

WITH LAW IN THEIR MINDS: SOME REFLECTIONS
ON THE NATURE OF PUBLIC INTERNATIONAL
LAW AT THE LIGHT OF CURRENT POLITICAL
SCIENCE THEORY

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The conclusion I came to during my time in the Foreign Office was that the old international order was neither a natural phenomenon to which humanity had simply adjusted its behaviour nor a fortuitous aggregation of countless past events of human interaction. The old international order determines the possibilities perceived by, and hence available to, politicians and governments and, so far as they play any part in the system, members of the general public. But the international system itself is

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nothing other than a structure of ideas; and it has been made nowhere else than in the human mind.¹

I. INTRODUCTION

In her seminal article, Burley² challenged international lawyers to explore the implications of recent political science theory upon international law theory. This essay is an attempt to take up that challenge. I shall use the bureaucratic politics model of the state³ and of the organizational decision making process,⁴ and the concepts of international regimes,⁵ transgovernmental networks⁶ and epistemic communities⁷ to propose an explanation about how and why international law is created, applied and maintained.

1. PHILIP ALLOTT, *EUNOMIA, NEW ORDER FOR A NEW WORLD* xv-xvi (1990).

2. Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205, 239 (1993).

Overall, international lawyers can ill afford to ignore the growing wealth of political science data on the world they seek to regulate. The measurements may be imprecise, the theories crude, but the whole offers at least the hope of a positive science of world affairs. As an adolescent discipline, international political science long rejected the insights of international law. As it grows, it rediscovers what international lawyers never forgot, but with added insights of its own. In the end, law informed by politics is the best guarantee of politics informed by law.

See also Anne-Marie Slaughter, *Liberal International Relations Theory and International Economic Law*, 10 AM.U. J. INT'L L. & POL'Y 717, 717-731 (1995) (summarizing the main schools of thought in International Relations Theory).

3. *See generally* GRAHAM T. ALLISON, *ESSENCE OF DECISION: EXPLAINING THE CUBAN MISSILE CRISIS* (1971) for a complete, and now classical, exposition of the model of bureaucratic politics decision making; *but see* Edward Rhodes, *Do Bureaucratic Politics Matter? Some Disconfirming Findings from the Case of the US Navy*, 47 WORLD POL. 1 (1994); Stephen D. Krasner, *Are Bureaucracies Important?(or Allison Wonderland)*, 7 FOREIGN POL'Y 159 (1972).

4. *See generally* PAUL R. KLEINDORFER ET AL., *DECISION SCIENCES, AN INTEGRATIVE PERSPECTIVE* 295-303 (1993).

5. *See generally* INTERNATIONAL REGIMES (Stephen D. Krasner ed., 1983); REGIME THEORY AND INTERNATIONAL RELATIONS (Volker Rittberger ed., 1993) [hereinafter REGIME THEORY].

6. *See generally* ROBERT O. KEOHANE & JOSEPH S. NYE, *POWER AND INTERDEPENDENCE* (2nd ed. 1989); THOMAS RISSE-KAPPEN, *BRINGING TRANSNATIONAL RELATIONS BACK IN: NON-STATE ACTORS, DOMESTIC STRUCTURES AND INTERNATIONAL INSTITUTIONS* 3 (Thomas Risse-Kappen ed., 1995) [hereinafter TRANSNATIONAL RELATIONS].

7. *See generally* Peter M. Haas, *Epistemic Communities and the Dynamics of International Environmental Co-Operation*, in REGIME THEORY, *supra* note 5, at 168 [hereinafter Haas, *Epistemic Communities*]; Peter M. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 INT'L ORG. 1-35 (1992) [hereinafter Haas, *Introduction*].

I shall question the *state as a unitary actor* paradigm, dominant in international law theory, and argue that it is possible to explain international law while conceptualizing the state as bureaucratic entity. I shall suggest that, if states are thus to conceptualize, it is possible to explain international law not as a creation of states but of individuals; that international law is an international regime created and maintained by the epistemic community of international law practitioners. In simpler words, that international law is a set “of implicit or explicit principles, norms, rules and decision-making procedures around which actors’ expectations converge in a given area of international relations”⁸ created and applied by a community of international lawyers and practitioners through their participation in their state’s or organization’s bureaucratic processes of foreign policy making, and that, in consequence, it reflects the shared conceptions of those individuals.⁹

II. THE TRADITIONAL CONCEPTION OF THE STATE

A. *State as a Unitary The Actor Model*

Public international law appears to be a state centered system. It assumes states are its main subjects and creators. Only states can be members of the United Nations¹⁰ and only states can be parties in cases before the International Court of Justice.¹¹ States conclude treaties¹² and their general practice constitutes customary international law.¹³ Even the principles of international law are postulated in terms of states’ rights and obligations:

8. Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, in INTERNATIONAL REGIMES, *supra* note 5, at 1, reprinted in ROBERT J. BECK ET AL., INTERNATIONAL RULES 167 (1996).

9. A preliminary exposition of some these theses was attempted in Carlos Fernando Díaz-Paniagua, *International Law and the Decision Making Process: Some Observations on Tacsan’s Alternative Approach*, II(1) INT’L LEGAL THEORY 17 (1996) (Am. Soc’y of Int’l Law Interest Group on the Theory of Int’l Law, Washington, D.C.).

10. U.N. CHARTER art. 4, para 1 (“Membership in the United Nations is open to all other peace-loving States which accept the obligations contained in the present Charter and, in the judgement of the Organization, are able and willing to carry out these obligations.”).

11. I.C.J. STAT. art. 34, para. 1 (“Only States may be parties in cases before the Court.”).

12. Vienna Convention on the Law of Treaties, May 23, 1969, art. 6, 1155 U.N.T.S. 331, 8 I.L.M. 679 (“Every State possesses capacity to conclude treaties.”).

13. See, e.g., IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 4 (4th ed. 1990).

[e]very State has the duty to refrain in its international relations from the threat or use of force . . . Every State shall settle its international disputes with other States by peaceful means . . . No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State.¹⁴

This state-centered conception of international law corresponds to the traditional theories of international relations that purport to explain international relations, including international law, as the result of state action. These theories assume that states are unitary rational actors, *i.e.*, unitary decision making entities, with only one set of goals, perceived options and estimated consequences of those options; that choose among their options that whose expected consequences they rank highest in terms of their goals.¹⁵

This approach is illustrated by the neo-realist theory of K. Waltz which contends that:

[s]tates are the units whose interactions form the structure of international political systems. . . . To say that a state is sovereign means that it decides for itself how it will cope with its internal and external problems, including whether or not to seek assistance from others and in doing so to limit its freedom by making commitments to them. States develop their own strategies, chart their own course, make their own decisions about how to meet whatever needs their experience and whatever desires they develop.¹⁶

B. *Limitations and Alternatives to the 'State as a Unitary Actor' Model*

The realities of international relations, that constitute the object of both international law and international relations theory, are more complex than their representation by the *state as a rational and unitary actor* model. States are neither unitary nor rational entities but fictitious persons. Individuals interacting constitute states' substance. As Judge Cassese

14. Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR, 25th sess., U.N. Doc A/RES/2625 (1970).

15. See generally ALLISON, *supra* note 3, at 10-38 (providing a general exposition of the State as a rational actor model).

16. KENNETH N. WALTZ, THEORY OF INTERNATIONAL POLITICS 95-96 (1979).

wrote: "States have no soul, no capacity to form and express an autonomous will; they are 'abstract' structures acting through individuals. Human beings alone can give flesh and blood to State activity." ¹⁷

This condition in the nature of states necessarily affects the operation international law. Treaties are, in fact, negotiated, signed, ratified and deposited by individuals acting on behalf of their states. *State practice*, that generates customary law, is really the sum of acts performed individual human beings. Particular norms of international law are, in the same way, complied with or violated, not by metaphysical entities, but by individuals.¹⁸ These phenomena are unavoidable and, in consequence, several substantive norms of international law respond to them. For example, both the rules regarding representation and full powers for the negotiation of treaties¹⁹ and the norms sanctioning genocide²⁰ acknowledge,

17. ANTONIO CASSESE, *INTERNATIONAL LAW IN A DIVIDED WORLD* 14 (1986).

18. *See id.* at 9-10.

Although the protagonists of international life are corporate structures, of course they cannot but operate through individuals, who do not act on their own account but as State officials, or rather as the tools of the structures to which they belong. Thus, for instance, if a treaty of extradition is concluded by the UK with the USSR, this deal should not blind us to what actually happens, namely that the international instrument is concretely brought into being by individuals and is subsequently implemented by individuals. Diplomats belonging to the two states negotiate the agreement; the instrument of ratification is formally approved and signed by the Heads of State, if necessary after authorization by parliamentary assemblies. Once a treaty has entered into force, it is implemented by the courts of each country and, if required, also by officials of the respective Ministries of Justice and, indeed, it is generally for the courts to grant or refuse in each particular case.

19. Vienna Convention on the Law of Treaties, May 23, 1969, arts. 7, 47, 50, 51, 1155 U.N.T.S 331, 8 I.L.M. 679.

(Art. 7.1. A person is considered as representing a state for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the state to be bound by a treaty if:

he produces appropriate full powers; or

it appears from the practice of the state concerned or from other circumstances that their intention was to consider that person as representing the state for such purposes and to dispense with full powers.

2. In virtue of their functions and without having to produce full powers, the following are considered as representing their state:

a) heads of state, heads of government and ministers for foreign affairs, for the purpose of performing all acts relating to the conclusion of a treaty;

b) heads of diplomatic missions, for the purpose of adopting the text of a treaty between the accrediting state and the state to which they are accredited;

Representatives accredited by states to an international conference or to an international organization or one of its organs, for the purpose of adopting the text of a treaty in that conference, organization or organ.

and purport to regulate, the role of individuals acting on behalf of their states.

Similarly, international relations theory and political science have acknowledged the limitations of the *state as a rational actor model* for describing the complex realities of international politics and have proposed several alternative conceptions of the state.²¹ One of these is the statist conception of the state, according to which states are "*central decision-making organizations and personnel*"²² interacting both with domestic and transnational actors and with other states.

This kind of conception of the state has been called *subsystemic, second image*²³ and a *two level approach*²⁴ because it uses the states' internal organization and politics for explaining their foreign policy and, more broadly, the whole international society. Even if in international relations theory and political science there still are considerable discrepancies about which elements should be emphasized and about the basic terminology,²⁵ there is a growing consensus that:

Art. 47. If the authority of a representative to express the consent of a state to be bound by a particular treaty has been made subject to a specific restriction, his omission to observe that restriction may not be invoked as invalidating the consent expressed by him unless the restriction was notified to the other negotiating states prior to his expressing such consent.

Art. 50. If the expression of a state's consent to be bound by a treaty has been procured through the corruption of its representative directly or indirectly by another negotiating state, the state may invoke such corruption as invalidating its consent to be bound by the treaty

Art. 51. The expression of a state's consent to be bound by a treaty has been procured by the coercion of its representative through acts or threats directed against him shall be without any legal effect.

20. Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260, art. 4, U.N. Doc. A/RES/260a (1948). 1021 U.N.T.S. 277 ("Art. 4. Persons committing genocide or any of the other acts enumerated in Article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.").

21. See generally MARTIN HOLLIS & STEVE SMITH, *EXPLAINING AND UNDERSTANDING INTERNATIONAL RELATIONS* 32-36 (1990) (summarizing the recent theoretical developments in political science regarding the State).

22. Stephen D. Krasner, *Power Politics, Institutions, and Transnational Relations*, in *TRANSNATIONAL RELATIONS*, *supra* note 6, at 259.

23. Michael Zürn, *Bringing the Second Image (Back) In: About Domestic Sources of Regime and the Course of Debt Crisis of the 1980s*, in *REGIME THEORY*, *supra* note 5, at 282-92.

24. HOLLIS, *supra* note 21, at 7-9; Andrew Kydd & Duncan Snidal, *Progress in Game-Theoretical Analysis of International Regimes and Non-State Actors*, in *REGIME THEORY*, *supra* note 5, at 127-34.

25. See generally HOLLIS, *supra* note 21, at 38-41; Thomas Risse-Kappen, *Bringing Transnational Relations Back in: Introduction*, in *TRANSNATIONAL RELATIONS*, *supra* note 6, at 17-28 (discussing the current debates about the role of the state and of its domestic structures in international politics).

the way in which states bargain and co-operate cannot be understood except with reference to the changing nature of the state and the domestic political system. States interests are not fixed but vary accordingly to the institutional context, to the degree of organization of the contending political forces within the state and wider political system, and to the leadership capacities of the major actors.²⁶

III. THE BUREAUCRATIC MODEL OF THE STATE AND THE DECISION MAKING PROCESS

A classic form of the *statist* alternative to the state as a rational actor model is the governmental or bureaucratic politics model.²⁷ This model purports to explain the conduct and policy, of states, but also of any other bureaucratic entity; either a corporation, an international organization, a non-governmental organization, or an interest group, as the outcome of interaction between human beings.²⁸

A. *Bureaucrats, interests and influence*

The key assumption of the *bureaucratic politics* model is that states and organizations are not unitary decision making actors but sets of bureaucrats bargaining between themselves.²⁹ States do not have a unitary set of goals, options and estimated consequences of those options, but rather each individual actor in the internal decision-making process has its own goals, conceptions and interests that he tries to promote, with the power at his disposal, within and through the organization.³⁰ Therefore, its main contention is that the actions attributed to the state are not rationally chosen solutions to particular problems but rather the result from "compromise, conflict, and confusion of officials with diverse interests and unequal influence."³¹

26. Andrew Hurrell, *International Society and the Study of Regimes, a Reflective Approach*, in REGIME THEORY, *supra* note 5, at 69, reprinted in BECK, *supra* note 8, at 206.

27. ALLISON, *supra* note 3, at 144-244; see also HOLLIS, *supra* note 21, at 146-54; KLEINDORFER, *supra* note 4, at 288-303.

28. See KLEINDORFER, *supra* note 4, at 288-303.

29. See ALLISON, *supra* note 3, at 164 ("The governmental actor is neither a unitary agent nor a conglomerate of organizations, but rather is a number of individual players. Groups of these players constitute the agent for particular governmental decisions and actions. Players are men in jobs."). *Id.*; HOLLIS, *supra* note 21, at 146-47; KLEINDORFER, *supra* note 4, at 296.

30. See ALLISON, *supra* note 3, at 166-67; KLEINDORFER, *supra* note 4, at 296.

31. ALLISON, *supra* note 3, at 162.

This model assumes that each individual actor in the internal decision making process has and promotes his own goals, conceptions and interests.³² These private goals and interests flow, in part, from the position of each actor in the bureaucratic organization but also from his personal values, interests and conception of his role.³³ Even more, these actors can sponsor certain outcomes due to misrepresentation of the situation or the options,³⁴ lack or inaccurate communication with other actors, reticence to take certain risks, self-imposed constraints³⁵ and even erroneous expectations.³⁶

In addition, the *bureaucratic politics* model assumes that the individual actors in the decision making process have diverse power. Each actor's capacity to influence the final governmental action, his power, depends on his possession of bargaining advantages, on his skill and will to use his advantages, and on the other actor's perception of his possession and willingness to use those advantages. Bargaining advantages are those elements, including formal authority, position, responsibilities, expertise, control of information and resources, charisma, and personal relations with other actors which also have bargaining advantages, that enable each actor to influence the final outcome.³⁷

Furthermore, this model does not distinguish, in principle, between policy or *strategic* decision making and regular conduct or *routine*

32. See *id.* at 166-67; KLEINDORFER, *supra* note 4, at 296.

33. See ALLISON, *supra* note 3, at 166-7.

A Secretary of State's resolution . . . depends not only upon the position, but also upon the player who occupies it. For players are also people; men's metabolisms differ. The hard core of bureaucratic politics mix is personality. How each man manages to stand the heat in *his* kitchen, each player's basic operating style, and the complementarity or contradiction among personalities and styles in the inner circles are irreducible pieces of the policy blend. Then, too, each person comes to his position with baggage in tow. His bags include sensitivities to certain issues, commitments to various projects, and personal standing with and debts to groups in the society.

See generally KLEINDORFER, *supra* note 4, at 35-42; YAACOV Y. I. VERZTBERGER, THE WORLD IN THEIR MINDS: INFORMATION PROCESSING, COGNITION AND PERCEPTION IN FOREIGN POLICY DECISIONMAKING 113 (1990) (providing a detailed discussion of the role of personal beliefs in the decision making process: "[t]he most elementary cognitive tools with which the decisionmaker approaches, and attempts to clarify and impose meaning, on complex and uncertain environments are beliefs, values and stereotypes. They serve as guides to information processing and become a baseline for interpretations, expectation and predictions of others' behavior."). But see HOLLIS, *supra* note 21, at 151 n.10 (arguing that the actors' preferences are determined only by their positions within the bureaucratic structure).

34. See KLEINDORFER, *supra* note 4, at 52-56.

35. See *id.* at 56-58.

36. See ALLISON, *supra* note 3, at 178-79.

37. See *id.* at 168-69.

decisions.³⁸ Any conduct requires to be performed, the decision of an individual to execute it. Nonetheless, this model acknowledges that most decisions are interrelated. First, because, as far as general policy decisions usually require long series of subordinate decisions for their implementation, there are a series of concatenated decisions. Second, previous decisions may determine the issues and options being considered and the power, interests and commitments of the actors. It further recognizes that the actors that make those subordinate decisions also try to promote their own goals, and that, in consequence, they try to modify, ignore or construe the previous decisions, with the power at their disposal, in order to favor their desired outcomes.³⁹ In this sense, an actor entrusted with the implementation of a policy decision can be more influential upon the final outcome than the actor who took it.⁴⁰

The consequence of these assumptions is that any state's or bureaucratic entity's action is an agglutination of several relatively independent judgments.⁴¹ The final outcome of the decision making process is the result of the bargaining among several actors each of which "pulls and hauls with the power at his discretion for the outcomes that will advance his conception of national, organizational, group, and personal interests."⁴² Thus, the final action cannot be the result of a rational selection between several options considering their estimated consequences against the entities' goals, nor of a simple choice by a unitary group, nor even the result of a coordinated policy or a common intention independently pursued. On the contrary, it is rather the sum of the inputs of several actors that were able either to act independently or to prevail in the decision making process at its different levels.

Additionally, this model recognizes that individuals outside of the formal structure of the bureaucratic entity also take part in the decision

38. See *id.* at 169-70 (discussing the channels of action). *But see* KLEINDORFER, *supra* note 4, at 298-99 (distinguishing between strategic, tactical and routine decisions).

39. See ALLISON, *supra* note 3, at 173.

Most decisions leave considerable leeway in implementation. Players who supported the decision will maneuver to see it implemented and may go beyond the spirit if not the letter of the decision. Those who opposed the decision, or opposed the action, will maneuver to delay implementation, to limit implementation to the letter but not to the spirit, and even to have the decision disobeyed.

40. See *id.* at 175 ("The mix of players and each player's advantages shift not only between action-channels but also along action-channels. Chiefs dominate the major formal decisions on important foreign policy issues, but indians, especially those in the organization charged with carrying out the decision, may play a major role thereafter."); KLEINDORFER, *supra* note 4, at 301.

41. See ALLISON, *supra* note 3, at 171-73.

42. *Id.* at 171.

making process. In the case of states, while this model acknowledges the central role of governmental officials in their government's decision making process, it recognizes that members of the parliament, press, interest groups and the public can and do take part in it, affecting thus the final outcome. Therefore, it suggests that there are concentric circles of influence and power in which state's actions crystallize.⁴³

B. Coalitions, Networks and Communities

The *bureaucratic politics* model also contends that individual actors tend to form coalitions with other actors in order to increase their capacity to influence the final outcome of the decision making process through the coordinated use of their bargaining advantages. These coalitions are formed either with actors that share similar values or goals before the bargaining on the specific issue starts or with actors that are persuaded, during the bargaining process, to sponsor their proposals.⁴⁴

Within governments, the formation of coalitions is not limited to each state's internal political system. When actions in one state result in advantages or disadvantages for actors in other state's internal political processes, or when the proposed action requires a certain degree of international negotiation, as most acts relevant to international law do, coalitions are formed transnationally. Furthermore, in those cases, the actors in one state, in order to increase their own influence in the final outcome, try to empower their allies in other states by creating bargaining advantages for them.⁴⁵

43. See *id.* at 164-65. C. W. Michael Reisman, *The View from the New Haven School of International Law*, in 86 A.S.I.L. PROC. 118-125 (1992). Taking a similar approach:

[t]he participants in any decision process include those formally endowed with decision competence, for example judge, and all those other actors who, though not endowed with formal competence, may nonetheless play important roles in influencing decisions. In international decision, the observer must examine, in addition to formal international organizations, state officials, non-governmental organizations, pressure groups, interest groups, gangs, and individuals who act on behalf of all other participants and on their own.

44. See ALLISON, *supra* note 3, at 169 (referring to "personal persuasiveness with other players (drawn from personal relations, charisma); and access and persuasiveness who have bargaining advantages drawn from above (based on interpersonal relations, etc.)" as sources of power.); KLEINDORFER, *supra* note 4, at 301. ("The political model especially highlights that in addition to their formal positions people are part of informal networks and coalitions, and that organizational rationality may not always prevail because of hidden agendas. This realization is especially crucial in understanding decision making in government or other large bureaucracies.").

45. See ALLISON, *supra* note 3, at 178.

Several political scientists and international relations theorists have devoted themselves to the study of this kind of transnational alliance.⁴⁶ For instance, Keohane and Nye have referred to *transgovernmental coalitions* and *transgovernmental policy networks* as the coalitions formed by “governmental bureaucracies charged with similar tasks . . . on particular policy questions,”⁴⁷ seeking to improve their chances of success by bringing “actors from other governments into their own decision-making processes as allies.”⁴⁸ They have also acknowledged the relevance of coalitions whose members do not belong to the formal governmental structure.⁴⁹ Thus, they use the broader concept of ‘transnational relations’ to refer to all “contacts, coalitions, and interactions across state boundaries that are not controlled by the central foreign policy organs of governments”⁵⁰ while they restrict the use of the term *transnational interactions* only to describe those transnational relations in which “at least one actor is not an agent of a government or an intergovernmental organization.”⁵¹

Some of these transnational coalitions are *ad hoc* alliances created specifically to promote particular policies, while others are permanent coalitions formed because its members share common values, interests and knowledge.⁵² Among the latter, the coalitions based on certain knowledge have deserved a closer examination because their characteristic bargaining advantage, their share knowledge, increases its potential influence in the final outcome as the issues object of the decision making process grow in complexity.⁵³

In situations of high technical intricacy or uncertainty, most of the regular participants in the decision making process lack the necessary knowledge to determine the key issues and, in consequence, depend on scientific or technical expertise. In such conditions, the task of making the

46. See generally Risse-Kappen, *supra* note 6, at 3-13 (summarizing the recent theoretical developments regarding transnational alliances); Haas, *Introduction*, *supra* note 7, at 16-25 (analyzing the differences between the several theoretical constructions regarding transnational alliances).

47. KEOHANE, *supra* note 6, at 34.

48. *Id.*

49. See *id.* at 24-25, 33-34; Joseph S. Nye & Robert O. Keohane, *Transnational Relations and World Politics: An Introduction*, in TRANSNATIONAL RELATIONS AND WORLD POLITICS ix (Robert O. Keohane & Joseph S. Nye eds., 1981).

50. Nye, *supra* note 49, at xi. See also Risse-Kappen, *supra* note 6, at 3.

51. Nye, *supra* note 49, at xii.

52. See Haas, *Introduction*, *supra* note 7, at 16-20 (discussing the various kinds of transnational alliances).

53. See *id.* at 4-16; Haas, *Epistemic Communities*, *supra* note 7, at 179-80.

decisions is shared with or transferred to the experts. Hence, the experts become participants in the bureaucratic bargaining. Even more, if those experts have political objectives, they can consolidate their influence upon the final outcome through the acquisition of bureaucratic positions from which they can dominate the decision making process. They can also extend their influence through the creation of coalitions, which enable them both to influence other actors and to avoid disagreements that might create lack of confidence in their expertise.⁵⁴

Several empirical studies have found transnational coalitions acting in this way. In the area of international economic relations, for instance, they have been found participating in the development of the European Economic and Monetary Union⁵⁵ and in the trade relations between the United States and Japan.⁵⁶ They have also been found acting in the areas of arms control,⁵⁷ environmental protection, from that of the African elephants⁵⁸ to that of the Mediterranean,⁵⁹ and in Law of the Sea negotiations,⁶⁰ as described by Keohane:

[a]s transnational economic activity increased, so did transnational political activity and contacts. . . . Oil companies worked through their lawyers' membership in the International Law Association, which influenced the

54. See Diana Crane, *Transnational Networks in Basic Sciences*, in TRANSNATIONAL RELATIONS AND WORLD POLITICS, *supra* note 49, at 242-251; Haas, *Epistemic Communities*, *supra* note 7, at 179.

Under conditions of complex interdependence and generalized uncertainty specialists play a significant role in attenuating such uncertainty for decision-makers. . . . Under such circumstances perceptions may be false, leaders lack adequate information for informed choice, and traditional search procedures are impossible, information is at a premium, and leaders look for those able to provide authoritative advice and/or delegate responsibility to them. . . . Such experts' influence is subject to their ability to avoid widespread internal disagreement, and their influence persists through their ability to consolidate political power through capturing important bureaucratic positions in national administrations, from which they may persuade other decision-makers or usurp control over decision-making.

55. See David R. Cameron, *Transnational Relations and the Development of European Economic and Monetary Union*, in TRANSNATIONAL RELATIONS *supra* note 6, at 37.

56. See Peter J. Katzenstein & Yutaka Tsujinaka, "Bullying," "Buying," and "Binding": *US-Japanese Transnational Relations and Domestic Structures*, in TRANSNATIONAL RELATIONS *supra* note 6, at 79.

57. See Matthew Evangelista, *Transnational Relations, Domestic Structures, and Security Policy in the USSR and Russia*, in TRANSNATIONAL RELATIONS *supra* note 6, at 146.

58. See Thomas Princen, *Ivory, Conservation, and Environmental Transnational Coalitions*, in TRANSNATIONAL RELATIONS *supra* note 6, at 227.

59. See Haas, *Epistemic Communities*, *supra* note 7, at 191-201.

60. See KEOHANE, *supra* note 6, at 86-162.

International Law Commission's work on draft conventions for the 1958 conference. Scientists organized transnationally in the Scientific Committee on Oceans Research (SCOR) and successfully pressed their governments to create the International Oceanographic Commission (IOC) to coordinate large-scale oceanographic research. World order groups worked transnationally to promote a stronger international regime.⁶¹

It seems that these coalitions of experts are an outgrowth of scientific communities. Progress of science requires the exchange of information about new discoveries, techniques and theories between the leading scientists. Their continued interaction forms a network of informal links: acquaintances, friendships, partnerships and confidence, among them, their collaborators and students, which favors the scientific research. Furthermore, as both the scientific community itself and the complexity and cost of the data collection increase, such community has to coordinate its activities and concentrate its resources both through international non governmental and intergovernmental organizations.⁶² Thus, if the members of the scientific community develop policy objectives, or if their knowledge is relevant to the political decision making process, the scientific community's network of communication and convergence of ideas facilitates the creation of transnational coalitions able to influence the decision making process.

These coalitions based on scientific or technical knowledge whose members promote coordinately a determined policy goal based arguably, on their particular knowledge, have been denominated *Epistemic Communities*.⁶³ They have been defined as: "A group of individuals (whose membership usually transcends national boundaries and includes both scientists or experts and policy-makers) who share a common view regarding causal mechanisms and appropriate responses and who have a common set of values [that] emerges in conjunction with the issue in question."⁶⁴

61. *Id.* at 110.

62. See Crane, *supra* note 54, at 237-38, 250.

63. See Haas, *Epistemic Communities*, *supra* note 7, at 179; Haas, *Introduction*, *supra* note 7, *passim*.

64. Oran R. Young & Gail Osherenko, *Testing Theories of Regime Formation: Findings from a Large Collaborative Research Project*, in REGIME THEORY, *supra* note 5, at 250. Cf. Haas, *Epistemic Communities*, *supra* note 7, at 179-80. Giving a more detailed and restrictive definition;

IV. INTERNATIONAL LAW ACCORDING THE 'BUREAUCRATIC POLITICS' MODEL

A. *The Decision Making Process*

The bureaucratic politics model of the state and the decision making process seems adequate to explain the operation of international law. Consider the simplest act relevant to international law, a unilateral declaration. According to the 'bureaucratic politics' model, these kind of acts should be either the result of the more or less detailed bargaining process inside the governmental structure of only one state, or the sum of relatively independent decisions and actions attributable to only one state.⁶⁵ P. Kamath's account of the decision making process of India's unilateral recognition of China's sovereignty over Tibet provides a suitable example:

[a]ccording to the former Principal Private Secretary of Nehru, M.O. Mathai, it was Ambassador K.M. Panikkar who by a change of crucial word in the cable changed India's policy on Tibet. Nehru's telegram to Panikkar in Peking authorized him to communicate India's recognition of Chinese *suzerainty* over Tibet, which Ambassador is alleg[ing] to have changed to *sovereignty*. If this is true, then Nehru did not make India's policy towards Tibet in 1950 but Ambassador Panikkar in fact made it. It is also said that Nehru was persuaded by Pannikar not to insist on a simultaneous Chinese recognition of McMahon line when India recognized Chinese claim over Tibet.⁶⁶

They are a group of professionals, often from a number of different disciplines, who share the following set of characteristics:

1. Shared consumatory values or principled beliefs. Such beliefs provide a value-based rationale for social action of the members of the community.
2. Shared causal beliefs or professional judgments. Such beliefs provide analytic reasons and explanations of behavior, offering causal explanations for the multiple linkages between possible policy actions and desired outcomes.
3. Common notions of validity: intersubjective, internally defined criteria for validating knowledge.
4. A common policy enterprise: a set of practices associated with a central set of problems which have to be tackled, presumably out of a conviction that human welfare will be enhanced as a consequence. *Id.*

65. See ALLISON, *supra* note 3, at 162-64.

66. P. M. KAMATH, FOREIGN POLICY-MAKING AND INTERNATIONAL POLITICS 90 (1990).

India's decision to recognize China's *suzerainty* over Tibet without insisting on a reciprocal recognition, seems, in Kamath's account, the result of interaction of the central actors in India's foreign policy making: the Prime Minister and his ambassador to Peking. India's recognition of China's *sovereignty* over Tibet, seems to have been a decision of the ambassador alone, who used his position, a bargaining advantage, to change the key wording, thus overruling the Prime Minister's objections. Hence, India's action, and its foreign policy and legal stand on this issue, can accurately be described as a the sum of the inputs of several actors that were able to act, interact, and prevail in the decision making process at its different levels.

Usually, the decision making process of actions relevant to international law is more complex than in Kamath's example. First, the decision making process can be less centralized or the governmental structure more complex. Second, nature of outcome being decided might be, in itself, more complex than a unilateral declaration. It might involve lengthy processes of negotiation with other states and the balancing of contending interests in the municipal arena. In the case of multilateral negotiations, these features of the bureaucratic decision making process become acute, as illustrated by the United States' position during the Third United Nations Conference on the Law of the Sea:

[a]t the Caracas law of the sea meetings, the United States delegation numbered 110 (of which only 20 were from the State Department) - a virtual conference within a conference. The efforts of the secretary of state to cut the size of the delegation still left a delegation over eighty at Geneva in 1975 Some U.S. delegates have misrepresented views of foreign governments within the delegation, others have taken position with foreign delegates contrary to official policy. Unauthorized leaks of U.S. fallback positions have not been uncommon. Somewhat more subtlety, the various "clubs" of delegates with similar functional interests in fishing, navies, oil, mining, and so forth that were established as part of the informal conference diplomacy set up regular channels of communication that cut across and created tension within the already fragmented national positions⁶⁷

A particularly important instance was the lobbying by the United States Interior Department and oil company officials with less developed

67. KEOHANE, *supra* note 6, at 116.

countries in favor of broad coastal state jurisdiction over the continental shelf (contrary to then official United States policy) at the Geneva sessions of the Seabed Committee.⁶⁸

These examples illustrate how the 'bureaucratic politics' model serves to describe the decision making process of actions relevant to international law. However, this description of the decision making process of actions relevant to international law does not explain why international law is complied in international relations.

B. The Effectiveness of International Law

I contend that the effectiveness of international law depends on whether it affects the states' decision making processes in such a way that the final outcomes comply or are in accordance with its substantive provisions or not. Only if the outcomes of those processes comply with international law, will it be effective. Only if those outcomes are construed to create or modify international law, will it be created or modified. Therefore, it is necessary to consider how international law affects the decision-maker's judgments in such a way that they will produce outcomes in accordance with it.

International law can affect the judgments of the actors in the decision making process in four different ways. First, it might be an element in the formation of the individual actor's goals and interests. Second, it might be part of the subject matter being decided. Third, it might be a bargaining advantage in the hands of some of the actors; and, fourth, it can be part of the constraints that might exist upon the bargaining process.

First, international law might be an element in the formation of the actors' goals. These goals are determined by the actors' positions in the governmental structure, their personal values, interests, expectations and conception of their role. Thus, it is possible that some actors may have certain personal preference, inclination or commitment to international law.⁶⁹ If it is so, they may prefer and promote policies and conduct that comply, or are in accordance, with it. President Wilson, who promoted

68. *Id.* at 149.

69. See ORAN R. YOUNG, *INTERNATIONAL GOVERNANCE: PROTECTING THE ENVIRONMENT IN A STATELESS SOCIETY* 192 (1994) ("Subjects may feel an obligation to comply with the prescriptions embedded in a regime because they see it as the proper thing to do on moral or ethical grounds (that is, for moral reason) . . .").

mechanisms based on international law for the maintenance of international peace,⁷⁰ exemplifies this attitude.

This kind of commitment to international law might flow from the education, previous experiences or ethics of the actors. However, it can also flow from the pure calculation of the advantages of that policy,⁷¹ either because it reduces future conflicts or because it creates norms of conduct that will, in subsequent interactions, be favorable to their interests or increase their bargaining advantages. Thus, for instance, Foreign Ministries' legal advisors will tend to advance policies in accordance to international law both as a result of their commitment, due to their education and position, to law, and as a form to increase their own influence and promote their parochial interests in their governments' overall bargaining process.

Second, international law can be the subject matter of the decision making process. Frequently, due to previous decisions and commitments, state's and international organization's bureaucrats have to develop policies or conduct towards international law or have to frame their decisions in terms of international law. The extended negotiations and contradictions within various governments to determine their positions during the Third United Nations Conference on the Law of the Sea exemplify this situation. The actors, while elaborating their state's positions towards the Conference, had to advocate their preferred policies or conduct on the substantive issues in normative terms, because only in such terms could they have been embodied in the expected outcome of the Conference; a treaty.

Third, knowledge of international law can be a bargaining advantage in the decision making process. When international law is the subject matter or a relevant element in the decision making process, due to the technicality or intricacy of the issues, the task of making the decision is shared with or transferred to experts in international law. Hence, as predicted by the model, the experts become influential in the bureaucratic bargaining because of their knowledge.

Furthermore, even when international law is less central to the issues at stake, the knowledge of international law allows the actors that possess it bring, in favor of their positions, the authority of previous commitments,⁷² or superior values, such as the respect for law. Thus, as

70. See KALEVI J. HOLSTI, *PEACE AND WAR: ARMED CONFLICTS AND INTERNATIONAL ORDER 1648-1989*, 181-89 (1991).

71. See YOUNG, *supra* note 69, at 193.

72. Cf. VERZTBERGER, *supra* note 33, at 306 (referring to the use of historical arguments in the foreign policy decision making process: "[w]hen information about the environment is

far as the use of such arguments allows them to influence the final outcome of the decision making process in line to their policy goals, their knowledge of international law becomes a base for their power. The use of international human rights law as an argument during the decision making process seems a suitable example.

Fourth, international law can be a constraint upon the decision making process.⁷³ Structural elements of international law are seldom reconsidered. They are, in fact, the result of previous decisions, which have settled the particular issues. Hence, all or most actors in the subsequent decision making processes assume them. For instance, when the policy toward a particular treaty negotiation is considered, the principle of the sovereign equality of states, finally agreed during the 1645-1648 negotiation of the peace of Westphalia,⁷⁴ is usually assumed and, therefore, the decisions are made taking it into consideration.

Similarly, international law can establish patterns of bargaining and influence the relative power of the actors.⁷⁵ In these cases, international law determines the *rules of the game* of the decision making process. For

complex and poses a high level of uncertainty and where power is shared, argumentation by reference to history is a vital component of policy formulation and serves as a means of persuading both the self and others.”).

73. See generally *id.* at 41-44 (discussing the psychological constraints that limit the behavior of the foreign policy decision-makers).

The perception of constraints affects choice. In choosing among options, decision-makers may systematically analyze the content of the issues at hand and the constraints imposed by the environment on choice, the implementation of the chosen alternative, and the possible consequences of any relevant option . . . tacit and explicit self-imposed commitments to other political entities and their determination of actors' behavior towards their partners. Thus, a partnership in an alliance imposes certain types of behavior toward other partners and a different sort toward those outside the alliance. Membership in an organization such as the United Nations demands, at least nominally, the adoption of specific standards of behavior, and any deviation from them is supposed to require explanation or self-justification. *Id.*

74. See HOLSTI, *supra* note 70, at 33-39.

75. Cf. Michael Byers, *Custom, Power and the Power of Rules: Customary International Law from an Interdisciplinary Perspective*, 17 MICH. J. INT'L L. 109, 122-124 (1995) (arguing a similar point using the state as a unitary actor model).

A legal system such as the international legal system does more than simply create expectations and promote stability. It also fulfills an essential social function by transforming applications of raw power into legitimate power, thereby creating rights to apply power within certain structures using certain means. For instance, in the absence of an overarching, law-making sovereign, the international legal system demands reciprocity: recognition on the part of those applying power of the rights of others to apply power within those same structures and using those same means. This recognition in turn imposes a significant constraints on states as they engage in behavior that contributes to the maintenance, development or change of rules of customary international law. *Id.*

example, the United Nations Charter and the rules of procedure of the Council inform the bargaining process, which creates resolutions of the Security Council of the United Nations. Thus, as far as the adoption of the resolutions requires certain majority and the norms favor decisions by consensus, the delegates that take part in the negotiations try actively to obtain the acquiescence of even the smallest powers. In the same way, the influence of the delegates of the permanent members is increased by the shadow of their veto power, also granted by previous decision regarding international law.

I submit that international law can affect, in any of the above mentioned ways, the judgment of some actors in the decision making process. If it does, such actors will be committed, constrained, empowered or expert in international law. Hence, if any of those actors prevails or influences the bargaining process, international law will probably inform the final outcome, *i.e.*, it will be effective. Conversely, if those actors are excluded from the decision making process, or if they exercise a minor influence, the final outcome will tend to be in less conformity with international law. The degree of influence of those actors upon the final outcome depends, as mentioned before, on their possession of bargaining advantages, their skill and will to use those advantages, and the other actor's perception of their possession and willingness to use those advantages, over the several stages of the decision making process. In consequence, the effectiveness of international law resides in the success of those actors committed, constrained, empowered or expert in it, in promoting policies or conducts in accordance with it, within the decision making processes of their organizations.

Consider, for instance, the effectiveness of the Laws of War. According to the previous argument, these norms would be effective only if they affect the judgments of some decision makers in the chain of command in such way that the final actions are in accordance with them. Conversely, these norms would be ineffective if they are put aside during the relevant decision making processes. General Powell's comment on the 1991 Gulf War decision making process seems to confirm these propositions: "Decisions were impacted by legal considerations at every level. Lawyers proved invaluable in the decision-making process."⁷⁶

C. *The creation of International Law*

The *bureaucratic politics* model also seems able to explain how and why international law is created. It argues the actors in the decision

76. Christopher Greenwood, *Command and the Laws of Armed Conflict*, 4 STRATEGIC AND COMBAT STUDIES INSTITUTE OCCASIONAL PAPER 1 (1993).

making process try to promote their goals not only within their particular organizations, but also through them. Governmental bureaucrats do not limit their interests, goals and expectations to the municipal arena, but they also have interests and goals in other states and expectations regarding the whole international society. Hence, these actors pursue, within their governments, outcomes regarding other states, *i.e.*, foreign policy. Furthermore, if these actors are, in some way, committed, constrained, empowered or expert in international law, those outcomes will tend to be expressed in terms of international law. Thus, I submit, international law is created for promoting, in the international arena, the interests, goals and values of those individuals committed, constrained or empowered by international law or expert in it.

Once these individuals are successful in committing their governments to diplomatic negotiations or in creating intergovernmental organizations, the bureaucratic decision making process is extended to the international arena. It seems that, in principle, international law affects the judgments of the individual actors in the intergovernmental decision making process in the same way that it does to those actors within the internal decision making process. Therefore, international law can also be an element in the formation of the individual actor's goals and interests, a part of the subject matter being decided, a bargaining advantage in the hands of some of the actors, or constitute constraints upon the bargaining process. In consequence, it seems that international law results from the "compromise, conflict, and confusion of officials with diverse interests and unequal influence,"⁷⁷ all of which try to promote their parochial interests, values and goals in the international arena.

The history of negotiation of the 1949 Geneva Conventions provides some support to these theses. As Best remarks, the influence and positions of some states seem to have been based on the influence and interests of their delegates:

Britain's social strategist Alexander was not being entirely satirical in his reference to 'the Great Powers (including Monaco.)' Monaco's chief delegate was the vigorous and influential French law professor from Aix-en-Provence, Paul de Geouffre de La Pradelle. Monaco mattered partly because *he* mattered. He was one of the most thoughtful contributors to the debates (two years later published a uniquely valuable book about the 1949 conference) and he was a weighty spokesman for the most persistent of

77. ALLISON, *supra* note 3, at 162.

pressure-groups, the International Committee of Military Medicine and Pharmacy, from which, based in Monaco before the war, had flowed a stream of humanitarian proposals.⁷⁸

In some instances, even the specific drafting of the provisions can be related to the parochial and immediate interests of the actors. The inconsistency embodied in article 130 of the III Geneva Convention, which refers to *great suffering or serious injury to body or health committed against persons or property*,⁷⁹ resulted, according to the British Foreign Office, to the fact that Mr. Vaillancourt, the head of the Canadian delegation, wanting his lunch, did not allow the drafting committee to look at it properly.⁸⁰

Furthermore, as far as the actions within one government or organization, or their outcomes, can affect the distribution of power or the goals of actors in other governments, those actors with common goals or values will tend to create transnational coalitions in order to increase their overall influence.⁸¹ If the member of these coalitions are successful in influencing their respective government's policy or conduct decision making process, the outcomes, *i.e.*, the actions attributed to those states, will tend to converge.⁸² These facts explain both the successful conclusion of treaties and the homogeneity of the state practice on which customary international law is based.

Regarding the role of transnational coalitions in the successful conclusion of treaties, a suitable example, which deserves to be quoted in full, is provided by the description of the negotiating process of the Atlantic Treaty given by Theodore Achilles, a member of the United States delegation:

At first there were the British, French, Belgians, Dutch, Luxembourgers, Canadians, and ourselves. The negotiations were normally conducted by the Secretary of State and the various ambassadors in Washington. They met only infrequently. The actual negotiations were

78. GEOFFREY BEST, *WAR AND LAW SINCE 1945* (1994).

79. III Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, art. 130, 75 U.N.T.S., 39 U.K.T.S. Cmnd. 550, 47 A.S.I.L. Supl. 119-177 (1953).

80. BEST, *supra* note 78, at 165.

81. ALLISON, *supra* note 3, at 178.

82. Cf. Haas, *Epistemic Communities*, *supra* note 7, at 188-89 ("[a]s epistemic communities obtain and consolidate influence in different governments, national preferences and policies will come to reflect the epistemic beliefs."); I. WILLIAM ZARTMAN & MAUREEN R. BERMAN, *THE PRACTICAL NEGOTIATOR* 37-38 (1982).

conducted by a working group of which Jack Hickerson was the senior member, Bill Galloway the junior officer, and [which included] myself and two other members of the U.S. team. The other members were ministers or political counselors of the various embassies here.

That was before the days of air conditioning, and we met all summer in our shirtsleeves around a table in one of the offices of the State Department. By the time the summer was over we had a treaty in pretty good shape, and all knew each other intimately, trusted each other, and we were all used to working together. Derick Hoyer-Miller, who was the British minister and the senior member of the British representatives in the working group, stated something which we later called the NATO spirit. One day in a working group he made a proposal. No one remembers what it was, but nobody liked the proposal and we all said so rather bluntly. And Derick said, all right, those are my instructions from London. I'll tell them that I made my pitch and that it was shot down, and that this is what everybody else thinks that the answer should be.

So we worked out collectively what we thought the best arrangement was. Derick referred it back to London and got approval on it, and we all referred it to our various governments and got approval.

That developed into a quite a negotiation technique. No matter what any of us had by the way of instruction, we would try to find what we thought was the right answer, and then tried to get our respective governments to agree to it. That worked out very well indeed.⁸³

Regarding customary international law, I contend its coherence is due to the fact that individuals belonging to the same epistemic community create it. As far as those individuals sharing knowledge about international law are committed, in different degrees, to promote outcomes in its terms and are successful in doing so both within the bureaucratic decision making process of their states or organizations and while acting in the international arena on their behalf, the actions regarding international law attributed to

83. ZARTMAN, *supra* note 82, at 37-38.

their states or organizations do converge.⁸⁴ The sum of these converging actions constitutes general practice.

It seems that international lawyers and diplomats form the epistemic community which creates international law. They share, on broad terms, certain number of professional beliefs: a similar conception of international law, its principles, sources and procedures.⁸⁵ The existence of these shared beliefs is evidenced by the fact that most introductory manuals to international law argue the same points, with the same examples, and, usually, even following the same structure. Similar syllabi and teaching methodologies in international law lectures around the world reinforce the homogeneity of the shared knowledge,⁸⁶ while the leading scholars systematize it and help to propagate it. Thus, if these beliefs are generally effective in international relations, is because those professionals are able to advance them through their state's or organization's policy-making processes.

These individuals also form a transnational network of professionals, as it is proved by the extended membership of professional organizations such as the American Society of International Law⁸⁷ and the existence of activities such as the annual meeting of Foreign Ministries'

84. Cf. M. SORNARAJAH, *THE INTERNATIONAL LAW OF FOREIGN INVESTMENT* 210-11 (1994) (arguing the investment protection law has been created by a 'club of jurists': "[o]verseas tribunals are inclined to apply norms developed by jurists from capital-exporting states which are favorable to investment protection . . . Statements that arbitrators belong to a club that reinforces attitudes of its members are beginning to appear.").

85. See Jutta Brunnée & Stephen J. Toope, *Environmental Security and Freshwater Resources: Ecosystem Regime Building*, 91 AM. J. INT'L L. 26, 34 (1997) ("It might even be argued that international lawyers themselves form something akin to an epistemic community, because they promote values through specific principles, such as the ecosystem principles posited in this paper, which can guide the evolution of regimes and ultimately gain normative significance."); see also Byers, *supra* note 75, at 130 ("As a social institution the process of customary law is above all a set of shared beliefs, expectations or understandings held by the individual human beings who govern and represent states. Like all institutions, and the international system itself, it is a set of ideas.").

86. See generally JOHN KING GAMBLE, *TEACHING INTERNATIONAL LAW IN THE 1990S* (1992).

87. Charlotte Ku, *Message from the Executive Director*, ASIL NEWSLETTER (The Am. Soc'y of Int'l Law, Washington, D.C.), Mar.-May 1996, at 4.

Through membership in the American Society of International Law, individuals gain access to a specialized and well-recognized network - both of other ASIL members and of members of organizations comparable to the society It is the formation and maintenance of this network which are a principal task of the leadership and staff of the organization. The network further identifies opportunities to motivate and to mobilize members to take leadership roles in their communities and professional life to foster the use and study of international law.

legal advisors during the General Assembly of the United Nations.⁸⁸ Their regular contact both through intergovernmental meetings and private associations provides them with an opportunity to form acquaintances, share information and create common values, all of which facilitate the formation of coalitions for the promotion of specific policy objectives.

It seems also that they share, on very broad basis, the same values and policy objectives. Most international lawyers and diplomats seem to be committed to promoting the rule of law in international relations: "world order through law."⁸⁹ Nevertheless, some empirical research seems necessary to assess the extent of this commitment and whether it is transformed into specific policy recommendations.

On the other hand, subgroups of this network clearly have shared values and policy objectives. For instance, a coalition including legal experts of the International Red Cross; Professor H. Lauterpacht, from Cambridge; Professor Graven, from Geneva University; Max Huber, former judge of the Permanent Court of International Justice; Captain Mouton, a member of The Netherlands's Supreme Court; and Coronel Phillimore, a legal advisor to the British Government and a member of the prosecution in Nuremberg, developed and successfully promoted the concept of *grave breaches* during the 1949 Geneva Conference.⁹⁰ Another example is provided by the coalition of Foreign Ministries' legal advisors, legal counselors in several permanent missions to the United Nations and the World Health Organizations, and private international lawyers belonging to several NGOs, that was able to advance two requests for advisory opinions on the use of nuclear weapons to the International Court of Justice.⁹¹ Finally, M. Sonarajah contends that a similar coalition is acting in the area of protection of foreign investment.⁹²

88. Miguel Angel González Felix, *Fifth Legal Advisers' Meeting at UN Headquarters in New York*, 89 AM. J. INT'L L. 644, 644-49 (1995).

89. Cf. Reisman, *supra* note 43, at 123 (arguing that: Jurists are distinctive among them [scholars] in that they alone undertake, explicitly, to intervene in the social process that has been examined in order to secure changes in the pattern of authoritative decision so that it will henceforth discriminate in favor of a particular party or, one hopes, in favor of the common interest).

90. BEST, *supra* note 78, at 160-65.

91. Manfred Mohr, *Advisory Opinion of the International Court of Justice on the Legality of the use of Nuclear Weapons Under International Law, a Few Thoughts on its Strengths and Weaknesses*, 316 INT'L REV. OF THE RED CROSS 92, 92-93 (1997).

In May 1992 an international campaign was launched in Geneva by non/governmental organizations (NGOs) under the title *World Court Project*. The original promoters of the campaign were the long-standing International Peace Bureau (IPB) in Geneva, the well-known International Physicians for the Prevention of Nuclear War and the International Association of Lawyers Against Nuclear Arms, formed at the end of the

V. CONCLUSION: THE NATURE OF INTERNATIONAL LAW

If the previous argument, that international law is a set of norms created by the members of an epistemic community, for promoting their parochial interests, goals and values in the international arena, were to be accepted; it would be necessary to reconsider the nature of international law. Conceiving it just as a system of law based on the will and practices of the states would appear unsatisfactory. Therefore, I suggest that international law should be conceived as an international regime created by an epistemic community.

The concept of international regimes, as used by political scientists and international relations scholars, refers to "sets of implicit or explicit principles, norms, rules and decision-making procedures around which actors' expectations converge in a given area of international relations."⁹³ This concept, in principle, does not coincide with that of international law.⁹⁴ It does not require the norms to be legally binding or have a legal

1980s. Some 10 more (international) NGOs, including Greenpeace International, later joined in. What at the outset looked like rather unpromising initiative by a few determined "peace activists" soon developed into a worldwide movement made up of numerous non-governmental and governmental players.

See also Legality of the Threat or use of nuclear weapon Advisory Opinion, *Dissenting Opinion of Judge Oda*, I.C.J. § 8 (1996), UN Doc. A/51/218 pp. 94-95 (1996), 35 I.L.M. 809 & 1343 (1996) (explaining the previous involvement of the NGO's).

92. *See* SORNARAJAH, *supra* note 84, at 354-55.

There are no objective criteria by which the principles of this so-called legal system [*lex mercatoria*] can be identified and no bench-mark by which it could be tested except its acceptance by a select group of European arbitrators and scholars who promote it through their incestuous writings. Systematic damage is done by efforts to create investment protection through the formulation of spurious doctrines by scholars totally committed to the protection of the multinational corporations and hostile to the interests of the developing countries. It is unlikely that these efforts will cease.

93. Krasner, *supra* note 8, at 2; *see* MARK W. ZACHER & BRENT A. SUTTON, GOVERNING GLOBAL NETWORKS: INTERNATIONAL REGIMES FOR TRANSPORTATION AND COMMUNICATIONS 14-15 (1996); *cf.* Volker Rittberger, *Research on International Regimes in Germany: The Adaptive Internalization of an American Social Science Concept*, in REGIME THEORY, *supra* note 5, at 10 - 11.

94. *Cf.* Brunnée, *supra* note 85, at 31 (using a more restrictive definition of regimes than the one used in this paper: "Regimes as understood in international relations theory, because of their grounding in state practice, provide building blocks for the construction of more specific (and binding) legal regimes. We call these relatively informal and nonbinding regimes *contextual regimes* for they provide a setting in which binding normativity can emerge."); *but see* Byers, *supra* note 75, at 128-36 ("To an international lawyer this phenomenon [regimes] sounds like international law by another name. Indeed, it is international law, with the important twist that the regime theorists, unlike international lawyers, are directly concerned about the relationship between power and sets of rules or procedures."); YOUNG, *supra* note 69, at 184-211; Kenneth W. Abbott, *Elements of a Joint Discipline*, 86 A.S.I.L. PROC. 167-72 (1992); Burley, *supra* note 2, at 220; Oran R. Young, *Remarks*, 86 A.S.I.L. PROC. 172-75 (1992).

character.⁹⁵ On the contrary, it purports to include norms, rules, principles and decision making procedure that do not necessarily belong to international law, such as non binding guidelines, secret or illegal agreements and even implicit agreements for the division of areas of influence.⁹⁶ Furthermore, regimes theory considers separate sections of international law, or sets of norms, as separate international regimes. Thus, for example, the *international shipping regime*, formed by over fifty international instruments regulating damage and compensation,⁹⁷ and the *Jan Mayen-Iceland Marine Resources regime*,⁹⁸ based on a treaty between Iceland and Norway,⁹⁹ are considered totally independent regimes.

Nevertheless, this kind of approach is familiar to international law scholarship. It is usual to describe areas of the law as separate unties: Law of the Sea, Laws of War, International Human Rights Law, the Hague System for the Settlement of Disputes, the Regime of the High Seas, Diplomatic Protection.¹⁰⁰ In addition, as far as general international law constitutes an indispensable framework for each particular international regime¹⁰¹ and provides some of their defining characteristics,¹⁰² it constitutes

95. Robert O. Keohane, *The Analysis of International Regimes: Towards a European-American Research Programme*, in REGIME THEORY, *supra* note 5, at 27-28 (arguing that a defining characteristic of regimes is their effectiveness).

[T]he most fundamental issue is whether regimes are to be identified on the basis of *explicit rules and procedures*, or on the basis of *observed behavior*, from which rules, norms, principles, and procedures can be inferred. Defining regimes simply in terms of explicit rules and procedures risks slipping into the formalism characteristic of some traditions of international law: that is, purely nominal agreements could be considered to be regimes, even though they had no behavioral implications. The futile and empty Kellogg-Briand Pact of 1927, to *outlaw war*, could on a formalistic definition be considered an international regime.

Rittberger, *supra* note 93, at 11.

96. See YOUNG, *supra* note 69, at 200-02; Friedrich Kratochwil, *Contract and Regimes: Do Issue Specificity and Variations of Formality Matter?*, in REGIME THEORY, *supra* note 5, at 73, 85-91.

97. See ZACHER, *supra* note 93, at 52-54.

98. See YOUNG, *supra* note 69, at 61-63.

99. Agreement on the Continental Shelf between Iceland and Jan Mayen, Oct. 22, 1981, Iceland-Norway, 21 I.L.M. 1222 (1982).

100. Cf. BROWNLIE, *supra* note 13, at 528 (arguing that:

International Law is not a system replete with certain nominated torts or delicts, but [that] the rules are specialized in certain respects. Thus reference may be made to the source of harm, such as unauthorized acts of officials, insurrections, and so on, or to the object and form of harm, as, for example, territorial sovereignty, diplomats and other official agents, or injury to nationals).

101. See ZACHER, *supra* note 93, at 2.

Without states' acceptance of each other's sovereign authority with defined territorial domains, their network of diplomatic conventions for communication and international

an integral element of each of them. Hence, as far as general international law is a set of norms shared among several independent regimes, it can be described as a *meta regime*.¹⁰³

Thus, I submit, particular sets of international law norms constitute several specific international regimes, characterized by the actor's perception that their norms are legally binding (*opinio juris*), while the core of general international law; including, possibly, its general principles, definitions about its subjects and sources, and basic principles on law of treaties and settlement of international disputes; constitutes a meta regime.

Once international law is conceptualized as an international regime created by an epistemic community, it is possible to apply to it, in order to understand its development, the theoretical elaboration of regimes theory. This theory contends that, when the distribution of power in the international society favors a state or group of states, norms are created by the action of actors and epistemic communities through the machinery of that hegemonic power, and that those norms will persist as long as that state maintains its dominant position.¹⁰⁴ When the power is distributed homogeneously or in several centers, the norms, according to this theory, are created by the action of the members of epistemic communities in the different governments, and they persist as far as those actors retain their

law-making, and their obligations to comply with international agreements and to assure compliance by their citizens, it would be impossible to generate the kinds of specific regimes that are increasingly prevalent and important in many spheres of international relations.

102. Cf. Kratochwil, *supra* note 96, at 80-1.

Although many regimes are likely to contain rules and norms that serve this function [increasing transparency and lowering transaction costs], it is difficult to call such provisions by themselves a regime, unless we refer directly to contracting itself as a regime. At a minimum, a regime requires a relationship that emerges from a long-term interactive contracting. This seems to be required for two reasons. First, the parties to an incomplete contract must agree not only on rules regulating specific actions, but also on much more general principles which impose upon them duties to settle future disputes. Consequently, it is quite understandable that these principles have been held to supply the 'basic defining characteristics of a regime', or even its 'nature'. *Id.*

103. See generally ZACHER, *supra* note 93, at 14 ("Norms are also often shared among specific regimes, and when the norms are the same or very similar among a number of regimes, it is possible to say that a meta regime exists.").

104. See Haas, *Epistemic Communities*, *supra* note 7, at 187 ("Under conditions of uncertainty, when the international power is concentrated in one state, and when epistemic communities have successfully consolidated influence in the dominant state . . . [t]he regime would still be created through the intercession of the hegemon, but its substance would reflect epistemic consensus.").

influence.¹⁰⁵ When there is a change in the distribution of power, the norms may persist if some members of the epistemic community that created them are able to acquire bureaucratic positions in the new dominant powers. Nevertheless, if the knowledge of such community loses its validity, the regime will decay. This theory further argues that both the variations in the national policies and the different degrees of compliance with the norms are due to the different degrees of penetration and influence of the members of the epistemic community in the decision making processes of each state.¹⁰⁶

This approach can provide some insights on the development of international law. First, it can explain its main trends. Thus, for example, the acceptance of international law by Third World Countries and Non-Western States¹⁰⁷ can be explained as the result of the penetration of members of the epistemic community of international law practitioners into the growing bureaucracies of those states.¹⁰⁸ Second, it can explain particular incidents in the development of the law. For instance, it would attribute the negotiations on the Law of the Sea since 1967, including the entrance into force of the 1982 United Nations Convention on the Law of the Sea, and the negotiation of two implementation agreements,¹⁰⁹ to the

105. *See id.* at 188-89.

106. *See id.* at 189.

National positions would vary according to the extent of penetration by epistemic communities, or the sensitivity of policies in that country to policies in a country already influenced by the epistemic community. . . . Policies and linkages may be quite sophisticated, reflecting the quality of its beliefs. The extent to which such lessons are accepted and converted into new policies in different countries, as well as regime compliance, are subject to the ability of members of the epistemic community to occupy key bureaucratic slots and to persuade others of their preferred policies.

107. *See generally* CASSESE, *supra* note 17, at 69-70.

108. *Cf.* ZARTMAN, *supra* note 82, at 226.

By now the world has established an international diplomatic culture that soon socializes its members into a similar behavior. Even the Chinese have learned to play the U.N. game by its rules, newly independent countries such as the African nations attach themselves to their former colonial delegations for general advice until they have learned the ropes, and groups of delegates teach the newer members about diplomatic ways originally developed for a European state system. It is difficult to maintain, as Nicolson and Morgenthau did, that the Western system of diplomacy and negotiation worked out over the centuries is in danger of imminent destruction at the hands of people who cannot comprehend our ways; to the contrary, the new nations have learned the Western ways well and are using them to their own purposes.

109. United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, U.N. Doc. A/CONF.62/122 (1982), *reprinted in* UNITED NATIONS, OFFICIAL TEXT OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA WITH ANNEXES AND INDEX, UN Sales No. E.83.V.5 (1983), 21 I.L.M. 1261 (1982); Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea, *adopted* July 28, 1994,

activities of a epistemic community of international lawyers and practitioners,¹¹⁰ formed around Ambassador Pardo,¹¹¹ and which grew during the following negotiations.

On the other hand, while this approach can provide a deeper understanding of the nature of international law and its role in international relations, it does not challenge the normal practice of international law. Its conclusions are limited to the theory of international law, not to the *normal science*¹¹² of international law. International law's methods do not lose their validity because they are the methods reserved for a community that uses them to promote the values and goals of its members. On the contrary, they are valid precisely because the members of such a community accept them, and the conclusions reached using them, as valid. Hence, international lawyers would have to continue arguing international law, using legal terms and legal methods, in order for their conclusions to be accepted as relevant statements of the law by other members of their community and, as a consequence, to be influential in promoting their own goals and values.

Finally, this conception of international law does have an ethical consequence. It highlights the role that international lawyers, including diplomats, legal advisors and academicians, play in international relations. It reveals that these individuals have certain values and goals regarding how international relations should be, and that they work to assure that those values are embodied in the actual practice attributed to their states or international organizations. Thus, it would require these professionals to acknowledge their role and relevance and to be aware of the direction that they are imprinting upon the international society. This new awareness calls for higher level of responsibility on their part.

Politicians and diplomats were privileged inhabitants of a world of unreality, an unreality which was life-threatening on a grand scale, a world which nevertheless seemed to its

G.A. Res. 48/263 (1994), 33 I.L.M. 1309 (1994); Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, *adopted* Dec. 5, 1995, G.A. Res. 50/24 (1995), U.N. Doc. A/CONF.164/37; U.N. Doc. A/50/550, annex I.

110. Cf. KEOHANE, *supra* note 6, at 114-16, 125, 148 - 50.

111. Cf. CASSESE, *supra* note 17, at 379-84.

112. THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2nd ed. 1970) (defining a normal science as the scientific endeavor which uses a paradigm, *i.e.*, (at vii) the "universally recognized scientific achievements that for a time provide model problems and solutions to a community of practitioners," as its criteria for determining the validity any further research.).

inhabitants, in characteristic paranoid fashion, to be perfectly real and natural and inevitably and right. It followed that specialists in the study of so-called international relations were studying a form of pathological behavior. And it followed also that the role of international lawyers had been to seek to rationalize and regularize pathological behavior.¹¹³

113. ALLOTT, *supra* note 1, at xii.