of action than weaker states. The U.S., the EU, and Japan can destroy the GATT/WTO system by leaving it; other countries cannot. The heavy reliance in the literature on ill-defined reputational sanctions has not been justified by detailed empirical work.

There have been sporadic efforts to make GATT/WTO more legalistic; the Disputes Settlement Understanding is the most impressive example. But these efforts can only run into trouble if the underlying interests of the states – their need to retain the flexibility to raise trade barriers when protectionist pressures surge – are not sufficiently precise and durable. If not, efforts to increase legalization will fail in two ways: (1) a few states violate the rules, absorbing reputational costs if any, and then other states follow (presumably with no reputational costs by this time); or (2) states will yield to the hydraulic effect and switch to near substitutes (for example, PTAs rather than discrimination). This is one theory for the failure of the GATT dispute resolution process in the 1960s; it had become overlegalized in the 1950s as a result of the efforts of the United States, but international trading policy had to change when the EC entered the system (Trebilcock and Howse 1999, 52). There is a real danger, often neglected by commentators (for example, the essays and commentary in Hart and Steger 1992; Kovenock and Thursby 1992), that increased legalization of international trade will either displace trade from illegal barriers to legal barriers without improving efficiency or, if the legal barriers are removed as well, put too much pressure on the system and cause it to collapse (see Reinhardt, To GATT [], 2003; Bown, On the Economic Success [], 2003). We will discuss these issues at a more general level in chapter 11.