International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts

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and mechanisms of exclusion. If "deconstruction" is able to bring out that dark side, the reality of the mall at night, it may provide a means for critical identification and practice. That liberalism—like the shopping mall—can be placed under critical scrutiny only by adopting a style that breaks the liberal conventions, by adopting an ironic distance. This may be done by replacing the conventions of formalism or pathos with a radically personalizing language: by looking at legal process in terms of the play of ambition, influence and insecurity never far below the surface.[17]

No style is neutral. A legal language-game has no difficulty in expressing hegemony—indeed, this is what it is supposed to do. But it is also expected to articulate experiences of injustice. No language-game, however, can express every subjectively felt violation. In order to articulate violations that are repressed in the dominant language-game, a change of style may be necessary. Martha Nussbaum once pointed out that justice may sometimes be realized only by giving up the conventions of generalizability and commensurability that are typical of law—and perhaps by writing a novel.[18] It is not always necessary to aim that high: a letter may sometimes suffice. But a break is needed if what is sought is critical distance from that diplomatic or academic consensus to the articulation of which the styles of international law have been devoted.

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INTERNATIONAL RELATIONS THEORY, INTERNATIONAL LAW, AND THE REGIME GOVERNING ATROCITIES IN INTERNAL CONFLICTS

I. INTRODUCTION: IR THEORY AND INTERNATIONAL LAW

Over the last ten years, international relations (IR) theory, a branch of political science, has animated some of the most exciting scholarship in international law.[1] If a true joint discipline has not yet emerged,[2] scholars in both fields have clearly established the value of interdisciplinary cross-fertilization. Yet IR—like international law—comprises several distinct theoretical approaches or "methods." While this complexity makes interactions between the disciplines especially rich, it also makes them difficult to explore concisely. This essay thus constitutes something of a minisymposium in itself: it summarizes the four principal schools of IR theory—conventionally identified as "realist," "institutionalist," "liberal" and "constructivist"—and then applies them to the norms and institutions governing serious violations of human dignity during internal conflicts (the "atrocities regime").

In their initial communication to the authors, the editors of this symposium posed a more pointed question: to what extent should individuals be held criminally accountable for human rights abuses in internal conflicts? That question calls for two types of responses, *doctrinal* or *positivist* (when *are* individuals criminally responsible?) and *normative* (when *should* individuals bear criminal responsibility?). These traditional forms of

[17] For brilliant examples, see David Kennedy, *Spring Break*, 63 TEX. L. REV. 1377 (1985); and his *Autumn Weekend*, *in* DANIELSEN & ENGLE, *supra* note 11, at 191. See also the concluding reflections in Hilary Charlesworth's contribution to this symposium, 93 AJIL 379, 392 (1999).

[18] MARTHA NUSSBAUM, LOVE'S KNOWLEDGE: ESSAYS ON PHILOSOPHY AND LITERATURE, esp. 35–50 (1990). *See also* her POETIC JUSTICE: THE LITERARY IMAGINATION IN PUBLIC LIFE (1995).

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[1] *See* Anne-Marie Slaughter, Andrew S. Tulumello & Stepan Wood, *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 AJIL 367 (1998).

[2] *See* Kenneth W. Abbott, *Elements of a Joint Discipline*, 86 ASIL PROC. 167 (1992) (discussing joint discipline).

legal scholarship, often combined, are illustrated by Steven Ratner's recent article[3] observing that the rules of international criminal responsibility contain "arbitrary schisms"—between international and internal conflicts, wartime and peacetime atrocities, and certain proscribed abuses (torture) and others that seem equally abhorrent (small-scale executions)—and arguing that the rules should be expanded to fill these gaps.

IR theory is not directly applicable to either of these inquiries. First, as a social science IR does not purport to be what Lassa Oppenheim—or the symposium editors[4]—might recognize as a true "legal method" capable of answering doctrinal questions, like the positivist approaches presented above by Bruno Simma and Andreas Paulus.[5] And like most social sciences, IR takes its "science" seriously (often too seriously), generally eschewing specific normative recommendations. An IR perspective can, however, enhance both kinds of scholarship. In general, by situating legal rules and institutions in their political context, IR helps to reduce the abstraction and self-contained character of doctrinal analysis and to channel normative idealism in effective directions.[6] More concretely, the visions of international politics underlying theories of IR do suggest some (often implicit) preferences for particular sources of law and normative outcomes.[7]

IR theory is most helpful in performing three different, though equally significant, intellectual tasks: *description, explanation* and *institutional design.*[8] First, while lawyers *describe* rules and institutions all the time, we inevitably—and often subconsciously—use some intellectual template (frequently a positivist one) to determine which elements of these complex phenomena to emphasize, which to omit. The carefully constructed models of social interaction underlying IR theory remind us to choose these templates carefully, in light of our purpose. More specifically, IR helps us describe legal institutions richly, incorporating the political factors that shape the law:[9] the interests, power, and governance structures of states and other actors; the information, ideas and understandings on which they operate; the institutions within which they interact.

IR scholars are primarily concerned with *explaining* political behavior—recently, at least, including law-related behavior. Especially within those schools that favor rationalist approaches, scholars seek to identify the actors relevant to an issue, the factors (material or subjective) that affect their behavior or otherwise influence events, and the "causal pathways" by which those factors have effect. These elements are typically incorporated in a model that singles out particular factors for study. In designing research, scholars

[3] Steven R. Ratner, *The Schizophrenias of International Criminal Law,* 33 TEX. INT'L L.J. 237 (1998).

[4] *See* Steven R. Ratner & Anne-Marie Slaughter, *Appraising the Methods of International Law: A Prospectus for Readers,* 93 AJIL 291, 291–92 (1999).

[5] Bruno Simma & Andreas L. Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View,* 93 AJIL 302 (1999).

[6] This is also a virtue of the New Haven approach, which shares IR's roots in political science. *See* Siegfried Wiessner & Andrew R. Willard, *Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity,* 93 AJIL 316 (1999). The IR approaches described here differ from the New Haven School in two major ways: (1) they focus on relatively specific sets of variables, rather than the entire global social process, creating greater theoretical parsimony; and (2) they at least attempt to separate analysis from normative or policy goals. On the latter point, both Simma/Paulus and Dunoff/Trachtman are correct in arguing that the New Haven School has tended to "ideologize" international law, and has too easily assumed a common global set of values. *See* Simma & Paulus, *supra* note 5, text at note 21; Jeffrey L. Dunoff & Joel P. Trachtman, *The Law and Economics of Humanitarian Law Violations in Internal Conflict,* 93 AJIL 394, 408 (1999). Wiessner and Willard in this symposium exhibit these characteristics far less than some proponents of the New Haven approach.

[7] Legal methodologies also mask implicit preferences. Even Simma and Paulus, who emphasize rigorous positivism, search for doctrinal "strategies" to overcome normatively troublesome gaps in legal text and practice. Simma & Paulus, *supra* note 5, at 311.

[8] *Cf.* Abbott, *supra* note 2, at 168 (suggesting similar intellectual tasks).

[9] The political perspective is shared by sophisticated legal scholars. *See, e.g.,* Louis Henkin, *International Law: Politics, Values and Functions,* 216 RECUEIL DES COURS 22 (1989 IV) ("First, law is politics.").

look for ways to test explanatory hypotheses, using case studies[10] or data analysis.[11] Like their counterparts in other social sciences, then, the rationalist schools of IR theory share a common methodological orientation with economics, as described by Jeffrey Dunoff and Joel Trachtman in this symposium.[12]

A scholar applying IR theory might treat legal rules and institutions as phenomena to be explained ("dependent variables"). What factors, one might ask, led states in 1949 to adopt the Geneva Conventions, codifying detailed standards of battlefield conduct but drawing sharp distinctions between "international armed conflicts" and other violent situations? (Those "schisms"—senseless from a moral perspective[13]—might prove less arbitrary as a matter of politics.) Alternatively, IR might analyze legal rules and institutions—including the processes of legal decision making[14]—as explanatory factors ("independent variables"). One might ask, has the existence of the International Criminal Tribunal for the former Yugoslavia (ICTY), or the way it has handled cases, affected the behavior of governments and other actors in the Balkans? If so, by what means?

Why should a lawyer care about questions like these? Analyses treating law as a dependent variable are valuable in many settings, for they help us understand the functions, origin and meaning of rules and institutions. Analyses treating law as an independent variable are also valuable (though unfortunately less common): they help us assess the workings and effectiveness of legal arrangements in the real world. Both forms of explanation, then, are valuable in their own right. But explanation is at least as important for its forward-looking applications: predicting future developments and *designing institutions* capable of affecting behavior in desirable ways.[15] It is here—constructing law-based options for the future, as the editors put it[16]—that lawyers can play their greatest role[17] and IR can make its most significant contribution.

It bears noting, though it is probably obvious, that there is a striking contrast between the intellectual tasks presented here and the "anti-instrumentalist legal styles" described by Martti Koskenniemi in this symposium.[18] (Constructivist IR theory is often anti-instrumentalist, though I emphasize its concrete applications.) Undoubtedly, as Koskenniemi suggests, such contrasts are largely a matter of personal and intellectual "style." But while one's style may reflect a preferred social or cultural identification, it also reflects (and shapes) one's personal and professional goals. My goals as a lawyer, scholar and teacher, are in large part instrumental: to better understand and communicate the functions, origins and meanings of legal rules and institutions, and thereby to contribute,

[10] *See, e.g.,* RONALD B. MITCHELL, INTENTIONAL OIL POLLUTION AT SEA (1994) (examining how rules on vessel pollution influenced compliance).

[11] *See, e.g.,* Beth A. Simmons, Money and the Law: Commitment and Compliance in International Monetary Affairs, paper presented at American Political Science Association (Sept. 4–7, 1998) (testing competing explanations for compliance with IMF Articles of Agreement) (on file with author).

[12] Dunoff & Trachtman, *supra* note 6.

[13] On this point the International Criminal Tribunal for the former Yugoslavia stated: "Indeed, elementary considerations of humanity and common sense make it preposterous that the use by States of weapons prohibited in armed conflicts between themselves be allowed when States try to put down rebellion by their own nationals on their own territory." Prosecutor v. Tadić, No. IT–91–1–AR72, Appeal on Jurisdiction, para. 119 (Oct. 2, 1995), 35 ILM 32 (1996), 105 ILR 419, *quoted more fully in* Simma & Paulus, *supra* note 5, at note 1.

[14] *See* Mary Ellen O'Connell, *New International Legal Process,* 93 AJIL 334 (1999).

[15] Institutional design is at the heart of current interdisciplinary collaboration. *See, e.g.,* Slaughter, Tulumello & Wood, *supra* note 1, at 385–87; ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY (1995); JAMES CAMERON, JACOB WERKSMAN & PETER RODERICK, IMPROVING COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL LAW (1996).

[16] Ratner & Slaughter, *supra* note 4, at 292.

[17] Dunoff and Trachtman describe institutional design as perhaps the lawyer's "most important creative role." Dunoff & Trachtman, *supra* note 6, text at note 1.

[18] Martti Koskenniemi, *Letter to the Editors of the Symposium,* 93 AJIL 351, 352 (1999).

in even a small way, to improving global governance and ultimately the human condition. Many of the intellectual approaches discussed in this symposium are valuable in this regard;[19] I find IR particularly helpful.

For all the potential payoff, the state of IR theory today complicates any effort to apply it to an issue like international criminal responsibility. First, the agenda, methods and terminology of IR differ significantly from traditional legal approaches, creating a "two cultures" problem.[20] Second, as already noted, IR is divided among contending schools, with the significance of norms and institutions a major point of contestation.[21] (Some speculate wryly that the traditional IR vision of the world as anarchic and conflictual reflects the discipline's own internal struggles!) Finally, while many IR scholars address international norms and institutions, until recently few have devoted much attention to distinctively *legal* norms and institutions, or to institutions involving individuals and private groups. Thus, there is relatively little IR literature analyzing the atrocities regime.

Clearly, interdisciplinary cross-fertilization must flow both ways. This essay suggests two important lessons for IR. First, IR scholarship has overlooked many issue areas in which international norms and institutions carry important consequences for individuals and states—as exemplified by the current *Pinochet* litigation. Second, most of these regimes are at least partially legalized, with legal rules, institutions, procedures and discourse that modify ordinary politics.[22] The legal character of international cooperation is itself a significant political phenomenon.[23]

II. Theories of International Relations

Four visions of international politics are prominent in IR scholarship today. Within IR, each school views itself as foundational. Yet in studying complex phenomena like the atrocities regime, they frequently overlap, with each providing important insights. By explicitly contrasting and combining these approaches, I hope to weaken, if not avoid, the intellectual dilemma identified by Koskenniemi: that one can fairly describe and assess a methodology only by escaping from its particular assumptions and politics.

Realist theory[24] has dominated IR since before World War II. Realists treat states as the principal actors in international politics. States interact in an environment of anarchy, defined as the absence of any central government able to keep peace or enforce agreements. Security is their overriding goal, and self-help their guiding principle. Under these conditions, differences in power are usually sufficient to explain important events. Realists concentrate on interactions among major powers and on matters of war and peace. Other issues—even related issues like war crimes—are secondary.

[19] Other theoretical approaches not included here are also useful. *See, e.g.,* Philip M. Nichols, *Forgotten Linkages—Historical Institutionalism and Sociological Institutionalism and Analysis of the World Trade Organization,* 19 U. Pa. J. Int'l Econ. L. 461 (1998).

[20] *See* Oran R. Young, Remarks, 86 ASIL Proc. 172, 173 (1992). *See also* Robert O. Keohane, *International Relations and International Law: Two Optics,* 38 Harv. Int'l L.J. 487 (1997); Anne-Marie Slaughter, *International Law and International Relations Theory: A Dual Agenda,* 87 AJIL 205 (1993).

[21] *See* John J. Mearsheimer, *The False Promise of International Institutions,* Int'l Security, Winter 1994–95, at 5; *Promises, Promises: Can Institutions Deliver?* Int'l Security, Summer 1995, at 39 (responses to Mearsheimer).

[22] *Cf.* Anne-Marie [Slaughter] Burley & Walter Mattli, *Europe Before the Court: A Political Theory of Legal Integration,* 47 Int'l Org. 41 (1993) ("the logic of law" operates to advance legal integration).

[23] For recent efforts to analyze international legalization, see Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter & Duncan Snidal, Legalization and World Politics: An Introduction; Abbott & Snidal, Toward a Theory of International Legalization; Slaughter, Keohane & Moravcsik, Legalized Dispute Resolution, International and Transnational; and other papers to be included in a volume edited by Keohane, Slaughter, Judith Goldstein and Miles Kahler (on file with author).

[24] Realist theory in IR should not be confused with Legal Realism, discussed briefly in O'Connell, *supra* note 14. Although the two approaches share a belief that formal legal rules have little independent effect on behavior, their assumptions and areas of application are otherwise quite different.

Realists do not conclude that international cooperation and international law are unlikely or unimportant: states will naturally cooperate when it advances their interests. They do assert, however, that political realities constrain the commitments states will accept, and that the interests of more powerful states set the terms of cooperation.[25] As a corollary, realists believe that international rules and institutions have little, if any, independent effect on state behavior: they are mere ("epiphenomenal") artifacts of the underlying interest and power relationships, and will be changed or disregarded (at least on important issues) if those relationships change.

In analyzing legal doctrine (which they rarely do), realists would hew closely to the actual practice and unambiguous expressions of consent of major states. They would be deeply suspicious of efforts to establish customary law through mere verbal formulations, pronouncements of international institutions or scholarly writings.[26] Since even treaties frequently obligate states to do only what they would have done anyway,[27] or reflect political pressures rather than serious commitments, these scholars should be narrowly interpreted.

Many *institutionalist* scholars start from a similar model of decentralized state interaction.[28] Some share with realists a conviction that states are "real" actors with clearly specified national interests. Most, however, view states as legal fictions that aggregate the interests and preferences of their citizens; these scholars rely on state-centric analysis rather than true "methodological individualism"[29] because it allows for more parsimonious explanation. In either case, these theorists acknowledge a broad spectrum of interests, from wealth to a cleaner environment, that depend on cooperation. Drawing on game theory, economics and other disciplines, institutionalists identify conditions that prevent states from realizing potential gains from cooperation—"market failures," in economic terms[30]—and analyze how rules and other institutions can overcome those obstacles. Regime theory,[31] a more expansive vein of institutionalist scholarship, incorporates information and ideas as well as power and interests,[32] and acknowledges significant roles for private and supranational actors[33] and domestic politics.[34]

In these accounts, institutions—broadly defined to include both norms or rules and organizations—*may* have independent effects on behavior: by changing the context of

[25] *See* Richard H. Steinberg, *Trade-Environment Negotiations in the EU, NAFTA and WTO: Regional Trajectories of Rule Development,* 91 AJIL 231 (1997) (analyzing influence of powerful states).

[26] *See* Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law,* 66 U. CHI. L. REV. (forthcoming 1999) (on file with author) (applying realist approach to customary law). Simma & Paulus, *supra* note 5, at note 61 and corresponding text, argue that such efforts mock the idea of customary law.

[27] *See* George W. Downs, David M. Rocke & Peter N. Barsoom, *Is the Good News about Compliance Good News about Cooperation?* 50 INT'L ORG. 380 (1996).

[28] *See, e.g.,* COOPERATION UNDER ANARCHY (Kenneth A. Oye ed., 1986).

[29] Dunoff & Trachtman, *supra* note 6, at 397, argue that economic theory requires methodological individualism. Yet many forms of economic analysis—for example, analysis of international transaction costs, strategic interactions and market failures—can be fruitfully applied to interactions among states, as many of their examples confirm. *See* Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers,* 14 YALE J. INT'L L. 335 (1989) (applying economic concepts to interactions among states). One might also question Dunoff and Trachtman's conclusion, based on methodological individualism, that economic analysis requires normative support for broadly representative international institutions. At least some advocates of public choice theory argue just the opposite. *See* John O. McGinnis, *The Decline of the Western Nation State and the Rise of the Regime of International Federalism,* 18 CARDOZO L. REV. 903 (1996).

[30] *See* Dunoff & Trachtman, *supra* note 6.

[31] *See* THEORIES OF INTERNATIONAL REGIMES (Andreas Hasenclever, Peter Mayer & Volker Rittberger eds., 1997); INTERNATIONAL REGIMES (Stephen D. Krasner ed., 1983).

[32] *See, e.g.,* IDEAS AND FOREIGN POLICY (Judith Goldstein & Robert O. Keohane eds., 1993).

[33] *See, e.g.,* Kenneth W. Abbott & Duncan Snidal, *Why States Act Through Formal International Organizations,* 42 J. CONFLICT RESOL. 3 (1998) (discussing functions of formal organizations).

[34] *See, e.g.,* Judith Goldstein, *International Law and Domestic Institutions: Reconciling North American "Unfair" Trade Laws,* 50 INT'L ORG. 4 (1996); Robert Putnam, *Diplomacy and Domestic Politics: The Logic of "Two-Level Games,"* 42 INT'L ORG. 427 (1988).

interaction, they facilitate the negotiation and implementation of agreements as well as other substantive interactions. For example, institutions can reduce the transaction costs of negotiation, provide unbiased information, create cognitive focal points to coordinate decentralized activities, insert neutral actors into situations of conflict, fill gaps in incomplete contracts, and facilitate the pooling of resources.[35] Of course, the obstacles that create a need for institutions also hamper their formation; how are institutions created in the first place? Institutionalists have made less progress in answering these "supply side" questions.[36]

On matters of legal doctrine, institutionalists would accept the traditional sources of international law, especially those revealing voluntary agreement among states; they would also be comfortable looking to national judicial decisions and norms promulgated by international courts and organizations. Some might even search more broadly for relevant normative expressions. In practice, though, institutionalist scholarship focuses on treaties. These are often seen as reciprocal bargains or contracts emerging from market-style interactions, a view that supports a narrow, textual mode of interpretation.[37] But treaties are also viewed as purposive acts akin to legislation; this vision suggests the appropriateness of the kinds of teleological interpretation supported by legal process scholars.[38]

Various forms of *liberal* IR theory have been influential for many years, but this approach has recently been given new vitality.[39] Liberals insist on methodological individualism, viewing individuals and private groups as the fundamental actors in international (and domestic) politics. States are not insignificant, but their preferences are determined by domestic politics rather than assumed interests or material factors like relative power. This approach implies that interstate politics are more complex and fluid than realists and institutionalists assume: national preferences can vary widely and change unpredictably. It calls for careful attention to the domestic politics and constitutional structures of individual states—a daunting prospect for analysts of international relations.

Liberals, on the other hand, are developing their own theoretical generalizations, using variations in domestic governance to explain differences in international behavior. For example, scholars are exploring whether liberal democratic states—with representative institutions and a commitment to the rule of law—are more amenable to legal relationships and arguments and more prone to comply with legal rules than states with different domestic regimes. Research in this vein—exemplified by Laurence Helfer and

[35] Dunoff & Trachtman, *supra* note 6, at 407, express a well-founded concern that institutionalists too often assume the superiority of formal institutions over more decentralized "market" interactions among states. In analyzing existing institutions, *see* Slaughter, Tulumello & Wood, *supra* note 1, at 375–77, one may be able to assume that states and other actors would only have created these bodies if they regarded the benefits as outweighing the costs (the principal exception would be where more powerful actors coerced weaker ones to consent). Prescriptively, however, one should compare a proposed institution to its alternatives, including the absence of institutionalization.

[36] One approach assumes that powerful states support the initial creation of institutions, but argues that the beneficial effects of institutions and the difficulty of replacing them allow them to maintain influence thereafter. *See* ROBERT O. KEOHANE, AFTER HEGEMONY (1984). Another approach argues that the "softness" of many international agreements reflects a balance between institutional benefits and the difficulty of creating them. *See* Abbott & Snidal, *supra* note 23.

[37] *See* Dunoff & Trachtman, *supra* note 6, at text following note 14.

[38] *See* O'Connell, *supra* note 14.

[39] *See* Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INT'L ORG. 513 (1997); Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT'L L. 503 (1995); Anne-Marie Slaughter, *The Liberal Agenda for Peace: International Relations Theory and the Future of the United Nations*, 4 TRANSNAT'L L. & CONTEMP. PROBS. 377 (1995); Burley & Mattli, *supra* note 22.

Anne-Marie Slaughter's analysis of supranational adjudication—is also helping to identify the domestic mechanisms through which international institutions affect behavior, and thus how they can be strengthened.[40]

Transnational liberals go further, highlighting the activities of private individuals and groups across national polities and within international institutions.[41] Traditional interest groups like business and labor, scientific communities, advocacy groups and networks concerned with issues like the rights of women or indigenous peoples,[42] and other private organizations all play significant roles, independently of states, in creating international rules and institutions. Such institutions may in turn function most effectively by changing the terms of domestic politics. Some liberals emphasize the role of particular organs of government—national ministries, courts, legislators—which increasingly forge their own transnational relationships.

In analyzing legal doctrine, liberals would accept traditional sources of law, but would question lawyers' easy claims of universality. Simma and Paulus, for example, argue that universal jurisdiction over genocide and crimes against humanity is "universally" recognized, on the basis of decisions in a few Western nations;[43] liberals might rather emphasize differences in adherence and implementation across domestic regime types. Transnational liberals, moreover, would reject doctrines that limit law creation to states. Asserting that the domestic-international distinction has broken down, they would urge the significance of transnational norms created by private actors and governmental units, as well as domestic norms.

Constructivist theory differs fundamentally from these rationalist accounts. Constructivists reject the notion that states or other actors have objectively determined interests that they can pursue by selecting appropriate strategies and designing effective institutions. Rather, international actors operate within a social context of shared subjective understandings and norms, which constitute their identities and roles and define appropriate forms of conduct.[44] Even fundamental notions like the state, sovereignty and national interests are socially constructed. They are not objectively true, but subjective; their meaning is not fixed, but contingent. Hilary Charlesworth's analysis of the construction of international law on a gendered basis disadvantageous to women is a telling example.[45] Even anarchy, the central concept of realism, "is what states make of it."[46] Many of these ideas are shared by the "English school" of IR theory, which emphasizes the subjective elements in an international "society" of states or, for some theorists, a range of private and public actors.[47]

[40] Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication,* 107 YALE L.J. 273 (1997). Liberal democracies may, however, resist international rules and institutions, believing their domestic systems to be adequate. *Id.* at 332–33.

[41] For a pioneering work, see ROBERT O. KEOHANE & JOSEPH S. NYE, POWER AND INTERDEPENDENCE: WORLD POLITICS IN TRANSITION (1977). *See also* BRINGING TRANSNATIONAL RELATIONS BACK IN: NON-STATE ACTORS, DOMESTIC STRUCTURES, AND INTERNATIONAL INSTITUTIONS (Thomas Risse-Kappen ed., 1995).

[42] *See* Hilary Charlesworth, *Feminist Methods in International Law,* 93 AJIL 379, 387 (1999) (describing lobbying efforts of women's rights groups).

[43] Simma & Paulus, *supra* note 5, at note 73 and corresponding text.

[44] For normative writings by legal scholars, see, e.g., THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS (1990); Harold Hongju Koh, *Why Do Nations Obey International Law?* 106 YALE L.J. 2599 (1997).

[45] Charlesworth, *supra* note 42.

[46] Alexander Wendt, *Anarchy Is What States Make of It: The Social Construction of Power Politics,* 46 INT'L ORG. 391 (1992).

[47] *See* HEDLEY BULL, THE ANARCHICAL SOCIETY (1977); Barry Buzan, *From International System to International Society: Structural Realism and Regime Theory Meet the English School,* 47 INT'L ORG. 327 (1993); Andrew Hurrell, *International Society and the Study of Regimes: A Reflectivist Approach, in* REGIME THEORY AND INTERNATIONAL RELATIONS 49 (Volker Rittberger ed., 1993).

Some understandings, like the Westphalian norms of sovereignty, define historical eras. More specific norms and understandings are generated, disseminated and internalized through the efforts and discourse of diverse actors.[48] Some constructivists emphasize the role of international organizations. Others stress the activities of scientific groups, nongovernmental organizations (NGOs) or transnational advocacy networks. In the constructivist view, even as states and other actors create norms and institutions to further their interests and values, those norms and institutions are redefining those interests and values, perhaps even the identities of the actors themselves.

In terms of legal doctrine, for constructivists all is subjective and perpetually "in play." Constructivists would look to a variety of normative expressions, including practice, to define the subjective element of custom or the meaning of treaty commitments. In addition, normative understandings vary with historical and political context.[49] Much as liberals see categories of states differentially amenable to law, some international society theorists see "concentric circles of commitment," with a Western core embedded in dense webs of norms and institutions, a Southern ring that participates selectively, and an outer ring on the fringes of society.[50]

III. Understanding the Atrocities Regime

This section explores how different schools of IR theory might explain three central features of the atrocities regime: the distinction between international and internal armed conflicts, the emergence of norms governing certain abuses outside of armed conflict, and the increasing reliance on criminal responsibility and criminal tribunals. As discussed earlier, the explanations IR theory offers—emphasizing political function, origin and meaning—shape and deepen our current understanding of legal rules and institutions, influence our predictions of future developments, and provide bases for reform.

To illustrate, assume we understood an international criminal tribunal functionally, as a means of deterring violations of agreed rules. We might then expect its evolution to depend on changing needs for deterrence, and might focus reform efforts on clarifying the rules, increasing the certainty of prosecution, and the like. If, however, we understood the tribunal in terms of its origins in the efforts of human rights organizations in countries experiencing atrocities, we might tie its evolution to the fortunes of those groups, and might focus reform on allowing them and the individuals they represent to appear before the tribunal. Finally, if we understood the tribunal subjectively, as embodying shared beliefs about appropriate conduct, we might link its future to the evolution of those beliefs, and might focus reform on facilitating dialogue between its judges and the community at large. If we treated these understandings as cumulative rather than alternative, we would have a rich menu of institutional improvements.

Humanitarian Law in International and Internal Conflicts

Two contrasting accounts of humanitarian law illustrate the range of explanatory approaches within IR. The first (like the first example in the preceding paragraph) is functional, state-centered and largely static; it aims at generalization. The second (combining the last two examples) encompasses private actors and normative beliefs, and is dynamic; it aims at describing the origins of a particular regime. These accounts

[48] *See, e.g.*, Martti Koskenniemi, *The Place of Law in Collective Security*, 17 MICH. J. INT'L L. 455, 467–78 (1996) (normative discourse at Security Council transformed identities, interests and understandings of "security").

[49] *See* Charlesworth, *supra* note 42, at 383.

[50] *See* Buzan, *supra* note 47, at 345.

represent very different intellectual "styles," and will appeal to different readers. Neither focuses explicitly on the international-internal distinction, but each sheds light on it.

First, James Morrow is developing a decentralized institutionalist account of the laws of war, informed by game theory.[51] For Morrow, international institutions allow states experiencing suboptimal outcomes in strategic interactions to improve their "payoffs" by establishing superior equilibria. For such an equilibrium to be stable, an institution must create common expectations about behavior: each actor must expect that all others will comply with a rule or agreement before it can be confident that its own compliance will be beneficial.[52] To create such a "common conjecture" in situations characterized by unreliable information or "noise," agreed rules must be highly precise. Similarly, an equilibrium in international relations will only be stable if it is self-enforcing: the risk that a breach will lead others to defect must create sufficient incentives to comply.

In this view, humanitarian law reflects a welfare-enhancing equilibrium: states obligate themselves to behave in specified ways, e.g., to protect prisoners of war, so that others will make the same commitments. The formality and legal character of the Geneva Conventions allow states unambiguously to signal their intentions and engage their reputations, making commitments more credible in a fundamentally anarchic setting.[53] States revise the Conventions after major wars—and before new conflicts skew negotiating positions—to incorporate recent experience. The precision of the Conventions creates common conjectures that limit mistakes and misperceptions. The Red Cross monitors compliance—forestalling both violations and erroneous retaliation—while aiding victims.[54] For all this, Morrow views the Conventions as having little independent effect on behavior; they merely coordinate relations among states with preexisting cooperative interests. He would presumably view efforts to modify state interests through humanitarian law as misguided.

States comply with humanitarian law primarily because of expectations of reciprocity,[55] though other considerations, including concern for their international reputation and domestic political support, also come into play. Even if national policy supports compliance, however, individual soldiers can violate the rules. Here it is dangerous to rely on reciprocity, which can easily get out of hand. Hence, the Conventions require parties to educate and supervise their own soldiers; that commitment is maintained by reciprocity. The "grave breaches" regime is a useful supplement. It applies mainly to high-level violators, who are unlikely to discipline themselves but highly likely to flee. The threat of prosecuting such individuals helps deter serious violations.

Rough empirical data support elements of this account. During World War II, for example, where pairs of warring states had ratified the 1929 POW treaty, both sides generally lived up to their commitments (e.g., Germany and the Allies). Where one or both parties had not ratified, however, treatment of POWs was abysmal—on both sides (e.g., Germany and the Soviet Union). (Other factors could explain some of these observations. For example, German troops may have mistreated Russian soldiers because of ethnic prejudice, though the reverse is less likely.) Symmetry in retaliatory capacity was

[51] *See, e.g.*, James D. Morrow, The Laws of War as an International Institution, paper presented at Program on International Politics, Economics and Security, University of Chicago (Feb. 1997); James D. Morrow, The Institutional Features of the Prisoners of War Treaties, paper presented at Rational International Institutions conference, University of Chicago (Apr. 1998) (on file with author).

[52] Morrow's approach incorporates factors like information, perceptions, expectations and norms, but in an interest-based strategic context.

[53] *Cf.* Dunoff & Trachtman, *supra* note 6, at note 30 (describing law as a precommitment strategy).

[54] The Conventions provided for "protecting powers" to serve similar functions.

[55] Responses to breach may be authorized by states or carried out by individual units.

also significant. Once Germany lost the ability to bomb British cities, Morrow asserts, the Allies ignored prewar pledges not to bomb civilians.

Symmetry and reciprocity help illuminate the legal distinction between international armed conflicts and other violent situations.[56] In international conflicts, states can anticipate reasonable symmetry between opposing forces, facilitating tit-for-tat enforcement. Here the regime is strongest: the Geneva Conventions, Protocol I and their grave breaches regimes all apply. In internal conflicts, symmetry is less likely. Since insurrectionist groups cannot ratify the Conventions, they cannot clearly signal their intentions or formally engage their reputations. Such groups often operate anonymously, hampering verification[57] and reciprocity. They may be unable to control their own fighters, creating noise. They may favor "dirty" tactics to counter superior forces. In these situations, states have been less willing to restrict their own operations, agreeing only to common Article 3 and Protocol II, with no grave breaches regime. (Apart from symmetry, governments may perceive internal conflicts as direct threats to survival, requiring maximum flexibility of response.) Finally, civil disturbances and terrorist actions are even more asymmetrical, and thus are not considered "armed conflicts" at all; even common Article 3 and Protocol II do not apply. Indeed, with low-level violence increasing worldwide, Protocol II actually narrowed the definition of "armed conflict" to situations involving organized dissident forces under "responsible command," where the logic of reciprocity can operate. These examples illustrate how IR theory can help lawyers predict the success of legal rules and design them to maximize effectiveness.

Martha Finnemore has adumbrated a contrasting liberal-constructivist account that sees humanitarian law as a product of private political action and an expression of social values. Finnemore traces the origins of humanitarian law to the efforts of committed private individuals,[58] notably the "political entrepreneur" Henry Dunant. Dunant's 1859 battlefield experiences and religious convictions led him to create what became the International Committee of the Red Cross. Within ten years, Dunant and his associates persuaded most major states to sign the first Geneva Convention, requiring aid for wounded combatants and granting protected status to medical and relief workers.

In this view, humanitarian law did not originate with states at all, but with a network of elite individuals who persuaded governments to accept it. Dunant's appeals, moreover, were based not on strategic considerations, but on morality and duty, even identity: what was appropriate for a modern "Christian nation."[59] The rhetoric of participating governments, too, was moralistic, not strategic. More concretely, Finnemore argues that the early history of the Convention supports a value-based interpretation. First, contrary to liberal predictions, Prussia and other authoritarian states strongly supported the Convention; Britain opposed it.[60] Furthermore, in early conflicts, contrary to a realist view, Prussia, Japan and other states applied the new rules unilaterally. Finally, during the Balkan Wars of the 1870s, the Red Cross decided that the Convention should apply to internal conflicts because of its humanitarian character.

Finnemore's optimistic (even idealistic) account has important implications for international lawyers. Finnemore suggests that national interests and preferences can be modified through persuasion, a conclusion relevant to institutional design as well as

[56] *Cf.* Dunoff & Trachtman, *supra* note 6, at 403 (emphasizing importance of reciprocity).

[57] *See* Kenneth W. Abbott, "*Trust But Verify*": *The Production of Information in Arms Control Treaties and Other International Agreements,* 26 CORNELL INT'L L.J. 1 (1993) (discussing information strategies).

[58] MARTHA FINNEMORE, NATIONAL INTERESTS IN INTERNATIONAL SOCIETY 69–88 (1996).

[59] The Christian theme was soon abandoned, allowing non-Christian countries to participate. *Id.* at 83–84.

[60] Britain's opposition was based on the belief that its policies already conformed to Convention principles. *See* note 40 *supra.*

political action.[61] Her analysis predicts widespread compliance even by nondemocratic states, and provides support for extending humanitarian law to internal conflicts.

International lawyers have a considerable stake in the accuracy of these accounts, but the evidence adduced to support them leaves many questions unanswered. If the Red Cross applied the first Geneva Convention to internal conflicts, how did the sharp international-internal distinction emerge? If some states applied that Convention unilaterally, what explains the contrary evidence from World War II? Have states with different domestic governance structures applied the rules differently in more recent times? Morrow suggests another empirical test: Do countries nearing victory disregard the rules, as his analysis implies?[62] Or do they continue to comply, as Finnemore's suggests? Further research could elucidate these points.

The Law of Peacetime Atrocities

Why have states criminalized certain atrocities—including genocide, crimes against humanity, torture and disappearances—even outside of armed conflict?[63] Why are these norms so inconsistent, with genocide clearly defined as an international crime, torture subject to a prosecute-or-extradite treaty regime but considered a customary international crime, crimes against humanity also considered a customary crime but defined only (and inconsistently) in the charters of international tribunals, and disappearances criminalized only in the Americas? And why are other atrocities—e.g., small-scale political executions—treated more lightly?

Realism has limited explanatory power here. Some human rights institutions undoubtedly benefit powerful states. The Nuremberg and Tokyo trials have been criticized as victors' justice, condemning Axis leaders for atrocities Allied forces also committed.[64] Those proceedings, like other early actions on human rights, allowed Allied governments to distinguish themselves from the Axis for domestic political purposes.[65] More recently, the interests of powerful states have produced an inconsistent pattern of institutionalization. The ICTY reflects big-power concern for Balkan stability—while deflecting attention from the failure to intervene more forcefully; the more cautious response in Cambodia reflects more attenuated interests.[66]

More generally, a realist might emphasize the weaknesses of the atrocities regime in practice. For all the legal instruments signed since 1948, that period has seen scores of bloody conflicts and atrocities, but remarkably few criminal proceedings. There were no international prosecutions until the creation of the ICTY, and most national prosecutions have targeted former Nazis.[67] In Kosovo, as this is written, investigators are uncovering mass graves and civilians are still being killed and driven from their homes, yet most of those indicted by the ICTY remain at large. To a realist, none of these facts is surprising. Yugoslavia will comply with international rules when it calculates that com-

[61] *See* CHAYES & CHAYES, *supra* note 15 (emphasizing persuasion in regulatory regimes).

[62] Morrow's hypothesis is based on the losing side's reduced ability to retaliate.

[63] Crimes against humanity have historically been tied to armed conflict, but the statutes of the Rwanda Tribunal and the international criminal court reject that link.

[64] *See* Gerry J. Simpson, *War Crimes: A Critical Introduction, in* THE LAW OF WAR CRIMES 1, 5, 9, 21–23 (Timothy L. H. McCormack & Gerry J. Simpson eds., 1997) (war crimes trials create moral demarcation between trier and accused, in spite of similar conduct).

[65] *See* MARGARET E. KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS 83–84 (1998).

[66] An ad hoc tribunal to try surviving leaders of the Cambodian Khmer Rouge is currently under consideration; it is unclear whether the current Cambodian Government will cooperate.

[67] *See* Simpson, *supra* note 64, at 8–9.

pliance furthers its national interests; Western powers will respond to atrocities by the same calculation. Only the coincidence of power and interest can change this sad scenario.

Liberal and constructivist scholars present a very different picture, emphasizing the emergence of norms through private political action and evolving beliefs and highlighting their subjective effects. In this account, attitudes toward human rights are reconfiguring the norms of sovereignty that have limited international responses to internal atrocities. Simultaneously prohibiting abhorrent conduct and justifying international intervention, these normative changes are reconstituting what it means to be a state. Again, this account suggests concrete political strategies for creating new norms and concrete institutional strategies—centered on modifying normative understandings and beliefs—for designing effective regimes.

Peacetime atrocity norms clearly arose in reaction to historical events—the Holocaust and the abuses by postwar authoritarian governments, especially in Latin America. These events produced cognitive "focal points" around which public attitudes of revulsion could coalesce. But what processes turned them into law? Liberal theory leads us to focus on political activity by individuals and groups. Constructivists emphasize that this is not "politics as usual," but a special politics rooted in values and aimed at changing values.[68] Yet it is still politics, "the strategic activity of actors in an intersubjectively structured political universe."[69]

Individuals have been important catalysts in the emergence of human rights norms. Raphael Lemkin, moved by the Armenian massacres and concerned about Nazi intentions, began to press for international criminalization of racial and religious massacres in 1933. After losing his family in the Holocaust, Lemkin gathered evidence of Nazi atrocities, coined the word "genocide," worked with the Nuremberg prosecutors, and lobbied for adoption of the Genocide Convention.[70]

Human rights NGOs played similar roles. In the 1960s, Amnesty International began its campaign against torture and related abuses. It rallied support by publicizing cases of politically motivated torture in all geographical (and ideological) regions. In the early 1980s, Amnesty helped draft the United Nations Convention against Torture. When Latin American dictatorships turned to "disappearances," Amnesty mobilized around that issue, building support for the 1994 Inter-American Convention on the Forced Disappearance of Persons.[71]

Margaret Keck and Kathryn Sikkink argue that "transnational advocacy networks" (TANs) have been the crucial political actors on human rights.[72] TANs link international NGOs like Amnesty, local NGOs in countries suffering abuses, and supportive officials and agencies within national governments and international organizations. They adopt conscious political strategies, selecting and "framing" issues for maximum political impact, publicizing abuses in dramatic ways, exposing discrepancies between government rhetoric and practice, and seeking material leverage over target countries. Many human rights networks were energized by the 1973 coup in Chile and focused on abuses there. Their contributions to the Torture and Disappearances Conventions were crucial.

This account helps explain why some atrocities have been criminalized and others have not: simply put, TANs and NGOs have worked on those issues that are most

[68] *See generally* KECK & SIKKINK, *supra* note 65; AUDIE KLOTZ, NORMS IN INTERNATIONAL RELATIONS: THE STRUGGLE AGAINST APARTHEID (1995).
[69] KECK & SIKKINK, *supra* note 65, at 5.
[70] *Id.* at 81–82, 87–88.
[71] *Id.* at 103–06.
[72] *Id.* at 1–4, 6.

conducive to political organization, dramatization and pressure. Keck and Sikkink argue that the most politically potent issues are those involving bodily harm to vulnerable individuals, like torture and disappearances, or the systematic sexual atrocities now addressed by international tribunals in response to pressure from women's groups.[73] Yet they do not explain why other bodily harm issues have not been criminalized. Further research might explain these differences.

As liberal theory would predict, some states appear more vulnerable than others to normative persuasion and pressure.[74] Keck and Sikkink find, for example, that states with liberal, law-based traditions have difficulty resisting legal or normative arguments, even if currently under authoritarian rule (e.g., Argentina). This logic suggests, however, that states without these traditions may resist normative pressures. Indeed, it implies that the widespread ratification of human rights treaties masks widely varying normative views, a form of "organized hypocrisy"[75] inconsistent with legal universality. Realism is also relevant here: Western governments have been reluctant to pressure strategically or economically significant states, while some target countries (e.g., China) are insulated from most forms of leverage.

Those who argue that international norms are transforming sovereignty—including many proponents of international criminal law—must recognize that some states still prefer domestic to international approaches and "truth telling" and reconciliation to prosecution. The Truth Commission in South Africa, with its broad amnesty powers, is the best example.[76] Yet truth-telling institutions themselves reflect new understandings of nationhood and governance. A related development is also significant: international reactions to demands for national autonomy are distinguishing among states on the basis of domestic governance.[77] While virtually everyone accepts South Africa's internal efforts, the Security Council rejected a domestic approach in Yugoslavia (as a sham) and Rwanda (where it might have degenerated into vengeance); legal officials involved in the *Pinochet* litigation are by and large rejecting it in Chile. IR theory is a valuable aid in mapping these evolving understandings.

Criminal Responsibility and Judicial Implementation

Legal modes of thought and action permeate the atrocities regime. Proscribed conduct is treated as unlawful, not merely unacceptable; it is subject to legal proceedings, not mere political responses. For the most part, moreover, this is relatively "hard" law: the relevant treaties create binding legal obligations; they clearly define the proscribed conduct; and they delegate implementation to judicial institutions—primarily national courts (with universal jurisdiction and prosecute-or-extradite requirements to limit self-serving decisions) but increasingly international tribunals as well.[78] Finally, these agreements incorporate criminal law concepts, not general notions of state responsibility. How would IR theory explain these characteristics?

Realists might argue that legal approaches help powerful states control disfavored conduct. In dealing with Yugoslavia, for example, the threat of prosecution was materially

[73] *See id.* at 27. *See also* Charlesworth, *supra* note 42, at 386–87.

[74] KECK & SIKKINK, *supra* note 65, at 117–19, 207–09.

[75] *See* Stephen D. Krasner, paper prepared for Conference on Norms in Future International Politics, University of California at Los Angeles (Nov. 1998) (on file with author).

[76] For an analysis favoring a limited duty to prosecute under international law, see Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime,* 100 YALE L.J. 2537 (1991).

[77] *Cf.* Thomas M. Franck, *The Emerging Right to Democratic Governance,* 86 AJIL 46 (1992) (arguing that international law is coming to require democratic national governance as condition of participation in international community).

[78] *See* Abbott & Snidal, *supra* note 23.

less costly than economic sanctions or military intervention. Governments can also depict such proceedings as apolitical acts, reducing potential political costs.[79] Normatively, realists would support delegation of enforcement decisions to national governments, which can consider national interests; they would accordingly support the U.S. decision not to join the international criminal court (ICC), while doubting the court's practical impact.

For institutionalists like Morrow, legalization enhances the coordinating function of agreements, whatever the underlying power relationships may be. The formality of treaties and their approval and ratification procedures allow states clearly to signal commitments;[80] legally binding commitments raise the political costs of violation, even for powerful states; careful drafting creates common conjectures; independent organizations provide unbiased monitoring; and courts resolve ambiguities and fill gaps.

Regime theory provides an even broader functional account of legalization. Individual criminal responsibility helps deter disfavored conduct, because of its value-laden character as well as the concrete threat of prosecution. Deterrence of individual officials is especially appealing when the alternatives—such as forcible intervention—are costly and difficult to organize. Decentralized enforcement through national prosecute-or-extradite obligations initially enabled regime architects to utilize existing institutions when the creation of new centralized institutions was politically impossible.

Decentralized enforcement, though, presents classic collective-action problems. Few states are materially affected by atrocities committed abroad,[81] so few governments have incentives to prosecute offenders, even if they could obtain jurisdiction. Politically, the benefits of prosecution are limited; the costs may be significant. Material resources are also limited, and governments may choose to devote them to more immediate concerns. Some states may simply be incapable of mounting prosecutions. In spite of the efforts of human rights groups, then, national prosecutions have been few in number and narrowly targeted. The public goods of prosecution and deterrence are undersupplied.

Two kinds of institutions can address such disjunctions between national and community incentives. One is a transnational enforcement process open to private complainants, which allows individuals and activist groups to vindicate international norms. Helfer and Slaughter have detailed how such "supranational" procedures spurred legal development under the European Convention on Human Rights and within the European Community.[82] Human rights plaintiffs have sought similar results through civil actions in national courts.[83] The atrocities regime includes no formal private access procedure. Informally, however, private groups supply information to international prosecutors, serving similar functions.

The second alternative is a public institution empowered to initiate cases on behalf of the community.[84] Examples here are even rarer; the Advocates General of the European

[79] British Home Secretary Straw utilized this tactic in his decision of December 1998 that authorized Spain's request for the extradition of General Pinochet to proceed.

[80] States often enter informal agreements to avoid domestic approval processes and provide greater flexibility. *See* Charles Lipson, *Why Are Some Agreements Informal?* 45 INT'L ORG. 495 (1991).

[81] States will have material interests when their nationals are among the victims, as with Spanish citizens in Pinochet's Chile, or when they are forced to receive refugees. States may also feel "moral externalities" from foreign atrocities. *See* Dunoff & Trachtman, *supra* note 6, at 404.

[82] *See* Helfer & Slaughter, *supra* note 40. *See also* Slaughter, Keohane & Moravcsik, *supra* note 23; G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization,* 44 DUKE L.J. 829 (1995) (arguing for similar procedures in the WTO).

[83] *See, e.g.,* Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980); Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995), *cert. denied,* 518 U.S. 1005 (1996), *summarized in* 90 AJIL 658 (1996). *See also* Harold Hongju Koh, *Transnational Legal Process,* 75 NEB. L. REV. 181 (1996) (discussing such litigation).

[84] *Cf.* Kenneth W. Abbott, *GATT as a Public Institution: The Uruguay Round and Beyond,* 18 BROOK. J. INT'L L. 31 (1992) (recommending the development of public institutions to enforce international economic norms).

Court of Justice (ECJ) come closest, but they cannot initiate litigation. Thus, while most commentators have emphasized the creation of international criminal courts, this analysis suggests that international prosecutors are equally significant, for they can resolve the collective-action problem of enforcement.

To vindicate international norms effectively, however, prosecutors and courts must be structured not only for impartiality and expertise, but also for political independence.[85] Independence depends importantly on the provision of sufficient resources for fact-finding and other judicial functions, and for administrative functions like imprisonment.[86] It also turns on details of staffing, structure and procedure—the selection of judges, tenure, compensation, docket control, decision-making procedures—as in domestic legal systems.

These considerations must be weighed against what Duncan Snidal and I term "sovereignty costs," the symbolic and material costs of diminished national autonomy.[87] Independent institutions are a major source of sovereignty costs, in part because their actions are inevitably somewhat unpredictable. The balancing of benefits and costs can be seen in the ICC statute, which gives priority to national prosecutions and limits the tribunal's independence, notably by authorizing the Security Council to delay proceedings.

Liberals would highlight the prominent role of lawyers and legal groups in creating the criminal responsibility system. It may be natural for lawyers to characterize acts like torture and genocide as crimes, and then to address them through prosecutors and courts. In this sense, lawyers operate as a transnational, knowledge-based "epistemic community," framing problems and solutions in legal terms for action by political institutions.[88] Legal approaches also serve political purposes. Characterizing conduct as criminal links emerging norms to established legal values, increasing their legitimacy; it motivates individuals and groups attuned to legal issues, including national judges; and it gives politicians neutral "cover" for potentially unpopular actions. Criminalization also supports the penetration of international norms into national legal systems.[89]

Constructivists would go further, emphasizing the value-laden quality of criminal law. Criminalization—the strongest form of social condemnation—reflects public revulsion. At the same time, international legal institutions can be "teachers of norms,"[90] shaping how governments and citizens perceive particular conduct. Actions like the Rwanda Tribunal's genocide conviction of a former mayor, Jean-Paul Akayesu, and the guilty plea of former Prime Minister Jean Kambanda, feed back into society to reshape how individuals view governance, the duties of states and citizens, even the meaning of

[85] *See* Helfer & Slaughter, *supra* note 40, at 300–04 (analyzing structural characteristics of effective supranational courts).

[86] According to former presiding Judge Goldstone, as of 1997 no state had volunteered prison facilities for the Rwanda Tribunal, and only eight for the ICTY. *See* Richard Goldstone, *Conference Luncheon Address*, 7 TRANSNAT'L L. & CONTEMP. PROBS. 1 (1997).

[87] Abbott & Snidal, *supra* note 23. Conceiving of impingement on national sovereignty as a "cost" suggests that states compare that and other costs to the benefits of international cooperation, as economic analysis would suggest. *See* Dunoff & Trachtman, *supra* note 6, at 397–98. It also suggests that sovereignty costs vary depending on the nature of the issue, the political context, the size and power of the state in question, and other considerations; sovereignty costs can even be positive.

[88] "Epistemic communities" are transnational networks of individuals, private organizations, and elements of national governments and international organizations united by common knowledge, typically scientific or technical knowledge. *See Knowledge, Power and International Policy Coordination*, 46 INT'L ORG. (special issue, Peter Haas ed., Winter 1992) (analyzing epistemic communities). Knowledge-based networks appear especially successful at identifying problems, placing them on the political agenda and suggesting solutions. Another community relevant to the atrocities regime is the network of forensic scientists that has documented atrocities since the early 1980s. *See* KECK & SIKKINK, *supra* note 65, at 93–94, 109–10.

[89] KECK & SIKKINK, *supra* note 65, at 12–13, argue that NGOs in repressive states use TANs to create international norms, then use those norms to modify domestic political and legal systems.

[90] *See* Martha Finnemore, *International Organizations as Teachers of Norms*, 47 INT'L ORG. 565 (1993).

statehood and citizenship. Social and psychological forces like these may well be influential, but their influence will not be equally deep in all parts of the world. Further study of the processes of normative change seems essential.

IV. Looking Forward

The visions of international relations and international law presented here have significant implications for the future of the atrocities regime. Normative decisions on the content of the regime must be made through legitimate processes of government. IR theory cannot dictate those decisions, but it can inform them with an understanding of what is politically likely, and politically possible. Once the normative decisions are made, moreover, IR can help structure rules and institutions to achieve the agreed ends.

Space precludes anything like a full exposition of these issues. This section summarizes the engines of change identified by the leading schools of IR theory, then considers the special role of legal institutions in the evolution of the regime.

Engines of Change

Realists see the interests of powerful states as the principal force behind—and the major constraint on—change. This need not imply a gloomy future. To some extent, at least, the major Western powers have come to view nondemocratic regimes as political liabilities and serious human rights abuses as undermining stability.

Yet realists would expect political considerations to continue constraining national decisions in this area. Realists would also expect powerful states to influence the design of international rules and institutions in ways that preserve their own flexibility, a prediction borne out in the ICC negotiations. Normatively, of course, most realists would argue that states should act in these ways, to protect their national interests.

Finally, in response to the idealism of some approaches, realists offer cautionary advice. For one thing, legal institutions alone will not bring an end to atrocities. More fundamental approaches, some quite costly, will also be required. In particular, major states may have to apply economic or military power to produce changes in behavior, as chancy as these tactics are. Yugoslavia illustrates the point: with the NATO Stabilization Force generally unwilling to act,[91] the Serbian-dominated nation, only a middling power, has maintained sufficient control on the ground to frustrate the ICTY and commit new atrocities in the face of worldwide condemnation.

Institutionalists typically agree that states are major engines of change, but they emphasize the ability of international rules and institutions to change the context of interaction and facilitate cooperative action. The post–Cold War Security Council, for example, enabled states to establish ad hoc international tribunals with broad legitimacy. When such a tribunal (the ICTY) can call on a major nation (Germany) to render up an accused individual (Duško Tadić) for trial, who can doubt that international politics has changed? Other legal institutions, from the International Law Commission to the ICC, can also play important roles.

Yet institutionalists would agree that legal arrangements are only part of the solution. An effective atrocities regime must include new or improved institutions for monitoring abuses, avoiding conflict, making and keeping peace, protecting minority rights, super-

[91] As this was written, however, the NATO Stabilization Force arrested a prominent Serbian general, Radislav Krstić, on charges of genocide and crimes against humanity growing out of the massacres of Bosnian Muslims fleeing Srebrenica.

vising elections, and performing many other functions. Political organizations like the Security Council and the Organization for Security and Co-operation in Europe will necessarily be central players.

Liberal theorists stake out a strong predictive/normative position: the distinctions between international, transnational and domestic politics and law are artificial, inappropriate and crumbling in practice. Thus, liberals would predict and support increasing resort to individual criminal responsibility and the demise of the distinction between international and internal conflicts, on political as well as legal grounds.

Liberals see political action by individuals and private groups as the major force behind such changes. They would expect sympathetic national and supranational agencies to cooperate in these efforts. For liberals, the *Pinochet* litigation is a defining episode: a single Spanish magistrate single-handedly revitalizing the extradite-or-prosecute regime, in a case mingling abuses of citizens and foreign nationals during a predominantly internal conflict. Moreover, neither Judge Garzón's actions nor the responses of the British courts and Home Secretary are the actions of "states"; they are the law-governed actions of independent officials and organs of government.

Constructivists see numerous engines of change: historical events like the Kosovo massacres, political activity by human rights groups and TANs, governmental actions like those in the *Pinochet* case, judicial decisions like the *Akayesu* verdict. All of these provide cognitive and moral focal points for social consensus and action. Political activists are expert at framing issues in ways that mobilize political support, resonating with broadly held cognitive and ideological principles. The key for constructivists is the transformative impact such actions have on subjective understandings of interest, appropriate behavior and identity.

Legal Institutions as Political Actors

Lawyers typically view courts and other legal institutions—even in politically charged areas like human rights—as "apolitical"; this is their special virtue.[92] To differing degrees, both positivist and legal process scholars often build on this assumption.[93] Recent IR scholarship, however, sees international legal institutions as intensely political actors, albeit in a special kind of politics. In this account, originally inspired by the ECJ, the political acumen of legal actors is among their most important traits, one that significantly influences the development of law and politics.[94]

Anne-Marie (Slaughter) Burley and Walter Mattli developed a "neofunctionalist" account of legal development, focusing on the actions of individual judges, lawyers, legal scholars and others associated with supranational courts.[95] All these individuals use their positions to pursue particular goals. These may include idealistic values, the interests of certain social groups, or particular legal outcomes, but they are also likely to include pure self-interest, such as professional prestige and power. One need not posit special com-

[92] *See, e.g.,* Theodor Meron, *International Criminalization of Internal Atrocities,* 89 AJIL 554, 555 (1995).

[93] However, the seminal Chayes, Ehrlich & Lowenfeld casebook on international legal process and other works by those authors recognize both that formal legal processes play a limited role in international politics and that even formal legal processes are often politicized. This is reflected in their conclusion, *see* O'Connell, *supra* note 14, at 337, that law "constrained," "justified" and "organized" political action by legal decision makers, rather than supplanting it.

[94] Helfer & Slaughter, *supra* note 40, consider the European Court of Human Rights and the UN Human Rights Committee as well as the ECJ, and develop a "checklist" of judicial techniques for effective supranational adjudication.

[95] *See* Burley & Mattli, *supra* note 22.

mitments to community interests to explain, e.g., the role of the ECJ in expanding European law; "ruthless egoism does the trick by itself."[96]

Professional norms and institutional rules prevent legal actors from utilizing direct political strategies like threats and bribes. But the law offers more subtle tools. Supranational judges, for example, can utilize standing rules and other access doctrines to acquire a caseload and build a supportive constituency of litigants and lawyers. They can render decisions and craft opinions that encourage national judges to view development of supranational law as a common project, while reassuring them that their own jurisdiction will be respected. (ECJ judges courted national counterparts even more directly, through seminars, dinners and other personal contacts.) They can select cases and interpret agreements in ways that develop doctrine in desired directions. Over time, as the increasing integration of Europe demonstrates, such actions can reshape politics as well as law. Political actors will generally acquiesce so long as judges remain within the seemingly neutral and apolitical domain of law—an image that judicial craftsmanship can help maintain.[97]

Actors associated with international criminal tribunals will undoubtedly pursue similar strategies. Some of their strongest political tools lie in the flexible doctrines of customary international law. The ICTY appellate chamber decision in *Tadić,* for example, expanded its own jurisdiction and that of other tribunals by enunciating a customary law of war crimes in internal conflicts.[98] Decisions accepting or rejecting indictments, interpreting substantive bases of jurisdiction, and fleshing out relationships to national institutions can develop doctrine, build constituencies, reassure skeptical politicians, and increase institutional legitimacy. By citing each other's decisions and those of national courts, each tribunal can enhance the authority of the entire regime.[99]

Although access by individual litigants is limited, international prosecutors and judges can forge cooperative relationships with national prosecutors and courts, international institutions (like the NATO Stabilization Force in the former Yugoslavia), human rights NGOs with information on pending and potential cases, and other outside groups. Through speeches, articles and personal contacts as well as formal decisions, Judge Goldstone, Judge Arbour and others associated with the Yugoslavia and Rwanda Tribunals have worked tirelessly to create an international "community of law" around those institutions.[100] Lawyers and legal scholars are significant players in this scenario. In human rights and humanitarian law, as in other specialized areas, lawyers and academics with expertise argue for the creation of particular rules and institutions, help draft the necessary agreements, serve on the institutions they help create or argue before them, and write approvingly of the results. Politically savvy judges will take full advantage of such individuals.

Realist scholars are suspicious of this approach.[101] They argue that states are unlikely to be fooled by legal stratagems,[102] and retain the power to overturn by treaty or supranational legislation any decisions they dislike. If the ECJ promoted European integration, for example, it was because the member states wished it to. Recent analyses

[96] *Id.* at 54.

[97] Many societies are less aware of the possibilities of judicial activism than the United States, and are accordingly more acquiescent.

[98] *See* Prosecutor v. Tadić, *supra* note 13, para. 134, 35 ILM at 70–71.

[99] *See* Helfer & Slaughter, *supra* note 40, at 323–28.

[100] *See, e.g.,* Goldstone, *supra* note 86.

[101] *See, e.g.,* Geoffrey Garrett, *The Politics of Legal Integration in the European Union,* 49 INT'L ORG. 171 (1995).

[102] Karen Alter argues that national politicians are not fooled, but have shorter time horizons than judges because of periodic elections. Karen Alter, *Who Are the "Masters of the Treaty"?: European Governments and the European Court of Justice,* 52 INT'L ORG. 121 (1998).

see value in both positions. Scholars are developing more sophisticated theories spelling out the conditions under which national and international judges, lawyers, litigants and other actors can cooperate to expand the influence of supranational law, and under which states and other "legislators" will acquiesce.[103]

V. Conclusion

The atrocities regime is a rich and fascinating area of study. Yet it is not the bare rules of the Geneva Conventions or the procedures of the ICTY that create this fascination; it is the political conflict played out in their creation and design, the struggle to imbue them with meaning, the effort to use them to modify undesirable behavior. As this symposium makes clear, many intellectual approaches can shed light on such complex social phenomena. Yet IR theory (a rich and multifaceted creation) has a particularly important contribution to make, for it has been developed—and is evolving—to illuminate just this kind of issue. IR is not a "legal method" in the narrow sense. Coupled with the study of law and legal institutions, though, it can be the cornerstone for a deeper understanding of international governance.

Kenneth W. Abbott*

Feminist Methods in International Law

I have mixed feelings about participating in this symposium as the feminist voice. On the one hand, I want to support the symposium editors' attempt to broaden the standard categories of international legal methodologies by including feminism in this undertaking. On the other hand, I am conscious of the limits of my analysis and its unrepresentativeness—the particularity of my nationality, race, class, sexuality, education and profession shapes my outlook and ideas on international law. I clearly cannot speak for all women participants in and observers of the international legal system. I also hope that one day I will stop being positioned always as a feminist and will qualify as a fully fledged international lawyer. My reservations are also more general because presenting feminism as one of seven rival methodological traditions may give a false sense of its nature. The symposium editors' memorandum to the participants encouraged a certain competitiveness: we were asked, "Why is your method better than others?" I cannot answer this question. I do not see feminist methods as ready alternatives to any of the other methods represented in this symposium. Feminist methods emphasize conversations and dialogue rather than the production of a single, triumphant truth.[1] They will not lead to neat "legal" answers because they are challenging the very categories of "law" and "nonlaw." Feminist methods seek to expose and question the limited bases of international law's claim to objectivity and impartiality and insist on the importance of gender relations as a category of analysis. The term "gender" here refers to the social construction of differences between women and men and ideas of "femininity" and "masculinity"—the excess cultural baggage associated with biological sex.

[103] *See, e.g.*, Helfer & Slaughter, *supra* note 40; Geoffrey Garrett, R. Daniel Kelemen & Heiner Schulz, *The European Court of Justice, National Governments, and Legal Integration in the European Union*, 52 Int'l Org. 149 (1998); Walter Mattli & Anne-Marie Slaughter, *Revisiting the European Court of Justice*, 52 Int'l Org. at 177.

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[1] *See* J. Ann Tickner, *You Just Don't Understand: Troubled Engagements between Feminists and IR Theorists*, 41 Int'l Stud. Q. 611, 628 (1997).