

Overcoming Temptations to Violate Human Dignity in Times of Crisis: On the Possibilities for Meaningful Self-Restraint

Steven R. Ratner^{*}

The codification of international human rights law and international humanitarian law, and the accession to those treaties by a large majority of states, does not at first glance seem to have any significant effect upon states' behavior in situations of crisis. Any understanding of the prospects for such law in these situations requires an appraisal of both the motivations of states in concluding these treaties and the pressures on them to ignore them. This paper analyzes those motivations and temptations through the framework of precommitment theory, a component of rational choice theory, originally articulated by Jon Elster and Thomas Schelling. The metaphor of Ulysses offers a useful way to address three different dimensions of the purposes that states join treaties: (1) beliefs, i.e., the state's attitude toward the norms in the treaty; (2) predictions, the state's concerns about its own future behavior; and (3) interactions, i.e., the extent to which the state is trying to influence or bind other states. And it permits linking those motivations to the propensity of states to comply at a later time.

* Albert Sidney Burleson Professor in Law, University of Texas School of Law. I appreciate comments from participants at the December 2002 Cegla conference, Tel Aviv University Faculty of Law, where this paper was first presented, as well as from participants at colloquia at Boalt Hall School of Law and Vanderbilt Law School in April 2003. I am also grateful for suggestions from my colleagues Lee Fennell, Karen Engle, and Sarah Cleveland.

The paper offers a four-part typology for why states commit to such treaties, contrasting it with notions from contemporary international relations theories. It then explores the contrasting approaches of compliance theories and international law doctrine to the temptation of states to violate treaties and elaborates the contributions of the precommitment framework. Building upon that framework, it proposes a set of strategies that those concerned with compliance might explore for making international law more relevant when governments seem most inclined to discount it.

INTRODUCTION

Can states really be expected to respect treaties protecting human dignity when confronting an internal or external enemy? The history of the last forty or fifty years leaves ample room for pessimism. The codification of key instruments of international human rights law and international humanitarian law and the accession to those treaties by a large majority of states do not, at least at first glance, seem to have any significant effect upon states' behavior in situations of crisis. Human rights treaties, meant to constrain states in peacetime, are flouted by many governments even in the absence of a national crisis. More significantly, those states otherwise predisposed to comply with human rights treaties have found ways to evade their basic provisions when they see a compelling need to do so. Humanitarian law, the principal purpose of which is to provide a minimal level of protection of human dignity in times of interstate and civil war, is often war's first victim.

These treaties, more than those on the myriad other issues in international law, are specifically directed at protecting *individuals* from the coercive power of the state. But the very imbalance of power between the individual and the state that makes these accords so important also tempts nations to violate them. When the individual is seen as an enemy and the state retains the key instruments of coercion, whether they be soldier, tanks, or jails, why comply?

Any understanding of the prospects for such law in these situations requires an appraisal of both the motivations of states in concluding these treaties and the pressures on them to ignore them. International law scholars and international relations theorists have addressed some aspects of these questions in recent works on compliance. Scholars have reached contrasting conclusions about patterns of compliance, the reasons for them, and their consequences. International relations theorists tend to seek explanations for signing treaties and for their observance. International law scholars tend to

come in two varieties; those who do not worry too much about compliance and those who devise systems to promote it. But those in both camps who are sympathetic to the project of constraining state behavior through legal norms run into the national emergency as a sort of vanishing point for international law. Just as the norms governing recourse to military force (*jus ad bellum*) seem the least effective of all international rules — giving rise to (unjustified) ontological doubts about the entire field — so the national crisis, originating without or within the state, seems to create a whole set of circumstances in which compliance with any norms, but in particular those protecting individuals, seems at best wishful thinking.

In this essay, I consider the possibilities for holding states to their human rights and humanitarian law commitments during national emergencies. I will make reference to a variety of theories from international relations and international law, but my principal framework is one outside of both disciplines: the notion of self-binding or precommitment. This concept, most lucidly articulated by Jon Elster but with origins in the work of Thomas Schelling, zeroes in on the central issue: temptation, or, as Aristotle described it, incontinence, where an otherwise good person gives into certain immoral desires.¹ The Elster and Schelling framework explains why and how individuals might wish to tie their hands at time T1 in order to prevent themselves from doing things at time T2 in the future. Elster's now-famous use of the Ulysses story has become the paradigmatic elaboration of the concept of self-binding against temptation, an idea that he and others have applied to issues ranging from quitting smoking to deterring foreign armies.² Their metaphor — indeed model — offers a richly textured way of understanding the extent to which states can be expected to observe human rights and humanitarian law in the crunch.

Part I of this paper offers an overview of the reasons states enter into such treaties, first by considering the perspectives of contemporary international relations and international law theories, and then superimposing

1 7 Aristotle, *Ethics* 226 (J.A.K. Thompson & Hugh Tredennick trans., Penguin Books 1976) (1953). The Greek term is *akrasia*:

a type of man who is impelled by his feelings to deviate from the right principle, but who, although mastered by his feelings to the extent of not acting in accordance with the right principle, is not so completely mastered as to be capable of the conviction that he should pursue such pleasures unrestrainedly.

Id. at 245-46.

2 Jon Elster, *Ulysses and the Sirens: Studies in Rationality and Irrationality* (1979) [hereinafter *Elster, Ulysses and the Sirens*]; Jon Elster, *Ulysses Unbound* (2000) [hereinafter *Elster, Ulysses Unbound*].

upon them the notion of precommitment. Part II examines the temptations states face in violating those precommitments. It explores the contrasting approaches of compliance theories and international law doctrine, noting the shortcomings of each and elaborating upon the contributions of the precommitment framework. Part III builds on the self-binding framework to consider strategies that those concerned with compliance might explore for making international law more relevant when governments seem most inclined to discount it.

Before beginning, I should point out that my notion of the national crisis or emergency is quite broad. It clearly includes the sorts of armed conflict that trigger the application of the 1949 Geneva Conventions and 1977 Protocols, as well as situations in which a state has proclaimed a national emergency under the International Covenant on Civil and Political Rights.³ But it also includes additional situations, such as those involved in the ongoing "war on terrorism" by the United States and other nations. As Oren Gross and Fionnuala Ni Aolain have pointed out, the line between emergency and normalcy is not a clear one, and the categories established by international law do not encompass the myriad crisis situations that states may face or perceive they are facing.⁴

As a second caveat, it bears mention that the entire notion of compliance carries with it certain (often hidden) assumptions about the nature and purpose of international norms. Norms can differ in terms of their clarity, authority, and control mechanisms used to induce compliance.⁵ In prescribing norms for different aspects of international affairs, states and non-state actors can have different expectations not only of the prospects for compliance, but of the meaning of compliance itself. As a result, the scholar discerning and evaluating patterns of compliance should be aware of the difference between such an endeavor in the area of human rights or humanitarian law — areas in which norms are often open-textured and are understood to be facing great

3 Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, arts. 2-3, 75 U.N.T.S. 135, 136-38 [hereinafter Geneva Convention III]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflict, June 8, 1977, art. 1, 1125 U.N.T.S. 609, 611; International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 4, 999 U.N.T.S. 171, 174 [hereinafter ICCPR].

4 Oren Gross & Fionnuala Ni Aolain, *Emergency, War and International Law — Another Perspective*, 70 *Nordic J. Int'l L.* 29 (2001).

5 W. Michael Reisman, *The Concept and Functions of Soft Law in International Politics*, in 1 *Essays in Honor of Judge Taslim Olawale Elias* 135, 135-36 (Emmanuel G. Bello & Bola A. Ajibola eds., 1992).

obstacles to immediate implementation — and an endeavor related to the trade, monetary, or environmental areas.⁶ More generally, relevance or influence, rather than compliance, seems the more important gauge of the role of law in international affairs.⁷ In this essay, I use the term compliance as a convenient, if not always precise, marker for the idea of rough conformity between a state's behavior and the basic requirements, if not all the details, of the relevant treaties.

I. WHY STATES ENTER INTO HUMAN RIGHTS TREATIES

Any analysis of the prospects for state compliance with treaties protecting human dignity must begin with the reasons states enter into such treaties in the first place. These motives vary significantly and tell us much about how the state will react to these obligations in a situation of crisis.

A. Contemporary Explanations

In recent years, a variety of scholars have offered theories as to why states choose to legalize their relations through treaties (or soft law). Kenneth Abbott and Duncan Snidal, following the work of Robert Keohane,⁸ have described two general views on the treaty formation process. First, a rationalist position regards treaty regimes as solutions by states to cooperation or coordination problems; states enter into treaties in the hope that the regimes they create will reduce transaction costs and provide various concrete incentives for states to act in a certain way, or, impose costs upon them if they do not. Second, a normative position regards states as entering into treaties based on the desires of actors within and across states to create shared communities that will operate by persuasion or internalization of norms.⁹

6 I appreciate this insight from Henry Steiner.

7 See generally Steven R. Ratner, *Does International Law Matter in Preventing Ethnic Conflict?* 32 N.Y.U. J. Int'l L. & Pol. 591 (2000); see also Beth A. Simmons, *Money and the Law: Why Comply with the Public International Law of Money?*, 25 Yale J. Int'l L. 323, 332-35 (2002) (on limits to the notion of compliance); Benedict Kingsbury, *The Concept of Compliance as a Function of Competing Conceptions of International Law*, 19 Mich. J. Int'l L. 345 (1998).

8 Robert O. Keohane, *International Relations and International Law: Two Optics*, 38 Harv. Int'l L.J. 487 (1997).

9 See Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 Int'l Org. 421 (2000).

Although Abbott and Snidal correctly point out that these two visions are complementary rather than contradictory, they go on to endorse the former and offer an essentially interest-based model for the conclusion of treaties.

This interest-based model, which is supported by other international relations scholars, considers the treaty process as a way for states to make credible commitments to one another. In particular, it posits that states enter into legal agreements because: (a) they want other states to act in a certain way and (b) they believe that those other states will not do so unless the latter gain something from the first state and are certain that it will be very costly for the first state to change its mind.¹⁰ In this framework, as stated by Charles Lipson, "treaties are a conventional way of raising the credibility of promises by staking national reputation on adherence."¹¹ These scholars then identify the increased costs that such legalization entails, ranging from reputational costs, as Lipson emphasizes, to monetary costs, if a regime (like the WTO) has hard enforcement mechanisms.

This now-conventional international relations account of why states enter into treaties has limits, however, with respect to understanding human rights treaties (though, as discussed below, it helps explain why states sign humanitarian law treaties). It considers such treaties almost exclusively as commitments between states and takes little account of the nature of these treaties as creating protections for individuals. Although this model recognizes that human rights treaties place special so-called sovereignty costs on states because they regulate quintessentially domestic affairs,¹² it does not regard this factor as ultimately affecting the reasons states enter into legal commitments. Clearly, human rights agreements create legal obligations between states, and they are, in that sense, meant to be credible commitments. But the two-part reasoning above represents only one of a set of reasons states actually enter into these treaties. States do not enter into them solely — or even substantially — because they see them as *necessary in order to get another state to act in some way that the first state has ex ante determined*.

The alternative to the "credible commitment" view, based on the idea of mobilization of internal groups and transnational normative communities, provides an important set of additional explanations in the area of human rights and humanitarian law. This model regards treaty ratification as part of a "norm cascade" in which states are induced by internal and external actors

10 *Id.* at 426-27.

11 Charles Lipson, *Why Are Some International Agreements Informal?*, 45 *Int'l Org.* 495, 511 (1991); Ratner, *supra* note 7, at 648-51.

12 Abbott & Snidal, *supra* note 9, at 437.

to join a normative community.¹³ But this lens also results in a somewhat distorted picture, since it discounts the interests of states and the inter-state component of such treaties. States do have interests in signing onto human rights treaties, even if they do not fit in the two-step model posited by most international relations theorists.

B. The Precommitment Alternative

Like the various strands of international relations theory, precommitment theory is essentially inductive. But rather than observing the actions of states, international organizations, and non-state institutions, precommitment theory derives from studies of the actions of individuals (although in later works, attempts have been made to extend the insights to polities as well). Precommitment is a framework for understanding the reasons that, and the methods by which, individuals and communities seek to bind themselves, in the sense of preventing themselves from having full liberty of action at a time in the future. The basic concept, therefore, is immediately relevant to the problem of treaties, though, as will be shown, not all treaties are precommitments as defined by Elster.

The core criterion of a precommitment is the purpose of the precommitting actor — it consists of a strategy undertaken principally to restrain oneself *from doing something that one would otherwise do* because such restraint will itself directly improve one's future welfare.¹⁴ I say "principally" and not "exclusively" because Elster has labeled one behavior as a precommitment even when the pertinent actor may not have such a concern. This is the so-called strategic precommitment, derived from Schelling's work, in which an individual binds himself not out of fear of what he might do, but to make a credible threat to others that he will not do something. The key example is the army that burns its bridges behind it to prevent its own retreat and thus

13 Stephen C. Ropp & Kathryn Sikkink, *International Norms and Domestic Politics in Chile and Guatemala*, in *The Power of Human Rights: International Norms and Domestic Change* 172, 191 (Thomas Risse et al. eds., 1999) (ratification linked to "global and regional normative developments") [hereinafter *The Power of Human Rights*].

14 Elster, *Ulysses and the Sirens*, *supra* note 2, at 37-47; Elster, *Ulysses Unbound*, *supra* note 2, at 4-7.

frighten the enemy.¹⁵ The army might fear that with the bridges intact it would be tempted to retreat, but the real reason to burn the bridges is to demonstrate the impossibility of retreat to the other side. This is related to the international relations idea of credible commitment; the state binds itself in order to induce another actor to change its behavior.¹⁶

Setting aside the strategic precommitment, Elster identifies four reasons that individuals enter into precommitments — to overcome future passion, to overcome future self-interest, to overcome hyperbolic discounting of time, and to prevent preference change.¹⁷ For any of these reasons, the intent of the person is essentially focused on the self — it is about binding oneself. This characterization of precommitment has an important explanatory purpose, in that it excludes actions by which individuals are not concerned with binding themselves, but only with binding others. This may, in fact, describe much behavior that resembles precommitment but is not actually precommitment. I will return to this point later.¹⁸

Applying precommitment theory to the actions of states has its hazards.¹⁹ First, the state itself is not unitary, but rather is comprised of numerous actors, governmental and non-governmental, each of whom may have very different motivations for favoring self-binding or different perspectives on what has been agreed to. Governmental actors may not regard the treaty as self-binding, while non-governmental organizations do view the treaty this way. Or some in government may have no concerns about what the state might do in the future, while others might have just such fears.

Second, it is difficult to speak of self-binding by the international community, since no such community exists. The so-called "international community," while a useful rhetorical and normative construct, is no more than that — a construct. It does not correspond to some clearly identifiable set

15 See, e.g., Thomas C. Schelling, *The Strategy of Conflict* 21-52 (1960); Jon Elster, *Intertemporal Choice and Political Thought*, in *Choice Over Time* 35, 39 (George Lowenstein & Jon Elster eds., 1992); James D. Fearon, *Signaling Foreign Policy Interests: Tying Hands Versus Sinking Costs*, 41 *J. Conflict Resol.* 68 (1997).

16 Abbott & Snidal, *supra* note 9, at 426 (citing game theory as basis for credible commitment idea). It is not, however, the same thing: the credible commitment of IR theory assumes that the state binding itself does so as part of a deal to give the other state something that the latter seeks. In the strategic precommitment, A's self-binding is not part of such a package.

17 Elster, *Ulysses Unbound*, *supra* note 2, at 6.

18 *Id.* at ix (quoting Jens Arup Seip to the effect that people do not try to bind themselves, but others).

19 For further thoughts, see Steven R. Ratner, *Precommitment Theory and International Law: Starting a Conversation*, 81 *Tex. L. Rev.* 2055 (2003).

of individuals, groups, or nations. In a system as diverse as the international arena, a set of actors may in fact be seeking to tie the hands of others, rather than their own hands. Thus, when one witnesses a group of states entering into what appears to be a self-binding arrangement, it might be an attempt by the group to constrain itself qua group; it might be an attempt by some members of the group to constrain others; or it might be a joint effort by individual states, by treaty or otherwise, each of which is trying to constrain itself.

Third, the problem of enforcement makes precommitment theory more difficult to apply in practice. States cannot literally tie themselves, nor have themselves tied, to the mast. Thus, while Ulysses could untie himself only with the help of others, states usually have no such constraints.

C. Precommitment and Treaties Protecting Individuals

Despite these obstacles, precommitment can serve a number of important functions in understanding why states enter into treaties and why they are tempted to violate them. With respect to the first stage, making commitments, the theory allows us to go beyond rationalist international relations theory's uni-causal approach to the making of international agreements — states make credible commitments only because they are necessary to get other states to do something the former group wants — by identifying and disaggregating other motivations. It enables us to address three different dimensions of the motivation for joining treaties: (1) *beliefs* — whether the state agrees with and has some initial belief in the norms in the treaty; (2) *predictions* — whether the state is trying to bind itself because of a concern about its own future behavior; and (3) *interactions* — how other states affect its decision and whether the state is trying to influence or bind them.

Seen from the perspective of self-binding, one can posit four stances, or starting positions, for states entering into human rights and humanitarian law treaties. (As a shorthand, I shall call these *treaties on human dignity*):²⁰

- First, some states sign these treaties with motivations that have little or nothing to do with human dignity. Their primary motivation is to enhance their reputation, score propaganda points, or curry favors with others. This would explain the positions of many of the large number of states that are parties to the International Covenant on Civil and Political Rights or the Geneva Conventions but have terrible human rights records or pay

²⁰ This categorization is based upon a similar list of purposes that apply to all treaties, set forth in *id.* at 2058-60.

little heed to the latter in times of armed conflict.²¹ If, in the end, they do carry out their obligations, it will not be because of precommitment — i.e. because they saw the treaty ratification as a way to prevent themselves at time T1 from violating human dignity — but wholly because of some later decision. From the perspective of precommitment theory, the state has not made a precommitment because it is not fundamentally concerned with tying its own hands to avoid succumbing to temptation. Rather, it is tying its hands in exchange for a benefit from others.

One interesting subcategory within this group of states seems to have a motivation that corresponds to the credible commitments idea of international relations theory — states entering into human rights treaties as part of a specific deal that provides them some other, non-human rights-related benefit. Thus, states in Central and Eastern Europe joined the European Convention on Human Rights, and later the Council of Europe’s Framework Convention on National Minorities, because (at least in part) the EU made clear that such membership was one of the political requirements for EU admission.²²

- Second, some states in the humanitarian law area are likely signing those treaties without a concern about their own future potential to violate, but rather because they want to ensure that treaty partners observe humanitarian law in future conflicts against them.²³ This reciprocity strategy corresponds to the international relations theory above and lies at the core of many treaty relationships outside human rights law; state A commits to an agreement because it is necessary to get state B to commit to act a certain way that benefits state A. Indeed, it explains why states entered into humanitarian law treaties long before they entered into human rights treaties — because they saw the former as a bargain that would ultimately redound to the benefit of their troops or civilians during wartime. It also explains why the United States, as the state most likely to deploy forces abroad, has the strongest interest in a robust humanitarian law. At the same time — as in the first

21 Parties to the ICCPR include Algeria, Angola, Iran, Iraq, Laos, Libya, Sudan, and Uzbekistan. Status of Multilateral Treaties Deposited with the Secretary-General, available at <http://untreaty.un.org>.

22 Cf. Treaty on European Union, Dec. 24, 2002, art 6(2), O.J. (C325) 1,12 (2002) (requiring Union members to respect ECHR rights); Manfred Nowack, *Human Rights ‘Conditionality’ in Relation to Entry to, and Full Participation in, the EU, in The EU and Human Rights* 687 (Philip Alston ed., 1999).

23 See James D. Morrow, *The Laws of War, Common Conjectures, and Legal Systems in International Politics*, 31 J. Legal Stud. S41 (2002) (relying on reciprocity as the exclusive basis for such treaties).

category of state actions — these decisions are not precommitments because the state's purpose is not overcoming temptation, but constraining someone else's behavior.²⁴ Moreover, the reciprocity strategy does not explain states' reasons for joining human rights treaties, because the beneficiaries of those regimes are the state's own citizens.

- Third and a variation of the second, some states sign treaties on human dignity without fear that they will violate them, but without the expectation of the direct benefit found in the previous rationale. As in the first category, these states are signing as a political gesture, but in this case they do so in order to demonstrate to their public and other states their innate belief in a particular regime. This gesture aims further to induce other states that would be tempted to abuse rights to adhere to these accords. The state is seeking to build up a regime that it hopes other states will join and to which they will be bound.²⁵ Thus, the United States eventually became a party to the ICCPR to enhance its voice in promoting human rights abroad.²⁶ The treaty commitment is merely the *legal vehicle* to advance the state's agenda of binding other states. The state's lack of concern that it might violate rights in the future (even if it turns out to be wrong) prevents categorization of this action as an Elsterian precommitment as well. Moreover, this dynamic is not the same as international relations theory's credible commitment, because the first state is not assuming that other states need this commitment from it in order for those other states to be convinced to sign.

- Fourth, some states presumably enter into treaties on human dignity because they really do wish to tie their hands for fear of the consequences of their later choices. These states are making a true precommitment. They use the vehicle of the treaty — a legal commitment to others — because they see it as stronger than a precommitment through regulation, statute, or even constitutional law; its form as a promise to *other* states does not per se make it any less of a precommitment.

The detailed reasons for entering into the treaty may correspond to any of the four that Elster has hypothesized, although I suspect most often

24 It is not even a strategic precommitment because it is not a unilateral self-binding by A that is meant to give A an advantage over B.

25 For an endorsement of this motivation, see Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 Yale L.J. 1935, 2004-11 (2002) (on expressive function of treaty ratification).

26 Senate Comm. on Foreign Relations, Report on the International Covenant on Civil and Political Rights, S. Exec. Rep. No. 102-23, 102d Cong., 2d Sess., at 3 (1992); on the United Kingdom's stance on human rights instruments, see generally A.W. Brian Simpson, *Human Rights and the End of Empire* (2001).

the primary reason is a need to overcome passion or self-interest in the future. A clear example would include states in transition from autocracy to democracy which want to lock in human rights commitments as a way to overcome temptations by future governments to renew human rights abuses.²⁷ A government taking this step is concerned that future legislators, prime ministers, armies, or private actors might violate human rights. As discussed further in Part III.A below, ratification itself represents a way by which the state ties its hands; and the state may engage in other precommitment strategies beyond ratification.

Four important qualifications should be made to the above categorization. First, as noted above, different actors within states have different motivations for entering into treaties. Governmental actors may not see the ratification process as self-binding — either because they do not care about preventing the offensive behavior or are not worried that they will commit it. But non-state actors, or indeed some actors within the government, may view it this way out of fear of what the police or military might do. Second, a state, acting through its government, may have more than one purpose. A government concerned about reciprocity in the humanitarian context might also be seeking to send a signal of its support for the humanitarian law regime as a whole. Indeed, one can create a hybrid category between the third and fourth categories above; namely states that precommit against future temptation but also want to send a message of support for the regime.

Third, outside actors may be unable to discern into which category a state entering into a treaty falls. Clearly, states in the first category will be hiding their motivations, since these are completely unrelated to the underlying purpose of the treaty. Even states in the last category, aware of the possibility that they might be tempted to commit abuses, may wish to be perceived as being in the second category. The final qualification is that the four positions described above are only hypotheses; empirical work can help demonstrate what proportion of states fall into each category or the need for hybrid categories. In a rare effort in this direction, Beth Simmons has

27 See, e.g., Carlos Santiago Nino, *Radical Evil On Trial* 68-69 (1996); Charter of Paris for a New Europe, Nov. 21, 1990, 30 I.L.M. 190, 193-95 (1991) (document of Organization for Security and Cooperation in Europe, declaring democracy to be "the only system of government" of the participating states); see also Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 Int'l Org. 217 (2000). For an attempt to link the motivations of states entering into human rights treaties with appropriate modes for responding to illegal reservations to such treaties, see Ryan Goodman, *Human Rights Treaties, Invalid Reservations, and State Consent*, 96 Am J. Int'l L. 531 (2002).

suggested, for instance, that the true precommitment rationale may explain relatively few cases of states' entry into human rights treaties. Her data and findings, limited to the ICCPR, suggest instead that states principally enter into treaties as a result of external influences and socialization, a finding consistent with the purposes discussed in categories one and three above.²⁸

The elements of precommitment theory thus allow for disaggregating the reasons states conclude these treaties in a much more nuanced way than offered by conventional international relations theory. The theory isolates important factors inherent in self-restraint and paves the way for a typology of such restraint. By identifying four distinct positions that states take when entering into human rights and humanitarian law treaties, we can help understand better the conditions under which they will be tempted to violate those commitments. The theory also permits us to see that the same act of self-restraint may be viewed in completely different terms — as a precommitment or as something else — by both those participating in it and by outsiders appraising it. Whether the proportion of bona fide Elsterian precommitments is large or small, the factors that differentiate precommitments from other forms of commitment remain useful analytical tools.

II. THE LIMITS OF SELF-BINDING: TEMPTATIONS TO VIOLATE

Having offered this basic understanding of the reasons states enter into treaties on human dignity, I now turn to the reasons they might be tempted to violate them.

A. The Descriptive: Compliance Theories and Their Shortcomings

Compliance theories have lately become a significant strand of international relations and international law scholarship.²⁹ International relations theorists in the rationalist posture say that states comply with international law for one of three reasons: 1) because the law is simply a reflection of their national

28 Beth Simmons, *Why Commit? Explaining State Acceptance of International Human Rights Obligations* (2002) (unpublished paper, on file with author).

29 For useful reviews, see Andrew Hurrell, *Norms and Ethics in International Relations*, in *Handbook of International Relations* 137 (Walter Carlsnaes et al. eds., 2002); Kal Raustiala & Anne-Marie Slaughter, *International Law, International Relations and Compliance*, in *Handbook of International Relations*, *supra*, at 538; see also Hathaway, *supra* note 25, at 1942-62.

interests (the realist position, in a somewhat exaggerated form); 2) because the law is nested in an institution in such a way that any temptation they might have to violate is overcome by consideration of their broader self-interest (the institutionalist position); or, 3) more recently, because of the special reputational costs to noncompliance irrespective of any regime or institution.³⁰ The normative schools have developed a variety of approaches that show how treaties themselves, because they are law, influence state behavior. They do so: 1) because of the origin and structure of the norms (a view most eloquently set forth by Thomas Franck), or: 2) because they alter the identity of states (the constructivist view).³¹ Others, including Abram and Antonia Chayes, Harold Jacobson and Edith Brown Weiss, Harold Koh, and this author, have offered perspectives that cross the lines between the rationalist and normative views.³²

Many of these views, from either perspective, suffer from one critical flaw: they treat compliance independently from the commitment process and thus do not explicitly link the motivations of states entering into treaties with the reasons they observe them. It is almost as if at time T2, states are faced with a set of factors, internal and external to them, that determine whether they will comply with a treaty — but their conduct is not affected by their own reasons for accepting the commitment at time T1. This may explain why there seem to be more theories explaining compliance than explaining the underlying commitment. This is not to say that those theories do not offer useful explanations of compliance — on the contrary — but they need to be put in the context of the reason for the original commitment.³³ Clearly,

30 See Andre Nollkaemper, *On the Effectiveness of International Rules*, 1992 Acta Politica 49, 55-56; for recent views relying on reputation, see Simmons, *supra* note 7; Andrew Guzman, *A Compliance-Based Theory of International Law*, 90 Cal. L. Rev. 1823, 1840-50 (2002).

31 For a review, see Ratner, *supra* note 7, at 648-51; see also Friedrich Kratochwil & John Gerard Ruggie, *International Organization: A State of the Art on an Art of the State*, 40 Int'l Org. 753, 767 (1986) (noting how norms can "guide," "inspire," or "rationalize" behavior but not "effect cause in the sense that a bullet through the heart causes death").

32 See Abram Chayes & Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (1995) (treaty performance); Harold K. Jacobson & Edith Brown Weiss, *Assessing the Record and Designing Strategies to Engage Countries*, in *Engaging Countries: Strengthening Compliance with International Environmental Accords* 511 (Edith Brown Weiss & Harold K. Jacobson eds., 1998); Harold Hongju Koh, *Bringing International Law Home*, 35 Hous. L. Rev. 623, 641-42, 669-73 (1998) (norm internalization); Ratner, *supra* note 7 (normative intermediary).

33 Scholarship linking the two include that by constructivists, who see ratification and

many factors can intervene between T1 and T2 (especially as the duration of that period increases) which make the original reasons for commitment less relevant for ultimate compliance. These factors may either decrease or increase the prospects for compliance.³⁴ But precommitment suggests that these original reasons remain highly relevant.

B. The Prescriptive: International Norms Governing Violations of International Norms

The propensity to violate norms is not merely the province of compliance theory. International law has developed rules on this question, rules reflected in treaties and customary law. Before venturing further in our attempt to understand why states do or do not comply in times of crisis, it is important to understand these rules, as they may affect the prospects for, or modes of, noncompliance. International law generally recognizes that states may have reasons to walk away from some treaty pledges. It does so in three different doctrinal areas.

First, the international law on treaties contains rules addressing the possibility that states will withdraw from or terminate treaties.³⁵ Thus, states can include clauses in their treaties allowing for withdrawal (and, in the case of a bilateral treaty, termination), usually upon some written notice;³⁶ states can also terminate treaties by consent of all the parties.³⁷ They can even withdraw from treaties where the explicit consent of both parties to such withdrawal is lacking by asserting an implied right of withdrawal, a material breach, the supervening impossibility of performance, or a fundamental change in circumstances.³⁸

Second, treaties themselves may provide derogation clauses, which allow a state to suspend its obligations unilaterally under parts of the treaty. Here a state is later able to renege on (or more precisely, limit the application of) a commitment without withdrawing from the treaty.

compliance as part of a process of acculturation to norms, as well as some empirical work, for example, Simmons, *supra* note 7, and Hathaway, *supra* note 25.

34 I appreciate this insight from Moshe Hirsch.

35 Vienna Convention on the Law of Treaties, May 23, 1969, arts. 54-64, 1155 U.N.T.S. 331, 344-47 [hereinafter VCLT].

36 *Id.* art. 54(a), 1155 U.N.T.S. at 344; *see also* Treaty on the Limitation of Anti-Ballistic Missile Systems, May 26, 1972, U.S.-U.S.S.R., art. XVI, 944 U.N.T.S. 13, 17.

37 VCLT, *supra* note 35, art. 54(b), 1155 U.N.T.S. at 345.

38 *Id.* arts. 56, 60-62, 1155 U.N.T.S. at 345-47; *see also* Ian Sinclair, *The Vienna Convention on the Law of Treaties* 186-96 (2d ed. 1984).

Third, the international law on state responsibility — a doctrine of customary law that addresses a state's liability for an internationally wrongful act — accepts the possibility that certain "circumstances precluding wrongfulness" can effectively excuse a state's violation of an international obligation. These include self-defense, *force majeure*, carrying out of lawful countermeasures in response to a prior illegal act, distress of individuals, or a state of necessity.³⁹

These three sets of doctrine have clear applications to treaties on human dignity:

- First, with respect to the treaty law rules on termination, the ICCPR does not contain a withdrawal clause, and it is generally understood that states may not withdraw from it.⁴⁰ On the other hand, the Geneva Conventions explicitly allow for withdrawal.⁴¹ Regarding the treaty law rules on material breach, the key treaties of international humanitarian law prohibit suspension of obligations in the event of a breach, however material, by another party;⁴² this is also the accepted view for the ICCPR.⁴³

- Second, the concept of derogation is also familiar to human rights and humanitarian law. The most famous derogation provisions are those for national emergencies "threatening the life of the nation" in the ICCPR and the European Convention on Human Rights.⁴⁴ The Geneva Conventions are replete with provisions wherein a state may decide on its own not to implement a particular protection.⁴⁵ Yet these derogation formulas do not permit states

39 Draft Articles on Responsibility of States for Internationally Wrongful Acts, arts. 21-25, *Report of the International Law Commission*, U.N. GAOR, 56th Sess., Supp. No. 10, at 43, 48-49, U.N. Doc. A/56/10 (2001) [hereinafter ILC Draft Articles].

40 General Comment 26, *Report of the Human Rights Committee*, U.N. GAOR, 53d Sess., Supp. No. 40, Vol. I, at 102, U.N. Doc. A/53/40 (1998).

41 See, e.g., Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 158, 75 U.N.T.S. 287, 392 [hereinafter Geneva Convention IV].

42 See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 51(8), 1125 U.N.T.S. 3, 27 [hereinafter Protocol I]. This is consistent with the Vienna Convention because the latter's material breach provisions are only default rules. VCLT, *supra* note 35, art. 60(4), 1155 U.N.T.S. at 346.

43 General Comment 24, para. 17, *Report of the Human Rights Committee*, U.N. GAOR, 50th Sess., Supp. No. 40, Vol. I, at 119, 123-24, U.N. Doc. A/50/40 (1995).

44 ICCPR, *supra* note 3, art. 4, 999 U.N.T.S. at 174; European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 2, 213 U.N.T.S. 221, 224.

45 See, e.g., Geneva Convention IV, *supra* note 41, art. 53, 75 U.N.T.S. at 322

to override certain provisions, such as those banning torture, slavery, and the retroactive application of criminal law.

- Third, regarding state responsibility, the most significant attempted restatement of customary international law — the International Law Commission's 2001 Draft Articles on State Responsibility — preclude countermeasures if they violate fundamental human rights or are inconsistent with international humanitarian law provisions prohibiting reprisals.⁴⁶ They also reject the defense of necessity if the contemplated act violates the "essential interest[s]" of "the international community as a whole," which might well include respect for basic provisions of human rights and humanitarian law.⁴⁷

Thus, whether through general lawmaking treaties like the Vienna Convention, specific human rights and humanitarian law treaties, or customary law, international law includes a clear set of norms regarding the permissibility of reneging on promises to protect human dignity. To summarize, and simplify a bit: (1) states can withdraw from key humanitarian law treaties but not human rights treaties; (2) they cannot justify the breach of such treaties based on breaches by other states; (3) they can derogate from some commitments, but not those clearly identified as without exception; and (4) they cannot engage in countermeasures or plead necessity if the result would violate certain core norms of human rights and humanitarian law.

What are the consequences of these rules for compliance? On the one hand, we have only shifted the problem over; the very factors that tempt states to violate treaties seem likely to tempt them to violate these rules as well. The mere existence of rules requiring states not to violate other rules would seem to be a rather ineffective way to make sure states do not violate the underlying norms. On the other hand, these secondary rules may exert their own independent effect (through whatever causal mechanism one chooses to endorse). For example, the nonderogable nature of the right against torture or the absolute ban on reprisals against civilians makes their

(prohibiting destruction of public or private property by occupying powers "except where such destruction is rendered absolutely necessary by military operations").

46 ILC Draft Articles, *supra* note 39, art. 50, at 51; *see also* Geneva Convention III, *supra* note 3, art. 13, 75 U.N.T.S. at 146 (banning reprisals against POWs); Protocol I, *supra* note 42, art. 51 (6), 1125 U.N.T.S. at 26 (banning reprisals against civilians).

47 ILC Draft Articles, *supra* note 39, art. 25(1)(b), at 49; *see also* Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), 1970 I.C.J. 3, 32 (Feb. 5) (notion of obligations *erga omnes*).

violation especially serious in the minds of outsiders. As discussed further below, this can affect strategies for maintaining compliance with them.

C. Precommitment and Compliance

Precommitment theory informs us that a critical factor in a state's propensity to comply with human rights and humanitarian law in situations of crisis is the original purpose for its entering into the treaty. It is thus useful to reconsider the four categories discussed above.

For states in the first category — those that had no real interest in the norm at time T1 — all other things being equal, the temptation to ignore the treaties on human dignity that they have signed will be constant and provide an ongoing challenge for internal and external actors. Thus, the many states that likely signed the Geneva Conventions with little or no consideration as to the treaties' exact requirements, or states that entered into human rights treaties merely to please other states, will have little predisposition not to violate them when they have an opportunity to do so. The rules of treaty interpretation or state responsibility will likely not be an independent brake on their behavior. This predisposition can, of course, be overcome. As will be discussed in Part III.A below, international relations scholars have shown that between time T1 and T2, a state's attitude toward noncompliance can cause it to remain faithful to the treaty. All this being said, it would seem a reasonable hypothesis — one ripe for empirical testing — that those seeking to ensure compliance from states in this category still have an uphill battle.

One caveat should be made related to the above position for the special case within the first category concerning states that enter into human rights treaties as part of a bargain to gain something else, such as EU membership. These states, even without a particular interest in the underlying rules in the treaties, may have a strong incentive to comply if they sense that the other parties to the bargain consider compliance with the treaty — and not merely ratification of it — part of the deal. They may end up proving amenable to precommitment devices that can keep them from deviating from their ultimate, non-human rights related goal.

States in the second and third categories — those confident that they will not be tempted to violate the treaty but entering based on strict reciprocity (category 2, confined to humanitarian law) or in order to promote the regime (category 3) — face a different dynamic. On the one hand, because they are in agreement with the content of the particular treaty at time T1 and comprehend quite clearly that it will bind them even in difficult situations at time T2, they would seem to have every incentive to comply with it at that later time. In constructivist terminology, the norms in the treaty are already

part of their identity. Perhaps Sweden, Denmark, and Finland, for example, really have no proclivities now or in the future to commit serious violations of human rights or humanitarian law. Those in the second category, because they have entered the treaty based on reciprocity considerations, have, in a sense, built in for themselves an additional incentive to comply (similar to the case of states entering into those treaties as a precondition for EU membership). If it turns out that they were wrong about their proclivities to violate the treaties at time T2, they have one more reason not to violate them. As a result of this confidence in their own future behavior, these two groups would likely be unwilling to consider devices to ensure that they stay bound.

On the other hand, these states might simply be wrong in predicting their future behavior. Actors within the state who realize this may then employ various precommitment strategies beginning at time T1 (discussed below), even if the government itself denies that it needs to employ them. Actors outside the state may join in if they are equally dubious about the government's confidence in its own future behavior. At time T2, if the precommitment strategies fail, other strategies can be deployed, such as those advocated by the institutionalists (sanctions and other regime-based actions).

Moreover, those entering the commitments based on reciprocity may have another reason to adopt precommitment strategies. As noted above, international humanitarian law and the law on state responsibility generally discourage unilateral reciprocal action to address violations. The ban on reprisals against civilians and POWs (some states still insist on the permissibility of reprisals against troops during combat⁴⁸) means that, at least as a legal matter, a state that violates IHL cannot itself become the subject of certain reciprocal violations. If the victim state at time T2 actually complies with this secondary obligation (or the first state thinks that it will), then the first state's disincentive to violate may be greatly attenuated.

Finally, states in the last category, those engaging in a precommitment against their own feared behavior, differ from the others in that they both care about the norm and are willing to admit up front that they might be tempted to violate it. These states should be the most amenable to engaging in precommitment strategies that seek to restrain their behavior at time T2. In a sense, these states are the most vigilant about the possibilities that they might violate human rights or humanitarian law; the strategies they adopt

48 See, e.g., U.K. Reservations (k) and (m), Jan. 28, 1998, to Protocol I, *supra* note 42, available at <http://www.icrc.org/ihl.nsf>.

may well serve to make them the least likely of the four groups to end up violating the norm. As noted above, it is possible that some actors within a state may be aware of the temptations down the road even while the government is not.

III. STRATEGIES FOR STAYING BOUND

Precommitment theory thus offers an explicit link between the reasons for commitment and the biases it creates toward noncompliance. But the theory does more. It identifies strategies that states and non-state actors may pursue to bind the state at time T1 or even at time T2. These strategies complement, and should be examined alongside of, those offered by international relations theories, which typically address the role of actors outside the state (e.g., other states, the regime, international mediators, NGOs). My goal in this section is to offer a set of self-binding strategies in the area of human rights and humanitarian law. I will then reflect upon how these internal binding strategies relate to the externally imposed strategies offered in more conventional international relations accounts.

A. Encouraging Commitment

A preliminary question — before considering strategies by which states can adhere to their legal commitments — concerns whether the nature of the commitment as a legal agreement itself increases the prospects for compliance with its contents. In other words, if a state enters into a treaty as a precommitment or for other purposes, does such legal self-binding have any independent *effects* on future behavior at all? It is easy to see how Ulysses' acts would protect him from the Sirens; but can the same be said about ratifying a treaty?

For decades, a mantra of the United Nations and indeed of international lawyers generally has been the need to codify international norms and get states to adhere to treaties. Political realists often dismiss these calls, saying that agreements will not make states change. Oona Hathaway has buttressed some of these claims by suggesting, through empirical research, that a state's adherence to a human rights treaty does nothing to improve its overall human rights record.⁴⁹

⁴⁹ Hathaway, *supra* note 25.

Political scientists have shown in a number of important cases how commitment does influence behavior. International relations scholars in the constructivist field have posited that even states that accept norms but have little interest in complying with them may find that the commitment transforms their identities and creates incentive to comply.⁵⁰ As Peter Haas has recognized, outside actors can also embarrass these states into complying with their obligations.⁵¹ Beth Simmons has demonstrated empirically that reputational costs from violations of treaties can be very significant.⁵² And, as institutionalist scholars have theorized, the treaties may be part of institutions that can ultimately induce compliance in specific cases. Thus, whether through norm internalization, fear of reputational harm, or the power of regimes, there is increased evidence that, contrary to the realists, legalization affects behavior over time. (Political scientists still differ, however, on what forms of legalization affect behavior; e.g., whether binding dispute settlement mechanisms like courts are needed.) These conclusions would suggest, for example, that efforts by the United Nations High Commissioner for Human Rights to gain Chinese accession to the ICCPR are not a waste of time. It is rather a first step on a very long road to changing China's approach to human rights.

The need for self-binding does not disappear if the state remains outside the treaty regime. Certain basic norms of human rights and humanitarian law are part of customary international law, so that a state is legally bound to follow them regardless of any initial choice to adhere.⁵³ At a minimum these include the core provisions of international humanitarian law in Article 3 common to the Geneva Conventions.⁵⁴ Whatever strategies are devised to prevent states from violating treaties at critical moments will apply to violations of customary international law. Those strategies, however, will be harder to implement, because treaties generally create more institutionalized

50 Ropp & Sikkink, *supra* note 13, at 234.

51 Peter M. Haas, *Choosing to Comply: Theorizing from International Relations and Comparative Politics*, in *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* 43, 54 (Dinah Shelton ed., 2000).

52 Simmons, *supra* note 7.

53 Some choice is involved in the sense that a state can choose to opt out of a norm during its formation by persistently objecting to it. This process does not, however, apply to those norms deemed peremptory or *jus cogens*.

54 *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, 113-14 (June 27); *Prosecutor v. Tadic*, International Criminal Tribunal for the Former Yugoslavia, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 102 (Oct. 2, 1995), available at <http://www.un.org/icty>.

relations — meetings of states parties, implementation mechanisms, even international organizations — than does customary law.⁵⁵

B. Internal Strategies

Elster's work on precommitment identifies seven devices by which individuals may engage in non-strategic precommitments. These are (1) eliminating options; (2) imposing costs; (3) setting up rewards; (4) creating delays; (5) changing preferences; (6) inducing passion; and (7) inducing ignorance.⁵⁶ For the sake of simplicity, I will eliminate the last one as not particularly relevant to preventing a state from yielding to temptation during a national emergency. Although individuals may prefer to remain ignorant about things (e.g., spousal fidelity), states will never seek to shield themselves from knowledge.

Actors within the state can deploy each of the remaining six devices to help states maintain their commitments. We might refer to these as second-order precommitment strategies, as their goal is to enable the state to stay bound. But these devices can be used to help a state with purposes corresponding to any of the four stances above, not merely those engaging in the Elsterian precommitment (Category 4). As noted above, the states in the last category would seem most likely to consider adopting them as affirmative state policies; states in the first three groups, confident of their future behavior, will probably only adopt these strategies if internal actors outside the government convince the government to accept them or are able to implement them outside the bounds of official state policy.

1. Eliminating Options

Governments or other domestic actors can adopt policies that make it physically impossible to carry out certain violations. Thus, for instance, a state could agree to destroy particular weapons that it might be tempted to use in an emergency and whose use would violate various humanitarian law norms on unnecessary suffering of combatants or on disproportionate or indiscriminate damage to civilians.⁵⁷ These might include obvious candidates like poisonous gases (which are independently banned by treaty⁵⁸), but could

55 Cf. Steven R. Ratner, *Jus Ad Bellum and Jus in Bello after September 11*, 96 Am. J. Int'l L. 905, 915 (2002).

56 Elster, Ulysses Unbound, *supra* note 2, at 6-34, 45-77.

57 Protocol I, *supra* note 42, arts. 35, 51, 1125 U.N.T.S. at 21, 26.

58 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 94 L.N.T.S.

also include mines. A state might choose to eliminate a class of weapons the use of which is permissible against combatants in war, such as cluster bombs, for fear that future leaders might be tempted to use them against civilians.

States may go beyond physical elimination of options to try legal elimination of options. Thus, when the Israeli Supreme Court made clear that the police could not torture suspects under existing law (although it left open the possibility that the Knesset might authorize similar methods), they were trying to foreclose a method for violating both human rights and humanitarian law.⁵⁹ Constitutional provisions that bar states of emergency, or otherwise protect human rights, can serve as precommitments that legally eliminate options. Legal elimination has two shortcomings. First, in order for legal elimination to function, the state must be characterized by the rule of law. If the military or police can ignore the law with no consequences, such self-binding is fairly useless. Second, legal self-binding is easily reversible, especially in times of emergency, when the courts will be most likely to revisit their decisions. It is thus not a one-time affair but requires constant internal and external monitoring.

2. *Imposing Costs*

The state seeking to avoid temptation, or those within it seeking to do so, can also make the violation more costly than it otherwise would be. Elster and others have written of the possibility of playing on audience effects; e.g., when a person committed to stopping smoking announces publicly that she will quit.⁶⁰ Of course, as discussed, the mere entry into a treaty is a type of public pronouncement that one will not engage in the offending conduct, raising the costs for noncompliance with its underlying policies.

But a state might impose additional costs upon itself beyond those incurred by making the promise. One method in the human rights area is for the state to assume supplemental obligations. In particular, any state joining the ICCPR has two additional options: (1) to recognize the authority of the UN's Human Rights Committee to hear and rule upon complaints by another state against it;⁶¹ (2) to recognized the Committee's authority to hear and rule

65; Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, *opened for signature* Jan. 13, 1993, 1974 U.N.T.S. 45.

59 Public Committee Against Torture v. State of Israel, 38 I.L.M. 1471 (1999) (Isr. Sup. Ct).

60 Elster, *Ulysses Unbound*, *supra* note 2, at 69.

61 ICCPR, *supra* note 3, art. 41, 999 U.N.T.S. at 182.

upon individual complaints against it.⁶² Although the Committee's rulings are not binding, there is some evidence that they have influenced governments in individual cases.⁶³ In the humanitarian law area, a state might make a public commitment to allow the International Committee of the Red Cross (ICRC) into its territory any time it is engaged in an internal conflict. Although the ICRC's observations are usually kept confidential, its criticisms have made it more difficult for some states to violate international humanitarian law.⁶⁴ An even more daring form would be a promise to allow NGOs into the state during such a conflict. Whoever the invitee, the invitation itself puts the state in a situation in which it would be highly embarrassing to both its public and actors abroad if it were to reverse its position — although rescinding such an invitation is always a possibility. A state could also invite in such organizations once the conflict has begun and once it has been accused of violations, to bind itself against the possibility of continuing violations.

3. *Setting Up Rewards*

In the case of individuals, the reward strategy entails some sort of monetary prize for sticking with one's precommitment. This scenario may seem a bit far-fetched in the case of states seeking to avoid temptations to violate human rights. As discussed in the next section, however, actors outside the state can clearly set up rewards for a state that maintains its commitments.

4. *Creating Delays*

Individuals can self-bind by setting up a "cooling off" period between the time they are first tempted to renege and the first opportunity to actually do so. At the state level, such periods are not unprecedented. Under the Covenant of the League of Nations, members agreed that they would not go to war with each other until three months after the League Council, arbitrators, or the Permanent Court of International Justice issued a decision.⁶⁵ This was not, however a strategy for keeping a commitment not to engage in war, since the Covenant itself contained no such prohibition. Indeed, one cannot expect

62 Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 302.

63 See, e.g., Philip Alston, *Beyond 'Them' and 'Us': Putting Treaty Body Reform into Perspective*, in *The Future of UN Human Rights Treaty Monitoring* 501, 505-09 (Philip Alston & James Crawford eds., 2000).

64 See generally Michael Ignatieff, *International Committee of the Red Cross (ICRC)*, in *Crimes of War: What the Public Should Know* 202 (Roy Gutman & David Rieff eds., 1999).

65 League of Nations Covenant, art. 12.

treaties to both prohibit certain conduct and also provide a mechanism for a cooling off period after which the prohibited conduct is again permissible.

Governments or other actors can, however, attempt to impose internal delays to prevent the state from giving in to the temptation to violate human dignity. Military procedures could, for example, prohibit the use of armed force against civilians until the potential targets have been given a certain grace period to desist from violent activities. The hope here is not only that the protesters will choose to stop, but that, more importantly, the army will give itself time to think of other options that are not likely to violate international humanitarian law.

Procedural requirements themselves can have built-in delays. Military doctrine might require that subordinates seek approval from superiors for certain forms of action. The key purpose of these requirements is to ensure that more experienced and accountable officers make the final decisions; but they also give everybody involved time to think the issue over. At the same time, unless those procedures are deeply entrenched in the decisionmaking hierarchy, officials will be greatly tempted to circumvent them in favor of a quick decision.

5. *Changing Preferences*

The individual who fears undertaking obnoxious conduct may wish not merely to construct devices to make that conduct more difficult; he may actually wish to adjust his innate preferences so that he has new desires, desires that make the temptation impossible. The classic cases involve addicts who undergo hypnosis. Can a state change its attitudes about violating international norms? States in the first category will not engage in this strategy because they do not think there is anything wrong with their current attitudes. But governments or internal actors who do fear the possibility of temptation can engage in numerous strategies to change governmental attitudes. The constructivist views and Koh's idea of norm internalization essentially describe a process in which norm violation is not so much costly as it is antithetical to the state's identity. Because the norms change the overall attitude of the state, its leaders do not, as it were, contemplate the violation in the first place.⁶⁶ While hardly hypnosis, the goal remains the same, i.e., to get at the roots of the temptation — thus the emphasis of constructivist theory on the *identity* of the state.

66 See, e.g., Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 *Int'l Org.* 887 (1998); Koh, *supra* note 32.

6. *Inducing Passion*

At times, passion can help someone overcome his immediate self-interest in favor of the longer-term self-interest. This notion is somewhat the opposite of the Ulysses paradigm, where passion was the enemy of long-term self-interest. But if an individual predicts that in the future he will be a bit too dispassionate, and that such rationality will result in the wrong decision, it might be possible to find a way to arouse the passions. This seemingly strange scenario might well apply to human rights. We often think of a government's temptation to violate human rights as driven by an irrational or passionate desire, stirred by the national emergency, to harm suspected or imagined enemies. But one might equally view such violations as rational, if somewhat regrettable, actions — driven by a utilitarian calculus in which the government decides, for example, that it must kill a certain number of innocent civilians in order to save a larger number.⁶⁷ Human rights law, and much of humanitarian law, reject such a calculation in favor of a deontological approach to protecting human dignity.⁶⁸ But getting the government to abandon its rational utilitarian approach in favor of an equally rational, but seemingly costly, deontological position, might require injecting some (anti-rational) passion into the debate. That passion must be directed toward preserving the human rights and humanitarian order.

The essence of such a strategy would seem to involve humanizing and building emotional ties with the enemy or the potential enemy. This is no small feat. But if a government can make an effort to reach out in some way to those opposed to it, it is less likely to violate their human rights. Efforts by military leaders and the ICRC to train soldiers to see the enemy combatant (in both civil and interstate wars) as one's fellow soldier are examples of this process.⁶⁹ These strategies require education, especially of the elite, about the

67 For a utilitarian defense of the law of war, see Richard B. Brandt, *Utilitarianism and the Rules of War*, in *War and Moral Responsibility* 25 (Marshall Cohen et al. eds., 1974).

68 See David Sidorsky, *Contemporary Reinterpretations of the Concept of Human Rights*, in *Essays on Human Rights: Contemporary Issues and Jewish Perspectives* 88, 103-04 (David Sidorsky ed., 1979). Humanitarian law's recognition that military advantage may allow for incidental civilian casualties does not go so far as to allow deliberate targeting of civilians.

69 See, e.g., *Operational Code of Conduct for the Nigerian Army, July 1967*, reprinted in *How Does Law Protect in War?* 793, 794 (Marco Sassòli & Antoine A. Bouvier eds., 1999) (urging soldiers to remember that enemy soldiers "were once your old comrade at arms... You must therefore treat them with respect."); Françoise J. Hampson, *Fighting by the Rules: Instructing the Armed Forces in Humanitarian Principles*, 269 *Int'l Rev. Red Cross* 111 (1989); David Roberts, *Training the Armed Forces to Respect International Humanitarian Law: The Perspective of the ICRC*

potential enemies of the state — their origins, their needs, the traits shared in common by both sides. There is plenty of room to be skeptical, even cynical, about this process. But it is one possible way that the state can bind itself.

C. Linking with External Strategies

Although precommitment strategies can make violations of human dignity harder, they can never prevent them completely. They represent a critical set of strategies for preventing a state from succumbing to temptation, but provide no guarantee that the state will not succumb. Herein lies the role for externally imposed constraints, which can complement the internal strategies. Indeed, some of the devices that Elster and others identify for individuals are the same devices that international relations theory identifies for outsiders. The imposition of costs for violations and the promising of rewards for compliance are the classic arsenal of carrots and sticks used by international organizations. International organizations can also ask states to delay undertaking certain actions (e.g., not defaulting on loans) in the hope that cooler heads will prevail in the interim and that the state will find alternatives to violation. As constructivist theory recognizes, outside actors, whether the transnational moral entrepreneurs identified by Ethan Nadelmann or the normative intermediary that I have identified, can change the preferences and identities of states.⁷⁰

But even when outside compliance mechanisms do not replicate the precommitment devices, the key to the effectiveness of each one lies in making the two complementary. Several strategies for such complementarity can be briefly outlined.

First, actors concerned with temptations to violate treaties on human dignity need to explicitly identify the reasons the state entered into the treaty. This identification may be obvious in extreme cases (e.g., Iraq's or Sweden's signature of the ICCPR), but can be difficult to discern in others. Such clarity in terms of the four categories above helps set a baseline degree of presumption of compliance. It helps inform these actors whether (second-order) precommitment strategies are feasible, whether they

Delegate to the Armed and Security Forces of South Asia, 319 Int'l Rev. Red Cross 433, 437 (1997) (on need to teach soldier of "nobility and honour in showing humanity and compassion to your defeated foe").

⁷⁰ Ethan Nadelmann, *Global Prohibition Regimes: The Evolution of Norms in International Society*, 44 Int'l Org. 479, 524-25 (1990); Ratner, *supra* note 7, at 688-92; *see also* Finnemore & Sikkink, *supra* note 66, at 896-99; Koh, *supra* note 32, at 646-55 ("norm entrepreneurs").

are likely to be effective, and what sorts of mechanisms from outside the state may be needed to induce compliance. This seemingly obvious need to categorize states is somewhat at odds with existing institutionalist theories, which tend to consider the regime and its strategies as a whole, without noting that states may be parties to the regime for very different reasons.

Second, outside actors capable of using techniques at times T1 and T2 should consider the advantages of internal precommitment devices deployed at T1 and encourage states to deploy them. If the state can be successfully encouraged to tie its hands in some way that increases the prospects for compliance — beyond whatever compliance pull the underlying legal norms may create — then states become subject to internal, rather than external, constraints. As Koh and others have pointed out, states that domesticate constraints and consider them their own choice are more likely to comply with them. If that proves to be the case, the external actors will need to deploy fewer resources, especially at time T2, to keep the state in line.

Third, once states are tempted to violate the treaty, outside actors should link their approaches both to the original stance of the state and to any subsequent internal strategies to stay bound. If, for instance, the state has adopted an Elsterian stance in joining the treaty (Category 4 above) and then finds itself tempted to breach it, outsiders should remind the state that it bound itself — through the treaty and perhaps subsequent strategies — precisely to prevent the behavior it is now tempted to undertake because it knew that such behavior would redound to its own detriment. And for any state that uses the internal self-binding techniques above and then finds itself in the same situation, where it would ignore or override those techniques, actors seeking compliance should encourage the state to implement those strategies so they can still work.⁷¹ Thus, for example, outsiders and insiders should first remind a state that it previously promised to allow international observers into an area of hostilities. Taking this initial tack is a necessary step to keep the state in line, but it is hardly sufficient, as the government can simply announce that it has changed its mind. At that point, actors with available resources will have to consider deploying carrots and sticks. But as they do so, they should continually make reference to the state's own willingness to tie its hands through the devices it adopted to promote compliance.

71 Cf. Elster, *Ulysses Unbound*, *supra* note 2, at 267-77 (on the role of outsiders in helping individuals keep their precommitments).

CONCLUSION

The realists are probably right about one thing concerning international law. No state, when faced with its own survival on the one hand, and adherence to global norms on human dignity on the other, will choose the latter. But the realists neglect to consider that international law almost never presents so stark a choice.⁷² The International Court of Justice itself has implicitly recognized that, in such a case, a state might be able to discard even humanitarian law.⁷³ But states do face crises, emergencies, and other situations where observance of the law does not, in the eyes of many, seem in its best interests. The key to promoting the law in these scenarios is to set up a dynamic whereby the state sees the law as more than some unrealistic piece of moral advice. For some states, this may be a lost cause, and only external forces will promote compliance. But for many others, those concerned with temptation and compliance can attempt to deploy an integrated strategy of internal and external devices. This strategy emanates from the experiences of individuals seeking to tie their own hands — precommitment theory — and of states seeking to tie the hands of others — international relations theory.

The prescriptions in this essay require implementation by elites and the public both inside states at risk and outside them. These communities must work in a coordinated fashion to make violations of international law more difficult. They must think creatively and not assume that the law must inevitably give way in time of crisis. But they must, first and foremost, undertake strategies *before* the crisis. At that stage, the groundwork can be laid for avoiding the damage later on. If these actors think about, and attempt to induce, compliance only once the state perceives compliance as against its interests, the odds are already stacked against such compliance. By that point, the attitude of the state has been transformed by the crisis. Those concerned with human rights should not give up at that stage; but we must try long before then to anticipate such situations and build a different dynamic of state responses to them.

72 Although concerning norms on the use of force rather than on human dignity, the Israeli first strike of June 1967 is probably the rare modern case of an opposition between law and survival, though even today there remains disagreement as to whether Egypt was really about to attack. For a recent treatment meddling old accounts and new interviews, see Michael B. Oren, *Six Days of War: June 1967 and the Making of the Modern Middle East* (2002).

73 *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226, 262-63 (Adv. Op. of July 8); *see also* Dissenting Opinion of Judge Higgins, 1996 I.C.J. 583, 589-90.

